

New Exculpatory Evidence

1. The Anna Austin background check

The Commonwealth dismissed the background check of Anna Austin-which disclosed that she was in possession of a .38 caliber Smith and Wessen gun-by providing misleading information. The Commonwealth posits that the failure to turn over such information was immaterial because it argues that the shooter was a man, the murder weapon was of a different caliber, and Ms. Austin lived on a different street. Regardless of the caliber of the gun used in the shooting being a .45 caliber and the fact that Ms. Austin is a middle-aged woman unrelated to Petitioner or the victim, the relevance of this information is another one, and the Commonwealth is swaying away from it. Ms. Austin is not a completely secluded individual, some other person with a connection with her could have had access to the gun. She could have had a male relative or acquaintance involved in the incident, and while Mr. Hill and Mr. Garrik testified that they saw males running from the scene, it is notable that Mr. Logan reported seeing a person running away from the scene but that he could not tell the gender. Furthermore, the fact that the gun is not the same as the one used in the shooting does not make the information immaterial. Extensive caselaw exists allowing consideration of proof of possession of a firearm that cannot be linked to the murder on the ground that it "tends to prove that the defendant had a weapon similar to the one used in the perpetration of the crime" relying on the fact that a suspect was shown to be in possession of a weapon prior to or on the day of the crime. See Commonwealth v. Coccioletti; Commonwealth v. Akers; Commonwealth v. Williams; Commonwealth v. Yount; Commonwealth v. Ford. In order for the defense to pursue the investigation of an alternative perpetrator, it should have had access to this information at trial. Had trial counsel known that police were interested in Anna Austin's firearm background, in addition to her unexplained connection to a murder scene on

a block she did not reside on, would have raised interest for further investigation for an alternative perpetrator by defense counsel.

The Commonwealth's argument that this evidence is fruitless leads to the question: fruitless to whom? The "fruitless lead" language is not grounded in precedent from the Supreme Court of the United States. Commonwealth v. Natividad, 200 A.3d 11, 48 (2019). It appears in this Court's jurisprudence **in** *Crews*, a case in which the defendant did not raise a constitutional challenge under *Brady*. Id. "What makes a lead "fruitless?" That it does not inculcate the defendant or that it does not fit in the Commonwealth's theory of the case? Permitting the Commonwealth to make such a prospective determination based upon its own assessment of evidentiary value diverges from the goals of fairness and justice that underlie *Brady*". Id. at 49.