

IN THE UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

MUMIA ABU-JAMAL,

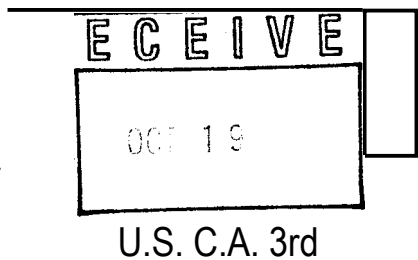
Appellee and Cross-Appellant,

vs.

MARTIN HORN, Director, Pennsylvania Department
of Corrections; CONNER BLAINE, Superintendent,
SCI Greene; DISTRICT ATTORNEY OF PHILADEL-
PHIA COUNTY; ATTORNEY GENERAL OF THE
OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellants and Cross-Appellees.

No. 02-



No. 01-9014

Death Penalty Case

**REPLY TO ANSWER TO SUPPLEMENTAL MOTION
FOR CERTIFICATE OF APPEALABILITY**

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IN THE UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

MUMIA ABU-JAMAL,)	No. 02-9001
)	
Appellee and Cross-Appellant,)	
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vs.)	
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MARTIN HORN, Director, Pennsylvania Department)	No. 01-9014
of Corrections; CONNER BLAINE, Superintendent,)	
SCI Greene; DISTRICT ATTORNEY OF PHILADEL-)	
PHIA COUNTY; ATTORNEY GENERAL OF THE)	
OF THE COMMONWEALTH OF PENNSYLVANIA,)	
)	<i>Death Penalty Case</i>
Appellants and Cross-Appellees.)	
_____)	

**REPLY TO ANSWER TO SUPPLEMENTAL
MOTION FOR CERTIFICATE OF APPEALABILITY**

COMES PETITIONER MUMIA ABU-JAMAL, Appellee and Cross-Appellant in the above-referenced matter, who in reply¹ to the state's Answer To Supplemental Motion For Certificate of Appealability, submits the following:

1. Timeliness

Respondent admits that "there is no specific time limit for filing motions on appeal," and that there has been no ruling on the Motion for Certificate of Appealability to which Petitioner has filed a supplement. Answer at 4. Thus to now argue that the Supplement somehow causes prejudice is without foundation.

A certificate of appealability was granted by the lower court as to Claim 16.² Memorandum and Order, Dec. 18, 2001, *Abu-Jamal v. Horn*, 2001 WL 1609690 (E.D. Pa. 2001.) The

1. The Answer was received by the office of the undersigned on October 12, 2005. Thus, this Reply is being filed within seven days of service. Fed. R. App. P. 27(3).

motion seeking enlargement of the claims to be considered by this Court was thereafter filed and is pending. Petitioner's Motion for Certification of Additional Issues for Appeal, Feb. 6, 2002. Petitioner is merely seeking to supplement that pleading.

Petitioner is under a sentence of death, and has been on Pennsylvania's death row for 23 years. All viably significant claims of constitutional import should be considered. In the supplemental he is asking this Court to grant a certificate of appealability as to only five additional claims: 6, 11-13, 29.

2. Claims 6, 11-13 and 29 are not frivolous

The claims presented in the Supplemental Motion are far from frivolous, as argued by Respondent. Answer at 5-6. The denied habeas corpus guilt-phase claims that Petitioner seeks to be considered on appeal are of constitutional significance and merit review by this Court. The issues would certainly be debatable by reasonable jurists.

Under 28 U.S.C. § 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure, a certificate of appealability is required for each claim he wishes to present to the Court of Appeals. The purpose of the requirement is "to prevent frivolous appeals." *Barefoot* at 893. It must be granted if the issue is "debatable among jurists of reason"; "a court could resolve the issue[] [in a different manner]"; or "the question[] [is] adequate to deserve encouragement to proceed further." *Id.* at 893 n.4. Any doubts must be resolved "in favor of the petitioner." *Whitehead v. Johnson*, 157 F.3d 384, 386 (5th Cir. 1998). That Petitioner in the case at hand is under a sentence of death is important, for "[i]n a capital case, the nature of the penalty is a proper consideration" to weigh in favor of granting an appealability certificate. *Barefoot*, 463 U.S. at 893.

2. Claim 16 addresses the Philadelphia District Attorney's systematic use of peremptory strikes to remove people of color from sitting on Petitioner's jury. *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Dretke*, 545 U.S. __ (June 13, 2005).

The certificate-of-appealability is distinct from the standard for prevailing on the merits, and the threshold is intended to serve only as a gate-keeping function. Courts must not prematurely terminate a petitioner's appeal when making an appealability determination by concluding, without the benefit of plenary appellate review, that he is not likely to prevail on the merits. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

A "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" in order to obtain a COA. *Tennard v. Dretke*, 542 U.S. , 124 S. Ct. at 2569 (quoting *Slack*, 529 U.S. at 484). The statute refers to "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253.

Ineffective Assistance of Counsel

Claim 6. Petitioner's Appointed Attorney Was Prejudicially Ineffective For Failing To Prepare For Trial, Investigate The Case, Retain And Consult Essential Experts, and Present Available Defenses

Respondent makes the erroneous assertion that trial counsel, Anthony E. Jackson, was not ineffective at the guilt phase, and in that context "[c]laims that conflict with reality are frivolous." Answer at 6. In fact, Mr. Jackson himself conceded during cross-examination by the prosecution that he "didn't do any investigation in this case." 7/28/95 Tr. 147. Respondent has made numerous sweeping allegations that are contrary to the facts. Sadly, Mr. Jackson's problems did not cease with the conclusion of the trial, and he was eventually disbarred. Order, Disciplinary Board of the Supreme Court of Pennsylvania, Case No. 3 DB 91, Feb. 4, 1992.

The PCRA record establishes that Mr. Jackson failed to prepare for the guilt phase. He bluntly admitted he had "very little time" to actually prepare for trial, spending most of his time working on motions and garnering discovery material. *Id.* at 89-92. Compounding his difficulties was the fact that he had a fledgling law practice at the time of his appointment on this case

and had other commitments. 7/27/95 Tr. 36-37; 7/31/95 Tr. 91. Indeed, Mr. Jackson requested, to no avail, that the court appoint another lawyer to assist him with little over a month left before trial. *Id.* at 92. Mr. Jackson was not prepared for trial. In addition to not conducting an adequate investigation, he failed to explore and prepare defenses, obtain the assistance of crucial experts in such fields as ballistics and pathology, and to probe the flaws and vulnerabilities in the prosecution's case. These failings singly and cumulatively resulted in a breakdown in the adversarial process.

There was an investigator, Robert Greer, who was only able to do minimal work on the case due to the lack of adequate funds. It is incorrectly argued by Respondent that substantial resources were available from a defense committee. Answer at 9-10. Again, the facts belie such a contention, and Respondent has not revealed the truth of what occurred. During the 1995 evidentiary hearing, Mr. Greer explained: "I got absolutely nothing from any committee, nothing from any Court." 8/31/95 Tr. 200. There simply was little money available for trial preparation. Mr. Jackson could "only raise approximately \$500. So I kept my bill around the money he had." *Id.* at 193. Respondent seeks to give the impression that the investigator worked far more on the case than he did.

Respondent argues that the contention is "ridiculous" that Mr. Jackson should have subpoenaed Officer Gary Wakshul at trial. In fact, the witness was essential to establishing that Petitioner did not state that he had shot any officer. Introduction of Officer Wakshul's police report that Petitioner "made no comments," would have proven the alleged "confession" was a complete fabrication concocted by the police.

The prosecution "confession" witnesses never reported the supposed confession to police until two months after it allegedly took place—this despite the fact that one of these witnesses, P.

O. Garry Bell, had given a police interview less than two weeks after the shooting. PCRA Pet., Exh. 24. Bell was the slain officer's former partner who admittedly threatened to kill Petitioner at the hospital. 6/24/82 Tr. 29-30, 135-36, 156. The other "confession" witness was Priscilla Durham,³ a hospital security guard who had been friends with the slain officer. 6/1/82 Tr. 115; 6/24/82 Tr. 37-38, 44, 156.

The jury also should have heard evidence that the "confession" surfaced in the wake of police brutality charges which Wakshul characterized as unheard of. 8/1/95 Tr. 46. The jury also should have heard that the prosecutor called a meeting of police officers during this period, and it was then that the notion of asserting that Petitioner had confessed apparently was first floated as a possible response to his charges against the police. *Id.* at 80.

Indeed, the jury should have heard this entire sequence of events, as well as Respondent's incredible justification for Wakshul's failure to report the "confession" at either of the first two interview sessions. The facts surrounding his turnabout are so stark in what they reveal about this prosecution that no argument by the prosecution could have persuaded a jury that this "confession" ever occurred. More importantly, these facts had the potential of tainting this entire prosecution because it revealed that law enforcement was willing to fabricate evidence to secure a conviction against Petitioner.

3. Pending before the Pennsylvania Supreme Court is review of a PCRA petition, part of which concerns the fact that Priscilla Durham has admitted she lied in testifying at trial that he heard Petitioner making any statement that he shot the deceased. Notice of Appeal, July 14, 2005; 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, Dec. 8, 2003, *Commonwealth v. Abu-Jamal*, Ct of Common Pleas No. 8201-1357-59. She admitted to lying because of police pressure. "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." Exhibit 2 to Petition, Declaration of Kenneth Pate, ¶¶ 6-7, Apr. 18, 2003.

For Respondent to now distort the evidence in an effort to justify the failure of defense counsel in not subpoenaing Wakshul, is in and of itself "ridiculous." Any reasonable defense lawyer would have seen the importance of Wakshul in establishing from his report at the time, that Petitioner made no incriminating statements at the hospital.

To borrow the language of opposing counsel, Respondent has endeavored to create "another fabrication" in claiming that Deborah Kordansky "flatly denied having seen anyone, let alone the true shooter," fleeing the scene.'. Answer at 12. That contention is a misrepresentation of her testimony, and is not true. Ms. Kordansky lived in the St. James House at the time of the shooting. Her apartment overlooked the area where the killing occurred. 8/3/95 Tr. 229-30. She saw a black man running eastward on Locust Street, away from the homicide scene, just after the shooting. This account would have been helpful to the defense, since it would have helped establish that the real killer fled the scene. It would have corroborated the testimony of Dessie Hightower who also observed an individual running eastward on Locust Street. Shortly afterwards Ms. Kordansky gave a statement to the police: "I told them the sequence of events, of nearing gunshots, sirens, seeing someone running." *Id.* at 240.

The case was a disaster. Because Mr. Jackson was ill prepared, asked to represent himself. That was just five weeks before trial. During that five pre-trial week—which Mr. Jackson recognized as a decisive period for trial preparation—he did little. 7/27/95 Tr. 138; 7/31/95 Tr. 95-96. Three weeks later, Petitioner complained again to no avail that "[y]ou have heard very clearly the lack of willingness on the part of Mr. Jackson to function in that role." 6/1/82 Tr. 29.

To his chagrin, Mr. Jackson was compelled to resume control over the case as the trial began. 7/31/95 Tr. 97. With a life in the balance, both the attorney and his client protested the change only to be met by threats from the court. These escalated to the point of Petitioner's ex-

pulsion from major portions of the trial and a contempt citation on the attorney. But most problematic was the breakdown in the attorney-client relationship which had begun because Mr. Jackson wanted to withdraw and objected to assisting his client. Confronted with this impossible situation, Mr. Jackson did not even take the obvious step and ask for a continuance of trial. Not surprisingly, the lawyer's performance during the trial revealed his lack of preparation, poor judgment, and an overall inability to place the prosecution's case within the crucible of meaningful adversarial testing—facts acknowledged by Mr. Jackson in his 1995 PCRA hearing testimony. 7/31/95 Tr. 95. Consequently, viable attacks upon each aspect of the prosecution's case were never made, leaving the jury with a warped view of the evidence. Mr. Jackson candidly summed up the state of his defense of Petitioner: "No money, no investigation, no experts, no prior preparation of witnesses." *Id.* at 123.

Mr. Jackson had no tactical or strategic reason for the acts and omissions set forth in the Supplemental Motion for Certificate of Appealability. In the absence of his failings, the jury would likely have reached a more favorable result. A powerful defense theory, centered upon the indisputable fact that five witnesses independently observed flight from the scene of the crime towards a nearby alleyway, was never developed and communicated to the jury. A devastating assault on the prosecution's use of a patently false confession and an attack on its reliance on dubious scientific evidence were bypassed. Physical evidence was never adduced to show that the key eyewitness's trial testimony, upon which rested the prosecution's theory of what happened on the night in question, was physically impossible. In short, defense counsel never forced the prosecution's case to "survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648 (1984); *see Strickland v. Washington*, 466 U.S. 668, 696 (1984).

It is submitted that jurists of reason would find debatable the determination of the lower court that Petitioner's trial attorney was not prejudicially ineffective. Further, contrary to the district court's conclusion, the state court denial of relief was "an unreasonable application of clearly established Federal law" and/or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

Denial of Right To Self-Representation

Claim 11. The Court Deprived Petitioner Of His Right To Self-Representation By Requiring That *Voir Dire* Be Conducted Only By Backup Counsel Or The Court, And Thereafter Stripped His *In Propria Personal* Status For The Remainder Of The Trial

Respondent's initial premise is wrong. To claim that Petitioner "was still representing himself" even though the judge would not permit him to conduct voir dire questioning makes no sense. Answer at 15. To argue that Petitioner was representing himself even though not allowed to participate in his own representation is an oxymoron. By no stretch of the imagination was he representing himself, when he was required to sit there while Mr. Jackson conducted the voir dire.

At the specific bidding of the prosecutor, the judge took away from Petitioner the right previously granted to represent himself 6/9/82 Tr. 3.2. Backup counsel objected and asked that Petitioner and the prosecutor be permitted to "continue the *voir dire*." *Id.* at 3.15. The only "choice" Petitioner was given was either to not represent himself and allow Mr. Jackson to do the *voir dire*, or, not represent himself and permit the judge to conduct the *voir dire*. *Id.* at 3.18. Petitioner and Mr. Jackson rejected the Hobson's choice and strongly objected. *Id.* at 3.19. Nevertheless, the court ruled that the remaining questioning of prospective jurors would be by at-

torneys, so at that point the self-representation ceased. *Id.* at 3.24. The following day Mr. Jackson unsuccessfully moved at the outset for a mistrial because the court had deprived Petitioner, who had been granted *in propria persona* status, of his right to conduct *voir dire*. 6/10/82 Tr. 4.2. The following day the attorney again objected that the court was denying Petitioner the right of self-representation and moved that the judge recuse himself. 6/11/82 Tr. 5.25. Later in the day Mr. Jackson pointed out that Petitioner "represents himself . . . He is client and defendant . . ." *Id.* at 5.204. Even though the right of self-representation had been removed from Petitioner during *voir dire*, the prosecutor stated towards the end of the process that "defendant is still representing himself." 6/17/82 Tr. 2. A short time later he contradicted the comment by mentioning in an argument that "Mr. Jamal will assist Mr. Jackson," who had been appointed as standby counsel. *Id.* at Tr. 4.

Respondent attempts to justify the stripping from Petitioner his self-representation right, by claiming that essentially the prosecutor was trying to protect or help Petitioner since he was scaring the jury, and that things were moving slowly. Answer at 15. First, the trial record reflects that the prosecutor wanted to win at all costs, so it is disingenuous to now claim he was concerned about helping the accused. Further, Respondent wants to carve out an exception to the constitutional right to function as one's own attorney. It is a Darwinian approach that only to the swiftest goes the constitutional right. One can represent himself or herself, but it must be fast. Finally, at the point the prosecutor asked the judge to not permit Petitioner to represent himself further in *voir dire*, only two days of jury selection had been consumed. Yet, it was already 40% complete. Respondent's statement that jury selection was proceeding at a "snail's pace" is simply not true. Answer at 15. Petitioner represented himself without incident during those first two days. Interestingly, his examination of prospective jurors was probably as good

as that of many lawyers.⁴ 6/7/82 Tr. 132-135, 137-141, 148-149, 157-158, 163-172, 174-178, 183, 187; 6/8/82 Tr. 10-36, 41-50, 60-69, 73-77, 78-85, 88-97, 109-119, 114-126, 129-131, 152-154. He questioned 23 venire members, successfully challenging two for cause. 6/8/82 Tr. 69-70, 156. He was even able to defeat a prosecution challenge for cause. 6/7/82 Tr. 159-63. The prosecutor was at that point losing ground and not doing well, so he suggested the judge "should ask the questions." 6/8/82 Tr. 2.141. The next morning the prosecution persuaded the judge to take over the examination of prospective jurors. 6/9/82 Tr. 3.2.

It is not true Petitioner "expressly conceded" that he had not been removed as his own counsel. Answer at 16. That a defense lawyer 13 years after the trial made an apparent misstatement certainly neither changes the facts of what occurred in the 1982 trial nor binds Petitioner to a false fact. Opposing counsel's claim that "by Abu-Jamal's own admission – no factual basis for the instant claim" is essentially an effort to foster a fraud on the Court. *Id.* The facts are the facts. The deprivation of Petitioner's right to represent himself in the 1982 trial cannot magically be changed by what a lawyer said in 1995.

Petitioner has made a substantial showing of the denial of the constitutional right to self representation at *voir dire* under the Fifth, Sixth and Fourteenth Amendments. Reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong, for he had a right to represent himself. Further, contrary to the conclusion below, the preceding establishes that the state court denial of relief was "an unreasonable application of clearly estab-

4. Petitioner was a prominent journalist in Philadelphia at the time of his arrest. His remarkable intelligence and ability to communicate as a radio reporter was recognized. He was one of the top names in local radio, interviewing many luminaries, winning a Peabody Award for his coverage of the Pope's visit, and became known as "the voice of the voiceless" during the years of Mayor Frank Rizzo. Petitioner was President of the Philadelphia Association of Black Journalists, and recognized by Philadelphia Magazine in 1981 as one of Philadelphia's "people to watch."

lished Federal law" and/or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *See* 28 U.S.C. § 2254(d)(1)-(2).

Exclusion of Petitioner from Significant Portions of Trial, Without Ability To Even Monitor Proceedings

12. The Court's Forced Removal Of Petitioner From Significant Portions Of The Trial Violated His Right To Self-Representation, To Assist In His Defense, Confront The Witnesses Against Him, A Fair And Reliable Determination Of Guilt, And Due Process Of Law

Respondent refers to Petitioner as "disruptive" for asking for a microphone so that he could be heard by the jury. Answer at 17. The "disruption" was insisting on his constitution right to self-representation, to assist in his defense, confront the witnesses, a fair and reliable determination of guilt, and due process of law guaranteed by the Fifth, Sixth and Fourteenth Amendments.

Petitioner was entitled to be present at every stage of his trial. *See Faretta v. California*, 422 U.S. at 819-21. That right is not waivable in capital cases. *Diaz v. United States*, 223 U.S. 442 (1912); *see also, Lewis v. United States*, 146 U.S. 370 (1892); *Hopt v. Utah*, 110 U.S. 574 (1884); *Near v. Cunningham*, 313 F.2d 929, 931 (4th Cir. 1963). Even if waivable, Petitioner's forced removal from the trial^s mandates the granting of a new trial because: (1) all of the alleged "disruptions" involved Petitioner's protests against the abridgement of his right to represent himself; and (2) even if justified, the removal was not appropriately tailored to protect his concomitant right to communicate with counsel and otherwise participate in his own defense.

5. Petitioner was absent for portions of the trial on June 18, 22, 23, 24, 25, 26 and 28. In each instance when he was ejected, he was deemed to be too disruptive in persistently insisting on the right to represent himself.

The court's decision to expel him from the courtroom as well as depriving him of his *in propria persona* rights was improper. See *United States v. Dougherty*, 473 F.2d 1113, 1126-27 (DC Cir. 1972). In *Dougherty*, the defendants sought permission to proceed *pro se*. The trial court denied the application. On appeal, the government argued that "'disruptive' incidents following the denial of the *pro se* motions" provide justification for the trial court's denial. *Id.* at 1126. The court spurned argument, noting that "[t]his is like using the fruit of an unreasonable search to provide a cause making the search reasonable." *Id.*

The court violated Petitioner's rights because it failed to consider, and deploy, available technology to ensure that Petitioner could contemporaneously monitor the proceedings, as well as promptly communicate with court-appointed counsel. See *U.S. ex rel. Boothe v. Superintendent*, 506 F. Supp. 1337 (E.D.N.Y.), *rev'd on procedural grounds*, 656 F.2d 27 (2d Cir. 1981).

Respondent discusses *Illinois v. Allen*, 397 U.S. 337 (1970), in which Justice Brennan advised trial courts that when a defendant is removed from court "the court should make reasonable efforts to enable him to communicate with his attorney and, if possible, to keep apprised of the progress of his trial. Once the court has removed the contumacious defendant, it is not weakness to mitigate the disadvantages of his expulsion as far as technologically possible in the circumstances." 397 U.S. at 351. See also *United States v. Ives*, 504 F.2d 935 (9th Cir. 1974); *Stewart v. Corbin*, 850 F.2d 492, 499-500 (9th Cir. 1988) (defendant offered a room where he could hear the proceedings); *United States v. Munn*, 507 F.2d 563, 567 (10th Cir. 1974) (defendant "was able to hear the progress of his trial through a broadcasting system"); *United States v. Washington*, 705 F.2d 489, 497 n.4 (D.C. Cir. 1983) (closed circuit television).

During those periods in which Petitioner was excluded from his own trial, the court did not provide Petitioner with any means to monitor the proceedings or to consult with Mr. Jackson

while court was in session. Consequently, Petitioner missed much of the testimony of critical prosecution witnesses. The court's action thereby undermined Petitioner's ability to participate meaningfully in his defense, including highly critical stages of the trial.

Claim 13. Petitioner Was Denied His Right To Self-Representation And To Be Present At All Critical Stages Of The Trial When He Was Excluded From Two Substantive *In Camera* Hearings

There is no reasonable justification offered by Respondent for Petitioner's exclusion from two *in camera* conferences. In one hearing the court dismissed an African-American juror and replaced her with a white alternate who had expressed prejudice against Petitioner. That the judge prevented Petitioner from attending the hearing, over the objections of defense counsel, is virtually unprecedented. That error was compounded 10 days later when the judge conducted a hearing with testimony on the issue of whether a police officer other than the deceased had shot Petitioner. The accused was again not present.

Petitioner's exclusion from the hearings violated his right to be present, both as the defendant and attorney of record in his *in propria persona* capacity. As noted, a defendant who represents himself is entitled to retain actual control over his defense to the same extent as a lawyer at the bar. *See McKaskle v. Wiggins*, 465 U.S. at 178-79. Accordingly, the exclusion violated his *Faretta* self-representation entitlements and his right to be present at all proceedings of consequence. *Oses v. Commonwealth of Massachusetts*, 775 F.Supp. 443 (D.Mass. 1991), *affd*, 961 F.2d 985 (1st. Cir. 1992).⁶ The exclusion from the *in camera* hearings also violated Peti-

6. It is no answer to this constitutional defect in the trial to assert that standby counsel was present in lieu of Petitioner. *McKaskle* specifically holds that where, as here, standby counsel speaks "instead of the defendant on any matter of importance, the *Faretta* right is eroded." 465 U.S. at 178.

tioner's right as an accused to be present at all critical stages of the trial, since both conferences went beyond perfunctory scheduling matters and purely legal issues.

Petitioner has made a substantial showing of the denial of constitutional rights under the Fifth, Sixth and Fourteenth Amendments. Reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong, for he had a right to be present at all critical stages of the trial included the two substantive *in camera* hearings. Also, contrary to the conclusion below, the preceding establishes that the state court denial of relief was "an unreasonable application of clearly established Federal law" and/or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *See* 28 U.S.C. § 2254(d)(1)-(2).

Bias of Trial Court

Claim 29. Petitioner's Right To Due Process Of Law And A Fair Trial Under The Fifth And Fourteenth Amendments Was Violated Because Of The Bias Of The Trial Judge, Albert F. Sabo

It is correct that Claim 29 addressed in the lower court related to the prejudice of the judge during the 1995 post-conviction hearing, rather than his bias in the 1982 trial. Answer at 32. Nevertheless, this claim should be considered in relation to the trial, since the state and federal courts specifically dealt with judicial prejudice at the trial: "Our review of the record evidences, first, that during trial in 1982, Judge [Albert] Sabo displayed no such adversarial position towards [Petitioner]. Rather, we find evidence therein that quite the contrary was true . . ." *Abu-Jamal v. Horn*, 2001 WL 1609690, at 128 (E.D. Pa. 2001.), quoting *Pennsylvania v. Abu-Jamal*, 553 Pa. 485, 720 A.2d 79, 91 (Pa.1998).

The combination of the deep-seated bias and hostility of the trial judge towards Petitioner resulted in an unfair trial. Petitioner has made a substantial showing of the denial of constitu-

tional rights under the Fifth, Sixth and Fourteenth Amendments. Reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong, for the judge's bias rendered the trial fundamentally unfair. Further, contrary to conclusion of the court below, the preceding establishes that the state court denial of relief was "an unreasonable application of clearly established Federal law" and/or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *See* 28 U.S.C. § 2254(d)(1)-(2).

CONCLUSION

For the foregoing reasons, it is respectfully requested that a certificate of appealability be granted as to the designated claims.

Dated: October 18, 2005

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and correct copy of the foregoing Supplemental Motion for Certificate of Appealability to be served by United States Mail, first class postage prepaid, upon the following person:

Hugh J. Bums, 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 18th day of October, 2005, at San Francisco, California.



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