

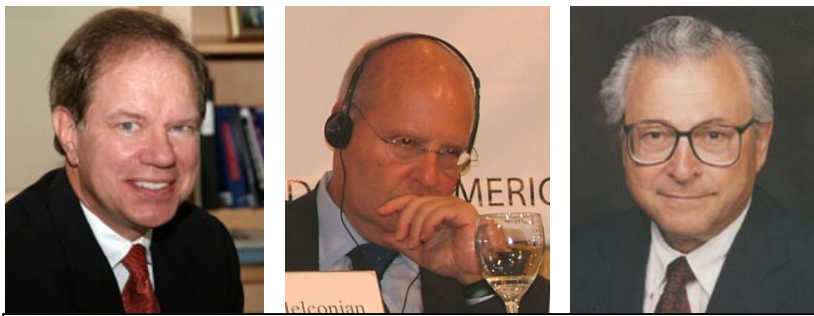
## **Mumia Abu-Jamal: On the Road to Freedom?\***

By JEFF MACKLER

It is difficult to imagine that the systematic race and class bias that permeate America's criminal "justice" system could be set aside and that the nation's most famed and innocent death row inmate and political prisoner of 25 years, Mumia Abu-Jamal, could win a new trial and freedom.

But that is precisely what appeared to be unfolding on May 17 in the packed Ceremonial Courtroom of the Federal Courthouse in Philadelphia as a three-judge panel of the U.S. Court of Appeals for the Third Circuit, in full view of 200 riveted Mumia supporters and others from across the country and around the world, mercilessly queried Pennsylvania's lead prosecutor and persecutor, Hugh Burns.

In contrast, Mumia's three-person legal team of Robert R. Bryan, Judith Ritter, and NAACP Legal Defense Fund amicus curiae (friend of the court) counsel Christina Swarns appeared to have the rapt, if not sympathetic, attention of the three judges during most the two-and-a-half-hour proceeding. In almost every instance Mumia's defense team responded to the panel's questions and arguments without hesitation and with citations buttressing their central arguments.



Judge Thomas Ambro, Chief Justice Anthony Scirica and Judge Robert Cowen

The day's events left little doubt that these Judges, Chief Justice Anthony Scirica and Judge Robert Cowen (Reagan appointees), and Judge Thomas Ambro of the Clinton era, had carefully read the voluminous briefs submitted by both

sides and thoroughly researched the history of the constitutional issues involved, including the precedent-setting cases that govern their interpretation.

Indeed, a number of the Third Circuit's previous decisions on several critical issues that directly pertain to Mumia's most telling arguments have marked this court as among the few remaining "liberal" juridical institutions in the country.

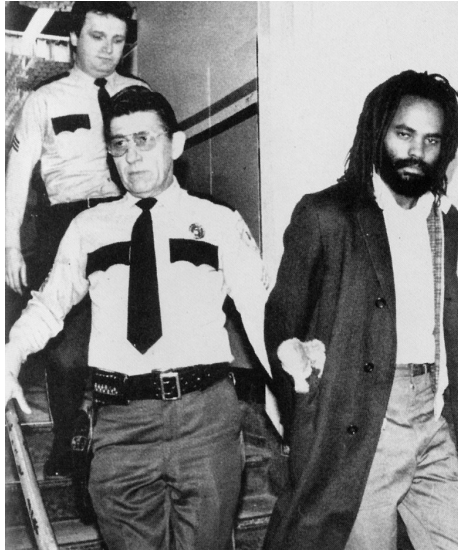
Hugh Burns was hard pressed to offer his own skewed interpretation of Third Circuit decisions when the judges, who had themselves authored a number of the cases cited, were virtually staring/glaring in his face as they peppered him with citations contradicting his central arguments.

This appears to be the real reason why Pennsylvania's prosecutors, looking for a more conservative panel of judges, filed motions prior to the hearing to literally recuse (remove) the entire Third Circuit from hearing Mumia's appeal. The prosecutors argued spuriously that the circuit included a judge who is the wife of Pennsylvania Gov. Ed Rendell (Rendell has pledged to sign a third warrant for Mumia's execution). They postulated that Marjorie Rendell's presence, by virtue of her relation to the governor, would constitute grounds for a future successful appeal of the proceedings by Mumia in the event of any decision against him.

The prosecution's effort to escape the Third Circuit's jurisdiction was rejected, as Robert R. Bryan's response brief successfully countered that the move was a blatant effort to circumvent the court for

political reasons. The judges also granted Bryan's request to double the time for oral arguments, finally granting each side one hour and five minutes as opposed to the traditional 30 minutes.

### Frame-up trial under "hanging judge" Sabo



In a 1982 frame-up trial presided over by now deceased "hanging judge" Albert Sabo, Mumia Abu-Jamal, an award-winning radio journalist, was convicted of the Dec. 9, 1981 killing of Philadelphia police officer Daniel Faulkner. The grotesque trial proceedings have been condemned by groups ranging from Amnesty International and the NAACP to the European Parliament and the presidents of France and South Africa. One third of the 35 Philadelphia police officers involved in one way or another in Mumia's case were later indicted on charges of corruption, witness intimidation, falsification of evidence, and involvement in drug peddling and prostitution.

Judge Sabo himself was a retired member of the death-penalty-obsessed Fraternal Order of Police and was widely seen as "a prosecutor's best friend." Sabo sentenced to execution a national record of 32 defendants (30 of whom were racial minorities) over the course of his 14-year stint on the bench.

According to an affidavit filed by award-winning court stenographer Terri Maurer Cater, she overheard Sabo state during a Mumia trial recess period and in the presence of another judge, "Yeah, and I'm going to help 'em fry the nigger."

This and other evidence of racial bias was clearly presented to the court. In one instance, said Bryan, a Black juror with a hearing disability, who explained that he could function perfectly well when he turned up his hearing aid, was dismissed while a white juror with the same disability was accepted.

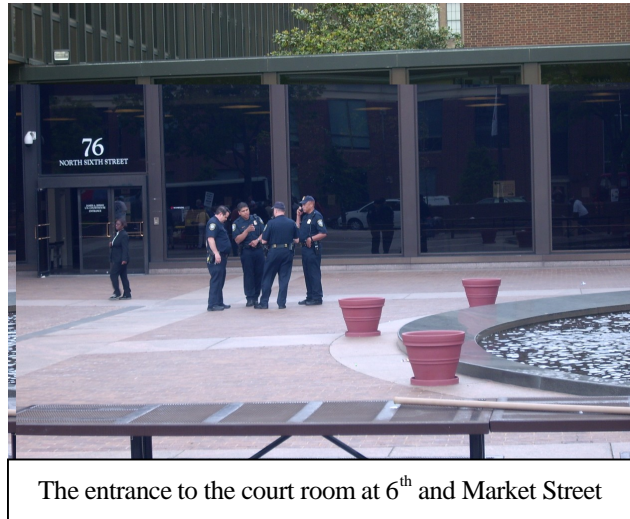
The May 17 hearing began with prosecution designee Hugh Burns presenting the state's case to reinstate the death sentence and execute Mumia by lethal injection. A 2001 federal district court decision by William H. Yohn Jr. had previously voided the trial court's death sentence based on Judge Sabo's flawed and ambiguous oral instructions and the similar written forms regarding mitigating circumstances sufficient to sentence Mumia to life imprisonment rather than death. In the face of repeated questions on this issue it seemed apparent that Burns was losing ground with his effort to cite cases to justify the flawed instructions that operated to lead jurors to falsely conclude that they had to be unanimous with regard to each and every mitigating circumstance to find sufficient grounds to sentence Mumia to life imprisonment as opposed to death.



In a withering presentation of Mumia's side of this issue, Judith Ritter detailed the flaws in Sabo's oral and written instructions and cited chapter and verse why similar unclear and ambiguous instructions had been struck down by the courts.

If Mumia wins on this issue, if the state insists on death it would be compelled within 180 days to hold what amounts to a new trial, except that the new jury would be barred from finding a verdict of innocence and instead be limited to choosing a sentence of either life in prison or death.

The prosecution has stated that in this eventuality the state has yet to decide if it would pursue a new trial. Instead it might well conclude that its interests would best be served by dropping the matter, thereby keeping Mumia in prison for life and avoiding having the state's frame-up further exposed with a defense presentation to a new jury, replete with volumes of new or suppressed evidence that prove Mumia's innocence. Before facing such a prospect the state has a further option, perhaps its magic weapon in turning any defeat it might suffer into victory. It can appeal any decision against it to that bastion of reaction and graveyard of civil liberties, U.S. Supreme Court.



The entrance to the court room at 6<sup>th</sup> and Market Street

### **Black jurors excluded from trial**

The next critical issue in dispute was Mumia's contention that in violation of the famous U.S. Supreme Court decision in the 1986 case of *Batson v. Kentucky*, racism guided the state's use of preemptory challenges to exclude Black jurors. Of the 14 qualified Black jurors interviewed in Mumia's 1982 trial, prosecutor Joseph McGill eliminated 10 with preemptory strikes, that is, removal with no stated cause.

Of the 25 possible white jurors, McGill eliminated only five. That left Mumia with a jury of nine whites and three Blacks (plus four white alternate jurors) in a city with a Black population of 40 percent. The jury's racial composition was further altered when Judge Sabo eliminated a Black juror already selected, who was replaced with a white juror, for a final jury composition of 10 whites and two Blacks.

The Black juror was dismissed after she went home in the evening when the trial was not in session to attend to her sick cat despite Judge Sabo's refusal to grant her permission to do so. But permission to leave the courtroom was not denied to a white juror for who Sabo authorized a police escort to take a civil service exam although it meant suspending the trial itself for a half day.

Race prejudice in jury selection by prosecutor Joseph McGill was cited by Bryan in both Mumia's written brief and Bryan's oral arguments. McGill, in six murder trials, including Mumia's, had removed 74 percent of Black jurors with preemptory challenges as compared to 25 percent of white jurors. Prior to becoming Pennsylvania governor, District Attorney Ed Rendell

had established a two-term record of having prosecutors use preemptory challenges to bar 58 percent of all Blacks from Philadelphia juries as compared to 22 percent for whites.

Further, the routine exclusion of Black jurors was the established practice of Philadelphia prosecutors, in accord with an overtly racist 1982 State Supreme Court decision in the case of Commonwealth v. Henderson, which held, “The race, creed, national origin, sex or other similar characteristics of a venireman (member of a jury pool) may be proper considerations in exercising preemptory challenges.”



That is, a Black person in Pennsylvania could be legally excluded from a jury panel if the prosecutor believed that he/she would be sympathetic to a Black defendant! Henderson was reversed at least in part by the U.S. Supreme Court's 1986 Batson decision. Hugh Burns' response to the data proving the exclusion of Blacks was that it was irrelevant and technically barred from consideration because the defense allegedly did not present it in a timely manner, that is, during the 1995 Post Conviction Relief Act hearing when new evidence was supposedly open to consideration. At that time, however, the extent of the data was unknown and did not become known until the case reached the federal courts.

A new twist to the issue of racist exclusion of Blacks was added to the hearing when the presiding judges themselves queried the defense as to the composition of the entire venire (jury pool) from which jurors were selected. Since no such data was available on this matter two of the judges speculated that it was hypothetically possible that the Black percentage of the entire jury pool could have been so high that McGill's preemptory elimination of 71 percent of the Black

jurors might not constitute discrimination at all. Indeed, one judge speculated with a straight face that it was possible that “discrimination against whites” might be the case!

At no time during Mumia’s decades of legal battles had the prosecution itself raised such a possibility, either in written briefs or oral arguments. The reason is obvious. The history of jury pools in Philadelphia had always indicated that Blacks were highly underrepresented, as opposed to the hypothetical scenario presented by two of the judges that the possibility existed that Blacks could have been over-represented. But the judges’ toying with the issue could indicate an inclination to establish a new precedent to undermine Mumia’s Batson claim.

Mumia’s defense attorneys responded that even in the absence of data on the overall jury pool, the sum total of the evidence of discrimination they had presented constituted a prima facie case of racial discrimination sufficient to comply with the standards set forth in Batson.

Should the Third Circuit affirm the state’s violation of Batson, the result could either be a new trial or the court’s sending the issue of jury discrimination back to the previous court for an evidentiary hearing, where the prosecution’s 1982 striking of each and every Black juror would have to be defended based on grounds other than race. Bryan told me that such a hearing would open the door wide to factually demonstrate that the exclusion of Blacks was based on racist criteria.



Prosecutor Joseph McGill

Perhaps the most stunning dispute of the day took place over the defense contention that prosecutor Joseph McGill’s summation to the jury included the statement, “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.”

It was here that the full force of the three-judge panel was brought to bear. Hugh Burns was challenged to justify why this statement did not constitute a violation of the U.S. Constitution. The justices were referring to the due-process clause of the 14<sup>th</sup> Amendment of the Bill of Rights as it applies to the Sixth Amendment’s fair-trial provisions, in short, the necessity of applying the standard that a jury must operate with a “presumption of innocence” to be negated only if the defendant is found to be guilty “beyond a reasonable doubt.”

The judges felt compelled to remind Burns that only juries, bound by this standard, determine guilt or innocence, not appeals courts, the latter being limited to deciding issues of the common law (law made by judicial decisions), statutory law, and associated constitutional interpretations.

McGill’s “appeal after appeal” statement to the jury was in fact his stock in trade. In fact, a 1986 decision of the Pennsylvania Supreme Court reversed a death sentence and ordered a new sentencing in the case of Commonwealth v. Baker, where McGill had dutifully offered the jury virtually the same “appeal after appeal” summation.

If the present judges apply this precedent and extend it to the guilt phase of the trial, as they should due to the constitutionally-mandated “reasonable doubt” imperative, Mumia’s guilty verdict will be voided and he will be granted a wholly new trial, a trial during which all the evidence of innocence that had been previously suppressed can be submitted to a new jury.

Of course, should the Third Circuit take this course of action, it is likely that the state will appeal the decision to the U.S. Supreme Court, placing Mumia’s fate once again in the hands of the reactionary judiciary.

Robert R. Bryan told this writer that “if the Third Circuit follows the law, Mumia will be granted a new trial,” an eventuality that he believes “will result in Mumia’s freedom.”

While it certainly appears that the “law” is on Mumia’s side, the conclusion that it will be applied, as Bryan fully understands, is far from certain. “The law, in its majestic equality,” French novelist Anatole France aptly observed, “permits the rich and the poor alike to sleep under bridges, beg in the streets, or steal bread.”

A review of “the law’s” record to date makes clear that its interpretation remains in the hands of a racist and class-biased judiciary that has to date torn it to shreds with tortuous renditions that defy logic.



Mumia’s lead counsel Robert R. Bryan, speaking to the press after the hearing

It was Judge Sabo, whose version of “the law” was applied nearly 100 times against defense motions protesting his violation of Mumia’s constitutional rights, who first indicated how the system would work in this case. It was Federal District Court Judge William H. Yohn’s interpretation of “the law” that was applied to rule against 28 of Mumia’s 29 constitutional issues originally presented to his court. Yohn repeatedly cited the 1996 Anti-terrorism and Effective Death Penalty Act (AEDPA), signed by President Clinton, to justify his interpretation of “the law.”

This reactionary law’s central proposition for the first time requires federal courts to grant a “presumption of correctness” to the findings of state courts, in this case the “legal” findings of racist Judge Albert Sabo. It was signed by President Clinton with his own warning that “parts of it” may be “found to be unconstitutional.” This “liberal” president was referring to the law’s abrogation of the presumption of innocence and associated denial of the right of habeas corpus, that is, the right to appeal injustices to the federal courts.

The AEDPA was so named because it was designed to make state court death penalty sentences “effective,” that is, immune from appeal to the federal courts. Prior to its passage a full 40 percent of all state court convictions in murder cases were reversed on appeal. Why? The record shows that the major grounds for reversal were incompetent counsel intimidation of witnesses and falsification of evidence, in effect, the central issues in Mumia’s case.

The AEDPA’s new standard, applied to Mumia’s appeal, allowed Judge Yohn to eliminate from consideration the myriad of factual and legal issues demonstrating police/prosecution’s falsification and fabrication of evidence, intimidation of witnesses and other atrocities under “the law” that had been buried beneath a mountain of contrary “legal” findings over the past 25 years.

Judge Yohn felt compelled to cite another novel interpretation of “the law,” the present doctrine that “innocence is no defense.” Authored by the U.S. Supreme Court in the infamous Herrera case, this holds that innocence is trumped by timeliness. If evidence of innocence is submitted beyond a statutory deadline, it is irrelevant. The legal process must embody “finality,” says the “law of the land” today, even if the result is the execution of an innocent man.

Today, the truth of what happened in the fateful early morning hours of Dec. 9, 1981, has been obliterated from the record by a system that has reduced Mumia's chances of freedom to the interpretations of a handful of "constitutional issues" by three supposedly unbiased jurists, while the vast reserve of evidence proving Mumia's absolute innocence had been long ago been barred from consideration.

The political stakes involved in Mumia's case are recognized by all. The federal level of the U.S. state itself believed that it was necessary to inform the Third Circuit where it stood when the House of Representatives in the last session of the Republican Congress passed a lying resolution condemning Mumia as a cop killer and warning the French city of St. Denis that its naming of a street after Mumia was unacceptable to the U.S.

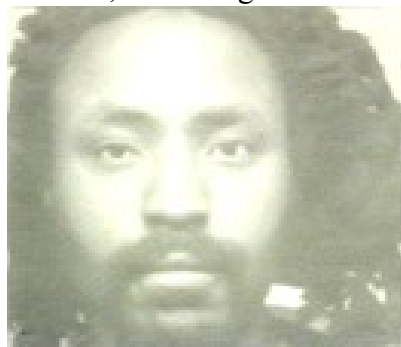
This is but one indication that "the law's" interpretation extends far beyond the judiciary. All but 31 House members approved this resolution that pitifully stated that Mumia had exhausted all his appeals at a time when his most important appeal was pending before one of the nation's highest courts. So much for the objectivity, not to mention the factual accuracy, of the legislative branch, the same branch of government that voted to hasten the execution of the 3350 people (mainly Blacks and other oppressed minorities) who inhabit the death-row sections of the profit-oriented prison industrial complex.

### **What really happened on the morning of Dec. 9, 1981?**

The truth of that day has been largely obliterated by countless police and prosecution manipulations and falsifications designed to buttress a scenario that cannot stand up to the massive accumulations of facts that were known at the time and subsequently unearthed. The facts are simple enough. In this writer's view, a police officer, shortly before 4:00 am, in a red-light district of Philadelphia, stopped a banged-up blue Volkswagen bug with a dangling license plate and demanded that the driver, Mumia's brother



Billy Cook, get out of the car, which he did. Officer Faulkner, who had put in a call for police back-up, also ended up with a driver's license application in his clothes that belonged to Arnold Howard, who had given it to Kenneth Freeman, Cook's street-stall business partner and a passenger in the VW bug. The license was almost immediately found by the police in Faulkner's clothing, but only reported to the defense some 13 years later.



Mumia's brother Billy Cook

An argument ensued and Faulkner bludgeoned Cook with his 17-inch flashlight. Mumia, parked in his taxicab a distance away, observed the beating. He headed toward the scene and was shot by Faulkner. Freeman then alighted from the VW and shot Faulkner.

Six witnesses say the shooter, Freeman, fled the scene, with several describing his clothing, hair, and physical characteristics, all vastly different from Mumia's. Mumia, near dead, lay a few feet away from Faulkner. All the

evidence accumulated since that time proves these assertions and disproves the prosecutions fabricated scenario (see [freemumia.org](http://freemumia.org)).

The 31 photographs of the crime scene taken minutes after the shootings by photojournalist Pedro Polakoff put the lie to the testimony of police “eyewitness” Robert Chobert, who claimed that he viewed the murder from his taxicab that was parked immediately behind Faulkner’s police car. There was no such taxicab there.

Chobert changed his testimony three times to conform to the police scenario. The photographs recently made public by Polakoff show conclusively that the police manipulated the crime scene, rearranging critical evidence and destroying fingerprint evidence on guns found at the scene.

The critical details of the frame-up have been vividly recounted for decades, with new evidence found just months ago further proving their veracity. New ballistic evidence revealed by Michael Schiffmann, a German researcher who wrote his PhD. thesis on the case, again demonstrates the impossibility that Mumia murdered Officer Faulkner.

What can be done today to win Mumia’s freedom? In a perfect world the solution would be in the French tradition of 1789. Drive the corrupt modern day monarchs of capital from their haughty palaces of power and storm the Bastille to free the innocent, including Mumia!

But we do yet not live in a perfect world. Our power has proved sufficient to stay the executioner’s hand for 25 years and beat back two warrants for Mumia’s execution. It has gotten us to the point where a possible aberration in the system has allowed the May 17 hearing to finally expose critical aspects of Mumia’s frame-up. But we are still far from seeing a free Mumia walk out of his supermax death row cell at the State Correctional Institution Greene in Waynesburg, Pennsylvania.

With the fight for one man’s life (Mumia is Everyman and Everywoman who faces death at the hands of criminals) once again on the line and at center stage, we have a new opportunity to reinvigorate our movement, broaden its base and ensure that justice is done.

Our capacity to mobilize in unprecedented numbers and make the political price of Mumia’s murder and continued incarceration too high to pay is central to the work ahead. History has amply demonstrated that all of our historic victories stem from the exercise of our collective power. That power lies with all who cherish freedom and despise injustice. Join the fight for Mumia’s freedom!

*Jeff Mackler, June 2007*

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\* This version of Jeff Mackler’s widely circulated article has been slightly edited by *Abu-Jamal News (AJN)*. Design and illustrations Michael Schiffmann.