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R. SETH WILLIAMS
District Attorney

April 5, 2013

The Honorable Rose Marie DeFino-Nastasi
1222 Criminal Justice Center
1301 Filbert Street
Philadelphia, PA 19107

Re: Commonwealth v. Eugene Gilyard
CP-51-CR-0408371-1998 (PCRA)

Dear Judge DeFino-Nastasi:

Please accept this letter brief as the Commonwealth's response to defendant's amended PCRA petition, which was filed on his behalf in the above-captioned case. Because defendant fails to establish an exception to the PCRA's time-bar, his untimely claims should be dismissed without a hearing.

On August 31, 1995, at approximately 2:30 a.m., Thomas Keal was gunned down in the street outside his home at 3621 North 17th Street while his daughter watched from a second-floor window.

At the time of his death, Mr. Keal owned two businesses on the 3600 block of North 17th Street, a seafood restaurant and a bar. Mr. Keal's daughter, Tonya Keal, lived directly across the street from her father, at 3622 North 17th Street, in a second floor apartment that was over top of the seafood restaurant. On the night of the murder, Ms. Keal awoke around 2:30 a.m. to take her young son to the bathroom. While she was up with her son, Ms. Keal looked out her bedroom window and saw defendant pacing back and forth across the street, near her father's house. Defendant had a bandana around his neck area, which he was pulling up and down. As defendant paced, he had his face turned in the direction of Ms. Keal's apartment and the restaurant below, as if he was looking to see what was going on inside the restaurant (N.T. 11/23/98, 186-196).

Ms. Keal left the window, intending to return to bed, when she heard the sound of her father locking the doors of the restaurant below. She then heard her father's voice, followed by the sound of a shotgun blast. Ms. Keal ran to another bedroom window and looked out to see co-defendant, Lance Felder, a.k.a. Tyree Wells, standing over her father with a handgun pointed at her father's head. Defendant was standing next to Felder with a shotgun. Ms. Keal could see that her father had been shot in the leg. Ms. Keal watched as Felder fired a shot into the back of her father's head. As she ran to the phone to dial 911, she heard yet another gunshot (N.T. 11/23/98, 198-209, 287).

According to Ms. Keal, her father always carried a gun after dark and also carried large amounts of cash. Specifically, on the day of her father's murder, she saw him with his gun, a ".357 snub," which he had in a holster along his belt line (N.T. 11/23/98, 200, 282).

Police Officer Carl Benson responded to a radio call and arrived at the scene of the shooting at 2:35 a.m. He found Mr. Keal's body laying in the street, near the sidewalk, in front of Mr. Keal's home at 3621 North 17th Street. There was blood in the area of Mr. Keal's knees and head. Mr. Keal's right pant's pocket was partially pulled out (N.T. 11/20/98, 61-63).

Mr. Keal was transported to Temple Hospital where he was pronounced dead the same day at 2:50 p.m. At the hospital, an empty, brown suede leather handgun holster was recovered from Mr. Keal's body as well as $2,258.05 in cash and other personal items (N.T. 11/23/98, 175-177; 11/30/98, 393).

Tonya Keal was interviewed by detectives on September 2, 1995 about her father's death. At that time, she was shown a photo array containing a photo of co-defendant Lance Felder and was asked if she could identify anyone. Ms. Keal responded that she was "not sure." Ms. Keal was not shown any photo arrays containing a photograph of defendant at that time. On December 31, 1997, Ms. Keal was again interviewed by detectives. She was shown a photo array containing a photograph of defendant and identified defendant as the male who she saw first, walking back and forth with the bandana (N.T. 11/23/98, 328, 12/1/98, 555; 12/1/98, 552-554).[1]

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[1] In his petition, defendant claims that there was a "dispute at trial" regarding whether or not Ms. Keal was shown a photo array containing a photograph of defendant when she was initially interviewed by police on September 2, 1995. See supplemental amended petition, filed February 3, 2012, page 4, paragraph 9. At trial, Detective Dusak was asked questions about Ms. Keal's September 2, 1995 interview. At that time, Detective Dusak was not involved in the case and was not present when Ms. Keal was interviewed on that date by other detectives. Nevertheless, at one point, Detective Dusak testified that he believed Ms. Keal was shown a total of four photo arrays on September 2, 1995, one of which contained a photograph of defendant. Later, after Detective Dusak was given an opportunity to read Ms. Keal's September 2, 1995 statement, which specified that she was shown only one array -- containing a photograph of Lance Felder. Detective Dusak explained, more than once, that he was mistaken in his earlier testimony and that, in fact, Ms. Keal was only shown a photo array containing a photograph of co-defendant Lance Felder and was specifically not shown any photo arrays containing any photographs of defendant. Detective Dusak testified that Ms. Keal was not shown any photograph of defendant until December 31, 1997, when he showed her a photo array containing defendant's photograph, which she identified (N.T. 12/1/98, 542-543, 555, 578-580, 586-592).

On September 18, 1995, detectives also interviewed Keith Williams, a man from the neighborhood where Mr. Keal was murdered. On the night of the murder, Keith Williams was sitting with his friend on the steps outside Mr. Williams' home, located at 1824 West Atlantic Street, just two blocks from the murder scene. He heard sirens and then saw two males running towards him coming from the direction where Mr. Keal had been shot. One of the males Mr. Williams clearly recognized as co-defendant, Lance Felder, who he knew from the neighborhood. Mr. Williams was not able to identify the other male, who he did not recognize.[2] Felder was running with a handgun and the other male was carrying a shotgun. Both males stopped momentarily at the corner of Atlantic and Gratz Streets, across from Mr. Williams' home, looked at Mr. Williams and his friend, and then proceeded to run up Gratz Street where they went into a house located on the 3600 block of North Gratz Street. Mr. Williams was familiar with the home that they entered and knew it to be occupied by members of the Felder family.[3] After approximately five minutes, Mr. Williams saw Lance Felder and the other male leave the house, get into an old white car, and drive down Gratz Street in the direction of Mr. William's house. At the corner of Atlantic and Gratz Streets, the males stopped and, again, looked right at Keith Williams and his friend. They then made a right turn onto Atlantic Street and proceeded to the corner of 19th and Atlantic where they again made a right turn, leaving the area. After the night of the murder, Keith Williams did not see Lance Felder again in the neighborhood (N.T. 12/1/98, 439-446, 474-486, 521-522).[4]

Lance Felder lived at 3621 North Gratz Street. Defendant lived several blocks away at 1634 West Erie Avenue (N.T. 12/1/98, 556).

Defendant and Lance Felder were arrested and charged with the murder of Thomas Keal. Beginning on November 19, 1998, defendant and Felder were tried by a jury sitting before the Honorable David N. Savitt.

On December 31, 1997, Ms. Keal was also shown a second photo array containing a photograph of Lance Felder. Ms. Keal did not select any of the photographs in that array and told the detective that she couldn't "be sure." Ms. Keal later identified Lance Felder at a line-up, as well as at the preliminary hearing and trial (N.T. 11/23/98, 207, 219, 349; 12/1/98, 549-551).

[2] Mr. Williams testified that he did not know defendant. He further testified that he didn't get a "good look" at the male with Lance Felder and, therefore, would not be able to identify that male if he saw him again (N.T. 12/1/98, 522, 526).

[3] Between Atlantic and Pacific Streets, Gratz Street runs for only two blocks -- the 3500 and 3600 blocks of North Gratz Street. From Keith Williams home, which is located on the 1800 block of Atlantic Street and sits across from the intersection of Gratz Street and Atlantic, there is a view directly up Gratz Street into the 3500 and 3600 blocks (N.T. 12/2/98, 704-707).

[4] When Keith Williams was interviewed on September 18, 1995, he was shown a photo array containing a picture of Lance Felder. At that time, Mr. Williams did not identify Lance Felder to police as one of the two men that he saw running from the scene. Later, on December 31, 1997, Mr. Williams was again interviewed by detectives at which time he identified Lance Felder from a photo array. Mr. Williams explained that his prior failure to identify Lance Felder was based on fear due to the fact that Mr. Williams children and grandmother lived in the home at 1824 Atlantic Street, right down the block from the Felder home at 3621 North Gratz Street (N.T. 12/1/98, 451-452, 454, 491-497, 500, 514, 517, 543-548).

At trial, defendant presented evidence that Rodney Swain and a male named Tyric were the real perpetrators of Mr. Keal's murder. Lamont Coker testified on behalf of defendant that Coker was "smoking marijuana" somewhere near 18th Street and Bouvier and Pacific Streets on the night of Mr. Keal's murder. According to Coker, he saw Mr. Keal leave the bar and then, shortly thereafter, "heard a van pull up" and heard a "shotgun blast." Somehow from his vantage point, he claimed to look onto 17th Street where he testified that he saw a van near the area of 3619-3921 17th Street. According to Coker, he saw a heavy-set male from the neighborhood named "Rodney" reach into Mr. Keal's waist line and remove a gun and then shoot two more times. According to Coker, after Rodney shot Mr. Keal, another man, whom Coker knew as Tyric[5] took a "money bag" after which both Tyric and Rodney got back into the van. Coker testified that there was a third male driving the van, whom he did not see, but who, according to Coker somehow fired the first shot that sounded like a shotgun blast. According to Coker, before driving away, the males "sprayed" gunshots into a crowd of people that had supposedly formed at the scene during their commission of the murder. Coker testified that the males "shot their way off the street," supposedly firing more than seven shots, from at least two different guns, in various directions as they left the scene in the van (659-663, 671-672, 678-680, 684-689).[6]

According to Coker, he provided his account of the murder to detectives after he was arrested, on December 12, 1997. Coker testified that the detectives questioned him about his possible knowledge of murders in the area where he lived, including Mr. Keal's murder. Coker testified that he provided the information about Mr. Keal's murder in the hope that he would be released by the police rather then held to face a violation of probation charge before the Honorable Rayford A. Means (N.T. 12/2/98, 665, 670).

On December 10, 1998, the jury found defendant guilty of second-degree murder, robbery, possessing an instrument of crime, and criminal conspiracy. The same day, Judge Savitt sentenced defendant to a mandatory term of life imprisonment for the murder with a concurrent term of one to two years incarceration for possessing an instrument of crime and five to ten years incarceration for criminal conspiracy. Defendant's robbery conviction merged for purposes of sentencing. Post-sentence motions were filed on December 21, 1998 and denied on January 4, 1999. The late Bernard L. Siegel, Esquire, represented defendant throughout these proceedings.[7]

Still represented by Mr. Siegel, defendant filed an appeal. Defendant's appeal was dismissed twice for failure to file a brief. Subsequently, on July 10, 2001, defendant's appellate rights were reinstated nunc pro tunc. On December 26, 2002, the

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[5] The trial transcript notes the males name as "Tyree," though Coker was not asked to spell the name. Coker's statement to police, written in his own hand, indicated that the male's name was "Tyric" (N.T. 12/2/98, 678-679).

[6] Coker only identified Rodney by his first name. However, Detective Dusak testified on cross-examination that a male by the name of Rodney Swain was brought in for questioning in 1995. Defense counsel attempted to elicit confirmation from Detective Dusak that Coker identified Rodney Swain as the shooter, however, an objection was lodged and sustained (N.T. 12/1/98, 575-576).

[7] The jury found co-defendant Felder guilty of first-degree murder, robbery, possessing an instrument of crime and criminal conspiracy.

Superior Court affirmed defendant's judgments of sentence. The Pennsylvania Supreme Court denied defendant's petition for allowance of appeal on September 17, 2003.

On October 24, 2003, defendant filed a pro se PCRA petition. Counsel was appointed. On June 24, 2004, counsel filed a "no-merit" letter pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988). After sending defendant notice pursuant to Pa.R.Crim.P. 907, Judge Savitt dismissed defendant's petition as meritless on October 13, 2004. Defendant appealed pro se. On October 5, 2007, the Superior Court affirmed Judge Savitt's dismissal of defendant's PCRA petition. Defendant filed a petition for allowance of appeal, which was denied by the Pennsylvania Supreme Court on May 7, 2008.

On July 9, 2010, defendant filed another pro se PCRA petition, raising a claim that his life sentence is unconstitutional, pursuant to Graham v. Florida, due to the fact that he was a juvenile at the time of the murder.[8] On March 31, 2011, defendant filed another pro se PCRA petition, this time alleging newly-discovered evidence in the form of a statement, purportedly signed by Ricky Welborn on March 18, 2011, in which Mr. Welborn claims that he and another unnamed male murdered Mr. Keal and neither defendant or Lance Felder were involved.

On August 17, 2011, Charlotte Haldeman Whitmore, Esquire, and Frank DeSimone, Esquire, both of the Pennsylvania Innocence Project, filed an amended PCRA petition on defendant's behalf, titled "Second Amended Petition for Post-Conviction Relief Pursuant to 42 Pa.C.S. § 9543." In that petition, defendant alleges newly-discovered evidence in the form of a certification, dated June 20, 2011, obtained from Ricky Welborn, in which Welborn states that he and an unidentified "friend" murdered Mr. Keal and defendant had nothing to do with the crime.

On December 2, 2011, Ms. Whitmore and Mr. DeSimone filed a supplemental amended petition on defendant's behalf, titled "Third Amended Petition for Post-Conviction Relief Pursuant to 42 Pa.C.S. § 9543." In that petition, defendant alleges newly-discovered evidence in the form of certifications obtained from Donnell Wiggins and Anthony Stokes on October 5 and 11, 2011, respectively. Defendant claims that the certifications corroborate Ricky Welborn's statement.

On February 3, 2012, Ms. Whitmore and Mr. DeSimone filed yet another supplemental amended petition on defendant's behalf, titled "Fourth Amended Petition for Post-Conviction Relief Pursuant to 42 Pa.C.S. § 9543." In that petition, defendant alleges newly-discovered evidence in the form of medical records for Anthoney Stokes, which defendant claims corroborates Anthony Stokes October 5, 2011 certification.[9]

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[8] In Graham v. Florida, 130 S.Ct. 2011 (2010), the United States Supreme Court found that it was unconstitutional to sentence a juvenile to life imprisonment for a non-homicide offense.

[9] In the medical records provided by defendant, the patient's name is recorded as "Anthoney Stokes." See last two pages of Exhibit L in Exhibits to Fourth Amended Petition for Post-Conviction Relief Pursuant to 42 Pa.C.S. § 9543.

On August 15, 2012, Ms. Whitmore and Mr. DeSimone filed a supplemental amended petition on defendant's behalf, claiming that defendant is entitled to a new sentencing hearing based upon the United States Supreme Court's decision in Miller v. Alabama, 132 S.Ct. 2455 (2012), because he was a juvenile at the time of his commission of the crime.[10]

The Commonwealth herein responds.

As an initial matter, defendant's claim of newly-discovered evidence based on Ricky Welborn's initial March 18, 2011 statement, which was raised by defendant in his March 31, 2011 pro se PCRA petition, is not explicitly raised as a claim in any of the counseled PCRA petitions filed on defendant's behalf by Ms. Whitmore and Mr. DeSimone. The first counseled petition, filed August 17, 2011, raises a claim of newly-discovered evidence only as to the later, June 20, 2011, certification provided by Ricky Welborn to Ms. Whitmore and Innocence Project investigator, Shaina A. Tyler. See amended petition, filed August 17, 2011, page 10, paragraph 33. Although the counseled petitions reference Welborn's March 18, 2011 statement, they do not specifically raise a claim of newly-discovered evidence as to that statement.

PCRA counsel seems to mistakenly believe that the claim regarding Welborn's March 18, 2011 statement has been properly raised by virtue of defendant's own raising of the claim in his pro se petition.[11] Counsel is incorrect. Because defendant is represented by counsel, his pro se pleadings cannot be considered. Indeed, the Pennsylvania Supreme Court has clearly held that, once counsel has entered his or her appearance, a defendant is not entitled to review of his pro se pleadings. See Commonwealth v. Ellis, 626 A.2d 1137 (Pa. 1993) (inappropriate to consider pro se pleadings of a counseled defendant). See also, Commonwealth v. Pursell, 724 A.2d 293 (Pa. 1999) (PCRA petitioner is not entitled to hybrid representation). Accordingly, the Commonwealth responds only to the newly-discovered evidence claims actually raised in the counseled petitions.

In the counseled petitions, defendant claims to have newly-discovered evidence in the form of certifications from Ricky Welborn, Donnell Wiggins and Anthony Stokes. He also claims to have newly-discovered evidence in the form of medical records for Anthoney Stokes. Because defendant fails to proffer sufficient evidence to show that his

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[10] In Miller v. Alabama, 132 S.Ct. 2455 (2012), the United States Supreme Court found that a mandatory life sentence without parole for individuals who were under the age of 18 at the time of their commission of the offense is unconstitutional. The Commonwealth would ask this Court to defer decision on this claim pending the Pennsylvania Supreme Court's ruling in Commonwealth v. Cunningham, 51 A.3d 78 (Pa. 2012) (order granting allocatur as to the question of whether Miller's holding is retroactive not only to claims on direct appeal but also to PCRA claims).

[11] PCRA Counsel's belief is apparent not only from the content of their petitions, but also from the titles of their petitions. Because counsel deems defendant's March 31, 2011 pro se petition an "amended petition," they titled the first petition that they filed on defendant's behalf a "Second Amended Petition for Post-Conviction Relief Pursuant to 42 Pa.C.S. § 9543." Similarly, the second counseled petition is titled a "Third Amended Petition" and the third counseled petition is titled a "Fourth Amended Petition." See "fourth" amended petition, filed February 3, 2012, page 10, paragraph 26(4).

newly-discovered evidence claims meet an exception to the PCRA's time-bar, defendant's claims are untimely and should be dismissed without a hearing.

Under the amended PCRA, petitions must be filed within one year of the date on which the judgment became final unless one of three statutory exceptions set forth in 42 Pa.C.S. §9545(b) applies.

42 Pa.C.S. §9545(b) provides in pertinent part:

> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the 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.
>
> (2) Any petition involving an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

Defendant's judgment of sentence became final on December 16, 2003, ninety days after the Pennsylvania Supreme Court denied his petition for allowance of appeal. Defendant then had one year -- until December 16, 2004 -- to file a timely PCRA petition. Defendant's current PCRA petition, initially filed by him, pro se, on July 9, 2010, is clearly untimely.[12]

The one-year time limit established by section 9545(b) is mandatory and jurisdictional in nature. Commonwealth v. Fahy, 737 A.2d 214, (Pa.1999); Commonwealth v. Alcorn, 703 A.2d 1054 (Pa. Super. 1997), alloc. denied, 724 A.2d 348 (Pa. 1998). Because defendant's petition is untimely, he must affirmatively plead and prove that one of the above exceptions set forth in 42 Pa.C.S. §9545(b) applies to his claims. See Commonwealth v. Beasley, 741 A.2d 1258 (Pa. 1999) (stating petitioner's burden is to plead and prove exception applies when PCRA petition is untimely). If he does not, this Court is without jurisdiction to consider his claims. See Commonwealth v. Murray, 753 A.2d 201, 203 (Pa. 2000); Commonwealth v. Pursell, 749 A.2d 911, 913-914 (Pa. 2000).

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[12] Defendant's subsequent pro se petition, filed by him on March 31, 2011, is equally untimely.

Because the PCRA's time limit is jurisdictional, this Court must first determine whether defendant's claims were timely filed before it may consider the merits of his petition. Commonwealth v. Peterkin, 722 A.2d 638, 643 (Pa. 1998). To meet his burden, defendant must proffer evidence to show that his claims fit into one of the three narrow exceptions to the time-bar. Without such a proffer, this Court lacks jurisdiction to even consider defendant's claims, let alone conduct a hearing. Commonwealth v. Pursell, 749 A.2d at 913-914 (courts are without jurisdiction to consider untimely petitions unless petitioner pleads and proves one of the exceptions to the time-bar).

As stated, defendant does not meet his burden of proving that his newly-discovered evidence claims fit within an exception to the time-bar. Defendant's proffer of evidence regarding the timing of his filing of the claims is wholly inadequate to establish this Court's jurisdiction to even conduct a hearing.

Defendant argues that his newly-discovered evidence claims fall within the newly-discovered facts exception to the time-bar. The newly discovered facts exception to the time-bar requires defendant to prove that "the facts upon which the claim is predicated were unknown to petitioner and could not have been ascertained by the exercise of due diligence." See 42 Pa.C.S. § 9545(b)(1)(ii). Defendant must also prove that the claim was filed "within 60 days of the date the claim could have been presented." See 42 Pa.C.S. § 9545(b)(2).

In each instance of his supposed newly-discovered evidence, defendant claims that he "discovered" the evidence on the date that the certifications were created or, in the case of the medical records for Anthoney Stokes, on the date that the records were received by counsel. See supplemental amended petition, filed February 3, 2012, page 12, paragraph 33, and page 16, footnote 16. Obviously, common sense dictates that defendant did not "discover" that the witnesses had information to provide or that certain medical records might exist on the dates that he ultimately obtained the witnesses' statements and the medical records.

Indeed, our appellate court's have made clear 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. See Commonwealth v. Abu-Jamal, 941 A.2d 1263, 1269 n.11 (Pa. 2008) (it is not the date of the witness's declaration that controls for purposes of establishing the timeliness of petitioner's filing of his PCRA claim, but rather the date petitioner first learned of or, with reasonable diligence, could have learned of the witness's account). See also, Commonwealth v. Breakiron, 781 A.2d 94, 98 (Pa. 2001) (sixty day requirement of section 9545(b)(2) is not met when defendant fails to provide information detailing when and how he discovered the evidence as well as why, with the exercise of reasonable diligence, he could not have obtained the evidence earlier). See also, Commonwealth v. Holmes, 905 A.2d 507 (Pa. Super. 2006) (even though petition filed within 60 days of the date of affidavit, defendant failed to satisfy burden of proving that he raised his claim within sixty days of the date the new facts were first discovered where defendant did not disclose the date on which he learned of the witness's new account).

Nowhere in any of defendant's numerous pleadings does he provide any details regarding how and when he actually first learned that Ricky Welborn, Donnell Wiggins, and Anthony Stokes might have information relevant to his case, let alone explain why he could not have obtained the information earlier with the exercise of reasonable diligence.[13] Unless and until defendant provides such a proffer, he plainly fails to sustain his burden of proving that his claims fit within an exception to the time-bar. Without proof of an exception to the time-bar, defendant's claims are simply untimely and, therefore, respectfully, this Court does not have jurisdiction to entertain those claims.[14] Accordingly, defendant's PCRA claims of newly-discovered evidence should be dismissed without a hearing.

Respectfully submitted,

Laurie A. Williamson
Assistant District Attorney

cc: Charlotte Haldeman Whitmore, Esquire
Frank DeSimone, Esquire

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[13] As stated previously, defendant's claim of newly-discovered evidence regarding the March 18, 2011 statement from Ricky Welborn was not properly raised in any of the counseled petitions. Nonetheless, it bears noting that even in defendant's March 31, 2011 pro se petition, he fails to provide a sufficient proffer regarding the circumstances and timing of his "discovery" of Ricky Welborn's account.

Attached to his March 31, 2011 pro se petition, defendant provides a letter, dated February 3, 2011, apparently written by defendant to a private investigator at Dash Investigative Services. In the letter, defendant writes that he "initially learned of [Welborn's] willingness to help [him]" through his co-defendant, Lance Felder, "by way of a third party letter." Defendant further writes, "I would again learn of such by way of another third party letter from my cousin, Sheldon Odom, who had been incarcerated with Ricky Welborn at SCI Graterford for a short period of time last year, 2010." See letter from defendant to Dash Investigative Services, attached as Exhibit A. The only other documents attached to defendant's March 31, 2011 pro se petition are an affidavit from Robert A. Dash, dated March 21, 2011, and a handwritten statement, dated March 18, 2011, purportedly signed by Ricky Welborn. See affidavit of Robert A. Dash, attached as Exhibit B, and handwritten Welborn statement, dated March 18, 2011, attached as Exhibit C. Defendant does not provide either of the two letters referenced in his February 3, 2011 letter to Dash Investigative Services, which purportedly informed defendant of Welborn's "willingness to help" nor does defendant provide any other indication of when he received the referenced letters.

[14] The Commonwealth does not object to this Court granting defendant an opportunity to amend his petition, as permitted under Rule 905 of the Pennsylvania Rules of Criminal Procedure. Alternatively, if this Court disagrees with the Commonwealth and believes that defendant has provided sufficient proffers to arguably establish an exception to the time-bar, the Commonwealth would respectfully request an opportunity to file a supplemental letter brief addressing the substance of defendant's newly-discovered evidence claims.

EXHIBIT
A

EXHIBIT A 3/18/11 - R.W

Febuary 3, 2011

Eugene Gilyard
DV-0222
301 Morea Rd.
Frackville, PA 17932

Dash Investigative Services
3861 Sarayo Circle
Harrisburg, PA 17110

Dear Mr. Dash:

I am in receipt of your letter dated Febuary 1, 2011. Thank you for writing me and agreeing to assist me in proving my innocence. I am aware that Earl Allen has contacted you on my behalf and agreed to fund your investigation.

The Frackville inmate's name is Ricky Welborn # DF-4934, @ SCI Frackville. I initially learned of his willingness to help me through my co-defendant, Lance Felder (aka Tyree Wells) # DV-1090, @ SCI Albion, by way of a third party letter. I would again learn of such by way of another third party letter from my cousin, Sheldon Odom, who had been incarcerated with Ricky Welborn at SCI Graterford for a short period of time last year, 2010. Mr. Welborn is one of the real perpetrators in the August 31, 1995 shooting death of a North Philadelphia businessman named Thomas Keal which I have been wrongfully convicted of and sentenced to life imprisonment. On the morning of the shooting, at approximately 2:30 AM, the decease's daughter, Tanya Keal, testified to observing two males standing over her father, one possessing a shotgun and the other a handgun. This was after she heard a shotgun blast while taking her son to the bathroom. She would then observe the male with the handgun fire several shots at her father as he lay in the street, in front of his home, across the street from the two businesses he owned, a bar and a seafood restaurant. Both men would then flee the scene running South on the 3600 block of North 17th Street. Approximately 2 and a half years later, Ms. Keal would pick me out from a photo array as being one of the two assailants she observed that night. Her testimony would be the only evidence against me at trial which inevitably led to my false conviction. There was additional evidence known to the detectives which was never investigated. From such is an eyewitness statement given by a Donita Mickeals just days after the crime, long before I was ever a suspect, in which she stated to have observed Mr. Welborn running near her home carrying a shotgun after she heard gun shots coming from the direction of the shooting. She has previously provided my co-defendant with a notarized affidavit in which she stated her willingness to testify to her initial statement given to detectives. Her testimony can possibly corroborate any admission of guilt made by Mr. Welborn. Also, a Tarik Chapman has too given my co-defendant a notarized affidavit in which he state to have supplied Mr. Welborn with a 22 caliber handgun, the

exact same caliber used in the shooting death of Mr. Keal. In addition, he stated to have received a 357 caliber handgun from Mr. Welborn, the exact same caliber handgun missing from Mr. Keal's holster, in return for having had to "toss" the borrowed 22 caliber handgun. It is alot I would have like to say. If you have any questions or requests then please do not hesitate to contact me.

As mentioned in my previous correspondance with you, my reason for wanting to hire you is so that you may visit Mr. Welborn at his current institution in order to obtain a sworn and written affidavit on my behalf in order that I may file in the court and begin the process of legally proving my innocence. I pray that you can be of assistance to me. I thank you in advance and look forward to hearing from you promptly.

Sincerely,

Eugene Gilyard

CC: File

EXHIBIT
B

On March 18, 2011 I interviewed Ricky Welborn at SCI Frackville where he is serving a life sentence for murder.

I gave him a letter dated February 3, 2011 that I received from Eugene Gilyard who is incarcerated at SCI Mahanoy for the August 31, 1995 killing of Thomas Keal in Philadelphia, PA.. Welborn read the letter that I now refer as exhibit A and acknowledged that the facts presented in the letter were accurate. He and another man actually committed the murder; not Gilyard and Lance Felder. The only discrepancy Welborn found in the letter was that he took the 357 hand gun out of Keals hand not from his holster.

Welborn provided me a written statement that I now refer to as exhibit B that he in fact was involved in Keal's murder and of Gilyard's innocence.

I intend to keep the original exhibits in case they are needed in future proceedings. Copies will be distributed to interested parties.

Sworn to and subscribed before me this

21st day of March, 2011

Heather Grose

Notary Public

Robert A. Dash

Robert A. Dash
Private Investigator

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
HEATHER GROSE, Notary Public
Susquehanna Twp., Dauphin County
My Commission Expires June 4, 2014

EXHIBIT
C

EXHIBIT B

My NAme is Ricky Welborn and im Currently incarcerated at SCI Frackville. I give this Statement to Private investigat Robert A. Dash of my own free Will. No Promises have been made to me.

I myself have received a letter from mr. Gilyard, Sent to mr. Dash. I have reviewed the Contents, And they are accurat to the be of my reccolletoins. Feb-3-2011

mr. Gilyard Was not envoled in the Killing of Thomas Keal, on August 31st 1995. I alongew with another Person Killed mr. Keal. I had the ~~Sheet~~ rw Shot Gun that I used to shot m. the Keal in the leg. my Partner Shot mr. Keal in the head - With the 22. Tance Felder Was also not involed With the Killing of mr. Keal.

my reason for Coming forward is Cause I Always Knew that these two men where incarcerated for a Crime they didnt Commit. And this Crime that I Commited has Always been on my Conscience, And I Just Want to own up to my Wrong doings. I mr. Welborn Am willing to Testify to these facts

#DF4934

mr. Ricky Welborn

Robert a Cash
WITNESS

3/18/11