

# Petition for Habeas Corpus

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

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MUMIA ABU-JAMAL,  
Petitioner, : 99 Civ.

v.

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

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## PETITION FOR HABEAS CORPUS RELIEF PURSUANT TO 28 U.S.C. §2254

Petitioner MUMIA ABU-JAMAL, through undersigned counsel, respectfully petitions this Court for a writ of *habeas corpus* pursuant to 28 U.S.C. §§ 2241 and 2254 et. seq., on grounds that his conviction and sentence of death were obtained in violation of the Constitution of the United States. In support thereof, Petitioner alleges as follows:

### I. PROCEDURAL HISTORY AND BACKGROUND

1. Petitioner Mumia Abu-Jamal ("Jamal") is presently on death row in the State Correctional Institution at Greene. A death warrant was issued on October 13, 1999, specifying an execution date of December 2, 1999. An application for a stay of execution is submitted herewith.
2. Judgment was entered in the Court of Common Pleas, Philadelphia County under the caption *Commonwealth v. Wesley Cook, a/k/a Mumia Abu Jamal*, Information # 1357 & 1358.
3. Jamal was charged by Information #1357 and 1358 of one count of first degree murder and one count of possession of an instrument of a crime.
4. Jamal pleaded not guilty and was tried by a jury, the Honorable Albert F. Sabo presiding.
  - a. On December 15, 1981, the Court of Common Pleas appointed Anthony Jackson to serve as Jamal's trial counsel; at the time, Jamal was recuperating from a gunshot wound in the hospital.
  - b. Court appearances were made on January 5, 8, 11, 20; February 2; March 18; April 1, 29; and May 13, 1982.
  - c. Suppression hearings were held on June 1 to June 4, 1982.
  - d. Jamal's trial commenced within 6 months of his arraignment. Jury selection began on June 7, 1982, and was completed with the jury being sworn on June 17, 1982.
  - e. On June 18, 1982, the guilt phase of Jamal's trial began with proceedings spanning two weeks, working six days per week.
  - f. The jury returned a guilty verdict at 5:30 p.m. on Friday, July 2, 1982.

- g. The trial court provided both counsel the choice of conducting the penalty phase during the evening hours of July 2nd or beginning the next day. Jamal's counsel did not express a preference. The prosecutor's request to proceed the following morning was granted.
- h. The penalty phase commenced on Saturday morning, July 3, 1982. After a brief and highly-politicized sentencing hearing - lasting less than two hours with virtually no advocacy on the part of Jamal's court-appointed counsel - the jury voted to impose the death penalty.
- i. The trial court denied post-trial motions and formally imposed the death sentence on May 25, 1983.

5. Jamal then pursued his direct appeal in the Supreme Court of Pennsylvania.

- a. Jamal was represented by court-appointed appellate counsel, Marilyn Gelb. Gelb was appointed appellate counsel after Jamal's initial appointed appellate counsel was relieved due to failure to prosecute the appeal.
- b. Judgment was affirmed by a bare quorum (four of seven justices) of the Pennsylvania Supreme Court. *Com. v. Abu-Jamal*, 521 Pa. 188, 555 A.2d 846 (1989), reh'g denied, 524 Pa. 106, 569 A.2d 915 (1990).
- c. Two justices did not participate in any phase of the appeal, and Chief Justice Nix, although participating robustly in the oral argument, withdrew his involvement from the decision of the Court. The reason for the recusal of these three Justices has never been made public.

6. Thereafter, Jamal petitioned the Supreme Court of the United States for *certiorari* review.

- a. Jamal's petition for a writ of *certiorari* was denied. *Abu-Jamal v. Pennsylvania*, 498 U.S. 881 (1990).
- b. Jamal then filed a petition for rehearing which was denied. *Abu-Jamal v. Pennsylvania*, 498 U.S. 993 (1990).
- c. Jamal moved for leave to file a second petition for rehearing, in light of the granting of the writ of *certiorari* in *Dawson v. Delaware*, 503 U.S. 159 (1992), which was a review of a decision of the Supreme Court of Delaware which relied in part on *Commonwealth v. Abu-Jamal*. The leave to file a second rehearing petition was denied. *Abu-Jamal v. Pennsylvania*, 501 U.S. 1214 (1991).

7. State authorities, including the Office of the Governor of Pennsylvania, were aware of Jamal's intention of filing a petition for collateral relief under Pennsylvania's Post Conviction Relief Act (PCRA) by June 5, 1995.

- a. The State authorities were aware of Jamal's intentions because prison officials routinely intercepted Jamal's mail, including privileged correspondence to and from Jamal's counsel.
- b. Correspondence by and between Jamal and counsel contained privileged and highly sensitive information of Jamal's intentions of filing his PCRA petition on or about June 5, 1995, and included highly confidential discussions concerning litigation strategy and counsel's evaluation of the possible claims that could be raised in the collateral proceedings.
- c. Jamal filed a civil rights action based upon this intrusion into his legal correspondence with the United States District Court for the Western District of Pennsylvania.
- d. The district court concluded that this interception of privileged communications by and between Jamal and his counsel "actually injured" him and violated his Sixth and Fourteenth Amendment rights. (See *Jamal v. Price, et al.*, No. 95-618, 1996 U.S. Dist. LEXIS 8570 (W.D. Pa. June 6, 1996).

8. On June 1, 1995, armed with privileged information derived from Jamal's correspondence, Governor Thomas Ridge signed a warrant for Jamal's execution, scheduling it for August 17, 1995.

9. On June 5, 1995, Jamal filed his petition for collateral relief pursuant to the Post-Conviction Relief Act ("PCRA"), accompanied with a memorandum of law and exhibits.
  - a. The PCRA petition was filed in the Court of Common Pleas and the matter was referred to the original trial judge, Hon. Albert Sabo, despite Jamal's compelling motion for recusal.
  - b. On July 12, 1995, the court denied the motion for recusal.
  - c. On July 14, 1995, the court denied Jamal's motion for discovery (and summarily quashed over two dozen subpoenas) and declined to rule on his motion for stay of execution on the dubious ground that the evidentiary hearing could conceivably be concluded in sufficient time to carry out the execution on the designated date.
  - d. Unbeknownst to Jamal at the time, the implementation of the execution date, which came about through the State's interception of privileged attorney-client correspondence, was done precisely for the purpose of justifying a rushed evidentiary hearing.
  - e. Judge Sabo rebuffed all efforts by Jamal to secure more time to prepare for the evidentiary hearing, which was set for July 12, 1995. Judge Sabo's haste in launching the evidentiary hearing is particularly evident by the fact that the prosecution had not yet answered Jamal's PCRA Petition and accompanying motions, and that four separate pretrial transcripts were still to be transcribed.
  - f. Faced with a draconian schedule which threatened his ability to present fairly evidence supporting his constitutional claims, Jamal filed an emergency interlocutory petition for relief with the Pennsylvania Supreme Court, arguing that Judge Sabo had abused his discretion in imposing an unrealistic hearing schedule. The Pennsylvania Supreme Court agreed and provided Jamal modest relief, pushing the start of the hearing to July 26, 1995.
  - g. An evidentiary hearing was held, beginning July 26 and ending August 15, 1995.
  - h. In the midst of the evidentiary hearing, where the PCRA court repeatedly rushed counsel to proceed faster so as to meet the execution deadline, it became apparent to the PCRA court (assuming the PCRA court was acting in good faith from the outset by refusing to rule on the stay application) that a stay of execution would be necessary. The PCRA court issued a stay of execution on August 7, 1995.
  - i. Final arguments were held on September 11, 1995.
  - j. In a written decision dated September 15, 1995, the court denied all of Jamal's claims for relief, adopting virtually verbatim the written submissions by the prosecution.

10. Jamal appealed the denial of his PCRA petition to the Supreme Court of Pennsylvania.
  - a. During the pendency of this appeal, Jamal applied four times for relief in the form of an evidentiary remand.
  - b. The first application, filed May 22, 1996, which the Court granted on September 4, 1996, concerned the need to supplement the record with testimony from one Veronica Jones, an eyewitness to events on the night in question.
  - c. The second application concerned a remand for the purposes of taking testimony from Pamela Jenkins, a newly available witness. The motion also included a remand for purposes of additional discovery, including the police and prosecution files in their entirety, and a request that the matter be assigned to a different judge.
  - d. The third motion concerned a remand to supplement Jamal's claim of a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), based upon a videotape exposing the Philadelphia District Attorney Office's policy and practice of systematically striking African-American venirepersons.
  - e. On May 30, 1997, the Court granted the motion for a second remand, limited to the taking of testimony from Pamela Jenkins. The Court denied all other requests within that motion, and denied the third application for remand in its entirety.

f. On August 1, 1998, Jamal submitted a fourth application for remand in order to present evidence in support of his claims that: (1) his death sentence should be vacated due to racial and geographical disparities, and (2) that the prosecution impermissibly used peremptory strikes to excuse qualified jurors on account of their race.

g. In addition to filing his brief in support of his appeal from the denial of his PCRA petition, Jamal sought the recusal of Justice Ronald D. Castille, one member of the Pennsylvania Supreme Court. The basis for this recusal motion was that Justice Castille was the District Attorney in Philadelphia at the time of Jamal's direct appeal from his judgment of conviction and sentence, and Justice Castille, directly and through his assistants, argued vigorously that Jamal received a fair trial and that the evidence of his guilt was overwhelming.

f. On October 29, 1998, the Pennsylvania Supreme Court issued its decision affirming the denial of Jamal's PCRA petition, and Justice Castille denied the recusal motion based upon his involvement in Jamal's direct appeal. The Court also denied the fourth application for remand on that date.

i. The Court denied Jamal's application for re-argument on November 25, 1998.

j. Jamal thereafter petitioned the Supreme Court of the United States for *certiorari* review, which was filed on April 22, 1999, *Abu-Jamal v. Pennsylvania*, No. 98-1702, and denied on October 4, 1999.

10. This Petition pursuant to 28 U.S.C. §§2241 and 2254 follows.

## II. PRELIMINARY STATEMENT

10. This petition for federal *habeas corpus* relief presents this Court with a state court record so fraught with constitutional error that it warrants the conclusion that this death row petitioner has never had a meaningful trial. Every element associated with the trial process is tainted with unfairness: law enforcement fabricated and suppressed evidence; the prosecution invoked improper argumentation (including explicit use of Jamal's past political views and activities), unfairly used evidence of a fabricated confession, and suppressed materially favorable evidence; the trial judge exhibited virtually no concern for fairness and exercised his discretion in every meaningful respect against the interests of Jamal, even to the point of thwarting defense counsel's feeble efforts to present exceedingly vital evidence to the jury; the jury was selected with race in mind; some jurors deliberated during the course of the trial proceedings; defense counsel, who was unwilling and ill-equipped to handle this highly-charged criminal trial, did little to develop and present a theory of defense (in both the guilt and penalty phases) based upon evidence that could have been acquired; defense counsel failed to secure the necessary resources, including the services of critical experts, to mount a defense; defense counsel failed to initiate obvious attacks against the prosecution's vulnerable theory of guilt; and Jamal himself, the one who prepared the case for trial in his capacity as *pro se* counsel, was illegitimately stripped of his *pro se* rights and banished unjustifiably from approximately half of the trial proceedings.

11. In the mid-1970's, Jamal focused his substantial talents on professional journalism and was quickly acknowledged to be a rising star. His news broadcasts were heard on such varied venues as National Public Radio, the Mutual Black Network, the National Black Network, and his own talk show on WUHY-FM. In late 1980, at age 26, Jamal was elected chair of the Philadelphia Chapter of the Association of Black Journalists. The January 1981 issue of Philadelphia Magazine named Jamal "one of the people to watch in 1981." Jamal remains an accomplished, widely-read, and much talked-about author. Jamal's writings have appeared in

a number of prestigious publications, including the Yale Law Journal, and he has published two acclaimed non-fiction books (one of which has been translated into seven languages).

12. In 1981, Philadelphia was in the throes of intense racial tension. Friction between police and the organization known as MOVE, had led to deep mistrust and suspicions on the part of Philadelphia law enforcement toward anyone perceived to be affiliated or in any way associated with that organization. Law enforcement perceived Jamal to be sympathetic to, if not actually affiliated with, the MOVE organization, in large measure based upon Jamal's journalistic writings and radio broadcasts. Moreover, Jamal was known to law enforcement because he was a founding member of the Philadelphia chapter of the Black Panther Party. Substantial evidence supports the fact that law enforcement officers who arrived at the scene of the shooting of P.O. Daniel Faulkner on December 9, 1981, immediately recognized Jamal. According to one eyewitness, police officers beat Jamal while shouting epithets (such as, "kill the black motherfucker"). Witnesses to various aspects of the events in question also assumed, based upon Jamal's appearance, that he was a MOVE member. It is in this context that the egregious police and prosecutorial misconduct, as detailed hereinbelow, should be viewed.

#### A. Overview Of The Defense Theory Of The Case Versus The Prosecution's Theory

13. This case arises from the shooting death of Philadelphia Police Officer Daniel Faulkner in the early morning hours of December 9, 1981, in Philadelphia's Center City near the corner of 13th and Locust Streets.

14. Jamal was also found at the scene, slumped on a nearby curb with a critical gunshot wound to his chest.

15. Within minutes of the shooting, four witnesses - each unknown to the others - independently reported to police that a black male had fled the scene. Each gave precisely the same details as to where the fleeing man fled. They told police that the fleeing black male ran eastbound on the south side of Locust St. On the south side of Locust St., about thirty feet east of the slain officer, was an alleyway, which provided an obvious escape route for anyone seeking to flee a crime scene.

16. One of the witnesses whom the police interviewed at the crime scene definitively reported that the fleeing black male - not Jamal - was the man who shot the officer.

17. Just a week later another witness - the fifth eyewitness - reported seeing two black males jogging away from the scene immediately after the shooting.

18. How this evidence of a fleeing killer was suppressed and transmuted into what the prosecution later claimed was an open-and-shut case against Jamal is an issue central to this Petition. Left unchallenged by an unwilling, ill-prepared, and ill-equipped defense attorney, the prosecution's case, as it was presented to the jury, consisted of a highly distorted and truncated array of evidence. Indeed, two key components of the prosecution's case - the testimony of a witness who claimed to have seen the actual shooting and the claim that Jamal confessed to the killing - were obviously fabricated. Evidence existed to expose these fabrications (along with evidence to expose other vulnerabilities in the prosecution's case), but was never presented to the jury, either because of the trial court's constitutionally improper rulings, the State's suppression of favorable evidence, or the ineffectiveness of counsel. For this reason, among others, Jamal's presumed innocence has never been rebutted in a genuinely fair proceeding.

19. The prosecution's case had three elements: the claim that eyewitnesses saw Jamal shoot the officer, the claim that Jamal confessed to the shooting at the hospital emergency room immediately after the shooting, and the fact that Jamal's legally-registered .38 caliber revolver was retrieved at the scene.

20. The parties agree that: (1) Police Officer Daniel Faulkner pulled over a Volkswagen driven by Jamal's brother, William Cook; (2) for reasons that remain unclear, Officer Faulkner scuffled with Cook on the curb adjacent to the Volkswagen; (3) meanwhile, Jamal ran towards Faulkner and Cook.

21. What transpired thereafter remains hotly contested. According to the prosecution, Jamal shot the officer once in the back, and then fired four more shots (including the fatal shot) execution-style while standing over the officer.

22. According to the prosecution's account, presented through the testimony of a disreputable prostitute who appears to have had ties with the Philadelphia police, the officer, having already been shot and falling toward the pavement, shot Jamal as he hovered above him. Under this prosecution scenario, the trajectory of Officer Faulkner's gunfire was necessarily in an upward direction. It is now uncontested that the bullet fired by Officer Faulkner traveled in a downward trajectory. Yet, without an expert pathologist to assist him, defense counsel was unable to refute the prosecution's false account of what happened on December 9, 1981. It is now clear, after Jamal has had access to a pathologist, that the physical evidence - namely, the actual, irrefutable downward trajectory of the bullet through Jamal's torso - unquestionably refutes the prosecution's account, and it reveals that the prosecution's key eyewitness did not actually see what she claimed to have seen.

23. Essential to the prosecution's theory of the case was the false assumption that William Cook was the only person in the pulled-over Volkswagen, and that only two men - Jamal and William Cook - were present with the officer during the time of the shooting. Critical to Jamal's defense was the fact that a third person was also at the scene, and that third person was seen fleeing towards a nearby alleyway immediately after Officer Faulkner was shot.

24. Recently discovered evidence which was suppressed by the Commonwealth - the existence of a driver's licence application belonging to one Arnold Howard found on the slain officer - bolsters numerous eyewitness accounts that a third person was on the scene, and that this third person fled to a nearby alleyway.

25. In short, substantial evidence points squarely to Jamal's innocence - evidence which was never presented to the jury due to police and prosecutorial misconduct, erroneous rulings by the trial judge, and constitutionally deficient preparation and performance by defense counsel.

#### B. Overview Of The Flawed Trial Process

26. With about three weeks left before trial, Jamal received permission to proceed *pro se*. He sought to represent himself because his court-appointed attorney, Anthony Jackson, bereft of funds access to secure expert and investigative assistance, made no secret of his lack of preparation and commitment to the case. Over Jackson's vigorous protest, he was appointed as back-up counsel. Either out of bitterness or lack of understanding of his obligations as back-up counsel (derived from the trial court's own misunderstanding of the obligations of back-up counsel), Jackson did nothing to prepare for the trial in the three weeks leading up to the trial.

27. Jackson admitted at the PCRA hearing that he needed the services of a pathologist, a ballisticsian, an investigator, and another trial lawyer to assist him. His efforts to secure these services were either rejected by the court outright or insufficient to accomplish that goal. In fact, Jackson's testimony at the PCRA hearing reveals that, despite his recognition of the needs for expert services, he did not make reasonable efforts to secure them. He nonetheless harbored a deeply cynical view of the possibility of securing funds to retain the necessary experts and other necessary services.

28. Just as the prosecution was about to give his opening statement, the trial court, without adequate justification, stripped Jamal of his right to represent himself and compelled Jackson, to his dismay and shock, to assume the responsibility of countering the prosecution's case. Jackson again protested, as he was unprepared, unwilling, and incapable of taking on that responsibility. Nonetheless, Jackson did not request a continuance so as to better fulfill his newly-imposed obligations. Instead, he admitted defeat at the very outset, confessing to the trial court that he saw no available defense in the case. What is apparent from the amplified record before this Court now, however, is the simple fact that the prosecution's case was plainly vulnerable to a vigorous defense.

29. Seeing that his life was in the hands of an inadequate lawyer, Jamal protested the patently unfair proceedings, leading to his banishment from approximately one-half of the entire trial proceedings.

30. As set forth below, evidence from purported eyewitnesses was distorted by undisclosed favors and threats. Exculpatory evidence was overlooked by defense counsel or suppressed by the State. Physical evidence undermining the prosecution's flawed theory of the case was never presented. A golden opportunity to expose the use of fabricated evidence of a confession was never seized. Blatantly improper argumentation to the jury went uncorrected.

31. The constitutionally-deficient performance of defense counsel, along with the police and prosecutorial misconduct, played itself out before a trial judge who openly sided with the prosecution on every meaningful judicial act. In the rare instances where defense counsel sought to reveal important impeachment evidence, including evidence of police misconduct, the trial judge promptly impeded him from doing so. When defense counsel sought a modest continuance to bring in a witness who could devastate the dubious prosecution claim that Jamal confessed, the trial judge not only denied the continuance, he also endorsed, without independent inquiry, the manifestly incorrect assertion by the prosecutor, rendered in bad faith, that this witness was unavailable.

32. The audience receiving the prosecution's highly distorted and truncated array of evidence was selected with race in mind. The jury consisted of ten whites and two blacks. Jamal unsuccessfully attempted to present to the PCRA court powerful statistical evidence that race-conscious jury selection infected this trial. He was thus precluded from showing that this was a persistent practice of jury selection in Philadelphia. He was barred from presenting videotape evidence exposing what the statistical evidence already makes clear: that the selection of nearly all-white juries - with token blacks who are elderly and/or from the West Indies - was no accident, but a trial technique taught to young Philadelphia prosecutors.<sup>1</sup>

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<sup>1</sup> The placement of a few blacks on the jury who are elderly and from the West Indies had two apparent beneficial effects for the prosecution. First, it is believed that elderly West Indian blacks are sympathetic to "law-and-order" themes, and hence, more prone to convict. Second, placing a few blacks on the jury would disguise the actual race-conscious jury selection method being deployed, thus thwarting an effective Batson challenge.

32. He was further barred from introducing a study (covering the relevant time period) which revealed that the Philadelphia District Attorney's office peremptorily struck African-Americans from jury service 55.28% of the time, as opposed to a strike rate of only 23.43% for non-African American jurors.

33. Further adding to the racial imbalance and unfairness of the jury selection was the court's decision, made *sua sponte*, to remove juror number one, Jeannie Dawley, an African-American and the only juror picked by Jamal before his right to self-representation was stripped from him. The court made this decision without any notice to counsel, let alone giving counsel a chance to *voir dire* juror Dawley, and replaced her with the first alternate, Michael Courchain, a white male who was manifestly unfit to serve on this case.

34. By the time the racially-sanitized jury began to deliberate, it had received a one-sided, unchallenged prosecutorial presentation for guilt. Even under those circumstances, the jury sought re-instruction on the legal definition of manslaughter.

35. The enhanced record presented in this Petition presents a far different picture from that presented at trial, with the prosecution's case exposed as far more vulnerable and flawed than the trial record would suggest.

### C. Overview Of The Sentencing Phase

36. The sentencing phase - taking place on a Saturday morning of the July 4th holiday weekend following a guilty verdict at 5:30 p.m. the day before - was equally riddled with misconduct and error. Jamal's defense attorney had given not a moment's thought about how best to advocate for Jamal's life. He never considered calling a single mitigation witness until the morning of the hearing (and only then considered calling family members who he never prepared to testify), despite the vast reservoir of witnesses who could have testified about Jamal's lifelong dedication to social justice, devotion to family and commitment to community improvement.

37. Instead, defense counsel hinged his aimless and desultory plea for life on the preposterous contention, which surely insulted the jury, that the victim was not a peace officer within the meaning of the death penalty statute. He also inexplicably told the jury that a life sentence would not necessarily mean a full life term behind bars.

38. With no consultation or guidance from his counsel, Jamal spoke to the jurors of his innocence, and expressed his anger over the injustice that had occurred before them. The court then permitted the prosecutor to mount an explicitly political attack, by "cross-examining" Jamal about his teenage political views as a member of the Black Panther Party in the 1960's.

39. The prosecution summation exploited the impermissible elicitation of First Amendment protected material, the difficulties Jamal had with the trial court emanating from the stripping of his *pro se* rights, and the suppression of materially favorable defense evidence. That summation inflamed the largely white jury by arguing and insinuating that the killing of Officer Faulkner was an outgrowth of political radicalism long brewing within Jamal, and that Jamal's past affiliation with the Black Panther Party justified a death sentence. This politicized argumentation, calculated to demonize Jamal as a dangerous political radical, underscored earlier prosecutorial arguments urging the jury to fulfill community expectations by reclaiming their

city which was characterized as being a battleground and "under siege" from an uncontrollable criminal class.

40. The prosecutor also improperly urged the jurors to discount the gravity of their decision, insisting that they would not be responsible for Jamal's sentence because it would be subject to "appeal after appeal after appeal."

41. With no meaningful advocacy by defense counsel, inflamed by the politicized and histrionic appeal by the prosecutor, and left with the impression that their decision would not be determinative of Jamal's fate, the jury went from its quandary over whether Jamal should be convicted of murder or manslaughter to quickly agreeing that he should be put to death.

42. The option to impose a life sentence was made more difficult by a penalty phase verdict form, coupled with a jury instruction, that misled the jury into believing that any conclusion concerning mitigation must be unanimous.

43. On appeal, Jamal challenged his conviction and sentence on several grounds, including the prosecution's use of peremptory strikes to remove African-Americans from jury service. The Supreme Court of Pennsylvania upheld his conviction and sentence, holding that a showing of 8 of 15 peremptory strikes against Blacks did not constitute a *prima facie* case under Batson. During the PCRA proceeding, the evidence showed that 11 of 15 strikes were used to strike Blacks.

#### D. Overview of the PCRA Proceedings and Subsequent Appeal

44. The trial judge also presided over the PCRA proceedings which have preceded the filing of the instant Petition, notwithstanding Jamal's compelling motion for his recusal. The trial judge's conduct during the PCRA proceedings and his deeply flawed opinion, adopting virtually verbatim the "findings of fact and conclusions of law" submitted by the prosecution, deprived Jamal of a full and fair state process.

45. As noted above, Judge Sabo rushed Jamal through the evidentiary hearing to meet an execution date imposed after the Governor's Office was alerted, through the interception of attorney-client correspondence, to Jamal's intention to file his PCRA petition.

46. Numerous subpoenas were quashed, thereby undercutting Jamal's ability to create a necessary record in support of his constitutional claims.

47. Pre-hearing discovery requests were summarily denied, often even before the State registered any objections.

48. Overt hostility toward PCRA counsel - leading in one instance to a contempt citation and in another to the incarceration of one of Jamal's lawyers - along with his flagrantly biased rulings in the prosecution's favor, made it palpable that Judge Sabo should not have presided over the PCRA proceedings.

49. On August 5, 1996, Jamal appealed the denial of the PCRA petition to the Pennsylvania Supreme Court, and at the same time filed a motion for the recusal of Pennsylvania Supreme Court Justice Ronald D. Castille on grounds that he was the District Attorney for Philadelphia at the time of Jamal's direct appeal and that his name appeared on the State's opposition brief

which expressly advocated the position that Jamal's trial was fair and that the evidence against him was compelling. The motion also justified recusal because Justice Castille was endorsed by cultivated the political support of the Fraternal Order of Police (FOP) during his election campaign. Justice Castille refused to recuse himself, noting that if he were to recuse himself because he was supported by the FOP, then four other Justices sitting on the Pennsylvania Supreme Court would have to do likewise. The FOP, of which Judge Sabo had once been a member, has organized, and continues to organize, a vocal campaign to carry out Jamal's death sentence. In fact, the FOP has gone beyond vocalizing its position by intruding itself into the judicial process through direct communication to the trial court.

#### E. Overview Of Claims Presented In This Petition

50. Constitutional error infects every aspect of this case. No ingredient associated with fundamental due process was free from the poison of unfairness. The claims raised in this Petition are presented under the following, broadly-conceived, thematic headings:

- A. Claims bearing upon the suppression, manipulation, and manufacturing of evidence are contained in Claims One through Five.
- B. Claims bearing upon the inadequacy of trial counsel's representation during the guilt phase of the trial are contained in Claims Six through Eight.
- C. Claims bearing upon the manner in which the trial and direct appeal were conducted are contained in Claims Nine through Fifteen.
- D. Claims bearing upon the mishandling of the jury, ranging from the selection process to premature deliberations, are contained in Claims Sixteen through Twenty.
- E. Claims bearing upon the penalty phase are contained in Claims Twenty-one through Twenty-eight.
- F. The claim bearing upon the conduct of the post-conviction proceedings is contained in Claim Twenty-nine.

51. Because Jamal's trial, in both the guilt and penalty phases, departed so radically from the minimal standards of due process and heightened reliability to which a capital defendant is entitled, this Petition should be granted.

### **III. CLAIMS FOR RELIEF**

10. Pursuant to the local rules and case authority governing the filing of petitions brought under 28 U.S.C. § 2254, the following claims for relief represent constitutional challenges to Petitioner's conviction and sentence of death that have been fairly presented to and exhausted in the state courts.

11. In the event this Court deems any of the claims set forth hereinbelow as wanting of exhaustion, Petitioner Mumia Abu Jamal respectfully requests leave to cure the defect in the pleadings by amending this Petition so as to excise those unexhausted claims.

12. With respect to each of the claims identified herein below, Petitioner sets forth supporting facts based upon the record developed during the course of the state court proceedings. Petitioner respectfully alleges that other facts exist to support the constitutional claims set forth hereinbelow and requests that he be given the opportunity to present those facts after engaging in full discovery, investigation, and access to this Court's subpoena power. Petitioner also requests that additional facts in support of this Petition be presented during the course of an evidentiary hearing.

**CLAIM ONE: THE STATE MANIPULATED TWO PURPORTED EYEWITNESSES TO FALSELY IDENTIFY JAMAL AS THE SHOOTER, IN VIOLATION OF HIS FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS RIGHTS**

10. Jamal was deprived of his right to a fair and reliable determination of guilt and penalty, as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, because the State's most important identification witnesses, Cynthia White and Robert Chobert, were coaxed and coerced into providing false testimony implicating Jamal.<sup>2</sup>

10. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

A. Cynthia White

11. The principal prosecution witness was a prostitute named Cynthia White. Her testimony was critical to the State because she was the only witness who claimed actually to have seen Jamal, gun in hand, shoot the officer.

12. Newly discovered evidence presented at Jamal's PCRA hearing revealed White's testimony to be a total fabrication. She was under police control throughout the pre-trial period and was a police informant.

13. White was plainly susceptible to police pressure. During the trial, she was serving an 18-month sentence in Massachusetts. She had 38 previous arrests for prostitution in Philadelphia and had three open cases in Philadelphia.<sup>3</sup>

14. In the days after the shooting, she was arrested at least twice for prostitution. Her picture was posted in the 6th District with instructions for arresting officers to "Contact Homicide."

15. Each time police picked White up, she revised her story. Without explanation, bench warrants against her were not prosecuted.

16. At the 1982 trial another prostitute, Veronica Jones, testified that police told her that White was given favors for providing false testimony. The trial court improperly struck this

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<sup>2</sup> A third witness, Michael Scanlan, was far less significant at Mr. Jamal's trial than White and Chobert. He misidentified Jamal at the scene as the driver of the Volkswagen. Scanlan conceded that he could not tell which of the black males was which, or who shot the officer. He also admitted he had been drinking that night with a friend until 4 a.m., and acknowledged what he saw was attended by "some confusion" and he was making "assumptions." All he could say for sure was that he heard some shots, did not see any guns, and could not identify who was doing the shooting. Scanlon's inability to see the events clearly was a product not only of the lateness of the hour and his drinking, but also of the fact that he had to view the events through the blinking turret lights of Officer Faulkner's police vehicle.

<sup>3</sup> This kind of police manipulation of prostitutes as informants was common in Philadelphia's Center City in the early 1980's, a time when Center City police were taking hundreds of thousands of dollars in bribes from prostitutes, pimps, and club owners. A federal probe of Center City police corruption began in mid-1981, and became public knowledge in a series of indictments that began in 1983. The probe led to over twenty convictions of police officers, including the Inspector who ran the Central Division in 1981-82, and the Deputy Commissioner for the whole department. The head of Homicide was named as an unindicted co-conspirator because of his relations with Center City prostitutes. The investigation revealed that police virtually controlled Center City prostitution through extortion, and that corrupt police engaged in sex with the Center City prostitutes under their control. White was arrested six times in 1980 and 1981 by 6th District police officers Joseph Gioffre and Richard Herron. These two officers were later convicted of extorting payoffs from 6th District street prostitutes.

testimony and barred further inquiry into White's relationship with the police and the incentives given to secure favorable testimony.

17. In 1996, at a remand hearing, Jones again described conversations in which police told her that White was receiving favors in return for her testimony.

18. This information about White was never disclosed to the defense. On the contrary, the prosecution affirmatively misrepresented that there were no such promises or inducements.

19. An investigator retained by the defense for a short period (until the meager funds were exhausted) was never able to interview White because two plainclothes police officers kept a watch over her.

20. According to a retired Center City police officer, Lawrence Boston, who testified at the PCRA hearing, White was receiving special favors after the shooting.

21. According to Boston, who knew White through walking a beat on 13th Street, "the word was out in the street" that White was living in Pine Hill, New Jersey, in a condominium near a golf course.

22. Boston also confirmed that police commonly used prostitutes as sources of information.

23. None of this information - indisputably known to police before trial - was ever disclosed to the defense.

23. Law enforcement's favors to White continued through at least 1987. Contrary to the prosecutor's representations at trial, White was not prosecuted on her three pending prostitution charges.

24. Police also provided unusual favors to White when she faced serious felony charges in 1987. At her bail hearing, a Homicide detective intervened to advise the judge of White's role in the Jamal case.

24. Notwithstanding the serious charges, and her record of "seventeen failures to appear" and "page after page" of arrests, the bail judge, although reluctant, released White on her own recognizance as a result of police intervention on her behalf.<sup>4</sup>

25. After White was released on her own recognizance, she never again appeared in the Philadelphia court system, and police made no attempt to apprehend her.

26. The special treatment of White, which extended into the late 1980's, shows either that White had been offered undisclosed favors and special treatment, or that police were afraid that, absent such continued inducements, White would recant her false testimony. None of the witnesses who claimed to see the events in question recalled seeing White in the vicinity of the shooting. In fact, two witnesses at the scene (William Singletary and Dessie Hightower,

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<sup>4</sup> Det. Culbreth, now retired, appeared on White's behalf at the bail hearing, causing the court to allow White to sign her own bond. Culbreth, who had served as Cynthia White's police escort at the 1982 trial, told the bail judge that White was a Commonwealth witness in a "high profile" case (i.e., this one). Culbreth appeared at the bail hearing because White had called him at the Homicide Unit and requested his help. "[S]he called me because she knew I would do it."

noted infra) recalled seeing her at another location. Moreover, one of those witnesses (Singletary) recalled White asking him, after the police arrived, "what happened?"

## B. Robert Chobert

27. Prosecution witness Robert Chobert testified at trial that he saw Jamal standing over the fallen officer and heard shots fired. Over the months before trial, Chobert had continually changed his testimony in ways favorable to the prosecution. However, the defense was blocked at trial from showing Chobert's incentive to favor the prosecution.

28. In two key respects, Chobert's initial accounts of the shooting provided important ammunition for the defense, and undermined his claim that Jamal was the shooter.

29. First, Chobert was one of several witnesses who saw a black male flee eastbound on the south side of Locust Street. He told an arriving police inspector that the shooter "ran away."

30. He repeated this observation less than an hour later, telling investigators that the person who shot Faulkner ran "30 steps" east. Approximately that distance east of the fallen officer is an alleyway which provided an obvious escape route.

31. Since Jamal was found slumped on the curb near the fallen officer, he could not have been the fleeing man to whom Chobert was referring.

32. Second, Chobert described the shooter as being a heavy man, about 6 foot and weighing 200 to 225 pounds.

33. When he observed Jamal standing in the courtroom he admitted he didn't look like someone who weighed 225 pounds and conceded he wasn't heavy.

34. To defense counsel's surprise, at trial Chobert retracted his account that the shooter ran thirty steps, and instead testified that the shooter only moved ten feet.

35. This retraction, of course, was a considerable blow to the defense, and defense counsel attempted to counter Chobert's revisionist recollection through evidence of his bias.

36. Defense counsel sought to challenge his credibility by presenting to the jury the fact that he had a criminal past, which Chobert described at sidebar: "I threw a bomb into a school...a Molotov [cocktail]...I got paid for doing it."

37. The trial court determined that Chobert's conduct was merely a simple act of arson, and thus outside the scope of legitimate impeachment.

38. The jury also never learned of Chobert's two convictions for driving while intoxicated, despite his earning his livelihood driving a cab.

39. The PCRA hearing revealed still more concerning Chobert's motive and bias. Chobert testified under a powerful penal and economic incentive - a prosecution inducement never disclosed to the defense.

40. From the moment he was first questioned by police, up to the time of Jamal's trial, Chobert was driving his cab without a driver's license. Chobert testified at trial with an understanding that he would receive the prosecutor's personal assistance in renewing his suspended license.

41. The Commonwealth's suppression of this agreement was a staggering blow to the defense. A valid driver's license was critical to Chobert's ability to earn a living - which is precisely why he asked the prosecutor to help him obtain the license. While the prosecutor offered a carrot (i.e., to try to get the license back), it also carried a stick (i.e., the threat to Chobert's probation because of his continuing driving violation).

42. The defense was entitled to show Chobert's vulnerable penal and economic circumstances and the substance of the prosecutor's assurances, to establish his motive to retreat from his earlier police interview statements in ways beneficial to the prosecution. This the defense was unable to do as a result of the suppression of this information. (See Claim Two, *infra*)

43. To make matters worse, the prosecutor extracted further advantage from his willful Brady violation. In summation, the prosecutor vouched for Chobert's credibility with singular fervor. He told jurors that they could "trust" Chobert, because "he knows what he saw." He posed the rhetorical question: "Do you think that anybody could get him [Chobert] to say anything that wasn't the truth?" According to the prosecutor, Chobert was unimpeachable and above criticism ("I would not criticize that man one bit ... I don't care what you say or what anybody says . . .").

44. The prosecution - knowing fully that the jury was denied evidence of Chobert's parole status, criminal history, and economic incentive to please the Commonwealth - asked rhetorically, "What motivation would Robert Chobert have to make up a story . . . ?" This improper vouching assured that the jury was misled regarding Chobert's reliability.

**CLAIM TWO: THE STATE SUPPRESSED EVIDENCE THAT THE TRUE SHOOTER FLED, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS**

45. Petitioner was deprived of his right to a fair and reliable determination of guilt and penalty, as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution by the State's suppression of eyewitness reports of a black male fleeing the crime scene moments after the shooting, and evidence that these witnesses were intimidated, threatened, coaxed and coerced into changing their testimonies.

46. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

A. Robert Chobert

10. As noted in the discussion of Claim One, *supra*, Chobert not only implicated Jamal as the shooter, he renounced his initial report to police at the scene of the shooting that he saw someone flee the scene.

11. Chobert's account of the fleeing man matched precisely numerous other independent eyewitness accounts, notably in that the flight was in the direction of a nearby alleyway.

12. Chobert's initial police statement concerning the fleeing man, which was given to aid in the apprehension of the actual perpetrator, bore the hallmarks of reliability by virtue of its spontaneity and the corroboration by other witnesses.

13. Because of the State's withholding of information concerning Chobert's alliance with the prosecution, the defense was simply ill-equipped to impeach Chobert effectively, or otherwise deal with Chobert's stunning departure from his initial police statement.

14. Instead, the jury was left with the erroneous impression that Chobert's altered account of what he had seen on December 9, 1981, was nothing more than a trivial or incidental inconsistency.

#### B. Veronica Jones

15. Perhaps the most glaring evidence of police manipulation of witnesses to deprive the defense of evidence concerning the flight of a third person from the scene of the crime came from the PCRA hearing testimony of Veronica Jones.

16. Less than a week after the shooting death of Officer Faulkner, Philadelphia detectives interviewed witness Veronica Jones.

17. She reported to these interviewing detectives seeing two black men "jogging" from the scene of the shooting.

18. Jones's account, taken to be reliably reported by these detectives, was memorialized in a police report.

19. Armed with this police report, the defense called Jones to testify at trial. Jones's account to the police plainly fit within the defense's theory of defense that the actual shooter fled the scene.

20. Although defense counsel never interviewed Jones before posing questions to her in front of the jury, he never expected, and had no reason to expect (as with Chobert), that her account would depart drastically from her eyewitness account given to police days after the shooting.

21. Jones's testimony, however, did unexpectedly depart from the account found in the police report. On the witness stand, Jones denied ever seeing anyone flee the scene, and, in contradiction to the observations of trained detectives, claimed that she was intoxicated from marijuana at the time of this interview.

22. In 1996, Jones testified at the PCRA remand hearing. She explained that her recantation occurred because she felt she had little choice.

23. She revealed that shortly before Jamal's trial, she was incarcerated on serious felony robbery and gun charges.

24. While sitting in jail, Jones received a visit from two police detectives who urged her to change her testimony to aid the prosecution.

25. They told her that she faced at least a decade in prison - a scenario she regarded as unimaginable, particularly because such a sentence would separate her from her three infant children.. These detectives then threw her a lifeline: provide favorable evidence for the prosecution - namely, identify Jamal as the shooter - and those charges would be dropped.

26. When the time came for her to testify, Jones could not bring herself to implicate an innocent man, but she also could not forego the possibility of saving herself by telling the truth as to what she saw on December 9, 1981. She opted, instead, for a middle course: implicate no one and deny seeing anyone flee the scene. This apparently satisfied law enforcement authorities, as Jones never served a prison term on her robbery and gun charges.

27. Jones's testimony at the 1996 hearing was put to a severe test. On cross-examination, the prosecutor told her that she would be arrested, then and there, on a stale and minor charge in another jurisdiction. Through tear-filled eyes, Jones announced to the judge (who had earlier warned her that she could go to prison for stepping forward) that she was finished with lying and that incarceration would not now compel her to withdraw from the truth again.

### C. William Singletary - Eyewitness To The Shooting

28. Witness William Singletary, a black Philadelphia businessman and decorated Vietnam veteran with friends on the police force, reported to police at the scene that the man who shot the officer was a third black male who ran from the scene.

29. Singletary specifically told detectives that the shooter was not Jamal.<sup>5</sup>

29. It is indisputable that Singletary was present at the scene of the shooting and immediately went to headquarters (referred to as the "Roundhouse") for questioning.

30. In 1995, at the PCRA hearing, Singletary testified that on the night of the shooting a detective (identified as a black male named "Green") ripped up his accurate statement indicating that Jamal was not the shooter and that the actual shooter fled.

31. Instead, police coerced Singletary, after five hours of badgering, into signing a false statement, indicating he did not see the shooting. Singletary was never sought as a trial witness because this falsified statement was the one the prosecution turned over to the defense.

32. Had the State disclosed Singletary's true statement, defense counsel also would have learned that shortly before the shooting Singletary saw Cynthia White nowhere near the site she claimed to be when the shooting occurred.<sup>6</sup> More importantly, Singletary would have im-

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<sup>5</sup> He saw the shooting of Officer Faulkner and he saw the shooting of Jamal. He saw a tall man with dreadlocks wearing a long army coat get out of the Volkswagen and shoot the officer. The shooter and the Volkswagen driver took off running east on Locust street. Singletary saw Jamal approach the scene, but Jamal did not have a gun and did not shoot Officer Faulkner. Singletary did see Officer Faulkner's gun discharge, wounding Jamal. Singletary also described police brutality: "a lot of police officers around the person that was beating him, kicking him, stomping him, sticking sticks in his wound, and just cursing, cursing, saying a lot of bad things."

<sup>6</sup> According to Singletary, she was far down the street talking to a man. In one of her interview statements, White confirmed that she was standing talking to a black male shortly before the shooting, and she also acknowledged that this man had witnessed the shooting. At trial, however, the prosecution and detective William Thomas misled the jury by disclaiming knowledge of the identity of the black male (Singletary) whom White reported had been standing near her before the shooting, and who she said witnessed the shooting.

peached White's account in another way, as she had asked Singletary, upon the arrival of the police at the crime scene, "what happened?"

32. Because the defense was wholly misled as to what Singletary had seen, he was never presented to the jury.

#### D. Arnold Howard And The Physical Evidence Of The Fleeing Man

33. Police not only suppressed Singletary's account that the actual shooter fled the scene, but also concealed corroborating physical evidence of a third man's presence.

10. At the 1995 PCRA hearing, Edward D'Amato, a retired police captain called by the prosecution, confirmed that police suppressed the fact that a driver's license application belonging to a third man, Arnold Howard, was found on the slain officer, and that some police initially pursued the theory that a third man fled the scene.

11. Although the prosecution had given the defense what purported to be an interview statement of Howard, the statement was misleading and incomplete because it did not explain that this document belonging to another man was found on the officer's body or that police regarded Howard as a possible suspect or witness who had fled the scene.

12. It is indisputable that this document in Howard's name was found on the slain officer, that investigators understood this to raise the possibility of a third person's presence at the shooting (possibly the shooter), particularly in light of witness statements indicating someone fled in the direction of a nearby alleyway. The police never disclosed this information to the defense.

13. The failure to disclose the presence of this document on the slain officer thus deprived the defense and the jury of material evidence that a third person was present on the scene, but-tressing the numerous eyewitness accounts that the shooter fled.

14. Not only did the Commonwealth suppress this information, but the prosecution and Det. Thomas affirmatively misled the jury that police discounted the possibility of a fleeing man - when in reality some police had pursued just that theory.

15. Moreover, according to Howard's PCRA testimony, the person he had given his license to was William Cook's vending stand partner, Kenneth Freeman, raising the strong implication that Freeman was riding with Cook on the night of the shooting and was the shooter who fled the scene. Freeman was the passenger with William Cook, and he was not found at the scene when police arrived. Singletary testified at the PCRA hearing that the shooter emerged from the passenger side of William Cook's Volkswagen.

16. Howard testified at the PCRA hearing that he was taken into custody shortly after the shooting on suspicion that he was involved in the shooting and had fled the scene.

17. The State withheld these facts from the defense and instead provided a witness statement which Howard says was not accurate and on which his name was forged.

18. According to Howard, several officers came to his home before dawn and took him into custody.

19. Howard testified he was transported to various police venues for the next 72 hours.
20. Howard was asked to sign a statement.
21. The police also tested his hands to see if he had fired a gun.
22. Howard's testimony revealed, for the first time, that two other suspects were also in police custody that morning.
23. Significantly, one of those suspects was Kenneth Freeman, a friend and business associate of William Cook (the two operated a vending stand together at 16th and Chestnut).
24. In February 1982 (just two months after the shooting) Central Division Det. Richard Ryan arrested Kenneth Freeman under unusual circumstances. Assisting Ryan in the Freeman arrest was James Forbes, a Central Division stakeout officer who was one of the first police on the scene after Faulkner's shooting and a key prosecution witness at the 1982 trial.
25. In May 1985, in the evening after the Philadelphia police bombing of the MOVE organization, Freeman was found dead in Philadelphia under mysterious circumstances.

#### E. Dessie Hightower - The Only Defense Eyewitness To The Fleeing Man Called At Trial

26. Because of the police intimidation of Singletary and Jones, the suppression of evidence that Howard's license application was found on the slain officer, and the manipulation of Chobert's testimony, the only evidence of the fleeing shooter presented to the jury was the testimony of a single defense witness, Dessie Hightower.
27. Hightower was also subjected to police pressure to change his story, including being subjected to a polygraph test during the course of six hours of questioning, after having told police that he saw a man flee the scene.
28. Hightower testified at trial that he saw a black male with dreadlocks flee the scene immediately after the shooting.
29. During the shooting, Hightower was in a parking lot just west of the corner of 13th and Locust St.
30. Looking out from behind a building just after hearing the shots, he saw a black male with dreadlocks running east on the south side of Locust Street, away from the shooting.
31. Hightower's testimony was favorable both in supporting the defense theory that the shooter fled, and also in raising an issue as to why the police had not pursued Hightower's statement (corroborated by several other witnesses) that a third man (the potential shooter) ran from the scene.
32. Law enforcement did not polygraph any other witness in connection with the Faulkner shooting.

33. In polygraphing Hightower, law enforcement never broached the pivotal issue - namely, the issue about the man seen running away from the scene - thus giving rise to the compelling inference that the polygraph was administered to intimidate this witness.

34. Det. Thomas - the detective in charge of the investigation - could not explain the decision to polygraph Hightower (a college accounting student with no criminal record) while not polygraphing such witnesses as Cynthia White, Robert Chobert and Albert Magilton, all of whom had significant criminal records.

35. The fact that Hightower underwent a polygraph examination was suppressed.<sup>7</sup>

#### F. Deborah Kordansky - Another Eyewitness To The Fleeing Man

35. Deborah Kordansky is a white woman who saw a man running eastward on Locust Street just after the shooting.

36. Kordansky did not testify at the trial because defense counsel did not locate her. Three reasons explain defense counsel's failure to locate this eyewitness: (1) defense counsel never made a genuine effort; (2) the prosecution redacted her address and phone number from her witness statement; and (3) the trial court refused to provide adequate funds for a defense investigator who could have devoted the time and effort to secure her attendance.

37. At the PCRA hearing, Kordansky explained that on the night of the shooting she lived at the St. James House at 13th and Walnut St., overlooking the scene of the shooting.

38. At about 3:45 to 4:00 a.m. Kordansky heard a noise she thought were firecrackers. When she looked out, she too saw a man running east on the south side of Locust Street - an observation that harmonized with the other eyewitness accounts.

39. Kordansky came down from her hotel room and promptly told police, in an effort to assist them in apprehending the fleeing perpetrator, that she had seen the man running on Locust Street.

10. During the defense phase of the trial, defense counsel advised the court that he wished to call Kordansky to testify. Although defense counsel was able to reach her by phone, Kordansky would not disclose her address. Defense counsel explained to the court that he wanted Kordansky's testimony but he was "not at all sure how I would go about securing the presence of the witness." Since she corroborated Dessie Hightower's report that someone fled east on Locust Street, defense counsel was clearly right to want to call her.

11. The defense's failure to call Kordansky was not a strategic or tactical decision by the defense. During the 1982 trial defense counsel told the court that, had he been given Kordansky's address before trial, he would have been able to interview her and "maintain some contact with the witness so I could have her in court."<sup>8</sup>

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<sup>7</sup> According to Hightower, police told him he "passed" the polygraph, although the testing officer claimed in 1995 that the results showed "deception." If police knew Hightower passed the test but falsified the results and ignored his account, it would establish the worst kind of due process violation. Knowing that Hightower passed the test would itself have affected the defense trial preparation. As things stood, attorney Jackson did not even interview Hightower before he took the stand.

<sup>8</sup> Defense counsel requested the court instruct the jury that she was unavailable due to the Commonwealth's refusal to provide her address and number before trial. But the court refused to do so.

### G. William Cook - Jamal's Brother

11. The jury never heard from Jamal's brother, William Cook. The defense attempted to present Cook at the 1995 PCRA hearing, and proffered that Cook would testify that he had a passenger in his car the night of the shooting, that this passenger was present when Officer Faulkner was shot, and that Jamal was innocent.

12. The defense also explained that Cook had not testified at the 1982 trial for fear of self-incrimination, and that since then he had been hiding and was reluctant to testify for fear that he would be arrested or otherwise harmed by police in retaliation for his appearance.

13. Cook was separately charged with assault on a police officer, and was advised by his attorney that injecting himself in Jamal's trial could risk a capital murder charge being lodged against him.

14. In the face of the PCRA court's refusal to provide Cook protection from arrest on outstanding bench warrants, Cook has again disappeared.

### **CLAIM THREE: JAMAL WAS FOUND GUILTY AND SENTENCED TO DEATH THROUGH THE USE OF A FABRICATED CONFESSION, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS**

10. Petitioner was deprived of his right to a fair and reliable determination of guilt and penalty, as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, because of the State's reliance on a fabricated confession and by the State's thwarting of defense efforts to expose that fabrication.

11. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

12. The prosecution presented evidence that Jamal exclaimed, while lying nearly unconscious on a hospital emergency room floor, that he had shot the deceased officer (referring to him as "motherfucker") and hoped that the officer ("the motherfucker") would die.

13. This evidence was concocted.

14. At the PCRA hearing, Jamal called Gary Wakshul to testify in order to establish that the confession was a concoction, and more importantly, that Wakshul's testimony at trial would have proven devastating to the prosecution's case.

15. Officer Wakshul and his partner stood guard over Jamal at the very time he purportedly confessed. If anyone was in a position to hear this confession - which was highly memorable, given its unrepentant crudeness - it was Wakshul and his partner, P.O. Stephen Trombetta. (A subpoena to call Trombetta as a witness at the PCRA hearing was quashed.)

16. Less than two hours after being relieved of his duty - during which time Jamal allegedly blurted out a highly memorable confession - Wakshul told investigating detectives that he was with Jamal the entire time and that Jamal had "made no comments." P.O. Trombetta never reported hearing a confession either.<sup>9</sup>

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<sup>9</sup> A doctor was present in the emergency room and did not hear the claimed confession. Instead, she saw an officer apparently kick Jamal and heard Jamal moan. Dr. Anthony Coletta treated Jamal within minutes of his arri-

16. Wakshul was fully capable of providing abundant details concerning the events surrounding Jamal's arrest during this first police interview on the morning of the shooting. Amidst these details, Wakshul reported: "We stayed with the male at Jefferson until we were relieved. During this time, the negro male made no comments." Wakshul signed this statement.

17. A week after reporting that Jamal "made no comments," Wakshul had yet another police interview in which he said nothing about any supposed confession.

18. This second interview concerned two subjects: Jamal's clothing and Officer Faulkner's missing camera. Like his earlier interview, Wakshul had no trouble recounting abundant details about these subjects. Specifically, Wakshul was able to report in this interview that at 3:54 a.m., he and his partner heard from radio dispatch that Faulkner had a "car stop" at 1234 Locust St.; pursuant to a request by Faulkner, Wakshul and his partner proceeded to the scene to offer back-up assistance; while en route, a civilian - described as a white male approximately 42 years old - stopped Wakshul's patrol car and reported that a police officer had been shot; the vehicle driven by the civilian was a "dark-colored auto, possibly a Ford, bearing New York license plates"; upon arriving at the scene, Wakshul observed Faulkner lying on the sidewalk, in a pool of blood, with a bullet wound to the face; Wakshul further observed that Jamal was on the curb, handcuffed, and apparently injured; and Wakshul recovered a Philadelphia press card from Jamal.

19. When the investigator in this second interview asked Wakshul if he had "anything you wish to add to this interview," Wakshul responded, not with any allusion to a confession, but with the declaration: "Nothing I can think of now." Again, Wakshul conceded at the PCRA hearing that he was not intending to withhold vital information, but had every incentive to disclose the existence of a confession, had any confession truly been uttered.

20. The jury never heard from Wakshul because the prosecutor told the court that he was on vacation and unavailable to testify at trial.

21. In fact, Wakshul, who was on vacation, was nevertheless in Philadelphia during the course of the trial, literally waiting at home to be called as a witness.

22. Wakshul's testimony would surely have marked the turning point in Jamal's trial. As the centerpiece to the defense attack upon the false confession claim, Wakshul's testimony would have shown that law enforcement, and the prosecution itself, was willing to use perjured testimony to secure a conviction.

23. Wakshul's testimony discredited the prosecution's confession evidence in other ways. Wakshul did not see P. O. Gary Bell (a man he knew well and easily recognized) among the police officers who were near Jamal at the time this alleged remark was made; nor did he see any hospital personnel in close proximity to Jamal, including hospital security personnel. This testimony was significant because Bell and hospital security guard Priscilla Durham testified that they heard Jamal's alleged confession.

24. On the other hand, Wakshul reported that his partner, Trombetta, was "near" Jamal at the time that this alleged remark was made, as were several other police officers. Yet Trombetta never reported hearing any remarks by Jamal.

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val. He found . Jamal to be "weak...on the verge of fainting...if you tried to stand him up, he would not have been able to stand."

25. In fact, not a single officer reported hearing Jamal's supposed confession when they were interviewed in the wake of the shooting.

26. Wakshul could have provided more to the defense. At the 1995 PCRA hearing, in a desperate attempt to help the prosecution, Wakshul averred that Jamal did in fact confess and that he failed to mention it in two earlier police interviews because he did not "realize its importance."

27. Wakshul's explanation for his failure to report the confession was so patently contrived and outrageously preposterous and offensive that it would have cast a pall over the prosecution's case as a whole. For that reason, his testimony at trial would have been devastatingly helpful to the defense.<sup>10</sup>

27. Wakshul, like the other law enforcement witness who testified concerning the confession, first disclosed hearing a confession sixty-four days after the shooting, immediately after the Philadelphia's Internal Affairs Bureau began its police brutality investigation based upon a complaint filed by Jamal.

28. Wakshul revealed at the PCRA hearing that police and the prosecutor worked to coordinate testimony in response to Jamal's police brutality charges. Law enforcement was outraged by the police brutality charges lodged by a man perceived to be the killer of a fellow police officer. This outrage prompted the decision to manufacture a confession.

29. According to Wakshul, in January or early February, 1982, there was a "round table prep meeting" between police officers charged with brutality and prosecutor McGill. At this "round table" meeting with the police officers, McGill raised the issue of whether Jamal might have made a confession, and asked the police officers to raise their hands if they had heard it, and Wakshul responded, for the first time, that he had.

30. Neither the fact of the meeting, nor the statements made there, were disclosed to the defense.<sup>11</sup>

30. At trial, the prosecutor told the court that Wakshul was unavailable to testify because he was away on vacation.

31. Based upon this representation by the prosecutor, who presumably was in a position to know of Wakshul's whereabouts, the court refused to order Wakshul's appearance or continue the trial to permit his testimony.

32. At the PCRA hearing, Wakshul established that he was in fact available to testify, had been ordered by superiors to remain available, and that the prosecution must have known this.

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<sup>10</sup> Wakshul's testimony at the PCRA hearing only bolstered this point. At the very outset of his hearing testimony, he acknowledged that a remark such as that attributed to Jamal was "stunning, carried tremendous "weight," and required no special police or legal training to recognize its importance. Moreover, Wakshul was a trained police officer who had experience in maintaining custody over a suspect. He also knew the importance of thorough and accurate police reports. Finally, Wakshul could not explain why it took sixty-four days to realize the importance of the alleged confession.

<sup>11</sup> At the PCRA hearing, the court precluded exploration of this area by quashing subpoenas of numerous police officers who presumably attended this preparation session.

33. As late as March or April, 1982, knowing Wakshul was the weak link in the prosecution's case, the Philadelphia Police Department engineered his supposed unavailability by approving a vacation for Wakshul which coincided with the presentation of the defense case.

34. However, Wakshul was advised by one, possibly two, individuals within the police department and/or the district attorney's office - and indeed, even possibly by McGill himself - to remain secretly available to testify at Jamal's trial should the prosecution need him.

35. Wakshul understood this instruction to mean that he should "stay around and [be] available in case we want to call you or you're called by someone, and see what transpired . . . and I did not go away on vacation, most of it was spent at home."

36. In fact, contrary to McGill's suggestion that Wakshul was entirely unavailable to testify, Wakshul was in Philadelphia "in compliance to a request to stay while cases were going on . . . ."

37. Wakshul testified he spent most of his vacation at home, and he could certainly have been reached by phone there. He finally felt free to leave the city only when the "testimony was over . . . [and] I had not been called and I figured I would not be needed. . . ."

**CLAIM FOUR: THE STATE DESTROYED CRITICAL PHYSICAL EVIDENCE, MANIPULATED AND MISREPRESENTED THE BALLISTICS AND MEDICAL EVIDENCE, AND SUPPRESSED CRIME SCENE TEST RESULTS, IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS**

38. The judgment of conviction and sentence of death was rendered in violation of Jamal's rights to a fair and reliable determination of guilt and penalty, as guaranteed by the Fifth, Eighth and Fourteenth Amendments, as a result of the State's destruction of important physical evidence, the State's manipulation and misrepresentation of ballistics and medical evidence, and the State's suppression of crime scene evidence.

39. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

40. At trial the prosecution relied heavily on the fact that Jamal's revolver was present at the scene as supposed evidence of guilt.

41. In reality, the ballistics evidence is entirely consistent with Jamal's claim that he did not fire his gun that night.

42. The prosecution's ballistics evidence did not even establish that the gun was fired, much less that Jamal fired it. When law enforcement arrives at a crime scene within minutes of a police shooting, it is a matter of routine for officers and crime scene detectives to examine all firearms for recent firing and to test a suspect's hands for gunpowder residue. The circumstances here leave no doubt that such tests must have been performed in this case. Yet, rather than reveal the negative findings concerning the firing of a gun attributed to Jamal, and the negative findings concerning gunpowder residue on Jamal's hands, body or clothing, law enforcement falsely claimed that none of these elementary tests were performed.

43. The prosecution's own expert admitted that neither the bullet from Faulkner's head wound nor the bullet recovered at the scene could be matched to Jamal's gun.

44. The Medical Examiner wrote on the first page of his report: "shot by .44 cal," - which would rule out Jamal's .38 caliber gun. This fact was never presented to the jury because of counsel's failure.

45. Moreover, law enforcement discarded a crucial bullet fragment found in the slain officer's head wound. The Medical Examiner measured this discarded fragment and reported this information in his post-mortem report. All the experts acknowledged such a fragment would normally be preserved, yet in this case the fragment vanished, not to be found in the prosecution evidence, unmentioned in the ballistics reports, and not presented at trial.

46. There was also a major contradiction in the ballistics report. At the PCRA hearing, it was established by Mr. Fassnacht, a firearms expert, that the State lab report noted that general rifling characteristics on the bullet specimen were unreadable, but then the report stated that a right-hand twist could be identified.

**CLAIM FIVE: THE COMMONWEALTH FAILED TO DISCLOSE GOVERNMENT POLITICAL SURVEILLANCE FILES DEMONSTRATING LONGSTANDING POLICE BIAS AGAINST JAMAL, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS**

47. Jamal's rights to fair and reliable determination of guilt and penalty, as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, were abridged by the State's failure to disclose police surveillance files of Jamal which would have substantiated Jamal's claim of bias in the investigation.

48. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

49. Law enforcement also failed to disclose evidence suggesting why police would manipulate, manufacture and suppress evidence to build a case against Jamal - for Jamal was well-known by law enforcement, as he was a highly visible critic of Philadelphia police brutality and was perceived to be allied with, if not a member of, the "Move" organization.

50. Bias in the investigation is deemed to be evidence which is materially favorable to the defense. Evidence that law enforcement had surveilled Jamal, particularly in the context of Philadelphia's highly-charged racial climate, provides the needed context to fully understand the motivation and the heightened desire to build a case against Jamal - even to the extent of using falsified evidence.

51. At the time of his arrest, Jamal was a young, prominent journalist and activist known as the "Voice of the Voiceless" for his trenchant reporting on racial issues in Philadelphia. He was perceived to be sympathetic to, if not a member of, the MOVE organization. In the late 1960's, as a teenage member of Philadelphia's Black Panther Party chapter, Jamal had been a target of police hostility, surveillance, and harassment - despite the fact that he engaged solely in constitutionally protected speech, writing, and activism, and had no criminal record prior to the instant charges.

52. The police awareness of Jamal continued as he became a renowned journalist in the late 1970's, especially because of his perceived support of the MOVE organization. In fact, in the summer of 1981 (just months before his arrest), Jamal attended the sentencing of nine MOVE members convicted of killing a member of the "stakeout unit" of the police department.

Members of the police department, including stakeout unit members who were among the first to arrive at the scene of P.O. Faulkner's shooting, attended that sentencing as well.

53. In 1980, Jamal was elected chair of the Philadelphia chapter of the Association of Black Journalists, and in January 1981 Philadelphia magazine touted him as one of the rising stars in Philadelphia.

54. Alphonse Giordano, the police inspector in charge at the crime scene (who resigned from the police force on the first business day after Jamal's trial and then pled guilty to federal corruption charges) knew Jamal through police surveillance of the Black Panther Party going back to the early 1970's.

55. Police withheld files showing that Jamal had been subjected to police surveillance because of his political activities.

56. At the PCRA hearing, Jamal presented over 600 pages of authenticated FBI files showing he was subjected to Philadelphia police surveillance since the late 1960's when, as a teenager, he helped to found the Philadelphia chapter of the Black Panther Party.

57. These FBI files establish that the Philadelphia police actively engaged in this surveillance and maintained their own files on Jamal.

58. The police files would show not only police bias, but also that despite constant surveillance, Jamal engaged in no criminal activity. In that respect, this evidence would have been relevant on the issue of mitigation in the penalty phase. (See Claim Twenty-two, *infra*)

**CLAIM SIX: PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS DUE TO DEFENSE COUNSEL'S PREJUDICIALLY DEFICIENT PERFORMANCE DURING THE GUILT PHASE**

59. Jamal was deprived of his right to a fair and reliable determination of guilt and penalty, and to the effective assistance of counsel, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, because of defense counsel's prejudicially deficient performance at the guilt phase - including, but not limited to, counsel's failure to obtain the critical assistance of a ballistics expert and pathologist; counsel's failure to obtain the complete services of an investigator; counsel's failure to serve as a zealous and minimally prepared advocate during trial; counsel's failure to investigate, prepare and present an affirmative defense of innocence; and counsel's failure to expose the flaws and vulnerabilities in the prosecution's case. These failings singly and cumulatively resulted in a total breakdown in the adversarial process, prejudicing petitioner's case.

60. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

**A. Jackson's Lack Of Experience In Capital Litigation And Recent Entry Into Criminal Practice**

10. Attorney Anthony Jackson (Jackson) was appointed by the Philadelphia Court of Common Pleas to represent Jamal on December 15, 1981, approximately one week after Jamal's

arrest. At the time, Jamal was recuperating in a hospital from a gunshot wound received at the scene of the incident in question.

11. At the time of Jackson's court appointment to represent Jamal, he had no prior capital litigation experience, had spent the most recent five years of his seven-year career in civil practice (apparently not even in trial litigation), and was in the midst of attempting to set up a solo private practice after having spent three years as a full-time administrator of a not-for-profit civil law office.

12. Jackson's nascent practice was undercapitalized and lacked a support staff. He shared an office and a secretary with another attorney. He was unable to formally open an office until three weeks after he accepted the appointment to represent Jamal.

13. Jackson was suspended from the practice of law at some point after Jamal's trial and before the PCRA proceedings.

14. Jackson knew or reasonably should have known that he was not prepared or able to undertake a case of this magnitude and complexity. Moreover, it was obvious that this case required more resources than Jackson could muster, especially in view of the contested scientific issues in the case.

15. When he testified during the PCRA hearing, some 13 years after the trial and at a time when he had been suspended from the practice of law, he could not recall if he had taken a capital case to the penalty phase before or after his appointment, opining that there might have been "one or two," but he could not "put it in time sequence." Since Pennsylvania did not restore the death penalty until 1978, while counsel was still employed full time in the public interest law office, it appears that Jamal's case was Jackson's first exposure to capital litigation.

16. The transition from being an administrator of a public interest office to being defense counsel in the most highly-charged capital case in the city of Philadelphia in over a quarter century caught Jackson unprepared professionally and financially. The task of handling this capital case, while simultaneously trying to launch his fledgling law practice by generating other clientele (which was time consuming), overwhelmed his ability to prepare adequately for trial. His inexperience, his lack of personal funds, and his unabashed lack of commitment to the case led to his failure to retain essential expert witnesses and led to the early loss of an investigator. As a result, favorable evidence - indeed, evidence pointing squarely to Jamal's innocence - never reached the jury; Jamal reasonably lost confidence in Jackson, resulting in a total breakdown in the attorney-client relationship; and the prosecution's vulnerable theory of the case was never genuinely tested within a truly adversarial process.

17. In short, Jackson's inexperience and inability to devote himself to Jamal's highly defensible case doomed the trial to a one-sided, untested version of events.

## B. Jackson's Deficient Performance During The Pretrial Phase

### 1. Initial Stages Of The Pretrial Phase

18. Jamal's case was evidently a low priority for Jackson. In his first scheduled court appearance, Jackson sought a continuance of the preliminary hearing because he had to go to Manhattan on an unrelated matter.

19. At the preliminary hearing on January 5, 1982, Jackson did not know such rudimentary facts as that Jamal's brother was a co-defendant; so obvious was Jackson's deficient performance, the court admonished him to "spend a little more time on the case."

20. The time that counsel allocated to Jamal's case during the first four months of his appointment was devoted only to filing of routine pretrial motions and attending routine court appearances. In Jackson's own words, there was "very little time to do very much else but to file all of these motions and argue the motions themselves."

21. There was one area where Jackson's efforts were acceptable; but even that instance later betrayed Jackson's virtual abandonment of Jamal's case. Jackson called two prominent citizens to testify at a bail hearing: State Senator Milton Street and State Representative David Richardson. They provided detailed testimony in regards to Jamal's positive character. Yet, Jackson was so thoroughly ill-prepared and overwhelmed, he never called any witnesses during the penalty phase of the trial. At the least, a minimally competent attorney would have called these two prominent citizens to testify in Jamal's behalf, as their power as witnesses had been amply proven.

## 2. Counsel's failure to obtain the services of experts and an investigator

22. Jackson failed to marshal the resources necessary for a meaningful defense at the trial. He proceeded to trial without the assistance of a pathologist, ballistics expert, and investigator, all of whom were crucial to the defense.

23. Counsel's failure to obtain the assistance of experts and an investigator resulted from his failure to make reasonable efforts to secure the necessary funding from the court.

24. At the time, the practice in Philadelphia, with respect to payment for professional services by experts and investigators in indigent capital cases, was for the court to set a base fee of \$150 per expert or investigator. After trial, counsel would submit an application to the court for payment of the rest of money owed to the retained expert and/or investigator. Under this system, defense counsel either convinced experts/investigators to provide their services and wait for payment after trial, or paid for their services and sought reimbursement as part of defense expenses after trial.

25. Realizing that he could not afford to front money to pay the experts pending reimbursement long after the conclusion of trial, and having no success in convincing experts to wait for payment, counsel appealed to the court on January 20, 1982, to authorize interim payments. The request was denied, but the court suggested that if he filed a memorandum of law supporting his need for interim payments, the court would reconsider the request. Jackson never seized the opportunity presented; he failed to file the motion.

26. Jackson let two months pass by. On March 18, 1982 - some 90 days after his appointment as petitioner's counsel - Jackson approached the court for funds to hire an investigator. As shown in the record, he was given the chance to secure additional funds through periodic submission of itemized bills.

THE COURT: ... What experts are you talking about?

MR. JACKSON: Well, I need an investigator.

THE COURT: You can give him his initial payment on one hundred and fifty dollars and let him submit an itemized bill and submit it with your pay petition.

MR. JACKSON: But again, Your Honor, I am back to the same problem....

THE COURT: If it's necessary, you can submit itemized bills from time to time.

MR. JACKSON: Would I submit them to you, Your Honor?

THE COURT: Before trial, yes.

MR. JACKSON: And that would be for each of the experts that I need additional funds for?

THE COURT: Yes, but you're going to have to justify them with itemized bills for the work done.

27. Jackson never took up the Court's suggestion to get the itemized bills if he wanted the court to approve additional money for an investigator and expert assistance. He returned empty-handed to court on April 1, but was again given an opportunity to deviate from normal practice and secure more money for expert services prior to trial.

THE COURT: Now on the increase in costs, I will sign an order granting the normal amounts that our policy allows. I'm leaving the question open, however, to this extent: if your experts give you an itemized bill, I will consider that [increase] at that point....If you hire an expert and he has to do extensive work, have him submit an itemized bill t that effect. And you can do that before trial.

MR. JACKSON: Okay, your Honor. But it hasn't worked thus far. I haven't been able to secure the experts that I need, sir, because of the money problem, I really haven't. There has been no expert that I can get, other than the investigator.

THE COURT: Go out an get your best expert and tell him to give you bills. You know, it you're going to have your eyes examined you would ask the doctor what he's going to charge you.

28. Four weeks later, Jackson had still not submitted billing estimates, nor had he retained any experts. On April 29th, Jackson returned to court and once again was given the chance to submit itemized bills for interim payments to experts.

MR. JACKSON: I have not been able to obtain a pathologist, Your Honor, for the fee you have indicated thus far. ...

If this court would insure the matter of payment, I believe that I might be able to se-cure one...

Would I be permitted to direct the pathologist to contact this Court in that respect? ...

29. The court again responded by instructing Jackson to get "an estimate as to what they need for the work and submit their bills to me with your pay petition also ... and do that pretty fast ... within a matter of hours after you give me the material I'll give you an answer."

30. Jackson never submitted the estimate. The PCRA court found that defense counsel "never requested funds for a pathologist before or during trial."

31. Confronted at the PCRA hearing with his numerous failures and missed opportunities to secure funding for needed experts and investigative assistance, Jackson was quite candid in his assessment of his own performance: "I was ineffective in getting money."

32. Jackson also revealed at the PCRA hearing his personal attitude toward the Philadelphia trial courts in regards to securing money. He felt that the whole process was a charade and efforts to secure funding was akin to playing a game which typically left the defense the loser. This attitude, whether warranted or simply a justification to masquerade his own frustrations and recognition that he had no business taking on the responsibilities of this case, explains Jackson's lackadaisical efforts to secure funding for necessary expert and investigative assistance.

### 3. Jackson's deficient pretrial preparation and Jamal's decision to proceed *pro se*

33. On May 13, 1982 (less than a month before trial), Jamal reluctantly decided to represent himself. This decision was to have huge repercussions on the trial proceedings. As discussed below and in Claim Eleven, *infra*, the trial court did not fully respect Jamal's right to proceed *pro se*, which led to Jackson being thrust unexpectedly into the lead role and Jamal being banished repeatedly from his own trial. The ripple effect of Jackson's lack of experience and commitment to Jamal's case during the pretrial phase was profound indeed.

34. Throughout the pretrial phase of the case, Jamal endeavored to assist Jackson in preparing a viable defense to charges he vigorously denied.

35. Jamal concluded that his life was in the hands of inadequate counsel on the day that Jackson unsuccessfully sought to have a second attorney assigned to the case because he was not, and could not be, prepared for trial. He cited commitments to "other trials ... [and] matters that are still outstanding" as the basis for seeking relief.

36. Jackson was forthright about his lack of preparation and lack of ability to meet the challenge of handling this capital case. Hearing Jackson announce in open court that he was in need of assistance and ill-equipped to handle this case, and fearing that matters were getting dangerously out of hand, Jamal reluctantly decided to assume control of his own defense. Jamal made it clear to the court that he had been willing to work closely with Jackson, but that Jackson's lack of commitment to his case had led to a total breakdown in his relationship with him.

37. Jackson was appointed as back-up counsel over his vehement protest. In the remaining few weeks leading up to trial, Jackson did absolutely nothing. On June 1, with trial less than one week away, Jamal complained to the court about "the lack of willingness on the part of Mr. Jackson to function in [the] role" of back-up counsel.

38. Based on the totality of the circumstances, including, but not limited to, Jamal's and trial counsel's representations, the trial court's observations, and trial counsel's previous deficient representation of Jamal, the trial court knew or reasonably should have known that during the time that Jackson was forced to remain as back-up - a period of five weeks - Jackson did nothing to represent Jamal or otherwise discharge his duties in that capacity. Jackson did not inquire of the trial court whether he was expected to do anything in preparation for trial.

39. With actual or constructive knowledge of Jackson's complete failure to undertake any steps to protect Jamal's interests during the interim that he was appointed as backup counsel, the trial court abruptly and unreasonably rescinded Jamal's *pro se* status on the day scheduled for the parties' opening statements, and ordered Jackson to proceed in Jamal's stead as his attorney. Under compulsion of the trial court's order, Jackson resumed his status as the attorney for Jamal, and ineffectively represented him throughout the remaining trial proceedings, and the formal imposition of the death sentence.

### C. Counsel's Failures At Trial

40. Thrust in the role of back-up counsel with the belief that Jamal would prepare for, and conduct, the trial proceedings for the defense, Jackson did nothing that a minimally prepared trial lawyer is expected to do to prepare for trial. He did not devise a trial strategy; did not interview witnesses; did not prepare examinations, opening remarks and voir dire topics; did not target evidentiary issues to research; did not subpoena witnesses; did not consult with his client; did not familiarize himself with the case file; did not consider avenues of attacking the prosecution's case; and did not assemble evidence to present to the jury that pointed squarely to Jamal's innocence.

41. Jackson's failure to do any meaningful work on Jamal's case, once he was appointed as back-up counsel, had the endorsement of the trial court. The trial court expressed the view that being back-up counsel "isn't a very difficult job. . . . It doesn't require too much to represent someone as back-up counsel."

42. Jackson, in essence, wrongly assumed that as back-up counsel, he was absolved of all obligations to prepare for trial (an erroneous assumption that was fostered by the trial court). This assumption proved catastrophic.

43. Thrust in the role of lead counsel at the time the prosecutor was to give his opening statement, Jackson was caught completely by surprise. Panicked, Jackson tried to convince the trial court and the Pennsylvania Supreme Court to relieve him of this unwanted burden. In the end, having failed to prepare even modestly for this capital trial, Jackson lurched forward in the litigation making life-and-death decisions serendipitously. Much of Jackson's actions in court were spontaneous reactions to events as they occurred, which is hardly the way a trial lawyer should handle a case.

44. Jackson's serendipitous, and wholly inadequate, approach to the trial - an approach colloquially known as "winging it" or "shooting from the hip" - was foreshadowed well before trial began.

45. The most obvious illustrations of Jackson's spur-of-the-moment decision-making rest with his decisions to call Wakshul and Kordansky as witnesses. These two important defense witnesses were sought to testify at the moment that Jackson needed them on the stand. He made no effort to secure their attendance before it came time to put them in the witness box. The result of Jackson's "winging it" approach was that these witnesses were never part of the evidentiary mix for the jury to consider.

46. At the preliminary hearing in January, 1982, the court admonished Jackson to devote more attention to the case, as Jackson's gaps in knowledge were transparent.

47. His pleas for allowance of a "second seater" at trial reflected his desperation.

48. His cynical, defeatist attitude toward the possibilities of securing expert and investigative services bespoke a broader dispirited attitude toward the case, which culminated in Jackson's unconscionable (and flawed) admission to Judge Sabo, in the midst of trial, that he saw no defense to the case.

49. Before trial commenced, Jackson informed the court that he was having a "problem" in organizing the "reams and reams of material" in Jamal's case. He frankly acknowledged: "I have . . . some reservation as to whether or not I can properly be prepared."

50. At the post-conviction hearing, Jackson candidly acknowledged, "I didn't do any investigation in this case."

51. Nor did trial counsel interview any witnesses, including those he put on the stand.

52. Jackson recklessly examined two pivotal defense witnesses - Dessie Hightower and Veronica Jones - without talking to them beforehand.

53. In one instance, while questioning Veronica Jones, the trial court asked Jackson "where are you going?" Jackson, stunned by Jones's retraction of seeing two men flee the scene, admitted that he "never talked to her before." The trial court then advised Jackson to take a recess and "take her outside and talk to her and interview her."

54. Jackson's practice of calling defense witnesses without first interviewing them extended to numerous other witnesses, including Dr. Anthony Colletta (Jamal's treating physician) and character witnesses, such as Sonia Sanchez who was subjected to a harsh cross-examination that Jackson could have foreseen if he had interviewed her prior to her testifying.

55. Jackson's failure to prepare witnesses brought an admonishment from the trial court that the State would be allowed to enter into proscribed lines of questioning of defense witnesses if counsel negligently "opened the door" for the solicitation of such questions in direct examination.

56. In the post-conviction hearing, Jackson acknowledged that he had not reviewed the medical examiner's report which contained a notation indicating that the bullet that killed Officer Faulkner came from a .44 caliber gun, even though his client was charged with killing the officer with a .38 caliber gun.

57. Jackson apparently never reviewed the medical examiner's report because he lost it. The record reveals that the loss of discovery material in Jamal's case was a persistent problem. On April 29, 1982, approximately a month before trial, the district attorney was alerted to the fact that Jackson had "misplaced a few statements and some photographs." On June 29, 1982, in the midst of the defense case, Jackson sought out the district attorney again for additional "statements in reference to witnesses" which he had lost.

58. Jackson was quite blunt in his assessment of the state of the defense: "No money, no investigation, no experts, no prior preparation of witnesses." His failings, singly and cumulatively, had a substantial and injurious effect and influence on the jury's determination of the guilt and penalty phase verdicts. Critically, viable attacks upon each aspect of the State's case - the confession, eyewitnesses, and physical evidence - were never made. Had the State's case been subjected to meaningful adversarial testing, there is a reasonable - indeed, compelling - likelihood that the outcome would have been different.

1. Counsel's failure to obtain experts resulted in the jury having a distorted view of the physical evidence in the case

a. The prejudice caused by failing to obtain a pathologist

59. After reviewing the medical evidence in petitioner's case, John Hayes, M.D., an associate medical examiner from New York City, testified at the PCRA hearing that the defense would have been well-served by the assistance of a forensic pathologist at trial. Critically, the testimony of a forensic pathologist would have shattered the credibility of the prosecution's star witness against Jamal and debunked non-expert testimony solicited by the prosecution to explain a glaring discrepancy in the physical evidence.

60. The prosecution's chief witness, Cynthia White, testified that Jamal's wound was caused by a falling Officer Faulkner who fired a shot upward toward a standing Jamal. White's testimony was crucial to the State because only she, of all the eyewitnesses, claimed to have seen the critical moment when Jamal supposedly shot Officer Faulkner. Dr. Hayes testified that her account of the shooting was medically impossible since the course of the bullet trajectory through Jamal's body was angled sharply downward.

61. Apparently, the prosecution knew that White's account was highly problematic. In an effort to make sense of her story, the prosecution questioned on cross examination Jamal's non-expert medical witness, Dr. Colletta, getting him to speculate that the path of the bullet might have been altered by a ricochet off one of Jamal's ribs, causing it to tumble in a downward direction. This speculation (which should not have been permitted under the Frye test) could easily have been shown, through the testimony of a competent pathologist, to have no valid basis in the evidence. Dr. Hayes testified that there was no indication of any damage to a rib, and thus no medical support for the speculation concerning a ricochet or tumble.

62. Without a defense pathologist, the jury was left only with this specious speculation and likely regarded it as a competent expert opinion.

b. The prejudice caused by failing to obtain a ballistics expert

63. After reviewing the ballistics evidence in the petitioner's case, George Fassnacht, a firearms expert, testified at the PCRA hearing that the assistance of a ballistics expert "very well could have affected the outcome of the trial." The cornerstone of the State's physical evidence was Jamal's gun, found at the crime scene, which the State argued was the murder weapon. The only physical evidence proffered in support of this argument were the general rifling characteristics of the bullet removed from Officer Faulkner.

64. At trial, the State's firearms expert testified that the general rifling characteristics of that bullet had a "right-hand direction of twist" consistent with Charter Arms revolvers, the make of firearm owned by the petitioner. Further, the State's expert testified that Charter Arms revolvers created eight lands and grooves on bullets fired from them, and connected this information to the bullet removed from Officer Faulkner.

65. Fassnacht testified that if the defense had obtained a ballistic's expert, the testimony of the State's expert could have been discredited by the internal contradictions of his findings in his own report. Fassnacht testified that the police ballistics report stated that the bullet's general

rifling characteristics were "indeterminable" but "then in the next breath and the same line it gave one of the general rifling characteristics as being right-hand direction of twist."

66. A ballistics expert called by the defense could have established for the jury that not only was there no support in the record for the State expert's testimony about lands and groves, but the record also contradicted the State's expert's testimony that a "right hand direction of twist" was characteristic of the bullet removed from Officer Faulkner. Further, a ballistics expert could have clarified for the jury that a right hand direction of twist is a characteristic of half the firearms sold in the country.

67. Fassnacht also testified that he found it remarkable that the police claimed not to have conducted other simple "crime scene" tests to determine whether Jamal's gun had been fired and whether Jamal had fired it. Fassnacht testified that, in his opinion, these were strange and curious omissions in a first degree murder case involving the shooting death of a police officer, and should have been placed before the jury by a qualified firearms expert. The import of this testimony would be that law enforcement was suppressing key evidence that virtually exonerated Jamal (a claim that should have been considered in tandem with the evidence concerning the fabricated confession).

## 2. Counsel's failure to retain an investigator resulted in the jury having a distorted view of the eyewitness accounts

68. An investigator's services were crucial in this case. The shooting took place in the midst of Philadelphia's downtown red-light district as bars were letting out. The street was relatively crowded and frequented by transients. Although the police interviewed numerous witnesses, no discovery was provided until March 1, 1982, almost three months after the shooting, and the witness statements disclosed were redacted to remove the witnesses' addresses and telephone numbers.

69. With no investigator, Jackson was totally dependent upon the prosecution for access to the witnesses. When Jackson requested access from the prosecutor, he was told that the witnesses did not want to speak with him, did not want to testify, or they would be harmful to the defense.

70. At the PCRA hearing, Robert Greer testified that he had been initially retained by counsel to work on Jamal's case, but had to stop his work after billing 22.5 hours because of lack of payment. Greer had 35 years of experience in law enforcement and worked for some of the best trial lawyers in Philadelphia. Of the 60-70 witness interviews the police had ostensibly conducted, he was only able to locate and interview just two persons before he left the case. These persons were the only individuals whose addresses the prosecution had inadvertently failed to remove from their statements - a practice followed with respect to all other witnesses and which Greer had never before seen. Greer testified that, in his opinion, all of these potential witnesses should have been interviewed, especially the 13-15 civilian witnesses who had information about the case. If given the time and resources, Greer was confident that he could have found them.

71. Because Greer was unable to complete his investigation, four other witnesses to a fleeing third person - William Singletary, Deborah Kordansky, Robert Chobert, Veronica Jones - were either not called or not properly presented.

72. William Singletary testified at the PCRA hearing that not only did he see someone flee in the direction of the alleyway, but that this person shot Officer Faulkner. He further would have testified that Cynthia White, the State's only eyewitness who claimed to have seen Jamal pull the trigger, was nowhere near the crime scene, and actually came up to him after the shooting to find out what had happened.

73. Deborah Kordansky testified at the PCRA hearing that she saw a man running eastward on the south side of Locust Street just after the shooting. Her testimony would have corroborated that of Dessie Hightower, the only defense eyewitness at trial, who also observed a person running east immediately after the shooting. When Jackson tried to secure her attendance at the moment he wanted her on the stand (a reflection of Jackson's serendipitous approach to the trial), he told the trial court that he could not retrieve her because he had no money to pay an investigator to assist him.

74. Robert Chobert also told police in his initial interview after the shooting that he too had observed a black male flee eastward. A prompt interview by Greer would have locked-in Chobert's on-the-scene account of the fleeing man, thus making it more difficult for Chobert to retreat from his initial police statement. An adequate investigation into Chobert's DWI convictions and suspension of his commercial driving license would also have shown the jury why he had an interest in retracting his initial police statement concerning the fleeing man. At minimum (assuming that Chobert's retraction was truthful), an investigative interview would have alerted the defense in advance to this revised account.

75. Veronica Jones told interviewing detectives that she saw two black males "jogging" away from the scene shortly after the shooting. Like Chobert, she retracted her testimony at trial due to police pressure. As with Chobert, an investigative interview would have further "locked-in" her initial police interview statement. At the least, an adequate investigation would have alerted Jackson to the possibility of Jones altering her testimony in light of her trouble with the law at the commencement of trial. Armed with this information, the defense could have properly cross-examined Jones and shown the jury why her initial statement to the police was more believable.

76. Moreover, because Greer's investigation was cut short on account of counsel's failure to secure funds for his services, Arnold Howard and actual physical evidence of a third person linked to Officer Faulkner's shooting was never brought to the jury's attention.

77. Howard testified at the PCRA hearing that he was interviewed by police after his driver's license application was found on the slain officer. He explained that he had given it to Kenneth Freeman who operated a vending stand with William Cook. Had Greer obtained this information from Howard, the defense could have evaluated William Cook's importance in a whole new light. Without Howard's information and physical documentation of a third person at the scene, Cook's value as a witness was minimal on account of his obvious bias toward the defense as the brother of the defendant. But had Greer obtained a statement from Howard, the defense would have sought from Cook the full details of Cook's relationship with Freeman, thus enhancing his value as a witness beyond the mere self-serving claim that Jamal did not shoot Faulkner. The upshot is that this array of evidence (rather than the mere assertion of innocence by one person with a close familial bond with the defendant) would have led to the conclusion that Freeman was at the scene at the time of the shooting and was nowhere to be found once the police arrived.

3. Counsel's failure to prepare for trial resulted in the jury not hearing highly favorable evidence to the defense, but being exposed to evidence that was deeply prejudicial

78. In failing to prepare for trial, Jackson counsel's performance proved to be prejudicial to his client in every conceivable way.

79. Probably the starkest illustration of Jackson "winging it" through the trial is his failure to secure the attendance of P.O. Gary Wakshul - the officer who was in a position to hear Jamal confess, but reported that he had "made no comments" - or his partner (P.O. Stephen Trombetta), who also never reported hearing a confession and yet was in a position to hear remarks by Jamal. Because he failed to subpoena and produce Wakshul and Trombetta, the jury never learned how the "confession" first surfaced two months after the shooting when Jamal decided to sue the police for brutalizing him on the night of arrest. Critically, the jury never learned how, in his first two interviews, prior to Jamal bringing suit, Wakshul had reported that Jamal was silent.

80. Perhaps most importantly, the failure to call Wakshul deprived the defense of exposing how utterly absurd the confession evidence really was, as Wakshul actually justified his belated disclosure of hearing a confession (64 days after it was allegedly made) with the outrageously absurd excuse that he had no idea of its importance until he was asked directly about it. That patently perjurious excuse for not telling investigators about a highly memorable confession would have marked a critical turning point in the trial, as it would have caused the jury to view the prosecution with a particularly jaundiced eye.

81. Moreover, Jackson knew or should have known that the State's medical examiner's report indicated that the bullet removed from P.O. Faulkner was .44 caliber, and that a fragment of the bullet had disappeared. Jackson could have used the State's own pathology report to directly challenge the prosecution's theory, with devastating effect, that Jamal's .38 caliber revolver was the murder weapon. At minimum, cross-examination would have caused the jury to question the reliability of the dubious scientific underpinnings to the prosecution's case.

82. Jackson never launched the necessary attack on witness Chobert's credibility by showing his motive to favor the prosecution. Although the prosecution suppressed its own secret favors to this witness, Jackson could have questioned Chobert on his parole status to establish bias. But Jackson failed to offer that evidentiary basis, resulting in the trial court precluding counsel from engaging in cross-examination of Chobert's criminal status

83. Jackson also failed to secure the attendance of eyewitness Deborah Kordansky whose testimony would have corroborated Dessie Hightower's testimony of a black male running east on Locust Street after the shooting occurred.

84. Moreover, his failure to prepare character witness Sonia Sanchez led to prejudicial information coming out in trial that could have been avoided. The prosecutor was allowed to cross examine Sanchez about her preface to a book written on Assata Shakur, a former member of the Black Liberation Army and fugitive convicted of killing a state trooper in New Jersey.

85. Similarly, Jackson's failure to prepare defense witness Dr. Anthony Colletta allowed for the State to use Colletta in cross examination to usher forth a theory explaining the downward trajectory of the bullet through Jamal's body - and thereby illegitimately restoring the credibility of the State's star witness, Cynthia White, in the process.

86. Jackson unreasonably failed to object to the prosecution's blatantly prejudicial comments made during summation at the guilt phase of petitioner's trial. Trial counsel's constitutionally deficient and prejudicial representation in this regard includes, but is not limited to, the following:

a) At the guilt phase summation, counsel unreasonably failed to object to (1) scornful remarks aimed at Jamal's protestations over the deprivation of his *pro se* rights; (2) improper vouching for the credibility of a prosecution witnesses; and (3) inflammatory statements made to the jury to induce them to see this particular case as a referendum on fighting crime generally, as this case was part of an effort to thwart the siege of criminality in our urban neighborhoods, and that, therefore, the community expected and demanded a conviction.

b) Trial counsel failed to ask the court to instruct the jury to disregard each of these deeply prejudicial comments.

c) Trial counsel's failings had a substantial and injurious effect and influence on the jury's verdict. But for counsel's unreasonable conduct, the jury would have reached more favorable results at the guilt phase of petitioner's trial.

87. Trial counsel unreasonably failed to ensure the empaneling of a fair and impartial jury. Trial counsel's constitutionally deficient performance in this regard includes, but is not limited to, the following:

a) Trial counsel failed to make an adequate record of the prosecution's racially-motivated use of peremptory challenges to remove African Americans from serving on petitioner's jury.

b) Trial counsel failed to use either a cause or an available peremptory challenge to remove Domenic Durso when counsel knew that this juror had as a friend a police officer who had been shot in the line of duty and was still receiving disability payments as a result.

c) Trial counsel failed to use either a cause or an available peremptory challenge to remove alternate juror Kleiner, who was then married to a Philadelphia police officer with two young children living at home.

d) When the trial court struck black juror Jeannie Dawley in chambers - the only juror selected during the period when Jamal was representing himself *pro se* - trial counsel failed to insist that Jamal be advised of the court's intentions or to object adequately to the court's action. This juror was replaced by alternate juror Michael Courchain who showed hostility to trial counsel during *voir dire* and admitted he could not be fair to both sides.

e) As a result of trial counsel's constitutionally deficient representation, the jury that decided petitioner's guilt and sentence included individuals who were unable to render impartial and fair verdicts.

#### E. Conclusion

88. Counsel had no tactical or strategic reason for the acts and omissions set forth above, nor could there have been any professionally adequate or reasonable basis for counsel's conduct.

89. In the absence of any or all of counsel's failings set forth above, the jury would have reached a more favorable result at the guilt and/or penalty phases of petitioner's trial.

**CLAIM SEVEN: THE PROSECUTION'S CASE WAS NEVER PLACED WITHIN THE CRUCIBLE OF MEANINGFUL ADVERSARIAL TESTING DUE TO THE COURT-CREATED CONFLICT OF INTEREST BETWEEN COUNSEL AND CLIENT, THUS VIOLATING HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS**

90. Jamal's rights to due process right to present a meaningful defense, to counsel untainted by a conflict of interest, to effective assistance of counsel, and to a fair and reliable determination of guilt and sentence, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, were violated as a result of the unbridgeable rift between Jamal and his court-appointed counsel.

91. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

92. As noted in Claim Eleven, *infra*, Jamal decided reluctantly to proceed *pro se* after it became apparent that his court-appointed counsel was floundering. Jamal had heretofore endeavored to work collaboratively with Jackson, but became concerned that his life was in jeopardy if the case remained in Jackson's hands. The court granted the *pro se* request, and immediately appointed Jackson to serve as backup counsel. Jackson's desperate plea to withdraw from the case, and his vocal objection to assuming the role of back-up counsel, had a devastating effect on the relationship between him and Jamal.

93. Jackson initially told the court, "I would refuse to be backup counsel." He made it clear that he would not perform this role even "[i]f that requires my incarceration." When Jamal protested that Jackson had made it clear he was not in a position to help him as back-up counsel, the court disagreed, noting that Jackson never made such a representation. Jackson immediately interjected, stating unambiguously on the record that he was unwilling to provide assistance.

94. When the court noted that backup assistance was important to protecting the rights of the defendant, Jackson responded: "I am not concerned right now, for the sake of discussion with Mr. Jamal's rights. Mr. Jamal has his rights. I am talking about my rights. I have a right to pick and choose which appointments I will provide to the Court." Jackson thus made it clear that he was placing his own interests (his own "rights") above that of Jamal's. This conflict of interest was never resolved by the trial court, and the reverberations from that failure by the trial court were felt throughout the trial (most notably in the ensuing decision by the trial court to banish Jamal from much of the trial proceedings).

95. After hearing that Jackson was focusing on his own "rights," Jamal expressed his reservations to the Court: "My point is that if I have a court appointed counsel assigned as backup counsel, who has express[ed] his inability to function in that role, then our relationship is compromised. My ability to depend on his resources is compromised."

96. While no heed was paid to this serious rift between counsel and client during the trial phase of the case (at a time when something meaningful could have been done to remedy the problem), the state courts responded to the problem after Jamal's conviction and death sentence. After the damage had been done (insofar as Jamal was convicted and sentenced to death after a woeful defense presented by Jackson), Jackson filed a petition with the Pennsylvania Supreme Court of this State requesting permission to withdraw as counsel. Jackson cited as the reason for his need to withdraw Jamal's allegation of ineffective assistance of counsel which "present[ed] a clear conflict of interest . . . ." Jackson also alerted the Pennsylvania Supreme Court to the fact that "during the trial and at every stage thereafter [Jamal] has been uncooperative with counsel." The Pennsylvania Supreme Court granted Jackson's application.

97. This same "conflict of interest" highlighted by Jackson in this post-judgment petition existed in the midst of trial, due to the deep and irreconcilable conflicts between Jamal and Jackson. Consequently, Jamal was never afforded constitutionally adequate counsel for his trial.

98. The rift between attorney Jackson and client Jamal was unbridgeable, and Jackson so stated to the trial court in the early stages of the trial proceeding (June 17th). The trial court recognized Jackson's difficulties with Jamal, telling him: "I realize your problem with Mr. Jamal."

99. Jackson repeatedly urged the court to permit him to withdraw as counsel, noting Jamal's adamant desire to represent himself, his refusal to cooperate with - and indeed, even to talk to - Jackson, and the constant fighting between the two - - all of which arose from the fact that Jamal became concerned over Jackson's failure to represent him adequately.

100. Jackson was so disheartened with the prospect of defending Jamal he told the trial court, in an in camera conference on June 18th: "I don't think there is any defense." Jackson never realized, due to his lack of dedication to the case, that the prosecution's theory of the case was highly vulnerable to attack and that the defense theory of case was supported by a compelling array of evidence.

101. Jackson, in urging the court to permit him to withdraw, argued that he did not have "the cooperation of [Jamal]" and that "to force me to remain in this situation where Mr. Jamal has said in no uncertain terms that he doesn't want me puts me in a position of trying to force advice on someone who doesn't want that advice." Jackson bluntly, and accurately, remarked: "[Jamal] has no faith in anything I say."

102. Although confronted with Jamal's demands to remove Jackson as counsel and to reinstate himself as *pro se* counsel, the court refused to deal meaningfully with the matter. Rather than probe into the underlying difficulties and determine with conscientious concern whether Jamal's rights were being protected, the court resorted immediately to threats - threats which escalated to the actual removal of Jamal from significant portions of the trial.

103. As a result, the court stripped Jamal of his right to be present at his own capital trial. Simultaneously, the court forced Jamal's ill-prepared counsel to provide constitutionally inadequate assistance.

104. Jackson made it clear to the court that Jamal and he were constantly fighting during the times when the court was not in session. He described how Jamal's trial strategy differed markedly from his own. He also told the court that Jamal refused to participate on the terms set by the court; that is, Jamal refused to consult with, and assist, attorney Jackson.

105. This utter breakdown in the attorney-client relationship - which was brought about by the court's unwillingness to permit Jamal to proceed *pro se* - tainted the entire trial. Jackson's performance during the trial revealed lack of preparation, poor exercise of judgment, and an overall inability to place the prosecution's case within the crucible of meaningful adversarial testing.

**CLAIM EIGHT: THE TRIAL COURT DENIED JAMAL THE ABILITY TO DEFEND HIMSELF BY DENYING MEANINGFUL ACCESS TO NECESSARY SERVICES OF**

## **EXPERTS AND AN INVESTIGATOR, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS**

106. Jamal's rights to confront the evidence against him, and to a fair and reliable determination of his guilt and penalty, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, were violated by the trial court's refusal to disburse sufficient funds to the defense for the assistance of necessary experts and an investigator.

107. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

108. Jackson was denied sufficient pretrial funding by the court for the following needed services: (1) a pathologist (to show that the prosecution's key eyewitness account was impossible), (2) a ballistics expert (to show that Jamal and his gun could not be connected to the shooting), and (3) an investigator (to locate favorable witnesses and expose the prosecution's manipulation of witnesses). As a result, the prosecution gave the jury an unchallenged and misleading impression that the physical evidence pointed to Jamal's guilt.

109. In reality, there simply was no ballistics evidence that Jamal or his gun was involved in the shooting. Nor was there an expert medical opinion to explain the wound received by Jamal. The defense did not muster the necessary attack on these fronts because the Commonwealth withheld, destroyed, lost or failed to collect key evidence. The defense was further hampered in presenting its case because the trial court denied the defense sufficient funds to retain its own experts. The Philadelphia Court of Common Pleas has been notorious for its refusal to permit adequate defense funds in capital cases.

110. At Jamal's PCRA hearing, forensics expert George Fassnacht explained that he stopped taking court-appointments in Philadelphia because in his experience the Philadelphia courts "either wouldn't pay sufficiently, would arbitrarily slash the bill in half, or make you wait one, two years for payment." In Fassnacht's words, the payment rules and practices in the early 1980's were "arbitrary and capricious."

111. For the same reasons, private investigator Robert Greer withdrew his assistance from the defense.

112. At one point during the pretrial phase of the case, the court told Jackson: "Tell them (the sought-after experts and investigator) point-blank they are not going to get money in advance. You handle your case as you see fit."

### A. Ballistics Expert

113. The prosecution's own expert admitted that neither the bullet from Faulkner's head wound nor the bullet recovered at the scene could be matched to Mr. Jamal's gun.

114. A defense ballistics expert would have shown that police ballistics tests were suspiciously incomplete, meaning either that standard tests were not performed or results favorable to Jamal were suppressed.

115. Moreover, the Commonwealth lost a crucial bullet fragment found in the slain officer's head wound. Medical Examiner Paul Hoyer measured the fragment in his post-mortem report.

116. Although all the experts acknowledged such a fragment would normally be preserved, it vanished without any trace in the ballistics reports, nor was it presented at trial. The mysterious missing fragment impaired the ability to determine the caliber of the bullet. Moreover, at the time of the autopsy, Hoyer wrote on his findings of the Medical Examiner: "shot by .44 cal," - ruling out Jamal's .38 caliber gun.

117. Ballistics expert George Fassnacht testified at the PCRA hearing and confirmed that the defense needed a ballistics expert to conduct tests, testify, and assist at counsel table during the trial. Fassnacht's expertise in ballistics and firearms forensics was stipulated.

118. In 1982, defense attorney Jackson had requested Fassnacht to assist in preparing for the trial in this case.

119. However, Fassnacht did not examine the police ballistics reports, did not examine the physical ballistics evidence, did not prepare any written report, and did not testify. The reason: defense counsel was unable to obtain prior court approval for his fees.

120. In 1994, Fassnacht was contacted by the defense and for the first time reviewed the police ballistics reports as well as the 1982 trial testimony of prosecution experts.

121. The purpose of this review was to determine whether there was forensic work which should have been performed on behalf of the defense that was not accomplished at the time of the trial.

122. In Fassnacht's opinion, a defense expert "very well could have affected the outcome of the trial."

123. Indeed, a defense ballistics expert would have cast doubt that Jamal's gun had been fired at all that night.

## B. Medical Expert

124. In 1982 the defense attempted to obtain the expert services of a pathologist. Jamal petitioned the court for funds to hire a pathologist and the court awarded a paltry \$150 for that purpose.

125. Defense counsel contacted five or six pathologists, but none would perform those services for \$150. Jackson was both unwilling and unable to pay a pathologist (or any other expert) with his own funds, even with the prospect of being reimbursed later.

126. A medical expert agreed to review the written medical reports and discussed them in a phone conversation with Jackson, but that expert did not examine any of the physical evidence.

127. With no funds, the defense went to trial without a pathologist.

128. A defense pathologist would have provided crucial assistance in refuting the prosecution's scenario of the shooting and undermining the reliability of the autopsy report.

129. The prosecution theorized that the officer had shot Jamal while falling after having been hit by a bullet.

130. But this theory was physically impossible, because Jamal's wound angled steeply downward through his torso.

131. To overcome this undeniable physical fact, the prosecution presented a hypothesis that the bullet somehow "ricocheted" and "tumbled" within Jamal's body. This hypothesis was based on testimony from Jamal's treating physician who acknowledged having absolutely no expertise in forensics and was "not qualified to speculate" about the angle of the shot or the trajectory of the bullet.

132. A defense pathologist would have refuted the prosecution's "upward trajectory" theory (rooted in the testimony of Cynthia White), and its explanation of a so-called "ricochet." Dr. John Hayes, M. D., a New York associate city medical examiner and expert forensic pathologist, testified for Jamal at the PCRA hearing.

133. In Dr. Hayes' expert opinion, if Jamal was standing upright when shot, the gunshot had to be angled down. Jamal thus could not have been shot by the falling officer as Cynthia White claimed. Further, there simply is no medical evidence of any ricochet.

134. This evidence would have completely devastated White's testimony, leaving the prosecution with the unenviable task of explaining why White proffered such a scenario in the first place. Moreover, had the trial court permitted the defense to elicit from witness Veronica Jones the evidence concerning police manipulation of White, the jury would have before it a vivid portrait of an investigation that was, to put it most charitably, deeply flawed.

135. Dismissing this testimony, the PCRA court denied the prosecution had even presented the theory that Jamal was shot by a falling officer. That stands in flat contradiction to the PCRA court's own finding that "[a]s Officer Faulkner was falling in front of the defendant, he returned fire, striking petitioner in the chest." [12]<sup>12</sup>

135. A defense pathologist also could easily have discredited the autopsy.

136. The autopsy failed to report a second wound on the officer's neck. The medical examiner, Dr. Hoyer, admitted there was, in fact, a second exit wound which he failed to describe in the autopsy report. Because of Hoyer's failure to describe the wound, there is no way to tell if it is a second bullet wound, much less an entry or exit wound.

137. Dr. Hayes also pointed out that Hoyer mistakenly reported that the officer's back wound was a contributing cause of death.

138. These suspicious errors and omissions in the autopsy undermine the reliability of the autopsy and thereby taint any inculpatory conclusions which might be drawn from it.

139. At the PCRA hearing, the court cut off inquiry into these irregularities. When counsel urged that a competent autopsy could assist in establishing the relative positioning of the shooter and the fallen officer, the PCRA court wrongly, and naively, insisted an autopsy's only relevance is to establish cause of death.

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<sup>12</sup> These contradictory findings exemplify how the PCRA court was willing take any and every position, regardless of fact or logic, to deny Jamal's claims.

### C. Defense Investigator

140. An investigator's services were crucial in this case for several reasons. The shooting took place in the midst of Philadelphia's downtown red light district as bars were letting out. The street was relatively crowded and frequented by transients. Although police interviewed numerous witnesses, no discovery was provided until March 1, 1982, almost three months after the event, and the witness statements disclosed were redacted to remove the witnesses' addresses and phone numbers.

141. Given the defense's limited resources, these witnesses were almost exclusively within the control of the police, and the defense was largely reliant on the District Attorney for access to witnesses.

142. Further, when defense counsel Jackson requested to speak to the witnesses, prosecutor McGill often stated that the witness did not want to be interviewed or would be harmful to the defense.

143. Jackson later found that these witnesses were actually willing to talk to him and were helpful to the defense case.

144. An investigator allied with the defense was necessary to locate, interview, and where necessary, subpoena witnesses. The record, as it presently stands, reveals that at minimum defense counsel should have located and interviewed the following witnesses: Kordansky, Singletary, Jones, and Howard. In one instance, Jackson stated in the midst of trial that he could not bring Kordansky into court because he had no money to pay an investigator. These witnesses all possessed vital information directly supporting the theory of defense that the actual shooter fled the scene. Moreover, these witnesses possessed information that contained leads to other evidence. Finally, the information that could have been acquired from these witnesses would have dramatically improved defense counsel's ability to cross-examine prosecution witnesses.

### **CLAIM NINE: THE COURT'S DENIAL OF A CONTINUANCE PRECLUDED JAMAL FROM PRESENTING CRITICAL DEFENSE EVIDENCE, IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS**

10. Jamal was denied his rights to a fair and reliable determination of guilt and penalty, as guaranteed by the Fifth, Eighth and Fourteenth Amendments, by the trial court's refusal to grant a continuance for the defense to call Officer Wakshul as a witness. (See Claim Three, *supra*)

11. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

12. Perhaps the most damaging evidence heard by the jury was Jamal's alleged confession, supposedly blurted out when he was brought into the hospital after being shot by Officer Faulkner.

13. This evidence was damaging in both the guilt and penalty phase. Even if the jury remained convinced of Jamal's guilt absent this evidence, its prejudicial impact on the sentencing of Jamal can only be characterized as devastating. Consequently, attacking this particular item of evidence was fundamental to any defense.

14. As noted in the discussion of Claim Three , *supra*, the defense sought to show, through the testimony of Wakshul, that Jamal never made a statement about the shooting, let alone "confessed" to the killing of Officer Faulkner.

15. Despite the obvious importance of Wakshul as a defense witness, the trial court refused to give the defense the opportunity to secure his attendance at the trial.

16. Indeed, the trial court justified the denial of a continuance to secure Wakshul's attendance on the outlandish ground that his testimony would not be beneficial to the defense.

17. Upon defense counsel's request to have Wakshul made available to the defense, the prosecutor announced: "He is not around. I am going to object to bringing this guy in. He is not around." As noted above in the discussion of Claim Three , *supra*, Wakshul was "around" to be produced as a witness.

18. Accepting the prosecutor's representation, the trial court stated that it was "not going to hold up this trial" to produce this witness. (In fact, the trial court - quite suspiciously - surmised that Wakshul was on "vacation" even before the prosecutor mentioned it). This insistence on adhering to a schedule, which itself is constitutionally illegitimate, smacks of bad faith, as the trial court willingly suspended trial proceedings to permit one juror to take a civil service exam. Moreover, it can hardly be said that the trial participants were proceeding sluggishly, as Judge Sabo conducted trial proceedings on a six-day work week schedule.

19. Repeated pleas to have the prosecutor ascertain if he was still in the city or had left the area went unheeded, with the court impatiently adding, "I am not going to go looking for anybody now."

20. The trial court should have been aware, if not in fact aware, that Wakshul was under orders by the prosecutor to be available for the trial. Yet, the court refused to inquire into the whereabouts of Wakshul. This refusal to inquire into Wakshul's availability and to grant a continuance to secure his attendance - efforts which would have proven successful, in view of the fact that Wakshul was in Philadelphia and available to testify - deprived Jamal of the opportunity to present absolutely vital evidence in his favor.

**CLAIM TEN: THE COURT IMPERMISSIBLY RESTRICTED THE ELICITATION OF MATERIAL EVIDENCE FAVORABLE TO THE DEFENSE, IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS**

21. Jamal was deprived of his rights to a fair and reliable determination of verdict and penalty, as well as his right to confront witnesses against him, as guaranteed by the Fifth, Eighth and Fourteen Amendments to the United States Constitution, by the trial court's illegitimate restrictions on the defense's elicitation of relevant evidence.

22. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

A. Restrictions On The Examination Of Veronica Jones

23. As shown in the discussion of Claim One, *supra*, the testimony of Cynthia White, a purported eyewitness, played a critical role in the prosecution's case. Just as the court undermined

Jamal's efforts to counter the prosecution's claim that he confessed, the court stripped him of the ability to show that witness White was unworthy of belief.

24. The defense called Veronica Jones to testify. Jones, like prosecution witness White, was a prostitute working in the area of the incident. Jones knew prosecution witness White as a fellow prostitute.

25. The defense attempted to elicit from Jones the fact that the police promised both Jones and White that if they testified for the prosecution against Jamal, they could ply their trade without police intrusion and harassment. Inducements were coupled with threats, according to Jones's trial testimony: "They [the police] were on me telling me I was in the area and I seen Mumia, you know, do it, you know, intentionally. They were trying to get me to say something that the other girl said. I couldn't do that."

26. This trial testimony regarding police promises and threats was stricken pursuant to the prosecution's objection.

27. The court gave no explanation for striking Jones's trial testimony relating to police inducements and threats, other than stating it was irrelevant. The court did not specify in what sense the testimony was irrelevant; this is especially troubling in the face of the defense's clear articulation that this testimony revealed in the prosecution's key eyewitness a bias and motive to fabricate.

28. This restriction on the ability of the defense to cast doubt on White's testimony should be viewed in tandem with the defense's inability to retain a pathologist. As shown in Claim Six , *supra*, a pathologist's testimony would have shown that White's supposed observation of the shooting was a physical impossibility, leaving the jury with no other conclusion but that she was lying. The pathologist's testimony, therefore, would have forced the prosecution to explain White's perjury; the testimony by Veronica Jones would have made that prosecutorial task impossible, as Jones's testimony reveals that White's perjury was the product of law enforcement manipulation.

#### B. Restrictions On The Examination Of Robert Chobert

29. As discussed in connection with Claim One and Two, *supra*, Chobert testified that he saw the shooting. He saw the incident allegedly from his taxicab which was parked one car length behind Faulkner's patrol car. Chobert heard a gunshot, looked up, and saw a large, heavy man standing over Faulkner. Chobert did not see Cynthia White at the scene.

30. The defense sought to present evidence that Chobert was still on probation for a felony conviction which he described at a sidebar: "I threw a bomb into a school . . . a Molotov cocktail . . . I got paid for doing it."

31. This evidence of Chobert's probationary status bore directly on his bias in favor of the prosecution, inasmuch as the threat of being adjudicated in violation of probation made him beholden to law enforcement.

32. The trial court disallowed inquiry into this area without adequate justification

**CLAIM ELEVEN: THE COURT UNCONSTITUTIONALLY STRIPPED JAMAL OF HIS RIGHT TO SELF-REPRESENTATION BY RULING THAT JAMAL HAD TO LET THE COURT OR BACK-UP COUNSEL CONDUCT VOIR DIRE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS**

33. Jamal's rights to self-representation, and to a fair and reliable determination of guilt and penalty, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, were violated by the trial court ruling that Jamal had to relinquish his participation in the *voir dire*, and let either the court or back-up counsel conduct *voir dire*.

34. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

35. On May 13, 1982, after his court-appointed lawyer admitted his lack of preparation to handle this case and expressed a desire to withdraw as counsel, Jamal sought, and was granted, permission to represent himself. The court, over Jamal's vigorous objection, appointed attorney Jackson as back-up counsel. Jackson also vehemently protested being placed in the role of back-up counsel, prompting the judge to reply, "You can fight that out with Mr. Jamal."

36. Jamal served as his own counsel in a suppression hearing, in which he queried fifteen witnesses and acquitted himself well as a *pro se* advocate. Jamal also served as counsel during the first two days of jury selection, without incident. He questioned 23 *venire* members, successfully challenging two for cause, defeating a government challenge for cause, and exercising two peremptory challenges.

37. At the start of the third day of *voir dire*, with forty percent of the panel questioned, the court precipitously ruled, over objection, that Jamal had to turn *voir dire* over to back-up counsel, or the court would conduct *voir dire*. The court's decision was based upon the complaints of the prosecutor that the pace of the *voir dire* was too slow, and that Jamal's status as a defendant in a high-profile murder case was unsettling to the *venire* members.

38. Jamal objected that his right to self-representation was being abridged. Back-up counsel argued that prospective jurors' discomfort was not grounds for ending Jamal's participation in *voir dire*, noting "that in all homicide cases, particularly in capital case, . . . jurors express some apprehension, some unsettlement, some fear with regard to the whole process."

39. With respect to the prosecution's complaint that the *voir dire* was taking too long, back-up counsel noted that at no time was Jamal "chastised or disciplined in any way for any obstruction" of the *voir dire* process. Back-up counsel reminded the trial judge, "The last case I had before you, it took us nine days to select a jury and it certainly didn't have as much publicity as this case." He also noted another trial where "it took five weeks to select a jury."

40. Faced with the prospect of a court-conducted *voir dire*, Jamal opted for back-up counsel to take over the questioning of the panel. Back-up counsel stated for the record that Jamal was coerced into relinquishing control of the case, and that this occurred "without any prior warning."

41. Jamal's right to proceed as his own counsel was eviscerated by the court's decision to ban him from conducting his own *voir dire*. Specifically, his constitutional right to proceed on his own behalf was violated in four respects.

42. First, the jury's impression of who actually was conducting the defense was irreversibly tainted by the court's actions.

43. Second, the court's decision to wrest control of the defense *voir dire* from Jamal could only have had an adverse impact on the fairness of the trial. The jury was given no explanation as to why the court, and then later back-up counsel, assumed control over the *voir dire*. In itself, the court's actions created the unacceptable risk that the jury would conclude that Jamal's own misconduct led to the change.

44. Third, the court improperly foisted upon Jamal an attorney he neither wanted nor trusted.

45. Fourth, by placing attorney Jackson in the lead counsel role, the court violated Mr. Jamal's right to counsel of his choice, independent of his right to proceed on his own behalf.

**CLAIM TWELVE: THE COURT'S FORCED REMOVAL OF PETITIONER FROM SIGNIFICANT PORTIONS OF HIS CAPITAL TRIAL VIOLATED HIS FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS**

46. Jamal's rights to self-representation, to assist in his defense, and to confront the witnesses against him, and to a fair and reliable determination of guilt and penalty, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution, were violated by the trial court forcibly removing Jamal from significant portions of his capital trial.

47. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

48. As indicated above, the trial court stripped Jamal of his right to self-representation during the *voir dire* process. His right to self-representation was restored at the start of the trial, but lasted less than a day.

49. On June 17, 1982, after the court's welcoming remarks to the jury, but before the state's opening statement, Jamal intervened to ask for a microphone at the table. A side-bar conference was held at which the court told Jamal, "You have to speak up and if you can't speak up then I may have to remove you and put Mr. Jackson in [as counsel]." Trial resumed and Jamal reasserted that he needed a microphone. A side-bar was held and the court repeated its threat to remove Jamal as *pro se* counsel.

50. When trial resumed before the jury, Jamal renewed an earlier motion to replace attorney Jackson with back-up assistance of his own choosing. The jury was excused and the court reiterated its threat to remove Jamal as *pro se* counsel. In response to Jamal's request that Jackson be removed from the case, Jackson again asked that he be permitted to withdraw.

51. Seeing that this scenario raised serious constitutional questions, the court suggested that Jackson take an emergency appeal to the Pennsylvania Supreme Court for guidance on the question of his role in the case. Jackson was uncertain whether he had standing to appeal since Jamal was still *pro se* counsel. The court commented, "Well, if you are asking me to remove him, I'll remove him. I'll make it easy for you."

52. The state then suggested that the court temporarily remove Jamal as primary counsel in order to give Jackson standing to appeal, and upon disposition, restore Jamal to his *pro se*

status. When Jackson raised concerns about such an approach, the trial court ruled that Jamal was being stripped of his right to self-representation in order not to create appellate jurisdiction but because of his disruption of court proceedings.

53. This decision was made in Jamal's absence.

54. The next day, June 18, in an in camera proceeding held in Jamal's absence, discussed infra in Claim Thirteen, the trial court indicated to counsel that it was predicting Jamal's removal from the courtroom: "I know what's going to happen. . . . [H]e'll stand up and rant and rave, and I'll ultimately have to hold him in contempt of court, and I will have to remove him from this courtroom."

55. When trial proceedings began, Jamal - convinced that his constitutional right to represent himself was being abridged - continued to protest on the record. The court responded just as it had predicted: Jamal was expelled from the trial proceedings.

56. The following day, June 19, Jamal was permitted to return to the courtroom upon his assurance that he would "behave himself." He remained in the courtroom for the day's proceedings without incident.

57. On June 21, the next day of trial, backup counsel moved on behalf of Jamal that his right to self-representation be restored, stating: "Mr. Jamal assured this Court on Saturday that his behavior would be consistent with the decorum and respect of the Court, I see no reason why Mr. Jamal should not or could not be permitted to represent himself from this point on." The prosecution had no objection to this request. Nonetheless, the court denied the motion to restore Jamal's right to self-representation, noting: "I said that once I had made a decision to remove Mr. Jamal that that would stay; that you are the attorney now."

58. The issue of self-representation arose again the next day, June 22. Jackson moved on behalf of Jamal for leave to file a petition in federal district court on the question whether Jamal's Sixth Amendment right to self-representation was being abridged. Although acknowledging the sincerity of Jamal's desire to represent himself, the court nevertheless reiterated its position and denied the motion for leave. Jamal then attempted to speak on his own behalf, resulting in his ejection from the courtroom.

59. Jamal returned to the proceedings the next day, June 23, and that afternoon reiterated his request not to have Jackson act on his behalf. The court viewed his assertion as "disrupting the orderly proceedings" of trial. Jamal took issue, asserting that his right to proceed *pro se* was not disruptive behavior. The court told Jamal to "[t]ake a walk" and had him removed from the courtroom.

60. Jamal was permitted back into the courtroom the next day, June 24. After the direct and cross-examination of a police officer who authenticated certain photographs, Jamal attempted to question the witness. The jury and witness were excused and another discussion ensued about Jamal's desire for self-representation. In the course of the discussion, Jamal asked what was the court's motive for denying him his right to self-representation. The court responded, "You're disrupting the decorum. That's why you can't represent yourself."

61. A security officer was next called to testify regarding certain statements she allegedly heard Jamal make on the night he was rushed to the hospital. At the conclusion of the direct

and cross-examination of this witness, Jamal tried to represent himself and pose a question to her. The assertion of his right to proceed *pro se* once again resulted in his expulsion from the courtroom.

62. Jamal was brought back into court the following day, June 25. During Jackson's cross-examination of an alleged eyewitness, Jamal attempted to exercise his right to self-representation and ask questions. Jamal was then expelled from the courtroom.

63. On June 26, Jamal was permitted to return to court after indicating that he would "not interrupt the proceedings and [would] be quiet." At the end of the day, the state rested its case. Jamal stated for the record (outside the presence of the jury) that he had continuously objected to back-up representing him.

64. On the next day of trial, June 28, Jackson requested on behalf of Jamal that his right to self-representation be restored. Jackson argued:

I would initially like to request that Mr. Jamal be permitted to provide and to give the opening remarks to the jury. . . . [W]e are at the point where the defense is now prepared to give its opening remarks to the jury, and I believe in the name of justice, Mr. Jamal has . . . made numerous requests to Your Honor with respect to his right to self-representation, and subsequently asked Your Honor to permit his opening remarks to the jury, the possible examination of three witnesses of his choice, as well as the closing.

65. The prosecution did not object to this request. Nevertheless, the court denied the motion, stating: "I told you initially that when I appointed you as Counsel, once you became Counsel you were going to follow this thing all the way through."

66. Jamal also objected to the secretiveness of an in camera conference held, without his presence, discussed *infra* Claim Thirteen, regarding indications that he was shot by arresting officers and not by Officer Faulkner. These officers were questioned in chambers and denied shooting Jamal. When the proceedings resumed in open court, Jamal unsuccessfully moved that in camera proceedings be made part of the public record. Jamal persisted in his objection, leading once again to his removal from the courtroom.

67. Jamal was permitted to return to the courtroom the next day, June 29, and he remained present for the remainder of the defense case. The clashes between Jamal and the court, however, over his right to self-representation led him to decide against testifying. Asked by the court did he wish to testify in his own behalf, Jamal stated:

My answer is that I have been told from the duration of this trial, the beginning of the trial, the inception of the trial, that I had a number of constitutional rights. Chief among them the right to represent myself. The right to select a jury of my peers. The right to face witnesses and examine them based on information they have given. Those rights were taken from me. It seems the only right that this judge . . . want[s] to confer is my right to take the stand, which is no right at all. I want all of my rights, not some of them. I don't want it piecemeal, I want my right to represent myself and I want my right to make closing argument. I want my rights in this courtroom because my life is on the line . . . .

68. At the close of the defenses case, back-up counsel requested again that the court allow Jamal the right to self-representation by permitting him to make the closing argument. The court responded: "I denied it before and I deny it now."

69. During those periods in which Jamal was banished from the court proceedings, the court did not provide Jamal with any means to monitor the proceedings or to consult with back-up counsel while court was in session. The court failed to consider, and to deploy, available technological devices to ensure that Jamal could at least contemporaneously monitor the proceedings, as well as promptly communicate with Jackson.

70. As a result, Jamal was not able to participate meaningfully in his defense, including during highly critical stages of trial. At the time of his removal on June 22, the prosecution's pivotal eyewitness, Cynthia White, was still on the stand. Because of his expulsion and lack of any monitoring device, Jamal did not see or hear much of the cross-examination of this critical prosecution witness, and he did not see or hear any of the redirect or re-cross examinations.

71. When Jamal was removed from the courtroom on June 23, he missed the cross, redirect, and recross examination of Anthony Paul, a firearms expert with the Philadelphia Police Department's Firearms Inspection Unit. After his removal from the courtroom on June 24, Jamal missed the completion of the cross, as well as the redirect and re-cross examination of the security guard at the hospital who falsely claimed she heard Jamal confess.

72. On June 25, Jamal was removed from the courtroom and missed most of the cross examination of State's eyewitness Michael Scanlan, as well as redirect and recross of this witness. Jamal also did not hear the testimony of medical examiner Paul Hoyer.

73. On June 26, Jamal missed the direct testimony of Charles Tumosa, a criminalist for the City of Philadelphia, before being allowed to return to court. On June 28, Jamal did not hear back-up counsel's opening statement and the testimony defense witnesses.

### **CLAIM THIRTEEN: JAMAL'S ABSENCE FROM TWO IN CAMERA CONFERENCES VIOLATED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS**

74. Jamal's rights to be present at all critical stages of his trial, to self representation, and to a fair and reliable determination of guilt and penalty, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, were violated by the trial court excluding Jamal's participation in two in camera conferences.

75. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

76. The court held two in camera conferences outside without Jamal's presence.

#### **A. The June 18th In Camera Conference Regarding Juror Dawley**

77. On June 18, 1982, a conference was held in chambers, in Jamal's absence, at the start of the day. The first item discussed was the denial of backup counsel's appeal to be removed from the case. At the end of this discussion, the court informed counsel of another matter. A

juror had made a request to go home to take her sick pet to the veterinarian during evening hours. The court denied the request without advising backup counsel or Jamal, and this juror, Jeannie Dawley, apparently took her pet to the veterinarian without court approval.

78. Backup counsel was reluctant to agree to the juror's dismissal without consulting Jamal. . Ultimately, Jackson acquiesced on the basis of the court's and prosecution's remarks that the juror was prejudiced against Jamal. The prosecutor stated: "[S]he hates Jamal, can't stand him." The court agreed, stating, "She'll hang him." Jamal was never present to register his own impressions and views of juror Dawley.

79. Jeannie Dawley, an African American woman, was the only member of the jury personally questioned and selected by Jamal before his right to conduct voir dire as *pro se* counsel was stripped. Jackson, as backup counsel, played no role in the questioning or selecting this juror.

80. Without Jamal's knowledge, Dawley was dismissed. In her stead, the court seated the first alternate, a male Caucasian named Edward Courchain, a palpably biased and unfit juror. See Claim Nineteen, *infra*.

81. The second matter raised in the in camera conference regarding the jury arose when the prosecutor alerted the court to the fact that he was with a prosecution witness, Robert Chobert, in a hotel dining room where other jurors were present. No action was taken in regards to this event, and Jamal was apparently unaware of this incident and was again not consulted.

82. In addition to these jury matters, attorney Jackson and the prosecutor summarized for the court what had transpired before the Pennsylvania Supreme Court in regards to Jackson's role in the trial.

83. Specifically, attorney Jackson had petitioned the Pennsylvania Supreme Court to stay the court's order removing Jamal from representing himself. Attorney Jackson explained that he also asked the Pennsylvania Supreme Court to permit Jamal to continue to represent himself with the assistance of one John Africa. Attorney Jackson further indicated that he was in a quandary as to how to proceed in the face of Jamal's explicit edict that he (Jackson) not act on his behalf.

#### B. The June 28th In Camera Conference Regarding The Shooting of Jamal

84. In a June 28th in camera conference, the trial court explored the issue whether admissible evidence existed indicating that a police officer other than the deceased shot Jamal.

85. Jamal was not present during this conference.

86. Although the court suggested that attorney Jackson talk privately with the police officer witnesses regarding the issue, Jackson urged that such a colloquy be conducted on the record, noting:

Judge, my concern - and it may not be the concern of the Court - is that in the position that I have been placed by Mr. Jamal, that Mr. Jamal would be suspicious of any representations that I would make to him as to what they [i.e., the witnesses] are saying . .

. .

87. Attorney Jackson then stated: "Judge, if I am going to question them on the record, I would not want to do that out of the presence of Mr. Jamal." The court curtly responded: "I don't care about Mr. Jamal."

88. The court refused to conduct the on-the-record hearing in open court, stating "I don't do this in front of the general public for anything," overlooking the fact that the jury was sequestered.

89. Attorney Jackson then asked if the court wished to proceed in Jamal's absence; the court responded, "Yes, question them on the record in the absence of Mr. Jamal," adding, "I am not going to go to open court with this. . . . There are court reporters out there."

90. Upon discussing the matter with Jamal, Jackson reported to the court: "I have just spoken to Mr. Jamal. Mr. Jamal would like to be present during the questioning of Mr. Makuch and Sgt. Westerman and he further indicates that just as the motions to suppress were conducted in a public arena he wants their testimony taken in the public arena."

91. The court responded: "Well, you can report back to him that I said, No, it will not be in the public arena." The court then added, "If he wants to come back here, fine. If he doesn't want to come back here, that's too bad....He's not going to tell me how to run the courtroom...Now let's get him. If he wants to come in, bring him in. If he doesn't want to be here, that's all right with me too."

92. Ultimately, Jamal's desire to have the proceedings in open court was rejected and the in camera hearing proceeded without him.

93. Both witnesses were brought into chambers and testified. They were subject to cross and redirect examination, with objections made by both sides and ruled upon by the court. At the conclusion of this hearing, Jamal personally and through Jackson again registered his objection to the secretive manner in which it was conducted. Attorney Jackson stated:

Mr. Jamal and I would ask Your Honor to make that a matter of public record, because Mr. Jamal believes it is in his interest to have this information presented here in open court, and again I say that in the name of justice. I don't think it presents any additional burden to the Commonwealth or to Your Honor, particularly since the jury has been sequestered. The jury has no opportunity to read the newspapers or to hear anything on the radio or television.

94. Although the court insisted that Jamal was not barred from the secret proceeding, Jamal explained that he did not wish to sacrifice his right to a public trial:

I chose not to go back in chambers for a very good reason. Because in chambers, in camera as it is called, this matter of a very serious import was discussed. . . . What is the Court trying to hide, Judge Sabo...Why don't you discuss this investigative log from the M.E.'s office, the Medical Examiner's Office. . . . I am trying to bring out evidence that they are trying to hide. . . . I will not allow this court to railroad me. I will not allow this court to hide evidence. . . bring it out in open court. . . the proper time is now. . . . I object to this obvious attempt to silence and keep information secret in a trial for my life.

95. Jamal was ultimately removed from the courtroom as a result of his disagreement with the court's refusal to make the proceedings public.

## **CLAIM FOURTEEN: THE PROSECUTOR'S IMPROPER GUILT PHASE SUMMATION VIOLATED THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS**

96. Jamal rights not to be compelled to testify, and to a fair and reliable determination of guilt and sentence, guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, were violated by the prosecution's improper summation at the guilt phase of trial.

97. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

98. The prosecutor unconstitutionally undermined the reasonable doubt standard and the jury's responsibility for its decision by stating:

"[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."

99. 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 cautioning the jury to resolve doubts in favor of conviction, because a conviction, unlike acquittal, would not be "final."

100. The prosecution's guilt phase closing also improperly ridiculed Jamal's assertion of his Sixth Amendment rights:

Will you understand that the Defendant is on trial for taking somebody's life, too. That is one thing we hadn't heard much about. It may be true and indeed it is true that Daniel Faulkner on December 9th, at 3:50, as he looked up at the barrel of this gun did not have an opportunity to ask for any type of counsel, or to make any type of abusive remarks in relation to anybody, the system, the laws or anything. No one quickly ran down and said, "Do you want an attorney?"

101. The prosecutor repeated this theme, referring to the deceased officer as "[t]hat man down there without an attorney . . . to assist him at that time." These comments were meant to prejudice the jury by exploiting the fact that Jamal vigorously asserted his rights to self-representation and assistance of counsel. These comments had particular potency, in view of the fact that some of the quarreling over Jamal's insistence on self-representation took place in front of the jury.

102. The prosecution further improperly commented on Jamal's "arrogant" *pro se* confrontations with the court to bolster the disputed confession and prove Jamal's "vicious" frame of mind:

Perhaps you may find those very consistent with the type of evidence you may have seen and as a matter of fact what you may have seen even in this courtroom. This sort of thing, ladies and gentlemen, when you arrive at the hospital and with the action that was just done and you speak out and you proclaim almost in a boastful and defiant

way you say, "I shot him and I hope he dies." . . . All of this and in particular the conduct of this Defendant. I plead to you consider the thrust of such arr[o]gance and hostility and injustice.

103. The prosecution also invited the jury to draw a negative inference from Jamal's failure to take the witness stand:

[A]lthough they have no burden to do anything, of all that they had, all that was presented to them over that period of time you saw what the defense put on, and they don't have any burden that is true, but - [objection overruled] Are they suggesting that there was a third man, a fourth man, or is he doing this all for his brother? I ask you to look through all this, as well as any other strategy or tactics you have seen during the whole of this particular trial and recognize it for what it is.

104. The plain meaning of this comment was that if Jamal's brother or a third person shot the officer, Jamal could very easily have taken the stand and said so.

105. The prosecutor improperly appealed to community sentiment and other irrelevant factors in order to raise the jury's passion to a fever pitch:

This is one vicious act. This is one uncompromising vicious act. This is one act that the people of Philadelphia, all of them, all of you everywhere is outraged over. This act demands action. This act demands a reasonable view and the result of responsibility and courage. . . . An officer of the law who serves two years in service and assists individuals throughout that time, some of whom have testified here. He helped a rape victim and mother of the victim and the last arrest he ever made. That man as a member of the Police Force comes back from war and is faced with a war on the street right at 13th and Locust. Ladies and gentlemen, I ask you, all of us, the Commonwealth, the people of this city, reach out to you and demand justice. Look right at that intent to kill and that man who did it with that weapon and say, "The evidence is clear to all of us. You are guilty of first degree murder."

106. The prosecutor improperly vouched for two key witnesses. He supplied his personal assurance of witness Robert Chobert's veracity, despite knowing that evidence of his bias and motive had been withheld from the defense and the jury. He told the jurors that they could "trust" Chobert, because "he knows what he saw." He posed the rhetorical question: "Do you think that anybody could get him [Chobert] to say anything that wasn't the truth?" According to the prosecutor, Chobert was unimpeachable and above criticism ("I would not criticize that man one bit . . . . I don't care what you say or what anybody says . . .").

107. Thus, the prosecutor - knowing fully that the jury was not permitted to hear evidence concerning Chobert's probationary status, his criminal history, and his economic incentive to please the prosecution in a secret deal - asked rhetorically "What motivation would Robert Chobert have to make up a story . . . ?"

108. The prosecution also improperly vouched for the credibility of witness Priscilla Durham - a hospital security guard who claimed she heard Jamal blurt out a confession - by referring to another hospital employee, (identified as "LaGrand"), a person who the prosecution never called. The prosecutor stated: "Priscilla Durham. Present was also LaGrand as he [Jamal] comes in and makes that statement." The not-so-subtle insinuation was that LaGrand, a person

who never testified, also heard the alleged confession. Thus, the prosecution was able to bolster the credibility of its key witness on the confession issue, and present to the jury a suggestion that LaGrand heard the confession as affirmative evidence when, in fact, no such evidence was before the jury.

109. The prosecution misled the jury by arguing that Jamal's failure to put on precluded evidence showed that no such evidence existed: [F]ifty-seven statements all given to the defense, with one hundred and twenty-five other statements all given to the defense, with all sorts of medical reports and ballistic reports and chemical reports and property receipts and all physical evidence. . . . all that was presented to them over that period of time you saw what they put on.

110. The prosecution knew the witnesses' addresses were deleted from their statements, that the defense had been unable to present witnesses Kordansky and Wakshul, and had been denied funds for expert and investigative assistance.

#### **CLAIM FIFTEEN: JAMAL'S CONSTITUTIONAL RIGHTS WERE VIOLATED THE DEFICIENT PERFORMANCE OF APPELLATE COUNSEL**

111. Jamal's rights to effective assistance of counsel, and to a fair and reliable determination of guilt and penalty, were violated by the deficient performance of direct appeal counsel.

112. In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, access to this Court's subpoena power, and an evidentiary hearing:

113. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

114. Jamal was represented on direct appeal by court-appointed counsel Marilyn Gelb.

115. Gelb was ineffective because she failed to review the entire trial record, and did not even possess the entire direct appeal record. She failed to raise numerous meritorious issues on direct appeal, or to challenge the ineffectiveness of Jamal's trial counsel. She operated under a conflict of interest because of her close personal relationship with Jamal's ineffective trial counsel.

116. Appellate counsel also pursued Jamal's direct appeal without acquiring a complete record of the proceedings in the trial court. Without that record, appellate counsel could not have fully evaluated all of the available appellate issues. For example, appellate counsel raised a claim concerning the insufficiency of funds to mount a defense, but did not have the pretrial minutes where defense counsel pleaded for additional funds and assistance to represent Jamal adequately.

#### **CLAIM SIXTEEN: THE STATE'S PURPOSEFUL RACIAL DISCRIMINATION IN ITS EXERCISE OF PEREMPTORY CHALLENGES VIOLATED THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS**

117. The State's purposeful racial discrimination in its exercise of peremptory challenges violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

118. All other allegations, facts and claims contained in this Petition, its attachments and the other submissions made in this litigation are incorporated as if fully set forth herein.

119. The State, through the acts of prosecutor Joseph McGill, exercised its peremptory strikes in a racially discriminatory manner to exclude African Americans from participation on the Jamal jury. Jamal is African-American. The State had no race-neutral reason for striking these African-American prospective jurors or, alternatively, in light of the recent study of the Philadelphia District Attorney's jury selection practices over a ten-year period that included this case, the specific practices of the trial prosecutor as evidenced by this study, and the recently released training videotape documenting the voir dire practices of the Philadelphia District Attorney's office, any supposedly race-neutral reasons proffered for the exclusion of black jurors in this case are pretextual.

#### A. Jamal Has Established A Prima Facie Violation of Batson and Swain

120. The record of this case yielded a pool of fifty (50) eligible jurors. This included sixteen (16) jurors who were seated; fifteen (15) jurors stricken by the prosecution; and nineteen (19) jurors stricken by the defense. Thirty-five (35) of these jurors (70.0%) were white; fifteen (15) were black (30.0%).

121. The prosecution had forty-three (43) opportunities to exercise a choice whether to accept or reject a prospective juror. Twenty-eight (28) of these jurors were white (65.12%). Fifteen (15) of these jurors were black (34.88%). The prosecution found twenty-eight (28) prospective jurors to be acceptable, and exercised peremptory challenges against fifteen (15) others. Theoretically, with 15 peremptory strikes and 28 accepted jurors, a racially neutral exercise of the State's challenges would have resulted in 10 challenged whites; 18 accepted whites; 5 challenged blacks; and 10 accepted blacks. The reality was starkly different.

122. The record establishes that Prosecutor McGill peremptorily struck 11 of 15 black jurors (73.33%, with odds of 2.75:1). [13]<sup>13</sup> By contrast, the State struck only four of 28 white jurors (14.29%, with odds of 1:6). Thus, Prosecutor McGill was 5.13 times more likely to peremptorily strike black venirepersons than other jurors in this case, and black jurors faced odds of being peremptorily struck that were 16.47 times greater than for other jurors.

122. Nearly 86% of the jurors acceptable to the State were white, while 73.33% of the jurors unacceptable to the State were black. In addition, the eleven peremptory strikes the State exercised against black jurors constituted 73.33% of the State's total peremptory challenges, as compared to four strikes (or 26.67%) against white jurors. Thus, while the pool of jurors from whom the State chose consisted of one black prospective juror for every 1.87 white prospective jurors, the State struck 2.75 black jurors for every white juror struck. This rate was substantially disproportionate to the racial composition of the eligible jury pool.

123. In addition to his conduct in this case, Prosecutor McGill's historic pattern and practice of excluding black jurors provides additional evidence of the constitutional violation in this case. Jamal has identified from the database of first-degree murder cases maintained by the Administrative Office of the Pennsylvania Courts six homicide cases prosecuted by Mr.

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<sup>13</sup> In its post-conviction opinion, the Supreme Court of Pennsylvania noted that it had inaccurately believed on direct appeal that the prosecution had struck eight African American jurors, rather than 10 or 11 black jurors. *Commonwealth v. Abu-Jamal*, 553 Pa. 485, 555, 720 A.2d 79, 113 (1998). During the PCRA proceedings, Jamal presented affidavits from struck jurors Alma Austin and Darlene Campbell stating that they are black. The State subsequently stipulated to this fact. In addition, trial counsel, Anthony Jackson, provided an affidavit on appeal that an eleventh prospective juror, Beverly Green, was black. The State did not stipulate to that fact. Consequently, Jamal is prepared to prove this fact in an evidentiary hearing.

McGill for which he has been able to obtain and analyze the voir dire notes of testimony, and has compiled the peremptory strike rates in these cases.<sup>14</sup>

123. In determining Mr. McGill's strike rates, Petitioner determined the race of jurors by cross-referencing the name of the juror, and other identifying information in the Notes of Testimony, against available voter registration data.<sup>15</sup> The evidence demonstrates that Mr. McGill systematically excluded prospective African-American venirepersons from jury service, striking them with approximately triple the frequency of prospective jurors who were not black.<sup>16</sup> Moreover, the data regarding the Philadelphia District Attorney's historic jury selection practices, and the contemporary observations of courts, judges, and lawyers, demonstrate a pattern and practice and official policy at the time of the trial in this case of exercising peremptory challenges to exclude African Americans from jury service. This evidence not only supports an inference of discriminatory intent under Batson but entitles Jamal to a new trial under *Swain v. Alabama*, 380 U.S. 202 (1965).

### B. The Systemic Evidence of Discrimination

123. As recently presented to this Court in *Hardcastle v. Horn*, No. 98-CV-3028 (E.D. Pa.), a comprehensive study by Professors David Baldus and George Woodworth of the University of Iowa of a more than ten-year period of Philadelphia death penalty cases, including three separate prosecutorial administrations, has documented a pattern and practice of racial discrimination in jury selection by the Philadelphia District Attorney's office. The study discloses that, where the race of prospective jurors is known or can be reliably imputed in capital cases, the District Attorney's office was more than two-and-a-third times more likely (2.36) to peremptorily strike African Americans from jury service than prospective non-black jurors. The study also reveals that, over this time period, the District Attorney's office struck African Americans 55.28% of the time (1,209 strikes of a possible 2,187 jurors), as opposed to a strike rate of only 23.43% for non-black jurors (749 of 3,196). [17]<sup>17</sup>

123. This means that, over the entire time period covered by the study, an individual juror who was African American faced odds of 1.24:1 of being the subject of a prosecutorial peremptory strike, while non-black jurors faced odds of being struck that were only 0.31:1. Thus, the odds that an individual juror would be peremptorily struck by the Philadelphia District Attorney's office increased by a factor of 4.04 if the juror was black.

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<sup>14</sup> While these are all of the McGill homicide cases Jamal has been able to identify to date, they do not exhaust the entire universe of homicide cases that he prosecuted. Consequently, Petitioner seeks discovery from the State of the identity of all homicide prosecutions in which juries were empaneled by Mr. McGill. Jamal is prepared to present the underlying data thus far acquired of McGill's past homicide cases in an evidentiary hearing.

<sup>15</sup> These consist of cases prosecuted by Mr. McGill between September 1981 and October 1983, before he left the Philadelphia District Attorney's office. As a result of the age of the McGill prosecutions and routine purges of the voter rolls by the City of Philadelphia, voter registration information was not available to determine the race of roughly half of the venirepersons (129 of 245, or 52.65%) in Mr. McGill's homicide cases. However, this information should be available from the State because the Philadelphia District Attorney's office had a policy and practice of keeping track of the race of potential jurors in homicide cases. E.g., D.A. Training Tape, at 66; *Diggs v. Vaughn*, 1991 WL 46319, \*1-2 (E.D. Pa. Mar. 27, 1991); *Sistrunk v. Vaughn*, No. 90-CV-1415, Magistrate's Report & Recommendation (E.D. Pa. Aug. 10, 1995) (Powers, Chief M.J.). Consequently, Petitioner seeks discovery of Mr. McGill's notes concerning the selection of jurors in all of his homicide prosecutions.

<sup>16</sup> Mr. McGill was 2.93 times more likely to peremptorily strike black venirepersons (43 of 58, or 74.1%, with odds of 2.87:1) than non-black jurors (21 of 83, or 25.3%, with odds of 1:2.95). The odds that McGill would peremptorily strike a black juror were 8.47 times greater than for non-black jurors.

<sup>17</sup> The strike rate was calculated by dividing the number of peremptory challenges actually exercised by the number of prosecutorial opportunities to exercise peremptory strikes. For example, if the prosecutor could have struck 12 jurors from a venire and exercised peremptory challenges against 5 of those jurors, the strike rate for that trial would be 5/12, or 41.67%.

124. Furthermore, during the prosecutorial administration in which defendant Hardcastle was tried, the Philadelphia District Attorney's office peremptorily struck African Americans 61.02% of the time (360 strikes of a possible 590 jurors), while striking non-blacks at a rate of only 21.40% (187 of 874). This means that, for this time period, Philadelphia prosecutors struck African Americans at a rate 2.85 times higher than other jurors. During this prosecutorial administration, an individual juror who was African American faced odds of 1.57:1 of being peremptorily struck by the prosecution, while all other jurors faced 0.27:1 odds of being struck. Thus, the odds that a juror would be peremptorily struck by the Philadelphia District Attorney's office during the administration in which Jamal was tried increased by a factor of 575 percent if the juror was black.

125. The evidence establishes that the Philadelphia District Attorney's office continued this consistent policy and practice of striking African Americans and women from venires in later prosecutorial administrations. A review of juror strikes in 80 capital cases prosecuted between January 1987 and April 1991 indicates that the Philadelphia District Attorney's office peremptorily struck African-American venirepersons 58.20% of the time (465 strikes of a possible 799 jurors), while striking other venirepersons only 22.13% of the time (254 of 1,148). This translates into a strike rate against African-American jurors throughout that district attorney's administration that was more than two-and-one-half times greater (2.63) than for non-black jurors.<sup>18</sup>

125. Petitioner has determined that, throughout the period covered by the study, Prosecutor McGill peremptorily struck African-American venirepersons 74.14% of the time he had an opportunity to do so (43 strikes of 58 prospective jurors). By contrast, McGill exercised peremptory strikes against venirepersons who were not African American in only 25.30% of his opportunities to do so (21 of 83, or 25.3%).<sup>19</sup> Consequently, McGill was nearly three times more likely (2.93) to peremptorily strike an African-American venireperson called for jury duty in a homicide prosecution than a venireperson who was not black.

125. In addition, a prospective juror who was black faced odds of 2.87:1 of being peremptorily struck by the prosecution in homicide cases in which Mr. McGill was selecting the jury, while non-black prospective jurors in those cases faced odds of less than 0.34:1 of being peremptorily struck. Thus, a prospective juror's odds of being peremptorily struck by Mr. McGill were 8.47 times greater if the juror happened to be black.

126. Indeed, Prosecutor McGill was 34.12% more likely to strike black jurors than the District Attorney's office was as a whole throughout the period of the study,<sup>20</sup> even though he struck non-black jurors at virtually the same rate as the Philadelphia District Attorney's office

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<sup>18</sup> The current prosecutorial administration continues to strike African Americans at a grossly disproportionate rate. From an analysis of 1,852 prosecutorial opportunities to strike jurors in homicide trials, the study discovered that the District Attorney's office struck African-American venirepersons 48.00% of the time (360 strikes of a possible 750 jurors), while striking other venirepersons only 26.77% of the time (295 of 1102).

<sup>19</sup> According to the jury selection database, McGill was 2.64 times more likely to peremptorily strike black venirepersons (36 of 50, or 72.0%) than non-black jurors (18 of 66, or 27.3%). However, Professor Baldus was able to identify the race of only 18 of the jurors against whom the prosecution had an opportunity to exercise peremptory challenges in this case. The figures presented above include the race of all 43 such jurors in this case. With respect to the race of jurors in this case who are missing from the database, 7 of 8 black jurors were struck, as compared to 3 of 17 non-black jurors.

<sup>20</sup> McGill struck black jurors 74.14% of the time, a raw percentage rate that was 18.86 percentage points higher than the 55.28% rate for the rest of the office, and an increase of 34.12% over the rate at which the office struck black jurors.

as a whole.<sup>21</sup> The overall racial disparity in his exercise of peremptory challenges was 124 percent greater than the already highly discriminatory rate at which the office as a whole exercised peremptory challenges.<sup>22</sup> Similarly, a black juror's odds of being peremptorily struck in cases prosecuted by McGill were double the already high odds present in any homicide case prosecuted by the Philadelphia District Attorney's office.<sup>23</sup>

126. Assistant district attorneys who were prosecuting cases at roughly the same time as this trial have implicitly acknowledged the policy to strike blacks. See, e.g., *Diggs v. Vaughn*, 1991 WL 46319, \*1 (E.D. Pa. Mar. 27, 1991) ("defense counsel at the trial which resulted in petitioner's convictions (which is, after all, the trial with which we are concerned) repeatedly brought to the attention of the trial judge his contention that the prosecutor was using peremptory challenges to exclude blacks from the jury, in violation of petitioner's rights, and repeatedly sought a mistrial on that basis; and that the prosecutor did not then deny that such was her intention, or attempt to justify her use of peremptory strikes on any other basis."); *Commonwealth v. Lark*, Nos. 2012-13, 2015, 2021-22, Jan. Term, 1980 (C.P. Phila.), NT Jury Selection, 6/2/85, at 176-77 (assistant district attorney, confronted with a challenge to his systematic striking of black jurors responded sarcastically, "Oh, how awful").

127. Furthermore, it has been known for years that the Philadelphia District Attorney's office peremptorily struck black jurors as a matter of policy at the time of Mr. Jamal's trial. Indeed, in *Commonwealth v. Hardcastle*, Nos. 3288-93, June Term, 1982 (Phila. C.P.) - a prosecution initiated at the same time the Philadelphia District Attorney's office was trying Mr. Jamal - the late Justice Juanita Kidd Stout noted that it was "the practice" of the Philadelphia District Attorney's office to strike blacks from juries. NT Post-Verdict Motions, at 799. Affidavits of experienced Philadelphia defense counsel filed in *Hardcastle v. Horn*, No. 98-CV-3028 (E.D. Pa.), and the testimony of defense counsel from the case of *Diggs v. Vaughn*, No. 90-2083 (E.D. Pa.), also indicate that the State had a pattern and practice of striking African Americans from jury service on the basis of race.

128. That the District Attorney's office would employ this practice in Jamal's case is not surprising when viewed in historical context. At the time of Petitioner's trial in June and July of 1982, the District Attorney's office routinely and successfully struck jurors on the basis of race. E.g., *Commonwealth v. Jones*, 246 Pa. Super. 521, 522-24, 371 A.2d 957, 958 (1977) (Philadelphia District Attorney's office excluded all 22 African Americans from jury - 8 for cause and 14 by use of peremptory challenges, exercising only one peremptory challenge against white jurors; no Swain violation because "the presumption that the prosecutor exercised his peremptory challenges in a proper manner is only overcome where the defendant produces evidence that in Case after case the prosecutor, regardless of the circumstances, is responsible for the removal of all blacks from every jury."); *Commonwealth v. Fowler*, 259 Pa. Super. 314, 318, 393 A.2d 844, 846 (1978) (en banc) (Philadelphia District Attorney's office exercised peremptory challenges to exclude all black jurors; no Swain violation because no evidence of "systematic exclusion of Blacks by the State"); *Commonwealth v. Green*, 264 Pa. Super. 472, 473-75, 400 A.2d 182, 183-84 (1979) (Philadelphia District Attorney's office

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<sup>21</sup> McGill struck non-black jurors 25.30% of the time, marginally lower than the 25.43% rate for the rest of the office, amounting to a decrease of 0.51% below the rate at which the office struck non-black jurors.

<sup>22</sup> McGill was 2.93 times more likely to strike blacks than other prospective jurors, while the District Attorney's office as a whole was 2.36 times more likely to strike blacks than other prospective jurors.

<sup>23</sup> A juror's odds of being peremptorily struck in cases prosecuted by McGill increased by a factor of 8.47 if the juror was black, while the juror's odds of being struck in all cases prosecuted by the District Attorney's office increased by a factor of 4.04 if the juror was black. Thus, a black juror's odds of being struck increased by an additional factor of 2.10 times in cases prosecuted by McGill.

exercised 17 peremptory challenges to exclude blacks from jury; no Swain violation because no evidence presented "showing a pattern of discrimination"); *State v. Anderson*, 302 Pa. Super. 457, 464-65, 448 A.2d 1131, 1134-35 (1982) (rejecting claim that Philadelphia District Attorney's office exercised peremptory challenges solely on the basis of race to empanel a jury of 10 whites and 2 blacks; record "clearly does not demonstrate the kind of systematic exclusion in case after case of all black jury members" the court believed was necessary to prove Swain violation); *State v. Edney*, 318 Pa. Super. 362, 371, 464 A.2d 1386, 1390-91 (1983) (in November Term, 1979, case, Philadelphia District Attorney's office exercised its peremptory challenges to exclude all blacks from the jury; no Swain violation because "the mere proof that all Blacks are excluded in a particular case, which is the extent of appellant's proof, is not enough to overcome" the presumption that the prosecution's use of peremptory challenges "was to obtain an objective and impartial jury"; "prejudicial exclusion of individuals from the jury . . . does not amount to a denial of equal protection of the laws"). [24]<sup>24</sup>

128. Indeed, at the time of Petitioner's trial, and even after, the Philadelphia District Attorney's office believed it was legal to strike jurors on the basis of race so long as they did not empanel an all-white jury, e.g., *Commonwealth v. Hardcastle*, Nos. 3288-93, June Term, 1982 (Phila. C.P.), NT Court En Banc 4/27/83, at 30 (statement of Assistant District Attorney) ("If it [the exclusion of African-American jurors] were systematic there would not have been any member of what appeared to be the black race on the jury.").

129. The inference that Prosecutor McGill's pre-Batson peremptory strikes in this case were racially based is independently supported not only by statistical evidence of his strikes in other cases but by other post-Batson conduct by the Philadelphia District Attorney's office evidencing a continuing policy and practice of employing peremptory strikes on the basis of race.

130. This evidence includes a 1987 videotape memorializing the jury selection policy and practice of the office.<sup>25</sup> This videotape was prepared by the District Attorney's office expressly for the purpose of training prosecutors in jury selection, but was not revealed to the public until April of 1997, when the senior assistant district attorney who had been selected to train the prosecutors in jury selection - Jack McMahon - was running against incumbent District Attorney Lynne Abraham for the D.A.'s job. In that tape, McMahon explicitly advocates peremptorily striking African-American venirepersons on the basis of race and/or racial stereotypes, and explains how to manufacture pretextual race-neutral explanations to avoid reversal under Batson. See DATV Productions, *Jury Selection with Jack McMahon*, passim ("D.A. Training Tape") (transcription attached as an Exhibit to this Petition). The jury selection data demonstrate that the District Attorney's office and Prosecutor McGill practiced what the videotape and McMahon preached - the consistent striking of African American jurors on the basis of race.

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<sup>24</sup> A number of federal cases also document the District Attorney's pattern and practice of discriminatorily exercising peremptory challenges to strike black jurors. E.g., *Harrison v. Ryan*, 909 F.2d 84 (3d Cir. 1990) (in non-capital case tried in September 1982, the Philadelphia District Attorney's office exercised 6 of 8 peremptory challenges to strike black venirepersons); *Diggs v. Vaughn*, 1990 WL 117986, \*1 (E.D. Pa. Aug. 8, 1990) (in 1977 murder prosecution, Philadelphia District Attorney's office exercised 15 of 20 available peremptory challenges, employing 14 to strike prospective black jurors and 1 to strike a prospective Puerto Rican juror); *McKendrick v. Zimmerman*, 1990 U.S. Dist. LEXIS 12223 (E.D. Pa. Sept. 12, 1990) (in 1978 murder prosecution, Philadelphia District Attorney's office peremptorily challenged 4 of 5 prospective black jurors, and challenged the fifth for cause); cf. *Sistrunk v. Vaughn*, 90-CV-1415 (E.D. Pa. 1995).

<sup>25</sup> This evidence first came to light while Jamal's PCRA appeal was pending before the Pennsylvania Supreme Court. Petitioner moved to remand to the PCRA Court to consider this new evidence, but the Court denied that motion. *Commonwealth v. Abu-Jamal*, 553 Pa. At 501, 720 A.2d at 86.

130. In the training videotape, McMahon expressly advocates striking African Americans and women from jury venires. His remarks make clear that race should feature prominently in the decisions of trial district attorneys as to whom to permit on the jury:

[P]eople from Mayfair are good and people from 33rd and Diamond stink. . . . [Y]ou don't want any jurors from 33rd and Diamond."

D.A. Training Tape at 21.

[W]hen they call the names out, okay, Juror No. 1, No. 20, Reynard Boykin. I know I'm not taking Reynard; I can tell you that already.

D.A. Training Tape at 25.

[L]et's face it, again, there's the blacks from the low-income areas . . . , you don't want those people on your jury.

D.A. Training Tape at 47-48.

[Y]ou know, in selecting blacks, you don't want the real educated ones . . . .

D.A. Training Tape at 55.

[I]n my experience, black women, young black women, are very bad.

D.A. Training Tape at 57.

You're not going to have some brain surgeon from Chestnut Hill with some nitwit from 33rd and Diamond.

D.A. Training Tape at 58.

131. Indeed, the presumption of the District Attorney's office against empaneling black jurors was plain from the manner in which jury selection trainer McMahon indicated that some African Americans might be acceptable as jurors. In indicating that he would select older black jurors, and blacks from the South, McMahon prefaced even that statement by saying "if you're sitting down and you're going to take blacks . . . ." D.A. Training Tape at 55.

132. Moreover the training videotape advocated that race should also play a role in prosecutorial decisions on whether to empanel certain white jurors, whom the prosecution might otherwise strike on race-neutral grounds:

Teachers you don't like. Teachers are bad, especially young teachers, like teachers that teach in like the grade school levels.

. . . [But i]f you get like a white teacher teaching in a black school that's sick of these guys maybe, that may be one that you accept.

D.A. Training Tape at 63.

133. Finally, the fact that the District Attorney's office advocated keeping a running tally of the racial composition of the venire illustrates the centrality of race in its exercise of peremptory challenges. In the training tape, jury selection trainer McMahon clearly explained that a district attorney must always keep track of the race of potential venirepersons.

Another thing to do, little tips, too, when a jury comes in the room, the 40 people come in the room, count them. Count the blacks and whites. You want to know at every point in that case where you are. In other words, the 40 come in - you'll never get it just right. You don't want to look there or go, "Is there a black back there? Wait a minute. Are you a black guy?"

D.A. Training Tape at 66-67.

This was also the practice of other senior prosecutors in the District Attorney's office, including the former Chief of the Homicide Unit, Barbara Christie. See *Diggs v. Vaughn*, 1991 WL 46319, \*1-2 (E.D. Pa. Mar. 27, 1991) ("The record demonstrates conclusively that, at each trial, the prosecutor [the Chief of the Homicide Unit] kept careful records of the race of each prospective juror, and a running tally of how many persons of each race remained on the *venire* for possible selection."); [26]<sup>26</sup> *Sistrunk v. Vaughn*, No. 90-CV-1415, Magistrate's Report & Recommendation (E.D. Pa. Aug. 10, 1995) (Powers, Chief M.J.) (prosecutor's *voir dire* notes in case tried in November 1981 "provide a contemporaneous chronicle of the spurious strikes for each black juror"; prosecutor "maintained . . . painstaking notes which revealed upon examination a running tabulation of the number of blacks left on the jury after each challenge was exercised").

134. Keeping tabs on the race of the *venire* was so important to the District Attorney's office that jury selection trainer McMahan advised young district attorneys to invent reasons to leave the courtroom, if necessary, to ascertain the racial composition of upcoming venirepersons:

And if you lose track or you're not sure of what's going on or you want to - you can always take a recess.

Because a lot of times what they do is they'll like have the next group - the court officers want to set them up. Like remember in that method I told you earlier where they have - now we've picked five, so they're going to bring seven more in. Usually they'll have the next seven sitting right out there in order. So you can see - you can say, "Judge, I have to go to the bathroom." You can go out and see what's left and check out what's left, see what's you know - because you know you got two strikes left. You want to know, look, you know, if the first two are going to be bad, I'm going to have to use strikes and the next ones will be good. But if they're two, you know, good ones coming up, then you know you're not going to strike them. And it changes your philosophy and your ability to make a decisions knowing what's coming up.

D.A. Training Tape at 67.

135. The District Attorney's office's consciousness of the race-based nature of these prosecutorial strikes, and the legal impropriety of such strikes, is further evidenced by the training tape's advice to young prosecutors as to how to create a pretextual race-neutral explanation for the strikes to avoid reversal under *Batson v. Kentucky*:

[I]n the future, we're going to have to be aware of [Batson], and the best way to avoid any problems with it is to protect yourself. And my advice would be in that situation is when you do have a black jury [sic], you question them at length. And on this little sheet that you have, mark something down that you can articulate later if something happens . . . .

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<sup>26</sup> *Diggs* was subject to the empaneling of three separate juries in this case, the final one in 1977.

So if - let's say you strike three blacks to start with, the first three people. And then it's like the defense attorney makes an objection saying that you're striking blacks. Well, you're not going to be able to go back and say, oh - and make up something about why you did it. Write it down right then and there. . . . And question them [the black jurors], say, "Well, he had a - had a" - Well the woman had a kid about the same age as the defendant and I thought she'd be sympathetic to him" or "She's unemployed and I just don't like unemployed people . . . .

. . . So sometimes under that line you may want to ask more questions of those people so it gives you more ammunition to make an articulable reason as to why you are striking them, not for race.

D.A. Training Tape at 69-71.27

To the contrary, the Supreme Court has long made clear that the State's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935). The Court has also clearly stated that "the only legitimate interest [the State] could possibly have in the exercise of its peremptory challenges is securing a fair and impartial jury. . . . The State's interest in every trial is to see that the proceedings are carried out in a fair, impartial, and nondiscriminatory manner." *J.E.B. v. Alabama*, 511 U.S. 127, 137 n.8 (1994). [27] <sup>27</sup>

136. McMahan also trained the prosecutors to adhere firmly to a set of practical rules in selecting jurors. As he explained:

But the key is, just as in playing blackjack, is to stay by the rules . . . .

And that's all I can tell you when you [sic] talk to you about this, is to play by certain rules and don't bend them and don't change them.

D.A. Training Tape at 3-4; *id.* at 60-62 ("I'm of the opinion you don't design a jury for a particular case. . . . I think your goal is the same regardless of what kind of case you have. . . . You pick the same jury. I don't care if it's a black, white, Puerto Rican, Chinese or what. You pick the same jury.").

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<sup>27</sup> The Philadelphia District Attorney's office's disregard for the constitutional limitations on prosecutorial conduct was further evidenced by the instructions to the trainees to ignore case law that forbids discrimination in jury selection. Jury selection trainer McMahan stated:

The case law says that the object of getting a jury is to get - I wrote it down. I looked in the cases. I had to look this up because I didn't know this was the purpose of a jury. "Voir dire is to get a competent, fair, and impartial jury." Well that's ridiculous. You're not trying to get that.

D.A. Training Tape at 45. Indeed, Mr. McMahan suggested to the Assistant District Attorneys that they would lose their jobs if they attempted to follow the law and choose fair jurors:

And if you go in there and any one of you 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.

D.A. Training Tape at 45-46.

137. In this very case, Prosecutor McGill followed this approach right down the party line. McGill did not follow the office policy of discrimination simply by striking African-American jurors at a rate that was disproportionate both to the racial composition of the venire and to the rate at which he struck white jurors, but in the manner in which he selected those few blacks whom he deemed acceptable.

138. McMahon clearly expressed, and McGill clearly followed, the District Attorney's office policy and practices with respect to selecting black jurors:

. . . [I]f you're sitting down and you're going to take blacks, you want older blacks. You want older black men and women, particularly men. . . . [¶] The other thing is, blacks from the South, excellent. Ask where they're from. You know, if you can tell they're - if they say, "I've lived in Philadelphia five years," if they're from, you know South Carolina and places like that, I tell you, I don't think you will ever lose a jury with blacks from South Carolina. They're dynamite. They're dynamite.

D.A. Training Tape at 55, 56-57.

McMahon explained that a jury of "eight whites and four blacks is a great jury, or nine and three," always looking for jurors who are "stable, conservative people." *Id.* at 59, 46.

139. Prosecutor McGill selected his "great jury" of 8 or 9 whites and 3 or 4 stable, older, conservative blacks. The black jurors acceptable to McGill were:

- a) Jennie Dawley (Juror No. 1): A retired unskilled laborer, living in Southwest Philadelphia for over 20 years, religious.
- b) James Burgess (stricken by the defense): Employed by SEPTA; probably about 50 years old; had lived in North Philadelphia for 30 years.
- c) Savannah Davis (Juror No. 7): A budget analyst for the federal government; grew up in South Carolina, but lived for more than 30 years in Strawberry Mansion; worked 29 years with government, and had two children working for government.
- d) Basil Malone (Juror No. 10): Grew up in the Virgin Islands, where he later worked as a telephone lineman; moved to Philadelphia ten years before the trial; worked two years for a maintenance company and several years before that for a machine shop; had children aged 21 and 16.

140. These discriminatory exclusions amount to a systemic pattern and practice of preemptorily denying African Americans the right to participate as jurors, in violation of the Sixth Amendment and the Equal Protection Clause of the United States Constitution. [28]<sup>28</sup>

140. The statistical evidence of gross disparities in the preemptory exclusion of African American jurors by the Philadelphia District Attorney's office over a ten-year period including the time in which this case was tried; the statistical evidence of disproportionate use of preemptory challenges in homicide case prosecuted by Prosecutor McGill; the evidence of the Philadelphia District Attorney's office's jury strikes in the series of cases individually challenged in, but affirmed by, the Pennsylvania courts; the statements of contemporary observers of the District Attorney's practices; and the content and official use of the McMahon training videotape all indicate that the Philadelphia District Attorney's office had a policy and practice of discriminating against African-American venirepersons at the time of Jamal's trial.

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<sup>28</sup> In the press, and in the letter accompanying the release of the McMahon videotape, current District Attorney Lynne Abraham stated that McMahon's statements on the training videotape cast doubt on the legality of McMahon's practices. See, e.g., Loren Feldman, I, the Jury, *Philadelphia Magazine*, June 1997, at 30 ("there is simply no debating that such information would be relevant in determining the propriety of [his] jury challenges.").

141. Given these facts, it is no surprise that the federal courts have repeatedly noted violations of the Equal Protection Clause of the United States Constitution in cases prosecuted by the Philadelphia District Attorney's office. See *Jones v. Ryan*, 987 F.2d 960 (3d Cir. 1993); *Harrison v. Ryan*, 909 F.2d 84 (3d Cir. 1990); *Diggs v. Vaughn*, 1991 WL 46319, \*1-2 (E.D. Pa. Mar. 27, 1991) ("The record demonstrates conclusively that, at each trial, the prosecutor [the Chief of the Homicide Unit] kept careful records of the race of each prospective juror, and a running tally of how many persons of each race remained on the venire for possible selection."); *McKendrick v. Zimmerman*, 1990 U.S. Dist. LEXIS 12223 (E.D. Pa. Sept. 12, 1990) (conviction procured by Chief of the Homicide Unit reversed on Batson grounds); cf. *Sistrunk v. Vaughn*, 90-CV-1415 (E.D. Pa. 1995). [29]<sup>29</sup>

**CLAIM SEVENTEEN: THE TRIAL COURT UNCONSTITUTIONALLY RESPONDED TO A JUROR'S REQUEST WITHOUT NOTIFYING THE DEFENSE, AND THEN ENGINEERED THIS JUROR'S REMOVAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS**

141. Jamal's rights to a fair and reliable determination of guilt and penalty, and to a fairly chosen jury, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments, were violated by the trial court's lack of notice to counsel of a juror's request, and by the trial court's use of the juror's subsequent actions as grounds for removal.

142. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

143. Jennie Dawley, was the only juror selected while Jamal was conducting his own *voir dire*. The court admitted its opposition to seating this juror from "the beginning" because of her "attitude."

144. Dawley had asked to go home to take her sick cat to the vet during evening hours. Rather than advise Jamal or his counsel of the juror request, the court summarily denied it. Without interrupting court, Dawley left the hotel in the evening hours to take the sick cat to the vet, returning immediately afterward.

145. Using this act as an excuse, the court released her. The court did so without consultation with counsel, without affording counsel the opportunity to *voir dire* Dawley to determine whether she was genuinely unfit to serve, and without due regard to the fact that this juror was personally selected by Jamal during his brief stint as *pro se* counsel. The record suggests that the court removed Dawley because he had a personally disliking toward her.

146. Moreover, the court's precipitous response to Dawley's apparent violation of the sequestration order contrasts sharply with its highly accommodating approach to another juror who had to take a civil service exam.

**CLAIM EIGHTEEN: THE COURT REFUSED TO EXCUSE FOR CAUSE A PALPABLY UNFIT AND BIASED JUROR, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS**

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<sup>29</sup> In *Sistrunk*, Prosecutor Barbara Christie, former chief of the Philadelphia District Attorney's homicide unit, and the prosecutor in *Diggs* and *McKendrick*, empaneled an all white jury to try an African-American defendant. The District Court's grant of habeas corpus relief for this Batson violation was reversed by the Third Circuit on procedural grounds. *Sistrunk v. Vaughn*, 96 F.3d 666 (3d Cir. 1996).

147. Jamal's rights to an unbiased jury, and to a fair and reliable determination of guilt and penalty, as guaranteed by the Sixth, Eighth and Fourteenth Amendments, were violated by the trial court allowing an individual biased against the defense to sit on Jamal's jury.

148. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

149. During *voir dire*, prospective juror Edward Courchain was questioned by backup counsel. Courchain never disguised his inability to keep an open mind, as reflected in the record:

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

Courchain: That's right.

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

Courchain: Right. . . .

Jackson: [W]e need to know now in your best judgment, whether or not you could be objective in this matter, stay in the middle, don't lean towards the prosecution, don't lean towards the defense, whether or not you could objectively determine the facts in this case?

Courchain: Do you want an honest opinion?

Jackson: Yes, sir.

Courchain: No.

Jackson: You cannot do that?

Courchain: No.

Jackson: Sir, if I were to tell you that the law requires that if you were to serve as a juror you are to set that aside, could you do that?

Courchain: I would try, but I don't know. Consciously, I don't know.

Jackson: Consciously -

Courchain: Unconsciously, it would still be there.

150. Courchain also expressed some hostility toward backup counsel, exclaiming at one point for Jackson to stop harassing him.

151. Jackson unsuccessfully challenged for cause, and Courchain became the first alternate juror.

152. As discussed Claim Eighteen, *supra*, during the brief period that Jamal acted as his own counsel, one juror, Jeanie Dawley, was selected. Dawley was dismissed sua sponte by the trial court without providing Jamal the opportunity to be heard. In her stead, the trial court permitted the seating of Courchain.

**CLAIM NINETEEN: SOME JURORS ENGAGED IN SECRET, PREMATURE DELIBERATIONS DURING THE COURSE OF THE TRIAL, IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS**

153. Jamal's rights to a fair and unbiased jury, and to a fair and reliable determination of guilt and penalty, as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, were violated because certain members of the jury engaged in clandestine deliberations and reached pre-formed conclusions about the case.

154. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

155. During the trial, at least three white jurors formed a grouping which deliberated in a hotel room, separate from the other jurors. These three white jurors formed an opinion as to Jamal's guilt prior to the conclusion of the guilt phase of the trial.

**CLAIM TWENTY: JAMAL'S JURY WAS DRAWN FROM A POOL THAT WAS COMPOSED IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS**

156. Jamal's rights to a jury drawn from a fair cross-section of the community, and to a fair and reliable determination of guilt and penalty, as guaranteed by the Fifth, Eighth and Fourteenth Amendments, were violated.

157. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

158. In 1982 Philadelphia jury pools were drawn from the voter registration list and divided into five groups. Within this geographically rotating system, at any given time, the jury pool over-represented particular neighborhoods of the racially-segregated city, and thus over-represented and under-represented particular racial groups.

159. The racial composition of the jury venire varied, depending on the period during the year in which a case went to trial.

160. As a result, the jury pool available for Jamal's trial did not reflect a fair cross-section of the community.

**CLAIM TWENTY-ONE: PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS DUE TO TRIAL COUNSEL'S PREJUDICIALLY DEFICIENT PERFORMANCE DURING THE PENALTY PHASE**

161. Jamal's rights to effective assistance of counsel, and to a fair and reliable determination of penalty, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, were violated by counsel's prejudicially deficient performance at the penalty phase of trial.

162. Jackson's testimony at the PCRA hearing was unequivocal and unchallenged on this point: he simply "hadn't done anything to prepare a penalty or a mitigation-phase hearing."

163. Jackson never even talked with Jamal concerning the penalty phase before the day that the hearing was conducted. The first time Jackson broached this delicate, and profound, subject was in the holding cell moments before the hearing was to begin. Jackson confessed to Jamal that, although calling family members in the penalty phase was, theoretically, an option, he had not prepared any of them to testify, or fort that matter, any witnesses at all. In essence, Jackson was telling Jamal that he could, theoretically, conduct the sentencing phase as he had the guilt phase: "wing it" by calling witnesses from the audience without any preparation.

164. Before the day of the hearing, Jackson never considered how he might approach a penalty hearing, and he never considered who he might call as witnesses. He never interviewed anyone for purposes of determining who he might call, even though a bevy of witnesses existed to educate the jury on the wisdom of not imposing death.

165. Jackson testified at the PCRA hearing that stringent time constraints intensified the handicap he suffered as a result of not preparing earlier.

166. After two weeks of trial (working six days per week), the guilt phase ended at 5:30 p.m., July 2nd, a Friday to a holiday weekend (independence day in Philadelphia).

167. Rather than provide counsel the respite of a weekend to collect his thoughts and prepare a strategy for the penalty phase, which Jackson expected, the court forced Jackson - already dispirited and ill-prepared - to proceed the next morning to attempt to save Jamal's life.

168. Jackson was too defeated even to request a continuance.

169. Jackson's performance at the penalty phase was constitutionally inexcusable, and - as the PCRA testimony of available mitigation witnesses amply shows - the resulting prejudice was monumental.

170. Jamal presented six "mitigation" witnesses at the PCRA hearing as exemplars of what the sentencing jury would have heard at a competently conducted penalty phase trial.

171. These witnesses included a veteran Pennsylvania State representative, two professional journalism colleagues, his high school teacher, his sister, and a long-time family friend and neighbor.

172. These PCRA witnesses were available and willing to testify at Jamal's original penalty phase trial - a fact that was never contested by the Commonwealth.

173. Faced with the vivid and compelling portrait these witnesses provided, even the Commonwealth admitted to the "immense talents of Mr. Jamal," his "obviously talented journalistic voice, and his activism."

174. Indeed, the lead prosecutor at the PCRA hearing admitted that the killing of Officer Faulkner could not be squared with Jamal's true character:

"From all the descriptions of everybody that has come here - and they all are good people from what I can see, I believe - I don't think [the shooting of Officer Faulkner] is characteristic [of Jamal]."

#### A. Jamal's Dedication to the Community and to the Voiceless

175. Jamal was a man whose entire life had been devoted to community service.

176. State Rep. Richardson explained how he came to know Jamal through their shared commitment to the community: "we were very actively involved in the community through a number of organizations, groups, to try to help promote and . . . motivate the community around cultural and positive aspects of the African-American community here in the City of Philadelphia."

177. It was Jamal's "compassion for people and compassion for those issues that did impact directly on vital issues, such as housing, such as health care, such as feeding the homeless," that drew Rep. Richardson closer to Jamal.

178. Rep. Richardson summarized Jamal's community commitment as being a dedication to the struggle for a better world.

179. Jamal's older sister, Lydia Wallace, explained that Jamal had the same compassion for the broader community even as a child growing up in the housing projects.

180. A long-time neighbor and family friend, Ruth Ballard, recalled Jamal as a young boy giving Bible lessons to others:

There is one particular incident where in the summertime mainly they would have Bible classes. And a teacher would come around and teach them at the community hall different things about the Bible and the Lord. And Mumia would go as well as other children, but Mumia would do something different after the class was over. He would go home and he would gather up the little children and he would read to them from the literature that he had received in Bible class. As though he was the preacher or the teacher.

181. Nothing changed, from Ms. Wallace's perspective, as her brother grew to adulthood: "He cared about people. He wanted everyone to have a fair shake. . . . So he, you know, he was about fairness, he was sensitive to the people's plight, hardship, oppression." This impression of Jamal's "concern for people" was not merely a by-product of sibling love. Even Jamal's high school teachers saw it.

## B. Jamal's Talents as a Journalist

182. Jamal was a professional journalist, and president of the Philadelphia Association of Black Journalists at the time of his arrest.

183. His mastery of the craft radio journalism was well-known and admired - but the jury never learned about it.

184. Radio journalist E. Steven Collins could have told the jury that Jamal as "the greatest voice and greatest journalist I had met," someone his peers expected would rise to the level of broadcasters like Charles Osgood and Ed Bradley.

185. Joe Davidson, a Wall Street Journal reporter, stated flatly that Jamal was "the best radio journalist in the City."

186. According to Collins, Jamal's commitment to the community was "seemingly his trademark" because his journalism spoke for "people who needed a voice. People who were out of

work. . . . [I]f you are standing in an employment line or in a welfare line and you get short treatment, as the people do on that level, Mumia would articulate and illuminate their condition in an incredible way."

187. Rep. Richardson remembered the time when Jamal aired an appeal to the community to help locate a missing child.

188. He explained that this particular broadcast "sticks out more so than a lot of other cases . . . because it was the compassion that was shown directly as it related to human life."

189. Similarly, as a Temple student, Collins recalled hearing a Jamal commentary on the pointless shooting death of a young black man. "[I]n three minutes it felt like I had a keen, a keen insight into what happened and Mumia's conclusion was compelling and it encouraged people to think about the value of life."

### C. Jamal's Qualities as a Human Being

190. The "mitigation" witnesses showed how Jamal's talents and activism flowed from his deep devotion to humanity's cause. Rep. Richardson saw Jamal as an amalgamation of slain black leaders: "[I]t was the compassion and heart and feeling of Dr. Martin Luther King but the tenacity of a Malcolm X, and also the conviction of a man like Medgar Evers. And I think if you tied them together and you look at what we have here today you would have that in a total, comprehensive sense in Mr. Jamal, who has been actively involved in our City and struggle for a long time." 13

191. Jamal's generosity was underscored by his high school teacher, Kenneth Hamilton: "[Jamal] was just very eager to share [with other classmates]."

192. Jamal was also recognized for his intellect, and his voracious reading. Hamilton "was impressed by his intelligence, his sincerity" and because "he was very well read for a young man of his age and he stood out as far as the rest of the class." Hamilton saw that Jamal exhibited powerful leadership abilities, which he often directed toward thwarting violence in his school.

### D. Jamal's Attitude Toward Peace/Violence

193. Witnesses uniformly described Jamal as peaceful, sensitive, and compassionate.

194. Rep. Richardson described Jamal as a "strong advocate" for peace, a "peacemaker" who "abhorred violence."

195. Jamal's sister recalled: "There is nothing that is in his character that I recall being violent. He's only been a peacemaker."

196. She further recounted how Jamal, as an adolescent, often defused tensions among rival gangs in the neighborhood.

197. Collins said he could not "remember one time where there was ever a discussion, any hostility, verbal or otherwise, towards any law enforcement, or even a philosophical view that would suggest that."

198. In trying to articulate his view of Jamal's attitude toward peace and violence, Collins stated that he "search[ed] my mind" but could not find any indication of a proclivity towards violence:

[I]n my mind I thought a million times about . . . this whole preoccupation with philosophical and some bent on hurting law enforcement or whatever. And I don't remember ever, ever, ever hearing that or having a discussion with Mumia or other people where that came up or that was principal or centerpiece as he has been treated in many news stories since this occurred.

#### E. Jamal's Dedication to Family

199. Jamal's private life displayed the same compassion he expressed publicly.

200. Jamal's sister testified that their family life during Jamal's childhood was structured, spiritually-based, and loving.

201. Jamal was especially close to his mother, visiting her frequently even after he struck out on his own.

202. Jamal also was a father at the time of his trial, and his devotion to his children was visible to those who knew him.

203. In fact, Rep. Richardson carried with him the following image of Jamal: "you could picture Mumia with his son on his shoulders and his microphone in his hand interviewing people in the community as he was actually out in the community doing his work."

#### F. The Prosecutorial Caricature of Jamal

204. The utter lack of mitigation evidence gave the prosecutor free rein to caricature Jamal as a vicious and "arrogant" anti-social monster - a caricature that strayed so far from reality as to eviscerate any modicum of confidence in the sentence.

205. The prosecutor pointed to Jamal's struggles with the court as symptomatic of that "arrogance" and a reflection of an anti-authoritarian outlook which paved the way for a cold-blooded killing.

206. And in a culmination of this feverish effort to secure a death verdict, the prosecutor evoked the image of a violent radical who was intent on shooting police officers by eliciting that Jamal was a teenage member of the Black Panther Party when he had quoted the slogans, "power to the people" and "all political power grows out of the barrel of a gun."

207. The prosecutor went so far as to suggest, with full knowledge of its falsity, that Jamal had engaged in a "constant abuse of authority and daily law-breaking."

208. Clearly, these aspersions needed answering. Jackson only needed to call a few mitigation witnesses who knew Jamal's true character to make the nonsense of such arguments so apparent as to prevent their utterance in the first place.

209. Not only did Jackson fail to prepare any mitigation evidence, but he failed to counsel Jamal on the legal risks of his mitigation plea - such as the risk that the prosecutor would seek

to cross-examine him, or that the examination would include reference to the 1970 newspaper article which the prosecutor had been trying to use in evidence throughout the trial - indeed, even going back to the bail hearing six months earlier.

210. While failing completely to offer meaningful and powerful mitigation evidence, Jackson insulted the jury with the senseless argument that the deceased officer was not a "peace officer" within the meaning of the death penalty statute. The relevant aggravating factor reads: "The victim was a fireman, peace officer, or public servant . . . who is killed in the performance of his duties." Jackson argued to the jury in his closing argument: [T]he Pennsylvania legislators, ha[ve] not specifically indicated that indeed a police officer is a person or the status of a person for which you are to decide that aggravating circumstances exist. . . . If they meant police officers, why didn't they say police officers?

211. Jackson also suffered a total lapse in judgment when he (not the prosecutor) told the jury that some convicted murderers who get a life sentence "get out in a few years."

212. That Jackson called as a witness in a bail hearing State Representative Richardson and State Senator Milton Street reveals that he gave absolutely no thought to the penalty phase. He surely knew, had he given it some thought, that these two prominent citizens - both of whom were readily available to testify - could be powerful witnesses on Jamal's behalf, having called them to the stand during a bail hearing earlier in the year.

**CLAIM TWENTY-TWO: JAMAL'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE PROSECUTION'S USE OF HIS TEENAGE AFFILIATION WITH THE BLACK PANTHER PARTY TO ARGUE FOR THE DEATH PENALTY**

213. Jamal's rights to freedom of speech and association, and to a fair and reliable determination of penalty, as guaranteed by the First, Fifth, Eighth and Fourteenth Amendments to the United States Constitution, were violated by the prosecution's use of Jamal's teenage affiliation with the Black Panther Party to argue for the death penalty.

214. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

215. In the death penalty phase, Jamal exercised his rights to allocution, reading a short statement to the jury protesting his conviction.

216. Over objection, the prosecution was then permitted to examine Jamal on a variety of political slogans he had espoused in a 1970 newspaper interview as a teenage member of the Black Panther Party.

217. The political slogans in question were the following: - "Political power grows out of the barrel of a gun." - "All power to the people." - "The Panther Party is an uncompromising party, it faces reality."

218. This evidence of Jamal's teenage political beliefs was central to the prosecution's argument that Jamal deserved the death penalty.

219. It was the prosecutor who injected these political views and associations into the case. Indeed, the prosecutor had sought to raise Jamal's past Black Panther Party affiliation during the bail phase and throughout the trial. [30]<sup>30</sup>

219. During the cross-examination, it was the prosecution which first raised the issue of Jamal's Black Panther history and views, using quotes from an interview that Jamal did with the Philadelphia Inquirer in 1970 when Jamal was 15-years-old.

Q. Mr. Jamal, let me ask you if you recall saying something sometime ago and perhaps it might ring a bell as to whether or not you are an executioner or endorse such actions. "Black brothers and sisters - and organizations - which wouldn't commit themselves before are relating to us black people that they are facing - we are facing the reality that the Black Panther Party has been facing, which is - " Now listen to this quote. You've often been quoted saying this: "Political power grows out of the barrel of a gun." Do you remember saying that, sir? \* \* \*

Q. Do you recall saying: "All power to the People"? Do you recall that? \* \* \*

Q. Do you recall saying that: "The Panther Party is an uncompromising party, it faces reality"?

220. There was nothing in these quotes to suggest anything more than Jamal's abstract political views (quoted when he was a teenager). None of the quotes advocated violence.

221. The real meaning of the "barrel of a gun" quote was precisely the opposite - to characterize the government's political repression of the Black Panther Party, i.e., the government's political power grew out of its armed repression of blacks and dissidents. This is evident from what the article further said:

"Protest killings by police. . . . Since the murders [of Panther members by police],' says West Cook, Chapter Communications Secretary, Black brothers and sisters and organizations which wouldn't commit themselves before are relating to us. Black people are facing the reality that the Black Panther Party has been facing: political power grows out of the barrel of a gun.' Murders a calculated design of genocide and a national plot to destroy the party leadership is what the Panthers and their supporters call a bloody two year history of police raids and shootouts. The Panthers say 28 party members have died in police gunfire during that period, two last month. . . . Genocide is coming to the forefront under the Nixon, Agnew and Mitchell regime, says West, and that's exactly what it is. The Panther Party is an uncompromising party. It faces reality."

222. At the penalty phase, Jamal further clarified that the quotation expressed criticism of historic governmental and military repression, drawing an historical analogy based on the conquest of the New World:

That was a quotation from Mao-Tse-Tung of the Peoples Republic of China. It's very clear that political power grows out of the barrel of a gun or else America wouldn't be here today. It is America who has seized political power from the Indian race, not by

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<sup>30</sup> The prosecutor raised the specter of the Black Panther Party as early as the first bail hearing, where he asked Jamal's character witness, State Sen. Milton Street, "did you know him in his late teens at all, or did you have any discussions with him when he was a member of the Black Panthers?" During the guilt phase of the trial, the prosecutor again repeatedly tried to ask Jamal's character witnesses about his earlier Black Panther Party views.

God, not by Christianity, not by goodness, but by the barrel of a gun. . . . I believe that America has proved that quote to be true.

223. Viewed in its proper context the decade-old comments in the newspaper did not in any way provide a motive for the shooting of a police officer, or suggest a plan or design to do so.

224. Yet the prosecution was able to wrench the slogan out of context and consciously sought to create exactly that false and prejudicial impression to the predominantly white jury in his penalty phase summation:

And maybe that was the siege all the way back then with political power, power growing out of the barrel of a gun. No matter who said it, when you do say it and when you feel it, and particularly in an area when you're talking about police or cops or shootings and so forth, even back then, this is not something that happened over night.

#### CLAIM TWENTY-THREE: JAMAL'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE PROSECUTOR'S IMPROPER PENALTY PHASE CLOSING

225. Jamal's rights to a fair and reliable determination of penalty, to freedom of speech and association, to self-representation, and to meaningful assistance of counsel, and not to be compelled to testify, as guaranteed by the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, were either violated or burdened by the prosecution's summation at the penalty phase.

226. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

227. In the penalty phase summation, the prosecution misled the jury by suggesting that the ultimate responsibility for Jamal's sentence would lie with the appellate courts:

"Ladies and gentlemen, you are not asked to kill anybody. You are asked to follow the law. The same law that I keep on throwing at you, saying those words, law and order. I should point out to you it's the same law that has for six months provided safeguards for this defendant. The same law, ladies and gentlemen, that will provide him appeal after appeal after appeal. [Objection noted.] The same law, ladies and gentlemen, that has made it so because of the constant appeals, that as Mr. Jackson said, nobody at all has died in Pennsylvania since 1962 for an incident that occurred in 1959. . . . The last one who was executed and that's over 20 years; appeal after appeal after appeal. That law should be that way and that law should be followed, and he should have every appeal."

228. This argument diminished the jury's sense of its role and responsibility. It improperly suggested that the appellate courts, not the jurors, would bear the ultimate responsibility for determining Jamal's sentence.

229. The prosecution burdened Jamal's right to silence by commenting that Jamal had chosen not to testify regarding "what the circumstances were" surrounding the incident:

You heard nothing at all, ladies and gentlemen, in reference to testimony as to any kind of emotional feeling on the defendant's part because he has, as his absolute right, he did not choose to take the stand and testify what the circumstances were.

230. The prosecutor also urged the jury to consider Jamal's difficulties with the court and counsel - in other words, his struggle to assert his Sixth Amendment rights - in deciding the sentence.

231. The prosecutor began the sentencing summation by advising the jury that sentencing was simply a matter of "aggravating and mitigating circumstances and the effect of either." He urged the jury to view its task as merely a matter of mechanically weighing those factors: "[I]f the aggravating outweighs the mitigating, then the law requires the death penalty . . . . It's really not a question of discretion . . . ."

232. Through these remarks the prosecution invoked the notion of legal duty not to emphasize its importance in its own right, but as a reassuring escape from the anxiety of moral choice. The argument diminished the jury's sense of moral responsibility by suggesting that the sentencing decision is based on quantifiable fact findings and a mechanical weighing, rather than an individualized determination involving the defendant's character and the totality of facts surrounding the crime. The words thus de-emphasize the sentencing decision's subtle, discretionary, individualized and morally weighty aspects, blunting the jury's sense of its truly awesome responsibility.

233. The pervading theme to the prosecutor's penalty phase summation was the notion of "law and order" and the battleground that our urban streets have become.

234. In discussing this theme, the prosecutor told the jury that law and order "is what this trial is all about more than any other trial I have ever seen."

235. Such comments are improper for they are tantamount to espousing an "authoritative" view that death is warranted, inviting the jury to vest its discretion with the prosecutor's imprimatur.

236. The prosecutor even went on to tell the jury that his mother told him that very morning: "Joe, if you can come up and kill a police officer, who is going to protect me?" and invoked the "constant battleground that we have during the course of every day in this City," remarking "we are one step from the jungle without the opportunity of individuals to enforce the law."

#### **CLAIM TWENTY-FOUR: THE STATE UNCONSTITUTIONALLY WITHHELD RELEVANT EVIDENCE IN MITIGATION IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS**

237. Jamal's rights to a fair and reliable determination of penalty, as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, were violated by the Commonwealth's withholding of Philadelphia police files demonstrating no criminal or violent activity on Jamal's part after years of constant surveillance.

238. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

239. At the PCRA hearing, Jamal produced over 600 pages of FBI files showing that he had been under constant surveillance since the late 1960s, when as a teenager he helped to find the local chapter of the Black Panther Party.

240. Since FBI and Philadelphia police worked cooperatively on surveillance, and Philadelphia police retained a surveillance file documenting Jamal's activities over the same time period.

241. Because the police files demonstrate that Jamal engaged in no criminal activity or violent behavior during the entire period of surveillance, this prosecution should have turned over this mitigating evidence to the defense.

242. This evidence would have been used to rebut the State's contention that Jamal had a long-term plan or motive to kill a police officer. It also would have corroborated the accounts of the available mitigation witnesses brought forth at the PCRA hearing.

**CLAIM TWENTY-FIVE: THE JURY WAS UNCONSTITUTIONALLY LED TO BELIEVE THAT ANY FINDINGS OF MITIGATING CIRCUMSTANCES REQUIRED UNANIMOUS JURY ACTION**

243. Jamal's rights to a fair and reliable determination of guilt and penalty, as guaranteed by the Eighth and Fourteenth Amendments, were violated by the jury's being led to believe that any finding of mitigating factors required unanimity.

244. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

245. The sentencing verdict form was constitutionally defective, because it created a substantial risk that jurors understood they must unanimously agree to the existence of a mitigating circumstance before a juror could weigh that mitigator.

10. The jury's completed verdict form showed one aggravating circumstance and one mitigating circumstance.10. \*\* On the first page of the form, the jury had to identify any mitigators it weighed by filling in a blank. Then, on the third page of the form, the jurors were required to identify mitigators by putting a check mark on the page. All twelve jurors had to sign that page.

11. The structure of the verdict form would lead the jury to believe that unanimity was required to find a mitigating circumstance. Nothing in the form suggested that the decision-making procedure for mitigators was any different from that for aggravators. On the contrary, the form for checking off mitigators was identical to the form for aggravators.

12. As a result, even if one or more jurors - indeed, even if eleven jurors - believed that an additional mitigator outweighed the aggravators, they would nonetheless have thought they could consider only the designated mitigator which was found unanimously.

13. The court's instructions, far from correcting the jury's misunderstanding based on the form, would have compounded that misunderstanding.

**CLAIM TWENTY-SIX: JAMAL'S CONSTITUTIONAL RIGHTS WERE VIOLATED THE JURY'S CONFUSION ON WHETHER LIFE IMPRISONMENT MEANT WITHOUT THE POSSIBILITY OF PAROLE**

14. Jamal's rights to a fair and reliable determination of guilt and penalty, as guaranteed by the Eighth and Fourteenth Amendment, were violated because the jury was confused whether life imprisonment in Pennsylvania carries no parole eligibility.

15. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

10. The defense sentencing summation was cut off by the court in such a way as to leave a false impression that "in some few cases" those with life sentences "are out in a few years." During closing argument, attorney Jackson told the jury that "in some few cases" inmates "are given life sentence and are out in a few years. . . . Do they serve out their time until they die? There are some persons who do that. What is life imprisonment? Life imprisonment is a life in a cage."

11. After the prosecutor objected, the court cut off this argument, saying counsel was "going too far afield."

12. Jackson's uncorrected suggestion that some lifers get "out in a few years," coupled with his failure to seek a clarifying instruction, constituted a serious breach of his obligation to provide effective assistance of counsel. The court's failure to correct the resulting misleading impression was itself a due process violation.

#### **CLAIM TWENTY-SEVEN: JAMAL'S DEATH SENTENCE IS ITSELF UNCONSTITUTIONAL UNDER EVOLVING STANDARDS OF DECENCY**

13. Jamal's rights to a fair and reliable determination of sentence, as guaranteed by the Eighth and Fourteenth Amendments, were violated because imposition of the death penalty itself contravened evolving standards of human decency.

14. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

15. In the past few years, national and local bar associations have led efforts calling for a moratorium on the death penalty. In February of 1997, the American Bar Association requested a moratorium on the death penalty nation-wide. In October of 1997, the Pennsylvania Bar Association called for a moratorium on capital punishment in Pennsylvania. Subsequently, the Philadelphia Bar Association issued a similar request for "a moratorium on executions in Pennsylvania until such time as the fair and impartial administration of the death penalty can be ensured and the risk that innocent persons may be executed is minimized."

16. The Pennsylvania Bar Association noted in its resolution that "Pennsylvania Department of Corrections statistics raise a serious concern that people of color and men are sentenced to death at a rate which substantially exceeds the rate at which Caucasians and women are sentenced to death." In addition, the Association called for "immediate cessation of any executions in the Commonwealth of Pennsylvania until such time as the fair and impartial administration of the death penalty can be ensured."

17. Similarly, the Philadelphia Bar Association noted "a substantial risk, in Philadelphia and elsewhere, that the death penalty continues to be imposed in an arbitrary, capricious and discriminatory manner."

18. Evolving standards of decency are also reflected in customary international law and United States treaty obligations. In 1948, the United States was one of the signing states parties to the Universal Declaration of Human Rights, which declares the right to life to be one of the most fundamental human rights. In 1992, the United States became a state party to the International Covenant on Civil and Political Rights (ICCPR), which adopted a protocol calling for abolition of the death penalty. On December 10, 1998, President Clinton signed Executive Order 13107 to ensure the proper implementation of the human rights treaties ratified by the U.S. Senate.

19. At the international level there have also been repeated calls for a moratorium on the death penalty. In April 1999, at the 55th Session of the United Commission on Human Rights, a resolution was adopted by wide margin calling for a global moratorium on the death penalty. The push toward a global moratorium is consistent with the increasing majority of countries that have abolished the death penalty in law or in practice.

20. The breach of the Eighth and Fourteenth Amendments by the imposition of the death penalty is not confined solely to the State-sponsored infliction of death upon the defendant. This constitutional breach does not solely or exclusively occur at the moment that a death sentence is carried out. The Eighth and Fourteenth Amendments forbid the infliction of "death penalty incarceration" upon a defendant inasmuch as this form of incarceration involves conditions and treatment that are so inhumane as to offend those evolving standards of human decency that mark the sine qua non of Eighth Amendment jurisprudence.

21. The most notable aspect of "death penalty incarceration" which offends those evolving standards of human decency is the length of time that a death row inmate must live within the shadow of impending State-sponsored execution. Such conditions of incarceration constitute torture and abhorrent treatment.

22. A key indicia of the evolving standards of human decency in regards to "death penalty incarceration" is the existence of international law documents which are subsumed within federal law by virtue of the Supremacy Clause of the U.S. Constitution. A wide array of multilateral human rights treaties and decisions by international tribunals construing said treaties condemn the imposition of punishment which amount to torture and abhorrent treatment. Two binding treaties - the International Covenant on Civil and Political Rights (ICCPR) and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) - have been construed to forbid lengthy "death penalty incarceration" as tantamount to inhumane treatment and torture.

23. Furthermore, the implementation of the death penalty, independent from the constitutional validity of that form of punishment in the abstract, violates the Eighth Amendment (in addition to the Fifth and Fourteenth Amendments, see Claim Twenty-nine, *infra*), because it is imposed more arbitrarily upon African-Americans accused of capital crimes than upon their white counterparts. International law also informs Eighth Amendment jurisprudence on this score insofar as the Convention on the Elimination of All Forms of Racial Discrimination (CERD) calls for affirmative steps to eliminate the racial disparity in the implementation of the death penalty.

24. As noted throughout this Petition, the constitutional deficiencies identified by Jamal in this Petition breach the Eighth Amendment's prohibition on cruel and unusual treatment inasmuch as the imposition of State-sanctioned execution, regardless of its legitimacy in itself,

cannot be imposed without heightened assurances that fundamental rights have been preserved and protected and that the justification for punishment reliably determined.

25. These heightened assurances guaranteed by the Eighth Amendment derive from evolving standards of human decency, and this is in part evidenced by international norms and treaties which instantiate the same and similar protections as those accorded by the U.S. Constitution.

**CLAIM TWENTY-EIGHT: JAMAL WAS SENTENCED TO DEATH DUE TO THE CONSTITUTIONALLY IMPERMISSIBLE FACTOR OF RACIAL DISCRIMINATION IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS**

26. Jamal's rights to equal protection, a fairly constituted jury, and to a fair and reliable determination of guilt and penalty, as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, were violated by the gross racial disparities operating in the administration of the death penalty in Philadelphia.

27. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

28. The Baldus-Woodworth study, described in Claim Sixteen *supra*, examined and documented the racial discrimination present in the charging and sentencing practices in Philadelphia County. The study demonstrates pervasive racial bias in Philadelphia's capital sentencing system. This study establishes that - after controlling for the severity of the offense - the overall odds that an African-American defendant will be sentenced to death in Philadelphia are more than 4 times greater than for non-black defendants. Similarly, the odds that defendants will be sentenced to death in cases involving non-black victims are also more than 4 times greater than those in cases involving black victims.

29. The discriminatory jury selection practices of the Philadelphia District Attorney's Office, discussed in Claim Seventeen, *supra*, did not simply result in the systematic exclusion of prospective black jurors. The Baldus-Woodworth researchers estimated the probability of black defendants receiving death sentences in cases falling within a mid-range of culpability, controlling for the proportion of black jurors. This analysis revealed that the racial disparity in death sentencing was directly proportion to the racial composition of the jury. For example, where 64% of the jury was black, there was a black/non-black disparity of seven percentage points in the probability of being sentenced to death. When blacks made up 37% of the jury, the black/non-black disparity in the rate of death sentences increased to fifteen percentage points. And when only 13% of the jury was black, the racial disparity in capital sentencing reached twenty-five percentage points.

30. In addition, the study also demonstrates that Philadelphia capital sentencing juries treat the race of a defendant who is black as a non-statutory aggravating circumstance. The study shows that being black more strongly affects whether a defendant will be sentenced to death than do many of the aggravating circumstances enumerated in Pennsylvania's capital sentencing statute.

31. Professors Baldus and Woodworth also found death-sentencing discrimination in Philadelphia based upon the race of the victim. The study revealed that juries to whom mitigating evidence was presented were far more likely to find that mitigation existed if the victim was

black. If the victim was not black, the odds are 4.3 times greater that a jury that already had found aggravation would fail to find that mitigation existed in the case.

32. In 1993, a Commission of the Philadelphia Bar Association, consisting of prosecutors, judges, and both civil and criminal practitioners filed a Petition Seeking the Appointment of a Commission to Investigate the Presence and Effect of Racial and Ethnic Bias in the Philadelphia Justice System (hereinafter Philadelphia Bar Association Petition). The Philadelphia Bar Association Petition particularly noted numerous indications of possible discrimination in capital sentencing, as well as racial discrimination that members of the Bar Association had experienced in Philadelphia's courts. The Petition suggested that:

The commission should evaluate the Philadelphia court's response to bias, if any, in the [capital] charging practices of the District Attorney's Office in Philadelphia, considering whether there are race-neutral or racially biased reasons for these practices.

33. These factors, individually and collectively, have created a capital-sentencing environment in which race plays an impermissible role in determining whether a defendant lives or dies. (See Claim Twenty-eight, *supra*)

### **CLAIM TWENTY-NINE: JAMAL WAS DENIED DUE PROCESS BY AN UNFAIR STATE POST-CONVICTION HEARING PROCEEDING**

34. Jamal's due process rights to a fair post-conviction proceeding, as guaranteed under the Fifth and Fourteenth Amendments, were violated by the biased actions of the PCRA court, and the illegitimate involvement of one Justice of the Pennsylvania Supreme Court in reviewing the PCRA court's denial of Jamal's PCRA petition.

35. All other allegations, facts and claims contained in this petition, its attachments and other submissions made in this litigation are incorporated as if fully set forth herein.

#### A. Judge Sabo

36. Judge Sabo's background included a stint as a deputy sheriff for Philadelphia for sixteen years; he was also a longstanding member of the Fraternal Order of Police, while he was a sheriff. Moreover, Judge Sabo was a member of a special "Homicide Unit" consisting of volunteer judges who offered to sit on homicide cases and who presided over most death-penalty cases in the entire state of Pennsylvania. Of the thirty-two death row inmates sentenced by Judge Sabo, twenty-nine were people of color.

37. Concerned that he would not receive a fair hearing on his PCRA petition, Jamal moved to recuse Judge Albert F. Sabo, the judge who had presided over his trial. Judge Sabo summarily rejected the recusal motion, yet Jamal's concerns over the judge's ability to be fair and impartial proved to be justified.

38. Judge Sabo rushed the proceedings in order to debilitate Jamal's efforts to present all of the evidence supporting his constitutional claims.

39. The judge repeatedly and without warrant castigated Jamal's attorneys, routinely issuing threats of contempt, and ultimately incarcerating one and fining another.

40. The judge quashed defense subpoenas at the behest of the Commonwealth, taking no regard for the underlying equities involved.

41. Virtually every single defense objection was overruled and every single Commonwealth objection sustained - logic, consistency, and the rules of evidence mattered not at all.

42. In the end, it is thus not surprising that his Findings of Fact and Conclusions of Law replicated the submissions by the Commonwealth and are fraught with blatant contradictions, inaccuracies, and unsupported conclusions.

### 1. Judge Sabo's palpable display of bias and hostility at the PCRA hearing

43. Judge Sabo's hostility and unfairness were undisguised. Journalists, both local and national, publicized the rank unfairness of the proceedings. The Philadelphia Inquirer 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." (July 16, 1995, p. E6.) [31]<sup>31</sup> A front page headline in the *Philadelphia Daily News* on July 19, 1995, put it bluntly: "Sabo Must Go." The *New York Times*, noting that Judge Sabo "has sent more people to death row than any judge in the state," cited actual courtroom occurrences at the PCRA hearing as illustrative of the fact that Judge Sabo "has been openly contemptuous of the defense." (July 30, 1995, p. A24.)

43. The *American Lawyer*, in discussing how Judge Sabo conducted the PCRA hearing, explained that he "flaunted his bias, oozing partiality toward the prosecution and crudely seeking to bully Weinglass, whose courtroom conduct was as correct as Sabo's was crass." (December 1995, p. 84.) That journal, which is not known for hyperbole, especially when it comes to criticisms of the judiciary, faulted Judge Sabo for barring Jamal from presenting witnesses and for "sharply restrict[ing] 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 also characterized Judge Sabo's incarceration and fining of Jamal's lawyers as "unwarranted." *Id.* at 85. The documentary record before this Court lends credence to these and other observations by impartial courtroom observers.

44. As noted, the PCRA court rushed Jamal to present his case "immediately" on just two court days notice.

45. On July 12, Jamal appeared and moved for a stay of execution (scheduled for August 17) and asked for a reasonable time to prepare for the evidentiary hearing. Instead, on July 14 the court took the stay motion "under advisement" and used the unstayed execution date as an excuse to rush the hearing. When the court ordered Jamal to begin the hearing, the Common-

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<sup>31</sup> 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, 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." 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.

wealth had not even answered the PCRA Petition. There was not even a complete record of the 1982 proceedings. A total of four pretrial hearing transcripts were not available until the middle of the PCRA hearing. The Commonwealth and the trial court used this expedited schedule to hamper Jamal's presentation.

46. A central strategy deployed by the judge to defeat judicial review was to block Jamal's proffer of evidence and then to cite the resulting absence of evidence as proof of Jamal's inability to prove his constitutional claims.

47. A striking example of this can be found in Judge Sabo's handling of Jamal's claim that prosecution witness Chobert had an unrevealed economic incentive to favor the prosecution. The court barred Jamal from showing that Chobert's statements to investigators immediately after the shooting supported the defense contentions that Jamal was not the shooter and that the true shooter fled the scene. By doing so, Judge Sabo was free to conclude, unencumbered by irrefutable contrary evidence, that Chobert's trial testimony harmonized with his pretrial statements.

48. Judge Sabo's efforts to defeat Jamal's constitutional claims were often more brazen. He quashed subpoenas, knowing that without the subpoenaed witnesses Jamal could not substantiate his constitutional claims. Subpoenas for P.O. Gary Bell, Stephen Trombetta, and other officers who were in a position to hear an alleged confession by Jamal were quashed, thus hampering Jamal from bolstering the proof that the "confession" evidence was concocted. Jamal 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. The subpoena for Savannah Davis was quashed.

49. Indeed, one of Jamal's lawyers was incarcerated for attempting to explain why the subpoena for the state court administrator was necessary.

50. By quashing that subpoena, Judge Sabo precluded proof substantiating Jamal's claim that geographic and racial disparities plague Pennsylvania's death penalty.

51. Judge Sabo's findings are laden with blatant inaccuracies. For example, Judge Sabo found that 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.

52. In another instance, the PCRA court rejected as "absurd" that ballistics Fasnacht was unavailable due to lack of funds. No citation to the record is provided, for the record is un rebutted from two sources that Fasnacht was, indeed, never retained to testify due to Jackson's inability to pay his fee.

53. The PCRA court also misstated the record on the pivotal issue of the fleeing shooter. Judge Sabo stated that 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 witness Hightower. The un rebutted 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.

## 2. Judge Sabo's deep-rooted biases infected his fact findings and required recusal.

54. That difficulties would arise from Judge Sabo's involvement in this post-conviction proceeding was foreshadowed by his adversarial relationship with 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.

55. The court's own fact findings describe the court's view that there was such a "running" controversy throughout the 1982 trial: "Petitioner 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. . . ."

56. Judge Sabo's distaste for Jamal, and his lingering bitterness over his "insults," "ridicule," and "belligerence," undeniably provoked the court's maltreatment of Jamal's current counsel and infected his findings, particularly on Jamal's Sixth Amendment claims.

57. The PCRA court, predisposed to conclude that Jamal had "controlled" the trial proceedings, sua sponte placed on the record those instances when defense counsel consulted with Jamal during the PCRA hearing.

58. With such a fixed predisposition - indeed, an obsession - the court simply could not fairly judge the credibility of attorney Jackson, who repeatedly swore that "Mr. Jamal was not dictating anything to me."

59. The court insisted that Jamal had no Sixth Amendment claim because "my memory of the case is Mr. Jamal was running the case." The court admitted that this was based on his recollection, not the record; the testimony from Jackson, in fact, refutes it.

60. Another indication of bias rested with the court's allegiance to the Fraternal Order of Police ("FOP"). Judge Sabo, formerly undersheriff for sixteen years, was a retired FOP member.

61. Those ties had an unusual impact in this case, because for years that group has actively lobbied for Jamal's execution.

62. Even during the proceedings, the FOP demonstrated for Jamal's execution. The courtroom audience was split - one side filled with Jamal's family and supporters, the other with FOP members. The court openly sided with the FOP members against Jamal's supporters. 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."

63. Further, issues of police misconduct and police credibility permeate this case, and the judge's FOP allegiance inspired his biased findings on these issues.

64. For example, the PCRA court refused to acknowledge that police had kicked and beaten the wounded Jamal - a fact established by the prosecution's own witnesses. In finding accounts of such brutality "incredible," the court asserted that according to Jamal's treating physician "there was no evidence of injury other than the gunshot wound to Jamal's abdomen." Yet the very testimony the PCRA court cited states that Jamal had numerous other head inju-

ries, 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" - all of which could have been caused by a blow to the head from a walkie talkie.

65. There was other graphic, unrefuted evidence that Jamal was beaten. Dessie Hightower saw "eight or nine officers" who were standing around Jamal and several of these officers were striking him with "various things, clubs, feet. They had him by the dread locks."

66. Even Commonwealth witness Cynthia White saw officers swinging their blackjacks at Jamal. For the PCRA judge, however, police officers simply can do no wrong. Thus the court found every police witness credible - even when they could remember nothing or had dramatically changed their testimony - while discrediting every defense witness.

67. 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 issued just three days after taking the matter under submission which adopted virtually verbatim the prosecution's submission.

68. While the court's pro-prosecution bias is revealed throughout his opinion, as discussed in detail in the arguments below, one example aptly demonstrates how the court adapted its 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 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. Justice Ronald D. Castille

69. At the time of Jamal's conviction and up through the period of his direct appeal, Justice Ronald Castille, a sitting member of the Pennsylvania Supreme Court, was employed in the District Attorney's Office for Philadelphia County.

70. In 1986, Justice Castille became the District Attorney for Philadelphia County.

71. As District Attorney, Justice Castille, through his assistants, advocated for the affirmance of Jamal's conviction and sentence before the Pennsylvania Supreme Court.

72. Justice Castille's name appeared as counsel of record on the legal brief submitted by the Commonwealth in opposition to Jamal's appeal to the Pennsylvania Supreme Court.

73. Justice Castille's involvement in this case, as opposing appellate counsel, was no incidental matter. As the lead prosecutor in the PCRA proceedings remarked, Jamal's case was "probably one of the biggest events in the criminal justice system in the City of Philadelphia for a quarter of a century."

74. Other District Attorneys in Philadelphia County have been outspoken about their direct roles in seeking, and preserving, the death verdict against Jamal. Justice Castille's predecessor, then-D.A. Edward Rendell, openly acknowledged his own role as Philadelphia's District Attorney in deciding to seek the death penalty against Jamal. Justice Castille's successor, D.A. Lynne Abraham, has been no less open about her advocacy against Jamal. Rendell has spoken

out against Jamal at rallies and other public gatherings. Abraham has written opinion columns in newspapers concerning her views of Jamal's guilt.

75. In view of the notoriety of this case, as evidenced particularly by the first-hand knowledge that Rendell and Abraham have about the evidence presented at Jamal's trial, it is beyond question that Justice Castille had far more than a passing knowledge of this matter before Jamal presented his PCRA appeal.

76. The nature of the claims asserted in the PCRA appeal also justified Justice Castille's recusal. As this Petition reveals, many of the claims asserted by Jamal concern egregious prosecutorial misconduct. Thus, Justice Castille was called upon to evaluate disturbing claims about conduct taking place within an office that he once headed.

77. Moreover, Justice Castille has been outspoken in defending a one-time colleague against allegations of misconduct, publicly claiming that this colleague's actions were in response to aggressive defense lawyering. When evidence of police misconduct within Philadelphia's 39th District recently surfaced, leading to revelations of falsely-convicted innocents, then D.A. Castille's office argued against an application by one elderly woman for overturning her conviction based upon documented corruption.

78. Justice Castille's ability to evaluate constitutional claims concerning prosecutorial misconduct alleged to have taken place within his office at a time when he was a member of that office is questionable; his ability to evaluate such claims in one of the highest profile cases to be handled by his office is even more remote.

79. Perhaps most fundamentally, Justice Castille took part in an appeal in which he and his assistants argued vigorously that Jamal had received a fair trial and that the evidence against him was both reliable and compelling. Having taken that position as an advocate and as a prosecutor (which implies a good faith belief that the position advocated is the truth), it is dubious to conclude that Justice Castille could become an impartial judicial arbiter over claims that directly attack that position.

80. Finally, like Judge Sabo, Justice Castille has a long-standing relationship with the Fraternal Order of Police (FOP). The FOP has mobilized actively to see to it that Jamal's death sentence is carried out.

81. Leaving aside the direct evidence which calls into question Justice Castille's ability to be fair in fact, the objective evidence on this score creates an appearance of impartiality that called for his recusal.

#### **IV. CONCLUSION**

82. Every element of the trial in this case - prosecution, court, witnesses, defense counsel, jury - was riddled with misconduct and error. No conviction or execution can stand when the combined effect of all the trial and sentencing errors so warped the trial process. To the extent that any of the errors here are alleged are deemed "harmless" on their own, those errors should be considered together for their cumulative impact on the trial and sentence.

#### **PRAYER FOR RELIEF**

WHEREFORE, petitioner respectfully requests that this Court:

- A. Order respondent to show cause why the requested relief should not be granted;
- B. Grant petitioner leave to conduct discovery, including the right to take depositions, request admissions, propound interrogatories, issue subpoenas for documents and other evidence; and afford petitioner the means to preserve the testimony of witnesses;
- C. Order an evidentiary hearing at which petitioner will offer this and further proof in support of the allegations herein;
- D. Permit petitioner a reasonable opportunity to supplement the petition to include claims which become known as a result of discovery and further investigation and as a result of obtaining information previously unavailable to petitioner;
- E. After full consideration of the issues raised in this petition, issue a writ of *habeas corpus* relieving petitioner from the judgment of conviction and sentence of death imposed in the Court of Common Pleas of Philadelphia County.
- F. Grant such further relief as the Court may deem appropriate in the interests of justice.

DATED this 14th day of October, 1999.

Respectfully Submitted,

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