

# **1 Appellant Mumia Abu-Jamal's Reply Brief**

# **2 Appellant Mumia Abu-Jamal's Supplemental Reply Brief**

**October 14, 2002 ■**

This is a slightly abridged version of the documents submitted to the court.\*

## **Reprints and Publications Labor Action Committee to Free Mumia Abu-Jamal**

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**Appellant  
Mumia Abu-Jamal’s  
Reply Brief,  
October, 14 2002**

In the Supreme Court of Pennsylvania, Eastern Division  
No. 364 Capital Appeal Docket, Commonwealth of  
Pennsylvania,

Appellee, vs. Mumia Abu-Jamal, Appellant.

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**INTRODUCTION**

If Arnold Beverly is telling the truth when he swears that he shot Officer Faulkner and Mumia Abu-Jamal had nothing to do with the shooting – and there is a veritable mountain of evidence which corroborates Beverly’s confession – then Petitioner Jamal must be innocent. If Petitioner Jamal is innocent, then the basis upon which the Commonwealth seeks to support Petitioner’s wrongful conviction must consist of perjured testimony and fabricated evidence – of which there is also substantial proof, including testimony from two witnesses that the prosecution’s only purported eyewitnesses to the shooting admitted that they did not even see the shooting.<sup>1</sup>

Under the PCRA, at 42 Pa C S Section 9543(a)(2)(vi), a person who, following their conviction,

obtains exculpatory evidence which, although it might fall short of proving actual innocence, establishes a reasonable doubt of guilt (i.e., “would have changed the outcome of the trial if it had been introduced”), is entitled to relief. Yet, in this case, the Commonwealth takes the astonishing stance that, even if Petitioner Jamal can prove that it is more likely than not that he is actually innocent, the courts still have no jurisdiction to hear this evidence.<sup>2</sup> If the Commonwealth’s interpretation of the law were correct, then the law would be unjust. Since the law cannot be unjust the Commonwealth’s interpretation must be wrong.

<sup>1</sup> See Petition, Paragraphs 142-362; Docket #D-1A, D-17, D-18, D-20, D-21, D-25, D-28; Motion for Remand to Take Testimony from Yvette Williams, in record on appeal herein.

<sup>2</sup> Claim 1 of the underlying Petition pleads two different legal claims: (1) A free-standing claim of “actual innocence” under the 8<sup>th</sup> and 14<sup>th</sup> Amendments (*Herrera v Collins*, 506 US 390 (1993); *Carriger v Stewart*, 132 F3d 463 (9<sup>th</sup> Cir 1997)(en banc)); (2) A claim of discovery of “exculpatory evidence” not previously discoverable under Sec. 9543(a)(2)(vi) of the PCRA.

The Commonwealth's position must be in error, because otherwise innocent persons who are able to prove their innocence would be executed or have to spend the rest of their lives in prison solely for the "crime" of running afoul of the District Attorney's misinterpretation of the PCRA's timeliness requirements. This would necessarily violate the 8th and 14th Amendments' prohibition on cruel and unusual punishment and subject the Commonwealth of Pennsylvania to universal condemnation as "no civilized society could tolerate" a judicial system that would allow such a "miscarriage of justice." *Commonwealth v Carpenter*, 725 A2d 154, 160 (Pa 1999). See also *Commonwealth v Hall*, 565 Pa 92, 100, 771 A2d 1232, 1237 (2001)(Nigro, J., concurring):

"While I acknowledge that the purpose of the one-year filing limitation is to establish finality and prevent the repetitive filing of meritless PCRA petitions, I also believe that the PCRA is designed to protect a defendant who reasonably relies in good faith upon counsel to protect his appellate rights, but counsel allows those rights to be forfeited...In my view, a rule that penalizes a defendant who reasonably relies in good faith upon his counsel to protect his appellate rights is contrary to the purpose of the PCRA..."

Petitioner's case fits squarely within two statutory exceptions to the PCRA filing deadlines, and there is jurisdiction to hear all of his claims on the merits, despite the Commonwealth's arguments to the contrary. Additionally, under *Commonwealth v Leasa*, 759 A2d 941 (Pa Super 2000), and numerous other authorities cited below, there is ample precedent to construe the underlying Petition as a first petition and an extension of the PCRA petition filed by prior counsel in 1995. This would obviate all the "timeliness" problems raised by the Commonwealth as the underlying Petition would then be a "first petition" filed before the 1996 effective date of the statutory filing deadlines created by the 1995 PCRA amendments.

As Petitioner has pointed out in his Opening Brief, a free-standing claim of actual innocence is not cognizable on the face of the PCRA and, therefore, is not affected by the PCRA's timeliness requirements; hence there is jurisdiction to hear this claim on the merits under the courts' state habeas power. The Commonwealth's counter-argument fails to appreciate the differences between such an "actual innocence claim" and a claim based upon the discovery of "exculpatory evidence" under PCRA Section 9543(a)(2)(vi).

Since Petitioner filed his Opening Brief, yet another federal judge has ruled the federal death penalty unconstitutional and the Governor of Illinois has set clemency

hearings for everyone on that state's death row. There is an ever growing consensus in this country, and even in Philadelphia, where the local bar association and the Philadelphia Inquirer have called for a moratorium on executions, that more rather than less scrutiny, and more rather than less reliability, must be built into the review of convictions, particularly in capital cases. Petitioner's argument that the Peterkin-Fahy line of cases should be overturned is now more compelling than ever.

The Commonwealth has conceded the substantive merits of Petitioner's claims for relief by filing an Answer to the underlying Petition which contests jurisdiction only.<sup>3</sup> Accordingly, upon this Court's reversal of the lower court's dismissal of the Petition, the Court should grant relief and overturn Petitioner Jamal's conviction or, in the alternative, remand for an evidentiary hearing. *Commonwealth v Williams*, 732 A2d 1167, 1180-1184 (Pa 1998).

### **I. Petitioner's Extra-Judicial Racial Bias Claim Merits Relief.**

"If true, intemperate remarks and racist attitudes by anyone involved in the justice system are deeply troubling. The [Pennsylvania] Supreme Court, the ultimate disciplinary mechanism for governance of the courts, takes these matters seriously and can be expected to address them promptly and firmly."—Judge Dembe, Memorandum and Order, November 21, 2001, p. 23 (dismissing Petitioner Mumia Abu-Jamal's claim for relief based on extra-judicial racial bias).

#### A. Petitioner's Extra-Judicial Racial Bias Claim Is Timely.

Petitioner Jamal's counsel first learned of Judge Sabo's racist "I'm going to help 'em fry the nigger" comment when they met with Court Stenographer Terri Maurer-Carter on August 18, 2001, and she told them that she had overheard Sabo make the remark to another person at the time of Petitioner's trial when she was passing through the antechamber of the court on her way to an assignment.<sup>4</sup> Ms. Maurer Carter's declaration (Docket

<sup>3</sup> The Commonwealth again conceded the merits of Petitioner's underlying claims for relief in its Brief on appeal by failing to dispute the merits analysis in Petitioner's Opening Brief.

<sup>4</sup> Declaration of Attorney Grossman, Docket #D-23. Petitioner's Counsel had been put in touch with Ms. Maurer Carter on August 17 or 18, 2001, through one of Petitioner's supporters who had answered a call from her that same day to a telephone number publicly advertised for those wishing information about his case. *Id.*

#D-12) was timely filed with the Court of Common Pleas on August 28, 2001, ten days later. The amendment to the Petition to add a Tenth Claim for Relief for extra-judicial racial bias (Docket #D-19) was timely filed on September 17, 2001, 30 days after Petitioner's counsel first discovered the evidence of Sabo's "fry the nigger" remark when it was disclosed to them by Ms. Maurer-Carter.<sup>5</sup>

Both the Maurer-Carter declaration and the amendment to the Petition to add the Tenth Claim for Relief were timely filed, pursuant to 42 Pa. C.S. Sec. 9545(b)(2), within 60 days of initial discovery of the evidence underlying these claims. This evidence could not have been earlier discovered because its discovery depended entirely upon Ms. Maurer-Carter's personal decision to come forward and disclose it to counsel. Given that the evidence was of a remark by Judge Sabo overheard by Ms. Maurer-Carter, how else could Petitioner's Counsel ever have learned of this evidence other than by her deciding on her own to contact them and disclose it?

The Commonwealth's assertion that Petitioner does not explain when or how this evidence was obtained or why it could not have been obtained earlier, with due diligence, is blatantly false. With regard to when the evidence was discovered, this evidence was obtained on August 18, 2001. With regard to how the evidence was discovered, the evidence was obtained when it was disclosed to Petitioner's counsel by Ms. Maurer-Carter. With regard to why this evidence could not have been earlier discovered, the evidence could not have been obtained earlier, because its discovery depended entirely on Ms. Maurer-Carter's coming forward and disclosing it. Neither Petitioner nor his counsel could have obtained this evidence any earlier, nor had any inkling of its existence, until Ms. Maurer-Carter disclosed it to counsel on August 18, 2001.

The Commonwealth seeks to obfuscate the fact that Petitioner has fully satisfied the when, how, and why requirements set forth in *Commonwealth v Yarris*, 731 A2d 581, 590 (Pa 1999) by peddling to the Court its idle speculation that maybe somehow Petitioner or one of his counsel discovered this evidence before August 18, 2001. However, the Commonwealth's pure speculation on this point is entirely irrelevant. Petitioner is not required to demonstrate that he or his counsel did not discover this evidence before it was discovered. Petitioner

need only inform the Court when the evidence was discovered and why it could not have been earlier discovered. As has already been explained, it is obvious from the circumstances under which the evidence was obtained that it could not have been earlier discovered, because its discovery depended on factors outside the control of Petitioner or his counsel, namely, the witness' personal decision to come forward and disclose it.

Finally, it should be noted that Judge Dembe did not rule that the Terri Maurer-Carter declaration or the Tenth Claim for Relief were untimely. Rather, she ruled that there was an issue as to timeliness because, according to her: "It is not possible to ascertain if the claim is timely filed because it is not clear that Petitioner could not have learned of the facts sooner." Apart from the fact that Judge Dembe fails to explain how Petitioner (or his counsel) could possibly have learned of the facts any sooner than Terri Maurer-Carter disclosed them on August 18, 2001, and that there was no way in which this evidence could have been discovered before Ms. Maurer-Carter disclosed it; even if Judge Dembe were correct in ruling that there is an issue as to timeliness, she should have set an evidentiary hearing on that issue rather than dismissing the claim on jurisdictional grounds. It is precisely where there is an issue of material fact that the PCRA court is required to have a hearing as that is the only way to resolve such an issue. Since Judge Dembe's reasons for dismissing Claim Ten were insufficient on their face, the dismissal without a hearing was an abuse of discretion. *Commonwealth v Williams*, 732 A2d 1167, 1181 (Pa 1999).

B. An Adverse Inference Must be Drawn Against the Commonwealth For Failing to Submit a Counter-affidavit.

Ms. Maurer-Carter's declaration was made under the penalty of perjury pursuant to 18 Pa. C.S. Sec. 4904 which gives it the same legal force and effect as an affidavit. The Commonwealth's observation that it is not in affidavit form is irrelevant.

The Commonwealth had over eight months from the time Ms. Maurer-Carter's declaration was filed on August 28, 2001, to submit a counter-affidavit from Judge Sabo, but it never did so.<sup>6</sup> Sabo was 80 or 81 years old when the Maurer-Carter declaration was filed. It surely must have occurred to the Commonwealth that Sabo might not be around for very much longer. Yet, despite that fact that it had over eight months to do so before he died, the Commonwealth never obtained an

<sup>5</sup> This was precisely "a matter of weeks" (*i.e.*, more than one week and less than a month) after this evidence was first discovered by Petitioner's counsel when it was disclosed to them by Ms. Maurer-Carter, as is pled in Petitioner's amendment to the underlying Petition.

<sup>6</sup> Judge Sabo died on May 8, 2002. See *Philadelphia Inquirer*, May 10, 2002, "Obituaries: Albert F. Sabo, 81, Abu-Jamal trial judge."

affidavit or declaration from him nor did it seek authorization from the court to take his deposition in order to perpetuate his testimony. Under these circumstances, an adverse inference must necessarily be drawn against the Commonwealth by this Court to the effect that the matters stated in the Maurer-Carter declaration are true.<sup>7</sup>

C. Petitioner's Claim of Extra-Judicial Racial Bias on the Part of Judge Sabo Has Not Been Previously Litigated.

The Commonwealth does not dispute Petitioner's constitutional right to an impartial judge at trial and in post-conviction proceedings. Instead of seeking to defend Judge Dembe's ruling to the contrary, the Commonwealth finesses its defense of her ruling by claiming that she did not really mean what she wrote, and inventing a different ground for that ruling, namely that Petitioner's claim of extra-judicial racial bias had been previously litigated. There are two fundamental problems with this argument, however:

Firstly: Judge Dembe makes no finding that Petitioner's present claim of extra-judicial racial bias was previously litigated, nor does she base her ruling on such an assumption. Judge Dembe merely states, in an inappropriate expression of solidarity with Sabo as a fellow jurist, that previous claims of bias raised against him by Petitioner's prior counsel were rejected on appeal. Judge Dembe nowhere rules, finds or even suggests that Petitioner's present claim of judicial bias was previously litigated.

Secondly: Petitioner's present claim of extra-judicial racial bias by Judge Sabo arises out of an entirely different set of facts from prior bias claims. Rather than a claim of bias based on Sabo's F.O.P. membership or generalized hostility to Petitioner and prior counsel, as were the bias claims previously raised, Petitioner's present claim is of specifically racial bias. Moreover, the previous bias claims were not of extra-judicial bias, instead they were based on the manner in which Judge Sabo conducted himself in court on the record.<sup>8</sup>

<sup>7</sup> The Commonwealth asserts, without providing any evidence of the truth of its assertion, that Judge Sabo publicly denied making the racist remark attributed to him. However, even if Sabo had issued such a self-serving denial, it would be inadmissible hearsay without any indicia of reliability, particularly because of the failure to make it under oath or subject to the penalty of perjury.

<sup>8</sup> In his Memorandum and Order dated December 18, 2001, pp. 12-13, denying Petitioner Jamal's motion to amend his federal habeas petition in *Jamal vs Horn*, U. S. District Judge Yohn specifically held that Petitioner Jamal's claim of extra-judicial racial bias by Judge Sabo, based on the Maurer-

## II. There Is Jurisdiction Under The PCRA To Hear The Underlying Petition On The Merits

A. The Petition Is Timely Under The "Governmental Interference" Exception.

The PCRA provides an exception to the one-year filing deadline for "interference by government officials" which prevents presentation of a claim. The underlying Petition pleads and proves that Petitioner's prior Chief Counsel Leonard Weinglass and Chief Legal Strategist Daniel Williams deliberately acted against his interests and as a "second prosecutor" in suppressing the evidence of his innocence and, in thereby interfering with the presentation of Petitioner's "actual innocence" claim, functioned as de facto agents of "government officials."

The Commonwealth's response on this issue indicates that they have entirely misconstrued Petitioner's argument. To cut through the confusion, consider the effect on Petitioner's case had the District Attorney herself done what was done here by Petitioner's prior counsel, Messrs. Weinglass and Williams:

Had the District Attorney obtained Arnold Beverly's confession to the murder of Officer Faulkner and exoneration of Petitioner Jamal, but suppressed both the confession and the corroborating lie detector test results, instead of turning them over to the defense, this would have violated Petitioner's right to receive material and exculpatory evidence in the hands of the State under *Brady v Maryland*, 373 US 83 (1963).

Had the District Attorney, instead of turning it over to the defense, suppressed the 1999 declaration of Petitioner's brother, William Cook, in which Cook, a witness to the incident for which Petitioner was convicted, swears that Petitioner did not shoot Officer Faulkner and

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Carter declaration, was wholly distinct from previous bias claims: "While these assertions, at least those regarding Sabo's purported prejudices, are not wholly dissimilar to those contained within the original petition, they are insufficiently related to come within the ambit of Fed. R. Civ. P 15(c). Indeed it is one thing to for a judge to favor the police or to disfavor the individual; it is quite another for him to be guided by racial animus. While neither is excusable, these are distinct allegations the substantiation of which would entail widely divergent evidentiary showings. Nothing within Jamal's initial petition put the government on notice that it would have to investigate Judge Sabo's racial attitudes. Consequently, under the principles articulated above, these assertions cannot be said to relate back to Jamal's initial petition *See generally Duffus*, 174 F.3d. At 336 (holding that one ineffectiveness claim does not relate back to a different, original ineffectiveness claim)."

recounts Kenneth Freeman's confession to participation in a plot to shoot Faulkner, this would also have violated *Brady v Maryland* because this evidence was material and exculpatory. Had the District Attorney kept William Cook from testifying in the 1995 post-conviction proceedings as to Petitioner Jamal's innocence and Kenneth Freeman's participation in the shooting of Officer Faulkner, this would have violated *Brady* because this evidence was material and exculpatory. Had the D.A. falsely advised the Court that Cook had "disappeared" and could not be located, this would have been prosecutorial misconduct.

Had the District Attorney put Robert Chobert on the witness stand in post-conviction and concealed the fact that Chobert had recanted his trial testimony this would have been prosecutorial misconduct and would have violated *Brady*, *supra*, and *Kyles v Whitley*, 514 US 419 (1995) because not only exculpatory evidence, but evidence tending to undermine the prosecution's case must also be disclosed.

Had the District Attorney put Arnold Howard on the witness stand in post-conviction and not disclosed that Howard had told him that the prosecution's star witness at trial, Cynthia White, had twice picked Kenneth Freeman out of a line-up shortly after the shooting of Faulkner, that would have been prosecutorial misconduct and violated *Brady* and *Kyles*. Had the District Attorney concealed from the defense that Kenneth Freeman's hands had been tested for gunpowder residue by the police that would have been prosecutorial misconduct and violated *Brady* and *Kyles*.

Had the District Attorney had Donald Hersing's affidavit with regard to corruption in the Philadelphia Police Department, particularly among officers responsible for the investigation of the shooting of Officer Faulkner, and failed to turn that over to the defense, that would have violated the *Brady* and *Kyles*.

Petitioner's ex-Chief Counsel and ex-Chief Legal Strategist did all of this and more in their capacity as "second prosecutors" acting in the interests of the State and against the interests of their client. This was not only "constructive denial of counsel" under *Rickman v Bell*, 131 F3d 1150 (6th Cir 1997), but when done by prior counsel was the equivalent of prosecutorial misconduct since they are acting as a "second prosecutor." It is in this sense that their actions can be attributed to the government as "interference by government officials" with the presentation of Petitioner's claims.

While a defense attorney, acting in the capacity of a defense attorney, may not be a "government official" within the meaning of Section 9545(b)(4) of the PCRA, a defense attorney acting in the capacity of a "second

prosecutor" certainly can be considered an agent of "government officials" as pled and proved in the underlying Petition and, therefore, their actions may be attributed to the District Attorney who indisputably is a "government official."

As in the case authorities cited in Petitioner's Opening Brief at p. 39, where defense attorneys have been held to be State actors under a variety of circumstances, in the case of *Edmonson v Leesville Concrete Co., Inc.*, 500 US 614 (1991), a civil case, private counsel was similarly considered to be a State actor for 14th Amendment purposes, when he utilized court proceedings to make peremptory challenges of potential jurors based on their race. The dissent in *Edmonson* specifically acknowledged the import of the holding in that case: "The Court concludes that the action of a private attorney exercising a peremptory challenge is attributable to the government and therefore may compose a constitutional violation." *Edmonson*, *supra*, 500 US at 631 (O'Connor, J., dissenting). Similarly here, the use (and misuse) of court proceedings by attorneys Weinglass and Williams, and the use (and misuse) of their status as Officers of the Court, to suppress evidence of Petitioner's innocence must be considered to be "state action" and their committing the equivalent of prosecutorial misconduct in their capacity as a "second prosecutor" demonstrates that they were indeed functioning as *de facto* agents of the prosecution.

Although the Commonwealth cavils over the semantics of Petitioner's contention in his Opening Brief, at p. 38, that Messrs. Weinglass and Williams "in function if not in fact" acted as agents of the prosecution, the clear import of this formulation is not, as the Commonwealth wrongly asserts, that there are no facts to prove up the agency allegation, but rather, as Petitioner points out in his Opening Brief, at p. 39, n. 47, that his prior defense counsel "stepped out of that role to act instead as a 'second prosecutor' and thereby functioned as *de facto* agents of the District Attorney who, indisputably is a 'government official.'" Petitioner does not concede that there are no facts to prove Weinglass and Williams were agents of the prosecution; to the contrary the underlying Petition pleads facts which establish that they functioned as agents of the prosecution.<sup>9</sup>

The statutory exclusion of defense attorneys from the definition of "government officials" in Sec. 9545(b)(4) of the PCRA reflects the simple fact that the role of defense attorney as advocate for his or her client

<sup>9</sup> See *Georgia v McCollum*, 505 US 42, 54 (1992) ("the determination whether a public defender is a state actor for a particular purpose depends on the nature and context of the *function* he is performing.") [emphasis added].

is incompatible with the role of a government official because the adversarial nature of our legal system presupposes that defense counsel and the prosecutor are adversaries rather than allies. When a defense attorney leaves his client "uncounseled" and deserts to the side of the prosecution, as happened in the case of Petitioner Jamal, "the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated" and what was supposed to be a fair and just proceeding turns into "a sacrifice of unarmed prisoners to gladiators." *Cronic*, 466 US at 656-657.

The Commonwealth contends that the adversarial relationship between a defense attorney and the prosecution negates Petitioner's argument that his prior counsel took on the character of a "government official." However, this precise argument was rejected by the Supreme Court in *Georgia v McCollum*, *supra*, where it held that a defense attorney's use of peremptory challenges in a criminal case to remove potential jurors because of their race constituted "state action" within the meaning of the 14th Amendment. In *McCollum*, the Supreme Court distinguished *Polk County v Dodson*, 454 US 312 (1981), in which it had earlier found that a Public Defender did not qualify as a state actor. The *McCollum* Court pointed out that, while the holding in *Polk County* was that "state action" could not be found solely from an attorney's employment by a governmental entity, this does not preclude a finding of state action: "Instead, the determination whether a public defender is a state actor for a particular purpose depends on the nature and context of the function he is performing." 505 US 42, 54 [emphasis added].

B. The Petition Is Timely Under The PCRA'S "Newly Discovered Evidence" Exception.

1. The Commonwealth blatantly misrepresents the facts as to when the evidence of Arnold Beverly's responsibility for the death of Officer Faulkner was discovered.

The Commonwealth's contention that, "defendant now admits that he possessed this evidence [i.e. Arnold Beverly's confession] even before he retained Mr. Weinglass and Mr. Williams," is simply untrue. It was not until mid-1999 that Beverly confessed that he shot Officer Faulkner. (Docket #D-13, Para. 14, Declaration of Rachel Wolkenstein). The reference in Petitioner's Opening Brief, at p. 10, which is misrepresented by the Commonwealth, is to the facts pled in the underlying Petition at Para. 77, to the effect that Weinglass and Williams were informed by attorney Wolkenstein upon their retainer in 1992 that there was a source of information who said that Officer Faulkner was killed by corrupt police and organized crime. Although the source was

Arnold Beverly he did not disclose his own role in the shooting, stated he would not testify, and said he would deny all of it if subpoenaed as a witness (Petition, para. 77).

2. The Commonwealth misconstrues *Bell v Cone*.

Petitioner contends that the undisclosed and concealed conflicts of interest of his prior counsel, and associated "constructive denial of counsel," are the facts underlying the claims in his Petition which could not previously have been discovered by him with due diligence. Since it is the attorney's duty to disclose a conflict of interest, and Messrs. Weinglass and Williams failed to disclose theirs, Petitioner Jamal could not have, as a matter of law, discovered these facts.

The Commonwealth responds that such facts relate solely to "ineffective assistance of counsel" under *Strickland v Washington*, 466 US 668 (1984), rather than to "constructive denial of counsel" under *United States v Cronic*, 466 US 648 (1984), and under various Pennsylvania precedents, cannot constitute the facts underlying his claims for relief. The Commonwealth's argument is based on the supposition that, under *Bell v Cone*, 122 S Ct 1843 (2002), Petitioner cannot make out a claim for "constructive denial of counsel" for prior post-conviction counsels' failure to subject the prosecution's case to the "crucible of adversarial testing" unless counsels' failure was "complete."

However, *Cone* is readily distinguishable from the case of Petitioner Jamal, because there was no conflict of interest issue in *Cone*. Where, as here, counsel have actual conflicts of interest which adversely affect their performance, there indisputably is a "complete" failure to subject the prosecution's case to meaningful adversarial testing, because everything which counsel do or do not do, and any advice counsel give or do not give their client, is fatally infected by their conflicts.

The Supreme Court points out in *Cone* that the difference between an "ineffectiveness of counsel" claim and a "constructive denial of counsel" claim is not a matter of "degree," but of "kind." It should be evident that an actual conflict of interest by counsel presents a very different kind of claim from one based on mere ineffectiveness, particularly where, as here, counsels' conduct was deliberate, intentional, and in violation of their duty of loyalty to their client.

In *Cone*, the other two categories of "constructive denial of counsel" enumerated in *Cronic* ("complete denial of counsel" and circumstances under which the likelihood counsel could have performed as an effective adversary were "remote") were not at issue. As will be demonstrated below, Petitioner Jamal's case falls readily

into both of these two categories, as well as the “crucible of adversarial testing” category.

3. The deliberate sabotage of Petitioner’s case by prior counsel marks it as “constructive denial of counsel” rather than mere “ineffectiveness.”

The facts of this case are far removed from those in Cone, Strickland, or other “ineffectiveness” cases. Petitioner does not contend that Weinglass and Williams acted in error or exercised poor judgment. To the contrary, what they did was entirely deliberate. No attorney innocently sabotages or suppresses all of the evidence which proves his or her client’s innocence. No attorney innocently sabotages or suppresses any claim for relief which his or her client might have which depends upon adducing any evidence of the client’s innocence. No attorney innocently puts one of the two main prosecution eyewitnesses on the stand, fails to put to him that he completely retracted his entire trial testimony just a few weeks before, and then goes outside court and tells the defense investigator who is waiting to testify that this witness retracted his trial testimony that he does not require the defense investigator to testify, because he has got all that he needs from this prosecution witness. No attorney innocently suppresses the confession of someone who is willing to testify that he committed the crime for which his innocent client has been wrongly convicted, not least when all of the further enquiries which he carries out and every analysis of the existing evidence which he performs all corroborate and substantiate the confession which this other man has made. No attorney innocently suppresses or sabotages his client’s claim for relief.

4. Petitioner’s case fits into each of the three categories of “constructive denial of counsel” outlined in Cronic.

All three situations outlined in Cronic, any one of which by itself mandates a finding of constructive denial of counsel, are present in the case of Petitioner Jamal:

(1) The conflicts of interest on the part of Petitioner’s ex-Chief Counsel and ex-Chief Legal Strategist, including but not limited to those related to the death threats they received to dissuade them from presenting evidence which would point to the real killers of Officer Faulkner, prevented prior counsel from assisting Petitioner during a critical stage in the proceedings by keeping them from presenting a claim of actual innocence; causing them to suppress exculpatory evidence which would undermine the prosecution’s case and/or prove Petitioner’s innocence; making them hold back evidence to prove-up the claims of trial error, ineffectiveness of counsel, and prosecutorial misconduct which they themselves raised; and preventing them from raising numerous other meritorious claims for relief because

to do so might involve the adducing of evidence which would point to the real killers of Police Officer Daniel Faulkner.

(2) There was a complete failure to subject the prosecution’s case to meaningful adversarial testing as a direct result of Weinglass’ and Williams’ conflicts of interest. Given their failure to present in the post-conviction proceedings before Judge Sabo, or thereafter, any of the evidence they had which proved Petitioner’s innocence, when the burden of proof was on them to demonstrate why Petitioner’s conviction should be overturned, there most certainly was a complete failure to subject the prosecution’s case to meaningful adversarial testing. Weinglass and Williams never presented any claim of “actual innocence,” deliberately suppressed exculpatory evidence, and held back evidence necessary to prove-up the legal claims in the very PCRA petition which they had filed and in which they alleged that the prosecution had framed-up Petitioner with perjured testimony and had suppressed exculpatory evidence.

(3) Under the circumstances in this case, i.e. conflicts of interest inextricably intertwined with explicit as well as implicit death threats to dissuade counsel from presenting evidence of their client’s innocence because such evidence might point to the real killers, the possibility that counsel could provide proper representation was indeed “remote.” Significantly, one of the specific examples the Court gave of category three, in Cronic, 466 US at 661, n 31, citing Cuyler v. Sullivan, 446 US 335 (1980), is where counsel labours under an actual conflict of interest, i.e. one which affects counsel’s performance.

At the very least, as U.S. District Judge Yohn acknowledged in his Memorandum and Order of December 18, 2001 (denying Petitioner’s motion to amend his federal habeas petition), to resolve the conflict of interest issue would require an evidentiary hearing. See also Williams, supra.

### **III. The Lower Court Abused Its Discretion BY Failing to Construe The Underlying Petition as a First Petition.**

A. This Petition Should Be Construed As A First Petition.

Petitioner Jamal never had a “truly counseled” first PCRA Petition because of the myriad actual conflicts of interest by his prior counsel. The Commonwealth ignores a substantial body of Pennsylvania law, cited in Petitioner’s Opening Brief at p. 3 & n. 7, which holds that there is a right to “conflict-free” representation in post-conviction proceedings and that a conflict of inter-

est by post-conviction counsel “vitiates” the proceedings. Given this case authority, it was an abuse of discretion for the Court of Common Pleas to decline to construe the underlying Petition as a first petition which, as an extension of the 1995 Petition, would relate back to the latter’s filing date.

In *Commonwealth v. Leasa*, 759 A2d 941 (Pa Super 2000), the Court found that a second petition was an extension of the first where Petitioner’s appeal from denial of the prior petition was dismissed because counsel failed to file a brief. The appellate court remanded the case to allow petitioner to pursue the claims his counsel had effectively waived. Although two years had elapsed, the Court ruled the second petition was timely because it was merely an extension of the first. Similarly here, prior counsel failed to litigate numerous claims on which Petitioner is entitled to relief and, as a result, this Petition should be construed as an extension of the 1995 petition.

In a vain attempt to distinguish Petitioner’s case from *Leasa* and *Commonwealth v. Peterson*, 756 A2d 687 (Pa Super 2000), the Commonwealth misconstrues *Commonwealth v. Priovolos*, 746 A2d 621 (Pa Super 2000), to support the mistaken proposition that where petitioner has completed an appeal a second petition cannot be construed as a first. However, in *Priovolos* the Court, citing *Commonwealth v. Yarris*, 731 A2d 581 (Pa 1999) and *Commonwealth v. DeHart*, 730 A2d 991 (Pa Super 1999), simply found that where petitioner has had the benefit of a “truly counseled petition” a second petition may not be treated as a first. The *Priovolos* Court identifies as the determinative factor not whether an appeal was completed, but whether petitioner has received what he is entitled to, viz., “the opportunity of legally trained counsel to advance his position in acceptable legal terms.” 746 A2d at 623.

In *Commonwealth v. Hampton*, 718 A2d 1250, 1252 (Pa Super 1998), a second petition was construed as a first based on a finding that the first petition was “uncounseled” because petitioner was deprived of his right to be represented by competent counsel “whose ability to frame the issues in a legally meaningful fashion insures the trial court that all relevant considerations will be brought to its attention.”<sup>10</sup>

In Petitioner Jamal’s case, where prior counsels’ actual conflicts of interest vitiate the proceedings and the evidence critical to Petitioner’s “actual innocence” claim was suppressed, it should be clear that all of the “rele-

vant considerations” were not put before the court and, as a result, Petitioner’s 1995 Petition was “not truly counseled.” It was, therefore, an abuse of discretion for the court below to decline to construe the underlying Petition as a first petition.<sup>11</sup>

#### B. *Leasa* And Related Authorities Should Not Be Overturned.

The Commonwealth betrays its knowledge that the underlying Petition should properly be construed as a first petition by its bizarre request, unsupported by any reasoning or authority, that this Court should overturn *Leasa* and *Peterson*. The decisions in these and the other cases cited to the same effect, *supra*, were apparently never appealed and there is no reason why they should now be overturned. Moreover, these cases are based on precedent of this Court, including *Commonwealth v. Fiero*, 341 A2d 448, 449-450 (Pa 1975) (“We have held that a theory of waiver or finally litigated cannot be predicated upon an uncounseled proceeding... Clearly this rule is not limited to the mere naming of an attorney to represent an accused, but also envisions that counsel so appointed shall have the opportunity and in fact discharge the responsibilities required by his representation.”); *Commonwealth v. Sangricco*, 415 A2d 65, 68-69 (Pa 1980) (petitioner uncounseled when second post-conviction dismissed where counsel not only failed to amend petitioner’s new pro se petition, but failed to argue or brief petitioner’s second set of claims); and *Commonwealth v. Scott*, 366 A2d 225 (Pa 1976) (petitioner uncounseled where counsel failed to amend inarticulately drawn pro se petition).

#### **IV. Petitioner’s Free-Standing “Actual Innocence” Claim is Not Subject to the PCRA’S Timeliness Requirements.**

In his Opening Brief, Petitioner argues that his free-standing “actual innocence” claim under the 8th and 14th Amendments is not cognizable under the PCRA. There is no provision in the PCRA which provides that such a claim is a basis for post-conviction relief. Since “actual innocence” is not cognizable under the PCRA,

<sup>11</sup> Contrary to the Commonwealth’s assertions, if the underlying Petition were not construed as a first petition, it would still meet the “threshold” requirements for a subsequent petition in *Commonwealth v. Lawson*, 549 A2d 107, viz., a strong prima facie showing of a “miscarriage of justice” based either on innocence or so unfair a trial that no “civilized” society could countenance its results. Petitioner Jamal’s case easily meets both requirements as Arnold Beverly’s confession and the corroborating evidence proves Petitioner’s innocence and, based solely on Judge Sabo’s “fry the nigger” remark, no “civilized” society could let that trial stand.

<sup>10</sup> See also *Commonwealth v. Lewis*, 718 A2d 1262 (Pa Super 1998); *Commonwealth v. Thomas*, 578 A2d 422 (Pa Super 1990); *Commonwealth v. Irons*, 385 A2d 1004 (Pa Super 1978).

the court below erred and abused its discretion by refusing to hear the claim on the merits under its common law habeas power. See *Commonwealth v Stock*, 679 A2d 760 (Pa 1996); *Commonwealth v Hall*, 771 A2d 1232 (Pa 2001)(relief available under court's inherent powers for claims not cognizable under PCRA).

The Commonwealth responds that an "actual innocence" claim is cognizable under 42 Pa.C.S. Sec. 9543(a)(2)(vi), which provides for post-conviction relief where exculpatory evidence is discovered which would have changed the outcome of the trial and which could not have been earlier discovered with due diligence. However, this is a very different claim from "actual innocence" although the same evidence might be relevant to both claims.

A claim of "actual innocence" alleges that petitioner did not commit the crime of which he was convicted, but is, in fact, innocent. A claim based on the discovery of exculpatory evidence under Sec. 9543(a)(2)(vi) alleges that petitioner has discovered evidence which would prevent a jury from finding him guilty beyond a reasonable doubt, regardless of whether or not he is, in fact, guilty.<sup>12</sup>

The standard of proof for an "actual innocence" claim is very different from that for a claim under Sec. 9543(a)(2)(vi). To prove "actual innocence" a petitioner must prove it is more likely than not that he is innocent. *Herrera v. Collins*, 506 US 390, 441-444 (1993)(Blackmun, J., dissenting); *Carriger v Stewart*, 132 F3d 463 (9th Cir 1997)(en banc). To prove-up a claim under Sec. 9543(a)(2)(vi) a petitioner need only prove that a jury presented with the newly-discovered exculpatory evidence could not find him guilty beyond a reasonable doubt.

Eligibility for relief under 42 Pa.C.S. Sec. 9543(a)(2)(vi) is subject to a number of procedural requirements: (1) the allegation of error has not been previously litigated or waived; (2) the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel; (3) the claim is filed in accordance with various timeliness re-

<sup>12</sup> Evidence which would result in a "not guilty" verdict need not be sufficient to prove a defendant's innocence, it need only cast sufficient doubt on the prosecution's case that a jury could not convict. For example, if newly discovered evidence raised a scenario under which someone other than the defendant might have committed the crime, and a jury could not choose between the prosecution and defense scenarios *beyond a reasonable doubt*, that evidence would meet the requirements of Sec. 9543(a)(2)(vi) even though it did not prove that defendant was, in fact, innocent.

quirements; (4) the newly-discovered evidence upon which the claim is based was unavailable at the original trial and could not have been earlier discovered with due diligence.

However, it would violate the 8th and 14th Amendments to impose such procedural obstacles upon a claim of "actual innocence," particularly in a capital case, where the petitioner is not merely claiming to have found evidence that, if he were granted another trial, he would be found "not guilty," but rather that he is, in fact, innocent. See, e.g., *Holloway v Jones*, 166 FS2d 1185 (2001); *Helton v Sec'y for Dept. of Corrs.*, 259 F3d 1310, 1315, n 2 (11th Cir 2001); *Wyzykowski v Dep't of Corrs.*, 226 F3d 1213, 1219 (11th Cir 2000); *Raglin v Randle*, 2001 WL 523530, at \*2 (6th Cir May 8, 2001)(unpublished); *Dew v Clarke*, 2000 WL 1545500, at \*2 (9th Cir Oct 17, 2000)(unpublished).

### **V. Petitioner Jamal Can Prove that He is Innocent.**

Petitioner Jamal can now prove his innocence in two complementary ways: First, Petitioner can show that there is not a shred of evidence against him which is not demonstrably false, perjured or otherwise unreliable. Secondly, Petitioner can prove that Officer Faulkner was killed by others, that he is innocent and has been framed.

The heart of the original prosecution case against Jamal was the testimony of the only two alleged "eye-witnesses" who claimed to have seen the shooting: street prostitute Cynthia White and cabdriver Robert Chobert. Both consistently altered their evidence in highly significant ways which invariably were favourable to the prosecution. (Petition, para. 224-275) They did not merely add further details to their earlier accounts, but retracted positive assertions which were favourable to Petitioner. With 38 previous prostitution convictions and still facing several outstanding charges, White was highly vulnerable to prosecutorial pressure (Petition, para. 236). Her testimony about the passenger in William Cook's Volkswagen at Cook's assault trial proves that she deliberately lied on this vital issue at Petitioner's trial where she concealed the passenger's presence (Petition, para. 252; N.T. 6/21/82, 4.106; Appendix 7 to Opening Brief).<sup>13</sup> Yvette Williams now proves that

<sup>13</sup> It was vital to the prosecution to suppress any evidence of Kenneth Freeman's presence as the passenger in William Cook's car because the Achilles' heel of the prosecution's case was the underlying premise that no one other than Petitioner was present at the crime scene who could have shot Officer Faulkner. Had this premise been refuted at trial with proof that Freeman was present (Docket #D-1A, Ex. "D"); his presence was suppressed by the prosecution's star witness,

White never saw the original incident at all, but was bribed and threatened by the police into giving perjured testimony.<sup>14</sup>

Chobert was presented by the prosecution at Petitioner Jamal's trial as the witness with no reason to lie. Petitioner can now prove that Chobert not only did have a reason to lie, but did so. Chobert was in daily violation of his probation on two counts of felony arson for unlawfully driving his cab without a drivers licence and faced over 30 years in state prison if his probation were revoked. (Petition para. 262-270) Chobert admitted to private investigator Mike Newman in 1995 that he committed perjury when he testified against Petitioner at trial because the truth was that he did not even see the shooting (Docket #D-21, Petition, para. 265).

The bullet which was recovered from Police Officer Faulkner's head wound could have come from multiple millions of weapons (N.T. 6/23/82; 169). The unimpeded downward trajectory of the bullet which came to rest in Jamal's lower back proves that Officer Faulkner could not have shot Jamal from a distance of about 12 inches (N.T. 6/26/82; 32) after he was first shot and fell to the sidewalk, as the prosecution maintained at the trial. There was no forensic evidence that either Officer Faulkner or Jamal fired a gun that night: no hand swabs were taken from either man. The absence of this evidence is consistent only with a police frame-up. (Petition, para. 169; N.T. 6/28/82; 128)

The only tenable explanation for the police's failure to secure the crime scene after the incident is that Jamal was framed. (Docket #D-1A, Ex. F; Petition, para. 173) Proper evaluation of the physical evidence at the scene directly contradicts the prosecution's case. The location of the bullet and bullet fragments found on Locust contradicts the supposed "eye-witness" testimony. (Petition, para. 230-235) Moreover, no bullets or bullet fragments or impact sites were identified on the sidewalk in the vicinity of Officer Faulkner's head or body. (Petition, para. 214-215) When analysed together, the physical evidence and alleged eyewitness testimony establish that at least nine bullets were fired at the scene. (Petition, para. 218-222) Petitioner's revolver had only five cham-

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Cynthia White (Petitioner's Opening Brief, Appendix 7); and the prosecution had itself suppressed the fact that Freeman was arrested shortly after the crime, his hands were tested for gunpowder residue, and he was twice picked out of a line-up by White (Docket #D-20, D-25); the frame-up of Petitioner Jamal would have collapsed like a house of cards.

<sup>14</sup> Yvette Williams' affidavit (Remand Motion re Yvette Williams) is corroborated by police suppression of William Singletary's evidence that White was in a position in which she could not have seen the shooting. (N.T. 8/11/95, 211-224; Petition, para. 239; N.T. 8/11/95, 300-301.)

bers so he obviously could not have fired those shots. (Petition, para. 222) Whoever did shoot Officer Faulkner did not act alone. (Petition para. 222) This destroys the entire prosecution's entire case against Petitioner Jamal.

Petitioner's so-called hospital "confession" was obviously fabricated. It is inherently incredible. There are three mutually inconsistent and incompatible versions of how, when and in what circumstances Jamal allegedly made it. No police officer reported it until nearly two months later. Officers Wakshul's and Trombetta's contemporaneous police reports state that Petitioner "made no comments." (Petition, para. 299-323; Docket #D-1A, Ex. N; #D-1A, Ex. B; #D-1A, Ex. A.)

By contrast, the contemporaneous evidence, the evidence at trial and the evidence discovered since all prove the truth of Arnold Beverly's confession.<sup>15</sup> It is corroborated by the now well-documented evidence of endemic police corruption in Philadelphia in the early 1980's, resulting in three independent FBI investigations and the successful prosecution of 30 police officers (Docket #D-1A, Ex. E; Petition, para. 149-150); the evidence that hitherto unidentified police officers were present when Officer Faulkner was shot (Docket #D-1A, Ex. K; Petition, para. 158-160); the central involvement of corrupt police officers in the investigation of Faulkner's murder at the crime scene (Petition, para. 149-151, 153-154); the failure to take hand swabs from either Petitioner Jamal or Officer Faulkner (Petition, para. 169); the failure to secure the crime scene (Docket #D-1A, Ex. F); the breaches and contradictions in the supposed chain of custody of the ballistics evidence (Petition, para. 548-549); Cynthia White's and Robert Chobert's perjury (Petition para. 230-270; Remand Motion re Yvette Williams; Docket #D-21); the unlawful intimidation of William Singletary (N.T. 8/11/95, 211-224), Veronica Jones (N.T. 10/1/96, 21-24), Pamela Jenkins (N.T. 6/26/97, 39, 42-44), and Dessie Hightower (Petition, para. 288); the unlawful suppression of any evidence that exculpated Jamal or incriminated others; the obviously fabricated, so-called hospital "confession;" and the perjury of the assigned Detective in the case, William Thomas (N.T. 6/29/82, 67-68 ).

Beverly's confession is also corroborated by so much of the detail of the "eyewitness" and other con-

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<sup>15</sup> A detailed analysis of how all of the evidence corroborates Arnold Beverly's confession is set forth in the underlying Petition at pp. 47-108, and in the memoranda prepared by Petitioner's prior attorneys and wrongfully stricken from the record by Judge Dembe (Docket #D-28). The Commonwealth absurdly seeks to impeach Beverly by citing to witnesses whose testimony the Commonwealth itself does not believe. (Commonwealth Brief, 19-20 & n. 16). By doing so, the Commonwealth defeats its own argument.

temporaneous evidence. Beverly's confession is corroborated by the green army jacket which he was wearing (Petition, para. 143-144; Docket #D-1A, Ex. B); the description of the killer crossing the street from the area of the parking lot (Petition para. 143-145); and the numerous accounts of the killer or killers fleeing the scene (Petition, para. 146). It is further corroborated by the skin denudation on Officer Faulkner's left knee (N.T. 6/25/82, 181; Docket #D-1A, Ex. B); the physical evidence found at the scene; the evidence of the number of bullets fired by Officer Faulkner's assailants (Petition, para. 215-222); the 9:00 a.m. entry in the Medical Examiner's Log (Petition, para. 163-164); and the lie detector test administered to Beverly by Dr. Honts (Docket #D-1A, Ex. C; Petition, para. 142).

Beverly's confession proves Petitioner Jamal was framed. It also explains why Petitioner was found shot at the scene and why he was framed. Apart from the demonstrably unreliable, false and perjured testimony which was relied upon by the prosecution at Jamal's trial, there is not a shred of evidence which contradicts Beverly's confession.<sup>16</sup>

William Cook's declarations (Docket #D-1A, Ex. D; Petition, para. 338-350), William Singletary's testimony (Petition, para 284-287), Cynthia White's concealment at Petitioner's trial of the presence of the passenger in Cook's car (Appendix 7, Opening Brief; N.T. 6/21/82, 4.106; Petition, para. 353-354), and Kenneth Freeman's subsequent arrest all prove Freeman's involvement in the shooting of Officer Faulkner (Petition, para. 354; Docket #D-1A, Ex. D) and Petitioner Jamal's innocence.

There is now no evidence against Petitioner Jamal at all. On the contrary, all of the evidence indicates that Officer Faulkner was set-up by corrupt police and organized crime, and killed by Arnold Beverly, his accomplice, and Kenneth Freeman (Petition, pp. 47-108; Docket #D-1A, Ex. B, Ex. D, Ex. E). Petitioner Jamal is innocent and is the victim of a terrible frame-up.

## **CONCLUSION**

For the foregoing reasons it is hereby requested that this appeal be granted.

Dated: October 14, 2002

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<sup>16</sup> The Commonwealth seeks to support its attack on the Beverly confession by citing to U.S. District Judge Yohn's decision declining to overturn Petitioner's conviction, but that decision is on appeal to the Third Circuit. Moreover, that decision was explicitly based entirely on the Judge's having previously denied Petitioner's emergency motion to depose Arnold Beverly, filed by Petitioner's present counsel upon noticing their appearance on his behalf on May 4, 2001, before having the opportunity to provide the District Court with their detailed analysis of the evidence corroborating Beverly (Petition, pp. 47-108); or to obtain the declaration of private investigator Mike Newman (Docket #D-21) which proves that one of only two eyewitnesses to the shooting, Robert Chobert, recanted his trial testimony against Petitioner; or to obtain the declaration of Yvette Williams (Remand Motion re Y.W.) which proves that the other alleged eyewitness, Cynthia White, did not even see the shooting. When Judge Yohn denied Petitioner leave to amend an "actual innocence" claim, based upon Beverly's confession, into his habeas petition, he explicitly refused to consider any of the evidence corroborating Beverly, resting his decision entirely on his earlier refusal to authorize Beverly's deposition.

**Appellant  
Mumia Abu-Jamal’s  
Supplemental  
Reply Brief,  
October, 14 2002**

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**ARGUMENT**

**I. Judge Dembe’s Dismissal of the Petition Is Bereft of “Internal and External Logic.”**

In dismissing the underlying Petition, Judge Dembe ruled that there were no material facts in dispute and, therefore, no need for an evidentiary hearing. However, if there were no material facts in dispute, and the judge assumed that the facts pled in the Petition were true, as she claimed she did in her Supplemental Opinion of February 20, 2002 (Appendix 3 to Petitioner’s Opening Brief), then she should have granted the Petition instead of dismissing it.

Judge Dembe was correct in finding that there were no material facts in dispute because the Commonwealth did not contest the merits of Petitioner’s claims for relief in its Answer to the Petition, limiting its pleading to disputing only the jurisdictional issue and failing to file any counter-affidavits.<sup>1</sup> However, Judge Dembe was less

<sup>1</sup> With regard to Judge Dembe’s summary execution of Petitioner Jamal’s extra-judicial racial bias claim (“Tenth Claim for Relief”) against Judge Sabo for his frank intention, as judge at Petitioner’s trial, to “help ‘em [the Philadelphia County District Attorney’s Office] fry the nigger,” it should be noted, as is analyzed in more detail in Point I of this Reply Brief, that Judge Dembe should also have granted relief on that claim because there was no material fact at issue there, either, given that the Commonwealth never filed a counter-affidavit from Sabo denying he had made the remark attrib-

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than candid in claiming that she had assumed the allegations in the Petition to be true before summarily dismissing it (Supplemental Opinion of February 20, 2002, Appendix 3 to Opening Brief), when the truth was that she assumed precisely the contrary with regard to the allegations of prior counsel’s conflicts of interest and resulting sabotage of Petitioner’s case based solely upon her assumption, unsupported by any evidence, that they were “hitherto honorable, capable and professional attorneys” of whom it was appropriate to query why they would “desert their training, ethics [sic!], and their professionalism [sic!]] and place their very right to practice law in jeopardy.” (Memorandum and Order, November 21, 2001, Appendix 1)

The implicit message unsaid but transmitted by Judge Dembe’s failure to provide an answer to this question is that her inability to answer her own rhetorical question must mean that these “hitherto honorable” Benedict Arnolds, these noble “Guildenstern and Rosencrantz, Rosencrantz and Guildenstern,”<sup>2</sup> these despica-

ated to him; but instead this illustrious jurist summarily dismissed the claim on purported grounds of lack of jurisdiction – although her actual finding was that there was an issue with regard to timeliness because, she claimed, it was “not clear” to her that Petitioner could not have learned of the fact that Judge Sabo had called him a “nigger” and promised to help the District Attorney “fry” him at an earlier time than he did learn of it – when, assuming *arguendo* that there were a timeliness issue, she should have set an evidentiary hearing to resolve the facts relevant to determining it.

<sup>2</sup> *Hamlet*.

ble Iagos,<sup>3</sup> would not and, indeed, did not, desert their “ethics” or “professionalism” (such as it was), despite the allegations in the Petition to the contrary which the judge assures us she assumed to be true, but then found to lack “external and internal logic” (whatever that may be).

Judge Dembe dismisses the facts pled in the Petition concerning Petitioner Jamal's betrayal by his prior counsel, in whom he placed not only his confidence, but his very life, as “mere conjecture” without even taking the opportunity to hear testimony at an evidentiary hearing from these “hitherto honorable” gentlemen concerning the implicit and explicit death threats to which they were subjected in order to dissuade them from presenting any evidence or raising any claims that might point to the real killers, and without hearing the testimony of attorney Wolkenstein and private investigator Mike Newman about Weinglass' disclosure of the threat he had received from Kenneth Freeman's brother (Docket #D-13, D-21.)

Similarly, without deigning to hear the testimony of Arnold Beverly, the self-confessed killer of Officer Faulkner, and based solely on her own idle speculation and racial stereotypes, Judge Dembe disparaged Beverly's confession as symptomatic of those people who engage in “[a]ggrandizing themselves by confessing to participation in a high profile crime.”

Ironically, Judge Dembe's blithe assertion that the facts pled in the Petition lack “external and internal logic” more appropriately describes her own Opinion dismissing the Petition, as it defies the most basic laws of Aristotelian logic – current in the West since the Crusades “recaptured” Aristotle's work on logic, lost after the fall of Rome, from the Arabs – by finding incredible that which she insists she has assumed to be true. Judge Dembe's dismissal of the Petition without an evidentiary (or any) hearing is even more egregious than that in *Commonwealth v Williams*, 732 A2d 1167, 1180-1184 (Pa 1998) where the PCRA court uncritically adopted in toto the prosecution's boiler-plate arguments (as Judge Dembe also did) instead of evaluating a (recantation) witness' testimony in light of the evidence.

## **II. It Was Error and an Abuse of Discretion to Dismiss the Petition Without Granting Relief or Holding an Evidentiary Hearing on Petitioner's “Actual Innocence” Claim.**

In *Williams*, this Court held it to be an abuse of discretion to discount the testimony of a witness without giving any particularized reasons for so doing. Similarly here. Judge Dembe savaged Arnold Beverly's sworn confession based upon nothing more than “mere conjecture” without giving Beverly the opportunity to testify in open court or herself the opportunity to observe his testimony, note his demeanour, evaluate his response to cross-examination, or question him herself.

If the judge had really wanted to know if Beverly is telling the truth or merely seeking to “aggrandize himself” she should have listened to Beverly's testimony in open court and under oath, and considered as well the testimony of Dr. Honts with regard to how the polygraph examination he administered to Beverly corroborated his testimony, and how Leonard Weinglass was incensed that this had occurred (Docket #D-1A, Ex. C, J). She should have had Donald Hershing explain the context of the events and the corruption of the police force in 1981 and the mob involvement in that corruption (Docket #D-1A, Ex. E). She should have listened to key witness Chobert admit that he had lied when he testified at trial and/or asked private investigator Mike Newman for his testimony about Chobert's 1995 recantation to him which Leonard Weinglass never questioned Chobert about when he called Chobert as a witness in the post-conviction hearings before Judge Sabo (Docket #D-21). She should have listened to Yvette Williams swear that Cynthia White told her how she was induced, cajoled, bribed with drugs and money, and coerced by the police to lie and falsely identify Petitioner Jamal as the person who shot Officer Faulkner when she was high on drugs at the time and did not even see the shooting. She should have listened to the Petitioner's brother, William Cook, explain that he was there when it happened and Mumia Abu-Jamal did not shoot Officer Faulkner but was himself shot down, but afterwards Kenneth Freeman, the passenger in Cook's car, who disappeared when shots rang out, confessed to Cook that he, Freeman, had been armed in that night, was involved in a plot to kill Faulkner, and had participated in the shooting; and that Cook wanted to testify at the post-conviction hearings in 1995, but Weinglass discouraged him from doing so and then falsely told the court that Cook had “disappeared” because he was afraid of being arrested on outstanding warrants (Docket #D-1A, Ex. D). And, of course, she

<sup>3</sup> *Othello*.

should have listened to the Petitioner himself recount what happened to him on December 9, 1981, explain that he did not shoot Officer Faulkner but was himself shot down and then viciously beaten by a small crowd of police officers, and deny that he had ever made the cruel statement falsely attributed to him by lying police officers months afterwards despite two contemporaneous reports by those guarding him where he lay gravely wounded which state that he "made no statement" (Docket #D-1A, Ex. A).

**III. It Was Error and an Abuse of Discretion to Dismiss the Petition Without Holding an Evidentiary Hearing on the "Conflicts of Interest" and "Constructive Denial of Counsel" Issues.**

Had Judge Dembe wanted to know if the "hitherto honorable" Weinglass and Williams had violated their duty of loyalty to their client, Petitioner Jamal, and served his head up to the executioner on a silver platter, she would have asked attorney Rachel Wolkenstein to testify about the history of their representation of Petitioner and the manner in which they sabotaged his defense (Docket #D-13). She would have issued a subpoena to Petitioner's ex-Chief Counsel and ex-Chief Legal Strategist and implored them to tell the truth about why they suppressed the evidence that would have freed their client.

**IV. It Was Error And An Abuse Of Discretion Not To Grant Relief Or Hold An Evidentiary Hearing On Petitioner's Extra-Judicial Racial Bias Claim.**

Had Judge Dembe been concerned about whether Petitioner Jamal had a fair trial she should have listened to Court Stenographer Terri-Maurer Carter recount how she overheard Judge Sabo say, in reference to Petitioner at the time of his trial, that he "was going to help 'em fry the nigger." Instead, Judge Dembe dismissed Petitioner's claim of extra-judicial racial bias with a haughty "Further discussion is unnecessary," just as Justice Taney dismissed those of Dred Scott with a worse than haughty pronouncement that Black people have "no rights which the white man was bound to respect." Dred Scott v Sandford, 60 US 393, 407 (1857).

**Conclusion**

Had Judge Dembe granted an evidentiary hearing she would have involved herself in the truth-seeking process, rather than indulging in idle speculation bereft of "external and internal logic" and then, having heard the evidence, would have had to free Mumia Abu-Jamal because the exonerating evidence would have been overwhelming.

For the foregoing reasons it is requested that Petitioner Mumia Abu-Jamal's appeal be granted.