Received 2/3/2021 11:50:20 AM Superior Court Eastern District

IN THE
SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

290 EDA 2019

COMMONWEALTH OF PENNSYLVANIA
Appellee

V.

WESLEY COOK, a/k/a MUMIA ABU-JAMAL
Appellant

COMMONWEALTH'S BRIEF FOR APPELLEE

***Nunc Pro Tunc* Defense Appeal from Prior Orders of the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, Dismissing Defendant's PCRA Petitions Filed in Docket No. CP-51-CR-0113571-1982.**

GRADY GERVINO
Assistant District Attorney
LAWRENCE J. GOODE
Supervisor, Appeals Unit
NANCY WINKELMAN
Supervisor, Law Division
CAROLYN ENGEL TEMIN
First Assistant District Attorney
LAWRENCE S. KRASNER
District Attorney of Philadelphia

Three South Penn Square
Philadelphia, PA 19107
(215) 686-5728
grady.gervino@phila.gov

TABLE OF CONTENTS

	PAGE
Table of Authorities	iv-ix
Counter-Statement of the Questions Involved	1
Counter-Statement of the Case	2-22
Summary of Argument	22-24
Argument	24-95
THE PCRA COURT PROPERLY DENIED POST-CONVICTION RELIEF	
I. TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE BY NOT QUESTIONING ROBERT CHOBERT ABOUT HIS PROBATIONARY STATUS.	26-43
A. The Relevant Background to Defendant's Claim.	26-27
B. The PCRA Court's Analysis of the Claim.	27-28
C. *Davis v. Alaska* **did not Provide a Basis for the Cross-examination.**	28-33
D. Mr. Chobert Could not Have Been Cross-examined Regarding his Probationary Status.	33-39
E. Had Counsel Cross-examined Mr. Chobert Regarding his Probation, it Would not Have Made a Difference at Trial.	39-43

II. THE PROSECUTOR DID NOT COMMIT A *BRADY* VIOLATION BY NOT DISCLOSING HE TOLD ROBERT CHOBERT HE WOULD TRY TO FIND OUT HOW HE COULD GET HIS DRIVER'S LICENSE RESTORED. 44-48

A. The Relevant Background to Defendant's Claim. 44-45

B. The PCRA Court's Analysis of the Claim. 45

C. There was no *Brady* Violation. 46-48

III. DEFENDANT'S CLAIM THAT THE PROSECUTION SUPPRESSED EVIDENCE THAT CYNTHIA WHITE LIED AT TRIAL PROVIDES NO BASIS FOR RELIEF. 49-57

A. The Relevant Background to Defendant's Claim. 49-50

B. The PCRA Court's Analysis of the Claim. 50

C. Defendant's Claim is Based Entirely on Inadmissible Hearsay. 50-57

IV. TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE REGARDING THE BALLISTICS OR MEDICAL FORENSIC EVIDENCE. 57-70

A. The Relevant Background to Defendant's Claim. 58-61

B. The PCRA Court's Analysis of the Claim. 62-63

C. Trial Counsel did not Provide Ineffective Assistance with Regard to the Ballistics Evidence. 64-67

D. Trial Counsel did not Provide Ineffective Assistance with Regard to the Medical Forensic Evidence. 67-70

V. THE PCRA COURT PROPERLY DENIED DEFENDANT'S *BATSON* CLAIM. 70-85

A. The Relevant Background to Defendant's Claim. 71-76

B. The PCRA Court's Analysis of the Claim. 76-77

C. Defendant may not Relitigate his *Batson* Claim Where the Pennsylvania Supreme Court Already Found it Meritless. 78-82

D. Defendant has not met the Standard Necessary to Succeed on a *Batson* Claim That was not Raised at Trial. 82-85

VI. THE PCRA COURT PROPERLY QUASHED SUBPOENAS DEFENDANT SENT TO JURORS IN AN ATTEMPT TO HAVE THEM IMPEACH THEIR VERDICT. 85-95

A. The Relevant Background to Defendant's Claim. 86-87

B. The PCRA Court's Analysis of the Claim. 87

C. Defendant was Properly Precluded from Presenting Jurors at the PCRA Hearing to Impeach Their Verdict. 88-95

Conclusion 96

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Abu-Jamal v. Horn, 520 F.3d 272 (3d Cir. 2008) 13, 78

Abu-Jamal v. Horn, 2001 WL 1609690 (E.D.Pa. Dec. 18, 2001) .... Passim

Abu-Jamal v. Pennsylvania, 498 U.S. 881 (1990) 11

Abu-Jamal v. Pennsylvania, 501 U.S. 1214 (1991) 11

Abu-Jamal v. Pennsylvania, 528 U.S. 810 (1999) 12

Abu-Jamal v. Secretary, Pennsylvania Dept. of Corrections, 643 F.3d 370 (3d Cir. 2011) 13, 14

Batson v. Kentucky, 476 U.S. 79 (1986) .... Passim

Brady v. Maryland, 373 U.S. 83 (1963) 22, 44

Davis v. Alaska, 415 U.S. 308 (1974) .... Passim

Kyles v. Whitley, 514 U.S. 419 (1995) 43

Pena-Rodriguez v. Colorado, 137 S.Ct. 855 (2017) 88, 91, 92

Smith v. Spisak, 558 U.S. 139 (2010) 13

Strickland v. Washington, 466 U.S. 668 (1984) 35

Swain v. Alabama, 380 U.S. 202 (1965) 71

Tanner v. United States, 483 U.S. 107 (1987) .... Passim

Wetzel v. Abu-Jamal, 565 U.S. 943 (2011) 14

Williams v. Pennsylvania, 136 S.Ct. 1899 (2016) 2, 14, 15, 19

Witherspoon v. Illinois, 391 U.S. 510 (1968) 74

State Cases

Cluggage's Lessee v. Swan, 4 Bin. 150 (Pa. 1811) 89

Commonwealth ex rel. Darcy v. Claudy, 79 A.2d 785 (Pa. 1951) 90, 94

Commonwealth v. Abu-Jamal, 40 A.3d 1230 (Pa. 2012) 13

Commonwealth v. Abu-Jamal, 555 A.2d 846 (Pa. 1989) ....Passim

Commonwealth v. Abu-Jamal, 720 A.2d 79 (Pa. 1998) 11

Commonwealth v. Abu-Jamal, 720 A.2d 121 (Pa. 1998) 12

Commonwealth v. Abu-Jamal, 833 A.2d 719 (Pa. 2003) 12

Commonwealth v. Abu-Jamal, 941 A.2d 1263 (Pa. 2008) 12

Commonwealth v. Abu-Jamal, 2013 WL 11257188 (Pa.Super., July 9, 2013)...... 14

Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998) 74

Commonwealth v. Auker, 681 A.2d 1305 (Pa. 1996) 36

Commonwealth v. Baez, 720 A.2d 711 (Pa. 1998) 32

Commonwealth v. Blakeney, 108 A.3d 739 (Pa. 2014) 83, 84

Commonwealth v. Bond, 819 A.2d 33 (Pa. 2002).. 79

Commonwealth v. Borders, 560 A.2d 758 (Pa. 1989) 36

Commonwealth v. Bozyk, 987 A.2d 753 (Pa.Super. 2009).................................... 32

Commonwealth v. Bracero, 473 A.2d 176 (Pa.Super. 1984) 54, 55

Commonwealth v. Brown, 141 A.3d 491 (Pa.Super. 2016).................................. 57

Commonwealth v. Bryant, 855 A.2d 726 (Pa. 2004)....................................... 46, 48

Commonwealth v. Cascardo, 981 A.2d 245 (Pa.Super. 2009).............................. 56

Commonwealth v. Clair, 326 A.2d 272 (Pa. 1974) 73

Commonwealth v. Colon, 846 A.2d 747 (Pa.Super. 2004).................................... 53

Commonwealth v. Cook, 30 Phila.Co.Rptr. 1, 1995 WL 1315980 (Pa.Com.Pl. 1995)..Passim

Commonwealth v. Cox, 728 A.2d 923 (Pa. 1999) 43

Commonwealth v. Culmer, 604 A.2d 1090 (Pa.Super. 1992)................................ 42

Commonwealth v. Dennis, 17 A.3d 297 (Pa. 2011)................................... 46, 47, 48

Commonwealth v. Dennis, 859 A.2d 1270 (Pa. 2004)..................................... 79, 84

Commonwealth v. Eichinger, 108 A.3d 821 (Pa. 2014) 88

Commonwealth v. Evans, 512 A.2d 626 (Pa. 1986) 34, 35, 36, 37

Commonwealth v. Fletcher, 861 A.2d 898 (Pa. 2004) 82

Commonwealth v. Fowler, 523 A.2d 784 (Pa.Super. 1987) 90

Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003) 74

Commonwealth v. Gentile, 640 A.2d 1309 (Pa.Super. 1994)................................ 42

Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002) 25

Commonwealth v. Greevy, 114 A. 511 (Pa. 1921) 89

Commonwealth v. Grosella, 902 A.2d 1290 (Pa.Super. 2006) 25

Commonwealth v. Hardcastle, 701 A.2d 541 (Pa. 1997) 79

Commonwealth v. Henkel, 90 A.3d 16 (Pa.Super. 2014) 25

Commonwealth v. Hutchinson, 25 A.3d 277 (Pa. 2011) 83, 84, 85

Commonwealth v. Johnson, 139 A.3d 1257 (Pa. 2016).. 25

Commonwealth v. Johnson, 532 A.2d 796 (Pa. 1987)... 35

Commonwealth v. Joines, 399 A.2d 776 (Pa.Super. 1979) 34

Commonwealth v. Kerpan, 498 A.2d 829 (Pa. 1985) 90

Commonwealth v. Lawrence, 960 A.2d 473 (Pa.Super. 2008) 43

Commonwealth v. Ligons, 971 A.2d 1125 (Pa. 2009) 83, 85

Commonwealth v. McGill, 832 A.2d 1014 (Pa. 2003) 26

Commonwealth v. Murphy, 591 A.2d 278 (Pa. 1991) 37, 38

Commonwealth v. Nero, 58 A.3d 802 (Pa.Super. 2012) 24

Commonwealth v. Patrick, 206 A.2d 295 (Pa. 1965) 88

Commonwealth v. Pompey, 375 A.2d 163 (Pa.Super. 1977) 51, 55

Commonwealth v. Presbury, 478 A.2d 21 (Pa.Super. 1984) 32, 33

Commonwealth v. Reid, 99 A.3d 427 (Pa. 2014) 81

Commonwealth v. Reid, 235 A.3d 1124 (Pa. 2020) 19, 20, 21

Commonwealth v. Rizvi, 166 A.3d 344 (Pa.Super. 2017) 22

Commonwealth v. Robinson, 780 A.2d 675 (Pa.Super. 2001) 54

Commonwealth v. Saunders, 946 A.2d 776 (Pa.Super. 2008) 82

Commonwealth v. Sepulveda, 55 A.3d 1108 (Pa. 2012) 84, 85

Commonwealth v. Simpson, 66 A.3d 253 (Pa. 2013) 81

Commonwealth v. Spence, 627 A.2d 1176 (Pa. 1993) 82

Commonwealth v. Spotz, 896 A.2d 1191 (Pa. 2006) 46, 47, 82

Commonwealth v. Statum, 769 A.2d 476 (Pa.Super. 2001) 55

Commonwealth v. Steele, 961 A.2d 786 (Pa. 2008) 90, 91, 95

Commonwealth v. Stern, 573 A.2d 1132 (Pa.Super. 1990) 80, 82

Commonwealth v. Tedford, 960 A.2d 1 (Pa. 2008) 90, 94

Commonwealth v. Thompson, 106 A.3d 742 (Pa. 2014) 82

Commonwealth v. Triplett, 381 A.2d 877 (Pa. 1977) 35

Commonwealth v. Uderra, 862 A.2d 74 (Pa. 2004) 83

Commonwealth v. Walker, 740 A.2d 180 (Pa. 1999) 35, 36, 37

Commonwealth v. Wiley, 966 A.2d 1153 (Pa.Super. 2009) 25

Commonwealth v. Williams, 420 A.2d 727 (Pa.Super. 1980) 88

Commonwealth v. Williams, 640 A.2d 1251(Pa. 1994)... 55

Commonwealth v. Williams, 863 A.2d 505 (Pa. 2004).. 82

Commonwealth v. Woods, 575 A.2d 601 (Pa.Super. 1990)................................... 55

Commonwealth v. Yarris, 731 A.2d 581 (Pa. 1999)... 53, 57

Friedman v. Ralph Bros., 171 A. 900 (Pa. 1934) 89

In re: Conflict of Interest of the Office of the Philadelphia District Attorney,
125 EM 2019.. 19, 20

Redmond v. Pittsburgh Railways Co., 198 A. 71 (Pa. 1938).................................. 89

State Statutes

18 Pa.C.S.A. § 503.. 52

42 Pa.C.S.A. § 9545(b)(2) 21

42 Pa.C.S.A. §§ 9543(a)(3).. 78

State Rules

Pa.R.E. 606(b)(1) 88

Pa.R.E. 606(b)(2)(A)... 88

Pa.R.E. 606(b)(2)(B) 88

Pa.R.E. 801(c) 51

Pa.R.E. 802 51

Pa.R.E. 804(3) 51

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

I. Did trial counsel provide ineffective assistance by not questioning Robert Chobert about his probationary status?

(Answered in the negative by the court below.)

II. Did the prosecutor commit a *Brady* violation by not disclosing that he told Robert Chobert he would try to find out how he could get his driver's license restored?

(Answered in the negative by the court below).

III. Did defendant's claim that the prosecution suppressed evidence that Cynthia White lied at trial provide a basis for PCRA relief?

(Answered in the negative by the court below.)

IV. Did trial counsel provide ineffective assistance with respect to the ballistics and medical forensic evidence?

(Answered in the negative by the court below.)

V. Did defendant's *Batson* claim provide a basis for relief?

(Answered in the negative by the court below.)

VI. Did the PCRA court improperly quash subpoenas defendant sent to jurors in an attempt to have them impeach their verdict?

(Answered in the negative by the court below.)

COUNTER-STATEMENT OF THE CASE

This is a *nunc pro tunc* appeal from prior orders dismissing defendant's PCRA petitions. Defendant was convicted of first-degree murder and possessing an instrument of crime in 1982 for the shooting death of Philadelphia police officer Daniel Faulkner. Defendant's judgment of sentence was affirmed by the Pennsylvania Supreme Court.

In the ensuing years, defendant filed four PCRA petitions, each of which was denied by the PCRA court, and in each case the dismissal of the petition was unanimously affirmed by the Pennsylvania Supreme Court. Although he was originally sentenced to death, that sentence was subsequently vacated by the federal courts due to instructional error at the penalty hearing. The Commonwealth elected not to pursue a death sentence at a new penalty hearing, and thus a sentence of life imprisonment was imposed for defendant's first-degree murder conviction.

In August of 2016, more than thirty years after he was convicted of murdering Officer Faulkner, defendant filed a fifth PCRA petition. Relying on *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016), defendant claimed he was entitled to reinstatement of his PCRA appellate rights from the dismissal of his four prior PCRA petitions. Defendant argued reinstatement of his prior PCRA appeals was warranted because Chief Justice Castille had served as the District Attorney of Philadelphia

during his direct appeal and had later not recused himself from considering the PCRA appeals.

Defendant subsequently filed an amended petition in which he added a second claim based on a letter provided to him during PCRA discovery. Defendant claimed that the letter, which was authored by Justice Castille while District Attorney, showed that the justice was biased against those convicted of killing police officers, and based on that alleged bias, he should have recused himself from hearing the prior PCRA appeals. Although the PCRA court ultimately rejected the *Williams*-based claim raised in the fifth PCRA petition, it granted relief based on the new claim raised in the amended petition and reinstated defendant's PCRA appellate rights. The reinstatement of those appellate rights is the basis of this appeal.

Statement of Facts

The facts as presented to the jury were this: During the early-morning hours of December 9, 1981, Officer Faulkner stopped a Volkswagen driven by defendant's brother, William Cook, near the corner of 13th and Locust Streets in Philadelphia. The officer was in uniform and was driving a marked police car. Shortly after stopping the car, the officer sent a radio message requesting the assistance of a police van. The officer stood behind Mr. Cook and was apparently about to frisk him when Mr. Cook turned and punched him in the face. As Officer Faulkner attempted to subdue and handcuff Mr. Cook, defendant ran out of a parking lot on the opposite

side of the street. Defendant ran over to the officer, whose back was turned, and shot him in the upper back with a five-shot revolver. The officer turned, grabbed for his own sidearm, and managed to fire one shot that hit defendant in the upper chest. Officer Faulkner fell to the ground and lay face-up. Defendant stood over him and repeatedly fired his revolver at the officer. One of defendant's high-velocity "plus P" bullets struck the officer between the eyes and entered his brain (N.T. 6/19/82, 106, 209-16, 276-77; 6/21/82, 4.79-4.106; 6/22/82, 5.179; 6/23/82, 6.97; 6/25/82, 8.4-8.34, 8.181; 6/28/82, 28.65).

Officer Robert Shoemaker and his partner, Officer James Forbes, were already on their way to 13th and Locust Streets in response to Officer Faulkner's radio message. A taxi driver flagged them down and told them an officer had been shot. Officer Shoemaker approached the shooting scene with his gun drawn and saw defendant sitting on the curb. His right arm was across his chest and his left hand was on the ground beside his leg. Officer Shoemaker said, "freeze," but defendant instead began to reach for something to his left. Officer Shoemaker could not see what it was. He stepped to one side for a better view and saw that defendant was reaching for a gun that was on the sidewalk beside him, about eight inches from his hand. When defendant ignored his second order to "freeze," Officer Shoemaker kicked defendant and knocked him to the ground, and then kicked the gun out of defendant's reach. Officer Forbes covered defendant's brother, who was frisked and found to be

unarmed. Defendant's brother said, "I ain't got nothing to do with this" (N.T. 6/19/82, 112-19, 127, 150-52, 155).

Officer Faulkner was put in a police van and rushed to Jefferson University Hospital. When the police attempted to handcuff defendant and place him in a police wagon to transport him to the hospital, he violently resisted. He continued to struggle against the officers when they subsequently brought him inside the hospital, the same one in which doctors were attempting to save Officer Faulkner's life. The officers carrying defendant—he refused to walk—temporarily placed him on the floor of the lobby next to the entrance to the emergency room. While lying there, defendant boasted, "I shot the mother fucker and I hope the mother fucker dies." A few moments later, as the officers were about to carry him into the emergency room, defendant repeated, "Yeah, I shot the mother fucker and I hope the mother fucker dies." Shortly thereafter, Officer Faulkner was pronounced dead (N.T. 6/19/82, 176-200, 263-64; 6/21/82, 4.109; 6/24/82, 27-30, 33-34, 56-61, 112-16, 133-36).

Defendant's Trial and Direct Appeal

Defendant was tried before the Honorable Albert F. Sabo and a jury in June of 1982. At trial the Commonwealth presented three eyewitnesses to the shooting. All three of the eyewitnesses, two of whom were able to identify defendant as the shooter, provided a consistent version of events. A fourth witness testified to seeing

defendant quickly approach the scene with his hand behind his back just before the shooting occurred. These four witnesses did not know one another.

Michael Scanlan testified that he was in his car waiting for the light to change at the corner of 13th and Locust Streets, when he saw an encounter between Officer Faulkner and a man who was driving a Volkswagen (that man would subsequently be identified as defendant's brother, Mr. Cook). During this encounter, Officer Faulkner spoke with Mr. Cook and directed him to stand "spread-eagle" in front of the police car. While Mr. Cook was standing "spread-eagle," he turned around and punched Officer Faulkner in the face. As Officer Faulkner tried to subdue Mr. Cook, another man (who would subsequently be identified as defendant) came "running out from a parking lot across the street towards the officer." Officer Faulkner's back was to defendant. According to Mr. Scanlan:

> I saw a hand come up, like this, and I heard a gunshot. There was another gunshot when the man got to the policeman, and the gentleman he had been talking to. And then the officer fell down on the sidewalk and the man walked over and was standing at his feet and shot him twice. I saw two flashes.

Defendant shot at the officer's face two or three times. One of the bullets struck its target, as Mr. Scanlan was able to see that Officer Faulkner's "whole body jerked" following one of the gunshots (N.T. 6/25/82, 8.4-8.11, 8.18-8.28).

Robert Chobert, a taxi driver, testified that he had just let off a fare and was filling out paperwork at 13th and Locust Streets, when he heard a shot:

> I looked up, I saw the cop fall to the ground, and then I saw [defendant] standing over him and firing more shots into him.

Mr. Chobert demonstrated how defendant stood over the fallen officer and fired at his face multiple times (N.T. 6/19/82, 209-16, 276-77).

Cynthia White, a prostitute, testified she was standing on the corner at 13th and Locust Streets and saw Officer Faulkner stop the Volkswagen driven by defendant's brother. She saw Mr. Cook punch the officer in the face. As the officer attempted to handcuff Mr. Cook, she saw defendant run toward the officer from the parking lot on the opposite side of the street. Defendant shot twice from behind the officer. Officer Faulkner staggered, and grabbed for something at his side; she could not see what it was because defendant moved into her line of view. The officer fell to the ground. Defendant then stood over the officer and fired down at him several times (N.T. 6/21/82, 4.92-4.107; 6/22/82, 5.179).

A fourth witness, Albert Magilton, did not see the shooting itself. However, he testified he saw a police officer pull over a Volkswagen at the corner of 13th and Locust Streets. The officer and the driver then met on the sidewalk. Mr. Magilton continued walking, and he saw defendant, who was on foot and holding his right hand behind his back, moving "across the street fast" in the direction of the stopped Volkswagen. A few moments later, Mr. Magilton heard a number of gunshots. When he looked back toward the Volkswagen, he no longer saw the officer. Mr. Magilton crossed the street and cautiously approached the stopped vehicle. When he got to the

sidewalk, he saw Officer Faulkner lying there. Defendant was sitting on the curb nearby (N.T. 6/25/82, 8.75-8.79, 8.104-8.112, 8.137-8.138).

Each of the above four witnesses testified that the only people present at the shooting scene were Officer Faulkner; defendant's brother, who moved toward the wall of a building and did nothing; and defendant. No one else was at the spot where the shooting occurred, although Mr. Scanlan confirmed the presence of the other eyewitnesses in the general area (N.T. 6/19/82, 212, 227-28, 233-34; N.T. 6/21/82, 4.106; 6/22/82, 5.134-5.135; 6/25/82, 8.20-8.21, 8.29-8.30). Two additional witnesses, a hospital security guard and a police officer, testified to the incriminating statements defendant made at the hospital, wherein he boasted that he shot Officer Faulkner and hoped he would die (N.T. 6/24/82, 28-30, 33, 113-16, 135-36).

Officer James Forbes testified that he was one of the two officers who first arrived at the shooting scene and that he recovered two handguns: the gun that defendant had been reaching for, a five-shot Charter Arms .38 caliber revolver with a two-inch barrel; and, from the street, a standard police-issue six-shot Smith and Wesson .38 caliber Police Special revolver with a six-inch barrel. The police gun, which was registered as issued to Officer Faulkner, contained six Remington .38 special cartridges, only one of which had been fired. The Charter Arms gun contained five cartridges, all of which had been fired (N.T. 6/19/82, 152-54, 162-63, 175-76; 6/23/82, 6.18-6.23, 6.90-6.100).

The trial evidence established that defendant had purchased the Charter Arms gun on June 27, 1979, and that it was registered to him. All of defendant's ammunition was of the "plus P" high-velocity type: four Federal .38 caliber "+P" and one Smith and Wesson .38 caliber "+P." The manager of the sporting goods store where defendant bought the gun explained that the "+P" is known in the gun trade as a "devastating bullet" because "[w]hen it hits the target, it just almost explodes" (N.T. 6/21/82, 4.32-4.59).

The bullet that struck defendant entered his right chest and was surgically removed from his right back. Ballistics testing confirmed that it had been fired from Officer Faulkner's gun. Another bullet was removed from Officer Faulkner's head. It was too deformed to be ballistically matched to a particular gun, but was caliber .38/.357 (.38 and .357 calibers are interchangeable), consistent with defendant's .38 caliber handgun. Moreover, it had a hollow base, a characteristic of ammunition manufactured by the Federal firearms company; four of the five spent shells in defendant's gun were of Federal manufacture. A copper bullet jacket, two flattened and distorted bullet specimens, and a number of fragments were also recovered from the shooting scene, all unusable for ballistics matching. However, one of the flattened bullet specimens, like the bullet taken from Officer Faulkner's head, had a hollow base—as did defendant's Federal brand ammunition. The bullet taken from Officer Faulkner's head had been fired from a gun barrel with eight lands, eight

grooves, and a right-hand twist. Defendant's gun had eight lands, eight grooves, and a right-hand twist. Finally, both the officer's and defendant's clothing tested positive for primer lead residue, which showed that both had been shot at a range of less than twelve inches (N.T. 6/19/82, 152-55; 6/23/82, 6.2-6.5, 6.100-6.114, 6.163-6.168; 6/26/82, 10-18, 32).

Defendant presented a number of witnesses at trial, most of whom were character witnesses. None of the witnesses observed the shooting;[1] nor did any of them present testimony that exculpated defendant. Neither defendant nor his brother testified.

On July 2, 1982, the jury convicted defendant of first-degree murder and possessing an instrument of crime. The following day, after a penalty hearing, the jury sentenced defendant to death. Defendant filed post-verdict motions, which the trial court denied after a hearing. The court then imposed the death sentence returned by the jury plus a consecutive sentence of two and one-half to five years' incarceration for possessing an instrument of crime.

---

[1] The sole exception was Cynthia White, an eyewitness who previously testified for the Commonwealth. Defendant called her during the defense case to ask her if she could remember in which hand the gunman (*i.e.*, defendant) held the gun. Ms. White testified that she could not remember in which hand defendant was carrying the gun (N.T. 6/29/82, 180-96).

With new counsel, defendant appealed to the Pennsylvania Supreme Court, which unanimously affirmed his judgment of sentence. *Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989), and the Court subsequently denied defendant's request for reargument. *Commonwealth v. Abu-Jamal*, 569 A.2d 915 (Pa. 1990).[2] The United States Supreme Court denied defendant's petition for a writ of *certiorari*. *Abu-Jamal v. Pennsylvania*, 498 U.S. 881 (1990). The federal high Court subsequently denied defendant's two petitions for rehearing. *Abu-Jamal v. Pennsylvania*, 498 U.S. 993 (1990), and *Abu-Jamal v. Pennsylvania*, 501 U.S. 1214 (1991).

Defendant's First Four PCRA Petitions

Defendant filed his first PCRA petition in 1995. A number of hearings were held, and Judge Sabo denied the petition. Defendant appealed to the Pennsylvania Supreme Court. On two occasions, the Supreme Court remanded the case to the PCRA court so defendant could present testimony from additional witnesses. On both occasions, after hearing the additional testimony, the PCRA court denied relief. The Pennsylvania Supreme Court unanimously affirmed the denial of PCRA relief, *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998), and the Court subsequently

[2] Chief Justice Castille was *not* a member of the Court during defendant's direct appeal or the Court's consideration of his request for reargument.

denied defendant's reargument request.[3] The United States Supreme Court denied defendant's petition for a writ of *certiorari*. *Abu-Jamal v. Pennsylvania*, 528 U.S. 810 (1999).

In 2001, defendant filed a second PCRA petition, which the Honorable Pamela Pryor Dembe dismissed as untimely. The Pennsylvania Supreme Court unanimously affirmed the dismissal. *Commonwealth v. Abu-Jamal*, 833 A.2d 719 (Pa. 2003), and the United States Supreme Court denied defendant's petition for a writ of *certiorari*. *Abu-Jamal v. Pennsylvania*, 541 U.S. 1048 (2004).

In 2003, defendant filed his third PCRA petition, which Judge Dembe dismissed as untimely. The Pennsylvania Supreme Court unanimously affirmed the dismissal of the petition, *Commonwealth v. Abu-Jamal*, 941 A.2d 1263 (Pa. 2008), and the United States Supreme Court denied defendant's petition for a writ of *certiorari*. *Abu-Jamal v. Pennsylvania*, 555 U.S. 916 (2008).

---

[3] During this and the three subsequent PCRA appeals, Chief Justice Castille was a member of the Court and participated in the consideration of the appeals. Defendant filed a motion seeking the justice's recusal from his first PCRA appeal. The motion was denied because, as Justice Castille explained in his opinion in support of the motion's denial, he was not personally involved in the prosecution of defendant's case at the trial level or on direct appeal. *Commonwealth v. Abu-Jamal*, 720 A.2d 121 (Pa. 1998) (Castille, J., denying recusal). Defendant also unsuccessfully sought Justice Castille's recusal from his second PCRA appeal.

In 2009, defendant filed a fourth PCRA petition, which Judge Dembe dismissed. The Pennsylvania Supreme Court unanimously affirmed the dismissal of the petition. *Commonwealth v. Abu-Jamal*, 40 A.3d 1230 (Pa. 2012).

Defendant's Federal *Habeas Corpus* Petition

Meanwhile, in 1999, defendant filed a petition for a federal writ of *habeas corpus* in the United States District Court for the Eastern District of Pennsylvania. The federal district court granted defendant a new penalty hearing (due to instructional error at the penalty hearing) and denied relief in all other respects. Both parties appealed, and the United States Court of Appeals for the Third Circuit affirmed the district court's decision. *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008). The Third Circuit denied defendant's petition for an *en banc* rehearing of the case, *see Abu-Jamal v. Secretary, Pennsylvania Dept. of Corrections*, 643 F.3d 370, 371 (3d Cir. 2011) (stating that reargument had been denied), and the United States Supreme Court denied defendant's petition for a writ of *certiorari*. *Abu-Jamal v. Beard*, 556 U.S. 1168 (2009). However, the Court granted the Commonwealth's petition for a writ of *certiorari* and remanded the case to the Third Circuit for further consideration in light of its decision in *Smith v. Spisak*, 558 U.S. 139 (2010).[4] On remand the Third Circuit affirmed the district court's order granting defendant a new penalty hearing.

---

[4] The relevant portion of *Spisak* involved alleged instructional error during the penalty phase of a capital trial.

Abu-Jamal v. Secretary, Pennsylvania Dept. of Corrections, *supra*. The United States Supreme Court denied the Commonwealth's petition for a writ of *certiorari*. *Wetzel v. Abu-Jamal*, 565 U.S. 943 (2011).

The Imposition of a Life Sentence

The Commonwealth subsequently declined to seek a new death sentence. Thus, on August 14, 2012, the trial court imposed a sentence of life imprisonment. Defendant filed post-sentence motions, which the trial court denied. He then appealed to this Court, raising claims regarding the imposition of his life sentence. This Court affirmed the judgment of sentence in a nonpublished opinion. *Commonwealth v. Abu-Jamal*, 3059 EDA 2012, 2013 WL 11257188 (Pa.Super., July 9, 2013).

Defendant's Fifth PCRA Petition

Defendant filed a fifth PCRA petition in 2016. Relying on the United States Supreme Court's decision in *Williams v. Pennsylvania*, *supra*, he claimed he was entitled to *de novo* review of his appeals from his prior four PCRA petitions. In *Williams*, the United States Supreme Court held that Chief Justice Castille should have recused himself from the Pennsylvania Supreme Court's consideration of Williams' PCRA appeal. This was because, as District Attorney, Chief Justice Castille had approved the trial prosecutor's request to seek the death penalty in that case. According to the Court, that act amounted to "significant, personal involvement in a critical decision" in the case that "gave rise to an unacceptable risk of actual bias."

Williams, 136 S.Ct. at 1908. The Court noted that the Commonwealth had argued that Chief Justice Castille's approval of the request to seek the death penalty was nothing more than a brief administrative act. The Court, however, explained that that characterization could not be "credited." *Id.* at 1907. This was because the Court was unwilling to assume that District Attorney Castille would treat "so major a decision as a perfunctory task requiring little time, judgment, or reflection on his part." *Id.*

In the present case, defendant pointed out that Chief Justice Castille had served as the District Attorney of Philadelphia during his direct appeal and that, accordingly, he likely had personal involvement in his case that warranted recusal under *Williams*. Defendant claimed that his petition was timely because he filed it within sixty days of the *Williams* decision and because *Williams* supposedly revealed that Justice Castille's denial of personal involvement in this case was likely not credible. He also claimed that *Williams* recognized a new constitutional right that applied retroactively.

Along with his PCRA petition, defendant filed a motion for discovery relating to evidence of District Attorney Castille's personal involvement in the case. The PCRA court (the Honorable Leon W. Tucker) concluded it had jurisdiction over this case based on the newly-discovered-fact exception (Opinion, Tucker, J., filed Dec. 27, 2018, p. 9). The "newly-discovered fact," according to the PCRA court, was the *Williams* holding "that there is an impermissible risk of actual bias when a judge

earlier had significant personal involvement as a prosecutor in a critical decision regarding a defendant's case" (*id.* at 13). Having concluded that it had jurisdiction over the case and that the matter involved "exceptional circumstances," the PCRA court granted the discovery request (*id.* at 8 & n.6).

During the discovery process, defendant obtained a June 15, 1990 letter that District Attorney Castille had sent to Governor Robert P. Casey in which he urged the governor to sign death warrants in cases in which the direct appeal process had concluded. Because defendant's direct appeal was then ongoing, the letter did not refer to him. In the letter, District Attorney Castille singled out the case of Leslie Beasley, who had been convicted of killing a Philadelphia police officer. District Attorney Castille told the governor that signing Beasley's death warrant was especially important because in the past ten days two other Philadelphia police officers had been shot to death in separate incidents. In that context, District Attorney Castille wrote, "I urge you to send a clear and dramatic message to all police killers that the death penalty in Pennsylvania actually means something."

Seven months after receiving the above letter, on the date the PCRA court had ordered any amended petition to be filed, defendant filed an amended PCRA petition. In that petition, he continued to argue that he was entitled to PCRA relief based on his *Williams* claim regarding Chief Justice Castille's supposed personal involvement in his direct appeal. Defendant also raised a new "second claim" that was

"independent of *Williams*" and that was based on the June 15, 1990 letter (defendant's amended PCRA petition, filed July 9, 2018, ¶ 30; N.T. 10/29/18, 7). Defendant argued that the letter was newly-discovered evidence that showed that Chief Justice Castille was biased against those convicted of killing police officers and therefore, for that reason as well, should have recused himself from hearing his PCRA appeals.

On December 27, 2018, the PCRA court entered an order (and filed an accompanying opinion) in which it denied defendant's *Williams*-based claim. The court denied the claim because it found that defendant had failed to show that, as District Attorney, Justice Castille had had "significant personal involvement in a critical decision" in his case (Opinion, Tucker, J., filed Dec. 27, 2018, pp. 16, 26-27). The court, however, concluded that defendant was entitled to relief based on his second claim, the one involving the June 15, 1990 letter to the governor. In the court's view, the letter called into question Chief Justice Castille's impartiality in cases, like the present one, involving the murder of a police officer (*id.* at 30-32). Thus, the court found that Chief Justice Castille should have recused himself from the PCRA appeals, and defendant was entitled to have those appeals reheard before a tribunal free of any influence from his potential bias. Accordingly, the PCRA court reinstated defendant's appellate rights from the dismissal of his four prior PCRA petitions.

Proceedings During the Current Appeal

After defendant filed his appellate brief, and 20 days before the Commonwealth's brief was due in this Court, Officer Faulkner's widow, Maureen Faulkner, filed a King's Bench petition asking the Pennsylvania Supreme Court to remove the Philadelphia District Attorney's Office from the case and replace it with the Pennsylvania Attorney General's Office.[5] Mrs. Faulkner contended that removal of the District Attorney's Office was necessary because of alleged conflicts of interest that supposedly prevented the office from properly handling this case.[6] In response, the Supreme Court entered an order in which it stayed the present appeal and appointed the Honorable John M. Cleland as special master to investigate the allegations.

After conducting his investigation, Judge Cleland filed a report announcing that he had found no basis for recommending the removal of the District Attorney's Office from the case:

---

[5] On the day he filed his appellate brief, defendant also filed a motion for a remand to the PCRA court to present what he contends is newly-discovered evidence. This alleged newly-discovered evidence consists of documents his attorneys found during a review of the Commonwealth's file for the case. Defendant maintains in his motion that the documents relate to the claims he has raised in the present appeal. The Commonwealth filed a response stating that it did not oppose a remand so the documents could be presented to the PCRA court. This Court has issued an order stating that decision on defendant's motion is deferred to the panel of this Court assigned to decide the merits of this appeal.

[6] Mrs. Faulkner had previously filed a motion in this Court seeking the removal of the District Attorney's Office from the case due to alleged conflicts of interest. This Court denied the motion.

> Having completed my investigation, it is my conclusion that [Mrs. Faulkner] has failed to establish the existence of a direct conflict of interest, which compromises the ability of the District Attorney or his assistants and staff to carry out the duties of his office. Nor has she established the existence of an appearance of impropriety that would compromise a reasonable person's confidence in the capacity of the District Attorney or his assistants and staff to serve the fair and impartial administration of justice in defending the conviction of [defendant] against issues raised in the pending PCRA petition.

In re: Conflict of Interest of the Office of the Philadelphia District Attorney, 125 EM 2019 (Cleland, J., Report of the Special Master, filed June 17, 2020, pp. 1-2). Thus, he recommended that the King's Bench petition be dismissed. The Pennsylvania Supreme Court subsequently entered an order stating that, "in accordance with the special master's recommendation," it was dismissing the King's Bench petition. *Id.* (*per curiam* order, filed Dec. 16, 2020). The Court further lifted the stay in the present appeal.

After the stay was lifted, defendant filed a motion in this Court requesting permission to file a supplemental memorandum to his brief addressing the relevance of *Commonwealth v. Reid*, 235 A.3d 1124 (Pa. 2020), a case decided while the Supreme Court's stay here was in effect. Defendant claimed it was necessary to address *Reid* because Justice Dougherty, in his concurring opinion in support of the order denying Ms. Faulkner's King's Bench petition, suggested that *Reid* requires dismissal of this appeal. Justice Dougherty stated that in *Reid* the Supreme Court held that *Commonwealth v. Williams*, *supra*, "does not provide an exception to the PCRA's

timeliness requirements, and that *nunc pro tunc* appeals reinstated pursuant to *Williams* are subject to *sua sponte* quashal." *In re: Conflict of Interest of the Office of the Philadelphia District Attorney*, *supra* (Dougherty, J., concurring statement, filed Dec. 16, 2020, p. 19). Justice Dougherty went on to state that, "[b]y all appearances, [defendant's] case falls squarely in this category." *Id.*

Defendant attached the proposed supplemental memorandum to his motion, and this Court subsequently granted the motion and directed that it and the supplemental memorandum "be placed with" his earlier-filed brief (Superior Court Order, filed Feb. 1, 2021). Defendant contends in the supplemental memorandum that *Reid* does not require dismissal of this appeal because his appellate rights were not reinstated pursuant to *Williams*. Defendant points out that the PCRA court rejected his *Williams*-based claim and instead restored his appellate rights based on District Attorney Castille's letter to the governor, which he states is newly-discovered evidence that came to light during the PCRA proceedings. Defendant maintains that "[t]his is a solid basis for the courts' jurisdiction" (defendant's proposed supplemental memorandum, 11).

The Commonwealth agrees that because the PCRA court denied defendant's *Williams*-based claim and instead restored his appellate rights based on the letter, *Reid* does not control the outcome here. But that does not mean that *Reid* is irrelevant to the threshold issue of the timeliness of defendant's PCRA petition.

This is because *Reid* established that defendant's original (fifth) PCRA petition, which was based on *Williams*, did not meet any time-bar exception and so should have been dismissed as untimely by the PCRA court. Given *Reid*, defendant thus needs to establish that his amended petition, in which he raised for the first time his newly-discovered-evidence claim based on the June 15, 1990 letter, was itself timely filed. This he cannot do.

Defendant was provided the letter no later than early October of 2017 (N.T. 4/30/18, 10).[7] At that time, pursuant to the PCRA time-bar, defendant was required to raise any claim "within 60 days of the date the claim could have been presented." 42 Pa.C.S.A. § 9545(b)(2).[8] Defendant, however, did not raise his newly-discovered evidence claim based on the letter until he filed his amended PCRA petition seven months later, on July 9, 2018. Thus, it appears that defendant did not timely raise the claim and that, accordingly, the PCRA court was statutorily barred from granting relief based on it and restoring his appellate rights.[9]

---

[7] *See also* defendant's October 19, 2017 letter to the PCRA court, filed of record, in which he quotes from the June 15, 1990 letter and states he received it as an attachment to a letter the PCRA court sent counsel on October 3, 2017.

[8] The 60-day period has since been extended to one year for claims arising *on or after* December 24, 2017. *See* Act 2018, Oct. 24, P.L. 894, No 146.

[9] During the proceedings below, the PCRA court entered orders stating that defendant had fifteen days following receipt of discovery to file any amendments to his original (fifth) PCRA petition, and the court ultimately gave defendant until July (footnote continued . . .)

In any event, even if the PCRA court correctly restored defendant's appellate rights from the dismissal of his prior PCRA petitions, as demonstrated below, none of his claims provides a basis for relief.

SUMMARY OF ARGUMENT

I. Trial counsel did not provide ineffective assistance by not invoking *Davis v. Alaska*, 415 U.S. 308 (1974), as a basis for cross-examining Robert Chobert with his probation status to show his alleged bias. Given the different facts of this case, the trial court would not have been required to allow such cross-examination. In fact, under Pennsylvania law at the time of trial, cross-examining Mr. Chobert with his probation status would not have been permitted. Further, even if such cross-examination had been permissible, it would not have made a difference in the outcome at trial.

II. Defendant's claim that the trial prosecutor violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose "that he had agreed to look into reinstating Mr. Chobert's suspended driver's license" (Brief for Appellant, 32) is meritless. The evidence presented at the PCRA hearing established that at some point, "probably"

9, 2018, to file an amended petition (N.T. 4/30/18, 40). The PCRA court, however, did not have the authority to extend the PCRA's timeliness requirements with respect to raising a new claim. *See Commonwealth v. Rizvi*, 166 A.3d 344, 347 (Pa.Super. 2017) ("[t]he PCRA's time limitations are mandatory and interpreted literally; thus, a court has no authority to extend filing periods except as the statute permits") (internal quotation marks and citation omitted).

during trial, and maybe not until after he had already testified, Mr. Chobert simply asked the prosecutor if he could tell him what steps he needed to take to have his license restored; the prosecutor responded that he would "look into it" but never did anything about it.

In any event, this information was not material to defendant's guilt or innocence. This is especially so because Mr. Chobert consistently identified defendant as the gunman going all the way back to the time of the shooting, well before trial and before he had even met the prosecutor. Additionally, there was overwhelming evidence that corroborated Mr. Chobert's testimony. Because the information was not material, no *Brady* violation could have occurred.

III. The PCRA court properly dismissed defendant's third PCRA petition in which he claimed that Cynthia White, who was then long-deceased, had twenty years earlier supposedly told a fellow inmate that the police were forcing her to falsely claim she had seen defendant shoot Officer Faulkner. The claim was based entirely on inadmissible (and unreliable) hearsay and could not establish any exception to the PCRA time-bar or the merits of any underlying claim.

IV. Trial counsel did not provide ineffective assistance by failing to "meaningfully consult" with or present the testimony of a ballistics or medical forensic expert. Defendant presented such experts at the PCRA hearing, and nothing they

said undermined the evidence of his guilt. If anything, their testimony supported the Commonwealth's case.

V. Defendant's claim that the prosecutor violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by using some of his peremptory challenges against African Americans provided no basis for relief. The claim was considered by the Pennsylvania Supreme Court on direct appeal, when Chief Justice Castille was *not* a member of the Court, and found meritless. Defendant could not relitigate the claim under the PCRA. In any event, the evidence he presented at the PCRA hearing failed to establish that a *Batson* violation occurred.

VI. The PCRA court properly quashed subpoenas defendant served on two jurors whereby he attempted to elicit testimony regarding alleged discussions some of the jurors had prior to formal deliberations. Such testimony is precluded by the rule prohibiting jurors from impeaching their verdict with post-verdict testimony regarding their internal discussions.

ARGUMENT

THE PCRA COURT PROPERLY DENIED POST-CONVICTION RELIEF.

When reviewing the denial of PCRA relief, this Court determines whether the PCRA court's ruling is supported by the record and free of legal error. *Commonwealth v. Nero*, 58 A.3d 802, 805 (Pa.Super. 2012). The PCRA court's findings will not be upset unless there is no support for them in the certified record. *Id.* Also, this

Court may affirm the PCRA court's decision if there is any basis in the record to support it and thus may rely on a basis different than that relied upon by the court below. *Commonwealth v. Wiley*, 966 A.2d 1153, 1157 (Pa.Super. 2009).

For ineffective assistance of counsel claims, the following standards apply: "Counsel is presumed to be effective; accordingly, to succeed on a claim of ineffectiveness the petitioner must advance sufficient evidence to overcome this presumption." *Commonwealth v. Johnson*, 139 A.3d 1257, 1272 (Pa. 2016). In order to overcome the presumption, a defendant must establish that: 1) the underlying claim has arguable merit; 2) counsel had no reasonable basis for his act or omission; and 3) "but for counsel's act or omission, the outcome of the proceedings would have been different." *Commonwealth v. Grosella*, 902 A.2d 1290, 1294 n.7 (Pa.Super. 2006).

Defendant's direct appeal was decided before *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002), which held that claims of ineffective assistance of trial counsel should generally be deferred to the PCRA. Prior to *Grant*, a defendant was required to raise any ineffective assistance of counsel claims at the first opportunity he had to do so, *see*, *e.g.*, *Commonwealth v. Henkel*, 90 A.3d 16, 23 (Pa.Super. 2014)—which in this case would have been on direct appeal, where defendant was represented by new counsel. If a defendant was represented by new counsel on direct appeal, and he failed to raise a claim of trial counsel's ineffectiveness at that stage, in order to obtain review of the claim under the PCRA he had to "layer" his claim. Specifically,

he had to demonstrate both that trial counsel was ineffective and that direct appeal counsel was ineffective for not raising trial counsel's ineffectiveness. *See Commonwealth v. McGill*, 832 A.2d 1014 (Pa. 2003).

I. TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE BY NOT QUESTIONING ROBERT CHOBERT ABOUT HIS PROBATIONARY STATUS.

Defendant claims trial counsel provided ineffective assistance by not questioning Commonwealth witness Robert Chobert about his probationary status. He further claims direct appeal counsel was ineffective for not raising this claim. At the time of trial, however, Mr. Chobert could not have been cross-examined regarding his probationary status. And even if such cross-examination was permissible, it would not have made a difference in the trial's outcome. Thus, defendant is not entitled to relief on this claim.

A. The Relevant Background to Defendant's Claim.

Mr. Chobert testified at trial that he was driving a taxi at the time of the incident and saw defendant shoot Officer Faulkner. Mr. Chobert was on probation for an arson conviction, and during cross-examination, trial counsel attempted to impeach him with the conviction, claiming it constituted *crimen falsi.* The Commonwealth objected, and the trial court sustained the objection because arson is not a *crimen falsi* offense (N.T. 6/19/82, 216-23).

Defendant claims that, rather than attempting to cross-examine Mr. Chobert with his conviction on the ground that it was *crimen falsi*, his counsel should have used the fact that he was on probation for that conviction to cross-examine him for bias. According to defendant, Mr. Chobert's probationary status provided "a powerful motive" for him to have favored the prosecution (Brief for Appellant, 17). Cross-examining Mr. Chobert regarding that probationary status, defendant contends, would have been proper under *Davis v. Alaska*, 415 U.S. 308 (1974), but because counsel was not familiar with that case, he did not advance that basis for the cross-examination and so was ineffective.

B. The PCRA Court's Analysis of the Claim.

The PCRA court rejected this claim. *See Commonwealth v. Cook*, 30 Phila.Co.Rptr. 1, 89-90 & n.34, 1995 WL 1315980 (Pa.Com.Pl. 1995) (hereinafter "PCRA Court Opinion I"). The court explained that *Davis v. Alaska* did not apply to this case because *Davis* "involved a witness who allegedly feared his own probation would be revoked because of his participation in the same crime with which the accused was charged" (*id.* at 89). In this case, however, "the fact that [Mr. Chobert] was on probation for arson, without more, did not bring him within the rule in *Davis* because there was no reason—nor has [defendant] suggested any—for Mr. Chobert to fear having his probation revoked" (*id.*). The court acknowledged that cases decided after defendant's trial "have expanded the scope of the rule in *Davis*" (*id.* at

89 n.34). Trial counsel, however, could not have been ineffective "for failing to apply later-decided cases" (*id.*).

The PCRA court further found that defendant failed to prove he was prejudiced by the absence of the cross-examination (*id.* at 89-90). Although defendant called Mr. Chobert as a witness at the PCRA hearing, he did not question him with regard to this claim. Additionally, the court pointed out, Mr. Chobert's testimony was corroborated by other witnesses; he immediately identified defendant as the shooter at the scene of the crime; and his pretrial statements regarding the shooting were consistent with his trial testimony (*id.* at 90).[10]

C. *Davis v. Alaska* did not Provide a Basis for the Cross-examination.

The PCRA court correctly concluded that *Davis v. Alaska* did not apply to this case. In *Davis*, the United States Supreme Court considered whether a state law precluding the use of juvenile adjudications in most court proceedings would have to give way where it conflicted with a criminal defendant's right to demonstrate a witness's potential bias. *Davis v. Alaska*, 415 U.S. at 309.

Davis was charged with breaking into an Anchorage bar and stealing its safe. The safe was subsequently found about twenty-six miles from Anchorage, near the

[10] The federal district court considered this claim on *habeas corpus* review and similarly concluded it provided no basis for relief. *See Abu-Jamal v. Horn*, No. CIV. A. 99-5089, 2001 WL 1609690 (E.D.Pa. Dec. 18, 2001), memorandum and order at 23, 57 (hereinafter "Federal District Court Opinion").

house in which Richard Green lived with his parents. The safe had been pried open and its contents removed. Green told responding officers that he had seen two men standing next to a late-model blue Chevrolet that had been parked near where the safe was found. The next day, Green was shown photographs of Davis and five other men, and he identified Davis as one of the men he saw standing by the car. Green would go on to be a "crucial witness" against Davis at trial. *Id.* 310. In addition to testifying to the above facts, he stated that when he observed Davis standing near where the pried-open safe was subsequently found, Davis was holding a crowbar. Additional evidence presented at trial established that Davis had rented a blue Chevrolet and that paint chips found in its trunk "could have" come from the stolen safe. *Id.* at 310.

At the time of the crime and trial, Green was on juvenile court probation after having been adjudicated delinquent for two burglaries. Davis wanted to cross-examine Green regarding this probation to show his potential bias. Davis contended the cross-examination could show that Green had falsely identified him to the police as a way of shifting suspicion away from himself, and that he was cooperating with the authorities because he feared his probation would be revoked. The trial court precluded the cross-examination based on an Alaska statute prohibiting the use of juvenile adjudications in most court proceedings.

At trial, Davis questioned Green at some length regarding whether he was concerned the police might suspect he was involved in the crime. Green gave somewhat conflicting answers, saying he did not think the police would suspect him; stating that he "thought they might ask a few questions is all;" and allowing that it did "cross his mind" that the police might suspect him. *Id.* at 312-13. Green, however, claimed that he was not bothered by the fact that the police might think he was involved; it was not something he was worried about. And, when he was asked if he had ever been questioned by the police like he was in this case, he flatly answered, "No." *Id.* Because of the trial court's earlier ruling, Davis did not question Green about the fact that he was on probation for committing other burglaries at the time he spoke with the police about the burglary at issue in the case and when he testified at trial.

The United States Supreme Court subsequently held that Davis's right to confront his accuser was violated by the trial court's prohibition on questioning Green about his juvenile record. The Court explained that because Davis was not allowed to ask Green about his juvenile court adjudication and probation stemming from the other burglaries, "Green's protestations of unconcern over possible police suspicion that he might have had a part in the [crime] and his categorical denial of ever having been the subject of any similar law-enforcement interrogation went unchallenged." *Id.* at 313-14.

The Court noted that Green was aware that Davis could not ask him about his juvenile record, and this fact likely caused him to testify in a different manner than he would have had such cross-examination been permitted. *Id.* at 314. As the Court explained, "It would be difficult to conceive of a situation more clearly illustrating the need for cross-examination." *Id.* Indeed, "[s]erious damage to the strength of the State's case would have been a real possibility had [Davis] been allowed to pursue this line of inquiry." *Id.* at 319. Thus, the Court held, "[i]n this setting," Davis's right of confrontation took precedence over the State's policy of preventing the disclosure of a juvenile's record, and Davis should have been allowed to cross-examine Green regarding his record. *Id.* at 319-20.

Davis does not support defendant's argument because this case is not at all similar to *Davis*. Here, unlike in *Davis*, there is no reason to believe Mr. Chobert feared he might be a suspect for the shooting; that such fear might have stemmed in part from his being on probation for having committed a similar crime; and that he identified defendant to deflect suspicion from himself. Mr. Chobert was *not* a suspect; he was *not* on probation for having committed a similar crime; and no one has suggested that he identified defendant to deflect suspicion from himself. Mr. Chobert was simply driving a taxi at the time of the incident; he happened to witness the shooting; and he immediately identified defendant as the person who shot Officer Faulkner.

Further, defendant has not pointed to anything Mr. Chobert testified to at trial that, like in *Davis*, would have been contradicted by the fact that he was on probation. Unlike in *Davis*, "serious damage" would not have occurred to the prosecution's case had defense counsel questioned Mr. Chobert about his probation. Thus, the relevant circumstances of this case are not at all similar to those in *Davis*, and defendant is wrong when he claims that, under *Davis*, he had the right to cross-examine Mr. Chobert regarding his probation. *Cf. Commonwealth v. Baez*, 720 A.2d 711, 726 (Pa. 1998) (explaining that in *Davis*, "[s]ince defense counsel was prohibited from making any inquiry as to whether the witness was presently on probation, the witness' categorical denial of ever having been the subject of any similar law-enforcement interrogation went unchallenged) (internal quotation marks and citation omitted); *Commonwealth v. Bozyk*, 987 A.2d 753, 757 (Pa.Super. 2009) (citing *Davis* for the proposition that a witness may be questioned about prior convictions where there is a possibility that the witness might be guilty of the crime and motivated to deflect blame from himself).

Defendant seems to believe that *Davis* established a *per se* constitutional right to question a witness about his probationary status regardless of the relevant circumstances or lack thereof. That is too broad a reading. This Court's decision in *Commonwealth v. Presbury*, 478 A.2d 21 (Pa.Super. 1984), makes that clear. In *Presbury*, this Court explained that in *Davis* the United States Supreme Court "held that

a state's interest in protecting juvenile offenders had to give way to the right of a criminal defendant to challenge the credibility of witnesses appearing and testifying against him." *Id.* at 24. However, this Court explained, *Davis* "did not hold that a witness' record was invariably admissible to attack credibility." *Id.* Rather, to be admissible, the record "must be relevant." *Id.*

In *Presbury*, the appellant claimed counsel was ineffective for failing to introduce evidence showing that a witness was incarcerated at the time of trial due to an adjudication of delinquency in an unrelated case. Presbury claimed this fact would show the witness's potential bias. This Court, however, rejected the claim because the fact that the witness was incarcerated for an adjudication of delinquency (and thus was under the supervision of the state) did not, by itself, establish a reason to believe he was biased in favor of the prosecution. *Id.* at 24-25. Thus, this Court's decision in *Presbury*, which was decided just two years after defendant's trial, makes clear that *Davis* did not establish a *per se* right to question a witness about the fact that he is under the supervision of the state.

D. Mr. Chobert could not have been Cross-examined Regarding his Probationary Status.

Absent the type of circumstances present in *Davis*—where there were particular facts that made the witness's record relevant to showing his potential bias—at the time of defendant's trial a witness could be cross-examined for bias with respect to his criminal record only where there was proof that the prosecution had the ability

to offer him leniency in a pending case. *E.g.*, *Commonwealth v. Joines*, 399 A.2d 776 (Pa.Super. 1979). That scenario did not apply here because Mr. Chobert did not have any open proceedings pending against him. He was serving the last year of a court-imposed five-year sentence of probation that was outside the prosecution's control. Thus, under the law that applied at the time of trial, Mr. Chobert could not have been cross-examined for bias with his arson conviction.

Cases decided after defendant's trial expanded the scope of permissible impeachment. In *Commonwealth v. Evans*, 512 A.2d 626 (Pa. 1986), the Pennsylvania Supreme Court announced a "new" rule, *id.* at 632, that shifted the analysis from the prosecutor's actual ability to provide leniency in a pending matter, to the possibility of leniency in the mind of the witness in any non-final matter:

> While we have always acknowledged the right of a party to impeach by showing bias, *new in the present case is our willingness to acknowledge what we had previously thought was too speculative*: that a prosecution witness may be biased because of the expectation of leniency in some pending matter even when no promises have been made. Thus, we hold that the right guaranteed by Art. I Section 9 of the Pennsylvania Constitution to confront witnesses against a defendant in a criminal case entails that a criminal defendant must be permitted to challenge a witness's self-interest by questioning him about possible or actual favored treatment by the prosecuting authority in the case at bar, or in any other non-final matter involving the same prosecuting authority.

Id. at 632 (emphasis added).

Trial counsel, of course, could not have been ineffective for failing to apply the new rule announced in *Evans* since that case was not decided until four years

after defendant's trial. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) (counsel's performance is judged under the "prevailing professional norms;" not later developments); *Commonwealth v. Johnson*, 532 A.2d 796, 801-02 (Pa. 1987) (counsel not ineffective for not relying on future cases); *Commonwealth v. Triplett*, 381 A.2d 877, 880-81 (Pa. 1977) (counsel cannot be faulted for failing to predict future changes in the law; thus, counsel's representation must be considered under the standards that existed at the time of his alleged ineffectiveness). Because (as *Evans* makes clear) at the time of trial the mere fact that a witness was on probation was not a sufficient basis for impeaching him for bias, counsel could not have been ineffective for failing to attempt to impeach Mr. Chobert.

In any event, even if *Evans* had been decided prior to trial, given the relevant circumstances of this case, there is no reason to believe that counsel would have been permitted to cross-examine Mr. Chobert with his arson conviction. This is because even under *Evans*, a defendant is not automatically entitled to cross-examine a witness with respect to his probationary or parole status. Instead, a defendant must be able to demonstrate a plausible reason to believe that the witness's probationary or parole status may have led the witness to falsely accuse him—which is not the case here.

This point was made clear by the Pennsylvania Supreme Court in *Commonwealth v. Walker*, 740 A.2d 180 (Pa. 1999). In that case, the Court considered its

decision in *Evans* (and also repeatedly referenced *Davis v. Alaska*; *see Walker*, 740 A.2d at 181-82). The Court explained that, although a defendant has a constitutional right to cross-examine a witness for bias, this does not mean that a trial court may no longer function as the gatekeeper in determining the relevance of the evidence supposedly showing bias:

> As previously noted, in *Commonwealth v. Evans* we recognized that a defendant's entitlement to challenge a witness's self-interest is rooted in the confrontation clauses of the state and federal constitutions. Notwithstanding this constitutional dimension, we have also recognized that the issue is essentially an evidentiary ruling regarding 'the scope and manner of cross-examination [which is] within the sound discretion of a trial judge whose decision[ ] will not be overturned absent an abuse of discretion.' *Commonwealth v. Auker*, 681 A.2d 1305, 1317 (Pa. 1996). *See also Commonwealth v. Borders*, 560 A.2d 758, 760 (Pa. 1989) ("the better course . . . is to favor the defendant's ability to fully and freely challenge the testimony and evidence of the prosecution with whatever tools are at his disposal, *so long as that use can be justified by an offer of relevance at the proceedings*").

Walker, 740 A.2d at 184 (emphasis supplied by *Walker*).[11]

In *Walker*, the appellant claimed the trial court erred in preventing him from cross-examining a prosecution witness regarding the fact that he was on parole when the witness first identified him to the police as the person who robbed him and also when he identified him at the preliminary hearing. The Pennsylvania Supreme Court recognized that a witness's probationary or parole status may be a proper subject for

[11] Throughout this brief, for the purpose of uniformity, the Commonwealth has occasionally reformatted citations contained in the passages it quotes.

cross-examination to show the witness's bias. However, the Supreme Court concluded that that did not mean that Walker was automatically entitled to question the witness about his parole status.

The Court found Walker's theory unpersuasive because he "made only a very general offer of proof as to the possible probative value of the fact that [the witness] had been on parole at the time of the incident." *Id.* at 185. Specifically, Walker claimed that the witness ran a speakeasy out of his house and thus "might have had an ulterior motive to cooperate with the police to avoid being charged with a probation violation for this illegal activity." *Id.* The Court concluded that, given the circumstances of the case, there was no reason to believe that the witness falsely identified Walker as the perpetrator because he was concerned about his parole status. Thus, the Court held, the trial court did not abuse its discretion in precluding Walker from questioning the witness about that status. *Id.* at 185.

Commonwealth v. Murphy, 591 A.2d 278 (Pa. 1991) (a case that followed *Evans*, is discussed in *Walker*, and is relied upon by defendant) shows the type of facts that would indicate that a witness's probation status might be relevant to her potential bias. Murphy was convicted of first-degree murder for the shooting death of the victim. The only eyewitness to the shooting was Wanda Wilson, who was nine years old when it occurred. At trial, which was not held until five years after the crime, Wilson, who was then on juvenile probation, testified that she saw Murphy

shoot the victim. When she was interviewed shortly after the shooting, however, Wilson did not identify Murphy as the shooter. Instead, it was not until four years later that she first identified him. Given Wilson's years-long delay in identifying Murphy, the Pennsylvania Supreme Court held that defense counsel should have brought to the jury's attention that Wilson was on probation at the time of trial. This was because that probation status might have provided a motive for her to cooperate in the prosecution (by identifying Murphy when she had not done so previously) and therefore was relevant to her potential bias.

The facts of the present case are much different than those in *Murphy*. Unlike the witness in *Murphy*, Mr. Chobert did *not* initially fail to identify defendant and then wait until years later, when he was on probation, to come forward with the identification. On the contrary, Mr. Chobert immediately identified defendant as the shooter at the scene of the crime. At that time, of course, the police investigation was just beginning, and it would have been extremely foolish (especially because he was on probation) for Mr. Chobert to have knowingly misdirected that investigation by providing the officers with false information. Thus, there is no reason to believe that Mr. Chobert's probation status would have provided him with a motive to falsely identify defendant (if anything, it would have encouraged him to be truthful in what he reported). Accordingly, even under the new law that did not come into effect until

after trial, the trial court would have been within its rights in precluding counsel from cross-examining Mr. Chobert about his probation.

E. Had Counsel Cross-examined Mr. Chobert Regarding his Probation, it Would not Have Made a Difference at Trial.

Even if counsel had been permitted to cross-examine Mr. Chobert regarding his probation, defendant's claim would still fail because such cross-examination would not have made a difference at trial. As explained above, Mr. Chobert was not in any way involved in the crime; he merely happened to witness it; and he immediately identified defendant as the shooter right after it occurred. There is no reason to believe that the fact he was on probation for a completely unrelated matter would have caused him to falsely identify defendant. In fact, 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. Thus, if anything, the fact that he was on probation would have served as a motivation for him to be truthful with the police.

Additionally, Mr. Chobert's testimony was corroborated by an abundance of other evidence. He testified at trial that he heard a shot, looked up, saw Officer Faulkner fall, and then saw defendant shoot him in the face. Defendant then went to the curb and fell (N.T. 6/19/82, 209-11). Cynthia White saw defendant run from the parking lot and shoot Officer Faulkner in the back. After the officer fell, defendant stood over him and shot down at him; then defendant slouched and sat down on the

curb (N.T. 6/21/82, 4.93-4.94). Michael Scanlan testified that he saw a man doing the same things the other witnesses saw defendant do: run from the area of the parking lot, shoot the officer from behind, and then stand over him and shoot him in the face (N.T. 6/25/82, 8.6-8.8). Albert Magilton testified that he saw defendant, who had one of his hands behind his back, moving "across the street fast" in the direction of Officer Faulkner; he heard a number of gunshots; and he saw the officer lying on the ground and defendant sitting on the curb nearby (*id.* at 8.75-8.79, 8.138). These witnesses did not know each other, and they all gave statements immediately after the shooting. Thus, there was no opportunity for them to coordinate their accounts.

Additionally, when the police arrived on the scene they found defendant sitting on the curb. The officers ordered him to "freeze," but he refused their command and reached for a gun that was on the sidewalk about eight inches from his hand. The gun was registered to defendant and consistent with having been the one that fired the bullet that killed Officer Faulkner. Defendant physically resisted the arresting officers. After he was taken to the hospital, he twice stated that he shot Officer Faulkner and hoped he would die (N.T. 6/19/82, 116, 119, 152-55, 178-82, 194-200; 6/21/82, 4.32.-4.36; 6/23/82, 6.107-6.116; 6/24/82, 28-30, 113, 135-36; 6/25/82, 8.178-8.181).

Defendant attempts to dismiss the overwhelming evidence presented against him by pointing to alleged discrepancies among the testimony of the various

eyewitnesses or between a particular eyewitness's testimony and her prior statements. These alleged discrepancies pertain to things such as the words the witnesses used to describe defendant's hairstyle, whether they remembered a taxi being parked behind Officer Faulkner's car, whether they remembered hearing one or two shots fired before they saw Officer Faulkner fall to the ground, and the relative heights of Officer Faulkner, defendant, and defendant's brother.[12] That there may have been some inconsistencies regarding some of these details, however, is hardly surprising. Given their relative insignificance, they are not the types of details that would have necessarily been impressed upon the witnesses' minds.

What is significant is that the testimony and statements of all four eyewitnesses was mutually corroborating and internally consistent with respect to the fact that defendant was the person who fatally shot Officer Faulkner. And, as already

---

[12] Defendant focuses much of his attention on the testimony of Cynthia White, a prostitute who was an eyewitness to the shooting. He even suggests that the prosecutor had concerns about her credibility by pointing to his comment, during closing argument, that "at times she wasn't very good at an explanation" (N.T. 7/1/82, 182). Defendant takes the prosecutor's comment out of context. He made the statement while explaining why her testimony *was credible*—she gave substantially the same version of events right after the shooting occurred and her testimony was corroborated by all of the other witnesses—while effectively acknowledging that she was not the most articulate or sophisticated individual (*id.* at 180-82; *see also* N.T. 6/21/82, 4.185, where, during a sidebar, the court states, "We all know she's . . . not exactly bright and she's a prostitute"). Indeed, during his examination of Ms. White, the prosecutor demonstrated that she gave substantially the same version of events throughout her various statements and the multiple times she testified (N.T. 6/22/82, 5.165-5.194).

explained, the witnesses' testimony was corroborated by the evidence establishing that defendant was arrested at the scene of the crime, his gun was lying on the side-walk next to him, he resisted arrest, and he admitted that he was the person who shot Officer Faulkner.[13]

Given the overwhelming evidence of defendant's guilt, and the fact that there is no reason to believe that Mr. Chobert's probationary status would have caused him to fabricate his testimony, defendant could not have possibly been prejudiced by trial counsel's failure to cross-examine him with respect to his probation. *Cf. Commonwealth v. Gentile*, 640 A.2d 1309, 1314 (Pa.Super. 1994) (any error in trial court's ruling prohibiting defendant from cross-examining witness regarding bias was harmless since the substance of the witness's testimony was confirmed by other witnesses); *Commonwealth v. Culmer*, 604 A.2d 1090 (Pa.Super. 1992) (even if trial court erred in precluding defendant from cross-examining the victim for bias regard-ing his two juvenile matters and an adult criminal charge, the error was harmless; the victim immediately and unequivocally identified defendant as his assailant, and

---

[13] Defendant also claims that if trial counsel had cross-examined Mr. Chobert about his probation, the jurors might have convicted him of third-degree murder or voluntary manslaughter rather than first-degree murder. It is difficult to understand how Mr. Chobert's probationary status could have been relevant to whether defend-ant acted with the specific intent to kill or under the heat of passion when he killed Officer Faulkner. Moreover, defense counsel himself instructed the jurors not to "compromise" their verdict and asked them to either find defendant guilty of first-degree murder or not guilty of anything at all (N.T. 7/1/82, 80-81).

thus there was no reason to believe his identification was influenced by his own criminal matters; also, the victim's identification testimony was corroborated by another witness).[14] Thus, even if such cross-examination had been permissible at the time of defendant's trial—it was not—trial counsel could not have been ineffective for not pursuing it. *See Commonwealth v. Cox*, 728 A.2d 923, 932-33 (Pa. 1999) (trial counsel could not have been ineffective for failing to cross-examine prosecution witnesses for bias based upon an outstanding warrant, criminal charges, probation, or parole, as there was no reason to believe such cross-examination would have led to a different result at trial). And because the underlying claim of trial counsel ineffectiveness fails, direct appeal counsel could not have been ineffective for not raising it. *See Commonwealth v. Lawrence*, 960 A.2d 473, 478 (Pa.Super. 2008) (appellate counsel will not be found ineffective for failing to raise a meritless claim).

[14] In arguing there is a reasonable probability that cross-examining Mr. Chobert about his probation would have resulted in a different verdict, defendant relies on *Kyles v. Whitley*, 514 U.S. 419 (1995). In that case the Court found there was a reasonable probability that evidence that was suppressed by the prosecution would have made a difference at trial if the defense had been aware of it. According to the Court, the suppressed evidence (which consisted of multiple items) would have, among other things, "substantially reduced or destroyed" the testimony of two of the eyewitnesses, *id.* at 441; it would have called into question "the thoroughness and even the good faith of the investigation," *id.* at 445; and it would have demonstrated that "the most damning physical evidence was subject to suspicion", *id.* at 454. Thus, the quality of the evidence at issue in *Kyles* was of a much different nature than the evidence at issue here—the fact that Mr. Chobert was on probation for a completely unrelated crime. Accordingly, defendant's reliance on *Kyles* is misplaced.

II. THE PROSECUTOR DID NOT COMMIT A *BRADY* VIOLATION BY NOT DISCLOSING HE TOLD ROBERT CHOBERT HE WOULD TRY TO FIND OUT HOW HE COULD GET HIS DRIVER'S LICENSE RESTORED.

Defendant raises a second claim regarding prosecution witness Robert Chobert. He argues the prosecutor violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose that he "agreed he would look into helping Mr. Chobert—a cab driver—regain his suspended driver's license" (Brief for Appellant, 14). Defendant's claim provides no basis for relief.

A. The Relevant Background to Defendant's Claim.

Defendant presented Mr. Chobert as a witness during the litigation of his first PCRA petition. He testified that his driver's license was suspended in December of 1981; that he had previously worked as a school bus driver; and that he was working as a cab driver at the time of the murder. He explained that at some point—he did not know when, but it "probably" was "sometime during the trial," and maybe after he testified—he asked the prosecutor "if he could help me find out how I could get my license back." The prosecutor responded that he would "look into it." Mr. Chobert stated that he knew the prosecutor did not have the power to get his license back for him; he was simply asking him to explain the law regarding what steps he had to take to get it restored. Mr. Chobert did not ever bring the issue up again with the prosecutor; the prosecutor never followed up; and at the time of the PCRA hearing,

which was held more than ten years after trial, Mr. Chobert still had not gotten his license back (N.T. 8/15/95, 4-19).

B. The PCRA Court's Analysis of the Claim.

The PCRA court rejected this claim (*see* PCRA Court Opinion I, at 64-65, 71). The court found Mr. Chobert's PCRA testimony to be credible (*id.* at 64-65). Specifically, the court credited Mr. Chobert's testimony that at some point during trial (it may have been after he testified), he asked the prosecutor to help him "find out how I could get my license back" (*id.* at 65). The prosecutor stated he would "look into it," but never got back to him (*id.*). The court further credited Mr. Chobert's PCRA testimony that, based on the prosecutor's statement that he would "look into it," he did not expect that the prosecutor would restore his license; rather, he simply expected that the prosecutor would tell him what he needed to do to have his license restored (*id.*).

The PCRA court explained that to succeed on a *Brady* claim, a defendant must establish that the prosecution withheld evidence that was material to his guilt or innocence (*id.* at 71). Based on the above factual findings, the court determined that defendant failed to prove that the Commonwealth withheld any material evidence (*id.*).[15]

---

[15] The federal district court considered the claim on *habeas corpus* review (*see* Federal District Court Opinion, at 15-18, 22, 24). The court concluded that, based (footnote continued . . .)

C. There was no *Brady* violation.

To establish a *Brady* violation, a defendant must show there was evidence suppressed by the state, either willfully or inadvertently; the evidence is favorable to the defense; and "the evidence was material, meaning that prejudice must have ensued." *Commonwealth v. Bryant*, 855 A.2d 726, 751 (Pa. 2004). Both impeachment evidence and exculpatory evidence fall within this rule. *Commonwealth v. Dennis*, 17 A.3d 297, 308 (Pa. 2011).

"[T]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial does not establish materiality in the constitutional sense." *Id.* Instead, for *Brady* purposes, evidence is considered "material" if there is "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Commonwealth v. Spotz*, 896 A.2d 1191, 1248 (Pa. 2006).

"[A] reasonable probability of a different result is established when the government's suppression of evidence undermines confidence in the outcome of the trial." *Commonwealth v. Dennis*, 17 A.3d at 308 (internal quotation marks and

---

on the evidence presented at the PCRA hearing, "it was not unreasonable for the PCRA court to determine that Chobert made no deal with the prosecutor in exchange for favorable testimony" (*id.* at 18, 22, 24). And, "because it is axiomatic that a *Brady* claim cannot survive where a defendant fails to demonstrate that evidence allegedly withheld by the prosecution even existed in the first instance" (*id.* at 18), it found the claim provided no basis for relief.

citation omitted). In determining whether the standard of materiality has been met, a court "is not to review the undisclosed evidence in isolation, but, rather, the omission is to be evaluated in the context of the entire record." *Id.* at 309.

Here, the evidence presented at the PCRA hearing established that the prosecutor did not promise Mr. Chobert any assistance with respect to his license in exchange for his testimony. Mr. Chobert specifically explained that he "didn't testify because [he] was trying to get [his] license back" (N.T. 8/15/95, 7). At some point, "probably" during trial, and maybe not until after he had already testified, he simply asked the prosecutor "if he could help [him] find out how [he] could get [his] license back" (*id.* at 4-5, 16-17, 19). The prosecutor responded that he would "look into it," but then did nothing about it, and years later Mr. Chobert still had not regained his license (*id.* at 4, 18-19).

It was defendant's burden to prove his *Brady* claim, which required him to establish, among other things, there was a "reasonable probability" the undisclosed information would have made a difference in the outcome at trial. *Commonwealth v. Spotz*, 896 A.2d at 1248. There is not a reasonable probability the verdict would have been different if the jury heard that, at some point, and maybe not even until after he had already testified, Mr. Chobert asked the prosecutor if he could tell him what steps he needed to take to have his license restored, and the prosecutor replied he would look into it. This is especially the case given that Mr. Chobert consistently

identified defendant as the person who shot Officer Faulkner, going all the way back to the time of the incident, which was long before he met the prosecutor and broached the subject with him.

Additionally, as explained above in Section I, subpart E, Mr. Chobert's testimony was corroborated by three other eyewitnesses, by defendant's presence and actions when the responding officers arrived on the scene, and by his own admissions that he shot Officer Faulkner. Because defendant failed to prove a reasonable probability that the undisclosed information would have made a difference at trial, the PCRA court properly rejected the claim. *See Commonwealth v. Dennis*, 17 A.3d at 309 (rejecting *Brady* claim where defendant failed to demonstrate there was a reasonable probability the use of the nondisclosed evidence would have led to a different result at trial); *Commonwealth v. Bryant*, 855 A.2d at 751 (rejecting *Brady* claim where defendant failed to demonstrate the evidence was material to his guilt or innocence).

III. DEFENDANT'S CLAIM THAT THE PROSECUTION SUPPRESSED EVIDENCE THAT CYNTHIA WHITE LIED AT TRIAL PROVIDES NO BASIS FOR RELIEF.

Defendant claims he was entitled to PCRA relief because newly-discovered evidence "establishes that the prosecution suppressed evidence that Cynthia White lied at [his] trial when she claimed she observed him shoot Officer Faulkner" (Brief for Appellant, 34). Defendant, however, failed to offer to present any competent evidence in support of this claim. Instead, his claim was based entirely on inadmissible and unreliable hearsay. Thus, it could not have entitled him to relief.

A. The Relevant Background to Defendant's Claim.

Cynthia White testified at trial that she was standing on the corner at 13th and Locust Streets and saw Officer Faulkner stop the Volkswagen driven by defendant's brother. According to her testimony, she saw defendant's brother punch the officer in the face. As Officer Faulkner attempted to handcuff defendant's brother, she saw defendant run toward the officer from the parking lot on the opposite side of the street. Ms. White further testified that she saw defendant shoot at Officer Faulkner twice from behind. Officer Faulkner fell, and defendant stood over him and fired down at him several times (N.T. 6/21/82, 4.92-4.107; 6/22/82, 5.179).

In 2003, more than twenty years after trial, defendant filed his third PCRA petition. Defendant attached to that petition a declaration from Yvette Williams. In her declaration, Ms. Williams stated that she was incarcerated with Ms. White in

December of 1981 (the month in which Officer Faulkner was killed). Ms. Williams claimed that Ms. White told her the police had "threatened her life" and forced her to say that defendant shot Officer Faulkner "when she really did not see who did it." Ms. Williams came forward with this information twenty years after Ms. White supposedly made the statement and nine years after she had died.

B. The PCRA Court's Analysis of the Claim.

The PCRA court found this claim provided no basis for relief (PCRA Court Memorandum and Order, Dembe, J., filed May 27, 2005) (hereinafter, "PCRA Court Opinion III). The court concluded that the petition raising the claim was not timely filed; that the claim was based entirely on inadmissible hearsay; and that Ms. White's trial testimony was "cumulative of other eyewitness testimony" (*id.* at 7, 13-17 & n.15).

C. Defendant's Claim is Based Entirely on Inadmissible Hearsay.

Defendant's claim that "the prosecution suppressed evidence that Cynthia White lied at [his] trial when she claimed she observed him shoot Officer Faulkner" (Brief for Appellant, 34) is based entirely on inadmissible hearsay and thus provides no basis for relief.

"Hearsay" is a statement that is offered to prove the truth of the matter asserted and that was not made by the declarant "while testifying at the current trial or

hearing." Pa.R.E. 801(c). It is not admissible unless it falls within a specific exception to the rule against hearsay. Pa.R.E. 802.

Defendant recognizes that Ms. White's statement to Ms. Williams is hearsay, but he claims it falls within the statement against penal interest exception to the hearsay rule. He is wrong.

There are three requirements that must be met for a statement to be admissible under this exception: (1) the declarant must be unavailable; (2) a reasonable person in the declarant's position would have made the statement only if she believed it was true because, when made, it had a great tendency to expose her to criminal liability; and (3) the statement must be "supported by corroborating circumstances that clearly indicate its trustworthiness." Pa.R.E. 804(3). Here, Ms. White's alleged statement to Ms. Williams fails to meet the latter two requirements.

Defendant claims Ms. White's statement is against her penal interest because she admitted "that she was planning to commit perjury and had signed false statements" (Brief for Appellant, 40). Nowhere in Ms. Williams' declaration, however, does she state that Ms. White told her that she was going to commit perjury, and even if she had, it does not appear that a statement that one *intends* to commit a crime would fall within this exception. *See Commonwealth v. Pompey*, 375 A.2d 163, 165 (Pa.Super. 1977) (declarant's statement that during an altercation he pulled out a knife and "was going to cut the [defendant]" may not have been a statement against

penal interest because the fact that the declarant "may have been in a frame of mind" to assault the defendant "hardly amounts to a crime").

Further, according to the declaration, Ms. White stated she falsely claimed to have seen defendant shoot Officer Faulkner because "the police were making her lie;" they had "threatened her life;" and she was worried they "would kill her if she didn't say what they wanted" (Williams declaration, ¶¶ 2, 6, 7). Under these circumstances, Ms. White's "false statements" accusing defendant of committing the shooting would have been "justifiable," *see* 18 Pa.C.S.A. § 503, and thus her alleged statement to Ms. Williams could not be considered to be against her penal interest.

Defendant also asserts that Ms. White's alleged statement to Ms. Williams was against her penal interest because in it she admitted to being a prostitute and drug user. Ms. White, however, was known to authorities as "a long-time drug addict and prostitute" who had been arrested more than thirty times (*e.g.*, PCRA Court Opinion III, at 14; N.T. 6/19/82, 13-14; 6/21/82, 4.80, 4.185; 6/22/82, 5.72). In Ms. Williams' declaration she states that the whole reason she approached Ms. White in prison was because she "knew she was a prostitute in center city Philadelphia," and "considering [prostitution] as an occupation" herself, she wanted to find out "what [it] was all about" (Williams declaration, ¶¶ 3, 5). Ms. Williams further claimed that Ms. White told her she had police officers for clients (*id.* ¶ 6). Given these circumstances, it cannot plausibly be said that by talking to Ms. Williams about her

prostitution and drug use Ms. White believed she was admitting to any conduct of which the authorities were unaware. Thus, the statement was not against her penal interest. *See Commonwealth v. Colon*, 846 A.2d 747, 757 (Pa.Super. 2004) (a statement is not against interest if it does not expose the declarant to any additional crime or punishment).

Even if Ms. White's alleged statement to Ms. Williams was against her penal interest, it would still fail to meet the hearsay exception because there were no circumstances that provided clear assurance that it was trustworthy and reliable. *See Commonwealth v. Yarris*, 731 A.2d 581, 591 (Pa. 1999) ("[d]eclarations against penal interest are admissible as an exception to the hearsay rule only where there are existing circumstances that provide clear assurances that such declarations are trustworthy and reliable").

According to Ms. Williams, the alleged conversation she had with Ms. White—during which the latter supposedly admitted that she had falsely accused defendant of shooting Officer Faulkner—took place in December of 1981. Ms. Williams, however, did not reveal the conversation until *twenty years* later and *nine years* after Ms. White had died and thus was no longer available to either corroborate or contradict anything Ms. Williams said. Additionally, Ms. Williams was herself a "violent" criminal who was incarcerated with Ms. White and who was intending to continue her life of crime (Williams declaration, ¶ 5). The timing of Ms. Williams'

revelation of Ms. White's alleged statement and Ms. Williams' own background seriously call into question the reliability of the alleged statement. *See Commonwealth v. Robinson*, 780 A.2d 675 (Pa.Super. 2001) (PCRA court did not abuse its discretion in concluding that one inmate's testimony that another inmate admitted committing the robbery for which defendant was convicted was not made under circumstances providing assurance that the admission was trustworthy and reliable so as to be admissible as a statement against penal interest; the inmate did not prepare an affidavit recounting the other inmate's admission until after the inmate had died, and the inmate who recounted the other inmate's alleged admission was himself "engaged in a criminal lifestyle").

Additionally, statements offered as declarations against penal interest are sufficiently trustworthy to be admissible only if "they were made to persons of authority or to persons having adverse interests to the declarant." *Commonwealth v. Bracero*, 473 A.2d 176, 179 (Pa.Super. 1984), *aff'd*, 528 A.2d 936 (Pa. 1987).

Here, Ms. White's alleged statement was not made to a person of authority or to someone whose interests were adverse to hers. Instead, it was made to a fellow inmate who came to her for advice about working as a prostitute. Also, her alleged statement was, in essence, a recantation of her prior statements identifying defendant as the person who shot Officer Faulkner. For these reasons as well, the statement was not sufficiently reliable to qualify as a statement against penal interest. *See*

Commonwealth v. Williams, 640 A.2d 1251, 1263 & nn. 8, 10 (Pa. 1994) (one inmate's testimony that another inmate admitted to him that he committed the murder for which defendant was on trial, and another inmate's testimony that a woman told him she was present during the murder and defendant did not commit it, were not admissible as declarations against penal interest since they were not made under circumstances assuring they were trustworthy and reliable); *Commonwealth v. Woods*, 575 A.2d 601, 603 (Pa.Super. 1990) ("recantation evidence is highly suspect"); *Commonwealth v. Bracero*, 473 A.2d at 179-80 (out-of-court statement not admissible as statement against penal interest where it was not made to anyone in authority or with an interest adverse to the declarant); *Commonwealth v. Pompey*, 375 A.2d at 165 (out-of-court statement not admissible under statement against penal interest exception where "[i]t was not made to a public official or to anyone with an interest adverse to the declarant;" rather, "[i]t was simply made to another onlooker at the scene of the [crime]").[16]

Defendant attempts to demonstrate the reliability of Ms. White's alleged statement by pointing to other evidence that supposedly corroborates it. This argument is

---

[16] *Compare Commonwealth v. Statum*, 769 A.2d 476, 480 (Pa.Super. 2001) (confession by defendant's friend that she, and not defendant, was the person involved in drug transaction was sufficiently trustworthy to be admissible as statement against penal interest where the friend made the statement to defendant's attorney, who was an officer of the court, and thus a reliable person of authority, and the statement was made in the attorney's office in front of the friend's mother, defendant, the attorney, and members of the attorney's staff).

unavailing. As this Court has explained, for purposes of the statement against penal interest exception, "[r]eliability is determined by referring to the circumstances in which the declarant gave the statement, not by reference to other corroborating evidence presented at trial." *Commonwealth v. Cascardo*, 981 A.2d 245, 258 (Pa.Super. 2009). Thus, the fact that defendant can point to evidence that supposedly supports the allegation that Ms. White did not really see him shoot Officer Faulkner does not support his claim that the out-of-court statement was admissible as a statement against penal interest.

But even if it were proper to look at the other evidence introduced at trial, his argument would fail. This is because a review of that evidence demonstrates the *reliability* of Ms. White's testimony that she saw defendant shoot the officer. Ms. White gave a detailed description of the shooting within twenty minutes of its occurrence (N.T. 6/21/82, 4.164-4.165). Her account was corroborated by the three other eyewitnesses who testified at trial. It was further corroborated by defendant's presence at the crime scene; by the fact that his own gun was on the ground next to where he was sitting (and he reached for it when the police arrived on the scene); and by his own admissions that he shot the officer. Indeed, when Ms. White gave her statement to the police just minutes after the shooting occurred, the investigation of the crime was just beginning, and those who were interviewing her would have no reason to know what other eyewitnesses might say.

In short, the only evidence defendant proffered in support of his claim that "Cynthia White lied at [his] trial when she claimed she observed him shoot Officer Faulkner" (Brief for Appellant, 34) was a twenty-year-old statement that was allegedly made by her and was inadmissible hearsay. Such inadmissible hearsay could neither have established a time-bar exception nor the merits of any underlying claim. *See Commonwealth v. Yarris*, 731 A.2d at 592 ("A claim which rests exclusively upon inadmissible hearsay is not of a type that would implicate the after-discovered evidence exception to the timeliness requirement, nor would such a claim, even if timely, entitle Appellant to relief under the PCRA"); *Commonwealth v. Brown*, 141 A.3d 491, 501-02 (Pa.Super. 2016) (another individual's alleged confession to the murder for which defendant was convicted was hearsay that did not meet the requirements for a statement against penal interest and, thus, could not be relied upon to establish the newly-discovered-facts exception to the time-bar). Accordingly, the PCRA court properly denied the claim.

IV. TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE REGARDING THE BALLISTICS OR MEDICAL FORENSIC EVIDENCE.

Defendant claims trial counsel provided ineffective assistance by "fail[ing] to engage or meaningfully consult a medical forensics or ballistics expert to testify about problems with the prosecution's case theory and to assist him in preparing to cross-examine the Commonwealth's expert witnesses" (Brief for Appellant, 41).

Specifically, defendant contends counsel should have brought out the fact that the medical examiner noted on his report that the bullet removed from Officer Faulkner's head was "44 cal," which supposedly would have been significant because defendant's gun was a .38 (*id.* at 42). He also argues that an expert could have testified that there were "standard procedures" the police could have conducted (but did not do) to determine whether he had fired his gun (*id.* at 42-43). And, he claims that counsel could have presented expert testimony regarding the trajectory of the bullet that Officer Faulkner fired into him that supposedly would have contradicted the Commonwealth's "theory of the case" (*id.* at 43-44).

A. The Relevant Background to Defendant's Claim.

Defendant presented three experts at the PCRA hearing regarding this claim. Their relevant testimony is described below.

1. George Fassnacht.

At the PCRA hearing, defendant presented George Fassnacht, a "forensic firearms consultant" (N.T. 8/2/95, 44). Mr. Fassnacht stated that before trial he consulted with defendant's attorney regarding the ballistics evidence (*id.* at 48-50). However, he stated he ended his involvement in the case because, after he billed

defendant's attorney for some of his initial work, he was informed that no additional funds would be available to continue to retain his services (*id.* at 50).[17]

Mr. Fassnacht explained that, had he been retained by defense counsel, he could have pointed out that there was no indication in the ballistics reports that any testing had been done to determine whether defendant's gun had been fired. He asserted the police could have determined whether defendant fired the gun by "[s]imply sniffing it." This is because, according to Mr. Fassnacht, "it's possible to smell a recently-fired firearm. The unmistakable odor lingers for several hours." Mr. Fassnacht, however, did not claim that at the time of the shooting it was the policy of the Philadelphia Police Department to conduct such a "sniff test."[18] He further acknowledged that, based on the information he had seen, it appeared that the bullet that was removed from Officer Faulkner's brain was a .38, *i.e.,* the same caliber as defendant's gun (*id.* at 58, 66-68, 102-13, 159-60).

---

[17] The record establishes that trial counsel was provided with funds to hire a ballistics expert (N.T. 1/20/82, 35-37). Counsel was also informed that if he needed additional funding he could file a petition with the trial judge, and the additional funding would likely be approved as long as it was shown "that the work was necessary and was relevant to the proceedings" (*id.* at 40-41).

[18] He did state that when he worked for the Philadelphia Police Department's Firearms Unit—during a period that was *not* contemporaneous with the shooting—he would sometimes give a lecture to the police recruits and "tell them about this test of smelling the barrel of a gun to see if it had recently been fired" (N.T. 8/2/95, 164).

Mr. Fassnacht also testified that there were “hand-wipe analysis” tests, such as the “neutron activation analysis test,” the police could have performed on defendant to determine whether he had fired the gun. According to him, these tests were “available” to the police at the time of the shooting, although he did not know how often they were used by the Philadelphia Police Department at that time. Mr. Fassnacht explained that the test “has to be done almost immediately,” and at the time that he offered this opinion, he was unaware of the circumstances of defendant’s arrest. When told that defendant had engaged in a physical struggle with the police at the scene of the shooting; that he had to be handcuffed with his hands behind his back; that he was taken to the hospital to receive treatment for his own gunshot wound; and that even there he continued to struggle with the police, Mr. Fassnacht acknowledged that the traces of gunshot residue could have been lost and the test “may have been very difficult to perform” (N.T. 8/2/95, 58, 68-73, 113-26).

2. John Hayes, M.D.

Defendant also presented Dr. John Hayes, a New York City medical examiner, at the PCRA hearing. He testified that the bullet that struck defendant travelled in a straight line through his body (although it did not exit it), passing from the right side of his chest backwards, downwards, and towards the left. Dr. Hayes explained that while a bullet can “tumble” as it passes through a body, that would not change its “angulation.” He further stated that there was no evidence that the bullet

ricocheted as it passed through defendant's body. Additionally, the doctor, a defense expert, testified that the wound path was consistent with a scenario whereby defendant shot the officer in the back and the officer spun around and fired at defendant while the latter was "slightly bent" forward (N.T. 8/4/95, 16, 20-22, 76-80, 114).

3. Paul Hoyer, M.D.

Defendant also presented Dr. Paul Hoyer at the PCRA hearing. Dr. Hoyer, who also testified at trial, was the medical examiner who conducted the autopsy of Officer Faulkner. At the PCRA hearing, he acknowledged that one of the papers relating to the autopsy contained a handwritten note from him stating "Shot 44 cal." Defendant argued that this .44 caliber reference was significant because his gun was a .38. Dr. Hoyer, however, explained that the notation was contained on something that was "an intermediate work product," *i.e.*, "a piece of paper" that would "normally" be "discarded." Notations such as those, he explained, were often made before he had even done the autopsy. Dr. Hoyer did not know why he had made that notation: "It could have been based on something I saw, it could have been based on something I was told. I can't tell you why it's there." Dr. Hoyer further testified at the PCRA hearing that he was *not* an expert in the field of ballistics and firearms identification and had never received any formal training in that area (N.T. 8/9/95, 185-93, 198-201).

B. The PCRA Court's Analysis of the Claim.

The PCRA court rejected defendant's claim that trial counsel provided ineffective assistance regarding the ballistics and medical forensic evidence (PCRA Court Opinion I, at 39-41, 46-49, 88-89). The court found that trial counsel could not have been ineffective for failing to present a ballistician or pathologist at trial because the evidence defendant presented at the PCRA hearing "fail[ed] to establish any such expert would have been helpful to his case, let alone change the outcome" (*id.* at 88). The court pointed out that some of the evidence defendant presented on this subject at the hearing "not only contradicted his own PCRA claims, it corroborated the Commonwealth's evidence from trial" (*id.*).

With respect to Mr. Fassnacht, the court explained that he "could not demonstrate that any of the ballistic evidence or testimony submitted at trial was false or incorrect" (*id.* at 39). Although Mr. Fassnacht testified that certain scientific tests were not done, he was unable to offer an opinion as to what the results of the tests would have been had they been performed (*id.* at 39-40).

With respect to Dr. Hayes, the PCRA court concluded that he "offered no opinion that would be inconsistent with the trial evidence" (*id.* at 47-49, 80). The trial evidence "showed [defendant] shot Officer Faulkner in the back, [defendant] was shot by the officer in turn, and then [defendant] blatantly executed Officer Faulkner by shooting him in the face as he lay helpless on the ground" (*id.* at 47-48).

Dr. Hayes conceded that Officer Faulkner could have shot defendant "just before falling," and because "none of the eyewitnesses to the murder were able to testify to the victim's precise posture at the instant he returned [defendant's] fire," the doctor's opinion could not have possibly contradicted their testimony (*id.* at 46-47).

The PCRA court further found that trial counsel could not have been ineffective by failing to cross-examine Dr. Hoyer regarding his "44 cal" notation (*id.* at 88-89). The court found that had trial counsel cross-examined the doctor on this subject, he would have explained that the notation was not a part of his report; that those types of notes were ordinarily written before he would even begin the autopsy; and that any reference at that point to the caliber of the bullet removed from Officer Faulkner "was a mere lay guess on his part" (*id.* at 49, 88-89). In fact, the court explained, defendant's own expert at the PCRA hearing, Mr. Fassnacht, contradicted any claim that the fatal bullet was a .44 (*id.* at 80).[19]

[19] On *habeas corpus* review, the federal district court considered defendant's claim that trial counsel was ineffective for failing to obtain a ballistics expert and pathologist. The court explained that, because Mr. Fassnacht's opinion "does nothing to refute the evidence that was presented at trial," counsel could not have been ineffective for failing to present him (Federal District Court Opinion, at 53, 55, 75-76). With respect to Dr. Hayes, the court found his testimony was consistent with a scenario whereby defendant "had been leaning forward while shot or the officer had the gun pointing down slightly" at the time he fired it (*id.* at 76). Because such a scenario was not inconsistent with the eyewitness testimony presented at trial, counsel could not have been ineffective for failing to call him (*id.* at 53, 55, 76).

C. Trial Counsel did not Provide Ineffective Assistance with Regard to the Ballistics Evidence.

Defendant claims trial counsel provided ineffective assistance with regard to the ballistics evidence. First, he asserts that trial counsel should have brought before the jury the fact that Dr. Hoyer made the "44 cal" notation in reference to the autopsy of Officer Faulkner. Defendant believes bringing out this fact would have been significant because his gun was a .38.

Contrary to what defendant claims, cross-examining Dr. Hoyer regarding the "44 cal" notation would not have made a difference at trial. As the medical examiner explained at the PCRA hearing, he was not a ballistics expert and had never received any formal training in that area. Thus, he did not have the competency to determine what the caliber of the bullet was. In fact, Dr. Hoyer did not know what prompted him to make that notation. It was not something that he wrote in his final report—rather, it was noted in his "intermediate work product," and notations such as those were often made before he had even conducted the autopsy (N.T. 8/9/95, 185-93, 198-201).

Most importantly, a ballistics expert was presented at trial, and his testimony established that the bullet removed from Officer Faulkner was .38 caliber and was consistent with having been fired from defendant's gun (N.T. 6/23/82, 6.107-6.110). Moreover, defendant's own ballistics expert testified at the PCRA hearing that the bullet removed from Officer Faulkner was definitely *not* .44 caliber, but rather, in

his opinion, was a .38, *i.e.*, the same caliber as defendant's gun (N.T. 8/2/95, 158-60). Trial counsel could not have been ineffective for failing to make an issue out of the medical examiner's "44 cal" notation when any suggestion that the bullet was a .44 would have been soundly refuted by the available expert testimony.

Defendant next claims "there was no evidence at trial that [his] gun had been fired at all on the night of [the shooting]" (Brief for Appellant, 42). He points out that Mr. Fassnacht testified at the PCRA hearing that the police could have tested his hands "for evidence of firing a gun" and smelled his gun "for evidence of recent firing" (*id.* at 43). According to defendant, "trial counsel did not mention the lack of this testing in front of the jury" (*id.*).

In fact, defense counsel elicited testimony at trial establishing that a suspect's hands can be tested to determine if he recently fired a gun (N.T. 6/26/82, 53-55). The test that the witnesses discussed—the neutron activation test—was the same test Mr. Fassnacht described at the PCRA hearing. Trial counsel further elicited testimony establishing that that test had not been performed on defendant (N.T. 6/29/82, 50-53). Additionally, in his closing argument, trial counsel asserted there were tests that the police could have performed, including the neutron activation test, but did not, and he suggested that they did not conduct those tests because of their "preconceived bias as to what happened" (N.T. 7/1/82, 68, 125-30, 141). Thus, defendant's

assertion that "trial counsel did not mention the lack of this testing in front of the jury" (Brief for Appellant, 43), is belied by the record.

Additionally, the lead detective on the case explained that it was not possible to perform the neutron activation test at the time of the shooting because the police department did not have the necessary kits (N.T. 6/29/82, 50-53). Testimony from the Commonwealth's expert at trial and defendant's expert at the PCRA hearing further established that, given the circumstances of defendant's arrest, it was unlikely that such a test could have been successful (N.T. 6/26/82, 87-95; 8/2/95, 113-16, 120-21). With respect to the "sniff test" to determine whether defendant's gun had been fired, defendant did not present evidence at the PCRA hearing that established that that test was part of the police protocol at the time of the shooting. And with respect to both tests, defendant's expert was unable to say that, had they been performed, they would have demonstrated that he did not shoot the officer.

Indeed, defendant's claim that "there was no evidence at trial that [his] gun had been fired at all on the night of [the shooting]" (Brief for Appellant, 42) is contradicted by the record. The ballistics and forensic evidence presented at trial established that Officer Faulkner was shot in the back from a distance of twelve inches or less and shot in the face from a distance of approximately twenty inches or less (N.T. 6/25/82, 8.165-8.166; 6/26/82, 15-18, 44-45). Multiple eyewitnesses testified that defendant ran up to Officer Faulkner, whose back was to him, and fired one or two

times at him; after Officer Faulkner fell to the ground, defendant stood over him and fired a number of additional shots at him (*e.g.*, N.T. 6/19/82, 210-16, 276-77; 6/21/82, 4.93-4.94, 4.98-4.104; 6/25/82, 8.6-8.11). One of the eyewitnesses testified to seeing "flashes" coming from defendant's hand as he pointed downward at the officer—this was at the same time the witness heard the gunshots (N.T. 6/25/82, 8.7-8.8, 8.73-8.74).

After shooting the officer, defendant sat on the curb. When the police arrived moments later, he reached for his gun, a five-shot revolver with a two-inch barrel (N.T. 6/19/82, 152-54, 162-63, 175-76; 6/23/82, 6.96), which was lying on the ground nearby. The officers recovered the gun, and a subsequent examination of the weapon established that it contained five cartridges, all of which had been fired (N.T. 6/23/82, 6.96-6.97). Thus, there was overwhelming evidence that defendant had fired his gun, and testimony from defense experts that there were tests that, potentially, could have confirmed that fact (but that were not conducted) would not have made a difference at trial.

D. Trial Counsel did not Provide Ineffective Assistance with Regard to the Medical Forensic Evidence.

The evidence presented at trial conclusively established that the bullet that struck defendant was fired from Officer Faulkner's gun (*e.g.*, N.T. 6/23/82, 6.181). Nevertheless, defendant claims that trial counsel was ineffective for failing to present a medical forensic expert who could have testified that that bullet travelled in a

downward path as it passed through his body. According to defendant, such testimony would have "contradicted the prosecution's narrative that, while lying on the ground after being shot himself, Officer Faulkner shot [defendant]" (Brief for Appellant, 43).

As an initial matter, counsel presented testimony at trial from the surgeon who treated defendant's gunshot wound. The surgeon testified at trial, as did defendant's expert at the PCRA hearing, that the bullet that struck defendant travelled in a downward path through his body (N.T. 6/28/82, 28.65-28.68). Thus, trial counsel did not need to call an expert—beyond defendant's treating physician, whom he did call—to establish the downward trajectory of the bullet.

Defendant, however, contends that his attorney should not have relied solely on the treating physician to establish the downward trajectory of the bullet. This is because the doctor testified that a bullet might ricochet or tumble as it passes through a body and, according to defendant, thereby suggested that the ricochet or tumble—rather than the angle at which the shot was fired—might explain why the bullet was found lower in defendant's body than where it entered. But while the doctor did testify that a bullet might ricochet or tumble, he did not claim that that had necessarily occurred here.

More importantly, even if counsel had presented an expert at trial, such as Dr. Hayes, who established without a trace of doubt that the bullet had travelled through

defendant's body in a downward path, that would not have made a difference in the trial's outcome. As stated above, defendant claims that such evidence would have "contradicted the prosecution's narrative that, while lying on the ground after being shot himself, Officer Faulkner shot [defendant]" (Brief for Appellant, 43). Contrary to what defendant suggests, however, none of the Commonwealth's witnesses testified that Officer Faulkner shot defendant while he was lying on the ground. In fact, none of the witnesses claimed to know when the officer fired back at defendant.

What the Commonwealth's evidence did establish, however, was that defendant shot Officer Faulkner in the back; that Officer Faulkner did not immediately fall to the ground; that he turned around and appeared to be grabbing for something; that before he fell to the ground another gunshot may have been fired; that after he fell to the ground defendant walked over to where he lay and fired a number of shots at him, one of which struck him in the face and killed him; and that the bullet that was subsequently removed from defendant was fired from the officer's gun (*e.g.*, N.T. 6/19/82, 215-16, 276-77; 6/21/82, 4.93-4.94, 4.102-4.103, 4.190, 6/22/82, 5.123, 5.127, 5.133-5.134; 6/23/82, 6.181; 6/25/92, 8.6-8.11, 8.28, 8.33-8.34, 8.38, 8.64).

Thus, the Commonwealth's evidence did not indicate that Officer Faulkner shot defendant while he (the officer) was lying on the ground. Rather, it strongly suggested that after defendant shot Officer Faulkner in the back, the officer spun around and shot defendant before falling to the ground. Significantly, Dr. Hayes'

testimony at the PCRA hearing established that such a scenario was entirely plausible based on the trajectory of the bullet through defendant's body along with the possibility that he might have been leaning forward slightly at the time he was shot (N.T. 8/4/95, 76-80, 114). Thus, if anything, presenting Dr. Hayes' testimony would have *supported* the Commonwealth's case. Accordingly, trial counsel could not have been ineffective for failing to present Dr. Hayes' testimony or any of the other ballistics or medical forensic evidence defendant presented at the PCRA hearing. The PCRA court properly rejected this claim.

V. THE PCRA COURT PROPERLY DENIED DEFENDANT'S *BATSON* CLAIM.

Defendant claims this Court should remand the case for further proceedings because he has supposedly demonstrated a *prima facie* case that the prosecutor used his peremptory challenges to discriminate against African Americans in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The Pennsylvania Supreme Court, however, considered defendant's *Batson* claim on direct appeal and found it was both waived and meritless. Having already been rejected by the Supreme Court, the claim could not be brought again under the PCRA. But even if defendant were entitled to litigate his *Batson* claim again in the PCRA court, it was properly rejected because he failed to demonstrate that a *Batson* violation occurred.

A. The Relevant Background to Defendant's Claim.

1. The relevant law.

In *Batson v. Kentucky*, *supra*, the United States Supreme Court "reaffirm[ed] the principle" that purposefully denying African Americans the right to serve as jurors based on their race violates the Equal Protection Clause of the federal constitution. *Id.*, 476 U.S. at 84. Although this prohibition against discriminating against potential jurors on account of their race was recognized decades earlier in *Swain v. Alabama*, 380 U.S. 202 (1965), in *Batson* the Court clarified the standard by which a defendant could establish such a violation.

In *Swain*, the Court stated it could not hold "that the striking of [African Americans] in a particular case is a denial of equal protection of the laws." *Swain*, 380 U.S. at 221. However, the Court explained, "when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be" removes qualified African Americans from the venire such that they never serve on petit juries, a constitutional violation may be found. *Id.* at 223.

In *Batson*, the Court overruled *Swain* to the extent it suggested that a constitutional violation could not be found based upon a prosecutor's use of peremptory challenges in a single case. *Batson*, 476 U.S. at 92-93, 100 n.25. The Court held that a defendant could establish purposeful discrimination based solely on the

prosecutor's actions in his own case, and it set forth a three-step process for determining whether a defendant had met his burden of proving discrimination: First, the defendant had to establish a *prima facie* case that the prosecutor had engaged in purposeful discrimination in removing African Americans from the jury; then, if the defendant made that showing, the prosecutor had to identify race-neutral reasons for removing the African Americans; and, finally, if the prosecutor put forth such reasons, the trial court had to determine whether the defendant had proven purposeful discrimination. *Id.* at 93-98.

The Court explained that to establish a *prima facie* case a defendant had to show that he was a member of a cognizable racial group and that the prosecutor used peremptory challenges to remove members of that group from the venire. *Id.* at 96. He could "rely on the fact, as to which there could be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." *Id.* (internal quotation marks and citation omitted). And, he had to show "that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id.* Some of these "relevant circumstances" might include a prosecutor's "pattern of strikes against black jurors included in the particular venire," and questions and statements made by the prosecutor during *voir dire*

that might "support or refute an inference of discriminatory purpose." *Id.* (internal quotation marks omitted).

2. The relevant procedural history.

In the present case, defendant was tried in 1982, a few years before *Batson*, but well after *Swain*. Defendant did not claim during jury selection or trial that the prosecutor used his peremptory challenges in a discriminatory manner. He did, however, claim on direct appeal that the prosecutor violated *Batson* by removing African Americans from his jury.

The Pennsylvania Supreme Court found that defendant waived the claim by not raising it at trial:

> There can be no doubt that under the longstanding teaching of *Commonwealth v. Clair*, 326 A.2d 272 (Pa. 1974), [defendant] has waived any claim that the prosecutor engaged in discriminatory use of peremptory challenges to obtain an unrepresentative jury. Not only did he fail to advance the issue in any form resembling that adopted by the Supreme Court in *Batson*, he made no attempt even to frame the issue under the then prevailing rules of *Swain v. Alabama*.

Commonwealth v. Abu-Jamal, 555 A.2d at 849.

Although the Supreme Court found defendant's *Batson* claim waived, it explained that in direct appeals of capital cases it had "at times" addressed the merits of waived claims due to "the extreme, indeed irreversible, nature of the death penalty." *Id.* Because defendant was sentenced to death, and because the Commonwealth, while asserting the claim was waived, also argued it was meritless, the Court

went on to address the merits of the claim and found it baseless.[20] The Court explained:

> Applying the "standards" set out in *Batson* for assessing whether a prima facie case exists, vacuous though they may be, we do not hesitate to conclude that no such case is made out here. That [defendant] is a member of a cognizable racial group and that the prosecutor used peremptory challenges to remove some members of [defendant's] race are facts so obvious to anyone even marginally acquainted with this case as to cause embarrassment at the need to set them out in writing. They are, nevertheless, two of the three "elements" necessary to establish a prima facie case. According to *Batson*, these facts, when taken with "any other relevant circumstances", must raise an inference that the prosecutor used his peremptory challenges to exclude venirepersons on account of their race. Examples of such "relevant circumstances" that might support or refute such an inference are a "pattern" (or not) of strikes against black jurors, and the prosecutor's questions and comments during *voir dire*.
>
> We agree with the Commonwealth that mere disparity of number in the racial make-up of the jury, though relevant, is inadequate to establish a prima facie case. The ultimate composition of the jury is affected not only by the prosecutor's use of peremptories, but by the defendant's use of such, by challenges for cause (more acute in capital cases because of the *Witherspoon* inquiry),[21] and by jurors' inability to serve for personal reasons. The Commonwealth cites at least one instance where [defendant] removed a black juror already passed as acceptable by the Commonwealth; it cannot be determined whether any of the venire, who were dismissed when it was [defendant's] turn to first pass on their acceptability, were black and might have been

---

[20] Defendant is no longer sentenced to death. Additionally, the Supreme Court has abrogated what was previously known as its "relaxed waiver" doctrine. *See Commonwealth v. Freeman*, 827 A.2d 385, 393-403 (Pa. 2003); *Commonwealth v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998).

[21] Referring to *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and questions regarding a juror's willingness or inability to impose a death sentence.

> acceptable to the Commonwealth. Moreover, we find no "pattern" in the use of peremptories. The Commonwealth used fifteen of the twenty available challenges. The record reflects that eight of these venirepersons were black.[22] Had [defendant] not peremptorily challenged the black venireperson acceptable to the Commonwealth, the first two jurors seated would have been black. We also note our agreement with the Commonwealth's argument that the replacement of the first juror chosen, a black woman, with an alternate, a white man, was entirely beyond the Commonwealth's control, and the resulting disparity in numbers of blacks and whites on the jury is no basis for an inference of purposeful discrimination. Finally, we have examined the prosecutor's questions and comments during *voir dire*, along with those of [defendant] and his counsel, and find not a trace of support for an inference that the use of peremptories was racially motivated.

Id. at 850.

Defendant re-raised his *Batson* claim in his first PCRA petition. Although he was given the opportunity to further develop a record in support of it, the only evidence he presented at the PCRA hearing was a stipulation indicating that ten African Americans were peremptorily struck by the prosecutor.[23] As stated above, on direct appeal defendant had claimed that eleven African Americans were removed by the prosecutor, and the record, which was silent as to the race of some of the stricken

[22] The Court noted that defendant claimed that eleven of the fifteen jurors struck by the prosecutor were African American, but that that number was in dispute since the race of several of the peremptorily-struck jurors did not appear in the record. *Commonwealth v. Abu-Jamal*, 555 A.2d at 848-89.

[23] The stipulation initially indicated that eleven African Americans were peremptorily struck by the prosecutor, but defendant subsequently withdrew the stipulation with regard to one of the stricken jurors, thereby bringing the number down to ten (PCRA Court Opinion I, at 102).

jurors, showed only that eight of them were African American. Although defendant originally claimed he wanted the prosecutor to testify at the PCRA hearing regarding the *Batson* claim, and thus the prosecutor (who was then in private practice) made himself available during the hearing, defendant ultimately decided not to call him as a witness (N.T. 8/3/95, 256-60; 8/4/95, 117-20).

B. The PCRA Court's Analysis of the Claim.

The PCRA court found defendant's claim failed for a number of reasons (PCRA Court Opinion I, at 101-04). First, the PCRA court judge—the same judge who presided at trial—stated that "[t]he Commonwealth did not intentionally or racially discriminate against African-American jurors in its use of peremptory strikes in violation of *Batson* and its progeny" (*id.* at 102). The court also pointed out that the issue had been previously litigated on the merits before the Pennsylvania Supreme Court and could not be relitigated again "merely because a new or different theory is posited as a basis for reexamining a claim that has already been decided" (*id.*). The court further noted that, at the PCRA hearing, the Commonwealth withdrew any objection to defendant presenting evidence on the subject. The only evidence defendant advanced, however, was the stipulation indicating that ten (rather than eight) African Americans were removed from the jury by the prosecutor (*id.*). Although the trial prosecutor was available to testify for the defense, defendant declined to call him (*id.*).

The PCRA court found that the stipulation indicating that ten (rather than eight) of the jurors removed by the prosecutor were African American did not in any way undermine the Supreme Court's conclusion that there was no *Batson* violation. The PCRA court explained:

> The Supreme Court's analysis . . . did not turn on whether eleven (as [defendant] claimed on appeal), ten (as claimed at the PCRA hearing), or eight (as shown in the trial record) of the venirepersons removed by the Commonwealth were black. Rather, the court focused on the third prong of the *Batson* prima facie analysis—whether "any other relevant circumstances" existed to support an inference of discriminatory intent.

(*id.* at 103) (citations omitted).

The PCRA court pointed out that the Supreme Court determined that those other relevant circumstances "refuted" defendant's claim (*id.*). Because defendant failed to demonstrate that the Supreme Court's analysis was incorrect, the PCRA court held, even if the claim was cognizable, it provided no basis for relief (*id.* at 103-04). The PCRA court also found that trial counsel could not have been ineffective "for failing to raise a *Batson* claim or make a *Batson* record at voir dire . . . since that case was handed down after the trial" (*id.* at 88).[24]

---

[24] The federal district court considered the claim on *habeas corpus* review (Federal District Court Opinion, at 103-09). The court held that the state courts' finding that defendant had not demonstrated a *prima facie* case of discrimination was not an unreasonable application of *Batson* (*id.* at 107). In reaching this conclusion, the court pointed out that the record failed to contain much of the relevant information for a *Batson* claim, and that the absence of that information was especially noteworthy because defendant had the opportunity to supplement the record at the PCRA hearing (footnote continued . . .)

C. Defendant may not Relitigate his *Batson* Claim Where the Pennsylvania Supreme Court Already Found it Meritless.

Defendant effectively ignores the fact that the Supreme Court has already considered, and rejected, this claim on direct appeal. Obviously unhappy with the result, he attempts to litigate the claim again in this PCRA appeal. However, the PCRA prohibits a claim that has been decided on the merits on direct appeal from being relitigated under the PCRA. *See* 42 Pa.C.S.A. §§ 9543(a)(3) (to be eligible for PCRA relief, a petitioner must plead and prove "[t]hat the allegation of error has not been previously litigated"); 9544(a)(2) (an issue is "previously litigated" if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue").

---

but failed to do so with the exception of the stipulation regarding the race of two of the stricken jurors (*id.* at 106). The court also found that, because defendant's "substantive" claim regarding the prosecutor's striking of African American jurors was "without merit," his claim that trial counsel was ineffective for failing to object to the prosecutor's use of peremptories necessarily failed (*id.* at 53, 55).

The United States Court of Appeals for the Third Circuit affirmed the federal district court's decision. *Abu-Jamal v. Horn*, 520 F.3d at 279-94. The court held that, because defendant "did not object to the prosecutor's use of peremptory challenges at any point during *voir dire* or at his 1982 trial," he had "forfeited" his jury discrimination claim. *Id.* at 283-84. The court went on to hold that, even assuming defendant's failure to object "is not fatal to his claim," the claim would still fail because he "has failed to meet his burden in proving a prima facie case." *Id.* at 284. Like the district court, the federal appellate court focused on defendant's failure to provide the necessary record for consideration of a *Batson* claim. *Id.* at 290-93. The court also explained that it had "never found a prima facie case based on similar facts" as here, where the prosecutor used ten of fifteen peremptory strikes against members of a racial group. *Id.* at 293.

And, the prohibition against relitigating a claim previously decided on direct appeal stands even if the defendant advances a new theory in support of the claim. *See Commonwealth v. Bond*, 819 A.2d 33, 38-39 (Pa. 2002) (despite the fact that defendant raised new theories in support of his claims, court would not, on PCRA appeal, address the claims, as it had previously considered them on direct appeal). Accordingly, defendant may not now relitigate his failed *Batson* claim. *See Commonwealth v. Dennis*, 859 A.2d 1270, 1279-80 (Pa. 2004) (defendant could not relitigate *Batson* claim under the PCRA since it was already rejected on the merits by the Supreme Court on direct appeal; although defendant wanted to litigate the claim again so he could remedy deficiencies in the record that were noted by the Supreme Court on direct appeal, the Court had nevertheless rejected the claim on the merits, and thus it could not be raised again); *Commonwealth v. Hardcastle*, 701 A.2d 541, 548 (Pa. 1997) (defendant's *Batson* claim would not be entertained on PCRA appeal where the claim was found meritless on direct appeal).

Defendant apparently believes he should be able to relitigate his previously-rejected *Batson* claim again on appeal because he presented "new evidence" in support of it at the PCRA hearing (Brief for Appellant, 48). This "new evidence" consisted of a stipulation indicating that the prosecutor used peremptory challenges to strike ten African Americans, one *less* than what defendant claimed on direct appeal but two more than what the record then showed. Of course, 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, and therefore there was no reason for the trial court to have noted for the record the races of the jurors struck by the prosecutor.

In any event, even if the Supreme Court had been aware of the precise number of African American jurors struck by the prosecutor—*i.e.*, ten, rather than eleven as claimed by defendant and eight as shown by the record—it would not have made a difference in the Court's ruling. This is because 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. *See Commonwealth v. Stern*, 573 A.2d 1132, 1135 (Pa.Super. 1990) (there is no particular number of strikes against minority veniremen that shows a *prima facie* case of discrimination). Rather, the Court considered the totality of the circumstances and found that there was no reason to believe the prosecutor's use of peremptory challenges was racially motivated. *Commonwealth v. Abu-Jamal*, 555 A.2d at 850.

In particular, the Court noted that the composition of a jury is affected not only by the prosecutor's use of peremptory challenges, but also by the defendant's use of them, by challenges for cause, and by the inability of certain jurors to serve due to personal reasons. The Court pointed out that the first two persons selected for the jury were African American; that one of the African Americans accepted by the

prosecutor was subsequently removed by the trial court because of a matter that "was entirely beyond the Commonwealth's control;" that defendant removed at least one African American juror who was accepted by the Commonwealth; that the record did not show the race of the jurors who were removed by defendant before the prosecutor had an opportunity to accept them; that the prosecutor used only fifteen of his twenty available peremptory challenges; that the disparity in the number of African Americans and Caucasians on the jury did not indicate that purposeful discrimination had occurred; and that a review of the prosecutor's, defendant's, and defense counsel's statements and questions during *voir dire* showed there was "not a trace of support for an inference that the use of peremptories was racially motivated." *Id.*

The only evidence defendant introduced at the PCRA hearing regarding his *Batson* claim was the stipulation that ten of the fifteen jurors struck by the prosecutor were African American. This evidence, however, did nothing to upset the Supreme Court's above analysis of this claim. This is especially true given that the Supreme Court and this Court have repeatedly rejected *Batson* claims in cases where there were *higher* disparities in the prosecutor's use of peremptory challenges than in the present case. *See*, *e.g.*, *Commonwealth v. Reid*, 99 A.3d 427, 461-62 (Pa. 2014) (no *Batson* violation even though prosecutor struck three times as many African American jurors as Caucasian ones); *Commonwealth v. Simpson*, 66 A.3d 253, 261-64 (Pa. 2013) (no *Batson* violation where the prosecutor used thirteen of his eighteen

peremptory challenges against African Americans); *Commonwealth v. Spotz*, 896 A.2d 1191, 1211-14 (Pa. 2006) (prosecutor's use of peremptory challenges to strike nine women and only one man did not establish a *prima facie* case of gender discrimination); *Commonwealth v. Williams*, 863 A.2d 505, 514-15 (Pa. 2004) (no *Batson* violation even though prosecutor used fourteen of his sixteen peremptory strikes against African Americans); *Commonwealth v. Saunders*, 946 A.2d 776, 783-84 & n.10 (Pa.Super. 2008) (no *Batson* violation even though, according to the defense, all of the prosecutor's peremptory challenges were used against African-American women); *Commonwealth v. Stern*, 573 A.2d at 1134-36 (prosecutor's use of peremptory challenges to strike eight African Americans and only one Caucasian did not establish a *prima facie* case of discrimination).[25]

D. Defendant has not met the Standard Necessary to Succeed on a *Batson* Claim that was not Raised at Trial.

Even if litigation of defendant's *Batson* claim were not barred by the Supreme Court's consideration and rejection of it on direct appeal, he would still not be

---

[25] Although defendant presented evidence at the PCRA hearing indicating the race of the jurors struck by the prosecutor, he did not provide any evidence regarding the race of the jurors he struck, even though the Pennsylvania Supreme Court noted this omission in the record when considering the claim on direct appeal. *Commonwealth v. Abu-Jamal*, 555 A.2d at 850. Defendant's failure to complete the record is, itself, significant, as the Supreme Court has repeatedly stated it will not grant relief on a *Batson* claim where the defendant has not provided a complete record for its review. *See*, *e.g.*, *Commonwealth v. Thompson*, 106 A.3d 742, 751-52 (Pa. 2014); *Commonwealth v. Fletcher*, 861 A.2d 898, 909-10 (Pa. 2004); *Commonwealth v. Spence*, 627 A.2d 1176, 1182-83 (Pa. 1993).

entitled to relief. This is because he did not meet the standard necessary to succeed on a *Batson* claim that, like here, was not raised at trial.

In presenting this claim, defendant contends that "[t]he only question here is whether [he] has demonstrated a prima facie case at the first step of the *Batson* inquiry" (Brief for Appellant, 48). According to defendant, "[t]hat does not require [him] to show that the challenge was more likely than not the product of purposeful discrimination" (*id.*) (internal quotation marks and citation omitted). This is a misstatement of the law.

The Pennsylvania Supreme Court has made clear that where, as here, a defendant raises a *Batson* claim on collateral review that was not presented to the trial court during *voir dire*, he is not entitled to rely on *Batson's* burden-shifting framework. *Commonwealth v. Hutchinson*, 25 A.3d 277, 287 (Pa. 2011). "Rather, when a claim of racial discrimination in jury selection has not been preserved, a post-conviction petitioner bears the burden in the first instance and throughout of establishing actual, purposeful discrimination by a preponderance of the evidence." *Id.*; *accord Commonwealth v. Blakeney*, 108 A.3d 739, 769 (Pa. 2014); *Commonwealth v. Ligons*, 971 A.2d 1125, 1142 (Pa. 2009); *Commonwealth v. Uderra*, 862 A.2d 74, 87 (Pa. 2004). This requirement of proving "actual, purposeful discrimination" is "in addition to all of the other requirements" a defendant must meet "to overcome the waiver of the underlying claim." *Commonwealth v. Uderra*, 862 A.2d at 87.

Here, the only evidence defendant presented at the PCRA hearing regarding his *Batson* claim was the stipulation indicating that the prosecutor struck a total of ten African Americans from the jury, two more than the total of eight that had previously been shown by the record. As explained above, this evidence was not sufficient to establish a *prima facie* case of discrimination, let alone prove the "actual, purposeful discrimination," *Commonwealth v. Hutchinson*, 25 A.3d at 287, necessary for him to succeed on the claim. In fact, the Pennsylvania Supreme Court has specifically held that "statistics *could never demonstrate* an intention to remove African-American venire members from the juror pool," *Commonwealth v. Dennis*, 859 A.2d at 1280 (emphasis added), which is what defendant needed to show to succeed on his claim. *See also Commonwealth v. Blakeney*, 108 A.3d at 769-70 (finding the statistical evidence forwarded by the defendant did not prove the "intentional discrimination" he needed to show to succeed on his *Batson* claim); *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1131-33 (Pa. 2012) (same).

In order for defendant to have proved "actual, purposeful discrimination," *Commonwealth v. Hutchinson*, 25 A.3d at 287, he had to demonstrate that the prosecutor struck the African American jurors because of their race and not because of any other race-neutral reasons. Defendant did not meet this burden. Although the trial prosecutor was available to testify during the PCRA hearings—and could have been questioned by the defense to determine what his reasons were for striking the

African Americans jurors (and whether those reasons were race neutral or, rather, showed an intent to discriminate)—defendant elected not to present him. Having failed to meet his burden of proving "actual, purposeful discrimination" on the part of the prosecutor, defendant could not have succeeded on his *Batson* claim. *See Commonwealth v. Sepulveda*, 55 A.3d at 1132-34 (referring to the defendant's *Batson* claim, which he did not raise at trial, as "frivolous" where he "failed to prove that the Commonwealth actually and purposefully discriminated in its peremptory challenges" and, instead, focused his argument on an attempt to make out a "*prima facie* case" of discrimination). Accordingly, even if not previously litigated, the claim was properly rejected by the PCRA court.[26]

VI. THE PCRA COURT PROPERLY QUASHED SUBPOENAS DEFENDANT SENT TO JURORS IN AN ATTEMPT TO HAVE THEM IMPEACH THEIR VERDICT.

Defendant claims the PCRA court erred by quashing subpoenas he sent to two jurors. Defendant issued the subpoenas because he hoped the jurors would impeach their verdict by testifying that some of the jurors discussed the trial evidence in the

---

[26] At the conclusion of his argument, defendant states that if his failure to raise this claim at trial is deemed "significant," trial counsel should be found ineffective for failing to advance it (Brief for Appellant, 56). But since defendant did not prove that the prosecutor engaged in "actual, purposeful discrimination," his ineffectiveness claim also necessarily fails. *See*, *e.g.*, *Commonwealth v. Hutchinson*, 25 A.3d at 286-89 (since defendant's proffered evidence did not establish "actual, purposeful discrimination in jury selection," his claim that counsel was ineffective for failing to raise a *Batson* claim necessarily failed); *Commonwealth v. Ligons*, 971 A.2d at 1145-46 (same).

evenings while sequestered in a hotel. Because Pennsylvania law prohibits jurors from impeaching their own verdict, the PCRA court properly quashed the subpoenas.

A. The Relevant Background to Defendant's Claim.

Defendant attached to his first PCRA petition an affidavit prepared by one of his attorneys. In the affidavit, defendant's attorney claimed that on January 9, 1994, *i.e.*, more than eleven years after trial, he went to the home of one of the jurors and "interviewed" her. Defendant's attorney claimed the juror told him that in the evenings, while the jurors were sequestered in their hotel, three other jurors would meet in the hotel room of one of those jurors and discuss the evidence presented in court that day. Defendant's attorney claimed the juror told him that whenever one of the jurors had a different view of the evidence than the other two, that juror "was invariably silenced and made to go along."

During the PCRA proceedings, defendant issued a subpoena for the juror who supposedly spoke to his attorney as well as for the jury foreman, who was identified as one of the three jurors who took part in the alleged conversations. The Commonwealth opposed defendant's attempt to present testimony from the jurors because such testimony was barred by the "no-impeachment rule." The Commonwealth also expressed concerns that defendant's attorneys were attempting to intimidate the

jurors. The PCRA court quashed the subpoenas (N.T. 8/1/95, 152-66; 8/2/95, 11-12, 185-89; PCRA Court Opinion I, at 20-21).

B. The PCRA Court's Analysis of the Claim.

The PCRA court precluded defendant from presenting the jurors as witnesses at the PCRA hearing for a number of reasons (PCRA Court Opinion I, at 107-08). First, the Court found defendant's claim waived because he did not raise it at trial or on direct appeal and did not offer to prove that the information could not have been obtained then with the exercise of reasonable diligence (*id.*). Next, the court held that testimony from the jurors regarding the alleged premature discussions was not permissible under Pennsylvania law, although the court noted that defendant could have presented testimony from any non-jurors who had witnessed the alleged discussions (*id.* at 107-08). And, finally, the court found defendant failed to demonstrate that this new evidence was exculpatory or would have changed the verdict (*id.* at 108).[27]

[27] The federal district court found this claim did not provide a basis for *habeas corpus* relief (Federal District Court Opinion, at 112-13). The court explained that under Pennsylvania law jurors are not permitted to impeach their own verdict, and defendant had failed to demonstrate that clearly established federal law was to the contrary (*id.*).

C. Defendant was Properly Precluded from Presenting Jurors at the PCRA Hearing to Impeach Their Verdict.

Under long-standing Pennsylvania law, jurors are not allowed to testify in post-verdict proceedings as a means of impeaching their verdict. *Commonwealth v. Eichinger*, 108 A.3d 821, 846 (Pa. 2014); *Commonwealth v. Patrick*, 206 A.2d 295, 297 (Pa. 1965); *Commonwealth v. Williams*, 420 A.2d 727, 729 (Pa.Super. 1980); Pa.R.E. 606(b)(1).[28] This rule derives from the common law, and there are "[s]ubstantial policy considerations" that support it. *Tanner v. United States*, 483 U.S. 107, 119 (1987). These include bringing finality to cases and preventing the constant re-litigation of matters decided by the jury; protecting jurors from being "harassed and beset by the defeated party" in an attempt to obtain information that might be used to undo the verdict; and preventing the jurors' words and conduct from being revealed and subject to scrutiny such that the public's confidence in the jury system itself might be severely undermined. *Id.* at 120-21. As the United States Supreme Court has explained, allowing jurors to impeach their verdict by offering evidence

---

[28] There are a few exceptions to this rule, none of which is applicable here. A juror may testify post-verdict regarding whether "prejudicial information not of record and beyond common knowledge and experience was improperly brought to the jury's attention." Pa.R.E. 606(b)(2)(A). A juror may also testify regarding whether "an outside influence was improperly brought to bear on any juror." Pa.R.E. 606(b)(2)(B). And, in an exception carved out by the United States Supreme Court, "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant," the no-impeachment rule must give way. *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 869 (2017).

of juror misconduct might lead to the invalidation of some verdicts that were reached after irresponsible or improper juror behavior. *Id.* at 120. "It is not at all clear, however, that the jury system could survive such efforts to perfect it." *Id.*[29]

In fact, not only are jurors precluded from impeaching their own verdict, but attorneys are forbidden from engaging in post-verdict *ex parte* communications with them in an attempt to obtain information that might be used to undo the verdict. In a case in which a defendant attempted to undermine his death sentence by reporting statements made by some of the jurors during post-trial interviews, the Pennsylvania Supreme Court explained as follows:

> The practice of interviewing jurors after a verdict and obtaining from them ex parte, unsworn statements in answer to undisclosed questions and representations by the interviewers is highly unethical and improper and was long ago condemned by this court in *Cluggage's Lessee v. Swan*, 4 Bin. 150, 158 (Pa. 1811), reiterated and reaffirmed in *Friedman v. Ralph Bros., Inc.,* 171 A. 900, 901 (Pa. 1934), and again quoted from at length in *Redmond v. Pittsburgh Railways Co.*, 198 A. 71, 72 (Pa. 1938). It is forbidden by public policy: *Commonwealth v. Greevy*, 114 A. 511, 512 (Pa. 1921). Certainly such post-trial statements by jurors are not to be given any weight on even an application for a new trial, much less a petition for a writ of habeas corpus.

[29] This is not to say there are no protections against juror misconduct. The whole point of *voir dire*, of course, is to obtain competent, fair, and impartial jurors who will be able to follow the court's instructions; during trial the behavior of the jurors is observable by the lawyers, the judge, and court personnel; jurors may report misconduct of other jurors *before* the verdict is received; and after the verdict parties may present evidence of juror misconduct from persons other than the jurors themselves. *See Tanner v. United States*, 483 U.S. at 127.

Commonwealth ex rel. Darcy v. Claudy, 79 A.2d 785, 786 (Pa. 1951). *See also Commonwealth v. Tedford*, 960 A.2d 1, 20 (Pa. 2008) (stating that the practice of interviewing jurors post-verdict to obtain support for overturning a verdict "is condemned"); *Commonwealth v. Fowler*, 523 A.2d 784, 786 (Pa.Super. 1987) ("post-trial affidavits and evidence of jurors elicited by the examination of counsel or by a litigant for the purpose of . . . impeaching the verdict are improper").

Defendant claims the no-impeachment rule "is limited to precluding testimony about statements made during deliberations" and does not "prohibit jurors from testifying that certain jurors improperly met to discuss evidence and prejudge the case prior to deliberations" (Brief for Appellant, 61). He is wrong.[30]

In *Commonwealth v. Steele*, 961 A.2d 786 (Pa. 2008), the Pennsylvania Supreme Court specifically considered the issue presented here: whether the no-impeachment rule applies to premature jury deliberations. In that case a juror provided a post-verdict declaration indicating that during trial one of the jurors made racially-prejudiced comments against the defendant; that some of the jurors had predisposed opinions regarding the defendant's guilt; and that "deliberative discussions" were held "prior to formal deliberation." *Id.* at 807. The Court acknowledged that the no-

---

[30] Defendant relies on *Commonwealth v. Kerpan*, 498 A.2d 829 (Pa. 1985), in support of his claim. That case, however, did not involve juror impeachment of the verdict. Rather, in *Kerpan* the Court found counsel ineffective for failing to object to the court's instructing the jurors that they could discuss the case before formal deliberations. Here, there was no such instruction; thus, *Kerpan* is inapposite.

impeachment rule contains "a narrow exception" for post-verdict testimony regarding "extraneous influences" that might have prejudiced the jury against the defendant. *Id.* at 808. The Court, however, held that that exception did not apply to the jurors' own statements, including statements made prior to formal deliberations:

> Despite [defendant's] contentions, the exception to the general no impeachment rule is not implicated here. The exception only applies to *outside* influences, not statements made by the jurors themselves. Here, one particular juror made some troubling statements. However, these statements were not based on any evidence not of record, or on any outside influences. Rather, one juror was attempting to influence the other jurors' opinion, although it was done inappropriately before deliberations. Indeed, [the reporting juror's] declaration states that the juror ". . . seemed to prey on the weaker jurors and tried to sway them." Nevertheless, the influence here was internal, not from outside sources. Once the verdict was entered, the jurors, including [the reporting juror], became incompetent to testify regarding any internal discussions or deliberations.

Id. (citations omitted; emphasis in original).[31]

---

[31] As stated above, in *Pena-Rodriguez v. Colorado*, *supra*, the United States Supreme Court, on constitutional grounds, carved out an exception to the no-impeachment rule for evidence that clearly indicates a juror "relied on racial stereotypes or animus to convict a criminal defendant." *Id.*, 137 S.Ct. at 869. In its opinion the Court noted that, like the Colorado Supreme Court in the case before it, the Pennsylvania Supreme Court, in *Steele*, had not recognized an exception to the no-impeachment rule for evidence of racial bias. *Id.* at 865. Thus, to the extent *Steele* indicates there is no exception to the no-impeachment rule for evidence of racial bias, that portion of the opinion is no longer good law. *Pena-Rodriguez*, however, does not in any way undermine *Steele's* more general holding that the no-impeachment rule applies not only to formal deliberations but also to internal discussions and statements made by jurors prior to deliberations. In fact, in *Pena-Rodriguez*, the improper statements were made during formal deliberations. Thus, any conceivable distinction between formal deliberations and premature deliberations was not before the Court.
(footnote continued . . .)

The United States Supreme Court has similarly concluded that the federal version of the no-impeachment rule applies not only to formal deliberations but also to alleged juror misconduct that occurred before deliberations. In *Tanner v. United States*, *supra*, two jurors contacted Tanner's attorney after trial and reported juror misconduct that occurred during trial. Specifically, the jurors stated that, during lunch breaks and at other times throughout the trial, several jurors drank excessive amounts of alcohol and used marijuana and cocaine. According to the reports, a number of the jurors fell asleep during trial, and one of the jurors even described himself as "flying" during the case. *Id.*, 483 U.S. at 115-16.

The United States Supreme Court considered whether evidence of the jurors' pre-deliberations misconduct, as reported by the jurors themselves, fell within the no-impeachment rule. It found that it did. The Court explained that under the common law no-impeachment rule exceptions were made "only in situations in which an 'extraneous influence' was alleged to have affected the jury." *Id.* at 117 (citation omitted). Determining whether the impropriety was considered the result of an internal or external influence, the Court stated, did not depend "on whether the juror

---

In the present case, the affidavit defendant presented from his attorney did not claim that the juror gave any indication that race played a role in the premature deliberations she supposedly overheard. Thus, the exception carved out in *Pena-Rodriguez* does not apply here.

was literally inside or outside the jury room when the alleged irregularity took place; rather, the distinction was based on the nature of the allegation." *Id.*

Thus, if the jurors learned information about the case from a newspaper, even if they acquired that knowledge while in the deliberations room, that was considered an external influence, and the exception applied. *Id.* at 118. If, however, the jurors reported after the verdict that they were unable to hear or understand the court's instructions, or if evidence was uncovered post-trial showing that a juror was not competent during the trial, that would be considered an "internal" matter, evidence of which would be prohibited by the no-impeachment rule. *Id.*

The Court explained that when the applicable federal rule of evidence was adopted—a rule similar to Pennsylvania's—it was intended that the distinction between internal and external influences would continue to determine whether an exception to the no-impeachment rule applied. *Id.* at 121. Because the jurors' alleged drug and alcohol use and drowsiness during trial would be considered an internal influence, juror testimony on those matters was prohibited by the no-impeachment rule. *Id.* at 125.

In reaching its conclusion, the Court also rejected Tanner's assertion that precluding the jurors from testifying regarding the alleged misconduct would violate his constitutional right to a fair trial before an impartial and competent jury. The Court recognized that defendants are entitled to have their cases heard by such a

jury, but that there are other "aspects of the trial process" that protect that right. *Id.* at 127. Thus, there was not a sufficient basis under the constitution to invalidate the long-recognized and well-justified rule precluding jurors from impeaching their verdict. *Id.* at 126-27.[32]

As explained above, one of the reasons for the no-impeachment rule is to prevent a losing party from harassing the jurors after the verdict in the hopes of garnering information that might be used to attack the verdict. In this case, more than eleven years after trial, one of defendant's attorneys went to the home of one of the jurors and interviewed her about the case. Defendant has not pointed to anything in the record indicating his attorneys were given permission to engage in this *ex parte* communication with the juror.

By going to the juror's home and conducting an *ex parte* interview of her, it appears defendant's attorney engaged in the very practice that has long been "condemned" by the Pennsylvania Supreme Court. *Commonwealth v. Tedford*, 960 A.2d at 20; *Commonwealth ex rel. Darcy v. Claudy*, 79 A.2d at 786. For that reason alone, his claim should be rejected. *See Tanner v. United States*, 483 U.S. at 126 (stating

[32] Defendant states there is disagreement among various jurisdictions regarding whether the no-impeachment rule applies to juror misconduct that occurs prior to formal deliberations. This Court, of course, is bound by decisions of the Pennsylvania Supreme Court. As demonstrated above, the Pennsylvania Supreme Court (as well as the United States Supreme Court) has held that the no-impeachment rule applies not only to the jury's formal deliberations but also to juror misconduct that occurs before formal deliberations.

that juror's affidavit was obtained by the defendant in violation of the post-verdict court's order and the local rule against juror interviews; "on this basis alone the [post-verdict court] would have been acting within its discretion in disregarding the affidavit").

But even assuming it was not improper for defendant's attorney to conduct an *ex parte* interview of the juror, the information he allegedly obtained from her provided no basis for relief. That information consisted of the juror's allegation that during trial other jurors engaged in premature discussions regarding the case. As demonstrated above, such discussions among the jurors themselves, regardless of whether they occurred before or during formal deliberations, are precisely the type of "internal discussions or deliberations" that fall within the no-impeachment rule and about which no juror may testify. *Commonwealth v. Steele*, 961 A.2d at 807-08. Accordingly, the PCRA court properly quashed the subpoenas seeking testimony from the jurors, and defendant's claim provides no basis for relief.

CONCLUSION

For the foregoing reasons, including those set forth in the PCRA court's opinions, the Commonwealth respectfully requests that this Court affirm the orders denying post-conviction relief.

Respectfully submitted,

/s/ Grady Gervino

GRADY GERVINO
Assistant District Attorney
LAWRENCE J. GOODE
Supervisor, Appeals Unit
NANCY WINKELMAN
Supervisor, Law Division
CAROLYN ENGEL TEMIN
First Assistant District Attorney
LAWRENCE S. KRASNER
District Attorney of Philadelphia