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PENNSYLVANIA SUPERIOR COURT
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA **Plaintiff-Appellee,**	)	**451 WDA 2018**
v.	)	**CP-02-CR-0004017-1993** **CP-02-CR-0004276-1993** **PCRA: 1st-Degree Murder** **PCRA Court: McDaniel, J.**
SHAWN LAMAR BURTON **Defendant-Appellant.**	)	

Defendant-Appellant's Opening Brief

Appeal from the February 14, 2018 Order Dismissing Shawn Burton's PCRA Petition Entered by the Honorable Donna Jo McDaniel of the Allegheny County Common Pleas Court, Criminal Division, CP-02-CR-0004017-1993 and CP-02-CR-0004276-1993

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TABLE OF CONTENTS

TABLE ON AUTHORITIES

CASES

RULES/STATUTES

STATEMENT OF JURISDICTION

Jurisdiction for this appeal is provided for at 42 Pa. C.S. § 742, relating to this Court's exclusive appellate jurisdiction from a Common Pleas Court's final order.

ORDER OR OTHER DETERMINATION IN QUESTION

Under appeal is the February 14, 2018 order dismissing Shawn Burton's PCRA petition entered by the Honorable Donna Jo McDaniel of the Allegheny County Common Pleas Court, Criminal Division, CP-02-CR-0004017-1993 and CP-02-CR-0004276-1993.[1]

On March 9, 2018, Mr. Burton appealed.[2]

On March 28, 2018, Mr. Burton filed his *Concise Statement of Errors on Appeal*.[3]

On July 17, 2018, Judge McDaniel filed her opinion.[4]

CLAIMS PRESENTED

Mr. Burton respectfully presents the following claims for the Court's consideration and adjudication:

> Claim #1: Judge McDaniel erred and violated Mr. Burton's state and federal due process rights by rejecting Mr. Burton's newly-discovered fact claim regarding the incriminating statements his co-defendant, Melvin Goodwine, made in his July 2009 expungement motion. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

[1] Rp. 1. Rp = Reproduced Record page number(s).
[2] Rp. 29.
[3] Rpp. 30-32.
[4] Rpp. 33-46.

Lower court: Judge McDaniel rejected this claim by finding Goodwine incredible.

Claim #2: Judge McDaniel erred and violated Mr. Burton's due process rights by striking the transportation order relating to Brien O'Toole's appearance at the February 14, 2018 PCRA hearing. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

Lower court: Judge McDaniel rejected this claim, finding Mr. Burton waived it because counsel did not request the the February 14, 2018 PCRA hearing transcripts.

SCOPE AND STANDARD OF REVIEW

In reviewing the grant or denial of PCRA relief, the Court examines whether the PCRA court's findings and conclusions are supported by the record and free of legal error. *Commonwealth v. Mitchell*, 141 A.3d 1277, 1283-1284 (Pa. 2016). The PCRA court's factual findings are entitled to deference if supported by the record, but its legal conclusions are reviewed *de novo*. *Commonwealth v. Hawkins*, 894 A.2d 716, 722 (Pa. 2006).

On January 31, 2018, counsel (Cooley) had Brien O'Toole properly served with a subpoena at SCI-Fayette. On February 1, 2018, O'Toole – or someone claiming to be O'Toole – wrote Judge McDaniel objecting to the subpoena. The February 1, 2018 letter, therefore, can be construed as a motion to quash the subpoena. Judge McDaniel did not enter an order quashing O'Toole's subpoena. Instead, on February 7, 2018, Judge McDaniel cancelled O'Toole's transportation order for the February 14, 2018 PCRA hearing, effectively quashing the subpoena because without the transportation

order SCI-Fayette was under no legal obligation to transport O'Toole to Allegheny County for the February 14, 2018 PCRA hearing.

Judge McDaniel's actions, therefore, are analogous to quashing a subpoena.[5] "[W]hether a subpoena shall be enforced rests in the judicial discretion of the court. [This Court] will not disturb a discretionary ruling of a lower court unless the record demonstrates an abuse of the court's discretion. So long as there is evidence which supports the lower court's decision, it will be affirmed. [This Court] may not substitute [its] judgment of the evidence for that of the lower court. *In re Subpoena No. 22*, 709 A.2d 385, 387 (Pa. Super. 1998).

"An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will." *Commonwealth v. Fleming*, 794 A.2d 385, 387 (Pa. Super. 2002).

PROCEDURAL AND FACTUAL HISTORY

A. Trial, direct appeal, and initial PCRA proceedings

On March 9, 1993, someone inside the Allegheny County Jail ("AJC") strangled inmate Seth Floyd to death. After an investigation, the Commonwealth charged Shawn

[5] "Although our research has not unearthed a standard for reviewing a trial court's decision not to enforce a subpoena, we conclude that the trial court's decision in the instant case was in essence similar to a decision to quash a subpoena, or part thereof." *Commonwealth v. Cook*, 865 A.2d 869, 876 (Pa. Super. 2004).

Burton (4017-1993 and 4267-1993) and Melvin Goodwine (4018-1993 and 4275-1993) with Floyd's death. Both were charged with murder and conspiracy.

Mr. Burton and Goodwine both pleaded not guilty and the Commonwealth jointly tried them before the Honorable Donna Jo McDaniel. Charles Schwartz represented Mr. Burton. Mark Lancaster represented Goodwine.

On September 28, 1993, a jury convicted Mr. Burton of first-degree murder and conspiracy, but only convicted Goodwine of conspiracy. The jury acquitted Goodwine of the murder charge. The trial court sentenced Mr. Burton to a mandatory term of life imprisonment, while sentencing Goodwine to 5 to 10 years imprisonment for his conspiracy conviction.

Mr. Burton appealed, but this Court affirmed. *Commonwealth v. Burton*, 688 A.2d 1225 (Pa. Super. 1996). The Supreme Court denied Mr. Burton's petition for allowance of appeal ("PAA"). *Commonwealth v. Burton*, 700 A.2d 437 (Pa. 1997). On August 4, 1998, Mr. Burton filed his first *pro se* PCRA petition. After a series of procedural irregularities irrelevant here, Mr. Burton filed another amended PCRA petition on October 5, 2005, asking for post-conviction DNA testing under 42 Pa. C.S. § 9543.1. On December 12, 2005, Judge McDaniel dismissed his petition. Mr. Burton appealed, but this Court affirmed, *Commonwealth v. Burton*, 924 A.2d 688 (Pa. Super. 2007), and the Supreme Court denied his PAA. *Commonwealth v. Burton*, 936 A.2d 39 (Pa. 2007).

B. The Goodwine PCRA petition

On May 30, 2013, Mr. Burton received a letter from Charlotte Whitmore, a staff attorney with the Pennsylvania Innocence Project ("PA IP"). The letter, dated May 23, 2013,[6] included a copy of a *pro se* "Motion for Partial Expunction of Adult Criminal Record" Goodwine filed on July 29, 2009 with the Allegheny County Common Pleas Court.[7] In the expungement motion, Goodwine admitted he had murdered Seth Floyd "in self-defense." Goodwine also said "an innocent man went to jail for a crime that I committed."[8]

According to Charlotte Whitmore, she had received copies of the expungement and the trial court's subsequent opinion denying the expungement motion from Twyla Bivins, who claimed to have received the documents from Goodwine's ex-girlfriend. In her May 23, 2013 letter to Mr. Burton, Whitmore explained that the PA IP had not yet determined whether it would become involved in his case, but advised him, if he had not previously been aware of the admission made by Goodwine in his expungement motion, he had 60 days from the date he received the PA IP's letter to file a newly-discovered fact PCRA petition based on the expungement motion.[9]

[6] Rpp. 63-64.
[7] Rpp. 71-80.
[8] Rp. 75.
[9] Rpp. 63-64.

On July 11, 2013, Mr. Burton filed a *pro se* PCRA petition,[10] asserting the admissions made in the expungement motion constituted newly-discovered facts under 42 Pa. C.S. § 9545(b)(1)(ii). On August 6, 2013, without appointing counsel and without holding a hearing, Judge McDaniel issued her 907-dismissal notice. On August 21, 2013, Mr. Burton filed his 907 objections, but Judge McDaniel dismissed his petition on August 27, 2013, finding his petition "patently frivolous and without support on the record." Also, without explicitly mentioning a public records presumption regarding the expungement motion, Judge McDaniel said Mr. Burton could have obtained Goodwine's expungement motion as early as July 2009 because it was a matter of public record.

Mr. Burton appealed (1459 WDA 2013) and represented himself before this Court. On July 15, 2014, in an unpublished opinion, a divided panel of this Court vacated Judge McDaniel's order and remanded for an evidentiary hearing. The Commonwealth timely petitioned for *en banc* review, which this Court granted on September 8, 2014. On August 25, 2015, the *en banc* panel vacated Judge McDaniel's order dismissing Mr. Burton's PCRA petition and remanded for an evidentiary hearing. *Commonwealth v. Burton*, 121 A.3d 1063 (Pa. Super. 2015).

[10] Rpp. 47-61.

The majority said Mr. Burton's petition was untimely, but because he argued his petition was timely under 42 Pa. C.S. § 9545(b)(1)(ii) based on the newly-discovered admissions made in Goodwine's expungement motion, the majority considered "the appropriate level of diligence required of an untimely PCRA petitioner." *Commonwealth v. Burton*, 121 A.3d at 1068. The majority recognized that the Supreme Court had previously held that "publicly available information cannot predicate a timeliness exception beyond the 60-day grace period defined in Section 9545(b)(2)." *Id.* (citing *Commonwealth v. Taylor*, 67 A.3d 1245, 1248 (Pa. 2013)). The majority, however, said this rule was "not absolute" because it had to adhere to section 9545's statutory text, which mandates only that the new fact(s) be "unknown *to the petitioner*." *Id.* at 1071 (emphasis in original).

The majority suggested that, while the presumption regarding public records is "reasonable when… [a] petitioner retains access to public information, such as when a petitioner is represented by counsel," a *pro se* petitioner, who is presumably incarcerated, does not have access to information readily available to the public, and, indeed, is "no longer a member of the public." *Id.* at 1072 (citing 42 Pa. C.S. § 9543(a)(1)). Quoting at length from *Commonwealth v. Bennett*, 930 A.2d 1264 (Pa. 2007), where the Supreme Court held that the public record presumption did not apply to PCRA petitioners who had been abandoned by their attorneys, the majority reasoned:

> If our Supreme Court [in *Bennett*] has recognized expressly that, without the benefit of counsel, we cannot presume a petitioner has access to information contained in his own public, criminal docket, then surely it cannot be that we presume a *pro se* petitioner's access to public information contained elsewhere.

Commonwealth v. Burton, 121 A.3d at 1073.

Accordingly, the majority said "the presumption of access to information available in the public domain does not apply where the untimely PCRA petitioner is *pro se*." *Id.*

The majority also said Judge McDaniel failed to develop an adequate record. It said the record did not support her rejection of Mr. Burton's claim that he had first learned of the admissions made in the expungement motion – and the expungement motion in general – when he received Whitmore's letter in May 2013. Suggesting Mr. Burton's diligence "may be sufficient," the majority said Mr. Burton raised genuine factual issues that warranted an evidentiary hearing. *Id.* at 1073-1074.

The Commonwealth sought discretionary review. The Supreme Court granted review, affirmed, and said the public records presumption does not apply to incarcerated *pro se* petitioners. *Commonwealth v. Burton*, 158 A.3d 618 (Pa. 2017). In remanding the case back to Judge McDaniel, the Supreme Court said Judge McDaniel "must first determine whether 'the facts upon which the claim is predicated were unknown to the petitioner.'" *Id.* at 638. The Supreme Court said making this determination "may," in some cases, "require a hearing." *Id.*

If Judge McDaniel determined Mr. Burton did not know about Goodwine's expungement motion or the admissions contained therein, the Supreme Court instructed Judge McDaniel to determine whether Mr. Burton exercised due diligence in obtaining the expungement motion and the admissions contained therein. In doing so, the Supreme Court instructed Judge McDaniel she *had to consider* Mr. Burton's *pro se* status between November 2007 (when Mr. Burton's first PCRA appeal ended) and July 2013 (when Mr. Burton filed his PCRA petition). *Id.* at 638.

C. Marvin Harper and Brien O'Toole PCRA Petitions

1. Marvin Harper

In April 2014, while Mr. Burton was appealing the Goodwine PCRA petition, Mr. Burton received a notarized affidavit from Marvin Harper (or Harpool).[11] Harper testified against Mr. Burton at trial and claimed he had seen Mr. Burton and Goodwine wrestling with Seth Floyd in Floyd's cell shortly before day inmates found Floyd dead in his cell. In his affidavit, though, Harper said he had lied at trial because he never saw Mr. Burton or Goodwine in Floyd's cell the day of the murder.

Harper said correctional officers had informed him if he provided information linking Mr. Burton to Floyd's murder, he would "receive a legal favor in exchange for this information."[12] Harper said he told correctional officers he "actually witnessed Mr. Burton" commit Floyd's murder. Harper, however, said his statement to correctional

[11] Rpp. 81-82.
[12] Rpp. 81-82.

officers was false. Harper said in exchange for his statement implicating Mr. Burton, correctional officers told him the District Attorney's Office ("DAO") agreed to drop his then pending $50,000 bond. Harper said he was now 39-years-old and has had "to live with" this lie for the last twenty years and that he has "asked GOD to forgive" him for what he had done to Mr. Burton.[13]

Harper notarized the affidavit on February 19, 2014 and mailed it to Mr. Burton at SCI-Greene shortly thereafter because Mr. Burton received the affidavit at SCI-Greene on February 24, 2014. On April 16, 2014, while he was appealing the dismissal of his Goodwine PCRA petition (1459 WDA 2013), Mr. Burton filed another PCRA petition ("Harper PCRA petition") based on Harper's affidavit.

On May 21, 2014, Mr. Burton filed a motion asking Judge McDaniel to stay his Harper PCRA petition due to his pending appeal regarding the Goodwine PCRA petition. Mr. Burton's motion was supported by clearly-established state law: "[W]hen 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 court in which review is sought, or upon the expiration of the time for seeking such review." *Commonwealth v. Lark*, 746 A.2d 585, 588 (Pa. 2000).

[13] Rp. 81-82.

On June 2, 2014, Judge McDaniel granted Mr. Burton's stay request. On July 16, 2014, however, Judge McDaniel issued a 907-dismissal notice and she dismissed the petition on substantive grounds on August 7, 2014. Mr. Burton appealed (1467 WDA 2014). On October 20, 2015, this Court agreed with Judge McDaniel that she should have dismissed the Harper PCRA petition, but said she erred when she substantively dismissed the petition. This Court cited *Lark* and said, "The PCRA court ultimately dismissed [Mr. Burton']s serial PCRA petition as untimely; it should have dismissed the petition as *premature*" because Mr. Burton's appeal (1459 WDA 2013) regarding the Goodwine PCRA petition was still pending before this Court. *Commonwealth v. Burton*, 2015 Pa. Super. Unpub. LEXIS 3834, at *1. In a footnote, this Court instructed Mr. Burton to re-file his Harper PCRA petition "within sixty days of the date of the order which finally resolves the previous PCRA petition, because this is the first 'date the claim could have been presented." *Id.* (quoting *Commonwealth v. Lark*, 746 A.2d at 588).

On May 26, 2017, within 60-days of the Supreme Court's remand regarding the Goodwine PCRA petition, Mr. Burton filed an *Amended Second PCRA Petition or in the Alternative Petitioner's Third PCRA Petition* ("Harper PCRA petition II").[14]

2. Brien O'Toole PCRA Petition

On July 20, 2017, after Mr. Burton filed his Harper PCRA petition II, counsel (Cooley) and his investigator, Zach Stern, interviewed Brien O'Toole at SCI-Fayette.

[14] Rpp. 83-124.

O'Toole testified against Mr. Burton at his trial. The Commonwealth summarized O'Toole's trial testimony in its opening brief on direct appeal:

> Brien O'Toole was an inmate in March 1993, and worked in the mental health unit of the jail (TT 649). During a period of time before Floyd died (TT 652), when [Mr. Burton] was housed in the mental health unit, he [Mr. Burton] asked O'Toole how the transfers to the jail Annex worked and O'Toole told him that after an inmate saw the doctor and was cleared by the doctor, that the inmate was moved into the general population and then transferred that evening (TT 650-651). [Mr. Burton] then asked O'Toole to find Goodwine and deliver a message to him (TT 651). The message was: "That he was going to be transferred straight to the Annex and that they weren't going to be able to do anything with Seth" (TT 651).

O'Toole is serving LWOP for murdering his ex-wife, Shareen O'Toole, on May 11, 1997.[15] During the July 20, 2017 interview, O'Toole said he had worked in the Mental Health Unit at the ACJ in 1993. While he worked there, inmates frequently asked him to pass messages to other inmates. These messages often concerned whether they would be transferred due to their mental health condition. In the days before Seth Floyd's murder, O'Toole said Mr. Burton, who he knew as "Showtime," had asked him to pass a message to his friend, Melvin Goodwin, about whether he (Burton) was going to be transferred. O'Toole said he did not find Mr. Burton's request weird or unusual.[16]

[15] Rpp. 125-127.

[16] These facts are contained in the *Supplemental Amended PCRA Petition* ("O'Toole Petition") Mr. Burton filed on September 18, 2017. Rpp. 128-136.

After Floyd's murder, O'Toole said detectives came to the jail and many inmates came forward with false information about Floyd's murder solely to help their own cases. O'Toole was in the gym when he was supposed to be working one day, and guards reprimanded him. To escape trouble, O'Toole said he told the guards he had information about Floyd's murder. Shortly thereafter, O'Toole said he spoke with detectives who told him the victim's name – Seth Floyd. This was the first time O'Toole had heard Seth Floyd's name.

O'Toole said once he had learned Goodwine and Mr. Burton had been arrested for Floyd's murder, he *assumed* Mr. Burton had asked him (O'Toole) to contact Melvin Goodwin because of what they were planning to do to Seth Floyd. O'Toole, though, told counsel and Stern he had no idea if Mr. Burton and Goodwine were or had been planning anything. When O'Toole spoke with detectives, however, O'Toole told counsel and Stern he exaggerated and fabricated the part of his statement where he told detectives that Mr. Burton had asked him (O'Toole) to tell Goodwine that they (Burton and Goodwin) "weren't going to be able to do anything to Seth." O'Toole also told counsel and Stern he had never heard the name Seth or Seth Floyd until after the murder had occurred when he spoke with detectives. O'Toole told counsel and Stern that his trial testimony – where he had told the jury that Mr. Burton had asked him to tell Goodwine "that they weren't going to be able to do anything with Seth" – was knowingly false.

Based on O'Toole's admission that he falsely testified at Mr. Burton's trial, Mr. Burton filed a *Supplemental Amended PCRA Petition* on September 18, 2017, within 60 days of O'Toole's July 20, 2017 interview at SCI-Fayette, raising an assortment of state and federal claims.[17]

D. October 5, 2017 PCRA hearing

On May 15, 2017, Judge McDaniel scheduled a PCRA hearing regarding the Goodwine PCRA petition. On September 25, 2017, Mr. Burton filed a *Certifications, Discovery, and Logistics Regarding 10/5/17 Hearing Motion*, which provided the Commonwealth with the Pa.R.Crim.P. 902(A)(15) certifications and requesting a copy of the pre-trial discovery.[18] On October 5, 2017, Judge McDaniel held a PCRA hearing regarding the Goodwine PCRA petition.[19] Twyla Bivens, Mr. Burton, and Goodwine testified.

Bivens explained how she had obtained Goodwine's legal papers from Goodwine's ex-girlfriend after she had run into Goodwine's ex-girlfriend at JR's – a bar on East Ohio Street in Pittsburgh. Bivens said she ran into Goodwine's ex-girlfriend at JR's in April 2013 and two or three weeks later the ex-girlfriend gave her Goodwine's legal documents, which she mailed to the PA IP shortly thereafter. Bivens knew Mr. Burton sent most of his legal documents to the PA IP hoping the PA IP would accept

[17] Rpp. 128-136.
[18] Rpp. 140-151.
[19] Rpp. 152-201.

his case, so this was why she mailed Goodwine's legal documents to the PA IP. Bivens told Mr. Burton she had mailed documents to the PA IP, but she did not know the content of the documents because she did not examine them; she merely obtained them in an envelope from Goodwine's ex-girlfriend and mailed them to the PA IP.[20]

Mr. Burton testified he had no awareness or knowledge of Goodwine's expungement motion – or the admissions made in the motion. While he knew he was innocent of Seth Floyd's death, he said Goodwine had never told him before, during, or after trial that he (Goodwine) was solely responsible for Floyd's murder. The first time he had learned of Goodwine's expungement motion was when he had received Charlotte Whitmore's (May 23, 2013) letter on May 30, 2013. Once he had received Whitmore's letter, he timely filed a PCRA petition based on the new facts contained in Goodwine's expungement motion.[21]

Counsel called Goodwine to the stand. When counsel presented Goodwine with the expungement motion and asked if he recognized the document, Goodwine said, "On the advice of counsel, I exercise my Fifth Amendment right to remain silent because my answers may tend to incriminate me."[22] Counsel then asked, "That expungement motion, you stated you killed Seth Floyd in self-defense?" Goodwine replied, "On the advice of counsel, I exercise my Fifth Amendment right to remain

[20] NT, PCRA Hrg., 10/5/2017, pp. 6-11.
[21] NT, PCRA Hrg., 10/5/2017, pp. 14-20, 26-29.
[22] NT, PCRA Hrg., 10/5/2017, p. 32.

silent because my answers may tend to incriminate me."[23] Counsel then asked, "In the affidavit section of the expungement motion, you wrote 'I Melvin Goodwine, do hereby swear and affirm that the following facts are true and correct based on my person knowledge, correct?" Goodwine replied, "On the advice of counsel, I exercise my Fifth Amendment right to remain silent because my answers may tend to incriminate me."[24]

Counsel then asked, "In the affidavit section of that expungement motion, you also wrote 'I understand that false statements made herein are subject to the penalties of 18 Pa. C.S.A. 4904 related to unsworn falsification to authority.' Is that correct?" Goodwine replied, "On the advice of my counsel, I exercise my Fifth Amendment right to remain silent because my answers may tend to incriminate me."[25] Counsel then asked, "On July 2nd on the very bottom of that affidavit, it was notarized by a Benjamin Weaver, correct" Goodwine replied, "On the advice of my counsel, I exercise my Fifth Amendment right to remain silent because my answers may tend to incriminate me."[26]

At this point, Judge McDaniel stopped counsel from asking additional questions and recognized the legitimacy of Goodwine's invocation in connection with Seth Floyd's murder.[27] Goodwine's appointed attorney then said,

[23] NT, PCRA Hrg., 10/5/2017, p. 33.
[24] NT, PCRA Hrg., 10/5/2017, p. 33.
[25] NT, PCRA, Hrg., 10/5/2017, p. 33.
[26] NT, PCRA, Hrg., 10/5/2017, pp. 33-34.
[27] NT, PCRA, Hrg., 10/5/2017, pp. 34.

> Just for the record, Mr. Goodwine would invoke his Fifth Amendment right to any questions regarding that petition, to any affidavit, to the incident that occurred at the county jail, to any witnesses or any evidence he may have proffered at his trial and to any relationship or any conversations he may or may not have had with the defendant in this case.[28]

After Goodwine invoked his Fifth Amendment right to remain silent and became "unavailable," counsel argued the expungement motion was admissible as substantive evidence under Pa.R.Evid. 803(8)'s "public records" exception and Pa.R.Evid. 804(b)(3)'s statement against penal interest exception.[29]

At the end of the hearing, Judge McDaniel made the following findings:

First, Judge McDaniel found Bivens credible and said she had a "viable story" regarding how she had come into possession of Goodwine's legal documents, including his expungement motion.[30]

Second, by finding Bivens credible, Judge McDaniel found Mr. Burton acted diligently when he first learned of Goodwine's expungement motion. As Judge McDaniel said, "The [Supreme Court's] majority opinion seems to be saying that we should be very accommodating whenever there is a *pro se* defendant."[31]

Third, while Judge McDaniel *substantively* considered Goodwine's expungement motion, she did not find the incriminating statements and admissions therein credible.

[28] NT, PCRA Hrg., 10/5/2017, p. 34.
[29] NT, PCRA Hrg., 10/5/2017, pp. 43-46.
[30] NT PCRA Hrg., 10/5/2017, pp. 47-48.
[31] NT, PCRA Hrg., 10/5/2017, p. 48.

Judge McDaniel based her credibility determination on a *prior* hearing – from a *separate* case – where Goodwine apparently testified. Judge McDaniel, though, did not know the prior hearing's date, nor did she mention the prior hearing's purpose. Also, Judge McDaniel did not incorporate Goodwine's prior testimony from this hearing into the record with respect to Mr. Burton's case. According to Judge McDaniel,

> [T]here was a prior hearing and I do not have the day for it where Mr. Goodwine did testify. I found him not to be credible. This seems to be, to me at the time, a manufactured scheme since Goodwine was protected by the double jeopardy clause and what did he have to lose. He had nothing to lose by coming in and helping out a fellow inmate or friend or whatever kind of coconspirator, what kind of relationship they had.
>
> That being said, I have already found Mr. Goodwine to be incredible at a prior hearing. He refused to testify today. And I feel that both of these outweigh a typewritten motion for expungement and, therefore, the PCRA as to this issue is denied.[32]

E. Parole and Probation Finally Disclosed Melvin Goodwine's Written Statement to the Parole Board

To prepare for the October 5, 2017 PCRA hearing, Zach Stern mailed a FOIA request to the Pennsylvania Board of Probation and Parole ("PBPP") requesting, "Any and all documentation relating to the parole application and file for Melvin Goodwine, DOB 8/27/1996, inmate #FP9276."[33] On September 19, 2017, David Butts from the

[32] NT, PCRA Hrg., 10/5/2017, pp. 48-49.
[33] Rp. 202.

PBPP's Office of Chief Counsel wrote Stern informing him the PBPP had requested and received a 30-day extension to comply with the request.[34]

On October 19, 2017, after Judge McDaniel had denied the Goodwine portion of Mr. Burton's PCRA petition at the October 5th PCRA hearing, David Butts replied to the FOIA request by sending Zach Stern nine (9) pages of Goodwine's parole file. In his October 19, 2017 letter, Butts said the PBPP had withheld additional documents because they were exempt from the FOIA law.[35]

On October 20, 2017, counsel (Cooley) called Butts and explained why Mr. Burton wanted/needed access to any statement(s) Goodwine had given to the parole board in 2008 or 2009 – be it handwritten or transcribed by a court reporter. After the call, counsel (Cooley) emailed Butts and summarized their phone conversation. On October 27, 2017, Butts emailed counsel (Cooley) seventeen (17) pages of Goodwine's parole file,[36] which included the following handwritten statement Goodwine wrote on September 16, 2009, where he confesses to strangling Seth Floyd as he – and only he - fought Floyd in Floyd's cell.

[34] Rp. 203.
[35] Rpp. 204-215.
[36] Rpp. 216-235.

Name: Melvin Goodwine

Institution No.: FP9276 **Block No:** FA

The Parole Board now requires a detailed written version of your offense(s). In the space(s) below, please provide a detailed written version of the offense(s). Return this completed form to the Parole Office.

I went to MR Floyd's Cell to Fight
The Fight was getting out of control. And in the
middle of our Struggle I Strangled MR Floyds to
Death with a Shoestring I had wrapped around my Hand during the
Fight. I made a very Bad Decision in not Reporting the
Incident And to this very Day I regret that Decision in not
Reporting what Happened in that cell.
Because MR Floyd Could Still be Alive IF I had Reported the
Crime. And I fully understands How that failing to Alert
The Proper Authorities has left me looking like a Cold
Blooded Killer which I am not And through Soul Searching
And Countless Groups I intend to convey that I totally
understand the magnitude of my Actions And that my Actions
will never be Repeated. I now Know the Pain my Actions
Caused to his Family And Also my Family And Children

Melvin Goodwine
Offender's Signature

9-16-09
Date

37

F. February 14, 2018 PCRA Hearing

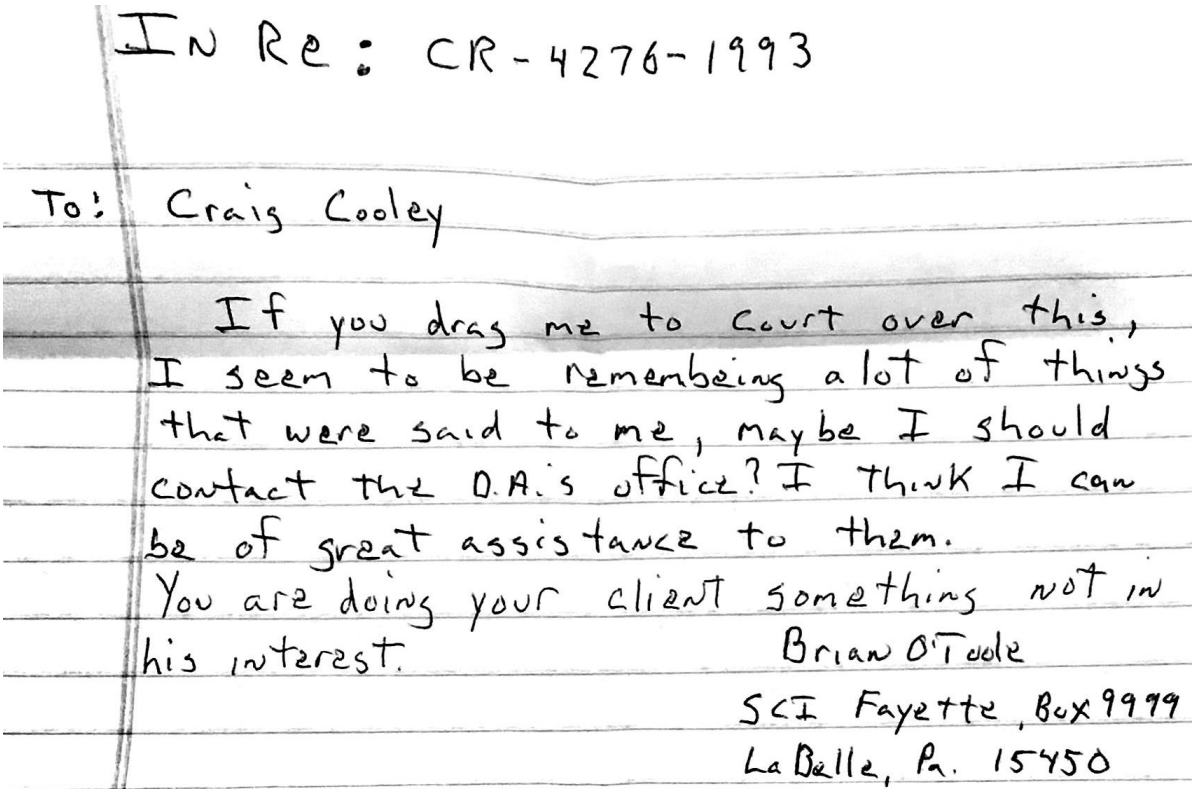
At the end of the October 5, 2017 PCRA hearing, Judge McDaniel scheduled another PCRA hearing for January 11, 2018. On December 20, 2017, before the January 11, 2018 PCRA hearing, counsel submitted a transportation order to Judge McDaniel requesting that Brien O'Toole's be transported from SCI-Fayette to Allegheny County for the January 11, 2018 PCRA hearing.[38] Judge McDaniel signed and entered the transportation order.

[37] Rp. 235.
[38] Rp. 237.

On January 3, 2018, counsel filed a motion to continue the PCRA hearing due to personal/family matters. Judge McDaniel rescheduled the PCRA hearing for February 14, 2018. On January 22, 2018, counsel submitted another transportation order to Judge McDaniel regarding Brien O'Toole.[39] Judge McDaniel signed and entered the transportation order.[40] Judge McDaniel also appointed Phillip C. Hong-Barco to represent O'Toole at the February 14th PCRA hearing.[41]

To compel O'Toole's appearance at the February 14th hearing, counsel subpoenaed O'Toole and Deputy Furlong of the Allegheny County Sheriff's Office ("ACSD") properly served O'Toole with the subpoena on January 31, 2018 at SCI-Fayette.[42] After being properly served, O'Toole – or someone claiming to be him – mailed the following letter to counsel's Plum Borough Office, which counsel received on February 1, 2018:

[39] Rp. 236.
[40] Rp. 26.
[41] Rp. 26.
[42] Rp. 330.



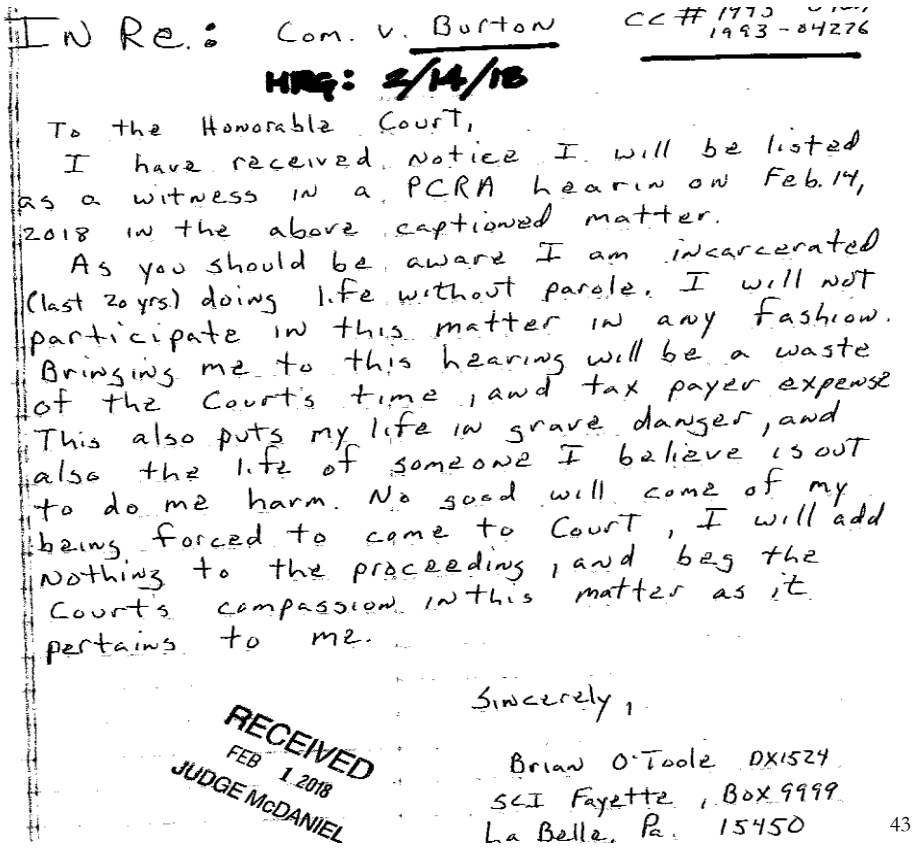
IN RE: CR-4276-1993

To: Craig Cooley

If you drag me to court over this, I seem to be remembering a lot of things that were said to me, maybe I should contact the D.A.'s office? I think I can be of great assistance to them.
You are doing your client something not in his interest.

Brian O'Toole
SCI Fayette, Box 9999
LaBelle, Pa. 15450

O'Toole – or someone claiming to be him – also mailed the following handwritten letter to Judge McDaniel's chambers objecting to the subpoena:



IN Re.: Com. v. Burton CC# 1993-04276

HRG: 2/14/18

To the Honorable Court,

I have received notice I will be listed as a witness in a PCRA hearing on Feb. 14, 2018 in the above captioned matter.

As you should be aware I am incarcerated (last 20 yrs.) doing life without parole. I will not participate in this matter in any fashion. Bringing me to this hearing will be a waste of the Court's time, and tax payer expense. This also puts my life in grave danger, and also the life of someone I believe is out to do me harm. No good will come of my being forced to come to Court, I will add nothing to the proceeding, and beg the Court's compassion in this matter as it pertains to me.

Sincerely,

Brian O'Toole DX1524
SCI Fayette, Box 9999
La Belle, Pa. 15450

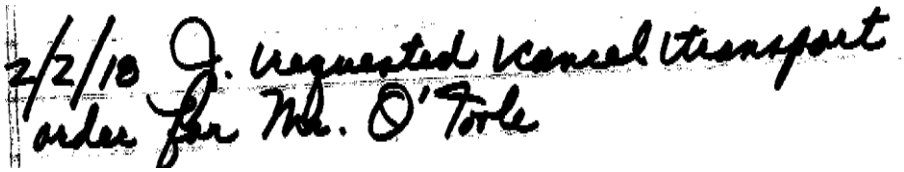
RECEIVED
FEB 1 2018
JUDGE McDANIEL

43

As indicated by the date-stamp, Judge McDaniel's chambers received this letter on February 1, 2018.[44] At the very bottom of the letter is a handwritten note date February 2, 2018, written by someone in Judge McDaniel's chambers, indicating Judge McDaniel had requested that someone in her chambers "cancel [the] transport order for Mr. O'Toole."

[43] Rp. 238.

[44] In Judge McDaniel's opinion, she claims she received this letter on February 12, 2018. Rp. 42. This assertion is wrong as the time-stamp indicates above. Judge McDaniel received the letter on February 1, 2018.



[45]

On February 5, 2018, three days after instructing someone to cancel O'Toole's transportation order, Judge McDaniel's chambers faxed counsel a copy of O'Toole's February 1, 2018 letter. On the same day, February 5th, Judge McDaniel's chambers emailed counsel informing him of the fax. The email also said:

> To be clear, Judge McDaniel has asked me to cancel the transportation order for Mr. O'Toole. I will wait in doing so until Wednesday afternoon, to allow time for either side to let me know if there is an objection. Should I NOT hear from either of you, the transportation order for Mr. O'Toole only, will be cancelled Thursday morning (Feb 8th).[46]

On February 6, 2018, counsel served Judge McDaniel with a motion objecting to the cancellation of O'Toole's transportation order.[47] On February 7, 2018, despite counsel's objections and without ever authenticating the February 1, 2018 letter, Judge McDaniel canceled the transportation order, but never informed counsel (Cooley) she had canceled the transportation order. On February 12, 2018, after not hearing from Judge McDaniel's chambers since February 6, 2018, counsel (Cooley) emailed Judge McDaniel's chambers regarding the transportation order.[48] While waiting for Judge McDaniel's chambers to reply, counsel spoke with O'Toole's appointed attorney,

[45] Rp. 238.
[46] Rpp. 240-242.
[47] Rpp. 243-258.
[48] Rpp. 240-242.

Phillip C. Hong-Barco, who informed counsel that Judge McDaniel had canceled O'Toole's transportation order. Later that day, February 12th, Judge McDaniel's chambers replied to counsel's email and told him Judge McDaniel had canceled the transportation order.[49]

On February 14, 2018, Judge McDaniel held the PCRA hearing regarding the Harper PCRA petition II and the O'Toole petition.[50] Counsel did not subpoena Harper for the hearing because Harper had refused to speak with him and Zach Stern to verify the facts and statements alleged his February 2014 affidavit and Harper had refused to response to our letters thereafter.

Despite counsel properly serving O'Toole with a subpoena, O'Toole never appeared because Judge McDaniel had canceled his transportation order. At the hearing, Judge McDaniel said this regarding why she had canceled the transportation order:

> I further have received a letter from Mr. O'Toole saying that he is doing life without parole. He will not participate in this matter. "Bringing me to the hearing is a waste of time. Puts my life in danger." And he will add nothing to the proceedings.
>
> So here we are. I cancelled testimony, his transportation order here, and he is not here. I'm not inclined to bring him – I'm not going to bring somebody in. For instance, Mr. Cooley, you suggest that perhaps I could hold him in contempt. I'm not sure how effective that would be, since he is doing life without parole. That would give him six

[49] Rpp. 240-242.
[50] Rpp. 259-287.

> months after he died, I guess, in jail, and I don't see any reason to bring him in and go to all that expense where there is an inkling.[51]

At the hearing, O'Toole's appointed attorney, Philip Hong-Barco, spoke on the record and said O'Toole was still refusing to testify, but Hong-Barco never identified a valid privilege buttressing O'Toole's refusal to appear and testify:

> May it please the Court, Philip Hong-Barco on behalf of Brian O'Toole. I did speak with Mr. O'Toole – who is incarcerated at SCI Fayette – over the phone last week. He did reiterate exactly to me what is in his letter, that in no way, shape or form is he going to be cooperating or answering any questions related to this case.
>
> I have received and reviewed, obviously, some of the pleadings in Your Honor's letter, and I was made aware that Your Honor did cancel the transportation order. Other than that, he really doesn't have anything else to say.[52]

At the hearing, counsel filed an amended motion objecting to the cancellation of O'Toole's transportation order.[53] Beside objecting to the fact counsel had properly subpoenaed O'Toole, counsel also argued that Judge McDaniel could not make credibility determinations regarding O'Toole without having a hearing. Judge McDaniel disagreed and said, "I find Mr. O'Toole totally, 100 percent, absolutely incredible."[54]

[51] NT, PCRA Hrg., 2/14/2018, pp. 4-5.
[52] NT, PCRA Hrg., 2/14/2018, pp. 5-6.
[53] Rpp. 288-303.
[54] NT, PCRA Hrg., 2/14/2018, pp. 10-11.

Based on O'Toole's absence, counsel called Zach Stern to testify as to what O'Toole had told him and counsel on July 20, 2017 at SCI-Fayette. Counsel argued Zach Stern's testimony regarding O'Toole's statement was admissible under Pa.R.Evid. 804(b)(3) as a statement against penal interest.

This position is supported by the Commonwealth's pre-hearing emails with counsel. Before the hearing, counsel emailed ADA Ron Wabby on February 7, 2018, asking if the Commonwealth would be willing to offer O'Toole immunity. ADA Wabby declined the immunity request and said the Commonwealth could charge O'Toole with perjury because, based on the Commonwealth's interpretation of the perjury statute, the statute of limitations would start on February 14, 2018, assuming O'Toole appeared and admitted under oath he had falsely testified at Mr. Burton's 1993 trial.[55]

Judge McDaniel permitted Zach Stern to testify and summarized O'Toole's statement.[56]

After Judge McDaniel dismissed the entirety of Mr. Burton's PCRA petition, Mr. Burton filed notice of appeal on March 9, 2014.[57] On March 21, 2018, counsel faxed the Allegheny County Court Reporter's Office ("CRO"), using the 412-350-5827 fax number, requesting the names of the court reporters who had transcribed the

[55] Rpp. 304-307.
[56] NT, PCRA Hrg., 2/14/2018, pp. 22-23.
[57] Rp. 29.

October 5, 2017 and February 14, 2018 PCRA hearings so counsel could start the process of having the transcripts produced.[58] The March 21st fax, which is attached for the Court's convenience, says:

> Good day and I hope this fax finds you well. I'm contacting the Court Reporter's Office to obtain transcripts in connection with *Commonwealth v. Shawn Lamar Burton*, 4017-1993, 4276-1993. Mr. Burton had a two PCRA hearings - **October 5, 2017 and February 14, 2018** – before **Judge McDaniel**. Mr. Burton is indigent and I'm representing him *pro bono*. I need the name and contact information of the court reporter(s) who transcribed the October 5, 2017 and February 14, 2018 PCRA hearings so I can provide him or her with the IFP order and my request to have the transcripts produced. My contact information is below. Please contact me at your earliest convenience. Thanks so much and have a great week.[59]

That same day, March 21st, the CRO called counsel and asked him to complete transcript request forms for both PCRA hearings and to mail them to the CRO. On March 31, 2018, counsel mailed a letter to the CRO, enclosing the two transcript request forms. The letter said:

[58] Counsel actually wrote the letter on March 14, 2018, as indicated by the date on the faxed letter, but counsel did not fax the letter until March 21, 2018 at 12:34:36 GMT. My assistant signed the letter for me as indicated by her "bubble" signature." Rp. 324.

[59] All the facts and documents regarding the February 14, 2014 PCRA hearing transcripts are set forth in the PCRA petition Mr. Burton mailed (via UPS) to the Allegheny County Common Pleas Court on September 17, 2018. Rpp. 308-326. On September 18, 2018, UPS sent counsel an email verifying that Mr. Burton's petition had been delivered to **DEPARTMENT OF COURT RECORDS CRIMINAL DIVISION** at 9:19 a.m. on September 18, 2018. Rpp. 327-328. The Clerk's Office for unknown reasons *never* docketed the PCRA petition, meaning there's no docket entry recognizing the filing of his PCRA petition on the Common Court Pleas Docket.

> Good day and I hope this letter finds you well. I'm contacting the Court Reporter's Office to obtain transcripts in connection with *Commonwealth v. Shawn Lamar Burton*, 4017-1993, 4276-1993. Mr. Burton had two PCRA hearings - **October 5, 2017 and February 14, 2018** – before **Judge McDaniel**. Mr. Burton is indigent and I'm representing him *pro bono*. I contacted your office on March 14, 2018 requesting production of the transcripts and someone from your office called me that day, May 21st, and asked me to submit formal transcript request forms for both PCRA hearings. I completed two transcript request forms – one for the October 5th hearing and one for the February 14th hearing – both of which are enclosed with this letter. My contact information is below. Please contact me at your earliest convenience if you have any questions. Thanks so much and have a great week.[60]

On March 27, 2018, counsel filed Mr. Burton's *Concise Statement of Errors on Appeal*, three of the errors concerned Judge McDaniel's cancellation of Brien O'Toole's transport order.[61]

On July 16, 2018, Judge McDaniel filed her opinion.[62] In her opinion, Judge McDaniel adjudicated Mr. Burton's first claim regarding the Goodwine expungement motion because the October 5, 2017 had been transcribed. Judge McDaniel, though, said Mr. Burton had waived the three claims raised regarding the cancellation of O'Toole's transportation order because counsel had not ordered the February 14, 2018 transcripts.[63]

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[60] Rp. 325.
[61] Rpp. 30-32.
[62] Rpp. 33-46.
[63] Rpp. 43-45.

On July 31, 2018, after receiving Judge McDaniel's opinion, counsel called the CRO, asking why he had never received the February 14, 2018 transcripts when he had submitted the transcript request form on March 31, 2018. The CRO told counsel it had received the transcript request form for the October 5, 2017 PCRA hearing, but could not find the transcript request form for the February 14, 2018 PCRA hearing. The CRO promised counsel the court reporter who had transcribed the February 14th hearing would produce the transcripts expeditiously. On August 8, 2018, court reporter Janice Fedorek emailed counsel a 28-page PDF copy of the February 14, 2018 transcripts.[64]

On September 17, 2018, with 60-days of learning of Judge McDaniel's refusal to adjudicate the O'Toole claims, counsel mailed (via UPS) a PCRA petition to the Allegheny County Common Pleas Court.[65] The PCRA petition explained the abovementioned sequence of events, *i.e.*, counsel's March 21st fax and March 31st letter to the CRO, and asked Judge McDaniel to reinstate Mr. Burton's 1925(a) rights so he could re-file his *Concise Statement of Errors on Appeal* and she could adjudicate the O'Toole claims.

After counsel mailed the PCRA petition from UPS on September 17, 2018, UPS sent counsel an email verifying the mailing and informing counsel the packet would be delivered to the **DEPARTMENT OF COURT RECORDS CRIMINAL**

[64] Rpp. 259-287.
[65] Rpp. 308-326.

DIVISION by 3:00 p.m. on September 18, 2018.[66] On September 18, 2018, UPS sent counsel another email informing him that Mr. Burton's PCRA petition had been delivered to the DEPARTMENT OF COURT RECORDS CRIMINAL DIVISION at 9:19 a.m. that morning (September 18th).[67] Also, counsel emailed ADA Wabby a copy of the PCRA petition on September 18, 2018 and explained the petition's purpose. Likewise, counsel mailed Judge McDaniel a courtesy copy of the petition as well as a brief letter explaining the petition's purpose.[68]

Despite the fact the Department of Court Records ("DCR") received the PCRA petition on September 18, 2018, there is no docket entry regarding the PCRA petition.[69] This is surprising and unsettling because the DCR did not transmit the record to this Court until October 2, 2018 – two weeks after it had received the PCRA petition.[70]

Counsel is fully aware Mr. Burton cannot file another PCRA petition while currently appealing the dismissal of a previously dismissed PCRA petition. *Commonwealth v. Lark*, 746 A.2d at 588. However, counsel mailed the petition simply to protect against any future arguments from the Commonwealth or this Court that Mr. Burton did not diligently file a PCRA petition seeking reinstatement of his 1925a rights based on Judge McDaniel's erroneous findings in her opinion. Also, because this is now the *second* time counsel has mailed a document to an Allegheny County Office and

[66] Rp. 327.
[67] Rp. 328.
[68] Rp. 329.
[69] Rp. 26.
[70] Rp. 27.

that office either lost/misplaced the document or failed to timely docket it, counsel simply wanted to point this fact out to the Court.

Lastly, if the Court remands for a new trial or new PCRA hearing, Mr. Burton's case will be assigned to a new judge because Judge McDaniel resigned on December 12, 2018 after this Court issued another opinion reprimanding her sentencing practices in sex assault/abuse cases. www.post-gazette.com/local/city/2018/12/13/Judge-Donna-Jo-McDaniel-resigns-Allegheny-County-sex-offenders/stories/201812130201 (last visited January 3, 2019).

ARGUMENTS

This Court is quite familiar with Judge McDaniel, particularly her disregard for the simplest forms of due process and this Court's instructions when it comes to properly sentencing sex offenders. *Commonwealth v. Bernal*, 2018 Pa. Super. LEXIS 1333 (Dec. 11, 2018); *Commonwealth v. McCauley*, 2018 Pa. Super. LEXIS 1267 (Nov. 28, 2018); *Commonwealth v. A.S.*, 160 A.3d 248 (Pa. Super. 2017). While it is unfortunate and illegal how Judge McDaniel adjudicated the Goodwine claim and how she dealt with the Brien O'Toole transportation order, counsel is *unsurprised* by Judge McDaniel's rulings and actions in Mr. Burton's case based on her comments, rulings, and actions in *Bernal*, *McCauley*, and *A.S.*

As these cases make clear, Judge McDaniel has a proclivity to do as she pleases, regardless of whether her comments, actions, or rulings denigrate the defendant's constitutional rights, the rule of law, or this Court's prior case law and instructions. Consequently, like the defendants in *Bernal, McCauley*, and *A.S.*, Mr. Burton needs this Court's commitment to the rule of law, due process, and common sense to rectify Judge McDaniel's clear errors and to grant him a new trial or a new PCRA hearing where Brien O'Toole must testify once properly subpoenaed.

Concerning the Goodwine claim, Judge McDaniel based her credibility finding regarding Goodwine on an alleged hearing in connection with his expungement motion where Goodwine supposedly testified. This hearing, notably, occurred in a case separate from Mr. Burton's case. Judge McDaniel, though, never identified the hearing

date, its purpose, and what exactly Goodwine said at the hearing that made her find him incredible years later at Mr. Burton's October 5, 2017 PCRA hearing. Moreover, Judge McDaniel never had the transcripts from this alleged prior hearing incorporated into the record in Mr. Burton's case so Mr. Burton, counsel, and this Court could meaningfully review Goodwine's alleged testimony to determine if Judge McDaniel's credibility determination at Mr. Burton's PCRA hearing was proper.

Judge McDaniel's actions regarding Brien O'Toole's transportation order are even more egregious and appalling. Counsel properly served O'Toole with a subpoena after O'Toole had confessed to counsel and his investigator, Zach Stern, that his trial testimony was knowingly false. O'Toole's confession to counsel and Stern created material issues of disputed fact regarding his trial testimony, requiring Judge McDaniel to hold a PCRA hearing where Mr. Burton could present O'Toole's testimony. Pa.R.Crim.P. 908(A)(2). Yes, O'Toole objected to the subpoena in his February 1, 2018 letter to Judge McDaniel, but his objections did not obviate his duty to appear at the February 14, 2018 PCRA hearing. Indeed, neither O'Toole nor his appointed attorney ever identified a valid privilege that permitted O'Toole to have the subpoena quashed.

Despite the absence of a valid privilege in O'Toole's February 1, 2018 letter, and not even questioning O'Toole about the legitimacy of the claims made in his letter, Judge McDaniel effectively quashed the subpoena by canceling O'Toole's transportation order on February 7, 2018. Judge McDaniel tried to justify her lawless decision by saying she found O'Toole incredible, but she never even questioned

O'Toole under oath in open court. Likewise, Judge McDaniel cancelled the transportation order before Zach Stern had testified as to what O'Toole had told him and counsel at SCI-Fayette on July 20, 2017.

In short, Judge McDaniel had no basis in law to cancel the transportation order, especially after counsel had properly served O'Toole with a subpoena. Yet, Judge McDaniel did just this and she *mocked counsel* at the February 14, 2018 by saying she found O'Toole "totally, 100 percent, absolutely incredible"[71] even though she never even questioned O'Toole regarding his objections or his confession to counsel and Zach Stern.

In the end, Mr. Burton is entitled to a new trial based on his Goodwine claim, and if a new trial is denied, he's entitled to a new PCRA hearing where O'Toole must appear and address questions regarding his July 17, 2017 admissions to counsel and Zach Stern.

[71] NT, PCRA Hrg., 2/14/2018, pp. 10-11.

Claim #1: Judge McDaniel erred and violated Mr. Burton's state and federal due process rights by rejecting Mr. Burton's newly-discovered fact claim regarding the incriminating statements his co-defendant, Melvin Goodwine, made in his July 2009 expungement motion. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

A. Introduction

To obtain a new trial based on after-discovered facts, the defendant must prove, by a preponderance, that the evidence: (1) could not have been obtained before the conclusion of trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach a witness's credibility; and (4) would likely result in a different verdict. *Commonwealth v. Curry*, 181 A.3d 1283 (Pa. Super. 2017). Mr. Burton's after-discovered fact claim regarding Goodwine's expungement motion satisfies these requirements.

First, based on Mr. Burton's *pro se* status from 2008 through September 2015, Goodwine's July 2009 expungement motion – and the admissions contained therein – constituted new facts that Mr. Burton could not have obtained until he received the expungement motion from the PA IP in May 2013. Indeed, Judge McDaniel found that the facts/admissions contained in Goodwine's expungement motion were unknown to Mr. Burton until May 2013.

Second, Judge McDaniel found that Mr. Burton exercised due diligence in obtaining the expungement motion and that he timely filed his Goodwine PCRA petition once he had received the expungement motion from the PA IP in May 2013.

Third, the facts/admissions contained in Goodwine's expungement motion are not merely corroborative or cumulative. To the contrary, they represent the quintessential definition of "exculpatory" because they clearly state Goodwine – *and only him* – was responsible for Seth Floyd's murder.

Fourth, the facts contained in Goodwine's expungement motion would likely compel a different outcome. Had the jury known that Goodwine admitted to being solely responsible for Floyd's death, it is reasonably likely jurors would have acquitted Mr. Burton of the murder and conspiracy charges, especially when there was no physical or direct evidence linking Mr. Burton to Floyd's cell and murder.

B. Goodwine's expungement motion is admissible as substantive evidence under Pa.R.Evid. 803(8)'s public records exception and Pa.R.Evid. 804(b)(3)'s statement against penal interest exception

1. Introduction

In his notarized expungement motion, Goodwine admitted under penalty of perjury that he "already admitted to the parole board" that he had "committed this act," *i.e.*, Seth Floyd's murder, "on my own in self-defense." Goodwine then wrote he "also admitted and [took] full responsibility and ownership that an *innocent man went to jail for a crime that I committed*." Here is the entirety of paragraph 5 in the expungement motion:

5) THE PETITIONER HAS ALREADY ADMITTED TO THE PAROLE BOARD THAT I COMMITTED THIS ACT ON MY OWN IN SELF DEFENSE. PETITIONER ALSO ADMITTED AND TAKE FULL RESPONSIBILITY AND OWNERSHIP THAT AN INNOCENT MAN WENT TO JAIL FOR A CRIME THAT I COMMITTED. NONETHELESS: BECAUSE I WAS ACQUITTED ON THE MURDER CHARGE, PETITIONER WANTS THE MURDER CHARGE AND THE OTHER CHARGES UNDER THIS [OTN] NUMBER THAT WAS nolle prossed AND withdrawn EXPUNGED FROM MY CRIMINAL RECORD. WHEN AN ARREST ENDS IN AN ACQUITTAL, THE INDIVIDUAL HAS AN AUTOMATIC RIGHT TO EXPUNGEMENT REGARDLESS OF HIS PAST RECORD OR THE CIRCUMSTANCES OF THE CASE. SEE ... COMMONWEALTH VS. D.M. 548, Pa. 131, 695, A.2d 770, (1997).

[72]

In paragraph 4, Goodwine indicated he had given oral and written statements to the parole board before filing his expungement wherein he took sole responsibility for Floyd's murder.[73] According to Goodwine's parole paperwork, the parole hearing he had before filing his expungement motion in July 2009 occurred on September 3, 2008. The parole board denied him parole after his September 3rd interview but not because he had refused to take responsibility for Seth Floyd's murder. Instead, the parole board denied him parole, in part, because of his "lack of remorse for the offense(s) committed."[74]

On September 16, 2009, before Goodwine met with the parole board again on January 8, 2010, he submitted the following "written account" of his "crime":

[72] Rp. 75.
[73] Rp. 75.
[74] Rpp. 228-229.

Name: Melvin Goodwine

Institution No.: FP9276 Block No: FA

The Parole Board now requires a detailed written version of your offense(s). In the space(s) below, please provide a detailed written version of the offense(s). Return this completed form to the Parole Office.

I went to MR. Floyd's Cell to Fight. The Fight WAS Getting out of Control. And IN the middle OF OUR Struggle I Strangled MR Floyds to Death with a Shoestring I had WRAPPED AROUND my HAND DURING the Fight. I made a very Bad Decision IN not Reporting the Incident And to this very DAY I regret that Decision IN not Reporting what Happened IN that cell. Because MR. Floyd Could Still be Alive IF I had Reported the Crime. And I fully understands How that Failing to Alert The Proper Authorities HAS left me looking like A Cold Blooded Killer which I AM not And through Soul Searching And Countless Groups I Intend to Convey that I totally understand the Magnitude of my ACTIONS And that my ACTIONS will never be Repeated. I now Know the Pain my ACTIONS Caused to his Family And Also my Family And Children

Melvin Goodwine
Offender's Signature

9-16-09
Date

[75]

The parole board granted Goodwine parole on January 8, 2010.[76]

At the end of his expungement motion, Goodwine attached the following "affidavit" where he said "all statements" in his motion were "the truth" and that "this truth" was "based on" his "personal facts and knowledge." Goodwine also said he had made his admissions/statements under penalty of perjury pursuant to 18 Pa. C.S. § 4904. He then had the affidavit notarized by notary Benjamin Weaver.

[75] Rp. 235.
[76] Rpp. 225-226.

AFFIDAVIT OF MELVIN GOODWINE

I, MELVIN GOODWINE, DO HEREBY SWEAR AND AFFIRM THAT THE FOLLOWING FACTS ARE TRUE AND CORRECT BASED ON PERSONAL KNOWLEDGE. BELOW ARE THE FACTS:

1) ALL STATEMENTS CONTAINED IN THE PETITIONERS MOTION TO EXPUNGE ADULT CRIMINAL RECORD AND PETITIONERS MOTION TO PROCEED IN, IN FORMA PAUPERIS STATUS IS THE TRUTH, THIS TRUTH IS BASED ON MY OWN PERSONAL FACTS AND KNOWLEDGE.

2) I FURTHER STATE THAT I SUBMITT BEFORE THE NOTARY AT S.C.I. HUNTINGDON, MY TWO (2) MOTIONS AND A COPY OF MY CERTIFIED ATTACHED CRIMINAL HISTORY TO BE SUBSCRIBED AND AFFIRMED FOR THE OFFICAL RECORD.

I UNDERSTAND THAT FALSE STATEMENTS MADE HEREIN ARE SUBJECT TO THE PENALTIES OF 18 Pa. C.S.A. 4904 RELATING TO UNSWORN FALSIFICATIONS TO AUTHORITIES.

x Michael Harrison
WITNESS:
DATE: 7-2-09

x Melvin Goodwine
MELVIN GOODWINE:
DATE: July 2 2009

SWORN AND SUBSCRIBED BEFORE ME THIS
2 DAY OF July 2009

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
BENJAMIN E. WEAVER, NOTARY PUBLIC
HUNTINGDON BORO., HUNTINGDON COUNTY
MY COMMISSION EXPIRES DEC. 26, 2011

On July 29, 2009, Goodwine filed his notarized expungement motion with the Allegheny County Common Pleas Court as indicated by the file-stamp below:

FILED

NTY, PENNSYLVANIA
09 JUL 29 PM 2:17

DEPT. OF . RECORDS
CRIM . DIVISION
ALLEGH . NTY PA

2. Rule 803(8)'s public records exception

At the October 5, 2017 PCRA hearing, Goodwine invoked his Fifth Amendment rights and refused to answer specific questions regarding his expungement motion, particularly the paragraphs where he confesses to murdering Seth Floyd and where he admits an innocent man went to prison for a crime he – and only he – committed. Although Goodwine refused to answer questions, his expungement motion was admissible a substantive evidence supporting Mr. Burton's newly-discovered fact claim.

As a publicly filed document, Goodwine's expungement motion constituted a "public record." The Superior Court and Supreme Court agreed, as both said the expungement motion constituted a "public record." *Commonwealth v. Burton*, 158 A.3d at 632-635; *Commonwealth v. Burton*, 121 A.3d at 1071-1073. Indeed, Mr. Burton's most recent appeal concerned whether a *pro se* petitioner could be presumed to know the facts contained in a "public record."[77] Thus, the "public record" issue has already been

[77] *Accord Commonwealth v. Taylor*, 67 A.3d 1245 (Pa. 2013) (the pleadings from trial counsel's representation of defendant's father-in-law before defendant's capital trial were "public records" and "readily available" because "[t]hese cases were docketed" and "filed with the clerk of court"); *Karoly v. Mancuso*, 65 A.3d 301 (Pa. 2013) ("the fact that the Motion to Disqualify and supporting brief were not filed under seal made their contents a matter of public record"); *Commonwealth v. Lopez*, 51 A.3d 195 (2012) (disciplinary proceedings and pleadings against trial counsel constitute "public records"); *Commonwealth v. Hawkins*, 953 A.2d 1248 (Pa. 2008) (transcripts from a key Commonwealth witness's sentencing hearing, which was in clerk's office files, constituted a "public record" and presumptively known by petitioner); *Commonwealth v. Bennett*, 930 A.2d 1264 (Pa. 2007) (an order dismissing an appeal, which is made part of the clerk's office case file, is a "public record"); *Commonwealth v. Chester*, 895 A.2d 520 (Pa. 2006) (charging documents regarding trial counsel's DUI arrest and prosecution, that were in the "clerk of court's files" were "public records" and presumptively known to petitioner).

litigated and is the "law of the case." *Commonwealth v. Starr*, 664 A.2d 1326, 1331 (Pa. 1995).

3. Rule 804(b)(3)'s statement against penal interest exception

Goodwine's admissions in the expungement motion that he killed Seth Floyd constitute statements against penal interest.

A statement against penal interest is one that:

> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to *civil* or criminal liability; and
>
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Pa.R.Evid. 804(b)(3) (emphasis added).

a. Civil liability

Goodwine's admissions and statements clearly exposed him to *civil* liability because Seth Floyd's family, without question, could have filed a wrongful death action against Goodwine seeking damages in connection with Floyd's death. 42 Pa. C.S. § 8301. The issue under Rule 804(b)(3)(A) is not the "likelihood" of Goodwine being civilly sued, but merely the "possibility." *Commonwealth v. Statum*, 769 A.2d 476, 480 (Pa. Super. 2001). Thus, regardless of the likelihood of him being civilly sued, Goodwine's

admissions in his expungement motion were obviously self-incriminatory and unquestionably against his own civil and criminal interests.

b. Criminal liability

When Goodwine invoked his right to remain silent regarding specific questions about Seth Floyd's murder, he repeatedly said, "On the advice of my counsel, I exercise my Fifth Amendment right to remain silent *because my answers may tend to incriminate me*."[78] Goodwine's appointed attorney also said:

> Just for the record, Mr. Goodwine would invoke his Fifth Amendment right to any questions regarding that petition, to any affidavit, to the incident that occurred at the county jail, to any witnesses or any evidence he may have proffered at his trial and to any relationship or any conversations he may or may not have had with the defendant in this case.[79]

Judge McDaniel ruled that Goodwine's invocation was legitimate.[80] To make such a ruling, though, Judge McDaniel had to find that the admissions Goodwine made in his expungement motion exposed him to a potential criminal prosecution in connection with Floyd's murder. Judge McDaniel's ruling, therefore, demonstrates Goodwine's admissions "exposed" him to "criminal" liability.

Judge McDaniel's "exposure to criminal liability" finding supports Mr. Burton's argument that the admissions made in Goodwine's expungement motion constitute

[78] NT, PCRA Hrg., 10/5/2017, p. 33.
[79] NT, PCRA Hrg., 10/5/2017, p. 34.
[80] NT, PCRA Hrg., 10/5/2017, p. 34.

statements against penal interest under Rule 804(b)(3) and, therefore, can be considered *substantively* by this Court when adjudicating Mr. Burton's newly-discovered facts claim.

C. Judge McDaniel's credibility determination is invalid, and her other factual findings are not supported by the record

Judge McDaniel substantively considered the admissions/statements Goodwine made in his expungement motion, but she did not find Goodwine credible. Judge McDaniel, though, based her credibility determination on a *prior* hearing – from a *separate* case – where Goodwine apparently testified, but Judge McDaniel did not know the prior hearing's date, nor did she mention its purpose. Also, Judge McDaniel did not incorporate Goodwine's prior testimony from this hearing into the record with respect to Mr. Burton's case. According to Judge McDaniel,

> [T]here was a prior hearing and I do not have the day for it where Mr. Goodwine did testify. I found him not to be credible. This seems to be, to me at the time, a *manufactured scheme* since Goodwine was protected by the double jeopardy clause and what did he have to lose. He *had nothing to lose* by coming in and *helping out* a fellow inmate or friend or whatever kind of coconspirator, what kind of relationship they had.
>
> That being said, I have already found Mr. Goodwine to be incredible at a prior hearing. He refused to testify today. And I feel that both of these outweigh a typewritten motion for expungement and, therefore, the PCRA as to this issue is denied.[81]

[81] NT, PCRA Hrg., 10/5/2017, pp. 48-49.

In her written opinion, Judge McDaniel mimicked her "manufactured scheme" finding and her belief that Goodwine and Mr. Burton had conspired with one another to create the false narrative presented in Goodwine's expungement motion.

> [I]t defies all logic that someone who defended against a homicide charge and was actually acquitted, would not simply make a quiet motion for expungement (if doing even that) and go about his business, but would instead confess to the very crime he was acquitted of and now sought to expunge. This Court is left with the inescapable conclusion that this was a *concocted scheme* that, when it didn't work as initially *planned*, was abandoned by *one of its participants*.[82]

Judge McDaniel's credibility determination is invalid, and her key factual findings are not supported by the record.

First, "[i]f *supported by the record*, the PCRA court's credibility determinations and factual findings are binding on this Court[.]" *Commonwealth v. Bardo*, 105 A.3d 678, 685 (Pa. 2014) (emphasis added). The term "record" in the phrase "supported by the record" means the "record" in *this case* – not some other case. The problem here is Judge McDaniel admitted she had based her credibility determination on information and testimony from another "record" altogether.

Moreover, Judge McDaniel did not incorporate the "record" from this other case – or the transcripts of the prior hearing she had mentioned where Goodwine apparently testified – into the "record" of Mr. Burton's case. Thus, there is nothing in Mr. Burton's "record" supporting Judge McDaniel's credibility determination. Judge McDaniel's

[82] Rp. 41.

credibility determination, therefore, is not binding on this Court and the Court can review it *de novo*. Under *de novo* review, Goodwine's expungement motion admissions are credible.

Second, because Judge McDaniel did not incorporate the "record" of this other case she had referred to – or the transcripts of the hearing she had mentioned where Goodwine apparently testified – Mr. Burton cannot vindicate his right to meaningful appellate review regarding Judge McDaniel's credibility determination. Put differently, how can Mr. Burton challenge Judge McDaniel's credibility findings when he has no idea what transpired or what Goodwine allegedly said when he testified at this other hearing in an entirely different case? The same goes for this Court. How can this Court meaningfully review Judge McDaniel's credibility finding when it has nothing to review – except Judge McDaniel's conclusory statement that Goodwine had testified at another hearing in a different case and that she found his testimony at that hearing incredible?

Third, Judge McDaniel's "manufactured scheme" and "concocted scheme" finding, which appears to be a primary cog in her credibility finding, is not supported by the record. To begin with, the Commonwealth introduced no evidence – that even remotely suggested – that Goodwine and Mr. Burton had somehow conspired with one another to create the narrative presented in Goodwine's expungement motion. Indeed, Mr. Burton testified at the October 5, 2017 PCRA hearing that he had never communicated with Goodwine once he began serving his life sentence in 1993.

Moreover, if Mr. Burton had conspired with Goodwine to concoct the narrative presented in the expungement motion, why would he then do nothing, legally, for years?

What – Mr. Burton purposely waited until someone else sent him Goodwine's expungement motion – assuming someone would, in fact, send him a copy – to create the false impression he knew nothing about the expungement motion and therefore could not have conspired with Goodwine to write it? This absurd conspiracy theory has no basis in reality, common sense, or the record. Simply put, if Mr. Burton conspired with Goodwine to create the narrative presented in the expungement motion, for the sole purpose of helping him obtain a new trial, Mr. Burton would have immediately obtained a copy of the expungement motion and filed a PCRA petition in 2009 or 2010 at the latest. He would not have waited around hoping someone would send him the expungement motion. To argue and/or find otherwise is ridiculous and incredible.

Fourth, part of Judge McDaniel's "manufactured scheme" and "concocted scheme" finding is her finding that Goodwine falsely took sole responsibility for Floyd's murder to *help* Mr. Burton undo his murder conviction. NT, PCRA Hrg., 10/5/2017, pp. 48 ("[Goodwine] had nothing to lose by coming in and *helping out* a fellow inmate or friend[.]"). The problem with this finding is similar to the problem mentioned above. If Goodwine falsely took responsibility for Floyd's murder *to help Mr. Burton*, why didn't he send Mr. Burton a copy of his expungement motion in 2009 or write him a letter

suggesting it would be in his (Burton's) best interest to request a copy of the expungement motion?

Likewise, as mentioned, if Mr. Burton conspired with Goodwine to create the narrative presented in the expungement motion, why didn't he then contact the Allegheny County Common Pleas Court and obtain a copy of the expungement motion in 2009, 2010, 2011, 2012, and 2013? In other words, Judge McDaniel's finding that Goodwine and Mr. Burton co-created a false narrative simply *to help* Mr. Burton is not supported by the record because there is no evidence in the record indicating Goodwine or Mr. Burton took any efforts or steps to ensure that Mr. Burton had or knew of the expungement motion before July 2013.

Fifth, Judge McDaniel's finding that Goodwine had "nothing to lose" by confessing to Seth Floyd's murder is not supported by the record. Indeed, Judge McDaniel's decision at the October 5, 2017 PCRA hearing to recognize the legitimacy of Goodwine's right to remain silent destroys this finding. If Goodwine had "nothing to lose," as Judge McDaniel claimed, she would not have recognized the legitimacy of his right to remain silent at the October 5, 2017 PCRA hearing and she would have forced him to testify and answer questions about the admissions he had made in his expungement motion. In the end, Judge McDaniel spoke out both sides of her mouth. In one breath, she claimed Goodwine had "nothing to lose." In the next breath, though, when Goodwine's testimony would have helped Mr. Burton, Judge McDaniel found he had "something to lose" because she found his invocation legitimate.

Sixth, if Goodwine falsely accepted sole responsibility for Seth Floyd's murder simply to obtain parole, why would he give an account of Floyd's murder that differed so dramatically from the narrative at trial that supported his *conspiracy* conviction? His conspiracy conviction, for instance, requires the existence of at least two people "conspiring" with one another to murder Floyd. The Commonwealth's narrative at trial was that Goodwine *and* Mr. Burton had murdered Floyd.

If Goodwine wanted to impress upon the parole board that he was truly "remorseful" for what he had done and was taking "full responsibility" for his part in Floyd's murder, why didn't he simply explain how he had "conspired" with Mr. Burton to "murder" Seth Floyd? In other words, it would have been far easier to obtain parole had Goodwine simply confessed to the narrative presented at trial, *i.e.*, he *and* Mr. Burton conspired to murder Floyd and that they both had participated in the murder. By removing Mr. Burton entirely from the narrative, Goodwine ran the risk of having the parole board not believe his account, which in turn decreased the likelihood of being paroled in the first place. Likewise, if Goodwine simply wanted to "help" Mr. Burton, he would have made certain that Mr. Burton knew about his expungement motion and statements to the parole board. Goodwine, though, took no steps – directly or indirectly – to convey this information to Mr. Burton.

Seventh, because the PCRA process is a civil proceeding, *Commonwealth v. Hill*, 16 A.3d 484, 495 n.14 (Pa. 2011); *Commonwealth v. Haag*, 809 A.2d 271, 284 (Pa. 2002), this Court can draw an adverse inference from Goodwine's decision to invoke his Fifth Amendment privilege and refuse to testify in response to probative evidence regarding Seth Floyd's murder and his involvement in the murder. *Harmon v. Mifflin County School District*, 713 A.2d 620, 623-624 (Pa. 1998). When the Court couples this adverse inference with the record evidence, it supports Mr. Burton's position that Judge McDaniel's credibility and factual findings are not supported by the record. In the end, then, there is every reason to believe the confessions Goodwine made in his expungement motion are true and the record evidence supports this finding.

D. Had the jury learned of and heard Goodwine's confessions, it is reasonably likely this evidence would have compelled a different result at Mr. Burton's trial

Had the jury learned of Goodwine's incriminating statements, it is reasonably likely they would have raised reasonable doubt in the jury's eyes with respect to Mr. Burton's culpability in connection with the murder and conspiracy counts.

1. When Goodwine has right to remain silent

Mr. Burton would exercise his compulsory process rights, *see* U.S. Const. amdt. 6. Pa. Const. art I, § 9, to subpoena Goodwine, to put him on the stand at the re-trial, and to force him to confront questions of whether he – and only he – murdered Seth Floyd. A witness is not exonerated from testifying merely by declaring that doing so would be self-incriminating. *Commonwealth v. Carrera*, 227 A.2d 627 (Pa. 1967). Rather,

the trial court must evaluate the circumstances to determine whether the proposed use of the privilege is real or illusory. *Commonwealth v. Long*, 625 A.2d 630 (Pa. 1993). Based on these principles, Goodwine would have to listen to the questions regarding the admissions he made in his expungement motion regarding Seth Floyd's murder and either answer them or invoke his right to remain silent.

It is entirely possible the trial court would reject Goodwine's invocation based on the fact he was acquitted of the murder count and he has already served his sentence arising from his conspiracy conviction. If Goodwine is not in "jeopardy" of being prosecuted criminally for Floyd's murder, the trial court could justifiably reject his invocation and force him to testify. Moreover, Goodwine could not invoke his right to remain silent out of fear he may be prosecuted for perjury. "A witness may not claim the privilege out of fear that he will be prosecuted for perjury for what he is about to say although he may do so if the new testimony might suggest he had perjured himself in a prior proceeding." *Commonwealth v. Tielsch*, 789 A.2d 216, 217 (Pa. Super. 2001).

Here, according to Judge McDaniel, she held a hearing of some sort regarding Goodwine's expungement motion where Goodwine apparently testified. That Goodwine testified at this hearing and discussed the substance of his expungement motion strongly suggests he testified *consistently* with what he had written and admitted in the motion. In other words, at this prior hearing, Goodwine apparently had no problem testifying about the substance of his expungement motion, meaning he had no fear of perjury charges. If he had no fear of perjury charges when he testified during

this alleged hearing, he should have no fear of perjury charges at a re-trial for Mr. Burton.

More importantly, though, counsel has searched in vain for any record of this prior hearing where Goodwine testified but has found no documentation ordering a hearing or when the hearing occurred. Indeed, Goodwine's Common Pleas Court docket sheet and case file does not list a hearing in connection with his expungement motion, nor does the docket sheet list an entry of a transportation order requiring Goodwine's attendance at a hearing.[83] This is significant because if there are no transcripts of the prior hearing, Goodwine would be entirely barred from invoking the privilege based on a fear he might be prosecuted for perjury.

A witness "cannot… invoke the privilege because he fears he might be prosecuted for perjury based on his testimony in the present [hearing]." *Commonwealth v. Tielsch*, 789 A.2d at 217. To be prosecuted for perjury, the "prior statements" must have been made at an "official proceeding," and there must be evidence of the witness's statements at this "official proceeding." 18 Pa. C.S. § 4902. Here, based on counsel's research, there are no transcripts from this alleged prior hearing regarding Goodwine's expungement motion.[84]

[83] Rpp. ___ (Goodwine's CP docket)

[84] If there are transcripts, Judge McDaniel should have incorporated them into the record because she used this hearing to gauge Goodwine's credibility.

If the trial court concluded Goodwine did not have a cognizable right to remain silent with respect to Floyd's murder, Goodwine would have to answer questions about Floyd's murder. For instance, without introducing the expungement motion, trial counsel could ask Goodwine if he had ever confessed to murdering Seth Floyd in a notarized pleading. With this question, Goodwine can do one of two things: *first*, he can admit to confessing in the expungement motion; or *second*, he can deny ever confessing to Floyd's murder.

In the former, if Goodwine admitted to previously confessing to Floyd's murder, his admission would be, without question, favorable and exculpatory to Mr. Burton. Even if Goodwine tried to downplay the admission, by suggesting he had fabricated the narrative in his expungement motion simply to get paroled, his admission would still be exculpatory and impactful to Mr. Burton's defense.

If Goodwine tried to contort the significant or validity of his prior admissions, the jury would have a front row seat to gauge his testimony, demeanor, and credibility. For instance, if Goodwine played this angle, trial counsel could then confront him with the expungement motion, particularly the affidavit where he said his admissions were truthful and based on personal knowledge. In the end, Mr. Burton believes Goodwine's testimony, demeanor, and credibility would substantially assist him in raising reasonable doubt.

If Goodwine denied ever confessing to Seth Floyd's murder, trial counsel could then introduce his expungement motion as a prior inconsistent statement under Pa.R.Evid. 803.1(1). Prior inconsistent statements are admissible as *substantive* evidence. *Commonwealth v. Brady*, 507 A.2d 66, 71 (Pa. 1986). The prior inconsistent statements that may be used as substantive evidence are limited to the following statements: the witness who gave the prior inconsistent statement must testify at trial and be subject to cross-examination regarding the statement; and the witness's previous inconsistent statement was either (a) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, (b) is a writing signed and adopted by the declarant, or (c) is a verbatim contemporaneous recording of an oral statement. *Commonwealth v. Brown*, 52 A.3d 1139, 1171 n.52 (Pa. 2012).

The expungement motion is a writing signed, adopted, and notarized by Goodwine and it speaks for itself: Goodwine researched, typed, and filed the motion after he had it notarized and vouched for the truthfulness of the admissions contained therein. Thus, the jury could consider the expungement motion as substantive evidence warranting Mr. Burton's acquittal. Likewise, the expungement motion would impeach Goodwine's credibility, which would be additional evidence in Mr. Burton's favor.

In the end, if Goodwine testified at re-trial, and denied ever confessing to Seth Floyd's murder, the jury could substantively consider his expungement motion as well as his testimony, demeanor, and credibility. Individually and collectively, it is reasonably

likely the jury would acquit Mr. Burton after reviewing the motion and seeing and listening to Goodwine's incredible testimony.

2. If Goodwine invokes his right to remain silent, the trial court would have to evaluate the legitimacy of the invocation on a question-by-question basis, meaning Goodwine would have to listen to each question before he could invoke the right and the trial court could rule on the invocation

At retrial, Goodwine could obviously invoke his right to remain silent, but he would have to invoke his right on a question-by-question basis. *Commonwealth v. Kirwan*, 847 A.2d 61, 65 (Pa. Super. 2004). As this Court has said, "a witness may ordinarily only assert the privilege to avoid responding to a particular question. A blanket privilege generally is not permitted." *Id.*; *Commonwealth v. Treat*, 848 A.2d 147, 148 (Pa. Super. 2004).

After invoking his right to remain silent, the trial court could, like Judge McDaniel did, recognize his invocation as legitimate. This ruling, though, could *not* be based on the fear of future perjury charges because there are no transcripts from a prior hearing where Goodwine testified. *Commonwealth v. Tielsch*, 789 A.2d at 217. Thus, if the trial court recognizes Goodwine's invocation as legitimate, the *jeopardy* would have to be attached to Seth Floyd's murder. If the trial court made such a finding, Goodwine would be considered "unavailable" under Pa.R.Evid. 804(a), and Mr. Burton could introduce the expungement motion as *substantive* evidence under Rule 804(b)(3).

3. The Commonwealth's evidence against Mr. Burton was inconsistent, far from overwhelming, and based on people who had an obvious motivate to fabricate evidence in order to seek a better outcome in their own cases

The Commonwealth's case against Mr. Burton was not overwhelming and was based on the types of witnesses that prosecutors and judges routinely find incredible because they have obvious motives to use whatever tactics available to them to obtain the best outcome for their own cases: inmates. For instance, when inmates testify on a defendant's behalf, their testimony is routinely deemed "incredible" because inmates are "engaged in a criminal lifestyle." *Commonwealth v. Robinson*, 780 A.2d 675, 676-677 (Pa. Super. 2001). As this Court has said, "such evidence should be viewed through the prism that '[t]elling a story' to help a friend or relative to beat the rap', cannot be viewed as an extraordinary circumstance." *Id.* (quoting *Commonwealth v. Bracero*, 528 A.2d 936, 941 (Pa. 1987)).

Thus, if the "criminal lifestyle" makes an inmate's testimony generally incredible when he or she testifies for a defendant, the same "criminal lifestyle" can make an inmate's testimony *in support of the Commonwealth's case* equally incredible. The bias in favor of the Commonwealth, however, is generally *much stronger* because the Commonwealth can give the inmate something in return, namely (1) testimony before their sentencing court, asking for a reduced sentence, (2) dismissing all or some of the charges currently pending against them, or (3) favorable testimony before the parole board, which increases the likelihood being paroled sooner than later. Put differently,

the motivation to testify in support of the Commonwealth must be "viewed through the prism" that "telling a story" supporting the Commonwealth's narrative can – and in many cases does – lead to a shorter sentence for the inmate, a complete or partial dismissal of charges, and other untold benefits.

Although Seth Floyd died a violent death, which was caused by a ferocious struggle, the Commonwealth presented no forensic evidence linking Mr. Burton to Floyd's murder. For instance, the forensic pathologist said Floyd died of ligature strangulation and that it would have taken 3 to 5 minutes of pressure before Floyd lost consciousness and died.[85] Likewise, officers said Floyd was bleeding from the mouth when they found him in his cell.[86] The Commonwealth linked no evidence from Floyd's cell or person to Mr. Burton – and vice versa – it linked no evidence from Mr. Burton to Floyd's person or cell.

The Commonwealth's key witnesses, several ACJ inmates, gave inconsistent narratives as to what they had allegedly seen shortly before and after Floyd's death, as well as testimony that was proved to be out-and-out false by other objective evidence and testimony. Officer Fluman, for instance, said an inmate had told him at 12:15 p.m. that there was a problem on Range 17. Officer Fulman went immediately to Range 17

[85] TT. 701-703.
[86] TT. 340.

and came across Floyd's body in cell 17-S.[87] Thus, whoever had murdered Floyd did so before 12:15 p.m.

a. Edwin Wright

Edwin Wright, an ACJ inmate, said he had spoken with Floyd, in front of Floyd's cell, between 11:55 a.m. and noon. Wright said Goodwine and Mr. Burton were in Floyd's cell. Mr. Burton was seated on Floyd's bed, while Goodwine was standing. Wright did not see Floyd wrestling or scuffling with Goodwine or Mr. Burton. Wright said he immediately went to lunch after speaking with Floyd. Wright said lunch ended between 12:20 p.m. and 12:25 p.m.[88]

b. Roy Steele

Roy Steele, an ACJ inmate, had seen Floyd on his (Steel's) way to lunch on the Range 17 stairwell. Steele said Floyd was with Goodwine. Steele was heading to lunch, while Floyd and Goodwine were walking back "onto" Range 17. Steele spoke briefly with Floyd on the stairwell regarding cigarettes he owed Floyd. After their brief conversation, Steele said he went directly to lunch, and that was the last time he saw Floyd alive.

[87] TT. 253, 272.
[88] TT. 447-4520

c. Micah Goodman

Micah Goodman, another ACJ inmate, said and he and another ACJ inmate, Marvin Harper, were on Range 17 between 11:30 and 11:40 a.m. looking for Roger and Rabbit to play cards.[89] As they walked down Range 17, they passed Floyd's cell (17-S) and heard a "scuffle" in Floyd's cell. Goodman said he looked into Floyd's cell and saw Goodwine and Mr. Burton "wrestling" with Floyd. Goodman said he didn't think too much of the wrestling because he claimed to have seen Goodwine, Mr. Burton, and Floyd wrestling before.[90]

Goodman said he and Harper walked to the end of Range 17 (to cell 17-Z) looking for Roger and Rabbit but couldn't find them. He said they turned around and walked back down Range 17. As they walked by Floyd's cell again, around 11:40 a.m. and 11:45 a.m., Goodman said he saw Goodwine, Mr. Burton, and Floyd "almost exactly" in "the same position[s]," meaning they were still wrestling.[91] Goodman said he returned to Range 13. Ten to fifteen minutes later, between 11:50 a.m. and noon, Goodman said he saw Goodwine and Mr. Burton "running down the stairs" near Range 13.[92]

[89] TT. 485-501, 513-514.
[90] TT. 485-501.
[91] TT. 495-496.
[92] TT. 500-502.

d. Marvin Harper

Marvin Harper's testimony mimicked Goodman's. He claimed he saw Goodwine, Mr. Burton, and Floyd wrestling when he and Goodman had walked by Floyd's cell both times. Harper, though, never mentioned seeing Goodwine and Mr. Burton running down the steps near Range 13, even though Goodman had testified that he (Goodman) was with Harper when they allegedly saw Goodwine and Mr. Burton running down the steps between 11:50 a.m. and noon.[93]

e. William Johnson

William Johnson, another AJC inmate, gave perhaps the most incredible testimony. Johnson's cell was 17-Y. He said he did not go to lunch that day and that he rested on his bunk during lunch. He said he learned of Floyd's death at 12:30 p.m. when fellow ACJ inmate, Chuck Webb, told him that Floyd had hung himself. At 12:35 p.m., Johnson said he saw Mr. Burton walk in front of his cell, throw something in the garbage can directly in front of his cell, and walk back down Range 17 in the opposite direction.[94] According to Johnson, Mr. Burton was the only person on Range 17 at 12:35 p.m. Johnson's testimony is incredible because multiple ACJ employees testified that Range 17 was on lock down and swarming with officers immediately after Officer Fulman found Floyd's body at 12:15 p.m.

[93] TT. 567-577.
[94] Tpp. 598-599.

Johnson's testimony became more incredible when the Commonwealth *recalled* him to the stand later during the trial. Johnson said he had failed to mention the following facts when he had first testified: While resting in his cell (17-Y), he "heard a lot of commotion," so he "got up and started walking down to each cell to see where the commotion was coming from." He heard the commotion sometime between noon and 12:10 p.m. because he said the commotion happened 5 to 10 minutes after Range 17 had gone to lunch. When Johnson got to Floyd's cell (17-S), he saw Mr. Burton "standing over" Floyd's body. Johnson said Mr. Burton "was just standing there looking at [Floyd][.]" Johnson said Floyd wasn't moving. Johnson said he "ran back" to his cell because he "was scared." Moments later Johnson said he saw Mr. Burton threw "something in the garbage can." Johnson said he never saw Goodwine.[95]

f. Summary of alleged eyewitness accounts

Wright allegedly spoke with Floyd in front of his cell between 11:55 a.m. and noon – and Goodwine and Mr. Burton were inside Floyd's cell at this time. Wright did not see any wrestling or commotions. Around this same time period, though, Steele said he saw Floyd on the Range 17 stairwell with Goodwine, but not Mr. Burton. Goodman and Harper, though, claimed they saw Goodwine and Mr. Burton "wrestling" with Floyd in Floyd's cell between 11:30 a.m. and 11:40 a.m. Ten to fifteen minutes later, between 11:45 a.m. and 11:55 a.m. Goodman, but not Harper, saw

[95] TT. 764-767.

Goodwine and Mr. Burton running down the steps near Range 13. Wright, though, had placed Floyd in his cell at this time – with Goodwine and Mr. Burton. Likewise, Steele had placed Floyd and Goodwine on the Range 17 stairwell at this time. Lastly, Johnson said he saw Mr. Burton standing over Floyd's body in Floyd's cell around 12:05 p.m. and 12:10 p.m. Johnson, though, said he did not see Goodwine in Floyd's cell or anywhere on Range 17 after 12:15 p.m. – except Mr. Burton. These contradicting timelines are self-evident: there is a strong likelihood each of these ACJ inmates lied, particularly when they placed Mr. Burton inside or near Floyd's cell.

g. Confession witnesses

From the moment of his arrest until today (January 15, 2019) Mr. Burton has always maintained his innocence. Thus, before trial he never confessed to any detectives or correctional officers. However, according to Gregory McKinney, another ACJ inmate, Mr. Burton confessed to him on either May 4th or 5th, 1992 in the ACJ's Disciplinary Housing Unit ("DHU").

The prosecutor asked, "What did [Mr. Burton] tell you about how [Floyd] died?" McKinney replied, "[Mr. Burton] said [Floyd] was suffocated. First he was choked with a plastic bag, then he was suffocated." The prosecutor then asked, "Did [Mr. Burton] tell you whether or not he had anything to do with it?" McKinney said Mr. Burton had

told him, "When hewent in the room, he hit [Floyd] first and someone else grabbed [Floyd] around his waist."[96]

After Goodwine's attorney, Mark Lancaster, made a *Bruton* objection, the prosecutor asked, "What did Mr. Burton tell you he did to Seth Floyd?" McKinney said, "[Mr. Burton] said he tied a plastic bag around his neck and suffocated him." The prosecutor then asked, "Did [Mr. Burton] tell you why Seth Floyd was tied to the bunk as he was found by the guards?" McKinney replied, "[Mr. Burton] tried to make it look like a suicide."[97]

On cross-examination, McKinney changed his testimony and said his conversations with Mr. Burton didn't actually take place in the DHU. Instead, they had occurred "out in the yard."[98] Moreover, on cross-examination, McKinney added these facts to Mr. Burton's confession. Mr. Burton told him he had used a "pillow" to suffocate Floyd. After suffocating Floyd, Mr. Burton told McKinney he (Burton) "dragged" Floyd's body out of Floyd's cell and "dragged him down" to the "slop sink." The "slop sink," according to McKinney, is "a big sink" at the "back of the range" where inmates "keep the utilities, brooms, mops, and buckets."[99]

[96] TT. 619.
[97] TT. 629.
[98] TT. 635.
[99] TT. 639-641.

Mr. Burton's alleged confession is incredible because it's contrary to the physical evidence. *First*, authorities collected no plastic bags in Floyd's cell or AJC garbage cans. *Second*, there's no physical or eyewitness evidence to corroborate portion of the alleged confession that Mr. Burton, let alone anyone, dragged Floyd's body down Range 17 to the slop sink. *Third*, Mr. Burton has maintained his innocence for the last twenty-six years – and has never made an incriminating statement or comment in all these years.

Brien O'Toole, another ACJ inmate, also testified. He said he worked in the ACJ's Mental Health Unit ("MHU"). Before Floyd's murder, when Mr. Burton was housed in the MHU, O'Toole said Mr. Burton had asked him how transfers to the annex worked. O'Toole supposedly told Mr. Burton that after an inmate saw the doctor and the doctor cleared him, the inmate would then be moved into general population, and transferred that evening. Mr. Burton then supposedly asked O'Toole to find Goodwine and deliver a message to him. The message, supposedly, was: "That he was going to be transferred straight to the Annex and that they weren't going to be able to do anything with Seth"[100]

[100] TT. 649-651. O'Toole, though, came clean to counsel and his investigator, Zach Stern, in July 2017 when he admitted he had fabricated his testimony. O'Toole said Mr. Burton never said what O'Toole claimed he said at trial. *Infra*, pp. 66-77 (Claim #2).

h. Conclusion

Simply put, the ACJ inmates gave inconsistent narratives. There's no forensic evidence linking Mr. Burton to Floyd's death even though whoever killed Floyd had to have struggled with him for several minutes to strangle him. McKinney's testimony, moreover, isn't supported by the physical evidence or witness statements.

Although the ACJ inmates and McKinney's testimony were inconsistent, they all had one thing in common: they all mentioned Mr. Burton in connection with Seth Floyd's murder. However, if the jury at retrial heard, received, and considered Goodwine's confessions to Floyd's murder, it is reasonably likely Goodwine's confessions would raise reasonable doubt regarding the ACJ inmates' testimony, including McKinney's confession testimony. Regarding the confessions, Goodwine confessed in a notarized motion filed under penalty of perjury and his confession is consistent with the physical evidence,[101] whereas Mr. Burton's alleged confession came from a convicted felon who got the facts and who sought a favorable outcome for his then pending receiving stolen property charges.

Mr. Burton, consequently, is entitled to a new trial and Judge McDaniel erred by holding otherwise.

[101] Whoever murdered Floyd, used a shoelace as a ligature to strangle him. In his September 2009 written statement to the parole board, Goodwine said he had used a shoelace to strangle Goodwine.

<u>Claim #2</u>: Judge McDaniel erred and violated Mr. Burton's due process rights by striking the transportation order relating to Brien O'Toole's appearance at the February 14, 2018 PCRA hearing. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

A. Introduction

At the end of the October 5, 2017 PCRA hearing, the parties agreed to hold another PCRA hearing on January 11, 2018. On December 20, 2017, counsel wrote Judge McDaniel requesting a transportation order for O'Toole's appearance at the January 11, 2018 PCRA hearing.[102] Judge McDaniel agreed and entered a transportation order. On January 3, 2018, counsel contacted Judge McDaniel and the Commonwealth and requested a 30-day postponement for the PCRA hearing due to some personal/family issues counsel was going through. Judge McDaniel and the Commonwealth agreed and reschedule the PCRA hearing for February 14, 2018. On January 22, 2018, counsel wrote Judge McDaniel requesting another transportation order for O'Toole for the February 14th hearing.[103] Judge McDaniel agreed and entered a transportation order.[104] Judge McDaniel also appointed Phillip Hong-Barco to represent O'Toole at the hearing.[105]

[102] Rp. 237.
[103] Rp. 236.
[104] Rp. 26.
[105] Rp. 26.

On January 24, 2018, counsel went to the Allegheny County Sheriff's Department ("ACSD"), obtained a subpoena for O'Toole's appearance at the February 14th hearing, and paid for the ACSD to serve the subpoena on O'Toole at SCI-Fayette. On January 31, 2018, Deputy Furlong properly served O'Toole at SCI-Fayette.[106]

On February 1, 2018, O'Toole wrote Judge McDaniel objecting to the subpoena.[107] O'Toole also sent counsel (Cooley) a letter on February 1, 2018 objecting to the subpoena. On February 5, 2018, four days after receiving O'Toole's letter, Judge McDaniel's chambers emailed counsel (Cooley) the letter O'Toole had sent Judge McDaniel on February 1, 2018. Moreover, the email said the following regarding the previously entered transportation order for O'Toole:

> To be clear, Judge McDaniel has asked me to cancel the transportation order for Mr. O'Toole. I will wait in doing so until Wednesday afternoon, to allow time for either side to let me know if there is an objection. Should I NOT hear from either of you, the transportation order for Mr. O'Toole only, will be cancelled Thursday morning (Feb 8th).[108]

On February 6, 2018, counsel emailed Judge McDaniel's chambers and informed her chambers that Mr. Burton objected to the cancellation of O'Toole's transportation order.[109] Counsel attached a 16-page memorandum outlining Mr. Burton's objections to his email.[110] On February 12, 2018, after not hearing from Judge McDaniel's

[106] Rp. 330.
[107] Rp. 238.
[108] Rpp. 240-242.
[109] Rp. 240-242.
[110] Rpp. 243-258.

chambers since February 6, 2018, counsel (Cooley) emailed Judge McDaniel's chambers regarding the transportation order.[111] While waiting for Judge McDaniel's chambers to reply, counsel spoke with O'Toole's appointed attorney, Phillip Hong-Barco, who informed counsel that Judge McDaniel had canceled O'Toole's transportation order on February 7, 2018. Counsel, though, was never informed of Judge McDaniel's cancellation. Later that day, February 12th, Judge McDaniel's chambers replied to counsel's email and told him Judge McDaniel had canceled the transportation order.[112]

At the February 14, 2018 PCRA hearing, O'Toole never appeared due to Judge McDaniel's directive to cancel his transportation order. When counsel objected, Judge McDaniel said she had the order canceled because she "[found] Mr. O'Toole totally, 100 percent, absolutely incredible."[113] Counsel filed an amended objections motion with Judge McDaniel at the hearing.[114]

Judge McDaniel abused her discretion, *which she has done in several cases recently*, when she directed her chambers to cancel O'Toole's transportation order. Mr. Burton properly subpoenaed O'Toole and the ACSD properly served him on January 31, 2018. Under clearly-established state law, O'Toole had to appear at the February 14th PCRA hearing and Judge McDaniel lacked the authority to effectively nullify the subpoena by canceling O'Toole's transportation order.

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[111] Rpp. 240-242.
[112] Rpp. 240-242.
[113] NT, PCRA Hrg., 2/14/2018, pp. 10-11.
[114] Rpp. 288-303.

Mr. Burton, therefore, respectfully requests the Court to overrule Judge McDaniel's cancellation and remand his case back to the Common Pleas Court with instructions to the PCRA court to hold an evidentiary hearing where O'Toole must appear if properly subpoenaed.

B. Preservation

In her opinion, Judge McDaniel said Mr. Burton waived this issue because counsel (Cooley) did not contact the CRO and ask it to produce the transcripts from the February 14th PCRA hearing.[115] As detailed *supra* and in the PCRA petition Mr. Burton mailed to the Common Pleas Court on September 18, 2018,[116] Judge McDaniel's finding is wrong. Counsel faxed the CRO on March 21, 2018 and mailed the transcript request to the CRO on March 31, 2018. For reasons unknown to counsel, the CRO claimed it either lost or misplaced the transcript request form. The CRO, more importantly, quickly produced the transcripts on August 8, 2018 once trial counsel contacted the CRO in late July 2018. A copy of the transcripts is incorporated into the *Reproduced Record*.[117]

Notwithstanding Judge McDaniel's waiver finding, the Court can still review this *procedural* claim because the primary facts giving rise to this *procedural* claim occurred *before* the February 14th PCRA hearing. Indeed, Judge McDaniel cancelled O'Toole's

[115] Rpp. 33-46.
[116] Rpp. 308-326.
[117] Rpp. 259-287.

transportation order on February 7, 2018 – a week *before* the February 14th PCRA hearing. The only thing Judge McDaniel did at the February 14th PCRA hearing regarding this *procedural* claim was articulate her reason for cancelling the transportation order – which took all of one page in the transcript.[118] Thus, counsel and Judge McDaniel created a "sufficient record… to permit this court's review of the [procedural] claim[]." *Commonwealth v. Laird*, 726 A.2d 346, 351 (Pa. 1999); *accord Commonwealth v. Lark*, 746 A.2d at 588 ("Although the trial court did not address the merits of Appellant's *Batson* claim, a sufficient record exists which permits this court's review.").

To be clear, Mr. Burton is not raising the *substantive* false testimony claim and other *substantive* claims he raised in the O'Toole PCRA petition. Zach Stern testified at the February 14th PCRA hearing as to what exactly O'Toole said to counsel and him (Stern) on July 20, 2017 at SCI-Fayette. However, to fairly and meaningfully litigate this claim before the PCRA court and this Court (on appeal) requires that Mr. Burton be permitted to confront O'Toole under oath in open court. Only by appearing and answering questions under oath can a PCRA court fairly, accurately, and meaningfully determine whether O'Toole's July 20, 2017 confession to counsel and Zach Stern is credible and truthful. In other words, part of the prejudice associated to the *procedural* claim is that Judge McDaniel deprived Mr. Burton of essential facts relative to his

[118] NT, PCRA Hrg., 2/14/2019, pp. 4-5.

substantive claims raised in his O'Toole PCRA petition. The absence of these facts deprived Mr. Burton of his opportunity to adequately and meaningfully litigate his *substantive* claims.

C. Reasons why Judge McDaniel abused her discretion

1. Judge McDaniel never had the February 1st letter properly authenticated

On February 1st, Judge McDaniel's chambers received a letter from an SCI-Fayette inmate. The name on the letter, Brien O'Toole, makes it appear as if O'Toole penned and mailed the letter to Judge McDaniel's chambers. However, neither the Commonwealth, nor Judge McDaniel introduced evidence into the record authenticating the letter and establishing that O'Toole penned and mailed the February 1st letter. Judge McDaniel merely assumed the letter's authenticity and assumed O'Toole had penned and mailed the letter. These are credibility and factual determinations that required additional evidence before they could be made.

Pa.R.Evid. 901(a) states: "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Here, the Commonwealth is the "proponent" of the letter because the Commonwealth never objected when Judge McDaniel's chambers indicated that Judge McDaniel wanted to cancel the transportation order based on the letter. However, neither the Commonwealth, nor Judge McDaniel for that matter, "produce[d] evidence sufficient

to support a finding that the item is what [they] claim it is," namely a handwritten letter writing and mailed by O'Toole. The easiest way the Commonwealth or Judge McDaniel could have authenticated the letter was to have O'Toole testify at the February 14th PCRA hearing. Pa.R.Evid. 901(b)(1) (stating that "testimony" from a "witness with knowledge" that "an item is what it is claimed to be" is a permissible way to authentic an item of evidence).

Judge McDaniel, therefore, abused her discretion.

2. There were no valid reasons to effectively nullify O'Toole's subpoena

Assuming O'Toole wrote the February 1st letter, he listed the following reasons why he should be permitted to skirt his subpoena responsibilities:

First, O'Toole claimed his appearance at the PCRA hearing would be a "waste of time," but he never explained why and how his testimony would be a "waste of time."[119]

Second, O'Toole vaguely claimed his appearance "will add nothing to the proceedings,"[120] but he never explained why and how his testimony would "add nothing" to Mr. Burton's PCRA proceedings.

Third, O'Toole vaguely claimed that appearing at the PCRA hearing will put him "in grave danger,"[121] but he never explains how his testimony at the PCRA hearing would place him "in grave danger."

[119] Rp. 238.
[120] Rp. 238.
[121] Rp. 238.

Fourth, O'Toole vaguely and confusingly claimed that appearing at the PCRA hearing will "also" put the "life of someone [he] believe[s] is out to do [him] harm" in "grave danger."[122] O'Toole, though, never identified this other person or the basis of why he believed this person's life was in "grave danger."

None of these are valid reasons for quashing his subpoena. Indeed, if a witness can skirt his subpoena responsibilities by simply writing a letter to the trial court and complain about the inconvenience of appearing or baldly claiming their appearance will put them in grave danger, compulsory process and the adversarial system will be turned on its head. Moreover, O'Toole's claim that his testimony "will add nothing to the proceeding" is simply wrong. As explained in Mr. Burton's O'Toole PCRA petition,[123] O'Toole represented the only Commonwealth witness who introduced "premeditation" and "deliberation" evidence. However, if the most damning aspect of his trial testimony is false, as he told counsel and Zach Stern on July 20, 2017, the Commonwealth's first-degree murder count and Mr. Burton's first-degree murder conviction are substantially weakened to the point where Mr. Burton would be entitled to a new trial because it is reasonably likely O'Toole's false testimony may have impacted the jury's first-degree murder verdict.

[122] Rp. 238.
[123] Rpp. 128-136.

Furthermore, noticeably absent from O'Toole's letter is any claim of privilege. Likewise, Judge McDaniel never received correspondences from O'Toole or his appointed counsel, Phillip Hong-Barco, that suggest or prove O'Toole had a valid privilege for having the subpoena quashed. A flat refusal to testify in absence of a valid privilege is plainly contempt. *In re Grand Jury of Chester County*, 544 A.2d 924, 925 (Pa. 1988); *Commonwealth v. McDermott*, 547 A.2d 1236 (Pa. Super. 1998); *In re Martorano*, 346 A.2d 22 (Pa. 1975).

Judge McDaniel, therefore, abused her discretion.

3. The record does not support Judge McDaniel's finding that O'Toole is totally, 100 percent, absolutely incredible

Whether a subpoena shall be enforced rests in the trial court's discretion. This Court will not disturb a trial court's discretionary ruling if there is evidence in the record supporting the decision. *Branham v. Rohm & Haas Co.*, 19 A.3d 1094, 1103 (Pa. Super. 2011). Also, a "court's findings are especially binding on appeal, where they are based upon the credibility of the witnesses, unless it appears that the court abused its discretion or that the court's findings lack evidentiary support or that the court capriciously disbelieved the evidence." *Hart v. Arnold*, 884 A.2d 316, 331 (Pa. Super. 2005) (quotations and citation omitted).

Mr. Burton does not dispute these principles. However, based on these principles, Judge McDaniel's key finding supporting her decision to effectively quash O'Toole's subpoena is not supported by the record and represents a "capricious" disbelief of the evidence.

Judge McDaniel's primary finding for canceling O'Toole's transportation order was her finding that O'Toole "is totally, 100 percent, absolutely incredible."[124] Based on the record, though, this finding is based *entirely* on the February 1st letter. Counsel, honestly, is at a loss as to how exactly Judge McDaniel made her credibility finding based solely on a single-page letter she never even had authenticated. Thus, Judge McDaniel's credibility finding is not supported by the record. Rather, it represents nothing more than an impulsive disbelief of evidence that clearly support's Mr. Burton's substantive claims.

Judge McDaniel, therefore, abused her discretion.

4. Based on Mr. Burton's O'Toole PCRA petition, he was entitled to an evidentiary hearing where O'Toole would testify

Judge McDaniel's directive to cancel O'Toole's transportation order also violated Mr. Burton's federal and state due process right to a fundamentally fair PCRA proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 556-557 (1987). "[F]undamental fairness requires that petitioners must be given the opportunity to present collateral claims at a meaningful time and in a meaningful way." *Commonwealth v. Peterson*, 192 A.3d 1123,

[124] NT, PCRA Hrg., 2/14/2018, pp. 10-11.

1130 (Pa. 2018) (quotations and citation omitted). Under state law, Mr. Burton was entitled to a PCRA hearing based on the evidence he presented in his O'Toole PCRA petition. By denying Mr. Burton his right to a hearing, based on her capricious credibility finding, Judge McDaniel deprived Mr. Burton of his right to "present" his "collateral claims" in a "meaningful" and "substantive" way.

A PCRA court "shall order a hearing" when the PCRA petition "raises material issues of fact." Pa.R.Crim.P. 908(A)(2). A hearing cannot be denied unless the PCRA court is "certain" the petition lacks "total" merit. *Commonwealth v. Bennett*, 462 A.2d 772, 773 (Pa. Super. 1983); *accord Commonwealth v. Wah*, 42 A.3d 335, 338 (Pa. Super. 2012). 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). Thus, an "evidentiary hearing should… be conducted where the record does not clearly refute" the petitioner's PCRA claim[s]. *Id.*

The record does not "clearly refute" Mr. Burton's after-discovered fact, due process, actual innocence, *Napue*, *Brady*, and cumulative prejudice claims raised in Mr. Burton's O'Toole PCRA petition. More importantly, O'Toole's July 20, 2017 admission to counsel and Zach Stern created a material issue of disputed fact regarding the truthfulness of his trial testimony and the Commonwealth's premeditation argument. Mr. Burton, therefore, was entitled to a PCRA hearing where Mr. Burton could confront O'Toole and question him under oath regarding the truthfulness of his trial testimony and July 20, 2017 statement.

Judge McDaniel, therefore, abused her discretion.

CONCLUSION

WHEREFORE, based on the forgoing facts and authorities, Mr. Burton respectfully requests the Court to grant the following relief:

1. A new trial based on the facts and admissions made in Goodwine's July 2009 expungement motion; or, in the alternative,

2. An order remanding to the Common Pleas Court with instructions to hold a PCRA hearing where Brien O'Toole is to testify if properly and timely subpoenaed by Mr. Burton.

Respectfully submitted this the 10th day of January, 2019.

/s/Craig M. Cooley
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CERTIFICATE OF SERVICE

On January 10, 2019, counsel e-filed Mr. Burton's opening brief via PAC-File. The Commonwealth received email notification of the filing along with a PDF copy of Mr. Burton's opening brief.

CERTIFICATION OF COMPLIANCE

Pursuant to Pa.R.A.P. 2135(d), counsel certifies Mr. Burton's brief exceeds 14,000 words. It has 15,500 words, but counsel has filed a motion requesting permission to exceed the word limit due to the complicated procedural history of this case as well as the two PCRA hearings had in this case.

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

COMMONWEALTH OF PENNSYLVANIA

v.

CC: 1993-04017, 1993-04276

SHAWN BURTON,

Defendant

OPINION

Filed By:

Honorable Donna Jo McDaniel
Court of Common Pleas of Allegheny County
323 Courthouse
436 Grant Street
Pittsburgh, PA 15219

(412) 350-5434

cc: Michael Streily, *Deputy D.A.*
Craing Cooley, *Defense Counsel*

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

COMMONWEALTH OF PENNSYLVANIA

v. CC: 1993-04017, 1993-04276

SHAWN BURTON,

Defendant

OPINION

The Defendant has appealed from this Court's Order of February 22, 2018, which dismissed his Supplemental Amended PCRA Petition following two (2) evidentiary hearings. However, a review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, this Court's Order should be affirmed.

This case has a complex procedural history. The Defendant was charged at CC 9304017 with Criminal Homicide[1] and at CC 9304276 with Criminal Conspiracy[2] in the strangulation death of Seth Floyd at the Allegheny County jail. Following a jury trial, the Defendant was convicted of first-degree murder and criminal conspiracy. On September 30, 1993, he was sentenced to a term of life imprisonment. The Judgment of Sentence was affirmed by the Superior Court on November 8, 1996. The Defendant's subsequent Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on August 15, 1997.

The Defendant filed a pro se PCRA Petition on August 4, 1998 and a subsequent Amended Petition on November 9, 1999. Counsel was appointed to represent the Defendant, but due to the

[1] 18 Pa.C.S.A. §2501
[2] 18 Pa.C.S.A. §903

Defendant's unwillingness to cooperate, he was permitted to withdraw and the Defendant proceeded pro se. After giving the appropriate notice, this Court dismissed the Defendant's pro se Amended PCRA Petition without a hearing on April 18, 2000. The Defendant's subsequent appeal was dismissed for his failure to file a brief, but this Court reinstated his appellate rights and he proceeded with his appeal. Superior Court initially remanded the case for an on-the-record colloquy with the Defendant regarding his waiver of counsel, after which counsel was re-appointed and the appeal continued. The Superior Court eventually affirmed this Court's dismissal of the Petition on February 21, 2007 and the Pennsylvania Supreme Court denied the Defendant's subsequent Petition for Allowance of Appeal on November 20, 2007.

No further action was taken until July 9, 2013, when the Defendant filed a second pro se PCRA Petition averring after-discovered evidence in the form of a 2009 Motion for Expungement filed by Melvin Goodwine and named this Court and an attorney from the Innocence Project as witnesses. After giving the appropriate notice, this Court dismissed the Petition as untimely on August 27, 2013.

On April 16, 2014, the Defendant filed the instant PCRA Petition, his third, purporting to raise an after-discovered evidence claim in the form of an Affidavit from Marvin Harpool, purportedly received in the mail by the Defendant on February 24, 2014, confessing to the killing. He also claims to have an affidavit from Melvin Goodwine also confessing to the killing. There is no date information provided regarding Goodwine's confession. Neither affidavit was attached to the Petition. After giving the appropriate notice of its intent to do so, this Court dismissed the Petition without a hearing on August 7, 2014. In an Opinion dated August 25, 2015, the Superior Court vacated this Court's dismissal Order and remanded the case for an evidentiary hearing on the Defendant's due diligence in relation to information available in public records. The

Commonwealth appealed. In an Opinion dated March 28, 2017, our Supreme Court affirmed the Superior Court's Order remanding the case to this Court for an evidentiary hearing.

Thereafter, Defendant's new counsel, Craig Cooley, Esquire, thereafter filed a series of pleadings in advance of the hearing: an "Amended Second PCRA Petition or in the Alternative Petitioner's Third PCRA Petition" filed on May 26, 2017; and "Supplemental Amended PCRA Petition", filed on September 18, 2017. An evidentiary hearing was held before this Court on October 5, 2017, wherein this Court addressed the remand Order and underlying issues relating to the Melvin Goodwine affidavit. At the conclusion of that hearing, this Court determined that the Defendant had acted with sufficient diligence to satisfy the after-discovered evidence exception as directed by the remand Order, but denied relief on the merits. A second hearing was subsequently scheduled to address issues relating to the Marvin Harpool affidavit and a new witness, Brian O'Toole. Thereafter, the Defendant filed a Supplemental Amended PCRA Petition to Satisfy the PCRA's 60-Day Rule on December 4, 2017. The second evidentiary hearing was held on February 14, 2018. At its conclusion, this Court denied relief and memorialized the same by written Order dated February 22, 2018. This appeal followed.

On appeal, the Defendant raises multiple claims of error, which are addressed as follows:

1. *Melvin Goodwine Expungement Claim*

Initially, the Defendant argues that this Court erred in denying him relief due to the statements made by his co-defendant, Melvin Goodwine, in his 2009 expungement petition. He avers that had the jury been presented with Mr. Goodwine's "admissions", he would have been acquitted. A careful review of the record reveals that this claim is meritless.

As noted above, in the procedural history, the Defendant initially sought relief regarding the Melvin Goodwine expungement petition in his July 9, 2013 PCRA Petition. Therein, he averred that he had received a letter from an attorney from the Innocence Project enclosing Mr. Goodwine's expungement petition from 2009, wherein Mr. Goodwine stated that he killed Seth Floyd alone, in self-defense. This Court initially dismissed the Petition as untimely, but our Superior Court directed this Court to conduct a hearing regarding the Defendant' diligence in obtaining it.

The proscribed hearing was held on October 5, 2017. At that time, the Defendant's ex-girlfriend, Twyla Bivens, testified that sometime in April, 2013, while at a birthday party she was approached by the ex-girlfriend of Melvin Goodwine, who said that Goodwine had left some papers at her place that she thought might be helpful to the Defendant. Several weeks later, the woman called Bivens again and asked if she still wanted the papers. Bivens said she did and the two women met to exchange the papers. Bivens set the papers aside for approximately 1-2 weeks, then reviewed them. Included in the papers was Goodwine's expungement motion. She forwarded the motion to Charlotte Whitmore, Esquire, an Innocence Project attorney who had been evaluating the Defendant's case. Whitmore then forwarded the motion to the Defendant, who then filed his second PCRA Petition.

After consideration of the testimony, the Court found Ms. Bivens' testimony regarding the date she received the Goodwine motion to be credible, and thus the PCRA Petition timely filed. (See Evidentiary Hearing Transcript, 10/5/17, p. 47-48).

As to the merits of the motion, the Defendant attempted to present the testimony of Mr. Goodwine, but the following occurred:

THE COURT: OK, Mr. Cooley, you may proceed .

MR. COOLEY: At this time I would call Melvin Goodwine. But I have spoken with Mr. Goodwine and he's made it clear to me that he intends to invoke his Fifth Amendment rights.

THE COURT: For the record, I would state that Ms. Middleman is here representing Mr. Goodwine. Is that correct?

MS. MIDDLEMAN: Yes, Your Honor.

THE COURT: You agree with the statement that was proffered?

MS. MIDDLEMAN: Yes, Your Honor. Mr. Goodwine intends to exercise his Fifth Amendment right to remain silent because his answers may tend to incriminate him.

MR. COOLEY: If Your Honor colloquy him -

THE COURT: Pardon me?

MR. COOLEY: Are you going to find that that is a valid vocation?

THE COURT: Yes.

MR. COOLEY: You do. Okay.

MR. WABBY: Your Honor, just for the record, as to what crime, the original murder or as to the potential perjury charge for filing -
MS. MIDDLEMAN: Perjury, unsworn falsification to authorities, and homicide in the federal courts.

MR. WABBY: Thank you, Your Honor.

THE COURT: Okay. Thank you. I guess that's it. We can excuse both Ms. Middleman and Mr. Goodwine.

MR. COOLEY: My understanding of the case law is he has to invoke on each question.

THE COURT: All right. Come on, Mr. Goodwine.

...

Q. (Mr. Cooley): Do you recognize this document, Mr. Goodwine?

A. (Mr. Goodwine): I can't see that far.

Q. Can you speak up?

A. No, I don't.

Q. If you can hold it, it's not going to bite you. Did you file this -

A. On the advice of my counsel, I exercise my Fifth Amendment right to remain silent because my answers may tend to incriminate me.

Q. That expungement motion, you stated you killed Seth Floyd in self-defense?

A. On the advice of my counsel, I exercise my Fifth Amendment right to remain silent because my answers may tend to incriminate me.

Q. In the affidavit section of the expungement motion, you write, "I, Melvin Goodwine, do hereby swear and affirm that the following facts are true and correct based on my personal knowledge, correct?

A. On the advice of my counsel, I exercise my Fifth Amendment right to remain silent because my answers may tend to incriminate me.

Q. In the affidavit section of that expungement motion, you also wrote "I understand that false statements made herein are subject to the penalties of 18 Pa.C.S.A. 4904 related to unsworn falsification to authority. Is that correct?

A. On the advice of my counsel, I exercise my Fifth Amendment right to remain silent because my answers may tend to incriminate me.

Q. On July 2nd on the very bottom of that affidavit, it was notarized by a Benjamin Weaver, correct?

A. On the advice of my counsel, I exercise my Fifth Amendment right to remain silent because my answers may tend to incriminate me.

Q. On Paragraph 5 -

THE COURT: Okay, Mr. Cooley. I think we've got the idea that Mr. Goodwine is going to invoke his Fifth Amendment rights.

Actually the case law states not that you have to question him on everything but that you should not call someone to the stand when you know they are going to invoke their Fifth Amendment rights. However, since this is a nonjury, I allowed you a little bit of leeway and I think we're done.

MR. COOLEY: Thank you, Your Honor.

MS. MIDDLEMAN: Just for the record, Mr. Goodwine would invoke his Fifth Amendment right to any questions regarding that petition, to any affidavit, to the incident that occurred at the county jail, to any witnesses or any evidence he may have proffered at his trial and to any relationship or any conversations he may or may not have had with the defendant in this case.

THE COURT: Okay. Thank you. You may be excused.

(E.H.T., 10/5/17, pp. 29-31, 32-35).

At the conclusion of the hearing, this Court placed its findings and conclusions on the record. It stated:

THE COURT: All right. Thank you. I'm going to start with Ms. Bivens who I find does have a viable story. She was given this information. She sent it to The Innocence Project. Right or wrong she thought it was the right thing to do and I find her testimony to be credible.
A couple things I would point out for the record, the Supreme Court affirms the decision remanding this for a hearing on the public records exception. The majority opinion seems to be saying that we should be very accommodating whenever there is a pro se defendant.

However, I would also like to state for the record that on 5/24 of 2007 we had a Grazier hearing and the defendant was found to knowingly, voluntarily and intelligently waive his right to an attorney. The then-attorney Tom Farrell withdrew and Mr. Burton convinced me that he was capable of representing himself.

That being said, there was a prior hearing and I do not have the day for it where Mr. Goodwine did testify. I found him not to be credible. This seems to be, to me at the time, a manufactured scheme since Goodwine was protected by the double jeopardy clause and what did he have to lose. He had nothing to lose by coming in and helping out a fellow inmate or friend or whatever kind of coconspirator, what kind of relationship they had.

That being said, I have already found Mr. Goodwine to be incredible at a prior hearing. He refused to testify today. And I feel that both of these outweigh a typewritten motion for expungement and, therefore, the PCRA as to this issue is denied.

(E.H.T. 10/5/17, p. 47-49).

As this Court noted at the hearing, Melvin Goodwine, whose testimony had been previously found to be not credible by this Court, refused to testify on the Defendant's behalf. The

Defendant's refusal to testify and assertion of his Fifth Amendment rights - particularly with regard to the crimes of perjury and unsworn falsification to authorities and any questions regarding his relationship or conversations with the Defendant - coupled with this Court's previous finding of incredibility - outweigh the 2009 expungement petition and support this Court's conclusion that the expungement petition represented a manufactured attempt to help the Defendant. As this Court noted, Goodwine, who was protected by the prohibition against double jeopardy, likely felt he had nothing to loose by adding a confession to his expungement petition, however after being subpoenaed to testify and consulting with counsel, realized that the contrary was true. Indeed, it defies all logic that someone who defended against a homicide charge and was actually acquitted, would not simply make a quiet motion for expungement (if doing even that) and go about his business, but would instead confess to the very crime he was acquitted of and now sought to expunge. This Court is left with the inescapable conclusion that this was a concocted scheme that, when it didn't work as initially planned, was abandoned by one of its participants.

As the Commonwealth correctly noted in its argument, there is a complete absence of evidence on the merits. Mr. Goodwine refused to acknowledge and validate the expungement motion as his own statement. He further refused to testify on all aspects of Seth Floyd's death, his relationship and conversations with the defendant and other crimes including perjury and unsworn falsification. Under these circumstances - with a complete lack of evidence - this Court was well within its discretion in finding Goodwine's expungement petition to be not credible and in denying relief on that basis. This claim is meritless.

2. *Brian O'Toole Claims*

The Defendant also raises multiple claims of error regarding subpoenaed defense witness Brian O'Toole, including this Court's cancellation of his transportation order and its refusal to

grant him immunity or otherwise order him to testify at the hearing. However, having failed to provide a complete record from which to evaluate these various claims, this Court is forced to conclude that they have been waived.

At trial, the Commonwealth presented the testimony of Brian O'Toole, which was summarized as follows:

> Brian O'Toole was an inmate in March 1993, and worked in the mental health unit of the Allegheny County Jail (TT 649). During the period of time before Floyd's murder (TT 652), when petitioner [the Defendant] had been housed in the mental health unit, petitioner asked O'Toole how the transfers to the Jail Annex worked. O'Toole told petitioner that after an inmate saw the doctor and was cleared by the doctor, the inmate was moved into the general population and then transferred that evening (TT 650-651). Petitioner then asked O'Toole to find Goodwine and deliver a message to him (TT 651). The message was "That he [petitioner] was going to be transferred straight to the Annex and that they weren't going to be able to do anything with Seth" (TT 651).
>
> O'Toole delivered the message to Goodwine that afternoon (TT 652). Goodwin then gave O'Toole a reply message for petitioner, that petitioner was to stay where he was at, not to get transferred because they had to do it (TT 652).

Commonwealth's Answer to Post-Conviction Relief Act Petition, 5/20/00, p. 17-18).

In his Supplemental Amended PCRA Petition, the defendant avers that Brian O'Toole told Zach Sterns, an investigator from the Innocence Project that "he falsely told the jury Shawn Burton had asked him to tell Melvin Goodwine that they (Burton and Goodwin [sic]) cannot do anything to Seth Floyd." (Defendant's Supplemental Amended PCRA Petition, p. 7). In response, this Court granted an evidentiary hearing and issued a transportation Order from Brian O'Toole. In light of the anticipated testimony, this Court also appointed counsel to represent Mr. O'Toole.

On February 12, 2018, two (2) days before the scheduled evidentiary hearing on February 14, 2018, this Court received the following letter from Brian O'Toole:

> In Re: Com v. Burton CC # 1993-04017
> 1993-04276

To the Honorable Court,

I have received notice I will be listed as a witness in a PCRA hearing on Feb. 14, 2018 in the above captioned matter.

As you should be aware I am incarcerated (last 20 yrs) doing life without parole. I will not participate in this matter in any fashion. Bringing me to this hearing will be a waste of the Court's time, and tax payer expense. This also puts my life in grave danger, and also the life of someone I believe is out to do me harm. No good will come of my being forced to come to Court, I will add nothing to the proceeding, and beg the Court's compassion in this matter as it pertains to me.

Sincerely,

Brian O'Toole DX1524
SCI Fayette, Box 9999
LaBelle PA 15450

After this Court's staff spoke to Mr. O'Toole's counsel, this Court cancelled the transportation Order for Mr. O'Toole.

The Defendant now argues that this Court erred in canceling the transportation Order, that it erred in not granting him immunity and forcing him to testify and in denying relief after allowing Investigator Sterns to testify to his conversation with O'Toole. However, this Court is impeded in its analysis of the Defendant's claims due to his failure to provide the complete record necessary for an evaluation of this claim, namely the transcript of the February 14, 2018 evidentiary hearing. Upon investigation, this Court determined that PCRA counsel failed to request a copy of the transcript of that hearing, as he is required to do pursuant to Pennsylvania Rule of Appellate Procedure 1911. That rule states, in relevant part:

Rule 191. Request for Transcript

(a) General rule. The appellant shall request any transcript required under this chapter in the manner and make any necessary payment or deposit therefor in the amount and within the time prescribed by Rules 4001 et seq. of the Pennsylvania Rules of Judicial Administration.

> ...(c) *Form. The request for transcript may be endorsed on, incorporated into or attached to the notice of appeal or other document and shall be in substantially the following form:*
>
> *[Caption]*
>
> *A (notice of appeal) (petition for review) (other appellate paper, as appropriate) having been filed in this matter, the official court reporter is hereby requested to produce, certify and file the transcript in this matter in conformity with Rule 1922 of the Pennsylvania Rules of Appellate Procedure.*
>
> _____
> *Signature*
>
> (d) *Effect of failure to comply. If the appellant fails to take the action required by these rules and the Pennsylvania Rules of Judicial Administration for the preparation of the transcript, the appellate court may take such action as it deems appropriate, which may include dismissal of the appeal.*

Pa.R.A.P. 1911.

In interpreting Rule 1911, our Supreme Court has held that it is not the duty of the trial court to obtain the transcripts or provide a complete record for the appellate court. It stated "the appellant has a duty to frame what is needed... Of course, if a party is indigent, and is entitled to taxpayer-provided transcripts or portions of the record, he will not be assessed costs. But, that does not absolve the appellant and his lawyer of his obligation to identify and order that which he deems necessary to prosecute his appeal. The plain terms of the Rules contemplate that the parties, who are in the best position to know what they actually need for appeal, are responsible to take affirmative actions to secure transcripts and other parts of the record." Commonwealth v. Lesko, 15 A.3d 345, 410 (Pa. 2011). In Commonwealth v. Peifer, 730 A.2d 489 (Pa.Super. 1999), our Superior Court acknowledged the requirements of Rule 1911, stating "It is the responsibility of appellant, not [the] court, to provide a complete record for review, including ensuring that any necessary transcripts are included in the official record... Failure to provide the necessary materials warrants a finding that appellant's claim is waived." Commonwealth v. Peifer, 730 A.2d

489, 493, FN3 (Pa.Super. 1999). See also Commonwealth v. Steward, 775 A.2d 819, 833 (Pa.Super. 2001).

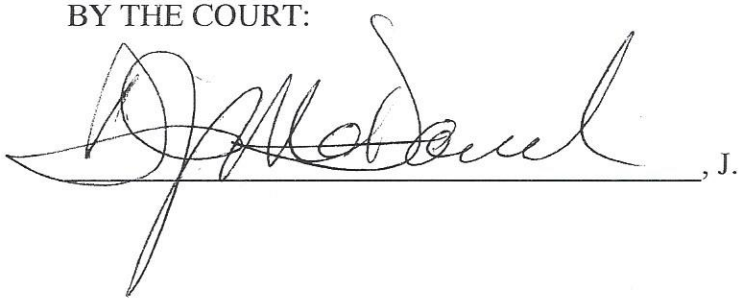
As noted above, this Court did hold the second evidentiary hearing for the reason that it wished to consider additional evidence on the Defendant's claims. Although Mr. O'Toole refused to appear, Mr. Sterns was permitted to testify regarding their conversation. The transcript of the proceedings is crucial and absolutely necessary to both this Court's and the appellate court's evaluation of his claims. However, absent the transcript of the hearing, this Court feels that its evaluation of the claims for the appellate court have been hampered and impeded by the lack of transcript.

This Court is mindful that the Defendant's Notice of Appeal purports to contain a "Rule 1911, 1921, and 1931 Statement" wherein counsel represents that he contacted the Court Reporter's Office and requested the transcript of the February 14, 2018 hearing. However, the Notice of Appeal lacks a copy of the actual transcript order form which is typically attached to a Notice of Appeal as proof of the order, and this Court's further investigation of the matter with the Court Reporter's Office reveals that the February 14, 2018 hearing was never ordered by counsel.

The issues presented here are complex and absolutely require evaluation of the transcript for their full and proper consideration. Having deprived this Court of the opportunity to re-analyze and consider his claims within the context of the entire record, the Defendant has prevented this Court from presenting a full analysis of his claims for the appellate courts. As such, this Court is constrained to conclude that all issues relating to Brian O'Toole identified in the Concise Statement (Issues #2-4) have been waived.

Accordingly, for the above reasons of fact and law, this Court's Order of February 22, 2018, which dismissed his Supplemental Amended PCRA Petition must be affirmed.

BY THE COURT:



, J.