IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 574 EAL 2018
	:	
Respondent	:	Petition for Allowance of Appeal from the Order of the Superior Court
	:	
v.	:	
	:	
MICHAEL RICHARDS,	:	
	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 1st day of May, 2019, the Petition for Allowance of Appeal is **DENIED**.

**NON-PRECEDENTIAL DECISION –
SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
vs.	:	
MICHAEL RICHARDS,	:	No. 3478 EDA 2017
Appellant	:	

Appeal from the PCRA Order October 6, 2017
In the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-CR-1200841-1999

BEFORE: PANELLA, J., PLATT*, J., and STRASSBURGER*, J.

MEMORANDUM BY PLATT, J.:

FILED NOVEMBER 06, 2018

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*Retired Senior Judge assigned to the Superior Court.

Appellant, Michael Richards, appeals from the order dismissing his second petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546, as untimely. We affirm.

The relevant facts and procedural history of this case are as follows. On May 30, 2001, a jury found Appellant guilty of first-degree murder, robbery, intimidation of a witness, and possession of an instrument of a crime. On August 6, 2001, the trial court sentenced Appellant to an aggregate term of life imprisonment, plus not less than eighteen nor more than thirty-six months' incarceration. This Court affirmed the judgment of sentence on April 7, 2003, and our Supreme Court denied further review on December 22, 2003. (See *Commonwealth v. Richards*, 828 A.2d 402 (Pa. Super. 2003) (unpublished memorandum), *appeal denied*, 841 A.2d 530 (Pa. 2003)). The PCRA court dismissed Appellant's first PCRA petition as untimely on September 2, 2005. This Court affirmed its order on September 22, 2006, and our Supreme Court denied further review on June 6, 2007. (See *Commonwealth v. Richards*, 913 A.2d 945 (Pa. Super. 2006) (unpublished memorandum), *appeal denied*, 926 A.2d 973 (Pa. 2007)).

Appellant filed the instant, counseled PCRA petition on May 4, 2017. Appellant attached two affidavits to the petition; one submitted by his father, Westmore Richards (dated October 2015), and another by a family friend, Timothy Zeigler (dated April 26, 2017). Both affidavits recount statements allegedly made by the jury foreperson to Westmore Richards and his wife in the lobby of the courthouse on the last day of trial. The affiants claim that the foreperson stated: "I hate Jamaicans all they do is kill people and sell drugs they should all go back where they come from[.]" (Affidavit of

Westmore Richards, 10/15, at l);[1] (***see also*** Affidavit of Timothy Zeigler, 4/26/17, at 1) (claiming jury foreperson said: "I don't like Jamaicans ... I don't like them ... I don't know why they let them over here."). Westmore Richards further averred that he immediately reported this information to defense counsel, who indicated that nothing could be done about the juror's comments because the trial had ended. (***See*** PCRA petition, 5/04/17, at 3 ¶5). Appellant argues that, in light of these affidavits, he is entitled to relief based on the United States Supreme Court's decision in ***Pena-Rodriquez v. Colorado,*** 137 S. Ct. 855 (2017).[2]

The PCRA court entered its order and opinion dismissing the petition on October 6, 2017, after issuing notice of its intent to do so. ***See*** Pa.R.A.P. 907(1). This timely appeal followed.[3]

Appellant raises the following question for our review: "[Whether] Appellant's present PCRA Petition is not untimely and the case should be remanded to the [PCRA court] for an evidentiary hearing because he is entitled to relief under ***Pena-Rodriquez***[, ***supra?***]" (Appellant's Brief, at 3).

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[1] Appellant was born in Jamaica.

[2] The ***Pena-Rodriquez*** Court held that, "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." ***Pena-Rodriquez, supra*** at 869. The no-impeachment rule refers to the "general rule [that] has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations." ***Id.*** at 861.

[3] The PCRA court did not order Appellant to file a concise statement of errors complained of on appeal. On October 25, 2017, it re-entered the opinion it filed on October 6, 2017. ***See*** Pa.R.A.P. 1925.

"Our standard of review of the denial of a PCRA petition is limited to examining whether the record evidence supports the court's determination and whether the court's decision is free of legal error." ***Commonwealth v. Shiloh***, 170 A.3d 553, 556 (Pa. Super. 2017) (citation omitted). "The timeliness of a PCRA petition is a jurisdictional requisite." ***Id.*** at 557 (citation omitted).

A petitioner must file any PCRA petition, including a second or subsequent petition, within one year of the date the underlying judgment becomes final. ***See*** 42 Pa.C.S.A. §9545(b)(1). The exceptions to the PCRA time-bar allow for three limited circumstances under which the late filing of a petition will be excused. ***See id.***[4] "If the [PCRA] petition is determined to be untimely, and no exception has been pled and proven, the petition must be dismissed without a hearing because Pennsylvania courts are without jurisdiction to consider the merits of the petition." ***Commonwealth v. Jackson***, 30 A.3d 516, 519 (Pa. Super. 2011), *appeal denied*, 47 A.3d 845 (Pa. 2012) (citation omitted).

Instantly, Appellant's judgment of sentence became final on March 22, 2004 when his time to file

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[4] The exceptions to the timeliness requirement are:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S.A. § 9545(b)(1)(i)-(iii).

a writ of *certiorari* with the United States Supreme Court expired. ***See*** U.S. Sup.Ct. R. 13; 42 Pa.C.S.A. § 9545(b)(3). Therefore, Appellant had until March 22, 2005, to file a timely PCRA petition. ***See*** 42 Pa.C.S.A. § 9545(b)(1). Because Appellant filed the instant petition on May 4, 2017, it is untimely on its face, and the PCRA court lacked jurisdiction to review it unless he pleaded and proved one of the statutory exceptions to the time-bar. ***See*** 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii).

As previously discussed, Appellant argues that he is entitled to relief pursuant to retroactive application of ***Pena-Rodriguez,*** thereby invoking the newly recognized and retroactively applied constitutional right exception at section 9545(b)(1)(iii). **(See** Appellant's Brief, at 7, 9, 11-13).

> Our Supreme Court has set forth a two-part test to determine the applicability of Section 9545(b)(1)(iii) to a new decision:
>
> > Subsection (iii) of Section 9545 has two requirements. First, it provides that the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or this [C]ourt after the time provided in this section. Second, it provides that the right "has been held" by "that court" to apply retroactively. Thus, a petitioner must prove that there is a "new" constitutional right and that the right "has been held" by that court to apply retroactively. The language "has been held" is in the past tense. These words mean

> that the action has already occurred, *i.e.*, "that court" has already held the new constitutional right to be retroactive to cases on collateral review. **By employing the past tense in writing this provision, the legislature clearly intended that the right was already recognized at the time the petition was filed.**

Commonwealth v. Kretchmar, 189 A.3d 459, 463 (Pa. Super. 2018) (citation omitted; emphasis added).

Therefore, since Appellant's PCRA petition is untimely, he must demonstrate that either the United States Supreme Court or the Pennsylvania Supreme Court has held that ***Pena-Rodriguez*** applies retroactively in order to satisfy section 9545(b)(1)(iii). ***See Kretchmar, supra*** at 463. Because at this time, no such holding has been issued, Appellant cannot rely on ***Pena-Rodriguez*** to invoke that timeliness exception. Accordingly, we conclude that Appellant has failed to establish that his untimely petition fits within one of the three exceptions to the PCRA's time-bar. Accordingly, the PCRA court properly dismissed the petition without a hearing. ***See Jackson, supra*** at 519.

Order affirmed.

Judgment Entered.

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Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/6/18

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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CP-51-CR-1200841-1999 (PCRA)
v.	:	
MICHAEL RICHARDS,	:	

OPINION

GLAZER, J. October 6, 2017

INTRODUCTION

The instant counseled petition, defendant's second, was filed on April 21, 2017. Because the petition is untimely, this court is without jurisdiction and it must be dismissed.

PROCEDURAL HISTORY AND FACTS

The procedural and factual histories of this case have been discussed previously in opinions issued by this court on December 10, 2001 and September 2, 2005. Those opinions are incorporated herein by reference.

In his second petition, defendant seeks to invoke two of the three timeliness exceptions to the one year time limitation for filing a claim of Post-Conviction relief—the newly-discovered evidence exception and the new constitutional right exception.

The evidence which forms the basis of defendant's petition are two affidavits filed by his father, Westmore Richards, and a family friend, Timothy Zeigler. The affidavits are dated October 2015 and April 26, 2017, respectively, and recount statements allegedly made by the jury foreperson on the last day of trial. The affiants claim that the jury foreperson approached Mr. Richards and his wife in the courthouse lobby and said, "I hate Jamaicans all they do is kill people and sell drugs they should all go back where they come from..." Westmore Richards affidavit, ¶3. According to Timothy Zeigler, the woman said "words to the effect of, 'I don't like Jamaicans', 'I don't like them' and 'I don't know why they let them over here'." Timothy Zeigler affidavit, pg. 1.

Although these statements were known to defendant on the last day of trial, he argues they constitute newly-discovered evidence because a court could not consider the evidence prior to the Supreme Court's decision in *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 862 (Mar. 6, 2017). Therefore, because the evidence was presented within sixty days of the date in which the claim could have first been presented, defendant argues his petition is timely. However, as is more fully explained below, defendant's reliance on *Pena-Rodriguez* is misplaced.

I. The *Pena-Rodriguez* Decision

In *Pena-Rodriguez*, the United States Supreme Court encountered a situation where two jurors reported that, during deliberations, a fellow juror, "juror H.C.", made racially charged statements related to the defendant. The Court recounted those statements as follows:

> "According to the two jurors, H.C. told the other jurors that he 'believed the defendant was guilty because, in [H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." The jurors reported that H.C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, 'I think he did it because he's Mexican and Mexican men take whatever they want.' According to the jurors, H.C. further explained that, in his experience, 'nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.' Finally, the jurors recounted that Juror H.C. said that he did not find petitioner's alibi witness credible because, among other things, the witness was 'an illegal.' (In fact, the witness testified during trial that he was a legal resident of the United States.)"

Pena-Rodriguez v. Colorado, 137 S.Ct. 855, 862 (Mar. 6, 2017) (citations omitted).

Upon learning of juror H.C.'s bias, the defendant unsuccessfully petitioned the trial court for a new trial. In denying the defendant's motion, the trial court cited the "no-impeachment" doctrine embodied in Colorado Rule of Evidence 606(b), which "generally prohibits a juror from testifying as

to any statement made during deliberations in a proceeding inquiring into the validity of the verdict." *Id* After the defendant exhausted his state remedies, the United States Supreme Court granted certiorari "to decide whether there is a constitutional exception to the no-impeachment rule for instances of racial bias." *Id.* at 863. Emphasizing the importance of eradicating racial bias from the judicial system and the right to a trial by an impartial jury guaranteed by the Sixth Amendment, the Court ruled there was such an exception. *Id.* at 869.

The Court did not, however, provide a rigid standard to guide lower courts in determining when evidence of racial bias is sufficient to warrant setting aside a verdict and granting a new trial. *Id.* at 870. Rather, Justice Kennedy decided to leave that "matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence." *Id.* at 869. He further noted:

> "Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar... there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations... the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict."

Id.

Analyzing the factual scenario in *Pena-Rodriguez*, Justice Kennedy determined the evidence of racial bias was sufficiently serious to

warrant an exception to the no-impeachment rule. Juror H.C.'s statements were "egregious and unmistakable in their reliance on racial bias" to convict the defendant. *Id.* at 870. He further noted how juror H.C. not only allowed his racial bias to convict the defendant, "but he also encouraged other jurors to join him in convicting on that basis." *Id.*

In making its determination, the Court weighed the source and reliability of the evidence presented as well. Prior to the jury being dismissed, the trial court read a mandatory jury instruction that informed the jury they were under no obligation to speak to the lawyers involved in the case and provided them with an avenue to report harassment that may occur relating to their role in the case. *Id.* However, despite knowing they were under no obligation to speak, two jurors approached the defendant's counsel "within a short time after the verdict" and "relay[ed] their concerns about H.C.'s statements." *Id.*

Recognizing the reliability and significance of the evidence presented, Justice Kennedy stated, "When jurors disclose an instance of racial bias as serious as the one involved in this case, the law must not wholly disregard its occurrence." *Id.* Thus, the case was remanded to the trial court for consideration of the evidence to determine whether the defendant had a right to a new trial.

DISCUSSION

Pursuant to 42 Pa.C.S.A § 9545(b)(1), a convicted defendant has one year from the date his or her judgment became final to file a petition for Post-Conviction relief before the trial court loses jurisdiction over the petition. There are, however, three exceptions to that rule:

> "(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petition and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively."

42 Pa.C.S.A. § 9545(b)(1)(i)-(iii).

These exceptions are commonly referred to as: (i) the "government interference exception", (ii) the "after-discovered evidence exception", and (iii) the "new constitutional right exception." A petition invoking one of these exceptions must be filed "within 60 days of the date the claim could have been presented." *Id.* § 9545(2).

Here, defendant concedes his petition is filed beyond the one-year filing deadline. Nevertheless, he claims this court has jurisdiction to hear his petition because it satisfies the after-discovered evidence and new constitutional right exceptions to the filing deadline, and was presented within 60 days of the date it could have been presented. However, defendant's argument is misplaced.

This court is without jurisdiction to hear defendant's petition for Post-Conviction relief. The

petition is filed more than one year from the date defendant's judgment of sentence became final, and none of the exceptions to the one year deadline enumerated by 42 Pa.C.S.A. § 9545(b)(1) apply to defendant's case. As further explained below, the petition is dismissed.

I. The Proffered Evidence Does Not Qualify as After-Discovered Evidence

Defendant mistakenly relies upon a Supreme Court decision and evidence that has been within his knowledge since the conclusion of his trial in seeking relief under the after-discovered evidence exception. A Supreme Court decision is not a "fact" and statements that a defendant has been aware of since the time of trial cannot be the basis of a PCRA petition invoking the after-discovered evidence exception.

A. Defendant had knowledge of the proffered statements prior to the conclusion of his trial.

In support of his petition for a new trial, defendant proffers two affidavits prepared by his father, Westmore Richards, and a family friend, Timothy Zeigler. While they are dated October 2015 and April 26, 2017, respectively, they each recount statements supposedly made by the jury foreperson to defendant's family on the last day of trial in May 2001.

In order to qualify for the "after-discovered evidence" the evidence must have been "unknown to the petitioner" and of such a nature that it "could not have been ascertained by the exercise of due diligence." 42 Pa.C.S.A. §9545(b)(1)(ii). Evidence of

statements that defendant has been aware of for sixteen years does not satisfy that standard.

B. A Supreme Court decision is not a newly-discovered "fact".

Recognizing he has been aware of these statements since 2001, defendant attempts to argue the claim is timely because, prior to the Supreme Court's holding in *Pena-Rodriguez*, the juror's statements could not be considered due to the no-impeachment rule. Therefore, the argument follows, the claim was presented within sixty days of the date in which it could have first been presented.

While it is true that prior to *Pena-Rodriguez* this court would likely have been prohibited from considering the juror's statement in a petition for a new trial, the same was true of the defendant in *Pena-Rodriguez* at the conclusion of his trial. Defendant simply chose not to present the evidence at the end of his trial; whereas, in *Pena-Rodriguez* the defendant chose to challenge the constitutionality of the no-impeachment rule in a case involving racial bias on direct appeal. Furthermore, a judicial opinion is not an unknown "fact" capable of triggering the newly-discovered fact exception to the timeliness requirement of 42 Pa.C.S.A. §9545(b)(1). *See Comm. v. Watts*, 23 A.3d 980, 986 (Pa. 2011).

In short, the newly-discovered fact exception requires that "the facts upon which the claim is predicated were *unknown* to the petitioner." 42 Pa.C.S.A. §9545(b)(1)(ii) (emphasis added). These facts were known to defendant in 2001. Therefore, they do not qualify as newly- discovered facts.

II. *Pena-Rodriguez Does Not Provide Defendant With Relief*

In *Pena-Rodriguez,* the Court encountered *reliable* evidence of one juror's obvious racial animosity with which he permeated the jury room during the course of deliberations. That is not the case here. Here, this court is presented with unreliable evidence of statements of questionable provenance that were not made within the context of jury deliberations. As such, this court finds this factual record is not analogous to that of *Pena-Rodriguez.* Therefore, defendant's petition also does not satisfy the new constitutional right exception to the PCRA timeliness bar.

A. *Pena-Rodriguez* does not have retroactive effect

Pursuant to 42 Pa.C.S.A. § 9545(b)(1)(iii), a petition may avoid the one year filing deadline if it proves "the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and *has been held by that court to apply retroactively*(emphasis added).

The only way the Supreme Court can make its ruling retroactive is by specifically stating it is to be applied retroactively in its holding. *See Comm. v. Abdul-Salaam,* 812 A.2d 497, 502 (Pa. 2002). ("the only way the Supreme Court can, by itself 'lay out and construct' a rule's retroactive effect...is through a holding.") *citing Tyler v. Cain,* 533 U.S. 656, 663 (2001). Thus, "a new rule of constitutional law is not 'made retroactive to cases on collateral review' unless the Supreme Court has held it to be retroactive." *Id.*

The Court in *Pena-Rodriguez* did not declare its holding was to apply retroactively to cases on

collateral review. Therefore, its holding is inapplicable to defendant.

B. Even if *Pena-Rodriguez* did apply retroactively, it would not provide defendant relief.

When it recognized an exception to the no-impeachment rule, the Court specifically noted that "not every offhand comment" will be sufficient to trigger an exception to the no-impeachment rule. *See Pena-Rodriguez*, 137 S.Ct. at 869. The Court decided to leave it to the "substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the provided evidence" to determine whether the statement shows "racial animus was a significant motivating factor in the juror's vote to convict." *Id.* In this court's discretion, the suspect timing, content, and source of the affidavits convinces this court that this case is unlike *Pena-Rodriguez*.

First, the timing of the presentation of this evidence is suspect. In *Pena-Rodriguez*, the evidence of racial animus was immediately brought to the attention of the trial counsel, and then the trial court, at the end of trial. Here, the affidavits were prepared in October 2015 and April 2017, and recount a conversation that took place fourteen and sixteen years ago, respectively. The long gap in time between the event and its memorialization does not lend confidence to the reliability of the statements.

Beyond their suspicious timing, the affidavits lack specificity. Neither identifies the juror by name, and defendant does not elucidate the steps he has taken to ascertain her identity. Further, while each affiant generally avers that the juror stated she hates Jamaicans, they do not provide clear and

specific quotes of the juror's statements—as was the case in *Pena-Rodriguez*.

Lastly, the source of the evidence is suspicious. Unlike in *Pena-Rodriguez* where juror H.C.'s statements were reported by two impartial jurors, the affidavits here were submitted by defendant's father, Westmore Richards, and family friend, Timothy Zeigler. Due to their relationship with defendant, this court cannot accord these affidavits the same weight as if they were provided by two impartial jurors. Moreover, it seems Timothy Zeigler had the opportunity to read the affidavit of defendant's father prior to preparing his own affidavit, which clouds his credibility even further.[1]

Furthermore, even if this exchange did occur, this court is unable to conclude that the juror's alleged racial animus toward Jamaicans was a significant motivating factor in her decision to convict defendant. First, unlike in *Pena-Rodriguez*, where the statements took place during jury deliberations and arguably had the effect of tainting the entire jury, these statements allegedly took place in the courthouse lobby, outside the presence of other jurors. Second, it is worth noting that defendant has argued three times—before the Pennsylvania Superior Court, the Eastern District of Pennsylvania, and the Third Circuit Court of Appeals—that he was prejudiced by the prosecutor characterizing him as a "Jamaican drug dealer". Each time, however, the courts rejected defendant's argument recognizing the "overwhelming evidence" establishing defendant's guilt.

This court is without evidence suggesting the jury foreperson took her alleged animus with her

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[1] *See* Timothy Zeigler affidavit, pg. 2 ("I have also read the Affidavit executed in October 2015 by Westmore Richards. The content of that Affidavit is true and correct to the best of my recollection.")

into the deliberation room. While these statements, if true, are very troubling to this court, without evidence suggesting what occurred in the deliberation room or evidence from an unbiased source, this court cannot say that racial animus was a significant motivating factor in the juror's decision to convict defendant. This is not the situation in *Pena-Rodriguez* where the juror said, in deliberations, "I think he did it *because he's Mexican...*" *Pena-Rodriguez*, 137 S.Ct. at 862 (emphasis added).

Therefore, taking all of these factors into consideration, this court finds that the evidence proffered by defendant does not meet the standard of proving racial animus was any factor, let alone a significant motivating factor, in the decision to convict. As such, defendant's petition is dismissed as untimely.

BY THE COURT:

_____

GLAZER, J

BURTON A. ROSE, ESQUIRE
Identification # 15724
1731 Spring Garden Street
Philadelphia, PA 19130
(215) 564-5550

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
vs.	:	
MICHAEL RICHARDS,	:	POST CONVICTION RELIEF ACT
Petitioner	:	CP-51-CR-1200841-1999

TO THE HONORABLE JUDGES OF THE COURT OF COMMON PLEAS OF PHILADELPHIA:

PETITION FOR A NEW TRIAL UNDER THE POST CONVICTION RELIEF ACT

COMES NOW, Michael Richards, Defendant in the above captioned matter and Petitioner herein, by his attorney, Burton A. Rose, Esquire, and hereby respectfully moves this Honorable Court to grant a new trial under the Post-Conviction Relief

Act, 42 Pa.C.S. §9541 et seq, and in support thereof represents the following:

1. Your Petitioner is Michael Richards, who is presently incarcerated at the State Correctional Institution at Rockview, No. ET-1385, serving a judgment of sentence imposed upon him by the Honorable Gary S. Glazer on May 31, 2001 on charges of Murder of the First Degree, Robbery, Possession of an Instrument of Crime and Intimidation of a Witness.

2. At trial of this case, there was significant evidence that the Petitioner was born in Jamaica, ran a drug house with another group of Jamaican men in the neighborhood where the homicide occurred and employed other Jamaicans to run that drug business. During opening and closing arguments, the prosecutor referred to the Petitioner as "a Jamaican drug dealer" and noted some witnesses knew him as "Jamaica Mike". The prosecutor also stated the case was about "a murder involving drugs", motivated by anger over Petitioner's loss of money due to the victim's irresponsible behavior. On direct appeal, the Petitioner argued trial counsel had been ineffective in failing to request a jury instruction limiting the use of references to his nationality and to drug activities as this might suggest a tendency towards violent behavior. The Superior Court affirmed the conviction on the grounds that the Petitioner suffered no prejudice, even if trial counsel had been ineffective. According to the Superior Court, the Petitioner's involvement in the sale of drugs would have been harmless error. Commonwealth v. Richards, 828 A. 2d 402 (Pa. Super. 2003). The Supreme Court of Pennsylvania denied a timely Petition for Allowance of Appeal. Commonwealth v. Richards, 841 A. 2d 530 (Pa. 2003).

3. The Petitioner has previously filed a PCRA Petition via the undersigned counsel on April 15, 2005 which was denied by Judge Glazer on September 2, 2005. On September 26, 2005, an appeal was taken to the Superior Court of Pennsylvania which affirmed the denial of PCRA relief on September 22, 2006. A subsequent Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania on June 6, 2007.

4. The Petitioner filed a timely Petition under 28 U.S. Code Section 2254 in the United States District Court for the Eastern District of Pennsylvania in which he argued ineffective assistance of counsel based upon trial counsel's failure to request a limiting instruction concerning the prosecution's references to his having been a "Jamaican drug dealer". The District Court denied the Petition, Richards v. Tennis, 2005 WL 991264 (EDPA 2005), holding that the references to the Petitioner's ancestry were not prejudicial in part because the Commonwealth did not draw a direct link between the Petitioner's ethnicity and the crime for which he was charged. The United States Court of Appeals for the Third Circuit granted a Certificate of Appealability but affirmed the District Court, holding that ineffective assistance on the part of trial counsel in this regard was not established as to the element of prejudice in that the evidence at the Petitioner's trial strongly supported his conviction of First Degree Murder. **Richards v. Tennis**, 2006 WL 2726496 (3rd Cir. 2006).

5. The Petitioner respectfully submits that shortly after the jury returned the verdict of guilty on May 31, 2001, the foreperson of the jury, an African-American female, encountered the Petitioner's mother and father in a hallway at the Criminal Justice Center. The juror, who was recognized as the foreperson by the Petitioner's

parents, told them that she "hates Jamaicans", as they only "sell drugs and kill people" and that "they should all go back to where they came from". This information was reported to trial counsel, Joseph Santaguida, Esquire, who responded that there was nothing that could be done because the trial was over and the jurors could not be challenged from that point forward.

6. The law on this issue remained as Mr. Santaguida said until March 6, 2017 when the United States Supreme Court decided the case of Pena-Rodriguez v. Colorado, 137 S. Ct. 855, holding that there would now be an exception to the general rule prohibiting impeachment of jurors after a verdict in a case where a juror makes a clear and explicit statement indicating racial animus. In Pena-Rodriguez, the juror's bias was based on that Petitioner's Hispanic identity. Prior to the Pena-Rodriguez decision, the law had been clear that a challenge to the no impeachment rule as applied to evidence of juror misconduct or bias was not permitted. Tanner v. United States, 483 U.S. 107 (1987).

(a) The state of Pennsylvania has repeatedly declined to recognize an exception to the no impeachment rule for racial bias. See Commonwealth v. Steele, 961 A. 2d 786, 807-808 (Pa. 2008). The United States Court of Appeals for the Third Circuit has concurred in a federal habeas case, Williams v. Price, 343 F. 3d 223, 237-239 (3rd Cir. 2003) (no exception for racial bias exists to the no impeachment of jurors rule).

(b) Furthermore, under Pennsylvania Rule of Evidence 606(b), "a juror may not testify at an inquiry into the validity of a verdict as to any a matter or statement occurring during the jury's deliberations or to the effect of anything upon that or any other jurors' mind or emotions in

reaching a decision upon the verdict or concerning the juror's mental processes in connection therewith...". This rule, often referred to as the "no impeachment rule", has been followed in Pennsylvania for a significant period of time, well prior to this Petitioner's trial. See Carter v.US Seal Corp, 604 A. 2d 1010 (Pa. 1992) and Pittsburgh National Bank v. Mutual Life Insurance Company, 425 A. 2d 383 (Pa. 1981). These cases have held that under no circumstances may jurors testify regarding their subjective reasoning processes; the only exception applies to outside influence, not to statements made by the jurors themselves. Carter, supra at 1013.

(c) However, as of March 6, 2017, the Sixth Amendment to the Constitution requires that the no impeachment of jurors rule give wav in order to permit the trial court to consider evidence of a juror's statement in any case resulting in the denial of the guarantee to the right to a fair and unbiased trial by jury.

7. The Petitioner respectfully submits that, if he is permitted to prove that these events occurred as described above, this case presents a situation which casts serious doubt on the fairness and impartiality of the deliberations and resulting verdict of his jury since the foreperson demonstrated racial animus that would have been a significant motivating factor in the vote to convict him, particularly in a case where there were multiple references at trial to the Petitioner's Jamaican background. As the Supreme Court noted in Pena-Rodriguez, supra at 871, "one racist juror would be enough" to establish sufficient racial bias to warrant a new trial.

8. If the juror in question had stated during voir dire under oath that she had no prejudice against a person of Jamaican ancestry,

then that juror would have lied during the jury selection process.

9. A defendant may file a PCRA petition out of the normal one year time limitation where the facts upon which the claim is predicated were unknown to him and could not have been ascertained by the exercise of due diligence or when the right asserted is a constitutional right newly recognized by the Supreme Court of the United States. Any petition invoking such an exception must be filed within sixty (60) days of the date the claim could have been presented. See 42 Pa.C.S Section 9545(b) (1) and (2). The Petitioner is filing this Petition within the sixty (60) day time frame of the decision in Pena-Rodriguez, supra. See Commonwealth v. Smith, 35 A. 3d 766 (Pa. Super. 2011).

10. The Petitioner could not have submitted this claim prior to March 6, 2017 because, as discussed above, he would have had no basis to move for relief under prevailing law prior to that date. See Reed v. Ross, 468 U.S.1 (1984) and United States v. LaPrade, 2016 WL 7338416 (3rd Cir. 2016) (where a constitutional claim is so novel that its legal basis was not reasonably available to counsel, a defendant can be excused for the failure to raise the claim at the time of the event in view of the law that controlled at that time). In the instant case, the Petitioner would have had no reasonable basis to challenge the verdict under prevailing law at the time of trial, as discussed above.

11. The Petitioner respectfully requests that the Court convene an evidentiary hearing at which time the Petitioner would present the testimony of his father Westmore Richards and Timothy Zeigler (Affidavits attached hereto) as well as other witnesses who could corroborate the fact that the Petitioner's parents and others heard, on or about May 31, 2001, the statement of the juror

regarding her bias against persons of Jamaican ancestry.

WHEREFORE, the Petitioner, Defendant Michael Richards, respectfully prays that this Honorable Court grant him a new trial in order to protect his federal and state constitutional rights to due process of law and to a fair trial by jury.

Respectfully Submitted,

_____

BURTON A. ROSE, ESQUIRE

Attorney for Petitioner

BURTON A. ROSE, ESQUIRE
Identification # 15724
1731 Spring Garden Street
Philadelphia, PA 19130
(215) 564-5550

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
vs.	:	
MICHAEL RICHARDS,	:	POST CONVICTION RELIEF ACT
Petitioner	:	CP-51-CR-1200841-1999

VERIFICATION

COMES NOW, Michael Richards, Defendant in the above captioned matter and Petitioner under the Post-Conviction Relief Act, subject to the penalties set forth in 18 Pa. C.S. 4904 relating to unsworn falsification to authorities, and does hereby verify that all of the facts as set forth in the attached Petition under the Post-Conviction Relief Act are true and correct to the best of his knowledge, information and belief.

Respectfully submitted,

_____

MICHAEL RICHARDS

DATED:_____

October 2015

To whom it may concern

My name is Westmore Richards I reside at 5018 Pembroke Road number 6 Hollywood Florida 33021-8111. In May of 2001 my son Michael Richards was on trial for murder in Philadelphia Pennsylvania my wife and I attend the trial from the beginning to the end we were able to observe the whole proceedings of the trial.

We did not understand most of what was taking place but we were there everyday until the conclusion of the entire trial I had moved to Philadelphia for the trial while my wife would travel to Philadelphia whenever there was a court date. I remembered the day that the trial ended that was the day my wife and I came in contact with the black woman juror that read my son's verdict in the lobby of the courthouse where she made the statement to us that she hate Jamaicans.

The juror look directly at my wife and I and said I hate Jamaicans all they do is kill people and sell drugs they should all go back where they come from we told the trial attorney right away but he said there was nothing that he could have done because the juror made the statement after the trial was over.

Sincerely,

Westmore Richards

BURTON A. ROSE, ESQUIRE
Identification # 15724
1731 Spring Garden Street
Philadelphia, PA 19130
(215) 564-5550

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
vs.	:	
MICHAEL RICHARDS,	:	POST CONVICTION RELIEF ACT
Petitioner	:	CP-51-CR-1200841-1999

AFFIDAVIT OF TIMOTHY ZEIGLER

COMES NOW, Timothy Zeigler, being duly sworn according to law, hereby deposes and avers that, to the best of my knowledge, information and belief, the following statement is the truth.

I was present on May 31, 2001 at the time of the issuance of the guilty verdict in the trial of Commonwealth v. Michael Richards, at the Philadelphia Criminal Justice Center. I was present because I am a longtime friend of the Richards family and I was particularly close with the Defendant's father, Westmore Richards.

After the verdict, myself, the Defendant's family and others were in the lobby when I overheard a conversation between an African-American woman, whom I immediately recognized as the jury forelady, and Westmore and Carol Richards, the parents of Defendant Michael Richards. I heard this woman tell Mr. and Mrs. Richards words to the effect of, "I don't like Jamaicans", "I don't like them" and "I don't know why they let them over here".

This conversation became a topic of discussion among many of the Defendant's friends and family.

I have had no occasion to discuss this event with any lawyers or investigators since 2001 until I met with attorney Burton A. Rose, Esquire on April 25, 2017 at this office. I agreed to put my recollection of this event in an Affidavit. I remember these facts because it was shocking moment to me to hear a juror speak with such hatred.

I have also read the Affidavit executed in October 2015 by Westmore Richards. The content of that Affidavit is true and correct to the best of my recollection.

I am willing to testify under oath in a court of law concerning this event if requested.

No one has offered me anything of value or threatened me in order to get me to agree to sign this Affidavit or to testify in Court.

Respectfully submitted,

_____

TIMOTHY ZEIGLER
5725 Kingsessing Avenue,
Philadelphia, PA 19143

DATE OF BIRTH: March 13, 1961

Sworn to and Subscribed

before me this 26th day of April, 2017.

_____

NOTARY PUBLIC

BURTON A. ROSE, ESQUIRE
Identification # 15724
1731 Spring Garden Street
Philadelphia, PA 19130
(215) 564-5550

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
vs.	:	
MICHAEL RICHARDS,	:	POST CONVICTION RELIEF ACT
Petitioner	:	CP-51-CR-1200841-1999

AFFIDAVIT OF SANDRA FINDLEY

COMES NOW, Sandra Findley, DOB: July 17, 1957, being duly sworn according to law, hereby deposes and avers that, to the best of my knowledge, information and belief, the following statement is the truth.

On May 31, 2001, I was home at my residence in Pembroke Pine, Florida. I was waiting to hear the result of the trial of my brother, Michael Richards. I received a telephone call from my mother, Carol Richards. She informed me that she had just heard a

statement from a juror who was an American black female. According to my mother, who was very upset at the time she was speaking to me, the juror had told mother that "Jamaicans came here only to sell drugs" and other remarks indicating hatred for Jamaican people.

I discussed this development with other siblings in my family. I have not spoken with a lawyer or investigator about this.

I remember this telephone call because it upset me to hear that my brother's case may have been decided by a jury that was composed of people who hated Jamaicans.

I am willing to appear in court to testify to the above if necessary.

Respectfully submitted,

_____

SANDRA FINDLEY
2525 Polk Street
Apt 3
Hollywood, FL 33020

DATE OF BIRTH: July 17, 1957

Sworn to and Subscribed

before me this___ day of ___2017.

_____

NOTARY PUBLIC