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Honorable Anthony J. Scirica  
Chief Judge  
United States Court of Appeals for the Third Circuit  
22614 United States Courthouse  
601 Market Street  
Philadelphia, Pennsylvania 19106-1746

Re: *Abu-Jamal v. Horn* (death penalty)  
Nos. 01-9014, 02-9001

Dear Judge Scirica:

We have just received a copy of the May 31, 2005 letter to you from the District Attorney of Philadelphia concerning the above-referenced matter. Since it is incomplete and thus possibly misleading, some clarification is in order.

This Court has entered an order for briefing on the effect of *Beard v. Banks*, 124 S.Ct. 2504 (2004). Order, June 29, 2004. The matter has been briefed by the parties and is awaiting further action by the Court. See Memorandum Regarding Effect of *Beard v. Banks*, 124 S.Ct. 2404 (June 24, 2004) On Present Appeals, July 29, 2004; Commonwealth's Memorandum re *Beard v. Banks*, July 29, 2004; Reply To Commonwealth's Memorandum re *Beard v. Bank*, Aug. 31, 2004; Commonwealth's Answer, Sept. 10, 2004. Now the Commonwealth criticizes this Court for even ordering briefing. Letter, DA to Chief Judge, May 31, 2005, at 2. Nevertheless, we agree with the District Attorney that *Banks* should have no influence on the instant appeal. *Id.* This was detailed in Cross-Appellant's briefing since his conviction did not become final until 1990, two years after *Mills*<sup>1</sup> as specifically recognized by the District Court.<sup>2</sup> Memorandum Regarding Effect of *Beard*, at 2; Reply, at 4. Consequently, the death judgment should not stand.

Cross-Appellant previously asked this Court to stay the proceedings, once the pending *Banks* issue is resolved, because of the current litigation in the state court. Status Report of Cross-Appellant and Appellee With Suggestion of Stay Due To Pending Proceedings, July 16, 2004. That request was denied. Order, Oct. 19, 2004. The state litigation involves claims of newly discovered evidence that Cross-Appellant's federal constitutional rights were violated during the trial.

It is correct that the Pennsylvania Supreme Court adjudicated various unexhausted claims in October 2003. *Commonwealth v. Abu-Jamal*, 833 A.2d. 719 (Pa. 2003). However, review was sought on behalf of Cross-Appellant in the United States Supreme Court. The Petition for Writ of Certiorari was denied May 17, 2004. *Abu-Jamal v. Commonwealth*, U.S. Sup.Ct. No. 03-9390 (2004).

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1. *Mills v. Maryland*, 486 U.S. 367 (1988).

2. "Although *Mills*, handed down on June 6, 1988, was decided after petitioner was sentenced to death, it nonetheless antedated the finality of petitioner's conviction, which was registered on October 1, 1990, when the United States Supreme Court denied his petition for a writ of certiorari. See, e.g., *Gray v. Netherland*, 518 U.S. 152, 180 (1996) (noting that a conviction becomes final upon the United States Supreme Court's denial of a writ of certiorari on a defendant's direct appeal). Accordingly, no retroactivity analysis is mandated pursuant to *Teague v. Lane*, 489 U.S. 288, 299-301 (1989)." Memorandum and Order (Yohn, J.), *Abu-Jamal v. Horn*, 2001 WL 1609690 84 (E.D. Pa. Dec. 18, 2001), at \*117 n.84.

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Opposing counsel has overlooked apprising the Court of the status of current litigation in the state court on unexhausted claims. On December 8, 2003, Cross-Appellant submitted in the Court of Common Pleas, Philadelphia, a Petition for Habeas Corpus Relief Pursuant To Article I, Section 14 of the Pennsylvania Constitution, and for Statutory Post-Conviction Relief Under The Post Conviction Relief Act. *Commonwealth v. Abu-Jamal*, Ct of Common Pleas No. 8201-1357-59. It concerns newly-discovered evidence not previously presented relating to innocence and the suborning of perjury:

- Claim 1            The State Manipulated A Purported Eyewitness To Falsely Identify Petitioner As The Shooter, In Violation Of His Rights Under The Fifth, Sixth Eighth, And Fourteenth Amendments.
- Claim 2            Petitioner Was Found Guilty And Sentenced To Death Through The Use Of A Fabricated Confession, In Violation Of The Fifth, Eighth And Fourteenth Amendments.

The state court has entered an order announcing an intention to dismiss the petition. Memorandum and Order, May 27, 2005. A response objecting to the dismissal will be filed on behalf of Cross-Appellant by June 16, 2005. In the event relief is denied, the matter will appeal to the Pennsylvania Supreme Court.

Your understanding is appreciated.

Yours very truly,



Robert R. Bryan  
Lead counsel for Mumia Abu-Jamal,  
Cross-Appellant.

RRB/bm

cc: Professor Judith L. Ritter  
Co-counsel for Mumia Abu-Jamal, Cross-Appellant

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