

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

MUMIA ABU-JAMAL,	)	
	)	Case No. 02-9001
Cross-Appellant,	)	
	)	
-vs-	)	
	)	
MARTIN HORN, Director, Pennsylvania	)	
Department of Corrections; CONNOR	)	
BLAINE, Superintendent, SCI Greene;	)	
DISTRICT ATTORNEY OF	)	
PHILADELPHIA COUNTY; ATTORNEY	)	
GENERAL OF THE COMMONWEALTH	)	
OF PENNSYLVANIA,	)	
	)	
Cross-Appellees.	)	

---

CROSS-APPELLANT JAMAL’S RESPONSE TO COMMONWEALTH CROSS-APPELLEES’ OPPOSITION TO MOTION TO CERTIFY ADDITIONAL ISSUES FOR APPEAL

– AND –

MOTION TO BE RELIEVED OF ANY PAGE LIMITATIONS ON THIS RESPONSE

COMES NOW Cross-Appellant Mumia Abu-Jamal and responds to the Commonwealth Cross-Appellees’ Opposition to his Motion to Certify Additional Issues for Appeal as follows; and hereby moves this Honorable Court to be relieved of any page limitations on this response because the complex issues under consideration cannot adequately be explained with any more brevity:

INTRODUCTION

The Commonwealth of Pennsylvania openly takes the position in its Opposition to Cross- Appellant Jamal’s Motion to Certify Additional Issues for Appeal that his innocence is “legally irrelevant.” Despite the District Court’s recognition of the merits of Cross-Appellant’s argument that a free-standing claim of actual innocence is cognizable on federal habeas, the Commonwealth, like the mad Roman emperor Caligula, insists that there is nothing wrong with executing an innocent man. The District Attorney’s cold-blooded indifference to whether she might in this case be responsible for the execution of an innocent man puts into bold relief precisely what is wrong with the manner in which the death penalty is administered in Pennsylvania.

Innocence is relevant.

Contrary to the Commonwealth’s obfuscatory rhetoric, it should be obvious to any “reasonable jurist” that Mumia Abu-Jamal’s innocence is directly relevant to various of the issues raised in the motion at issue. Mr. Jamal’s innocence is relevant to Claim 31, the free-standing actual innocence claim which the District Court denied leave to amend into the habeas petition. Mr. Jamal’s innocence is relevant to Claims 31-36 which allege that he was subjected to a “constructive denial of counsel” by the failure and refusal of his post-conviction and prior federal habeas

Chief Counsel Leonard Weinglass and Chief Legal Strategist Daniel Williams to put forth a positive case in his defense and/or allege and prove the ineffectiveness of his trial counsel for the same dereliction of duty. Mr. Jamal’s innocence is relevant to Claims 1-4 in the original habeas petition as it represents the “other side of the coin” to the claims which detail how an innocent man was framed- up for a crime that he did not commit. Mr. Jamal’s innocence is relevant to proving “cause and prejudice” sufficient to be relieved of any procedural defaults which the Commonwealth asserts resulted from the actions or failures to act of his prior attorneys and which the Commonwealth wishes to hang around the neck of Mr. Jamal. And Mumia Abu-Jamal’s innocence is an issue which is inextricably intertwined with this Court’s consideration of his *Batson* claim – which is the only issue the District Court certified for appeal – as it provides grounds to relieve him of the procedural default of the evidence to prove-up that claim which the District Court asserted as the basis for its denial of the claim in the underlying habeas proceedings.

Despite its contention that Mr. Jamal’s innocence is “legally irrelevant,” the Commonwealth piles one falsehood upon another in its “counter-introduction” in a desperate effort to keep its 20 year frame-up in place.

### **The Commonwealth drags out yet another phony “confession.”**

Apparently sensing the inherent implausibility of the fabricated “confession” it presented at trial, the Commonwealth now has the *chutzpah* to dust off yet another fabricated “confession” story to bolster its desperately faltering case against Mumia Abu-Jamal in this court, albeit, it has to be said, the Philadelphia District Attorney has never previously had the effrontery to try to introduce it into evidence or otherwise at all in any court since the story first surfaced in January 1999.

The Commonwealth presents this court with the imaginings and inventions of Phillip Bloch, whose patently preposterous account of how Mr. Jamal allegedly confessed to him during a prison interview in a room known to be “bugged” by prison authorities was so heavily discredited when it was first planted in the print media that the Commonwealth adroitly gives precedence in its Memorandum to the author of the magazine article in which this so-called “confession” first saw the light of day rather than to Bloch, the Commonwealth’s supposed potential witness, himself. The Commonwealth also fails to disclose that “Pulitzer prize-winning journalist” Buzz Bissinger (whom one may be sure did not win a prize for this story from anyone other than the FOP) was also the author of a fawning and highly-selective account of the administration of Philadelphia Mayor Ed Rendell, who was the Head District Attorney at the time of the original frame-up trial of Mumia Abu-Jamal. Be that as it may, Bissinger plainly reported this fable in *Vanity Fair* without first bothering to checkout his source.

Although Bloch claimed that Mr. Jamal made the spurious “confession” to him when Bloch was visiting Jamal on behalf of the Pennsylvania Prison Society, the organization’s records reveal that they had fired Bloch a year earlier for violating several of their internal rules. The final nail in the coffin of Bloch’s fantastic tale was supplied from the mouth or rather the pen of Bloch himself in the form of a letter he wrote to Mumia Abu-Jamal long after the alleged “confession” in which he offered the opinion that Jamal would most certainly be acquitted if he succeeded in obtaining a new trial! Certainly an odd thing to write to a man who had purportedly confessed his guilt.

The facts which demolish the lies told by Bloch are set forth in the documents attached hereto as Appendices “A” through “D”, consisting respectively of an article from the respected media watchdog organization Fairness and Accuracy in Reporting (“FAIR”), a *Philadelphia Tribune* article by distinguished local journalist Linn Washington, an article published soon after Bloch’s revelations by Mumia Abu-Jamal himself, and the letter from Bloch whose contents are described above.

The Commonwealth knows that Cross-Appellant Jamal is innocent. The Commonwealth knows that Cross-Appellant Jamal can prove that he is innocent. Otherwise, the Commonwealth could not possibly have come up with the utterly preposterous

suggestion that the fact that someone else, and not Cross-Appellant Jamal, killed Police Officer Faulkner “is legally irrelevant to any issue raised in the [instant] motion”!<sup>1</sup> Otherwise, the Commonwealth would not be so desperate as to try and dredge up the long since discredited *Vanity Fair*’s fairy tale of a so-called “confession” to a man who had no access to Cross-Appellant Jamal at the time,<sup>2</sup> and who was still writing to Cross-Appellant Jamal a year after the alleged confession telling him: “when you get a new trial, I think that there is a good chance of acquittal.”<sup>3</sup>

### **The Commonwealth fakes the death of Cynthia White.**

As the frame-up of Mumia Abu-Jamal is increasingly coming apart at the seams, the District Attorney in her desperation to keep the evidence which proves Mumia’s innocence from being heard has now gone so far as to resurrect the hoax of Cynthia White’s supposed death.

There is no evidence that Cynthia White is dead. The putative death certificate which the Commonwealth produced at the 1997 remand hearing to establish that Cynthia White died in 1992 turned out not to be, as the Commonwealth claimed, a “self-authenticating” official New Jersey record, but rather an ad hoc collection of several different sealed and unsealed documents stapled together to give the false impression of a single record (Tr. 6/27/97: 143). The Social Security number on the putative death certificate did not belong to Cynthia White, but to a woman named Migdalia Cruz, who was born in Puerto Rico on May 25, 1957. Thereafter, fingerprint evidence proved beyond doubt that the woman whose death certificate the Commonwealth had produced was not Cynthia White. According to Detective Witcher, White’s fingerprint codes were: PM 11 12 CO 16 DO 08 13 PI 18 (Tr. 6/26/97: 155). However, the fingerprint codes in the Camden Police fingerprint records for the deceased woman were PM 13 12 17 16 PO 18 13 CI 20 (Commonwealth Exhibit 8 for remand hearing held 6/26/97 -7/1/97). On cross-examination, Camden Police Officer Morgan admitted that the fingerprint codes were different and did not correspond (Tr. 7/1/97: 49- 51).

In the light of this evidence, PCRA Judge Sabo’s fact finding that Cynthia White was dead is plainly perverse. It was made in order to discredit Pamela Jenkins’ testimony (she had testified that she had seen Cynthia White alive in 1997). It is a fine, practical example of how Judge Sabo’s bias against Cross-Appellant Jamal has infected this case (See the declaration of Court Reporter, Terri Maurer-Carter).

Similar considerations apply to the Commonwealth’s bizarre contention that Cynthia White had never been known as “Lucky.” It is obvious from Veronica Jones’ trial testimony that “Cynthia” and “Lucky” are the same person. (Tr. 6/29/82: 129, 134-136) Jones confirmed at the 1996 remand hearing that White was nicknamed “Lucky.” (Tr. 10/1/96: 30) Pamela Jenkins also testified that Cynthia White was nicknamed “Lucky.” (Tr. 6/26/97: 47) Both in 1996 and in 1997, Petitioner offered into

evidence at the remand hearings before Judge Sabo court files from various of Cynthia White's criminal cases which show her alias to be "Lucky," but the judge refused to accept the evidence. (Tr. 10/1/96: 160-161; Tr. 6/30/97: 140-141) Petitioner offered into evidence at the 1997 remand hearing the sworn statement of private investigator Donald Burton that several individuals in North Philadelphia identified a photograph of Cynthia White as "Lucky." (Tr. 6/30/97; Petitioner's Supplemental Offers of Proof, Ex. 1) Petitioner also offered the sworn statement of private investigator Chris Milton that he spoke to various persons in Philadelphia who resided at addresses that Cynthia White had provided as hers in court files from various of her criminal cases and they stated that they knew her and she used the name "Lucky." (Petitioner's Supplemental Offers of Proof, Ex. 2)

### **The frame-up continues.**

The Vanity Fair story really typifies the quality of the evidence upon which Cross-Appellant Jamal's conviction is based. It is embarrassing. The Commonwealth does not dare to embark upon a fully fledged analysis of the available evidence in this case, because the Commonwealth knows that the prosecution case would come apart in their hands. Instead, the Commonwealth has been reduced to trying to select what it believes is the "cream" of the case against Cross-Appellant Jamal. The Commonwealth's selection is highly revealing. So, too, is the fact that, even with this *creme de la creme*, the Commonwealth is forced to twist and misstate the evidence.

The "high point" of the prosecution case against Cross-Appellant Jamal, according to the Commonwealth's memorandum in opposition to the instant motion, is the testimony of the alleged prosecution "eye-witnesses." However, the Commonwealth blatantly misrepresents the trial evidence and lies to this Court when it states that there were five "eyewitnesses" who claimed to have seen Mumia Abu-Jamal shoot Police Officer Faulkner. In fact, there were only two witnesses who claimed to have seen this, street prostitute Cynthia White and convicted felon Robert Chobert. The District Court in its ruling from which this appeal is taken refers to four "eyewitnesses" but specifically notes that of these only two (White and Chobert) testified at trial to allegedly having seen Cross-Appellant shoot the police officer. (District Court Opinion, p. 5)<sup>4</sup>

Cynthia White, the prostitute with 38 previous arrests and three open cases in Philadelphia, was demonstrably an unwilling witness in this case: she gave the police a false address on December 9, 1981, when she was allegedly "interviewed" immediately after the shooting (6/22/82; 5.41). Cynthia White did not have to fabricate her account during the course of this supposed "interview", because the words were put into her mouth by corrupt police officers, who had been present when the shooting occurred.<sup>5</sup> The real killer, Arnold Beverly, did cross Locust from in front of the parking lot and shoot Police Officer Faulkner.

Even without Yvette Williams' testimony, Cynthia White can and has been shown to have testified falsely. Yvette Williams' testimony supplies direct evidence not only that White lied but also that it was the police who coerced, cajoled and bribed her into lying.

At the original trial, Robert Chobert was the *only* other supposed "eye-witness" who claimed to have seen Cross-Appellant Jamal shoot Police Officer Faulkner.<sup>6</sup> In his first statement to the police, Robert Chobert said the killer had run away. However, when he testified at trial Chobert claimed that he saw Mr. Jamal shoot Officer Faulkner. In 1995, Robert Chobert retracted his trial testimony in an interview with defense investigator, Mike Newman and admitted that not only did he not see the shooting, he was not parked on Locust Street directly behind Officer Faulkner's police car, as he testified to at trial, but was parked on the cross-street, 13<sup>th</sup> Street, north of Locust, from which location the shooting would have taken place behind him and to the east of where he was located.<sup>7</sup>

Chobert was particularly vulnerable to police and/or prosecution coercion because he was on felony probation after having pled to two counts of arson (as a Class 1 and Class 2 felony, respectively) and was facing over 30 years of state prison if his probation were revoked. Chobert, a taxi driver, was in daily violation of probation for driving his cab on a suspended driver's license, a misdemeanor. The police not only could have made Chobert sing any tune they wanted, they could have made him dance to it as well, which they effectively did when he was on the witness stand at trial.<sup>8</sup>

Both Police Officer Shoemaker and his partner, Police Officer Forbes' testimony about supposedly finding Cross-Appellant Jamal's gun when they arrived on the scene is contradicted by the contemporaneous evidence. The police radio transcript makes it clear that no police officer at the scene reported to central division that a suspect with a weapon had been found until some 14 minutes after Police Officer Shoemaker and Police Officer Forbes arrived at the scene, despite radio enquiries and flashes that the suspect had fled with the officer's gun.

At the trial, Mr Paul, the Commonwealth's own ballistics expert, conceded that the bullet which was allegedly recovered from Police Officer Faulkner's head wound could have come from multiple millions of weapons (6/23/82; 169)<sup>9</sup>

The unimpeded, downward trajectory of the bullet which came to rest in Cross-Appellant Jamal's lower back proves that Police Officer Faulkner could not have shot Cross-Appellant Jamal after he was first shot and fell to the sidewalk. The Commonwealth simply cannot account for how, on their scenario, Police Officer Faulkner fired just once, supposedly wounding Cross-Appellant Jamal in this way, whilst he was standing (even supposing that he had time to turn, draw his gun and shoot Cross-Appellant Jamal after he was shot in the back and before he fell to the sidewalk), and yet never fired again.

When analysed together, the physical evidence and alleged eyewitness testimony establish that *nine* bullets were fired at the scene other than the bullet which lodged in Cross-Appellant Jamal's lower back. Astonishingly, the Commonwealth challenges Cross-Appellant to prove this point when it is crystal clear from the trial evidence. According to the police ballistics report and the medical examiner's report, one bullet was recovered from the officer's head wound, one bullet entered his back and exited his neck, one bullet went through his jacket and exited the jacket without hitting the officer. According to the prosecution's own witnesses, the shooter fired three shots at the prostrate officer's head which missed him before firing the fatal shot. Bullet fragments were recovered from a door at the scene indicating that three additional shots were fired. This adds up to *nine* bullets having been fired in addition to the one that hit Cross-Appellant Jamal.<sup>10</sup>

However, Cross-Appellant Jamal's snub-nose .38 special revolver was chambered for only five bullets and could not have fired those nine shots. Whoever did shoot Police Officer Faulkner did not act alone. If more than one person was involved in the shooting of Police Officer Faulkner, the whole prosecution theory of the case against Cross-Appellant Jamal falls apart. However, Arnold Beverly states that he acted with an accomplice.

The alleged, supposedly spontaneous, unsolicited hospital "confession", unreported by any of the numerous police officers who were present until months afterwards and contradicted by their contemporaneous police reports, is frankly risible.

And that's it. That is the prosecution case. Small wonder the Commonwealth felt constrained to drag out and dust off yet another fabricated "confession" and resurrect the hoax of Cynthia White's supposed death.

#### **The Commonwealth launches Daniel Williams' "pre-emptive strike" against the truth.**

Perhaps even more shocking than its present efforts to pull the wool over the eyes of this Court with the same pattern of misrepresentations and outright fabrications which characterized the original prosecution of Mr. Jamal 20 years ago is the Commonwealth's shameless tossing into the lap of the Court the nefarious and thoroughly dishonest book authored by Jamal's ex-Chief Legal Strategist Daniel Williams in flagrant violation of Rule 1.8 of the Pennsylvania Rules of Professional Conduct, and the Local Rules of the U.S. District Court for the Eastern District of Pennsylvania, which bar an attorney from negotiating or entering into a contract to publish a book about a case in which the attorney is representing a party during the time of that representation. The Official Comment to that rule explains that its purpose is to protect the client from the *per se* conflict of interest which would result from that situation since what might make the book sell might not be in the best interests of the client.

Petitioner's ex-Chief Counsel Leonard Weinglass, in a letter to Mr. Jamal,<sup>11</sup> describes the book, *Executing Justice: The "Inside Story" of the Mumia Abu-Jamal Case*, as a "pre-emptive strike" against "the witness that we blocked from coming forward," i.e., Arnold Beverly, the real killer of Police Officer Daniel Faulkner, whose written and videotaped confession (both on file in the underlying proceedings in the District Court) exonerates Mumia Abu-Jamal, but inculpates corrupt police officers and organized crime in Faulkner's death. Weinglass states in that letter that his colleague, Mr. Williams, had implanted his "pre-emptive strike" weapon into the book because of his concern that Beverly's confession, although still buried, might one day "surface."

The Commonwealth's shameless use of Williams' book for precisely the "pre-emptive" strike purpose for which it was written (which the District Attorney previously did in both the Pennsylvania Court of Common Pleas and the U.S. District Court when Mr. Jamal's present counsel unearthed Beverly's confession and the evidence which corroborates it, including the results of the lie detector test taken by Mr. Beverly) inadvertently proves up precisely the pervasive and deep-rooted *conflicts of interest* which infected Weinglass' and Williams' representation of Mr. Jamal from its inception and of which the book, *Executing Justice*, was the latest example. The detailed factual basis for these contentions with regard to these conflicts of interest is pled directly into the allegations of the Proposed Amended Habeas Petition which the District Court denied leave to file in the underlying proceedings and will not be repeated here.

#### **The conflicts of interest by Cross-Appellant Jamal's prior counsel.**

However, the Commonwealth's highlighting of the "conflicts of interest" issues which are part of the very fabric of this appeal and raise the constitutional issue of "constructive denial of counsel" most appropriately puts the case of Mr. Jamal within the context of the recent decision of the U.S. Court of Appeals for the Second Circuit in *United States v. Schwartz*, 2d Cir., Case No. 00-1479, February 28, 2002, wherein the conviction of a white police officer for assisting in the brutal sodomizing of a Black man, Abner Louima, with a broken stick from a toilet plunger was overturned because of a conflict of interest by the defendant's attorney who refused to present the confession of another officer which would have exonerated his client but prejudiced the interests of the police union whom he also represented. The defense attorney had advised his police officer client that the confession was "unbelievable" but did not disclose to the client the attorney's conflict of interest which regard to the confession.

Similarly here, ex-Chief Counsel Weinglass and ex-Chief Legal Strategist Williams buried the confession of Arnold Beverly even though it exonerated their client, Mr. Jamal, allegedly because they found it unbelievable (although this was

itself a lie as they knew that Beverly was telling the truth<sup>12</sup>) but did not disclose their own conflicts of interest to Mr. Jamal which poisoned their assessment of the confession and their advice and counsel to their client. The truth of the matter is that The utter poverty of the Commonwealth's case against Cross-Appellant Jamal should have been exposed years ago. It should have been exposed in State Court during the original PCRA proceedings. It should have been exposed in the original, unamended Federal Habeas petition. The reason why it was not exposed was the conflict of interest on the part of Cross-Appellant Jamal's prior counsel, Leonard Weinglass and Daniel Williams, who between them, as Chief Counsel and Chief Legal Strategist, controlled the entire presentation of Cross-Appellant Jamal's case between 1992 and May, 2001.

This conflict of interest is plainly the lynchpin of Cross-Appellant Jamal's case for a COA against the District Court's denial of the various interlocutory motions and other orders, which are the subject of the instant motion. It provides both the practical justification and much of the legal justification for the need to amend the original federal habeas petition and to admit the newly- discovered evidence. Yet, staggeringly, the Commonwealth fails to make any mention of it in its summary of the recent procedural history of this case.<sup>13</sup> The Commonwealth fails to make even passing mention of it at all until page 13 of their memorandum.<sup>14</sup>

As is evident from the Second Circuit's decision in *United States v Schwartz*, *supra*, that circuit has a developed and articulated body of decisional law concerning attorneys' conflicts of interest. A brief review of some key points from that body of law will prove helpful in informing this Honorable Court's consideration of the conflicts of interest issue in this case.

Where a defendant's counsel is burdened by an actual conflict of interest, prejudice is presumed. To obtain reversal of a conviction based upon a conflict of interest on the part of a defendant's counsel, the defendant "need only establish (1) an actual conflict of interest that (2) adversely affected his counsel's performance." *Schwartz* at \*15 and authorities cited therein.

The test for whether an attorney has an *actual* as opposed to a *potential* conflict of interest is whether "the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action." *Id.*

In order to show that an actual conflict has adversely affected an attorney's performance, the defendant may show a "lapse in representation" resulted from the conflict. *Id.* To prove a lapse in representation, a defendant must "demonstrate that some 'plausible alternative defense strategy or tactic might have been pursued' and that the 'alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.'" *Id.* at 16 and authorities cited therein. This is precisely what happened in the case of Mumia Abu-Jamal when his ex-Chief Counsel Weinglass and ex-Chief Legal Strategist

Williams refused, because of their conflicts of interest, to present the evidence, including Arnold Beverly's confession, which proves Mr. Jamal's innocence.

The key point here is the following:

"A defendant is not required to show that the lapse in representation affected the outcome of the trial ... [and] the forgone strategy or tactic is not even subject to a requirement of reasonableness." *Id.*

The reason for this rule is as follows:

"The test is a strict one because a defendant has a right to an attorney who can make strategic and tactical choices free from any conflict of interest. An attorney who is prevented from pursuing a strategy or tactic because of the canon of ethics is hardly an objective judge of whether that strategy or tactic is sound trial practice." *Id.*

The application of Second Circuit law on attorney conflicts of interest, as elucidated in *Schwartz* and the authorities cited therein, effectively blows out of the water all of the Commonwealth's arguments that rest on attorney Williams book, Weinglass' and Williams' feigned skepticism as to the truth of Arnold Beverly's testimony, or Cross-Appellant Jamal's allegedly having followed the tainted advice received from his conflict-infected Chief Counsel and Chief Legal Strategist.

Cross-Appellant Jamal, just like the white police officer who was the defendant in *Schwartz*, had a right to legal representation by an attorney "who can make strategic or tactical choices free from any conflict of interest." That right was violated in both the state post-conviction proceedings and the federal habeas proceedings in the District Court prior to May 4, 2001, when Cross-Appellant Jamal's present counsel took over his representation.

Given these pervasive conflicts of interest, the District Court should have granted Mr. Jamal's motion for leave to file the proposed amended habeas petition to put forward the "alternative defense strategy" of proving his actual innocence and raising the additional claims of constitutional violations set forth in the amended petition. The District Court should then have considered the claims for relief in the amended petition on their merits.

Weinglass' and Williams' conflicts of interest – and the resulting constructive denial of counsel which Mr. Jamal suffered as a result – are key elements underlying the issue of the District Court's error in denying leave to amend the habeas petition to cure the defects engendered therein as a result of those conflicts and with regard to the merits of various of the additional claims pled therein. While the Commonwealth contends that the "constructive denial of counsel" issue does not apply out of the context of the Sixth Amendment they can cite no case authority to

support this proposition and, rather than reply to Cross-Appellant's arguments as to why the jurisprudence which has developed around the doctrine in a Sixth Amendment context should be applied to the Fourteenth Amendment "due process" clause, the Commonwealth simply ignores these arguments. Given that the Commonwealth is incapable of formulating a counter-argument to Cross-Appellant's position, the issues related to the conflicts of interest and constructive denial of counsel should be certified for appeal as it should be evident that "reasonable jurists" could certainly disagree as to the issue.

**The test for granting a Certificate of Appealability.**

This brings us to the test for granting a Certificate of Appealability ("COA"). Although the Commonwealth has correctly noted that the granting of a COA depends upon the making of a "substantial showing" of violation of a constitutional right, they fail to mention the proper test for determining when such a showing has been made.<sup>15</sup> That test is an extremely liberal one which merely requires showing that reasonable jurists would find it "debatable" whether the District Court had correctly resolved the issue in question. "Under AEDPA, a COA may not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 USC Sec. 2253(c) ... The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 483- 84 (2000).

Another way of saying this is that "reasonable jurists could disagree" on the merits of the issue. As noted federal habeas scholars Liebman and Hertz explain:

"[A] certificate [of appealability] must issue if the appeal presents a 'question of some substance,' i.e., at least one issue (1) that is 'debatable among jurists of reason'; (2) 'that a court could resolve in a different manner';(3) that is 'adequate to deserve encouragement to proceed further'; or (4) that is not 'squarely foreclosed by statute, rule, or authoritative court decision, or ... [that is not] lacking any factual basis in the record.'"<sup>16</sup>

As will be demonstrated below in the point-by-point response to the Commonwealth's issue- by-issue Opposition, the Commonwealth generally ignores Cross-Appellant's arguments, makes no attempt to analyze or refute them, and, instead, merely restates its position or portions of the District Court's opinion. This in and of itself proves that these issues should be certified for appeal as the inability of the Commonwealth to even formulate a counter-argument necessarily demonstrates that reasonable jurists could, at least, disagree as to these issues. This is particularly striking with regard to Claim 30, the so-called "John Africa" claim, where neither the District Court nor the Commonwealth

was able to analyze or refute Cross-Appellant's detailed and clearly articulated arguments, supported with ample citations to authority, instead contenting themselves with mis- stating the issue in the first instance and then citing inapposite cases to demolish the straw men they themselves had constructed.

**A COA may be granted for procedural issues if the underlying claim for relief is of constitutional dimensions.**

The Commonwealth has also tossed another red herring onto the table in claiming that such procedural issues as the District Court's denying leave to amend the habeas petition or denying leave to depose Arnold Beverly are not reviewable by federal habeas because they are allegedly not of "constitutional dimension." Bereft of any authority in point to support their argument, the Commonwealth contents itself with quoting general language from cases which are simply off point. Indeed, the law is precisely to the contrary as the Supreme Court made clear in *Slack*, procedural issues are reviewable by habeas if reasonable jurists could disagree as to whether the District Court erred in ruling on them and if the underlying claims for relief are of constitutional dimensions:

"When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, supra, at 478.<sup>17</sup>

For the reasons set out in the instant motion, the District Court plainly abused its discretion in this case, when it denied Cross-Appellant Jamal leave to re-draft and amend the habeas petition, and when it struck evidence from the record and denied leave to supplement the record, and when it refused to authorize the deposition of Arnold Beverly or to reconsider the same. The District Court made fundamental errors of legal analysis.

Furthermore, the District Court consistently failed to pay any heed to the practical impact of prior counsels' conflict of interest on the conduct of Cross-Appellant Jamal's case prior to May 4, 2001, let alone take adequate account of the impact of prior counsels' conflict of interest in its legal analysis. Fundamentally, the District Court failed to acknowledge or understand that, under basic agency principles, the acts of conflicted counsel cannot be properly attributed to a client for they are acts outside the scope of counsel's authority as derived from the agency.

**The Claims in the Proposed Amended Petition  
are properly exhausted.**

The Commonwealth is clearly confused in its assertion that the *Schlup v Delo*<sup>18</sup> “gateway” for avoiding procedural default through a showing of “actual innocence” is irrelevant to the issues in this case and is even more confused in its mistaken assertion that the claims in the Proposed Amended Habeas Petition are unexhausted. It is a matter of record that on July 3, 2001, less than 60 days after Cross-Appellant’s present counsel took over his representation from prior counsel, pursuant to Order of the District Court, they filed on Cross-Appellant Jamal’s behalf a Petition for Post-Conviction Relief and/or Writ of Habeas Corpus in the Court of Common Pleas of the Commonwealth of Pennsylvania. A Notice of Filing of that petition, with a true and accurate copy thereof, was duly filed in this action at the same time. Each of the “new” claims set forth in the Proposed Amended Federal Habeas Petition was first set forth in that state Post-Conviction Petition *before* Cross-Appellant presented to the District Court his motion for leave to file the proposed amended federal habeas petition. Moreover, not only did the Commonwealth of Pennsylvania take the position before the District Court (in opposing Cross-Appellant’s motions to reconsider denial of leave to depose Arnold Beverly; to amend the habeas petition; and to stay the federal habeas proceedings while the state post-conviction petition was under consideration by the Pennsylvania courts) that it was futile for Cross-Appellant to seek relief in the Pennsylvania courts, the District Court (in denying Cross-Appellant’s motions) agreed with the Commonwealth’s position that it was futile for Cross-Appellant to seek relief in the Pennsylvania courts. The Court of Common Pleas subsequently dismissed the post-conviction petition on jurisdictional grounds without reaching the merits of any of the claims for relief.<sup>19</sup> Accordingly, all of these claims are duly exhausted.

The real issue before this Court is not exhaustion, but rather procedural default. It is the Commonwealth’s position, thus far accepted by the Pennsylvania Courts, that the claims in the post-conviction petition filed on July 3, 2001 (and thereafter set forth as Claims 31-39 in the Proposed Amended Federal Habeas Petition) were “untimely” because they should have been presented in 1999 by Cross-Appellant’s ex-Chief Counsel Leonard Weinglass and ex-Chief Legal Strategist Daniel Williams. It is Cross-Appellant’s position, as articulated by his present counsel, that the failure of these attorneys to fulfill their duty of loyalty to their client and their deep-rooted conflicts of interest mean that their failure and/or refusal to present these claims to the state courts cannot be attributed to Cross-Appellant.

Moreover, the *Schlup* gateway to overcoming procedural default in cases where a federal habeas petition can prove his or her “actual innocence” (actually their “legal innocence” since the test is that it be more likely than not that a reasonable jury would

not find the petitioner guilty beyond a reasonable doubt in light of the new evidence of innocence) is directly relevant to this issue since a satisfactory showing of innocence requires the federal courts to consider these claims on their merits.

Additionally, since “actual innocence” is itself a gateway to overcoming procedural default, a free-standing claim of actual innocence can never itself be defaulted. Indeed, for a court to rule that an actual innocence claim were defaulted in a capital case would violate both the Eighth Amendment ban on cruel and unusual punishment and the suspension clause of the Federal Constitution, just as using a statute of limitations to bar a free-standing claim of actual innocence in a capital case would violate these same two constitutional provisions.

**ARGUMENT**

**1. A COA SHOULD CERTIFY FOR APPEAL THE  
DISTRICT COURT’S DENIAL OF LEAVE TO FILE THE  
PROPOSED AMENDED HABEAS PETITION.**

**A. THE DISTRICT COURT ABUSED ITS DISCRE-  
TION IN DENYING LEAVE TO AMEND THE HABEAS  
PETITION TO INCORPORATE CLAIMS 32-39.**

These claims are based on violations of Cross-Appellant Jamal’s right not to be subjected to a “constructive denial of counsel” under *Cronic v United States* and its progeny. *See also* the recent case of *United States v Schwartz* with regard to the right to conflict-free representation by counsel.<sup>20</sup> The facts underlying each of these claims with respect to the myriad and deep-rooted conflicts of interest by prior counsel Weinglass and Williams could not have been previously discovered by Cross-Appellant Jamal as a matter of law as the conflicts were undisclosed by the attorneys. *Cf. United States v Schwartz, supra.* Thus, each of these claims are timely under the AEDPA.

The Commonwealth asserts but can cite no case authority to support its assertion that the “constructive denial” of counsel doctrine is limited to violations of the Sixth Amendment right to counsel. Since the Sixth Amendment does not guarantee counsel for post-conviction proceedings, state or federal, the Commonwealth argues that Cross-Appellant’s constitutional rights were not violated when attorneys Weinglass and Williams treacherously betrayed him by suppressing the evidence which proves his innocence and holding back or sabotaging legal claims which might have revealed such evidence and opened the Pandora’s box of police corruption and organized crime involvement in the murder of Officer Faulkner which those attorneys were unwilling to risk their own lives to expose.

However, there is no reason to limit the “constructive denial of counsel” doctrine to the Sixth Amendment context in which it arose. Such situations fit squarely within the parameters of the Fourteenth Amendment’s protection of the right to “due process of law.” As is explained in detail in the motion to certify additional issues for appeal and will not be repeated in such detail

here, an attorney violating his or her duty of loyalty to a client and acting directly contrary to the client's interests and in the interests of the prosecution, as in the case of *Rickman v Bell* and as in the instant case, so undermines the adversary process that the client cannot possibly receive due process of law in such proceedings. The most basic element of due process is a fair proceeding before an impartial tribunal, with adequate notice. If a person's attorney is actively working on behalf of the opposing party, it cannot possibly be a fair proceeding. State post-conviction proceedings are the cornerstone of appellate review in criminal cases in his country. The factual and legal findings made in state post-conviction proceedings form the basis for all further review. A conflict of interest on the part of counsel turns those proceedings into worse than a sham. It renders meaningless the whole appellate process. The constructive denial of counsel within state post-conviction proceedings which flows from a conflict of interest on the part of counsel must therefore be cognizable under the Fourteenth Amendment.<sup>21</sup>

Since there is no law on point as to whether or not the "constructive denial of counsel" doctrine may or should be applied within the ambit of the Fourteenth Amendment, this is clearly an issue on which a COA must be issued. It is well-established that a COA must issue where the legal question presented by the petitioner has never before been decided by the circuit court. *Houston v Lack*, 487 US 266, 269 (1988); *Julius v Jones*, 875 F2d 1520, 1525-1526 (11<sup>th</sup> Cir), *cert den'd* 493 US 900 (1989). 2 Liebman & Hertz, *supra*, 1449 n. 58, Sec. 35.4c.

#### **B. A COA SHOULD ISSUE WITH REGARD TO THE DISTRICT COURT'S DENIAL OF LEAVE TO AMEND THE HABEAS PETITION TO INCLUDE CLAIM 31.**

Claim 31 is a free-standing claim of actual innocence. As noted in Cross-Appellant's Motion to Certify Additional Issues for Appeal (and contrary to the Commonwealth's misinterpretation) a majority of the justices of the United States Supreme Court in *Herrera v Collins*, 506 US 390 (1993) assumed without deciding that the execution of an innocent person would violate the Constitution and, thus, left open the possibility that a free-standing claim of actual innocence would state a proper claim for relief in federal habeas, and a different majority would have so held. See *Carriger v Stewart*, 132 F3d 463, 476 (9<sup>th</sup> Cir 1997)(en banc).

Thus, the issue of whether a free-standing claim of actual innocence is cognizable in federal habeas is certainly certifiable for appeal.

The District Court (wrongly) ruled that Cross-Appellant did not meet the weaker evidentiary standard for actual innocence under *Schlup v Delo* and, thus, the court did not consider what the stricter standard would be that he would have to meet for a free-standing innocence claim under *Herrera*. However, the District Court's decision was not only in error, it was reached without having considered Cross-Appellant's detailed and extensive

analysis of the evidence and rested, instead, on the court's original denial of Cross-Appellant's motion for leave to depose Arnold Beverly, a motion that Cross-Appellant's new counsel filed on May 4, 2001, when we first entered this case and before we had an opportunity to provide the Court with such an analysis of the evidence. That analysis is set forth in Appendix "B" to the pending motion.

Every detail of Arnold Beverly's confession is corroborated by and consistent with other evidence presented at the trial and by the rest of the newly-discovered evidence. There is clear evidence of police corruption in this case, from the background evidence declaration of Donald Hersing, through the numerous complaints of so many, independent eyewitnesses and the glaring flaws in the prosecution case, to, say, the simple, but highly significant evidence of Linn Washington. The only possible explanation for the crime scene being unsecured and unattended so shortly after the original incident is that this prosecution was a frame-up. No impartial and properly instructed jury could or would possibly convict Cross-Appellant Jamal on the evidence which is presently available. Rather, they would be bound to conclude that Cross-Appellant Jamal is innocent. *If Arnold Beverly is telling the truth, which he is (and the Commonwealth have yet to offer any evidence to impeach him), Cross-Appellant Jamal is innocent. End of story.*

It is well-established that a COA should be issued where the District Court decided complex or substantial issues when adjudicating a claim or the factual rationale for the District Court's ruling is unclear. 2 Liebman & Hertz, *Federal Habeas Corpus Practice and Procedure* 1448, Sec. 35.4c. The factual issues in this case with regard to Mumia's actual innocence claim are both complex and substantial issues and, given the mountain of evidence which both destroys the prosecution's case and explains what really happened on December 9, 1981, the factual rationale for the District Court's ruling is most certainly unclear. It contradicts the evidence rather than being based upon it. Accordingly, a COA should issue.

#### **C. A COA SHOULD BE ISSUED FOR DENIAL OF CLAIM 30.**

Claim 30 is the claim that Cross-Appellant Jamal's Sixth and Fourteenth Amendment right to the assistance of a lay advisor at counsel table whilst defending himself was violated when Judge Sabo aborted his *pro se* status and forced a court-appointed attorney on him. The District Attorney has proved to be incapable of comprehending much less refuting Cross-Appellant Jamal's detailed legal argumentation, citation of authorities, and historical exegesis in support of his position that the Sixth Amendment must necessarily include a right to lay assistance (at no cost to the State) given the Supreme Court's ruling in *Faretta* that the right to assistance by counsel was codified rather than created by the Sixth Amendment and itself was derivative of an earlier common law right to have the assistance of one's friends when represent-

ing himself before the King's courts during an earlier historical period when lawyers did not exist.

Not only does the Commonwealth offer no analysis whatsoever of Cross-Appellant's argumentation, the Commonwealth cannot even correctly state what it is, instead mechanically reproducing the District Court's refusal to comprehend that Cross-Appellant does not argue that he had the right to be *represented* by a non-lawyer (John Africa), but rather it is his position that he did have the right to be *assisted* by a friend who was not a lawyer whilst he was representing (defending) himself. Just this bare perception of the fundamental legal issue presented by this situation by a court should immediately reveal that the cases cited by the District Court (and the Commonwealth) which allegedly hold that there is no right to be *represented* by a non-lawyer are entirely irrelevant to the point. In fact, since neither the Commonwealth or the District Court could cite even *one* case which holds that there is no such right, how can a COA be denied for an appeal of this issue?

This is certainly an issue that "has never before been decided by the circuit court" (*Houston v Lack, supra; Julius v Jones, supra; 2 Liebman & Hertz, supra, 1449, Sec. 35.4c*) since it has never been decided by any other court than the Supreme Court itself in *Faretta*. The logical and historical analysis of the right to represent oneself which is enunciated in *Faretta* must by its own terms necessarily imply the existence of a prior common law right, also codified into the Sixth Amendment, to have the assistance of a non-lawyer friend when representing (defending) oneself at no cost to the State. There is no case law to the contrary nor could there be given the particular historical development of the right to counsel as articulated by the *Faretta* court.

**D. THE DISTRICT COURT MISUNDERSTOOD AND/OR MISAPPLIED *DUFUS* AND *THOMAS* AND VIOLATED THE AEDPA'S SCHEME OF CONDITIONING A RESTRICTION ON AMENDING HABEAS PETITIONS TO "OPT-IN" STATES.**

Once again, the District Attorney misconstrues and/or misunderstands Cross-Appellant's position. Cross-Appellant argues that the District Court did not properly construe or apply *Dufus* and *Thomas* because it created its own more stringent test for whether a habeas amendment "related back" than the traditional test for amending any other pleading. Although the District Court theoretically acknowledged that habeas petitions are like any other pleading and the same rule should govern as to when amendments of any pleading "relate back," by ruling that amendments which changed the legal theory of a claim but arose out of the same factual nexus did not "relate back", the District Court effectively invented its own novel and wholly-misconceived "relation back" theory for habeas amendments.

Cross-Appellant clearly pointed out in the pending motion that the *Thomas* court specifically declined to reach that issue and expressly acknowledged that the issue was open in the Third

Circuit.

Where – as here – the legal question presented by a habeas petitioner has never before been decided by the circuit court, then a COA must of necessity be issued for its review on appeal. *See Houston v Lack, supra; Julius v Jones, supra; and 2 Liebman & Hertz, supra, at 1449, Sec. 35.4c.*

Additionally, by creating its own bizarre "three little bears" test for "relation back" and permitting no change of legal theory even where additional allegations in the proposed amended habeas petition arise from the same factual nexus as set forth in the original pleading, the District Court applied a novel interpretation of the law, and the legal rationale for the court's ruling is unclear as it makes neither logical nor jurisprudential sense. Under such circumstances, this Court is compelled to issue a COA. *See 2 Liebman & Hertz, at 1449, Sec. 35.4c.*

**E. THE DISTRICT COURT ERRED AND/OR ABUSED ITS DISCRETION IN DENYING CROSS-APPELLANT THE DISCOVERY TO PROVE UP HIS CLAIMS AND PERPETUATE THE TESTIMONY OF ARNOLD BEVERLY, AND IN DENYING LEAVE TO FILE THE VARIOUS DECLARATIONS AND OTHER DOCUMENTS OFFERED TO EXPAND THE RECORD.**

These procedural issues are inextricably intertwined with the substantive question of Cross-Appellant Jamal's right to amend his habeas petition in order to remedy the numerous defects in the petition (including but not limited to failing to set forth an explicit claim of actual innocence) resulting from the violations of his Fourteenth Amendment right to "due process" as a result of the conflicts of interest on the part of his former counsel which subjected Mr. Jamal to a "constructive denial of counsel" under *United States v Cronin*. Cross-Appellant was entitled to the discovery to both preserve and uncover the evidence necessary to prove up the underlying claims set forth in the Proposed Amended Habeas Petition. Denial of the right to set forth these claims was the precondition for denying the right to discovery to prove them up. Yet how can a court *not* violate the Eighth Amendment and the Suspension Clause of the federal constitution where it refuses an innocent person the right to assert and prove up his or her innocence of the crime for which the person is sentenced to be executed?

**2. A COA SHOULD ISSUE FOR THE DISTRICT COURT'S DENIAL OF CLAIMS 1-4 IN THE ORIGINAL HABEAS PETITION.**

The Commonwealth entirely misunderstands and/or misrepresents Cross-Appellant Jamal's arguments as to why a COA should issue for denial of Claims 1-4, the *Brady* claims in the original habeas petition.

*Firstly*, Cross-Appellant is not arguing here that a COA should issue for Claims 1-4 in their amended version, that argument is subsumed under Point 1, above, which requests a COA

issue for the District Court's denial of the motion to amend the petition. Rather, Cross-Appellant's argument is that the evidence of his innocence, including but not limited to Arnold Beverly's confession, sufficiently proves-up these claims so as to entitle him to an evidentiary hearing on the claims, thus it was error for the District Court to summarily dismiss these claims.

*Secondly*, although Yvette Williams' declaration was not available to the District Court since she did not come forward until after the court issued its decision of December 18, 2001, Yvette Williams would have been available to testify at an evidentiary hearing with regard to these claims had the District Court set one. There was sufficient evidence before the court for it to have set an evidentiary hearing and it was error not to have done so.

*Thirdly*, the Commonwealth misses the relevance of Terri Maurer-Carter's affidavit (which is part of the District Court record in the underlying proceedings). The District Court rested its decision dismissing these claims on its deference to the "fact-finding" in the state post-conviction proceedings by Judge Sabo. However, Ms. Maurer-Carter swears that she overheard Judge Sabo make the following statement in reference to Mumia Abu-Jamal at the time of his trial: "Yeah, and I'm going to help 'em fry the nigger." Obviously, there can be no deference by the federal courts to purported fact-finding by a state court judge who has made such a statement because the judge's blatant racism, bias and prejudice would necessarily infect and deform his fact-finding to such an extent it would amount to little more than "fact-frying."

It should be emphasized that the Commonwealth presented no evidence to refute the declaration under penalty of perjury by Court Reporter Terri Maurer-Carter. An adverse inference must of necessity be drawn from this because if Ms. Maurer-Carter's statement is untrue, one would expect that the Commonwealth could readily have filed a sworn affidavit from Judge Sabo denying that he had made such a statement.

For the District Court to simply ignore such evidence of racist prejudice in the state post-conviction proceedings represents a shocking abrogation of responsibility and makes the District Court itself a party to Judge Sabo's shameful conduct. The Eleventh Circuit Court of Appeals took a much different approach to somewhat similar misconduct by a state court trial judge even though the element of explicit racial prejudice was lacking. In *Porter v Singletary*, 49 F3d 1483, 1487, n. 5 (11<sup>th</sup> Cir 1995), the case was remanded back to the District Court for an evidentiary hearing concerning a state trial judge's statement, as reported in a sworn affidavit from a court clerk, that if the prosecution obtained a guilty verdict for first degree murder he would "fry the son-of-a-bitch."

An independent review of the evidence in the record without any deference to Judge Sabo's "fact-frying" should, at a minimum, result in these claims being remanded to the District Court

with instructions to set an evidentiary hearing. Accordingly, a COA should issue.

### **3. A COA SHOULD ISSUE FOR THE DISTRICT COURT'S DENIAL OF CLAIM 11.**

This claim asserts that the District Court erred when it denied relief for Judge Sabo's violation of Cross-Appellant Jamal's Sixth and Fourteenth Amendment right to self-representation when he took the voir dire out of Mr. Jamal's hands and gave him the Hobbesian choice between having the court or his court-appointed lawyer conduct the voir dire. Despite the fact that Cross-Appellant can cite to specific language in the *McKaskle* case where the Supreme Court specifically listed the right to participate in jury voir dire as one of the core fundamental rights which a *pro se* defendant has under the Sixth Amendment right to self-representation, the Commonwealth blandly asserts that Sabo's conduct did not violate Mr. Jamal's right to defend himself.

What is the Commonwealth's legal argument to support this frankly *nonsensical* position? Actually they have none. They raise an incoherent argument *ad personem* that Cross-Appellant's counsel are supposedly guilty of the offense of "impertinent falsification of the District Court's rulings" for having dared to critique the District Court's obviously mistaken and confused ruling that jury voir dire supposedly takes place outside the presence of the jury because in *McKaskle* the voir dire of two witnesses took place outside the presence of the jury.

Here the legal rationale for the District Court's decision is not only unclear, it is opaque! How can the voir dire of the jury takes place outside the presence of the jury? With all due respect to the District Court, this makes no sense. If the rationale for the court's decision is itself a logical contradiction it must be said that the legal rationale for the court's decision is indeed unclear, unless the District Attorney wishes to argue that logic itself should be banished from the courtroom.

A COA must be issued where a District Court applied a "novel" interpretation of the law or the legal or factual rationale for its decision is "unclear." Liebman & Hertz, *supra*. Both considerations certainly apply in this case where the District Court's decision is derived from an "apples and oranges" style confusion between jury voir dire and witness voir dire and the rationale for the decision – that voir dire of the jury takes place outside the presence of the jury – is itself a logical contradiction which, as such, literally makes no sense.

### **4. A COA SHOULD ISSUE FOR THE DISTRICT COURT'S DENIAL OF CLAIM 14.**

Claim 14 asserts a violation of Cross-Appellant's rights under *Caldwell* and *Beck* when the prosecutor argued in closing statement in the innocence/guilt phase of the trial that Mr. Jamal should be convicted of murder because if he were acquitted the case would be over and there would be no way that the D.A. or

the court could do anything about it, whereas if he were convicted he would still have “appeal after appeal.”

Cross-Appellant Jamal in the pending motion presents a specific and detailed argument as to why such prosecutorial misconduct is not barred solely in the penalty phase of a capital trial but is equally reversible error in the innocence/guilt phase. The Commonwealth makes no specific reply to this argument. Rather it entirely ignores the argument and merely repeats its unjustified assertions about how *Caldwell's* application is supposedly restricted by the Eighth Amendment to the penalty phase.

But this ignores the holding in *Beck* that undermining the reliability of the guilt-determining process violates the Eighth Amendment in a capital case and, obviously, if the prosecutor can misinform the jury that they can and should give the benefit of the doubt to the prosecution on the burden of proof instead of holding the prosecution to the burden of proving every element of its case beyond a reasonable doubt, this most certainly undermines the reliability of the guilt-determining process and shifts the balance unconstitutionally in favor of the State and against the individual charged with a crime who is supposed to be presumed innocent. The inability of the District Attorney to meet this argument head on must mean that Cross-Appellant Jamal *ipso facto* meets the test of showing that “reasonable jurists” could disagree on the issue.

#### **5. A COA SHOULD ISSUE FOR THE DISTRICT COURT'S DENIAL OF CLAIM 18.**

Claim 18 alleges that Cross-Appellant's right under the Fifth and Fourteenth Amendments to a fair trial was violated when a challenge for cause of an admittedly biased white juror was denied by Judge Sabo. The Commonwealth chants by rote its mantra of “deference to the discretion of the trial judge” while it conveniently ignores the fact that a judge who states his intention in the case of a Black defendant to help the prosecution “fry the nigger” is hardly a judge whose “discretion”—exercised in such a manner as to facilitate that goal—is deserving of any deference of any kind by any court. To rule otherwise would be to make a mockery of the Fourteenth Amendment and to reconstruct the jurisprudential structure of federal habeas law as if the South rather than the North had won the Civil War. It would be to resurrect the rule of the infamous *Dred Scott* decision, that Black people in this country have no rights that any white man is bound to respect. This cannot be the law in the year 2002, over 100 years after the abolition of slavery in this country.

The Commonwealth similarly ignores Cross-Appellant's specific citations to the trial transcript to show the juror's admission of incurable bias which should have resulted in his disqualification for cause by the trial court. Since, again, the Commonwealth does not provide any counter-argument to Cross-Appellant's position, their inability to refute the argument is evidence in support of the merits of Cross-Appellant's claim for relief. Accordingly, a COA should issue.

#### **6. A COA SHOULD ISSUE FOR DENIAL OF CLAIM 29 AND THE STRIKING OF THE SUPPLEMENT TO CLAIM 29 BASED ON JUDGE SABO'S “FRY THE N\*\*\*\*\*R” REMARK.**

While the District Court simply ignores Judge Sabo's “fry the n\*\*\*\*\*r” remark, as reported by Court Reporter Terri Maurer-Carter, the Eleventh Circuit Court of Appeals took a much different approach to a somewhat similar remark by a state court trial judge even though the element of explicit racial prejudice was lacking. In *Porter v Singletary*, 49 F3d 1483, 1487, n. 5 (11<sup>th</sup> Cir 1995), the case was remanded back to the District Court for an evidentiary hearing concerning a state trial judge's statement, as reported in a sworn affidavit from a court clerk, that if the prosecution obtained a guilty verdict for first degree murder he would “fry the son-of-a-bitch.” As the Eleventh Circuit notes in that opinion, citing *Marshall v Jericho*, 446 US 238 (1980), “a fundamental tenet of due process is a fair and impartial tribunal.” 49 F3d at 1487. The circuit court in *Porter* also emphasizes that “the impartiality of the judiciary is the most central concept of the [Judicial] Canons of Ethics.” 49 F3d at 1489, n. 11. It most certainly violates due process for a trial or post-conviction judge in the case of an African-American defendant to announce in ugly racist terms his intention to “help ‘em” (i.e., the District Attorneys Office) “fry” (i.e. execute) the “n\*\*\*\*\*r.”

Cross-Appellant Jamal has cited the District Court itself which noted in its Opinion denying in part and granting in part the underlying habeas petition that the issue of whether federal habeas reaches “due process” violations in state post-conviction proceedings is *open* in both the Third Circuit and the United States Supreme Court and, although Cross-Appellant's position on this issue is supported by the minority line of authority in the circuit courts of appeal, it is the law in at least one circuit court, the First Circuit, pursuant to *Dickerson v Walsh*, 750 F2d 150 (1<sup>st</sup> Cir 1984).

Where an issue is open in the United States Supreme Court or in the Circuit Court of Appeals in which a particular appeal on that issue is taken, a COA must issue. *See, e.g., Lynce v Mathis*, 117 S Ct at 893; 2 Liebman & Hertz, *supra*, at 1448, Sec. 35.4c. And where the same or similar issue has been resolved favorably to a petitioner in another circuit court of appeals, a COA must issue because it is proven *ipso facto* under such circumstances that “reasonable jurists could differ” as to that issue. *Lozada v Deeds*, 498 US 430 (per curiam); *Guti v INS*, 908 F2d 495 (9<sup>th</sup> Cir 1990).

Moreover, the District Court ignores the fact that the evidence of specific racial bias relates back to 1982, the time of Cross-Appellant Jamal's original trial. There is no question that federal habeas reaches “due process” violations in first instance proceedings.

Furthermore, even if the District Court's “relation back” analysis was correct, the claim in the Supplement to Claim 29

would be cognizable now under the AEDPA. It would be a new claim, the factual predicate for which could not have been discovered by Cross-Appellant Jamal until Terri Maurer-Carter first approached Cross Appellant Jamal's present attorneys in August, 2001.

### CONCLUSION

For the foregoing reasons, Cross-Appellant's Motion to Certify Additional Issues for Appeal should be granted.

---

Dated: March 11, 2002

Respectfully submitted,

MUMIA ABU-JAMAL  
SCI Greene, No. AM8335  
175 Progress Drive  
Waynesburg, PA 15370-8090

Cross-Appellant

NICK BROWN  
Barrister-at-Law  
4 New Square, Lincoln's Inn  
London WC2A 3RJ, United Kingdom  
011-44-207-822-2000

MARLENE KAMISH  
Attorney-at-Law  
P.O. Box 08376  
Chicago, IL 60608  
(312) 455-0766

ELIOT LEE GROSSMAN  
Law Office of Eliot Lee Grossman  
La Rotunda Building  
248 East Main Street, Suite 100  
Alhambra, CA 91801  
(626) 943-1945

Attorneys for Cross-Appellant Mumia Abu-Jamal

J. MICHAEL FARRELL  
Attorney-at-Law  
718 Arch Street, Suite 402 South  
Philadelphia, PA 19106  
(215) 925-1105

Local Counsel

### ENDNOTES

<sup>1</sup>The Commonwealth chooses to make this the opening contention of its entire Memorandum in opposition to Cross-Appellant's Motion to Certify Additional Appellate Issues.

<sup>2</sup>Records show that Phillip Bloch was fired by the Pennsylvania Prison Society a year earlier for repeated violations of its procedures.

<sup>3</sup>Phillip Bloch's letter to Cross-Appellant Jamal, July 17, 1993 (Appendix "D").

<sup>4</sup>Although the District Court cites Judge Sabo's PCRA Opinion at pp. 86-87 to the effect that witness Albert Magilton (allegedly) identified Cross-Appellant Jamal as the "perpetrator" of the crime, a review of the actual trial transcript reveals that this description of Magilton's testimony is inaccurate and misleading as Magilton only testified to having seen Cross-Appellant walk half-way across the street, losing sight of Cross-Appellant, and then later seeing Cross-Appellant sitting down at the curb. Magilton did not see the shooting and, therefore, could not have identified Cross-Appellant, or anyone else, as the "perpetrator." (Tr. 6/25/82: 8.75-8.81; 8.88-8.89)

<sup>5</sup>Arnold Beverly, Marcus Cannon, William Singletary and even Robert Chobert (6/21/82; 267) all state that police officers, who have never been identified, were present when Police Officer Faulkner was shot. Cross-Appellant Jamal himself was shot by a uniformed officer as he first approached the scene after Police Officer Faulkner had been killed. If police officers were present when Officer Faulkner was killed, then they must have been there as part of the plot to kill him.

<sup>6</sup>It is the Commonwealth, and not Cross-Appellant Jamal, who misstates the evidence.

<sup>7</sup>Newman also states that he reported Chobert's recantation to Chief Counsel Leonard Weinglass, but Weinglass never asked Chobert about it when he called Chobert as a witness in the 1995 post-conviction hearings. The District Court struck Mike Newman's declaration from the record and then denied Cross-Appellant's motion for leave to file the declaration.

<sup>8</sup>As for the other putative witnesses, Albert Magilton testified that he did not see the shooting. He claimed to have seen Cross-Appellant Jamal crossing the street, but then lost sight of him until he later saw him sitting on the curb. Even this identification is questionable as Magilton was brought by the police to identify Mr. Jamal as he was lying in the back of the police wagon after his arrest. This procedure was obviously grossly improper, tainted and flawed. Moreover, Arthur Magilton had a cousin who was a police officer and an uncle who had been a Chief Inspector in Homicide.

The rest of Albert Magilton's testimony is perfectly consistent with Arnold Beverly's testimony. The figure whom Albert Magilton saw in the area of the parking lot and starting to cross Locust was walking. This figure was not doing anything to cause Albert Magilton to turn round to see what he was going to do next, or to pay any particular attention to him, because Albert Magilton carried on crossing the street (6/25/82; 8.87). This figure was about 75-80 feet away (6/26/82; 8.100) from Albert Magilton and it was nearly 4 am. At best, Albert Magilton could only have got a very passing impression of this figure. It is more than likely that the man Magilton saw crossing the street was actually Arnold Beverly and not Cross-Appellant Jamal. In 1995, Albert Magilton wrongly described "Cross Appellant Jamal" as wearing a green army field jacket to a defense investigator. Yet,

this is precisely what Arnold Beverly says that he was wearing, whilst Property Receipt 854920 establishes beyond peradventure that Cross Appellant Jamal was wearing a red and blue quilt waist length jacket.

Highly significantly, Michael Scanlon did *not* identify Cross-Appellant Jamal as the man who ran across the street or the man who shot Police Officer Faulkner (6/25/82; 8.46). When he was asked to perform a back of the police wagon identification, Michael Scanlon thought that Cross-Appellant Jamal was the man who had been driving the Volkswagen (and therefore not the person who shot Police Officer Faulkner) (6/25/82; 8.46). Moreover, his testimony to the effect that the person who shot Police Officer Faulkner came across the street from the parking lot on the north side of Locust is, again, perfectly consistent with Arnold Beverly's testimony. The person Michael Scanlon saw crossing the street was Arnold Beverly.

The Commonwealth's belated attempt to revive and try to breathe life into the corpse of Robert Harkins's testimony now could not be a clearer indication of the extent to which the Commonwealth are now forced to try and scrape the evidential barrel. Robert Harkins was interviewed by the police in December 1981. He said nothing to incriminate Cross Appellant Jamal in any way. Accordingly, he was not called by the Commonwealth as a witness at the original trial. At the 1995 PCRA hearing, he was called as a witness by the Defense in an attempt to prove up a *Brady* violation. The decision to put him on the stand was made on the basis of an affidavit which he had given to a defense investigator in January 1994. He did not come up to proof. Following a visit by two detectives in July 1995, Robert Harkins refused to speak to Cross-Appellant Jamal's prior attorneys before he was put on the stand at the 1995 PCRA hearing. What he said in 1995 about what he saw in 1981 is demonstrably false.

<sup>9</sup>The Commonwealth itself describes this bullet as either a .38 special or a .357 magnum. Even assuming this to be an accurate description (the medical examiner had previously identified it as a .44 magnum) what the Commonwealth fails to mention is that a .357 magnum cartridge is longer than a .38 special cartridge in order to accommodate the additional gunpowder which gives the .357 magnum round more stopping power than the .38, and which also makes it impossible to load a .357 magnum round into a .38 special revolver because the .357 round is too long to fit into the chamber and the cylinder will not close with the round sticking out. If this bullet was from a .357 magnum round it could not have been fired from Cross-Appellant's .38 special revolver. Interestingly, several of the police officers who were at the crime scene were from the "stake-out" unit whose standard weapons were .357 magnum revolvers.

<sup>10</sup>See Petitioner's Motion for Reconsideration of the Memorandum and Order Dated 19<sup>th</sup> July 2001, Appendix B to the Instant Motion, Paragraphs 128 to 137.

<sup>11</sup>The Weinglass letter is attached as an exhibit to the state post-conviction petition filed by Mr. Jamal's present counsel on July 3, 2001, and which is itself attached as an exhibit to the Notice of Filing of State Post-Conviction Petition which was filed in the District Court in the proceedings underlying this appeal.

<sup>12</sup>The District Court wrongly struck the complete set of the written memoranda prepared by and for and on behalf of Cross-Appellant Jamal's prior attorneys in 1999 assessing the credibility of Arnold Beverly's confession and the impact of his confession on this case, which were filed with the District Court in

November 2001 under a motion to file further evidence in support of the motion to file the re-drafted and amended habeas petition (Doc # 135). These memoranda prove that, at the very time when attorney Weinglass and attorney Williams were giving Cross-Appellant Jamal an ultimatum that they would resign from his legal team if Arnold Beverly's confession was presented to the court, attorney Weinglass and attorney Williams knew that, with Arnold Beverly's testimony, they could prove that the Petitioner was innocent and did not shoot Police Officer Faulkner. These memoranda therefore prove attorney Weinglass and attorney Williams' conflict of interest. For, in the light of these memoranda, there can be, for them, no innocent explanation for why Arnold Beverly's confession was not presented to the court in June 1999. These memoranda prove that, when attorney Weinglass and attorney Williams told Cross-Appellant Jamal that using Arnold Beverly's confession would damage his case, they were being dishonest. These memoranda prove that attorney Williams attempt to rubbish Arnold Beverly's confession in his book, *Executing Justice*, was dishonest and that the motivation behind attorney Williams' writing of this book and attorney Weinglass' involvement and complaisance in the project was their conflict of interest and their ruthless desire to protect their own necks, even if it meant that Cross-Appellant Jamal lost his own.

These memoranda also demonstrate the many and various ways in which the existing evidence, both on the record and outside the record, substantiates Arnold Beverly's confession and proves his reliability as a witness. They show how Arnold Beverly's confession finally provides an explanation for so many of the hitherto unexplained and, indeed, otherwise inexplicable aspects of and evidence in this case. They also begin to demonstrate the devastating impact which Arnold Beverly's evidence had on every single limb of the prosecution case constructed against Cross-Appellant Jamal. Taken individually, they all point to the same conclusion; taken together, their cumulative weight is inexorable.

But what really stands out is that, in all of these memoranda, not a single one of them is negative. Cross Appellant Jamal's present attorneys have not discovered in the files of his former counsel *any* memorandum by attorney Weinglass or attorney Williams responding to or disagreeing with these memoranda, or setting forth any reasons to believe that Arnold Beverly is not a credible witness or that his confession in declaration form is false. Indeed, quite the opposite. For instance, on page 3 of attorney Weinglass' copy of Richard Genova's memorandum "Shooting Scenario and New Evidence" dated 11<sup>th</sup> May 1999 in the Section entitled "New Information Better Fits Events Than Sabo's and PA Supreme Court's Findings", attorney Weinglass has scribbled in the margin the words "Suggests M[umia] shot by another

<sup>13</sup>The Commonwealth also fails to mention why Cross-Appellant Jamal fired Weinglass and Williams in March, 2001. Cross-Appellant Jamal acted within days of receiving a proof copy of Williams' extraordinary book, *Executing Justice*, and learning that Weinglass was proposing to do nothing to prevent publication. *Executing Justice* purports to be an inside account of Cross-Appellant Jamal's case. The best that can be said of it is that it was written in complete disregard of Williams and Weinglass' rules of professional conduct in both state and district court and of the fiduciary duty of loyalty which they owed to their client. The truth, however, is much worse. It is a skilfully woven tissue of lies which was written with intention of stifling at birth any form of inquiry into the veracity of Arnold Beverly's

confession, let alone a full blown investigation into the Cross-Appellant Jamal's irresistible case on actual innocence, together with the reasons why Weinglass and Williams had buried this evidence and otherwise generally undermined his case throughout the whole nine years when they had acted as Cross-Appellant Jamal's attorneys.

<sup>14</sup>In the context of its consideration of Cross-Appellant Jamal's motion to amend the petition to add Claims 32-39, the District Court accepted, correctly, that in the absence of an evidentiary hearing, it had to proceed on the assumption that these conflicts of interests would be made out.

<sup>15</sup>Moreover, the Commonwealth wrongly asserts that the AEDPA limits the issuance of a COA to violations of the federal constitution only. However, Liebman & Hertz explain that the law is to the contrary: "AEDPA does not purport to alter the federal courts' habeas jurisdiction over 'violation[s] of the Constitution or laws or treaties of the United States' or in any way to amend the preexisting jurisdictional statutes. [citing *inter alia Felker v Turpin*, 518 US 651, 658-664 (1996)] ... For reasons that are not readily apparent – or, more probably, as a result of careless drafting – ... [certain] provisions at times refer to violations of all types or 'Federal right[s] or to all types of 'claim[s]' cognizable in habeas corpus, but at other times refer only to ... violations of 'constitutional right[s]' or to 'constitutional' error. The haphazard – and, at times, downright arbitrary – nature of the discrepancies among these provisions, and between them and the habeas corpus statutes' unamended jurisdictional provisions, should make courts think twice, even in an era of 'plain meaning' statutory interpretation, before placing too much emphasis on their nuances." 1 Liebman & Hertz, 403, Sec. 9.1.

<sup>16</sup>2 Liebman & Hertz, Federal Habeas Practice and Procedure (3<sup>rd</sup> ed 1995), 1444, Sec. 35.4c, and accompanying footnote, citing *Barefoot v Estelle*, 463 US 880, 893 n. 4, 894 (1983) and numerous other authorities.

<sup>17</sup>When "an applicant challenges the district court's dismissal for a reason not of constitutional dimension - here, application of the post-AEDPA statutory limitations period - the petitioner must first make a credible showing the district court erred" in its decision on the procedural issue; "if such a showing of error is made ... the court [of appeals will] ... consider whether the prisoner has made a substantial showing of the denial of a constitutional right on the underlying claims" *Sonnier v. Johnson*, 161 F. 3d. 941, 943-44 (5<sup>th</sup> Cir. 1998); *Davis v Johnson*, 158 F. 3d. 806, 809 (5<sup>th</sup> Cir. 1998); *Whitehead v. Johnson*, 157 F. 3d. 384, 386-88 (5<sup>th</sup> Cir. 1998).

<sup>18</sup>513 US 298 (1995).

<sup>19</sup>The dismissal of the post-conviction petition is presently on appeal before the Pennsylvania Supreme Court, *Commonwealth v Jamal*, Capital Appeal Docket No. 364.

<sup>20</sup>Claim 39 sets forth 10 specific underlying claims of ineffective representation by appellate counsel which were never raised by prior counsel due to their conflicts of interest.

Each of these underlying claims is itself of constitutional dimensions.

<sup>21</sup>The Commonwealth misses the point of Cross-Appellant's argument that the AEDPA, by delegating to the states the front-line defense of federal constitutional rights through the exhaustion doctrine, and by deferring to state court fact-finding, must necessarily presume that state court proceedings to review alleged violations of the federal constitution will conform to basic federal requirements of "due process of law" under the Fourteenth Amendment. If these procedures are unfair or unjust, how can the states properly carry out their responsibility to safeguard federal constitutional rights?