IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 485 Capital Appeal Division

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

vs.

MUMIA ABU-JAMAL,
Appellant.

BRIEF FOR APPELLANT

Appeal from Order of the Court of Common Pleas, First Judicial District, Philadelphia County, Criminal Section, Denying Petition Under the Post Conviction Relief Act, at Nos. 8201-1357-59, January Term 2005

ROBERT R. BRYAN
Law Offices of Robert R. Bryan
2088 Union Street, Suite 4
San Francisco, California 94123-4124
Telephone: (415) 292-2400
Fax: (415) 292-4878
E-Mail: BryanlawSF@aol.com

Lead counsel for Appellant,
Mumia Abu-Jamal

JUDITH L. RITTER, Pa. Bar. No. 73429
Widener University School of Law
P.O. Box 7474
4601 Concord Pike
Wilmington, Delaware 19801
Telephone: (302) 477-2121
Fax: 302-477-2227
E-Mail: JLRitter@widener.edu

Associate counsel for Appellant,
Mumia Abu-Jamal

PAUL GEORGE, Pa. Bar No. 25722
McKinney and George
239 S. Camac Street
Philadelphia, Pennsylvania 19107
Telephone: (215) 735-0598
Fax: (215) 735-0599
E-Mail:

pgeorge@mckinneyandgeorge.com

Local counsel for Appellant,
Mumia Abu-Jamal

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATUTES

STATEMENT OF JURISDICTION

This is the appeal of a capital post-conviction (PCRA) case. The lower court dismissed Appellant's petition without a hearing pursuant to Pa. R. Crim. P. § 909 B(2)(b). This Court has jurisdiction pursuant to 42 Pa. C.S. § 9546(d). It provides in relevant part:

> Review of order is death penalty cases – A final order under this subchapter is a case in which the death penalty has been imposed shall be directly appealable only to the Supreme Court pursuant to its rules.

Id.

Further, this Court has jurisdiction pursuant to *Commonwealth v. Bryant*, 780 A.2d 646 (Pa. 2001); *In re Suspension of the Capital Unitary Review Act and Related Sections of Act No. 1995-32* (SSI); and Amendment of Chapter 1500, Rules of Criminal Procedure, No. 22 Crim. Proc. Rules, Docket No. 2 , Aug. 11, 1997.

SCOPE AND STANDARD OF REVIEW

This Court reviews whether the ruling of the PCRA court is supported by the record and free of legal error. *Commonwealth v. Strong,* 761 A.2d 1167, 1170 n.3 (Pa. 2000). Appellant submits that the lower court did not fully and fairly resolve the claims raised. Consequently, a remand for fair adjudication is appropriate unless this Court grants relief. In this regard the standard of review is whether Appellant has presented issues of fact which, when proven, would entitle him to relief. *Commonwealth v. Sherard,* 394 A.2d 971 (Pa. 1978).

ORDERS IN QUESTION

The court below entered an order denying Appellant's PCRA petition. Order, June 17, 2005. An opinion was earlier rendered announcing the court's intention to dismiss the petition. Memorandum and Order, May 27, 2005. Copies of the orders are attached hereto.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the lower court improperly dismissed Appellant's PCRA petition without a hearing where Appellant's petition contained newly discovered evidence that, if credible, entitle him to a new trial because it establishes that the state manipulated a purported eyewitness to falsely identify Appellant as the shooter, in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article One, Section 9 of the Pennsylvania Constitution.

2. Whether the lower court improperly dismissed Appellant's PCRA petition without a hearing where Appellant's petition contained newly discovered evidence that, if credible, entitle him to a new trial because it establishes that he was found guilty and sentenced to death through the prosecutorial use of a fabricated confession, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article One, Section 9 of the Pennsylvania Constitution.

3. Whether Appellant's PCRA petition was timely filed pursuant to 42 Pa.C.S.A. sec. 9545(b)(1)(i),(ii), because the facts upon which the PCRA claims are predicated were unknown to him and could not have been ascertained by the exercise of due diligence and because of governmental interference.

STATEMENT OF CASE

Based upon newly discovered evidence of prosecutorial and police fraud resulting in the conviction and death judgment rendered against Appellant, a PCRA petition was filed in the Court of Common Pleas. *See* Petition for Habeas Corpus Relief Pursuant To Article I, Section 14 of the Pennsylvania Constitution, and for Statutory Post-Conviction Relief Under the Post-Conviction Relief Act, 42 Pa. C.S. § 9541 *et* seq, Dec. 8, 2003 [hereinafter Petition for Habeas Corpus] . The new evidence undermined the fairness of the 1982 trial. The Commonwealth then sought dismissal of the petition as untimely, *see* Appellee's Motion to Dismiss Untimely Third PCRA Petition, to which Appellant responded. *See* Appellant's Reply to Motion To Dismiss, Feb. 13, 2004.

Counsel were subsequently advised by the lower court that a hearing would be held on February 11, 2005. Order, Dec. 16, 2004. The lower court then canceled the hearing based upon its belief that this Court's then recent holding in *Commonwealth v. Johnson,* 863 A.2d 423 (Pa. 2004) precluded the lower court's exercise of jurisdiction over this matter. *See* Order, Jan. 5, 2005. Thus Appellant was denied an opportunity to present witnesses or even argue his right to a hearing.

Following briefing on both the relevance of *Commonwealth v. Johnson* and on the lower court's notification of its intention to dismiss the petition, the petition was dismissed, without hearing or oral argument, pursuant to Pa. R. Crim. P. 909 B(2)(b). *See* Order, June 17, 2005.

A brief overview of the case history might be helpful to the Court. Appellant is on death row in the State Correctional Institution at Greene. He was arrested on December 9, 1981 for the killing of Daniel Faulkner, a police officer. Following the trial, he was sentenced to death on May 23, 1983. The direct appeal was denied by this Court. *Commonwealth v. Abu-Jamal,* 521 Pa. 188, (1989), *reh'g den'd,* 524 Pa 106 (1990). A petition for writ of *certiorari* was denied by the United States Supreme Court. *Abu-Jamal v Pennsylvania,* 498 U.S. 881, *reh g den'd,* 498 US 993 (1990), 501 U.S. 1214 (1991). On June 1, 1995, Governor Thomas Ridge signed a warrant, scheduling Ap-

pellant's execution for August 17, 1995.

A petition under the Pennsylvania Post-Conviction Relief Act was filed on June 5, 1995. The matter was referred to the original trial judge, Hon. Albert Sabo. He denied Appellant's motion for recusal which was based upon a claim of bias. On July 14, 1995, the court denied Appellant's motion for discovery, summarily quashed over two-dozen subpoenas, and declined to rule on his motion for stay of execution on the ground that the evidentiary hearing could conceivably be concluded in sufficient time to carry out the execution. Judge Sabo rebuffed all efforts by Appellant to secure more time to prepare for the evidentiary hearing which had been set for July 12, 1995. Appellant filed an emergency interlocutory petition for relief with the Pennsylvania Supreme Court, arguing that the judge had abused his discretion in imposing an unrealistic hearing schedule. This Court agreed and granted more time, setting the hearing for July 26, 1995.

Following an evidentiary hearing held July 26 - August 15, 1995, and related proceedings, the petition was denied on September 15, 1996. *Pennsylvania v Abu-Jamal,* 30 Phila 1, 1995 Phila Cty Rptr LEXIS 38 (1995). Appellant appealed the denial of post-conviction relief to this Court. This Court affirmed the denial of the petition for post-conviction relief. *Commonwealth v Mumia Abu-Jamal* (Pa 1998) 720 A.2d 79. A Petition for Certiorari to the Supreme Court of the United States was denied on October 4, 1999.

Thereafter a federal habeas corpus petition was filed on behalf of Appellant in the United States District Court for the Eastern District of Pennsylvania. Pet. for Writ of Habeas Corpus, Oct. 15, 1999, *Abu-Jamal v Horn, et al,* E.D. Pa. Oct. 15, 1999) No. 99-5089. The writ was granted with regard to the death sentence, but denied with regard to the conviction itself. *See Abu-Jamal v. Horn,* 2001 WL 1609690 (E.D. Pa. 2001). Cross-appeals were filed, briefed and argued on May 17, 2007.

On July 3, 2001, Appellant filed in the Court of Common Pleas a petition for post-conviction relief. The court denied the petition without a hearing on December 11, 2001. On February 20,

2002, a Supplemental Opinion was issued. The decision was appealed. This Court affirmed the lower court's denial of relief. *Commonwealth v. Abu-Jamal,* 574 Pa. 724 (2003), *cert denied* 124 S.Ct. 2173 (2004).

The instant petition was filed on December 8, 2003. It proffered newly discovered evidence in the form of two declarations. One, from Yvette Williams, indicated that Cynthia White, a key eye-witness for the prosecution at Appellant's 1983 trial, admitted to Ms. Williams that she testified falsely at Appellant's trial. *See* Declaration of Yvette Williams. Moreover, Ms. White, who is now deceased, indicated that she committed perjury because of threats she received from law enforcement officers. *See id.* According to the Williams declaration, Cynthia White, who was a prostitute with several criminal matters pending against her at the time of Appellant's trial, said that police officers threatened to seek maximum penalties in her pending cases if she did not testify that she saw Appellant shoot Daniel Faulkner. *See id.* at 1-2. White also told Williams that she received money from police. *See id.* at 2. In the instant petition, Appellant claimed that the newly discovered evidence contained in the Williams declaration established grounds for a new trial because it demonstrated that the Commonwealth's chief eyewitness testified falsely and it was the Commonwealth's agents who procured the false testimony. Under these circumstances, the Commonwealth is charged with notice of the acts undertaken to get White to testify falsely and violated its obligation to disclose this information pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963). Had this information been disclosed prior to or at the time of Appellant's trial, there is a reasonable probability that the outcome of the trial would have been different.

The second declaration was from Kenneth Pate. His step-sister, Priscilla Durham, was a witness for the Commonwealth at Appellant's trial. Durham was the only civilian to testify that she heard Appellant confess to killing Officer Faulkner while Appellant was being treated for a gunshot room in a hospital emergency room. According to Pate's declaration, after the trial Durham admit-

ted to him that she had lied. Durham told Pate that she did not hear any confession, but testified that she did because of pressure exerted upon her by the police who brought Appellant, in custody, to the emergency room. Just as with the evidence contained in the Declaration of Yvette Williams, Kenneth Pate's declaration provides grounds to support a claim that false evidence was presented at trial and that the Commonwealth withheld exculpatory evidence.

SUMMARY OF ARGUMENT

Two claims based upon newly discovered evidence were presented in the PCRA petition. *See* Petition for Habeas Corpus. The new facts establish that the prosecution of Appellant was a product of fraud and false evidence deliberately orchestrated by members of the Philadelphia Police Department. Consequently, he was deprived of the rights guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article One, Section 9 of the Pennsylvania Constitution.

The dismissal of the petition by the Court of Common Pleas was based upon erroneous premises. First, it is incorrect that the newly discovered evidence in the pending petition "does little more than reiterate claims Appellant made in his first two PCRA petitions." Memorandum and Order, *supra*, at 14. The new evidence concerning both witnesses is not merely impeaching in nature. Rather, it concerns exculpatory evidence that was deliberately withheld by the prosecution in violation of well-established principles enunciated in *Brady v. Maryland,* 373 U.S. 83, 87 (1963). The police pressured the two people referenced in the petition to give false testimony at trial, then concealed that crucial information from Appellant. This newly discovered evidence is offered not simply to impeach the credibility of the prosecution's trial witnesses, but to also establish a *Brady* claim.

Secondly, contrary to the lower court's conclusion, *Commonwealth v. Johnson*, 863 A.2d 423 (Pa. 2004), does not apply to the case of Appellant since newly discovered facts are before the court, not just a "newly willing source for previously known facts." Memorandum and Order, *supra*, at 14. Appellant was unaware of the newly discovered evidence regarding the false testimony of Priscilla Durham until two years ago and no previous claim has asserted the facts contained in her affidavit. Likewise, the newly discovered evidence regarding Cynthia White was not set forth in earlier petitions or at trial since the new facts were unknown. Finally, the new facts are neither mere

impeachment nor are they inadmissible hearsay.

ARGUMENT

I. NEWLY DISCOVERED EVIDENCE SHOWS THAT THE STATE MANIPULATED A PURPORTED EYEWITNESS TO FALSELY IDENTIFY APPELLANT AS THE SHOOTER, IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION 9 OF THE PENNSYLVANIA CONSTITUTION

Appellant was deprived of his right to a fair and reliable determination of guilt and penalty, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article One, Section 9 of the Pennsylvania Constitution because the state's most important identification witness, Cynthia White, was coaxed and coerced into providing false testimony implicating him. Her testimony was critical to the prosecution. If the jury had heard testimony that White's testimony was the result of threats and favors, there is a reasonable probability that the result of the trial would have been different. *See United States v. Bagley,* 473 U.S. 667, 678-79 (1985) (holding that exculpatory evidence is material when, "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

Newly discovered evidence from Yvette Williams establishes that White lied at Appellant's trial by falsely testifying that she observed him shoot police officer Daniel Faulkner. *See* Declaration of Yvette Williams at 2. In fact, she did not see the shooting. *See id.* Ms. Williams' affidavit also establishes that it was the police who caused Ms. White to falsely testify through the use of a combination of threats and bribery that included supplying illegal drugs and drug paraphernalia to her in jail for the purpose of inducing that testimony. *See id.* at 2-3.

In her declaration, Williams explained:

> 6. When Lucky [Cynthia White] told me she didn't see who shot Officer Faulkner, I asked her why she was "lying on that man" (Mumia Abu-Jamal). She told me it was because for the police and vice threatened her life. Additionally, the police were giving her money for tricks. "The way she talked, we were talking "G's"

($1,000.00). She also said she was terrified of what the police would do to her if she didn't say that Mumia shot Officer Faulkner. According to Lucky, the police told her they would consolidate all her cases and send her "up" (Muncy), a women's prison, for a long time if she didn't testify to what they told her to say. Lucky told me she had a lot of open cases and out-of-state warrants and was scared of going to Muncy. She was scared that her pimp "would get pissed off"at all the money he was losing when she was locked up, and off the street. She was afraid that when she got out he would beat her up or kill her.

7. Lucky was worried the police would kill her if she didn't say what they wanted. She was scared of what the MOVE people would do to her after she testified against Mumia; but MOVE never threatened Lucky while incarcerated. She was scared when she told me all of this plus she was crying and shaking. Whenever she talked about testifying against Mumia Abu-Jamal, and how the police were making her lie, she was nervous and very excited and I could tell how scared she was from the way she was talking and crying.

8. Lucky told me that what really happened that night was that she was "on the stroll" (looking for and serving customers) in the area of 13th and Locust when Officer Faulkner got shot, but she definitely did not see who did it. She also told me that she had a drug habit and was high on drugs when it happened. She tried to run away after the shooting, but the cops grabbed her and wouldn't let her go. They took her in the car first and told her that she saw Mumia shoot Officer Faulkner.

Declaration of Yvette Williams, Jan. 28, 2002 at 2-3.

The declaration of Ms. Williams does not merely provide direct contradiction of the prosecution's key witness at trial, but it also materially undermines the integrity of the entire original investigation and case against Appellant. The fact that the prosecution witness testified falsely as a result of police inducement taints all of the evidence upon which the Commonwealth relied at the original trial. This type of proof would not only have been strong impeachment of White's testimony, but there is a reasonable probability that such evidence would create doubt about the motives and trustworthiness of law enforcement personnel involved in this case. *See Bagley* 473 U.S. at 678-79. The subornation of perjury from Cynthia White results in the inescapable conclusion that the original investigating officers may have caused other witnesses to lie, that exculpatory and impeachment evidence was suppressed and that other evidence may have been fabricated as well. Evidence that Cynthia White was coerced into lying would have far more significance than simply canceling out her testimony. It would raise a host of questions regarding why investigating police

felt the need to improperly fabricate evidence. *See e.g. United States v. Boyd,* 55 F.3d 239, 246 (7th Cir. 1995) (emphasizing the significance of the failure to disclose special treatment given to witnesses by federal agents by stating, "might not the prosecution's case have collapsed entirely had the truth come out about the behavior and the treatment of these witnesses?").

II. NEWLY DISCOVERED EVIDENCE SHOWS THAT THE APPELLANT WAS FOUND GUILTY AND SENTENCED TO DEATH THROUGH THE USE OF A FABRICATED CONFESSION IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION 9 OF THE PENNSYLVANIA CONSTITUTION

Appellant was deprived of his right to a fair and reliable determination of guilt and penalty, as guaranteed by the Fifth, Eighth and Fourteenth Amendments, because of the state's reliance on a fabricated confession and by its thwarting of defense efforts to expose that fabrication.

Newly discovered evidence has established that Priscilla Durham, a hospital security guard who testified at trial to hearing Appellant confess, has since admitted to concocting the story. *See* Declaration of Kenneth Pate para. 7 & 8. She admitted to Kenneth Pate that in fact she never heard Appellant make any incriminating statements. Pate asserts in his declaration that:

> 2. Sometime around the end of 1983 or the beginning of 1984 I had a telephone conversation with Priscilla Durham in which the subject of Mumia Abu-Jamal came up.
>
> . . . .
>
> 4. Priscilla began to complain about the way she was treated on the job, about her back hurting, and them `treating her like that' after all she did for them they laid her off.
>
> 5. Then Priscilla started talking about Mumia Abu-Jamal. She said that when the police brought him in that night she was working at the hospital. Mumia was all bloody and the police were interfering with his treatment, saying "let him die."
>
> 6. Priscilla said that the police told her that she was part of the "brother-

hood" of police since she was a security guard and that she had to stick with them and say that she heard Mumia say that he killed the police officer, when they brought Mumia in on a stretcher.

7. I asked Priscilla: "Did you hear him say that?" Priscilla said: "All I heard him say was 'Get off me, get off me, they're trying to kill me.'"

8. Priscilla also said there was a lot of chaos and confusion going on when the police brought Mumia in and when they were talking to her.

Declaration of Kenneth Pate, Apr. 18, 2003.

Priscilla Durham was the only civilian to testify at trial that Appellant admitted the shooting. Police Officer Gary Bell also testified that he heard Appellant confess. However, the jury had to have put a great amount of weight on Bell's testimony after hearing a civilian private security guard, with ostensibly no bias against Appellant, corroborate Bell's account. There is a reasonable probability that if the jury was informed that Durham was pressured by police into falsely testifying about a confession, it would have disregarded the alleged confession. Without proof of a confession, extremely powerful evidence, there is a reasonable probability that the verdict would have been different. *See United States v. Bagley,* 473 U.S. 667, 678-79 (1985). Moreover, for the reasons stated above with regard to witness Cynthia White, disclosure of the pressure placed upon Durham to claim she heard the confession, would likewise create a reasonable probability that the other witnesses and evidence presented would be viewed by the jury with skepticism.

III. THE LOWER COURT ERRED IN DISMISSING THE PCRA PETITION AS UNTIMELY, FOR THE CLAIMS THEREIN FALL WITHIN THE AFTER-DISCOVERED AND GOVERNMENTAL-INTERFERENCE EXCEPTIONS OF 42 PA.C.S. § 9545(B)(1)(i)-(ii).

The PCRA petition, while filed more than one year after Appellant's conviction became final, contains claims that fall within two of the exceptions to the statutory time bar. They involve both governmental interference and newly discovered evidence that could not have been

discovered through the exercise of due diligence.[1] Both claims allege violations of recognized constitutional rights under Amendments Five, Six, Eight and Fourteen of the United States Constitution and Article One, Section 9 of the Pennsylvania Constitution. Both claims allege the prosecutorial suppression of exculpatory material evidence and the presentation of false evidence in contravention of the right to a fair trial and due process of law guaranteed by the Constitution and *Brady v. Maryland,* 373 U.S. 83, 87 (1963). Appellant's petition contained timely, colorable claims for relief under the Post-Conviction Relief Act and it was error for the lower court to dismiss the petition and deny Appellant a hearing.

The newly discovered facts allege that government agents were involved in obtaining false, material testimony at Appellant's trial. The declaration of Yvette Williams states that Cynthia White told her that she lied on the stand because she was afraid of reprisals from the police if she refused to do so. The declaration of Kenneth Pate states that Priscilla Durham lied on the stand because she was pressured by the police. The witnesses' fears, created by agents of the Commonwealth not only explain the false testimony, but, also explain why these witnesses didn't come forward sooner than they did. If the alleged events occurred, the prosecutor in Appellant's trial had an obligation to disclose these threats and efforts to suborn perjury. *See Brady v. Maryland,* 373 U.S. 83, 87 (1963). The failure to disclose constitutes "interference by government officials" within the meaning of section 9545(b)(1)(i). *See Commonwealth v. Breakiron,* 781 A.2d 94, 98 (Pa. 2001) (holding that 9545(b)(1)(i) can be satisfied if appellant establishes a meritorious

---

[1] The statute provides exceptions for, *inter alia,*

> (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 Appellant and could not have been ascertained by the exercise of due diligence . . .

42 Pa.C.S. § 9545(b)(1)(i)-(ii).

Brady claim).

Secondly, the newly discovered evidence could not have previously been obtained by Appellant in the exercise of due diligence because its discovery was wholly dependent upon two unknown witnesses coming forward. Yvette Williams executed a declaration on January 28, 2002. At that time the denial of Appellant's second PCRA petition was pending review by this Court.[2] Appellant sought permission from this Court to file the current PCRA petition while review of the previous petition was pending before this Court. *See* Appellant's Motion for Remand To Take Testimony of Yvette Williams, No. 364 CAP, Feb. 14, 2002. Filed with the motion was the Declaration of Yvette Williams, *supra*. The Commonwealth successfully blocked Appellant's efforts to return to the lower court in order to address the new evidence and the motion for remand was denied. Order, Mar. 28, 2002. Later when the Pate information was discovered, that also was filed along with a second remand motion. *See* Appellant Mumia Abu-Jamal's Application for Relief Under Appellate Rule 123 and Motion for Remand To Take Testimony From Kenneth Pate, Apr. 24, 2003. That included the Declaration of Kenneth Pate. Once more, Appellant was unsuccessful in having the new evidence heard.

At the time of the denial of Appellant's two remand motions, his appeal of the denial of his second PCRA petition was still pending in this Court. Because of this, Appellant was prohibited from filing a new PCRA petition in the Court of Common Pleas. *See Commonwealth v. Lark,* 746 A.2d 585, 588 (Pa. 2000). Appellant filed the instant petition within 60 days of this Court's order denying his pending appeal.[3] The lower court agreed with Appellant that this was proper and did not mean that the petition was untimely:

> In *Commonwealth v. Lark*, 746 A.2d 585, 588 (Pa. 2000), the Pennsylvania

[2] The previous PCRA petition was denied December 11, 2001. Thereafter the matter was appealed to this Court. *See* Notice of Appeal, Jan. 9, 2002.

[3] The statute provides that any petition invoking the newly discovered evidence exception must be filed within 60 days of the date the claim could have been presented. 42 Pa.C.S.A. 9545 (b)(2).

> Supreme court held that a PCRA Court does not have jurisdiction to entertain additional post-conviction claims while its decision in a prior PCRA proceeding in the same case is on appeal. On this basis, [the] PCRA Count finds that Petitioner had 60 days from October 8, 2003 to raise new claims. Because Petitioner filed this petition on December 8, 2003, it is not untimely for the reason asserted by the Commonwealth.

Memorandum and Order, *supra*, at 11.

Nevertheless, the lower court dismissed the petition finding it did not qualify as after-discovered evidence under the PCRA. The court offered several bases for its conclusion. They will be discussed individually.

Commonwealth v. Johnson

The lower court was wrong when it concluded that *Commonwealth v. Johnson*, 863 A.2d 423 (Pa. 2004), precluded its exercise of jurisdiction over Appellant's petition. *See* Memorandum and Order, *supra*, at 14. In *Johnson* the court dismissed a second PCRA petition as untimely pursuant to 42 Pa. C.S. § 9546(d). It was determined that neither the "governmental interference" exception under sec. 9545(b)(1)(i), nor the "newly-discovered evidence" exception of sec. 9545(b)(1)(ii), applied in the case because the proffered evidence in that case failed to establish a violation under *Brady v. Maryland. See Johnson,* 863 A.2d at 427, With regard to each new piece of evidence, the court found that the appellant either had prior knowledge of the information allegedly withheld by the government, or he failed to show that he could not have obtained it from other sources or by exercising reasonable diligence. *See id.*

The claim in *Johnson* was solely based on the information included in an affidavit of a prosecution witness, George Robles, which tended to show that Robles was a drug dealer who colluded with the police. Appellant claimed that the Commonwealth withheld the impeachment evidence found in the affidavit in violation of *Brady*. The court rejected the claims after finding that

all of the allegedly "new facts" were either known to defense counsel during trial or could have been easily uncovered through sources available to the defense.[4]

The same cannot be said of Appellant's proffer of new facts. There is no conceivable way that Appellant could have known that Cynthia White confided her perjury to a fellow inmate. Yvette Williams, who kept White's admissions to herself out of fear of police reprisals were she to come forward, contacted Appellant's counsel when she did, after hearing news coverage of the case. *See* Declaration of Yvette Williams at 3. She simply felt too guilty that she had been keeping this important information to herself. *See id.* There is no reasonable way that this evidence could have come to light had Williams not reached out to Appellant's counsel.

Likewise, until Kenneth Pate got word directly to Appellant who was on death row, about the admissions of Priscilla Durham, Pate's step-sister, there would have been no way for Appellant or his counsel to have even a hint that Appellant's suspicions that her testimony was fabricated could be supported with proof.

The lower court's opinion also cites *Johnson* for the principle that "the newly discovered evidence exception focuses on newly discovered facts, not on a newly discovered or a newly willing source for previously known facts." *See* Memorandum and Order at 13. However, unlike in *Johnson,* the declarations offered in the instant petition bring to light new facts. The fact that Cynthia White admitted lying on the stand because she was intimidated by the police, had not previously been asserted. The only similar facts introduced into the proceedings earlier involved testimony from two different individuals (Pamela Jenkins and Veronica Jones) that the police had tried to coerce testimony from them. This is quite different from the statement in the Williams declaration that Cynthia White, prime prosecution witness, admitted to perjury. Appellant's case would be analo-

[4] For example, this Court found that there were individuals other than Robles who were aware of his involvement with police. *Johnson,* 863 A.2d at 427. Johnson also claimed that his counsel was unable to interview Robles sooner because Robles threatened defense investigators. The court pointed out that this was untrue as defense counsel himself interviewed Robles twice prior to trial. *Id.*

gous to *Johnson* if he had previously proffered the statement of one or more different witnesses or of Cynthia White herself that Cynthia White admitted perjury. In that case, Yvette Williams would merely be a new source for old facts. However, this is not the case. The instant petition is the first time that Appellant was able to offer evidence concerning White's perjury and of her description of what led to her false testimony.

Similarly, prior to the proffer of the facts contained in Kenneth Pate's declaration, Appellant had not offered evidence that Priscilla Durham was coaxed by police at the hospital to help law enforcement by claiming to have heard Appellant confess. The fact that trial counsel urged the trial jury to disbelieve the testimony about the confession does not mean that Pate's declaration does no more than offer a new source for previously known facts. To hold otherwise, would mean that anytime a defendant professed innocence at trial, any newly discovered evidence of innocence would be excluded as cumulative.

Thus, contrary to the opinion of the lower court, *Commonwealth v. Johnson* does not dictate a finding that the court lacks jurisdiction over Appellants present claims.

The New Facts are Not Mere Impeachment

The lower court's finding that the proffered evidence was "mere impeachment" *see* Memorandum and Order , at 14, misses the point. While the witnesses' admissions contained in both the Williams and Pate declarations could have been used to impeach their trial testimony, they have additional, equally important relevance. If true, both declarations reveal that the falsity of trial testimony was know to the Commonwealth, yet never disclosed. This is a violation of Appellant's rights under *Brady v. Maryland*. Pursuant to *Brady* and its progeny, nondisclosure of material impeachment evidence requires reversal. *See United States v. Bagley,* 473 U.S. 667 (1985). In fact, in *Commonwealth v. Johnson,* the newly obtained affidavit contained "valuable impeachment evidence" allegedly withheld by the Commonwealth. *See Johnson*, 863 A.2d at 426. Notwithstanding,

this Court did not deny relief because the new evidence was mere impeachment. To the contrary, this Court properly recognized that the evidence was relevant to support a *Brady* claim. *See id.*

In addition to proving a *Brady* violation, the use of false testimony, if known to the government or its agents, independently establishes a violation of Appellant's right to due process of law. *See Napue v. Illinois,* 360 U.S. 264 (1959); *Alcorta v. Texas,* 355 U.S. 28 (1957); *Mooney v. Holohan,* 294 U.S. 103 (1935). Far beyond mere impeachment, the evidence contained in Appellant's petition demonstrates very serious violations of his constitutional rights.

The Claims Do Not Depend Upon Inadmissible Hearsay

The lower court characterized the evidence submitted in Appellant's petition as "inadmissible hearsay." Memorandum and Order, *supra*, at 15-16. This is incorrect. As stated by Appellant in the lower court, the statements made by Cynthia White to Yvette Williams are admissible as exceptions to the hearsay rule. They are admissions against interest, admissible because she is unavailable and they are reliable:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. Pa. Rules of Evidence 804(b)(3).

Cynthia White was in jail with Ms. Williams after Officer Faulkner was shot. White admitted that she lied in identifying Appellant as the shooter and that her anticipated testimony against him would be false. Williams reports that:

4. *When Lucky told me she didn't see who shot Officer Faulkner, I asked her why she was "lying on that man" (Mumia Abu-Jamal). She told me it was because for the police and vice threatened her life. Additionally, the police were giving her money for tricks. "The way she talked, we were talking "G's" ($1,000.00). She also said she was terrified of what the police would do to her if she didn't say that Mumia shot Officer Faulkner.* According to Lucky, the police told her they would consolidate all her cases and send her "up" (Muncy), a women's prison, for a long time if she didn't testify to what they told her to say. Lucky told me she had a lot of open cases and out-of-state warrants and was scared of going to Muncy. She was scared that her pimp "would get pissed off at all the money he was losing when she was locked up, and off the street. She was afraid that when she got out he would beat her up or kill her.

5. Lucky was worried that the police would kill her if she didn't say what they wanted. She was scared of what the MOVE people would do to her after she testified against Mumia; but MOVE never threatened Lucky while incarcerated. She was scared when she told me all of this plus she was crying and shaking. *Whenever she talked about testifying against Mumia Abu-Jamal, and how the police were making her lie, she was nervous and very excited* and I could tell how scared she was from the way she was talking and crying.

6. Lucky told me that what really happened that night was that she was "on the stroll" (looking for and serving customers) in the area of 13th and Locust when Officer Faulkner got shot, but *she definitely did not see who did it. She also told me that she had a drug habit and was high on drugs when it happened.* She tried to run away after the shooting, but the cops grabbed her and wouldn't let her go. They took her in the car first and told her that she saw Mumia shoot Officer Faulkner.

Declaration of Yvette Williams, *supra* (emphasis added).

The admissions of Cynthia White were clearly against her interest. *See Rudisill v. Cordes*, 5 A.2d 217 (1939); *Commonwealth v. Williams*, 640 A.2d 1251 (1994). She admitted to Ms. Williams that she was planning to commit perjury. The police had persuaded her to lie and identify Appellant as the killer. She also admitted to committing various crimes, e.g., drug use, prostitution.

White is also an unavailable witness within the meaning of Rule 804(a)(4). Appellee has stated as a fact that she died in 1992. NT 6/26/97 at 135-46; NT 7/1/97 at 18-30, 59; *see also* Motion To Dismiss Untimely Third PCRA Petition, Jan. 8, 2004, at 19.

There is substantial evidence to support the reliability of White's admissions to Williams.[5] In his petition Appellant lists numerous reasons that White's admissions are believable. *See* Petition for Habeas Corpus at para. 40 – 70. For one thing, Cynthia White had personal knowledge of the police corruption which was rife in Philadelphia in the early 1980's. Therefore, she was aware of the devastating extent to which police officers in Philadelphia could complicate and potentially endanger her life. In 1980 and 1981, Cynthia White was arrested numerous times by 6th District Police Officers Joseph Goiffre and Richard Herron. These two officers were later charged with extorting payoffs for protection of prostitution and after-hours liquor sales. Herron was convicted on all charges. *See United States v. Herron and Goiffre,* CR 85-00052, US Dist. Ct. E.D. Pa. Additional aspects of the case that support the reliability of the statements include: evidence that White was initially uncooperative at the scene of the shooting; testimony by other eye-witnesses that they did not remember seeing White at the scene; evidence that other witnesses to this crime were intimidated by police; and inconsistencies between White's varying accounts of the crime.

Priscilla Durham's statements are also admissible because they are against her interest and reliable. She essentially admitted to Mr. Pate that she had committed perjury when she testified at Appellant's trial. The police had persuaded her to lie. The "police told her that she was part of the 'brotherhood' of police . . . and that she had to stick with them and say that she heard Mumia say that he killed the police officer . . ." Declaration of Kenneth Pate at para. 6.

Several facts substantiate Durham's statement to Pate that there was no confession. No police officer reported the alleged confession until nearly two months after its supposed elicitation. It is inconceivable that if Appellant had shouted out "I shot the motherfucker and I hope he dies," all of the police officers and other hospital personnel who surrounded him at the time would not have

[5] It is worth emphasizing that Williams declaration is not hearsay. Whether or not Williams is being truthful when she claims that White made these admissions could be fully explored were Williams to take the stand at a PCRA hearing. The statements that Williams attributes to White are hearsay, but admissible under the declaration against interest exception.

reported such a statement. It is equally beyond belief that Officer Gary Wakshul, who was at Appellant's side, would have stated in his report that Appellant "made no comments" and his partner, Officer Trombetta, would likewise fail to report it if Appellant had in fact admitted the shooting. In addition, Appellant was critically wounded and, according to the attending physician, said nothing (NT 6/28/82 at 69) and was in no condition to struggle. "He was weak. He could move, but he was weak." *Id.* at 73. "I would say he was on the verge of fainting . . . in other words, if you tried to stand him up, he would not have been able to stand up." *Id.* at 76. He was also handcuffed. *Id.* at 77. At the trial, a psychiatric resident observed Appellant on the floor of the emergency area shortly before being admitted into the treatment room. NT 6/29/82 at 14. As a police officer picked up a foot of Appellant, all that came from him was "a moan." *Id.* at 23.

Even if the statements reported in the declarations of Williams and Pate did not fall squarely within a statutory hearsay exception, they should be deemed admissible. This Court is urged not to apply the hearsay rule mechanistically, but rather to do that which is constitutionally just. *See Chambers v. Mississippi,* 410 U.S. 284, 302 (1973) (stating that where constitutional rights directly affecting. the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice); *Green v. Georgia,* 442 U.S. 95, 97 (1979) (holding that regardless of whether defendant's proffered evidence fell within an exception to the state's hearsay rule, in light of indicia of the statement's reliability, its exclusion violated defendant's right to due process). Here, to ignore the tendered declarations against interest would violate Appellant's rights to due process, a fair trial and the right to present witnesses in his own behalf.

In sum, the PCRA petition herein was timely because it satisfied two exeptions to the statutory time bar. Furthermore, the claims contained in the petition were neither inadmissible nor merely relevant to impeach credibility.

CONCLUSION

For all the reasons presented herein, the decision of the lower court should be reversed and the Appellant should be granted a new trial, or in the alternative, the matter should be remanded for a hearing.

DATE: June 1, 2007

Respectfully submitted,

PAUL GEORGE, ESQ.
Pa. Bar No. 25722
McKinney and George
239 S. Camac Street
Philadelphia, PA 19107

Telephone: (215) 735-0598
Facsimile: (215) 735-0599
E-mail: pgeorge@mckinneyandgeorge.com

Local Counsel for Appellant,
Mumia Abu-Jamal

ROBERT R. BRYAN
Law Offices of Robert R. Bryan
2088 Union Street, Suite 4
San Francisco, California 94123-4124
Telephone: (415) 292-2400
Facsimile: (415) 292-4878
E-mail: RobertRBryan@aol.com

Lead counsel for Appellant,
Mumia Abu-Jamal

JUDITH L. RITTER
Pennsylvania Attorney ID# 73429
Widener University School of Law
P.O. Box 7474
4601 Concord Pike
Wilmington, Delaware 19801
Telephone: (302) 477-2121
Facsimile: (302) 477-2227
E-mail: JLRitter@widener.edu

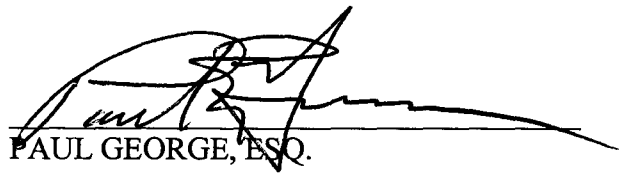
Associate Counsel for Appellant,
Mumia Abu-Jamal

PROOF OF SERVICE

I, Paul George, Esq., hereby certify that on this date I served the foregoing BRIEF OF APPELLANT by First Class Mail and properly addressed pursuant to the requirements of Pa. R.A.P. § 121, upon the following:

Hugh J. Burns, Jr., Esq.
Assistant District Attorney
Chief, Appeals Unit
Three South Penn Square
Philadelphia, PA 19107-3499

Date: June 1, 2007



PAUL GEORGE, ESQ.

IN THE COURT OF COMMON PLEAS

FOR THE COMMONWEALTH OF PENNSYLVANIA

FIRST JUDICIAL DISTRICT

COMMONWEALTH,	)	
	)	Case No. 8201-1357-59
Respondent	)	
-vs-	)	
MUMIA ABU-JAMAL,	)	
Petitioner	)	PCRA

MEMORANDUM AND ORDER

In accordance with Criminal Rule of Procedure 909, the Court hereby announces its intention to dismiss the instant Post Conviction Relief Act Petition filed on December 8, 2003. Petitioner will be given the appropriate notice. The reasons for dismissal are detailed below.

Factual History

On December 9, 1981, Philadelphia Police Officer Daniel Faulkner was shot in the back. The first shot did not kill

Law Offices of Robert R. Bryan
2088 Union Street
San Francisco, CA 94123

him, and he was able to return fire, wounding his assailant. He then collapsed and, as he lay on the ground, the assailant pumped several more shots directly into his face, killing him.

At least four eyewitnesses saw all or part of the event and testified at trial.[1] One of them, Robert Chobert, made an on the scene identification of Petitioner Mumia Abu Jamal as the man who shot Officer Faulkner. *Pennsylvania v. Cook*, 30 Phila. 1, 16 (Pa. C.P. 1995).

Arriving police found Petitioner, wounded and sitting near Officer Faulkner's body, reaching for a gun.[2] When taken to the hospital for treatment, Petitioner fought police and raged to several more witnesses, "I shot the M---F--- and I hope he dies."[3] Bullets from Faulkner's gun were extracted from Petitioner's body, and the bullets found in Faulkner's body, while too badly damaged to be identified with certainty as coming from Petitioner's gun, were exactly matched with the type of ammunition used in Petitioner's gun.

---

[1] These witnesses were, Cynthia White, Robert Chobert, Michael Scanlan (AKA Scanlon) and Albert Magilton. *Pennsylvania v. Cook*, 30 Phila. 1, 15 (Pa. C.P. 1995) (opinion of the PCRA court in first PCRA proceeding).

[2] This gun was registered in his name. A policeman kicked the gun out of his reach.

[3] Two witnesses testified to this effect at trial: emergency room security guard Priscilla Durham and police officer Gary Bell.

I Trial Phase and Direct Appeal

Petitioner chose to be tried by a racially mixed jury. Early in the proceedings, he fired his court-appointed trial counsel.[4]

On July 2, 1982 at the conclusion of the trial over which the Honorable Albert J. Sabo presided, the jury convicted Petitioner of murder in the first degree and related offenses. On July 3, 1983, following the penalty

[4] The Pennsylvania Supreme Court provided a succinct account of Petitioner's legal representation during his trial: "Appellant, who had been granted indigent status, steadfastly insisted from the initiation of this matter that he be permitted to proceed with "counsel" of his choice. However, he insisted on proceeding with an individual known as John Africa who was not a licensed attorney and had apparently never received any formal legal schooling. The court properly refused this request and, when Appellant requested to proceed *pro se*, the court initially permitted such status and as a precaution appointed back up counsel to assist Appellant. When it became apparent that Appellant was unable to properly conduct voir dire, the court first asked Appellant whether his back up counsel could take over the questioning or whether he preferred the court to conduct *voir dire*. Appellant steadfastly refused to permit his back up counsel to take part in any of the proceedings and argued vehemently that the court should not perform the *voir dire* questioning. We find that the court properly took over the questioning and then properly ordered that back up counsel take control." *Commonwealth v. Mumia Abu-Jamal*, 553 Pa. 485, 720 A.2d 79, 109 (1998) (footnotes omitted).

phase of the trial, the same jury sentenced Petitioner to death.

The Pennsylvania Supreme Court affirmed the judgment of sentence on direct appeal. *Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989), *reargument denied*, 524 Pa. 106, 569 A.2d 915 (Pa. 1990). The United States Supreme Court denied certiorari, *Abu-Jamal v. Pennsylvania*, 498 U.S. 881 (1990), and two petitions for rehearing, *Abu-Jamal v. Pennsylvania*, 498 U.S. 993 (1990); *Abu-Jamal v. Pennsylvania*, 501 U.S. 1214 (1991).[5]

II First PCRA Petition

Petitioner retained new counsel and filed his first petition under the Post Conviction Relief Act, (PCRA) 42 Pa.C.S. § 9541, on July 5, 1995.[6] Judge Sabo presided over three weeks of evidentiary hearings in July and August, 1995 and scheduled additional evidentiary hearings on September 11 and 12 so Petitioner could produce additional evidence. On

[5] Petitioner had new counsel for the direct appeal and raised three issues: a *Batson* claim, a claim of improper cross-examination of a character witness, and alleged prosecutorial misconduct for comments made at the penalty phase of the trial.

[6] In 1995, there were no time limitations for the filing of PCRA petitions.

September 15, 1995, Judge Sabo issued an order denying relief. Petitioner appealed to the Pennsylvania Supreme Court, which twice remanded the case back to the PCRA court for additional evidentiary hearings. These hearings took place in October 1996 and May 1997. [7] The Supreme Court of Pennsylvania ultimately denied relief. *Commonwealth v. Mumia Abu-Jamal, a/k/a Wesley Cook,* 553 Pa. 485, 720 A.2d 79 (1998). The Supreme Court of the United States denied certiorari on October 4, 1999. *Abu Jamal v. Pennsylvania,* 528 U.S. 810 (1999).

III Second PCRA petition

On July 3, 2001, Petitioner retained new counsel and filed a second PCRA petition. By this time, the Pennsylvania Legislature had amended the Post Conviction Relief Act to place limits on the time in which Petitioners could raise post trial claims for relief. 42 Pa.C.S.A. 9545(b) (1) (2). The amendments provide that the statutorily mandated time limits are jurisdictional in nature, not merely statutes

---

[7] While the matter was on appeal to the Pennsylvania Supreme Court, Petitioner filed three separate requests for remand to the PCRA court. These applications encompassed requests to present additional testimony, requests for discovery, requests to submit a videotape allegedly relevant to *Batson* issues, and requests to assign the case to another judge. The Supreme Court remanded the case twice for the purpose of including additional testimony in the record.

of limitation. Therefore, aside from limited exceptions specified in the Act, the time limits cannot be tolled for any reason, including equitable considerations. *See, Commonwealth v. Bennett*, 842 A.2d 953 (Pa. Super, 2004), *appeal granted*, 2005 Pa. LEXIS 193. On this basis, the PCRA Court dismissed Petitioner's second PCRA petition as untimely filed on December 11, 2001. Petitioner appealed this decision to the Supreme Court of Pennsylvania on January 9, 2002. On October 8, 2003, the Pennsylvania Supreme Court agreed that the PCRA Court did indeed lack jurisdiction and upheld the denial of relief. *Commonwealth v. Mumia Abu-Jamal*, 833 A.2d 719 (Pa. 2003). The United States Supreme Court denied certiorari on May 17, 2004. *Abu-Jamal v. Pennsylvania*, 124 S. Ct. 2173 (U.S. 2004). This abbreviated version of the history of this matter leads us to the instant proceedings.

IV Third PCRA petition

Current Issues

On December 8, 2003, having retained new counsel, Petitioner filed this, his third PCRA Petition in which he proffers evidence in the form of testimony from two newly uncovered witnesses, Yvette Williams and Kenneth Pate, who, he claims, will discredit the trial testimony of Cynthia

White and Patricia Durham.[8] Petitioner alleges that his latest claims are timely raised under the PCRA because the new evidence did not come to his attention until the appeal of the order dismissing his second PCRA petition was pending in the Pennsylvania Supreme Court. In the alternative, Petitioner claims that he is entitled to relief under state *habeas corpus* jurisprudence.

This Court finds that the third PCRA petition is untimely filed and that none of the exceptions to untimely filing applies. Therefore, this court does not have jurisdiction to entertain Petitioner's latest claims for relief and dismisses his petition. The state habeas corpus claim is also dismissed.

Discussion

This case has a long history. For over twenty years, Petitioner's attorneys[9] have claimed that he was framed for the murder of Officer Faulkner and that the Commonwealth

---

[8] The purported new evidence consists of a claim that eyewitness Cynthia White perjured herself at trial; and that Priscilla Durham, one of the three witnesses to defendant's spontaneous admission of guilt in the emergency room, also perjured herself.

[9] Petitioner has had new attorneys for every stage of the proceedings. Besides having separate counsel for trial and direct appeal, he has had a different team of attorneys for each PCRA petition.

manipulated eyewitness Cynthia White to falsely identify him. Despite the testimony of other eye witnesses; forensic evidence that bullets extracted from Officer Faulkner's body were of the type used in a gun registered to Petitioner and found at the scene; and the fact that shortly following the murder, three different people heard Petitioner brag that he shot Officer Faulkner and hoped that he would die, Petitioner has persisted in claiming that corrupt Philadelphia Police Officers conspired with "The Mob" to murder Officer Faulkner and pin the blame on Petitioner, who serendipitously happened to be passing by in his cab on the night of the murder.

Petitioner has raised essentially the same claim in each of his PCRA petitions. The only thing that has changed is the identity of the proffered witnesses.[10]

---

[10] In his first PCRA petition, he offered the testimony of Pamela Jenkins to support his claim that the police coerced Cynthia White into identifying Petitioner as the shooter. Petitioner also attempted to introduce retraction testimony from Veronica Jones, an eyewitness to the shooting who testified at trial. Ms. Jones claimed that the police had coerced her into testifying. This evidence was ultimately rejected because it did not constitute after-discovered evidence, and was found not credible. *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998).

The essence of the claims Petitioner raised in his second PCRA petition is that "the prosecution . . . suborn[ed] perjury and present[ed] fabricated evidence throughout Petitioner's trial. In so doing, the prosecution perpetrated a fraud upon the court." Petition of July 3, 2001 at 48-49. The most notable of the ten claims raised in the second PCRA petition, is that a man named Arnold Beverly and an unknown accomplice, who were working for "The Mob" and corrupt Philadelphia police officers, were the real killers of Officer Faulkner.

Petitioner argues that the third petition is timely filed pursuant to 42 PA C.S.A 9545(b) (1) (ii) which provides that PCRA petitions must be filed within one year of the date the judgment becomes final unless the petition alleges and petitioner proves that "(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 [this] exception shall be filed within 60 days of the date the claim could have been presented."[11]

As was discussed in detail in this Court's Opinion dismissing Petitioner's second PCRA petition, unless a petition has been timely filed, the PCRA Court lacks any jurisdiction to grant any relief to the Petitioner. *See, also, Commonwealth v. Wilson*, 824 A.2d 331 (Pa. Super. 2003).

Petitioner also alleged that trial and prior PCRA counsel were ineffective for failing to attack the trial testimony of eyewitness, Robert Chobert.

[11] When an appellant's PCRA appeal is pending before a court, a subsequent PCRA petition cannot be filed until the resolution of review of the pending PCRA petition by the highest state court in which review is sought, or upon the expiration of the time for seeking such review. *Commonwealth v. Lark*, 560 Pa. 487, 493 (Pa. 2000).

The Pennsylvania Supreme Court docket entries state that Petitioner filed for writ of certiorari in the United States Supreme Court after the Pennsylvania Supreme Court denied relief and that his petition was denied on May 17, 2004, more than five months after the third PCRA petition was filed in the Court of Common Pleas. This raises the possibility that the instant PCRA petition was actually premature under *Commonwealth v. Fisher*, 2005 Pa. LEXIS 612 (Pa. 2005). (judgment becomes final at conclusion of direct review, including discretionary review in United States Supreme Court. Supreme Court of Pennsylvania, or at expiration of time for seeking review.)

Petitioner's first claim is that newly discovered evidence, in the form of the statements from Kenneth Pate and Yvette Williams, lay dormant for more than twenty years and did not surface until after Petitioner appealed the dismissal of his second PCRA petition. He argues that deadline for bringing this evidence to the attention of the PCRA court was December 8, 2003, which was 60 days after the Pennsylvania Supreme Court denied relief on October 8, 2003.[12]

The Commonwealth argues that *Commonwealth v. Lark*, 746 A.2d 585(Pa. 2000) requires the automatic dismissal of the third PCRA petition, reasoning that because the Pennsylvania Supreme Court held that Petitioner's second PCRA petition was untimely filed, it follows that all claims in subsequent PCRA petitions must be untimely as well. This appears to contradict the plain language of *Lark*, which held that when an appellant's PCRA appeal is pending before a court, a PCRA court cannot entertain a subsequent PCRA petition until the appeal is concluded, or upon the expiration of the time for seeking such review. *Id.* at 588.

[12] The United States Supreme Court denied Petitioner's Petition for Writ of Certiorari on May 17, 2004.

In *Commonwealth v. Lark*, 746 A2d 585, 588 (Pa. 1999), the Pennsylvania Supreme Court held that a PCRA Court does not have jurisdiction to entertain additional post-conviction claims while its decision in a prior PCRA proceeding in the same case is on appeal. On this basis, PCRA Court finds that Petitioner had 60 days from October 8, 2003 to raise new claims. Because Petitioner filed this petition on December 8, 2003,[13] it is not untimely for the reason asserted by the Commonwealth, but remains untimely for the reasons set forth below.

Petitioner filed his third PCRA petition on December 8, 2003. In this petition, he claims that Yvette first contacted his former attorney with her exculpatory information on December 18 or 19, 2001 and that she executed her formal declaration on January 28, 2002. *Petition for Habeas Corpus Relief, para. 35 p. 9, 10, Declaration of Yvette Williams*. Petitioner's assertions with respect to when he became aware of Kenneth Pate's testimony, however, are vague and uncertain. Pate's declaration, attached to the third PCRA petition, states that in 1984 when he and Petitioner were both incarcerated at SCI Huntingdon, Pate wrote Petitioner a note in which he stated that his cousin,

[13] The first business day after the 60th day, which fell on a Sunday.

Priscilla Durham, admitted to him in a 1982 phone conversation that she did not hear Petitioner admit to shooting Officer Faulkner. Pate claimed that he gave the note to an unidentified inmate, a "tier worker" whom Pate claims had access to Petitioner, and instructed this inmate to pass the note on to Petitioner. *Declaration of Kenneth Pate, April 18, 2003*. Significantly, Petitioner neither admits nor denies receiving the note, leaving it up to the court to guess what happened.

Pate claims that at some unspecified time between December 2002 and February 2003 he saw Petitioner in the prison yard at SCI Huntington and that he again told Petitioner about the 1982 phone conversation he had with Patricia Durham. *Declaration of Kenneth Pate.*

On December 16, 2004, the PCRA Court scheduled a hearing for the purpose of determining if the allegations in the third PCRA petition met the timeliness requirements of the PCRA.

On December 20, 2004, the Pennsylvania Supreme Court decided *Commonwealth v. Roderick Johnson*, 863 A.2d 423 (Pa. 2004), *reargument denied*, 2005 Pa. LEXIS 216, (February 8,

2005). *Johnson* held that the after-discovered evidence exception focuses on newly discovered facts, not on a newly discovered or a newly willing source for previously known facts.[14]

The PCRA Court cancelled the evidentiary hearing and ordered briefing on the question of whether, under the holding in *Johnson*, the Court of Common Pleas lacked jurisdiction to consider the claims in the third PCRA Petition.

Conclusion

After careful consideration, the PCRA Court concludes that under *Commonwealth v. Johnson*, the third PCRA petition is untimely filed because the evidence Petitioner advances

---

[14] In *Johnson*, the defendant was convicted of murder largely on the testimony of George Robles. The defense theory was that Robles conspired with the police to give false testimony. *Commonwealth v. Johnson*, 727 A.2d 1089 (Pa. 1999). After Johnson's judgment of sentence was affirmed on appeal, he filed two PCRA petitions. The first petition, which was timely filed, was denied on the merits. [14] Nine months later, Johnson filed a second PCRA petition, which was dismissed as untimely by the PCRA Court. In the second petition, Johnson produced an affidavit that Robles executed after trial, supporting Johnson's claim that the Commonwealth withheld evidence Johnson could have used to attack Robles' testimony at trial, i.e. that Robles was a drug dealer who colluded with the police. *Id.* at 425. The Pennsylvania Supreme Court held that this evidence did not qualify as after-discovered evidence, Pa.C.S. 9545 (b)(1)(ii), for purposes of the timeliness requirements of the PCRA. "The after-discovered evidence exception. . . focuses on newly discovered facts, not on a newly discovered or a newly willing source for previously known facts. Johnson's claim of governmental interference claim, 42 Pa.C.S.9545 (b)(1)(i), was also rejected. *Commonwealth v. Johnson*, 863 A.2d 423, 427 (Pa. 2004).

does not qualify as after-discovered evidence under the PCRA. Because Petitioner has failed to plead facts which would an exception to the timely filing requirements of the PCRA, the instant petition must be dismissed for lack of jurisdiction. Although the instant PCRA petition was filed within 60 days of the date of dismissal of the previous petition, it nonetheless fails the timeliness jurisdictional requirements.

The third petition does little more than reiterate claims petitioner made in his first two PCRA petitions. The only thing that appears to differentiate the instant PCRA petition from the first and second petitions is that new witnesses, namely Yvette Williams and Kenneth Pate, have come forward to testify to previously raised claims.

The "newly discovered" evidence regarding eyewitness Cynthia White, now deceased, is that Yvette Williams would testify that Ms. White, a long-time drug addict and prostitute, confessed to Ms. Williams that she, White, had been pressured by police to testify on behalf of the Commonwealth. This is mere impeachment evidence. In the context of a petition for post-conviction relief, to warrant relief, after-discovered evidence must meet a four-prong test: (1) the evidence could not have been obtained before

the conclusion of the trial by reasonable diligence; (2) the evidence is not merely corroborative or cumulative; (3) the evidence will not be used solely for purposes of impeachment; and (4) the evidence is of such a nature and character that a different outcome is likely. *Commonwealth v. Choice*, 830 A.2d 1005 (Pa. Super. Ct. 2003). Even if this Court were to find that Ms. Williams did not contact petitioner until December 18 or 19 of 2001, Ms. William's testimony fails the other three prongs of this test.

Ms. White's credibility and potential reasons for testifying falsely were examined exhaustively at trial [N.T. 6/22/82 at 24 195-213]. No one ever mistakenly believed that Ms. White was a model citizen. In addition to being inadmissible hearsay, See, *Commonwealth v. Yarris*, 731 A.2d 581 (Pa. 1999), Petitioner's proffer is not of new facts, but of "newly discovered or newly willing sources" for a previously raised claim--the very situation to which the *Johnson* case refers.

Even were her credibility further successfully attacked, Ms. White's evidence remains merely cumulative of other eyewitness testimony.[15]

The other "newly discovered" evidence is an affidavit from one Kenneth Pate, claiming that he spoke to Patricia Durham, a hospital security guard who testified at trial that she heard Petitioner admit to shooting Officer Faulkner. Pate would testify that Durham told him that she heard no such thing and that the Commonwealth pressured her into testifying. This evidence is also inadmissible hearsay. *See, Yarris, Supra.* Even if the rules of evidence did not bar the admission of Mr. Pate's statement, it would be of scant value to Petitioner. Philadelphia Police Officer Gary Bell was also present when Petitioner bragged about shooting Officer Faulkner, and testified to this effect at trial. N.T. 6/24/82 at 32, 136. The only conceivable value of Pate's testimony, therefore, would be to impeach Officer Bell's testimony. This would not be sufficient to afford Petitioner relief under the PCRA. *See, Choice, Supra.*

---

[15] **Eyewitness Robert Chobert testified he saw Petitioner standing over Officer Faulkner and firing bullets into him. NT 6/19/82 at 210. Eyewitnesses Michael Scanlan, testified that he saw the same thing. NT 6/25/82 at 8.7. Albert Magilton did not see the actual shooting, but he saw the beginning of Petitioner's encounter with Officer Faulkner, heard shots, saw Faulkner on the ground and Petitioner sitting on the curb nearby. NT 6/25/82 at 8.77.**

By Petitioner's own admission, [Affidavit of Kenneth Pate], he has long known about this evidence, perhaps as early as 1984. Counsel does not explain Petitioner's failure to memorialize Pate's evidence years ago. Petitioner has the burden to plead and prove all relevant dates. He has failed to meet that burden.

In summary, the instant petition proffers inadmissible hearsay, which, were it admissible, would at best be cumulative or impeachment evidence. The proffered evidence consists of newly willing sources for previously asserted facts. Finally, Petitioner fails to plead jurisdictional facts, which, if proven would establish as a matter of law that he acted with due diligence.

Petitioner also contends that he is entitled to habeas corpus relief under Article I, section 14 of the Pennsylvania Constitution, and that the 1995 amendments to the PCRA are invalid because they unconstitutionally suspend the state constitutional right to habeas corpus relief. This argument, raised and dismissed in Petitioner's second PCRA petition, was also rejected in *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998). *See also, Commonwealth v. Mercado*, 826 A.2d 897 (Pa. Super. 2003). Therefore, Petitioner's habeas corpus claim is dismissed.

Therefore, the following Notice is given:

NOTICE PURSUANT TO PENNSYLVANIA RULE OF CRIMINAL PROCEDURE 909

Date: May 27, 2005

You are hereby advised that in twenty (20) days from the date of this **NOTICE**, your request for post-conviction relief will be dismissed without further proceedings. No response to this notice is required. If, however, you choose to respond, your response is due within twenty (20) calendar days of the above date.

BY THE COURT,

Dembe, J.

COMMONWEALTH)
)
-vs-)
)
MUMIA ABU-JAMAL,)
)
Petitioner) PCRA

PROOF OF SERVICE

I hereby certify that on this day I am serving the foregoing order upon the person(s) indicated below, which service satisfies the requirements of Pa. R. Crim. P. 114

First Class Mail

Robert R. Bryan, Esq.
2088 Union Street
Suite 4
San Francisco, California 94123-4121

Judith L. Ritter, Esq.
Widener University School of law
P.O. Box
7474
4601 Concord Pike
Wilmington, Delaware 19801

Steven W. Hawkins, Esq.
120 Wooster Street
Second Floor
New York, NY 10012

Jill Cullbert, Esq.
2088 Union Street
Suite 4
San Francisco, California 94123-4121

Interoffice Mail

Robin Godfrey, Esq.
PCRA Unit
DA's Office
1421 Arch Street

Hugh Burns, Esq.
Appeals Unit
DA's Office
1421 Arch Street

Dembe, J.

May 27, 2005

IN THE COURT OF COMMON PLEAS
[illegible] JUDICIAL DISTRICT

COMMONWEALTH,	)	
	)	Case No. 8201-1357-59
Respondent	)	
	)	
-vs-	)	
	)	
MUMIA ABU-JAMAL,	)	
	)	
Petitioner.	)	PCRA

ORDER

The Court has reviewed Petitioner's response filed pursuant to Pa. R. Crim. P 909 B(2)(b), and enters the following Order:

And Now, this 17th day of June, 2005, Petitioner's petition for post-conviction relief is dismissed.

BY THE COURT,

Dembe, J.