IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
CRIMINAL TRIAL DIVISION

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

NOTICE OF COURT'S INTENT TO DISMISS WITHOUT HEARING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF PURSUANT TO PA. R. CRIM. P 907

AND NOW, this 26th day of October, 2022, upon consideration of Defendant's counseled Petition for Habeas Corpus Relief Pursuant to Article I, Section 14 of the Pennsylvania Constitution and Statutory Post-Conviction Relief Under 42 Pa.C.S. § 9542 et seq. and Consolidated Memorandum of Law (hereinafter "PCRA Petition"),[1] Defendant is hereby given notice of the Court's intention to dismiss the Petition without hearing pursuant to Pa. R. Crim. P. 907(1) for the reasons herein.

I. BRIEF HISTORY OF THE CASE

Presently pending before the Court is Defendant's sixth PCRA Petition. A recitation of facts and the extensive procedural history of Defendant's case is unnecessary for the parties to understand the Court's basis for dismissing this action.

On July 2, 1982, a jury found Defendant guilty of fatally shooting Philadelphia Police Officer Daniel Faulkner. Defendant was convicted of first-degree murder and possessing an instrument of crime. On July 3, 1982, after a penalty-phase hearing, Defendant was sentenced to death. On

[1] Defendant asserts that "[t]o the extent this claim is not cognizable under the PCRA, [Defendant] has a remedy under Pennsylvania's habeas corpus statute." *See* PCRA Pet. at 6. However, if Defendant raises claims that are cognizable under the PCRA, then the PCRA is the sole remedy for those claims, even if those claims are procedurally barred in Defendant's case. *See Com. v. Peterkin*, 722 A.2d 638 (Pa. 1998). Defendant raises *Batson* and *Brady* claims that fall within the scope of the PCRA, specifically 42 Pa.C.S. § 9543 (a)(2). *See infra* note 5 (explaining that this is the only possible ground for relief). Therefore, this Court will not interpret Defendant's PCRA Petition as a petition for habeas corpus.

March 6, 1989, the Supreme Court of Pennsylvania (SCOPA) affirmed Defendant's conviction on direct appeal. *See Com. v. Abu-Jamal,* 555 A.2d 846 (Pa. 1989).

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

In 2016, Defendant filed his fifth PCRA petition. Although the PCRA Court granted partial relief by reinstating Defendant's direct appeal rights from his first four PCRA petitions, the Superior Court of Pennsylvania reversed that decision. *See Com. v. Cook*, 266 A.3d 656, 2021

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

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

WL 4968874 (Pa. Super. Ct. Oct. 26, 2021) (unpublished table decision).[4] During proceedings stemming from Defendant's fifth PCRA, the trial prosecutor at Defendant's trial, Joseph McGill, submitted an affidavit (hereinafter "McGill's Affidavit"), which the parties heavily cite in Defendant's instant PCRA.

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

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

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[4] Defendant's focus in his fifth PCRA petition was whether former SCOPA Chief Justice Ronald Castille should have recused himself from participating in appeals from Defendant's first four PCRAs. Justice Castille was a Philadelphia Assistant District Attorney (ADA) at the time of Defendant's trial, but there was no evidence that he personally participated in Defendant's prosecution. Justice Castille resigned from his ADA position shortly after Defendant had filed a notice of appeal from his death sentence, and Justice Castille returned to the office as the District Attorney of Philadelphia in 1986, when Defendant's direct appeal was pending. There was no evidence that Justice Castille had participated in Defendant's direct appeal or gained any special knowledge about that appeal when the Justice was the District Attorney. The PCRA Court determined that Defendant had uncovered newly-discovered evidence reflecting the appearance of impropriety, citing a letter written by then District Attorney Castille to the Governor of Pennsylvania in 1990 "urg[ing the governor] to send a clear and dramatic message to all police killers that the death penalty in Pennsylvania actually means something." *See Cook*, 2021 WL 4968874 at *2. The Superior Court determined that this letter would not have warranted Justice Castille's recusal. *See id.* at **7-10.

Commonwealth's Response to Defendant's Brief in Opposition to the Motion to Dismiss the PCRA Petition (hereinafter "Commonwealth's Reply Brief"). On October 12, 2022, Defendant sought the PCRA Court's permission to file amended witness certifications. The Court accepted Defendant's amended witness certifications.

II. DEFENDANT'S PCRA CLAIMS

Defendant's PCRA Petition raises three claims:

1. A letter written by Robert Chobert to the trial prosecutor, Joseph McGill, and postmarked after Defendant was sentenced, is *Brady* evidence that the Commonwealth promised to pay Chobert in exchange for his trial testimony against Defendant (hereinafter "the Chobert Letter").
2. A series of memos, letters, and notes written by several former employees of the District Attorney's Office of Philadelphia (hereinafter "the DAO") are *Brady* evidence that Cynthia White testified against Defendant in exchange for the Commonwealth's declination to prosecute three of her open prostitution cases.
3. McGill's handwritten notes from voir dire and McGill's affidavit provided during Defendant's fifth PCRA proceedings (hereinafter "McGill's Affidavit") constitute new evidence that renews Defendant's *Batson* claim.

III. DISCUSSION

A claim warrants PCRA relief only if Defendant "pleads and proves by a preponderance of the evidence" that (1) his conviction or sentence resulted from one of the grounds specified at 42 Pa.C.S. § 9543 (a)(2),[5] and (2) the claim has not been previously litigated or waived. *See* 42

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

Pa.C.S. § 9543 (a). A PCRA petition does not warrant an evidentiary hearing if the PCRA Court reviews the parties' filings and relevant portions of the record relating to Defendant's claims, and "is satisfied from this review that there are no genuine issues concerning any material fact" that, if resolved in Defendant's favor, merit PCRA relief. *See* Pa. R. Crim. P. 907(1). Here, Defendant is not entitled to PCRA relief on any of his claims as no genuine issues concerning any material fact need to be resolved at an evidentiary hearing.

Though the parties address *Batson* last, this Court discusses *Batson* first, because Defendant's *Batson* claim is untimely and thus this Court has no jurisdiction to decide this issue on its merits. The Court then fully addresses Defendant's *Brady* claims. Although the Court doubts that Defendant could prove some aspects of his *Brady* claims by a preponderance of the evidence, an evidentiary hearing is unwarranted: even if Defendant were able to prove by a preponderance of the evidence his theories about the documents attached to his PCRA Petition, he has not raised any genuine issues concerning material facts that show that he was prejudiced at trial because of his inability to impeach Robert Chobert or Cynthia White with the alleged *Brady* evidence.

A. Defendant's *Batson* Claim is Waived, Previously Litigated, and Untimely

Defendant presents McGill's handwritten notes recorded during voir dire as new evidence supporting a *Batson* claim that he has unsuccessfully litigated several times. *Batson v. Kentucky*, 476 U.S. 79 (1986), held that a prosecutor denies a criminal defendant due process by exercising peremptory strikes against prospective jurors to purposefully exclude members of a particular race from the jury pool. If a defendant timely raises a *Batson* claim during voir dire, it proceeds in three phases:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and

> third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

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

To satisfy the first prong of the original *Batson* test, a defendant has to prove three elements to satisfy his burden to present a prima facie *Batson* claim: (1) the defendant is a member of a cognizable racial group; (2) the prosecution exercised peremptory challenges to strike members of the defendant's racial group; and (3) "these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude [those venirepersons] on account of their race." *See Batson*, 476 U.S. at 96. The second phase of *Batson* inquiries "does not demand an explanation that is persuasive, or even plausible. . . ['T]he issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion)).[6]

The parties dispute whether the Court should analyze Defendant's *Batson* claim through the original three-phase burden-shifting framework or through the more stringent *Uderra* standard, which requires Defendant to plead and prove "actual, purposeful discrimination by a preponderance of the evidence, in addition to all other requirements essential to overcome the waiver of the underlying claim." *Com. v. Uderra*, 962 A.2d 74, 87 (Pa. 2004). If Defendant's Batson claim was not untimely and this Court had jurisdiction to consider the merits of his claim, this Court would apply the *Uderra* standard. However, this Notice often refers to the standard three-phase *Batson* claim, because the events that are relevant to this Court's finding that Defendant's *Batson* claim is procedurally barred predate *Uderra*.

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

In the instant petition, Defendant explicitly cites only two aspects of McGill's voir dire notes that were not previously known to him: First, Defendant claims that McGill's notes relate to more than forty (40) prospective jurors, and for "approximately 20 of those jurors, Mr. McGill wrote race and gender information next to the prospective juror's names at the top of his notes about each juror (e.g., 'B/F' or 'W/F')." *See* PCRA Petition, at 32.[7] Second, Defendant claims that McGill made a note in the margins next to one prospective juror labelled "B/M" that "I accepted but D rejected this Black male," which Defendant argues is proof that McGill "was seeking to build a record to rebut any claim of discrimination by emphasizing that he accepted *some* Black jurors." *See* PCRA Petition, at 33.

Although Defendant's Reply Brief additionally argues that McGill's voir dire notes reflect that McGill "deemed certain characteristics important for selecting jurors but struck prospective Black jurors who were more favorable with respect to those criteria than non-Black panelists whom he did strike," Defendant does not clearly articulate which facts supporting this statement are new to Defendant and which were already apparent from the trial record and Defendant's previous *Batson* litigation.[8] Besides these efforts to claim that there are new aspects to Defendant's old *Brady* claim, Defendant's PCRA Petition and Reply Brief litigate *Batson* as if

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[7] Defendant further notes that "[a]lthough the record does not disclose race information for every prospective juror, the record discloses the only prospective Black juror for whom Mr. McGill did not identify by race in his notes: J.D., who was seated as juror #1. J.D. was later excused after violating the Court's sequestration order." *See* PCRA Petition, at 32 (internal citations to PCRA Petition, Ex. E omitted).

[8] *See* Def.'s Reply Brief, at 23 (citing PCRA Petition, at 31-40) (emphasis added). This portion of the Reply Brief and the reference to pp. 31-40 of Defendant's PCRA Petition is ambiguous because the "new evidence" could refer to either or both of the following: (1) *McGill's thoughts* about which characteristics were important about prospective jurors, which are reflected in his voir dire notes or (2) the *characteristics* of particular jurors, which were not clear in the record or postconviction proceedings. If it is only the former, then every argument made about the timeliness and prior litigation is the same as arguments raised herein about McGill's racial notations about prospective jurors. But if it is the latter, then Defendant has never stated which aspects of ¶¶ 57-70 derive from McGill's voir dire notes and which aspects are obvious in the trial or appellate records. Notably, Defendant would have to explain why he could not previously discover this information himself.

this is the first time that Defendant raises a *Batson* claim, without clearly delineating which portions of his current *Batson* argument are claims and arguments that he has made before.[9] That alone is not fatal to his *Batson* claim, so this Court thoroughly examined Defendant's representations that Defendant could not have meaningfully litigated this *Batson* claim sooner through his own due diligence and that the *Batson* claim is not waived or previously litigated. These arguments are bare assertions in Defendant's PCRA Petition, but Defendant attempts to flesh out the assertions in his Reply Brief. *See* PCRA Petition, at 5-6, 27; Def.'s Reply Brief, at 23-29, 39-43.

1. Defendant's *Batson* Claim is Now Waived

A PCRA petitioner must plead and prove by a preponderance of the evidence that each claim raised has not been waived. 42 Pa.C.S. § 9543 (a), (a)(3). "[A]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, . . . on appeal or in a prior state court proceeding." 42 Pa.C.S. § 9544(b). Defendant's *Batson* claim is waived, because Defendant failed to preserve a timely objection under *Batson* or its predecessor, *Alabama v. Swain*, 380 U.S. 202 (1965), during voir dire. Although several courts have rejected Defendant's *Batson* claims on the merits, most of those courts have acknowledged that Defendant's *Batson* claim is waived. *Batson* was decided when Defendant's direct appeal was pending. *Batson* can apply retroactively to a defendant whose voir dire predated the *Batson* decision, but only if the defendant has properly preserved a *Batson* or *Swain* claim. *See Com. v. Smith*, 17 A.3d 873, 893-95 (Pa. 2011). If a defendant litigates *Batson* in PCRA proceedings, and he has not preserved the

[9] For example, it is not clear whether Defendant has ever before made the more granular venireperson comparisons in previous filings that he forwards in his PCRA Petition, at 37-40. Because it is Defendant's burden to explain which aspects of his claims are based on *new* facts and explain why he could not uncover those facts earlier, the Court does not credit Defendant's Reply Brief assertions that it is newly revealed to Defendant in McGill's notes that McGill "deemed certain characteristics important for selecting jurors but struck prospective Black jurors who were more favorable with respect to those criteria than non-Black panelists whom he did strike." *See supra* note 11.

claim at trial and on direct appeal, then the *Batson* claim is waived, and Defendant must instead frame the *Batson* claim as an ineffective-assistance-of-counsel (IAC) claim that, but for trial counsel's or appellate counsel's ineffectiveness, Defendant could have prevailed on his *Batson* claim. *See id.* at 894-95. However, SCOPA has generally struck down retroactive-*Batson* claims that were made through layered IAC claims. *See Com. v. Sneed*, 899 A.2d 1067, 1075-77 (Pa. 2006).[10]

Defendant's *Batson* claim is waived because Defendant did not properly preserve a *Batson* claim both at trial *and* in his direct appeal, and because Defendant cannot now litigate prior counsel's ineffectiveness in failing to preserve these claims. This Court notes that this seems counterintuitive, considering the number of times courts have rejected Defendant's *Batson* claims on the merits in prior proceedings: First, although Defendant made requests for the court to collect race-based information from jurors, Defendant did not object to McGill's exercises of peremptory strikes based on race and did not raise a general *Swain* or *Batson*-like argument. Thus, Defendant waived his *Batson* claim by failing to make a relevant and timely objection at trial. Second, during Defendant's direct appeal, SCOPA noted that Defendant had waived his *Batson* claim. SCOPA then rejected Defendant's *Batson* claim on the merits. Third, during Defendant's first PCRA proceedings, the PCRA court noted that it had "relax[ed] the waiver rule and [made] findings and conclusions based on the merits of each issue presented," including Defendant's *Batson* claim. *See Cook a/k/a Abu-Jamal*, 1995 WL 1315980 at *70 n.28 (discussing relaxation of waiver rule), **101-04 (rejecting *Batson* claim on merits). SCOPA reviewed and affirmed the PCRA court's conclusion that Defendant's *Batson* claim lacked merit,

[10] This line of cases is particularly complex in death-penalty cases that were on direct appeal when *Batson* was decided, because until 1998, SCOPA had discretion to apply a relaxed-waiver rule to capital cases. That means that in cases like Defendant's case, SCOPA might have decided to reach the merits in the case, but after SCOPA abandoned the relaxed-waiver rule in PCRA appeals and serial PCRAs in *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998), claims that once received the benefit of the relaxed-waiver rule could be waived in later proceedings.

but SCOPA did not indicate whether the issue had been waived. *See Abu-Jamal*, 720 A.2d at 113-14 (Pa. 1998). Next, in Defendant's second PCRA petition, which was filed July 16, 2001, Defendant raised several ineffective-assistance-of-counsel (IAC) claims, including an IAC claim that previous PCRA counsel had been ineffective by failing to properly litigate Defendant's *Batson* claim. The PCRA court denied all of Defendant's IAC claims as untimely, because he had filed them more than one year after SCOPA affirmed the dismissal of his first PCRA, and SCOPA again affirmed the PCRA court, dismissing all of Defendant's claims as untimely (and not noting whether they were waived). Finally, although it is persuasive rather than binding on this Court, the Third Circuit held that Defendant had waived his *Batson* claim by failing to raise a relevant contemporaneous objection at trial.[11]

For all of these reasons, Defendant fails to meet his burden to prove that his retroactive *Batson* claim is not waived.

2. Defendant's *Batson* Claim is Previously Litigated

Additionally, Defendant must plead and prove by a preponderance of the evidence that his PCRA claims have not been previously litigated. 42 Pa.C.S. § 9543 (a), (a)(3). An issue has been previously litigated if either (1) "the highest appellate court in which petitioner could have had review as a matter of right has ruled on the merits of the issue", or (2) "it has been raised and decided in a proceeding collaterally attacking the conviction or sentence." *See* 42 Pa.C.S. § 9544(a). It is well settled that petitioners cannot obtain PCRA review of previously litigated claims by presenting new theories to support previously litigated versions of their claims. *See, e.g., Com. v. Peterkin*, 649 A.2d 121, 123 (Pa. 1994).

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[11] *See Abu-Jamal v. Horn*, 520 F.3d 272, 283-84 (3d Cir. 2008), *vacated on other grounds by Beard v. Abu-Jamal*, 558 U.S. 1143 (2010) (Mem.). The Third Circuit thoroughly discussed Defendant's prior *Batson* litigation, because the Third Circuit was reaching the issue of whether a defendant's retroactive *Batson* claim might be waived by failing to raise objections during voir dire as a matter of first impression. *See id.* at 279-284.

Here, as discussed above, Defendant makes his *Batson* argument in his PCRA Petition as if it is the first time he has litigated it, without clearly articulating which aspects of his *Batson* argument are new arguments and which have never been made before. Thus, Defendant has failed to prove by a preponderance of the evidence that his *Batson* claim is not already litigated. The Court also notes that Defendant's attempt to liken his *Batson* claim to the "watershed revelation" in *Commonwealth v. Chmiel*, 173 A.3d 617 (Pa. 2017), is unpersuasive. In *Chmiel*, the "watershed revelation" was an FBI report debunking a forensic methodology used to link the defendant to a crime. This Court finds that the revelation in *Chmiel* is that it put material physical evidence in an entirely different light. Here, Defendant's only "new" evidence of a *Batson* violation appears to be Defendant's realization that McGill made notations about venirepersons' races and a peremptory strike; Defendant does not identify any of the notations as information that is not recorded in voir dire transcripts or that he and defense counsel were unable to observe with their own eyes during voir dire.[12] Defendant presents no "new facts" that McGill notes anything that is not openly and routinely collected by the courts in juror information questionnaires today, which are disseminated to both parties and the Court during voir dire. Defendant appears to argue that making race salient in voir dire notes is circumstantial evidence that a prosecutor's exercise of peremptory strikes is racially motivated. The Court declines to find that a facially neutral observation of race (*i.e.*, observing that a person appears to be Black) is *per se* intentional racial bias. Moreover, in the broader context of Defendant's pretrial efforts to request that the trial court elicit race-based information about prospective jurors, *see infra* Part

[12] For example, Defendant asserts that the new evidence *is* a watershed revelation because it shows that "the prosecutor was actively tracking jurors by race and struck prospective Black jurors even though they were more favorable compared to non-Black jurors he did not strike with respect to the prosecutor's own jury selection criteria." PCRA Petition, at 41-42. But, as discussed at *supra* nn.11-12 and accompanying text, Defendant does not clearly explain which aspects of the prosecutor's jury-selection criteria are "new" and not apparent in the record.

III.A.3, it is truly unsurprising that McGill noted many venirepersons' races and genders and noted one venireperson that Defendant rejected but McGill would have accepted.

3. Defendant's *Batson* Claim is Time-Barred Because He Did Not Exercise Due Diligence to Uncover its Underlying Facts

Defendant must prove that he has filed a PCRA petition either (1) within one year of the date that his judgment becomes final or (2) within one year of the date that he was first able to prove any of three exceptions to the one-year time bar. 42 Pa.C.S. § 9545 (b)(1)-(2). Only two of the three time-bar exceptions are applicable here: the government-interference exception and the newly-discovered-facts exception. The government-interference exception applies if "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States," § 9545 (b)(1)(i). The newly-discovered-facts exception applies if "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence[.]" § 9545 (b)(1)(ii). Importantly, although the "due diligence" language appears only in the newly-discovered-facts exception of § 9545, the due diligence requirement equally applies to *Brady* claims that may fall under the government-interference exception. *See Com. v. Abu-Jamal*, 941 A.2d 1263, 1268 (Pa. 2008).

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

demand that the Defendant employ "perfect vigilance . . . but rather it requires reasonable efforts by a petitioner, based on the particular circumstances, to uncover facts that may support a claim for collateral relief." *Com. v. Burton*, 121 A.3d 1063, 1071 (Pa. Super. Ct. 2015) (en banc).

This Court was prepared to reach the merits of Defendant's *Batson* claim, particularly after reading a conversation that occurred on the record between the trial court and McGill after the first juror selected, a Black woman, violated the court's sequestration rules:

> The Court: I was worried about her from the very beginning, to be honest with you. I don't select the jury, you gentlemen do. . . .
> Mr. McGill: *Well, I wanted to get as much black representation as I could that I felt was in some way fair-minded.*
> The Court: *She's a mental case.*
> Mr. McGill: I don't think she would be charmed by [Defendant].
> The Court: She wouldn't be charmed by him.
> Mr. McGill: That's one of the reasons I took her.
> The Court: *She'll hang him*. But the trouble is I'm afraid she might have gotten some information yesterday.

N.T. Trial 6/18/82, at 2.45-2.46 (emphasis added).[13] Although this was not an example of a peremptory strike, this Court interpreted the exchange as a clear indication of a race-conscious jury-selection strategy—McGill had made an effort to select a few Black jurors he thought would be "fair minded," and yet McGill had still ended up using ten (10) of his fourteen (14) peremptory strikes to exclude Black prospective jurors. But it was also apparent that this passage is in the trial record and not new evidence. The Court also noted that SCOPA did not mention this exchange in its *Batson* analysis; but SCOPA stated only that it had examined the entire voir dire record, which would not have included this discussion. *See Abu-Jamal*, 555 A.2d at 850 (Pa. 1989). It is possible that the passage was never presented to SCOPA; Defendant's filings do not clarify which aspects of his *Batson* claim are previously litigated. Thus, the Court's interest was

[13] Earlier in this conversation, McGill proclaimed, "I thought she was good. She hates him, she hates [Defendant], can't stand him." *Id.* at 2.40. The trial court openly expressed surprise that the attorneys selected this juror and stated that she had appeared to be "belligerent." *See id.* at 2.42-2.43.

piqued, and the Court conducted extensive analysis before concluding that this claim is procedurally barred.

After the Court's review, it is satisfied that Defendant was not diligent in litigating his *Batson* claim throughout its many iterations. If Defendant wanted the benefit of full merits review of a retroactive *Batson* claim, he should have made efforts to create the most detailed record possible as close to trial as possible. *Batson* violations are based on discriminatory intent, and it is difficult to prove or refute a person's intentions without creating a record of them. Defendant has never in open court asked McGill to present a record of his reasons for strikes or selections of prospective jurors. But Defendant now faults the Commonwealth for not proactively offering the information sooner. *See* Def.'s Reply Brief, at 27. It is Defendant who should have been more proactive about fully litigating his *Batson* claim with the resources available to him.

At every turn, Defendant's *Batson* litigation efforts were insufficient. First, prior to voir dire, Defendant attempted to submit a questionnaire to jurors that seemed to be race-based questions, because defense counsel noted that "[i]t has been the custom and the tradition of the [DAO] to strike each and every black juror that comes up peremptorily." N.T. Pretrial 3/18/82, at 11-12. And right before voir dire began, Defendant asked the Court to create a record of prospective jurors' races; the Court declined to do so, but permitted Defendant to ask prospective jurors to self-identify their races. *See* N.T. Voir Dire 6/7/82, at 17-20. Although this seemed to be aspects of a strategy to litigate a race-based jury-selection claim under *Batson's* predecessor case, *Alabama v. Swain*, 380 U.S. 202 (1965), throughout voir dire, Defendant never raised a formal objection or any allegation that McGill had stricken any prospective juror based on race.

Second, given an opportunity to litigate his *Batson* claim under the relaxed-waiver doctrine, Defendant failed to make out a prima facie *Batson* case, in part because he focused on strike statistics that the Court found to be unpersuasive, and in part because SCOPA independently

reviewed the voir dire record and did not find "a trace of support for an inference that the use of peremptories was racially motivated." *See Abu-Jamal*, 555 A.2d at 850 (Pa. 1989).

Thus, Defendant's first PCRA proceedings presented Defendant's first chance to create a meaningful evidentiary record that could have supported his *Batson* claim. Instead, Defendant's first PCRA petition included a three-page *Batson* claim that merely argued that SCOPA incorrectly assessed his initial *Batson* claim because he could now prove that McGill struck eleven Black venirepersons, not just eight, as SCOPA had previously cited. At trial, defense counsel claimed that he would have called McGill to testify about McGill's peremptory strikes and representations about the strikes that were made to SCOPA on direct appeal, but counsel decided not to call McGill as a witness, because the Commonwealth offered to stipulate that three people would have testified that they were Black venirepersons whom McGill struck during Defendant's voir dire. *See* N.T. 8/4/95, at 119-20. In pursuing this narrow litigation strategy, Defendant had effectively ignored SCOPA's finding that there was no "trace of support for an inference that the use of peremptories was racially motivated." *See Abu-Jamal*, 555 A.2d at 850 (Pa. 1989); *Cook a/k/a Abu-Jamal*, 1995 WL 1315980 **103-04; *Abu-Jamal*, 720 A.2d at 114 (Pa. 1998). And for this reason, the Court is not persuaded by Defendant's argument that he did not call McGill because McGill's testimony was unnecessary for his particular defense strategy. Def.'s Reply Brief, at 26-27. After the McMahon videotape[14] surfaced, Defendant attempted to use the video to expand his *Batson* claim. *See Abu-Jamal*, 720 A.2d at 86 (Pa.

[14] The McMahon videotape is a lecture given by former ADA Jack McMahon in which McMahon advised other ADAs of ways to flout *Batson*. *See Com. v. Basemore*, 744 A.2d 717, 729-32 (Pa. 2000) (extensively describing the McMahon video). The video was recorded at the DAO in 1987, but the general public did not learn of the video until 1997. *See Com. v. Hutchinson*, 25 A.3d 277, 289 n.6 (Pa. 2011). SCOPA has "condemned in the strongest possible terms the tactics and practices expounded in the McMahon lecture as violative of basic constitutional principles." *See id.* at 288. However, SCOPA has also repeatedly rejected claims based on the McMahon video where McMahon did not preside over a defendant's trial. *See id.* at 288-899 (collecting cases).

1998). Defendant attempted to litigate *Batson* as an IAC claim in his second PCRA petition in 2001, but the PCRA Court rejected that as untimely, and SCOPA affirmed. *See Abu-Jamal*, 833 A.2d 719 (Pa. 2003).

In the instant proceedings, it is Defendant's burden to prove by a preponderance of the evidence that he exercised due diligence in investigating his claims, Defendant did not attempt to meet that burden of proof in his initial Petition. Defendant's Reply Brief arguments that the courts and the prosecution impeded him from discovering McGill's reasoning for his voir dire decisions are unpersuasive. First, Defendant did not provide any PCRA record citations to support his claim that he made valid discovery motions that, if granted, would have revealed McGill's voir dire notes ahead of the evidentiary hearing.[15] Further, this Court would not disturb SCOPA's finding that a remand was unwarranted or the Eastern District of Pennsylvania's finding that Defendant was not entitled to discovery.[16] Second, the 1995 evidentiary hearing

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[15] Defendant's Reply Brief asserts that Defendant "repeatedly sought discovery *during PCRA proceedings*, including of the prosecution's file and with respect to his *Batson* claims," but it cites only a portion of a SCOPA opinion that does not support this claim. *See* Def.'s Reply Brief, at 27 (emphasis added).

This Court independently reviewed files available at the Office of Judicial Records for Defendant's discovery motions from his 1995 evidentiary hearing, and revealed only a singular Motion for Discovery, in which Defendant did not make any requests tailored to uncover McGill's voire dire decisionmaking. Instead, the Motion for Discovery includes only one paragraph with two requests that, if granted, could have revealed evidence relevant to Defendant's *Batson* claim: "The name, address and race of each member of the jury venire questioned to sit on the jury in petitioner's case," and "[t]he voting districts from which juror questionnaire forms were mailed for the jury venire questioned to sit in petitioner's case." Def.'s Motion for Discovery, at 22. Thus, even if Defendant's Motion for Discovery had been granted, it would not have compelled the Commonwealth to disclose McGill's voir dire notes.

[16] Defendant requested *after* the evidentiary hearing that SCOPA remand Defendant's *Batson* claim to the PCRA Court for discovery of the voir dire notes after the McMahon video, and SCOPA denied that request. *See supra* note 13 and accompanying text; *see also Abu-Jamal*, 720 A.2d at 86 (Pa. 1998). SCOPA's opinion does not specify its reasoning for rejecting the remand, but the federal district court emphasized that Defendant's trial occurred several years before the filming of the McMahon training video and McMahon did not prosecute Defendant. *Abu Jamal*, 2001 WL 1609690 at *109 (E.D. Pa. 2001). And Defendant requested McGill's voir dire notes (and the entire prosecution file) *during federal habeas proceedings*, but the federal district court applied federal law and determined that there was no legal basis for compelling the Commonwealth to disclose these documents to Defendant. *Id.* at **107-08.

record simply does not support Defendant's argument that Defendant could not have asked McGill about his reasoning behind strikes of Black venirepersons because the Court and the Commonwealth had restricted Defendant's bases for questioning McGill by requiring Defendant to make an offer of proof for McGill's testimony. *See* Def.'s Reply Brief, at 28.[17] Significantly, the Commonwealth opposed everything in Defendant's offer of proof for the scope of McGill's testimony *except* Defendant's proposed line of *Batson* questioning, and Defendant's proposed line of *Batson* questioning was phrased broadly enough to permit questions about McGill's intentions and strategy.[18] Third, the Court disagrees with Defendant's contention that asking McGill about his reasoning would have been a "fishing expedition." *See* Def.'s Reply Brief, at

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[17] In context, the Commonwealth's request for a narrow offer of proof for McGill was reasonable: Defense counsel submitted about three hundred (300) pages of filings for the first PCRA, including attachments. None of those attachments included an affidavit from ADA McGill or any representation of attempts to interview McGill. *See* N.T. 7/19/95, at 35-40. Initially, defense counsel refused to provide a more detailed offer of proof than the facts that (1) McGill was the trial prosecutor and that (2) defense counsel could question him about "18 volumes" of material (presumably the trial transcripts), although, as the Commonwealth pointed out, it would be impractical for the Commonwealth or McGill to prepare for questions about any or all of 4,000 pages. *See* N.T. 7/26/95 at 222-23, 226-29.

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

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

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

> Your Honor, I would suggest to Your Honor and submit that if they want to inquire of Mr. McGill with respect to the *Batson* issue, I think they should be given full latitude so this claim could be litigated once and for all, whatever their additional evidence is. I think everything else they have mentioned [is cumulative of other witnesses or] a witch hunt and I would ask Your Honor to so find and preclude an inquiry in that regard.

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

27-28. Rather, it was a rare opportunity for Defendant to fully litigate a retroactive *Batson* claim by expanding the evidentiary record.

Additionally, the Court is not persuaded by the two main cases Defendant cites to support his due-diligence argument. First, Defendant asserts that *Commonwealth v. Lambert*, 884 A.2d 848, 852 (Pa. 2005), held that the one-year time-bar begins to run when the Commonwealth discloses "previously withheld evidence from the Commonwealth's own files, and not available from other sources." Even if that were an accurate understanding of *Lambert's* facts and holding, the operative phrase remains "*and not available from other sources*." Defendant could have obtained the *facts* underlying his claim straight from McGill. Notably, *Lambert* involved seven different *Brady* claims, and SCOPA found that one of the claims was *not* timely because that defendant already knew the relevant new facts from a different source. *See id.* at 856. Regarding that piece of evidence, the *Lambert* Court held that "because the facts underlying this claim were known or knowable to appellant, it does not qualify under the newly discovered evidence exception and, thus, is untimely." *Id.* Second, while *Commonwealth v. Basemore*, 744 A.2d 717 (Pa. 2000), is facially more similar to Defendant's case, because it involves the timing of a newly-discovered-evidence claim and *Batson*, it is unhelpful to Defendant's due-diligence analysis because in *Basemore*, the Commonwealth stipulated that the training video was not released to the public until a specific date, and there is no reason for the defendant to have been aware of the comments that former-ADA McMahon (who prosecuted that defendant less than a year later) made in the video.[19] Here, the Commonwealth makes no comparable concessions.

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[19] Given the highly unusual circumstances alleged, as well as the nature of the proof asserted, it is at least arguable that Basemore's claim of recent discovery of concealed government activity implicating the fundamental fairness of his trial would state a claim for relief under Section 9543(a)(2)(i), although the issue has not previously been raised. Under such unique circumstances, while we do not foreclose the possibility that Basemore's *Swain/[B]atson* claim may ultimately be resolved on grounds of waiver, we believe that the best course would be to permit Basemore the opportunity to develop a

In sum, Defendant's *Batson* claim is time-barred, because over the decades that he has litigated his *Batson* claim, he has failed to show due diligence in learning anything about McGill's thought process in jury selection, and he cannot cure that failure with McGill's voir dire notes.[20] For all of these reasons, Defendant has failed to persuade the Court that his discovery of McGill's voir dire practice was not attributable to his own lack of diligence in properly litigating this *Batson* claim, which has already been litigated in Defendant's direct appeal, first PCRA, appeal from the dismissal of his first PCRA, second PCRA, appeal from the dismissal of his second PCRA, and federal habeas proceedings.

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

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

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> record concerning the asserted violation, Mr. McMahon's conduct and its implications with respect to his trial.

Basemore, 744 A.2d at 733.

[20] Compare the litigation history of Defendant's *Batson* claim to his *Brady* claim about Robert Chobert. The Commonwealth also asserted in a brief footnote that Defendant failed to show due diligence in uncovering the facts underlying the Chobert letter. *See* MTD, at 42 n.16. However, the Court finds that this claim is timely and that Defendant could not have learned it sooner through his own due diligence. First, had the same Motion for Discovery discussed at *supra* note 18 been granted, Defendant could have received the Chobert Letter, because there were requests sufficiently detailed to yield this type of impeaching information about Chobert. Second, Defendant called Chobert as a witness and asked about similar financial incentives to testify (assistance with reinstating his license and protective housing), but neither the Commonwealth nor Chobert offered any information that would have led Defendant to suspect that Chobert wrote to McGill regarding "money owe[d]" to him.

undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985); *see also Com. v. Wholaver*, 177 A.3d 136, 158 (Pa. 2018).

Defendant presents two *Brady* claims based on documents found in the six boxes that the DAO permitted Defendant to review in 2019.

1. The Commonwealth's Alleged Nondisclosure of Robert Chobert's Financial Incentive to Testify is Not a *Brady* Violation Because it is Immaterial to Defendant's Conviction

Defendant correctly states that the prosecution's failure to disclose a witness's financial incentive to testify against a defendant could potentially violate *Brady*. *See, e.g., Banks v. Dretke*, 540 U.S. 668 (2004). Defendant asserts that the Chobert Letter is evidence that the Commonwealth offered Chobert a financial incentive to testify against Defendant, and that the existence of this financial incentive is evidence withheld by the Commonwealth that Defendant could have used to impeach McGill. PCRA Petition, at 6-7. The parties agree to the authorship, post-trial postmark date[21], and explicit content of the Chobert Letter, which includes in relevant part:

> Mr. McGill
> I have been calling you to find out about the money own [*sic*] to me.
> So here is a letter, finding out about money. Do you need me to sign anything.
> How long will it take to get it.
> How was your week off good I hope.

See PCRA Petition, Ex. B; PCRA Petition, at 7; MTD, at 43. In McGill's Affidavit, McGill claimed that the Chobert Letter follows up on a discussion that McGill and Chobert had after Defendant's trial, where Chobert asked whether he could receive reimbursements for lost wages due to his participation in Defendant's trial, and McGill responded that he would "look into it,"

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

although McGill had no intention of looking into anything because he knew that, as a policy matter, the DAO did not compensate witnesses for lost wages. *See* PCRA Petition, Ex. C (McGill's 2019 Affidavit), at 2-3. A few reasonable inferences can be drawn from the Chobert Letter: (1) Chobert and McGill had previously discussed Chobert's desire to collect money that Chobert felt was owed to him; (2) Chobert is following up on that conversation after more than one attempt to call McGill;[22] and (3) Chobert expects to hear back from McGill about this. But Defendant makes additional inferences from the Chobert Letter that require additional support: First, Defendant avers that because Chobert does not reference a specific dollar amount, Chobert must be asking for a sum that Chobert and McGill had previously agreed upon. PCRA Petition, at 8. Second, and more importantly, Defendant argues that Chobert specifically expected a money payment from the Commonwealth "in exchange for his testimony against" Defendant. *Id.* at 14. Defendant further argues that the Chobert Letter is fundamentally inconsistent with McGill's Affidavit, because Chobert clearly requests money that Chobert believes is owed to him and appears to reference a previously agreed upon sum rather than offering a calculation of Chobert's lost wages. *See id.* at 7-8.

It is unclear how Defendant expects to prove these additional inferences through witness testimony or further argument at an evidentiary hearing, because (1) McGill's Affidavit does not reflect that McGill will support these inferences; (2) Robert Chobert was unwilling to sign a witness certification for Defendant's private investigator; (3) defense counsel represents no successful attempts to discuss this letter with Chobert; and (4) Defendant presents no other evidence that Chobert remembers this letter written forty years ago. Thus, there is no evidence on record upon which this Court could credit defense counsel's bald assertion that "[u]pon

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

information and belief, at an evidentiary hearing, Mr. Chobert will testify regarding the contents and context of the letter." *See* Witness Certificate for Robert Chobert submitted Oct. 12, 2022, at 2. However, it is unnecessary to resolve these factual issues at an evidentiary hearing, because they are ultimately immaterial to the Court's finding because Defendant cannot prove prejudice.

Assuming arguendo that Defendant *could* prove by a preponderance of the evidence at an evidentiary hearing that (1) Chobert had a financial incentive to testify against Defendant, (2) the Chobert Letter was withheld by the Commonwealth,[23] and (3) the Commonwealth promised the payment related to Chobert's trial testimony, *then Defendant's Brady claim still fails*. The Court is satisfied that even if the jury had heard that the Commonwealth had promised to give Chobert some additional form of payment related to his testimony against Defendant, that impeaching information would not have been sufficient to undermine the jury's verdict of first-degree murder.

First, impeaching information about Chobert's financial incentives *to testify* is not particularly persuasive because Chobert immediately and steadfastly identified Defendant as the person who shot Faulkner, and Chobert never changed his statements or testimony regarding the shooter's degree of culpability. Chobert stayed at the scene after the shooting and identified Defendant as the person who shot Faulkner minutes after the shooting. *See* N.T. Trial 6/19/82, at 210-13. Three days later, Chobert gave detectives another statement identifying Defendant as the shooter. During Defendant's motion to suppress hearing, where Defendant personally questioned Chobert, Chobert told Defendant, "I saw you shoot [Faulkner], and I never took my eyes off you until you got in the back of the wagon." N.T. 6/2/82, at 2.75. At trial, Chobert unequivocally identified Defendant as the shooter, and his testimony was subject to strenuous cross-

[23] The Commonwealth does not appear to dispute this fact.

examination. Chobert remained adamant fifteen years later at Defendant's 1997 evidentiary hearing that Defendant committed this homicide. Second, at the 1997 evidentiary hearing, Chobert credibly testified that he *did* rely on McGill for at least one benefit—assistance with getting his license reinstated—but that that benefit did not change his testimony against Defendant and was not the reason that he testified against Defendant. *See Abu-Jamal*, 720 A.2d at 95-96 (Pa. 1998). Finally, as discussed below, other evidence corroborated Chobert's testimony and independently supported a finding that Defendant committed first-degree murder. *See* Part III.B.3, *infra*. The jury could have convicted Defendant of first-degree murder even if Chobert had not identified Defendant. Defendant might not agree with this evidence, but that does not render Chobert's testimony necessary to Defendant's first-degree murder conviction.

For all of these reasons, even in the unlikely situation that Defendant calls Chobert as a witness and Chobert contradicts McGill's Affidavit by claiming that the Commonwealth had promised him money related to his trial testimony against Defendant, that admission would not have been sufficient to carry Defendant's burden. Therefore, Defendant's *Brady* claim about Chobert lacks merit.

2. The Commonwealth's Alleged Nondisclosure of the Commonwealth's Dismissal of Three Open Prostitution Cases Against Cynthia White in Exchange for Her Testimony is Not a *Brady* Violation Because it is Immaterial to Defendant's Conviction

Defendant attaches to his PCRA Petition a series of seven memoranda, notes, and letters authored by various former DAO employees (hereinafter the Cynthia White prosecution documents) as proof of Defendant's *Brady* claim that the Commonwealth promised to drop Cynthia White's three open misdemeanor prostitution cases in exchange for her testimony against Defendant. *See* PCRA Petition, Ex. D. Defendant correctly states that the Commonwealth's nondisclosure of evidence of a witness's incentive to testify against a defendant in exchange for leniency in the witness's own criminal cases can be *Brady* evidence.

See Com. v. Strong, 761 A.2d 1167 (Pa. 2000). However, after reviewing the Cynthia White prosecution documents, McGill's Affidavit, and Defendant's amended Witness Certificates, this Court finds that Defendant can prove by a preponderance of the evidence after an evidentiary hearing that White formed a deal with the Commonwealth to testify against Defendant in exchange for leniency. Defendant's argument requires making unreasonable inferences from the documents cited, and Defendant has provided no additional proof that any of the documents' authors would testify at an evidentiary hearing to anything beyond what is contained in these memoranda.

First, Defendant speculates that the efforts documented in the Cynthia White prosecution documents to (1) extradite White from Massachusetts after she was paroled there to Philadelphia and (2) give White an expedited trial date are evidence of favorable treatment. It is equally, if not more, consistent with an effort to prosecute White before any speedy-trial claim warranted dismissal of her cases. Defendant supplies no extrinsic evidence supporting his claim that these are special efforts made for White. If the Commonwealth truly did not want to prosecute White, it only had to appear to bungle its efforts to extradite her so that the clock conveniently expired on her misdemeanor prostitution charges. Thus, even if the relevant witnesses are able to remember White's extradition, the Court does not find that testimony would reveal proof of a secret deal between White and the Commonwealth regarding White's open cases.

Second, on October 12, 2022, Defendant submitted a Witness Certificate signed by Andre Washington, who was the Chief of the DAO's Municipal Court Unit when he authored a December 6, 1982, memorandum informing then-ADA Michael Weisberg that Weisberg was "specially assigned" to prosecute three cases against Cynthia White in Municipal Court for three separate counts of prostitution (hereinafter "Washington's Memo"). The Witness Certificate simply states that if Washington is called to testify at an evidentiary hearing, he will testify

regarding the contents of Washington's Memo. The original text of the Witness Certificate stated "I will testify regarding the contents and context of the memorandum," but Washington crossed out the words "and context" and signed his initials next to the edit. The Court interprets this to mean that Washington has agreed to testify only about the text of the memorandum, and Washington will not testify about any other conversations or interactions that he may have had about White's cases. Here are the relevant portions of Washington's Memo:

> This defendant was the witness in the recent police shooting case tried by Joe McGill. *There were no specific deals worked out for her testimony, so these cases should be vigorously prosecuted.* Please note that there is an outstanding Rule 6013 Petition [a speedy-trial motion] which will have to be litigated before trial.
>
> [Details about the interstate detainer omitted]
>
> There is no objection to a plea being agreed upon for these three cases. . . .
>
> *Before proceeding to trial please see [McGill] and discuss this case.* If possible, arrange for an earlier date for trial.

PCRA Petition, Ex. D (second out of seven memoranda) (emphasis added).

Defendant speculates that the purpose of Washington's instructions to "vigorously prosecute" the case is "to bolster, in an official memo, the representation that Ms. White was offered no deals in exchange for her testimony," and that "[i]t is apparent that the memo was designed to make it seem that Ms. White would be vigorously prosecuted, but required the prosecutor to speak privately with A.D.A. McGill before moving forward." PCRA Petition, at 23-24 (emphasis in original). Defendant supplies no extrinsic evidence about Washington's Memo besides this assertion of its subliminal messaging, and Washington's Witness Certificate clarifies that he plans to provide no additional context. It is not inherently contradictory for Washington to relay to a subordinate that no specific promises were made to White, to direct Weisberg to proceed with prosecuting White's cases, to authorize Weisberg to work out a plea agreement, and to instruct Weisberg to consult with McGill before bringing White to trial.

Rather, Washington's Memo is entirely consistent with the notion that a prosecutor assigned to a case works through the case with some level of autonomy, while reporting to a supervisor and sometimes consulting with employees in other units or stakeholders in other offices who have information that is relevant to the case.

McGill's Affidavit claims that McGill wanted to track White's open cases and speak with the assigned ADA to inform the ADA "of her courageous participation in [Defendant's] case." [24] *See* PCRA Petition, Ex. C, at 5. Regardless of whether McGill's version of events is true, Defendant has presented no witnesses who will testify at an evidentiary hearing that White in fact testified pursuant to a deal she struck with McGill or the Commonwealth in her open cases. As a practical matter, it is unclear how Defendant would prove these inferences. According to Defendants' own witness certifications, the defense team has not been able to reach any of the relevant witnesses besides Andre Washington. Defendant cannot call Cynthia White as a witness, because she died in 1992. *Abu-Jamal*, 941 A.2d at 1265 n.5 (Pa. 2008). The Court is unaware of whether Weisberg is alive, available, and willing to contradict McGill's representation that McGill did not convey any specific deal to Weisberg and just wanted to put in a good word for White; Defendant has not submitted a witness certification or any recent information about Weisberg. Defendant can call McGill, but nothing in McGill's affidavit supports Defendant's claim that McGill formed an agreement with White for leniency in her open cases in exchange for her testimony against Defendant. And even if all other witnesses were to testify to what is written in these memos,[25] and the Court draws all *reasonable* inferences in Defendant's favor, it is unclear

[24] The Court does not accept anything in McGill's Affidavit as true or false at this stage of the PCRA proceedings. But the Court considers the Affidavit to reflect what McGill likely would say if he testified.
[25] On October 12, 2022, defense counsel submitted Witness Certificates representing that the defense team has failed to reach two additional authors of documents about White's municipal court cases (Alfred Little and Richard Di Benedetto), yet counsel believes that they will testify regarding "the contents and context" of the documents. The Court does not credit counsel's beliefs that these witnesses will remember the "context" of documents written in 1982 about a woman's misdemeanor prostitution cases; counsel's

that these seven documents, McGill's affidavit, and the testimony of available witnesses, without more, raise a genuine issue concerning any material fact regarding Defendant's *Brady* claim that must be resolved at an evidentiary hearing.

However, assuming arguendo that Defendant can prove by a preponderance of the evidence his theory that McGill promised White leniency in her open matters in exchange for White's testimony against Defendant, then this *Brady* claim still fails, because this impeachment evidence would have been immaterial to Defendant's trial outcome. Although the Court does not agree that White's testimony was as incredible as Defendant argues,[26] the Court finds that White was already impeached at trial with information that the jury was free to credit as White's self-interest in cooperating with the Commonwealth because she had open cases. Most importantly for Defendant's current *Brady* claim, White freely admitted to being incarcerated in a Massachusetts jail for an eighteen-month sentence for prostitution at the time of her trial testimony, to having perhaps thirty (30) or more prostitution arrests, and to having three open Philadelphia cases stemming from prostitution arrests. *See* N.T. Trial 6/21/82, at 4.79-85.[27] White testified that she had no arrangement or deal with the Commonwealth regarding her open cases or her Massachusetts conviction. *See id.* at 4.81-86. Thus, the jury had ample information

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beliefs are unsupported by recent evidence about the witnesses, representations from those witnesses that they do remember what they wrote, or some other extrinsic proof.

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

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

from which it could infer that White testified against Defendant due to her own self-interest in leniency in her own criminal cases, and the jury was free to believe or disbelieve White's testimony that she would not receive any favorable treatment. Given the extensive impeachment evidence elicited at trial through White's testimony, including evidence of the three then-open prostitution cases, there is no reason for the Court to find that (1) the jurors credited White's testimony, but (2) the juror's knowledge of the eventual dismissal of her three open prostitution cases would have tipped the balance of White's credibility so drastically that it undermines the Court's confidence in the jury's verdict.

Moreover, Defendant presents no persuasive argument or compelling evidence that any changes in White's statements and testimony were attributable to some agreement for leniency. While there appear to be some inconsistencies across White's statements and testimonies, White apparently always maintained that she saw a police officer attempt to arrest a man, and then watched another man – this Defendant – run across a parking lot and shoot multiple times at the police officer. Further, even if White's testimony were completely removed from Defendant's trial, Defendant could have been convicted based on the testimony of other witnesses. For these reasons, even if Defendant could prove his *Brady* claim regarding Cynthia White by a preponderance of the evidence, the withheld evidence was ultimately immaterial to Defendant's trial outcome.

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

If a defendant presents multiple *Brady* claims with arguable merit, the Court must consider the cumulative impact of those claims rather than each individual piece of evidence. For this analysis, the Court returns to what Defendant's exhibits, affidavits, and witness certifications *can* prove. Aside from McGill's Affidavit, Defendant's exhibits relevant to his *Brady* claims are documents from a file forty (40) years old, and nothing in those documents—individually or as a

whole—proves either of Defendant's claims by a preponderance of the evidence. Unfortunately, without extrinsic evidence, such as witness affidavits or witness certifications outlining information that witnesses are able and willing to provide that support Defendant's inferences, Defendant presents only unauthenticated documents that he might or might not have successfully impeached Chobert and White with—it is entirely possible that Chobert and White would have given plausible explanations that countered Defendant's inferences. The Court finds that these documents, absent additional corroboration of Defendant's assumptions, could not have created reasonable doubt in jurors' minds that Defendant was guilty of a lesser degree of homicide or innocent of this crime. That is mainly because of the considerable other trial testimony, including the corroborative testimony of scene witnesses Michael Scanlan's and Albert Magilton's,[28] and the testimony of various officers that the Court has no basis to discredit.[29] Although the testimony of White and Chobert certainly contributed to Defendant's conviction, sufficient evidence existed for jurors to have lawfully convicted Defendant of first-degree murder even

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

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

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

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

Thus, Defendant's *Brady* claims fail, because even if Defendant somehow manages to prove by a preponderance of the evidence that the documents he presents as evidence *are* evidence of deals that the Commonwealth struck with Chobert and White in exchange for their testimony that Defendant shot Faulkner, this Court finds that the *Brady* material would not have reasonably changed the outcome of Defendant's trial.

IV. CONCLUSION

For the foregoing reasons, it is the intent of the Court to dismiss Defendant's PCRA Petition because it fails to state a claim upon which post-conviction relief may be granted. **Defendant may respond to this proposed dismissal of his Petition within twenty (20) days, pursuant to Pa. R. Crim. P. 907(1).**

BY THE COURT:

Lucretia Clemons, J.
Dated: October 26, 2022

PROOF OF SERVICE

I hereby certify that I am this day caused to be served the foregoing this person(s), and in the manner indicated below:

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DATED: 10/26/22

Micah Alexander
Law Clerk to Hon. Lucretia Clemons