PENNSYLVANIA SUPERIOR COURT
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	)	
Plaintiff-Appellee,	)	**197 WDA 2020**
	)	**198 WDA 2020**
v.	)	**CP-02-CR-0004017-1993**
	)	**CP-02-CR-0004276-1993**
	)	**PCRA: First-Degree Murder**
	)	**PCRA Court: Flaherty, T.E.**
SHAWN LAMAR BURTON	)	
Petitioner-Appellant.	)	

Petitioner-Appellant's Opening Brief

Appeal from the January 23, 2020 Order Dismissing Shawn L. Burton's PCRA Petition Entered by the Honorable Thomas E. Flaherty of the Allegheny County Common Pleas Court, Criminal Division, CP-02-CR-0004017-1993 and CP-02-CR-0004276-1993

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JURISDICTIONAL STATEMENT

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 January 23, 2020 order dismissing Shawn L. Burton's PCRA petition entered by the Honorable Thomas E. Flaherty of the Allegheny County Common Pleas Court, Criminal Division, CP-02-CR-0004017-1993 and CP-02-CR-0004276-1993.[1]

On January 2, 2020, Judge Flaherty issued a 907-dismissal notice.[2] The dismissal notice was incorporated into an accompanying 10-page opinion explaining Judge Flaherty's findings, conclusions, and reasons for issuing the dismissal notice.[3]

On January 23, 2020, Judge Flaherty entered his dismissal order.[4]

On February 4, 2020, Mr. Burton appealed.[5]

Based on his January 2, 2020 opinion, Judge Flaherty didn't request Mr. Burton to file a *Concise Statement of Errors on Appeal*.

On February 24, 2020, Judge Flaherty re-filed his January 2, 2020 opinion as his 1925(a) opinion.[6]

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[1] Rp. 1. Rp = Reproduced Record page number(s).
[2] Rpp. 104-105.
[3] Rpp. 106-115.
[4] Rp. 1.
[5] Rpp. 2-5.
[6] Rpp. 116-117.

CLAIMS PRESENTED

I. The PCRA court's credibility findings regarding Melvin Goodwine's confessions are wrong and aren't supported by the record.

II. The PCRA court erred by not addressing Mr. Burton's meritorious arguments regarding why Melvin Goodwine's confessions would be admissible as substantive evidence at a retrial because – at a retrial – Mr. Burton would compel Melvin Goodwine to take the stand, using his compulsory process right, and force Melvin Goodwine to answer questions about his confessions, and Melvin Goodwine would have to answer these questions because – at this point – Melvin Goodwine has no Fifth Amendment right to remain silent.

III. The PCRA court's conclusion that Melvin Goodwine's credible confessions wouldn't likely produce different verdicts at a retrial is wrong and not supported by the record.

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).

INTRODUCTION

Shawn Burton is innocent of Seth Floyd's March 9, 1993 murder inside the Allegheny County Jail ("ACJ") and he's maintained his innocence since detectives first questioned him in March 1993. His co-defendant, Melvin Goodwine, however, has confessed multiple times to being the person *solely* responsible for Seth Floyd's murder: (1) once in a July 29, 2009 expungement motion filed before the very trial judge who presided over his joint trial with Mr. Burton; and (2) once, and perhaps twice, to the Pennsylvania Board of Probation and Parole ("PBPP") with one definitely occurring on September 16, 2009. Here are his expungement motion and PBPP confessions:

> 4) THE PETITIONER IS OVER (40) YEARS IN AGE. THE PETITIONER HAS BEEN INCARCERATED FOR OVER FIVE YEARS IN THE STATE SYSTEM. A REQUIREMENT OF THE PENNSYLVANIA PAROLE BOARD, IS TO ACCEPT AND OWN FULL RESPONSIBILITY FOR YOUR CRIME. ALSO, THE PETITIONER MUST SECURE STABLE EMPLOYMENT AND HOUSING PRIOR TO RELEASE. THE PAROLE BOARD AND PETITIONER'S AGENT, MS. PATTON, WERE GIVEN A WRITTEN AND VERBAL ACCOUNT OF PETITIONER'S CRIME. PETITIONER COMMITTED THIS ACT IN SELF DEFENSE. HOWEVER, I WAS ADVISED NOT TO USE THIS DEFENSE AT TRIAL. THE PETITIONER WAS CHARGED WITH CRIMINAL HOMICIDE AND MURDER. THE CRIMINAL HOMICIDE CHARGE WAS nolle prossed/withdrawn. THE PETITIONER WAS FOUND (NOT GUILTY) ON THE MURDER CHARGE. THE PETITIONER MOTIONS THE COURT TO EXPUNGE THESE CHARGES FROM MY DOCUMENTED CRIMINAL RECORD. SEE ... ASSOCIATED OTN: CHARGES AT B07665-5427-93.
>
> 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).[7]

[7] Rp. 186.

OFFENDER'S WRITTEN VERSION OF OFFENSE
SCI-HUNTINGDON

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. [redacted] 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 [redacted] 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

[8]

The question the Court must address is how would a new trial playout if Mr. Burton could use these confessions to raise reasonable doubt regarding the murder and conspiracy counts. After this Court's May 24, 2019 opinion (451 WDA 2018 – *Burton II*), remanding Mr. Burton's case to the PCRA court to address this very issue, Mr. Burton filed a comprehensive memorandum explaining how a retrial would playout if he utilized his compulsory process right and compelled Melvin Goodwine to take the stand and confronted him with his confessions.[9]

[8] Rp. 275.
[9] Rpp. 6-57.

As Mr. Burton explained, if Goodwine denied confessing in his expungement motion or before the PBPP, Mr. Burton could introduce his confessions as substantive evidence under the prior inconsistent statement doctrine. Moreover, if Goodwine admitted to confessing to Seth Floyd's murder, his in-court admission would constitute substantive evidence Mr. Burton could weaponize to raise reasonable doubt. Lastly, if Goodwine refused to answer questions about his confessions by trying to invoke his Fifth Amendment right against self-incrimination, Mr. Burton methodically explained why Goodwine's Fifth Amendment request would be illusory. Consequently, if Goodwine attempted to invoke his Fifth Amendment right, the trial court would reject it, meaning he'd have to answer each question regarding his confessions, meaning his confessions will either be admitted as prior inconsistent statements or he'll acknowledge his confessions, admit they're true, and continue to proclaim he's solely responsible for Seth Floyd's murder.

This leads to the credibility issue and whether Goodwine's confessions would likely produce different verdicts at retrial. The first question is whether it's likely jurors would find Goodwine's confessions credible. If so, the second question is whether it's likely Goodwine's credible confessions would sufficiently undermine the District Attorney's Office's ("DAO") case against Mr. Burton to raise reasonable doubt, thus producing a different result than the first trial. The answer to both questions is yes. Goodwine's confessions are credible and it's likely they'd raise reasonable doubt.

On October 4, 2019, the PCRA court heard oral arguments regarding this Court's remand order from its May 24, 2019 opinion. In its January 2, 2020 and February 24, 2020 opinions, the PCRA court *never addressed* the scenarios played out above, *i.e.*, if Mr. Burton compelled Goodwine to the stand, what would Goodwine possibly say about his confessions, and would he be required to answer questions about his confessions?

The PCRA court, instead, simply said: (1) Goodwine's confessions weren't credible; (2) Goodwine's confessions wouldn't be admissible as substantive evidence under the statement against penal interest hearsay exception codified in Pa.R.Evid. 804(b)(3); and (3) even if Goodwine's confessions were admitted, it's unlikely they'd change the outcome of Mr. Burton's first trial.[10] Each finding and conclusion is wrong, not supported by the record, and some have already been rejected by this Court in its May 24, 2019 opinion.

Consequently, Mr. Burton once again asks this Court – *and hopefully for the last time* – to grant him a new trial based on Melvin Goodwine's confessions. Mr. Burton is entitled to a new trial because Goodwine's confessions are credible, admissible as substantive evidence, and it's likely their impact at a retrial would produce an outcome different than Mr. Burton's first trial.

[10] Rpp. 106-115.

PROCEDURAL AND FACTUAL HISTORY

Mr. Burton's case is before this Court for the third time since 2014 regarding the very same Goodwine claim. *Commonwealth v. Burton*, 2019 Pa. Super. Unpub. LEXIS 2073 (May 24, 2019) ("*Burton II*"); *Commonwealth v. Burton*, 121 A.3d 1063 (Pa. Super. 2015) ("*Burton I*"); *Commonwealth v. Burton*, 2014 Pa. Super. LEXIS 4989 (Sept. 8, 2014). The Court, therefore, is quite familiar with the procedural history and relevant facts. Thus, counsel jumps right to Melvin Goodwin's July 29, 2009 expungement motion – which is what started this now seven-year legal odyssey for Mr. Burton and the Court.

A. Melvin Goodwine's July 29, 2009 expungement motion

1. *Burton I*

On May 30, 2013, Mr. Burton received a letter from Charlotte Whitmore, a staff attorney with the Pennsylvania Innocence Project ("PA IP").[11] The letter, dated May 23, 2013, included a copy of a *Motion for Partial Expunction of Adult Criminal Record* ("expungement motion") Melvin Goodwine filed on July 29, 2009.[12] In the expungement motion, Goodwine admitted he – and only he – had murdered Seth Floyd "in self-defense." Goodwine also said, "An innocent man went to jail for a crime that I committed."[13] Likewise, Goodwine said he'd confessed – verbally and in writing – to the PBPP and his parole agent, Ms. Patton.

[11] Rpp. 174-175.
[12] Rpp. 182-191.
[13] Rp. 186.

Having never seen the expungement motion, and having never heard of Goodwine's confession, Mr. Burton filed a newly-discovered fact PCRA petition on July 11, 2013.[14] The PCRA court – Judge McDaniel – dismissed the PCRA petition as untimely, finding Mr. Burton could've obtained Goodwine's expungement motion years earlier because it was a publicly filed document and therefore a matter of public record.[15]

On appeal, a divided panel of this Court reversed (1459 WDA 2013), finding the public records presumption, *i.e.*, matters of public record can't be unknown, didn't apply to *pro se* incarcerated inmates like Mr. Burton. *Commonwealth v. Burton*, 2014 Pa. Super. LEXIS 4989 (Sept. 8, 2014). The DAO sought *en banc* review, which this Court granted, but on August 25, 2015, the *en banc* panel affirmed the initial panel's holding regarding the public records presumption. *Commonwealth v. Burton*, 121 A.3d 1063 (Pa. Super. 2015). The DAO sought discretionary review. The Supreme Court granted review, affirmed, and said the public records presumption didn't 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 she "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.*

[14] Rpp. 158-173.
[15] Rpp. 144-157.

If Judge McDaniel determined Mr. Burton didn't know about Goodwine's expungement motion confession, the Supreme Court instructed her to determine whether Mr. Burton exercised due diligence in obtaining the expungement motion. In doing so, the Supreme Court told 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 Goodwine PCRA petition). *Id.* at 638.

2. First remand proceedings regarding the Goodwine claim based on *Burton I*

a. October 5, 2017 hearing

On October 5, 2017, Judge McDaniel held a hearing regarding the Goodwine claim.[16] Twyla Bivens, Mr. Burton, and Goodwine testified.

Based on Twyla Bivens's and Mr. Burton's testimony, Judge McDaniel found that Mr. Burton acted diligently because he didn't know about Goodwine's expungement motion or confession until he'd received the PA IP's letter in May 2013. Thus, Judge McDaniel found Mr. Burton's PCRA petition timely under the PCRA's newly-discovered facts timeliness exception.[17]

When counsel called Goodwine to the stand, he presented Goodwine with the expungement motion and asked if he recognized the document. Goodwine replied, "On the advice of counsel, I exercise my Fifth Amendment right to remain silent

[16] The October 5, 2017 hearing transcripts are in the Reproduced Record. Rpp. 192-241.
[17] NT, PCRA Hrg., 10/5/2017, pp. 47-48.

because my answers may tend to incriminate me."[18] 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 silent because my answers may tend to incriminate me."[19] 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."[20]

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."[21] 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."[22]

[18] NT, PCRA Hrg., 10/5/2017, p. 32. Goodwine didn't request counsel. Judge McDaniel appointed him counsel before the hearing.
[19] NT, PCRA Hrg., 10/5/2017, p. 33.
[20] NT, PCRA Hrg., 10/5/2017, p. 33.
[21] NT, PCRA Hrg., 10/5/2017, p. 33.
[22] NT, PCRA Hrg., 10/5/2017, pp. 33-34.

At this point, Judge McDaniel stopped the questioning, recognized the legitimacy of Goodwine's invocation, and entered a blanket ruling preventing counsel from asking additional questions.[23] Goodwine's appointed attorney then 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.[24]

After Goodwine invoked his 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.[25]

At the end of the hearing, Judge McDaniel said she didn't find Goodwine's expungement motion confession credible. She based her credibility determination on a *prior* hearing – from a *separate* case – where Goodwine supposedly testified regarding his expungement motion. Judge McDaniel, however, didn't know the prior hearing's date, nor did she mention the prior hearing's purpose. Also, she didn't incorporate Goodwine's prior testimony from this hearing into the record *with respect to Mr. Burton's case*. According to Judge McDaniel:

[23] NT, PCRA Hrg., 10/5/2017, p. 34.
[24] NT, PCRA Hrg., 10/5/2017, p. 34.
[25] NT, PCRA Hrg., 10/5/2017, pp. 43-46.

> [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.[26]

Judge McDaniel never ruled whether Goodwine's confession was admissible as substantive evidence.

b. Goodwine's written PBPP confession

On September 11, 2017, in preparation for the October 5, 2017 hearing, Zach Stern, Mr. Burton's investigator from the PA IP, submitted a Right-To-Know request under Pennsylvania's Right-To-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., to the PBPP, requesting: "Any and all documentation relating to the parole application and file for Melvin Goodwine, DOB 8/27/1996, inmate #FP9276."[27]

Under the RTKL, the PBPP had to respond to the RTKL request by September 19, 2017 – weeks before the October 5, 2017 hearing. On September 19, 2017, David Butts, the PBPP's Open Records Officer, wrote Stern and informed him the PBPP

[26] NT, PCRA Hrg., 10/5/2017, pp. 48-49.
[27] Rp. 242.

needed an additional thirty days to comply with the RTKL request because Goodwine's PBPP case file was stored at a remote facility.[28]

On October 5, 2017, Judge McDaniel denied the Goodwine claim. At that point, though, Mr. Burton hadn't received Goodwine's PBPP case file.

On October 19, 2017, David Butts wrote Stern again and sent him nine pages from Goodwine's PBPP file.[29] The nine pages didn't include handwritten statements from Goodwine or PBPP reports indicating Goodwine had confessed to murdering Seth Floyd in self-defense.[30] Butts, though, said the PBPP had "withheld information" that was "exempt from disclosure by [the RTKL][.]"[31]

On October 20, 2017, counsel (Cooley) called Butts and explained why Mr. Burton wanted/needed access to statements Goodwine gave the PBPP in 2008 or 2009 – be it handwritten or transcribed by a court reporter. After the call, counsel emailed Butts a summary of their phone conversation.

On October 27, 2017, Butts emailed counsel (Cooley) eight additional pages of Goodwine's PBPP file, which meant the PBPP had now disclosed seventeen pages in all.[32] The eight new pages contained the following handwritten statement from Goodwine:

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[28] Rp. 243.
[29] Rp. 244-245.
[30] Rpp. 246-255.
[31] Rp. 245.
[32] Rpp. 256-275.

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 [redacted] 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 [redacted] 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

33

3. *Burton II*

Mr. Burton appealed Judge McDaniel's dismissal order regarding the Goodwine claim (451 WDA 2018). On May 24, 2019, this Court remanded again because Judge McDaniel made several unsupported findings when she dismissed the Goodwine claim ("*Bruton II*"). The Court said four findings formed the foundation of Judge McDaniel's ultimate finding that Goodwine's confession wasn't credible:

> (1) she had found Goodwine's testimony incredible at a "prior hearing," (2) Goodwine "refused to testify" at the PCRA hearing, (3) Goodwine "was protected by the prohibition against double jeopardy" and, thus, he "likely felt he had nothing to lose by adding a confession to his expungement petition," and (4) the "inescapable conclusion

[33] Rp. 275.

> … was that [Goodwine's confession] was a concocted scheme" between Burton and Goodwine[.][34]

The Court said each finding wasn't supported by the record.

First, while Judge McDaniel mentioned a "prior hearing" where Goodwine supposedly testified regarding the expungement motion, she never made the transcripts of this hearing part of the record in Mr. Burton's case. The Court said it "cannot review, let alone accept, a credibility determination premised on a record that is not before us."[35]

Second, the Court said, "Judge McDaniel offer[ed] no explanation for why, in her view, Goodwine's invocation of his Fifth Amendment right not to incriminate himself – which… [she] accepted as valid – cast[ed] doubt on the credibility of his confession."[36] The Court also said it "agreed with [Mr.] Burton that the record lack[ed] support for Judge McDaniel's conclusion that Goodwine 'likely felt he had nothing to lose by adding a confession to his expungement motion[.]'"[37] Moreover, the Court agreed with Mr. Burton that Judge McDaniel's decision to "recognize the legitimacy of Goodwine's right to remain silent destroy[ed] [her nothing to lose] finding."[38]

[34] Rp. 136. The *Burton II* opinion is part of the *Reproduced Record*. Rpp. 118-142.
[35] Rpp. 136-137.
[36] Rp. 137.
[37] Rp. 137.
[38] Rpp. 137-138.

The Court also addressed the DAO's argument regarding why *it believed* Goodwine confessed in his expungement motion. In its opening brief to this Court, the DAO claimed that, because Goodwine had to take "full responsibility" for his crime before being paroled, Goodwine merely confessed "to curry favor with the parole board by making a claim that he thought would most likely result in being paroled[.]"[39]

In his opening brief, though, Mr. Burton foresaw the DAO's *predictable* "curry favor" argument and thoroughly dismantled it with this argument:

> [I]f 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.[40]

[39] Rp. 138, fn. 8.
[40] Rp. 138, fn. 8.

The Court said Mr. Burton's "argument is a *convincing counter* to the [DAO's] [curry favor] position."[41]

Third, the Court agreed with Mr. Burton there was "no support" in the record "for Judge McDaniel's finding that Goodwine and [Mr.] Burton concocted a plan for Goodwine to confess in the expungement motion."[42] The Court said it was "wholly illogical" for Judge McDaniel "to conclude that the two men planned Goodwine's 2009 confession, but [Mr.] Burton then waited until 2013 to raise it in his PCRA petition."[43]

The Court also said "if Goodwine confessed solely to help [Mr.] Burton, why would he not have sent that confession to [Mr.] Burton (or at least notified him of its existence)?" Likewise, the Court said had Mr. Burton concocted a plan with Goodwine to have him (Goodwine) confess in his expungement motion, Mr. Burton "would not have waited around hoping someone would send him the expungement motion."[44] Lastly, the Court said Judge McDaniel's timeliness finding destroyed the "concocted a plan" finding, because under her timeliness finding, Judge McDaniel "found credible evidence that [Mr.] Burton *first discovered* Goodwine's expungement motion when the [PA IP] mailed him a copy of it."[45]

[41] Rp. 138, fn. 8.
[42] Rp. 139.
[43] Rp. 139.
[44] Rp. 139.
[45] Rp. 139 (emphasis in original).

In the end, the Court said there was "no evidence presented" at the October 5, 2017 hearing "to support Judge McDaniel's reasons for finding Goodwine's confession incredible." As a result, the Court remanded "for further proceedings."[46]

Regarding its remand order, the Court said:

> [W]e recognize that remanding would be unnecessary if we accepted either of the [DAO's] arguments that Goodwine's confession in the expungement motion is hearsay that would not be admissible as substantive evidence at a new trial, or that the confession would not likely result in a new verdict, even if admitted.[47]

The Court didn't adjudicate the hearsay and impact issues because Judge McDaniel didn't address them, and "each potentially involves factual findings and/or credibility determinations that must be made by the PCRA court in the first instance."[48] Mr. Burton, however, countered the DAO's hearsay and impact arguments, and the Court found these counter-arguments to be strong: "[Mr.] Burton offers strong counter-arguments to both of the [DAO's hearsay and impact] claims."[49]

Lastly, the Court commented on Goodwine's September 16, 2009 PBPP confession – a statement Mr. Burton and counsel received on October 27, 2017,[50] three

[46] Rpp. 139-140.
[47] Rp. 140.
[48] Rp. 140.
[49] Rp. 140.
[50] The Court said counsel received the parole board confession on October 19, 2017. Mr. Burton received part of Goodwine's PBPP case file (only nine pages) on October 19, 2017, but the nine pages didn't contain the handwritten confession. Counsel received the handwritten confession on October 27, 2017, when David Butts emailed counsel eight additional pages from Goodwine's PBPP case file. Rpp. 112-133.

weeks after Judge McDaniel had dismissed the Goodwine claim. As the Court correctly recognized, "Goodwine does not mention [Mr.] Burton anywhere in that confession."[51] Because the PBPP didn't disclose this statement until after Judge McDaniel had dismissed the Goodwine claim, this statement wasn't part of the record when Judge McDaniel dismissed the Goodwine claim. The Court, therefore, instructed the PCRA court to decide "whether it will permit [Mr.] Burton to present this evidence to supplement his Goodwine claim on remand."[52]

On remand, the Court instructed the PCRA court to address the following issues. *First*, whether Mr. Burton can supplement his Goodwine claim with Goodwine's September 16, 2009 PBPP confession. *Second*, whether Goodwine's expungement motion and PBPP confessions are credible. *Third*, if Goodwine's confessions are credible, whether they can be used as substantive evidence. *Fourth*, whether Goodwine's credible confessions would likely result in different verdicts at a retrial.

4. Second remand proceedings regarding the Goodwine claim based on *Burton II*

On September 9, 2019, Mr. Burton filed his comprehensive post-remand brief with the PCRA court.[53] The PCRA court was now Judge Flaherty because Judge McDaniel retired in December 2018. On October 2, 2019, the DAO filed its *Answer*.

[51] Rp. 141, fn. 10.
[52] Rp. 141, fn. 10.
[53] Rpp. 6-57.

On October 3, 2019, the PCRA court head oral argument regarding Mr. Burton's and the DAO's respective positions regarding the remand issues.[54]

On January 2, 2020, the PCRA court issued its 907-dismissal notice as well as a 10-page opinion.[55] On February 24, 2020, the PCRA court refiled its January 2, 2020 10-page opinion as its 1925(a) opinion.[56] The PCRA court made the following findings and conclusions in its opinion.

a. Whether Mr. Burton can supplement his Goodwine claim with the PBPP documents

The PCRA court said Mr. Burton could supplement his Goodwine claim with the PBPP documents: "At the October 4, 2019 hearing, this Court permitted [Mr. Burton] to supplement the record with the documents he received from the PBPP."[57]

b. Whether Goodwine's confessions are credible

The PCRA court found Goodwine's confessions incredible for the following reasons:

First, in his July 29, 2009 expungement motion, Goodwine said he'd "given a written and verbal account of [his] crime" to the PBPP and his parole agent Ms. Patton.[58] The limited documents provided to counsel by the PBPP, however, only included one written statement from Goodwine – and he handwrote that statement on

[54] Rpp. 58-103.
[55] Rpp. 106-115.
[56] Rpp. 116-117.
[57] Rp. 107.
[58] Rp. 186.

September 16, 2009 – after July 29, 2009.[59] Assuming the PBPP disclosed Goodwine's entire PBPP case file to counsel, *which it didn't*, the PCRA court said Goodwine's expungement motion contained a "factual inaccuracy," *i.e.*, contrary to his expungement motion, Goodwine didn't provide a written statement to the PBPP before July 29, 2009.[60]

Second, the PCRA court found his expungement motion confession unreliable, in part, because "Goodwine made the statements in his Motion in order to receive a personal benefit, which diminish their reliability."[61]

Third, the PCRA court found his PBPP confession unreliable, in part, because:

> Goodwine was well aware that the PBPP requires an offender to accept responsibility for his crime as a consideration of parole. It was not until after he was denied parole on this basis [in 2008] that Goodwine made [his] written statement.[62]

Fourth, the PCRA court found his PBPP confession unreliable, in part, because Goodwine's written narrative was "contrary" to the trial evidence:

> It is significant to note that Goodwine did not admit to conspiracy to commit murder, which is the crime for which he was convicted. Rather, he stated that he killed Floyd in self-defense. This assertion is contrary to the evidence presented at trial[.]"[63]

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[59] Rp. 275.
[60] Rp. 109.
[61] Rp. 109.
[62] Rpp. 109-110.
[63] Rp. 110.

c. Whether Goodwine's confessions are admissible as substantive evidence

The PCRA court said Goodwine's confessions constituted hearsay but only addressed the statement against penal interest hearsay exception in Pa.R.Evid. 804(b)(3). The PCRA court didn't address the prior inconsistent statement doctrine regarding the situation where Goodwine is compelled to testify and denies having confessed to Seth Floyd's murder.

Regarding Rule 804(b)(3), the PCRA court said, because Goodwine was acquitted of the homicide count, Goodwine didn't make his expungement motion confession "in a manner… contrary to… [his] pecuniary interest."[64] The PCRA court, however, said this about Goodwine's Fifth Amendment invocation at the October 5, 2017 hearing: "Goodwine… validly invoked his Fifth Amendment privilege…. [but] this fact cannot be considered in an analysis of whether Goodwine's statement was against his penal interest at the time the statement was made."[65]

Regarding Goodwine's PBPP confession, the PCRA court made a similar finding:

> Goodwine knew that he had to accept responsibility for his actions… to gain release from custody at the time he wrote [his PBPP confession]. Again, at the time the statement was made, Goodwine had been acquitted of the homicide. As such, he could not have thought that [his confession] would

[64] Rp. 112.
[65] Rp. 112.

> have exposed him to criminal liability at the time [it] was made.[66]

d. Whether – if admitted as substantive evidence – Goodwine's confessions would likely produce different verdict regarding the homicide and conspiracy counts

The PCRA court said, even if jurors considered Goodwine's confessions as substantive evidence, they were "unlikely to change the outcome of the trial."[67] The PCRA court said the testimony of the ACJ inmates who testified against Mr. Burton "was largely consistent with each other."[68] The PCRA court then summarized the testimony from the following ACJ inmates – (1) Edwin Wright, (2) Micah Goodman, (3) Marvin Harper, (4) Gregory McKinney, and (5) Brian O'Toole – and said their collective testimony "outweigh[ed] any self-serving statement[s] made by Goodwine," meaning it was "unlikely" a retrial would produce different verdicts.[69]

[66] Rp. 112.
[67] Rp. 112.
[68] Rp. 113.
[69] Rpp. 113-115.

ARGUMENTS

I. The PCRA court's credibility findings regarding Melvin Goodwine's confessions are wrong and aren't supported by the record. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

A. Introduction

This Court has now given the DAO two opportunities to present evidence and argument explaining why Goodwine's confessions aren't credible. Once at the October 5, 2017 remand hearing based on *Burton I* and once at the October 4, 2019 remand hearing based on *Burton II*. To date, however, the DAO and both PCRA courts have yet to identify a single legitimate record-based reason why Goodwine's confessions are incredible.

Based on the evidence and argument presented at the October 5, 2017 hearing, Judge McDaniel identified four reasons why Goodwine's expungement motion confession was incredible. In *Burton II*, however, this Court said, "[T]here was no evidence presented at the PCRA hearing… to support Judge McDaniel's reasons for finding Goodwine's confession incredible."[70] Thus, if the DAO didn't present new evidence at the October 4, 2019 hearing, that proved *Burton II* was manifestly wrong, it couldn't relitigate or reargue these four incredibility reasons/findings at the October 4, 2019 remand hearing because *Burton II's* adjudication of these reasons/findings constituted the "law of the case." *Commonwealth v. Starr*, 664 A.2d 1326, 1331 (Pa. 1995).

[70] Rp. 139.

Remarkably, at the October 3, 2019 remand hearing, the DAO made the very same credibility arguments rejected in *Burton II*.[71] Likewise, some of Judge Flaherty's credibility findings are the same findings this Court rejected in *Burton II*.

B. Like Judge McDaniel's credibility findings, Judge Flaherty's credibility findings aren't supported by the record, are based on unfounded assumptions, and some mirror Judge McDaniel's findings this Court rejected in *Burton II*

1. The alleged factual inaccuracy in Goodwine's expungement motion is based on two assumptions, not the record

The PCRA court said Goodwine's expungement motion confession was unreliable, in part, because the records the PBPP disclosed to counsel didn't include a pre-July 29, 2009 written statement from Goodwine. In Goodwine's expungement motion, he said he'd provided the PBPP and his parole agent, Ms. Patton, a written and verbal account of the murder. The PCRA court's finding is based on at least two *faulty assumptions*, not the record. Put differently, there's nothing in the record proving Goodwine didn't provide a written statement to the PBPP before July 29, 2009.

First, the PCRA court *assumes* the written statement Goodwine mentions in his expungement motion, had to have been retained by the PBPP and placed into his PBPP case file. For all we know, because the PBPP denied Goodwine's 2008 parole request, the PBPP could've discarded Goodwine's 2008 written statement because it believed it didn't accurately represent the underlying facts that led to his conspiracy conviction.

[71] Rpp. 58-103.

And this is a real possibility. Goodwine's PBPP records tell us he went before the PBPP in 2008 but was denied parole. Accordingly, in 2008 Goodwine had to give a written statement like he did in 2009. However, the PBPP documents counsel received in October 2017 contained no written statement from 2008. In other words, because Goodwine had to give a written statement in 2008, *if the PBPP disclosed Goodwine's entire file to counsel*, and his file didn't contain a 2008 written statement, logic dictates the PBPP didn't retain Goodwine's 2008 written statement and make part of his permanent PBPP case file.

Second, the PCRA court *assumes* the PBPP disclosed Goodwine's entire PBPP file to counsel on October 27, 2017. This is an erroneous assumption because, based on the PBPP's communications with counsel, the PBPP didn't disclose Goodwine's entire case file. Counsel, keep in mind, only received seventeen pages of documents from the PBPP. Consequently, if the PBPP retained Goodwine's 2008 written statement, it's entirely possible this statement is part of the case file not disclosed to counsel.

Simply put, the record doesn't prove or support what the PCRA court found, *i.e.*, Goodwine never gave a written statement before filing his expungement motion, meaning he lied in his expungement motion regarding his PBPP confession, meaning his expungement motion confession is unreliable.

2. The PCRA court's second credibility finding isn't supported by the record and doesn't make sense because the PCRA court spent so little time explaining its justification(s)

The PCRA court found Goodwine's expungement motion confession unreliable, in part, because "Goodwine made the statements in his Motion in order to receive a personal benefit, which diminish their reliability."[72] The PCRA court's finding makes so little sense it can't possibly be supported by the record.

First, the PCRA court never identified the "personal benefit" Goodwine was seeking. Was the expungement of his murder charge – itself – the "personal benefit"? If so, the PCRA court never explained why Goodwine's desire to have his murder charge expunged, rendered his expungement motion confession unreliable. What – Goodwine believed by confessing to Seth Floyd's murder, *but under an entirely different narrative than that presented at trial*, his confession would increase the likelihood of having his expungement motion granted? No – Goodwine didn't think this when he filed his expungement motion because presenting a narrative markedly different than the trial narrative decreased – significantly – the likelihood Judge McDaniel would grant his expungement motion.

Second, Goodwine mentioned his 2008 PBPP confessions in his expungement motion, so was obtaining parole the "personal benefit" Goodwine was seeking? If so, Judge Flaherty's finding represents nothing more than the "curry favor" argument

[72] Rp. 109.

Judge McDaniel and the DAO espoused in *Burton II* – an argument/reason this Court rejected.

3. The PCRA court's third credibility finding is based on another faulty assumption, namely that Goodwine's 2008 written and verbal statements to the PBPP had to be different than his 2009 written and verbal statements to the PBPP, but there's no evidence in the record proving or supporting this finding

The PCRA court found Goodwine's PBPP confession unreliable, in part, because:

> Goodwine was well aware that the PBPP requires an offender to accept responsibility for his crime as a consideration of parole. It was not until after he was denied parole on this basis [in 2008] that Goodwine made [his] written statement.[73]

This finding, like the second finding, is another off-shoot of the "curry favor" finding rejected by the Court in *Burton II*.

More importantly, like the PCRA court's first finding, this finding is also based on at least one faulty assumption. Without a shred of evidence in the record, the PCRA court *assumes* Goodwine's 2008 written and verbal statements to the PBPP had to be *different* from his 2009 written and verbal statements because the PBPP denied his 2008 parole request. This simply isn't true – and far from it. One need only consider the following fact pattern to realize Goodwine could've easily written the same "lone wolf" narrative in 2008 and 2009:

[73] Rpp. 109-110.

- Based on the PBPP documentation, Goodwine had to provide the PBPP with a written and verbal accounting of Seth Floyd's murder during his 2008 parole proceedings.

- It's entirely plausible, Goodwine's 2008 written and verbal accounting mirrored his 2009 accounting – with him being solely responsible for Seth Floyd's murder.

- However, upon reviewing Goodwine's 2008 accounting, the PBPP found it incredible because it differed so dramatically from the trial evidence and his conspiracy conviction, *i.e.*, *a conspiracy requires the involvement of at least two people, not one*. The PBPP then used this incredibility finding to find Goodwine wasn't being truthful, and if he wasn't being truthful, he wasn't showing remorse, and without a sincere showing of remorse, the PBPP couldn't – and ultimately didn't – grant him parole.

- Undeterred by his 2008 denial, Goodwine reapplied for parole in 2009, but he didn't charge his narrative because he knew the truth. Thus, in 2009 Goodwine told the PBPP *the exact narrative he told in 2008*, *i.e.*, he was solely responsible for Seth Floyd's death and Mr. Burton played no role in the murder. This time, though, the PBPP realized Goodwine was, in fact, taking "full responsibility" for his actions, even if the jury's verdicts didn't accurately reflect the true scope of his actions and culpability. Put differently, that Goodwine was unwilling to change his narrative in 2009 – even after this same narrative didn't lead to his parole in 2008 – could've easily conveyed to the PBPP that Goodwine's "lone wolf" narrative was, in fact, true.

- Upon finding his 2009 and 2008 narratives to be true, the PBPP found Goodwine was taking "full responsibility" for his *true* actions – not simply the actions reflected by the jury's conspiracy verdict. By taking "full responsibility" for his *true* actions, the PBPP found Goodwine was genuinely remorseful for said actions, and used the remorsefulness finding to grant him parole in 2009.

The point of this fact pattern is to simply show the Court what happens when a PCRA court premises a "finding" on an assumption, not the actual record. There's nothing in the record indicating Goodwine's 2008 accounting differed from his 2009

accounting, and the PCRA court can't be permitted to find as such simply because it *assumes this difference into existence*. The record must give rise to the PCRA court's findings, not the PCRA court's own whimsical assumptions about what it thinks happened during Goodwine's 2008 PBPP proceedings.

4. The PCRA court's fourth credibility finding actually supports Mr. Burton's position regarding why Goodwine's PBPP confession is credible

The PCRA court found Goodwine's PBPP confession unreliable, in part, because Goodwine's written narrative was "contrary" to the trial evidence and inconsistent with his conspiracy conviction.[74] This finding represents yet another off-shoot of the "curry favor" argument. More significantly, it's the primary reason why Goodwine's PBPP confession is credible.

Goodwine wanted to be paroled – that's obvious. But the worst possible way of obtaining parole is to: (1) present a narrative to the PBPP that is markedly different than the narrative presented at trial; and the (2) markedly different narrative can't even legally support the conviction that gave rise to not only the inmate's incarceration but the inmate's request for parole.

Yet, this is exactly what Goodwine did. His "lone wolf" narrative not only turns the trial narrative of a conspiracy between him and Mr. Burton on its head, it can't support his conspiracy conviction because a conspiracy requires two or more people.

[74] Rp. 110.

In the end, all Goodwine had to do to *increase the likelihood* of *receiving* parole was to present a narrative *consistent with* the trial testimony and his conspiracy conviction. He didn't do this though. Instead, he did something that *increased his likelihood* of *not receiving* parole, meaning he jeopardized his own freedom by sticking with the "lone wolf" narrative. His willingness to jeopardize his own freedom is what makes his "lone wolf" confession credible.

There's one last thing Mr. Burton wants to say about the PCRA court's unreliability findings – particularly its findings regarding Goodwine's PBPP confessions. The PCRA court's unreliability findings mirror the arguments the DAO has made for the last seven years. The DAO's global unreliability argument can be summed up as such: Goodwine's verbal and written PBPP confessions are patently unreliable for an obvious reason, *i.e.*, Goodwine simply wanted parole and said what the PBPP wanted to hear regardless of whether it was true or not.

With all due respect to the DAO, this argument does a significant disserve to the hard work the PBPP puts into evaluating each parole application. From the DAO's perspective, Goodwine's confession is so obviously untrue, because he was simply saying what the PBPP wanted to hear, no reasonable fact-finder would find it truthful and credible. If the DAO's argument is true, then this is news to the hardworking folks at the PBPP. In other words, based on the DAO's argument, the PBPP is either totally incompetent or it knowingly shortened Goodwine's prison time even though his written

and verbal accounting of Seth Floyd's murder was so clearly untrue. It defies logic and common sense to think the PBPP would grant parole to Goodwine if it honestly believed his "lone wolf" accounting was patently untrue and solely self-serving.

Parole, keep in mind, is "a penological measure for the disciplinary treatment of prisoners *who seem capable of rehabilitation outside of prison walls*." *Hendrickson v. Pennsylvania State Board of Parole*, 185 A.2d 581, 584 (Pa. 1962) (emphasis added). Rehabilitation requires, among other things, remorse. Remorse requires one to accept responsibility for his actions. Accepting responsibility requires the person to truthfully divulge – orally, in writing, or both – what he did during the criminal action that resulted in his conviction(s).

Thus, if Goodwine's "lone wolf" narrative so patently untrue, the PBPP, *i.e.*, the people who are trained to make these findings and who do so on a daily basis, would've rejected Goodwine's 2009 parole request for an obvious reason: his refusal to be truthful meant he's not remorseful, and if he's not remorseful, he's probably "not capable of rehabilitation outside of prison walls." *Hendrickson v. Pennsylvania State Board of Parole*, 185 A.2d at 584.

In the end, if the DAO wasn't so concerned with its singular and tunnel-vision objective of protecting a conviction at all costs, it too would find what the PBPP found: Goodwine's "lone wolf" narrative must be credible because why else would he provide a narrative that's so markedly different than the trial evidence and narrative when doing so greatly increased the likelihood he wouldn't receive parole?

II. The PCRA court erred by not addressing Mr. Burton's meritorious arguments regarding why Melvin Goodwine's confessions would be admissible as substantive evidence at a retrial because – at a retrial – Mr. Burton would compel Melvin Goodwine to take the stand, using his compulsory process right, and force Melvin Goodwine to answer questions about his confessions, and Melvin Goodwine would have to answer these questions because – at this point – Melvin Goodwine has no Fifth Amendment right to remain silent. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

A. Introduction

At a new trial, Mr. Burton would exercise his compulsory process rights, *see* U.S. Const. amdt. 6; Pa. Const. art I, § 9, by subpoenaing Melvin Goodwine, putting him on the stand, and forcing him to answer questions about his confessions. Once confronted with these questions, Goodwine could do one of three things: (1) he could deny ever having filed any motions or pleadings or ever having provided a written statement to a government agency confessing to Seth Floyd's murder; (2) he could admit to his expungement motion and PBPP confessions, tell jurors they're true, and that he – and only he – murdered Seth Floyd; or (3) he could attempt to invoke his Fifth Amendment right. Each scenario is played out below. Under each scenario, Goodwine's confessions are admissible as substantive evidence.

B. Melvin Goodwine denies ever having confessed in a pleading or to the PBPP

Once on the stand, Goodwine could answer trial counsel's questions. In doing so, Goodwine could deny ever having confessed in a pleading or to a government agency – like the PBPP. If so, trial counsel would introduce Goodwine's expungement

motion and PBPP written statement as prior inconsistent statements under Pa.R.Evid. 803.1(1).

Prior inconsistent statements may be used as *substantive* evidence if the following circumstances are present: 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); *Commonwealth v. Brady*, 507 A.2d 66, 71 (Pa. 1986).

The expungement motion is a signed writing that Goodwine adopted and notarized. The PBPP written statement is a "verbatim contemporaneous recording of an oral statement" Goodwine gave to the PBPP on September 16, 2009. Consequently, if Goodwine denied he'd ever confessed to killing Seth Floyd in self-defense, jurors could consider his confessions as *substantive* evidence of *reasonable doubt* in Mr. Burton's favor.

C. Melvin Goodwine admits to and discusses his expungement motion and PBPP confessions

Goodwine could also admit to having typed and filed his expungement motion. If so, trial counsel would then confront Goodwine with his expungement motion and ask Goodwine to read paragraphs 4 and 5. Goodwine could then read paragraphs 4

and 5. Trial counsel would then ask if paragraphs 4 and 5 are true. Goodwine could reply, "Yes, they're true," and admit to jurors that he – and only he – killed Seth Floyd in self-defense. The same sequence could happen regarding Goodwine's PBPP confession. He could admit his written statement is true and tell jurors, again, that he – and only he – murdered Seth Floyd in self-defense.

In this scenario, Goodwine's admissions would constitute *substantive* evidence of reasonable doubt in Mr. Burton's favor.

D. Melvin Goodwine attempts to invoke his Fifth Amendment right

At the retrial, Goodwine could attempt to invoke his Fifth Amendment right, but he'd have to do so on a question-by-question basis. *Commonwealth v. Kirwan*, 847 A.2d 61, 65 (Pa. Super. 2004). "[A] witness may… only assert the privilege to avoid responding to a particular question. A blanket privilege… is not permitted." *Id.*; *Commonwealth v. Treat*, 848 A.2d 147, 148 (Pa. Super. 2004). Thus, neither Goodwine nor his attorney, assuming he has one at the retrial, can request a blanket, pre-questioning ruling before trial counsel even calls him to the stand and asks him a single question. *Commonwealth v. Tielsch*, 789 A.2d 216, 218 (Pa. Super. 2001) ("[If questions are posed on cross-examination concerning matters for which Appellant can assert his Fifth Amendment privilege, he can do so at that time. There is no need for the trial court or this Court to speculate on what questions defense counsel will ask on cross-examination.").

For instance, trial counsel would ask Goodwine if he'd ever filed a motion to have his homicide charge expunged. Goodwine *would have to answer this question* because answering it wouldn't incriminate him; it'd simply inform jurors he, at some point, had filed an expungement motion. Ditto regarding Goodwine's PBPP written statement. If trial counsel asked Goodwine if he'd ever given a written statement to the PBPP, Goodwine would have to answer this question because answering it wouldn't incriminate him; it'd simply inform jurors he, at some point, gave a written statement to the PBPP.

1. If Melvin Goodwine denied filing an expungement motion and denied providing a written statement to the PBPP

a. Expungement motion

If Goodwine denied filing an expungement motion, trial counsel would impeach him by confronting him with the expungement motion and asking him the following questions. Again, Goodwine would have to listen to each question and invoke his right on a question-by-question basis:

> 1. Have you ever tried to have the homicide charge expunged from your criminal record?
>
> 2. Have you ever filed an expungement motion with the Allegheny County Common Pleas Court?
>
> 3. When did you file this expungement motion?
>
> 4. Do you recognize this document (*i.e.*, the expungement motion)?

5. Do you recognize this name on the cover page: Melvin K. Goodwine?

6. Do you recognize this name on page 1 of the expungement motion: Melvin Kenneth Goodwine?

7. Do you recognize the address listed on the expungement motion: 1100 Pike Street, Huntingdon, PA 16654?

8. When you served your 5- to 10-year prison sentence for your conspiracy conviction, did you serve part or all of your sentence at SCI-Huntingdon?

9. Is this your signature on the expungement motion's cover page?

10. Is this your signature on page 7?

11. Is this your signature on page 9?

12. Is this your signature on the certificate of service?

13. Is this your signature for your affidavit?

14. Is this your SS#: 206-60-7629 on page 1?

15. Is this your SS#: 206-60-7629 on page 2?

16. Is this your SS#: 206-60-7629 on your affidavit?

17. Is this your date of birth: 8/27/1966 on page 1?

18. Is this your date of birth: 8/27/1966 on page 2?

19. Is this your date of birth: 8/27/1966 on the affidavit?

20. In your affidavit, did you write, "I, Melvin Goodwine, do hereby swear and affirm that the following facts are true and correct based on personal knowledge."?

21. In you affidavit, did you write, "(1) All statements contained in the petitioners motion to expunge adult criminal record and petitioners motion to proceed in forma pauperis status is the truth, this truth is based on my own personal facts and knowledge"?

22. In your affidavit, did you write, "I understand that false statements made herein are subject to the penalties of 18 Pa. CSA 4904 relating to unsworn falsifications to authorities"?

23. In paragraph #4 of the expungement motion, did you write: "The parole board and petitioner's agent, Ms. Patton, were given a written and verbal account of petitioner's crime. Petitioner committed this act in self-defense."?

25. In paragraph #5 of the expungement motion, did you write, "The petitioner had already admitted to the parole board that I committed this act on my own in self defense. Petitioner also admitted and take(s) full responsibility and ownership that an innocent man went to jail for a crime that I committed."?

b. Goodwine's PBPP written confession

If Goodwine denied providing the PBPP with a written statement, trial counsel would impeach him with his PBPP written statement and ask him the following questions. Again, Goodwine would have to listen to each question and invoke his right on a question-by-question basis:

1. Do you recognize this document entitled "Offender's Written Version of Offense"?

2. Do you recognize the name listed at the top – Melvin Goodwine?

3. Do you recognize the "Institution No. FP9276"?

4. While you served your 5- to 10-year prison sentence for your conspiracy conviction, was your PA DOC number FP9276?

5. At the bottom of the document there's a line for the "Offender's Signature" and there's a signature above that line. Do you recognize that signature?

6. Is that your signature?

7. Next to the signature line is a line for the "Date" and the numbers "9-16-09" are listed above that line. Do you recognize that date?

8. Did you write the numbers 9-16-09?

9. Do you see the sentence, "The Parole Board now requires a detailed written version of your offense(s)"?

10. Do you see the handwriting below this sentence?

11. Is that your handwriting?

12. The first sentence of the written statement says, "I went to Mr. Floyd's cell to fight." Did you write that sentence?

13. The second sentence says, "The fight was getting out of control." Did you write that sentence?

14. The third sentence says, "And in the middle of our struggle I strangled Mr. Floyd[] to death with a shoestring I had wrapped around my hand during the fight." Did you write that sentence?

15. The fourth sentence says, "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." Did you write that sentence?

16. The fifth sentence says, "Because Mr. Floyd could still be alive if I had reported the crime and I fully understand 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." Did you write that sentence?

17. The last sentence says, "I now know the pain my actions caused to his family and also my family and children." Did you write that sentence?

18. Are these six sentences – which you wrote – true?

19. Did you – and only you – strangle Seth Floyd in self-defense on March 9, 1993?

20. Before or after writing this statement, did you make this same statement verbally to the parole board?

2. If Melvin Goodwine attempts to invoke his Fifth Amendment right, the right would be inapplicable, meaning he'd have to answer the above questions

A witness isn't exonerated from testifying merely by declaring that doing so would or may be self-incriminating. *Commonwealth v. Carrera*, 227 A.2d 627 (Pa. 1967). The trial court must evaluate the circumstances to determine whether the privilege's proposed use is real or illusory. *Commonwealth v. Long*, 625 A.2d 630 (Pa. 1993). The "privilege extends not only to statements that by themselves would be evidence the declarant has committed a crime, but also to assertions that would be 'a link in the chain' of evidence needed to convict." *Commonwealth v. Kirwan*, 847 A.2d at 65.

Lastly, as *Kirwan* makes clear, to trigger the right, the declarant must establish the DAO can, legally and factually, *prosecute* him for a criminal offense. *Commonwealth v. Hawkins*, 469 A.2d 252, 254 (Pa. Super. 1983) ("Appellant's refusal to testify can be justified only if such testimony would put him in jeopardy."). If the DAO can't prosecute the declarant, the right can't be invoked.

Consequently, if Goodwine invoked his right to remain silent, the first question the trial court *must ask* is what criminal offense(s), if any, the DAO could charge and prosecute based on Goodwine's potential testimony? Mr. Burton and counsel can only think of four potential criminal offenses: homicide, conspiracy, perjury, and false swearing. Based on the facts and law, however, the DAO can't prosecute Goodwine for any of these criminal offenses.

a. Homicide and conspiracy

Yes, Goodwine's expungement motion and PBPP confessions incriminate him regarding Seth Floyd's murder, *i.e.*, the murder and conspiracy counts. However, Goodwine was acquitted of the homicide count and convicted of the conspiracy count. Thus, under straight-forward double jeopardy principles, *see* U.S. Const. admt. 5; Pa. Const. art. I, § 10, the DAO can't retry him on either count. *Commonwealth v. Scott*, 509 A.2d 1301, 1302 (Pa. Super. 1986) ("The verdict of a jury, upon a valid indictment, in a court of competent jurisdiction, acquitting the defendant of the fact is an absolute bar to any subsequent prosecution for the same offense.") (citation omitted). The inability

to retry him on both counts means Goodwine can't premise his invocation on these counts.

b. Perjury and false swearing based on the expungement motion and PBPP confessions

Goodwine could base his invocation on the belief the DAO could prosecute him for perjury or false swearing under 18 Pa. C.S. §§ 4902, 4903. For instance, if Goodwine intended to testify that his expungement motion and PBPP confessions were false, he could believe the DAO could prosecute him for perjury and false swearing. Goodwine's fear of being prosecuted, however, is illusory for at least two reasons.

Legally, the DAO couldn't prosecute Goodwine based on the statute of limitations. A perjury or false swearing prosecution must ordinarily commence within two years after it's committed. 42 Pa. C.S. § 5552(a). Because a material element of perjury and false swearing is fraud, however, the DAO may commence prosecution within one year after discovering the offense, *so long as eight years have not transpired since the original offense date.*

Goodwine filed his expungement motion on July 29, 2009 and he gave his PBPP written and verbal confessions on September 16, 2009. It's now March 2020 – more than *ten years* "since the original offense date," meaning if Goodwine testified at a retrial and said his expungement motion and PBPP confessions were false, the DAO couldn't prosecute him for perjury and false swearing under §§ 4902, 4903 because the

"prosecution" would "commence" more than eight years after the "original offense date."

Factually, if Goodwine testified at a retrial and said his expungement motion and PBPP confessions were false, his testimony would represent the only evidence to establish the crimes of perjury and false swearing. The "corpus delicti rule," however, "prohibits the Commonwealth from obtaining a conviction when the only evidence is the defendant's confession[.]" *Commonwealth v. Tielsch*, 789 A.2d at 218; 18 Pa. C.S. §4902(f) ("In any prosecution under this section, except under subsection (e) of this section, falsity of a statement may not be established by the uncorroborated testimony of a single witness."). *Tielsch* is on point.

In *Tielsch*, the Commonwealth was prosecuting Steven Tielsch for various crimes. During Tielsch's trial, the Commonwealth sought to call Donald Geraci to testify based on statements he'd made to law enforcement implicating Tielsch in the charged crimes. When the Commonwealth called Geraci to testify, however, Geraci's attorney told the trial court Geraci wouldn't "testify in conformity with [his prior statements] but would state that he had no personal knowledge of Tielsch, that his knowledge of Tielsch carrying guns is hearsay, that he was never in Tielsch's apartment, that he never saw Tielsch carrying a gun, and that he was not threatened by Tielsch." *Commonwealth v. Tielsch*, 789 A.2d at 217.

Geraci's attorney argued Geraci would assert his Fifth Amendment privilege "because his testimony would directly contradict the two police reports which could lead to his prosecution for either perjury or giving false information to law enforcement authorities." *Id.* His attorney "further argued that cross-examination might elicit testimony on [Geraci's] pending drug charges as well as a pending federal investigation." *Id.* The trial court found Geraci's Fifth Amendment claim "illusory" and "directed" him to testify. When Geraci refused, the trial court held him in contempt. *Id.*

Relevant here is Geraci's Fifth Amendment claim that – if his testimony at trial differed from his two law enforcement statements – the Commonwealth could prosecute him for false swearing. Like the trial court, this Court found Geraci's Fifth Amendment claim illusory:

> Similarly, [Geraci's] claim that he could be prosecuted for making false reports to law enforcement personnel is unavailing. If [Geraci] testified in the present trial that his prior statements were false, *that would be the only evidence available to establish the crime of making false reports.* Since the corpus delicti rule prohibits the Commonwealth from obtaining a conviction when the only evidence is the defendant's confession, this claim is also illusory.

Id. at 218 (emphasis added).

Based on *Tielsch*, the DAO wouldn't have sufficient evidence to charge Goodwine with perjury and false swearing, making Goodwine's invocation illusory.

c. Perjury based on testimony at the retrial

Goodwine could base his invocation on the belief the DAO could prosecute him for perjury under 18 Pa. C.S. § 4902 based on his testimony at the retrial. This belief is also illusory. The DAO couldn't prosecute Goodwine for perjury if he testified at the retrial and said he – and he alone – murdered Seth Floyd in self-defense and that his expungement motion and PBPP confessions were true. This is the case because the DAO would have no evidence to prove his testimony at Mr. Burton's retrial was false. For instance, had Goodwine testified at his and Mr. Burton's joint trial in 1993 and confessed to murdering Seth Floyd in self-defense, the DAO couldn't have prosecuted him for perjury back in 1993 because, like now, it didn't have evidence to prove his testimony was, in fact, false.

Consequently, if Goodwine based in invocation on this reason, his claim would be illusory because there's no probable cause to charge Goodwine with perjury. While prosecutors have "broad discretion" to decide when and whether to prosecute, a prosecutor must "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause[.]" *Commonwealth v. Hawkins*, 469 A.2d at 255.

d. Conclusion

If Goodwine invoked his right to remain silent at Mr. Burton's retrial, the trial court would have to reject his request and force him to answer all questions regarding his expungement motion and PBPP confessions. If Goodwine must answer these questions, jurors would be able to consider his confessions as *substantive* evidence. If

Goodwine denied he'd ever confessed to killing Seth Floyd in self-defense, he'd be confronted with his "prior inconsistent statements" contained in his expungement motion and PBPP written statement. A prior inconsistent statement, as mentioned, may be used as *substantive* evidence if the prior statement (a) is a writing signed and adopted by the declarant or (b) a verbatim contemporaneous recording of an oral statement. *Commonwealth v. Brown*, 52 A.3d at 1171 n.52; *Commonwealth v. Brady*, 507 A.2d at 71.

On the other hand, if Goodwine must answer all questions regarding his expungement motion and PBPP confessions, there's a strong possibility he'll simply repeat his confession to the jurors, tell them Mr. Burton is innocent, and call it a day, leaving it for the jurors to determine the credibility of his confessions and his testimony regarding Mr. Burton's innocence.

3. Even if Melvin Goodwine's invocation is deemed legitimate, his confessions are still admissible as substantive evidence

If the trial court found a reason to grant Goodwine's Fifth Amendment request, even though one doesn't exit factually or legally, the trial court would have to apply the privilege on a question-by-question basis. Therefore, Goodwine would have to listen to each question, decide whether he wished to invoke his right to remain silent for each question, and when he did invoke his right, the trial court would have to determine whether the question's substance triggered his right to remain silent. More importantly, if the trial court recognized Goodwine's Fifth Amendment invocation, his confessions

would still be admissible as substantive evidence because they 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).

Goodwine's confessions clearly exposed him to *civil* liability because Seth Floyd's family, without question, can file a wrongful death action against him seeking damages in connection with Floyd's death. 42 Pa. C.S. § 8301. The issue under Rule 804(b)(3)(A) isn't 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 confessions are against his own civil interests.

Moreover, if Mr. Burton only offered Goodwine's confessions to show they're against his *civil* interests, Mr. Burton wouldn't have to satisfy subsection (B)'s "trustworthiness" requirement because this only applies if the proponent of the evidence is introducing the statement to show the declarant exposed himself to criminal

liability by making the statement(s). Even if the "trustworthiness" requirement applied, Mr. Burton could satisfy it. *Supra*, pp. 24-32 (explaining why Goodwine's confessions are credible).

Lastly, if the trial *grants* Goodwine's Fifth Amendment request, because it believes Goodwine's answers would place him in real jeopardy of being criminally prosecuted, this finding would satisfy subsection (B) because it's based on the finding that Goodwine's confessions "tend[] to expose" him "to criminal liability." Mr. Burton would also satisfy subsection (B)'s "trustworthiness" requirement.

Regarding Rule 804(b)(3), the PCRA court said, because Goodwine was acquitted of the homicide count, he didn't make his expungement motion confession "in a manner… contrary to… [his] pecuniary interest."[75] The PCRA court is wrong because Rule 804(b)(3) has a civil liability component – which the PCRA court never considered. Goodwine's confessions – without question – expose him to a civil wrongful death suit brought by Seth Floyd's family.

Perhaps the most confusing ruling from the PCRA court is its ruling regarding the significance of what its claims to be Goodwine's "*validly* invoked… Fifth Amendment privilege[.]"[76] If Goodwine "validly invoked" his Fifth Amendment right, the PCRA court must believe that forcing him to answer questions about his

[75] Rp. ___ (1/2/2020 opin, p. 7).
[76] Rp. ___ (1/2/2020 opin, p. 7).

confessions would expose him to criminal liability by providing the DAO with the necessary facts and evidence to prosecute him for a criminal offense. *Commonwealth v. Hawkins*, 469 A.2d at 254.

The PCRA court, though, said this about Goodwine's "*validly* invoked" Fifth Amendment privilege: "Goodwine… validly invoked his Fifth Amendment privilege…. [but] this fact cannot be considered in an analysis of whether Goodwine's statement was against his penal interest at the time the statement was made."[77] The PCRA court is wrong and it didn't cite a single case to support these *irreconcilable* positions, *i.e.*, Goodwine has a valid Fifth Amendment claim regarding his expungement motion confession, but when he made said confession it didn't expose him to criminal liability.

The PCRA court could've used Goodwine's refusal to answer questions about his confession as *circumstantial evidence* to determine whether his confession exposed him to criminal or civil liability "at the time" he made said confession. Goodwine's Fifth Amendment invocation is *tied directly* to his expungement motion confession, so why wouldn't a court be able to consider the two together to determine if – when Goodwine made his expungement confession – it exposed him to criminal or civil liability?

Judge Flaherty's finding is like Judge McDaniel's finding that Goodwine had "nothing to lose by adding a confession to his expungement petition[.]"[78] In *Burton II*, Mr. Burton argued, "Judge McDaniel's decision at the… hearing to recognize the

[77] Rp. 112.
[78] Rp. 137.

legitimacy of Goodwine's right to remain silent destroys this finding."[79] This Court "agree[d]" with this argument, meaning a finding that Goodwine can *validly* invoke his Fifth Amendment right "destroys" any notion that he didn't have anything to lose when he confessed to murdering Seth Floyd, meaning when Goodwine confessed to murdering Seth Floyd he exposed himself to criminal and civil liability, meaning his confessions fall under Rule 804(b)(3)'s hearsay exception.

Regarding Goodwine's PBPP confession, the PCRA court said:

> Goodwine knew that he had to accept responsibility for his actions… to gain release from custody at the time he wrote [his PBPP confession]. Again, at the time the statement was made, Goodwine had been acquitted of the homicide. As such, he could not have thought that [his confession] would have exposed him to criminal liability at the time [it] was made.[80]

The PCRA court's finding is wrong. Rule 804(b)(3) has a civil liability component the PCRA court didn't consider. Goodwine's confessions, without question, expose him to a civil wrongful death suit from Seth Floyd's family.

In the end, no matter what way you slice it, the jurors at Mr. Burton's retrial will be able to consider Goodwine's credible confessions as substantive evidence of reasonable doubt in Mr. Burton's favor.

[79] Rpp. 137-138.
[80] Rp. 112.

III. The PCRA court's conclusion that Melvin Goodwine's credible confessions wouldn't likely produce different verdicts at a retrial is wrong and not supported by the record. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

A. Introduction

The PCRA court said, even if jurors considered Goodwine's confessions as substantive evidence, they were "unlikely to change the outcome of the trial."[81] The PCRA court said the testimony of the ACJ inmates who testified against Mr. Burton "was largely consistent with each other."[82] The PCRA court then summarized the testimony from the following ACJ inmates – (1) Edwin Wright, (2) Micah Goodman; (3) Marvin Harper, (4) Gregory McKinney, and (5) Brian O'Toole – and said their collective testimony "outweigh[ed] any self-serving statement[s] made by Goodwine," meaning it was "unlikely" a retrial would produce a different verdict.[83] The PCRA court is wrong and its "consistency" finding regarding the alleged "consistency" between the ACJ inmates who testified isn't supported by the record.

Mr. Burton must show by a preponderance Goodwine's confessions would likely result in different verdicts if a new trial were granted. *Commonwealth v. Padillas*, 997 A.2d 356, 363 (Pa. Super. 2010). Mr. Burton, notably, needn't establish that Goodwine's confessions "prove his innocence beyond a reasonable doubt." He need only prove Goodwine's confessions would have likely changed the outcome of his trial had they

[81] Rp. 112.
[82] Rp. 113.
[83] Rpp. 113-115.

had been introduced. *Commonwealth v. Payne*, 210 A.3d 299, 304 (Pa. Super. 2019) (quoting 42 Pa. C.S. § 9543(a)(2)(vi)). Goodwine's credible confessions satisfy this standard, the PCRA court erred by concluding otherwise, and this Court should – *after seven years of litigation* – grant Mr. Burton a new trial.

B. The DAO's evidence against Mr. Burton was inconsistent and far from overwhelming

1. The DAO presented no forensic evidence linking Mr. Burton to Seth Floyd's cell or person

Seth Floyd was strangled to death. The forensic pathologist said it would've taken three to five minutes of pressure before Floyd lost consciousness and died.[84] Likewise, officers said Floyd was bleeding from the mouth when they found him.[85] The DAO, however, presented no physical evidence linking Mr. Burton to Floyd's murder. The DAO linked no blood evidence from Floyd's cell or person to Mr. Burton, and vice versa, it linked no physical evidence from Mr. Burton to Floyd's person or cell.

2. The alleged eyewitness accounts of the ACJ inmates who supposedly saw Mr. Burton and Goodwine together shortly before Seth Floyd's murder

Several ACJ inmates testified on the DAO's behalf, but they gave inconsistent narratives as to what they'd allegedly seen shortly before and after Seth Floyd's death, as well as demonstrably false testimony. Officer Fluman, for instance, said an inmate told him at 12:15 p.m. there was a problem on Range 17. Officer Fulman immediately

[84] Tpp. 701-703.
[85] Tp. 340.

went to Range 17 and found Floyd's body in his cell – 17-S.[86] Thus, whoever murdered Floyd did so before 12:15 p.m.

a. Edwin Wright

Edwin Wright, an ACJ inmate, said he'd 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 didn't see Floyd wrestling or scuffling with Goodwine or Mr. Burton. Wright said he went directly to lunch after speaking with Floyd.[87]

b. Roy Steele

Roy Steele, an ACJ inmate, claimed he saw Floyd on the Range 17 stairwell as he (Steele) walked to lunch. Floyd was with Goodwine, but not Mr. Burton, and they were walking back "onto" Range 17. Steele spoke briefly with Floyd on the stairwell regarding cigarettes he owed Floyd. After their conversation, Steele went directly to lunch.

c. Micah Goodman

Micah Goodman, another ACJ inmate, said he and another ACJ inmate, Marvin Harper, were on Range 17 between 11:30 a.m. and 11:40 a.m. looking for Roger and Rabbit to play cards.[88] As they walked down Range 17, they passed Floyd's cell (17-S)

[86] Tpp. 253, 272.
[87] Tpp. 447-452.
[88] Tpp. 485-501, 513-514.

and heard a "scuffle" in Floyd's cell. Goodman claimed he looked into Floyd's cell and saw Goodwine and Mr. Burton "wrestling" with Floyd. Goodman didn't think too much of the wrestling because he'd seen Goodwine, Mr. Burton, and Floyd wrestling before.[89]

Goodman and Harper walked to the end of Range 17 (cell 17-Z) looking for Roger and Rabbit but didn't find them. They turned around and walked back down Range 17. As they passed Floyd's cell, around 11:40 a.m. and 11:45 a.m., Goodman claimed he saw Goodwine, Mr. Burton, and Floyd "almost exactly" in "the same position[s]," meaning they were still wrestling.[90] Goodman said he returned to Range 13. Ten to fifteen minutes later, between 11:50 a.m. and noon, Goodman saw Goodwine and Mr. Burton "running down the stairs" near Range 13.[91]

d. Marvin Harper

Marvin Harper's testimony mimicked Micah Goodman's – for the most part. He claimed he saw Goodwine, Mr. Burton, and Floyd wrestling when he and Goodman 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 claimed he (Goodman) was with Harper when he (Goodman) saw Goodwine and Mr. Burton running down the steps between 11:50 a.m. and noon.[92]

[89] Tpp. 485-501.
[90] Tpp. 495-496.
[91] Tpp. 500-502.
[92] Tpp. 567-577.

e. William Johnson

William Johnson, another ACJ inmate, gave perhaps the most incredible eyewitness testimony. Johnson's cell was 17-Y. He said he didn't go to lunch that day. He stayed behind and rested on his bed. 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 claimed he saw Mr. Burton walk in front of his (Johnson's) cell, throw something into the garbage can directly in front of his (Johnson's) cell, and walk back down Range 17 in the opposite direction.[93] 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.

Johnson's testimony became even more incredible when the DAO *recalled* him to the stand later during trial. Johnson claimed he'd failed to mention several facts when he first testified. For instance, while resting in his cell (17-Y) during lunch, 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." Johnson claimed he heard the commotion between noon and 12:10 p.m. because he said the commotion happened five to ten minutes after Range 17 had gone to lunch.

[93] Tpp. 598-599.

When Johnson got to Floyd's cell (17-S), he claimed he saw Mr. Burton "standing over" Floyd's body. Johnson claimed Mr. Burton "was just standing there looking at [Floyd][.]" Johnson claimed Floyd wasn't moving. Johnson claimed he "ran back" to his cell because he "was scared." Moments later Johnson claim he saw Mr. Burton throw "something in the garbage can." Johnson claimed he never saw Goodwine.[94]

f. Summary of alleged eyewitness accounts

Edwin Wright allegedly spoke with Floyd in front of his (Floyd's) cell between 11:55 a.m. and noon – and Goodwine and Mr. Burton were supposedly inside Floyd's cell at this time. Wright, though, didn't see any wrestling or fighting. At the same time, however, Roy Steele claimed he saw Floyd on Range 17's stairwell with Goodwine, but not Mr. Burton. Micah Goodman and Marvin Harper, however, both 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., Micah Goodman, but not Marvin Harper, supposedly saw Goodwine and Mr. Burton running down the steps near Range 13. Edwin Wright, however, placed Floyd in his cell during this period – 11:45 a.m. to 11:55 a.m. – with Goodwine and Mr. Burton. Likewise, Roy Steele placed Floyd and Goodwine on Range 17's stairwell during this period – 11:45 a.m. to 11:55 a.m. Lastly, William Johnson claimed he saw Mr. Burton standing over

[94] Tpp. 764-767.

Floyd's body in Floyd's cell around 12:05 p.m. and 12:10 p.m. Johnson, though, claimed he didn't see Goodwine in Floyd's cell or anywhere on Range 17.

These contradicting timelines speak for themselves. They considerably undermine the DAO's case against Mr. Burton. Consequently, if jurors at Mr. Burton's retrial considered Goodwine's credible confessions, it's likely the outcome of his retrial would be different than his first trial. Specifically, the credible confessions themselves would create reasonable doubt to produce acquittals for the murder and conspiracy counts, or the doubt created by the credible confessions would combine with the doubt created by the above inconsistencies to produce reasonable doubt and acquittals for the murder and conspiracy counts.

3. The DAO's confession and premeditation witnesses also presented with credibility issues

a. Gregory McKinney

Mr. Burton has maintained his innocence since his arrest. Thus, he never confessed to detectives before trial. 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 McKinney, "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 replied, "When [Mr. Burton] went in the room, he hit [Floyd] first and someone else grabbed [Floyd] around his waist."[95]

After Goodwine's attorney 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."[96]

On cross-examination, McKinney changed his testimony and claimed his conversations with Mr. Burton didn't take place in the DHU, but rather "out in the yard."[97] Also, McKinney added new facts to Mr. Burton's alleged confession. Mr. Burton, he claimed, told him he'd used a "pillow" to suffocate Floyd. After suffocating Floyd, Mr. Burton said he "dragged" Floyd's body "down" to the "slop sink." The "slop sink," McKinney said, is "a big sink" at the "back" of Range 17 where inmates "ke[pt] the utilities, brooms, mops, and buckets."[98]

McKinney's testimony is incredible. Authorities collected no plastic bags in Floyd's cell or ACJ garbage cans, and there's no evidence Floyd was dragged from his cell because Officer Fulman found him in his cell.

[95] Tp. 619.
[96] Tp. 629.
[97] Tp. 635.
[98] Tpp. 639-641.

b. Brien O'Toole

Brien O'Toole, another ACJ inmate, testified and served as the DAO's premeditation/motive witness. O'Toole 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 claimed Mr. Burton had asked him how transfers to the ACJ's annex worked. O'Toole claimed he told Mr. Burton that after an inmate saw the doctor and the doctor cleared him, the inmate would be moved into general population, and transferred that evening. Mr. Burton, O'Toole claimed, asked him to find Goodwine and deliver him a message. The message, O'Toole claimed, was: "That he [Burton] was going to be transferred straight to the Annex and that they weren't going to be able to do anything with Seth."[99]

While Goodwine's credible confessions greatly undermine O'Toole's testimony, O'Toole, himself, has acknowledged his trial testimony was false because Mr. Burton never told him to tell Goodwine they (Burton and Goodwine) "weren't going to be able to do anything with Seth." O'Toole made this admission to counsel and his investigator, Zach Stern, at SCI-Fayette on July 20, 2017.[100] Thus, at a retrial Mr. Burton would also subpoena O'Toole and Zach Stern to obliterate O'Toole's testimony specifically and to undermine the DAO's case generally.

[99] Tpp. 649-651.
[100] Rpp. 295-301.

C. The outcome at retrial: It's likely jurors would acquit Mr. Burton of the murder and conspiracy counts

In the end, the ACJ inmates gave conflicting testimony, testimony that was plainly contradicted by the physical evidence, and demonstrably false testimony. Also, the DAO presented no physical evidence linking Mr. Burton to Seth Floyd's death even though whoever killed Floyd had to have struggled with him for several minutes to strangle him.

In short, the DAO's case against Mr. Burton wasn't overwhelming – and the fact jurors acquitted Goodwine of the murder charge drives this point home. All the above ACJ eyewitnesses, outside of William Johnson, had Mr. Burton and Goodwine together at different points before Seth Floyd's murder. Micah Goodman and Marvin Harper, in fact, claimed they saw Mr. Burton and Goodwine wrestling or scuffling with Seth Floyd in Floyd's cell shortly before 12:15 p.m. when Floyd's body was discovered.

Despite the fact these ACJ inmates repeatedly put Goodwine and Mr. Burton together shortly before Seth Floyd's murder, and in some instances, put them both *inside* Floyd's cell *wrestling* or *scuffling* with Floyd, jurors had to have reasonable doubts about what these witnesses claimed they saw because how else do you explain their acquittal of Goodwine regarding the murder count? Consequently, if jurors had doubts about the claimed observations of ACJ inmates at Mr. Burton's first trial, these doubts would be increased exponentially at retrial once jurors heard Goodwine's credible confessions.

Moreover, based on the jury acquitting Goodwine of the murder count, jurors had to believe Mr. Burton – and he alone – murdered Seth Floyd. Based on the conspiracy conviction, jurors obviously believed Goodwine "agreed" to help Mr. Burton murder Seth Floyd, but they obviously didn't believe Goodwine participated in the actual murder. The question, then, becomes this: if jurors believed Mr. Burton was the person who actually murdered Seth Floyd, which DAO witnesses gave jurors this narrative? Three witnesses immediately come to mind: (1) William Johnson, (2) Gregory McKinney, and (3) Brien O'Toole

William Johnson claimed he saw Mr. Burton standing over Seth Floyd's body inside Floyd's cell, Gregory McKinney claimed Mr. Burton confessed, and Brien O'Toole provided jurors with premeditation evidence when he told them Mr. Burton suggested to him that he (Burton) and Goodwine intended to harm Seth Floyd. The question, then, becomes how would Goodwine's credible confessions impact the jury's credibility assessments of William Johnson, Gregory McKinney, and Brien O'Toole. The answer is simple: Goodwine's credible confessions would significantly undercut the already questionable credibility of each witness.

The DAO, keep in mind, had to recall Williams to the stand to get him to claim he saw Mr. Burton standing over Seth Floyd's body in Floyd's cell. Likewise, McKinney's confession is incredible because there's no eyewitness or physical evidence to corroborate his claim Mr. Burton dragged Seth Floyd's body out of his (Floyd's) cell and down Range 17. Lastly, O'Toole's testimony always seemed a bit too convenient

for the DAO, as he represented the only premeditation/motive witness. Also, O'Toole has now admitted his trial testimony was false and that Mr. Burton never mentioned anything to him about Goodwine or Seth Floyd.

Simply put, it's likely Goodwine's credible confessions would – by themselves – raise reasonable doubt regarding the murder and conspiracy counts. Also, the significant doubt created by Goodwine's credible confessions would create reasonable doubt when combined with the doubt produced by the numerous inconsistencies in the ACJ inmates' testimonies, resulting in different verdicts for the murder and conspiracy counts.

This Court, consequently, should – *at long last* – grant Mr. Burton a new trial.

CONCLUSION

WHEREFORE, based on the forgoing facts and authorities, Mr. Burton respectfully requests the Court to grant him a new trial because, at a retrial, Melvin Goodwine's credible confessions would likely produce an outcome different than his first trial.

Respectfully submitted this the 2nd day of March, 2020.

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CERTIFICATE OF SERVICE

On March 2, 2020, 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 is under 14,000 words.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

CC NO.: 4017-1993
Superior Court No: 198 WDA 2020

CC NO.: 4276-1993
Superior Court No: 197 WDA 2020

v.

SHAWN LAMAR BURTON,

Defendant.

OPINION

JUDGE THOMAS E. FLAHERTY

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, CRIMINAL DIVISION

v. CC No.: 4017-1993
4276-1993

SHAWN LAMAR BURTON,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Recent and Relevant Procedural History

On July 11, 2013, Defendant filed his second *pro se* PCRA Petition asserting that he was in possession of newly discovered exculpatory evidence that 1) was unavailable to him at the time of his trial; and 2) that this evidence would have changed the outcome of his trial if the evidence had been introduced. At that time, this matter was assigned to the Honorable Judge Donna Jo McDaniel. On August 21, 2013, Judge McDaniel dismissed Defendant's Petition. Defendant timely filed an appeal, and in July 2014, the Pennsylvania Superior Court vacated Judge McDaniel's August 21, 2013 Order and remanded for an evidentiary hearing on Defendant's second PCRA Petition. The Commonwealth filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. On March 28, 2017, the Pennsylvania Supreme Court affirmed and remanded for an evidentiary hearing.

Judge McDaniel conducted an evidentiary hearing on February 14, 2018. Following this hearing, Judge McDaniel dismissed Defendant's PCRA Petition. Defendant filed an appeal, and on May 28, 2019, the Pennsylvania Superior Court vacated Judge McDaniel's Order and stated as follows:

> we vacate the PCRA court's order to the extent it denied Burton's after-discovered evidence claim premised on Goodwine's confession in his motion to expunge, and we remand for further proceedings regarding that claim. On remand, the PCRA court must make credibility determinations regarding Goodwine's confession that are supported by the record before it. If the court finds Goodwine's confession credible, it must then assess whether his statements in the motion to expunge would be admissible as substantive evidence, and whether that evidence would likely result in a different verdict if a new trial were granted.

(Superior Court Opinion 5/28/19, pp. 23-24). Additionally, the Superior Court noted that Defendant had received documentation from the Pennsylvania Board of Probation and Parole ("PBPP") regarding Melvin Goodwine. This information was received after the October 5, 2017 PCRA hearing, but prior to Defendant's appeal. The issue of whether to allow Defendant to supplement his PCRA Petition with this additional information was deferred to this Court.

In January 2019, Judge McDaniel retired from her service on the Bench. Upon remand, this matter was reassigned to the undersigned for disposition. On September 9, 2019, Defendant filed a Memorandum of Law and Fact in Support of Petitioner's Melvin Goodwine Claim. The Commonwealth filed an Answer to Defendant's Motion on October 3, 2019. A hearing was held on October 4, 2019.

Issue One: Defendant's Supplemental Evidence

Defendant requested to supplement the record with evidence received from the PBPP in conjunction with Melvin Goodwine's parole applications. At the October 4, 2019 hearing, this Court permitted him to supplement the record with the documents he received from the PBPP.

Issue Two: Credibility of Melvin Goodwine's Statement

On September 3, 2008, the PBPP denied Goodwine's application for parole. In their Notice of Board Decision, the PBPP listed three (3) reasons for their denial: his lack of remorse for the offense committed, his institutional behavior, and his interview with the hearing examiner

and/or PBPP member. In his denial letter, Goodwine was notified that his case would not be reviewed until December 2009 and that he was unable to file a petition for parole for one year from the date of the letter, i.e.—until September 3, 2009.

On July 29, 2009, approximately one month before he was eligible to re-petition for parole, Goodwine filed a Motion for Partial Expunction of Adult Criminal Record wherein he asked that the homicide charges for which he was acquitted be expunged from his record. In that Motion, Goodwine stated, in relevant part: "a requirement of the Pennsylvania Parole Board is to accept and own full responsibility for your crime...The Parole Board and Petitioner's Agent, Ms. Patton, were given a written and verbal account of Petitioner's crime. Petitioner committed this act in self-defense." (M. for Partial Expunction, p. 2, ¶4). Further, Goodwine stated, "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[s] 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." (M. for Partial Expunction, p. 2, ¶5). Goodwine's purpose in filing the Motion was as follows:

> It is very important concerning the Petitioner's future employment, housing, and education that the current status in my documented criminal record be corrected by expungement. The adverse consequence the Petitioner may endure should expunction be denied is that I may be denied employment, housing, and education. Also, it has negatively influenced my chances for such things as reduction of prison custody level, promotional transfers, institutional job training, and selfhelp [sic] programs. The petitioners arrest record will prejudice my future employment, housing, and education opportunities.
>
> This will cause me to suffer further humiliation and embarrassment upon release. There is no legitimate state interest or benefit to law enforcement to maintain an arrest record that ended in a dismissal.

(M. for Partial Expunction, p. 3, ¶6).

On September 16, 2009, in conjunction with his parole proceedings, Goodwine wrote the following in his "Offender's Written Version of Offense" at SCI-Huntingdon:

> 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 understand 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.

(PBPP Statement, 9/16/09). Goodwine was granted parole on January 8, 2010.

Goodwine was called to testify before Judge McDaniel on October 5, 2017. On that date Goodwine was represented by counsel and invoked his Fifth Amendment Privilege against self-incrimination. This invocation was accepted, and, therefore, Goodwine is unavailable as a witness.

The credibility assessment of Goodwine's statements is limited to the circumstances surrounding their making, as Goodwine's testimony cannot be compelled. Initially, this Court notes that at the time Goodwine drafted and submitted the Motion for Partial Expunction, he had not yet drafted and submitted his statement to the PBPP. As such, there is a factual inaccuracy within his Motion, as he claimed to have already submitted his statement to the PBPP. Further, the purpose of his Motion was to expunge the homicide charges from his record. This Court finds that Goodwine made the statements in his Motion in order to receive a personal benefit, which diminish their reliability.

Additionally, Goodwine was well aware that the PBPP requires an offender to accept responsibility for his crime as a consideration of parole. It was not until after he was denied

parole on this basis that Goodwine made this written statement. It is significant to note that Goodwine did not admit to conspiracy to commit murder, which is the crime for which he was convicted. Rather, he stated that he killed Floyd in self-defense. This assertion is contrary to the evidence presented at trial as is discussed below.

Taking all of the facts and circumstances into consideration, this Court does not find Goodwine's statement to bear the necessary indicia of reliability to deem it to be credible. As such, they are inadmissible.

Issue Three: Admissibility of Goodwine's Statement—Substantive Evidence

In the event this Court's credibility determination is found to be erroneous, the remaining issues on remand will be addressed. Goodwine's statement is hearsay. Hearsay evidence is traditionally excluded unless it falls within the type of hearsay that has been determined to bear the necessary indicia of reliability that support its veracity. As Goodwine is an unavailable witness, Pennsylvania Rule of Evidence 804 applies. Reviewing Rule 804, the only exception that would be available to admit his statement would be a statement against interest, which is defined as follows:

> A statement 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.E. 804(b)(3) (emphasis added).

The Pennsylvania Supreme Court addressed admission of hearsay statements against interest in *Commonwealth v. Brown*, 52 A.3d 1139 (Pa. 2012). The *Brown* Court noted that the relevant period of time to examine for determining whether a statement was made contrary to the declarant's penal interest is at the time the statement was uttered. *Commonwealth v. Brown*, 52 A.3d 1139, 1178 (Pa. 2012).[1] Further, our Supreme Court stated that only self-inculpatory statements are to be admitted under Rule 804(b)(4) and mandated that an individual analysis of each statement be conducted, even if it is made in the context of one large statement. Specifically, the *Brown* Court held:

> Thus, in determining whether a particular declaration is admissible under Pa.R.E. 804(b)(3) because it subjects its maker to criminal liability, each of the statements in the declaration must be examined, in the context in which it was made, as well as in conjunction with all of the circumstances surrounding the criminal activity described by the declaration. If an individual statement, when viewed in this manner, "so far tended to subject the declarant to ... criminal liability ... that a reasonable person in the declarant's position would not have made the statement unless believing it to be true," it is admissible under Pa.R.E. 804(b)(3). If an

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[1] This Court notes that Pa.R.E. 804 was amended in 2013 to reflect 2010 amendments to Federal Rule 804(b)(3). *Commonwealth v. Brown*, 52 A.3d 1139 (Pa. 2012) was authored prior to the most recent revision of the Rule. The text of the former rule read as follows:

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

This Court notes that the language "at the time of its making" was removed from the current rule and replaced with "a reasonable person in the declarant's position." The Comments to FRE 804(b)(3) state:

> Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. ...A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.
>
> All other changes to the structure and wording of the Rule are intended to be stylistic only. There is no intent to change any other result in any ruling on evidence admissibility.

F.R.E. 804(b)(3), Comments 2010 Amendment As such, the substantive requirement of the credibility assessment referring to the time of utterance remains unchanged.

individual statement does not do so, when examined, it is not admissible under this exception to the hearsay rule.

Commonwealth v. Brown, 52 A.3d at 1182.

This Court finds that Goodwine's statements do not fall within this exception. At the time Goodwine made the statements in his Motion, he had been acquitted of this homicide and was asking for those charges to be expunged from his record. Goodwine was likely familiar with the concept of Double Jeopardy and under the belief that he could not be prosecuted for this killing. Therefore, it cannot be said that Goodwine's statement was made in a manner that was contrary to the declarant's pecuniary interest.

While this Court acknowledges that Goodwine subsequently and validly invoked his Fifth Amendment privilege against self-incrimination at the October 5, 2017 hearing, this fact cannot be considered in an analysis of whether Goodwine's statement was against his penal interest at the time the statement was made.

With regard to Goodwine's statement to the PBPP, Goodwine knew that he had to accept responsibility for his actions in order to gain release from custody at the time he wrote the Offender's Written Version of Offense. Again, at the time the statement was made, Goodwine had been acquitted of the homicide. As such, he could not have thought that these statements would have exposed him to criminal liability at the time they were made.

Issue Four: Whether the Statement, if admitted, is Likely to Change Outcome of Trial

After a thorough review of the trial transcripts in this matter, this Court finds that Goodwine's statements, should they be admitted, are unlikely to change the outcome of the trial. Initially, this Court notes that Defendant's assertion that "the Commonwealth's evidence against Mr. Burton was inconsistent, far from overwhelming, and based upon ACJ inmates who had

obvious [motives] to fabricate testimony to obtain better outcomes in their own criminal cases" is not supported by the record. Each witness testified that they were not given any sort of break on their pending charges or sentencing in exchange for making statements to corrections officers or investigating police officers. Defendant committed this offense while incarcerated, therefore, any potential witness, other than jail staff, were inmates. The fact that a witness is an inmate does not necessitate a finding that they lack credibility.[2] Further, the witnesses' testimony was largely consistent with each other.

This Court incorporates the factual summary as set forth in the Pennsylvania Superior Court Opinion at 451 WDA 2018 as if fully set forth herein. In addition, this Court finds that the following facts as presented at trial are likely to outweigh any statement made by Goodwine, and, therefore, not change the outcome of the trial. On March 9, 1993, Seth Floyd ("Floyd") was found in his cell at the Allegheny County Jail on 17 Range with a shoelace tied around his neck and attached to the chain holding his bed to the wall. His official cause of death was asphyxiation.

Several inmates testified that Defendant and Goodwine were in Floyd's cell during lunch on March 9, 1993. At that time, Defendant and Goodwine were not housed in the same range as Floyd. Specifically, Edwin Wright ("Wright") testified that on March 9, 1993 he was incarcerated in the Allegheny County Jail and housed on 17 Range. (T. p. 443). Wright testified that on March 9, 1993, he was transported to the courthouse for a hearing. (T. p. 444). When Wright returned from court, he went back to 17 Range to obtain his coffee cup. (T. p. 446).

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[2] This Court notes that Defendant states in his Brief, "the Commonwealth based its case on witnesses who prosecutors and judges routinely find incredible because they have obvious motives to use whatever means necessary to obtain the best outcomes for *their own cases*: inmates." (P. 45, emphasis in original). Yet, Defendant would have this Court presume the statement made by Goodwine, who was an inmate at the time he made his statement, was credible. Credibility is not something that can be determined solely upon the witness' criminal history or place of lodging.

After retrieving his cup, Wright was exiting 17 Range to go to lunch and Floyd asked him a question. (T. p. 448). Wright testified that he stopped to answer his question, and observed Defendant and Goodwine in Floyd's cell. (T. p. 450). After lunch, Wright found out that Floyd died. (T. p. 452).

Micah Goodman ("Goodman") testified that he was incarcerated in the Allegheny County Jail in March 1993. (T. p. 484). Goodman testified that he was housed on the same range as Floyd and was familiar with Floyd, Goodwine, and Defendant. (T. p. 485). He further testified that on March 9, 1993, he and Marvin Harper ("Harper") walked up to 17 Range to gamble. When they walked past Floyd's cell, they heard a scuffle. (T. pp. 487, 490). Goodman looked in and saw Defendant and Goodwine wrestling with Floyd. (T. p. 492). Specifically, Goodman testified that he saw Floyd on his stomach on the bed, and Defendant and Goodwine were behind him physically holding him down. (T. pp. 492-93). Goodman continued walking toward the end of the range, but did not find the person with whom he intended to gamble, so he turned around to leave 17 Range. (T. p. 495). He walked past Floyd's cell a second time and observed the three men in the same positioning. (T. p. 496).

Marvin Harper testified that he was incarcerated in the Allegheny County Jail in March 1993. (T. p. 567). On March 9, 1993, Harper testified that he went to 17 Range with Goodman to play cards. (T. p. 568). As he was walking past what was later determined to be Floyd's cell, he saw two guys, later identified as Defendant and Goodwine, wrestling with Floyd. (T. p. 569). Harper testified that Defendant had Floyd's upper body and Goodwine was holding Floyd's waist and it appeared as though Floyd was fighting back. (T. pp. 572-73). About half an hour later, Harper found out that Floyd had died in his cell. (T. p. 574).

Gregory McKinney ("McKinney") testified that he was incarcerated in the Allegheny County Jail beginning on March 16, 1993. (T. p. 607). McKinney was housed in in the Disciplinary Housing Unit with Defendant in May 1993. (T. p. 609). McKinney testified that on or about May 5, 1993, Defendant and he were talking about Floyd's death. (T. p. 619). During this conversation, Defendant stated that he tied a plastic bag around Floyd's neck and suffocated him. (T. p. 628). Defendant then stated that he tied Floyd to the bunk to make it look like a suicide. (T. p. 628).

Brian O'Toole ("O'Toole") testified that he was incarcerated in the Allegheny County Jail in February 1993 and was assigned as an inmate to work in the mental health unit. (T. pp. 648-49). O'Toole was working in the mental health unit when Defendant was housed there. (T. p. 650). During that time, Defendant asked O'Toole to find Goodwine and tell him that Defendant "was going to be transferred straight to the Annex and they weren't going to be able to do anything with Seth." (T. p. 651). O'Toole testified that Goodwine told him to "go back and tell him to stay where he is at, not to get transferred because they had to do it." (T. p. 652).

This testimony, along with all of the other testimony and evidence produced at trial, outweighs any self-serving statement made by Goodwine, and, therefore, the outcome is unlikely to change if a new trial were granted.

BY THE COURT,

Date: 1/2/20

Thomas E. Flaherty J.

Thomas E. Flaherty