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IN THE SUPERIOR COURT OF PENNSYLVANIA

3880 EDA 2017, 2242 EDA 2018

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff-Appellee,

v.

ROBERT WILLIAMS,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT ROBERT WILLIAMS

Criminal Trial Division of the Court of Common Pleas of Philadelphia County
at Docket No. CP-51-CR-00011614-2007 (Brinkley, J.)

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1
STATEMENT OF JURISDICTION 4
ORDERS IN QUESTION 5
SCOPE AND STANDARD OF REVIEW 6
STATEMENT OF QUESTIONS INVOLVED 6
STATEMENT OF THE CASE 7

A. At The Age Of 19, Mr. Williams Is Convicted And Sentenced 7

B. Throughout Mr. Williams' Probation Period, Judge Brinkley Shows A Highly Unusual Personal Interest In Him 8

C. Based On Her Personal Investigation, Judge Brinkley Sentences Mr. Williams To 2 To 4 Years In Prison For Technical Probation Violations Despite The District Attorney's Office And Probation Officer's Recommendations Against Imprisonment 9

D. After Judge Brinkley Cancels A Bail Hearing, This Court Orders Her To Act On Mr. Williams' Motion For Bail "Without Further Delay" 14

E. Judge Brinkley Finally Releases A Transcript Relevant To The Recusal Motion And Her Personal Attorney Comments To The Press On Matters Relevant To This Case 15

F. New Evidence Casts Serious Doubt On Mr. Williams' Original Conviction And Provides Grounds For A PCRA Petition 18

G. The Pennsylvania Supreme Court Exercises Its King's Bench Power To Order Mr. Williams' Release On Bail—Which Leads Judge Brinkley To Comment On The Case To The Press Though Her Lawyer 24

H. On A Second King's Bench Application, The Pennsylvania Supreme Court Splits 3 To 3, Without Prejudice, On Whether Judge Brinkley Must Be Disqualified 26

I. Judge Brinkley Insists On A PCRA Hearing And Engages In Further Misconduct 27

J. Judge Brinkley Denies PCRA Relief 36

K. The Pennsylvania Supreme Court Leaves The Recusal Issue To This Court In The First Instance 38

SUMMARY OF ARGUMENT....................39

ARGUMENT....................42

I. Mr. Williams Has Satisfied The Standard For PCRA Relief, And This Court Should Reverse With Directions To Grant The Petition 42

A. Contrary To Judge Brinkley's Ruling, PCRA Relief Should Have Been Granted Based On The Commonwealth's Answer, Which Showed No Genuine Issues Concerning Any Material Fact 43

B. Contrary To Judge Brinkley's Ruling, Mr. Williams' PCRA Petition Should Have Been Granted Based On The Parties' Stipulated Facts 47

C. Contrary To Judge Brinkley's Ruling, The New Evidence Was Not Solely For Impeachment And Would Likely Result In A Different Verdict In A New Trial 54

II. Based On Judge Brinkley's Conduct, This Court Should Remove Judge Brinkley From The Case And Vacate The November 6, 2017 and June 25, 2018 Orders 58

III. Judge Brinkley Disregarded The Governing Statute And Due Process By Revoking Mr. Williams' Probation and Sentencing Him To 2-4 Years In State Prison, And This Court Should At Least Reverse The Sentence And Remand For Further Proceedings....................65

A. Judge Brinkley's Finding Of Probation Violation Is Fatally Tainted By Both Procedural And Substantive Legal Errors....................66

1. The Trial Court Failed To Give Proper Notice Of Alleged Probation Violations....................66

2. Judge Brinkley Revoked Probation On A Legally Improper Basis....................70

B. Judge Brinkley Abused Her Discretion By Imposing A 2 To 4 Year Sentence 72

1. Pa.R.A.P. 2119(f) Statement....................72

2. Judge Brinkley Lacked Any Basis To Order Total Confinement 74

3. The 2 To 4 Year Prison Sentence Was Manifestly Excessive.......77

4. Judge Brinkley's Approach To Mr. Williams' Sentencing Struck A Tone Of Advocacy Rather Than Dispassionate Reflection....79

5. Judge Brinkley Failed To Make Particularized Findings And Conclusions On The Record In Open Court....80

CONCLUSION....82

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

PROOF OF SERVICE

March 29, 2018 Pa.R.A.P. 1925(a) Opinion (3880 EDA 2017)....Tab A

June 25, 2018 Order and Opinion Denying PCRA Relief....Tab B

November 30, 2018 Pa.R.A.P. 1925(a) Opinion (2242 EDA 2018)....Tab C

February 16, 2018 Pa.R.A.P. 1925(b) Statement (3880 EDA 2017)....Tab D

August 29, 2018 Pa.R.A.P. 1925(b) Statement (2242 EDA 2018)....Tab E

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Page(s)

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720 A.2d 79 (Pa. 1998)....................6

Commonwealth v. Bernal,
200 A.3d 995 (Pa. Super. 2018)....................60, 61, 62, 64

Commonwealth v. Bonaccurso,
625 A.2d 1197 (Pa. Super. 1993)....................42, 57

Commonwealth v. Booth,
766 A.2d 843 (Pa. 2001)....................68

Commonwealth v. Bryant,
417 A.2d 240 (Pa. Super. 1979)....................69

Commonwealth v. Cartrette,
83 A.3d 1030 (Pa. Super. 2013) (en banc)....................5

Commonwealth v. Carver,
923 A.2d 495 (Pa. Super. 2007)....................73

Commonwealth v. Castro,
93 A.3d 818 (Pa. 2014)....................50

Commonwealth v. Chimenti,
507 A.2d 79 (Pa. 1986)....................45, 46

Commonwealth v. Cottle,
426 A.2d 598 (Pa. 1981)....................74, 75, 76

Commonwealth v. Crump,
995 A.2d 1280 (Pa. Super. 2010)....................73

Commonwealth v. D'Amato,
856 A.2d 806 (Pa. 2004)....................46

Commonwealth v. Darush,
459 A.2d 727 (Pa. 1983)....................60, 61, 64, 79

Commonwealth v. DeLuca,
418 A.2d 669 (Pa. Super. 1980) 67

Commonwealth v. Derry,
150 A.3d 987 (Pa. Super. 2016) 77

Commonwealth v. Dodge,
77 A.3d 1263 (Pa. Super. 2013) 73

Commonwealth v. Druce,
848 A.2d 104 (Pa. 2004) 79

Commonwealth v. Elliott,
50 A.3d 1284 (Pa. 2012) 66, 68

Commonwealth v. Ferguson,
893 A.2d 735 (Pa. Super. 2006) 5, 73, 79

Commonwealth v. Fiore,
780 A.2d 704 (Pa. Super. 2001) 41, 49, 50, 55

Commonwealth v. Foreman,
55 A.3d 532 (Pa. Super. 2012) 58

Commonwealth v. Gaus,
446 A.2d 661 (Pa. Super. 1982) 80, 81

Commonwealth v. Gibson,
951 A.2d 1110 (Pa. 2008) 53

Commonwealth v. Goodman,
311 A.2d 652 (Pa. 1973) 60

Commonwealth v. Hall,
80 A.3d 1204 (Pa. 2013) 68, 69

Commonwealth v. Heilman,
876 A.2d 1021 (Pa. Super. 2005) 4

Commonwealth v. Henry,
706 A.2d 313 (Pa. 1997) 47

Commonwealth v. Johnson,
179 A.3d 1105 (Pa. Super. 2018) 58

Commonwealth v. Johnson,
966 A.2d 523 (Pa. 2009) 47

Commonwealth v. Jones,
912 A.2d 268 (Pa. 2006) 53

Commonwealth v. King,
839 A.2d 237 (Pa. 2003) 62

Commonwealth v. Lemanski,
529 A.2d 1085 (Pa. Super. 1987) 62

Commonwealth v. Martin,
360 A.2d 733 (Pa. Super. 1976) 68

Commonwealth v. Mathews,
486 A.2d 495 (Pa. Super. 1984) 74

Commonwealth v. McCauley,
199 A.3d 947 (Pa. Super. 2018) 62, 64

Commonwealth v. McCracken,
659 A.2d 541 (Pa. 1995) 41, 49, 50, 55

Commonwealth v. Mount,
257 A.2d 578 (Pa. 1969) 50, 55

Commonwealth v. Parlante,
823 A.2d 927 (Pa. Super. 2003) 73

Commonwealth v. Pasture,
107 A.2d 321 (Pa. 2014) 77

Commonwealth v. Perrin,
59 A.3d 663 (Pa. Super. 2013) 50

Commonwealth v. Phila. Elec. Co.,
372 A.2d 815 (Pa. 1977) 40, 47

Commonwealth v. Quinlan,
412 A.2d 494 (Pa. 1980) 69

Commonwealth v. Rhodes,
990 A.2d 732 (Pa. Super. 2009) 61, 62, 64, 72

Commonwealth v. Riggins,
377 A.2d 140 (Pa. 1977) 80, 81

Commonwealth v. Rodda,
723 A.2d 212 (Pa. Super. 1999) 79

Commonwealth v. Ruff,
414 A.2d 663 (Pa. Super. 1979) 67, 68

Commonwealth v. Santiago,
855 A.2d 682 (Pa. 2004) 53

Commonwealth v. Shiftier,
879 A.2d 185 (Pa. 2005) 68

Commonwealth v. Small,
189 A.3d 961 (Pa. 2018) .... *passim*

Commonwealth v. Smith,
17 A.3d 873 (Pa. 2011) 45

Commonwealth v. Soto,
983 A.2d 212 (Pa. Super. 2009) 58

Commonwealth v. Vilsaint,
893 A.2d 753 (Pa. Super. 2006) 69

Commonwealth v. Walls,
926 A.2d 957 (Pa. 2007) 78

Commonwealth v. White,
910 A.2d 648 (Pa. 2006) 27, 61

Commonwealth v. Williams,
69 A.3d 735 (Pa. Super. 2013) 6, 77, 79

Commonwealth v. Williams,
732 A.2d 1167 (Pa. 1999) 47, 53

Douglas v. Buder,
412 U.S. 430 (1973) (per curiam) 72

Falcione v. Cornell School District,
557 A.2d 425 (Pa. Super. 1989) 52

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 67

Harrison v. United States,
392 U.S. 219 (1968) 57

In re Bruno,
101 A.3d 635 (Pa. 2014) 39, 59

In re McFall,
617 A.2d 707 (Pa. 1992) 60, 61, 79

Johnson v. Mississippi,
403 U.S. 212 (1971) 60

Joseph v. Scranton Times L.P.,
987 A.2d 633 (Pa. 2009) 60, 62, 64

Kershner v. Prudential Insurance Co.,
554 A.2d 964 (Pa. Super. 1989) 52

Marshall v. Jerrico, Inc.,
446 U.S. 238 (1980) 60

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400 U.S. 455 (1971) 60

Mun. Publications, Inc. v. Court of Common Pleas of Phila. Cty.,
489 A.2d 1286 (Pa. 1985) 61

Park v. Greater Delaware Valley Savs. & Loan Ass'n,
523 A.2d 771 (Pa. Super. 1987) 47

Taylor v. Hayes,
418 U.S. 488 (1974) 60

Williams v. Pennsylvania,
136 S. Ct. 1899 (2016) 60

Statutes

1 Pa.C.S. §1928(b)(1) 68

18 Pa. C.S. §1371(c) 75

42 Pa.C.S. §9721(b) 77, 78, 80

42 Pa.C.S. §9754(b)-(c) 66

42 Pa.C.S. §9754(d) 65, 67

42 Pa.C.S. §9771(a) 76

42 Pa.C.S. §9771(a), (d) 65

42 Pa.C.S. §9771(b) 68

42 Pa.C.S. §9771(b), (c) 66

42 Pa.C.S. §9771(c) 74

Rules

Pa.R.Crim.P. 590(a)(3) 46

Pa.R.Crim.P. 708(A) 13, 67, 68

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PRELIMINARY STATEMENT

When a trial judge injects herself into a probationer's personal and professional life and creates an appearance of bias and, on top of that, makes multiple legally erroneous rulings, the whole judicial system suffers. That's what has happened here. Judge Genece Brinkley has presided over proceedings involving Robert Williams for over a decade. During that time, Mr. Williams has become a globally recognized recording and performing artist, professionally known as Meek Mill. That fact—which should be reason to celebrate a success in the probation system—instead has had significant adverse consequences for Mr. Williams in Judge Brinkley's courtroom. Probation that should have been terminated long ago instead was revoked and an unwarranted prison sentence imposed. Then, when newly discovered evidence removed any assurance of the reliability of the underlying conviction, an uncontested PCRA petition was unfairly denied. This consolidated appeal challenges several of Judge Brinkley's rulings, as well as her refusal to recuse herself from presiding over this case.

Mr. Williams' PCRA petition should have been granted. Mr. Williams filed a PCRA petition promptly after learning that a Philadelphia police officer—the only Commonwealth witness at his 2008 trial—was on a list of current and former officers who are not to be used as witnesses for the Commonwealth because the District Attorney's Office cannot stand behind their credibility. After careful review of the file, and consistent with its position in numerous similar cases, the Commonwealth consented to immediate PCRA relief in the form of an order allowing a new trial.

During the same time period that Mr. Williams was seeking PCRA relief, the Defender Association of Philadelphia filed numerous PCRA petitions similar to Mr. Williams' (that is, based on the previously undisclosed perjury of Officer Graham), nearly all of which were heard, with the consent of the original trial judges, by President Judge Woods-Skipper. In those cases, Judge Woods-Skipper—consistent with the Rules of Criminal Procedure—summarily granted relief based on the District Attorney's agreement, after investigation, that relief was necessary. Judge Brinkley, however, insisted that PCRA relief could not be granted to Mr. Williams without an evidentiary hearing, even though Criminal Rule 907(2) provides that a hearing is not required where "there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law."

Judge Brinkley's conduct during the (unnecessary) PCRA hearing went far beyond the bounds of what a reasonable person would expect of a judge in this Commonwealth. During the first witness's testimony and before the bulk of the evidence was presented, Judge Brinkley blurted out that this matter was headed to the appellate court—suggesting she already had made up her mind to deny the petition. Moreover, Judge Brinkley acted like a prosecutor, not a judge, throughout the hearing. She grilled (and even laughed derisively at) a respected 35-year veteran of the Philadelphia Defender Association and conducted an adversarial examination of the Assistant District Attorney. What's more, Judge Brinkley would not allow Mr. Williams to make a record on the threshold disqualification question, and instructed (unsuccessfully) the court reporter not to "take down" objections made by Mr. Williams' counsel.

Barely one week after the hearing, Judge Brinkley denied Mr. Williams' PCRA petition with a 47-page order and opinion. Independent of the problems with the way Judge Brinkley handled Mr. Williams' PCRA petition, her ruling—and the underlying reasoning—was wrong as a matter of law. Mr. Williams plainly met his PCRA burden, and his petition should have been granted.

Judge Brinkley should be removed from presiding over Mr. Williams' case. Judge Brinkley's conduct during the PCRA hearing was nothing new. She has handled Mr. Williams' case in a highly unusual and improper manner for years. In fact, the Pennsylvania Supreme Court split 3 to 3 in June 2018 on whether it would be appropriate at that time—even before the PCRA hearing—to use its King's Bench power to remove Judge Brinkley. Although Mr. Williams' petition was denied by operation of law given the equally divided vote, a three-Justice dissenting opinion stated that Judge Brinkley's "continued involvement in this case has created an appearance of impropriety that tends to undermine the confidence in the judiciary." One additional Justice thought pre-hearing action was premature, while two voted to deny relief without comment. In August 2018, after Mr. Williams filed another King's Bench application, the Court denied the petition "without prejudice to [Mr. Williams] to pursue his claims before the Superior Court in the normal course." Mr. Williams—who preserved the recusal issue for direct appeal—does so now.

Judge Brinkley erred in revoking Mr. Williams' probation and in sentencing him for technical probation violations. Even before Mr. Williams filed his PCRA petition, Judge Brinkley committed reversible errors when she ruled in November 2017 that he had committed technical probation violations, and then,

against the recommendations of both the Probation Office and the District Attorney's Office, revoked Mr. Williams' probation and sentenced him to 2 to 4 years in prison. Judge Brinkley not only violated the Criminal Rules and constitutional precedent governing probation proceedings, but also defied the Sentencing Code and fundamental norms of the sentencing process in multiple ways.

This Court can right all wrongs in this case by reversing Judge Brinkley's June 25, 2018 order denying PCRA relief and directing that Mr. Williams' PCRA petition be granted. In addition, this Court should remove Judge Brinkley from this case such than any retrial must be assigned to a different judge. Even if the Court does not direct that the PCRA petition be granted, it should vacate Judge Brinkley's order denying PCRA relief—either because it amounts to reversible error, or because it was entered by a judge who should have been disqualified. At a minimum, this Court should reverse the probation revocation and direct that any new proceedings be held before a different judge.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 42 Pa.C.S. §742 and Pa.R.A.P. 341(a) based on timely notices of appeal from two final orders.

On November 6, 2017, Judge Brinkley revoked probation and sentenced Mr. Williams to 2 to 4 years in prison. (R.448a-450a at 68-75). This was a final, appealable order. *See Commonwealth v. Heilman*, 876 A.2d 1021, 1026 (Pa. Super. 2005). Mr. Williams filed a timely notice of appeal on December 6, 2017. (R.580a-581a). This Court has jurisdiction under 42 Pa.C.S. §9781(b) to consider the discretionary aspects

of the probation violation sentence if it grants allowance under Pa.R.A.P. 2119(f).[1] *See Commonwealth v. Ferguson*, 893 A.2d 735, 736–37 (Pa. Super. 2006). Compliance with the statutory and constitutional due process requirements for a probation revocation proceeding that relate to a finding of violation *vel non*, including legality of the revocation determination, however, are questions of law and in any event do not constitute an appeal of the "sentence"; they are therefore not subject to Rule 2119(f). *See Commonwealth v. Cartrette*, 83 A.3d 1030, 1037–42 (Pa. Super. 2013) (en banc).

On June 25, 2018, Judge Brinkley issued an opinion and order denying Mr. Williams' petition for PCRA relief. (Tab B). This was a final, appealable order. *See* Pa.R.Crim.P. 910. Mr. Williams filed a timely notice of appeal on July 25, 2018. (R.1072a-1073a).

On multiple occasions, Mr. Williams moved for Judge Brinkley to recuse herself, but Judge Brinkley declined to do so (or even to consider Mr. Williams' recusal request) at each juncture, most recently during the June 18, 2018 PCRA hearing (R.807a-808a at 10-14) and in her November 30, 2018 Pa.R.A.P. 1925(a) opinion (Tab C at 2-3).

ORDERS IN QUESTION

On November 6, 2017, Judge Brinkley sentenced Mr. Williams to 2 to 4 years in prison. (R.448a-450a at 68-75; R.452a-459a). On March 29, 2018, Judge Brinkley issued a Pa.R.A.P. 1925(a) opinion in support of that sentence. (Tab A). On June 25, 2018, Judge Brinkley issued an opinion and order denying Mr. Williams' petition for

[1] *See* Argument, §III.B.1, *infra.*

PCRA relief. (Tab B). On November 30, 2018, Judge Brinkley issued a Pa.R.A.P. 1925(a) opinion in support of that denial of PCRA relief. (Tab C).

SCOPE AND STANDARD OF REVIEW

This Court's review of a denial of PCRA relief encompasses whether the trial court's findings of fact are supported by the record and whether its conclusions of law are free from legal error. *Commonwealth v. Small*, 189 A.3d 961, 971 (Pa. 2018). A *de novo* standard of review applies to the trial court's legal conclusions. *Id.* A trial court's denial of a request for disqualification or recusal is reviewed for an abuse of discretion. *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 89 (Pa. 1998). Errors of law committed in determining a violation of probation are reviewed *de novo*, while a sentence imposed upon revocation of probation is reviewed for abuse of discretion. *Commonwealth v. Williams*, 69 A.3d 735, 740 (Pa. Super. 2013).

STATEMENT OF QUESTIONS INVOLVED

1. Whether Mr. Williams' PCRA petition should have been granted without an evidentiary hearing, because the petition and the answer showed that there was no genuine issue concerning any material fact and Mr. Williams was entitled to relief as a matter of law, and because the hearing record showed that that he met his burden for PCRA relief?

The trial court ruled the answer is no. Mr. Williams submits the answer is yes.

2. Whether Judge Brinkley's conduct created the appearance of bias, requiring her removal from the case, and vacatur of her November 6, 2017 and June 25, 2018 orders?

The trial court ruled the answer is no. Mr. Williams submits the answer is yes.

3. Whether the November 6, 2017 order sentencing Mr. Williams to 2 to 4 years in prison should be vacated because the trial court: (a) failed to give proper notice of the alleged probation violations; (b) revoked probation on an unlawful basis; (c) lacked a basis to order total confinement; (d) imposed a sentence that was manifestly excessive; (e) struck a tone of advocacy rather than dispassionate reflection; and (f) failed to make particularized findings and conclusions on the record in open court.

The trial court ruled the answer is no. Mr. Williams submits the answer is yes.

STATEMENT OF THE CASE

A. At The Age Of 19, Mr. Williams Is Convicted And Sentenced

On August 19, 2008, following a non-jury trial before Judge Brinkley, Mr. Williams was convicted of carrying a firearm without a license, carrying a firearm in public in Philadelphia, possession of an instrument of crime, simple assault, and possession of a controlled substance with intent to deliver. (R.60a-63a). He was also convicted of certain additional lesser-included offenses. (R.106a-111a). The charged offenses allegedly occurred on January 24, 2007, more than 12 years ago, when Mr. Williams was 19 years old and had no prior convictions. (R.60a-61a; R.101a at 5).

Philadelphia Police Officer Reginald Graham was the only affiant on the application for the search warrant that yielded the evidence used to support several charges at trial. (R.1349a-1357a). Judge Brinkley relied on Graham's affidavit for the finding of probable cause that justified her denial of a pretrial motion to suppress. (R.70a-71a at 23-28). Graham was the only Commonwealth witness at trial. (R.74a-82a

at 37-69). Mr. Williams testified at trial, asserting his innocence on all but the gun possession charges. (R.84a-88a at 80-95).

Judge Brinkley sentenced Mr. Williams in January 2009 to serve concurrent terms of 11½ to 23 months' county confinement, to be followed by 10 years' probation. (R.106a-111a).

B. Throughout Mr. Williams' Probation Period, Judge Brinkley Shows A Highly Unusual Personal Interest In Him

During her oversight of Mr. Williams' case, Judge Brinkley repeatedly engaged in conduct that strayed far outside the judicial role. For instance, she continually offered Mr. Williams professional advice that went beyond the bounds of what is appropriate for a judge overseeing a defendant's probation. Both on and off the record. Judge Brinkley suggested that Mr. Williams break his contract with his present professional management (Roc Nation of New York) and return to the local manager he had used earlier in his career (Charles Alston, p/k/a Charlie Mack, of Philadelphia). (R.144a at 125-26; R.160a at 53-54; R.240a at 62-63; R.376a-377a at 24-25).

In addition, on multiple occasions, Judge Brinkley made this case a personal matter. She repeatedly accused Mr. Williams of "thumbing his nose," not even at "the court," but at her personally. (R.140a at 111-12; R.211a at 159-60; R.246a at 85; R.253a at 7-8; R.276 at 98-99). And when Mr. Williams' career did not advance as quickly as she expected, Judge Brinkley took that personally as well:

> Talk about your fans being disappointed, *how about me?* How about me after doing all I've done for you over all these years trying to help you have a career and to move your career forward? Because I said you know

> what? He has the ability to be like Jay-Z. He has the ability to make Jay-Z's kind of money.

(R.221a-222a at 200-01 (emphasis added)).

In 2015, at another hearing regarding primarily travel-related issues, Judge Brinkley took personal offense to the fact that Mr. Williams had not become "greater than Jay-Z." (R.297a at 77-79).

C. Based On Her Personal Investigation, Judge Brinkley Sentences Mr. Williams To 2 To 4 Years In Prison For Technical Probation Violations Despite The District Attorney's Office And Probation Officer's Recommendations Against Imprisonment

When the Probation Office and District Attorney's Office in November 2017 recommended against prison time for Mr. Williams based on the alleged technical probation violations Judge Brinkley identified, Judge Brinkley nonetheless revoked Mr. Williams' probation and sentence him to 2 to 4 years in prison, based on her own personal investigation, including a surprise visit to Mr. Williams' community service site.

Judge Brinkley supplements a probation officer's report based on her own investigation. On October 24, 2017, Judge Brinkley sent an email to all parties stating that "this court has scheduled a VOP hearing in the captioned matter for Monday November 6, 2017, … at which time the court will address any issues arising from Defendant's probation status." (R.1093a). Two days later, on October 26, 2017, Mr. Williams' probation officer issued a report on events from 2017 involving Mr. Williams: (1) a failed drug test in early 2017 which resulted from an overuse of pain medication, after which Mr. Williams rehabbed and has been clean ever since; and (2) arrests *with charges dismissed* after investigation (one for coming to the aid of a close

family friend and another for "popping a wheelie" on a city street in a video posted to social media). (R.1096a-1097a). The report was *not* a request for revocation; it noted that Mr. Williams had "responded well" and "actively participated in an effort towards behavioral change." (R.1097a). The probation officer went on to say that Mr. Williams' conduct while under supervision was "within normal limits." (*Id.*).

Despite these recommendations, on October 31, 2017, Judge Brinkley informed the parties by email that the matters discussed by the probation officer would be addressed at a hearing on November 6, 2017 as "potential technical violations," and that additional "incidents and/or facts which occurred during [Mr. Williams'] probation which are not specifically detailed in [the probation officer's] summary report" would also be reviewed at the hearing. (R.1095a).

The next day, Judge Brinkley sent the parties a formal notice of the hearing, accompanied by her own "more detailed factual summary" which, according to Judge Brinkley's email, was "prepared by the Court in order to assist Counsel in preparation for the scheduled Violation of Probation Hearing." (R.1099a-1103a). Several of Judge Brinkley's added accusations were based on her own investigation on "various [unspecified] social media outlets." (R.1102a.). At least one of those added accusations—*i.e.*, that Mr. Williams received drug treatment in Atlanta, Georgia without providing notice to the court—was contradicted the Probation Office's report, which indicated that Mr. Williams provided the court with a required notice of

travel.[2] (R.1101a-1102a; R.1097a). The letter's narrative exposition did not identify any specific conditions of Mr. Williams' probation that he allegedly violated. (R.1099a-1103a).

Judge Brinkley cross-examines the probation officer and disregards her recommendation. At a November 6, 2017 hearing, Judge Brinkley conducted a lengthy adversarial examination of the probation officer. (R.411a-415a at 25-44). Despite Judge Brinkley's cross-examination, the probation officer held to her view, stating that Montgomery County "would be comfortable continuing supervising [Mr. Williams], comfortable being his probation officer and not in prison." (R.415a at 44). For its part, the District Attorney's Office took the position that Mr. Williams' conduct did *not* warrant prison time, stating "the person I think that is before you today is not the person who was before you back in 2007" and "I do not think that [these] are violations that require the defendant to be incarcerated at this point." (R.438a at 27-28).

Judge Brinkley reveals she spied on Mr. Williams' community service. Instead of limiting the hearing to the written reports and the District Attorney's recommendation, Judge Brinkley stepped outside the judicial role and admonished Mr. Williams based on her own recollections and personal investigation. For example, Judge Brinkley revealed that she made what she said was a "surprise visit" to the community service site where Mr. Williams was assigned to serve the homeless in

[2] This accusation was also contradicted by contemporaneous emails sent to Judge Brinkley indicating that Mr. Williams was receiving treatment in Atlanta. (*See* R.1277a-1283a; R.418a at 56).

order to spy on him. (R.448a-450a at 67-74). She made this surprise visit without notice to (or in the presence of) Mr. Williams' counsel, either before or after the visit. Indeed, the first time Judge Brinkley revealed her visit to the site (on a date that was never specified in the record) was during her colloquy with Mr. Williams at the conclusion of the November 6, 2017 probation violation hearing:

> THE COURT: … I sat in the room waiting for you to come out that day with a tray to serve the homeless people, and you didn't.
>
> THE DEFENDANT: Can I speak on my behalf?
>
> THE COURT: *No.* Mr. Williams, I can appreciate that you think that you have served the homeless, but that was a *surprise visit by me.* …
>
> ---
>
> THE COURT: … So once you went to Broad Street Ministry, after a while *I decided to go in there to check up on you*, and that's when I saw you. And that's when I told the director that this is a homeless meal serving location. And there were lots of people in there, but I sat at one of the tables just to *blend in* to see if I would see you doing anything.

(R.448 at 68; R.450 at 73-74 (emphasis added)). Judge Brinkley apparently was angry that Mr. Williams was sorting clothes for the homeless instead of serving food to them (a task which was not chosen by him, but rather assigned to him when he showed up at the designated location to perform community service). *Id.*

Judge Brinkley sentences Mr. Williams to prison. Immediately after revealing her surprise visit to Mr. Williams' community service site—and without providing Mr. Williams any notice or opportunity to present contrary evidence or argument—Judge Brinkley revoked probation and imposed a state prison sentence of 2 to 4 years' confinement. (R.450 at 73-74). This sentence was imposed, despite the

recommendations of both the Probation Office and the District Attorney against prison time:

> THE COURT: -- and every time I do more and more and more to give you break after break after break to help you, you, basically, thumb your nose *at me* and just do what you want the way you want. So, I have to – I'm going to give you a sentence of incarceration. This sentence is absolutely necessary to vindicate the authority of the Court. The record will reflect over all of these sessions, all of these VOP hearings, all of the opportunities I've given you to try to address your issues, that each and every time you've done something that indicates that you have no respect for this Court. So my sentence is two to four years in state prison.

(R.450a at 73-74 (emphasis added)). At the close of the hearing, Judge Brinkley ordered Mr. Williams be taken into state custody immediately. (R.450a at 75).

On March 29, 2018, in response to Mr. Williams' statement of issues, Judge Brinkley issued a Rule 1925(a) opinion. The opinion did not address the fact that both the Commonwealth and Probation Office recommended against prison time. Judge Brinkley tried to excuse her surprise visit to spy on Mr. Williams as "a one time occurrence" that did not affect her sentencing decision. (Tab A at 23). She also asserted that Mr. Williams received proper notice of the probation violations from the Probation Office's October 26, 2017 report and her own October 31, 2017 supplement to that report. (Tab A at 30-33). Yet, she did not address the fact that neither the report nor the supplement constituted a request for revocation. *See* Pa.R.Crim.P. 708(A). She also did not address the fact that neither the report nor the supplement disclosed that Judge Brinkley had made a "surprise visit" to Mr. Williams' community service site, from which she made observations that led to her view that

Mr. Williams' had "thumb[ed] his nose" and thus should serve a 2 to 4 year prison sentence of "total confinement." (Tab A at 42) (stating that a sentence of "total confinement" was "necessary to vindicate the authority of the Court" because Mr. Williams "thumbed his nose at this Court"). Judge Brinkley stated that the sentence was not otherwise excessive because "there is no requirement that this Court impose the 'minimum possible sentence.'" (Tab A at 41).

Finally, Judge Brinkley claimed that she had sufficiently provided the reasons for her sentence on the record when she stated that "[t]he record will reflect over all of these sessions, all of these VOP hearings, all of the opportunities I've given you and try to address your issues, that each and every time you've done something that indicate that you have no respect for this Court." (Tab A at 46-47 (quoting R.450a at 74)).

D. After Judge Brinkley Cancels A Bail Hearing, This Court Orders Her To Act On Mr. Williams' Motion For Bail "Without Further Delay"

On November 14, 2017, Mr. Williams filed a motion in the trial court asking for Judge Brinkley's recusal[3] and, on November 15, 2017, for reconsideration and modification of the probation revocation sentence. Pending determination of those motions, Mr. Williams moved for immediate release on bail. The Commonwealth advised that it was taking no position on these motions.

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[3] Mr. Williams filed supplemental recusal motions on December 4, 2017 and February 12, 2018. Judge Brinkley declined to rule on any of these motions.

The clerk of courts, consistent with its routine practice, scheduled a hearing on Mr. Williams' bail motion for November 27, 2017. Judge Brinkley, however, directed that the hearing be cancelled and removed from the calendar. Because Judge Brinkley gave no indication that she would act in a timely fashion on the unopposed motion, Mr. Williams filed an emergency petition for an original writ of habeas corpus in this Court, and this Court ordered Judge Brinkley to address the bail motion without further delay. (R.460a). In response, Judge Brinkley, without first addressing the request for her recusal, denied bail pending adjudication of Mr. Williams' pending motion to modify the sentence and pending any subsequent appeal. (R.461a-579a).

E. Judge Brinkley Finally Releases A Transcript Relevant To The Recusal Motion And Her Personal Attorney Comments To The Press On Matters Relevant To This Case

In early 2016, Mr. Williams had sought a copy of the notes of a sealed, in-chambers (but not *ex parte*) portion of a February 5, 2016 probation violation proceeding—asking that he have access to it for the defense of his case, but not be unsealed. Judge Brinkley denied that request. Mr. Williams appealed and this Court held that it lacked jurisdiction because no appealable order had been entered. *See Commonwealth v. Williams*, No. 1631 EDA 2016 (Pa. Super. Sept. 8, 2017). Then, almost two years later, on January 26, 2018, Judge Brinkley ordered that the notes of the in-chambers conference be unsealed, transcribed, and made available to the public. No party ever asked that the transcript be unsealed—nor was any party seeking access to the transcript at that time. Yet, Judge Brinkley *sua sponte* ordered its release—apparently for purely personal reasons.

Shortly after the transcript was released, local press outlets reported that Judge Brinkley had retained private counsel, A. Charles Peruto, Jr., to advise her and potentially take action on her behalf against Mr. Williams and/or his counsel and professional representatives. According to *Philadelphia Inquirer*[4] and *Legal Intelligencer* reporting,[5] Mr. Peruto—speaking on behalf of Judge Brinkley—asserted "all the allegations" made by Mr. Williams about Judge Brinkley's comments—all of which Mr. Williams has meticulously supported with record citations—are "100 percent false" (*Legal Intelligencer*) and "didn't happen" (*Inquirer*). In addition, according to both reports, Mr. Peruto, speaking on Judge Brinkley's behalf, threatened to sue Mr. Williams and/or his attorneys and/or professional management for defamation if they either failed to publish an apology (*Legal Intelligencer*) or if they filed a complaint about the judge with the Judicial Conduct Board (*Inquirer*).

Further, Mr. Peruto, again speaking on Judge Brinkley's behalf, asserted that the judge unsealed the long-sealed February 5, 2016 transcript not as an action taken in the judicial administration of Mr. Williams' case, but for the purpose of "deflat[ing] the accusation" against Judge Brinkley herself (*Inquirer*) and to defend her reputation (*Intelligencer*). In a video-recorded interview with *TMZ.com* published on February 7,

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[4] Jeremy Roebuck and Mark Fazlollah, *Meek Mill Genece Brinkley hires lawyer, threatens to sue rapper's backers*, Philadelphia Inquirer (Feb. 1, 2018), http://www2.philly.com/philly/news/pennsylvania/philadelphia/meek-mill-judge-genece-brinkley-lawsuit-threat-20180201.html.

[5] Max Mitchell, *Brinkley Hires Peruto to Fight Criticism Over Her Handling of Meek Mill's Case*, Legal Intelligencer (Feb. 1, 2018), https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2018/02/01/brinkley-hires-peruto-to-fight-criticism-over-her-handling-of-meek-mills-case/.

2018, Mr. Peruto, referring to himself and Judge Brinkley as "we," directly and personally attacked Mr. Williams' attorneys.[6]

While Judge Brinkley released the transcript to vindicate herself, the transcript supports what Mr. Williams had said in his efforts to recuse the judge—in particular, Judge Brinkley's efforts to convince Mr. Williams to return to his prior management. The Assistant District Attorney handling Mr. Williams' case at the time (Ms. DeSantis) said that she, Probation Officer Underwood, and Judge Brinkley were "a team," doing "[w]ork that the Judge wanted" (R.334a at 34). She then expressed the "team's" view that Mr. Williams' alleged difficulties as a probationer resulted from his current professional management, which they compare unfavorably with Charlie Mack's prior representation of Mr. Williams. (R.325a at 25; *see also* R.347a at 47). Judge Brinkley did not express disagreement with these statements, only briefly disavowing authority to control Mr. Williams' management decisions, a statement Mr. Williams reasonably understood at the time as being made simply "for the record"—which is consistent with what Judge Brinkley's own words suggested ("I don't want the record to suggest ….") (R.366a at 66).[7]

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[6] *Meek Mill's Lawyer is a Liar, Says Judge Genece Brinkley's Lawyer*, TMZ (Feb. 7, 2018), www.tmz.com/2018/02/07/meek-mill-legal-team-liars-judges-lawyer-charles-peruto-jr.

[7] The record reveals Judge Brinkley's unusual affinity for ADA DeSantis. After Ms. DeSantis left the District Attorney's Office and had no further official role in these proceedings, Judge Brinkley directed the parties to include Ms. DeSantis (through her personal Gmail account) on communications regarding Mr. Williams. (R.1325a-1326a).

F. New Evidence Casts Serious Doubt On Mr. Williams' Original Conviction And Provides Grounds For A PCRA Petition

In the meantime, Mr. Williams learned of information warranting PCRA relief—relief to which the Commonwealth agreed. Judge Brinkley denied the petition despite that Mr. Williams met his PCRA burden.

Former police officers sign affidavits indicating Mr. Williams' conviction was based on untruthful statements. In February 2018, while Mr. Williams' recusal motion was pending, he discovered information that contradicted the Commonwealth's case-in-chief from his original trial and supported relief under the Post-Conviction Relief Act. In particular, he learned the following about the Commonwealth's only witness at the 2008 trial, Reginald Graham.

On February 6, 2018, former Philadelphia Police Officer Jerold Gibson provided a sworn affidavit to a licensed private investigator stating that he (Gibson) was present (with Officer Graham) when Mr. Williams was arrested on January 24, 2007. Officer Gibson was part of the same squad as Graham (the Narcotics Field Unit) from 2004 to 2013. (R.798a ¶1). Gibson's affidavit demonstrates that Graham lied as to nearly every material fact in his testimony at trial. At the time of Mr. Williams' arrest, according to Gibson's affidavit:

- Contrary to Graham's testimony (R.76a at 45), and consistent with Mr. Williams' testimony (R.84a at 80), Gibson did not hear Mr. Williams ask, "Who are you?" to approaching police (R.789a ¶6).

- Contrary to Graham's testimony (R.76a at 45), and consistent with Mr. Williams' testimony (R.84a-85a at 80-81), Mr. Williams never pointed a gun at Officer Graham or anyone else (R.798a ¶¶7-8).

- Contrary to Graham's testimony (R.76a at 45), and consistent with Mr. Williams' testimony (R.84a at 80), Gibson observed Mr. Williams take a gun out of his waistband to discard it. The gun was in fact recovered "a couple feet away" from Mr. Williams, following his arrest. (R.799a ¶18).

- Contrary to Graham's testimony (R.76a at 45), and consistent with Mr. Williams' testimony (R.84a at 80), approaching officers did not yell to Mr. Williams to "Drop the gun." (R.798a ¶10).

- Contrary to Graham's testimony (R.76a at 45), and consistent with Mr. Williams' testimony (R.84a-85a at 80-81), Graham never took cover behind a green van, but rather remained on the sidewalk with Mr. Williams (R.798a ¶9).

- Contrary to Graham's testimony (R.76a at 46), and consistent with Mr. Williams' testimony (R.84a at 80), Mr. Williams did not stand up from behind a car and take off running (R.798a ¶11).

- Contrary to Graham's testimony (R.76a at 46), and consistent with Mr. Williams' testimony (R.84a-85a at 80-81), police officers did not tackle Mr. Williams as he tried to flee (R.798a-799a ¶¶11-12).

- Contrary to Graham's testimony (R.76a at 46), and consistent with Mr. Williams' testimony (R.84a-85a at 80-81), Mr. Williams did not struggle with officers at the time of his arrest (R.799a ¶13).

- Finally, according to Gibson, Graham never claimed that Mr. Williams had pointed a gun at him until after Mr. Williams was in custody. (R.799 ¶19).

On February 7, 2018, former Philadelphia Police Officer Jeffrey Walker provided a sworn affidavit to an investigator, stating that he was in the Narcotics Field Unit from 1999 to 2013, and worked with Officer Graham in that Unit from 2003 to 2005 or 2006 and then again in 2012. (R.728a-730a.). Walker was a cooperating witness for the federal government in a prosecution of certain members of the Unit on criminal charges. Walker's affidavit corroborates Gibson's. Based on his detailed,

direct and personal knowledge of the workings of the Narcotics Field Unit and of Graham's conduct while part of that Unit, Walker's affidavit states:

- Officer Graham frequently misused confidential informants and fabricated the alleged probable cause for search warrants. He also lied about the justification for warrantless searches. (R.728a ¶5).

- Officer Graham frequently stole and kept money that he recovered during searches and arrests. (R.728a ¶6).

- Officer Graham often beat people he considered suspects, as Mr. Williams testified was done to him by Graham in this case. (R.728a ¶3).

- Officer Graham admitted to Walker in 2007 or 2008 that he beat Mr. Williams during his arrest in this case. (R.729a ¶12).

- Based on Walker's experience as a police officer and in particular his experience working with Graham and further based upon his review of the Preliminary Arrest Report in Mr. Williams' case, prepared and filed by Graham, the Arrest Report "bears the hallmarks of a fraudulent affidavit, written to manufacture probable cause for the search warrant." (R.729a ¶13). In support of this conclusion, Walker cited four specific details that did not ring true to him. Among these is Graham's claim that Mr. Williams pointed a gun at the officers who approached to arrest him (as Graham testified and Mr. Williams denied). (R.729a ¶13(c)).[8]

After learning of a "do not call" list of non-credible police, Mr. Williams files a PCRA petition. On February 13, 2018, the *Philadelphia Inquirer* published an investigative report[9] from which Mr. Williams learned for the first time that:

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[8] Walker's affidavit is consistent with the FBI reports of interviews with Walker dated from 2013 to 2014, except that Officer Walker did not discuss Mr. Williams' case with the FBI, as they did not ask him about that subject.

[9] Mark Fazlollah, Craig R. McCoy, and Jeremy Roebuck, *Philadelphia's DA office keeps secret list of suspect police*, Philadelphia Inquirer (Feb. 13, 2018), continued on next page

- Officer Graham's name appears on a list, first created in early 2017 according to the article and previously secret and unknown outside the District Attorney's Office, of Philadelphia police officers and former officers who are not to be used as witnesses for the Commonwealth, as the District Attorney's Office will not stand behind their credibility.
- Officer Walker testified in civil depositions in 2016 about Graham's perjury, additional acts of dishonesty, and other misconduct.

In light of the *Philadelphia Inquirer*'s investigative report, on February 14, 2018, Mr. Williams filed a PCRA petition asserting that newly discovered evidence of police perjury supported his long-maintained actual innocence of most of the charges in his underlying case. (R.585a-615a). That petition was routinely assigned to Judge Brinkley.

On March 8, 2018, the District Attorney's Office first disclosed to Mr. Williams a partial copy of the "do not call" lists, entitled "Police Misconduct Review Committee Spread Sheet," dated January 4, 2018. This document lists Officer Graham as being in the status "Do not call without Deputy approval" based on "misconduct" in the form of "several alleged acts of corruption" by Graham dated November 1, 2013. (R.740a-741a; *see also* R.622a-623a ¶¶7-8). By letter dated April 11, 2018, the District Attorney's Office made a supplemental disclosure, stating that it had information regarding the relevant misconduct on the part of Officer Graham as of September 17, 2014, but that no disclosure had been made to Mr. Williams or his counsel at that time. (R.743a-744a).

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http://www2.philly.com/philly/news/philadelphia-police-misconduct-list-larry-krasner-seth-williams-meek-mill-20180213.html.

Notwithstanding the Commonwealth's agreement that a new trial is warranted, Judge Brinkley refuses to grant PCRA relief. At an April 16, 2018 status conference, the District Attorney's Office stated in open court that after review of the file and consistent with its position in numerous similar cases, the Commonwealth consented to an immediate grant of PCRA relief in the form of an order allowing a new trial. (R.700a-702a at 8-9, 13). The ADA further disclosed that the Commonwealth now believes that Graham's misconduct dates to as early as 2005, well before Mr. Williams' arrest and trial. (R.701a at 9).

Judge Brinkley, however, refused to grant PCRA relief. (R.702a at 13-14). She further refused Mr. Williams' suggestion that she transfer this case voluntarily "in the interests of justice," pursuant to Pa.R.Crim.P. 903(C), to President Judge Woods-Skipper, who currently presides over hundreds of similar (and later filed) cases from the dockets of many different trial judges, to assure consistency of treatment and disposition. (*Id.*). Judge Brinkley also insisted that PCRA relief could not be granted without an evidentiary hearing, even though Rule 907(2) provides that a hearing is not required where "there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law."

On April 20, 2018, the Defender Association of Philadelphia filed PCRA petitions in cases similar or identical to Mr. Williams' (that is, based on the previously undisclosed perjury of Officer Graham) before President Judge Woods-Skipper, who summarily granted relief under the PCRA in several of those cases, without a hearing, based on the District Attorney's agreement that relief was necessary. (R.836a-869a).

Each of those convictions, like Mr. Williams', depended on Graham's testimony alone, either at a preliminary hearing or at trial.

On April 20, 2018, Mr. Williams' counsel wrote to Judge Brinkley again asking her to reassign Mr. Williams' case to President Judge Woods-Skipper consistent with all of the "Officer Graham cases" so that his unjust conviction could be treated the same as the others. Judge Brinkley did not respond to this letter and suggestion.

Shortly after that, Mr. Williams filed an amended and supplemental PCRA petition, explaining that he obtained additional information from the Philadelphia Police Internal Affairs Department and the Philadelphia Police Board of Inquiry via subpoena. (R.718a ¶18). The new evidence showed that, on March 8, 2017, the Board of Inquiry had found Officer Graham guilty of engaging in criminal conduct and "[l]ying or attempting to deceive regarding a material fact during the course of any Departmental investigation." (R.768a-769a).

The documentation showed that in the course of a federal criminal investigation of the Narcotics Field Unit, Graham agreed to take a polygraph examination, the conclusion of which was that he was lying when he denied participating in official corruption. (R.771a-774a). The Police Department opened its own disciplinary process after being notified of the results of the FBI investigation. (R.777a). On March 15, 2017, one week after he was found guilty before the Board of Inquiry, Graham resigned from the force, prior to being formally dismissed. (R.778a).

Because the District Attorney's Office had agreed that a new trial was warranted, Mr. Williams attached the affidavit of Bradley S. Bridge, a 35-year veteran of the Defender Association, stating that PCRA relief without a hearing has been

granted by numerous judges of the Philadelphia Court of Common Pleas, spanning 23 years, in more than 1500 similar cases where the Commonwealth agreed that the convictions appeared to rest on the testimony of since-discredited police. (R.781a-786a). Mr. Williams made clear in the amended petition that he "requests an evidentiary hearing under Rule 908 *only if* material averments of this petition are disputed by the Commonwealth" and that "[h]e concurs with the District Attorney's Office … that relief can and should be granted on this petition without a hearing, as provided in Pa.R.Crim. 907(2)." (R.721a ¶28 (emphasis added)).

In response, the District Attorney's Office restated its position of agreement in writing to Judge Brinkley. (R.803a). Still, Judge Brinkley insisted on a hearing.

G. The Pennsylvania Supreme Court Exercises Its King's Bench Power To Order Mr. Williams' Release On Bail—Which Leads Judge Brinkley To Comment On The Case To The Press Though Her Lawyer

On April 24, 2018, upon Mr. Williams' application, the Pennsylvania Supreme Court exercised its King's Bench power and unanimously ordered Mr. Williams' immediate release on bail pending determination of his PCRA petition, directing that bail was to continue "until final resolution of the PCRA matter, including any appellate review." (R.704a-705a). The Court further ordered Judge Brinkley to reach a final decision on Mr. Williams' PCRA petition within 60 days. (*Id.*).

As grounds for exercising its extraordinary King's Bench power, the Court relied on the fact that "[t]he Commonwealth has recently stated, on the record in open court, that there are credibility issues with a police officer who was a 'critical witness' at Petitioner's trial. As such, the Commonwealth agreed that Petitioner is

entitled to PCRA relief." (R.704a). As for Mr. Williams' request that Judge Brinkley be removed from presiding over his case, this Court declined that request "[a]t this juncture," but "noted that the presiding jurist may opt to remove herself from presiding over this matter. *See* Pa. R. Crim. P. 903(C)," referencing that Rule's "interests of justice" standard. (R.705a).

As directed, Judge Brinkley promptly granted bail, and Mr. Williams was released from state prison that day after more than five months' incarceration. But Judge Brinkley did not take up the Supreme Court's invitation for her to voluntarily reassign the case. Instead, she scheduled an evidentiary hearing on the PCRA petition for June 18, 2018. (R.52a).

Within hours of the Supreme Court's order, Mr. Peruto again spoke to *TMZ.com* on Judge Brinkley's behalf and stated that the judge will not grant immediate relief as requested by the parties, will not recuse herself as suggested by the Supreme Court, and will not necessarily overturn the conviction. Mr. Peruto stated that: "the judge does not feel the Supreme Court in any way repudiated her rulings when it ordered that Meek go free without bail, pending the next hearing in June ...."[10]

Mr. Peruto also told the *New York Post* that Judge Brinkley did not feel that the Supreme Court was "rebuking" her and that she was standing her ground despite the District Attorney's position that Mr. Williams is entitled to a new trial. Mr. Peruto relayed that "Judge Brinkley knows Meek's case inside and out, and the Supreme

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[10] *Meek Mill's Judge Will Not Remove Herself From the Case*, TMZ (Apr. 25, 2018), http://www.tmz.com/2018/04/25/meek-mill-judge-genece-brinkley-remove-recuse-case/.

Court Justices do not."[11] Neither Mr. Peruto nor Judge Brinkley has ever disputed or retracted these press reports.

H. On A Second King's Bench Application, The Pennsylvania Supreme Court Splits 3 To 3, Without Prejudice, On Whether Judge Brinkley Must Be Disqualified

On June 1, 2018, Mr. Williams filed a second application for King's Bench relief, requesting that the Pennsylvania Supreme Court reassign his PCRA proceedings to Judge Woods-Skipper. The application explained that since the Court ruled on Mr. Williams' earlier King's Bench application, Judge Brinkley had continued to engage in the type of conduct on which Mr. Williams' original King's Bench application was based.

On June 12, 2018, the Supreme Court issued an Order stating that "the Court being equally divided, the Emergency Application for King's Bench Jurisdiction is DENIED by operation of law." (Order and Dissenting Statement, 59 EM 2018 (Pa. 2018)). Justice Baer, in a dissenting statement joined by Justice Todd and Justice Donohue, stated:

> I believe Judge Genece Brinkley should have disqualified herself pursuant to Pa.R.Crim.P. 903(C) (providing PCRA trial judge should disqualify themselves in the interests of justice) as her continued involvement has created an appearance of impropriety that tends to undermine public confidence in the judiciary.

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[11] Emily Smith, *Tough judge refuses to step down from Meek Mill's case*, New York Post, Page Six (Apr. 25, 2018), https://pagesix.com/2018/04/25/tough-judge-refuses-to-step-down-from-meek-mills-case/.

(*Id.* (citing *Commonwealth v. White,* 910 A.2d 648, 657 (Pa. 2006)). The Order noted that "Justice Wecht would deny relief without prejudice to Petitioner's right to raise the matter anew following his June 18, 2018 evidentiary hearing." (*Id.*). In light of Justice Wecht's position, the June 12 denial was effectively "without prejudice."

I. Judge Brinkley Insists On A PCRA Hearing And Engages In Further Misconduct

Since the matter would remain before Judge Brinkley, Mr. Williams' counsel wrote to her to convey that "the parties do not request or require an evidentiary hearing as the matter is no longer contested, and we jointly request that this Court grant a new trial as requested by the parties." (R.1485a). The letter continued: "In the event that your Honor is unable or unwilling to honor the request of the parties and order a new trial, we respectfully urge the Court to transfer this case to our President Judge so that Mr. Williams' case can be treated in the same manner in which thousands of cases have been disposed of in the First Judicial District." (*Id.*).

Judge Brinkley, however, insisted on an evidentiary hearing—and her conduct at that hearing was remarkable. As detailed below, she made it clear that she would not seriously entertain the positions of Mr. Williams and the Commonwealth.

Judge Brinkley signals her opposition to the consented-to relief at the outset of the PCRA hearing. Without providing any counsel an opportunity to make a case, Judge Brinkley immediately launched into an explanation why, in her view, Mr. Williams' position was incorrect and why relief could not be granted based on the filings already submitted:

> *You don't understand the process.* The process is that the Commonwealth doesn't get to determine what relief is granted. At some point there may be a hearing. That hearing will address the allegations you made in terms of credibility issues. There has to be testimony taken. The transcripts have to be transcribed.

(R.806a at 6).

Judge Brinkley refuses counsel a chance to make a record on Mr. Williams' recusal request. Mr. Williams' counsel attempted to raise the threshold recusal issue at the start of the June 18 hearing, but was rebuffed. (R.807a-808a at 11-14). When counsel objected that Judge Brinkley was preventing him from making a record, Judge Brinkley threatened to adjourn the hearing:

> THE COURT: Excuse me, sir. Okay. We're going to have to adjourn the hearing because we're here for one thing and one thing only. The only issue before this Court is the issue of the PCRA.
>
> MR. TACOPINA: And not your fitness?
>
> THE COURT: The Supreme Court has spoken. Their decision is in writing. Anyone who wants to read it, can print it out and read it.
>
> ****
>
> MR. TACOPINA: So what your lawyer said regarding the hearing –
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> THE COURT: My lawyer? Excuse me, sir. We are not going to discuss anything today other than the evidentiary issues for your PCRA petition that you filed. That is the only thing that is before the Court today.
>
> MR. TACOPINA: And I'm now going to sit down but object to Your Honor preventing me from making a record.

(R.808a at 13-14).

Judge Brinkley insists on an evidentiary hearing. Mr. Williams' counsel then drew Judge Brinkley's attention to the "most significant thing that has happened

in this case which was the answer that the Court had directed the district attorney's office to file." (R.808a at 15). Judge Brinkley, however, assumed the role of adversary of both Mr. Williams and the District Attorney's Office and denied the request because, in her words, the Commonwealth's "agreement to a new trial is only a recommendation to this Court." (R.808a-809a at 16-17).

Judge Brinkley relentlessly cross-examines Mr. Williams' witness. Because Judge Brinkley insisted on hearing evidence, Mr. Williams' counsel called Senior Assistant Public Defender Bradley Bridge as a witness to establish the "different and disparate treatment [Mr. Williams] has received." (R.809a at 18). Mr. Bridge testified as to the established procedure of granting PCRA relief without a hearing when the Commonwealth, after investigation, agrees that relief is warranted—a practice spanning 23 years with five different District Attorneys (Lynne Abraham, Seth Williams, Kathleen Martin, Kelly Hodge, and Lawrence Krasner) at the helm. (R.811a-812a at 27-29). Mr. Bridge confirmed that this process has been followed in cases involving Officer Graham, including three where Officer Graham was the sole prosecution witness, and that PCRA relief was granted without the need for an evidentiary hearing when the District Attorney agreed that such relief was necessary. (R.812a-813a at 31-36).

Mr. Bridge's testimony also established that Judge Brinkley was simply incorrect when she has tried to justify her refusal to transfer this case to Judge Woods-Skipper by saying that the only cases that have been transferred are those where the judge who presided over the proceedings relating to the petitioner's underlying trial or guilty plea no longer was a sitting criminal court judge. (R.810a at

24; R.820a at 62; *see also* R.701a at 12). More specifically, Mr. Bridge testified that the standard procedure of having all cases heard by the President Judge was being utilized in the case of one of Mr. Williams' co-defendants, Nina Harth, who had pleaded guilty before trial and been sentenced by Judge Brinkley. (R.814a at 38; *see also* R.872a-881a).

None of this made any difference to Judge Brinkley. Refusing to budge, she put on a prosecutor's hat and relentlessly cross-examined Mr. Bridge for a large part of the hearing—34 pages of the 107 page transcript. (R.815a-820a at 41-63, 821a-825a at 67-73, 75-81). When Judge Brinkley asked Mr. Bridge about his basis for filing PCRA petitions, Mr. Bridge explained that the inclusion of an officer's name on a prosecution Do Not Call list is sufficient a basis to file a PCRA petition because it constitutes a *prima facie* case for PCRA relief. Judge Brinkley responded by laughing derisively while sarcastically stating, "A Do Not Call list constitutes—preponderance of the evidence?" (R.820a at 61), which is not what Mr. Bridge has suggested. Later, on redirect by Mr. Williams' counsel, Mr. Bridge affirmed that never before had his credibility been questioned, nor had he been laughed at, by a judge (R.820a at 63-64), and acknowledged that he sensed Judge Brinkley was ridiculing him (R.822a at 69). And then, in response to Judge Brinkley's question on re-cross, "Do you believe that I was laughing at you in the course of this serious case?," Mr. Bridge politely stated, "I wouldn't call it a laugh. I would call it a smirk … And the answer is yes." (R.822a at 70). Other attorneys present at the hearing later stood to place on the record that they had heard the judge laugh at Mr. Bridge during this testimony. (R.822a at 70; R.831a at 106).

The record is replete with exchanges between Judge Brinkley and Mr. Bridge showing that her agenda was to attempt to undermine Mr. Bridge (and seemingly Judge Woods-Skipper) rather than asking the type of questions judges typically pose in an effort to gather information or clarify a witness's testimony. One stands out—where Judge Brinkley attempted to undermine Mr. Bridge's testimony by putting him through a memory test, questioning him about his affidavit but refusing to provide him with a copy of it until Mr. Williams' counsel objected to this departure from standard trial procedure involving a prior statement:

> THE COURT: Okay. So going to … your affidavit on page –
>
> MR. McMONAGLE [Mr. Williams' counsel]: Do you have that?
>
> THE WITNESS: I don't, no.
>
> MR. McMONAGLE: Your Honor, would you like me to provide him a copy of it?
>
> THE COURT: Well, I can just read it. I can read it and you can tell me if you remember saying this.
>
> THE WITNESS: Okay.
>
> MR. McMONAGLE: Well, that's not fair, Your Honor. Let him see it.
>
> THE COURT: Okay.
>
> MR. McMONAGLE: Why would you do that?
>
> THE COURT: It's not a problem. If he remembers -- well, it's sort of like if you remember doing it, you kind of remember what you wrote, right, if you wrote it yourself?
>
> THE WITNESS: I wrote it myself.
>
> THE COURT: He can see it, but he wrote it.

(R.819a at 57-58). On re-examination, the District Attorney's Office sought to make sure the basis for the PCRA petition and the District Attorney's agreement to such relief was perfectly clear to Judge Brinkley. (R.823a at 74-75). Judge Brinkley then immediately resumed cross-examination:

> THE COURT: … So the questions that he asked you indicate that you were aware or believed that Graham had taken a polygraph test and lied. Is that what you understand?
>
> THE WITNESS [Mr. Bridge]: That's what I understand.
>
> THE COURT: Okay. And you know polygraph results are never admissible in our courts?
>
> MR. McMONAGLE: Objection, Judge.
>
> THE COURT: You're a lawyer, right?
>
> THE WITNESS: I'm a lawyer.
>
> MR. McMONAGLE: Judge, objection.
>
> THE COURT: Excuse me.
>
> MR. McMONAGLE: You're trying to sabotage this, Your Honor.
>
> THE COURT: No. Sir, I'm doing what I need to do to make sure the record is absolutely complete.

(R.823a at 76). And again:

> THE COURT: Okay. And you are aware based upon the information attached to the stipulations that retired Police Officer Graham was interviewed by federal authorities in 2014. As a result of this cooperation, Graham was not indicted by either the federal court, state court, or local court?
>
> MR. RILEY [Assistant District Attorney]: I am aware of that, Your Honor.

(R.827a at 91). And again:

> THE COURT: Obviously the feds believed him. They didn't charge him.
>
> MR. McMONAGLE: Oh, no, Judge. Let's not be –
>
> THE COURT: I'm just saying.
>
> MR. McMONAGLE: Let's not –
>
> THE COURT: I'm just saying.
>
> MR. McMONAGLE: Let's not corrupt the record.
>
> THE COURT: They didn't charge him with anything, right?
>
> MR. McMONAGLE: The feds didn't charge him because in order to charge somebody, you need a little bit more than that. And so they decided not to charge him. But he did get charged by his own police department, was found guilty of lying to his own police department and lying to the FBI and committing theft he was found guilty of by his police department.

(R.830 at 102-03).

Judge Brinkley reveals she pre-judged the case and instructs the court reporter not to record objections. When Mr. Williams' counsel objected to Judge Brinkley's conduct, Judge Brinkley let slip that she knew this case would be going to a higher court—implying that she already had made up her mind to deny the agreed-to relief—and then, remarkably, instructed the court reporter (unsuccessfully) to not take down the objections from Mr. Williams' counsel:

> MR. McMONAGLE: Judge, let me say this to you: At this point in time I want to make a record, you are acting as an extrajudicial officer. You're acting like a prosecutor in this case. The District Attorney's Office in this case hasn't seen fit to cross-examine this witness, potentially denigrate this respected officer of the court. I ask you to stop. I respectfully ask you to stop.

> THE COURT: Well, sir, let me respond to you by saying this: My responsibility, because this is my case, is to make sure that the record is clear *because obviously we know that it's going to go to another court after here.* So –
>
> MR. McMONAGLE: Obviously we know that? You mean you've made your mind up?
>
> THE COURT: No, I haven't made my mind up.
>
> MR. McMONAGLE: Well, how else would it go to another court?
>
> THE COURT: It doesn't matter what I do.
>
> MR. McMONAGLE: Let the record reflect –
>
> THE COURT: It doesn't matter –
>
> MR. McMONAGLE: Hold on. Let the record –
>
> THE COURT: Excuse me. Let the record reflect that I'm still speaking and you may sit down until I'm finished.
>
> MR. McMONAGLE: I'll wait till you're done.
>
> THE COURT: Thank you very much.
>
> MR. McMONAGLE: You're welcome. I want to make sure she got that down, too.
>
> THE COURT: *No. She's not going to take down what you're saying because she's only going to take down what I'm saying.*

(R.821a at 67-69 (emphasis added)). Judge Brinkley's efforts to manipulate the record continued:

> MR. McMONAGLE: Judge, may I –
>
> THE COURT: Sir –
>
> MR. McMONAGLE: -- before you ask your next question, let me make an objection.
>
> THE COURT: *No, you can't* –

MR. McMONAGLE: I can't make an objection?

THE COURT: Sir –

MR. McMONAGLE: Let the record reflect, I –

THE COURT: *No, the record is not reflecting anything that you say because I'm still talking. The record does not reflect anything that you –*

MR. McMONAGLE: I have an objection to that.

THE COURT: No. No. Sir, you have to sit down and wait your turn now.

MR. McMONAGLE: I object.

THE COURT: Excuse me. *The objection is not—anything that you just said is not being recorded.*

(R.824a at 77-78 (emphasis added)). Obviously, the court reporter, to her credit, honored her oath and did not follow Judge Brinkley's lawless directive.

The parties offer a stipulation, and Judge Brinkley cross-examines the Assistant District Attorney. After Mr. Bridge's testimony was completed, Mr. Williams' counsel read into the record a stipulation of facts (with supporting documentary evidence) agreed to by Mr. Williams' counsel and the District Attorney's Office. This stipulation contained all of the facts necessary for PCRA relief. (R.825a at 84-88; *see also* R.883a-884a). The stipulation included, *inter alia*, the facts that "[t]he Commonwealth does not have confidence in the credibility of Reginald Graham's testimony in this case," "the sworn affidavit of former Philadelphia Police Officer Jerold Gibson, one of Mr. Williams' arresting officers, contradicts Reginald Graham's sworn testimony concerning Mr. Williams' arrest," and "[t]he Philadelphia District

Attorney's Office agrees to PCRA relief in this case in the form of a new trial." (R.883a-884a ¶¶2, 4, 11).

Judge Brinkley, however, declined to grant relief on the basis of the stipulation and took up where she left off with her cross-examination of Mr. Bridge by cross-examining the Assistant District Attorney Liam Riley. (R.827a-830a at 90-102). In the end, however, the District Attorney's Office stood fast:

> MR. RILEY: Your Honor, we are agreeing to the stipulations as proposed.
>
> THE COURT: Okay.
>
> MR. RILEY: We are conceding this case warrants PCRA relief.
>
> THE COURT: Okay.
>
> MR. RILEY: And we have done so based on examining the nature of the corruption that was found, Officer Graham. The FBI determined he lied and Internal Affairs determined he lied. And looking at all the evidence in total, we do not have confidence in his testimony both going forward as was decided by the DA's Office in 2014, and going back as long as we have evidence there was some misconduct.

(R.830a at 104).

Judge Brinkley closed the hearing by saying that she would "issue [her] decision in due course." (R.831a at 107).

J. Judge Brinkley Denies PCRA Relief

On June 25, 2018, just 7 days later, Judge Brinkley issued a 47-page order and opinion denying Mr. Williams' PCRA petition because, in her estimation, Mr. Williams did not show by a preponderance of the evidence that PCRA relief in the

form of a new trial was warranted, despite the District Attorney's agreement that a new trial was warranted.

As part of Judge Brinkley's analysis, she declined to accept the facts stipulated to by the parties, stating that "this Court, as a finder of fact, is free to believe all, part, or none of the testimony of any witnesses, whether by testimony in court or by stipulation." (R.1051a at 43; *see also* R.1031a at 23 ("[T]his Court is not bound to accept the agreement of the parties for relief.")). Remarkably, Judge Brinkley stated that she "assesse[d] credibility in favor of Officer Graham … and against the testimony of Walker and his statements and affidavits, as stipulated by counsel." (R.1051a at 43). In fact, Judge Brinkley spent eight pages of her opinion attempting to rehabilitate the reputation of former officer Graham, who resigned in disgrace after he lied to the FBI and his own police department about theft on the job, and whose credibility the Commonwealth's prosecutors are unwilling to stand behind. (R.1039a-1046a at 31-38).

Judge Brinkley also concluded that none of the information pertaining to Officer Graham's conduct as a corrupt police officer was sufficient to warrant a new trial. Judge Brinkley stated that "[a]lthough Defendant was successful in convincing this Court that the evidence could not have been obtained prior to trial by exercising reasonable diligence and that it is not merely corroborative or cumulative, the evidence still would be used solely for impeachment purposes and would not have changed the outcome at trial." (R.1051a-1052a at 43-44).

Judge Brinkley also made a number of wrong (and offensive) assertions that go to her fitness to preside as an impartial jurist in this case. In particular, as an apparent

justification for requiring Mr. Williams to be treated differently from all other similarly-situated PCRA petitioners, Judge Brinkley stated that the 23-year practice of correcting wrongful convictions without an evidentiary hearing when the District Attorney agrees to relief is akin to America's horrific pre-Civil War heritage of condoning slavery. (R.1034a at 26 n.8).

Almost as remarkably, Judge Brinkley asserted that the issue of whether an evidentiary hearing was necessary is "irrelevant" and that Mr. Williams is simply "attempting to pit one female trial judge against another" by pointing out the settled practice for handling these agreed-to petitions, all of which are before Judge Sheila Woods-Skipper. (R.1025a at 17 n.5).

K. The Pennsylvania Supreme Court Leaves The Recusal Issue To This Court In The First Instance

On June 27, 2018, Mr. Williams returned to the Supreme Court for a third time, in light of the controlling force of Justice Wecht's concurring opinion on the Court's June 12, 2018 Order. Based on Judge Brinkley's conduct at the June 18, 2018 hearing and injudicious statements in her opinion denying PCRA relief, Mr. Williams requested that the Court disqualify Judge Brinkley, vacate the June 25 order denying PCRA relief, and either direct the Court of Common Pleas to grant the PCRA petition, or reassign the petition to President Judge Woods-Skipper. On July 5, 2018, the Commonwealth responded, stating that it took no position on Mr. Williams' application. On August 21, 2018, the Court denied relief "without prejudice to [Mr.

Williams] to pursue his claims before the Superior Court in the normal course."[12] (Aug. 21, 2018 Order, 71 EM 2018 (Pa. 2018)).

Mr. Williams already had appealed to this Court. Specifically, on December 6, 2017, Mr. Williams filed a notice of appeal of the November 6, 2017 revocation of probation and sentence (3880 EDA 2017) and, on February 16, 2017, filed a Pa.R.A.P. 1925(b) statement of matters complained of on appeal (Tab D). Judge Brinkley, in turn, issued a Pa.R.A.P. 1925(a) opinion on March 29, 2018. (Tab A). In addition, on July 25, 2018, Mr. Williams filed a notice of appeal of the June 25, 2018 denial of PCRA Relief (2242 EDA 2018) and, on August 29, 2018, filed a Pa.R.A.P. 1925(b) statement of matters complained of on appeal (Tab E). Judge Brinkley, in turn, issued a Pa.R.A.P. 1925(a) opinion on November 30, 2018. (Tab C).

On February 1, 2019, this Court entered an order consolidating Mr. Williams' appeals and permitting him to file an Appellant's brief that does not exceed 22,500 words in length.

SUMMARY OF ARGUMENT

I. Mr. Williams satisfied the standard for PCRA relief. In fact, this matter should have been resolved simply and efficiently with an order granting the petition based on the lack of a genuine issue concerning any material fact and the Commonwealth's legally proper agreement to a new trial, without any need for a

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[12] The Pennsylvania Supreme Court will generally employ the King's Bench authority only when the issue requires timely intervention by the court of last resort of the Commonwealth, regardless of the merits of a petitioner's case. *See In re Bruno*, 101 A.3d 635, 670 (Pa. 2014).

hearing. Alternatively, this matter should have been resolved simply and efficiently based on the stipulation entered into evidence at the hearing. Judge Brinkley, however, insisted on holding a hearing, made findings contrary to the parties' stipulation, and then denied Mr. Williams' PCRA petition on the erroneous basis that the new evidence was solely for impeachment and would not likely result in a different verdict in a new trial. Judge Brinkley erred on all points:

First, an evidentiary hearing is not a prerequisite to PCRA relief. In fact, Pa.R.Crim.P. 907(2) clearly provides that "[a] petition for post-conviction collateral relief may be granted *without a hearing* when the petition and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law." (emphasis added). Because the Commonwealth, in its answer, raised no genuine issues concerning any material fact and stated its agreement that Mr. Williams was entitled to PCRA relief in the form of a new trial (R.700a-702a at 8-9, 13; R.803a), Judge Brinkley erred in ruling that an evidentiary hearing was required.

Second, a stipulation is part of the evidentiary record and "binds the Commonwealth, *and the Court*[.]" *Commonwealth v. Phila. Elec. Co.*, 372 A.2d 815, 821 (Pa. 1977) (emphasis added). Judge Brinkley thus erred when she reasoned that she was "free to believe all, part, or none of the testimony of any witnesses, whether by testimony in court *or by stipulation*." (Tab B at 43 (emphasis added)).

Third, contrary to Judge Brinkley's ruling, new evidence is not used solely to impeach the credibility of a witness simply because one of the effects of the new evidence is to impeach the testimony of a witness. If that were the case, almost no

new evidence would pass muster and allow for PCRA relief. Rather, according to controlling case law, if new evidence undermines key testimony from an essential witness, it is not properly categorized as being used "solely to impeach" a witness and the PCRA requirement is satisfied. *See Commonwealth v. McCracken*, 659 A.2d 541, 545 (Pa. 1995); *Commonwealth v. Fiore*, 780 A.2d 704, 711-12 (Pa. Super. 2001).

II. Based on Judge Brinkley's unscrupulous conduct, this Court should at least vacate the November 6, 2017 and June 25, 2018 orders and remand for PCRA proceedings before a new trial judge. Judge Brinkley's conduct warrants recusal/disqualification under the federal Due Process Clause, Pennsylvania common law standards, and Pa.R.Crim.P. 903(C). The cumulative effect of Judge Brinkley's antics portray an undeniable appearance of bias and a lack of impartiality.

In particular, and among other things, Judge Brinkley repeatedly offered Mr. Williams professional advice and showed an unusual personal interest in his case; Judge Brinkley rejected the no-revocation and no-incarceration recommendations of the Probation Office and the District Attorney and imposed a 2 to 4 year prison sentence; Judge Brinkley authorized her personal attorney to tell the press that "Judge Brinkley knows Meek's case inside and out, and the Supreme Court Justices do not"; Judge Brinkley refused to allow counsel at the PCRA hearing to make a record on Mr. Williams' request that the judge recuse or disqualify herself; and Judge Brinkley made statements suggesting she had prejudged the case and instructed the court reporter not to record counsel's objections.

III. Judge Brinkley committed reversible error on November 6, 2017, when she revoked Mr. Williams' probation and sentenced him to 2 to 4 years' in prison.

Judge Brinkley committed error pertaining to the revocation by (1) initiating a probation revocation proceeding without giving advance written notice that specified conduct of the probationer was alleged to violate a stated condition of his probation, and (2) finding vaguely articulated technical violations and general unsuitability for supervision to justify revocation. Judge Brinkley committed error pertaining to the sentence because she (3) lacked any basis to order total confinement, (4) issued a 2 to 4 year prison sentence that was manifestly excessive, (5) struck a tone of advocacy rather than dispassionate reflection, and (6) failed to make particularized findings and conclusions on the record in open court.

ARGUMENT

I. Mr. Williams Has Satisfied The Standard For PCRA Relief, And This Court Should Reverse With Directions To Grant The Petition

To be eligible for PCRA relief based on "exculpatory evidence," 42 Pa.C.S. §9543(a)(2)(vi), the petitioner must demonstrate that the evidence "(1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted." *Commonwealth v. Small*, 189 A.3d 961, 972 (Pa. 2018). The Pennsylvania Supreme Court views the fourth inquiry—whether the evidence would likely result in a different verdict if a new trial were granted—"as the lodestar of the after-discovered evidence analysis." *Id.* at 976 n.12. A likely change in even the "degree" of guilt in a new trial is sufficient to satisfy the inquiry regarding a different result. *Commonwealth v. Bonaccurso*, 625 A.2d 1197, 1200–01 (Pa. Super. 1993).

Here, Judge Brinkley insisted on holding an evidentiary hearing (even though there were no genuine issues concerning any material fact given the Commonwealth's answer to the petition) and denied Mr. Williams' PCRA petition following a hearing (even though the parties stipulated to facts sufficient for PCRA relief). Then, after the hearing, Judge Brinkley concluded that "[a]lthough Defendant was successful in convincing this Court that the evidence could not have been obtained prior to trial by exercising reasonable diligence and that it is not merely corroborative or cumulative, the evidence still would be used solely for impeachment purposes and would not have changed the outcome at trial." (Tab B at 43-44). These rulings amount to legal error in every respect.

A. Contrary To Judge Brinkley's Ruling, PCRA Relief Should Have Been Granted Based On The Commonwealth's Answer, Which Showed No Genuine Issues Concerning Any Material Fact

Because Mr. Williams' petition and the Commonwealth's answer showed that there were no genuine issues concerning any material fact and that Mr. Williams is entitled to relief as a matter of law, PCRA relief should have been granted.

Contrary to Judge Brinkley's condescending insistence (R.701a at 11), an evidentiary hearing is not a prerequisite to PCRA relief. To the contrary, Rule 907(2) clearly provides that "[a] petition for post-conviction collateral relief may be granted *without a hearing* when the petition and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law." (emphasis added). The settled practice of granting PCRA relief without a hearing in hundreds of similar cases where the Commonwealth, after investigation,

has agreed to such relief reflects the express language of Rule 907(2). (R.781a-R.786a; R.810a-814a at 22-39; R.884a ¶9; R.995a-1000a).

Here, Mr. Williams' petition included affidavits from former police officers (Gibson and Walker) avowing that former Police Officer Reginald Graham—the only affiant on the applicable search warrant, and the Commonwealth's only witness at trial—lied on nearly every material fact in his testimony at trial. Further, the petition included a report showing that Graham was on the District Attorney's "do not call" list due to credibility problems, as well as documentation revealing the Philadelphia Police Department Board of Inquiry's conclusion that Graham was guilty of both criminal conduct and "[l]ying or attempting to deceive regarding a material fact during the course of any Departmental investigation." (R.764a-779a).

In response to Mr. Williams' petition, the Commonwealth filed an answer stating that it "agrees to PCRA relief in the form of a new trial" because "Officer Graham was the sole witness to testify at defendant's trial." (R.803a). The Commonwealth elaborated on its position, stating that "[i]n light of recent disclosures regarding this officer's misconduct, the Commonwealth is not able to stand behind the credibility of his trial testimony at this time." (*Id.*). The Commonwealth thus raised no genuine issues concerning any material fact—which should be the end of the matter. PCRA relief is warranted.

Judge Brinkley, however, insisted that PCRA relief could not be granted "because the Commonwealth's agreement to a new trial is merely a recommendation to this Court." (R.809a at 18). In her opinion denying relief, Judge Brinkley wrote that "this Court is not bound to accept the agreement of the parties for relief." (Tab B at

23). In support, Judge Brinkley cited a dissent in *Commonwealth v. Smith*,[13] 17 A.3d 873 (Pa. 2011) and *Commonwealth v. Chimenti*, 507 A.2d 79 (Pa. 1986). (Tab B at 23). But neither case supports the conclusion that a trial judge may ignore Rule 907(2) and insist on holding an evidentiary hearing to resolve (or seek to create) disputes that do not exist.

In *Smith*, the Pennsylvania Supreme Court affirmed the denial of certain PCRA claims. 17 A.3d 873. The case did not involve a Commonwealth agreement to PCRA relief, and it did not involve a court insisting on an evidentiary hearing where there were no genuine issues concerning any material fact. *See id.* Judge Brinkley characterizes the dissent in *Smith* as supporting her prerogative to hold an evidentiary hearing despite the procedure stated in Rule 907(2), but the dissent in *Smith* does no such thing. In fact, the dissent states that the Pennsylvania Supreme Court must require "uniform, strict adherence" to the Criminal Rules in PCRA matters. *Id.* at 916 (Saylor, J., dissenting). Adherence to the Criminal Rules in this case would have resulted in an order granting PCRA relief in the form of a new trial when it became apparent there were no genuine issues concerning any material fact and that the Commonwealth agreed to relief. *See* Pa.R.Crim.P. 907(2).

In the other opinion relied on by Judge Brinkley, *Chimenti*, the Pennsylvania Supreme Court vacated an order of a single Superior Court judge who required a trial

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[13] Judge Brinkley's June 25, 2018 opinion refers to *Commonwealth v. Smith* as "*Commonwealth v. Johnson.*" (Tab B at 23). In the November 30, 2018 Pa.R.A.P. 1925(a) opinion, Judge Brinkley acknowledges that this was an incorrect citation. (Tab C at 8 n.2).

judge to accept a defendant's guilty plea agreement without review. 507 A.2d 79. Importantly, *Chimenti* involved Rule 319 (which is now Rule 590), which expressly provides that a trial judge faced with a guilty plea or plea agreement may refuse to accept it. *See* Pa.R.Crim.P. 590(a)(3) ("The judge may refuse to accept a plea of guilty, and shall not accept it unless he determines after inquiry of the defendant that the pleas is voluntary."). It is apparent that Rule 590 exists to protect the innocent against being pressured into unfair convictions by pleas. In the very different PCRA context, the plain language of Rule 907(2) points in the opposite direction.

Judge Brinkley implies that it was wrong for the parties' agreement to restrict what she can do—that is, that the Commonwealth's agreement is "merely a recommendation." (R.809a at 18). But it's not the parties' agreement in and of itself that warrants relief without a hearing in this circumstance; rather, it is the terms of Rule 907(2). Judge Brinkley's June 25, 2018 opinion does not even mention Rule 907(2).

When Judge Brinkley finally addressed Rule 907(2) in her November 30, 2018 Pa.R.A.P. 1925(a) opinion, she revealed her misunderstanding of the rule's command. Judge Brinkley stated that "[t]he explicit language of Rule 907(2) did not prohibit this Court from holding an evidentiary hearing, especially given that the affidavits submitted by the Defendant were testimonial in nature and thus could not establish the absence of a genuine issue of material fact." (Tab C at 5). But it is not solely the affidavits submitted with Mr. Williams' PCRA petition that establish the absence of a genuine issue of material fact; rather, it is the affidavits, *and* the federal and City investigative reports, *plus the Commonwealth's agreement to PCRA relief—i.e.,* failure to

dispute the affidavits—that establish the absence of a genuine issue of material fact. Each of the cases Judge Brinkley cites in support of her position that a hearing was necessary is inapposite because the Commonwealth *opposed* PCRA relief. (Tab C at 6 (citing *Commonwealth v. D'Amato*, 856 A.2d 806, 825 (Pa. 2004); *Commonwealth v. Henry*, 706 A.2d 313, 321 (Pa. 1997); *Commonwealth v. Williams*, 732 A.2d 1167, 1180-81 (Pa. 1999); *Commonwealth v. Johnson*, 966 A.2d 523, 539-40 (Pa. 2009); *Small*, 189 A.3d at 978)).

For these reasons, Judge Brinkley erred in ruling that an evidentiary hearing was necessary despite the Commonwealth's answer showing that the case presented no issues concerning any material fact.

B. Contrary To Judge Brinkley's Ruling, Mr. Williams' PCRA Petition Should Have Been Granted Based On The Parties' Stipulated Facts

A stipulation is part of the evidentiary record and "binds the Commonwealth, *and the Court*[.]" *Commonwealth v. Phila. Elec. Co.*, 372 A.2d 815, 821 (Pa. 1977) (emphasis added); *Park v. Greater Delaware Valley Savs. & Loan Ass'n*, 523 A.2d 771, 773 (Pa. Super. 1987) ("[S]tipulated facts are binding upon the court as well as the parties").

Here, Mr. Williams and the District Attorney's Office entered into evidence at the June 18, 2018 hearing a stipulation providing that (1) Graham was the only witness called by the Commonwealth at Mr. Williams' trial; (2) the Commonwealth does not have confidence in the credibility of Graham's testimony in this case; (3) the District Attorney's Office had information regarding the relevant misconduct of

Graham as of September 7, 2014 but did not disclose that information to Mr. Williams or his counsel before March 8, 2018; and (4) the District Attorney's Office agrees to PCRA relief in this case in the form of a new trial. (R.883a-884a ¶¶1, 2, 8, 11). This stipulation, which is controlling, shows that each of the four elements for PCRA relief is satisfied. *See Small*, 189 A.3d at 972.

First, the new evidence "could not have been obtained prior to the conclusion of the trial [in August 2008] by the exercise of reasonable diligence." *Small*, 189 A.3d at 972. Mr. Williams did not learn that Officer Graham was on a police "do not call" list maintained by the District Attorney's Office until the *Philadelphia Inquirer* reported about such a list on February 13, 2018. Moreover, as the stipulation provides, the District Attorney's Office did not disclose information regarding Officer Graham's misconduct to Mr. Williams or his counsel until March 8, 2018. (R.884a ¶8). Nor did he know of Graham's history and pattern of corruption and lies, as later revealed in a federal criminal investigation. (R.885a-994a).

Second, the new evidence from the Philadelphia Police Department, the District Attorney's Office, and former officers Gibson and Walker, as stipulated to by the Commonwealth, is not "merely corroborative or cumulative." *See Small*, 189 A.3d at 972. The new evidence is of a different character than any evidence presented at the trial. Although Mr. Williams testified at trial in support of his innocence, no evidence regarding Graham's history of misconduct and deceit (which pre-dated and post-dated Mr. Williams' trial) was presented. (R.65a-98a; R.883a ¶3). Under these circumstances, the new evidence is not merely corroborative or cumulative. *See Small*, 189 A.3d at 974 ("If the new evidence is of a different and 'higher' grade or character, though upon

the same point, or of the same grade or character on a different point, it is not 'merely' corroborative or cumulative, and may support the grant of a new trial based on after-discovered evidence.").

Third, the new evidence from the Philadelphia Police Department, the District Attorney's Office, and former officers Gibson and Walker, as stipulated to by the Commonwealth, will not be used "solely to impeach the credibility of a witness." *Small*, 189 A.3d at 972. The new evidence undermines the testimony of the only affiant on the application for a search warrant that led to evidence presented at Mr. Williams' trial, and the Commonwealth's only trial witness: Graham. (R.883a ¶1). Where the new evidence undermines key testimony from an essential witness, it is not properly categorized as being used "solely to impeach" a witness. *See Commonwealth v. McCracken*, 659 A.2d 541, 545 (Pa. 1995) (reversing order denying PCRA relief and concluding that new evidence was not "for impeachment purposes" where it showed "the only Commonwealth witness" who identified perpetrator recanted his testimony); *Commonwealth v. Fiore*, 780 A.2d 704, 712-13 (Pa. Super. 2001) (reversing order denying PCRA relief where new testimony contradicted Commonwealth's two key witnesses and thus "would not be used solely to impeach their credibility").

Fourth, the new evidence from the Philadelphia Police Department, the District Attorney's Office, and former officers Gibson and Walker, as stipulated to by the Commonwealth, "would likely result in a different verdict if a new trial were granted." *Small*, 189 A.3d at 972. The new evidence contradicts the testimony of Graham—the only affiant on the applicable search warrant, and the Commonwealth's only trial witness. (R.74a-82a at 37-69; R.883a ¶1). New evidence that contradicts the

Commonwealth's case-in-chief—especially evidence that compromises the Commonwealth's only witness—satisfies the "likely result in the different verdict" inquiry.[14] *McCracken*, 659 A.2d at 548; *see id* at 545 ("[T]he limited evidence connecting Appellant to the crime makes [the witness's] recantation of such nature and character that a different verdict will likely result at a retrial."); *Commonwealth v. Mount*, 257 A.2d 578, 581 (Pa. 1969) (holding that new evidence that Commonwealth's key witness had lied about her credentials in other cases would likely compel a different result because "without [her] testimony, there is insufficient evidence to prove that the appellant did rape the deceased"); *Fiore*, 780 A.2d at 714 (holding that the testimony of previously unavailable witness "contradicts the Commonwealth's case-in-chief" and thus would likely result in a different verdict).

The importance of the Commonwealth's stipulation that it "does not have confidence in the credibility of Reginald Graham's testimony in this case" cannot be overstated. (R.883a ¶2). This fact alone plainly satisfies the fourth inquiry. If the Commonwealth lacks confidence in Graham and will not present him as a witness at a

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[14] The analysis on the "fourth" inquiry resembles the analysis on the "third" inquiry. In practice, the third inquiry collapses into the fourth inquiry, which is the "lodestar of the after-discovered evidence analysis." *Small*, 189 A.3d at 976 n.12; *see also Commonwealth v. Perrin*, 59 A.3d 663, 669 (Pa. Super. 2013) (Wecht, J.), *appeal granted, order vacated*, 103 A.3d 1224 (Pa. 2014) ("In practice, the third and fourth prescribed inquiries tend to collapse into each other. The fourth question, regarding the likelihood of a different result, tends to dominate the entire inquiry."). Judge Brinkley's statement that *Commonwealth v. Castro*, 93 A.3d 818, 827 n.13 (Pa. 2014) is the most current clarification on this standard (Tab C at 14) does not account for *Small*.

new trial, then there is no case to be made against Mr. Williams at a new trial.[15] As noted, Graham was the only affiant on the applicable search warrant, and the Commonwealth's only witness at trial. (R.134a-1351a; R.74a-82a at 37-69; R.883a ¶1). In fact, the Pennsylvania Supreme Court relied on the Commonwealth's position that "there are credibility issues" with Graham as a "critical witness" in taking the rare and extraordinary step of exercising its King's Bench power to order Mr. Williams' release on bail pending completion of the PCRA proceedings and any appeals. (R.704a). Mr. Williams' petition thus should have been granted based on the stipulation entered into evidence at the hearing.

But Judge Brinkley had other ideas. Despite the stipulation—indeed, contrary to it—she "assesse[d] credibility in favor of Officer Graham … and *against the testimony* of Walker [and] his statements and affidavits, *as stipulated by counsel*." (Tab B at 43 (emphasis added)). Judge Brinkley reasoned that she was "free to believe all, part, or none of the testimony of any witnesses, whether by testimony in court *or by stipulation*." (*Id.* (emphasis added)). Remarkably, Judge Brinkley devoted eight pages of the opinion to an attempt to rehabilitate Graham. (Tab B at 31-38). In particular, despite the fact that Graham failed an FBI polygraph about stealing money during an investigation, she credited his contrived story—which the Philadelphia Police Department apparently did not believe—that he did not steal the money and instead

[15] Judge Brinkley's reference to other officers having been present at the time of arrest is wholly speculative as to what they may have observed, what they might even recall if asked about events of more than a dozen years ago, and their availability to testify at any new trial.

threw an envelope of money in the trash. (Tab B at 33). Judge Brinkley then concluded that "the totality of the evidence contained in Graham's statement point to his truthfulness in dealing with a difficult atmosphere of corruption in his immediate work environment." (Tab B at 38).

Judge Brinkley's express rejection of the stipulated facts in favor of her own strained inferences is reason enough to reverse. Indeed, this Court has reversed where a trial court makes findings contrary to a stipulation. In *Kershner v. Prudential Insurance Co.*, 554 A.2d 964 (Pa. Super. 1989), the trial court disregarded the parties' stipulation and injected issues into the case that were irrelevant given the stipulation. *Id.* at 967. This Court "reiterate[d] that the stipulations defining the issues in this case were binding upon the trial court" and "[t]hese stipulations precluded the court from addressing the issues upon which it based its grant of a directed verdict[.]" *Id.* Likewise, in *Falcione v. Cornell School District*, 557 A.2d 425 (Pa. Super. 1989), this Court vacated a judgment where the trial court made findings contrary to the stipulated facts. *Id.* at 428-29. This Court explained that "[s]tipulated facts are, quite simply, a statement of facts to which the parties are in agreement" and further stated that "[b]ecause the parties are in agreement as to those facts contained in the stipulation, they are controlling." *Id.* at 428.

In her November 30, 2018 Rule 1925(a) opinion, Judge Brinkley argued that she has a duty to make credibility determinations (Tab C at 8-9), but overlooked the fact that credibility determinations are necessary only when there is a *dispute* as to a material fact as to the validity of a petitioner's claim for relief. Here, because the Commonwealth's stipulation, there was no dispute as to a material fact, no credibility

issue as to any witness (both sides credited Gibson and Walker, the FBI polygrapher, and the Police Department internal affairs investigators and discredited Graham), and no thus credibility determination was necessary. Again, none of the cases Judge Brinkley cited involve a situation where the Commonwealth entered into a stipulation as to facts relevant to the petition and agreed to PCRA relief. (Tab C at 8-9 (citing *Johnson*, 966 A.2d at 539; *Commonwealth v. Jones*, 912 A.2d 268, 293 (Pa. 2006); *Commonwealth v. Gibson*, 951 A.2d 1110, 1123 (Pa. 2008); *Commonwealth v. Santiago*, 855 A.2d 682, 694 (Pa. 2004); *Small*, 189 A.3d at 978; *Williams*, 732 A.2d at 1181)).

Apart from this legal error, Judge Brinkley's assessment of credibility in favor of Graham was against the manifest weight of the evidence. To be clear, Judge Brinkley assessed credibility in favor of an officer who failed an FBI polygraph, was found guilty of theft and lying by the Philadelphia Police Department Board of Inquiry, and chose to resign in the face of a unanimous recommendation for dismissal. (R.883a ¶5). Moreover, Judge Brinkley found Graham credible not based on any insight she gathered from seeing him testify, but based solely on the interviews and reports the Board of Inquiry evaluated in recommending his dismissal. (Tab B at 31-38). Notably, Judge Brinkley had no trouble finding Graham credible based on raw investigative memoranda, but at the same time concluding she could not assess the credibility of his accusers because only their sworn and certified (and stipulated to) affidavits were available to her. (Tab B at 43).

Accordingly, Judge Brinkley erred in ruling that she was free to disregard the parties' stipulation to facts as well as in assessing credibility in favor of Graham. Mr.

Williams' PCRA petition should have been granted based on the parties' stipulated facts.

C. Contrary To Judge Brinkley's Ruling, The New Evidence Was Not Solely For Impeachment And Would Likely Result In A Different Verdict In A New Trial

Even apart from Judge Brinkley's error regarding the necessity of an evidentiary hearing and her blatant disregard for the parties' stipulation, Mr. Williams satisfied the standard for PCRA relief, and Judge Brinkley erred in concluding otherwise. Although Judge Brinkley acknowledged that the new evidence could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence, and was not merely corroborative or cumulative, she held that Mr. Williams did not satisfy his PCRA burden because "the evidence still would be used solely for impeachment purposes and would not have changed the outcome at trial." (Tab B at 44). Judge Brinkley was wrong on both accounts.

First, the new evidence from the Philadelphia Police Department, the District Attorney's Office, and former officers Gibson and Walker will not be used *solely* to impeach the credibility of Graham. *See Small*, 189 A.3d at 970 (stating that the standard is whether the new evidence would be used "*solely* to impeach the credibility of a witness") (emphasis added). Contrary to what Judge Brinkley implies in her opinion (Tab B at 43-44), new evidence is not "used solely to impeach" the credibility of a witness simply because one of the effects of the new evidence is to impeach the testimony of a witness. If that were the case, almost no new evidence would pass muster and allow for PCRA relief. Rather, according to controlling case law, if new

evidence wholly undermines key testimony from an essential witness, it is not properly categorized as being used "solely to impeach" a witness and the PCRA requirement is satisfied. *See McCracken*, 659 A.2d at 545 (reversing order denying PCRA relief and concluding that new evidence was not "for impeachment purposes" where it showed that "the only Commonwealth witness" who identified the perpetrator recanted his testimony); *Mount*, 257 A.2d at 581 (reversing denial of PCRA relief where Commonwealth expert was shown to have falsified her credentials *in other trials*); *Fiore*, 780 A.2d at 712-13 (reversing order denying PCRA relief where new testimony contradicted the Commonwealth's two key witnesses and thus "would not be used solely to impeach their credibility").

Second, and relatedly, the new evidence from the Philadelphia Police Department, the District Attorney's Office, and former officers Gibson and Walker would likely result in a different verdict if a new trial were granted. Contrary to what Judge Brinkley stated in her opinion (Tab B at 44-46), the relevant inquiry is not whether the new evidence would have changed the outcome of the *previous trial* had the evidence been available; rather, the relevant inquiry is whether the new evidence "would likely result in a different verdict if a *new trial* were granted." *Small*, 189 A.3d at 972 (emphasis added). This is why the Commonwealth's stipulation that it "does not have confidence in the credibility of Reginald Graham's testimony in this case" is so critical. (R.883a ¶2). If the Commonwealth lacks confidence in Graham and thus will not present him as a witness at a new trial, then there is no case to be made against Mr. Williams at a new trial, so far as the record shows. As noted, Graham was the

only affiant on the applicable search warrant, and the Commonwealth's only witness at trial. (R.1349a-1351a; R.74a-82a at 37-69; R.883a ¶1).

Judge Brinkley noted that Graham's affidavit said that Officer Sylvia Jones was with him during surveillance (Tab B at 45-46), but that does not change the fact that Graham was the only affiant, and thus it is Graham's credibility at issue. Judge Brinkley also noted that Jones was available throughout the trial (Tab B at 45), but the Commonwealth never asserted that Jones was a witness available to testify, and when the Commonwealth was asked to make an offer of proof in support of probable cause for the search warrant, it stated only that "[t]he offer of proof would be that Police Officer Graham would testify that two people leaving the house with keys are these two young men …." (R.70a at 23). And nothing shows that Jones could testify now.

In her November 30, 2018 opinion, Judge Brinkley stated that another officer, Officer James Johnson, testified at Mr. Williams' sentencing and presumably could have testified at trial (Tab C at 10-11), but there is no basis in the record to "presume" Johnson would or could testify at a retrial;[16] the fact remains that the Commonwealth did not call Johnson to testify at trial, and the Commonwealth now takes the position that the absence of Graham's testimony makes it likely that a different verdict would result if Mr. Williams were re-tried, regardless of whether other officers were present for part of the incident that occurred over a decade ago.

[16] At sentencing in 2009, Johnson testified that he was just two years from retirement. (R.1506a at 75-76). In addition, the opinions that Johnson expressed at Mr. Williams' sentencing about "young black men" who "are killing police" and who "don't listen because they want … fast money, they want to beat the system" (R.1506a at 75) might also make him an undesirable witness at a retrial.

Judge Brinkley also reasoned that Mr. Williams did not show a likely different result because, at his original trial, after his motion to suppress was denied, and after he denied selling crack cocaine and denied pointing a gun at the arresting officers, Mr. Williams admitted that he was carrying a loaded gun, which he said he quickly put on the ground upon being approached by arresting officers. (Tab C at 11-12 (citing R.84 at 80-87)). But Judge Brinkley ignored that a petitioner need not show that newly discovered evidence would justify complete acquittal; rather, a petitioner need only show that it would likely affect the outcome of the trial. A likely change in even the "degree" of guilt in a new trial is sufficient to satisfy the inquiry regarding a different result. *Bonaccurso*, 625 A.2d at 1200–01. Moreover, Mr. Williams' testimony was the direct fruit of the violations of which he complains—that is, Graham's false affidavit that supported the warrant and thus the admissibility of the gun introduced in evidence against him. He would otherwise have exercised his right to remain silent. His own testimony therefore cannot, as a constitutional matter, be used against him now. *See Harrison v. United States*, 392 U.S. 219, 223 (1968). Judge Brinkley thus erred in ruling that the new evidence would not likely result in a different verdict in a new trial.

Finally, in her November 30, 2018 opinion, Judge Brinkley states that there is no nexus between what caused Graham to be placed on a District Attorney Do No Call List and Mr. Williams' case. (Tab C at 13). But Judge Brinkley ignores the parties' stipulation that "[t]he sworn affidavit of former Philadelphia Police Officer Jerold Gibson, one of Mr. Williams' arresting officers, contradicts Reginald Graham's sworn testimony concerning Mr. Williams' arrest" (R.883a ¶6), and Officer Gibson's affidavit

shows that Graham lied as to almost every aspect of his testimony in Mr. Williams' case. (R.798a-799a). Judge Brinkley states that case law holds that "conjecture" regarding an officer's conduct in another case will be insufficient to satisfy the standard for PCRA relief, but in none of the cases on which Judge Brinkley relies did the Commonwealth agree to PCRA relief and stipulate that it lacked confidence in the credibility of the officer at issue. (*See* Tab C at 13 (citing *Commonwealth v. Foreman*, 55 A.3d 532, 537 (Pa. Super. 2012); *Commonwealth v. Soto*, 983 A.2d 212, 215 (Pa. Super. 2009); *Commonwealth v. Johnson*, 179 A.3d 1105, 1123 (Pa. Super. 2018)). The problems with Graham's testimony are far from "conjecture."

Because Mr. Williams satisfied the standard for PCRA relief, and Judge Brinkley committed reversible errors in denying Mr. Williams' petition, this Court should reverse Judge Brinkley's June 25, 2018 order denying PCRA relief and direct that Mr. Williams' petition be granted.

II. Based On Judge Brinkley's Conduct, This Court Should Remove Judge Brinkley From The Case And Vacate The November 6, 2017 and June 25, 2018 Orders

Judge Brinkley's highly unusual conduct was the focus of Mr. Williams' King's Bench application to the Pennsylvania Supreme Court. On June 12, 2018, the Pennsylvania Supreme Court divided equally on whether it should exercise its authority to remove Judge Brinkley prior to the PCRA hearing—and thus Mr. Williams' application was denied by operation of law, without prejudice. Justice Baer, in a dissenting statement joined by Justice Todd and Justice Donohue, stated: "I believe Judge Genece Brinkley should have disqualified herself pursuant to Pa.R.Crim.P. 903(C) as her continued involvement has created an appearance of

impropriety that tends to undermine public confidence in the judiciary." (June 12, 2018 Dissenting Statement, 59 EM 2018 (Pa. 2018)). Later, after the PCRA hearing, the Pennsylvania Supreme Court denied Mr. Williams' subsequent King's Bench application "without prejudice to [Mr. Williams] to pursue his claims before the Superior Court in the normal course." (Aug. 21, 2018 Order, 71 EM 2018 (Pa. 2018)).

In her November 30, 2018 opinion, Judge Brinkley stated that her recusal is not required because "the issue of recusal has been decided in this state's highest court and is not an issue at bar." (Tab C at 2-3). This is wrong. The Pennsylvania Supreme Court simply declined to use its *King's Bench power* to remove Judge Brinkley from the case at that time. When the state high court decides whether to use its King's Bench power, it applies an entirely different standard than the one used by a trial court and this Court on direct appeal. The Supreme Court will generally employ the King's Bench authority only when the issue requires timely intervention by the court of last resort of the Commonwealth, regardless of the merits of a petitioner's case. *See In re Bruno*, 101 A.3d 635, 670 (Pa. 2014). Whether the Supreme Court uses its extraordinary power to order recusal does not, as Judge Brinkley implied, create some kind of law-of-the-case, as reflected by the fact the Court denied Mr. Williams' later King's Bench application "without prejudice to [Mr. Williams] to pursue his claims before the Superior Court in the normal course." (Aug. 21, 2018 Order, 71 EM 2018 (Pa. 2018)).

Judge Brinkley's conduct warrants her removal from the case based on three different standards.

First, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution entitles a defendant to "'a proceeding in which he may present his case with assurance' that no member of the court is 'predisposed to find against him.'" *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1910 (2016) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)). The due process principle extends to both "actual bias" and "appearance of bias." *Taylor v. Hayes*, 418 U.S. 488, 501 (1974); *see also Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971).

Second, under Pennsylvania common law, "'[a] judge should respect and comply with the law and should conduct [her]self at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.'" *In re McFall*, 617 A.2d 707, 713 (Pa. 1992) (quoting Code of Judicial Conduct, Canon 2(A)). Consequently, a party seeking recusal of a trial judge and assignment to a different judge for sentencing "need not prove that the judge's rulings actually prejudiced him; it is enough to prove that the reasonable observer might question the judge's impartiality." *Commonwealth v. Bernal*, 200 A.3d 995, 999 (Pa. Super. 2018) (citation omitted); *see also Joseph v. Scranton Times L.P.*, 987 A.2d 633, 634 (Pa. 2009). "'[T]he appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of either of these elements.'" *McFall*, 617 A.2d at 713 (quoting *Commonwealth v. Goodman*, 311 A.2d 652, 654 (Pa. 1973)). This well-settled principle is exemplified by the Pennsylvania Supreme Court's landmark opinion in *Commonwealth v. Darush*:

> Although we find no evidence of bias and are convinced the judge acted in what he sincerely felt was a proper manner, we nevertheless believe appellant is entitled to resentencing by another judge because certain remarks the judge was said to have made about appellant could raise a reasonable question concerning his impartiality in sentencing.

459 A.2d 727, 730 (Pa. 1983). In objectively contemplating the reaction of "the reasonable observer," the court is to imagine, and then abide by, the reasonable reaction to "all the circumstances" of "a significant minority of the lay community." *Id.* at 732.

When determining whether removal of a judge is required, this Court may look at the entire course of the judge's conduct—there is no need to search for a single "smoking gun" bad act. As this Court has explained: "[A] party's call for recusal need not be based only upon discre[te] incidents, but may also assert the cumulative effect of a judge's remarks and conduct even though no single act creates an appearance of bias or impropriety." *Bernal*, 200 A.3d at 999 (citing *Commonwealth v. Rhodes*, 990 A.2d 732, 748-49 (Pa. Super. 2009)); *see also Commonwealth v. White*, 910 A.2d 648, 659-60 (Pa. 2006).

Under this standard, a judge's removal is warranted where, for example:

- The judge appears to act as both an agent of the judiciary and the prosecution. *McFall*, 617 A.2d at 713.
- The judge takes a special interest in the defendant. *White*, 910 A.2d at 655-56.
- The judge has personal knowledge of disputed facts. *Mun. Publications, Inc. v. Court of Common Pleas of Phila. Cty.*, 489 A.2d 1286, 1289 (Pa. 1985).
- The judge's remarks reflect a disparaging attitude towards the defendant. *Darush*, 459 A.2d at 732.

- The judge declines to use a report in the record and instead relies on evidence obtained *ex parte*. *Rhodes*, 990 A.2d at 750.

- The judge's conduct indicates a pre-determined view of the law as applied to the facts. *Commonwealth v. Lemanski*, 529 A.2d 1085, 1089 (Pa. Super. 1987).

- The judge makes an effort to hide facts from the parties and the public that might be relevant to a recusal motion. *Joseph*, 987 A.2d at 636.

- The judge shows animus against counsel in addressing the reasons for denying a recusal motion. *Commonwealth v. McCauley*, 199 A.3d 947, 952-53 (Pa. Super. 2018).

- The judge goes into a hearing with a prepared statement and signals that she has made up her mind prior to the hearing. *Bernal*, 200 A.3d at 999.

Third, Rule 903(C) pertains specifically to PCRA proceedings and provides that "[t]he trial judge, if available, shall proceed with and dispose of the petition in accordance with these rules, unless the judge determines, in the interests of justice, that he or she should be disqualified." The "interests of justice" standard under Rule 903 contemplates disqualification even where the common law "recusal" standard for lack of impartiality is not met. *Commonwealth v. King*, 839 A.2d 237, 241 (Pa. 2003) (finding no abuse of discretion where trial judge "concluded that he was not required to recuse himself" but nevertheless determined that the "interests of justice" required reassignment of a PCRA).

Based on any of these three standards, Judge Brinkley's conduct warrants her removal from this case (and vacatur of her orders). This Court is very familiar with the kinds of judicial conduct that can create an appearance of bias, having recently issued two opinions on such judicial conduct that occurred in Allegheny County. *See Bernal*, 200 A.3d at 999; *McCauley*, 199 A.3d at 952-53. Judge Brinkley's conduct,

unfortunately, surpasses even the conduct that warranted vacatur, remand, and reassignment in those cases. As the list below reveals, Judge Brinkley's injudicious conduct has been stark and sustained for years on end:

- Judge Brinkley repeatedly offered Mr. Williams professional advice and showed an unusual personal interest in his case. *Supra* at 8-9.

- Judge Brinkley made what she referred to as a "surprise visit" to Mr. Williams' community service site to spy on him, where she tried to "blend in" with people, as if she were an undercover investigative agent rather than an impartial jurist. *Supra* at 11-12.

- Judge Brinkley supplemented a Probation Office report based on her own investigation on social media outlets. *Supra* at 9-10.

- Judge Brinkley conducted a lengthy adversarial examination of the probation officer at the November 6, 2017 hearing because of the officer's position that prison time was not warranted. *Supra* at 11.

- Judge Brinkley rejected the recommendations of the Probation Office and the District Attorney and imposed a state prison sentence of 2 to 4 years' confinement—immediately after she revealed her surprise visit to Mr. Williams' community service site on the record. *Supra* at 12-13.

- Judge Brinkley's personal attorney told the press that Judge Brinkley finally decided to release a transcript that Mr. Williams had been requesting—for the purpose of "deflat[ing] the accusation" against Judge Brinkley and defending her reputation. *Supra* at 16.

- Judge Brinkley's personal attorney made comments to the press on her behalf, threatening to sue Mr. Williams, his attorneys, and/or professional management if they failed to publish an apology or if they filed a complaint about Judge Brinkley with the Judicial Conduct Board (an action for which there would be immunity, if it occurred, as well as a guarantee against retaliation). *Supra* at 16.

- Judge Brinkley's personal attorney (after the Pennsylvania Supreme Court ordered Judge Brinkley to release Mr. Williams on bail) told the

press that "Judge Brinkley knows Meek's case inside and out, and the Supreme Court Justices do not." *Supra* at 25-26.

- Judge Brinkley insisted on holding a hearing on Mr. Williams' PCRA petition, despite the Commonwealth's agreement to PCRA relief. *Supra* at 21-22, 27-29.

- Judge Brinkley (at the June 18, 2018 PCRA hearing) went into the hearing with a prepared statement that signaled her opposition to the position put forth by Mr. Williams and the Commonwealth that PCRA relief in the form of a new trial was warranted. *Supra* at 27-28.

- Judge Brinkley refused to allow counsel to make a record on Mr. Williams' request that the judge recuse or disqualify herself. *Supra* at 28.

- Judge Brinkley relentlessly cross-examined (and then scoffed at) Mr. Williams' witness and the assistant district attorney, who had represented the District Attorney's Office's agreement to PCRA relief. *Supra* at 29-33.

- Judge Brinkley made statements suggesting she had prejudged the case and instructed the court reporter not to record counsel's objections. *Supra* at 33-35.

- Judge Brinkley made wrong (and offensive) assertions in her opinion denying PCRA relief, including: a statement that the 23-year practice of correcting wrongful convictions without a hearing when the District Attorney agrees to relief is in some way comparable to condoning of slavery, and a statement that Mr. Williams is "attempting to pit one female trial judge against another." *Supra* at 37-38.

Vacating Judge Brinkley's November 6, 2017 sentencing order and June 25, 2018 denial of PCRA relief, and remanding for proceedings before a different judge, is the relief that is required when a trial judge's remarks and conduct create an appearance of bias and impropriety. *Joseph*, 987 A.2d at 637; *Darush*, 459 A.2d at 732; *Bernal*, 200 A.3d at 999; *McCauley*, 199 A.3d at 952-53; *Rhodes*, 990 A.2d at 751. Only

this relief will protect both Mr. Williams' interests and the integrity of the judicial system.

Judge Brinkley's actions would be cause for concern—and would adversely impact the public's view of the integrity of the judicial system—in any case. But that concern is particularly acute here. Given Mr. Williams' celebrity status, the Commonwealth's judicial system now is subject to heightened attention. Mr. Williams deserved better, as do all defendants in his situation. The Commonwealth's judicial system generally does do better, and this Court can demand that it always do better. Accordingly, in order to restore confidence in the judicial system, this Court should at least remove Judge Brinkley from the case, vacate Judge Brinkley's November 6, 2017 sentencing order and June 25, 2018 denial of PCRA relief, and direct that any future proceedings be held before a different judge.

III. Judge Brinkley Disregarded The Governing Statute And Due Process By Revoking Mr. Williams' Probation and Sentencing Him To 2-4 Years In State Prison, And This Court Should At Least Reverse The Sentence And Remand For Further Proceedings

A judge's decision whether to revoke probation follows a three-step process. *First*, the court determines whether, as a matter of fact, proven conduct of the probationer has violated any of the written conditions of his supervision. 42 Pa.C.S. §9754(d); Pa.R.Crim.P. 708(B)(2). *Second*, if there has been misconduct in violation of any condition, the court must decide whether that deviation warrants revocation of probation, rather than reinstatement with a warning or admonition, alteration of the conditions, or even termination of supervision. 42 Pa.C.S. §9771(a), (d). *Third*, if the court determines that revocation is warranted, it must impose a new and lawful

sentence. *Id.* §9771(b), (c). The first and second steps pertain to the violation, and the third pertains to the sentence. As explained below: (A) Judge Brinkley's finding of a probation violation is fatally tainted by both procedural and substantive legal errors; and (B) Judge Brinkley abused her discretion by revoking probation and imposing a sentence of total confinement.

A. Judge Brinkley's Finding Of Probation Violation Is Fatally Tainted By Both Procedural And Substantive Legal Errors

Judge Brinkley committed fundamental statutory and constitutional error by (1) initiating a probation revocation proceeding without giving advance written notice specifying the conduct alleged to violate a stated condition of his probation, and (2) revoking probation on a legally improper basis.

1. The Trial Court Failed To Give Proper Notice Of Alleged Probation Violations

By agreement of the sentencing court (Philadelphia), Mr. Williams was serving his probationary sentence under the supervision of the Montgomery County probation department, as that was where he was then living. He signed and agreed to abide by certain conditions, as contemplated by 42 Pa.C.S. §9754(b)-(c). (R.1087a-1088a; R.1090a-1091a).[17] On October 26, 2017, the probation officer wrote to Judge

[17] Section 9754(b) provides that the court may impose only conditions that serve the purposes of probation. Subsection (c) suggests 14 standard conditions. "[T]hese fourteen conditions must be the starting point in any analysis of a probation violation." *Commonwealth v. Elliott*, 50 A.3d 1284, 1291 (Pa. 2012) (holding that probation officer's authority to impose conditions is limited to elaboration of conditions imposed by the judge at sentencing or in a subsequent modification proceeding).

Brinkley recounting aspects of Mr. Williams' recent conduct. Although the probation officer sent copies of this letter to the District Attorney and to Mr. Williams' counsel, she did not recommend that probation be revoked or even that a hearing be held. (R.1096a-1097a). Accordingly, the probation officer's letter did not take the form of a violation notice under Rule 708(A) ("A written request for revocation shall be filed with the clerk of courts."). Nor did the DA's office file such a "request for revocation."

Despite this, Judge Brinkley responded by writing a supplemental letter of her own, dated October 31, 2017 (R.1100a-1103a), which she apparently viewed as an allegation of violations and which summoned Mr. Williams to a hearing. The judge's letter was in narrative form and did not accuse Mr. Williams of engaging in particular conduct that was said to violate any particular condition of his supervision. (*Id.*). This manner of initiating a probation violation proceeding disregarded the basic statutory and constitutional requirements, and requires that the ensuing finding of violation and prison sentence be vacated.

The Due Process Clause of the Fourteenth Amendment requires the trial court and prosecution, before revoking a defendant's probation, to adhere to certain procedures, including providing the defendant with "'written notice of the claimed violations of [probation].'" *Commonwealth v. DeLuca*, 418 A.2d 669, 672 (Pa. Super. 1980) (quoting *Commonwealth v. Ruff*, 414 A.2d 663, 667 (Pa. Super. 1979) and *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973)). This fundamental, minimum Due Process requirement (under both U.S. Const., Amend. XIV, and Pa.Const., Art. I, §9) is reflected in the governing provisions of the Sentencing Code. *See* 42 Pa.C.S. §9754(d)

(no violator term may be imposed unless the court finds "on the record that a violation has occurred"); *id.* §9771(b) (revocation requires "proof of the violation of a specified condition of the probation"); *accord* Rule 708(B)(2). In this light, Rule 708(A) must be understood to require that the "request for revocation" include both a factual allegation of a violation and a specification of what condition the misconduct is said to have violated.[18] *See* Timothy Wile, *Pennsylvania Law of Probation and Parole* §13:8, at 429 (3d ed. 2010).

The Pennsylvania Supreme Court has noted "that, as a penal statute, Section 9754 must be interpreted in the light most favorable to the appellee (Probationer)." *Commonwealth v. Hall*, 80 A.3d 1204, 1212 (Pa. 2013). Likewise, there is no ambiguity in the prohibition contained in 42 Pa.C.S. §9771(b) against revocation in the absence of "proof of the violation of specified conditions of the probation." However, if any ambiguity could be perceived, "such language should be interpreted in the light most favorable to the accused." *Commonwealth v. Booth*, 766 A.2d 843, 846 (Pa. 2001); *see also Commonwealth v. Shiftier*, 879 A.2d 185, 189 (Pa. 2005) (same); 1 Pa.C.S. §1928(b)(1) (penal statutes must be strictly construed).

For its part, this Court has "repeatedly emphasized that the Commonwealth must strictly comply with the requirement that notice of the alleged violations be in writing." *Ruff*, 414 A.2d at 667 (citing *Commonwealth v. Martin*, 360 A.2d 733 (Pa. Super.

[18] Moreover, unless the notice specifies the condition that was allegedly violated, the defendant cannot enforce his right under *Elliott* to insist that only conditions imposed by the judge (or by the probation officer in furtherance of those conditions) be relied on.

1976)). If the trial court fails to prove notice of each of the claimed violations, then this Court shall "direct that the lower court schedule a new revocation hearing and provide appellant with written notice of the charges." *Commonwealth v. Bryant*, 417 A.2d 240, 242 (Pa. Super. 1979). This requirement is so important that this Court, with the Supreme Court's later approval, has long held that the right to specific notice is not waived even by a failure of the probationer to object at the hearing. *See Commonwealth v. Quinlan*, 412 A.2d 494, 496-97 (Pa. 1980) (explaining *Commonwealth v. Spence*, 381 A.2d 949 (Pa. Super. 1977)).

Judge Brinkley stated that Mr. Williams received proper notice of the probation violations when he received the Probation Office's October 26, 2017 report and her own October 31, 2017 supplement to that report. (Tab A at 30-33). But, in disregard of the statutes and rules and of this Court's cases, neither of these letters had identified any specific condition of his probation that Mr. Williams was said to have violated; nor was any even pointed out during the November 6, 2017 hearing. This fundamental deviation from the procedural requirements resulted in a failure to separate the three decisional steps and prevented the defense from answering the charges, even assuming that any particular "charges" could have been levied had proper procedures been followed.

As this Court ruled in *Commonwealth v. Vilsaint*, 893 A.2d 753, 757 (Pa. Super. 2006), it is "fundamentally unfair to incarcerate a person … for violating a condition never officially imposed. Indeed, it seems impossible to violate a non-imposed condition." Further, probation "conditions must be reasonable and devised to serve rehabilitative goals ...." *Hall*, 80 A.3d at 1215. These limitations, and the entire

legislative scheme, are undermined if probation can be revoked in the absence of an articulated violation of a specified condition of probation. Reversal for this reason alone would be warranted.

Even putting aside this fundamental procedural defect, the fact remains that neither the probation office report nor Judge Brinkley's supplement disclosed that the judge had made a "surprise visit" to Mr. Williams' community service site. (*See* R.1096a-1097a; R.1100a-1103a). This was a crucial omission, because that surprise visit would later inform Judge Brinkley's opinion that Mr. Williams had "thumb[ed] his nose" at her and thus deserved a 2 to 4 year prison sentence. (R.450a at 73-74). Mr. Williams had no opportunity to prepare any defense to this allegation, much less present any. (R.448a at 68 (Judge Brinkley responding "No" when Mr. Williams asked, "Can I speak on my behalf")).

Because Judge Brinkley failed to give proper notice of the alleged probation violations, this Court should vacate Judge Brinkley's finding of violations and resulting revocation of probation and new sentence. This Court should direct that if, on remand, either the Probation Office or the District Attorney files a notice under Rule 708(A) that provides Mr. Williams with written notice of alleged violations of his conditions of probation, a different judge should be assigned to schedule a new revocation hearing.

2. Judge Brinkley Revoked Probation On A Legally Improper Basis

Although a trial court may revoke probation based on a technical violation—*i.e.*, based on a violation of a condition of probation other than that the probationer

refrain from committing another crime (sometimes called a "direct violation")—the revocation still must be based on a violation of a "condition of probation." Pa.R.Crim.P. 708(B)(2). Here, Judge Brinkley merely listed a hodge-podge of technical "violations" without tying them to any specific conditions of probation, and then revoked probation based on her overall impression that Mr. Williams engaged in "nose-thumbing" conduct:

> THE COURT: Okay. I find the defendant in technical violation of this Court's order for all of the reasons listed in the letter that I mentioned, including testing positive for drugs after this Court has extended numerous opportunities for treatment ….
>
> … So that's a technical violation, as well as the traveling and scheduling travel in violation of this Court's order, continuing to travel. I'm sorry, going to – well, staying in Philadelphia when he's supposed to be in Greece and not telling anybody.
>
> And, in particular, the use of the Fast Flush product to wash the urine.
>
> * * *
>
> … The defendant picked up two new cases in the process, one in St. Louis, one in New York. Those are not direct violations, but the activity engaged in results in what I believe to be conduct which may mean that he's not suitable for probation status anymore. I find those are technical violations. So the defendant is in technical violation for all the reasons I just mentioned.
>
> In addition, there's another situation that I didn't go into detail …. but the defendant was on social media indicating that he was doing a video at 3 o'clock in the morning in the streets of Philadelphia when he was supposed to have just been doing a photoshoot …. No information was given to the Court concerning any video on that same day. … That's just another example of how the defendant just does, basically, what he wants. So he's in technical violation.

(R.436a-437a at 18-21)). The finding that Mr. Williams violated probation by *failing to travel overseas* (due to a sudden change in circumstances) after receiving permission to do so illustrates how far Judge Brinkley stretched to find violations. Instead of attempting to tie aspects of Mr. Williams' alleged conduct to specific conditions of probation, and then explaining why a revocation was appropriate, Judge Brinkley made the decision to revoke probation because, in her estimation, Mr. Williams "is not suitable for probation status anymore" because he "just does, basically, what he wants." But this cannot support a revocation, consistent with either Due Process or the governing rule and statutes. Indeed, it has long been held that any conclusion that probation has been violated and should be revoked because the probationer "displayed poor attitude" or failed to demonstrate "strict compliance" violates Due Process. *Douglas v. Buder*, 412 U.S. 430, 431 (1973) (per curiam).

Accordingly, Judge Brinkley revoked probation on a legally improper basis.

B. Judge Brinkley Abused Her Discretion By Imposing A 2 To 4 Year Sentence

1. Pa.R.A.P. 2119(f) Statement

With respect to discretionary aspects of sentencing, Appellate Rule 2119(f) requires the appellant to provide a separate "concise statement of the reasons" for his challenges on appeal. This statement "must raise a 'substantial question' as to whether the trial judge, in imposing sentence, violated a provision of the Sentencing Code or contravened a 'fundamental norm' of the sentencing process." *Commonwealth v. Rhodes*, 990 A.2d 732, 744–45 (Pa. Super. 2009). This provision applies to the sentencing

aspect of a probation revocation proceeding. *Commonwealth v. Ferguson*, 893 A.2d 735, 736–37 (Pa. Super. 2006).[19]

Here, as detailed below, Judge Brinkley contravened the Sentencing Code and fundamental norms of the sentencing process in multiple ways:

- Judge Brinkley lacked any basis to order total confinement.
- Judge Brinkley's 2 to 4 year prison sentence was manifestly excessive.
- Judge Brinkley's approach to Mr. Williams' sentencing struck a tone of advocacy rather than dispassionate reflection.
- Judge Brinkley failed to make particularized findings and conclusions on the record in open court.

Each of these raises a substantial question as to whether Judge Brinkley violated a provision of the Sentencing Code or a fundamental norm of the sentencing process. *See Commonwealth v. Dodge*, 77 A.3d 1263, 1273 (Pa. Super. 2013) (impermissible sentencing factors involve a substantial question); *Commonwealth v. Crump*, 995 A.2d 1280, 1282 (Pa. Super. 2010) (total confinement involves a substantial question); *Commonwealth v. Carver*, 923 A.2d 495, 497 (Pa. Super. 2007) (manifestly excessive sentence involves a substantial question); *Commonwealth v. Parlante*, 823 A.2d 927, 929–30 (Pa. Super. 2003) (failure to provide reasons for sentence presents a substantial question).

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[19] While the decision whether to revoke probation at all is discretionary, it is not part of "sentencing." Nevertheless, Mr. Williams includes his argument on that point, out of an abundance of caution, under the Rule 2119(f) statement.

2. Judge Brinkley Lacked Any Basis To Order Total Confinement

A trial court may impose a sentence of "total confinement" following revocation of probation only when one of three "prerequisites" is satisfied:

> (1) the defendant has been convicted of another crime; or
>
> (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or
>
> (3) such a sentence is essential to vindicate the authority of the court.

42 Pa.C.S. §9771(c); *Commonwealth v. Mathews*, 486 A.2d 495, 497 (Pa. Super. 1984). When a trial court violates §9771(c), the sentence shall be vacated and the case remanded. *See Commonwealth v. Cottle*, 426 A.2d 598, 602 (Pa. 1981).

Here, Judge Brinkley conceded that Mr. Williams had not been convicted of another crime; indeed, she could not and did not find that Mr. Williams had even engaged in any criminal conduct. (R.436a ("The defendant picked up two new cases in the process, one in St. Louis, one in New York. *Those are not direct violations*, but the activity engaged in … *may mean that he's not suitable for probation* status anymore.") (emphasis added)). Nor did she find that he was likely to commit another crime, as she hardly could considering that Mr. Williams had remained crime-free for a decade. Instead, Judge Brinkley asserted only that the sentence of total confinement was "necessary to vindicate the authority of the Court." (Tab A at 42). Judge Brinkley further stated that "[e]ach time, Defendant thumbed his nose at this Court and refused to take his sentence seriously, ostensibly due to his status in the entertainment business." (*Id.*). Judge Brinkley did not address any of Mr. Williams' efforts to rehabilitate himself, the enormous positive changes he had made since his conviction

a decade earlier, or the recommendations of the Probation Office and the District Attorney's Office against prison time. (*Id.*).

In this regard, the comments leading up to Judge Brinkley's sentence are eye-opening. (R.448a-450a at 68-76). Judge Brinkley asserted that she had been "trying to help" Mr. Williams since 2009, but that "every time I do more and more and more to give you break after break after break to help you, you, basically thumb your nose at me and just do what you want to the way you want." (R.450a at 74). This falls far short of demonstrating that total confinement in state prison was "essential" to vindicate the court's authority.

The Pennsylvania Supreme Court has been clear that trial courts should not be quick to order total confinement to "vindicate" their "authority." In *Cottle*, the Court addressed a sentence of total confinement due to a defendant's failure to report to the probation office. 426 A.3d at 599. The defendant also had been arrested on three occasions while on probation, but these arrests did not result in convictions. *Id.* at 601. The probation office recommended discharge because the defendant had pursued an effective program of alcoholic rehabilitation and secured permanent employment. *Id.* at 599. Yet, the trial court handed out a sentence of total confinement. The Supreme Court reversed because although "the failure to abide by the court's directive to meet the terms of probation offends the dignity of the court," total confinement for a probation violation "requires more than merely an affront to the court's authority." *Id.* at 601-02. A total confinement sentence, instead, is appropriate only when it is "essential" to vindicate the authority of the court. *Id.* at 602 (quoting former 18 Pa. C.S. §1371(c)). As the Supreme Court further explained,

"[t]o ignore [the defendant's] efforts in his own behalf and act solely on the basis of his failure to comply the court's directive, would place form over substance." *Id.*

The order of total confinement here is contrary to *Cottle's* holdings and admonitions in multiple ways. The order—based only on Judge Brinkley's view that Mr. Williams had "thumbed his nose" her—ignores his commendable efforts to rehabilitate himself, including overcoming a drug problem, his steady and enormously successful employment, his remaining crime-free throughout his twenties, and the recommendations of the Probation Office and the District Attorney's Office against prison time. The order of total confinement was far from "essential" to vindicate the authority of the court. Instead, it placed form over substance and ignored the objective that has been achieved by Mr. Williams through his probation. Indeed, this case well illustrates the destructive effect on individuals, on communities, and on our system of criminal justice of excessive periods of probation supervision.[20] After ten years (or less, in truth), the proper response in this case would have been to terminate supervision, *see* 42 Pa.C.S. §9771(a), not to revoke. In any event, Judge Brinkley failed to justify a sentence of total confinement.

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[20] *See, e.g.*, Vincent Schiraldi, *The Pennsylvania Community Corrections Story*, Columbia University Justice Lab (April 25, 2018), https://justicelab.columbia.edu/sites/default/files/content/PACommunityCorrections4.19.18finalv3.pdf; ACLU of Pennsylvania, *Overview: Probation and Parole in PA* (2018), https://www.aclupa.org/files/2415/4878/7087/ACLU-PA_Overview___Probation_and_Parole_in_PA.pdf; Jacobson, Schiraldi, Daly & Hotez, *Less Is More: How Reducing Probation Populations Can Improve Outcomes* (2017), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/less_is_more_final.pdf.

3. The 2 To 4 Year Prison Sentence Was Manifestly Excessive

The Sentencing Code "constrains a sentencing court's discretion in that it requires that any sentence imposed be '*consistent with* the protection of the public, the gravity of the offense[,] … and the rehabilitative needs of the defendant.'" *Commonwealth v. Williams*, 69 A.3d 735, 742 (Pa. Super. 2013) (quoting 42 Pa.C.S. §9721(b)) (emphasis in original). "A sentence that disproportionately punishes a defendant in excess of what is necessary to achieve consistency with the section 9721(b) factors violates the express terms of 42 Pa.C.S. §9721(b)." *Id.* When this Court finds that a probation violation sentence violates the terms of section 9721(b), the proper disposition is to vacate the sentence and remand. *Id.* at 750. This remains the law, even after *Commonwealth v. Pasture*, 107 A.2d 321 (Pa. 2014). *See Commonwealth v. Derry*, 150 A.3d 987, 992–93 (Pa. Super. 2016) (explaining and reaffirming *Commonwealth v. Cartrette*, 83 A.3d 1030, 1042–43 (Pa. Super. 2013) (en banc)).

Here, Judge Brinkley opined that the sentence of 2 to 4 years in prison was not excessive because "this Court has given Defendant numerous chances to rehabilitate himself through house arrest, county probation and parole, and county incarceration" and that "Defendant once again failed to take his sentence seriously and his conduct while on probation indicated that he was not making meaningful progress towards rehabilitation." (Tab A at 41). Judge Brinkley further stated that she "was limited only by the maximum sentence that could have been imposed at the original sentencing." (Tab A at 39). She added that "there is no requirement that this Court impose the 'minimum possible sentence.'" (Tab A at 41).

Judge Brinkley did not account for the technical nature of Mr. Williams' alleged violations; nor did she account for the fact that incarceration is unnecessary here to protect the public. While it may not be legally required to impose the "minimum possible" sentence, *Commonwealth v. Walls*, 926 A.2d 957, 965 (Pa. 2007), the severity of the sentence imposed must nevertheless be consistent with the statutory goals of sentencing. Although Judge Brinkley touched on rehabilitation, she did not address the fact that Mr. Williams completed his detox program and outpatient drug and alcohol treatment to the satisfaction of the Probation Office, as stated in its report to Judge Brinkley. (R.1097a).

Judge Brinkley also did not address the Probation Office's professional conclusion that "Mr. Williams' overall adjustment to our supervision has been within normal limits," that "[h]e has responded well to corrective measures and actively participated in an effort towards behavioral change" (*id.*), and that the probation officer "would be comfortable continuing supervising [Mr. Williams], comfortable being his probation officer and not in prison." (R.415a at 44). Nor did Judge Brinkley address the Assistant District Attorney's conclusion that Mr. Williams "is not the person who was before you back in 2007," that Mr. Williams has been "clean since January of 2017," and that the prosecutor does "not think that they are violations that require the defendant to be incarcerated at this point." (R.438a at 27-28).

Judge Brinkley's sentence was manifestly excessive in light of the considerations of subsection 9721(b)—that is, protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. This Court has vacated sentences and remanded under similar circumstances. Notably, in *Commonwealth v.*

Palrante, 823 A.2d 927 (Pa. Super. 2003), where a trial judge revoked probation and sentenced the defendant to a substantial amount of prison time, this Court vacated the sentence because "[t]he record indicate[d] that the trial court failed to consider [the defendant's] age, family history, rehabilitative needs, the pre-sentence report or the fact that all of her offenses were non-violent in nature and that her last two probation violations were purely technical." *Id.* at 930-31; *see also Ferguson*, 893 A.2d at 740.

In short, Judge Brinkley's 2 to 4 year prison sentence was manifestly excessive.

4. Judge Brinkley's Approach To Mr. Williams' Sentencing Struck A Tone Of Advocacy Rather Than Dispassionate Reflection

A probation violation sentence will be rejected if the sentencing court's approach to the sentence "is infused with 'partiality, prejudice, bias or ill will.'" *Williams*, 69 A.3d at 742 (quoting *Commonwealth v. Rodda*, 723 A.2d 212, 214 (Pa. Super. 1999)). "Because of the tremendous discretion a judge has when sentencing, 'a defendant is entitled to sentencing by a judge whose impartiality cannot reasonably be questioned.'" *Commonwealth v. Druce*, 848 A.2d 104, 108 (Pa. 2004) (quoting *Darush*, 459 A.2d at 732). "'A tribunal is either fair or unfair. There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings.'" *Id.* (quoting *McFall*, 617 A.2d at 714). If the trial court's remarks, viewed collectively, "strike a tone of advocacy rather than dispassionate reflection," then the sentence cannot stand. *Williams*, 69 A.3d at 744.

Here, for all of the reasons discussed above, §II, *supra*, Judge Brinkley's approach to Mr. Williams' sentencing struck a tone of advocacy and gave the appearance of prejudice. Rather than acting as an impartial factfinder and adjudicator, Judge Brinkley took an unseemly personal interest in the details of Mr. Williams' life and career, with a resulting personal response to his perceived failures to satisfy her subjective preferences and expectations. Accordingly, Judge Brinkley's approach was infused with the appearance of prejudice.

5. Judge Brinkley Failed To Make Particularized Findings And Conclusions On The Record In Open Court

The Rules of Criminal Procedure and the Sentencing Code require, in every case where there is a revocation of probation, that the court make "a finding of record that the defendant violated a condition of probation," Pa.R.Crim.P. 708(B)(2), and that "the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed." 42 Pa.C.S. §9721(b). As this Court has recognized, the trial judge's stated reasons for revoking probation "should reflect the judge's consideration not only of those sentencing criteria enumerated in the Sentencing Code but also the circumstances of the offense and the character of the offender." *Commonwealth v. Gaus*, 446 A.2d 661, 664 (Pa. Super. 1982) (citation and internal punctuation omitted). This requirement acts as a "safeguard against arbitrary decisions and prevent[s] consideration of improper and irrelevant factors." *Commonwealth v. Riggins*, 377 A.2d 140, 147 (Pa. 1977). If this Court determines that a trial court has failed to articulate properly

the reasons for the particular sentence imposed, then it will vacate the sentence and remand. *Gaus*, 446 A.2d at 665.

In her written opinion, Judge Brinkley stated that an explanation "need not be lengthy where it is obvious that the probationer is not in compliance with the terms and conditions of his sentence" and that she sufficiently provided reasons on the record when she stated as follows:

> I appreciate everything that you said, but I have been trying to help you since 2009 […] and every time I do more and more and more to give you break after break after break to help you, you, basically, thumb your nose at me and just do what you want the way you want. So, I have to— I'm going to give you a sentence of incarceration. This sentence is absolutely necessary to vindicate the authority of this Court. The record will reflect over all of these sessions, all of these VOP hearings, all of the opportunities I've given you to try to address your issues, that each and every time you've done something that indicates that you have no respect for this Court.

(Tab A at 46-47 (quoting R.450a at 74)).

It is impossible to decipher from this passage whether Judge Brinkley considered only legitimate factors in reaching her sentencing decision. *Riggins*, 377 A.2d at 147. The problem is exacerbated by the fact that Judge Brinkley, only moments before issuing her decision, had chastised Mr. Williams based on what she saw during her "surprise visit" to his community service site, which would be an obvious improper (an previously undisclosed) basis for a sentencing decision. (R.448a-450a at 68-74).

Judge Brinkley thus failed to make particularized findings and conclusions on the record in open court.

For all these reasons, Judge Brinkley violated the governing rules and statutes, and abused her discretion in revoking probation and sentencing Mr. Williams to 2 to 4 years in state prison. This Court should reverse Judge Brinkley's November 6, 2017 sentence.

CONCLUSION

This Court should reverse Judge Brinkley's June 25, 2018 order denying PCRA relief and direct that Mr. Williams' PCRA petition be granted. In addition, this Court should remove Judge Brinkley. Accordingly, any re-trial must be assigned to a different judge. Even if the Court does not direct that the PCRA petition be granted, it should vacate Judge Brinkley's order denying PCRA relief—either because it amounts to reversible error, or because it was entered by a judge who should have been disqualified—and remand for PCRA proceedings before a different judge. At a minimum, this Court should reverse Judge Brinkley's November 6, 2017 finding of probation violations and direct any new proceedings to be held before a different judge.

Respectfully submitted,

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Dated: March 25, 2019

Counsel for Robert Williams

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify pursuant to Pa.R.A.P. 127 that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify pursuant to Pa.R.A.P. 2135(d) that this filing complies with the word limit of 22,500 ordered by this Court on February 1, 2019, because it contains 22,357 words.

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PROOF OF SERVICE

I hereby certify that I am this 25th day of March, 2019, serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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Tab A

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OF PENNSYLVANIA

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	**CP-51-CR-00011614-2007**
	:	
vs.		
ROBERT WILLIAMS	:	**SUPERIOR COURT** **133 EDM 2017**

CP-51-CR-0011614-2007 Comm. v. Williams, Robert
Opinion

OPINION

BRINKLEY, J. **MARCH 29, 2018**

Defendant Robert Williams appeared before this Court for a violation of probation hearing. This Court found him to be in technical violation of his probation for the fifth time and, as a result, revoked his probation and sentenced him to a term of 2 to 4 years state incarceration. Following Defendant's sentencing, he filed several motions for recusal which raised various untimely and unmeritorious claims of impropriety in an attempt to unfairly judge shop. Defendant appealed his judgment of sentence and raised the following issues on appeal: (1) whether this Court improperly failed to recuse herself from this matter and "erred in failing at any time to act upon any of defendant's motions for recusal, filed November 14, 2017, December 4, 2017, and February 12, 2018; (2) whether Defendant received proper notice of the alleged probation violations prior to the violation of probation hearing; (3) whether the evidence was sufficient to find Defendant in technical violation of his probation; (4) whether the sentence

imposed was manifestly excessive and whether this Court properly sentenced Defendant to a term of total confinement; and (5) whether the Court stated sufficient reasons on the record for the sentence imposed. This Court's judgment of sentence should be affirmed.

PROCEDURAL HISTORY AND FACTS

On or about January 23, 2007, Defendant was observed by undercover officers P.O. Sonia Jones and P.O. Reginald Graham selling crack cocaine to a confidential informant at the corner of 22nd and Jackson Streets in the city of Philadelphia, after which Defendant rode away on a dirt bike and entered a residence at 2204 South Hemberger Street. He had been observed earlier that day entering the residence with a key. After obtaining a search warrant for the residence, undercover officers returned to the residence the next day.

On January 24, 2007, after observing another drug sale to a confidential informant by a co-defendant, numerous backup officers were called to the scene. Upon arrival, Defendant, who was seen exciting the front of the location, produced a gun, hid behind a car, and pointed the gun at officers. After police repeatedly shouted, "Police, drop the gun," Defendant took off running, holding his waistband with police chasing him. He was caught crouching between two cars, handcuffed, and arrested. From between the cars, police recovered a loaded gun. (N.T. 8/19/2008, p. 44-51).

Upon execution of the search warrant, police recovered illegal drugs throughout the residence. In a second floor rear bedroom, in which numerous photographs of Defendant were found, police recovered 13 red packets and 13 clear jars with purple tops of marijuana, 128 grams of marijuana in a clear Ziploc baggy and $6,808.00 in US currency. From the dining room table, police recovered 6 grams of marijuana and a black gun holster. From the basement, police recovered 11 grams of crack cocaine in one clear baggy and a black bag that contained 213

grams of marijuana, as well as a variety of drug paraphernalia, including plates, razor blades covered in a white powdery residue, new and unused clear plastic packets, clear jars with purple tops, and a box of Remington .40 caliber bullets. The gun, which was recovered from Defendant's hiding spot between two cars when he was chased by police officers, was a 9mm Luger semi-automatic, loaded with 8 live rounds, with an obliterated serial number. This firearm was test-fired and found to be operable. From Defendant's person, police recovered $45 US currency and a clear packet containing 21 clear packets of marijuana. Id.

At trial on August 19, 2008, based upon evidence in the record and Defendant's own testimony to being in possession of a loaded weapon and carrying it concealed upon his person without a license, Defendant was found guilty of possession with intent to deliver a controlled substance (PWID); two violations of the Uniform Firearms Act (VUFA): Carrying a Firearm Without a License § 6106, and Carrying a Firearm in a Public Place in Philadelphia, § 6108; possession of an instrument of crime; possession of a loaded weapon; knowing and intentional possession of a controlled substance, and simple assault. Id. at 80, 118, 122-123. Sentencing was deferred until January 16, 2009, at which time he was sentenced to an aggregate sentence of 11 ½ to 23 months county incarceration plus 10 years reporting probation.[1] Defendant was ordered to receive drug treatment while in jail, and upon release, earn his GED, seek and maintain employment, and pay mandatory court costs and fees. (N.T. 1/16/2009, p. 93-95). After serving only six months of his sentence, Defendant was paroled to house arrest. Upon completion of six months on house arrest, Defendant continued on parole and probation. On January 13, 2011, Defendant tested positive for opiate use; however, Defendant was allowed to continue on probation/parole. (N.T. 2/11/2011, p. 5-7). On November 30, 2011, Defendant tested positive

[1] Even though Defendant was arrested while in possession of drugs and was seen tossing a gun, and was subject to then existing drug/gun state mandatory sentencing laws, he was sentenced to only a county sentence.

again for opiate use. He was found to be in technical violation on December 9, 2011. Once again, Defendant was permitted to continue on probation/parole. (N.T. 12/9/2011, p. 3-16).

Subsequently, Defendant was stopped in Philadelphia on October 31, 2012 while operating a Range Rover with illegally tinted windows. Upon exiting their vehicle, police smelled a strong odor of marijuana emanating from the vehicle. One passenger admitted to carrying a weapon and was later found to be an off duty police officer from Florida with a Florida license to carry a weapon. Police obtained a search warrant after K-9 police dogs were called to the scene and alerted to the exterior of the vehicle. Upon search, no contraband was located and a written warning was issued for the dark tinted windows. This stop later became the subject of a Federal lawsuit in which Defendant claimed mistreatment by the Philadelphia Police Department. This lawsuit resulted in a defense verdict. (See Police Report 10/31/2012).

On March 15, 2013, Defendant was found in technical violation for the second time for traveling outside Philadelphia County without permission. Defendant was allowed to continue on probation. (N.T. 3/15/2013). On July 11, 2014, Defendant was found in technical violation for the third time for failing to report to his probation officer, making unauthorized travel plans, and ignoring this Court's orders. Defendant was sentenced to an aggregate term of 3 to 6 months county incarceration plus 5 years reporting probation. (N.T. 7/11/2014, p. 159-195). Defendant was granted parole on December 1, 2014. On December 10, 2015, Defendant was found to be in technical violation for the fourth time for providing a sample of cold water instead of actual urine for drug screen, traveling without permission, failing to comply with his travel schedule and the rules relating to his travel vouchers, and failing to report as scheduled to his probation officer. Defendant's probation was revoked and he was sentenced to 6 to 12 months county incarceration

plus 6 years reporting probation, with immediate parole to house arrest. (See Court's Opinion 9/19/2016).

Subsequently, on March 15, 2017, Defendant was arrested in the St. Louis, Missouri Lambert International Airport and charged with assault. It was admitted by Defendant, defense counsel, and Probation Officer Subbio that Defendant was not involved in any altercation until he exited a vehicle in which he was riding from outside the terminal. He then ran inside the terminal and began to stomp on a person who was already on the ground. The charges were later reduced to summary offenses. (N.T. 11/6/2017, VOP Part I, p. 26-28, 60-62, 69, VOP Part II, p. 42). Defendant entered into a negotiated resolution under which he would perform community service.

Thereafter, Defendant was arrested again on or about August 16, 2017 and originally charged with felony reckless endangerment (of the first degree), arising from engaging in riding an all-terrain vehicle (ATV) in the middle of traffic while in New York City, creating a dangerous situation for the citizens of New York. Eventually, those charges were reduced to misdemeanor reckless endangerment (of the second degree). Defendant entered into a negotiated resolution under which he would perform community service. (N.T. 11/6/2017, VOP Part II p. 47-51).

Following Defendant's arrest in St. Louis in March 2017, Assistant District Attorney, Marian Braccia, requested that this Court schedule a violation of probation hearing. This Court declined to do so at that time and instead postponed scheduling a hearing until the matter in St. Louis was resolved. As outlined above, Defendant thereafter incurred a second arrest in New York City in August 2017, for which Defendant entered into a negotiated arrangement ultimately resolving the matter in April 2018.

On November 6, 2017, Defendant appeared before this Court for a violation of probation hearing. Recently assigned Assistant District Attorney, Jennifer Hoffman, appeared on behalf of the Commonwealth for the first time with respect to this matter. Defendant was represented by his newest and most recently retained counsel Brian McMonagle, Esquire. First, this Court reviewed Defendant's criminal history dating back to 2007 and his behavior while serving probation.

Next, Kathleen Subbio, Deputy Chief Montgomery County adult probation officer, testified. She stated that she began supervising Defendant on January 8, 2017, after he completed the house arrest portion of his sentence. She testified that she never received any information regarding Defendant's four (4) prior violations of probation. (N.T. 11/6/2017, VOP Part I, p. 15, 29-30). She testified that on January 9, 2017, she and Josh Mangle, Montgomery County probation supervisor, conducted a scheduled visit to Defendant at his home. Upon entering his living room she observed a packet of "Fast Flush" capsules on the sofa table. Supervisor Mangle proceeded to secure a urine sample. (N.T. 11/6/2017, VOP Part I, p. 47-48). It tested positive for oxycodone. Defendant reported to the probation office later that day and met with Subbio, Mangle, and Mike Gordon, the chief probation officer, at which time he admitted to ingesting Percocet. Subbio testified that Defendant originally agreed to enter inpatient drug treatment, but then decided to do in-home detoxification with a recovery coach in Atlanta. Subbio stated that Defendant told her the recovery coach was too expensive, so they agreed to have him return to Montgomery County and receive outpatient drug treatment, which he did. Subbio testified that Defendant did not test positive for any drugs after he entered treatment. She stated that, in her opinion, while there had been "certainly, a few hiccups, I guess, to say the least," Defendant was "meeting expectations." (N.T. 11/6/2017, VOP Part I, p. 14-18).

Probation supervisor Josh Mangle testified next. He stated that he supervised the house arrest portion of Defendant's sentence after the matter was transferred to Montgomery County in February 2016. Mangle supervised Defendant from February 28, 2016 until January 8, 2017. Mangle stated that he visited Defendant at his home approximately every 10 days and tested his urine for illegal substances. He testified that on March 4 and March 8, 2016, Defendant made unauthorized stops to and from community service. Mangle testified that he visited Defendant's home on January 9, 2017 and that he collected the urine sample that tested positive for oxycodone. He stated that at first Defendant denied any drug use, but then admitted that he was using Percocet and that he had been hiding an ongoing drug problem for years. Id. at 44-54.

Michael Brinkley, a representative of Defendant's management company ROC Nation, and no relationship to this Court, testified next. He stated he had been working with Defendant since early August 2017. The Court inquired why a performance originally scheduled at Syracuse University on September 24, 2017 was rescheduled for November 4, 2017 because both dates were well-after the August 17, 2017 order prohibiting travel or performances until further order of the Court. He stated he believed Defendant was free to schedule performances once the cases in St. Louis and New York were resolved and did not consider the meaning of the Court's order prohibiting travel and performances "until further order of the Court." Mr. Brinkley acknowledged that Defendant's management continued to promote performances through the date of this hearing. Id. at 93.

Next, the parties stipulated to the testimony of Clinton Saunders. Mr. Saunders was employed by MIH Enterprises as Defendant's booking agent. They stipulated that he would testify that "no scheduling of new shows was done after the Court's second order, which was in September." (N.T. 11/6/2017, VOP Part II, p. 4). The Court asked the parties to clarify which

order this referenced. The parties were unable to determine a date or produce a copy of that order. To clarify the stipulation, Clinton Saunders subsequently testified that he remembered making contracts in July with the schools where Defendant was scheduled to perform in September. However, the agreements were verbal so there were no email or written documents that could confirm the dates. He testified that it was his practice to call schools two weeks prior to a scheduled performance to let the school know "there's a chance that [Defendant] might not be allowed to perform there" and offer to replace Defendant with another performer. He stated, "My communication was exactly what you said in the e-mail, that he cannot perform until after the cases in St. Louis and the New York case, which was October 12th." Id. at 17. The Court reminded the witness that the order said "until further order of the Court."

The Court then heard the argument of defense counsel. He argued that Defendant had been battling drug addiction and was spending large sums of money to combat his issue. He argued that with respect to the altercation at St. Louis International Airport, Defendant was merely jumping into a fight to protect a friend who was being "sucker punched."

Defense counsel also argued that Defendant's decision not to go to Greece and then not to inform this Court or the probation department was not out of "disrespect", but rather was because he "could not pull it off." He further argued that Defendant did not intend to perform while he was in Philadelphia instead of Greece, but a friend invited him to perform at a party and he obliged. Defense counsel noted that Defendant did not attend the approximately 15 performances that were scheduled in this time and argued that the goal for Defendant, after cutting his latest album, was to go to work and perform. The Court noted, "But if you can't go, you can't schedule it like you are going to go and tell members of the general public, in those

locations, that you are coming and then tell them, after they have bought their tickets, that they are not coming." Id. at 89.

Defense counsel further argued that when Defendant was in New York riding the motorbike and doing wheelies, it was only because of his celebrity status that he was arrested and charged with a felony. Defense counsel argued that once the authorities in New York took a closer look at the facts, they agreed to put Defendant into a diversionary program. He argued that Defendant never intended to disrespect the Court, but that it was difficult to build a career as a performer while on probation. Id. at 64-65, 100.

Defendant was found in technical violation of this Court's order for reasons including testing positive for drugs after this Court extended numerous opportunities for treatment, traveling and scheduling travel in violation of this Court's order, staying in Philadelphia when he was supposed to go to Greece and not advising anyone of his proposed change in schedule, using Fast Flush to wash his urine, scheduling drug detoxification in Atlanta without first properly notifying the Court, and engaging in activity in St. Louis and New York which endangered the safety of citizens in those jurisdictions and which indicated that Defendant was no longer suitable for probation. The Court expressed a recognized pattern of Defendant going to public events and taking the stage to perform, which occurred at both the party at the Crystal Tea Room and at the Made In America concert, which events were not listed on his travel schedule. The Court described it "as a constant problem" that has been going on for years. Defense counsel argued there are a lot of people Defendant has to notify before performing and added, "I just think of the things that we deal with every day, [this is one] of the things that we shouldn't be, I don't know, losing sleep over." Id. at 73. The Court stated that Defendant was required to notify the probation department and the District Attorney at least 72-hours ahead of a

performance because serious safety issues arose in the past from an unscheduled performance and police inability to handle crowd control. The Court then proceeded to sentencing.

At sentencing, Michael Rubin, the founder and CEO of Fanatics, Rue La La, and ShopRunner as well as a co-owner of the Philadelphia 76ers, testified on behalf of Defendant. He testified that he asked to be called to speak on behalf of Defendant. He stated that he met Defendant about four years prior at a basketball game and they became friends. He stated that he believed Defendant had a lot of potential and could make a big difference in the world. He described Defendant as kind to fans and "just so nice to everybody." Id. at 22-26.

Defense counsel introduced letters from Shawn Carter (p/k/a Jay-Z) and Michael Rubin, on behalf of Defendant which both stated, in different ways, that the Court had as much to do with Defendant's opportunity to build his future as anybody. Defense counsel argued that Defendant rescheduled cancelled performances in an attempt to comply with the Court's orders and protect Defendant's reputation and that this was done in the hope that Defendant would be able to meet the future obligations. Id. at 92, 100.

Defense counsel, who had been involved in the case for a week, recommended continuing probation in order to give Defendant a chance to continue to try to grow his career and improve as a person. He emphasized that Defendant must rely on people working for him in order to grow his career and then acknowledged, "[b]ut the ultimate result of what happened here is that they haven't been as good as they should be." Id. at 32.

The Commonwealth then acknowledged that Defendant was in technical violation and was not perfect. However she stated that, from what she was able to read that day and the testimony provided at the hearing, Defendant had grown since his initial arrest. She also stated that she believed the testimony that all representatives of Defendant misunderstood the Court's

orders by overlooking the meaning of "until further order of the Court." Id. at 27-28. Having been assigned to the case for a couple of days, she recommended that probation be continued.

Next, Defendant spoke on his own behalf. He admitted that he was a gun carrying drug dealer. (N.T. 11/6/2017, VOP Part II, p. 46). He admitted to committing crimes stating, "I came to this courtroom as a criminal. I was carrying guns, I was selling weed. I was being a criminal...I came here the minute [*sic*] [admitted] that I had a gun without even pleading [guilty]." Id. He further stated, "When I was in a life of crime, I used to -- when I was arrested by you, I could sit on something when I was in prison and knew that, like, I committed a crime. Even when two officers came in here and said that I pointed a firearm at them, your judgment was, you found me guilty of pointing a firearm at these two officers, which you should." (N.T. 11/6/2017, VOP Part II, p. 58). He stated he is no longer involved in criminal activity, specifically averring that, "I turned away from a life of crime. And when I came in here, I was committing crimes, to sit in jail and keep my sanity knowing that I committed a crime and I had intentions to commit a crime." (N.T. 11/6/2017, VOP Part II, p. 68). Defendant stated that he was addicted to Percocet for years. He stated the embarrassment made it difficult to try to get treatment while hiding it from the public and that detoxifying was the hardest battle of his life. He stated that he stopped rapping about Percocet and now uses his time to tell kids not to take the drug. He stated that in St. Louis, he jumped out of the car and ran back into the airport to try to protect a friend who was like a little brother to him. Defendant stated he tried to ignore the men who were insulting him for not taking a picture with them, but "my instincts kicked in" when he saw his friend getting hit. Growing up, he stated "I had to get aggressive." "I got to protect myself... I got to get involved in activities that I don't want to be in. I got to talk a certain

way, be a certain way around criminal activity I wouldn't be around if I wasn't in this position." Id. at 45-46.

Defendant also admitted to having a long history of illegally riding ATV bikes, "From state to state, when you let me go on tour, I always had bikes on the back of my tour bus. I rode state to state. The most thing we ever got is a ticket." (N.T. 11/6/2017, VOP part II, p. 50). Defendant stated that he quit riding bikes after the arrest in New York. Defendant explained that he loved riding bikes because it was a safe place for black boys and men to put their differences aside and come together. He stated that he went into rough neighborhoods while riding bikes where other celebrities would not go. "My whole image is dream chasing. I'm based off of coming in contact with people. If I don't come in contact with people, my music wouldn't even resonate the way it resonates." Id. at 49. He stated he popped a wheelie on a bike after a charity event and was arrested a few days later. He stated he took a deal to reduce the charge from an F1 felony by taking a driving class online.

Defendant asked the Court for leniency. Defendant stated he did not see most of the e-mails sent between the Court, his attorneys, and the District Attorney's Office. He acknowledged, "I may have been wrong for even letting [the booking agent] attempt to try to rebook anything, but we're just trying to survive." Id. at 54. He stated he has worked hard to succeed in his career because a lot of people depend on him and the odds were against him from the beginning. He stated it is hard for him as a celebrity to get a regular job because he has to worry about protecting his life. He asked the Court not to take away his ladder to success because he was working hard. "I feel like you showed no [*sic*] favor towards me, I feel like you took a chance with me, and you put some type of dedication into seeing me win, as you probably did with [other defendants]." Id. at 62. Defendant said performing at Made In America was a

once-in-a-lifetime opportunity. When Jay-Z asked him to perform in Philadelphia, he jumped at the opportunity. He also described pressure to sing at a charitable event at the Crystal Tea Room hosted by Dion Waiters because the crowd cheered and his latest album had just come out, even though he had told the Court that he was travelling to Greece on a private airplane.

Defendant next described his charity work by describing the Court-mandated charity with veterans' groups as impactful. He stated that he also gave meals to the homeless. The Court reminded Defendant that she once toured his community service location at Broad Street Ministries and a supervisor told her that Defendant chose to sort clothing rather than serve food to the homeless, and that Defendant only served meals after he realized Judge Brinkley was there taking a tour. Defendant also described a different event where he walked around downtown Philadelphia passing out meals. "I put my life on the line, walking around in the streets knowing that a random person could approach me. I walked into some of these homeless people who got knives on them and they talking to us disrespectful, only taking… food." Id. at 72-73.

After listening to the testimony and considering the facts of record, the Court sentenced Defendant to 2 to 4 years incarceration. The Court stated that this sentence is absolutely necessary to vindicate the authority of the Court. "The record will reflect over all of these sessions, all of these VOP hearings, all of the opportunities I've given you to try to address your issues, that each and every time you've done something that indicates that you have no respect for this Court." Id. at 74. The Court stated she appreciated the work both attorneys did for this hearing because both defense counsel and attorney for the Commonwealth came on to this case within the last week. She noted, however, that defense counsel's argument that Defendant was turning the corner was the exact same argument that prior defense counsel made at the last hearing in February 2016. Id. at 75-76.

On November 14, 2017, Defendant filed a Motion for Recusal. On November 15, 2017, Defendant filed a Motion to Modify Sentence. On November 16, 2017, Defendant filed a Motion for Bail pending post-trial motions stating that no hearing was required.[2] On November 27, 2017, Defendant filed an Emergency Petition for an Original Writ of Habeas Corpus with the Superior Court. On November 28, 2017, the Superior Court denied Defendant's Emergency Habeas Corpus Petition because his Motion for Bail was still pending and directed this Court to enter a disposition of Defendant's Motion for Bail.

Four days later, on December 1, 2017, this Court issued an Order and Opinion denying Defendant's Motion for Bail. On December 6, 2017, Defendant filed a Notice of Appeal with the Superior Court which included a request for the notes of testimony from the *in camera* portion of the February 6, 2016 sentencing hearing. On January 26, 2018, upon notes of testimony being transcribed and posted to the Court Reporting System, including the formerly sealed notes from the *in camera* portion of the hearing, this Court ordered that Defendant file a Concise Statement of Errors Complained of on Appeal Pursuant to Pa.R.A.P. 1925(b). Defendant, through counsel, did so on February 16, 2018.

ISSUES

I. WHETHER THIS COURT IMPROPERLY FAILED TO RECUSE HERSELF FROM THIS MATTER AND "ERRED IN FAILING AT ANY TIME TO ACT UPON ANY OF DEFENDANT'S MOTIONS FOR RECUSAL, FILED NOVEMBER 14, 2017, DECEMBER 4, 2017, AND FEBRUARY 12, 2018.

II. WHETHER DEFENDANT RECEIVED PROPER NOTICE OF THE ALLEGED PROBATION VIOLATIONS PRIOR TO THE VIOLATION OF PROBATION HEARING.

[2]On November 17, 2017, a bail hearing was listed in error for November 27, 2017, but was immediately cancelled as a result of the clerical error. Defendant never requested a hearing, to the contrary, he stated that a hearing was not necessary. *See* Defendant's Motion for Bail, 11/16/2017, p. 8; Defendant's Emergency Petition for an Original Writ of Habeas Corpus, 11/27/2017, p. 14.

III. WHETHER THE EVIDENCE WAS SUFFICIENT TO FIND DEFENDANT IN TECHNICAL VIOLATION OF HIS PROBATION.

IV. WHETHER THE SENTENCE IMPOSED WAS MANIFESTLY EXCESSIVE AND WHETHER THIS COURT PROPERLY SENTENCED DEFENDANT TO A TERM OF TOTAL CONFINEMENT.

V. WHETHER THE COURT STATED SUFFICIENT REASONS ON THE RECORD FOR THE SENTENCE IMPOSED.

DISCUSSION

I. THIS COURT COMMITTED NO ERROR WHEN IT DID NOT ACT UPON DEFENDANT'S MOTIONS FOR RECUSAL.

Defendant claims that this Court should have recused herself from presiding over this matter and "erred in failing at any time to act upon any of the defendant's motions for recusal, filed November 14, 2017, December 4, 2017, and February 12, 2018." (Defendant's Statement of Matters Complained of on Appeal, 2/16/2018). This Court committed no error and no relief is due. The motions for recusal were untimely and all issues contained therein were waived. Moreover, this Court lacked jurisdiction to consider said motions for recusal as Defendant filed a Notice of Appeal on December 6, 2017 and the Superior Court assumed jurisdiction on that date. Last, even if these motions could be deemed timely and this Court had proper jurisdiction to decide these motions, there was no basis for this Court's recusal.

a. After Defendant filed his Notice of Appeal, this Court lacked jurisdiction to rule on Defendant's Motions for Recusal.

First, this Court did not err by failing to act upon the defendant's motions for recusal. Pursuant to Pa.R.Crim.P. Rule 720(B)(3)(a), the Court shall rule on a post-sentence motion within 120 days of the filing of the motion. If a decision is not made within 120 days, the motion will be considered denied by operation of law. However, pursuant to Pa. R. Crim. P. 708, this rule does not apply to a post-sentence motion following a violation of probation sentence. The

Court has jurisdiction to decide the motion only within 30 days from the date of sentence. Commonwealth v. Swope, 123 A.3d 333, 337 n. 16 (Pa. Super. 2015). Defendant was sentenced on November 6, 2017. Defendant filed his first motion for recusal on November 14, 2017. The deadline for making a decision on this motion was therefore December 6, 2017. The second motion for recusal was filed December 4, 2017; this Court had until December 6, 2017 to rule, at which point the court's jurisdiction was extinguished. Likewise, under Pa.R.A.P. 1701, this Court's jurisdiction ended when the Defendant's appeal was filed and thus, this Court was no longer able to proceed further on those matters. See also Commonwealth v. Ledoux, 768 A.2d 1124 (Pa.Super.2001) (citing Commonwealth v. Miller, 715 A.2d 1203, 1205 (Pa.Super. 1998)) ("Jurisdiction is vested in the Superior Court upon the filing of a timely notice of appeal"). Thus, once Defendant filed his Notice of Appeal on December 6, 2017, this Court no longer had jurisdiction in this matter and was unable to rule on any of the motions for recusal in connection with Defendant's direct appeal of his violation sentence.[3]

b. Defendant's Motions for Recusal were untimely.

Even if this Court retained jurisdiction to rule on these motions, no relief is due as the motions for recusal were untimely filed since all facts which formed bases for Defendant's motions were known to Defendant prior to the violation of probation hearing. "The case law in this Commonwealth is clear and of long standing; it requires a party seeking recusal or disqualification to raise the objection at the earliest possible moment, or that party will suffer the consequence of being time barred." Lomas v. Kravitz, 170 A.3d 380 (Pa. 2017) (quoting

[3] To the extent that Defendant's Supplemental Motion for Recusal filed on February 12, 2018 might be considered timely and not barred by the assumption of jurisdiction of the Superior Court, it requests that this Court recuse from filing a 1925(a) Opinion as if the court had resigned from the bench, become disabled, retired, or otherwise become unavailable, and a different jurist should prepare this Court's Opinion in this case. This suggested posture lacks any basis in caselaw or reality. If, however, the Superior Court determines that a separate decision on Defendant's third "Supplemental" Motion for Recusal should be entered, the Court will enter an Order. However, Defendant's recusal issues are addressed in this Opinion.

Goodheart v. Casey, 565 A.2d 757, 763 (Pa. 1989) (citing Reilly by Reilly v. SEPTA, 489 A.2d 1291 (Pa. 1985)). The earliest possible moment is "when the party knows of the facts that form the basis for a motion to recuse." Id. at 390. "Where the asserted impediment [to a jurist deciding a case] is known to the party, and that party fails to promptly direct the attention of the jurist to that fact, the objection is waived and the party may not subsequently offer the objection as a basis for invalidating the judgment." Id. (quoting Goodheart, 565 A.2d at 764). If a party fails to raise an objection when the facts were already known, the "jurist, under such circumstances, may properly assume that the lack of objection by the litigants reflects the appropriateness of his or her participation." Id. Allowing a motion for recusal to remain timely post-verdict would create a loophole wherein a defendant with an unfavorable result could seek to have the judge disqualified, thus creating an unfair judge shopping opportunity. Goodheart, 565 A.2d at 763.

In the case at bar, Defendant's motions for recusal were untimely and therefore all issues were waived. The record reflects that Defendant filed his first motion for recusal on November 14, 2017. This was 8 days after this Court conducted a violation of probation hearing, found Defendant in technical violation, and sentenced him to 2 to 4 years state incarceration. In his motion, Defendant argued that this Court should recuse itself "from considering and ruling on [a timely motion under Pa.R.Crim.P. 708E for reconsideration and modification of his sentence] and from any further adjudicatory role in this case." (Defendant's Motion for Recusal of the Hon. Genece E. Brinkley, J., 11/14/2017). In support of his motion to recuse, Defendant claimed that this Court "personally revis[ed] and greatly expand[ed] the assigned Probation Officer's summary report;" "personally visited the community service site where [Defendant] was assigned to serve the homeless;" "directed the parties and the Probation Office to include former Assistant District Attorney DeSantis, who handled prior violation hearings, as a recipient of

notices and communications concerning [Defendant];" "repeatedly offered inappropriate personal and professional advice to the defendant," including suggesting that he "break his contract with his present professional management;" "invited the defendant and his then-girlfriend (Onika Maraj, p/k/a Nicki Minaj, also a prominent musical performer) into chambers" at the conclusion of the February 5, 2016 hearing; "relied on her (understandably imperfect) personal memory when determining whether Defendant was in compliance with the terms and conditions of his probation; and allegedly made improper remarks at several of Defendant's violation of probation hearings by "repeatedly react[ing] and express[ing] herself in personal, injudicious terms" dating back to proceedings that took place in 2012. Id. First, there is no evidence in the record for many of these alleged bases for recusal. Second, if any evidence possibly exists, it was known to Defendant prior to his November 6, 2017 violation of probation hearing. Third, if Defendant believed that this conduct rendered this Court unable to impartially adjudicate his case, he should have filed a motion for recusal long before November 14, 2017. Indeed, none of these alleged actions were new, as Defendant cited to remarks this Court made on the record as far back as 2012. Rather, Defendant waited to file a motion for recusal until **after** his November 6, 2017 violation of probation hearing **after** he had an unfavorable result, and then filed his motions for recusal in an attempt to unfairly "judge shop."

In his motion for recusal filed December 4, 2017, Defendant claimed an alleged FBI investigation as an "additional supporting factor supporting recusal." He claimed that he is aware of when this Court learned of the investigation after the November 6, 2017 hearing and that this "raises further doubt as to her ability to preside impartially." To the contrary, there is no evidence to support any of these claims. There is zero evidence that there was ever any FBI investigation. This Court was never directly informed of any past or ongoing investigation by the

FBI. This entirely self-serving and baseless allegation apparently was fabricated either by Defendant himself and/or others on his behalf and cannot be considered "new information" which could possibly form a timely basis for recusal as there is no evidence of any basis in fact or reality.

Furthermore, Defendant argued that he filed his motions for recusal at the earliest possible moment, claiming that none of his allegations of improper conduct would have been sufficient prior to the November 6, 2017 hearing because it was only at that hearing that this Court allegedly conducted an "adversarial" examination of Probation Officer Subbio. To the contrary, this Court's examination of Subbio was not adversarial and the record reflects that Defendant never objected to any of this Court's questioning of Subbio during the violation hearing. There is nothing from the record that indicates that this Court asking a witness questions during a hearing, which this Court is permitted to do, makes the hearing adversarial and thus would warrant this Court's recusal.

Defendant further claims that this Court cited her visit to Defendant's community service locale as a basis for his technical violation and that this, too, was "new" information that tipped the scales in favor of recusal. This claim is also without merit. First, Defendant already was aware of this Court's tour of the community service site prior to the violation hearing since he saw her there himself. Second, the record clearly shows that this Court did not state that Defendant's conduct at that particular community service location was a reason for finding him in technical violation. Indeed, Defendant was given full credit for the hours he spent in service at this organization. While this Court did discuss Defendant's conduct at the homeless location in response to Defendant's remarks regarding his community outreach efforts, it was not listed as a reason for revocation. Rather, this Court specifically stated that the reasons she found Defendant

in technical violation were contained, in part, in Probation Officer Subbio's summary letter, including "testing positive for drugs after this Court has extended numerous opportunities for treatment;" "traveling and scheduling travel in violation of this Court's order," including "staying in Philadelphia when he's supposed to be in Greece and not telling anybody;" "the use of the Fast Flush product to wash the urine," which was an ongoing issue since Defendant had previously given the Probation Department a sample of cold water instead of urine; picking up "two new cases...one in St. Louis, one in New York. Those are not direct violations, but the activity engaged in results in what I believe to be conduct which may mean he's not suitable for probation status anymore." (N.T. 11/6/2017, VOP Part II, p. 18-20). Based upon the foregoing, Defendant's motions for recusal were untimely.

c. Defendant's Motions for Recusal were without merit.

Last, even if the motions for recusal were timely and this Court had jurisdiction to act upon them, no relief is due as this Court has not engaged in any conduct that would require recusal. The standard of review for a denial of recusal is well settled. The Pennsylvania Supreme Court "presumes judges of this Commonwealth are 'honorable, fair and competent,' and when confronted with a recusal demand, have the ability to determine whether they can rule impartially and without prejudice." Commonwealth v. Kearney, 92 A.3d 51 (Pa.Super. 2014) (quoting Commonwealth v. White, 734 A.2d 374, 384 (Pa. 1999)). "The party who asserts a trial judge must be disqualified bears the burden of producing evidence establishing bias, prejudice, or unfairness necessitating recusal, and the 'decision by a judge against whom a plea of prejudice is made will not be disturbed except for an abuse of discretion'." Id. (citing Commonwealth v. Darush, 459 A.2d 727, 731 (Pa. 1983)). "An abuse of discretion is not merely an error of judgment, but occurs only where the law is overridden or misapplied, or the judgment exercised

is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence or the record." Lomas, 170 A.3d at 389 (quoting Zappala v. Brandolini Prop. Mgmt., Inc., 909 A.2d 1272, 1284 (Pa. 2006)). The Pennsylvania Supreme Court has stated:

> As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged. In considering a recusal request, the jurist must first make a conscientious determination of his or her ability to assess the case in an impartial manner, free of personal bias or interest in the outcome. The jurist must then consider whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a personal and unreviewable decision that only the jurist can make. Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice that decision will not be overruled on appeal but for an abuse of discretion.

Commonwealth v. Abu-Jamal, 720 A.2d 79, 89 (Pa. 1998). It is presumed that the judge has the ability to determine whether he or she will be able to rule impartially and without prejudice, and his or her assessment is personal, unreviewable and final. Kearney, *supra*. (citing Commonwealth v. Druce, 848 A.2d 104, 108 (Pa. 2004)).

The Code of Judicial Conduct was adopted by the Pennsylvania Supreme Court for itself and members of the judiciary. According to the Pennsylvania Supreme Court in Reilly by Reilly v. SEPTA, 489 A.2d 1291, 1298 (Pa. 1985):

> [T]he code of Judicial Conduct "does not have the force of substantive law, but imposes standards of conduct upon the judiciary to be referred to by the judge in his self-assessment of whether he should volunteer to recuse from a matter pending before him. The rules do not give standing to others, including Superior Court, to seek compliance or enforcement of the Code because its provisions merely set a norm of conduct for all our judges and do not impose substantive legal duties on them.

In the case at bar, even if Defendant's motions for recusal were timely and even if the Superior Court had not assumed jurisdiction by virtue of his direct appeal, there is no basis for

this Court to recuse itself from any further involvement in this matter. This Court has impartially and without prejudice presided over numerous proceedings in this matter since 2008, long before his current counsel became involved one week before the violation of probation hearing. None of the allegations by Defendant constitute evidence that this Court is unable to act impartially and without personal bias or prejudice with respect to this matter. In his motion for recusal filed November 14, 2017, Defendant alleged numerous grounds for recusal. *See supra*, p. 15-16. None of these allegations are sufficient grounds for recusal. This Court has presided over Defendant's proceedings in an impartial, unbiased manner. Moreover, a series of meritless claims of bias cannot be combined together to create a simple cumulative claim of bias. Commonwealth v. Kearney, 92 A.3d 51, 62 (Pa.Super. 2014). None of Defendant's meritless claims taken independently form a sufficient basis for recusal and neither are they sufficient when combined together.

Significantly, there was nothing improper about this Court providing additional information not specifically included in the probation officer's summary report, but which were contained in numerous e-mails from the same officer. The summary report prepared by Ms. Subbio was insufficient to provide Defendant with adequate notice of the potential violations that would be addressed at the violation hearing. Ms. Subbio's report failed to include many of the potential violations of which this Court became aware through email exchanges with Ms. Subbio and Mr. Mangle. This Court asked Ms. Subbio to include them in her report and she refused. Therefore, in order to provide Defendant with a complete and comprehensive list of the potential violations that had been brought to this Court's attention via email exchanges with his probation officers and which would be addressed at the hearing, this Court prepared a supplementary report

so that Defendant could adequately prepare to address those potential violations. There was nothing improper about this and no recusal is warranted.

Next, Defendant claims that it was improper for this Court to personally visit him at the location where he was performing community service for the homeless. This claim is without merit. This Court, as is true for many other judges in Philadelphia[4], has toured other sites, custodial and noncustodial, to verify that they are appropriate places for her to send defendants. Indeed, this was a scheduled tour with the program managers who took her on a tour of the facility. Her visit did not make her a fact witness, as Defendant alleges. Moreover, he was not penalized in any way for his conduct at the location. He was given full credit for all hours he claimed he performed at the facility at issue. Furthermore, the Court never returned to this community service location and never visited or toured any other location Defendant listed on his schedule for community service. Indeed, it was a **one time** occurrence given the Court's calendar, and Defendant was to perform community service for at least 90 days, six days a week. Therefore, no relief is due.

Defendant claims it was improper for this Court to ask parties to include former Assistant District Attorney Noel DeSantis on email exchanges after she began working at the Attorney General's office. First, there is no evidence that the court "asked" the parties to include former ADA DeSantis on e-mails. However, Ms. DeSantis was very familiar with Defendant's case, as she had overseen it since his sentencing in 2009. She was familiar with his travel protocols and all aspects of his probation. There was nothing improper for Ms. DeSantis, someone with vast experience working with Defendant and the probation department, to remain informed in order to possibly assist the parties as a resource. Moreover, at no time prior to the motion for recusal did

[4] In fact, there is another judge in Philadelphia who routinely performs community service *with* his defendants and is lauded for it. *See* "They performed community service with the judge who sentenced them," Philly Voice, 3/7/2018.

this Court receive any complaints regarding Ms. DeSantis' remaining informed. Indeed, she could have done this simply by reading newspapers and other public documents herself. Therefore, this is not a ground for recusal.

Next, Defendant claims this Court should recuse herself for allegedly asking Defendant and his girlfriend to have a private conversation,[5] wherein this Court allegedly insisted Defendant sing a Boyz II Men song for her and give her a "shout out." This bald allegation has no basis in reality. There is zero evidence to support this claim. There is no record of such a conversation ever taking place and thus no evidence to support this claim. Therefore, this cannot serve as a ground for recusal.

Defendant also claims that this Court offered "inappropriate personal and professional advice," including urging him to change management companies. As discussed in further detail below, this claim is belied by the record. *See infra*, p. 27-28. This Court did not inappropriately try to persuade Defendant to change management companies. This Court has no personal interest in any of Defendant's professional and business matters and has never expressed an interest beyond making sure that Defendant reports as scheduled, abides by his travel protocols, and complied with the terms and conditions of his sentence, like all other probationers. **The court has repeatedly told Defendant that he cannot demand special treatment just because he has chosen to be an entertainer.** (N.T. 11/19/2012, p. 68-70); (N.T. 6/10/2009, p. 18-19).

Defendant further claims that this Court "repeatedly reacted and expressed herself in personal, injudicious terms," by referring to herself in the first person as opposed to the third person. He points to this Court using expressions such as "you thumbed your nose at me," and

[5] Contrary to Defendant's assertions that this Court initiated and requested that Defendant and his then girlfriend, Onika Manaj, meet with her in chambers, this Court did not request the meeting, rather Manaj requested that the meeting occur several times throughout her testimony. (N.T. 12/5/2015, p. 78, 79, 80, 97, 92).

this his behavior was "a slap in my face." None of this creates grounds for recusal. "Judicial remarks during the court of trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." Kearney, 92 A.3d at 61. Expressions of annoyance, disappointment and in some cases, anger, are not valid to establish bias. Id. (quoting Liteky v. US, 510 U.S. 540, 555-56 (1994)). It is not expected for judges to withhold all expressions of personal feelings such as annoyance and disappointment. Id. In the case at bar, there was nothing improper or inappropriate about any of this Court's comments or expressions. Nothing Defendant cites rises above the level of acceptable judicial behavior. Indeed, the Court referred to Defendant "thumbing your nose at this court" numerous times during the many violation hearings occasioned by Defendant's behavior. (N.T. 8/18/2014, p. 80); (N.T. 8/29/2014, p. 16); (N.T. 12/10/2015, p. 8). Moreover, at Defendant's November 6, 2017 VOP hearing, the Court used the terms "this Court" in referring to herself over 30 times. (N.T. 11/6/2017, VOP Part I, p. 5, 6, 7, 10, 11, 12, 13, 43, 55, 99); (N.T. 11/6/2017, VOP Part II, p. 4, 9, 18, 19, 74). Therefore, no relief is due.

Defendant also asserted that this Court had numerous instances of extra-judicial misconduct and that this Court's decisions were "on a basis other than what has been heard in proceedings held in open court." *See* Motion for Recusal, 11/14/2018, p. 6, 10. This Court did not base her decision for revocation on extra-judicial information, rather this Court was clear in stating that, "The record will reflect over all of these sessions, all of these VOP hearings, all of the opportunities I've given you to try to address your issues, that each and every time you've done something that indicates that you have no respect for this Court." (N.T. 11/6/2017, p. 73-74).

The Supreme Court has adopted the extra-judicial source doctrine, maintaining that, "the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). The Supreme Court of Pennsylvania "has also tentatively accepted the extra-judicial source doctrine, noting it is significant if the information at the root of the recusal motion was obtained in a prior proceeding of the case, and not from any pretrial bias or personal disdain." Commonwealth v. Druce, 848 A.2d at 110 (citing Commonwealth v. Boyle, 447 A.2d 250, 252 n. 6 (Pa. 1982)). Simply put, in order to qualify as extra-judicial, information cannot have been obtained through either prior or present case proceedings. Id.

In the case at bar, all of the information considered in the making of this Court's decision was provided to this Court through routine and standard proceedings which took place previously and/or presently in the course of this case. Therefore, Defendant's allegations that this Court based her decision on information obtained independently from internet research and her **one time** tour of Defendant's homeless community service location are false. This Court did question Defendant's witnesses, Mr. Brinkley and Mr. Saunders, as to public appearances that were publicly known, as they were indicated on several of Defendant's travel schedules and were put on the schedule after this Court mandated that Defendant cease all scheduling of future performances. Thus, this Court did not rely on public information in making its decision, but rather relied on the testimony by Mr. Brinkley and Mr. Saunders, representatives of his management company ROC Nation, given at Defendant's hearing, which confirmed the scheduling and/or failure to cancel these appearances post order. This information was therefore not from an extra-judicial source, but from the mouths of the Defendant and his witnesses. (N.T.

11/6/17, VOP Part I, p. 80-82, 94); (N.T. 11/6/2017, VOP Part II, p. 13-15). Therefore, this Court did not use extra-judicial information to bias Defendant in anyway and no relief is due.

With regard to Defendant's Motion for Recusal filed December 6, 2017, Defendant claimed that this Court was under FBI investigation. This claim is entirely without merit. Defendant has not produced a scintilla of evidence that this Court was ever under any investigation. This Court has no knowledge of any alleged investigation other than that which was which was reported in local newspapers which are not evidence. Therefore, Defendant's motion for recusal on these grounds must fail as baseless and unfounded.

With regard to his motion for recusal filed February 12, 2018, Defendant claimed additional bases for this Court's recusal including the unsealing and public release of the February 5, 2016 *in camera* meeting, media reports that this Court had retained private counsel, A. Charles Peruto, Jr., Esquire, to refute Defendant's attack upon her personal integrity, and comments in the media made by Mr. Peruto[6]. Defendant also repeated his claim that this Court improperly urged him to switch professional management companies.

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[6] This Court retaining private counsel is not grounds for recusal. There is no evidence in Defendant's February 12, 2018 Supplemental Motion for Recusal, that support Defendant's allegations that a violations of the Judicial Code occurred. Rule 2.10(a) of the Code of Judicial Conduct states "(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing." *See* 207 Pa. Code Canon 2. Furthermore, Rule 210(e) clarifies that "(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter." Id.

The code is clear that instances involving allegations in the media of a judge's conduct, create an exception to the public statement rule allowing a representative of a judge to issue a comment in response to allegations so long as it does not address the merits of the case or impair the fairness of the matter. In the current instance, this Court personally did not make any statements to the media regarding the matter. To the extent that Mr. Peruto made comments about the case, the comments were not related to the merits of the case and addressed issues related solely to accusations in the media. These accusations were largely unrelated to the case at hand and instead were simply personal attacks. Assertions that Mr. Peruto made statements as to the merits of the case or that would impair the fairness of this Court are belied by the record. Moreover, Defendant attached newspaper articles as his only evidence for Peruto's alleged comments. Newspaper articles are not evidence in any case, and even if they were, the quoted statements in the articles do not indicate that Mr. Peruto directed his comments to anyone in particular.

Last, this Court made the decision to unseal the February 5, 2016 *in camera* notes on or around the time Defendant filed his Notice of Appeal on December 6, 2017. At that time, this Court had not even retained private counsel. Thus, the notes were not released on the advice of counsel.

First, as stated above, Defendant's claim which alleged that this Court urged him to change management companies is patently false and was disproven by the record. The notes of testimony from the February 5, 2016 *in camera* meeting directly belie this claim. These notes confirm that this Court did not force, coerce, or tell Defendant to leave his management at Roc Nation and return to a former manager by the name of Charles Alston, a/k/a/ "Charlie Mack." Indeed, these notes indicate that, not only did Defendant himself complain about his current management, but his attorney Frank DeSimone, Esquire, also complained about Defendant's management. (N.T. 2/5/2016, p. 30-31, 49-50, 53, 62-64, 67). Defendant stated, "Like with ROC Nation, so many people trying to help me with charity, they just juggle things. I tell them I am coming to get my son at four o'clock. It got outrageous... it damaged my life. When I am telling them I have to slow everything down, don't approve nothing until you have say so from me...I try just to organize my life." (N.T. 2/5/2016, p. 30-31). Mr. DeSimone stated, "I agree with Ms. Underwood and Ms. DeSantis. It was chaos. When I got into this, it was chaos. You have to see the E-mails. 15 people involved. Total chaos. This young man needs simple – keep it simple. Structure. That is what he needs...The rules are simple. I don't mean the rules. I mean the people trying to help him. They weren't helping him." (N.T. 2/5/2016, p. 50). These notes also indicate that the assigned probation officer complained of difficulty supervising Defendant under the current management as compared with the lack of problems she had with his former manager. Id. at 19, 23-24, 65-66. Likewise, the assigned district attorney agreed with the assigned probation officer regarding Defendant's performance on probation under his former manager as compared to his current management. Id. at 25, 3-34, 49, 56-57. However, this Court did not make any suggestions regarding Defendant's management. In fact, this Court tried more than once to redirect the conversation away from this topic and refocus the conversation onto Defendant's

allocution, which was the main reason the *in camera* session was held in the first place, and strictly at Defendant's request. Id. at 4, 34, 51, 66.

Furthermore, there was nothing improper about this Court unsealing and releasing these notes of testimony. Defendant repeatedly asked for private access to these notes, a request that this Court previously denied and was the subject of a prior appeal that was affirmed by the Superior Court. However, after Defendant appealed his most recent sentence on or about December 6, 2017 and the content of those sealed notes formed the basis of many of his claims, this Court decided **at that time** to unseal the notes as Defendant would need them to prepare his appellate brief and the Superior Court would require them to have a complete record in order to properly review all of Defendant's claims. Therefore, on January 26, 2018, upon completion of the notes being transcribed, this Court unsealed the notes, allowing them to be obtained by the parties, and issued a 1925(b) Order on that same date.

It should be noted that, in his February 12, 2018 Supplemental Motion for Recusal, Defendant stated that this Court had personally selected Probation Officer Treas Underwood for assignment to this case. *See* Defendant's Supplemental Motion for Recusal, 2/12/2018, p. 3. This statement is belied by the record which shows that at Defendant's November 19, 2012 VOP hearing, ADA DeSantis recommended Ms. Underwood stating, "So at this point, I want the case reassigned to Ms. Treas Underwood, because Your Honor asked for Ms. O'Loughlin and she couldn't do it because she's in House Arrest. So I checked around, and Ms. Underwood can do it, and I think it's only fair, because she's in the domestic violence unit, and she said she'll do it, and she writes three-page summaries." (N.T. 11/19/2012, p. 59-60).

II. DEFENDANT HAD PROPER NOTICE OF ALL POTENTIAL PROBATION VIOLATIONS PRIOR TO HIS PROBATION HEARING.

Defendant claims that he was not served with proper notice of the alleged probation violations prior to the hearing. This claim is entirely without merit. Defendant received a *Gagnon I* letter from his Montgomery County probation officer, Ms. Subbio, which outlined several of his potential violations. He also received a more detailed letter from this Court after Ms. Subbio refused to include certain information which had been provided to the Court in prior e-mails which included all of Defendant's potential violations. The primary purpose of the second letter from the Court was to ensure that Defendant received proper notice of all potential violations that would be addressed at the violation of probation hearing so that Defendant would be able to prepare properly. Thus, Defendant's claim that he had no notice "of what conduct of the defendant was said to constitute the alleged violations of the defendant's probationary term" and that he did not receive any notification "of what condition or conditions of probation were said to be violated by any specified instance of the defendant's alleged conduct" is completely false and belied by the record.

Due process requires that a probationer receive written notice of the claimed probation violations prior to commencement of the revocation hearing. Commonwealth v. Carter, 532 A.2d 779, 781 (Pa. 1987) (quoting Commonwealth v. Quinlan, 258 412 A.2d 494, 496 (Pa. 1980)). Specifically, a probationer must have "written notice of the claimed violations of [probation or] parole" and "disclosure to the [probationer or] parolee of evidence against him." Commonwealth v. Sims, 770 A.2d 346, 349 (Pa.Super. 2001) (citing Commonwealth v. Ferguson, 761 A.2d 613, 617 (Pa.Super. 2000)). The purpose of requiring written notice "is to ensure that the...probationer can sufficiently prepare his case, both against the allegations of violations, and against the argument that the violations, if proved, demonstrate that....probation is no longer an

effective rehabilitative tool and should be revoked...[T]he requirement bears directly on the ability to contest revocation." Carter, 532 A.2d at 781 (quoting Commonwealth v. Perry, 385 A.2d 518, 520 (Pa.Super. 1978)).

In the case at bar, Defendant had sufficient advance notice of the potential violations to be addressed at the violation hearing on November 6, 2017. Defendant was supervised by Kathleen Subbio and Josh Mangle of the Montgomery County Probation Office.[7] Rather than send a *Gagnon I* Probation Summary Report as is typical in Philadelphia County, on October 26, 2017, Ms. Subbio sent all parties a letter that included several alleged violations to be addressed at Defendant's November 6, 2017. In this letter, Ms. Subbio outlined the following potential violations:

1. Two (2) instances of Defendant violating house arrest rules. Specifically, Defendant made additional unauthorized stops while traveling to and from his approved locations on March 4, 2016 and March 8, 2016.
2. On January 9, 2017, Ms. Subbio and her supervisor Mr. Mangle visited Defendant at his home and observed "Fast Flush" capsules on the coffee table.
3. On that same date, January 9, 2017, Defendant's urine was collected and tested positive for Oxycodone.
4. On that same date, January 9, 2017, Defendant reported to the Montgomery County Adult Probation/Parole Department and initially denied any drug use. After further questioning, he admitted to an ongoing substance abuse problem that had been going on for years.

[7] The transfer of his supervision from Philadelphia County to Montgomery County was done in 2016 at Defendant's request.

5. On March 15, 2017, Defendant was charged by the St. Louis International Airport Police Department with Assault (Count I and Count 2). Defendant pled guilty to both charges on September 18, 2016, with the agreement that upon completion of 40 hours of community service, the plea would be withdrawn and the charges would be dismissed.
6. On August 16, 2017, Defendant was charged by the New York Police Department with Reckless Endangerment and Reckless Driving. Ms. Subbio indicated in her letter that this case was "due to be dismissed on April 10, 2018."

(See attached Kathleen Subbio Letter, Montgomery County Adult Probation/Parole Department, 10/26/2017).

In addition to this letter from Ms. Subbio which outlined several potential probation violations, on October 31, 2017, this Court prepared and sent an even more detailed letter with any and all potential violations alleged so that Defendant would be adequately prepared. The additional details were based upon e-mails forwarded to this Court from Mr. Gordon, Mr. Mangle and Ms. Subbio that further described Defendant's conduct while under supervision. This Court had asked Ms. Subbio to include these items in her letter for the sake of completeness and she refused to do so. These additional potential violations included Defendant engaging in community service with an organization benefitting children, which was not on the list of appropriate community service organizations for which Defendant could volunteer; failing to provide verification of participating in a medically assisted detoxification program in California; failing to travel to Athens, Greece as scheduled but instead remaining in Philadelphia and performing at the Crystal Tea Room without notifying the probation department or local police department as he was required to do; visiting a private residence in Atlanta, Georgia without

authorization or stating the address; and scheduling and promoting several professional engagements around the country despite this Court's August 17, 2017 Order stating that he could not travel outside of Philadelphia and Montgomery Counties except to attend court proceedings related to his pending charges in St. Louis and New York City, "until further order of the court." (See attached VOP Court Letter regarding Defendant's alleged violation allegations, 10/31/2017).

Ms. Subbio's and this Court's letters taken together provided Defendant with a detailed and comprehensive list of the alleged probation violations that would be addressed at the violation of probation hearing on November 6, 2017. In fact, a review of the notes of testimony from the violation hearing shows that each of these potential violations were addressed in turn and there were not any potential violations raised that Defendant did not have the opportunity for which to prepare.

As stated above, the purpose of advance notice is to ensure that the probationer has sufficient opportunity to prepare his case and gather evidence to rebut allegations of violations. Here, Defendant's due process rights were not violated because he received two detailed letters outlining potential violations that allowed him to prepare for his defense. Moreover, Defendant has presented no evidence to support his claim that he lacked sufficient notice and was unable to adequately prepare, and there is no evidence in the record to support it either. The record shows that Defendant did not raise an objection at any time during the violation of probation hearing claiming lack of sufficient notice. Thus, Defendant's claim is wholly without merit and no relief is due.

III. THE EVIDENCE PRESENTED AT THE VIOLATION OF PROBATION HEARING WAS SUFFICIENT FOR THIS COURT TO FIND DEFENDANT IN TECHNICAL VIOLATION OF HIS PROBATION.

The evidence presented at the violation hearing was sufficient to establish that Defendant was in technical violation of his probation. Sentencing following a revocation of probation is vested within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. Commonwealth v. Fish, 752 A.2d 921, 923 (Pa.Super. 2000) (quoting Commonwealth v. Smith, 669 A.2d 1008, 1011 (Pa.Super. 1996)). "An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will." Commonwealth v. Griffin, 804 A.2d 1, 7 (Pa.Super. 2002). Great weight must be given to the sentencing court's decision since the sentencing court is "in the best position to view defendant's character, displays of remorse, defiance or indifference, and overall effect and nature of the crime." Fish, 752 A.2d at 923. The sentencing court "sentences flesh-and-blood defendants and the nuances of sentencing decisions are difficult to gauge from cold transcript used upon appellate review. Moreover, the sentencing court enjoys an institutional advantage to appellate review, bringing to its decisions an expertise, experience, and judgment that should not be lightly disturbed." Commonwealth v. Pasture, 107 A.3d 21, 28 (Pa. 2014). Therefore, when considering an appeal from a sentence imposed after the revocation of probation or parole, appellate review is limited to the determination of "the validity of the probation revocation proceedings and the authority of the sentencing court to consider the same sentencing alternatives it had at the time of the initial sentencing." Commonwealth v. MacGregor, 912 A.2d 315 (Pa.Super. 2006) (citing 42 Pa.C.S. §9771(b); Commonwealth v. Gheen, 688 A.2d 1206, 1207 (Pa.Super. 1997)).

In order to support a revocation of probation or parole, the Commonwealth must show by a preponderance of the evidence that a defendant violated his probation or parole. Commonwealth v. Shimonvich, 858 A.2d 132, 134 (Pa.Super. 2004). To prove a fact by the preponderance of the evidence, the Commonwealth must prove that the existence of the contested fact is more probable than its nonexistence. Commonwealth v. Scott, 850 A.2d 762, 764 (Pa.Super. 2004). The preponderance of the evidence is "the lowest burden of proof in the administration of justice, and it is defined as the greater weight of the evidence, i.e., to tip the scales slightly in one's favor." Commonwealth v. Ortega, 995 A.2d 879, 886 n. 3 (Pa.Super. 2010).

A violation of probation hearing's main purpose is "to determine whether [probation] remains a viable means of rehabilitation..." Shimonvich, 858 A.2d at 136 (quoting Commonwealth v. Mitchell, 632 A.2d 934, 936-937 (Pa.Super 1993). The primary concern of probation is the rehabilitation and restoration of the individual to a useful life. Commonwealth v. Mullins, 918 A.2d 82, 85 (Pa. 2007). It is a suspended sentence of incarceration "served upon such lawful terms and conditions as imposed by the sentencing court." Id. (citing Commonwealth v. Walton, 397 A.2d 1179, 1184-84 (Pa. 1979)). "The purpose of the revocation hearing is simply to establish to the satisfaction of the judge who granted probation that the individual's conduct warrants his continuing as a probationer." Id. (quoting Commonwealth v. Kates, 304 A.2d 701, 710 (Pa. 1973)). Thus, "a probation violation is established whenever it is shown that the conduct of the probationer has indicated that probation has proven to be an ineffective vehicle to accomplish rehabilitation and not sufficient to deter against future antisocial conduct." Commonwealth v. Infante, 888 A.2d 783, 791 (Pa. 2005) (quoting Commonwealth v. Brown, 469 A.2d 1371, 1376 (Pa. 1983)). Technical violations "can support

revocation and a sentence of incarceration when such violations are flagrant and indicate an inability to reform." Commonwealth v. Carver, 923 A.2d 495, 498 (Pa.Super. 2007).

In the case at bar, the evidence presented at the violation hearing was sufficient to prove by a preponderance of the evidence that Defendant was in technical violation of his probation. This Court found Defendant committed several technical violations, not limited to, but including: illegal drug use and possession of "Fast Flush" to wash his urine; engaging in a fist fight at St. Louis International Airport, which resulted in arrest; driving a 4-wheeler on the streets of New York City, which resulted in arrest after he was seen coming into the airport and stomping on a person already on the ground being beaten; failing to go to Greece as scheduled and instead remaining in Philadelphia and performing at the Crystal Tea Room without notifying the probation department or police department for the public's safety; scheduling and promoting professional events around the country in direct contravention of this Court's order which stated Defendant could not leave the Philadelphia area until further notice except to attend to his criminal matters in St. Louis and New York City. (N.T. 11/6/2017, VOP Part II, p. 18-20).

At the violation hearing, Defendant admitted on the record that he had a drug addiction problem and had gone through drug treatment. ("I would like to start with, like, the Percocet addiction. I've been on and off the drug for a few years now." N.T. 11/6/2017, VOP Part II, p. 34). He admitted that while he was at St. Louis International Airport, he ran out of a parked car and into the airport terminal to join in a fist fight. ("And it wasn't just him, it was two airport workers that was actually fighting, and it was the two of us actually fighting. And, you know, it just got out of control." N.T. 11/6/2017, VOP Part II, p. 41-43). He admitted that he broke the law by riding motorbikes around New York City on busy streets endangering the safety of its citizens. ("And that just was a mistake I made. I never felt that riding a bike would get me sent to

prison." N.T. 11/6/2017, VOP Part II, p. 51). Both he and his attorney admitted that he did not go to Greece as he had been given permission to do, but instead went to a party at the Crystal Tea Room and performed because someone at the party pressured him to do so. ("I was approved to go to Greece about 2 o'clock in the afternoon, 2, 3 o'clock. The flight for Greece left at 6 o'clock. With international flights you have to leave about two hours before, so I couldn't make it." N.T. 11/6/2017, VOP Part II, p. 65; "). In fact, he was approved the day before his scheduled flight. He, his attorney Mr. McMonagle, and his representative Mr. Brinkley who scheduled and promoted his events, admitted that they continued to schedule and promote events nationwide even after this Court ordered him to stop until further notice. (N.T. 11/620/17, Part I, p. 81, 83-84, 86-90; 11/6/2017, Part II, p. 16-17, 53-54).

These on-the-record admissions by Defendant, his attorney and those who work on his behalf, were sufficient to support this Court's finding that probation had been an ineffective vehicle to accomplish rehabilitation and was insufficient to deter future antisocial conduct. There is no need to even weigh the preponderance of the evidence since Defendant admitted all of these violations on the record. Since Defendant's ongoing and repeated violations indicated an inability to reform, this Court properly found Defendant in technical violation of his probation for the fifth time.

IV. THE SENTENCE IMPOSED WAS NOT MANIFESTLY EXCESSIVE AND DEFENDANT WAS PROPERLY SENTENCED TO A TERM OF TOTAL CONFINEMENT.

Defendant claims that this Court improperly sentenced him to a 2 to 4 year term of state incarceration, arguing that this sentence was manifestly excessive and that a term of total confinement was not appropriate under the circumstances of his case. This claim is without merit.

The standard of review for sentences imposed following a revocation of probation is well-settled:

> The imposition of sentence following the revocation of probation is vested within the sound discretion of the trial court, which, absent an abuse of that discretion, will not be disturbed on appeal. An abuse of discretion is more than an error in judgment—a sentencing court has not abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

Commonwealth v. Swope, 123 A.3d 333 (Pa.Super. 2015).

When considering an appeal from a sentence imposed after the revocation of probation or parole, appellate review is limited to the determination of "the validity of the probation revocation proceedings and the authority of the sentencing court to consider the same sentencing alternatives it had at the time of the initial sentencing." Commonwealth v. MacGregor, 912 A.2d 315, 317 (Pa.Super. 2006) (citing 42 Pa.C.S. § 9771(c)). The sentencing court is limited only by the maximum sentence it could have imposed at the time of the original sentencing. Id. Pursuant to 204 Pa. Code 303.1(b), sentencing guidelines do not apply to sentences imposed as a result of revocation of probation, intermediate punishment or parole. Once probation or parole has been revoked, a sentence of total confinement may be imposed if any of the following conditions exist: the defendant has been convicted of another crime; the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or, such a sentence is essential to vindicate the authority of court. 42 Pa.C.S.A. § 9771(c); Commonwealth v. Coolbaugh, 770 A.2d 788, 792 (Pa.Super. 2001). There is no requirement that a sentencing court's imposition of sentence be the "minimum possible confinement." Walls, 926 A.2d at 965.

In the case at bar, this Court properly sentenced Defendant to a term of 2 to 4 years state incarceration after finding him in violation of his probation for the fifth time. This sentence was within the statutory limits and was reasonable after considering all relevant factors. As stated above, the length of incarceration was solely within this Court's discretion and was limited only by the maximum sentence that could have been imposed at the original sentencing. Under Pennsylvania law, the maximum sentence for possession with intent to deliver a controlled substance (PWID), an ungraded felony, is 10 years incarceration, a $100,000 fine, or both. 35 Pa.C.S. 780-113 (f)(1.1). The maximum sentence for Carrying a Firearm without a License (VUFA § 6106), a felony of the third degree, is 7 years incarceration, a $15,000 fine, or both. 18 Pa.C.S. 1103(3); 18 Pa.C.S. 1101(3). Thus, this Court could have sentenced Defendant up to a maximum aggregate sentence of 17 years, minus credit for time Defendant already served in prison. This Court sentenced Defendant to 2 to 4 years state incarceration. This sentence was well within the statutory limits and was a reasonable exercise of this Court's discretion in light of Defendant's admitted drug use and addiction; possession of "Fast Flush" drug masking agent; failure to adhere to the agreed upon travel protocols; and failure to show meaningful growth and progress towards his rehabilitation.

Indeed, this was the **fifth** time that this Court found Defendant in technical violation. As outlined in this Court's Opinion on September 19, 2016, Defendant's history while on probation showed a pattern of Defendant committing the same sorts of violations again and again:

> In 2011, Defendant was in technical violation for testing positive for opiate use. This Court allowed his probation to continue. In 2013, Defendant was in technical violation for traveling outside Philadelphia County without permission and failing to report properly to his probation officer. Again, this Court showed leniency and allowed Defendant's probation to continue. In 2014, Defendant was in technical violation for failing to report properly to his probation officer, failing to provide his probation officer

with a working phone number, failing to abide by the rules of the Interstate Compact for Adult Offender Supervision for interstate travel, and traveling outside Philadelphia County without permission. At that time, this Court sentenced Defendant to 3 to 6 months county incarceration plus 5 years reporting probation; he was released on early parole in December 2014. [In December 2015], only a year later, Defendant appeared before this Court for yet another violation of probation hearing for committing the exact same technical violations. Once again, Defendant failed to report to his Probation Officer as ordered to do so, he failed to adhere to the agreed upon travel protocols, and failed to provide urinalysis for drug screens as ordered to do so by this Court. At his prior violation hearing, this Court had warned Defendant that she would impose a state sentence if he was found to be in violation again. However, this Court carefully considered the testimony presented at the violation of probation hearing and at sentencing by those who support Defendant and chose to be lenient and impose only a county sentence, explaining:

> So, ordinarily, when I tell a person, and I do it routinely, that "if you come back, you are going to get a State sentence." And that is what they get. Pure and simple. I don't say how much it's going to be ahead of time. We don't do that. I just say, "You are going to get a State sentence." If you do so much to bring yourself back here that means that you're basically telling me that you want a State sentence. But this defendant did have a lot of community support, and I am taking that into consideration, as well."

(N.T. 2/5/16, p. 86). After asking Defendant whether he understood his new sentence, this Court went on:

> I don't really know what that means to this defendant, because I have been trying to work with this Defendant since 2009. Try to help him move his career forward. I have tried to help him understand that this could have been over long ago. That he just do what he's supposed to do all along, but okay. That is my sentence. I hope that the defendant takes it to heart and follows these instructions this [time].

(N.T. 2/5/16, p. 90).

Court's Opinion, 9/19/2016, p. 20-21.

Instead of using this opportunity to turn his life around and comply with the terms and conditions of his sentence, Defendant once again chose to thumb his nose at this Court and continued to commit the same sort of violations. Specifically, Defendant tested positive for opiate use, failed to stay out of trouble by engaging in conduct such that he incurred two new arrests that resulted in negotiated resolutions; failed to abide by the protocols set in place to allow him to travel domestically and internationally for work; and failed to abide by this Court's orders to stop scheduling appearances while his cases were pending in St. Louis and New York City, until further order of this Court.

Furthermore, this Court properly considered the factors set forth in 42 Pa.C.S.A. § 9721: the protection of the public, the gravity of Defendant's offense in relation to the impact on the victim and the community, and his rehabilitative needs. Since his original conviction in 2008, this Court has given Defendant numerous chances to rehabilitate himself through house arrest, county probation and parole, and county incarceration. Unfortunately, Defendant once again failed to take his sentence seriously and his conduct while on probation indicated that he was not making meaningful progress towards rehabilitation. Revocation and a state sentence was an appropriate sentence under the circumstances in order to vindicate the authority of the Court. In order to make this determination, this Court considered Defendant's long history since his original conviction in 2008, listened to Montgomery County probation officers Subbio and Mangle and their report on Defendant's conduct while under their supervision, heard defense counsel's arguments, heard testimony from several of Defendant's friends and supporters, and listened to Defendant's allocution. After taking all of this into consideration, this Court found it appropriate to impose a 2 to 4 year state sentence. As stated above, there is no requirement that this Court impose the "minimum possible sentence." Rather, based upon Defendant's ongoing

failure to take the necessary steps to comply with the terms and conditions of probation, this Court found it appropriate to sentence Defendant to a term of state incarceration.

Defendant argues that a sentence of total confinement "violated 42 Pa.C.S. § 9771(c)(3) and the fundamental norms underlying the sentencing process." This claim is without merit. This sentence was absolutely necessary to vindicate the authority of the Court under 42 Pa.C.S.A. § 9771(c). Through his course of conduct while serving probation, Defendant repeatedly demonstrated his disdain for this Court's rules and the conditions placed upon him. Defendant failed to comply with previous judicial efforts to rehabilitate Defendant through house arrest, county probation, and parole, as well as prior revocations where this Court continued to give Defendant lenient sentences with the hope that he would make meaningful progress towards his rehabilitation without having to resort to state incarceration. Each time, Defendant thumbed his nose at this Court and refused to take his sentence seriously, ostensibly due to his status in the entertainment business. Instead of simply complying with the terms and conditions of his probation so he could finish out his sentence and continue to work, Defendant continued to disregard this Court's directions and did whatever he wanted to do. Thus, this Court properly sentenced Defendant to a term of total confinement in order to vindicate the authority of the court.

Last, Defendant claims that "the totality of the circumstances of [Defendant's] sentencing does not overcome the presumption of vindictiveness." This claim is without merit. A claim of vindictiveness raises due process concerns. Specifically, the Pennsylvania courts have held that "a sentencing court may not punish a defendant for exercising his constitutional rights, or chill the exercise of those rights by resentencing a defendant vindictively." Commonwealth v. Robinson, 931 A.2d 15, 22 (Pa.Super.2007) (citing Commonwealth v. Speight, 854 A.2d 450,

455 (Pa. 2004); *see also* North Carolina v. Pearce, 395 U.S. 711, 725 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) (recognizing a due process violation where a court increases the severity of a punishment at resentencing).

Claims of judicial vindictiveness "ordinarily arise where a defendant has been resentenced to a more severe sentence after successfully having his first conviction overturned on appeal." Robinson, 931 A.2d at 22 (citing Pearce, *supra*); *see also* Commonwealth v. Barnes, 167 A.3d 110, 123 (Pa.Super.2017) (noting that Pearce's rationale extends to "when the original sentence is vacated and a second sentence is imposed without an additional trial."); Commonwealth v. Tapp, 997 A.2d 1201, 1203 (Pa.Super. 2010)(stating that under Pearce, the U.S. Supreme Court recognized "the possibility that a trial court's imposition of an enhanced sentence after retrial may be motivated by reasons personal to the judge, including vindictiveness toward the defendant for having secured relief from the original sentence on appeal.")). These claims can also apply to situations "where the trial court increased a sentence after the defendant filed post-sentence motions, and where the court did not justify the increase in any way." Robinson, 931 A.2d at 23 (citing Commonwealth v. Hernandez, 783 A.2d 784, 787-88 (Pa.Super. 2001); Commonwealth v. Serrano, 727 A.2d 1168, 1170 (Pa.Super. 1999)).

A presumption of vindictiveness may arise where "there is an apprehension on the part of a defendant to exercise his legal rights due to a fear of retaliation from the court." Speight, 854 A.2d at 455 (citing United States v. Esposito, 968 F.2d 300, 303 (3d Cir.1992) (citing United States v. Goodwin, 457 U.S. 368, 380 (1982)). "Thus, if the court imposes a harsher sentence after a retrial, a presumption of vindictiveness applies. That presumption can be overcome by pointing to 'objective information in the record justifying the increased sentence'." Robinson, 931 A.2d at 22. More simply, "whenever a trial court imposes upon a defendant a more severe

sentence following resentencing, the reasons for such sentence must be made part of the record." Barnes, 167 A.3d at 124 (citing Serrano, 727 A.2d at 1170).

After careful review of the case law where the Pennsylvania Superior and Supreme Courts have examined the presumption of vindictiveness, this Court could not find a single instance where this applies to sentencing after revocation of probation/parole. All of the case law cited above indicates that this presumption attaches where the trial court resentences after remand from the Superior Court or imposes a new sentence after the defendant filed post-sentence motions. In fact, the Pennsylvania Supreme Court expressly stated that a "trial court does not necessarily abuse its discretion in imposing a seemingly harsher post-revocation sentence where the defendant received a lenient sentence and then failed to adhere to the conditions imposed on him." Commonwealth v. Pasture, 107 A.3d 21, 29 (Pa. 2014). It is well settled that "upon revocation, the sentencing alternatives available to the court shall be the same as the alternatives available at the time of initial sentencing." 42 Pa.C.S.A. § 9773.

In the instant case, this Court properly revoked Defendant's probation after finding him in technical violation for the fifth time for failing to adhere to the conditions imposed on his probation and, after weighing all of the sentencing alternatives originally available at the time of initial sentencing, properly imposed a sentence of 2 to 4 years state incarceration. This was a reasonable sentence within the statutory bounds based upon Defendant's criminal history, conduct while on probation, and his disrespect for this Court and the conditions placed upon him for his probation. The presumption of vindictiveness is inapplicable as this Court was not resentencing Defendant following a remand from the Superior Court or a post-sentence motion. Therefore, Defendant's claim must fail.

Moreover, to rebut the presumption of vindictiveness, the sentencing court must adequately state its reasons on the record for imposing a more severe sentence. This is already a requirement at violation of probation hearings. *See* Pa.R.Crim.P. 708(C)(2) (stating that at the time of sentencing following revocation, "[t]he judge shall state on the record the reasons for the sentence imposed."). As discussed in detail below, this Court stated sufficient reasons on the record for the sentence imposed. Briefly, in support of revocation and a term of total confinement, this Court stated that Defendant had thumbed his nose at this Court repeatedly, tested positive for drugs, possessed "Fast Flush" drug masking agent, failed to adhere to the protocols put in place to allow him to travel for work, and scheduled and promoted events in violation of this Court's order. All of these reasons, in conjunction with this Court's experience with this Defendant since 2008, were sufficient for this Court to revoke Defendant's probation and sentence him to a term of 2 to 4 years state incarceration.

V. THIS COURT PROPERLY STATED SUFFICIENT REASONS ON THE RECORD FOR THE SENTENCE IMPOSED.

The Court stated sufficient reasons on the record justifying the sentence imposed. At the time of sentencing, the judge is obligated to state on the record the reason for the sentenced imposed, however the explanation need not be lengthy and "a discourse on the court's sentencing philosophy is not required." Pa. R. Crim. P. 708(C)(2); Commonwealth v. Malovich, 903 A.2d 1247 (Pa.Super.2006) (quoting Commonwealth v. McAfee, 849 A.2d 270, 275 (Pa.Super. 2004)). The purpose of this requirement is to provide "a procedural mechanism for the aggrieved party both to attempt to rebut the court's explanation and inclination before the sentence proceeding ends, and to identify and frame substantive claims for post sentence motions or appeal." Commonwealth v. Reaves, 923 A.2d 1119, 1129 (Pa. 2007). According to the Pennsylvania Supreme Court:

> VOP proceedings are often short and to the point. A convicted defendant released into the community under such control of the sentencing judge, who violates the terms of his release and thereby betrays the judge's trust, is rarely in a strong position. Unless the defendant's lapses are explainable, or there has been some mistake of fact, the question of whether release will be terminated, and if so, the length of incarceration, rests peculiarly within the discretion of the VOP judge. In instances where parole is revoked, the reason for revocation and sentence are usually obvious, and there is not much that the judge would need to say.

Id. at 153, n. 12. More recently in Pasture, the Pennsylvania Supreme Court explained:

> Simply put, since the defendant has previously appeared before the sentencing court, the stated reasons for a revocation sentence need not be as elaborate as that which is required at initial sentencing. The rationale for this is obvious. When sentencing is a consequence of the revocation of probation, the judge is already fully informed as to the facts and circumstances of both the crime and the nature of the defendant, particularly where, as here, the trial judge had the benefit of a PSI during the initial sentencing proceedings.

107 A.3d at 453. "[W]here the revocation sentence was adequately considered and sufficiently explained on the record by the revocation judge, in light of the judge's experience with the defendant and awareness of the circumstances of the probation violation, under the appropriate deference standard of review, the sentence, if within the statutory bounds, is peculiarly within the judge's discretion." Id. at 454.

In the case at bar, this Court stated sufficient reasons for the sentence imposed. At the violation of probation hearing on November 6, 2017, this Court found Defendant in violation of his probation for the **fifth** time. Immediately prior to sentencing Defendant, this Court stated its reasons for the sentence:

> But in any event, I appreciate everything that you said, but I have been trying to help you since 2009 [...] and every time I do more and more and more to give you break after break after break to help you, you, basically, thumb your nose at me and just do what you want the way you want. So, I have to—I'm going to give you a

> sentence of incarceration. This sentence is absolutely necessary to vindicate the authority of the Court. The record will reflect over all of these sessions, all of these VOP hearings, all of the opportunities I've given you to try to address your issues, that each and every time you've done something that indicates that you have no respect for this Court.

(N.T. 11/6/2017, p. 74). Specifically, this Court pointed to Defendant's repeated disrespect of this Court, its orders, and the terms and conditions of his probation. The record shows that Defendant abused drugs, possessed "Fast Flush" capsules (a drug masking agent), incurred two new arrests that resulted in negotiated resolutions, failed to adhere to his approved travel schedule and performed without authorization in Philadelphia, and scheduled and promoted events in violation of this Court's order. All of these violations were enumerated in the *Gagnon I* letter written by Montgomery County Probation Officer Kathleen Subbio; the supplemental letter prepared by this Court to aid Defendant in his preparations for the violation hearing; and were discussed in great detail at the violation hearing itself. As stated above, the explanation for this Court's sentence need not be lengthy and where it is obvious that the probationer is not in compliance with the terms and conditions of his sentence, "there is not much that the judge would need to say." Reaves, 923 A.2d at n. 12. Therefore, Defendant's claim that this Court stated insufficient reasons for the sentence imposed is without merit and this Court's judgment of sentence should be affirmed.

CONCLUSION

After reviewing all applicable case law, statutes, and testimony, this Court committed no error. This Court did not commit any error with respect to Defendant's motions for recusal. Defendant received proper notice of all alleged probation violations in advance of his hearing. Additionally, the evidence at the hearing was sufficient for this Court to find Defendant in technical violation of his probation. The sentence imposed was not manifestly excessive and this Court stated sufficient reasons on the record to support a state sentence of 2 to 4 years. Accordingly, this Court's judgment of sentence should be affirmed.

BY THE COURT:

J.

Court's Exhibit A

First Judicial District of Pennsylvania
COURT OF COMMON PLEAS
JUDICIAL CHAMBERS

GENECE E. BRINKLEY
JUDGE

THE JUSTICE JUANITA KIDD STOUT CENTER
FOR CRIMINAL JUSTICE
1301 FILBERT STREET, SUITE 1404
PHILADELPHIA, PA 19107
(215) 683-7109/10
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October 31, 2017

Frank DeSimone, Esquire
1880 John F Kennedy Blvd
Suite 600
Philadelphia, PA 19103

Marian Braccia, Esquire
Assistant District Attorney
Three South Penn Square
Philadelphia, PA 19102

RE: Commonwealth v. Robert Williams, CP-51-CR-0011614-2007

Dear Counsel:

As you know, I previously forwarded to you a probation summary prepared by Montgomery County Deputy Chief Probation Officer Kathleen Subbio. However, it appears that there are substantive facts which are missing from her summary which previously were included in various emails forwarded to me from Mr. Gordon, Mr. Mangle and/or Ms. Subbio. These facts should have been included in the probation summary as these facts and incidents are relevant and actually occurred during the course of Defendant's probation, and may assist both counsel in preparing for the VOP hearing scheduled for November 6, 2017.

First, Mr. Williams was sentenced on or about February 5, 2016 to six to 12 months county incarceration with immediate parole to house arrest, to be followed by six years reporting probation. Subsequently, on or about February 18, 2016, house arrest and probation supervision were transferred to Montgomery County at the request of Mr. Williams and they agreed to supervise as a courtesy to Philadelphia County. There were several conditions imposed at the time of sentence including ninety (90) days of community service at organizations serving the homeless, veterans, and by working to build homes with an organization such as Habitat for Humanity.

Unfortunately, at the outset, Mr. Williams was engaging in activity which violated house arrest rules as he was stopping at a convenience store every day before going to his community service work location. He was advised that this activity was not permitted and subsequently adjusted his behavior. In addition, unfortunately, Mr. Williams engaged in community service with an organization benefitting children, which was not on the list of appropriate community service organizations for which Mr. Williams could volunteer. Therefore, his house arrest and community service were extended to June 7, 2016, at which time he completed his 90 days of community service.

Mr. Williams was permitted by this Court to travel outside of Philadelphia and Montgomery Counties to allow him to further his career as an entertainer and recording artist. He was required to submit a requested travel schedule in advance to the Montgomery County Probation Department with copies to the Court, the assigned District Attorney and his counsel. For all Philadelphia engagements, the Assistant District Attorney was responsible to notify local police so that all engagements would have appropriate police and security coverage to protect the public.

Mr. Williams continued to travel and tested negative for controlled substances until approximately January 9, 2017. At that time, Mr. Mangle and Ms. Subbio conducted a routine and scheduled home visit at Defendant's residence in Montgomery County. Upon entering his living room, Ms. Subbio observed a packet of "Fast Flush" capsules on the sofa table. A urine sample was procured from Defendant which tested positive for the presence of Oxycodone. Defendant denied any drug usage and denied any knowledge of "Fast Flush" capsules which were located inside his home. Subsequently, Defendant claimed that he became ill in Atlanta, GA and Miami, FL and received those medications as part of his treatment. No verification of these claims was ever provided this Court. Defendant was ordered to report to the Probation Department later that day by 3:00 pm. At that time, Defendant admitted the illegal drug use citing recent stressors and depression as reasons for his relapse.

On or about January 10, 2017, this Court received an email that Ms. Desiree Perez, COO of Roc Nation indicated that she had coordinated with Cast Centers, West Hollywood, CA for assessment and treatment of Defendant. This treatment included seven days of medically assisted detox in California. However, even though requested, no verification of this detox treatment was provided to this Court. It is believed that Defendant may have had some sort of detox treatment in Atlanta, GA. However, this is not the travel plan or treatment plan which was approved by the Court. To date, no additional information has been provided concerning his medically assisted detox. However, Defendant did complete outpatient drug and alcohol treatment at RHD/Rise Above through the Montgomery County Probation Department on or about June 16, 2017.

While Defendant was still receiving drug treatment in Montgomery County, he continued to travel to promote his entertainment and recording business. He was arrested on or about March 15, 2017, in St. Louis, MO, and charged with two counts of assault. These charges arose from an altercation at the St. Louis International Airport in which Defendant, according to the police report, allegedly left his vehicle outside the airport, ran into the terminal and began fighting, at one point stomping on a subject on the ground, involving one or more airport employees. This case was resolved when Defendant negotiated an agreement under which the charges would be Nolle Prosequi upon proof of completion of 40 hours of community service.

On or about August 2, 2017, Defendant requested that he be allowed international personal travel to Athens, Greece, on a private airplane, from August 3 to August 6, 2017, which was granted by the Court. However, it came to the attention of the Court that, in fact, Defendant did not travel to Greece, but instead remained in Philadelphia and participated in a performance at the Crystal Tea Room in Downtown Philadelphia. No prior notice of this engagement was given to the Probation Department, the Court or the Philadelphia Police Department. In addition, it came to the Court's attention that Defendant was visiting a residence in Atlanta, GA when no recording or scheduled engagements were included on Defendant's requested travel schedule and no hotel arrangements appeared on the schedule. This travel was contrary to the court's order, in that Defendant was permitted to travel for specifically scheduled engagements to allow him to further his career as an entertainer and recording artist.

In addition, after Defendant completed his drug treatment, Defendant was again arrested, this time in New York City, about five months later, on or about August 16, 2017. He was charged with felony charges which were subsequently reduced to misdemeanor and/or summary Reckless Driving. Again, Defendant negotiated an agreement under which he would complete community service in exchange for dismissal of the charges which is scheduled for April 10, 2018.

On or about August 17, 2017, this Court ordered that Defendant could not travel outside of Philadelphia and Montgomery Counties, except to attend hearings in criminal court in St. Louis on September 8, 2017 and in New York City on October 11, 2017, until further order of the court. However, based upon information received, Defendant, in fact, scheduled and promoted numerous engagements outside Philadelphia up to and including November 4, 2017, some of which may have been posted on social media. Obviously, both counsel can consult various social media outlets to confirm any information available on this subject.

On or about August 22, 2017, the Montgomery County Probation Department indicated that they would be returning courtesy supervision to Philadelphia County due to overwhelmed resources and because this case posed unique challenges incongruent with their supervision and mission. Thereafter, this Court requested that they continue to supervise while the court took time to make other arrangements.

On or about October 24, 2017, this Court scheduled a Violation of Probation Hearing, in this matter for November 6, 2017.

On or about October 27, 2017, this Court received correspondence from a student group at Syracuse University requesting that Defendant be allowed to perform during their homecoming activities on November 4, 2017. The letter, which is attached, states that they had promoted the event as featuring "Meek Mill", that they had sold over 1400 tickets and expected to sell out. They also indicate that this is the second time they had scheduled this event to feature Defendant and they were concerned about their reputation if he did not perform. This is one example of an engagement which appears to have been scheduled in contravention of the court's travel order. A copy of relevant documents are attached.

As stated above, I have included specific facts which were not included in the Probation Summary from Ms. Subbio in order to allow both counsel to better prepare for the VOP hearing.

Sincerely,

Judge Genece E. Brinkley

Attachment

GEB:clw

ADULT PROBATION, PAROLE AND
DUI SERVICES
OF
MONTGOMERY COUNTY

PARTNERING FOR A BETTER TOMORROW

MICHAEL P. GORDON
CHIEF
TODD BERGMAN
DEPUTY CHIEF
KATHLEEN SUBBIO
DEPUTY CHIEF
STEPHANIE LANDES
DEPUTY CHIEF
ROBIN ELLIOTT
OFFICE MANAGER

408 Cherry Street
PO Box 311
Norristown, PA 19404
Office 610-992-7777 Fax: 610-992-7778

October 26, 2017

Honorable Genece E. Brinkley
Philadelphia County Court of Common Pleas
Criminal Justice Center, Room 1404
Philadelphia, PA 19107

RE: Robert Williams, CP-51-CR-0011614-2007, PP#892643

The offender's case was originally received for courtesy supervision from Philadelphia County Adult Probation on February 19, 2016. On or about February 28, 2016, Mr. Williams was placed on Electronic Monitoring/House Arrest for a period of ninety (90) days. Initially, the offender presented with minor adjustment issues, specific to following the rules of house arrest supervision. On March 4, 2016, Mr. Williams had to be reminded that he could only travel directly to and from his approved location. No other stops were permitted. He acknowledged this reminder. On March 8, 2016, there was another secondary stop by Mr. Williams. A more direct conversation was had with Mr. Williams in which he was distinctly made aware that any future failure to comply actions would result in his removal and case being returned to Philadelphia. This Department addressed the issues with Mr. Williams, and no further infractions occurred. During the course of house arrest supervision, the offender tested negative for all substances and completed the required community service hours. Mr. Williams was subsequently released from house arrest on or about June 7, 2016.

The offender's case continued to be supervised without issue until January 9, 2017. On January 9, 2017, at approximately 10:45 a.m., Supervisor Josh Mangle and I conducted a routine and scheduled home visit with the offender at his address of record. Upon entering the living room, I observed a packet of "Fast Flush" capsules on the sofa table. Supervisor Mangle proceeded to the offender's bathroom and secured a urine sample which tested positive for the presence of Oxycodone. The offender denied any drug use and also denied any knowledge of the "Fast Flush" capsules that were located in the home. As a result of the home visit, the offender was directed to report to Montgomery County Adult Probation/Parole Department by 3:00 p.m. on that date to further address the issues.

The offender reported as directed and met with Chief Adult Probation Officer Michael Gordon, Supervisor Mangle and myself. The offender initially denied any illegal/unprescribed drug use.

Upon further questioning, the offender admitted to ingesting Percocet pills (1 to 2/day) for approximately 3 weeks prior to this visit. He cited depression and recent stressors as reason for his relapse. Further, the offender divulged that he has struggled with Percocet use on and off for years, and that this remains his "biggest battle." The offender indicated he has experienced withdraw symptoms in his attempt to cease use and also requested assistance to address his drug use. The offender was directed to coordinate for a drug and alcohol assessment and detoxification (if deemed appropriate by treating clinicians) no later than January 10, 2017 @ 1:00 p.m.

On January 10, 2017, Supervisor Mangle and I spoke with Desiree Perez, COO of Roc Nation. Ms. Perez coordinated with Cast Centers, West Hollywood, California, for assessment and treatment of the offender. I received an initial treatment plan from Dr. Mylett, Executive Director of Cast Centers. As per my conversation with Dr. Mylett, the offender was scheduled to receive approximately seven (7) days of medically assisted detox.

At that time, it was this Department's position to allow the offender to continue with inpatient/outpatient treatment as deemed appropriate by the treatment team at Cast Centers. With your Honor's approval, the offender was medically detoxed while staying at a residence in Atlanta, Georgia. Upon Mr. Williams' return to Pennsylvania, he underwent a drug and alcohol assessment at RHD/Rise Above. The assessment recommendation was for the offender to participate in individual outpatient counseling. Mr. Williams successfully completed outpatient drug and alcohol treatment on June 16, 2017.

It should be noted that the offender subsequently reported that he was ill while in Atlanta, Georgia and then Miami, Florida. In Atlanta, between 12/18/16 and 12/22/16, the offender was treated by Linda McIver, nurse practitioner. Records received from Linda McIver verify the offender was diagnosed with Viral syndrome, Cough and Abdominal Cramp. He was prescribed Benzonatate, Cheratussin AC and Bentyl.

On or about March 15, 2017, the offender was charged by the St. Louis International Airport Police Department with Assault (Count 1 and Count 2). This case was resolved on or about September 18, 2017, when the offender pled guilty to Counts 1 and 2. Upon completion of 40 hours of community service, the plea will be withdrawn and the charges will be dismissed.

On or about August 16, 2017, the offender was charged by the New York Police Department with Reckless Endangerment and Reckless Driving. Criminal Court of the City of New York, County of New York, NY, records indicate this case is due to be dismissed on April 10, 2018.

While the offender's supervision presented unique challenges to this Department, Mr. Williams' overall adjustment to our supervision has been within normal limits. He has responded well to corrective measures and actively participated in an effort towards behavioral change.

Respectfully,

Kathleen Subbio
Deputy Chief Adult Probation Officer

Tab B

FILED
2018 JUN 25 PM 4:45
OFFICE OF JUDICIAL RECORDS
FIRST JUDICIAL DISTRICT
OF PA

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	**CP-51-CR-00011614-2007**
	:	
vs.	:	
	:	
ROBERT WILLIAMS	:	

FILED
JUN 25 2018
PCRA Unit
CP Criminal Listings

BRINKLEY, J.

ORDER AND OPINION

AND NOW, this 25th day of June, 2018, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that Defendant Robert William's February 14, 2018 Petition for PCRA Relief and his May 16, 2018 Amended (supplemental) PCRA petition is **DENIED.**

Defendant Robert Williams filed a petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 et seq. (eff. Jan. 16, 1996), raising a claim that exculpatory evidence, unavailable at the time of trial, had subsequently become available and would have changed the outcome of the trial if it had been introduced at trial. After independent review of Defendant's PCRA petition, Defendant's Amended (supplemental) PCRA petition and the Commonwealth's Answer, this Court held an evidentiary hearing on June 18, 2018. After an in-depth review of the record, Court history, notes of testimony, and evidence submitted at the evidentiary hearing, this Court hereby denies Defendant's petition for PCRA relief as Defendant failed to meet his burden of proof.

0171_Order_Denying_Post-Conviction_Relief_Act_Petition

PROCEDURAL AND FACTUAL HISTORY

On or about January 23, 2007, Defendant was observed by undercover police officers, Officer Sonia Jones and Officer Reginald Graham, selling crack cocaine to a confidential informant at the corner of 22nd and Jackson Streets in the city of Philadelphia, after which Defendant rode away on a dirt bike and entered a residence at 2204 South Hemberger Street. He had been observed earlier that day entering the residence with a key. After obtaining a search warrant for the residence, undercover officers returned to the residence the next day.

On January 24, 2007, after observing another drug sale to a confidential informant by a co-defendant, numerous officers were called to the scene. Upon arrival, Defendant, who was seen exiting the location, produced a gun, hid behind a car, and pointed the gun at officers. After police repeatedly shouted, "Police, drop the gun," Defendant took off running, holding his waistband with police chasing him. He was caught crouching between two cars, handcuffed, and arrested. From between the two cars, police recovered a loaded gun. (N.O.T. 8/19/2008 Trial, p. 44-51.)

Upon execution of the search warrant, police recovered illegal drugs throughout the residence. In a second floor rear bedroom, in which numerous photographs of Defendant were found, police recovered 13 red packets and 13 clear jars with purple tops of marijuana, 128 grams of marijuana in a clear Ziploc baggy and $6,808.00 in US currency. From the dining room table, police recovered 6 grams of marijuana and a black gun holster. From the basement, police recovered 11 grams of crack cocaine in one clear baggy and a black bag that contained 213 grams of marijuana, as well as a variety of drug paraphernalia, including razor blades covered in white powdery residue, new and unused clear plastic packets, clear jars with purple tops, and a box of Remington .40 caliber bullets. The gun, which was recovered from Defendant's hiding spot

between two cars when he was chased by police officers, was a 9mm Luger semi-automatic, loaded with 8 live rounds, with an obliterated serial number. This firearm was test-fired and found to be operable. From Defendant's person, police recovered $45.00 US currency and a clear packet containing 21 clear packets of marijuana. The gun and drugs were placed on property receipts #2703265 and #2703278 and were moved into evidence in Commonwealth Exhibits C-1, C-2, and C-3. Id. at 44-51, 71.

At trial on August 19, 2008, based upon evidence in the record and Defendant's own testimony to being in possession of a loaded weapon and carrying a concealed gun on his person without a license, Defendant was found guilty of possession with intent to deliver a controlled substance (PWID); two violations of the Uniform Firearms Act (VUFA): Carrying a Firearm Without a License § 6106, and Carrying a Firearm in a Public Place in Philadelphia §6108; possession of an instrument of crime (PIC); possession of a loaded weapon; knowing and intentional possession of a controlled substance; and simple assault. Id. at 80, 118, 122-23. Sentencing was deferred until January 16, 2009, at which time he was sentenced to an aggregate sentence of 11 ½ to 23 months county incarceration plus 10 years reporting probation.[1] Defendant was ordered to receive drug treatment while in jail, and upon release, earn his GED, seek and maintain employment, and pay mandatory court costs and fees. (N.O.T. 1/16/2009, p. 93-95.)

On November 6, 2017, Defendant was found to be in violation of his probation for the fifth time for reasons including testing positive for drugs after this Court extended numerous opportunities for treatment, traveling and scheduling travel in violation of this Court's order, staying in Philadelphia when he was supposed to go to Greece and not advising anyone of his

[1] Even though Defendant was arrested while in possession of drugs and was seen tossing a gun and may have been subject to then drug and gun state mandatory sentencing laws pursuant to 42 Pa.C.S. § 9712.1, he was sentenced to only a County sentence.

proposed change in schedule, using Fast Flush to wash his urine, and engaging in activity in St. Louis and New York which endangered the safety of citizens in those jurisdictions and which indicated that Defendant was no longer suitable for probation. This Court sentenced Defendant to 2 for 4 years state incarceration.

On February 14, 2018, Defendant filed a petition for relief pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 et seq. (eff. Jan. 16, 1996) alleging that he had become aware of exculpatory evidence, unavailable at the time of trial, which would have changed the outcome of the trial if it had been introduced at trial. Specifically, Defendant alleged that the publication in the media of the District Attorney's police officer "Do Not Call List" implicated Officer Graham as he was one of several officers on the list. In support of his claim that this list, had it been available at trial, would have changed the outcome, Defendant attached affidavits dated February 6, 2018 and February 7, 2018 taken by Cliff Goldsmith, private investigator, from disgraced former police officers, Jeffrey Walker and Jerold Gibson stating that Graham had likely lied on the stand and that his affidavit of probable cause bore the signs of a fraudulent affidavit. In his petition, Defendant requested an evidentiary hearing. Def.'s PCRA Pet. ¶20. On February 14, 2018, Defendant also filed a motion for bail pending appeal.

On March 29, 2018, this court filed an Order and Opinion denying Defendant's motion for bail pending appeal. Subsequently, on April 16, 2018, a status listing was held during which the Defendant requested an extension of time to file an amended petition and Liam Riley, Esquire of the District Attorney's Office, agreed that a new trial was warranted and that PCRA relief should be granted.

On April 17, 2018, Bradley Bridge, Esquire of the Defender Association of Philadelphia filed a Motion for a New Trial Based Upon After Discovered Evidence; Alternatively, For Post

Conviction Collateral Relief; Or Alternatively, For Writ of Habeas Corpus on behalf of Defendant even though Defendant already had a counseled PCRA petition prepared and filed by private counsel pending in front of this Court. On April 18, 2018, Mr. Bridge filed a Praecipe to Withdraw PCRA Petition.

On April 24, 2018, the Pennsylvania Supreme Court, acting within its King's Bench jurisdiction, released Defendant on bail pending PCRA proceedings and any following appeals and directed this Court issue a final resolution with respect to the pending PCRA petition within 60 days. That same day, this Court complied with the decision of the Pennsylvania Supreme Court and issued an order releasing Defendant on bail pending PCRA proceedings.

On April 25, 2018, this Court ordered Defendant to file an amended petition within 30 days and ordered the Commonwealth to file a response to that amended petition within 10 days. On May 16, 2018, Defendant filed an Amended (supplemental) PCRA petition in which Defendant stated that he maintained his innocence on all but the gun possession charges, however, averred that those charges were the direct fruits of a false affidavit and perjured testimony and therefore cannot negate his entitlement to PCRA relief. Def.'s Am. PCRA Pet. ¶17. In his amended petition, Defendant indicated that the persons who may testify at an evidentiary hearing in addition to the defendant were private investigator Cliff Goldsmith, Luke Brindle-Khym, Bradley Bridge, Esquire, disgraced former Police Officer Jerold Gibson, and disgraced former Police Officer Jeffrey Walker. Def.'s Am. PCRA Pet. ¶30.

In his amended petition, Defendant attached another affidavit of former Police Officer Jerold Gibson dated March 15, 2018 and claimed that former Police Officer Gibson would testify at a hearing that retired Officer Reginald Graham lied to nearly every material fact in his testimony at trial. Def.'s Am. PCRA Pet. ¶14. In addition, Defendant claimed that former Police Officer

Jeffrey Walker would testify at a hearing that retired Officer Graham misused informants, fabricated probable cause for search warrants, lied about the justification for warrantless searches, stole and kept money recovered during searches, beat people he considered suspects, beat Defendant Williams during his arrest, and would testify that the arrest report prepared by retired Officer Graham bears the hallmark of a fraudulent affidavit written to manufacture probable cause for the search warrant, and would also testify that his affidavit is consistent with FBI form 302 reports of interviews with Walker from 2013 and 2014. Walker would also testify that he did not discuss the Williams' case with the FBI because they did not ask him about the Williams case. Def.'s Am. PCRA Pet. ¶14(b). Defendant Williams also claimed that Walker would testify about Officer Graham's alleged perjury in civil depositions from 2016 in which current District Attorney Larry Krasner was then private civil Plaintiff's counsel and was suing the City of Philadelphia based upon allegations of other police misconduct.

Notwithstanding the issue of a possible conflict of interest, the Commonwealth filed a response on May 29, 2018 stating in its entirety:

> The Commonwealth agrees to PCRA relief in the form of a new trial. Here, Officer Graham was the sole witness to testify at defendant's trial. In light of recent disclosures regarding this officer's misconduct, the Commonwealth is not able to stand behind the credibility of his trial testimony at this time. Accordingly, the Commonwealth concedes that a new trial is necessary.

Comm.'s Answer to Am. PCRA Pet. 5/29/2018.

On June 18, 2018, this Court held an evidentiary hearing to determine whether PCRA relief should be granted. Defense counsel began by addressing an issue Defendant had raised with the Pennsylvania Supreme Court when he requested that this Court be disqualified. (N.O.T. 6/18/2018, p. 11). This Court informed defense counsel that the Supreme Court of Pennsylvania already had ruled on the issue and that it was not ripe for discussion at this hearing. This Court emphasized

that this was an evidentiary hearing and that the only issue before this Court was whether Defendant could prove by a preponderance of the evidence under the PCRA that he was entitled to relief. Id. Next, defense counsel requested that this Court grant PCRA relief purely as a result of the agreement between the parties. This Court responded by informing counsel that the Commonwealth's "agreement to a new trial is only a recommendation to this Court. It is not binding upon this Court, nor is the decision and the manner in which Judge Woods-Skipper handled her cases binding upon this Court." This Court was clear that this case would be reviewed separate and apart from any other case before any other judge. Id. at 17.

Next, Defendant called Public Defender Bradley Bridge as his only in-court witness. Id. at 19. Bridge testified that he began working on post-conviction relief cases in 1995 and had since been responsible for reopening convictions involving corrupt police officers. Id. at 20. He explained the streamlined process that he helped to develop over the years with regard to questionable police officers. He stated that the process consisted of the Defender Association of Philadelphia filing a petition for PCRA relief and then having a conversation with the District Attorney's Office determining whether the officer in question was integral to the Commonwealth's case-in-chief. If the parties agreed that relief was necessary, PCRA relief would be granted without an evidentiary hearing and the case would be reopened and nolle prossed. Id. at 20-21. He testified that when the parties agreed, the judge would honor the will of the parties without further need for an evidentiary hearing. Id. at 22.

Next, Bridge testified regarding a series of PCRA petitions filed as a result of the actions of allegedly corrupt narcotic officers. Even though some of those officers were never convicted, a number of the cases that were post-conviction cases were granted and nolle prossed. Id. at 23. Bridge testified about a group of over 1400 PCRA cases involving Officers Liciardello, Reynolds,

Betts, Spicer, Speiser, and Norman. Id. at 25. He stated that the allegations stemmed from former Officer Walker and that those officers were charged with crimes. As a result, a number of those cases were granted PCRA relief by agreement of the parties, even before these officers were found "not guilty", and immediately thereafter the Commonwealth's motion to nolle prose was granted by President Judge Sheila Woods-Skipper. Id. at 26-27. Bridge testified that he would provide the court with a spread sheet and the court would go through the list, typically giving each case 10 to 15 seconds of consideration, and grant relief in bulk. He stated as many as 150 cases were reviewed in one sitting. Id. at 28. In all of those cases, no evidentiary hearing took place and the court granted relief solely based upon agreement of the parties without any further inquiry. Id. at 28. He testified that this had been the process for the past 23 years. Id. at 29.

Next, Bridge explained that Officer Graham related petitions were filed upon two particular events. First, there was an article in the Inquirer alleging that Officer Graham was placed on a District Attorney's "Do Not Call List." The second event occurred on March 5, 2018, when District Attorney Lawrence Krasner actually turned over the list to Bridge. Id. at 30. Bridge stated that he filed a total of approximately 290 post-conviction petitions solely based upon the District Attorney's Office "Do Not Call List." Id. Bridge testified that three of these petitions already had been granted relief by the Honorable Sheila Woods-Skipper pursuant to agreements between the parties consistent with the streamlined process. Id. at 32. Defense counsel then introduced the transcripts for the PCRA hearings of Defendants Diane Hasty, Michael Allen, and Lawrence Lockman. Id. at 36. Bridge confirmed that in these three cases the court granted immediate relief without an evidentiary hearing. Id. All three transcripts contained similar language as follows: "PCRA is granted. Motion for New Trial is granted. Commonwealth's motion to nolle prosse is granted due to credibility of the arresting officer and no additional evidence available." Id. at 55.

Bridge then testified as to the Defender Association's representation of Defendant Nina Harth. Id. He stated that Commonwealth v. Nina Harth was a companion case to Mr. Williams's case. Bridge testified that Defendant Nina Harth was arrested by Officer Reginald Graham on the same date and same location as Defendant Williams and that he filed a PCRA petition on behalf of Harth which is currently pending in front of the Honorable Sheila Woods-Skipper. Id. at 37. Defense counsel then introduced a Court History for Defendant Nina Harth, which Bridge stated he obtained online, marking it D-2. The docket indicated that Harth pled guilty to simple assault before this Court in 2008 and was sentenced to 11 ½ to 23 months in county custody with immediate parole. Id. at 38.

On cross-examination, Bridge explained the two-step process by which PCRA petitions he filed were handled in court. He stated the first step is that after the parties had agreed to relief, PCRA relief was granted by the court. Second, the judge overturned the conviction and granted a new trial. Then the Judge inquired as to whether there was additional evidence. Once the Commonwealth represented that they had no additional evidence, the Commonwealth's motion to nolle prosse was granted. Id. at 40-41.

In order to make sure the record was absolutely clear, this Court asked Bridge if he had done any investigation on his own involving Officer Graham. Id. at 41. The following testimony was elicited.

> **THE COURT:** You didn't do any investigation at all?
> **THE WITNESS:** No. I take that back. I mean, I take that back. I did look at some internal affairs investigations involving him.
> **THE COURT:** Did you speak to retired Police Officer Graham yourself?
> **THE WITNESS:** I have not.
> **THE COURT:** Okay. Did you subpoena or speak to his lawyer, Mr. Abdul-Rahman?
> **THE WITNESS:** I did not.
> **THE COURT:** Who's representing him at those internal affairs --
> **THE WITNESS:** I did not.

THE COURT: Did you subpoena or speak to anyone -- I'm sorry. Police Officer Sonya Jones who conducted undercover surveillance with Police Officer Graham back on 1/23/2007?
THE WITNESS: I did not.
THE COURT: Did you talk to her?
THE WITNESS: I did not.
THE COURT: Did you subpoena or speak to Police Officer James Johnson or any of the other back-up officers that were in the police paperwork for the date of arrest 1/24 -- excuse me. 1/24/2007.
THE WITNESS: I did not.
THE COURT: Okay. Did you speak or subpoena anyone from the FBI regarding their investigation of Police Officer Graham before you had conversations with the DA about agreeing that there was credibility issues, did you talk to anybody in the FBI?
THE WITNESS: I've spoken to deputy general. We talked about Graham. I talked to a number of FBI agents --
THE COURT: Clearly you would have – may have talked to him about Walker because he was indicted. But I'm asking you specifically about Graham.
THE WITNESS: I don't recall. No, I don't think so.
THE COURT: Okay. Were you aware of retired Police Officer Graham's cooperation with the federal authorities back in 2014?
THE WITNESS: I read about it, but I didn't have that information.
THE COURT: You didn't have that information?
THE WITNESS: No.

Id. at 42-44. Bridge further confirmed that he did not speak to anyone from Philadelphia Police Department Internal Affairs or Officer Graham's attorney, Abdul-Rahman, before agreeing with the Commonwealth that there were credibility issues related to Graham. Id. at 45. When asked what exactly he did do, Bridge stated, "I examined the District Attorney's Do Not Call list. I saw the allegations contained in the list. I maintained an internal list in my office regarding officers from which there have been credibility issues that have risen. It was based on that that I went forward and filed the post-conviction relief." Id. Bridge testified that he did not get a transcript from the internal affairs investigation to determine what happened during that investigation which ultimately led to Graham being placed on the Do Not Call List.

Bridge confirmed that in addition to the Do Not Call List, he based his determination on the affidavits of former Officer Walker and former Officer Gibson filed by defense counsel, both

of whom had been convicted of *crimen falsi* crimes. Id. at 57. Bridge stated that he believed that Graham's placement on the Do Not Call List created questions of credibility which constituted cause for relief and met the preponderance of the evidence standard. Id. at 61. He also advocated that an agreement between counsel on the record is sufficient and that this process, which has been used for the past 23 years, was not deficient or defective. Id. at 73.[2]

The Commonwealth then asked Bridge on further examination about the 60-day time frame for filing a PCRA petition once a newly-discovered fact is learned. Id. at 74. Bridge testified that Graham's inclusion on the Do Not Call List, information that the FBI had determined that Officer Graham lied to them and failed a polygraph examination, and Walker and Gibson's affidavits all buttressed the legitimacy of the petitions that were already filed Id. at 75, 81. Bridge later concurred with this Court that polygraph results are not admissible in court. Id. at 77.

Next Defense requested to move defense exhibits, previously marked as D-1 and D-2, into evidence.[3] Id. at 83-84. Defense counsel then marked D-3, stipulations by and between the parties, as its next exhibit. Defense Counsel read the parties stipulations as follows:

> No. 1, former Philadelphia Police Officer Reginald Graham was the affiant on the search warrant and the only witness called by the Commonwealth in the trial of Commonwealth vs. Robert Williams, indexed at CP-51-CR-0011614-2007.
>
> Two, it is stipulated by and between the parties that the Commonwealth does not have confidence in the credibility of Reginald Graham's testimony in this case.
>
> Three, it is stipulated that the FBI 302s of former Philadelphia Police Officer Jeffrey Walker, Exhibit A, include allegations of criminal misconduct engaged in by Reginald Graham. The alleged criminal conduct predates Mr. Williams' arrest and trial in this case. The allegations include theft while on duty.
>
> Four, the sworn affidavit of Jeffrey Walker, Exhibit B, details Reginald Graham's criminal misconduct.

[2] At this point and several times throughout Bridge's testimony, the Court officers were required to take action to quiet the courtroom of laughter and audible responses from Defendant's supporters in the gallery. The Court found nothing funny about this serious matter.

[3] D-2 was never authenticated by the Court Clerk and was obtained by Defendant via an online docket.

Five, the Philadelphia Police Department Internal Affairs and Police Board of Inquiry files reflect that following a hearing before the Police Board of Inquiry on March 8th, 2017, Reginald Graham was found guilty on both counts of theft while on duty and lying during the departmental investigation with a unanimous recommendation for dismissal from the Philadelphia police department. That's Exhibit C. These charges arose out of evidence developed during a federal investigation of the Narcotics Field Unit. In the course of the federal investigation, Graham agreed to take a polygraph exam on May 14th, 2014, which indicated deception when Graham denied participating in theft while working as a police officer in the Narcotics Unit. As a result of the adjudication, Graham resigned from the Philadelphia Police Department prior to being formally dismissed.

Six, the sworn affidavit of former Philadelphia Police Officer Jerold Gibson, one of Mr. Williams' arresting officers, contradicts Reginald Graham's sworn testimony concerning Mr. Williams' arrest.
Seven, on March 8th of 2018 the District Attorney's Office of Philadelphia disclosed to Mr. Williams a partial copy of a list entitled Police Misconduct Review Committee Spreadsheet, dated January 3rd of 2018, which lists Reginald Graham as having been investigated by federal authorities for several alleged acts of corruption and lists the limit on testimony as quote, do not call without deputy approval. And that's Exhibit E.

Eight, on April 11th, 2018, the District Attorney's Office made a supplemental disclosure stating that the District Attorney's Office, quote, actually had information regarding the relevant misconduct of Graham as of September 7th, 2014, and that there was no evidence indicating that a disclosure of that evidence was made to Mr. Williams or his counsel before the March 8th, 2018, disclosure. And that's Exhibit F.

Nine, in over 1500 cases the Commonwealth agreed to PCRA relief because convictions were based on testimony of police officers in whose credibility the Commonwealth could no longer be confident. Relief has been granted in those cases without an evidentiary hearing. The sworn affidavit of Bradley Bridge, Esquire, details the way in which such cases have been handled. That's Exhibit G.

Ten, on April 20th, 2018, three PCRA petitioners who were arrested by Reginald Graham were granted PCRA relief by agreement without an evidentiary hearing before -- without an evidentiary hearing by President Judge Sheila Woods-Skipper. That's Exhibit H.

Eleven, the District Attorney's Office agrees to PCRA relief in this case in the form of a new trial.

Twelve, Exhibits A through H are admitted without objection from either party.

Id. at 85-88. After the Court noted the proper procedure for admission of stipulations, defense counsel then clarified that the parties agreed that if called to testify, someone from the FBI would come and say that the 302s attached include allegations of criminal misconduct allegedly engaged in by Officer Graham and if called to testify Walker and Gibson would testify consistently with their respective affidavits. Id. at 89. Additionally, they agreed that if called to testify a representative from the Police Board of Inquiry would testify to the information stated within exhibit C and that if called to testify a representative from the District Attorney's Office would inform this Court about the misconduct review sheet, exhibit E.

Last, this Court inquired about the investigation completed by Liam Riley, Esquire and the District Attorney's Office. The following statements were made by the Commonwealth as an officer of the court:

> **THE COURT:** Now, for the DA's Office, so that this record is complete with regard to all of these stipulations, before you entered into these stipulations, Mr. Riley, did you subpoena or speak to retired Police Officer Reginald Graham?
> **MR. RILEY:** I did not, Your Honor.
> **THE COURT:** Did you subpoena or speak to his lawyer, Mr. Abdul-Rahman?
> **MR. RILEY:** I did not, Your Honor.
> **THE COURT:** Did you subpoena or speak to Police Officer Sonya Jones who conducted the undercover surveillance with Police Officer Graham back on 1/23/2007?
> **MR. RILEY:** No, I did not, Your Honor.
> **THE COURT:** Did you subpoena or speak to Police Officer James Johnson or any of the other back-up officers involved in the paperwork on 1/24/2007?
> **MR. RILEY:** No, I did not, Your Honor.
> **THE COURT:** Did you subpoena or speak to -- okay. Scratch that. Did you consider the affidavits of former Police Officers Jeffrey Walker and Jerold Gibson in your assessment and conclusion regarding the credibility of Police Officer Graham?
> **MR. RILEY:** We did consider them, yes.
> **THE COURT:** And in doing so, did you consider that both of those officers had already plead guilty to crimen falsi crimes?
> **MR. RILEY:** Yes, we did, Your Honor.
> **THE COURT:** Okay. And you are aware based upon the information attached to the stipulations that retired Police Officer Graham was interviewed by federal

authorities in 2014. As a result of this cooperation, Graham was not indicted by either the federal court, state court, or local court?
MR. RILEY: I am aware of that, Your Honor.
THE COURT: And that the other officers, Walker, Liciardello, et cetera, were indicted?
MR. RILEY: Yes, Your Honor.
THE COURT: Okay. Did you speak to anyone at the FBI regarding their investigation of retired Police Officer Reginald Graham before you agreed to a new trial in this case? That happened back on April 16th.
MR. RILEY: I did not speak to him, Your Honor.
THE COURT: Okay. Did you subpoena or speak to retired federal prosecutor Curtis Douglas?
MR. RILEY: I did not.
THE COURT: Did you actually review any of the 302 investigation reports of the federal government involving Police Officer Jett, who was one of the police officers involved in the arrest?
MR. RILEY: I cannot say I reviewed the 302, Your Honor. I am one of a number of people who have worked on these police misconduct investigations overall. So there -- I'm sure people in our office have.
THE COURT: Okay. Well, your name is on everything that was submitted.
MR. RILEY: Correct, Your Honor. I'm clear I did not do that at all.
THE COURT: Okay. And at the time you agreed to a new trial on April 16th, had you subpoenaed or reviewed any of the 302 investigation reports regarding police officer -- retired Police Officer Graham?
MR. RILEY: Regarding Police Officer Graham?
THE COURT: Yes.
MR. RILEY: Yes, I did.
THE COURT: Before April 16th?
MR. RILEY: Yes, Your Honor.
THE COURT: Okay. So did you do any separate investigation of your own before you agreed to a new trial?
MR. RILEY: Your Honor, we --
THE COURT: Your office, the DA's Office.
MR. RILEY: In terms of investigation, we did not subpoena or interview additional witnesses, to my knowledge.

Id. 90-93. This Court then stated that it would review all of the additional documents submitted by the parties and issue a decision in due course. Id. at 102. The documents submitted include the following: (1) 6/26/2013 FBI interview of Jeffrey Walker; (2) 5/23/2013 FBI interview of Jeffrey Walker; (3) 11/1/2013 FBI interview of Jeffrey Walker; (4) 11/25/2013 FBI interview of Reginald Graham; (5) 5/14/2014 FBI Polygraph Examination Report of Reginald Graham; (6) 5/14/2014

FBI interview of Reginald Graham; (7) 6/22/2016 Internal Affairs interview of Reginald Graham; (8) 6/29/2016 Internal Affairs interview of Jeffrey Walker; and (9) 9/16/2016 Internal Affairs Police Investigation Analysis.

After reviewing the record, trial transcripts and considering the evidence and testimony presented at the evidentiary hearing, this Court is bound by the law to deny Defendant's PCRA petition because Defendant failed to meet his burden by a preponderance of the evidence.

ANALYSIS

I. Timeliness

As a threshold matter, in order to satisfy the timeliness requirement of a PCRA petition, a petitioner must file within one year after the date on which their judgment of sentence became final. *See* 42 Pa.C.S. § 9545(b)(1). Outside of this one year deadline, the PCRA court has no jurisdiction to address the merits of the petition. Commonwealth v. Rienzi, 827 A.2d 369, 371 (Pa. 2003). In order to overcome the untimeliness of a petition, a petitioner must plead and prove that he meets one of the following three exceptions to the time-bar:

> i. Failure to raise the claim previously was the result of interference from government officials with the presentation of the claim in violation of Constitution of laws of this Constitution or the Constitution of laws of the United States;
>
> ii. The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> iii. The right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. C.S. §9545(b)(1)(i)-(iii).

Importantly, a petition invoking one of the timeliness exceptions for the PCRA must be filed within 60 days of the date the claim first could have been presented. 42 Pa. C.S. § 9545(b)(2). The petitioner must plead and prove specific facts that demonstrate his claim was raised within the 60-day time frame. Commonwealth v. Hernandez, 79 A.3d 649, 652 (Pa. Super. 2013). The time "limitations are mandatory and are interpreted literally; thus, a court has no authority to extend filing periods except as statute permits." Commonwealth v. Fahy, 737 A.2d 214, 222 (Pa. 1999).

In the case at bar, Defendant's judgment became final on February 16, 2009, when the time to file an appeal with the Superior Court expired. Therefore, Defendant's PCRA petition, filed on February 14, 2018 was untimely by approximately nine years. *See* 42 Pa. C.S. § 9545(b)(1). Thus, in order to avoid the time-bar, Defendant needed to plead and prove that one of the three statutory exceptions applied.

In an attempt to satisfy an exception to the time-bar, Defendant asserted the newly-discovered fact exception, averring that the release of a Do Not Call List created by the District Attorney's office, which contained the name of the main officer in Defendant's case, is a newly-discovered fact that was otherwise unknown and unascertainable by the exercise of due diligence prior to Defendant's case. Defendant claimed that he became aware of this list through newspaper articles and a private investigation on or about February 13, 2018 and filed his claim thereafter on February 14, 2018.[4] This information was not ascertainable at an earlier date and this Court agrees that Defendant has met the timeliness exception, thus giving this Court jurisdiction to evaluate Defendant's after-discovered evidence claim on the merits.

[4]As discussed in this Court's March 29, 2018 Order and Opinion, there is a discrepancy as to when Defendant was first made aware of issues regarding credibility of Officer Graham, as both affidavits attached to Defendant's February 14, 2018 PCRA petition are dated prior to February 13, 2018, the date which Defendant avers he became aware of the accusations against Officer Graham. The fact that he had sent out investigators to question both former Officer Walker and former Officer Gibson about Officer Graham belies Defendant's assertion that he first became aware of Officer Graham's alleged misconduct through newspaper articles dated February 13, 2018.

II. Defendant's Irrelevant Challenge to an Evidentiary Hearing under PCRA.

a. Defendant's Irrelevant Challenge to an Evidentiary Hearing[5]

In support of Defendant's PCRA Petition, Defendant attached an affidavit from Public Defender Bradley Bridge, Esquire in which Bridge asserts that he has been working in the area of post-conviction relief for the past 23 years, specifically dealing with cases where there were allegations of police corruption. In his affidavit, as mirrored by his testimony at the evidentiary hearing, he described the process utilized by the District Attorney's office, the Defender Association, and the Philadelphia Judiciary, wherein once the lack of credibility of police officers is demonstrated by criminal charges, deceit or brutality, "[a]ttorney's from the Defender Association then meet with attorneys from the Philadelphia District Attorney's office to assess the roles played by the corrupt police officers as well as when the incident arose to determine the viability of a claim that the conviction was tainted by corrupt police officers at a time that the corruption was known to have existed." Def.'s Ex. K ¶5. Bridge testified that "after the Philadelphia District Attorney's Office and the Defender Association assess the convictions, the Philadelphia Judiciary is contacted." Def.'s Ex. K ¶6. The cases are then consolidated for review and relief is granted by agreement of the parties. (N.O.T. 6/18/2018, p. 28). If it is determined that the District Attorney has no further evidence other than the testimony of the corrupt police officer, the case is "nolle prossed" at the very same hearing. Id. Bridge averred in his affidavit that he had worked on vacating over 1,500 convictions and filed an additional 6,000 PCRA petitions based upon police officers on the Do Not Call List. Def.'s Ex. K ¶4, 9.

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[5] Defendant's issue questioning an evidentiary hearing in this case is irrelevant and has nothing to do with the merits of this case. Defendant simply is attempting to pit one female trial judge against another. Each judge has the right to exercise discretion and assess credibility as she sees fit. Indeed, our judiciary acts independently – one judge on the same court is not bound by the decisions of another judge of equal jurisdiction. While the Philadelphia County Court of Common Pleas has exercised the use of a three-judge panel to review certain types of cases, in relation to new opinions from our Superior Court, such as Megan's Law/ SORNA issues and Birchfield/ DUI issues, that is not applicable to Defendant Williams's matter. Nevertheless, this Court will thoroughly address the issues raised.

In his affidavit, Bridge stressed the importance that corrupt officer cases be consolidated under one judge in order to ensure a consistent process, however, after reviewing the PCRA petition which Bridge filed on behalf of Defendant Williams, in this same case, this Court has concerns regarding the manner in which Bridge has handled these cases. In the Defender Association's April 17, 2018 PCRA petition filed on behalf of Defendant Williams,[6] which was later withdrawn, Bridge inaccurately stated the facts of Defendant's case. He stated: "Petitioner Robert Williams was arrested on 1/24/2007, and charged with PWID. Petitioner pled guilty before the Honorable Genece E. Brinkley. Petitioner was sentenced on 8/19/2008 to 2 – 4 years confinement Probation 8 years." Def.'s PCRA Pet. 4/17/2018 ¶1 (*see* also Court's Appendix A). Not only was Defendant charged with PWID **and** VUFA, PIC, and simple assault, but he also did not plead guilty to those charges. He had a nonjury trial. Moreover, Defendant was not sentenced on 8/19/2008. He was sentenced on January 16, 2009. Most glaringly, he was not sentenced to 2 to 4 years confinement and 8 years probation, but rather, was sentenced only to 11 ½ to 23 months county incarceration plus 10 years reporting probation. Bridge further stated, "Petitioner neither filed a post-conviction petition nor a habeas corpus petition in state or federal court." Def.'s PCRA Pet. 4/17/2018 ¶2. This statement is false as Defendant previously had filed a PCRA petition by private counsel on February 14, 2018.

Bridge then stated in his PCRA petition on behalf of Defendant Williams that, "Counsel is **still not aware** [of] the facts known to the prosecutor's office that justified Officer Graham's placement on the secret list." Def.'s PCRA Pet. 4/17/2018 ¶4 (emphasis added). However, just three days later on April 20, 2018, three of Bridge's Graham related PCRA cases, Diane Hasty,

[6] The docket reveals that Defendant was never represented by the Defender Association of Philadelphia, that Defendant always has had private counsel, and that Defendant's Counseled PCRA Petition for the very same claim, regarding Officer Graham already had been filed nearly (2) two months at the time the Defender Association PCRA Petition was filed.

Michael Allen, and Lawrence Lockman, were granted relief and immediately nolle prossed by the District Attorney's office in front of President Judge Woods-Skipper. Bridge testified at Defendant Williams' evidentiary hearing that, "So what would happen is typically earlier in the week before, each of those hearings are set for Friday, so like the Tuesday before the prosecutor and I would agree on a number of cases for which relief would be appropriate." (N.O.T. 6/18/2018, p. 27). If Bridge was still unaware of the reason for which Graham was on the list on April 17, 2018, it is evident that he agreed to relief in the three cases discussed earlier, subsequently granted on April 20, 2018, without ever making himself aware. The record in those cases remain void of any investigation that would have informed Bridge as to the facts known to the District Attorney that justify Officer Graham's placement on the list.

In addition, in support of Defendant's April 17, 2018 PCRA petition, Bridge relied heavily on case law from Pennsylvania Supreme Court case Commonwealth v. McCracken, 659 A.2d 541 (Pa. 1995). Bridge wrote:

> A comparison to the facts presented here to those in ***McCracken*** demonstrates the strength of the instant claim. In ***McCracken*** the Pennsylvania Supreme Court affirmed the granting of a new trial by the trial court where the only eyewitness later recanted his testimony. The Supreme Court held that where, there and as here, the accused denied committing the crime, where the critical evidence is undercut by after-discovered evidence, a new trial is appropriate if the newly discovered evidence "was the essence of [the] defense and the ultimate question in [the] trial. Thus [the witness's] recantation is neither cumulative, corroborative, nor for impeachment purposes." ***Commonwealth v. McCracken***, *supra* at 550. That is similarly true here.

Def.'s PCRA Pet. 4/17/2018 ¶10. Defendant Williams' case differs greatly from McCracken. Unlike McCracken, there was no recantation testimony in this case. This case only involved testimony from other sources, Walker and Gibson, neither of whom testified at trial. Their testimony would be used solely to impeach the credibility of the testifying officer, Reginald Graham. Furthermore, the Supreme Court in McCracken conceded that, "we must defer to

credibility determinations made by the trial court which had the opportunity to observe the demeanor and hear the testimony of the witnesses." Id. at 551. Thus, the Supreme Court emphasized the importance of the trial judge's experience with the case from start to finish. In McCracken, the trial court indicated that:

> it had presided over every proceeding in this case with the exception of the first bail hearing and preliminary hearing. *Id.* Having had the opportunity to listen to the testimony and observe the demeanor of the witnesses in this case, the court noted that "there are things which [it] can find which might come as a surprise to those who have not heard the actual testimony and seen the actual witnesses testify." *Id.* at 19.

Id. at 549. In this respect, McCracken is similar to this case, but only in that this Court has presided over this case from the very beginning and has exclusively heard every bit of testimony related to this case and was able to observe the demeanor of each witness.

Bridge testified at Defendant's evidentiary hearing in order to explain the process that the courts have been using to review allegedly-corrupt officer PCRA petitions. However having reviewed Bridge's PCRA petition, which was subsequently withdrawn, this Court is not convinced that Bridge's approach is in accord with the PCRA and current case law. Having taken notice of how inaccurate the facts were and how void the petition was of applicable case law, this Court cannot rely on Bridge's testimony regarding how such PCRA petitions should be handled.

b. Defendant's Reference to Commonwealth v. Nina Harth

Defendant introduced what Defendant referred to as a "companion case", Commonwealth v. Nina Harth. (N.O.T. Evidentiary Hr'g 6/18/2018, p. 36.) The following exchange occurred between Defense counsel and witness Bridge:

> **Q:** Nina Harth, I am correct, was a companion case to Mr. Williams, correct?
> **A:** That is correct.
> **Q:** Arrested by Officer Reginald Graham on the same date and same location, correct?
> **A:** That's correct.
> **Q:** And your office represents Ms. Harth?

A: I do, personally.
Q: Have you filed a PCRA petition on behalf of Ms. Harth?
A: I have.
Q: Tell the Judge who that's in front of.
A: It's in front of Judge Sheila Woods-Skipper.
Q: Sheila Woods-Skipper.

***

Q: Would it be fair to say that I've just hand[ed] you D-2… and can you tell the Court and obviously describe for the record what D-2 is?
A: D-2 is the court docket for which you can obtain online. And it's the court docket for Nina Harth…
Q: And I'm correct that it reflects that in fact Ms. Harth had pled guilty before Her Honor, the Honorable Genece E. Brinkley on January the 22nd of 2008?
A: That's what it indicates, yes.
Q: And then on Her Honor's probation for a period of time?
A: Yes.
Q: And then ultimately you learning of this list, you filed a PCRA petition on her behalf?
A: I did.
Q: And that PCRA Petition is now pending in front of Judge Woods-Skipper?
A: That's correct.

Id. at 36-38. In fact, it appears that several representations made in Court regarding Harth's case are either incorrect or misleading. It appears that only one arrest report was prepared for Defendant Williams, Defendant Harth, Defendant Parker, and Defendant Bailey, all of whom were arrested the same day at that location. Defendant Parker and Defendant Bailey were found not guilty by this Court. The arrest report states the following:

> While the officers were effecting the arrest for Williams, a B/F (later ID as Nena Harth) was observed by P/O Rich run from inside of 2204 S. Hemberger Street, SB on Hemberger Street. The officer pursued her on foot, at which time she attempted to throw punches at the Officer. The Officer then used controlled holds to subdue Harth.

(*see* court history and Appendix A). Thus, contrary to Bridge's testimony, Harth was arrested by Officer Rich while Officer Graham was still in the process of arresting Defendant. Officer Graham wrote the Arrest Report that included Harth and Defendant in the list of individuals arrested. It is not clear whether Bridge's statements were intentional misrepresentations or innocent errors, but

after reviewing Harth's docket, it is apparent that Harth's circumstances were very different from Defendant's. The docket reflects that on January 22, 2008, Harth pled guilty to simple assault (on Officer Rich) and was sentenced to 6 to 23 months incarceration with immediate parole. On April 13, 2009, Harth's parole was revoked after she was found in direct violation and she was ordered to serve her back time. Soon thereafter, Harth was released from custody and has not served a sentence related to this case since approximately 2009. As such, she was no longer serving a sentence for which PCRA relief could be granted at the time Bridge filed his PCRA petition in 2018. Clearly such a petition is questionable based upon the plain language of the PCRA. By contrast, Defendant's case remained open before this Court due to Defendant's repeated and frequent violations of probation for which Defendant is still serving a sentence.

c. Defendant's Objections to an Evidentiary Hearing in This Case

As stated above, during his June 18, 2018 evidentiary hearing, Defendant objected to this Court conducting such hearing and asking questions.[7] In support of this objection, Defendant called Bradley Bridge, Esquire, who discussed extensively why he believed no evidentiary hearing should take place in this case.

However, to the contrary, the record reflects that this case was properly before this Court. As Defendant noted during the evidentiary hearing, the Philadelphia Court of Common Pleas is handling other PCRA petitions that involved Officer Graham in bulk hearings. Defendant's case was not administratively re-assigned to the Honorable Sheila Woods-Skipper, who is hearing the other cases, because Defendant's case was still pending before this Court. As Defendant represented at the evidentiary hearing, Judge Woods-Skipper dismissed three PCRA petitions on April 20, 2018. During the hearing in which the petitions were dismissed, it is undisputed that no

[7] "Where the interest of justice so requires, the court may examine a witness regardless of who calls the witness." Pa.R.E. 614(b).

findings of fact or law were actually put on the record. As a result, this Court is not bound by those determinations. Commonwealth V. King, 999 A.2d 598, 600 (Pa. Super. 2010).

In addition, this Court is not bound to accept the agreement of the parties for relief. *See* Commonwealth v. Johnson, 17 A.3d 873 (Pa. 2011)(upholding the PCRA Court's dismissal of PCRA despite the agreement of the parties for relief when the record reflected, notwithstanding the absence of an evidentiary hearing, the defendant had no meritorious claims)(Saylor, J. dissenting, finding the record insufficient to make determinations and rebuking the PCRA Court for mismanaging the defendant's PCRA petition for decades and failing to create an adequate record for review); Commonwealth v. Chimenti, 507 A.2d 79 (Pa. 1986)(rebuking the Philadelphia District Attorney's Office and President Judge of Superior Court for furthering an illicit agreement to replace a jury verdict with a lesser charge without creating a record or following criminal procedure in order to avoid bringing the request before the Trial Court).

Here, this Court was asked to make an early determination on the merits of Defendant's PCRA through his Motion for Stay and for Bail Pending Consideration of his Post-Conviction Relief Act petition. After analyzing the standards for post-conviction bail and reviewing Defendant's PCRA Petition, this Court found that the motion was not supported by any evidence in the record. Thus, Defendant knew that he had not proven any of his claims on the record.

This Court also noted that in response to Defendant's Bail Motion, the District Attorney's Office declined to submit an analysis of the case in order to make a recommendation and only stated that "[t]he Commonwealth is not in a position to accept or reject the allegations contained in [Defendant's affidavits of Gibson and Walker] at this time." Comm. Resp. to Def.'s Mot. For Stay and Bail, 3/14/2018, ¶6. In abdicating its responsibility to conduct a review of this case, the Commonwealth very generally stated:

> In the event Petitioner's conviction is reversed (in whole or in part) as a result of post-conviction proceedings, the risk of an unjust or disproportionate sentence having been served exists. That risk increases as long as Petitioner remains in custody. Especially in light of the history of hundreds of convictions already having been reversed based on information provided by Officer Walker, there is a strong showing of likelihood of Petitioner's conviction being reversed (in whole or in part).

Id. at ¶10.

Despite this Court's request for such analysis and sufficient information to support claims raised, the District Attorney provided the following letter in brief as its complete response to Defendant's PCRA Petition:

> The Commonwealth agrees to PCRA relief in the form of a new trial. Here, Officer Graham was the sole witness to testify at defendant's trial. **In light of disclosures regarding this officer's misconduct**, the Commonwealth is not able to stand behind the credibility of his trial testimony at this time. Accordingly, the Commonwealth concedes that a new trial is necessary.

Comm. Letter in Brief Answer 5/29/2018 (emphasis added). However, at the Evidentiary Hearing, the District Attorney's Office made clear that it did not conduct its own review of the alleged misconduct. *Supra* p. 13-14. After reviewing the record thoroughly, this Court is unable to determine exactly what the Commonwealth based its decision upon when determining that it is not able to stand behind the credibility of Officer Graham's trial testimony, except for the affidavits submitted by Defendant from corrupt former Police Officers Walker and Gibson. Notwithstanding that the burden is on Defendant to prove by a preponderance of the evidence that relief should be granted, the District Attorney's apparent lack of investigation did not bolster Defendant's claims or clarify for this Court the reasons for their stipulations and agreement to grant relief.

Furthermore, this Court is unconvinced that, considering the obvious lack of investigation and review, the 23-year process developed by the District Attorney's Office and Defender Association wherein the court grants relief solely based upon the agreement of the parties meets

the requirements of the Pennsylvania Legislature through the PCRA statute. Based upon this Court's experience in handling a large volume of PCRA cases from 1996 to 1998 and September 2017 to present, this Court has consistently created a full and complete record in matters assigned. This case has been handled in the same fashion under the language and procedures spelled out in the PCRA and current case law.

With the benefit of this experience, the following information was elicited from Defense witness Bridge:

> **THE COURT:** ... You mentioned that because this has been going on and this is the way it's been handled for 23 years, that just doing an agreement between counsel on the record is okay for everything. For everything. As long as you for 23 years you've done it the same way, the same thing has happened the same way. I mean, honestly, a lot of other situations in life could be discussed about how long they took place and they were not all together right at the time. We can talk about a number of things in life that took place for a very long time but they were not right. And somehow somewhere down the road it was corrected.
>
> So you're saying because it was 23 years it has been done with just an agreement between counsel without either one you or without -- let me just say you, without you doing any further investigation, that that is the way that it should continue and that no one should ever do any research concerning why you come to these conclusions? That's my question. Because it's been done for 23 years that way.
> **THE WITNESS:** I fully agree with you that simply doing things repetitively the same way over a period of time does not make it right. We all have instances where we know that that's true.
> **THE COURT:** Right.
> **THE WITNESS:** So, no, I have no doubt that you're absolutely correct on that. I point out the way that we've done this in the past 23 years to establish the following: What we've done through multiple iterations in development of the procedure is I think established a transparent due process protection where there's procedural due process for all parties. And the reason I think that's important is that that by setting up a regimented routine that is utilized irrespective of who the parties are helps to protect and ensure that there be due process. I've been an appellate attorney ever since I graduated law school in '79. It was my first job. I did appeals only for those four years. So I fully recognize the importance of following procedure and how that achieves protection for all citizens. And that's why I think the process that's been done here utilizes the best protections that I think we can achieve.
>
> Is it the best? Not necessarily. Can it be improved? Certainly could. But I don't agree that simply doing it the same way or the same process for 23 years means it's

> potentially available to be reopened and reexamined because that process is deficient or defective. That I take umbrage with.

(N.O.T. Evidentiary Hr'g 6/18/2018, p. 71-72.)[8] Both the District Attorney's Office and Defender Association openly admitted their lack of investigation. Despite the fact that the District Attorney's Office and Defender Association already have established a process to review PCRA petitions for juveniles sentenced to life without the possibility of parole **individually** based upon the facts and merits of their arguments, a similarly individual review has not been implemented for other PCRA petitions involving related claims.[9] The PCRA petitions filed by the Defender Association on behalf of Defendant Williams and Defendant Nina Harth illustrate legitimate pitfalls in the process and the need to create a complete individual record in each PCRA case. This Court followed the procedure outlined in the PCRA and appropriately conducted an evidentiary hearing, creating a thorough record. Therefore, Defendant's challenges to this Court conducting an Evidentiary Hearing under the PCRA were properly denied.

III. After-Discovered Evidence

In order to succeed on a claim for post-conviction relief, the burden is on the petitioner to demonstrate by a preponderance of the evidence that he or she is eligible for relief. 42 Pa.C.S. §9543. The Pennsylvania Supreme Court has provided the test for granting a new trial following an evidentiary hearing for after-discovered evidence:

> The four-prong test for awarding a new trial based [on] after-discovered evidence is well settled. The evidence: (1) could not have been obtained prior to trial by exercising reasonable diligence; (2) is not merely corroborative or cumulative; (3)

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[8] This Court was constrained to recognize that history is full of practices that existed for years without correction. The institution of slavery persisted in this country for over 300 years. The continuation of these practices depended upon the complicity of those who had the power to change it and believed that the practice was beyond reproach due to the longevity. The longevity of this practice repeatedly was legitimized by those who supported it. In addition, recently the #MeToo Movement has exposed the unequal power dynamics in society that effectively subjugated a class of citizens for hundreds of years.

[9] In Philadelphia County, bulk cases involving juveniles sentenced to life without parole are currently assigned to Senior judge Katheryn Streeter Lewis, who conducts an individual review of each PCRA petition alleging claims under Miller v. Alabama, 132 S. Ct. 2455 (2012).

> **will not be used solely to impeach a witness's credibility**; and (4) **would likely result in a different verdict**. *See Commonwealth v. Pagan*, 597 Pa. 69, 950 A.2d 270, 292 (2008).

Commonwealth v. Castro, 93 A.3d 818, n. 7 (Pa. 2014)(emphasis added). In deciding whether the after-discovered evidence would likely result in a different verdict, the PCRA court must not only examine the strength of the evidence introduced at trial, but should take into consideration the motive of those offering the after-discovered evidence and the integrity of those providing this new evidence. Commonwealth v. Padillas, 997 A.2d 356, 365 (Pa. Super. 2010). Recantation evidence is of notoriously low integrity and is highly unreliable. Commonwealth v. D'Amato, 856 A.2d 806, 825 (Pa. 2004). The PCRA court must address the believability of such testimony in determining whether relief is warranted. Id. In Commonwealth v. Washington, 927 A.2d 586, 597 (Pa. 2007), the Supreme Court of Pennsylvania upheld the decision of the PCRA court to deny relief after determining that the source of the newly-discovered evidence was not credible because the witness had nothing to lose in making such an exculpatory statement, "implicitly finding that [co-defendant's] affidavit was not credible." Id. The Court stated, "Thus, the PCRA, as fact-finder, having assessed the credibility of [co-defendant's] confession and its significance in light of the trial record, properly denied Appellant relief." Id. Thus, where the source of allegedly exculpatory evidence is not credible the PCRA court may properly deny relief. Id. In addition, the finder of fact is free to believe all, part, or none of the testimony of any witness. Commonwealth v. Patterson, 180 A.3d 1217, 1230 (Pa. Super. Feb. 8, 2018).

a. The Substance of the After-Discovered Evidence

Defendant relied on a list prepared by the District Attorney's Office entitled "Police Misconduct Review Committee Spread Sheet." Def.'s Am. PCRA Pet. ¶14(c)(i). This list, also called the "Do Not Call List", lists Officer Reginald Graham with the status, "Do not call without

Deputy approval" based upon unspecified "misconduct" because he was "investigated by Federal authorities for several alleged acts of corruption." Def.'s Ex. D. The date of misconduct is recorded as November 1, 2013. Neither Defendant nor the District Attorney offered any explanation as to what occurred on November 1, 2013 to form the basis of the specific misconduct.

Following a thorough review of all documents provided on the record in this case, the only event that occurred relevant to this case on November 1, 2013 was that former Police Officer Jeffrey Walker provided a statement to the FBI. However, Officer Graham's name is mentioned only with regard to one incident. No date or details of this incident were provided within the statement. The complete statement Walker provided that date, recorded by an FBI agent in a 302 report, concerning Officer Graham is as follows:

> Walker advised the Brockton Road Job (DC# 05-19-004239) which he had discussed in earlier interviews with the FBI is not the first time where Walker and Reggie Graham stole money together. There was an earlier job where Walker and Graham were in a house and they found a shoebox full of money. Graham told Walker to grab it and they split the money.

FBI 302 of Jeffery Walker, 11/1/2013 p. 6. This statement apparently formed the basis for the misconduct for which Officer Graham appeared on the Do Not Call List.

In support of these allegations, Defendant proffered affidavits from disgraced former-Police Officers Jeffrey Walker and Jerold Gibson claiming that Officer Graham participated in falsifying affidavits of probable cause, lying on the stand and stealing money during raids as far back as 2005. He also presented FBI interviews of both Walker and Officer Graham from 2013 and 2014, as well as a Philadelphia Police Department Internal Affairs Investigation of Officer Graham which concluded in the board finding that Officer Graham had engaged in criminal conduct, theft, and lying during the investigation. The basis for these findings was the testimony

of Walker in his FBI interviews and in interviews with Internal Affairs. Throughout all of his interviews Officer Graham maintained his innocence.

Jeffery Walker was a member of the Philadelphia Police Department's Narcotics Field Unit from 1999 to 2013, a period of fourteen years. Def.'s Am. PCRA Pet. ¶14(b). Walker only worked with Officer Graham in that unit from 2003 to 2005 or 2006 and then again in 2012, a maximum of four years. Id. The parties admit that Walker was convicted of *crimen falsi* offenses for which he was fired from the Philadelphia Police Department. (N.O.T. 6/18/2018 p. 57.)

Notably, Walker was not present at Defendant's arrest and, therefore had no personal knowledge of this case. Further, Walker did not work with Officer Graham from 2005 or 2006 until 2012, a period of 6 or 7 years. Defendant attempted to introduce Walker's review of Officer Graham's work on this case by unofficially qualifying him as an expert witness by highlighting his "personal knowledge of the workings of the Narcotics Field Unit." Def.'s Am. PCRA Pet. ¶14(b). Defendant provided the Court with an affidavit from Walker in which Walker reviewed Officer Graham's Arrest Report for Defendant. Walker stated that it "bears the hallmarks of a fraudulent affidavit, written to manufacture probable cause for the search warrant." Def.'s Ex. B. ¶13.

Significantly, Walker did not testify at the evidentiary hearing in Defendant's case, therefore the Court had no opportunity to assess the credibility of Walker's testimony in Court. Alternatively, the parties stipulated that, if called to testify, Walker would have testified consistently with his affidavit. However, a stipulation of a witness's testimony is not an admission as to the veracity or credibility of the testimony. Rather, it is "simply an agreement to incorporate the testimony of a witness who, if called, would testify to exactly what was being stipulated." Commonwealth v. Johnson, 17 A.3d 873, 910 (Pa. 2009). Walker was also convicted of a *crimen*

falsi crime. The Pennsylvania Supreme Court explained, "*crimen falsi* necessarily entails an element of falsehood, and includes everything which has a tendency to injuriously affect the administration of justice by the introduction of falsehood and fraud." Commonwealth ex rel. Pa. Attorney Gen. Corbett v. Griffin, 946 A.2d 668, 673 (Pa. 2008)(internal quotes and citations omitted); *see also* Pa.R.E. 609 ("For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty… must be admitted if it involved dishonesty or false statement."). Upon review of Defendant's affidavits of Jeffrey Walker and Jerold Gibson, serious credibility issues were found. Def.'s Ex. A and B. "Both affiants have been convicted for crimes while working in law enforcement." Comm. Resp. to Def.'s Mot. For Stay and Bail, 3/14/2018, ¶6.

Gibson was a member of the Philadelphia Police Department from January 1996 to March 2013 and was a member of the Narcotics Field Unit with Officer Graham from 2004 to 2013. Ex. A ¶1. Notably, Gibson, who served with Officer Graham for 9 years, never stated in his affidavit that he saw Officer Graham take any money, steal any money, or accept any money from Walker. However, Gibson was present at the execution of the search warrant of 2204 Hemberger Street and was present during Defendant's arrest. Id. ¶2. Gibson's affidavit is largely consistent with Defendant's actual testimony at trial. Gibson confirmed that Defendant possessed a firearm at the time of arrest and that, upon seeing the police officers, lifted the gun in a manner Gibson described as suggesting Defendant tried to discard the gun. Id. ¶7-8. Gibson's affidavit focused upon discrepancies regarding whether police officers yelled "Police" while approaching Defendant (*see* Def.'s PCRA Ex. A, ¶10 ("Officers Graham and Johnson did not yell "Police" or "Drop the gun" to Mr. Williams.") and whether Defendant lifted his gun toward the police officers (*see* Def.'s PCRA Ex. A, ¶7 ("I never saw Mr. Williams lift his gun and point it at Officers Graham and

Johnson."). However, Defendant Williams himself testified at trial that they all screamed "Police" (N.O.T. Trial 8/19/2008, p. 80.) and Officer Graham testified that: "[W]hen he pulled the gun from his pants, he pointed the gun in our direction where we were at and he crouched down behind the car, we yelled 'police' several times, 'drop the gun.' After several verbal commands, that's when Mr. Williams then stood up from behind the car and took off running." Id. at 45.

b. Disgraced Former-Officer Jeffrey Walker is Not Credible

As stated above, Defendant raised credibility issues with Officer Graham's trial testimony and probable cause affidavit by using written statements given by former Police Officer Walker, the lynchpin of Defendant's claims.

On June 18, 2018, the parties introduced evidence by way of stipulation for the first time at the evidentiary hearing. This evidence included at least four separate interviews of Walker and four separate interviews of Officer Graham. The parties made no attempt to explain the details of the newly-introduced evidence. However, after a thorough review of the complete record for this case, the Court is not persuaded that Defendant met his burden to prove by a preponderance of the evidence that this newly-discovered evidence would have changed the outcome of his trial.

In 2013 and 2014, the FBI investigated the Philadelphia Police Narcotics Field Unit ("NFU"). During this investigation, it is undisputed that Officer Graham provided unsolicited information to federal investigators. Investigative Supp. Serv. Mem. 9/16/2016 p. 1.

In an interview conducted November 25, 2013, Officer Graham explained that he suspected that Walker corrupted an investigation referred to as the "Brockton Road" investigation. FBI 302 of Reginald Graham, 11/25/2013 p. 1. While Officer Graham completed the Police Arrest Report for the investigation, Walker and Officer Alphonso Jett executed the search warrant on a vehicle

that was confiscated during the investigation. Officer Graham, who was not present with Officer Jett and Walker, stated that he received a call from Officer Jett who stated:

> he didn't like what was going on and that WALKER had offered him money from the car. GRAHAM told JETT to put WALKER on the phone. GRAHAM told WALKER not to do that on his job and the money better come upstairs. WALKER told GRAHAM he was just playing. GRAHAM then told JETT to keep an eye on the bag [retrieved during the search of the vehicle]... Stacks of money were observed in the bag. WALKER brought the bag in the office and GRAHAM watched it as it went into MALKOWSKI's office.
>
> When the bag went into MALKOWSKI's office, LICIARDELLO and REYNOLDS went into the office and the door was shut. GRAHAM expected to be called into the office to count it, but he never was. As the money was being counted, GRAHAM was finishing up the [Police Arrest Report]. At this point in his career, GRAHAM was suspicious about the credibility of LICIARDELLO, REYNOLDS and WALKER. Because of these suspicions, GRAHAM made a point of putting on the [Arrest Report] that the money seized from the car was counted by MALKOWSKI. MALKOWSKI was the one who gave GRAHAM the amount for the property receipt. GRAHAM thought that $34,000 was the approximate amount that went on the property receipt.

Id. at 2. Officer Graham recalled that he did not realize that money was likely taken until later because he did not believe at that time that Sgt. Malkowski was corrupt. Id. Officer Graham spoke to Officer Jett while leaving the building and Officer Jett stated that he made sure all the money came upstairs from the car. Id. Officer Jett also explained that Walker took money from the bag found in the car and offered it to Officer Jett. Officer "JETT told WALKER, that he didn't know me and that he (JETT) could be from Impact. JETT told GRAHAM that WALKER put the money back." Id. at 2.

Officer Graham indicated that he would talk to Assistant District Attorney Curtis Douglas about his concerns regarding Liciardello, Reynolds, and Walker. Id.

Officer Graham indicated that Walker had a problem with Officer Graham. Officer Graham believed that Walker was pushed onto Officer Graham's squad. Officer Graham told Walker to stop trying to be Liciardello, who allegedly acted as the ring-leader for the corrupt

officers. Id. at 5. Walker would go off on his own and the sergeant would have to call him back to jobs. Officer Graham complained to the lieutenant and sergeant that he believed they needed to get rid of Walker, but they responded that they were "stuck with him." Id. Walker complained that he was losing money while working on Graham's squad and that Sgt. Meehan would not allow him to do what he wanted. Walker heard that another squad was making more money and suggested that he and Officer Graham transfer to that squad. Officer Graham told Walker that they would transfer together and even drafted the transfer memoranda for each of them. However, Officer Graham was not serious about transferring to a different squad with Walker and subsequently requested to withdraw his memo. Officer Graham did all of this in order to disassociate himself from both Walker and the other corrupt police officers. As a result, Walker was then transferred and Officer Graham was not. Subsequently, Walker discovered what Officer Graham did. Id. A few months thereafter, Walker was arrested for planting drugs in a vehicle. FBI 302 of Jeffrey Walker, 5/29/2013 p. 1.

On May 14, 2014, Officer Graham voluntarily submitted to a polygraph examination conducted by the FBI. He failed the test when asked whether he took money from Brockton Road and whether he took money from Walker. FBI 498 of Reginald Graham, reported 5/21/2014 p. 3. In an interview immediately following discovery of the results, Officer Graham explained that he investigated a case with a suspect named Scruggs that led to the case at Brockton Road. Shortly after the Scruggs investigation, Walker asked to meet Officer Graham at a Sunoco gas station. Walker handed Officer Graham an envelope and drove away. Officer Graham stated that he did not open the envelope, assumed Walker had handed him stolen money from the Scruggs investigation, and threw the unopened envelope in the trash. Id. Officer Graham explained that he said that he never took money from Walker or the Brockton Road job because he was afraid the

investigator would not believe that he did not open the envelope or keep the money and was afraid of the repercussions. Id.

Officer Graham repeated this explanation during a subsequent interview with the FBI that same day. He repeated that he did not steal money or take any money from Walker. FBI 302 of Reginald Graham, 5/14/2014 p. 1. Walker called him to meet at a Sunoco gas station, handed Officer Graham an envelope, Officer Graham did not open the envelope but suspected that it was money stolen from the Scruggs investigation, and threw it in the trash. Id. Officer Graham elaborated that he believed that was possibly being set up by Malkowski and felt that he had no choice but to take the envelope. Id. at 2.

Officer Graham further explained that shortly before Walker was arrested, Walker confided that the other corrupted officers pulled guns on Walker and threatened to kill him because they found out he was talking to the FBI and ADA Douglas. Id. at 2. Officer Graham then contacted ADA Douglas out of concern for Walker's safety. Id.

Officer Graham further explained a number of times when he reported bad behavior of other officers to various sources and suffered repercussions as a result. He stated that sometime in 2003 or 2004, he was called to Internal Affairs to give a statement on one of the cases Liciardello, Walker, and Reynolds had that generated a complaint. Reginald Graham Statement 6/22/2016 p. 2. Officer Graham stated that he was tired of submitting statements because their cases received complaints and that he was not involved in obtaining probable cause for those arrests. Immediately following the interview, Sgt. Malkowski called Officer Graham regarding his answers. Officer Graham believed Sgt. Malkowski relayed the information to Liciardello and Reynolds because they gave him the cold shoulder and Liciardello called him a "snitch." Id.

Next, Officer Graham stated that he warned a Captain new to the squad to be careful of Liciardello, Reynolds, and Walker. Apparently that Captain relayed the warning back to those officers. Officer Graham stated that he and his partners were threatened. "We were told that they would have our jobs and we were told that they knew a lot of people." Id. at 3.

Officer Graham was questioned by Jean Durbin in the City Solicitor's Office regarding a case. He responded that he could only vouch for his part of the case, that he did not trust the other officers involved, and did not want to be associated with them. While leaving the meeting, he received a call from Sgt. Malkowski who apparently already knew the content of the meeting before he even returned to the police department. At that point, Officer Graham stated that he believed he had no one left to report anything to because his captain was the cousin of Sgt. Malkowski. Id.

Officer Graham stated that an occasion arose where he went to the commissioner's office for an unrelated issue and complained to Sgt. Kim Byrd about the situation. He explained to her that Liciardello ran his own jobs and kept the rest of the squad in the dark, that he was known for having a black bag in all of his warrants for probable cause, and that all his cases ended with another officer holding the black bag inside the house while Liciardello got a search warrant signed. He also expressed that he wanted off the squad. Shortly thereafter, Liciardello and Reynolds were removed from the street but continued to make as much overtime as when they were on the street. Id.

Sometime later, Officer Graham was named as a defendant in a federal court case referred to as the Randle case. He testified that he separated himself from the other defendants and the judge dropped him from the Randle case and other cases in which he was named. Id.

> After I returned to work things changed at the unit. Cases that I was working were put on the back burner. These cases were my primary cases and something was

> always more important than my cases. I had several good jobs and I was not recognized for my good work while Liciardello, Reynolds, and Walker were constantly recognized and put in for awards. We did not work together from that point. It was more of an us v. them mentality.

Id. at 4. Shortly thereafter, Sgt. Malkowski made Walker ride and work with Officer Graham, which was not done before. Officer Graham believed Walker was supposed to fish for information and report back to Sgt. Malkowski. Sometime thereafter, Walker warned Officer Graham to watch himself, that Liciardello and Reynolds were very angry with him because of the Randle case, and warned him to be careful who he talked to. Id. After the conversation, Officer Graham changed his routine and took different routes of travel, however someone punctured all the tires in his car at one point and cracked all the windows in his apartment in another incident. Officer Graham did not report these incidents because he did not know who to trust. Id.

Officer Graham spoke to ADA Douglas regarding his work in the Scruggs case and recommended Liciardello, Reynolds, and Walker not be used in court. Officer Graham told the District Attorney his concerns about the officers and that he wanted to disassociate himself from them by working on a federal case. Id.

Thereafter, Sgt. Byrd notified Officer Graham that Liciardello and Reynolds were returning to street duty. He believed her call was meant to warn him to be careful. Officer Graham was left with the impression that someone told Sgt. Byrd that Liciardello and Reynolds were good guys, so he believed that nothing was going to be done about his complaint. Id.

Officer Graham added that he reported a complaint with Lt. Wixted and Sgt. Meehan when the NFU was broken up. Id. at 5. He expressed concern that it might be a problem if Walker was transferred to their squad but did not tell them everything he knew because he did not know who to trust.

When Internal Affairs asked Officer Graham to explain Walker's accusation that he stole money from Brockton Road and the "shoebox" job, Officer Graham maintained that Walker tried to offer Officer Jett money and Officer Jett told Officer Graham. Officer Graham then "told [Walker] off." Id. Officer Graham was so concerned about Walker's attempt to take money and the way that the money was counted by Sgt. Malkowski in a private room with Liciardello and Reynolds that he asked an FBI agent to retrieve the money immediately. Id. at 6. The search warrant reflected that $34,000.00 was recovered from the investigation, Sgt. Malkowski told Officer Graham that there was $32,000.00 in the bag, and the FBI determined that there was $32,252.00 recovered. Id. Officer Graham answered that he was not asked about a "shoebox" case during the actual polygraph test. Id. at 5. It appeared there were only two substantive questions asked: "Did you steal that money from Brockton Road;" and "Did you take that money from Walker?" FBI 302 of Reginald Graham, 5/14/2014 p. 4.

Officer Graham explained that his history of expressing concern with these officers, his concerns being relayed back to these officers, and then suffering repercussions as a result made him afraid during the polygraph examination.

> I felt very nervous when I took the polygraph. I did a preliminary interview with Sgt. Deacon before taking the polygraph. This upset and alarmed me because he introduced himself, he said he worked at Narcotics for several years and he knew and worked with Sgt. Malkowski and Lt. Wixted. Sgt. Deacon also said he worked with several other supervisors that still work there. It also bothered me because I felt that it was now going to get out that I was down at the FBI giving info and people back at the unit would know that I was there.
>
> I was worried about information being leaked because in the past I was asked by the FBI to wear a wire against P/O Williams and P/O Clahar. A little while later I was told by a former partner that I was asked to do that. I knew there was a leak because that was true. All info talked about with Feds & the fact that I took a polygraph, I wore a wire, etc.

Reginald Graham Statement 6/22/2016 p. 5.

After thoroughly comparing each statement provided by Officer Graham, while there were discrepancies, the totality of the evidence contained in Graham's statement point to his truthfulness in dealing with a difficult atmosphere of corruption in his immediate work environment. He stated he did not take any money from Walker from the Brockton Road job or Scruggs job. Indeed, when the money was recorded from the Brockton Road job, it was Officer Jett who complained that Walker offered **him** money, which he refused to take. Officer Graham was not even present, either when the money was recovered or when it was counted, as it was counted by Sgt. Malkowski. In addition, with regard to the Scruggs job, Officer Graham stated that he was offered an envelope by Walker while pumping gas at a Sunoco gas station. While he did not open it, he stated he thought it contained money from the Scruggs job and threw it in the trash, as he thought he was being watched.

Indeed, Walker's statements contain similar themes that support the credibility of Officer Graham's statements. Walker's statements show that police supervisors supported and were involved with the corrupt enterprise. FBI 302 of Jeffrey Walker, 5/29/2013 p. 4-5, 9; FBI 302 of Jeffrey Walker, 11/25/2013 p. 3, 6. Thus, Officer Graham's repeated complaints to multiple sources became an actual threat to their careers and ability to support their families. The corrupt officers were violent, which is why Walker stated he was threatened when they believed Walker was reporting on them. FBI 302 of Jeffry Walker, 5/29/2013 p. 3.

Walker's statements also have major inconsistencies. Walker explained that when money was taken from a crime scene,

> LICIARDELLO would divvy up money at his locker at NFU. Even after WALKER was on the "outs" with LICIARDELLO, LICIARDELLO would still divide up money there the same way. Each person from the unit would go into the locker one at a time to get their cut.

FBI 302 of Jeffrey Walker, 5/29/2013 p. 6-7. Despite this practice, Walker never alleged that Officer Graham went to the locker room to collect a cut from Liciardello. Walker's only claims were that he allegedly directly gave money to Officer Graham when no one else was present. FBI 302 of Jeffrey Walker, 5/29/2013 p. 4.

On May 21, 2013, Walker was caught by federal authorities planting drugs in a car. FBI 302 of Jeffry Walker, 5/29/2013 p. 1. A mere 8 days after he was caught planting drugs, Walker provided his first interview to the FBI on May 29, 2013. At that time, Walker already knew that Graham had been in contact with city, state, and federal authorities about their unit members and therefore, had motive to implicate Graham.

In his affidavit for this case, Walker stated, "when I worked with Jones, Graham, and Johnson, I observed them misusing confidential informants on numerous occasions. I witnessed them let confidential informants go out of their view, in violation of policy, and then create fraudulent search warrant affidavits in which they claimed to have directly witnessed those confidential informants purchase drugs." However, this is in direct contradiction to Walker's own testimony to the FBI in which he clearly stated Officer Sonia Jones was clean. FBI 302 of Jeffrey Walker, 6/26/2013 p. 3. Walker's description of Officers Jones, Graham, and Johnson are the only time in the record that Walker talks about these three officers together. This Court found no allegations that Officer Johnson was corrupt in any of the statements made during either the FBI or PPD investigations.

The only link between these three officers for the purpose of this affidavit appears to be that Officer Jones was with Officer Graham and also observed the incidents where Defendant sold drugs that formed the basis for Officer Graham's probable cause affidavit that led to Defendant's arrest. Officer Johnson helped Officer Graham arrest Defendant and testified at Defendant's

sentencing for this case that Defendant pointed a gun near him. Officer Johnson testified in relevant part as part of his victim impact statement:

> Your Honor, on that particular day, we went to go serve a search warrant. I was a passenger of the vehicle. We arrived at 2204 H [Hemberger] Street. There is a van there. I couldn't even see over the van, so I couldn't even see Officer Graham. I'm just already getting out of the car with this, this ram was used to knock down the door. This is not something I want to do. It's something I have to do. I have two years left [before retiring].
>
> As we approach the property, I didn't see or hear anything. He's behind this van. I come around the van with the ram. He has the gun pointed right to my head. Now, where do you go from there? I'm taught to shoot in combat. What do you do when you have no fire and he's feet away from you?
>
> Your Honor, I fell backwards and tried to take cover and I did see him and I did get my firearm up in line of his sight, lock my sights up at him as he ducked behind the car looking to get a shot off, which I believe he didn't get a shot off.
>
> The family should be thankful I didn't take his life. Really, you know, that's what we should really be really here about. I could justifiably take his life and, you know what, it would make my fear horrible. It's not something I want to do.
>
> Not one time did he ever say I'm so sorry.

(N.O.T. Sentencing 1/16/2009, p. 76-77). He continued: "And when I turned that corner behind that van, I was blindsided by a .40 caliber handgun that was bigger than mine and I'm defenseless and I have a baby—I have two babies at home. What do I tell my wife after that? I can't tell her anything." Id. at 79.

At the conclusion of its investigation, federal prosecutors declined to prosecute Officer Graham even though they did indict several other officers allegedly involved in the illegal enterprise. The record shows Walker's testimony was gathered and used by the investigation into corruption by members of the NFU. That information was presented to a jury with Walker as its cooperating witness. After hearing Walker's testimony, the federal jury found each of the officers

charged in the case "not guilty" of any crimes. (N.O.T. 6/18/2018 p. 49) ("They were indicted and found not guilty."). Thus, it can be inferred that the jury did not find Walker's testimony credible.

However, despite the FBI's decision and the Philadelphia District Attorney's decision to decline to charge Officer Graham in 2014, the Philadelphia Police Department's Internal Affairs division decided to lodge charges in 2016. However, it appears that no charges were lodged by the Internal Affairs Division for conduct unbecoming, lying, or theft by Liciardello, Spicer, and others who were indicted and found not guilty. As a result of the Internal Affairs action against Officer Graham, both Officer Graham and Walker were interviewed.[10] Sgt. Meehan reported to the Police Internal Affairs Division that during the investigation "P/O Graham conducted himself in a professional manner and is hard working and knowledgeable and he would rate him satisfactorily." Employee Assessment 11/3/2016.[11] The results of the complete investigation were recorded in the memorandum prepared by Investigative Support Services to the Police Commissioner that concluded without specifying its findings of fact, that Officer Graham lied during the course of the investigation and committed two counts of theft while on duty. This memorandum contained only information extracted from reports of interviews conducted by the FBI and by PPD Internal Affairs of Officer Graham and Walker. It noticeably did not contain any information regarding Walker's conviction for *crimen falsi* crimes or the reliability of his testimony, details or analysis of cases allegedly corrupted, or interviews of any officer of the Philadelphia Police Department who was not convicted of a crime.

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[10] Significantly, there is an affirmation at the end of the interview report Walker's interview that states the following:

I HAVE READ THE FOREGOING STATEMENT CONSISTING OF (17) PAGES AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Walker did not sign or date the interview report provided to the Court.

[11] Both Walker and Officer Graham spoke highly of Sgt. Meehan in a way that suggested that he was not corrupt or involved in the enterprise.

The Police Internal Affairs record lacks any statements that may have been collected from Officer Sonia Jones, Officer Graham's partner who also observed the drug sales in question in Defendant's probable cause affidavit for the arrest warrant; Officer Alphonso Jett, who was offered money by Walker following the Brockton Road job; or Officer James Johnson, who assisted Officer Graham in arresting Defendant. The record lacks any underlying facts of any cases discussed in the interviews with Walker or Officer Graham that could verify information provided or establish a timeline. The record lacks an explanation of why Internal Affairs concluded in its report that Officer Graham committed two separate counts of theft but only found one count of conduct unbecoming for theft. The record also lacks an explanation of why the allegations of theft appear to have happened sometime in 2005 but the date of misconduct is recorded in an internal memorandum to Human Resources as June 22, 2016, eleven years later. Apparently, the only event which occurred on June 22, 2016 was Officer Graham's interview by Internal Affairs. This date is different than the District Attorney's "date of misconduct" on its Do Not Call List, which recorded the misconduct as occurring on November 1, 2013, which was the date of disgraced Officer Walker's third interview with the FBI that was provided to the Court.

Ultimately, the allegations of misconduct related to Officer Graham do not relate to the facts of Defendant Williams' case, the instant matter, and do not create a question of credibility for Defendant's trial or underlying arrest. No mention was found of Defendant's case in any of the interviews of Officer Graham or Walker. Walker's statements alone are not sufficiently reliable to undermine the credibility of Officer Graham's testimony in our case due to Walker's federal conviction for theft, a *crimen falsi* crime, the inconsistencies in his own statements, and the lack of detail in major portions.

As stated above, this Court, as finder of fact, is free to believe all, part, or none of the testimony of any witnesses, whether by testimony in court or by stipulation. This Court, as finder of fact, assesses credibility in favor of Officer Graham as explained in his statements regarding corruption at higher levels of the Philadelphia Police Department and against the testimony of Walker as his statements and affidavits, as stipulated by counsel.

c. The After-Discovered Evidence Would Not Have Changed The Verdict At Trial

In the case at bar, Defendant has the burden of proving by a preponderance of the evidence that if the newly discovered evidence was presented at trial the outcome would have been different. Established law in Pennsylvania states that the after-discovered evidence exception applies specifically to unknown facts and does not encompass a newly discovered source for previously known facts. Commonwealth v. Johnson, 863 A.2d 423, 427 (Pa. 2004). Defendant offered Gibson's affidavit in order to advance the theory that Defendant did not raise his gun toward Officer Graham. However, this was Defendant's defense at trial, which he testified to on the stand. Therefore, Gibson's statements are merely a new source for a previously-known fact that was heavily considered at trial. Indeed, Defendant Williams was found not guilty of aggravated assault, but guilty of simple assault. Further, it is only being offered as impeachment evidence, which is not sufficient to meet the requirements of PCRA relief. Castro, 93 A.3d n. 7.

The Court now turns to Defendant's allegations that Officer Graham was a corrupt cop who participated in stealing money from narcotic investigations and arrests as claimed by disgraced former Officer Walker. None of this information, if available at the time of trial and accepted as true, would have been successful in changing the verdict. Although Defendant was successful in convincing this Court that the evidence could not have been obtained prior to trial by exercising reasonable diligence and that it is not merely corroborative or cumulative, the evidence

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still would be used solely for impeachment purposes and would not have changed the outcome at trial. Had this information been available at the time of trial, Defendant could only have used it in two ways: (1) in support of a motion to suppress the affidavit of probable cause and (2) to impeach the credibility of Graham on cross-examination. Since the latter does not support relief under the after-discovered evidence test, this Court will now focus on whether Defendant could have succeeded using this evidence at a motion to suppress hearing.

It has long been established that courts are to give deference to the findings of the magistrate when evaluating affidavits of probable cause. Commonwealth v. Leed, -- A.3d --, 2018 WL 2452659, at *7 (Pa. June 1, 2018). "Both the magistrate in his or her pre-search determination, and the trial court in its post-search review must read probable cause affidavits in a common sense fashion to ascertain whether probable cause exists. Gates, 462 U.S. at 239, 103 S.Ct. 2317. However, this does not permit either court to engage in speculation or conjecture, as the burden rests entirely upon the Commonwealth." Id. Courts should consider the totality of the circumstances when evaluating affidavits of probable cause. Id.

In his Affidavit, Walker stated, "I reviewed the summary of Officers Graham and Jones's surveillance activities in the preliminary arrest report ("PARS") from Mr. Williams' Arrest. I think it bears the hallmarks of a fraudulent affidavit, written to manufacture probable cause for a search warrant." Def.'s Ex. B ¶13. Walker goes on to state that the "hallmarks" making it a fraudulent affidavit are that the officers did not stop the unknown black female they saw give Williams money in exchange for small objects, which would have ordinarily been done, and that it was implausible for Officer Jones to have been close enough to the corner of 22nd and Jackson Street to observe the confidential informant buy drugs. Id. These generalizations as to why Officer Graham and Officer Jones's affidavit must be fraudulent are nothing more than conjecture without any tangible proof

or semblance of knowledge of what actually occurred and was observed by Officer Graham and Officer Jones. Indeed, these generalizations are being made by Walker in February 2018, who obviously has motivation to fabricate his statement since he was convicted of a federal crime and Officer Graham was convicted of nothing.

In his amended PCRA petition Defendant alleged:

> The newly discovered evidence in the case therefore affects not only the integrity of the trial but also the integrity of the suppression hearing. Had Graham not falsely sworn out the affidavit and falsely justified Mr. Williams' arrest, none of the physical evidence introduced at trial (nor the testimony about the drugs and gun) would have been admissible. The case against Mr. Williams would therefore have failed entirely.

Def.'s Am. PCRA Pet. ¶17. Ignoring for the moment credibility issues of Walker and Gibson and the questionable truthfulness of their statements, Defendant would **not** have succeeded on a motion to suppress the affidavit of probable cause even with this newly-discovered evidence because Officer Graham was not the only officer who observed Defendant selling drugs. Rather, Officer Jones was also present with Officer Graham during the surveillance of Defendant and was available throughout Defendant's trial to testify. Both Officer Graham **and** Officer Jones observed Defendant participating in the sale of drugs in a public location where Defendant had no reasonable expectation of privacy, after which he walked into the house at 2204 South Hemberger.[12] Both Officer Graham and Officer Jones indicated in the warrant that there was a reliable source

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[12]Additionally, in order to show standing to bring a motion to suppress the affidavit of probable cause Defendant proffered that Officer Graham would testify to seeing Defendant go in and out of the house using a key. It is this same testimony of Officer Graham, that Defendant used to show that he had standing to even raise the motion in the first place. (N.O.T. 8/19/2008, p. 23). If, as Defendant avers, Graham is incredible and lied as to every material aspect of his testimony then Defendant's proffer of Graham's testimony regarding seeing Defendant using a key to enter and exit the residence would be incredible as well and Defendant would not have been able to prove standing necessary to raise such a motion. As the Court stated at Mr. William's trial, "All right. Based upon the case law and the fact that the offer of proof is that at trial Graham would testify that the other two people who entered and exited with keys were these defendants that establishes their standing." Id.

indicating that drugs were being supplied from and sourced from 2204 South Hemberger. At the suppression hearing this Court found:

> Then the warrant, the affidavit goes on to say on 1/23/07 Police Officer Graham and Police Officer Jones met with the confidential informant at the location -- at a confidential location for the purpose of conducting a narcotics investigation at 2204 South Hemberger. They, obviously, set up surveillance at that point and observed a person who, I guess, was later identified as Defendant Parker (sic) [Williams] exit the location, 2204 South Hemberger, get on a bike and ride down to the corner of the street, observed that same black male engage in what they believe to be a drug transaction, get back on the bike, ride back to 2204, enter the property with keys. Subsequently they saw the same individual back on the corner of 22nd Street, at which time the CI was then walked to the corner and engaged in what Graham and Jones observed to be what they thought was a drug transaction. And then observed the same black male return to 2204, get back on the bike and ride back to 2204 South Hemberger. After having observed these two transactions and having one of them involved with the CI, this is sufficient for the purpose of this warrant on the four corners to have been issued. It specifically describes the place to be searched and things to be seized and the fact the search warrant was executed the very next day on 1/24/07. So the motion is denied.

(N.O.T. 8/19/2008, p. 26-28). Officer Jones was present for everything that occurred and was listed in the affidavit of probable cause. Furthermore, in his interview with the FBI, Walker himself stated that Jones was clean. FBI 302 of Jeffrey Walker, 6/26/2013 p. 3. Since Officer Jones was stated in the affidavit of probable cause as observing the entire drug activity with Officer Graham, its falsification was not demonstrated. Thus, Defendant would not have prevailed on a motion to suppress even with these new accusations against Officer Graham.

Notably, even if Defendant could have prevailed on a motion to suppress the affidavit of probable cause, only the evidence found **inside** of 2204 South Hemberger as a result of the search warrant likely would have been suppressed at trial. The vast majority of Defendant's charges related to the illegal gun he had on his person **outside** of the house and in plain-view of every officer that responded as backup officers. Therefore, all of the gun possession charges are unaffected by Defendant's success or failure at a motion to suppress hearing.

Based upon the foregoing, Defendant did not meet his burden to prove by a preponderance of the evidence that Defendant is entitled to PCRA relief. This Court, as finder of fact, has found portions of the evidence contradicted in the affidavits and statements of former Officer Jeffery Walker and former Officer Jerold Gibson not credible. In addition, the Court has rejected Defendant's challenge to this Court conducting an evidentiary hearing as such hearing is authorized and required under the PCRA. Accordingly, Defendant's request for relief pursuant to 42 Pa.C.S. § 9545, et seq. is **DENIED**.

BY THE COURT:

______________________ **J.**

APPENDIX “A”

FILED
04/17/2018 02:41:01 PM
Post Trial Unit
By: M. DON

DEFENDER ASSOCIATION OF PHILADELPHIA
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Bradley S. Bridge and Shonda Williams
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COMMONWEALTH OF PENNSYLVANIA	: THE COURT OF COMMON PLEAS : CRIMINAL TRIAL DIVISION
	: **CP-51-CR-0011614-2007**
VS.	: CHARGES: PWID, etc.
Robert Williams PPN: 892643	

MOTION FOR A NEW TRIAL BASED UPON AFTER DISCOVERED EVIDENCE; ALTERNATIVELY, FOR POST CONVICTION COLLATERAL RELIEF; OR ALTERNATIVELY, FOR A WRIT OF HABEAS CORPUS

Robert Williams, by Bradley S. Bridge, Assistant Defender, Assistant Defender, Shonda Williams, Assistant Defender, Karl Baker, Assistant Defender, Chief, Appeals Unit, and Keir Bradford-Grey, Defender, hereby requests relief under Rule 720(C), Pa.R.Cr.P., as after discovered evidence, alternatively under the Post Conviction Relief Act, or alternatively as a writ of Habeas Corpus pursuant to the Pennsylvania and United States Constitutions and 42 Pa.C.S.A. §6501 ***et. seq.***, and in support thereof avers:

1. Petitioner Robert Williams was arrested on 1/24/2007, and charged with PWID. Petitioner pled guilty before the Honorable Genece E. Brinkley. Petitioner was sentenced on 8/19/2008 to 2 - 4 years confinement Probation 8 years. Petitioner was represented by Private Counsel.

2. Petitioner neither filed a post-conviction petition nor a habeas corpus petition in state or federal court.

3. There have been substantial developments following Petitioner's plea that entitles petitioner to a new trial based upon after discovered evidence and based upon due process of law, under both the Pennsylvania and United States' Constitutions. An examination of the facts and the applicable law demonstrate this conclusion.

4. The critical police officer in the instant case was Reginald Graham. Unknown to defense counsel at the time that this matter was going to trial was the fact that there was information that Officer Graham was not a credible police officer. On March 5, 2018 counsel was given first the first time a copy of the Philadelphia District Attorney's "do not call" list, a list of police officers for which a prosecutor cannot call to testify in any matter without explicit permission from the First Assistant District Attorney. Counsel then learned for the first time that Officer Graham was on that list. Counsel is still not aware the facts known to the prosecutor's office that justified Officer Graham's placement on that secret list.

5. While the prosecution has not turned over any Brady material, counsel is filing this petition within 60 days of the public disclosure of the "do not call" list. These facts constitute after-discovered evidence.

The Law Applicable To After Discovered Evidence

6. Pennsylvania law regarding after-discovered evidence is well established. It must be discovered after trial or could not have been discovered before or during trial through reasonable diligence, it must not be merely corroborative or cumulative, it cannot be used solely for impeaching a witness's credibility and a different verdict would likely result if there were a new trial utilizing this evidence. ***Commonwealth v. Brosnick***, 530 Pa. 158, 607 A.2d 725 (1992); ***Commonwealth v. McCracken***, 540 Pa. 541, 659 A.2d 541 (1995). That standard is easily met by the facts presented here. The Philadelphia District Attorney's Office was in possession of critical information toxic enough to bar Officer Graham from testifying unless explicitly given permission to testify by the Deputy District Attorney. These facts could not have been discovered earlier through due diligence.

7. It is clear that this new evidence is not merely corroborative or cumulative. There was no similar impeachment available to be used in this case.

8. This new evidence would not be used solely to impeach the officer involved. It could have been utilized to support a CI motion, a Motion to Suppress and/or it could have been utilized to undermine the officer's reliability by demonstrating that he had, for example, had lied about the actions of the CI in this case and in other cases or lied about what drugs (and what weight of drugs) were involved in his drug arrests.

9. A defendant need only establish by a preponderance of evidence that the newly discovered evidence would likely compel a different verdict. Commonwealth v. Fiore, 780 A.2d 704, 711 (Pa. Super. 2001). He need not prove the impossibility of his guilt. Here, if the fact finder had been aware of the devastating information exclusively possessed by the District Attorney's Office it is likely that the verdict would have been different.

10. A comparison to the facts presented here to those in ***McCracken*** demonstrates the strength of the instant claim. In ***McCracken*** the Pennsylvania Supreme Court affirmed the granting of a new trial by the trial court where the only eyewitness later recanted his testimony. The Supreme Court held that where, as there and as here, the accused denied committing the crime, where the critical evidence is undercut by after-discovered evidence, a new trial is appropriate if the newly discovered evidence "was the essence of [the] defense and the ultimate question in [the] trial. Thus Aldridge's recantation is neither cumulative, corroborative, nor for impeachment purposes." ***Commonwealth v. McCracken***, *supra* at 550. That is similarly true here. This Honorable Court should grant a new trial based upon after discovered evidence.

Alternative Bases for Relief

11. The Due Process Clauses of both the United States and Pennsylvania Constitutions provide an alternative basis for

granting relief. Due process demands that petitioner be given the opportunity to put this new information before a fact finder.

12. Given the above, if this Court or a jury had been aware that the officer was, for example, lying about the confidential informant and other matters in this case and in others, this Court or the jury would likely have found petitioner not guilty. In the unlikely event that a fact finder would have found petitioner guilty, that verdict would have been so untenable that such a verdict would have been arbitrary and so contrary to the truth-determining process that the verdict would not have been a reliable adjudication of guilt.

13. Any or all of the above would be cognizable through a federal writ of habeas corpus. The violations of the federal constitutional rights to due process of law and a fair prosecution as set forth above would require the granting of federal habeas corpus relief. It should, therefore, be cognizable as such under the PCRA, as an alternative basis for relief. To the extent that the recent amendments to Pennsylvania's PCRA abrogate this as a ground for relief, the recent amendments must be recognized as unconstitutionally enacted and without force or effect, and the prior applicable provisions of the PCRA deemed applicable here. See ***Commonwealth ex rel. Dadario v. Goldberg***, 773 A.2d 126, 131, fn. 5 (Pa. 2001).

14. The violation of state and federal constitutional rights to due process of law set forth above constitutes grounds for the

grant of a state writ of habeas corpus, as guaranteed by Article I, §14 of the Pennsylvania Constitution and 42 Pa.C.S.A. §6102 ***et seq***. To the extent that the PCRA purports to, or might be interpreted to supplant or subsume the remedy of habeas corpus as guaranteed by the Pennsylvania Constitution and protected by 42 Pa.C.S.A. §6102 ***et seq.***, while at the same time denying petitioner the right to seek or receive a writ of habeas corpus in a context like that presented here, the PCRA constitutes an unconstitutional infringement upon the state constitutional right of habeas corpus.

15. While the petitioner pled guilty, it was only because petitioner was not in possession of the information described above. This Honorable Court and defense counsel were kept in the dark about critical and vital facts involving the instant officer's corruption. This Honorable Court should, therefore, grant a new trial where these facts can properly be presented to the fact finder.

WHEREFORE, Petitioner, by and through counsel, respectfully requests that this Honorable Court grant relief as after-discovered evidence, or under the Post-Conviction Relief Act or grant a writ of Habeas Corpus, and grant a new trial.

Respectfully submitted,

/S/
BRADLEY S. BRIDGE
Assistant Defender

SHONDA WILLIAMS
Assistant Defender

KEIR BRADFORD-GREY
Defender

DEFENDER ASSOCIATION OF PHILADELPHIA
1441 SANSOM STREET
PHILADELPHIA, PA 19102
(215) 568-3190

DEFENDER ASSOCIATION OF PHILADELPHIA
BY: KEIR BRADFORD-GREY, Defender and
Bradley S. Bridge and Shonda Williams
Identification No. 00001
1441 Sansom Street
Philadelphia, PA 19102
(215) 568-3190

COMMONWEALTH OF PENNSYLVANIA	: THE COURT OF COMMON PLEAS : CRIMINAL TRIAL DIVISION
	: **CP-51-CR-0011614-2007**
VS.	: CHARGES: PWID, etc
Robert Williams PPN: 892643	

ORDER

AND NOW, this day of , 2017, upon examination of the Motion For A New Trial Based Upon After Discovered Evidence; Alternatively, For Post Conviction Collateral Relief, Or Alternatively, For Writ Of Habeas Corpus, it is HEREBY ORDERED and DECREED, that a new trial is granted. The District Attorney's motion to *nolle prosse* all the charges under that court number is granted.

J.

DEFENDER ASSOCIATION OF PHILADELPHIA
BY: KEIR BRADFORD-GREY, Defender and
Bradley S. Bridge and Shonda Williams
Identification No. 00001
1441 Sansom Street
Philadelphia, PA 19102
(215) 568-3190

COMMONWEALTH OF PENNSYLVANIA	:	THE COURT OF COMMON PLEAS
	:	CRIMINAL TRIAL DIVISION
	:	**CP-51-CR-0011614-2007**
VS.		
	:	CHARGES: PWID, etc
Robert Williams		
PPN: 892643		

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing "MOTION FOR A NEW TRIAL BASED UPON AFTER DISCOVERED EVIDENCE; ALTERNATIVELY, FOR POST CONVICTION COLLATERAL RELIEF; OR ALTERNATIVELY, FOR A WRIT OF HABEAS CORPUS" upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 122:

Judge Sheila Woods-Skipper 1201 Criminal Justice Center Philadelphia, PA 19107	District Attorney of Philadelphia 3 South Penn Square Philadelphia, PA 19102
TYPE OF SERVICE: ( )First Class Mail (x)E-File	TYPE OF SERVICE: ( )Personal (x)E-File

Signature of Counsel for Appellant:
/S/
BRADLEY S. BRIDGE, Assistant Defender
DEFENDER ASSOCIATION OF PHILADELPHIA
1441 SANSOM STREET
PHILADELPHIA, PA 19102

DATE: 4/17/2018

NOTE: Under 18 Pa.C.S.A. 4904 (Unsworn Falsification to Authorities), a knowingly false proof of service constitutes a misdemeanor in the second degree.

FILED
04/18/2018 02:54:55 PM
Post Trial Unit
By: N. LOW

IN THE COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

: CP-51-CR-0011614-2007

V

:

ROBERT WILLIAMS

PRAECIPE TO WITHDRAW PCRA PETITION

On April 18, 2018 the above captioned PCRA petition is hereby withdrawn.

/S/
BRADLEY BRIDGE, Assistant Defender

Defender Association of Philadelphia
1441 Sansom Street
Philadelphia, PA 19102

Defendant: last name: WILLIAMS Sex: Male SSN: - - DOB: 05/06/1987
first name: ROBERT middle initial: Race: Black Birth Place: Philadelphia

FACTS OF THE CASE:
YOUR AFFIANT RECEIVED INFORMATION FROM A RELIABLE SOURCE WHO STATED THAT NARC OTICS SALES ARE BEING CONDUCTED IN THE 1ST DISTRICT AT 22ND & JACKSON STREET, AND ALSO 23RD & JACKSON STREET BY NUMEROUS B/M'S ON BIKES OR FOOT IN THESE AREAS. THE SOURCE WENT ON TO STATE THAT THE DRUGS ARE BEING SUPPLIED FROM AND STORED INSIDE OF 2204 S. HEMBERGER STREET.

ON 1-23-06, P/O GRAHAM #6214 & P/O JONES #7253 MET WITH A C/I AT A CONFIDENTIAL LOCATION FOR THE PURPOSE OF CONDUCTING A NARCOTICS INVESTIGATION AT 2204 S. HEMBERGER STREET. AT APPROX. 3:30PM, P/O GRAHAM OBSERVED A B/M (LATER ID AS ROBERT WILLIAMS) APPROX. 21YRS., MEDIUM COMPLEXION, APPROX.5'8", WEARING A BLACK SKI HAT, TAN COAT W/PATCHES ON THE SLEEVES, EXIT 2204 S. HEMBERGER STREET, GOT ON A BIKE AND RODE DOWN TO THE CORNER OF 22ND & JACKSON STREET. THIS SAME B/M (R. WILLIAMS) THEN ENGAGED AN UNK. B/F STANDING ON THE CORNER IN A BRIEF CONVERSATION, AT WHICH TIME THE B/F HANDED WILLIAMS AN UNK. AMOUNT OF USC IN EXCHANGE FOR SMALL OBJECTS RETRIEVED FROM HIS COAT POCKET. WILLIAMS THEN GOT BACK ON HIS BIKE, DROVE BACKED TO 2204 S. HEMBERGER STREET, AND ENTER THE PROPERTY WITH KEYS. AT APPROX. 3:50PM, (2) B/M'S (LATER ID AS RASSON PARKER & WILIAM BAILEY) WERE OBSERVED EXIT 2204 S. HEMBERGER STREET, LOCKED THE DOOR WITH KEYS, GET INTO A BLACK NISSIAN BEARING A PA TAG OF GKS-6419, AND PROCEED OUT OF THE AREA. AT APPROX. 4:45PM, THE C/I WAS SEARCHED BY THE OFFICERS BOTH BEFORE AND AFTER THE BUY AND HAD NO ADDITIONAL USC OR NARCOTICS ON HIS/HER PERSON, AND PROVIDED 20.00 PRE-RECORDED BUY MONEY (SER#EA08661123D). P/O JONES OBSERVED THE C/I WALK UP TO THE SAME B/M (R. WILLIAMS) WEARING THE TAN COAT W/PATCHES ON THE CORNER OF 22ND & JACKSON STREET. THE C/I THEN HAD A BRIEF CONVERSATION WITH WILLIAMS, EXCHANGED THE PRE-RECORDED BUY MONEY FOR SMALL OBJECTS RETRIEVED FROM THE B/M COAT POCKET. THE C/I RETURNED TO THE OFFICERS AND TURNED OVER (2) CLEAR ZIPLOCK PACKETS CONTAINING AN OFF WHITE CHUNKY SUBSTANCE ALLEGED CRACK COCAINE. DURING THIS TIME THE B/M (R. WILLIAMS) WAS THEN OBSERVED RIDE HIS BIKE DOWN TO 2204 S. HEMBERGER STREET, AND ENTER THE PROPERTY. YOUR AFFIANT PERFORMED A NIK TEST "G" ON (1) PACKET OF THE CRACK COCAINE PURCHASED WHICH WAS POSITIVE FOR COCAINE BASE, PLACED ON PROPERTY RECEIPT #2703260, AND SUBMITTED TO THE CHEM LAB FOR FURTHER ANALYSIS.

THE C/I UTILIZED BY P/O GRAHAM & P/O JONES WAS IN CONTINOUS VIEW OF THE OFFICER AT ALL TIMES PRIOR TO THE C/I SEARCH, AND AFTER HE/SHE RETURNED TO THE OFFICERS AFTER THE BUY. THE C/I HAS PARTICIPATED IN NUMEROUS NARCOTICS INVESTIGATIONS, WHICH HAS LED TO NUMEROUS ARREST, DRUG CONFISCATIONS, & GUN RECOVERIES INCLUDING ARRESTS AND CONFISCATIONS LISTED ON DC#S #06-04-053446, 06-25-117102, 06-16-051234.

ON 1-24-07 AT APPROX. 6:00PM, P/O GRAHAM & P/O JONES CONDUCTED A SURVEILLANCE AT 2204 S. HEMBERGER STREET. AT WHICH TIME THE OFFICERS OBSERVED A GREEN MINI-VAN PARKED IN FRONT OF 2204 S. HEMBERGER STREET. RASSON PARKER WAS THEN OBSERVED GETTING OUT OF THE DRIVER SIDE OF THE VEHICLE, WALK UP TO 2204, AND ENTER THE PROPERTY USING KEYS. AT APPROX. 6:05PM, BACK-UP OFFICERS WERE NOTIFIED TO EXECUTED SW#. DURING THIS TIME ROBERT WILLIAMS WAS OBSERVED WALKING OUT OF 2204 S. HEMBERGER STREET, AT THE SAME TIME OFFICERS WERE COMING DOWN THE BLOCK. AS P/O GRAHAM & P/O JOHNSON #4381 PROCEEDED TO 2204 S. HEMBERGER STREET ON FOOT, ROBERT WILLIAMS LOOKED AT THE OFFICERS (WHO WERE IN FULL RAID GEAR) AND BEGAN TO TUG ON A DARK OBJECT IN THE FRONT OF HIS PANTS. AS THE OFFICERS BEGAN TO TAKE COVER AND YELL POLICE, THEY OBSERVED WILLIAMS PULL A BLACK GUN FROM THE FRONT OF HIS PANTS (WAISTEBAND) AND POINT DIRECTLY AT THE OFFICERS. ONCE BEHIND COVER THE OFFICERS WERE ABLE TO DRAW THEIR SERVICE WEAPONS, AND DRAW DOWN ON WILLIAMS ORDERING HIM TO DROP THE GUN. AT WHICH TIME WILLIAMS PROCEEDED TO RUN AND HIDE BETWEEN (2) VEHICLES, BOTH OFFICERS THEN TACKLE WILLIAMS TO THE GROUND. WILLIAMS REFUSED TO TAKE HIS HAND FROM UNDER HIS BODY, AND BEGAN TO PUT UP A VIOLENT STRUGGLE. WHILE TRYING TO HANDCUFF WILLIAMS P/O GRAHAM & P/O JOHNSON ATTEMPTED TO USE CONTROL HOLDS ON THE DEFENDANT WITH NEGATIVE RESULTS. THE DEFT WAS STRUCK SEVERAL TIMES BY OFFICER'S JOHNSON & GRAHAM IN ORDER TO EFFECT THE ARREST. (NECESSARY FORCE WAS USED TO EFFECT THE ARREST). (DURING THE COURSE OF THE STRUGGLE P/O JOHNSON DID INJURE HIS RIGHT HAND AND WAS LATER TRANSPORTED TO JEANES HOSPITAL FOR SWELLING AND PAIN TO HIS RIGHT HAND). RECOVERED FROM UNDER A CAR WHERE THE STRUGGLE ENSUED BY P/O GRAHAM WAS (1) BLACK SIG SAUER .9MM MODEL #P225 LOADED W/(1) IN THE CHAMBER AND (7) IN THE MAGAZINE. RECOVERED FROM WILLIAMS PERSON WAS $45.00 USC (PR#2703266), (1) CLEAR ZIPLOCK PACKET CONTAINING (21) CLEAR ZIPLOCK PACKET CONTAINING ALLEGED MARIJUANA (PR#2703265), (1) PA ID CARD (PR#2703267). WHILE THE OFFICERS WERE EFFECTING THE ARREST FOR WILLIAMS, A B/F (LATER ID AS NENA HARTH) WAS OBSERVED BY P/O RICH RUN FROM INSIDE OF 2204 S. HEMBERGER STREET, SB ON HEMBERGER STREET. THE OFFICER PURSUED HER ON FOOT, AT WHICH TIME SHE ATTEMPTED TO THROW PUNCHES AT THE OFFICER. THE OFFICER THEN USED CONTROLLED HOLDS TO SUBDUE HARTH. AT APPROX. 6:07PM, OTHER MEMBERS OF NFU#1 SOUTH#1 EXECUTED SW#127338 AT 2204 S. HEMBERGER STREET. WILLIAMS WAS THEN BROUGHT INTO 2204 S. HEMBERGER STREET AS OFFICERS WERE STILL EXECUTING SEARCH WARRANT, WHERE HE BEGAN TO PUT UP A VIOLENT STRUGGLE AGAIN BY ATTEMPTING TO KICK OFFICERS, AND CONTINUED TO FIGHT AND REFUSED POLICE COMMANDS. OFFICERS THEN HAD TO TACKLE WILLIAMS TO THE GROUND AND SUBDUED HIM.

ARRESTED BY P/O JETT #9872 WAS WILLIAM BAILEY, RECOVERED FROM HIS PERSON WAS $235.00 USC (PR#2703270) & PA DRIVERS LICENSE (PR#2703271). ALSO ARRESTED BY P/O JETT WAS IKEEM PARKER, RECOVERED FROM HIS PERSON WAS $13.00 USC (PR#2703268) & $253.00 USC (PR#2703273). ARRESTED BY P/O GIBSON #7511 WAS RASSON PARKER, RECOVERED FROM HIS PERSON WAS $208.00 USC (PR#2703269). ALSO ARRESTED BY P/O GIBSON WAS RAMEIL JONES, RECOVERED FROM HIS PERSON WAS $682.00 USC (PR#2703264).

RECOVERED FROM REAR BEDROOM CLOSET BY P/O CAIN #1353 WAS INSIDE OF A BAG WAS $3,486.00 USC (PR#2703276). ALSO RECOVERED FROM THE CLOSET WAS (1) CLEAR BAGGIE TIED IN A KNOT CONTAINING (13) RED ZIPLOCK PACKETS OF ALLEGED MARIJUANA, (1) CLEAR ZIPLOCK BAGGIE CONTAINING (13) CLEAR JARS W/PURPLE TOPS CONTAINING ALLEGED MARIJUANA, & (1) CLEAR ZIPLOCK BAGGIE CONTAINING ALLEGED MARIJUANA
APPROX. 128 GMS (ALL ON PR#2703278) RECOVERED FROM THE REAR BEDROOM DRESSER DRAWER BY P/O WIMS #5135 WAS $2,552.00 USC (PR#2703279) & $770.00 USC (PR#2703272). RECOVERED FROM THE SAME BEDROOM WAS NUMEROUS PICTURES OF THE DEFTS. (PR#2703277).

RECOVERED FROM THE DINNING ROOM TABLE BY P/O PARROTTI #4810 WAS (1) CLEAR BAGGIE TIED IN A KNOT CONTAINING ALLEGED MARIJUANA APPROX. 6GMS (PR#2703278). ALSO RECOVERED FROM THE DINNING ROOM FLOOR WAS (1) BLACK GUN SHOULDER HOLSTER (PR#2703274).

RECOVERED FROM THE BASEMENT ON A SHELF BY P/O RICH #9843 WAS (1) PLATE, (5) SMALLER PLATES, & (2) RAZOR BLADES ALL CONTAINING A WHITE RESIDUE (PR#2703278). ALSO RECOVERED FROM THE BASEMENT WAS (1) CLEAR ZIPLOCK PACKET W/AN APPLE EMBLEM CONTAINING NUMEROUS NEW & UNUSED YELLOW TINTED ZIPLOCK PACKETS, (1) CLEAR ZIPLCOK PACKET W/AN APPLE EMBLEM CONTAINING NUMEROUS NEW & UNUSED CLEAR ZIPLOCK PACKETS, (2) CLEAR ZIPLOCK PACKETS W/AN APPLE EMBLEMS CONTAINING NUMEROUS NEW & UNUSED GREEN TINTED ZIPLOCK PACKETS, & (1) BLACK BAG CONTAINING NUMEROUS NEW & UNUSED CLEAR JARS

Certificate of Service

Commonwealth v. Robert Williams **CP-51-CR-0011614-2007**

Type of Order: Order and Opinion Denying PCRA Relief

I hereby certify that I am this day serving the foregoing Court Order and Opinion upon the person(s), and in the manner indicated below, which service satisfies the requirements of Pa. R.Crim.P. 114:

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Commonwealth:

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Type of Service: ( ) Personal ( ) First Class Mail (x) Other, please specify: inter-office mail

Date: 6-25 __________, 2018

Tab C

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OFFICE OF JUDICIAL RECORDS
CRIMINAL DIVISION
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	**CP-51-CR-00011614-2007**
vs.		**SUPERIOR COURT** **2242 EDA 2018**
ROBERT WILLIAMS	:	**NOVEMBER 30, 2018**

CP-51-CR-0011614-2007 Comm. v. Williams, Robert
Opinion

BRINKLEY, J.

SUPPLEMENTAL OPINION

This Court filed an Order and Opinion on June 25, 2018 denying Defendant's PCRA petition and addressing relevant issues in this instant matter, which opinion is hereby incorporated by reference as if fully set forth herein at length. Defendant appealed this denial to the Superior Court. This Court now supplements said Opinion and addresses issues raised in Defendant's Statement of Matters Complained of on Appeal. The issues addressed in this Opinion are: (1) whether this Court improperly failed to recuse itself; (2) whether the Court (Tucker, S.J.) erred in ruling that both the coordinate jurisdiction rule and Rule 903(D) do not disqualify this Court from presiding over the instant matter; (3) whether this Court erred by holding an evidentiary hearing; (4) whether this Court displayed pervasive partiality and prejudged the outcome of the evidentiary hearing; (5) whether this Court erred by refusing to accept the facts stipulated by the parties and making credibility determinations about the witnesses; (6) whether this Court invoked the incorrect legal standard under 42 Pa.C.S. § 9543(a)(2)(vi). This Court's decision should be affirmed.

ISSUES

I. WHETHER THIS COURT IMPROPERLY FAILED TO RECUSE ITSELF.

II. WHETHER THE COURT (TUCKER, S.J.) ERRED IN RULING THAT BOTH THE COORDINATE JURISDCTION RULE AND RULE 903(D) DO NOT DISQUALIFY THIS COURT FROM PRESIDING OVER THE INSTANT MATTER.

III. WHETHER THIS COURT ERRED BY HOLDING AN EVIDENTIARY HEARING.

IV. WHETHER THIS COURT DISPLAYED PERVASIVE PARTIALITY AND PREJUDGED THE OUTCOME OF THE EVIDENTIARY HEARING.

V. WHETHER THIS COURT ERRED BY REFUSING TO ACCEPT THE FACTS STIPULATED BY THE PARTIES AND MAKING CREDIBILITY DETERMINATIONS ABOUT THE WITNESSES.

VI. WHETHER THIS COURT INVOKED THE INCORRECT LEGAL STANDARD UNDER 42 Pa.C.S § 9543(a)(2)(vi).

DISCUSSION

I. THIS COURT COMMITTED NO ERROR WHEN IT DID NOT RECUSE ITSELF.

The Pennsylvania Supreme Court previously addressed the issue of recusal in its April 24, 2018 order. In this order the Supreme Court of Pennsylvania, through its King's Bench jurisdiction, stated:

> At this juncture, the request for immediate reassignment to another jurist is DENIED. Notwithstanding this denial, it is noted that the presiding jurist may opt to remove herself from presiding over this matter. See Pa .R.Crim.P. 903(C) (in the context of ongoing PCRA proceedings, a jurist may opt to remove himself or herself from presiding over the matter "in the interests of justice"). In all other respects, Petitioner's requests for relief are DENIED.

Commonwealth v. Williams, Supreme Court of Pennsylvania Order No. 31 EM 2018, Apr. 24, 2018. Thus, the issue of recusal has been decided in this state's highest court and is not an issue at

bar.[1] Additionally, the Supreme Court denied Defendant's June 1, 2018 Emergency Application for King's Bench Jurisdiction in Light of Proceedings Subsequent to this Court's 4/24/2018 Order raising issues pertaining to this Court's recusal. Thus, the issue has twice been considered by this state's Supreme Court. Furthermore, the Pennsylvania Supreme Court denied Defendant's Renewed Emergency Application for King's Bench Jurisdiction for a third time on August 21, 2018. That petition outlined all of the facts of the instant case and discussed in great detail the events of the June 18, 2018 evidentiary hearing. Still the Pennsylvania Supreme Court denied the petition and refused to change course on their previous decision to deny reassignment. The Pennsylvania Supreme Court has ruled on the matter, thus this Court did not err when it upheld the decision of the Supreme Court.

In addition, Defendant's claims for recusal are unfounded and lack merit. This Court was and has always been able to fairly preside over this matter. This Court had the benefit of sitting through Defendant's original trial and all of the hearings related to this case and has always been unbiased in its decisions. Having been present at all of the previous hearings, this Court was uniquely qualified to oversee the instant PCRA matter. Thus, this Court did not err in failing to recuse itself.

II. THE COURT (TUCKER, S.J.) COMMITTED NO ERROR IN RULING THAT BOTH THE COORDINATE JURISDCTION RULE AND RULE 903(D) DO NOT DISQUALIFY THIS COURT FROM PRESIDING OVER THE INSTANT MATTER.

Defendant's claim that the Court (Tucker, S.J.) erred in his June 5, 2018 Order and Memorandum Opinion, is untimely and thus should be dismissed. Petitioner had 30-days from the issuance of the Court's order to file an appeal with the Pennsylvania Superior Court. Pa.R.A.P.

[1] Additionally, this Court discussed Defendant's request for recusal at length in its March 29, 2018 1925(a) opinion related to Defendant's VOP appeal.

903(a). As such, Defendant had until July 5, 2018, to appeal the decision of the Court, however, Defendant did not file an appeal to this Court's June 25, 2018 Order until July 25, 2018. Thus, his claim with regard to Judge Tucker's June 5, 2018 Order is untimely by twenty days.

Even though Defendant's claim regarding Supervising Judge Tucker's Order denying Defendant's Motion for Administrative Reassignment is untimely, his claim still fails as it is also without merit. Supervising Judge Leon Tucker heard extensive argument at his June 5, 2018 hearing. After taking into consideration counsel's position and the applicable statutes and law, the Court in a detailed Memorandum laid out its reasoning for denying Petitioner's motion. In his Order and Memorandum, Supervising Judge Tucker stated:

> Here, Petitioner has requested that this Court, as Supervising Judge of the Criminal Division of the First Judicial District, remove Judge Brinkley from this case, and reassign it to another Judge. This Court and Judge Brinkley are judges of coordinate jurisdiction. Both having been duly elected by the citizens of Philadelphia and the First Judicial District. Therefore, this Court would not overrule any decision made by Judge Brinkley, as we wear the same robe. A Supervising Judge in the Court of Common Pleas has coordinate jurisdiction with all other Common Pleas judges. The supervisory powers of a Supervising Judge are administrative in nature. This notion that the Supervising Judge can overrule another Judge is unfounded and violates the Coordinate Jurisdiction Rule. Even if it were true that the Supervising Judge had more judicial power than other Judges on the Court of Common Pleas, the motion would still be denied because the Supreme Court of Pennsylvania recently denied Petitioner's request for immediate reassignment. Certainly, the Supervising Judge does not have authority to overrule the decision of the Supreme Court of Pennsylvania.

Order and Mem. Op. 6/5/2018, at 2.

Supervising Judge Tucker also explained why the case could not be reassigned under Pa.R.Crim.P. 903(D). Since Judge Brinkley was not unavailable or otherwise disqualified, the Supervising Judge had no authority to reassign the case. Additionally, the Court noted that Rule 903 specifically grants authority to the **<u>Administrative Judge</u>** to reassign cases where a judge is unavailable or disqualified, not the Supervising Judge. As such, the Court did not err and properly

denied Defendant's Motion for Administrative Reassignment.

III. THIS COURT COMMITTED NO ERROR BY HOLDING AN EVIDENTIARY HEARING.

While relief **may** be granted without a hearing when the petition and answer show that there is no genuine issue concerning any material fact, an evidentiary hearing was necessary in this case to enter testimony on the record and to allow the court, as fact-finder, to assess credibility. Pa. R. Crim. P. 907(2). "Oral testimony alone, either through testimonial affidavits or depositions, of the moving party or the moving party's witnesses, even if uncontradicted, is generally insufficient to establish the absence of a genuine issue of material fact." Krentz v. Consol. Rail Corp., 910 A.2d 20, 36–7 (Pa. 2006) (citing Schroeder v. Commonwealth, 710 A.2d 23, 25 (Pa. 1998). The explicit language of Rule 907(2) did not prohibit this Court from holding an evidentiary hearing, especially given that the affidavits submitted by Defendant were testimonial in nature and thus could not establish the absence of a genuine issue of material fact.

Since former Police Officer Graham was never formally indicted or convicted, it was essential that this Court hear witness testimony on the record to address Defendant's claim of corruption. Defendant's petition contained testimonial affidavits claiming what former convicted Police Officers Walker and Gibson **would** testify to if they were called to testify at an evidentiary hearing. The testimony in these affidavits is not part of the record until that testimony is elicited at an evidentiary hearing. Testimonial affidavits are sworn statements of what an individual would testify to at an evidentiary hearing. Simply submitting a testimonial affidavit does not absolve Defendant of the need for an evidentiary hearing to meet his burden of proof, as issues of credibility still need to be considered by the court. It is the court's duty to address the believability of such testimony, thus where the crux of the Defendant's argument rests on the content of a testimonial affidavit, it is essential that the Court hold an evidentiary hearing to hear that testimony and make

credibility determinations. Commonwealth v. D'Amato, 856 A.2d 806, 825 (Pa. 2004); Commonwealth v. Henry, 706 A.2d 313, 321 (Pa. 1997) (evidentiary hearing was held after testimonial affidavit was submitted so that PCRA court could judge the credibility of the recantation testimony); Commonwealth v. Williams, 732 A.2d 1167, 1180-81 (Pa 1999); Commonwealth v. Johnson, 966 A.2d 523, 539-40 (Pa. 2009)(holding that PCRA hearings are held specifically to assess credibility, "were the analysis otherwise, the initial trial would lose its status as the main event, and final criminal judgments would be subject to vacatur based on mere affidavits"); Commonwealth v. Small, 189 A.3d 961, 978 (Pa. 2018)(PCRA court held an evidentiary hearing to assess the credibility of witness whose affidavit was submitted as the main newly-discovered evidence in PCRA petition). Thus, in the case at bar, it was necessary to hold an evidentiary hearing so that the parties could move the testimony of their witnesses into the record and this Court could assess credibility.

It is up to the parties to determine what evidence they want to present at an evidentiary hearing. As a tactical decision, the parties must determine if they want to present live witnesses or stipulate to what witnesses would testify to if they were present. In the case at bar, rather than call witnesses that would testify as to former police Officer Graham's alleged corruption, Defendant chose to question Bradley Bridge, Esquire, of the Public Defenders Association as to the necessity of the evidentiary hearing altogether, while wholly ignoring the issue of claimed corruption until the end of the hearing at which time additional stipulations were entered. Defendant continues to argue that an evidentiary hearing should not have been held, rather than proving by a preponderance of the evidence that the evidence presented would have changed the outcome at trial.

This Court was required to create a complete record which contained all of the evidence necessary to determine if PCRA relief should be granted. This Court is not bound by any practices of other trial courts or judges sitting in the Court of Common Pleas and since no findings of fact or law were included in the records of other cases in which former Officer Graham might have been involved, this court is not bound by those decisions. Commonwealth v. King, 999 A.2d 598, 600 (Pa. Super. 2010). Defendant was held to the same standard to which this Court holds every other Defendant requesting PCRA relief. That standard is distinctly laid out in 42 Pa.C.S § 9543(a)(2)(vi) and was followed in this case as the law requires. Thus, this Court committed no error.

IV. THIS COURT DISPLAYED PROPER JUDGMENT AND CONSIDERED ALL OF THE EVIDENCE SUBMITTED AT THE EVIDENTIARY HEARING.

This Court properly reviewed all of the evidence presented at Defendant's evidentiary hearing and did not pre-judge the outcome of Defendant's case. This Court was required to and complied with the law to create a complete and thorough record. At the June 18, 2018 evidentiary hearing, Defendant moved numerous documents into evidence purporting to show that former Officer Graham was corrupt. This Court reviewed each and every document closely and completed an in-depth review of the record and case law, as evidenced by this Court's June 25, 2018 Opinion. It was only after this full and complete inquiry that this Court came to its decision to deny Defendant relief based upon the fact that Defendant did not meet his burden of proof in showing that the new evidence, if submitted at trial, would have changed the outcome. Thus, this Court committed no error.

V. THIS COURT ACCEPTED THE FACTS STIPULATED BY THE PARTIES AND PROPERLY MADE CREDIBILITY DETERMINATIONS ABOUT THE WITNESSES.

This Court did not refuse to accept stipulations of the parties. The parties stipulated to what their witnesses would testify to had they been present at the evidentiary hearing. Commonwealth v. Smith, 17 A.3d 873, 910 (Pa. 2011)[2](a stipulation of a witness's testimony does not go to the veracity or credibility of the testimony). It is ultimately the decision of this Court to determine what parts of that testimony are credible and if this evidence would have changed the outcome at trial. Defendant and the Commonwealth did, in fact, stipulate to what their witnesses would testify to and were not inhibited by this Court.

Additionally, it is the job of the PCRA court to make credibility determinations regarding witnesses who testify at an evidentiary hearing. "Indeed, one of the primary reasons PCRA hearings are held in the first place is so that credibility determinations can be made; otherwise, issues of material fact could be decided on pleadings and affidavits alone." Commonwealth v. Johnson, 966 A.2d 523, 539 (Pa. 2009); Commonwealth v. Jones, 912 A.2d 268, 293 (Pa. 2006); Commonwealth v. Gibson, 951 A.2d 1110, 1123 (Pa. 2008)(stating that, "The [PCRA] court is expressly requested to resolve areas of factual controversy and credibility disputes via numbered factual findings"). Furthermore, the credibility determinations of the PCRA court should be provided great deference by reviewing courts. Id. Higher courts are bound by the PCRA court's credibility determinations "where there is record support for those determinations." Commonwealth v. Santiago, 855 A.2d 682, 694 (Pa. 2004). This Court's Opinion discussed at length the reasons for which this Court did not find Defendant's witnesses, convicted former police officers Walker and Gibson credible and provided ample analysis regarding their possible motives

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[2] In this Court's June 25, 2018 Order and Opinion, this citation was incorrectly cited as Commonwealth v. Johnson, 17 A.3d 873, 910 (Pa. 2009), the correct citation is as written above. Ct. Op., 6/25/2018, p. 29.

and bias, as well as inconsistencies in various documents. Thus, Defendant's argument that this Court did not have the authority to assess the credibility of witnesses is demonstrably incorrect and belied by well-established case law on the matter.

Indeed, in prior instances where the PCRA court failed to make credibility determinations on the record, the Supreme Court of Pennsylvania remanded the matter and directed the PCRA court to make such credibility determinations. Such was the case in Commonwealth v. Small, 189 A.3d 961, 978 (Pa. 2018) wherein the Pennsylvania Supreme Court stated:

> Where appropriate, we have remanded matters involving after-discovered evidence claims and specifically directed the trial or PCRA court to make credibility determinations on recantation testimony. For example, in *Williams*, the PCRA court failed to make an independent determination as to the credibility of the recanting witness. This Court noted the PCRA court, as fact-finder, "is in a superior position to make the initial assessment of the importance of [the recantation] testimony to the outcome of the case," and remanded with a direction for the PCRA court to "render its own, independent findings of fact and conclusions of law concerning [the recanting person's] credibility and the impact, if any, upon the truth-determining process which can be discerned from such testimony." 732 A.2d at 1181.

Id, (citing Commonwealth v. Williams, 732 A.2d 1167, 1181 (Pa. 1999). This Court not only had the right to make credibility determinations but had a duty, as required by the Pennsylvania Supreme Court, to render findings of fact and credibility determinations. Thus, this Court committed no error.

VI. THIS COURT INVOKED THE CORRECT LEGAL STANDARD UNDER 42 Pa.C.S § 9543(a)(2)(vi).

This Court did not invoke the wrong legal standard for whether to allow a new trial under PCRA subsection 9543(a)(2)(vi). In this Court's June 25, 2018 Order and Opinion, this Court correctly stated that the standard for determining if a new trial should be granted is as follows:

> The four-prong test for awarding a new trial based [on] after-discovered evidence is well settled. The evidence: (1) could not have been obtained prior to trial by exercising reasonable diligence; (2) is not merely corroborative or cumulative; (3)

will not be used solely to impeach a witness's credibility; and (4) **would likely result in a different verdict**. *See Commonwealth v. Pagan*, 597 Pa. 69, 950 A.2d 270, 292 (2008).

Commonwealth v. Castro, 93 A.3d 818, n. 7 (Pa. 2014)(emphasis added).

Ct. Op., 6/25/2018, p. 26-27. This test is conjunctive, thus Defendant must prove that each of the factors has been met in order for a new trial to be warranted. Commonwealth v. Foreman, 55 A.3d 532, 537 (Pa. Super. 2012). This court noted that even if Defendant could overcome the fact that the new evidence is merely a new source for the argument which Defendant already testified to at trial and could prove that the evidence is not merely impeaching, Defendant's claim still fails because the evidence would not have changed the outcome at trial.

Defendant asked this Court to consider a new trial completely without former Officer Graham's testimony, citing that the District Attorney stipulated that Officer Graham would not have been called had they known of his alleged corruption[3]. However, Police Officer Sonia Jones was also on the scene when defendant was observed selling drugs[4] and multiple officers were present when Defendant was arrested and discovered to be in possession of an illegal firearm. The record demonstrated that the Commonwealth had a multitude of officers present on the day of trial, including Officer Jones, Officer Johnson and Officer Jett, which they could have called to testify instead of Officer Graham. (N.T. 8/19/2008, p. 83-86). Officer Jones was present during all stages of the investigation and could have testified as to what occurred in Defendant's case. Officer Johnson was also available to testify at the time of trial and even testified on the record at Defendant's sentencing hearing:

[3] It should be noted that the Commonwealth did not stipulate that they would not have called Officer Graham at trial. Rather, the parties stipulated "that the Commonwealth does not have confidence in the credibility of Reginald Graham's testimony in this case." (N.T. 6/18/2018, p. 85).

[4] *See* FBI 302 of Jeffrey Walker, 6/26/2013 p. 3, wherein Officer Walker states that he believes Officer Sonia Jones to be clean.

Your Honor, on that particular day, we went to go serve a search warrant. I was a passenger of the vehicle. We arrived at 2204 H [Hemberger] Street. There is a van there. I couldn't even see over the van, so I couldn't even see Officer Graham. I'm just already getting out of the car with this, this ram was used to knock down the door. This is not something I want to do. It's something I have to do. I have two years left [before retiring].

As we approach the property, I didn't see or hear anything. He's behind this van. I come around the van with the ram. He has the gun pointed right to my head. Now, where do you go from there? I'm taught to shoot in combat. What do you do when you have no fire and he's feet away from you?

Your Honor, I fell backwards and tried to take cover and I did see him and I did get my firearm up in line of his sight, lock my sights up at him as he ducked behind the car looking to get a shot off, which I believe he didn't get a shot off.

The family should be thankful I didn't take his life. Really, you know, that's what we should really be really here about. I could justifiably take his life and, you know what, it would make my fear horrible. It's not something I want to do.

Not one time did he ever say I'm so sorry. And when I turned that corner behind that van, I was blindsided by a .40 caliber handgun that was bigger than mine and I'm defenseless and I have a baby—I have two babies at home. What do I tell my wife after that? I can't tell her anything.

(N.T. Sentencing 1/16/2009, p. 76-77). Officer Graham was not the only officer present in this case and although he was the only Officer to testify at trial, the same testimony could have been elicited from multiple other sources at the time.

Additionally, Defendant admitted when he testified at trial that he possessed an illegal firearm. Defendant testified as follows:

Q. Mr. Williams, first of all on the 24th when you were arrested, did you have a gun on you?
A. Yes.
Q. And did have you have the gun on you when you were coming out of 2204 or whatever the address is on Hemberger Street?
A. Yes.
Q. And tell the Judge what happened?
A. When I came out of 2204 Hemberger a green charger turned the corner, it was like four people in it, turned the corner, two males was walking up, they both was walking up, they was all running and they hopped out the car first and they was running up at the same time. They all screamed "police," every last one of them.

One of the big cops with the bald head, he ain't here right now, he had the big jacket and knocked on the door. And when he screamed "police," I turned my back to put the gun on the ground in the car and came back up and laid down on the car in the back of the car like this. One of them run in front of me, came up grabbed me, put me on the ground right here, put the cuffs on me, picked me up, took me to the top of the steps. When I got to the top of the steps the big male who's not here right now, he threw me in the house and after that it was just like lights out, just beat me up.

(N.T. 8/19/2008, p. 80). He also testified on cross-examination as follows:

Q. Where did you get the gun from?
A. It just came from the streets.
Q. Did you buy it?
A. No, I didn't buy it.

Id, at 87. Thus, his own testimony at trial was corroborative of Officer Graham's testimony that Defendant brandished a gun. Four of Defendant's seven convictions stemmed from his possession of the illegal firearm.[5] Defendant admitted at trial that he had a gun and that he produced it from his person when police officers arrived on the scene. This admission was sufficient to find him guilty of those offenses. As a result, Defendant did not meet his burden in proving that the outcome of his trial would have been different with respect to the gun charges, since his own admissions provided the necessary proof of guilt.

Additionally, this Court thoroughly considered the newly-discovered evidence put forth by Defendant, claiming that Officer Graham was allegedly a corrupt police officer. In support of his argument, Defendant submitted written statements of convicted former Officers Walker and Gibson, FBI 302 investigation reports and Police Internal Affairs documents. This Court found that the evidence submitted was not credible and that the information contained in the reports was also suspect as it was based solely upon the testimony of those same convicted officers. As for the

[5] Defendant was convicted of the following four gun related offenses: (1) Carrying a Firearm Without a License § 6106, (2) Carrying a Firearm in a Public Place in Philadelphia, § 6108; (3) possession of an instrument of crime; and (4) possession of a loaded weapon.

Police Internal Affairs documents, those documents contained very little information and did not offer proof that former Officer Graham was corrupt or that any connection existed between Defendant's 2007 case and the accusations against Graham which arose in 2016, nine years later.

Indeed, there is no nexus between what allegedly occurred in 2016 causing Officer Graham to be placed on a District Attorney Do Not Call list and Defendant's case. In Commonwealth v. Foreman, the Superior Court of Pennsylvania decided that new evidence regarding the filing of criminal charges in an unrelated matter against the testifying detective did not meet the after-discovered evidence test since such evidence would be used solely to impeach the credibility of the detective and would not likely result in a different verdict if a new trial were granted. Foreman, 55 A.3d 532, 537 (Pa. Super. 2012); (Commonwealth v. Soto, 983 A.2d 212, 215 (Pa. Super. 2009); Commonwealth. v. Johnson, 179 A.3d 1105, 1123 (Pa. Super. 2018)(finding that former detective's criminal convictions that occurred years after Defendant's trial have no bearing on Defendant's own case and is solely impeachment evidence). The Superior Court emphasized that the petitioner failed to show any nexus between his case and the detective's alleged misconduct in an incident which occurred more than two years after the petitioner's conviction. Id. These assertions were found to be pure conjecture and would not compel a different jury verdict. The same is true here, as Defendant has asked this Court to conclude that accusations of corruption are more than merely impeachment evidence. Indeed, the evidence here is standard *crimen falsi* evidence, to be used solely to attack a witness's credibility by attempting to show that Graham was allegedly involved in an incident involving dishonesty or falsity and which occurred nearly nine years after Defendant's conviction. Thus, this Court's determination that the evidence was merely impeaching is correct and consistent with the decision of higher courts in cases with similar fact patterns.

In support of his argument, Defendant cites Commonwealth v. Perrin, 59 A.3d 663 (Pa. Super. 2013) (Wecht, J., concurring) a Superior Court case holding that new evidence tending to destroy the credibility of an essential trial witness is not merely impeaching, if it would likely change the outcome at trial. However, subsequently, the Pennsylvania Supreme Court has stated that "even if his impeachment would 'destroy and obliterate' a witness, it is still impeachment, and the rule does not quantify the degree of impeachment beyond which the rule no longer applies." Commonwealth v. Castro, 93 A.3d 818, 827 n. 13 (Pa. 2014). Thus, while the Superior Court of Pennsylvania has pivoted back and forth in regards to impeachment evidence[6], our Supreme Court of Pennsylvania has been firm in stating that there is **no degree of impeachment** evidence that overcomes the third prong as applied. After taking into consideration all of the evidence presented to this Court and current case law, this Court determined that the evidence was merely impeaching. *See* Ct. Op. 6/25/2018, at 44-47. Thus, this Court did not err.

Additionally, Defendant avers that the standard is whether the new evidence would likely result in a different verdict if presented to and believed by a jury at a hypothetical new trial. This paraphrased language used by Defendant seems to contradict current case law. In order to recognize what a new trial might look like, the court must take the facts of the **original** trial and look at that trial in tandem with the new evidence presented at the evidentiary hearing. One need only look to the statute itself to see that the standard makes reference to the original trial. 42 Pa.C.S § 9543(a)(2)(vi) states:

> (a) General rule.--To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:... (2) That the conviction or sentence resulted from one or more of the following:... (vi) The

[6] See Commonwealth v. Choice, 830 A.2d 1005 (Pa. Super. 2003) (Klein, J. dissenting)(opining that the third prong of the test is overly-broad and should not be applicable where the impeachment evidence can alter the verdict). *See also* Commonwealth v. Foreman, 55 A.3d 532 (Pa. Super. 2012) (Wecht, J. concurring)(agreeing with J. Klein's dissent in Choice, but concluding that the Superior Court is bound by the standard as elicited by our Supreme Court which ultimately precludes relief).

> unavailability at the time of trial of exculpatory evidence that has subsequently become available and **<u>would</u>** have **<u>changed</u>** the outcome of the trial if it **<u>had been</u>** introduced.

42 Pa.C.S § 9543(a)(2)(vi)(emphasis added). In order for PCRA courts to ascertain what might happen at a new trial, the court must consider the entire record, including the known history of the original trial. This court analyzed the various ways which Defendant averred he would use the new evidence and concluded that the verdict at trial would not be impacted regardless. Ct. Op., 6/25/2018, at 43-47. As a result, this Court used the correct legal standard and did not err.

CONCLUSION

After review of the applicable case law and statutes, this Court committed no error. Defendant's PCRA petition was properly denied based upon lack of merit. Accordingly, this Court's decision should be affirmed.

BY THE COURT:

J.

Tab D

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**IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT
PHILADELPHIA COUNTY, PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA, Plaintiff,	Trial Division – Criminal Section
v.	CP-51-CR-0011614-2007 (Super. Ct. No. 3880 EDA 2017)
ROBERT WILLIAMS, Defendant-Appellant.	

DEFENDANT'S STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

TO THE HONORABLE GENECE E. BRINKLEY OR ANOTHER, NON-RECUSED JUDGE OF THE SAID COURT:

Defendant-Appellant Robert Williams was resentenced by this Court on November 6, 2017, after a revocation of probation, to a term of two-to-four years of total confinement. On December 6, 2017, he filed a timely notice of appeal. On December 19, 2017, he filed a timely Docketing Statement with the Superior Court identifying six issues he intends to raise on appeal. Some of his issues are also identified and outlined in the bail motions he filed in this Court and in the Superior Court in November and December. On January 26, 2018, some 51 days after the filing of the notice of appeal, this Court filed an order under

Pa.R.App.P. 1925(b) requiring that the defendant-appellant, within 21 days, articulate his issues for appeal.

The issues are:

1. a. Judge Brinkley failed, and continues to fail, to recuse herself from presiding in this matter, based on numerous instances of extrajudicial misconduct and circumstances creating an appearance of lack of impartiality, as described in Mr. Williams' motions to recuse.

b. Judge Brinkley's comments and direct involvement in matters at issue in the revocation proceeding also violated the due process requirement of "a neutral hearing body" in revocation matters. See *Black v. Romano*, 471 U.S. 606, 612 (1985); *Commonwealth v. Burrell*, 497 Pa. 367, 441 A.2d 744, 746–47 (1982).

c. The Court erred in failing at any time to act upon any of the defendant's motions for recusal, filed November 14, 2017, December 4, 2017, and February 12, 2018.

2. This Court failed, prior to the revocation hearing, to give the notice required by Pa.R.Crim.P. 708(A), 42 Pa.C.S. § 9771(b) and Pa.R.Crim.P. 708(B)(2), and by procedural due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution, and by Pa.Const., art. I, sections 1 and 9, of what conduct of the defendant was said to constitute the alleged violations of the defendant's probationary term. In particular, neither the Court's "*Gagnon* summary" letter dated October 31, 2017, nor the Order dated November 1, 2017, provided such notice. Nor did the Court give notice of what condition or conditions of probation were said to be violated by any specified instance of the defendant's alleged conduct.

3. In finding a violation of probation, the Court violated Rule 708 and procedural due process by failing to particularize its findings and conclusions, declaring instead that Mr. Williams had committed technical violations "for all of the reasons listed in the letter" from the Court to counsel dated October 31, 2017 (which as explained under Issue 2 itself failed to give the required notice). *See* Tr. 11/6/17 (part II), at 18; see generally *id.* at 18–21.

4. The evidence presented at the November 6, 2017, hearing was insufficient to establish any intentional violation of probation.

a. Insofar as probation was revoked, in whole or in part, because Mr. Williams used an illegal drug in January 2017, the record shows that this was due to an addiction, and that he promptly entered and successfully completed treatment, with no recurrence; nor does the record support any finding that he made "use of the Fast Flush product to wash the urine," Tr. 19, or if he did, that his conduct violated any condition of his probation.

b. Insofar as probation was revoked, in whole or in part, because of Mr. Williams' arrest in St. Louis, MO, in March 2017, or his arrest in New York City in August 2017, the record failed to establish that he actually, in fact or as a matter of law, engaged in any conduct that violated the conditions of his probation on either occasion.

c. Insofar as probation was revoked, in whole or in part, because Mr. Williams traveled or planned to travel out of state (for work) without proper court permission, or failed to travel after receiving permission to travel, the record does not establish that he ever did so intentionally and in violation of any condition of his probation, or as a result of anything other than a miscommunication.

d. Insofar as probation was revoked, in whole or in part, because Mr. Williams did "not provid[e] the Court with sufficient information as to what he's doing," and "just does, basically, what he wants," Tr. 21, the record does not establish that such conduct occurred, or if it did, constituted a violation of any condition of probation.

5. The Court failed to justify its imposition of a sentence of total confinement as the penalty for any violations found. Imposition of a sentence of total confinement violated 42 Pa.C.S. § 9771(c)(3) and the fundamental norms underlying the sentencing process, because it was not essential to vindicate the authority of the Court.

6. Even if total confinement for some period of time was warranted, the sentence of two to four years' imprisonment was manifestly excessive punishment in this case, because it was not "consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant," 42 Pa.C.S. § 9721(b), and thus violated fundamental norms of the sentencing process.

7. In violation of 42 Pa.C.S. § 9721(b) and the fundamental norms of the sentencing process, the reasons offered by the Court on November 6, 2017, cannot and do not explain the sentence it selected. *See* Tr. 11/6/17 (Part II), at 73–75.

8. The revocation of Mr. Williams' probation and imposition of a term of imprisonment also violated Due Process because the totality of the circumstances of Mr. Williams's sentencing does not overcome the presumption of vindictiveness that arises from the fact that when the Court issued its October 31, 2017, "*Gagnon* summary" letter recounting potential technical violations, Mr. Williams had recently completed an appeal from a prior revision of his sentence, and when last previously resentenced, this Court had

expressly cautioned Mr. Williams against appealing, claiming that doing so created a risk of a higher sentence. *See* Tr. 2/9/16 at 11.

Dated: February 16, 2018

Respectfully submitted,
ROBERT WILLIAMS, Defendant

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PROOF OF SERVICE

On February 16, 2018, I served a copy of the foregoing Statement on the attorney for the Commonwealth, Ass't. District Attorney Michael Stackow, by filing it electronically with the Court of Common Pleas, Philadelphia County, and hand-delivering a copy to the Deputy Court Administrator, Criminal Trial Division, for the attention of Judge Brinkley.

s/Alexis Cocco
Co-Counsel for Defendant Williams

Tab E

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IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT
PHILADELPHIA COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	Trial Division – Criminal Section
Plaintiff,	
v.	CP-51-CR-0011614-2007 (Super. Ct. No. 2242 EDA 2018)
ROBERT WILLIAMS,	
Defendant-Appellant.	

DEFENDANT'S STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

TO THE HONORABLE GENECE E. BRINKLEY, JUDGE OF THE SAID COURT:

By memorandum and order filed June 25, 2018, this Court denied the amended petition for post-conviction relief submitted by Defendant-Appellant Robert Williams. On July 25, 2018, Mr. Williams filed a timely notice of appeal. On April 24, 2018, the Supreme Court of Pennsylvania – exercising its extraordinary King's Bench jurisdiction – unanimously ordered Mr. Williams' immediate release on bail pending determination of his PCRA petition. In that Order, the Supreme Court took the further step of directing that this bail was to continue "until final resolution of the PCRA matter, including any appellate review" (that is, even if this Court were to deny the PCRA motion).

On August 8, 2018, this Court filed an order under Pa.R.App.P. 1925(b) requiring that the defendant-appellant, within 21 days, articulate his issues for appeal. On August 21, 2018, he filed a timely Docketing Statement with the Superior Court. Elaborating on the points mentioned in the Superior Court docketing statement, the issues for appeal are:

1. a. Judge Brinkley failed, and continues to fail, to recuse herself from presiding in this matter, despite numerous instances of extrajudicial misconduct and circumstances creating an appearance of lack of impartiality, as described in Mr. Williams' motions to recuse, filed November 14, 2017, December 4, 2017, and February 12, 2018, and in the Prayer for Relief of the Amended PCRA, filed May 16, 2018. See *In re McFall*, 617 A.2d 707, 712 (Pa. 1992) ("the appearance of impropriety is sufficient justification for the grant of new proceedings before another judge").

b. The Court erred in failing at any time to act upon any of the defendant's motions for recusal, filed November 14, 2017, December 4, 2017, and February 12, 2018, and refused again to consider doing so on June 18, 2018. *See* Tr. 6/18/18, at 13–14.

c. Judge Brinkley further engaged in additional conduct that "a significant minority of the lay community" could reasonably view as exhibiting a lack of judicial impartiality. See *Commonwealth v. Darush*, 459 A.2d 727, 732 (Pa. 1983). For example, Judge Brinkley retained private counsel to speak publicly on her behalf about the case. And in her memorandum opinion, the judge accused undersigned counsel – publicly, untruthfully and without any fair basis – of "attempting to pit one female trial judge against another," because counsel suggested that this case be transferred to the docket of the jurist who is handling nearly all the similar cases in this Court. *See* Mem.Op. 6/25/18, at 17 n.5.

2. The Court (Tucker, J.) erred in ruling (Order & Memorandum filed June 5, 2018):

a. That the "coordinate jurisdiction rule" prevents a judge sitting in an administrative capacity from finding the case-assigned judge, who has declined to transfer a case under Pa.R.Crim.P. 903(C), to be "disqualified" under Rule 903(D) (the basis on which Judge Tucker refused to direct the transfer of the case). *See* 42 Pa.C.S. §§ 325(e)(1) (powers of president judge), 953 (delegated authority of administrative judges of divisions of the Court); Pa.R. Jud.Admin. 706(d) (appointment of divisional administrative judges); and

b. That Rule 903(D), which refers to a judge who "*is* ... disqualified," only applies only if the judge *has been* disqualified. Under a proper reading of Rule 903(D), if the presumptively assigned PCRA judge refuses to recuse herself in circumstances where reasonable jurists would view that judge as "disqualified," the Administrative Judge has authority to direct a transfer of the case. Here, Judge Brinkley was "disqualified" by the ongoing history of the case, including her hiring of an attorney to speak publicly on her behalf about the case, the personal injuries affecting her mental capacity to concentrate and otherwise perform her job (as self-reported in recent lawsuits), and her excessive personal involvement in probation supervision.

3. The Court erred in ruling on April 16, 2018, that relief cannot be granted in a PCRA matter without an evidentiary hearing (Tr. 4/16, at 10–14), and thus abused its discretion under Pa.R.Crim.P. 907(2) by convening an evidentiary hearing where there was "no genuine issue concerning any material fact" and upon those undisputed facts the defendant was entitled to relief, as expressly agreed by the Commonwealth.

4. Judge Brinkley displayed pervasive partiality at the evidentiary hearing on June 18, 2018, and prejudged its outcome. In particular, Judge Brinkley: (a) assumed an adversarial and prosecutorial role by relentlessly cross-examining (and laughing derisively at the candid testimony of) Assistant Defender Bradley Bridge, a respected 35-year veteran of numerous special projects for the Court and the Defender Association of Philadelphia, whose detailed, candid, and undisputed testimony established this Court's disparate treatment of Mr. Williams (Tr. 6/18, at 41–63, 67–73, 75–81), and then in declaring Mr. Bridge's testimony to be unreliable based on immaterial (and promptly corrected) mistakes in a prior filing (Mem.Op. 6/25, at 20); (b) stated that the judge knew this case would be going to a higher court (Tr. 6/18, at 68–69), thus suggesting, when the proceedings were barely half over, that she had already made up her mind to deny the petition, as a ruling for the defendant could not have been appealed by the Commonwealth after it had conceded relief; (c) told Mr. Williams' counsel he could not object and instructed the court reporter (unsuccessfully) to not take down the objections from Mr. Williams' counsel (Tr. 6/18, at 67–69, 77–78); and (d) harshly cross-examined the District Attorney's Office representative on the stipulation of facts submitted by the parties (Tr. 6/18, at 90–102) and wrongly second-guessed and impugned the nature and extent of the District Attorney's pre-concession investigation (Mem.Op. 6/25, at 23–24).

5. The Court erred in its post-hearing determination by:

a. Refusing to accept the facts stipulated by the parties. See *Falcione v. Cornell Sch. Dist.*, 557 A.2d 425, 428 (Pa. Super. 1989); *Kershner v. Prudential Ins. Co.*, 554 A.2d 964, 966 (Pa. Super. 1989); and, relatedly,

b. Making credibility determinations about the absent witnesses Graham, Walker, and Gibson.

6. The Court's adverse credibility determination with respect to Assistant Defender Bridge was clearly erroneous and an abuse of discretion, insofar as it rested upon minor and immaterial errors (which Mr. Bridge had promptly corrected) in a related legal filing. Mem.Op. 6/25, at 20.

7. This Court's credibility finding in favor of former P/O Reginald Graham:

a. Was clearly erroneous and an abuse of discretion, insofar as it credited self-serving assertions recounted in hearsay documents, the witness did not testify at the hearing, and the Court rejected the conclusions of two independent law enforcement investigations that found him to be corrupt and lacking in credibility; and

b. Was legally immaterial under the applicable test for granting PCRA relief under 42 Pa.C.S. § 9543(a)(2)(vi) (*see* Point 7, *infra*).

8. The Court invoked the wrong legal standard for whether to allow a new trial under PCRA's subsection 9543(a)(2)(vi) (previously unavailable exculpatory evidence), by claiming that Mr. Williams was advancing "merely a new source for a previously-known fact," and evidence that was "merely impeaching" (Mem.Op. 6/25, at 43–44), rather than focusing on whether the new evidence, if presented to and believed by a jury at a hypothetical new trial, would likely result in a different verdict. *Commonwealth v. McCracken*, 659 A.2d 541, 545 (Pa. 1995) (credible recantation of key witness); *Commonwealth v. Mount*, 257 A.2d 578 (Pa. 1969) (evidence that essential, non-cumulative witness misrepresented her credentials *at other trials*); *Commonwealth v. Perrin*, 59 A.3d 663, 669 (Pa. Super. 2013) (Wecht, J., concurring) (new evidence tending to destroy credibility of

essential trial witness is not "merely" impeaching, if it would likely change outcome at a new trial).

9. Relatedly, the Court erred in concluding that the new evidence of former P/O Graham's corrupt activities, if available a the time of trial and accepted as true, would not have "been successful in changing the verdict." Mem.Op. 6/25, at 43. To the contrary, it is stipulated that this information, if known, would have resulted in Graham not being called to the stand at trial at all – a judgment that is for the District Attorney, not the Court, to make. Since Graham was the only witness for the Commonwealth at trial, there is necessarily a reasonable probability that the result of the trial would have been different.

10. The Court violated Mr. Williams' right to equal protection of the law, in violation of the Fourteenth Amendment to the United States Constitution and equivalent guarantees of the Pennsylvania Constitution, by treating him differently from hundreds of similarly situated defendants in this Court, whose convictions were likewise premised on the testimony of since-discredited police officers, and whose convictions were then, after investigations deemed sufficient by the post-conviction units serving under an unbroken succession of at least five District Attorneys, summarily vacated by an unbroken succession of Criminal Division Judges of this Court (whose prudent and lawful handling of those cases cannot properly be compared with this Nation's shameful and tragic history of condoning human slavery, or to official and social tolerance of sexual assault and harassment; *see* Mem.Op. 6/25, at 26 n.8).

11. Judge Brinkley's lack of impartiality, as detailed in this Statement, denied Mr. Williams his right to due process of law under the Fourteenth Amendment and equivalent guarantees of the Pennsylvania Constitution.

Dated: August 29, 2018

Respectfully submitted,
ROBERT WILLIAMS, Defendant

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PROOF OF SERVICE

On August 29, 2018, I served a copy of the foregoing Statement on the attorney for the Commonwealth, Ass't. District Attorneys Tracey Kavanagh, Liam Riley, and Paul M. George, by filing it electronically with the Court of Common Pleas, Philadelphia County, and hand-delivering a copy to the Deputy Court Administrator, Criminal Trial Division, for the attention of Judge Brinkley.

s/Peter Goldberger
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