

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

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

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**PETITIONER JAMAL’S MEMORANDUM OF LAW IN  
SUPPORT OF COURT’S JURISDICTION TO HEAR HIS  
PCRA/ HABEAS PETITION ON THE MERITS.**

*“Yeah, and I’m going to help ‘em fry the n\*\*\*\*r.”  
– Judge Sabo<sup>1</sup>*

**INTRODUCTION**

Petitioner Mumia Abu-Jamal has been imprisoned for 20 years and is awaiting execution for a crime he did not commit. Another man, Arnold Beverly, has confessed to the crime and exonerated Petitioner Jamal. Shocking evidence has just now surfaced of racist prejudice against Mr. Jamal and connivance with the prosecution by the trial and post-conviction judge, Albert Sabo, providing what is now overwhelming proof that Mr. Jamal did not receive a fair trial or fair post-conviction hearing.<sup>2</sup>

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

These conflicts of interest provide the factual basis on which Petitioner Jamal’s case fits squarely within two of the statutory exceptions to the PCRA’s one-year filing requirement: the “governmental interference” exception (Sec. 9545(b)(1)(i)) and the “undiscoverable factual predicate” exception (Sec. 9545(b)(ii)). In ruling on the jurisdictional issue in the manner in which the court intends to do at this juncture – just as in ruling on a demurrer or motion to dismiss – the court must assume that the allegations in the Petition are true. *Balsbaugh v. Rowland*, 447 Pa. 423, 426, 290 A2d 85, 87 (1972). Should the court not make this assumption, then it must order a full evidentiary hearing in order to sort out any disputed jurisdictional facts and cannot rule based solely upon the pleadings or other items on file.<sup>3</sup> Petitioner specifically requests an evidentiary hearing.

The full “inside story” of how the treachery of Petitioner Jamal’s prior counsel made it necessary for his new counsel to

initiate these proceedings cannot be properly or adequately told within the confines of the procrustean bed of a 15-page legal memorandum.<sup>4</sup> Accordingly, the court cannot read this memorandum in isolation, but must read it in the context of the entire 274-page Petition, the affidavit of attorney Rachel Wolkenstein, and the other documents and things filed on behalf of Petitioner in this action. It is there that the factual details are told of how Messrs. Weinglass and Williams suppressed the evidence of Petitioner’s innocence and buried his meritorious legal claims for relief.<sup>5</sup>

The Pennsylvania Post-Conviction Relief Act specifically defines its scope as follows: “This subchapter provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief.” 42 Pa.C.S.A. Sec. 9542. The plain language of the statute indicates that the intent of the Legislature in enacting the PCRA was to provide that such persons *may obtain collateral relief*. However, Respondent Commonwealth of Pennsylvania misinterprets the PCRA’s purpose as being to *deny* relief to persons like Petitioner Jamal, who have been wrongly convicted of crimes they did not commit, and to preclude this court from even considering the evidence which proves his innocence. According to Respondent, it is “too late” for Petitioner Jamal’s innocence to matter to this court.

This cannot possibly be the law. The Commonwealth of Pennsylvania cannot straight-jacket its courts from acting to remedy such a macabre and grotesque injustice as would occur if the State itself were to commit murder by knowingly executing an innocent person. “[N]o civilized society could tolerate” a judicial system that would allow such a “miscarriage of justice” to occur.<sup>6</sup> Even if the PCRA’s one-year deadline were applicable to the pending Petition (which it is not), and even if the statutory exceptions were not available in this case (which they are), this court would still have the inherent power to hear Petitioner Jamal’s claims on the merits:

*“[N]o matter where or how the chains of his captivity were forged – the power of the judiciary of this state is adequate to crumble them to dust, if an individual is deprived of his liberty contrary to the law of the land”* *Commonwealth ex rel. Webster v. Fox*, 7 Pa.336, 338 (Pa. 1847).

**I. THIS PETITION FITS SQUARELY WITHIN TWO OF THE STATUTORY EXCEPTIONS TO THE PCRA’S ONE-YEAR FILING DEADLINE.**

The grotesque and all-pervading conflicts of interest which infected attorneys Weinglass’ and Williams’ representation of Petitioner Jamal from its inception (detailed at pp. 1-12, 26-47 of the Petition, and whose devastating impact is thoroughly explained in the remainder of the Petition, all of which allegations are incorporated herein by reference), irrevocably perverted the adversary process in this case and demolished the foundation stone of the constitutional guarantee of “due process” in Article 1, Section 9 of the Pennsylvania Constitution and the 14<sup>th</sup> Amendment to the U.S. Constitution.

It is these facts concerning Weinglass’ and Williams’ conflicts of interest which provide the factual predicate underlying Petitioner Jamal’s claims for relief which could not have been known previously by Petitioner because they were undisclosed and ruthlessly and skillfully concealed from him by Messrs.

Weinglass and Williams. Since it is the attorney's duty to disclose a conflict of interest to the client, these facts could not have been known to Petitioner Jamal as a matter of law so long as attorneys Weinglass and Williams represented him. It is these facts which also demonstrate, as alleged in the Petition, that Weinglass and Williams, in function if not in fact, were acting at all times as *agents* of the District Attorney in suppressing Arnold Beverly's confession and failing to put forward the other claims and evidence set forth in the pending Petition. Thus, under *respondeat superior* the actions of Messrs. Weinglass and Williams are attributed to the Commonwealth and thereby constitute "governmental interference" with the presentation of Petitioner Jamal's claims, even though attorneys Weinglass and Williams themselves may not be "government officials" within the meaning of the PCRA.

Respondents continue their efforts to obfuscate the facts by improperly putting before the court Daniel Williams' mendacious *fictionalized* account of Petitioner Jamal's case in his book, *Executing Justice*. Williams' scribbles are *not* under penalty of perjury and are inadmissible hearsay; the book was published in flagrant violation of Rule 1.8 of the Pennsylvania Rules of Professional Conduct; therefore, it would be wholly improper for the court to consider its contents to be evidence in these proceedings. The District Attorney's assertions that "the book" was published with Petitioner's permission are false, irrelevant, and unsupported by any evidence. Petitioner never gave permission to attorney Williams to publish that book. Petitioner filed a federal lawsuit against both Williams and his publisher in an attempt to thwart publication.<sup>7</sup> Additionally, no client could give his or her attorney "permission" to violate the Rules of Professional Conduct.

The passage in *Executing Justice* with which the District Attorney seeks to slam the courthouse door in Petitioner Jamal's face was intentionally designed by its author, Mr. Williams, for precisely such "pre-emptive strike" purposes, as attorney Weinglass himself admits: "He [attorney Dan Williams] also unbelievably goes into the witness [Arnold Beverly] who we blocked from coming forward (I really objected to this since it has not surfaced; Dan thinks it will and this is a pre-emptive strike)."<sup>8</sup>

It is hardly surprising that the District Attorney has assiduously avoided discussing the manifold conflicts of interest by Petitioner Jamal's prior counsel, since it is firmly established in Pennsylvania law that "the mere existence of such a conflict vitiates the proceedings." *Commonwealth v. Cox*, 441 Pa. 64 (1970). In *Commonwealth v. Wright*, 374 A2d 1272, 1273 (Pa. 1977), the Pennsylvania Supreme Court held that even "an appearance of a conflict of interest" was sufficient to threaten the "duty of zealous advocacy" by counsel representing a post-conviction petitioner on ineffective representation claims against his trial and appellate attorney who worked in the same office. The *Wright* Court ordered a remand for appointment of a different attorney. Numerous other such cases indicate that there is a well-established right to conflict-free representation in post-conviction proceedings. *See, e.g., Commonwealth v. Sherard*, 384 A2d 234 (Pa. 1977); *Commonwealth v. Fox*, 383 A2d 199 (Pa. 1978); *Commonwealth v. Lutz*, 397 A2d 787 (Pa. 1979); *Commonwealth v. Hughes*, 457 A2d 541 (Pa. Super. 1983); *Commonwealth v. Torres*, 721 A2d 1103 (Pa. Super. 1998) (applying *Wright*). In *Commonwealth v. Balenger*, 704 A2d 1385 (Pa.

Super. 1997), this rule was extended to conflicts of interest on the part of a prosecutor whose affair with the ex-girlfriend of a defendant deprived him of the right to a conflict-free prosecution.

All the cases cited by the Commonwealth suffer from the same distinguishing characteristic, none involves a "constructive denial of counsel" under *United States v. Cronin*, 466 US 648, 656 (1984), arising from such flagrant and deleterious conflicts of interest by counsel as in Petitioner Jamal's case, rather the cases cited by the District Attorney are "mere ineffectiveness" cases under *Strickland v. Washington*, 466 US 668 (1984). As the Third Circuit noted in *Appel v. Horn*, 250 F3d 203, 221 (2001), the distinction between "constructive denial of counsel" and "ineffectiveness of counsel" is a crucial distinction of which the District Court, in that case was, and in this case the court should be "acutely aware."

#### **A. THE PETITION IS WITHIN THE "GOVERNMENTAL INTERFERENCE" EXCEPTION.**

Section 9545(b)(1)(i) of the PCRA creates an exception to the one-year filing deadline where "interference by government officials" is responsible for the failure to previously raise a claim. Section 9545(b)(4) excludes "defense counsel" from the definition of "government officials." However, Section 9545(b)(4) has no application to the facts of this case because: (1) Petitioner does not allege that his prior counsel, Weinglass and Williams are or were "government officials," rather he alleges that they acted in function, if not in fact, as *agents* of government officials insofar as their actions served the interests not of petitioner, but of the District Attorney; and (2) Section 9545(b)(4) is obviously intended to preclude the argument that defense attorneys, in virtue of their position as officers of the court (privately-retained) or employees of the government (public defender or appointed counsel) should be considered to be "government officials." The allegations in this case are wholly to the contrary, however. Here it is alleged that Petitioner Jamal's prior defense counsel *stepped out of that role* to act instead as a "*second prosecutor*" and thereby functioned as *de facto agents* of the District Attorney who, indisputably is a "government official." Their suppression of Petitioner's claims thus constitutes "governmental interference" because their acts, as agents of the District Attorney, are attributed to the District Attorney, a "government official," under the doctrine of *respondeat superior*.

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

#### **B. THE PETITION IS WITHIN THE "UNDISCOVERABLE FACTUAL PREDICATE" EXCEPTION.**

Section 9545(b)(ii) provides an exception to the one-year filing deadline where "the facts upon which the claim is predicated" are unknown to the petitioner and could not have been ascertained by due diligence. The central facts upon which all of the claims in the pending Petition are predicated are the conflicts of

interest on the part of Petitioner Jamal's former attorneys Weinglass and Williams, and the fact that, throughout their retainer, the manner in which they purported to "represent" Petitioner was dictated by their own *personal* best interests, to the detriment of and contrary to the interests of their client, even to the extent of actively undermining and sabotaging his true case, while objectively acting, whether consciously or not, in and on behalf of the interests of the prosecution (and the real murderers of Officer Faulkner, *i.e.*, those who hired Arnold Beverly).

These facts were unknown to Petitioner Jamal, and could not have been ascertained by him personally, with or without the exercise of due diligence during the currency of Weinglass' and Williams' retainer, because the underlying conflicts themselves were not disclosed, but intentionally concealed, and because these conflicts of interest deformed and perverted the attorneys' advice and counsel to Petitioner Jamal. As a result, Petitioner did not and could not have previously ascertained that Arnold Beverly's confession, related corroborating evidence, supported rather than undermined his case. Moreover, did not and could not have known that, because of these conflicts of interest, his attorneys ignored or suppressed other claims and evidence that should have been but were not raised by them.

As a matter of law, the facts of these conflicts of interest were not and could not have been known to the Petitioner until his prior attorneys were withdrawn from his representation pursuant to order of the U.S. District Court when his new counsel entered their appearances in the federal habeas proceedings on 4<sup>th</sup> May, 2001, nor could Petitioner himself have raised any issues based upon those conflicts before that time.<sup>9</sup> It follows that, as a result of the Petitioner's former attorneys' conflict of interest, the underlying facts upon which all of the claims which are set out in the current PCRA petition are predicated, were unknown to the Petitioner and could not have been ascertained by him personally, with due diligence, during the currency of their retainer. Unlike the appellant in *Commonwealth v. Carr*, 768 A.2d. 1164, 1168, who by a phone call to his attorney or the court clerk could have quickly discovered that no appeal had been filed, Petitioner could not have discovered the existence of these conflicts simply by picking up a phone.

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

### **C. THE PETITION WAS FILED WITHIN THE STATUTORY 60- DAY PERIOD.**

Section 9545(b)(2) provides that a petition invoking any of the exceptions to the one-year filing deadline shall be filed within 60 days of "the date the claim could have been presented." In this case, the petition at issue was filed by Petitioner Jamal's new

counsel on July 3, 2001, within 60 days of May 4, 2001, when they took over the representation of Petitioner Jamal by filing their appearances in the U.S. District Court in the federal habeas proceedings, thereby effecting the withdrawal of Petitioner's prior counsel, pursuant to court order. Accordingly, this petition is timely filed.

The claims in the petition at issue could not have been presented previously because they are all based upon the "constructive denial of counsel" resulting from prior counsel's conflicts of interest. Since prior counsel could not have litigated their own ineffectiveness (*Commonwealth v. Albert*, 522 Pa. 331, 333, 561 A2d 736, 737 (1989)), by the same token they could not have litigated their own "constructive denial of counsel." Moreover, as a practical matter, prior counsel would certainly never have litigated their own violations of their duty of loyalty to their client and their outright betrayal of their duty to him by acting directly contrary to his interests and in the interests of the prosecution and the real murderers of Police Officer Faulkner (*i.e.*, the persons who hired Arnold Beverly). Petitioner Jamal himself could not have raised these claims earlier as he could only act through his attorneys,<sup>10</sup> and it was those attorneys who did not raise those claims and who concealed from Petitioner the conflicts of interest on their part which caused them to hold back and suppress the claims.

### **II. THE PCRA'S ONE-YEAR DEADLINE DOES NOT BAR THIS PETITION BECAUSE PETITIONER COULD ONLY HAVE MET IT WITH THE USE OF A TIME MACHINE.**

According to the District Attorney, the one-year filing deadline created by the 1995 PCRA amendments applied in the case of Petitioner Jamal on October 1, 1991, one year after the United States Supreme Court denied certiorari and the direct appeal process came to an end. (*Commonwealth Answer*, p. 8) This was over 4 years *before* this deadline was even enacted by the Legislature, and almost 8 years *before* Arnold Beverly signed the confession which the District Attorney is trying to keep out of the courtroom. If the one-year filing deadline retroactively precluded Arnold Beverly's confession from being heard by this court years before Arnold Beverly confessed or the deadline itself even existed, Petitioner Jamal would have had to have had a time machine and gone "*Back to the Future*" in order to have timely filed the pending PCRA/Habeas Petition.<sup>11</sup> It is respectfully submitted that this court should decline to retroactively apply a time deadline which could only have been met with the assistance of a time machine and which, therefore, must be in violation of the "due process" provisions in Article 1, Section 9 of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution.

### **III. THIS COURT HAS INHERENT POWER TO HEAR THE PETITION ON THE MERITS.**

Although the Pennsylvania Legislature amended the PCRA on November 17, 1995 (effective January 16, 1996), the Pennsylvania Supreme Court continued for a number of years thereafter to utilize its long-established "relaxed waiver" rule as well as other exercises of its inherent power. In at least *nineteen* published opinions issued *after* the PCRA was amended, the Pennsylvania Supreme Court explicitly applied and/or reaffirmed the relaxed waiver rule.<sup>12</sup> In *Banks v. Horn* (3<sup>rd</sup> Cir 1997) 126 F3d 206, the Third Circuit reversed the District Court's finding

that a habeas petitioner had defaulted his claims because of the one-year time bar and held that the petitioner should be given the opportunity to exhaust his claims in the state court as he might still obtain relief there, given the Pennsylvania Supreme Court's long record of using its decisional law to override the statutory language of the PCRA. *See also Fahy v. Horn*, — F3d —, 2001 WL 121145 (3<sup>rd</sup> Cir Feb. 9, 2001).

Although the Pennsylvania Supreme Court ultimately decided to withdraw its judicially-created “relaxed waiver rule,” the inherent power which was the source of that rule still resides in the Pennsylvania courts, else the court could not have exercised that power – or made reference to its application in the rule – in *nineteen published decisions* issued after the effective date of the 1995 PCRA amendments. The Pennsylvania Supreme Court did not withdraw the “relaxed waiver rule” because the 1995 PCRA amendments had deprived the state courts of the power to utilize it. Rather, in *Commonwealth v. Albrecht*, 720 A2d 693 (Pa. 1998), the court withdrew the rule as a policy decision of its own in a case in which the pre-amendment version of the PCRA was at issue, as that was the version in effect when Albrecht filed his PCRA petition. *Id.* at 697, n.1.

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

Although, in *Commonwealth v. Fahy*, 737 A2d 214 (Pa. 1999), the Pennsylvania Supreme Court indicated that the PCRA's one-year time bar would no longer be subject to equitable tolling or the “miscarriage of justice” exception, the holding in *Fahy* must be read as elucidating a general rule of policy to which exceptions might be made, albeit only in the rare and unusual case – like that presently before this court – in which truly “extraordinary circumstances” are present. This is the only reasonable reading of *Fahy*, and those cases following its strictures, because this is the only reading under which *Fahy* is consistent with the case law previously discussed and, more importantly, consistent with the obvious fact that the Legislature cannot limit, restrict, or erase the inherent power of the courts under any circumstances, and certainly not in Pennsylvania where the constitutional doctrine of “separation of powers” is firmly entrenched.<sup>13</sup>

Moreover, Pennsylvania's courts “have long permitted appeals *nunc pro tunc* where non-negligent conduct or ‘something more than mere hardship’ prevented compliance with the filing period.”<sup>14</sup> This is a highly significant point since failure to timely file an appeal is always considered to be *jurisdictional*. In *Commonwealth v. Stock*, 679 A2d 760, 764 (1996), the Pennsylvania Supreme Court held that *nunc pro tunc* relief was available under the “extraordinary circumstances” present when defendant in a summary case requested counsel to file an appeal and he failed to do so. *Stock* is particularly significant because there the defendant had no right to representation by counsel because it was a summary case. Thus, under *Stock*, the Commonwealth's argument against Petitioner Jamal which rests upon their supposition that his right to effective representation by counsel “expired” at the conclusion of the original post-convic-

tion proceedings and appeal therefrom, is clearly invalid. This court has the inherent power to review Petitioner Jamal's claims on the merits and should exercise that power *in the interests of justice*. If the court has the power to grant *nunc pro tunc* relief to remedy the jurisdictional bar for late filing of an appeal, the court must necessarily also have the power to grant *nunc pro tunc* relief to remedy the jurisdictional bar for late filing of a PCRA/Habeas Petition.

#### **IV. THE COURT SHOULD USE ITS INHERENT POWER TO CONSTRUE THE PENDING PETITION AS AN “EXTENSION” OF THE PETITIONER'S 1995 PETITION.**

This court may and should, “in the interests of justice,” consider the pending PCRA/HABEAS Petition as “merely an extension of litigation” of Petitioner's original post-conviction petition, as was done in the post-*Peterkin/Fahy* cases of *Commonwealth v. Peterson*, 756 A2d 687, 689 (Pa. Super. 2000); *Commonwealth v. Leasa*, 759 A2d 941, 942 (Pa. Super. 2000); and *Commonwealth v. Priovolos*, 746 A2d 621, 624 (Pa. Super. 2000). See also the very recent case of *Commonwealth v. Bronshtein*, Pa. Super. No. 938 EDA 2000, August 23, 2001, where, citing *Leasa*, the court construed a second PCRA petition as a first petition because of the ineffectiveness of petitioner's original post-conviction attorney. Similarly here, where Petitioner Jamal's original PCRA counsel, Weinglass and Williams, subjected him to the infinitely worse situation of “constructive denial of counsel” on that petition – the equivalent of having *no counsel*, but instead a “second prosecutor” – the pending Petition should be construed as a first petition.

Additionally, the court's inherent *nunc pro tunc* power permits consideration of the pending petition as if it were filed in 1995 (when the original petition herein was filed before enactment of the 1995 PCRA amendments established the one-year filing deadline), as was done in *Commonwealth v. Ross*, 763 A2d 853 (Pa. Super. 2000). This would mean that there would be no timeliness requirement on the pending petition. Such a result is more than warranted in this case where the treachery of Petitioner's prior counsel is magnitudes more despicable than the “mere ineffectiveness” of counsel in *Commonwealth v. Leasa*, who caused his client's appeal to be dismissed for failure to file a brief, or that of the attorney in *Commonwealth v. Quail*, 729 A2d 571 (Pa. Super. 1999), who filed a “wholly deficient brief.” Truly, the Petitioner was deprived of a “truly counseled PCRA Petition” (*Priovolos*, 746 A2d at 624) in the original post-conviction proceedings.

#### **V. THIS COURT SHOULD USE ITS COMMON LAW HABEAS POWER TO HEAR THE PETITION ON THE MERITS.**

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

*“Nor does one need to search through the books for a precedent for its application ... [N]o matter what may be the situation or how involved the circumstances, any person who claims he is illegally imprisoned or*

*restrained of his liberty may have such claim inquired into by a competent court, and, if his claim is found to be well grounded, he will be discharged and freed of such restraint.”* *Commonwealth v. Fair*, 146 A2d 834, 846, 394 Pa. 262 (1958).

#### **A. COMMON LAW HABEAS CORPUS CAN NEITHER BE SUBSUMED, NEUTERED, NOR RENDERED IMPOTENT BY CODIFICATION.**

There is a long line of Pennsylvania cases which make it abundantly clear that the state writ of habeas corpus cannot be subsumed by codification because “[i]t is an implied common-law power, not created by the habeas corpus act ... but existing before and since the passage of that act ... and, in a proper case, it is always grantable ...” *Commonwealth v. Fair*, 146 A2d 834, 846, 394 Pa. 262 (1958).<sup>15</sup> In *Commonwealth v. Gibbons*, 9 Pa. Super. 527, 533 (1899), the court explained:

“The inherent power of the court ... to grant a common law writ of habeas corpus ... is and should be, beyond controversy, even if the right were not expressly conferred ... It is an implied common law power, not created by the habeas corpus act ... but existing both before and since the passage of that act in every court of record ... Judges of the King’s Bench and Common Pleas of England found a similar lack of express authority in the British statute, but in order to carry out its manifest purpose and spirit they extended the powers, impliedly given to the courts ...”).<sup>16</sup>

The right to relief by writ of habeas corpus is further protected by Article I, Section 14 of the Pennsylvania Constitution which provides that the writ may not be suspended. Article 1, Section 9 of the Pennsylvania Constitution guarantees the right to “due process” of law. Habeas Corpus is one of the means of implementing and protecting that due process right. The right to state habeas corpus has been constitutionally protected in Pennsylvania since 1790 and there has been a state habeas corpus statute since 1785. Accordingly, the Legislature cannot abrogate, suspend, or unduly interfere with the right to relief by way of habeas corpus.<sup>17</sup>

Although the PCHA, like its successor, the PCRA, contained language purporting to “encompass” habeas corpus and other common law remedies, the Pennsylvania Supreme Court held in *Commonwealth v. Lesko*, 501 A2d 200, 204 (Pa. 1985) that the PCHA’s remedies were derivative from habeas corpus and the common law writ was still available, and in *Commonwealth v. Sheehan*, 285 A2d 465, 467 (Pa. 1971) that all claims previously cognizable on a common law writ, when “not covered” by the PCRA, may be litigated by habeas corpus. The PCRA’s codification of the habeas corpus remedy cannot, then, subsume the writ. Common law habeas corpus, constitutionally guaranteed, must continue to coexist with the statutory PCRA remedy and must be available when relief under the PCRA is not.

Under the facts in this case, to deny habeas relief on the pretext of the PCRA’s one-year time bar would constitute a “suspension of the writ” in violation of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution. It should be noted, as pointed out by Professor Place, that the federal courts have ruled the one-year filing deadline for federal habeas established by the AEDPA *not* to be a “suspension of the writ” precisely because – in contrast to the PCRA’s deadline – it

is a *statute of limitations* and, as such, is subject to equitable tolling.<sup>18</sup>

#### **B. THE SUPPOSITION THAT POST-CONVICTION CLAIMS COULD EVER BE “COGNIZABLE BUT TIME-BARRED” IS AN INHERENTLY SELF-CONTRADICTORY JURISPRUDENTIAL OXYMORON.**

In *Peterkin*, the Pennsylvania Supreme Court acknowledged that common law habeas corpus continues to exist alongside the PCRA, but ruled that it was available only for claims not cognizable under the PCRA. It further ruled that claims barred by the PCRA’s one-year filing requirement were still “cognizable” under the PCRA and, thus, relief was not available by habeas corpus for such time- barred claims.<sup>19</sup>

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

If habeas relief is not available for such claims, then the writ has been unlawfully suspended by the Legislature in violation of the Pennsylvania Constitution’s “suspension” and “due process” clauses and/or the inherent power of the courts to issue the common law writ has been unlawfully invaded by the Legislature in violation of the separation-of-powers doctrine.

Since the underlying premise of *Peterkin*’s apparent eclipsing of common law habeas with the PCRA under the mantra “cognizable but time-barred” is now revealed to be a mere shibboleth, it is respectfully suggested that *Peterkin* and its progeny should be read as evincing a judicial policy of self-restraint more akin to the equitable doctrine of *laches*. This policy of judicial restraint with regard to granting habeas relief for claims that would be time-barred under the PCRA must necessarily give way, *in the appropriate case*, where “extraordinary circumstances” make it incumbent to provide such relief, as in the case of Petitioner Mumia Abu-Jamal. Indeed, this is precisely the point so eloquently urged by Professor Place: “Even as a limit on a court’s jurisdiction, the one-year filing period should be excused under the *nunc pro tunc* doctrine where extraordinary circumstances prevent incarcerated defendants from complying with the filing period.”<sup>20</sup>

#### **VI. TERRI MAURER-CARTER’S EVIDENCE OF JUDGE SABO’S RACIAL PREJUDICE AND CONNIVANCE WITH THE PROSECUTION IS TIMELY.**

Terri Maurer-Carter’s declaration recently filed herein,<sup>21</sup> and its expansion of the judicial bias claim in the Petition, are quite clearly within the 60-day deadline for the “factual predicate” exception because the declaration was filed within a matter of weeks of Ms. Maurer-Carter’s bringing her information to the attention of Petitioner Jamal’s counsel, and could not have previously been discovered by due diligence as its discovery was contingent upon her personal decision to bring her evidence forward.

## CONCLUSION

This court clearly has jurisdiction to entertain his claims and grant relief to Petitioner Jamal. Even if the PCRA's one-year deadline were to be applied to his Petition, Mr. Jamal's case fits squarely within two of its statutory exceptions. Additionally, the court has a variety of legal doctrines it can and should employ to entertain the Petition outside the statutory exceptions, including but not limited to its generic inherent powers; the *nunc pro tunc* power; equitable tolling; construing the petition as "merely an extension" of the original petition filed in 1995 before the PCRA's time bar provisions were enacted; and common law habeas corpus. Procedural rules "cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue, the propriety of allowing the state to conduct an illegal execution of a citizen." *Commonwealth v. McKenna*, 383 A2d 174, 181 (Pa. 1978).

Dated: September 7, 2001

Respectfully submitted,

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## NOTES

1. declaration of Terri Maurer-Carter, Court Reporter, on file herein.

2. See note 1, *supra*.

3. While the right to an evidentiary hearing is not absolute, unless the court is certain of the total lack of merit of an issue raised in a PCRA petition, a hearing must be held on the issue. *Commonwealth v. Rhodes*, 272 Pa. Super. 546, 416 A2d 1031 (1979); *accord Commonwealth v. Hughes*, 311 Pa. Super. 155, 158, 457 A2d 541, 543 (1983). Moreover, when a post-conviction petitioner alleges facts which would establish that counsel failed to raise an issue of arguable merit and that no reasonable basis existed for counsel's failure to raise such issue, petitioner must be granted a hearing on that issue. *Commonwealth v. Sherard*, 483 Pa. 183, 394 A2d 971 (1978); *accord Commonwealth v. Rhodes, supra*. Thus, where petitioner has pled material facts which, if proven, would entitle him to relief, he must be granted an evidentiary hearing. *Commonwealth v. Pulling*, 470 A2d 170 (Pa. 1983).

4. It is respectfully urged that, under the complex legal and factual issues in this case, it is a violation of "due process" under Article 1, Section 9 of the Pennsylvania Constitution and the 14<sup>th</sup> Amendment to the U.S. Constitution, to arbitrarily confine this memorandum to 15 pages. Petitioner's Counsel have, nonetheless, exerted their best efforts to keep this memorandum as brief and to the point as possible and are filing contemporaneously herewith a motion for leave to exceed the page limitation with regard to the several additional pages that proper representation of the issues has necessitated. There is no statutory authority to support the 15-page, or any other page limit for this memorandum.

5. Suffice it to say, solely by way of introduction, that Petitioner Jamal was not and could not have been aware of his prior attorneys' conflicts of interest, duplicity, and sabotage of his case. Petitioner respected attorneys Weinglass and Williams and put his complete faith, trust and confidence in them, their actions, and their legal advice. Petitioner relied on his prior attorneys because he could not do otherwise. It is because those attorneys betrayed their innocent client, and have literally handed his head over to the executioner on a silver platter, that his new counsel have had to initiate these proceedings.

6. *Commonwealth v. Carpenter*, 725 A2d 154, 160 (Pa. 1999). Moreover, to time bar a claim of actual innocence would violate the Fifth and Fourteenth Amendments' requirement that no "procedural rule" preclude a defendant from putting forward evidence of innocence, *Chambers v. Mississippi*, 410 US 284 (1973), and in a capital case such as this would violate the Eighth and Fourteenth Amendments' prohibition on cruel and unusual punishment *Herrera v. Collins* 506 US 390 (1993).

7. *Mumia Abu-Jamal vs St. Martin's Press and Attorney Daniel R. Williams*, USDC (WD Pa.), No. 01-540.

8. Weinglass Letter dated 2/22/01, Exhibit "H" to Petition for Post-Conviction Relief and/or Writ of Habeas Corpus.

9. See *Commonwealth v. Johnson*, 532 A.2d. 796 (Pa. 1987). ("Our familiar cases have defined the first available opportunity [to raise issues of ineffectiveness of counsel] as the moment when the defendant is represented by different counsel either on direct appeal or collateral review."); *Commonwealth v. Lark*, 746 A.2d. 585, 589 (Pa. 2000) The nearest parallel to the facts of this case in the existing cases is the element of the petitioner's *Batson*

claim in *Commonwealth v. Lark*, 746 A2d 585, which was based on the McMahon tape. The petitioner in *Lark* was prevented by an objective external factor, namely the prohibition on commencing fresh PCRA proceedings during the currency of existing PCRA proceedings, from presenting his claim within 60 days of first learning of the underlying evidence. In this case, Petitioner was also prevented by an objective external factor, his prior attorneys' conflict of interest, from presenting these claims to the court until after those attorneys withdrew their appearances. (claim of ineffectiveness properly raised "at the earliest stage of the proceedings at which the ineffective counsel is no longer representing Appellant"); *Commonwealth v. Ellis*, 398 Pa. Super. 538, 550, 581 A2d 595, 600 (1990), *aff'd* 534 Pa. 176, 626 A2d 1137 (1993)(refusing to accept claims defendant attempted to raise *pro se* when represented by counsel).

10. See *Commonwealth v. Ellis*, 398 Pa. Super. 538, 550, 581 A2d 595, 600 (1990), *aff'd* 534 Pa. 176, 626 A2d 1137 (1993)(refusing to accept claims defendant attempted to raise *pro se* when represented by counsel).

11. While the Pennsylvania Supreme Court has, in *Commonwealth v. Peterkin*, 722 A2d 638 (Pa. 1998) and its progeny, embraced such "Back to the Future" jurisprudence in, e.g., *Commonwealth v. Cross*, 726 A2d 333 (Pa. 1999); *Commonwealth v. Banks*, 726 A2d 374 (Pa. 1999); *Commonwealth v. Yarris*, 731 A2d 581 (Pa. 1999); *Commonwealth v. Fahy*, 737 A2d 214 (Pa. 1999); *Commonwealth v. Beasley*, 741 A2d 1258 (Pa. 1999); *Commonwealth v. Crawley*, 739 A2d 108 (Pa. 1999), none of these cases raised the unique "extraordinary circumstances" of Petitioner Jamal's case in which his own attorneys, Messrs. Weinglass and Williams, flagrantly breached their duty of loyalty to their client by suppressing the signed confession of the real killer – corroborated by a lie detector test and other evidence – which exonerates him of any role in the crime for which he is sentenced to death. Moreover, and is argued in detail below, even the *Peterkin* line of cases contains within it the principle that the Pennsylvania courts have the inherent power, including but not limited to state habeas corpus, to reach the merits of such claims for relief as are presented under the truly "extraordinary circumstances" in this case.

12. See *Commonwealth v. Gibson*, 720 A2d 473 (Pa. 1998); *Commonwealth v. Wayne*, 720 A2d 456 (Pa. 1998); *Commonwealth v. Williams*, 720 A2d 679 (Pa. 1998); *Spotz*, 716 A2d at 585; *Brown*, 711 A2d at 455; *Commonwealth v. Clark*, 710 A2d 31 (Pa. 1998); *Jermyn*, 709 A2d at 856; *Harris*, 703 A2d at 445; *Commonwealth v. Hall*, 701 A2d 190 (Pa. 1997); *Morales*, 701 A2d at 520; *Elliott*, 700 A2d at 1251; *Washington*, 692 A2d at 1030; *Marinelli*, 690 A2d at 214; *Gibson*, 688 A2d at 1160; *Morris*, 684 A2d at 1042; *Miles*, 681 A2d at 1301; *Speight*, 677 A2d at 326; *Cook*, 676 A2d at 649; *Johnson*, 668 A2d at 102.

13. See *DeChastellux v. Fairchild*, 15 Pa. 18 (1850); *Com. Ex rel. v. Halloway*, 42 Pa. 446 (1862); *Titusville Iron Works v. Keystone Oil Co.*, 122 Pa. 627, 633, 15 A 1917 (1888). See also *In re Investigation of the June Grand Jury*, 46 Dauph. Co. Rep. 54 (Pa. 1938), where a grand jury investigation had been ordered of the administration of Governor Earle. The Legislature, controlled by Earle's party, passed a statute removing investigation of mismanagement in the executive department from jurisdiction of the quarter sessions courts. The statute was held to be uncon-

stitutional as a violation of separation of powers. Additionally, "separation of powers" is a basic element of the "republican form of government" guaranteed to the states by Article 4, Section 4 of the United States Constitution. See *The Federalist* No. 43 (James Madison).

14. Thomas M. Place, "The Claim is Cognizable but the Petition is Untimely: The Pennsylvania Supreme Court's Recent Collateral Relief Decisions," 10 Temple Pol. & Civ. Rights L. Rev 49, 71 (Fall 2000). See, e.g., *Stock, supra*; *Commonwealth v. Lewis*, 718 A2d 1262 (Pa. Super. 1998); *Commonwealth v. Hall*, 713 A2d 650, (Pa. Super. 1998); *Commonwealth v. Lantzy*, 712 A2d 288 (Pa. Super. 1998)(en banc).

15. See also *Williamson v. Lewis*, 39 Pa. 9, 29 (1861)(the common law writ of habeas corpus is "much broader [in] scope" and exists alongside the form of the writ secured by statute); *Gosline v. Place*, 32 Pa. 521 (1859)(habeas corpus "has a much broader scope than that form of it which is secured by the habeas corpus act; for it may issue in all sorts of cases").

16. See also *People ex rel. Tweed v. Liscomb*, 60 NY 559 (1875): "Relief from illegal imprisonment by means of this remedial writ is not the creature of any statute. The history of the writ is lost in antiquity. It was in use before the Magna Carta and came to us as part of our inheritance from the mother country, and exists as part of the common law of the state ... It is made a part of the Constitution, that no person shall be deprived of his liberty without due process of law. Whenever the virtue and applicability of the writ have been attacked or impugned, it has been defended and its vigor and efficiency reasserted, as the great bulwark of liberty."

17. See *Commonwealth ex rel Swann v. Shovlin*, 223 A2d 1, 5 (Pa. 1966)("[T]he Legislature may not encumber access to habeas corpus in a fashion which results in a 'practical deprivation' of that right."). See also *Commonwealth ex rel. Wardrop v. Warden, State Correctional Inst.*, 352 A2d 88, 89 (Pa. Super. 1975); *Commonwealth v. Maute*, 263 Pa. Super. 220, 397 A2d 826, 829 (1979); *Burkett v. Love*, 89 F3d 135, 141 (3<sup>rd</sup> Cir 1996).

18. Thomas M. Place, "The Claim is Cognizable but the Petition is Untimely: The Pennsylvania Supreme Court's Recent Collateral Relief Decisions," 10 Temple Pol. & Civ. Rights L. Rev 49, 79-81 (Fall 2000). Indeed, Professor Place persuasively argues that the Pennsylvania Supreme Court is simply wrong in holding that the PCRA one-year filing deadline is a jurisdictional bar when it should properly be held to be a Statute of Limitations. *Id.* at 68-71.

19. *Id.* at 77: "Holding that the writ of habeas corpus continues to exist 'only in cases in which there is no remedy under the PCRA,' the Court concluded that Peterkin's claims were cognizable under the PCRA and, therefore, even though the claims were time barred, habeas corpus was not available as a remedy."

20. *Id.* at 81.

21. According to Ms. Maurer-Carter, a Court Reporter, during the time of Petitioner Jamal's original trial she overheard a conversation in the antechambers of the court in which Judge Sabo said, referring to Mumia Abu-Jamal: "Yeah, and I'm going to help 'em fry the n\*\*\*\*r."