IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
Respondent,	:	CP-51-CR-0113571-1982
v.	:	Nos. 1357-1359 (1981)
MUMIA ABU-JAMAL,	:	
Petitioner.	:	

PETITION FOR
HABEAS CORPUS RELIEF
PURSUANT TO ARTICLE I, SECTION 14 OF THE
PENNSYLVANIA CONSTITUTION
AND
STATUTORY POST-CONVICTION RELIEF UNDER
42 Pa. C.S. § 9542 et seq.
AND
CONSOLIDATED MEMORANDUM OF LAW

Petitioner, Mumia Abu-Jamal, through counsel, hereby petitions for habeas corpus and post-conviction relief pursuant to Article I, Section 14 of the Pennsylvania Constitution and 42 Pa. C.S. § 9542 et seq.

RELEVANT PROCEDURAL HISTORY

1. Mumia Abu-Jamal is serving a mandatory life sentence without the possibility of parole, in the State Correctional Institution at Mahanoy pursuant to his murder conviction for the December 9, 1981 shooting of Philadelphia Police Officer, Daniel Faulkner. Following a jury trial, he was sentenced to death on May 23, 1983. The

direct appeal was denied by the Pennsylvania Supreme Court. *Commonwealth v. Abu-Jamal,* 521 Pa. 188, (1989), *reh'g denied,* 524 Pa 106 (1990). A petition for writ of *certiorari* was denied by the United States Supreme Court. *Abu-Jamal v Pennsylvania,* 498 U.S. 881 (1990), *reh'g denied,* 498 US 993 (1990).

2. A petition under the Pennsylvania Post Conviction Relief Act was filed on June 5, 1995. The matter was referred to the original trial judge, Albert Sabo. The petition was denied on September 15, 1996. *Pennsylvania v. Abu-Jamal,* 30 Phila 1, 1995 Phila Cty Rptr LEXIS 38 (1995). Mr. Abu-Jamal appealed the denial of post-conviction relief to the Pennsylvania Supreme Court. The Supreme Court of Pennsylvania affirmed the denial of the petition for post-conviction relief. *Commonwealth v. Mumia Abu-Jamal* 720 A.2d 79 (Pa. 1998), *cert. denied* 528 U.S. 810 (1999).

3. A federal habeas corpus petition was granted with regard to the death sentence, but denied with regard to the conviction itself. *See Abu-Jamal v. Horn,* 2001 WL 1609690 (E.D. Pa. 2001). This was affirmed by the Third Circuit. *See Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008). The United States Supreme Court denied Mr. Abu-Jamal's request for certiorari review. *See Abu-Jamal v. Beard*, 556 U.S. 1168 (2009). The Supreme Court granted the Commonwealth's petition for certiorari, vacated the circuit court's decision affirming the district court's grant of sentencing relief, and remanded the case to the Third Circuit for further review in light of an intervening decision. *See Beard v. Abu-Jamal*, 558 U.S. 1143 (2010). In 2011, the Third Circuit again declared Mr. Abu-Jamal's death sentence unconstitutional, and the United States Supreme Court denied the Commonwealth's request for certiorari review. *See Abu-Jamal v. Secretary*, 643 F.3d. 370 (3d Cir. 2011); *Wetzel v. Abu-Jamal*, 132 S. Ct. 400 (2011). In December of 2011, the

Philadelphia District Attorney announced that he would no longer seek the death penalty for Mr. Abu-Jamal. On August 13, 2012, the Court of Common Pleas resentenced Mr. Abu-Jamal to a life sentence without the possibility of parole. On October 1, 2012, Mr. Abu-Jamal's Motion for Post-Sentence Relief was denied by the Court of Common Pleas, and that denial was affirmed by the Superior Court of Pennsylvania on July 9, 2013. *Commonwealth v. Abu-Jamal,* 2013 WL 11257188.

4. Mr. Abu-Jamal's subsequent three petitions for post-conviction relief were denied by the Court of Common Pleas, and each of those decisions were affirmed by the Pennsylvania Supreme Court. *See Commonwealth v. Abu-Jamal,* 574 Pa. 724 (2003), *cert denied* 124 S. Ct. 2173 (2004); *Commonwealth v. Abu-Jamal,* 596 Pa. 219 (2008) *cert. denied* 129 S. Ct. 271 (2008); *Commonwealth v. Abu-Jamal,* 615 Pa. 81 (2012).

5. On December 27, 2018, the Court of Common Pleas (Tucker, J.) granted in part Mr. Abu-Jamal's fifth petition for relief under the Post Conviction Relief Act (PCRA). The Court of Common Pleas ruled that Mr. Abu-Jamal's appellate rights in his previous four PCRA petitions must be reinstated due to the appearance of judicial bias because Justice Ronald Castille participated in deciding the appeals in the Pennsylvania Supreme Court after denying Mr. Abu-Jamal's motions asking for his recusal. The Court held that Justice Castille erred by denying Mr. Abu-Jamal's recusal motions because a letter Justice Castille wrote the Governor when he was the Philadelphia District Attorney demonstrated that Justice Castille had a disqualifying appearance of bias in capital cases where the victim was a police officer. As directed by Judge Tucker, Mr. Abu-Jamal filed a Notice of Appeal

in the Superior Court[1] in order to begin the process of the rehearing of his previously denied PCRA appeals.

6. Shortly thereafter, on January 3, 2019, the Commonwealth wrote Judge Tucker a letter, stating that, on December 28, 2018, the District Attorney and members of his staff came across six boxes with the name "Mumia" or "Abu-Jamal" on them. *See* Exhibit ("Ex.") A, attached hereto. In its January 3, 2019 letter, the Commonwealth acknowledged: "this means the Commonwealth's prior representations that it had produced the complete file for this Court's review in these cases were incorrect." *Id*. The Commonwealth permitted undersigned counsel to review the materials in the six boxes. That review revealed highly significant evidence, which the Commonwealth never previously disclosed, establishing that Mr. Abu-Jamal's trial was tainted by: (a) a failure to disclose material evidence discrediting its two key witnesses in violation of the United States and Pennsylvania Constitutions; and (b) the discriminatory removal of prospective Black jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

7. Mr. Abu-Jamal filed a motion in the Superior Court to remand his case to the Court of Common Pleas in order to litigate the claims arising from this new evidence. Pursuant to *Commonwealth v. Lark,* 746 A.2d 585, 588 (2000), Mr. Abu-Jamal was not permitted to file a new PCRA petition while the *nunc pro tunc* appeals were pending in the Superior or Supreme Courts. The *nunc pro tunc* appeals were subsequently dismissed by

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[1] That appeal *nunc pro tunc* was filed in the Superior Court rather than the Pennsylvania Supreme Court because Mr. Abu-Jamal's death sentence had been replaced with a life sentence. The Philadelphia District Attorney's appeal of Judge Tucker's ruling was withdrawn before any briefs were submitted. The Superior Court initially transferred the appeal to the Pennsylvania Supreme Court, but the Pennsylvania Supreme Court transferred the case back, ruling that the Superior Court properly had jurisdiction over the appeal. *See Commonwealth v. Cook*, 262 A.3d 1251 (table) (Pa. Sept. 7, 2021).

the Superior Court on October 26, 2021. *See Commonwealth v. Cook*, 290 ED 2019, *available at* 2021 WL 4958874 (unpublished). And the Superior denied the motion to remand as moot in the same order. *See id*., 2021 WL 4958874, at *10.

JURISDICTION

8. Section 9545(b) of 42 Pa. S.C. states:

> (b) Time for filing petition.--
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within one year of the date the claim could have been presented.

This petition meets the requirements of 42 Pa. C.S. § 9545(b)(1)(i) and (ii) because Mr. Abu-Jamal's previous failure to raise the instant claims and present the facts supporting them was the direct result of the non-disclosure by government officials—specifically, the Philadelphia District Attorney's Office—of evidence that a witness at trial had an arrangement or understanding for financial payment in exchange for his testimony; another witness had a similar arrangement or understanding for leniency in her pending charges in exchange for her testimony; and new evidence that the trial prosecutor exercised his peremptory challenges of prospective jurors in a racially discriminatory manner. The

newly disclosed evidence consists of letters, memoranda and notes contained within the District Attorney's files and not disclosed until January 3, 2019. *See* ¶ 6, *supra*. Therefore, the facts upon which these claims are predicated could not have been ascertained earlier by the exercise of due diligence. *See* 42 Pa. C.S. § 9545(b)(1)(ii). In addition, as noted above, this is the first opportunity for Mr. Abu-Jamal to file this claim since he learned of the new evidence, since he was precluded by *Lark* from filing a new PCRA petition while his previous petitions were being adjudicated on appeal. *See Lark,* 746 A.2d 585, 588 (2000).

9. This Court also has jurisdiction under Pennsylvania's constitutional guarantee of habeas corpus. To the extent this claim is not cognizable under the PCRA, Mr. Abu-Jamal has a remedy under Pennsylvania's habeas corpus statute, 42 Pa. C.S. § 6501 *et seq*. *See Commonwealth v. Judge*, 916 A.2d 511, 521 (Pa. 2007). This Court also has jurisdiction over Mr. Abu-Jamal's claim and the authority to grant relief under Mr. Abu-Jamal's state constitutional right to life and liberty (Art. I, § 1); his right of access to open courts for review of those claims (Art. I, § 11); his rights to due process and to effective assistance of counsel (Art. I, § 9); and his state constitutional right to habeas corpus (Art. I, § 14). *See Commonwealth v. Peterkin*, 722 A.2d 638, 640 (Pa. 1998) ("the writ [of habeas corpus under Article I, Section 14] continues to exist . . . in cases in which there is no remedy under the PCRA").

NEWLY DISCOVERED FACTS AND LEGAL BASES FOR RELIEF

I. The Prosecution Violated *Brady v. Maryland* by Withholding Evidence Discrediting Its Two Key Witnesses.

A. The *Brady* Violation Concerning Witness Robert Chobert

10. Recently discovered evidence shows that the prosecution's most important witness expected to receive money from the Commonwealth in exchange for his testimony,

and indeed that he understood there to be some prior agreement or understanding between himself and the prosecution, such that the prosecution "owed" him money for his testimony. Specifically, in a post-trial letter postmarked August 6, 1982, the prosecution's principal eyewitness, Robert Chobert, wrote Joseph McGill, the sole trial prosecutor, stating "I have been calling you to find out about the money own (sic) to me. So here is a letter finding out about money." Ex. B.

11. In a November 18, 2019 affidavit submitted in support of a King's Bench Petition filed by Daniel Faulkner's widow Maureen Faulkner, Mr. McGill admitted receiving this letter from Mr. Chobert. Ex. C ¶ 8. Mr. McGill asserts, however, that Mr. Chobert's post-trial request for money does not indicate that he was offered or promised money in exchange for his testimony. *See id.* Rather, according to Mr. McGill, before he wrote this letter, Mr. Chobert asked for money for lost income, but Mr. McGill simply told Mr. Chobert that he would "look into it."[2]

12. The explanation proffered by Mr. McGill for Mr. Chobert's letter (over 25 years after the letter was written) is inconsistent with the content of the letter. Mr. Chobert is clearly asking for money *owed* to him. He was not asking whether Mr. McGill had looked into a request made by Mr. Chobert. He also says, "do you need me to sign anything. How long will it take to get it." Ex. B. The contemporaneous letter clearly reflects Mr. Chobert's belief that there was an agreement, understanding, or arrangement in which the prosecution promised Mr. Chobert money in connection with his testimony. He therefore believed it was owed to him after he testified, and he was trying to collect.

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[2] Mr. McGill also stated that despite this representation to Mr. Chobert, he actually did not look into it at all as that would have gone against office policy. *See* Ex. C ¶ 8.

Mr. McGill's claim that Mr. Chobert was merely following up on Mr. McGill's agreeing to look into payment for lost wages is not credible because Mr. Chobert's letter clearly reflects his understanding that he is owed money by the Commonwealth. Further, Mr. Chobert does not provide any dollar figure or supporting papers regarding his lost income but rather appears to ask for a previously agreed upon sum.

13. For over a quarter century, the Commonwealth hid this crucial evidence from Mr. Abu-Jamal's attorneys. The first time this came to light was when Mr. Chobert's letter to Mr. McGill was disclosed to defense counsel in January 2019. This letter is powerful evidence of a *Brady* violation requiring a new trial.

14. The suppression of evidence that a key prosecution witness has been offered payment in connection with his testimony is a classic violation of *Brady v. Maryland,* 373 U.S. 84 (1963). *See, e.g., Banks v. Dretke*, 540 U.S. 668, 675, 678, 702 (2004) (capital penalty proceeding violated due process where State suppressed evidence that key witness had been paid approximately $200); *Thomas v. Westbrooks*, 849 F.3d 659, 665 (6th Cir. 2017) (new trial required where State did not disclose a payment made to its key witness, because the non-disclosure deprived the defendant of his "right to impeach the State's witnesses against him on the grounds of pecuniary bias in the case") (citations omitted); *Schofield v. Palmer*, 621 S.E.2d 726, 731 (Ga. 2005) (new trial required because prosecution's suppression of the fact that key witness was paid prevented the defendant "from impeaching that witness with 'an age-old, logical, pecuniary argument that [he] had a motive to lie,'" and further recognizing that "the State must have also believed that knowledge of the payment would have affected its case against [the defendant] because it went to such great lengths to conceal it").

15. It does not matter whether the prosecution's offer of payment is a firm promise, or a more general understanding or arrangement. As the Fifth Circuit Court of Appeals has explained, Supreme Court precedent makes clear that "[a] promise is unnecessary." *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008). Rather, the Supreme Court has emphasized that "evidence of any understanding or agreement" concerning benefits in exchange for an important witness's testimony is key and must be disclosed. *Giglio v. United States*, 405 U.S. 150, 154 (1972); *accord United States v. Bagley*, 473 U.S. 667, 683 (1985) (controlling opinion of Blackmun, J., joined by O'Connor. J.) ("This possibility of a reward gave [the witnesses] a direct, personal stake in [the defendant's] conviction. The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction."); *Commonwealth v. Strong*, 761 A.2d 1167, 1171-72 (Pa. 2000) (*Giglio* made clear that due process requires that any potential understanding between the prosecution and a witness be revealed to the jury).

16. The prosecution's failure to disclose exculpatory evidence is material and constitutes a *Brady* violation when there is a "reasonable probability" that, had the inducement offered by the Government been disclosed to the defense, the result of the trial would have been different. *Bagley*, 473 U.S. at 684. The Supreme Court has further stressed that the adjective "reasonable" in the reasonable probability test "is important." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). A petitioner need not demonstrate that it is "more likely than not" the verdict would have been different had the evidence been disclosed, but simply that he did not "receive[] a fair trial, understood as a trial resulting in

a verdict worthy of confidence." *Id.* "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* (quoting *Bagley*, 473 U.S. at 678).

17. There is a reasonable probability that the disclosure of any offer of payment by the prosecution or the police to Mr. Chobert would have affected the trial's outcome. Mr. Chobert was undeniably the prosecution's star witness. He was one of only two witnesses who claimed to have seen Mr. Abu-Jamal shoot Officer Faulkner. The credibility of the other, Cynthia White, was poor and her version of the events changed significantly over time. Thus, Mr. Chobert was the Commonwealth's most important witness. If the jury had learned that Mr. Chobert was offered money by the prosecution, his credibility would have been damaged, and there is a reasonable probability that this would have changed the verdict.[3] Plainly, a trial is not fair when jurors do not know that the prosecution had offered its most important witness monetary compensation in connection with his testimony.

18. The importance of Mr. Chobert's testimony is underscored by the prosecutor's summation, which leaned heavily on Mr. Chobert's account, vouched for his credibility, and unmistakably suggested Mr. Chobert had no motive to lie. The prosecution said about Mr. Chobert,

> the kernel of believability, the trust that you can have in an individual when he talks as he did. I would not criticize that man one bit. He knows what he saw and I don't care what you say or what anybody says, that is what he saw. Do you think that anybody could get him to say anything that wasn't the truth?

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[3] During a hearing for Mr. Abu-Jamal's first PCRA petition it came to light that Mr. McGill also told Mr. Chobert that he would look into helping him get back his suspended driver's license. 1995 PCRA Tr. 8/19/95 at 4-5. This was particularly important as Mr. Chobert made his living driving a taxicab. *Id.* at 7.

Tr. 7/1/82 at 179.[4]

19. None of the prosecution's other witnesses were as central to its case as Mr. Chobert. The only other witness who claimed to have seen Mr. Abu-Jamal shoot Officer Faulkner was Cynthia White. Ms. White was also an important witness for that reason. But her prior inconsistent statements, open criminal cases, and inability to answer questions during her testimony meant the prosecutor would surely be concerned about her credibility with the jury.

20. Prior to trial, Ms. White, a prostitute well known to the police, signed three statements for the police on three different days about the shooting—each significantly different from the others. Examples of the inconsistencies include contradictory statements about whether: there was an altercation between Officer Faulkner and Mr. Abu-Jamal's brother; how many shots were fired before Officer Faulkner fell; and the relative heights of the Officer, the shooter and Mr. Abu-Jamal's brother. *See* Tr. 6/21/82 at 159-90.

21. In addition, the jury learned that at the time of trial, Ms. White was serving a prison sentence in Massachusetts and had as many as 38 prior arrests. Tr. 6/21/82 at 80. At the time of trial, she had four to five open criminal cases pending against her. Tr. 6/22/82 at 26. She admitted to using several aliases, Tr. 6/21/82 at 80 (although she lied about this in her police statement) and, despite knowing she would be needed for trial, gave a false address while being interviewed by the investigating police officers on the night of the shooting. *See* Tr. 6/22/82 at 42. And, in response to cross-examination questions about

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[4] "Tr." in citations herein refers to pages from Mr. Abu-Jamal's 1982 trial.

her past dishonesty, Ms. White repeated, "I don't remember," over and over again. Tr. 6/21/82 at 115 et. seq.

22. The fact that Mr. Chobert and Ms. White were the only eyewitnesses is especially important because their testimony was the only evidence the jury could have relied upon to return a verdict of first-degree murder, rather than an acquittal or a lesser degree of homicide. Although other evidence showed that Officer Faulkner and Mr. Abu-Jamal had both been shot, no other witness purported to have seen the shootings; nor was there any other evidence establishing how those shootings occurred. Mr. Chobert's and Ms. White's accounts of the number of gun shots and the relative positioning of Mr. Abu-Jamal and Officer Faulkner were essential to the prosecution's theory of the case, including its theory about how the shootings occurred and Mr. Abu-Jamal's mental culpability.

23. The only other witnesses who claimed to have seen or heard the shooting were Michael Scanlan and Albert McGilton. Mr. Scanlan, who was driving his car near the scene, testified that he saw a man run towards Officer Faulkner with something in his hands. However, he did not see a gun, nor a flash, and in any event could not identify the man. *See* Tr. 6/25/82 at 4-74. As the prosecutor acknowledged in summation, "Scanlan couldn't identify anyone." Tr. 7/1/82 at 158.

24. In addition, what Mr. Scanlan did testify he saw was in direct conflict with Mr. Chobert's and Ms. White's testimony. Mr. Scanlan said that the Officer did not fall down until being shot a second time. Tr. 6/25/82 at 7. Mr. Chobert testified that the Officer fell after a single shot. Tr. 6/19/82 at 210, 228. Mr. Scanlan said that the man running toward the Officer had an Afro hairstyle, as opposed to long dreadlocks as Mr. Chobert stated in his statement to the police. Tr. 6/25/82 at 45. Mr. Scanlan said that he did not

see a cab behind the police car, *id.* at 20, but that was where Mr. Chobert claimed his cab was parked. *See* Tr. 6/19/82 at 228. And Mr. Scanlan said there was no one else there, thus failing to corroborate Ms. White's claim that she was standing on the same sidewalk where Officer Faulkner fell. *See* Tr. 6/25/82 at 21.

25. Albert McGilton did not see the shooting at all, but rather testified that he heard shots while standing on the street. Tr. 6/25/82 at 77. He identified Mr. Abu-Jamal as a man he saw coming across the adjacent parking lot, but did not see what, if anything, he did. *Id.* at 77, 92. Plus, like Mr. Scanlan, he denied seeing a cab or any car parked behind the police car. *Id.* at 85-86.

26. In sum, other than the impeached Cynthia White, Robert Chobert was the only witness who testified that he saw Mr. Abu-Jamal shoot Officer Faulkner, and his credibility was therefore essential to the prosecution's case. The prosecution's failure to disclose a promise of payment to Mr. Chobert deprived Mr. Abu-Jamal of important impeachment evidence. It is reasonably probable that this would have affected the trial's outcome.

27. The Supreme Court's decision in *Kyles v. Whitley*, 514 U.S. 419 (1995), is instructive. In *Kyles*, the Supreme Court considered whether omitted evidence that would have affected the credibility of two prosecution eyewitnesses established a "reasonable probability" of a different result. *See id.* at 434. The Court in *Kyles* held that the omitted impeachment evidence established a reasonable probability of a different result, even though the prosecution in that case presented two other eyewitnesses whose testimony was not impeached by the new evidence. In rejecting the State's argument that the existence of these two other eyewitnesses meant there was no reasonable probability of a different

result, the Supreme Court explained: "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before." *Id*. at 444 (citing *United States v. Agurs*, 427 U.S. 97, 112-13 (1976)). Prejudice is even clearer here than in *Kyles* given the lack of other witnesses whose credibility was not affected by withheld evidence.

28. Moreover, in *Kyles*, just as in this case, the prosecution's closing argument supported a finding of prejudice. The Court explained that "[t]he likely damage" to the prosecution's case from the hidden impeachment evidence concerning two prosecution witnesses was "best understood by taking the word of the prosecutor," who highlighted those two witnesses during closing. *Id.* at 444. So too here, where the prosecutor relied heavily on Mr. Chobert and vouched for his trustworthiness in closing. Tr. 7/1/82 at 179. *See also Banks*, 540 U.S. at 685, 701 (relying on prosecutor's closing argument to confirm the importance of a witness to the prosecution's case, such that the failure to disclose a $200 payment to the witness was material).

29. Newly disclosed evidence that the Commonwealth withheld the fact that Robert Chobert expected a money payment in exchange for his testimony against Mr. Abu-Jamal proves a *Brady* violation in light of the significance of this crucial witness's credibility. *See Tassin,* 517 F.3d at 781 ("'The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.'") (quoting *Napue v. Illinois* 360 U.S. 264 (1959)).

B. The Prosecution's *Brady* Violation Concerning Witness Cynthia White

30. The prosecution's second most important witness was Cynthia White—the only other witness who claimed to have seen Mr. Abu-Jamal shoot Officer Faulkner. Although jurors knew Ms. White had open charges against her, they did not know of any arrangement or understanding that the prosecution would seek favorable treatment for Ms. White in exchange for her testimony. Evidence disclosed for the first time in January 2019 is highly probative of such a hidden arrangement, which constitutes an independent *Brady* violation that undermines confidence in the outcome of Mr. Abu-Jamal's first-degree murder conviction. Considering the combined effect of the suppressed evidence concerning Mr. Chobert and Ms. White, as the law requires, only highlights that Mr. Abu-Jamal did not receive a fair trial. *See Kyles*, 514 U.S. at 436-37 (the materiality of suppressed evidence must be considered based on the "cumulative effect of suppression," rather than "item by item").

31. New evidence disclosed by the District Attorney's Office in January 2019 contained memoranda and letters which reveal that after Mr. Abu-Jamal's trial, the District Attorney's Office, at its higher levels, made significant efforts to monitor and direct the outstanding prostitution charges against Cynthia White. *See* ¶ 32 *infra* and Ex. D (containing seven relevant letters and memoranda). Ms. White was one of two witnesses at Mr. Abu-Jamal's trial who testified that she saw him commit the crime.[5] At the time of the offense she had been working as a prostitute for a long time, was then serving a prison sentence in Massachusetts, had as many as 38 prior arrests, Tr. 6/21/82 at 80, and had 4-5

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[5] The only other eyewitness, Robert Chobert, is the subject of Mr. Abu-Jamal's *Brady* Claim IA above which speaks of evidence concerning an arrangement or understanding that Mr. Chobert expected to be paid after testifying for the prosecution.

open criminal cases pending against her. *Id.* at 6/22/82 at 26. At Mr. Abu-Jamal's trial, the prosecutor maintained that Ms. White had been offered no incentives to testify and that no promises were made to her concerning leniency in her outstanding cases. *Id.* at 6/21/82 at 72. Materials in the recently disclosed files suggest that was not true. Memoranda in these files indicate that members of the District Attorney's Office paid special attention to Ms. White's upcoming prostitution cases, and each of these memoranda instructed the trial prosecutor to "contact Joe McGill (lead prosecutor in Mr. Abu-Jamal's case) prior to [White's] trial." They also seek to facilitate her release from custody after her return to Pennsylvania from a Massachusetts prison.

32. Mr. Abu-Jamal's trial and penalty phases were completed on July 3, 1982. Cynthia White's testimony was completed on June 22, 1982. The following is a chronological list with summaries, of memoranda and letters written by or between members of the Philadelphia District Attorney's Office months after the trial ended. (Attached as Exhibit D). These seven memoranda prove that Mr. McGill, a homicide prosecutor, and other Philadelphia Assistant District Attorneys made persistent efforts to have Cynthia White returned expeditiously from Massachusetts where she was serving jail time to Philadelphia where they intended to move up her trial date and facilitate her release from custody. These actions raise a strong inference that after the trial, Mr. McGill was following through on an off-the-record and undisclosed offer, or understanding, of leniency and assistance in securing her freedom, to Cynthia White as an incentive to her testifying against Mr. Abu-Jamal. The following items were not disclosed until 2019:

a. Handwritten memorandum from Richard DiBenedetto to A.D.A. Joe McGill

regarding Cynthia White-August 31, 1982. The memo advises Mr. McGill that Cynthia White was transported to "our prison system today," and it informs Mr. McGill that Lt. Martin has been advised to hold her in security. Ex. D (sixth page).

b. Letter from Richard DiBenedetto, Philadelphia D.A.'s Office Deputy for Intergovernmental Affairs, to a Records Officer at the Massachusetts Correctional Institution-September 15, 1982. This letter indicates that while Ms. White was about to be returned from Philadelphia to Massachusetts (after being brought to Philadelphia in order to testify at Mr. Abu-Jamal's trial),[6] the Philadelphia D.A. would like to have her immediately sent back to Philadelphia to face her prostitution charges. The letter states that Ms. White had already told Mr. DiBenedetto that she would waive any waiting period. Ex. D (first page).

c. Memorandum from Richard DiBenedetto, Philadelphia D.A.'s Office Deputy for Intergovernmental Affairs to Sgt. Keaveny at the Cell Room-October 1, 1982. This memo informed the Sergeant that Ms. White would be released on parole by Massachusetts on October 29, and asked that she be picked up in Massachusetts and brought to Philadelphia on that date. A handwritten note on the bottom of the memo states, "Try to get an early listing date once def. has been returned per Brad." Ex. D (fifth page).

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[6] Apparently, since Ms. White was in Philadelphia pursuant to the Interstate Rendition of Witnesses Act, the D.A. was prohibited from proceeding with her prostitution cases while she was in the jurisdiction pursuant to that Act. *See* Ex. D at first page; Tr. 6/21/82 at 72.

d. Memorandum to Ed Wilbraham of the Philadelphia D.A.'s Municipal Court Unit from Richard Dibenedetto of the Extraditions Unit regarding Cynthia White-November 1, 1982. This memo states that Brad Richman wanted to get an early trial date for Ms. White's prostitution charges. The memo says that the case was listed for January 14, 1983 but asks that the Municipal Court A.D.A. consider getting the charges re-listed for an earlier date. It concludes with the instruction to "have the assigned A.D.A. contact Joe McGill prior to trial." Ex. D (third page) (emphasis added).

e. Memorandum to Ed Wilbraham of the Philadelphia D.A.'s Municipal Court Unit from Alfred Little, Philadelphia D.A. Trial Services Director regarding Cynthia White- November 22, 1982. This memo informed the Municipal Court Chief that a subpoenaed witness in the Commonwealth's case against Cynthia White, upon appearing to testify but not being needed, was told by the court bailiff that he need not return to court. Mr. Little then asks if, "there is anything further we should do." The memo also states that, "This file is currently signed out to A.D.A. Joseph McGill of the Homicide Unit." Ex. D (fourth page) (emphasis supplied).

f. Memorandum from Andre Washington Chief of the D.A.'s Municipal Court Unit to Michael Weisberg, an A.D.A. in that Unit regarding Cynthia White-December 6, 1982. This memo, written five months after the conclusion of Mr. Abu-Jamal's trial, instructs the trial A.D.A. that he has been assigned to Ms. White's prostitution cases and that she had been a witness in "the recent police shooting case tried by Joe McGill." The memo protests that there were

no specific deals worked out for her testimony, "so these [prostitution] cases should be vigorously prosecuted." Yet despite this protestation, the memo concludes by instructing the trial A.D.A. that, "before proceeding to trial please see A.D.A. Joseph McGill, in the Homicide Unit, and discuss this case." And, "if possible, arrange for an earlier date for trial." It concludes by telling the Municipal Court A.D.A to "keep me informed of your progress." Ex. D (second page).

g. Handwritten memorandum from A.D.A. Weisberg to A.D.A. McGill regarding Cynthia White-April 28, 1983. This memorandum informs Mr. McGill that all of Cynthia White's cases were "discharged by Judge Coppolini for lack of prosecution." According to the memo, one case was dismissed because a civilian witness failed to appear;[7] one was dismissed because the arresting officer left the force (and the judge would not allow a continuance); and the third was dismissed upon motion of the defendant's counsel. The memo indicates that the defendant (who apparently had been released on bail by this point) failed to appear, and yet the courtroom A.D.A. did not ask for a bench warrant. The final paragraph of the memo states that the A.D.A. indicated for the record that the Commonwealth expended time and money to try to secure the appearance of the necessary witnesses. *See* Ex. D (seventh page).

[7] This likely refers to the witness mentioned in paragraph 32(e) above, who was told on an earlier date that he need not return at all.

33. There can be no reason for prosecutors involved in prostitution charges in Municipal Court to be repeatedly instructed to contact a senior homicide prosecutor like Joe McGill about charges against a specified defendant, other than for Mr. McGill to have a say over the handling of her cases, all of which were eventually dismissed.

34. The inferences established by the above-listed documents as a whole are that: on the one hand, the D.A.'s Office endeavored to make it seem that they had neither offered nor provided favorable treatment to Ms. White in exchange for her testimony; but on the other hand, the documents reveal a concerted effort by Mr. McGill and several Philadelphia D.A. Unit Chiefs to bring Ms. White back from Massachusetts, secure an early trial date in order to expedite her release, and ultimately allow her cases to be dismissed for lack of prosecution. The correspondence listed above paints a picture of the Commonwealth pushing for a speedy disposition of Ms. White's charges, and repeatedly instructing the Municipal Court prosecutor(s) to speak to A.D.A. McGill before doing anything else.

35. During this time, the documents reveal that Ms. White's Municipal Court file was checked out by Mr. McGill. *See* ¶ 32(e), *supra*.

36. The newly disclosed documents make clear that A.D.A. McGill took pains to follow Ms. White's cases after the Abu-Jamal trial was concluded. They make clear that he had undocumented conferences with the Municipal Court prosecutors and others concerning the handling of Ms. White's cases.

37. For an exhibit to Maureen Faulkner's 2019 Kings Bench Petition, trial prosecutor, Joseph McGill, signed an affidavit in which he states that he "never took any steps to intervene in the prosecution of Cynthia White for any crime." Ex. C ¶ 8. But he

admits that the direction to "contact ADA McGill before proceeding to trial" against Cynthia White was so that he could "track her progress," and "make the assigned prosecutor aware of her courageous participation in the Jamal case." *Id.* Thus, by ADA McGill's own account, he wanted to make other prosecutors aware of her testimony against Mr. Abu-Jamal, in order to put in a good word for her, or in other words, pass along to the Municipal Court ADA information that would weigh in her favor. Mr. McGill's intentions in this regard should have been disclosed. *See Commonwealth v. Weiss,* 986 A.2d 806, 812 (Pa. Sup. Ct. 2009) (noting that the failure to disclose prosecutor's letter on witnesses' behalf to the parole board could form the basis for a *Brady* violation).

38. Mr. McGill's assertion that he took no steps to intervene in Ms. White's cases is inconsistent with both his admission that he wanted to "track her progress," and "make the assigned prosecutor aware of her courageous participation in the Jamal case." It is also inconsistent with the fact that he took her prostitution case files to his office (*see* ¶ 32(e), *supra*) and with the clear direction in multiple inter-office memos that the prosecutor assigned to Ms. White's case should talk with ADA McGill before proceeding against her. *See* ¶ 32(d), (f).

39. Moreover, Ms. White was a reluctant witness. This is evidenced by the fact that when she was first interviewed by police on the night of Officer Faulkner's death and asked for her contact information, she gave the detectives a false address, *see* Tr. 6/21/82 at 172-173, and that the Homicide Unit had so much difficulty bringing her in for follow-up interviews that they needed to post a sign in the Roundhouse asking that if Cynthia White were arrested, to contact Homicide. *See id.* That Ms. White ultimately testified notwithstanding her demonstrated reluctance to do so further supports the inference that,

prior to her testimony, she and the prosecution reached an arrangement or understanding that she would receive favorable treatment if she testified—favorable treatment that she did in fact receive as documented by the multiple memos hidden until January 2019.

40. The value of the undisclosed information in showing motive, bias, and interest that can be used by the defense to discredit a witness' testimony, is at the core of the *Brady* rule. Accordingly, the United States Constitution requires the disclosure of not "only bona fide enforceable [promises] . . . . Its reach extends to 'any understanding[s] or agreements[s]"' between the government and a prosecution witness. *Haber v. Wainwright,* 756 F.2d 1520, 1524 (11th Cir. 1985) (quoting *Giglio v. United States,* 405 U.S. 150, 155 (1972)); *see also Tassin*, 517 F.3d at 778; *Bragan v. Morgan,* 791 F. Supp. 704, 715 (M.D. Tenn. 1992) (noting that disclosure of such evidence is required because it "is highly relevant to the jury's deliberation") (citations and internal quotations omitted). Due process thus mandates disclosure of all information that can be used to impeach.

41. Accordingly, The United States Supreme Court long settled the issue that *Brady* is violated by prosecutorial non-disclosure of "unfinalized" agreements, witness "understandings" and/or beliefs about potentially favorable treatment, "tacit" assurances or "implied understandings." *Bagley,* 473 U.S. at 683 ("This possibility of a reward gave [the witnesses] a direct, personal stake in respondent's conviction. The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction" and thus to please the Government); *Commonwealth v. Strong*, 761 A.2d 1167, 1171-72 (Pa. 2000) (*Giglio* made clear that due process requires that any potential understanding between the prosecution and a witness be

revealed to the jury); *Gilday v. Callahan*, 59 F.3d 257, 269 (1st Cir. 1995) (stating, "even if the 'wink and nod' deal had not been explicitly communicated to Fleischer [the prosecution witness], he must have been given some indication that testimony helpful to the government would be helpful to his own cause"); *Reutter v. Solem*, 888 F.2d. 578, 582 (8th Cir. 1989) (in finding a *Brady* violation, stating "our conclusion does not depend on a finding of either an express or an implied agreement between [the witness] and the prosecution"); *Boone v. Paderick,* 541 F.2d 447, 451 (4th Cir. 1976) (rather than being less useful for impeachment, any "tentativeness" in a potential agreement increases the impeachment value, because "[t]he more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor").

42. Mr. McGill's affidavit is also significant because it indicates that the DA's office was using the memos to attempt to create a misleading record that there was no arrangement or understanding concerning Ms. White's testimony. One of the memoranda claims "there were no specific deals worked out for her testimony," "so these [prostitution] cases should be vigorously prosecuted." Ex. D (second page) (emphasis supplied). But, in his most recent affidavit, Mr. McGill acknowledges that he was "track[ing Ms. White's] progress," and sought to "make the assigned prosecutor aware of her courageous participation in the Jamal case." Ex. C ¶ 8. The most reasonable interpretation of the memo is that the line about prosecuting Cynthia White for the crime of prostitution "vigorously," was included to bolster, in an official memo, the representation that Ms. White was offered no deals in exchange for her testimony. Then, the memo directs the prosecuting Assistant to "before proceeding to trial please see A.D.A. Joseph McGill, in the Homicide Unit, and discuss this case," and to "if possible, arrange for an earlier date

for trial." Ex. D (second page). It is apparent that the memo was designed to make it seem that Ms. White would be vigorously prosecuted, but required the prosecutor to speak privately with A.D.A McGill before moving forward. And we now know that Mr. McGill, by his own account, was tracking Ms. White's case and seeking to make prosecutors aware of her testimony against Mr. Abu-Jamal. This is powerful evidence of an arrangement or understanding for leniency in connection with Ms. White's testimony.

43. The Commonwealth's failure to disclose any offer of leniency to Cynthia White is a clear violation of Mr. Abu-Jamal's rights under *Brady v. Maryland*. Because she was one of only two eyewitnesses, Cynthia White's credibility was a crucial issue for the prosecution. She was serving a prison sentence at the time of her testimony. She had several open cases in Philadelphia for which there were outstanding bench warrants and detainers. As set forth in paragraphs 19-21, *supra*, there were numerous inconsistencies between her pre-trial and trial statements as well as during the course of her trial testimony. Yet, the incentive to testify stemming from obtaining a way to avoid prosecution on pending charges would have constituted a different category of impeachment. *See Banks*, 540 U.S. at 702 (rejecting State's argument that evidence key witness was a paid informant was "'merely cumulative'" to other categories of impeachment that had been presented at trial). The jury would have had a significant additional reason to doubt her credibility if it had been made aware of promises by the Commonwealth to secure her release on the Philadelphia cases, as soon as possible. *See Strong,* 761 A.2d at 1175 ("impeachment evidence which goes to the credibility of a primary witness against the accused is critical evidence and it is material to the case whether that evidence is merely a promise or an understanding between the prosecution and the witness").

44. Both the prosecutor and defense counsel made it clear to the judge and the jury that whether or not Ms. White had been offered leniency on her pending cases in exchange for her testimony was a highly significant factor in an assessment of her credibility. After ADA McGill informed the court and defense counsel that "there has been no agreement in reference to her charges," Tr. 6/21/82 at 72, he began his direct examination of this key witness by eliciting testimony that no deals or agreements had been made with regard to her pending cases, *id*. at 81-82, or with the Massachusetts court system. *Id.* at 84-85. During his cross-examination of Ms. White, defense counsel spent a considerable amount of time inquiring about promises of leniency in exchange for her testimony. *See e.g., id.* 6/22/82 at 81. In fact, in a lengthy line of questioning, defense counsel elicited testimony that when Ms. White was arrested for prostitution on two separate occasions after Officer Faulkner's death, each time she requested that the Homicide Unit be contacted, each time she was taken to the Homicide Unit, and each time she gave a new, different, and more prosecution-friendly statement about Officer Faulkner's shooting. *See id.* 6/21/1982 at 177. Despite admitting to these facts, Ms. White denied that she was given preferential treatment because of her pending cooperation in Mr. Abu-Jamal's trial. *See id.* at 81-82.

45. The memoranda listed in paragraph 32 *supra* demonstrate that A.D.A. McGill paid close attention to Ms. White's pending cases after her trial testimony, tried to have her court dates moved up, and had private conversations with the prosecutors handling those cases. This *Brady* violation was particularly prejudicial to Mr. Abu-Jamal's case because, rather than simply failing to disclose any explicit or implicit agreements, A.D.A. McGill went out of his way to elicit testimony that no such agreement existed, thereby

using this falsehood as a means of bolstering White's credibility. The false impression created and exploited through the Commonwealth's failure to disclose its intentions leaves no question that the information withheld could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

46. The Supreme Court's decisions in "*Giglio* and *Napue* set a clear precedent, establishing that where a key witness has received consideration or potential favors in exchange for testimony and lies about those favors, the trial is not fair." *Tassin*, 517 F.3d at 778. That is precisely what happened here.

47. As stated above, Ms. White was one of only two witnesses at Mr. Abu-Jamal's trial who testified that she saw him commit the crime. The other one was Robert Chobert. And, as explained in paragraph 22 above, the only testimony to support the theory that this was a first-degree murder was that of Mr. Chobert and Ms. White. In Claim IA above, Mr. Abu-Jamal has raised a *Brady* claim based upon new evidence that Mr. Chobert expected to be paid money for his testimony. Given the importance of these two witnesses, the suppressed evidence described above is material for each of them. That is even more clearly so when the cumulative impact of the undisclosed impeachment evidence with regard to both Mr. Chobert and Ms. White is considered, as is required by *Brady*'s materiality analysis. *See Kyles v. Whitley,* 514 U.S. at 441.

II. The *Batson* Violation

48. The files first disclosed in January 2019 provide powerful, new evidence that the prosecution relied on race in striking prospective jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Specifically, those files include handwritten notes by Mr. McGill, showing that he was actively tracking prospective jurors by race during jury

selection, including by prominently placing the letter "B" next to the names of many prospective Black jurors.[8] The explicit focus on the race of prospective jurors in the prosecutor's notes is highly probative evidence that the prosecutor relied, at least in part, on race in deciding which jurors to strike in violation of *Batson*. *See, e.g.*, *Foster v. Chatman*, 136 S. Ct. 1737, 1744, 1748 (2016); *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005).

49. The Pennsylvania courts lacked this critical evidence when they previously adjudicated Mr. Abu-Jamal's *Batson* claim, which means the claim is properly before the Court and not barred by the rule against re-litigating claims previously adjudicated set forth in 42 Pa. C.S.A. § 9544(a)(2). *See Commonwealth v. Chmiel*, 173 A.3d 617, 627 (2017) (explaining that "[a]n issue is not previously litigated," within the meaning of 42 Pa. C.S.A. § 9544(a)(2), "when it does not rely solely upon previously litigated evidence") (citing *Commonwealth v. Miller*, 746 A.2d 592, 602 nn.9 & 10 (Pa. 2000)).

50. When combined with the other evidence in this case—which includes the starkly disparate strike pattern and a comparative juror analysis between prospective Black jurors the prosecutor struck and similarly-situated white jurors he did not strike—a *prima facie* case under *Batson* is satisfied. Under *Batson*, this means the burden shifts to the Commonwealth to have the prosecutor, Mr. McGill, proffer race-neutral reasons for his strikes of prospective Black jurors, something he has never attempted to do despite offering two affidavits on this subject. If Mr. McGill proffers race-neutral reasons, this Court would

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[8] Exhibit E contains a copy of handwritten notes by Mr. McGill during jury selection. Pursuant to the Commonwealth's prior request, the names of the venirepersons have been redacted. Each name has been replaced with a label that says, "Named Prospective Juror." Throughout this filing, Mr. Abu-Jamal uses initials to refer to specific prospective jurors.

then consider all the relevant evidence to determine whether the proffered reasons are pretextual.

51. *Batson*'s prohibition against racial discrimination in jury selection reflects the Supreme Court's longstanding recognition that "[d]iscrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). "Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *Miller-El*, 545 U.S. at 237-38 (citations and internal quotation marks omitted). Moreover, the "very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality, and undermines public confidence in adjudication." *Id*. (citations and internal quotation marks omitted).

52. The *Batson* Court "stressed a basic equal protection point: In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019) (describing *Batson*). It proceeded to establish a framework for ferreting out such discrimination. First, a "defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race." *Miller-El v. Cockrell*, 537 U.S. 322, 328 (2003) (citing *Batson*, 476 U.S. at 96-97). Second, if a prima facie showing is made, "the prosecutor must offer a race-neutral reason for striking the juror in question." *Id*. (citing *Batson*, 476 U.S. at 97-98). Third, if the prosecutor does so, the trial court must then determine whether the defendant has shown purposeful discrimination. *See id.* (citing *Batson*, 476 U.S. at 98).

53. Mr. Abu-Jamal's trial occurred before *Batson*, and the prosecutor was never called upon to provide reasons for any of his strikes of prospective Black jurors. Therefore, as the Pennsylvania courts recognized when Mr. Abu-Jamal raised this claim on direct appeal and in his first PCRA petition, the key question is whether the evidence supports a *prima facie* case of discrimination under *Batson*'s first step. *See Abu-Jamal*, 553 Pa. at 555-56 (PCRA opinion); *Abu-Jamal*, 521 Pa. 188, 197 (1989) (direct appeal opinion). To establish a *prima facie* case, Mr. Abu-Jamal need not show that a peremptory "challenge was more likely than not the product of purposeful discrimination." *Johnson v. California*, 545 U.S. 162, 170 (2005). "Instead a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id*.

54. In assessing the prima facie case, one relevant circumstance is the prosecutor's strike pattern. *See Batson*, 476 U.S. at 97. Here, the prosecutor used peremptory strikes to exclude 15 members of the jury panel, 10 of whom were Black, and 5 of whom were not Black.[9] By contrast, of the 24 panelists whom the prosecution accepted, only four were Black, whereas 20 were not Black.[10] In other words, out of the

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[9] In its brief to the Pennsylvania Supreme Court on direct appeal, the Commonwealth acknowledged that eight of the prosecutor's 15 peremptory strikes were used against prospective Black jurors. *See* Commonwealth's Br., No. 51 E.D. Appeal Docket 1983, at 19 (excerpt attached hereto as Exhibit F); *see also* Tr. 6/7/82 at 134; 6/8/82 at 2.78; 6/10/82 at 4.79-80, 4.238; 6/11/82 at 5.115; 6/15/82 at 180, 233. In PCRA proceedings, the parties stipulated that two additional prospective jurors struck by the prosecutor were Black. *See* 30 Phila. Co. Rptr. 1, 102-103; Tr. 8/3/95 at 259.

[10] *See* Commonwealth Direct Appeal Br., No. 51 E.D. Appeal Docket 1983 at 19-20 & Ex. A (attached hereto as Exhibits F & G) (representing that the prosecutor accepted four Black prospective jurors and attaching an affidavit from the trial prosecutor). The 24

14 Black panelists whom the prosecution could have struck or accepted, the prosecutor struck 10, for a strike rate of 71.4%. By contrast, out of the 25 non-Black panelists whom the prosecutor could have struck or accepted, the prosecutor struck only 5, for a strike rate of 20%. "Happenstance is unlikely to produce this disparity." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003). Indeed, as explained in the footnote, such an extreme racial disparity would occur by chance well under 1% of the time, which means this disparity is statistically significant and probative of discrimination.[11]

55. This strike pattern is particularly significant because of the racial dynamics of this case. Because Mr. Abu-Jamal and the excluded panelists are Black, this is "one of

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prospective jurors whom the prosecutor accepted are documented at the following transcript pages: Tr. 6/7/82 at 165-74, 174-87; 6/8/82 at 2.36-2.46; 6/9/82 3.68-3.74, 3.79-85, 3.85-92, 3.138-151, 3.191-97, 3.228-38; 6/10/82 at 4.51-71, 4.80-90, 4.125-36, 4.137-45, 4.153-67, 4.207-18; 6/11/82 at 5.53-63, 5.94-101, 5.115-24, 5.151-60, 5.169-78; 6/15/82 at 123-33, 193-207, 233-46; 6/16/82 at 298-313.

[11] A post-conviction court may "'appl[y] general statistical principles to the evidence on the record in order to assess the role of chance'" as a potential explanation for disparate exclusion of jurors, even if that statistical analysis was not presented in the trial court. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986) (quoting *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977)). Here, a statistics calculator (see, e.g., https://www.socscistatistics.com/tests/chisquare/default2.aspx), allows a user to create a table as follows:

	Struck by Prosecution	Accepted by Prosecution
Black Panelists	10	4
Non-Black Panelists	5	20

Based on this table, the p-value (or likelihood of this extreme result occurring by chance) is .001541. That p-value is not only below .05 (or 5%), which is the general threshold for statistical significance, it is well below .01. *See, e.g.*, *Woodfox v. Cain*, 772 F.3d 358, 380 (5th Cir. 2014); *Stagi v. Nat'l R.R. Passenger Corp.*, 391 F. App'x 133, 137-38 (3d Cir. 2010).

the easier cases to establish a prima facie case," as the "[r]acial identity between the defendant and the excused person" may cause the prosecutor to rely on a "forbidden stereotype" about juror partiality in excluding Black jurors. *Powers v. Ohio*, 499 U.S. 400, 416 (1991). Moreover, as the Superior Court has recognized, "the potential for misuse of peremptory challenges is greatest when," as here, "a defendant is accused of attacking an individual of a different race. In such a case, the prosecutor has a special incentive to select jurors who are of the same racial background of the victim." *Commonwealth v. Jackson*, 386 Pa. Super. 29, 44-45 (1989). The "racial configuration" of a Black defendant and white victim "contribute[s] significantly to [the] prima face case." *Simmons v. Beyer*, 44 F.3d 1160, 1168 (3d Cir. 1995); *see also Johnson*, 40 F.3d at 666 (similar).

56. On direct appeal, the record did not reflect the race of all prospective jurors struck by the prosecution, and the Pennsylvania Supreme Court therefore was under the mistaken impression that the prosecutor had used peremptory strikes to exclude 8 prospective Black jurors, instead of 10. *See* 521 Pa. at 198. That error was corrected in post-conviction proceedings, but the Pennsylvania Supreme Court determined that the new evidence documenting the severity of the strike pattern did "not alter [its] original conclusion" denying relief because the Court had previously examined the voir dire transcript and did not "'find a trace of support for an inference that the use of peremptories was racially motivated.'" 553 Pa. at 556 (quoting direct appeal opinion).

57. The new evidence, which was never before the Pennsylvania Supreme Court because the Commonwealth did not disclose it until January 2019, casts the record in a fundamentally different light, and shows far more than a "trace of support for an inference that the use of peremptories was racially motivated." *Id*. Specifically, the

Commonwealth has disclosed notes written by prosecutor Joseph McGill for over 40 prospective jurors. *See* Ex. E. For approximately 20 of those jurors, Mr. McGill wrote race and gender information next to the prospective juror's names at the top of his notes about each juror (e.g., "B/F" or "W/F"). *See id*. Although the record does not disclose race information for every prospective juror, the record discloses the only prospective Black juror for whom Mr. McGill did not identify by race in his notes: J.D., who was seated as juror #1. *See id*. J.D. was later excused after violating the Court's sequestration order, at which point Mr. McGill told the Court he had accepted J.D. because "she hates Jamal," Tr. 6/18/82 at 41—the Court later added "[s]he'll hang him," *id*. at 46.

58. Mr. McGill's contemporaneous notes prominently identifying the race of many jurors leave no doubt that he was focused on race during jury selection, and they provide highly probative evidence that race was a factor in his exercise of peremptory strikes. Indeed, the Supreme Court has twice relied on such evidence in concluding that a *Batson* violation was established at the ultimate third step of the inquiry—even when the state courts had reached a contrary conclusion. *See Foster v. Chatman*, 136 S. Ct. 1737, 1744, 1748 (2016) (relying on notes showing that the prosecution was tracking the race of jurors in finding a *Batson* violation); *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005) (explaining that the prosecutors "took their cues from a 20-year old [discriminatory] manual of tips on jury selection, as shown by their notes of the race of each potential juror"); *see also Diggs v. Vaughn*, No. 90-2083, 1991 WL 46319, at *1 (E.D. Pa. Mar. 27, 1991) (in finding a *Batson* violation, relying in part on notes showing that the prosecutor was tracking the race of prospective jurors, which indicated that race "featured very prominently in the thought processes of the trial prosecutor"). These cases apply with even

more force here, because the sole issue is whether Mr. Abu-Jamal can establish a *prima facie* case of discrimination, which simply requires evidence "sufficient to permit . . . an inference that discrimination has occurred." *Johnson*, 545 U.S. at 170.

59. Mr. McGill's notes are also relevant for another reason: they indicate that Mr. McGill was seeking to build a record to rebut any claim of discrimination by emphasizing that he accepted *some* Black jurors. Thus, in his handwritten notes with respect to J.B., a prospective juror whom Mr. McGill had identified next to his name as "B/M," Mr. McGill also wrote the following in the margin: "I accepted but D rejected this Black male." Ex. E (seventh page) (juror's name redacted). Mr. McGill then emphasized this point in the short affidavit the Commonwealth provided to the Pennsylvania Supreme Court on direct appeal. *See* Ex. G ¶ 3 (2/18/87 Aff. of Joseph McGill). But *Batson* is not satisfied simply because the prosecutor accepts some Black jurors. On the contrary, *Batson* "forbids striking even a single prospective juror for a discriminatory purpose." *Flowers,* 139 S. Ct. at 2244. Mr. McGill's handwritten notes about J.B. highlight his awareness of race during jury selection, but indicate he wrongly thought he could rebut any inference of discrimination so long as he accepted some Black jurors.

60. Notably, in the colloquy with the Court about J.D. (the Black juror excused for violating the Court's sequestration order), Mr. McGill asserted: "I wanted to get as much black representation as I could <u>that I felt was in some way fair minded</u>." Tr. 6/18/82 at 46 (emphasis added). He made clear that in his mind J.D. was fair minded because she "hates Jamal." *Id.* at 41. These statements, combined with his notes concerning prospective juror J.B., indicate that during jury selection Mr. McGill was relying on the "forbidden stereotype," *Powers*, 499 U.S. at 416, that, on average, Black jurors would be

more likely to favor Mr. Abu-Jamal, and that he thought he could overcome any evidence of discrimination by highlighting his willingness to accept some Black jurors. That is not the law. On the contrary, *Batson* held that "[t]he Equal Protection Clause 'forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black.'" *Flowers*, 139 S. Ct. at 2241 (citation omitted).

61. In addition to this new evidence of Mr. McGill's contemporaneous notes, there is additional new evidence probative of a *Batson* violation: the November 18, 2019 affidavit Mr. McGill filed in connection with a King's Bench Petition filed by Officer Faulkner's widow Maureen Faulkner. *See* Ex. C. In that affidavit, Mr. McGill does not proffer any race-neutral justifications for his strikes of prospective Black jurors. *See id.* And he acknowledges that his shorthand notes from voir dire contain references to prospective jurors by race. *See id.*

62. Mr. McGill nonetheless insists that the focus on jurors' race during voir dire revealed by his notes is "consistent with the law in the Commonwealth of Pennsylvania." Ex. C ¶ 8. To support that assertion, Mr. McGill provides a copy of the current jury questionnaire for use at criminal trials, which includes a question about a prospective juror's race. *See id.* Mr. McGill admits that he does not remember whether a similar questionnaire was in use in 1982. *See id.* But, even if it was, asking about race on an official jury form is entirely different than tracking race on shorthand notes during the selection of the petit jury. Such official forms allow courts and litigants to determine whether jury pools represent a fair cross-section of the community, as required by law. *See*

Duren v. Missouri, 439 U.S. 357 364 (1979). They may also provide key information for reviewing courts in assessing a *Batson* claim.

63. By contrast, there is no similar reason for a prosecutor to track the race of prospective jurors on handwritten notes during jury selection. The direct appeal proceedings in this case highlight the difference between asking about race on an official questionnaire for the purposes of fair judicial administration, and a prosecutor highlighting (some, but not all) jurors' races in voir dire notes. In its direct appeal brief in Mr. Abu-Jamal's case, the Commonwealth asserted that the record did not reveal the race information of prospective juror A.A., which is one of the reasons the Pennsylvania Supreme Court believed that the prosecutor had used peremptory strikes on 8 rather than 10 prospective Black jurors. *See* Ex. F. But Mr. McGill's handwritten notes, which were not part of the record, showed A.A. was Black, and Mr. McGill did not include that information in the affidavit he presented to the Pennsylvania Supreme Court. *See* Ex. E at 5 (Mr. McGill's notes, with A.A.'s name redacted); Ex. G (affidavit submitted by Mr. McGill on direct appeal).

64. In his November 2019 affidavit, Mr. McGill asserts more generally that he is "confident" that tracking jurors' race in his handwritten notes was "a standard practice" in 1982. Ex. C. ¶ 8. Mr. McGill does not provide any evidence to support that assertion. But, in any event, a practice may be both standard and discriminatory. In *Miller-El*, the Supreme Court relied on prosecutors' notes tracking jurors by race as evidence that prosecutors were acting consistent with a discriminatory manual that had long been in circulation in the prosecutor's office. *See Miller-El*, 545 U.S. at 266 (explaining that the

prosecutors "took their cues from a 20-year old [discriminatory] manual of tips on jury selection, as shown by their notes of the race of each potential juror").

65. Here, Mr. McGill's assertion that he was following "standard practice" in tracking jurors' race implicates the Philadelphia District Attorney Office's well-documented pattern of discriminatory jury selection in the early 1980s. As the late Justice Juanita Kidd Stout noted at oral argument in another Philadelphia capital case tried in 1982, "as one of the most active trial judges," she had seen "a practice" of Philadelphia prosecutors excluding Black jurors. *See* Brief of Appellee in *Hardcastle v. Horn*, 2/11/2002, No-01-9006 at 7 (3d Cir.) (quoting Justice Stout's statements). In his concurring opinion in *Miller-El*, Justice Breyer noted a study showing that, in capital trials in Philadelphia between 1981 and 1997, prosecutors struck 51% of prospective Black jurors but only 26% of prospective non-Black jurors. *See* 545 U.S. at 268. And, the notorious McMahon videotape from 1986 shows a Philadelphia prosecutor training other prosecutors as to how to keep African Americans off of juries. That tape is especially relevant because it "leaves no doubt that [Mr. McMahon] had developed the techniques he advocates over the course of his career" in the Philadelphia District Attorney's Office. *Wilson v. Beard*, 426 F.3d 653, 669 (3d Cir. 2005).

66. In sum, while Mr. McGill claims that tracking prospective jurors' race was standard in 1982, his affidavit does not even attempt to provide a single non-discriminatory explanation why he would have highlighted the race of prospective jurors in his handwritten jury selection notes. His failure to offer any non-discriminatory justification in his affidavit is additional new evidence supporting the *prima facie* case.

67. Finally, Mr. McGill asserts in his affidavit that in his notes he also recorded information about prospective jurors, including "the section of the city where they live, their vocation, the work of their relatives, and numerous other aspects of their lives." Ex. C. ¶ 8. But this does not provide a race-neutral reason for the fact that he also expressly tracked jurors' races. And, the additional characteristics Mr. McGill highlights only confirm that Mr. Abu-Jamal has established a *prima facie* case of discrimination.

68. First, "the section of the city" where a prospective juror lives often correlates strongly with race, and can itself be a proxy for racial discrimination in *Batson* cases. *See, e.g.*, *United States v. Bishop*, 959 F.2d 820, 825 (9th Cir. 1992), *overruled on other grounds United States v. Nevils*, 598 F.3d 1158 (9th Cir. 2010); *Moore v. Wallace*, 2016 WL 628788, at *4. Mr. McGill did not suggest some race-neutral reason for focusing on neighborhood (such as familiarity with the scene of the crime, which was in Center City) in his affidavit. Second, Mr. McGill's references in his affidavit to tracking prospective jurors' "vocation, the work of their relatives, and numerous other aspects of their lives," provide further support for an inference of discrimination because Mr. McGill struck multiple prospective Black jurors whose characteristics revealed "nothing . . . that would clearly cause a prosecutor free of racial stereotyping to question [the juror's] objectivity." *Johnson v. Love*, 40 F.3d 658, 666 (3d Cir. 1994). The information disclosed by the following Black jurors who were struck by Mr. McGill demonstrates the point:

a. B.G., a prospective Black juror, was employed as a data entry operator, the same job she had for six years. Tr. 6/9/82 at 3.241. She lived with her mother, who had been employed as a nurse for 11 years. *Id.* at 3.245-46. B.G. affirmed (twice) that she had no conscientious objections to imposing the death penalty,

that she had no bad feelings toward the criminal justice system or district attorneys, and (in response to multiple questions) that she would be fair and impartial in considering all of the evidence. *Id.* at 3.243-44.

b. G.G. was a trimmer in a clothing factory; G.G. was married, and her husband was a supervisor at a hospital. Tr. 6/10/82 at 4.73-75. She affirmed that she would reach a verdict based solely on the evidence, had no conscientious objections that would prevent her from imposing the death penalty, and said "no" when asked if she had any kind of unpleasant experience with the Philadelphia police or any other police that would prevent her from being fair in listening to police testimony. *Id.* at 4.75-77.

c. C.L. was retired, having previously worked as a drug counselor at a detention center for the City of Philadelphia, for the Veteran's Administration, and as a sergeant in the Army. Tr. 6/11/82 at 5.103-04; 109-09. He was married and his wife was a schoolteacher. Tr. 6/11/82 at 5.103-05. C.L. twice affirmed that his previous employment at the detention center would not interfere with his ability to be a fair juror in deciding the case, further answering "yes" when asked both whether he was still friends with a number of corrections officers and staff at the detention center, and when asked if he had ever "occasion to befriend in various ways some of the inmates." *Id*. at 5.113. He stated that he had no conscientious objections that would prevent him from imposing the death penalty and would be able to vote for the death penalty if he thought it was appropriate based on the evidence, and that he

would have no sympathy for Mr. Abu-Jamal because he was representing himself. *Id*. at 5.110-12.

d. V.B. lived with her mother, and they were both unemployed. Tr. 6/8/82 at 2.81-83. She said "no" when Mr. McGill asked if she or anyone close to her had ever had an unpleasant experience with the Philadelphia police that would in some way prevent her from being fair; said "no" when he asked (twice) if the fact that Mr. Abu-Jamal was representing himself would cause her to be in some way partial to him, and said "no" when asked if she had any philosophical beliefs that would prevent her from imposing the death penalty. *Id*. at 2.83-85.

69. Nothing about these jurors' "vocation, the work of their relatives, [or the] numerous other aspects of their lives," Ex. C. ¶ 8 (McGill Aff. 11/18/19), suggested that any of these prospective Black jurors would be unfair to the prosecution. They all affirmed that they would be fair, and that they had no conscientious objections to the death penalty. Those who were asked affirmed that Mr. Abu-Jamal's role representing himself would not make them partial to him, and that they had no negative prior experience with the police or criminal justice system that would bias them. And their vocations and family situations were varied, making clear there was no justification for striking them on that basis. B.G. and G.G. were working; C.L. was retired; V.B. was unemployed. G.G. and C.L. were married, and their spouses both worked. B.G. and V.B. were unmarried and lived with their mothers; B.G.'s mother worked, and V.B.'s mother was unemployed.

70. Moreover, "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve" makes clear that none of these answers

provide a valid justification for striking these prospective jurors. *Miller-El*, 545 U.S. at 241. For example, although he struck V.B (who was unemployed and lived with her mother who was also unemployed) and B.G. (who was employed and lived with her mother who was also employed), Mr. McGill accepted prospective non-Black jurors who were unemployed and lived with spouses who were also unemployed; and he accepted prospective non-Black jurors who were single or unmarried.[12]

CONCLUSION

71. The facts and law set forth above in support of Mr. Abu-Jamal's *Brady* claims demonstrate that there is no genuine issue concerning any material fact and that petitioner is entitled to relief as a matter of law. *See* Pa. R. Cr. P. 907(2). The new factual predicates for the *Brady* claims consist entirely of documents supplied by the District Attorney's Office and by former A.D.A. McGill. These documents call for an Order granting a new trial. In the alternative, Petitioner respectfully requests that this Court hold an evidentiary hearing. Were a hearing to be scheduled, Mr. Abu-Jamal would call as witnesses the individuals who wrote the letters and memoranda in question who would testify to the facts contained therein.

72. The newly disclosed jury selection evidence fundamentally alters the evidentiary record with respect to the *Batson* claim and establishes a *prima facie* case of

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[12] *See, e.g.*, Tr. 6/10/82 at 4.80-81, 85, 90 (Mr. McGill accepting non-Black juror who was unemployed and whose wife, whom he lived with, was unemployed); 6/16/82 at 299, 306, 313 (same); Tr. 6/7/82 at 166, 174 (Mr. McGill accepting single non-Black panelist); 6/9/82 at 3.80-81, 85 (Mr. McGill accepting divorced prospective non-Black juror); 6/11/82 at 95, 101 (same). It is clear that none of the prospective jurors described in this footnote were Black, as they were all accepted by the prosecution but not among the four prospective Black jurors accepted by the prosecution. *See* Ex. F at 19 & Ex. G (identifying by name four prospective Black jurors accepted by prosecution).

discrimination at *Batson* step one. If unrebutted, that *prima facie* showing requires a new trial. *See Simmons*, 44 F.3d at 1168. Alternatively, the State may seek a hearing at which Mr. McGill could proffer race-neutral reasons for the strikes, and Mr. Abu-Jamal would then have an opportunity to demonstrate those proffered reasons are pretexts for discrimination. *See Miller-El*, 537 U.S. at 328 (citing *Batson*, 476 U.S. at 97-98).

CLAIMS FOR RELIEFAND REQUEST FOR EVIDENTIARY HEARING

WHEREFORE, based on the foregoing, Mr. Abu-Jamal respectfully requests that this Court:

a. vacate his convictions and order a new trial

b. in the alternative, provide an opportunity for discovery and schedule an evidentiary hearing.

c. order such further relief as may be appropriate.

Respectfully Submitted,

/s/ *Judith L. Ritter*

JUDITH L. RITTER
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E-mail: JLRitter@widener.edu

SAMUEL SPITAL
Admitted *Pro Hac Vice* pursuant to Court Order (Sept. 12, 2017)
NAACP Legal Defense & Education Fund, Inc.
40 Rector Street, 5th floor

New York, New York 10006
Telephone: (212) 965-2200
E-mail: sspital@naacpldf.org

Counsel for Mumia Abu-Jamal

EXHIBIT A

LAWRENCE S KRASNER
DISTRICT ATTORNEY

DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499
(215) 686-8000

January 3, 2019

The Honorable Leon W. Tucker
Supervising Judge - Criminal
Suite 1201, Criminal Justice Center
1301 Filbert Street
Philadelphia, Pa. 19107

Re: Commonwealth v. Mumia Abu-Jamal, aka Wesley Cook
CP-51-CR-9113571-1982 PCRA

Dear Judge Tucker,

I write to inform the Court of a development in this case.

On December 28, 2018, the D.A. and members of his staff went to a remote and largely inaccessible room of the District Attorney's Office marked "Storage," looking for office furniture. While there, they came across six file boxes, five of which were marked with the name "McCann." Edward McCann was a high-level supervisor in prior administrations. He left the Philadelphia District Attorney's Office in 2015. The boxes were also marked with the name "Mumia" or "Abu-Jamal" and one of the boxes was marked with the full name "Mumia Abu-Jamal." Five of the boxes contained one of the following designations: 18/29, 21/29, 23/29, 24/29, 29/29. The sixth had no numbering.

This means the Commonwealth's prior representations that it had produced the complete file for this Court's review in this case were incorrect, although those representations were based upon a diligent search and were accurate to the best of the Commonwealth's knowledge at the time. The Commonwealth had delivered to this Court 32 boxes for review, each marked in sequential order (1 of 32, 2 of 32, 3 of 32, etc.). According to the District Attorney's Office's database, these 32 boxes were the complete file for Mr. Abu-Jamal's case. Nothing in the Commonwealth's

database showed the existence of these six additional boxes. All entries in the database pre-date this administration.

We are in the process of reviewing these boxes. We regret this development. Should this Court wish to review the contents of these six boxes, we will provide them.

Respectfully submitted:

Tracey Kavanagh
Assistant District Attorney
Supervisor, PCRA Unit
215-686-5707

cc: Judy Ritter, Esquire
Samuel Spital, Esquire

EXHIBIT B

Mr. McGill

U have been calling yaw to find out about the money owe to me.

So here is a letter, finding out about money. Do you need my to sign anything how long will it take to get it.

How was your week off good U hope.

Set me know soon, write me back

Robert Robert

Robert Chobert

Phila PA

P2

EXHIBIT C

AFFIDAVIT OF JOSEPH McGILL, ESQUIRE

I, Joseph McGill, Esquire, on my oath hereby affirm the following to be true and correct based on my personal knowledge of the case Commonwealth v Wesley Cook a/k/a Mumia Abu Jamal:

1. I have been a member in good standing of the Bar of the Pennsylvania Supreme Court since 1973. My Supreme Court Attorney I.D. is 17703.

2. I worked in the Office of the Philadelphia District Attorney as an Assistant District Attorney for over 12 years from about 1973 through mid-1986. For many of those years I served in the Homicide and Jury Trial Divisions.

3. I was the sole prosecutor for the Commonwealth v. Welsey Cook a/k/a Mumia Abu Jamal ("Jamal") case which resulted in the defendant being convicted of First-Degree Murder on July 2, 1982.

4. I have reviewed the September 3, 2019 "Appellant's Motion for Remand" ("the Motion") filed by Jamal in the Pennsylvania Superior Court citing alleged "new evidence."

5. The Motion cites as "new evidence", three exhibits: (a) a handwritten letter from Robert Chobert, ("Chobert") who was one of the eye witnesses in the Jamal case, addressed to me in August 1982, a month after the trial and guilty verdict; (b) a redacted version of my handwritten notes from jury selection; and (c) various notes and memorandums concerning the disposition of misdemeanor charges against another eyewitness, Cynthia White ("White").

6. The Motion alleges that these three exhibits show that;

- "a key witness for the State (Chobert) has been offered payment in connection with his testimony…"
- I committed "a *Batson* violation" during jury selection by "tracking the races of prospective jurors" and
- I gave White "incentives and promises" because I tracked her subsequent prosecutions for misdemeanor offenses.

7. Since the Motion was filed in September, no one from the current district attorney's office has ever contacted me to investigate these documents or the accusations being made against me and the validity of Jamal's conviction.

8. Had anyone from the District Attorney contacted me I could have provided the following clear basis for rejecting this latest attempt to undo Jamal's conviction:

The Chobert, August 6, 1982, Post-trial letter:

- Jamal was arrested at the scene of the crime by a police officer who arrived at the crime scene within forty-five seconds of a radio call from a wounded Officer Faulkner.
- Chobert witnessed the murder and identified Jamal at the scene as the murderer of Officer Faulkner.
- Chobert's on scene identification was made weeks before I ever met Chobert and before I was assigned to prosecute the case.
- In fact the murder occurred at approximately 3:55 in the morning so at the time Chobert identified Jamal, I was at home asleep.
- I never at any time before, during, or after I was assigned as the prosecutor in the case promised Chobert anything of value in exchange for his testimony.
- Like other witnesses Chobert made the identification of the murderer the night of the crime, at subsequent hearings and at trial all at great risk to his own personal safety.
- As with all witnesses who testify bravely and truthfully, ***after*** the trial I thanked him for his work as a witness and asked if I could help him in any way.
- Chobert asked me in response if he could be compensated for the time he lost from his taxi cab business. This request was made well after his testimony.
- As in any case where a witness made such a request ***after*** trial I responded politely that I would look into it.
- I did not look into it because although his loss of time from work was a legitimate grievance, such reimbursement is not practical, nor the

policy of the DAO; indeed, the District Attorney never had a budget for such items.

- Mr. Chobert's August 6th 1982 letter, received ***after trial*** and ***after*** he had testified truthfully reflects his belief that he was owed money for lost time from work.
- The suggestion that I paid a witness to testify is offensive and particularly preposterous given the timing of Chobert's original identification and testimony and the letter.

The *Batson* challenge;

- My notes from Jury Selection contain numerous shorthand references to the potential jurors' demographics including race, the section of the city where they live, their vocation, the work of their relatives and numerous other aspects of their lives.
- As with many past filings, Jamal's attorneys characterize these notes as nefarious and evidence of racial prejudice in Jury Selection.
- Nothing could be further from the truth.
- First, the practice of tracking the demographics of potential jurors including their race and gender is consistent with the law in the Commonwealth of Pennsylvania.
- Pennsylvania Rule of Criminal Procedure Rule 632 dictates the form and substance of the Juror Questionnaire form in a criminal trial.
- That form which I attach to this affidavit includes a biographical section which requests that the potential juror identify if they are "WHITE, BLACK HISPANIC OR OTHER." (See attached).
- I do not recall if the Rules of Criminal Procedure required the use of a similar form in 1982 when I prosecuted Jamal but I am confident that the practice of noting or "tracking" the basic demographic information for each potential juror was a standard practice then as well.
- The notes which Jamal and his attorneys characterize as evidence of a *Batson* violation are notes on a panel of potential jurors which I presumably used during jury selection.

- My conduct during jury selection in the Jamal trial has been scrutinized repeatedly by both state and federal courts including the State Supreme Court and the 3rd Circuit Court of Appeals.
- No court has ever found any evidence that I engaged in *Batson* violations and nothing in the "new evidence" suggest otherwise.
- In denying one of Jamal's previous appeals based on *Batson* the 3rd Circuit Court of Appeals cited to the opinion of the Pennsylvania State Supreme Court;

> "The court also examined the prosecutor's statements and conduct during *voir dire* and found "not a trace of support for the inference that the use of peremptories was racially motivated."

- I did **not** exercise peremptory challenges based on race.
- And I did not as is suggested "track race" for any impermissible reason.
- In fact, the first juror I accepted for the Jamal jury was an African - American female.
- All told I selected and agreed to the empaneling of a total of 4 African -American jurors.
- One of those four African-American jurors was struck from the panel by Jamal and his counsel.
- Another was dismissed by the court prior to the panel being sworn.
- Two of the four African-American jurors that I selected were sworn in as jurors and remained on the jury until the final verdict and sentence.
- My notes reflect a standard and acceptable part of the jury selection process and nothing more.

Cynthia White:

- White was an eyewitness to Officer Faulkner's murder.
- White worked as a prostitute and had a long record of arrest associated with prostitution.
- I never took any steps to intervene in the prosecution of Cynthia White for any crime.
- I never contacted any agency in any state to request that charges against Cynthia White be dismissed.
- Among the new evidence cited in the Motion is a December 6, 1982 Memorandum from Andre Washington, the Chief of District Attorney's Office Municipal Court Unit to an assistant District Attorney "Specially Assigned" to prosecute White.
- The memorandum includes the following:
  "This defendant was a witness in the recent police shooting case tried by Joe McGill. There were no specific deals worked out for her testimony, so these cases should be vigorously prosecuted."
- I never took any steps to countermand this instruction.
- There was in fact no deal for White's testimony.
- As in the case of Chobert, Ms. White testified at great personal risk to her safety.
- She testified bravely and truthfully and I admired her for her part in bringing to justice a man who executed a police officer in cold blood.
- The direction to notify me of her case was for no other purpose than to track her progress and to make the assigned prosecutor aware of her courageous participation in the Jamal case.
- I never suggested, directed or otherwise influenced the outcome of her cases and absolutely had no agreement with her to do so in exchange for anything.
- In fact, as is plainly evident from the Assistant District Attorney "Weisberg" memorandum of April 28, 1983 cited in the Motion, the White cases were dismissed by a Municipal Court Judge for a variety of reasons including, the failure of a civilian witness to appear despite being under subpoena, a police officer retiring and being unavailable

to testify and the Judges granting of the Public Defender's motion to dismiss on the grounds of "Judicial economy." Obviously, I had no role in any of these events least of all the Judge's determination that "no more time or money" should be spent prosecuting White.

JOSEPH McGILL, ESQUIRE

Sworn to and subscribed before me

On this 18th day of November, 2019

NOTARY PUBLIC

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
JAMINE REID, Notary Public
City of Philadelphia, Phila. County
My Commission Expires April 8, 2021

EXHIBIT D

(Seven letters/memoranda)

[illegible] tember 15, 1982

Ms. Christine Hillman
Records Officer
Massachusetts Correctional Institution
Framingham, Massachusetts 01701

Re: Cynthia White, aka Mildred Saunders
Our: MC8112 1285, Chg. Prostitution
MC8110 0600, Chg. Prostitution
MC8111 3925, Chg. Prostitution

Dear Ms. Hillman:

We had previously lodged copies of our Bench Warrants to act as Detainers against the above-named inmate who is presently serving a sentence at your Institution. As you are aware the inmate is presently in our custody in Philadelphia having been sent her pursuant to the Interstate Rendition of Witnesses Act. We expect to have her returned to your custody on or about September 20th, 1982. Since Miss White is in Philadelphia pursuant to the Interstate Rendition of Witnesses Act, we cannot prosecute her on the outstanding charges while she is here as a witness. However, I am enclosing a copy of our Form 5 Request for Temporary Custody under the Interstate Agreement on Detainers Act as we would like to have her returned to our custody for prosecution on these charges.

Would you please advise the inmate immediately upon receipt of this request for custody and determine whether she will waive the waiting period. I believe she will as she has indicated this to me. Once she waives the waiting period you will, of course, have to send me an offer to deliver custody and we will set up a date to have the inmate transferred to Philadelphia. If she is granted parole within the next two months we would be willing to take custody of her before her parole date and she can be paroled on her Massachusetts sentence while she is in our custody. Could you please speak with the parole authorities in your jurisdiction and determine whether they will agree to this. If you have any further questions with regard to this matter, please do not hesitate to contact me.

Sincerely,

Richard Di Benedetto

RICHARD DI BENEDETTO
Deputy, Intergovernmental Affairs

RDiB:cb

MEMORANDUM

CITY OF PHILADELPHIA

TO : Michael Weisberg, ADA, Municipal Court Unit

DATE 12-6-82

FROM : Andre Washington, Chief, Municipal Court Unit

SUBJECT: COMMONWEALTH V. CYNTHIA WHITE,
MC 81-11-3925, 81-10-600, 81-12-1285,
LISTED: JANUARY 14, 1983, COURTROOM 275

You are specially assigned to prosecute the above-captioned cases at the Municipal Court Trial level. The defendant is charged with three separate counts of Prostitution and related offenses. The Public Defender represents the defendant.

This defendant was the witness in the recent police shooting case tried by Joe McGill. There were no specific deals worked out for her testimony, so these cases should be vigorously prosecuted. Please note that there is an outstanding Rule 6013 Petiton which will have to be litigated before trial. This defendant was previously incarcerated in Massachusetts and was transported originally to Philadelphia under the Inter-State Agreement as to witnesses. However, that Agreement indicates that the defendant cannot be tried for any outstanding cases in the jurisdiction to which she is being transported. Therefore, the defendant is considered to be unavailable. Consequently, the defendant was transported back to Massachusetts after the completion of her testimony and then we had to proceed under the Inter-State Agreement on detainers to have her transported back to Philadelphia.

For the purpose of the Rule 6013 Petition, you will probably need Rich DiBenedetto to testify to his efforts in producing the defendant as well as having a copy of the Inter-State Agreement for witnesses available to provide the judge. Please ensure that all necessary witnesses are subpoenaed for January 14, 1983. However, please note that each case is an individual incident. Therefore, all three cases cannot proceed unless there is a plea which can be worked out. There is no objection to a plea being agreed upon for these three cases. However, if the cases go to trial, then the defendant will have to have separate trial dates. You should try the earliest case first.

Before proceeding to trial please see A.D.A. Joseph McGill, in the Homicide Unit, and discuss this case. If possible, arrange for an earlier date for trial. In order to do that, you will have to contact Steve Jaffe.

Please keep me informed of your progress.

AW:cl

MEMORANDUM

CITY OF PHILADELPH

TO : Ed Wilbraham, Municipal Court Unit

DATE 11/1/82

FROM : Rich DiBenedetto, Extraditions

SUBJECT: Cynthia White

MC 8111-3925
MC 8110-0600
MC 8112-1285
MC 8112-0810

This defendant was given a bench warrant hearing today and the above cases were relisted to January 14, 1983 in courtroom 275. Brad Richman had previously filed 6013 petitionds and wanted to get an early trial date when the defendant was returned. Since the trial commissioner listed the cases for January 14th, you may want to consider getting them re-listed to an earlier trial date if that is possible. Please have the assigned ADA contact Joe McGill prior to trial.

Putnam Cty.
Jail
Palatka, Fla

MEMORANDUM

CITY OF PHILADELPHIA

TO : Edward Wilbraham, Chief, Municipal Court Unit

DATE 11/22/82

FROM : Alfred T. Little, Trial Services Director

SUBJECT: Commonwealth v. Cynthia White
Case No. MC 8110-0600
Listed 1/14/83 Courtroom 275
Witness: Thomas W. Lawson

Witness Thomas Lawson has informed our office by return subpoena mailer post card that he has come down twice and was told by the bailiff that there is no need for him to come back.

This file is currently signed out to A.D.A. Joseph McGill of the Homicide Unit.

Please let us know if there is anything further we should do.

js

MEMORANDUM

CITY OF PHILADELPHIA

TO :

DATE

FROM : Sgt. Keaveny, Cell Room

10/1/82

SUBJECT: Rich DiBenedetto, D.A.'s Office

Cynthia White
aka: Mildred Saunders

This defendant will be granted parole from the Massachusetts Correctional Facility in Framingham on October 29th. Please pick her up at the institution on that day.

NOTE

Try to get an early listing date once def. has been returned per Brad

8/31/82

To: Joe McGill
From: Rich D. Benedetto
Re: Cynthia White

This witness was transported to our prison system today. Lt. Martin has been advised & told her in security.

Fr: ADA WEISBERG

Sub: CYNTHIA WHITE PROSTITUTION CASES

On 4/28/83 in room 275, three Cynthia White prostitution cases were dischmged by Judge Coppolino for lack of prosecution.

81/10-0600 was dischmged after the civilian witness failed to appear. The witness WAS properly served.

81/12-1285 was dischmged due to the arresting officer having left the police force. The judge would not give the Commonwealth another opportunity to contact the officer.

81/11-3995 was dischmged by Judge Coppolino on the motion of the Public Defender, who argued that although the defendant had failed to appear, judicial economy dictated that no more time or money be expended on capturing this defendant on such a minor charge.

As to all three cases, I am on record as to the amount of money and time expended upon extradition; court notices to police officers for this listing and service on the civilian for this listing.

— Mike Weis

EXHIBIT E

#
369 NAMED PROSPECTIVE JUROR "35 W/F

① [illegible]
② [illegible]
③ [illegible]

29 NAMED PROSPECTIVE JUROR W/F

① S/W 8 yrs.
② Powell [illegible] ? [illegible]
③ [illegible] College [illegible]
→ [illegible]

④ [illegible] CLS
⑤ [illegible]
⑥ H →

89

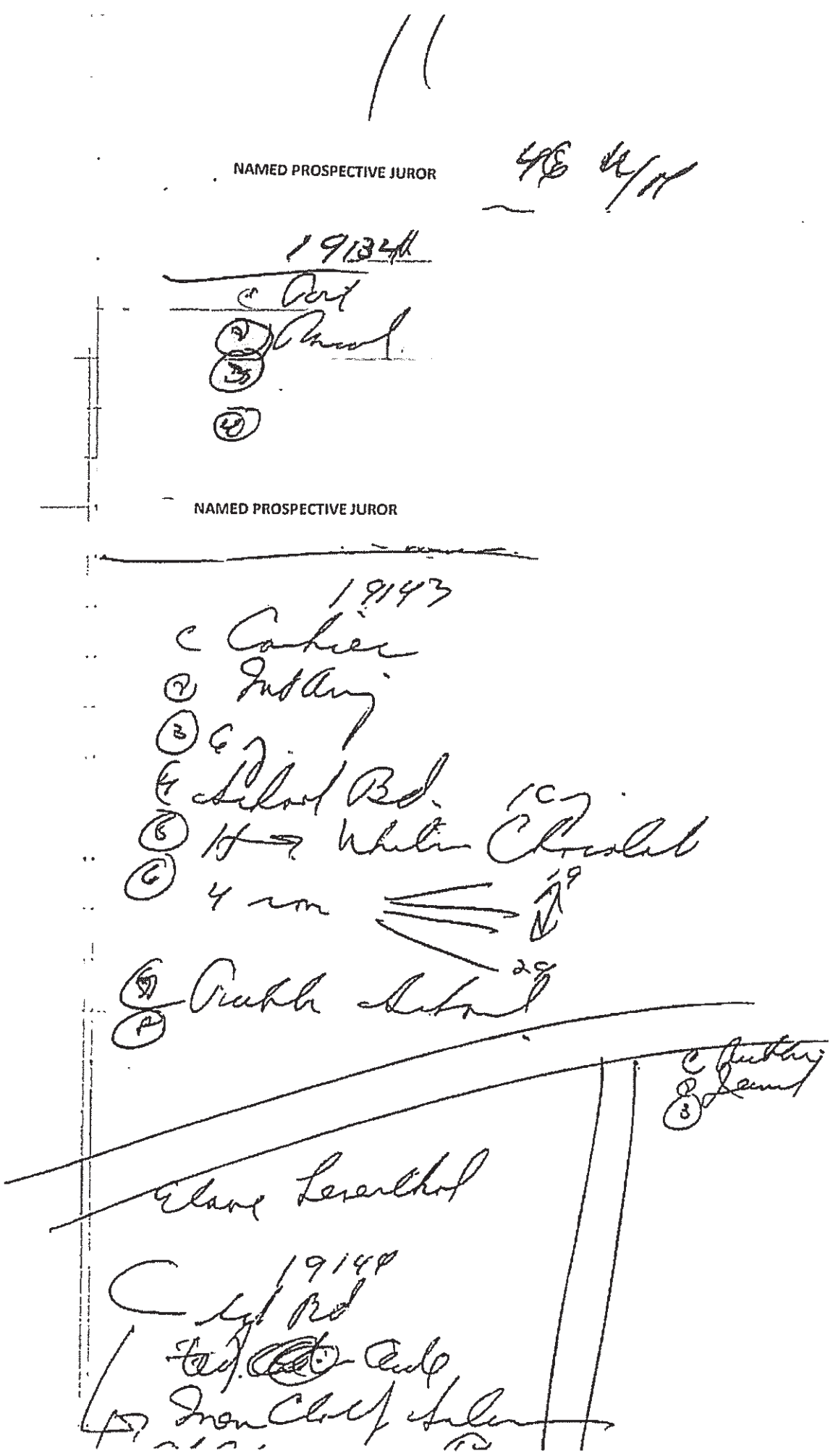
NAMED PROSPECTIVE JUROR

① S/M - Ohelin → (1969)
② [illegible]
— retired
③
④
⑤ Crmm Laborer
⑥ Husband →
⑦ Club of Jesus Christ
⑧

11

NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR



NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR

(1) [illegible]
(2) [illegible]
(3) U. Chile (1968)
(4) [illegible]
(5) 12 [illegible]
(6) [illegible]
– [illegible]

(7) 33 [illegible] 31 [illegible] ?

(8) No Club
Only Church Member

(9) [illegible]

(10) – all public school.

(11) [illegible]

(12) ..

NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR B/M

X 30 [illegible] RGF

NAMED PROSPECTIVE JUROR

[illegible]

NAMED PROSPECTIVE JUROR

B/

H-7

(1) [illegible]

(2) [illegible]

→ 30 yrs

(3) employed → Supp Budget Analyst

(4) Fed Govt - 8 yrs. 22 yrs

(5) H → Retired Educ → (75 y)

(6) NTA

(7) (22) → [illegible]

(32) → State (1981?)

(8) A Civil ST.

(9) Bus Adm. — Grad School

(10) born in South Carolina

NAMED PROSPECTIVE JUROR

W/M

① brother - police officer - 7 or 8 yrs.
② [illegible] Phila.
③ [illegible]
④ [illegible]
⑤ [illegible]
⑥ [illegible]
⑦ [illegible]
⑧
⑨

NAMED PROSPECTIVE JUROR

① South Phila.
② 19148

③
④
⑤

(131)

NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR

(1) S/U

(2) [illegible]

(3) [illegible] 4/1/58 [illegible]

(4) [illegible]

(5) [illegible]

(6) [illegible]

(7) [illegible]

(8) [illegible]

(9) 19143

(10) [illegible]

(11)

(12) [illegible]

(13)

NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR

c Nall - 30 y.

(8) clerical

(3) [illegible]

(4) [illegible] police

another [illegible] - police

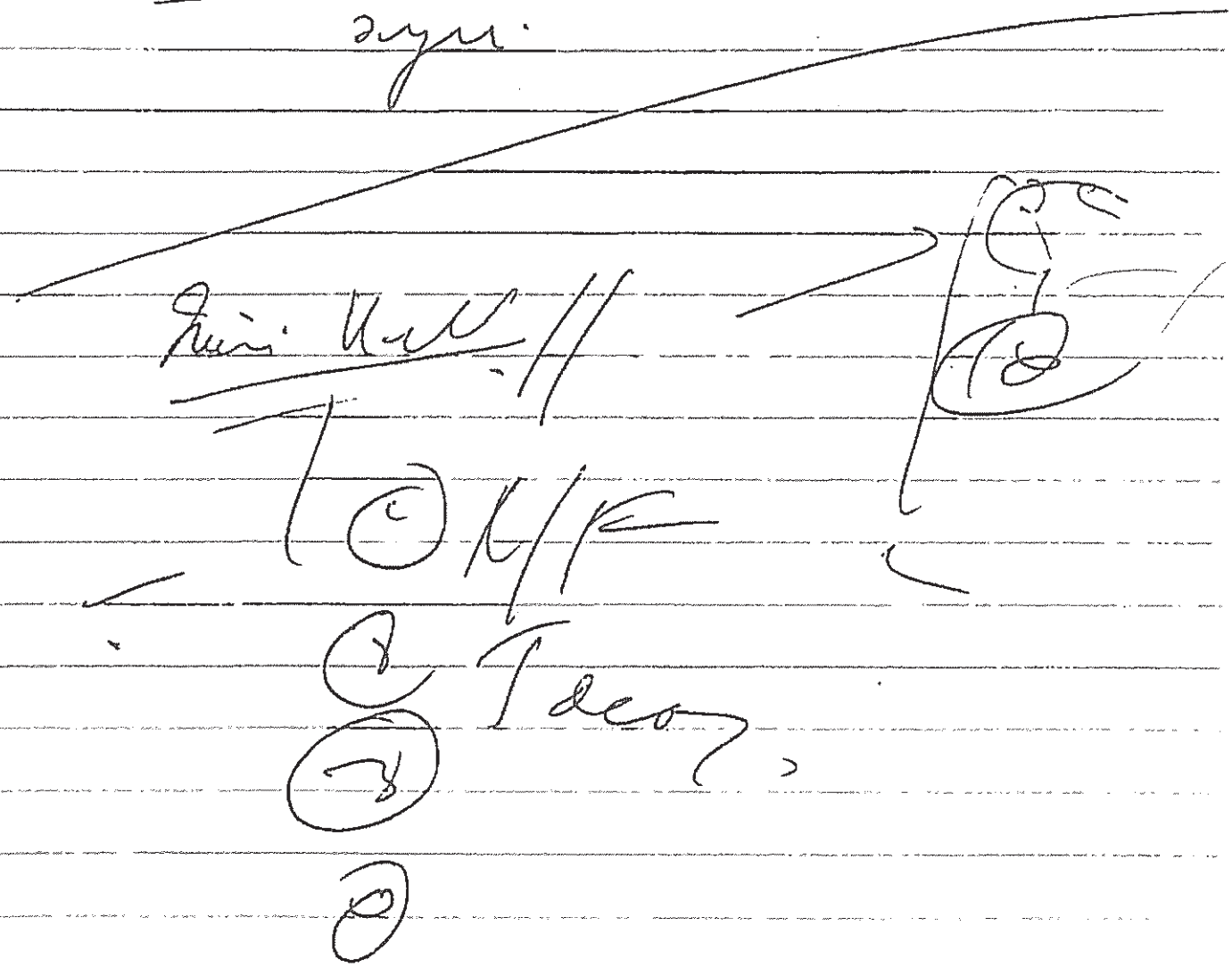
(8) poor white + black. [illegible]

323

NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR



NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR

33 W/F

14

NAMED PROSPECTIVE JUROR

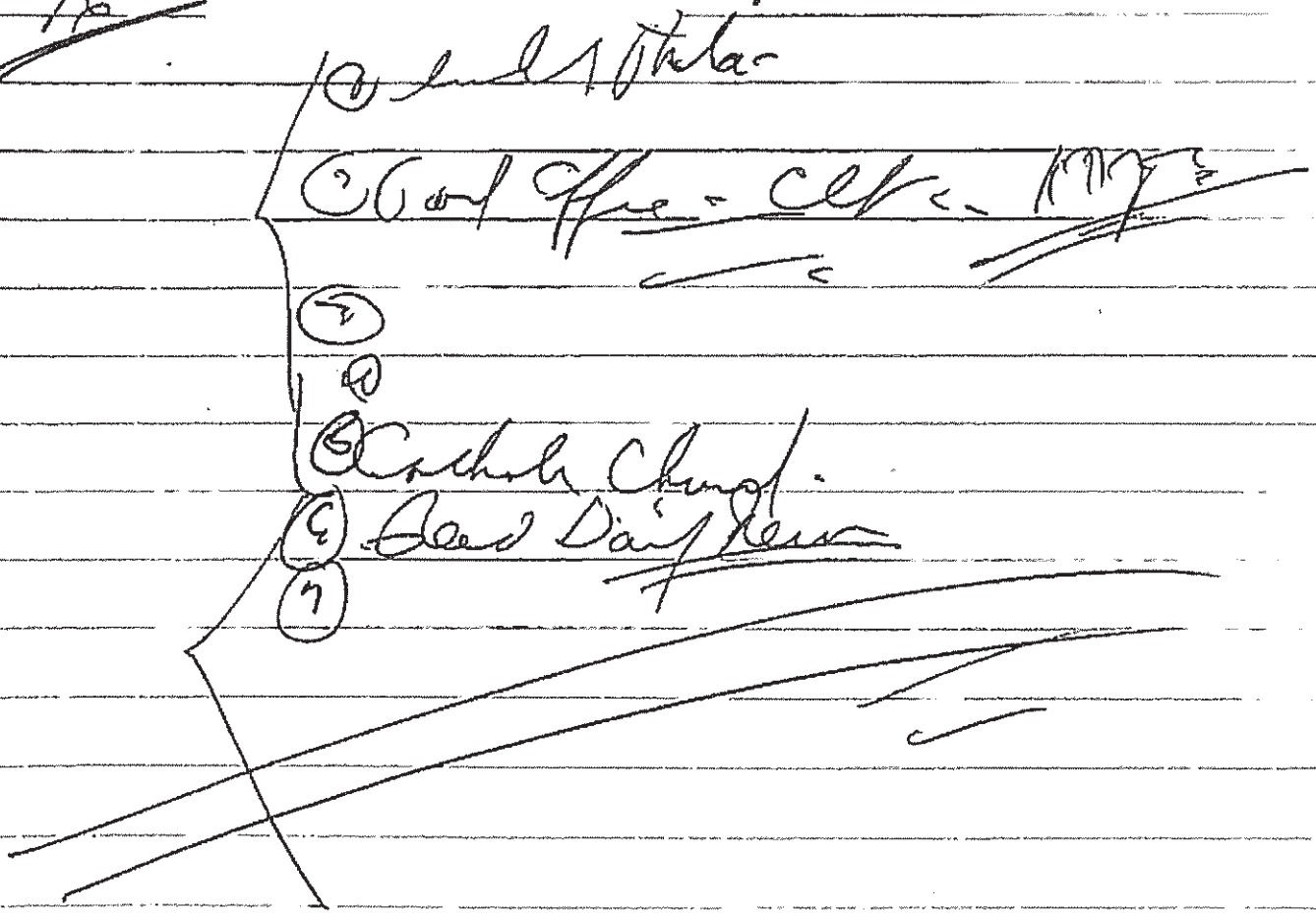
346

NAMED PROSPECTIVE JUROR

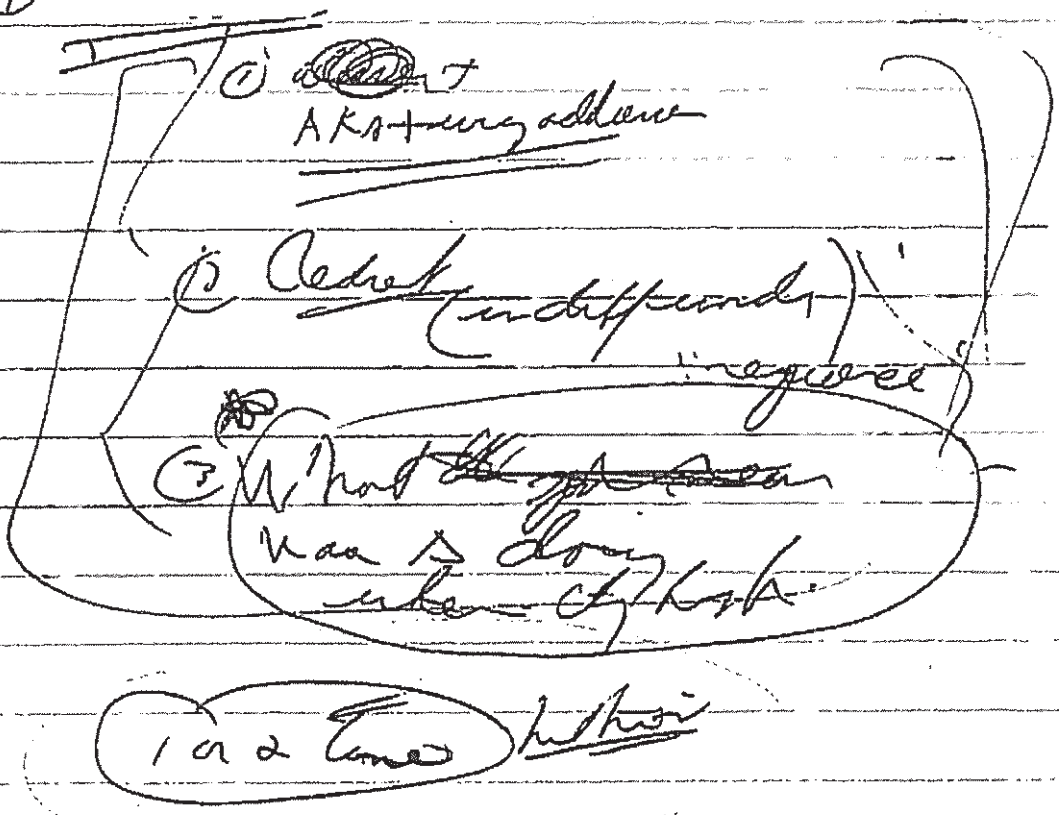
14

NAMED PROSPECTIVE JUROR

76



NAMED PROSPECTIVE JUROR



NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR

(12) (13)

NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR

(13) (18)

NAMED PROSPECTIVE JUROR

① Irvin
② Stan & John
③
④

NAMED PROSPECTIVE JUROR

① S/M
② Pump station engineer
(12 yrs)
③ married ... not employed
④ → Trumbull High School
⑤ Air Ley.
⑥ DOB
⑦ I ... L8mon

199→ NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR 23 M/M

(1 South Park HS (5)

(2)

TM/E

369→ NAMED PROSPECTIVE JUROR

(1 what a cop and he died

(2)

NAMED PROSPECTIVE JUROR

NAMED PROSPECTIVE JUROR

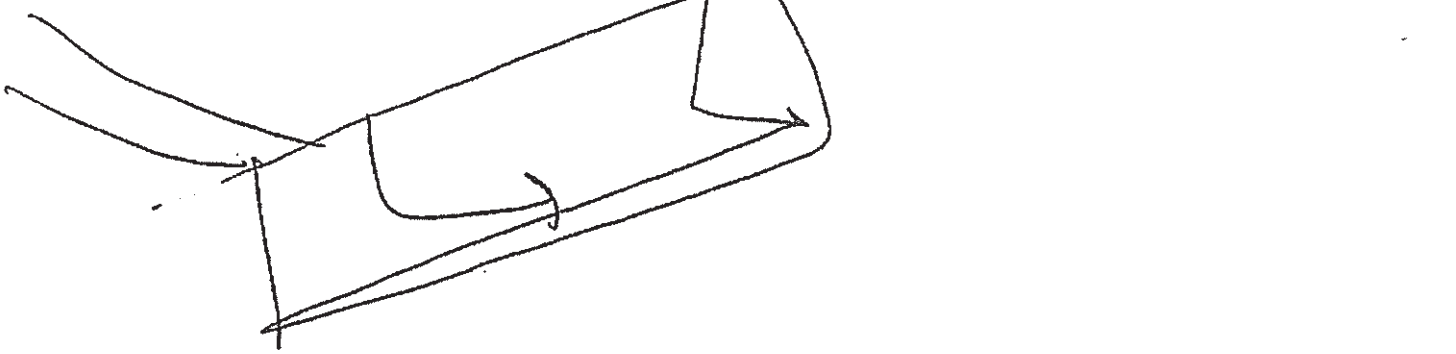


EXHIBIT F

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 51 E.D. APPEAL DOCKET 1983

COMMONWEALTH OF PENNSYLVANIA

v.

MUMIA ABU-JAMAL,
APPELLANT

BRIEF FOR APPELLEE

Appeal from the Judgment of Sentence of the Court of Common Pleas, Trial Division, Criminal Section, of Philadelphia County, as of Information Nos. 1357-1378, January Sessions, 1982.

MARIANNE E. COX
Assistant District Attorney
HUGH J. BURNS, JR.
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit
GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
WILLIAM G. CHADWICK, JR.
First Assistant District Attorney
RONALD D. CASTILLE
District Attorney

1300 Chestnut Street
Philadelphia, Pennsylvania 19107

ARGUMENT

I. Trial Issues

DEFENDANT HAS WAIVED HIS CLAIM THAT PEREMPTORY CHALLENGES WERE UTILIZED IN A DISCRIMINATORY MANNER, AND HIS CLAIM IS, IN ANY EVENT, TOTALLY REFUTED BY THE RECORD.

Defendant claims entitlement to a new trial based upon his unsubstantiated allegation that the assistant district attorney exercised his peremptory challenges in a discriminatory manner. Defendant, however, never raised this allegation in the lower court, thereby depriving the trial court of the opportunity of inquiring into the reasons for the exercise of the prosecutor's challenges. Nor did he raise his claim post-verdict, but rather asserted his present allegations for the first time in an affidavit, filed by trial counsel on August 22, 1986, more than four years after trial, which defendant appends to his brief. At the time of voir dire in June, 1982, defendant noted for the record the race of a few venirepersons during questioning. Defendant made no claim either during voir dire or before the panel was sworn, that peremptory challenges were utilized in a discriminatory manner. Indeed, defendant never even noted for the record the racial composition of the jury, but asks this Court for a new trial based upon allegations de hors the record, citing only trial counsel's recollection some four years after

the fact.[2] Defendant's failure to raise his present claim at the time of voir dire and at post-verdict motions is indicative of its lack of substance and should be a basis for foreclosing review. Commonwealth v. Peterkin, 513 A.2d 373, 378 (Pa. 1986); cert. denied, 107 S.Ct. 962, 93 L.Ed 2d 1010 (1987); Commonwealth v. Szuchon, 506 Pa. 228, 256, 484 A.2d 1365 (1984); Commonwealth v. Clair, 458 Pa. 418, 326 A.2d 272 (1974).[3]

2. It is interesting to note that in addition to not raising any claim of racially motivated use of peremptories at the time of voir dire, defense counsel actually expressed a totally different theory for what he considered the small number of blacks on the jury. After the first six jurors were selected, defense counsel appeared on a talk show on the radio station where defendant had previously been employed. During the program counsel expressed the view that the reason only one out of the first six jurors was black was due to black venirepersons' opposition to the death penalty (N.T. 6/15/82, 68-69, 58-70). The comment was then made that "we blacks should stick together." (N.T. 6/15/82, 69). Trial counsel's remarks about the trial were in violation of the trial court's direction not to discuss the case with the media (N.T. 6/10/82, 4.44), and resulted in subsequent venirepersons being more closely questioned about whether they listened to WDAS radio station.

Despite trial counsel's indiscretion in broadcasting such a statement during the voir dire process, it is noteworthy that he made no claim either "on the air," or in court, that the prosecutor was using his peremptory challenges in a discriminatory manner. The first and only mention of this claim was not made until after defendants conviction when he raised it in a statement that he read during his direct testimony at the penalty phase of trial (N.T. 7/3/82, 13).

3. Whether or not Batson v. Kentucky, 106 S.Ct. 1712, 90 L.Ed 2d 69 (1986), should be applied to cases on direct appeal as a

(footnote continued on next page)

In any event, defendant's claim that the prosecutor systematically used peremptory challenges to exclude blacks from the jury is refuted by the record. Indeed, the very first juror selected was black (N.T. 6/7/82, 174-187; Brief for Defendant a 2). The very next juror that the Commonwealth found acceptable to serve as juror number two was also black, but defendant exercised one of his peremptory challenges to strike this venireperson (N.T. 6/9/82, 3.85-3.92). The Commonwealth also accepted juror number seven, who defendant concedes was black (Brief for Defendant at 2-3; N.T. 6/11/82, 5.53-5.64). The Commonwealth does not dispute defendant's representations as to juror number seven's race, but it is not of record, nor is the race of any of the other selected jurors due to defendant's failure to raise his present claims at trial.[4]

(footnote 3 continued)

a matter of state law, see Commonwealth v. McFeely, 509 Pa. 394, 502 A.2d 167, 169 (1985) (Pennsylvania courts not bound by retroactivity decision in United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed 2d 202 (1982), it would only apply to a case where the issue was preserved for review. See Commonwealth v. Hernandez, 498 Pa. 405, 446 A.2d 1268, 1270-1271 (1982) (defendant not entitled to benefit of decision applicable to cases pending on direct appeal given his failure to preserve claim at trial). As defendant failed to properly preserve his allegations, his claim is not even cognizable under the less strigent test of Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed 2d 759 (1965).

4. The trial prosecutor represents that juror number ten was also black. (See Affidavit Appendix A). Had defendant properly raised his claim below, this Court would have had a full record upon which to review defendant's claim, instead of affidavits filed by the litigants. In any event, without regard to the race of juror number ten, defendant has still failed to make out a prima facie showing of discriminatory exercise of peremptory challenge.

The record additionally establishes that the Commonwealth exercised a total of fifteen peremptory challenges; eight of these fifteen were used to strike black venirepersons. The race of the other seven stricken prospective jurors is not of record. Defendant now claims for the first time that three of these remaining seven prospective jurors challenged by the Commonwealth were also black. If defendant at the time of trial thought that the assistant district attorney struck these prosecutive jurors solely due to their race, he would have raised such a claim at the time. Having waited four years after the jury was selected to make this allegation, without record support, his claim should not be considered by the Court.

In any event, the Commonwealth selected three[5] black venirepersons for service on the jury. Had defendant not struck James Burgess, a black person whom the Commonwealth accepted, four out of the twelve empaneled jurors would have been black. The fact that one black juror (juror number one) was excused, early in the trial without objection by defendant, cannot be used to bolster defendant's present allegations about the prosecutor. It was hardly the prosecutor's fault that this juror bolted from the hotel where she was sequestered because her cat became ill (N.T. 6/18/82, 2.36-2.39, 2.45).

The prosecutor here did not exhaust his peremptory challenges, but, as noted above, accepted four black venirepersons

5. See footnote 1 supra.

for the jury (one of whom was stricken by defendant), and exercised almost half of his peremptory challenges against persons whose race does not appear of record, at least four of whom defendant concedes were not minority members.

Moreover, as to all of the peremptory challenges utilized by the assistant district attorney, against both black and white prospective jurors, the cold record, on its face, indicates non-racially motivated reasons for the prosecutor's exercise of his discretionary challenges. Most of the jurors peremptorily struck were unmarried, unemployed or frequently listened to the radio station where defendant had worked as an announcer. Others were either young, answered questions in a very hesitant manner, or expressed serious reservations about the death penalty. Other stricken jurors expressed bias against the police, or in favor of prison inmates, or had difficulty understanding basic legal principles that were explained during voir dire.[6]

6. A summary of all prospective jurors challenged by the Commonwealth is as follows:

Janet Coates (black) (N.T. 6/7/82, 121-163) 20 years old (121); listened to defendant's radio show (129-130); dropped out of school (134); employed for only three weeks (132); bias against police (133); could not fairly consider Commonwealth's evidence if defendant did not testify (136-159); answered questions incoherently (123, 130, 159); never served on a jury before (121).

Alma Austin (race not of record; defendant claims she is black) (N.T. 6/8/82, 2.47-2.56) strong feelings against death

(footnote continued on next page)

By contrast, the jurors upon whom both the defense and Commonwealth agreed, both principal and alternate jurors, were

(footnote 6 continued)

penalty (2.51-2.54); divorced, living with male friend (2.47-2.48; never served on a jury (2.48).

Verna Brown (black) (N.T. 6/8/82, 2.78-2.86) 22 years-old unmarried with 6-year-old child; unemployed, mother unemployed (2.78-2.79, 2.84); familiar with defendant as announcer (2.82); never served on a jury (2.79).

Beverly Green (race not on record; defenda nt claims she is black) (N.T. 6/8/82, 3.240-3.246) hesitant in answering questions (3.242-2.245); unmarried and young (3.240, 3.246).

Genevieve Gibson (black) (N.T. 6/10/82, 4.72-4.80) temporarily laid off (4.73); six years out of high school (4.74); never served as juror (4.74); familiar with defendant from radio and newspaper (4.78).

Gaitano Ficordimondo (race not on record, defendant concedes he is white) (N.T. 6/10/82, 4.93-4.102) 22-year-old student (4.93, 4.96); never served on jury previously (4.96).

Webster Reddick (black) (N.T. 6/10/82, 4.219-4.238) three years out of high school (4.223); unmaried (4.220); hesitant in answering questions (4.222, 4.224); strong reservations about death penalty (4.226-4.23).

John Finn (race not on record; defendant concedes he is white) priest (5.75); hesitant in answering questions (5.76, 5.79-5-80, 5.82); never served as juror before (5.78).

Carl Lash (black) (N.T. 6/11/82, 5.102-5.115) hearing problem (5.110-5.111); unemployed (5.103); former counselor at prison and close relationship with number of inmates (5.105, 5.113-5.114).

Delores Thiemicke (race not of record; defendant concedes that she is white) (N.T. 6/11/82, 5.191-5.194) unemployed, 24 years old (5.192-5.193); never served as juror (5.193).

(footnote continued on next page)

mature, married or widowed, either employed or retired (or in two cases recently laid off), in many cases had grown children and prior service on a jury, and had lived in the same neighborhood for many years (N.T. 6/7/82, 174-188); (N.T. 6/9/82, 3.191-197); (N.T. 6/10/82, 4.80-4.91); (4.137-4.145); (4.153.4.167); (4.207-4.218); (N.T. 6/11/82, 5.53-5.64); (5.94-5.101); (5.115-5.124); (N.T. 6/15/82, 123-132); (123-132); (N.T. 6/16/82, 298-313); (381-414); (464-474); (481-488); (489-496).

Thus, notwithstanding defendant's waiver of this issue, the record refutes defendant's allegations, and he has failed to make out a prima facie showing of improper exercise of discretionary challenges.

(footnote 6 continued)

Mario Bianchi (race not of record; defendant concedes he is white) (N.T. 6/15/82, 105-116) 32 years old (106); father was victim of violent crime during previous week (106-107); misunderstands presumption of innocence (112-113); familiar with defendant as broadcaster (111).

Wayne Williams (black) (N.T. 6/15/82, 171-180) 21 years old, unmarried (171); never served as juror (172); listened to defendant on radio for years (172-173); worked in similar occupation as defendant (178).

Henry McCoy (black) (N.T. 6/15/82, 218-233) daughter works at same radio station as defendant; had frequent conversations with daughter who expressed disbelief in validity of charges against defendant (223-225, 229-232)

Darlene Sampson (race not of record; defendant alleges she is black) (N.T. 6/16/82, 272-298) 25 years old (173); listened to defendant on radio (276); opposed to death penalty (281-291); sister was recently killed during a crime (277-280, 292-293); expressed view that she could not be fair if trial lengthy (293-297); never served as juror before (276).

EXHIBIT G

AFFIDAVIT OF JOSEPH McGILL, ESQUIRE

COMMONWEALTH OF PENNSYLVANIA :

: SS

CITY AND COUNTY OF PHILADELPHIA :

Joseph McGill, Esquire, being duly sworn according to law, doth depose and say that the following facts are true and correct:

1. I am a former Assistant District Attorney in the City of Philadelphia and was the assigned prosecutor in the case of Commonwealth v. Mumia Abu-Jamal, January Sessions, 1982, No. 1357-1359.

2. I have a distinct recollection that jurors number one, seven and ten, Jennie Dawley, Savanna Davis a Basil Malone, were black. Juror number one was removed early in the trial and replaced by the first alternate who was caucasian.

3. I additionally selected as juror number two prospective juror James Burgess who was also black, but he was subsequently challenged peremptorily by defendant.

Joseph McGill

JOSEPH McGILL, ESQUIRE

Sworn to and subscribed :
before me this 13th day :
of February, 1987 :

Susan E. Finnegan

Notary Public

My Commission Expires:

APPENDIX A

SUSAN E. FINNEGAN
Notary Public, Phila., Phila. Co.
My Commission Expires July 17, 1989