

BY: Marc Bookman, Esquire
1315 Walnut Street, Suite 1331
Gregory Pagano, Esquire
1315 Walnut Street, 12th Floor
Philadelphia, PA 19107

COMMONWEALTH OF PENNSYLVANIA : COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION
CAPITAL CASE

VS. : CHARGE: MURDER, ETC.

KAREEM JOHNSON : CP-51-CR-1300424-2006

MOTION FOR DISCOVERY

Kareem Johnson was sentenced to death in 2007 for the murder of Walter Smith. He received a new trial on April 22, 2015 by agreement of counsel. Per Assistant District Attorney Michael Barry, the instant case remains capital. Per this Court's ruling of September 15, 2015, this motion sets forth a discovery request, which will be the subject of a hearing pursuant to this filing. The below Introduction will set out the remarkable background of this death penalty prosecution, supporting defense claims for discovery beyond that which has been provided by the Commonwealth.

INTRODUCTION

In the instant case, a red baseball hat¹ was seized by the

¹ There was a second hat in the case, a black hat worn by the decedent at the time he was shot in the head. This hat was not at the crime scene, but later tested positive for the decedent's blood.

Commonwealth as part of the crime scene immediately outside Dooner's Lounge at 29th Street and Somerset Avenue on December 15, 2002. During the opening statement of Mr. Johnson's trial, prosecutor Barry established the importance of the red hat to the Commonwealth's case:

So now with, I would submit, as certain evidence as can you find we know that that hat that was left at that scene in the middle of the street has Kareem Johnson's sweat on it and has Walter Smith's blood on it. Based on that evidence, we come to trial. (N.T. p.88, 6/20/07).

On the first day of the trial, Officer William Trenwith, assigned to the Crime Scene Unit for the past 15 years and with 30 years experience as a policeman, testified in the following way about the red hat that was laying, per testimony, 8-10 feet from the decedent's body:

Q: When you collected this hat, did you take any notice of blood on the hat?

A: There was small drops underneath the brim.

Q: Did that blood appear to be fresh?

A: Yes. (N.T. p.116, 6/20/07).

Shortly thereafter, prosecutor Michael Barry brought out through the officer's testimony that Trenwith had never seen blood travel so far from a victim's body (N.T. p.123, 6/20/07) – this testimony was used later in the trial by the prosecutor, who argued that the shooter was standing close to the decedent's body, and that the blood from the decedent's body splashed onto the brim of the shooter's hat.

The red hat was central to the Commonwealth's case – the Commonwealth claimed that the decedent's DNA (his blood) was on the hat. In closing, prosecutor Barry stated: "Nobody said the killer wore the hat. Do you know who says the killer wore the hat? Walter Smith says the killer wore the hat. He says it with his blood." (N.T. p.66, 6/22/07). At the sentencing hearing, the red hat again played a prominent role: "We know that he [Kareem Johnson] got in real close, within 2 ½ feet, close enough so that Walter Smith's blood could splash up onto the bill of the cap he was wearing." (N.T. p.72, 6/26/07).

But it was in the trial closing argument that Mr. Barry emphasized the neutral nature and evidentiary power of the red hat:

Do you know who says the killer wore the hat?
Walter Smith says the killer wore the hat. He says it
with his blood.

This is the killer's hat. This is the killer's hat. The crime scene tells you that. The physical evidence tells you that. Physical evidence. Physical evidence, what's out there. Physical evidence has no bias. Physical evidence cannot lie. Physical evidence does not want to lie. Physical evidence cannot be intimidated. Physical evidence cannot be killed. It is just out there. It is there and it says what it says. No influence from me. No inference from the defendant or defense. It just says what it says. This overwhelming physical evidence says that killer's hat was left out on the scene. (N.T. p. 66,68, 6/22/07).

While physical evidence cannot lie or have bias, the physical evidence in this case was used to badly mislead the

jury. Not only was there no fresh dripping blood on the red hat, there was **no blood at all**. Nor did the property receipt for the red hat indicate any blood at all, or even any suspicion of blood. (Exhibit A).

The red hat has other confusing aspects to it. There are three DNA reports about a sweat stain allegedly found on the red hat, each report approximately 5 weeks apart between April and June 2006. The first is unlabeled, the second is called a "Supplemental Report," and the third is labeled an "Amended Report." The first report does not incriminate Mr. Johnson, while the second and third do – yet no paperwork has been provided explaining these discrepancies; the reports simply change information.

The jury was also misled in another way as well, through the suggestion by the prosecutor that all of the testing leading to the arrest of Kareem Johnson was completed before Mr. Johnson was even a suspect in the case:

[T]he DNA testers...they have no interest on whether it is Kareem Johnson or somebody else. Of course, as we all know with all of these individuals, they did their examinations before Kareem Johnson was even the defendant on this case. So they don't have a thing one way or another to go after him.

This is flatly untrue: none of the testing was done until a criminal (Bryant Younger) named Kareem Johnson after he himself was facing life imprisonment in a federal drug case.

Given the misrepresentations in the evidence presented to the jury in 2007, the Commonwealth has not been forthright in its responses to discovery requests thus far. On January 19, 2011, an analysis of Property Receipt #9001079 (Exhibit B) indicated that there was no blood on the red hat (Exhibit A). It is unclear why this analysis was done, since there was no prior analysis indicating otherwise. However, the time period around 1/19/2011 is significant – a warrant for Mr. Johnson’s execution was signed on 1/14/11 (Exhibit C), and that warrant was stayed on 1/18/11 (Exhibit D). Thus, it is a reasonable inference that the report, dated 1/19/11 (there is a draft report dated 1/6/11) and addressed to the assigned detective and the District Attorney Homicide Unit, was in preparation for the execution warrant. If such is not the case, the hearing ordered by this Court will clarify the reason for the 1/19/11 report.

Nonetheless, when PCRA counsel sought discovery relating to the DNA evidence, the Commonwealth’s response, ***filed 16 months after being notified that there was no blood at all on the red hat***, was as follows:

Defendant’s request is a clear “fishing expedition” to attempt to locate evidence to see whether there is any basis to assert a speculative, as-yet-unbrought ineffectiveness claim relating to ***hypothetical exculpatory evidence*** regarding the DNA evidence. (emphasis added).

(Exhibit E).

The misrepresentations continued in this court. Undersigned

defense counsel had requested all activity sheets in the instant case – counsel first received activity sheets from a different homicide case, then received activity sheets on the instant case that ended in early January 2003, whereas Mr. Johnson was not arrested until May 22, 2006. Thus, the Commonwealth had not and as yet has not provided activity sheets covering three years and five months of activity – during this period a number of crucial witnesses were interviewed, three separate DNA reports were generated, and Mr. Johnson was identified and arrested.

On September 15, 2015, the following exchange took place in front of this Court:

THE COURT: Are you satisfied, based on your investigation and your inquiry at the Homicide Unit, that you have turned over everything that you have and everything that exists in terms of activity sheets?

MR. BARRY: I am, your Honor. I had no activity sheets in my trial file when this came back. That was why this was delayed. We actually sent the activity sheets to one of the mitigator cases -- for what could be one of the aggravator cases. And I didn't realize that. My paralegal did that. I ordered the homicide file. I didn't get it until the Friday before Labor Day. These were all the activity sheets that were in there. I checked with Detective Burns, and he said there wouldn't be any activity sheets, that he's aware of. I looked through the entire homicide file, and I did not find any other activity sheets. I do not believe Mr. Johnson was ever a fugitive on this case. He was in custody on this case when he was charged, so there would be no Fugitive Squad activity sheets. That's everything I have. (N.T. 4-5, 9/15/15).

Once again, the Commonwealth has made a misrepresentation in the

instant capital case. Exhibit F was in the possession of trial counsel from 2006² - it is an activity sheet dated 5/22/06, and it documents Kareem Johnson's arrest at Graterford Prison by a task force, as well as other details, such as his preliminary hearing date and the fact that he did not make a statement when arrested. It also indicates that the case was now being handled by SIU, rather than Platoon #2. The Commonwealth's representation that there were no other activity sheets, while seemingly illogical and contrary to counsel's considerable experience, is also provably incorrect.

Discovery Request

Based on the serial misrepresentations that have plagued this case since Kareem Johnson's arrest nearly 10 years ago, defense counsel now requests the following discovery:

- 1) **All activity sheets** - undersigned counsel have had decades of experience with homicide paperwork, and have never seen a single case where activity sheets did not document every significant action in a homicide prosecution. In the instant case, the activity sheets provided by the prosecution *do not even mention* Kareem Johnson's name. In addition, there is considerable activity that takes place in the instant investigation that has not been documented

² Post-conviction counsel obtained Exhibit F from the trial file of Bernard Siegel. This, of course, can be documented if the chain of custody of Exhibit F becomes an issue.

on activity sheets: Aside from the provably false statement already made on the record (noted in the discussion above), the Commonwealth has failed to turn over activity sheets discussing any witness contacts, any DNA gathering, any testing, or anything at all that occurred between 1/5/03 and today, even though the record indicates that considerable DNA testing was done, and a number of witnesses (including Bryant Younger, the informant in the instant case, and someone who is unidentified but spoken to on 1/9/06, as per the affidavit of probable cause) were interviewed;

2) All taskforce paperwork involving the instant investigation

– the activity sheet from 5/22/06 (not supplied to undersigned counsel) indicates that Kareem Johnson was arrested by “taskforce” detectives. The platoon handling the case, per this new activity sheet, is SIU, rather than Platoon #2, which was indicated by all other activity sheets already provided. In addition, Detective Burns, testifying at the preliminary hearing in the instant case, indicates that he has been assigned to a “taskforce” looking at cases in the area where a murder related to this case occurred (N.T. p.9, 10/3/2006). Thus, all taskforce paperwork compiled in the investigation of the instant case is relevant;

3) **The homicide file** – Given the misrepresentations that have taken place over the course of 10 years at Kareem Johnson’s trial, in his post-conviction procedures, and in the instant pretrial discovery, the only way defense counsel and this Court can be assured that constitutional discovery procedures are now being complied with is by a review of the entire homicide file. As *Kyles v. Whitley*, 514 U.S. 419 (1995), makes clear, it is a prosecutor’s obligation to ensure that all exculpatory information in the hands of any law enforcement official is provided to the defense (“This...means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”) *Kyles v. Whitley*, 514 U.S. 419 at 437. The facts established in the introduction to this motion compel the release of the homicide file.

4) **All DNA testing information relating in any way to the red and black hats, all protocols and manuals relating in any way to the instant testing, and all information exchanged between the criminalistics laboratory and any law enforcement personnel** – the errors in DNA testing are well documented in the Introduction above, and allegations of protocol violations, errors in testing, and overt mistakes regarding incorrect assumptions and conclusions regarding

blood and sweat evidence have already been established in post-conviction litigation in the instant case.

5) In addition to the above requests, Mr. Johnson makes the following specific inquiries:

a. Any subsequent interviews with Bryant Younger – the 75-483 provided to counsel indicates that there will be further interviews;

i. His F.B.I. extract;

ii. The full history and extent of his cooperation in this and any other case;

iii. The full details of any agreement authorized or promised by the Commonwealth in exchange for any statements or testimony made by Younger;

b. Any statement by Terrell Brice – he is mentioned in the statement of Craig Butler;

c. Any statement by "Dink," who is referenced in the statement of Raqib Witherspoon, as well as all information as to Dink's identity;

i. All information as to why Raqib Witherspoon was in the Homicide Unit of the Philadelphia police department;

d. Any statement by "Shameeka," "Keisha," "LaKeisha," or Sandra Yvonne Stewart, all of whom are mentioned in the statement of Rhonda Smith;

- i. All evidence of cards or letters sent to Rhonda Smith by "LaKeisha;"
 - e. Any statement by Clinton Robinson aka "Boobie" or Carnell Chamberlain, who is referenced in the affidavit of probable cause;
 - f. The full details of any agreement authorized or promised by the Commonwealth in exchange for any statements or testimony made by Tyreek Mathis;
 - g. Any statements by "Taneesha," Kairi Brooks, or Taneisha Wiggins, all of whom are mentioned in the statement of Tyrique Smith;
 - h. Any statement by Paula Turner, referenced in the statement of Tyrone Smith;
 - i. Any statement taken on 1/9/06 – this date is referenced in the affidavit of probable cause as the date of an unidentified witness's statement;
 - j. A complete version of the affidavit of probable cause that is not cut off at the bottom;
 - k. A complete version of the scene notes – the notes provided end in the middle of a sentence, indicating that there are more scene notes not yet provided;
- 6) **The Commonwealth maintains its intention to seek the death penalty against Kareem Johnson. Thus the following discovery is requested, based on *Rompilla v. Beard*, 545**

U.S. 374 (2005):

- a. Notice of the aggravating factors the Commonwealth intends to prove;
- b. Complete discovery in the killing of Faheem Thomas-Childs;
 - i. All documents in the hands of any law enforcement officials regarding the criminal background, behavior or convictions of the "Broaster Brothers," who are alleged to be in a shoot-out with Kareem Johnson at the time the victim was killed via crossfire;
- c. Notice of any other crimes the Commonwealth intends to prove are relevant to show a significant history of violent felonies on the part of Mr. Johnson;
- d. All witnesses allegedly endangered in the course of the instant homicide;

Respectfully Submitted,

Marc Bookman, Esq.

Gregory Pagano, Esq.