

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

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COMMONWEALTH : CP-51-CR-0823621-1984
 : CP-51-CR-0907971-1984
v. :
 :
TERRANCE WILLIAMS :
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FRIDAY, 28 SEPTEMBER 2012
Courtroom 507
Criminal Justice Center
Philadelphia, Pennsylvania

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BEFORE THE HONORABLE M. TERESA SARMINA, J.
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A P P E A R A N C E S :

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Assistant Federal Defenders
for the Defendant, Terrance Williams

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COURT'S RULING - Page 04

1 THE COURT: The court reporter
2 has asked that everyone identify themselves
3 for the record.

4 MR. NOLAS: Billy Nolas, Your
5 Honor, on behalf of the Petitioner.

6 MR. MONTROY: Eric Montroy, Your
7 Honor, on behalf of the Petitioner.

8 MR. NOLAN: Shawn Nolan, Your
9 Honor, on behalf of Petitioner.

10 MS. GIVENS: Jennifer Givens,
11 Your Honor, on behalf of Petitioner.

12 MR. EISENBERG: Ronald Eisenberg
13 for the Commonwealth.

14 MS. GODFREY: Robin Godfrey on
15 behalf the Commonwealth.

16 MS. NAHLER: Kari Nahler on
17 behalf of the Commonwealth.

18 THE COURT: Thank you.

19 Under our system of law, there
20 are safeguards to guard against convictions or
21 sentences that may be proper for a number of
22 reasons.

23 The first level of review of a
24 conviction and sentence is afforded a
25 defendant through a direct appeal. At that

1 time, trial court error and missteps by the
2 prosecutor, including prosecutorial
3 misconduct, based on things that can be
4 gleaned from the record of the trial are
5 reviewed. After that stage of the
6 proceedings, which can go as far as the U.S.
7 Supreme Court, there is the opportunity for
8 what is called a collateral challenge to the
9 conviction, including that prior counsel
10 rendered ineffective assistance.

11 This is a very technical area,
12 and in Pennsylvania is governed by the Post
13 Conviction Relief Act, also known as the PCRA.

14 Under the PCRA, all petitions for
15 relief must be filed within one year of
16 judgment becoming final.

17 Judgment of sentence becomes
18 final at the conclusion for direct review.

19 This Court was assigned the
20 petition of Terrance Williams for
21 Post-Conviction Relief and for a stay of
22 execution.

23 A review of that petition made it
24 obvious that the judgment of sentence had
25 become final decades ago.

1 This Court made the decision to
2 hear evidence from two witnesses in this case,
3 the trial prosecutor regarding petitioner's
4 two homicide trials, Miss Andrea Foulkes, as
5 well as the Commonwealth's principal witness
6 at both of those trials, Marc Draper.

7 Due to the time limitations
8 involved, and due to the duty of the Court to
9 make credibility determinations concerning the
10 testimony to be provided, this Court made the
11 unusual decision to direct that neither side
12 would be permitted to speak to or prep the
13 witnesses prior to them testifying.

14 The Court retrieved from Ms.
15 Foulkes a CD that had earlier been provided to
16 her by the District Attorney's Office since it
17 contained much more than what was necessary
18 for her to review the decisions she made at
19 the two trials.

20 It was apparent from her
21 testimony here that she reviewed much more
22 than just what occurred at trial, and she
23 conceded as much. And I imply no wrongdoing
24 on her part for having done that. She
25 received that CD before the Court ever knew it

1 had been provided to her by the District
2 Attorney's Office.

3 The Court also precluded the
4 defense from providing to Mr. Draper the
5 affidavit he had most recently provided to
6 them, notwithstanding that they had told him
7 they would send it. He had not had the
8 opportunity to review any of his trial
9 testimony before testifying here.

10 The Court also directed that
11 Ms. Foulkes' trial files be brought to the
12 Court's chambers, and that both sides would be
13 permitted to review them there and mark any
14 documents that they wanted to use in their
15 examination of the witnesses.

16 Ms. Foulkes also had, and took,
17 the opportunity to go through her files and to
18 copy whatever she wanted.

19 Both sides were then given a copy
20 of whatever she had copied.

21 Over this past weekend the Court
22 also directed that the two Homicide files of
23 the Philadelphia Police Department's Homicide
24 Unit from 1984 were to be brought to the
25 courtroom so that both sides could search

1 through those to see if there was additional
2 evidence that supported or contradicted the
3 claims made by Petitioner.

4 The Court has taken these
5 extraordinary measures because the Court is of
6 the view that if Petitioner is to be executed,
7 it should be because there is confidence that
8 the verdict of death imposed by the jury in
9 1986 was what the word "verdict" means: To
10 speak the truth.

11 The decision for a jury to make
12 in a capital trial at the penalty phase is
13 based on complicated instructions.

14 But, to grossly summarize, it is
15 as follows:

16 To determine whether or not the
17 aggravating circumstances that the
18 Commonwealth case claims apply to the case
19 exists. These are set by statute;

20 To determine whether the
21 mitigating circumstances the defense claims
22 applied to the case exists. There are
23 enumerated areas; but, then, there is also a
24 catch-all that provides for anything and
25 everything about the defendant and about the

1 circumstances of the crime that would make the
2 case less deserving of a death sentence. And,
3 obviously, the aggravating circumstances are
4 things that the Commonwealth believes would
5 make it more deserving of a death sentence.

6 If the jury unanimously finds
7 beyond a reasonable doubt that there are
8 aggravating circumstances and no mitigating
9 circumstances, then the jury must return a
10 sentence of death.

11 If the jury unanimously finds
12 beyond a reasonable doubt that there is one or
13 more aggravating circumstance and any juror
14 finds by a preponderance of the evidence that
15 there is any mitigating circumstance, then the
16 jury is to engage in a weighing, and is only
17 to return a sentence of death where the jury
18 concludes beyond a reasonable doubt that the
19 aggravating circumstances outweigh the
20 mitigating circumstances.

21 Here, the jury found no
22 mitigating circumstances.

23 The cases are clear that a
24 conviction based upon a lie cannot stand. So,
25 it has been a critical determination for this

1 Court to decide what is the truth and what is
2 not;

3 What it credible and what is not;
4 Who is to be believed and who is
5 not.

6 In making its factual findings,
7 the Court is free to believe some, all, or
8 none of each of the witness's testimony.

9 Petitioner's first claim is that
10 trial counsel failed to provide Constitutional
11 effective assistance of counsel during the
12 trial penalty phase.

13 He asserts that he was unfairly
14 prejudiced when appellate counsel and the
15 Pennsylvania courts were never given the
16 opportunity to hear or rebut what the
17 Commonwealth termed, quote, "anti-mitigation,"
18 closed quotes, evidence.

19 He alleges that the Third Circuit
20 relied on this evidence in dismissing his
21 habeas corpus petition in violation of the
22 Superior Court's decision in the case of
23 Cullen v. Pinholster, a 2011 case.

24 Petitioner fails to prove that
25 this Court has jurisdiction over this claim,

1 and he cannot show that he was prejudiced, as
2 the underlying issue was previously litigated.
3 Therefore, this claim should not entitle
4 petitioner to a stay of execution, or to any
5 relief.

6 Petitioner fails to prove that
7 this Court has jurisdiction to hear this PCRA
8 claim under Section 9545 of Title 42 because
9 this claim does not meet the criteria for one
10 of the timeliness exceptions.

11 This claim does not involve
12 governmental interference, nor does it involve
13 newly discovered facts or recent
14 retroactively-applied Supreme Court case law.

15 In fact, petitioner frames his
16 argument as one of ineffectiveness of counsel.

17 The Pennsylvania Supreme Court
18 noted in Bennett that, quote, An allegation of
19 PCRA counsel's ineffectiveness could not be
20 invoked as a newly-discovered fact for
21 purposes of this subsection. We have
22 steadfastly adhered to this principle. We
23 firmly reject any such attempts to circumvent
24 the one-year time limitation via claims of
25 PCRA counsel ineffectiveness.

1 This issue was, in fact,
2 presented to the United States Supreme Court
3 on a writ of certiorari which was denied.
4 Accordingly, this Court will not discuss this
5 claim further.

6 As to petitioner's claim that the
7 Commonwealth violated due process by
8 suppressing evidence of Renee Rucker's crimen
9 falsi convictions, the Court finds that
10 counsel have failed to show that they could
11 not have accessed this information at an
12 earlier date with the exercise of due
13 diligence and, therefore, this Court is
14 without jurisdiction to entertain it.
15 Additionally, the Court fails to see how the
16 prejudice prong would be met.

17 Petitioner's claim that the
18 Commonwealth failed to disclose impeachment
19 evidence as to Marc Draper due to information
20 he provided about a burglary he committed,
21 which was orchestrated by Petitioner Williams,
22 is meritless, as no reasonable defense counsel
23 would have used that evidence.

24 As to the claim that there was a
25 "deal" with Draper that was suppressed, the

1 Court finds that this claim could have been
2 raised earlier by the exercise of due
3 diligence, certainly as of the time of
4 Draper's PCRA appending the 1988 letter from
5 ADA Foulkes was filed; and, accordingly, this
6 is untimely.

7 I would note that it seems like
8 it could have been a viable claim under at
9 least the first prong of Napue and Giglio, and
10 might have satisfied the prejudice prong
11 meriting a new trial.

12 This Court has not addressed, at
13 this juncture, the claims relative to his
14 conviction in the Hamilton case, but at first
15 blush thinks it may be untimely. I have
16 focused my attention on the capital matter,
17 which is of urgency given the time constraints
18 and the date set for the execution of
19 petitioner.

20 The Court finds that the
21 petitioner is entitled to a stay of execution
22 under Section 9545(c), given that petitioner
23 has met his burden under Morris II to, quote,
24 demonstrate:

25 One, that all the requirements of

1 this subchapter have been met;

2 Two, that there is a pending stay
3 application;

4 And, Three, that there is a
5 strong likelihood of success on the merits.

6 Petitioner exceeded the strong
7 likelihood threshold, demonstrating actual
8 success on the merits with respect to the
9 penalty phase.

10 Under section 9545(c),
11 petitioner needed to demonstrate that he met
12 all the requirements of this subchapter.

13 Both Morris I and Morris II make
14 it explicitly clear that the above language
15 incorporated the jurisdictional provision of
16 Section 9545(b) into the analysis of granting
17 a stay of execution.

18 For this Court to have
19 jurisdiction, that is, the power or authority
20 to reach the merits of his claims, petitioner
21 must have established that his claims fall
22 under at least one of three narrowly defined
23 exceptions to the PCRA.

24 Here, petitioner maintained that
25 he had met the following two exceptions:

1 One, which is actually Subsection
2 i, that the failure to raise the claim
3 previously was the result of interference by
4 government officials with the presentation of
5 the claim in violation of the Constitution or
6 laws of this Commonwealth, or the Constitution
7 or laws of the United States;

8 And, ii, that the facts upon
9 which the claim is predicated were unknown to
10 the petitioner and could not have been
11 ascertained by the exercise of due diligence.

12 This Court has jurisdiction in
13 this case, given that petitioner demonstrated
14 governmental interference pursuant to Section
15 9545(b)(1)(i), and that the claim, which could
16 not have been raised earlier with the exercise
17 of due diligence, was filed within 60 days of
18 the date that it first could have been
19 presented pursuant to Section 9545(b)(2).

20 Petitioner has proved that
21 failure to raise the claim previously was the
22 result of interference by government officials
23 with the presentation of the claim in
24 violation of the Constitution.

25 Our Supreme Court mandates that

1 petitioner plead and prove that the failure to
2 raise a claim previously was the result of
3 interference by government officials. And for
4 that I cite Commonwealth v. Stokes, which was
5 citing Commonwealth v. Hawkins.

6 By removing direct and indirect
7 information which demonstrated that Amos
8 Norwood had homosexual relationships with
9 teenage boys from the statements that were
10 turned over to the defense, the government
11 interfered with the presentation of this
12 claim.

13 In this case, the governmental
14 interference is actually the Brady claim.
15 They are one and the same.

16 The suppressed evidence
17 establishes the fact that the government
18 interfered.

19 The only way that petitioner
20 could have demonstrated a Brady claim based
21 upon the fact that there was information in
22 the District Attorney's file and in the
23 Philadelphia Police Department's file was to
24 actually go into the files themselves.

25 Petitioner demonstrated that this

1 claim could not have been raised earlier by
2 the exercise of due diligence, as is required
3 by Commonwealth v. Yarris, Commonwealth v.
4 Beasley, and Commonwealth v. Albrecht. And
5 then petitioner brought this claim within 60
6 days from when the claim first could have been
7 brought.

8 Petitioner established that the
9 claim could not have been raised earlier with
10 the exercise of due diligence through the
11 affidavit and testimony of Marc Draper.

12 It is because of the statements
13 in Mr. Draper's affidavit, in which he alleged
14 that he made a statement about petitioner's
15 motive for the crime, which was never
16 disclosed to the defense, that this Court
17 ordered the DA's and police boxes opened.

18 The information uncovered as a
19 result of this Court's order could not have
20 come to light if it weren't for Draper's
21 original affidavit. Therefore, this Court
22 analyzes whether this claim satisfies the due
23 diligence requirement of Section 9545(b)(2) by
24 determining whether petitioner exercised due
25 diligence in learning of the information

1 contained in Mr. Draper's statement.

2 Mr. Draper stated in his
3 affidavit and at the evidentiary hearing that
4 he would not have spoken to Terry Williams'
5 attorneys or anyone else about the events
6 surrounding his life sentence for years.

7 In the late 1980s, Mr. Draper
8 refused to speak with petitioner's counsel,
9 and this is as per the Post-Sentence motion
10 Notes of Testimony, he would not talk with Ed
11 Chew when Nick Panarella sent him there.

12 At some point during his stay in
13 Graterford, from 1996 to 2005, Mr. Draper
14 again refused to talk with someone who came on
15 petitioner's behalf.

16 Mr. Draper was credible when he
17 said that his anger at Terry Williams, and at
18 himself for having to serve a life sentence,
19 prevented him from talking about the Norwood
20 murder over the years.

21 The Court found that his
22 explanation as to why he finally spoke up made
23 sense.

24 Mr. Draper decided to break his
25 silence on the subject because of the impact

1 of news of Terry Williams nearing execution in
2 light of also having lost his appeals -- I'm
3 sorry, in light of Williams having lost his
4 appeals in March of 2011.

5 Terry Williams and Marc Draper
6 were friends for a large portion of their
7 youth.

8 The notion that Mr. Draper
9 decided to put his own anger aside and speak
10 up in order to spare the life of his childhood
11 friend is not an incredible one, and the
12 Court, in fact, credited it.

13 The Third Circuit denied
14 Petitioner's habeas petition in March 2011.

15 Petitioner's counsel spoke with
16 Mr. Draper nine months later in January of
17 2012.

18 Is a nine-month delay from the
19 first moment when it could fairly be said that
20 Terry Williams had lost his appeals until
21 counsel's conversation with Mr. Draper not
22 duly diligent? This Court finds that the
23 nine-month delay is duly diligent within the
24 meaning of Yarris.

25 Petitioner then filed his current

1 PCRA petition within 60 days of learning of
2 the substance of Mr. Draper's January
3 affidavit.

4 Petitioner's claim is plainly not
5 waived under Section 9544(b).

6 A claim of error is waived if the
7 defendant or petitioner could have raised the
8 issue at trial, on appeal, or in a prior post
9 conviction proceeding but failed to do so.

10 Petitioner's claim of error in
11 his PCRA was that the government suppressed
12 evidence given by Marc Draper.

13 The PCRA court held an
14 evidentiary hearing on that claim.

15 In the process of doing so, the
16 District Attorney and Philadelphia Police
17 trial boxes revealed the existence of
18 suppressed evidence.

19 The Brady claim based on that
20 evidence could not have been raised at any
21 time prior to Marc Draper's statement that
22 prior to the Norwood trial he told Ms. Foulkes
23 and the police this case was really about a
24 homosexual relationship, as it was only
25 because of his statement that this Court

1 ordered that the trial boxes be opened.

2 Nor is Petitioner's claim
3 previously litigated under Section 9544(a).

4 A claim of error is previously
5 litigated when either the highest appellate
6 court in which the petitioner could have had
7 review as a matter of right has ruled on the
8 merits of the issue, or it has been raised and
9 decided in a proceeding collaterally attacking
10 the conviction or sentence.

11 First, no court has ruled on the
12 merits of Petitioner's current Brady claim.

13 Our Supreme Court addressed a
14 claim of counsel's ineffectiveness for failing
15 to investigate and present psychiatric
16 mitigating evidence.

17 As part of that claim, petitioner
18 elicited evidence from Donald Fisher that
19 Mr. Norwood was very degrading and he liked to
20 have sex with kids.

21 However, the current claim does
22 not rest solely upon that evidence. In fact,
23 it is based on evidence uncovered for the
24 first time within the last two weeks.

25 The fact that the evidence inside

1 the DA and Police boxes corroborated evidence
2 petitioner elicited at the 1998 PCRA hearing
3 does not mean that his current claim has
4 already been litigated.

5 The merits of the current issue
6 revolve around whether or not the three prongs
7 of Brady have been met, and that is Brady v.
8 Maryland, whereas the merits of the previous
9 issue was about ineffectiveness;

10 And, second, none of the claims
11 raised by petitioner in the 1998 PCRA was
12 based on the prosecution having suppressed
13 Marc Draper's statement to the government or
14 evidence of the victim's homosexual
15 proclivities towards teenage boys. Not until
16 Mr. Nolas amended his January 2012 PCRA
17 petition in light of this Court's evidentiary
18 hearing has petitioner raised the specific
19 claim upon which relief is being granted.

20 To be entitled to a stay of
21 execution under Section 9545(c), petitioner is
22 required to prove a strong likelihood of
23 success on the merits.

24 Petitioner exceeds that
25 threshold, proving that there was impeachment

1 evidence, which was material to punishment,
2 and if disclosed could reasonably be taken to
3 put the whole case in such a different light
4 as to undermine confidence in the verdict as
5 to the jury's sentence of death. And I cite to
6 Cone v. Bell for that proposition, a United
7 States Supreme Court case.

8 Petitioner demonstrated that the
9 government sanitized the statements of two
10 witnesses, Mamie Norwood and Reverend Charles
11 Poindexter, removing information that either
12 directly or indirectly demonstrated that the
13 victim was a homosexual ephebophilic.

14 For those who do not know, an
15 ephebophile is an adult who has a sexual
16 attraction to teens.

17 Additionally, Andrea Foulkes
18 failed to disclose evidence in her possession
19 that the victim had made sexual advances on a
20 teenage member of his church, and that there
21 were other possible instances of sexual
22 impropriety.

23 Without this evidence,
24 petitioner's counsel was given a skewed and
25 incomplete picture of the victim, which

1 effectively tied his hands while the
2 prosecution elicited testimony at trial about
3 his kind and caring character.

4 If disclosed, the cumulative
5 impact of this impeachment evidence would have
6 enabled petitioner's counsel to challenge the
7 government's sympathetic portrayal of the
8 victim. Ultimately, the nondisclosure of that
9 evidence undermines confidence in the jury's
10 death sentence.

11 When undertaking the three-part
12 Brady analysis, it is particularly instructive
13 to compare the evidence in the government's
14 possession against that which was given to
15 petitioner's counsel in discovery.

16 A June 1984 police activity sheet
17 revealed that the police learned during a
18 June 22nd, 1984, interview -- Mr. Eisenberg
19 and Ms. Godfrey, I will be happy to give you
20 what I wrote, if you rather, so you don't have
21 to be trying to get it down; I will be happy
22 to share it -- that during a June 22nd, 1984,
23 interview with Reverend Charles Poindexter
24 that the victim may have been a homosexual,
25 and that about five years prior to the

1 interview there had been a complaint from the
2 mother of a 17-year old boy at church who said
3 that the victim propositioned him for sex.

4 However, the version of the
5 June 22, 1984, interview that the prosecution
6 turned over to the defense omitted those
7 portions of Reverend Poindexter's statement
8 entirely.

9 The same June 1984 police
10 activity sheet also revealed that the police
11 learned that Mamie Norwood, the victim's
12 widow, had told them about a time in which she
13 awoke at 2 A.M. to find a young, slim male
14 standing silently in the hallway of her home.

15 Mrs. Norwood explained to police
16 that her husband woke her to ask her for
17 money. She then watched as her husband loaded
18 some stereo equipment into his car, and then
19 he got in and drove off with the young man.

20 Mrs. Norwood said that her
21 husband returned home around 9 to 10:00 the
22 next morning and told her a, quote, "rambling"
23 story about being abducted, but how he was
24 able to escape after using psychology on the
25 captors until they fell asleep.

1 Wells, and Jesse Lofton, all of which included
2 one question as to their knowledge of Amos
3 Norwood's homosexuality. All three
4 interviewees answered in the negative.

5 Additionally, Mr. Lofton
6 mentioned the supposed kidnapping, but thought
7 that it involved Mr. Norwood being held up at
8 gunpoint at a red light, and was pretty sure
9 it was reported to police.

10 The version of Reverend
11 Poindexter's statement turned over to the
12 defense mentioned the supposed kidnapping. He
13 speculated that maybe it had something to do
14 with drugs because Mr. Norwood worked as a
15 chemist in New Jersey.

16 It is also worth noting that even
17 though this non-disclosure was not about Amos
18 Norwood, the police also failed to pass the
19 search warrant of James Stallings' home, which
20 revealed another middle-aged man with whom
21 Terry Williams was very familiar had assorted
22 nude photos of men laying around in his home,
23 just as Herb Hamilton had.

24 Without the evidence above, the
25 defense had one piece of information

1 suggesting that Mr. Norwood was a homosexual,
2 Ronald Rucker's statement that "Terry said
3 Amos was a homosexual and was the type to pay
4 people." And the defense had one piece of
5 information suggesting that Mr. Norwood was an
6 ephebophile, Marc Draper's July 20th, 1984,
7 statement in which he said that he asked
8 Mr. Norwood, "So you like boys?" To which
9 Mr. Norwood had responded, "Yeah."

10 As I will discuss shortly
11 regarding the materiality of all of this, the
12 government's suppression not only deprived the
13 defense of impeachment evidence with respect
14 to Reverend Poindexter and Mamie Norwood, but
15 it also resulted in painting an incomplete and
16 misleading picture for defense counsel.

17 Evidence in the possession of the
18 prosecution and the police are both subject to
19 the Brady duty to disclose.

20 In order to comply with Brady,
21 "The individual prosecutor has a duty to learn
22 of any favorable evidence known to the others
23 acting on the government's behalf in this
24 case, including the police." And that's from
25 Strickler v. Greene, another United States

1 Supreme Court case.

2 Our Supreme Court endorsed that
3 same principle in Commonwealth v. Burke saying
4 that Brady extends to evidence in the files of
5 police agencies of the same government
6 bringing the prosecution.

7 The June 1984 activity sheet
8 which detailed the complete versions of the
9 Poindexter and Norwood interviews was found in
10 the H-84-127 police box. The search warrant
11 of James Stallings' home was also found
12 therein. The evidence is properly considered
13 within the scope of the prosecutor's control
14 under Burke.

15 There are three essential
16 components of the Brady claim.

17 The first essential component of
18 a Brady violation, according Strickler,
19 requires that the evidence at issue be
20 favorable to the accused because it is
21 exculpatory or because it is impeaching. The
22 information pulled out of the respective
23 statements of Mamie Norwood and Reverend
24 Charles Poindexter would have allowed a
25 reasonable defense counsel to impeach them

1 after having testified to the following. And
2 this is from Mamie Norwood and Andrea Foulkes
3 asking her:

4 "You had indicated in response to
5 questions by the defense attorney that your
6 husband didn't pick up strangers.

7 Did your husband have occasion to
8 take young people back and forth from time to
9 time in his car?

10 "MRS. NORWOOD: The ones that he
11 worked with, yes, that I knew.

12 "MS. FOULKES: How much of his
13 time would you say, if you know; how often
14 would he do that? Often? Rarely? Middle?

15 "MRS. NORWOOD: It would be every
16 week at some point.

17 "MS. FOULKES: And then from time
18 to time he would chauffeur young people from
19 one point to another, would he not?

20 "MRS. NORWOOD: The ones that I
21 know he works with, yes.

22 "MS. FOULKES: When he would do
23 that, would he take those young people home?

24 "MRS. NORWOOD: Yes."

25 A little further down Ms. Foulkes

1 says:

2 "From time to time, did you ever
3 see evidence of that chauffeuring process by
4 things left in your car?"

5 "MRS. NORWOOD: Yes, sometimes."

6 And that was from the Notes of
7 Testimony of January 14th, 1986, at Pages 157
8 to 158.

9 As to Reverend Charles
10 Poindexter, the following was asked.

11 Question by Ms. Foulkes:

12 "Did Mr. Norwood have any special
13 responsibility in the church regarding youth?"

14 "REVEREND POINDEXTER: Yes, he
15 did.

16 "MS. FOULKES: What were those
17 responsibilities?"

18 "REVEREND POINDEXTER: He was
19 warden for many years of the acolytes or the
20 service of the church, and he was in charge,
21 he was the founder and in charge of what we
22 called the Youth Theater Fellowship, which
23 dealt with youth between the ages of seven and
24 eighteen.

25 "MS. FOULKES: Were there

1 occasions, Reverend, in connection with his
2 duties, where Mr. Norwood would come to the
3 church in the night hours to fulfill some of
4 these duties?

5 "REVEREND POINDEXTER: Yes, there
6 were.

7 "MS. FOULKES: Also, in your
8 contact with Mr. Norwood, did you observe him
9 from time to time transport young people from
10 the church activities to their homes or other
11 locations?

12 "REVEREND POINDEXTER:
13 Frequently."

14 And that was from Notes of
15 Testimony, January 14th, 1986, at 166 and 167.

16 On Redirect Ms. Foulkes asked:

17 "Reverend, from time to time, do
18 the church activities extend beyond the people
19 who are parishioners and members of the
20 church?

21 "REVEREND POINDEXTER: Yes, they
22 do."

23 On Recross Examination

24 Mr. Panarella asked:

25 "Certainly, church activities or

1 functions are for church members; is that
2 correct?

3 "REVEREND POINDEXTER: Well, the
4 activities that Mr. Norwood participated in
5 very often involve young people outside of our
6 parish congregation. In fact, many who are
7 now active came in as a result that kind of
8 inclusion.

9 "MR. PANARELLA: And that would
10 occur at organized functions; is that correct?

11 "REVEREND POINDEXTER: Not
12 necessarily. Sometimes they were simply trip
13 services where they were invited to
14 participate.

15 "MR. PANARELLA: There were no
16 church services occurring late in the evening
17 on June 11th, were there?

18 "REVEREND POINDEXTER: Oh, no, of
19 course not.

20 "MR. PANARELLA: And there is
21 nothing of any youth activities or anything of
22 that nature that was going to take place at
23 your church at that time; correct?

24 "REVEREND POINDEXTER: No.

25 "MR. PANARELLA: So when you make

1 reference to unusual or that it would not be
2 unusual to have non-church members come to
3 church functions, it would have been extremely
4 unusual to have a non-parishioner at the
5 church when no church functions were going on?

6 "REVEREND POINDEXTER: No, it
7 would not have been."

8 Ms. Foulkes objected, the Court
9 overruled it, and then Reverend Poindexter
10 said:

11 "No, it would not have been."

12 "MR. PANARELLA: It would not have
13 been unusual to have a non-church member at a
14 non-church function late at night when the
15 church wasn't open to the public?

16 "REVEREND POINDEXTER: No.

17 "MR. PANARELLA: That's correct?

18 "REVEREND POINDEXTER: Would you
19 like me to explain?

20 "MR. PANARELLA: Yes.

21 "REVEREND POINDEXTER: Very often,
22 Mr. Norwood had friends of some of the young
23 people to help with the building of the sets
24 for the plays and, quite often, I saw him with
25 young people or the people who were working

1 with him, people that I never knew before.

2 "MR. PANARELLA: Again, you never
3 knew Mr. Williams?

4 "REVEREND POINDEXTER: I never
5 knew Mr. Williams.

6 "MR. PANARELLA: Or Mr. Draper?

7 "REVEREND POINDEXTER: No.

8 "MR. PANARELLA: Now, you were
9 aware, were you not, that Mr. Norwood had some
10 problem in the past?

11 "REVEREND POINDEXTER: Some
12 problem?

13 "MS. FOULKES: Objection, Your
14 Honor.

15 "THE COURT: Just a moment, I am
16 going to sustain it. I don't know quite what
17 it is or how it is related to the
18 circumstances here, so I will have to sustain
19 the objection at this time."

20 And Mr. Panarella at that time
21 then said:

22 "I have nothing further."

23 And that's from the Notes at
24 Pages 172 to 174.

25 Had the evidence detailed above

1 been disclosed, it could have been used by a
2 reasonable defense attorney to impeach the
3 testimony of both Mamie Norwood and Reverend
4 Charles Poindexter, in which they characterize
5 Mr. Norwood as a kind church volunteer who
6 wanted to help out the kids of the
7 neighborhood.

8 Demonstrating that Mr. Norwood
9 may have had ulterior motives, the homosexual
10 ephebophilia, would have been favorable to the
11 accused in this case.

12 The second essential component of
13 a Brady violation according to Strickler
14 requires that the evidence at issue be
15 suppressed by the government, either willfully
16 or inadvertently. The sanitization of the
17 statements turned over to defense counsel, and
18 the non-disclosure of the substance of Ms.
19 Foulkes' handwritten notes demonstrates that
20 evidence has plainly been suppressed. And it
21 isn't that she had to turn over her personal
22 notes, but the information that she had
23 gleaned, albeit that she wasn't turning over
24 her notes.

25 Furthermore, the evidence borne

1 out over the course of the evidentiary hearing
2 about former ADA Foulkes' sometimes playing a
3 little fast and loose suggests that the
4 scale -- which you will hear shortly also
5 additional factors -- tip toward a finding
6 that the suppression was closer to willful
7 than to inadvertent.

8 Ms. Foulkes had just prosecuted
9 Terrance Williams for the murder of Herbert
10 Hamilton. In that case, she opened on the
11 following information:

12 "However, Terrance Williams also
13 had a secret life, and that secret life was
14 his engagement in making money by hustling
15 homosexuals for favors, for money, for
16 clothing, for anything of value to him, and
17 Herbert Hamilton was one of a number of people
18 that Terrance Williams engaged in this.

19 Herb Hamilton was not the only
20 individual with whom Terrance Williams engaged
21 in this kind of enterprise.

22 You'll hear from Marc Draper that
23 Terrance Williams had told him that he, on
24 other occasions, sought to earn money, make
25 money, what have you, by having homosexual

1 acts with various individuals."

2 During the trial of this case,
3 Ms. Foulkes also questioned -- that's the
4 Hamilton case -- Ms. Foulkes also questioned
5 Marc Draper as follows:

6 "Now, on other occasions that
7 Terry discussed how he obtained money, had
8 Terry indicated to you that with other
9 individuals from whom he had obtained money or
10 clothing, that he had, indeed, engaged in
11 sexual relations?"

12 Answer from Draper:

13 "Yes."

14 Ms. Foulkes admitted at the
15 September 20th, 2012, PCRA hearing before this
16 Court, when speaking about petitioner and
17 Mr. Norwood:

18 "Did I suspect that there was a
19 sexual connection between them? Yes, I did."

20 And that's from the Notes of
21 Testimony of that date at Pages 103 and 104.

22 Despite her sense as to the truth
23 of the relationship in the Norwood case, Ms.
24 Foulkes still made the following argument in
25 closing at the penalty phase of the Norwood

1 case:

2 "Now, Ladies and Gentlemen, you
3 know the horrible circumstances of the death
4 of Amos Norwood. You know that the defendant,
5 Terrance Williams, for no other reason but
6 that a kind man offered him a ride home, that
7 he and another man tied him up in the darkness
8 of a cemetery and beat him to death, squashed
9 him like a bug that you might be irritated
10 with against a windshield, beat him with two
11 blunt instruments."

12 That was from the Notes of
13 Testimony of February 3rd, 1986, at Page 1873.

14 Ms. Foulkes indicated or
15 maintained to this Court that she did not care
16 if she got less than First Degree Murder in
17 the Hamilton case, and that she didn't care if
18 she got death in the Norwood case.

19 This Court did not find this
20 testimony to be credible. Instead, the Court
21 is constrained to say that she did, at times,
22 play games and took unfair measures to win.

23 And the following are some items
24 that I will point to evidence of that.

25 In terms of how Ms. Foulkes had

1 handled the deal that had allegedly been
2 struck with Draper and that was challenged, on
3 February 20, 1985 at Page 375 in the Hamilton
4 trial she said to Mr. Draper:

5 "You agreed to plead to murder,
6 robbery and conspiracy. Second Degree Murder
7 is a life sentence," and he answered: "Yes."

8 "You agreed to testify in this
9 case and in the case for which you are
10 charged; is that correct?

11 "ANSWER: Yes.

12 "Is that the full extent of any
13 deals or agreements between yourself and the
14 Commonwealth?"

15 "ANSWER: Yes."

16 Although this is a claim that
17 should have been raised earlier, the Court
18 views this as evidence of her wanting to win.
19 Based on the Napue and Giglio cases, this is
20 indisputably not the whole truth. She knew
21 she was writing the letter for him, and the
22 language of the letter that she personally
23 wrote clearly indicates that there had been a
24 separate agreement. At the hearing here
25 before me she acknowledged that language.

1 And then at the Norwood trial
2 regarding that deal, on Cross of Draper by
3 Panarella, Draper is asked:

4 "Was there anything more agreed
5 upon between you, your attorney, your family
6 and the police or the District Attorney's
7 Office, other than what is embodied in this
8 document," which at the trial was C-18, the
9 agreement which Arnold Gordon signed, who was
10 Chief of Homicide at that time.

11 And his answer was:

12 "No."

13 "Not nothing at all?"

14 "No."

15 Ms. Foulkes had a duty to correct
16 this because she knew she had agreed to
17 something more, to write to the Parole Board,
18 which she, in fact, did in 1988. This issue
19 is noted here to show that this was a course
20 of conduct by Ms. Foulkes.

21 Again, regarding the desire to
22 win first degree murder in the Hamilton case,
23 February 20th, 1985, at Pages 436-437.

24 Mr. Williams' attorney, Steve
25 Gallagher was going to call Gregory Lowe, also

1 known as Gregory Lee.

2 Judge Sabo asked:

3 "What would he be able to testify
4 to?"

5 Mr. Gallagher said he would
6 testify to a conversation with Marc Draper,
7 that Marc Draper told him the facts of this
8 killing and that he's the one that did the
9 stabbing. Ms. Foulkes then had the detectives
10 go and speak to the witness up in the cell
11 room, which at that time was in City Hall,
12 after which he decided not to testify for
13 Williams.

14 Gregory Lowe did testify at the
15 PCRA hearing in 1990, and testified that after
16 a visit from Detective Cimino, he decided not
17 to testify on defendant's behalf to that
18 effect, as he was told it would affect any
19 plea agreement that he was trying to work out
20 with the Commonwealth, or that it could affect
21 that plea agreement.

22 At that same PCRA hearing,
23 Detective Cimino testified that Andrea Foulkes
24 did come to them and said that the defense was
25 going to call Lowe. And that's at -- Gregory

1 Lowe testifying was September 10th, 1990, at
2 Page 17, and Detective Cimino testifying is at
3 Page 44.

4 He said he did go up to the cell
5 room to see Mr. Lowe, claiming he merely
6 wanted to see if this was the same person who
7 had been their informant on a number of cases,
8 and that he was concerned for Mr. Lowe's
9 safety because they were responsible for him.

10 Ms. Foulkes testified before me
11 that she did have the detective go up to talk
12 to them and to see what this was about.

13 Regarding letters that the
14 defendant wrote and gave to Marc Draper hoping
15 he would testify in conformity therewith,
16 which, again, showed certain conduct by Ms.
17 Foulkes I submit the following:

18 Ms. Foulkes provided both letters
19 to Attorney Gallagher in the Hamilton trial on
20 February 21st, 1985, as she was calling Marc
21 Draper to rebut Williams' testimony.

22 In responding to the attorney's
23 complaint about having been deprived of these
24 prior to trial, it appears that Ms. Foulkes
25 was not candid with the Court. And this is at

1 Pages 639 to 642 or 643.

2 A review of the record reflects
3 that she told the judge she had only gotten
4 the letters that Monday, February 18th, 1985,
5 and it is possible that the letters were
6 mailed to George Draper, but she purposely
7 waited to turn them over.

8 George Draper testified at Page
9 682 about receiving the letters from his son.
10 She doesn't ask him when he got them on
11 direct; but on Cross Mr. Gallagher brings out
12 that George Draper had gotten them on
13 January 18th, 1985, more than a month earlier,
14 and that he had turned them over to his
15 attorney on January 19th, 1985.

16 But P-8, which was marked as an
17 exhibit in this hearing, and that P-8 was
18 dated December 20th, 1984, a Thursday, Ms.
19 Foulkes' personal notes indicate that she
20 knows about the letters and her notes indicate
21 that she is going to have Marc Draper provide
22 them to the detective next Friday, which would
23 have been no later than December 28th, 1984.
24 Even if it hadn't been the next day, December
25 21st, it certainly would have been by

1 December 28th, 1984.

2 Then she claimed to the court, to
3 Judge Sabo, that she had to protect Marc
4 Draper, but the fact is that she could have
5 and should have, instead, sought a protective
6 order from the judge to keep from having to
7 disclose those to the defense. And this is
8 presented here merely to show another example
9 of gamesmanship by Ms. Foulkes as further
10 evidence that she wanted to win and she had no
11 problem disregarding her ethical obligations,
12 because this move was in the face of case law
13 to the contrary, and I will cite to the
14 Supreme Court case of Commonwealth v. Rodgers,
15 R-o-d-g-e-r-s, for that proposition, a 1983
16 case out of Philadelphia. And, Ms. Foulkes
17 was clearly up on her case law, as evidenced
18 by her citing to Commonwealth v. Beasley.

19 The third and final essential
20 component of a Brady violation according to
21 Strickler requires that prejudice ensue.

22 Prejudice in this context is
23 defined by the concept of materiality.

24 Evidence is material when,
25 according to Cone v. Bell, there is a

1 reasonable probability that, had the evidence
2 been disclosed, the result of the proceedings
3 would have been different. In other words,
4 when the evidence could reasonably be taken to
5 put the whole case in such a different light
6 as to undermine confidence in the verdict.

7 When undertaking the materiality
8 analysis, the court in *Kyles v. Whitley*
9 offered four aspects of materiality to help
10 guide the determination.

11 The fourth aspect is particularly
12 relevant to this case. Quote, "Materiality to
13 is be judged by reference to the suppressed
14 evidence considered collectively, not
15 item-by-item, with the focus on the cumulative
16 effect of suppression," closed quotes.

17 There is no better proof that
18 prejudice ensued than Ms. Foulkes' own
19 admission. As someone who had the privilege
20 of viewing the suppressed evidence in the
21 government's possession collectively, she
22 said, as quoted above, "Did I suspect that
23 there was a sexual connection between them?
24 Yes, I did." And when the Court asked her,
25 "So maybe he is doing Norwood and getting

1 money," she responded, "No, of course that
2 occurred to me." And that was Notes of
3 Testimony of September 20th, 2012, at Pages
4 102-103.

5 Ms. Foulkes stated of course she
6 felt like there was a homosexual relationship
7 between petitioner and Norwood because she was
8 able to connect all of the dots.

9 Had reasonable defense counsel
10 been given all of the dots, that attorney,
11 too, would have been able to connect them,
12 and, at the very least, stand up in closing in
13 response to Ms. Foulkes' penalty phase
14 statement that there was no other reason and
15 argue that there is enough evidence to suggest
16 that Amos Norwood was a homosexual ephebophile
17 who was taking advantage of petitioner.

18 The existence of an unsympathetic
19 victim can be, in and of itself, sufficient to
20 undermine one's confidence that the jury would
21 have returned the same verdict of death.

22 For all of the reasons stated
23 herein, petitioner has demonstrated that he is
24 entitled to relief in the form of a new
25 penalty phase.

1 And I would note that the items
2 that I have cited as to comments regarding
3 homosexuality that were in Ms. Foulkes' notes
4 and that were made exhibits during the course
5 of the trial both by petitioner, as well as by
6 the court exhibits, is not. So what I
7 mentioned here is not exclusive. There are
8 more; I just haven't spoken to every single
9 item.

10 However, the Court finds that
11 petitioner cannot meet the materiality
12 standard with regard to the guilt phase.

13 Had the suppressed evidence been
14 disclosed and a complete picture presented to
15 defense counsel, a reasonable attorney would
16 have had the information needed to make a
17 compelling argument as to mitigation.
18 However, the suppressed evidence would not
19 have put forth facts upon which a
20 heat-of-passion defense could have being
21 rooted.

22 Additionally, the overwhelming
23 consciousness of guilt evidence would have
24 outweighed any attempt to argue that
25 petitioner committed this killing in the heat

1 of passion. Therefore, the suppressed
2 evidence does not undermine confidence in the
3 verdict of guilt.

4 And, accordingly, this Court is
5 granting the stay of execution, and this Court
6 is granting a new penalty phase.

7 Thank you.

8 MS. GODFREY: Your Honor, there
9 are a few housekeeping items.

10 There is a few things, including
11 Notes of Testimony and Your Honor's order
12 regarding the order of no communication
13 between the Commonwealth and the defense and
14 any witnesses that may still be under seal.
15 Can you unseal them so that we can have
16 access?

17 THE COURT: And to whom are you
18 referring?

19 MS. GODFREY: The Notes of
20 Testimony. Anything that occurred on the
21 record in the back.

22 THE COURT: Absolutely.
23 Everything is unsealed. Yes, absolutely.

24 MS. GODFREY: And can we have our
25 boxes back?

1 THE COURT: Yes. I will get
2 those to you probably very shortly.

3 Anything else?

4 MR. NOLAS: Not right now, Your
5 Honor. Thank you very much.

6 COURT OFFICER: This Court will
7 take a short recess.

8 -----

9 COURT OFFICER: This court is
10 back in session. Please cease all conversation
11 and take your seats.

12 MS. GODFREY: Your Honor, is it
13 possible to get a copy of --

14 THE COURT: Let me give you a
15 copy.

16 Ms. Godfrey, you should not take
17 this as this is my opinion.

18 MS. GODFREY: Okay.

19 THE COURT: It is what I read
20 into the record as the basis for my ruling.
21 As I said, I didn't want you try to write down
22 every word that I was saying, and I want you
23 all to understand that.

24 Does defense counsel want one as
25 well, or not?

1 **MR. NOLAS:** Sure.

2 **THE COURT:** I am not trying to
3 suggest that you should want one or not.

4 **MR. NOLAS:** Your Honor, I was not
5 taking notes, so, yes, it would be very
6 helpful. Thank you.

7 Is Your Honor going to do a
8 formal order, or --

9 **THE COURT:** I am sure the clerk
10 will write up a formal order granting the stay
11 of execution and granting a new penalty phase.

12 Is there anything else?

13 **MR. NOLAS:** No, Your Honor.
14 Thank you very much.

15 **COURT OFFICER:** This court is
16 adjourned.

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C E R T I F I C A T E

I HEREBY CERTIFY that the proceedings and evidence are contained fully and accurately in the Notes taken by me on the argument, hearing, or trial of the above cause, and that this is a correct transcript of same.

Lisa J. Amatucci, RPR, CSR

LISA J. AMATUCCI, RPR, CSR

**Senior Official Court Reporter
Court of Common Pleas
Philadelphia County**

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