

**COURT OF COMMON PLEAS,
COMMONWEALTH OF PENNSYLVANIA
FIRST JUDICIAL DISTRICT**

COMMONWEALTH,)	
Respondent,)	Case No. 8201-1357-59
)	
-vs-)	
)	
MUMIA ABU-JAMAL.)	
Petitioner.)	

**PETITIONER JAMAL’S REPLY TO COMMONWEALTH
RESPONDENT’S UNTIMELY RESPONSE TO MEMO-
RANDUM OF LAW ON COURT’S JURISDICTION.**

“[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).

INTRODUCTION

After having assured the Court that they needed but one week to respond to Petitioner Jamal’s Memorandum of Law on the Court’s jurisdiction to entertain the pending PCRA/Habeas Petition, the Commonwealth Respondent has taken five times longer to fashion a fragmentary and perfunctory response which ignores Petitioner’s arguments and supporting case authority. Respondent’s legally and morally indefensible position that it is “too late” for the Court to stop the execution of an innocent man is as poorly argued as it is conceived. The PCRA/Habeas Petition is timely and this Court clearly has jurisdiction to entertain it and grant the relief requested.

The new evidence which has been filed with this Court since the filing of Petitioner’s Memorandum of Law, including the declaration of private investigator George Michael (“Mike”) Newman, further serves to prove up the facts which support the Court’s jurisdiction.

**I. THE SUPPRESSION OF ROBERT CHOBERT’S
RECATANTION OF HIS TRIAL TESTIMONY BY
ATTORNEYS WEINGLASS AND WILLIAMS VIOLATED
PETITIONER’S RIGHT TO EFFECTIVE REPRESENTA-
TION BY COUNSEL (AND NOT TO BE SUBJECTED TO
CONSTRUCTIVE DENIAL OF COUNSEL) IN THE 1995
PCRA PROCEEDINGS AND REQUIRES THIS COURT
TO CONSTRUE THE PENDING PETITION AS A *FIRST*
PETITION.**

Private Investigator Mike Newman’s declaration, on file herein, proves the truth of the allegations in the pending petition that Petitioner Jamal’s 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. The suppression of this evidence was directly contrary to the interests of Petitioner Jamal and flagrant-ly violated his prior attorneys’ duty of loyalty to their client. This clearly violated Petitioner’s right to effective representation in

the PCRA proceedings (and not to be subjected to constructive denial of counsel) and necessarily means that Petitioner was not provided with a “truly counseled petition.” Thus, this Court should treat the pending PCRA/Habeas Petition as a *first* petition.

Taxi driver Robert Chobert was one of only two alleged eye-witnesses to the shooting of Officer Faulkner. The other was prostitute Cynthia White. 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. Chobert told Newman that what actually happened was that he was sitting in his cab on 13th Street, north of Locust, after having just let a passenger off, when he heard gunfire. Chobert exited his cab and saw a Black male standing next to a police car parked on Locust suddenly slump down. Chobert approached the police car and saw a police officer sprawled on his back on the sidewalk and a Black male slumped down nearby.

Although Chobert told this to Chief Counsel Weinglass, Weinglass did not question Chobert 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 as Weinglass had gotten everything he needed out of Chobert. However, this was far from the truth as Weinglass had left out of his examination of Chobert the most important part – Chobert had recanted his trial testimony and admitted he had not even seen the shooting!

There can be no possible tactical explanation for Weinglass’ failure to bring before the PCRA court Chobert’s recantation of his trial testimony; nor could this have been mistake, inadvertence or neglect by Weinglass. Attorney Weinglass held back evidence which would have proved the very claims that he was making in the PCRA proceedings, that the prosecution witnesses at trial had fabricated their testimony. Discrediting Chobert’s testimony would necessarily have also discredited Cynthia White’s as the prosecution’s having suborned perjury by Chobert would suggest their complicity in doing the same with regard to White, particularly with regard to White’s suppression of the existence of the passenger [Kenneth Freeman] in William Cook’s car, a point which is argued in detail in the pending petition.

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. This clearly shows that the conflicts of interest which plagued their representation of Petitioner Jamal did not start with publication of Williams’ mendacious book, or even with the suppression of Arnold Beverly’s confession in June of 1999, but fatally infected the entire PCRA proceedings that preceded these events. As a consequence, this Court should and must treat the pending petition as a *first* petition and consider its claims for relief on the merits, as was done in the post-*Peterkin* 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); and in *Commonwealth v. Bronshtein*, Pa. Super. No. 938 EDA 2000, August 23, 2001, where, citing *Leasa*, the court construed a

second PCRA petition as a first petition because of the ineffectiveness of petitioner's original post-conviction.

II. PETITIONER JAMAL WAS DEPRIVED OF HIS RIGHT TO A FAIR HEARING IN THE PRIOR PCRA PROCEEDINGS BY A RACIST JUDGE WHOSE SELF-PROCLAIMED GOAL WAS TO "HELP 'EM FRY THE N**R."**

The Commonwealth Respondents have offered no evidence to dispute the veracity of Court Reporter Terri Maurer-Carter's recounting in her declaration of Judge Sabo stating during the time of Petitioner Jamal's original trial that he was going to "help 'em fry the n****r." Quite obviously, neither Petitioner Jamal nor any other Black person could have received a fair trial from such a judge. Having expressed such sentiments during the 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 is additional evidence for that intention.

Even if it were assumed that Judge Sabo's racist attitudes had mellowed over the years, it was incumbent upon him as a *judge* to have disclosed his prior statement and intentions to "fry the n****r" in response to Petitioner's motion to recuse him for prejudice and to have granted that motion. Sabo's failure to do so proves that both his attitudes and intentions remained consistent over the years and that Petitioner's right to a fair hearing was violated by Judge Sabo's presiding over the PCRA proceedings. That being the case, this court must entertain the pending petition and construe it as a *first* petition, because Petitioner never really had any proper PCRA proceedings in 1995-1996, nor could he have had when the judge presiding over those proceedings was motivated not to administer justice but rather to "help 'em fry the n****r."¹

III. THIS COURT HAS JURISDICTION TO ENTERTAIN AND GRANT THE PCRA/HABEAS PETITION.

A. THE COURT SHOULD NOT ENFORCE A TIME DEADLINE THAT PETITIONER WOULD HAVE NEEDED A TIME MACHINE TO MEET.

While the Commonwealth maligns Petitioner's argument that the Court should not enforce a filing deadline which he would have needed a time machine to meet, it simultaneously argues that Petitioner's case was final on October 1, 1990, and, implicitly, that the deadline to have filed this petition would have passed on October 1, 1991, long before Arnold Beverly signed his written confession to the murder of Officer Faulkner and long before the filing deadline was itself created by the 1995 amendments to the PCRA (effective on January 16, 1996). By itself ridiculing the notion that Petitioner would have needed a time machine to meet the PCRA's one-year filing deadline, the Commonwealth implicitly and necessarily concedes the absurdity of retroactively enforcing the deadline. The Commonwealth vainly tries to save its position from this contradiction by referring to the statutory exceptions to the filing deadline. However, the issue of whether or not the exceptions apply does not arise until *after* it is first determined whether the deadline itself applies. 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. To apply such a deadline in such a manner would be 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."

B. PETITIONER JAMAL'S CASE FITS SQUARELY WITHIN THE STATUTORY EXCEPTIONS FOR CLAIMS WHOSE FACTUAL BASIS COULD NOT PREVIOUSLY HAVE BEEN DISCOVERED BY DUE DILIGENCE AND/OR WHICH COULD NOT HAVE PREVIOUSLY BEEN PRESENTED BECAUSE OF GOVERNMENTAL INTERFERENCE.

Commonwealth Respondent obfuscates the "conflict of interest" issues which underlie Petitioner's argument that his pending petition fits within the statutory exceptions to the one-year filing deadline for those claims whose factual basis could not have previously been discovered by due diligence or whose prior presentation was obstructed by governmental interference. The factual basis for Petitioner's claims for relief is precisely the undisclosed conflicts of interest by his prior counsel, Messrs. Weinglass and Williams, which as a matter of law could not have been discovered by Petitioner prior to their withdrawal from his representation and their substitution by his present counsel. The conduct of his prior counsel – acting directly contrary to Petitioner's interests in suppressing the evidence which proves his innocence and failing to raise numerous meritorious claims of constitutional error – constitutes governmental interference with presentation of these claims because, by so acting, his counsel acted in the capacity of a "second prosecutor" rather than acting on his behalf.

Respondent occludes the significant differences between the "ineffectiveness of counsel" doctrine under *Strickland* and the "constructive denial of counsel" doctrine under *Cronic* – a distinction of critical importance recognized by the Third Circuit in *Appel* – and cites a number of inapposite cases in the *Strickland* line which all involve "inadvertence" or "mistakes" by counsel, rather than the intentional sacrifice of their client's interests to the attorney's own personal interests or the adverse interests of a third party, as in the case of Petitioner Jamal.

Where, as here, an attorney acts *against* his client's interests, the attorney's conduct cannot be attributed to the client through a legal fiction of agency because in such a situation the putative agent has violated the fundamental fiduciary duty that an agent owes to his or her principal, the duty of *loyalty*. Moreover, the conduct of attorneys Weinglass and Williams in this case is by no stretch of the imagination "mere inadvertence" or "mistake" but outright treachery and betrayal. Messrs. Weinglass and Williams suppressed the very evidence which proves that their client, Mumia Abu-Jamal, is innocent of the crime for which he has been condemned to die – the confession of the real killer, Arnold Beverly, and the extensive collection of supporting evidence, including a lie detector test, which corroborates it. By suppressing that evidence, they have served up their client's head to the executioner and, rather than acting as his advocates have instead literally acted as *devil's advocates*. Under these unique circumstances it is neither fair, nor just, nor reasonable to attribute their despicable conduct to their innocent client under some inapplicable legal *fiction*.

According to the declaration of private investigator Mike Newman, 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, 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. 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.

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 and, it must be said, serving the real murderers' interests in stopping short any investigation which might lead to their own doorsteps.

Such conduct by *putative* defense lawyers fits squarely within the category of "acting as a second prosecutor" under *Rickman v. Bell* and, rather than being "hyperbolic rhetoric" as the Commonwealth redundantly complains, is an accurate legal description of conduct which constitutes a "constructive denial of counsel" under both *Rickman* and *Cronic*. Weinglass' and Williams' flagrant violation of the Rules of Professional Conduct and *per se* conflict of interest that was "inextricably intertwined" with publication of William's mendacious book, *Executing Justice*, the self-proclaimed "inside account" of Mumia's case, was only the latest example of the conflicts of interest which fatally infected their representation of Petitioner Jamal from its very inception.

These conflicts of interest preclude the Court from attributing to Petitioner Jamal any responsibility for his prior attorneys' suppression of the evidence which proves his innocence. These conflicts of interest necessarily deprived Petitioner Jamal of his

right to effective representation by counsel in the PCRA proceedings and deprived him of his right to a "truly counseled petition."

Commonwealth Respondent ignores the Pennsylvania cases on conflicts of interest cited by Petitioner which clearly hold that such conflicts *vitiates* the proceedings. These cases are supported by an additional line of federal conflict of interest cases which similarly hold that where an attorneys' conflict of interest has an adverse effect on their performance, no prejudice need be shown. *See, e.g., Campbell v. Rice*, 2001 US App LEXIS 20321, *8 (9th Cir., Case No. 99-17311, September 12, 2001)(*quoting United States v. DeFalco*, 644 F2d 132, 136 (3rd Cir 1980)(en banc): "The essence of the system is that there be professional antagonists in the legal forum ... if any circumstance impedes the unqualified participation by an attorney, the adjudicatory function is inhibited, ultimately threatening the object of that function, justice in the cause at hand."); *Holloway v. Arkansas*, 435 US 475, 490 (1978)("in a case of joint representation of conflicting interests the evil - it bears repeating - is in what the advocate finds himself compelled to *refrain* from doing ...").

C. THIS COURT HAS INHERENT POWER TO ENTERTAIN AND GRANT THE PCRA/HABEAS PETITION.

In his Memorandum of Law, Petitioner Jamal cites numerous authorities which demonstrate that, despite *Peterkin's* apparent holding that the PCRA's time deadlines are jurisdictional, this Court still has 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 as was done in the post-*Peterkin* 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); and in *Commonwealth v. Bronshtein*, Pa. Super. No. 938 EDA 2000, August 23, 2001, where, citing *Leasa*, the court construed a second PCRA petition as a first petition because of the ineffectiveness of petitioner's original post-conviction.

Rather than analyze or even discuss Petitioner's arguments and supporting case authorities, the Commonwealth Respondent simply chants back their interpretation of the holding in *Peterkin* as though it were some kind of magical mantra which would relieve them of the responsibility to respond directly to Petitioner's very specific arguments in his Memorandum of Law. However, *Peterkin* is merely the beginning and not the end of Petitioner's analysis of the jurisdictional issue. Petitioner's Memorandum demonstrates quite clearly that, for example, just as the Pennsylvania courts have entertained "late" appeals despite the "jurisdictional bar" of untimely filing, they may similarly entertain an allegedly untimely PCRA/Habeas Petitions. 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 this Court or any court is powerless to stop or even inquire into what would be the ultimate injustice - the execution of an innocent person - is an absurdity. If that were true, then our legal system would be a cruel and capricious pretense and a sham rather than a guardian of life and liberty under the rule of law.

IV. PETITIONER HAS A RIGHT TO A HEARING ON THE JURISDICTIONAL ISSUE.

Commonwealth Respondents adroitly pled their Answer to the Petition in such a fashion as to make it the equivalent of a motion to dismiss, raising only the jurisdictional and no other issue. The transparent motive for this was to deprive Petitioner of the right which he would have had to a hearing had they brought a formal motion to dismiss. This maneuver cannot be countenanced by the court. The Legislature's obvious intent in providing for a mandatory hearing was to ensure that no PCRA petitioner would be deprived of a hearing on the merits of his or her claims without first having – at a minimum – a hearing on the threshold issue of his or her right to consideration of his or her claims. Where the Respondent seeks to plead around this requirement the Court should rule that their putative Answer which answers only the jurisdictional issue is actually a motion to dismiss and treat it accordingly. Particularly in a capital case, and particularly in this capital case, it is most necessary that “justice should satisfy the appearance of justice.”

V. IT WOULD BE A GRAVE MISCARRIAGE OF JUSTICE FOR THIS COURT TO DECLINE TO ENTERTAIN THE PCRA/HABEAS PETITION OF AN INNOCENT MAN WRONGLY CONVICTED WHEN THE REAL KILLER HAS CONFESSED.

Before Felix Frankfurter became one of the truly great justices of our Supreme Court, and while still a Professor of Law, he wrote an article in the March 1927 *Atlantic Monthly* (attached hereto as EXHIBIT “A”) exposing the “grave miscarriage of justice” in the Sacco-Vanzetti case in which two innocent Italian anarchists were convicted and sentenced to death. Despite Professor Frankfurter's incisively written article, and a prominent international movement in defense of these two innocent men, they were executed by the State of Massachusetts after the United States Supreme Court refused to hear their appeal, and the resulting stain on the history of our legal system remains to this day.

There are a number of historical parallels between the case of Sacco-Vanzetti and that of Mumia Abu-Jamal which future historians will undoubtedly comment upon in their assessment of how well our legal system functioned in this historical period. This Court has a grave responsibility in this case, not only because it holds a man's life in its hands, but because its decision will be subject to the scrutiny not only of higher courts in our legal system, and the court of public opinion throughout the world, but also the highest court – the court of history.

In both cases the real murderer confessed and exonerated the innocent men wrongly convicted and sentenced to death. In Justice Frankfurter's article he describes the confession of Celestino F. Madeiros and the supporting evidence which proved that he and the Morelli gang had committed the crime for which Sacco and Vanzetti were sentenced to death. In the case of Mumia Abu-Jamal the real killer, Arnold Beverly, has confessed and the PCRA/Habeas Petition, and other filings before the Court corroborate the truth of that confession. Both Arnold Beverly's signed written confession and a videotape of Arnold Beverly confessing are on file in this action.

In Justice Frankfurter's article he describes the Sacco-Vanzetti case in terms – equally applicable to the case of Mumia Abu-Jamal – as one in which “a long succession of disclosures has aroused interest far beyond the boundaries of Massachusetts

[Pennsylvania] and even of the United States, until the case has become one of those rare *causes célèbres* which are of international concern.” It is respectfully submitted that it is the duty of this Court to ensure that history does not repeat itself in this case with an innocent man being executed while the confession of the real murderer is ignored.

ENDNOTE

¹The claim for relief based on Ms. Maurer-Carter's declaration is timely as the facts underlying the claim could not have been previously discovered with due diligence as their discovery was contingent upon Ms. Maurer-Carter's personal decision to come forward with that information.

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Respectfully submitted,

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