THE PENNSYLVANIA INNOCENCE PROJECT
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Post Trial Unit

COMMONWEALTH OF PENNSYLVANIA Respondent	:	PHILADELPHIA COURT OF COMMON PLEAS CRIMINAL TRIAL DIVISION
v.	:	CP-51-CR-0408371-1998
EUGENE GILYARD Petitioner	:	

REPLY TO COMMONWEALTH'S RESPONSE TO PETITION FOR POST-CONVICTION RELIEF PURSUANT TO 42 Pa. C.S. § 9543

TO THE HONORABLE JUDGE DEFINO-NASTASI, PRESIDING IN THE COURT OF COMMON PLEAS CRIMINAL TRIAL DIVISION FOR THE COUNTY OF PHILADELPHIA:

Petitioner, Eugene Gilyard files this *Reply to Commonwealth's Response to Petition for Post-Conviction Relief Pursuant to 42 Pa.C.S. §9543* to respond to the Commonwealth's argument that Gilyard's claims were not timely filed.

I. Introduction

1. Mr. Gilyard was arrested for the murder of Thomas Keal two and a half years after the crime. He was convicted on the basis of the testimony of a single eyewitness, the victim's daughter, Tonya Keal, who saw the perpetrators for a few seconds from a second-story window across the street from the crime. The shooting occurred in the dark hours of the morning (2:30 a.m.) and Ms. Keal had to peer through the blades of a fan in the window to see the incident. Ms. Keal failed to identify a perpetrator in photo spreads shown soon after the shooting, and when she was shown a photo array including Mr. Gilyard's photo more than two years after the crime, she was "not sure" if Mr. Gilyard was one of the perpetrators. In light of the new evidence set forth in Mr. Gilyard's Petition ("Amended Petition"), Ms. Keal has requested that the Commonwealth reinvestigate her father's murder.

2. There is powerful new evidence that Ricky Welborn ("Rolex") and Timothy Tyler ("Tizz") murdered Mr. Keal. First, Mr. Welborn has confessed to this crime in explicit detail and is of similar appearance to the description of a perpetrator. Further, in the course of this confession, Welborn stated that just a few hours before he murdered Mr. Keal, he shot and injured a man named Anthony Stokes with the same sawed-off shotgun that he used to shoot Mr. Keal. Second, Mr. Stokes has corroborated this earlier shooting in a statement that is fully supported by relevant medical records. Third, Mr. Tyler ("Tizz") has also admitted to his role in the shooting. Finally, three witnesses have stated that they saw Rolex and Tizz running from the scene of Mr. Keal's shooting. Two of these witnesses have also stated that Rolex and Tizz told them that they intended to rob a bar immediately before shooting Mr. Keal.

II. The Commonwealth's Response

3. In the Letter Response to Mr. Gilyard's Petition for Post-Conviction Relief, the Commonwealth makes a single argument: that even if Mr. Gilyard is innocent and Welborn and

Tyler are the perpetrators, the Court should decline to order a hearing because Mr. Gilyard did not adequately allege when he had knowledge of the new evidence supporting his PCRA claims. The Commonwealth's argument is wrong as a matter of law and fact.

4. Mr. Gilyard's petition is timely as he has satisfied the requirements of 42 Pa.C.S.A. §9545(b)(1)(ii). To be timely under §9545(b)(1)(ii), Mr. Gilyard must only allege that there were facts unknown to him, that he filed a petition within 60 days of discovering these facts, and that he took steps to ascertain these facts. *Commonwealth v. Bennett*, 593 Pa. 382, 396 (Pa. 2007). In each of the amendments to the Petition, Mr. Gilyard properly alleges "facts upon which [his] claim is predicated," which he could not have known earlier with the exercise of due diligence, and which, if presented to the jury in his case, would likely change the outcome of his trial. 42 Pa.C.S.A. §9545(b)(1)(ii). His claims of newly discovered evidence were all raised within sixty days "of the date the claim could have been presented." 42 Pa.C.S.A. §9545(b)(2).

5. Significantly, the Commonwealth does not argue that the amendments to the Petition were not each filed within 60 days of the dates when Mr. Gilyard first learned of the *specific facts* that support his claims. Instead, the Commonwealth seeks dismissal on the unprecedented ground that the relevant dates for purposes of the PCRA 60 day time limitation are those on which Mr. Gilyard "actually first learned that the witnesses Ricky Welborn, Donnell Wiggins, and Anthony Stokes *might* have information relevant to his case." (Commonwealth Letter Response, 9; first emphasis in original).[1] The Commonwealth also seeks dismissal of the Petition on the ground that Mr. Gilyard must have known the facts he alleged prior to the dates asserted in the Petition. Both propositions are plainly mistaken.

6. The Commonwealth's argument that the 60 day time period began as soon as Mr. Gilyard learned that a witness *might* have information about his case is without legal support and

[1] The Commonwealth's letter response does not have page numbers, but this quote is taken from the ninth page counting the title page as page one.

runs directly against the pleading requirements of the PCRA. According to the Commonwealth, Mr. Gilyard was under an obligation to file a PCRA petition (or amendment to a pending petition) on mere rumor, speculation, or rank hearsay that someone might know something about the case. This supposed mandate under the PCRA would require the filing of a PCRA petition even if the "witness" had no personal knowledge about the case or if what the witness knew or believed was not relevant to a valid claim under the PCRA. The Commonwealth's interpretation directly contradicts §9545(b)(1)(ii) and borders on the absurd as it would require the filing of frivolous PCRA petitions.

III. Governing Legal Standards

7. The Pennsylvania courts have made clear that the Commonwealth's position is untenable. In *Commonwealth v. Frey*, 41 A.3d 605 (Pa. Super. Ct. 2012), Frey was convicted of murder in 2003 despite the fact that the victim's body had never been found. In 2008, the victim's remains were discovered and a forensic report was completed. In May 2010, the Commonwealth advised Frey that the victim's body had been discovered, but did not provide Frey with the forensic report regarding the cause of death (and other relevant factors) until June 2010. The report provided Frey with relevant information that supported a claim under the PCRA and Frey proceeded to file his PCRA petition 60 days from the date he received the *report* (but beyond the 60 days when he was first notified by the prosecutor of the discovery of the victim's body). The *Frey* Court ruled that the time ran from the *report*, and not the notice of the discovery of the body, as the "fact" that triggers the 60 day rule must be a fact that provides ground for relief. 41 A.2d at 610. Thus, *Frey* clearly establishes the rule that mere knowledge that some person or report might have or contain information that provides a predicate for PCRA relief does not start the running of the clock. As in *Frey*, Mr. Gilyard had no basis to proceed under the PCRA until the actual facts that provided a basis for relief were discovered.

8. In *Commonwealth v. Abu-Jamal*, 941 A.2d 1263 (Pa. 2008), the Court ruled that the trigger date for filing a newly discovered evidence claim under the PCRA is the date when the witness first provides specific factual information to the defendant or his counsel. *Id.* at 1269, n.11. In *Abu-Jamal*, a witness provided information to the defense that she had falsely identified the defendant as the shooter due to police threats. *Id.* at 1265. The Court held that the date of the receipt of this specific information from the person with first-hand knowledge started the 60 day period (and not when the statement was later reduced to writing). *Id* at 1269. Significantly, in *Abu-Jamal*, the Court also rejected a claim based on an affidavit from an inmate who heard a witness admit to having falsely testified at trial on the ground that such evidence did not meet the newly discovered evidence exception because "a claim based on inadmissible hearsay does not implicate this exception." *Id.* at 1269 (citing *Commonwealth v. Yarris*, 731 A.2d 581, 592 (Pa. 1999)).

9. Further, the Commonwealth's assertion (Commonwealth Letter Response, 8), that "common sense dictates" that Mr. Gilyard must have known that the witnesses had relevant information before he even had the opportunity to learn from them (or their medical records) is entirely inaccurate. The facts (which can be proven at a hearing, if necessary) show that what the Commonwealth thinks is "common sense" has nothing to do with what actually occurred in the investigation of this case. As we detail below, neither Mr. Gilyard nor his representative spoke to any of the witnesses identified in the Amended Petitions prior to obtaining their statements. To the contrary, all of the statements were taken on the same day that the witness was first interviewed. By the same token, Mr. Gilyard did not know the contents of Mr. Stokes' medical records prior to receiving them. Thus, the dates that the witnesses were interviewed and the dates that the records were received are the earliest possible dates that the "facts upon which the

claim is predicated" could have been known with the exercise of due diligence. 42 Pa.C.S.A. §9545(b)(1)(ii).

IV. Specific Factual Allegations and the Timeliness of the Legal Claims

10. In late 2010, Mr. Gilyard's mother received two letters that indicated only that Mr. Welborn had told other inmates in the DOC (a Lance Felder and Sheldon Odom), that Mr. Welborn might be willing to help Mr. Gilyard. Because the DOC does not permit communications directly between inmates[2], Mr. Gilyard had no way of personally contacting Mr. Welborn to determine what information he might have or whether that information could be relevant to a PCRA petition. Thus, Mr. Gilyard was not aware of any "*facts* upon which [his] claim is predicated" at the time that he received the initial letters. If Mr. Gilyard had filed a PCRA at that time, all he could have alleged was that Welborn might be willing to help him in his case. Is there any doubt but that such a frivolous petition, resting on factual allegations that were inadmissible speculation and triple hearsay would be dismissed as failing to present evidence sufficient to establish a claim under § 9545(b)(1)(ii)? *See Abu-Jamal*, 941 A.2d at 1269 (holding that a claim based on inadmissible hearsay does not establish the § 9545(b)(1)(ii) exception).

11. Rather than filing a frivolous petition, Mr. Gilyard immediately took steps to discover what information Mr. Welborn might have that would be relevant to a potential claim under the Act. First, Mr. Gilyard, who is indigent, sought to raise money to hire a private investigator. In January 2011, a friend, Earl Allen, agreed to fund a private investigator. In February 2011, Mr. Gilyard wrote to the private investigator and asked him to interview Mr. Welborn. The investigator interviewed Mr. Welborn on March 18, 2011, at which time Mr. Welborn confessed to murdering Mr. Keal. Thus, March 18, 2011 was the first date upon which

[2] Mr. Gilyard is incarcerated at SCI Mahanoy, Mr. Welborn is incarcerated at SCI Frackville, Mr. Felder is incarcerated at SCI Albion, and Mr. Odom was incarcerated at SCI Fayette.

Mr. Gilyard, acting with due diligence, received information supporting a claim under the PCRA. He filed a PCRA petition on March 31, 2011, well within the 60 days prescribed by the Act.[3]

12. On June 20, 2011, staff members from the Pennsylvania Innocence Project, acting on behalf of Mr. Gilyard, met with Mr. Welborn in an effort to secure any additional information relevant to the case, and particularly any information that would corroborate his confession. During this meeting, Mr. Welborn stated that he shot an Anthony Stokes with the same gun and on the same day that he murdered Mr. Keal. This was the first time that anyone involved with this case, including Mr. Gilyard, had ever heard of Anthony Stokes. Further, without speaking directly with Mr. Stokes, neither Mr. Gilyard nor the lawyers at the Pennsylvania Innocence Project could know whether Mr. Welborn's assertion was true. Thus, the Commonwealth's argument that Mr. Gilyard should have filed another amended PCRA petition within 60 days of when he first learned that Mr. Stokes "might" have information about the case is erroneous. There was no legal basis to file a petition raising newly discovered evidence in the form of Mr. Stokes' knowledge prior to speaking directly with Mr. Stokes, as the petition would have rested on pure conjecture and supposition. However, this point is moot because on August 17, 2011, within 60 days of the June 20th Welborn interview, Mr. Gilyard filed an amended PCRA petition. That petition raised newly discovered evidence in the form of Welborn's more detailed confession, including the details that Welborn provided about Mr. Stokes.

[3] The Commonwealth suggests (in a plainly undeveloped argument) that this Court cannot consider the claims made in this pro se petition because the later amended petitions were filed by newly retained pro bono counsel for Mr. Gilyard. As the Commonwealth appears to concede, the fact that the later amendments re-alleged the relevant allegations of the March 31, 2011 filing, renders moot any "argument" on this point. Further, the Commonwealth is wrong on the legal issue. This is not a case, like those cited by the Commonwealth, where a defendant seeks to independently file a brief or motion on an issue already briefed by counsel. Rather, starting with the March 31 filing, the defendant, first pro se and then with the assistance of counsel, has filed serial amendments in accord with the PCRA amendment requirements and Mr. Gilyard has not submitted pro se filings that seek to supplement counsel's filings.

13. The Pennsylvania Innocence Project immediately started an investigation regarding Mr. Stokes. On July 7, 2011, it was determined that Mr. Stokes was in the Curran-Fromhold Correctional Facility and plans were made to visit him at this jail. However, on July 11, 2011, CFCF staff informed the Project investigator that Mr. Stokes was being transferred to a state facility. On August 2, 2011, the Project investigator spoke to staff at SCI Camp Hill and was given clearance to visit Mr. Stokes on September 21, 2011. On September 21, 2011, after the Project investigator arrived at SCI Camp Hill, correctional officers refused the visit absent an explicit statement of permission from Mr. Stokes. The Project investigator faxed a letter requesting permission to visit and received the necessary permission from Mr. Stokes on September 26, 2011. On October 11, 2011, the Project investigator interviewed Mr. Stokes, at which time Mr. Stokes confirmed that Mr. Welborn had shot him with a sawed-off shotgun. Mr. Stokes also stated that he had been treated at the Hospital of the University of Pennsylvania. Mr. Gilyard filed an amended petition on December 2, 2011, well within 60 days of first discovering this information from Mr. Stokes.

14. To further corroborate these allegations and because Mr. Stokes was not certain of the precise date on which Mr. Welborn had shot him, on November 1, 2011 the Pennsylvania Innocence Project secured a signed medical release from Mr. Stokes. Counsel received Mr. Stokes' medical records on January 18, 2012, and an amended PCRA was filed within 60 days of that date. Once again, the Commonwealth's argument that Mr. Gilyard should have filed an amended PCRA within 60 days of the date on which he was informed that medical records "might exist," without any knowledge as to whether they existed or what they would show relevant to the case, is far wide of the mark. Prior to requesting the records, Mr. Gilyard did not know if they even existed and if they did whether they were at all relevant to the pending PCRA claims. Counsel could not file an amended petition alleging that the records existed or that they

corroborated other evidence without actual knowledge of these facts, and any such petition would be properly dismissed as frivolous. The earliest possible date that Mr. Gilyard could have been aware with the exercise of due diligence that relevant medical records existed that corroborated Mr. Welborn's confession was the date that the records were received. Neither Mr. Gilyard nor his representative had knowledge of the contents of the medical records prior to January 18, 2012.

15. In July 2011, the Pennsylvania Innocence Project received information from an inmate that a Donnell Wiggins may have information regarding an alleged statement by "Tizz" in which he confessed to killing Mr. Keal. The Commonwealth suggests that Mr. Gilyard should have filed an amended petition within 60 days of the date Mr. Gilyard learned that Wiggins might have relevant information. Once again, any such petition would have been entirely frivolous, as it would have been based on inadmissible hearsay and speculation that Wiggins may have been heard "Tizz" confess to this crime.

16. The inmate who provided Mr. Wiggins' name did not have any information about his location other than a prior address, recorded as 1621 Mount Vernon Street, Philadelphia. Pennsylvania Innocence Project staff members went to that address, but the occupants stated that they did not know Mr. Wiggins. Thereafter, a database search disclosed that a Shoneece Wiggins lived at **1612** Mount Vernon Street. On September 2, 2011, after several additional attempts to secure information at that address, Pennsylvania Innocence Project staff members spoke to Tamika McMurren, Mr. Wiggins' cousin. Ms. McMurren stated that Mr. Wiggins was living at Coleman Hall, a half-way house in Philadelphia. After weeks of searching and numerous failed appointments made through Mr. Wiggins' counselor, Pennsylvania Innocence Project staff members were finally able to speak with Mr. Wiggins on October 5, 2011. On that date Mr. Wiggins confirmed that "Tizz" had confessed to shooting Mr. Keal with "Rolex." An

amended petition was filed within 60 days of October 5, 2011, which is the earliest possible day that Mr. Gilyard could have known, with the exercise of due diligence, the facts from Mr. Wiggins that formed the basis of his PCRA claim.

17. The Commonwealth makes the unremarkable point that "it is the date the witness's version of events *first* could have been discovered by defendant with reasonable diligence that triggers the jurisdictional sixty-day deadline of Section 9545(b)(2), not the date the defendant first obtained a written affidavit or certification from the witness." (Commonwealth Letter Response, 8). Indeed, the cases it cites on this point establish only that a defendant must file within 60 days of receipt of non-hearsay facts, and cannot wait until those facts are incorporated into a formal statement or affidavit.[4] Here, the dates that Mr. Gilyard first could have discovered the witnesses' version of events are the same dates that the witnesses signed their certifications. This is different from the *Holmes* case cited by the Commonwealth, in which Holmes was incarcerated in the same facility as the witness and did not allege the date that the witness first told the facts that formed the basis of his claim. See *Commonwealth v. Holmes*, 905 A.2d 507 (Pa. Super. Ct. 2006) (questioned by *Bennett*, 593 Pa. at 394, on other grounds) (holding that the 60 day period began on the date that the witness himself first revealed the new information to the defendant).

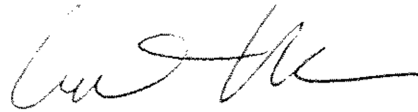
18. The Amended Petition presents several claims that are cognizable under the Act and therefore which entitle Mr. Gilyard to an evidentiary hearing. Plainly, the central facts alleged—that two other persons have credibly admitted to the crime for which Mr. Gilyard is currently incarcerated, as corroborated by other witnesses and documentary evidence, are

[4] The Commonwealth cites Commonwealth v. Breakiron for the proposition that the petitioner must provide a "reasonable explanation" as to why the new information could not have been discovered earlier with the exercise of due diligence. 781 A.2d 94, 98 (Pa. 2001). But that is not the issue before this Court, where the Commonwealth has argued only that the hearsay/rumors start the 60 day clock and that Mr. Gilyard may have had some unspecified knowledge prior to the dates he has properly alleged in his Petition. To the extent the Commonwealth is attempting to argue that Mr. Gilyard could have secured the evidence earlier in the exercise of due diligence, they provide no facts (or law) to support what is on the record of this case a baseless claim.

sufficient to establish that the facts are not merely corroborative or cumulative, will not be used solely to impeach the credibility of a witness, and would likely result in a different verdict if a new trial were granted. If believed, the voluntary confessions of Welborn and Tyler would most certainly overcome the highly questionable single witness identification testimony that is the only evidence presented by the Commonwealth. *Accordingly, Petitioner is entitled to a hearing.* In the alternative, if the Court rules that any allegation is not sufficiently precise or fails to provide sufficient basis for its timing, Petitioner, as the Commonwealth has stated, would have the right to file an Amended Petition.

WHEREFORE, Petitioner requests that that this Court order a hearing on the claims in the Amended Petition and thereafter grant relief in the form of an arrest of judgment or a new trial.

Respectfully submitted,



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IN THE PHILADELPHIA COURT OF COMMON PLEAS
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PROOF OF SERVICE

Charlotte Haldeman Whitmore, Esquire, being duly sworn according to law does hereby state and aver that she is counsel for the petitioner in the above-captioned matter and that she has served by hand delivery upon

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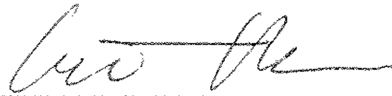
a copy of the *Reply to Commonwealth's Response to Petition for Post-Conviction Relief* being filed on behalf of the petitioner in the above-captioned matter.



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