

IN THE UNITED STATES COURT OF APPEAL  
FOR THE THIRD CIRCUIT

MUMIA ABU-JAMAL,	)	No. 02-9001
	)	
Appellee/Cross-Appellant,	)	
	)	
vs.	)	
	)	
MARTIN HORN, Director, Pennsylvania Department	)	No. 01-9014
of Corrections; CONNER BLAINE, Superintendent,	)	
SCI Greene,	)	
	)	
Appellants/Cross-Appellees.	)	<i>Death Penalty Case</i>
	)	

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**RESPONSE OF MUMIA ABU-JAMAL, APPELLEE AND CROSS-  
APPELLANT, TO COMMONWEALTH'S REPLY TO RESPONSE  
TO NOTICE OF SUPPLEMENTAL AUTHORITY**

COMES MUMIA ABU-JAMAL, Appellee and Cross-Appellant, through lead counsel, ROBERT R. BRYAN, who in response to the Commonwealth's Reply To Response To Notice of Supplemental Authority, submits the following:

The Commonwealth is trying to sow confusion where there should be none. This aspect of the case was fully briefed in 2006 and addressed during oral argument before the Court nine months ago. *See* Transcript from Oral Argument (May 17, 2007), at 25-31; Fourth-Step Reply Brief of Appellee and Cross Appellant, Mumia Abu-Jamal (Oct. 27, 2006), at 11-17; Third Step Brief for Appellants (Aug. 23, 2006), at 24-31.

The Pennsylvania Supreme Court did *not* deny the *Batson* claim on the novel grounds that the Commonwealth asks this Court to apply. In fact the state court said it could deem the *Batson* claim waived under *state law* waiver rules, but declined to do so because of the capital case relaxed waiver rule. "We have, at times, indicated that because of the extreme, indeed irreversible, nature of the death penalty, it may be appropriate to relax application of the waiver rule and address the merits of

arguments raised for the first time in the direct appeal to this Court.” *Commonwealth v. Abu-Jamal*, 555 A.2d 846, 848-49 (Pa. 1989) It thus addressed the *Batson* claim on the merits. *Id.* at 848-50.

The Commonwealth raised its novel theory for the first time on appeal to this Court—it was not an issue in the district court. This theory, if not waived, is utterly irrelevant to the question of whether the Pennsylvania Supreme Court’s decision withstands scrutiny under 28 U.S.C. § 2254(d), since the state court did not in any way even hint that it was applying the theory that the Commonwealth now asks this Court to apply. As pointed out by the lower federal court:

The claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Direct Appeal Br. at 1-5; Amend. St. PCRA Pet. ¶¶ 135-38; St. PCRA Mem. at 144-47. Moreover, it was adjudicated on the merits by the state courts. *See Abu-Jamal*, 555 A.2d at 848-50; *PCRA Op. F.F.* ¶¶ 290-91 & *C.L.* ¶¶ 138-46; *PCRA Appeal Op.* at 113-14. Therefore, it is subject to the strictures of § 2254(d).

*Abu-Jamal v. Horn*, Memorandum and Order at 17, 2001 WL 1609690 (E.D. Pa. 2001).

Since the assertions in the Commonwealth’s Reply serve no purpose but to vex the Court and Mr. Abu-Jamal with frivolous arguments that have already been fully briefed, they should be rejected.

Dated: February 11, 2008

Respectfully submitted,



ROBERT R. BRYAN

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Mumia Abu-Jamal

**CERTIFICATE OF SERVICE**

I hereby certify that on this date I caused a true and correct copy of the foregoing

**Response of Mumia Abu-Jamal, Appellee and Cross-Appellant, To Commonwealth's  
Reply To Response To Notice of Supplemental Authority**

to be served by United States Mail, first class postage prepaid, upon the following:

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

Executed on this the 11th day of February, 2008, at San Francisco, California.



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