IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAJOR GEORGE TILLERY, **Petitioner**	**:**	**CIVIL ACTION**
v.	**:**	
KENNETH EASON, et al., **Respondents**	**:**	**NO. 20-2675**

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Respondents respectfully request that the petition for a writ of habeas corpus be dismissed with prejudice and without a hearing, and in support thereof submit the following response.

FACTS

The trial court set forth the facts of petitioner's crimes as follows:

> . . . At approximately 10:00 p.m. on October 27, 1976, Philadelphia police received a call to the address at Huntingdon and Warnock Streets in North Philadelphia. At the corner, they broke down the locked door of a poolroom operated by William Franklin and discovered the dead body of John Hollis. A medical examination later revealed that Hollis died of a gunshot wound to the trunk of his body. Inside the poolroom, the police found live and spent .38 caliber ammunition and a set of car keys. Around the corner from the poolroom at 2527 North 11th Street, police officers found John Pickens bleeding from a gunshot wound. Both Pickens and Hollis were shot by different guns.
>
> For more than three years, the shooting of Pickens and Hollis remained unsolved. However, in the spring of 1980, police detectives, investigating the homicide of Samuel Goodwin, visited a Philadelphia prison to determine

if Emanual Claitt, an inmate who had known about Goodwin, could provide any information about Goodwin's death. The information Claitt provided went far beyond the Goodwin case. Claitt described in detail the operation of what he labeled the "black mafia," a crime syndicate run by black Muslims in Philadelphia. His information described a vivid picture of events culminating with the shootings of Pickens and Hollis.

Claitt testified that from 1976 until 1980, he engaged in drug dealing and extortion as a member of the Philadelphia "black mafia." The organization divided the city into sections for business purposes. Alfred Clark was the leader of the North Philadelphia branch. He held the rank of first lieutenant and had "the last word" for all business in the city. Sylvester White directed the West Philadelphia branch. John Pickens also dealt drugs in West Philadelphia. During the 1970s, [petitioner] held the rank of first lieutenant and "had control of the entire city as far as methamphetamine is concerned. . . ." Claitt received his heroin supply from Clark and his methamphetamine supply from [petitioner]. Clark and [petitioner] were partners in the heroin and methamphetamine trade. Claitt characterized [petitioner] as Clark's "right hand man."

On the night of October 20, 1976, Claitt, Clark, [petitioner], James Ravenell and Rainey met at the home of Dana Goodman at 59th and Woodbine Streets to discuss a disagreement between Goodwin and Pickens over drug selling in West Philadelphia. Pickens arrived with Hollis and argued with Clark about a transaction with Clark which disposed of drugs claimed by Pickens at the expense of Pickens. During the argument, Hollis called Clark a "gangster." He then grabbed Clark by the collar, took out a pistol, slapped Clark in the face with the gun and pointed at Clark as if he were about to shoot. Pickens stopped Hollis from firing the weapon, but [petitioner] said that Hollis "would have to die for what he did." Although White was not present, Clark said he would talk to him and arrange a meeting at Franklin's poolroom to settle the dispute.

Thereafter, a group consisting of Clark, Claitt, Rainey, Ravenell and [petitioner] met White at a mosque at 13th Street and Susquehanna Avenue in North Philadelphia. The group then drove to Franklin's poolroom. When they arrived at the poolroom, [petitioner] accused White of setting up the earlier incident and demanded a meeting on Friday, October 22, 1976, to which White was to bring Pickens and Hollis. White agreed to the demand. On the evening of Friday, October 22, 1976, Clark met the group outside the mosque. Clark made everyone surrender their weapons because a peaceful meeting was planned. The group then drove to the poolroom at Huntingdon and Warnock Streets. When they arrived, Clark instructed Claitt to remove two more guns from the group and then guard the door. Additionally, [petitioner] arranged for one of his couriers, Robert Mickens, to watch outside the poolhall for police.

Inside the poolhall, [petitioner] and Franklin sat at opposite ends of a table. [Petitioner] told Hollis to apologize, but Hollis refused. Following a nod to Franklin, [petitioner] reached under the table and pulled out a gun. Franklin also reached under the table and pulled out a weapon. [Petitioner] then shot Hollis in the back. When Pickens protested, [petitioner] shot Hollis again and Franklin then shot Pickens. Pickens proceeded to run through a locked door shattering the glass.

William Arnold arrived immediately after the shooting and discovered Pickens holding his stomach. Pickens had collapsed from the wound. Arnold helped him to a house at 2527 North 11th Street where the police found him.

Based on Claitt's information, the police obtained a warrant on May 23, 1980, for [petitioner's] arrest. However, for three years police were not able to serve the warrant because [petitioner] could not be located. A detective in California finally arrested [petitioner] in November, 1983. [Petitioner] was returned to Philadelphia on December 8, 1983, to stand trial. . . .

Commonwealth v. Tillery, 391 Pa. Super. 641, 563 A.2d 1956 (Memorandum), slip op. at 2-5.

PROCEDURAL HISTORY

On May 29, 1985, a jury sitting before the Honorable John A. Geisz of the Philadelphia Court of Common Pleas found petitioner guilty of murder in the first degree, aggravated assault, two counts of criminal conspiracy, and possession of an instrument of crime. Petitioner was represented at trial by Joseph Santaguida, Esquire, who was replaced after the trial by James Bruno, Esquire, who filed post-verdict motions on petitioner's behalf. On December 9, 1986, Judge Geisz sentenced petitioner to life imprisonment for the murder conviction, with various terms of confinement for his other convictions.

Petitioner appealed to the Pennsylvania Superior Court, advancing dozens of claims of prosecutorial misconduct, trial counsel ineffectiveness, and trial court error. On May 30, 1989, the Superior Court affirmed Petitioner's judgment of sentence. Commonwealth v. Tillery, 563 A.2d 195 (Pa. Super. 1989) (table) (memorandum opinion attached as Exhibit A). On March 5, 1990, the Pennsylvania Supreme Court denied allowance of appeal. Commonwealth v. Tillery, 593 A.2d 841 (Pa. 1990) (table).

On or about September 20, 1996, petitioner filed a counseled petition for collateral relief, under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. Section 9541, *et seq*. On January 13, 1998, the PCRA court dismissed the petition. Petitioner appealed, contending that he was denied the effective assistance of trial counsel because Mr. Santaguida had not called as a witness one of the victims from the shooting incident, John Pickens, allegedly because of a conflict of interest on Mr. Santaguida's part. The Superior Court affirmed the denial of PCRA relief on April 21, 1999. Commonwealth v.

Tillery, 738 A.2d 1058 (Pa. Super. 1999) (table). On August 18, 1999, the Pennsylvania Supreme Court denied allowance of appeal. Commonwealth v. Tillery, 742 A.2d 674 (Pa. 1999) (table).

On December 22, 1999, petitioner filed a petition for a writ of habeas corpus in federal court, once again claiming trial counsel was ineffective and had a conflict of interest. By order dated October 27, 2000, the Honorable Clarence C. Newcomer adopted and approved the report and recommendation of the Honorable Chief Magistrate Judge James R. Melinson, and dismissed the petition with no certificate of appealability issued.

Petitioner sought relief in the Court of Appeals for the Third Circuit, which remanded his case to the District Court on August 23, 2002 for further proceedings on his conflict of interest/ineffectiveness claim. The District Court thereafter held hearings on April 23, 2003, and May 28, 2003. On July 28, 2003, the District Court entered another order, reaffirming its previous order of October 30, 2000, concluding that petitioner had failed to make a sufficient showing to warrant habeas relief. On July 23, 2004, the Court of Appeals granted another certificate of appealability. On July 29, 2005, the Court of Appeals affirmed, concluding that petitioner failed to demonstrate an actual conflict of interest that adversely impacted his trial counsel's performance. Tillery v. Horn, 142 Fed. Appx. 66, 70–71 (3d Cir. 2005) (unpublished). On November 28, 2005, the United States Supreme Court denied petitioner's petition for writ of certiorari. Tillery v. Beard, 546 U.S. 1043 (2005) (memorandum).

Petitioner filed his second PCRA petition on August 13, 2007, alleging that the two eyewitnesses to his crime, Emanuel Claitt and Robert Mickens, had provided false

testimony, and that the Commonwealth had knowingly withheld exculpatory impeachment information from him prior to trial. (Petition attached as Exhibit B). Specifically, petitioner argued that, in return for testifying against him, Claitt and Mickens received favorable treatment from the Commonwealth, including immunity from prosecution and/or reduced sentencing on their own criminal charges. The PCRA court dismissed petitioner's second petition as untimely, and the Superior Court affirmed on July 15, 2009. Commonwealth v. Tillery, 981 A.2d 937 (Pa. Super. 2009) (table) (memorandum opinion attached as Exhibit C). On December 9, 2009, the Pennsylvania Supreme Court denied allowance of appeal. Commonwealth v. Tillery, 985 A.2d 972 (Pa. 2009) (table).

On October 6, 2014, petitioner filed his third PCRA petition (attached as Exhibit D), wherein he proffered signed recantations from Claitt and Mickens, and repeated the allegations raised in his 2007 petition – that they had provided false testimony at his trial and that the Commonwealth provided them favorable treatment in return. The PCRA court dismissed the petition as untimely on September 26, 2016. (The PCRA court's opinion is attached as Exhibit E). On June 11, 2018, the Pennsylvania Superior Court affirmed. Commonwealth v. Tillery, 193 A.3d 1063 (Pa. Super. 2018) (table) (reargument denied (Aug. 9, 2018)) (memorandum attached as Exhibit F). On February 6, 2019, the Pennsylvania Supreme Court denied allowance of appeal. Commonwealth v. Tillery, 201 A.3d 729 (Pa. 2019) (table).

On June 22, 2020, the Court of Appeals granted petitioner leave to file a second or subsequent habeas petition. In re: Major G. Tillery, C.A. No. 20-1941; ECF Doc 1. This Court ordered respondents to file an answer to petitioner's serial habeas petition. Respondents answer that petitioner fails to meets the qualifications to file a second

habeas petition, the petition is barred by the statute of limitations, the claims are defaulted, and the claims are meritless. Accordingly, his petition should be dismissed with prejudice and without a hearing.

APPLICABLE LEGAL STANDARDS

A. Independent and adequate state ground doctrine

"A federal habeas court will not review a claim rejected by a state court if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Walker v. Martin, 131 S.Ct. 1120, 1127 (2011) (quoting Beard v. Kindler, 558 U.S. 53, 55 (2009)). "The state-law ground may be a substantive rule dispositive of the case, or a procedural barrier to adjudication of the claim on the merits." Id.

A state procedural rule is "independent" if it does not "depend[ ] on a federal constitutional ruling." Ake v. Oklahoma, 470 U.S. 68, 75 (1985). "To qualify as an 'adequate' procedural ground, a state rule must be 'firmly established and regularly followed.'" Walker, 131 S.Ct. at 1127 (quoting Beard v. Kindler, 558 U.S. 53, 60 (2009)). "[A] discretionary state procedural rule can serve as an adequate ground to bar federal habeas review." Kindler, 558 U.S. at 60. "[A] discretionary rule can be 'firmly established' and 'regularly followed' – even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." Id. at 60-61.

"[A]n adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show cause for the default and prejudice attributable thereto, . . . or demonstrate that failure to consider the

federal claim will result in a fundamental miscarriage of justice." Harris v. Reed, 489 U.S. 255, 262 (1989).

B. Exhaustion requirement

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). See also 28 U.S.C.A. § 2254(b)(1). "[E]xhaustion of state remedies requires that petitioners 'fairly presen[t]' federal claims to the state courts." Duncan v. Henry, 513 U.S. 364, 366 (1995) (per curiam). The fair presentation doctrine requires that "the substance of a federal habeas corpus claim must first be presented to the state courts." Picard v. Connor, 404 U.S. 270, 278 (1971). "[F]or purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." Gray v. Netherland, 518 U.S. 152, 162-163 (1996). "[M]ere similarity of claims is insufficient to exhaust." Duncan, 513 U.S. at 366.

Fair presentation also requires a state prisoner to "invok[e] one complete round of the State's established appellate review process." Carey v. Saffold, 536 U.S. 214, 220 (2002). "In Pennsylvania, one complete round includes presenting the federal claim through the Superior Court on direct or collateral review." Moore v. McCready, 2012 WL 6853243 at *6 (E.D. Pa. 2012) (report and recommendation). "The burden of establishing that . . . claims were fairly presented falls upon the petitioner." Lines v. Larkin, 208 F.3d 153, 159 (3d Cir. 2000).

"The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." Rose v. Lundy, 455 U.S. 509, 518 (1982). "[I]t would be unseemly in our dual system of

government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." Id. (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)).

"[I]f the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. . . there is a procedural default for purposes of federal habeas." Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991)).

C. Cause and prejudice and miscarriage of justice

When a claim is procedurally defaulted, federal habeas review "is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[ ] will result in a fundamental miscarriage of justice." Id., 501 U.S. at 750.

"'[C]ause' under the cause and prejudice test must be something external to the petitioner, something that cannot fairly be attributed to him." Id. at 753 (emphasis omitted). Generally, "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" Id. at 753 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).

There is, however, a "narrow exception" to the general rule of Coleman: "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Martinez v. Ryan, 566 U.S. 1, 9 (2012). This "narrow exception" has four requirements:

"(1) the claim of 'ineffective assistance of trial counsel' was a 'substantial' claim; (2) the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the 'initial' review proceeding in respect to the 'ineffective-assistance-of-trial-counsel claim'; and (4) state law requires that an 'ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding[,]'" or "makes it virtually impossible for appellate counsel to adequately present an ineffective assistance [of trial counsel] claim on direct review." Trevino v. Thaler, 569 U.S. 413, 423 (2013) (quotation marks and citation omitted).

The miscarriage of justice gateway to defaulted claims first "requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324 (1995). "Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." Id. at 316. "Evidence is not new if it was available at trial, but a petitioner merely chose not to present it to the jury." Goldblum v. Klem, 510 F.3d 204, 226 n.14 (3d Cir. 2007) (quotation marks and citation omitted). In addition, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Schlup, 513 U.S. at 327. "[T]he Schlup standard is demanding and permits review only in the extraordinary case." House v. Bell, 547 U.S. 518, 538 (2006) (quotation marks and citations omitted).

D. Deference to state court adjudications on merits

When a federal claim has been adjudicated on the merits in the state court proceedings, the "restrictive" and "deferential" standard of review set forth in 28 U.S.C. § 2254(d) applies to the claim on federal habeas review. Johnson v. Williams, 568 U.S. 289, 293, 297 (2013). Section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d). "[T]he requirements of § 2254(d) are difficult to meet." Johnson, 568 U.S. at 292. This section "sharply limits the circumstances in which a federal court may issue a writ of habeas corpus to a state prisoner." Id. at 298.

"Section 2254(d)(1)'s 'clearly established' phrase refers to the holdings, as opposed to the dicta, of [the United States Supreme Court's] decisions as of the time of the relevant state-court decision." Lockyer v. Andrade, 538 U.S. 63, 71 (2003) (quotation marks and citation omitted). "In other words, 'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Id. at 71-72.

"A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in [the United States

Supreme Court's] cases, or if it decides a case differently than [the Court] ha[s] done on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694 (2002). "[A] run-of-the-mill state-court decision applying the correct legal rule . . . to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Williams v. Taylor, 529 U.S. 362, 406 (2000).

"The court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies it to the facts of the particular case." Bell, 535 U.S. at 694. "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. . . . The state court's application of clearly established law must be objectively unreasonable." Lockyer, 538 U.S. at 75. There must be "no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e] [Supreme] Court's precedents." Nevada v. Jackson, 569 U.S. 505, 508-509 (2013) (per curiam). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Harrington v. Richter, 562 U.S. 86, 102 (2011). The decision reviewed under section 2254(d) is "the last state-court adjudication on the merits." Greene v. Fisher, 565 U.S. 34, 40 (2011).

E. Deferential ineffectiveness standard

The clearly established federal law regarding claims of ineffective assistance of counsel is found in Strickland v. Washington, 466 U.S. 668 (1984). Cullen v. Pinholster, 563 U.S. 170, 189 (2011). Under Strickland, judicial scrutiny of counsel's performance is "highly deferential" and counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment.” 466 U.S. at 689-690. “To establish ineffective assistance of counsel a defendant must show both deficient performance by counsel and prejudice.” Premo v. Moore, 562 U.S. 115, 121 (2011) (quotation marks and citation omitted).

“To establish deficient performance, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness.” Richter, 562 U.S. at 104 (quotation marks and citation omitted). “The challenger’s burden is to show ‘that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.’” Id. (quotation marks and citation omitted).

“Of particular importance in a claim of appellate or PCRA counsel ineffectiveness is the ‘well established principle that counsel decides which issues to pursue on appeal and there is no duty to raise every possible claim.’” Figueroa v. Mooney, 2016 WL 4975211 at *10 (E.D. Pa. 2016) (report and recommendation) (quoting Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996)). “This process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” Smith v. Murray, 477 U.S. 527, 536 (1986) (quotation marks and citation omitted). “Generally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of counsel be overcome.” Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986) (quoted with approval in Smith v. Robbins, 528 U.S. 259, 288 (2000).

“With respect to prejudice, a challenger must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.’” Id. (quotation marks and citation omitted). Prejudice “requires a substantial,

not just conceivable, likelihood of a different result." Pinholster, 536 U.S. at 189 (quotation marks and citation omitted).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). "Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both highly deferential, . . . and when the two apply in tandem, review is doubly so." Richter, 562 U.S. at 105 (quotation marks and citations omitted). "The Strickland standard is a general one, so the range of reasonable applications is substantial." Id.

F. Deference to state court factual determinations

Pursuant to the federal habeas statute, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C.A. § 2254(e)(1). "This presumption of correctness applies to factual determinations of both state trial and appellate courts." Lewis v. Horn, 581 F.3d 92, 111 (3d Cir. 2009). "Implicit factual findings are entitled to § 2254(e)(1)'s presumption of correctness as well." Id. "Additionally, . . . [section] 2254 does not condition deference to state court factual findings on whether the state court held a hearing." Id.

ARGUMENT

THE HABEAS PETITION SHOULD BE DISMISSED AS IT DOES NOT MEET THE QUALIFICATIONS FOR A SECOND PETITION AND IS UNTIMELY, DEFAULTED, AND MERITLESS.

In the instant second habeas petition, petitioner presents affidavits from the two eyewitnesses from his trial, Emmanuel Claitt and Robert Mickens, recanting their testimony. He claims that these affidavits provide newly-discovered evidence that these witnesses' entire testimony was fabricated for them by a cabal of detectives and prosecutors, and that they were instructed to lie about the extent of their plea agreements. These recantations are so unreliable as to not meet the requirements for a second petition. Additionally, petitioner is unable to demonstrate that he meets the habeas statute's timeliness requirements, where he filed his habeas petition four years after obtaining the affidavits and made no prior attempt to interview these witnesses, even when he allegedly had cause to do so decades earlier. Nor are the alleged "facts" from these dubious recantations reliable such as to grant him equitable tolling. Also, his claims are defaulted because the state court found them untimely raised under state law. Finally, even if considered on the merits, petitioner's claims fail. His free-standing claim of innocence is not a basis for habeas relief and his claim that the state court violated "due process" in how it applied its own state law on collateral review is not cognizable. For all of these reasons, habeas relief should be denied.

I. PETITIONER HAS NOT SATISFIED THE HABEAS STATUTE'S REQUIREMENTS FOR A SECOND PETITION.

The habeas statute creates a substantial burden for a petitioner to overcome before obtaining review of a second petition, such as the one filed in the instant matter. The statute reads as follows:

> **(2)** A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--
> **(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> **(B)(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> **(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C.A. § 2244(b).[1]

Petitioner is not raising a new rule of constitutional law, so the first exception does not apply. He is claiming that the recantations meet the second exception, based on the

[1] Notably, these requirements are stricter than those to create a gateway to actual innocence in a first petition, under Schlup v. Delo, 513 U.S. 298 (1995) (discussed infra in Section II(E)), in that the statute requires petitioner to additionally demonstrate due diligence and prove his qualification with clear and convincing evidence. Cooper v. Woodford, 358 F.3d 1117, 1119 (9th Cir. 2004). Because this is a second petition, it is the statutory requirements, rather than those articulated in Schlup, that control. See McQuiggin v. Perkins, 569 U.S. 383, 397 n.1 (2013) (we held inapplicable to first petitions the stricter standard AEDPA prescribed for second-or-successive petitions); House v. Bell, 547 U.S. 518, 539 (2006) (recognizing that AEDPA "clear and convincing" standard applies to second and subsequent petitioners, while Schlup standard applies to first petitions).

unsupported accusations of misconduct made against the police and prosecutors. ECF Doc 2-1, at 135-148.[2] Although the Third Circuit determined that petitioner had made a prima facie showing that his petition satisfied the second exception, it is ultimately for this Court to serve as the gatekeeper to determine whether he in fact has met the exception. As explained below, petitioner did not meet either prong of this exception. He has proffered the least reliable form of evidence: recantations from fellow career criminals making outlandish, unsupported accusations against police and prosecutors. Therefore, respondents respectfully request that this Court determine that petitioner has not met the stringent requirements for review of a second petition.

A. The Court of Appeals has not issued a final ruling on the issue; this Court makes the determination of whether the statute's requirement was met.

Even where the Court of Appeals has preliminarily authorized the filing of a second petition for a writ of habeas corpus, this Court is required to conduct its own independent gatekeeping analysis of whether the statutory requirements for a second petition have been met. See 28 U.S.C. § 2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section"); Goldblum v. Klem, 510 F.3d 204, 220 (3d Cir. 2007) ("if a court of appeals finds that a petitioner has made a prima facie showing, the district court is obligated to conduct an independent gatekeeping inquiry under section 2244(b)(4)").

[2] The numbers of the pages are obscured in this document because multiple headers are printed on top of each other. Thus, any page number references to ECF Doc 2-1 herein reference the page of the pdf file on the ECF system.

Here, as detailed below, petitioner is unable to meet the above-quoted statutory exception to have a second or subsequent petition reviewed. The alleged factual predicates for petitioner's claims could have been discovered through due diligence many years ago, if they were in fact true. Moreover, the facts underlying petitioner's claims do not come close to establishing by clear and convincing evidence that no reasonable juror – not even one – would have voted to convict him. Petitioner has not satisfied the statutory requirements for merits review of a successive habeas petition, and thus, his petition should be dismissed.

B. Petitioner's offer of proof does not meet the standard of reliability.[3]

The recantations proffered by career criminals now claiming they perjured themselves and making unsupported accusations against police and prosecutors do not come close to the quality of evidence that demonstrates by clear and convincing evidence that no juror would convict upon hearing it. Even under the more lenient Schlup standard, recantations do not qualify as "reliable." "Affidavits of recantation do not fall into any type of reliable evidence – exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – identified in Schlup." Ajamu-Osagboro v. Patrick, 620 F.Supp.2d 701, 718 (E.D. Pa. 2009). Indeed, recantation evidence is inherently unreliable. See United States v. Williams, 70 Fed.Appx. 632, 634 (3d Cir. 2003) ("cases are legion that courts look upon recantations with great suspicion"); Landano v. Rafferty, 856 F.2d 569, 572 (3d Cir. 1988) ("Courts have historically viewed recantation testimony with great suspicion"); Ajamu-Osagboro, 620 F.Supp.2d at 718 ("Recantation testimony

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[3] For ease of discussion, respondents will address the second prong first, and then discuss the diligence prong in the next section.

is inherently untrustworthy"). As it is "inherently suspect," recantation evidence does not meet the clear and convincing evidence standard that no reasonable factfinder, upon learning of the recantation, would have still found petitioner guilty. Swainson v. Walsh, CIV.A. 12-165, 2014 WL 3508642, at *6 (E.D. Pa. July 16, 2014). Thus, by their very nature, these affidavits do not meet the requirements to establish an exception to the prohibition against second and subsequent petitions.

Moreover, the reasons for finding these particular recantations unreliable are far more than just generic distrust of recantations. They include the significant improbability of the specific story underlying the recantations, the incentive for the recanters to lie, and the objective evidence countering their assertions.

1. The police did not fabricate long detailed stories.

The most obvious reason to find that these recantations do not meet the standard for reliability is that the probability of them being true is highly unlikely. These witnesses both claim that the **entirety** of their accounts was made up for them by several police and prosecutors. See Doc 2-1, at 173 (Claitt: "Everything I testified to at Major Tillery's trial and William Franklin's trial about witnessing an argument between Alfred Clark and Joseph Hollis, threats made by Major Tillery against John Pickens and the shootings at the pool hall a few days later was false. My testimony was made up while being questioned by homicide detectives Larry Gerrard, Ernest Gilbert and Lt. Bill Shelton and being prepped by ADAs Ross, Christie and King to testify against Major Tillery and William Franklin"); id. at 181 (Mickens: "At the trial I falsely testified that I was a look-out during the shooting of John Hollis and John Pickens. That was totally false. My entire testimony

was scripted and rehearsed by ADA Barbara Christie"). However, this would require several factors to be true, which individually would be unlikely enough, and combined go well beyond the realm of reasonable possibility.

First, for the recantations to be true, it would require several detectives and prosecutors to demonstrate such an extraordinary disregard for professionalism, justice, and morality as to provide entirely fabricated stories to two people who were not even present for the events they claim to have witnessed. Claitt claims that Lt. Shelton "said [he] would be framed in another murder" if he did not adopt the manufactured statement against petitioner. Doc 2-1, at 174. Forcing a total non-witness to become the sole eyewitness to the murders requires malicious intent that goes well beyond the misconduct, however unacceptable, normally attributed to over-zealous prosecutors and police. Moreover, despite petitioner's fondness for characterizing himself as the victim of a grand conspiracy, even **he** has never explained the motive for so many police and prosecutors to take such extreme measures in targeting him four years after the crime took place, such that they would manufacture their case from nothing.[4]

Second, even if all of these police and prosecutors had the requisite level of malice to fabricate their entire case against petitioner, they would also need the creative abilities of the very best novelists to fabricate the statements and testimony from nothing. To fully appreciate the depth of imagination it would take to fabricate these accounts, one would need to read the entirety of the witnesses' statements and extensive testimony. However,

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[4] As explained infra, if police simply wanted to "clear" the case, there was much easier target to choose.

even examination of selected details should more than suffice to show that police detectives did not compose these accounts from their own imaginations.

a. Claitt's story is far too detailed to have been made up by police.

Claitt claims that the police not only made up his witnessing the crime, but also fabricated an entire meeting that took place two days earlier. ECF Doc. 2-1, 164. But if police wanted to pin the crime on petitioner, they needed only coach Claitt to say that he witnessed petitioner pull the trigger. And it strains credulity to believe that the police would have been able to invent the details described by Claitt. As Claitt described the meeting in his trial testimony, he arrived at Dana Goodman's house along with Alfred Clark, James, Ravenell, Fred Rainey, and petitioner (N.T. 5/14/85, 27). Dana and Lawrence Goodman were already there. After about five to ten minutes of waiting in the kitchen, John Pickens, "Shank," and Joe Hollis arrived. Id. at 27-28. For the police to think not only of who was present at the meeting, but the order in which they arrived, and the room in which Claitt waited would require great attention to detail. In detailing the argument that ensued, the police and prosecutors allegedly went into extraordinary detail as to who said what, every line of dialogue in that exchange, the exact place that people grabbed each other, how guns were held, and the point at which Claitt could no longer see people. All of this detail occurs in this small fragment of Claitt's much larger testimony:[5]

> Well, John Pickens confronted Alfred Clark. He asked Alfred, he said, said Alfred, he said, "how come you took the drugs from – from Mark Garrick?" Alfred – responded, he asked him why he wanted to know. And John

[5] It appears from the transcript that Claitt spoke with a stutter. Hence, the awkward syntax.

> Pickens told him the drugs that he took were his because he was partners with Mark Garrick in the heroin that he took. And that – Alfred Clark said, "It's too late because the drugs are already out on the street."
>
> …
>
> Pickens said was that – "that mean I'm going to take a loss?" And Alfred said, "Those were the breaks." So, after he said that, Joe Holis asked Alfred, you know, like – like, "what do you think? . . . You are not a real gangster" and Hollis grabbed Alfred by the collar and took a pistol and smacked him across the face with the pistol. After he smacked him, he leveled the gun off, like leveled off and as though he was going to shoot him and John – John Pickens pushed his hand out and said that we don't have to do it that way. We can talk this over.
>
> After that happened, Dana Goodman said that they were going to have to leave his house with those guns because when Hollis drew his gun and smacked Alfred, Gregory and John Pickens drew guns. . .. After Dana made the statement that they had to leave the house with those guns like that . . . John Pickens, Gregory which his name is Shank and Joe Hollis . . . backed out of the kitchen, like, Fred said to John Pickens, he said, "I want to talk to you." So Fred Rainey went out with them. Where they went after that, after they left the kitchen, I didn't see but it looked as though they was going out the door.

N.T. 5/14/85, 28-29 (quotation marks added for ease of reading).

Second, the level of detail in Claitt's description of the shooting itself, just a portion of which is reprinted here, seems far more complex than what police would need, if they were just trying to frame petitioner. It also seems very difficult for a non-eyewitness to fabricate this level of detail. Claitt testified:

> Well, Alfred had began to – to – to discuss the business that was at hand, which was to be about drug – area and discrepancies that they were having in West Philly and when he was – before he began to discuss that, he had

mentioned it to Joe Hollis that that incident out in West Philly was not forgotten, the incident talking about at Goodman's house. He had let Hollis know that that wasn't forgotten.

And at that point, [petitioner] said, well, to Joe Hollis – he asked him did he remember that he smacked Alfred out in West Philly at Dana Goodman's house with a pistol and Joe Hollis asked him, well, so what? What about it, right? We came out here to talk about, you know, cooling things out, making the peace.

And so [petitioner] then said that … none of us had, like, never approached Alfred in that manner and he had wanted Joe Hollis to apologize. He feel as though Joe Hollis owed Alfred apology to what he did – did to him at Dana Goodman's house.

And, like, Joe Hollis like said he remembered it but what about it. And [petitioner] went on to say, you know, like, none of us did this job, you know, caused these and what have you and he wanted him to apologize and Hollis said he wasn't going to do that. And so [petitioner] then said, right, you know, like as a smart gesture, you know, okay.

And in saying that, like, he looked to the other end of the pool table which directly straight ahead was William Franklin. Like, he gave William Franklin a gesture, and, like I was standing back, you know, looking at everything that was happening around the pool table. I noticed him nod his head and in compliance with Franklin.

And at that time, [petitioner] and Franklin, like, they – they took their hands and went underneath the pool table. Where [petitioner] was standing at, James Ravenell was positioned where, when he went down under the pool table, he didn't . . . bend down in a body gesture. He took his hand and went just, like, underneath the pool table.

When they came from underneath the pool table with their hands, I noticed [petitioner] to have a gun in his hand. And when he went underneath it and came from underneath the table, he had the gun and placed it around to – to his back.

> And at the same time, he started to see around James Ravenell and . . . for whatever reason that he had, he just stepped around Ravenell and Hollis was standing with his attention toward Alfred talking and [petitioner] just shot Joe Hollis in the back. . . .
>
> It appeared to me that – that Joe Hollis had been hit at the time because of the way he jolted. When I heard the sound of the gun go off, I didn't see where the bullet actually traveled but I seen Joe Hollis jolt and jolt.
>
> In falling he went up against the pool table and, like, he went up against the pool table and, like, was about to make a turn in my direction. And me seeing him got shot once and come in my way, I wanted to get out of the range of fire because [petitioner] still had the gun pointed at him.
>
> And when he turned to, like, as though to get out of the way of where he was – you know, he was being shot, [petitioner] fired again. But – but before [petitioner] fired, John Hollis – Jo – Jo – Jo – John Pickens objected to what was – what had happened about Joe getting shot.

N.T. 5/14/85, 60-62.

Claitt also claims that "it was also a total fabrication that [petitioner] pulled a gun on me and threatened to shoot me in Philadelphia in early 1983." ECF Doc 2-1, at 175. Again, it takes significant effort for police and/or prosecutors to come up with an entire non-existent instance of witness intimidation. Moreover, the level of detail, involving various people, clearly came from Claitt, not a third-party non-witness.

> I ran into [petitioner] around 3 blocks from my family's business establishment up in West Oak Lane section. . . . I had came to the intersection of – of Kimball and Nedro Avenue and Kimball and Nedro is an intersection where it's a point. It comes to a triangle point and there's a bar called the Pigeon Coop and it's a telephone that sits right on the point of the triangle.
>
> And I was going there to meet a gentleman by the name of Donald Lattimere who was an associate of mine in the drug world.

> Upon my arrival there, I had a female in a 1981 Fleetwood of mine and when I pulled up on the corner near the telephone booth, I left my car running and as I got out to meeting Donald on the corner, a friend of mine sig – signaled to me to go back . . . .
> In the direction that he waved his – this person waved their hand, I looked in that direction, to – to see [petitioner] getting – getting out his car and he was running in a gesture where – where he had a gun in his hand but down, pointed down and he was, like, trying to creep up on me from across the street near Church Lane. . . .
> When I seen then, by that time, I had got in my car and I had left my car running and I proceeded to just get away from where [petitioner] was coming. And as I was driving off, which I – I pushed down on the accelerator very hard because I realized that he had a gun in his hand and I realized that I – he had knowledge of my testimony against him on a murder charge at a preliminary hearing against his codefendant…

N.T. 5/14/85, 90-92.

Finally, it bears noting that the cross-examination took two days of trial. Claitt was able to recount in great detail events that he allegedly never experienced, answer questions about these events for three days, and then convince twelve people to unanimously agree that these events had taken place. The recantation claiming that he was able to do this simply by recounting a story wholly fabricated by law enforcement is highly improbable.

b. Mickens' testimony was not scripted.

Without belaboring the same point with Mickens, it still bears noting that the level of detail in his testimony belies the assertion that the prosecutor "scripted" it. For instance, on cross-examination, defense counsel insinuated that it did not make sense for Mickens to look out for police on Warnock Street, when the intersecting street Huntingdon was

allegedly the more "main" street. N.T. 5/21/85, 65-66. Mickens explained this, without leading questions, on redirect: "Well, at that time stake-out unit is in the regular police. They knew that certain people were approaching certain areas certain ways. So, knowing me, if they was trying to sneak up on me, they wouldn't buck traffic coming up Warnock, center the north side or the south side." Id. at 117. Mickens then elaborated, "I could conceal myself better on Warnock Street and plus if the cops did come, I could knock on the side glass without the cops nosing there." Id. Petitioner, and his new-found friend Mickens, would like this Court to believe that the prosecutor was so clever and creative that she "scripted" this unintuitive explanation for Mickens to give on redirect examination in case defense counsel happened to ask on cross-examination about his choice of street to stand upon. This is highly implausible. His recantation should be disregarded.

2. It does not make sense for the police to fabricate complex stories for the witnesses while making them far less helpful than they could have been.

Paradoxically, for Claitt's and Mickens' story to be correct, the police would have been so clever as to write an incredibly detailed story of multiple events for the witnesses, yet so foolish as to miss opportunities to make this a much easier case to close.

Most obviously, the police and prosecutors inexplicably did not use Mickens to their full advantage. According to Mickens, his "entire trial testimony was scripted and rehearsed" by the trial prosecutor and was "totally false." ECF Doc 2-1, at 181. If this were true, it is inexplicable why the allegedly clever and unscrupulous prosecutor scripted a story that was so minimally helpful. Mickens testified at trial that shortly before the murder, petitioner asked him to stand outside the poolhall as a lookout. N.T. 5/21/85, 32-36. He also testified that a few days after the shooting, petitioner asked him to be an alibi

witness for him. Id. at 17. While this established petitioner's presence at the scene and a certain consciousness of guilt, it still allowed room for petitioner to claim that one of the many other people in the poolhall was responsible for the shooting. If the prosecutor was willing to "script" anything, it is unfathomable that she did not write the script to include Mickens as a witness to the shooting, who would identify petitioner as the shooter.

Likewise, Mickens testified that after he heard the shots, he saw William Franklin running with a gun in hand in hot pursuit of the person who had earlier entered with Mr. Hollis. N.T. 5/21/85, 39-40. Mickens testified that petitioner emerged sometime later, and made no mention of a gun or pursuit. Id. at 43. If the prosecutor was willing to script anything needed to convict petitioner, it does not make sense that she failed to include in her "script" that petitioner had a gun and was pursuing individuals. The absurdity of Mickens' accusation about his testimony being "scripted" casts into doubt everything else that he claims.

Second, it would have been impractical to pin the crime on petitioner, when there were much easier targets. For instance, responding police had seen Alfred Clark's vehicle at the scene when they first arrived, and then found it gone shortly thereafter. N.T. 5/9/85, 86, 112-114. Police managed to stop that vehicle and Alfred Clark fled from it. Id. at 68. Thus, if police were simply looking to score a "clearance," it would have been far easier to "script" their witnesses to accuse Alfred Clark. In fact, Alfred Clark was dead by the time of trial (id. at 128), so accusing him would have ensured virtually no risk of the clearance being challenged. Moreover, they would not have needed to wait four years to clear it. Finally, if police and prosecutors were so unscrupulous, it is strange that they

would be so honest as to introduce evidence to the jury about Clark that would leave petitioner with an avenue for pointing to an alternate suspect.

In fact, having to pursue the case against petitioner was terribly inconvenient for the detectives whom Claitt accuses of corruption, because petitioner was so difficult to find. Detective Girard testified that he had to spend ten days in the back of a van on a stakeout for petitioner. N.T. 5/20/83, 57. Presumably, a corrupt detective who will do anything to clear a case would not unnecessarily inconvenience himself this way. Petitioner points to no evidence whatsoever that Detective Girard would have any reason to want to target him. And if Detective Girard really did have such a burning desire to arrest petitioner, no moral scruples, and a limitless imagination, then it is impossible to understand why it took him **four years** after the crime to force someone to give a statement against petitioner, or why this belatedly identified witness was someone who could be easily challenged in court with his own criminal past.

3. Claitt and Mickens have several motives to falsely recant.

While petitioner fails to establish any reason why a cabal of prosecutors and detectives would conspire to convict him, it is not difficult to readily ascertain Claitt's reasons for his sudden recantation. Claitt himself states his disdain for law enforcement. He claims that "[a]fter Major Tillery's trial I was told I hadn't done good enough, that I 'straddled the fence.' In 1989 I was convicted of felony charges and spent 13 ½ years in prison for something I didn't do and framed by the ADA." Doc 2-1 at 176.

This statement is revealing for multiple reasons. First, it appears from the docket that Claitt pled guilty to multiple charges, making his allegation that he too is an innocent

man framed by law enforcement especially suspect. See Exhibit G (Claitt's criminal history); online dockets for CP-51-CR-0513651-1989; CP-51-CR-0630691-1989; CP-51-CR-0726811-1989, located at www.pacourts.us/courts/courts-of-common-pleas/docket-sheets. Second, it makes no sense that the prosecution would claim that he "straddled the fence," in this case. Claitt made no denial or hedging that he was testifying to what he witnessed. Third, it is clear he bears a grudge against the Commonwealth because he served over a decade in prison starting four years after his testimony. Fourth, rather than taking responsibility for his crimes, Claitt (much like petitioner) blames law enforcement for his jail time. Fifth, Claitt was literally a partner in crime with petitioner, as they worked for the same crime boss, Alfred Clark. Sixth, even by the time of trial, other criminals made Claitt suffer for his cooperation with police. N.T. 5/16/85, 45 ("missionaries" for petitioner in prison threatened Claitt and his family); 98 (after testifying against Franklin, Claitt was stabbed in the eye in prison). Petitioner apparently did not become any less dangerous while in prison, as he continued to orchestrate assaults, threats, gambling, and gang activities. See Conquest v. Hayman, CIV. A. 07-2125 MLC, 2011 WL 1322153, at *9 (D.N.J. Mar. 31, 2011) (discussed in greater detail infra at Section II(D)). The dangers of "snitching" in Philadelphia have certainly not lessened over time. Indeed, a witness in a homicide case today almost invariably recants **at trial**, usually by claiming police made up or forced the statement. Therefore, Claitt's motivations to dishonestly recant are obvious and plentiful.

Likewise, Mickens has many of the same motives. Mickens expresses his displeasure that after cooperating with law-enforcement in other cases, they allowed information to be leaked to the press, causing him to be in danger of being labeled a

"snitch." ECF Doc 2-1, at 180. As he put it, he "complained" about this to the trial prosecutor in the instant matter. Id. As detailed further below, Mickens faced a great deal of intimidation regarding his testimony. And it seems that following trial, he remained in the criminal world where cooperating with law enforcement is abhorred. In 2001, Mickens was arrested again for retail theft, MC-51-CR-0108481-2001. Someone in Mickens' position has far more to gain in the "no snitch" culture around him by recanting his statement than by keeping petitioner in prison for a murder that has no personal significance to Mickens.

4. Claitt's and Mickens' claims about undisclosed deals are unsubstantiated and disproven.

Both Mickens and Claitt claim that with regard to their open cases that they disclosed to the jury, they also had secret deals that they hid from the jurors, allegedly pursuant to the prosecutor's instructions. Respondents are placed at a terrible disadvantage in responding due to the extreme tardiness of these claims, where it is now impossible to assemble the normal evidence that would be used to rebut them. Nonetheless, it must be noted that of the objective evidence that is available, none of it supports petitioner's claim, and some of it in fact rebuts the claim. In fact, it shows that rather than "dropping" Claitt's open case pursuant to a deal, the prosecution was forced to *null pros* the case when the complaining witness failed to appear. Thus, the claims of a "secret deal" do not have sufficient reliability to meet the statutory exception for second petitions.

a. Claitt did not get an undisclosed deal.

The jury was well-aware that Claitt received significantly reduced jail time for a number of cases because of his cooperation. Nonetheless, Claitt now claims that he

received an additional benefit with a robbery case that he told the jury was open, and was coached to lie about this at trial. ECF Doc 2-1, at 170. It is hardly a coincidence that he makes such a claim for petitioner's benefit. Petitioner claimed in his second PCRA litigation (2007-2009) that Claitt had lied about that robbery charge being an open case because it was dismissed three years after Claitt testified. See Second PCRA Petition, filed 8/13/07 (Exhibit B), at 21 (quoting Claitt's trial testimony that he received no agreement for his pending robbery charge followed by petitioner's editorializing "this testimony was false and known to be so by the Commonwealth and should have been corrected").

However, there is objective evidence that the charges were not dismissed pursuant to a deal, but rather because the victim of the robbery failed to appear at trial. Petitioner (who wishes to give the impression of an isolated prisoner without access to anything), apparently has more materials than are available to Respondents, as he has the notes of testimony from that case, which he attached to his second PCRA petition. Commonwealth v. Claitt, CP-51-CR-0537641-1983, notes of testimony, 12/16/87 (attached here as Exhibit H).[6] It turns out that the charges were *null prossed* because the victim left the courthouse without permission. Exhibit H, at 3. The victim proceeded to disregard a bench warrant. Id. Additionally, the prosecution requested a *null pros* (rather than a court dismissal) so it could investigate whether there was witness intimidation. Id. at 6. Thus, it was against the wishes of the prosecution that the robbery case against Claitt had to be dropped, and hardly depicts a scenario where the

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[6] Respondents find it curious that petitioner omitted certain pages, and if the issue is further litigated, will file a discovery motion to obtain the complete transcript from petitioner.

prosecution dropped the case due to some undisclosed "deal." Therefore, Claitt told the truth when he testified three years earlier that the robbery case was still open without agreement.[7] This is further evidence that Claitt's recent declaration, written for the benefit of petitioner, is false.

Moreover, the jury was well aware that Claitt was testifying pursuant to agreements with the Commonwealth that enabled him to receive little jail time in return for his cooperation. Claitt testified that he had eight open cases at the time he gave his statement to police. N.T. 5/15/85, 8. He acknowledged that his lawyer recommended to him that he cooperate with police so as to curry favor with the District Attorney's Office and get a reduction in his punishment. Id. at 14. As soon as Claitt testified against petitioner's fellow-shooter William Franklin, the District Attorney's Office went to a judge and got Claitt's detainer lifted, allowing him to leave jail immediately. Id. Claitt testified that as a result of his cooperation, prosecutors dropped three of the cases against him. Id. at 19. For three of the remaining cases, for which Claitt pled guilty, the District Attorney's Office wrote a letter to the judge explaining his cooperation. Id. at 19. The judge sentenced Claitt to a minimum of 18 months in prison. Id. at 20. Claitt ended up serving even less than that before being paroled. Id. at 21. Although Claitt was acquitted in two of his eight cases (N.T. 5/15/85, 6, 16), the jury learned the bottom line was that, as a result of his cooperation, Claitt served eighteen months for six cases that included: car theft, possession of drugs, weapons possession (N.T. 5/14/85, 86), attempted arson

[7] The following part of cross-examination gives insight into Claitt's state of mind that he intended to take the case to trial:
Q. [by defense counsel]: "And now you were faced with being in violation of your parole and another open case for robbery, is that correct?"
A. [by Claitt]: "Only if I'm found guilty of that robbery." N.T. 5/15/85, 24-25.

(N.T. 5/15/85, 20), and selling drugs (id.). Thus, any claim by petitioner that the prosecution and Claitt had concealed from the jury that he received significant benefits for his cooperation are belied by the record.

Moreover, there is additional corroborating evidence that Claitt was not given a deal beyond the positive recommendation of the prosecution. The notes of testimony from Claitt's sentencing following his guilty plea to drug dealing and conspiracy in the arson case reflect as much. After the prosecutor informed the sentencing court of Claitt's ongoing cooperation, the court asked what the recommended sentence was. The prosecutor stated: "As part of the negotiation the Commonwealth agreed to make no recommendation, so that we are bound not to make a recommendation." Commonwealth v. Claitt, N.T. 9/17/81 (Exhibit I), 7. This is also consistent with what the court advised Claitt at his guilty plea hearing. Commonwealth v. Claitt, N.T. 11/28/80, at 42 (exhibit to second PCRA petition, at 16) (attached here as Exhibit J) (The District Attorney "is not going to recommend any sentence in this case and that will be purely within my discretion as to what the appropriate sentence should be").

Interestingly, Claitt was not even consistent with his recent claims of secret deals. In his first declaration, signed May 4, 2016, he claimed that detectives and prosecutors promised him that if he cooperated: "I wouldn't get state time in my many pending criminal charges and I wouldn't be charged in the murder of Samuel Goodwin, that I had nothing to do with." ECF Doc 2-1, 161-162.[8] In his "supplemental" declaration, signed on June

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[8] Claitt testified at trial that detectives initially suspected him of the Goodman murder, and he went to talk to them in part to deny his involvement. N.T. 5/14/85, 12-15. If Claitt's testimony was merely scripted by the police and prosecutors, it seems very odd that they would include this in their "script."

3, 2016, Claitt claims that he "had been promised the DA's recommendation to receive no more than 10 years." ECF Doc 2-1, at 169. Nor is this "supplement" -- really an amendment from "no state time" to "no more than 10 years" -- surprising, because in petitioner's second PCRA petition (from 2007) petitioner had claimed that the prosecution had recommended no more than 10 years. PCRA Petition, 8/13/07, at 5-6. Apparently, Claitt adjusts his story to petitioner's liking so as to match the claims petitioner made in the past. This is hardly reliable.

b. Petitioner presents no supporting evidence that Mickens received a secret deal negotiated before the end of petitioner's trial.

Mickens claims that the Commonwealth promised him "no prison time" on his pending rape case. Doc 2-1, at 181. At trial, Mickens explained that he had pled open to rape, was awaiting sentencing, and that no promises as to his sentence had been made. N.T. 5/21/85, at 26. However, he also informed the jury that the prosecution was dropping other related charges in his case, including robbery. Id. at 25. At trial, Mickens told the jury that he expected the Commonwealth would tell the sentencing judge that Mickens had provided information on this and other murders and that he believed the judge would give him a "little tap on the wrist" for the rape and robbery. N.T. 5/21/85, 26, 55-56.

Petitioner presents no evidence that the sentence eventually imposed on Mickens was the result of any agreement made at any time, let alone prior to petitioner's trial.[9] He does not provide the transcripts of Mickens' sentencing hearing or any other court

[9] It is difficult to ascertain from the computerized version of the court records what that sentence actually was. The record states there was a sentence of "confinement" for rape and a minimum of 5 years of probation for conspiracy. The length of confinement for the rape is not specified. (Record is attached as Exhibit L).

documents supporting his allegations. Instead, he merely speculates that the sentence imposed must have been the result of a secret deal made prior to trial. What is certain is that the mere representation of Mickens, in the context of a recantation of testimony made decades earlier, is the least reliable form of evidence of an allegedly undisclosed deal. It is all too easy for Mickens to simply sign whatever petitioner would like to forward to the court. As petitioner has not produced objective, reliable evidence of an undisclosed deal, he has failed to meet his burden to show that he has previously unobtainable evidence that would convince twelve jurors to vote for acquittal.

5. Mickens' claim that the Commonwealth falsely claimed he needed protection is not reliable.

Mickens claims: "My identity as a prosecution witness was kept from [petitioner] and his lawyer before I was called as a witness at the trial on the false grounds that I needed a protective order to protect me from [petitioner]." ECF Doc 2-1, at 181. He further claims: "That was not true. I had told [petitioner] that I would be a witness for him at the murder trial of John Hollis [i.e. the instant matter]. He had no reason to think I'd be a witness *against* him. I had no contact with [petitioner] once I was sent to Northampton County Prison. I did not fear him or ask for protection from [petitioner]." Id. (italics in original). While this "revelation" serves to fulfill petitioner's wishlist of the alleged injustices rendered against him by his imagined conspiracy, it actually further illustrates the unreliability of Mickens' recantation as a whole.

Before trial, the Commonwealth filed a motion, pursuant to a state rule of criminal procedure, requesting a protective order for Mickens. In accordance with that rule, the trial court held a hearing without defense counsel present. At the hearing, the prosecutor explained that Mickens had expressed fear for his safety in testifying at this trial.

Petitioner had seen Mickens in prison and asked him if he had given information to police. When Mickens denied it, petitioner warned him that the safety of Mickens and Mickens' family depended on Mickens not giving information to police. N.T. 4/23/85, 5. The prosecutor explained that Mickens had been transferred out of Pennsylvania, but that the safety of his family, who remained in the particular section of Philadelphia under petitioner's influence, was still in jeopardy. Id. at 5-6.

At this point, a different prosecutor named Mr. Long related the threats Mickens received as a result of his cooperation in Mr. Long's unrelated homicide prosecution. Mr. Long explained that a newspaper article had been written about Mr. Mickens' testimony for the prosecution in his case, and that the article had been posted on a bulletin board in the prison. As a result of this, Mickens had received "a lot of veiled threats." Id. at 7. Mickens had informed the prosecutor in the instant matter that he was attacked in prison. Id. at 7-8. Thus, Mickens was transferred to Northampton County Prison and placed in protective custody. Id. at 8. Based on this information, the court granted the protective order, allowing late disclosure of Mickens' statement and keeping Mickens out of the Philadelphia prison system. Id. at 9. The prosecutor then related to the court: "Mickens' only concern is that once he testifies here, however many days it takes him to testify, if it takes more than one day, that the sheriffs may forgot or not realize that he should be returned to Northampton, so that he's not left in any area where he could be in jeopardy by the population of the local prisons." Id. at 13.

At trial, defense counsel objected to the protective order having been granted, claiming that the prosecution could make such a request for every witness in every case. The prosecutor explained that the request was truly exceptional based on the

circumstances of this particular witness. The judge agreed, stating that this was the first such request he received "for many years." N.T. 5/21/85, 13. Defense counsel also argued that Mickens and petitioner were so friendly that petitioner "attempted to use him for an alibi and there was nothing in the statement that he ever refused [petitioner]." Id. at 8. The prosecutor cogently responded that the moment when it became clear that Mickens would not be an alibi witness, and in fact would be a witness for the prosecution, would be the moment where his life would become endangered. Id. at 9. Mickens corroborated in his testimony at trial that petitioner had asked him to be an alibi witness and that he agreed to do so. N.T. 5/21/85, 15-19.

Mickens' recantation statement, while superficially what petitioner would like to hear, actually does more to corroborate than undermine the prosecutor's representations to the court. Mickens states that he had requested the prosecutor to transfer him to Northampton prison because his cooperation in a different prosecution became known through a newspaper article. ECF Doc 2-1, at 180. This corroborates exactly what the prosecutor represented to the court at the hearing on the protective order. N.T. 4/23/85, 7. Mickens (uncoincidentally) repeats the faulty argument of petitioner's trial counsel that he did not need protection because he had told petitioner he would serve as an alibi witness. That argument is as irrational as when trial counsel made it, because the danger Mickens and his family faced was from petitioner finding out that Mickens would no longer serve as an alibi witness and had instead become a witness for the prosecution. Mickens claims that he faced no danger from petitioner because he was safely in Northampton prison. Not only does this actually corroborate the need for his protection, it also ignores

the prosecutor's representations that Mickens had family in North Philadelphia, the area under the thumb of petitioner and his associates in organized crime.

Furthermore, it is unclear why the prosecution would go through such extraordinary measures to protect Mickens if he had not expressed concern regarding his safety. While petitioner would have this court believe that it was a dishonest tactic to surprise the defense, the effort required, the risk of the judge finding out, as well as the necessary cooperation of yet another prosecuting attorney (Mr. Long), would hardly be justified if it were not true. Trial counsel Joseph Santiguida was one of the very best defense attorneys at the time. The prosecutor would know that Mr. Santiguida finding out late about this witness would hardly prevent him from being able to conduct an extensive cross-examination. Indeed, even a cursory review of the sixty pages of transcript containing the cross and recross-examinations of Mickens reveal counsel was not prevented from exhaustively challenging his testimony. N.T. 5/21/85, 50-99, 121-130. As the Superior Court explained on direct appeal: petitioner's counsel "received copies of [Mickens'] criminal record and statements concerning threats on Mickens' family which justified the protective order.[[10]] Moreover, [petitioner] was afforded a recess to prepare for Mickens' testimony and he then thoroughly cross-examined the witness." Exhibit A, at 10. Finally, if Mickens had never conveyed any concern to the prosecutor and the motion was just a tactic to sandbag defense counsel, then it served no purpose for the prosecutor to claim Mickens wished to go back to Northampton County **after** his testimony. Once again, petitioner would have this Court believe that the detectives and

[10] The record reflects that the defense also received the statement of Mickens to police regarding this case. N.T. 5/21/85, 6.

prosecutor had no limits to their moral boundaries and creative abilities but then they used them for little to no actual purpose.

In light of the above, it is clear that Mickens told the prosecutor that he was in fear for his safety and his claim to the contrary in his recantation is patently false. This is yet another portion of the recantation that is so implausible as to cast doubt upon the whole.

6. Claitt's and Mickens' claims about being allowed sexual favors are not of such a nature as to require a reasonable person to acquit.

Claitt claims in his statement that he "was allowed to have sex" with his four girlfriends in "homicide rooms and hotel rooms in exchange for [his] cooperation." ECF Doc 2-1, at 162. Mickens provides petitioner a throw-away line that he told detectives that he "missed" his girlfriend, so they obligingly allowed him to have sexual relations with her at the police station. ECF Doc 2-1, at 180. It is not a coincidence that Claitt and Mickens, on behalf of petitioner, would make this claim. Petitioner's fellow gangster Andre Harvey unsuccessfully tried this accusation in 2000.[11] A PCRA court held an evidentiary hearing in Harvey's case (CP-51-CR-0703051-1983), found the claim incredible, and made factual findings that are significant in understanding this claim (the PCRA court's opinion is attached hereto as Exhibit K).

The allegation in Harvey's case was that police allowed witness Charles Atwell to received sexual favors from his girlfriend Maxine Harris-Jiles. At the evidentiary hearing,

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[11] Andre Harvey was convicted of killing Fred Rainey. As established in petitioner's trial, Fred Rainey was part of Alfred Clark's faction (the same faction as petitioner), and in fact, arrived with petitioner and Claitt to the meeting at Goodman's house. N.T. 5/14/85, 27.

Mr. Atwell testified that Ms. Harris-Jiles was permitted to visit him at the police station, along with their children, so he could visit with all of them. The court found this testimony, which was corroborated by Detective Gerrard (the same detective from this case), credible. Exhibit K, at 9. The court also explicitly found incredible the testimony of Ms. Harris-Jiles that police had allowed her to provide sexual favors to Atwell, as she claimed extreme memory loss, including about the statement she gave to police regarding witness intimidation. Id. at 13.[12]

Here, Claitt does not even claim that these alleged sexual visits induced him in any way to give his statement or testimony against petitioner. In fact, Claitt testified at trial that the District Attorney's Office went to a judge and got his detainer lifted, allowing him to leave jail. N.T. 5/15/85, 14. Notably, he was released on June 4, 1980, which was only two weeks after he gave his statement to police on May 20, 1980. N.T. 5/16/85, 15, 64. Presumably, Claitt could arrange any sexual rendezvous on his own at this point without police assistance. It seems unlikely that he would make up an entire story that he would maintain during trial five years later, just to have sex two weeks early. Moreover, when viewed in context with Claitt's false allegations that the police wrote his entire testimony for him and that he was given a deal for a robbery charge that was actually dropped due to the key witness failing to appear, this appears to just be another part of the laundry list of allegations petitioner would like Claitt to make.

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[12] Respondents acknowledge that a decade prior to Harvey's PCRA hearing, in Commonwealth v. Lester, 572 A.2d 694, 697 (Pa. Super. 1990), a similar allegation was made against Detective Gerrard and was not disputed by the Commonwealth, for reasons that are no longer ascertainable.

Finally, while Respondents would not countenance such irregular police procedure if it took place, it hardly seems relevant at this point. Claitt and Mickens claim that their entire testimony was completely false and scripted later by police and prosecutors. As explained above, the "bottom line" is that these recantations have so many obvious holes and implausibilities as to be facially incredible. Neither Claitt nor Mickens claim that the substance of their police statements or trial testimony in any way turned on being able to visit their girlfriends at a particular point during their police interviews. To the contrary, they are claiming secret deals (unsubstantiated and/or contradicted by the record) and that the police and prosecutors fabricated their entire eyewitness accounts. Thus, these salacious stories of sex in the police station are not "evidence" of the nature that twelve jurors hearing it would be at all compelled to acquit.[13]

C. Petitioner does not meet the requirement that the factual predicate could not have been discovered with due diligence.

Petitioner has also failed to meet the other statutory prong for a second or subsequent petition; namely, that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." 28 U.S.C. §2244(b)(B)(i).

The factual predicate here is that the witnesses against petitioner at trial perjured their testimony inculpating petitioner, and that they did not disclose the full nature of their agreements with the prosecution. As petitioner claims his actual innocence, he would

[13] The same could be said for the allegation that Claitt and Mickens make that police put them together in the hopes that Claitt would persuade Mickens to cooperate. As Mickens is claiming that he only testified to get a secret deal, even if such an encounter took place (and there is no reason to assume it did), it hardly seems relevant to the bottom line, i.e. there is hardly clear and convincing evidence that the mere allegation of this encounter would make any reasonable juror acquit, particularly as such an alleged encounter is not *per se* police misconduct.

already have been aware that these witnesses "perjured" their testimony. In his second PCRA litigation in 2007-2009, petitioner already claimed, through use of court documents, that these witnesses had not disclosed the full nature of their plea agreements. Moreover, petitioner relied on sentencing procedures from the 1980s as alleged support for his claims. Thus, the factual predicate for a claim regarding those procedures could have been brought decades ago. Because petitioner has "known" the vital facts underlying the recantations for many years, this evidence is not previously undiscoverable through the exercise of due diligence, as required under the statute. See Swainson v. Walsh, CIV.A. 12-165, 2014 WL 3508642, at *6 (E.D. Pa. July 16, 2014) (petitioner failed to meet the due diligence requirement for second and subsequent petitions where he "offer[ed] no reasonable basis to explain" why he could not have in his prior state and federal proceedings sought the information contained in a recantation statement); Miller v. D.A. for County of Philadelphia, CV 12-0742, 2019 WL 2869641, at *10 (E.D. Pa. June 12, 2019), report and recommendation adopted, CV 12-0742, 2019 WL 2866506 (E.D. Pa. July 1, 2019) (petitioner failed to meet the due diligence requirement for second and subsequent petitions with his proffer of a recantation by witness "Arnold" because "[t]he vital fact underlying Arnold's recantations was that Arnold perjured himself at Petitioner's 1998 trial. This has been known to Petitioner since his 1998 trial").

Respondents are not raising petitioner's lack of diligence as a mere technicality or procedural trap. Rather, Respondents are truly prejudiced by petitioner's inexplicable delay. Petitioner was aware at the time of trial that Claitt had not yet been sentenced for a pending robbery charge, as Claitt testified to this. N.T. 5/14/85, at 7. Claitt's robbery charge was dismissed in 1987. CP-51-CR-0537641-1983. Thus, petitioner and his

lawyers could have followed up at any time since 1987 to investigate the reasons for the dismissal by reviewing the notes of testimony, speaking with Claitt's attorney, and even speaking with Claitt himself, if necessary. Had petitioner and his attorneys challenged the dismissal of the charges closer in time, Respondents would have a plethora of evidence to rebut the challenge, including the court file, the prosecution's file, and the prosecution and defense attorneys as witnesses to the reasons for the dismissal. Instead, Respondents must rely solely on the selected pages of notes of testimony from the dismissal of Claitt's robbery at a court proceeding in 1987, that petitioner attached to his prior pleadings, to demonstrate that the case was withdrawn because the complaining witness failed to appear despite a bench warrant, not because of a secret deal.

Likewise, the delay in bringing the claim that Mickens received a secret deal for what was apparently an open rape case at the time of petitioner's trial was completely unnecessary and prejudicial. Petitioner knew at the time of trial that Mickens was going to be sentenced. Petitioner identifies no reason why, as soon as the sentencing was completed, he and his lawyers could not have obtained the transcripts and court materials to determine if there were any improprieties or statements that could be used to support a claim that Mickens had received an undisclosed deal from the Commonwealth.

The extreme delay in petitioner making this claim severely prejudices Respondents' ability to rebut it. The undersigned attempted to obtain the notes of testimony and trial file. However, the court reporters do not maintain notes of testimony for non-homicide matters beyond seven years. Likewise, it has not been possible to

obtain the District Attorney's file for such an old non-homicide case. Thus, it is impossible to see what sentence the prosecutor asked for at Mickens' sentencing.[14]

Moreover, even if the prosecutor had asked for a low sentence because of Mickens' cooperation, that in no way proves that this was pursuant to an agreement made *before* Mickens testified against petitioner. The Commonwealth at this point has no way to call the prosecutor of that case (the Commonwealth has not even been able to ascertain the prosecutor's identity) to ask what plea recommendation was given and why, let alone produce the file that would likely contain notes needed to refresh that prosecutor's recollection about a case from more than 30 years ago.

Likewise, if petitioner wished to investigate the allegation that Claitt and Mickens were allowed to have conjugal visits with their girlfriends at the police station, he had much earlier opportunities to do so. This allegation first appeared with regard to two detectives in his case in Commonwealth v. Lester, 572 A.2d 694, 697 (Pa. Super. 1990). As discussed above, the allegation next appeared at the 1997 PCRA hearing in Commonwealth v. Harvey, CP-51-CR-0703051-1983, a case involving the murder of one of the gangsters mentioned in petitioner's trial. The delay in bringing this claim substantially prejudices Respondents. The recollection of the detectives, assuming they are even available at this point, will be substantially diminished. The same is true for the unsupported claim that detectives asked Claitt to assist them in securing Mickens' cooperation. Respondents now do not have a fair opportunity to ask detectives if the two were ever brought together, and if so, for what purpose. Had petitioner made any attempt

[14] And as explained, supra note 9, it is not even possible to determine what sentence Mickens received.

to reach out to Claitt and Mickens sooner, perhaps they would have been willing to make these accusations sooner for his benefit. His failure to even attempt it, precludes review of his second petition.

II. Petitioner fails to overcome the habeas statute of limitations.

The present petition is governed by the federal habeas corpus statute, 28 U.S.C. § 2241 et seq., also known as AEDPA (for the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), amending, inter alia, the federal habeas statute at 28 U.S.C. §§ 2241 et seq., effective April 24, 1996). Holland v. Florida, 560 U.S. 631 (2010); Lindh v. Murphy, 521 U.S. 320, 336 (1997). That statute includes a one-year time limitation on the filing of new petitions:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). Under any of these possible start dates, the petition is untimely.

A. Date judgment became final

Petitioner was sentenced on December 9, 1986. On May 30, 1989, the Superior Court affirmed Petitioner's judgment of sentence. Commonwealth v. Tillery, 563 A.2d 195 (Pa. Super. 1989) (table). On March 5, 1990, the Pennsylvania Supreme Court denied allowance of appeal. Commonwealth v. Tillery, 593 A.2d 841 (Pa. 1990) (table). Petitioner's convictions therefore became final on June 4, 1990.[15] See Sup. Ct. R. 13.1 (providing 90 days to file timely petition for writ of certiorari); Fahy v. Horn, 240 F.3d 239, 243 (3d Cir. 2001) (judgment of sentence becomes final at "the conclusion of direct review or the expiration of the time for seeking such review"). As petitioner's judgment of sentence became final before AEDPA and its statute of limitations was enacted, "the one-year limitations period runs from the AEDPA's effective date: April 24, 1996." Wood v. Milyard, 566 U.S. 463, 468 (2012). Petitioner's petition is decades too late.

B. Date factual predicate could have been discovered with due diligence

Petitioner does not qualify for a later start date on the grounds that he did not "discover" the recantations until 2016 when the witnesses signed their statements. The true date that the alleged "facts" became known to petitioner was much earlier than the date the recantation statements were signed. The vital "facts" underlying petitioner's claims are that the two eyewitnesses against him lied at trial, not that they later decided to recant. See Santiago v. Barone, CIV.A. 10-649, 2012 WL 6151748, at *2 (E.D. Pa. Dec. 10, 2012) (the vital fact in a recantation claim is that the witnesses lied at trial, not that they later decided to recant, thus the operative date is the date of trial, not the date

[15] While June 3, 1990 was exactly 90 days later, it was a Sunday.

the recantation was signed) (citing Sistrunk v. Rozum, 674 F.3d 181 (3d Cir. 2012) (likewise holding that petitioner had not shown he pursued his rights diligently where he knew of witness's perjury but did nothing about it for 12 years, the point where he received a letter from the witness recanting his testimony and claiming police coercion)). Nonetheless, petitioner made no apparent attempt to contact these witnesses until he sent an attorney to talk to them in 2016, whereupon they immediately provided statements. See ECF Doc 2-1, 191-192 (statement of Rachel Wolkenstein, Esquire, relating virtually immediate cooperation of Claitt and Mickens in recanting).

In any event, petitioner did not file the instant habeas petition until four years after the recantation statements were signed. The earliest possible date that petitioner filed the present habeas petition was April 30, 2020, the date he signed it. ECF Doc 2, at 19. Petitioner may not use as an excuse that he was waiting to see whether the state court would rule his petition untimely, as it did. See Pace v. DiGuglielmo, 544 U.S. 408, 416 (2005) (rejecting argument that exhaustion requirement forced petitioner to wait and see if PCRA petition was timely before filing habeas petition because petitioner could have filed timely "protective" habeas petition); Preski v. Shapiro, 3:19-CV-00288, 2020 WL 315758, at *6 (M.D. Pa. Jan. 21, 2020) (petitioner fails to exercise due diligence when he waits for state proceedings to end before filing claim of "new" evidence) (citing Pace, supra; Garrick v. Diguglielmo, 162 Fed.Appx. 122, 125 (3d Cir. 2005) (noting that "nothing prevented [petitioner] from filing a timely [federal] petition and then seeking to amend or otherwise complete it as 28 U.S.C. § 2242 and Fed.R.Civ.P. 15(a) would allow," once all pending state proceedings resolved); Tyler v. Palakovich, 2006 WL 485306, at *6 (M.D. Pa. 2006) (rejecting petitioner's argument that he "needed to exhaust state court remedies

on his 'newly discovered evidence' claim before filing a federal habeas petition" because petitioner could have filed timely "protective" habeas petition)).

Likewise, petitioner's claim to have newly "discovered" that the witnesses received alleged undisclosed plea deals also fails. First, it was disclosed *at trial* that these witnesses had open cases for which the Commonwealth would inform the sentencing courts of these witnesses' cooperation. N.T. 5/15/85, 8 (Claitt); N.T. 5/21/85, 26 (Mickens). Moreover, those sentencings took place in the 1980s, thus giving petitioner decades to investigate what took place at the sentencings and challenge them. See supra, Section I(C) (detailing petitioner's lack of diligence). Finally, petitioner already claimed in his second PCRA petition filed in 2007 to have evidence that Claitt and Mickens received deals for their testimony, using documents that were available from the 1980s. Commonwealth v. Tillery, 2937 EDA 2008 (Pa. Super. 2009) (memorandum opinion), at 5. Yet he did not file a habeas petition until several years after the dismissal of that 2007 petition. Thus, petitioner has no basis to claim that he has timely raised his claims.

C. Statutory Tolling

Section 2244 of the federal habeas statute provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). As explained above, the time limit began on April 24, 1996. Petitioner initiated his state post-conviction proceedings on September 20, 1996, 149 days later. On August 18, 1999, the Pennsylvania Supreme Court denied allowance of appeal. Commonwealth v. Tillery, 742 A.2d 674 (Pa. 1999)

(table). This is the date on which the statute of limitations began to run again. Stokes v. D.A. of County of Philadelphia, 247 F.3d 539, 542 (3d Cir. 2001) ("the time during which a state prisoner may file a petition for a writ of *certiorari* in the United States Supreme Court from the denial of his state post-conviction petition does not toll the one year statute of limitations"). Thus, after accounting for statutory tolling, the deadline for a timely petition was on March 23, 2000. Again, the instant habeas petition was not filed until April 30, 2020. ECF Doc 2, at 19. Thus, this petition is manifestly untimely.

D. Equitable Tolling

The habeas statute of limitations is subject to equitable tolling in appropriate circumstances. Holland v. Florida, supra; accord Miller v. New Jersey State Dept' of Corrections, 145 F.3d 616 (3d Cir. 1998). No such circumstances are present here. A party seeking equitable tolling must demonstrate that: (1) some extraordinary circumstance prevented him from filing his federal habeas petition until he actually filed it, despite (2) his exercise of diligence in attempting to file his federal habeas petition as early as possible throughout the entire period for which he seeks equitable tolling. Holland, 560 U.S. at 649; Pace, 544 U.S at 418; LaCava v. Kyler, 398 F.3d 271, 276 (3d Cir. 2005).

There are no extraordinary circumstances that prevented petitioner from filing in federal court by the deadline. Petitioner was able to file his first habeas petition on December 22, 1999, approximately twenty years before the instant petition. As explained above in Section I(C), the basis of petitioner's claims of perjury and alleged sentencing deals with the witnesses would have been ascertainable since the 1980s, more than a

decade before that initial habeas petition was filed.

Petitioner's attempt to excuse his lack of diligence by blaming the prison for placing him in restrictive housing (ECF Doc 2-1, 143-146) should not be countenanced. He only has himself to blame for his discipline in prison. As explained by the United States District Court in New Jersey: petitioner received "a total of twenty-six disciplinary charges from the Pennsylvania Department of Corrections during his current incarceration." Conquest v. Hayman, CIV. A. 07-2125 MLC, 2011 WL 1322153, at *9 (D.N.J. Mar. 31, 2011). "Notably, five of the misconduct charges were assaults on other inmates, and four involved threats to staff members. He also has accumulated forty-nine inmate 'keep separates' due to his criminal associations both before and during his incarceration." Id. "His behavior while incarcerated in Pennsylvania included violent assaults, fighting, threatening correctional staff members with bodily harm and refusing to obey an order." Id. "Included in his disruptive behavior are numerous challenges to procedures, attempted orchestrated assaults against staff and inmates, and organized gambling, in addition to a long history of gang related criminal activities." Id.

Petitioner's behavior in New Jersey's prison system was not better. "A memo from NJDOC Director William F. Plaintier in April 2005 to Chief of Staff Charles Ellis described [petitioner's] potential for MCU placement at NJSP. His history of assaultive and threatening behavior against both inmates and staff was noted, along with his involvement in an elaborate escape attempt during a potential court appearance." Id. "Also noted was [petitioner's] alliance with the 'Black Mafia' that gives him a significant power base within the Pennsylvania Department of Corrections, as well as many

separation issues. Finally, it was noted that [petitioner] is non-compliant with programming recommendations." Id.

In light of petitioner's extensive misconduct in prison, his complaint that he was in restrictive housing resembles that of the man who murders his parents and then pleads for sympathy on the grounds of being an orphan. Moreover, petitioner's "restrictive" housing situation did not keep him from filing PCRA petitions in 1996 and 2007 and a first habeas petition in 1999. Additionally, petitioner has had several lawyers in several legal proceedings over the years. Petitioner lists no less than seven attorneys, who represented him at trial, direct appeal, three PCRA proceedings, and one prior habeas proceeding. ECF Doc 2-1, 5-6. There is no reason why these lawyers could not have obtained transcripts and court records to support the claims of alleged deals. There is also no reason why these lawyers could not reach out to Mickens and Claitt to find support for their claims. Petitioner is not entitled to equitable tolling.

E. Petitioner does not demonstrate the miscarriage of justice exception based on his assertion of actual innocence.

Petitioner asserts that the recantations of the witnesses against him meets the standard under Schlup v. Delo, 513 U.S. 298, 324, 327 (1995) to have a claim of actual innocence reviewed, despite the statute of limitations. Doc 2-1, at 154. He is incorrect.

"Proving actual innocence based on new evidence requires the petitioner to demonstrate (1) new evidence (2) that is reliable and (3) so probative of innocence that no reasonable juror would have convicted the petitioner." Santiago v. Barone, CIV.A. 10-

649, 2012 WL 6151748, at *2–3 (E.D. Pa. Dec. 10, 2012) (quoting *Sistrunk v. Rozum,* 674 F.3d 181, 191 (3d Cir.2012) (citing *Schlup v. Delo,* 513 U.S. 298, 324, 327 (1995)).

Claitt's and Mickens' recantations are not new evidence for purposes of Schlup. The vital "facts" underlying this evidence are that they supposedly perjured their testimony inculpating petitioner and that they did not disclose the full nature of their agreements with the prosecution. As petitioner claims his actual innocence, he would already have been aware that these witnesses "perjured" their testimony. In his second state PCRA litigation in 2007-2009, petitioner already claimed, through use of court documents, that these witnesses had not disclosed the full nature of their plea agreements Because petitioner has "known" the vital facts underlying the recantations for many years, this evidence is not new under Schlup. See Sistrunk, 674 F.3d at 189, 191 (finding that letter from witness Gregory Anderson admitting to perjury at preliminary hearing and affidavit stating that Damon Rodriguez admitted to being shooter were not new under Schlup because "Sistrunk not only could have known, but actually *did* know of the vital facts underlying both the Anderson letter and Rodriguez affidavit – i.e., Damon Rodriguez was the real shooter and Gregory Anderson perjured himself – long before the filing of his habeas petition") (emphasis in original).

Moreover, reliability is sorely lacking here. "Affidavits of recantation do not fall into any type of reliable evidence – exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – identified in Schlup." Ajamu-Osagboro v. Patrick, 620 F.Supp.2d 701, 718 (E.D. Pa. 2009). Recantation evidence is inherently unreliable. See United States v. Williams, 70 Fed.Appx. 632, 634 (3d Cir. 2003) ("cases are legion that courts look upon recantations with great suspicion"); Landano v. Rafferty, 856 F.2d

569, 572 (3d Cir. 1988) ("Courts have historically viewed recantation testimony with great suspicion"); Ajamu-Osagboro, 620 F.Supp.2d at 718 ("Recantation testimony is inherently untrustworthy"). As the proffer is not only a recantation "admitting" a massive amount of perjury but is an extremely tardy one at that, it is particularly unreliable. See Santiago, 2012 WL 6151748, at *3 (finding tardy letter of recantation does not support equitable tolling because it is not reliable); (citing Sistrunk, 674 F.3d at 191 (finding a recantation letter unreliable where the letter came "nearly a decade too tardy"); Teagle v. DiGuglielmo, 336 F. App'x 209, 213 (3d Cir.2009) (characterizing affidavit admitting the bulk of witness's trial testimony was perjury as "suspicious and untrustworthy evidence" that "does not, in the absence of additional corroborating evidence or circumstances, meet the standard of reliability contemplated by Schlup")).

Finally, not only is the proffered evidence "inherently suspect," by nature of being very tardy recantations, it is also suspect for the myriad of reasons detailed above in Section I(B). These witnesses claim that their **entire** police statements and testimony were made-up by a sizable conspiracy of police and prosecutors. As discussed above, the level of detail and the fact these witnesses persuaded a jury of the truth of their testimony after extensive cross-examination (more than a day for Claitt), belies their outlandish assertions. In Mickens' case, it is incredible that police and prosecutors would make up a story for him to tell that was not even an eyewitness account of the shooting. Moreover, the objective evidence available regarding their sentencings demonstrates that they told the truth at trial that they had not received negotiated sentences in exchange for their testimony, contrary to their new allegations of secret deals about the sentence. And Claitt even admits his hostility towards law enforcement. Any reasonable juror would

recognize that the recantations are beyond incredible and would hardly compel them to acquit.

III. Petitioner's claims are defaulted because the state court found them untimely under an independent and adequate rule of state law.

Petitioner's claims are also procedurally defaulted based on the state court's application of the PCRA's timeliness requirement. The Superior Court concluded that petitioner's most recent PCRA petition (his third) was untimely under the PCRA statute's time limitations. Commonwealth v. Tillery, 3270 EDA 2016 (Pa. Super. 2018) (memorandum opinion, Exhibit F, at 3). "The PCRA's timeliness requirement is an independent and adequate state ground, rendering [a petitioner's] claim procedurally defaulted and unreviewable in federal court" Chrupalyk v. Kauffman, 2:19-CV-00047-GJP, 2020 WL 4060569, at *7 (E.D. Pa. May 15, 2020), report and recommendation adopted, CV 19-0047, 2020 WL 4059885 (E.D. Pa. July 20, 2020) (citing Peterson v. Brennan, 196 F. App'x 135, 142 (3d Cir. 2006) (not precedential) (affirming the district court's "order that the PCRA statute of limitations is an adequate and independent state ground to deny habeas relief"). While petitioner pled exceptions to the timeliness requirement, he failed to meet the requirements for those exceptions by demonstrating an extreme lack of due diligence in bringing his claim.

A. As found by the state courts, petitioner failed to demonstrate due diligence.

The state court's finding that Petitioner's third PCRA petition was untimely was a purely state law ruling that is binding and may not be reconsidered on federal habeas review. See Merritt v. Blaine, 326 F.3d 157, 165 (3d Cir. 2003) ("A federal court is bound by a state court's finding that a petitioner's PCRA petition was untimely, even where the petitioner sought to pursue his PCRA petition under a statutory exception to the PCRA's time bar"). In any event, the state court clearly got state law right.

In considering petitioner's raising of the statutory exceptions for new facts and governmental interference, the Superior Court found that petitioner failed to exercise due diligence in bringing his claims. Commonwealth v. Tillery, 3270 EDA 2016 (Pa. Super. 2018) (memorandum opinion, Exhibit F, at 5-6). The Superior Court noted that petitioner brought the same claims that the prosecution had suborned perjury from the witnesses in his PCRA petition from 2007, without attaching statements from Claitt or Mickens. Id. at 5. Petitioner failed to adequately explain why he did not obtain such statements at the time he first brought those claims, offering nothing more than "vague speculation" that the witnesses would have been unwilling to provide such statements earlier than 2016. Id. Thus, the Superior Court concluded that petitioner failed to exercise due diligence in obtaining his allegedly newly discovered evidence, as required by the PCRA statute. Id. at 6.

The PCRA court, whose ruling the Superior Court affirmed, explained this reasoning in more detail, making two particularly significant points. PCRA Court Opinion, filed 1/13/17, (Tucker, J.) (Exhibit E). First, while petitioner made vague allegations of having been in restrictive housing, ill, and frequently transferred in prison, he failed to

provide supporting evidence of his general assertions. Id. at 5. Moreover, petitioner did not provide a meaningful recounting of the past thirty years to show that he specifically could not make any effort during that very long period of time to ascertain the willingness of witnesses, whom he supposedly knew perjured themselves, to recant. Id. at 5.

Second, and of greater importance, the PCRA court noted that petitioner alleged in 2007 that the witnesses had received undisclosed deals based on his reading of court records from the 1980s. Id. at 6-7. Thus, it was untenable that he did not even attempt to obtain the witnesses' version of events at that time in light of his alleged "discovery." See id. at 7 ("Based upon Petitioner's purported discovery of the Commonwealth's role in suborning Claitt and Mickens, Petitioner had reason to believe that the witnesses may be amenable to disclosing their fabricated testimony").

The conclusions of the state courts that petitioner did not exercise due diligence are well supported by the record. Petitioner knew at the time of his trial that Claitt and Mickens had open cases, as they testified to this. N.T. 5/15/85, 8 (Claitt); N.T. 5/21/85, 26 (Mickens). Petitioner also heard them testify as to the scope of any promises made by the prosecution. N.T. 5/15/85, at 14, 19-21 (Claitt); N.T. 5/21/85, at 25-26 (Mickens). Petitioner and his many attorneys could have easily followed-up by examining the notes of testimony from the sentencing hearings and court records to ascertain what representations were made to the court. If there were any discrepancies between the sentencing proceedings and the testimony of the witnesses at trial, petitioner could have raised them in a timely manner, and there would be a contemporaneous record and witnesses available to testify as to what happened. In fact, he could have compelled Claitt and Mickens to testify at a PCRA hearing, if he had raised the claims in a timely

manner and had a sufficient offer of proof of a secret deal. Indeed, in his 2007 PCRA petition, petitioner raised claims that the witnesses had received secret plea deals, using documents that were available from the 1980s. Commonwealth v. Tillery, 2937 EDA 2008 (Pa. Super. 2009) (memorandum opinion), at 5.[16] Thus, at the very least, petitioner could have contacted Claitt and Mickens at that time to investigate his claim of alleged secret deals.

Likewise, petitioner's post-conviction attorneys could have pursued the sex-for-cooperation claim if they wished. The Superior Court's decision announcing misconduct by the same detectives in petitioner's case was from 1990. Commonwealth v. Lester, 572 A.2d 694, 697 (Pa. Super. 1990). Thus, if the attorneys wished to investigate whether the detectives had committed similar misconduct in petitioner's case, they were free to contact Mickens and Claitt and ask about it.[17]

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[16] Respondents would stress that these documents did not actually reveal secret plea deals. Claitt and Mickens testified that these were open cases. There was nothing in the records to suggest otherwise, besides petitioner's speculative belief that the outcomes were too good to not have been negotiated. However, that does not take into account any negotiations that may have taken place **after** petitioner's trial with regard to the other matters in which those witnesses cooperated, or the particularities of the sentencing judges who had heard about their extensive cooperation in homicide matters. Plea deals made after trial are not Brady material. See Bracey v. Superintendent Rockview SCI, 17-1064, 2021 WL 191847, at *17 n.1 (3d Cir. Jan. 20, 2021) (Phipps, Cir.J., concurring) ("The two witnesses entered plea agreements on the additional charges, but the transcripts do not specify when they entered those agreements. Unless those plea agreements were in place when those witnesses testified against Bracey, the prosecution would not have been obligated to disclose them: post-trial favorable treatment of a witness is not within the scope of *Brady* disclosures." (citing Bell v. Bell, 512 F.3d 223, 234 (6th Cir. 2008) (en banc)).

[17] They were also free to subpoena the police log administration building log books from the early 1980s that petitioner uses as an exhibit.

The complete absence of any effort whatsoever by Petitioner over a period of thirty years to even ascertain the state of mind of these witnesses defies any notion of due diligence. Based on his statement, Claitt seems to believe that the prosecution framed him for a crime he did not commit, causing him to serve a 13.5 year sentence beginning in 1989. ECF 2-1, 176. It seems incredible that this "framed" man (who pled guilty to these crimes), who already received the benefits of his cooperation, would not be all too willing to tell petitioner anything he wanted more than a decade ago, as he did in 2016. It appears that these witnesses gave their statements in 2016, because that is when Rachel Wolkenstein, Esquire, decided to speak with them.

Indeed, the Pennsylvania courts' decision to find the claims time-barred on the basis of petitioner's lack of due diligence in bringing them was consistent with how the Third Circuit interprets effectively identical language in the federal analogue to 42 Pa.C.S. § 9545(b)(1)(ii) – 28 U.S.C. § 2244(d)(1)(D) – in exactly the same way. Section 2244(d)(1)(D) provides that the one year statute of limitations for federal habeas petitions may run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). The Third Circuit has held that "the 'factual predicate' of a petitioner's claims constitutes the 'vital facts' underlying those claims." McAleese v. Brennan, 483 F.3d 206, 214 (3d Cir. 2007). See also Champney v. Secretary, Dept. of Corrections, 469 Fed. Appx. 113, 116 (3d Cir. 2012) ("The requisite 'factual predicate' of a claim is the set of 'vital facts' underlying the claim"). The Pennsylvania Superior Court's interpretation of its own state postconviction relief procedures in accordance with how this Circuit interprets its corresponding federal postconviction procedures was not "inconsistent with

the traditions and conscience of our people or with any recognized principle of fundamental fairness." D.A.'s Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 70 (2009).

B. The Dennis decision does not excuse petitioner's lack of diligence.

Petitioner claims that he should not be required to demonstrate due diligence because the underlying basis of his claims are that the Commonwealth violated Brady v. Maryland, 373 U.S. 83 (1963) by not disclosing to him that the prosecution "knew" the witnesses were perjuring themselves and that there were alleged undisclosed deals. Petitioner cites Dennis v. Sec., Pennsylvania Dept. of Corrections, 834 F.3d 263, 275 (3d Cir. 2016) (en banc) for the proposition that the due diligence requirement does not exist for Brady claims. However, the state court here did not ever assert that Brady contained a due diligence requirement. Rather, the state court found that the state PCRA statute contains a due diligence requirement for bringing forward new evidence. Likewise, the Dennis decision did not examine the PCRA's due diligence requirement, let alone find that it violated the Constitution or clearly established Supreme Court law interpreting it. Thus, Dennis is of no moment in determining whether the state court unreasonably applied Supreme Court law in determining that the PCRA petition was untimely filed. See Vogt v. Coleman, CV 08 - 530, 2017 WL 2480732, at *2 (W.D. Pa. June 8, 2017) ("The Pennsylvania Superior Court concluded that Petitioner's second PCRA petition was untimely filed and, no matter what effect Dennis may have on that decision, although it has none, this Court is "bound" by that finding").[18]

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[18] For similar reasons, the Dennis decision in inapplicable with regard to the federal habeas statute's time limitations. See Smith v. Mahally, CV 17-5809, 2018 WL 4658714, at *5 (E.D. Pa. Apr. 19, 2018), report and recommendation adopted, CV 17-05809, 2018 WL 4635937 (E.D. Pa. Sept. 26, 2018), certificate of appealability denied sub nom. Smith v. Superintendent Dallas SCI, 18-3465, 2019 WL 2064447 (3d Cir. Apr. 1, 2019)

In any event, even putting aside that Dennis has no applicability to reviewing the constitutionality of a state court's enforcement of its own statute of limitations, it also bears noting that applying it to the inherently suspect "recantations" would stretch the holding in Dennis far beyond what could have reasonably been intended. Petitioner puts the proverbial cart before the horse by presuming that he has a viable Brady claim without proffering reliable evidence in support of it. The Dennis case did not do this, as there appears to have been no dispute that the Brady material itself existed, as they were items that existed in objective reality.[19] Specifically, the items were a receipt, a police activity sheet, and six police documents regarding a tip pointing to a different suspect. Dennis, 834 F.3d at 275. Such physical evidence existing from the time before trial starkly contrasts with the "word" of self-admitting perjurers given thirty years after trial.

Indeed, the Dennis court in no way contemplated that it would be overturning the law that recantations are "inherently unreliable," and that a petitioner can force the state to spend significant resources on an evidentiary hearing on a recantation claim as long as the recantations make unsupported allegations of misconduct on the part of police and prosecutors.[20] Such a ruling not only goes against significant federal and state precedent

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("The Dennis court did not address any timeliness challenge as none was raised. Although the calculation of the AEDPA limitations period may not begin until discovery of the alleged Brady material, such a claim is still subject to the habeas limitations period" (citing several decisions).

[19] The Dennis court itself emphasized that these were objective pieces of evidence. See Dennis, 834 F.3d at 285 ("The Commonwealth did not disclose the DPW receipt that was in the police's possession, provided objective impeachment evidence of a key Commonwealth witness, and bolstered Dennis's alibi").

[20] Recantation claims almost invariably include some allegation that the police and prosecution coerced the witness. Indeed, it is rare in a homicide trial in Philadelphia held within recent decades that the witnesses do not recant, claiming that the police and/or

regarding the unreliability of recantations, it also allows perjurers, usually acting in collusion with the criminal defendant, to derail the entire criminal justice process any time they see fit. Nothing in the Dennis decision supports such a result.

In the alternative, even if the state decision had been based on evaluating the merits of the Brady claim, instead of a state procedural bar, Dennis would still not excuse petitioner's lack of diligence. As the Court of Appeals recently explained, "where the record demonstrates that the defendant or defense counsel was aware of the potential Brady material but failed to pursue investigation of that ultimate claim, nothing in Dennis or any other decision of this Circuit, including today's, stands in the way of any of the consequences that AEDPA attaches to a lack of due diligence." Bracey v. Superintendent Rockview SCI, 17-1064, 2021 WL 191847, at *13 (3d Cir. Jan. 20, 2021) (quotation marks and citations omitted). "[A]s far as Brady claims go, due diligence requirements remain substantial: If there is a reasonable basis for a petitioner to believe additional investigation will yield undisclosed Brady material, that petitioner must investigate or else risk the statutory consequences." Id. Here, petitioner had every reason to investigate his own claims that the witnesses obtained secret deals and perjured themselves, as he has been alleging this since at least trial and in his 2007 PCRA petition. Therefore, his lack of diligence is not excusable.

In any event, even if petitioner could somehow ignore all of the procedural bars and resulting defaults, he still could not establish the materiality prong of a Brady claim

prosecutors made up their statements. This is why the Pennsylvania courts were compelled to allow a witness's prior contemporaneously recorded and adopted statements to be used as substantive evidence. Commonwealth v. Brady, 507 A.2d 66 (Pa. 1986) (as limited by Commonwealth v Wilson, 707 A.2d 1114 (Pa. 1998)) and Commonwealth v. Lively, 610 A.2d 7 (Pa. 1992)).

based on his proffer of two inherently unreliable recantations. As explained in great detail above in section I(B), these recantations are particularly unreliable as they simultaneously claim that the police and prosecutors were so creative and unscrupulous as to make up the entirety of detailed eyewitness statements, yet chose stories that would not ensure conviction, making one "eyewitness" not even present for the killings.

Moreover, the witnesses somehow withstood extensive cross-examination about their recollections of events that they supposedly never witnessed. Adding in an obvious motive for these witnesses to lie – one claims that the prosecution completely manufactured an unrelated case against him – and these recantations could never establish materiality, let alone be compared with the objective evidence presented in Dennis.

Petitioner's claim is defaulted and should be rejected on that basis as well for the foregoing reasons. To the extent petitioner relies on Schlup's equitable exception to procedural bars based on a reliable claim of actual innocence, respondents dispute that he meets that exception for the reasons articulated supra in Claim II(E) (addressing the Schlup exception in regards to the federal habeas statute's time restrictions).

IV. Petitioner's claims fail on the merits.

Even if reviewed on the merits, despite the three significant procedural bars to review – statutory restrictions for a second petition, habeas statute of limitations, and procedural default – the two grounds for relief raised in the petition do not entitle him to the writ. Petitioner raises a free-standing claim of actual innocence, which is not a cognizable claim for relief. Petitioner's due process claims are also not grounded in the

law, as they merely complain of the state court's discretionary rulings during his third PCRA proceeding. Relief should be denied.

A. Petitioner's free-standing claim of actual innocence does not entitle him to relief.

Petitioner's first ground for relief in his petition is "factual innocence." ECF Doc 2, at 8; ECF Doc 2-1, at 102. This claim is unavailing.

"Generally, a stand-alone claim of actual innocence is not a cognizable claim in a federal habeas proceeding." Sutherland v. Gilmore, CV 19-0732, 2019 WL 7906193, at *7 (E.D. Pa. Nov. 26, 2019), report and recommendation adopted, 2:19-CV-00732, 2020 WL 703679 (E.D. Pa. Feb. 12, 2020) (quoting Albrecht v. Horn, 485 F.3d 103, 121-122 (3d Cir. 2007) (citing Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L. Ed.2d 203 (1993)). "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." Id. (quoting Herrera, 506 U.S. at 400) (also citing Albrecht, 485 F.3d at 121-22; Fielder v. Varner, 379 F.3d 113, 122 (3d Cir. 2004)). "Instead, actual innocence may be a 'gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" Id. (quoting Herrera, 506 U.S. at 404 (also citing Schlup, 513 U.S. 298; House v. Bell, 547 U.S. 518 (2006)).

Rather than base his claim on an underlying constitutional violation, petitioner erroneously asserts: "Innocence constitutes a substantive ground upon which to relieve [petitioner] of his unconstitutional incarceration." ECF Doc 2-1, 106. Thus, under Herrera,

petitioner's "stand-alone claim of actual innocence is non-cognizable and therefore, must be dismissed." Sutherland, at *7.

B. Petitioner's due process claim does not entitle him to relief.

Petitioner's only other ground for relief is that the prosecution violated his due process rights by putting forward allegedly perjured testimony and not disclosing alleged plea deals. ECF Doc 2-1, at 108-124. However, as detailed above, he has not come close to demonstrating any purported misconduct.

Petitioner complains that he did not receive an evidentiary hearing. ECF Doc 2-1, at 124. This claim is not cognizable on habeas review. See Swainson v. Walsh, CIV.A. 12-165, 2014 WL 3508642, at *17 (E.D. Pa. July 16, 2014) (claim that PCRA court erred in not granting evidentiary hearing based on untimely PCRA petition raising a recantation claim is not cognizable on habeas review) (citing Estelle v. McGuire*,* 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (habeas review "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); id. ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); Lambert v. Blackwell*,* 387 F.3d 210, 247 (3d Cir.2004) ("alleged errors in collateral proceedings ... are not a proper basis for habeas relief")).

Petitioner claims that the state court applied state law inconsistently with how it applied it in his co-defendant's case, by granting the co-defendant an evidentiary hearing. ECF Doc 2-1, at 115-131. Petitioner cites no clearly established Supreme Court law making a constitutional requirement that co-defendants (who received separate trials) to receive identical treatment at each stage of their respective appellate processes. Such a rule would not even make sense because any two trials and appellate procedures will

have some variation. Essentially, this argument is a restatement of his previous claim that the state court misapplied its law regarding evidentiary hearings, and thus is not cognizable on habeas review.

Lastly, petitioner claims that the state court erroneously found that he was raising essentially the same claims as presented in his 2007 PCRA petition. ECF Doc 2-1, at 131-134. The state court, however, was correct. In 2007, petitioner asserted that the witnesses in his case received favorable sentences allegedly based on undisclosed plea deals. PCRA petition, filed 8/13/07 (Exhibit B) at 4 ("the below argument is regarding the trial testimony of Emanuel Claitt and the undisclosed preferential treatment that he received in return for his testimony against [petitioner]"); id. at 32 ("when Mr. Mickens testified that there was no agreement. . . the Commonwealth clearly knew there was an agreement and should have immediately corrected such false testimony"). In that 2007 PCRA petition, he at least used court records, albeit ones that he could have brought forward when they were generated in the 1980s. Commonwealth v. Tillery, 2937 EDA 2008 (Pa. Super. 2009) (memorandum opinion), at 5. In his 2016 PCRA petition, petitioner brought the same claim using **less** reliable "evidence," in the form of recantation statements.

Moreover, the similarity in claims was not the underlying basis of the Superior Court's ruling. The state court's ruling was based on petitioner's failure to exercise due diligence in the 31 years after his conviction to bring forth his claims. The similarity of his claims to those he presented a decade earlier was among the factors underscoring petitioner's lack of diligence. See Exhibit F, at 5-6 (in the sentence immediately following the Superior Court's observation that the arguments in his third petitioner "expanded"

those in the 2007 petition, it wrote: "Consequently, we find [petitioner] failed to prove he acted with due diligence in discovering these allegedly new facts and governmental interference"). Therefore, petitioner's due process claims fail on the merits.

CONCLUSION

Petitioner failed to meet the statutory requirements for a second habeas petition, his petition is barred by the federal statute of limitations, it is defaulted, and it is meritless. For the foregoing reasons, respondents respectfully request that the petition for a writ of habeas corpus be dismissed with prejudice, without a hearing, and without a certificate of appealability.

Respectfully submitted,

/s *Samuel H. Ritterman*
SAMUEL H. RITTERMAN
Assistant District Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAJOR GEORGE TILLERY, **Petitioner**	**:**	**CIVIL ACTION**
v.	**:**	
KENNETH EASON, et al., **Respondents**	**:**	**NO. 20-2675**

CERTIFICATE REGARDING SERVICE

I, SAMUEL H. RITTERMAN, counsel for Respondents, hereby certify that on February 5, 2021, a copy of the foregoing document served on petitioner via first-class mail at the following address:

Smart Communications/PADOC
Major George Tillery / AM9786
SCI CHESTER
PO Box 33028
St Petersburg, FL 33733

/s/ Samuel H. Ritterman
____
SAMUEL H. RITTERMAN
Assistant District Attorney

EXHIBIT A

Superior Court Opinion

On

Direct Appeal

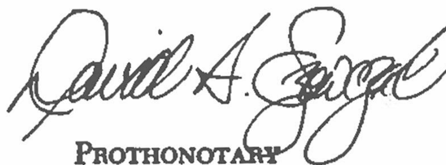
J. 17001/89

COMMONWEALTH OF PENNSYLVANIA, Appellee v. MAJOR GEORGE TILLERY, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3297 Philadelphia 1986

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:



PROTHONOTARY

Dated: MAY 30, 1989

J. 17001/89

COMMONWEALTH OF PENNSYLVANIA, Appellee v. MAJOR GEORGE TILLERY, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3297 Philadelphia 1986

Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia County, Criminal Division at Nos. 8403-568, 570, 571, 573, 574.

BEFORE: POPOVICH, JOHNSON and WATKINS, JJ.

MEMORANDUM: FILED MAY 30 1989

This is an appeal from a December 9, 1986, judgment of sentence of the Philadelphia County Court of Common Pleas. On May 29, 1985, a jury convicted appellant of murder in the first degree, possessing instruments of a crime generally, criminal conspiracy and aggravated assault.[1] Post-trial motions were

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1 For the crime of first degree murder, appellant was sentenced to life imprisonment. For the crime of possessing instruments of a crime generally, appellant received a sentence of not less than one year nor more than two years incarceration. For the crime of criminal conspiracy, appellant was sentenced to prison for not less than five years nor more than ten years. For the crime of aggravated assault, appellant received a sentence of not less than five years nor more than ten years incarceration. For a second charge of criminal conspiracy, appellant was sentenced to prison for not less than five years nor more than ten years. All sentences are to run concurrently with the sentence for first degree murder, except the sentence for aggravated assault, which is to run consecutively to the sentence for first degree murder.

denied by the Honorable J. Geisz on December 8, 1986. We affirm.[2]

The facts of this have a rather long and tortuous past. At approximately 10:00 p.m. on October 22, 1976, Philadelphia police received a call to the address at Huntingdon and Warnock Streets in North Philadelphia. At that corner, they broke down the locked door of a poolroom operated by William Franklin and discovered the dead body of John Hollis. A medical examination later revealed that Hollis died of a gunshot wound to the trunk of his body. Inside the poolroom, the police found live and spent .38 caliber ammunition and a set of car keys. Around the corner from the poolroom at 2527 North 11th Street, police officers found John Pickens bleeding from a gunshot wound. He was treated at a hospital and survived his injuries. Both Pickens and Hollis were shot by different guns.

For more than three years, the shooting of Pickens and Hollis remained unsolved. However, in the spring of 1980, police detectives, investigating the homicide of Samuel Goodwin, visited a Philadelphia prison to determine if Emanual Claitt, an inmate who had known Goodwin, could provide any information about Goodwin's death. The information Claitt provided went far beyond the Goodwin case. Claitt described in detail the operation of what he labeled the "black mafia", a crime syndicate run by black

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[2] A notice of appeal to the Superior Court was filed on December 9, 1986. In November, 1988, the record was certified to this Court without the requisite Rule 1925 opinion.

Muslims in Philadelphia. His information described a vivid picture of the events culminating with the shootings of Pickens and Hollis.

Claitt testified that from 1976 until 1980, he engaged in drug dealing and extortion as a member of the Philadelphia "black mafia". The organization divided the city into sections for business purposes. Alfred Clark was the leader of the North Philadelphia branch. He held the rank of first lieutenant and had "the last word" for all business in the city. Sylvester White directed the West Philadelphia branch. John Pickens also dealt drugs in West Philadelphia. During the 1970's, appellant held the rank of first lieutenant and "had control of the entire city as far as methamphetamines is concerned . . . ." Claitt received his heroin supply from Clark and his methamphetamine supply from appellant. Clark and appellant were partners in the heroin and methamphetamine trade. Claitt characterized appellant as Clark's "right hand man".

On the night of October 20, 1976, Claitt, Clark, appellant, James Ravenell and Rainey met at the home of Dana Goodman at 59th and Woodbine Streets to discuss a disagreement between Goodwin and Pickens over drug selling in West Philadelphia. Pickens arrived with Hollis and argued with Clark about a transaction in which Clark disposed of drugs claimed by Pickens at the expense of Pickens. During the argument, Hollis called Clark a "gangster". He then grabbed Clark by the collar, took out a pistol, slapped Clark in the face with the gun and

pointed it at Clark as if he were about to shoot. Pickens stopped Hollis from firing the weapon, but appellant said that Hollis "would have to die for what he did". Although White was not present, Clark said he would talk to him and arrange a meeting at Franklin's poolroom to settle the dispute.

Thereafter, a group consisting of Clark, Claitt, Rainey, Ravenell and appellant met White at a mosque at 13th Street and Susquehanna Avenue in North Philadelphia. The group then drove to Franklin's poolroom. When they arrived at the poolroom, appellant accused White of setting up the earlier incident and demanded a meeting on Friday, October 22, 1976, to which White was to bring Pickens and Hollis. White agreed to the demand.

On the evening of Friday, October 22, 1976, Clark met the group outside the mosque. Clark made everyone surrender their weapons because a peaceful meeting was planned. The group then drove to the poolroom at Huntingdon and Warnock Streets. When they arrived, Clark instructed Claitt to remove two more guns from the group and then guard the door. Additionally, appellant arranged for one of his couriers, Robert Mickens, to watch outside the poolhall for police.

Inside the poolhall, appellant and Franklin sat at opposite ends of a table. Appellant told Hollis to apologize, but Hollis refused. Following a nod to Franklin, appellant reached under the table and pulled out a gun. Franklin also reached under the table and pulled out a weapon. Appellant then shot Hollis in

the back. When Pickens protested, appellant shot Hollis again and Franklin then shot Pickens. Pickens proceeded to run through a locked door shattering the glass.

William Arnold arrived immediately after the shootings and discovered Pickens holding his stomach. Pickens had collapsed from the wound. Arnold helped him to a house at 2527 North 11th Street where the police found him.

Based on Claitt's information, the police obtained a warrant on May 23, 1980, for appellant's arrest. However, for three years the police were not able to serve the warrant because appellant could not be located. A detective in California finally arrested appellant in November, 1983. Appellant was returned to Philadelphia on December 8, 1983, to stand trial for the aforementioned charges.

At the outset of our discussion of the issues, we must note that appellant's brief mocks the rules of appellate procedure.[3] The two and one-half page summary of argument is in violation of Pa.R.A.P. 2118 which reads, "[t]he summary of argument should not be a mere repetition of the statement of questions presented." The order in question is not included in the brief as required by Pa.R.A.P. 2115(a). Moreover, counsel for appellant raises approximately forty (40) issues in his forty-one

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3 See Commonwealth v. Jones, 329 Pa.Super. 20, 477 A.2d 882 (1984); Commonwealth v. Drew, 353 Pa.Super. 632, 510 A.2d 1244 (1986); Pa.R.A.P. 2101.

page argument.[4] He proceeds to raise the issues and then cite paragraph after paragraph of law. However, more often than not, counsel for appellant fails to set forth little, if any, argument to support his position on the issues. As such, many issues have been waived. See Commonwealth v. Manigualt, 501 Pa. 506, 462 A.2d 239 (1983). Regardless, we have carefully reviewed all the claims raised by appellant and found them to be without merit.

In section A of appellant's argument,[5] he lists 18 allegations of prosecutorial misconduct during closing remarks to the jury. Rather than offer a solid argument following each allegation, appellant baldly asserts the prosecutor's comment was either an improper expression of opinion, prejudicial, unfair or irrelevant. As such, issues A through F and issues H through R of section A are hereby deemed waived for the failure to set forth any substantive argument in support of the issues. See Commonwealth v. Balch, 328 Pa.Super. 71, 476 A.2d 458 (1984); Commonwealth v. Petras, 368 Pa.Super. 372, 534 A.2d 483 (1987).

However, appellant does manage to set forth an argument in his brief, albeit weak, in support of issue G of section A.

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4 We agree with the Commonwealth's reflection that counsel for appellant appears to think that if he claims prosecutorial misconduct as often as possible, he can create the appearance of impropriety where none, in fact, exists. Appellate advocacy is measured by effectiveness, not loquaciousness. See U.S. v. Hart, 693 F.2d 286, 287, n. 1 (3rd Cir. 1982); cited with approval in Commonwealth v. Sirbaugh, 347 Pa.Super. 154, 500 A.2d 453 (1985); Commonwealth v. Klinger, 323 Pa.Super. 181, 470 A.2d 540 (1983).

5 The argument in appellant's brief consists of sections A through I.

That issue is premised on the following remarks by the Commonwealth:

> (g) "And I ask you to recall Mister Sterling's testimony indicating he knew the defendant through the courtship of his daughter. Defendant through the courtship of Mister Sterling's now dead daughter in the year 1983, not in the year 1981, when Claitt gets ambushed and speeds away with a bullet meant to end his ability to talk." (5/28/85 p. 89).

Appellant contends the comments regarding the death of Mr. Sterling's daughter were an ill-concealed attempt to divert the jury from an objective evaluation of the testimony. He contends the remarks infer appellant was responsible for the death of Mr. Sterling's daughter. We disagree.

> Our Supreme Court has stated:
>
> . . . [T]hat a prosecutor, just as a defense attorney, must have reasonable latitude in presenting a case to the jury and must be free to present his or her argument with "logical force and vigor." (citations omitted). Counsel's remarks to the jury may contain fair deductions and legitimate inferences from the evidence presented during the testimony. (citations omitted). . . .
>
> However, not every intemperate or uncalled for remark by the prosecutor requires a new trial. As we have stated many times:
>
>> [C]omments by a prosecutor do not constitute reversible error unless the "unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict." (citations omitted).

> Furthermore, the prejudicial effect of the prosecutor's remarks must be evaluated in the context in which they occurred. (citations omitted).

Commonwealth v. D'Amato, 514 Pa. 471, 526 A.2d 300 (1987).

We are not of the opinion that the testimony concerning the death of Mr. Sterling's daughter inferred that appellant had, in fact, killed her. A review of the record indicates the Commonwealth did not attempt to connect the death of Mr. Sterling's daughter to the hands of the appellant. In fact, the remark clarified for the jury why Mr. Sterling's daughter did not testify at the trial. The remark did not affect the objectivity of the jury. Therefore, this argument must fail.

In section B of his brief, appellant maintains he was denied a fair trial by three instances of prosecutorial misconduct committed during the trial. The first two issues of the three listed are deemed waived. Again, appellant asserts only the naked allegation that the prosecutor's comments were irrelevant and prejudicial without setting forth any substantive argument to buttress his position. See e.g., Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); Commonwealth v. Simon, 432 Pa. 386, 248 A.2d 289 (1968).

However, appellant does offer an argument, albeit abbreviated, regarding the third allegation of prosecutorial misconduct. He claims the Commonwealth failed to provide trial counsel with discovery concerning the testimony of Los Angeles

Police Detective Richards. Appellant argues trial counsel, "should have objected to the presentation of this witness due to the fact the defense was unaware of this witness . . . " Despite this allegation, appellant does not claim any harm whatsoever from the detective's testimony. Without an assertion of prejudice, appellant has not presented any basis or reason for relief to be granted. See e.g., Commonwealth v. Starks, 304 Pa.Super. 527, 450 A.2d 1363 (1982).

Appellant raises a myriad of ineffective assistance of counsel claims in section C of his brief. However, the five issues raised by appellant are waived for the failure to set foth a substantive argument or to assert prejudice from counsel's actions. See Petras, 534 A.2d at 485; Commonwealth v. Pettus, 492 Pa. 558, 424 A.2d 1332 (1981); Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987).

In section D of his brief, appellant contends the trial court erred in granting the Commonwealth's petition for a protective order for witness Robert Mikens (who was present outside the poolroom at the time of the shootings). Appellant asserts that since he was not represented at the in camera hearing when the order was entered, he was denied his right to a fair trial. He proceeds to argue that if he was informed of Mickens' testimony prior to trial, he might have investigated him and possibly discovered any biases the witness held against appellant. We disagree.

Appellant was informed of Mickens' testimony before the Commonwealth presented the witness. He received copies of the witness' criminal record and statements concerning threats on Mickens' family which justified the protective order. Moreover, appellant was afforded a recess to prepare for Mickens' testimony and he then thoroughly cross-examined the witness.

Regardless, appellant does not argue the evidence and representations made to the trial court were insufficient to support granting the protective order. His only claim is that he should have been informed of Mickens' identity at a stage in the proceedings that would have provided time to investigate the witness. However, appellant does not allege any concrete prejudice resulting from the delayed discovery. Instead, he speculates about a possible investigation and discovery of biases Mickens may have held against appellant. Any type of speculation concerning issues raised on appeal is not sufficient grounds to order a new trial. See, Commonwealth v. Holmes, 315 Pa.Super. 256, 461 A.2d 1268 (1983).

The arguments in Sections E and F of appellant's brief are also deemed waived for the failure to offer a substantive argument to buttress his position. See Balch, 476 A.2d at 461. See also, Cosner v. United Penn Bank, 358 Pa.Super. 484, 517 A.2d 1337 (1986); Trustees of First Presbyterian Church of Pittsburgh v. Oliver Tyrone Corp., 248 Pa.Super. 470 n.1, 375 A.2d 193 (1977).

The argument set forth in section G of appellant's brief is that the trial court erred in allowing the Commonwealth to present testimony from Robert Mickens that he had been assaulted in prison. Appellant claims this testimony caused the jury to have undue sympathy towards Mickens and that such testimony was irrelevant and prejudicial because there was no showing the assault was made with appellant's knowledge or consent. We are not persuaded by this argument.

At the time of the trial, Mickens was a Commonwealth informant against may other persons charged with various crimes. The evidence was relevant to explain the witness' motives for appearing as a witness for the Commonwealth.

Additionally, at the time of the prison assault, Mickens was prepared to testify in an unrelated homicide case against another defendant. When appellant met Mickens in prison around the time of the assault, appellant stated he did not think Mickens was acting as a Commonwealth source. As such, there was no reason for the jury to draw a conclusion that appellant assaulted Mickens.

In section H of his brief, appellant contends the trial court erred in allowing the Commonwealth to present testimony of a flight from the authorities by appellant because a warrant was not issued until 1980, four years following the shooting incident. Appellant maintains there was no direct evidence or circumstantial

proof that appellant had notice he was sought by the police until after he moved to California. We disagree.

A thorough perusal of the record shows there was sufficient circumstantial evidence to prove that appellant knew he was, or would be, accused of committing a crime. Commonwealth v. Hailey, 332 Pa.Super. 167, 480 A.2d 1240 (1984). See also, Commonwealth v. Osborne, 433 Pa. 297, 249 A.2d 330 (1969). The record reveals the appellant disappeared from Philadelphia following the shootings. Alphonsa Sterling testified he knew the appellant in Los Angeles from May to July, 1983, when appellant was friendly with Sterling's daughter. During that time, appellant called himself Isaiah, said he was from New Orleans, kept his hair short and wore dark glasses. Clearly, evidence of appellant's flight from the city, change in appearance, use of an alias and false statements about his background provide sufficient circumstantial evidence he knew he was accused of a crime.

In section I of his brief, appellant attempts to advance the same argument in a different way. Not only must this argument fail for the reasons enunciated in the discussion of the foregoing issue, but it is also waived by appellant's failure to offer an argument in support of his position. Commonwealth v. Gravely, 486 Pa. 194, 404 A.2d 1296 (1979).

The length and vagueness of appellant's brief makes appellate review very difficult. Although many of appellant's issues are technically waived, we nevertheless have reviewed all

of appellant's claims and found then to be without merit. However, we note that when issues are not properly raised and developed in briefs and when the briefs are wholly inadequate to present specific issues for review, we do not have to consider the merits of the appeal. Commonwealth v. Drew, 353 Pa.Super. 632, 510 A.2d 1244 (1986). See also, Commonwealth v. Stoppie, 337 Pa.Super. 235, 486 A.2d 994 (1984); Bolus v. United Penn Bank, 363 Pa.Super. 247, 525 A.2d 1215 (1987).

Judgment of sentence affirmed.

EXHIBIT B

Second PCRA petition, filed 8/13/07

Original Copy.

PENNSYLVANIA COURT OF COMMON PLEAS - COUNTY OF PHILADELPHIA

COMMONWEALTH OF PENNSYLVANIA, Plaintiff : March Term, 1984 Bills No. 568 - 574

And

March Term 1984 Bills No. 0155 - 0169

VS.

TILLERY, Defendant.

CP-51-CR-0305681-1984 Comm. v. Tillery, George
Post-Conviction Relief Act Petition Filed

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PCRA UNIT

MOTION PURSUANT TO THE POST CONVICTION RELIEF ACT

Petitioner Major Tillery, pro se, moves this court for relief under the Post Conviction relief Act 42, Pa.C.S.A. S 9541 et. and in support thereof represent the following.

1. Your petitioner Major Tillery prison number is 526689, is presently incarcerated at New Jersey State Prison. And has a mailing address of P.O. Bo... ...NJ 08625.

2. ...oner was found guilty by jury ...r the Hon. John E. Geisz, of the charge ...ene 1st°, poss. of instrument of crime - generally, ...nal conspiracy, agg. assault, under bills of information March Term 1984 numbers 568, 570, 571, 573, and 574.

3. On 12-9-86 your petitioner was sentence under bill number 570 on the charge of 1st° murder of Joseph Hollis to a mandatory life sentence.

On bill number 568 charge of poss. of instrument of crime, petitioner received one to two years to run concurrent

with bill 570.

On bill number 573 charging petitioner with agg. assault on John Pickins, petitioner was sentence to 5-10 years to run concurrent with bill 570.

On bill number 574 charging petitioner with criminal conspiracy he was sentence to 5-10 years to run concurrent with bill 570.

4. Subsequent to this verdict petitioner filed Port Trial Motions which were denied. Petitioner then filed timely appeals to the State Superior Court of Pennsylvania in 1986. The decision of the lower court was affirmed on 5-30-89.

5. Petitioner than filed a petition for allowance of appeal with the Supreme Court of Pennsylvania which was also denied.

6. At trial petitioner was represented by attorney Joseph Santaguida. At Post Trial motions and the filing of appeals before the Superior Court and Supreme Court of Pennsylvania, your petitioner was represented by James S. Bruno.

CASE NUMBER TWO

March Term 1984 - Bill 0155-0169

1. On 8-5-85, petitioner was found guilty by jury on all counts which was presided over by the Hon. D'Alessandro. Petitioner was charged with Criminal Conspiracy, Risking a Catastrophe, Prohibited Offensive Weapons, Attempted Arson and

Arson.

2. 1984 March Bills, 0155 Criminal Conspiracy, 0156 Risking Catastrophe, 0158 Prohibited Offensive Weapons, 0159 Arson Endangering Person and Property, 0160 Arson Endangering Person and Property, 0161 Risking Catastrophe, 0163 Prohibited Offensive Weapons, 0164 Criminal Conspiracy, 0165 and 0166 Attempted Arson Endangering Persons and Property, 0167 Risking Catastrophe, 0168 Prohibited Offensive Weapon, and 0169 Criminal Conspiracy.

3. At trial petitioner was represented by attorney Joseph Santaguida. On 8-31-87, Post Verdict Motions was denied, petitioner was sentenced to 12-24 years. petitioner was Represented by James A. Lineberger on post verdict motions.

4. Petitioner attorney James A. Lineberger than filed a timely appeal to the Pennsylvania Superior Court, and the Supreme Court of Pennsylvania which was denied.

5. Petitioner respectfully request that all the charges in both cases March Term 1984 Bill No. 568-574 and March Term 1984 No. 0155-0169 be dismissed, or in the alternative be granted a new trial!

ARGUMENTS IN SUPPORT OF POST CONVICTION RELIEF

The following arguments are in support of petitioners motion for Post Conviction Relief.

POINT ONE

THE COMMONWEALTH OF PENNSYLVANIA D.A. BARBARA CHRISTIE KNOWINGLY WITHHELD EXCULPATORY IMPEACHMENT EVIDENCE OF ONE OF ITS KEY WITNESSES AGENT/INFORMANT EMMANUAL CLAITT IN ORDER TO OBTAIN THE MURDER CONVICTION. THUS DENYING DEFENDANTS FOURTEENTH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION AND PA. CONST. ART. 3, § 12; 42 PA. CSA § 9541 et.

In the case sub judice, the Commonwealth used a well known prosecutor informant by the name of Emmanuel Claitt as its prime witness in order to obtain the conviction of Major G. Tillery. Mr. Claitt was the only eye-witness to the murder of Joseph Hollis and assault of Pickins connecting defendant to the crimes. No other witness connected defendant to the crimes not even the surviving victem Mr. Pickins. Therefore, this case basically boils down to one of the credibility of the Commonwealths only witness as identified above. See, U.S. v. Foster, 874 F.2d 491 (8th Cir. 1988); "Case boils down to a question of the credibility of the witnesses."

However, the below argument is regarding the trial testimony of Emmanuel Claitt and the undisclosed preferential treatment that he received in return for his testimony against the defendant. Emmanuel Claitt is a career criminal and has a long criminal history in the state of Pennsylvania. [See, Exhibits 1, 2, and 3] Mr. Claitt also has a long history of providing information to the Commonwealth and has testified as a witness in many cases prior to the defendants and thereafter, which

he then in turn received preferential treatment from the Commonwealth. At defendants trial defense attorney Mr. Joseph Santiguida attempted to discredit Emmanuel Claitt testimony with his past criminal history as well as with his potential favorable expectations from the Commonwealth.

Although the Commonwealth via, Barbera Christie, disclosed that it will speak to Mr. Claitt sentencing judge the Honorable Judge Katz, and indicate Mr. Claitt favorable testimony against Mr. Tillery, the Commonwealth intentionally withheld that it would be recommended that Mr. Claitt receive a sentence of "no more then ten (10) years" on his pending charges. [See, Exhibit 10 Attached hereto] Mr. Claitt at the time of defendants trial had several indictments pending against him in the state of Pennsylvania. [See, Exhibits 1, 2, and 3, Attached hereto]

Most of the pending charges Mr. Claitt had pending was not disclosed to the defense prior to trial nor were the favorable recommendation of "no more then ten (10) years" he received from the Commonwealth in regards to his indictments, contrary to Supreme Court precedent set forth in the matter of, Brady v. Maryland, 373 U.S. 83 (1963); which states in pertinent part that: "A prosecutor has a duty to provide an accused with all evidence in the state's possession materially favorable to the accused defense." The prosecutor failed to do such here. See also, Com. v. Romansky, 702 A.2d 1064 Pa. Super. 1997). Based on the Commonwealth recommendation of "no more then ten (10) years", Judge Katz sentenced Mr. Claitt to

a concurrent sentence of 7 years but he only served 23 1/2 months and he was released from Camp Hill on November 22, 1982 after completing his prison term. After Mr. Claitts release however, he committed more crimes as indicated in the attached exhibits one, two, and three.

The only way defendant discovered Exhibits one, two, three, and seven, is through his own independent research after his convictions of the Hollis/Pickins shootings trial and the subsequent fire bombing trial. Exhibits one, two, three, and seven, is therefore newly discovered evidence that was intentionally withheld by the Commonwealth in order to obtain it's unlawful convictions. See, Romanky, supra. id.

Moreover, the Commonwealth committed a farce on the court when it withheld Exhibits one, two, three, and seven, and in fact, indicated to the court that Mr. Claitt will be receiving "no recommendations" from the Commonwealth as to a set sentence regarding his pending indictments before Judge Katz, and that it was only agreed that Mr. Claitt will enter into an "open plea" and that the court can sentence Mr. Claitt to the fullest extent of the law. In other words, the Commonwealth gave the impression to the jury and the defense as well as the trial judges, that Mr. Claitt had no expectations other then protection in return for his trial testimony. Thus giving him know motive to falsely accuse the defendant of the indicted offenses. [See, Exhibit 7]

xhibit seven, is a letter that the Commonwealth wrote
e State of Pennsylvania Parole Board on January 31, 1984,
mmending that the parole board remove a detainer pending
inst Mr. Claitt so that he may be released on bail which
ould otherwise be impossible with a pending parole detainer.
This recommendation was based on Mr. Claitts future testimony
against defendant in the homicide trial.

As a result of the Commonwealths recommendation to the
parole board on behalf of Mr. Claitt the detainer was lifted
and Mr. Claitt was able to make bail and was released. [See,
Exhibits 7 and 11 Attached hereto]

Also attached hereto as exhibit six, is an additional letter
written by the Commonwealth D.A. Ross dated January 5, 1981,
to the Hon. Judge Katz, who's court Mr. Claitt had pending
indictments. The letter indicates Mr. Claitt continual
relationship as a Commonwealth witness since January of 1980,
not only in the defendants case, but in several other cases
in the state of Pennsylvania. This demonstrates that Mr. Claitt
was a agent for the state of Pennsylvania and a well compensated
one at that, considering the lenient sentences and dismissals
of indictments he received in exchange for his cooperation's
with the Commonwealth. [See, Exhibit 6 Attached hereto]. Matteo
v. Superintendent, SCI Albion, 171 F.3d 877 (1999).

Mr. Claitt was not only a witness against Mr. Tillery in
the homicide and aggravated assault (shootings) case, but was
also a Commonwealth witness against Mr. Tillery in the

subsequent fire bombing indictment. In both cases Mr. Claitt admits his participation in the crimes, but suspiciously was never charged in the homicide case as an accomplice or a co-conspirator, and received a concurrent sentence in the subsequent fire bombing cases as stated earlier. The Commonwealth never explained why Mr. Claitt was never charged and indicted in the homicide of Mr. Hollis and the aggravated assault of Mr. Pickins. Mr. Claitt not being charged in the Hollis/Pickins crimes are clear signs of "Use Immunity" in return for his various trial testimony's. This type of exchange should have been disclosed to the jury and the Commonwealths failure to do so is a clear due process violation contrary to the Fourteenth Amendment of the United States Constitution. See, e.g., Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987); holding in pertinent part that: "A defendant has the right to question whether a witness is testifying under a grant of immunity, or absent such a grant, whether witness thought he had immunity."

Furthermore, Mr. Claitt testimony against Mr. Tillery in the Hollis/Pickins crimes in regards to his reasons and expectations contradicts his subsequent trial testimony against Mr. Tillery in the fire bombings cases. [See, Exhibit 10 and 11]

In exhibit ten, which is the closing summation of Commonwealth D.A. Minehart in the fire bombing trial, that it was recommended to Judge Katz, that Mr. Claitt not receive "no more then ten (10) years" on his pending indictments in exchange

for his testimonies against Mr. Tillery. This testimony is in direct contradiction to exhibit eleven, which is the Commonwealth D.A. Christie closing summation at the defendants homicide/aggravated assault trial where it's position is that there was "no set deal" and that the Commonwealt only enter into an "open plea" agreement with Mr. Claitt. An "open plea" agreement meaning by the D.A. Christie definition is that the judge has full discretion as to the sentence Mr. Claitt will receive and that therefore Mr. Claitt has no expectations as to the sentence he will receive. The latter position allowed the Commonwealth in defendants homicide trial to paint a false impression to the jury that Mr. Claitt had no ulterior motive to want to curry favor for the prosecution. See, Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987).

Also as new evidence the defendant discovered after his convictions are exhibits four, five, eight, and nine, all of which defendant discovered by his own independent investigations by utilizing The Right To Know Act (TRTKA).

Exhibit four, is the transcript from Mr. George Rose homicide trial, another victim of Mr. Claitts false testimony. Mr. Rose was Mr. Tillery codefendant in the subsequent fire bombing trial and went on trial in 1980 for the unrelated homicide of Mr. Alfred Clark based on the testimony of Commonwealth witness Mr. Claitt. This trial commenced prior to the defendants capture, and it was indicated that Mr. Claitt agreed with the D.A. Ross that five (5) open charges he had

pending at the time will be dismissed as a result of his testimony. This demonstrates that Mr. Claitt had an agreement of favorable treatment with the Commonwealth prior to the capture and homicide trial of the defendant. The defendant was arrested on December 8, 1983, in L.A. California and began trial in the Hollis/Pickins shootings in May of 1985. This evidence surely was known to the Commonwealth prior to defendants capture and it should had been disclosed to the defendant prior to his trial.

Fortunately for Mr. Rose, the jury disbelieved Mr. Claitts testimony against him and found him not guilty of all charges.

Furthermore, despite of the fact that Mr. Claitt testified that he was present during Mr. Clark murder he was never charged as an accomplice to Mr. Rose. The latter in itself demonstrates just as in the case sub judice, that Mr. Claitt is never charged by the Commonwealth for his participation in homicides. Which further supports the inference of an agreement with the Commonwealth in the form of "Use Immunity".

Exhibit five, is the December 1983 transcript from Mr. Frazier homicide trial, which is unrelated to the case sub judice. Mr. Claitt was a witness against Mr. Frazier and testified that Mr. Frazier confessed to him from his jail cell, although Mr. Claitt was well known in the jail as a Commonwealth police informant.

In the Frazier case, Mr. Claitt is cross-examined extensively about his cooperation with the Commonwealth in the indictments against the defendant Mr. Tillery, as well as to

other individuals including Mr. Rose. Again--- Mr. Claitt acknowledges that he had expectations from the Commonwealth in exchange for his testimony against the defendant who had not been apprehended at the time of Mr. Fraziers trial, but a warrant was out for his arrest. This evidence should have been disclosed prior to the defendants trial.

Exhibit eight, is the transcript from Mr. James Brand fire bombing trial. Mr. Brand was the defendants co-defendant in the fire bombing indictment but was separately triad in 1980 prior to defendants capture. Mr. Claitt was the Commonwealths prime witness against Mr. Brand, as he was in all the cases mentioned above.

At Mr. Brand[2] trial Mr. Claitt falsely stated that he was receiving no favorable recommendations from the Commonwealth in exchange for his trial testimony's, and maintained that his reasoning for coming forward to the police regarding the indictments against defendant Mr. Tillery and co-defendants, was simply because he sought justice for a friend [viz, "Samual Goodwin"] that he suspected was killed by Mr. Tillery and associates.

Exhibit nine, is additional testimony of Mr. Claitt from

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[2]Mr. Rose, Mr. Smith, Mr. Brand, and Mr. Tillery were all co-defendants on the fire bombing indictments. Although Mr. Rose appeared at the preliminary hearing with Mr. Brand, they weren't tried together. Mr. Rose and Mr. Tillery were tried together, subsekuent to Mr. Brand and Smith.

the fire bombing indictment against James Brand. At Mr. Brand and Mr. Rose preliminary hearing on the fire bombing indictment in July of 1980, Mr. Claitt further submitted that he was expecting no recommendation from the Commonwealth, as far as, promises, or reduced sentences regarding his pending matters. Which directly contradicts his testimony in other trials regarding the same subject.

Because of the multitude of trial testimonies that Mr. Claitt provided to the Commonwealth on various separate occasions, made it the more difficult for the defendant to locate and obtain the documents to support his position that Mr. Claitt had good reason to want to curry favor for the prosecution.

It was only through defendants independent strenuous research that he discovered the above mentioned material. Material that was intentionally withheld by the Commonwealth. Thus committing nothing less then a miscarriage of justice and a farce upon the trial court. See, Com. v. Romanky, supra. Where the court held that: "evidence of an understanding or agreement regarding future prosecution would be relevant to the witness credibility and the jury should have been informed of it."

The defendant in the instant matter was left handicapped from cross-examining Mr. Claitt as to his expectations because of the Commonwealths intentional withholding of the very evidence that discredited its prime witness and demonstrates that Mr. Claitt had all the reason to falsely accuse Mr. Tillery of the

indicted offenses. Mr. Claitt was never charged with the Hollis/Pickins shootings although he admitted he was part of a criminal organization and not only was present when the shootings occurred, but in fact, admitted he lead the two shooting victims into an ambush.

Being well aware of Mr. Claitt envolvement in the shootings, the Commonwealth gave no reasons to the Court or the defense for it's decision not to charge Mr. Claitt as an accomplice to murder and assault. It is clear that Mr. Claitt received favorable treatment in the form of "Use Immunity" in exchange for his testimony against the defendant. The Commonwealth had an obligation to disclose such immunity to the defense prior to trial. See, Moore v. Kemp, supra.

Furthermore, Mr. Claitt received a sentence of no more then ten (10) years in Judge Katz court based on the recommendation of the Commonwealth. This evidence existed prior to defendants trial but was intentionally withheld from the defense. At trial the Commonwealth gave the impression that Mr. Claitt would be fully prosecuted in his pending indictments. When in fact, his pending matters were disposed of by the Commonwealth, through either concurrent sentences, nolle pros, or out right dismissals, and again the guarantee of no more then ten (10) years. [Exhibits 1, 2, 3, and 7]

If defendant would have be made aware of this evidence, defense counsel could have utilized it to completely destroy Mr. Claitt credibility as to his expectations from the

Commonwealth in exchange for his testimony against Mr. Tillery. The Commonwealth had an obligation to disclose such evidence and its failure to do so is a miscarriage of justice and tainted defendants conviction entitling him to a new trial. See e.g., Blankenship v. Estelle, 545 F.2d 510 (5th Cir. 1977); Where it was discussed in pertinent part: "Although in the instant case the testimony that Brooks and Crawford were under indictment may have been technically true, it left an erroneous impression of an impending trial and the absence of leniency as an inducement to testify. This court has recently made clear that we will not tolerate prosecutorial participation in technically correct, yet seriously misleading, testimony which serves to conceal the existence of a deal with material witnesses."

As in the case sub judice, although it was technically correct that Mr. Claitt had pending indictments against him, and that the Commonwealth did write letters for his protection, the Commonwealth withheld the part that it was recommended that Mr. Claitt receive no more then ten (10) years, and that five other cases be nolle pros or dismissed as discussed earlier in the motion. Nor was it disclosed that Mr. Claitt received immunity from the Hollis/Pickins indictment.

Even more critical is the fact that the Commonwealth stated to the jury during its closing that Mr. Claitt received an "open plea" and that his sentence is totally left to the discretion of the court. (Trial Tran. ¶May 14, 1985) [Exhibit 11]

In conclusion, this case is before the court on a subsequent

motion under the Post-Conviction-Relief-Act (PCRA). As such, the defendant has demonstrated that a grave miscarriage of justice has been committed against him by the Commonwealths intentional withholding of the above stated information. See, Com. v. Lawson, 519 Pa. 504 (1988); Holding that: "A second or subsequent post conviction request for relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred."

Therefore defendant has met his burden. The new evidence as exhibits one, two, three, four, five, eight, and nine, attached hereto was discovered by defendant within the last sixty (60) days pusuant the the Post-Concicction-Relief Act (PCRA), and clearly shows that the Commonwealth denied defendant due process rights when it knowingly withheld material impeachment evidence that should have been disclosed to defense prior to trial, so that with this evidence defendant could have swayed the jury's verdict in his favor and been acquitted of all charges. See, Com. v. Szuchon, 534 Pa. 483, (1993).

For the foregoing reasons mentioned above, the defendant should be entitled to a new trial under the Post Conviction Relief Act **(PCRA)**.

POINT TWO

THE COMMONWEALTH OF PENNSYLVANIA D.A. BARBARA CHRISTIE AND MINEHART ALLOWED ITS KEY WITNESS EMMANUEL CLAITT FALSE TESTIMONY TO GO UNCORRECTED IN ORDER TO OBTAIN THE HOMICIDE & ARSON (FIRE BOMBING) CONVICTIONS. THUS DENYING DEFENDA-NTS FOURTEENTH AMENDMENT RIGHTS OF THE U.S.CONSTITUTION AND PA. CONST. ART. 3, § 12; 42 PA. CSA § 9541 et.

The Commonwealths cases on the homicide and assault conviction of Hollis/Pickins, as well as the fire bombing conviction was based primarily on the testimony of informant Emmanuel Claitt as argued in point one of the below motion. On May 20, 1980, Mr. Claitt was interviewed by detectives from the Commonwealth of Pennsylvania regarding an unrelated homicide. At that interview Mr. Claitt volunteered information regarding the homicide of Mr. Hollis and aggravated assault (shooting) of Mr. Pickins, and indicated that defendant Mr. Tillery was responsible for there crimes.

As a result of Mr. Claitt false testimony, Mr. Tillery was convicted of the Hollis/Pickins crimes on May 29, 1985 and sentenced accordingly*.

Subsequent to Mr. Tillery murder conviction, Mr. Claitt testified as the key witness for the Commonwealth on the additional indictment regarding the aggravated arson (fire bombing) case. As a result of Mr. Claitt testimony, Mr. Tillery was convicted on August 5, 1985,

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*Defendant homicide trial and bombing trial was before different trial judges. The homicide trial was tried before the Hon. John E. Geitz. And Hon. N. D'Alessandro, presided over defendants' fire bombing trial.

of all crimes associated with the fire bombing indictment.

Mr. Tillery has adamantly maintained his innocence and continues to do so.

The Commonwealth only obtained Mr. Tillery unlawful convictions through the uncorrected false testimony of Mr. Claitt. Mr. Claitt trial testimony's regarding his favorable expectations from the Commonwealth, is in conflict with each other. In fact, the trial testimony that he provided at Mr. Tillery homicide trial regarding expectations, is in direct contradiction to his testimony at the subsequent fire bombing trial.

Furthermore, Mr. Claitt provided a multitude of testimony's on behalf of the Commonwealth in several different trials prior to Mr. Tillery and thereafter. At trials unrelated to the case sub judice, Mr. Claitt was cross-examined about his long standing history of providing information for the Commonwealth, and his motives for providing such information in the cases against Mr. Tillery. As such, Mr. Claitt gave conflicting answers as to his under-handed deals with the Commonwealth. Most of the latter testimony Mr. Tillery recently learned of through his independent efforts by utilizing the Right To Know Act (RTKA).

For example, at Mr. Rose unrelated homicide trial in 1980, Mr. Claitt was a witness for the Commonwealth D.A. Ross. Mr. Claitt testified at that time that there in fact was a deal linked between himself and the Commonwealth that certain indictments pending against him would be dismissed as a result of his favorable testimony. This testimony could have been used at the defendants trial to show that

Mr. Claitt did have a deal. However, due to the Commonwealths intentional failures Mr. Claitt was allowed to testify that he received no deals from the Commonwealth and that he was testifying to seek justice for the death of friend he felt defendant was responsible for. [Exhibit 4]

Mr. Claitt also provided testimony at Mr. Frazier unrelated homicide trial on behalf of the Commonwealth D.A. Ross. At the Frazier trial Mr. Claitt was cross-examined significantly about his assistance in the Mr. Tillery case. Mr. Claitt testified that Dt. Raymond Dougherty and Lt. Shelton, who were the investigators in the Tillery investigations, questioned him about defendants involvement in criminal activity. At that time Mr. Claitt provided incriminating statements regarding Mr. Tillery, and testified at Mr. Frazier trial that he was indeed expecting some favorable consideration from the Commonwealth for his assistance in the arrest and convictions of defendant. [Exhibit 5]

Further, Mr. Claitt provided trial testimony at Mr. Tillery co-defendant in the fire bombing case, Mr. Brand. At Mr. Brand preliminary hearing and trial, Mr. Claitt testified that there was no deals made, and his only reason for testifying was to seek justice for a friend. [Exhibit(s) 8 and 9]

However, at Mr. Tillery codefendant in the Hollis/Pickins case, Mr. Franklin. Mr. Claitt testified that there was deals made. And the Commonwealth D.A. Ross who prosecutored the case against Franklin, held a back room conference with Mr. Claitt sentencing Judge Kubacki in which it was stated by the D.A. that there were deals made between

the Commonwealth and Mr. Claitt. [Exhibit 20]

Then Mr. Claitt immediately contradicted himself later in the Franklin Hollis/Pickins trial when he testified that although he was hoping for a concurrent sentence on his pending fire bombing charges, he received no promises, or recommendations from the Commonwealth. [Exhibit 21]

The above reference testimonies all occurred prior to Mr. Tillery trials, and could had been utilized if the Commonwealth would have disclosed and corrected the false testimonies when they occurred.

Although, the Commonwealth of Pennsylvania was well aware of the contradictory testimony's provided by it's prime witness, the prosecutor(s) involved allowed this testimony to go before the jury uncorrected at both trials. See, United States v. Bigeleisen, 625 F.2d 203 (8th Cir. 1980); "[t]he duty to correct false testimony is on the prosecutor, and that duty arises when the false evidence appears."

Most importantly, the Commonwealth at the Mr. Tillery homicide trial viz, Barbera Christie, not only failed to correct the false testimony of Mr. Claitt when it appeared. She suborned such false testimony.

The relevant testimony occurred during direct examination at the homicide trial and is stated below: [Exhibit 11 pg. 5]:

COMMONWEALTH: BARBERA CHRISTIE:

QUESTION --- OKAY. THE 3 CHARGES THAT YOU'VE JUST DISCUSSED, WHAT IF ANYTHING DID YOU DO WITH REGARD TO THOSE CHARGES THAT CAUSED YOU TO BE INCARCERATED? DID YOU GO TO TRIAL OF WHAT DID YOU DO?

ANSWER BY CLAITT --- I PLEAD GUILTY, OPEN PLEA IN FRONT OF JUDGE LEON KATZ.

QUESTION --- ALL RIGHT. CAN YOU TELL THE JURY WHAT YOU MEAN BY OPEN PLEA?

ANSWER --- OPEN PLEA IS, I PLEAD GUILTY TO THE CHARGES WITH --- WITH NO RECOMMENDATION FROM THE DISTRICT ATTORNEY'S OFFICE. IT WAS AN OPEN PLEA WHEREIN THE JUDGE WOULD DECIDE MY FATE AS TO SENTENCE.

QUESTION --- ALL RIGHT. AND WHAT SENTENCE DID YOU RECEIVE FROM JUDGE KATZ ON YOUR PLEA TO THOSE CHARGES?

ANSWER --- ONE AND A HALF TO 7 YEARS FOR SALES ON NARCOTICS. AND ONE TO 5 YEARS FOR ATTEMPT ARSON AND 6 TO 12 MONTHS FOR POSSESSION OF AN INSTRUMENT OF CRIME.

[Also exhibit 11 pg 6:]

QUESTION --- NOW, AT THE TIME OF YOUR SENTENCING BEFORE JUDGE KATZ, DID ANY MEMBER OF THE DISTRICT ATTORNEY'S OFFICE RECOMMEND OR REQUEST OF JUDGE KATZ ANY PARTICULAR SENTENCING RELATIVE TO THOSE CHARGES TO WHICH YOU PLEAD GUILTY?

ANSWER --- ASSISTANT DISTRICT ATTORNEY LYNN ROSS RECOMMENDED TO JUDGE LEON KATZ THAT AT -- HE MADE THE COURT AWARE OF ANY COOPERATION WITH THE DISTRICT ATTORNEY'S OFFICE IN VIEW OF THE NUMBER OF CASES THAT I HELPED THEM PROSECUTOR AND HIS ONLY STIPULATION WAS THAT HE ASKED THE COURT TO RUN THE SENTENCE TOGETHER, MEANING CONCURRENT. [**Failed to add that there was a recommendation that he receive no more then 10 years on his sentence.**]

QUESTION --- ALL RIGHT. NOW WITH REGARD TO THE TIME WHICH YOU WOULD RECEIVE AND DID RECEIVE FROM JUDGE KATZ, DID ANY MEMBER OF THE DISTRICT ATTORNEY'S OFFICE, MISTER ROSS OR ANYONE ELSE, REQUEST OR RECOMMEND OR REPRESENT TO JUDGE KATZ, AND PARTICULAR PERIOD OF TIME OTHER THAN WHATEVER TIME YOU RECEIVED, THAT THE REQUEST, THAT THE TIME RUN TOGETHER, RUN CONCURRENT?

ANSWER --- NO. THERE WAS NO OTHER RECOMMENDATION. [**This testimony was false and known to be so by the Commonwealth and should have been corrected.**]

[Also Exhibit 11 pg 7]

QUESTION --- SO AT THE TIME OF THE PLEA BEFORE JUDGE KATZ, DID YOU HAVE OPEN CASES WHICH YOU IN YOUR TERMINOLOGY HAD TO FIGHT ALONE?

ANSWER --- YES, I DID.

QUESTION --- AND AT THE CURRANT MOMENT, AT THIS TIME, DO

YOU HAVE AN OPEN CASE PENDING?

ANSWER --- YES, I DO.

QUESTION --- WHAT' THE CHARGE IN THAT CASE?

ANSWER --- ROBBERY.

QUESTION --- OKAY. THAT IF ANY UNDERSTANDING OR AGREEMENT DO YOU HAVE WITH REGARD TO YOUR PENDING ROBBERY CASE WITH THE DISTRICT ATTORNEY'S OFFICE?

ANSWER --- I HAVE NO AGREEMENT AT ALL. **[This testimony was false and known to be so by the Commonwealth and should have been corrected.]**

* * * *

Although the Commonwealth was well aware of the fact that it was promised to Mr. Claitt that it would be recommended that he receive no more then 10 years on his sentence. At no time did the D.A. Christie attempt to clarify Mr. Claitt false testimony when it occurred. And in fact, gave the impression to the jurors that Mr. Claitt will be sentence with no recommendation from the D.A. Office as shown above, and that Mr. Claitt received no promises and only that he plead to a so called "open plea"[2]. Also see, [Exhibit 23]

This is coupled by the closing summation testimony provided by D.A. Minehart at Mr. Tillery subsequent fire bombing trial. The

---

[2]According to the Commonwealth and Mr. Claitt, an "open plea" is a plea of no set time recommendations, and that the court can sentence a defendant to the fullest extent of the law. This position by the Commonwealth gave the jurors in Mr. Tillery trial the impression that Mr. Claitt had no expectations of receiving a lighter sentence in exchange for his testimony. Although the Commonwealth clearly knew that it was recommended that Mr. Claitt be sentenced to no more then 10 years.

fact that it was a different D.A. prosecuting Mr. Tillery fire bombing trial then at the prior homicide, doesn't change the Commonwealth responsibility to correct false testimony.

At Mr. Tillery fire bombing trial, Mr. Claitt admitted that he was receiving a recommendation of no more then a 10 year sentence from the Commonwealth prior to his testimony given at Mr. Tillery homicide trial.

The relevant testimony was brought out on direct examination at the fire bombing trial and is stated below: [Exhibit 14 pg 69]

COMMONWEALTH MR. MINEHART:

QUESTION --- NOW, AS TO THE AGREEMENT, AS TO HOW MUCH TIME YOU WOULD SPEND IN PRISON ON THIS CASE, WHAT WAS THE AGREEMENT WITH THE DISTRICT ATTORNEY'S OFFICE THAT YOU HAD?

ANSWER --- THAT WHEN I GOT SENTENCED, MY SENTENCE WOULDN'T EXCEED 10 YEARS, MAXIMUM. [**This testimony differs significantly from his trial testimony at the prior homicide trial.**]

* * * *

Evenmore troubling is the fact that Commonwealth D.A. Minehart clearly was aware of the false testimony provided by Mr. Claitt because he was the prosecutor in several of the indictments pending against Mr. Claitt in Judge Katz court room and appeared at a preliminary hearing on Novemeber 28, 1980 on behalf of the Commonwealth to discuss the pending indictments status. This hearing occurred an entire three years prior to Mr. Tillery's arrest in California. At the preliminary hearing Mr. Claitts deals were discussed and it was stated on the record by D.A. Minehart that there clearly are deals, and Mr. Claitt also stated on the record that

he received "promises" from the Commonwealth. [Exhibit 1]

Therefore, there should be no question that D.A. Minehart was aware that Mr. Claitt was testifying falsey when he said he received no "promises" or the like from the Commonwealth at defendants trials.

In fact D.A. Minehart went on to somewhat contradict his position as with regards to the deals Mr. Claitt received at defendants fire bombing trial in October 1985. At defendants fire bombing trial Mr. Minehart admitted that there were all kinds of deals with Mr. Claitt but still maintained that there was no promises, refusing to take a strong position as to one fact or the other. At no time did Mr. Minehart show even an attempt to correct Mr. Claitts false testimony. [Exhibit 12]

Additionally, Dt. Gerrard testified on behalf of the Commonwealth and admitted that there were deals made with Mr. Claitt prior to 1980. And that Mr. Claitt detainers were lifted and he was allowed to sign his own bail. Thus contradicting Mr. Minehart position as well, and what makes Dt. Gerrard testimony regarding what Mr. Claitt received is more believable given the fact that Mr. Claitt was released from jail and various indictments of his own were dismissed by the Commonwealth.

Furthermore, Mr. Claitt provided testimony at defendants co-defendant Mr. Rose fire bombing trial in 1985 as well. At Mr. Rose trial the Commonwealth D.A. Mr. Minehart again admitted that there were deals but immediately contradicted himself by stating there were no deals. [Exhibit 16; pg 82-83]

Moreover, because of the veracity of Mr. Claitt various

testimonies and of the D.A. Office contradictory positions regarding the deals made with Mr. Claitt it is difficult to know when Mr. Claitt is telling the truth or not.... or whether he received a deal or not. And know conviction should even in part, be allowed to stand on such veracity. The Commonwealth has a obligation to make it clear to the court, jury, and the defense , whether a witness is receiving something in exchange for his testimony.

It is clear that Mr. Claitt is a career criminal and a habitual liar, who's credibility is meager at best and has a history of not being charged in homicide cases despit his admitted participation in them.

Basically the states case, as in, U.S. v. Foster, 874 F.2d 491 (8th Cir. 1988); "Boiled down to a question of the credibility of the witnesses." U.S. v. Foster, 874 F.2d 491 (8th Cir. 1988).

See e.g., Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). "Held: The failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment." Napue supra, 360 U.S. Id. "First, it is established that a conviction obtained through use of false evidence, known to be such by the representatives of the State, must fall under the Fourteenth Amendment, quoting: Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Also in Napue the Court stated that "The jury's estimate of the truthfulness and reliability of

a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Id.

Furthermore, in Napue at 269, quoting People v. Savvides, 1 N.Y. 2d 554, 557; 136 N.E. 2d 853,854-855; 154 N.Y.S. 2d 885, 887:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.... That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

See supra, United States v. Bigeleisen, 625 F.2d 203 (8th Cir. 1980).

This is not a case in which the witness' bias becomes irrelevant because the witness' testimony is fully corroborated, nor is this a case in which the witness' testimony has been thoroughly impeached and proof of his bias would be merely cumulative. See, e.g., McCleskey v. Kemp, 753 F.2d 877, 885 (11th Cir. 1985).

The disclosure of Mr. Claitt' expectations from the state in return for his testimony against defendant, however, would not have been merely repetitious, reinforcing a fact already knew; instead, "the truth would have introduced a new source of potential bias." Brown v. Wainright, 785, F.2d 1457, 1466

(11th Cir. 1986). See also United States v. Sanfilippo, 564 F.2d 176, 178 (5th Cir. 1977) ("A jury may very well give great weight to a **precise reason** to doubt credibility when the witness has been shown to be the kind of person who might perjure himself.").

One might argue that Mr. Claitt false testimony was not perjured. Under those circumstances the defendant directs the courts attention to Dupart v. United States, 541 F. 2d 1148, 1150 (5th Cir. 1976); Where it was held "where testimony, even though not perjurious, would surely be highly misleading to the jury...."

Finally, this case is before the court on a subsequent motion under the Post-Conviction-Relief-Act (PCRA). As such, the defendant has demonstrated that a grave miscarriage of justice has been committed against him by the Commonwealths intentional systematic failures to correct false testimony at the homicide trial and the fire bombing trial. Therefore, as supported by the evidence presented and the supporting case citations the defendant is entitled to a new and fair trial which is guaranteed to him under the Fourteenth Amendment of the United States Constitution and the Post Conviction Releif Act (PCRA) as stated in POINT ONE.

POINT THREE

THE COMMONWEALTH OF PENNSYLVANIA D.A. BARBARA CHRISTIE KNOWINGLY WITHHELD EXCULPATORY IMPEACHMENT EVIDENCE OF ONE OF ITS KEY WITNESSES AGENT/INFORMANT ROBERT MICKINS IN ORDER TO OBTAIN THE MURDER/ASSAULT CONVICTIONS. AND ALLOWED ITS WITNESS FALSE TESTIMONY TO GO UNCORRECTED BEFORE THE JURY. THUS DENYING HIS FOURTEENTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND PA. CONST. ART. 3, § 12; 42 PA. CSA § 9541 et.

Mr. Robert Mickins was the only other witness besides Mr. Claitt to implicate the defendant in the Hollis/Pickins crimes.

On September 26, 1984, Mr. Mickins gave a sworn statement to investigators from the Commonwealth of Pennsylvania implicating Mr. Tillery in the homicide and assault charges mentioned in the indictment. The alleged crimes occurred on October 22, 1976, an entire 8 years prior to Mr. Mickins statement to police. And he only gave the statement after he was arrested on unrelated rape and robbery charges. See, [Exhibit 3C]

A statement that he claims he never had the opportunity to read before signing. Because of this, he provided the Commonwealth with an additional statement in April of 1985 further implicating the defendant in the crimes and this time adding that it was Mr. Tillery who ask him to be the look out instead of another individual he initially said ask him to be the look out. See, [Exhibit 2B]

Although Mr. Mickins admitted that he was the look out guy at the crime scene which allowed these shootings to occur, he never

was charged as an accomplice or co-conspiritor in the indictment.

The Commonwealth via, Barbera Christie never gave any explanation as to why Mr. Mickins was not charged as such. Mr. Mickins not being charged in the Hollis/Pickins crimes are clear signs of an undisclosed "Use Immunity" agreement in return for his trial testimony against Mr. Tillery. This type of exchange should have been disclosed to the jury and the Commonwealths failure to do so is a clear due process violation contrary to the Fourteenth Amendment of the United States Constitution. See, e.g., Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987); holding in pertinent part that: "A defendant has the right to question whether a witness is testifying under a grant of immunity, or absent such a grant, whether witness thought he had immunity."

Moreover, Mr. Mickins has a long criminal back-ground, and an extensive history as a Commonwealth informant/agent. See, e.g., Matteo v. Superintendent, SCI Albion, 171 F.3d 877 (1999). He has testified in several cases on behalf of the Commonwealth, and in all of the cases he has stated people confessed crimes to him for no apparent reason. To add fuel to the fire, D.A. Barbera Christie has a history of using false jail house witnesses to assist her in obtaining convictions for the Commonwealth. The two put together is a deadly combination. See, [Exhibit 5E]

Although at defendants trial it was disclosed that Mr. Mickins would be receiving some assistance from the Commonwealth on his pending rape/robbery indictment in exchange for his testimony. There were certain promises that was withheld from the defense.

Such as, exhibit 1A, which is attached hereto in support of defendants motion. Exhibit 1A is evidence of further favorable treatment Mr. Mickins was receiving from the Commonwealth in exchange for his testimony against defendant. This evidence was never disclosed prior to Mr. Tillery trial, and was never brought to the attention of the court or the defense. The defendant only learned of this evidence within the last sixty (60) days, by his own independent investigation through utilizing the Right To Know Act (RTKA). See, [Exhibit 1A]

See, Brady v. Maryland, 373 U.S. 83 (1963); which states in pertinent part that: "A prosecutor has a duty to provide an accused with all evidence in the state's possession materially favorable to the accused defense." The prosecutor failed to do such here. See also, Com. v. Romanky, supra. Where the court held that: "evidence of an understanding or agreement regarding future prosecution would be relevant to the witness credibility and the jury should have been informed of it."

This evidence clearly shows that after defendants conviction Mr. Mickins continued to use his testimony against defendant as a bargaining tool to get favorable treatment from the Commonwealth on his own criminal matters.

As seen, in or about November of 1985, after defendants conviction, Mr. Mickins wrote to his own sentencing [viz, Judge Eugene Clark] asking for help in getting him released from prison on a Home Furlough. And by using his history as a Commonwealth witness in several murder trials including Mr. Tillery's, as a bargaining tool,

he was successful in obtaining furloughs, with a favorable recommendation of the D.A. Miss Barbera Christie, who again, has a history of using false witnesses. Mr. Mickins also clearly admitted in his letter that the court only sentenced him to 2-5 years in Northampton county prison instead of up state where prison sentences are often served.

See e.g., Blankenship v. Estelle, 545 F.2d 510 (5th Cir. 1977); Where it was discussed in pertinent part: "This court has recently made clear that we will not tolerate prosecutorial participation in technically correct, yet seriously misleading, testimony which serves to conceal the existence of a deal with material witnesses."

If defendant would have been made privy to this evidence, it would have given the defense more damaging evidence to show that Mr. Mickins had great reason to want to curry favor for the Commonwealth. And that reason was not to receive the full sentence eligible for the rape/robbery charges. Charges that shoes Mr. Mickins character as being a weak individual to want to prey on defenseless woman. Such evidence goes directly to the credibility of the Commonwealth on additional witness to the crimes and Mr. Tillery's alleged involvement. See, United States v. Sanfilippo, 564 F.2d 176, 178 (5th Cir. 1977) ("A jury may very well give great weight to a **precise reason** to doubt credibility when the witness has been shown to be the kind of person who might perjure himself.").

In fact Mr. Mickins was allowed to testify that he only plead guilty to an "open plea", and that sentencing was up to his sentencing judge [viz, Clark] with no recommendations from the Commonwealth.

See, [Exhibit 4D]

The latter in itself was false evidence that was allowed to go uncorrected before the jury. The commonwealth had an obligation to disclosed and correct Mr. Mickins false testimony, with the evidence of the favorable recommendations he received from the Commonwealth in Judge Clark court room. The deals Mr. Mickins had was already established at Judge Clarks court, when the Commonwealth nolle pros several of his pending indictments. See, [Exhibit 4D pg 24-25]

See, Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). "Held: The failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment." And also U.S. v. Foster, 874 F.2d 491 (8th Cir. 1988). Napue 360 U.S. Id. "First, it is established that a conviction obtained through use of false evidence, known to be such by the representatives of the State, must fall under the Fourteenth Amendment, quoting: Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Also in Napue the Court stated that "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Id.

In the case sub judice, when Mr. Mickins testified that there was no agreement [Ex. 4D pg 25]; the Commonwealth clearly knew that there was an agreement and should have immediately corrected such false testimony. It's failure to do so gave the false impression to the jury that Mr. Mickins had no reason to want to curry favor for the Commonwealth by lying against defendant. Even though, Mr. Mickins had every reason in the world to want to curry favor for the Commonwealth, and that reason was to stay out of prison, whether by Home Furloughs, or "Use Immunity" on the homicide indictment. or the very lenient sentence he received for rape/robbery.

See supra, Napue at 269, quoting People v. Savvides, 1 N.Y. 2d 554, 557; 136 N.E. 2d 853,854-855; 154 N.Y.S. 2d 885, 887:

> "A lie is a lie, no matter what its subject, and, if it is any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.... That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

Again as stated in the matter of, United States v. Bigeleisen, 625 F.2d 203 (8th Cir. 1980); "[t]he duty to correct false testimony is on the prosecutor, and that duty arises **when the false evidence appears."**

This is not a case in which the witness' bias becomes irrelevant because the witness' testimony is fully corroborated, nor is this a case in which the witness' testimony has been thoroughly impeached and proof of his bias would be merely cumul-

ative. See, e.g., McCleskey v. Kemp, 753 F.2d 877, 885 (11th Cir. 1985).

If the truth would had been disclosed "it would have introduced a new source of potential bias." Brown v. Wainright, 785, F.2d 1457, 1466 (11th Cir. 1986). See also United States v. Sanfilippo, 564 F.2d 176, 178 (5th Cir. 1977) ("A jury may very well give great weight to a **precise** **reason** to doubt credibility when the witness has been shown to be the kind of person who might perjure himself.").

One might argue that Mr. Mickins false testimony was not perjured. Under those circumstances the defendant directs the courts attention to Dupart v. United States, 541 F. 2d 1148, 1150 (5th Cir. 1976); Where it was held "where testimony, even though not perjurious, would surely be highly misleading to the jury...."

Therefore, in light of the evidence and the arguments presented before the Court, the defendant is entitled to a new and fair trial un-tainted by the various false testimonies of Mr. Mickins and Mr. Claitt, which is guaranteed to defendant under the Fourteenth Amendment of the United States Constitution.

CONCLUSION

All of the issues presented in the below motion should also be considered collectively. Defendants arguments are also supported by the exhibit annexed hereto for the courts consideration.

Respectfully submitted,

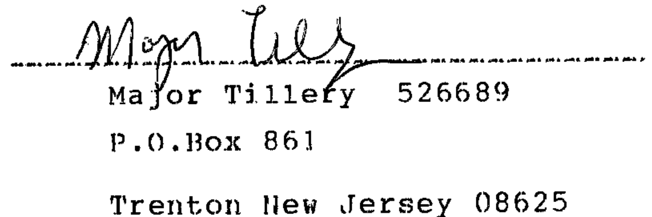
Major G. Tillery

Dated: 8-2-07

VERIFICATION

I **Major Tillery ,** do hereby verify the facts set forth in the attached Motion are true and correct to the best of my knowledge information and belief. **Sending This Motions With The Proper Exhibits To Support Defendants Claim.**

The undersigned understands that the statement made therein are subject to the penalties of 18 Pa.C.S. Section 4904 relating to unsworn falsification to authorities.



Major Tillery 526689
P.O.Box 861
Trenton New Jersey 08625

DATE 8-2-07

EXHIBIT C
Superior Court Opinion
Affirming denial of
Second PCRA Petition

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
MAJOR G. TILLERY,	:	
Appellant	:	No. 2937 EDA 2008

Appeal from the PCRA Order of September 9, 2008,
in the Court of Common Pleas of Philadelphia County,
Criminal Division at No. CP-51-CR-0305681-1984

BEFORE: GANTMAN, KELLY and COLVILLE*, JJ.

MEMORANDUM: **FILED JULY 15 , 2009**

This case is an appeal from the order dismissing Appellant's petition under the Post Conviction Relief Act ("PCRA"). Finding Appellant's petition untimely, we affirm the dismissal.

Facts

Appellant was convicted of murder and related offenses. On appeal, this Court affirmed his judgment of sentence. ***Commonwealth v. Tillery***, 563 A.2d 195 (Pa. Super. 1989) (unpublished memorandum). On March 5, 1990, the Pennsylvania Supreme Court denied his petition for allowance of appeal. ***Commonwealth v. Tillery***, 593 A.2d 841 (Pa. 1990).

*Retired Senior Judge assigned to the Superior Court.

In a separate case, Appellant was convicted of, *inter alia*, arson. This Court affirmed his judgment of sentence on March 15, 1989. ***Commonwealth v. Tillery***, 560 A.2d 830 (Pa. Super. 1989) (unpublished memorandum). He did not file a petition for allowance of appeal.

In 2007, Appellant filed the instant PCRA petition, his second on each case.[1] In his petition, Appellant claimed the Commonwealth withheld exculpatory and/or impeachment information from him prior to trial. More specifically, Appellant contended that, in return for testifying against him, certain Commonwealth witnesses were to receive, or had already received by the time of his trial, favorable treatment from the Commonwealth. The favorable treatment included immunity from prosecution and/or reduced sentencing on the witnesses' own criminal charges. Appellant's position was that the favorable treatment constituted undisclosed exculpatory or impeachment material. Similarly, Appellant also contended the Commonwealth allowed one or more of the witnesses to testify falsely by denying or understating the extent of the favorable treatment.

---

[1] The petition addresses both of Appellant's cases. While Appellant should have filed separate petitions, one at each case number, the PCRA court accepted his petition as filed and dismissed the petition through a single order now on appeal before us. Given the PCRA court's acceptance of the petition as filed and the fairly evident untimeliness of Appellant's PCRA requests, we see no reason to remand this matter to have the two cases treated separately.

In his petition, Appellant cited to numerous documents such as transcripts from various proceedings and letters from the Commonwealth (*e.g.*, a letter to the judge who was to sentence one of the aforesaid witnesses). The documents supposedly demonstrated the favorable treatment, the Commonwealth's failure to disclose it and the witnesses' false testimony about the favorable treatment.

Proceeding under Pa.R.Crim.P. 907, the PCRA court issued a notice of intent to dismiss the petition as being untimely. Subsequently, the court dismissed the petition on that basis. Appellant then filed this appeal.

Legal Principles

In order to be timely, a PCRA petition, including a second or subsequent one, must normally be filed within one year of when a defendant's judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1). A judgment of sentence becomes final at the end of direct review, including discretionary review in the Pennsylvania or U.S. Supreme Court, or at the expiration of time for seeking such review. ***Id.*** at (b)(3).

The time period for seeking review in the Pennsylvania Supreme Court is thirty days from the entry of our order sought to be reviewed. Pa.R.A.P. 1113(a). Ninety days is the period for petitioning the U.S. Supreme Court for a writ of *certiorari* after the Pennsylvania Supreme Court enters an order disposing of a case. SUP.CT.R. 13.

Despite the normal one-year deadline, the PCRA provides three statutory exceptions to the time bar. ***See*** 42 Pa.C.S.A. § 9545(b)(1) (setting forth exceptions based on governmental interference, newly discovered facts and/or a newly announced retroactive constitutional right). The exception for newly discovered facts requires the petitioner to plead and prove that "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence." ***Id.*** at (b)(1)(ii). Where a petitioner invokes one or more of the aforesaid exceptions, the PCRA petition must be filed within sixty days of when the claim could have been brought. ***Id.*** at (b)(2). Ultimately, if a PCRA petition is untimely, the PCRA court lacks jurisdiction to entertain it. ***Commonwealth v. Hawkins***, 953 A.2d 1248, 1252 (Pa. 2006).

When considering a PCRA court's denial of relief, our standard of review is limited to determining whether the court's ruling is supported by the record and is free of legal error. ***Commonwealth v. Treadwell***, 911 A.2d 987, 989 (Pa. Super. 2006). An appellant has the burden to persuade us that the PCRA court erred and that relief is due. ***Commonwealth v. Wrecks***, 931 A.2d 717, 722 (Pa. Super. 2007).

Analysis

Appellant's judgment of sentence on his murder case became final in June 1990 when the time for seeking a writ of *certiorari* in the U.S. Supreme

Court expired. On his arson case, his judgment of sentence became final in April 1989, thirty days after the entry of our affirmance. The instant PCRA petition was not filed until 2007 and was, therefore, facially late.

To overcome this untimeliness, Appellant attempts, as he did in the PCRA court, to invoke the exception for newly discovered facts. In particular, he claims that, within sixty days before he filed his petition, he discovered the transcripts and Commonwealth letters on which he relies to substantiate his claims. However, those documents all appear to be from the 1980s. Even to the extent Appellant might not have known about the facts contained therein until recently, he fails to show us why he could not have discovered those facts by due diligence at some earlier date. As such, he fails to convince us he is entitled to a time-bar exception under 42 Pa.C.S.A. § 9545(b)(1)(ii).

Accordingly, Appellant has not persuaded us of any legal or factual error in the PCRA court's dismissal of his petition on the grounds that the petition was late and that the court therefore lacked jurisdiction. Consequently, we will not disturb the court's ruling and we affirm the dismissal.

Order affirmed.

Judgment Entered.

Prothonotary

Date:____________________

EXHIBIT D

Third PCRA petition filed June 15, 2016

&

Supplemental petition filed September 7, 2016

MAJOR G. TILLERY
AM 9786
Petitioner *PRO SE*
SCI Frackville
1111 Altamont Blvd.
Frackville, PA 17931

Received
JUN 15 2016
Office of Judicial Records
Appeals/Post Trial

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
Respondent,	:	Docket Number CP-51-CR-0305681-1984
v.	:	
MAJOR G. TILLERY,	:	
Petitioner	:	

PETITION FOR POST- CONVICTION RELIEF
And PRELIMINARY MEMORANDUM OF LAW

Petitioner, MAJOR G. TILLERY, *pro se*, respectfully petitions this Court for relief pursuant to the Post-Conviction Collateral Relief Act (PCRA), 42 Pa. C.S. & 9541 *et. seq*., and in support thereof avers the following:

I. INTRODUCTION

1. This is a case of factual innocence and gross prosecutorial misconduct violating Petitioner Major Tillery's right to due process and a fair trail.

CP-51-CR-0305681-1984 Comm. v. Tillery, George
Post-Conviction Relief Act Petition Filed

The actions of the Commonwealth resulted in a fundamental miscarriage of justice that shocks the conscience and warrants reversal of his conviction and dismissal of charges against Petitioner Major Tillery.

2. Newly discovered evidence proves the Commonwealth knowingly and intentionally manufactured and presented false evidence to convict Petitioner. Jailhouse informants were coerced and promised favors to lie and testify that Petitioner Major Tillery was involved in the shooting homicide of Joseph Hollis and assault of John Pickens. This falsified testimony was the *only evidence* presented against Petitioner. Petitioner has spent over thirty years in prison for crimes he did not commit.

3. Petitioner Major Tillery was convicted of homicide, assault, weapons and conspiracy charges in May 1985 for poolroom shootings that left Joseph Hollis dead and John Pickens wounded on October 22, 1976, purportedly over disputes between drug dealers. Career informant Emanuel Claitt also identified Petitioner as an official in the Nation of Islam and that the Nation of Islam ran the Black Mafia.

4. Petitioner is serving a sentence of life imprisonment without the possibility of parole. William Franklin, the operator of the poolroom, charged as a co-conspirator in the shootings, was tried and convicted in December 1980.

5. Pickens, the survivor of the shootings, gave a statement to police detectives that identified the shooters as individuals other than Petitioner and Franklin. Pickens did not testify at either trial.

6. There was no evidence against Petitioner linking him to these 1976 shootings except for the testimony of two jailhouse informants: that of Emanuel Claitt obtained in spring of1980 and the other from Robert Mickens obtained in the fall of 1984.

7. Claitt and Mickens were incarcerated with open felony charges and faced decades of state prison time. During their trial testimony both Claitt and Mickens repeatedly swore that they had received no promises, agreements or deals in exchange for their testimony. The trial prosecutor Barbara Christie insisted to the Court and to the Jury that these witnesses were not given any plea agreements or sentencing promises. This was false.

8. The newly discovered evidence in this Petition are the sworn declarations of these witnesses, Emanuel Claitt [Exhibit A, B] and Robert Mickens [Exhibit C] that their testimony was entirely false, and that this false testimony was manufactured by the prosecution with the assistance of police detectives and secured by threats, coercion and favors including dismissal of felony charges, minimal or no state time on pleas and access to sexual encounter while in the police custody.

9. Petitioner is factually innocent of the homicide of Joseph Hollis and the assault on John Pickens, but he was prevented from providing that defense at trial because the Commonwealth concealed its actions presenting false evidence and withheld material exculpatory evidence in violation of *Brady v. Maryland* and *Napue v. Illinois*, and the due process principles for which they stand.

II. ELIGIBILITY FOR RELIEF

10. This PCRA petition presents claims of actual innocence and the denial of due process and a fair trial by the Commonwealth's intentional manufacture and presentment of false evidence against the Petitioner, and suppression of the information that it has done so. This petition also presents other claims pursuant to *Brady v. Maryland* and its progeny for the suppression of exculpatory impeachment evidence.

11. Petitioner states that he is entitled to relief pursuant to the following provisions of the PCRA:

a. Petitioner's conviction resulted from "a violation of the Constitution of Pennsylvania or laws of this Commonwealth or the Constitution of the United States, which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S. §9543(a)(2)(i).

b. Petitioner's conviction resulted from "the unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial" if it had been introduced." 42 Pa. C.S. §9543(a)(2)(vi).

12. Specifically, the claims set forth herein are based upon violations of Petitioner's right to due process of law guaranteed to him by the Fourteenth Amendment to the United States Constitution and Article I, § 9 of the Pennsylvania Constitution.

13. The constitutional errors and newly discovered exculpatory evidence described herein have been neither previously litigated nor waived. See 42 Pa.

C.S. § 9543(a).

14. Petitioner has been convicted of crimes under the laws of this Commonwealth and is actively serving a sentence of life imprisonment without the possibility of parole as a result of his convictions. Therefore, Petitioner is entitled to relief pursuant to the provisions of the PCRA.

III. THIS PCRA PETITION IS TIMELY

15. A PCRA petition, including any subsequent petition must be filed within one year of the date the judgment becomes final. 42 Pa.C.S. §9545(b)(1).

16. Petitioner is fully aware that his instant petition, his third PCRA petition, is outside that time limitation. However, this petition is timely pursuant to the exceptions to the time constraints imposed. 42 Pa. C.S. §9545(b)(1)(i), (ii), as relevant here provide:

> (i) The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii)The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence;
>
> ***
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

17. Petitioner presents several claims in this petition that are based upon newly discovered facts that the Commonwealth manufactured false evidence

against the Petitioner and knowingly and intentionally presented this false evidence to the Jury and the Court. The prosecution suppressed the fact of its fabrication of the evidence against Petitioner as well as suppressed exculpatory impeachment evidence of plea deals and agreements. The Commonwealth committed a fraud on the Court and the Jury and undermined the fundamentals of due process.

18. This case falls squarely under the considerations of *Mooney v Holohan*, 294 U.S. 103 (1935). Due process is violated "if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."

19. This case is also governed by the holdings and considerations in *Napue v. Illinois*, 360 U.S. 264 (1959), *Brady v. Maryland*, 373 U.S. 83, 87 (1963), *Giglio v. United States*, 405 U.S. 150, 154 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995) and their legal progeny.

20. The newly discovered evidence is contained in the sworn declarations from the two prosecution fact witnesses, Emanuel Claitt and Robert Mickens, who provided the entirety of trial evidence against Petitioner.

21. Claitt and Mickens now establish that their testimony was manufactured by the prosecution and police who coerced and threatened them with false charges and provided favors including plea agreements, dismissal of charges as well as allowing sexual favors while incarcerated to these witnesses as

inducement and in exchange for their false testimony. These witnesses were coached to testify falsely.

22. Claitt and Mickens understood that the Commonwealth would penalize them if that did not lie on the witness stand and that they would be rewarded if they did.

23. Commonwealth representatives told the Court and the Jury that these witnesses had no reason to falsify their testimony and asserted there were no plea agreements, knowing this was false. The witnesses' false statements that there were no plea agreements were not corrected.

24. On April 18, 2016 Robert Mickens provided a sworn declaration in which he stated for the first time that his testimony at trial was fabricated and coerced by then Assistant District Attorney Barbara Christie, Detectives John Cimino and James McNeshy. Mickens swore that he was promised a very favorable plea agreement and treatment in his pending criminal cases. He was promised protection in prison against prisoners who viewed him as a "snitch." Mickens was granted sexual favors in exchange for his false testimony.

25. On May 4, 2016 Emanuel Claitt provided a sworn declaration, supplemented by another sworn declaration on June 3, 2016 stating that his testimony against Petitioner was fabricated and coerced and coached by ADAs Leonard Ross, Barbara Christie, along with ADA Roger King with the assistance of Detectives Larry Gerrard, Ernest Gilbert, Lubiejewski and Lt. Bill Shelton. As part of the coercion to convince Claitt into falsely testifying he was threatened

with false murder charges as well as given promises and agreements of favorable plea deals and sentencing. He was also given sexual favors.

26. The Verified Declarations of Robert Mickens and Emanuel Claitt contain newly discovered facts that each testified falsely based on evidence fabricated by the prosecution and police.

27. The facts upon which Petitioner bases his claims raised here became known to Petitioner within the last 60 days. This Petition is filed within 60 days of the date these claims could have been presented, meeting the jurisdictional time period set forth under 42 Pa. C.S. §9545(b)(2).

A. Government Interference 42 Pa. C.S. §9545(b)(1)(i)

28. Here the new evidence is the fact that it was the government itself that knowingly and intentionally fabricated and presented false evidence against Petitioner. The Commonwealth concealed and suppressed the facts of its actions.

29. As set forth below *infra*, the prosecution denied that its witnesses were not truthful and made affirmative statements to the Court upholding the veracity of its witnesses and attacking the efforts of Petitioner to uncover the fundamental falsity of these witnesses' testimony: That neither witness was present at the time of the crime, and in the case of Claitt, also not present at the meetings two days before the shooting.

30. The prosecution additionally falsely stated on the record that the Commonwealth had no agreement, no deals with these witnesses regarding their respective pending cases.

31. Underlying the entirety of the Commonwealth's prosecution was interference with the right of the Petitioner to due process by falsifying evidence and concealing that falsification. That misconduct interfered and prevented Petitioner from earlier discovering this new evidence. See, *Banks v. Dretke,* 540 U.S. 668, 696 (2004).

B. After Discovered Facts and Due Diligence:

32. It is averred that the facts revealed in these declarations were previously unknown to Petitioner and could not have been previously discovered through the exercise of due diligence.

33. It was not within the power or capacity of Petitioner to obtain the truth that Robert Mickens' and Emanuel Claitt's false testimony was actually manufactured by the Commonwealth. The Commonwealth concealed that fact.

34. Petitioner maintained his innocence from the time he learned he was being accused of shooting Joseph Hollis and John Pickens. Because Petitioner was not involved in that shooting, he knew that what Emanuel Claitt and Robert Mickens testified to was false.

35. Nonetheless Petitioner did not and could not obtain, no matter how much he tried, evidence of the fact the Commonwealth fabricated the evidence and coerced Claitt and Mickens into falsely testifying.

36. Similarly there was no way for the Petitioner to obtain the factual evidence that Commonwealth representatives allowed and assisted these witnesses to have sex with girlfriends in the Round House interview rooms, and in Claitt's

case to be provided with hotel rooms prior to the willingness of these witnesses to come forward.

37. Petitioner had no control over, nor could he by his exercise of due diligence obtain this new evidence until such time as these witnesses were willing and ready to come forward to clear their consciences and overcome fear of retaliation by the prosecution and police. It rested with Robert Mickens and Emanuel Claitt to decide to come forward. Their respective declarations state that they are only now willing to provide this information.

38. Due diligence does not require the Petitioner to act on the *assumption* that Commonwealth withholds *Brady* material, that Commonwealth witnesses are committing perjury and the Commonwealth improperly permits them to do so. See *Commonwealth v. Selenski*, 994 A.2d 1083, 1089 (2010), *Commonwealth v. Davis*, 86 A.3d 883 (P.A. Super. 2014).

39. Moreover, throughout the over thirty years Petitioner has been imprisoned for crimes he did not commit, he has repeatedly challenged his conviction under extremely difficult circumstances. For twenty of those thirty-plus years, Petitioner was in solitary and disciplinary custody with severe restrictions on phone communication, personal visits and access to legal materials.

40. Petitioner was transferred almost two dozen times to prisons in the Federal system, New Jersey as well as within the PA Department of Corrections. His own legal records were taken from him and delayed in being returned to him

during each of these transfers. In 2011 his legal files, including transcripts and prior legal pleadings were destroyed by water damage at SCI Pittsburgh.

41. Petitioner has had several serious medical emergencies, liver and bowel problems that incapacitated him for periods of time. In addition Petitioner was and is hampered by lack of funds and adequate legal assistance. This made it extremely difficult to conduct the investigation needed to pursue the new evidence presented here.

42. These explanations are provided to this Court to explain the objective circumstances that impeded Petitioner's attempts to uncover and present to the Court the Commonwealth's falsification of evidence against him, the suppressed evidence of his innocence and other materially favorable evidence pursuant to *Brady* et. al.

43. There is authority for the proposition that second or subsequent petitions will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred. See *Commonwealth v. Szuchon*, 633 A.2d 1098, 1099 (1993) (citing *Commonwealth v. Lawson*, 549 A.2d 107 (1988).

44. This standard is met if the petitioner can demonstrate either: (1) that the proceedings resulting in the petitioner's conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (2) that the petitioner is innocent of the crimes charged.

45. This Petition surely meets these tests. Petitioner is factually innocent. The gross intentional prosecutorial misconduct in fabricating witness testimony, coercing and inducing witnesses to present false testimony and suppressing materially favorable evidence is clearly a miscarriage of justice that shocks the conscience.

46. To the extent the Commonwealth contests Petitioner's diligence in the discovery of any of the facts related to these claims, Petitioner requests an evidentiary hearing at which he will prove that he has acted with the requisite diligence. (See below p.53, the Court Must Provide an Evidentiary Hearing.)

47. Moreover, in light of the *Brady* violations enumerated in this Petition, Petitioner is entitled to review of previously raised *Brady* claims. That is because the *Brady* claims require an evaluation of the cumulative impact of the *Brady* violations. See e.g. *Kyles v. Whitley*, 514 U.S. 419, 421 (1995) (materiality of Brady violation "turns on the cumulative effect of all such evidence suppressed by the government"). In short, the new evidence of due process violations must be assessed with the old evidence on the same points.

IV. RELEVANT CASE HISTORY

48. Petitioner *pro se* Major Tillery AM9786 is serving a sentence of life without parole in the Commonwealth of Pennsylvania. He is incarcerated at SCI Frackville, 1111 Altamont Blvd., Frackville, PA 17931.

49. On May 29, 1985, following a jury trial in the Philadelphia Court of Common Pleas, Petitioner Tillery was convicted of first-degree murder, aggravated assault, criminal conspiracy and weapons offenses arising out of the October 22, 1976 shooting death of Joseph Hollis and the wounding of John Pickens. Post-trial motions were denied by the Hon. John E. Geisz and Petitioner was sentenced to life imprisonment without possibility of parole on December 9, 1986. At trial Petitioner was represented by attorney Joseph Santaguida. At post-trial motions and the filing of appeals before the Superior Court and PA Supreme Court, Petitioner was represented by attorney James S. Bruno.

50. The Pennsylvania Superior Court affirmed Tillery's conviction on May 30, 1989, *Commonwealth v. Tillery*, 563 A.2d 195 (Pa. Super. 1989), and the Pennsylvania Supreme Court denied allocatur (Petition for Allowance on Appeal) on March 5, 1990, *Commonwealth v. Tillery*, 593 A.2d 841 (Pa. 1990).

51. On September 20, 1996, Tillery filed a petition under Pennsylvania's Post-Conviction Relief Act (PCRA) asserting ineffective assistance of trial counsel because of a conflict of interest after he discovered that his trial counsel, Joseph Santaguida, Esq., had also represented Tillery's alleged victim, John Pickens, with respect to the Commonwealth's charges against William Franklin, Tillery's alleged co-perpetrator in the 1976 shooting. Franklin was tried in November-December 1980. The Court of Common Pleas dismissed Tillery's petition as procedurally defaulted and without an evidentiary hearing on January 13, 1998, and the Superior Court affirmed the dismissal on April 21, 1999.

Commonwealth v. Tillery, 738 A.2d 1058 (Pa. Super. 1999). Petitioner was represented by attorney Richard P. Hunter.

52. Tillery then filed a petition for a writ of *habeas corpus* with the United States District Court for the Eastern District of Pennsylvania on December 22, 1999, in which he again contended that his trial counsel operated under an actual conflict of interest. On October 30, 2000, the District Court dismissed Tillery's petition.

53. The Third Circuit Court of Appeals by Order dated August 23, 2003, directed the district court to hold an evidentiary hearing, after which the District Court by Order dated July 29, 2003, reaffirmed the dismissal of Tillery's petition. On July 29, 2005 in *Tillery v Horn* 432 Fed Appx 66 (2005) the Third Circuit affirmed the District Court's judgment of dismissal. Petitioner was represented by attorney Michael Consusione.

54. On August 13, 2007 Petitioner filed a Second PCRA petition *pro se*. The central claim of that PCRA petition was the prosecution's suppression of exculpatory impeachment evidence, specifically a favorable plea deal. The Commonwealth filed a Motion to Dismiss via a letter brief on May 8, 2008. The PCRA court received a letter brief in opposition to the Motion to Dismiss on June 13, 2008. The letter was submitted by Brian J. McMonagel, Esq. on Petitioner's behalf, but an Amended PCRA was never filed. No evidentiary hearing was held.

55. The Petition was dismissed by the Hon. John J. Poserina, Jr. on September 9, 2008 as untimely filed. A *pro se* Notice of Appeal was filed on

October 1, 2008. A formal Opinion was filed by the Hon. J. Poserina on December 11, 2009 affirming the denial of the petition as untimely filed. On July 15, 2009 the Superior Court affirmed the dismissal of Petitioner's Second PCRA. On December 9, 2009, the Pennsylvania Supreme Court denied a Petition for Allowance of Appeal.

56. During the entire period of the preparation and pendency of his *pro se* Second PCRA petition, Petitioner was incarcerated at New Jersey State Prison in the Special Management Unit.

57. Petitioner's right to due process of law is guaranteed to him by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 9 of the Pennsylvania Constitution.

58. The constitutional errors and newly discovered exculpatory evidence described herein have been neither previously litigated nor waived. See 42 Pa. C.S. § 9543(a).

59. Petitioner has been convicted of crimes under the laws of this Commonwealth and is actively serving a sentence of life imprisonment without the possibility of parole as a result of his convictions. Therefore, Petitioner is entitled to relief pursuant to the provisions of the PCRA.

IV. STATEMENT OF FACTS RELEVANT TO PETIONER'S CLAIMS

A. Overview and Evidence Relevant to Guilt

60. The facts of the case as presented in the Superior Court decision denying Petitioner's appeal from his December 9, 1986 judgment of sentence of the Philadelphia County Court of Common Pleas, *Commonwealth v. Tillery*, 563 A.2d 195 (Pa. Super. 1989), begin with the following:

> "The facts of this case have a rather long and tortuous past. At approximately 10:00 p.m. on October 22, 1976, Philadelphia police received a call to the address at Huntingdon and Warnock Streets in North Philadelphia. At that corner they broke down the locked door of a poolroom operated by William Franklin and discovered the dead body of John [Joseph] Hollis. A medical examination later revealed that Hollis died of a gunshot wound to the trunk of this body. Inside the poolroom, the police found live and spent .38 caliber ammunition and a set of car keys. Around the corner from the poolroom at 2527 North 11th Street, police officers found John Pickens bleeding from a gunshot wound. He was treated at a hospital and survived his injuries. Both Pickens and Hollis were shot by different guns.
>
> "For more than three years, the shooting of Pickens and Hollis remained unsolved. However, in the spring of 1980, police detectives investigating the homicide of Samuel Goodwin, visited a Philadelphia prison to determine if Emanuel Claitt, and inmate who had known Goodwin, could provide any information about Goodwin's death. The information Claittt provided went far beyond the Goodwin case. Claitt described in detail the operation of what he labeled the "black mafia" a crime syndicate run by black Muslims in Philadelphia. His information described a vivid picture of the events culminating with the shootings of Pickens and Hollis.
>
> "Claitt testified that from 1976 until 1980, he engaged in drug dealing and extortion as a member of the Philadelphia "black mafia". The organization divided the city into sections for business purposes. Alfred Clark was he leader of the North Philadelphia branch. He held the rank of first lieutenant and had "the last word' for all business in the city. Sylvester White directed the West Philadelphia branch. Johns Pickens also dealt drugs in West Philadelphia. During the 1970s's, appellant had the rank of first lieutenant and had 'had control of the entire city as far as methamphetamines is

concerned ....' Claitt received his heroin supply from Clark and his methamphetamine supply form appellant. Clark and appellant were partners in the heroin and methamphetamine trade. Claitt characterized appellant as Clark's 'right hand man.'"

.....

"Based on Claitt's information, the police obtained an arrest warrant on May 23, 1980, for appellant's arrest. William Franklin was charged as well for the same offenses and went to trial in November 1980, was convicted and sentenced to life imprisonment.

"However, for three years the police were not able to serve the warrant because appellant could not be located. A detective in California finally arrested appellant in November, 1983. Appellant was returned to Philadelphia on December 8, 1983, to stand trial."

61. No physical evidence from the scene was presented as evidence against Petitioner. Fingerprints were not taken. NT 10:83.[1] Car keys found in the poolroom were identified as belonging to Fred Rainey, but he was not charged for anything having to do with the shootings. NT 13:12. A large plastic bag containing a controlled substance was found on the pool table. NT 13:8. Coats, a hat and glasses were found in the poolroom, but not linked to anyone. NT 13:33. Alfred Clark was detained after a car stop shortly after the shooting, but he was not charged. NT 13:43-44. Eighteen hundred dollars was confiscated but was later released to Clark. NT 13:31.

62. Shortly after the shooting, while in the hospital, surviving victim John Pickens made a statement to a homicide detective[2] NT 13:56, but no charges

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[1] Petitioner is indicating transcript pages by using NT followed by a number that is the

[2] Pickens gave a verbal and written statement to homicide detective McGrath that "Dave" and "Rickie" committed the shooting. (Exhibit D)

were brought against Petitioner, or anyone else. NT 13:57. Pickens never testified, not at William Franklin's trial in Nov-December 1980 nor at Petitioner's trial in May 1985. The prosecution didn't try to subpoena Pickens as a witness.

63. The Commonwealth's evidence against Petitioner that he was inside the poolroom and one of the shooters of Hollis and Pickens came solely from career jail informant Emanuel Claitt in May 1980.[3]

64. According to Claitt, Petitioner threatened Hollis after Hollis pistol-whipped Clark during a dispute about drug selling in West Philadelphia on October 20, 1976. NT 14:30. Petitioner was involved in making arrangements for a meeting at the poolroom between Hollis and Clark with others. NT 14:32, 39.

65. Claitt said that it was arranged that everyone would meet at the mosque and go from there to the poolroom, but before the service was over Petitioner and Franklin got up and left. NT 14:42.

66. After the service, Claitt drove over to the poolroom with Clark and others, and was asked by Clark to guard the door inside the poolroom. NT 14.49. Claitt didn't see Petitioner and William Franklin at the poolroom until they came from behind a barrier and shot at Hollis and Pickens. NT 14:59.

67. Claitt said after Pickens was shot "he ran through this door which had a glass centerpiece in it."[4] NT 14:73.

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[3] Between January 1980 and Petitioner's 1985 trial Claitt provided information to and/or testified for the prosecution against Robert Lark, William Franklin, James Brand, George Rose, Fred Rainey, Major Tillery and Larry Frazier

68. Claitt was not charged in anyway in connection with the shootings.

69. The other prosecution fact witness was Robert Mickens, also a jail house informant. Mickens did not testify at Franklin's trial in 1980 and became a prosecution witness against Petitioner in a statement given to detectives on September 26, 1984, eight years after the shootings.

70. Mickens testified that while walking down the street in front of the poolroom shortly before 10 pm on the night of the shooting, he was asked by Petitioner to be an outside "lookout" to watch for patrolling police cars. NT 21:36.

71. Mickens said Petitioner was on the poolroom steps with Franklin and Alfred Clark. NT 21:35,60.

72. Mickens did not witness and did not know what happened inside the poolroom, but heard shots.

73. Mickens also testified that he was asked to and agreed to be an alibi witness for Petitioner back in 1976, a few days after the shootings. NT 21:15.

74. Mickens was a surprise witness for the prosecution, kept secret from Petitioner until he was called to the witness stand. The Commonwealth had

[4] The issue of whether Pickens went through a glass door, and even whether a glass door was in the poolroom in 1976 and/or an exist door from the poolroom, was an issue of extensive questioning to numerous witnesses at Petitioner's trial. None of the police officers at the scene in 1976 saw a glass door, or took photographs of any such door. Nor was the there any medical evidence that John Pickens was injured going through a glass door. It was only when ADA Barbara Christie prepared for Petitioner's trial in 1985 were photos taken of a hallway that reportedly once had a glass pane.

obtained a protective order prior pursuant to Rule 305 F[5]. The Commonwealth disclosed over Mickens' September 24, 1984 statement (C-41) just minutes before he testified. [Exhibit E]

B. Witnesses' Arrests and Plea Agreements with the Commonwealth

75. Both Claitt and Mickens were prosecution witnesses with a criminal history, pending cases and were incarcerated during Petitioner Tillery's trial. The testimony of Claitt and Mickens was repeatedly challenged on the grounds they had received possible favorable plea deals in exchange for their testimony against Petitioner.

Claitt Testimony That He Had "No Plea Deals"

76. In April 1980 homicide detectives questioned Emanuel Claitt who was incarcerated on a probation violation and had 8 or 9 open cases. NT 14:8.

77. Claitt was questioned about the homicide of Samuel Goodwin NT 15:8 and provided information on that homicide, as well as others, including the homicides of Alfred Clark (April 1979) and Joseph Hollis (October 1976) and firebombings committed by him and others. NT 14:8.

78. Claitt's open charges included auto theft, possession with intent to distribute drugs, weapons charges and conspiracy.

[5] Petitioner objected to the *in camera* proceeding that led to the protective order that concealed the fact that Robert Mickens was going to be a prosecution witness on the grounds that there was no basis for a finding that Mickens needed protection from Petitioner. The court overruled the objection and preserved the record of the exparte petition. NT 21:2-13.

79. On May 20, 1980, Claitt gave a 6-page statement on the 1976 shootings of Hollis and Pickens, "Investigation-Interview Record," taken by Det Lawrence Gerrard (Com. Exh-31).[6] NT 15:8. This inculpated Petitioner and William Franklin.

80. Following Claitt's statement an arrest warrant was issued for Petitioner.

81. Per Claitt, at the time of that statement he had "no agreement" regarding plea deals on his pending 8 or 9 cases. NT 14:78. The only "understanding" Claitt had with the Commonwealth was that after his testimony at preliminary hearings he would get help to be released on bail and he would have to fight his cases on his own "with no helping [sic] from the District Attorney's office." NT 14:83.

82. On June 4, 1980, Claitt testified at Franklin's preliminary hearing and at the separate preliminary hearing against George Rose.[7]

83. On June 10, 1980, Claitt was released from jail after the Commonwealth went to Judge Kubacki to lift Claitt's detainer on violation of probation on firearms charges. NT 14:81.

84. On July 9, 1980—a month later—while out on bail, Claitt was arrested on new charges for car theft. When back in prison, the Commonwealth

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[6] Petitioner has not been able to obtain a copy of C-31 from the Clerk's office. ADA Barbara Christie read a portion of the statement back to Claitt in her re-direct examination. See NT 16:71-76.

[7] Rose was charged with the murder of Alfred Clark but acquitted after a jury trial. NT 14:81.

also placed firebombings charges against him as well as Petitioner, George Rose and James Brand. NT 14:82.

85. Claitt made bail for firebombing charge, and was out on the streets when he testified against Franklin at trial Nov-early Dec 1980. NT 14:79, 82.

86. On November 29, 1980, during the Franklin trial, Claitt pled guilty to 3 of the pending charges, the firebombing and the 2 drug charges before the Hon. Judge Leon Katz. NT 14:83.

87. Claitt testified this was an "open plea…I pled guilty to the charges with no recommendation from the District Attorney's office…the Judge would decide my fate as to sentence." The only request to Judge Katz would be a recommendation that the sentences run concurrent. NT 14:5, 6.

88. On January 5, 1981 the ADA Leonard Ross sent a letter to Judge Katz. NT 14:19. (Exhibit F) Claitt testified this letter was to inform Judge Katz that he had "cooperated with the District Attorney."

89. Claitt also said that the "agreement" he had with the District Attorney was that in view of this cooperation they [the District Attorney] would nolle pross three of his cases, but "would not recommend a sentence, they would leave it up to the judge." NT 14:86.

90. On Sept 18 1981 Claitt was sentenced by Judge Katz. On the three charges he pled guilty to he received concurrent sentences of one and a half to seven years, one and a half to five years and a matter of months.[8] NT 14:83.

91. Claitt was acquitted of two cases and the District Attorney nolle prossed three cases. NT 14:20.

92. This sentence gave Claitt a total of one and half to seven years in prison and 5 and a half years under the supervision of the parole board. NT 14:80.

93. On November 22, 1982 Claitt was released on parole. NT 15:24.

94. Claitt served a year and a half in prison. NT 15:22.

95. On April 21, 1983 Claitt was arrested on new charges of robbery and aggravated assault. 14:94 This robbery charge put Claitt in violation of state parole and put him back in custody. NT 14:94.

96. On February 29, 1984 Claitt was released on the parole violation and able to sign his own bond on the robbery case immediately after testifying against Petitioner at his preliminary hearing.[9] NT 14:95.

97. Claitt was re-incarcerated for violation of parole for reporting to his parole officer with a knife in his sock. NT 14:99.

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[8] Unmentioned by Claitt or ADA Barbara Christie are 13 charges from May 16, 1980 including robbery, assault, firearms before Judge Levy Anderson, which were nolle prossed April 13, 1982. See CP-51-CR-1107131-1980 [Exhibit G]

[9] Undisclosed by ADA Barbara Christie were the letters by Arnold Gordon, Chief, Homicide Unit to the Secretary of PA Parole Board, January 31, 1984 and District Attorney Edward Rendell's letter to Judge John J. Chiovero, February 18, 1984. [Exhibits H, I, J]

98. On May 14 and 15, 1985 Claitt testified against Petitioner, while incarcerated in violation of parole and with pending robbery and aggravated assault charges. NT 14:25, 93.

99. At the time of his trial testimony against Petitioner, Claitt had spent 8 ½ months in Philadelphia Detention Center, Isolation Unit, Protective custody. NT 14:3.

100. Claitt testified there was no sentencing agreement on the pending open robbery case, which was scheduled for trial June 24, 1985 before the Hon. Judge John J. Chiovero. NT 14:6, 94.

101. When questioned by ADA Christie if there was an understanding or agreement with the Commonwealth concerning the disposition of those open charges. Claitt said:

> "As to Agreement, the District Attorney merely mentioned that they did all they were going to do for me at that point but they would make Judge Chivoero aware of my prior cooperation and that I would be testifying in other trials in the near future." NT 14:94.

102. ADA Barbara Christie told the Hon. John A. Geisz as part of her objections to Petitioner's attorney continued questions to Claitt about possible plea agreements:

> "The witness has testified to his understanding of the Agreement. And now the witness has indicated that there is no agreement with regard to sentencing on the open robbery. There is no agreement. He goes to trial on that. He has a parole date of September 85 and that he is currently in custody for violating his parole. And his understanding of any agreement he has with the commonwealth is that the Commonwealth will make the parole board aware of his cooperation in this and the other cases. NT 14:98.

103. On May 28, 1985 ADA Christie gave her Summation to the Jury saying there was "no set deal" and that the Com would only enter into an "open plea" agreement with Claitt. NT 28:60. She further stated:

> "Claitt talked to the police in May 1980, *with no deal but with a great desire*, great desire for protection for himself and his family, particularly after he went public in court and testified in June 1980 at a preliminary hearing and December 1980 at the Franklin trial.
>
> "Yes, Claitt was in and out of custody. He pled guilty to 3 crimes. He stood trial on 2 and he awaits trial on a third."[10] NT 28:90.

Mickens Testimony That He Had "No Plea Deal"

104. In February 1984 Robert Mickens was arrested on rape, assault and robbery charges and remained incarcerated through the May 1985 trial of Petitioner. NT 21:23, 54.

105. In September 1984 Mickens was taken to police headquarters at 8th and Race for questioning about the homicide of Ronald Johnson and volunteered information to the homicide detective about other homicide cases. NT 12:29.

106. On September 26, 1984 Mickens gave police a statement regarding what he knew of the homicide by shooting of Joseph Hollis, recorded in a 6-page Investigation-Interview Record (Com Exh 41). NT 21:106-7. [Exhibit E]

107. Mickens placed Petitioner outside the poolhall on the night of the shootings, asking Mickens to be a police look-out. NT 21:107.

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[10] This 1983 robbery case from 1983, pending during Tillery trial was nolle processed by the Commonwealth December 16, 1987. {See Exhibit G]

108. Mickens testified in in preliminary hearings two separate murder cases against George Brown and Kenneth Purnell, on December 8, 1984 and January 3, 1985. NT 21:27.

109. Mickens was identified in the prison as a snitch and placed in areas of protective custody in a Philadelphia prison and then transferred to a prison outside the Philadelphia area. NT 21:101,105

110. On May 16, 1985 Mickens pled guilty to criminal conspiracy and rape before the Hon. Eugene Clarke Jr. and was scheduled to be sentenced on July 18, 1985. NT 21:24.

111. Mickens testified it was an "open plea" with no plea bargaining, 21:24 that his sentencet would be up to the judge. NT 21:25.

112. Mickens was advised that he could get 10-20 years on the rape case, 5 to 10 on the conspiracy and that the sentences could run concurrent or consecutive. NT 21:26.

113. His only "understanding" with the District Attorney's office was that it would let Judge Clark know about his cooperation and that the other charges would be nolle prossed. NT 21:26.

114. In her summation, ADA Christie told the jury that Mickens "awaits sentence on a guilty plea to a rape charge and conspiracy. That could net him 15 to 30 years at the decision and discretion of the sentencing judge." NT 28:91.

115. When sentenced before the Hon. Eugene Clark, Jr. on October 10, 1985, Mickens received probation.

IV. Newly Discovered Evidence and Exculpatory Evidence the Commonwealth Has Concealed For the Past Thirty-one Years That Proves Major Tillery is Innocent and that the Commonwealth Knowingly Presented False Evidence of his Guilt

116. Petitioner has within the last sixty days discovered new evidence from the two Commonwealth fact witnesses, Emanuel Claitt and Robert Mickens. These newly discovered facts are contained in sworn declarations of Emanuel Claitt and Robert Mickens. [Exhibits A, B and C]

117. Claitt and Mickens each swear that their testimony inculpating Petitioner was a lie, manufactured by the Commonwealth, resulting from coercion and promises of plea deals and sexual favors.

118. The significance of this new evidence is that it proves that the entirety of the prosecution's case against Petitioner was based on false testimony, manufactured and presented by the Commonwealth.

119. This new evidence proves Major Tillery's innocence. Without the testimony of Emanuel Claitt the District Attorney could not have prosecuted Petitioner. Had the facts of the coercion and promises made to these witnesses to compel them to falsely testify been known to the jury, Petitioner would have been acquitted at trial.

120. This newly discovered evidence was unavailable to Petitioner despite his exercise of due diligence. Claitt and Mickens were previously unwilling to come forward with the truth and provide this evidence to Petitioner because they feared retaliation by the police and prosecution.

Below, Petitioner presents the contents of these verified declarations.

Newly Discovered Evidence From Emanuel Claitt, May 4 and June 3, 2016

121. Without the testimony of Emanuel Claitt there is no case, no evidence of Major Tillery's involvement in the shootings of Joseph Hollis and John Pickens.

122. Prior to Claitt's statement to police detectives May 20, 1980 there were no suspects in the October 22, 1976 shootings of Hollis and Pickens. It was only after Claitt's statement that an arrest warrant was issued for Petitioner.

123. ***Verified Declaration of Emanuel Claitt, May 4, 2016***

> I submit this declaration stating that I lied when I testified at the trial of Major Tillery in May 1985 for the murder of Joseph Hollis and attempted murder of John Pickens on October 22, 1976.
>
> I wasn't in the pool hall when Joseph Hollis was shot and killed and John Pickens shot and injured.
>
> I wasn't anywhere near Joseph Hollis and John Pickens when they were shot.
>
> I lied when I testified that Major Tillery and William Franklin were in the pool hall and shot Hollis and Pickens.
>
> I was in prison in 1980 on serious charges and I was approached by Philadelphia detectives Larry Gerrard and Ernest Gilbert. They threatened to charge me with the murder of Samuel Goodwin. I had eight or nine open cases, at least three of them were felonies with a lot of years of prison time.
>
> I was threatened about the murder of Samuel Goodwin. The detectives really wanted information to get Major Tillery for murder.
>
> Detectives and prosecutors ADA Lynn Ross and Barbara Christie promised if I said that Major Tillery and William Franklin were the shooters in the 1976 murder of Joseph Hollis and the attempted murder of John Pickens I wouldn't get state time in my many pending criminal charges and I wouldn't be charged in the murder of Samuel Goodwin, that I had nothing to do with.

I was threatened that I would get maximum prison time if I didn't cooperate to get Tillery and Franklin.

I was also allowed to have sex with my girlfriends (four of them) in the homicide interview rooms and in hotel rooms, in exchange for my cooperation.

Detectives Larry Gerrard and Ernest Gilbert, and Lt. Bill Shelton with the knowledge and direction of ADAs Lynn Ross, Roger King and Barbara Christie, promised me leniency, threatened me and allowed me private time for sex with girlfriends in the homicide interview rooms and hotel rooms.

Major Tillery couldn't be found when the prosecution wanted

to arrest him and Franklin. So Franklin was tried in December 1980 and I falsely testified against William Franklin at his trial for the 1976 murder of Hollis and attempted murder of Pickens. In truth, I wasn't in or near the pool hall when the shootings happened.

After Franklin's trial I tried to recant but Lt. Shelton threatened me and said I would be framed on another murder.

At Major Tillery's trial in 1985, I testified about a meeting and an argument that supposedly took place on October 20, 1976 between Alfred Clark the leader of North Philadelphia drug selling and those in charge of drug selling in West Philadelphia, including Joseph Hollis and John Pickens. This argument supposedly took place in the home of Dana Goodman. I testified that Major Tillery was there and after an argument and pistol slapping of Clark by Hollis, Major Tillery said that "Hollis would have to die for what he did."

This was not true. I was not at any such meeting and I didn't have any personal knowledge of this supposed argument and threat made by Major Tillery.

I also testified at Major Tillery's trial that after the argument in Goodman's house a group that included me as well as Clark and Major Tillery met at a mosque in North Philadelphia and drove a few blocks to a poolroom owned by William Franklin to demand Sylvester White, the head of the West Philadelphia drug selling, arrange a meeting with Hollis and Pickens.

None of this testimony was true. I had no involvement, if any of this actually happened.

I falsely testified that on October 22, 1976, I was standing by the door inside the pool hall during the meeting to prevent anyone from

entering or leaving and that both Franklin and Pickens were in the pool hall.

I lied when I testified I heard gunshots in the pool hall, saw Pickens and Hollins shot and that Major Tillery and Franklin were in the pool hall and that they were the shooters.

At Major Tillery's trial I was forced by ADA Barbara Christie to testify about the "black mafia" and that they were run by Black Muslims in Philadelphia.

Before Major Tillery's trial, detectives instructed me to persuade Robert Mickens to become a witness against Major Tillery.

I was put in a police van to ride alone with Mickens back and forth from homicide up to the county holding prison on State Street, to make it clear to Mickens that he really had no choice, except to testify against Major Tillery.

I knew Robert Mickens before this and lied at Major Tillery's trial when I testified I had never met or spoken with him.

I also falsely accused Major Tillery of placing a fire bomb on t he front porch of Frank Henderson on Church Lane.

Everything I testified to at Major Tillery's trial and William Franklin's trial about witnessing an argument between Alfred Clark and Joseph Hollis, threats made by Major Tillery against John Pickens and the shootings at the pool hall a few days later was false.

My testimony was made up while being questioned by homicide detectives Gerrard and Gilbert and being prepped by ADAs Ross, Christie and King to testify against Major Tillery and William Franklin.

Detectives Larry Gerrard, Ernest Gilbert and ADAs Barbara Christie, Len Ross, Roger King interviewed me, and worked over my testimony to make sure Major Tillery and William Franklin were convicted of murder and attempted murder.

In exchange for my false testimony many of my cases were not prosecuted. I got probation. I was sentenced to just 18 months for fire bombing and was protected when I was arrested between the time of Franklin's and Tillery's trials.

After Major Tillery's trial I was told I hadn't done good enough, that I "straddled the fence." In 1989 I was convicted of felony charges and spent 13 ½ years in prison for something I didn't do and framed by the ADA.

In 2014 I was given help by the prosecution in getting all my bond judgments dismissed on cases going back over 23 years.

I am now giving this verified declaration because I want to free my conscience. I need to be able to live with myself. It is vital I correct this.

I testified falsely against Major Tillery and William Franklin because I was threatened by the police and prosecutors with a murder prosecution for a crime I didn't commit. I was promised no state time for crimes I did commit if I lied.

I am ready to testify in court for Major Tillery and William Franklin and tell the truth that I lied against them at their trials, coerced by police and prosecutors.

124. Verified Supplemental Declaration of Emanuel Claitt, June 3, 2016

I submit this supplemental declaration about my false, manufactured testimony against Major Tillery and William Franklin in the November 1980 and May 1985 trials for the murder of Joseph Hollis and attempted murder of John Pickens on October 22, 1976.

The police detectives and prosecutors I met with knew I didn't have any personal knowledge that Major Tillery and William Franklin were involved or part of those shootings. They manufactured the lies I gave against Tillery and Franklin and coached me before the trials.

It was clear they knew I didn't have any direct knowledge about the shootings at the poolroom on October 22, 1976, that I wasn't there then or at the argument at Dana Goodman's house or meetings before the October 22, 1976 shootings.

For example: In our meetings I said you know I wasn't there – you have to fill in the blanks. Detectives Gerard, Gilbert, Lubiejewski, Lt. Shelton and ADA Ross would tell me, "you've got to say it this way." I was told "we've got to bring him down—you've got to help us." That meant I should lie." Barbara Christie told me: "You're the best. You should have been a lawyer." That meant I knew how to lie.

The prosecutor against William Franklin in 1980 was Leonard Ross. I met with him as well as ADAs who worked with Barbara Christie soon after I met with Lt. Bill Shelton and Detectives Gerrard and Gilbert and Lubiejewski. I met with ADA Roger King also who had me lie in another case.

I was coached by ADA Barbara Christie before Major Tillery's trial. She was worried about my first statement that John Pickens had gone through a glass door. She coached me to testify about a second door leading out of the poolroom and that it had been a glass door.

ADA Christie coached me how to answer the defense attorney's questions about whether I had plea deals or any agreements for leniency in sentencing for all the charges I faced back in 1980 when I first gave a statement about the shootings of Hollis and Pickens and since then.

ADA Christie coached me on this like ADA Lynn Ross did before I testified against William Franklin.

Back in 1980 when I testified at Franklin's trial I lied when I said that the only plea agreement was that my sentences on three cases would run concurrently. But I had been promised the DA's recommendation to receive no more than 10 years. In fact I got one and a half-years.

When I was questioned about this at Major Tillery's case I repeated the lie that I had no plea deal about length of sentencing. ADA Christie knew that wasn't true.

I was scheduled to go to trial on my robbery case soon after the Tillery trial was over. ADA Christie coached me to stick to saying that the robbery case was "open" and that there were no agreements about leniency and sentencing.

She coached me to just say I knew the judge would be told about my cooperation in Major Tillery's case and other cases. That's what I stuck to.

But my testimony that there was no plea deal was a lie and ADA Christie knew that. She told me the robbery charge and other charges would be nolle prossed. And they were.

It was also a lie, known to ADAs Ross, Christie, King that Major Tillery and George Rose were involved in bombing -firebombings in 1979 and 1980 that I testified to in August 1985.

It was also a total fabrication that Major Tillery pulled a gun on me and threatened to shoot me in Philadelphia in early 1983.

I wasn't willing to tell the truth about the lies I testified to at

these trials and that my false testimony was manufactured by the ADAs and police until now.

> It has taken me all these years to be willing and able to deal with my conscience and put aside my fears of retaliation by the police and prosecution for telling what really happened at those trials.
>
> I am now ready and willing to testify in court for Major Tillery and William Franklin and tell the truth that I lied against them at their trials, coerced by police and prosecutors.

125. These declarations of Emanuel Claitt establish that the testimony he gave at trial was false. As most succinctly stated from Claitt's declarations, "I wasn't in the pool hall when Joseph Hollis was shot and killed and John Pickens shot and injured…I lied." (May 4, 2016)

126. Emanuel Claitt provides new evidence that the Commonwealth knowingly presented false inculpatory testimonial evidence against Petitioner. "The police detectives and prosecutors knew I didn't have any personal knowledge that Major Tillery and William Franklin were involved or part of those shootings. They manufactured the lies I gave against Tillery and Franklin and coached me before the trials." (June 3, 2016)

127. Claitt describes meetings with police and prosecutors in which they worked over what he would say, "filling in the blanks." Police and prosecutors knew that Claitt didn't have any personal knowledge of the poolroom shootings and what led up to that.

128. Claitt tried to recant after Franklin's trial but was threatened by a police lieutenant with being framed on a murder.

129. Claitt describes being set up to meet with Robert Mickens in a police van making a phony trip back and forth from the Roundhouse to the State prison

in order talk to Mickens and pressure him to also testify against Petitioner, because he had "no choice."

130. Claitt states that ADA Christie worked him over and coached him to remedy a "problem" in his testimony that John Pickens fled the poolroom after being shot, running through a glass door.

131. It was made up for Claitt to testify that Petitioner pulled a gun on him and threatened to shoot him in 1983.

132. Claitt further states he was forced to testify that the Nation of Islam ran the "black mafia" controlling drug dealing in Philadelphia and to testify to everyone's Muslim names.

133. Claitt states that his false testimony was based in part on the threats from police detectives that he would be charged with murders he did not commit if he refused to become a witness against Petitioner.

134. Emanuel Claitt provides new evidence that the Commonwealth made numerous plea deals with Claitt to induce his false testimony, and then coached Claitt to deny those plea deals were made.

135. Claitt testified at trial with the knowledge that he would be able to get out on bail, signing his own bonds and have parole and probation detainers lifted. This is supported by the letters from the District Attorney's office to judges and the PA Parole Board.

136. Claitt was given repeated "get out of jail" passes despite his numerous parole violations and the commission of new felonies each time he was released.

137. Although Claitt testified that there were "no deals" and "open pleas," he was secure and confident that the District Attorney's office would protect him, nolle prosse numerous felony charges and arrange for him to get minimal sentences.

138. That these plea deals existed is corroborated by the facts that for the 8 or 9 pending felonies in 1980, for which he faced 25-50 years on the three cases he pled guilty to, Claitt spent just a year and a half in prison.

139. There is also the matter of the undisclosed 13 charges from May 16, 1980 including robbery, assault and firearms that were pending against Emanuel Claitt when he testified at Franklin's trial. These were nolle prossed by the prosecution before Judge Levy Anderson on April 13, 1982. See CP-51-CR-1107131-1980.[Exhibit G]

140. ADA Barbara Christie did not disclose this history to Petitioner Tillery at his trial, nor did Emanuel Claitt testify about this..

141. Additionally the "open" robbery charges from 1983 that Claitt was questioned about at Petitioner's trial were nolle prossed after Petitioner's post-trial motions were denied. This was the very same charges that ADA Christie assured the Court and the Jury were "open" and that the prosecution had made no plea deals with Claitt.

142. Claitt also reveals in his declarations that while incarcerated police arranged visits between Claitt and different girl friends in homicide interview rooms in police headquarters and at hotels for him to have sex.

143. Claitt's understanding and agreement with the Commonwealth was the plea deals and sexual favors were given in exchange for his false testimony to get a murder conviction against Petitioner. These agreements and arrangements were made possible only by the conscious action of the Commonwealth.

144. Emanuel Claitt provides new evidence that the Commonwealth failed to correct the false testimony he gave on Petitioner's guilt and that there were no plea deals, but suppressed plea arrangements and favors asked of Judges and the Parole Board but suborned Claitt's false testimony.

Newly Discovered Evidence Provided by Robert Mickens

145. Robert Mickens was a surprise witness at Petitioner's trial. His testimony was intended to corroborate Emanuel Claitt that Petitioner was in the poolroom when shots were fired. Mickens was not a witness to the shootings.

146. ***Verified Declaration of Robert Mickens, April 18, 2016:***

> In May 1985 I falsely testified as a witness for the Philadelphia County District Attorney in the prosecution of Major George Tillery (CP-51-CR-0305681-1984) on murder charges.
>
> The testimony I gave at that trial was false, manufactured by the prosecutor, Assistant District Attorney Barbara Christie.
>
> I was coerced and promised favors if I falsely testified against Major Tillery.
>
> I was arrested on February 28, 1984 on charges of robbery and rape and faced twenty-five years of imprisonment if convicted.

ADA Christie told me that if I "worked with [her] on the Major Tillery case" she "guaranteed" I wouldn't be sent upstate on my robbery and rape case and would be "protected."

ADA Christie and her homicide detectives, John Cimino and James McNeshy, repeatedly brought me in for questioning on a number of robbery and murder cases, asking me to become a prosecution witness against Major Tillery.

On one occasion ADA Christie showed me what looked like a paper signed by Major Tillery saying that I was going to be an alibi witness for him. I told her I was.

I was brought down by homicide detectives to tell me that co-defendants Kenneth Pernell and Darry Workman were accusing me of being involved in the murder of Abe Green, a neighbor of the men.

When I agreed to become a witness against them, because Darry Workman had confessed to me that he had shot Abe Green, I was transferred out of the Philadelphia area to a prison in Easton, PA, Northampton County Prison for my protection.

Before the preliminary hearing and my cooperation with the prosecution was publicly known, this information was released and an article appeared in the *Philadelphia Daily News* saying that I was a witness against Pernell and Workman. This put me at risk as a known "snitch." I complained to ADA Christie and she promised to take care of me.

I was brought down from Easton, supposedly to meet with the homicide detectives in Philadelphia. Instead I was put in a police van with Emanuel Claitt, who already testified against Major Tillery's co-defendant. I rode back and forth from police headquarters to the county prison on State Street with Claitt, but never taken from the van.

Claitt told me I was "pretty hemmed up" and that Major Tillery was a "slime," that Major Tillery had been spreading the word that I was a snitch and that I should testify against Major Tillery.

I told detectives Cimino and McNeshy that I missed my girlfriend Judy Faust. I was given an hour and a half private visit with her in an interview room in the police headquarters so that we could have sex.

I was a secret witness for the prosecution at trial.

My identity as a prosecution witness was kept from Major Tillery and his lawyer before I was called as a witness at the trial on the

> false grounds that I needed a protective order to protect me from Major Tillery.
>
> That was not true. I had told Major Tillery that I would be a witness for him at the murder trial of John Hollis. He had no reason to think I would be a witness *against* him. I had no contact with Major Tillery once I was sent to Northampton County Prison. I did not fear him or ask for protection from Major Tillery.
>
> At the trial I falsely testified that I was a look-out during the shooting of John Hollis and John Pickens. That was totally false. My entire testimony was scripted and rehearsed by ADA Barbara Christie.
>
> I agreed to give this false testimony because I was I promised no prison time on the rape and robbery charges and that I would be protected by the prosecution. I was given sexual favors in exchange for my false testimony.
>
> When I was sentenced on October 10, 1985 after my guilty plea of rape and criminal conspiracy, I didn't get prison time. I was sentenced to five years probation.
>
> I didn't come forward earlier to recant and explain because of my own guilt for falsely testifying against Major Tillery and my fear of retaliation by the prosecution and police.
>
> Much in my life has changed. I want to make amends for falsely testifying against Major Tillery. I am willing and ready to be a witness in any proceeding brought to challenge his conviction.

147. Robert Mickens swears in his declaration that his trial testimony was "totally false …scripted and rehearsed by ADA Barbara Christie." He explains the police and prosecution coerced him to testify falsely against Petitioner, to say he was asked by Major Tillery to be a look-out for police outside the poolroom, that Petitioner was him to be an alibi witness for him and he feared for his life and that of his family if he wasn't.

148. Mickens now exposes that his testimony was lies. He was not a look-out outside the poolroom, no one asked him to be lookout and that Petitioner hadn't asked him to be an alibi witness and Petitioner hadn't threatened him.

149. It was the Commonwealth that threatened to bring false murder charges against Mickens, while promising him no prison time on rape and robbery charges if he testified against Petitioner. They set Mickens up with Emanual Claitt, their career informant, to convince him he had no choice but to lie against Petitioner.

150. The police and prosecution arranged and allowed him to have sexual tryst with his girlfriend in police headquarters while he was in custody to induce his false testimony.

151. Mickens feared retaliation if he came forward earlier and told the truth about his lying testimony.

152. The new evidence provided by Mickens in his declaration supports the fact that the Commonwealth manufactured the testimonial evidence against Petitioner, knowingly presented this falsified evidence, suppressed materially favorable evidence and failed to correct Mickens false testimony.

V. CLAIMS FOR RELIEF

153. The above quoted declarations provide previously unavailable and newly discovered evidence showing that Petitioner is an innocent man. They show that Petitioner is the victim of gross prosecutorial misconduct in the

Commonwealth's manufacture and presentation of known false testimony inculpating Petitioner.

154. The Commonwealth also suppressed exculpatory information, i.e., information that either challenged the credibility of Commonwealth witnesses or the Commonwealth's trial presentation, and that demonstrate that Petitioner was not involved at all in the shootings of Joseph Hollis and John Pickens. Petitioner now places these verified declarations in their proper legal framework showing that Petitioner is entitled to relief on the following grounds.

CLAIM I.

Newly Discovered Evidence Demonstrates Petitioner's Innocence

155. Petitioner has always asserted his innocence. There is no physical or forensic evidence of the perpetrators from the crime scene in October 1976. There is no physical evidence presented linking Petitioner in any way to this crime. No guns found linked to the bullets. No fingerprints event taken. The keys found in the poolroom were not Petitioner's, the $1800 was not Petitioner's, the drugs were not Petitioner's, the items of clothing found in the poolroom were not Petitioner's. His car was not on the scene.

156. The surviving victim John Pickens gave police a statement shortly after he was shot that names other men, not Petitioner or William Franklin, as the shooters. Pickens did not testify at either Franklin's 1980 trial or Petitioner's in

1985. [Exhibit D]

157. Without the testimony of Emanuel Claitt, there was *no evidence* against Major Tillery. It was only the testimony of Emanuel Claitt who put Petitioner inside the pool hall, pulling out a gun and shooting Joseph Hollis. It was Claitt who put Petitioner at a meeting where Petitioner supposedly made threats against Hollis's life and helped arrange the poolroom meeting where Hollis was killed and Pickens wounded. There was no other evidence against Petitioner. That testimony was a lie.

158. Robert Mickens was brought in for Petitioner's trial, to provide some corroboration to Claitt's testimony by testifying that Petitioner asked him to be a lookout for police outside the poolroom. This is the only evidence, other than Claitt's testimony, that puts Petitioner at the poolroom that night. As Mickens declares, his testimony was a lie. No one, not Petitioner, Clark or Franklin asked him to be look-out that night. He did not see Major Tillery near the poolroom.

159. In further support of this claim, Petitioner incorporates supporting paragraphs of this petition regarding facts and law.

160. The newly discovered facts support Petitioner's claim that he is factually innocent. These new facts require the vacation of Petitioner's conviction.

161. The legal standard governing a post-conviction claim of newly discovered evidence is well-known. A petitioner must: establish that: (1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3)

it is not being used solely to impeach credibility; and (4) it would likely compel a different verdict. *Commonwealth v. Washington*, 927 A.2d 586, 595-96 (Pa. 2007). Petitioner new evidence of innocence meets each of these prongs.

CLAIM II.

The Commonwealth Manufactured and/or Presented False Inculpatory Evidence and Suppressed Material, Exculpatory Evidence in Violation of Petitioner's Sixth and Fourteenth Amendment Right to the United States Constitution and Article One, Section Nine of the Pennsylvania Constitution

162. Petitioner's right to due process, right to a fair trial, and right to present a defense were violated as the Commonwealth manufactured and/or intentionally presented false testimony and evidence of Petitioner's guilt and withheld from Petitioner and his counsel material, exculpatory evidence, including impeachment evidence, in violation of Petitioner's Fifth and Fourteenth Amendment rights to the United states Constitution and Article I, §9 of the Pennsylvania Constitution.

163. The newly discovered evidence in this case exposes a fundamental miscarriage of justice, violating the right to due process by the Commonwealth against Petitioner Major Tillery by suborning the truth, and committing fraud on the Court and jury with the intentional presentation of false evidence manufactured by the Commonwealth against Petitioner Major Tillery. The false evidence so manufactured and presented at Petitioner's trial constituted the sole

evidence of his culpability – that he shot and killed Joseph Hollis and wounded John Pickens-- as well as materially favorable impeachment evidence, the existence of plea deals that induced and coerced these witnesses to lie.

164. It is long established that a conviction obtained through use of false evidence, known to be false by government representatives, must fall under the Fourteenth Amendment. *Mooney v Holohan*, 294 U.S. 103 (1935) held in a historic decision that due process is violated "if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." See also, *Pyle v. Kansas*, 317 U.S. 213 (1942); *Curran v. Delaware*, 259 F.2d 707 (3rd Cir. 1958).

165. This case is also governed by the holdings and considerations in *Napue v. Illinois*, *supra*, *Brady v. Maryland*, *supra*, *Giglio v. United States*, *supra, Kyles v Whitely, supra*, and their legal progeny.

166. In *Napue v Illinois*, 360 U.S. 264, 269 (1959) the United States Supreme Court confirmed the principle that "a State may not knowingly use false evidence, including false testimony to obtain a tainted conviction."

167. The Pennsylvania courts have ruled strongly and similarly following *Napue.* The Commonwealth's intentional presentation of false evidence is a miscarriage of justice that no civilized society can tolerate.

168. "It is of course, an established principle that a conviction obtained through the knowing use of materially false testimony may not stand; a

prosecuting attorney has an affirmative duty to correct the testimony of a witness which he knows to be false." *Commonwealth v. Carpenter*, 472 Pa. 510, 372 A.2nd 806, 810 (1977) ((citing *Giglio v. United States*, 405 U.S. 150 (1972), quoted in *Commonwealth v Hollowell*, 477 Pa. 232, 236-37, 383 A.2nd 909, 911 and *Commonwealth v Romansky*, 702 A.2nd 1064, 1066 (Pa. Super. 1997).

169. *Napue* created a three-part test to determine whether a conviction of this kind of case violates due process: that the testimony was false, the prosecutor knew it was false, and the false testimony was material.

170. With the requirement that false testimony be "material," the Supreme Court meant that there must be "a reasonable likelihood that the false testimony could have affected the judgment." *Napue*. "Where the prosecution obtains a conviction through the use of false or perjured testimony, a strict standard of materiality must applied." *Commonwealth v Romansky*, 702 A.2d 1064, 1068 (Pa.Super. 1997), appeal denied, 555 Pa. 699, 723 A.2d 670 (1998). "[T]he false testimony is considered material if it could in any reasonable likelihood have affected the verdict." Id. When making the materiality determination, "the state of mind of the prosecutor is not material, but rather, the important issue is whether the accused received a fair trial." Id.

171. In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." *Id*. at 373 U.S. 87. "Impeachment evidence

… as well as exculpatory evidence, falls within the Brady rule.) *United States v. Bageley*, 473 U.S. 667, 676 (1985). The prosecution has an affirmative "duty to disclose such evidence … even though there has been no request (for the evidence) by the accused." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976). That responsibility "encompasses evidence 'known only to police investigators and not to the prosecutor.'" *Id.* at 280-281 (quoting *Kyles v, Whitley*, 514 U.S. 419, 438 (1995).). It is well established that the state violates a defendant's right to due process under *Brady* when it is withheld. *Smith v. Cain*, --- U.S. ----, 132 S. Ct. 627, 630

172. To establish a *Brady* violation, Petitioner must prove three elements: "[1] the evidence (at issue) was favorable to the accused, either because it is exculpatory or because if it impeaches; [2] the evidence was suppressed by the prosecution, either willfully or inadvertently; and [3] prejudice ensued." *Commonwealth v. Chmiel*, 30 A.3d 1111, 1130 (Pa. 2011). The evidence withheld by the Commonwealth, as detailed above, ensured "[t]hat no reliable adjudication of Petitioner's guilt or innocence could have taken place." *Commonwealth v. Strong*, 761 A.2d 1167, 1175 (Pa. 2000) (reversing conviction for Commonwealth's failure to comply with *Brady* obligations).

173. Additionally, the Commonwealth failed to correct testimony given by Emanuel Claitt it knew to be false, in violation of *Napue v. Illinois,* 360 U.S 264, 269 (1959) (Holding that the State commits a Fourteenth Amendment

violation when "although not soliciting false evidence, [it] allows it to go uncorrected when it appears.").

174. Knowledge of information in the possession of any law enforcement actor that has a connection to a particular prosecution is chargeable to the prosecutor. *Kyles v. Whtley*, 514 U.S. 419, 437, 482 (1995) ("prosecutor is responsible for any favorable evidence known to the others acting on the government's behalf in the case, including the police"; "prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf"). Thus, knowledge by any of the police officers working on this case is chargeable to the prosecutor, as is knowledge by any one of the prosecutors.

175. Under *Brady* and its progeny, a "showing of materiality [prejudice] does not require demonstration by even a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434. Instead, the "touchstone of materiality is a 'reasonable probability' of a different result." *Id.*; *Commonwealth v. Strong*, 761 A.2d 1167, 1171 (Pa. 2000) ("As *Brady* and its progeny dictate, when the failure of the prosecution to produce material evidence raises a reasonable probability that the result of the trial would have been different if the evidence had been produced, due process has been violated and a new trial is warranted." *citing United States v. Bagley*, 473 U.S. 667 (1985)). A reasonable probability of a different result existed "when the prosecution's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles, Id.*; *see also Hull v. Kyler*, 190 F.3d 88, 110 (3d Cir.

1999) (The "undermines confidence" standard is not a stringent one. It is less demanding than the preponderance standard.").

176. In assessing materiality, the Court considers how effective counsel could have used the suppressed information at trial and through pre-trial investigation and development of other evidence. *Kyles*, 514 U.S. at 441 (finding prejudice where "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable"); *Id.* at 441-49 (reviewing ways in which competent counsel could have used and developed withheld information to impeach prosecution witnesses and undercut police investigation); *United States v. Bagley*, 473 U.S. 667, 676 (1985) (materiality analysis considers whether suppressed information, "if disclosed and used effectively" by the defense, may have made a difference); *Id.* at 683 (materiality inquiry considers "any adverse effect that the [suppression] might have had on the preparation or presentation of the defendant's case" and "the course that the defense and the trial would have taken had the defense not been misled"); *Wilson v. Beard*, 589 F.3d 651, 659, 664 (3d Cir. 2009) (same).

177. In assessing materiality, the Court considers how effective counsel could have proceeded in the absence of the due process violations both at trial and in pre-trial investigation and development of other evidence. *Kyles*, 514 U.S. at 441; *United States v. Bagley* 473 U.S. 667, 676; *Wilson v. Beard*, 589 F.3d 651, 664 (3d Cir. 2009); *Simmons v. Beard*, 590 F.3d 223, 231 (3d Cir. 2009); *Breakiron v. Horn*, 642 F.3d 126 (3rd Cir. 2011).

178. In this case, the "absence of due process violations" would have meant no prosecution of the Petitioner, because in the absence of due process violations, there was no "evidence" against the Petitioner.

1. The Commonwealth Manufactured and/or Presented the False Testimony of Emanuel Claitt that Petitioner was Involved in the Homicide of Joseph Hollis and Assault on John Pickens

179. Emanuel Claitt's declarations establish that his testimonial evidence was false and that the Commonwealth knew it was false. The presentation of false evidence by a prosecutor constitutes the most fundamental violation of due process.

180. This is not a case of falsification or prosecutorial suppression of a *particular* aspect of the prosecution's case. This false evidence was the *entirety* of the evidence against Petitioner. This false evidence is unquestionably material to the conviction of Petitioner.

181. Petitioner was convicted solely on the basis of witness testimony. It was Emanuel Claitt alone who provided testimonial evidence that Petitioner Tillery was in the poolroom and shot the victims.

182. Petitioner incorporates the factual allegation and legal argumentation included in the paragraphs above in support of this claim.

183. Claitt's declaration also provides proof of the Commonwealth's intentional manufacture and presentation of false testimony against Petitioner. It also provides evidence of the prosecution's efforts to suborn perjury by Robert Mickens, by disclosing the phony transport of Claitt and Mickens from the Round

House to the jail on State Road for Claitt to pressure Mickens into testifying against Petitioner.

184. Since the prosecution's case did not exist without that Claitt's testimony there is no question that this new evidence is material.

2. The Commonwealth Manufactured and/or Presented False Testimony of Robert Mickens that Tillery was at the Poolroom When Hollis and Pickens were Shot

185. Robert Mickens provided testimonial evidence that Petitioner Tillery had asked him to be a police lookout outside the poolroom and that Tillery went into the poolroom shortly before he heard shots. Mickens also provided testimony that Petitioner was attemped to establish a false alibi.

186. Mickens' trial testimony provided corroboration to Claitt's testimony that Petitioner was in the poolroom when Hollis and Pickens were shot.

187. Mickens trial testimony served to prop up Claitt's testimony, which was weakened or compromised by his extensive and continued arrest record and the accusations that his testimony was induced by plea deals.

188. Mickens' declaration establishes that trial testimony was false and that the Commonwealth knew it was false because it was the Commonwealth that manufactured it. Mickens' declaration disclosed the Commonwealth's conscious efforts to coerce him into falsely testifying against Petitioner.

189. The new evidence provided by Mickens that his trial testimony was a lie, coerced and induced by the prosecution eliminates that his trial testimony corroborating Claitt.

190. Mickens declaration also corroborates the Commonwealth's intent to convict Petitioner, whatever the cost to truth. It confirms the Commonwealth's manufacture of false evidence by threats of false prosecution and providing plea deals, protection, and sexual favors. The new evidence provide by Mickens is material.

3. The Commonwealth Presented False Testimony that Emanuel Claitt and Robert Mickens Had No Plea Agreements with the Commonwealth and that False Testimony was Not Corrected by the Commonwealth

191. Petitioner repeats and incorporates paragraphs above for relevant facts and legal argument.

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193. The existence of plea deals in exchange for testimony is material to the veracity of these witnesses, witnesses who provided the only evidence linking Petitioner to these crimes. It is material evidence, the falsification of which and failure to correct requires reversal of the conviction.

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court found it coercive and a violation of due process and reversed a conviction based on Lester's confession that was induced by he promise of sexual favors. The named homicide detectives involved in 1983 were Lawrence Gerrard and Ernest Gilbert, the same detectives who were central to the handling of both Emanuel Claitt and Robert Mickens.

200. Claitt's and Mickens' revelations that their false testimonies were induced by the Commonwealth providing them with sexual favors constitutes separate and independent grounds for reversal of the Petitioner's conviction.

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> "Such disclosure will serve to justify trust in the prosecutor as the representative . . .of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."

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disclose favorable evidence to a defendant:

> "And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. See Rose v. Clark, 478 U. S. 570, 577–578 (1986); Estes v. Texas, 381 U. S. 532, 540 (1965); United States v. Leon, 468 U. S. 897, 900–901 (1984) (recognizing general goal of establishing "procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth' " (quoting Alderman v. United States, 394 U. S. 165, 175 (1969)).

204. Moreover, the government has special obligations when it comes to their cooperating informants. *See, Commonwealth v. Strong, 761 A.2d 1167, 1175 (2000),* observing that a tentative commitment from a prosecutor might be more likely to encourage false testimony from a cooperating witness than a firm promise, since the witness will have a greater incentive to curry favor with the prosecutor if a specific agreement has not yet been reached.

205. Courts have established that a "prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truthseeking mission of our criminal justice system." *Commonwealth of the Northern Mariana Islands v. Bowie*, 236 F.3d 1083, 1089 (9th Cir. 2001).

206. This obligation stems from two sources: first, the government enlists and controls and rewards its informants and is therefore in a unique position to evaluate their reliability. The second is that the prosecutor, as the representative of the sovereign, has an ethical obligation to ensure that the defendant is given a fair trial. See *Bowie*, 236 F.3d at 1089 (citing *Berger v. United States, supra,* at 88.)

207. In the instant case, the Commonwealth abandoned all concern and its constitutional obligations to the defendant to due process and a fair trial. The quest for a conviction at all costs, regardless of the veracity of "evidence," has resulted in a gross miscarriage of justice such that it shocks the conscience. The appropriate remedy is to dismiss the indictments and release Petitioner, and failing that to grant him a new trial.

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VI. PREVIOUS LITIGATION OF ISSUES RAISED

208. The issues raised herein have not been previously litigated.

VII. COURT MUST PROVIDE AN EVIDENTIARY HEARING

209. This Court must afford Petitioner an evidentiary hearing. It has long been the standard that post-conviction hearings are appropriate when a petitioner pleads facts entitling him to relief. *Townsend v. Sain*, 372 U.S. 293 (1963). Where, as here, the post-conviction pleadings "raise material issues of fact" and evidentiary hearing is required. Pa. R. Crim. P. 908(A) (2); *Commonwealth v. Williams*, 732 A.2d 1167, 1189-90 (Pa. 1999) ("Clearly, a material factual controversy exists …; therefore, we hold that the PCRA court erred in dismissing [the] ground for relief without conducting a factual hearing.") (citing former Pa. R. Crim. P. 1509(b)).

210. A hearing cannot be denied unless this Court "is certain of total lack of merit" of the petition. *Commonwealth v. Bennett*, 462 A.2D 772, 773 (Pa. Super. 1983) (quoting *Commonwealth v. Rhodes*, 416 A.2d 1031, 1035-36 (Pa. Super. 1979)); accord *Commonwealth v. Korb*, 617 .2d 715, 716 (Pa. Super. 1992) (remanding for evidentiary hearing where "[i]t appears that appellant has presented a claim of ineffective assistance of counsel which contains at least arguable merit") (citing *Commonwealth v. Copeland*, 554 A.2d 54, 60-61 (Pa. 1988)). Even in "borderline cases Petitioners are to be given every conceivable legitimate benefit in the disposition of their claims for an evidentiary hearing." *Commonwealth v. Pulling*, 470 A.2d 170, 173 (Pa. Super. 1983) (remanding for evidentiary hearing) (quoting *Commonwealth v. Strader*, 396 A.2d 697, 702 (Pa. Super. 1978) and *Commonwealth v. Nahodil*, 239 A.2d 840 (Pa. Super. 1968)).

211. A post-conviction hearing is particularly appropriate where the merits of a petitioner's claims revolve around the credibility of witnesses for whom the petitioner has provided an affidavit. A court may not judge the credibility of a recantation witness, or similar witness, based solely on an affidavit. *Commonwealth v. D'Amato*, 856 A.2d 806, 825-826 (pa. 2004) ("This Court has also emphasized, however, that even as to recantations that might otherwise appear dubious, the PCRA court must, in the first instance, assess the credibility and significance of the in light of the evidence as a whole."); see also, *Commonwealth v. Johnson,* 966 A.2d 523, 539 (Pa. 2009) ("one of the primary

reasons PCRA hearings are held in the first place is so that credibility determinations can be made; otherwise, issues of material fact could be decided on pleadings and affidavits alone. The PCRA court here obviously appreciated this fact in part, since it made a controlling credibility determinations respecting Cook's recantation testimony.") and id. at 541-42 (in *D'Amato,* the PCRA court failed to mention, let alone pass upon, the credibility of the recantation testimony in its opinion. This Court held that the PCRA court had defaulted on its duty to assess the credibility of the recantation and its significance in light of the trial record, and we remanded the matter to the PCRA court for the limited purpose of making such determination.").

212. At a minimum, Petitioner must be afforded an opportunity to prove the timeliness of his Petition. He has pled with specificity that he has met the exceptions to the PCRA time bar. Therefore, this Court must give him an opportunity to prove these facts. Indeed, the petitioner in *Commonwealth v. Bennett,* 930 A.2d 1264, 1272, 1274 (Pa. 2007) also invoked the time bar exceptions pled by Petitioner and the Pennsylvania Supreme Court noted the requirements for an evidentiary hearing. *See also Commonwealth v. Lasky*, 934 A.2d 120, 123 (Pa. Super. 2007) (remanding to lower court "for the conduct of an evidentiary hearing by the lower court in order to determine (1) when certain procedural facts became known to Appellant, (2) whether the exercise of due diligence on Appellant's part would have revealed these facts to Appellant sooner,

and ultimately (3) whether Appellant now has made a viable claim that one of the exceptions articulated at 42 Pa.C.S.A. § 9545, i.e. (b)(1)(ii), to the one year time limit for filing a PCRA petition").

213. Based on the above, Petitioner is entitled to, and therefore requests that an evidentiary hearing be held.

VIII. PETITIONER IS ENTITLED TO DISCOVERY

214. Discovery in post-conviction proceedings is governed by Pa.R.Crim.P. 902 (E) (1), which permits discovery upon leave of Court and upon a showing of exceptional circumstances. Petitioner proffers that he shows such exceptional circumstances.

215. The circumstances of this case are indeed exceptional. Petitioner requests immediate discovery of all reports of police and prosecution interviews, meetings and any communication relating to witnesses Emanuel Claitt and Robert Mickens.

216. Petitioner requests leave to file a more detailed and specific discovery request.

IX. CONCLUSION AND REQUEST FOR RELIEF

For all of the above reasons and the attached affidavits and exhibits, Petitioner requests the following relief:

A. That Petitioner be granted permission for leave to proceed in forma pauperis.

B. That the Commonwealth be required to respond to this petition.

C. That the Court permit Petitioner to file such amendments, supplements or briefs as required in the interest of justice.

D. That the Court permits oral arguments on any and all dispositive issues.

E. That the Court permit discovery as requested above.

F. That following discovery, the Court conduct evidentiary hearings on all material disputed issues of fact.

G. That the Court vacates Petitioner's conviction and sentence and award him a new trial.

H. In the interest of justice given the gross violations of due process in this case, that the Court vacates Petitioner's conviction and sentence and dismiss the charges.

178. In this case, the "absence of due process violations" would have meant no prosecution of the Petitioner, because in the absence of due process violations, there was no "evidence" against the Petitioner.

1. The Commonwealth Manufactured and/or Presented the False Testimony of Emanuel Claitt that Petitioner was Involved in the Homicide of Joseph Hollis and Assault on John Pickens

179. Emanuel Claitt's declarations establish that his testimonial evidence was false and that the Commonwealth knew it was false. The presentation of false evidence by a prosecutor constitutes the most fundamental violation of due process.

180. This is not a case of falsification or prosecutorial suppression of a *particular* aspect of the prosecution's case. This false evidence was the *entirety* of the evidence against Petitioner. This false evidence is unquestionably material to the conviction of Petitioner.

181. Petitioner was convicted solely on the basis of witness testimony. It was Emanuel Claitt alone who provided testimonial evidence that Petitioner Tillery was in the poolroom and shot the victims.

182. Petitioner incorporates the factual allegation and legal argumentation included in the paragraphs above in support of this claim.

183. Claitt's declaration also provides proof of the Commonwealth's intentional manufacture and presentation of false testimony against Petitioner. It also provides evidence of the prosecution's efforts to suborn perjury by Robert Mickens, by disclosing the phony transport of Claitt and Mickens from the Round

House to the jail on State Road for Claitt to pressure Mickens into testifying against Petitioner.

184. Since the prosecution's case did not exist without that Claitt's testimony there is no question that this new evidence is material.

2. The Commonwealth Manufactured and/or Presented False Testimony of Robert Mickens that Tillery was at the Poolroom When Hollis and Pickens were Shot

185. Robert Mickens provided testimonial evidence that Petitioner Tillery had asked him to be a police lookout outside the poolroom and that Tillery went into the poolroom shortly before he heard shots. Mickens also provided testimony that Petitioner was attemped to establish a false alibi.

186. Mickens' trial testimony provided corroboration to Claitt's testimony that Petitioner was in the poolroom when Hollis and Pickens were shot.

187. Mickens trial testimony served to prop up Claitt's testimony, which was weakened or compromised by his extensive and continued arrest record and the accusations that his testimony was induced by plea deals.

188. Mickens' declaration establishes that trial testimony was false and that the Commonwealth knew it was false because it was the Commonwealth that manufactured it. Mickens' declaration disclosed the Commonwealth's conscious efforts to coerce him into falsely testifying against Petitioner.

189. The new evidence provided by Mickens that his trial testimony was a lie, coerced and induced by the prosecution eliminates that his trial testimony corroborating Claitt.

190. Mickens declaration also corroborates the Commonwealth's intent to convict Petitioner, whatever the cost to truth. It confirms the Commonwealth's manufacture of false evidence by threats of false prosecution and providing plea deals, protection, and sexual favors. The new evidence provide by Mickens is material.

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191. Petitioner repeats and incorporates paragraphs above for relevant facts and legal argument.

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and ultimately (3) whether Appellant now has made a viable claim that one of the exceptions articulated at 42 Pa.C.S.A. § 9545, i.e. (b)(1)(ii), to the one year time limit for filing a PCRA petition").

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For all of the above reasons and the attached affidavits and exhibits, Petitioner requests the following relief:

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B. That the Commonwealth be required to respond to this petition.

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E. That the Court permit discovery as requested above.

F. That following discovery, the Court conduct evidentiary hearings on all material disputed issues of fact.

G. That the Court vacates Petitioner's conviction and sentence and award him a new trial.

H. In the interest of justice given the gross violations of due process in this case, that the Court vacates Petitioner's conviction and sentence and dismiss the charges.

CONCLUSION

For all the above reasons and for those set forth in this *pro se* PCRA Petition and based on the entire record of this case, Petitioner MAJOR G. TILLERY seeks vacation of his conviction and the attendant relief requested.

Dated: June 15, 2016

MAJOR G. TILLERY
AM 9786
SCI Frackville
1111 Altamont Blvd.
Frackville, PA 17932

VERIFICATION

I verify that the statements made in the above Declaration are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are subject to the penalties of 18 Pa.C.S. sec. 4904, relating to unsworn falsification to authorities.

Date: June 15, 2016

MAJOR G. TILLERY

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Petitioner *PRO SE*
SCI Frackville
1111 Altamont Blvd.
Frackville, PA 17931

Received
SEP 07 2016
Office of Judicial Records-Motions

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY, PENNSYLVANIA

Received
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Appeals/Post Trial

COMMONWEALTH OF PENNSYLVANIA,	Docket Number
Respondent,	CP-51-CR-0305681-1984
v.	
MAJOR G. TILLERY,	
Petitioner	

PETITIONER'S SUPPLEMENTAL PCRA PETITION

Petitioner, MAJOR G. TILLERY, *pro se*, respectfully submits this Supplemental PCRA Petition:

On June 15, 2016 petitioner filed a PCRA petition pursuant to 42 Pa. C.S. § 9541 et. stating, "this is a case of factual innocence and gross prosecutorial misconduct violating Petitioner Major Tillery's right to due process and a fair trial. The actions of the Commonwealth resulted in a fundamental miscarriage of justice that shocks the conscience and warrants reversal of his conviction and dismissal of charges against Petitioner Major Tillery."

The Petition is pending before this Court and this Court filed a Notice of Intent to Dismiss pursuant to PA.R.Crim. P. 907 on August 19, 2016. Petitioner is simultaneously filing his Response in Objection to Notice of Intent to Dismiss.

Petitioner continued his investigation subsequent to the filing of his PCRA in June 15, 2016 and has obtained new evidence and facts that were not previously known to him that corroborate the fact of the Commonwealth's misconduct, further supporting Petitioner's claims of actual innocence and violations of his right to due process.

Petitioner submits to this court the videotape of Emanuel Claitt recorded on August 3, 2016. [Exhibit A] In this videotape Emanuel Claitt reaffirms his sworn declarations of May 4 and June 3, 2016. This videotape is submitted to preserve the evidence provided by Emanuel Claitt that his entire trial testimony was falsified, the product of coercion and inducements by the Commonwealth including concealed plea deals and being providing sexual favors.

This videotape was recorded by Rachel Wolkenstein who is assisting Petitioner. Her sworn declaration is attached and is incorporated into this Petition.

As set forth in the Wolkenstein declaration, Petitioner now has evidence corroborating Emanual Claitt's statement that he received sexual favors while in custody by being allowed to have private sexual encounters with girlfriends in the Roundhouse, assisted by homicide detectives Lawrence Gerrard and Ernest Gilbert:

(1) Emanuel Claitt has provided the names and contact information for two of the woman that were brought to him by homicide detectives, Helen Ellis and Denise Certain.

(2) Helen Ellis acknowledged that she had sex with Emanuel Claitt in the Roundhouse homicide interview rooms and that arrangements were made with detectives who brought her up to him.

(3) Roundhouse log-in page 192 for December 14, 1983, has Emanuel Claitt's signature along with Det. Gilbert and his girlfriend Denise Certain signed in under Det. Gerrard for an overlapping time period. [Exhibit C]

Petitioner intends to present Helen Ellis, Denise Certain as witnesses at an evidentiary hearing. Witness certifications are attached.

Timeliness of Supplement

Petitioner reasserts the facts and legal argument set forth in the Petition and his Response In Objection to the Notice of Intent to Dismiss regarding timeliness. He makes the following additional points.

The new facts presented in this Supplement are timely filed pursuant to 42 Pa. C.S. § 95459(1) (i), inasmuch as the Commonwealth's failure to discharge its constitutional obligation to provide the defense *Brady* material constituted

"governmental interference" with the presentation of this claim. *See Banks v. Dretke*, 540 U.S. 668, 696 (2004).

Petitioner has satisfied the requirements of 42 Pa. C.S. 9545(ii) in that he has exercised the requisite diligence to uncover the undisclosed Roundhouse record and the activity of the detectives involved in this; and to investigate and obtain additional and corroborative evidence from witnesses whose possible relevance and involvement in this case only became known to Petitioner with the information provided by Emanuel Claitt on August 3, 2016.

Petitioner requests this Court order discovery of all reports, notes and correspondence in the possession of agents of the Commonwealth pertaining to this case.

Petitioner also requests that if this Court grants leave to Petitioner to file an amended complaint that the additional facts presented here be incorporated into said amended complaint.

VERIFICATION

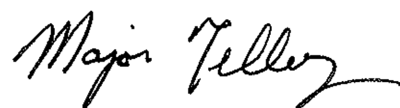
I verify that the statements made in the above response are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are subject to the penalties of 18 Pa.C.S. §4904 and 28 U.S.C. § 1746, relating to unsworn falsification to authorities.

Date: September 6, 2016

MAJOR TILLERY

September 6 2016

Respectfully submitted,



MAJOR G. TILLERY, *pro se*
AM 9786
SCI Frackville
1111 Altamont Blvd.
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COURT OF COMMON PLEAS
PHILADELPHIA COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
Respondent,	:	Docket Number CP-51-CR-0305681-1984
v.	:	
MAJOR G. TILLERY,	:	
Petitioner	:	

Certification of Helen Ellis as a Witness

I, Major Tillery, the Petitioner in the above-captioned action certify the following:

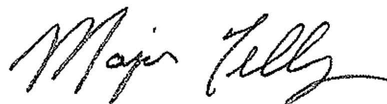
It is my intention to call Helen Ellis as my witness in an evidentiary hearing held on the claims presented in my PCRA petition filed June 15, 2016.

Helen Ellis resides at 2452 32nd Street, Philadelphia, PA and her date of birth is December 28, 1955.

Helen Ellis will testify that she had sex with Emanuel Claitt in the Roundhouse homicide interview rooms and that arrangements were made with detectives who brought her up to him.

September 6, 2016

Respectfully submitted,



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Frackville, PA 17931

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Respondent, v. MAJOR G. TILLERY, Petitioner	Docket Number CP-51-CR-0305681-1984

Certification of Denise Certain as a Witness

I, Major Tillery, the Petitioner in the above-captioned action certify the following:

It is my intention to call Denise Certain as my witness in an evidentiary hearing held on the claims presented in my PCRA petition filed June 15, 2016.

Denise Certain resides at 616 N. 32nd Street, Philadelphia, PA and her date of birth is July 29, 1958.

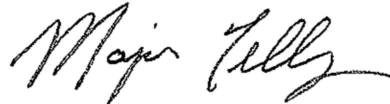
Denise Certain will testify that she had sex with Emanuel Claitt in the Roundhouse homicide interview rooms and that arrangements were made with detectives who brought her up to him. She will identify her signature on the Roundhouse login sheet for December 14, 1983.

Date	Name		Time In	Time Out	
12-13-83	Daniel Thomas	I.D.	1:30 pm	12 pm	Oable
12-13-83	Wm. Hayward	I.D.	12:25 pm	1 pm	Jaglich
12/13/83	Tyrone Brown	Hom	1:50	3:10	Jaglich
12/13/83	Barry Tomolo	Poly	1:30 pm	3:30 pm	Calhoun
12/13/83	Rosemary Calabrese	NARC	2:05 pm		
12/13/83	Christine Di Cicco	NARC	2:05		
12/13/83	A.B. Palmer/G. Klep	SCU.	4 pm	11:55	Corey Bryant Annie Brown
12/13/83	Frank Delia	SDD	4:30	5:55	Doug Hein
12/13/83	Linda Lizmore	Hom	7:05 pm		Grace/Benn
12/13/83	Steve Royster	Hom	7:05		Zhel
	~~Annie Edmonds~~ ? (?)	Hom	8:05 pm		
12-13-83	Carmelo Rivera	Hom	9:00 p	10:10	Gerard
"	Doris Bonns	"	9:05	10:20	Dlyn
"	Mike	"		pm	
"	Milda	"			
12-14-83	~~Wilfredo De Cunter~~	Hom	10:00	10:30	Dlyn
12-14-83	Nancy Clark (?)	Hom			
12-14-83	John McCorkle	I.D.	9:10 a	9:45 a	Mullen
12-14-83	Richard McKay	NARC	9:45		Pastore
12-14-83	Denise Certain ? (?)	Hom.	11:45 am	1:30 pm	McQuillan
12-14-83	Effrain Nunes	Hom	12-	12:45	Gerard
"	Luis Torres				Sgt Lynd
12/14/83	George Hodges	Hom	2:20	6:20 P	Nachurst
12:35 pm	Caesar Baez	Hom	2:20	6:35 P	Nachurst
	Calvin Butler	I.D.		2:35 P	Jaglich
12-14-83	Marilyn Kilson	Hom	4:15 P	7:05 P	McCart
12-14-83	Cristino Valle	Hom.	5:00 P		Dlyn
12-14-83	Angel Fresneda	Poly	5:35 pm	8:34 pm	Lt. McC
12-14-83	J. Edmonds	Hom.	5:50		Det.
12-14-83	Alvin McNair	Hom	6:00 P	7:35 P	
12-14-83	~~Geneva~~ Fields	Gambling	6:50	9:15 pm	Hansen
" "	Sula Bey	"	"	9:15 Pm	"

192

September 6, 2016

Respectfully submitted,



MAJOR G. TILLERY, *pro se*
AM 9786
SCI Frackville
1111 Altamont Blvd.
Frackville, PA 17931

DECLARATION OF RACHEL WOLKENSTEIN
PURSUANT TO PA C.S. § 4904 AND 28 U.S.C. § 1746

RACHEL WOLKENSTEIN, declares the following under penalty of perjury:

I am an attorney at law, admitted to practice in the State of New York since 1974, residing in Brooklyn, NY.

This declaration is submitted in support of the Supplemental Petition filed by Petitioner.

Since approximately February 2015, I have assisted Major Tillery *pro bono,* in his efforts to overturn his conviction, to obtain and review his court records, and those of the witnesses against him, to conduct limited investigation and help him find *pro bono* legal representation in upcoming legal proceedings. In April 2016 I had phone call with Robert Mickens in which he said that he would provide an affidavit and was willing to testify on behalf of Major Tillery.

We met on April 18, 2016 and for the first time described why he had lied when he testified against Major Tillery at his trial. Robert Mickens recounted to me the combination of threats and favors he received from detectives and prosecutors to coerce and induce him to testify falsely. He described how the prosecutors coached him to answer questions about what he supposedly saw on the night of the shootings and to deny he received any plea deals.

I typed up the key points of what he told me. This was reviewed by Mr. Mickens and he signed his verified declaration that same day.

Mr. Mickens disclosed why his false testimony was sought by the prosecution and police and how it was obtained. He disclosed the van ride with Emanuel Claitt between the Roundhouse and the county prison on State Road during which Mr. Claitt pushed him to testify against Major Tillery. Mr. Mickens also disclosed that homicide detectives arranged for his girlfriend to join him in the Roundhouse for a sexual encounter. Mr. Mickens was quite emotional in describing this and expressed pain and regret about his role in Major Tillery's conviction.

It was a surprise when shortly after this a lead resulted in learning that Emanuel Claitt, whose testimony was the sole evidence against Major Tillery, was willing to meet and indicated that he needed to finally tell the truth about his false testimony against Major Tillery and William Franklin, who was the co-defendant in the case and tried three years earlier than Petitioner.

I met with Emanuel Claitt on May 3, 2016 and he told me that his trial testimony against Major Tillery and William Franklin was totally false, that he [Claitt] wasn't even in or near the poolroom that night and he had no personal knowledge of the who shot Joseph Hollis and John Pickens. Emanuel Claitt described the process of the detectives and prosecutors obtaining his false statement and preparing him to testify. I took notes in speaking with Mr. Claitt and met him the next morning, May 4, 2016 with a typed up declaration. He made some corrections and signed the declaration under penalty of perjury. I spoke with

him again on the phone and in person on June 3, 2016 and he signed a supplemental declaration.

I met with Emanuel Claitt again on August 3, 2016. During this meeting he gave me the names of three of the women who he had sex with while in police custody. One woman, Barbara Claitt is deceased. He also told me that Helen Ellis, who is the mother of three of his children, saw him in the Roundhouse a number of times for the purposes of having sex. A third woman, Denise Certain ("De De") was another woman who he saw at the Roundhouse.

On August 3, 2016, Emanuel Claitt agreed to be videotaped. I taped Emanuel Claitt as he reaffirmed his sworn declarations and read a statement that is a composite of his two verified declarations. This videotape is submitted as an exhibit to the Supplemental Declaration. [Exhibit A]

I located Helen Ellis on August 4, 2016 outside her home and spoke with her briefly. She acknowledged that she had sex with Emanuel Claitt in the Roundhouse homicide interview rooms and that arrangements were made with detectives who brought her up to him.

Based on the information received from Emanuel Claitt, I located Denise Certain.

With the information received from Robert Mickens, that included being put in a police van alone with Emanuel Claitt to give Claitt the opportunity to persuade Mickens to falsely testify against Major Tillery, and that homicide detectives had facilitated private sexual encounters for both men with their

respective girlfriends in the Roundhouse, I attempted to obtain documentary corroborative evidence.

This included research in public records and the filing of requests pursuant to the RTKL for: Roundhouse log-in records for periods from 1980 through 1985, covering Emanuel Claitt's and Robert Mickens' periods of incarceration; and prisoner transport records between the PAB building and the detention center on State Road; and regarding Robert Mickens, transport records between the Northhampton County prison and Philadelphia in late 1984-1985. These requests were denied, appealed and reviewed. Both the Philadelphia Police Department and Northhampton County state they have searched and cannot locate these records and were likely not retained. [Exhibit B]

I learned of other murder convictions from the same years (mid-80s) that involved the same detectives as those who worked with Emanuel Claitt, Det. Lawrence Gerrard and Ernest Gilbert and a similar modus operandi in obtaining convictions – providing sexual favors to prisoner informants.

On August 25, 2016 I visited Andre Harvey, a lifer imprisoned at SCI Graterford, and he gave me documents that he had acquired when he challenged his conviction in a 1995 PCRA, in part on grounds that the prosecution witnesses against him had been provided sexual favors to falsely testify against him. Detectives Gerrard and Gilbert were central to that.

Andre Harvey gave me copies of the 17 pages of "sign-in and out logs at the Roundhouse" secured by his then investigator Paul J. Paris. This was just 17

pages of 80 from the period of June 1-December 31, 1983. In looking over those pages, I saw that on page 192, the log-in sheet for December 14, 1983, Emanuel Claitt signed in under Det. Gilbert and his girlfriend Denise Certain signed in under Det. Gerrard. [Exhibit C]

Andre Harvey said that doesn't have any other portion of the Roundhouse log in sheets.

On behalf of Petitioner, Major Tillery, I am continuing in the search for additional records that corroborate the Commonwealth misconduct that permeates the conviction of Major Tillery for crimes he did not commit. on August 3, 2016

Dated: September 6, 2016

RACHEL WOLKENSTEIN

VERIFICATION

I verify that the statements made in the above Declaration are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are subject to the penalties of 18 Pa.C.S. §4904 and 28 U.S.C. § 1746, relating to unsworn falsification to authorities.

Date: September 6, 2016

RACHEL WOLKENSTEIN

EXHIBIT B

CITY OF PHILADELPHIA

POLICE DEPARTMENT
HEADQUARTERS, FRANKLIN SQUARE
PHILADELPHIA, PENNSYLVANIA 19106

RICHARD J. ROSS JR.
Commissioner

July 5, 2016

Ms. Rachel Wolkenstein
515 Avenue I Apt. 6C
Brooklyn, NY 11230

RE: Pennsylvania Right-To-Know Act (RTKA) Request

Dear Ms. Wolkenstein:

Your Pennsylvania Right-To-Know Act request dated 06-27-16 was received by this office on 06-27-16 for:

1. Police Administration Building (Round House) Log-in Book entries for :
   January 1 – November 29, 1980
   June 1, 1981- November 30, 1982 &
   April 1, 1983- July 31, 1985
2. Transport Orders/Records for transport of prisoner Emanuel Claitt (PP# 439759) between the Philadelphia Detention Center on State Road and the Police Administration Building on Race Street:
   January 1- November 19, 1980
   September 1, 1981- November 30, 1982
   April 1, 1983- July 31, 1985
3. Transport Orders/Records for transport of prisoner Robert Mickens (PP#0472454) between the Philadelphia Detention Center on State Road and the Police Administration building on Race Street.
   February 1, 1984- May 25, 1985

After processing your request, the Philadelphia Police Department responds as follows:

Your request ***cannot be granted*** for the reason that the record requested is beyond the agency's **retention schedule**. Pursuant to Section 507 of the Act "*Nothing is this act shall be construed to modify, rescind, or supersede any record retention policy or disposition schedule of an agency established pursuant to law. regulation, policy, or other directive*".

Should you wish to contest any part of this decision, you may file an appeal with the Office of Open records as provided for in 65 P.S. § 67.1101. You have 15 business days from the mailing date of the City's response to challenge the response. Please direct any appeal to the

Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA 17120-0225 and copy the undersigned.

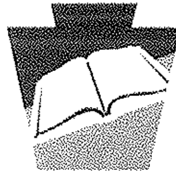
Please be sure to copy Mr. Jeffrey Cohen, Assistant City Solicitor for the City of Philadelphia Law Department on your appeal, located at One Parkway Building, 17th Floor, 1515 Arch Street, Philadelphia, PA 19102.

FOR THE POLICE COMMISSIONER

Sincerely,

Lt Edward Egenlauf #430

Lieutenant Edward Egenlauf
Open Records Officer
Philadelphia Police Department
750 Race Street, Room 203
Philadelphia, PA 19106
FAX: 215-686-1183
Email: police.righttoknow@phila.gov



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
RACHEL WOLKENSTEIN, **Requester**	:	
v.	:	**Docket No.: AP 2016-1257**
PHILADELPHIA POLICE DEPARTMENT, **Respondent**	:	

On June 27, 2016, Rachel Wolkenstein ("Requester") submitted a request ("Request") to the Philadelphia Police Department ("Department") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking log-in book entries and transportation records for two named inmates. On July 5, 2016, the Department denied the Request, asserting that the Records requested are no longer possessed by the Department, pursuant to its record retention schedule.

On July 25, 2016, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial. On August 4, 2016, the Department submitted a position statement, reiterating its position that the requested records are beyond the Department's record retention schedule. Accompanying the submission was the affidavit of the Department's Open Records Officer, who testifies, under penalty of perjury, that a search of the Department's records discovered no records responsive to the Request.

Under the RTKL, an affidavit may serve as sufficient evidentiary support for the nonexistence of records. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Department acted in bad faith or that the record exists in the possession of the Department, "the averments in [the affidavit] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Based on the evidence provided, the Department has met its burden of proving that the records requested do not exist in the Department's possession, custody or control. Accordingly, the appeal is **denied**.

For the foregoing reason, the Department is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal or petition for review to the Philadelphia County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.[1] This Final Determination shall be placed on the website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: August 26, 2016

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent to: Rachel Wolkenstein (via e-mail only);
Jeffrey Cohen, Esq. (via e-mail only);
Lieutenant Edward Egenlauf (via e-mail only)

[1] *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

-----Original Message-----
From: Daniel ODonnell <DODonnell@northamptoncounty.org>
To: rwolkenstein3 <rwolkenstein3@aol.com>
Cc: Edna Hewitt <EHewitt@northamptoncounty.org>; Sharon Lerch
<SLerch@northamptoncounty.org>
Sent: Fri, Jul 8, 2016 2:37 pm
Subject: Re: Right to Know

Ms. Wolkenstein:

I received a response from the Prison with regard to your request below. They searched their records and archives. They have no such records going back that far. Accordingly, the request must be **DENIED** pursuant to RTKL Section 705 because no such records exist in the possession of the County.

You have a right to appeal this decision in writing to the Executive Director, Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA 17120. If you choose to file an appeal, you must do so within fifteen (15) business days of the mailing date of the agency's response as outlined in Section 1101 of the RTKL. If you have further questions, feel free to contact the Solicitors Office.

Daniel M. O'Donnell, Esq.
Assistant County Solicitor & Open Records Officer
Office of the Solicitor
Northampton County Courthouse
669 Washington Street
Easton, PA 18042
Telephone: 610.829.6350
Fax: 610.559.3001

From: Daniel ODonnell
Sent: Tuesday, July 5, 2016 2:36 PM
To: rwolkenstein3@aol.com
Cc: Edna Hewitt; Sharon Lerch
Subject: Right to Know

Rachel Wolkenstein
VIA EMAIL ONLY

Ms. Wolkenstein:

The County received your request made pursuant to the Pennsylvania RIght to Know Law (RTKL) on June 30, 2016 seeking transport orders "and or other records" for Robert Mickens, between 9/15/1984 and 10/10/1985.

Ordinarily, a response would be due within five (5) business days of receipt, or in this case July 8, 2016. However, in this case given the age of the documents at issue, the County is invoking its right to an extension of time to respond by up to thirty (30) days from the original due date. Accordingly, the response from the County in this matter will be due on or before **August 7, 2016**.

Also, please be aware that the Office of the District Attorney has its own Open Records Officer. So to the extent you may be seeking records from that office, you will need to contact them directly. Additionally, please be aware that any information in the Criminal Division file is a public record, but is not subject to disclosure by the County under the Right to Know Law as such records are non-financial Judicial Records, not County records, and such filings are generally already available for inspection and copying at the Office of the Criminal Division.

The extension herein is invoked pursuant to RTKL Section 902(a): (3) a timely response to the request for access cannot be accomplished due to bona fide and specified staffing limitations; (4) a legal review is necessary to determine whether the record is a record subject to access under the RTKL, and (7) the extent or nature of the request precludes a response within the required time period.

Thank you.

Daniel M. O'Donnell, Esq.
Assistant County Solicitor & Open Records Officer
Office of the Solicitor
Northampton County Courthouse
669 Washington Street
Easton, PA 18042
Telephone: 610.829.6350
Fax: 610.559.3001

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pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
RACHEL WOLKENSTEIN,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2016-1262**
	:	
NORTHAMPTON COUNTY,	:	
Respondent	:	

On June 30, 2016, Rachel Wolkenstein ("Requester") submitted a request ("Request") to Northampton County ("County") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking various records related to the transport of Robert Mickens between September 15, 1984 and October 10, 1985. On July 8, 2016, the County denied the Request, claiming that it does not possess any responsive records.

On July 26, 2016, the Requester filed a timely appeal with the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c). On August 5, 2016, the County submitted the affidavit of Daniel Keen, the Director of the Northampton County Prison, who attests that a search was conducted and that no responsive records exist in the County's possession, custody, or control.[1]

Under the RTKL, an affidavit may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the County has acted in bad faith or that the records do, in fact, exist, "the averments in [the affidavit] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. Prot*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Based on the evidence provided, the County has met its burden of proof that it does not possess the records sought in the Request. Accordingly, the appeal is **denied**.

For the foregoing reasons, the County is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final

---

[1]The County also submitted the verification of Daniel O'Donnell, the County Open Records Officer and Assistant Solicitor, explaining in detail the search and his own efforts in supervising employees looking for records.

Determination, any party may appeal or petition for review to the Northampton County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.[2] This Final Determination shall be placed on the website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: August 25, 2016

/s/ Jordan C. Davis

Jordan C. Davis
Appeals Officer

Sent to: Rachel Wolkenstein (via e-mail only)
Daniel O'Donnell, Esq. (via e-mail only)

[2] *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

EXHIBIT C

PA OFFICE
(215) 673-6048

NJ OFFICE
(609) 340-8899

PAUL J. PARIS
Detective Agency
P.O. BOX 296
CROYDON, PA 19021-0948

LICENSED & BONDED
IN PA & NJ

FAX
215-673-0328

May 15, 1995

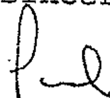
Andre Harvey #AM9119
S.C.I. Mahanoy
301 Morea Rd.
Frackville, Pa. 17932

Dear Andre:

Enclosed, please find copies of 17 pages taken from the sign-in & out logs at the Roundhouse. Also enclosed, please find copies of the statements taken from Maxie Harris-Jiles and Sharon Artis. Plus, find my breakdown of the entries on the 17 pages. You will see my notes at the bottom of the breakdown page.

As of this date, Jeremy is waiting to receive the logs for May, 1983, from the Roundhouse. Also, he is waiting for the sign-in & out logs from the Detention Center and Holmesburg, covering May 1 to December 31, 1983. Give me a call after you have reviewed this stuff. I will be in Pittsburgh on Derrick's case next week, not this week.

Sincerely,



Paul J. Paris

PJP/lms
Encl.

REVIEW OF THE SIGN IN & OUT LOGS OBTAINED FROM THE P.A.B., COVERING THE PERIOD FROM 6-1-83 to 12-31-83. THE FOLLOWING ENTRIES ARE LISTED BY PAGE NUMBER, NAME OF VISITOR, DETECTIVE, AND DATE.

Page 110, McClain, Det. Gerrard #9189, 6-2-83.
Page 117, McClain, Gerrard, 6-16-83.
Page 120, McClain, Gerrard, 6-23-83.
Page 122, Maxie Harris & Douglas Atwell, Gerrard, 6-28-83
Page 123, McClain, Gerrard, 6-30-83.
Page 128, Maxie Harris, Gilbert #9148, 7-14-83.
Page 131, Maxie Harris, Gerrard, 7-20-83 & Thelma & Constance Martin, Gilbert, also 7-20-83.
Page 135, Maxie Harris, Charles Atwell, & Jerry Fields, Gerrard, 8-3-83.
Page 137, McClain, Gilbert, 8-9-83.
Page 140, Maxie Harris, Gilbert, & Jerry Fields, Gerrard, 8-17-83.
Page 149, Maxie Harris, Gerrard, & Gertrude & Sarah Martin, Gilbert, 9-7-83.
Page 161, Maxie Harris, Gilbert, Thelma Fields, Gilbert, and Constance Fields, (Girard), 10-7-83.
Page 169, Rochelle Jackson (anyone?), Gilbert, 10-27-83.
Page 183, Maxie Harris, Gerrard, 11-23-83 & Lettie Randolph (anyone?), Gerrard, 11-23-83.
Page 189, Theresa Burrell (anyone?), Gilbert, 12-7-83.
Page 192, Annie Edmonds, Nancy Claitt?, & Denise Certain (any of these mean anything?), Gilbert & Gerrard, 12-13 & 12-14-83.
Page 199, Mary Whach & Floretta Caudle (mean anythng?), Gerrard, 12-29-83.

The other pages had none of our people. It would appear that Atwell was being brought down by a wagon, meaning he would come in a different entrance and therefore, would not show on this log. We need to put these dates & times together with the logs from the Detention Center & Holmesburg.

– FIND NO SIGN-INS FOR: SHARON ARTIS, GLONDENNA REDDICK, CHARMAINE PASCHALL, OR DARLENE PARKER.

12-13-83	Daniel Thomas	I.D.	1230 PM	1245 PM	[illegible]
12-13-83	Wm. Hayward	I.D.	1225 PM	1 PM	Jaglicki
12/13/83	Tyrone Brown	HOM	1 15 P	3 10 P	[illegible]
12/13/83	Barry Comfort	Poly	1 30 PM	3 30 PM	Calluna
12/13/83	Rosemary Calabrese	NARC	2:25 PM		[illegible]
12/13/83	[illegible]	NARC	2:30 PM		
12/13/83	D.B. Palmer Gray	SCU.	4 PM	7:55 PM	Corey-Bryant Annie Kaarlo
12/13/83	Frank Della	S.O.D	4 30	5 55 PM	Doug-Ha[illegible]
12/13/83	Linda Lizmore	Hom	7 05 PM		Grace / Benn[illegible]
12/13/83	Steve Royster	Hom	7 05 PM		[illegible]
12-13-83	Annie Edmonds ? (?)	Hom	8 PM		Gerard
"	Carmelo Rivera	Hom	9 00 P	10 10	Deyn
"	Doris Bonn[illegible]	"	9 00	10 20 PM	[illegible]
"	Mike	"			
"	Hilda	"			
12-14-83	[illegible] De Carl[illegible]	Hom	10 00	10 [illegible]	[illegible]
12-14-83	Nancy Clark ? (?)	Hom	P [illegible]		[illegible]
12-14-83	John McCorkle	I.D.	9 10 A	9 45 A	[illegible]
12-14-83	Richard McKay	NARC	9 45		Purlow[illegible]
12-14-83	[illegible] Certain ? (?)	Hom	11 45 AM	1 30 PM	McDerm[illegible]
12-14-83	Effrain Nunes	Hom	12	12 45	Gerard
"	Luis Torres			"	Sgt [illegible]
12/14/83	George Hodges				
"	Cesar Baez	Hom	2 00	6:25 P	Nachman
12:35 PM	Calvin Butler	Hom	2 20	6 35 P	Nachman[illegible]
		I.D.		2 50	
12-14-83	Marilyn Kilson	Hom	4 15 P	7 00 P	Jaglicki
12-14-83	Cristino Valle	Hom.	5 00 P		McCant
12-14-83	Angel Fakuneda	Poly	5 35 PM	8 30 P	Deyn
12-14-83	J. Edmonds	Hom.	5 45 P		Lt. McC
12-14-83	Alvin McHarr	Hom	6:00 P	7:35 P	Det. [illegible]
12-14-83	[illegible]	Garden	6 50	9 [illegible]	[illegible]
" "	[illegible] Bay	"	"	9 15 PM	[illegible]

EXHIBIT E

PCRA Court Opinion following denial of Third PCRA Petition

FILED

JAN 13 2017

Appeals/Post Trial
Office of Judicial Records

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

v.

GEORGE M. TILLERY

CP-51-CR-0305681-1984
3270 EDA 2016

OPINION

LEON W. TUCKER, J.

This appeal comes before the Superior Court following the dismissal of a Post Conviction Relief Act ("PCRA")[1] petition filed on October 6, 2014. On September 26, 2016, this court dismissed the PCRA petition for the reasons set forth below.

I. PROCEDURAL HISTORY

George M. Tillery (hereinafter referred to as "Petitioner") was arrested and subsequently charged with homicide and related offenses stemming from the shooting death of John Hollis and the non-fatal shooting of John Pickens in October 1976 in the city of Philadelphia.

On May 29, 1985, following a jury trial presided over by the Honorable John Geisz, Petitioner was convicted of first-degree murder, aggravated assault, two counts of criminal conspiracy, and possessing an instrument of crime. After post-verdict motions were denied, the trial court imposed a sentence of life imprisonment on the murder conviction and lesser terms of incarceration on the remaining convictions. Following a direct appeal, Petitioner's judgment of

CP-51-CR-0305681-1984 Comm. v. Tillery, George
Memorandum Opinion

[1] 42 Pa. Cons. Stat. §§ 9541-9546.

sentence was affirmed by the Superior Court on May 30, 1989, and the Pennsylvania Supreme Court denied *allocatur* on March 5, 1990.[2]

On September 16, 1996, through private counsel, Richard P. Hunter, Esquire, Petitioner filed his first PCRA petition. The PCRA court denied the petition on January 13, 1998. The Superior Court affirmed the PCRA court's order denying relief on April 21, 1999.[3] The Pennsylvania Supreme Court denied *allocatur* on August 18, 1999.[4]

Petitioner filed his second PCRA petition on August 13, 2007. On September 9, 2008, the PCRA court dismissed his petition as untimely. The dismissal of Petitioner's PCRA petition was affirmed by the Superior Court on July 15, 2009.[5] The Pennsylvania Supreme Court denied *allocatur* on December 9, 2009.[6]

On October 6, 2014, Petitioner filed the instant, *pro se,* collateral petition, his third.[7] Petitioner filed supplemental petitions on December 9, 2014 and June 15, 2016. Pursuant to Pennsylvania Rule of Criminal Procedure 907, Petitioner was served notice of the PCRA court's intention to dismiss his petition on August 19, 2016. Petitioner submitted responses to the Rule 907 letter on September 7 and September 21, 2016. On September 26, 2016, the PCRA court

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[2] *Commonwealth v. Tillery*, 563 A.2d 195 (Pa. Super. 1989) (unpublished memorandum), *appeal denied*, 593 A.2d 841 (Pa. 1990).
[3] *Commonwealth v. Tillery*, 738 A.2d 1055 (Pa. Super. 1999) (unpublished memorandum).
[4] *Commonwealth v. Tillery*, 742 A.2d 674 (Pa. 1999).
[5] *Commonwealth v. Tillery*, 981 A.2d 937 (Pa. Super. 2009) (unpublished memorandum).
[6] *Commonwealth v. Tillery*, 985 A.2d 972 (Pa. 2009).
[7] The current version of the PCRA contains a provision permitting a defendant whose conviction became final prior to January 16, 1996, the date the current version of the PCRA took effect, to file a timely first PCRA petition within one year of that date. *See Commonwealth v. Alcorn*, 703 A.2d 1054, 1056-57 (Pa. Super. 1997) (holding that where a petitioner's judgment of sentence became final on or before the effective date of the amendment to the PCRA, the amended PCRA contained a provision whereby a first PCRA petition could be filed by January 16, 1997, even if the conviction in question became final more than a year prior to the date of the filing). Petitioner's most recently filed PCRA petition was neither his first nor was it filed within one year of the date the amendment took effect.

dismissed his PCRA petition as untimely.[8] On October 20, 2016, the instant notice of appeal was timely filed to the Superior Court.

II. DISCUSSION

A. Petitioner's current PCRA petition was manifestly untimely.

Petitioner's petition challenging the constitutionality of his conviction and legality of his detention was facially untimely. As a prefatory matter, the timeliness of a PCRA petition is a jurisdictional requisite. *Commonwealth v. Robinson,* 12 A.3d 477 (Pa. Super. 2011). A PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying judgment becomes final. 42 Pa. Cons. Stat. § 9545(b)(1). A judgment is deemed final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." *Id.* § 9545(b)(3).

Petitioner's judgment of sentence became final for PCRA purposes in June 1990 after the Pennsylvania Supreme Court denied *allocatur* and time period for filing a petition for writ of *certiorari* in the United States Supreme Court expired. *See id.*; U.S. Sup. Ct. R. 13 (effective January 1, 1990). Petitioner's *pro se* petition, filed on October 6, 2014, was therefore untimely by approximately twenty-three years. *See* 42 Pa. Cons. Stat. § 9545(b)(1).

B. Petitioner was ineligible for the limited timeliness exceptions found in 42 Pa. Cons. Stat. § 9545 (b)(1)(i), (ii).

Despite the one-year deadline, the PCRA permits the late filing of a petition where a petitioner alleges and proves one of the three narrow exceptions to the mandatory time-bar under

[8] The Honorable Leon W. Tucker issued the order and opinion in this matter in his capacity as Supervising Judge of the Criminal Section of the Court of Common Pleas of Philadelphia – Trial Division as of March 7, 2016 as the trial judge is no longer sitting.

42 Pa. Cons. Stat. § 9545(b)(1)(i)-(iii). To invoke an exception, a petition must allege and the petitioner must prove:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

Id. § 9545(b)(1)(i)-(iii).

In attempt to overcome the PCRA's statutory time-bar, Petitioner argued that his petition fell within the "governmental interference" exception, § 9545(b)(1)(i),[9] and the "newly-discovered evidence" exception, § 9545(b)(1)(ii).[10]

According to Petitioner, the new information triggering both exceptions was found in signed recantations from Emanuel Claitt and Robert Mickens, Commonwealth witnesses who provided extensive inculpatory testimony at Petitioner's trial. Both witnesses now assert that they were not present during the commission of the crime and fabricated the entirety of their detailed testimonies. *See* PCRA petition, 6/15/16 at exhibits A, B, C. According to Claitt and

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[9] The "governmental interference" exception, § 9545(b)(1)(i) requires a petitioner to plead and prove: (1) the failure to previously raise the claim was the result of interference by government officials and (2) the information on which he relies could not have been obtained earlier with the exercise of due diligence. *Commonwealth v. Williams*, 105 A.3d 1234, 1240 (Pa. 2014) (citing *Commonwealth v. Abu–Jamal,* 941 A.2d 1263, 1268 (Pa. 2008)).

[10] The timeliness exception set forth in Section 9545(b)(1)(ii) requires a petitioner to demonstrate he did not know the facts upon which he based his petition and could not have learned those facts earlier by the exercise of due diligence. *Commonwealth v. Bennett,* 930 A.2d 1264, 1271 (Pa. 2007). Due diligence demands that the petitioner take reasonable steps to protect his own interests. *Commonwealth v. Carr,* 768 A.2d 1164, 1168 (Pa. Super. 2001). A petitioner must explain why he could not have learned the new fact(s) earlier with the exercise of due diligence. *Commonwealth v. Breakiron,* 781 A.2d 94, 98 (Pa. 2001).

Mickens, a cabal of prosecutorial agents – assistant district attorneys and members of law enforcement – implemented a scheme of coercion and incentives to obtain fabricated testimony against Petitioner. *Id.*

Notwithstanding Petitioner has previously raised these claims in a prior PCRA,[11] his failure to demonstrate that the witnesses' statements could not have been obtained earlier by exercising due diligence was fatal to proving either statutory exception. Rather than detailing any specific efforts to contact Claitt or Mickens in the thirty-one years between his conviction and the filing of his instant petition, Petitioner instead argued that i) the circumstances of his confinement prevented communication and ii) irrespective of his inability to communicate, Claitt's and Mickens's decisions to recant could not have possibly been fostered at an earlier time. Neither argument is persuasive.

In support of his first assertion, Petitioner detailed a litany of general impediments to his ability to contact the witnesses. *See* PCRA petition, 6/15/16 at 10. Petitioner claimed, for example, that for twenty of the past thirty-plus years, his access to communication channels was "severely restricted." PCRA petition, 6/15/16. Even if Petitioner substantiated this claim with supporting evidence, and the court excluded those years from scrutiny, Petitioner failed to articulate any attempts to locate the witnesses during the remaining decade. Furthermore, although Petitioner cited instances of illness and frequent transfer between correctional facilities, he did not specify whether these incidents occurred during the non-restricted period of incarceration, and if so, for what duration. PCRA petition, 6/15/16 at 10-11. Petitioner's attempt to explain his inability to act for over thirty years was therefore patently insufficient to demonstrate due diligence.

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[11] *See* PCRA petition, 8/13/07.

Alternatively, Petitioner relied upon the Superior Court's decision in *Commonwealth* v. *Davis,* 86 A.3d 883 (Pa. Super. 2014) and *en banc* decision in *Commonwealth* v. *Medina,* 92 A.3d 1210 (Pa. Super. 2014) in arguing that waiting for Claitt and Mickens to feel comfortable recanting was sufficient to meet his burden of due diligence. *See* 907 response, 9/7/16 at 7-11.

In *Davis,* the defendant was convicted of murder based, in part, on the testimony of Commonwealth witness Jerome Watson. *Davis,* 86 A.3d at 885–86. More than thirty years after the conclusion of Davis's trial, Watson recanted his trial testimony and revealed he made an undisclosed deal with the assistant district attorney. *Id.* at 888. The Superior Court held that since there was no indication at trial of any deal or expected leniency, it would have been unreasonable to require that Davis conduct a search prior to receiving Watson's affidavit detailing possible governmental interference. *Id.* at 890–891.

In *Medina,* the defendant was convicted of murder based, in part, on the testimony of two Commonwealth witnesses. *Medina,* 92 A.3d at 1213. More than a decade after the conviction, the witnesses recanted their trial testimonies. *Id.* at 1213–1214. The Superior Court upheld the PCRA court's finding that Medina satisfied the newly-discovered evidence exception to the statutory time-bar. *Id.* at 1218.

In both *Davis* and *Medina*, the Superior Court's due diligence analysis centered on the fact that neither Davis nor Medina had reason to believe they could elicit exculpatory information from the respective witnesses. *Davis,* 86 A.3d at 890; *Medina,* 92 A.3d at 1218–1219.

Here, Petitioner would have been aware that Claitt and Mickens falsely inculpated him at trial. Furthermore, in 2007, nine years before acquiring the affidavits supporting the instant petition, Petitioner claimed to have uncovered evidence that the witnesses perjured themselves

regarding undisclosed preferential treatment from the Commonwealth in exchange for their testimonies. *See* PCRA petition, 8/13/07. Based upon Petitioner's purported discovery of the Commonwealth's role in suborning Claitt and Mickens, Petitioner had reason to believe that the witnesses may be amenable to disclosing their fabricated testimony.

Not only were the instant facts distinguishable from those in *Davis* and *Medina*, the Superior Court in *Davis* also evaluated whether Davis exercised due diligence in discovering proof that the witness fabricated his murder confession, a fact that would have been immediately known to Davis. *Davis*, 86 A.3d at 890–91. In concluding that Davis did exercise due diligence, the Superior Court relied upon Davis's affidavits detailing attempts by family members and friends to contact the witness after trial to convince him to admit that he lied on the stand. *Id.* at 891. Again, *Davis* is of no benefit to Petitioner, who failed to demonstrate any efforts by either himself, or anyone on his behalf, to contact either witness prior to 2016.

Ultimately, Petitioner argued that because Claitt's and Mickens's statements indicated that they only recently desired to "clear their consciences," any effort on his part to urge their emotional cleansing would have been fruitless.[12] *See* PCRA petition 6/15/16 at 10 ("It rested with Robert Mickens and Emanuel Claitt to decide to come forward."). In other words, Petitioner suggested that known, untruthful witnesses may be reasonably afforded an indefinite time for reflection, free from pleas from aggrieved petitioners. The PCRA court does not agree. Petitioner's attempt to circumvent his duty to act diligently by speculating that any interaction prior to 2016 would have been futile was unavailing.

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[12] The fact that both witnesses chose to "clear their consciences" immediately upon speaking with Petitioner's attorney, Rachel Wolkenstein, in 2016, weakens Petitioner's intimation that the witnesses were previously impervious to persuasion. *See* Supplemental petition, 9/7/16 at 12.

IV. CONCLUSION

This court has once again evaluated an untimely collateral petition (his third) filed by Mr. Tillery. Petitioner failed, however, to plead and prove an exception to the timeliness provision found in either subsections 9545 (b)(1)(i) or (ii). Additionally, Petitioner was not entitled to habeas corpus relief.[13] Accordingly, for the reasons stated herein, the decision of the court dismissing the collateral petition should be affirmed.

BY THE COURT:

LEON W. TUCKER, J. /NV

[13] Petitioner erroneously contended that the Department of Corrections ("DOC") lacked legal authority for his continued detention due to the lack of a written sentencing order, in contravention of 42 Pa. Cons. Stat. § 9764(a)(8) and 37 Pa. Code § 91.3. *See Joseph v. Glunt,* 96 A.3d 365 (Pa. Super. 2014) (concluding that the PCRA did not subsume an illegal-sentence claim based on the inability of the DOC to produce a written sentencing order). Upon review, the Honorable John Geisz entered sentencing orders in this matter on December 9, 1986. Additionally, upon reviewing the criminal docket through the Common Pleas Case Management System, Petitioner's sentence was accurately docketed by the Clerk of Courts of this court. The Superior Court has held that even when the DOC lacks possession of a written sentencing order, it has continuing authority to detain a prisoner. *Id.* at 372.

EXHIBIT F

Superior Court Opinion following denial of Third PCRA Petition

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MAJOR GEORGE TILLERY	:	
Appellant	:	No. 3270 EDA 2016

Received
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Office of Judicial Records
Appeals/Post Trial

Appeal from the PCRA Order September 26, 2016
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0305681-1984

BEFORE: GANTMAN, P.J., PANELLA, J., and DUBOW, J.

MEMORANDUM BY PANELLA, J. **FILED JUNE 11, 2018**

Major George Tillery[1] appeals from the order entered in the Philadelphia County Court of Common Pleas, denying his untimely third petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

Briefly, Appellant was convicted of first-degree murder, aggravated assault, possessing an instrument of crime, and two counts of criminal conspiracy following a jury trial in 1985. The court sentenced him to life imprisonment. This Court affirmed, and the Pennsylvania Supreme Court denied allowance of appeal.

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[1] Appellant indicates his name is incorrectly listed on this appeal as "George M. Tillery." ***See*** Appellant's Brief, at 1. Previous court documents confirm Appellant has been referred to as "Major George Tillery" throughout associated proceedings. We have corrected the error.

Thereafter, Appellant filed his first PCRA petition, which was unsuccessful. In 2007, Appellant untimely filed his second PCRA petition. In it, he claimed a timeliness exception to the PCRA based on newly discovered evidence. Appellant alleged two of the Commonwealth's witnesses at his trial, Emanuel Claitt and Robert Mickens, received previously undisclosed favorable plea deals in exchange for their false testimony. Appellant contended these plea deals, previously unknown to him, gave the witnesses motive to lie about Appellant's involvement in the murder. The PCRA court denied the petition as untimely, and this Court affirmed.

Appellant filed this petition, his third, on June 15, 2016. The PCRA court denied the petition without holding an evidentiary hearing. This appeal is now properly before us.

Appellant argues the PCRA court erred in dismissing his petition as untimely. We review an order dismissing a petition under the PCRA by examining whether the court's determination is supported by the evidence of record and is free of legal error. ***See Commonwealth v. Halley***, 870 A.2d 795, 799 n.2 (Pa. 2005). We will not disturb the court's factual findings unless there is no support for them in the certified record. ***See Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa. Super. 2001). Moreover, a court may decline to hold a hearing on a petition if it determines the petitioner's claim is patently frivolous and is without a trace of support either in the record or from other evidence. ***See Commonwealth v. Jordan***, 772 A.2d 1011, 1014 (Pa. Super. 2001).

The timeliness of a post-conviction petition is jurisdictional. ***See Commonwealth v. Hernandez***, 79 A.3d 649, 651 (Pa. Super. 2013). Generally, a petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment is final unless the petition alleges, and the petitioner proves, an exception to the timeliness requirement. ***See*** 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii). A PCRA petition invoking one of these statutory "exceptions must be filed within sixty days of the date the claims could have been presented." ***Hernandez***, 79 A.3d at 652 (citing 42 Pa.C.S.A. § 9545(b)(2)). Finally, exceptions to the PCRA's time bar must be pled in the petition. ***See Commonwealth v. Burton***, 936 A.2d 521, 525 (Pa. Super. 2007). ***See also*** Pa.R.A.P. 302(a).

Appellant's judgment of sentence became final on June 3, 1990, when his time for filing a writ of *certiorari* with the United States Supreme Court expired. ***See*** 42 Pa.C.S.A. § 9545(b)(3); U.S. Sup. Ct. R. 13. Appellant filed this petition on June 15, 2016—more than 26 years after his judgment of sentence became final. It is, as he concedes, patently untimely. ***See*** Appellant's PCRA Petition, filed 6/15/16, at 5. Thus, the PCRA court lacked jurisdiction to review Appellant's petition unless he was able to successfully plead and prove one of the statutory exceptions to the PCRA's time-bar.

Appellant attempts to plead both the governmental interference exception and the newly discovered facts exception. He proffers the same evidence for both claims: signed affidavits from two witnesses in his case, Emanuel Claitt and Robert Mickens. In their affidavits, the men aver they

received favorable plea deals and other favors from the Commonwealth in exchange for their testimony, and that they lied when asked about any potential plea deals during Appellant's trial. Claitt and Mickens also allege various police detectives and the Assistant District Attorney prosecuting Appellant's case repeatedly threatened them with criminal charges, which coerced them to provide testimony falsely incriminating Appellant.

To demonstrate the governmental interference exception, "the petitioner must plead and prove the failure to previously raise the claim was the result of interference by government officials, and the information could not have been obtained earlier with the exercise of due diligence." ***Commonwealth v. Abu-Jamal***, 941 A.2d 1263, 1268 (Pa. 2008) (citation omitted). To claim the newly discovered facts exception, a petitioner must plead and prove that "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence[.]" 42 Pa.C.S.A. § 9545(b)(1)(ii). "[D]ue diligence requires neither perfect vigilance nor punctilious care, but rather it requires reasonable efforts by a petitioner, based on the particular circumstances, to uncover facts that may support a claim for collateral relief." ***Commonwealth v. Brown***, 141 A.3d 491, 506 (Pa. Super. 2016) (citation omitted).

Appellant devotes much of his brief to disputing the PCRA court's dismissal of his petition, on the grounds that Appellant failed to prove he acted with due diligence. Appellant contends he had no way of knowing before he received these affidavits that the Commonwealth orchestrated a conspiracy to

keep him in jail, and requiring him to have investigated this matter in the 31 years between his trial and the filing of this PCRA petition placed an unreasonable burden on him. Appellant also argues the conditions of his incarceration prevented him from filing a PCRA petition sooner. Appellant chronicles his movements between various prisons, as well as stints in solitary confinement, as evidence that he was unable to file this petition at an earlier date.

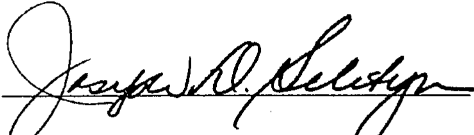
The Pennsylvania Supreme Court previously evaluated the argument that prison conditions constitute a timeliness exception to the PCRA, and rejected it. ***See Commonwealth v. Albrecht***, 994 A.2d 1091, 1095 (Pa. 2010) (holding inmate's failure to show restricted conditions of incarceration were illegal prevented him from obtaining timeliness relief under PCRA's governmental interference exception).

Also, Appellant's contention that he was unable to obtain this information sooner is belied by his second PCRA petition, filed in 2007. In it, Appellant accuses the Commonwealth of suborning perjury from Claitt and Mickens, and he provides various transcripts and letters as proof. While Appellant's 2007 petition lacks the signed affidavits from Claitt and Mickens attached to his current petition, he raises substantially the same arguments in each. The claims here merely expand on the arguments in the 2007 petition, and he offers only vague speculation that Claitt and Mickens would have been unwilling to provide such information before. We find such explanations unavailing.

Consequently, we find Appellant has failed to prove he acted with due diligence in discovering these allegedly new facts and governmental interference. Accordingly, we affirm the order dismissing his PCRA petition as untimely.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/11/18

EXHIBIT G

Court summary for Emmanuel Claitt

First Judicial District of Pennsylvania
Secure Court Summary

Claitt, Emmanuel M.

DOB: [redacted]
SID: [redacted]
PID: [redacted]
License:

Sex: Male
Eyes: Brown
Hair: Unknown or Completely Bald
Race: Black

Aliases:
Barry Rivers
EMANUAL CLAITT
Emanuel Clait
Emanuel Claitt
Emanuel M. Claitt
Emanuel M. Cliatt
Emanuel M. Elaitt
Emanuel Michael Claitt
Emanuel Michael Claitt
Emmanuel Claitt
Emmanuel Cliatt
Emmanuel M. Claitt

Closed

Philadelphia

CP-51-CR-0904461-1972 Proc Status: Completed DC No: 7117035511 OTN:

Arrest Dt: 08/16/1972 Disp Date: 01/18/1973 Disp Judge: Dwyer, William A. Jr.
Def Atty: Defender Association of Philadelphia - (PD)

Seq No	Statute	Grade	Description	Disposition
1	18 § 6106		CARRYING FIREARMS WITHOUT LICENSE	Guilty

Sentence Dt.	Sentence Type	Program Period	Sentence Length
01/18/1973	Confinement		

CP-51-CR-0108261-1973 LA Case Proc Status: Completed DC No: 7235077158 OTN:

Arrest Dt: 12/29/1972 Disp Date: 05/17/1973 Disp Judge: Salus, Herbert W.
Def Atty: Defender Association of Philadelphia - (PD)

Seq No	Statute	Grade	Description	Disposition
1	18 § 3502		BURGLARY	Not Guilty
2	Migration § Migration			Demurrer Sustained

CP-51-CR-1210971-1974 LA Case Proc Status: Completed DC No: 7414066094 OTN:Z4758633

Arrest Dt: 10/15/1974 Disp Date: 04/09/1975 Disp Judge: Jenkins, Norman
Def Atty: Defender Association of Philadelphia - (PD)

Seq No	Statute	Grade	Description	Disposition
1	35 § 780-113 §§ A16		KNOWING/INTENTIONALLY POSS CONTROLLED SUBST	Not Guilty
2	35 § 780-113 §§ A30		MFG/DEL/ OR POSS W/I MFG OR DEL CONTRL SUBS	Not Guilty

CP-51-CR-0400383-1975 Proc Status: Completed DC No: 7535016432 OTN:Z4758644

Arrest Dt: 03/12/1975 Disp Date: Disp Judge:

Recent entries made in the court filing offices may not be immediately reflected on the court summary report. Neither the courts of the Unified Judicial System of the Commonwealth of Pennsylvania nor the Administrative Office of Pennsylvania Courts assume any liability for inaccurate or delayed data, errors or omissions on these reports. Court Summary Report information should not be used in place of a criminal history background check which can only be provided by the Pennsylvania State Police. Moreover an employer who does not comply with the provisions of the Criminal History Record Information Act may be subject to civil liability as set forth in 18 Pa.C.S. Section 9183.

Please note that if the offense disposition information is blank, this only means that there is not a "final disposition" recorded in the Common Pleas Criminal Court Case Management System for this offense. In such an instance, you must view the public web docket sheet of the case wherein the offense is charged in order to determine what the most up-to-date disposition information is for the offense.

First Judicial District of Pennsylvania
Secure Court Summary

Claitt, Emmanuel M. (Continued)
Closed (Continued)
Philadelphia (Continued)

Seq No	Statute	Grade	Description	Disposition
1	18 § 3502		BURGLARY	
2	18 § 903		CRIMINAL CONSPIRACY	
3	18 § 3701		ROBBERY	
4	18 § 6106		CARRYING FIREARMS WITHOUT LICENSE	
5	18 § 6108		CARRYING FIRE ARMS/PUBLIC STREET OR PLACE	
6	18 § 907		POSSESSING INSTRUMENTS OF CRIME	
7	18 § 907		POSSESSING INSTRUMENTS OF CRIME WEAPON	

CP-51-CR-1222231-1975 Proc Status: Completed DC No: 7514026970 OTN:Z4758655
Arrest Dt: 05/08/1975 Disp Date: 07/12/1976 Disp Judge: Kubacki, Stanley L.
Def Atty: Deutsch, Myron H. - (PR)

Seq No	Statute	Grade	Description	Disposition
	Sentence Dt. / Sentence Type		Program Period / Sentence Length	
1	18 § 6108		CARRYING FIRE ARMS/PUBLIC STREET OR PLACE	Guilty
	07/12/1976 Probation			

CP-51-CR-0408091-1979 LA Case Proc Status: Completed DC No: 7904013546 OTN:
Arrest Dt: 04/07/1979 Disp Date: 09/17/1981 Disp Judge: Katz, Leon
Def Atty: Deutsch, Myron H. - (PR)

Seq No	Statute	Grade	Description	Disposition
1	18 § 3928		UNAUTH USE AUTO AND OTHER VEHICLES	Nolle Prossed
2	18 § 3921		THEFT BY UNLAWFUL TAKING OR DISPOSITION	Nolle Prossed
3	18 § 3925		THEFT BY RECEIVING STOLEN PROPERTY	Nolle Prossed

CP-51-CR-0510241-1980 LA Case Proc Status: Completed DC No: 8006026046 OTN:Z4758736
Arrest Dt: 05/02/1980 Disp Date: 09/28/1981 Disp Judge: Cain, Herbert R. Jr.
Def Atty: Deutsch, Myron H. - (PR)

Seq No	Statute	Grade	Description	Disposition
1	18 § 3921		THEFT BY UNLAWFUL TAKING OR DISPOSITION	Nolle Prossed
2	18 § 3925		THEFT BY RECEIVING STOLEN PROPERTY	Nolle Prossed
3	18 § 3928		UNAUTH USE AUTO AND OTHER VEHICLES	Nolle Prossed

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First Judicial District of Pennsylvania

Secure Court Summary

Claitt, Emmanuel M. (Continued)

Closed (Continued)

Philadelphia (Continued)

CP-51-CR-0810671-1980 Proc Status: Completed DC No: 7935020793 OTN:

Arrest Dt: 03/31/1979 Disp Date: 09/17/1981 Disp Judge: Katz, Leon

Def Atty: Deutsch, Myron H. - (PR)

Seq No	Statute / Sentence Dt.	Sentence Type	Grade	Description / Program Period	Sentence Length	Disposition
1	35 § 780-113 §§ A16			KNOWING/INTENTIONALLY POSS CONTROLLED SUBST		Guilty Plea
	09/17/1981	Confinement			Min: 2 Year(s)	
2	35 § 780-113 §§ A30			MFG/DEL/ OR POSS W/I MFG OR DEL CONTRL SUBS		Guilty Plea
	09/17/1981	Confinement			Min: 2 Year(s)	

CP-51-CR-0813281-1980 LA Offense Proc Status: Completed DC No: 8014000991 OTN:

Arrest Dt: 01/06/1980 Disp Date: 09/17/1981 Disp Judge: Katz, Leon

Def Atty: Deutsch, Myron H. - (PR)

Seq No	Statute / Sentence Dt.	Sentence Type	Grade	Description / Program Period	Sentence Length	Disposition
1	18 § 907			POSSESSING INSTRUMENTS OF CRIME		Nolle Prossed
2	18 § 907			POSSESSING INSTRUMENTS OF CRIME WEAPON		Nolle Prossed
3	35 § 780-113 §§ A16			KNOWING/INTENTIONALLY POSS CONTROLLED SUBST		Guilty Plea
	09/17/1981	Confinement				
4	35 § 780-113 §§ A30			MFG/DEL/ OR POSS W/I MFG OR DEL CONTRL SUBS		Nolle Prossed
5	18 § 903			CRIMINAL CONSPIRACY		Nolle Prossed

CP-51-CR-0820931-1980 LA Offense Proc Status: Completed DC No: 7935097848 OTN:Z4758795

Arrest Dt: 08/08/1980 Disp Date: 09/17/1981 Disp Judge: Katz, Leon

Def Atty: Deutsch, Myron H. - (PR)

Seq No	Statute / Sentence Dt.	Sentence Type	Grade	Description / Program Period	Sentence Length	Disposition
1	18 § 3301			ATT ARSON ENDANGERING PERSONS		Nolle Prossed
2	18 § 3301			ATT ARSON ENDANGERING PROPERTY		Nolle Prossed
3	18 § 3304			CRIMINAL MISCHIEF		Nolle Prossed
4	18 § 907			POSSESSING INSTRUMENTS OF CRIME		Nolle Prossed

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First Judicial District of Pennsylvania
Secure Court Summary

Claitt, Emmanuel M. (Continued)
Closed (Continued)
Philadelphia (Continued)

Seq No	Statute	Grade	Description	Disposition
Sentence Dt.	Sentence Type	Program Period		Sentence Length
5	18 § 907		POSSESSING INSTRUMENTS OF CRIME WEAPON	Nolle Prossed
6	18 § 908.1		PROHIBITED OFFENSIVE WEAPONS	Nolle Prossed
7	18 § 3302		CAUSING/RISKING CATASTROPHE	Nolle Prossed
8	18 § 903		CRIMINAL CONSPIRACY	Guilty Plea
09/17/1981	Confinement			Min: 1 Year(s)

CP-51-CR-0916561-1980 LA Case Proc Status: Completed DC No: 8035071776 OTN:Z4758806
Arrest Dt: 09/10/1980 Disp Date: 12/05/1980 Disp Judge: Ivanoski, Leonard A.
Def Atty: Deutsch, Myron H. - (PR)

Seq No	Statute	Grade	Description	Disposition
1	18 § 2702		AGGRAVATED ASSAULT	Not Guilty
2	18 § 2701		SIMPLE ASSAULT	Not Guilty
3	18 § 2705		RECKLESSLY ENDANGERING ANOTHER PERSON	Not Guilty

CP-51-CR-1107131-1980 LA Case Proc Status: Completed DC No: 8035025356 OTN:
Arrest Dt: 05/16/1980 Disp Date: 04/13/1982 Disp Judge: Anderson, Levy
Def Atty: Deutsch, Myron H. - (PR)

Seq No	Statute	Grade	Description	Disposition
1	18 § 2705		RECKLESSLY ENDANGERING ANOTHER PERSON	Nolle Prossed
2	18 § 2706		TERRORISTIC THREATS	Nolle Prossed
3	18 § 903		CRIMINAL CONSPIRACY	Nolle Prossed
4	18 § 2702		AGGRAVATED ASSAULT	Nolle Prossed
5	18 § 2701		SIMPLE ASSAULT	Nolle Prossed
6	18 § 6106		CARRYING FIREARMS WITHOUT LICENSE	Nolle Prossed
7	18 § 6106		FIREARMS WITHOUT LICENSE-IN AUTO	Nolle Prossed
8	18 § 6108		CARRYING FIRE ARMS/PUBLIC STREET OR PLACE	Nolle Prossed
9	18 § 907		POSSESSING INSTRUMENTS OF CRIME	Nolle Prossed
10	18 § 907		POSSESSING INSTRUMENTS OF CRIME WEAPON	Nolle Prossed
11	18 § 3921		THEFT BY UNLAWFUL TAKING OR DISPOSITION	Nolle Prossed

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First Judicial District of Pennsylvania
Secure Court Summary

Claitt, Emmanuel M. (Continued)
Closed (Continued)
Philadelphia (Continued)

Seq No	Statute	Grade	Description	Disposition
12	18 § 3925		THEFT BY RECEIVING STOLEN PROPERTY	Nolle Prossed
13	18 § 3701		ROBBERY	Nolle Prossed

CP-51-CR-0537641-1983 LA Case Proc Status: Completed DC No: 8339002000 OTN:M1474292
Arrest Dt: 04/21/1983 Disp Date: 12/16/1987 Disp Judge: Manfredi, William J.
Def Atty: Williams, Brian R. - (CA)

Seq No	Statute	Grade	Description	Disposition
1	18 § 6106		CARRYING FIREARMS WITHOUT LICENSE	Nolle Prossed
2	18 § 6108		CARRYING FIRE ARMS/PUBLIC STREET OR PLACE	Nolle Prossed
3	18 § 907		POSSESSING INSTRUMENTS OF CRIME	Nolle Prossed
4	18 § 907		POSSESSING INSTRUMENTS OF CRIME WEAPON	Nolle Prossed
5	18 § 903		CRIMINAL CONSPIRACY	Nolle Prossed
6	18 § 3701		ROBBERY	Nolle Prossed
7	18 § 3921		THEFT BY UNLAWFUL TAKING OR DISPOSITION	Nolle Prossed
8	18 § 3925		THEFT BY RECEIVING STOLEN PROPERTY	Nolle Prossed

CP-51-CR-0513651-1989 LA Offense Proc Status: Completed DC No: 8914031724 OTN:M3950391
Arrest Dt: 05/01/1989 Disp Date: 10/23/1991 Disp Judge: Guarino, Angelo A.
Def Atty: Defender Association of Philadelphia - (PD)

Seq No	Statute	Grade	Description	Disposition
Sentence Dt.	Sentence Type	Program Period	Sentence Length	
1	18 § 2705		RECKLESSLY ENDANGERING ANOTHER PERSON	Nolle Prossed
2	18 § 907		POSSESSING INSTRUMENTS OF CRIME	Nolle Prossed
3	18 § 907	M1	POSSESSING INSTRUMENTS OF CRIME WEAPON	Guilty Plea
10/23/1991	Confinement		Min: 1 Year(s) Max: 2 Year(s)	
4	18 § 3921		THEFT BY UNLAWFUL TAKING OR DISPOSITION	Nolle Prossed
5	18 § 3925		THEFT BY RECEIVING STOLEN PROPERTY	Nolle Prossed
6	18 § 3701	F1	ROBBERY	Guilty Plea
10/23/1991	Confinement		Min: 5 Year(s) Max: 10 Year(s)	
7	18 § 2701		SIMPLE ASSAULT	Nolle Prossed

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First Judicial District of Pennsylvania
Secure Court Summary

Claitt, Emmanuel M. (Continued)

Closed (Continued)

Philadelphia (Continued)

Seq No	Statute	Grade	Description	Disposition
Sentence Dt.	Sentence Type	Program Period	Sentence Length	
8	18 § 903	F2	CRIMINAL CONSPIRACY	Guilty Plea
10/23/1991	Confinement		Min: 1 Year(s) Max: 2 Year(s)	

CP-51-CR-0630691-1989 LA Offense Proc Status: Completed DC No: 8914044391 OTN:M4006133

Arrest Dt: 06/14/1989 Disp Date: 10/23/1991 Disp Judge: Guarino, Angelo A.

Def Atty: O'Keefe, Joseph Scott - (PR)

Seq No	Statute	Grade	Description	Disposition
Sentence Dt.	Sentence Type	Program Period	Sentence Length	
1	18 § 2701		SIMPLE ASSAULT	Nolle Prossed
2	18 § 3921		THEFT BY UNLAWFUL TAKING OR DISPOSITION	Nolle Prossed
3	18 § 3925		THEFT BY RECEIVING STOLEN PROPERTY	Nolle Prossed
4	18 § 3701		ROBBERY	Guilty
10/23/1991	Confinement		Min: 8 Year(s) 6 Month(s) Max: 20 Year(s)	
5	18 § 907		POSSESSING INSTRUMENTS OF CRIME	Guilty
10/23/1991	Confinement		Min: 2 Year(s) Max: 5 Year(s)	
6	18 § 907		POSSESSING INSTRUMENTS OF CRIME WEAPON	Nolle Prossed

CP-51-CR-0726811-1989 LA Offense Proc Status: Completed DC No: 8935044496 OTN:M3982156

Arrest Dt: 05/26/1989 Disp Date: 01/17/1990 Disp Judge: Cohen, Gene D.

Def Atty: Defender Association of Philadelphia - (PD)

Seq No	Statute	Grade	Description	Disposition
Sentence Dt.	Sentence Type	Program Period	Sentence Length	
1	18 § 3502		BURGLARY	Nolle Prossed
2	18 § 3921		THEFT BY UNLAWFUL TAKING OR DISPOSITION	Nolle Prossed
3	18 § 3925		THEFT BY RECEIVING STOLEN PROPERTY	Nolle Prossed
4	18 § 3925	F3	THEFT BY RECEIVING STOLEN PROPERTY	Guilty Plea
01/17/1990	Confinement		Min: 3 Month(s) Max: 23 Month(s)	
5	18 § 3925		RECEIVING STOLEN PROPERTY BUSINESS	Nolle Prossed
6	18 § 6106		CARRYING FIREARMS WITHOUT LICENSE	Nolle Prossed
7	18 § 6106		FIREARMS WITHOUT LICENSE-IN AUTO	Nolle Prossed

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First Judicial District of Pennsylvania
Secure Court Summary

Claitt, Emmanuel M. (Continued)
Closed (Continued)
Philadelphia (Continued)

Seq No	Statute	Grade	Description	Disposition
	Sentence Dt. / Sentence Type		Program Period / Sentence Length	
8	18 § 6108		CARRYING FIRE ARMS/PUBLIC STREET OR PLACE	Nolle Prossed

CP-51-CR-0603011-2005 Proc Status: Sentenced/Penalty Imposed DC No: 0524041701 OTN:N3389035
Arrest Dt: 05/24/2005 Disp Date: 10/13/2006 Disp Judge: Dempsey, Thomas
Def Atty: Hetznecker, Paul Joseph - (PR)

Seq No	Sentence Dt.	Statute / Sentence Type	Grade / Program Period	Description	Sentence Length	Disposition
1		35 § 780-113 §§ A30	F	Manuf/Del/Poss/W Int Manuf Or Del		Guilty Plea
	10/13/2006	Confinement	3 years - 6 years		Min: 3 Year(s) Max: 6 Year(s)	
2		35 § 780-113 §§ A16	M	Int Poss Contr Subst By Per Not Reg		Nolle Prossed

CP-51-CR-0007080-2011 Proc Status: Sentenced/Penalty Imposed DC No: 1139014136 OTN:N7334913
Arrest Dt: 03/21/2011 Disp Date: 08/10/2011 Disp Judge: Dempsey, Thomas
Def Atty: Defender Association of Philadelphia - (PD)

Seq No	Sentence Dt.	Statute / Sentence Type	Grade / Program Period	Description	Sentence Length	Disposition
1		18 § 3921 §§ A	F3	Theft By Unlaw Taking-Movable Prop		Nolle Prossed
2		18 § 3925 §§ A	F3	Receiving Stolen Property		Guilty Plea - Negotiated
	08/10/2011	Probation	3 years		Max: 3 Year(s)	
3		35 § 780-113 §§ A16	M	Int Poss Contr Subst By Per Not Reg		Nolle Prossed
4		18 § 3928 §§ A	M2	Unauth Use Motor/Other Vehicles		Nolle Prossed

MC-51-CR-1211681-1978 LA Case Proc Status: Completed DC No: 7835010022 OTN:Z4758692
Arrest Dt: 12/13/1978 Disp Date: 10/16/1980 Disp Judge: Silberstein, Alan K.
Def Atty: Deutsch, Myron H. - (PR)

Seq No	Statute	Grade	Description	Disposition
1	35 § 780-113 §§ A16		KNOWING/INTENTIONALLY POSS CONTROLLED SUBST	Withdrawn

MC-51-CR-1211691-1978 LA Case Proc Status: Completed DC No: 7835010023 OTN:Z4758692
Arrest Dt: 12/13/1978 Disp Date: 05/02/1979 Disp Judge: Kafrissen, Arthur S.
Def Atty: Deutsch, Myron H. - (PR)

Seq No	Statute	Grade	Description	Disposition
1	18 § 3928		UNAUTH USE AUTO AND OTHER VEHICLES	Withdrawn
2	18 § 3926		THEFT OF SERVICES	Withdrawn

MC-51-CR-1211701-1978 LA Case Proc Status: Completed DC No: 7835087355 OTN:Z4758692

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First Judicial District of Pennsylvania
Secure Court Summary

Claitt, Emmanuel M. (Continued)
Closed (Continued)
Philadelphia (Continued)

Arrest Dt: 12/13/1978 Disp Date: 10/16/1980 Disp Judge: Silberstein, Alan K.
Def Atty: Preminger, Daniel M. - (PR)

Seq No	Statute	Grade	Description	Disposition
1	18 § 2702		AGGRAVATED ASSAULT	Withdrawn
2	18 § 2701		SIMPLE ASSAULT	Withdrawn
3	18 § 907		POSSESSING INSTRUMENTS OF CRIME WEAPON	Withdrawn
4	18 § 908.1		PROHIBITED OFFENSIVE WEAPONS	Withdrawn
5	18 § 2705		RECKLESSLY ENDANGERING ANOTHER PERSON	Withdrawn
6	18 § 6106		CARRYING FIREARMS WITHOUT LICENSE	Withdrawn
7	18 § 6108		CARRYING FIRE ARMS/PUBLIC STREET OR PLACE	Withdrawn

MC-51-CR-0330461-1979 Proc Status: Completed DC No: 7935020793 OTN:
Arrest Dt: 03/31/1979 Disp Date: 08/07/1980 Disp Judge: Glancey, Joseph R.

Seq No	Statute	Grade	Description	Disposition
1	35 § 780-113 §§ A16		KNOWING/INTENTIONALLY POSS CONTROLLED SUBST	Held for Court
2	35 § 780-113 §§ A30		MFG/DEL/ OR POSS W/I MFG OR DEL CONTRL SUBS	Held for Court

MC-51-CR-0216791-1989 LA Case Proc Status: Completed DC No: 8935015495 OTN:
Arrest Dt: 02/19/1989 Disp Date: 11/28/1989 Disp Judge: Kirkland, Lydia Y.
Def Atty: Defender Association of Philadelphia - (PD)

Seq No	Statute	Grade	Description	Disposition
1	18 § 6106		CARRYING FIREARMS WITHOUT LICENSE	Withdrawn
2	18 § 6108		CARRYING FIRE ARMS/PUBLIC STREET OR PLACE	Withdrawn

MC-51-CR-0539971-2005 Proc Status: Completed DC No: 0524041701 OTN:N3389035
Arrest Dt: 05/24/2005 Disp Date: 06/02/2005 Disp Judge: Migrated, Judge
Def Atty: Hetznecker, Paul Joseph - (PR)

Seq No	Statute	Grade	Description	Disposition
1	35 § 780-113 §§ A30		MFG/DEL/ OR POSS W/I MFG OR DEL CONTRL SUBS	Held for Court
2	35 § 780-113 §§ A16		KNOWING/INTENTIONALLY POSS CONTROLLED SUBST	Held for Court

MC-51-CR-0011861-2011 Proc Status: Completed DC No: 1139014136 OTN:N7334913

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First Judicial District of Pennsylvania
Secure Court Summary

Claitt, Emmanuel M. (Continued)
Closed (Continued)
Philadelphia (Continued)

Arrest Dt: 03/21/2011 Disp Date: 06/20/2011 Disp Judge: Washington, Craig M.
Def Atty: Defender Association of Philadelphia - (PD)

Seq No	Statute	Grade	Description	Disposition
1	18 § 3921 §§ A	F3	Theft By Unlaw Taking-Movable Prop	Held for Court
2	18 § 3925 §§ A	F3	Receiving Stolen Property	Held for Court
3	35 § 780-113 §§ A16	M	Int Poss Contr Subst By Per Not Reg	Held for Court
4	18 § 3928 §§ A	M2	Unauth Use Motor/Other Vehicles	Held for Court

MC-51-CR-0010420-2015 LA Case Proc Status: Completed DC No: 1525026239 OTN:N9579415
Arrest Dt: 04/07/2015 Disp Date: 06/09/2015 Disp Judge: Gehret, Thomas F.
Def Atty: Defender Association of Philadelphia - (PD)

Seq No	Statute	Grade	Description	Disposition
1	18 § 5123 §§ A	F2	Contraband/Controlled Substance	Dismissed - LOE
2	35 § 780-113 §§ A16	M	Int Poss Contr Subst By Per Not Reg	Dismissed - LOE

Archived

MC-51-CR-0603631-1970		Comm. v. Claitt, Emanuel
MC-51-CR-0703981-1971		Comm. v. Claitt, Emanuel
MC-51-CR-1211421-1971	LA Offense	Comm. v. Claitt, Emanuel
MC-51-CR-0201871-1972	LA Case	Comm. v. Claitt, Emanuel
MC-51-CR-1221081-1972	LA Case	Comm. v. Claitt, Emmanuel
MC-51-CR-1028351-1973	LA Case	Comm. v. Claitt, Emanuel
MC-51-CR-1032781-1973	LA Case	Comm. v. Claitt, Emmanuel
MC-51-CR-1032791-1973	LA Case	Comm. v. Claitt, Emmanuel
MC-51-CR-1011361-1974	LA Case	Comm. v. Elaitt, Emanuel
MC-51-CR-0313021-1975		Comm. v. Claitt, Emmanuel
MC-51-CR-0313031-1975	LA Case	Comm. v. Claitt, Emmanuel
MC-51-CR-0505311-1975		Comm. v. Claitt, Emanual

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First Judicial District of Pennsylvania
Secure Court Summary

Claitt, Emmanuel M. (Continued)

Archived (Continued)

MC-51-CR-1034651-1975	LA Case	Comm. v. Claitt, Emanuel
MC-51-CR-0713541-1976	LA Case	Comm. v. Claitt, Emanuel
MC-51-CR-0404131-1977	LA Case	Comm. v. Claitt, Emanuel
MC-51-CR-1228031-1978	LA Case	Comm. v. Claitt, Emanuel
MC-51-CR-0406201-1979		Comm. v. Cliatt, Emanuel
MC-51-CR-1234881-1979		Comm. v. Claitt, Emanuel
MC-51-CR-0429951-1980	LA Case	Comm. v. Cliatt, Emmanuel
MC-51-CR-0512961-1980	LA Case	Comm. v. Claitt, Emmanuel
MC-51-CR-0703341-1980	LA Case	Comm. v. Claitt, Emanuel
MC-51-CR-0704981-1980		Comm. v. Claitt, Emanuel
MC-51-CR-0805451-1980	LA Offense	Comm. v. Claitt, Emanuel
MC-51-CR-0808071-1980	LA Case	Comm. v. Claitt, Emanuel
MC-51-CR-0910651-1980	LA Offense	Comm. v. Claitt, Emmanuel
MC-51-CR-0418591-1983	LA Case	Comm. v. Claitt, Emanuel
MC-51-CR-0905521-1985	LA Case	Comm. v. Claitt, Emmanuel
MC-51-CR-0500271-1989		Comm. v. Claitt, Emanuel
MC-51-CR-0540311-1989		Comm. v. Claitt, Emmanuel
MC-51-CR-0611741-1989		Comm. v. Clait, Emanuel

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EXHIBIT H

Commonwealth v. Claitt

N.T. 12/16/87

(as excerpted by petitioner)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
(CRIMINAL TRIAL DIVISION)

FEB 24 1988

- - -

COMMONWEALTH	:	MAY TERM 1983
		3764 - Carry. Firearms
	:	Pub. St.
		Carry. Firearms
	:	W/O Lic.
vs.		3765 - PIC Genly.
	:	PIC Weapon
		3766 - Criminal Conspiracy
	:	3767 - Robbery
		3768 - Theft Unl. Tak/
	:	Disp.
EMANUEL CLAITT		Theft RSP

- - -

ROOM 625, CITY HALL
PHILADELPHIA, PENNSYLVANIA

- - -

WEDNESDAY, DECEMBER 16, 1987

SAME CASE

- - -

BEFORE: HONORABLE WILLIAM J. MANFREDI, J.

- - -

APPEARANCES:

JEFFREY KOLANSKY, ESQUIRE
and PATRICIA CASSIDY, ESQUIRE
Assistant District Attorney
For the Commonwealth

BRIAN WILLIAMS, ESQUIRE
For the Defendant

- - -

TRIAL COMMISSIONER McNICHOLS: 39 on Your Honor's list, Emanuel Claitt.

MR. KOLANSKY: I'd like to make a record in this case, and Miss Cassidy may interject something if I'm in error.

This case was first called for trial on Monday, at least at this listing. Mr. Hart was the Assistant District Attorney at that time, and he announced ready in the room at that time. It was sent out to Courtroom 633, which we found out the police officer was in the district, the gun had been escheated to the State, and the witness had failed to appear.

We asked for a bench warrant, and we received it. We recovered the gun from Harrisburg by State Police Transport and proceeded with the motion to suppress that afternoon.

We continued with the motion to suppress the next morning. The witness was picked up I believe by Detective Schnell, from the Homicide Unit, on a bench warrant, was picked up that morning and brought into court.

During the ruling on the motion to suppress sometime yesterday in Courtroom 633, the witness who had been picked up on the bench

warrant -- he was not in custody, because he indicated he would stay in the room -- left the presence of Room 633 or left the vicinity of Room 633 and failed to appear. A second bench warrant or a continuing bench warrant was then ordered by Judge Biunno. The witness did not return yesterday. A subsequent follow-up bench warrant was ordered.

There was an attempt to serve the bench warrant yesterday afternoon and I believe overnight as well.

MS. CASSIDY: One o'clock in the morning.

MR. KOLANSKY: One o'clock in the morning, six o'clock in the morning, and numerous other attempts of various types were made to obtain that particular witness, whose name is --

MS. CASSIDY: Ruben Lee.

MR. KOLANSKY: Ruben Lee.

As of this juncture, at 10:10 on the third day in effect of trial in this matter or what would have been trial in this matter, the witness has not been located, is not present. We are otherwise ready in all aspects to proceed, but are unable to do so because of the lack of

discharge this case.

MR. KOLANSKY: There's no such motion, as I understand it.

MR. WILLIAMS: Move to trial at this point.

THE COURT: Well, under the circumstances, since there may be some issues that have to be resolved here, the District Attorney would like to satisfy himself there was no intimidation or any other means used to prevent the witness from being here, I would entertain his motion to grant the nolle pros as opposed to another disposition of the case.

Nolle pros ordered.

MR. KOLANSKY: Thank you, Your Honor.

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EXHIBIT I

<u>Commonwealth v. Claitt</u>

N.T. 9/17/81

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIAL DIVISION

\- - -

COMMONWEALTH	: APRIL TERM, 1979
	: NO. 809-UNAUTH USE AUTO 810-THEFT, RSP
	: - - -
	MAY TERM, 1980
	1024-THEFT, RSP
	: 1025-UNAUTH USE AUTO
	- - -
v.	: AUGUST TERM, 1980
	: NO. 2093-ATT ARSON PERS ATT ARSON PROP
	: 2094-ATT CRIM MISCH 2095-PIC GEN
	: PIC WEAPON PROHIB OFF WEAPON
	: 2096-RISK CAT
EMANUEL M. CLIATT	2097-CONSPIRACY

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Room 615, City Hall

Philadelphia, Pennsylvania

\- - -

September 17, 1981

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RECEIVED

FEB 19 1982

DISTRICT ATTORNEY'S OFFICE

BEFORE:

HONORABLE LEON KATZ, J.

PRESENT:

LEONARD ROSS, ESQUIRE
Assistant District Attorney
For the Commonwealth

MYRON DEUTSCH, ESQUIRE
Court Appointed Counsel
For the Defendant

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COMMONWEALTH VS. EMANUEL M. CLIATT

SEPTEMBER 17, 1981

MR. ROSS: Your Honor, the matter that's before us is Commonwealth vs. Emanuel Cliatt. There are five matters before you. Two matters, and I will give you, for the record, Mr. Cliatt has already pled guilty to.

THE COURT: What are the bill numbers?

MR. ROSS: They are CP 8008, 1067, charging the defendant with manufacture with intent to deliver a controlled substance. Also before Your Honor deferred is 8008, 1328 to 1330, which is another drug case, which the defendant pled guilty to. And to be honest with you, I'm not sure, I think it's again with possession with intent to deliver.

Then there are three open matters that are listed before you, Your Honor. They are CP 8008, 2093 to 97, charging the defendant with various charges, involving arson, criminal mischief, risking catastrophe, conspiracy. This case, Mr. Cliatt will enter a guilty plea

as to one of those bills, and the other bills, with regard to that case, will be nol-prossed.

The other two cases that remain, that are open, are 7904-809 and 810, which will be nol-prossed upon sentencing, and 8005, 1024 to 1025, which will be nol-prossed--

THE COURT: 80 what?

MR. ROSS: 8005, 1024 and 1025. That will also be nol-prossed after Your Honor sentences Mr. Cliatt.

Those two cases, Your Honor, both involve the possession and use of stolen automobiles. Those are the two cases that the Commonwealth is going to nol-pros.

Mr. Cliatt will be pleading guilty to the one bills that's remaining, number, that's Bill 2097, Judge, August of 1980.

THE COURT: What's the charge?

MR. ROSS: Charing the defendant with criminal conspiracy, where the object is arson, risking catastrophe; overt act, did possess an explosive device. Co-defendants in the case are George Rose, George Tillary, and Douglas Smith, and George Grant.

THE COURT: Are there any other cases other than the ones you mentioned that are open or pending against this defendant?

MR. ROSS: No. Is that right?

MR. DEUTSCH: No.

MR. ROSS: I believe.

MR. DEUTSCH: The only thing is--

MR. ROSS: Montgomery County.

THE COURT: I'm talking about Philadelphia.

MR. DEUTSCH: In Philadelphia, no, sir.

MR. ROSS: This is it, Judge.

MR. DEUTSCH: It involves an automobile.

THE COURT: Are you saying to me that if and when he pleads guilty to 2097, and the others are nol-prossed at the time of sentencing, then all of the cases pending against him are completed in Philadelphia County?

MR. ROSS: Yes, that's my understanding, Judge.

MR. DEUTSCH: That's right.

THE COURT: Any you're prepared for sentencing on the other matters today?

MR. DEUTSCH: If I may, Your Honor--

(Conference by defense counsel with defendant off the record.)

THE COURT: I don't want to have a piecemeal sentence because this case has been kicking around a long time.

MR. ROSS: I agree with Your Honor. I think the sentence should all be imposed on one day. The Commonwealth has no objection to however it's done. If Mr. Cliatt wants to plead guilty today and be sentenced on all of them, that's fine. If he wants to be continued, that's fine. Whatever Mr. Cliatt wants.

THE COURT: How about the matter that we discussed earlier, matters that are pending, without going into detail?

MR. ROSS: Without going into detail, Mr. Cliatt has continued his cooperation, Your Honor.

THE COURT: You feel confident that that cooperation will continue even after

sentencing?

MR. ROSS: Yes, it does, Your Honor, because Mr. Cliatt knows that should he not cooperate, then the Commonwealth's safekeeping of him will stop.

THE COURT: Are you prepared to make a recommendation as to sentencing in all these cases?

MR. ROSS: As part of the negotiation the Commonwealth agreed to make no recommendation, so that we are bound not to make a recommendation.

MR. DEUTSCH: I was informed, while sitting in Your Honor's courtroom, by Mr. Cliatt, that some of this cooperation Mr. Ross speaks about has extended to certain other areas that Mr. Ross is not responsible for.

THE COURT: In Philadelphia?

You don't have to say what, is it in Philadelphia?

MR. ROSS: Can we have a second?

(Conference by district attorney with defense counsel off the record.)

MR. DEUTSCH: Perhaps I should

speak to you at side bar?

THE COURT: Is he prepared to plead guilty now to the one bill?

(Conference by defense counsel with defendant off the record.)

THE COURT: Otherwise I can sentence him on the other bills and he could ask for a jury trial, or non-jury trial on the other bill.

(Conference by defense counsel with defendant off the record.)

MR. DEUTSCH: All right.

(Off the record discussion in open court.)

MR. DEUTSCH: Mr. Cliatt is prepared to plead to one bill out of the, I think, Bill 2097.

THE COURT: Conspiracy.

MR. DEUTSCH: Yes. And--

THE COURT: Agree that the other bills will be nol-prossed at the time of sentencing.

MR. DEUTSCH: Yes, that was the agreement, Your Honor. And that's been the

agreement for some time.

THE COURT: Do you have that bill here?

COURT CLERK: Yes, I do, Judge.

THE COURT: Let's go on with the guilty plea.

MR. ROSS: Does Your Honor wish me to conduct the colloquy?

THE COURT: Yes.

(Whereupon defendant approached the bar of the court.)

EMANUEL M. CLIATT, 5148 Green Street, SWORN:

MR. ROSS: Mr. Cliatt, how old are you?

THE DEFENDANT: Twenty-eight.

MR. ROSS: Do you read, write, and understand the English language?

THE DEFENDANT: Yes, I do.

MR. ROSS: How far did you go in school?

THE DEFENDANT: Eleventh grade.

MR. ROSS: Are you presently under the influence of any narcotics or alcoholic

beverages?

THE DEFENDANT: No.

MR. ROSS: Where are you presently located, in terms of where you're living--strike that--are you presently incarcerated or out on the street?

THE DEFENDANT: Incarcerated.

MR. ROSS: And how long have you been incarcerated?

THE DEFENDANT: Three months.

MR. ROSS: Approximately?

THE DEFENDANT: As of today, three months.

MR. ROSS: Now, Mr. Cliatt, have you ever been under the care of a psychiatrist or in a mental institution?

THE DEFENDANT: No.

MR. ROSS: Do you understand that you're here today charged with, in this particular case, four Bills of Indictment involving a fire bombing that occurred on or about November 11th, 1979? Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: And that you are accused, along with others, of having attempted to blow up a certain house. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: What's the date?

MR. ROSS: November 11th, 1979.

THE COURT: All right.

MR. ROSS: Now, you understand, Mr. Cliatt, that you have an absolute right to go to trial on all the Bills of Information that are presented against you regarding that attempted bombing. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: Do you understand that at that trial you would have a right to either have a jury trial or a trial by a judge sitting without a jury? If you chose to be tried by a jury you would participate, along with your counsel, in selecting members of the community that would sit in judgment of you. They would hear the case and listen to the evidence and then decide whether or not the Commonwealth proved you guilty beyond

a reasonable doubt. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: And do you understand that those citizens would be your peers, that is, jury would be selected from the citizens of Philadelphia? Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: Do you understand that their verdict would have to be unanimous, Mr. Cliatt, that is, all twelve of the people that you and your counsel, along with the district attorney and the judge selected to be on the jury, would have to be convinced beyond a reasonable doubt that you were guilty before you could be found guilty?

THE DEFENDANT: Yes.

MR. ROSS: Do you understand, further, that the burden of proof that the Commonwealth has is that of a reasonable doubt. That means that the Commonwealth has to prove, through the evidence, to a jury's satisfaction, or to the judge's satisfaction, that you were guilty beyond a reasonable doubt. And reasonable doubt is the kind of doubt

that would arise from the evidence or the lack of evidence that would cause a reasonable man to refrain from acting in a matter of the upmost importance to himself. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: That that's how the Commonwealth would have to prove you guilty, beyond a reasonable doubt. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: If you went to trial you would have the right, whether it was a jury trial or a waiver trial, to cross examine the witnesses that were presented against you. That is, the witnesses would be called to testify. You would listen to their direct testimony and your attorney would have the right to ask them questions. That's called cross examination. However, by pleading guilty you're giving up your right to confront those witnesses against you and instead, the Commonwealth would merely give a summary to the judge about the incident. Do you under-

stand that?

THE DEFENDANT: Yes.

MR. ROSS: Now, if you went to trial you would also have the right to testify and present evidence in your own behalf. However, if you did not wish to testify or present evidence in your own behalf, there is nobody that could force you to do so. But, if you chose to do so, you could. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: Now, by pleading guilty you're giving up various other rights. For instance, if you went to trial you would have the right to present to this Court what's called a Motion to Suppress. You could allege that a statement that you gave to the detectives about this case was gotten in violation of your legal rights. And, you could ask the Court to rule that the Commonwealth could not use that statement. By doing so, if the Court agreed with you, the Commonwealth would be precluded from using that against you. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: By pleading guilty, however, you are giving up all your rights to argue a Motion to Suppress, and you're saying to the Court that all the evidence that the Commonwealth has can be used against you. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: Now, I indicated to you that there were two types of trial. If you chose to be tried without a jury, then the judge alone would have to be convinced beyond a reasonable doubt that you were guilty, instead of the twelve people of the jury. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: Everything else would be the same. You would have the same rights and the same rules would apply, whether it was a jury trial or a non-jury trial. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: Mr. Cliatt, by pleading guilty you are giving up certain appellate

rights. That is, if you were found guilty you would have the right to argue in the Superior Court of Pennsylvania that certain mistakes were made during your trial, and ask them to either discharge you or to grant you a new trial.

By pleading guilty, however, you are limiting your rights to raise certain issues on appeal, and you're limited to three issues. The only issues that you could raise on appeal by pleading guilty are, the jurisdiction of the Court, that is, whether or not the incident happened in Philadelphia; the legality of the sentence that is finally imposed upon you by this Court; and, the voluntariness of your plea. Those are the only three things that you could raise on appeal. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: Do you understand that by answering these questions you're indicating to the Court in that you are making a voluntary plea, that is, that you, nobody is forcing you to do this. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: Do you understand you're further bound by your answers today? You cannot change your mind tomorrow and say that you didn't understand what was asked of you if today you said you understood it.

THE DEFENDANT: Yes.

MR. ROSS: Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: Now, with regard to sentencing in this particular case, you will be pleading guilty to a conspiracy bill where the maximum penalty is five to ten years in prison. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: That means that when the judge sentences you, unless the sentence exceeds that five to ten year period, that would even limit your appellate rights even further. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: Now, by pleading guilty to conspiracy what you are pleading guilty to is the fact that you made an agreement

with one or more other individuals to do a crime. In this particular case we're saying that the crime was arson and making a bomb to explode an individual's house. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: And that by pleading guilty you are agreeing with the Commonwealth that you did an overt act, in this particular case, the overt act is that you did possess an explosive device, the one that was actually attempted to bomb the house. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: Do you understand by pleading guilty you are admitting that the facts contained in the Bill of Information, that is, that you did make the agreement, that you did have that criminal objective, and that you did that overt act in fact are true? Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: All right. Now, has anybody threatened you or forced you in any

way to get you to plead guilty here today?

THE DEFENDANT: No.

MR. ROSS: Are you doing this of your own free will and based on your own decision, after consultation with your attorney and discussions about this?

THE DEFENDANT: Yes.

MR. ROSS: Are you satisfied with Mr. Deutsch as your lawyer, in that you feel that he's had enough time to properly prepare the case, does he know enough about the case to properly represent you, and give you the advise that he's given you?

THE DEFENDANT: Yes.

MR. ROSS: Do you understand further that by pleading guilty here today you are giving up all rights you have to putting forward a defense. I'm not sure what kind of defense you could have in an arson and a bombing case, but for instance, you could say at some point that you didn't know what you were doing was wrong because you were mentally ill. That would be an insanity defense. By pleading guilty here today you could not later

raise that on appeal and say you should not have pled guilty because at the time you had a defense available to you, whether it was true or not, doesn't make any difference. So, that you could not raise on appeal the fact that you wanted to raise a defense. Do you understand that?

THE DEFENDANT: Yes.

MR. ROSS: Do you have any questions now, Mr. Cliatt, with regard to your guilty plea?

THE DEFENDANT: No.

MR. ROSS: Does Your Honor have any additional questions?

THE COURT: No.

MR. DEUTSCH: I have no questions.

THE COURT: Do you understand there are no promises?

MR. ROSS: I'm sorry.

THE COURT: Here, as there aren't in the other cases, as to what your sentence would be. You've been told there's a possibility of a maximum of five to ten years plus a fine. And although that's the maximum,

that's not an indication you will get it, nor is there any indication that you won't get the maximum. Is that clear, or any other sentence in between?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

COURT CRIER: Emanuel M. Cliatt, to this Bill of Information 2097, August Sessions, 1980, charging you with criminal conspiracy, to this Bill of Information how say you, guilty or not guilty?

THE DEFENDANT: Guilty.

COURT CRIER: Your Honor, defendant pleads guilty to Bill of Information Number 2097.

MR. ROSS: Your Honor, a brief summary of the facts, just for the record, if I might.

THE COURT: Yes.

MR. ROSS: Your Honor, on November 11th, 1979, at 5935 Wister, W-I-S-T-E-R street, in the County of Philadelphia, there was an explosive device that was placed on the porch of the home, of an individual by

the name of Kenneth Washington. At that time the device did not explode.

It was subsequently taken by the Philadelphia bomb squad and subsequently exploded at the Police Academy in an area that they have designed specifically for the exploding of explosives that have been confiscated.

Some time in 1980 Mr. Cliatt came forward, after a number of statements that he gave to the police regarding other cases, he gave the police a statement indicating his involvement in the attempted bombing of the home that was owned by Kenneth Washington. In that he indicated that he made an agreement, if not oral, certainly a tacit agreement with George Tillary, who was a business associate, George Rose, who was a business associate, and Douglas Smith, who was a business associate of Mr. Cliatt's, and all of them were part of the same business conspiracy at the time to get even with Mr. Washington for certain wrongs that had been committed against Major Tillary.

In the statement Mr. Cliatt indicated to the police that he was instrumental in picking up certain explosives from an individual named George Grant. He was also present at the time the explosive device was placed at Mr. Washington's home, was there at the time, although he didn't participate other than being there. That when the explosive device did not go off, several gun shots were fired at it in an attempt to make it explode, which it didn't. And eventually they left the scene.

Mr. Cliatt has reiterated the statement he gave to the police at two separate preliminary hearings involving George Rose and Douglas Smith, who have been apprehended and their cases are pending before this Court with regard to the bombings.

That in brief summary, Your Honor, is the matter that Mr. Cliatt is pleading guilty to.

Mr. Cliatt, do you understand the facts as I've just basically summarized them to the Judge?

THE DEFENDANT: Yes.

THE COURT: Do you have any corrections as to the facts as read by the D.A.?

THE DEFENDANT: No, sir.

THE COURT: All right.

MR. ROSS: That would be all I have for the summary. Mr. Cliatt has indicated he already pled guilty.

THE DEFENDANT: Yes.

THE COURT: He's entered a plea on this bill already.

MR. ROSS: Yes, he did, Your Honor.

THE COURT: Let me recapitulate what I have. This case has been on the books for some time. I have a guilty plea on Bill 8008-1067, which is for the manufacture and sale of drugs, which carries a maximum sentence of fifteen years.

MR. ROSS: That's correct.

THE COURT: I also have a guilty plea previously entered by the defendant on 8008, 1329, which is possession of drugs, which carries a maximum sentence, if it's the first offense, as I believe it is, of one

year. Is that correct?

MR. ROSS: I defer to Your Honor. I think that is correct. I was unclear when I gave you the brief summary.

THE COURT: That's why I'm correcting it. My record indicates 1329.

MR. ROSS: All right.

THE COURT: Today he's pled guilty to Bill 8008-2097, which is the conspiracy bill, arson, involving a fire bombing wherein we just heard the summary. And, that has a five to ten year maximum sentence. Is that correct?

MR. ROSS: That's correct, Your Honor. Your Honor, if I might just interrupt, I would just also remind the Court, or perhaps let the Court know, for the first time, as part of the plea agreement, although we make no recommendation as to the sentence, we do, as part of it, ask the Court to give Mr. Cliatt one sentence, and to have the other sentences run concurrently. That was part of the agreement that whatever sentences he got would run concurrently, so whatever maximum Your Honor

has determined, and minimum, make that on one bill and then have the others to run concurrent with that.

THE COURT: All right. All the other bills that are open against this defendant in Philadelphia County only, because I don't have jurisdiction in the others, and the others are to be nol-prossed at the time of sentencing which will be today.

MR. ROSS: The bills that are before Your Honor, today.

THE COURT: That includes the recent bills that you mentioned, 8005, 1024 and 1025, possession and use of the automobiles.

MR. ROSS: That's correct, Your Honor.

THE COURT: All right.

MR. ROSS: And also 7904, 809.

THE COURT: Yes.

MR. ROSS: Which is another theft of an auto. There are two separate incidents, two separate cars.

THE COURT: Either of you gentleman or the defendant wish to say anything before

I pronounce sentence, and of course, I assume we all agree at this time that both defense counsel, the D.A., has examined the pre-sentence investigation, mental health evaluation, and unless I hear to the contrary I will assume that there are no corrections as far as the factual and history contained therein.

MR. DEUTSCH: I think there was just one correction that Mr. Cliatt is the father of three children. I noticed it said two children.

THE COURT: All right.

MR. DEUTSCH: And that's the only thing I saw.

THE COURT: Also the drug evaluation which I didn't mention.

MR. DEUTSCH: Yes, we have read it. That was provided before this hearing and we have read it.

THE COURT: I also want to put on the record that I have received from Leonard N. Ross, assistant district attorney of the homicide unit, a letter dated January 5th, 1981, and without being specific, for reasons

that I think we all concur, Mr. Ross has outlined a pattern of cooperation of a meaningful nature on the part of the defendant. And, that in response to my question, Mr. Ross has indicated that he's confident that that cooperation will continue. Is that correct, sir?

MR. ROSS: Yes, Your Honor. And if it doesn't there's, I'm confident--

THE COURT: For whatever reason you're confident, you are confident it will continue.

MR. ROSS: Yes, sir.

THE COURT: Am I to understand from the defendant and/or counsel, that the defendant has been incarcerated for a period of three months on this case, or on one of these cases as a result of a bench warrant that I issued?

MR. DEUTSCH: That's correct. That's as a result of a bench warrant alone.

THE COURT: Whatever time I give him, he has approximately three months credit.

MR. ROSS: Judge, actually, to be

honest, he's probably got close to a year on these cases. What was basically happening, Judge, is just to be very quick about it, and it's hard to distinguish exactly what, he had so many cases open and so many detainers and bench warrants, that's something the prison may have to figure out. He was released for a period of time and then he wouldn't show up when he was supposed to and he would be arrested for a while--

THE COURT: We're not going to get involved in that mathematics. It's not germaine to what the sentence is.

MR. ROSS: Whatever the sentence Your Honor gives, if you just add the words "To be given credit for whatever time he's served on these cases," and if that's a problem we can certainly straighten it out at a later date.

MR. DEUTSCH: I understand--I recognize the seriousness of the charges to which the defendant has pled guilty. And, I'm sure the district attorney shares that with me as does his counsel. I also recognize the

importance of the cooperation that he's extended.

THE COURT: Must keep in mind that although one cooperates with the Commonwealth, we cannot wash out the fact that he's been convicted of at least nine crimes, possibly more, including the crimes to which he pled guilty today, because as of the time of the pre-sentence investigation, as stated on the face sheet, he was convicted of seven crimes and he's pled guilty today to another one, so it's at least eight.

He's had two commitments. He's had one probation violation, without any juvenile record.

The recommendation of the pre-sentence investigator is incarceration. And, if it were not, if it were not for the cooperation extended to the Commonwealth, I would think that full justification that this defendant should receive a maximum sentence of seven and a half to fifteen years on the drug charge, namely 1367, manufacture, sale, and delivery of drugs. Not that I'm minimizing the other

charges, such as the conspiracy to fire bomb the house and the possession of the drugs.

However, I'm taking that into consideration because I think, in the field of law enforcement, that there are many times when we cannot prosecute career criminals or criminals who commit acts of violence without the cooperation of either co-defendants or others who have information. And that's, I think, what is present in this case.

MR. ROSS: Judge, might I just comment briefly on that one fact for the record, so Your Honor will have some--

THE COURT: Please do.

MR. ROSS: In these particular cases, Your Honor, none of those cases could have been brought to trial without Mr. Cliatt's statements. The two homicide matters, as well as the bombings, although we basically knew who was involved, Judge, we had no hard evidence to present to a Court until Mr. Cliatt made his statements. Everything that you said in general terms is specifically true in this particular case. Those five

cases or so that have been presented, and people have been arrested for, could not have happened without Mr. Cliatt's statements and cooperation.

THE COURT: I think that the defendant should be subject to the parole authorities.

What happened in the probation cases? Didn't he have three probations pending?

MR. DEUTSCH: As I understand it, Your Honor, we tried a case a number of years ago before Judge Kubacki and he's the one that put him on the probation. Although, there's been some arrests and detainers and back and forth, it's always been with Judge Kubacki. It was a five year probation and we got through about three and a half, almost four without too much trouble, and it was only in the last year of the probation that it began to break down from these other matters. The actual date of expiration was July 10th, 1981. If you take it into five annual years.

MR. ROSS: The other judge, Judge Caesar, was the Municipal Court case of which

Mr. Cliatt appealed and then Judge Kubacki had the exact same case. So, there really is only one judge in terms of probation, and the only one that's active is Judge Kubacki. And I would say for the record, Judge Kubacki's indication was that probably, regardless of what Your Honor did, he would terminate his probation since you would have him under some kind of supervision, either your own personal supervision or state parole supervision if Your Honor were to sentence him.

THE COURT: Do you have anything to say, Mr. Cliatt, yourself?

MR DEUTSCH: Could we start, Your Honor, with my discussing that matter with you at side bar, and then--

THE COURT: What matter, sentencing matter?

MR. DEUTSCH: No, having to do originally when we talked about some cooperation, there was something I wanted to say off the record.

THE COURT: All right.

(Conference in chambers off the

record.)

(The following is in open court:)

THE COURT: All right, Mr. Cliatt, for the reasons that I've stated, and upon analysis of the pre-sentence report, mental health evaluation, the drug evaluation, the letter from Mr. Ross that I alluded to dated January 5th, 1981, sentence of the Court is as follows--

MR. ROSS: Judge, excuse me for just one second, before you do that, the question that you asked Mr. Cliatt, whether he had anything to say remained unanswered.

THE COURT: Do you have anything to say, sir, before I sentence?

THE DEFENDANT: Yes, sir.

THE COURT: Please say it.

MR. DEUTSCH: He did want to address the Court.

THE COURT: Go ahead.

THE DEFENDANT: What I wanted to say was, that as far as my life, as far as my life of being involved in crime, you know, I think, not only think, I know that, you know,

I'm through with crime as far as I'm concerned because, you know, I'm not accepted amongst the hustlers and people in the street, doing the things that are wrong, because I have told and testified on these people. My type is not accepted amongst that type no more. I'm saying whatever you sentence me to today, Your Honor, like, you know, after this, you know, this is it.

THE COURT: What you're saying to me is you really don't have any choice because you're not going to be trusted, in a way. That's a hard way of walking the straight and narrow, but apparently that's, whatever reason it is, we should all be thankful that you're going to get out of the field of crime.

THE DEFENDANT: Yes, sir.

THE COURT: For your own sake, it would have been better if you never got in as deeply as you did. Nevertheless, is there anything else you want to say?

THE DEFENDANT: No, Your Honor.

THE COURT: On Bill 1067, which is the drug bill that I mentioned, wherein the

maximum is fifteen years, sentence of the Court is to undergo a period of incarceration of not less than eighteen months nor more than seven years.

On Bill 1329, which is the possession, where the maximum is one year, the sentence of the Court is six to twelve months to run concurrently with the bill imposed on 1067.

On Bill 2097, which is the conspiracy and fire bombing case, where the maximum is ten years, the sentence of the Court is to undergo a period of incarceration of not less than one nor more than five years. And that sentence is to run concurrently with the sentence imposed on 1067.

I will entertain a motion to nol-pros all other bills.

MR. ROSS: Judge, I will move to nol-pros all the remaining bills that are before you.

THE COURT: Motion is granted. All other bills are nol-prossed.

Mr. Ross, would you advise him as to his rights to appeal any or all of the

sentences imposed today?

MR. ROSS: Mr. Cliatt, you have thirty days from today in which to appeal the sentences that have just been handed down on all these cases. Since you pled guilty, as I indicated, you're appellat rights are severely limited.

If you do not notify that you wish to appeal within thirty days, your right to appeal will be considered to be waived.

You have, however, ten days also for you to file a motion with this Court to modify the sentence that was imposed upon you, and you must do that prior to your perfecting your appeal or notice of appeal to the Superior Court.

If you cannot afford to have a lawyer to represent you, one will be appointed for you free of charge. Mr. Deutsch will notify the appellate court if you wish to appeal, if you want to do so, and then a lawyer will be appointed for you if you could not afford one and wanted one. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about your sentence?

MR. DEUTSCH: Would Your Honor be kind enough in some way to indicate on the record that he, it's your understanding that he's to get credit through the prison authorities for all time served?

THE COURT: I will make that very clear. It's the intention of this Court for the defendant to get any and all credit that he's entitled to. All right.

THE DEFENDANT: Thank you.

MR. DEUTSCH: Thank you.

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EXHIBIT J

Commonwealth v. Claitt

N.T. 11/28/80

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

CRIMINAL TRIAL DIVISION

COMMONWEALTH	APRIL TERM, 1979
	0809 - UNAUTHORIZED USE AUTO/OTHER VEHICLE
VS.	0810 - THEFT, UNLAWFUL TAKING/DISPOSITION
EMANUEL CLIATT	THEFT, RECEIVING STOLEN PROPERTY

	: MAY TERM, 1980
	: 1024 - THEFT, UNLAWFUL TAKING/DISPOSITION
	THEFT, RECEIVING STOLEN PROPERTY
	1025 - UNAUTHORIZED USE AUTO/OTHER VEHICLE
	: AUGUST TERM, 1980
	: 1067 - KNOWINGLY POSS. CONTROLLED SUBSTANCE
	MANUFACTURING WITH INTENT TO MANUFACTURE/ DELIVER CONTROLLED SUBSTANCE

COMMONWEALTH		AUGUST TERM, 1980
		1328 - POSS. INSTRUMENT CRIME, GENERALLY
VS.		POSS. INSTRUMENT CRIME, CONCEALED WEAPON
EMANUEL CLIATT	:	1329 - KNOWINGLY POSS. CONTROLLED SUBSTANCE
	:	MANUFACTURING WITH INTENT TO MANUFACTURE/DELIVER CONTROLLED SUBSTANCE
	:	1330 - CRIMINAL CONSPIRACY
	:	AUGUST TERM, 1980
	:	2093 - ATT. ARSON--PERSON
		ATT. ARSON--PROPERTY
		2094 - CRIMINAL MISCHIEF
		2095 - POSS. INSTRUMENT CRIME, GENERALLY
		POSS. INSTRUMENT CRIME, CONCEALED WEAPON
		PROHIBITED OFFENSIVE WEAPON
		2096 - RISKING CATASTROPHE
		1097 - CRIMINAL CONSPIRACY

COMMONWEALTH : AUGUST TERM, 1980

: 1656 - SIMPLE ASSAULT

VS. : AGGRAVATED ASSAULT

: 1657 - RECKLESSLY END. PERSON

EMANUEL CLIATT

: AUGUST TERM, 1980

: 713 - RECKLESSLY END. PERSON

: TERRORISTIC THREATS

: 714 - CRIMINAL CONSPIRACY

: 715 - SIMPLE ASSAULT

: AGGRAVATED ASSAULT

: 716 - CARRYING FIREARM PUBLIC STREET

: UNLAWFUL CARRYING FIREARM W/O LICENSE

: CARRYING FIREARM W/O IN VEHICLE

: AUGUST TERM, 1980

: 717 - POSS. INSTRUMENT CRIME, GENERALLY

: POSS. INSTRUMENT CRIME, CONCEALED WEAPON

: 718 - THEFT

RECEIVING STOLEN PROPERT

: 719 - ROBBERY

NOVEMBER 28, 1980

COURTROOM 615, CITY HALL

DISPOSITION

BEFORE: HONORABLE LEON KATZ, J.

PRESENT: JEFFREY MINEHART, ESQUIRE
ASSISTANT DISTRICT ATTORNEY
FOR THE COMMONWEALTH

MYRON H. DEUTSCH, ESQUIRE
COUNSEL FOR THE DEFENSE

EMANUEL CLIATT,
DEFENDANT

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THE COURT: ALL RIGHT, ARE WE READY?

COURT CRIER: YOUR HONOR, THIS IS CASE NO. 1. IT IS ALSO CASE NO. 3 AND CASE NO. 5 AND CASE NO. 6, ALL DEALING WITH EMANUEL CLIATT.

MR. MINEHART: WELL, LET'S HOLD ON.

(WHEREUPON THE CASE WAS SET ASIDE WHILE THE CALLING OF THE LIST CONTINUED.)

(LATER)

THE COURT: ARE YOU READY?

MR. MINEHART: YES, SIR, YOUR HONOR.

BY THE COURT CRIER: (TO DEFENDANT)

Q. WOULD YOU STATE YOUR FULL NAME AND SPELL YOUR LAST NAME?

A. EMANUEL CLIATT, C-L-I-A-T-T.

Q. AND YOUR ADDRESS?

A. 5148 GREENE STREET.

BY THE COURT:

Q. WHAT STREET?

A. GREENE.

Q. IS THAT AN "E" ON THE END?

A. YES, SIR; YES.

MR. DEUTSCH: YES.

(AT 11:57 A.M. THE DEFENDANT WAS SWORN

AND/OR AFFIRMED OF RECORD.)

THE COURT: GENTLEMEN, BEFORE WE GO INTO ANY COLLOQUY, I WOULD LIKE TO KNOW FROM ANYONE IS THERE AN AGREEMENT?

MR. DEUTSCH: THERE IS AN AGREEMENT.

THE COURT: ALL RIGHT, I WOULD LIKE TO KNOW WHAT THAT AGREEMENT IS ON THE RECORD BEFORE WE GO INTO ANY COLLOQUY.

MR. MINEHART: WELL --

THE COURT: THERE ARE SEVERAL CASES HERE.

MR. DEUTSCH: I THINK THAT WE HAVE THE PRELIMINARY MATTERS FOR YOUR HONOR.

THERE ARE CERTAIN CASES THAT HAVE BEEN REMOVED FROM THIS JOINT LIST THAT HAVE BEEN BROUGHT TO YOUR HONOR. ONE OF THEM HAS BEEN RETURNED TO JUDGE GAFNI IN 625 AND IT MAY INVOLVE A PRELIMINARY HEARING SO THAT THAT WILL NOT BE DISPOSED OF TODAY.

THERE IS ANOTHER ONE THAT THERE IS SOME QUESTION AS TO THE SUBJECT MATTER ITSELF OF THE PLEA. WE'RE ASKING THAT THAT ITEM BE CONTINUED BEFORE YOUR HONOR TO ANOTHER DATE.

THE COURT: YOU'RE NOT IDENTIFYING

ANYTHING FOR ME.

MR. DEUTSCH: WELL, WOULD YOU GIVE ME THAT RECORD?

THE COURT: WHICH ONE, NO. 1, 2, 3? IS IT 4, 5, 6, 7; I MEAN, THERE ARE DIFFERENT CASES LISTED BEFORE ME TODAY.

MR. DEUTSCH: YES, SIR, YOUR HONOR, YOU'RE RIGHT.

(WHEREUPON COUNSEL FOR THE DEFENSE EXAMINES HIS PORTFOLIO.)

(LATER)

MR. DEUTSCH: IF YOUR HONOR PLEASE?

THE COURT: YES?

MR. DEUTSCH: THE CASE THAT IS IN 625 IS THE MUNICIPAL COURT --

THE COURT: IT IS LISTED HERE TODAY BECAUSE IT WAS A JOINT LIST. IT WAS LISTED ORIGINALLY IN 625, BUT IT WAS BROUGHT HERE AND RETURNED TO 625.

MR. DEUTSCH: I CAN IDENTIFY THAT FOR YOUR HONOR AS MUNICIPAL COURT 80-05-1296. JUDGE GAFNI HAS THAT IN HIS JURISDICTION.

COURT CLERK: WE DON'T HAVE IT HERE.

MR. MINEHART: NO, NO.

THE COURT: ALL RIGHT.

LET'S GO.

MR. DEUTSCH: THE NEXT CASE THAT YOU WOULD LIKE TO HAVE CONTINUED IN FRONT OF YOUR HONOR TO ANOTHER DATE IS COMMON PLEAS 80-08-2093.

THE COURT: WE HAVE THAT HERE.

MR. DEUTSCH: FINE.

I AM ASKING THAT THAT BE GIVEN ANOTHER DATE BEFORE YOUR HONOR, BUT THERE IS SOME QUESTION AS TO A PLEA ARRANGEMENT.

MR. MINEHART: THAT CASE, WE REQUEST A WAIVER. 180 DAY RULE.

MR. DEUTSCH: MY CLIENT IS WILLING TO WAIVE THE 180 DAY RULE.

THE COURT: WHAT IS THE RUNDATE?

MR. MINEHART: DECEMBER THE 8TH, YOUR HONOR.

COURT CRIER: JANUARY THE 29TH, YOUR HONOR.

(THERE WAS A CONFERENCE BETWEEN COUNSEL FOR THE DEFENSE AND THE DEFENDANT.)

MR. MINEHART: MY RECORD SHOWS THAT THIS IS DECEMBER THE 8TH. APPARENTLY, THERE IS AN ESTIMATED RUNDATE BECAUSE MINE SHOWS THAT IT'S GOING TO BE A SENTENCING, WHICH IS GOING TO BE DEFERRED IN THIS MATTER BEYOND DECEMBER THE 30TH, WHICH RUNDATE --

THE COURT: WELL, ALL OF THE SENTENCES WILL BE DEFERRED.

MR. MINEHART: WELL, IT'S GOING TO HAVE TO BE A WAIVER, ANYWAY. THE FILE SHOWS A RUNDATE OF DECEMBER THE 30TH. MY POINT IS THAT WE'RE NOT GOING TO BE ABLE TO GET IT, ANYWAY.

THE COURT: IS THERE GOING TO BE A GUILTY PLEA IN THIS CASE EVENTUALLY, DO YOU SUSPECT?

MR. DEUTSCH: I SUSPECT THAT THAT MAY BE. (NODS HEAD AFFIRMATIVELY.)

IF YOUR HONOR PLEASE, IT'S CLEARLY, TO PLACE IT ON THE RECORD, IT'S A QUESTION OF SEMANTICS BETWEEN THE DISTRICT ATTORNEY'S OFFICE AND MY UNDERSTANDING OF WHAT WAS THE ARRANGEMENT.

THE COURT: WHY DON'T WE LIST IT FOR A DAY WHICH WOULD BE A DAY OF SENTENCING?

MR. DEUTSCH: Okay.

THE COURT: If appropriate, he can enter a guilty plea at that time and I have already received the presentence reports.

MR. DEUTSCH: Yes, sir.

I think that would be just fine.

THE COURT: I don't know what the date of the sentencing will be, but I guess I can give you a pretty good idea.

MR. MINEHART: If it goes way beyond that, we at that time would have a right to list the case for trial.

THE COURT: Yes.

(Whereupon the court clerk checks the calendar for scheduling.)

THE COURT: Do you have a calendar there with the week from January 27th?

COURT CRIER: We can take it from January the 27th. The 27th is a Tuesday. The next would be February the 3rd, Your Honor.

(Whereupon the Court makes some personal notations.)

(LATER)

THE COURT: ALL RIGHT.

THIS IS TO BE CONTINUED.

NOW, ARE YOU READY --

MR. DEUTSCH: YES, SIR.

THE COURT: THIS WILL BE CONTINUED TO FEBRUARY THE 3RD.

MR. DEUTSCH: THANK YOU, SIR.

THAT WOULD BE IN THIS ROOM, YOUR HONOR?

THE COURT: WELL, TECHNICALLY, ROOM 617 AT 3:30.

NOW, THE NEXT BREAKDOWN BETWEEN NOW AND THEN, YOU CAN HAVE IT RELISTED, MR. MINEHART, FOR A WAIVER AND I'LL NOT HEAR THAT WAIVER.

MR. MINEHART: WELL, YOUR HONOR, DO YOU WISH TO TAKE A WAIVER OF THE 1100 NOW, IN THAT CASE?

THE COURT: YES, YOU CAN DO THAT NOW.

MR. MINEHART: DO YOU WANT TO WAIVE THIS?

COURT CLERK: WE CAN, LATER.

THE COURT: THE WAIVER WILL BE FEBRUARY THE 10TH.

MR. MINEHART: YES, SIR.

BY MR. MINEHART: (TO DEFENDANT)

Q. MR. CLIATT, HOW OLD ARE YOU, SIR?

MR. MINEHART: HAS HE BEEN SWORN?

COURT REPORTER: YES, SIR.

A. (NO ANSWER)

BY MR. MINEHART:

Q. HOW OLD ARE YOU, SIR?

A. TWENTY-FOUR.

Q. HOW FAR DID YOU GO IN SCHOOL?

A. TWELFTH GRADE.

Q. DO YOU READ AND WRITE ENGLISH?

A. YES, SIR.

Q. DO YOU UNDERSTAND WHAT'S HAPPENING HERE TODAY?

A. YES, SIR.

Q. ARE YOU UNDER THE INFLUENCE OF ANY NARCOTICS OR ALCOHOLIC BEVERAGES?

A. NO.

Q. HAVE YOU EVER BEEN TREATED FOR ANY MENTAL ILLNESSES?

A. NO.

Q. HAVE YOU BEEN CONFINED TO ANY TYPE OF A MENTAL HOSPITAL?

A. NO.

Q. DO YOU REALIZE, SIR, THAT YOU HAVE RIGHTS UNDER THE LAWS OF PENNSYLVANIA TO HAVE YOUR CASE, SPECIFICALLY THE CASE IN WHICH YOU ARE CHARGED WITH THE CRIME OF ARSON ON BILL NO. 80-08-2093 TO 2097, YOU HAVE A RIGHT TO HAVE THAT CASE LISTED HERE TODAY AND YOU HAVE A RIGHT TO HAVE THAT CASE TRIED WITHIN 180 DAYS?

DO YOU UNDERSTAND THAT, SIR?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR.

Q. NOW, INASMUCH AS WE WOULD REQUEST JANUARY 3RD ON THAT CASE, THE ESTIMATED RUNDATE ON THAT CASE, THAT IS, 180 DAYS WOULD RUN OUT ON DECEMBER THE 8TH OF 1980?

DO YOU UNDERSTAND THAT, SIR?

A. YES, SIR.

Q. AND YOU HAVE A RIGHT TO HAVE YOUR CASE TRIED ON OR BEFORE THAT DATE. YOU HAVE THAT RIGHT.

DO YOU UNDERSTAND THAT?

A. YES, SIR.

Q. YOUR ATTORNEY INDICATED THAT HE HAS REQUESTED A CONTINUANCE IN THIS MATTER SO THAT THIS CASE MIGHT BE LISTED BEFORE HIS HONOR, JUDGE KATZ, SO THAT CERTAIN ASPECTS OF THE CASE COULD BE EXPLORED BETWEEN YOUR ATTORNEY AND THE DISTRICT ATTORNEY'S OFFICE.

DO YOU UNDERSTAND THAT?

A. Yes, sir.

Q. Now, that would be that the next time the case would be listed would be February the 3rd of 1981.

Do you understand that?

A. Yes, sir.

Q. What the Court is asking you to do is to give up your right to be tried within 180 days; that is, to give up your speedy trial rights and waive your right to that 180 day Rule until February the 10th of next year.

Do you understand that?

A. Yes, sir.

Q. That's a week beyond the trial date.

A. Yes, sir.

Q. Are you willing to do that?

A. Yes, sir.

Q. Have any threats been made to you?

A. No, none.

Q. Have any promises been made to you to have you give up your rights?

A. No.

Q. Are you doing this of your own free will?

A. Yes, I am.

MR. MINEHART: Does Your Honor have any

QUESTIONS?

THE COURT: No.

MR. MINEHART: YOUR HONOR, IF I MIGHT, THERE WILL BE A PLEA TODAY ENTERED INTO ON TWO CASES; SPECIFICALLY ON BILL NO. 80-06-1067 --

THE COURT: 80-06?

MR. MINEHART: YES -- 1067.

THE COURT: OKAY, WAIT A MINUTE.

THAT'S 80-08.

MR. MINEHART: AND THAT IS THE CHARGE OF KNOWINGLY AND INTENTIONALLY POSSESSION A CONTROLLED SUBSTANCE AND THE MANUFACTURING AND DELIVERING A CONTROLLED SUBSTANCE WITH THE INTENT TO DELIVER, SCHEDULED NUMBER ONE --

THE COURT: WHAT NUMBER IS THAT ON THE LIST?

MR. MINEHART: ON YOUR LIST?

I HAVE NUMBER FIVE, YOUR HONOR.

THE COURT: THEN, WAIT A MINUTE.

MR. MINEHART: THAT'S NUMBER FIVE.

THE COURT: THAT'S 80-08.

MR. MINEHART: 80-08, THAT'S WHAT I SAID.

THE COURT: 1067.

MR. MINEHART: Yes.

We entered on that in an open plea and there will further be a plea entered that would be under -- well, it's on Your Honor's list, which would be Case No. 6, and that would be to Bills 1329, and that would be possession of controlled substance.

THE COURT: 1329?

MR. MINEHART: Yes, sir.

THE COURT: All right.

Those would be the two pleas entered today? Is that right?

MR. MINEHART: Yes, sir.

The agreement would be that they would open pleas, Your Honor, as to the sale and as to the possession, specifically 1067, No. 5 Case on Your Honor's list, which would be for the sale and, 1328 would be to the --

THE COURT: 1329, you said.

MR. MINEHART: 29, excuse me, Your Honor, which would be the possession. Any conversation for the open plea woJld be at the time of the sentencing.

No. 1 on Your Honor's list would be nolle prossed.

THE COURT: Well, would you identify that, please?

MR. MINEHART: That is Common Pleas No. 79-04-809 to 810.

No. 3 on Your Honor's list, 80-05, Nos. 1024 to 1025, also will be nolle prossed at the time of sentencing.

THE COURT: Okay.

MR. MINEHART: Okay, so that would be --

THE COURT: That's the disposal cases on the list today? There are other cases on the list.

MR. MINEHART: Yes, sir, Your Honor. That disposes of the cases on Your Honor's list in the sense that it would be the opening cases; if the plea is acceptable, it will be nolle prossed at the time of sentencing.

THE COURT: Mr. Minehart, there are other bills on here that you have not referred to.

Are you suggesting that all the other bills will be nolle prossed or just the two that

YOU HAVE MENTIONED?

MR. MINEHART: THE OTHER BILLS ON THE OTHER COUNTS WILL BE NOLLE PROSSED AT THE TIME OF SENTENCING AS WELL, YOUR HONOR.

THE COURT: ON ALL CHARGES PENDING AGAINST HIM?

MR. MINEHART: (NO ANSWER)

THE COURT: OTHER THAN THE ONES WE CONTINUED TODAY?

MR. MINEHART: OTHER THAN -- WELL, THERE ARE OUTSTANDING CASES THAT WE'RE MAKING NO AGREEMENTS TODAY, ONE OF WHICH WE CONTINUED, WHICH WAS INITIALLY BEFORE YOUR HONOR.

THE COURT: HOW ABOUT 80-09-1656 AND 1657 ON THE ADD-ON?

MR. MINEHART: YOUR HONOR, THAT CASE WAS LISTED FOR DECEMBER THE 5TH IN ROOM 313 AND THAT WILL REMAIN IN 313.

MR. DEUTSCH: THAT'S CORRECT.

THE COURT: AND 80-11, 713 TO 719?

MR. MINEHART: YES, THAT CASE WAS SENT FROM 625 AND IT WAS RETURNED TO 625 AND THEY HAVE GIVEN THAT DATE THERE -- WHAT DATE DID THEY GIVE,

Mr. Deutsch?

MR. DEUTSCH: December the 5th of 1980 in 625.

THE COURT: All right.

Then, the only Bills that will be nolle prossed will be the two that you mentioned on the other cases; is that right?

MR. MINEHART: That's correct, Your Honor.

If Your Honor please, may I just have a moment?

(There was a conference between the district attorney and counsel for the defense.)

(LATER)

MR. MINEHART: Your Honor, if I could continue my -- just the colloquy to the defendant on two cases; we have already done the colloquy on the one case and the add-on, and I want to qualify because he will waive the Rule on the cases in which you're going to nolle prosse.

THE COURT: Yes.

(There was a conference between counsel for the defense and the defendant.)

THE COURT: He is pleading guilty to two

BILLS?

MR. MINEHART: THAT'S CORRECT, YOUR HONOR.

THE COURT: 80-08-1067 AND 80-08-1329?

MR. MINEHART: THAT'S CORRECT.

THE COURT: THIS IS AN OPEN PLEA?

MR. MINEHART: THAT'S CORRECT.

THE COURT: WITHOUT ANY OTHER CONSIDERATIONS OR ARE THERE ANY NEGOTIATIONS?

MR. MINEHART: JUST THE NOLLE PROSSES, YOUR HONOR, THAT'S IT.

THE COURT. ALL RIGHT.

BY MR. MINEHART: (TO DEFENDANT)

Q. MR. CLIATT, IF I MIGHT, YOU INDICATED BRIEFLY THAT YOU WERE WILLING TO GIVE UP YOUR RIGHT TO A SPEEDY TRIAL ON ATTEMPT ARSON CHARGES, SPECIFICALLY BILL NO. 80-08-2093 TO 2097.

IS THAT CORRECT, SIR?

A. THAT IS, YES.

Q. YOU ALSO HAVE TWO CASES WHICH ARE GOING TO -- THE AGREEMENT IS THEY WILL BE NOLLE PROSSED AT THE TIME OF YOUR SENTENCE, WHICH IS LISTED FOR FEBRUARY 3RD OF 1981.

ARE YOU AWARE OF THAT, SIR?

A. YES, SIR.

Q. AND YOUR ATTORNEY HAS REQUESTED BECAUSE OF -- OR, PART OF THIS NEGOTIATION, THIS CASE BE LISTED AT THAT TIME FOR THE INTENTS OF NOLLE PROSSING, IF IN FACT YOUR GUILTY PLEA IS ACCEPTED.

DO YOU UNDERSTAND THAT?

A. YES, SIR.

Q. ARE YOU WILLING TO GIVE UP YOUR RIGHT TO THE 180 DAYS ON BOTH OF THESE, BOTH OF THOSE CASES, SPECIFICALLY BILL NO. 79-04-809 AND 810, CHARGING YOU WITH THEFT OF AN AUTO AND UNAUTHORIZED USE OF AN AUTO; ARE YOU WILLING TO WAIVE YOUR 180 DAY TRIAL TO THAT CASE?

A. YES, SIR.

Q. ALSO, AS TO THE CASE OF COMMON PLEAS 80-05-1024 TO 1025, CHARGING YOU ALSO WITH THEFT AND UNLAWFUL TAKING AND UNAUTHORIZED USE OF AN AUTO?

A. YES, SIR.

Q. DO YOU UNDERSTAND THAT YOU HAVE A RIGHT TO HAVE THESE CASES HEARD PRIOR TO THE 180 DAYS?

A. YES, SIR.

Q. HAVE THE CASES COME TO TRIAL?

A. YES, SIR.

Q. DO YOU UNDERSTAND THAT, SIR?

A. YES, SIR.

MR. MINEHART: DOES YOUR HONOR HAVE ANY QUESTIONS?

THE COURT: NO.

MR. DEUTSCH: WE JUST HAVE TO HAVE THE 11TH AMENDED, WHATEVER FORM IS NEEDED TO INCLUDE THOSE TWO. NO. 1 AND NO. 3.

(LATER)

THE COURT: VERY WELL, ARE YOU READY TO GO ON THE COLLOQUY NOW AS TO THE TWO BILLS?

MR. DEUTSCH: AS TO THE TWO BILLS, SHOULD WE DO IT ALL AT ONCE?

THE COURT: YES.

MR. DEUTSCH: TOGETHER?

THE COURT: YES.

BY MR. DEUTSCH:

Q. MR. CLIATT, DO YOU KNOW THAT THIS IS A COMBINATION AND I'VE GOT TO ASK YOU SPECIFICALLY ON OPEN PLEAS TO BILLS NO. 80-06-1067 AND 80-08-1329?

A. YES, SIR. (NODS HEAD AFFIRMATIVELY.)

Q. WOULD YOU STATE FOR THE RECORD, PLEASE, HOW OLD YOU ARE?

A. TWENTY-FOUR.

Q. AND HOW FAR HAVE YOU GONE IN SCHOOL?

A. TWELFTH GRADE.

Q. AND WHAT IS YOUR PHYSICAL CONDITION TODAY?

A. (NODS HEAD AFFIRMATIVELY.) GOOD.

Q. GOOD?

A. (NODS HEAD AFFIRMATIVELY.) GOOD.

Q. ARE YOU UNDER THE INFLUENCE OF ANY DRUGS OR ALCOHOL TODAY?

A. NO, SIR. NO, SIR. (SHAKES HEAD NEGATIVELY.)

Q. HAVE YOU EVER HAD ANY PSYCHIATRIC TREATMENT?

A. NO, SIR.

Q. HAVE YOU EVER BEEN IN ANY PSYCHIATRIC INSTITUTION?

A. NO, SIR.

Q. HOW FAR DID YOU GO IN SCHOOL?

A. TWELFTH GRADE.

Q. DO YOU READ AND WRITE THE ENGLISH LANGUAGE?

A. YES, SIR.

Q. HAVE I REPRESENTED YOU SINCE THE BEGINNING OF THIS MATTER?

A. YES.

Q. UP UNTIL THE PRESENT TIME?

A. YES, SIR.

Q. INCLUDING TODAY, ARE YOU SATISFIED WITH THE

SERVICES, THE LEGAL SERVICES THAT HAVE BEEN RENDERED TO YOU?

A. YES, SIR.

Q. AND HAVE I ADVISED YOU OF YOUR RIGHTS AND YOUR PRIVILEGES IN TERMS OF MAKING DECISIONS IN THIS MATTER? HAVE I DONE THAT UP TO THIS POINT?

A. YES, SIR.

Q. AND DO YOU KNOW THAT THIS MATTER IS NOW LISTED FOR AN OPEN PLEA BEFORE JUDGE KATZ?

DO YOU KNOW THAT YOU HAVE A RIGHT TO BE TRIED BEFORE A JURY OF TWELVE PEERS OF THE COMMUNITY, TWELVE PERSONS FROM THE COMMUNITY?

A. YES, SIR.

Q. DO YOU KNOW THAT YOU HAVE A RIGHT TO SELECT THOSE PEOPLE?

A. YES, SIR.

Q. DO YOU KNOW THAT IN THIS KIND OF A MATTER, THAT THE COMMONWEALTH WOULD HAVE TO PROVE YOUR GUILTY; THEY WOULD HAVE TO PUT ON WITNESSES AND YOU WOULD HAVE A RIGHT TO CROSS-EXAMINE THOSE WITNESSES?

A. YES, SIR.

Q. DO YOU KNOW THAT HE WOULD HAVE TO PROVE YOUR GUILTY BEYOND A REASONABLE DOUBT?

DO YOU UNDERSTAND AND ARE YOU AWARE OF THAT?

A. YES, SIR.

Q. ARE YOU AWARE ALSO THAT YOU HAVE A RIGHT TO WAIVE THAT RIGHT TO TRIAL BY A JURY?

A. YES, SIR.

Q. THAT YOU COULD BE TRIED BY A JUDGE SITTING WITHOUT A JURY?

A. YES, SIR.

Q. ARE YOU FAMILIAR WITH THE FACT THAT IF YOU ARE TRIED BY A JUDGE SITTING WITHOUT A JURY, HE WOULD HAVE TO LISTEN TO ALL THE EVIDENCE JUST AS HE WOULD WITH A JURY?

A. YES, SIR.

Q. DO YOU KNOW THAT WHEN WE FINISH, HE WOULD HAVE TO FIND YOU GUILTY BEYOND A REASONABLE DOUBT?

A. YES, SIR.

Q. ARE YOU WAIVING THAT -- ARE YOU WAIVING THAT RIGHT?

A. YES, SIR.

Q. TODAY?

A. YES, SIR.

Q. AND DO YOU REALIZE WHEN YOU PLEAD GUILTY THAT YOU'RE LIMITATIONS OF YOUR RIGHTS TO APPEAL ARE VERY

LIMITED WHEN YOU PLEAD GUILTY?

A. YES, SIR.

Q. DO YOU REALIZE THAT YOU HAVE A RIGHT TO QUESTION THE JURISDICTION OF THIS COURT AND THAT I WILL TELL YOU THAT IT IS MY RELIEF THAT THE COURT DOES HAVE JURISDICTION?

A. YES, SIR.

Q. IS IT YOUR RIGHT -- YOU HAVE A RIGHT TO TAKE EXCEPTION OR TO APPEAL THE SENTENCE OF THE COURT IF IT WOULD BE AN ILLEGAL SENTENCE.

A. YES.

Q. ARE YOU MAKING THIS PLEA VOLUNTARILY AND OF YOUR OWN FREE WILL?

A. YES, SIR.

Q. HAS ANYBODY PROMISED YOU ANYTHING?

A. NO, SIR.

Q. AND MAY I STATE FOR THE RECORD THAT THE DISTRICT ATTORNEY HAS ALREADY SAID THAT HE WOULD COME FORWARD AND HE WOULD STATE WHAT YOU HAVE DONE DO FAR IN THE MATTER WITH THE COMMONWEALTH.

A. YES, SIR.

Q. IS THAT YOUR UNDERSTANDING?

A. YES, SIR.

Q. HAS ANYBODY PRESSURED YOU OR BROUGHT ANY THREATS TO YOU TO PLEAD AS YOU'RE DOING TODAY?

A. NO, SIR.

MR. DEUTSCH: ANYTHING, YOUR HONOR?

THE COURT: PLEASE ADVISE YOUR CLIENT WHAT HE SPECIFICALLY INTENDS TO PLEAD GUILTY TO AND WHAT THE MAXIMUM SENTENCES ARE AND IS HE PLEADING GUILTY TO THESE BILLS BECAUSE HE IS IN FACT GUILTY?

MR. DEUTSCH: ALL RIGHT, YOUR HONOR.

MR. MINEHART, WILL YOU --

BY MR. DEUTSCH:

Q. MAY I ASK YOU, ARE YOU PLEADING GUILTY TODAY BECAUSE YOU ARE IN FACT GUILTY TO THE CRIMES THAT YOU EXPECT TO PLEAD GUILTY TO?

A. YES.

Q. YOU WILL LISTEN TO THE DISTRICT ATTORNEY AS TO THE EXACT CRIMES?

A. (NO ANSWER)

MR. MINEHART: IF I CAN TAKE FIVE, JUST A MOMENT, YOUR HONOR?

THE COURT: DO YOU WANT A DISCUSSION IN THIS CASE?

MR. MINEHART: YES, SIR, YOUR HONOR.

THE COURT: OKAY.

(THERE WAS A CONFERENCE BETWEEN THE DISTRICT ATTORNEY AND AN UNIDENTIFIED COLORED MALE IN CIVILIAN ATTIRE.)

(LATER)

MR. MINEHART: DID YOU GO OVER THE JURISDICTIONAL RIGHTS AND THE APPELLATE RIGHTS?

MR. DEUTSCH: YES, SIR.

BY MR. MINEHART:

Q. YOU REALIZE, MR. CLIATT, THAT YOU ARE WAIVING YOUR RIGHT TO ANY PRETRIAL MOTIONS, SUCH AS MOTIONS TO SUPPRESS ANY PHYSICAL EVIDENCE WHICH MAY HAVE BEEN TAKEN OR ANY STATEMENTS WHICH MAY HAVE BEEN TAKEN FROM YOU?

A. (NODS HEAD AFFIRMATIVELY.)

Q. DO YOU UNDERSTAND THAT, SIR?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR.

Q. DO YOU UNDERSTAND THAT YOUR ATTORNEY WOULD HAVE A RIGHT TO FILE THEM PRIOR TO TRIAL AND THAT IF THEY WERE LITIGATED IN YOUR FAVOR, THAT TYPE OF EVIDENCE MAY NOT BE USED AT TRIAL?

DO YOU UNDERSTAND THAT, SIR?

A. YES.

Q. DO YOU UNDERSTAND, SIR, THAT BY PLEADING GUILTY, YOU ARE GIVING UP ANY DEFENSE FOR JUSTIFICATION IN THIS CASE THAT YOU MIGHT HAVE OR FOR ANY CRIMES THAT YOU ARE CHARGED WITH?

DO YOU UNDERSTAND THAT, SIR?

A. YES, SIR.

Q. NOW, HAVE ANY PROMISES BEEN MADE TO YOU TO GET YOU TO PLEAD GUILTY TODAY?

A. NO, SIR.

Q. OTHER THAN THE AGREEMENT IN CERTAIN CASES WHICH WILL BE NOLLE PROSSED AT A LATER DATE AT THE TIME OF SENTENCING, HAVE ANY PROMISES BEEN MADE TO YOU?

A. NO, SIR.

MR. DEUTSCH: MR. MINEHART, I THINK WE OUGHT TO PUT IT ON THE RECORD OR I THINK, WE ALREADY PUT ON THE RECORD THAT THE DISTRICT ATTORNEY WILL FILE CERTAIN OTHER MATTERS AND HE WILL COME TO THE COURTROOM AND HE WILL MAKE A STATEMENT OF WHAT HE HAS DONE IN THE PAST THAT WOULD BE DONE.

THE COURT: WELL, YOU KNOW, BUT I DON'T KNOW WHAT THAT MEANS. THAT COULD BE WHAT,

MITIGATING CIRCUMSTANCES OR AGGRAVATING CIRCUMSTANCES?

MR. DEUTSCH: IN THE NATURE OF MITIGATING.

THE COURT: WELL, I THINK THE STATEMENT SHOULD BE MADE IN THE PRESENCE OF THE DEFENDANT SO THAT HE KNOWS WHAT HE IS PLEADING GUILTY TO. OR, AT LEAST UNDER WHAT CIRCUMSTANCES HE'S PLEADING GUILTY TO.

MR. DEUTSCH: YES, SIR, THE CIRCUMSTANCES--

BY MR. DEUTSCH:

Q. I THINK YOU FULLY WELL KNOW AND I AM SPEAKING NOW ON BEHALF OF MR. LEONARD ROSS, THE ASSISTANT DISTRICT ATTORNEY, WHO WOULD BE HERE AND MR. ROSS HAS ALREADY TOLD YOU THAT HE WOULD INDICATE YOUR COOPERATION IN CERTAIN CASES IN YOUR TESTIMONY?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR.

Q. IN CERTAIN CASES?

A. (NODS HEAD AFFIRMATIVELY.)

Q. AND THIS TESTIMONY WAS FAIRLY IMPORTANT TO YOU?

A. YES, SIR.

Q. AND YOU EXPECTED HIM TO SAY THAT?

A. YES, SIR.

BY THE COURT:

Q. AND THAT IS A PROMISE THAT YOU RECEIVED FROM THE DISTRICT ATTORNEY?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR.

Q. FROM THE DISTRICT ATTORNEY'S OFFICE?

A. YES, SIR. YES, SIR. (NODS HEAD AFFIRMATIVELY.)

MR. DEUTSCH: THAT'S CORRECT.

BY THE COURT:

Q. THAT'S ONE OF THE REASONS YOU'RE PLEADING GUILTY, IS IT NOT?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR. YES, SIR.

MR. DEUTSCH: THAT'S CORRECT.

BY THE COURT:

Q. WHAT OTHER PROMISES HAVE BEEN MADE TO YOU?

A. (SHAKES HEAD NEGATIVELY.) NONE.

Q. OTHER THAN THE OTHER CHARGES THAT WE MENTIONED WILL BE DROPPED AT THE TIME OF SENTENCING?

A. NOTHING, YOUR HONOR, OTHER THAN THE FACT THAT THE DISTRICT ATTORNEY SAID THAT HE WOULD SEND DOWN A PERSON HIMSELF AND SPEAK TO THE COURT.

BY MR. RINEHART:

Q. HAVE ANY PROMISES BEEN MADE TO YOU AS TO WHAT YOUR SENTENCE WILL BE?

A. No, sir. (Shakes head negatively.)

MR. DEUTSCH: If Your Honor please, it is our understanding that it will be completely open.

THE COURT: Very well.

Mr. Hinehart, will you go on through the specific charges that he's pleading guilty?

BY MR. HINEHART:

Q. Sir, you are being charged with possessing a controlled substance under Bill of Information No. 80-08-1067 and specifically on Bill of Information, you were charged that you did knowingly, intentionally possess a controlled substance, which contents were found to be heroin, and that you did manufacture, deliver, possess with intent to manufacture and deliver a controlled substance, that is, heroin, and that you did in fact, which was a Schedule I drug, that you sold those to Officer Lee of the Narcotic Unit who is here today.

Do you understand that, sir?

A. Yes, sir.

Q. That is what you are pleading guilty to.

A. (Nods head affirmatively.)

THE COURT: And the maximum sentence for that?

BY MR. MINEHART:

Q. AND YOU REALIZE THAT YOU FACE A PENALTY UP TO 15 YEARS IN PRISON?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR.

(THERE WAS A CONFERENCE BETWEEN COUNSEL FOR THE DEFENSE AND THE DEFENDANT.)

(LATER)

MR. MINEHART: I DON'T HAVE THE FINE THAT CONTROLS THAT.

THE COURT: ALL RIGHT --

MR. MINEHART: YES, I DO.

BY MR. MINEHART:

Q. YOU FACE A POSSIBLE SENTENCE OF IMPRISONMENT NOT TO EXCEED 15 YEARS AND PAY A FINE NOT TO EXCEED $250,000.00.

DO YOU UNDERSTAND THAT, SIR?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR.

Q. DO YOU REALIZE THAT THE JUDGE HERE HAS THE POWER TO SENTENCE YOU AS SUCH?

DO YOU UNDERSTAND THAT?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR.

Q. YOU ARE ALSO CHARGED ON BILL NO. 80-08-1329 WITH POSSESSION OF A CONTROLLED SUBSTANCE AND THE FACTS IN

THIS INCIDENT ALSO WERE HEROIN AND THAT IN FACT IN THIS BILL OF INFORMATION, YOU ARE NOT BEING CHARGED WITH THE SALE, BUT YOU'RE BEING CHARGED WITH POSSESSION OF HEROIN.

A. YES, SIR.

Q. AND INASMUCH AS YOU'RE CHARGED WITH POSSESSION, YOU FACE THE PENALTY OF --

MR. MINEHART: IF I CAN HAVE A MOMENT, YOUR HONOR?

(LATER)

BY MR. MINEHART:

Q. -- AND THAT IT IS YOUR INTENTION TO PLEAD GUILTY TO THE POSSESSION OF A DRUG, HEROIN, IN THIS CASE?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR; YES. (NODS HEAD AFFIRMATIVELY.)

Q. NOW, SIR, YOU REALIZE THAT THE POSSIBLE PENALTY FOR THAT COULD BE 15 YEARS IN PRISON, ALSO, AND THAT IS A SCHEDULE I DRUG.

DO YOU UNDERSTAND THAT, SIR?

(THERE WAS A CONFERENCE BETWEEN COUNSEL FOR THE DEFENSE AND THE DISTRICT ATTORNEY.)

(LATER)

MR. MINEHART: IF I CAN BE GIVEN JUST A MINUTE, YOUR HONOR?

(WHEREUPON THE ASSISTANT DISTRICT ATTORNEY EXAMINES THE PENAL CODE.)

(LATER)

MR. MINEHART: EXCUSE ME, YOUR HONOR, BUT THERE HAS BEEN SOME DISPUTE THAT -- IT IS MY UNDERSTANDING THAT IT IS THE LAW -- THE LAW IS --

I APOLOGIZE, CAN I JUST HAVE ANOTHER MOMENT?

(LATER)

BY MR. MINEHART:

Q. DO YOU REALIZE, SIR, THAT POSSESSION OF A SCHEDULE I DRUG, HEROIN, IT'S A POSSIBILITY OF A COMMITMENT OF ONE YEAR IMPRISONMENT AND A FINE OF $5,000.00 OR THE FACT THAT IF IT IS YOUR SECOND CONVICTION, YOU FACE THE POSSIBILITY OF A THREE YEAR IMPRISONMENT --

MR. MINEHART: DOES IT GIVE THE FINE THERE?

THE COURT: AND/OR A $25,000.00 FINE.

BY MR. MINEHART:

Q. AND/OR A $25,000.00 FINE.

DO YOU UNDERSTAND THAT?

A. YES, SIR.

Q. KNOWING THE POSSIBLE PENALTIES THAT YOU FACE, UP TO 16 YEARS IN PRISON OR TO 19 YEARS IN PRISON AND A FINE OF APPROXIMATELY $300,000.00 OR $275,000.00 -- KNOWING THAT, SIR, DO YOU STILL INTEND TO PLEAD GUILTY?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR.

Q. YOU REALIZE, SIR, THAT IF YOU ARE ON PROBATION OR PAROLE, AND WE DON'T KNOW -- WE DON'T WANT YOU TO TELL US RIGHT NOW, BUT IF YOU ARE, FROM THE FACTS, ARE UNDER ANY FORM OF PROBATION OR PAROLE, THIS CONVICTION COULD VIOLATE YOUR PROBATION OR PAROLE.

DO YOU UNDERSTAND THAT?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR.

Q. AND HAVE YOU DISCUSSED THIS WITH YOUR ATTORNEY?

A. YES, SIR.

Q. ARE YOU SATISFIED WITH HIS REPRESENTATION?

A. YES, SIR.

Q. YOU REALIZE, SIR, THAT YOU WOULD CHOOSE THAT JURY -- IN FACT, IF ANY OF THOSE JURORS HAD ANY TYPE OF A REASONABLE DOUBT, AND THAT REASONABLE DOUBT WOULD BE EXPLAINED TO YOU; IT'S A TYPE OF A DOUBT THAT AN ORDINARY PERSON HAS RESTRAINED -- OR, WOULD RESTRAIN AN ORDINARY PERSON FROM ACTING IN A MATTER OF THE GREATEST IMPORTANCE TO HIMSELF. IF THE ONE-ON-ONE JURY HAD THAT

TYPE OF A DOUBT, THOUGH, HE WOULD NOT VOTE TO CONVICT YOU. YOU CANNOT BE CONVICTED OF THAT CRIME IN WHICH YOU ARE CHARGED.

DO YOU UNDERSTAND THAT?

A. YES, SIR.

Q. A HUNG JURY WOULD BE -- A MISTRIAL WOULD BE DECLARED AND BECAUSE IT IS A HUNG JURY, IN THIS INSTANCE THE COMMONWEALTH WOULD EITHER RETRY YOU OR THEY MAY NOT; THEY MAY DECIDE NOT TO RETRY YOU AGAIN.

DO YOU UNDERSTAND THAT?

A. YES, SIR.

Q. AND YOU ARE GIVING UP THE RIGHT AND YOU'RE ALSO GIVING UP THE RIGHT TO GO TO TRIAL BEFORE HIS HONOR, JUDGE KATZ AND HE WILL LISTEN AND IF HE HAS A DOUBT, HE CANNOT CONVICT YOU. HE WOULD IN FACT ACQUIT YOU IF HE HAD A REASONABLE DOUBT.

DO YOU UNDERSTAND THAT?

A. YES, SIR.

Q. AND YOU'RE GIVING UP YOUR RIGHT TO CROSS-EXAMINE WITNESSES IN THIS MATTER AND YOU'RE GIVING UP YOUR RIGHT TO PRESENT EVIDENCE AND PRESENT TESTIMONY IN YOUR BEHALF.

DO YOU UNDERSTAND THAT, SIR?

A. YES, SIR.

Q. AND YOUR PRESUMPTION OF INNOCENCE, IF YOU SAID NOTHING DURING THE TRIAL, THE COMMONWEALTH WOULD STILL HAVE THE BURDEN OF CONVICTING YOU BEYOND A REASONABLE DOUBT.

DO YOU UNDERSTAND THAT?

A. YES, SIR.

Q. KNOWING ALL OF YOUR RIGHTS, KNOWING ALL OF YOUR ENTITLEMENTS, IT IS STILL YOUR DECISION, A DECISION OF YOUR OWN FREE WILL, TO PLEAD GUILTY HERE TODAY?

A. YES, SIR.

MR. MINEHART: DOES YOUR HONOR HAVE ANY QUESTIONS?

THE COURT: YES.

BY THE COURT:

Q. NOW, MR. CLIATT, DO YOU UNDERSTAND THAT I'M NOT PART OF ANY AGREEMENT OR PARTY TO ANY AGREEMENT THAT YOU MAY HAVE ENTERED INTO WITH YOUR ATTORNEY OR WITH ANY REPRESENTATIVE OF THE DISTRICT ATTORNEY'S OFFICE?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR.

Q. DO YOU UNDERSTAND THAT?

A. YES, SIR.

Q. THAT I AM FREE TO COMPLETELY REJECT OR ACCEPT THE NEGOTIATED GUILTY PLEA THAT IS BEING OFFERED HERE?

A. YES, SIR.

Q. DO YOU UNDERSTAND THAT?

A. YES, SIR.

Q. AND IF I CHOSE TO REJECT ANY OF THE TERMS WHICH WE DISCUSSED IN THIS MATTER, WE WILL HAVE A DISCUSSION PRIOR TO THIS TIME AND YOU WILL BE PERMITTED TO WITHDRAW YOUR GUILTY PLEA; IF YOU PLEAD GUILTY AND I REJECT IT, YOU WILL THEN GO TO ANOTHER ROOM BEFORE ANOTHER JUDGE.

A. (NODS HEAD AFFIRMATIVELY.)

Q. AND THAT I WILL NOT ADVISE THAT OTHER JUDGE THAT YOU IN FACT PLED GUILTY.

A. YES, SIR.

Q. DO YOU UNDERSTAND THAT?

A. YES, SIR.

Q. IF I REJECT IT BEFORE YOU PLEAD GUILTY, I WOULD TRANSFER THIS CASE TO ANOTHER COURTROOM AND NOT ADVISE THAT JUDGE THAT YOU INTENDED TO PLEAD GUILTY.

DO YOU UNDERSTAND THAT?

A. YES, SIR; YES.

Q. AND AS I UNDERSTAND IT, WHAT YOU'RE PLEADING GUILTY TO, YOU'RE PLEADING TO BILL NO. 80-08-1067, WHICH IS THE SALE OF HEROIN?

A. YES, SIR.

Q. AND 80-08-1329, WHICH IS POSSESSION OF HEROIN?

A. YES, SIR.

Q. IS THAT CORRECT?

A. YES, SIR.

Q. YOU'RE PLEADING GUILTY TO THOSE BILLS BECAUSE YOU IN FACT DID SELL HEROIN AS ACCUSED IN THE ONE BILL, 1067, AND YOU IN FACT DID POSSESS HEROIN IN BILL NO. 1329 AS CHARGED.

IS THAT CORRECT?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR.

Q. AND THAT THE ONLY REASON YOU'RE PLEADING GUILTY IS NOT BECAUSE SOMEONE'S THREATENING YOU OR IN ANY WAY PROMISING YOU ANYTHING?

A. (SHAKES HEAD NEGATIVELY.) NO, SIR.

Q. AND AS PART OF THAT GUILTY PLEA AND UNDERSTANDING, TWO BILLS WILL BE NOLLE PROSSED; THEY WILL BE THE BILLS CHARGING YOU WITH UNAUTHORIZED USE OF A VEHICLE AND THEFT OF THAT VEHICLE, WHICH OFFENSE ALLEGEDLY OCCURRED ON NOVEMBER THE 16TH, 1979, IDENTIFIED AS BILL NO. 79-04-809 AND 810.

DO YOU UNDERSTAND THAT?

A. (NODS HEAD AFFIRMATIVELY.)

Q. THE OTHER BILL WHICH WILL BE NOLLE PROSSED IS

IDENTIFIED AS BILL NO. 80-05, NO. 1024 TO 1025, WHICH IS THE RESULT OF AN INCIDENT THAT OCCURRED ON APRIL THE 25TH, 1980 IN WHICH YOU WERE CHARGED WITH THEFT AND UNAUTHORIZED USE OF AN AUTOMOBILE?

A. YES, SIR.

Q. THOSE ARE TO BE NOLLE PROSSED BOTH AT THE TIME OF SENTENCING?

A. YES, SIR.

Q. ARE THERE ANY OTHER UNDERSTANDINGS THAT YOU ARE AWARE OF AT THIS TIME OTHER THAN THE TWO THAT I'VE STATED AND YOUR ATTORNEY DID, THAT A REPRESENTATIVE OF THE DISTRICT ATTORNEY'S OFFICE WILL PRESENT HIMSELF AT THE TIME OF SENTENCING AND INDICATE THE EXTENT OF THE COOPERATION THAT YOU HAVE GIVEN THE DISTRICT ATTORNEY'S OFFICE IN VARIOUS CASES.

DO YOU UNDERSTAND THAT?

A. YES, SIR.

Q. DO YOU UNDERSTAND THAT I AM FREE TO REJECT ANY OF THAT?

A. (NODS HEAD AFFIRMATIVELY.)

Q. THE RECOMMENDATION OR EVIDENCE OF ANY COOPERATION, IF I WISH?

A. YES, SIR.

Q. OR, I AM, OF COURSE, FREE TO CONSIDER THAT IN MY SENTENCING.

DO YOU UNDERSTAND THAT?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR.

Q. AND IS IT PERFECTLY CLEAR TO THE DISTRICT ATTORNEY THAT HE IS NOT GOING TO RECOMMEND ANY SENTENCE IN THIS CASE AND THAT WILL BE PURELY WITHIN MY DISCRETION AS TO WHAT THE APPROPRIATE SENTENCE SHOULD BE?

A. YES, SIR.

Q. AND THAT'S EXACTLY WHAT AN OPEN PLEA MEANS; THAT THERE IS NOT ANY RECOMMENDATION TO BE MADE. THERE IS NO AGREEMENT BY YOU OR YOUR ATTORNEY OR THE DISTRICT ATTORNEY'S OFFICE OR THE COURT.

A. (NODS HEAD AFFIRMATIVELY.)

Q. IT'S COMPLETELY OPEN AND I WILL SENTENCE YOU IN ACCORDANCE WITH THE FACTS OF THE CASE, THE PRESENTENCE REPORTS AND ALL THE OTHER MATERIAL THAT I'LL HAVE BEFORE ME AT THE TIME OF SENTENCING.

DO YOU UNDERSTAND THAT?

A. YES, SIR.

Q. AND YOU ARE FULLY AWARE OF THE MAXIMUM SENTENCES AS OUTLINED TO YOU BY THE DISTRICT ATTORNEY?

A. YES, SIR.

Q. AND YOU UNDERSTAND THAT I HAVE A LEGAL RIGHT TO GIVE YOU A MAXIMUM SENTENCE AS OUTLINED BY MR. MINEHART.

IS THAT CLEAR TO YOU?

A. YES, SIR.

Q. ANY SENTENCE THAT'S EXCESSIVE, THAT WILL BE ILLEGAL AND YOU HAVE A RIGHT TO APPEAL.

A. YES, SIR. (NODS HEAD AFFIRMATIVELY.)

Q. MR. MINEHART IS GOING TO READ TO YOU A SUMMARY OF THE FACTS PERTAINING TO THOSE TWO CASES THAT YOU INTEND TO PLEAD GUILTY TO.

I WANT YOU TO LISTEN CAREFULLY AND IF FOR ANY REASON, THERE IS AN INACCURACY OR INCOMPLETE FACTOR, I WANT YOU TO TELL YOUR ATTORNEY AND HE WILL EXPRESS THAT TO THE COURT.

DO YOU UNDERSTAND THAT?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR.

THE COURT: MR. MINEHART?

MR. MINEHART: YOUR HONOR, OFFICER FRANK LEE, BADGE NO. 3033 --

THE COURT: WHICH ONE ARE YOU PROCEEDING ON?

MR. MINEHART: THIS IS ON 1067, YOUR HONOR.

FRANK LEE, OF THE DRUG ENFORCEMENT ADMINISTRATION TASK FORCE, PHILADELPHIA POLICE OFFICER ASSIGNED THERE, HE WOULD TESTIFY THAT ON NOVEMBER THE 30TH, 1978, HE WAS IN THE COMPANY OF A RELIABLE INFORMANT AND HE WENT TO THE LOCATION OF 7443 WOOLSTON STREET, WHICH IS THE RESIDENCE OF THE DEFENDANT, EMANUEL CLIATT, IN THE CITY AND COUNTY OF PHILADELPHIA.

THE INFORMANT AND OFFICER LEE WERE ADMITTED IN THIS RESIDENCE BY A NEGRO MALE WHO UPON THEIR ENTRANCE STATED THAT MANNY, REFERRING TO DEFENDANT CLIATT, WAS NOT AT HOME, BUT HAD CALLED AND STATED THAT HE WAS ENROUTE TO HIS RESIDENCE. APPROXIMATELY FIVE MINUTES LATER, OFFICER LEE OBSERVED THE DEFENDANT IN COMPANY WITH TWO OTHER NEGRO MALES ENTER THE KITCHEN AND DINING ROOM FROM WHAT APPEARED TO BE FROM THE BASEMENT ENTRANCE. AT THIS TIME, OFFICER LEE WAS INTRODUCED TO CLIATT AFTER WHICH CLIATT AND THE INFORMANT ENTERED INTO THE DINING ROOM AND ENGAGED IN A CONVERSATION.

SHORTLY AFTERWARDS, THE INFORMANT STATED TO OFFICER LEE THAT CLIATT HAD STATED THAT HE

WOULD SELL FIVE BUNDLES OF HEROIN AT A COST OF $60.00 PER BUNDLE. OFFICER LEE AT THAT TIME APPROACHED CLIATT IN THE LIVING ROOM AREA AND ASKED HIM THE PRICE FOR FIVE BUNDLES AND HE WAS ADVISED BY CLIATT THAT IT WOULD COST $300.00 AND HE AGREED TO SELL IT TO OFFICER LEE AND HE COUNTED OUT $300.00 OF OFFICIAL ADVANCED MONEY, WHICH HE GAVE TO CLIATT WHO THEN RECOUNTED THE MONEY AND REENTERED THE DINING ROOM AND CONVERSED WITH A MALE IN THE KITCHEN.

THE DEFENDANT THEN TOLD OFFICER LEE THAT THE PACKAGE WOULD BE AT THE RESIDENCE IN ABOUT TEN MINUTES. AT THIS TIME, AT APPROXIMATELY 1:25 P.M. THE DEFENDANT SAID TO OFFICER LEE AND THE INFORMANT THAT THEY WOULD HAVE TO FOLLOW HIM TO A LOCATION, WHICH IS A FEW BLOCKS FROM THE STASH AND THAT HE WOULD SIGNAL OFFICER LEE WHERE HE PARKED HIS VEHICLE AND TO AWAIT HIS RETURN WITH THE HEROIN. OFFICER LEE THEN OBSERVED THE DEFENDANT ENTER INTO A BASEMENT DOOR ENTRANCE AS HE AND THE INFORMANT WERE EXITING THEIR VEHICLE. THEY THEN PROCEEDED TO FOLLOW THE DEFENDANT.

THEY FOLLOWED HIM TO THE 7900 BLOCK OF UPSAL STREET WHERE THE DEFENDANT STOPPED HIS VEHICLE AND HE SIGNALED TO OFFICER LEE TO PARK HIS CAR AFTER WHICH THE DEFENDANT LEFT THE AREA AND AT APPROXIMATELY 1:50 P.M., OFFICER LEE OBSERVED THE DEFENDANT RETURN TO THE 7900 BLOCK OF UPSAL STREET AND PARKED HIS VEHICLE PARALLEL TO OFFICER LEE'S CAR.

OFFICER LEE AND THE INFORMANT EXITED OFFICER LEE'S VEHICLE AND APPROACHED THE DEFENDANT'S VEHICLE. AT THIS TIME, OFFICER LEE OBSERVED THE DEFENDANT HAND THE INFORMANT SOMETHING AS THE INFORMANT APPROACHED THE OPERATOR'S SIDE OF THE DEFENDANT'S VEHICLE.

OFFICER LEE AND THE INFORMANT CONVERSED WITH THE DEFENDANT FOR A SHORT TIME AFTER WHICH OFFICER LEE OBSERVED THE DEFENDANT EXIT THE AREA ON VERNON ROAD. THE INFORMANT WAS SEARCHED FOR MONIES AND NARCOTICS BEFORE THEY WENT OVER TO THE DEFENDANT'S HOUSE AND NOTHING WAS FOUND. SUBSEQUENTLY, THIS PACKAGE WAS TURNED OVER TO OFFICER LEE AND IT WAS MAILED TO THE LABORATORY FOR ANAYLSIS, THE DRUG ENFORCEMENT ADMINISTRATION.

THE CHEMIST, JOSEPH J. BARBATO OF THE NORTHERN REGIONAL LABORATORY OF NEW YORK, IF HE WAS CALLED TO TESTIFY, HE WOULD TESTIFY THAT HE EXAMINED A PACKAGE RECEIVED INTACT, FILE NO. CK-79-X017, THAT THEY RECEIVED THIS ON NOVEMBER THE 30TH OF 1978 AND THAT THE TECHNICIAN RECEIVED IT ON 12/4/78 AND IT WAS MAILED ON 11/30/78. THEY RECEIVED FIVE BUNDLES OF GLASSINE BAGS CONTAINING A WHITE POWDER AND SECURED WITH RUBBER-BANDS CONSISTING OF A TOTAL OF 118 BAGS. NO OTHER MARKS OR LABELS. IT WAS FOUND TO CONTAIN 47.5 GRAMS WITH A NET WEIGHT OF 1.66 GRAMS OF HEROIN.

THERE WERE 116 GLASSINE BAGS OF WHITE POWDER WHICH WERE FOUND TO BE HEROIN. THERE WERE 47.68 GRAMS GROSS WEIGHT AND 1.66 GRAMS NET WEIGHT OF HEROIN, WHICH WAS DIVIDED INTO 216 GLASSINE BAGS.

THE COURT: IT WAS DIVIDED BY WHOM, THE ANALYST?

MR. MINEHART: NO, YOUR HONOR, WHEN IT WAS SOLD, IT WAS IN THE 116 INDIVIDUAL BAGS, FIVE BUNDLES, CONTAINING FIVE LARGE BUNDLES CONTAINING

THE 116 INDIVIDUAL BAGS WHICH WERE SUBMITTED FOR THE CHEMICAL ANALYSIS. THIS REPORT WAS SIGNED BY JOSEPH J. BARBATO, B-A-R-B-A-T-O, CHEMIST.

YOUR HONOR, THAT WOULD BE THE COMMONWEALTH'S CASE AS TO BILL NO. 80-08-1067.

AS TO BILL NO. 80-08-1329, YOUR HONOR, IF YOU HAVE ANY QUESTIONS THAT YOU WANT TO ASK THE DEFENDANT -- IF YOU HAVE ANY QUESTIONS BEFORE --

BY THE COURT: (TO DEFENDANT)

Q. HAVE YOU HEARD THE SUMMARY ON THIS CHARGE WHICH WE HAVE IDENTIFIED AS 1067, NAMELY, THE SALE OF HEROIN?

A. YES, SIR. YES, SIR.

Q. ARE THERE ANY CORRECTIONS THAT YOU WISH TO MAKE?

A. (SHAKES HEAD NEGATIVELY.)

(THERE WAS A CONFERENCE BETWEEN COUNSEL FOR THE DEFENSE AND THE DEFENDANT.)

(LATER)

DEFENDANT CLIATT: YOUR HONOR, THE ONLY THING I CAN SAY IS THAT THE REASON I LEFT MY HOUSE; RIGHT? BECAUSE, I WASN'T SURE WHO HE WAS; RIGHT? HE WASN'T PRESENT WHEN HE GAVE THE INFORMANT, YOU

KNOW, THE PACKAGE.

BY THE COURT:

Q. YOU'RE SAYING THAT HE DIDN'T OBSERVE IT?

A. (SHAKES HEAD NEGATIVELY.) NO, SIR -- YES, SIR, I'M SAYING HE DIDN'T OBSERVE IT. THAT'S WHAT -- THE REASON WHY, I TOLD HIM I HAD TO GO TO THE 7900 BLOCK UPSAL. THE 7900 UPSAL.

Q. YOU GAVE THE INFORMANT THAT PACKAGE?

A. (NODS HEAD AFFIRMATIVELY.) YES, SIR.

MR. DEUTSCH: YES, SIR, HE DOES.

THE COURT: YOU'RE SAYING HE DIDN'T OBSERVE IT, IN YOUR OPINION?

MR. MINEHART: YES, SIR.

BY THE COURT:

Q. YOU'RE NOT AWARE THAT HE OBSERVED IT; IS THAT CORRECT?

A. YES, SIR.

Q. WHICH MEANS, HE MAY OR MAY NOT HAVE OBSERVED IT?

A. YES, SIR.

THE COURT: ALL RIGHT.

MR. MINEHART: ANY OTHER QUESTIONS?

NOW, ON BILL NO. 80-08-1329, WHICH IS -- IN WHICH THE DEFENDANT PLED GUILTY TO THE CHARGE

OF POSSESSION, THAT IF OFFICER HILT, H-I-L-T, THE PHILADELPHIA NARCOTICS, BADGE NO. 1524 WAS CALLED TO TESTIFY, HE WOULD TESTIFY THAT ON JANUARY THE 5TH OF 1980, HE WAS ARMED WITH AN ARREST WARRANT AND A SEARCH AND SEIZURE WARRANT THE SEARCH AND SEIZURE WARRANT NO. 44333 WAS SIGNED BY HIS HONOR JUDGE MARCONES TO SEARCH THE PREMISES OF 5148 GREENE STREET.

THIS WARRANT WAS OBTAINED AS A RESULT OF INFORMATION FROM A RELIABLE INFORMANT AS WELL AS A STATEMENT FROM LARRY CLIATT, L-A-R-R-Y -- C-L-I-A-T-T, AT THAT ADDRESS AND HE WAS ALSO A RESIDENT OF THE DEFENDANT EMANUEL CLIATT OF 5148 GREENE STREET.

THE OFFICERS WENT TO THE RESIDENCE AND IN COMPANY WITH UNIFORMED POLICEMEN FROM THE 14TH DISTRICT, WENT TO THE FRONT DOOR AND OTHER OFFICERS SECURED THE OTHER DOOR AND THEY KNOCKED ON THE DOOR AND THEY STATED THAT THEY WERE POLICE-MEN WITH A WARRANT AND THERE WAS NO RESPONSE.

AT THIS TIME, THEY OBSERVED A MALE LOOKING OUT THE WINDOW AND UPON SEEING THE POLICE OFFICERS RUN UP THE STEPS AND AT THIS TIME, THE DEFENDANT --

AT THIS TIME, OFFICER HILT WOULD TESTIFY THAT KNOWING THAT THE EVIDENCE WAS GOING TO BE DESTROYED, HE ALONG WITH OFFICER SCANZELLO AND UNIFORMED OFFICERS OF THE 14TH DISTRICT OPENED THE FRONT DOOR AND ENTERED THE RESIDENCE. THEY WERE MET ONCE INSIDE THAT RESIDENCE BY CARL CLIATT WHO WAS COMING DOWN THE STEPS FROM THE SECOND FLOOR.

AT THIS TIME, THEY SAT CARL DOWN ON THE SOFA; THEY GAVE HIM A COPY OF THE WARRANT. SERGEANT EVANS AND UNIFORMED OFFICERS WENT TO THE SECOND FLOOR WITH THE ASSIGNED OFFICER HILT, WHO JOINED THEM ON THE SECOND FLOOR IN THE MIDDLE BEDROOM. THE OFFICER WOULD TESTIFY THAT THEY FOUND THE DEFENDANT, EMANUEL CLIATT, WHICH THEY THEN PLACED HIM UNDER ARREST AND THEY KNEW THAT THERE WERE OUTSTANDING ARREST WARRANTS FOR HIM. THE RESIDENCE WAS SECURED AND A SEARCH WAS CONDUCTED FROM THE SECOND FLOOR MIDDLE BEDROOM WHERE THE DEFENDANT CLIATT WAS FOUND AND THERE WAS CONFISCATED ONE FOIL PACKAGE CONTAINING A WHITE POWDER, TWO PLASTIC BAGS CONTAINING A TAN SUBSTANCE IN ROCK FORM AND AN IDENTIFICATION IN

BOTH THE NAMES OF EMANUEL CLIATT AND HELEN ELLIS. FROM THE REAR BEDROOM, POLICE CONFISCATED A TRIPLE BEAM SCALE AND NUMEROUS PAPER PACKETS, EMPTY, AND IDENTIFICATION IN THE NAME OF CARL CLIATT.

FROM THE SECOND BEDROOM ON THE SECOND FLOOR WAS CONFISCATED A VIAL CONTAINING A LIQUID PAPER PACK CONTAINING A WHITE POWDER, NUMEROUS SPOONS WITH RESIDUE. ALSO, IN THE BASEMENT WAS FOUND A PLASTIC BAG CONTAINING 13 MANILA BAGS CONTAINING A BROWN WEED AND SEED.

THE DEFENDANTS WERE TAKEN INTO CUSTODY AND FURTHER ARRANGEMENTS FOR A FURTHER SEARCH -- AFTER SPEAKING WITH MR. CLIATT, A SEARCH WAS DONE OVER THE MIDDLE BEDROOM WHERE THE IDENTIFICATION FOR EMANUEL CLIATT WAS FOUND, AND BEHIND THE RADIATOR, THE ASSIGNED CONFISCATED A PLASTIC BOX WHICH DID CONTAIN ONE CLOTH BAG CONTAINING FOUR LARGE PAPER PACKS CONTAINING A WHITE POWDER AND EIGHT SMALL PAPER PACKS CONTAINING A WHITE POWDER; $590.00 IN UNITED STATES CURRENCY AND A A PSFS SAVINGS BOOK IN THE NAME OF EMANUEL CLIATT.

THESE ITEMS WERE SUBMITTED TO A CHEMICAL LABORATORY BY OFFICER HILT AND POLICEMAN SCANZELLO,

SPECIFICALLY, THE PLASTIC BOX CONTAINING THE BROWN CLOTH BAG WHICH CONTAINED FOUR LARGE PAPER PACKETS AND EIGHT SMALL PAPER PACKETS CONTAINING A WHITE POWDER, WHICH WAS IN FACT HEROIN.
IT CONTAINED A WHITE POWDER, HEROIN, A CONTROLLED SUBSTANCE SCHEDULE I.

THAT WOULD BE THE COMMONWEALTH'S CASE, YOUR HONOR, AS TO THE POSSESSION CHARGE.

BY THE COURT: (TO DEFENDANT)

Q. MR. CLIATT, HAVE YOU HEARD THE TESTIMONY OR A SUMMARY OF THE TESTIMONY AS TO BILL NO. 1329, CHARGING YOU WITH POSSESSION OF HEROIN?

A. YES, SIR.

Q. DO YOU HAVE ANY CORRECTIONS OR ADDITIONS TO MAKE?

A. (SHAKES HEAD NEGATIVELY.) NO, SIR.

MR. MINEHART: YOUR HONOR, I JUST WOULD POINT OUT FOR THE COMPLETE SUMMARY THAT 5148 GREENE STREET IS IN PHILADELPHIA.

BY THE COURT:

Q. THAT'S G-R-E-E-N-E?

A. YES, SIR.

Q. ALL RIGHT.

THE COURT: ARRAIGN HIM ON THE TWO BILLS.

MR. DEUTSCH: IF YOUR HONOR PLEASE, I THINK THAT THE RECORD SHOULD DEMONSTRATE --

(THERE WAS A CONFERENCE BETWEEN COUNSEL FOR THE DEFENSE AND THE DEFENDANT.)

(LATER)

BY MR. DEUTSCH:

Q. THE RESIDENCE ITSELF WHERE ALL OF THIS HAPPENED, WHICH IS THE RESIDENCE OF 5148 GREENE STREET?

A. YES.

Q. THAT'S IN THE NAME OF STERELTA -- SOMETHING LIKE THAT, STERELTA CLIATT, AND THERE ARE OTHER PEOPLE THAT LIVE IN THAT HOUSE. I THINK YOUR HONOR SHOULD BE AWARE-- I'M JUST INDICATING THAT OTHER PEOPLE WERE ARRESTED AND THERE WAS A MENTION OF A LARRY CLIATT MENTIONED IN THIS MATTER.

THE COURT: THE DEFENDANT IS PLEADING GUILTY TO BEING IN POSSESSION OF THAT NO MATTER HOW MANY PEOPLE LIVED THERE; CORRECT?

MR. DEUTSCH: THAT'S CORRECT; THAT'S CORRECT. THERE'S NO QUESTION ABOUT IT.

PERHAPS I MIGHT SAY IT COULD BE MITIGATING AREAS.

THE COURT: WELL, THAT WOULD BE THE ONLY

RELEVANCY THAT YOU'RE BRINGING IT IN TO SHOW THAT THERE WERE OTHER PEOPLE WHO POSSESSED THEM? THEN, I SEE NO NEED TO PLEAD GUILTY TO THE --

MR. DEUTSCH: WE'RE NOT DOING THAT, YOUR HONOR.

THE COURT: ALL RIGHT, THEN.

MR. DEUTSCH: I JUST WANTED YOUR HONOR TO BE AWARE THAT IT'S A RESIDENCE OF OTHER PEOPLE.

THE COURT: VERY WELL.

(WHEREUPON THE DEFENDANT APPEARED BEFORE THE BAR OF THE COURT WITH COUNSEL.)

COURT CRIER: SHALL HE BE ARRAIGNED?

THE COURT: YES.

BY THE COURT CRIER: (TO DEFENDANT)

Q. TO THIS BILL OF INFORMATION NO. 1067, AUGUST SESSIONS, 1980, CHARGING YOU WITH MANUFACTURING, DELIVERING OR POSSESSING WITH INTENT TO MANUFACTURE/ DELIVER A CONTROLLED SUBSTANCE, HOW DO YOU PLEAD; GUILTY OR NOT GUILTY?

A. GUILTY.

BY THE COURT:

Q. THE CONTROLLED IS THAT IT WAS HEROIN; IS THAT CORRECT?

A. (Nods head affirmatively.) Yes, sir.

COURT CRIER: Guilty to 1067, Your Honor.

BY THE COURT CRIER:

Q. Emanuel Cliatt, to this Bill of Information No. 1329, August Sessions, 1980, charging you with knowingly possessing a controlled substance, how do you plead; guilty or not guilty?

A. Guilty.

THE COURT: The controlled substance, there, is also heroin; is that correct?

DEFENDANT CLIATT: Yes, sir.

COURT CRIER: He pleads guilty to Bill 1029, Your Honor.

(At 12:55 P.M. the defendant was arraigned and pled guilty of record.)

THE COURT: Are you presently on probation?

DEFENDANT CLIATT: Yes, sir, Your Honor.

MR. DEUTSCH: It's Judge Kubacki.

THE COURT: Five years probation?

MR. DEUTSCH: That's correct, Your Honor.

DEFENDANT CLIATT: Yes, sir, Your Honor. (Nods head affirmatively.)

THE COURT: MR. MINEHART, UNDER THAT CATEGORY OF THE FLLLOWING ACTIVE CASES. THIS DEFENDANT'S RECORD SHEET, ALL OF THESE ACTIVITIES, ARE THEY ALL ACCOUNTED FOR IN THE COLLOQUY THAT WE HAD TODAY?

(WHEREUPON THE DISTRICT ATTORNEY PERUSES HIS PORTFOLIO.)

THE COURT: THERE IS A COUNT OF FOUR THAT WILL BE LISTED AT A FUTURE DATE OR NOT PROSECUTED AT THE TIME OF SENTENCING AS PART OF THIS AGREEMENT?

I'M REFERRING SPECIFICALLY WITHOUT, BUT NOT EXCLUSIVELY TO 30-05.

MR. MINEHART: JUST A MOMENT, YOUR HONOR.

THE COURT: ARE YOU RECOMMENDING 30-35 AND 36, RECKLESSLY ENDANGERING ANOTHER PERSON, TERRORISTIC THREATS, AGGRAVATED ASSAULT, AND SO FORTH?

MR. MINEHART: YOUR HONOR, THAT ACTUALLY BEGINS WITH CP-80-01, 1713 ON AND THAT WAS DISCHARGED, THE SENTENCE BEING AT 6-25, WHICH WAS INITIALLY BROUGHT IN HERE AND THAT WAS -- THAT HAS BEEN GIVEN THE DATE OF 12-05 AND 6-25. THE

CASE FOLLOWING THAT IS LISTED FOR 433 ON 12-5 AND THEY'VE ALL BEEN ACCOUNTED FOR. I'VE CHECKED WITH MR. LAWRENCE IN THE MUNICIPAL COURT CASES AND ALL THE COMMON PLEAS ACTIVE CASES ARE CONTINUED FOR YOUR HONOR, AND I READ OVER THE COMPUTER SHEET --

THE COURT: WELL, I'M CERTAINLY NOT GOING TO SIT DOWN AND STUDY THIS RECORD IN DETAIL AT THIS TIME BECAUSE IT'S A VOLUMINOUS MATTER AND I'M NOT GOING TO SENTENCE YOU. I'M NOT GOING TO SENTENCE YOU UNTIL FEBRUARY THE 3RD; THAT'S THE DATE OF THE DEFERRED SENTENCE?

YOU'VE BEEN GIVEN DETAINERS HERE, MR. MINEHART, BY THE CLERK OF QUARTER SESSIONS, FOUR, TO BE SPECIFIC. THEY ARE NUMBERS 1, 3, 5, AND 6--

COURT CLERK: THAT REFERS TO THE CASES ON THE LIST.

THE COURT: UH-HUH.

COURT CLERK: TWO OF THEM ARE NOLLE PROSSED AND THEY HAVE DETAINERS ON THEM.

THE COURT: WHAT IS THE EXPRESSED OF THE DEFENDANT'S CUSTODY OR BAIL?

MR. MINEHART: HE'S ON BAIL, YOUR HONOR,

AND --

THE COURT: HOW MUCH BAIL, TOTAL? HOW MUCH BAIL ARE YOU ON; DO YOU KNOW AT THIS TIME THE AMOUNT OF BAIL?

DEFENDANT CLIATT: YOUR HONOR, I WOULDN'T, BUT I GUESS IT'S -- WELL, I WOULD HAVE TO GUESS, JUDGE, BUT I AIN'T RIGHT.

COURT CLERK: THESE TWO, THE ONES THAT WERE DISCHARGED, HE SIGNED HIS OWN BOND AND ANOTHER IS FIVE THOUSAND.

MR. MINEHART: FIVE THOUSAND ON 1329.

THE COURT: THAT'S ON THESE TWO CASES?

COURT CLERK: UH-HUH.

MR. MINEHART: YES, SIR, YOUR HONOR. THAT'S ON 1067.

BY THE COURT: (TO DEFENDANT)

Q. WHERE ARE YOU NOW LIVING?

A. WITH MY MOTHER.

Q. WHERE?

A. 5148 GREENE STREET.

Q. AND WHAT ARE YOU DOING?

A. I WORK FOR MY UNCLE AT 2067 DURIEL AVENUE AT A DELICATESSEN.

Q. WHAT DO YOU DO AT THE DELICATESSEN?

A. I'M A CASHIER.

Q. AND WHO IS YOUR UNCLE?

A. BERNARD BEAMER.

Q. HOW DO YOU SPELL THAT NAME?

A. WHAT?

Q. HIS LAST NAME?

A. B-E-A-M-E-R.

Q. HOW LONG HAVE YOU WORKED THERE?

A. OH, YOUR HONOR, OVER A PERIOD OF YEARS, I'VE BEEN WORKING THERE OVER A PERIOD OF ABOUT SEVEN YEARS, OFF AND ON, BUT SINCE I HAVE BEEN ARRESTED IN PRISON, RIGHT, HE AGREED TO TAKE ME ON, YOU KNOW, TO TAKE ME HERE TODAY AND LET ME WORK THERE.

Q. THAT'S BEEN SINCE WHEN?

A. SINCE BACK IN JUNE.

Q. WERE YOU IN PRISON IN JUNE OF THIS YEAR?

A. YES, SIR, YOUR HONOR.

Q. WELL, DO YOU HAVE ANY CHILDREN?

A. YES, SIR, THREE.

Q. DO YOU SEE YOUR CHILDREN?

A. YES, I TOOK THE MOTHER OF MY CHILDREN AND SHE'S SITTING RIGHT HERE IN COURT. (INDICATING)

Q. HOW OLD ARE YOUR CHILDREN?

A. Teresa's one year old and Vivian is two.

Q. Any more?

A. And the third one is Daniel and he's seven.

Q. You don't live with the mother of the children, do you?

A. No, I don't, Your Honor.

Q. The mother of the two children, right, is Helen Ellis. Who does she live with?

A. She lives with me.

Q. The mother of the two children; are you supporting them?

A. The kids, yes, sir, Your Honor.

THE COURT: Do you have any position as to bail for detainers, Mr. Minehart?

MR. MINEHART: I believe the bail was part of the agreement, the bail would remain the same.

THE COURT: Well, I haven't heard that before.

MR. MINEHART: Well, Your Honor, we have no position as to bail.

THE COURT: How about the detainers?

MR. MINEHART: Your Honor, we have the

DETAINERS AND THAT'S AT THE DISCRETION OF THE COURT.

MR. DEUTSCH: IF YOUR HONOR PLEASE, MR. CLIATT IS SCHEDULED ON MONDAY TO TESTIFY IN ONE MATTER AND LATER IN DECEMBER AND I'M NOT SURE OF THE DATE THAT HE'S GOING TO TESTIFY IN ANOTHER MATTER. THESE ARE HOMICIDE CASES WHICH IT IS MY UNDERSTANDING THAT THE DISTRICT ATTORNEY'S OFFICE HAS A GREAT DEAL OF INTEREST IN GETTING HIS TESTIMONY.

THE COURT: WELL, I'VE NOT HEARD THAT MUCH ON THE RECORD ABOUT THAT; THE ONLY THING I HEARD WAS SOME REPRESENTATIVE FROM THE DISTRICT ATTORNEY'S OFFICE WAS GOING TO COME INTO COURT AT THE TIME OF SENTENCING. THE TESTIMONY ABOUT THE SENTENCING OR THE COOPERATION OF THE DEFENDANT WAS --

MR. DEUTSCH: THE HOMICIDE CASES HE HAS TESTIFIED TO SO FAR AND HOW MANY MORE HE IS SCHEDULED TO TESTIFY -- WELL, IT'S MY UNDERSTANDING THAT THERE IS ONE THAT HE HAS TESTIFIED IN AND THERE ARE TWO THAT HE IS NECESSARY TO, BECAUSE THOSE GENTLEMEN ARE IN JAIL AND THERE IS A THIRD

ONE WHERE THEY HAVE A BENCH WARRANT OUT, AND THEREFORE, --

IS THAT RIGHT?

DEFENDANT CLIATT: THAT'S RIGHT. THERE'S A BENCH WARRANT.

MR. DEUTSCH: THERE IS A BENCH WARRANT OUT FOR THREE DIFFERENT INDIVIDUALS CHARGED WITH TWO OF THE MURDERS AND THEY HAVE NOT CAUGHT THEM YET, AND HE IS TESTIFYING AGAINST ONE ON A FIRE-BOMBING.

THE COURT: IS IT POSSIBLE TO ASSUME THAT THAT WILL TAKE PLACE BEFORE HIS UTILIZATION AS A WITNESS IS COMPLETED?

MR. DEUTSCH: IT MAY BECAUSE THERE IS A BENCH WARRANT OUTSTANDING, IF YOUR HONOR PLEASE, AND THEY DIDN'T CATCH THOSE INDIVIDUALS AND I THINK NOT AS TO THE OTHER INDIVIDUALS, THEY ARE SCHEDULED TO GO TO TRIAL, BUT THAT'S BEFORE FEBRUARY THE 3RD --

THE COURT: MR. MINEHART, I WOULD ASK THAT THIS -- WHO IS THIS MEMBER OF THE HOMICIDE?

MR. MINEHART: THAT WOULD BE MR. ROSS, R-O-S-S, LENNY ROSS.

THE COURT: WELL, HE IS TO SUPPLY ME WITH A WRITTEN STATEMENT WELL IN ADVANCE OF THE DATE OF SENTENCING AS TO HIS COOPERATION, IF ANY.

MR. MINEHART: I WOULD ADVISE HIM, SIR.

THE COURT: I DON'T WANT TO HEAR THIS FOR THE FIRST TIME AT THE TIME OF SENTENCING. I WANT TO STUDY THE DOCUMENTS AND VERIFY THE --

MR. MINEHART: CERTAINLY, YOUR HONOR.

THE COURT: AND I WILL GIVE HIM THE RESPONSIBILITY OF CONVEYING THAT TO MR. ROSS THAT HE SHOULD HAVE IT IN MY POSSESSION NO LATER THAN JANUARY THE 4TH, WHICH WOULD GIVE ME ONE MONTH TO VERIFY SOME OF THE ITEMS AND EVALUATE AND ALSO, FOR THEM TO APPEAR ON THE DATE OF SENTENCING WITH ANY ADDITIONAL INFORMATION THAT THEY MAY HAVE ACQUIRED SINCE THE EXECUTION OF THAT LETTER.

MR. MINEHART: YES, SIR.

THE COURT: IS THAT CLEAR?

MR. MINEHART: YES, SIR, YOUR HONOR. I'LL MARK IT DOWN ON THE FILE.

THE COURT: AND MR. DEUTSCH, I IMPLORE YOU TO BE SURE THAT THE DISTRICT ATTORNEY DOES THAT.

MR. DEUTSCH: I'LL CONTACT MR. ROSS MYSELF.

THE COURT: YOUR CLIENT IS CHARGED WITH A PENALTY AND HE HAS PLEADED GUILTY TO SOME SEVERE OFFENSES IN WHICH THERE WOULD BE A POSSIBLE PRISON SENTENCE. I DON'T WANT TO SENTENCE HIM WITHOUT THE BENEFIT OF ALL OF THE INFORMATION THAT IS AVAILABLE, WHETHER IT BE AGGRAVATING OR MITIGATING IN NATURE.

MR. DEUTSCH: OBVIOUSLY, THIS IS VERY MITIGATING; WE WOULD WANT YOUR HONOR TO HAVE ALL OF IT.

THE COURT: I WANT IT IN ADVANCE. I DON'T WANT THE GENERAL TERMS. I WANT SPECIFICALLY AS TO WHAT TYPE OF WITNESSES AND WHAT THE TESTIMONY IS AND THE NAMES, THE NAMES OF THE CASES AND WHERE IT WAS TRIED AND BEFORE WHOM AND THE PRESIDING JUDGE AND THE JURY, AND ALL THE OTHER INFORMATION. I THINK YOUR CLIENT IS ENTITLED TO THAT AND THE COURT IS CERTAINLY ENTITLED TO IT. THE COURT HAS TO MAKE A DECISION AND BEFORE MAKING THAT DECISION -- BECAUSE, LOOKING AT YOUR CLIENT'S RECORD, HE HAS BEEN IN TROUBLE ALMOST CONTINUOUSLY FOR QUITE A FEW YEARS.

DO YOU HAVE ANY COMMENT ON THAT, MR.

MINEHART?

MR. MINEHART: No, YOUR HONOR.

THE COURT: I WOULD ALSO WANT THE NARCOTIC OFFICER, WHOEVER IS IN CHARGE IN THIS INVESTIGATION, BEFORE ME AND THE DISTRICT ATTORNEY BEFORE ME AND A STATEMENT AS TO THIS DEFENDANT'S ACTIVITY AND I THINK, EITHER WRITTEN OR IN PERSON, AT THE TIME OF SENTENCING.

MR. MINEHART: OFFICER LEE, I BELIEVE, INTENDS TO BE HERE AT THE TIME OF SENTENCING.

THE COURT: IN THIS CASE, HE'S PLEADING GUILTY AND HE IS THE ONE THAT I AM SENTENCING.

UNIDENTIFIED COLORED MALE POLICE OFFICER: I'M GOING TO BE HERE.

THE COURT: OKAY.

MR. MINEHART: ON FEBRUARY THE 3RD.

BY THE COURT: (TO DEFENDANT)

Q. MR. CLIATT, HAVE YOU USED DRUGS IN THE PAST?

A. (SHAKES HEAD NEGATIVELY.) NO, SIR.

Q. YOU NEVER USED DRUGS YOURSELF?

A. (SHAKES HEAD NEGATIVELY.) NO, SIR.

Q. ANY KIND OF DRUGS?

A. YOUR HONOR, WHEN YOU SAY DRUGS, USE, NOW --

Q. ILLEGITMATE DRUGS?

A. YES, YES, SIR, YOUR HONOR.

Q. NOT RECENT POSSESSION --

A. YES, I HAVE USED THEM. I THOUGHT YOU WERE TALKING ABOUT A SPECIFIC DRUG, HEROIN.

Q. WELL, WHAT DRUGS HAVE YOU USED?

A. COCAINE AND CODEINE AND SYRUP.

Q. HAVE YOU EVER BEEN TREATED FOR ANY DRUGS?

A. (SHAKES HEAD NEGATIVELY.) NO.

Q. ANY DRUG ABUSE?

A. NO.

Q. HAVE YOU EVER HAD ANY DRINKING OR ALCOHOLIC PROBLEMS?

A. NO, SIR. (SHAKES HEAD NEGATIVELY.)

Q. WELL, I'M GOING TO DEFER THIS MATTER UNTIL FEBRUARY THE 3RD; I BELIEVE THAT IS THE DATE THAT WE SET?

A. YES, SIR, YOUR HONOR.

COURT CRIER: YES, SIR, YOUR HONOR.

THE COURT: I'M GOING TO ASK FOR A PRESENTENCE REPORT AND A MENTAL HEALTH EVALUATION AND A DRUG EVALUATION AND AN ABUSIVE EVALUATION REPORT. PLUS, I WANT A WRITTEN DOCUMENT AND

AGAIN, I REPEAT, MR. ROSS OF THE DISTRICT ATTORNEY'S OFFICE.

MR. MINEHART: YES, SIR.

THE COURT: THAT'S ALL PART OF THE PAGE THAT I WILL LOOK AT, AMONG THE OTHER THINGS IN DETERMINING THE APPROPRIATE SENTENCING.

DO YOU HAVE ANYTHING YOU WANT TO SAY, MR. CLIATT?

DEFENDANT CLIATT: (SHAKES HEAD NEGATIVELY.)

THE COURT: WELL, YOU HAVE THE OPPORTUNITY IF YOU WISH TO PRESENT ANY FURTHER TESTIMONY OR WITNESSES RELATIVE TO YOUR SENTENCING.

DEFENDANT CLIATT: YES, SIR.

THE COURT: BAIL WILL REMAIN THE SAME. I'M NOT LODGING ANY DETAINERS.

DEFENDANT CLIATT: THANK YOU.

(WHEREUPON COURT WAS ADJOURNED.)

EXHIBIT K

Commonwealth v. Harvey

PCRA Court Opinion

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION - CRIMINAL SECTION

COMMONWEALTH	:	JULY TERM, 1983 NO. 0305
vs	:	
ANDRE HARVEY	:	

RECEIVED
JUL 14 1999
PCRA UNIT

OPINION AND ORDER

BRINKLEY, J. JULY 14, 1999

David M. McGlaughlin, Esquire, on behalf of Petitioner, has filed an Amended Petition for relief pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §9541 et seq.

I. HISTORY

1. On May 9, 1984, following a jury trial, Petitioner and his two co-defendants were found guilty of first degree murder, conspiracy and violations of the Uniform Firearms Act. Trial counsel for Petitioner was Barry Denker, Esquire. The Honorable Francis Biunno presided.

2. The Commonwealth presented evidence that on October 27, 1982, Petitioner and his two co-defendants pulled up to the corner of 27th and Oxford Streets in a blue Gremlin, got out of the car, and began to argue with Fred Rainey, who had been standing on the

corner. Subsequently, all three co-defendants pointed guns at Rainey and fired shots. Rainey ran down the street and the three accomplices got back in the car and fired more shots, causing the victim's death.

Mr. Charles Atwell was an eyewitness to the crime and apparently was later threatened by the defendants to not reveal what he had seen.[1] On May 17, 1983, Atwell himself was arrested and charged with two counts of aggravated assault in an unrelated case (N.T. 4/26/84, p. 28). While in custody on the charges, Atwell contacted homicide detectives and gave a statement identifying Petitioner and co-defendants Williams and White as the gunmen.

3. Newly appointed counsel, Stanley Bluestine, filed post-verdict motions on behalf of the Petitioner. On February 3, 1987, the trial court denied the motions and sentenced Petitioner to a term of life imprisonment for murder and five to ten consecutive years for conspiracy. An appeal was filed by Mr. Bluestine, on behalf of Petitioner. The trial court filed an opinion and on August 31, 1987, the Superior Court affirmed the judgment of

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[1]At Petitioner's trial, evidence was presented that two weeks after the incident Petitioner and his co-defendant, Russell Williams, fired shots in the direction of the witness when he was standing on a street corner (See N.T. 4/26/84, pp. 24-25, 103).

sentence. Petition for allowance of appeal was denied by the Supreme Court on September 12, 1990.

4. On December 28, 1992, Burton Rose, Esquire, filed an Amended Petition on behalf of Petitioner. The petition was denied on December 10, 1993. On September 1, 1994, the Superior Court affirmed the PCRA court's denial of the petition.

5. On November 10, 1995, present counsel filed a second PCRA Amended Petition on Petitioner's behalf. An Evidentiary Hearing was held on February 18 and 19, 1997.[2] On July 2, 1997, this Court held the matter under advisement.

II. STANDARD OF REVIEW

A. MULTIPLE PETITIONS

A second or multiple petition for post conviction relief need not be considered unless the Defendant can make out a strong prima facie showing of miscarriage of justice. Commonwealth v.Lawson, 519 Pa. 504, 549 A.2d 107 (1988); Commonwealth v. Blackwell, 384 Pa.Super.251, 558 A.2d 107 (1989). The Defendant's allegation did not meet that standard.

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[2]Petitioner's claims were consolidated with those of co-defendants Russell Williams and Harvey White for hearing purposes since similar issues were raised by all three Petitioners.

B. WAIVER

All issues that are not raised in the Defendant's first post-conviction petition are deemed to be waived. Commonwealth v. Eaddy, 419 Pa.Super. 78, 614 A.2d 1203 (1992), appeal denied, 626 A.2d 1155 (Pa. 1993).

In order for the Petitioner to overcome waiver, he must meet the conditions set forth in Section 9543 (a) (3) of the Act by the showing that the allegations of error have resulted in the conviction or affirmance of an innocent individual. Commonwealth v. Dukeman, 413 Pa.Super. 397, 605 A.2d 418 (1992); Commonwealth v. Ryan, 394 Pa.Super. 373, 575 A.2d 949 (1990). Petitioner's allegations did not meet that requirement.

C. PREVIOUSLY LITIGATED ISSUES

A Petitioner is not entitled to PCRA review on an issue that has been previously litigated. 42 Pa.C.S.A. §9543 (a) (3). An issue has been previously litigated if: "(1) it has been raised in the trial court, the trial court has ruled on the merits of the issue and the Petitioner did not appeal; (2) the highest appellate court in which Petitioner could have had review as a matter of right has ruled on the merits of three issue; or (3) it has been raised in and decided in a proceeding collaterally attacking the conviction of sentence." 42 Pa.C.R.A. §9544(a).

"An issue may not be relitigated merely because a new or different theory is posited as a basis for reexamining an issue that has already been decided." Commonwealth v. Senk, 496 Pa. 630, 437 A.2d 1218, 1220 (1981); Commonwealth v. Tenner, 377 Pa.Super. 540, 547 A.2d 1194, 1997 (1988), appeal denied, 562 A.2d 826 (Pa. 1989).

D. AFTER-DISCOVERED EVIDENCE

Pursuant to Section 9543 (a) (2) (vi) of the PCRA, a Petitioner is entitled to post-conviction relief if he pleads and proves that his conviction resulted from: "The unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced."

In Commonwealth v. Tizer, 525 Pa. 315, 580 A.2d 305 (1990), our Supreme Court interpreted a previous, identical provision to require that the following four requirements be satisfied: (1) the evidence must have been discovered only after trial and must not have been discoverable through the exercise of reasonable diligence; (2) it must be exculpatory and not merely cumulative or corroborative; (3) it must not be used only to impeach the credibility of a witness; and (4) it must be of such nature and character that it would compel a different result. See also Commonwealth v. Frey, 512 Pa.557, 517, A.2d 1265 (1986).

III. ISSUES

The following issues were raised in the 1995 amended PCRA petition: (1) Commonwealth witness, Charles Atwell, was supplied with sexual favors in exchange for his false eyewitness testimony, and the testimony of a post-incident confrontation with Mr. Harvey;[3]

(2) Atwell testified falsely about his favorable treatment by the Commonwealth whereby he received a windfall of a nol pros of his open assault charges in exchange for his testimony, which was not harmless error;[4]

(3) The nol pros of Atwell's open aggravated assault charges was secured by police misconduct, and illegal acts.[5]

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[3]The sole issue addressed at the February 18th and 19th Evidentiary Hearing was whether sexual favors were provided to Charles Atwell in order to induce him to falsely implicate the Petitioner for the crime for which he was convicted. Accordingly, this Opinion will discuss only this issue.

[4]With regard to Petitioner's claim that Atwell testified against him in exchange for dropping Mr. Atwell's aggravated assault charges, Mr. Flannery, the assistant district attorney on the case, testified that the charges were nolle prossed because the complaining witness never showed up to the preliminary hearing (N.T. 5/1/84, pp.4-24)

[5]Petitioner alleges that he was denied a fair trial because the Commonwealth knowingly failed to disclose the material inducements and/or other considerations or promises made to Charles Atwell. There is no credible proof that Charles Atwell was offered a deal or was made any promises other than his request to be transferred from the Detention Center to Holmesburg Prison, which was part of his testimony during the original trial (N.T. 4-26-84, p.31).

(4) The evidence offered by Marvin McClain was tainted by McClain's relationship with Atwell.[6]

IV. DISCUSSION

Petitioner claims that police provided witness Charles Atwell with sexual encounters with women in the Police Administration Building (PAB), in exchange for his testimony implicating the Petitioner and his co-defendants in the murder of Fred Rainey.

The burden of proving the ground upon which post-conviction relief is requested, rests upon the Petitioner. Commonwealth v. Baker, 352 Pa.Super. 260, 507 A.2d 872 (1986); Commonwealth v. Fox, 272 Pa.Super. 8, 414 A.2d 642 (1979). In order to obtain relief under the PCRA, a petitioner has the burden of pleading and proving by a preponderance of the evidence that his or her conviction or sentence resulted from at least one of the errors set forth in Section 9543(a)(2), he or she has not previously litigated or waived any of the issues he or she raises, and the decision to forego litigating the issues was not tactical. 42 Pa.C.S.A. §9543(a).

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[6] On or about June 5, 1998, Petitioner submitted this claim as a supplemental issue. However, this issue was waived as it was not raised previously on post-trial motions, on direct appeal or on his first PCRA Petition. Moreover, it is well settled that a second or multiple petition for post-conviction relief need not be considered unless Defendant can make out a strong prima facie showing of miscarriage of justice. Lawson, supra. This petitioner has failed to do.

Passing on the credibility of witnesses is a function solely within the province of the finder of fact, which is free to believe all, part, or none of the evidence. Commonwealth v. Woods, 432 Pa.Super. 428, 638 A.2d 1013, 1015 (1994); Commonwealth v. Mayfield, 401 Pa.Super. 560, 585 A.2d 1069 (1991). Furthermore, a judge as a fact-finder is presumed to be able to disregard inadmissible or incompetent evidence. Commonwealth v. Glover, 266 Pa.Super. 531, 405 A.2d 945 (1979).

In the instant case, the Court conducted an evidentiary hearing on February 18 and 19, 1997 at which testimony was presented from five witnesses. Those witnesses were Charles Atwell and Detective Gerrard for the Commonwealth and Douglas Atwell, Maxie Harris-Jiles and Sharon Artis for Petitioners. After a review of the record and the testimony given at the evidentiary hearing, this Court finds the testimony of Commonwealth witness Charles Atwell credible and that of Petitioner's witnesses Douglas Atwell, Sharon Artis and Maxie Harris-Jiles incredible, and thus finds Petitioner's claims to be without merit.

Nearly thirteen years elapsed between the original trial date and the date of the evidentiary hearing. All of the witnesses presented at the evidentiary hearing in February 1997 needed their memories refreshed or suffered impeachment by the adverse party. Notwithstanding the foregoing, this Court has resolved the issue of credibility in favor of the Commonwealth. Charles Atwell

testified credibly that he was not provided with sexual favors to induce him to falsely implicate Petitioner for the crime for which he was convicted (N.T. 2/18/97, pp. 30, 50-51, 67, 74-75). Mr. Atwell acknowledged that he was transported from the county prison to the Police Administration Building to provide information in an ongoing police investigation in this case. While at the PAB, he acknowledged visits with Maxie Harris-Jiles, whom he listed on visitor logs as his wife. However, at that time, she was, in fact, either a current or former girlfriend. More importantly, however, she was the mother of his children (N.T. 2/18/97, pp. 59-69).

Atwell also testified credibly that the purpose of his visits with Ms. Harris-Jiles was to visit with his children (N.T. 2/19/97, p. 76). Even Ms. Harris-Jiles and Detective Gerrard corroborate the fact that visits included the presence of one or two young children under the age of five years (N.T. 2/18/97, pp. 72, 2/19/97, pp. 109, 116). Moreover, Atwell testified that the only consideration he requested and which was granted during his cooperation with homicide detectives preceding the jury trial in this case was transfer from the same county prison where the Petitioner and his co-defendants were housed (N.T. 4/26/84, pp. 31-33, 56-59; N.T. 6/30/83, p. 61). This request has the ring of truth since there is a claim that Atwell was himself shot at by two of the Petitioners following the killing of Mr. Rainey (N.T.

4/26/84, pp. 24-25, 103). Moreover, Ms. Harris-Jiles claimed that her life and that of her children were threatened during the course of this investigation (N.T. 2/18/97, pp. 67-68, 2/19/97, p. 209). Thus, a request for transfer from the same prison was appropriate and possibly necessary to protect Mr. Atwell from any danger while awaiting trial.

Furthermore, Mr. Atwell's testimony at trial was consistent with that of at least three other eyewitnesses. In addition, circumstantial evidence regarding the theft of the vehicle involved in the shooting and the presence of co-defendant Williams' fingerprints on that vehicle following the shooting, support Atwell's testimony regarding Mr. Harvey and his co-defendants.[7]

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[7]The evidence, as summarized by the trial court was as follows: On October 27, 1982 at approximately 3:15 p.m., Fred Rainey was shot several times while in the vicinity of 27th and Oxford Streets in Philadelphia, Pennsylvania. **Theodore Young**, age 15, who lived at 1623 North 27th Street, testified that he was the neighbor of the victim and that at the time of the shooting he was walking on 27th Street toward Oxford when he saw the victim standing outside of 1603 North 27th Street. Mr. Rainey was talking to some people inside a blue Gremlin hatchback automobile. Mr. Young was about twelve to fifteen feet away from the victim when he saw the victim turn and start to run in Mr. Young's direction. Mr. Young heard two shots fired from the Gremlin and saw the victim fall to the ground. As Mr. Young hid behind a parked car and covered his head, he then saw the Gremlin speed away.

Robert Bently testified that on October 27, 1982 at about 1:30 p.m., he saw the defendant Howard White driving a blue Gremlin. Later he saw the victim, Fred Rainey, who he had known for three or four years, standing near a blue Grémlin and arguing with someone inside the car. Mr. Bently heard shots coming from the area of the blue Gremlin which then sped off with three men

in it. After the shooting, Mr. Bently saw the victim run down the street and collapse on the pavement.

Charles Atwell, age 30, testified that on October 27, 1982 at about 2:50 p.m., he was walking with **Marvin McClain** on Oxford Street approximately a half a block from 27th Street. He said he saw the victim, Fred Rainey, standing on the corner of 27th and Oxford Streets. He then saw a blue Gremlin driven by the defendant Howard White and occupied by Andre Harvey and Russell Williams traveling from 26th to 27th Street on Oxford Street. He saw the Gremlin pull up to the curb near Rainey, [and] he saw all three defendants get out of the car. Hands were moving in an apparent argument. Then Atwell saw all three defendants point at Rainey, he heard shots and saw all three defendants' hands jerk. Rainey ran north on 27th Street and Atwell lost sight of him. The defendants then all got back into the car and Mr. Atwell heard two more shots. Mr. Atwell further testified that he knew the victim and all of the defendants for several years. He also testified that he knew that Levonia Davidson was Howard White's girlfriend and he had seen them in the past together in the blue Gremlin.

Marvin McClain testified that On October 27, 1982, he was with Charles Atwell about one half block away from 27th and Oxford Streets when he saw the victim and the three defendants arguing. He saw a gun in the defendant Andre Harvey's hand and heard a shot from the area where the defendant Russell Williams was standing. He ran toward the corner and heard several more shots. He then saw Howard White get into the blue Gremlin and at that time saw a gun in defendant White's hand. He also saw the defendant Andre Harvey with a gun in his hand standing over the victim's prone body and kick the victim in the head.

Officer Irvin Henderson testified that on October 27, 1982 at approximately 5:35 p.m., he went to 2442 W. Sharswood Street, Philadelphia, Pennsylvania and met with Levonia Davidson, who reported that her 1976 blue Gremlin, license number BYE 676 had been stolen. This car was recovered undamaged on October 28, 1982 at 1:35 a.m., by Detective William Thomas. Subsequently, one latent fingerprint was taken from the top of the exterior of the passenger door and identified as being the first digit of the left finger of Russell Williams.

Dr. Paul J. Foyer, an assistant medical examiner for the county of Philadelphia, testified that he performed an autopsy on Fred Rainey and that the victim's body had five bullet tracks from at least four shots and that the cause of death was gunshot

Thus, Atwell's testimony was deemed credible at trial and it remains credible in light of Petitioner's new claims regarding Atwell's alleged motive.

Moreover, in making a credibility finding in favor of the Commonwealth, this Court specifically rejects the testimony of Douglas Atwell, Sharon Artis and Maxie Harris-Jiles. First, Douglas Atwell was housed at Graterford Prison with Petitioner Harvey and co-defendant Howard White. He testified that he had conversations about this case with them after having read about the Superior Court's ruling in Commonwealth v. Lester, 572 A.2d 694 (Pa.Super. 1990). Thus, he may have had motivation to fabricate his testimony.[8] Moreover, Douglas Atwell's testimony that he brought angel dust to the PAB and gave it, not to his Uncle Charles Atwell, but to Detective Gerrard is quite incredible.

Second, with regard to the testimony of Sharon Artis, her memory was quite diminished. Many details escaped her memory, but,

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wounds of the chest, abdomen and extremities.

[8]In Lester, the Superior Court granted relief to Petitioner where Petitioner claimed that the same officers involved in the instant case, Detectives Gerrard and Gilbert, permitted Lester to have sex at the PAB in order to induce Lester into giving a confession following his arrest. Involvement of the same officers in the case at bar cannot raise a presumption about their activity for the exact reasons at issue in Lester. Each case must be reviewed on its own merits.

apparently, the only thing she could remember was going to the PAB, visiting with her then boyfriend, Mr. Singleton and having sex with him the two or three times she visited him. However, there were no police logs introduced indicating that Ms. Artis ever had visited Mr. Singleton while he was in custody at the PAB. Therefore, based upon Ms. Artis' severely diminished memory, less weight was accorded her testimony.

Lastly, with regard to the testimony of Maxie Harris-Jiles, the severe failure of her memory, likewise, renders her testimony incredible. Ms. Harris-Jiles testified that she suffers from a nervous condition called Steven Johnson Syndrome, which caused memory loss in 1983 and 1984. She testified further that she still suffered from memory loss at the time of the February 1997 evidentiary hearing (N.T. 2-18-97, pp.71-72). Moreover, Ms. Harris-Jiles memory was so impaired that she did not even recall having given her own statement on December 20, 1984 to police regarding threats against her life and that of her children (N.T. 2-18-97 pp.67-70).

Thus, Petitioner's argument is based solely upon speculation. He offers no credible evidence to prove that any deals or promises were made in exchange for the testimony of Mr. Atwell other than that to which Atwell and Assistant District Attorney Flannery testified. Nor is there sufficient credible evidence to support

the notion that Mr. Atwell was given sexual favors in order to induce him to testify falsely against Petitioner and his co-defendants at the Police Administration Building.

Furthermore, with regard to issue of after-discovered evidence, as stated in Tizer, infra, four requirements must be met: (1) the evidence must have been discovered only after trial and must not have been discoverable through the exercise of reasonable diligence; (2) it must be exculpatory and not merely cumulative or corroborative; (3) it must not be used only to impeach the credibility of a witness; and (4) it must be of such nature and character that it would compel a different result. Petitioner has failed to meet these requirements. Petitioner's claims regarding sexual favors given as an inducement to Charles Atwell to testify falsely against Petitioner, even if believed, would be used only to impeach the credibility of Atwell. Moreover, because overwhelming evidence was adduced at trial including eyewitness testimony from three persons other than Atwell, the sexual favors claim is not of such nature and character that it would compel a different result. Thus, this claim is meritless.

Likewise, Petitioner's claim of violation of due process and fair trial rights under the U.S. and Pennsylvania Constitutions is equally meritless. As discussed previously, Commonwealth Attorney Flannery testified that aggravated assault charges against Atwell

were nolle prossed because the complaining witness failed to appear at the preliminary hearing (N.T. 5-1-84, pp.4-24). Additionally, Atwell testified that the only consideration he requested, which was granted in exchange for his testimony was transfer from the same prison where Petitioner and his co-defendants were being held. This request was reasonable under the circumstances and was granted by the Commonwealth. Thus, there was no failure, either on the part of the Commonwealth or Atwell, to disclose any promise or inducements to Atwell in exchange for his testimony. Therefore, the truth determining process was not undermined and the defense was not prohibited from revealing to the jury, through cross-examination, the extent of the promises or inducements to Atwell in exchange for his cooperation.[9]

In conclusion, Petitioner failed to meet his burden of proof by a preponderance of credible evidence that he is entitled to PCRA relief. He failed to make out a prima facie showing of miscarriage of justice; he made no showing that the allegations of error have resulted in the conviction of an innocent individual and evidence

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[9]To the contrary, Mr. Seay, counsel for co-defendant Williams, vigorously cross-examined Atwell in an attempt to show that he received favorable treatment in exchange for his testimony. But since there was no other "deal" other than transfer from one institution to another, Mr. Seay was limited in his questioning.

O R D E R

AND NOW, this 14th day of July, 1999, after a review of the pleadings and record it is hereby ORDERED and DECREED that Petitioner's claim for post-conviction relief is denied.

BY THE COURT:

G Bunkley J.

EXHIBIT L

Court summary for Robert Mickens

First Judicial District of Pennsylvania
Court Summary

Mickens, Robert
DOB: [redacted]
Sex: Male
Eyes: Brown
Hair: Gray or Partially Gray
Race: Black

Aliases:
Robert Mickens

Closed

Philadelphia

CP-51-CR-0503611-1973 Proc Status: Completed DC No: 7306004143 OTN:

Arrest Dt: 04/30/1973 Disp Date: 08/15/1973 Disp Judge: Wilson, Calvin T.
Def Atty: Leidner, Milton S. - (PR)

Seq No	Sentence Dt.	Statute / Sentence Type	Grade / Program Period	Description	Sentence Length	Disposition
1		18 § 6106		FIREARMS WITHOUT LICENSE-IN AUTO		Guilty
	08/15/1973	Probation			Min: 3 Year(s)	

CP-51-CR-0311001-1984 Proc Status: Completed DC No: 8414004870 OTN:M1803406

Arrest Dt: 02/28/1984 Disp Date: 10/10/1985 Disp Judge: Clarke, Eugene Jr.
Def Atty: Moore, Thomas William - (CA)

Seq No	Sentence Dt.	Statute / Sentence Type	Grade / Program Period	Description	Sentence Length	Disposition
7		18 § 3121		RAPE		Guilty Plea
	10/10/1985	Confinement				
9		18 § 903		CRIMINAL CONSPIRACY		Guilty Plea
	10/10/1985	Probation			Min: 5 Year(s)	

CP-51-CR-0947661-1991 Proc Status: Completed DC No: 9035014949 OTN:M4337325

Arrest Dt: 03/10/1990 Disp Date: 05/16/1997 Disp Judge: Davis, Legrome D.
Def Atty: Defender Association of Philadelphia - (PD)

Seq No	Sentence Dt.	Statute / Sentence Type	Grade / Program Period	Description	Sentence Length	Disposition
1		35 § 780-113 §§ A16		KNOWING/INTENTIONALLY POSS CONTROLLED SUBST		Guilty Plea
	05/16/1997	No Further Penalty				
2		35 § 780-113 §§ A30		MFG/DEL/ OR POSS W/I MFG OR DEL CONTRL SUBS		Guilty Plea
	05/16/1997	Confinement			Max: 23 Month(s)	
	05/16/1997	Probation			Min: 4 Year(s)	

CP-51-CR-0308441-2002 Proc Status: Completed DC No: 0109016040 OTN:N0795524

Arrest Dt: 06/02/2001 Disp Date: 06/27/2002 Disp Judge: Temin, Carolyn Engel
Def Atty: Henry, Todd Edward - (PR)

Seq No	Sentence Dt.	Statute / Sentence Type	Grade / Program Period	Description	Sentence Length	Disposition

Recent entries made in the court filing offices may not be immediately reflected on the court summary report. Neither the courts of the Unified Judicial System of the Commonwealth of Pennsylvania nor the Administrative Office of Pennsylvania Courts assume any liability for inaccurate or delayed data, errors or omissions on these reports. Court Summary Report information should not be used in place of a criminal history background check which can only be provided by the Pennsylvania State Police. Moreover an employer who does not comply with the provisions of the Criminal History Record Information Act may be subject to civil liability as set forth in 18 Pa.C.S. Section 9183.

Please note that if the offense disposition information is blank, this only means that there is not a "final disposition" recorded in the Common Pleas Criminal Court Case Management System for this offense. In such an instance, you must view the public web docket sheet of the case wherein the offense is charged in order to determine what the most up-to-date disposition information is for the offense.

First Judicial District of Pennsylvania
Court Summary

Mickens, Robert (Continued)
Closed (Continued)
Philadelphia (Continued)

Seq No	Statute	Grade	Description	Disposition
	Sentence Dt. / Sentence Type	Program Period	Sentence Length	
1	18 § 3921		THEFT BY UNLAWFUL TAKING OR DISPOSITION	Guilty Plea
	06/27/2002 Confinement		Min: 2 Year(s) Max: 4 Year(s)	
7	18 § 903		CRIMINAL CONSPIRACY	Guilty Plea
	06/27/2002 Probation		Min: 5 Year(s)	

MC-51-CR-0305821-1990 Proc Status: Completed DC No: 9035014949 OTN:M4337325
Arrest Dt: 03/10/1990 Disp Date: 09/20/1991 Disp Judge: Kirkland, Lydia Y.
Def Atty: Defender Association of Philadelphia - (PD)

Seq No	Statute	Grade	Description	Disposition
1	35 § 780-113 §§ A30		MFG/DEL/ OR POSS W/I MFG OR DEL CONTRL SUBS	Held for Court
2	35 § 780-113 §§ A16		KNOWING/INTENTIONALLY POSS CONTROLLED SUBST	Held for Court

MC-51-CR-0108481-2001 Proc Status: Completed DC No: 0108000809 OTN:N0505606
Arrest Dt: 01/06/2001 Disp Date: 08/15/2001 Disp Judge: Mekel, Edward G.
Def Atty: Henry, Todd Edward - (PR)

Seq No	Statute	Grade	Description	Disposition
	Sentence Dt. / Sentence Type	Program Period	Sentence Length	
1	18 § 3921		THEFT BY UNLAWFUL TAKING OR DISPOSITION	Guilty
	08/15/2001 Probation			
2	18 § 3925		THEFT BY RECEIVING STOLEN PROPERTY	Guilty
	08/15/2001 Probation			
3	18 § 3929		RETAIL THEFT	Guilty
	08/15/2001 Probation			

MC-51-CR-0556761-2001 Proc Status: Completed DC No: 0109016040 OTN:N0795524
Arrest Dt: 06/02/2001 Disp Date: 03/08/2002 Disp Judge: Anderson, Linda F.
Def Atty: Henry, Todd Edward - (PR)

Seq No	Statute	Grade	Description	Disposition
1	18 § 3921		THEFT BY UNLAWFUL TAKING OR DISPOSITION	Held for Court
3	18 § 3927		THEFT FAIL MK REQ DISP OF FUNDS RECEIVED	Held for Court
4	18 § 4113		MISAP ENTRUST PROP & PROP GOVT/FIN INST	Held for Court

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First Judicial District of Pennsylvania
Court Summary

Mickens, Robert (Continued)
Closed (Continued)
Philadelphia (Continued)

Seq No	Statute	Grade	Description	Disposition
5	18 § 3925		THEFT BY RECEIVING STOLEN PROPERTY	Held for Court
6	18 § 903		CRIMINAL CONSPIRACY	Held for Court
7	18 § 4906		FALSE REPORTS TO LAW ENFORCEMT AUTH INCRIM	Held for Court

Archived

MC-51-CR-0127371-1973 Comm. v. Mickens, Robert

MC-51-CR-0222681-1984 Comm. v. Mickens, Robert

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