

IN THE COURT OF COMMON PLEAS  
FOR THE COMMONWEALTH OF PENNSYLVANIA  
FIRST JUDICIAL DISTRICT

COMMONWEALTH,	)	Case Nos. 8201-1357-59
	)	
Respondent,	)	
	)	
vs.	)	
	)	
MUMIA ABU-JAMAL,	)	
	)	
Petitioner.	)	<i>Death Penalty Case</i>
_____	)	

**PETITIONER'S RESPONSE TO MEMORANDUM AND ORDER OF INTENT TO DISMISS PENDING POST-CONVICTION RELIEF ACT PETITION WITHOUT A HEARING, AND MOTION FOR HEARING AND ORAL ARGUMENT**

TO: THE HONORABLE PAMELA PRYOR DEMBE, JUDGE

COMES PETITIONER, MUMIA ABU-JAMAL, through Robert R. Bryan, lead counsel, and Judith L. Ritter, local and associate counsel, who, pursuant to Pennsylvania Rule of Criminal Procedure 909 and Amendments Five, Six and Fourteen of the United States Constitution, submit this response to the Court's Memorandum and Order of intent to dismiss the pending Post-Conviction Relief Act petition without a hearing. Memorandum and Order, May 27, 2005. The Court is further moved to set an evidentiary hearing in order for Petitioner to have an opportunity to present evidence establishing that he did not receive a fair trial and is a victim of false evidence. Finally, the Court is asked at a minimum to grant a hearing so that counsel can orally argue the matter.

As demonstrated in extensive pleadings and evidence filed over many years, this case is unique. It involves the lethal combination of racial bias on the part of the trial judge and prose-

cution, police misconduct, false testimony, intimidation, and an inept defense. The presentation of false testimony rendered the trial fundamentally unfair and deprived Petitioner of due process and equal protection of the law under the Fifth, Sixth and Fourteenth Amendments.

Petitioner simply seeks a hearing before this Court, so that he can establish the constitutional violations raised in the petition. The Court has previously scheduled a hearing for February 11, 2005, which it canceled *ex mero motu*. Order, Feb. 15, 2005; Order, Dec. 16, 2004.

### OVERVIEW

Two claims based upon newly discovered evidence are presented in the pending PCRA petition.\* 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, 42 Pa. C.S. § 9541 *et seq.*, Dec. 8, 2003. The evidence establishes that the prosecution of Petitioner was a product of fraud and false evidence. Consequently, he was deprived of the fundamental rights guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

This Court's intention to dismiss the petition is based upon erroneous premises. First, It is untrue that the newly discovered evidence in the pending petition "does little more than reiterate claims petitioner made in his first two PCRA petitions." Memorandum and Order at 14. The new evidence concerning both witnesses is not merely impeaching in nature. Rather, it concerns exculpatory evidence that was deliberately withheld by the prosecution in violation of well-established principles enunciated in *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The po-

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\* There have been a number of other issues of great constitutional significance previously presented bearing on the unfairness of the 1982 trial, e.g., the trial judge was overheard stating in reference to Petitioner, "I'm going to help'em fry the n\*\*\*\*r," Petitioner was excluded from significant portions of the trial, he was denied the right to self-representation, and the prosecution systematically removed people of color from the jury.

lice pressured the two people referenced in the petition to give false testimony at trial, then concealed that crucial information from Petitioner. This newly discovered evidence is offered not simply to impeach the credibility of the prosecution's trial witnesses, but to also establish a *Brady* claim.

Secondly, *Commonwealth v. Johnson*, 863 A.2d 423 (Pa. 2004) does not apply to the case of Petitioner since newly discovered facts are before the Court, not just a "newly willing source for previously known facts." Memorandum and Order, at 14. Petitioner was unaware of the newly discovered evidence regarding the false testimony of Priscilla Durham until two years ago and no previous claim has asserted the facts contained in her affidavit. Likewise, the newly discovered evidence regarding Cynthia White was not set forth in earlier petitions or at trial.

The pending claims involve the prosecutorial suppression of exculpatory evidence and the presentation of false evidence in contravention of the right to a fair trial, reasonable access to the courts, due process of law, and equal protection of the laws guaranteed by Amendments Five, Six and Fourteen. *Id.* Under the circumstances, the Court's ruling should not be finalized. Petitioner is entitled to oral argument and a hearing.

## **ARGUMENT**

### **1. The Petition Is Timely**

Contrary to the opinion of the Court, the petition is timely because it falls within the after-discovered and governmental-interference exceptions of 42 Pa.C.S. § 9545(b)(1)(i)-(ii). *See Commonwealth v. Lark*, 746 A.2d 585 (2000). The facts upon which the claims are based were previously unknown to Petitioner and could not have been ascertained by the exercise of due diligence. Members of law enforcement engaged in fraudulent conduct and a cover-up of their misdeeds.

The two claims fall within the following exceptions:

- (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 . . .

42 Pa.C.S. § 9545(b)(1)(i)-(ii).

**2. The Failure To Raise The Evidence Earlier Was The Result Of Governmental Interference With The Presentation Of The Claims**

These claims concern the withholding of exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83. Had the prosecution not withheld the evidence for two decades, the present litigation would be unnecessary.

**3. The After-Discovered Evidence Exception To The Timelines Requirement Has Been Met**

The Court concludes that the present petition should be dismissed because it depends upon hearsay evidence. As earlier presented, the statements of Ms. White to Yvette Williams are admissible as exceptions to the hearsay rule. They are admissions against interest and the declarant, Cynthia White, is unavailable. The statements of Ms. Durham are also statements against interest.

To ignore the tendered declarations against interest would violate Petitioner's constitutional right to a fair trial, due process of law, to confront and cross-examine adverse witnesses, and to present witnesses for the defense.

The hearsay rule, which has long been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in

order that his demeanor and credibility may be assessed by the jury. *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970). A number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination. *Among the most prevalent of these exceptions is the one applicable to declarations against interest - an exception founded on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made . . . .*

. . . .

Few rights are more fundamental than that of an accused to present witnesses in his own defense. E.g., *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. *The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.*

*Chambers v. Mississippi*, 410 U.S. 284, 298-302 (1973) (footnotes omitted) (emphasis added).

The newly discovered evidence deals with prosecution witnesses who have admitted to either committing or intending to commit perjury. Petitioner alleges that the fraudulent testimony was orchestrated by members of law enforcement. The Commonwealth should not be permitted to profit from its own misconduct.

**A. Cynthia White Admissions Against Interest and Unavailability**

The sworn statement made by Ms. Williams establishes that the prosecution's key witness, Cynthia White, now unavailable through death, lied at trial and falsely identified Petitioner as the person who fired the fatal shots. Declaration of Yvette Williams, *supra*. The

Williams affidavit reveals, according to White, she did not see the shooting, but arrived on the scene later. The affidavit also establishes that it was the police who caused White to falsely testify through the use of a combination of threats and bribery. The proffered testimony is admissible as an exception to the hearsay rule since it concerned an admission against interest. Pa. Rules of Evidence 804(b)(3).

White admitted that she lied in identifying Petitioner and that her testimony against him would be false.

6. *When Lucky told me she didn't see who shot Officer Faulkner, I asked her why she was "lying on that man" (Mumia Abu-Jamal). She told me it was because for the police and vice threatened her life. Additionally, the police were giving her money for tricks. "The way she talked, we were talking "G's" (\$1,000.00). She also said she was terrified of what the police would do to her if she didn't say that Mumia shot Officer Faulkner. According to Lucky, the police told her they would consolidate all her cases and send her "up" (Muncy), a women's prison, for a long time if she didn't testify to what they told her to say. Lucky told me she had a lot of open cases and out-of-state warrants and was scared of going to Muncy. She was scared that her pimp "would get pissed off at all the money he was losing when she was locked up, and off the street. She was afraid that when she got out he would beat her up or kill her.*

....

8. Lucky told me that what really happened that night was that she was "on the stroll" (looking for and serving customers) in the area of 13<sup>th</sup> and Locust when Officer Faulkner got shot, but *she definitely did not see who did it. She also told me that she had a drug habit and was high on drugs when it happened.* She tried to run away after the shooting, but the cops grabbed her and wouldn't let her go. They took her in the car first and told her that she saw Mumia shoot Officer Faulkner.

9. While Lucky and I were locked up in the "hole", the detectives would come to the jail a lot and get her out to talk to her. When she came back she always had things they wouldn't let us have in there, like cigarettes and candy and even hoagies, syringes and white powders. They would let her out for two (2) hours recreation time during times the women's jail was on lock down for count.

Declaration of Yvette Williams, Jan. 28, 2002 (emphasis added).

The admissions of White were against her interest. *See Rudisill v. Cordes*, 5 A.2d 217 (1939); *Commonwealth v. Williams*, 640 A.2d 1251 (1994). She admitted to Ms. Williams that she was planning to commit perjury, and that the police had persuaded her to falsely identify Petitioner as the killer. She also admitted to committing various crimes. White is also an unavailable witness within the meaning of Rule 804(a)(4). The Commonwealth admits that she died in 1992. 6/26/97 NT 135-146; 7/1/97 NT 18-30, 59.

Contrary to the conclusion of this Court, the Williams' declaration meets the "four-prong test." Memorandum and Order, at 15. It could not have been obtained before the end of the trial, is not merely corroborative or cumulative, would not be used for the sole purpose of impeachment, and it is of a nature that a different outcome is likely. *Commonwealth v. Choice*, 830 A.2d 1005 (Pa. Super. Ct. 2003). Ms. White's testimony does not merely provide direct contradiction of the prosecution's main witness at trial, but it also materially undermines the integrity of the entire police investigation and prosecution of Petitioner. The fact that White testified falsely as a result of police inducement taints all of the evidence upon which the Commonwealth relied at the original trial. As pointed out, it falls within *Brady*. The subornation of perjury from White results in the inescapable conclusion that the original investigating officers caused other witnesses to lie, exculpatory and impeachment evidence was suppressed, other evidence was fabricated, and at least some of the police officers also committed perjury.

The Williams declaration provides new evidence of White's fabrication and the reasons for it. In light of this new information, it is established that the conviction of Petitioner was obtained through the knowing use of perjured testimony. This goes far beyond mere impeachment. If the fact of and the reasons for which White falsely identified Petitioner as the shooter when she had not even seen the shooting were known at the time of the trial, there can be no doubt that he would not have been convicted and sentenced to death. The information

provided by Ms. Williams reveals that the witness was induced and coerced by police to testify falsely against Petitioner, even though she did not even see the shooting.

**B. Priscilla Durham's Admissions Against Interest**

The prosecution presented testimony that allegedly Petitioner, while lying virtually unconscious on a hospital emergency room floor on December 9, 1981, stated he shot the officer and hoped he would die. The newly discovered evidence now establishes that the testimony was false. It is now known that Priscilla Durham, a hospital security guard who claimed to have heard the statement, admitted to concocting the story. Declaration of Kenneth Pate, Apr. 18, 2003. By her own admission, Ms. Durham lied:

5. . . . She said that when the police brought him in that night she was working at the hospital. Mumia was all bloody and the police were interfering with his treatment, saying "let him die."

6. Priscilla said that the police told her that she was part of the "brotherhood" of police since she was a security guard and that she had to stick with them and say that she heard Mumia say that he killed the police officer, when they brought Mumia in on a stretcher.

7. *I asked Priscilla: "Did you hear him say that?" Priscilla said: "All I heard him say was 'Get off me, get off me, they're trying to kill me.'"*

Exhibit 2, Declaration of Kenneth Pate, *supra* (emphasis added).

The tendered declaration of Mr. Pate is admissible as an exception to the hearsay rule since it concerned an admission against interest. Pa. Rules of Evidence 804(b)(3). Durham admitted to having committed perjury. In fact, Petitioner was severely wounded. The only words uttered by him was his reaction to being severe pain.

The prosecution deliberately withheld the exculpatory evidence in violation of well established constitutional law. *Brady v. Maryland*, 373 U.S. 83. Under the circumstances, Petitioner is entitled to a new trial.

**CONCLUSION**

WHEREFORE, Petitioner moves the Court to set aside its intent to dismiss the Petition without a hearing and oral argument. Further, the Court is moved to order an evidentiary hearing in order for Petitioner to have an opportunity to present evidence establishing that he did not receive a fair trial and is a victim of false evidence.

DATE: June 15, 2005

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, Robert R. Bryan, hereby certify that on this 15<sup>th</sup> day of June, 2005, I served the foregoing Motion To Aside Memorandum and Order of Intent To Dismiss Pending Post-Conviction Relief Act Petition Without A Hearing, and Motion for Hearing and Oral Argument, upon the following person by depositing the same in the United States Mail, first class postage prepaid at the following address:

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

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

Executed on this the 15<sup>th</sup> day of June, 2005, at San Francisco, California.



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