

**IN THE
SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT**

290 EDA 2019

**COMMONWEALTH OF PENNSYLVANIA
Appellee**

V.

**WESLEY COOK, a/k/a MUMIA ABU-JAMAL
Appellant**

COMMONWEALTH'S SURREPLY BRIEF FOR APPELLEE

***Nunc Pro Tunc* Defense Appeal from Prior Orders of the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, Dismissing Defendant's PCRA Petitions Filed in Docket No. CP-51-CR-0113571-1982.**

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ARGUMENT

DEFENDANT’S REPLY BRIEF FAILS TO DEMONSTRATE HE TIMELY RAISED THE CLAIM UPON WHICH RELIEF WAS GRANTED.

Defendant has filed a reply brief in which he attempts to demonstrate that he timely raised the claim upon which PCRA relief was granted. Defendant’s arguments are unavailing.

In his fifth PCRA petition, defendant sought reinstatement of his prior PCRA appellate rights under *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016). As the Commonwealth explains in its principal brief, the PCRA court initially concluded it had jurisdiction over the case because the *Williams* decision itself supposedly constituted a newly-discovered fact (*see* Opinion, Tucker, J., filed Dec. 27, 2018, pp. 9, 11, 13). The PCRA court, however, ultimately rejected defendant’s *Williams* claim. In fact, as the Pennsylvania Supreme Court’s decision in *Commonwealth v. Reid*, 235 A.3d 1124 (Pa. 2020), would subsequently make clear, *Williams* does not provide an exception to the time-bar. Thus, defendant’s fifth PCRA petition, which he filed decades after his judgment of sentence became final, was untimely and should have been dismissed.

Although the PCRA court rejected defendant’s *Williams* claim, it granted him relief based on a different claim—one that defendant has conceded was a “new” “second claim” that was “independent of *Williams*” (Reply Brief for Appellant, 8; defendant’s amended PCRA petition, filed July 9, 2018, ¶ 30; N.T. 10/29/18, 7).

That claim was one of newly-discovered evidence based on a letter written by District Attorney Castille that was disclosed to the defense in October of 2017, while defendant's fifth PCRA petition was pending before the lower court. Defendant, however, did not raise that new claim until he filed his amended PCRA petition in July of 2018, nine months after he received the letter and well beyond the sixty-day period then in effect for raising a claim under a time-bar exception. *See* 42 Pa.C.S.A. § 9545(b)(2) (“[a]ny petition invoking [a time-bar exception] shall be filed within 60 days of the date the claim could have been presented”) (version of statute effective to Dec. 23, 2018).¹ Thus, the Commonwealth argues in its principal brief, defendant did not timely raise the claim, and the PCRA court was barred from granting relief based on it.

Defendant asserts in reply that there are “special amendment rules” that applied to the petition in which he raised his newly-discovered-evidence claim based on the letter, and accuses the Commonwealth of “entirely” ignoring those rules (Reply Brief for Appellant, 3-4). He asserts that under those rules, “an amendment to a pending *and timely* PCRA petition will be deemed timely regardless of the

¹ In its Brief for Appellee, the Commonwealth inadvertently wrote that defendant raised this claim *seven* months after he received the letter. Defendant actually raised the claim *nine* months later, *i.e.*, seven months after the sixty-day period expired.

provisions in the PCRA statute” (*id.* at 3) (emphasis added). The Commonwealth agrees with this statement of law.

The problem for defendant, however, is that his fifth PCRA petition, which was based on *Williams*, was *not* timely. It was filed twenty-five years after his judgment of sentence became final, and it did not meet any time-bar exception. Thus, his subsequent petition, in which he raised for the first time his newly-discovered evidence claim based on the letter, was not an amendment to a *timely* PCRA petition, and the so-called “special amendment rules” did not apply.²

Defendant complains that he “was entitled” to rely on the PCRA court’s ruling that it had jurisdiction over the initial petition based on *Williams*, and it would be “grossly unfair” to not treat the later petition as an amendment of a timely one (Reply Brief for Appellant, 4). He says this is because he had no reason to know the PCRA court’s timeliness ruling might be legally wrong, as *Reid* would subsequently establish. Yet defendant did have fair warning of the issue: the Commonwealth specifically argued in the PCRA court that the *Williams* decision did not constitute a newly-

² Consider, by contrast, the cases defendant cites in support of his assertion that the time-bar provisions do not apply to amended petitions. *See Commonwealth v. Crispell*, 193 A.3d 919 (Pa. 2018); *Commonwealth v. Flanagan*, 854 A.2d 489 (Pa. 2004); and *Commonwealth v. Padden*, 783 A.2d 299 (Pa.Super. 2001). In those cases, the defendants filed amendments to first post-conviction petitions that were timely *per se* because they were filed before the time-bar went into effect (*Flanagan*), within one year of when the time-bar went into effect (*Crispell*), or within one year of when the judgment of sentence became final (*Padden*).

discovered fact or provide any other basis for invoking a time-bar exception and that, accordingly, defendant's initial petition was untimely (*see* Commonwealth's Motion to Dismiss, filed Mar. 30, 2017, pp. 11-20; N.T. 4/24/17, 17-30, 38-39, 43). Although the PCRA court rejected the Commonwealth's arguments, defendant, who is represented by counsel, should have known that the court's contested ruling regarding the alleged timeliness of that initial petition might not survive. Thus, it was incumbent on him to protect his interests by complying with the time-bar provisions with respect to his new claim rather than relying exclusively on the court's ruling regarding the initial petition.

Defendant also argues that he timely raised the claim upon which relief was granted—*i.e.*, his “new” “second claim” that was “independent of *Williams*”—because he mentioned the Castille letter in a letter he sent the PCRA court less than sixty days after obtaining the Castille letter. Nowhere in his letter to the PCRA court, however, did he suggest that he was raising any claim other than the *Williams* one.

Defendant began the letter by saying, “The constitutional issue before this Court is whether former Justice Castille ‘had significant, personal involvement . . . in a critical decision regarding’ Mr. Abu-Jamal’s case when Justice Castille was the elected District Attorney” (defendant’s Oct. 19, 2017 letter to the PCRA court) (quoting *Williams*; omission supplied by defendant). And, he repeatedly described the Castille letter as evidence of Castille’s “significant, personal involvement” in

this case (*id.*). Of course, the phrase “significant, personal involvement” is the key phrase the United States Supreme Court used in *Williams* to assess the constitutional issue presented.

Defendant’s references to the Castille letter in his letter to the PCRA court were specifically directed at his *Williams* claim. Nowhere in the letter did he suggest that he was raising a “new” “second claim” that was “independent of *Williams*.” Additionally, the letter did not purport to be an amendment to an earlier PCRA petition or a new PCRA petition, as defendant now attempts to style it. The point of the letter was to address the scope of the PCRA court’s discovery order as it related to the *Williams* claim and whether the Commonwealth was fully complying with the order. Defendant was claiming that the fact that the Commonwealth had not disclosed the Castille letter during earlier rounds of PCRA discovery showed it was taking too narrow a view of the order. He was not presenting substantive argument with respect to his *Williams* claim or any other one. His attempt to now characterize his letter to the court as a basis for finding that he fairly and timely raised the new claim he would not go on to raise in his amended petition until nine months later, is simply without support in the record or the law.

None of the arguments defendant advances in his reply brief for finding that he timely raised the claim upon which relief was granted survives scrutiny. As the Commonwealth states in its principal brief, because defendant did not timely raise

the claim, the PCRA court was statutorily barred from granting relief and reinstating his appellate rights.

CONCLUSION

For the reasons stated in the Commonwealth's Brief for Appellee and this Surreply Brief, the Commonwealth respectfully requests that this Court affirm the orders denying post-conviction relief.

Respectfully submitted,

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