



Mumia's Attorneys Demand Pennsylvania Supreme Court Hear Testimony From The Man Who Shot Daniel Faulkner.

Attorneys for death row journalist Mumia Abu-Jamal filed this appeal brief in the Pennsylvania Supreme Court on August 27, 2002.*

This appeal brief argues that Mumia Abu Jamal is the innocent victim of a frame-up by corrupt police and organized crime and demands his immediate release. the attorneys are asking the court to invoke a little-used procedure to itself hear testimony under oath from ex-mob hit man Arnold Beverly, who swears that he was hired to shoot and kill Police Officer Daniel Faulkner and Jamal had nothing to do with the shooting. Beverly states in a videotape of his confession that he will testify in any court. For a copy of this compelling video, please contact the Labor Action Committee to Free Mumia Abu Jamal.

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

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Statement of Jurisdiction

This Court has jurisdiction pursuant to 42 Pa CS 9546(d); *Commonwealth v Bryant*, 780 A2d 646, 648 (2001)(Supreme Court has jurisdiction over appeal in capital case where sentencing reversed but request for guilt-phase relief denied); In Re: Suspension of the Capital Unitary Review Act and Related Sections of Act No. 1995-32 (SSI); and Amendment of Chapter 1500 of the Rules of Criminal Procedure, No. 22 Criminal Procedure Rules, Docket No. 2 (August 11, 1997); 42 Pa CS 502, 726; Pennsylvania Constitution, Article 5, Sections 2 & 10(a).

Standard of Review and Eligibility for Relief

A. Constitutional Standards

Petitioner Jamal is eligible for relief under the standards of the United States Constitution. The underlying Petition demonstrates error under the 5th, 6th, 8th, and 14th Amendments. Petitioner seeks substantive review of his claims under established principles of constitutional law cited in this brief.¹ See also *Chapman v California*, 386 US 18 (1967) (relief required when constitutional error is not harmless beyond a reasonable doubt).

Petitioner meets the test to establish “constructive denial of counsel” under *Cronic v United States*, 466 US 648, 656-657 (1984) and its progeny: Where counsel does not act in the role of an advocate for his/her client, causing an actual breakdown in the adversarial process; prejudice is presumed. See also *Rickman v Bell*, 131 F3d 1150, 1155 (6th Cir 1997)(counsel acts as “second prosecutor” instead of defense attorney). Petitioner meets the two-prong test to establish “ineffective assistance of counsel” under *Strickland v Washington*, 466 U.S. 668 (1984) and its progeny: Counsel provided deficient, unreasonable representation in critical areas of the proceedings; and confidence in the outcome is undermined as a result, establishing prejudice.² See also *Williams v Taylor*, 529 US 362 (2000).

The claims in the underlying Petition of violations of Petitioner’s rights, under Pennsylvania statutory and state constitutional law, to effective representation by counsel in post-conviction proceedings and appeal therefrom, properly plead material facts which raise, as well, federal constitutional issues of violations of the 14th Amendment’s due process and equal protection clauses. *Ford v Wainwright*, 477 US 399, 427-429 (O’Connor, J., concurring and dissenting).³

B. State Law and Eligibility for PCRA Relief

The underlying Petition sets forth an actual innocence

claim and layered claims of actual innocence, ineffectiveness of trial, appellate and prior post-conviction counsel, and constructive denial of counsel on the part of prior post-conviction counsel. The layered claims are not “boiler-plate,” but properly plead specific facts to prove each element of the underlying claim and the layered claims of ineffectiveness of counsel and constructive denial of counsel, thereby demonstrating that these claims are not previously litigated or waived⁴ and further demonstrating that prior counsel can have had no rational strategic or tactical reason for failing to raise said claims. See *Commonwealth v Rivers*, 567 Pa 239, 255, 786 A2d 923, 932 (2001).⁵ Petitioner’s underlying claims set forth the facts and law which demonstrate his eligibility for relief.

There is an enforceable statutory right under Pa. R. Crim. P. 904 to effective representation by post-conviction counsel; violation of right to effective representation on appeal from denial of post-conviction relief violates right of appeal under Art. V, Sec. 9 of Pennsylvania Constitution. *Commonwealth v Albrecht*, 554 Pa 31, 45-46, 720 A2d 693 (1998); *Commonwealth v Albert*, 522 Pa. 331, 334, 561 A2d 736 (1989); *Commonwealth v Pursell*, 555 Pa 233, 724 A2d 293 (1999).⁶

Petitioner’s claims of “constructive denial of counsel” flowing from prior post-conviction counsels’ conflicts of interest plead material facts sufficient for relief under Pennsylvania law which recognizes a right to conflict-free representation in post-conviction and that “the mere existence of such a conflict vitiates the proceedings.” *Commonwealth v. Cox*, 441 Pa. 64 (1970); *Commonwealth v. Wright*, 374 A2d 1272, 1273 (Pa. 1977)(mere appearance of conflict of interest sufficient to threaten “duty of zealous advocacy” owed by counsel to post-conviction petitioner).⁷

Petitioner proffers evidence in support of the underlying Petition which the Court did not consider on direct appeal. *Commonwealth v Miller*, 746 A.2d 592, 602 nn 9-10 (Pa. 2000). The Petition properly alleges the facts which prove that it is timely filed pursuant to 42 Pa. C.S. Sec’s 9545(b)(1)(i), 9545(b)(1)(ii), and 9545(b)(2). To the extent that the opinion of the court below may have relied on waiver, the court erred. To the extent the court below may have found any procedural defects in the pleadings, it failed to give Petitioner the opportunity to cure these by amendment. All of Petitioner’s claims are properly before this Court for consideration on the merits.

The Commonwealth did not dispute the merits of Petitioner’s claims in its Answer to the Petition, instead limiting itself to the jurisdictional issue. By filing an Answer (not required by Pa R Crim Pro 906) which was limited to contesting jurisdiction, the

Commonwealth deprived Petitioner of the mandatory hearing required on a motion to dismiss (Rules 907, 908). Having proceeded in this manner, the Commonwealth must be held to the consequences of its tactical choice: It has thereby admitted the truth of the allegations which plead Petitioner's claims, conceded their legal sufficiency, and waived the right to litigate these issues. Accordingly, once the jurisdictional issue is decided in Petitioner's favor, this Court must grant the relief requested. Petitioner has demonstrated prejudicial constitutional errors in the circumstances of this case and his entitlement to relief.

Petitioner alleges that relief is sought under the following specific provisions of the PCRA, found at 42 Pa.C.S. § 9543(a)(2)-(4):

(2) That the conviction or sentence resulted from one or more of the following:

(i) 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.^[8]

(ii) Ineffective assistance of counsel 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.^[9]

(iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.^[10]

(3) That the allegation of error has not been previously litigated or waived.

(4) That 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.^[11]

Petitioner has pled and proved material issues of fact which entitle him to relief or, in the alternative, to an evidentiary hearing to prove up such facts. *See Townsend v Sain*, 372 U.S. 293 (1963); *Commonwealth v Sherard*, 394 A.2d 971 (Pa. 1978); *Commonwealth v Pulling*, 470 A.2d 170 (Pa.Super. 1983); Pa.R.Crim.Pro. 907.

Orders/Determinations In Question

On November 21, 2001, the Court of Common Pleas (Dembe, J.) issued a Memorandum and Order

giving notice of its intention to dismiss Petitioner's PCRA/Habeas Petition on December 11, 2001. On December 11, 2001, the Court of Common Pleas issued its Order denying relief to Petitioner. On February 20, 2002, the Court of Common Pleas issued a Supplemental Opinion. These rulings and orders are attached in the Appendix to this Opening Brief.

Statement Of Questions Involved

1. Did the Court of Common Pleas err in denying Petitioner Jamal's claim he was deprived of a fair trial before a fair tribunal at his 1982 trial, and deprived of a fair hearing on his 1995 PCRA Petition, by Judge Sabo's race prejudice?
2. Did the Court of Common Pleas err in ruling the Petition to be untimely?
3. Can the PCRA's one-year deadline bar this Petition when it could only have been met with a time machine?
4. Did the Court of Common Pleas abuse its discretion by refusing to use its inherent power to hear the Petition on the merits?
5. Should this Court overturn the *Peterkin-Fahy* line of cases?
6. Should Petitioner be granted relief on the merits of his claims?

Statement Of The Case: Procedural History

Although innocent, Petitioner Jamal was wrongly convicted in the Court of Common Pleas, First Judicial District, of first-degree murder and related charges and sentenced to death in 1982. On direct appeal, the Pennsylvania Supreme Court affirmed Petitioner's conviction and sentence. *Commonwealth v Abu-Jamal*, 555 A2d 846 (Pa. 1989). On June 5, 1995, Petitioner, by and through his prior counsel, filed a Petition for Post-Conviction Relief which was denied in *Pennsylvania v Cook*, 30 Phila. 1 (1995), which denial was affirmed in *Pennsylvania v Abu-Jamal*, 720 A2d 79 (Pa. 1998). On October 15, 1999, Petitioner, by and through his prior counsel, attorneys Leonard Weinglass and Daniel Williams, filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Pennsylvania under Case No. 99-5089.¹²

On May 4, 2001, after the U.S. District Court granted Petitioner's motion to discharge his counsel for conflicts of interest, Petitioner's present counsel entered their appearances in the federal habeas proceedings and filed several affidavits found in the files of prior counsel, including a signed confession from the real murderer, Arnold Beverly, which exonerates Petitioner Jamal.¹³ On July 3, 2001,

Petitioner's present counsel filed in the Court of Common Pleas the underlying Petition, including claims of actual innocence supported *inter-alia* by Arnold Beverly's confession and corroborating evidence, including the results of his polygraph examination.

On August 17, 2001, a status conference was held in the Court of Common Pleas and the parties ordered to brief the issue of the Court's jurisdiction. On November 21, 2001, the Court of Common Pleas issued a Memorandum and Opinion announcing its intention to summarily dismiss the Petition. On December 10, 2001, Petitioner duly filed a Response to the Court's notice of intent to dismiss. On December 11, 2001, the Court denied the Petition without a hearing. A Notice of Appeal and related pleadings were filed on January 9, 2002. On February 20, 2002, the Court of Common Pleas issued a Supplemental Opinion.

On December 18, 2001 the United States District Court overturned Petitioner's death sentence in the above-described federal habeas proceedings, but reaffirmed his conviction. Thereafter, the Commonwealth appealed reversal of the sentence and Petitioner cross-appealed affirmance of the conviction. *Jamal v Horn*, Case No. 01-9014 & 02-9001. On June 11, 2002, the United States Court of Appeals stayed the federal appeal and cross-appeal *sua sponte*, pending this Court's ruling on the instant appeal.

Statement of the Case: Factual Background

Petitioner Mumia Abu-Jamal is innocent. Exculpatory evidence which was suppressed by his previous lawyers, Chief Counsel Leonard Weinglass and Chief Legal Strategist Daniel Williams, including a signed confession by Arnold Beverly, the man who shot and killed Police Officer Daniel Faulkner, proves that Petitioner Jamal is innocent and had nothing to do with the shooting. This evidence was filed with the underlying Petition as exhibits thereto (Docket #D-1A). The evidence includes the confession of Arnold Beverly signed under penalty of perjury (EXHIBIT "B": Declaration of Beverly, 6/8/99); the results of a lie detector test administered to Beverly by leading polygraph examiner, Dr. Charles Honts, which corroborates Beverly's confession (EXHIBIT "C": Declaration of Dr. Honts, 5/18/99); the declaration of Petitioner Jamal's brother William Cook, who was present during the incident of December 9, 1981, swears to Petitioner's innocence and discloses that Kenneth Freeman confessed his involvement in the shooting to Cook (EXHIBIT "D": Declaration of Cook, 5/15/99); and a declaration by ex-FBI informant Donald Hersing which documents the pervasive corruption in the Philadelphia Police

Department in the 1980's (EXHIBIT "E": Declaration of Hersing, 5/10/99).¹⁴This evidence could and should have been presented to the Court of Common Pleas by attorneys Weinglass and Williams with a petition for post-conviction relief and/or writ of habeas corpus, but they did not do so because of myriad conflicts of interest which caused them to breach their duty of loyalty to their client, Petitioner Jamal, and subject him to "constructive denial of counsel" in violation of his right to due process of law under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 9 of the Pennsylvania Constitution, and to "ineffective representation by counsel" in violation of Pa R Crim Pro 904, and Article I, Section 14 and Article V, Section 9 of the Pennsylvania Constitution.¹⁵

Arnold Beverly states in his confession¹⁶ that he and an accomplice were hired by corrupt elements in the Philadelphia Police Department and organized crime to kill Officer Faulkner because he was getting in the way of their protection and pay-offs racket in the center city area. Petitioner Jamal had nothing to do with the shooting and did not even appear on the scene until after the Officer was shot. (Docket #D-1A, Exhibit "B") Petitioner Jamal did not shoot Officer Faulkner. Petitioner was in the wrong place at the wrong time, was himself shot down and gravely wounded, and fell victim to a frame-up which has served for over 20 years to conceal the identities of those responsible for planning the murder of Officer Faulkner and hiring those who carried it out. (Docket #D-1A, Exhibit "A")

Attorneys Weinglass and Williams failed and refused to present the evidence of Mumia Abu-Jamal's innocence as a result of deep-rooted and pervasive conflicts of interest which infected their representation of Petitioner Jamal from its inception. These conflicts of interest came from a variety of sources, including but not limited to a specific death threat which Leonard Weinglass received during the PCRA proceedings to dissuade him from presenting evidence which would point toward the real killers of Officer Faulkner. (Docket #D-13: Declaration of Rachel H. Wolkenstein, Esq.; Docket #D-21: Affidavit of George Michael Newman, Private Investigator.) Not only did Weinglass disclose this death threat to both attorney Wolkenstein and investigator Newman, when Newman repeatedly advised Weinglass to investigate the possible involvement in Officer Faulkner's murder of one Kenneth Freeman, Weinglass refused to do so because the death threat he had received posed a risk he was unwilling to take. (Docket #D-21)

When attorney Weinglass and attorney Williams were first retained they were advised by attorney Wolkenstein that she had a source of information who

stated that he knew that the Petitioner had not shot Officer Faulkner and that Faulkner was actually killed as a result of a “mob hit” by corrupt elements in the police department and organized crime because he was interfering with their protection racket in the center city area. The source stated that he would not disclose who had actually shot Faulkner and would not testify about any of this and would deny all of it if subpoenaed. Attorney Weinglass made it clear that this information was too hot to handle as far as he was concerned and that he would not pursue it and would not authorize any investigation of this information. The source of this information was Arnold Beverly. (Docket #D-13)

When Arnold Beverly finally came forward in June of 1999 with the full story of how Police Officer Faulkner had been killed, and disclosed his own role in administering the fatal final shot, rather than presenting it to the courts with the corroborating evidence, Attorneys Weinglass and Williams, according to Williams’ own account in his nefarious book, Executing Justice, immediately “sought out ways to push [Arnold Beverly] onto the trash heap.”

Even when those attempts foundered, when, for instance, the results of the polygraph examination of Arnold Beverly confirmed that he was telling the truth, they still refused to use his evidence. Although attorney Weinglass had previously used Dr. Honts’ services as a polygraph examiner, he specifically telephoned Dr. Honts after getting the results of the polygraph test to angrily disparage Arnold Beverly and the test results. Attorney Weinglass falsely led Dr. Honts to believe that DNA tests had been carried out which contradicted the results of the polygraph test and Arnold Beverly’s confession (Docket #D-1A, EXHIBIT “J”: Affidavit of Dr. Honts, 6/29/01).

During the original post-conviction hearings before Judge Sabo in 1995, Petitioner’s then Chief Counsel Leonard Weinglass knew that Robert Chobert, one of only two prosecution witnesses who testified at trial that they saw Petitioner shoot the police officer, had recanted his testimony to Private Investigator George Michael Newman and admitted that he had not even seen the shooting.¹⁷ Although Weinglass called Chobert as a witness, he never asked Chobert about his recantation even though Newman was present in the courthouse and available to testify and impeach Chobert if he denied it. Instead, after finishing with Chobert, Weinglass instructed Newman to leave because Weinglass had “got everything we needed” from Chobert on the witness stand. (Docket #D-21)

There can be no good reason for Weinglass not to have inquired of Chobert concerning his recantation, particularly because even the truncated version of Petitioner’s case which Weinglass and Williams presented in the original PCRA petition and

proceedings raised claims that the prosecution had suppressed evidence and manipulated their witnesses to give false testimony against Petitioner. By suppressing Chobert’s recantation, Weinglass undermined the legal claims in the very case that he was presenting in post-conviction.

Weinglass and Williams similarly undermined their own case in the 1995 post-conviction hearings by suppressing other evidence that would have shown Petitioner’s innocence and pointed toward the trail that would lead to the real murderers. They did not call Petitioner Jamal to testify and Weinglass specifically advised him not to testify although his testimony would have demonstrated that he was innocent. (Docket #D-1A, Exhibit “A”)

Weinglass did not inquire of Arnold Howard as to the identity of the Black woman who, according to Howard, had twice picked Kenneth Freeman out of a line-up as a participant in the shooting of Officer Faulkner shortly after the incident, although Howard had told him that it was the prosecution’s star witness Cynthia White. Nor did Weinglass inquire about the police testing Kenneth Freeman’s hands for gunpowder residue, although Howard had disclosed all of this information to Weinglass before he testified. (Docket #D-20, #D-25)

Weinglass did not call Petitioner’s brother, William Cook, although Cook was at the scene when Faulkner was shot. Weinglass claimed that Cook had “disappeared” because he was afraid of being prosecuted on outstanding warrants, but Cook wanted to testify and was discouraged from doing so by Weinglass himself. (Docket #D-1A, Exhibit “D”) When private investigator George Michael Newman offered to locate Cook, Weinglass refused to allow him to do so. Newman had previously requested an opportunity to interview Cook which was also refused by Weinglass. (Docket #D-21)

At approximately the same time that Weinglass and Williams had received the signed confession of Arnold Beverly they had also obtained a signed declaration from Cook, in which he stated that Kenneth Freeman was a passenger in the car Cook was driving when stopped by Officer Faulkner, that Freeman disappeared after shots rang-out, and that Freeman later admitted to Cook that there had been a plot to kill Officer Faulkner, and that he, Freeman, was armed that night and participated in the shooting. Cook’s declaration also clearly states that Petitioner Jamal did not shoot Officer Faulkner. However, this declaration by Cook was never presented by Petitioner’s prior counsel. (Docket #D-1A, Exhibit “D”; Docket #D-13)

Weinglass and Williams failed to call other important witnesses to testify in the 1995 post-conviction proceedings, did not expose the “pro

forma” defense put on at trial by Petitioner’s court-appointed attorney, and failed to raise numerous meritorious points of constitutional error based upon ineffective representation by appellate counsel in Petitioner’s direct appeal.¹⁸

Attorneys Weinglass and Williams were unwilling to endanger their own lives and safety by pursuing a defense of Petitioner Jamal that might threaten to unmask the powerful and ruthless people who planned Officer Faulkner’s murder. They were unwilling to risk the potential harm to their professional reputations and careers that might ensue from the campaign of calumny and “disinformation” that might be unleashed against them by those whose interests lay in making the frame-up of Mumia Abu-Jamal stick.

The long and the short of it is that attorneys Weinglass and Williams consistently put their own personal interests ahead of the interests of their client, Petitioner Jamal, and violated their duty of loyalty to him in so doing. The latest manifestation of these conflicts of interest is attorney Williams’ publishing a book, Executing Justice, with the complicity of attorney Weinglass, whilst they were still Petitioner’s attorneys of record, which purports to be the “inside story” of the Mumia Abu-Jamal case, in flagrant violation of Rule 1.8, Pennsylvania Rules of Professional Conduct which prohibits an attorney from publishing such a book during their representation of a client.

Attorney Williams never disclosed the nature of the book to the Petitioner and, in fact, in the final pages of the book, attorney Williams says that he did not want to share the text with the Petitioner, supposedly “to avoid even the insinuation that he had a hand in it.” (Docket #D-1A, EXHIBIT “G”: Executing Justice, p. 380.) Petitioner Jamal never consented to the publication of Williams’ book, nor could he have consented as a matter of law because Williams never disclosed to Petitioner his conflict of interest in publishing the book.¹⁹ Williams misrepresented to Petitioner that the book was in his interests, thus affirmatively concealing rather than disclosing the conflict of interest.²⁰

The publication of Williams’ book violated attorneys Weinglass’ and Williams’ duty of loyalty to their client by making numerous misrepresentations of the facts of his case. Despite the fact that attorneys Weinglass and Williams knew that Petitioner Jamal is innocent and they themselves had in their hands the evidence to prove his innocence, Daniel Williams falsely and malevolently suggests in his introduction to Executing Justice, subtitled “The Problem of Ambiguity,” that Petitioner Jamal is guilty.²¹ This *ambiguity*, which is the central theme of Executing Justice, is something which attorneys Weinglass and

Williams implanted into Petitioner Jamal’s case by suppressing the confession of Arnold Beverly and concealing the involvement of Kenneth Freeman. Had attorneys Weinglass and Williams presented this and other corroborating evidence at the 1995 post-conviction hearings, including Petitioner’s own testimony, they would have destroyed the *ambiguity* which is the theme of Williams’ book. In failing to present this evidence they acted directly contrary to Petitioner Jamal’s interests and on behalf of their own personal interests.

Not only did attorneys Weinglass and Williams suppress Arnold Beverly’s confession and corroborating evidence, they prepared a “preemptive strike” against the evidence in the form of Williams’ book, Executing Justice, should it ever surface in the future. Attorney Weinglass himself describes the passage in Williams’ book concerning the Arnold Beverly evidence (Docket #D-1A, Exhibit “G”) as a “pre-emptive strike” in a letter to Petitioner Jamal, dated February 22, [2001]: “He [Daniel Williams] also, unbelievably, goes into the witness who we blocked from coming forward (I really objected to this since it has not surfaced; Dan thinks it will and this is a pre-emptive strike).” (Docket #D-1A, Exhibit “H.”) The Commonwealth relied upon this “pre-emptive” strike in the Court of Common Pleas to argue in favor of dismissal of the underlying Petition.

At the time of Petitioner’s jury trial before Judge Sabo, the judge was overheard by Court Reporter Terri Maurer-Carter, in conversation in the antechambers of the court, stating in reference to Petitioner Mumia Abu-Jamal: “Yeah, and I’m going to help ‘em fry the nigger.” Ms. Maurer-Carter disclosed this to the attorneys for Petitioner Jamal on August 18, 2001, at which time she signed a declaration which was filed in the Court of Common Pleas on August 28, 2001. Prior to disclosing this information to Petitioner’s Counsel on August 18, 2001, neither Petitioner nor his Counsel had any knowledge of this matter nor could they have since obtaining this evidence depended entirely on Ms. Maurer-Carter’s willingness to come forward with it. (Docket #D-12; Docket #D-19; Docket #D-23.)

Summary of Argument

Petitioner Mumia Abu-Jamal has been imprisoned for 20 years and is still in danger of execution for a crime he did not commit. Another man, Arnold Beverly, has confessed to the crime and exonerated Petitioner Jamal. Mr. Beverly’s confession is corroborated by a wealth of evidence, including a lie detector test administered by a leading polygraph expert. All of this, and more, was set forth in the underlying Petition and supported by declarations and sworn affidavits as well as a videotape of Mr. Beverly’s

confession.

However, the Court of Common Pleas, Hon. Pamela Dembe, Judge, presiding, refused to consider Petitioner's claim of actual innocence on the merits, denied an evidentiary hearing and discovery, and dismissed the petition without affording Petitioner a hearing. The numerous errors in the "fact-finding" which underlies the dismissal of the Petition demonstrate that the court below did not "thoroughly review the petition, the answer...and all other relevant information that is included in the record" as required by the Pennsylvania Rules of Criminal Procedure.²² See Official Comment to Rule 907.²³

Shocking evidence has surfaced in this case of racial prejudice against Mr. Jamal and connivance with the prosecution by the trial and original post-conviction judge, the late Albert Sabo, providing what is now overwhelming proof that Mr. Jamal did not receive a fair trial or a fair hearing in the original post-conviction proceedings. According to Court Reporter Terri Maurer-Carter's declaration under penalty of perjury (Docket #D-12), she overheard Judge Sabo make the following statement about Mumia Abu-Jamal in conversation in the antechambers of the court at the time of Petitioner Jamal's original trial: "*Yeah, and I'm going to help 'em fry the nigger.*"

A similar remark by a trial judge in casual conversation prior to a defendant's trial resulted in reversal of the conviction in *United States v H. Rap Brown*, 539 F2d 467, 468 (5th Cir 1976) (judge overheard stating "that he had been told he was going to preside at Petitioner's trial and 'that he was going to get that nigger.'"). However, the Court of Common Pleas denied relief on this claim on the preposterous basis that Petitioner had no right to an impartial judge at his jury trial.

The Petition details the manifold conflicts of interest by Mumia Abu-Jamal's ex-Chief Counsel Leonard Weinglass and ex-Chief Legal Strategist Daniel Williams which infected their representation from its inception; motivated them to ignore, jettison, or sabotage numerous meritorious claims for relief; prevented them from putting forward Arnold Beverly's confession and other compelling evidence of Mr. Jamal's innocence when they had such evidence in hand; and caused them to deceive Mr. Jamal into believing they were always acting in his interests when instead they were sacrificing him on the altar of their personal best interests, their fear for their own lives and safety, as well as their careers and

reputations, and their desperation to cover up the pattern of deceit they had practiced on Mr. Jamal over the years.

These conflicts of interest provide the factual basis on which Petitioner Jamal's case fits squarely within two of the statutory exceptions to the PCRA's one-year filing requirement: the "governmental interference" exception (Sec. 9545(b)(1)(i)) and the "undiscoverable factual predicate" exception (Sec. 9545(b)(ii)). Despite the detailed documentation of these conflicts of interest in the Petition and the supporting declarations and affidavits, and despite Petitioner's extensive briefing of the legal issues of "constructive denial of counsel" and "conflicts of interest," neither of these terms appear anywhere in the opinion of the court below.

To time bar a claim of actual innocence, as the Court of Common Pleas has done, violates the Fifth and Fourteenth Amendments' requirement that no "procedural rule" preclude a defendant from putting forward evidence of innocence.²⁴ In a capital case, such as this one, it would violate the Eighth and Fourteenth Amendments' prohibition on cruel and unusual punishment to bar such evidence. *Herrera v. Collins* 506 US 390 (1993).

Even if the PCRA's one-year deadline were applicable to the pending Petition (which it is not), and even if the statutory exceptions were not available in this case (which they are), the Court of Common Pleas still had the inherent power to hear Petitioner Jamal's claims on the merits and its refusal to do so, under the unique facts and extraordinary circumstances in this case, was an abuse of discretion; and this Court has the jurisdiction, and the obligation in this case, to grant relief under its King's Bench powers and/or its Extraordinary Jurisdiction.²⁵

Relief Requested

This Court is requested to set oral argument on this appeal; overturn the Order of the Court of Common Pleas dismissing the Petition; order that post-conviction relief and/or a writ of habeas corpus be granted; reverse Petitioner's conviction and order his release. Or, in the alternative, that the aforesaid Order of the Court of Common Pleas be reversed and this matter be remanded for hearing before a different judge with instructions to grant relief or, in the alternative, to conduct an evidentiary hearing on the merits of Petitioner's claims; and to grant Petitioner discovery.

I. The Court of Common Pleas Erred in Denying Petitioner Jamal's Claim That He Was Deprived of His Right to a Fair Tribunal/Fair Trial, and Deprived of a Fair Hearing on

His 1995 PCRA Petition, By Judge Sabo's Race Prejudice.

“Without the people’s trust that our decisions are made without malice, ill-will, bias, personal interest or motive for or against those submitting to our jurisdiction, our whole system of judicature will crumble.”
Reilly v SEPTA, 507 Pa 204, 225, 489 A2d 1291, 1301 (1985).

On August 28, 2001, Petitioner Jamal filed in the Court of Common Pleas a declaration under penalty of perjury by Court Reporter Terri Maurer-Carter in which she stated that, at the time of Petitioner’s trial in 1982, in the anteroom to Judge Sabo’s courtroom, she overheard the judge make the following statement to another person concerning Petitioner: “*Yeah, and I’m going to help ‘em fry the nigger.*” Thereafter, on September 17, 2001, Petitioner filed a Motion to Amend and Amendment to his PCRA/Habeas Petition adding a tenth claim for relief for judicial bias at trial and in the 1995 post-conviction proceedings, based upon Ms. Maurer-Carter’s declaration.

The Court of Common Pleas denied Petitioner’s Tenth Claim for Relief on the astounding basis that Petitioner had no right to an impartial judge to preside over his jury trial. As will be demonstrated below, this ruling is plain error in that it flies in the face of the established law on judicial bias and the right to a fair tribunal and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution. Moreover, by rejecting Petitioner’s argument that Article 1, Section 9 of the Pennsylvania Constitution requires a judge presiding over a jury trial to be impartial, the Court of Common Pleas effectively declared the courts of the Commonwealth of Pennsylvania to be a “justice-free zone.”

A. The Veracity Of The Maurer-Carter Declaration Was Neither Questioned By The Court Below Nor Refuted By The Commonwealth.

The Commonwealth offered no evidence to dispute the veracity of Court Reporter Terri Maurer-Carter’s declaration. Since the Commonwealth could readily have provided a sworn affidavit from Judge Sabo denying having made the statement at issue, had he not stated his intention to “help ‘em fry the nigger,” the only logical conclusion to draw from the Commonwealth’s failure to offer such evidence is that Judge Sabo *did* make the statement. It is “hornbook law” that an adverse inference may be drawn against a party having it in their power to produce certain

evidence who fails to do so. Such an adverse inference must be drawn, in this case, from the Commonwealth’s failure to rebut the Maurer-Carter declaration.

The Court of Common Pleas implicitly accepted the veracity of Terri Maurer-Carter’s declaration by failing to call into question or express any doubts about her credibility. Accordingly, this Court must take as proven the allegations as to Judge Sabo’s racial bias and prejudice against Petitioner Jamal and the judge’s expressly declared intention at the time of Petitioner’s trial to “help ‘em fry the nigger.”

B. The Maurer-Carter Declaration And Associated Amendment To The Underlying Petition Were Timely Filed.

Ms. Maurer-Carter’s declaration was signed by her under penalty of perjury on August 21, 2001, and filed in the Court of Common Pleas on August 28, 2001 (Docket #D-12). On September 17, 2001, Petitioner filed a Motion to Amend and Amendment to the underlying Petition to add a tenth claim for relief based on the Maurer-Carter declaration (Docket #D-19). That amendment specifically alleged, at paragraph 792 thereof, that the declaration and amendment were timely filed “within the 60-day period provided for by 42 Pa.C.S. Sec. 9545(b)(1)(ii) and 42 Pa. 9545(b)(2) in that the declaration was filed within a matter of weeks of Ms. Carter bringing her information to the attention of Petitioner’s Counsel and such information could not have been previously discovered with due diligence since it depended entirely upon Ms. Carter’s willingness to come forward.” Thereafter, on October 22, 2001, Petitioner filed in the Court of Common Pleas a declaration under penalty of perjury by one of his counsel, Eliot Lee Grossman, Esq. (Docket #D-23), in which counsel stated that he and co-counsel Marlene Kamish, Esq., were put in touch with Ms. Maurer-Carter by telephone on August 17 or 18, 2001, when they were in Philadelphia to appear at a status conference in the underlying proceedings and they subsequently met with Ms. Maurer-Carter on August 18, 2001, at which time she provided the information which was then set forth in her declaration. In his declaration attorney Grossman specifically states that, “[p]rior to August 17, 2001, neither I nor Ms. Kamish had ever met or spoken with Ms. Maurer-Carter, nor did we have any knowledge of the facts which are set forth in her declaration.”

These three documents on file in the Court of

Common Pleas in this matter establish that the Maurer-Carter declaration was filed within 10 days of the information therein being first disclosed to Petitioner's Counsel—which is precisely “a matter of weeks” from then and, therefore, within the 60-day statutory period provided for by the PCRA. Consequently, the Tenth Claim for Relief, and the Maurer-Carter declaration supporting it, were timely filed.

The Court of Common Pleas erred when it stated that 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. Indeed, this is bare speculation on the part of the Court unsupported by any evidence or even any theoretical elucidation of how such a scenario might have come to pass. How could Petitioner possibly have learned of the facts sooner than Ms. Terri Maurer-Carter decided to disclose them to Petitioner's Counsel? He simply could not have. Until Ms. Maurer-Carter came forward, neither the Petitioner nor his present or prior counsel had or can have had any reason to suspect that Ms. Maurer-Carter had heard Judge Sabo make such a statement. Even if this were an issue, it would be one for determination at an evidentiary hearing. It was error for the court to adjudicate this issue adversely to Petitioner based solely upon idle speculation.

C. The Court Of Common Pleas Erred in Ruling That Petitioner Jamal Did Not Have the Right to an Impartial Judge.

“The quality of justice we can claim to have achieved in this nation is not measured by what our best judges can do but by what the worst of our judges have done.”²⁶

In denying Petitioner Jamal's Tenth Claim for Relief, the Court of Common Pleas ruled that the accused in a criminal proceeding has no right under Article 1, Section 9 of the Pennsylvania Constitution, or the Fifth and Fourteenth Amendments to the United States Constitution, to an impartial judge at a jury trial or in post-conviction proceedings. This is an astonishing ruling which, if sustained by this Court, would reduce our legal system to the level of “Taliban justice.”

The Court of Common Pleas cites no authority to support its peculiar position and ignores the authorities cited in Petitioner's Tenth Claim for Relief which hold to the contrary, namely: *Berger v United States*, 225 US 22 (1921); *United States v Grinnell*

Corp., 384 US 563 (1966); *Likety v United States*, 510 US 540 (1944); *Porter v Singletary*, 49 F3d 1483 (11th Cir 1995); *Marshall v Jerrico*, 446 US 238 (1980). The foregoing cases are merely illustrative of a wealth of authorities in support of what one would have assumed, prior to Judge Dembe's holding to the contrary, was a literal “no-brainer,” *i.e.*, that judges should be impartial and the conviction of a Black person in a trial presided over by a judge who expressed the intention to “help ‘em fry the nigger” must be reversed as violative of due process. *See, e.g., United States v H. Rap Brown*, 539 F2d 467, 468 (5th Cir 1976) (conviction reversed where judge overheard stating “that he had been told he was going to preside at Petitioner's trial and ‘that he was going to get that nigger.’”)²⁷

The United States Supreme Court holds in *In re Murchison*, 349 US 133, 136 (1955):

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that “every procedure which would offer a possible temptation to the average man as a judge...not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.” *Tumey v Ohio*, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way “justice must satisfy the appearance of justice.” *Offett v United States*, 384 U.S. 11, 14.

However, the Court of Common Pleas takes the frankly surprising and unsustainable position that an openly racist judge who expresses the specific intention to contrive with the prosecution to procure the conviction and death sentence of a defendant *because of the defendant's race* does not deprive the defendant of his constitutional right to a fair trial so long as it is the jury and not the judge who is the fact-

finder. This entirely ignores the well-established rule that “judicial bias is one of those ‘structural defects in the constitution of the trial mechanism,’ as distinct from mere ‘trial errors,’ that automatically entitle a petitioner for habeas corpus to a new trial.” *Bracy v. Gramley*, 520 U.S. at 905.²⁸ The Third Circuit directly recognized that this rule is applicable to jury trials in *United States v Thompson*, 483 F2d 527, 529 (3rd Cir 1973), where it reversed the conviction after jury trial of a “Black militant” for violation of the Selective Service laws because of bias on the part of the trial judge and remanded the case for retrial before a different judge:

“We do not mean to suggest that the allegations [of judicial bias], if true, had the potential to affect the fairness of the proceedings up until the rendering of the verdict. However, under [28 USC] Section 144 a defendant is entitled to trial before a judge who is not biased against him at any point of the trial ...”

In *Bracy v. Gramley*, 520 US at 904, the Supreme Court noted, quoting from *Atena Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986), that “the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor” as to the minimum impartiality requirements that a judge must satisfy to provide a defendant with the “fair trial” to which he or she is entitled. Judge Sabo’s open expression of his intent to contrive with the prosecution to “fry” Petitioner Jamal *because of his race* falls straight through that “constitutional floor” into a cesspool of racism which, over 100 years after the Civil War, still pollutes our society and, lamentably, elements of its judiciary.

It should go without saying that where the judge at a Black man’s jury trial expresses in ugly racist terms his intention “to help ‘em fry the nigger,” justice hardly satisfies the appearance of justice. To the contrary, such a trial would be a cynical farce and, in a capital case, no better than a lynching party. This is precisely what Petitioner Jamal’s trial before Judge Sabo was, to the eternal disgrace of the Commonwealth of Pennsylvania.

That the Court of Common Pleas *today* could so cavalierly dismiss this grotesque violation of fundamental due process and basic human decency—and could do so based on the outrageous premise that a fair trial does not require an impartial judge—suggests, among other things, a lack of sensitivity to the important role assigned to impartiality in the

Pennsylvania Code of Judicial Conduct which emphasizes that a judge “should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” (Canon 2) and that “A judge should perform the duties of his office impartially and diligently” (Canon 3).²⁹

The Court of Common Pleas ignores the obvious fact that *any* exercise of discretion by a racist judge during the jury trial of a Black person would be an abuse of discretion as it would necessarily be poisoned by the venom of that racism, particularly where the judge expresses a specific intention in ugly racist terms—as Judge Sabo did—to work hand-in-hand with the prosecution to obtain a conviction and death sentence *because* the defendant is Black. As Judge Rovner has noted, “discretionary choices are not left to a court’s inclination, but to its judgment; and its judgment is to be guided by sound legal principles,” but where “a judge exercises her discretion for invidious reasons, she has exceeded her authority.” *Bracy v Gramley*, 81 F3d 684, 702 (7th Cir 1996)(Rovner, J., dissenting), *overruled*, 520 US 899 (1997).

In this case, there is ample evidence in the trial transcript of Judge Sabo using his discretion against Petitioner Jamal, and, given what we now know of the judge’s intention to “fry the nigger,” there is additional circumstantial evidence of his racial prejudice as well, including but not limited to: (1) the taking of the jury voir dire out of Petitioner Jamal’s hands because of Judge Sabo’s perception that jurors were allegedly “afraid” of Petitioner; (2) refusing Petitioner Jamal the assistance of his friend, non-lawyer John Africa, a Black man, at counsel table, which Sabo, in denying post-trial motions, admitted was because of Africa’s “appearance” and “life-style” (Petition, Paragraphs 755-760); (3) aborting Petitioner’s right to self-representation on the false pretext of “disruptive behavior” (Petition, Paragraphs 605-630); (4) removing Black juror Jean Dawley from the jury without a hearing, with Sabo’s transparently racist reference to “these people” and his demeaning description of Dawley as a “mental case” who should be examined by a psychiatrist (Petition, Paragraphs 664-697); and directing the jury to return with a verdict for death (Petition, Paragraphs 721-726).

Additionally, the Court of Common Pleas gave no consideration to the myriad ways in which a biased judge can deform a jury trial:

[W]e cannot ignore the influence that the

judge retains even in a jury trial...I do not refer so much to the ability of the judge to communicate his opinions to the jury through raised eyebrows, choice bits of sarcasm, and questioning of the witnesses that strays into advocacy, although this happens...I mean the extraordinary ability of the trial judge to shape the trial itself. It is she who decides what evidence the jury may hear, how counsel may behave in front of the jury, what arguments may be made, how they may be made, what legal principles the jury must apply, and even, to a significant degree, who will sit on the jury. Thus, even when the verdict is not entrusted to her, a partial judge retains great influence, if not directly upon the jury, then upon the myriad events that culminate in the jury's decision. *Bracy v Gramley*, 81 F3d 684, 701 (7th Cir 1996)(Rovner, J., dissenting), *overruled*, 520 US 899 (1997).³⁰

It is in part for such reasons that judicial bias is considered to be a "structural defect" in a trial requiring reversal without a showing of prejudice. As the Supreme Court has explained: "When the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired." *Vasquez v Hillery*, 474 US 254, 263 (1986). Thus it is that to establish a deprivation of due process due to judicial bias it is only necessary to show that the circumstances would offer a possible temptation to the judge "not to hold the balance nice, clear, and true between the state and the accused." *Tumey v Ohio*, 273 US at 532.³¹

In the Court of Common Pleas, the Commonwealth argued that Petitioner Jamal was barred from raising a claim for relief based on the new evidence of Judge Sabo's racial prejudice on the basis that claims of the judge's *non-racial* bias had previously been raised and denied in the 1995 post-conviction proceedings and on appeal therefrom. This specious argument directly contradicts the contrary ruling by U.S. District Judge Yohn with regard to the same question in the federal habeas proceedings in this same matter.³²

D. The "Dred Scott Decision" Is The Only Precedent For Judge Dembe's Ruling That Petitioner Jamal Had No Right To An Impartial Judge.

Never is an individual as personally *involved* with government as when faced by the power of a court, when his or her freedom and very life is at stake, at the tender mercies of the state. And rarely has a case been clearer than when a black man actually sued a United States court for his freedom from slavery. The case? *Dred Scott v Sanford*, 1857...Chief Justice Roger Brooke Taney—a bony, stooped slave owner from Maryland—wrote:

"The question is simply this, can a Negro, whose ancestors were imported to this country and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights and privileges and immunities guaranteed by that instrument to the citizen...We think they are not...included under the word "citizens"...and can therefore claim none of the rights and privileges which that instrument provides for...They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race...and so far inferior that they had no rights which the white man was bound to respect ..."

In these words...the face of U.S. racist oppression was made plain.³³

Although the Court of Common Pleas cites no authority in support of its astounding ruling that Petitioner Jamal had no right to an impartial judge at his jury trial there is, lamentably, precedent of a certain kind in *Dred Scott vs Sanford*, 60 U.S. 393 (1857), which is generally regarded by historians as one of the causes of the Civil War. In *Dred Scott*, a Black slave brought a lawsuit for a declaration of his freedom based upon his master's having transported him from a slave state through "free states," in which slavery was illegal, to Missouri, in which slavery was permitted.

Chief Justice Taney in *Dred Scott*, like Judge Dembe in the case of Petitioner Mumia Abu-Jamal, held that the court had no jurisdiction and ordered the action dismissed. Judge Dembe based her decision upon a purported jurisdictional time-bar and the alleged irrelevance of an impartial judge to a fair jury trial. Justice Taney based his decision upon his view of Black people as property, "beings of an inferior order...altogether unfit to associate with the

white race.” 60 US at 407.

In ruling that Mumia Abu-Jamal had no right to an impartial judge, Judge Dembe implicitly ruled that Petitioner Jamal had no right to a fair tribunal. But since being tried before an *unfair tribunal* is no different from being “tried” by a lynch mob, the “right” to be tried before an *unfair* tribunal is no right at all.

Judge Sabo’s vile racist comment that, at Petitioner Jamal’s trial, he, the judge, was “going to help ‘em fry the nigger” meant that, in Judge Sabo’s courtroom, Mr. Jamal, like Dred Scott before him, was not a citizen with rights guaranteed to him by the Constitution, but rather an inferior being with “no rights which the white man was bound to respect.” When, 20 years later, Judge Dembe summarily denied Petitioner Jamal relief without expressing even one iota of the shock and indignation to which this Court gave voice in commenting on the blatant racism of the infamous “McMahon videotape” in *Commonwealth v Basemore*, 560 Pa 258, 744 A2d 717, 731, n. 12, 733 (2000), she demonstrated that in her courtroom, just as for Judge Sabo before her, and Justice Taney, before them both, a Black person has “no rights which the white man was bound to respect.”³⁴

E. Judge Sabo’s Racial Bias Deprived Petitioner Of A Fair Hearing On His 1995 PCRA Petition.

Judge Sabo’s exercises of discretion (now known to have been for the purpose of “help[ing] ‘em fry the nigger”) were relied upon by this Court to deny various of Petitioner’s arguments on direct appeal and on subsequent appeal from Judge Sabo’s denial of post-conviction relief.³⁵

Having expressed his sentiments to “help ‘em fry the nigger” at the time of Petitioner Jamal’s original trial, there should be little doubt that Judge Sabo’s intentions were identical during the subsequent PCRA

proceedings. Indeed, his obvious hostility to both Petitioner and his counsel during those proceedings, amply detailed in daily newspaper accounts of Sabo’s antics, is additional evidence of that intention. The Court of Common Pleas, in denying Petitioner’s Tenth Claim for Relief on the basis that Judge Sabo was not the fact-finder at his jury trial, failed to consider that Judge Sabo *was* the fact-finder in his 1995 post-conviction proceedings. Judge Sabo should have granted Petitioner’s motion to recuse him from hearing the post-conviction proceedings or should have recused himself *sua sponte*, just as he should have recused himself *sua sponte* from presiding at Petitioner Jamal’s trial.

Since Petitioner Jamal was deprived of his right to a fair hearing at the 1995 PCRA proceedings, it is just as if he never had a first PCRA petition. The Petition underling this appeal should, therefore, be considered to be an “extension” of Petitioner Jamal’s original PCRA petition which, in this case, should relate back to the filing of that petition in 1995.³⁶ Since the 1995 Petition was filed before the 1996 effective date of the PCRA amendments, the allegedly “jurisdictional” time deadlines enacted by those amendments would not apply to Petitioner’s present claims.

There is another reason that the underlying Petition must be considered to be an extension of the 1995 Petition: Any rulings which this Court has previously made in this case to the effect that Judge Sabo legitimately acted within his discretion in the rulings which he made at trial and during the original PCRA proceedings are necessarily in error, since those decisions were reached in ignorance of Judge Sabo’s racial prejudice against Petitioner Jamal and thus in ignorance of the fact that Sabo’s racism must necessarily have affected the manner in which he exercised his discretion.

II. The Court of Common Pleas Erred in Ruling the Petition to be Untimely.

The grotesque and all-pervading conflicts of interest which infected attorneys Weinglass’ and Williams’ representation of Petitioner Jamal from its inception (Petition, pp. 1-12, 26-47) irrevocably perverted the adversary process in this case and demolished the foundation stone of the constitutional guarantee of “due process” in Article 1, Section 9 of the Pennsylvania Constitution and the 5th and 14th Amendments to the U.S. Constitution.

It is the facts of Weinglass’ and Williams’ conflicts of interest which provide the factual predicate underlying Petitioner Jamal’s claims for relief which could not have been known previously by Petitioner because they were undisclosed and ruthlessly and skillfully concealed from him by Messrs. Weinglass and Williams. It is these facts which make the underlying Petition timely under Sec. 9545(b)(1)(i) of the PCRA. Since it is the attorney’s duty to disclose a

conflict of interest to the client, these facts could not have been known to Petitioner Jamal as a matter of law so long as attorneys Weinglass and Williams represented him.

It is these facts which also demonstrate, as alleged in the Petition, that Weinglass and Williams, in function if not in fact, were acting at all times as *agents* of the District Attorney in suppressing Arnold Beverly's confession and failing to put forward the other claims and evidence set forth in the pending Petition. Thus, under *respondeat superior* the actions of Messrs. Weinglass and Williams are attributed to the Commonwealth and thereby constitute "governmental interference" with the presentation of Petitioner Jamal's claims, even though attorneys Weinglass and Williams themselves may not be "government officials."

A. The Court Of Common Pleas Ignored The "Conflict Of Interest" Issue.

A "content analysis" of the Court of Common Pleas' Memorandum and Order of November 21, 2001, reveals that the words "conflict of interest" appear nowhere in that opinion although it is the manifold conflicts of interest by Petitioner Jamal's prior Chief Legal Counsel Leonard Weinglass and Chief Legal Strategist Daniel R. Williams, *from the inception of their representation*, which provide the factual basis for the claims for relief set forth in the PCRA/Habeas Petition and thereby place the Petition squarely within the statutory exceptions to the PCRA filing deadlines.

Not only does the Court of Common Pleas fail to analyze or even mention the "conflict of interest" issue, it makes no reference at all to the numerous Pennsylvania cases cited by Petitioner which establish that "the mere existence of such a conflict vitiates the proceedings," *Commonwealth v Cox*, 441 Pa 64 (1970), and even "an appearance of conflict of interest" is sufficient to threaten the "duty of zealous advocacy" which is the obligation of an attorney representing a post-conviction petitioner. *Commonwealth v. Wright*, 374 A2d 1272, 1273 (Pa. 1977).³⁷

The deprivation of the right to conflict-free representation in state post-conviction proceedings in Pennsylvania also constitutes a violation of the Fourteenth Amendment to the U.S. Constitution because, where a state provides a right it is not otherwise obligated to provide under the federal constitution, the subsequent denial of that right violates federal guarantees of due process and equal protection of the law. *Griffin v Illinois*, 351 US 12

(1955); *Douglas v California* (372 US 353 (1963)); *Hicks v Oklahoma* (447 US 343, 346 (1980)); *Ford v Wainwright*, 477 US 399, 427-429 (O'Connor, J., concurring and dissenting), *Fetterly v. Paskett*, 997 F2d 1295, 1300 (1993).

B. The Court Of Common Pleas Ignored Prior Counsels' Flagrant Violations Of The Rules Of Professional Conduct.

Content analysis also reveals that there is no reference to the Pennsylvania Rules of Professional Conduct anywhere in the Court of Common Pleas' Memorandum and Order, despite the fact that ex-Chief Legal Strategist Daniel William's publication of his mendacious book, *Executing Justice*, was a flagrant and brazen *per se* violation of Rule 1.8 which specifically prohibits an attorney from entering into or even negotiating a contract to publish a book on a current case in which he represents one of the parties.³⁸

Among the unsavory motives that Messrs. Weinglass and Williams had in publishing the book was that of ruthlessly covering up the manner in which their own cowardice and mishandling of Petitioner's case over the previous nine years, capped off by their suppression of Arnold Beverly's confession and the evidence which corroborated it, had undermined and sabotaged Petitioner's defense at the very same time that they had built their careers on cynically and hypocritically posing to the world as his courageous and self-sacrificing *radical* lawyers, fighting a heroic battle against "the system." (Petition, Para. 19, 73-135)

In its jurisprudential myopia, the Court of Common Pleas missed the obvious fact that the necessary precondition for publication of *Executing Justice* was the suppression of Arnold Beverly's confession and the evidence corroborating it because the *ambiguity* which, according to its author, ex-Chief Legal Strategist Daniel William, is the central theme of the book, not only presupposes the suppression of that evidence, but would be destroyed by that evidence being brought forward. While Williams might have written a very different book had he and Weinglass presented Arnold Beverly's confession to the courts instead of burying it in their files, having buried it the only possible book that he could publish was one which threw the last few shovel fulls of dirt over its burial site and their own tracks.³⁹ It is Petitioner's argument that the book, *Executing Justice*, exemplifies in stunningly sharp relief what ex-Chief Counsel Weinglass and ex-Chief Legal Strategist

Williams have done throughout their involvement in this case, they have shamelessly used it to aggrandize and promote themselves and their own careers to the detriment of their client's interest in proving his innocence, saving his life, and restoring his freedom.

**C. The Court of Common Pleas Ignored The
"Constructive Denial of Counsel" Issue.**

Although the legal doctrine of "constructive denial of counsel" is at the heart of Petitioner's case as to why the court had jurisdiction to entertain the underlying Petition, content analysis reveals that the words "constructive denial of counsel" appear nowhere in the Court of Common Pleas' opinion. However, the allegations in the Petition and the evidence in the supporting declarations and other documents, makes it exceedingly clear that the conflicts of interest by Petitioner's previous counsel resulted in violations of Petitioner's constitutional rights that went far beyond those contemplated by the doctrine of "ineffective representation by counsel" under *Strickland v Washington*, 466 US 668 (1984), to constitute a "constructive denial of counsel" under *United States v Cronin*, 466 US 648, 656 (1984). Both legally and qualitatively, there is a huge difference between mere "ineffective assistance of counsel" on the one hand, and "a conflict of interest" and a consequent "constructive denial of counsel" on the other.⁴⁰

The crucial distinction between the doctrines of "ineffectiveness of counsel" and "constructive denial of counsel" is simply ignored by the Court of Common Pleas which proceeds to analyze Petitioner's allegations of treachery and betrayal by his former counsel as though Petitioner were complaining only that prior counsel were ineffective when, to the contrary, Petitioner alleges that his prior attorneys, fearing for their own lives and safety, put their own interests and their interests in their future careers before Petitioner's best interests and buried the evidence which proves he is innocent rather than run the personal risks to themselves and their professional reputations in putting forward such evidence.

**D. The Court Of Common Pleas Erred In Failing
To Assume The Truth Of The Allegations In
The Petition Before Dismissing It.**

In dismissing the underlying Petition, the Court of Common Pleas forgot that its role at the pleading stage is *not* to make credibility determinations which could only be made at an evidentiary hearing, but rather, just as in ruling on a motion to dismiss or a

demurrer (*see Balsbaugh v Rowland*, 447 Pa 423, 426, 290 A2d 85, 87 (1972)), to *assume* that the allegations in the Petition are true, and then consider whether, if true, the Petitioner would be entitled to relief as a matter of law. It would only be upon a correct finding that the allegations in the Petition, even if true, would not justify relief that a Court could properly dismiss a Petition.⁴¹

For precisely the same reasons, it was not the Court of Common Pleas' role at the pleading stage to make adverse findings about the credibility of Arnold Beverly or to conjecture as to what Weinglass and Williams may have thought about him. Whilst the Court of Common Pleas speculated that Arnold Beverly may have falsely confessed to the murder of Police Officer Faulkner because he might be an attention seeker, it can point to no evidence in the record which even suggests that this may be so. As to the Court's implied conjecture that Weinglass and Williams may have believed that Arnold Beverly was a dishonest witness, there is no evidence to support such a surmise. Williams' book is not admissible evidence and, in any event, it is demonstrably self-serving and untrue in what it purports to record about Arnold Beverly. The thick stack of legal memoranda (Docket #D-28), Dr. Honts' and Rachel Wolkenstein's affidavits (Docket #D-13, D-1A), together with the fact that Weinglass and Williams had known that Arnold Beverly had been saying that Police Faulkner had been murdered as a result of a "mob hit" since the inception of their retainer, all independently prove this.⁴²

**E. The Court Of Common Pleas Arbitrarily
Struck From The Record The Evidence
Which Proves Up The Conflicts Of Interest.**

The Court of Common Pleas struck from the record a thick stack of memoranda prepared by Petitioner's prior attorneys roughly the size of a New York City phonebook (Docket #D-28) which detail all of the evidence which corroborates the truth of Arnold Beverly's testimony that he, and not Mumia Abu-Jamal, shot and killed Officer Faulkner as part of a planned "hit" by organized crime and corrupt police to eliminate an obstacle to the rampant and widespread police corruption in center city Philadelphia in the 1980's.⁴³ The Court erred and abused its discretion in striking this key evidence from the record and violated Pa R Crim Pro 907 & 908.⁴⁴

This is precisely the evidence which proves up the "conflicts of interest" by Petitioner's prior counsel

which this Court fails to consider or even discuss in its Memorandum and Order, exposes the fundamental lies in Williams' self-serving *fictional* account of Petitioner's case in Executing Justice, and answers the rhetorical questions posed by the Court in asserting that Petitioner's allegations purportedly lack "external" and "internal" logic. The very existence of these memoranda prove that Messrs. Weinglass and Williams did not, as claimed in William's book, dismiss out-of-hand the possible truth of Arnold Beverly's confession, but rather that a tremendous amount of time and effort went into analyzing how Beverly's confession fit into and was corroborated by the other available evidence in the case as well as by evidence of the extent of police corruption in Philadelphia as revealed by the FBI investigations and federal prosecutions of highly-placed police officials.⁴⁵

The Court struck the memoranda from the record on the purported grounds that they were filed without leave of court. However, there is no written rule to the knowledge of Petitioner's Counsel which establishes such a requirement. Moreover, the Court had filed numerous other documents from Petitioner's Counsel without ever requiring an application for leave of court or advising counsel that leave was required.⁴⁶ It is the very memoranda which the Court of Common Pleas wrongly struck from the record which prove up the conflicts of interest which the Court does not mention in its opinion. And, even if leave of court were required, the Court should have granted leave to file these memoranda *in the interest of justice*.

F. The Petition Was Timely Filed Under The "Governmental Interference" Exception.

Section 9545(b)(1)(i) of the PCRA creates an exception to the one-year filing deadline where "interference by government officials" is responsible for the failure to previously raise a claim. Section 9545(b)(4) excludes "defense counsel" from the definition of "government officials." However, Section 9545(b)(4) has no application to the facts of this case because: (1) Petitioner does not allege that his prior counsel, Weinglass and Williams are or were "government officials," rather he alleges that they acted in function, if not in fact, as *agents* of government officials insofar as their actions served the interests not of petitioner, but of the District Attorney; and (2) Section 9545(b)(4) is obviously intended to preclude the argument that defense attorneys, in virtue solely of their position as officers

of the court (privately-retained) or employees of the government (public defender or appointed counsel) should be considered to be "government officials."⁴⁷

There is ample precedent for finding, in certain circumstances, that defense counsel have acted out of their proper role and instead as a prosecutor or organ of the state and that their actions should, therefore, be attributed to the state. *See, e.g., Rickman v. Bell*, 131 F.3d. 1150, 1156-1157 (6th Cir. 1997) (defense attorney acted as a "second prosecutor"); *Georgia v. McCollum*, 505 US 42 (1992) (defense attorney's conduct constituted "state action" in violation of the Fourteenth Amendment); *Faretta v. California*, 422 US 806, 820-821 (1974) (defense attorney imposed by court on *pro se* defendant acts as an "organ of the State").

According to the declaration of private investigator Mike Newman (Docket #D-21), Chief Counsel Weinglass intentionally quashed any investigation of the involvement of Kenneth Freeman in the murder of Officer Faulkner, despite Newman's repeated entreaties to authorize such investigation, and Weinglass admitted that it was because he was unwilling to run the personal risk to his own life and safety of pursuing that line of investigation. Not only did Weinglass and Williams keep Petitioner Jamal's brother, William Cook, off the witness stand in the 1995 PCRA hearings, and misrepresent to the Court that he had "disappeared," at the same time they suppressed Arnold Beverly's confession they also suppressed William Cook's declaration, signed in the same time period (Docket #D-IA), in which he revealed that Freeman had confessed to him that he, Freeman, was part of a plot to murder Officer Faulkner, that he was armed the night Faulkner was killed, and participated in the shooting.

Attorneys Weinglass and Williams failed to raise the ineffective representation by trial attorney Anthony Jackson in failing to use the transcript from William Cook's trial to impeach Cynthia White's perjurious hiding of the existence of a passenger in Cook's car when it was stopped by Officer Faulkner, the passenger was Kenneth Freeman. (*See* Appendix 7 to this brief.)

Weinglass failed to ask Arnold Howard, when he testified in the 1995 PCRA hearings, to identify the Black woman who he said had picked Kenneth Freeman out of a line-up twice on the day after Faulkner was killed, despite the fact that Howard had previously told him that the woman was the prosecution's star witness, Cynthia White, and did not ask about Freeman having been tested for gunpowder

residue by the police although Howard had also disclosed this to Weinglass. (Docket #D-20, D-25)

By suppressing the evidence of Freeman's role in the murder, and withholding any legal claims that would point to his involvement, Weinglass and Williams not only hid evidence which would have proved their client's innocence, but which also would have impeached the credibility of Cynthia White, the prosecution's star witness, and proved up the prosecution's misconduct in hiding and fabricating evidence at the original trial. There can be no justification or excuse for this. There is no possible scenario under which this can be described as a tactical decision by Weinglass and Williams. The suppression of this evidence and withholding of these claims did not serve the interests of Mumia Abu-Jamal, it served only the personal interests of Weinglass and Williams in protecting their own necks even if their client lost his, while at the same time serving the District Attorney's interest in preserving his/her ill-gotten conviction.

Private Investigator Mike Newman's declaration (Docket #D-21) also proves the truth of the allegations in the Petition that previous Chief Counsel Weinglass and Chief Legal Strategist Williams suppressed Robert Chobert's recantation of his trial testimony. There can be no possible tactical explanation for this. Chobert was one of only two alleged eyewitnesses to the shooting of Officer Faulkner. The other was prostitute Cynthia White.⁴⁸ According to Newman's declaration, Chobert admitted to him that, contrary to his trial testimony, he did not see Petitioner Jamal shoot Officer Faulkner. Moreover, rather than being parked on Locust Street directly behind Faulkner's squad car, as he had testified at trial, Chobert was actually parked north of Locust on the cross street, 13th Street. Although Chobert told this to Chief Counsel Weinglass, Weinglass did not question him about this when he was on the witness stand. Newman was in the courthouse, waiting to testify about Chobert's recantation to him. However, Weinglass told him to leave because his testimony was unnecessary!

Weinglass' conduct shows that his and Williams' decision to suppress any evidence which might begin to reveal what had really happened on December 9, 1981 necessarily deformed their entire presentation of Petitioner's case, infecting even the presentation of their legal claims of constitutional error. This was a clear violation of their duties to their client and was directly contrary to their client's interests. Such conduct by *putative* defense lawyers fits squarely

within the category of "acting as a second prosecutor" under *Rickman v. Bell*.

For nine whole years, attorney Weinglass and attorney Williams did more than any prosecutor could ever do to send Petitioner Jamal to his death. They strangled at birth the evidence which shows that he did not kill Police Officer Faulkner and, in the process, jettisoned numerous other decisive claims for relief. They did so, because their only interest in this case was what they could get out of it for themselves. If Mumia Abu-Jamal is ever executed, his blood will be on their hands and in their pockets.

G. The Petition Was Timely Filed Under The "Undiscoverable Factual Predicate" Exception.

Section 9545(b)(ii) provides an exception to the one-year filing deadline where "the facts upon which the claim is predicated" are unknown to the petitioner and could not have been ascertained by due diligence. The central facts upon which all of the claims in the pending Petition are predicated are the conflicts of interest on the part of Petitioner Jamal's former attorneys Weinglass and Williams, and the fact that, throughout their retainer, the manner in which they purported to "represent" Petitioner was dictated by their own *personal* best interests, to the detriment of and contrary to the interests of their client, even to the extent of actively undermining and sabotaging his true case, while objectively acting, whether consciously or not, in and on behalf of the interests of the prosecution.

These facts were unknown to Petitioner Jamal, and could not have been ascertained by him personally during the currency of Weinglass' and Williams' retainer, because the underlying conflicts themselves were not disclosed, but intentionally concealed, and because these conflicts of interest deformed and perverted the attorneys' advice and counsel to Petitioner Jamal. As a result, Petitioner did not and could not have previously ascertained that Arnold Beverly's confession, related corroborating evidence, supported rather than undermined his case. Moreover, he did not and could not have known that, because of these conflicts of interest, his attorneys ignored or suppressed other claims and evidence that should have been but were not raised by them.

As a matter of law, the facts of these conflicts of interest were not and could not have been known to the Petitioner until his prior attorneys were withdrawn from his representation pursuant to order of the U.S. District Court when his new counsel entered their

appearances in the federal habeas proceedings on May 4, 2001, nor could Petitioner himself have raised any issues based upon those conflicts before that time. It follows that, as a result of the Petitioner's former attorneys' conflict of interest, the underlying facts upon which all of the claims which are set out in the current PCRA petition are predicated, were unknown to the Petitioner and could not have been ascertained by him personally, with due diligence, during the currency of their retainer.⁴⁹

Because of attorneys Weinglass' and Williams' breaches of their duty of loyalty to Petitioner Jamal, and refusal to follow his instructions to prove his innocence, their conduct cannot be attributed to him. A principal is not responsible for his agent's breach of fiduciary duty or refusal to follow instructions. Moreover, as is explained in *Coleman v. Thompson*, 502 US 722, 753-754 (1991), a client's usual responsibility for the acts (or failures to act) of his attorney, under general agency principles, is severed by a constitutional violation, such as the attorney's "ineffective representation." Here the severing constitutional violation implicit is the "constructive denial of counsel" to which Petitioner Jamal has been subjected.

The specific causal connection between the *death threat* received by ex-Chief Counsel Leonard Weinglass (which the Court of Common Pleas either missed or chose to ignore in its review of the record) and Weinglass' refusal to authorize investigation of Kenneth Freeman's involvement in the murder of Officer Faulkner, is proved up by private investigator Newman's declaration. It is their own desperate need to bury Freeman's involvement in the killing which explains Weinglass' and William's failure to raise the legal issue of trial attorney Jackson's "ineffectiveness" for failing to prove up the presence of Freeman at the crime scene as a passenger in William Cook's car when it was pulled over by Officer Faulkner, when Jackson could have used Cynthia White's prior testimony at William Cook's trial (Appendix 7 to this Brief) to establish the presence of this passenger, as well as to impeach White and prove-up prosecutorial misconduct in concealing the passenger's very existence at Petitioner Jamal's trial. It is Weinglass' and Williams' failure to prove-up through the testimony of Arnold Howard at the 1995/1996 PCRA hearings that Freeman had his hands tested for gunpowder residue by police a short time after Officer Faulkner was killed and that Freeman was twice identified in a line-up by Cynthia White which provides further

evidence of their conflicts of interest and the disastrous effect they had on presentation of Petitioner's case in the 1995 PCRA Petition and subsequent proceedings thereon.

The sheer number of examples of how Weinglass and Williams fouled up the Petitioner's meritorious claims for relief *and* the variety of the ways in which they did so, which are exhaustively detailed in the underlying Petition, proves that there had to have been a conflict of interest on the part of the Petitioner's prior attorneys, that they had to be motivated by something other than the best interests of their client. Weinglass and Williams are not and were not inexperienced, naive or feckless attorneys. They knew precisely what they were doing. Williams' book and Weinglass' letter to the Petitioner of 2/22/01 prove this (Docket #D-1A, Exhibit "H").

When, in June of 1999, they subsequently ended up with Arnold Beverly's signed confession in their hands, corroborated by a lie detector test and undeniable evidence of rampant and widespread police corruption, that same conflict between their own narrow personal interests and their client's interest, caused them to bury that evidence rather than present it to any court. It was that same conflict which earlier caused them to keep Petitioner Jamal's brother, William Cook, off the witness stand at the 1995 PCRA proceedings, as his testimony would have pointed to Kenneth Freeman, who had confessed to Cook that he, Freeman, had been an armed participant in the shooting of Officer Faulkner. And it was that same conflict which later flowered into attorney Williams' unethical and mendacious book, Executing Justice, among whose purposes was to cover their trail and keep suppressed both the evidence of Petitioner's innocence and that of their cowardly betrayal of their innocent client to the executioner while cynically and hypocritically posing to the world as Mumia Abu-Jamal's courageous defenders.⁵⁰

Had Weinglass and Williams raised the Petitioner's case on actual innocence for the first time when they had Arnold Beverly's confession in their hands in mid-1999, it would have exposed the fact that they had earlier failed to present any of the other evidence, such as the Petitioner's own testimony and the testimony of his brother, William Cook, which demonstrates that the Petitioner is innocent and which was available at the time of the original PCRA hearing, together with the reasons why they had suppressed this other evidence in 1995. Not only that, it would doubtless also have emerged that, at the time

of the original PCRA hearing, attorney Weinglass had kept William Cook off the witness stand when he wanted to testify and then falsely represented to the court that Cook had disappeared. In any event, the exposure of Weinglass' and Williams' suppression in 1995 of the then available evidence pointing to Petitioner's innocence would have left their personal legal and political reputations in tatters. (Petition, Paragraph 94)

This explains why Weinglass and Williams suppressed Arnold Beverly's confession instead of presenting it to the courts in 1999. This explains why Williams has savaged Arnold Beverly and the testimony of other defense witnesses in his book. In neither instance were he or Weinglass acting in anybody's best interests but their own. They were simply attempting to cover their own backs. After all, given that Petitioner Jamal did not shoot Officer Faulkner, someone else must have. Effective refutation of the frame-up perpetrated on Petitioner Jamal might just as well reveal its function as a cover-up of the identity of the real killers and point to the trail of those who hired them to do the job. Thus, even to put forward the evidence to prove the limited claims raised on Petitioner Jamal's behalf by attorneys Weinglass and Williams might raise the lid on the Pandora's box that these attorneys were terrified to open.⁵¹

Throughout the period when attorney Weinglass and attorney Williams represented the Petitioner they put their interests before his interests. They used the Petitioner for their own purposes from beginning to end. They advanced their careers and their reputations on his back. They made money out of him. They fed on the faith and trust which the Petitioner placed in them. They sucked the lifeblood out of him. They used him up and then, when he had outlived his usefulness to them, they threw him away, ruthlessly stabbing him in the back with attorney Williams' utterly mendacious book in order to cover up their tracks.

H. The Petition Was Timely Filed Within the Statutory 60-Day Period.

Section 9545(b)(2) provides that a petition invoking any of the exceptions to the one-year filing deadline shall be filed within 60 days of "the date the claim could have been presented." In this case, the petition at issue was filed by Petitioner Jamal's new counsel on July 3, 2001, within 60 days of May 4, 2001, when they took over the representation of Petitioner Jamal by filing their appearances in the U.S. District Court

in the federal habeas proceedings, thereby effecting the withdrawal of Petitioner's prior counsel, pursuant to court order. Accordingly, this petition is timely filed.

The claims in the petition at issue could not have been presented previously because they are all based upon the "constructive denial of counsel" resulting from prior counsel's conflicts of interest. Since prior counsel could not have litigated their own ineffectiveness (*Commonwealth v. Albert*, 522 Pa. 331, 333, 561 A2d 736, 737 (1989)), by the same token they could not have litigated their own "constructive denial of counsel."⁵²

I. Petitioner Jamal Could Not Have Acted on His Own to Bring Before the Court the Evidence of His Innocence.

While in another context the Court of Common Pleas refers to "hornbook law," it fails to note that it is also "hornbook law" that a client who is represented by an attorney may not act on his or her own behalf but may only act through the attorney. No court would entertain a post-conviction petition signed by a client who was attempting to act *pro se* while at the same time being represented by an attorney. *See, e.g., Commonwealth v. Ellis*, 398 Pa Super 538, 550, 581 A2d 595, 600 (1990), *aff'd* 534 Pa 176, 626 A2d 1137 (1993)(refusing to accept claims defendant attempted to raise *pro se* when represented by counsel).

It appears that the Court of Common Pleas' ruling in this regard is based upon its profound confusion over the procedural history of this case. The Court of Common Pleas incorrectly states in its Memorandum and Opinion of 11/21/01, p. 4, that Petitioner filed a *pro se* petition for habeas corpus in the U.S. District Court on October 15, 1999, and requested that attorneys Weinglass and Williams be removed. Petitioner never was *pro se* in the federal habeas proceedings. His federal habeas petition was filed by his *prior counsel* on October 15, 1999. The Court of Common Pleas incorrectly states in its Memorandum and Opinion of 11/21/01, p. 4, that attorneys Weinglass and Williams were allowed to withdraw from the federal habeas proceedings on April 6, 2000. To the contrary, the District Court ordered that upon the entering of their appearances by Petitioner's present counsel that the appearances by his prior counsel, Messrs. Weinglass and Williams, would be withdrawn. Present counsel entered their appearances in the U.S. District Court, and the appearances of prior counsel were thereby withdrawn, on May 4,

2001, *not* April 6, 2000.

The Court of Common Pleas' suggestion that Petitioner Jamal somehow had a *personal* responsibility to attempt an end run around attorneys Weinglass and Williams when they were still his attorneys of record and should have, on his own, written and filed his own PCRA petition based on Arnold Beverly's confession is, quite frankly, devoid of legal merit. Mr. Jamal could not have done so while he was still represented by Messrs. Weinglass and Williams.

Only Mr. Jamal's attorneys, Chief Counsel Weinglass and Chief Legal Strategist Daniel Williams, could have filed such a PCRA Petition. They refused to do so because they did not consider it to be in their own personal and professional interests to do so, despite the overwhelming need to do so in order to fulfill their responsibilities as Mr. Jamal's advocates.

The Court of Common Pleas cited no case authority in its Memorandum and Opinion of November 21, 2001, in support of its ruling that Petitioner Jamal had a personal obligation to have filed the underlying Petition when Messrs. Weinglass & Williams were still his attorneys of record. In its Supplemental Opinion, the Court of Common Pleas cites a Superior Court decision, *Commonwealth v Baldwin*, — A2d —, 2001 WL 1662497 (Pa Super December 31, 2001)(No. 526 MDA 2001), which is off-point because Baldwin's direct appeal had just been denied and he was *pro se* during the period in which his post-

conviction petition should have been timely filed. Petitioner Jamal, however, was not *pro se* and was not in the situation of a defendant whose direct appeal had just been denied. Rather, Petitioner Jamal's case was in federal habeas proceedings and the attorneys who represented him in those proceedings, his then Chief Counsel Leonard Weinglass and Chief Legal Strategist Daniel Williams, were still his attorneys of record in the post-conviction proceedings in the Court of Common Pleas under Case No. 8201-1357 1/1.

After the federal judge granted Petitioner leave to substitute counsel in the federal proceedings and ordered that upon the appearance of new counsel his prior counsel's appearances would be withdrawn, and after all of that was effectuated, his present counsel filed the Petition which underlies this appeal *under the same case number* as his original PCRA petition, and a motion for substitution of counsel (Docket #D-3), which the Court of Common Pleas granted.

By filing the underlying Petition under the same case number as that of the original post-conviction proceedings initiated by prior counsel in 1995, the Court of Common Pleas acknowledged that this is the same action. Messrs. Weinglass and Williams remained Petitioner's counsel in this action until his new counsel appeared and effectuated the necessary substitution of counsel. Petitioner was never *pro se*, never had a personal obligation to file any document with the Court of Common Pleas, and was never legally able to act on his own since he has always been represented by counsel.⁵³

III. The PCRA's One-Year Deadline Cannot Bar This Petition Because Petitioner Could Only Have Met It With the Use of a Time Machine.

According to the Court of Common Pleas, the one-year filing deadline created by the 1995 PCRA amendments applied in the case of Petitioner Jamal one year after June 10, 1991, when, according to the court, Petitioner's "[d]irect appeals ended." (Memorandum and Opinion, 11/21/01, p. 9.) This was over 4 years *before* this deadline was even enacted by the Legislature, and almost 8 years *before* Arnold Beverly signed the confession which forms the basis for the claims for relief which the Court of Common Pleas refused to consider. If the one-year filing deadline retroactively precluded Arnold Beverly's confession from being heard by the Court of Common Pleas years before Arnold Beverly confessed or the deadline itself even existed, Petitioner Jamal would have had to have had a time

machine and gone "*Back to the Future*" in order to have timely filed the pending PCRA/Habeas Petition.

Petitioner argued unsuccessfully to the Court of Common Pleas that it should decline to retroactively apply a time deadline which could only have been met with the assistance of a time machine and which, therefore, must be in violation of the "due process" provisions in Article 1, Section 9 of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution. The Commonwealth's Response to this argument was that the statutory exceptions to the filing deadline save it from the "time machine" problem.⁵⁴ However, The Court of Common Pleas ruled that Petitioner's case did not fit within the statutory exceptions.

If this Court were to uphold the Court of Common

Pleas' ruling that Petitioner's case does not fit within the statutory exceptions to the PCRA's filing requirements and rule that there is no inherent power to hear his claims for relief on the merits, this would render the Post-Conviction Relief Act unconstitutional as written and as applied to

Petitioner as it would entrap him in precisely the situation complained of to the Court of Common Pleas, i.e., having his petition dismissed for failure to comply with a filing deadline that he could not have met without the assistance of a time machine.⁵⁵

IV. The Court of Common Pleas Abused Its Discretion by Refusing to Use Its Inherent Power to Hear the Petition on the Merits.

A. The court of common pleas abused its discretion by refusing to use its common law habeas power.

"There is no locked door which may not be opened by the key of habeas corpus, there is no stone wall which may not be pierced by it, there is no enclosure which may not be entered by the person bearing this writ, which is now accepted as the greatest and most important remedy known to jurisprudence and which Blackstone called 'the most celebrated writ in the English law ...'"

"Nor does one need to search through the books for a precedent for its application...[N]o matter what may be the situation or how involved the circumstances, any person who claims he is illegally imprisoned or restrained of his liberty may have such claim inquired into by a competent court, and, if his claim is found to be well grounded, he will be discharged and freed of such restraint." Commonwealth v. Fair, 146 A2d 834, 846, 394 Pa. 262 (1958).

There is a long line of Pennsylvania cases which make it abundantly clear that habeas cannot be subsumed by codification because "[i]t is an implied common-law power, not created by the habeas corpus act...but existing before and since the passage of that act...and, in a proper case, it is always grantable..." *Commonwealth v. Fair*, 146 A2d 834, 846, 394 Pa. 262 (1958). See also *Commonwealth v. Gibbons*, 9 Pa. Super. 527, 533 (1899).

The right to relief by writ of habeas corpus is further protected by Article I, Section 14 of the Pennsylvania Constitution which provides that the writ may not be suspended. Article 1, Section 9 of the Pennsylvania Constitution guarantees the right to

"due process." Habeas Corpus is one of the means of implementing and protecting that right. The right to habeas corpus has been constitutionally protected in Pennsylvania since 1790. There has been a state habeas statute since 1785. Accordingly, the Legislature cannot abrogate, suspend, or interfere with the right to habeas.⁵⁶

In *Peterkin*, this Court acknowledged that common law habeas corpus continues to exist alongside the PCRA, but ruled it was available only for claims not cognizable under the PCRA. It further ruled that claims barred by the PCRA's one-year filing requirement were still "cognizable" under the PCRA and, thus, habeas relief was not available.

However, the very supposition that a claim could be "cognizable but time-barred" is self-contradictory. What it means for a claim to be "cognizable" is that it sets forth factual allegations sufficient to state a claim for relief. If, after *Peterkin*, "timeliness" is a *jurisdictional requirement*, then factual allegations of "timeliness" are necessary to adequately plead a claim for post-conviction relief. Thus, any "cognizable" claim, will necessarily be timely and, by definition, all time-barred claims are necessarily non-cognizable. Thus, any claim which is "untimely" must necessarily be non-cognizable under the PCRA, and habeas relief must be available for such claims.

Moreover, Petitioner Jamal's "actual innocence" claim is not cognizable on the face of the PCRA. Thus, under this Court's decision in *Commonwealth v. Hall*, 771 A2d 1232 (Pa 2001), state habeas corpus relief is available to Petitioner Jamal as the PCRA's supposed subsuming of common law habeas does not extend to claims not "cognizable" under the PCRA.

Although the Pennsylvania Legislature amended the PCRA on November 17, 1995 (effective January 16, 1996) to establish the one-year filing deadline for post-conviction relief, this Court continued for a number of years thereafter to utilize its long-established "relaxed waiver" rule as well as other exercises of its inherent power. In at least *nineteen*

published opinions issued *after* the PCRA was amended, this Court explicitly applied and/or reaffirmed the relaxed waiver rule.⁵⁷ Although this Court ultimately decided to withdraw its judicially-created “relaxed waiver rule,” the inherent power which was the source of that rule must still reside in the Pennsylvania courts.

When, in *Commonwealth v. Peterkin*, 722 A2d 638, 641, 643, n.7 (Pa. 1998), this Court ruled that the one-year filing deadline created by the 1995 PCRA amendments was “jurisdictional,” it still acknowledged that the deadline could be equitably tolled in the right case. *Peterkin* rested on *Sayres v. Commonwealth*, 88 Pa. 29, 309 (1879), in which the filing deadline at issue was a *statute of limitations*, not a jurisdictional bar, and as such was subject to equitable tolling.⁵²

Although, in *Commonwealth v. Fahy*, 737 A2d 214 (Pa. 1999), this Court indicated that the PCRA’s one-year time bar would no longer be subject to equitable tolling or the “miscarriage of justice” exception, it is Petitioner’s position that the holding in *Fahy* should properly be read as elucidating a general rule of policy to which exceptions might be made, albeit only in the rare and unusual case—like that presently before this Court—in which truly “extraordinary circumstances” are present. Any other reading would constitute a “suspension” of habeas corpus in violation of Article 1, Section 14 of the state constitution. Professor Place has pointed out that the federal courts have ruled the one-year filing deadline for federal habeas established by the AEDPA *not* to be a “suspension of the writ” precisely because—in contrast to the PCRA’s deadline—it is a *statute of limitations* and, as such, is subject to equitable tolling.

Pennsylvania’s courts “have long permitted appeals *nunc pro tunc* where non-negligent conduct or ‘something more than mere hardship’ prevented compliance with the filing period.”⁵³ This is a highly significant point since failure to timely file an appeal is always considered to be *jurisdictional*. In *Commonwealth v. Stock*, 679 A2d 760, 764 (1996), this Court held that *nunc pro tunc* relief was available under the “extraordinary circumstances” present when defendant in a summary case requested counsel to file an appeal and he failed to do so.⁵⁴

In *Commonwealth v. Hall*, 771 A2d 1232 (Pa 2001) this Court purported to limit its holding in *Stock* to cases in which the petitioner’s claims were not cognizable under the PCRA because, for example, he or she was out of custody. However, if the PCRA

subsumes all collateral relief, including common law habeas, when one is in custody, and as a consequence common law habeas (and other such remedies) are only available for those who are out of custody, then habeas corpus has been “suspended” in violation of the state constitution. “Habeas corpus” literally means to “produce the body.” Habeas is the traditional remedy for persons who are wrongfully in custody. But, under *Hall*, if the authorities have the body, they don’t have to produce it, while if they lack the body, they do have to produce it. Such “logic” is worthy of *Catch-22*.⁵⁵ In *Hall*, this Court stood habeas corpus on its head and then cut it off.⁵⁶

Rather than analyze or even discuss Petitioner’s arguments and supporting case authorities, the Court of Common Pleas simply brushed them off in a footnote which cited *Peterkin* and *Fahy*.⁵⁷ However, *Peterkin* is merely the beginning and not the end of Petitioner’s analysis of the jurisdictional issue. Petitioner has clearly demonstrated that these inherent powers of the court may not be stripped away by the Legislature because that would violate the doctrine of “separation of powers.” And, simply put, the very notion that the courts are powerless to stop or even inquire into what would be the ultimate injustice—the execution of an innocent person—is an absurdity.

Despite *Peterkin*’s apparent holding that the PCRA’s time deadlines are jurisdictional, the Court of Common Pleas still had the inherent power to entertain and grant the pending petition by utilizing its *nunc pro tunc*, common law habeas, or other inherent powers, or construing the petition as a *first* petition. The Court of Common Pleas erred and abused its discretion by declining to use its inherent powers in this fashion.

B. The Court Of Common Pleas’ Refusal To Use Its Inherent Power To Construe The Underlying Petition As A First Petition Or An “Extension” Of The 1995 Petition Was An Abuse Of Discretion.

The Court of Common Pleas erred and abused its discretion when it refused, “in the interests of justice,” to consider the Petition as first petition or “merely an extension of litigation” of Petitioner’s original post-conviction petition, as was done in the post-*Peterkin/Fahy* cases of *Commonwealth v. Peterson*, 756 A2d 687, 689 (Pa. Super. 2000); *Commonwealth v. Leasa*, 759 A2d 941, 942 (Pa. Super. 2000); *Commonwealth v. Priovolos*, 746 A2d 621, 624 (Pa. Super. 2000); *Commonwealth v. Bronshtein*, Pa. Super. No. 938 EDA 2000, August 23, 2001.

1. Petitioner's 1995 Petition Was Not "Truly Counseled."

Petitioner Jamal's original PCRA counsel, Weinglass and Williams, subjected him to an infinitely worse situation than that in the cases of *Petersen, Leasa, Privolos and Bronshtein*. Here Petitioner's prior counsel subjected him to a "constructive denial of counsel"—the equivalent of having *no counsel* and, instead, a "second prosecutor." Therefore, the underlying Petition should have been construed by the Court of Common Pleas as a first petition or an extension of the 1995 petition which relates back to that petition's date of filing.

Additionally, the court's inherent *nunc pro tunc* power permitted, and in this case demanded that the underlying petition be considered as if it had been filed in 1995 (when the original petition herein was filed *before* enactment of the 1995 PCRA amendments established the one-year filing deadline), as was done in *Commonwealth v. Ross*, 763 A2d 853 (Pa. Super. 2000). This would mean that there would be no timeliness requirement on the pending petition.⁵⁸

2. Petitioner Was Deprived Of A Fair Hearing On His 1995 Petition By Judge Sabo's Race Prejudice.

Judge Sabo *was* the fact-finder in the 1995 PCRA hearings. Petitioner Jamal's statutory and constitutional right to a fair hearing was necessarily violated by Judge Sabo's presiding at the 1995 hearings *and* by his refusal to grant Petitioner's motion to recuse him for bias *and* by his own failure to recuse himself *sua sponte*.

Since Petitioner Jamal was deprived of his right to a fair hearing at the 1995 PCRA proceedings, it is just as if he never had a first PCRA petition. Just as in the cases cited above, this Petition should have been considered by the Court of Common Pleas to be Petitioner Jamal's *first* petition or an extension of his 1995 Petition which would relate back to the filing of the 1995 Petition.

3. Petitioner Was Deprived Of A Fair Hearing On His Appeal Of Denial Of Post-Conviction Relief.

"The truth pronounced by Justinian more than a thousand years ago, that 'impartiality is the life of justice,' is just as valid today as it was then." United States v Brown, 539 F2d 467, 469 (5th Cir 1976)(per curiam).

Appellant Jamal previously presented to this Court a motion for remand to take testimony under oath from Justice Ronald D. Castille, and a motion to recuse the Justice, with regard to his responsibility for the infamous McMahon videotape, produced by the Philadelphia District Attorneys' Office during Castille's administration.⁵⁹ The videotape, which instructs Assistant District Attorneys on how to utilize peremptory challenges to ethnically cleanse juries of African-Americans, was officially condemned by this Court in *Commonwealth v Basemore*, 560 Pa 258, 744 A2d 717, 731, n. 12 (2000). The videotape's first frame bears the name Ronald D. Castille and his title as District Attorney, the Official Seal of the City of Philadelphia, and the logo of DATV Productions, the video production department of the Philadelphia District Attorneys' Office.

Justice Castille was District Attorney during the pendency of Appellant's direct appeal, which included a *Batson* claim, which the District Attorneys Office opposed. Justice Castille previously participated in ruling on and denying Appellant Jamal's appeal from Judge Sabo's denial of post-conviction relief, which included a *Batson* claim, without disclosing to the Court or the parties his official responsibility for the McMahon videotape in his capacity as District Attorney. Additionally, Justice Castille participated in this Court's denial of Appellant Jamal's remand motion to take evidence concerning the McMahon videotape, submitted while that appeal was under submission, also without disclosing his responsibility for the videotape.

The Baldus Study, which covers the period 1981 through 1997, includes a specific discussion of the McMahon videotape (3 U. Pa. J. Const. L. 3, 41-43) and provides a wealth of statistical data which suggests that the racially discriminatory tactics taught to prosecutors in that videotape were utilized throughout that period to keep African-Americans from serving on juries. Of direct relevance is the graph set forth in Figure 4 of the Baldus Study (3 U. Pa. J. Const. L. at 75) which shows that, although the United States Supreme Court decision in *Batson v*

Kentucky, 476 US 79 (1986) came down in the first year that Justice Ronald D. Castille was Philadelphia District Attorney, the strike rate of Black jurors by Philadelphia prosecutors did not decrease, but dramatically increased, beginning in the period 1986-1987, to reach a significantly higher level in the period 1989-1990, than in either the preceding Rendell administration or the succeeding Abraham administration.⁶⁰

Petitioner's counsel have found three decisions of this Court ruling on *Batson* claims involving the McMahon videotape: *Commonwealth v Basemore*, 560 Pa 258, 744 A2d 717 (2000); *Commonwealth v Lark*, 560 Pa 487, 746 A2d 585 (2000); and *Commonwealth v Rollins*, 558 Pa 532, 738 A2d 435 (1999). *Basemore*, the only one of these decisions in which Justice Castille did not participate, is the only one in which this Court granted relief and ordered a remanded for an evidentiary hearing on the *Batson* claim. In *Lark* and *Rollins*, the petitioner's *Batson* claim was denied on the basis that a *prima facie* case was not established.

In *Basemore*, 744 A2d at 731, n. 12, this Court directly ruled that the practices taught in the McMahon videotape with regard to jury selection by prosecutors in criminal cases were in "highly flagrant" violation of the United States Constitution. This Court also found that "tactics of the sort reflected in the transcript [of the videotape] impugn the legitimacy of the judicial process." 744 A2d at 733. After specifically quoting numerous shocking excerpts from the transcript of the McMahon videotape (744 A2d at 730-731), this Court specifically held that "[t]here can be no question that the practices described in the transcript support an inference of invidious discrimination on the part of any proponent." 744 A2d at 731-732 [emphasis added].

The conclusion is inescapable that the term "any proponent" of these practices must necessarily include District Attorney Ronald D. Castille. There is no evidence that Justice Castille, when he was District Attorney, ever disavowed the McMahon videotape which bears his own name and title, either within the District Attorneys Office to those Assistant District Attorneys for whose conduct he was responsible as their ultimate supervisor, or publicly.

In *Rollins*, 738 A2d at 443, n. 10, this Court, with Justice Castille participating in the decision, rejected a *Batson* claim underlying an "ineffective assistance of counsel" claim on grounds of failure to make a *prima facie* showing of improper use of peremptory

challenges, despite the evidence of the McMahon videotape. However, Justice Castille participated in that decision without disclosing to the Court or the parties that, rather than having been "created" by Mr. McMahon, the videotape was, in fact, created by DATV Productions, and in its first two frames bears the name and title of Ronald D. Castille as District Attorney, alongside the Official Seal of the City of Philadelphia and the logo of the District Attorneys Office video production department. Such evidence would necessarily have proved up the appellant's *prima facie* case.

In *Lark*, 746 A2d at 589, this Court relied, in part, upon its earlier decision in *Rollins*, to find similarly that no *prima facie* case had been established under *Batson* despite the evidence of the McMahon videotape. Again, Justice Castille participated in this decision without disclosing to the Court or the parties his responsibility, as District Attorney, for that training videotape. Such evidence would have established the *prima facie* case which the Court held had not been proved. Nor did Justice Castille disclose that the assumption which underlay the Court's earlier decision in *Rollins*, i.e., that the videotape was "created" by McMahon, was false.

In *Aetna Life Ins. Co. v Lavoie*, *supra*, 475 US at 831-833 (Brennan, J., concurring) it is pointed out that: "The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates necessarily imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process." 475 US at 831.

As Justice Brennan aptly remarks:

"Justice Embry's participation in the court's resolution of the case, while he was fully aware of his interest in its outcome, was sufficient in itself to impugn the decision. The description of an opinion as being "for the court" connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each

member's involvement plays a part in shaping the court's ultimate disposition. 475 US at 830-831.⁶¹

Justice Castille's participation in this Court's denial of Petitioner's previous appeal of denial of post-conviction relief violated Article V, Section 18 of the Pennsylvania Constitution which prohibits a judge from engaging in "conduct which prejudices the proper administration of justice" and "conduct which brings the judicial office into disrepute." Justice Castille similarly violated this constitutional provision when he participated in the deliberations on and denial of Petitioner's remand motion to conduct

discovery with regard to the very same McMahon videotape which bears the Justice's name and prior title as District Attorney.

Because of Justice Castille's participation in this Court's denial of Petitioner Jamal's appeal of denial of post-conviction relief on his 1995 PCRA Petition, Petitioner was deprived of a fair and impartial adjudication of that appeal. Accordingly, the Petition which underlies this appeal should be construed as an extension of the 1995 Petition, as in *Peterson, Leasa Privolos, and Bronshtein, supra*, and heard and granted on its merits by this Court or remanded.

V. This Court Should Overturn the Peterkin-Fahy Line of Cases.

The impetus for the *Philadelphia Inquirer*, hardly a "liberal" publication, to publicly demand a moratorium on executions in the State of Pennsylvania was a federal court's recent overturning of the conviction and death sentence in the very case which underlies the Court of Common Pleas' decision that it purportedly lacks jurisdiction to hear Mumia Abu-Jamal's Petition—the case of Otis Peterkin. In *Commonwealth v Peterkin*, 554 Pa 547, 722 A2d 638 (1999), this Court interpreted the filing deadlines created by 1995 amendments to the Post-Conviction Relief Act ("PCRA") as "jurisdictional" and, on that basis, refused to consider a death row inmate's claims that he did not have a fair trial. In *Peterkin v Horn*, 2001 US Dist LEXIS 18313 (USDC, EDPA, November 6, 2001), the U.S. District Court overturned Peterkin's conviction and death sentence for prosecutorial misconduct, ineffectiveness of trial and appellate counsel, and most alarmingly because there was insufficient evidence for a jury ever to have convicted him in the first place.

The numerous recent exonerations of persons previously on death row throughout the United States motivated U.S. District Judge Rakoff to declare the federal death penalty statute unconstitutional in *United States v Quinones*, 2002 US Dist LEXIS 7320 (USDC, SDNY, April 25, 2002) because:

We now know, in a way almost unthinkable even a decade ago, that our system of criminal justice, for all its protections, is sufficiently fallible that innocent people are convicted of capital crimes with some

frequency.⁶²

These considerations should, at a minimum, cause this Court to ponder the wisdom of maintaining its policy of foreclosing post-conviction review because of rigid "timeliness" requirements. As Judge Rakoff points out:

Just as there is typically no statute of limitations for first-degree murder- for the obvious reason that it would be intolerable to let a cold-blooded murderer escape justice through the mere passage of time-so too one may ask whether it is tolerable to put a time limit on when someone wrongly convicted of murder must prove his innocence or face extinction.

The rationale of this Court's decision in *Peterkin* has been decisively undermined in the very case from which it emanated and in numerous other such cases in this very state and throughout the nation. Professor Place has persuasively argued that this Court was wrong in the first instance in ruling that the PCRA filing deadline is a jurisdictional bar rather than a statute of limitations.⁶³ It is now time for this Court to revisit its decisions in *Peterkin* and *Fahy*, overturn that line of cases, and, in the case of Petitioner Jamal, invoke equitable estoppel and remand Petitioner's claims for a hearing on the merits with the discovery requested.⁶⁴

VI. Petitioner Should be Granted Relief on the Merits of His Claims.

Petitioner should be granted relief on the merits of his claims. Each claim in the Petition sets forth the facts and law necessary to plead and prove that claim. The Commonwealth, by failing in its Answer to deny the allegations stating the claims, has admitted the truth of these allegations and their legal sufficiency. This Court should either remand this action to the Court of Common Pleas with instructions to grant Petitioner's claims on the merits, or this Court itself should grant Petitioner's claims on the merits.

FIRST CLAIM FOR RELIEF

Petitioner's First Claim for Relief is based on "actual innocence." The evidence pled and proved in the Petition, and the supporting declarations, affidavits, and other documents and things on file in the Court of Common Pleas, demonstrate that it is more likely than not that Petitioner is innocent and thereby establish Petitioner's eligibility for relief. *Herrera v Collins*, 506 US 390, 443-444 (1993); *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (en banc). See Petition, pp. 47-108, incorporated herein by reference. The Court of Common Pleas' decision purporting to deny this claim was unreasonable and contrary to established law.

SECOND CLAIM FOR RELIEF THROUGH AND INCLUDING EIGHTH CLAIM FOR RELIEF

Petitioner's First through Eighth Claims for Relief plead and prove "constructive denial of counsel" (*Cronic v United States*, 466 US 648, 656-657, 659, 662 (1984); *Rickman v Bell*, 131 F3d 1150, 1155 (6th Cir. 1997)) and/or "ineffectiveness of counsel" (*Strickland v Washington*, 466 U.S. 668 (1984); *Williams v Taylor*, 529 US 362 (2000)) by Petitioner's former attorneys, Leonard Weinglass and Daniel Williams, in the post-conviction proceedings before Judge Sabo, and appeal therefrom, and in failing to file an additional PCRA Petition setting forth Petitioner's "actual innocence" claim after they obtained a signed confession from Arnold Beverly. See the underlying Petition, pp. 1-4.

The underlying claims include those brought under *Brady v Maryland*, 376 US 83 (1963) and *Kyles v Whitley*, 514 US 419, for the prosecution's failure to turn over to the defense at trial exculpatory evidence or evidence tending to undermine the prosecution's

case which is in the possession or known to the police and/or the prosecution where the net effect of the evidence not produced raises a reasonable probability that its disclosure would have produced a different result.

NINTH CLAIM FOR RELIEF

Petitioner's Ninth Claim for Relief pleads and proves a claim of "constructive denial of counsel" and/or "ineffective assistance of counsel" by Petitioner's prior post-conviction counsel, Weinglass and Williams, in failing to present 10 claims of ineffective assistance of appellate counsel Marilyn Gelb on direct appeal. Petitioner's claims of ineffective assistance of appellate counsel are judged by the *Strickland* standard described above. *Mason v Hanks*, 97 F.3d 887, 892 (7th Cir. 1996); *Mayo v Henderson*, 13 F.3d 528, 533 (2d Cir. 1994); *Matire v Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987).

Claims 9(1)-9(3) are based on Appellate Counsel Gelb's failure to raise on direct appeal the ineffectiveness at trial of court-appointed defense attorney Anthony Jackson in: (1) failing to prove up the presence of a passenger in William Cook's car when it was stopped by Officer Faulkner; (2) failing to request a jury instruction that the alleged eyewitness I.D. testimony against Petitioner Jamal should be viewed with caution; and (3) actively colluding behind his client's back with prosecutor and trial judge as to how to sabotage Petitioner's defense and any subsequent claims of ineffective representation. Petitioner has adequately pled and proved these claims under the *Strickland* standard explained above.

Claim 9(4) is based on Appellate Counsel Gelb's failure to raise on direct appeal the violation of Petitioner's Sixth and Fourteenth Amendment rights to represent himself at trial. This represents "structural error" which requires reversal without a showing of prejudice. *Faretta v California*, 422 US 806 (1975); *Arizona v Fulminante*, 499 US 279 (1990); *McKaskle v Wiggins*, 465 US 168 (1984); *Sullivan v Louisiana*, 508 US 275 (1993).

Claim 9(5) is based on Appellate Counsel Gelb's failure to raise on direct appeal the violation of Petitioner's statutory and Fourteenth Amendment right to appeal denial of his right to self-representation and to be assisted by a lay advisor at

counsel table. This is “structural error” where prejudice is presumed under *Roe v Flores-Ortega*, 528 US 470, 120 S Ct 1029, 1038 (2000).

Claim 9(6) is based on Appellate Counsel Gelb’s failure to properly raise on direct appeal the violation of Petitioner’s statutory and constitutional right under the Fourteenth Amendment to exercise a peremptory challenge of alternate juror Courchain.⁶⁵

Claim 9(7) is based on Appellate Counsel Gelb’s failure to raise on direct appeal the violation of Petitioner’s right under *Batson* to have a jury whose members have not been excluded because of race when juror Dawley, a Black woman, was removed from the jury without a hearing. This violated Petitioner’s 14th Amendment right not to have a jury selected by purposeful discrimination against persons because of their race. *Batson, supra*.

Claim 9(8) is based on Appellate Counsel Gelb’s failure to raise on direct appeal the statutory and constitutional error in the penalty phase jury instructions and jury verdict form which precluded the jury from reaching any verdict other than death. This violated Petitioner’s 8th and 14th Amendment rights not to have the death penalty capriciously imposed without due consideration of the individual and particular circumstances of the crime and the defendant. *Furman v Georgia*, 408 U.S. 238 (1972); *Gregg v Georgia*, 428 U.S. 153 (1976). This claim also involves violation of Petitioner’s rights under the 8th and 14th Amendments not to be sentenced to death without the jury giving due consideration to any mitigating evidence.⁶⁶ It is also based on Judge Sabo’s directing a verdict of death, thereby constituting a violation of Petitioner Jamal’s 14th Amendment right to due process of law by depriving him of the statutory right under 42 Pa. C.S. 9711 (a) to have the jury determine whether or not his sentence was to be death.

Claim 9(9) is based on Appellate Counsel Gelb’s failure to raise on direct appeal the bias of Judge Sabo which deprived Petitioner Jamal of his right to a fair trial before a fair tribunal under the Fifth and Fourteenth Amendments to the U.S. Constitution. *See Berger v United States* (1921) 255 US 22; *United States v Grinnell Corp.* (1966) 384 US 563; and *Likety v United States* (1994) 510 US 540. Judicial bias is a “structural bias” for which prejudice is presumed. 520 US 899(1997). No right is more fundamental to the notion of a fair trial than the right to an impartial judge.⁶⁸ The facts pled and proved in the underlying Petition establish that Petitioner satisfies the test of *In re Murchison*, 349 US 133, 136

(1955), to prove judicial bias, *to wit*, that “every procedure which would offer a possible temptation to the average man as a judge...not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.”

Claim 9(10) is based on Appellate Counsel Gelb’s failure to raise on direct appeal the violations of Petitioner’s intertwined federal constitutional rights to allocation and not to be compelled to testify against himself under the Fifth and Fourteenth Amendments, and failed to request rehearing after the Pennsylvania Supreme Court violated Petitioner’s right to due process under the Fourteenth Amendment by unreasonably reinterpreting Pennsylvania law to deprive him of his statutory right to allocation. Petitioner pled and proved facts sufficient to establish that he was deprived of his constitutional right to allocation. This is structural error for which prejudice is presumed.⁶⁹

TENTH CLAIM FOR RELIEF

This claim is based on violation of Petitioner’s 5th, 6th and 14th Amendment rights to a fair tribunal and/or a fair trial, at the time of Petitioner’s trial in 1982 and at the time of his post-conviction hearing before Judge Sabo, caused by Judge Sabo’s racism, as proved by the declaration of Court Reporter Terri Maurer-Carter who overheard the judge make the following statement referring to Petitioner at the time of his trial: “Yeah, and I’m going to help ‘em fry the nigger.” Petitioner has pled and proved this claim and demonstrated his eligibility for relief. Petitioner meets the test of *In re Murchison*, 349 US 133, 136 (1955)(citing *Tumey v Ohio*, 273 U.S. 510, 532): where there is “a possible temptation to the average man as a judge...not to hold the balance nice, clear and true between the State and the accused, [this] denies the latter due process of law.”⁷⁰

REQUEST THAT ORAL ARGUMENT BE SET

Pursuant to Rule 2311(b), R. App. Pro., and Section III(A)(1), Internal Operating Procedures of the Supreme Court, Petitioner hereby requests a hearing date be set for oral argument. This is a complex death penalty case which has been misrepresented to this Court by prior counsel due to deep-rooted conflicts of interest. Oral argument is necessary to ensure that Petitioner’s true case is properly evaluated by the Court and to enable Counsel to provide any clarification the Court may find necessary to give Petitioner’s claims full and fair consideration.

CONCLUSION

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

Respectfully submitted,
MUMIA ABU-JAMAL
Appellant

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On the Brief:
ROBERT R. BRYAN, ESQ.

- 1 The Supreme Court has not ruled on the standard of proof for a “free-standing” claim of actual innocence under the 8th and 14th Amendments. Petitioner’s claim meets the stringent test proposed by Justice Blackmun in his dissent in *Herrera v Collins*, 506 US 390, 443-444 (1993)(court should weigh new evidence of innocence against evidence of guilt and determine whether petitioner can show he is probably innocent in light of all the evidence). See also *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (en banc)(petitioner must prove it is more likely than not that he is innocent to prevail on “actual innocence” claim).
- 2 Petitioner’s claims of ineffective assistance of appellate counsel are also judged by the *Strickland* standard. *Mason v Hanks*, 97 F.3d 887, 892 (7th Cir. 1996); *Mayo v Henderson*, 13 F.3d 528, 533 (2d Cir. 1994); *Matire v Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987).
- 3 Where a state provides a right it is not otherwise obligated to provide under the federal constitution, the subsequent denial of that right violates the 14th Amendment’s guarantees of due process and equal protection. *Griffin v Illinois*, 351 US 12 (1955); *Blair v Armontrout*, 916 F.2d 1310, 1335, n.3 (8th Cir 1990); *Douglas v California*, 372 US 353 (1963); *Hicks v Oklahoma*, 447 US 343, 346 (1980); *Walker v Deeds*, 50 F.3d 670, 672-73 (9th Cir. 1995); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (1993). The 14th Amendment may also be violated by a state’s arbitrary denial of the benefits of its own domestic rules or by an unreasonable interpretation of state law. *Board of Pardons v Allen*, 482 U.S. 369, 373-78 (1987); *Daniels v Williams*, 474 U.S. 327, 329-300 (1986); *Bush v Gore*, 531 US 98 (2000).
- 4 See *Commonwealth v Morales*, 549 Pa 400, 701 A.2d 516, 520 (1997); *Commonwealth v Beasley*, 544 Pa 554, 564, 678 A.2d 773, 778 (1986); *Commonwealth v Pursell*, 724 A.2d 293, 302-03 (Pa. 1999); *Commonwealth v Pierce*, 786 A.2d 203, 212 (Pa.2001).
- 5 Contra, *Kimmelman v Morrison*, 477 U.S. 365, 385-387 (1986) (court should not supply “strategy” counsel did not actually have); *Griffin v Warden*, 970 F.2d 1355, 1358-59 (4th Cir. 1992); *Harris v Reed*, 894 F.2d 871, 878 (7th Cir.1990); *Laird v Hom*, 159 F.Supp.2d 58, 116 (E.D. Pa. 2001).
- 6 There should also be a right to effective representation in state post-conviction proceedings under Art. I, Sec. 14 of the Pennsylvania Constitution. *Albrecht*, supra, 554 Pa. at 42, n. 6. This Court has left open the question of whether such a state constitutional right exists. *Commonwealth v Travaglia*, 541 Pa. 108, 139 & n. 9, 661 A.2d 352 (1995); *Commonwealth v Beasley*, 544 Pa. 554, 576, n.1, 678 A.2d 773 (1996)(Cappy, J., dissenting).
- 7 Accord, *Commonwealth v. Sherard*, 384 A.2d 234 (Pa. 1977); *Commonwealth v. Fox*, 383 A.2d 199 (Pa. 1978); *Commonwealth v. Lutz*, 397 A.2d 787 (Pa. 1979); *Commonwealth v. Hughes*, 457 A.2d 541 (Pa. Super. 1983); *Commonwealth v. Torres*, 721 A.2d 1103 (Pa. Super. 1998)(applying *Wright*). See also *Commonwealth v. Balenger*, 704 A.2d 1385 (Pa. Super. 1997).
- 8 Contra, *Chapman* (harmless beyond reasonable doubt standard for federal constitutional errors); *Brecht v Abramson*, 507 U.S. 619, 637-38 (1993) (substantially injurious constitutional error mandates relief); *Williams*, 120 S.Ct. at 1519 (outcome-determinative test for ineffectiveness claims inconsistent with 6th and 14th Amendments); *Hull v Kyler*, 190 F.3d 88, 110 (3d Cir. 1999).
- 9 Contra, *Williams*, 120 S.Ct. at 1519; *Strickland*, 466 U.S. at 693; *Hull*, 190 F.3d at 110; *Greer v Mitchell*, 264 F.3d 663, 679 (6th Cir. 2001); *Mason*, 97 F.3d at 893; *Mayo*, 13 F.3d at 534; *Matire*, 811 F.2d at 1439.
- 10 Contra, *Kyles v Whitley*, 514 U.S. 419, 434 (1995) (reasonable probability standard).
- 11 Contra, *Kimmelman v Morrison*, 477 U.S. 365, 385-387 (1986) (court should not supply “strategy” counsel did not actually have); *Griffin v Warden*, 970 F.2d 1355, 1358-59 (4th Cir. 1992); *Harris v Reed*, 894 F.2d 871, 878 (7th

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- Cir. 1990); Laird v Horn, 159 F.Supp.2d 58, 116 (E.D. Pa. 2001).
- 12 The Court of Common Pleas incorrectly states in its Memorandum and Opinion of 11/21/01, p. 4, that Petitioner filed a pro se petition for habeas corpus in the U.S. District Court. Petitioner never was pro se in the federal habeas proceedings.
 - 13 The Court of Common Pleas incorrectly states in its Memorandum and Opinion of 11/21/01, p. 4, that attorneys Weinglass and Williams were allowed to withdraw from the federal habeas proceedings on April 6, 2000. To the contrary, the District Court ordered that upon the entering of their appearances by Petitioner's present counsel that the appearances by his prior counsel, Messrs. Weinglass and Williams, would be withdrawn. This took place on May 4, 2001, not April 6, 2000.
 - 14 This evidence is further corroborated by other exhibits filed under Docket #D-1A, including the declaration of Petitioner Mumia Abu-Jamal in which he gives his account of the events of December 9, 1981 (EXHIBIT "A"); the declaration of William Cook, dated 4/29/01, in which he provides additional details of the incident of December 9, 1981, and describes Attorney Weinglass' discouraging him from testifying at the post-conviction hearings (EXHIBIT "D"); and a declaration from prominent Philadelphia journalist Linn Washington which demonstrates the suspicious lack of any police control of the crime scene just several hours after the incident (EXHIBIT "F"). The evidence of Petitioner Jamal's innocence is also corroborated by the evidence from his original trial, as is explained in considerable detail in the underlying Petition at pp. 50-107, Paragraphs 142-362, and cannot be repeated here for considerations of space.
 - 15 It is these conflicts of interest, and the "constructive denial of counsel" which Petitioner suffered as a result, which provide the basis for jurisdiction over the underlying Petition under 42 Pa. CSA Sec. 9545(b)(1)(i) & 9545(b)(1)(ii); and, in addition to Petitioner's innocence, provide the basis to invoke the court's inherent power to remedy grave miscarriages of justice in extraordinary circumstances, and for this Court to invoke its King's Bench power and/or Extraordinary Jurisdiction, as is further explained below.
 - 16 A videotape of Arnold Beverly's confession was filed with the Court of Common Pleas under Docket #D-16A.
 - 17 On February 14, 2002, Petitioner filed a remand motion in this Court to take testimony from Yvette Williams, whose affidavit dated January 28, 2002, is attached thereto as Exhibit "A," in which she states that the prosecution's star witness, street prostitute Cynthia White, had admitted to Williams shortly after the incident that she had not seen the shooting either, but was cajoled, bribed and threatened by the police to falsely identify Petitioner Jamal as the shooter.
 - 18 See the Third through Ninth Claims for Relief in the Petition underlying this appeal. Weinglass and Williams failed to object to Judge Sabo's order turning over the physical evidence to the Philadelphia Police Department. The forensic experts retained by Petitioner's present counsel have expressed the opinion that this evidence should be subjected to independent testing utilizing techniques not available at the time of Petitioner's 1982 trial. See Docket #D-17, D-18.
 - 19 According to the Official Comment to Rule 1.8: "An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation."
 - 20 When Petitioner Jamal learned of the book, and found that it contained numerous false statements and misrepresentations, he filed a lawsuit against attorney Williams and his publisher in an attempt to thwart publication, Mumia Abu-Jamal vs St. Martin's Press and Attorney Daniel R. Williams, USDC (WD PA), Case No. 01-540.
 - 21 "Ah, ambiguity, [Cornel] West's proclamation [of Mumia's innocence] begs the question: is

- Mumia's stature as a writer, the 'truth' of his message, unworthy of attention if he is guilty of firing a bullet into the brain of a young police officer? Does guilt for such an act necessarily muffle this voice for social justice? Or can such a guilty man nonetheless still speak to us, clearly and credibly? Indeed, even if his guilt somehow justifies extinguishing his right to remain alive, does it extinguish the worth of his message? Does Mumia's worthiness, in short, as a voice for the voiceless depend upon his innocence? If so, why?" Daniel R. Williams, *Executing Justice* (St. Martin's Press, 2001), xvi.
- 22 Judge Dembe incorrectly found that Petitioner Jamal filed a pro se petition for writ of habeas corpus in the U.S. District Court on October 15, 1999, when, in fact, it was Petitioner's former counsel, Leonard Weinglass and Daniel Williams, who filed that petition on Petitioner's behalf. Petitioner Jamal was never in pro se status in the federal habeas proceedings or the state post-conviction proceedings in this case. Judge Dembe incorrectly found that Weinglass & Williams were allowed to withdraw from the federal habeas proceedings on April 6, 2000, when, in fact, the District Court ordered that they would be withdrawn upon new counsel filing appearances in the proceedings. Judge Dembe incorrectly found that new counsel appeared on April 6, 2000, when, in fact, their appearances were filed on May 4, 2001. As will be explained more specifically below, these factual errors by Judge Dembe fatally undermine the factual premises for her legal rulings denying relief on the underlying PCRA/Habeas Petition.
- 23 Additionally, rather than presuming that the allegations in the Petition are true, as the Court of Common Pleas should have done in ruling on whether the Petition should be dismissed without a hearing (*Balsbaugh v Rowland*, 447 Pa 423, 426, 290 A2d 85, 87 (1972)), the court engaged in idle speculation about the credibility of the allegations or the corroborating evidence although it had no basis to doubt the credibility of the evidence.
- 24 See *Chambers v Mississippi*, 410 US 284 (1973); *Washington v Texas*, 388 US 14, 23 (1967); *Davis v Alaska*, 415 US 308, 319-320 (1974).
- 25 "[N]o matter where or how the chains of his captivity were forged – the power of the judiciary of this state is adequate to crumble them to dust, if an individual is deprived of his liberty contrary to the law of the land" Commonwealth ex rel. *Webster v. Fox*, 7 Pa.336, 338 (Pa. 1847).
- 26 *Bracy v Gramley*, 81 F3d 684, 700 (7th Cir 1996)(Rovner, J., dissenting), overruled, 520 US 899(1997). As Judge Rovner points out: "No right is more fundamental to the notion of a fair trial than the right to an impartial judge ... [citing *Johnson v Mississippi*, 403 US 212 (1971)(per curiam); *In re Murchison*, 349 US 133 (1955); *Aetna Life Ins. Co. v Lavoie*, 475 US 813 (1986); *Ward v Village of Monroeville, Ohio*, 409 US 57 (1972); *Tumey v Ohio*, 273 US 510 (1927); *United States v Brown*, 539 F2d 467, 469 (5th Cir 1976)(per curiam)] ... The constitutions of our nation and of our states, the rules of evidence and of procedure, and 200 years of case law promise a full panoply of rights to the accused. But ultimately the guarantee of these rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted." 81 F3d at 696.
- 27 Similar use of the "n-word" by judges in other jurisdictions has been vehemently criticized and resulted in suspension or removal from office of the offending jurists. See, e.g., *In re Ferrara*, 582 NW2d 817, 819 (Mich. 1998)("[A] person harboring and communicating such revolting views is unworthy of holding the privileges and responsibilities of public office. Indeed, the mean-spirited, crude, and biased nature and tone of the statements that were made public are inexcusable and unacceptable from a judge."); *In re Goodfarb*, 880 P2d 620, 623 (Ariz. 1994)(the use of such language during the course of judicial proceedings is "debilitating to the administration of justice.").
- 28 See also *Brecht v Abramson*, 507 US 619 (1993); *Sullivan v Louisiana*, 508 US 275 (1993); *Tumey v Ohio*, 273 US 510 (1927); *Tyson v Trigg*, 50 F3d 436, 442 (7th Cir 1995).
- 29 Cf. *Porter v Singletary*, 49 F3d 1483, 1489, n. 11 (11th Cir 1995): "Indeed, the impartiality of the judiciary is the most central concept of the

[Judicial] Canons of Ethics.”

- 30 See Appendix 9 for a partial list of Judge Sabo’s rulings which “shape[d] the trial.”
- 31 Where a judge has directly stated his intention, in the trial of a Black person, “to help ‘em fry the nigger” it should be evident that this represents much worse than merely a “possible temptation” not to act impartially.
- 32 See *Jamal v Horn*, USDC, ED Pa., No. 99-5089, Memorandum and Order Denying Motion to Amend Habeas Petition, December 18, 2001: “Indeed, it is one thing for a judge to favor the police or to disfavor an 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 different evidentiary showings.”
- 33 Mumia Abu-Jamal, *All Things Censored* (New York: Seven Stories Press, 2000) 231-2.
- 34 Judge Dembe’s astonishing ruling denying Petitioner’s Tenth Claim for Relief demonstrates both plain error and the unfitness of the judge who issued it to again hear this case.
- 35 In *Commonwealth v Jamal*, 521 Pa. 188, 555 A.2d 846 (1989), in upholding Petitioner’s conviction and death sentence on direct appeal, this Court relied upon trial judge Sabo’s “discretion” to reject the following claims of error: (1) denying defense challenge for cause of venire person Courchain during jury selection, 521 Pa at 198, 555 A.2d at 851; (2) barring Petitioner from continuing to personally conduct voir dire of jury when he was representing himself pro se and changing the procedure by which voir dire was being conducted, 521 Pa at 201, 555 A.2d at 852; (3) permitting improper cross-examination of defense character witness Sanchez, 521 Pa. at 205, 555 A. 2d at 854; (4) permitting cross-examination of defendant on his statement in allocution during penalty phase of capital trial, 521 Pa. at 212, 555 A. 2d at 857. In *Commonwealth v Jamal*, 720 A2d 79 (1998), this Court, in upholding Judge Sabo’s denial of post-conviction relief, relied upon the judge’s exercise of discretion to reject the following claims for relief: (1) denying recusal motion, 553 Pa. at 507, 720 A.2d at 89; (2) refusing to admit 600 pages of FBI files re Petitioner Jamal, 553 Pa. at 543, 720 A. 2d 108; (3) seating biased alternate juror Courchain after juror Dawley improperly removed from jury, 553 Pa. at 558, 720 A. 2d at 115.
- 36 See *Commonwealth v. Peterson*, 756 A2d 687, 689 (Pa. Super. 2000); *Commonwealth v. Leasa*, 759 A2d 941, 942 (Pa. Super. 2000); *Commonwealth v. Priovolos*, 746 A2d 621, 624 (Pa. Super. 2000); and *Commonwealth v. Bronshtein*, Pa. Super. No. 938 EDA 2000, August 23, 2001,
- 37 See also *Jedwahny v. Philadelphia Transportation Co.*, 135 A. 2d 252, 254, 255 (Pa. 1957), *Commonwealth v. Sherard*, 384 A2d 234 (Pa. 1977); *Commonwealth v. Fox*, 383 A2d 199 (Pa. 1978); *Commonwealth v. Lutz*, 397 A2d 787 (Pa. 1979); *Commonwealth v. Hughes*, 457 A2d 541 (Pa. Super. 1983); *Commonwealth v. Torres*, 721 A2d 1103 (Pa. Super. 1998)(applying *Wright*); *Commonwealth v. Balenger*, 704 A2d 1385 (Pa. Super. 1997).
- 38 The Official Comment to Rule 1.8 specifically notes that there is necessarily a conflict of interest in such a situation because what may promote sales of the book may not be in the best interests of the client. This means that, as a matter of law, Williams’ violation of Rule 1.8 also constitutes conclusive evidence of his conflict of interest with regard to publication of the book.
- 39 The Court of Common Pleas misunderstood or misconstrued Petitioner’s argument as being that Weinglass and Williams sabotaged Petitioner’s case in order to increase the sales of William’s book. It is Petitioner’s argument that the publication of *Executing Justice* not only constitutes a per se conflict of interest in violation of the Rules of Professional Conduct, but it was specifically intended by ex-Chief Legal Strategist Williams, according to ex-Chief Counsel Weinglass, to be a preemptive strike against Arnold Beverly’s testimony. As such, it was also necessarily intended to be a preemptive strike against Petitioner Jamal’s interest in

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- having his innocence proved since there could be no more compelling evidence of his innocence than the voluntary confession of the real killer, corroborated by a lie detector test and a wealth of additional evidence.
- 40 See *Rickman v. Bell*, 131 F3d 1150, 1156-1157 (6th Cir. 1997); *United States v. Cronin*, 466 US 648, 656 (1984); *Smith v. Robinson*, 528 US 259, 286 (2000); *Wood v. Georgia*, 450 US 261, 271 (1981); *Appel v. Horn*, 250 F3d 203, 221 (2001); *United States v. Cook*, 45 F3d 388, 393 (10th Cir. 1995); *Commonwealth v. Lawson*, 519 Pa. 504, 513, 549 A2d 107 (1988).
- 41 See Official Comment to Rule 907, Pennsylvania Rules of Criminal Procedure: “To determine whether a summary dismissal is appropriate the judge should thoroughly review the petition, the answer, if any, and all other relevant information that is included in the record. If, after this review, the judge determines that the petition is patently frivolous and without support in the record, or that the facts alleged would not, even if proven, entitle the defendant to relief [emphasis added], or that there are no genuine issues of fact, the judge may dismiss the petition as provided herein.”
- 42 In its Supplemental Opinion the Court of Common Pleas ingenuously insists that it did assume the allegations in the Petition to be true before dismissing it. However, were this an accurate account of the manner in which the Court considered the Petition, it would not have questioned the credibility of Arnold Beverly, it would not have described the allegations concerning the conflicts of interest by Weinglass and Williams as “mere conjectures,” it would not have concluded that what it misdescribed as Petitioner’s “attorney fraud theory” purportedly “collapses by virtue of its lack of external and internal logic,” and the Court most certainly would not have rejected Petitioner’s arguments on the basis of a rhetorical question as to why “hitherto honorable, capable and professional attorneys [would] desert their training, their ethics, their professionalism and place their very right to practice law in jeopardy” when the answer to this question is contained in the very allegations in the Petition which the Court, in its Supplemental Opinion, claims that it assumed to be true when it summarily dismissed the Petition without a hearing.
- 43 The Court of Common Pleas disparagingly and inaccurately describes these documents as “a scrapbook collection of media articles, discovery, and affidavits which are largely repetitive of items already of record in the case, as well as other materials of doubtful origin, reliability and relevance.” Supplemental Opinion, p. 5. However, a review of these documents demonstrates that they provide detailed and meticulous analysis of the evidence which corroborates Arnold Beverly’s testimony. See Appendix 4, Index to Docket #D-28.
- 44 See Official Comment to Rule 907: “To determine whether a summary dismissal is appropriate, the judge should thoroughly review the petition, the answer, if any, and all other relevant information that is included in the record.”
- 45 While it was not Messrs. Weinglass and Williams who prepared these memoranda, but other members of the legal team, Weinglass and Williams had all of these many memoranda at their disposal for review and analysis and, significantly, there is not one memorandum by Weinglass or Williams or anyone else which attempts, even as a “devil’s advocate,” to attack Beverly’s credibility or the truth of his testimony or to pose an alternative interpretation of the evidence to refute rather than corroborate his testimony.
- 46 See Docket #D-12, D-13, D-16/16a, D-17, D-18, D-20, D-21, D-23, D-25.
- 47 The allegations in this case are wholly to the contrary, however. Here it is alleged that Petitioner Jamal’s 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.” Their suppression of Petitioner’s claims thus constitutes “governmental interference” because their acts, as agents of the District Attorney, are attributed to the District Attorney, a “government official,”

under the doctrine of respondeat superior.

- 48 On February 14, 2002, Petitioner filed a remand motion in this Court to take testimony from Yvette Williams, whose affidavit dated January 28, 2002, is attached thereto as Exhibit “A,” in which she states that the prosecution’s star witness, street prostitute Cynthia White, had admitted to Williams shortly after the incident that she had not seen the shooting either, but was cajoled, bribed and threatened by the police to falsely identify Petitioner Jamal as the shooter.
- 49 Cf. *Commonwealth v. Carr*, 768 A.2d. 1164, 1168, where, by a simple phone call to his attorney or the court clerk, defendant could have discovered no appeal had been filed. Petitioner Jamal could not have discovered his counsels’ conflicts of interest by a simple phone call.
- 50 See Petition, Paragraph 75: “As the endgame of this case approaches, attorney Weinglass and attorney Williams are anxious to reposition themselves in the legal and political spectrum. This book was written not “to make [the Petitioner’s] ordeal more interesting and attractive to a main stream audience,” as attorney Williams claims in Paragraph 12 of his Affidavit (EXHIBIT “I”) filed in *Mumia Abu-Jamal vs St. Martin’s Press and Attorney Daniel R. Williams*, USDC (WD PA), Case No. 01-540 (hereinafter “the civil proceedings”). Rather, it was written to make attorney Weinglass and attorney Williams more attractive to a main stream audience. It was written with an eye to their futures after the Petitioner’s case was finished. It was written to portray attorney Weinglass and attorney Williams as wise and responsible lawyers fighting an heroic struggle against insuperable odds in an unfair and flawed criminal justice system. It was written both to preserve and to enhance attorney Weinglass’ and attorney Williams’s reputations. It was written not to advance the best interests of the Petitioner, but the best interests of attorney Weinglass and attorney Williams.”
- 51 Whilst it is plainly possible that what is alleged in the Petition is only the “tip of the iceberg” as to the dark motives and other possible factors in play which caused attorneys Weinglass and

Williams to act as they did; and while it is certainly possible that there is much more to the real “inside story” of this case than Petitioner Jamal’s present counsel have thus far been able to uncover; and while it is clearly possible that Weinglass and Williams were subjected to various external pressures which are not presently known; and while it is even possible for such pressures to have come from the real murderers of Police Officer Daniel Faulkner, those who planned his killing and hired the triggermen to carry out it out, Petitioner Jamal need not be able to prove that all of this is what has actually happened when what is known is more than sufficient to make out a compelling case of conflicts of interest and constructive denial of counsel, as is alleged in the Petition.

- 52 Moreover, as a practical matter, prior counsel would certainly never have litigated their own violations of their duty of loyalty to their client and their outright betrayal of their duty to him by acting directly contrary to his interests and in the interests of the prosecution and the real murderers of Police Officer Faulkner (i.e., the persons who hired Arnold Beverly). Petitioner Jamal himself could not have raised these claims earlier as he could only act through his attorneys, and it was those attorneys who did not raise those claims and who concealed from Petitioner the conflicts of interest on their part which caused them to hold back and suppress the claims.
- 53 Moreover, it would simply be absurd to impose on Petitioner a personal obligation to file a state post-conviction petition pro se – assuming he could even do so, which, as pointed out above, he could not – alleging conflicts of interest, sabotage and betrayal by his attorneys when the very same attorneys still represented him in federal habeas proceedings arising from the same underlying trial and conviction. Petitioner Jamal could have taken no such action. Instead, he properly followed the only procedure available to him, he retained present counsel who substituted out his prior attorneys and timely filed the underlying Petition on his behalf.
- 54 The Commonwealth also argued that the applicable one-year filing deadline was actually one year after the effective date of the PCRA

Amendments which became effective in January of 1996. However, this does not save the Commonwealth from the “time machine” problem because even their January 1997 filing deadline passed two and one-half years before Arnold Beverly confessed.

- 55 In Petitioner’s Response to the Commonwealth in the Court of Common Pleas, it was pointed out that: “A petitioner whose case does not fit within the statutory exceptions would still be placed in the “Catch-22” situation of being precluded from post-conviction relief because of a time deadline that he or she could only have met with the assistance of a time machine.” By construing the statutory exceptions to the PCRA’s one-year filing deadline in such a manner as to rule that Petitioner Jamal’s case does not fit into them, the Court of Common Pleas placed him precisely into that “Catch-22” situation which Petitioner decried as “a jurisprudential absurdity that would necessarily violate the ‘due process’ provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution and, in a capital case such as this, the Eighth Amendment’s prohibition of ‘cruel and unusual punishment.’”
- 56 Although the PCHA, like its successor, the PCRA, contained language purporting to “encompass” habeas corpus and other common law remedies, this Court held in *Commonwealth v. Lesko*, 501 A2d 200, 204 (Pa. 1985) that the PCHA’s remedies were derivative from habeas corpus and the common law writ was still available, and in *Commonwealth v. Sheehan*, 285 A2d 465, 467 (Pa. 1971) that all claims previously cognizable on a common law writ, when “not covered” by the PCRA, may be litigated by habeas corpus.
- 57 See *Commonwealth v. Gibson*, 720 A2d 473 (Pa. 1998); *Commonwealth v. Wayne*, 720 A2d 456 (Pa. 1998); *Commonwealth v. Williams*, 720 A2d 679 (Pa. 1998); *Spotz*, 716 A2d at 585; *Brown*, 711 A2d at 455; *Commonwealth v. Clark*, 710 A2d 31 (Pa. 1998); *Jermyn*, 709 A2d at 856 ; *Harris*, 703 A2d at 445; *Commonwealth v. Hall*, 701 A2d 190 (Pa. 1997); *Morales*, 701 A2d at 520; *Elliott*, 700 A2d at 1251; *Washington*, 692 A2d at 1030; *Marinelli*, 690 A2d at 214; *Gibson*, 688 A2d at 1160; *Morris*, 684 A2d at 1042; *Miles*, 681 A2d at 1301; *Speight*, 677 A2d at 326; *Cook*, 676 A2d at 649; *Johnson*, 668 A2d at 102. See also *Banks v. Horn* (3rd Cir 1997) 126 F3d 206; *Fahy v. Horn*, — F3d —, 2001 WL 121145 (3rd Cir Feb. 9, 2001).
- 52 Thomas M. Place, “The Claim is Cognizable but the Petition is Untimely: The Pennsylvania Supreme Court’s Recent Collateral Relief Decisions,” 10 *Temple Pol. & Civ. Rights L. Rev.* 49, 79-81 (Fall 2000). Moreover, as Professor Place persuasively argues: “Even as a limit on a court’s jurisdiction, the one-year filing period should be excused under the *nunc pro tunc* doctrine where extraordinary circumstances prevent incarcerated defendants from complying with the filing period.” *Id.*, 81.
- 53 *Id.*, 71.
- 54 *Stock* is particularly significant because there, despite the defendant having no right to representation by counsel because it was a summary case, the court still granted *nunc pro tunc* relief for the ineffectiveness of counsel who failed to timely file an appeal. Thus, under *Stock*, the Commonwealth’s argument raised against Petitioner Jamal in the court below, which rests upon their supposition that his right to effective representation by counsel “expired” at the conclusion of the 1995 post-conviction proceedings and appeal therefrom, is clearly invalid.
- 55 “There was only one catch and that was Catch-22, which specified that a concern for one’s own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn’t, but if he was sane he had to fly them. If he flew them he was crazy and didn’t have to; but if he didn’t want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.” Joseph Heller, *Catch-22* 55 (1996 Scribner Paperback

- Edition).
- 56 Regardless of how logical (or illogical) Hall may be, since Petitioner Jamal's "actual innocence" claim is not cognizable under the PCRA, as is argued *supra*, this Court's holding in Hall compels the conclusion that state habeas relief is available to review the Petition and this Court should either invoke its King's Bench powers to grant the writ or remand to the Court of Common Pleas for that purpose.
- 57 Memorandum & Order, 11/21/01, p. 5, n. 7.
- 58 Such a result is more than warranted in this case, where the treachery of Petitioner's prior counsel is magnitudes more despicable than the "mere ineffectiveness" of counsel in *Leasa*, *supra*; *Commonwealth v. Quail*, 729 A2d 571 (Pa. Super. 1999); or *Priovolos*, *supra*.
- 59 Justice Castille recused himself from participating in this Court's denial of Petitioner Jamal's remand motion to take his testimony, although the Justice did not recuse himself from participating in this Court's 1998 denial of Petitioner's motion for remand to supplement his *Batson* claim with the *McMahon* videotape and for discovery on it, nor did the Justice recuse himself from this Court's denial in that same year of Petitioner's appeal from denial of post-conviction relief. *Commonwealth v. Abu-Jamal*, 720 A2d 79, 86 (Pa. 1998).
- 60 It remains to be clarified whether the *McMahon* videotape was produced in 1986 or 1987. Cf. *Commonwealth v. Lark*, 560 Pa 487, 746 A2d 585, 589 (2000); *Commonwealth v. Rollins*, 558 Pa 532, 738 A2d 435, 443 (1999); *Commonwealth v. Basmore*, 560 Pa 258, 744 A2d 717, 727 (2000).
- 61 Justice Blackmun and Justice Marshall, in their concurrence in *Aetna*, 475 US at 832-833, note: "[E]ven if Justice Embry had not written the court's opinion, his participation in the case would have violated the Due Process Clause. Our experience should tell us that the concessions extracted as the price of joining an opinion may influence its shape as decisively as the sentiments of its nominal author. To discern a constitutionally significant difference between the author of an opinion and the other judges who participated in a case ignores the possibility that the collegial decision making process that is the hallmark of multimember courts led the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity. And because this collegial exchange of ideas occurs in private, a reviewing court may never discover the actual effect a biased judge had on the outcome of a particular case ... The violation of the Due Process Clause occurred when Justice Embry sat on this case, for it was then the danger arose that his vote and his views, potentially tainted by his interest in the pending *Blue Cross* suit, would influence the votes and views of his colleagues."
- 62 Pointing to the number of recent exonerations of death row defendants by DNA testing, the 68% prejudicial error rate uncovered by Liebman's study of 4,578 capital appeals and the fact that, "in just the past decade, at least 20 additional defendants who had been duly convicted of capital crimes and were facing execution have been exonerated and released," Judge Rakoff concluded that "the inference is unmistakable that numerous innocent people have been executed whose innocence might otherwise have been similarly established."
- 63 Thomas M. Place, *op. cit.*, 68-71.
- 64 It is, of course, Petitioner's position, as is argued elsewhere herein, that his case fits squarely within the statutory exceptions to the PCRA's filing deadlines and he may be granted relief without overturning *Peterkin* and *Fahy*.
- 65 *United States v. Martinez-Salazar* (9th Cir 1998) 146 F3d 653; *United States v. Annigoni* (9th Cir 1996) 96 F3d 1132; *Swain v. Alabama* (1965) 380 US 202, 219, overruled in part on other grounds, *Batson v. Kentucky* (1986) 476 US 79.
- 66 See *Lockett v. Ohio*, 438 U.S. 586 (1978); *Mills v. Maryland*, 108 S. Ct. 1860 (1988); *Eddings v. Oklahoma*, 455 US 104 (1982); *Woodson*, 428 US at 304; *McCoy v. North Carolina* (1990) 494 US 433; *Frey v. Fulcomer*, 132 F.3d 916 (1997).

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- 68 Johnson v Mississippi, 403 US 212 (1971)(per curiam); In re Murchison, 349 US 133 (1955); Aetna Life Ins. Co. v Lavoie, 475 US 813 (1986); Ward v Village of Monroeville, Ohio, 409 US 57 (1972); Tumey v Ohio, 273 US 510 (1927); United States v Brown, 539 F2d 467, 469 (5th Cir 1976)(per curiam).
- 69 Green v United States, 365 U.S. 301, 304 (1961); Groppi v Leslie, 404 U.S. 496, 501, 503 (1971); Boardman v Estelle, 957 F2d 1523 (9th Cir 1992); Ashe v State, 586 F2d 334, 336 (4th Cir 1978); United States v Jackson, 923 F2d 1494, 1496 (11th Cir 1991).
- 70See Berger v United States, 225 US 22 (1921); United States v Grinnell Corp., 384 US 563 (1966); Likety v United States, 510 US 540 (1944); Porter v Singletary, 49 F3d 1483 (11th Cir 1995); Marshall v Jerrico, 446 US 238 (1980); United States v H. Rap Brown, 539 F2d 467, 468 (5th Cir 1976).