

IN THE COURT OF COMMON PLEAS  
FOR THE COMMONWEALTH OF PENNSYLVANIA  
FIRST JUDICIAL DISTRICT

RECEIVED  
MAY 27 2005  
PCRA UNIT

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

MEMORANDUM AND ORDER

In accordance with Criminal Rule of Procedure 909, the Court hereby announces its intention to dismiss the instant Post Conviction Relief Act Petition filed on December 8, 2003. Petitioner will be given the appropriate notice. The reasons for dismissal are detailed below.

Factual History

On December 9, 1981, Philadelphia Police Officer Daniel Faulkner was shot in the back. The first shot did not kill

Law Offices of Robert R. Bryan  
2088 Union Street  
San Francisco, CA 94123

him, and he was able to return fire, wounding his assailant. He then collapsed and, as he lay on the ground, the assailant pumped several more shots directly into his face, killing him.

At least four eyewitnesses saw all or part of the event and testified at trial.<sup>1</sup> One of them, Robert Chobert, made an on the scene identification of Petitioner Mumia Abu Jamal as the man who shot Officer Faulkner. *Pennsylvania v. Cook*, 30 Phila. 1, 16 (Pa. C.P. 1995).

Arriving police found Petitioner, wounded and sitting near Officer Faulkner's body, reaching for a gun.<sup>2</sup> When taken to the hospital for treatment, Petitioner fought police and raged to several more witnesses, "I shot the M---F--- and I hope he dies."<sup>3</sup> Bullets from Faulkner's gun were extracted from Petitioner's body, and the bullets found in Faulkner's body, while too badly damaged to be identified with certainty as coming from Petitioner's gun, were exactly matched with the type of ammunition used in Petitioner's gun.

---

<sup>1</sup> These witnesses were, Cynthia White, Robert Chobert, Michael Scanlan (AKA Scanlon) and Albert Magilton. *Pennsylvania v. Cook*, 30 Phila. 1, 15 (Pa. C.P. 1995) (opinion of the PCRA court in first PCRA proceeding).

<sup>2</sup> This gun was registered in his name. A policeman kicked the gun out of his reach.

<sup>3</sup> Two witnesses testified to this effect at trial: emergency room security guard Priscilla Durham and police officer Gary Bell.

## Procedural History

### I Trial Phase and Direct Appeal

Petitioner chose to be tried by a racially mixed jury. Early in the proceedings, he fired his court-appointed trial counsel.<sup>4</sup>

On July 2, 1982 at the conclusion of the trial over which the Honorable Albert J. Sabo presided, the jury convicted Petitioner of murder in the first degree and related offenses. On July 3, 1983, following the penalty

---

<sup>4</sup> The Pennsylvania Supreme Court provided a succinct account of Petitioner's legal representation during his trial: "Appellant, who had been granted indigent status, steadfastly insisted from the initiation of this matter that he be permitted to proceed with "counsel" of his choice. However, he insisted on proceeding with an individual known as John Africa who was not a licensed attorney and had apparently never received any formal legal schooling. The court properly refused this request and, when Appellant requested to proceed *pro se*, the court initially permitted such status and as a precaution appointed back up counsel to assist Appellant. When it became apparent that Appellant was unable to properly conduct *voir dire*, the court first asked Appellant whether his back up counsel could take over the questioning or whether he preferred the court to conduct *voir dire*. Appellant steadfastly refused to permit his back up counsel to take part in any of the proceedings and argued vehemently that the court should not perform the *voir dire* questioning. We find that the court properly took over the questioning and then properly ordered that back up counsel take control." *Commonwealth v. Mumia Abu-Jamal*, 553 Pa. 485, 720 A.2d 79, 109 (1998) (footnotes omitted).

phase of the trial, the same jury sentenced Petitioner to death.

The Pennsylvania Supreme Court affirmed the judgment of sentence on direct appeal. *Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989), *reargument denied*, 524 Pa. 106, 569 A.2d 915 (Pa. 1990). The United States Supreme Court denied certiorari, *Abu-Jamal v. Pennsylvania*, 498 U.S. 881 (1990), and two petitions for rehearing, *Abu-Jamal v. Pennsylvania*, 498 U.S. 993 (1990); *Abu-Jamal v. Pennsylvania*, 501 U.S. 1214 (1991).<sup>5</sup>

## II First PCRA Petition

Petitioner retained new counsel and filed his first petition under the Post Conviction Relief Act, (PCRA) 42 Pa.C.S. § 9541, on July 5, 1995.<sup>6</sup> Judge Sabo presided over three weeks of evidentiary hearings in July and August, 1995 and scheduled additional evidentiary hearings on September 11 and 12 so Petitioner could produce additional evidence. On

---

<sup>5</sup> Petitioner had new counsel for the direct appeal and raised three issues: a *Batson* claim, a claim of improper cross-examination of a character witness, and alleged prosecutorial misconduct for comments made at the penalty phase of the trial.

<sup>6</sup> In 1995, there were no time limitations for the filing of PCRA petitions.

September 15, 1995, Judge Sabo issued an order denying relief. Petitioner appealed to the Pennsylvania Supreme Court, which twice remanded the case back to the PCRA court for additional evidentiary hearings. These hearings took place in October 1996 and May 1997.<sup>7</sup> The Supreme Court of Pennsylvania ultimately denied relief. *Commonwealth v. Mumia Abu-Jamal, a/k/a Wesley Cook*, 553 Pa. 485, 720 A.2d 79 (1998). The Supreme Court of the United States denied certiorari on October 4, 1999. *Abu Jamal v. Pennsylvania*, 528 U.S. 810 (1999).

### III Second PCRA petition

On July 3, 2001, Petitioner retained new counsel and filed a second PCRA petition. By this time, the Pennsylvania Legislature had amended the Post Conviction Relief Act to place limits on the time in which Petitioners could raise post trial claims for relief. 42 Pa.C.S.A. 9545(b) (1) (2). The amendments provide that the statutorily mandated time limits are jurisdictional in nature, not merely statutes

---

<sup>7</sup> While the matter was on appeal to the Pennsylvania Supreme Court, Petitioner filed three separate requests for remand to the PCRA court. These applications encompassed requests to present additional testimony, requests for discovery, requests to submit a videotape allegedly relevant to Batson issues, and requests to assign the case to another judge. The Supreme Court remanded the case twice for the purpose of including additional testimony in the record.

of limitation. Therefore, aside from limited exceptions specified in the Act, the time limits cannot be tolled for any reason, including equitable considerations. See, *Commonwealth v. Bennett*, 842 A.2d 953 (Pa. Super, 2004), appeal granted, 2005 Pa. LEXIS 193. On this basis, the PCRA Court dismissed Petitioner's second PCRA petition as untimely filed on December 11, 2001. Petitioner appealed this decision to the Supreme Court of Pennsylvania on January 9, 2002. On October 8, 2003, the Pennsylvania Supreme Court agreed that the PCRA Court did indeed lack jurisdiction and upheld the denial of relief. *Commonwealth v. Mumia Abu-Jamal*, 833 A.2d 719 (Pa. 2003). The United States Supreme Court denied certiorari on May 17, 2004. *Abu-Jamal v. Pennsylvania*, 124 S. Ct. 2173 (U.S. 2004). This abbreviated version of the history of this matter leads us to the instant proceedings.

#### IV Third PCRA petition

##### Current Issues

On December 8, 2003, having retained new counsel, Petitioner filed this, his third PCRA Petition in which he proffers evidence in the form of testimony from two newly uncovered witnesses, Yvette Williams and Kenneth Pate, who, he claims, will discredit the trial testimony of Cynthia

White and Patricia Durham.<sup>8</sup> Petitioner alleges that his latest claims are timely raised under the PCRA because the new evidence did not come to his attention until the appeal of the order dismissing his second PCRA petition was pending in the Pennsylvania Supreme Court. In the alternative, Petitioner claims that he is entitled to relief under state *habeas corpus* jurisprudence.

This Court finds that the third PCRA petition is untimely filed and that none of the exceptions to untimely filing applies. Therefore, this court does not have jurisdiction to entertain Petitioner's latest claims for relief and dismisses his petition. The state *habeas corpus* claim is also dismissed.

### Discussion

This case has a long history. For over twenty years, Petitioner's attorneys<sup>9</sup> have claimed that he was framed for the murder of Officer Faulkner and that the Commonwealth

---

<sup>8</sup> The purported new evidence consists of a claim that eyewitness Cynthia White perjured herself at trial; and that Priscilla Durham, one of the three witnesses to defendant's spontaneous admission of guilt in the emergency room, also perjured herself.

<sup>9</sup> Petitioner has had new attorneys for every stage of the proceedings. Besides having separate counsel for trial and direct appeal, he has had a different team of attorneys for each PCRA petition.

manipulated eyewitness Cynthia White to falsely identify him. Despite the testimony of other eye witnesses; forensic evidence that bullets extracted from Officer Faulkner's body were of the type used in a gun registered to Petitioner and found at the scene; and the fact that shortly following the murder, three different people heard Petitioner brag that he shot Officer Faulkner and hoped that he would die, Petitioner has persisted in claiming that corrupt Philadelphia Police Officers conspired with "The Mob" to murder Officer Faulkner and pin the blame on Petitioner, who serendipitously happened to be passing by in his cab on the night of the murder.

Petitioner has raised essentially the same claim in each of his PCRA petitions. The only thing that has changed is the identity of the proffered witnesses.<sup>10</sup>

---

<sup>10</sup> In his first PCRA petition, he offered the testimony of Pamela Jenkins to support his claim that the police coerced Cynthia White into identifying Petitioner as the shooter. Petitioner also attempted to introduce retraction testimony from Veronica Jones, an eyewitness to the shooting who testified at trial. Ms. Jones claimed that the police had coerced her into testifying. This evidence was ultimately rejected because it did not constitute after-discovered evidence, and was found not credible. *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998).

The essence of the claims Petitioner raised in his second PCRA petition is that "the prosecution . . . suborn[ed] perjury and present[ed] fabricated evidence throughout Petitioner's trial. In so doing, the prosecution perpetrated a fraud upon the court." Petition of July 3, 2001 at 48-49. The most notable of the ten claims raised in the second PCRA petition, is that a man named Arnold Beverly and an unknown accomplice, who were working for "The Mob" and corrupt Philadelphia police officers, were the real killers of Officer Faulkner.



Petitioner argues that the third petition is timely filed pursuant to 42 PA C.S.A 9545(b) (1) (ii) which provides that PCRA petitions must be filed within one year of the date the judgment becomes final unless the petition alleges and petitioner proves that "(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence... (2) Any petition invoking [this] exception shall be filed within 60 days of the date the claim could have been presented."<sup>11</sup>

As was discussed in detail in this Court's Opinion dismissing Petitioner's second PCRA petition, unless a petition has been timely filed, the PCRA Court lacks any jurisdiction to grant any relief to the Petitioner. See, also, *Commonwealth v. Wilson*, 824 A.2d 331 (Pa. Super. 2003).

---

Petitioner also alleged that trial and prior PCRA counsel were ineffective for failing to attack the trial testimony of eyewitness, Robert Chobert.

<sup>11</sup> When an appellant's PCRA appeal is pending before a court, a subsequent PCRA petition cannot be filed until the resolution of review of the pending PCRA petition by the highest state court in which review is sought, or upon the expiration of the time for seeking such review. *Commonwealth v. Lark*, 560 Pa. 487, 493 (Pa. 2000).

The Pennsylvania Supreme Court docket entries state that Petitioner filed for writ of certiorari in the United States Supreme Court after the Pennsylvania Supreme Court denied relief and that his petition was denied on May 17, 2004, more than five months after the third PCRA petition was filed in the Court of Common Pleas. This raises the possibility that the instant PCRA petition was actually premature under *Commonwealth v. Fisher*, 2005 Pa. LEXIS 612 (Pa. 2005). (judgment becomes final at conclusion of direct review, including discretionary review in United States Supreme Court, Supreme Court of Pennsylvania, or at expiration of time for seeking review.)

Petitioner's first claim is that newly discovered evidence, in the form of the statements from Kenneth Pate and Yvette Williams, lay dormant for more than twenty years and did not surface until after Petitioner appealed the dismissal of his second PCRA petition. He argues that deadline for bringing this evidence to the attention of the PCRA court was December 8, 2003, which was 60 days after the Pennsylvania Supreme Court denied relief on October 8, 2003.<sup>12</sup>

The Commonwealth argues that *Commonwealth v. Lark*, 746 A.2d 585 (Pa. 2000) requires the automatic dismissal of the third PCRA petition, reasoning that because the Pennsylvania Supreme Court held that Petitioner's second PCRA petition was untimely filed, it follows that all claims in subsequent PCRA petitions must be untimely as well. This appears to contradict the plain language of *Lark*, which held that when an appellant's PCRA appeal is pending before a court, a PCRA court cannot entertain a subsequent PCRA petition until the appeal is concluded, or upon the expiration of the time for seeking such review. *Id.* at 588.

---

<sup>12</sup> The United States Supreme Court denied Petitioner's Petition for Writ of Certiorari on May 17, 2004.

In *Commonwealth v. Lark*, 746 A2d 585, 588 (Pa. 1999), the Pennsylvania Supreme Court held that a PCRA Court does not have jurisdiction to entertain additional post-conviction claims while its decision in a prior PCRA proceeding in the same case is on appeal. On this basis, PCRA Court finds that Petitioner had 60 days from October 8, 2003 to raise new claims. Because Petitioner filed this petition on December 8, 2003,<sup>13</sup> it is not untimely for the reason asserted by the Commonwealth, but remains untimely for the reasons set forth below.

Petitioner filed his third PCRA petition on December 8, 2003. In this petition, he claims that Yvette first contacted his former attorney with her exculpatory information on December 18 or 19, 2001 and that she executed her formal declaration on January 28, 2002. *Petition for Habeas Corpus Relief, para. 35 p. 9, 10, Declaration of Yvette Williams*. Petitioner's assertions with respect to when he became aware of Kenneth Pate's testimony, however, are vague and uncertain. Pate's declaration, attached to the third PCRA petition, states that in 1984 when he and Petitioner were both incarcerated at SCI Huntingdon, Pate wrote Petitioner a note in which he stated that his cousin,

---

<sup>13</sup> The first business day after the 60th day, which fell on a Sunday.

Priscilla Durham, admitted to him in a 1982 phone conversation that she did not hear Petitioner admit to shooting Officer Faulkner. Pate claimed that he gave the note to an unidentified inmate, a "tier worker" whom Pate claims had access to Petitioner, and instructed this inmate to pass the note on to Petitioner. *Declaration of Kenneth Pate, April 18, 2003.* Significantly, Petitioner neither admits nor denies receiving the note, leaving it up to the court to guess what happened.

Pate claims that at some unspecified time between December 2002 and February 2003 he saw Petitioner in the prison yard at SCI Huntington and that he again told Petitioner about the 1982 phone conversation he had with Patricia Durham. *Declaration of Kenneth Pate.*

On December 16, 2004, the PCRA Court scheduled a hearing for the purpose of determining if the allegations in the third PCRA petition met the timeliness requirements of the PCRA.

On December 20, 2004, the Pennsylvania Supreme Court decided *Commonwealth v. Roderick Johnson*, 863 A.2d 423 (Pa. 2004), *reargument denied*, 2005 Pa. LEXIS 216, (February 8,

2005). *Johnson* held that the after-discovered evidence exception focuses on newly discovered facts, not on a newly discovered or a newly willing source for previously known facts.<sup>14</sup>

The PCRA Court cancelled the evidentiary hearing and ordered briefing on the question of whether, under the holding in *Johnson*, the Court of Common Pleas lacked jurisdiction to consider the claims in the third PCRA Petition.

### Conclusion

After careful consideration, the PCRA Court concludes that under *Commonwealth v. Johnson*, the third PCRA petition is untimely filed because the evidence Petitioner advances

---

<sup>14</sup> In *Johnson*, the defendant was convicted of murder largely on the testimony of George Robles. The defense theory was that Robles conspired with the police to give false testimony. *Commonwealth v. Johnson*, 727 A.2d 1089 (Pa. 1999). After Johnson's judgment of sentence was affirmed on appeal, he filed two PCRA petitions. The first petition, which was timely filed, was denied on the merits.<sup>14</sup> Nine months later, Johnson filed a second PCRA petition, which was dismissed as untimely by the PCRA Court. In the second petition, Johnson produced an affidavit that Robles executed after trial, supporting Johnson's claim that the Commonwealth withheld evidence Johnson could have used to attack Robles' testimony at trial, i.e. that Robles was a drug dealer who colluded with the police. *Id.* at 425. The Pennsylvania Supreme Court held that this evidence did not qualify as after-discovered evidence, Pa.C.S. 9545 (b) (1) (ii), for purposes of the timeliness requirements of the PCRA. "The after-discovered evidence exception. . . focuses on newly discovered facts, not on a newly discovered or a newly willing source for previously known facts. Johnson's claim of governmental interference claim, 42 Pa.C.S.9545 (b)(1)(i), was also rejected. *Commonwealth v. Johnson*, 863 A.2d 423, 427 (Pa. 2004).

does not qualify as after-discovered evidence under the PCRA. Because Petitioner has failed to plead facts which would an exception to the timely filing requirements of the PCRA, the instant petition must be dismissed for lack of jurisdiction. Although the instant PCRA petition was filed within 60 days of the date of dismissal of the previous petition, it nonetheless fails the timeliness jurisdictional requirements.

The third petition does little more than reiterate claims petitioner made in his first two PCRA petitions. The only thing that appears to differentiate the instant PCRA petition from the first and second petitions is that new witnesses, namely Yvette Williams and Kenneth Pate, have come forward to testify to previously raised claims.

The "newly discovered" evidence regarding eyewitness Cynthia White, now deceased, is that Yvette Williams would testify that Ms. White, a long-time drug addict and prostitute, confessed to Ms. Williams that she, White, had been pressured by police to testify on behalf of the Commonwealth. This is mere impeachment evidence. In the context of a petition for post-conviction relief, to warrant relief, after-discovered evidence must meet a four-prong test: (1) the evidence could not have been obtained before

the conclusion of the trial by reasonable diligence; (2) the evidence is not merely corroborative or cumulative; (3) the evidence will not be used solely for purposes of impeachment; and (4) the evidence is of such a nature and character that a different outcome is likely. *Commonwealth v. Choice*, 830 A.2d 1005 (Pa. Super. Ct. 2003). Even if this Court were to find that Ms. Williams did not contact petitioner until December 18 or 19 of 2001, Ms. Williams's testimony fails the other three prongs of this test.

Ms. White's credibility and potential reasons for testifying falsely were examined exhaustively at trial [N.T. 6/22/82 at 24 195-213]. No one ever mistakenly believed that Ms. White was a model citizen. In addition to being inadmissible hearsay, See, *Commonwealth v. Yarris*, 731 A.2d 581 (Pa. 1999), Petitioner's proffer is not of new facts, but of "newly discovered or newly willing sources" for a previously raised claim--the very situation to which the *Johnson* case refers.

Even were her credibility further successfully attacked, Ms. White's evidence remains merely cumulative of other eyewitness testimony.<sup>15</sup>

The other "newly discovered" evidence is an affidavit from one Kenneth Pate, claiming that he spoke to Patricia Durham, a hospital security guard who testified at trial that she heard Petitioner admit to shooting Officer Faulkner. Pate would testify that Durham told him that she heard no such thing and that the Commonwealth pressured her into testifying. This evidence is also inadmissible hearsay. *See, Yarris, Supra.* Even if the rules of evidence did not bar the admission of Mr. Pate's statement, it would be of scant value to Petitioner. Philadelphia Police Officer Gary Bell was also present when Petitioner bragged about shooting Officer Faulkner, and testified to this effect at trial. N.T. 6/24/82 at 32, 136. The only conceivable value of Pate's testimony, therefore, would be to impeach Officer Bell's testimony. This would not be sufficient to afford Petitioner relief under the PCRA. *See, Choice, Supra.*

---

<sup>15</sup> Eyewitness Robert Chobert testified he saw Petitioner standing over Officer Faulkner and firing bullets into him. NT 6/19/82 at 210. Eyewitnesses Michael Scanlan, testified that he saw the same thing. NT 6/25/82 at 8.7. Albert Magilton did not see the actual shooting, but he saw the beginning of Petitioner's encounter with Officer Faulkner, heard shots, saw Faulkner on the ground and Petitioner sitting on the curb nearby. NT 6/25/82 at 8.77.



By Petitioner's own admission, [Affidavit of Kenneth Pate], he has long known about this evidence, perhaps as early as 1984. Counsel does not explain Petitioner's failure to memorialize Pate's evidence years ago. Petitioner has the burden to plead and prove all relevant dates. He has failed to meet that burden.

In summary, the instant petition proffers inadmissible hearsay, which, were it admissible, would at best be cumulative or impeachment evidence. The proffered evidence consists of newly willing sources for previously asserted facts. Finally, Petitioner fails to plead jurisdictional facts, which, if proven would establish as a matter of law that he acted with due diligence.

Petitioner also contends that he is entitled to habeas corpus relief under Article I, section 14 of the Pennsylvania Constitution, and that the 1995 amendments to the PCRA are invalid because they unconstitutionally suspend the state constitutional right to habeas corpus relief. This argument, raised and dismissed in Petitioner's second PCRA petition, was also rejected in *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998). See also, *Commonwealth v. Mercado*, 826 A.2d 897 (Pa. Super. 2003). Therefore, Petitioner's habeas corpus claim is dismissed.

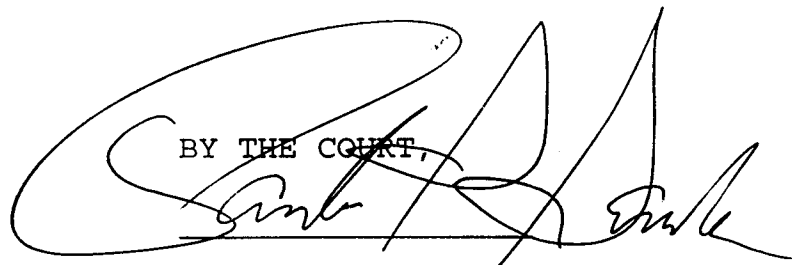
Therefore, the following Notice is given:

**NOTICE PURSUANT TO PENNSYLVANIA RULE OF CRIMINAL  
PROCEDURE 909**

Date: May 27, 2005

You are hereby advised that in twenty (20) days from the date of this NOTICE, your request for post-conviction relief will be dismissed without further proceedings. No response to this notice is required. If, however, you choose to respond, your response is due within twenty (20) calendar days of the above date.

BY THE COURT,

A large, stylized handwritten signature in black ink, appearing to read "Dembe, J.", is written over the text "BY THE COURT,".

Dembe, J.

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

PROOF OF SERVICE

I hereby certify that on this day I am serving the foregoing order upon the person(s) indicated below, which service satisfies the requirements of Pa. R. Crim. P. 114

First Class Mail

Robert R. Bryan, Esq.  
 2088 Union Street  
 Suite 4  
 San Francisco, California 94123-4121

Judith L. Ritter, Esq.  
 Widener University School of law  
 P.O. Box  
 7474  
 4601 Concord Pike  
 Wilmington, Delaware 19801

Steven W. Hawkins, Esq.  
 120 Wooster Street  
 Second Floor  
 New York, NY 10012

Jill Cullbert, Esq.  
 2088 Union Street  
 Suite 4  
 San Francisco, California 94123-4121

Interoffice Mail

Robin Godfrey, Esq.  
PCRA Unit  
DA's Office  
1421 Arch Street

Hugh Burns, Esq.  
Appeals Unit  
DA's Office  
1421 Arch Street

A handwritten signature in black ink, appearing to read "J. Dembe". The signature is stylized with large, sweeping loops and a long horizontal tail.

---

Dembe, J.

May 27, 2005