IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v,	:	No. CP-14-CR-0382-1982
	:	
SUBRAMANYAM VEDAM,	:	
Defendant	:	

Attorneys for the Commonwealth:	*Joshua Andrews, Esq.* *Matthew Metzger, Esq.*
Attorneys for Defendant:	*Gopal Balachandran, Esq.* *Michael Wiseman, Esq.*

OPINION AND ORDER

Grine, P.J.

Presently before the Court is Petitioner's PCRA Petition, which consists of the PCRA Petition filed on March 17, 2023, the Amended PCRA Petition filed on October 13, 2023, the Response filed on February 7, 2024, and the Amended PCRA Petition filed on March 11, 2024. Collectively, these filings will be referred to herein as the "PCRA Petition." A PCRA hearing was held on February 6 and 7, 2025, and thereafter, the parties submitted briefs in support of their respective positions. The matter is now ripe for disposition.

The Court has thoroughly and extensively considered whether the Commonwealth suppressed exculpatory evidence prior to Petitioner's 1988 trial as well as whether the Commonwealth failed to correct testimony which it knew or should have known to be materially false. For the reasons set forth below, the Court concludes that the Commonwealth violated Petitioner's due process rights and deprived him of a fair trial. Therefore, the Court **VACATES** Petitioner's conviction and awards him a new trial.

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BACKGROUND

In February 1983, a jury convicted Subramanyam Vedam (hereinafter "Petitioner") of first-degree murder for killing Thomas Kinser (hereinafter "Kinser"). The Superior Court reversed and remanded for a new trial. Petitioner was retried and a jury again convicted him of first-degree murder on February 25, 1988.

Kinser's remains were found in a sinkhole in September 1981, approximately nine months after he had gone missing. Forensic pathologist Dr. Thomas Magnani ("Dr. Magnani") determined the cause of death to be a gunshot which entered the top of Kinser's skull, exited the bottom of the skull, and re-entered his torso through his neck or chest. A .25 caliber bullet was recovered from inside Kinser's shirt. No weapon was found at the scene. At trial, the Commonwealth's theory was that Petitioner used a .25 caliber gun to kill Kinser. Commonwealth witness Daniel O'Connell testified that he sold Petitioner a .25 caliber gun and ammunition prior to Kinser's disappearance and allowed Petitioner to test-fire the weapon in a wooded area behind the restaurant at which O'Connell was employed. Defense counsel disputed the timing of the sale and the nature of the fatal wound to Kinser at the time of trial, including by challenging the size of the hole in Kinser's skull compared to the .25 caliber bullet alleged to have caused the hole and whether the test-fired bullet and the bullet found with Kinser's remains were fired from the same gun and/or came from the same box of ammunition.

Pursuant to the sentence imposed on March 30, 1988 following his second trial, Petitioner is serving a life sentence at SCI – Huntingdon. Petitioner filed post-trial motions, which were denied by the Court on March 16, 1990. The Superior Court affirmed the conviction on September 11, 1991. ***Commonwealth v. Vedam***, 601 A.2d 1301 (Pa. Super. 1991). The

Supreme Court of Pennsylvania denied allowance of appeal on August 19, 1992. ***Commonwealth v. Vedam***, 613 A.2d 559 (Pa. Super. 1992).

Petitioner filed his first Petition for Post-Conviction Relief on May 31, 1994. The Commonwealth filed a Motion to Dismiss the Petition for Post-Conviction Relief without a hearing on July 5, 1994, and the Court granted the Commonwealth's motion on July 21, 1994. Petitioner filed a second Petition for Post-Conviction Relief on December 26, 1996. The Commonwealth filed an Answer to the Second Petition on March 14, 1997, and a Motion to Dismiss Second Petition for Post-Conviction Relief without a hearing on March 11, 1999. By Order dated December 13, 2000, the Court granted the Commonwealth's motion to dismiss without a hearing. On February 25, 2013, Petitioner filed an Amended Third PCRA petition, which was dismissed as untimely, and no appeal was taken.

In 2021, Petitioner's counsel and the Centre County District Attorney's Office agreed that Petitioner's counsel would be permitted to review all of the Centre County District Attorney's files pertaining to Petitioner's case. On March 18, 2022 and May 24, 2022, Petitioner's counsel reviewed said files. Within the files, Petitioner's counsel identified various items which formed the basis for the current PCRA Petition.

By Opinion and Order dated October 1, 2024, the Court granted the Commonwealth's Motion to Dismiss regarding all issues except the alleged ***Brady***[1] and ***Napue***[2] violations based on a handwritten note containing specific measurements of the hole in Kinser's skull and purportedly written by then-District Attorney Ray Gricar, who prosecuted Petitioner in the 1988 trial and the Neutron Activation Analysis ("NAA") data generated when the FBI conducted an analysis of the composition of a test-fire bullet and the bullet found with Kinser's remains. A

[1] ***Brady v. Maryland,*** 373 U.S. 83 (1963).
[2] ***Napue v. Illinois***, 360 U.S. 264 (1959).

PCRA evidentiary hearing was held on February 6 and 7, 2025 regarding the FBI measurements in the handwritten note and the NAA data contained in the full FBI file.

At the PCRA hearing, the Court received extensive scientific evidence on the following wide-ranging topics: methods utilized in forensic anthropology research, the ability of a .25 caliber bullet to cause a hole smaller than its own diameter, the smallest hole observed by forensic anthropologists to be caused by a .25 caliber bullet, the scientific validity of the "shrinkage" theory noted in the full FBI file, differences between .22 caliber and .25 caliber bullets and the wounds they cause, the significance of the entry and exit wound shapes, forensic anthropology standards regarding estimation of caliber based on the size of a wound and excluding a particular size bullet based on the size of a wound, the likelihood that the fatal wound in Kinser's skull could have been caused by a .22 caliber bullet, research conducted after the 1988 trial regarding correlation between bullet caliber and the wounds they can produce, the impact of size and velocity of bullets on exit wounds, and composition of bullets and the possibility or probability of two bullets of varying compositions coming from the same "melting", batch, or box of ammunition.

Much of this battle of the experts, however, was irrelevant to the Court's present analysis and is more appropriately the subject of testimony at any subsequent retrial. The touchstone of the Court's analysis of whether Petitioner was deprived of the right to a fair trial is the 1988 trial itself. ***See Commonwealth v. Payne***, 210 A.3d 299, 302 (Pa. Super. 2019) (*en banc*) (noting that among the factors to be considered by the PCRA court are: "(1) the prosecution's theory *at the original trial*, and the difficulty of making this argument in light of the new evidence; and (2) the prosecutor's closing remarks, which may demonstrate the importance of the new evidence") (emphasis added). Thus, the Court's focus at this juncture, after finding that there are no

procedural impediments to considering Petitioner's substantive ***Brady*** and ***Napue*** claims, is what impact the FBI measurements of the hole in Kinser's skull and the underlying NAA data contained in the full FBI file would have had on the trial in 1988 if the information had been disclosed.

PROCEDURAL REQUIREMENTS FOR PCRA RELIEF

To be eligible for post-conviction relief, a petitioner must prove by a preponderance of the evidence that his conviction or sentence resulted from one of several enumerated circumstances, ***see*** 42 Pa.C.S. § 9543(a)(2), and that the claims have not been previously litigated or waived, ***see*** 42 Pa.C.S. § 9543(a)(3). One such enumerated circumstance is that the petitioner's conviction and sentence resulted from "[a] violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(i).

A PCRA petition must be filed within one (1) year from the date a judgment becomes final. 42 Pa.C.S.A. § 9545(b)(1). "[A] judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." ***Commonwealth v. Staton***, 184 A.3d 949, 954 (Pa. 2018) (quoting 42 Pa.C.S.A. § 9545(b)(3)). Timeliness of a petition under the PCRA is a jurisdictional threshold and may not be disregarded in order to reach the merits of the claims raised in an untimely PCRA petition. ***Commonwealth v. Lawson***, 90 A.3d 1 (Pa. Super. 2014); ***see also Commonwealth v. Cristina***, 114 A.3d 419 (Pa. Super. 2015).

In the instant matter, Petitioner's judgment of sentence became final on November 17, 1992, ninety days after the Pennsylvania Supreme Court denied his petition for allowance of

appeal, and he declined to petition the United States Supreme Court for a writ of certiorari. ***See*** U.S. Sup. Ct. R. 13 (stating that an appellant must file petition for writ of certiorari with the United States Supreme Court within ninety days after entry of judgment by state court of last resort). Thus, Petitioner had until November 17, 1993 to file a timely PCRA petition. The instant petition, filed on March 17, 2023, was filed more than twenty-nine years after the judgment of sentence became final. Therefore, the instant petition is facially untimely under the PCRA. ***See*** 42 Pa.C.S.A. § 9545(b)(3).

However, Pennsylvania courts may consider an untimely PCRA petition if the petitioner can plead and prove one of three exceptions set forth under 42 Pa.C.S.A. § 9545(b)(1), which provides:

> **(b) Time for filing petition.--**
>
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (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). Any PCRA petition invoking one of these exceptions "shall be filed within one year of the date the claim could have been presented." 42 Pa.C.S.A. § 9545(b)(2).

When this Court originally considered the due diligence arguments following the Commonwealth's Motion to Dismiss, it ruled that Petitioner was not on notice of the potential ***Brady*** issue regarding the FBI measurement and NAA data until January 2024 when the full FBI file was provided to Petitioner's counsel. The Commonwealth takes issue with the Court's reasoning and maintains that the newly-discovered fact exception and the government interference exception to the one-year time-bar of the PCRA are not available to Petitioner such that the PCRA Petition cannot be considered on its merits. Petitioner responds that there is no diligence requirement under ***Brady*** and its progeny, and even if there were a diligence requirement, the Court properly concluded in its October 1, 2024 opinion that no degree of diligence would have uncovered the FBI measurements of the hole in Kinser's skull or the underlying NAA data. The Court reaffirms its findings regarding applicability of the newly-discovered fact and government interference exceptions with the following additional discussion.

While the Commonwealth is correct that the Court cannot consider the merits of the underlying ***Brady*** claims unless Petitioner can first establish an exception to the PCRA's jurisdictional time-bar, ***see Commonwealth v. Stokes***, 959 A.2d 306, 310 (Pa. 2008) (explaining that a PCRA petitioner must first meet the statutory exceptions of the timeliness requirements before the merits of their ***Brady*** claim can be considered), the Court disagrees with the Commonwealth that the newly-discovered fact and government interference exceptions do not apply in this case.

It is true that there was a passing reference to the FBI measuring the hole in Kinser's skull during the testimony of FBI Agent William Albrecht ("Agent Albrecht"). N.T. 2/23/1988 at 114 (Q: Did you measure the size of that particular hole at the top of the skull? / A: Yes.). That a measurement was made and what that measurement was are two distinct facts. The

Commonwealth was in possession of the specific measurements and failed to disclose them. The same is true with the fact that a neutron activation analysis was done but the NAA data itself was not disclosed.

The Commonwealth argues that Petitioner "could have taken action to protect his interests by investigating the obvious, available source of information. Petitioner could have requested or subpoenaed the file from the FBI" after learning during Agent Albrecht's testimony at the 1988 trial that he measured the skull hole and that a neutron activation analysis was done. Commonwealth's Brief at 48. The Court is not persuaded that Petitioner had equal access to the FBI measurement and NAA data even with a subpoena. The Commonwealth and Petitioner reached the following stipulation for purposes of the PCRA hearing:

> If called to testify, Robert Mothershead – Unit Chief, Firearms/Toolmarks Unit of the FBI Laboratory, would have attested to the following: Until approximately 2019, the FBI lab did not provide bench notes or other supporting documents, including underlying data, absent a formal discovery request. Such a request was typically made by the legal team expected to call the expert as a witness at trial – most often the prosecutor, but it is his understanding that formal requests made by the defense would also be honored. He joined the FBI in 1996, but he believes that this was the practice at the time of Petitioner's trials.

Petitioner's Exhibit 3 (Stipulation dated 2/6/2025) at ¶8. The Commonwealth misreads this stipulation to mean that any subpoena from the defense would have been honored. Commonwealth's Brief at 7-8, 49. Rather, the stipulation states that it is Robert Mothershead's *understanding* that formal requests by the defense would also be honored. Additionally, he did not work at the FBI in 1988 but *believes* such a policy existed in 1988. The Court therefore accords these averments no weight.

The stipulated portion of the report by Petitioner's expert, William Tobin ("Mr. Tobin") sets forth his knowledge of the FBI's internal policy to never disclose its bench notes or

underlying data. ***See*** Petitioner's Exhibit 7 for PCRA hearing at 2. Mr. Tobin avers, in pertinent part:

> During my training at the FBI Laboratory as a forensic metallurgist beginning in 1974, I was directed to abbreviate any/all entries in my underlying benchnotes as much as possible. When I inquired as to why, I was told to make it as difficult as possible for a defense attorney to understand such that it would require [my] presence to interpret. . . . . Additionally, I observed that it was custom, habit and practice for examiners to only provide a typewritten outgoing laboratory report with only a "thumbnail" summary overview of opinion(s) without any underlying basis, benchnotes, instrumental output, or other supporting documentation, in all areas of forensic practice that I observed, which is likely all of them over my 24-year forensic career. Even when subpoenaed to testify, the underlying data were generally never provided. Albrecht's testimony in Vedam embodies that custom, habit, and practice.

Id. Based on the foregoing, the Court reiterates its conclusion that the newly-discovered fact exception and the government interference exception to the PCRA time-bar apply in this case because no amount of due diligence would have enabled Petitioner to obtain the specific FBI measurements and underlying NAA data in the full FBI file prior to January 10, 2024. The only reason Petitioner was able to finally obtain this information is because the Commonwealth and FBI chose to turn it over.

The Court therefore has jurisdiction to address the merits of Petitioner's ***Brady*** and ***Napue/Glossip***[3] claims involving the FBI measurements of the hole in Kinser's skull and the NAA data contained in the full FBI file. Additionally, the Court incorporates its previous findings that these two issues were not waived and that the Commonwealth is not entitled to dismissal based on the delay in filing the PCRA petition because the delay was caused by the Commonwealth's suppression of the handwritten note containing the FBI measurements and the full FBI file.

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[3] ***Glossip v. Oklahoma***, 145 S. Ct. 612 (2025).

SKULL HOLE MEASUREMENTS BY FBI

A. *BRADY* CLAIM

The first of Petitioner's remaining claims of eligibility for relief under the PCRA is based on the Commonwealth's failure to disclose the FBI's measurements of the hole in Kinser's skull in violation of his due process rights pursuant to ***Brady v. Maryland,*** 373 U.S. 83 (1963). ***Brady*** and its progeny make it clear that the due process rights of the accused are violated if the government fails to disclose before trial, either intentionally or inadvertently, the existence of material evidence favorable to the defense. ***Id.*** at 87; ***see also Commonwealth v. Gibson,*** 951 A.2d 1110, 1126 (Pa. 2008) (requiring a defendant "to demonstrate that exculpatory or impeaching evidence, favorable to the defense, was suppressed by the prosecution, to the prejudice of the defendant."). The duty to disclose favorable evidence is an affirmative one that extends beyond the evidence in the prosecutor's actual possession to anything in the possession of the prosecution team, including law enforcement. ***See Commonwealth v. Lambert,*** 884 A.2d 848, 854 (Pa. 2005).

There are "three necessary components that demonstrate a violation of the ***Brady*** strictures: the evidence was favorable to the accused, either because it is exculpatory or because it impeaches; the evidence was suppressed by the prosecution, either willfully or inadvertently; and prejudice ensued." ***Commonwealth v. Conforti***, 303 A.3d 714, 725-26 Pa. 2023) (citing ***Lambert***, 884 A.2d at 854). "Favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Commonwealth v. Johnson***, 815 A.2d 563, 573 (Pa. 2002) (quoting ***Kyles v. Whitley***, 514 U.S. 419, 433, 115

S.Ct. 1555, 131 L.Ed.2d 490 (1995)). The United States Supreme Court has clarified that to prevail on a ***Brady*** claim, a petitioner "need not show that he more likely than not would have been acquitted had the new evidence been admitted. He must show only that the new evidence is sufficient to undermine confidence in the verdict." ***Wearry v. Cain***, 577 U.S. 392 (2016).

Petitioner asserts that the Commonwealth violated his due process rights under ***Brady*** and its progeny by failing to disclose to him before trial the FBI's measurement of the hole in Kinser's skull, first in the form of handwritten notes contained in the Centre County District Attorney's file and later in the full FBI file disclosed to Petitioner on January 10, 2024. The Court agrees with Petitioner that failure to disclose this information is a ***Brady*** violation.

1. Favorable to the Accused

First, this evidence is favorable to Petitioner. The United States Supreme Court has consistently held that evidence is favorable where it would tend to exculpate a defendant or impeach evidence against him, where the defense might have used it to impeach the government's witnesses, or where it might have been helpful in conducting the cross-examination. ***See Brady, supra; United States v. Bagley***, 473 U.S. 667, 683 (1985) (finding a "significant likelihood" that the prosecution's failure to disclose inducement offered to two of its witnesses "misleadingly induced defense counsel to believe [the witnesses] could not be impeached on the basis of bias or interest").

The measurement of the size of the bullet hole in Kinser's skull is favorable to Petitioner because it undermines the Commonwealth's theory that a .25 caliber weapon caused Kinser's death and supports the defense theory that the .25 caliber bullet is too large to have caused the hole in Kinser's skull. The Commonwealth's theory depended on the murder weapon being a .25 caliber firearm. In the Commonwealth's opening statement at the 1988 trial, the prosecutor

stated that Petitioner purchased a .25 caliber handgun from an individual named Dan O'Connell and used it to kill Kinser on December 14, 1980, the day Kinser disappeared. ***See*** N.T. 2/22/1988 at 29, 31-32. The prosecutor informed the jury that the police "knew that the murder weapon was a .25 semiautomatic." ***Id.*** at 46. No murder weapon was ever produced at trial. The Commonwealth instead relied on two expert witnesses, Dr. Magnani and Agent Albrecht, to link the .25 caliber bullet to Kinser's death. If the murder weapon was not a .25 caliber firearm, then the primary link between Petitioner and the homicide would be severed.

At trial, Dr. Magnani testified that the bullet that caused the hole in Kinser's skull and led to Kinser's death could not be larger than the hole present in Kinser's skull. He also stated that the maximum size of the fatal bullet was 6 millimeters, which was also the size of the hole:

> Q: Coming back to what we agreed on a few minutes ago; that the hole couldn't be smaller than the bullet or the bullet couldn't be larger than the hole, would you say that this bullet could not be larger than .6 centimeters or 6 millimeters?
>
> A: Yes.

See N.T. 2/22/1988 at 101.

When Agent Albrecht testified, he provided the measurements of a standard .25 caliber bullet. He testified that the standard size of an unfired .25 caliber bullet is .251 inches, or 6.35 millimeters. ***See*** N.T. 2/23/1988 at 116-17. Based on the testimony of these two Commonwealth witnesses, a .25 caliber bullet is .35 millimeters too big to have caused the hole in Kinser's skull. Both Dr. Magnani's testimony and the handwritten note in the Commonwealth's file about Agent Albrecht's measurements indicate that factoring in the margin of error on the measurement of the bullet, the range would be 5.9 millimeters to 6.1 millimeters (which can also be written as .59 to .61 centimeters). ***See*** N.T. 2/22/1988 at 99; PCRA Petition Exhibit R. Even factoring in that

margin of error, a .25 caliber bullet is still too large to make the hole found in Kinser's skull (6.35 millimeter bullet vs. a 6.1 millimeter hole).

Nevertheless, Agent Albrecht testified that he did not find anything "inconsistent" between the size of the hole in Kinser's skull and a standard .25 caliber bullet. ***See*** N.T. 2/23/1988 at 114 ("Q: Did you find anything inconsistent between those two measurements [the measurement of the skull hole and the standard size of a .25 caliber bullet]? / A: In my opinion, no."). According to the credible testimony of Dr. Ann Ross at the PCRA hearing, Agent Albrecht's testimony in this regard was incorrect and misleading from a scientific perspective. N.T. 2/6/2025 at 37-41.

The specific FBI measurement of the hole in Kinser's skull was never adduced at trial, despite the Commonwealth obviously having access to the measurements, as indicated in the handwritten note and the prosecutor's reference in his closing argument to the hole being smaller than the bullet. ***See*** PCRA Petition Exhibit R; N.T. 2/24/1988 at 166. Having the specific FBI measurements would have bolstered Petitioner's argument that a .25 caliber gun could not have been the murder weapon and Petitioner could not have committed the murder because there was no evidence that Petitioner had access to any other gun or ammunition smaller than a .25 caliber.

The FBI measurements are impeachment evidence that undeniably would have been used on cross-examination of Agent Albrecht regarding his conclusion that there was no inconsistency between the size of the hole in Kinser's skull and a .25 caliber bullet. Without the specific measurements, defense counsel was unable to effectively challenge Agent Albrecht's testimony on cross-examination or to impeach him by questioning why he concluded that a 6.35 millimeter bullet could cause a 6.1 millimeter hole. The first prong of ***Brady*** is therefore satisfied.

2. Suppressed by the Commonwealth

Second, the evidence was suppressed by the prosecution. Petitioner first obtained the FBI's specific measurement of the hole in Kinser's skull between March 2022 and July 2022, when Petitioner was permitted access to the Centre County District Attorney's files. Included in the file was a handwritten note containing a specific measurement of the hole in Kinser's skull which was taken by the FBI expert retained by the Commonwealth in preparation for trial. The Commonwealth disclosed six FBI reports to defense counsel prior to trial, none of which contained any specific measurements of the skull hole as detailed in the handwritten note. The October 1981 FBI report contains the following statement: "This report supplements and confirms the results of the Laboratory examinations telephonically furnished to Corporal Fred E. Dailey of your department on October 8, 1981." ***See*** PCRA Petition Exhibit S. The October 1981 report references Specimen Q1 as a .25 caliber bullet and Specimen Q4 as Kinser's skull and contains only a vague reference to measuring the skull holes. No actual measurements were provided to Petitioner or his counsel until discovery of the handwritten note in 2022.

While the handwritten note is not dated, it is clear from the 1988 trial transcript that the prosecutor was aware that Agent Albrecht had taken specific measurements of the hole in Kinser's skull and that the hole in the skull was smaller than the bullet. ***See*** N.T. 2/24/1988 at 166 ("I said was the hole smaller by some degree than the bullet. He said yes."). Despite the reference in the October 1981 report to a telephone call with a member of local law enforcement regarding the FBI examination of the skull, the prosecutor never asked Agent Albrecht what the specific measurements were at trial. The fact that defense counsel never asked about the specific measurement on cross-examination supports the conclusion that the measurements were suppressed. Defense counsel expressly questioned Dr. Magnani about his specific

measurements, which had been disclosed prior to trial. It is reasonable to assume that defense counsel would have asked Agent Albrecht for his specific measurements as well, had defense counsel known that he measured and recorded the dimensions of the hole.

The full FBI file disclosed on January 10, 2024 corroborated the specific measurements contained in the handwritten note found in the Centre County District Attorney's files. The specific measurements of the skull hole are reflected in handwritten notes on the report but not included in the typed FBI report that was disclosed to the defense prior to trial, which is further indication that the measurements were suppressed. The fact that the note was not signed and the Commonwealth would have been able to argue against its admissibility is of no consequence. The Pennsylvania Supreme Court has repeatedly held that the admissibility of suppressed evidence is not "a prerequisite to a determination of materiality under ***Brady***." ***See Commonwealth v. Willis***, 46 A.3d 648, 670 (Pa. 2012). It is enough for ***Brady*** purposes that the note was within the Centre County District Attorney's files prior to the 1988 trial, as is demonstrated by the prosecutor's reference in closing argument that the hole in the skull was smaller than the bullet.

3. Prejudice / Materiality

Third, the evidence is material and prejudice resulted from its non-disclosure, thus satisfying the final prong of ***Brady***. Evidence is material if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." ***Kyles***, 514 U.S. at 435. Stated differently, evidence is material "when there is any reasonable likelihood it could have affected the judgment of the jury." ***Wearry***, 577 U.S. at 392 (2016) (citations and internal quotation marks omitted); ***Kyles***, 514 U.S. at 434 (the "touchstone of materiality is a reasonable probability of a different result, and the adjective is important. The question is not

whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial."). In reaching its conclusion on materiality, the Court must and did consider the record of the case as a whole.

At Petitioner's 1988 trial, the issue of the size of the bullet compared to the wound in Kinser's skull was central to both the Commonwealth's and defense's theories of the case. The prosecutor's opening statement outlined the Commonwealth's theory that Petitioner killed Kinser on December 14, 1980 using a .25 semiautomatic handgun. The Commonwealth used the .25 caliber bullet to connect Petitioner to the murder by telling the jury that Petitioner purchased a .25 caliber handgun prior to Kinser's disappearance. ***See*** N.T. 2/22/1988 at 29, 31-32. The Commonwealth claimed the identity of the murder weapon was undisputed. ***Id.*** at 46 ("When Dan O'Connell told the officers that [Petitioner] had test-fired the [.25 caliber] gun, they were immediately very, very interested because they knew that the murder weapon was a .25 semiautomatic."). In defense counsel's opening, he indicated that the identity of the murder weapon was unresolved and that a key issue in the case would be what gun killed Kinser. ***Id.*** at 54 ("Now of course, nobody mentioned to you where this gun is, and I don't suppose anybody will because . . . the gun has not been found. . . . I alert you now to watch for the evidence as to whether this gun that the district attorney talks about is really the one that is involved here.").

Throughout the trial, the size of the bullet that caused the fatal wound to Kinser's skull was discussed at length, particularly through Commonwealth experts Dr. Magnani and Agent

Albrecht. Dr. Magnani was asked directly how the size of the skull wound compared to the dimensions of the bullet, and he testified:

> Well, they will never be exactly the same. They will be approximately the same, but *the hole in the skull will be larger than the size of the bullet* because as the bullet goes through, it destroys tissue and it destroys bone and it just excavates some of the bones.

See N.T. 2/22/1988 at 86-87 (emphasis added). Defense counsel followed up by asking:

> Q: Would you say that one basic fact you could say is for sure, and that is, that the size of the bullet cannot be larger than the hole?
>
> A: That's absolutely right, yes.

N.T. 2/22/1988 at 99-100. Defense counsel then asked Dr. Magnani the specific measurement of the skull hole, and Dr. Magnani testified that it was 1 centimeter by 0.6 centimeters. ***Id.*** at 101. Dr. Magnani reiterated that the fatal bullet could not be larger than 6 millimeters (which is the same as 0.6 centimeters). ***Id.; see also id.*** at 104 ("Q: But in no event can the bullet be wider than the narrower dimension? / A: No."). Agent Albrecht testified that the standard size of a .25 caliber bullet is larger than 6 millimeters. N.T. 2/23/1988 at 116-117.

Based on the testimony of these two expert witnesses, the .25 caliber bullet was too large to have caused the fatal wound in Kinser's skull. Nevertheless, the prosecutor elicited the curious conclusion from Agent Albrecht that there was nothing "inconsistent" between the size of the hole in Kinser's skull and the size of a standard .25 caliber bullet. N.T. 2/13/1988 at 114.

There is a reasonable probability that the jury's judgment would have been affected if evidence of Agent Albrecht's measurements of the skull hole had been provided. Defense counsel could have attacked Agent Albrecht's credibility with the concrete evidence that his

measurements belied his own conclusion. Undermining Agent Albrecht's credibility would potentially have severed the key link between Petitioner and the crime because there was no evidence that Petitioner had access to any gun or ammunition other than the .25 caliber. Failure to provide the FBI measurements limited defense counsel's ability to impeach Agent Albrecht on this crucial point.

Based on the foregoing, Petitioner has established all three necessary prongs of the ***Brady*** analysis. The FBI's measurement of the wound in Kinser's skull was favorable to Petitioner in that it was both exculpatory and useful for impeachment. The evidence was suppressed by the Commonwealth and undermines confidence in the outcome of the trial because it could have been used to undermine the Commonwealth's theory that a .25 caliber handgun was the murder weapon and to impeach the Commonwealth's key witness, Agent Albrecht, whose credibility was critical to securing a conviction against Petitioner. As such, the Commonwealth violated Petitioner's due process rights under ***Brady*** and its progeny and Petitioner is entitled to relief under 42 Pa.C.S. § 9543(a)(2)(i).

B. *NAPUE / GLOSSIP* CLAIM

Petitioner next contends that the Commonwealth violated his due process rights under ***Napue v. Illinois***, 360 U.S. 264 (1959), by knowingly presenting perjured testimony; specifically, Agent Albrecht's testimony that he found nothing inconsistent between the size of the hole in Kinser's skull and the standard size of an unfired .25 caliber bullet. N.T. 2/23/1988 at 114 ("Q: Did you find anything inconsistent between those two measurements [the measurement of the skull hole and the standard size of a .25 caliber bullet]? / A: In my opinion, no.").

The Supreme Court recently and succinctly recited the law of the ***Napue*** line of cases:

> In *Napue v. Illinois*, this Court held that a conviction knowingly obtained through use of false evidence violates the Fourteenth Amendment's Due Process Clause.

> To establish a *Napue* violation, a defendant must show that the prosecution knowingly solicited false testimony or knowingly allowed it to go uncorrected when it appeared. If the defendant makes that showing, a new trial is warranted so long as the false testimony may have had an effect on the outcome of the trial, that is, if it in any reasonable likelihood could have affected the judgment of the jury. In effect, this materiality standard requires the beneficiary of the constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

Glossip v. Oklahoma, 145 S. Ct. 612, 626-27 (2025) (cleaned up). A ***Napue*** due process violation occurs even where the falsehood goes only to the issue of the witness' credibility. ***Napue***, 360 U.S. at 269. Courts have found a "reasonable likelihood" that the judgment of the jury could have been affected where a key witness lied about a fact relevant to their credibility and the witness' credibility was an important issue in the case. ***Id.*** at 265-72 (finding reasonable likelihood where perjured testimony was committed by a "principal witness" whose testimony was "extremely important."). With these principles in mind, the Court finds that Petitioner has met his burden of establishing a ***Napue/Glossip*** false evidence claim.

1. Falsity of the Testimony and Lack of Correction by Commonwealth

The falsity of Agent Albrecht's testimony regarding the measurement of the hole in Kinser's skull not being inconsistent with the size of a .25 caliber bullet is proven by the transcript from the 1988 trial. After directly asking Agent Albrecht, "[d]id you measure the size of that particular hole at the top of the skull?" the prosecutor asked about the standard size of a .25 caliber bullet. N.T. 2/23/1988 at 114. The prosecutor then asked, "[d]id you find anything inconsistent between those two measurements?" ***Id.*** Agent Albrecht answered, "In my opinion, no." ***Id.*** While Agent Albrecht phrased his answer as an opinion, the statement was objectively false because the specific measurements he took of the hole in the skull demonstrated that the hole was smaller than the .25 caliber bullet. Nevertheless, Agent Albrecht testified that he did not find any inconsistency in the measurements. No one corrected this testimony.

The Commonwealth contends that Agent Albrecht's testimony was not false because research on the correlation between entry wounds and bullet diameters shows that entry wounds can be smaller than the bullet diameters that produce them. Commonwealth's Brief at 44. However, as the Commonwealth notes, there were no scientific publications or findings in 1988 that support the conclusion that a bullet can produce a hole smaller than its diameter. ***Id.*** at 44. While the Commonwealth claims that means it could not be on notice at the time of the 1988 trial that there was an issue with Agent Albrecht's conclusion that there was nothing "inconsistent" between the size of the bullet and the size of the hole in Kinser's skull, that claim is clearly belied by the record. The Commonwealth's own expert stated unequivocally multiple times throughout his testimony that the bullet had to be smaller than the hole it purportedly caused. Agent Albrecht's "consistency" conclusion falsely suggests that his testimony was aligned with the Commonwealth's other expert, Dr. Magnani, when in fact it directly contradicted Dr. Magnani's "bigger bullet, bigger hole" conclusion.

2. Commonwealth's Knowledge of Falsity

The Commonwealth was on notice that this testimony from Agent Albrecht was false, not only because the Commonwealth had the specific measurements but also because another Commonwealth witness, Dr. Magnani testified repeatedly the day before that the hole could not be smaller than the bullet which caused it. N.T. 2/22/1988 at 86-86, 99-101, 104. Further evidence that the Commonwealth was aware of the falsity of Agent Albrecht's testimony on this issue is found in the prosecutor's closing statement, wherein he stated:

> I asked him [Agent Albrecht] if he measured the hole in the skull. He said yes. I said did you measure the good bullet, the .25 that wasn't mangled. He said yes. I said was the hole smaller by some degree than the bullet. He said yes. I said does that create any problem or any inconsistency there. He said no.

N.T. 2/24/1988 at 166.

3. Materiality

The testimony of Agent Albrecht provided the primary link between the cause of death and Petitioner, making him a key witness for the Commonwealth. The Commonwealth relied upon the testimony in question in its closing argument, as quoted above. Had the jury known that Agent Albrecht's own measurements revealed that the hole in Kinser's skull was too small to have been caused by a .25 caliber bullet, his credibility would have been significantly undermined, as would the purported link between Petitioner and the murder. Thus, there is a reasonable likelihood that knowledge of Agent Albrecht's measurements and the fact that his "consistency" conclusion was not supported by the evidence could have affected the jury's judgment.

The Court concludes that Petitioner's due process rights under ***Napue*** and ***Glossip*** were violated because the prosecutor knew or should have known that Agent Albrecht's testimony was false and failed to correct it. The Commonwealth cannot meet its burden of demonstrating beyond a reasonable doubt that this error did not contribute to the verdict, and consequently, Petitioner's conviction cannot stand.

NAA DATA IN FBI FILE

A. *BRADY* CLAIM

Petitioner asserts that the Commonwealth violated his due process rights under ***Brady*** and its progeny by failing to disclose to him before trial the NAA data contained in the full FBI file. The Court agrees with Petitioner that failure to disclose this information is a ***Brady*** violation.

1. Favorable to the Accused

The Court finds that the NAA data contained in the full FBI file is favorable to Petitioner because it undermines Commonwealth witness Agent Albrecht, whose testimony linked the .25

caliber test-fired bullet to the .25 caliber bullet found with Kinser's remains by comparing markings on their casings. In addition to challenging Agent Albrecht's conclusions regarding the markings on the two bullets, defense counsel also questioned Agent Albrecht about the neutron activation analysis conducted by the FBI and the conclusion that the FBI was unable to determine whether the test-fired bullet and the bullet found with Kinser's remains "were part of the same batch, but it could have been in the same box." N.T. 2/23/1988 at 123.

However, defense counsel did not have access to the underlying NAA data with which he could have sought an expert opinion such as that provided by William Tobin at the PCRA hearing in February 2025. Upon receipt and review of the NAA data, Mr. Tobin concluded that the composition of the test-fired bullet and the bullet found with Kinser's remains "are so disparate that it increases the likelihood that the bullets are from different boxes of bullets, thereby weaking the claim that a single firearm was responsible for the firing of both, as alleged by the Commonwealth in its theory of prosecution." PCRA Petition Exhibit OO at 4 (emphasis in original).

As discussed above, the Commonwealth's theory hinged on a .25 caliber handgun causing Kinser's death. The Commonwealth linked Petitioner to the gun that purportedly killed Kinser because he purchased a .25 caliber gun and box of ammunition from Dan O'Connell days before Kinser went missing. The gun was owned by O'Connell's father, who testified that discovered both the gun and the clip were missing. N.T. 2/23/1988 at 158. O'Connell testified that he sold Petitioner his father's .25 caliber gun in early December 1980 and on the date of purchase, he and Petitioner test-fired the gun behind a local Wendy's. N.T. 2/23/1988 at 70-72. O'Connell also testified that he "took the gun, the clip, and a number of rounds of ammunition" and sold them to Petitioner. N.T. 2/23/1988 at 70-71.

The NAA data undercuts the purported inculpatory value of the bullet recovered with Kinser's remains by weakening the "match" that Agent Albrecht sought to establish between the test-fired bullet and the bullet recovered with the remains. The credibility of Agent Albrecht's testimony that the two bullets "could have been from the same box" could have been impeached with the expert testimony of someone like Mr. Tobin testifying about the NAA data and his conclusion that it was "highly unlikely" that they were packaged in the same box.

Moreover, trial counsel could have utilized the suppressed NAA data in conjunction with the suppressed FBI measurement to reinforce his argument that the .25 caliber bullet found with Kinser's remains could not have been the bullet which caused Kinser's death. ***See Kyles***, 514 U.S. at 436 ("stressing" that materiality is considered "collectively, not item by item").

The Commonwealth takes issue with the credibility of Mr. Tobin's conclusion on the following grounds: (1) it effectively mirrored the trial testimony presented by the Commonwealth's expert; (2) the statements in the stipulated portions of his report have been undermined by other judicial opinions; and (3) the statements in the stipulated report are "unreliable, unpersuasive, and not credible." Commonwealth's Brief at 34-35. Setting aside the obvious irony in the Commonwealth's argument that Mr. Tobin's conclusions are not credible but also corroborate the evidence presented by the Commonwealth at the 1988 trial, the Court declines to disregard Mr. Tobin's conclusions based on unrelated testimony in two different cases in two different jurisdictions outside of Pennsylvania that involve dissimilar circumstances from his conclusions reached in this case. If the Commonwealth wished to challenge Mr. Tobin's credibility, it could have required testimony rather than stipulating to the admissibility of the portions of his report that the Commonwealth now claims is not credible.

2. Suppressed by the Commonwealth

The NAA data in the full FBI file was clearly suppressed by the Commonwealth. The parties stipulated that the full FBI file was provided to the Centre County District Attorney's Office on January 9, 2024, and the Centre County District Attorney's Office provided it to counsel for Petitioner the next day. The Commonwealth argues that the full FBI file (and the NAA data contained therein) cannot form the basis of a ***Brady*** violation because there is no proof that the full FBI file was in the possession of the Centre County District Attorney's Office or local law enforcement before January 9, 2024. The Commonwealth initially based its argument on three cases that stand for the general proposition that information in possession of a federal agency but not in the actual possession of the Commonwealth or a local police agency cannot form the basis of a ***Brady*** violation. ***See Commonwealth v. Simpson***, 66 A.3d 253 (Pa. 2013); ***Commonwealth v. Watkins***, 108 A.3d 692 (Pa. 2014); ***Commonwealth v. Brown***, 196 A.3d 130 (Pa. 2018).

As the Court explained in the October 1, 2024 Opinion and Order denying the Commonwealth's Motion to Dismiss the PCRA Petition, the Commonwealth's reliance on these cases is misplaced because all three are materially distinguishable from the circumstances in the instant case. None of the three cases cited by the Commonwealth as an attempt to excuse its failure to provide the full FBI file to Petitioner prior to the 1988 trial involve FBI or other federal law enforcement involvement in the particular case the Commonwealth was prosecuting. Here, the Commonwealth retained the FBI to assist in its prosecution of Petitioner. Relying on the Supreme Court of the United States' opinion in ***Kyles v. Whitley***, the Court found that the FBI's knowledge in this case could be imputed to the Centre County District Attorney's office because the FBI was acting on its behalf in the prosecution of Petitioner. ***See Kyles***, 514 U.S. at 437

("[T]he 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."). In ***Kyles***, the Supreme Court found that the prosecutor a prosecutor can be found in violation of their ***Brady*** obligation for failure to disclose evidence known only to police investigators. ***Id.*** at 438.

The Commonwealth now argues that the Court improperly relied on ***Kyles*** because ***Kyles*** was decided in 1995. According to the Commonwealth, the prosecutor's ***Brady*** obligations at Petitioner's trial in pre-***Kyles*** 1988 were different and "the Commonwealth would not have been considered to be in constructive possession of the FBI's file, and therefore it would not have been subject to disclosure so long as it was not in the Commonwealth's actual possession." Commonwealth's Brief at 54. The Commonwealth cites no authority for this proposition, nor could the Court find any.

In reaching its conclusion 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[]", the ***Kyles*** Court explicitly noted that a more lenient rule in which the prosecutor would not be held accountable for information known only to police investigators and not to the prosecutor would "amount to a serious change of course from the ***Brady*** line of cases." ***Kyles***, 514 U.S. at 438. The ***Kyles*** Court then quoted a 1972 opinion of the Supreme Court of the United States which held ***Brady*** information known by one member of the prosecutor's office but not disclosed to the prosecutor trying the case until after the trial constitutes a ***Brady*** violation. ***Giglio v. United States***, 405 U.S. 150 (1972). In *Giglio*, the Supreme Court also instructed – in 1972, before either of Petitioner's two trials – "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." ***Id.*** at 154.

Here, the Commonwealth worked closely with the FBI in the prosecution of Petitioner. One of the Commonwealth's key witnesses, Agent Albrecht, personally measured the hole in Kinser's skull and signed off on the results of the neutron activation analysis. The Commonwealth's attempt to hide behind the FBI, who it retained to assist in the prosecution of Petitioner and relied heavily on in that prosecution, is a gross distortion of the ***Brady*** doctrine and patently offensive to the due process protections of both the Pennsylvania and United States Constitutions.

3. Prejudice / Materiality

The NAA data is material and prejudice resulted from its suppression by the Commonwealth. As noted above, the identity of the murder weapon and its connection to Petitioner were central issues in the trial, particularly because the case against Petitioner was circumstantial. In the absence of murder weapon to present as evidence, the Commonwealth relied on the testimony of Agent Albrecht to connect the .25 caliber handgun and ammunition purchased by Petitioner to the .25 caliber bullet found with Kinser's remains and which purportedly was the cause of the fatal wound Kinser's skull. The centrality of the issue is evident due to the amount of testimony presented by the Commonwealth to link the test-fire bullet to the bullet found with Kinser's remains as well as defense counsel's cross-examination on the issue neutron activation analysis. Defense counsel's cross-examination was limited, however, because he did not have access to the underlying NAA data that was only disclosed to the defense in January 2024. It is of no consequence that defense counsel elicited the testimony about neutron activation analysis at trial as opposed to the Commonwealth. The Commonwealth possessed the NAA data that could have been used to weaken its theory linking the .25 caliber handgun purchased by Petitioner and the .25 caliber bullet that purportedly killed Kinser but did not

provide that information to the defense. Nevertheless, the Commonwealth's witness provided a conclusion based on the analysis which defense counsel was unable to effectively challenge because he did not have access to the underlying NAA data itself.

Armed with the NAA data prior to trial in 1988, defense counsel could have sought expert testimony to impeach Agent Albrecht's conclusion that the bullet found with Kinser's remains could have come from the same box of ammunition as the test-fired bullet. Defense counsel could have presented testimony such as that of Mr. Tobin, who testified that the NAA data establishes that the bullet found with Kinser's remains likely could not have come from the same source as the test-fired bullet, significantly weakening the Commonwealth's theory that the same gun fired both bullets.

Agent Albrecht was a key witness for the Commonwealth, making his credibility critical to the Commonwealth securing a conviction in this case. The defense's ability to counter Agent Albrecht's testimony with expert testimony of its own could well have affected the jury's judgment in this case. This is particularly true when considered in conjunction with the Commonwealth's suppression of Agent Albrecht's measurement of the hole in Kinser's skull, addressed above. The Commonwealth's "disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item." ***Kyles***, 514 U.S. at 420. Here, the net effect of the evidence suppressed by the Commonwealth raises a reasonable probability that its disclosure would have produced a different result at trial. Therefore, the conviction cannot stand, and Petitioner is entitled to a new trial.

B. *NAPUE / GLOSSIP* CLAIM

Petitioner argues that the Commonwealth violated his due process rights under ***Napue v. Illinois*** by knowingly presenting perjured testimony regarding the NAA data. For the reasons set

forth below, the Court disagrees with Petitioner on this claim.

To prevail on a ***Napue*** claim, Petitioner bears the initial burden of establishing that a witness committed perjury. ***Glossip***, 145 S. Ct. at 626-27. The testimony at issue here is Agent Albrecht's statement that the FBI was unable to determine whether the test-fired bullet and the bullet found with Kinser's remains "were part of the same batch, but it could have been in the same box." N.T. 2/23/1988 at 123. Petitioner's expert, Mr. Tobin, concluded that it is "highly unlikely" that the two bullets came from the same box. PCRA Petition Exhibit OO. Neither expert could say with certainty that the bullets came from the same box of ammunition or that they did not. Agent Albrecht's conclusion suggests a possibility that they could have come from the same box, while Mr. Tobin's conclusion suggests an improbability that the two bullets could have come from the same box. While the differences in the two experts' conclusions could have affected the judgment of the jury had they both been presented at the time of trial, the Court cannot say that the testimony of Agent Albrecht in this regard is false. The Court need not address the remaining elements of the ***Napue*** claim because Petitioner has failed to establish that the testimony of Agent Albrecht on this issue is false. As such, Petitioner is not entitled to relief under ***Napue/Glossip*** as it relates to testimony on the NAA data.

CONCLUSION

Petitioner is entitled to a new trial as a result of the Commonwealth's failure to comply with its obligations under ***Brady*** and ***Napue/Glossip*** regarding the FBI measurements of the skull hole and the Commonwealth's failure to comply with its ***Brady*** obligations regarding the NAA data. Accordingly, the Court enters the following Order:

ORDER

AND NOW, this 28 day of August, 2025, it is hereby ORDERED:

1. Petitioner's PCRA Petition is **GRANTED** as to the *Brady* claims involving the FBI measurements of the hole in Kinser's skull and the NAA data.
2. Petitioner's PCRA Petition is **GRANTED** as to the *Napue/Glossip* claim involving the FBI measurements of the hole in Kinser's skull.
3. Petitioner's PCRA Petition is **DENIED** as to the *Napue/Glossip* claim involving the NAA data.
4. Petitioner's conviction is hereby **VACATED**;
5. Petitioner is entitled to a new trial due to the Commonwealth's failure to comply with its obligations under *Brady* and *Napue/Glossip*; and
6. This case shall be placed on the Criminal Pre-Trial list for the December 2025 term of Court.

BY THE COURT:

Jonathan D. Grine, President Judge