

**IN THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA
EASTERN DIVISION**

COMMONWEALTH,)	
)	Capital Appeal Docket No. 364 CAP
Appellee,)	
)	
-vs-)	
)	
MUMIA ABU-JAMAL.)	
)	
Appellant.)	

**APPELLANT JAMAL’S MOTION FOR REMAND
TO TAKE TESTIMONY OF JUSTICE RONALD D. CASTILLE.**

COMES NOW Appellant Mumia Abu-Jamal and hereby moves this Court for an Order remanding this action to the Court of Common Pleas to take testimony from and/or depose Justice Ronald D. Castille with regard to his responsibility for the Jack MacMahon videotape on Jury Selection, produced by the Philadelphia District Attorney’s T.V. Productions Department (“DATV Productions”) and bearing the name and title “Ronald D. Castille, District Attorney” and the official seal of the City of Philadelphia, and in support thereof alleges and says as follows:

1. Attached hereto and incorporated herein by reference as EXHIBIT “A” is a true and correct copy of the first two frames of the Jack MacMahon videotape on Jury Selection. Frame 1 bears the official seal of the City of Philadelphia, the name and title “Ronald D. Castille, District Attorney,” and identifies the videotape as having been produced by the District Attorney’s television productions department “DATV Productions.” Frame 2 identifies the videotape as “Jury Selection by Jack MacMahon.”

2. Attached hereto and incorporated herein by reference as EXHIBIT “B” is the Jack MacMahon videotape itself.

3. Attached hereto and incorporated herein by reference as EXHIBIT “C” is the caption page of the Commonwealth’s brief on direct appeal in Mr. Jamal’s case in which Ronald D. Castille, District Attorney, is listed as counsel of record for the Commonwealth along with various of his underlings.

4. The MacMahon videotape recorded a training session for Assistant District Attorneys in the Philadelphia District Attorneys Office in 1986 on how to exclude African-Americans from juries during criminal trials by, inter-alia, the use of peremptory challenges during jury selection, and how to conceal the discriminatory purpose and intent of removing such persons from juries because of their race.

5. In 1997, Appellant’s prior counsel, while his case was under submission to this Court on appeal of denial of post-conviction relief, moved the court for a remand to supplement his *Batson* claim with the MacMahon videotape and to conduct discovery with regard to the same. The Commonwealth, represented by the District Attorneys Office, opposed that motion, claiming inter-alia that the videotape was produced by MacMahon and represented his personal views and not those of the District Attorneys Office.¹ This Court denied the remand motion. *Commonwealth v Abu-Jamal*, 720 A2d 79, 86 (Pa. 1998).

¹The Commonwealth, by the District Attorneys Office, took the same position with regard to the MacMahon tape in the federal habeas proceedings.

6. However, during this Court's consideration of Appellant's remand motion, referenced above, Justice Castille did not disclose on the record to counsel for the parties or to the Court his own conflict of interest in ruling on that motion given that his name and title as District Attorney appeared in the first frame of the videotape and that the tape was produced by the District Attorney's television productions department when he was District Attorney.² There is no indication in the record that Justice Castille recused himself from voting to deny the remand motion.

7. The Petition for Post-Conviction Relief and/or Writ of Habeas Corpus which forms the basis for this appeal includes a claim for relief based upon *Batson v Kentucky*, 476 US 79 (1986). That is the Ninth Claim for Relief, Subpoint 7, set forth in the aforesaid Petition at pp. 199-210, paragraphs 664-697, which alleges that it was ineffective assistance by appellate counsel on direct appeal not to have raised the violations of *Batson* which occurred when Judge Sabo and Assistant District Attorney McGill colluded to remove juror Dawley, a Black woman, from the jury because of her race. The MacMahon videotape was obviously an immediate response to *Batson* by the Philadelphia District Attorneys Office during the Castille Administration, but its purpose was to subvert the United States Supreme Court's decision rather than to comply with it.

8. The MacMahon videotape provides additional evidence to prove-up a *prima facie* case of the District Attorney's discriminatory intent in removing Ms. Dawley from the jury because of her race. The videotape proves that the District Attorneys Office (under the tutelage of then District Attorney Ronald D. Castille) had a practice and procedure post-*Batson* (and post-Mr. Jamal's trial) of using peremptory challenges to take Blacks off juries because of their race which was an obvious continuation of the similar pre-*Batson* (and pre-Castille) practice of the District Attorneys Office which had been noted in numerous court decisions in that period. *See, e.g., Diggs v Vaughn*, 1991 US Dist LEXIS 3945, *4 (EDPA 1991)(District Court rested

its reversal of a conviction under *Batson*, in part, on the Magistrate's findings which were based, in part, on "testimony of attorneys familiar with practices in the Philadelphia courts during the relevant period [the defendant's trial was in 1977], to the effect that assistant district attorneys routinely sought to exclude blacks from criminal juries."); *Commonwealth v. Jones*, 246 Pa. Super. 521, 522-24, 371 A.2d 957, 958 (1977) (Philadelphia District Attorney's office excluded all 22 African Americans from jury -- 8 for cause and 14 by use of peremptory challenges, exercising only one peremptory challenge against white jurors; no Swain violation because "the presumption that the prosecutor exercised his peremptory challenges in a proper manner is only overcome where the defendant produces evidence that in case after case the prosecutor, regardless of the circumstances, is responsible for the removal of all blacks from every jury."); *Commonwealth v. Fowler*, 259 Pa. Super. 314, 318, 393 A.2d 844, 846 (1978) (en banc) (Philadelphia District Attorney's office exercised peremptory challenges to exclude all black jurors; no Swain violation because no evidence of "systematic exclusion of Blacks by the State"); *Commonwealth v. Green*, 264 Pa. Super. 472, 473-75, 400 A.2d 182, 183-84 (1979) (Philadelphia District Attorney's office exercised 17 peremptory challenges to exclude blacks from jury; no Swain violation because no evidence presented "showing a pattern of discrimination"); *State v. Anderson*, 302 Pa. Super. 457, 464-65, 448 A.2d 1131, 1134-35 (1982) (rejecting claim that Philadelphia District Attorney's office exercised peremptory challenges solely on the basis of race to empanel a jury of 10 whites and 2 blacks; record "clearly does not demonstrate the kind of systematic exclusion in case after case of all black jury members" the court believed was necessary to prove Swain violation); *State v. Edney*, 318 Pa. Super. 362, 371, 464 A.2d 1386, 1390-91 (1983) (in November Term, 1979, case, Philadelphia District Attorney's office exercised its peremptory challenges to exclude all blacks from the jury; no Swain violation because "the mere proof that all Blacks are excluded in a particular case, which is the extent of appellant's proof, is

²If Appellant's former Chief Counsel Leonard Weinglass and former Chief Legal Strategist Daniel Williams knew that "Ronald D. Castille, District Attorney" appeared in the first frame of the MacMahon videotape with the seal of the City of Philadelphia and the designation "DATV Productions," but did not bring this to the attention of the Court, this is additional evidence of their myriad and profound conflicts of interest which form the basis for a number of the jurisdictional arguments raised on behalf of Appellant in this appeal.

not enough to overcome" the presumption that the prosecution's use of peremptory challenges "was to obtain an objective and impartial jury"; "prejudicial exclusion of individuals from the jury . . . does not amount to a denial of equal protection of the laws"); *Harrison v. Ryan*, 909 F.2d 84 (3d Cir. 1990) (in non-capital case tried in September 1982, the Philadelphia District Attorney's office exercised 6 of 8 peremptory challenges to strike black venire persons); *Diggs v. Vaughn*, 1990 WL 117986, *1 (E.D. Pa. Aug. 8, 1990) (in 1977 murder prosecution, Philadelphia District Attorney's office exercised 15 of 20 available peremptory challenges, employing 14 to strike prospective black jurors and 1 to strike a prospective Puerto Rican juror); *McKendrick v. Zimmerman*, 1990 U.S. Dist. LEXIS 12223 (E.D. Pa. Sept. 12, 1990) (in 1978 murder prosecution, Philadelphia District Attorney's office peremptorily challenged 4 of 5 prospective black jurors, and challenged the fifth for cause).

9. There is no evidence that District Attorney Ronald D. Castille took any action to countermand or reverse the practice and procedure of the District Attorneys Office in using peremptory challenges to take Blacks off juries because of their race. To the contrary, the MacMahon videotape proves that during his administration District Attorney Castille continued the discriminatory policies of his predecessors.

10. When Justice Castille was District Attorney the brief bearing his name filed in Mr. Jamal's direct appeal opposed the *Batson* claim on the basis that no *prima facie* case had been proved. The MacMahon videotape was produced by the District Attorneys Office in 1986 during Mr. Castille's administration and while Mr. Jamal's appeal was under submission to this Court. District Attorney Castille never advised the Court of the existence of the MacMahon videotape and its possible impact on the appeal in proving up the discriminatory intent of the District Attorneys Office in using its peremptory challenges to take Blacks off Mr. Jamal's jury.

11. When this Court denied Mr. Jamal's appeal of denial of post-conviction relief in 1998, and denied his *Batson* claim on the basis that no *prima facie* case had been established, Justice Castille voted in favor of that decision without disclosing to the parties or the Court the evidence of the MacMahon videotape which bears his own name as District Attorney at the time it was produced by DATV

Productions – evidence which would have proved-up the *prima facie* case – and without disclosing his own conflict of interest in adjudicating the *Batson* claim.

12. In addition to the *Batson* claim set forth in the Ninth Claim for Relief of the Petition for Post-Conviction Relief and/or Writ of Habeas Corpus which underlies this appeal, Appellant Jamal moved the Court of Common Pleas to amend the Petition to include a claim for relief based upon Judge Sabo's statement at the time of trial, with reference to Mr. Jamal, that he was "going to help 'em fry the nigger." The Commonwealth failed to present any evidence to dispute the veracity of Court Stenographer Terri Maurer-Carter's declaration under penalty of perjury in which she recounted having heard the statement. Judge Sabo never denied under oath having made the statement. Justice Castille, as a member of this Court, is now in the position of adjudicating this claim with regard to how Judge Sabo's racism irreparably contaminated both Mr. Jamal's trial and the subsequent post-conviction proceedings over which he presided; yet Justice Castille himself has his name, as District Attorney, on the MacMahon videotape in which Assistant District Attorneys are specifically instructed in how to discriminate against Black people by using peremptory challenges to keep them off the jury.

13. Under all of the above circumstances, it is both appropriate and necessary to authorize the taking of testimony under oath from Justice Castille, in the Court of Common Pleas and/or by deposition, to determine the extent to which he is responsible for the production, utilization, and distribution of the MacMahon videotape by the District Attorneys Office when he was Philadelphia District Attorney; to what extent, if any, he took any action to reverse the practice and procedure of the District Attorneys Office – well documented in numerous court decisions – to discriminate against Black people by using peremptory challenges to remove them from juries; whether he can impartially adjudicate this appeal, in which both a *Batson* claim and a claim of racial prejudice against the trial and post-conviction judge are involved; and whether he can impartially adjudicate this appeal on behalf of Mumia Abu-Jamal, a prominent Black political activist and former member of the Black Panther Party, wrongfully convicted of killing a white police officer.

14. Each of the above issues is inextricably intertwined

with the jurisdictional issue in this appeal in that one of the grounds upon which jurisdiction is asserted is the *exceptional circumstances* and *grave miscarriage of justice* involved in this case which both permit and require the courts to exercise their inherent power to reach the merits of Appellant Jamal's claims for relief, as briefed in the Court of Common Pleas and as will be briefed at the appropriate time herein. Among these exceptional circumstances which involve a grave miscarriage of justice is the racial prejudice and discrimination which contaminated Appellant Jamal's trial, on the part of judge and prosecutor during the jury selection process and as particularly exemplified in the manner in which Ms. Dawley, a Black woman, was removed from the jury, without a hearing, and replaced by a biased white juror who admitted he could not give Mr. Jamal a fair hearing, and as grotesquely manifested by Judge Sabo's "fry the nigger" remark in which he explicitly made clear his intention to work hand-in-hand with the prosecution to convict and execute Mr. Jamal *because he is Black*. It is Justice Castille's impartiality in adjudicating these precise issues which is specifically at issue with regard to his responsibility for the MacMahon videotape.

CONCLUSION

For the foregoing reasons it is respectfully requested that this motion be granted and that this action be remanded to the Court of Common Pleas to take testimony under oath and/or authorize the deposition of Justice Ronald D. Castille.

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EXHIBIT "A"

[FRAME 1 & FRAME 2: MACMAHON VIDEOTAPE]

EXHIBIT "B"

[MACMAHON VIDEOTAPE-ATTACHED
TO ORIGINAL PLEADING ONLY]

EXHIBIT "C"

[CAPTION PAGE OF COMMONWEALTH
BRIEF ON DIRECT APPEAL]

Dated: May 17, 2002

Respectfully submitted,

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

Appellant

NICK BROWN
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 Appellant Mumia Abu-Jamal

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

Local Counsel for Appellant Mumia Abu-Jamal

By: _____
J. MICHAEL FARRELL
Attorneys for Appellant