COMMONWEALTH OF PENNSYLVANIA:	:	IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA CRIMINAL DIVISION
VS.	:	No. 0118-97; 1537-97
RODERICK JOHNSON	:	DIMITRIOU GEISHAUSER, J.

ORDER

AND NOW, this 29th day of October, 2020, it is hereby **ORDERED** and **DECREED** that:

1. the Defendant's Motion to Dismiss Information on Double Jeopardy Grounds is **GRANTED;**
2. the above-captioned matter is scheduled for Case Status on December 1, 2020 at 9:30 a.m. in courtroom 4E of the Berks County Services Center.

BY THE COURT:

Eleni Dimitriou Geishauser, J.

COMMONWEALTH OF PENNSYLVANIA:	:	IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA CRIMINAL DIVISION
VS.	:	
	:	No. 0118-97; 1537-97
RODERICK JOHNSON	:	DIMITRIOU GEISHAUSER, J.

Christopher P. Phillips, Esquire, Senior Deputy Attorney General,
Attorney for the Commonwealth

Jay M. Nigrini, Esquire,
Attorney for the Defendant

Patrick F. Linehan, Esquire,
Attorney for the Defendant

OPINION AND ORDER IN DISPOSITION OF DEFENDANT'S MOTION TO DISMISS INFORMATION ON DOUBLE JEOPARDY GROUNDS,

GEISHAUSER, E.D. JUDGE, October 29, 2020

These dockets are before this court as a result of the United States District Court for the Eastern District of Pennsylvania's order granting the Defendant's petition for writ of *habeas corpus* and the Pennsylvania Supreme Court's holding affirming Judge Scott D. Keller's order that granted the Defendant a new trial. This court, although not the original trial court, has been tasked with determining whether the law prohibits the Defendant from retrial as a result of the higher courts' determination that *Brady* violations were committed by the then-District Attorney Mark C. Baldwin, Esquire. The *Brady* violations in these dockets are intimately connected and therefore the true

impact of the misconduct is best set forth in joint presentation and evaluation of the dockets. The court is compelled to set forth the procedural history and facts of these voluminous dockets as it relates to the underlying issue.

To be clear, this court is not writing to substantiate (address) the issue of *Brady*. That issue has very clearly been determined by the higher courts. *Brady* was violated. However, the details of this violation are set forth to illustrate the intentional nature of Attorney Baldwin's behavior in this matter.

PROCEDURAL HISTORY DOCKET 118-97

On November 25, 1997, the Defendant was convicted of two counts of first-degree murder. Following a penalty phase, the jury sentenced the Defendant to death. The Defendant filed an appeal to the Supreme Court of Pennsylvania, which affirmed the Defendant's death sentence. *Commonwealth v. Johnson*, 556 Pa. 216, 727 A.2d 1089, 1095 (Pa. 1999). The United States Supreme Court denied *certiorari*. *Johnson v. Pennsylvania*, 528 U.S. 1163, 120 S.Ct. 1180, 145 L.Ed.2d 1087 (U.S. 2000).

In April of 2000, the Defendant filed a petition for post-conviction relief, followed by a second petition in September of 2003[1]. The PCRA court denied the former and dismissed the later as untimely. The Supreme Court of Pennsylvania affirmed both of those decisions. *See Commonwealth v. Johnson*, 572 Pa. 283, 815 A.2d 563 (Pa. 2002); *Commonwealth v. Johnson*, 580 Pa. 594, 863 A.2d 423 (Pa. 2004).

In 2005, the Defendant filed another PCRA petition. While that petition was pending, the Defendant was also pursuing federal *habeas corpus* relief in connection with

[1] *See* 42 Pa.C.S.A. § 9541, *et seq* (Post Conviction Relief Act) (hereinafter "PCRA").

an unrelated homicide case, specifically Docket Number 1537-97. During the federal *habeas* proceedings, the United States District Court for the Eastern District of Pennsylvania ordered the Commonwealth to disclose any evidence of a relationship between a key Commonwealth witness, George Robles, and the Reading Police Department and/or the Berks County District Attorney's Office, "including any documents relevant to Robles being a paid or unpaid informant or a cooperating witness." *See Johnson v. Folino*, 671 F.Supp.2d 658, 664, n.4 (E.D. Pa. 2009), *rev'd on other grounds*, 705 F.3d 117 (3d Cir. 2013).

In response to the federal court's discovery order, the Commonwealth produced five police reports, which we will discuss at length later in this opinion. In August of 2010, the Defendant amended his PCRA petition to allege that the Commonwealth violated *Brady* by withholding the police reports. The PCRA court dismissed the Defendant's amended petition as untimely. On appeal, the Supreme Court of Pennsylvania reversed and remanded for a review of the merits of the Defendant's *Brady* claim. *See Commonwealth v. Johnson*, 619 Pa. 386, 64 A.3d 621 (Pa. 2013) (per curium) (holding that "the information discovered during the federal *habeas* proceedings constitutes 'newly discovered' facts for purposes of the (b)(1)(ii) exception to the [PCRA's] jurisdictional time bar.").

On remand, the Honorable Scott D. Keller granted the Defendant's PCRA petition and awarded him a new trial. In his July 6, 2015 opinion and order, Judge Keller held that the police reports were suppressed by the Commonwealth in violation of *Brady*. Judge Keller reasoned that evidence contained in the reports was relevant to

George Robles' "bias and desire to assist the police and the Commonwealth to avoid interference with his own activities." Opinion at 6. Judge Keller explained that the "evidence is particularly important in light of defense counsel's attempt at trial to introduce evidence of Mr. Robles' interest." *Id.* He wrote, "Defense counsel was clearly hampered by the inability to impeach Mr. Robles without evidence of his interactions with the police. The Court also emphasizes that the prosecuting attorney had knowledge of the criminal investigation of Mr. Robles within the months leading to Defendant's trial." Opinion at 6-7 (citing RPD Crime Investigation Report - Assignment number 65117-97 - dated November 7, 1997; N.T. PCRA Hearing, 10/20-21/14, at Exhibit 9, page 8, at 88)[2].

In affirming Judge Keller's decision, the Pennsylvania Supreme Court characterized the police reports as "textbook impeachment evidence" that suggested that "Robles sought to curry favor with the police in the face of ongoing criminal investigations and mounting evidence of his own criminal conduct." *Commonwealth v. Johnson*, 644 Pa. 150, 162, 174 A.3d 1050, 1056-57 (Pa. 2017). The Court explained how critical the police reports would have been to challenging Robles' credibility at trial:

> Robles was the linchpin to the Commonwealth's case against Johnson. Competent counsel could have used the information in the police reports to cross-examine Robles and to weaken his credibility by exposing his bias and interest in cooperating with the Reading Police Department. A thorough cross-examination would have revealed that Robles hoped to receive favorable treatment from the authorities in exchange for providing information. For example, the first police report revealed that Robles had responded to the investigation into his criminal activity by providing information regarding an

[2] The cited document is a police report by Detective Angel Cabrera that states that on Saturday, November 8, 1997, he advised District Attorney Baldwin of the November 7th shots fired incident involving Robles. The Defendant's capital trial began on November 18, 1997.

unsolved murder; ultimately, Robles was not charged in connection with the incident under investigation. Evidence that Robles had provided information to the police out of his own self-interest might have cast doubt upon the veracity of Robles' testimony against Johnson. The police reports further evidenced Robles' motive to cooperate with the police in order to discern the status of investigations into his own crimes. *See* N.T. PCRA Hearing, 10/20-21/2014 at 105-106 (Detective Cabrera testifying that he believed that Robles had a "vested interest," and was motivated to provide information to the police in order to ascertain the extent of police investigation into his own activities).

The withheld evidence also revealed instances where Robles had lied or deceived the police when it was in his interest to do so, by, for example, falsely claiming to be the juvenile's guardian when police were investigating the April 25, 1996 shots-fired incident, and by falsely denying ownership of a .40 caliber gun in connection with the November 7, 1997 investigation. In addition, the withheld evidence revealed that Robles had a motive to eliminate rival drug dealers such as Johnson's affiliates. Counsel attempted to explore this motivation at trial by suggesting that, as a known drug dealer, Robles had an ulterior motive in testifying for the prosecution. The trial court precluded this questioning after the prosecutor denied the existence of any evidence to support counsel's assertions. When confronted with the police reports at the PCRA hearing, Robles admitted that he was, in fact, a drug dealer.

The withheld police reports also would have permitted defense counsel to establish for the jury Robles' motive to further his ongoing collaboration with the Reading Police Department. Evidence that Robles benefitted from his relationship with the police by being able to engage in drug sales without fear of repercussions would have suggested that Robles was motivated to provide testimony helpful to the prosecution in this case . . . .

Robles criminal conduct, and his willingness to provide information implicating other individuals in criminal activity, likely would have elevated the importance of the letter that Robles sent to Detective Cabrera offering to "do anything" to get out of jail by demonstrating that Robles was motivated to provide information to the police to serve his own interests. On direct appeal, this Court found that, although this letter would have been useful in cross-examining Robles, it was, standing alone, insufficient to warrant a new trial . . . . It now turns out that the letter did not stand alone. Placed into the context of the other withheld evidence, the impeachment value of this letter becomes even stronger.

Id. at 162-64, 1057-58. The Supreme Court concluded that it had "little difficulty agreeing with the PCRA court" that if the reports had been disclosed prior to trial, there

was a "reasonable probability that [the Defendant] would not have been convicted of first-degree murder." *Id.* at 165, 1058-59.

On December 20, 2018, Docket Number 118-97 was reassigned to the undersigned. On August 12, 2019, the Defendant filed a Motion to Dismiss Information of Double Jeopardy Grounds. On September 19, 2019, the Commonwealth filed a Motion to Withdraw Death Penalty Certification in this case.

PROCEDURAL HISTORY DOCKET 1537-97

On July 14, 1998, the Defendant was convicted of first-degree murder. He was subsequently sentenced to life imprisonment. Following an unsuccessful direct appeal of his conviction, the Defendant filed a PCRA petition arguing that trial counsel was ineffective. The PCRA court denied the petition, and the Superior Court of Pennsylvania affirmed the denial.

The Defendant then filed a second PCRA petition, which he later sought to supplement with alleged *Brady* violations. While his second PCRA petition was pending, the Defendant filed a petition for writ of *habeas corpus* in the United States District Court for the Eastern District of Pennsylvania on June 25, 2004. His *habeas corpus* petition raised several claims, including allegations that the Commonwealth wrongfully withheld impeachment evidence related to the Commonwealth's three primary witnesses.

The District Court granted discovery to the Defendant and the Commonwealth eventually produced previously undisclosed evidence. The Defendant subsequently filed three more protective PCRA petitions in the Court of Common Pleas. The PCRA

court ultimately held that the Defendant's *Brady* claim was untimely under the PCRA because it was filed more than one year from the date on which his judgment of sentence became final. The court further held that none of the statutory exceptions to the PCRA time bar applied. The Superior Court of Pennsylvania affirmed the denial of the Defendant's PCRA petition.

In November of 2009, the District Court denied the Defendant's *habeas corpus* petition with respect to his *Brady* claim. *Johnson v. Folino*, 671 F.Supp.2d 658, 674 (E.D. Pa. 2009). In its January 16, 2013 opinion, the Third Circuit Court of Appeals reversed the District Court's denial of the Defendant's *Brady* claim. In doing so, it held that there was sufficient "cause" and "prejudice" to overcome the procedural default rule, and that the District Court's conclusion that exculpatory material needed to be admissible in order to be material under *Brady* was in error. Accordingly, it remanded the case to the District Court with the instruction to "evaluate the materiality of each item of suppressed evidence individually," and to consider the "cumulative effect of all of the evidence that was suppressed and favorable to [the Defendant]." *Johnson v. Folino*, 705 F.3d 117, 131 (3d Cir. 2013).

After the District Court awarded the Defendant a new trial, because the Defendant filed a Motion to Dismiss Information on Double Jeopardy Grounds in this case as well, Docket Number 1537-97 was reassigned to the undersigned on November 20, 2019. A three-day hearing on the Defendant's Motion to Dismiss Information on Double Jeopardy Grounds was subsequently held from January 13, 2020 to January 15, 2020. The parties then filed post-hearing briefs.

FACTS DOCKET NUMBER 118-97

In Docket Number 118-97, the facts, as summarized by the Pennsylvania Supreme Court in its opinion that affirmed the Honorable Scott D. Keller's order reversing the Defendant's conviction due to the Commonwealth's *Brady* violations, are that on December 8, 1996, Damon and Gregory Banks (hereinafter "the Banks cousins") robbed Madelyn Perez at gunpoint in her boyfriend's apartment. The Banks cousins were looking for drugs and money. Ms. Perez told her boyfriend, Shawnfatee Bridges, about the robbery. Bridges met with the Defendant and Richard Morales later that evening. At one point, Bridges grabbed a shotgun and stated that he wanted to go to the Banks cousins' house to kill them. Bridges also showed the Defendant and Morales a 9mm Glock handgun that he was carrying.

The following day, the Defendant, Bridges, and Morales traveled in a minivan to the Banks cousins' home. When they arrived, Bridges pretended that he was interested in recruiting the Banks cousins to oversee his drug-dealing business while he was out of town. The Banks cousins apparently believed the pretext and got into the minivan with the three other men. Later that evening, police officers found the dead bodies of the Banks cousins on a gravel driveway that led to a silt basin.

Around the same time, police officers received a report from a local restaurant that was located fewer than five miles from the silt basin that an unknown man had been shot. Upon arrival, the police identified the wounded man as the Defendant. The Defendant was subsequently transported to a local hospital.

A few days later, while still hospitalized, the Defendant gave a statement to the

police. The Defendant confessed that he participated in the Banks cousins' murders but said that his role in the conspiracy was limited to driving the minivan. The Defendant told police that after picking up the Banks cousins, he drove them, along with Bridges and Morales, to a dirt road near a construction site. He stated that Bridges and Morales got out of the minivan and told the Banks cousins to follow them to where the drugs were stashed. When the Banks cousins grew suspicious and refused to comply, Bridges walked around to the front of the minivan and started shooting. The Defendant claimed that, as he was exiting the van, Bridges shot him in the torso. The Defendant stated that as he was fleeing, he saw Bridges shoot into the minivan at the Banks cousins. He said that he then walked to the restaurant, where the police found him.

At the Defendant's capital murder trial, the Commonwealth called a forensic pathologist who testified that one of the bullets recovered from the body of Damon Banks was a .38 caliber projectile. The Commonwealth presented evidence that a .38 caliber handgun was recovered close to the murder scene, and a ballistics expert matched that firearm to the bullet recovered during Damon Banks' autopsy.

The Commonwealth rebutted the Defendant's claim that he was merely present at the scene of the murders by calling George Robles, who testified that the Defendant owned a .38 caliber handgun like the one found near the crime scene. Robles also testified that when he visited the Defendant in the hospital after the murders, the Defendant confessed that he took the .38 caliber weapon from the scene of the murder, wiped it off with his shirt, and then threw it on the side of the road about a quarter mile from the construction site. Robles provided the crucial link between the Defendant and

the murder weapon at trial.

Prior to trial, defense counsel had requested that the Commonwealth produce all discovery material relevant to the defense. He received no discovery regarding Robles' prior criminal activities and involvement with law enforcement. Nevertheless, given the importance of Robles' testimony, defense counsel attempted to undermine his credibility on cross-examination by showing that Robles was involved in ongoing criminal activities and was also an informant for the Reading Police Department. Defense counsel began by questioning Robles about his employment status. Then-District Attorney Mark Baldwin objected to the questioning in front of the jury. (N.T. Trial, 11/18/97-11/26/97, at 525).

At side bar, defense counsel told Judge Keller, "The relevance is that this individual had - doesn't work, hasn't worked," and "I think he's a dealer of drugs or a paid informant by the Reading Bureau of Police." Baldwin replied, "That's absurd. He's on material witness bail." *Id.* When asked to clarify the type of bail Baldwin responded that Robles was on "material witness bail, Your Honor, material witness bail, not bail for any known or charged crimes, Your Honor." *Id.* The court again asked, "He is not charged with anything?" *Id.* Baldwin replied, "No, sir . . . [i]n fact he's not been convicted or arrested on any crime." *Id.* at 526. Based upon this information, the trial court sustained the Commonwealth's objection in part, but did not prevent the defense from "inquiring as to any legitimate area of [Robles'] possible bias or interest in the outcome" of the trial. *Id.*

The Defendant was convicted of two counts of first-degree murder on November

25, 1997. During the penalty phase of the Defendant's trial, the Commonwealth again called Robles to establish that the Defendant was involved in drug dealing as an "enforcer." (N.T. at 925-929). Defense counsel again questioned Robles about his finances, and Robles testified that he relied on others for income. *Id.* at 954. As during trial, without documentation regarding Robles' criminal activity, counsel was unable to effectively impeach Robles' testimony. As previously discussed, at the completion of the penalty phase, the jury sentenced the Defendant to death.

FACTS DOCKET NUMBER 1537-97

In Docket Number 1537-97, the facts, as summarized by the United States Third Circuit Court of Appeals, are that on the evening of November 1, 1996, Jose Bernard Martinez was shot to death in Reading, Pennsylvania. An eyewitness reported seeing a man chase down and shoot another man along Schuylkill Avenue. The eyewitness described the shooter as a black man wearing dark clothes, jeans, and a checkered jacket, but she was unable to identify the shooter.

The Reading Police subsequently approached George Robles seeking information about the shooting. Robles denied any knowledge of the incident. Police returned to Robles repeatedly during the investigation, interviewing him between six and twelve times. Robles continued to claim that he had no knowledge of the shooting.

Finally, on December 17, 1996, Robles indicated that his "conscience was killing him" and provided a statement that implicated the Defendant and a man named Richard Morales. Robles told investigators that the Defendant came to his home after the shooting and confessed his involvement. According to Robles, the Defendant

admitted to confronting Martinez at a Getty Mart about a debt that Martinez owed to the Defendant's friend, firing his gun twice in the store, chasing Martinez down in a van after he fled, and ultimately shooting Martinez in the street. Robles told police that the Defendant said that he bumped into a girl and, mistaking her for Morales, yelled to her that he had just "killed that guy." Robles also said that Morales came to his home about fifteen minutes after the Defendant left and confirmed the Defendant's account of the shooting.

On the same day that Robles recanted his denials, Shannon Sanders gave a statement to police. She told them that on the night of the shooting she had been walking in an alley in the immediate vicinity of Schuylkill Avenue when she encountered a dark-skinned man dressed in baggy clothes and carrying a handgun. She said that the man confessed that he had just shot a man. Sanders, who was an acquaintance of the Defendant, could not identify the man she encountered despite having seen his face. Although Sanders waited six weeks before speaking to investigators, she told her story to family and friends. The Defendant and Morales were subsequently arrested and charged with the murder of Martinez.

In February of 1997, George Robles was arrested as a material witness after failing to appear in court to testify against the Defendant. He was incarcerated for approximately two months in Berks County Prison as a result. During his incarceration, he wrote a letter to Detective Angel Cabrera of the Reading Police Department asking to be released early and offering to "do anything" in exchange:

Angel. Look I can't take this jail. I am doing everything possible to help you.

> Please, Please help me. I'm not a runner you know that I just want to go home. I can't eat. I can hardly sleep and I feel like I'm in here forever. Angel, I feel like I'm dying here. I am begging you and Vega with my word as a man and father to be. I'm not running. Just send me home please. I will do anything . . . .

(Defense Exhibit "B," Motion to Dismiss Information on Double Jeopardy Grounds). Robles was released from prison after he testified at the Defendant's preliminary hearing.

Prior to trial, the Defendant filed a motion to compel discovery seeking "all information and reports in possession of the Reading Police Department and DANET concerning any and all criminal activities charged and uncharged, past and present of George Robles. The defense theory was that "Robles was actively engaged in criminal enterprises in Reading . . . [and] that certain police officer[s] were aware of that, that that's been for some reason, uncharged and we'd like to find out why that is and what they know about him. [Because] [t]his guy has no arrest record." District Attorney Baldwin stated that he was "unaware of any reports which state that . . . [Robles] is a suspect of a crime." The court inquired of the District Attorney, "So, we agree that you are stating that he has no convictions and that you have no information about any police reports which name him as a suspect?" Baldwin replied, "That's correct. I believe that there was a report turned over . . . where Mr. Robles may have been shot at . . . that's the only report I am aware of Mr. Robles being involved in any criminal activity." *Johnson v. Folino*, 705 F.3d 117, 122 (3d Cir. 2013).

The Defendant also sought discovery into whether any of the Commonwealth's witnesses were on probation or parole, or whether they had received any agreements,

inducements, or promises with respect to their testimony. Baldwin represented that "there have been no promises or inducements to any of the witnesses . . . there are no plea agreements, there are no pending cases that I am aware of and there's been no promise for the testimony." The Honorable Linda K.M. Ludgate, relying on the representations of the District Attorney, did not order the discovery that Defendant sought with respect to George Robles. *Id.*

At trial, the Commonwealth presented no physical evidence or eyewitness testimony connecting the Defendant to the shooting of Martinez. The Commonwealth's case consisted of two eyewitnesses who were unable to identify the shooter and three witnesses who claimed that the Defendant confessed to killing Martinez. The principal witness against the Defendant was George Robles, who testified that on the night of November 1, 1996, he was at home with several friends smoking marijuana and drinking beer when the Defendant, whom he described as his best friend, showed up out of breath around midnight and confessed that he had just killed someone. Robles provided further details about the confrontation at the convenience store and the chase and ultimate shooting on Schuylkill Avenue.

Defense counsel cross-examined Robles about his involvement with a gang, his alleged drug-dealing, his feud with the Defendant, and his relationship with the Reading Police Department. However, because Robles had no convictions or arrests (other than the material witness warrant), the cross-examination consisted of little more than counsel's allegations and Robles' repeated denials. In his closing argument, District Attorney Baldwin argued to the jury, "And I submit to you that if the man was

involved in criminal activity, the Reading Police would do their job." *Id.* at 125. The jury convicted the Defendant of first-degree murder and related offenses. On July 14, 1998, the Defendant was sentenced to life imprisonment.

BRADY VIOLATIONS DETERMINED BY APPEALS COURTS

Defense counsel in Docket Number 118-97 did not learn of the letter Robles wrote to Detective Angel Cabrera from prison until the Defendant's case was on direct appeal, and he was provided with the letter by trial counsel for his alleged co-conspirator, Shawnfatee Bridges, not by the Commonwealth. He raised the issue of the undisclosed letter unsuccessfully on direct appeal. *Commonwealth v. Johnson*, 727 A.2d 1089, 1095 (Pa. 1999). In a subsequent proceeding, the Pennsylvania Supreme Court noted that additional discovery that had been provided "likely would have elevated the importance of the letter." *Commonwealth v. Johnson*, 174 A.3d 1050, 1058 (Pa. 2017).

As previously mentioned, that additional discovery was obtained after the Defendant filed a petition for writ of *habeas corpus* in the United States District Court for the Eastern District of Pennsylvania in Docket Number 1537-97, the Schuylkill Avenue case. In that proceeding, the Defendant once again requested discovery regarding George Robles' involvement in criminal activity and interactions with law enforcement. The District Court ruled that the Defendant provided "specific allegations" supporting his claim of *Brady* violations and ordered the Commonwealth to produce, "[a]ny and all documents" in its possession "which concerns, relates, or evidences a relationship" between agents of the prosecution and Robles. *Johnson v. Folino*, 671 F.Supp. 2d 658, 664 (E.D. Pa. 2009), *rev'd*, 705 F.3d 117 (3d Cir. 2013).

In response to the District Court's discovery order, over the next year and a half the Commonwealth produced five police reports that detailed distinct investigations into Robles' criminal conduct. The first of the reports, dated February 27, 1996, described an incident in which Robles approached two individuals, threatened them at gunpoint, and discharged his firearm into the air. When Detective Angel Cabrera confronted Robles about the incident, Robles attempted to avoid arrest by offering to provide information about an unsolved murder. Robles ultimately identified the perpetrator of the homicide to the police. He was never charged in connection with the assault.

The second police report, dated April 25, 1996, involved a gang-related shootout near Robles' residence. During their investigation, police learned that, immediately after the shootout, a juvenile who had been staying with Robles hid guns and drugs in a safe that Robles owned and kept in a nearby apartment. The police also discovered that Robles' neighbors suspected that Robles was selling drugs out of his residence. Detective Cabrera recovered the then-empty safe from a neighbor. Instead of seizing the safe, Detective Cabrera returned it to Robles. When police questioned the juvenile, Robles falsely claimed that he was the juvenile's guardian so that he could remain present during the interview. Robles ultimately advised the juvenile to confess in a manner that did not implicate Robles. Although Detective Cabrera discovered Robles' fingerprint on a cigar box containing one hundred three bags of crack cocaine that was recovered from the shooting suspect, and although Detective Cabrera threatened to arrest Robles, Robles was never charged in connection with the incident.

The third police report, dated August 1, 1997, involved another investigation into shots fired. When police responded, they encountered Robles, who admitted to being armed with a firearm that he was lawfully licensed to carry. A man who was with Robles matched the description of the shooter, and the ammunition from Robles' gun matched the spent shell casings that were found on the ground. Robles denied any involvement, the complainant remained anonymous, and Robles was never charged in connection with the incident.

The fourth police report, dated September 18, 1997, documented another police response to shots fired on the block where Robles lived. The responding officer, who spoke with Robles, wrote in the report that he suspected that Robles was involved in drug dealing. Robles was not charged in connection with the incident.

The fifth police report, dated November 7, 1997, described yet another investigation into shots fired near Robles' residence. Three witnesses reported that the shots were fired from Robles' residence. Upon arrival, police recovered shell casings from a .40 caliber weapon. Robles told the police that he was not home when the shots were fired and denied owning a .40 caliber weapon. Despite Robles' denials, Detective Cabrera recovered a .40 caliber pistol that was registered to Robles. Once again, Robles was not charged.

FACTUAL TIMELINE DOCKETS 118-97 AND 1537-97

The depth and duration of Attorney Baldwin's deception is best illuminated in the format of a timeline. Thus, the court sets forth the following as established via the court exhibits entered into evidence at the January 13-15, 2020 hearings.

2/27/96	Robles *Brady* incident - Police Report
4/25/96	Robles *Brady* incident - Police Report
11/1/96	Homicide Schuylkill Ave. 1537-97
11/2/96	Criminal Investigator meeting Detective Cabrera provides his file of info re: Robles
12/9/96	Homicide Banks Cousins 118-97
12/9/96	Detective Vega interview of Robles with Cabrera 21:30 hours
12/17/96	Dietrich and Cabrera take Robles statement (d ex. 38 p. 1)
2/97	Robles in jail on material witness bail
6/18/97	Attorney Bispels' letter (p. 377) (d ex. 16 p. 1)
7/15/97	Letter from Attorney Leroy Levan to Baldwin specifically requesting Robles Letter to Cabrera in Bridges case (cw ex. 3 p. 52)
8/1/97	Robles *Brady* incident - Police Report
9/2/97	Vega tells Luz Cintron sending investigator to talk to her and Robles (cw ex. 3)
9/13/97	Cabrera and Vega take statement from Cintron
9/13/97	Robles, Cabrera, and Vega go to Buttonwood Street Bridge looking for guns for both cases (cw ex. 3)
9/18/97	Robles *Brady* incident
9/27/97	Meeting with Shade, Vega, Attorney Levan, Attorney Maynard, Fry, Baldwin
11/7/97	Robles *Brady* incident - Police Report - Cabrera investigating officer (d ex. 27 p. 1)
11/8/97	Cabrera meets with Attorney Baldwin regarding Robles' gun permit (N.T. 1/13-1/15 2020 at 304-05).
11/16/97	Vega leaves Robles' letter to Cabrera on Baldwin's desk
11/18/97	Cabrera requests firearms trace report George Robles (d ex. 27 p. 4)
11/19/97-	J. Keller trial transcript (d ex. 36 p. 1)
11/20/97	

11/24/97	Baldwin, Cabrera, Robles meeting about Johnson (p. 310)
11/25/97	Johnson convicted in 118-97
2/27/98	Letter from Bispels to Assistant District Attorney Millman re: Robles discovery (d ex. 29 p. 1)
4/13/98	Millman says will look into it and get back to him
5/15/98	Judge Ludgate Pretrial and mtg w/ Bispels, Shade, Vega, Dorsett, Baldwin
	Bispels and Dorsett lay out info previously requested and not provided (cw ex. 4 p. 9) transcript – Baldwin denies knowledge and points to cross in other cases. Candor to the tribunal. Nothing vague about request.
5/22/98	Letter from Baldwin to Dorsett and Bispels (d ex. 33)
7/14/98	Johnson convicted 1st degree in 1537-97

DOUBLE JEOPARDY

The Double Jeopardy Clause of the Pennsylvania Constitution largely mirrors that of the United States Constitution, providing in the relevant part that "[n]o person shall, for the same offense, be twice put in jeopardy of life or limb[.]" Pa. Const. Art. I, § 10. The Fifth Amendment to the United States Constitution provides, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." Both the Pennsylvania and federal Double Jeopardy Clauses bar retrial in cases where mistrials were intentionally caused by prosecutorial misconduct. In *Commonwealth v. Smith*, the Pennsylvania Supreme Court held that the Pennsylvania Double Jeopardy Clause provides criminal defendants with even further protection. Our Supreme Court held in *Smith* that the Pennsylvania Double Jeopardy Clause precludes retrial "not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to

prejudice the defendant to the point of the denial of a fair trial." *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992).

In *Commonwealth v. Martorano*, the Pennsylvania Supreme Court reiterated that the standard set forth by the United States Supreme Court in *Oregon v. Kennedy*, 456 U.S. 667 (U.S. 1982), was inadequate to protect a defendant's rights under the Pennsylvania Constitution and that Pennsylvania's Double Jeopardy Clause bars retrial where the prosecutor specifically undertakes to prejudice a defendant to the point of denying him a fair trial. *Commonwealth v. Martorano*, 741 A.2d 1221 (Pa. 1999). Under both *Smith* and *Martorano*, although prosecutorial error is not a *per se* bar to retrial, where the prosecutor's conduct changes from mere error to intentionally subverting the court process to prejudice the defendant to the point of the denial of a fair trial, then retrial is barred. *Commonwealth v. Burke*, 781 A.2d 1136, 1144 (Pa. 2001).

In *Smith*, the Commonwealth deliberately withheld evidence from a capital defendant. *Commonwealth v. Smith*, 615 A.2d 321, 324 (Pa. 1992). The withheld evidence included an agreement with the Commonwealth's chief witness that he would receive favorable treatment at sentencing on unrelated charges in exchange for his testimony and physical evidence that suggested that the murder took place in a location different from the Commonwealth's theory. *Id.* at 323. Specifically, the physical evidence consisted of grains of sand found between the toes of the murder victim during her autopsy. The sand was significant because it was inconsistent with the Commonwealth's theory and supported the defendant's claim that someone else committed the crime in Cape May, New Jersey. *Id.*

The Pennsylvania Supreme Court found that this prosecutorial misconduct constituted "egregious prosecutorial tactics" that were intended to prejudice the defendant and deny him a fair trial. *Id.* at 323; 325. Accordingly, it held that the Double Jeopardy Clause of the Pennsylvania Constitution barred a retrial. *Id.* at 325. Later, the Supreme Court explained that the *Smith* standard applied to other forms of prosecutorial misconduct beyond the out-of-court concealment of exculpatory evidence, holding that it covers "any number of scenarios in which prosecutorial overreaching is designed to harass the defendant through successive prosecutions or otherwise deprive him of his constitutional rights. *Commonwealth v. Martorano*, 741 A.2d 1221, 1223 (Pa. 1999). The Pennsylvania Superior Court held that the *Smith* standard applies not only to the intentional misconduct of prosecutors, but also to the intentional misconduct of police officers who are part of the prosecution team. *Commonwealth v. Adams*, 177 A.3d 359, 372-73 (Pa. Super. 2017).

Most recently, on May 19, 2020, the Pennsylvania Supreme Court decided *Commonwealth v. Johnson*, 231 A.3d 807 (Pa. 2020). In that case a red baseball cap was found at the scene of a shooting, photographed, and assigned a property receipt number. A companion of the victim who was with him at the time of the shooting subsequently gave a statement at the police station and handed a detective the victim's black baseball cap, which had a bullet hole in it. The witness had picked the cap up at the scene of the crime. The cap was assigned a separate property receipt number, and testing at the crime lab revealed the presence of the victim's blood under the brim of the cap.

After police received information from a jailhouse informant that the Appellant had implicated himself in the murder, they obtained a sample of the Appellant's DNA. Testing revealed that Appellant was a contributor to the DNA found on the sweatband of the red baseball cap. The Commonwealth proceeded to trial with the understanding that there was only one baseball cap involved - the red one - and that it contained both the victim's blood and the Appellant's DNA. At trial, the Commonwealth's crucial piece of evidence was the red baseball cap. The prosecutor, who was unaware that there were two baseball caps, emphasized that the cap with the Appellant's DNA on it also had the victim's blood on it. The jury convicted the Appellant and sentenced him to death.

The Appellant subsequently filed a counseled, amended petition pursuant to the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546. In response to a defense open records request, a forensics report was generated that reflected that two hats, a red one and a black one, each with a distinct property receipt number, had been analyzed in connection with the Commonwealth's case, and that the victim's blood was only found on the black hat. The Commonwealth agreed that the Appellant was entitled to a new trial, and the PCRA court entered an order to that effect.

At a later hearing, the court allowed the Appellant to develop evidence to support a potential motion to bar retrial based on double jeopardy grounds. The hearing revealed that the Commonwealth misunderstood its own evidence and conflated the findings relating to the red and black caps. Despite the existence of separate property receipt numbers, the Commonwealth did not realize at trial that there

were two caps involved. In ruling from the bench, the court expressed that it was "more than mere negligence" that the Commonwealth took a capital case to trial "without even awaiting a full criminalistics DNA analysis." The court characterized the prosecution's handling of the evidence as "extremely negligent, perhaps even reckless." Nonetheless, the court credited the prosecutor's testimony that the errors did not reflect bad faith or intentional misconduct, which the court held were required to bar retrial. Accordingly, the court denied the Appellant's motion to bar retrial.

On interlocutory appeal, the Superior Court affirmed in a non-precedential decision. The Court relied on its prior decision in *Commonwealth v. Adams*, 177 A.3d 359 (Pa. Super. 2017) for the position that double jeopardy principals only bar retrial where there is proof that the prosecutorial misconduct was committed with an intent to either provoke a mistrial or deny the defendant a fair trial. The Superior Court characterized the prosecution's actions as "egregious" and "intolerable," and stated that the Commonwealth acted with "deliberate indifference." Nevertheless, the Superior Court concluded that the conduct "did not rise to the level of intentionality required to bar further prosecution."

On discretionary review, the Supreme Court noted, "The Commonwealth's failure to grasp, during the trial or the proceedings leading up to it, that there were two hats involved in this matter does appear to have been the result of an accumulation of a series of mistakes." The Court pointed out that there was little of record to suggest that the prosecution was aware of the mistakes or that there was a conspiracy by the Commonwealth's witnesses to conceal such awareness from the lower court. The Court

also noted the lower court's finding that the prosecutor's testimony that he should have noticed that the property receipts were different and that his mistake was unintentional was credible. The Court then extensively documented the evolution of Double Jeopardy jurisprudence in this Commonwealth leading up to its holding in *Commonwealth v. Smith*, 532 Pa. 177, 615 A.2d 321 (Pa. 1992), where, as discussed, it held that Commonwealth's conduct of intentionally withholding exculpatory evidence and denying the existence of an agreement with one of its main witnesses violated the defendant's double jeopardy rights.

The Supreme Court explained that "later case law clarified that not all intentional misconduct is sufficiently egregious to be classified as overreaching and, as such, to invoke the jeopardy bar." (citing *Commonwealth v. Burke*, 566 Pa. 402, 417, 781 A.2d 1136, 1145 (Pa. 2001). Specifically, the Court noted that:

> Dismissal of criminal charges punishes not only the prosecutor . . . but also the public at large, since the public has a reasonable expectation that those who have been charged with crimes will be fairly prosecuted to the full extent of the law. Thus, the sanction of dismissal of criminal charges should be utilized only in the most blatant cases. Given the public policy goal of protecting the public from criminal conduct, a trial court should consider dismissal of charges where the actions of the Commonwealth are egregious and where demonstrable prejudice will be suffered by the defendant if the charges are not dismissed.

Commonwealth v. Johnson, 231 A.3d 807, 822 (Pa. 2020) (citing *Commonwealth v. Burke*, 566 Pa. 402, 416, 781 A.2d 1136, 1144 (Pa. 2001).

In *Johnson, supra*, the Appellant characterized the Commonwealth's misconduct "as tantamount to bad faith in that the entire prosecution team was extremely careless in its handling of a capital case, with the result that Appellant was confined to death row, with its attendant risk of execution, for nine years before the mistakes were

discovered." The Appellant referenced the American Bar Association's standards, which state that prosecutors have a duty to seek justice and not merely convict. The Appellant also argued that other jurisdictions formulated double jeopardy tests that take into account whether the prosecutorial misconduct entailed intentionality or indifference to the possibility of mistrial or reversal on appeal. The Appellant argued to the Supreme Court that the application of those principles would result in immunity from retrial.

In its opinion, the Supreme Court stated, "The question thus becomes whether the type of misconduct which qualifies as overreaching is broad enough, under our state constitution, to encompass governmental errors that occur absent a specific intent by the prosecutor to deny the defendant his constitutional rights." After reviewing case law from other jurisdictions, the Court concluded:

> We agree with the observations of our sister states. It is established that the jeopardy prohibition is not primarily intended to penalize prosecutorial error, but to protect citizens from the "embarrassment, expense, and ordeal" of a second trial for the same offense and from "compelling [them] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent [they] may be found guilty." . . . When the government engages in improper actions sufficiently damaging to undercut the fairness of a trial, it matters little to the accused whether such course of conduct was undertaken with an express purpose to have that effect or with a less culpable mental state. Either way, the conduct imposes upon the defendant the very "Hobson's choice" which double jeopardy seeks to prevent.
>
> Therefore, we ultimately conclude as follows. Under Article I, Section 10 of the Pennsylvania Constitution, prosecutorial overreaching sufficient to invoke double jeopardy protections includes misconduct which not only deprives the defendant of his right to a fair trial, but is undertaken recklessly, that is, with a conscious disregard for a substantial risk that such will be the result. This, of course, is in addition to the behavior described in *Smith*, relating to tactics specifically designed to provoke a mistrial or deny the defendant a fair trial. In

> reaching our present holding, we do not suggest that all situations involving serious prosecutorial error implicate double jeopardy under the state Charter. To the contrary, we bear in mind the countervailing societal interests mentioned above regarding the need for effective law enforcement . . . and highlight again that, in accordance with long-established double-jeopardy precepts, retrial is only precluded where there is prosecutorial *overreaching* – which, in turn, implies some sort of conscious act or omission. Notably, however, this Court has explained, albeit in a different context, that reckless conduct subsumes conscious behavior. *See Taylor v. Camelback Ski Corp. Inc.*, 616 Pa. 385, 402, 47 A.3d 1190, 1200 (2012) (indicating that recklessness, as distinguished from negligence, "requires conscious action or inaction which creates a substantial risk of harm to others").

Commonwealth v. Johnson, 231 A.3d 807, 826 (Pa. 2020).

The Court then held that the prosecuting attorney made "almost unimaginable" mistakes by not realizing that two different baseball caps were involved despite the presence of two separate property receipt numbers. The Court explained that his mistakes were compounded by the fact that the detective who received the black baseball cap with the bullet hole that the victim had been wearing apparently forgot that information as the investigation ensued. In addition, the lead crime scene investigator testified that he saw fresh drops of blood under the brim of the red baseball cap, when that would have been impossible.

While the record supported the finding that these acts were not done intentionally or with a specific purpose to deprive the Appellant of his rights, the Court held that they were "strongly suggestive of a reckless disregard for consequences and for the very real possibility of harm stemming from the lack of thoroughness in preparing for a first-degree murder trial." The Court concluded that the Appellant suffered "prejudice . . . to the point of the denial of a fair trial," and held that Article I,

Section 10 immunized the Appellant from being put in jeopardy a second time. *Commonwealth v. Johnson*, 231 A.3d 807, 827-28 (Pa. 2020).

In the instant case, three related but distinct rules comprise the Law of the Case Doctrine:

> (1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter; (2) upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court; and (3) upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court.

Commonwealth v. Lancit, 2016 Pa. Super. 102, 139 A.3d 204, 207 (Pa. Super. 2016).

As discussed, in his July 6, 2015 opinion and order, the Honorable Scott D. Keller specifically found that District Attorney Baldwin "had knowledge of the criminal investigation of Mr. Robles within the months leading to Defendant's trial." Opinion at 6-7. Judge Keller's order granting the Defendant a new trial based upon the *Brady* violations was affirmed by the Pennsylvania Supreme Court. *Commonwealth v. Johnson*, 174 A.3d 1050 (Pa. 2017). Because the trial in Docket Number 118-97 took place before the trial in Docket Number 1537-97, District Attorney Baldwin necessarily had knowledge of the criminal investigation of Robles at that time as well.

Judge Keller's finding was bolstered by testimony that was elicited at the January 2020 hearing on the Defendant's motion. Detective Angel Cabrera testified about his investigation into the shots fired incident as outlined in his November 1997 police report and about his desire to revoke Robles' gun permit. Specifically:

Q: Did you, because you went on November [8], 1997 to see Mark Baldwin,

did you feel strongly at that time about revoking George Robles' permit?

A: Oh yes. Yes, I would never have gone to him if I did not feel strongly.

Q: And at that time, 1997, did you feel strongly about how George Robles being involved in criminal activities?

A: Of course, yes, I feel strongly about him being the type of individual he is, yes.

(N.T. January 13-15, 2020 at 327-28).

As a result, as he testified, Cabrera reported the incident, and Robles' involvement in it, to Baldwin and discussed the possibility of revoking Robles' gun permit. Cabrera documented this in a supplemental police report, dated November 8, 1997, that states as follows:

> On Saturday, November 8th, 1997 at approx. 1530 hours, I had gone to the District Attorney's Office, and I advised him as to what took place. I had told him that, I would like to pull his permit, but I can not [sic] due to the fact that I have no one saying who was shooting. I had also advised Mark Baldwin that I took the .40 caliber weapon, and it is now in property. I had advised him that, I will continue to look for the shooter if it ends up being Robles, I will make the arrest immediately without delay. Baldwin stated that this is all we can do for now until the evidence is there to connect the gun to the shooter.

Defense Exhibit 40 at 8.

During the January 2020 hearing, Detective Cabrera testified about his meeting with Baldwin as follows:

Q: There appears to be a notation of a date of November 8th, 1997?

A: Correct.

Q: That was a Saturday, correct?

A: Correct, sir.

Q: That you went into the District Attorney's Office and indicated that you wanted to pull his, meaning George Robles', gun permit?

A: Correct.

Q: Was that the meeting that you were referring to where you were, as you said, laying out for Mr. Baldwin all of the things that you were trying to get Mr. Robles for?

A: Yes. I gave him the whole picture of everything, yes.

Q: And when you say the whole picture of everything, do you mean, hey, back in '96 somebody accused Robles of pointing a gun, but the charges got dropped because the victim would not go forward?

A: I can't say I gave him a number of that date. I gave him everything off the top of my head as to what he was being always involved in. You know, with shots fired there is drug activity, and his name always surfaced.

Q: So I appreciate your giving us information as you can at this point, but if I'm hearing you correctly, at that meeting with Mr. Baldwin, when you were trying to revoke Mr. Robles' gun permit, you were informing Mr. Baldwin of your suspicions of criminal activities for shootings and drug-related offenses?

A: Correct.

Q: What was his response when you told him that?

A: Nothing. Nothing. We agreed on pulling the permit. That was about it. I left after that.

(N.T. January 13-15, 2020 at 304-05).

As the Defendant noted in his post-hearing brief, the fact that, on September 16, 1997, District Attorney Baldwin received a copy of the letter from Robles to Detective Cabrera in which Robles offered to "do anything" in exchange for getting out of jail[3] and failed to disclose it to defense counsel is additional circumstantial evidence that he

[3] See Defense Exhibit 24 – Note from Detective Gerardo Vega to Baldwin.

was aware of the criminal investigations into Robles and intentionally suppressed them prior to the Defendant's trial. Detectives Albert Schade, Angel Cabrera, and Gerardo Vega testified at the January 2020 hearing that Baldwin never asked them to search for or provide reports documenting Robles' involvement in uncharged criminal activities. (N.T. January 13-15, 2020, at 302, lines 8-12; at 345, lines 12-15; at 387-88, line 20 to lines 1-6)[4]. That is inconceivable to this court given Baldwin's receipt of the letter and the subsequent information provided to him directly by Detective Cabrera on November 8, 1997.

District Attorney Baldwin's misrepresentations to the courts and defense counsel are equally inconceivable. A close examination of the timeline set forth in this opinion leaves the court with no doubt that District Attorney Mark Baldwin made a conscious, intentional, and purposeful decision to not disclose the determined *Brady* material. The deliberate nature of his contemptuous behavior is evident in the fact that he blatantly lied about his knowledge of the reports directly to the court. The Fifth Amendment mandates that prosecutors produce all exculpatory evidence, including impeachment evidence, prior to trial, even when such evidence has not been requested specifically. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97 (U.S. 1963); *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766 (U.S. 1972). The duty to disclose extends to "exculpatory evidence in the files of police agencies of the government bringing the prosecution." *Commonwealth v. Ovalles*, 2016 Pa. Super. 166, 144 A.3d 957, 965 (Pa.

[4] Had he done so, he would have learned that Detective Cabrera kept the reports on his desk. (N.T. January 13-15, 2020 at 380, lines 6-11).

Super. 2016).

The prosecutorial misconduct that occurred in these two cases was egregious. District Attorney Baldwin's conduct, which resulted in the Defendant spending twenty-three years on death row, was comparable to the deliberate actions taken by the prosecutor in *Commonwealth v. Smith*, 615 A.2d 321, 324 (Pa. 1992). It certainly far exceeded the recklessness standard recently adopted by the Pennsylvania Supreme Court in *Commonwealth v. Johnson*, 231 A.3d 807 (Pa. 2020). We reiterate the American Bar Association's standard that prosecutors have a duty to seek justice and not merely convict. Justice was not served here.

This court is mindful that, as stated in *Johnson, supra*, the public at large is also punished by the dismissal of criminal charges and that, as a result, courts should only apply that remedy where the actions of the Commonwealth are egregious and where demonstrable prejudice will be suffered by the defendant if the charges are not dismissed. This is such a case. Aristotle said, "The only stable state is the one in which all men are equal before the law." As a society, we cannot expect the public to respect law and order if those who are entrusted to enforce it do not also respect it.

In the instant case, the conduct before the court is not that of the Defendant but rather that of the individuals entrusted to enforce the laws of this Commonwealth. Had these acts been committed by a witness, the individual could have been, and in all likelihood would have been, charged with obstruction of justice. Had these acts been committed by defense counsel, in addition to charges, a disciplinary action would have been initiated that would potentially result in the suspension or loss of legal license.

Mr. Baldwin's position as District Attorney seems to have protected him from such censure. But in this matter, all men are equal before the law and this court renders judgment of Mr. Baldwin's egregious behavior.

Former United States Supreme Court Justice William O. Douglass said, "The liberties of none are safe unless the liberties of all are protected." Thus, given the recklessness standard recently adopted by our Supreme Court in *Johnson*, which was far exceeded here, we are constrained to grant the Defendant's Motion to Dismiss Information on Double Jeopardy Grounds. Accordingly, the court enters the following order: