IN THE UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

Nos. 01-9014 and 02-9001

MUMIA ABU-JAMAL,

Appellee in No. 01-9014,
Appellant in No. 02-9001,

v.

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; and CONNER BLAINE, Superintendent of the State Correctional Institution at Greene,

Appellants in No. 01-9014,
Appellees in No. 02-9001.

BRIEF OF APPELLEE AND CROSS-APPELLANT, MUMIA ABU-JAMAL

On Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania (Yohn, J.), No. 99 Civ. 5089

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Dated: July 19, 2006

PRELIMINARY STATEMENT

All emphasis herein is supplied unless otherwise indicated. Parallel citations are generally omitted unless otherwise indicated.

Appellee and Cross-Appellant, Mumia Abu-Jamal, is referred to herein by name. Respondents below, Appellants and Cross-Appellees, are generally referred to as "the Commonwealth."

The District Court's Opinion and order granting relief as to penalty only, is appended hereto as Appendix 1-99 (Memorandum and Order (Doc. 138) (*Abu-Jamal v. Horn*, U.S. Dist. No. CIV 99-5089 WY, Dec. 18, 2001 Memorandum and Order (Doc. 138), *Abu-Jamal v. Horn*, U.S. Dist. No. CIV 99-5089 WY, Dec. 18, 2001) and cited herein as Memorandum and Order (Doc. 138.

The Commonwealth's brief is cited as "Appellants' Brief."

There are two appendices. The first, filed with the Commonwealth's initial brief, is denoted "Supp.App." followed by the page number. The second and Supplemental Appendix of Mr. Abu-Jamal, filed with the present brief, is cited "Supp. Supp.App." followed by the page number.

As is the standard of practice in Pennsylvania, transcripts from state court proceedings are referred to as "Notes of Testimony." They are cited as "NT-" followed by the date and page number.

Due to the complexity of the case and to help provide clarity, each argument heading is followed by the related claim number from the habeas corpus petition.

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The District Court had jurisdiction to grant relief pursuant to 28 U.S.C. §§ 2241 and 2254, and this Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253.

INTRODUCTION

This brief is submitted on behalf of Mumia Abu-Jamal, a renowned journalist who has been on death row for nearly a quarter of a century. That he is African American should not be a factor in this case, but in fact has been a thread running through case since his arrest on December 9, 1981. Even the trial judge was overhead making a racial derogatory remark concerning Mr. Abu-Jamal. See Argument III; Supp.App. 151-53 (Declaration of Terri Maurer-Carter, *Abu-Jamal v. Horn*, U.S. Dist. No. CIV 99-5089 WY (Doc. 110), Aug. 28, 2001).

The issues in this case related to the right for Mr. Abu-Jamal to have a fair trial, due process, and equal protection of the law under the Fifth, Sixth and Fourteenth Amendments. In an apparent effort to bias and distract the Court away from the issues, the Commonwealth has distorted facts and used inflammatory language.

This present brief is divided into two parts. Part One is concerned with guilt-phase habeas claims, and contains three separate issues. Argument I demonstrates that the prosecutor deprived Mr. Abu-Jamal of the reasonable doubt standard and the jury's responsibility for its decision by stating to the jury that Mr. Abu-Jamal would have "appeal after appeal" if convicted, in violation of the right to a fair trial, a trial by

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INTRODUCTION

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This present brief is divided into two parts. Part One is concerned with guilt-phase habeas claims, and contains three separate issues. Argument I demonstrates that the prosecutor deprived Mr. Abu-Jamal of the reasonable doubt standard and the jury's responsibility for its decision by stating to the jury that Mr. Abu-Jamal would have "appeal after appeal" if convicted, in violation of the right to a fair trial, a trial by

jury, and due process of law guaranteed by Amendments Five, Six and Fourteen of the United States Constitution. He turned the standards of reasonable doubt and presumption of innocence on their head. The prosecutorial argument shifted the burden of proof onto the defense by cautioning the jury to resolve doubts in favor of conviction, because a conviction, unlike acquittal, would not be final; that if the jurors were unsure, they should convict for there would be further review of the case. Argument II establishes that the jury selection procedures utilized by the prosecutor were racially discriminatory in contravention of the holding in *Batson v. Kentucky*, 476 U.S. 79 (1986). His exclusion of African-Americans violated Mr. Abu-Jamal's rights under the Equal Protection Clause of the Fourteenth Amendment. And in Argument III, the bias and racism of the judge who presided over the 1995 PCRA hearing deprived Mr. Abu-Jamal of the right to due process of law and a fair hearing under the Fifth and Fourteenth Amendments.

Part Two of the brief responds to the arguments raised in the Commonwealth's penalty-phase appeal. It is demonstrated that the District Court correctly determined that the penalty-phase verdict form and instructions violated *Mills v. Maryland*, 486 U.S. 367 (1988), and that habeas relief is thus appropriate under 28 U.S.C. § 2254(d). Thus, the reversal of the death penalty judgment was constitutionally mandated.

STATEMENT OF THE ISSUES

The issues involved in this appeal are:

1. Whether by telling the jury that Mr. Abu-Jamal would have "appeal after appeal" if convicted and thus a guilty verdict would not be final, the prosecutor unconstitutionally diminished the jury's role, misled the jury, undermined the reliability of the guilt-innocence determination, and sabotaged the right to the presumption of innocence and not to be convicted unless proved guilty beyond a reasonable doubt.

This issue is preserved through various pleadings in the state and federal courts. Claim 14, Petition for Writ of Habeas Corpus (Doc. 1), Oct. 15, 1999, *Abu-Jamal v. Horn*, U.S. Dist. No. 99 CIV 5089 WY.]; Supp.App. 65-71 (Memorandum and Order (Doc. 138) at 91-99, *supra*).

2. Whether the jury selection procedures utilized by the prosecutor were racially discriminatory in contravention of the holding in *Batson v. Kentucky*, 476 U.S. 79 (1986).

This issue is preserved through various pleadings in the state and federal courts. Claim 16, Petition for Writ of Habeas Corpus (Doc. 1), *supra*; Supp.App. 75-80 (Memorandum and Order (Doc. 138) at 103-08, *supra*).

3. Whether Mr. Abu-Jamal is entitled to habeas corpus relief because of the bias of the judge who conducted the PCRA hearing.

This issue is preserved through various pleadings in the state and federal courts. Claim 29, Petition for Writ of Habeas Corpus (Doc. 1), *supra*; Supp.App. 96-98 (Memorandum and Order (Doc. 138) at 127-29, *supra*).

4. Whether this court should affirm the district court's grant of sentencing relief under *Mills v. Maryland*, 486 U.S. 367 (1988).

This issue is preserved through various pleadings in the state and federal courts. Claim 25, Petition for Writ of Habeas Corpus (Doc. 1), *supra*; Supp.App. 84-96 (Memorandum and Order (Doc. 138) at 114-2791-99, *supra*).

STATEMENT OF CASE

The relevant facts and related issues are discussed in the body of this brief. Nevertheless, a brief review of the procedural history would be helpful due to the complexity of the case.

Trial, Appellate and Initial Postconviction Proceedings

Mr. Abu-Jamal was convicted of first-degree murder and related charges in the Court of Common Pleas, First Judicial District, Philadelphia, and sentenced to death in 1982. On direct appeal, the convictions were affirmed. *Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989). Thereafter a Petition for Post-Conviction Relief was denied. *Pennsylvania v Cook*, 30 Phila. 1 (1995). The denial was affirmed on appeal. *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998).

Federal Proceedings

A habeas corpus petition was filed on behalf of Mr. Abu-Jamal in the United States District Court, Eastern District of Pennsylvania. Supp.App. 111 (Petition for Writ of Habeas Corpus (Doc. 1), Oct. 15, 1999, *Abu-Jamal v. Horn*, U.S. Dist. No. 99 CIV 5089 WY). The conviction was affirmed, but the death judgment overturned. *Abu-Jamal v. Horn*, 2001 WL 1609690 (E.D. Pa. 2001). The Commonwealth appealed reversal of the death sentence and Mr. Abu-Jamal appealed the guilt-phase affirmance. Notice of Appeal By Respondent, Dec. 20, 2001; Notice of Cross-Appeal by Petitioner, Mumia Abu-Jamal, Jan. 16, 2002.

The District Court granted a certificate of appealability as to Claim 16, which concerned the *Batson* issue of racism in jury selection. Supp.App. 99 (Memorandum and Order (Doc. 138) at 131, *Abu-Jamal v. Horn*, U.S. Dist. No. CIV 99-5089 WY, Dec. 18, 2001). This Court subsequently certified two additional habeas issues for review on appeal, i.e., Claim 14 (prosecutor's guilt phase argument that if convicted, Mr. Abu-Jamal would have "appeal after appeal"), Claim 29 (the bias of the trial judge at the 1995 PCRA hearing). Order, Dec. 6, 2005.

State Postconviction and Appellate Proceedings

During the pendency of the federal habeas corpus proceedings, a petition was filed in the Court of Common Pleas on July 3, 2001. On December 11, 2001, the court denied the Petition without a hearing. A Notice of Appeal and related pleadings

were filed on January 9, 2002. On February 20, 2002, the Court of Common Pleas issued a Supplemental Opinion.

On October 8, 2003, the Pennsylvania Supreme Court affirmed the lower court's denial of relief on issues that included the constitutionality of a judge presiding over a PCRA hearing in capital case in which he was overheard during the trial in reference to the African-American defendant, that he was "going to help'em fry the nigger." *Commonwealth v. Abu-Jamal*, 833 A.2d. 719 (Pa. 2003). A Petition for Writ of Certiorari was filed in the Supreme Court of the United States. *Abu-Jamal v. Commonwealth*, U.S. Sup.Ct. No. 03-9390 (2004). *Certiorari* review was denied. The contentions included the constitutionality of a judge presiding over a capital murder trial in which he made racist remarks against the accused.

On December 8, 2003, Petitioner filed in the Court of Common Pleas a third petition for post-conviction relief. *Commonwealth v. Abu-Jamal*, Ct. of Common Pleas No. 8201-1357-59. Relief was denied without a hearing. Order, June 17, 2005. The matter is pending appeal in the Pennsylvania Supreme Court.

Mr. Abu-Jamal remains on death row.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Counsel for Mr. Abu-Jamal know of no related cases or proceedings.

STANDARD OF REVIEW

Mr. Abu-Jamal's habeas petition was filed after the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Thus,

AEDPA applies to this case. Because the District Court did not hold an evidentiary hearing, this Court's appellate review is *de novo*. *Jacobs v. Horn*, 395 F.3d 92, 99 (3d Cir. 2005)

SUMMARY OF ARGUMENT

Argument I reveals that the prosecutor during the guilt phase summation told the jurors that if convicted, Mr. Abu-Jamal would have "appeal after appeal." He was implicitly stating that the benefit of the doubt should be given to the prosecution, that the Commonwealth should be entitled to a presumption of guilt, rather than the jurors following the law and not returning a guilty verdict unless convinced beyond a reasonable doubt of the accused's guilt. Consequently, the entire fairness of the trial, right to a trial by jury, and due process under the Fifth, Sixth and Fourteenth Amendments was fatally skewed.

The jury selection procedures utilized by the prosecutor were racially discriminatory in contravention of *Batson v. Kentucky*, 476 U.S. 79 (1986). His exclusion of African-American venirepersons through the use of peremptory challenges violated Mr. Abu-Jamal's rights under the Equal Protection Clause of the Fourteenth Amendment.

It is established in Argument III that Mr. Abu-Jamal was deprived of the right to a fair hearing and due process of law because of the bias of Judge Albert F. Sabo who presided over the 1995 PCRA hearing. The judge clearly had a predisposition of prejudice against capital defendants and especially towards Mr. Abu-Jamal.

Finally, this Court should affirm the District Court's holding that because the penalty phase jury instructions and verdict form did not comport with the requirements delineated in *Mills v. Maryland*, 486 U.S. 367 (1988) and *Boyde v. California*, 494 U.S. 370 (1990), Mr. Abu-Jamal is entitled to habeas corpus relief.

ARGUMENT

PART ONE: APPEAL OF MUMIA ABU-JAMAL, CROSS-APPELLANT

I. THE PROSECUTOR TOLD THE JURY THAT MR. ABU-JAMAL WOULD HAVE "APPEAL AFTER APPEAL" IF CONVICTED AND THUS A GUILTY VERDICT WOULD NOT BE FINAL, THEREBY UNCONSTITUTIONALLY DIMINISHING THE JURY'S ROLE AND RESPONSIBILITY, MISLEADING THE JURY, UNDERMINING THE RELIABILITY OF THE GUILT-INNOCENCE DETERMINATION, AND, SABOTAGING THE RIGHT TO THE PRESUMPTION OF INNOCENCE AND NOT TO BE CONVICTED UNLESS PROVED GUILTY BEYOND A REASONABLE DOUBT

[Claim 14, Petition for Writ of Habeas Corpus (Doc. 1), Oct. 15, 1999, *Abu-Jamal v. Horn*, U.S. Dist. No. 99 CIV 5089 WY.]

The prosecutor unconstitutionally undermined the reasonable doubt standard and the jury's responsibility for its decision by stating during his guilt-phase summation:

> [Y]ou as a unit are in a position of deliberating and reaching a decision and a decision of finality to a certain degree. If your decision of course were to acquit, to allow the Defendant to walk out, that is fine. There is nothing I can do and there is nothing that the judge or anyone could do that would affect that in any way. *If you find the Defendant guilty of course there would be appeal after appeal and perhaps there could be a reversal of the case, or whatever, so that may not be final.*

NT 7/1/82 at 146 (emphasis added)

This argument diminished the jury's sense of its role and responsibility in holding the prosecution to its burden of proof. The intent and effect of this argument was

to shift the burden of proof onto the defense by telling the jury to resolve doubts in favor of conviction. The prosecutor told jurors that if they were unsure, they should convict for there would be further review of the case after a conviction. It violated due process and the right to a fair under the Fifth, Sixth and Fourteenth Amendments.

The prosecution's proper role "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). As part of this duty to see that justice is done, the prosecutor must avoid improper statements to the jury. Because of the prosecutor's prominent courtroom role as representative of the Commonwealth—and the mantle of respect and authority this creates in the eyes of the jury—jurors are predisposed to give great deference to the prosecutor's words, and improper prosecutorial arguments "are apt to carry much weight against the accused when they should properly carry none." *Id.* at 88.

Claims of improper prosecutorial argument that do not implicate a specific constitutional right—*i.e.*, general claims that the argument rendered the trial "unfair"—are evaluated under the "fundamental fairness" standard of *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Under *Donnelly*'s "fundamental fairness" standard, the prosecutor's argument violates due process when its effect "is to distract the trier of fact and thus raise doubts as to the fairness of the trial." *Marshall v. Hendricks*, 307 F.3d 36, 67 (3d Cir. 2002).

This "fundamental fairness" standard, however, does not apply to improper arguments that implicate *specific constitutional rights*. *Donnelly*, 416 U.S. at 643.

When the prosecutor's arguments or statements tend to prejudice the exercise of "a specific right," an even more exacting standard must be applied. *Id.* (citing *Griffin v. California*, 380 U.S. 609 (1965)). Thus, when the prosecutor's argument implicates a specific constitutional right, the "United States Supreme Court has presumed that a due process violation has occurred," and required the state to show that the constitutional error is harmless. *Marshall*, 307 F.3d at 70-71 (citing *Griffin*; *Doyle v. Ohio*, 426 U.S. 610 (1976)).

Here, the prosecutor's argument attacked Mr. Abu-Jamal's specific rights to a trial by jury guaranteed by the Sixth Amendment and to the presumption of innocence and proof beyond a reasonable doubt as required by due process of law.

Mr. Abu-Jamal's right to a jury trial was attacked when the prosecutor told the jury that, if they convicted, their decision would not be final. By saying this and telling the jury that a guilty verdict would be reviewed in "appeal after appeal," the prosecutor incorrectly advised the jury that their role and responsibility was less than it was. This deprived Mr. Abu-Jamal of his right to trial by jury because unlike the jury guaranteed by the Constitution, his jury was told that they were not the final fact-finders. While *Caldwell v Mississippi*, 472 US 320 (1985) is not directly controlling because it applies to the sentencing process, certainly there is a close analogy between the effect of such an argument at the penalty phase and one made during the innocence-guilt phase, for each lessens the jurors' sense of responsibility for their decision. The primary concerns articulated in *Caldwell* as to a prosecutor's remarks at

the penalty phase apply equally to the argument in the case at hand as to the question of culpability. In fact, the *Caldwell* Court recognized that there was a wealth of legal authority condemning this sort of argument at the guilt-innocence phase of a trial. See Caldwell, 472 U.S. at 333-34, nn.4-6 (citing *State v. Jones*, 296 N.C. 495, 498-99 (1979) (ordering new trial on issue of guilt in capital case where argument was used during guilt phase even though trial judge gave curative instruction); People v. Morse, 60 Cal. 2d 631, 649-63 (1964); *Pait v. State*, 112 So. 2d 380, 383-384 (Fla. 1959); *Blackwell v. State*, 79 So.2d 731, 735-36 (Fla. 1918); *People v. Johnson*, 284 N.Y. 182 (1940); *Beard v. State*, 19 Ala.App. 102 (1923); ABA STANDARDS FOR CRIMINAL JUSTICE 3-5.8 (2d ed. 1980) ("References to the likelihood that other authorities, such as the governor or the appellate courts, will correct an erroneous conviction are impermissible efforts to lead the jury to shirk responsibility for its decision.")). *See also*, *State v. White*, 211 S.E.2d 445, 449-51 (N.C. 1975) (vacating conviction where prosecutor told jury that defendant would have right to appeal if convicted, and court issued "curative" instruction that appellate court would review only for legal error (citing *State v. Hines*, 211 S.E.2d 201 (N.C. 1975); *State v. Dockery*, 77 S.E.2d 664 (N.C. 1953); *State v. Hawley*, 48 S.E.2d 35, 37 (N.C. 1948); *State v. Little*, 45 S.E.2d 542, 545 (N.C. 1947)); *Davis v State*, 161 NE 375, 383 (Ind. 1928) ("To urge the jury to convict the defendant, and tell them that if the trial court believed a mistake had been made it would grant a new trial, and that if the trial court did not the defendant had the right to appeal to the Supreme Court, which could reverse the case if it believed an er-

ror had been made . . . transcends the bounds of proper argument and is calculated to induce the jury to disregard their responsibility.") (citing *State v. Kring*, 64 Mo. 591 (1877)); *Hammond v. State*, 120 S.E.2d 539, 541 (Ga. 1923); (improper argument where prosecutor told jury: "If the state has not made out a case, and they convict this man, and the evidence does not authorize it, nobody will set it aside quicker than the judge, and if refused may be appealed to the Supreme Court. If he should be turned loose, it was at an end." Such argument was improper because it "tended to lessen the sense of the peculiar and sole responsibility resting on the jury. The question for their solution was the sufficiency of the evidence . . . to convince their minds beyond a reasonable doubt of the guilt of the accused. The suggestion that, if they should convict him, and the evidence did not authorize it, the judge would set it aside should not have been made.")

Mr. Abu-Jamal's right to due process of law was violated when the prosecutor informed the jurors that if they "were to acquit, to allow the Defendant to walk out, that is fine. There is nothing I can do and there is nothing that the judge or anyone could do that would affect that in any way." On the other hand, according to the prosecutor, after a guilty verdict there would be "appeal after appeal," and "there could be a reversal." Thus, he urged the jury members to rely upon the availability of appeals to the defense and non-availability of appeals to the prosecution, as a reason to return a guilty verdict. No other inference could reasonably be drawn from these

remarks. This turned the concepts of reasonable doubt and presumption of innocence on their heads.

The presumption of innocence and the requirement of proof beyond a reasonable doubt are grounded upon the idea that doubts should be resolved in favor of the accused and *acquittal. See e.g., Coffin v. United States,* 156 U.S. 432, 456 (1895) (presumption of innocence embodies principle "that it is better that ten guilty persons escape than that one innocent suffer"); *In re Winship,* 397 U.S. 358, 363 (1970) ("The reasonable doubt standard...provides concrete substance for the presumption of innocence" (citing Coffin)). This prosecutor told the jury to give the benefit of the doubt to the prosecution and conviction. This argument played on the same lay misconception of the nature and scope of appellate review which was the linchpin of other courts' condemnation of such argument. *See supra* (citing cases). In fact, no appellate court will review the trial evidence as though it were itself the jury. No court on appeal will overturn a guilty verdict because it decides that it has a reasonable doubt as to the defendant's guilt although the jury which convicted presumably had none. *See Commonwealth v. Williams,* 896 A.2d 523, 535 (Pa. 2006) (Pennsylvania Supreme Court reviews for sufficiency of evidence by considering evidence "in light most favorable to" prosecution and making "all reasonable inferences" in prosecution's favor). Moreover, it was wrong that Mr. Abu-Jamal would have "appeal after appeal" since Pennsylvania law guaranteed him only one appeal, as of right, to the state supreme court rather than being

diluted within the overall context of the prosecutor's closing argument, as the District Court suggested, the prosecutor's message that the jury should give the prosecutor the benefit of the doubt and err on the side of conviction , was exacerbated by his inflammatory call to recruit the jury to join the "war on the street" and, by voting guilty, avenge the "one act that the people of Philadelphia, all of them, all of you everywhere is outraged over." NT 7/1/82 at 172, 187. The clear implication of the prosecutor's argument was that the jury not only could do so with a clear conscience, but had such a duty, despite the law, since the prosecutor guaranteed them that the defendant would have "appeal after appeal" for the courts to correct any mistake they might make.

The prosecutor's argument attacked specific constitutional entitlements of the accused, namely, the right to a jury trial, the right to the presumption of innocence and the right not to be convicted unless proved guilty beyond a reasonable doubt. It was not harmless. Relief is appropriate.

The state court said prosecutorial argument is improper only if "the unavoidable effect of the prosecutor's language would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict." *Abu-Jamal-1* at 854. This standard, which seems to have originated in a 1927 Pennsylvania Supreme Court case, *see Commonwealth v. Myers*, 139 A. 374, 377 (Pa. 1927), has no obvious relationship to the United States Supreme Court's due process standards as set forth above. Accord-

ingly, it cannot be said that the state court adjudicated Mr. Abu-Jamal's federal constitutional claim on the merits, and habeas review is *de novo*. *See Marshall*, 307 F.3d at 69 n.18 (citing *Everett v. Beard*, 290 F.3d 500, 507-08 (3d Cir. 2002)).

If it is nevertheless assumed that the state court decision be reviewed under § 2254(d), that ruling is "contrary to" and/or an "unreasonable application of" clearly established law.

The state court's standard, with its emphasis on "*unavoidable* effect," "*fixed* bias and hostility," etc., poses an insurmountable barrier to relief that is more forgiving of misconduct than *Donnelly* standard, which requires only that the argument "raise doubts as to the fairness of the trial." *Marshall*, 307 F.3d at 67. Perhaps most significantly here, the state court standard does not recognize that an even more exacting standard than *Donnelly* must be applied when, as here, the prosecutor attacks a specific right.

The state court was also unreasonable when it denied the claim because, supposedly, "the prosecutor was not attempting to suggest that the jury should resolve any doubts by erring on the side of conviction because an error on the side of acquittal would be irreversible." *Abu-Jamal-1* at 854-55. Under Supreme Court law, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Marshall*, 307 F.3d at 64 (quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982)). The state court's focus on what it believed the prosecutor was "attempting to suggest" shifted the analysis away from

its proper concern—the effect of prosecutor's comments—to an amorphous and irrelevant consideration of the prosecutor's intent. Moreover, the state court's claim that the prosecutor was not suggesting error on the side of conviction flies in the face of the plain language of the prosecutor's argument.[1]

The prosecutor's "appeal-after-appeal" argument diminished the reliability of the guilt-innocence determination. It directly interfered with Mr. Abu-Jamal's right to a fair trial and of law due process in violation of Amendments Five, Six and Fourteen. Thus, the conviction must be overturned.

II. THE PROSECUTOR ENGAGED IN RACIALLY DISCRIMINATORY PRACTICES IN JURY SELECTION, THEREBY MANDATING A NEW TRIAL OR AT LEAST AN EVIDENTIARY HEARING

[Claim 16, Petition for Writ of Habeas Corpus, *supra.*]

The jury selection procedures utilized by the prosecutor were racially discriminatory in contravention of the holding in *Batson v. Kentucky*, 476 U.S. 79 (1986). His exclusion of African-American venirepersons through the use of peremptory challenges violated Mr. Abu-Jamal's rights under the Equal Protection Clause of the Fourteenth Amendment.

Batson claims are analyzed in three steps:

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1. As "support" for its claim about what the prosecutor was "attempting to suggest," the state court cited the prosecutor's earlier comment that: "The power of the jury is immense. Truely [sic] immense. Because your actions will determine actions." *Abu-Jamal-1* at 855 (quoting NT 7/1/82 at 145). But this does not undermine the harmful effect of the prosecutor's improper statements at all. The prosecutor told the jury it had "immense" power to set Mr. Abu-Jamal free right now, or it could err on the side of caution, convict him, and let the appellate courts sort it out.

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the . . . court must determine whether the defendant has shown purposeful discrimination.

Miller-El v. Cockrell, 537 U.S. 322, 328-29 (2003) (citations omitted).

Here, Mr. Abu-Jamal has established a prima facie case and the prosecutor has not offered race-neutral reasons for his strikes. Relief through the granting of a new trial, or at least an evidentiary hearing, is appropriate.

A. There Is a Prima Facie Case Under *Batson v. Kentucky*, 476 U.S. 79 (1986)

The existence *vel non* of a prima facie case depends on the "totality of the relevant facts," taking into account "that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." *Batson*, 476 U.S. at 94, 96-97. "The burden of establishing a prima facie case" is "minimal" and "not onerous." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).[2] Mr. Abu-Jamal need show only that there is "some reason to believe that discrimination *might* be at work." *Johnson v. Love*, 40 F.3d 658, 663 (3d Cir. 1994). Here, several considerations show that there is a prima facie case.

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2. *Burdine* and *Hicks* were "Title VII" cases that "explained the operation of prima facie burden of proof rules." *Batson*, 476 U.S. at 94 n.18.

1. A "'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." *Batson*, 476 U.S. at 97. Here, there was such a "pattern."

In selecting the 12 jurors, 45 people were either selected or struck with peremptories.[3] Of these, 6 were struck by the defense before the prosecutor had an

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3. Janet Coates, NT 6/7/82 at 121-63; Carol Coyle, NT 6/7/82 at 165-74; Jennie Dawley, NT 6/7/82 at 174-87; Stanley Evans, NT 6/8/82 at 2.36-46; Alma Austin, NT 6/8/82 at 2.47-56; Verna Brown, NT 6/8/82 at 2.78-86; Patricia Vogel, NT 6/9/82 at 3.52-57; Catherine Moseley, NT 6/9/82 at 3.68-74; Kenneth Warner, NT 6/9/82 at 3.79-85; James Burgess, NT 6/9/82 at 3.85-92; Joseph Sedor, NT 6/9/82 at 3.128-38; Louis Bogner, NT 6/9/82 at 3.138-51; Gary Howe, NT 6/9/82 at 3.151-66; James Mattiace, NT 6/9/82 at 3.191-97; Eileen Citino, NT 6/9/82 at 3.214-28; Alexander Ottinger, NT 6/9/82 at 3.228-38; Beverly Green, NT 6/9/82 at 3.240-46; John Fitzpatrick, NT 6/10/82 at 4.51-71; Genevieve Gibson, NT 6/10/82 at 4.72-80; Richard Tomczak, NT 6/10/82 at 4.80-90; Gaetano Fiordimondo, NT 6/10/82 at 4.93-102; Jayne Affet, NT 6/10/82 at 4.125-36; Joseph Mangan, NT 6/10/82 at 4.137-45; Maurice Simovetch, NT 6/10/82 at 4.153-67; Miriam Adelman, NT 6/10/82 at 4.207-18; Webster Riddick, NT 6/10/82 at 4.219-38; Savanna Davis, NT 6/11/82 at 5.53-63; John Finn, NT 6/11/82 at 5.74-84; Lois Pekala, NT 6/11/82 at 5.94-101; Carl Lash, NT 6/11/82 at 5.102-15; George Ewalt, NT 6/11/82 at 5.115-24; Joseph Rasiul, NT 6/11/82 at 5.151-60; Keith Richman, NT 6/11/82 at 5.169-78; Dolores Thiemicke, NT 6/11/82 at 5.191-94; Gwen Spady, NT 6/15/82 at 49-56; Mario Bianchi, NT 6/15/82 at 105-16; Basil Malone, NT 6/15/82 at 123-33; Anne Boyle, NT 6/15/82 at 133-40; Wayne Williams, NT 6/15/82 at 171-80; John Cinque, NT 6/15/82 at 193-207; Wilmer Spittle, NT 6/15/82 at 210-17; Henry McCoy, NT 6/15/82 at 218-33; Domenic Durso, NT 6/15/82 at 233-46; Darlene Sampson, NT 6/16/82 at 272-98; Lewis Godfrey, NT 6/16/82 at 298-313.

opportunity to either strike or accept them.[4] Thus, there were 39 people whom the prosecutor had an opportunity to strike or accept. He struck 15[5] and accepted 24.[6]

The state court record establishes the race of the 39 people whom the prosecutor struck or accepted. The voir dire record expressly shows the races of 12 of them.[7] On direct appeal, the Commonwealth and Mr. Abu-Jamal agreed as to the race of 15 more.[8] In the PCRA proceedings, the Commonwealth and Mr. Abu-Jamal stipulated

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4. Patricia Vogel, Joseph Sedor, Gary Howe, Eileen Citino, Anne Boyle, Wilmer Spittle.

5. Janet Coates, Alma Austin, Verna Brown, Beverly Green, Genevieve Gibson, Gaetano Fiordimondo, Webster Riddick, John Finn, Carl Lash, Dolores Thiemicke, Gwen Spady, Mario Bianchi, Wayne Williams, Henry McCoy, Darlene Sampson.

6. Carol Coyle, Jennie Dawley, Stanley Evans, Catherine Moseley, Kenneth Warner, James Burgess, Louis Bogner, James Mattiace, Alexander Ottinger, John Fitzpatrick, Richard Tomczak, Jayne Affet, Joseph Mangan, Maurice Simovetch, Miriam Adelman, Savanna Davis, Lois Pekala, George Ewalt, Joseph Rasiul, Keith Richman, Basil Malone, John Cinque, Domenic Durso, Lewis Godfrey.

7. Nine were identified as black: Janet Coates, NT 6/7/82 at 134; Verna Brown, NT 6/8/82 at 2.78; James Burgess, NT 6/9/82 at 3.92; Genevieve Gibson, NT 6/10/82 at 4.79-80; Webster Riddick, NT 6/10/82 at 4.38; Carl Lash, NT 6/10/82 at 5.115; Gwen Spady, NT 6/15/82 at 56; Wayne Williams, NT 6/15/82 at 180; Henry McCoy, NT 6/15/82 at 233. Three were identified as white: Carol Coyle, NT 6/7/82 at 170; Catherine Moseley, NT 6/9/82 at 3.72; Kenneth Warner, NT 6/9/82 at 3.83.

8. Two were identified as black: Jennie Dawley, Savanna Davis. Thirteen were identified as white: James Mattiace, Richard Tomczak, Gaetano Fiordimondo, Joseph Mangan, Maurice Simovetch, Miriam Adelman, John Finn, Lois Pekala, George Ewalt, Dolores Thiemicke, Mario Bianchi, Domenic Durso, Lewis Godfrey. *See* Commonwealth's Direct Appeal Brief at 18-22 and n.6; App. 255 (Affidavit of Joseph McGill, Feb. 18, 1987, ¶ 2 (Appendix A to Commonwealth's direct appeal brief)).

to the race of 2 more.[9] The Commonwealth declined to stipulate that Beverly Green was black;[10] we assume for the sake of argument, in the Commonwealth's favor, that she was white. The Commonwealth asserted on direct appeal that Basil Malone was black, which Mr. Abu-Jamal has not contested.[11] Throughout the state court proceedings, the Commonwealth emphasized, and the state courts found, that the prosecutor accepted *one* black person, James Burgess, who was then struck by the defense;[12] this identifies 8 more people—accepted by the prosecutor but struck by the defense—as white.[13]

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9. Alma Austin was identified as black in 1982 ("THE COURT: For the record, give us your race please? THE VENIREPERSON: Black, Negro." NT 6/9/82 at 3.92). Both Ms. Austin and Darlene Sampson were in court during the 1995 PCRA hearing, for the purpose verifying they are in fact African American. NT 7/27/95 at 12-13.

10. *See* NT 6/9/82 at 3.240-46.

11. *See* Commonwealth's Direct Appeal Brief at 18 n.4; App. 255 (Affidavit of Joseph McGill, *supra*, ¶ 2).

12. *See* Commonwealth's Direct Appeal Brief at 19-20; App. 255 (Affidavit of Joseph McGill, *supra*, ¶ 3); *Commonwealth v. Abu-Jamal*, 30 Phila. Co. Rptr. 1, 103 (Sabo, J., Sept. 15, 1995) ("[T]he first juror selected was black, and three additional black persons were later selected [by the prosecutor]. Only two black jurors ultimately heard the case because James Burgess, who was accepted by the Commonwealth, was peremptorily struck by Mr. Abu-Jamal and Jennie Dawley was dismissed for violating sequestration.").

13. Stanley Evans, Louis Bogner, Alexander Ottinger, John Fitzpatrick, Jayne Affet, Joseph Rasiul, Keith Richman, John Cinque.

These numbers are summarized as follows:

	Black	**White**	**Total**
People the prosecutor had an opportunity to strike or select	14	25	39
People the prosecutor struck	10	05	15
People the prosecutor accepted	04	20	24
People selected for the jury	03	09	12

These numbers show a real racial disparity in the prosecutor's use of peremptory strikes. The prosecutor struck **71%** (10/14) of the blacks he had an opportunity to strike, but struck just **20%** (5/25) of the whites he had opportunity to strike—*i.e.*, he struck blacks at **3.6 times** the rate than he struck whites. The odds of being struck if you were black were **2.5-to-1** (10/4), but the odds of being struck if you were white were just **0.25-to-1** (5/20)—*i.e.*, a black person's odds of being struck were **10 times** higher than someone who is white.

This racial disparity is the type of "pattern" that supports a prima facie case. *See Miller-El*, 537 U.S. at 342 (where prosecutor used 71% (10/14) of strikes against African-Americans, who were 26% (11/42) of those eligible, "[h]appenstance is unlikely to produce this disparity"); *Turner v. Marshall*, 63 F.3d 807, 813 (9th Cir. 1995) (prima facie case where African-Americans were approximately 30% of those available and prosecutor used 56% of strikes against them); *United States v. Alvarado*,

923 F.2d 253, 256 (2d Cir. 1991) (strike rate "nearly twice the likely minority percentage of the venire strongly supports a prima facie case").

2. Mr. Abu-Jamal is black and the prosecutor's high strike rate was against black people, making this "one of the *easier cases* to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred." *Powers v. Ohio*, 499 U.S. 400, 417 (1991); *Jones v. Ryan*, 987 F.2d 960, 972 (3d Cir. 1993).

3. Mr. Abu-Jamal is black and the decedent was white. This "racial configuration . . . *contribute[s] significantly* to [the] prima facie case," *Simmons v. Beyer*, 44 F.3d 1160, 1168 (3d Cir. 1995) (finding prima facie case based on interracial offense and prosecutor's striking "at least one" African-American), because "a prosecutor still burdened with a stereotypical view of the world might well believe that a black juror would be more sympathetic to the defendant and less sympathetic to the victims than would a white juror," *Johnson*, 40 F.3d at 666. *See also Jones*, 987 F.2d 960, 971-72 (3d Cir. 1993) (black defendant/white victim supports prima facie case); *Commonwealth v. Jackson*, 562 A.2d 338, 345 (Pa.Super. 1989) ("potential for misuse of peremptory challenges is greatest when a defendant is accused of attacking an individual of a different race"). This is especially true here, where there were issues regarding Mr. Abu-Jamal's membership in with the Black Panther Party and support for the MOVE organization. E.g., NT 6/1/82 at 23, 70, 94; NT 6/7/82 at 74-84, 117; NT 6/9/82 at 24; NT 6/11/82 at 205-07; NT 7/3/82 at 21-31.

4. The decedent was a *police officer*, as were key prosecution witnesses, and the defense raised issues of police racism, brutality and misconduct. *E.g.*, NT 1/8/82 at 94-98; NT 1/11/82 at 77-78; NT 3/18/82 at 50-54; NT 4/29/82 at 43-46; NT 5/13/82 at 25-26, 33-35, 44-47; NT 6/1/82 at 65, 79, 93, 115-19, 137-38; NT 6/2/82 at 2.4-6, 2.44, 2.130-31; NT 6/3/82 at 3.5-6, 12-17, 29-32; NT 6/4/82 at 4.43-92; NT 6/19/82 at 8-19; NT 7/31/95 at 83-84, 87-89.[14]. This further supports the prima facie case, since a prosecutor may strike black people based upon a stereotypical belief that they are more hostile to the police than are whites. *See Holloway v. Horn*, 355 F.3d 707, 723 (3d Cir. 2004) (support for prima facie case where, "while Holloway, the victim, and key prosecution witness Shirley Baker were *all black*, the [police] officer who took Holloway's custodial statement, Detective Gilbert, was *white*" and "Holloway's credibility versus that of Detective Gilbert, a white police officer, was a crucial issue for the jury"); *Cochran v. Herring*, 43 F.3d 1404, 1410 (11th Cir. 1995) (former prosecutors describe racial stereotype that African-Americans are "anti-police . . . and should not be left on juries"); *United States v. Bishop*, 959 F.2d 820, 825-26 (9th Cir. 1992) (prosecutor used "racial stereotypes" by assuming that African-American prospective juror were more likely to have negative feelings about police); *Tankleff v.*

14. See also *United States v. City of Philadelphia*, 644 F.2d 187 (3rd Cir. 1980).

Senkowski, 135 F.3d 235, 249 n.3 (2d Cir. 1998) (noting possible use of such stereotypes by prosecutor).[15]

5. The "prosecutor's questions and statements" regarding jury selection also support the prima facie case. *Batson*, 476 U.S. at 97.

After the jury was chosen, it was discovered that juror Jennie Dawley, an African-American, had broken sequestration. *See* NT 6/18/82 at 2.35. Judge Sabo said he was surprised Ms. Dawley was selected in the first place, because she seemed to him to be a "mental case" who was "pretty close to" being "mentally incompetent." *Id.* at 2.39-40, 45-46. The prosecutor explained why he selected Ms. Dawley: "I thought she was good. She *hates him*, she *hates Jamal, can't stand him. . . . Can't stand him.*" *Id.* at 2.40. The prosecutor then elaborated: "I wanted to get as much black representation as I could that I felt was in some way *fair-minded.*" *Id.* at 2.46.

The prosecutor's statements support the prima facie case because they suggest that, in the prosecutor's mind, an African-American had to "*hate*" *Mr. Abu-Jamal* before the prosecutor would consider her to be "*fair minded*," *i.e.*, the prosecutor presumed African-Americans would favor Mr. Abu-Jamal and chose African-

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15. A videotape of a "training session on jury selection," given by the Philadelphia District Attorney's Office in 1987, *Wilson v. Beard*, 426 F.3d 653, 656 (3d Cir. 2005), confirms that this racial stereotype was extant in this prosecutor's office. *See id.* at 657 (quoting training tape's direction that Philadelphia prosecutors should strike "blacks from the low-income areas" because they have "a resentment for law enforcement"). Appendix at 182-254 (Transcript, DATV Productions, *Ron D. Castille, District Attorney, Jury Selection with Jack McMahon*, 1986 ("Training Tape")).

Americans who overcame that presumption by exhibiting actual hostility to Mr. Abu-Jamal. *See Jackson*, 562 A.2d at 346 ("prosecutor may strive to eliminate nearly all black venirepersons, but may make an exception in favor of. . . black venirepersons who are viewed as sympathetic to the Commonwealth").

6. The time and place of this trial (pre-*Batson*, Philadelphia) further support the prima facie case—at the time of this trial, the Philadelphia District Attorney's Office was a place where a prosecutor who was of a "mind to discriminate," *Batson*, 476 U.S. at 95, was free, even encouraged, to do so.

At the time of this trial, prosecutorial discrimination in jury selection was "*widespread*" and "*common*" because of the "crippling burden of proof" that *Swain v. Alabama*, 380 U.S. 202 (1965) imposed upon defendants seeking to challenge such discrimination. *Batson*, 476 U.S. at 92; *id.* at 101 (White, J., concurring); *id.* at 103 (Marshall, J., concurring). Philadelphia was no exception to this "widespread, common problem."

Pennsylvania's courts have recognized that, before *Batson*, Pennsylvania law *allowed prosecutors to intentionally discriminate* in jury selection, so long as their race-based strikes were not so systematically exclusionary that they violated *Swain*. *See Commonwealth v. Henderson*, 438 A.2d 951, 953 (Pa. 1981) (pre-*Batson* Pennsylvania law allowed a prosecutor to strike blacks "because he believed that black jurors would tend to be more favorable than white jurors to the black defendant"; race was deemed a "proper consideration[] in exercising peremptory challenges"); *Com-*

monwealth v. Brown, 417 A.2d 181, 186 (Pa. 1980) (same). Pennsylvania law at the time of this trial thus "*encouraged prosecutors to use peremptory challenges to arrange the racial balance of juries* to their benefit." *Henderson*, 438 A.2d at 962 n.8 (Nix, J., dissenting).

Mr. Abu-Jamal's trial counsel confirmed that Philadelphia prosecutors practiced the discrimination that Pennsylvania law encouraged. Before jury selection, counsel stated for the record:

> It has been the custom and the tradition of the District Attorney's Office to strike each and every black juror that comes up peremptorily. It has been my experience since I have been practicing law, as well as the experience of the defense Bar, the majority of the defense Bar, that that occurs. . . . They always do, they always do.

NT 3/18/82 at 12.

For the direct appeal, the trial attorney provided an affidavit stating that he observed discrimination by the prosecutor in this case:

> 3. It was apparent during voir dire that the prosecutor exercised both peremptory and cause challenges against otherwise qualified black venirepersons.
>
> . . . .
>
> 6. It was clear to me that the prosecutor was pursuing a traditional course (for prosecutors) of excluding as many blacks from service on this jury as he could exclude, and was pursuing this course solely by reason of the race of these venirepersons which was the same as that of appellant. . . . [T]he exclusions were also sought because the victim was white.

Supp.App. 259-260 (Affidavit of Anthony Jackson, Aug. 22, 1986).

At the PCRA hearing, the prosecutor questioned trial counsel about the statements. Mr. Jackson emphatically reaffirmed that, in his experience at the time of this trial, it was the practice of "most [Philadelphia] D.A.'s, most homicides, [to] *get rid of as many blacks as they possibly can*" (NT 7/28/95 at 208), and that the trial prosecutor in the case at hand *followed that racially discriminatory practice*:

> [PCRA Prosecutor]: That was based on your history in trying cases, so you say, and the question now is are you saying that Mr. McGill was exercising peremptory strikes in a racially motivated fashion?
>
> [Trial Counsel]: Sure.
>
> [PCRA Prosecutor]: You are saying that?
>
> [Trial Counsel]: Yes, sir. . . . [I]t was true. You may call it ridiculous but it was true, wasn't it? . . . Yes, it was true. . . . It was true.

NT 7/28/95 at 208-09.

Trial counsel's observations about pre-*Batson* prosecutorial discrimination in Philadelphia are not idiosyncratic. For example, in *Commonwealth v. Brown*, 417 A.2d at 186, defense counsel gave "his personal observation that in the two years prior to the [1978] trial, he represented black defendants in five Philadelphia murder trials during which the prosecution used peremptory challenges in a discriminatory fashion." *See also id.* at 188 (Nix, J., dissenting) ("this problem has repeated itself in this and other cases"). In *Diggs v. Vaughn*, 1991 WL 46319, *1 (E.D. Pa. March 27, 1991), the federal court heard and credited "testimony by attorneys familiar with practices in the Philadelphia courts [before *Batson*], to the effect that assistant district attorneys routinely sought to exclude blacks from criminal juries."

In numerous cases close in time to this trial, Pennsylvania's state courts found that Philadelphia prosecutors used all or most of their peremptory strikes against African-Americans, but held that there was no remedy because the cases pre-dated *Batson* and, thus, discrimination was allowed.[16] Since *Batson*, Philadelphia prosecutors repeatedly have been found to have engaged in intentional discrimination during jury selection.[17]

Similarly, an extensive study of peremptory strikes in Philadelphia found that, "in 317 capital trials in Philadelphia between 1981 and 1997, prosecutors struck 51%

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16. *E.g.*, *Henderson*, 438 A.2d at 952 (Philadelphia prosecutor used peremptory strikes to eliminate all blacks); *Commonwealth v. McKendrick*, 514 A.2d 144, 150 (Pa.Super. 1986) (same); *Commonwealth v. Edney*, 464 A.2d 1386, 1390-91 (Pa.Super. 1983) (same); *Commonwealth v. Fowler*, 393 A.2d 844, 846 (Pa.Super. 1978) (same); *Commonwealth v. Jones*, 371 A.2d 957, 958 (Pa.Super. 1977) (same); *Brown*, 417 A.2d at 186 (Philadelphia prosecutor used all sixteen peremptory strikes against blacks); *Commonwealth v. Green*, 400 A.2d 182, 183 (Pa.Super. 1979) (Philadelphia prosecutor used seventeen peremptory strikes against blacks); *Commonwealth v. Harrison*, 12 Phila. Co. Rptr. 499, 516, 1985 WL 384524 (Phila. C.P. June 5, 1985) (Philadelphia prosecutor used six of eight peremptory strikes against blacks). These opinions undoubtedly represent just a small fraction of the pre-*Batson* Philadelphia cases in which such discrimination occurred, since defendants "were not likely to have raised" such claims under pre-*Batson* law, no matter how egregious the discrimination. *Riley v. Taylor*, 277 F.3d 261, 284 n.8 (3d Cir. 2001) (en banc).

17. *E.g.*, *Wilson v. Beard*, 426 F.3d 653 (3d Cir. 2005); *Brinson v. Vaughn*, 398 F.3d 225 (3d Cir. 2005); *Hardcastle v. Horn*, 368 F.3d 246 (3d Cir. 2004); *Holloway v. Horn*, 355 F.3d 707 (3d Cir. 2004); *Jones v. Ryan*, 987 F.2d 960 (3d Cir. 1993); *Harrison v. Ryan*, 909 F.2d 84 (3d Cir. 1990); *Diggs v. Vaughn*, 1990 WL 117986 (E.D. Pa. Aug. 8, 1990), *subsequent history*, 1991 WL 46319 (E.D. Pa. March 27, 1991); *McKendrick v. Zimmerman*, 1990 WL 135712 (E.D. Pa. Sept. 12, 1990); *Commonwealth v. Dinwiddie*, 542 A.2d 102 (Pa.Super. 1988), *aff'd*, 601 A.2d 1216 (Pa. 1992); *Commonwealth v. Basemore*, March Term 1987, Nos. 1762-65 (PCRA trial court opinion) (Savitt, J.); *Commonwealth v. Wilson*, July Term 1988, Nos. 3267, 3270-71 (PCRA trial court opinion) (Temin, J.); *Commonwealth v. Spence*, Sept. Term 1986, Nos. 3391-95 (PCRA trial court opinion) (Berry, J.).

of black jurors and 26% of nonblack jurors," with the racially disparities being higher before *Batson* (when this jury was selected) than after. *Miller-El v. Dretke*, 125 S.Ct. 2317, 2341 (2005) (Breyer, J., concurring) (citing Baldus, Woodworth, Zuckerman, Weiner, and Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 52-53, 73, n.197 (2001) ("Baldus-Woodworth study")).[18]

Further support for the prima facie case comes from evidence concerning jury selection training in the Philadelphia District Attorney's Office. For example, shortly after *Batson* was decided, the Office made a training videotape *urging prosecutors to engage in racially discriminatory jury selection.* Supp.App. 182-254 (Training Tape).[19] The fact that such statements were made openly, on videotape, and as part of

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18. This and similar studies were cited favorably by a Committee appointed by the Pennsylvania Supreme Court and charged with investigating racial and gender bias in state justice system. *See* FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 201 (2003) ("BIAS REPORT") (*www.courts.state.pa.us/Index/Supreme/biasreport.htm*). Based upon this and similar studies, the Committee found "strong indications that Pennsylvania's capital justice system does not operate in an evenhanded manner" when it comes to race; found particularly "*alarming results*" in Philadelphia capital cases, with Philadelphia prosecutors "striking African Americans from the jury twice as often as non-African Americans"; and recommended a moratorium on the death penalty. BIAS REPORT at 201, 205-09, 218-21, 223 n.5.

19. The "practices described in the [Training Tape] . . . *flout constitutional principles in a highly flagrant manner.*" *Commonwealth v. Basemore*, 744 A.2d 717, 731 n.12 (Pa. 2000). For example:

> [T]he purpose of voir dire, namely, to select a fair and impartial jury, is denigrated as "ridiculous," in favor of the selection of jurors who will be biased in favor of conviction; various *racial* and gender *stereotypes are described and offered as reasons to discriminate in the selection of jurors; techniques for accomplishing such discrimination are described* in detail, including the maintenance of a running tally of the race of the venire panel and the invention of pretextual

a training exercise shows that discriminatory use of peremptory strikes was an *openly accepted practice* in the Office.[20] Thus, this District Attorney's Office was a place where a prosecutor who was "of a mind to discriminate," *Batson*, 476 U.S. at 96-97, could do so and was encouraged to do so.[21] Moreover, the fact that the Training Tape was made *after Batson* suggests that the Office even more openly encouraged discrimination at the (pre-*Batson*) time of this trial.[22]

> reasons for exercising peremptory challenges; and a willingness to deceive trial courts to manipulate jury panels to these ends is also expressed.

Id., 744 A.2d at 729; *see also id.* at 727-32 (quoting parts of Training Tape); *Wilson*, 426 F.3d at 655 (tape "repeatedly advises [the] audience to use peremptory challenges . . . in apparent violation of *Batson*"); *id.* at 656-58 (describing "training session" recorded on the tape); *Brinson*, 398 F.3d at 229 (videotape "depicted a training session in which McMahon advocated the use of peremptory challenges against African Americans").

20. A former prosecutor who served under three Philadelphia District Attorneys, Joel Moldovsky, observed: "What I'm most disturbed by is his abuse of the office. . . . It was unconstitutional then, and it's unconstitutional now. . . . You don't teach young attorneys to exclude poor people, or black people or Hispanic people." App. 256-58 (New York Times, *Former Philadelphia Prosecutor Accused of Racial Bias*, April 3, 1997).

21. The Training Tape suggests that *prosecutors would be fired* if they did not use discriminatory and otherwise improper jury selection techniques and, as a result, obtained fewer convictions. *See* App. 226-27 (Training Tape at 45-46) ("[I]f you go in there and . . . think you're going to be some noble civil libertarian and try to get jurors, 'Well, he says he can be fair; I'll go with him,' that's ridiculous. You'll lose and you'll be out of the office; you'll be doing corporate law. Because that's what will happen. You're there to win . . . . And the only way you're going to do your best is to get *jurors that are as unfair and more likely to convict than anybody else in that room.*") (emphasis added). The Tape also makes it clear that other prosecutors in the office used similar discriminatory techniques. *E.g.*, App. 237 (Id. at 56) ("*And I've seen DAs who strike them because they're black, and that's kind of like a rule, 'Well, they're black, I've got to get rid of them.*'") (emphasis added).

22. The District Court thus erred when it deemed the Training Tape irrelevant because it was made after this trial and supposedly reflected the views only of Mr.

These considerations about the time (pre-*Batson*) and place (Philadelphia) of jury selection—e.*g.*, discrimination was common; discrimination was allowed by state law; trial counsel and other lawyers observed a pattern of discrimination by this prosecutor's office; the state and federal courts repeatedly found discrimination by this prosecutor's office; statistical studies show a pattern of discrimination by this prosecutor's office; training materials made by this prosecutor's office encouraged discrimination and show that it was accepted practice—support the prima facie case. It suggests that, at the time of this trial, there was a "culture of discrimination," *Miller-El*, 537 U.S. at 347, in this prosecutor's office, so that a prosecutor who was "of a mind to discriminate," *Batson*, 476 U.S. at 96-97, was free and even encouraged to do so. *See Miller-El*, 537 U.S. at 334-35 (similar evidence about prosecutor's office—e.*g.*, training materials, judicial findings of discrimination in other cases, defense counsel testimony about discrimination—supports *Batson* claim); *Riley*, 277 F.3d at 280-84 (office's strikes in other cases relevant to *Batson* inquiry); *United States v. Hughes*, 864 F.2d 78, 79-80 (8th Cir. 1988) (taking "judicial notice of the frequency of the charge of systematic exclusion of black jurors" in jurisdiction; "history of exclusion is a relevant factor in deciding whether the defendant has made out a prima facie case").

B. This Court Should Grant Relief Or Remand For A Hearing Because There Are No Race-Neutral Reasons For The Prosecutor's Strikes

1. Since there is a prima facie case, the *Batson* inquiry must proceed to step-two—*i.e.*, the prosecutor must give race-neutral reasons for his strikes. *See*

McMahon. *See* App. 80 (Memorandum and Order, *Abu-Jamal v. Horn*, U.S. Dist. No. CIV 99-5089 WY, *supra*, at 109).

Miller-El, 537 U.S. at 328-29; *Batson*, 476 U.S. at 98. Because this prosecutor has never done so, this Court must either grant relief, *see Holloway*, 355 F.3d at 725-26, or remand to the District Court for an evidentiary hearing at which the prosecutor will have an opportunity to give reasons and the District Court will make the ultimate determination as to whether the prosecutor discriminated on the basis of race, *see Brinson*, 398 F.3d at 235; *Hardcastle*, 368 F.3d at 261-62.

2. In its Pennsylvania Supreme Court brief on direct appeal, the Commonwealth combed the voir dire record for information about potential jurors that *might* provide reasons for the prosecutor's strikes. *See* Commonwealth's Direct Appeal Brief at 20-22 n.6; *see also* Supp.App. 76-77 (Memorandum and Order (Doc. 138), at 105 n.69, *Abu-Jamal v. Horn*, U.S. Dist. No. CIV 99-5089 WY) (referring to Commonwealth's state court brief). There is no evidence, however, that the information in the Commonwealth's state court brief reflects the prosecutor's *actual* reasons for striking anyone.[23] Thus, its speculation does *not* satisfy the prosecutor's step-two burden under *Batson*. *See Miller-El*, 125 S.Ct. at 2328 n.4, 2332 (*Batson* gives prosecutors the "burden of stating a racially neutral explanation for their own actions," which is not satisfied by existence of possible reasons gleaned from voir dire record); *Holloway*, 355 F.3d at 725 ("The Commonwealth defends the Hackley strike by looking to the voir dire transcript for information that might have motivated the prosecutor's decision. . . . This speculation, however, does not aid our inquiry into the

23. The Commonwealth attached to its direct appeal brief an affidavit from the prosecutor, which identifies the races of some of the jurors and prospective jurors. *See* App. 255 (Affidavit of Joseph McGill, *supra*). It neither states any reasons for his strikes nor suggests that the strikes were motivated by the information in the Commonwealth's brief.

reasons the prosecutor actually harbored for the Hackley strike."); *Riley*, 277 F.3d at 282 ("Apparent or potential reasons do not shed any light on the prosecutor's intent or state of mind when making the peremptory challenge.").

Moreover, the speculative "reasons" in the Commonwealth's state court brief actually raise *additional* concerns about the prosecutor's motive. For example:

a. The Commonwealth's state court brief says "never served on a jury" as a reason for striking African-Americans, but the prosecutor *accepted whites* who had never served on a jury, *see, e.g.*, NT 6/7/82 at 166 (Carol Coyle); NT 6/9/82 at 3.192 (James Mattiace); NT 6/10/82 at 4.82 (Richard Tomczak); *id.* at 4.138 (Joseph Mangan); *id.* at 4.208 (Miriam Adelman); NT 6/11/82 at 5.96 (Lois Pekala); NT 5.116 (George Ewalt); NT 6/15/82 at 243 (Dominic Durso); NT 6/16/82 at 306 (Lewis Godfrey).

b. The Commonwealth's state court brief says "unemployed" as a reason for striking African-Americans, but the prosecutor *accepted whites* who were unemployed. *See, e.g.*, NT 6/10/82 at 4.80 (Richard Tomczak); NT 6/16/82 at 299 (Lewis Godfrey).

c. The Commonwealth's state court brief says "single," "unmarried" or "divorced" as a reason for striking African-Americans, but the prosecutor *accepted whites* who were "single, . . ."unmarried" or "divorced." *See, e.g.*, NT 6/7/82 at 166 (Carol Coyle); NT 6/9/82 at 3.81 (Kenneth Warner); NT 6/11/82 at 5.95 (Lois Pekala).

d. The Commonwealth's state court brief says "worked in similar occupation as defendant" as a reason for striking Wayne Williams, an African-

American. The "similar occupation" was being a DJ at some street parties. *See* NT 6/15/82 at 178. Assuming, charitably to the Commonwealth, that this was "similar" to Mr. Abu-Jamal's work as a radio journalist, the prosecutor's striking of Mr. Williams should be compared to the prosecutor's disparate treatment of a white man, Dominic Durso, whose son was a DJ, *see* NT 6/15/82 at 238. While the prosecutor struck Mr. Williams without asking *any questions* about his "similar profession" or if it would affect his judgment, the prosecutor asked Mr. Durso how long his son had been a DJ, if his son worked for a radio station and if his son's work would affect him, and then *accepted* Mr. Durso. *See id.* at 245-46.

e. The Commonwealth's state court brief says "hearing problem" as a reason for striking Carl Lash, an African-American. But Mr. Lash's actual testimony was that he has *no problem hearing* and "*can hear anything*" so long as his hearing aid is on, NT 6/11/82 at 5.110, and the prosecutor himself said to Mr. Lash: "I have noted that during the course of your questioning by Mr. Jackson and myself that *you have no problem hearing*," *id.* at 5.111. Moreover, the prosecutor *accepted a white person*, Maurice Simovetch, who actually did have a hearing problem. *See* NT 6/10/82 at 4.165-66 ("Q. . . . I noticed that when you were answering Mr. McGill's questions you touched your ear. Do you have any difficulty hearing at all sir? A. Pardon? Q. Do you have any difficulty at all hearing? A. No. Well, I shouldn't say no; I have to pay real close attention.").

f. The Commonwealth's state court brief speculates that the prosecutor struck several African-Americans (Janet Coates, Verna Brown, Genevieve Gibson, Darlene Sampson) because they had heard Mr. Abu-Jamal on the radio, but the prosecutor accepted several white people *without even asking* if they had ever heard Mr. Abu-Jamal on the radio. *See, e.g.*, NT 6/7/82 at 165-74 (Carol Coyle); NT 6/9/82 at 3, 68-74 (Catherine Moseley); NT 6/9/82 at 3.79-85 (Kenneth Warner); NT 6/9/82 at 3.191-97 (James Mattiace); NT 6/10/82 at 4.80-90 (Richard Tomczak); NT 6/10/82 at 4.137-45 (Joseph Mangan); NT 6/10/82 at 4.153-67 (Maurice Simovetch); NT 6/10/82 at 4.207-18 (Miriam Adelman); NT 6/11/82 at 5.94-101 (Lois Pekala); NT 6/11/82 at 5.115-24 (George Ewalt); NT 6/15/82 at 233-46 (Dominic Durso); NT 6/16/82 at 298-313 (Lewis Godfrey).

g. The Commonwealth's state court brief also distorts the testimony of African-Americans who supposedly were struck because they heard Mr. Abu-Jamal on the radio. For example:

(1) The Commonwealth's brief says Janet Coates "listened to defendant's radio show"; she testified that she had heard him on the radio but "[i]t's been a long while since I have listened to him," NT 6/7/82 at 129-30, and it would not affect her ability to be fair, NT 6/7/82 at 130.

(2) The Commonwealth's brief says Verna Brown was "familiar with defendant as an announcer," but her testimony was that she had *never heard him* on the radio and, instead, had just "heard that he is a newscaster," NT 6/8/82 at 2.82.

(3) The Commonwealth's brief says Genevieve Gibson was "familiar with defendant from radio and newspaper," but her testimony was that she had just *heard his name* about one year before, and knew nothing about him or the case, NT 6/10/82 at 4.77-78.

(4) The Commonwealth's brief falsely stated that Darlene Sampson "listened to defendant on the radio" but her testimony was: "MR. McGILL: Did you ever hear the defendant on the radio? PROSPECTIVE JUROR: No." NT 6/16/82 at 276.

Thus, the Commonwealth's state court brief distorts the record, and the prosecution's speculative "proffered reason[s] for striking . . . black panelist[s] appl[y] just as well to . . . otherwise-similar nonblack[s] who [were] permitted to serve," which is "*evidence tending to prove purposeful discrimination.*" *Miller-El*, 125 S.Ct. at 2325; *accord Riley*, 277 F.3d at 282 (comparison between stricken blacks and selected whites is instructive in "determining whether the prosecution's asserted justifications for striking the black juror is pretextual"). In short, the Commonwealth's speculation "*reeks of afterthought*," *Miller-El*, 125 S.Ct. at 2328, and supports Mr. Abu-Jamal's claim.

3. Even if it is erroneously assumed that the Commonwealth's speculation satisfies *Batson*'s step-two, the Court must remand for an evidentiary hearing on step-three, at which the District Court can "determine whether the defendant has shown purposeful discrimination," *Miller-El*, 537 U.S. at 329, an inquiry that requires credibility findings and detailed consideration of the record, *see Miller-El*, 125 S.Ct. at 2331 ("*Batson* provides an opportunity to the prosecutor to give the reason for striking

the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it").

C. Relief is Required Under 28 U.S.C. § 2254(d)

The Pennsylvania Supreme Court's decision on the *Batson* claim is contrary to and/or an unreasonable application of clearly established law, and/or based on an unreasonable determination of facts, 28 U.S.C. § 2254(d).

The Pennsylvania Supreme Court first addressed the *Batson* claim on direct appeal, where it held there was no prima facie case:

> Applying the "standards" set out in *Batson* for assessing whether a prima facie case exists, *vacuous though they may be*, we do not hesitate to conclude that no such case is made out here.

Abu-Jamal-1 at 850 (citation omitted).

The state court's derision of *Batson* as "vacuous" is reflected throughout its "analysis" of this claim.

1. It framed the issue as whether "the prosecution *systematically excluded* jurors by race." *Abu-Jamal-1* at 848. This is not the *Batson* standard. This Circuit has found that a Pennsylvania state court applied "an *invalid constitutional standard*" when, as here, it found no prima facie case because the prosecutor did "not *systematically exclude* people on the basis of race." *Jones*, 987 F.2d at 970. The "*systematic exclusion*" standard used by *Abu-Jamal-1* imposes "the 'crippling burden of proof' imposed by the *Swain* decision," not the standard for a *Batson* prima facie case. *Jones*, 987 F.2d at 970; *accord Ford v. Georgia*, 498 U.S. 411, 417 (1991) ("systematic exclusion of black jurors" is "the standard . . . described in *Swain*"). Since *Abu-*

Jamal-1 used "an invalid constitutional standard," it is contrary to and/or an unreasonable application of *Batson*.

2. The state court also described the issue as whether the prosecutor used "peremptory challenges to obtain an *unrepresentative* jury." *Abu-Jamal-1* at 849. Again, this is *not* the law of *Batson*, which does *not* require proof of "an unrepresentative jury." The jury can be "representative"—*i.e.*, exactly reflect the jurisdiction's population—and there *still* is a *Batson* violation if the prosecutor struck even one African-American for race-based reasons:

> Under *Batson*, although a defendant has no right to a petit jury composed in whole or in part of persons of his own race . . . the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. Consistent with this principle, . . . a prosecutor's purposeful discrimination in excluding even a single juror on account of race cannot be tolerated as consistent with the guarantee of equal protection under the law.
>
> . . . .
>
> Thus, a *Batson* inquiry focuses on whether or not racial discrimination exists in the striking of a black person from the jury, not on the fact that other blacks may remain on the jury panel. A defendant can make a prima facie case of discrimination without reference to the jury's racial makeup.

Holloway, 355 F.3d at 720, 728-29 (citations and quotation marks omitted); *accord J.E.B. v. Alabama*, 511 U.S. 127, 141 n.3 (1994) ("It is irrelevant that" the jury may be representative of the population. "Because the right to nondiscriminatory jury selection procedures belongs to the potential jurors, as well as to the litigants, the possibility that members of both [races] will get on the jury despite the intentional discrimination is beside the point.").

3. The Pennsylvania Supreme Court also based its analysis on its own opinion in *Commonwealth v. Hardcastle*, 546 A.2d 1101 (Pa. 1988) ("*Hardcastle-1*"),

which denied a *Batson* claim by holding there was no prima facie case. *See Abu-Jamal-1* at 850. This Circuit has already held that *Hardcastle-1*—the model for *Abu-Jamal-1*—is "an objectively unreasonably application of *Batson*" because it erroneously "conflated steps one and two of the *Batson* analysis" and assumed the prosecutor had race-neutral reasons when she had not articulated any. *Hardcastle*, 368 F.3d at 256-59.

4. Further failing to apply the actual law of *Batson*, the Pennsylvania Supreme Court complained that "it cannot be determined whether any of the venire, who were dismissed when it was [Mr. Abu-Jamal's] turn to first pass on their acceptability, were black and might have been acceptable to the Commonwealth." *Abu-Jamal-1* at 850. This Circuit has already found that such a record-making requirement is an "unreasonable application" of *Batson* – "evidence of the race of jurors acceptable to the Commonwealth who were stricken by the defense, finds no place in the prima facie case, as defense strikes are irrelevant to the determination of whether the prosecutor has engaged in discrimination." *Holloway*, 355 F.3d at 729-30.

Indeed, the state court was even *more* unreasonable here than in *Holloway*. In *Holloway*, 355 F.3d at 728, the Pennsylvania Supreme Court "place[d] an undue burden upon the defendant" and unreasonably applied *Batson* when it required a record of the races of people who were accepted by the Commonwealth and *thereafter* struck by the defense. Here, *Abu-Jamal-1* demanded an even *more* burdensome, and irrelevant, record of the races of those struck by the defense when it was "the [*defense's*] *turn to first pass on their acceptability*" and who "might have been acceptable to the Commonwealth." *Abu-Jamal-1* at 850. It is hard to conceive how that record could

be made in *any* case. When it is the defense's "turn to first pass on [a potential juror's] acceptability," and the defense strikes that person, the prosecutor *does not have to, or get to, make a decision about whether to strike or accept.* To make the record demanded by *Abu-Jamal-1*, the prosecutor would have to state, after the defense goes first and strikes a potential juror, that the prosecutor would or would not have accepted the juror if given the opportunity. In addition to requiring the prosecutor to make hypothetical statements about questions s/he never actually had to answer, this would invite abuse of peremptory challenges—a prosecutor could undermine a *Batson* challenge simply by claiming that s/he would have accepted every black person struck by the defense.

5. After laying this defective foundation, *Abu-Jamal-1* failed to find a prima facie case, based upon two considerations.

a. First, *Abu-Jamal-1* said: "[W]e have examined the prosecutor's questions and comments during voir dire, along with those of the appellant and his counsel, and find not a trace of support for an inference that the use of peremptories was racially motivated." *Abu-Jamal-1* at 850. This is unreasonable. As stated above, the record included defense counsel's observations that Philadelphia prosecutors discriminate in jury selection, the prosecutor's admission that he selected a black juror because she apparently "hated" Mr. Abu-Jamal and the prosecutor's statement that he considered a black person "fair minded" only if s/he showed hostility. Surely this is at least a "trace of support for an inference" of racial motivation.

b. Second, the state court said it saw "no 'pattern' in the use of peremptories" because: (i) the first juror selected (Ms. Dawley) was black; (ii) had the defense "not peremptorily challenged the black venireperson acceptable to the Commonwealth, the first two jurors seated would have been black"; and (iii) the prosecutor used just eight of his fifteen peremptories against blacks. *Abu-Jamal-1* at 850. This is utterly flawed.

(1) *Abu-Jamal-1*'s reliance on the fact that the first juror selected was black is, at least, unreasonable. Under *Batson*, "the possibility that members of both [races] will get on the jury despite the intentional discrimination is *beside the point.* The exclusion of even one juror for impermissible reasons" violates equal protection. *J.E.B.*, 511 U.S. at 141 n.3; *accord Batson*, 476 U.S. at 95 ("A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." Thus, in *Brinson v. Vaughn*, 398 F.3d 225 (3d Cir. 2005), this Circuit held that the (Pennsylvania) state court decision was "'contrary' to *Batson*, or at least represented an unreasonable application of that precedent" when the state court failed to find a prima facie case based upon the fact that "there were three black persons on the jury and the selection of the jury was completed with the prosecutor still having six [peremptory] strikes." *Brinson*, 398 F.3d at 233 and n.8. This Circuit explained:

> [A] prosecutor may violate *Batson* even if the prosecutor passes up the opportunity to strike some African American jurors. *Batson* was "designed to ensure that a State does not use peremptory challenges to

> remove *any* black juror because of his race." 476 U.S. at 99 n.22 (emphasis added). Thus, a prosecutor's decision to refrain from discriminating against some African American jurors does not cure discrimination against others.

Brinson, 398 F.3d at 233.

Here, it is particularly unimpressive that the first juror was black. As stated above, defense counsel before jury selection accused the prosecutor's office of racial discrimination, giving the prosecutor incentive to defuse this claim by early selection of a black juror. *See Jackson*, 562 A.2d at 346 (recognizing that "prosecutor may try to deflect criticism of a discriminatory jury selection strategy by allowing token minority representation on the jury"). The first potential juror to survive challenges for cause, Ms. Coates, was *black* and the *prosecutor struck her*. *See* NT 6/7/82 at 134, 163. The second, Ms. Coyle, was *white* and the *prosecutor accepted her* (she was then struck by the defense). *See id.* at 170, 174. The third, Ms. Dawley, was black. The prosecutor could strike her, and risk a public "I told you so" from the defense in this high profile case, or accept her, and undermine the accusation. The prosecutor's choice was made particularly simple by his observation that Ms. Dawley "*hates Mr. Abu-Jamal, can't stand him. . . . Can't stand him.*" NT 6/18/82 at 2.40. For all these reasons, selection of Ms. Dawley does not counter the prima facie case.

(2) *Abu-Jamal-1*'s claim that, had the defense not struck "the black venireperson acceptable to the Commonwealth, the first two jurors seated would have been black," *Abu-Jamal-1* at 850, reflects the state court's unreasonable obsession with *defense* strikes, at the expense of the proper concern with the *prosecutor*'s strikes. *See Holloway*, 355 F.3d at 729 ("defense strikes are irrelevant to the determi-

nation of whether the *prosecutor* has engaged in discrimination"; "the focus properly falls on the *prosecutor*'s actions"). When the *prosecutor*'s strikes are examined, as *Batson* requires, a different picture emerges. As stated, the first person available for selection or peremptory, Ms. Coates, was black; the prosecutor struck her. Ms. Dawley (the African-American who "hated" Mr. Abu-Jamal) was then selected. The prosecutor then struck Alma Austin and Verna Brown, *both black*. *See* NT 6/8/82 at 2.47-56, 2.78-86. Thus, if not for the *prosecutor*'s peremptory strikes, the *first four jurors would have been black*—more than served on the jury. The state court's improper focus on *defense* strikes blinded it to this.

(3) *Abu-Jamal-1*'s reliance on the prosecutor's supposed use of only eight of fifteen strikes against blacks is vitiated by the post-conviction record, which shows that the prosecutor actually used at least *ten* strikes against blacks. *See supra*; *Abu-Jamal-2* at 113-14. When this was corrected on PCRA appeal, the Pennsylvania Supreme Court stated:

> This court's analysis of this issue on direct appeal indicated that the record reflected that the prosecution employed peremptory challenges to strike eight African-American venirepersons. It now appears, via a stipulation, that there may have been two more African-American venirepersons stricken by the prosecution. That evidence does not alter our original conclusion. Significantly, in concluding on direct appeal that Appellant failed to establish a prima facie case of discrimination, we stated: "[W]we have examined the prosecutor's questions and comments during voir dire, along with those of the appellant and his counsel, and find not a trace of support for an inference that the use of peremptories was racially motivated." Even assuming that ten, rather than eight, stricken venirepersons were African-American, we would still arrive at

> the same resolution of this issue that we did on direct appeal. Appellant's current claim, thus, warrants no relief.

Abu-Jamal v. Horn -2 at 114 (citation to *Abu-Jamal-1* omitted).

Thus, *Abu-Jamal-2 disavowed Abu-Jamal-1*'s no-"pattern" holding, which was based upon the mistaken belief that only eight blacks were struck, and *Abu-Jamal-2* declined to find a prima facie case solely because the statements made by the prosecution and defense supposedly did not suggest any racial motivation. This is unreasonable. Cases are legion in which a prima facie case is established *without suspicious statements* by the prosecutor. *E.g.*, *Brinson*, 398 F.3d at 235 ("The pattern of strikes . . . is alone sufficient to establish a prima facie case . . . . This conclusion is not undermined by the fact that other factors suggestive of possible racial discrimination on the part of the prosecution are not present . . . . [W]e are *not aware of any suspicious questions or statements made by the prosecution* . . . and it does not appear that the crime was racially charged. But the question whether a prima facie case has been established must be judged based on all relevant circumstances; no rigid test need be satisfied; and in some cases, a prima facie case may be made out based on a single factor."); *Hardcastle*, 368 F.3d at 256 (finding prima facie case without suspicious comments or questions); *Holloway*, 355 F.3d at 721-23 (same); *Simmons*, 44 F.3d at 1168 (prima facie case based on interracial offense and prosecutor's striking "at least one" African-American). Indeed, it is the "*rare instance*" when the prosecutor openly makes comments that raise an inference of discrimination, and "a primary justification for the *Batson* burden shifting framework is the recognition that [such] direct evidence of the prosecutor's discriminatory intent will often be hard to produce." *Wilson*, 426

F.3d at 670. Moreover, the state court's reliance on the absence of suspicious statements is doubly unreasonable here, since there actually *were* some.

6. In addition to its unreasonable treatment of the matters it *considered* ("pattern," comments), the state court also unreasonably failed to give *any* consideration to other relevant circumstances—*e.g.*, a black defendant with Black Panther connections, a white police officer decedent, allegations of police misconduct, observations by trial counsel and others that the prosecutor's office routinely discriminated during selection, the office's production of a training tape urging racial discrimination, the statistical study showing the office's racially disparate strikes. The state court decision is thus "unreasonable insofar as it failed to evaluate the totality of" the facts supporting the prima facie case. *Williams*, 529 U.S. at 397.[24]

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24. All of these matters were presented to the Pennsylvania Supreme Court in the PCRA proceedings, with the Training Tape and the Baldus-Woodworth study presented in Mr. Abu-Jamal's PCRA appellate briefs. *See Commonwealth v. Abu-Jamal*, No. 119 CAD, Brief for Appellant at 4, 96-98; *id.*, Reply Brief for Appellant at 50.

The Training Tape was suppressed by the Philadelphia District Attorney's Office until April 1997, when District Attorney Lynn Abraham released it during her election campaign against Jack McMahon. *E.g.*, App. 256-58 (New York Times, *Former Philadelphia Prosecutor Accused of Racial Bias*, *supra*). Because this was *after* Mr. Abu-Jamal had filed the state court briefs, he sought a remand to supplement the *Batson* claim with the Training Tape, and for several other reasons. The Pennsylvania Supreme Court allowed a limited remand to take testimony from one witness, but denied Mr. Abu-Jamal's motion to supplement the *Batson* claim. *See* App. 4 (Memorandum and Order, *Abu-Jamal v. Horn*, U.S. Dist. No. CIV 99-5089 WY, *supra*, at 5); *Abu-Jamal-2* at 86.

A preliminary version of the Baldus-Woodworth study was first released in the summer of 1998, after Mr. Abu-Jamal's Pennsylvania Supreme Court briefs were filed. He asked for leave to supplement the record with the study, but the Pennsylvania Supreme Court denied the request. *See* App. 108 (Memorandum and Order, *Abu-Jamal v. Horn*, U.S. Dist. No. CIV 99-5089 WY, *supra*, at 80). The District Court erroneously held that Mr. Abu-Jamal "failed to develop" the Baldus-

7. Even aside from the numerous flaws in its analysis, the state court decision is "objectively unreasonable," *Williams*, 529 U.S. at 409, simply because it is unreasonable to not find a prima facie case on this record. The prima facie burden is not a heavy one. *See* part A, *supra*. For example, in *Simmons v. Beyer*, 44 F.3d at 1168, this Circuit found a prima facie case because the defendant was black, the victim (of a violent crime) was white, and the prosecutor struck "at least one potential African American juror." Here, those same factors and *much more* are present, and failure to find a prima facie case is unreasonable.

Conclusion

For the reasons expressed herein, habeas relief is appropriate under 28 U.S.C. § 2254(d). The prosecutor's removal of black venirepersons was racially discriminatory in violation of *Batson v. Kentucky*, 476 U.S. 79 and Mr. Abu-Jamal's rights under the Equal Protection Clause of the Fourteenth Amendment.

The conviction should be reversed. At the very least, there must be an evidentiary hearing at which the prosecutor will have an opportunity to give reasons for his strikes and the District Judge will decide the ultimate question of whether the prosecutor discriminated on the basis of race.

Woodworth study in state court. *Id.* Mr. Abu-Jamal presented the study to the Pennsylvania Supreme Court as soon as it was available. Assuming the Pennsylvania Supreme Court declined to consider it for "procedural" reasons, that "procedural" ruling is not an adequate state ground, *see, e.g., Jacobs v. Horn*, 395 F.3d 92, 117-18 (3d Cir. 2005); *Bronshtein v. Horn*, 404 F.3d 700, 708-09 (3d Cir. 2005), and, thus, Mr. Abu-Jamal did not "fail to develop" the facts, *see Wilson*, 426 F.3d at 665.

III. THE BIAS OF THE JUDGE WHO PRESIDED OVER THE 1995 PCRA HEARING DEPRIVED MR. ABU-JAMAL OF THE RIGHT TO DUE PROCESS OF LAW AND A FAIR HEARING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND SHOULD HAVE PREVENTED THE DISTRICT COURT FROM USING A PRESUMPTION OF CORRECTNESS WHEN REVIEWING THE FACT FINDING OF THE STATE COURT

[Claim 29, Petition for Writ of Habeas Corpus, *supra.*]

A. The PCRA Proceedings Violated Due Process

Mr. Abu-Jamal was deprived of the right to a fair hearing and due process of law because of the bias of the judge who presided over the 1995 PCRA proceedings, Albert F. Sabo.[25] As a result, the rights of Mr. Abu-Jamal under the Fifth and Fourteenth Amendments were violated. The judge had a predisposition of prejudice against capital defendants and, based upon the record, especially towards Mr. Abu-Jamal. *See Liteky v. United States,* 510 U.S. 540, 551, 114 S.Ct. 1147 (1994) ("A favorable or unfavorable predisposition can also deserve to be characterized as `bias' or `prejudice' because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment.").

Newly discovered evidence reveals that during the 1982 trial Judge Sabo stated, in reference to Mr. Abu-Jamal, that he was "going to help'em fry the nigger." Supp.App. 151-53 (Declaration of Terri Maurer-Carter, Court Stenographer, Aug. 28, 2001) (emphasis added). The new evidence was immediately filed federally after discovery. *Id.*, Doc. 110. Three weeks later a motion was filed in an effort to expand the

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25. Judge Albert F. Sabo died on May 8, 2002.

judicial bias claim, contending that the newly discovered evidence established that the judge "was racially prejudiced against Petitioner." Petitioner's Supplement To Twenty-Ninth Claim for Relief In Petition for Writ of Habeas Corpus, Doc. 116, Sept. 17, 2001. The evidence also was submitted to the state court as well, and then as part of a petition to the U.S. Supreme Court following denial of state relief. *Abu-Jamal v. Pennsylvania*, Pet. for Writ of Certiorari, U.S. Sup.Ct. No. 03-9390, Mar. 8, 2004. The issue was: "Whether it is permissible under the Fifth, Sixth and Fourteenth Amendments for a judge to preside over a capital murder trial in which he was overheard stating during the proceedings in reference to the African-American defendant: "Yeah, and I'm going to help'em fry the nigger." The court declined to accept review on certiorari. Order, May 8, 2004.

The overriding issue before this Court, as reflected in its Order granting a certificate of appealability, is whether the denial of due process resulting from judicial bias during post-conviction proceedings can be grounds for federal habeas corpus relief. Order, Dec. 6, 2006. The facts reflect that the trial judge was prejudiced against Mr. Abu-Jamal at the 1995 PCRA hearing, 13 years after the trial. Thus Mr. Abu-Jamal was deprived of the right to a fair post-conviction proceeding as guaranteed under the Fifth and Fourteenth Amendments.

1. The Judge Had A History of Bias

In order to appreciate the unfairness of the post-conviction proceedings, it is important to understand the background of Judge Albert F. Sabo The public record

pertaining to his bias sheds light on his in-court behavior. The judge's reversal rate in capital cases alone substantiates the overarching point that he is indeed reckless in his pro-prosecution rulings. Possibly no other judge sitting in Pennsylvania had an equivalent percentage of capital cases reversed. A cursory review of some of these cases is instructive:

> *Commonwealth v. Crenshaw,* 470 451 (1983) Judge Sabo was reversed for applying a 1978 death penalty statute to a 1976 homicide.
> *Commonwealth v. Murphy,* 591 A.2d 278 (1991) Judge Sabo was reversed for barring defense counsel from cross-examining a prosecution witness for bias on the basis of his juvenile probationary status in violation of the U.S. Supreme Court's holding in *Davis v. Alaska*, 415 US 308 (1974).
> *Commonwealth v. Bryant,* 611 A.2d 703 (1992) Judge Sabo was reversed for permitting the prosecution to introduce evidence of a prior crime when "the factual predicates were not so distinctly similar."
> *Commonwealth v. Fried,* 555 A.2d 119 (1989) Judge Sabo was reversed for giving an erroneous instruction that lessened the burden for the prosecution.
> *Commonwealth v. Beck,* 402 A.2d 1371 (1979) Judge Sabo was reversed for excluding evidence of the victim's prior conviction for assault and battery and an eye-witness account of another violent episode where the accused claimed self-defense as a defense.[26]

Judge Sabo's was known as a "defendant's nightmare." His general bias against those facing the ultimate punishment was well known in Philadelphia:

> For 14 years, Sabo was assigned to Courtroom 253—hearing nothing but homicides.
> In that time he became the king of death row.
> Sabo was the judge in 31 cases that resulted in the death penalty.

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26. Even in those instances where Judge Sabo is affirmed, such as *Commonwealth v. Reid,* 626 A.2d 118 (1993), his hostility and bias toward the accused was evident. There defense counsel sought funds for a psychologist to examine the defendant in advance of the sentencing hearing. The request was met with a terse reaction: "Why don't you mine for gold while you're at it?"

> One in every six people sentenced to die in Pennsylvania was sentenced by Sabo.
> [A]n Inquirer study found no other judge in the country with as many people on death row.
>
> . . . .
>
> A review of 35 Sabo trials reveals case after case in which the judge, through his comments, his rulings, and his instructions to the jury, has favored prosecutors.
>
> On several occasions he has held in contempt—even locked up—defense attorneys and defense witnesses. . . .
>
> . . . .
>
> The Inquirer review found cases in which prosecutors cautioned Sabo that his rulings might go too far in their behalf.

Exhibit A, Petitioner's Motion and Memorandum To Review for Reasonableness the State Court's Findings of Fact Pursuant To 28 U.S.C. §2254(d)(2) and the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution, U.S. Dist. Ct., Jan. 19, 2000 (F.Tulsky, Philadelphia Inquirer, *The Judge Who Put 31 on Pa.'s Death Row: Juries Chose the Sentences, but Judge Albert F. Sabo's Critics Say He Played A Role, He Is Known As A Judge Who Favors Prosecutors*, Sept. 13, 1992).

The record of Judge Sabo as a jurist was well known for its racial overtones:

> In his 15-plus years as a judge in the Philadelphia Common Pleas Homicide Program, Senior Judge Albert Sabo imposed the death penalty on 26 of the 137 people currently on death row in Pennsylvania—24 of them black men.
>
> Duquesne Law Professor Bruce Ledewitz, who has for many years assisted lawyers undergoing the complexity and emotion of trying death cases, cited Sabo's statistics at a forum last week, and called them "damning."
>
> A nationally known constitutional scholar, Ledewitz said Sabo's statistics would be unacceptable in the worst Southern death-belt states, and vividly demonstrate why judges should be rotated in their assignments.

Exhibit B, Petitioner's Motion and Memorandum To Review for Reasonableness the State Court's Findings of Fact, *supra*). (L.Brennan, *Penna. Death Penalty Called Biased: Blacks Disproportionaly On Death Row*, Mar. 17, 1992).

Judge Sabo's death-penalty record exemplified the destructive influence of race in the implementation of Pennsylvania's death penalty:

> Not all areas of serious concern are related to the appalling lack of resources. Another serious problem unrelated to finances is one that plagues the application of the death penalty in far too many places: the destructive influence of race.
>
> Many point to the record of Judge Sabo—the same judge who refused to allow a psychologist to examine black defendant Anthony Reid—an example of that influence. Sitting as a homicide judge since 1974, he has sentenced more people to death than any judge in the state: 26 death sentences, accounting for 40 percent of all those sentenced to death from Philadelphia and more than 20 percent of all condemned prisoners in the Pennsylvania. a whopping 24 out of the 26—more than 92 percent—are black men.

Exhibit C, Petitioner's Motion and Memorandum To Review for Reasonableness the State Court's Findings of Fact, *supra.* (*Justice on the Cheap: The Philadelphia Story, The Intractable Problem of Race,* Death Penalty Information Center, at 9-10, May 1992).

Judge Sabo's background provides insight into his bias and unfitness to preside over a high-profile capital case involving the death of a police officer. For the 16 years prior to becoming a Court of Common Pleas judge, he served as the Under-Sheriff of Philadelphia County. He was a long-standing member of the Fraternal Order of the Police (which is a major lobbying organization dedicated to seeing the execution of Mr. Abu-Jamal carried out), the National Sheriff's Association and the Police Chief's Association of Southeast Pennsylvania. NT 7/12/95 at 15-16.

The combination of the deep-seated bias and hostility of Judge Sabo towards capital litigants, and his antipathy regarding Mr. Abu-Jamal, resulted in a constitu-

tionally unfair hearing under the Fifth, Sixth and Fourteenth Amendments.

2. Judge Sabo's Display of Bias and Hostility at the PCRA Hearing

At the outset of the 1995 PCRA hearing, Mr. Abu-Jamal unsuccessfully moved to recuse Judge Sabo who rushed the proceedings. The judge repeatedly castigated Mr. Abu-Jamal's counsel, routinely issuing threats of contempt, and ultimately incarcerated one and fined another. He quashed defense subpoenas at the behest of the Commonwealth. Virtually every defense objection was overruled while the Commonwealth objections were sustained. In the end, it is not surprising that the judge's Findings of Fact (FOF) and Conclusions of Law (COL) replicated the submissions by the Commonwealth and were fraught with contradictions, inaccuracies and unsupported conclusions.

The hostility and bias of Judge Sabo could not have been more apparent. Journalists, both local and national, publicized the rank unfairness of the proceedings. The leading paper in Philadelphia observed: "The behavior of the judge was disturbing the first time around—and in hearings last week he did not give the impression to those in the courtroom of fair-mindedness. Instead, he gave the impression, damaging in the extreme, of undue haste and hostility toward the defense's case." Philadelphia Inquirer, July 16, 1995, Exhibit 6.[27] Another newspaper had the headline: "Sabo Must

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27. The court fixated on this coverage, and admonished the media on such minutiae as reporting inaccurately that the court ejected three spectators the previous day, rather than four. The court lamented the negative press coverage he received: "In the old days we lawyers had a saying: If you have the evidence on your side,

Go." Philadelphia Daily News, July 19, 1995. A national newspaper observed that he "has sent more people to death row than any judge in the state," and cited actual courtroom occurrences at the PCRA hearing as illustrative of the fact that Judge Sabo "has been openly contemptuous of the defense." The New York Times, July 30, 1995, at A24. A prominent legal journal observed that he "flaunted his bias, oozing partiality toward the prosecution and crudely seeking to bully Weinglass,[28] whose courtroom conduct was as correct as Sabo's was crass." The American Lawyer, Dec. 1995, at 84. The Judge was faulted for barring the defense from presenting witnesses and for "sharply restrict[ing] Mr. Abu-Jamal's lawyers in their questioning of witnesses, and block[ing] them from making offers of proof on the record to show the import of the precluded testimony." *Id.* It was also observed that the judge's incarceration and fining of Mr. Abu-Jamal's lawyers was "unwarranted." *Id.* at 85.

The PCRA court rushed Mr. Abu-Jamal to present his case "immediately" on just two court days notice. On July 12, Mr. Abu-Jamal moved for a standard stay of execution, since his execution was scheduled for August 17, 1995, and asked for a

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argue the evidence. If you have the law on your side, argue the law. And if you have neither the evidence or the law, scream like hell. Now the news media, specifically the *Inquirer*, has changed that to read as follows: If you don't have the evidence or the law, blame it on the Judge." NT 8/14/95 at 5, 9. The court refused to accept the press reports as indicative of the public perception of impropriety—and even refused to accept them in the record when proffered by the defense. Yet the court seized upon a press report which was critical of defense counsel and implied that lead defense counsel had encouraged a march on the judge's home—which was not only patently false but had absolutely no basis in the record

28. Leonard Weinglass, lead attorney for Mr. Abu-Jamal at the 1995 PCRA hearing.

reasonable time to prepare for the evidentiary hearing. Instead, on July 14 the court took the stay motion "under advisement" and used the execution date as an excuse to rush the hearing. When the court ordered Mr. Abu-Jamal to begin the hearing, the Commonwealth had not even had time to answer the PCRA petition. There was not even a complete record of the 1982 proceedings.[29] Unquestionably the Commonwealth and the judge used the expedited schedule to hamper Mr. Abu-Jamal's ability to prepare and make an adequate presentation.

A central strategy deployed by the judge to defeat judicial review was to block Mr. Abu-Jamal's proffer of evidence and then to cite the resulting absence of evidence as proof of Mr. Abu-Jamal's inability to prove his constitutional claims. A striking example of this can be found in Judge Sabo's handling of Mr. Abu-Jamal's claim that prosecution witness Chobert had an unrevealed economic incentive to favor the prosecution. The court barred Mr. Abu-Jamal from showing that the witnesses' statements to investigators immediately after the shooting supported the defense contentions that the accused was not the shooter and that the true culprit had fled the scene. By so doing Judge Sabo was free to conclude, unencumbered by evidence to the contrary, that Chobert's trial testimony harmonized with his pretrial statements.

Judge Sabo's efforts to defeat Mr. Abu-Jamal's constitutional claims were often more brazen. He quashed subpoenas, knowing that without the subpoenaed witnesses

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29. Four of the pretrial hearing transcripts were not available until the middle of the PCRA hearing.

Mr. Abu-Jamal could not substantiate his constitutional claims. Subpoenas for officers Gary Bell, Stephen Trombetta, and others who were in a position to hear an alleged incriminating statement by Mr. Abu-Jamal were quashed, thus hampering Mr. Abu-Jamal from bolstering proof that such damning evidence was concocted. He could not prove that three jurors during the course of the trial, secretly deliberated in a hotel room situated next to that of juror Savannah Davis for Ms. Davis' subpoena was quashed. Indeed, one of Mr. Abu-Jamal's lawyers was incarcerated for attempting to explain why the subpoena for the state court administrator was necessary. By quashing that subpoena, Judge Sabo precluded proof substantiating Mr. Abu-Jamal's assertion that geographic and racial disparities plague Pennsylvania's death penalty.

Judge Sabo's findings were laden with blatant inaccuracies. For example, he found that Mr. Abu-Jamal "offered no evidence whatever" to establish that appellate counsel "failed to order the transcripts of several pretrial proceedings." The record of the hearing is crystal clear that pretrial minutes were transcribed *for the first time* while the hearing was taking place, and those minutes were delivered to the court immediately after being transcribed. NT 7/14/95 at 16-17, 39, 54, 78; NT 8/7/95 at 40. In another instance, the PCRA court rejected as "absurd" that a ballistic expert was unavailable due to a lack of funds. The court also misstated the record on the pivotal issue of the fleeing shooter. Judge Sabo said that the witness Kordansky's testimony "is consistent with the runner going toward the scene of the murder and not away." He made a similar finding with respect to Dessie Hightower. The unrebutted fact is

that Kordansky, Hightower, and two other witnesses told law enforcement, immediately after the shooting, that they had seen someone running east on the south side of Locust St. in the direction of a darkened alleyway.

3. Judge Sabo's Deep-Rooted Biases Infected His Fact Findings and Required Recusal

That difficulties would arise from Judge Sabo's involvement in this post-conviction proceeding was foreshadowed by his adversarial relationship with Mr. Abu-Jamal in 1982. This PCRA proceeding, therefore, provided one of the clearest situations requiring recusal—a judge who has been embroiled in a "running, bitter controversy" with a party in prior proceedings. *Commonwealth v. Stevenson*, 482 Pa. 76, 393 A.2d 386 (1978). The court's own fact findings describe its view that there was such a "running" controversy throughout the 1982 trial: "Mr. Abu-Jamal refused to cooperate with this court or follow proper courtroom procedures. *He constantly insulted this court, yelled, used foul language, ridiculed his counsel, and acted belligerently.* . . ." Judge Sabo's distaste for Mr. Abu-Jamal, and his lingering bitterness over his "insults," "ridicule," and "belligerence," undeniably provoked his maltreatment of Mr. Abu-Jamal's PCRA counsel and infected his findings, particularly on Sixth Amendment claims. In fact, Mr. Abu-Jamal was quiet and extremely well behaved during the 1995 PCRA hearing. Apparently predisposed to conclude that Mr. Abu-Jamal had "controlled" the trial proceedings, the judge *sua sponte* placed on the record those instances when defense counsel consulted with Mr. Abu-Jamal

during the PCRA hearing NT 8/3/95 at 161; NT 8/10/95 at 1. With such a fixed bias, the court simply could not fairly judge the credibility of Mr. Abu-Jamal's trial attorney, who repeatedly swore that "Mr. Jamal was not dictating anything to me." NT 7/27/95 at 139-41; NT 7/31/9 at 97-98. The court insisted that Mr. Abu-Jamal had no Sixth Amendment claim because "my memory of the case is Mr. Jamal was running the case." NT 8/1/95 at 130.

Another indication of bias rested with the court's allegiance to the Fraternal Order of Police ("FOP"). Judge Sabo, formerly undersheriff for 16 years, was a retired FOP member. Those ties had an unusual impact in this case, because for years that group has actively lobbied for Mr. Abu-Jamal's execution.[30] Even during the proceedings, the FOP demonstrated for Mr. Abu-Jamal's execution. The courtroom audience was split—one side filled with Mr. Abu-Jamal's family and supporters, the other with FOP members. The court openly sided with the FOP members. Most appallingly, the court not only permitted, but encouraged, off-duty FOP members to carry loaded firearms in the courtroom, stating that the FOP "are in here for my protection. . . . I consider the police officers for my protection in this Courtroom." NT 7/31/95 at 56-57. Especially since issues of police misconduct and police credibility were themes

30. The Fraternal Order of Police continues to attempt interfere with Mr. Abu-Jamal's effort to secure a new and fair trial. The FOP has even criticized this Court for it s decision to grant a certificated of appealability to hear the issues presented in the present brief. See, *e.g.*, *Pa FOP Condemns Recent Court Decision To Hear Claims By Convicted Cop Killer Mumia Abu-Jamal*, Fraternal Order of Police web site (www.pafop.org/page11.html), Dec. 20, 2005

running throughout the PCRA hearing, Judge Sabo's FOP support and allegiance rendered the proceedings totally unfair. For example, the court refused to acknowledge the fact that the Philadelphia Police had kicked and beaten the wounded Mr. Abu-Jamal—a fact established by the prosecution's own witnesses. In finding accounts of such brutality "incredible," the judge asserted that according to Mr. Abu-Jamal's treating physician "there was no evidence of injury other than the gunshot wound to Mr. Abu-Jamal's abdomen." FOF ¶ 256 n.25; *see also Id.* ¶ 223. Yet the very testimony the PCRA court cited states that Mr. Abu-Jamal had numerous other head injuries, including "a laceration of his forehead . . . swelling over the left eye, a laceration of his left lower lip, and . . . soft tissue swelling on the right side of his neck and chin." NT 6/28/82: 58. There was other graphic evidence that Mr. Abu-Jamal had been beaten. Mr. Hightower saw "eight or nine officers" at the scene who were standing around Mr. Abu-Jamal striking him with "various things, clubs, feet NT 6/28/82 at 130. They had him by the dread locks." Even the star prosecution witness Cynthia White saw officers swinging their blackjacks at Mr. Abu-Jamal. NT . 6/21/82 at 149-50. For the PCRA judge, however, police officers simply did no wrong.

With his allegiance to the FOP, Judge Sabo's pro-prosecution bias was but the flip side of the same coin. Indeed, his allegiance to the prosecution culminated with his opinion which adopted virtually verbatim the prosecution's submission.

While the court's pro-prosecution bias is revealed throughout his opinion. One example aptly demonstrates how the judge adapted rulings to suit the prosecution. At

the 1982 trial, over defense objection, the court qualified medical examiner Paul Hoyer as a ballistics expert on bullets and wounds. But at the PCRA hearing, faced with Dr. Hoyer's note that the fatal bullet was a ".44 cal[iber]"—which would exclude Mr. Abu-Jamal's gun—the court reversed itself, finding Dr. Hoyer was "not a ballistics expert" and his .44 caliber finding was "a mere lay guess."

B. There Is A Remedy For This Due Process Violation

For the above-stated reasons, due process was violated when Judge Sabo presided during the PCRA proceedings. There should at least be an evidentiary hearing on this issue. The state court's denial of this claim is "contrary to" and/or an "unreasonable application of" clearly established law *See* 28 U.S.C. 2254(d). Judge Yohn did not decide this due process issue, however, because he held that "errors in [state] post-conviction proceedings are not cognizable on [federal] habeas review." Supp.App. 98 (Memorandum and Order, *supra*, at 130). Judge Yohn erred.

One of the foundational principles of our Nation's jurisprudence is "that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded. . . . [E]very right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). In particular, there *must* be a remedy for the due process violations that occurred during the PCRA proceedings. As set forth below, there is.

1. Judge Sabo's Bias In The PCRA Proceedings Is A Cognizable Claim for Relief In These Federal Habeas Proceedings

As Judge Yohn noted, the Circuits are divided regarding whether constitutional errors during state post-conviction proceedings are cognizable in federal habeas pro-

ceedings, and that "neither the Supreme Court nor the Third Circuit has addressed this issue." Supp.App. 97 (Memorandum and Order, *supra*, at 128). A leading treatise on federal habeas corpus practice and procedure, Randy Hertz & James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (4th ed. 2001) ("FHCPP"), notes the Circuit split described by Judge Yohn. *See* FHCPP at 314 n.48 (citing and discussing cases cited by Judge Yohn). It concludes that, under Supreme Court precedent, federal constitutional violations in state post-conviction proceedings *are cognizable* in federal habeas:

> Three Supreme Court decisions suggest that federal courts should treat a challenge to the procedures utilized in state post-conviction proceedings as cognizable and reviewable in habeas corpus. First is *Ford v. Wainwright*, 477 U.S. 399 (1986), in which the Court adjudicated and granted relief on a federal habeas corpus claim that the Due Process Clause requires a fair state postconviction procedure for determining that a capital prisoner is sufficiently "sane" to be executed. *Id.* at 414-17. *See id.* at 423-25 (Powell, J., concurring). Second is *Herrera v. Collins*, 506 U.S. 390 (1993), in which the Court adjudicated the merits of (but denied relief on) a federal habeas corpus claim that due process requires a fair state postconviction procedure for adjudicating the propriety of continuing to incarcerate or, at least, of executing a prisoner who can be shown via newly discovered evidence to be innocent. *See id.* at 410-11. Third, is *Heck v. Humphrey*, 512 U.S. 477 (1993), in which the Supreme Court held that habeas corpus and not [42 U.S.C.] section 1983 proceedings are the proper forum for actions that may have, as a direct *or collateral* effect, a determination that the moving party's incarceration, or the length of incarceration, violates federal law.

FHCPP at 314-15 n.48 (emphasis in FHCPP; some citations omitted).

Petitioner submits that this is the better approach, and should be adopted by this Circuit. Federal constitutional violations in state post-conviction proceedings should be deemed cognizable in federal habeas corpus proceedings

Since Judge Sabo's bias presents a cognizable claim in federal habeas, an appropriate remedy must be fashioned. He sat as a factfinder in the PCRA proceedings; thus a possible remedy would be to order the state courts to redo the PCRA hearing, with an unbiased judge presiding. This Circuit's precedent, however, does not allow such a "do-over" remedy. It has repeatedly held that federal habeas courts "do not have authority under the federal habeas statutes, 28 U.S.C. § 2241 or § 2254, to remand a habeas corpus petition to a state court for an evidentiary hearing." *Hardcastle v. Horn*, 368 F.3d 246, 261 (3d Cir. 2004) (quoting *Keller v. Petsock*, 853 F.2d 1122, 1129 (3d Cir. 1988)). There is, however, a remedy that protects Mr. Abu-Jamal's rights without requiring the "do-over" that this Circuit's precedent forbids—the District Court should review his claims *without any deference* to Judge Sabo's findings of fact, which are tainted by his bias.

Under ordinary circumstances, a state court's findings of fact are "presumed to be correct" with the habeas petitioner having "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Here, however, where *the factfinder was biased*, it would violate due process to require deference to the state court factfindings. *See Concrete Pipe & Products of Calfornia, Inc., v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 626 (1993) (requiring deference to factfinding of biased tribunal violates due process (citing *Withrow v. Larkin*, 421 U.S. 35, 58 (1975)). The appropriate remedy for the due process violation arising from Judge Sabo's bias, therefore, is to require the District Court to examine the state court record *de novo*, without deference to Judge Sabo's findings of fact.

2. Even if Judge Sabo's Bias Is Not A Cognizable Claim For Relief In Federal Habeas Proceedings, It Nevertheless Requires the Federal Courts to Reject the "Presumption of Correctness" Contained in §2254(e)(1)

Even if it is assumed that Judge Sabo's bias in the PCRA proceedings is *not* a cognizable claim for federal habeas corpus relief, it nevertheless requires that there should be *no "presumption of correctness"* for any findings of fact made by Judge Sabo.

a. As stated above, Judge Yohn cited decisions holding that constitutional errors in state post-conviction proceedings are not cognizable as claims for federal habeas relief. Non-cognizability as a *claim for relief*, however, does *not* mean that there are no consequences for the bias. Indeed, the decisions cited by Judge Yohn, deeming such claims non-cognizable, show that there *are appropriate repercussions.*

For example, in *Hopkinson v. Shillinger*, 866 F.2d 1185, 1218-20 (10th Cir. 1989), cited in Supp.App. 97 (Memorandum and Order, *supra*, at 128 n.96), the petitioner asserted that the state courts violated due process when they denied his claims without allowing an evidentiary hearing. The Tenth Circuit held that a due process violation in state post-conviction was not cognizable as a claim in federal habeas corpus proceedings, but that :

> [I]f the state postconviction petition was dismissed arbitrarily, the petitioner can present anew to the federal courts any claim of violation of his federal constitutional rights. Any deficiency in the state procedure would affect the presumption of correctness accorded the state court's findings. *Ford v. Wainwright,* 477 U.S. 399, 410-11 (1986) (plurality opinion); *id.* at 423-24 (Powell, J., concurring); *Townsend v. Sain*, 372 U.S. 293, 316 (1963); . . . And the federal courts can, as the instant case

demonstrates, give an adequate remedy for violations of federal constitutional rights.

Hopkinson, 866 F.2d at 1219-20; *see also Wilson v. Beard*, 426 F.3d 653, 665 (3d Cir. 2005) (when state post-conviction courts inappropriately deny relief without allowing evidentiary hearing, hearing should be held in federal court).[31]

Similarly, in *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989), cited in Supp.App. 97 (Memorandum and Order, *supra*, at 128 n.96), the petitioner asserted that "delay . . . in deciding his petition for state post-conviction relief violated his due process rights," and the Ninth Circuit deemed this due process claim non-cognizable in federal habeas. Nevertheless, this is still relevant to the federal proceedings. Inordinate delay in the state post-conviction process means that the federal habeas court should *excuse the exhaustion requirement. See Story v. Kindt*, 26 F.3d 402, 405 (3d Cir. 1994) ("inexcusable or inordinate delay by the state in processing claims for relief may render the state remedy effectively unavailable, thereby prompting the federal court to excuse exhaustion" (citations and quotation marks omitted)); *Cristin v. Brennan*, 281 F.3d 404, 411 (3d Cir. 2002) (acknowledging continuing vitality of the doctrine of excusing exhaustion when delay is inordinate).[32]

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31. Similarly, in *Spradley v. Dugger*, 825 F.2d 1566, 1567 (11th Cir. 1987), cited in DCO at 266 n.96, the petitioner asserted that his due process rights were violated when the state post-conviction court denied relief without allowing an evidentiary hearing and the Eleventh Circuit deemed such a claim non-cognizable in federal habeas. Nevertheless, assuming a hearing was needed, there would be a *remedy* in federal habeas—a federal evidentiary hearing.

32. Two district court decisions cited by Judge Yohn, *Forrest v. Fulcomer*, 1990 WL 9370 (E.D. Pa. Feb. 1, 1990), and *Cornish v. Vaughn*, 825 F.Supp. 732 (E.D.

Similarly, in *Williams-Bey v. Trickey*, 894 F.2d 314, 317 (8th Cir. 1990), cited in Supp.App. 97 (Memorandum and Order, *supra*, at 128 n.96), the petitioner asserted that due process was violated when the state failed to provide adequate discovery in state post-conviction. The Eighth Circuit deemed this due process claim non-cognizable in federal habeas, *id.*, but as a consequence appropriate discovery was provided in federal court. *See Banks v. Dretke*, 540 U.S. 668, 675 (2004) ("through discovery and an evidentiary hearing ... in a federal habeas corpus proceeding, . . . long-suppressed evidence came to light" and death sentence was vacated); *Bracy v. Gramley*, 520 U.S. 899 (1997) (ordering discovery for federal habeas claim of judicial bias).

Similarly, in *Morris v. Cain*, 186 F.3d 581, 585 (5th Cir. 2000), cited in Supp.App. 97 (Memorandum and Order, *supra*, at 128 n.96), the petitioner asserted that the state post-conviction court violated due process when it subjected a claim of "structural" error to harmless error analysis and denied relief by deeming the alleged error harmless. The Fifth Circuit deemed this due process claim non-cognizable in federal habeas, *id.*, at 585 n.6, but the claim was given *de novo* federal review and the Fifth Circuit granted relief. *Id.* at 585-88.

Pa. 1993), *see* App. 97 (Memorandum and Order, *supra*, at 128 n.97), assumed the *cognizability* in federal habeas proceedings of a due process violation arising from excessive delay in state post-conviction proceedings. The "cognizable error" approach taken by *Forrest* and *Cornish* leads to *exactly the same remedy* as an approach that assumes the error is *not* cognizable—if there is "inordinate delay" in state post-conviction, the federal habeas court "may excuse the exhaustion requirement." *Forrest*, 1990 WL 9370 at *3; *accord Cornish*, 825 F.Supp. at 733 ("The only relief I could grant Cornish, assuming his claim [of inordinate delay in state post-conviction] had merit, would be to waive the requirement that he exhaust all his state remedies.").

Thus, even the cases holding that constitutional violations in state post-conviction are not cognizable as claims in federal habeas corpus recognize that these violations of due process impact the way the federal courts must review the petition.

b. This Circuit's precedent shows that as a result of Judge Sabo's bias, the District Court should review the case without affording a "presumption of correctness" to Judge Sabo's findings of fact.

In *Rolan v. Vaughn*, 445 F.3d 671 (3d Cir. 2006), this Circuit discussed the role of § 2254(e)(1)'s "presumption of correctness," and the effect thereon of defects in the state post-conviction proceedings. It was held that run-of-the-mill defects in state post-conviction procedures do *not* dissolve the presumption of correctness, although such errors may be relevant to the federal habeas court's determination of whether the state court decision was "reasonable," under § 2254(d)(1)-(2), and/or whether the petitioner has "adequately rebutted" the presumption of correctness under § 2254(e)(1). *Rolan*, 445 F.3d at 679 (citing *Lambert v. Blackwell*, 387 F.3d 210 (3d Cir. 2004)).

This Circuit found, however, that there is at least one type of state post-conviction error that *does eliminate the presumption of correctness* – the presumption of correctness does *not* apply when there is a defect in the state court process that "impugn[s] the integrity of the entire proceeding." *Rolan*, 445 F.3d at 680. Bias of the judicial factfinder—here, Judge Sabo—plainly is such a defect in "the integrity of the entire proceeding." *See Johnson v. United States*, 520 U.S. 461, 468-69 (1997) ("lack of an impartial trial judge" is "structural error" that "def[ies] harmless-error analysis" (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)); *In re Murchison*, 349 U.S. 133, 136 (1955) ("Every procedure which would offer a possible temptation to the av-

erage man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." (quoting *Tumey*, 273 U.S. at 532)); *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (racial discrimination "offends ... the integrity of the courts").

Thus, even if it is assumed that Judge Sabo's bias is *not* a cognizable *claim* for federal habeas relief, that bias requires the District Court to review the state court record without deference to Judge Sabo's factfindings. Mr. Abu-Jamal's right to due process of law and a fair hearing under the Fifth and Fourteenth Amendments require no less.

C. Judge Yohn Erred When He Denied Relief, Or At Least An Evidentiary Hearing

For the reasons stated above, there should be no presumption of correctness for Judge Sabo's factfindings. Judge Yohn erred when he held that there is no remedy for Judge Sabo's bias. At the very least, the District Court should hold an evidentiary hearing at which the above-described evidence of Judge Sabo's bias can be fully developed and considered.

Judge Yohn also erred in his treatment of evidence of Judge Sabo's bias contained in the Declaration of Terri Maurer-Carter, who overheard Judge Sabo say of Mr. Abu-Jamal that he was "going to help'em fry the nigger." Supp.App. 151-53 (Declaration of Terri Maurer-Carter (Doc. 110), *supra*). This significant evidence of Judge Sabo's bias was discovered by Mr. Abu-Jamal's counsel in August, 2001 and immediately filed with the District Court. *Id.* Less than three weeks later they filed a

motion to supplement the judicial bias claim. *See* Supp.App. 154-60 (Petitioner's Supplement To Twenty-Ninth Claim for Relief in Petition for Writ of Habeas Corpus (Doc. 116), Sept. 17, 2001). The another pleading was filed to expand the record with the Maurer-Carter declaration. Supp.App. 161-67 (Petitioner's Motion for Leave To File Declaration Re Timeliness of Filing of Declaration of Terri Maurer-Carter and/or Motion To Expand Record (Doc. 129), Oct. 22, 2001).[33]

Two months later December 18, 2001, Judge Yohn denied the motions to supplement and amend Claim 29. Supp.App. 125 (Doc. 136.) He held that the Maurer-Carter supplement/amendment to Claim 29 was untimely under AEDPA's statute of limitations because, he believed, (1) it was filed after AEDPA's limitations period expired, and (2) it did not "relate back" to the allegations in the habeas petition under Rule 15(c) of the Rules of Civil Procedure. Judge Yohn erred. The amendment was timely and should have been allowed.

AEDPA was enacted on April 24, 1996. *See Wilson v. Beard*, 426 F.3d 653, 663 (3d Cir. 2005). Because Mr. Abu-Jamal's conviction was final before that date, he had a one year "grace period" from that date in which to timely file his federal habeas petition. *Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998). Moreover, when AEDPA was enacted Mr. Abu-Jamal had a "properly filed," 28 U.S.C. § 2244(d)(2),

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33. Mr. Abu-Jamal's counsel also filed the Maurer-Carter declaration as part of a successive PCRA petition. The Court of Common Pleas denied PCRA relief without allowing an evidentiary hearing, and the Pennsylvania Supreme Court affirmed. *See Commonwealth v. Abu-Jamal*, 833 A.2d 719 (Pa. 2003).

PCRA petition pending in Pennsylvania's state courts. Thus AEDPA's limitations period was *tolled* and did not start to run until relief was denied by the Pennsylvania Supreme Court, in *Abu-Jamal-2*, on November 25, 1998. Mr. Abu-Jamal timely filed his federal habeas petition within one year of that date, on October 15, 1999.

When Mr. Abu-Jamal's counsel discovered the Maurer-Carter information, in August 2001, AEDPA allowed *one year from the date of discovery* in which to timely amend the already filed habeas petition with the newly discovered evidence. *See* 28 U.S.C. § 2244(d)(1)(D) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of . . . the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence"). Her declaration was filed in August and an amendment was filed in September 2001, with eleven months still left on the AEDPA year. Thus, the amendment plainly was *timely* under § 2244(d)(1)(D).

Judge Yohn, however, erroneously deemed the amendment untimely. The source of his error is clear—he assumed that the AEDPA year on this newly discovered evidence began to run on *November 25, 1998* when the Pennsylvania Supreme Court denied PCRA relief in *Abu-Jamal-2*, but the AEDPA year for this evidence *actually* began to run in *August 2001* when it was discovered. When the correct starting date for the AEDPA year is taken into account, the amendment was timely. It should have been allowed.

Moreover, the amendment is timely even if it is erroneously assumed, as did Judge Yohn, that the AEDPA year began to run on November 25, 1998, because the amendment "relates" back under Fed. R. Civ. Pro. 15(c) to the allegations in Claim 29 of the habeas petition. Judge Yohn further erred when he held to the contrary.[34]

In *Mayle v. Felix*, 125 S.Ct. 2562 (2005), the Supreme Court held that an amendment to a timely habeas petition "relates back" to the original timely filing date when the amendment and the original petition "are tied to a common core of operative facts." At the core of Claim 29 in the original petition was the assertion that Judge Sabo was biased against Mr. Abu-Jamal. The Maurer-Carter declaration, that she overheard Judge Sabo say he was "going to help'em fry" Mr. Abu-Jamal, obviously is "tied to," and compelling evidence of, that core issue.[35] Thus, even if it is erroneously assumed that the amendment was filed outside the appropriate AEDPA year, it was timely because it related back to the timely filed petition.

The overriding issue is whether the denial of due process resulting from judicial bias during post-conviction proceedings can be grounds for federal habeas corpus re-

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34. For the reasons stated above, the amendment is timely under § 2244(d)(1)(D) even if it does not "relate back" to the filing date of the original habeas petition.

35. Indeed, the Pennsylvania Supreme Court found the Maurer-Carter declaration to be so closely related to the allegations already pled in Claim 29 of the original habeas petition that it deemed the Maurer-Carter information "previously litigated" when it was presented in the successive PCRA proceedings. *See Abu-Jamal*, 833 A.2d at 726-27.

lief. It is submitted that Fifth and Fourteenth Amendments require that the answer be in the affirmative.

PART TWO: THE COMMONWEALTH'S APPEAL

IV. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S GRANT OF SENTENCING RELIEF UNDER *MILLS V. MARYLAND*, 486 U.S. 367 (1988)

[Claim 25, Petition for Writ of Habeas Corpus, *supra*.]

Judge Yohn found that the penalty-phase verdict form and instructions violated *Mills v. Maryland*, 486 U.S. 367 (1988), and that habeas relief is appropriate under 28 U.S.C. § 2254(d). Supp.App. 1, 84-96 (Memorandum and Order (Doc. 138), *supra*, at 1, 114-27, *Abu-Jamal v. Horn*, U.S. Dist. No. CIV 99-5089 WY). Thus, the death penalty judgment was reversed, which the Commonwealth appealed. Supp.App. 98-99 (*Id.* at 130-31). The ruling is based upon a careful consideration of the record and the law. This Court should affirm.

A. Introduction.

Instructions that require the jury to unanimously find a mitigating circumstance violate the Eighth Amendment because they create a "barrier to the sentencer's consideration of all mitigating evidence." *Mills*, 486 U.S. at 375. Instructions violate *Mills* when, "viewed in the context of the overall charge," there is a "reasonable likelihood" that the jury interpreted the instructions as requiring a unanimous mitigation finding. *Boyde v. California*, 494 U.S. 370, 378, 380 (1990).

In *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), this Circuit found that oral instructions *materially identical* to those used here *violate Mills*. In *Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001) ("*Banks-I*"), *rev'd in part*, 536 U.S. 266 (2002), *aff'd on*

reh'g, 316 F.3d 228 (3d Cir. 2003), *rev'd in part sub nom*, *Beard v. Banks*, 542 U.S. 406 (2004) ("*Banks-4*"), this Circuit found that oral instructions and a verdict form *materially identical* to those used here *violate Mills*, and that it was "objectively unreasonable" under § 2254(d)(1) for the state court to hold otherwise.

Under *Banks-1*, Mr. Abu-Jamal's *Mills* claim is summarily resolved: the form and instructions used here are *materially identical* to those in *Banks*. *Banks-1* held that this form and instructions violate *Mills*, and that habeas relief is required under § 2254(d)(1). Thus, habeas relief is required in the case at hand.

Recently, however, this Circuit found that the Supreme Court's decision in *Banks-4* makes *Banks-1* "no longer precedential," although it remains "instructive and relevant." *Hackett v. Price*, 381 F.3d 281, 294 n.9 (3d Cir. 2004); *see also id.* at 304 n.16 (Becker, J. dissenting) (agreeing that *Banks-1*'s merits/2254(d) analysis remains "'instructive and relevant . . .', particularly given that the analysis in *Banks[-1]* reflects the unanimous judgment of three members of this Court").[36] We therefore discuss

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36. We respectfully submit that the *Hackett* panel erred when it deemed *Banks-1*'s merits/2254(d) ruling non-precedential. The Supreme Court did *not* reverse *Banks-1*'s merits/2254(d) ruling, but reversed solely on non-retroactivity grounds. (The four Justices who dissented on the retroactivity issue *did* address the merits and found relief appropriate "[f]or the reasons identified by the Third Circuit" in *Banks-1*. *Banks-4*, 542 U.S. at 423 (dissenting opinion)). When part of a decision is reversed by the Supreme Court, the rest of the decision (the merits/2254(d) ruling in *Banks-1*) continues to be controlling Circuit precedent. *See, e.g.*, *United States v. Kikumara*, 947 F.2d 72, 77-78 (3d Cir. 1991); *McLaughlin v. Pernsley*, 867 F.2d 308, 312-13 (3d Cir. 1989); *Finberg v. Sullivan*, 658 F.2d 93, 100 n.14 (3d Cir. 1981); *accord Central Pines Land Co. v. United States*, 274 F.3d 881, 893 n.57 (5th Cir. 2001). Nevertheless, given *Hackett*, we assume that *Banks-1* is non-precedential.

Apart from holding *Banks-1* non-precedential, *Hackett* is otherwise inapposite. The *Hackett* majority found no *Mills* error because the *Hackett* jury reported

this *Mill* claim in detail, treating *Frey* and *Banks-1* as "instructive and relevant" but not controlling.[37] It remains clear that the form and instructions used here violate *Mills*, and that relief is required under § 2254(d)(1).

B. The Verdict Form and Oral Instructions Violated *Mills*

1. The form: The three-page verdict form, as completed by the jury, states:

> We, the jury, having heretofore determined that the above-named defendant is guilty of murder of the first degree, do hereby further find that:
>
> (1) We, the jury, unanimously sentence the defendant to
> ☒ death
> ☐ life imprisonment.
>
> (2) (To be used only if the aforesaid sentence is death)
> We, the jury, have found unanimously
> ☐ at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance(s) is/are _____.
> ☒ one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are *A* .
> The mitigating circumstance(s) is/are *A* .
>
> ---
>
> *AGGRAVATING AND MITIGATING CIRCUMSTANCES*
>
> *AGGRAVATING CIRCUMSTANCE(S)*:

---

it had *unanimously rejected* the proffered mitigating circumstances. *Hackett*, 381 F.3d at 301. That holding is inapposite here, where the jury found a mitigating circumstance, but not all of those proposed by the defense, thus raising the real possibility that some jurors would have found additional mitigating circumstances, but were precluded from doing so by the *Mills* violation. Here, the jury's reported findings actually *highlight* the *Mills* violation.

37. This, in essence, was also Judge Yohn's approach—rather than giving this claim the summary treatment that *Banks-1* allows, he devoted 28 pages of his opinion to a detailed examination of the verdict form and instructions.

(a) The victim was a fireman, peace officer or public servant concerned in official detention who was killed in the performance of his duties. (✓)

[nine more statutory aggravating circumstances, labeled (b)-(j) and followed by a ( ), not checked by the jury]

MITIGATING CIRCUMSTANCE(S):

(a) The defendant has no significant history of prior criminal convictions (✓)

[seven more statutory mitigating circumstances, labeled (b)-(h) and followed by a ( ), not checked by the jury]

[twelve lines for signatures of all jurors]

Supp.App. 128-30, First Degree Murder Verdict Penalty Determination Sheet (death), *Comm. v. Abu-Jamal*, Court of Common Pleas No. 1358, July 3, 1982 ("- -" denotes page break).

a. This verdict form is *materially identical* to the *Banks* form, *see Banks-1*, 271 F.3d at 549-50, which this Circuit found "*does suggest the need for unanimity*" for finding a mitigating circumstance. *Id.* at 549. Thus, under *Banks-1*, the form violates *Mills*. Heeding *Hackett*, however, we examine the form without further reference to *Banks-1*. It remains clear that this form *plainly requires* the jury to find each mitigating circumstance *unanimously*.

b. The form opens with "*We, the jury*, having heretofore determined that the above-named defendant is guilty of murder of the first degree, *do hereby further find that*:" The form thus requires that *everything* marked on it must be *found by the jury that found Mr. Abu-Jamal guilty—i.e.*, the *unanimous jury*.

Page One of the form requires the jury to specify the sentence; requires the jury to specify that "[t]he aggravating circumstance(s) is/are ___"; and requires the jury to specify that "[t]he *mitigating circumstance(s)* is/are ___." Given the form's opening statement, that everything on the form must be *unanimously* found, the form thus requires that the sentence, the aggravating circumstances and the *mitigating* circumstances must be unanimously found. While the first two requirements are proper, the third violates *Mills*.

Pages Two and Three of the form list ten aggravating circumstances and eight mitigating circumstances with a "( )" next to each to be checked if it is found. Given the form's opening statement, which tells the jury to mark only items that it unanimously finds, the form thus specifies that the jury is to find an aggravating or *mitigating* circumstance only if it is *unanimously* found. While the first requirement is proper, the second violates *Mills*.

c. The form has an additional express unanimity requirement on Page One:

> We, the jury, have found *unanimously*
> ☒ one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are *A* .
> *The mitigating circumstance(s) is/are* *A* .

Thus, the form requires the jury to consider only the aggravating and *mitigating* circumstances that it has "found *unanimously*." While the first requirement is proper, the second violates *Mills*.

d. Page Three of the form, just below the list of mitigating circumstances, requires the signatures of *all twelve jurors*. Again, this ensures that only *unanimously*

found mitigating circumstances are considered. If fewer than twelve jurors found a mitigating circumstance, checked it on the checklist on Page Three (despite the fact that the form opens with a requirement that only findings of the *unanimous jury* be recorded), and wrote it on Page One (despite the fact that Page One says "We the jury have found *unanimously* . . . [t]he mitigating circumstance(s) is/are ___"), then the jurors that disagreed *could not sign the verdict form without violating their oaths*. The presence of all twelve signatures shows that the jury considered only the mitigating circumstance that it unanimously found.

e. Unanimity for finding a mitigating circumstance is also required by the form's *identical treatment* of aggravating and mitigating circumstances. To comply with *Mills*, the jury would have to *ignore* this and assume, *contrary to the form's plain language* and *without any rational basis*, that aggravation and mitigation should be treated *differently*. A court cannot reasonably assume that the jury treated aggravating and mitigating circumstances differently. Instead, the court must "presume that, unless instructed to the contrary, the jury would read similar language throughout the form consistently." *Mills*, 486 U.S. at 378.

f. After *Mills*, the Pennsylvania Supreme Court changed the standard form, which now states:

> The aggravating circumstance(s) unanimously found (is)(are) ____ .
> The mitigating circumstance(s) found by one or more of us (is)(are) ____.

Pa.R.Cr.P. 808.

The form used here had no such language. This post-*Mills* change shows "at least some concern" that the form used here violated *Mills*. *Id.*, 486 U.S. at 382.

g. The findings recorded on the form by the jury also highlight the *Mills* violation. Trial counsel argued for several mitigating circumstances, under 42 Pa.C.S. § 9711(e): Mr. Abu-Jamal had no prior convictions and, thus, had "no significant history of prior criminal convictions," § 9711(e)(1); he was "under the influence of extreme mental or emotional disturbance," § 9711(e)(2), as a result of seeing the decedent beating his brother; Mr. Abu-Jamal's age (27 years) at the time of the offense, § 9711(e)(4); and "other evidence of mitigation concerning the character and record of the defendant," § 9711(e)(8), based upon testimony from fifteen defense witnesses, *see* NT 6/30/82 at 17-50, 125-56; NT 7/1/82 at 3-31, regarding Mr. Abu-Jamal's good character and history of concern for and assistance to Philadelphia's African-American community. *See* NT 7/3/82 at 38-42.

The (e)(1) mitigating circumstance ("no significant history of prior criminal convictions") was *not disputed* by the Commonwealth and was presented as a matter of law. However, the Commonwealth vigorously disputed the *other* mitigating circumstances—(e)(2), (4) & (8)—that were argued by counsel. The jury's mitigation findings were *exactly* what one would expect, given the *Mills* violation. The jury *unanimously found* the (e)(1) mitigating circumstance, as it *had to*. But the jury did *not* unanimously find the other, *disputed*, mitigating circumstances. The findings thus confirm that it is reasonably likely that the *Mills* error prevented jurors from giving mitigating effect to the evidence before them.

h. The *Abu-Jamal* form is similar to the form used in *Mills*, 486 U.S. at 384-89, which contained a similar checklist of mitigating circumstances. If anything, the *Abu-Jamal* form was *more likely* to be understood as requiring a unanimous mitigation finding than was the *Mills* form.

The *Mills* form gave the jury the choice of marking "yes" or "no" for each listed mitigating circumstance, and the list was prefaced with: "[W]e unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist by a preponderance of the evidence and each mitigating circumstance marked 'no' has not been proven by a preponderance of the evidence." *Id.* at 387 (capitalization altered). Maryland's high court interpreted a "no" entry on the form as showing that the jury *unanimously rejected* the "no"-marked mitigating circumstance. *See id.* at 372. So-interpreted, the form was *constitutional*—if the jury *unanimously rejected* each mitigating circumstance, no juror was prevented from giving effect to mitigation that s/he believed to exist. *Id.*

The United States Supreme Court found the Maryland court's interpretation of the *Mills* form "plausible" in light of the form's language ("we unanimously find that . . . each mitigating circumstance marked 'no' has not been proven by a preponderance of the evidence"). *Id.* at 377. The death sentence was nevertheless unconstitutional because it was not clear that the *jury* gave the form the same interpretation as did the Maryland court. *See id.* at 375-76.

The *Abu-Jamal* form is not even susceptible to the "plausible" saving-interpretation that the Maryland court gave the *Mills* form. In *Mills*, the jury marked

each mitigating circumstance "yes" or "no," and a "no" mark was plausibly interpreted as a *unanimous rejection* of the mitigating circumstance. Here, the jury's options were to check a mitigating circumstance if it was found, or *leave it blank*, and the failure to check cannot plausibly be interpreted as a unanimous rejection. Instead, it signifies the jury's failure to *unanimously find* a mitigating circumstance.[38]

i. In short, the *Abu-Jamal* verdict form *plainly required* that mitigating circumstances be *unanimously* found. There is more than a "reasonable likelihood" that the form was understood in a *Mills*-violating way –the jury would have to *disobey the form's plain language* in order to comply with *Mills*.

2. The oral instructions: Since the verdict form violates *Mills*, this death sentence is unconstitutional unless the oral instructions somehow cured the error. Nothing in those instructions even comes close to doing so. Instead, the oral instructions *compounded* the *Mills* error.[39]

a. Judge Sabo's instructions on how to use the form compounded the form's *Mills* error.

Judge Sabo first stated: "You will be given a verdict slip upon which to record your verdict and findings." NT 7/3/82 at 92-93. Here, and throughout, Judge Sabo made no distinction between "findings" of aggravating circumstances and "findings" of mitigating circumstances (except for different burdens of proof, *see infra*); thus, the

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38. Even if the *Jamal* form could be given a "plausible" interpretation that rendered it constitutional, this death sentence remains unconstitutional because it is, at least, reasonably likely that the jury did not interpret the form in that way.

39. Jamal need not establish that the oral instructions violated *Mills*; it is sufficient to show that they did not cure the form's *Mills* error. Nevertheless, the oral instructions *did* violate *Mills*, as set forth below.

jury had no reason to believe there was any difference (except for different burdens of proof)—both must be unanimous.

Judge Sabo then instructed on how to use Page Two's checklist of aggravating circumstances and complete Page One where it says "[t]he aggravating circumstance(e) is/are ___":

> [W]hat you do, you go to Page 2. Page 2 lists all the aggravating circumstances. They go from small letter (a) to small letter (j). Whichever one of these that you find, you put an "X" or check mark there and then, put it in the front. Don't spell it out, the whole thing, just what letter you might have found.

NT 7/3/82 at 94.

Judge Sabo then used materially identical language regarding how to use Page Three's checklist of *mitigating* circumstances and complete Page One where it says "[t]he *mitigating* circumstance(e) is/are ___":

> [T]hose mitigating circumstances appear on the third page here. They run from a little (a) to a little letter (h). And whichever ones you find there, you will put an "X" mark or check mark and then, put it on the front here at the bottom, which says mitigating circumstances. And you will notice that on the third or last page, it has a spot for each and every one of you to sign his or her name on here as jurors . . . .

NT 7/3/82 at 94-95.

These instructions treat aggravating and mitigating circumstances *identically* as things to be "found" and recorded by the *unanimous jury*. The instructions do not even *hint* that an aggravation finding must be unanimous but a mitigation finding need not be. And the last instruction on finding mitigating circumstances "places in the

closest temporal proximity the task of finding the existence of mitigating circumstances and the requirement that each juror indicate his or her agreement with the findings of the jury" by signing the form. Supp.App. 94 (Memorandum and Order, *supra*, at 125). These instructions thus show "a reasonable likelihood that the jury believed that it was precluded from considering mitigating circumstances that were not unanimously found to exist." *Id.* These instructions do not cure the form's *Mills* error, they compound it.

b. Judge Sabo also instructed:

> Members of the jury, you must now decide whether the defendant is to be sentenced to death or life imprisonment. The sentence will depend upon your findings concerning aggravating and mitigating circumstances. The Crimes Code provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.
>
> The verdict must be a sentence of life imprisonment in all other cases.
>
> . . . .
>
> Remember, that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstance. Or, if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

Supp.App. 133, 135, NT 7/3/82 at 90, 92.

This is *identical* to instructions in *Frey*, 132 F.3d at 922, and *materially identical* to instructions in *Banks-1*, 271 F.3d at 546-47, which this Circuit found *violated*

Mills because it is "reasonably likely" that the jury "understood the[m] . . . to require unanimity in consideration of mitigating evidence." *Frey*, 132 F.3d at 923; *see Banks-1*, 271 F.3d at 547-48. Because these instructions "used the word 'unanimously' 'in close proximity to—within seven words of—the mitigating circumstances clause' . . . [,] [t]he effect of the temporal proximity of these two concepts was the creation of 'one sound bite' in which the requirement of unanimity and the enterprise of finding mitigating circumstances, to which that requirement does not rightfully apply, were joined." Supp.App. 94 (Memorandum and Order, *supra*, at 125) (quoting *Frey*; footnote omitted). Moreover, the instructions treat aggravating and mitigating circumstances *identically* and the jury had no reason to treat them differently. In particular, given this identical treatment of aggravation and mitigation, "[t]here is no way that a juror would understand that a mitigating circumstances could be considered by less than all jurors." *Banks-1*, 271 F.3d at 548. In short, "there was no defensible linguistic construction of the[se] . . . instructions apart from [a conclusion that] the unanimity requirement pertained to the jury's task of determining the existence of mitigating circumstances," in violation of *Mills*. Supp.App. at 89 (*Id.* at 119).[40]

c. Judge Sabo also instructed on the different burdens of proof for aggravating and mitigating circumstances:

> Whether you sentence the defendant to death or to life imprisonment will depend upon what, if any, aggravating or mitigating

40. Even if it is assumed that these instructions do not violate *Mills*, it remains clear that they do not cure the form's *Mills* error.

> circumstances you find are present in this case. . . . Aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt, while mitigating circumstances must be proved by the defendant by a preponderance of the evidence.
>
> . . . .
>
> The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances, but only by a preponderance of the evidence. This is a lesser burden of proof than beyond a reasonable doubt.

NT 7/3/82 at 2-3, 91.

Again, this is *materially identical* to instructions in *Frey*, 132 F.3d at 923, and *Banks-1*, 271 F.3d at 547, which this Circuit found contributed to *Mills* error. Since the instructions stress the different *burdens* for proving aggravating and mitigating circumstances, but are otherwise silent as to any differences in the *manner* of proof, jurors would naturally conclude that *both* "aggravating *and* mitigating circumstances must be discussed and unanimously agreed to, as is typically the case when considering whether a burden of proof has been met." *Frey*, 132 F.3d at 924. Because "[s]uch an understanding . . . is plainly inconsistent with the requirements of *Mills*," it "adds to [the] concern that the jury could have understood the charge to require unanimity in consideration of mitigating evidence." *Frey*, 132 F.3d at 924. In short, this instruction "likely cemented the jury's mistaken impression that it was obligated *not* to consider a mitigating circumstance that was found to exist by anything other than the

entire panel." Supp.App. 89 (Memorandum and Order, *supra*, at 119) (emphasis in original).[41]

d. Throughout the instructions, Judge Sabo used the pronoun "you" to refer without distinction to the entity that reaches a guilty verdict, sentences, "finds" aggravating circumstances and "finds" mitigating circumstances.[42] To reach a *Mills*-compliant understanding of the instructions, the jury would have to know that "you" meant the *unanimous jury* for the first three matters, but meant *each individual juror* for the last. But *nothing* in the instructions even remotely suggested that. The "natural interpretation" of the instructions was that the same "you"—the unanimous jury—did all of these things. *Mills*, 486 U.S. at 381.

e. After *Mills*, Pennsylvania's standard instructions were changed to:

> [Y]ou are to regard a particular aggravating circumstance as present only if you all agree that it is present. On the other hand, each of you is free to regard a particular *mitigating* circumstance as present despite what other jurors may believe. . . . The specific findings as to any particular aggravating circumstance must be unanimous. . . . That is not true for any mitigating circumstance. Any circumstance that any juror considers

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41. Even if it is assumed that the instructions do not violate *Mills*, it remains clear that they do not cure the form's *Mills* error.

42. In addition to the instructions already quoted, *see* NT 7/3/82 at 2-3 ("Ladies and gentlemen of the jury, *you* have found the defendant guilty of murder in the first degree, and *your* verdict has been recorded. We are now going to hold a sentencing hearing during which . . . *you* will decide whether the defendant is to be sentenced to death or life imprisonment. Whether *you* sentence the defendant to death or life imprisonment will depend upon what, if any, aggravating or mitigating circumstances *you* find are present in this case."). Here, as throughout the instructions, there is *no distinction* between the guilt-finder, the sentencer-finder and the finder of aggravating and *mitigating* circumstances.

> to be mitigating may be considered by that juror in determining the proper sentence.
>
> Pennsylvania Suggested Standard Criminal Jury Instruction 15.2502H (PBI 2005) (emphasis in original).

No such instruction was provided here. This post-*Mills* change to the instructions shows "at least some concern" that the instructions given here violated *Mills*. *Id.* at 382.

f. In short, the oral instructions violated *Mills*; even assuming they did not violate *Mills*, they certainly did *not* cure the form's *Mills* error.

C. Relief Is Required under 28 U.S.C. § 2254(d)

Habeas relief is required because the state court decision on this claim is "contrary to" and/or an "unreasonable application of" clearly established law.

1. In *Banks-1*, 271 F.3d at 544, this Circuit found it an "unreasonable application" of *Mills* for the state court to deny relief based upon oral instructions and a verdict form that were *materially identical* to those used here. Thus, under *Banks-1*, relief is required here. Heeding *Hackett*, however, we consider the state court decision under § 2254(d) without relying on *Banks-1*. It remains clear that relief is required.

2. The Pennsylvania Supreme Court addressed this claim in *Abu-Jamal-2*, where it first complained that Mr. Abu-Jamal "offered absolutely no evidence in support of this claim at the PCRA hearing." *Abu-Jamal-2* at 119. It is contrary to clearly established law, including *Mills*, to denigrate a challenge to a *jury instruction* because the defendant has not presented "evidence" to support the claim. *See Mills*, 486 U.S.

at 381 ("There is, of course, *no extrinsic evidence* of what the jury in this case actually thought. We have before us only the verdict form and the judge's instructions."); *Kelly v. South Carolina*, 534 U.S. 246, 256 (2002) ("Time after time appellate courts have found jury instructions to be insufficiently clear without any record that the jury manifested its confusion").

3. Regarding the verdict form, *Abu-Jamal-2* noted that it "consisted of three pages" and stated:

> [a] The requirement of unanimity is found only at page one in the section wherein the jury is to indicate its sentence. [b] The second page of the form lists all the statutorily enumerated aggravating circumstances and includes next to each such circumstance a designated space for the jury to mark those circumstances found. [c] The section where the jury is to checkmark those mitigating circumstances found, appears at page three and includes no reference to a finding of unanimity. [d] Indeed, there are no printed instructions whatsoever on either page two or page three. [e] The mere fact that immediately following that section of verdict slip, the jurors were required to each sign their name is of no moment since those signature lines naturally appear at the conclusion of the form and have no explicit correlation to the checklist of mitigating circumstances. As such, we cannot conclude . . . that the structure of the form could lead the jurors to believe that they must unanimously agree on mitigating evidence before such could be considered.

Abu-Jamal-2 at 119 (each sentence has been lettered for future reference).

This is unreasonable for several reasons.

a. *Abu-Jamal-2*'s claim that the "requirement of unanimity is found only at page one in the section wherein the jury is to indicate its *sentence*" is contrary to the record. In addition to stating "We, the jury unanimously *sentence* the defendant to death," Page One of the form also states:

> We, the jury, have found *unanimously* . . .

The aggravating circumstance(s) is/are *A* .
The *mitigating circumstance(s) is/are* *A* .

Thus, Page One's express "requirement of unanimity" applied to the sentence *and* to aggravating and *mitigating* circumstances.

In addition to this express use of the word "unanimously," the form opens with the requirement that *everything on the form* must be the "find[ings]" of "the jury" that found Mr. Abu-Jamal guilty – *i.e.*, the *unanimous* jury. This applies to Page One's finding that the "*mitigating* circumstance(s) is/are __" and to Page Three's checklist of *mitigating* circumstances *just as clearly* as it applies to Page One's finding that the "aggravating circumstance(s) is/are __" and Page Two's checklist of aggravating circumstances. Moreover, the form closes with a requirement that *all twelve jurors* sign it, reinforcing the form's opening statement that all findings—including mitigating circumstances—must be by the unanimous jury.

The Pennsylvania Supreme Court simply ignored these ways (and others, described in this brief) in which the form imposed a "requirement of unanimity" and, thus, unreasonably applied *Mills*. *See Williams*, 529 U.S. at 397-98 (state court decision "unreasonable insofar as it failed to evaluate the totality of" relevant facts).

b. *Abu-Jamal-2* correctly stated that Page Two "lists all the . . . aggravating circumstances and includes next to each such circumstance a designated space for the jury to mark those circumstances found"—*i.e.*, an aggravating circumstance was checked on Page Two only if the "*the jury*," not an *individual juror,* "found" it. This

is a proper requirement. What *Abu-Jamal-2* unreasonably failed to note, however, is that the list of *mitigating* circumstances on Page Three is *identical* in format to the aggravating circumstances list. Thus, it was natural for the jury to believe that mitigating circumstances, like aggravating circumstances, must be *unanimously* found, in violation of *Mills*.

c. *Abu-Jamal-2* also unreasonably applied *Mills* when it relied on the proposition that Page Three, which has the mitigating circumstances checklist, "includes no reference to a finding of unanimity." As stated above, the form starts with a requirement that *everything* thereon be found by the *unanimous* jury; the form ends—on Page Three itself, just below the checklist of mitigating circumstances—with a requirement that all twelve jurors sign, indicating their *unanimous* agreement with *everything* on the form; the form treats aggravating and mitigating circumstances identically. This shows, at least, a reasonable likelihood that the jury believed it had to unanimously find a mitigating circumstance. Indeed, Page Two, the aggravating circumstances list, is just as bereft of a "reference to a finding of unanimity" as Page Three, yet it is undisputed that the jury knew it had to find aggravating circumstances unanimously.

Even the Pennsylvania Supreme Court's own description of Page Three shows that it requires unanimity for finding a mitigating circumstance. As the state court stated, Page Three is the "section where *the jury* is to checkmark those mitigating circumstances *found*." *Abu-Jamal-2* at 119. There is, at least, a reasonable likelihood

that the jury understood Page Three in exactly that way—only mitigating circumstances "*found*" *by* "*the jury*," not by *individual jurors*, should be considered. To use Page Three in a way that satisfies *Mills*, the jury would have to know that *each juror* should check those mitigating circumstances *found by him or her*, even if the other jurors disagreed. To say the least, that is an odd reading of the form. And the jury would have to give this strange treatment to mitigating circumstances but *not* aggravating circumstances, despite the fact that aggravating and mitigating circumstances are treated identically on the form.

d. *Abu-Jamal-2* correctly noted that "there are no printed instructions whatsoever on either page two [listing aggravating circumstances] or page three [listing mitigating circumstances]" of the form, but *Abu-Jamal-2* unreasonably failed to recognize that this *contributes to* the *Mills* error. Because there are no printed instructions on the pages listing the aggravating and mitigating circumstances, the jury had to look to the other parts of the form, the overall structure of the form, and the oral instructions to understand what to do with those lists. As set forth in this brief, all of those factors—*e.g.*, the identical treatment, apart from burdens of proof, of aggravating and mitigating circumstances; Page One's opening requirement that everything on the form must be unanimously found; Page One's requirement that the jury record only the "aggravating circumstance(s)" and "*mitigating circumstance(s)*" that "We, the jury, have found *unanimously*"; Page Three's requirement that all twelve jurors sign show their agreement to the findings by signing the form, the oral instructions on

how to use the form, etc.—indicated that both aggravating and mitigating factors must be unanimously found.

e. *Abu-Jamal-2* also unreasonably applied *Mills* when it said Page Three's signatures-of-all-jurors requirement "is of no moment since those signature lines naturally appear at the conclusion of the form and have no explicit correlation to the checklist of mitigating circumstances." The reason it is "natural[]" for the twelve signatures to "appear at the conclusion of the form" is that it *signifies the agreement of all twelve jurors* to the *findings recorded on the form*. This is especially obvious here, where the form *opens* with a requirement that everything thereon be the findings of the *jury*, not individual jurors.

To the extent the signatures "have no explicit correlation to the checklist of mitigating circumstances," *exactly the same* is true for the checklist of *aggravating circumstances* and the *sentence*. To satisfy *Mills*, the jurors would have to know that signing the form signaled *agreement* to the sentence and *agreement* to the findings of aggravating circumstances, but was *meaningless* with respect to mitigating circumstances. Nothing in the form or instructions conveyed that bizarre concept.

Even if *Abu-Jamal-2*'s "reasoning" about the signatures made any sense in isolation, it unreasonably failed to consider Judge Sabo's "explanation of th[e] form" in his oral instructions. Supp.App. 94 (Memorandum and Order, *supra*, at 125). As stated above, and as Judge Yohn found, the oral instructions on how to use Page Three *did* make an "explicit correlation" between the signatures and the mitigating

circumstances and, thus, cemented the *Mills*-violation that is apparent on the face of the form. *Id.*

4. *Abu-Jamal-2*'s failure to consider Judge Sabo's instructions on how to use the form is symptomatic of its general violation of the clearly established law that a "single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde*, 494 U.S. at 378. The state court looked at each page of the form in isolation from the other parts of the form and from the form's overall structure, and failed to consider the oral instructions at all. The state court decision is thus contrary to *Boyde* or, at least, an unreasonable application of *Mills*.

5. Even aside from the many flaws in its "analysis," *Abu-Jamal-2* is "objectively unreasonable," *Williams*, 529 U.S. at 409, simply because it is unreasonable to fail to find a *Mills* violation on this record. The form *plainly requires* that mitigating circumstances be unanimously found; the oral instructions themselves violate *Mills*, and certainly do not cure the form's *Mills* error. It was unreasonable for *Abu-Jamal-2* to hold that there is not even a "reasonable likelihood" that the jurors understood the form and instructions in a way that violate *Mills*.

D. The Commonwealth's Arguments Are Erroneous

The Commonwealth presents erroneous arguments regarding exhaustion, "waiver" and the merits/2254(d).

1. The *Mills* claim was fairly presented in state court

The Commonwealth says the *Mills* claim was not fairly presented in state court. *See* Appellants' Brief § I. Judge Yohn properly rejected the Commonwealth's non-exhaustion argument.

a. The Commonwealth says the only *Mills*-related claim that was fairly presented was that *counsel was ineffective* for failing to raise a *Mills* claim. *See* Appellants' Brief at 16, 20-21, 33-38. The Commonwealth errs.

Mr. Abu-Jamal's state court briefs plainly and fairly presented the *Mills* claim. In the initial brief to the Pennsylvania Supreme Court, the "Statement of Questions Involved," question No. 23, states: "Was Appellant's death sentence unconstitutional where the verdict form misled the jurors to believe that unanimity was required to find or weigh a mitigating circumstance?" Brief for Appellant, No. 19 CAD, at 5. This is the *Mills* claim, *not* an ineffectiveness claim. Similarly, section XXIII of the "Argument" part of the brief is captioned: "The Verdict Form Would Have Led Jurors to Believe Unanimity Was Required to Consider a Mitigating Circumstance." *Id.* at 114. Again, this is the *Mills* claim, *not* an ineffectiveness claim. This section of the Argument then discusses the *Mills* claim *without ever even mentioning an ineffectiveness claim*, *see id.* at 114-15, and concludes: "This Court must follow *Mills* and vacate the death sentence." *Id.* at 115. Thus, it is utterly clear that Mr. Abu-Jamal *did fairly present* his *Mills* claim in state court.

Moreover, the Pennsylvania Supreme Court *addressed the Mills claim on its merits*. *See Abu-Jamal-2* at 119. Under these circumstances, the *Mills* claim is exhausted and not procedurally barred even if Mr. Abu-Jamal had *not* fairly presented it. *See Lefkowitz v. Newsome*, 420 U.S. 283, 292 n.9 (1975) (when "state courts entertained the federal claims on the merits, a federal habeas corpus court must also determine the merits of the applicant's claim"); *Caldwell v. Mississippi*, 472 U.S. 320, 326-28 (1985) (no procedural bar to direct review where state supreme court *sua sponte* raised and resolved claim, even if claim was not properly raised by defendant); *Walton v. Caspari*, 916 F.2d 1352, 1356 (8th Cir. 1990) ("petitioner need not actually have raised a claim in a state petition in order to satisfy the exhaustion [requirement], if a state court with the authority to make final adjudications actually undertook to decide the claim on its merits in petitioner's case"); *Cooper v. Wainwright*, 807 F.2d 881, 887 (11th Cir. 1986) ("petitioner's alleged failure to present his *Lockett* claim to the Supreme Court of Florida does not necessarily mean that the court did not reach it. If that court did reach the merits of petitioner's claim, then a federal habeas court must review the alleged constitutional violation.").

The *Mills* claim was fairly presented to, and decided on the merits by, the Pennsylvania Supreme Court. It is exhausted, and is not procedurally barred. It was before the District Court, and is before this Court, on the merits.[43]

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43. Because the Commonwealth erroneously claims that only an ineffective assistance of counsel claim was fairly presented, it spends several pages arguing that direct appeal counsel was not ineffective for failing to raise the *Mills* claim. *See* Appellants' Brief at 42-45. Since the *Mills* claim itself is before this Court on the merits, the Commonwealth's arguments about ineffectiveness are irrelevant.

b. The Commonwealth says the only *Mills* issue fairly presented to the state courts was a challenge to page three of the verdict form. Thus, the Commonwealth, contends, this Court cannot consider the rest of the verdict form or the oral instructions. *See* Appellants' Brief at 16-32. The Commonwealth errs.

Mr. Abu-Jamal's Pennsylvania Supreme Court brief described the *entire verdict form*, not just the third page, and asserted that: (1) "The *structure of the verdict form* would lead the jury to believe that unanimity was required to find a mitigating circumstance"; and (2) "Nothing in the *court's instructions* would have corrected the jury's probable misunderstanding based on the form." Brief for Appellant, No. 119 CAP, at 114-15 (citing transcript of oral instructions). Thus, fairly read, Mr. Abu-Jamal's Pennsylvania Supreme Court brief asserted that the verdict form and oral instructions, taken as a whole, violated *Mills*. That is all that is required for exhaustion.

The Commonwealth's own authorities confirm that Mr. Abu-Jamal fairly presented his entire *Mills* claim. In *Landano v. Rafferty*, 897 F.2d 661 (3d Cir. 1990), cited in Appellants' Brief at 27-28, this Circuit stated:

> [W]hen a petitioner raises the same constitutional question in both state and federal courts and the resolution of that question requires the courts to review the same factual record, the failure of the petitioner to highlight the same facts in state court as he does in federal court does not mean that the federal claim is non-exhausted.

Id. at 673 n.18.

Here, Mr. Abu-Jamal raised a *Mills* claim in both state and federal courts, and presented the same factual record in support of that claim (the verdict form and oral instructions) in state and federal courts. At most, the difference between the state and

federal court pleadings is a matter of "highlight[ing]." The claim was fairly presented.[44]

The Commonwealth erroneously asserts that *Picard v. Connor*, 404 U.S. 278 (1971), deemed a claim unexhausted because the "particular focus" of the claim was different in federal court and state court. Appellants' Brief at 26. Actually, the federal court claim was *entirely different* from the state court claim—in state court the defendant raised a *state law* issue, with a hint of a possible *Fifth Amendment* (grand jury indictment) issue; in federal court the defendant raised an entirely different *Fourteenth Amendment* (equal protection) issue. *See Picard*, 404 U.S. at 273-74. Thus, the federal claim did not just shift "focus," it raised entirely new and distinct legal theories, and *Picard* is inapposite, as are the other, similar cases the Commonwealth cites.

2. Mr. Abu-Jamal did not "waive" 28 U.S.C. § 2254(d)(1)'s "unreasonable application" clause

The Commonwealth says Mr. Abu-Jamal "waived the unreasonable application clause" of § 2254(d)(1). Appellants' Brief at 39. The Commonwealth is wrong.

First, Mr. Abu-Jamal *could not* "waive" the unreasonable application clause. Section 2254(d)(1) does not give habeas litigants a "right" that they may "waive." Instead, section "2254(d)(1) places a new constraint on the *power of a federal habeas court* to grant a state prisoner's application for a writ of habeas corpus." *Williams*,

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44. *See also Bright v. Williams*, 817 F.2d 1562, 1564-65 (11th Cir. 1987) (cited with approval in *Landano*) (jury instruction claim fairly presented where federal court pleadings "expanded to role of [certain] language [in the instructions] from a secondary consideration to a primary consideration in support of the same theory of relief").

529 U.S. at 412 (O'Connor, J., concurring). Judge Yohn, having found that Mr. Abu-Jamal's death sentence *violates the Eighth Amendment*, was duty-bound to determine if § 2254(d)(1) allows the writ to be granted, or if Mr. Abu-Jamal should be unconstitutionally executed. Mr. Abu-Jamal could not "waive" Judge Yohn's duty to determine the federal court's power. Secondly, he *did not* "waive" the unreasonable application clause. When District Court counsel filed their initial Memorandum of Law, before *Williams v. Taylor*, 529 U.S. 362 (2000) was decided, they apparently believed that the analysis fit best under § 2254(d)(1)'s "contrary to" clause. After *Williams*, however, they filed a supplemental memorandum which stated that *Williams* "infused most of the analytical muscle into the 'unreasonable application' clause"; that "the vast majority of claims presented by habeas petitioners will only invoke the 'unreasonable application' clause"; and that, as to *all of Mr. Abu-Jamal's claims*, "the state-court adjudication of the claims are *not reasonable* under subdivision (d)(1)." Supplemental Memorandum of Law, June 1, 2000 (Doc. 37), *Abu-Jamal v. Horn*, U.S. Dist. No. CIV 99-5089 WY at 2, 4, 15. Thus, District Court counsel *invoked* the "unreasonable application" clause as to all claims—they did *not* "waive" it.

Third, Mr. Abu-Jamal *did not* "waive" the unreasonable application clause even if it is erroneously assumed, as the Commonwealth does, that District Court counsel limited their arguments to the "contrary to" clause. He never sought to waive his right to habeas relief on the *Mills* claim (or any other claim). Throughout the District Court proceedings, counsel asserted that the death sentence violates *Mills*, and that habeas relief is warranted under § 2254(d)(1). Assuming, *arguendo*, that counsel limited themselves to the "contrary to" clause of § 2254(d)(1), counsel's error is un-

derstandable, given the "overlapping meanings of the phrases 'contrary to' and 'unreasonable application of,'" *Williams*, 529 U.S. at 385, and the problems these "overlapping meanings" have caused for courts and litigants in this Circuit. For example, in *Hackett v. Price*, 381 F.3d 281 (3d Cir. 2004), the district court analyzed a *Mills* claim solely under "contrary to" clause, *id.* at 300; the Circuit panel majority "conclude[d] that [the] claim is more appropriately reviewed under [the] 'unreasonable application'" clause, *id.*; and the Circuit panel dissenter stated that the appropriate review "may fall in the overlap between the 'contrary to' and 'unreasonable application of' standards," *id.* at 305 n.17 (Becker, J., dissenting). Under these circumstances, where counsel unswervingly sought relief under *Mills* and § 2254(d)(1), any error about which *clause* of § 2254(d)(1) applied cannot be deemed a "waiver."

Fourth, assuming that Mr. Abu-Jamal could "waive" the unreasonable application clause and that counsel tried to "waive" it, Judge Yohn *did not accept* a "waiver." *See* Supp.App. 8 (Memorandum and Order, *supra*, at 11). This was within Judge Yohn's discretion, especially since § 2254(d)'s provisions control "the power of [the] federal habeas court," *Williams*, 529 U.S. at 412 (O'Connor, J., concurring), and "implicate interests beyond those of the parties," and, thus, are "not exclusively within the parties' control to decide whether . . . [they] should be raised or waived," *Szuchon v. Lehman*, 273 F.3d 299, 321 n.13 (3d Cir. 2001) (*sua sponte* raising and finding procedural default despite Commonwealth's waiver of that defense); *see also Christy v. Horn*, 115 F.3d 201, 207 n.3 (3d Cir. 1997) ("[T]he Commonwealth may waive exhaustion of [Christy's unexhausted claim], thereby permitting the district court to

review the petition as filed. The district court *is not required, however, to accept a waiver* and may require state court exhaustion."); *United States v. Grass*, 93 Fed. Appx. 408, 414 (3d Cir.) (not precedential) (district court did not abuse discretion when it refused to accept defendant's waiver of counsel's potential conflict of interest, particularly where "granting the waiver would raise serious questions . . . about the public's confidence in the administration of justice"), *vacated and remanded on other grounds*, 543 U.S. 1112 (2004), *reaffirmed in relevant part*, 125 Fed. Appx. 379 (3d Cir. 2005). Since Judge Yohn *did not accept* any purported attempt to waive, there is no waiver.

Finally, even if Mr. Abu-Jamal could have "waived," even if counsel had tried to "waive," and even if Judge Yohn had allowed "waiver," this Court nevertheless should hear the "waived" arguments because "[t]his Court has discretionary power to address issues that have been waived." *Bagot v. Ashcroft*, 398 F.3d 252, 256 (3d Cir. 2005) (granting relief on argument not raised in district court). Consideration of the arguments is particularly appropriate here, given the above-described considerations; given that the arguments concern "a pure question of law . . . that is closely related to arguments that [Mr. Abu-Jamal] did raise" in the District Court" and given that "failing to consider [Mr. Abu-Jamal's] arguments would result in . . . substantial injustice." *Bagot*, 398 F.3d at 256; *see also Patterson v. Cuyler*, 729 F.2d 925, 929 (3d Cir. 1984) (considering habeas petitioner's arguments that were not raised in district court "because the severity of the [life imprisonment] sentence which petitioner is serving prompts us to meticulously examine each of his legal claims").

3. The Commonwealth's merits/2254(d) arguments are erroneous

Just a few of the Commonwealth's arguments regarding the merits and § 2254(d) deserve response.

a. The Commonwealth says it could *never* be "unreasonable" to deny a *Mills* claim unless there was an "express" or "explicit" unanimity requirement for mitigating circumstances. *See* Appellants' Brief at 45-48. The Commonwealth errs. Supreme Court law is clear that an "express" or "explicit" unanimity requirement is *not necessary* to a *Mills* violation. Instead, it need only be shown that there is a "reasonable likelihood" that the jury interpreted the instructions as requiring a unanimous mitigation finding. *Boyde*, 494 U.S. at 380.

In *Mills* itself, the unanimity requirement was *not* "explicit" or "express" in the way the Commonwealth suggests. Instead, the *Mills* instructions were *ambiguous*, and a "plausible" reading of those instructions did *not* require unanimity. *Id.*, 486 U.S. at 377; *see also id.* at 382 (instructions and form suffered from "*ambiguity*"); *McKoy v. North Carolina*, 494 U.S. 433, 444 n.8 (1990) ("In *Mills*, the Court divided over the issue whether a reasonable juror could have interpreted the instructions in that case as allowing individual jurors to consider only mitigating circumstances that the jury unanimously found. . . . In [*McKoy*], *by contrast*, the instructions and verdict form *expressly* limited the jury's consideration to mitigating circumstances unanimously found."); *id.* at 445 (Blackmun, J., concurring) (*Mills* "instructions were held to be invalid because they were susceptible of two plausible interpretations, *and under*

one of those interpretations the instructions were unconstitutional" (emphasis in original)).[45]

Finally, the unanimity requirement on Mr. Abu-Jamal's verdict form *was* "express"/"explicit" – the form required unanimity for mitigating circumstances just as "expressly"/"explicitly" as it did for aggravating circumstances.

b. The Commonwealth claims *Abu-Jamal-2* was "reasonable" because it was "consistent with" and "in accord with" *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991). Appellants' Brief at 56; *see also id.* at 47. The Commonwealth errs.

In *Frey*, 132 F.3d at 923-24, and *Banks-1*, 271 F.3d at 548-49, this Court found that the oral instructions given here are *materially different* from those in *Zet-*

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45. The Commonwealth makes the unanimity requirement seem "explicit" in *Mills* by creative use of ellipsis, stating that the *Mills* form said "we unanimously find . . . the following mitigating circumstances." Appellants' Brief at 45 (quoting *Mills*, 486 U.S. at 387). In context, the *Mills* form said: "[W]e unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist by a preponderance of the evidence and each mitigating circumstance marked 'no' has not been proven by a preponderance of the evidence." *Id.*, 486 U.S. at 387 (capitalization altered). The Supreme Court found that a "plausible" interpretation of this language was that the mitigating circumstances marked "no" on the form were *unanimously rejected* by the jury. The instructions nevertheless were unconstitutional because the Supreme Court could not be confident that the jury adopted this "plausible," constitutional interpretation of the instructions. *See Mills*, 486 U.S. at 377. Even the Pennsylvania Supreme Court has recognized that the *Mills* instructions were ambiguous, not "express" or "explicit," on the unanimity issue. *See Commonwealth v. Billa*, 555 A.2d 835, 844 (Pa. 1989) ("In *Mills*, the . . . Maryland law was *ambiguous* on whether a jury had to be unanimous on the existence of mitigating circumstances before it or any of the individual jurors could weigh said circumstances against aggravating. Nevertheless, the United States Supreme Court held that unless it could rule out the substantial possibility that the jury may have rested its verdict on 'improper grounds,' the verdict could not stand.")

tlemoyer—here they suggested the need for unanimity for finding a mitigating circumstance; in *Zettlemoyer* they did not.

To "support" its claim that the oral instructions here (and in *Frey* and *Banks*) were materially identical to those in *Zettlemoyer*, the Commonwealth says: "*Frey* itself expressly recognized that it was 'plausible' to read [oral] instructions similar to those here as proper." Appellants' Brief at 56. The Commonwealth's citation is to *Frey*'s statement that there was a "plausible" "interpretation" of the *Frey* oral instructions that made them constitutional. *Id.*, 132 F.3d at 924. But, as *Frey* went on to find, *see* 132 F.3d at 924-25, the existence of a "plausible" saving-interpretation is *irrelevant*. After all, in *Mills* itself, there was a "plausible" saving-interpretation of the instructions, but the instructions were unconstitutional because the jury may not have reached that "plausible" understanding. *Id.*, 486 U.S. at 377. The Commonwealth errs when it suggests that the existence of a "plausible" constitutional reading of instructions shows that the state court was reasonable in denying relief.

Even if it is falsely assumed that the *Zettlemoyer* oral instructions were *identical* to those given here, the verdict form there is utterly different from the *Mills*-violating form used here.

The *Zettlemoyer* form stated:

> 1. We the jury unanimously sentence the defendant to: ___ death __ life imprisonment.
>
> 2. (To be used in the sentence if death)
>
> We the jury have found unanimously:
>
> __ at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance is _____.

__ the aggravating circumstance outweighs [the] mitigating circumstances. The aggravating circumstance is _____.

Zettlemoyer, 923 F.2d at 308.

In finding this form unobjectionable (when considered with the *Zettlemoyer* oral instructions), this Circuit stressed the importance of the fact that the verdict sheet included the language "[t]he aggravating circumstance is _____," but *there was no such language for mitigating circumstances*. *Id.* at 308.[46] The form used here suffers from *exactly* the problem that this Court found *absent* from the *Zettlemoyer* form—Mr. Abu-Jamal's jury was *required to specify what mitigating circumstances it found*, and the mitigating and aggravating circumstances were treated *identically* as items to be found by the unanimous jury. Moreover, the form used here requires a unanimous mitigation finding for other reasons that were absent from the *Zettlemoyer* form. *Id.*

The Commonwealth's claim that *Abu-Jamal-2* was "in accord with" *Zettlemoyer* is frivolous. The oral instructions here are materially different, and the verdict form utterly dissimilar from those in *Zettlemoyer*.

c. The Commonwealth argues that denials of *Mills* claims by other Courts of Appeal show that *Abu-Jamal-2* was reasonable. *See* Appellants' Brief at 46-48, 52-56. But *none* of the decisions cited by the Commonwealth consider jury instructions and verdict forms that are materially similar to the ones used here. Instead, those decisions simply hold that some instructions and forms used in some other states do not violate *Mills*. Since proper consideration of a jury instruction challenge requires

46. In *Frey*, 132 F.3d at 924, this Circuit noted that the *Zettlemoyer* verdict slip *is* ambiguous, however, and *would* contribute to jury confusion concerning the need for unanimity without the appropriate oral instructions given in *Zettlemoyer*.

careful consideration "of the overall charge," *Boyde*, 494 U.S. at 378, these decisions from other Circuits are not informative.

For example, the Commonwealth quotes *Scott v. Mitchell*, 209 F.3d 854, 874 (6th Cir. 2000), as finding "no *Mills* error where [the] jurors [were] told 'all twelve of you must sign [the verdict form] . . . [i]t must be unanimous,'" Appellants' Brief at 46, but the *Scott* verdict form did not have any space for recording *mitigating* circumstances found, and did not in any other way specify what mitigation was found, so the presence of signatures was not significant. The same was true in *Abdur'Rahman v. Bell*, 226 F.3d 696, 711-12 (6th Cir. 2002) and *Duvall v. Reynolds*, 139 F.3d 768, 792 (10th Cir. 1998), upon which the Commonwealth also relies, *see* Appellants' Brief at 53. The Commonwealth cites *Parker v. Norris*, 64 F.3d 1178, 1187 (8th Cir. 1995), *Kornahrens v. Evatt*, 66 F.3d 1350, 1364 (4th Cir. 1995) and *Fox v. Ward*, 200 F.3d 1286, 1302 (10th Cir. 2000), *see* Appellants' Brief at 47, 54 n.11, but these opinions say *nothing* about the actual language of the challenged instructions and/or forms, making it impossible to determine if they are relevant. In *Smith v. Dixon*, 14 F.3d 956, 981 n.15 (4th Cir. 1994), cited in Appellants' Brief at 46, the court found the *Mills* claim procedurally barred and, therefore, addressed it only in passing in a footnote, where it noted that the *petitioner had* "*concede*[*d*] that the sentencing form presented to the jury that sentenced him *did not require unanimity* for consideration of mitigating circumstances." In *Gacy v. Welborn*, 994 F.2d 305, 307 (7th Cir. 1993), cited in Appellants' Brief at 54, the court considered instructions that have no relevance here because they arose under Illinois' unusual capital sentencing scheme, where "a single juror's belief that the defendant has demonstrated the existence of a

single mitigating factor precludes the death sentence." Similarly, in *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990) and *Griffin v. Delo*, 33 F.3d 895 (8th Cir. 1994), cited in Appellants' Brief at 47, 54 n.11, the challenged instructions were vastly different from those used here, *see Kordenbrock* at 1108 n.7 (quoting instructions); *Griffin* at 905 (same). In *Maynard v. Dixon*, 943 F.2d 407, 419 (4th Cir. 1991) and *Noland v. French*, 134 F.3d 208, 213 (4th Cir. 1998), cited in Appellants' Brief at 46, 47, 54 & n.11, the instructions and verdict form treated aggravating circumstances (and the sentence) *very differently* from mitigating circumstances—there was an express unanimity requirement for aggravating circumstances (and the sentence), but "the word 'unanimously' [wa]s conspicuously absent from the verdict form question on mitigating circumstances"; here, in contrast, *no distinction* was made between findings of aggravating and mitigating circumstances, and the form required that both be unanimously found. In *Powell v. Bowersox*, 112 F.3d 966, 970 (8th Cir. 1997), cited in Appellants' Brief at 53-54, the unanimity concept arose only in the "weighing" instruction, *not* the instructions on finding aggravating and mitigating circumstances. Finally, *Williams v. Coyle*, 260 F.3d 684, 702 (6th Cir. 2001), cited in Appellants' Brief at 54 n.11, did not actually involve a *Mills* claim—there was no claim that a unanimous finding of a *mitigating circumstance* was required; instead, the petitioner only claimed that "the instruction led the jury to believe that they must return a *unanimous recommendation*" *of sentence.*[47]

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47. The Commonwealth does not cite *Gall v. Parker*, 231 F.3d 265, 325 (6th Cir. 2000), which granted habeas relief on a *Mills* claim where, as here, the jury was told to record the mitigating circumstances it found on the verdict form; nor does the Commonwealth cite *Kubat v. Thieret*, 867 F.2d 351, 373 (7th Cir. 1989), which also granted habeas relief on a *Mills* claim.

d. The Commonwealth says this Circuit's decision in *Banks-1* was not sufficiently deferential to the state courts under AEDPA. *See* Appellant's Brief at 49-56. Since we do not treat *Banks-1* as controlling, just "instructive and relevant," *Hackett*, 381 F.3d at 294 n.9, the Commonwealth's argument is irrelevant.

The Commonwealth's claim about *Banks-1* is also wrong. The *Banks-1* Court fully recognized that AEDPA's deferential standards applied, and that it could grant relief "only if [the state court decision] is contrary to or unreasonably applies clearly established federal law." *Banks-1*, 271 F.3d at 539 (citing *Williams v. Taylor*, 529 U.S. 362 (2000)).[48] The four Supreme Court Justices who reached the merits of the *Mills* claim in *Banks-4* agreed that *Banks-1* properly applied AEDPA, and that habeas relief was appropriate under § 2254(d) for "the reasons identified by the Third Circuit" in *Banks-1*. *Banks-4*, 542 U.S. at 423 (dissenting opinion). Most recently, in *Hackett*, 381 F.3d at 293, this Circuit expressly found that *Banks-1* "analyzed a *Mills* claim under the more stringent AEDPA standard of review."

48. *See also id.* at 537 ("The issue that we must actually resolve . . . is much more circumscribed [than whether constitutional error exists], because of the scope of review under AEDPA"); *id.* at 543 ("we need ask only whether the Pennsylvania Supreme Court's application of Mills should be disturbed under the AEDPA standard"); *id.* at 544 ("[O]ur analysis [is] not . . . dictated by *Frey*—which was pre-AEDPA—but by the AEDPA standard. Thus, we must ask whether the Pennsylvania Supreme Court determination regarding the constitutionality of the instructions, verdict slip, and polling of the jury involved an unreasonable application of *Mills*.").

CONCLUSION

For the foregoing reasons, this Court should grant habeas relief from the conviction of Mr. Abu-Jamal, and deny the Commonwealth's appeal.

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Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP/GOOD STANDING

I, Robert R. Bryan, Esq., hereby certify that I am a member in good standing of the Bar of this Court.

Date: July 20, 2006

ROBERT R. BRYAN

CERTIFICATE REGARDING FRAP 32(a)(7)(C)

I, Robert R. Bryan, Esq., hereby certify that this brief consists of approximately 25,530 words, as determined by the Microsoft Word 2002 word processing system used to prepare the brief. Being two briefs combined into one, both that of the Appellee and Cross Appellant, this is within the 28,000 (14,000 doubled) word limit set out in FRAP 32(a)(7)(B).

Date: July 20, 2006

ROBERT R. BRYAN

CERTIFICATION THAT E-BRIEF AND HARD COPY ARE IDENTICAL

I, Robert R. Bryan, Esq., hereby certify that the text of the E-Brief and Hard Copies of the brief filed this date are identical.

Date: July 20, 2006

ROBERT R. BRYAN

CERTIFICATION OF VIRUS CHECK

I, Robert R. Bryan, Esq., hereby certify that a virus check was performed this date of the E-Brief in this matter utilizing McAfee Virus Scan software.

Date: July 20, 2006

ROBERT R. BRYAN

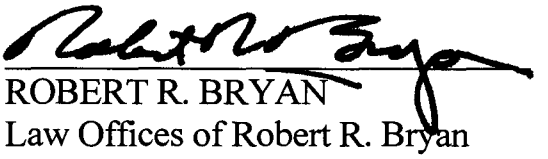
CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and correct copy of the foregoing **BRIEF OF APPELLEE AND CROSS-APPELLANT, MUMIA ABU-JAMAL** to be served by United States Mail, first class postage prepaid, upon the following person:

Hugh J. Burns, Jr.
Assistant District Attorney
District Attorney's Office
1421 Arch Street
Philadelphia, PA 19102

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 20th day of July, 2006, at San Francisco, California.



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