IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JERMONT COX AND KEVIN MARINELLI,

Petitioners

VS. **No. 102 EM 2018**

COMMONWEALTH OF PENNSYLVANIA

Respondent

BRIEF OF AMICUS CURIAE ATLANTIC CENTER FOR CAPITAL REPRESENTATION IN SUPPORT OF PETITIONERS JERMONT COX AND KEVIN MARINELLI

King's Bench Proceeding Under Pa. Const. Art. V, Section 2, and Pa. Const. Sched. Art. V, Section 1 Regarding The Supreme Court's Jurisdiction And Merits In The Above-Captioned Matters

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INTEREST OF THE AMICUS

The Atlantic Center for Capital Representation (ACCR) is a nonprofit organization based in Philadelphia, Pennsylvania. The Center's mission is to serve as a clearinghouse for capital litigation, and to provide litigation support to attorneys with clients facing capital prosecution or execution. The Center focuses on Pennsylvania, and furthers its mission through consultation with capital defense teams, training lawyers and mitigation specialists, and conducting trial and post-conviction litigation. The Center has conducted ten "Bring Your Own Case" trainings in Pennsylvania since its formation in 2010, and staff have taught regularly at bi-yearly conferences for the Pennsylvania Association of Criminal Defense Lawyers in Rule 801-approved Continuing Legal Education classes. ACCR has consulted in many capital cases across the state, and is intimately aware of issues facing capital defense teams and their clients. Thus, ACCR has a significant interest in the manner in which capital jurisprudence is administered in Pennsylvania.

SUMMARY OF THE ARGUMENT

In "The Commonwealth Of Pennsylvania's Answer To Petition For Extraordinary Relief Under King's Bench Jurisdiction," the Commonwealth frames the instant issue as an attempt to end capital punishment in Pennsylvania based on the Joint State Government Commission Study ("Study"). It then spends considerable time questioning the Commission, the motivations of the participants, and its sources. The Study, of course, is the diagnosis that has resulted from many symptoms observed over many years. This brief addresses those symptoms in detail, and ultimately draws the only conclusion possible: that there are indeed "unconscionable defects in Pennsylvania's practices and procedures of capital punishment," *Commonwealth v. Jermont Cox, Petition For Extraordinary Relief Under King's Bench Jurisdiction, p.1.*

Senate Resolution No. 6, which directed the formation of the commission that ultimately promulgated the Study, specifically addressed the question of the adequacy of defense counsel in capital cases: "The quality of counsel provided to indigent capital defendants and whether such counsel and the process of providing counsel assures the reliability and fairness of capital trials." The answer to this inquiry is a resounding no – poorly trained and under-resourced defense counsel have rendered capital verdicts utterly unreliable.

But defense attorneys are not the only lawyers in the capital courtroom. Time and again, prosecutors have made blunders equal to or greater than their

defense counterparts, and these mistakes have undermined the fairness of capital verdicts as well. In short, ineptitude on both sides of the aisle has caused the validity of death sentences across Pennsylvania to be questioned, and certainly is one of the foremost reasons capital punishment in the state is arbitrary and capricious.

Finally, there is prosecutorial misconduct – violations of *Brady v. Maryland,* 373 U.S. 83 (1963) and *Batson v. Kentucky,* 476 U.S. 79 (1986) and arguments designed to stir juries to improper emotional decisions - that cannot be attributed to ineptitude, but rather is evidence of a systemic failure of an adversary system to regulate itself as the Pennsylvania Constitution requires. For all of these reasons, 42 Pa. C.S. Sec. 9711 is in violation of Article One, Section 13 of the Pennsylvania Constitution.

ARGUMENT

I. Under-Resourced and Poorly Trained Defense Counsel Have Routinely Failed to Provide Effective Representation in Capital Cases.

A. A Lack Of Resources For Indigent Capital Defense Has Resulted In Arbitrary And Capricious Death Verdicts.

The under-financing of capital defense in Pennsylvania is hardly a secret. See, generally, *Commonwealth v. King,* 57 A.3d 607 at 633 (Pa. 2012) (Saylor, concurring specially); *Commonwealth v. McGarrell,* 87 A.3d 809 at 810 (Pa. 2014) (Saylor, dissenting); *Death-Penalty Stewardship And The Current State Of Capital Jurisprudence,* 23 Widener L.J. 1 (2013). Exercising King's Bench jurisdiction is an opportunity for the entire Court to recognize that the many years of failing to properly finance capital punishment in Pennsylvania has rendered the death penalty unconstitutional.

In *How Much Difference Does The Lawyer Make? The Effect Of Defense Counsel On Murder Case Outcomes,* 122 Yale L. J. 154 (2012), cited in *Commonwealth v. McGarrell,* 87 A.3d 809 at 810-11 (Pa. 2014) (Saylor, dissenting) and *Commonwealth v. Brown,* 196 A.3d 130 at 201 (*McGarrell* opinion cited in entirety), a study of the results in homicide cases comparing court-appointed and public defender representation in Philadelphia provided a startling insight into the importance of counsel: defender clients lowered their clients' murder conviction rate by 19% and lowered the probability of a life sentence by 62%. Overall, defender clients received homicide sentences that were 24% lower

than court-appointed clients. The study, conducted by the Rand Corporation over an 11-year period from 1994-2005, also references a crucial fact relevant to the instant issue: while no defender client received a death sentence during the 11 years (or ever, from 1993 to the present), 74 court-appointed clients were death-sentenced. Given that the Defender Association was randomly appointed to 20% of all homicides over that period, its clients might reasonably have been expected to receive 17 death verdicts, rather than none.

The better results secured by Defender Association attorneys have been attributed to two facts: the Defender lawyers are salaried, and thus need not balance their work and their business[1]; and the Defender Association capital trial unit adheres to the ABA Guidelines, *infra*[2]. The Rand Study concludes that "the causes of this disparity are ***incentive structures created by the appointment system*** and a resulting failure of appointed counsel to prepare cases as thoroughly as the public defender (emphasis added)."

B. Capital Defense Lawyers And Trial Courts Have Made Crucial Decisions Impacting Death Penalty Cases Based On Financial Rather Than Legal Reasoning.

In a letter to a trial judge on a capital case[3], a defense lawyer who claims to have tried more than 50 death penalty cases described his own "financial distress" when a capital case he was handling was continued:

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[1] 122 Yale L.J. at 161

[2] *Commonwealth v. McGarrell,* 87 A.3d at 810, fn. 2.

[3] Letter from Quarter Sessions file of *Commonwealth v. Darnell Thomas,* CP-51-CR-0013003-

> While my personal situation should not necessarily dictate a Court's decision on such a motion [for new counsel], I would still respectfully point out that I was ready in March and had blocked off three weeks for trial. With the continuance, I had no trial matters which could be put on during those three weeks, *causing me some financial distress*. (Emphasis added).

Exhibit 1 (letter and relevant docket page) attached. It goes without saying that crucial issues in capital cases - such as whether a case should be continued, or whether new counsel should be appointed – cannot be decided based on the financial condition of the parties' counsel.

Personal finances are not the only improper issues dictating behavior in capital courtrooms. Trial courts are often keenly aware of the costs of capital trials to their counties, and make legal decisions based on money rather than precedent. In the pending case of *Commonwealth v. Cheron Shelton and Robert Thomas,* CC:201608964/201608963, the trial court made a preliminary decision to proceed with a sextuple murder capital trial without paying for any mitigation at all. His explanation follows:

> Defense Counsel: Your Honor…a petition to appoint a [mitigation] specialist for the penalty phase [is pending] and we are inquiring about that but we will bring it up at the status conference.
>
> The Court: Well, I'm reluctant to do that right now because I'm thinking about trying to stage it a little bit differently…Try the homicide and say first degree murder. That way we don't have to expend all that money on [mitigation]. If they get convicted, then we'll try the case within 60 days in the penalty phase….When I get [mitigation] specialists that charges (sic) more money than the

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2007.

> lawyers who are trying the case, it becomes evident to me we're building a cottage industry that seems to be funded by public money that might not be a necessity to be able to do all the work they need to do within 60 days.

Exhibit 2, selected notes of testimony, attached. The trial court's plan, *to save money in a capital case by spending none on mitigation investigation until after a first degree murder verdict*, thus precluded trial counsel from engaging effectively and competently in negotiation with the Commonwealth, conducting effective pretrial litigation, advising her client about what plea to enter, conducting voir dire, synthesizing a first phase defense with a second phase defense, conducting a thorough mitigation investigation, and preparing an effective sentencing defense should the jury indeed return a verdict of first degree murder. Only after lengthy litigation, the submission of four affidavits by national defense and ethics experts, and a recusal by the original trial court did this trial court decision get reversed.

Direct financial stress, whether felt by the practitioner or the county, is not the only motivating factor leading to ineffectiveness of counsel in capital cases. The criminal justice system's failure to properly remunerate capital defense counsel to shockingly unprofessional gaffes in representation.

In *Commonwealth v. Cooper,* 941 A.2d 655 (Pa. 2007), a defense counsel who handled many capital cases in Philadelphia argued to a jury that had just convicted his client of first degree murder that the "eye for an eye" phrase from the Bible applied only to the murder of a pregnant woman. He urged the jury to

request a bible during their deliberations to confirm his opinion, and the jury did just that. (The trial judge denied the jury's request). Defense counsel presumably forgot a central fact in the case he was arguing: that his client had been convicted of killing a pregnant woman. While such a mistake seems beyond the pale, counsel's own rationalization was that his argument to the jury was one he made "out of habit." Given the longstanding requirement of individualized sentencing in capital cases, *Woodson v. North Carolina,* 428 U.S. 280 (1976), it seems fair to say that any defense counsel who makes habitually similar penalty phase closing arguments is not rendering effective assistance.

While closing penalty phase arguments should vary depending on the facts, some questions must be asked in every capital case. For defense attorneys, the first question must be: Is my client *eligible* for the death penalty? In the case of *Commonwealth v. Lionel Campfield,* CP-51-CR-0006549-2009, defense counsel did not ask that question for almost two years. When he finally did, he learned that his client was only 16 years old at the time of the crime, and thus ineligible for the death penalty[4]. Mr. Campfield was harshly, and rightly, condemnatory of his counsel: "I went to sleep every night thinking about it, whether I would live through this. They were supposed to be fighting for my life, and they[5] didn't even

[4] See Exhibit 3, attached: motion filed by defense counsel, and docket entries indicating the Commonwealth's motion to seek death, defense counsel's motion to have the death penalty barred, and the entry noting that the defendant was a juvenile.

[5] Campfield's other lawyer was an ex-felon. "They should have told me that," he said. *Philadelphia Inquirer,* Page A17, October 23, 2011.

come to see me until like two weeks before the trial." *Philadelphia Inquirer,* Page A17, October 23, 2011. Mr. Campfield's attorney was more sanguine about the stress his client had needlessly suffered: "It was really of no consequence that he shouldn't have been facing the death penalty, because whether it was a capital case or a non-capital case, you still provide the defendant with a full range of social services." *Philadelphia Inquirer,* Page A17-18, October 23, 2011.

Short of having a client ineligible for the death penalty, a central obligation of any capital defense attorney is to ensure that her client doesn't receive a death sentence. The *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, long recognized by the United States Supreme Court as "guides to determining what is reasonable," *Wiggins v. Smith,* 539 U.S. 510 at 524 (2003), address this obligation directly in Guideline 10.9.1, *The Duty To Seek An Agreed-Upon Disposition*: "Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition." A rudimentary review of the transcript of *Commonwealth v. Sam Lan,* 51-CR-51-0002112-2007, attached as Exhibit 4, indicates how casually defense counsel took his professional obligation:

> The Court: There is an offer of life concurrent[6]. What is going on with that?

[6] Mr. Lan was serving a life sentence for another murder when he was offered a plea to a concurrent life sentence in his pending case. Thus, the case was highly aggravated.

> Defense Counsel: I believe I communicated that some time ago. He never responded to it...What I can try and do is during the course of this week see if I can talk to him on the phone and see what he wants to do in that regard but I have never gotten an indication that he was desirous of taking that offer.
>
> Prosecutor: But you have spoken to him about it?
>
> Defense Counsel: Spoken, no because it was long after he was sent to the state and the only communication I was able to have with him since were through correspondence.
>
> The Court: ...What is going on? It is unacceptable for you not to know whether he is going to accept life and for you not to have seen him and for [co-counsel] to totally drop the ball. There is something wrong here.

Pp. 8-10, Exhibit 4. The idea of resolving a murder case with a client by mail for a life sentence without the possibility of parole, whether concurrent or consecutive to another sentence, is, as the Court properly notes, "unacceptable." One need hardly refer to the ABA Guidelines[7] to know that such interactions with clients can only lead to the conclusion stated by the trial court: "There is something wrong here."

The *Sam Lan* case is hardly an isolated example of defense counsel failing to properly communicate with a defendant. Dating back to *Commonwealth v. Perry*[8], 644 A.2d 705 (Pa. 1994) through *Commonwealth v. Brooks,* 839 A.2d 245 (Pa.

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[7] GUIDELINE 10.5 – *Relationship With The Client* ("Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.").

[8] "[O]n the eve of trial, counsel was unaware that his client faced the death penalty, apparently considered it a routine case which in his view did not require an interview with his client, and could not prepare for a death penalty hearing since he did not know it was a capital case." 644 A.2d at 708.

2003) and *Commonwealth v. Elliot*, 80 A.3d 415 (Pa. 2013), Pennsylvania has a long history of such ineffectiveness. The lack of necessary communication between lawyer and client in a capital context has wide-ranging consequences beyond simple ineffectiveness, however: resolution short of a full-blown capital trial becomes less likely, proper investigation and presentation of a trial and penalty phase becomes more difficult, and post-conviction litigation becomes a near certainty. There is no doubt that the minimal funding available to court-appointed counsel has a great deal to do with plea attempts by mail, a failure to inquire of a client's age, and habitually similar closing arguments. See generally, *Commonwealth v. McGarrell, supra.* Were a lawyer properly remunerated for her time, she could surely visit with her client regardless of his location, spend enough time with him to learn the relevant facts of his case, and work to develop a relationship necessary to resolve capital cases. A lack of resources is the likely subtext to all of the errors detailed above, and the criminal justice system's failure to remunerate counsel to establish a necessary relationship with a client has proven penny-wise and pound-foolish.

C. Defense Counsel's Inability To Present A Constitutionally Effective Penalty Phase Has Caused A Shocking Number Of Sentencing Reversals.

That defense counsel matters in capital cases cannot be doubted; but the authors of the Rand Study, *supra,* cautioned against any quick fixes:

> In the short run, relying more on public defenders and less on appointed counsel may be a sensible way of increasing the reliability of the criminal justice system. But in the long run, our goal should be a criminal justice system that is robust to inevitable human error. This may require more fundamental, systematic change.

Of course, the "inevitability of human error" takes on an ominous tone when put in the context of capital punishment, not only for possible innocent defendants subject to possible execution, but also for those defendants undeserving of a death sentence. The Philadelphia experience is instructive. In *Commonwealth v. McGarrell,* 87 A.3d 809 (Pa. 2014), a case in which this Court exercised extraordinary jurisdiction to examine fees paid to court-appointed counsel in capital cases, the defendants supplied the Court with a shocking statistic: Of the past twenty-five capital cases that had been reversed out of Philadelphia for ineffective assistance of counsel, prosecuted over a period of decades, a remarkable ***fifteen*** were cases in which the entitlement of relief was stipulated to by the Commonwealth.[9] When the Commonwealth is conceding that 60% of the cases in which it obtained death sentences involved ineffective assistance of counsel, it is hard to believe that any capital verdicts are reliable. Even without concessions, however, the Philadelphia death penalty experience in the modern era

[9] *Kindler v. Horn*; Rollins v. Horn; Comm. v. Elliott; *Comm. v. James Smith; Comm. v. Freeman; Comm. v. Washington;* Judge v. Beard; Bond v. Beard; *Comm.v. Ramos; Comm. v. Carson;* Holland v. Horn; *Comm. v. Rainey; Comm. v. Hanible;* Comm. v. Cooper; *Baker v. Horn; Comm. v. Damon Jones;* Morris v. Beard; *Comm. v. Tilley;* Comm. v. Gribble; *Comm. v. Leroy Thomas; Marshall v. Beard; Lark v. Beard;* Comm. v. Clark; *Comm. v. Hutchinson; Comm. v. Craig Williams.* (Stipulations of relief by the Commonwealth in italics).

is a shocking example of complete system failure. Responsible for 55% of the death sentences in Pennsylvania in the modern era,[10] Philadelphia has seen only one of those sentences carried out, a defendant who, like the other two defendants executed by the state, gave up his appeals.[11]

Philadelphia has not cornered the market on ineffective defense lawyering in capital cases, however. According to the Death Penalty Information Center, 93 Pennsylvania cases[12] have been reversed for failure to investigate and present mitigating evidence in a penalty phase. The scope of such a breakdown in the adversary process cannot be overestimated - 93 times, a case had to be reinvestigated, requiring a further expenditure of resources, court time by trial judges, appellate judges, prosecutors, and new defense attorneys, and all ultimately to vacate the initially imposed sentence. Perhaps most shocking of all, a mere 4.32% of those defendants returning for resentencing have been sentenced to death again. Such numbers are monuments to the arbitrary and capricious nature of the Pennsylvania death penalty.

II. Careless And Unprofessional Errors By The Prosecution Have Made Death Sentences Arbitrary And Capricious.

[10] Philadelphia produced 201 of the 365 death sentences since 1978, or 55.1%.
[11] Gary Heidnik was sentenced from Philadelphia. The other two to waive their appeals were Leon Moser and Keith Zettlemoyer.
[12] Robert Brett Dunham, *Pennsylvania Capital Case Cite List of Reversals Because of Ineffective Assistance of Counsel*, Death Penalty Information Center (May 13, 2018), on file at Death Penalty Information Center.

Ineffective assistance of counsel is the logical focus of innumerable capital appeals in Pennsylvania, given the great number of death penalty reversals that have taken place over the years. See Footnote 15, *supra.* Far less attention is paid to fundamental errors made by the prosecution in capital trials, however; but prosecutorial errors themselves have come with enough regularity to render the death penalty unconstitutional.

It has already been noted, *supra* at pp.15-16, that defense counsel took close to two years before realizing that his client in *Commonwealth v. Lionel Campfield* was under 18 at the time of the crime, and thus ineligible for the death penalty. Perhaps this misses the more important issue, however – the Commonwealth, in fulfilling what one must presume is the most solemn duty it has, made the decision to seek death against a juvenile years after *Roper v. Simmons,* 543 U.S. 551 (2005), precluded it. Not intentionally, of course, but with such little attention to detail that it didn't recognize its error until a defense attorney pointed it out only days before trial. Nor was this the only time such an event occurred; the Commonwealth also filed *Rule 801* notice, indicating its intent to seek the death penalty, in *Commonwealth v. Kazair Gist*, CP-09-CR-0003596-2012[13]. Such errors show an extraordinarily casual approach to capital punishment[14].

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[13] Attached as Exhibit 5 are docket entries indicating the defendant's age, the Commonwealth's motion to seek death, the Commonwealth's withdrawal of said motion three months later, and an article from the *Bucks County Courier Times* indicating that the defendant was a juvenile at the time of the killing.

[14] Indeed, the casual approach to capital prosecution is not simply who the Commonwealth

In *Commonwealth v. Murray,* 83 A.3d 137 (Pa. 2013), the Commonwealth submitted the murder of an unborn child to the jury for consideration of a death sentence, apparently unaware that such a murder was ineligible for death. That the murder of an "unborn child was submitted to the jury as a death-eligible offense is shocking," this Court declared. 83 A.3d. at 163. When the jury in fact returned a death sentence for the unborn fetus, the death sentence had to be vacated.

In *Commonwealth v. Padilla,* 80 A.3d 1238 (Pa. 2013), the Commonwealth alleged that a misdemeanor firearms violation was in fact a felony[15] and thus suitable for the aggravating circumstance 42 Pa. C. S. 9711 (d)(6). As this Court noted, "It appears that neither the parties nor the trial court realized that the offense to which the stipulation actually occurred was, in fact, not a felony but rather was a misdemeanor." While this Court, in a closely divided opinion, opted to deny penalty phase relief and suggested instead that the issue was better addressed in post-conviction, 80 A.3d at 1273, there is no doubt whatsoever that the prosecution believed a misdemeanor was in fact a felony.

Kareem Johnson spent nine years on death row before defense attorneys discovered that the DNA report that had been presented as inculpatory before a

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targets for a death sentence. In *Commonwealth v. Buck,* 709 A.2d 892 (Pa. 1998), this Court noted that the Commonwealth "may not give notice of aggravating factors that appear completely unfounded and then refuse to comply with the court's request to offer its explanation as to its basis for seeking the death penalty." 709 A.2d at 898.

[15] See also *Commonwealth v. Chapman,* 136 A.3d. 126 (Pa. 2016), where the Commonwealth argued that two criminal convictions in New Jersey were felonies, even though the maximum punishments were 18 months.

capital jury was in fact exculpatory.[16] *Commonwealth v. Johnson,* 2018 WL 3133226 (Super. Ct. 2018), Petition For Allowance Of Appeal, granted December 19, 2018. This was not a minor error, however: as the prosecutor argued to the jury, the DNA report concerned a hat that was the central evidence in the case against Johnson:

> This is the killer's hat... ***Physical evidence has no bias. Physical evidence cannot lie. Physical evidence does not want to lie. Physical evidence cannot be intimidated. Physical evidence cannot be killed...***This overwhelming physical evidence says that killer's hat was left out there on the scene. (N.T. p. 68, 6/22/07) (emphasis added).

Exhibit 6, attached. The prosecutor's virtually nonexistent preparation for trial was described by the Superior Court as "deliberate indifference," a phrase that commonly appears in civil law but has no place in Pennsylvania's criminal jurisprudence at all. The idea that a capital case might be prepared by a prosecutor with deliberate indifference shocks the conscience; the only thing more shocking is that deliberate indifference led to a man going to death row for nine years for an incredibly obvious mistake.

These errors - failure to know the proper gradations of criminal offenses, failure to know possible punishments for homicide offenses, failure to prepare - might fairly be considered violative of the most rudimentary expectations for

[16] The *Johnson* case appears here as a textbook example of prosecutorial error. It could just as easily have appeared earlier in the instant brief, as a textbook example of defense attorney ineffective assistance of counsel.

prosecutorial professionalism in a capital case. Intentional misconduct by the Commonwealth, rather than simple ineptitude, has undermined capital punishment as well.

III. Intentional Misconduct By The Prosecution Has Indelibly Blemished Pennsylvania's Death Penalty Jurisprudence.

Pennsylvania prosecutors in capital cases have intentionally struck black jurors in violation of *Batson v. Kentucky,* 476 U.S. 79 (1986),[17] withheld exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83 (1963),[18] and made improper arguments[19] in the heat of capital cases. Given that capital cases carry the most serious consequences in the criminal justice system, it is reasonable to conclude that prosecutors are likely to violate the rules of conduct when the stakes are the highest. This is *exactly* the opposite of how a criminal justice system should operate.

A. Prosecutors Have Consistently Struck Black Jurors In Capital Cases.

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[17] See, e.g., *Commonwealth v. Wilson,* July Term 1988, Nos. 3267-73 (Philadelphia Court Of Common Pleas), new trial granted 1/17/03, acquitted on retrial, 11/15/05; *Lark v. Secretary Pa. Department of Corrections,* 566 Fed. Appx. 161 (3rd Cir. 2014), life sentence on retrial, 11/8/17; *Hardcastle v. Horn,* 332 Fed. Appx. 764 (3rd Cir. 2009), resentenced to 30-60 years, 3/16/11.

[18] See, e.g., *Lambert v. Beard,* 537 Fed. Appx. 78 (3rd Cir. 2013), resentenced to 34-68 years, released 8/18); *Breakiron v. Horn,* 642 F.3d. 126 (3rd. Cir. 2011); *Dennis v. Wetzel,* 966 F.Supp. 2d. 489 (E.D. Pa. 2013); *Zachary Wilson v. Beard,* 589 F.3d 651 (3rd Cir. 2009).

[19] *Commonwealth v. LaCava,* 666 A.2d. 221 (Pa. 1995); *Commonwealth v. Montalvo,* CP-67-CR-0003183-1998, filed 5/22/17; *Bond v. Beard,* 2006 WL 1117862 (E.D. Pa. 2006) ("The closing argument at the penalty phase...seems designed to create a lynch-mob mentality on the part of the jury. At the very least, it represents an unacceptable appeal to class prejudice, an "us against them" approach to

The initial plan to avoid the dictates of *Batson v. Kentucky* was articulated by a prominent Philadelphia prosecutor shortly after the opinion came down in 1986. His thinking was captured on tape:

> The worst jurors according to McMahon are "blacks from the low-income areas" because they are less likely to convict as a result of "resentment for law enforcement [and] . . . for authority." The tape distinguished, however, between good and bad black jurors on the basis of their age and gender. ***As a defense against Batson claims, McMahon recommended that "the best way to avoid any problems . . . is to protect yourself." The way to do this was to question black jurors "at length" and record contemporaneous documentation of "legitimate" reasons as each black is struck.

Statistical Proof Of Racial Discrimination In The Use Of Peremptory Challenges: The Impact And Promise Of The Miller-El Line Of Cases As Reflected In The Experience Of One Philadelphia Capital Case, 97 Iowa L. Rev. 1425 (2012).

Pennsylvania prosecutors have long had patterns of unconstitutionally striking black jurors in capital cases. In *Holloway v. Horn,* 355 F.3d 707 (3rd Cir. 2004), the prosecutor struck 11 of 12 African-Americans. 355 F.3d at 722. In *Gibson v. Wetzel,* 2016 WL 1273626 (E.D. Pa. 2016), the prosecutor used 69% of strikes on potential black jurors. In *Lark v. Beard,* 2012 WL 3089356, (E.D. Pa. 2012), 13 of 15 prosecution strikes were made against African-Americans. In short, prosecutors have been striking a disproportionate number of black jurors for a very long time.

B. Prosecutors Have Made Improper Arguments In Their Attempts To Achieve Death Sentences.

In *Commonwealth v. LaCava,* 666 A.2d 221 (Pa. 1995), the prosecutor "painted a vivid picture that society is under heavy attack and that this jury was in a unique position to respond to that attack by sentencing appellant to death because he was a drug dealer..." This Court noted that his "send a message" closing argument "went far beyond the permissible limits of oratorical flair and aggressive advocacy." 666 A.2d at 237. Mr. LaCava's death sentence was reversed.

In case that admonition wasn't enough, this Court issued the following crystal-clear warning only two years later in *Commonwealth v. Hall,* 701 A.2d 190 (Pa. 1997): "Accordingly, we advise all parties in criminal matters before any court in the Commonwealth to refrain from such [send a message] exhortation in the future." 701 A.2d at 203.

And yet in 1999, only two years after *Hall* and four years after *LaCava,* and in the very same unit of the very same office as a prosecutor in a capital case made the following argument:

> When you think of the death penalty, there are ***messages*** to be sent. There's a ***message*** on the street saying, look at that, he got death, you see that, honey, that's why you live by the rules, so you don't end up like that. Because they're in these bad neighborhoods. You also send a ***message*** in prisons. (Emphasis added).

Commonwealth v. DeJesus, 860 A.2d 102 (Pa. 2004). The argument prompted Justice Castille to wonder whether the Court's "clear directive" had "proved too subtle," noting that "[i]n light of our explicit directive in *Hall,* which was

but the last in a series of decisions expressing grave concerns over this type of argument, we are dismayed, to say the least, by the Government lawyer's use of such prohibited rhetoric in this case." 860 A.2d at 118.

This is not the only context in which prosecutors in capital cases have ignored this Court's dictates regarding proper arguments. Regarding religious references, this Court, in *Commonwealth v. Henry,* 569 A.2d 929 (1990), noted "that the prosecutorial practice of pushing "oratorical flair" to its limits, and patterning arguments upon remarks that this Court has only narrowly tolerated, is a dangerous practice we strongly discourage." One year later, in *Commonwealth v. Chambers,* 599 A.2d 630 (Pa. 1991), this Court made it clear that what had previously been narrowly tolerated was now forbidden: "We now admonish all prosecutors that reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action." 599 A.2d at 643. But even the threat of discipline could not deter a prosecutor in a capital case, four years later, from making a similar argument. *Commonwealth v. Brown,* 711 A.2d 444 (Pa. 1998).

Other improper arguments, counter to fundamental concepts of death penalty jurisprudence, have been made as well. Since *Caldwell v. Mississippi,* 472 U.S. 320 (1985), it has been black letter law that the responsibility for a capital sentence rests solely with the jury, and any undermining of that responsibility is error.

However, in the case of *Commonwealth v. Montalvo,* both the prosecutor and the trial judge ignored this basic tenet. Four times during the penalty phase the prosecutor advised the jury that their sentence was "a recommendation." *Commonwealth v. Montalvo,* CP-67-CR-0003183-1998, PCRA Opinion (filed 5/22/17). Exhibit 7 attached.

C. Prosecutors Have Routinely Hidden Exculpatory Discovery In Capital Cases.

In *Commonwealth v. Smith,* 615 A.2d 321 (Pa. 1992), the Commonwealth hid evidence that the main prosecution witness had been given favorable treatment in his own open case, and that the victim had been killed at a New Jersey beach, which was consistent with the defense theory of the killing. The latter *Brady* violation was particularly relevant, in that the prosecution doubled down on its misconduct rather than admit to it:

> The Commonwealth excoriated Corporal Balshy, implying that he had fabricated his testimony about the adhesive lifters. The Commonwealth then presented the testimony of other state police officers who had attended the autopsy and did not remember the sand or the adhesive lifters, attempting to prove that Balshy's testimony was false. The prosecutor even recommended to the deputy executive attorney general that he investigate the feasibility of prosecuting Balshy for perjury. A few days later, *while appellant's trial was still in progress,* the Pennsylvania state police discovered the missing adhesive lifters in their evidence locker at the state police barracks. Despite their significant relation to the facts at issue in the trial, the Commonwealth suppressed the discovery. Then for more than two years, while appellant's case was on direct appeal to this court, the Commonwealth continued to suppress the fact that it had in its possession the disputed

> exculpatory evidence, vigorously arguing all the while that this court should affirm appellant's death sentence.

615 A.2d at 323, 324. This Court barred retrial.

The Commonwealth decided to seek the death penalty against Percy St. George[20], even though the evidence against him was quite thin. An alleged eyewitness to the killing, a juvenile named David Glenn, took the stand at the preliminary hearing and explained that he was not an eyewitness at all, but that a friend of his, also a juvenile, had used his name when identifying St. George. A detective then testified that Glenn was lying, and that he in fact had identified St. George. A subsequent investigation revealed that it was the detective who was lying, however. Ultimately, three police officers involved in the investigation of the case took the Fifth Amendment when a "Motion To Bar Prosecution Based On Due Process Violations" was filed, and the case against Percy St. George was dismissed. See Exhibit 8 attached.

Dennis Counterman went to death row for killing his three children in an arson murder. This Court affirmed the conviction, *Commonwealth v. Counterman,* 719 A.2d 284 (Pa. 1998), but noted that the discovery process engaged in by the prosecutor had smacked of unethicality. 719 A.2d at 298, fn. 8. This Court never learned the full extent of unethical behavior exhibited by the prosecutor, however. Several years later, on post-conviction in the Court of Common Pleas, Judge

[20] See generally, *Slate, Three Murders In Philadelphia, Marc Bookman, May 12, 2017.*

Lawrence Brenner found multiple *Brady* violations, including crucial statements suggesting that one of the children was a fire setter and that the main witness against Mr. Counterman, his wife, had given exculpatory statements to the police about her husband immediately after the fire. "This Court finds that far too many doubts arise from the Commonwealth's repeated *Brady* violations in this case...[T]his Court finds that no reliable adjudication of the Defendant's guilt or innocence could have taken place. The Defendant has established a due process violation as the Commonwealth failed to disclose exculpatory information concerning the credibility of its key witness." See *Commonwealth v. Counterman,* Court of Common Pleas Order of 8/27/01, Case Number 2500/1988. Exhibit 9, selected pages of Order.

Having spent 16 years on death row for a crime he had always insisted he hadn't done, Mr. Counterman entered a plea under the dictates of *Alford v. North Carolina*, 400 U.S. 25 (1970), rather than risk another trial, and was released from prison in 2006. *Allentown Morning Call,* 10/19/06.

Finally, this Court should not be misled into thinking that the misconduct discussed above is ancient history. In *Commonwealth v. Shelton and Thomas, supra,* hearings are underway at the time of this writing in Allegheny County about misconduct by an experienced detective in a capital case – sworn testimony at a preliminary hearing and sworn statements have misstated the facts. Motions are pending to dismiss the case and, in the alternative, to bar the death penalty. *Bad*

Police Work: Missteps Warrant Dismissal Of Homicide Case, Pittsburgh Post-Gazette, January 3, 2019.

CONCLUSION

The Office of Attorney General, in opposing the Court's exercise of King's Bench jurisdiction, claims that Petitioners are asking this Court to "forgo all judicial norms and standards...based on a document produced by the General Assembly's Joint State Government Commission." Surely Dennis Counterman, Kareem Johnson, Percy St. George, and the hundreds of defendants subjected to ineffective assistance of counsel, unprofessional mistakes, and overt prosecutorial misconduct would disagree. The "document" produced by the JSGC is not fiction; rather, the study reflects a capital punishment system that has been in "disrepair"[21] from its earliest years to today. The Pennsylvania death penalty is unconstitutional not because a document says it is, but because the results of capital prosecutions over 41 years have been arbitrary, capricious, and based on a complete breakdown of prosecution and defense standards.

Dated: February 22, 2019

Respectfully Submitted:

Marc Bookman, Esquire
Pa. Bar No. 37320
Co-Director
Atlantic Center for Capital Representation

[21] *Commonwealth v. McGarrell,* 87 A.3d at 810 (Pa. 2014) (Saylor, Chief Justice, dissenting).

CERTIFICATE OF COMPLIANCE

Counsel for amicus curiae hereby certifies that this brief complies with the 7,000 word limit of Pa. R. P. A. 531 based on the word count (6947) according to the word processing system used to prepare it.

Marc Bookman, Esquire
Pa. Bar No. 37320

CERTIFICATE OF SERVICE

This 22nd day of February, 2019, I, Marc Bookman, Esquire, hereby certify that a true and correct copy of the foregoing document was served upon the persons and in the manner indicated below, in compliance with Pa. R.A.P. 121:

BY FIRST CLASS MAIL, POSTAGE PRE-PAID &ELECTRONIC SERVICE:

Leigh Skipper, Esquire
Federal Community Defender Office, Eastern District of Pennsylvania
Suite 545-West, The Curtis Center
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

Lawrence Krasner, Esquire
District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107
(215) 686-5073

Josh Shapiro, Esquire
Pennsylvania Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-5211

EXHIBIT 1

Docket Number: CP-51-CR-0013003-2007

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Darnell A. Thomas

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	03/08/2010		Court of Common Pleas - Philadelphia County
Trial Scheduled 5/23/2011 9:00AM			
2	03/08/2010		Court of Common Pleas - Philadelphia County
Assignment of Judge			
3	03/08/2010		Court of Common Pleas - Philadelphia County
Hearing Notice			
4	03/08/2010		Minehart, Jeffrey P.
Trial Rescheduled ADA: BRIDGETTE KIRN ATTY: DAVID RUDENSTEIN TRIAL CONTINUED. EARLIEST POSSIBLE DATE GIVEN. NCD 5/23/11 ROOM 602. BY THE COURT,			
1	03/15/2010		CP Courtroom Operations
Trial Cancelled			
2	03/15/2010		Court of Common Pleas - Philadelphia County
Hearing Notice			
D10/1	04/21/2010		Thomas, Darnell A.
Motion for Appointment of Counsel			
D11/1	10/04/2010		Thomas, Darnell A.
Motion for Appointment of Counsel			
1	11/02/2010		Court of Common Pleas - Philadelphia County
Trial Scheduled 5/23/2011 9:00AM			

DAVID S. RUDENSTEIN

Attorney at Law

Phone: 215-464-7890 -- Fax: 215-464-7891
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Philadelphia, PA 19114

ALL OTHER MAIL TO:
9411 Evans Street
Philadelphia, PA 19115

COPY

April 26, 2010

The Honorable Jeffrey P. Minehart
Suite 1206 Criminal Justice Center
1301 Filbert Street
Philadelphia, PA 19107

EX PARTE

RE: Com. v. Darnell Thomas (a/k/a Darryl Thurston)
CP-51-CR-0013003-2007 PP #0729255 DOB: 12/25/74
Trial listed: 05/23/11, courtroom 602

My dear Judge Minehart:

Please be advised that Mr. Thomas has filed a motion seeking appointment of new counsel. I am writing to vigorously oppose that motion.

A number of the allegations that Mr. Thomas makes are simply not accurate. I have enclosed a copy of his motion for the Court's convenience.

In Paragraph #2, Mr. Thomas notes that his original attorney, Mr. Greene, stepped aside for health reasons and was replaced with myself. That is true; however, Mr. Thomas fails to point out that I was one of his original attorneys as I was his mitigation counsel and had been involved in this case from the inception.

Mr. Thomas complains of a lack of personal contact with him. I do wish that I had limitless hours to spend with my clients in prison. I do not. However, I have spent an amount of time that is sufficient to prepare both myself and Mr. Thomas for trial. Moreover, I have put together a defense team and so, it is not just myself that is working on the case but others, including mitigation counsel, Gary S. Server, Esquire; the noted forensic psychologist, Steve Samuel, Ph.D.; private investigator Sharon Williams; and a mitigation specialist as well. Through this team effort, I have a wealth of information, both about the case and about Mr. Thomas. Unfortunately, some of that information perhaps might not be as helpful as Mr. Thomas would wish, but, I am still fully informed as to all of the circumstances.

On January 10, 2010, I did visit with him at the prison and Mr. Thomas is simply not accurate when he claims that I made it clear that I would not put much effort into his defense. Judge Minehart, you have seen me in court and know what kind of practitioner

I am. I am hoping that you would agree that almost everyone in the building would consider me to be a most effective advocate, and a zealous representative of indigent defendants.

Mr. Thomas pleads that "both the defendant and counsel believe there is an irreconcilable personality conflict ..." and seeks replacement of counsel. However, this is egregiously incorrect. I do not have any irreconcilable personality conflict with my client. When I did visit with him, we had a calm, cool and reflective conversation about each and every aspect of his case.

While I cannot be certain, I believe that my client's aggravated state probably stems from the fact that we were to go to trial on Monday, March 15, 2010 and that the trial was postponed because of certain requests by co-counsel, including Mr. Bowers who needed to have immediate foot surgery. As you might recall, I vigorously argued in opposition to the continuance and requested that the cases be severed. I did not wish Mr. Bowers to go without needed medical treatment; I simply wanted to get my case on and I believe that the Commonwealth could well sever. The Court ruled against my argument and I respect that decision, and the case was rescheduled for May 23, 2011.

It is interesting to note that, prior to the time of walking in for trial in March, I was ready to go and that my client, at that time, was not seeking new counsel. If Mr. Thomas feels that we have not had enough contact, and I disagree with that assertion, the fact that we have now more than another year to prepare, would only mean that both he and I will be even more prepared than we were back in March.

While my personal situation should not necessarily dictate a Court's decision on such a motion, I would still respectfully point out that I was ready in March and had blocked off three weeks for trial. With the continuance, I had no trial matters which could be put on during those three weeks, causing me some financial distress. I have, again, blocked out time to try this matter and would certainly like to do so. I am familiar with all aspects of this case, including the issues on guilt/innocence and with regard to the mitigation side of the case as well. The law is clear; a defendant is not entitled to court appointed counsel of his choice and should not be permitted to have new counsel appointed simply because he, and only he, has some difficulty in the attorney-client relationship. By copy of this letter to Mr. Thomas, I am imploring him to work harder with me to prepare the case to his satisfaction.

Lastly, Mr. Thomas notes that, if the Court will not appoint new counsel, he would consider going pro se. This is troubling as well as Mr. Thomas could get a new attorney and have the same perceived problems with that counsel and he would be right back before the Court on the same motion.

I would respectfully request that the Court deny the defendant's motion with regard to the appointment of new counsel. If, by the end of the summer, Mr. Thomas would like to proceed pro se, I would ask the Court to hold such a hearing and determine whether he is competent to represent himself and whether this counsel should stay in the case as stand-by or back-up counsel. While I do not believe that is in the best interest of Mr. Thomas in this capital case, I do believe that he has the right to go pro se if he wishes to and if he is competent to do so. Thank you very much.

Respectfully yours,

David Rudenstein

DSR/mer

cc: Darnell Thomas

EXHIBIT 2

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,

PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	CRIMINAL DIVISION
	CC No: 201608964/201608963
vs.	PROCEEDINGS: Motions Hearing - Change of Venue/Venire
	REPORTED & TRANSCRIBED BY: Mary Anne Salsgiver Official Court Reporter
CHERON SHELTON, ROBERT THOMAS	DATE: March 12, 2018
Defendants.	BEFORE: Hon. David R. Cashman

A P P E A R A N C E S

FOR THE COMMONWEALTH: Kevin Chernosky, ADA
Lisa Pellegrini, ADA
Alicia Sutton Werner, ADA
District Attorney's Office

Randall McKinney, Esq.
Wendy Williams, Esq.
For the Defendant Shelton

Casey White, Esq.
Michael Machen, Esq.
For the Defendant Thomas

- - -

Commonwealth's response.

MR. MACHEN: Neither do I.

MS. PELLEGRINI: I have copies here.

THE COURT: Okay, I do have the Commonwealth's.

MS. WILLIAMS: Your Honor, in addition our motion to declare the case complex on behalf of Mr. Shelton is pending and a petition to appoint a litigation specialist for the penalty phase and we are inquiring about that but we will bring it up at the status conference.

THE COURT: Well, I'm reluctant to do that right now because I'm thinking about trying to stage it a little bit differently.

MS. WILLIAMS: As far as the complex?

MS. PELLEGRINI: Bifurcating the case?

THE COURT: Try the homicide and say first degree murder. That way we don't have to expend all that money on litigation. If they get convicted, then we'll try the case within 60 days in the penalty phase.

MS. WILLIAMS: I know I heard that discussed in another courtroom or another county as an idea. Is there any information that I could read or educate myself on doing a

case that way? I never heard of that but I'd like to learn more about doing it.

THE COURT: I don't know why we couldn't do it that way.

MS. WILLIAMS: I'm not saying we can't.

THE COURT: That's something I'll consider. I'm not going to spend money right now.

MS. WILLIAMS: I understand that. What about the declaring the case complex? I did file an additional motion. I know as far as the defense counsel goes, we have costs and expenses out and we can't file a billing or for reimbursement until the case is declared complex.

MS. PELLEGRINI: Nothing further.

MR. WHITE: On Mr. behalf of Mr. Thomas the only pending motion is the motion to suppress. His statement that was given to Detective Hitchings in camera a number of weeks ago, I believe that motion is still pending.

THE COURT: And there's a motion to intervene by the Post-Gazette.

MS. WILLIAMS: I don't know.

THE COURT: In light of the fact that

EXHIBIT 3

GARY S. SERVER, ESQUIRE
I.D. 52866
52103 DELAIRE LANDING
PHILADELPHIA, PA 19114
(215) 632 – 3546

COMMONWEALTH OF PENNSYLVANIA	:COURT OF COMMON PLEAS :PHILADELPHIA COUNTY
VS.	:CRIMINAL TRIAL DIVISION :CP-51-CR-0006549-2009
LIONEL CAMPFIELD	:TRIAL DATE: 11/1/10 :COURTROOM:

NOTICE FOR HEARING

AND NOW, this day of , 2010, upon application of GARY S. SERVER, ESQUIRE, attorney for the above named defendant, TO BAR THE IMPOSITION OF THE DEATH PENALTY. a hearing is hereby ordered for the day of , 2010, at .M. in courtroom Criminal Justice Center-1301 Filbert Street, Philadelphia, Pa.

_____

J.

GARY S. SERVER, ESQUIRE
I.D. 52866
52103 DELAIRE LANDING
PHILADELPHIA, PA 19114
(215) 632 - 3546

COMMONWEALTH OF PENNSYLVANIA	:COURT OF COMMON PLEAS :PHLADELPHIA COUNTY
VS.	:CRIMINAL TRIAL DIVISION :CP-51-CR-0006549-2009
LIONEL CAMPFIELD	:

MOTION TO BAR THE IMPOSITION OF THE DEATH PENALTY

The defendant, by and through counsel, moves to bar the imposition of the death penalty, and in support thereof avers the following:

1. The defendant was arrested on 10/24/08 and charged with two counts of Murder and related offenses.
2. The Commonwealth alleges that the defendant participated in the intentional killings of Nashir Hinton and Alonzo Robinson on 6/16/05 at 5863 Malvern Street in Philadelphia.
3. The Commonwealth filed Notice that it seeks the imposition of the death penalty alleging 5 Aggravating Circumstances.
4. Upon information and belief after obtaining school, delinquent, dependent and other relevant documentation, and based upon documents provided by the Commonwealth, it appears that the defendant's true date of birth is 7/5/88. No other date of birth has been alleged.
5. At the time of the alleged murders on 6/16/05 the defendant was 16 years, 11 months and 11 days old.
6. In the case of Roper v. Simmons, 543 U.S. 551, decided March 1, 2005, the United States Supreme Court held that under the 8th and 14th Amendments to the U.S. Constitution the imposition of the death penalty on offenders who were under age 18 at the time the crime was committed is forbidden.
7. The defendant, being only 16 years, 11 months and 11 days old at the time of the alleged offense on 6/16/05 is therefore ineligible for the imposition of the death penalty.

WHEREFORE, the defendant respectfully requests that the Commonwealth be barred from seeking and imposing the death penalty.

RESPECTFULLY SUBMITTED BY:

GARY S. SERVER, ESQUIRE
ATTORNEY FOR DEFENDANT

Docket Number: CP-51-CR-0006549-2009

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Lionel Campfield

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
4	07/20/2009		Court of Common Pleas - Philadelphia County
Hearing Notice			
5	07/20/2009		Commonwealth of Pennsylvania
Defense Request for Further Investigation ADA: D. Watson-Stokes Def. Atty: Thomas McGill Court Rptr: Judy Bonner Court Clerki: Kathryn Morris Defense request for further pre-trial. TRE. NCD: 8/19/09 room 1105			
1	08/19/2009		Court of Common Pleas - Philadelphia County
Pre-Trial Conference Scheduled 9/23/2009 9:00AM			
2	08/19/2009		Court of Common Pleas - Philadelphia County
Assignment of Judge			
3	08/19/2009		Court of Common Pleas - Philadelphia County
Assignment of Judge			
4	08/19/2009		Court of Common Pleas - Philadelphia County
Hearing Notice			
5	08/19/2009		Lerner, Benjamin
Pre-Trial Conference Continued ADA: Watson-Stokes Atty: T. McGill Steno: Capizzi Def req for further pre-trial. TRE. NCD: 9/23/09 Rm: 1105 CTurcks/Court Clerk			
D1/1	09/23/2009		McGill, Thomas L. Jr.
VERIFICATION OF CERTIFICATION UNDER PA.R.CRIM.P. 801			

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

SECURE DOCKET

Docket Number: CP-51-CR-0006549-2009

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Lionel Campfield

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
7	10/06/2010		Court of Common Pleas - Philadelphia County
Assignment of Judge			
8	10/06/2010		Court of Common Pleas - Philadelphia County
Assignment of Judge			
9	10/06/2010		Court of Common Pleas - Philadelphia County
Hearing Notice			
1	10/07/2010		DeFino-Nastasi, Rose
Court Ordered - Listed for Status ADA: G. Fairman ATTY: T. McGill, Jr. STENO: S. Rios CLERK: G. Williams NCD 10/18/2010 R 1107 Trial date of 11/1/2010 remains			
2	10/07/2010		Court of Common Pleas - Philadelphia County
Status Listing Scheduled 10/18/2010 9:00AM			
1	10/18/2010		DeFino-Nastasi, Rose
Trial Date to Remain			
1	10/19/2010		Campfield, Lionel
Motion to Preclude the Commonwealth from Seeking the Death Penalty			
1	10/20/2010		Court of Common Pleas - Philadelphia County
Status Listing Scheduled 10/20/2010 9:00AM			
2	10/20/2010		DeFino-Nastasi, Rose
Counsel Attached for Trial Atty Thomas McGill Jr. attached for jury trial on 11/8/10 Room 1107			

EXHIBIT 4

First Judicial District of Pennsylvania

51CR00021122007
Sam Lan

Hearing Volume 1
January 31, 2011

CRS
Court Reporting System

First Judicial District of Pennsylvania
100 South Broad Street, Second Floor
Philadelphia, PA 19110
(215) 683-8000 FAX:(215) 683-8005

Original File 1-31-11^LAN.txt, 29 Pages
CRS Catalog ID: 11030055

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Commonwealth vs. Lan
talk to them both but there is nothing that you shouldn't hear so far.
MR. VEGA: Was it Bernie's intention to call these family members from California to come here?
THE COURT: That is what we are trying to figure out.
MR. VEGA: That is what I am trying to figure out.
THE COURT: Are they showing up for court? If they are not, why can't they just come here? Is there any possibility trying to get them here without having to pay for you to fly out to California?
MITIGATION SPECIALIST: Well, without the aid of an interpreter and the ability to speak with Sam on the issue because the parents don't know at this point that he has a capital case.
THE COURT: They don't know?
MITIGATION SPECIALIST: They don't know.
THE COURT: Does he talk to

Page 6

Commonwealth vs. Lan
them from the prison?
MITIGATION SPECIALIST: Yes but he doesn't want to worry and concern them. So his sister, who is also a minor, who I also have been communicating with, she was the first one to know, I asked her to communicate with the family that I'm looking for additional background information because he is currently appealing his life sentence that he has now.
MR. VEGA: Are they at least aware that he is serving a life sentence?
MITIGATION SPECIALIST: They are currently aware that he is serving a life sentence and offer support to him. So they regularly put money on the books and send him things.
THE COURT: Do they go and see him?
MITIGATION SPECIALIST: No, Your Honor.
THE COURT: Where is the

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Commonwealth vs. Lan
sister?
MITIGATION SPECIALIST: Also in California. Currently they live in San Bernardino, California.
THE COURT: You do speak to her?
MITIGATION SPECIALIST: Yes, Your Honor.
THE COURT: She speaks English?
MITIGATION SPECIALIST: Yes, Your Honor.
THE COURT: She needs to tell the family it is a death penalty case and they need to come in.
MITIGATION SPECIALIST: I understand from a legal perspective the bottom line is we need you here but in terms of building a relationship with the family, it is not, by the way, let me tell you over the phone with an interpreter your son is facing death. You get the people in the room and establish a communication. I understand

Page 8

Commonwealth vs. Lan
what you two are saying and to answer that question about their willingness to come, I am at a standstill.
THE COURT: The sister should have been able to ask that and let you know already.
MITIGATION SPECIALIST: I am not able to get her to do what she doesn't want to do.
THE COURT: She doesn't want to tell them?
MITIGATION SPECIALIST: She is a minor. She is 16 years old.
THE COURT: She knows he has a trial in two weeks?
MITIGATION SPECIALIST: Yes, she knew that for some time in me communicating to her. Sam did not communicate that to her or the family.
THE COURT: There is an offer of life concurrent. What is going on with that?
MR. MANDELL: I believe I communicated that some time ago. He

Page 9

Commonwealth vs. Lan

never responded to it. My thought was always he wanted to wait and see what happened with his current case, although I know the Court's feeling in that regard, that is not something that is going to delay the process.

What I can try and do is during the course of this week see if I can talk to him on the phone and see what he wants to do in that regard but I have never gotten an indication that he was desirous of taking that offer.

MR. VEGA: But you have spoken to him about it?

MR. MANDELL: Spoken, no because it was long after he was sent to the state and the only communication I was able to have with him since were through correspondence.

THE COURT: Was this Judge Tucker's case?

MR. MANDELL: It was initially.

THE COURT: I see continued

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Commonwealth vs. Lan

1/22/10, 2/22, 3/17, further pretrial, 10/26/10, 11/3/10. What is going on? It is unacceptable for you not to know whether he is going to accept life and for you not to have seen him and for Mr. Siegel to totally drop the ball. There is something wrong here.

We are having pretrial conferences. People are not coming in and telling the truth or telling what is really going on. I won't accept that. This is out of control.

I am not giving the funds for California. You need to tell the sister to tell the family he is facing the death penalty and they need to get in here is the bottom line. I will give you the funds to go to Somerset unless we can get him in here. I would have done that months ago. If Mr. Siegel will not respond to you, you come to me or Mr. Mandell and then he comes to me.

There is no way two weeks before a capital case all of this

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Commonwealth vs. Lan

shenanigans is going on and nobody tells the Court. I have to find out from rumor and innuendo that she didn't see him yet. That is outrageous. It really is. So the offer, I want to know by Friday whether he is taking the offer.

If not, I will give you the funds. When can you set up going to see him?

MITIGATION SPECIALIST: If you give me the funds today, I will be on the plane tomorrow.

THE COURT: To?

MITIGATION SPECIALIST: To somerset.

THE COURT: You fly there?

MR. MANDELL: It is the Western part of the state.

THE COURT: There is a plane that goes there?

MITIGATION SPECIALIST: Yes, you fly to Pittsburgh and drive over an hour outside of Pittsburgh.

THE COURT: Here is the thing,

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Commonwealth vs. Lan

then we have no Mr. Siegel anyway possibly.

MR. MANDELL: We don't know.

MR. VEGA: I will know by Friday because we are statussing. I am sure his secretary will communicate with Judge Sarmina's staff, so I will report to you as soon as I know.

THE COURT: So this is what we will do, by Friday, 2/4, I want to know if he is taking life.

Obviously I will not send you anywhere until I know if he is taking life. If we can get him in by Monday, then we will do it that way.

MR. VEGA: Just check with the sheriffs. They go on a certain date from Somerset to bring the guys to Graterford. If you talk to your sheriff, they will know when the next bus is.

COURT CLERK: It doesn't work that way anymore. We have to go through Mr. Chip Junod. We have to go through

EXHIBIT 5

COURT OF COMMON PLEAS OF BUCKS COUNTY

SECURE DOCKET

Docket Number: CP-09-CR-0003596-2012

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Kazair Gist

CALENDAR EVENTS

Case Calendar Event Type	Schedule Start Date	Start Time	Room	Judge Name	Schedule Status
Miscellaneous Criminal Hearings	04/25/2013	9:30 am	Courtroom #1	Judge Rea B. Boylan	Scheduled
Trial	05/06/2013	9:00 am	Courtroom #2	Judge Rea B. Boylan	Cancelled
Trial	06/03/2013	9:00 am	Courtroom #1	Judge Rea B. Boylan	Scheduled
Miscellaneous Criminal Hearings	07/29/2013	9:00 am	Courtroom #2	Judge Rea B. Boylan	Scheduled
Trial	09/03/2013	9:00 am	Courtroom #2	Judge Rea B. Boylan	Scheduled
Sentencing	12/16/2013	10:00 am	Courtroom #2	Judge Rea B. Boylan	Scheduled
Reconsideration/Modify Sentence	01/22/2014	10:30 am	Courtroom #2	Judge Rea B. Boylan	Cancelled
Reconsideration/Modify Sentence	04/03/2014	9:30 am	Courtroom #2	Judge Rea B. Boylan	Scheduled

CONFINEMENT INFORMATION

Confinement Known As Of	Confinement Type	Destination Location	Confinement Reason	Still in Custody
06/26/2014	DOC Confined	SCI Forest		Yes

DEFENDANT INFORMATION

Name: Kazair Gist
Hair Color: Black
Eye Color: Brown
Date of Birth: 12/30/1993
Address:

SSN:
SID: 396-97-40-8

Address Type Home :
608 Martin Luther King Blvd
Trenton, NJ 08618

Drivers License No: G46754296312932
Drivers License State: NJ
Fingerprint Status: Not Fingerprinted

COURT OF COMMON PLEAS OF BUCKS COUNTY

SECURE DOCKET

Docket Number: CP-09-CR-0003596-2012

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Kazair Gist

Representing: Gist, Kazair

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	04/10/2012		Wagner, Robert
Bail Set - Gist, Kazair			
1	05/01/2012		Bateman, Wallace H. Jr.
Order Granting Motion for Appointment of Counsel for preliminary hearing only, unless deft remains incarcerated			
1	05/29/2012		Court of Common Pleas - Bucks County
Original Papers Received from Lower Court			
2	05/29/2012		Court of Common Pleas - Bucks County
Formal Arraignment Scheduled 06/22/2012 12:00PM			
3	05/29/2012		Court of Common Pleas - Bucks County
Penalty Assessed			
1	06/01/2012		Court of Common Pleas - Bucks County
Assigned to Judge: Boylan, Rea B.			
1	06/04/2012		Court of Common Pleas - Bucks County
Formal Arraignment Scheduled 6/22/2012 9:30AM Homicide arraignment			
2	06/04/2012		Court of Common Pleas - Bucks County
Hearing Notice			
1	06/07/2012		Court of Common Pleas - Bucks County
Hearing Notice			
1	06/21/2012		Bucks County District Attorney's Office
Notice of Aggravating Circumstances			

COURT OF COMMON PLEAS OF BUCKS COUNTY

SECURE DOCKET

Docket Number: CP-09-CR-0003596-2012

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Kazair Gist

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	09/07/2012		Court of Common Pleas - Bucks County

Miscellaneous Criminal Hearings Scheduled 12/11/2012 9:30AM
Homicide pre-trials
Homicide Pre-trials

2	09/07/2012		Court of Common Pleas - Bucks County

Miscellaneous Criminal Hearings Scheduled 12/12/2012 9:30AM
Homicide Pre-Trials
Homicide Pre-Trials

3	09/07/2012		Court of Common Pleas - Bucks County

Miscellaneous Criminal Hearings Scheduled 12/13/2012 9:30AM
Homicide Pre-Trials

4	09/07/2012		Boylan, Rea B.

Pre-Trial Motion Hearing Held
Pre-Trial Motions. Deft request Trial continued to 2/4/13. C/W withdraws Death Penalty. order signed to seal Discovery. New pre-trial motions dates 12/11, 12/12/12, 12/13/12. 11/19/12 Record ID due. Remanded to Sheriff.

5	09/07/2012		Court of Common Pleas - Bucks County

Miscellaneous Criminal Hearings Scheduled 10/10/2012 9:00AM
Homicide Pre-Trials

1	09/10/2012		Court of Common Pleas - Bucks County

Exhibits Filed
Pre Trial Motions

1	09/11/2012		Boylan, Rea B.

Evaluation Ordered
Order dated 9/11/12 it is ordered that Dr. Valliere be permitted to conduct an evaluation of the defendant regarding the factors enumerated 42 Pa. C.S.S. 6355 (4) (iii)(F) and (G) it is ordered that Dr. Valliere be admitted enterance into the Curran Formhold, Dr. Valliere shall not question on any matters related to the murder, upon completeion a written report shall be prepared
Bucks County Correctional Facility

BUCKS COUNTY Courier Times

Final DeGennaro killer gets 52 to 104 years

By Laurie Mason Schroeder / Staff Writer
Posted Dec 16, 2013 at 12:01 AM
Updated Dec 16, 2013 at 4:00 PM

Kazair Gist, the so-called "muscle" in the Danny DeGennaro murder case, was sentenced Monday to 52 to 104 years in a state prison.

Gist, 19, of Trenton, was 17 at the time of the Levittown musician's Dec. 28, 2011, murder but was charged as an adult. His case was the first Bucks County test of a 2012 change in the law that made sentencing juveniles to automatic life sentences unconstitutional.

Gist will be 70 when's he's eligible for parole. He spoke briefly in court, saying that he wasn't involved with the killing and wasn't even friends with the other convicted murderers, Jermaine Jackson, 21, and Breon Powell, 22.

"I'm a good person. I come from a good family," he said.

A jury in October found Gist guilty of both first- and second-degree murder. The panel heard testimony that both he and Powell fired gunshots during a botched robbery at DeGennaro's Crabtree Drive home.

Experts said Powell fired a shotgun at DeGennaro and hit him in the chest at close range. Gist fired a handgun in the musician's direction but missed, police concluded.

Two women who were with the men on the night of the killing testified that Powell and Gist went into the house wearing gloves and covering their faces with pantyhose. Tatyana Henderson and Danasia Bakr, both 19, testified that they heard two shots just before Powell and Gist came running toward the getaway car.

The women -- who cooperated with prosecutors in the hopes of getting lighter sentences -- testified that both Powell and Gist admitted shooting DeGennaro.

Henderson and Bakr testified that Jackson recruited them to take part in the scheme to "get money" from DeGennaro, who allegedly owed Jackson money. The plan, they told jurors, was for Jackson to go in and demand the cash from DeGennaro first. If the victim didn't comply, they said, Powell and Gist were supposed to come in and hold him at gunpoint.

Henderson was sentenced last week to one to two years in the county jail, plus five years of probation. Bakr, the first to come forward, had her case transferred to juvenile court. She was sent to a locked juvenile detention facility last week and could remain there until her 21st birthday.

Powell, who was 19 at the time of the killing, was sentenced to life in prison last week. Jackson was also sentenced to life following a separate trial in June.

Under the new law, Judge Rea Boylan had to sentence Gist to at least 35 years, but had discretion beyond that. The judge considered numerous factors, including the impact of the killing on DeGennaro's family and the community, and Gist's level of "criminal sophistication."

It was revealed in court Monday that Gist had been arrested nine times as a juvenile, starting when he was just 9 years old. He was found delinquent five times in New Jersey juvenile courts, for crimes including having drugs on school property and illegal possession of a firearm.

His attorney, Alan Bowman, said Gist was the product of a turbulent childhood who was raised in a dangerous neighborhood.

"He has not had an uncomplicated existence. It was a labyrinth out of which he could not always extricate himself." Bowman said. "His life has been one of challenge. He has not always met that challenge in a meritorious fashion."

Bowman said Gist will appeal.

Prosecutor Matt Weintraub argued for a life sentence, saying Gist was just as culpable as Powell. The prosecutor noted that Gist was just two days shy of his 18th birthday when the slaying occurred.

Weintraub called the sentence "a just and fair decision," noting that Gist will be off the streets until he's an elderly man.

"This man's parole officer hasn't even been born yet," he said.

Outside the courtroom after the sentencing, DeGennaro's daughter, Gia DeGennaro Pape, hugged the detectives and prosecutors involved in the case.

She said she was relieved that the marathon court process was finally over, although she was not yet ready to say she felt closure.

"These past two years have been a nightmare and I still can't believe that he's gone."

Danny DeGennaro was well known on the local music scene and had traveled the country playing with big acts like Billy Squier and Bo Diddley. He had suffered some setbacks, including heroin addiction, but was working on a comeback at the time of the killing, friends said.

Despite the horrible crime that took her father's life, Pape said that some positive things have come out of the trial process.

"I learned a lot about our government, and how the law works. And I've formed relationships with the detectives and prosecutors and victim advocates who have been with us, guiding us, since day one."

Pape said she knows the murder won't be her dad's legacy; he will forever be remembered for his beautiful music and his ability to make friends wherever he went. That's why more than 1,000 people turned out for his funeral, she said.

"So many people loved him. He never judged anyone, and he always remembered where he came from, even when he was playing with famous people. He was humble, and grounded, and laid back. He just wanted to be with the people he loved and to play his music."

Laurie Mason Schroeder: 215-694-7489; email: lmason@calkins.com; Twitter: @BucksCourts

EXHIBIT 6

First Judicial District of Pennsylvania

51CR13004242006
Kareem Johnson

Trial (Jury) Volume 5
June 22, 2007

First Judicial District of Pennsylvania
100 South Broad Street, Second Floor
Philadelphia, PA 19110
(215) 683-8000 FAX:(215) 683-8005

Original File 622J1.txt, 0 Pages
CRS Catalog ID: 07102171

not a specific science, but there is strong indication that one person was up around here (indicating). We know that from them. We know about how. We know about how. And this tells, this hat tells a lot.

Officer Trenwith tells you where the hat was. He demonstrated in court. He stood on the stand and he said: If I were the body of Walter Smith, that's how far away the hat was. He told you he has never in his vast experience as a crime scene officer seen blood from a shooting travel that far. He told you that when he picked up the hat, when he picked up the hat, there was blood -- this is the distance here. Again, we blew it up on the screen, but this is photograph. Walter Smith. There's the hat way over there. Walter Smith. There's the hat. Walter Smith, there's the hat.

He told you that when he picked up the hat, under that hat was fresh blood. Blood that I don't think anybody disagrees at this point was Walter Smith's blood. Right? So Mr. Coard has spent a lot of time saying nobody

saw the killer wear the hat. Nobody said the killer wore the hat. Do you know who says the killer wore the hat? Walter Smith says the killer wore the hat. He says it with his blood. There is no other way Walter Smith's blood could have gotten on the underside of this hat pointing away from his body, underside, couldn't have come up from the ground underside that far away unless the person who killed Walter Smith was standing close to him while he shot and killed him, so close that the blood could squirt up on the hat. There is just no other way. The hat didn't get up there and walk there itself. Right?

No other individual is going to be standing over this body unless he is the shooter while this -- really, is there going to be a guy standing there like this, check it out, while the shooter is there blasting him in his head? No. It makes no sense. There is only one way that hat gets that far from the body with Walter Smith's blood on the underside of that brim. And that is, that the wearer of

that hat was one of the killers of Walter Smith. Period. There is just no other way to interpret that.

So once you know that, we know this: The killer wore that hat. Some other things about the hat. Even now, even as it has been sitting in evidence and tested, it still looks pretty new. Doesn't it? It looks pretty new. It is not an old ratty hat. You don't see a lot of sweat in the sweatbands. You don't see a lot of sweat. You don't see a lot of marks. I have some hats that are disgusting, they got like the salty stuff all along here because you wear it a lot. This is a new-looking hat. 15 years ago. Were they making these hats 15 years ago? The sweat could have gotten on there. Is this a hat from 1987? I mean, come on. No. This is a modern-style hat, a modern-style hat. It is new-looking. It was left in the middle of the street.

And the point -- I am sorry you missed the point -- of asking people if they came up to get the hat is because if somebody else left their hat there, a nice new hat, they would

have come, said: Hey, can I get my hat back? Can I grab my hat? That's my hat there. I lost my hat. Can I go grab my hat there? My hat is in the scene.

Nobody did that. Nobody did that. No innocent bystander, just somebody who happened to be running away, came back to claim that hat. That hat just sat there abandoned, new hat in the middle of the road. This is the killer's hat. This is the killer's hat. The crime scene tells you that. The physical evidence tells you that. Physical evidence. Physical evidence, what's out there. Physical evidence has no bias. Physical evidence cannot lie. Physical evidence does not want to lie. Physical evidence cannot be intimidated. Physical evidence cannot be killed. It is just out there. It is there and it says what it says. No influence from me. No inference from the defendant or defense. It just says what it says. This overwhelming physical evidence says that killer's hat was left out on the scene.

Officer Helm and Officer Harris got there within a minute. The hat was there.

EXHIBIT 7

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

Commonwealth of Pennsylvania	:	CP-67-CR-0003183-1998
vs.	:	PCRA – Capital Case
Milton Noel Montalvo	:	

Appearances:

For the Commonwealth: Jennifer A. Peterson, Attorney at Law,
Deputy Attorney General

For the Defendant: Shawn Nolan, Esquire
Assistant Federal Defender

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S PCRA PETITION

AND NOW, this 22nd day of May, 2017, we GRANT in part Defendant's request for post-conviction relief.

We DENY Defendant's request for a new trial on the issue of Defendant's guilt concerning the charges. However, we GRANT Defendant's request

Accordingly, based upon the ample precedent on this precise issue we believe Defendant's claim is meritless. Thus, he is not entitled to relief on this claim.

However, we do find merit in the claim that the trial Court failed in its instruction to the jury when it indicated at one point that the jury's sentence was a "recommendation" only. Trial counsel failed to object to the Court's comment and to the pervasive comments by the Commonwealth prosecutor to the jury that they were only giving a "recommendation." NT 1/20, 21/2000 at 21, (Prosecutor Kelley's opening statement - penalty phase); 22, (Prosecutor Kelley's opening statement); 127 (Prosecutor Kelley's closing argument - penalty phase); 134 (Prosecutor Kelley's closing argument); and notably, at page 136 when this exchange took place:

> [trial counsel:] ... You don't have to kill anybody.
> Attorney Kelley: I object to that argument. They are not doing it, they are recommending the sentence.
> The Court: Objection sustained. That is an improper statement, ladies and gentlemen. I am the sentencing person. Your decision is a recommendation to the Court.
> [No objection or response from trial counsel.]

The failure to object to this was candidly recognized by trial counsel at the PCRA hearing. NT 7/27/2015 at 34. While the trial judge did, in the midst of final penalty-phase instructions, state that the verdict was not merely a recommendation, (NT 1/21/2000 at 168) at best, this only served to create confusion in the jurors' minds as to what their role in actual sentencing was.

EXHIBIT 8

FAX TRANSMISSION

DATE: October 5, 1994

FAX NO.: 557-4920

TO: Bradley Bridge, Esquire & Mark Bookman, Esquire

FROM: Jeffrey M. Kolansky, Esquire

SUBJECT: Commonwealth v. Percy St. George

3 Page(s) to Follow

PLEASE CALL (215) 963-9517 FOR ADDITIONAL INFORMATION OR IF THERE IS A PROBLEM WITH TRANSMISSION. THANK YOU.

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JEFFREY M. KOLANSKY

NEW JERSEY OFFICE
Suite 206
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Stone Harbor, New Jersey 08247
(609) 368-8822

October 3, 1994

Honorable Carolyn Engel Temin
190 City Hall
Philadelphia, PA 19106

RE: Commonwealth v. Percy St.George
C.C.P. Criminal Trial Division
October Term, 1993, No. 1257

Dear Judge Temin:

Please accept the following letter brief on behalf of Detective Manuel Santiago in lieu of a formal response to Defendant's Motion to Bar Retrial.[1]

The defendant's Motion to Bar Retrial, in its narrowest sense, makes bold, unsupported, and scurrilous allegations that 1) at least one detective gave false testimony under oath and 2) presumably other officers coerced a witness into offering a false statement in order to implicate Percy St. George for the murder of Japelle McCray. To support his position, St.George argues, inter alia, that the police officers, in general, should have noticed that different birth dates and apparently different schools (although illegible) are embraced on two separate statements of a witness who is identified as David Glenn. A review of this case clearly shows that even the most discernable eye, could fail to notice that the name/identification given by the witness, i.e., David Glenn, and signatures on the statements appear to be the same on each document. This is not addressed by the Defendant's motion, nor does it endorse defendant's position of alleged impropriety by the Detective Santiago.

Notwithstanding the above, the 1) content and tenor of the Defendant's motion, including accusations of perjury/subornation of perjury embraced therein, and 2) defendant's admission, through

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[1] Although Defendant's Motion to Bar Retrial is addressed to the Commonwealth's Attorney, Respondent, Detective Manuel Santiago, asserts standing to respond due to a likely abridgement of his Fifth Amendment right against self incrimination if forced to testify in the instant matter. While Respondent does not allege standing to oppose the Motion to Bar Retrial and takes no position related to its outcome, he does allege standing to respond as a vehicle to oppose the introduction of his testimony.

counsel, that he will "vigorously" seek prosecution through the District Attorney's Office for perjury, obstruction of justice and related matters against the Detective, leads to the inescapable conclusion that the officer's testimony is subject to Fifth Amendment protection. Here, defendant's accusations are totally without merit. However, in an abundance of caution, Detective Santiago submits that these very allegations coupled with the notice of hearing to testify, are nonetheless tantamount to impaneling a grand jury, and seeking to compel the Detective to provide testimony before same and against his right against self-incrimination. Under the circumstances applicable herein, and absent a grant of immunity, the officer is entitled to assert his Fifth Amendment privilege against self-incrimination and will seek to do same. Indeed, police officers are entitled like all other persons to the benefit of the Constitution, including the privilege against self-incrimination. Uniformed Sanitation Men Asso. v. Commissioner of Sanitation, 392 U.S. 280, 88 S.Ct. 1917 (1968).

In this case, and to the extent the Detective desires such protection, he is required to claim it now, otherwise, the privilege may be deemed waived. Rogers v. United States, 340 U.S. 367, 715 Ct. 438(1951) reh den. 341 U.S. 912, 71 S.Ct. 619 (1951). See, Maness v. Meyers, 419 U.S. 449, 95 S.Ct. 584 (1975) (privilege against self-incrimination may be lost by not asserting it in a timely fashion); Garner v. United States, 424 U.S. 648, 96 S.Ct. 1178 (1976) (while inquiry in a Fifth Amendment case is not ended when incriminating statement is made in lieu of a claim of privilege, the failure to claim privilege is relevant, as in the ordinary case, an individual under compulsion to make disclosures as a witness who reveals information, instead of claiming privilege, loses the benefit of the privilege).

In the case sub judice, and in light of the allegations at issue, the Detective will be willing to testify only if granted transactional and use immunity. Obviously, the object of the Fifth Amendment privilege against self-incrimination will be accomplished by immunity providing that 1) the witness, cannot be prosecuted or subjected to any penalty or forfeiture for or account of any transaction, matter, or things concerning which he might testify and 2) no evidence or testimony obtained can be used against him or used to search for any other evidence or testimony. Absent such immunity, the Detective will be compelled to assert his Fifth Amendment privilege.

Based on the foregoing, Detective Santiago respectfully requests that this Court dispose of the foregoing issue.

Very truly yours,

KOLANSKY & STRAUSS, P.C.
Attorneys at Law

By: /s/
Jeffrey M. Kolansky

JMK/cv

cc: via facsimile

Charles J. Grant, Esquire
Ann Ponterio, Esquire
Bradley Bridge, Esquire
Mark Bookman, Esquire
Thomas McGill, Esquire
Joseph McGill, Esquire

EXHIBIT 9

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs. CaseNo. 2500/1988

DENNIS COUNTERMAN

ORDER

NOW, this (¥7,«-day of August, 2001, upon consideration of Defendant's motion for post conviction collateral relief, and for the reasons expressed in our accompanying Opinion,

IT IS HEREBY ORDERED that Defendant's motion for post conviction collateral relief is GRANTED and the Defendant is granted a new trial.

IT IS FURTHER ORDERED that the Defendant's convictions and sentence of death are VACATED.

IT IS FURTHER ORDERED that the Clerk of Courts-Criminal Division shall send a copy of this Order to Defendant and his counsel, as well as to the Office of the District Attorney, by certified mail, return receipt requested.

BY THE COURT:

Lawrence J. Brenner, J.

> Appellant has established a due process violation as the Commonwealth failed to disclose exculpatory information concerning the credibility of a key witness. The Commonwealth's failure to comply with Brady is a violation of the Fourteenth Amendment to the United States Constitution. As demonstrated above, that *violation undermined the truth-determining process so that no reliable adjudication of appellant's guilt or innocence could have taken place.*

Strong, 761 A.2d at 1175. (Emphasis added).

In the instant matter, considering all of the Brady violations in their totality, and in light of the relevance of the information withheld by the Commonwealth, there is a reasonable probability that the outcome of the trial could have been different. The undisclosed documents would have provided the Defendant with information that could have been used to impeach one of the main prosecution witnesses, Janet Counterman. This Court finds that far too many doubts arise from the Commonwealth's repeated Brady violations in this case. As this Court clearly recognizes, compliance with the Brady doctrine is indispensable to the fair and just disposition of criminal charges. Therefore, in light of the numerous Brady violations discussed above, this Court finds that no reliable adjudication of the Defendant's guilt or innocence could have taken place. The Defendant has established a due process violation as the Commonwealth failed to disclose exculpatory information concerning the credibility of its key witness. The Defendant has met the criteria for relief under 42 Pa. C.S.A. §9543(2)(i). Accordingly, the Defendant's convictions and death sentences are vacated and the Defendant is entitled to a new trial.

Next, Defendant contends that his trial counsel were ineffective.

IN THE SUPREME COURT OF PENNSYLVANIA

Jermont Cox, Petitioner	:	102 EM 2018
v.	:	
Commonwealth of Pennsylvania, Respondent	:	

PROOF OF SERVICE

I hereby certify that this 22nd day of February, 2019, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served:	Joshua D. Shapiro
Service Method:	eService
Email:	lsnyder@attorneygeneral.gov
Service Date:	2/22/2019
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Representing:	Respondent Commonwealth of Pennsylvania

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Representing:	Respondent Commonwealth of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

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Phone:	215-928-0520
Representing:	Petitioner Jermont Cox

/s/ Marc Alan Bookman

(Signature of Person Serving)

Person Serving:	Bookman, Marc Alan
Attorney Registration No:	037320
Law Firm:	
Address:	Atlantic Center For Capital Representation 1315 Walnut St Ste 1331 Philadelphia, PA 19107
Representing:	Amicus Curiae Atlantic Center for Capital Representation, Philadelphia, PA