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For Chicana/Chicano Studies Foundation

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On The Amicus Briefs

It is always a remarkable experience to read amicus briefs in my case. It may surprise you to know that I learn from them, for they illustrate things about my own case that I never knew or had long forgotten. Each of them performed that function for me.

If they did that for me, imagine what they can do for you. What these skilled and uncompromising lawyers did was something truly remarkable-they read the court record and faithfully and correctly, I think, argued that they found clear constitutional, judicial, prosecutorial and defense violations.

After almost two decades this is the first time that lawyers looking at the case (from two continents) have highlighted the constitutional violation represented by the court's denial of my right of self-representation and the denial of my right to the assistance of a non-lawyer, John Africa. The briefs are more than a procedural or case history. They are history lessons about fundamental human rights that were violated by the state with impunity. So I invite you to read and learn what it means to have a court-appointed lawyer who seems like a prosecutor and a judge who is one.

Learn as I did what happened in back rooms
when I wasn't there and no one cared.

Learn how jurors are really chosen; how they are moved,
replaced and imposed as foreman of a hanging jury.

Without a doubt this happens every day in America, but you
will rarely have a better opportunity to read a record such as this.

If you read these briefs, then you've learned these important things and then you know it is time to act. Find out why an American court found them "unnecessary" and "unhelpful".

Please contact the nearest office of International
Concerned Family & Friends of Mumia Abu Jamal. Join us.

ONA MOVE LONG
LIVE JOHN AFRICA
Mumia Abu Jamal 8/22/00"

Write To Mumia!"
To communicate directly w/Mumia
please write to him at:
Mumia Abu-Jamal
AM 8335
SCI-Greene
175 Progress Drive
Waynesburg, PA 1537

Amicus Brief Filed by
For Chicana/Chicano Studies Foundation

(please note: pages numbers in table of contents have changed)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MUMIA ABU-JAMAL,
Petitioner,
Case No. 99 Civ. 5089
MARTIN HORN, Commissioner, **(YOHN)**
Pennsylvania Department of Corrections,
and **CONNER BLAINE,** Superintendent of
the State Correctional Institution
at Greene;
Respondent.

BRIEF OF AMICUS CURIAE FOR CHICANA/CHICANO STUDIES FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

(THIS IS A CAPITAL CASE)

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Respondent.

BRIEF OF *AMICUS CURIAE*
"FOR CHICANA/CHICANO STUDIES FOUNDATION"

INTRODUCTION

The case of Petitioner Mumia Abu-Jamal is an exceedingly complex one which presents a veritable "Gordian's knot" of complicated legal and factual issues which have generated literally hundreds of pages of briefs by the parties and various amicus. The justification for submitting this amicus brief is three-fold: (1) to provide additional context, cited from the record, with which to view several issues of particular significance to *Amicus* which are presently before the court, each one of which mandates reversal of Mr. Jamal's conviction; (2) to argue that the Commonwealth's admission at the PCRA hearing as to the power of the mitigation evidence mandates reversal of Mr. Jamal's death sentence and precludes their seeking the death penalty at re-trial; and (3) to dispose of the Commonwealth's argument that certain of Petitioner's claims have been procedurally defaulted.

ARGUMENT

I. DENIAL OF PETITIONER MUMIA ABU-JAMAL'S *FARETTA* RIGHT OF SELF-REPRESENTATION *MANDATES* THAT A NEW TRIAL BE GRANTED.

A. MR. JAMAL HAD A RIGHT TO REPRESENT HIMSELF AT TRIAL.

The right of a citizen to represent himself before the power of the State is a fundamental one, arising from precedent that predates the founding of the Republic. It is personal and individual and is of such a fundamental nature that its denial constitutes a structural defect in the proceedings. The Supreme Court has repeatedly held that denial of the right to self-representation is never harmless error and must be remedied by granting the defendant a new trial. Faretta v. California, 422 U.S. 806 (1975); Arizona v. Fulminante, 499 U.S. 279, 310 (1990), *citing* McKaskle v. Wiggins, 465 U.S. 168 (1984); *accord* Sullivan v. Louisiana, 508 U.S. 275 (1993).

In Faretta, 422 U.S. at 819, the Supreme Court specifically holds:

> "Although not stated in the [Sixth]Amendment in so many words, the right to self-representation — to make one's own defense personally — is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."

The basis for the holding in Faretta is the court's extensive and scholarly historical and conceptual analysis from which it concludes that "[t]he right of self-representation finds support in the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which the Amendment emerged." 422 U.S. at 818. Indeed, the Faretta court notes that the only English court in which a defendant was forced against his will to be represented by counsel was the notorious Court of Star Chamber, an infamous 16th and 17th century institution whose very name is synonymous with tyranny and injustice. 422 U.S. at 822"

In tracing the history of the right to self-representation prior to the American Revolution, the Supreme Court notes that the insistence upon a right of self-representation was, if anything, more fervent [in the Thirteen Colonies] than in England. The colonists "brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers," a distrust which "became an institution." The aftermath of the Revolution saw a "sudden revival" of the "old dislike and distrust of lawyers as a class." And, it was "[i]n the heat of these sentiments [that] the Constitution was forged." 422 U.S. at 826-827.

According to the Supreme Court: "The Founders believed that self-representation was a basic right of a free people. Underlying this belief was not only the anti-lawyer sentiment of the populace, but also the 'natural law' thinking that characterized the Revolution's spokesmen." 422 U.S. at 830, n.39. Indeed, Thomas Paine argued that the right to counsel was secondary to the right of self-representation, from which the former was itself derived: "Either party ... has a natural right to plead his own cause; this right is consistent with safety, therefore it is retained; but the parties may not be able, ... therefore the civil right of pleading by proxy, that is, by a council, is an appendage to the natural right [of self-representation] ..." Id.

Ironically, in this case it is the Commonwealth of Pennsylvania which has violated Petitioner Jamal's right to self-representation although William Penn, the founder of the Commonwealth, was one of its strongest advocates. Penn, as a Quaker, was no stranger to persecution. Before coming to America, he was charged with inciting a riot for preaching a sermon in the street in England after his church had been closed by the government. Penn defended himself and was acquitted. He is credited with authorship of the Pennsylvania Frame of Government of 1682, "the most influential of the Colonial documents protecting individual rights," in which the right to self-representation is set forth as follows: "That, in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves; or, if unable, by their friends ...." This right to self-representation was carried over to the Declaration of Rights of the Pennsylvania Constitution, and

is typical of codifications of the same right in numerous other state constitutions. 422 U.S. at 827, n. 37, 38.

B. THERE WAS NO REASON TO ABORT MR. JAMAL'S RIGHT OF SELF-REPRESENTATION AND FORCE AN UNWANTED LAWYER ON HIM.

As the Supreme Court points out in Faretta, 422 U.S. at 820-821:

> "The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the amendment, shall be an aid to a willing defendant — *not an organ of the State* [emphasis added] interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the amendment insists ... *An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction*. [emphasis added] Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." [emphasis in original]

The grotesque scenario described in Faretta, in which counsel "represents" a defendant through a legal fiction but serves in reality as an *organ of the State,* is precisely what occurred in the case of Petitioner Mumia Abu-Jamal. This should never have happened as there was no justification for depriving Mr. Jamal of his right to self-representation. In order to demonstrate this, it is necessary to review in detail the chronology of events leading up to June 17, 1982, when Judge Sabo revokes Mr. Jamal's *pro se* status.

In May 13, 1982, during pre-trial proceedings, Petitioner Mumia Abu-Jamal requests and is granted the right to represent himself. (5/13/82 Tr. 54, 68-70) Thereafter, he skillfully conducts a several day suppression hearing, adroitly cross-examines *fifteen* witnesses, and eloquently argues several additional motions. During these four days, Mr. Jamal conducts himself appropriately, is respectful to the court, and draws neither admonishments nor warnings from the trial judge for any "disruptive" behavior, as there is none. (6/1/82 Tr. 1.1-1.149; 6/2/82 Tr. 2.1-2.135; 6/3/82 Tr. 3.1-3.104; 6/4/82 Tr. 4.1-4.147)

Mr. Jamal then conducts two days of jury voir dire during which time he questions 23 potential jurors, successfully challenges two for cause, defeats a prosecution challenge for cause, and exercises two peremptory challenges. Mr. Jamal, again, is appropriate and respectful to the court, and the voir dire proceeds without incident. (6/7/82 Tr. 1-189; 6/8/82 Tr. 2.1-2.159)

The following day, the trial judge takes over the voir dire himself, but does not alter Mr. Jamal's *pro se* status. Judge Sabo acknowledges that he had not "rebuked" Mr. Jamal for any of his conduct during voir dire, but claims that questioning of the venire was proceeding too slowly and, allegedly, some venire members were uncomfortable being questioned by the defendant. (6/9/82 Tr. 3.17) The Pennsylvania Supreme Court, in its review of these proceedings on appeal from the PCRA post-conviction proceedings, notes that Mr. Jamal "argued vehemently that the court should not perform the *voir dire* questioning" but that the court "took over the questioning and then properly [sic] ordered that back-up counsel take control." (Commonwealth v. Mumia Abu-Jamal, 720 Atlantic Reporter 2d 79, 109 (Pa. 1998). Thereafter, jury selection continues for an additional four and one-half days without any disruptive behavior on the part of Mr. Jamal. 6/9/82 Tr. 3.106-3.250; 6/10/82 Tr. 4.1-4.251; 6/11/82 Tr. 5.1-5.212; 6/15/82 Tr. 1-255; 6/16/82 Tr. 1-497)

On June 17, 1982, pre-trial proceedings continue with regard to various matters, including Mr. Jamal's request that various items of evidence be provided to him by the prosecution prior to commencement of trial. These proceedings take place without incident. (6/17/82 Tr. 1.1-1.31.) The trial then begins.

After the court's opening instructions to the jury, but before the state's opening statement, Mr. Jamal asks the court for a microphone at counsel table. A side-bar conference is held. The court refuses his request and threatens to remove his *pro se* status and put back-up counsel, Mr. Jackson, in as attorney of record if Mr. Jamal doesn't "speak up." Trial resumes with Mr. Jamal again requesting a microphone. A side-bar is held. Mr. Jamal repeats his request for a microphone and expresses his dissatisfaction with Mr. Jackson, renewing an earlier request to have a lay person, John Africa, sit with him at counsel table to advise and assist him. The prosecutor taunts Mr. Jamal, accusing him of trying to "chicken out" of representing himself. The court denies Mr. Jamal's requests. The court again threatens to revoke Petitioner's *pro se* status. Mr. Jackson makes a motion for leave to withdraw, citing his lack of qualifications and discomfort with regard to the role of back-up counsel and Mr. Jamal's rejection of him. The motion is denied. (6/17/82 Tr. 1.44-1.69)

When trial resumes before the jury, Mr. Jamal renews his motion for leave to have John Africa sit with him at counsel table. (Mr. Africa was a personal friend of Mr. Jamal. Although a non-lawyer, Mr. Africa had recently successfully defended himself in a federal criminal prosecution.) The jury is excused and discussion continues at side-bar. Mr. Jamal vigorously argues in support of his request. The court asks Mr. Jamal if it is his intention to disrupt the proceedings. Mr. Jamal twice assures the court that it is not his intention to be disruptive. Discussion of the matter of Mr. Africa continues until the noon recess. (6/17/82 Tr. 1.70-1.89)

After the noon recess, in open court and out of the presence of the jury, discussion continues of Mr. Jamal's request for the presence of John Africa at counsel table. The prosecutor states on the record that he has no objection to Mr. Africa sitting in the courtroom in the same area where police officers are sitting, nor has he any objection to Mr. Jamal talking with Mr. Africa at recess, in between witnesses, before court, or in his cell. (6/17/82 Tr. 1.90-1.96) It is clear from this that the prosecution had no security concerns with regard to Mr. Africa, nor was he concerned that Mr. Africa might be disruptive of the proceedings or encourage Mr. Jamal to be disruptive. Judge Sabo apparently had no such concerns either, as he advises the prosecutor that he has no problem with Mr. Africa being in the courtroom during the proceedings, including during breaks. (6/17/82 Tr. 1.114)

Discussion continues with regard to Mr. Jamal's lack of faith in Mr. Jackson and his request to have Mr. Africa sit with him at counsel table. The judge suggests three times to Mr. Jackson that he go to the Supreme Court for clarification of his role, given Mr. Jamal's position. (6/17/82 Tr. 1.115-1.117) In response to Jackson's expression of doubt that he would have standing to do so, Judge Sabo first responds that he can tell the Supreme Court that the trial judge is "on the verge" of removing Mr. Jamal as his own attorney, and then offers to actually revoke Mr. Jamal's *pro se* status if Mr. Jackson so requests: "Well, if you're asking me to remove him, I'll remove him. I'll make it easy for you." (6/17/82 Tr. 1.118)

There was no justification at this point to revoke Mr. Jamal's *pro se* status. The prosecutor himself indicates that the only reason to make Mr. Jackson primary counsel would be to give him standing to request the Supreme Court clarify his role as back-up counsel. The prosecutor specifically says to Judge Sabo that once such clarification is forthcoming "and we are again before this Court in this trial that Your Honor consider moving Mr. Jackson and reappointing or for that matter allowing Mr. Jamal to represent himself again." (6/17/82 Tr. 1.120) Just prior to saying this, the prosecutor acknowledges Mr. Jamal's desire to represent himself and advises the judge of his own feeling that Mr. Jamal would accept the Supreme Court's decision. (6/17/82 Tr. 1.119) Had Mr. Jamal been disruptive of the proceedings, certainly the *prosecutor* would not have suggested that the judge restore him to *pro se* status, nor would the prosecutor have offered the opinion that Mr. Jamal would comply with the Supreme Court's decision.

Additionally, the prosecutor concedes that Mr. Jamal has presented what is at least an *arguably meritorious* issue deserving of adjudication by the Pennsylvania Supreme Court: "And the issue, as I understand it, is whether or not backup counsel must in fact be an attorney. Of course, if

they say that's not needed, it's not necessarily true, well then, he can have whomever he wishes." (6/17/82 Tr. 1.121) The prosecutor also concedes that having a lay person at counsel table and a back-up attorney are not mutually exclusive alternatives, suggesting to Judge Sabo that, even if the Supreme Court rules that Mr. Jamal can have the assistance of Mr. Africa, that the court continue to have Mr. Jackson present. (6/17/82 Tr. 1.121)

However, Judge Sabo, after previously suggesting removal of Mr. Jamal's *pro se* status purely as a stratagem to confer "standing" on Mr. Jackson, and explicitly acknowledging the prosecutor's statement that there was no other reason to do so, proceeds to accuse Mr. Jamal of intentionally disrupting the orderly progression of the trial. (6/17/82 Tr. 1.122)

When Mr. Jamal inquires as to how he disrupted the proceedings, Judge Sabo says: "[W]hen I make a ruling that's it, you don't argue with the Court about the ruling ..." Mr. Jamal immediately accepts this injunction and advises the court that he will comply with it by replying: "Judge, fine." (6/17/82 Tr. .122) Despite this, Judge Sabo proceeds to strip Mr. Jamal of his right to self-representation, appointing Mr. Jackson as attorney of record. (6/17/82 Tr. 1.123)

It is important to note that this is the *first* time that Judge Sabo specifically instructed Mr. Jamal that it is improper to continue arguing a point after the court has made a ruling. Prior to that, Mr. Jamal had renewed his motion for the assistance of Mr. Africa at numerous points in the proceedings. Rather than admonishing Mr. Jamal on those occasions and instructing him not to re-argue the point, the Judge Sabo had entered into extended discussion with him, discussion in which the prosecutor frequently joined.

As a result, it was reasonable for Mr. Jamal, as a lay person, to assume there was nothing improper in continuing to press a point which he felt was crucial to his defense. As previously argued, above, this was a point which even the *prosecutor* acknowledged to present a legitimate issue and which, immediately prior to revocation of Mr. Jamal's *pro se* status, the prosecutor himself had suggested be taken before the Pennsylvania Supreme Court.

Moreover, at the time he revoked Mr. Jamal's *pro se* status, Judge Sabo made no specific factual findings of any kind as to when Mr. Jamal had allegedly been disruptive or how such alleged behavior had interfered with the proceedings. Clearly, Mr. Jamal's conduct prior to having his right to self-representation revoked did not even approach that of the defendant in Illinois v. Allen, 397 U.S. 337 (1970). In Allen, the classic case on the limitations of the right to self-representation, the *pro se* defendant, upon being instructed to confine his voir dire to questions concerning the juror's qualifications, began to argue with the judge in an abusive and disrespectful manner, continued talking when the judge appointed counsel to continue the voir dire, threatened the judge's life, tore his file out of the attorney's hands and threw the papers on the floor, and said the following: "There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial." 397 U.S. at 340. The defendant was removed from the courtroom, allowed to return after a recess, repeated the same conduct and was again excluded. The Supreme Court ruled that, by his conduct, the defendant had forfeited his Sixth Amendment right to be present at his trial.

Dougherty v. United States, 473 F.2d 1113 (D.C. Cir. 1972) was a multi-defendant case in which anti-Vietnam War protesters were charged with various crimes for having invaded Dow Chemical's offices and committed acts of vandalism. There the court held that it was an unconstitutional deprivation of the right to self-representation for the trial court to have denied defendants' request to proceed *pro se* based upon disruptive behavior which occurred after denial of their request, explaining that this would be like "using the fruit of an unreasonable search to provide a cause making the search reasonable." The Dougherty court further explained that it would be "anomalous to hold that the denial of one's rights can be justified by reference to the nature of subsequent complaints protesting that denial." 473 F2d at 1126. Thus, in the case before this court, it is only to Mr. Jamal's conduct prior to having his *pro se* status revoked that the court should look to determine whether Judge Sabo was justified in stripping him of his right to self-representation. As is previously argued, Mr. Jamal's conduct did not merit removal of his *pro se* rights.

With regard to behavior prior to having *pro se* status denied, the Dougherty court held that such behavior must be disruptive in the sense of "evincing defendants' intent to upset or unreasonably delay the hearing." 473 F2d at 1127. In the case before this court, Mr. Jamal's intent was clearly to press his point with regard to his need for the assistance of Mr. Africa in order to present his *pro se* defense. There was no intent to upset or unreasonably delay the hearing, as earlier demonstrated by Mr. Jamal's stoically professional acceptance of denial of his suppression motion and exemplary conduct throughout the voir dire proceedings, and as later evidenced by his twice stating to the trial judge on the record that it was not his intention to in any way disrupt the proceedings.

When Judge Sabo finally instructed Mr. Jamal that it was improper for him to continue to argue a point after the court had ruled, Mr. Jamal agreed to follow that instruction. Previous to that, the judge had permitted Mr. Jamal to renew his motion with regard to Mr. Africa on a number of occasions and both the court and the prosecutor had permitted themselves to be drawn into continued argument on the motion. It was reasonable for Mr. Jamal to assume that it was proper for him to continue to press his point under the circumstances and his persistence in so doing cannot properly be characterized as evincing a disruptive intent.

In his dissent in Illinois v. Allen, 397 U.S. at 353, Justice Douglas reminds us that "great injustices have at times been done to unpopular minorities by judges" and quotes at length from the court record of William Penn's trial in London in 1670. There is a such a striking similarity between the English judges' interchange with that "gentle Quaker" three centuries ago and that between Judge Sabo and Petitioner Mumia Abu-Jamal three hundred years later that it evokes an eerie sense of *deja vu*:

WILLIAM PENN: I desire you would let me know by what law it is you prosecute me, and upon what law you ground my indictment.
RECORDER: Upon the common-law.
PENN: Where is that common law?
RECORDER: You must not think that I am able to run up so many years, and over so many adjudged cases, which we call common-law, to answer your curiosity.
PENN: This answer I am sure is very short of my question, for if it be common, it should not be so hard to produce. (397 U.S. at 353)
***
THE COURT [Judge Sabo]: The law of Pennsylvania says that you can only have backup counsel who is a member of the bar, and that's the way it's going to be.
THE DEFENDANT [Mumia Abu-Jamal]: What I'm saying to you, Judge, is that –
THE COURT: And I'm saying to you –
THE DEFENDANT: — there is no rule or statute that you can point to –
THE COURT: If you think –
THE DEFENDANT: — that says I can't have someone –
THE COURT: If you think that's wrong –
THE DEFENDANT: — sitting at the defense table? (6/17/82 Tr. 1.107-1.108)
***
RECORDER: Sir, will you plead to your indictment?
PENN: Shall I plead to an Indictment that hath no foundation in law? If it contain that law you say I have broken, why should you decline to produce that law ... ? (397 U.S. at 353)
***
THE COURT: ... I made a ruling on the law. You must follow it.
THE DEFENDANT: You have made a ruling on your procedure. You have not made — there is no law that states why someone cannot assist me at the defense table, and you know it. (6/17/82 Tr. 1.108-1.109)
***
RECORDER.: You are a saucy fellow, speak to the Indictment.
PENN: I say, it is my place to speak to matter of law; I am arraigned a prisoner; my liberty, which is next to life itself, is now concerned ... I say again, unless you shew me, and the people, the law you ground your indictment upon, I shall take it for granted your proceedings are merely

arbitrary. (397 U.S. at 353-354)
***
THE COURT: If you don't like it, your attorney can tell you what you can do.
THE DEFENDANT: That is not a ruling on the law. It's a ruling on your procedure.
THE COURT: No, it isn't. It is a ruling on the law.
THE DEFENDANT: What law? What law can you state that I cannot have someone assist me at that table? (6/17/82 Tr. 1.109)
***
RECORDER: You are an impertinent fellow, will you teach the court what law is? It is 'Lex non scripta,' that which many have studied 30 or 40 years to know, and would you have me to tell you in a moment?
Penn: Certainly, if the common law be so hard to be understood, it is far from being very common ... (397 U.S. at 354)
***
THE COURT: Mr. Jamal, I am not going to argue consistently throughout this trial. If you continue to act in this way –
THE DEFENDANT: In what way am I acting?
THE COURT: When I make a ruling you have an automatic exception to that ruling. It will be reviewed by the Appellate Court. I don't want to stand here and argue with you all day long on
every ruling I'm going to make throughout this trial. (6/17/82 Tr. 1.109-1.110)
***
RECODER: Sir, you are a troublesome fellow, and it is not for the honour of the court to suffer you to go on.
PENN: I have asked but one question, and you have not answered me; though the rights and privileges of every Englishmen be concerned in it.
RECORDER: If I should suffer you to ask questions till to-morrow morning, you would be never the wiser.
PENN: That is according as the answers are.
RECORDER: Sir, we must not stand to here you talk all night.
PENN: I design no affront to the court, but to be heard in my just plea ... (397 U.S. at 354-355)
***

THE COURT: Standing here and arguing with me all day is foolish.
THE DEFENDANT: No, it is not foolish.
THE COURT: I do what I believe is the law.
THE DEFENDANT: ... What I'm saying, Judge, is, that there is no law that prohibits you from allowing someone to assist me at the defense table. This is done all the time. I cited cases during that Motion to Suppress, a number of cases, that happened right here in this City Hall where there was an assistance from non-lawyers at the defense table, and there's no reason— and there's no reason for you or the Commonwealth to deny me access to assistance that I have stated a number of times that I need in my defense. (6/17/82 Tr. 1.113-1.114)
***
RECORDER: Take him away. My lord, if you take not some course with this pestilent fellow, to stop his mouth, we shall not be able to do any thing to night.
MAYOR: Take him away, take him away, turn him into the bale-dock. (397 U.S. at 355)
***
THE COURT: You have certain rights but what I said is this: My position is that you have
deliberately disrupted the orderly progression of this trial. Therefore, I am removing you as primary counsel and I am appointing Mr. Jackson to take over as primary counsel. (6/17/82 Tr. 1.122-1.123)

After quoting from the transcript of William Penn's trial, Justice Douglas, in his dissent in Illinois v. Allen, asks us: "Would we tolerate removal of a defendant from the courtroom during a trial because he was insisting on his constitutional rights, albeit vociferously, no matter how obnoxious his philosophy might have been to the bench that tried him? Your Honor, the question before this Honorable Court is similar: Will the Court tolerate removal of Mumia Abu-Jamal as *pro se* counsel for his own defense because he was insisting on his constitutional rights, albeit vociferously?

C. MR. JAMAL'S RIGHT TO REPRESENT HIMSELF WAS WRONGFULLY TAKEN FROM HIM ON THE QUESTIONABLE BASIS OF AN "APOCRYPHAL" PENNSYLVANIA SUPREME COURT DECISION IN AN *IN CAMERA* HEARING FROM WHICH HE WAS UNLAWFULLY EXCLUDED.

Shortly after Judge Sabo's precipitous revocation of Mr. Jamal's *pro se* rights at the end of the day on June 17, 1982, court was adjourned until the next morning. (6/17/82 Tr. 1.127-1.128) The next day's proceedings were highly irregular. The first entry in the transcript for June 18, 1982 notes that a conference was held in chambers *off the record.* Then, a conference was held in chambers on the record which occupies fifty-five pages of transcript. (6/18/82 Tr. 2.1-2.56) Given that these conferences dealt with critical issues related to Mr. Jamal's right to self-representation and a conflict of interest on the part of his back-up counsel, they constituted improper *in camera hearings*. Mr. Jamal was not present at either of these hearings, in violation of his Sixth Amendment right to self-representation (Oses v. Com. of Mass., 775 F.S. 443 (D. Mass. 1991), *aff'd* 961 F.2d 985 (1st Cir. 1992)) and his Fifth and Sixth Amendment right to be present at all critical stages of the proceedings. Hopt v. Utah, 110 U.S. 574, 579 (1884); United States v. Gagnon, 470 U.S. 522, 526.

While it is not known what transpired in the *off the record* hearing, the subsequent on the record *in camera* hearing begins with the prosecutor and Mr. Jackson, giving Judge Sabo their conflicting accounts of an apocryphal ruling earlier that morning by Supreme Court Justice McDermott on several purported petitions allegedly presented by Jackson. (6/18/82 Tr. 2.2-2.4, 2.58)

The reason for *Amicus's* qualifying adjectives in the preceding sentence is that there is no record on the Pennsylvania Supreme Court docket of any such petitions, hearing or ruling. (See certified copy of Supreme Court docket and accompanying declaration attached hereto as EXHIBIT "A".) It should also be noted that at no point in the fifty-five page transcript of this *in camera* hearing is there any indication that either counsel have presented Judge Sabo with a written order or decision from Justice McDermott.

According to the prosecutor, there were three petitions presented by Mr. Jackson to Justice McDermott, all of which were denied: (1) a petition to stay the trial court's order appointing Jackson as Mr. Jamal's attorney; (2) a petition to stay the trial court's order preventing John Africa from sitting at counsel table; and (3) a petition for John Africa to be permitted to set at counsel table as counsel for Mr. Jamal, however "[t]he [Supreme] Court did not say anything about the mistrial request ..." (6/18/82 Tr. 2.2) Although Mr. Jackson disagreed with this account, claiming that he "never requested that John Africa act as counsel, but to assist Mr. Jamal," (6/18/82 Tr. 2.4), the prosecutor recounted, to the contrary, that "there was considerable argument as to whether or not John Africa could be counsel ... [and] there was a clear statement by Justice McDermott that no one can represent a defendant who is not an attorney of the law." (6/18/82 Tr. 2.3). Mr. Jackson also added that Justice McDermott had given him guidelines, at his request, for his "participation in the trial." (6/18/82 Tr. 2.5)

While *Amicus's* counsel are admittedly unfamiliar with the day-to-day workings of the Philadelphia courts, it does seem rather odd that, when back in open court, Judge Sabo proceeds to act as though the conflicting *oral* accounts of these purported Supreme Court rulings (of which there is no apparently no written record) are instructions which are binding upon him as trial judge: "I don't want to hear anymore about it. As I told you yesterday, I would abide by what the Supreme Court said. The Supreme Court has spoken in this matter. They have affirmed my decisions and there's nothing to argue any further." (6/18/82 Tr. 2.59)

While it is exceedingly difficult to know what to make of these highly irregular and, frankly, *baffling* proceedings, what is clear is that Judge Sabo relied upon these apocryphal "rulings" by Judge McDermott to sustain his earlier revocation of Mr. Jamal's right to self-representation, as well as the denial of assistance by Mr. Africa at counsel table, as indicated by the fact that Judge Sabo's reference to the Supreme Court having

"affirmed" his decisions so that "there's nothing to argue any further" immediately follows Mr. Jackson, in open court, renewing on behalf of Mr. Jamal the request for the assistance of Mr. Africa at counsel table, and advising the court that he, Jackson, was "now being forced by the Court to participate as his [Jamal's] trial counsel against his [Jamal's] wishes." (6/18/82 Tr. 2.59)

What is even more baffling, and chillingly illustrative of the grossly prejudicial consequences of the apocryphal hearing and purported rulings by the Pennsylvania Supreme Court is that, later in the trial, Jackson advises Judge Sabo that, in fact, Justice McDermott was neither presented with nor ever ruled upon Mr. Jamal's right to represent himself: "The issue of self-representation was not presented specifically to the Supreme Court so that this matter remains with Your Honor with regard to whether in fact Mr. Jamal could continue to represent himself." (6/21/82 Tr. 4.3)

What this means is that, on June 18 when Judge Sabo refused to reinstate the *pro se* status he had stripped from Mr. Jamal without justification the previous day, ***he did so on the basis of a Supreme Court ruling that had never been made, on an issue that had never been presented!*** Can this Honorable Court countenance denial of a fundamental federal constitutional right as a consequence of such bizarre proceedings which, with all due respect to the Commonwealth of Pennsylvania, belong more properly in the Court of Star Chamber, or that of the Queen of Hearts in Alice-in-Wonderland, than in any courtroom in the United States of America?

After Jackson explains to Judge Sabo on June 21 that the issue of Petitioner's *pro se* rights is still before the trial court, he renews the motion for leave for Mr. Jamal to proceed *pro se*, specifically requesting that Mr. Jamal at least be permitted to make closing argument and cross-examine three particular witnesses. Judge Sabo denies all these motions. (6/21/82 Tr. 4.3-4.5)

Inasmuch as Judge Sabo's initial revocation of Petitioner Jamal's *pro se* status was in violation of his Sixth Amendment right to self-representation (as there had been no disruption and providing "standing" to Mr. Jackson to obtain apocryphal orders is obviously no reason to remove one's *pro se* rights), Mr. Jamal still had the right to represent himself and it was, therefore, an additional violation of that right to exclude him from the *in camera* hearing. Since a hearing concerning Mr. Jamal's right to proceed *pro se*, and to have the assistance of a lay person at counsel table, was clearly a "critical stage" of the proceedings, it further violated his Fifth and Sixth Amendment rights to exclude Petitioner from that hearing.

D. THE UNWANTED LAWYER THAT THE COURT IMPOSED ON MR. JAMAL "CONTRIVED" AGAINST HIM WITH THE ACTIVE CONNIVANCE OF JUDGE SABO AND THE PROSECUTOR.

In Faretta the court notes that a compelling reason *not* to impose counsel upon a defendant who insists upon representing himself is that "[t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him." 422 U.S. at 834. During the *in camera* on-the-record proceedings on June 18, 1992, Mr. Jackson, the appointed counsel who was "thrust upon" Mr. Jamal, actually did "contrive" against him, *in Mr. Jamal's absence*, by waiving the attorney/client privilege and actively plotting against his client with the prosecutor and trial judge.

It is hornbook law that the attorney/client privilege protects all confidential communications between attorney and client and that the holder of the privilege is the *client*, not the attorney. The attorney is duty bound to protect the client's confidences "at every peril to himself." In this case, however, during the *in camera* hearing from which Mr. Jamal was excluded, Mr. Jackson repeatedly revealed confidential communications with Mr. Jamal to the prosecutor and trial judge. Consider the following:
MR. JACKSON: ... if, indeed, Mr. Jamal is saying, *as he has to me*, that indeed it is his strategy for me not to participate ... I would want that on the record; that *Mr. Jamal is telling me not to participate, to be silent."* (6/18/82 Tr. 2.6)

MR. JACKSON: ... that's what he's telling me, Judge.
THE COURT: I know he's telling you that." (6/18/82 Tr. 2.17)

"MR. JACKSON: Well, *he says it's in his best interest* ..." (6/18/82 Tr. 2.20)

"MR. JACKSON: ... but in this instance where the defendant is specifically asking that I not ask questions ..." (6/18/82 Tr. 2.27)

The foregoing statements were made in the course of a discussion which took up thirty pages of transcript in which Mr. Jackson attempted to explain to the prosecutor and Judge Sabo what he dimly perceived, but did not explicitly articulate, as a conflict of interest which he had between his duty of loyalty to Mr. Jamal, as his client (MRPC Rule 1.7 and Comment re Loyalty to Client), and his duties as an officer of the court not to engage in what might be considered to be unprofessional conduct (MRPC Rule 1.16(a)(1)). It appears that the essence of this conflict was, according to Mr. Jackson that, on the one hand, Justice McDermott had instructed him that it was his duty to represent Mr. Jamal's interests to the best of his ability, but on the other hand Mr. Jamal had instructed him not to examine any witnesses or participate in the trial in any way. (6/18/82 Tr. 2.5-2.35)

There are major problems with the way in which Mr. Jackson handled this situation, all of which point to the necessity of protecting a defendant's right to self-representation in order to prevent such situations from occurring. What Mr. Jackson should have done, under the version of the American Bar Association's Model Rules of Professional Conduct in effect at that time, was to advise the trial judge of the general nature of the conflict of interest *without revealing any confidential discussions with his client* and then *moved for leave to withdraw.* (See Comment to MRPC Rule 1.16 re Mandatory Withdrawal: "Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.")

Mr. Jackson, however, did precisely the opposite! Not only did he gratuitously reveal confidential attorney/client communications to the prosecutor and the trial judge, he did *not* move for leave to withdraw. This is an additional oddity to the situation, given that previously he had repeatedly begged Judge Sabo to let him out of the case. When it was unquestionably his ethical obligation, both to his client and to the court, to request leave to withdraw he inexplicably failed to do so. Had the trial judge denied Jackson leave to withdraw, in such circumstances, he could have taken an interlocutory appeal which should properly have been granted.

The actions of Mr. Jackson were even more egregious than previously noted, however, because, in the course of these *in camera* discussions with prosecutor and judge, he made it crystal clear that his real concern was not to find the means to reconcile his conflicting duties, but rather to figure out — with the active contrivance of prosecutor and judge — how to sabotage his client's interests, facilitate his conviction, and, most importantly, insulate it from reversal on appeal. Moreover, Mr. Jackson even suggests to Judge Sabo, in the form of a hypothetical, that his own client, Mr. Jamal, *be removed from the courtroom*. And, in fact, when the trial proceeds Mr. Jamal is removed a number of times from the courtroom spending almost half the trial in a cell. If this interpretation of Mr. Jackson's conduct sounds harsh, consider the following extracts from the *in camera* proceedings:

THE COURT: What kind of strategy is that to sit back there and refuse to answer anything? What kind of strategy is that really?
MR. JACKSON: Judge, I wish I could answer you —
...
THE COURT: Well, what you may have to do, if that's going to be his strategy, and every
witness testifies, you may have to confer with him and then you may have to put on the record that you have conferred with Mr. Jamal –
MR. JACKSON: Fine.
THE COURT: — and he has instructed me not to ask any questions.
MR. JACKSON: Fine.
THE COURT: Maybe that's the way. I don't know.
MR. JACKSON: Judge, I think –
THE COURT: I really don't know. I think it's bad.

MR. JACKSON: I do, too, Judge. But I think the Court is doing all it can do and *in that way he*
*can't come back and say, "I had ineffective representation, '*when it's clear that's what he wants. (6/18/82 Tr. 2.17-2.18)

THE COURT: What he's going to say is he's arguing that because we didn't allow John Africa to represent him, therefore, he doesn't ask any questions and, therefore, the whole proceeding is improper and unconstitutional and everything else. This is what worries me.
MR. JACKSON: ... Judge, I understand your worry.
MR. JACKSON: ... *let's assume for the moment he was removed from the courtroom —*
THE COURT: What do you mean assume? He's been removed. You mean from the courtroom?
MR. JACKSON: Yes, from the courtroom. Mr. Jamal advises me not to ask any questions because it's in his best interest not to do that, and let's assume he's going to be convicted and goes up to the Supreme Court, or whatever. The question is, number one, did the Court — well, *did he knowingly waive his right, and — I don't think it could be any question about it* and, number two, did I have any right to violate what he considered to be his best interests and number three, can the Court on its own — and I believe it's intruding into the area of the defense. (6/18/82 Tr. 2.20-2.22)

MR. JACKSON ... in this instance where the defendant is specifically asking that I not ask questions ... one of the possible ways of doing it is after your examination I would then consult with Mr. Jamal and based on his consultation and his advice and direction to me that I have no questions. It is his choice because I think for us to get into violating what he chooses, what he asserts as his right and his interests, *I think is going to put the Court in a real tenuous position* ... (6/18/82 Tr. 2.27)

MR. MCGILL: If I can, Judge? The specific issue is where the defendant intelligently makes the decision –
THE COURT: That's the thing.
MR. MCGILL: — that it is in his best interest to say nothing –
MR. JACKSON: That's right.
MR. MCGILL: — that in his strategy to say nothing, and for that reason, perhaps to make a
statement by saying nothing and win the sympathy of the jury that it would be in his best interest to get a verdict which he would want, which would be an acquittal.
THE COURT: Well –
MR. MCGILL: Is that what you said?
MR. JACKSON: That's it.
THE COURT: I agree with that a 100 percent but what worries me is that he is adopting this so-
called strategy solely because I have refused to allow John Africa to represent him.
...
THE COURT: "If John Africa had represented him there would be cross-examination and that's
what worries me." (6/18/82 Tr. 2.29-2.30)

"MR. MCGILL: ... never has there been a case that I know of where no one has been cross-examined. And that is the issue that you're putting in.
MR. JACKSON: Exactly.
MR. MCGILL: Judge, that bothers me, that issue.
...
THE COURT: Let me say this: Mr. Jackson, even though He's doing this and you say he does it
intelligently and knowingly, isn't he in effect not being represented by anyone?
MR. JACKSON: No.
THE COURT: Why?
MR. JACKSON: Because I would make the representation to the Court.
THE COURT: You're not really representing him, then. That's what worries me. It's just as though he were sitting there without counsel.
...
THE COURT: ***Why wasn't this issue raised with Justice McDermott?*** (6/18/82 Tr. 2.32-2.35)

What does the above *in camera* proceeding represent? Precisely the grotesque situation which the Faretta court explains it is the purpose of the Sixth Amendment to prevent — where counsel "represents" the defendant only as a legal fiction, but really serves as an *organ of the State* "interposed between an unwilling defendant and his right to defend himself personally." 422 U.S. at 820-821.

It should be quite obvious why Mr. Jamal was excluded from these *in camera* proceedings — it is inconceivable that Mr. Jackson would have so shamelessly contrived against his client before the client's very eyes as he so readily did behind the client's back. This deplorable record of Mr. Jackson's literally "selling his client down the river" belies Judge Sabo's later findings of fact in which he discounts Jackson's testimony at the PCRA hearing as allegedly intentional misrepresentations to support Petitioner's claim of ineffective representation. The reality is precisely to the contrary — Mr. Jackson actively contrived with both the prosecutor and Judge Sabo at trial to sabotage any such claims that Petitioner might later raise.

It is in part because an attorney, as an officer of the court, always has a potential conflict between their duty to their client and their duty to the court, that the Sixth Amendment protects one's right to represent oneself and, as will be argued below, one's right to be assisted in that representation by a lay person who is not an attorney. Petitioner Jamal made that very point in the trial court in passionately arguing in support of both of these rights:

> It's my life at stake and John Africa is the only representative I would have faith in and trust in; not paid by the Court, not paid out of the same pocket as the D.A., not court appointed. I want John Africa in this trial as backup counsel for me and I will defend myself. (6/17/82 Tr. 1.56-1.57)
>
> I do not want to be backed up or represented by Attorney Jackson or any other lawyer of the ABA anywhere in America. I want John Africa as my counsel. (6/18/82 Tr. 1.59)
>
> In terms of lawyers it's very clear that there are 1300 people at Holmesberg Detention Center, House of Correction. All of them have lawyers, either private or Public Defenders and it's very clear for those 1300 people that those lawyers have not served their needs in terms of obtaining freedom for them, in terms of finding them innocent of charges ... This is my only trial. I have no criminal record ... I have never been before the bar of the Court ... So what's important to me to have is a representative that I have faith in, that I can trust; it's not Attorney Jackson ... It is John Africa ... (6/18/82 Tr. 1.80-1.81)

If the foregoing is insufficient to demonstrate that it was the desperate and chillingly kafkaesque situation of Petitioner Jamal — on trial for his life with an incompetent and unprepared attorney appointed to "represent" him whom he *rightly* had no confidence in and did not trust — which was responsible for his repeated anguished pleas to Judge Sabo to allow him the assistance of John Africa at counsel table so he could defend himself; consider the following: *attorney Jackson brazenly admits to both prosecutor and trial judge*, during voir dire of a juror who cannot get out of his mind what the newspapers say about the case, ***that he doesn't have a defense:***

> THE COURT: The thing is can he set aside what the papers say?
>
> MR. MCGILL: He did say he felt there was a crime committed but didn't know who did it.

MR. MCGILL: *Isn't that your defense? That someone else did it?*

MR. JACKSON: ***I don't have a defense.*** 6/16/82 Tr. 399)

For Mr. Jamal's attorney to have "no defense" in the midst of trial in an eminently defensible case was the equivalent of the defense attorney in Nixon v. Singletary, —- So.2d —-, 2000 WL 63415 (Fla. 2000) having the "strategy" of conceding his client's guilt at the guilt/innocence stage of the trial without the client's consent. The court in Nixon held that to be *per se* ineffective assistance of counsel, the prejudicial effect of which is presumed.

E. MR. JAMAL WAS DENIED HIS CONSTITUTIONAL RIGHT TO HAVE A LAY PERSON ASSIST HIM AT COUNSEL TABLE.

Mr. Jamal repeatedly moved the trial court to permit him to have the assistance of a lay person, John Africa, at counsel table so that he could effectively represent himself. While such a request might, at first blush, seem unusual, particularly to a lawyer or judge, it was well within the ambit of the ancient right to *self-representation.*

The right to have the assistance of a *lay person* when representing oneself in court was well-recognized in English common law in existence at the time of formation of our Republic (a point brilliantly argued in the case at bar in the brief of *Amicus Curiae* 22 Members of the British Parliament) and early codifications thereof in the Thirteen Colonies. Both this ancient common law and its colonial codifications, according to the Faretta court, are among the principal sources of the right to represent oneself and/or have the *assistance of counsel* which is codified — but not created — by the Sixth Amendment. See Faretta, supra, 422 U.S. at 831: "If anyone had thought that the Sixth Amendment, as drafted, *failed to protect the long respected right of self-representation,* there would undoubtedly have been some debate or comment on the issue. But there was none."

Historically, the right to assistance of counsel was itself founded on the earlier right to the assistance of one's *friends* when pleading one's own cause in the ancient law courts: "The first lawyers were personal friends of the litigant, brought into court by him so that he might "take 'counsel' with them" before pleading. Faretta, 422 U.S. at 819, *citing* 1 F. Pollock & F. Maitland, The History of English Law 211 (2d ed. 1909), the classic historical treatise on the development of the English legal system. "Similarly, the first 'attorneys' were personal agents, often lacking any professional training, who were appointed by those litigants who had secured royal permission to carry on their affairs through a representative, rather than personally." Id., *citing* Pollock & Maitland at 212-213.

The Massachusetts Body of Liberties (1641), at Article 26, provided as follows:

> "Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man aginst whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines ...." 422 U.S. at 827, n. 32.

The Pennsylvania Frame of Government of 1682, authored by William Penn and quoted earlier herein, "perhaps 'the most influential of the Colonial documents protecting individual rights," similarly provided for the explicit right to have the assistance of one's "friends" in pleading one's cause:

> "That, in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves; or, if unable, by their friends ...." 422 U.S. at 830, n. 37.

It should be evident from the legal history elucidated above, that the right to have the assistance of a non-lawyer is necessarily implied in the right to represent oneself since the latter historically preceded the former; and both of these rights pre-dated the right to be represented by a lawyer, a later right derived from the previous two. Moreover, our self-reliant ancestors self-consciously wrote into the early colonial charters and state constitutions explicit statements of their right to self-representation in the courts to protect themselves from the depradations of the professional lawyer who "was synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions." Faretta, 422 U.S. at 826, *quoting* C. Warren, A History of the American Bar 7 (1911).

Given that the right to self-representation was, in part, carried over into American law, from colonial charters, to state constitutions, and into the Sixth Amendment to the Federal Constitution, to *protect people from lawyers*, it would be self-contradictory and ahistorical to hold that one who exercises the right to represent oneself can only be assisted in that self-representation by a *lawyer* rather than a lay person. While a court may appoint a licensed attorney as "back-up" counsel for an indigent person exercising their right to self-representation (United States v. Dougherty, 473 F.2d 1113, 1124-1126 (D.C. Cir. 1972), *cited in* Faretta, 422 U.S. at 834, n. 46), there is no contradiction between a court providing such a professional "back-up counsel" *and respecting the defendant's right to be assisted, at no cost to the State, by a friend or other lay person of their choice.* The prosecutor at Petitioner Jamal's trial himself took this position, in one of many legal arguments concerning Petitioner's *pro se* rights, in suggesting to Judge Sabo that, even if the Pennsylvania Supreme Court makes a ruling on interlocutory appeal that Mr. Jamal can have the assistance of a lay person at counsel table, the court continue to have attorney Jackson available as "back-up counsel." (6/17/82 Tr. 1.121) Having taken this position at trial, the Commonwealth cannot now argue that providing an attorney as "back-up counsel" and respecting Petitioner's right to have the assistance of a lay person are mutually exclusive alternatives. See, e.g., People v. Taylor, 614 N.E.2d 1272, 1276 (Ill. 1993); People v. Edwards, 609 N.E.2d 962, 965 (Ill. 1993).

In the case at bar, Petitioner Jamal first requested and was granted the right to represent himself during pre-trial proceedings on May 13, 1982 and his appointed counsel, Mr. Jackson's status was changed to "back-up counsel." (5/13/82 Tr. 54-56) Thereafter, Mr. Jamal raised repeatedly throughout pre-trial proceedings and trial his request that he be assisted at counsel table by a lay person, John Africa. Mr. Africa had, just several months before, represented himself in a federal criminal prosecution, United States v. Leaphart, et al., and won a stunning acquittal which was widely reported in the local media. Although an admittedly controversial figure, Mr. Africa had, as a result of his dignified courtroom presence and electrifying closing statement to the jury, become something of a local hero to many Philadelphians, due in part to the "City of Brotherly Love's" long tradition of sympathy for the underdog.

As was noted earlier in this brief, neither the prosecutor nor Judge Sabo expressed any security concerns with regard to Mr. Africa, nor did they articulate any preoccupations that he might disrupt the proceedings or encourage Mr. Jamal to do so. To the contrary, the prosecutor stated that he had no objection to Mr. Africa sitting in the courtroom in the same area as his police officer assistants, nor did he object to Mr. Jamal consulting with Mr. Africa at recess, in court between witnesses, before court, or in his cell. (6/17/82 Tr. 1.90-1.96) Judge Sabo had no problem with Mr. Africa being in the courtroom during the proceedings or breaks. (6/17/82 Tr. 1.114)

During voir dire on June 11, 1982, in the course of attorney Jackson renewing Mr. Jamal's motion for the assistance of a lay person at counsel table, he notes on the record that prosecutor McGill has had the assistance at counsel table at various times in the proceedings of fellow prosecutor Brad Richman, Eric Hinson from the Appeals Department of the D.A.'s Office, and Police Officer Gwen Thomas. (6/11/82 Tr. 5.208) In those instances, according to Jackson, "counsel did not even request Your Honor whether or not it was all right if he sat at table because it's done ... if either of them sat at the table, no request is even made ..." (Id.) Thereafter, on June 17, 1982, at what appears to be a pre-trial conference, the prosecutor asks Judge Sabo for leave to have the assistance of Police

Detective William Thomas, presumably a non-lawyer, in the courtroom during trial. (6/17/82 Tr. 1.3) Later that same day, the prosecutor admits that, during the motion to suppress hearing, he was assisted by a police officer, Gwen Thomas, at counsel table, with whom he conferred for "hours." (6/17/82 Tr. 1.97)

In Faretta, 422 U.S. at 830, n. 38, the court notes that one of the sources of the Sixth Amendment was the New Jersey State Constitution, Article XVI (1776) which provided that accused criminals were to have the "same privileges of ... counsel, as their prosecutors." It would certainly seem reasonable that, if the prosecution may have non-lawyers at counsel table to assist them, a *pro se* defendant should have the same right.

It is noteworthy that during Petitioner Jamal's trial, Judge Sabo specifically remarks that his concern in not permitting Petitioner to have the assistance at counsel table of Mr. Africa is that, had he done so, he is certain that there would have been cross-examination by Mr. Jamal: "If I allow him to have John Africa I'm sure he would be cross-examining." (6/18/82 Tr. 2.53)

The right to represent oneself has been recognized as a fundamental right by our Supreme Court, the deprivation of which is a "structural defect affecting the [very] framework within which the trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 310 (1990). The right of self-representation is among the "basic protections" without which "a criminal trial cannot reliably serve its basic function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Id. For these reasons, denial of the right to self-representation is among the category of constitutional errors not subject to the harmless error rule. Id. Accordingly, deprivation of the right to represent oneself must necessarily result in reversal of a defendant's conviction.

In McKaskle v. Wiggins, 465 U.S. 168, 174 (1983), the Supreme Court held that a defendant's right to self-representation "plainly encompasses certain specific rights to have his voice heard." The court noted that, in determining whether a defendant's Faretta right to self-representation has been respected, "the primary focus must be on whether the defendant had a fair chance to present his case in his own way." Id. at 177. In this connection it should be noted that the Faretta court, 422 U.S. at 833, n. 43 acknowledged the difficulties that a *pro se* defendant may encounter in attempting to exercise their right of self-representation:

> "As stated by Mr. Justice Sutherland in Powell v. Alabama, 287 U.S. 45: 'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Given the acknowledged difficulties of self-representation, it is eminently reasonable to insist that the right to defend oneself must necessarily imply the right to the assistance of a lay person or persons in order to make it possible to effectively exercise that right. The Supreme Court emphasizes in Faretta that "[t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him." 422 U.S. at 833. How then can a court rule that a *pro se* defendant provided with an attorney as "back-up counsel" by the State does not *also* have the right to the assistance, *at no cost to the State*, of a lay person at counsel table, particularly since they have a right to preserve "actual control" over their case? McKaskle v. Wiggins, 465 U.S. at 176-179.

The Faretta court adopts Justice Brennan's trenchant observation in his concurrence in Illinois v. Allen, supra, that "[i]t is not conceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense." Pointing out that it is "the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage," Justice Brennan (and the Faretta majority) remind us that the defendant's choice must be honored out of "that respect for the individual which is the lifeblood of the law." 422 U.S. at 834. That being the case, the individual's free choice to have a lay person assist them at counsel table is necessarily deserving of the same respect as their choice to represent themself.

Mr. Jamal himself expressed this same principle in his anguished and futile pleas to Judge Sabo to "honor his choice" and show him "that respect for the individual which is the lifeblood of the law":

> It's my life at stake and John Africa is the only representative I would have faith in and trust in; not paid by the Court, not paid out of the same pocket as the D.A., no court appointed. I want John Africa in this trial as backup counsel for me and I will defend myself. (6/17/82 Tr. 1.56-1.57)

Rather than receiving that respect "which is the lifeblood of the law," Mumia Abu-Jamal, an intelligent, respected and articulate professional journalist, had unwanted counsel "thrust" upon him and, as the Supreme Court warned in Faretta, that counsel acted as "not an assistant, but a master" and Mr. Jamal's right to make a defense was "stripped of the personal character upon which the [Sixth] amendment insists." 422 U.S. at 820-821. Is it any wonder that Mr. Jamal repeatedly protested what was not only a profoundly demeaning but ultimately *deadly* violation of his fundamental constitutional rights? With all due respect to this Honorable Court, can any of us gainsay that, were we not attorneys, and were we thrust by fate into the same circumstances, that we would have acted any differently?

F. MR. JAMAL'S RIGHT TO CONTROL HIS OWN DEFENSE WAS VIOLATED WHEN JUDGE SABO ARBITRARILY TOOK *VOIR DIRE* OUT OF HIS HANDS AND TURNED IT OVER TO HIS INCOMPETENT AND UNPREPARED "BACK-UP COUNSEL."

In Faretta v. California, 422 U.S. 806 (1975), the Supreme Court held that a defendant in a criminal prosecution has a Sixth Amendment right to represent themself. In McKaskle v. Wiggins, 465 U.S. 168, 174 (1984), the Supreme Court held that the right to self-representation "plainly encompasses *certain specific rights*." (emphasis added) These rights, which form the "core of a defendant's right of self-representation," (Id. at 177) are specified as follows:

> "The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, *to participate in voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial." Id. at 174. (emphasis added)"

In Arizona v. Fulminante, 499 U.S. 279, 310 (1990), the Supreme Court, following its holding in McKaskle, that denial of the right to self-representation mandates reversal and is not susceptible to "harmless error" analysis, explained that deprivation of the right to self-representation or other equivalent constitutional rights constitutes a "structural defect affecting the framework within which the trial proceeds" because "without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."

In the case at bar, Petitioner Mumia Abu-Jamal, after conducting the jury voir dire in his trial in an exemplary fashion for two days, during which time he questioned 23 potential jurors, successfully challenged two for cause, defeated a prosecution challenge for cause, and exercised two peremptory challenges (6/7/82 Tr. 1-189; 6/8/82 Tr. 2.1-2.159), had this "specific right" precipitously and arbitrarily taken from him by the trial judge and handed over to his incompetent and unprepared "back-up counsel." (6/9/82 Tr. 3.17) In reviewing Judge Sabo's action on appeal

from denial of post-conviction relief, the Pennsylvania Supreme Court finds that he "took over the questioning and then properly [sic] ordered that back-up counsel take control." Commonwealth v. Mumia Abu-Jamal, 720 A.2d 79, 109 (Pa. 1998).

Judge Sabo admitted at trial that he had not previously "rebuked" Mr. Jamal for his conduct of the voir dire, but claimed that questioning of the venire was too slow and that some venire persons were uncomfortable being questioned by the defendant. (6/9/82 Tr. 3.17)

The Court's refusal to allow Mr. Jamal to conducting voir dire, based on its supposed evaluation of Petitioner's performance was improper. The quality of the defendant's legal knowledge and performance is immaterial in determining whether or not the defendant invoked and the court properly recognized, the right to conduct his own defense. McKaskle specifically identifies the right to conduct voir dire as a guaranteed element of the right of self representation. See also, Commonwealth v. Celejewski 324 Pa. Super. 185 471 A.2d 525 (1984).

This was clearly an inexcusably violation of Petitioner Jamal's Sixth Amendment right to self-representation under Faretta and McKaskle and, thus, *mandates* reversal of his conviction under McKaskle and Fulminante. The reasons given by Judge Sabo to justify his interference with Mr. Jamal's Sixth Amendment right to conduct the voir dire are clearly inadequate to justify that action. In Peters v. Gunn, 33 F.3d 1190, 1192 (9th Cir. 1994), the court holds that a trial court's finding that a defendant would not be able to do a competent job of representing himself was not a proper basis to deny him the right to self-representation. In Peters the appellate court points out that the Faretta criterion for a defendant to qualify for self-representation — that they are "literate, competent, and understanding" (and make the decision voluntarily, exercising their informed free will) — *does not require that a defendant be competent at lawyering*. "Competent" simply means "competent to stand trial," it does not refer to the ability of the defendant to mount a successful defense.

In attempting to justify removal from Petitioner Jamal of one of the "core" functions of self-representation — conducting voir dire of the jury — Judge Sabo claimed, in part, that the voir dire was proceeding too slowly, in other words, Mr. Jamal was not doing a sufficiently competent job of lawyering with regard to the velocity of his questioning the venire. This pseudo-justification clearly violates the holding in Peters v. Gunn as the "[l]ack of legal qualifications alone cannot be a basis for refusing a defendant's *pro se* request." 33 F.3d at 1192.

Judge Sabo's other reason for aborting Mr. Jamal's right to conduct voir dire was that certain members of the venire allegedly felt uncomfortable being questioned by the defendant. It should be obvious that, in any murder trial, at least some, if not all members of the jury are going to be "uncomfortable" just being in the same courtroom with the defendant. If jury discomfort were a primary concern, then defendants in murder trials would be routinely excluded from the courtroom just to make the jurors feel comfortable. The fact that some jurors allegedly felt uncomfortable being questioned by the defendant in this case cannot justify taking the voir dire away from him. If the jurors then feel uncomfortable having the defendant give opening and closing statement, shall this also be taken away? If jury discomfort is accepted as a proper reason to cancel a defendant's Sixth Amendment right to self-representation "a very small number of defendants would qualify" to represent themselves and this fundamental right would be turned into a legal nullity. Peters, supra, at 1193.

Although it might be argued that, since the trial judge has the statutory authority in Pennsylvania to take voir dire out of the hands of a defense attorney and do it themself, this entitles them to do the same to a *pro se* defendant, this argument runs head on into the explicit and specific language in the Supreme Court decision in McKaskle v. Wiggins, 465 U.S. at 174 which enumerates voir dire as one of the "certain specific rights" which the Sixth Amendment right to self-representation "plainly encompasses." Moreover, the McKaskle court states that the right to conduct voir dire, and the other rights specifically specified therein, "form the core of a defendant's right of self-representation." Id. at 177. That being the case, how can a trial judge take any of those rights away, particularly for such paltry reasons as are offered to justify such action in this case? To the extent that the Pennsylvania voir dire statute could be interpreted to permit such a constitutional violation, it would clearly be unconstitutional as applied.

Even assuming *arguendo* that Judge Sabo could take over the voir dire himself, it was a violation of Petitioner Jamal's specific Sixth Amendment right to "control the organization and content of his own defense" for the judge to decide that back-up counsel Jackson, rather than Mr. Jamal, should do the voir dire. Moreover, this would be the equivalent, in a case in which a defendant was represented by two attorneys, of the court deciding which attorney was to be lead counsel and which was to be "second chair" or which attorney would cross-examine which witnesses. The court simply cannot intervene so intimately into defense strategy.

II. MUMIA ABU-JAMAL'S DEATH SENTENCE SHOULD BE REVERSED AND THE COMMONWEALTH PRECLUDED FROM AGAIN SEEKING THE DEATH PENALTY AT RETRIAL.

A. THE MITIGATION TESTIMONY OFFERED AT THE PCRA HEARING — THE CREDIBILITY AND WEIGHT OF WHICH WAS CONCEDED BY THE COMMONWEALTH ATTORNEY – PROVED THAT MR. JAMAL IS A PEACEFUL AND DEEPLY SPIRITUAL COMMUNITY LEADER AND ADVOCATE FOR THE VOICELESS; A DEVOTED FAMILY MAN WHO HAS "IMMENSE TALENTS" AS A JOURNALIST; AND IT WAS "NOT CHARACTERISTIC" OF HIM TO HAVE COMMITTED THE CHARGED CRIME.

Six mitigation witnesses testified at the PCRA hearing. Each testified that they were available and willing to testify on behalf of Mumia Abu-Jamal in the penalty phase of his original trial in 1982, but were never contacted by imposed-counsel Jackson.

1. Hon. David P. Richardson.

Hon. David P. Richardson, Pennsylvania State Representative for the 201st Legislative District of Philadelphia, testified that he had known Mumia Abu-Jamal for almost 30 years and that Mr. Jamal was a gifted radio journalist, dedicated community leader, and a peaceful and loving family man who was devoted to his son whom he took with him everywhere, carrying the young boy on his back while interviewing people in the community for his radio show.

At the time he testified, the late Representative Richardson had been a Pennsylvania State Representative for 23 years, having won twelve consecutive terms in the state legislature. Mr. Richardson was the Chairperson of the House Health and Human Services Committee. He was a member of the Executive Committee of the National Conference of State Legislators and the Executive Committee of the National Black Caucus of State Legislators. (7/26/95 PCRA Tr. 32-33)

Representative Richardson had served as chairperson of the Black Elected Officials of Philadelphia, ward leader of the 59th ward in Philadelphia, and committee person for the 59th ward, 5th division. He was a former president of the National Black Caucus of State Legislators. He was a member of the board of directors of numerous local organizations, including the Greater Germantown Youth Corporation, Germantown Settlement Organization, Pennsylvania Council of the Arts, and the Afro-American Historical and Cultural Museum. (Id.)

Representative Richardson received numerous awards for his civic and community activities, including Teamster Local 502's "Political Action Award," Community Action for Prisoners' "Outstanding Service Award," and the AME Union Church "Distinguished Service Award." (Id.)

Representative Richardson was clearly a well-known and widely-respected "elder statesman" in local and state politics in Pennsylvania. It goes without saying that it is a rare capital defendant indeed who has such a distinguished and respected figure as Representative Richardson testify on his behalf.

Representative Richardson testified that, shortly after he and Mr. Jamal graduated from high school, they became acquainted as fellow community activists whose paths frequently crossed in the late '60s and early 70's. After Representative Richardson was first elected to the state legislature in 1973, he was frequently interviewed by Mr. Jamal in his capacity as a professional radio journalist. (7/26/95 PCRA Tr. 39-41)

According to Representative Richardson, Mumia Abu-Jamal was a local institution in Philadelphia who was widely-respected due to his

prominence on the airways and the positive impact that his radio programs had in the city:

> "... I believe that Mr. Jamal was a special gift that had a unique voice to Philadelphia. In fact, his melodious voice that many people heard over the radio stations here in the City of Philadelphia would be identified first by his voice even before they would hear his name. And many individuals grew to respect that name here in the City of Philadelphia and also his works as a journalist ..." (7/26/95 PCRA Tr. 42)

Mr. Jamal was a member of the Association of Black Journalists and had served as president of the Philadelphia Chapter of that organization. (7/26/95 PCRA Tr. 47)

Representative Richardson specifically recalled a radio broadcast by Mr. Jamal about the parents of a missing 12 or 13-year old who were trying to locate their child: "The reason that it sticks out ... was the compassion that was shown directly as it related to a human life." Although their child was missing, the parents weren't getting any help from city authorities to locate the child.

Representative heard Mr. Jamal's "compassionate plea to ask that people call in and try to give the whereabouts of where this child was because the parents were very upset." (7/26/95 PCRA Tr. 48-49) When asked if he "detected the compassion in Mr. Jamal in his voice," Representative Richardson responded:

> "You can feel it. It transcends voice, it actually vibrates through you and you can feel it. If you heard him speak you would know what I was talking about. Others who have heard him would know what I'm referring to. So therefore it transcended just the compassion they heard, but also the fact that it was felt very closely because of his relationship to the situation and how he felt about it. So it was very evident." (7/26/95 PCRA Tr. 49)

Mumia Jamal wasn't just a journalist reporting on the community, he identified with the community and worked closely with community organizations on issues that affected the welfare of many needy Philadelphians. According to Representative Richardson, Mr. Jamal was "one of those persons that had an opportunity to really grasp the issues within the community" and "was also able to work with the community organizations and groups who would listen to his wisdom and knowledge." (7/26/95 PCRA Tr. 43)

Mr. Jamal "had a lot of compassion for people and compassion for those issues that did impact directly on vital issues, such as housing, such as health care, such as feeding the homeless. And also at a time in starting a breakfast program for needy children within the community." To Representative Richardson, Mumia Abu-Jamal was "someone conscious and concerned about the community." Mr. Jamal was a well-respected community leader who "was given a gift and had an opportunity to use that gift in the community to help promote, and also to educate as a teacher." Mr. Jamal was a "leader of the community" and "a lot of people looked up to him." (7/26/95 PCRA Tr. 43-44)

Representative Richardson testified that Mr. Jamal was a devoted family man who understood "what it means to raise a family" and "did not shun his responsibility." Mr. Jamal "wanted his son to be part of what he was doing" and "when he was out there in the community [working as a journalist] he had his son with him." (7/26/95 PCRA Tr. 54) According to Representative Richardson:

> "If you had ever been around him and knew him like we knew him, I think you could picture Mumia with his son on his shoulders and his microphone in his hand interviewing people in the community as he was actually out there doing his work ... He did that with his professional job as a journalist most of the time that we saw him." (7/26/95 PCRA Tr. 53)

Representative Richardson testified that Mumia Abu-Jamal "abhorred violence" and that he had never heard Mr. Jamal express any desire to use violence. To the contrary, Mr. Jamal "was for trying to make sure that all the time we saw peace and unity within our community." He was a "peacemaker in many situations there were involved in the black community."

Representative Richardson recounted that there had been situations at public political meetings or rallies where fights broke out and "it was Mumia's voice that sort of like quelled [it] and got order back to those settings" and convinced people that "we must not be fighting against one another." In fact, there have been "many situations where there have been toe-to-toe confrontations in the community and it has been Mumia that has stepped in to be the peacemaker." (7/26/95 PCRA Tr. 50-51)

2. <u>Steven Collins</u>

Steven Collins testified that he is a radio broadcaster on WDAS radio in Philadelphia where he has worked for 19 years. WDAS is the number one radio station in the Philadelphia area with respect to listenership of Afro-American adults between the ages of 25 and 54 years. Mr. Collins testified he was 40 years old and a native Philadelphian. He has a degree from Temple University in radio, television, and film and is a graduate of West Catholic High School. Mr. Collins is a member of the Philadelphia Chapter of the Association of Black Journalists, a member of the board of directors of the Philadelphia Ad Club, and is involved in a number of community organizations including the Police Athletic League and Concerned Black Men. (7/26/95 PCRA Tr. 75-76)

Mr. Collins described the extraordinary effect that Mumia Abu-Jamal had on him when he first heard Mr. Jamal report a story over the air: "I heard Mumia on the radio when I was a student at Temple University. He was on WKDU which was Drexel's radio station. And he did a commentary on a young brother who was shot. And I didn't know the brother and I didn't know the circumstances, but in three minutes it felt like I had a keen, a keen insight into what happened and Mumia's conclusion was compelling and it encouraged people to think about the value of life. And I thought I would like to meet him." (7/26/95 PCRA Tr. 80)

A few weeks later, by coincidence, Mr. Collins met Mr. Jamal at a news conference and a close relationship developed between the student reporter and the professional reporter in which Mumia Jamal became Mr. Collins "mentor" and helped him pursue a career in commercial news broadcasting in Philadelphia. According to Mr. Collins this was a tremendously important event in his life and career: "Mumia was my age but had an exceeding wealth of experience, an understanding and a genuine care about me and other people who wanted to be in broadcasting. He also was an extraordinary reporter at that time." (7/26/95 PCRA Tr. 81)

What made Mumia Jamal stand out as a reporter, according to Steve Collins, was "a serious concern for people which transcended just reporting a news story. He wanted to know the condition of people ... He had an eloquent style, and he had, has a commanding voice. But essentially, he wanted to tell the story of people. All people and specifically African-American people in the City." (7/26/95 PCRA Tr. 82)

Mr. Collins explained that: "Radio is a medium of imagination ... [but you] have to tell a story in 30 or 45 seconds ... Mumia had an ability to tell story in a relatively short period of time that was piercing ... people used to say radio news is a tune out. But when Mumia was on people tuned it up. He had a great, great command of language ... [not] only I was impacted but millions of people in the tri-state Philadelphia area who heard him were as well." (7/26/95 PCRA Tr. 86) Mr. Collins had no hesitation in saying of Mumia Jamal: "I thought he was the greatest voice and greatest journalist I had met, beyond [even] some of the people that I had worked with at the [Philadelphia] Inquirer [newspaper]." (7/26/95 PCRA Tr. 83)

When asked if Mumia had any kind of bent toward violence , Mr. Collins replied: " ... I knew, I've known Mumia for a long, long time. During that period prior to this incident we were very, very close. And in searching my mind, I can't remember one time where there was ever a discussion, any hostility, verbal or otherwise, towards any law enforcement, or even a philosophical view that would suggest that ... in my mind I thought a million times about [it] ... And I don't remember ever, ever hearing that or having a discussion with Mumia ... where that came up ..." (7/26/95 PCRA Tr. 97-98)

When the Commonwealth attorney rose to cross-examine, he

acknowledged that Steve Collins is a widely-known and respected radio personality in the Philadelphia area, stating: "I have heard your voice many times .... I heard your broadcasts myself." Indeed, the Commonwealth attorney was evidently so impressed with Mr. Collins and his testimony that he didn't even question him concerning Mr. Jamal's abilities as a journalist and reporter, saying instead: "*... I will take your word as to the immense talents of Mr. Jamal."* (7/26/95 PCRA Tr. 98).

3. Kenneth Hamilton.

Kenneth Hamilton testified that he taught history for 30 years at Benjamin Franklin High School in Philadelphia and for the last 24 years coached their basketball team. He testified that he was 53 years old and a native Philadelphian. He was Mumia Abu-Jamal's high school history teacher and later became his friend. (6/26/95 PCRA Tr. 105-108)

Mr. Hamilton testified that he noticed that, the first day that Mumia was in his class, he was impressed by the young man's intelligence and sincerity. Mumia was "very well read for a young man of his age and he stood out as far as the rest of the class." Mr. Hamilton's respect for Mumia grew over time as he got to know him better. (6/26/95 PCRA Tr. 109)

Mr. Hamilton was not only impressed with Mumia's intelligence, he was also impressed with his character. Mr. Hamilton explained that when he was dean of students, he would frequently have meetings with the principal and vice-principal in which they would discuss the fact that Mumia was very helpful to them in acting as a "student-mediator" to help them deal with problems of gang violence at the school. Mr. Hamilton noted that it was very unusual to have a student play a role like that and that in his 30 years at Benjamin Franklin High School, he had only known a very small "select" and "unique" group of students like Mumia who could and would carry out such responsibilities. (7/26/95 PCRA Tr. 110-113)

Mr. Hamilton explained that "we used to have a lot of mobs with gangs and gang war." The school administration would use Mumia to talk to gang members and convince them to stop the violence and keep the peace: " Well, he would impress his peers ... especially the gang members, he could really make them feel bad about wanting to kill each other and beat each other up ... He would put things on their minds. The same things we as adults do, but coming from their peers it would be more meaningful [to them]." (7/26/95 PCRA Tr. 110-111)

Mumia Abu-Jamal was held in such high esteem by his fellow students at Benjamin Franklin High School that he was overwhelmingly elected student body president. Mr. Hamilton's opinion of his former student was equally laudatory: "Yes, he's very intelligent. You can see that he had been, that he was well-read. And outspoken. He voiced his opinions. His opinions were usually based on facts. Which a lot of young people at his age, they have a lot of opinions but many of them are not basing it on what they read. And that stood out." (7/26/95 PCRA Tr. 109-110)

Unlike many other students in Mr. Hamilton's classes, Mumia would constantly contribute to class discussion, asking questions, offering comments, and "sharing with them many of the ideas out of his readings." Mumia was "further advanced educationally than most of his peers and he was very willing to share in those ideas." His voice and demeanor generally had a calming effect on the other students. Mumia never gloated over the fact that he had this gift of intelligence, "he was just very eager to share." (7/26/95 PCRA Tr. 115)

Mr. Hamilton knew Mumia's family as he would sometimes give Mumia a ride home or go home with him to visit. Just before Mr. Hamilton met him, Mumia's father died and Mumia "took it on himself to fill the void that was left in the family to help his mother." (7/26/95 PCRA Tr. 121) Mumia was very supportive to his twin brother, who subsequently became a career soldier in the United States armed forces. Mumia took over the role of father with regard to the "baby" of the family, his younger brother. Mumia would go to school for parent conferences with his brother. When there was a problem with his brother's school attendance, Mumia "was there instantly to try and find out how we could solve this problem." (7/26/95 PCRA Tr. 124)

Mr. Hamilton testified that there was nothing in his experience with Mumia to indicate that he was a violent person or has a tendency towards violence. In fact, everything that Mr. Hamilton knows about Mumia points in the opposite direction, away from violence. (7/26/95 PCRA Tr. 117-118)

4. Lydia Wallace

Lydia Wallace is Mumia Abu-Jamal's older sister. She used to change his diapers when he was a baby. Ms. Wallace hold a B.A. degree in human services and administration from Antioch University and a certificate in fitness and nutrition. She is a licensed practical nurse who works as director of social services for the mentally retarded and mentally ill. Ms. Wallace has worked in the latter field since 1988. Prior to that she worked as a practical nurse for 12 years. Ms. Wallace is treasurer and a member of the board of directors of the Philadelphia Black Womens' Health Group Project. She has served in the past as a Democratic Party committee woman. (7/26/95 PCRA Tr. 138-140, 149)

Ms. Wallace testified that, as a child, Mumia used to spend a lot of his time reading in the library. He grew up in a strict Southern Baptist family. Their mother was involved in neighborhood activities, serving as a poll watcher and election judge during elections. Mumia has four brothers. In addition to his younger brother and twin brother, Mumia has two older brothers. One older brother is a retired career soldier who attained the rank of sergeant. Mumia's twin brother is also a career soldier in the U.S. armed forces. (7/26/95 PCRA Tr. 145-148)

According to Ms. Wallace, Mumia was Avery, very sensitive." Growing up, "[i]f his brothers got into arguments ... he would be the peacemaker." Mumia was a "real sensitive kind of kid." He was a very loving child. Ms. Wallace recounts: "He was loving towards all of us. But he was very loving towards my mother. He, adored my mother ... He would never come in the house without hugging and kissing her. He was always bringing her things, like bean sprouts and fresh vegetables and fresh fruit, because he was always concerned about her health." (7/26/95 PCRA Tr. 149-151)

Ms. Wallace testified that, as a child, Mumia loved to read. Mumia "read everything that he could read about religion." He was "spiritual" and very interested in religion: "[W]hen he was, I guess he was elementary school age ... And there was a Jewish synagogue, there was a missionary church, there was a Catholic church, there were al kinds of churches around. And I recall Mumia going to these churches, visiting the rabbis and priests and ministers and all that stuff, questioning them about religious things. He would always talk to the older people in our neighborhood, talk to them about religious things. So we always said well, he's just spiritual, you know." (7/26/95 PCRA Tr. 153)

When he became an adolescent, Mumia became even more "[q]uiet, loving, sensitive." But he never changed. "He was always, you know, spiritual." Mumia's interest in spiritual matter continued into adolescence. "He felt that even a roach had a right to live." (7/26/95 PCRA Tr. 154, 156)

Mumia "loved going to school, he loved learning." Mumia was "always learning and teaching and we respected that." As the children of the family all got older, Mumia became "an advisor for us." Even though Awe were older, older than him." But Mumia's knowledge and interests in things beyond the housing project in which they lived made his brothers and sister listen to him. (7/26/95 PCRA Tr. 149, 154-156)

Mumia had principles. He was always truthful, even as a young boy. Ms. Wallace remembered: "He wouldn't lie. He wouldn't lie. He used to get us in a lot of trouble [when we were kids]. Sometimes we would be doing something we had no business as children to do. And we would all get in a corner and say well, we going, we going to tell mom that we did this, we did that. And everybody said yeah, this is the lie, this is what we are going to tell. Not Mumia. He'd get us beaten every time. He would not do that, he just wouldn't hang with the crowd."
(7/26/95 PCRA Tr. 150)

Mumia was always interested in the well-being of his community. According to Ms. Wallace: "He like being out in the community with people. He liked being with people. So he was concerned about whether we had good housing or being well fed or whether the neighborhood's kids had food or something like that. He was always concerned about the community." (7/26/95 PCRA Tr. 161)

Mumia was a devoted father who loved kids: "...he was very fatherly, very affectionate, very loving, you know, to his children. He loves children. They didn't have to be his children. They could be anybody's children. Because the kids in the neighborhood, you know, sat and told me that he would read to them. I mean he just loved children. But he was very, very affectionate and protective of his children."

Ms. Wallace testified that here was nothing violent in Mumia's nature, to the contrary he was always a peace-maker: "There is nothing that is in his character that I recall being violent. He's only been a peacemaker. He always talked, like kids in the neighborhood and they were gang-warring ... he would talk to them, you know. He would talk to people, he was always a peacemaker. Even if he got into a confrontation, unfortunate to his opponent, he would talk them out of confrontation. You know, they might want to fight, but before they knew it, Mumia had talked them out of it. And they didn't even know that they had been talked out of it, you know. He was like that. He wasn't, there wasn't anything violent about him. You know, that just wasn't his nature." (7/26/95 PCRA Tr. 164-165)

The Commonwealth attorney asked Ms. Wallace on cross-examination how she could reconcile her description of her baby brother, Mumia, with the crime of which he was convicted. This was her answer: "No, not my kind brother. No question in my mind, I , you know. Well, the other thing is he told me he didn't do it. So I believed him. *But I know that's not characteristic of his – of him, he is not like that."* (7/26/95 PCRA Tr. 191)

Ms. Wallace's previous testimony, and the testimony of the other witnesses who had testified before her – State Representative Richardson, radio newsman Steve Collins, high school teacher and coach Kenneth Hamilton – was so compelling and rang so true that it impacted even the Commonwealth Attorney with such force that he spontaneously responded from his own heart as follows:

"From all the descriptions of everybody that has come here – and they all are good people from what I can see, I believe – I don't think that [the shooting of the officer] is characteristic [of Mumia Abu-Jamal]." (7/26/95 PCRA Tr. 191)

Ruth Dorothea Ballard

Ruth Dorothea Ballard testified that she lived in Philadelphia for 50 years and was a telephone operator. She was a neighbor and friend of Mumia's family and has known Mumia Abu-Jamal ever since he was a one-year old infant. According to Ms. Ballard, Mumia was always a quiet child. He grew up to be a respectful and patient young man who loved to read. (7/26/95 PCRA Tr. 207-213) The memory of Mumia Abu-Jamal which most sticks in Ms. Ballard's mind is when he was about 10 years old: A[I]n the summertime mainly they would have Bible class. And a teacher would come around and teach them at the community hall different things about the bible and the Lord. And Mumia would go as well as other children, but Mumia would do something different after the class was over. He would go home and he would gather up the little children and he would read to them from the literature that he had received in the Bible class. As though he was the preacher or the teacher." (7/26/95 PCRA Tr. 215)

The other mitigation witnesses who testified gave similar testimony.

B. HAVING CONCEDED AT THE PCRA HEARING THAT THE MITIGATION WITNESSES WERE CREDIBLE, THEIR TESTIMONY PROVED THE "IMMENSE TALENTS" OF MR. JAMAL, AND THE CHARGED CRIME WAS "NOT CHARACTERISTIC" OF HIM, THE COMMONWEALTH IS NOW BARRED FROM DISPUTING THESE FACTS BY THE DOCTRINES OF JUDICIAL ESTOPPEL, JUDICIAL ADMISSIONS, AND ACQUIESCENCE.

There is now no "case or controversy" between Petitioner and Respondent in the case of Mumia Abu-Jamal as to the credibility or significance of the mitigation evidence presented at the PCRA hearing. It is well-established that the Commonwealth Prosecutor is an "embodiment" of the Commonwealth and, as such, speaks at all times in this representative character. Commonwealth v. Hollowell, 383 A.2d 909 (1978). In this case, the "embodiment" of the Commonwealth agreed at the PCRA hearing that Mr. Jamal is a man of "immense talents" and the crime of which he was convicted was "not characteristic" of him.

In stating to witness Steve Collins in the course of cross-examining him, "I will take your word as to the immense talents of Mr. Jamal," (7/26/95 PCRA Tr. 98) the Commonwealth attorney clearly accepted the "word" of Mr. Collins, given under oath in open court, as truthful. By himself vouching for the truthfulness of Mr. Collins' testimony, the Commonwealth attorney adopted that testimony and made it his (and the Commonwealth's) own, just as if he had himself given that testimony or presented it through another witness who testified under oath.

The effect of the Commonwealth attorney's statement concerning the credibility and significance of the character evidence in the course of his cross-examination of Ms. Wallace at the PCRA hearing was similar. Not only did the Commonwealth attorney specifically state that he did not "think that [the crime of which Mr. Jamal was convicted] is characteristic [of him], but the Commonwealth attorney also stated that the basis for this belief was the testimony of all the "good people" who had testified at the PCRA hearing on behalf of Mr. Jamal.

Inasmuch as "good people" do not lie under oath, it is necessarily true that, by his statement, the Commonwealth attorney vouched for the truthfulness of these mitigation witnesses' testimony and, thus, made it his (and the Commonwealth's) own, in the same fashion as he adopted the testimony of Mr. Collins concerning Mr. Jamal's "immense talents."

The doctrine of judicial estoppel holds that, once having affirmed under oath that a particular state of facts exists, a party may not later assert the contrary is true. People v. Hood, 638 N.E.2d 264, 265 Ill.App.3d 232 (1994). This prevents a party from assuming a position in a legal proceeding inconsistent with one previously asserted. People v. Goestenkors, 662 N.E.2d 574, 278 Ill.App.3d 144 (1996).

Having vouched for and adopted the testimony of Petitioner Jamal's mitigation witnesses, the Commonwealth cannot now contest the truth or significance of that testimony, but is bound by it under the doctrine of judicial estoppel.

The Commonwealth has also conceded these issues under the doctrine of judicial admissions. It has been held that statements of a prosecutor during opening or closing statement may constitute evidentiary admissions. See, e.g., United States v. Salerno, 937 F.2d 797, 811 (7th Cir. 1991). The Illinois Supreme Court has also ruled to the same effect. See People v. Cruz, 643 N.E.2d 636, (Ill. 1994); People v. Howery, 687 N.E.2d 836 (Ill. 1997). Statements made during cross-examination with specific reference to testimony of the witness under oath should obviously be given similar effect.

The doctrine of acquiescence holds that a party which explicitly or implicitly accepts an adverse party's position in a particular proceeding cannot later contest that point. As the court explains in People v. Taylor, 614 N.E.2d 1272, 1276, 245 Ill.App.3d 602 (1993): "We find it rather disingenuous to argue a point of law before the trial court, and then on appeal contend that position is the basis for a reversal." See also People v. Edwards, 609 N.E.2d 962, 966, 241 Ill.App.3d 839 (1993) (state could not argue on appeal that a written post-trial motion was required when it said it would "honor" an oral motion in trial court); People v. Franklin, 504 N.E.2d 80, 83 (Ill. 1987) (despite general rule that a prevailing party may raise any reason in the record in support of judgment, they may not raise a theory inconsistent with contrary findings to which they have acquiesced).

Our legal system is, in its essence, an adversary system. If there is no "case or controversy" between the parties, there is no issue for a court to decide. At the PCRA hearing, although the Commonwealth, for the reasons advanced above, had effectively conceded that the character evidence presented by the mitigation witnesses had proven that the crime of which Petitioner Jamal was convicted was "not characteristic" of him, Judge Sabo saw fit to entirely discount the mitigation evidence, purporting to find that it "would have been less than persuasive to a Philadelphia jury which possessed a great deal of common sense," despite its dramatic effect on the Commonwealth attorney himself. Pennsylvania v. Cook, 30 Phila. 1, 30; 1995 Phila. Cty. Rptr. (1995) The Commonwealth, by the statements on the record of its own counsel, had effectively conceded this issue, however, so it was no longer before the court to be ruled upon. Thus, all of Judge Sabo's findings of facts and law with regard to the mitigation witnesses must be set aside.

Given that the Commonwealth conceded the truth and effect of the mitigation evidence at the PCRA hearing, Petitioner has clearly proved the necessary elements of his claim of ineffective representation by counsel in the penalty phase of his trial. These witnesses all testified at the PCRA hearing that they would have testified at trial but were never contacted by Mr.

Jamal's attorney and requested to do so. Since their testimony at the PCRA hearing convinced even the Commonwealth attorney that the crime was "not characteristic" of Mr. Jamal, the Commonwealth cannot now contend that not even one reasonable juror would have been convinced by such evidence to vote against death in the penalty phase had this evidence been presented at the original trial.

As a consequence, Mr. Jamal's death sentence must be set aside on grounds of ineffectiveness of counsel at the penalty phase. Since it would serve neither the deterrent or retributive purposes of the death penalty to impose it for an aberrant act, not characteristic of the defendant and the Commonwealth has conceded that the alleged act is not characteristic, based upon the doctrines of judicial estoppel, judicial admissions, and acquiescence, the Commonwealth should be precluded from again seeking a death sentence on retrial.

C. WHERE THE CRIME OF WHICH A PERSON IS CONVICTED IS OUT OF CHARACTER FOR THEM AND/OR THE RESULT OF SPECIAL CIRCUMSTANCES, A CAPITAL SENTENCE MAY NOT BE IMPOSED AS IT WOULD SERVE NEITHER THE DETERRENT NOR THE RETRIBUTIVE PURPOSES OF THE DEATH PENALTY.

At the PCRA hearing, the Commonwealth attorney admitted that the mitigation evidence presented there proved "the immense talents of Mr. Jamal" (7/26/95 PCRA Tr. 98) and that the crime of which he had been convicted was not characteristic of him: *"From all the descriptions of everybody that has come here – and they all are good people from what I can see, I believe – I don't think that [the crime] is characteristic [of Mr. Jamal]*. (7/26/95 PCRA Tr. 191)

It is the position of *Amicus* that this evidence, had it been presented in the penalty phase of Mr. Jamal's trial, would have precluded *as a matter of law* the imposition of a death sentence, because it would have conclusively proved that the crime was out of character for him and, thus, that neither the deterrent nor retributive purposes of capital punishment would be served by his execution. A sentence of death under such circumstances would be nothing more than a callous act of senseless barbarism that would constitute a "cruel and unusual punishment" in violation of the Eighth Amendment.

The fact that appointed counsel Jackson did not present this evidence, when the witnesses were available and willing to testify, constitutes a denial of Mr. Jamal's right to effective representation by counsel in the penalty phase of his trial. The further fact that, at the PCRA hearing, the Commonwealth conceded that the crime was out of character for Mr. Jamal means that they should now be precluded from again seeking the death penalty at retrial.

In Woodson v. North Carolina, 428 U.S. 280, 304 (1976) the Supreme Court held that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

The basis for this holding is the court's finding that a process which accords no significance to such factors "excludes from consideration in fixing the ultimate punishment of death the frailties of mankind." In expatiating upon this point, the Supreme Court clarifies that the problem with such a capital sentencing process is that "[i]t treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Id.

In People v. Johnson, 538 N.E.2d 1118,1128 (Ill. 1989) the Illinois Supreme Court cited Woodson and specifically applied these principles in reversing a death sentence on grounds that the murder of which the defendant was convicted was "an aberration brought on by special circumstances which in all likelihood will not be repeated." Following Woodson, the Illinois court reasoned that "neither the deterrent nor retributive functions of the death penalty are served" by its imposition in such a situation.

In Johnson, the defendant returned to his place of employment after having been fired, drew a gun and shot his supervisor and a co-worker twice each, killing both of them. He then commanded another co-worker to get down on the floor. After taking the supervisor's wallet from his dead body, the defendant shot the second co-worker once and, when the victim rolled over, shot him again. The defendant went through the victim's pockets and took $120. As he was leaving, the defendant saw the victim move. Saying, "Oh, you are still moving," he stabbed the man in the abdomen with a knife.

The Illinois Supreme Court reversed Johnson's death sentence, based upon the circumstances of his termination and the following character evidence: "A number of witnesses testified to the defendant's good character. He was not known to be violent or untruthful. He never had any gang involvement, and he was caring, friendly and helpful to the people who knew him. The defendant attended public school in Chicago. He completed high school in four years . . . The defendant had no juvenile record and had received only one misdemeanor unlawful possession of a weapon charge . . . he got a mechanic's job at Goodyear Tire, where he worked for over four years. His work record was good, though he was often tardy or late, which he blames on his drug and alcohol use. He claims to have had a good relationship with Hinshaw, his superior . . . the defendant expressed remorse to the victims and to the family of Foss [the murdered co-worker]. He attributes much of his behavior to his chemical dependency." 538 N.E.2d at 1130. Based on the foregoing facts, the court held that this defendant was not "the type of person who should be permanently eliminated from society." Id.

The Johnson court makes reference to other cases in which it has applied these same principles to reverse death sentences where the crimes were even more macabre: In People v. Buggs, 112 Ill.2d 284 (1986) the defendant poured gasoline on his wife and lit a match; the resulting blaze killed her and two of their children. In People v. Carlson, 79 Ill.2d 564 (1980) the defendant shot his wife 10 times, set fire to the house, then sat drinking in a bar until the police came for him, at which time he opened fire, killing one officer. In both these cases, the Illinois Supreme Court reversed the death sentences: in the former, based on evidence that the defendant was in his forties with no criminal record, had a drinking problem, was going through a divorce, and was jealous of his wife's boyfriends; in the latter, based on evidence the defendant, also in his forties with no criminal record, also going through a divorce and jealous of his wife's boyfriend, had two heart attacks, a concussion and other injuries. Johnson, supra, 538 N.E.2d at 278-279. Other similar cases cited in Johnson where death sentences were reversed as inappropriate are: People v. Gleckler, 82 Ill.2d 145 (1980); People v. Crews, 42 Ill.2d 60 (1969); People v. Walcher, 42 Ill.2d 159 (1969).

D. JUDGE SABO UNREASONABLY AND ERRONEOUSLY APPLIED THE RULE OF *LOCKET vs. OHIO* IN REJECTING THE MITIGATION EVIDENCE PRESENTED AT THE PCRA HEARING ON THE SPECIOUS GROUND THAT IT DID NOT REDUCE MR. JAMAL'S ALLEGED CULPABILITY.

In Lockett v. Ohio, 438 U.S. 586, 605 (1978) the Supreme Court holds that a sentencer in a capital case may not be precluded from considering as a mitigating factor "any aspect of a defendant's character or record" which might provide a basis for a sentence less than death. Thus, any evidence intended to mitigate the sentence, and which is indicative of a defendant's character, is admissible and must be considered. In Eddings v. Oklahoma, 455 U.S. 104, 115, n. 10 (1982), the Supreme Court cautions that, when mitigating evidence is properly offered, "Lockett requires the sentencer to listen."

The purpose of the rule of Lockett is to prevent a death sentence from being wrongly imposed when there are factors present which call for a punishment less severe. The basis for the rule is the heightened importance of treating a defendant in a capital case with "that degree of respect due the uniqueness of the individual" which is the foundation stone of our democratic society. Id. "[T]he rule in Lockett is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." Eddings, 455 U.S. at 110. The resulting precedential "bottom line" is that a sentencer may not be kept from considering *any* mitigating evidence. Mills v. Maryland, 486 U.S. 367, 375

(1988); McKoy v. North Carolina, 494 U.S. 433, 438 (1990).

At the PCRA hearing, a number of people who love and respect Mumia Abu-Jamal came forth to testify on his behalf. As is more fully detailed below, this testimony was so moving and powerful that it even touched the professionally-hardened heart of counsel for the Commonwealth who readily conceded that Mr. Jamal had "immense talents" (7/26/95 PCRA Tr. 98) and agreed that the alleged crime was "not characteristic" of him (7/26/95 Tr. 191) Moreover, Commonwealth Counsel *vouched for the credibility of the mitigation witnesses*, calling them "all good people" and stating that, based on their testimony, *he himself did not "think that [the alleged murder of the police officer] is characteristic [of Mr. Jamal]."* Id.

Judge Sabo totally discounted this evidence, however, claiming that "a Philadelphia jury" would not have found Mr. Jamal to be "somehow less culpable" based on the mitigation evidence presented at the PCRA hearing. Pennsylvania v. Cook, 30 Phila. 1, 30; 1995 Phila. Cty. Rptr. LEXIS 38, 47 (1995). On that unreasonable and erroneous basis, Judge Sabo found that the evidence was not of a "mitigating nature." This ruling was unreasonably erroneous for at least four separate reasons:

FIRST: Judge Sabo violated Lockett by applying the wrong test, as demonstrated by the fact that he made *precisely the same mistake* which caused the Supreme Court to reverse the death sentence in Eddings v. Oklahoma, 455 U.S. 104 (1982) — ***he confused the two wholly different concepts of "mitigation" and "legal excuse."*** Id. at 113, 116. Judge Sabo wholly discounted the mitigation evidence offered as to Mr. Jamal in the PCRA proceedings on the basis that this evidence "in no way mitigate(s) the fact . . . [of his conviction]" and does not show him to be in any way "less culpable." 30 Phila. at 30, 31.

In Eddings, although the sentencing judge stated that he took into account the defendant's chronological age of 16 years, the judge did not consider that this was "a juvenile with serious emotional problems" who had been raised "in a neglectful, sometimes even violent, family background," and whose "mental and emotional development were at a level several years below his chronological age." Instead, the judge found that "as a matter of law he was unable even to consider the evidence." 455 U.S. at 113, 116. The state appellate court took the same approach and affirmed on the basis that the proffered mitigation evidence was "was not relevant because it did not tend to provide a legal excuse from criminal responsibility." Id. at 113.

The United States Supreme Court reversed the defendant's death sentence in Eddings *because such evidence was undoubtedly relevant to mitigation even if it did not excuse the defendant's conduct.* In its opinion, the Supreme Court, after listing all of the above-enumerated evidence concerning the defendant's family history, emotional problems and stunted mental and emotional development, explains that while "[a]ll of this does not suggest an absence of responsibility for the crime of murder" it is, nonetheless, a "relevant mitigating factor" which, like the chronological age of the minor must be "duly considered in sentencing." 455 U.S. at 116.

SECOND: In dismissing Petitioner Jamal's mitigation evidence out of hand (30 Phila. at 28-34), Judge Sabo essentially rules that evidence which even convinced the Commonwealth attorney that Mr. Jamal had "immense talents" and the crime of which he was convicted was "not characteristic" of him was, nonetheless, *irrelevant* to mitigation. This demonstrates an appalling misapprehension of the meaning of "relevance" in the mitigation context on the part of a judge who reputedly has sentenced more defendants to death than any other judge in the United States. It should be apparent that Judge Sabo confuses what are probably the two most basic concepts of the law of evidence: relevance and weight. The Supreme Court in McKoy, 494 U.S. at 440, in reversing a state death sentence for identical error, provides a detailed explanation of this difference in the capital-sentencing context:

> "[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence'
> ...
>
> "The meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding ...
>
> "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. The relevance exists even if the fact-finder fails to be persuaded by that evidence. It is not necessary that the item of evidence alone convinces the trier of fact or be sufficient to convince the trier of fact or the truth of the proposition for which it is offered."

THIRD: Judge Sabo "unreasonably erroneously" applied Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 494 U.S. 433 (1990) because the relevant test is whether *one* juror will find the evidence sufficiently mitigating, not whether the *entire jury* will so find. *Moreover, it is an objective test as to what a "reasonable juror" would do, not a subjective test as to what a "Philadelphia jury" with "common sense" would do.*

In Mills, 486 U.S. at 384, the Supreme Court reversed a Maryland death sentence because the jury instructions and verdict form created "a substantial probability that reasonable jurors ... well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance."

In McKoy, 494 U.S. at 435, the Supreme Court overturned North Carolina's capital sentencing statute because its unanimity requirement for mitigating evidence "prevents the jury from considering ... any mitigating factor that the jury does not unanimously find."

Judge Sabo, by rejecting the mitigating evidence presented at the PCRA hearing because, allegedly, no *jury* would accept it, in effect inserts into the Pennsylvania sentencing statute the same unanimity requirement struck down in McKoy and/or assumes that, in the penalty phase, the jury would be instructed in the manner disapproved in Mills.

FOURTH: In his decision denying post-conviction relief, Judge Sabo not only discounts the mitigation witnesses, but even goes so far as to find that their testimony proves up the contrary factor of *aggravation:* "[T]he essence of the character testimony was that this petitioner is a man of great intelligence and talent. The defense would have liked the penalty jury to conclude that as a result, petitioner was somehow less culpable; that if petitioner had no creative ability, low intelligence, low charisma, no family life, that his act of murder would have been worse. This man had opportunities others did not have; gifts to which others would not even aspire, talents that left others in absolute awe, a family that loved him, friends and professional colleagues who admired him. *But somehow this is supposed to mitigate the fact… [of his conviction]*." 30 Phila. at 29-30.

The clear implication of Judge Sabo's semiotic legerdemain is that Mr. Jamal, by reason of his positive character traits, *is more deserving of being "permanently eliminated from society" than if he lacked those attributes.* In other words, in the universe of Judge Sabo, if Mumia Jamal were a low-life gang-banger of low intelligence, with a vast criminal record of numerous violent crimes, who routinely beat-up his parents and siblings and had not one positive attribute, he would be of more value to society and would have more right to live than the actual Mumia Jamal whose friends, family, and former teacher described to the court, (in testimony found credible by the Commonwealth attorney!) as an intelligent, sensitive, and loving man, with a deeply spiritual nature, who loves to read, is concerned about the well-being of others in his community, and is a well-respected community leader and devoted parent!

If Lockett and its progeny stand for the proposition that a capital defendant may not be precluded from offering evidence in mitigation at

the penalty phase, then it is axiomatic the court may not, as Judge Sabo does after the PCRA hearing, work feats of judicial reverse-alchemy to transform the gold of mitigation into the lead of aggravation. Such a cynical sleight-of-hand turns the very notion of mitigation on its head and is additional evidence of the grotesque judicial bias which poisoned the state court proceedings at trial and on post-conviction review.

III. JUDGE SABO DEPRIVED MR. JAMAL OF HIS RIGHT TO A JURY OF HIS PEERS BY "STACKING" THE JURY, WRONGFULLY REMOVING A BLACK WOMAN JUROR AND REPLACING HER WITH A WHITE MALE WHO HAD ADMITTED HE COULD NOT GIVE MR. JAMAL A FAIR TRIAL, BUT WHOM THE JUDGE HAD PREVIOUSLY REFUSED TO EXCUSE FOR CAUSE OR BY DEFENSE PEREMPTORY.

A. JUDGE SABO ENGINEERED THE REMOVAL OF A BLACK WOMAN JUROR WITH THE COMPLICITY OF THE PROSECUTOR AND MR. JAMAL'S COURT-IMPOSED ATTORNEY.

Ms. Jennie B. Dawley, a Black woman, was the only remaining juror who had been selected when Petitioner Jamal had conducted his own voir dire. One June 18, 1982, she tried all day to speak to the "court crier" (bailiff) to advise him that she needed to take her sick cat to the vet before he closed at 7:00 p.m. The "crier" apparently ignored Ms. Dawley until approximately 3:00 p.m. when he finally got around to listening to her and then took the request to Judge Sabo. The judge summarily denied it without informing either counsel of the request. The basis for the denial was Judge Sabo's *assumption* that Ms. Dawley had someone at home who could take the cat to the vet, although the "crier" disclaimed any knowledge that this was actually the case. (6/18/82 Tr. 2.36-2.37)

In voir dire, Ms. Dawley stated that she lived with her husband, but shook off any questions about him or his work as follows: "Well, let's not bring him in. Okay? Let it rest like that. He's not here." (6/7/82 Tr. 177) After that, neither side asked anything else about Mr. Dawson. Judge Sabo had no reason to assume that Mr. Dawley was actually present in the household that day or could, in fact, take her cat to the vet.

Although *Amicus's* concern with Ms. Dawley's cat might seem picayunish, it is important to contrast Judge Sabo's abrupt and arbitrary treatment of this Black woman juror to that given to a white male juror later in the trial for whom the Judge sacrificed approximately half a trial day so the juror could, accompanied by court deputies, take a civil service exam. (6/22/82 Tr. 5.245) Moreover, immediately after Judge Sabo denied Ms. Dawley's request to take her cat to the vet (which would not have interrupted the trial) the court "crier" took another unidentified juror "on his settlement." (6/18/82 Tr. 2.38)

Like Antigone in the ancient Greek myth, who put her duty to her brother above her duty to Creon, Ms. Dawley took her sick cat to the vet anyway. When she returned, the "crier" brought the matter to Judge Sabo's attention at the very moment that he, the prosecutor, and appointed counsel Jackson were deeply engaged in the *in camera* hearing described in Point I-(E), above, collectively war-gaming various scenarios for insulating Mr. Jamal's eventual conviction from appellate review. The Judge immediately went off the record to have a discussion of unknown length with the prosecutor and Mr. Jackson. (6.18.82 Tr. 2.36)

The discussion which follows, on the record, with regard to what to do about Ms. Dawley is another example of defense attorney, prosecutor and Judge working together, almost as a team, to the detriment of Mr. Jamal. Judge Sabo twice expresses his surprise that Ms. Dawley was accepted on the jury, claiming that she had a "belligerent attitude" (6/18/82 Tr. 2.39, 2.42) and indicating that he "was not going to keep her in the beginning." Although both the prosecutor and Mr. Jackson seem to agree that Ms. Dawley was "belligerent" (6/18/82 Tr. 2.42-2.43) there is no sign of this belligerence in the transcript of the voir dire (6/18/82 Tr. 2.174-2.187)

Having got the signal from Judge Sabo that Ms. Dawley should be manipulated off the jury, the prosecutor proceeds to "con" appointed counsel by claiming that she was a "good" juror for the prosecution because she allegedly "hates Jamal, can't stand him," although there is nothing in the transcript of the voir dire to suggest this. (6/18/82 Tr. 2.40) After Judge Sabo states that Dawley's alleged hatred of Mr. Jamal is not the point, the prosecutor persists in making the point that she "[c]an't stand him." Judge Sabo acknowledges "[t]hat's one point," and immediately adds "but doing what she did she worries me." (6/18/82 Tr. 2.40-2.41) In other words, it doesn't bother Judge Sabo that there is a juror who allegedly "hates" the defendant and "can't stand him," what bothers him instead is that she violated his order not to leave to take her cat to the vet.

The prosecutor then suggests that Ms. Dawley be excused without a hearing or an opportunity to explain herself "rather than put her through anything." (6/18/82 Tr. 2.42) Mr. Jackson has a moment of hesitation, expressing reluctance to do so without first consulting with his client, Mr. Jamal, (6/18/82 Tr. 2.43) but shortly thereafter, for no apparent reason, forgets that concern and agrees to summarily excuse Ms. Dawley: "I wouldn't have any objections to excuse her. I mean, I don't have any objections at all." (6/18/82 Tr. 2.45)

The discussion continues, with Judge Sabo again expressing that he was "worried about her from the very beginning." (6/18/82 Tr. 2.45-2.46) Then we have the following revealing exchange between judge and prosecutor:

> THE COURT: You can see *these people*, you know.
>
> MR. MCGILL: Well, I wanted to get as much *black* representation as I could that I felt was in some way fair-minded. (emphasis added) (6/18/82 Tr. 2.46)

And, after Judge Sabo repeats an earlier comment to the effect that this Black woman juror is a "mental case," Ms. Dawley is dropped from the jury without further ado. (6/18/82 Tr. 2.46) Tellingly revealing of appointed defense counsel Jackson's frame of mind during these proceedings is what occurs immediately afterwards when the prosecutor reveals that the night before, while having dinner with a prosecution witness at a hotel, he allegedly discovers for the first time that the jury is sequestered in the same hotel! What is defense attorney Jackson's reaction: "*Well, I'd like to object but I haven't been instructed to do anything anyhow so –"* and drops the matter in mid-sentence. (6/18/82 Tr.2.50)

Is appointed defense counsel Jackson's behavior during the discussion over juror Dawley and its aftermath "effective representation by counsel" or is his "representation" a "legal fiction" which conceals his true function as an *organ of the State* whose role is to go through the motions and pretend to put on a defense, thereby ensuring his client's conviction and insulating it from reversal on appeal? Jackson's earlier assurances to Judge Sabo now take on an even more ominous tone: "*In that way he can't come back and say, 'I had ineffective representation ...'"* (2/18/82 Tr. 2.18)

B. JUDGE SABO REPLACED THE BLACK WOMAN JUROR WITH A WHITE MALE WHO BECAME FOREMAN; THIS JUROR HAD ADMITTED ON *VOIR DIRE* THAT HE COULD NOT GIVE MR. JAMAL A FAIR TRIAL, BUT THE JUDGE REFUSED TO EXCUSE HIM FOR CAUSE OR BY DEFENSE PEREMPTORY CHALLENGE.

The juror "selected" as the first alternate, Juror No. 13, Edward Courchain, admitted to being unable to give Petitioner Jamal a fair trial or overcome the prejudicial effects of having read about the case in the newspaper, but Judge Sabo wrongfully refused to excuse him for cause pursuant to defense motion. This was prejudicial error mandating reversal under United States v. Martinez-Salazar, 146 F.3d 653 (9th Cir. 1998) as the defense ultimately exhausted the two peremptory challenges it had for selection of alternates pursuant to Rule 1108(b) & (c), Pennsylvania Rules of Criminal Procedure. Judge Sabo compounded the egregiousness of this error by *refusing to accept a defense peremptory challenge of the juror although the defense still had one peremptory remaining which it was*

permitted to use on another juror thereafter! In a trial filled with surreal scenes, this one would have astounded even Andres Breton. (6/16/82 Tr. 413)

Consider the following extracts from the voir dire of Juror Courchain:

MR. MCGILL: Sir, if you were selected as a juror in this case, it would be your function to listen to the evidence and reach your verdict solely based on the evidence that you would hear in this courtroom, and not anything you may have read. Would you be able to follow those instructions of the Court?

THE PROSPECTIVE JUROR: It would be a little difficult. (6/16/82 Tr. 385)

MR. MCGILL: Now, the Judge would indicate or instruct you ... to listen to the evidence, reach a fair verdict based on the evidence *and be fair to both sides*. Now sir, would be able to do that?

THE PROSPECTIVE JUROR: *No, I don't think so.* Be fair to both sides.

...

MR. MCGILL: Now, the question would then be, *is it because of something you may have read or heard?*

THE PROSPECTIVE JUROR: *Right.* The case itself.

...

MR. MCGILL: Do you understand that anything that you read in the newspapers or heard on T.V. is not evidence?

THE PROSPECTIVE JUROR: I understand that.

MR. MCGILL: You understand.

THE PROSPECTIVE JUROR: *But I'm swayed a little bit.* (6/18/82 Tr. 387-389)

MR. JACKSON: Mr. Courchain, you've indicated that you may have some difficulty serving in this case; is that correct?

THE PROSPECTIVE JUROR: That's right.

MR. JACKSON: And you further indicated that this difficulty arises from your exposure to the news media; is that correct?

THE PROSPECTIVE JUROR: Right.

...

MR. JACKSON: Now, as a result of all of what you've heard and read, do you feel that you would have an open mind if you were selected as a juror in determining the guilt or innocence of Mr. Jamal?

THE PROSPECTIVE JUROR: *That I couldn't say.*

MR. JACKSON: We need to know now in your best judgment, *whether or not you could be objective in this matter,* stay in the middle, *don't lean towards the prosecution, don't lean towards the defense,* whether or not you could objectively determine the facts in this case?

THE PROSPECTIVE JUROR: ***Do you want an honest answer?***

MR. JACKSON: Yes, sir.

THE PROSPECTIVE JUROR: ***No.***

MR. JACKSON: ***You cannot do that?***

THE PROSPECTIVE JUROR: ***No.*** (6/16/82 Tr. 391-394)

As if this were not enough to demonstrate the bias of this juror and the indisputable basis *mandating* that he be excused for cause, in subsequent questioning the juror volunteered that he could not set aside what he had read in the newspaper because "[u]nconsciously it would still be there" and "[n]obody is going to get it out of your brain" (6/16/82 Tr. 394) and he could not "guarantee what sub-consciously will happen" if he were on the jury. (6/16/82 Tr. 395) The juror directly and specifically admitted that, in his own words: "...unconsciously I don't think I could be fair to both sides." (6/16/82 Tr. 395) When then asked if he could, nonetheless, "unconsciously" set his opinions aside, the juror responded: "That is the same thing, isn't it?"

Despite these direct admissions of bias, Judge Sabo twice refused the defense challenge for cause. (6/18/82 Tr. 397-398, 411) Then, in what can only be described as an "enigmatic" side-bar conference, Judge Sabo *refused to accept a defense peremptory challenge, although the defense had one challenge left,* and seated this self-confessedly biased juror:

MR. MCGILL: Your Honor, this juror is acceptable to the Commonwealth.

MR. JACKSON: Peremptory, your Honor.

THE COURT: Just a minute.

(Side-bar conference was held as follows on the record:)

THE COURT: You can't, you have no –

MR. JACKSON: Maybe he doesn't know what a peremptory means.

THE COURT: I'll just say selected.

———

THE COURT: You have been selected as Juror No. 13." (6/16/82 Tr. 413)

This admittedly-biased white male juror, Edward Courchain, became foreman of the jury which convicted Petitioner Mumia Abu-Jamal and sentenced him to death. This grotesque abuse and manipulation of the jury selection process clearly violated Petitioner's 5th Amendment right to due process of law. United States v. Martinez-Salazar, supra.

IV. MR. JAMAL'S RIGHT TO A FAIR TRIAL, TO CONFRONT AND PRESENT WITNESSES, AND TO EFFECTIVE REPRESENTATION BY COUNSEL WAS VIOLATED WHEN THE PROSECUTOR LIED ABOUT THE WHEREABOUTS OF THE "WEAK LINK" IN THE PROSECUTION'S PHONY CONFESSION STORY, OFFICER WAKSHUL, JUDGE SABO REFUSED A BRIEF CONTINUANCE TO LOCATE HIM, AND MR. JAMAL'S COURT-IMPOSED ATTORNEY HAD FAILED TO SUBPENA HIM.

The centerpiece of the prosecution's case against Petitioner Jamal consisted of a fabricated "confession" which did not surface until approximately three months after the incident. The phony confession was of a highly inflammatory nature guaranteed, if believed, to grossly prejudice the jury in both the guilt and penalty phases of the trial. The prosecution's story was that, as Mr. Jamal lay in the emergency room with a gunshot wound in his chest, weak and unable to stand, surrounded by police officers, he suddenly yelled out: "I shot the motherfucker and I hope he dies!"

However, there was direct impeachment evidence readily available from Police Officer Wakshul, who was guarding Mr. Jamal at the precise time of the alleged confession and who was interviewed shortly afterwards by investigating detectives. Wakshul gave a *signed statement* to the detectives which specifically stated: "We stayed with the male at Jefferson [Hospital] until we were relieved. *During this time, the negro male*

made no comments." (emphasis added) (8/1/95 PCRA Tr. 37-38)

Officer Wakshul was perhaps the most crucial witness for the defense to have presented at trial. Had Wakshul testified, his testimony would not only have blown the prosecution's phony confession right out the window, it would have cast a *reasonable doubt* on the prosecution's entire case. The defense could have compellingly argued that, the prosecution and police having so blatantly attempted to deceive the jury with perjured testimony, none of their witnesses or evidence should be believed.

However, the jury did not hear Officer Wakshul for three interrelated reasons which in themselves constitute a microcosm of the manner in which appointed counsel, prosecution and judge together contrived to guarantee the conviction of Mr. Jamal:

First, appointed counsel, Mr. Jackson neglected to subpoena Officer Wakshul, offering at trial the following lame explanation for his dereliction: AI was forced to remember everything that everybody said and I couldn't do it." (6/1/82 Tr. 34)

Second, the prosecutor blatantly lied on the record at trial, falsely claiming that Wakshul was on vacation and unavailable when, pursuant to instructions by the police and/or the prosecutor's office, he was at home in Philadelphia waiting by the telephone in case his testimony were needed. (7/1/82 Tr. 38; 8/1/95 PCRA Tr. 78-80, 102, 118, 136).

Third, Judge Sabo, after first suggesting to the prosecutor the pretext that Officer Wakshul might be on vacation, arbitrarily refused to grant a short continuance in order to locate the officer and ascertain his availability to testify. (7/1/82 Tr. 33-38)

This tragi-farce constitutes a veritable witches' brew of ineffective assistance of counsel, prosecutorial misconduct, and a judicial arbitrariness inexplicable for any purpose other than to insure the conviction of Mr. Jamal.

V. THIS HONORABLE COURT'S RECENT DECISION IN *WHITNEY vs. HORN* _VITIATES ANY ARGUMENT BY THE COMMONWEALTH THAT MR. JAMAL PROCEDURALLY DEFAULTED ANY OF HIS CLAIMS FOR RELIEF.

In Whitney v. Horn, Civ. No. 99-1993 (E.D. Pa. June 7, 2000), this Honorable Court, the Hon. Harvey Bartle, District Judge, presiding, issued a writ of habeas corpus reversing a state court conviction and death sentence based upon a jury instruction issue which the Commonwealth had claimed was procedurally defaulted because it was not previously raised in a PCRA petition.

The court held that the Pennsylvania Supreme Court's previous "relaxed waiver" rule for capital cases — under which successive state habeas petitions were permitted without any time limitations — precluded the Commonwealth from asserting procedural default as to claims not raised in state habeas petitions pending in November of 1995, when amendments to the PCRA were enacted which required any successive petitions to be filed within one year of the original petition. The basis for this decision is that the new law essentially created a "Catch-22" situation for Mr. Whitney, who had a pending state habeas petition, because Pennsylvania law prohibited filing of a subsequent petition until after the prior petition had been adjudicated:

> "Up until January 16, 1996, the relaxed waiver rule in capital cases and the absence of time limitations on filing successive PCRA petitions were the firmly established and regularly followed practices in Pennsylvania. Up until at least November 17, 1995, when the PCRA amendments were enacted, Whitney justifiably relied on these practices. Under those practices, all his claims did not have to be raised in one PCRA petition. The 60 day window between passage and the effective date of the PCRA amendments was of no help to Whitney because his first petition was pending during that period and admittedly Pennsylvania law did not allow him to pursue a second petition while the first petition was pending. See Lark, 746 A.2d at 588. As a result of the 1996 PCRA amendments, the legal landscape changed dramatically. Whitney suddenly lost all opportunity to file a successive petition with 'waived' claims. What occurred here was analogous to reducing a statute of limitations from four years to two years in the third year after the cause of action arose." Whitney v. Horn, at p. 14.

After explaining the "Catch-22" nature of the situation created by the PCRA amendments, this Honorable Court holds that there can be no procedural default under such facts:

> "The Pennsylvania procedural bar to Whitney's raising the claims he asserts here is not an adequate state ground precluding our review of those claims. Not giving him a grace period before the revised PCRA took effect runs afoul of the fair notice requirement enunciated by the Supreme Court in Ford [Ford v. Georgia, 498 U.S. 411 (1991)] and by our Court of Appeals in Cabrera [Carbrera v. Barbo, 175 F.3d 307 (3d Cir. 1999), *cert. Den'd* —- U.S. —-, 120 S. Ct. 205 (1999)]." Id.

The rule of Whitney is directly applicable to the case of Petitioner Mumia Abu-Jamal in that his state habeas petition, filed on June 5, 1995, was still pending on appeal before the Pennsylvania Supreme Court on November 17, 1995, and was remanded for additional hearings on September 4, 1996 and May 30, 1997, before denial of the petition was affirmed on October 29, 1998. See Commonwealth v. Lark, 746 A.2d 585, 588 (Pa. 2000). Thus, like Mr. Whitney, Petitioner Jamal could not have filed a second PCRA petition while his first one was still pending. Accordingly, any argument by the Commonwealth that any of Petitioner's claims are procedurally defaulted for not having been included in his PCRA petition should be rejected under Whitney.

CONCLUSION

For the foregoing reasons, it is respectfully requested that an evidentiary hearing be granted; Petitioner Mumia Abu-Jamal's conviction and death sentence be reversed; the Commonwealth of Pennsylvania be precluded from again seeking the death penalty at retrial and a writ of habeas corpus issue for the Petitioner's immediate release.

Respectfully submitted,

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Dated: June 28, 2000