COURT OF COMMON PLEAS, COMMONWEALTH OF PENNSYLVANIA
FIRST JUDICIAL DISTRICT

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

PETITIONER MUMIA ABU-JAMAL'S RESPONSE TO COURT'S NOTICE OF INTENT TO DISMISS PETITION FOR POST-CONVICTION RELIEF AND/OR WRIT OF HABEAS CORPUS.

Pursuant to this Court's Order of November 21, 2001, and Pennsylvania Rules of Criminal Procedure 907, 908, and 909, Petitioner Mumia Abu-Jamal hereby submits his Response to Court's Notice of Intent to Dismiss Petition for Post-Conviction Relief and/or Writ of Habeas Corpus and Demands Oral Argument and a Hearing thereon:

INTRODUCTION

"But as the district attorney prepares for her new term, there's fresh evidence in her own backyard on the critical need to halt all executions . . . . Dwindling public support for the death penalty rests on the presumption that it's administered fairly. But even a hardened prosecutor should have doubts about that now."

Philadelphia Inquirer Editorial
November 12, 2001

The impetus for the *Philadelphia Inquirer* to publicly demand a moratorium on executions in the State of Pennsylvania was a federal court's recent overturning of the conviction and death sentence in the very case which underlies this Court's intended decision that it purportedly lacks jurisdiction to hear Petitioner Jamal's PCRA/Habeas Petition – the case of Otis Peterkin. In

Commonwealth v Peterkin, 554 Pa 547, 722 A2d 638 (1999), the Pennsylvania Supreme Court interpreted the filing deadlines created by 1995 amendments to the Post-Conviction Relief Act ("PCRA") as "jurisdictional" and, on that basis, refused to consider a death row inmate's claims that he did not have a fair trial. Because the Pennsylvania Supreme Court sidestepped the issue of whether Mr. Peterkin had a fair trial, a federal judge had to step in and do the job the state supreme court refused to do. Result? In *Peterkin v Horn*, 2001 US Dist LEXIS 18313 (USDC, EDPA, November 6, 2001), the federal court overturned Peterkin's conviction and death sentence for prosecutorial misconduct, ineffectiveness of trial and appellate counsel, and most alarmingly because there was insufficient evidence for a jury ever to have convicted him in the first place.

In short, what the Pennsylvania Supreme Court achieved in *Peterkin* was to conceal a grave and flagrant miscarriage of justice which it was its very task to remedy. In this case, in seeking to rely on the same line of authority, this Court achieves precisely the same with its refusal to hear Petitioner Jamal's claims that he is innocent; that the real killer has confessed and exonerated him; that his prior attorneys, Weinglass and Williams, suppressed this and other evidence of his innocence and failed or refused to raise meritorious issues of violations of Petitioner's constitutional rights at trial and in succeeding proceedings, because they themselves were the victims of death threats, and because everything which they did or purported to on behalf of the Petitioner was governed by how they thought that they could best further their careers, they put their own lives and safety and personal and professional reputations before the interests of their client; and the conflicts of interest on the part of those attorneys resulted in a situation far beyond "ineffective representation" to constitute a "constructive denial of counsel" which was the equivalent of Petitioner having had no counsel, but instead being faced with a "second prosecutor."

The *Inquirer* editorial pointedly describes the overturn of Peterkin's conviction and death

sentence as "another case that casts troubling doubts on the fairness of the death penalty – a system that disproportionately condemns minorities and the poor, and sometimes even the innocent." The case of Petitioner Mumia Abu-Jamal, in which evidence has recently been brought forward which proves that the trial and post-conviction judge, the notorious Judge Sabo, had remarked, at the time of Petitioner's original trial, that, "Yeah, and I'm going to help 'em fry the n****r," *and* that Petitioner Jamal is, in fact, innocent, should make it abundantly clear that this case, like that of Otis Peterkin is, to borrow the words of the *Philadelphia Inquirer*, "another case that casts troubling doubts on the fairness of the death penalty - – a system that disproportionately condemns minorities and the poor, and sometimes even the innocent."

The rationale of the Pennsylvania Supreme Court's decision in *Peterkin* and other cases in which it has been followed has now been decisively undermined by the overturning of Mr. Peterkin's conviction and death sentence and the revelations of the numerous injustices which deprived him of a fair trial. In these circumstances, this Court can and should grant Petitioner Jamal a full hearing on the merits of his claims for relief in his pending PCRA/Habeas Petition even if it were to find that the claims in the Petition fall outside of the statutory exceptions to the PCRA filing deadlines.[1] As Petitioner Jamal argued in his Memorandum of Law in Support of Court's Jurisdiction, at pp. 10-11 thereof, both *Commonwealth v Peterkin, supra,* and *Commonwealth v Fahy*, 737 A2d 214 (Pa 1999) should be read as establishing a general rule of judicial restraint, rather than a strict jurisdictional bar, to which exceptions might be made in a truly extraordinary case like that of Petitioner Jamal in order to avoid a grave miscarriage of justice. This argument is even more compelling now, after the recent overturn of Peterkin's conviction and death sentence by the U.S. District Court.

---

[1]It is, of course, Petitioner's position, as is further argued in this Response, that his case fits squarely within the statutory exceptions to the PCRA's filing deadlines.

In his Memorandum of Law in Support of Court's jurisdiction, at pp. 9-15 thereof, Petitioner Jamal set forth over 6 pages of legal argument, supported by case citations, to prove that, even despite the *Peterkin* decision and other cases in which it has been followed, the Court has jurisdiction to hear this Petition on its merits under its various inherent powers, including its *nunc pro tunc* power , under which the "jurisdictional bar" of late filing of an appeal may be overcome, as in *Commonwealth v Stock*, 679 A2d 760, 764 (Pa 1996); its power to construe this Petition as a first 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), *Commonwealth v Provolos*, 746 A2d 621, 624 (Pa Super 2000), *Commonwealth v Ross*, 763 A2d 853 (Pa Super 2000), *Commonwealth v Bronshtein*, Pa Super No. 938 EDA 2000, August 23, 2001; its common law habeas power, and its generic inherent powers which were the source of the previously-followed "relaxed waiver" rule in capital cases.[2]

This Court simply ignores each of these arguments in reaching its decision to dismiss this Petition for an alleged want of jurisdiction, dismissing in a brief footnote whose only citation to authority is, again, the *Peterkin* case, Petitioner's argument that state habeas relief is available. The Court fails to analyze or even consider Petitioner's arguments as to why state habeas cannot be "subsumed" by the PCRA – the Court merely reasserts the very proposition which is itself at issue – and further asserts that since Petitioner "availed himself of PCRA relief in 1997 [sic], no habeas relief can be sought."

In addition to ignoring the fact that the *claims* for which Petitioner is now requesting habeas relief are not the same claims raised in the previous PCRA proceedings (which took place in 1995-

[2]*See* the nineteen published opinions cited at endnote 12 of Petitioner's Memorandum of Law In Support of Court's Jurisdiction, issued by the Pennsylvania Supreme Court after the 1995 amendments to the PCRA, which apply or reaffirm the "relaxed waiver" rule.

1996 pursuant to a petition filed in 1995), the Court also ignores the fact that Petitioner Jamal suffered not merely "ineffective representation" by counsel, but what amounts to a "constructive denial of counsel" in those proceedings *and* the fact that the proceedings were held before Judge Sabo who, during the time of Petitioner's original trial, expressed his intent to "help 'em fry the n****r." If Petitioner Jamal "availed himself" of these proceedings, they were clearly to no avail because of the grotesque and egregious violations of his constitutional right to due process of law which permeated and poisoned those proceedings.

In the light of the District Court's decision in *Peterkin*, these arguments are now unanswerable. 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), *Commonwealth v Provolos*, 746 A2d 621, 624 (Pa Super 2000), *Commonwealth v Ross*, 763 A2d 853 (Pa Super 2000), *Commonwealth v Bronshtein*, Pa Super No. 938 EDA 2000, August 23, 2001 should govern this case. The facts of this case are indistinguishable from the facts of those cases, save in that the conduct of the Petitioner's prior attorneys, Messrs. Weinglass and Williams, is at least ten million times more reprehensible than the conduct of the prior attorneys in those cases.

I

THIS PETITION FITS SQUARELY WITHIN THE STATUTORY EXCEPTIONS TO THE PCRA FILING DEADLINES.

A "content analysis" of the Court's Memorandum and Order of November 21, 2001, reveals that the words "conflict of interest" appear nowhere in that opinion although it is the manifold conflicts of interest by Petitioner Jamal's prior Chief Legal Counsel Leonard Weinglass and Chief Legal Strategist Daniel R. Williams, *from the inception of their representation*, which provide the factual basis for the claims for relief set forth in the PCRA/Habeas Petition and thereby place the

Petition squarely within the statutory excepts to the PCRA filing deadlines.

Not only does this Court fail to analyze or even mention the "conflict of interest" issue, it makes no reference at all to the numerous Pennsylvania cases cited in Petitioner's Memorandum of Law in Support of Court's Jurisdiction, at pp. 4-5 thereof, which establish that "the mere existence of such a conflict vitiates the proceedings,"*Commonwealth v Cox*, 441 Pa 64 (1970), and even "an appearance of conflict of interest"is sufficient to threaten the "duty of zealous advocacy" which is the obligation of an attorney representing a post-conviction petitioner, *Commonwealth v Wright*, 374 A2d 1272, 1273 (Pa 1977).[3]

Moreover, this Court struck from its files a stack – roughly the size of a New York City phonebook – of memoranda prepared by Petitioner's prior attorneys which detail all of the evidence which corroborates the truth of Arnold Beverly's testimony that he, and not Mumia Abu-Jamal, shot and killed Officer Faulkner as part of a planned "hit" by organized crime and corrupt police to eliminate an obstacle to the rampant and widespread police corruption in center city Philadelphia in the 1980's. This is precisely the evidence which proves up the "conflicts of interest" by Petitioner's prior counsel which this Court fails to consider or even discuss in its Memorandum and Order, exposes the fundamental lies in Williams' self-serving *fictional* account of Petitioner's case in Executing Justice, and answers the rhetorical questions posed by the Court in asserting that Petitioner's allegations purportedly lack "external" and "internal" logic.

The very existence of these memoranda prove that Messrs. Weinglass and Williams did not, as claimed in William's book, dismiss out-of-hand the possible truth of Arnold Beverly's confession,

---

[3]*See* Petitioner's Memorandum of Law in Support of Court's Jurisdiction at p. 5 where six Pennsylvania Supreme Court and appellate court cases are cited to demonstrate that there is a well-established right under Pennsylvania law to "conflict-free" representation by counsel in post-conviction proceedings.

but rather that a tremendous amount of time and effort went into analyzing how Beverly's confession fit into and was corroborated by the other available evidence in the case as well as by evidence of the extent of police corruption in Philadelphia as revealed by the FBI investigations and federal prosecutions of highly-placed police officials. While it was not Messrs. Weinglass and Williams who prepared these memoranda, but other members of the legal team, Weinglasss and Williams had all of these many memoranda at their disposal for review and analysis and, significantly, there is not one memorandum by Weinglass or Williams or anyone else which even attempts, even as a "devil's advocate," to attack Beverly's credibility or the truth of his testimony or to pose an alternative interpretation of the evidence to refute rather than corroborate his testimony.

The Court erred and abused its discretion in striking this key evidence from the record and, by keeping this relevant evidence out of the record, violated Rule 907 and 908 of the Pennsylvania Rules of Criminal Procedure. As noted in the Official Comment to Rule 907: "To determine whether a summary dismissal is appropriate, the judge should thoroughly review the petition, the answer, if any, and all other relevant information that is included in the record."

The Court struck the memoranda from the record on the purported grounds that they were filed without leave of court. However, there is no written rule to the knowledge of Petitioner's Counsel which establishes such a requirement. Moreover, the Court had accepted a number of filings of various other documents by Petitioner's Counsel, including but not limited to the Declaration of George Michael Newman, the Declaration of Terri Maurer-Carter, and other documents, without ever requiring an application for leave of court and without ever advising counsel that leave of court was required.

It is these very memoranda which this Court has stricken which by themselves prove up the conflicts of interest which the Court does not mention in its opinion. And, in the interests of justice,

the Court should have, in any case, granted leave of court to file these memoranda in order to fulfill the legislative purpose of the PCRA statute which is to provide for "an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief." 42 Pa CSA Sec 9542. How is that purpose to be accomplished if the courts arbitrarily refuse to file evidence which is crucial to proving up the basis for the relief which it is the purpose of the PCRA to provide?

Content analysis also reveals that there is no reference to the Pennsylvania Rules of Professional Conduct anywhere in this Court's Memorandum and Order, despite the fact that ex-Chief Legal Strategist Daniel William's publication of his mendacious book, Executing Justice, was a flagrant and brazen *per se* violation of Rule 1.8 which specifically prohibits an attorney from entering into or even negotiating a contract to publish a book on a current case in which he represents one of the parties. The Official Comment to Rule 1.8 specifically notes that there is *necessarily* a conflict of interest in such a situation because what may promote sales of the book may not be in the best interests of the client. This means that, as a matter of law, Williams' violation of Rule 1.8 also constitutes conclusive evidence of his conflict of interest with regard to publication of the book.

This Court misunderstands or misconstrues Petitioner's argument as being that Weinglass and Williams sabotaged Petitioner's case in order to increase the sales of William's book. It is Petitioner's argument that the publication of Executing Justice not only constitutes a *per se* conflict of interest in violation of the Rules of Professional Conduct,[4] but it was specifically *intended* by ex-

[4]Although the District Attorney asserts, without any evidence to prove her assertion, that Williams published Executing Justice with Petitioner's permission, this is simply false. Not only did Petitioner never give permission to Williams to publish that book, immediately after reading the pre-publication proofs Petitioner retained counsel who filed a lawsuit to thwart publication. Moreover, given that publication of the book represented a *per se* conflict of interest in violation of the Rules of Professional Conduct, as a matter of law Petitioner could not have given permission. Weinglass and Williams not only failed to disclose their conflicts of interest with

Chief Legal Strategist Williams, according to ex-Chief Counsel Weinglass, to be a *preemptive strike* against Arnold Beverly's testimony. As such, it was also necessarily intended to be a preemptive strike *against Petitioner Jamal's interest in having his innocence proved* since there could be no more compelling evidence of his innocence than the voluntary confession, corroborated by a lie detector test, of the real killer.

It is Petitioner's argument, set forth at Paragraph 19 and 73-135 of the Petition, that *among* the unsavory motives that Messrs. Weinglass and Williams had in publishing the book was to ruthlessly cover up the manner in which their own cowardice and mishandling of Petitioner's case over the previous nine years, capped off by their suppression of Arnold Beverly's confession and the evidence which corroborated it, had undermined and sabotaged Petitioner's defense at the very same time that they had built their careers on cynically and hypocritically posing to the world as his courageous and self-sacrificing *radical* lawyers, fighting a heroic battle against "the system."

It is Petitioner's argument that the necessary precondition for publication of Executing Justice was the suppression of Arnold Beverly's confession and the evidence corroborating it because the *ambiguity* which, according to its author, is the central theme of the book, not only presupposes the suppression of that evidence but would be destroyed by that evidence being brought forward. While Williams might have written a very different book had he and Weinglass presented Arnold Beverly's confession to the courts instead of burying it in their files, having buried it the only possible book that he could publish was one which threw the last few shovel fulls of dirt over its burial site and their own tracks.

While it is not Petitioner's argument that Weinglass and Williams suppressed the evidence of their client's innocence to increase the sales of Williams' book, it is a matter of record that Williams

---

regard to publication of the book, they misrepresented to Petitioner that publication was in his interests.

received a $30,000 advance as a collateral benefit of having published a book which served as a preemptive strike against the evidence which would prove both Mumia Abu-Jamal's innocence and his own attorneys' perfidy, treachery, and betrayal.

It is Petitioner's argument that the book, Executing Justice, exemplifies in stunningly sharp relief what ex-Chief Counsel Weinglass and ex-Chief Legal Strategist Williams have done throughout their involvement in this case, they have shamelessly used it to aggrandize and promote themselves and their own careers to the detriment of their client's interest in proving his innocence, saving his life, and restoring his freedom.

Whilst it is plainly possible that what is alleged in the Petition is only the "tip of the iceberg" as to the dark motives and other possible factors in play which caused attorneys Weinglass and Williams to act as they did; and while it is certainly possible that there is much more to this story than Petitioner Jamal's present counsel have thus far been able to uncover; and while it is clearly possible that Weinglass and Williams were subjected to various external pressures which are not presently known; and while it is even possible for such pressures to have come from the real murderers of Police Officer Daniel Faulkner, those who planned his killing and hired the triggermen to carry out it out, Petitioner Jamal need not be able to prove that all of this is what has actually happened when what is known is more than sufficient to make out a compelling case of conflicts of interest and constructive denial of counsel, as is alleged in the Petition.

The death threat that Chief Counsel Weinglass received with regard to Kenneth Freeman is explained in detail in the Petition and is documented by private investigator Newman and former legal team member, Rachel Wolkenstein, Esq., in their respective affidavits. But the evidence demonstrating this conflict of interest does not rest solely with this death threat alone. The proof of this conflict of interest is the manner in which Weinglass and Williams represented the Petitioner and

presented his case both in court and to the public at large throughout their retainer (See Paragraphs 73 to 135 of the present PCRA Petition).

The proof of this conflict of interest lies in what Weinglass and Williams knew at the outset of their retainer, in what investigations they subsequently did carry out and in what investigations they did not carry out, in the claims for relief which they did present to the court and the claims for relief which they did not, in how they undermined and, indeed, sabotaged so many of the claims for relief which they purported to pursue, and in the contrasting way in which they whipped up a political campaign around this case in the streets, but then sold the Petitioner's case short in court, abjuring the very same arguments and evidence which they were so loudly proclaiming to the world outside and the waiting news media.

The proof of this conflict of interest lies in the only reason which anyone representing the Petitioner might have had in not presenting Arnold Beverly's case to the court in 1999: given the obvious and devastating impact that Arnold Beverly's confession had on every aspect of the prosecution case against the Petitioner, given that Arnold Beverly had passed a lie detector test, given that it was most unlikely that one could ever get any better evidence to prove his innocence than a confession from the real killer, given that, as the legal memoranda plainly demonstrate, despite Williams' protestations to the contrary in his mendacious book, Weinglass and Williams, plainly had to have believed that Arnold Beverly was telling the truth, and given that this was potentially their once and for all opportunity to present Arnold Beverly's testimony to the court in the light of the 60-day time limit on presenting fresh evidence under the PCRA statute, Weinglass' and Williams' true reasons for burying Arnold Beverly's confession and the corroborating evidence could not possibly have been based on their client's best interests, but only on their own personal best interests and/or other interests adverse to those of their client, Petitioner Jamal.

Had Weinglass and Williams raised the Petitioner's case on actual innocence for the first time when they had Arnold Beverly's confession in their hands in mid-1999, it would have exposed the fact that they had earlier failed to present any of the other evidence, such as the Petitioner's own testimony and the testimony of his brother, William Cook, which demonstrates that the Petitioner is innocent and which was available at the time of the original PCRA hearing, together with the reasons why they had suppressed this other evidence in 1995. Not only that, it would doubtless also have emerged that, at the time of the original PCRA hearing, attorney Weinglass had kept William Cook off the witness stand when he wanted to testify and then falsely represented to the court that Cook had disappeared. In any event, the exposure of Weinglass' and Williams' suppression in 1995 of the then available evidence pointing to Petitioner's innocence would have left their personal legal and political reputations in tatters (Paragraph 94 of the present PCRA Petition).

This explains why Weinglass and Williams suppressed Arnold Beverly's confession instead of presenting it to the courts in 1999. This explains why Williams has savaged Arnold Beverly and the testimony of other defense witnesses in his book. In neither instance were he or Weinglass acting in anybody's best interests but their own. They were simply attempting to cover their own backs.

However, as the present PCRA Petition enumerates exhaustively, the real damage to the Petitioner's case had been done by the manner Weinglass and Williams had conducted the original PCRA proceedings in 1995, when, contrary to the Petitioner's express instructions, Weinglass and Williams suppressed the Petitioner's case on actual innocence together with any evidence which supported it and any claim which depended on this evidence.

But, again, Weinglass and Williams went further than this. They even sabotaged the claims which they were purporting to pursuing. For present purposes, one example, possibly the most stark example, will have to suffice: the otherwise wholly inexplicable failure by Weinglass and Williams to

prove up in the PCRA hearings in 1995-1996 that one of only two alleged eyewitnesses who claimed to have seen Petitioner Jamal shoot Officer Faulkner, convicted felon Robert Chobert, had recanted his trial testimony and admitted to private investigator Newman that he had not even seen the shooting.[5] This cannot possibly be described as a strategic or tactical decision by those attorneys *unless they were, as a matter of fact, working on behalf of the District Attorney or the real murderers of Officer Faulkner*. There is no possible reason why it would not be in Petitioner Jamal's interests to discredit Chobert's trial testimony.

This Court's intended decision clearly fails to appreciate the significance of Weinglass' and Williams' failure to prove up Chobert's recantation of his trial testimony. The contention that Petitioner Jamal had been convicted on fabricated and perjured testimony of prosecution witnesses was probably the most prominent feature of the case which Weinglass and Williams purported to mount in the original PCRA proceedings. Newman was present at court, ready to testify to the recantation if Chobert were to deny it. But Weinglass never asked Chobert about it on the witness stand and then got rid of Newman by lying to him, telling Newman he was no longer required, because Weinglass had gotten "everything he needed" out of Chobert.

This is no innocent or negligent mistake. This is far from being "mere ineffectiveness" of counsel. This is proof positive that the conflicts of interest which began at the inception of Weinglass' & Williams' retainer, and had their ultimate expression in the publication of the perfidious Executing Justice, permeated and deformed the 1995/1996 PCRA hearings to such an extent as to cause Messrs. Weinglass & Williams to hold back evidence to prove their own claims that Petitioner Jamal had been convicted on fabricated evidence and perjured testimony.

---

[5]The other alleged eyewitness, prostitute Cynthia White, had ample reason to be vulnerable to police pressure to fabricate her testimony, and had demonstrably perjured herself at Petitioner's trial by concealing the presence at the crime scene of the passenger in William Cook's vehicle, as is detailed in the Petition.

`After all, if Petitioner Jamal did not shoot Officer Faulkner, then someone else must have. Effective refutation of the frame-up perpetrated on Petitioner Jamal might just as well reveal its function as a cover-up of the identity of the real killers and point to the trail of those who hired them to do the job. Thus, even to put forward the evidence to prove the limited claims raised on Petitioner Jamal's behalf by attorneys Weinglass and Williams might raise the lid on the Pandora's box that these attorneys were terrified to open. Since even the District Attorney concedes that there is a right to "effective representation" in Pennsylvania at least on a first PCRA petition, Weinglass' and Williams' suppression of Chobert's recantation clearly violated this right – as well as the right not to be subjected to a constructive denial of counsel – and means that Petitioner Jamal never had a "truly counseled" first PCRA petition (*Commonwealth v Priovolos,* 746 A2d 621, 624 (Pa Super 2000)), thus this Court may and should construe this Petition as a first petition which relates back to the 1995 filing date of his original petition. *Commonwealth v Bronshtein*, Pa Super. No. 938 EDA 2000, August 23, 2001.

Although the legal doctrine of "constructive denial of counsel" is at the heart of Petitioner's case as to why this Court has jurisdiction to entertain the present PCRA/Habeas Petition, content analysis reveals that the words "constructive denial of counsel" appear nowhere in this Court's opinion. However, Petitioner's Memorandum of Law in Support of Court's Jurisdiction, at p. 5, makes it exceedingly clear that the conflicts of interest by Petitioner's previous counsel resulted in violations of Petitioner's constitutional rights that went far beyond those contemplated by the doctrine of "ineffective representation by counsel" under *Strickland v Washington*, 466 US 668 (1984), to constitute a "constructive denial of counsel" under *United States v Cronic*, 466 US 648, 656 (1984).

The Petitioner's case is that, because of his prior attorneys's conflicts of interest, he suffered "a constructive denial of counsel" (PCRA Petition, Paragraphs 133 to 135). *Rickman v. Bell,* 131

F3d 1150, 1156-1157 (6th Cir. 1997); *United States v. Cronic*, 466 US 648, 656 (1984); *Smith v. Robinson,* 528 US 259, 286 (2000); *Wood v. Georgia,* 450 US 261, 271 (1981); *Appel v. Horn,* 250 F3d 203, 221 (2001); *United States v. Cook*, 45 F3d 388, 393 (10th Cir. 1995); *Commonwealth v. Lawson*, 519 Pa. 504, 513, 549 A2d 107 (1988).

Both legally and qualitatively, there is a huge difference between mere "ineffective assistance of counsel"on the hand, and " a conflict of interest" and a consequent "constructive denial of counsel" on the other hand. *See Appel v. Horn, supra.*

In the first instance, the agency relationship between principal and agent, client and attorney, subsists and the acts of the attorney which are within the scope of his retainer are properly attributable to his client. Hence, for example, Section 9545(b)(4) which expressly excludes defense counsel from the definition of government officials, because, in cases where there is no conflict of interest, acts of malfeasance or nonfeasance on the part of a client's attorneys are properly attributable to the client on normal agency principles.

In the second instance, however, the normal agency relationship has broken down. Normal agency principles do not apply, because the relationship of principal and agent has broken down as a result of the agent's conflict of interest. As the attorney is in breach of his fiduciary duty to act in the best interests of his client, any acts of malfeasance or nonfeasance on his part are not attributable to the client. When, as in this instance, an attorney has deliberately acted in ways which are contrary to his client's interest because of a conflict of interest on his part, none of his acts are attributable to this client. Section 9545(b)(4) simply has no application and was never intended to have any application in these circumstances.

The crucial distinction between these two doctrines, whose importance was emphasized by the Third Circuit in *Appel v Horn*, is simply ignored by this Court which proceeds to analyze

Petitioner's allegations of treachery and betrayal by his former counsel as though Petitioner were complaining that prior counsel were "merely ineffective" when, to the contrary, Petitioner alleges that his prior attorneys, fearing for their own lives and safety, put their own interests and their interests in their future careers before Petitioner's best interests and buried the evidence which proves he is innocent rather than run the personal risks to themselves and their professional reputations in putting forward such evidence.

The specific causal connection between the *death threat* received by ex-Chief Counsel Leonard Weinglass (which the Court either missed or chose to ignore in its review of the record) and Weinglass' refusal to authorize investigation of Kenneth Freeman's involvement in the murder of Officer Faulkner is proved up by the declaration under penalty of perjury from private investigator George Michael Newman.

It is their own desperate need to bury Freeman's involvement in the killing which explains Weinglass' and William's failure to raise the legal issue of trial attorney Jackson's "ineffectiveness" for failing to prove up the presence of Freeman at the crime scene as a passenger in William Cook's car when it was pulled over by Officer Faulkner, when Jackson could have used Cynthia White's prior testimony at William Cook's trial to establish the presence of this passenger, as well as to impeach White and prove-up prosecutorial misconduct in concealing the passenger's very existence at Petitioner Jamal's trial. It is Weinglass' and Williams' failure to prove-up through the testimony of Arnold Howard at the 1995/1996 PCRA hearings that Freeman had his hands tested for gunpowder residue by police a short time after Officer Faulkner was killed and that Freeman was twice identified in a line-up by Cynthia White which provides further evidence of their conflicts of interest and the disastrous effect they had on presentation of Petitioner's case in the 1995 PCRA Petition and subsequent proceedings thereon.

The specific causal connection between Weinglass and Williams' conflict of interest and their suppression of Arnold Beverly's confession in 1999 is proved by the Petitioner's prior attorneys previous legal memoranda, by Weinglass' handwritten annotations on one of those memoranda, by the demonstrable lies told in Williams' book, by Rachel Wolkenstein's affidavit, by Michael Newman's affidavit, by the history of Weinglass and Williams' entire involvement in this case, by their knowledge at the outset that Police Officer Faulkner was a victim of a "mob hit", by their earlier suppression of the Petitioner's case on actual innocence together with the evidence with was then available to prove the Petitioner's innocence, by their sabotaging of even the claims for relief which they did present on the Petitioner's behalf, by the claims presented in the current PCRA Petition, by Weinglass' lie to the court about William Cook's alleged "disappearance," by the contrasting way in which they conducted the case in court and whipped up the political campaign in the streets, and by the fact that it was so plainly only in their interests (and in the interests of the District Attorney's Office and, it must be said, the real murderers) that Arnold Beverly's confession be suppressed.

Petitioner has demonstrated that the conflict of interest infected every decision which Weinglass and Williams took in relation to the conduct of this case. From the beginning to the end of their retainer, they made a series of decisions which are otherwise wholly inexplicable, even on the grounds of gross incompetence, in relation to the conduct of the Petitioner's case. Whilst the common denominator of many of those decisions is Weinglass and Williams' clear and obvious determination not to advance the Petitioner's case on actual innocence at all, not only as an independent claim, but also, to the extent that the evidence which proves the Petitioner's innocence was necessary to prove up numerous other meritorious claims for relief on his behalf, not to pursue such claims, or to the extent that any were nominally pursued, not to prove them with all or any of the available evidence, the impact of the conflict of interest did not stop there. As Newman's affidavit proves, Weinglass and

Williams even fouled up their attack on Chobert's credibility and Weinglass then lied to Newman to cover this up.

The sheer number of examples of how the Weinglass and Williams' fouled up the Petitioner's meritorious claims for relief *and* the variety of the ways in which they did so, which are exhaustively detailed in the present PCRA Petition, proves that there had to have been a conflict of interest on the part of the part of the Petitioner's prior attorneys, that they had to be motivated by something other than the best interests of their client. Weinglass and Williams are not and were not inexperienced, naive or feckless attorneys. They knew precisely what they were doing. Williams' book and Weinglass' letter to the Petitioner of 2/22/01 prove this.

This is not a case when errors were made just once, or twice, or three times, or any innocent number of times. This is not a case when the prior attorneys sometimes made baffling and incompetent mistakes. This is a case when every time the prior attorneys had the opportunity or needed to present the Petitioner's case on actual innocence, the evidence which supported it, they abjured it. This is a case when just about every time they had in their hands a potentially winning claim on the Petitioner's behalf, they ignored it, misrepresented it, failed to adduce the evidence to support it, or otherwise undermined it.

Instead of properly analyzing Petitioner's allegations with regard to his prior counsel's conflicts of interest and their impact on his case, the Court constructs its own "straw man" version of Petitioner's claims – that "these attorneys believed that foreclosing Petitioner's chances for a new trial would increase the sales of Mr. William's book" – and then proceeds to ridicule and destroy the "straw man" it has created. According to this Court, "this attorney fraud theory collapses by virtue of its lack of external and internal logic." The Court poses the following irrelevant rhetorical questions: "Why would hitherto honorable, capable and professional attorneys desert their training,

their ethics, their professionalism and place their very right to practice law in jeopardy? Why would one or more of these attorneys behave so heinously when the only possible advantage would be to the one among them who authored the book? How would a public failure to secure relief for a client facing the death penalty improve sales of a book?"

These rhetorical questions could just as readily be addressed to the issue of *why* Mr. Williams chose to violate Rule 1.8 of the Rules of Professional Conduct as flagrantly and brazenly as he indisputably did when he published Executing Justice. Yet, the mere fact that such questions might be asked does not disprove Mr. Williams' guilt, nor does it make his conduct any less blameworthy. Indeed, anytime disciplinary charges are brought against an attorney, which happens thousands of times each year in this country, probably in this state as well, the same questions might be and are asked. However, in this case, the following points should be realized:

Firstly, it should be noted that it is not Petitioner Jamal's burden to prove-up or even explain the subjective motive or intent of his prior counsel in doing what they did to suppress the evidence which proves his innocence and other legal claims of violations of his constitutional rights. All that Petitioner Jamal need prove is the objective effect upon his case of his prior counsel's nonfeasance, misfeasance, and malfeasance, and show that their conduct has no reasonable strategic or tactical explanation. If the Court is interested in ascertaining Messrs. Weinglass' and Williams' motivation it should authorize the taking of their depositions and/or set an evidentiary hearing and issue subpoenas for them to appear and testify.

Secondly, the Court constructs its "straw man" by ignoring Petitioner's allegations and argument that the conflicts of interest by his former counsel began at the inception of their representation when they decided not to pursue investigation of information that Officer Faulkner had been the victim of a planned murder by organized crime and corrupt police officers because he was

an obstacle to the "pay-off" rackets that permeated the Central Division of the Philadelphia Police Department in the 1980's. It is alleged in the PCRA/Habeas Petition that Weinglass and Williams knew that to pursue such an investigation would put them up against ruthless, powerful and dangerous forces and would put not only their own lives and safety at risk, but also their future careers.

When they subsequently ended up with Arnold Beverly's signed confession in their hands, corroborated by a lie detector test and undeniable evidence of rampant and widespread police corruption, that same conflict between their own narrow personal interests and their client's interest, caused them to bury that evidence rather than present it to any court. It was that same conflict which earlier caused them to keep Petitioner Jamal's brother, William Cook, off the witness stand at the PCRA proceedings, as his testimony would have pointed to Kenneth Freeman, who had confessed to Cook that he, Freeman, had been an armed participant in the shooting of Officer Faulkner.

And it was that same conflict which later flowered into attorney Williams' unethical and mendacious book, Executing Justice, among whose purposes was to cover their trail and keep suppressed both the evidence of Petitioner's innocence and that of their cowardly betrayal of their innocent client to the executioner while cynically and hypocritically posing to the world as Mumia Abu-Jamal's courageous defenders.

Thirdly, in finding that its straw man "attorney fraud theory" supposedly "collapses by virtue of its lack of external and internal logic", this Court also forgets that its role at the pleading stage in these proceedings is *not* to make credibility determinations which could only be made at an evidentiary hearing, but rather, just as in ruling on a motion to dismiss or a demurrer (*see Balsbaugh v Rowland*, 447 Pa 423, 426, 290 A2d 85, 87 (1972)), to *assume* that the allegations in the Petition are true, and then consider whether, even if true, the allegations do not justify granting relief. It

would only be upon a correct finding that the allegations in the Petition, even if true would not justify relief, that a Court could properly dismiss a Petition. *See* Official Comment to Rule 907, Pennsylvania Rules of Criminal Procedure: "To determine whether a summary dismissal is appropriate the judge should thoroughly review the petition, the answer, if any, and all other relevant information that is included in the record. If, after this review, the judge determines that the petition is patently frivolous and without support in the record, *or that the facts alleged would not, even if proven, entitle the defendant to relief* [emphasis added], or that there are no genuine issues of fact, the judge may dismiss the petition as provided herein."

For precisely the same reasons, as well as the eminently practical reason that, as a matter of fact, unless and until the Court has heard Arnold Beverly or, for that matter, attorney Weinglass or attorney Williams, testify it is impossible for the Court to make any credible findings of fact, it is not the Court's role at this stage to make any findings about the credibility or otherwise of Arnold Beverly or to conjecture as to what Weinglass and Williams may have thought about him.

Whilst the Court speculates that Arnold Beverly may have falsely confessed to the murder of Police Officer Faulkner because he is an attention seeker, it can point to no evidence in the record which even suggests that this may be so. The Court ignores the possibility that Arnold Beverly is telling the truth and that the Commonwealth of Pennsylvania is itself about to commit murder by executing an innocent man. The Court ignores the possibility that, if Arnold Beverly were ever permitted to testify, the Court might find him to be a credible witness. Without itself hearing Arnold Beverly testify, the Court simply cannot dismiss out of hand his written and signed confession under penalty of perjury, and his videotaped confession, both of which are on file in this Court and part of the record.

As it is, all of the available evidence points inevitably to the conclusion that Arnold Beverly

is telling the truth. Arnold Beverly's confession is not only corroborated by the existing evidence on the record and the further fresh evidence which has now been filed with Court, but also provides an explanation for the otherwise completely inexplicable aspects of the original prosecution case against the Petitioner as is set out not only in the present PCRA Petition (Paragraphs 1337 to 362), but also in the memoranda prepared by the Petitioner's prior attorneys in 1999, which the Court has improperly stricken from the record.

As to the Court's implied conjecture that Weinglass and Williams may have believed that Arnold Beverly was a dishonest witness, there is no evidence to support such a surmise. Williams' book is not admissible evidence and, in any event, it is demonstrably self-serving and untrue in what it what purports to record about Arnold Beverly. The legal memoranda, Dr. Honts' and Rachel Wolkenstein's affidavits, togther with the fact that Weinglass and Williams had known that Arnold Beverly had been saying that Police Faulkner had been murdered as a result of a "mob hit" since the inception of their retainer all independently prove this.

In summary, not only does the Court fail to consider Petitioner's real allegations and argument, it also uses the wrong methodology. The Court should assume the allegations in the Petition to be true, and then inquire whether Petitioner would be entitled to relief. If he would, then the Petition should not be dismissed. An evidentiary hearing should be set at which Petitioner might present the evidence to prove the allegations in the Petition and discovery should be authorized in order to prepare for that hearing.

Additionally, of course, the Court should apply the proper legal concepts in its analysis, in this case, the concepts which do not appear in its Memorandum and Order, namely "conflict of interest" and "constructive denial of counsel." Such analysis – by its own "internal" and "external" logic – will necessarily lead to the conclusion that this Petition should not be dismissed but rather heard on its

merits.

While the Court purports to find that no new material facts were discovered within the sixty days immediately preceding the filing of this Petition, the truth is otherwise. The new facts which underlie Petitioner's claims for relief in this PCRA/Habeas Petition which were discovered between May 4, 2001, when Petitioner's present counsel took over his representation from prior counsel Weinglass & Williams, and July 3, 2001, when this Petition was filed, and could not have previously been discovered, include the following:

a. throughout their retainer, attorney Weinglass and attorney Williams had a conflict of interest.

b. throughout their retainer, attorney Weinglass and attorney Williams had consistently and flagrantly acted in breach of their fiduciary duty of loyalty to him in ways which were contrary to his best interests, and only in their best interests.

c. there was evidence which was available which, completely contrary to what attorney Weinglass and attorney Williams had told the Petitioner as a result of their conflict of interest, did not damage his case, but, quite the opposite, proved the Petitioner's innocence.

d. there was evidence which was available which proved his innocence of which the Petitioner was completely unaware, because of attorney Weinglass and attorney Williams' conflict of interest.

e. there were numerous meritorious claims for relief which, because of their conflict of interest, attorney Weinglass and attorney Williams had deliberately suppressed, of which the Petitioner was unaware.

f. there were numerous meritorious claims for relief which, because of their conflict of

interest, attorney Weinglass and attorney Williams had deliberately undermined and sabotaged in ways of which the Petitioner was completely unaware.

g. throughout their retainer, attorney Weinglass and attorney Williams deliberately, because they were acting in their own interests, and because they were not acting in the Petitioner's best interests, withheld the Petitioner's case on actual innocence, deliberately withheld the evidence which proves the Petitioner's innocence from the Courts, and deliberately withheld, or deliberately failed to present properly, numerous meritorious claims for relief on the Petitioner's behalf, because proving those claims depended upon adducing the evidence which proved the Petitioner's innocence, as is demonstrated by a review of the claims in the pending Petition.

h. the real reasons why evidence which was previously potentially available which proves the Petitioner's innocence was not presented to the Court.

i. the real reasons why numerous meritorious claims for relief on the Petitioner's part were either not pursued or, if they had been pursued, had failed to succeed.

j. the Petitioner's whole case had been deliberately sabotaged by his prior attorneys, Weinglas and Williams.

The Court suggests that Petitioner may have known that Arnold Beverly had signed a written confession in June 1999 to the crime for which Petitioner had been convicted, but ignores the fact that prior to May 4, 2001, Petitioner did not know that his prior attorneys had undisclosed conflicts of interest which necessarily tainted all of the advice they had given him. He did not know that every act which they purported to perform on his behalf was tainted by those conflicts of interest. He did not know that when his prior attorneys told him that, say, Arnold Beverly's confession would be presented to the court, metaphorically speaking, over their dead bodies, that among the reasons why

they were so desperate that Arnold Beverly's confession should never see the light of day in a courtroom was that it exposed the failure to present so much other evidence which goes to prove the Petitioner's innocence which could and should have been adduced at the 1995 PCRA hearing, but which they had suppressed, together with the reasons why they had done so and how they had misled the PCRA court.

Although Petitioner Jamal had put his total trust and confidence in attorneys Weinglass and Williams and had literally put his life in their hands, he did not know and had no way to know that they were much more concerned to protect their own lives and safety, as well as their reputations and careers, by burying Arnold Beverly's confession, than they were concerned to win Petitioner Jamal's case by presenting the confession to the courts. This conflict of interest was never disclosed to Petitioner Jamal by ex-Chief Counsel Weinglass or ex-Chief Legal Strategist Williams when they refused to present Beverly's confession and misrepresented to Petitioner Jamal that this evidence would harm rather than help his case.

Prior to May 4, 2001, the Petitioner had believed that attorneys Weinglass and Williams had been honestly acting in his best interests in everything in which they had done or purported to do on his behalf. Prior to May 4, 2001, the Petitioner had quite properly been able to believe that he could rely and act upon his prior attorneys' advice and that their advice was genuine, disinterested and given with only his best interests in mind. Petitioner Jamal had put his total trust and confidence in these attorneys. He had to. He had placed his life in their hands.

Indeed, the only inkling which the Petitioner had before May 4, 2001, that his prior attorneys might have done anything other than with his best interests in mind was when he received the proof copy of Williams' book, Executing Justice, at the end of February, 2001. However, he did not then suddenly realise exactly what attorney Weinglass and Williams had done. The scales did not suddenly

fall from his eyes and the whole picture suddenly emerge in front of him. He only knew that something was very wrong. He could see that Williams' book was built upon one flagrant lie after another although it purported to be the "inside story" of his case. He could see that Williams cynically and diabolically traded on his position as Petitioner's attorney to give his lies a false veneer of credibility and to tie the lies to Petitioner Jamal. He could see that although he was innocent, and his attorneys knew that he was innocent, Williams' book repeatedly suggested in various ways that he was guilty. He knew that his Chief Counsel, Leonard Weinglass, whom he had respected for his long years of experience, legal acumen, and political principles, would do nothing to stop publication of the book because Weinglass told him as much.

Feeling rightly that he could no longer trust the two men that he had put his faith and trust in for nine years, and to whom he had literally entrusted his life, Petitioner Jamal did the only thing which he could do in the circumstances, on March 5, 2001, he personally filed a motion in the District Court for withdrawal of his existing counsel and requested time to find new counsel. When, on April 6, 2001, the District Court granted the Petitioner's motion, ordered the withdrawal of his counsel approved upon the entry of new counsel, and granted him 30 days for new counsel to enter their appearance, he set about finding new counsel.

When Petitioner's new counsel became aware of the evidence, including Arnold Beverly's confession, which they filed in the District Court on May 4, 2001, when they filed their appearances, they, like the Petitioner, did not know the true reasons why Petitioner's ex-Chief Counsel and ex-Chief Legal Strategist had not presented the evidence to any court. This only began to emerge in the following weeks as they began to work their way into the case and through the prior attorneys' papers, piecing together what the Petitioner's prior attorneys had done and why they had done it. It was only as the sheer scale of the numerous ways in which the Petitioner's prior attorneys, Messrs.

Weinglass and Williams, had undermined the Petitioner's case began to emerge that it became clear that this was not a case merely of grossly incompetent prior counsel, but that attorney Weinglass and attorney Williams had been actively working against the Petitioner's best interests at almost every turn.

It was only as the Petitioner's present counsel began to piece together the extent to which the evidence on the record and the other available evidence so closely corroborated Arnold Beverly's confession and made sense of the previously and otherwise inexplicable aspects of the original prosecution case against the Petitioner, and the extent to which the Petitioner's prior attorneys had understood and appreciated this at the time when they were telling the Petitioner that attempting to rely upon Arnold Beverly's confession would positively damage his case that the truth that there was no innocent explanation for the failure to present Arnold Beverly's testimony to the Court began to emerge, because there was no good reason and no one ever voiced any good reason.

The Petitioner's prior attorneys' conflict of interest did not rise fully formed, like a phoenix out of the ashes of the prior attorneys' retainer, on May 4, 2001. It had to be painstaking pieced together from an analysis of everything which the prior attorneys had done, the reasons which they had given for doing it (for instance, in Williams' book) and the independent and contemporaneous evidence which destroyed the credibility of Williams' account, and the manner in which Weinglass and Williams had acted throughout their retainer until the conclusion that Weinglass and Williams had been actively sabotaging the Petitioner's case from almost the outset of their retainer and certainly before the 1995 PCRA became inevitable.

Even now, further evidence continues to emerge. Hence the Petitioner's filing of all of the prior attorneys internal memoranda relating to the decision not to present Arnold Beverly's confession to the Court in 1999 on 16th November 1999, which was only possible after an exhaustive

search through all of the dozens of boxes of the prior attorneys' papers had established that, in all of those thousands of papers, not one single reason was ever put forward in any of the memoranda relating to this aspect of the case as to why Arnold Beverly's confession should not be presented to the court.

In any event, as a matter of law, the Petitioner could not have known about the factual predicate underlying the claims of conflict of interest in the current PCRA Petition until his present attorneys entered their appearances on May 4, 2001, and his prior attorneys' representation was withdrawn, because his prior attorneys' conflicts of interest were undisclosed by his prior attorneys and the Petitioner could not have acted on these claims until his prior attorneys were withdrawn from his representation.

The other statutory exception to the PCRA's filing deadlines which is pled in this Petition is that these claims for relief could not have been previously presented because of interference by governmental officials. Contrary to this Court's mis-perception of this argument, it is not the Petitioner's case that the Petitioner's prior attorneys acted as government officials. It is the Petitioner's case that they are deemed to have acted **as agents** of government officials, because they **deliberately** acted against the Petitioner's interests and in the interests of the Commonwealth. Thus section 9545(b)(4) has no application on the facts of the present case. This is not to say that whenever a defendant fails to be acquitted as a result of his attorney's negligence, the attorney is deemed to have acted as an agent of the prosecution. Quite the contrary. It is the Petitioner's case that this issue only arises in the, hopefully, exceptional case such as the present one, when, as a result of conflicts of interest, the attorney's acts of nonfeasance, misfeasance and/or *malfeasance* were **deliberately** carried out in the interests of the prosecution and contrary to the interests of his client.

II

PETITIONER JAMAL COULD NOT HAVE ACTED ON HIS OWN TO BRING BEFORE THE COURT THE EVIDENCE OF HIS INNOCENCE SUPPRESSED BY HIS OWN ATTORNEYS, WEINGLASS AND WILLIAMS, BECAUSE A CLIENT IS BARRED FROM ACTING ON HIS OWN WHEN HE IS REPRESENTED BY COUNSEL.

While in another context this Court refers to "hornbook law," it fails to note that it is also "hornbook law" that a client who is represented by an attorney may not act on his or her own behalf but may only act through the attorney. No court would entertain a pleading signed by a client who was attempting to act *pro se* while at the same time being represented by an attorney.

Thus, this Court's suggestion that Petitioner Jamal somehow had a *personal* responsibility to attempt an end run around attorneys Weinglass and Williams when they were still his attorneys of record and should have, on his own, written and filed his own PCRA petition based on Arnold Beverly's confession is, quite frankly, devoid of legal merit. Mr. Jamal could not have done so while he was still represented by Messrs. Weinglass and Williams.

Only Mr. Jamal's attorneys, Chief Counsel Weinglass and Chief Legal Strategist Daniel Williams, could have filed such a PCRA Petition. They refused to do so because they did not consider it to be in their own personal and professional interests to do so, despite the overwhelming need to do so in order to fulfill their responsibilities as Mr. Jamal's advocates. Instead, Messrs. Weinglass and Williams spent their time drafting a federal habeas petition which similarly failed to present the Arnold Beverly confession and other evidence of Mr. Jamal's innocence and suppressed any facts or legal issues that might conceivably open the Pandora's box, expose the involvement of Arnold Beverly and Kenneth Freeman, expose the involvement of organized crime and corrupt police officers, and, most dangerously, possibly point to the identity and involvement of the unknown persons who planned the murder of Officer Faulkner and hired the hitmen to carry it out, while at the

same time they put together Mr. Williams' infamous book, Executing Justice, to cover their own trail and keep the frame-up in place which it was their duty, as Mr. Jamal's attorneys, to expose and overturn.

III

PETITIONER JAMAL WAS DEPRIVED OF HIS RIGHT TO A FAIR HEARING ON HIS 1995 PCRA PETITION.

This Court has implicitly accepted the credibility of Terri Maurer-Carter's declaration under penalty of perjury that, while Petitioner Jamal was on trial before Judge Sabo, she heard the Judge make the following statement referring to Petitioner: "Yeah, and I'm going to help 'em fry the n****r." The Court does not challenge Ms. Maurer-Carter's credibility and, indeed, there is no evidence in the record to contradict her account.

The Court states that it is not possible to ascertain if the claim is timely filed because it is "not clear" that Petitioner could not have learned of the facts sooner. How Petitioner could possibly have learned of the facts sooner than Ms. Terri Maurer-Carter disclosed them to Petitioner's Counsel in August of this year is left unexplained. Until Ms. Maurer-Carter came forward, neither the Petitioner nor his present or prior counsel had or can have had any reason to suspect that Ms. Maurer-Carter had heard Judge Sabo make such a statement. However, if this is an issue it is obviously one to be determined at an evidentiary hearing at which both the Court and the District Attorney would be free to inquire of Ms. Maurer-Carter as to whatever details they wished to know.

While the Court takes the frankly surprising and unsustainable position that an openly racist judge who expresses the specific intention to contrive with the prosecution to procure the conviction and death sentence of a defendant does not deprive the defendant of his constitutional right to a fair trial so long as it is the jury and not the judge who is the fact-finder – ignoring the obvious fact that

any exercise of discretion by such a judge during a jury trial would be an abuse of discretion as it would necessarily be poisoned by the venom of racism[6] – the Court forgets that it was the same "n****r-frying" Judge Sabo who *was* the fact-finder in the 1995 PCRA hearings. Thus, Petitioner Jamal's statutory and constitutional right to a fair hearing was necessarily violated by Judge Sabo's presiding at the 1995 hearings *and* by his refusal to grant Petitioner's motion to recuse him for bias *and* by his own failure to recuse himself *sua sponte*.

Since Petitioner Jamal was deprived of his right to a fair hearing at the 1995 PCRA proceedings, it is just as if he never had a first PCRA petition. Just as in the cases cited in Petitioner's initial Memorandum of Law in Support of Court's Jurisdiction, at pp. 11-12 thereof, and with even more reason than in those cases, this Petition should be considered to be Petitioner Jamal's *first* petition and it should relate back to the filing of the 1995 Petition. Since the 1995 Petition was filed before the effective date of the PCRA amendments, the time deadline relied upon by this Court to deny jurisdiction in this matter would not apply and the Court should hear this Petition on the merits.

Any rulings which the appellate courts may have made in this case to the effect that Judge Sabo legitimately acted within his discretion in the rulings which he made at trial and during the original PCRA proceedings are necessarily in error, since those decisions were reached by the appellate courts in ignorance of Judge Sabo's racial prejudice against Petitioner Jamal and thus in

---

[6]Moreover, there is ample evidence of Judge Sabo using his discretion against Petitioner Jamal throughout the trial, and there is at least circumstantial evidence of his racial prejudice as well, including but not limited to: (1) the taking of the jury voir dire out of Petitioner Jamal's hands because of Judge Sabo's perception that jurors were allegedly "afraid" of Petitioner; (2) refusing Petitioner Jamal the assistance of his friend, non-lawyer John Africa, at counsel table which Sabo, in denying post-trial motions, admitted was because of Africa's "appearance" and "life-style" (Petition, Paragraphs 755-760); (3) aborting Petitioner's right to self-representation on the pretext of "disruptive behavior" (Petition, Paragraphs 605-630); (4) removing Black juror Jean Dawley from the jury without a hearing, with Sabo's transparently racist reference to "these people" and his demeaning description of Dawley as a "mental case" who should be examined by a psychiatrist (Petition, Paragraphs 664-697); and directing the jury to return with a verdict for death (Petition, Paragraphs 721-726).

ignorance of the fact that Sabo's racism must necessarily have affected the manner in which he exercised his discretion. *Any* exercise of discretion by a judge whose expressed *purpose* in making his rulings was "help 'em fry the n****r" must necessarily be an abuse of discretion.

IV

THE COURT HAS FAILED TO THOROUGHLY REVIEW THE PETITION, ANSWER, AND RELEVANT INFORMATION IN THE RECORD.

The Official Comment to Rule 907, Rules of Criminal Procedure, emphasizes that, "[t]o determine whether a summary dismissal is appropriate, the judge should *thoroughly review* [emphasis added] the petition, the answer, if any, and all other relevant information that is included in the record." The factual inaccuracies in the Court's Memorandum and Order make it clear that such a *thorough* review has not been carried out as required.

The Petitioner's Petition for a Writ of Habeas Corpus which was filed in the United States District Court for the Eastern District of Pennsylvania on 15th October 1999 was filed by the Petitioner's then attorneys, Leonard Weinglass and Daniel Williams, on the Petitioner's behalf. The Petitioner was not acting *pro se* at this time. Leonard Weinglass and Daniel Williams continued to be the Petitioner's attorneys of record until 4th May 2001. Their representation was only withdrawn on this date, when the Petitioner's present counsel, Marlene Kamish, Eliot Grossman, Nick Brown and Michael Farrell entered their appearances. These factual errors are far from insignificant in their necessarily deleterious effect on the Court's consideration of the jurisdictional issue.

The Petitioner does not allege that his prior attorneys' conduct amounts only to mere "ineffectiveness of counsel." Rather, it is the Petitioner's case that his prior attorneys' entire retainer was tainted by a conflict of interest on their part, that he suffered "constructive denial of counsel" and that there was a total breakdown in the adversarial system.

The Petitioner most certainly does allege that he was unaware of the relevant facts and "strategies" chosen by his former lawyers prior to May 4, 2001. The Petitioner most certainly does allege that he was completely unaware that his prior attorneys, Weinglass and Williams, were sabotaging his case as a result of conflicts of interest on their part prior to May 4, 2001. The Petitioner most certainly does allege that he had no idea that he had been deceived and betrayed by his prior attorneys prior to May 4, 2001, and that he and his present attorneys only gradually came to realise this and to begin to understand the contours of what had happened during the period between his present attorneys entering their appearances in U.S. District Court on May 4, 2001, and their filing of this Petition in this Court on July 3, 2001.

Petitioner does not suggest that the reason for the manner in which his previous attorneys behaved is that his prior attorneys believed that foreclosing the Petitioner's chances for a new trial would increase the sales of Williams' book. This point is discussed in detail above and will not be repeated here.

The Petitioner most certainly does assert that the weight and sufficiency of the evidence relied upon by the prosecution at his original trial has never been effectively or properly challenged, that the reason why this did not happen at the original PCRA hearing was because of his prior attorneys' conflict of interest, and that he was unaware that this had happened or of the reason why this had or might have happened until after May 4, 2001.

The Petitioner most certainly does assert that he was unaware that, because of their conflict of interest, his prior attorneys had in bad faith suppressed his case on actual innocence and had in bad faith suppressed the evidence which proved his innocence.

The Petition most certainly does explain why Petitioner did not file a new PCRA Petition or apply to amend his earlier PCRA Petition in 1999, and this point is further explained in this Response,

viz., Petitioner was represented by his Chief Counsel Leonard Weinglass and Chief Legal Strategist Daniel Williams and could only act through them. Petitioner had placed his full faith and trust in them and had no reason to know or suspect that all of their conduct and all of their advice to him was tainted and poisoned by their undisclosed conflicts of interest.

Petitioner most certainly does assert that he was prevented from testifying during the original PCRA proceedings because he followed the advice of his prior attorneys and that (although he was unaware of this until after May 4, 2001) the reason why they blocked him from testifying was because of their conflicts of interest.

Petitioner was unaware (and could never have been aware) of many of the remaining facts and events underlying his claim that Weinglass and Williams deliberately and in bad faith failed and refused properly to investigate or provide a genuine defense in his case and deliberately and in bad faith failed to expose the "pro forma" defense put on by attorney Jackson at his trial.

Petitioner was unaware (and could never have been aware) that Weinglass and Williams were acting in bad faith and that their failure to present his defense case was a deliberate act on their part, which stemmed from their conflict of interest, and that they were not acting in his best interests at all.

Petitioner was unaware that Weinglass had deliberately and in bad faith kept William Cook off the stand in 1995, and was unaware that Weinglass had lied to the Court about why William Cook was not being called to testify.

Petitioner was unaware (and could never have been aware) that Robert Chobert had retracted his trial testimony when he was interviewed by defense investigator, Mike Newman, in 1995, and thus was unaware that Weinglass had deliberately failed to elicit this fact from Robert Chobert when he testified in 1995.

Petitioner most certainly does assert that he was completely unaware (and could never have

been aware) that, as a result of their conflict of interest, Weinglass and Williams deliberately and in bad faith kept off the stand himself, his brother William Cook, Doctor Coletta, Michael Newman, Prosecutor McGill and his former appellate counsel Marilyn Gelb. The Petitioner most certainly does assert that he was unaware that, as a result of their conflict of interest, Weinglass and Williams deliberately and in bad faith failed to elicit vital testimony from William Thomas, William Singletary, Arnold Howard, Robert Chobert and Anthony Jackson.

Petitioner was completely unaware (and could never have been aware) that, as a result of their conflict of interest, Weinglass and Williams had deliberately and in bad faith failed to object to Judge Sabo's order turning over the physical evidence in the case to the police thus providing them with ample opportunity for them to tamper with the evidence, or that, as a result of their conflict of interest, Weinglass and Williams had deliberately and in bad faith failed to have the ballistics and firearms evidence tested. This issue could not be waived by Weinglass and Williams' failure to raise this claim on appeal from denial of post-conviction relief, since Weinglass and Williams, the same counsel who had deliberately and in bad faith failed to object to Judge Sabo's order or have the ballistics or firearms evidence tested, continued to represent the Petitioner on that appeal. Their bad faith and their conflict of interest persisted.

The Petitioner was completely unaware (and could never have been aware) that, as a result of their conflict of interest, Weinglass and Williams had deliberately and in bad faith failed to investigate, request discovery on or otherwise prove up in the original PCRA proceedings attorney Jackson's history of drug abuse.

The Petitioner was completely unaware (and could never have been aware) that, as a result of their conflict of interest, Weinglass and Williams had deliberately and in bad faith failed to plead or prove up numerous points of ineffective representation on direct appeal by Petitioner's appellate

counsel, Marilyn Gelb.

V

THIS PETITION MAY NOT BE DISMISSED WITHOUT A HEARING.

Pursuant to Rules 907, 908 and 909, Pennsylvania Rules of Criminal Procedure, Petitioner demands a hearing and oral argument on the issue of whether or not this Petition should be dismissed.

The Court notes at the beginning of its Memorandum and Order that it requested briefing on the issue of whether Petitioner is entitled to oral argument on the jurisdictional issue, however, the Court failed to rule on this issue.

Although the Court seeks to base its intended dismissal of this action on Rule 909, it is evident from the text of the rules that Rules 907, 908 and 909 are interrelated in such a fashion that they cannot be interpreted properly in isolation from each other. Rule 908, which governs hearings, states that, except as provided in Rule 907, the judge shall order a hearing "whenever the Commonwealth files a motion to dismiss due to the defendant's delay in filing the petition" or "when the petition for post-conviction relief or the Commonwealth's answer, if any, raises material issues of fact."

In this case, the Commonwealth filed an Answer which was the equivalent of a Motion to Dismiss because it *only* raised the issue of the Court's jurisdiction to hear the petition and did not go to the merits of any of Petitioner's Claims for Relief. Thus, since the Answer is the equivalent of a motion to dismiss, Rule 908 would require the Court to hold a hearing before ruling on whether or not it would dismiss the petition. The Official Comment to Rule 908 points out that: "The 1997 amendment to paragraph (a)(1) requires a hearing on every Commonwealth motion to dismiss due to delay in the filing of a PCRA petition."

Rule 907 governs disposition of a petition without a hearing. The Official Comment to Rule

907 states: **"A PCRA petition may not be dismissed due to delay in filing except after a hearing on a motion to dismiss. *See* 42 Pa.C.S. Sec. 9548(b) and Rule 908."** Thus it is evident that Rule 907 cannot apply when the basis for dismissal is an alleged delay in filing, as in this case. Rule 907 distinguishes the procedure in non-capital cases in which the petitioner is restricted to filing written opposition to a notice of intent to dismiss from that in capital cases, under Rule 909, where the petitioner may request oral argument, by noting that the Rule 907 procedure applies "[e]xcept as provided in Rule 909 for death penalty cases."

Although it might generally be within the court's discretion to grant a request for oral argument under Rule 909, it would obviously be an abuse of discretion to refuse such a request in a case such as this one in which the basis for the notice of intent to dismiss is an alleged "delay" in filing the petition and in which the Commonwealth has chosen to file an Answer which is the equivalent of a motion to dismiss.

Finally, it is quite clear from reviewing Rules 907-909 and their accompanying Official Comments that it was the intent of the Legislature that a PCRA petition not be dismissed without a hearing on grounds of late filing, because to do so would mean that not only would a petitioner never have his or her claims of constitutional violations even considered by the courts, but the petitioner would not even have the opportunity for a hearing on whether the court *should* hear these claims. Such a summary procedure would violate the very purpose of the Post-Conviction Relief Act which is to provide 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.

CONCLUSION

For the foregoing reasons, the Court should withdraw its notice of intent to dismiss this Petition without a hearing and should, instead, set an evidentiary hearing, authorize discovery, and

reach the merits of Petitioner Jamal's claims that he is innocent and was wrongly convicted in violation of his constitutional rights. The Court should not and cannot properly dismiss this Petition without oral argument and a hearing in open court with Petitioner Jamal and the public present.

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

Dated: December 10, 2001

Respectfully submitted,

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

Petitioner

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
2927 West Liberty Avenue #193
Pittsburgh, PA 15216-2525
(412) 264-6686

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 Petitioner Mumia Abu-Jamal

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

Local Counsel for Petitioner Mumia Abu-Jamal

By: _____
ELIOT LEE GROSSMAN
Attorneys for Petitioner