# DEFENDER ASSOCIATION OF PHILADELPHIA

**BY: ELLEN T. GREENLEE, Defender, and Marc Bookman and Karl Schwartz, Assistant Defenders**

**Identification No. 00001**

**1441 Sansom Street**

**Philadelphia, PA 19107 Attorneys for Shannon Parks**

COMMONWEALTH OF PENNSYLVANIA : COURT OF COMMON PLEAS

CRIMINAL TRIAL DIVISION

VS. : C.P. 0403-0065

SHANNON PARKS : CHARGES: MURDER, ETC.

ORDER

And now, this day of , 2006, a hearing on the attached Motion is now scheduled for the day of

, 2006 in Courtroom 602 of the Criminal Justice Center.

By The Court:

J.

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MOTION FOR DISCOVERY

1. On July 8th, 2003, during the course of a robbery, Ida Jackson was shot and killed.
2. On July 23rd, 2003, Eric Whitely was interviewed by homicide detectives. He acknowledged actively participating in the robbery, and implicated Defendant as the shooter. In exchange for naming Defendant as the shooter, the Commonwealth guaranteed that Eric Whitely would not be charged as an adult for his admitted participation in a felony murder;
3. The Commonwealth and Eric Whitely memorialized this agreement in a Memorandum of Agreement (see Exhibit One), which was signed by Eric Whitely and his counsel on September 22, 2003.
4. The Memorandum of Agreement explicitly states that “***ERIC WHITELY shall commit no crimes in the future****,*” and that “**if *he participates in any subsequent criminal activity subsequent to the date of this agreement…this agreement is null and void, and [ERIC WHITELY] will be prosecuted to the fullest extent…***”;
5. The Commonwealth also allowed Whitely to be released from custody on passive monitoring after signing his own bond (see Exhibit Two);
6. On March 8th, 2005, after violating many of the rules of passive monitoring, Eric Whitely was placed on electronic monitoring;
7. On May 24th, 2005, in the 3900 block of Wyalusing Avenue, Sukree Irvin was shot multiple times. He survived the shooting. Sukree Irvin did not identify the shooter; however, there were two additional witnesses at the scene, Blaine Hall and Troy Lynch. Blaine Hall, the victim’s cousin, identified Eric Whitely as the shooter; and Troy Lynch identified Whitely as being at the scene (See Exhibit Four);
8. On June 6, 2005, Whitely was arrested and charged with Attempted First Degree Murder, Conspiracy, Violation of Uniform Firearms Act and related charges, for his role in the May 24th, 2005 shooting of Sukree Irvin;
9. When arrested, Whitely dropped a shirt that contained a plastic bag of alleged marijuana. This behavior was a violation of Whitely’s house arrest conditions as well as the laws of the Commonwealth of Pennsylvania; yet this information was not even provided to the judge who had placed him on house arrest;
10. On June 27, 2005, after Eric Whitely violated the terms of the Memorandum of Agreement by participating in subsequent criminal activity for which the Commonwealth arrested him, the Commonwealth agreed to keep Whitely on house arrest

on his murder charge and grant him house arrest on the new charge, instead of prosecuting him to the “fullest extent” as mandated by their Agreement;

1. On June 29th, 2005, Blaine Hall testified at the preliminary hearing for one of Whitely’s co-defendants, Mark Robert. Hall again identified Whitely as the shooter. Sukree Irvin was also called at the preliminary hearing. There was nothing in the police paperwork to suggest that Irvin, the victim, could identify the shooter; thus, he was never asked whether he could identify the person who shot him (see Exhibit Five);
2. Gina Smith, the Assistant District Attorney who is prosecuting Defendant in the instant case, and whose main witness in that prosecution is Eric Whitely, was present at the June 29th, 2005 preliminary hearing, but made no appearance on the record. Thus the purpose of her presence there was never clarified. The Commonwealth, however, by arresting Whitely, had already made an independent determination that he was the gunman in the incident. ***Moreover, at that very same hearing on June 29th, 2005, the Commonwealth represented that “we’re sure that he [Whitely] was the shooter”*** (see

Exhibit Five, p. 36). Defense counsel for Shannon Parks spoke with Blaine Hall on July 11, 2005 about Ms. Smith’s presence on June 29, 2005. According to Hall, Ms. Smith interviewed him, and pressed him about the certainty of his identification of Eric Whitely as the shooter;

1. After several Commonwealth and defense continuances, Eric Whitely’s preliminary hearing was scheduled for March 2nd, 2006. One week prior to the hearing defense counsel learned that the necessary Commonwealth witness, Blaine Hall, was a resident at the Glen Mills School. On February 24th, 2006, at the direction of defense counsel in this case, Tom Young, Esq., the Assistant Defender assigned to the room in

which the Whitely hearing was scheduled, notified the assigned Assistant District Attorney, Andrew Kowalewski, that his eyewitness against Eric Whitely, Blaine Hall, was residing at the Glen Mills School. Assistant District Attorney Kowalewski thanked Mr. Young, and informed him that a bring down would be ordered;

1. Kowalewski, however, already knew about the need for the witness Blaine Hall, as well as the existence of the second witness, Troy Lynch. At an earlier listing of the case, September 19th, 2005, Kowalewski had announced to the Court that there were two witnesses in the case, and that (at that time) the victim was hospitalized;
2. On March 2, 2006, Assistant District Attorney Kowalewski informed Mr.

Young that he had decided not to bring the eyewitness, Blaine Hall, down from Glen Mills School. He told Mr. Young that he intended to proceed in the case with only the testimony of the victim, Sukree Irvin. This was a knowingly false statement; at the time it was made, Assistant District Attorney Kowalewski knew from the police reports that Sukree Irvin never identified the person who shot him (see Exhibit Six). In addition, as was noted above, Kowalewski himself had announced at an earlier listing that there were *two* witnesses. The Commonwealth made no efforts to bring in Blaine Hall or Troy Lynch;

1. When the case of Commonwealth v. Eric Whitely was called, Assistant

District Attorney Kowalewski informed the Court that the *victim* had failed to appear, and that therefore the case would be withdrawn. Of course, the *victim’s* non-appearance at the preliminary hearing was of no moment; at no time had he ever identified the shooter. According to the Commonwealth’s own police reports and the testimony elicited in a previous preliminary hearing for a co-defendant, eyewitness Troy Lynch (who never

testified but did give a statement to the police) placed Whitely at the scene of the crime, and eyewitness Blaine Hall identified Whitely as the shooter. Indeed the victim, Sukree Irvin, was not even a necessary witness at the preliminary hearing; yet it was announced that based on his failure to appear the case would be withdrawn. The only witness the Commonwealth needed at the preliminary hearing was the one witness the Commonwealth decided not to bring down;

1. The Commonwealth’s apparent lack of interest in prosecuting the shooter, Eric Whitely, is in stark contrast to its zeal in prosecuting the far less culpable co- defendant, Mark Robert, who punched Sukree Irvin before Whitely shot him. At a preliminary hearing for Robert two witnesses were called (see Point Six *supra*), and Robert was held for court. The Commonwealth strongly objected to any bail reduction for Robert, and assured the Court of the following:

I [Assistant District Attorney Brandi Brice] spoke with Gina Smith after the session that we had this morning. We are actually prepared to take action to get Mr. Whitely to get back into custody now that we’re sure that he was the shooter….

The Commonwealth, now that we have had an opportunity to interview both of our witnesses, complainants, more importantly eyewitnesses, the Commonwealth is prepared to take steps to get Mr. Whitely back into custody.

That argument [that Whitely is out, so Robert should be out] to some degree is not going to help now because he [Whitely] is going to be in custody as well, within no time at all.

(see Exhibit Five, pp. 36-37). Whitely was never put back into custody; instead he remained on house arrest;

At a subsequent decertification hearing on January 20, 2006, the Commonwealth argued strenuously to Judge Benjamin Lerner, who presided over the hearing, that Mr.

Robert **was just as culpable as Eric Whitely**, and thus should be tried in adult court. Judge Lerner disagreed, noting that Robert was not as blameworthy as Whitely since he was not the shooter; nonetheless, he added that it was simply “good fortune” that the case was not First Degree Murder;

1. The Commonwealth’s stated rationale for withdrawing prosecution against Eric Whitely was pretextual. The most cursory review of the paperwork reveals that the victim’s non-appearance could not possibly be a basis for not proceeding with the preliminary hearing. The case was withdrawn because the necessary witness, whom the Commonwealth unquestionably knew was both required and available, was not brought to court. Blaming the victim’s alleged failure to appear for the dismissal does however allow the Commonwealth to now suggest the following: Since the case has been dismissed, through no fault of its own, there is no proof that Whitely engaged in “subsequent criminal activity;”
2. The dismissal, however, was completely driven by the actions of the Commonwealth; and the effect was to save the Commonwealth from having to declare its agreement with Eric Whitely null and void as required by the explicit terms of the Memorandum of Agreement. It strains credulity to suggest that, in a case in which the victim was shot multiple times, the Commonwealth would not have subpoenaed its crucial eyewitness from Glen Mills, having received notice almost a week before of his location; and failing to do that, at least have asked the Court for an additional listing. Thus, it is reasonable to assume that the Commonwealth’s lack of readiness, and subsequent willingness to withdraw prosecution, was based on nothing other than a desire to relieve their homicide witness of a second set of extremely serious charges;

LEGAL CLAIMS

1. The Commonwealth violated Defendant’s rights to due process, a fair trial, effective assistance of counsel and to be free from cruel and/or unusual punishment pursuant to the Pennsylvania and United States Constitutions by withdrawing prosecution against Eric Whitely for the sole purpose of preserving his value as a witness in the instant case, notwithstanding the fact that an eyewitness, who was willing to testify, had unambiguously identified Eric Whitely as having shot an unarmed victim multiple times; and the Commonwealth, through its representative, had declared its certainty that Whitely was guilty;
2. Even without regard to the question of whether Eric Whitely has violated the Memorandum of Agreement, the Commonwealth’s conduct is egregious and prejudicial in its impact on Defendant’s right to challenge the credibility of the Commonwealth’s central witness against Defendant. By eliminating Eric Whitely’s open case in a manner designed to prevent attribution to the Commonwealth, the prosecution has irreparably damaged Defendant’s right to effectively cross examine him;
3. Assistant District Attorney Smith disregarded a clear conflict of interest, by challenging the identification of a Commonwealth witness in a prosecution – the prosecution of her witness Eric Whitely - to which she was not assigned and under circumstances in which she had a vested interest in seeing that prosecution fail. Accordingly, she engaged in prosecutorial misconduct, which is attributable to her office. Such misconduct serves to deprive Defendant of his United States and Pennsylvania Constitutional rights to a due process, a fair trial, effective assistance of counsel and to be free from cruel and/or unusual punishment;
4. Indeed, even if her conduct did not constitute prosecutorial misconduct, her questioning the witness against Whitely surely raises a relevant factual issue - the type and extent of the benefit that Assistant District Attorney Smith was conferring upon her witness, Eric Whitely. The related questions of prosecutorial influence upon Eric Whitely and the lengths to which the prosecution is willing to go to preserve his value as a witness are key issues pertaining to the credibility of Eric Whitely and the integrity of the instant prosecution. Not only does the defense have a basis to explore that issue, but their not doing so would constitute ineffectiveness;

**Remedies**

1. The Commonwealth should be precluded from seeking Defendant’s execution. It is black letter law that “[b]ecause of that qualitative difference [between life imprisonment and death], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” Woodson

v. North Carolina, 428 U.S. 280 at 305; see also Callins v. Collins, 510 U.S. 1141 (1994);

Lockett v. Ohio, 438 U.S. 586 (1978). The Commonwealth’s failure to prosecute Eric

Whitely, as thoroughly documented above, inevitably lessens the reliability of the instant verdict, as any death verdict the Commonwealth is able to obtain will be the result of the constitutionally improper protection provided to Whitely. Thus, the Commonwealth should be precluded from seeking death in the instant case;

1. The Commonwealth should be precluded from using Eric Whitely as a witness in the instant case. By approving Attempt Murder charges against him, after he and it had executed the Memorandum of Agreement, the Commonwealth made a determination that Whitely had engaged in subsequent criminal activity. The

Commonwealth thereafter represented in open court that “**we’re sure that he was the shooter.**” The Commonwealth’s announced certainty that Whitely had engaged in subsequent criminal activity absolutely precludes the use of him as a witness, according to the Memorandum of Agreement. On separate grounds, the circumstances of the Commonwealth’s withdrawal of prosecution against Whitely mandates precluding use of him as a witness, because it robbed from the process of that dismissal any degree of integrity, and rendered any suggestion that Mr. Whitely might be innocent completely suspect;

REQUESTED DISCOVERY

1. There exists essential evidence to be presented at the hearing on the instant Motion which is currently in the possession of the Commonwealth. The defense requests that the following be disclosed in advance of the hearing:
2. The prosecutor’s entire case file, in the matter of Commonwealth v. Eric Whitely, MC 0506 - 0169, as it existed on March 2nd, 2006, the date the case against Eric

Whitely was withdrawn;

1. Any other memoranda, notations, or writings of any kind, prepared by law enforcement and/or attorneys within the District Attorney’s Office, pertaining to the prosecution of Eric Whitely in MC 0506 - 0169. *This includes any writings relating to interviews and/or discussions with eyewitness Blaine Hall, observations pertaining to his credibility, and opinions regarding the guilt or innocence of Eric Whitely.*
2. Disclosure of all communications, whether or not documented, between Assistant District Attorney Gina Smith and any law enforcement officer, assistant district

attorney, or attorney representing Eric Whitely, pertaining in any way to the prosecution of Eric Whitely in MC 0506 - 0169;

1. Disclosure of the address of former Assistant District Attorney Kowalewski, so that defense counsel can serve him to appear as a witness for the hearing on the instant Motion;
2. Disclosure of whether the Commonwealth intends to immunize Mr. Whitely such that any testimony he gives at Defendant’s trial relating to the shooting of Sukree Irvin would not be used against him. If the Commonwealth intends to offer such immunity, Defendant demands a copy of the immunity petition;
3. Disclosure of the actions taken by the Commonwealth to countermand the representation to the Court on June 29, 2005, that Eric Whitely would be taken back into custody, disclosure of the rationale for the decision to countermand the representation and disclosure as to whether the Court was notified of the Commonwealth’s reversal of position;

Respectfully Submitted: Karl Schwartz

Marc Bookman Assistant Defenders