

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 3270 EDA 2016

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

MAJOR G. TILLERY,
Appellant

REPLY BRIEF FOR APPELLANT

*Appeal from Order of the Court of Common Pleas of
Philadelphia County, Pennsylvania, Criminal Division*

*Order entered by The Honorable Leon W. Tucker on September 26, 2016, Dismissing the Post-
Conviction Relief Act Petition of Major G. Tillery
In the Court of Common Pleas of Philadelphia County, PA at
No. CP 51-CR-0305681-1984*

STEPHEN P. PATRIZIO, ESQUIRE
Attorney I.D. No. 23263
Attorney for Appellant
1500 JFK Boulevard, Suite 1205
Philadelphia, PA 19102
(215) 569-2121

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REPLY BRIEF OF APPELLANT MAJOR TILLERY

The Commonwealth Arguments Are Not Supported by Fact or Law

The issue before this Court is whether Appellant Major Tillery's third PCRA petition with claims of due process violations based on his actual innocence and Commonwealth violations of *Mooney v. Holohan*, 294 U.S. 103 (1935) and *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and their progeny was dismissed in error on jurisdictional grounds for failure to meet either the "government interference" or "newly-discovered facts" timeliness exceptions of 42 Pa. C.S. §9545(b)(1)(i) and (ii).

The PCRA court was unambiguous that its Rule 907 Order dismissing Tillery's petition was not a ruling on the merits of the petition claims. R 16-a. In dismissing the petition for lack of timeliness, the PCRA court did not make factual findings on the veracity of recanting prosecution witnesses Emanuel Claitt and Robert Mickens or the merits of the allegations of Commonwealth misconduct.

The central counter-argument made by the Commonwealth is that Tillery's claim in his third PCRA petition is "the same claim he unsuccessfully raised in his untimely *second* petition." P. 7. (emphasis in original).

That was not the determination made by the PCRA court. It did not dismiss Tillery's third petition as untimely based on finding Tillery presented the "same claim" or "same facts" as in his 2007 petition. The PCRA court's due diligence analysis began with the period *following* the 2007 filing. 7-A.

As set forth in Appellant's Brief, the facts underlying Tillery's *Brady* claims filed in 2007 are *not* the same facts as presented in his third PCRA petition filed June 15, 2016.

The Commonwealth's "Counter-Statement of Case" begins with the irrelevant and intentionally prejudicial assertion that Petitioner, Major Tillery, was "a lieutenant in a drug trafficking organization."¹ The charges against Major Tillery did not include any drug trafficking or drug related charges and consequently he was not convicted of any. Major Tillery has always asserted his innocence of the crimes he was convicted of and sentenced to life imprisonment without the possibility of parole.

The Commonwealth's Counter-statement and Argument regarding the claims and factual allegations in Tillery's third PCRA Petition, filed June 15,

¹ The Commonwealth similarly gratuitously and prejudicially described Petitioner as a "lieutenant in the notorious 'Black Mafia' drug organization" in its recent motion to this Court.

2016² is false by omission of both Tillery's *Brady* claims that the Commonwealth knowingly and intentionally manufactured and then presented at trial the false evidence against him and the numerous newly discovered factual allegations in support of those claims.

Contrary to the Commonwealth's arguments, Tillery's new facts are not prosecution witnesses Emanuel Claitt's and Robert Mickens' recantations, but that the factual allegations contained in those sworn declarations, which they will testify to in court if so permitted, contain newly discovered facts of the Commonwealth's misconduct. Stated otherwise, it is not a new fact that Claitt and Mickens lied in inculcating Tillery; he has always maintained his innocence and that he was not present at the shootings or had any participation in the homicide and assault that underlies his conviction. What are newly discovered are specific acts of misconduct by the Commonwealth, which resulted in Tillery's conviction.

The Commonwealth's falsification of the record—by discounting the factual allegations presented in Tillery's Third PCRA petition—is further compounded by its reliance on *Commonwealth v. Johnson*, 863 A.2d 423

² Petitioner's Third Petition was filed on June 15, 2016. He filed a Petition for a Writ of Habeas Corpus based on challenge to his sentencing on October 6, 2014. Petitioner did not file a response to the Rule 907 Notice to dismiss this Petition for a Writ of Habeas Corpus, nor did he appeal that dismissal.

(Pa. 2004) and ignoring the analysis of the timeliness exceptions and holdings of *Commonwealth v. Bennett*, 930 A. 2d 1264 (Pa. 2007), *Commonwealth v. Davis*, 86 A.3d 883 (Pa. Super. 2014), *Commonwealth v. Medina*, 92 A.3d 1210 (Pa. Super. 2014)(*en banc*) appeal dismissed (2016), and *Commonwealth v. Burton*, 153 A.3d 618 (Pa. 2016).

The Commonwealth’s argument is that once a defendant has asserted a *claim* of government misconduct based on any fact, that defendant is forever precluded from raising new, additional Brady claims based on any other facts/acts of government misconduct that are newly discovered. It should not be necessary to state that a constitutional claim is not the same as the fact(s) that supports the claim.³

That Tillery raised a *Brady* claim in his 2007 PCRA petition based on one specific example of a non-disclosed plea agreement gleaned from court records does not preclude him from filing a subsequent petition presenting *Brady* claims based on other pieces of evidence.⁴ The separate claims are

³ A constitutional claim is: “Any claim or cause of action predicated on a right or duty established by the Constitution.” And “A fact in pleading is a circumstance, act, event, or incident.” – Blacks Law Dictionary, 2nd Edition

⁴ Tillery was able to locate court records that provided information only that Claitt was promised a sentence of “less than 10 years” and that Mickens had obtained parole assistance. The records underlying this petition did not contain information that these witnesses’ testimony was manufactured and coached by the Commonwealth or that these witnesses had been threatened with false charges of homicides, that numerous charges were nolle processed or sentences significantly reduced, or that these witnesses had been given private time for sex with girlfriends in the homicide interview rooms.

supported by specific factual allegations, which are first examined for jurisdictional timeliness pursuant to §9545(b)(1)(i-iii).

As stated in *Commonwealth v. Bennett*, at 1274, when a petitioner's "allegations bring his claim within the ambit of' an exception to the PCRA's one year limitations provision, he must still prove that it meets the requirements therein Such questions require further fact-finding and the PCRA court, acting as fact finder, should determine whether [the petitioner] met the 'proof' requirement."

The Commonwealth's position is that a defendant is precluded from filing more than one post-conviction action based on a Brady claim, irrespective of the provisions of §9545(b)(1)(i-iii). This is not only a denial of the Commonwealth's admonition of "mandatory and literal interpretation" of the statute, but contrary to the basic constitutional precepts underlying *Mooney v. Holohan*, *Brady* and their progeny.

As an additional argument, the Commonwealth denies the very existence of Tillery's specific allegations of acts of government misconduct, presented in his third PCRA petition, which underlie his claims of actual innocence and of government misconduct (pursuant to *Mooney v. Holohan* and *Brady*). The following acts of government misconduct were previously unknown to Tillery, including:

- (a) Prosecution witnesses Emanuel Claitt and Robert Mickens were not on the scene of the shootings and the entirety of their testimony concerning Tillery was false, the result of both threats and favorable treatment by the Commonwealth as inducement for their false testimony;
- (b) Threatening prosecution witnesses Claitt and Mickens with false murder charges unless they agreed to provide false testimony against Tillery;
- (c) Arranging private meetings for sexual liaisons to Claitt and Mickens while they were in custody, by named detectives, with named women;
- (d) Homicide detectives and prosecutors manufactured the false statements and testimony of Claitt and Mickens inculcating Tillery;
- (e) Meeting arranged between Claitt and Mickens while they were in custody for Claitt to convince Mickens to falsely testify against Tillery;
- (f) Commonwealth grants of multiple plea deals to Claitt and Mickens--dismissal of charges and minimal sentences, bail arrangements and release from jail despite detainers;
- (g) Prompting Claitt and Mickens to testify falsely denying those plea deals and bail and parole agreements;
- (h) Commonwealth vouching for truthfulness and lack of ulterior motive for Claitt's and Mickens' false testimony, which was not corrected by the Commonwealth.

Rather than acknowledging Tillery has presented these new facts of government misconduct, the Commonwealth declares “*the supposed ‘misconduct’ does not exist*, and the PCRA court did not find this allegation credible. (Opinion, Tucker, J., 6/13/17, at 7).” (Com. Brief P. 8) Whether intended or not, the Commonwealth is making a merits finding on Tillery's *Brady* claims, and imputing to the PCRA court a factual finding that was not made.

In this, the Commonwealth follows the rejected analysis and findings of *Commonwealth v. Johnson, supra* as its authority that Tillery’s petition does not meet the timeliness exception. *Johnson* held that a post-conviction petition “must establish a meritorious *Brady* claim in order to fall within an exception set forth in § 9545 (b)(1)(i-iii).”⁵ Less than a year later, this core element of *Johnson* was rejected by the Pennsylvania Supreme Court in *Com v. Lambert*, 884 A.2d 848 (Pa. 2005), and reaffirmed in *Bennett*, at 1271-72, and quoted in *Commonwealth v. Burton*, at 627:

“In *Lambert*, the appellant raised a number of *Brady* claims and alleged that the court had jurisdiction over his claims under subsection (b)(1)(ii). The Commonwealth urged us to follow a similar analysis to that set forth in [*Commonwealth v. Johnson*, 580 Pa. 594, 863 A.2d 423 (Pa. 2004)], arguing that appellant must establish a meritorious *Brady* claim in order to fall within an exception set forth in subsections (b)(1)(i)-(iii). In rejecting the Commonwealth's argument, we made clear that the exception set forth in subsection (b)(1)(ii) does not require any merits analysis of the underlying claim.

Rather, "the exception merely requires that the 'facts' upon which such a claim is predicated must not have been known to appellant, nor could they have been ascertained by due diligence." *Lambert*, 884 A.2d at 852. Therefore, our opinion in *Lambert* indicated that the plain language of subsection (b)(1)(ii) is not so narrow as to limit itself to only claims involving "after-discovered evidence."

Rather, subsection (b)(1)(ii) has two components, which must be alleged and proved. Namely, the petitioner must establish that: 1)

⁵ “As we conclude that Appellant's underlying *Brady* claim is without merit, we necessarily also conclude that Appellant has failed to show that his petition falls within any of the exceptions to the PCRA's time requirements. Cf. *Commonwealth v. Breakiron*, 566 Pa. 323, 781 A.2d 94, 98 (2001) (Section 9545(b)(1)(i) timeliness exception can be satisfied if appellant establishes meritorious *Brady* claim).” *Commonwealth v. Johnson*, at 426. (emphasis added)

"the facts upon which the claim was predicated were unknown" and (2) could not have been ascertained by the exercise of due diligence." 42 Pa.C.S. §9545(b)(1)(ii) (emphasis added). If the petitioner alleges and proves these two components, then the PCRA court has jurisdiction over the claim under this subsection. See *Lambert*, supra., *Bennett*, 930 A.2d at 1271-72 (emphasis in original)."

To the extent *Commonwealth v. Johnson* is not fundamentally flawed as precedent in analyzing timeliness exceptions, it is applicable to examination of "*specific pieces of evidence*" in support of a *Brady* claim as to whether it had been previously presented in support of prior *Brady* claims.⁶ This entails a piece by piece examination of the facts presented, not a sweeping characterization that any piece of evidence of government misconduct is the same as any other piece of evidence of government misconduct and having raised one piece of such evidence, a defendant cannot bring another *Brady* claim. Notably the analysis behind the oft-cited holding of *Johnson* that "(b)(i)(ii) focuses on newly discovered *facts*, not on a *new source* for previously known facts" is *not* the Commonwealth's position in Tillery's case.

Reply to the Commonwealth on Tillery's Due Diligence

⁶ For instance, a letter by the prosecution witness of payoff to police as well as a material witness bail reduction report that were the basis of *Brady* claims had been previously presented and denied on direct appeal and in *Johnson*'s first PCRA petition. Each individual factual allegation presented in support of *Johnson*'s *Brady* claims was examined to determine if that specific factual allegation was a basis for a timeliness exception. *Commonwealth v. Johnson*, at 425-426.

In Tillery's Brief on Appeal (pps. 40-50), he set forth in particular detail why he meets the due diligence standard, applying the consideration of examining his particular circumstances to take "reasonable steps not requiring unreasonable assumptions" pursuant to *Bennett, Burton, Medina* and *Davis*. The Commonwealth does not address this analysis and its application to Tillery.

However, the conclusion to be drawn from Tillery's second PCRA petition filed in 2007 in regard to his exercise of his due diligence is that he made extreme efforts as a *pro se* petitioner to uncover and present what evidence he could find that Claitt and Mickens testified falsely that there was no plea deal and that the Commonwealth knowingly allowed that false testimony. The documentation that was available to Tillery from those court files covering several different cases was but one specific promise made to Claitt and Mickens, which were not disclosed. (See, footnote 3)

Based on the trial testimony of Claitt and Mickens stating that they were witnesses to or in some way involved in the shootings, Tillery assumed they were accessories, but not charged. Tillery learned, based on the numerous times they testified as the key prosecution witness, that Claitt and Mickens were career informants, beholden to the police and prosecution. These factors are concrete reasons Tillery had no reasonable expectation that

either Claitt or Mickens would acknowledge he lied in testifying against him.

The Commonwealth ignores or misstates the particular conditions of Tillery's *pro se* status and conditions of imprisonment as "not explain[ing] why he did not try" to exercise due diligence. In particular it is in error to assert "his counsel apparently contacted the witnesses and received signed recantations *on the same day*." (Com. Brief P. 9) (emphasis in original). See Tillery Brief (P. 49) setting forth the fact there was an investigation over the course of a year that resulted in obtaining the sworn declarations of Claitt and Mickens.

The Due Diligence Requirement is Erroneously and Unconstitutionally Imposed on Government Interference Exception

The Commonwealth's response to Tillery's argument against the imposition of a due diligence requirement under the government interference timeliness exception is to simply cite *Commonwealth v. Abu-Jamal*, 941 A.2d 1263 (Pa. 2008) and state that the Pennsylvania Supreme Court has "consistently held" due diligence as a component of §9545 (b)(1)(i).

Tillery argues that this Court should seriously examine this issue in light of his argument and follow both the intent and literal statutory requirements of the exception. The Pennsylvania Supreme Court has made numerous correctives to its analysis and holdings regarding the timeliness

exception provisions of §9545 (b)(1)(i-iii), some of which are referenced herein.

Moreover, and most importantly, for constitutional reasons a *Brady* claim, brought pursuant to the government interference timeliness exception, should be decoupled from the requirement that the petitioner exercise due diligence. The purpose of 42 Pa. C.S. §9545 was not only finality in criminal cases. The concomitant purpose of the PCRA is “to provide a reasonable opportunity for those who have been wrongfully convicted to demonstrate the injustice of their convictions.” *Commonwealth v. Judge*, 916 A.2d 511, 520 (2007). The timeliness exceptions to §9545(b)(1) were intended to provide a means of “vindication of persons who are actually innocent” *Commonwealth v. Sam*, 952 A.2d 565, 574-75 (Pa. 2008).

As discussed in *Dennis v. Sec’y Pa. Dep’t of Corrections*, 834 F.3d 263, 290 (3rd Cir. 2016), the United States Supreme Court has never recognized an affirmative due diligence duty by the defense as part of *Brady*.

“The focus on disclosure by the prosecutor, not diligence by defense, is reiterated in the Supreme Court’s approval of the shift in the traditional adversarial system *Brady* imposes. In *United States v. Bagley*, the Court explained that “[b]y requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model” because the prosecutor is not tasked simply with winning a case, but ensuring justice. 473 U.S. 667, 675 n.6, 105 S. Ct.3375, 87 L. Ed. 2d 481 (1985).” *Dennis*, at 290.

Conclusion

For all the foregoing reasons, contained in this Reply and the Brief for Appellant, the PCRA court's Order should be reversed and Tillery's petition should be determined to have plead and proved the elements to qualify and be deemed timely filed pursuant to §9545 (b)(1)(i) and (ii). In the alternative, the PCRA court's Order should be reversed and the case remanded for an evidentiary hearing on the question of timeliness.

Respectfully Submitted,

/s/ Stephen P. Patrizio

STEPHEN P. PATRIZIO, ESQUIRE
Attorney for Appellant,
Major G. Tillery

CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of the Appellant, Major Tillery, complies with the type-volume limitation of Pa.R.A.P. 2135. The Reply Brief of Appellant is 2,954 words.

/s/ Stephen P. Patrizio

STEPHEN P. PATRIZIO, ESQUIRE

Date: August 16, 2017

CERTIFICATE OF ACCURACY

I, Stephen P. Patrizio, Esquire, hereby certify that I have on this date filed the foregoing Brief for Appellant via a bound hard copy and pdf copy electronically filed with the court. I further certify that the text of the pdf version of the brief filed electronically and the hard copy of the brief are identical.

/s/ Stephen P. Patrizio

Date: August 16, 2017

STEPHEN P. PATRIZIO, ESQUIRE

PROOF OF SERVICE

I, STEPHEN P. PATRIZIO, Esquire, hereby certify that I am on this day serving the foregoing brief upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

SERVICE BY HAND DELIVERY

Superior Court of Pennsylvania
Eastern District
530 Walnut Street
Philadelphia, PA 19106

SERVICE BY REGULAR FIRST CLASS MAIL

Hugh J. Burns Jr., Assistant District Attorney
Flynn P. Burke, Assistant District Attorney
Philadelphia County District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107-3499

Major G. Tillery, Appellant
Inmate No. AM9786
SCI Frackville
1111 Altamont Blvd.
Frackville, PA 17931

Date: August 16, 2017

/s/ Stephen P. Patrizio

STEPHEN P. PATRIZIO, ESQUIRE