1995 WL 1315980, 30 Phila.Co.Rptr. 1
(Cite as: 1995 WL 1315980 (Pa.Com.Pl.), 30 Phila.Co.Rptr. 1)

September 15, 1995

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Court of Common Pleas of Pennsylvania, Philadelphia County, Criminal Division
Commonwealth of Pennsylvania
v.
Wesley Cook a/k/a **Mumia** Abu-Jamal

No. 1357.
January Term, 1982

Hugh Burns, Esquire, for the Commonwealth.

Leonard Weinglass, Esquire, *Rachel Wolkenstein*, Esquire and *David Rudovsky*, Esquire, for Defendant.

SABO, J.

FINDINGS OF FACT, CONCLUSIONS OF LAW, & ADJUDICATION

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The above-captioned matter comes before this court as a result of the defendant's counseled petition for relief being filed pursuant to the Post Conviction Relief Act, 42 Pa. C.S.A. §9541 *et seq.*

I. ISSUES

The defendant raised the following issues in his PCRA petition and the supplement thereto:

(1) That the Commonwealth withheld materially favorable evidence from the defense and knowingly used false evidence against the petitioner:

(a) that William Singletary indicated someone other than petitioner was the shooter, the shooter fled, Cynthia White was not present at the scene, and law enforcement intimidated and threatened him to change his statement;

(b) that Robert Harkins failed to identify petitioner as

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the shooter in a photo array;

(c) that Dessie Hightower passed a polygraph examination indicating that a black male fled the scene immediately after the shooting;

(d) that Philadelphia police files existed pertaining to petitioner's political activities and affiliations which demonstrated police bias against him;

(e) that Sixth District Police coercion caused witness William Singletary to flee to North Carolina and caused Veronica Jones and Robert Chobert to retract their initial claims that another individual fled the scene;

(f) that the Commonwealth made a deal with Cynthia White whereby plainclothes police protected her while she worked at a street corner at night as a prostitute;

(g) that Veronica Jones interviewed with police during January 1982 and was offered police protection for her prostitution;

(h) that the Commonwealth orchestrated the absence of Officer Gary Wakshul who would have testified that petitioner did not confess;

(i) that Officer Gary Bell's December 9, 1981 patrol log would have reflected petitioner did not confess; and

(j) that there was written and visual evidence of a second bullet wound in Officer Faulkner's throat which the ‘incompetent‘ Medical Examiner failed to detect at the autopsy;

(2) That the court deprived petitioner of his fundamental right to present a defense and he was barred from presenting the following evidence proving he never confessed to shooting anyone:

(a) Veronica Jones to show prosecution witness Cynthia White was coaxed and coerced into testifying;

(b) Robert Chobert was susceptible to police pressure to lie because he had two previous DWI convictions and a prior conviction for throwing a molotov cocktail for pay into a school and was on probation at the time of trial; and

(c) the testimony of Officer Gary Wakshul;

(3) That petitioner's absence from two *in camera* conferences violated his due process rights as counsel of record and as an accused to be present at critical stages of the trial;

(4) That deep and irreconcilable conflicts between petitioner and his attorney, Anthony Jackson, Esquire, resulted in ineffective assistance of counsel:

(a) because Mr. Jackson failed to exercise rudimentary skills to ensure the empaneling of a fair and impartial jury;

(b) because Mr. Jackson failed to talk to defense witnesses prior to calling them to the stand;

(c) because Mr. Jackson failed to arrange for the testimony of Officer Wakshul sufficiently in advance of trial; and

(d) because Mr. Jackson failed to present meaningful adversarial testing of the prosecution's case;

(5) That the removal of petitioner from portions of the trial was unwarranted and violated his right to self-representation, to assist in his defense, and to confront the witnesses for the Commonwealth;

(6) That petitioner was denied due process because he was not informed as to the events in the trial taking place during his absence from the proceedings;

(7) That the jury could not carry out its duty to fairly evaluate the evidence in accordance with the presumption of innocence in the wake of petitioner's forced absence from the courtroom;

(8) That the court prejudiced petitioner by not allowing John Africa to be recognized as a legal advisor and assistant and by forcing Anthony Jackson, Esquire, to represent petitioner;

(9) That petitioner did not take the stand in his own defense because of ‘clashes‘ with the court and because of his objection to being represented by Mr. Jackson;

(10) That the prosecution's guilt-phase summation exceeded the boundaries of propriety and thus deprived

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petitioner of his right to due process:

(a) because the prosecution invited the jury to denigrate petitioner's exercise of his constitutional right not to testify;

(b) because the prosecution improperly vouched for two key witnesses, Robert Chobert and Priscilla Durham;

(c) because the prosecution falsely and prejudicially took advantage of the court's rulings precluding petitioner from presenting a defense; and

(d) because the prosecution inflamed and prejudiced the jury by urging that the ‘People of Philadelphia‘ demand ‘Action‘ to avenge the officer's death;

(11) That at least three white jurors conducted premature deliberations at the hotel where they were sequestered in violation of petitioner's due process rights;

(12) That the verdict form created a substantial probability that jurors believed unanimity was required to find a mitigating circumstance;

(13) That the prosecution's summation in the sentencing phase diminished the jury's responsibility in determining whether death was appropriate, burdened petitioner's right to silence, and exploited petitioner's difficulties with the court and his attorney over his pro se status:

(a) because the summation stated that the sentencing decision was a mere mechanical process and not one involving discretion;

(b) because the summation impermissibly conveyed the impression that the **death penalty** was warranted based upon the experience of the prosecutor;

(c) because the prosecution tarnished petitioner's character based upon his decision not to testify about the incident; and

(d) because the prosecution exploited petitioner's persistent difficulties with the court and his attorney to portray him as both ungrateful of the rights he was afforded as a petitioner and ‘antiauthoritarian;‘

(14) That petitioner was sentenced to death without the benefit of adequate assistance of counsel in the penalty phase;

(15) That the jury was not advised that a sentence of life carried with it no possibility of parole, violating petitioner's Eighth and Fourteenth Amendment rights; and

(16) That petitioner's appellate counsel was ineffective and prevented appellate review of meritorious issues raised on the record in violation of his Sixth Amendment rights;

(17) That the jury pool is not random;

(18) That the Pennsylvania **Death Penalty** Statute is a violation of the State and Federal Constitutions; and

(19) That this court erred in not recusing itself from the PCRA process.

This court will also discuss issues raised throughout the course of the instant PCRA proceeding which were not raised in petitioner's counseled petition or supplement thereto but which are deserving of comment.

II. TRIAL EVIDENCE AND PROCEDURAL HISTORY

(1) Petitioner Mumia Abu-Jamal (‘Mr. Jamal‘) is presently incarcerated at SCI-Greene, and is awaiting execution of a death sentence upon a conviction of murder in the first degree and possession of instrument of crime.

(2) Petitioner was arrested on December 9, 1981, for the shooting death of twenty-six year old Philadelphia Police Officer Daniel Faulkner while he was on duty in the vicinity between 12th and 13th Streets on Locust Street, Philadelphia, Pennsylvania.

(3) Petitioner was arraigned on January 20, 1982, before the Honorable Paul Ribner.

(4) Anthony Jackson, Esquire, was assigned as counsel to petitioner on December 15, 1981.[FN1]

FN1. Mr. Jackson was no longer an attorney practicing law in the Commonwealth of Pennsylvania at the time of this PCRA matter.

(5) The case was then assigned to this court. Pretrial

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matters had been held before Judge Ribner prior to being assigned to this court for trial.

(6) A trial by jury commenced on June 7, 1982, wherein, Judge Ribner had allowed petitioner to represent himself with Mr. Jackson designated backup counsel.

(7) Several times during the course of the trial, petitioner requested John Africa be appointed as counsel and Mr. Jackson be removed as backup counsel. This court did not grant petitioner's request because Mr. Africa was not a trained, licensed, or practicing attorney nor was petitioner entitled to appointed counsel of his choice.[FN2] Furthermore, Mr. Jackson was appointed as backup counsel in order to protect petitioner's constitutional rights.[FN3]

> FN2. John Africa was the titular head of MOVE, a group of radical [[sic] active in Philadelphia, who rejects all governmental authority.

> FN3. This matter has been previously litigated by the Pennsylvania Supreme Court.

(8) Petitioner refused to cooperate with this court or follow proper courtroom procedures. He constantly insulted this court, yelled, used foul language, ridiculed his counsel, and acted belligerently. After countless warnings by this court that petitioner would be removed as pro se counsel because of his intentional misbehavior, on June 17, 1982, we removed him as primary counsel and appointed Mr. Jackson to take over as primary counsel. This court stated '[m]y position is that you have deliberately disrupted the orderly progression of this trial. Therefore, I am removing you as primary counsel and I am appointing Mr. Jackson to take over as primary counsel.' (N.T. 6/17/82, 1.123)

(9) On June 18, 1982, Mr. Jackson filed a Petition for a Writ of Prohibition or Exercise of Plenary Jurisdiction with the Pennsylvania Supreme Court, requesting the court order that the defendant be allowed to proceed pro se, and John Africa be allowed to sit at counsel table. The late Justice James P. McDermott held a hearing and denied petitioner's request that same day.

(10) However, this court subsequently permitted petitioner to represent himself but on numerous occasions had to remove him as pro se counsel, and instruct Mr. Jackson to act as primary counsel. On numerous occasions we had to remove petitioner from the courtroom because of his defiance and deliberate disruptiveness. Each time petitioner was removed, the jury was instructed to draw no adverse inferences from his absence *(e.g.,* N.T. 6/18/82, 2.61-2.92; 6/19/82, 4-8; 6/21/82, 4.1-4.5; 6/22/82, 5.4-5.44; 6/23/82, 6.116-6.129; 6/24/82, 16-26, 85-95; 6/25/82, 8.2-8.4, 8.13-8.16; 6/26/82, 156-60; 7/1/82, 41-53).

(11) During the times petitioner was removed from the courtroom, his counsel, Mr. Jackson, kept petitioner fully informed of the proceedings (N.T. 6/29/82, 6).

(12) The Commonwealth presented evidence that on December 9, 1981, Officer Faulkner made a routine traffic stop of a Volkswagen driving against traffic which was occupied by petitioner's brother, William Cook. The officer radioed for assistance before exiting his patrol vehicle.

(13) After approaching the Volkswagen, Mr. Cook stepped out of the vehicle. A struggle ensued between him and Officer Faulkner.

(14) Witness Cynthia White, a prostitute, witnessed petitioner run out of a parking lot from the opposite side of the street, as Officer Faulkner attempted to subdue and handcuff Mr. Cook.[FN4] Petitioner ran toward Officer Faulkner with a gun drawn and shot Officer Faulkner, striking him in the back.

> FN4. Petitioner claims Cynthia White, the central prosecution witness, had been given a special undisclosed favor by police in exchange for her testimony and that she was under police protection while she worked as a prostitute at the corner of 12th and Locust Streets. Petitioner failed to produce a scintilla of credible evidence to prove his claim let alone establish it by a preponderance of the evidence. The only evidence offered at the evidentiary hearing was that investigator Robert Greer was unable to interview Ms. White because when he saw her at the corner, on several occasions, there was a little red car parked with two occupants which he opined to be plainclothes police officers (N.T. 8/1/95, 175-76, 182, 201-202). This court cannot find that two occupants in a little red car parked on a street corner in the city of Philadelphia are police officers protecting a prostitute who had been previously and subsequently arrested at least 38 times. Such conduct would discourage any po-

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tential customers.

(15) As Officer Faulkner was falling in front of the defendant, he returned fire, striking petitioner in the chest. Ballistic testing later confirmed that the bullet which struck petitioner was fired from Officer Faulkner's revolver.

(16) Petitioner then stood over the fallen officer and shot him directly in the face as the officer lay on his back. The bullet struck the officer between the eyes and entered his brain. Three other bullets were then discharged by petitioner from his .38 caliber gun.

(17) Petitioner walked several steps away from the dying officer and dropped down, sitting on the curb. William Cook remained on the scene standing near the wall of the adjacent building. The shooting was also witnessed by Robert Chobert, Michael Scanlon and Albert Magilton, all of whom testified as Commonwealth's witnesses.

(18) Within forty-five seconds of Officer Faulkner's radio call, Officers Robert Shoemaker and James Forbes responded. As they approached the scene, a cab driver signalled them to stop and exclaimed that a police officer had been shot. Subsequently, additional police officers arrived on the scene.

(19) Officer Faulkner was immediately taken to Jefferson University Hospital where he was later pronounced dead.

(20) While investigating the scene, Officer Shoemaker approached with his gun drawn. He observed petitioner sitting on the curb. Petitioner reached for something that the officer could not identify. Officer Shoemaker ordered petitioner to ‘freeze‘ but he continued to reach for the object. Officer Shoemaker then moved to see what petitioner was reaching for. The officer identified the object as a gun located within a foot of petitioner's reach. Officer Shoemaker again shouted ‘freeze‘ but petitioner failed to comply. The officer then kicked petitioner in the center of the chest to get him away from the gun and then kicked the gun out of petitioner's reach.

(21) Simultaneously, Officer Forbes approached William Cook who was frisked and determined to be unarmed. Mr. Cook then exclaimed, ‘I ain't got nothing to do with this.‘

(22) Officer Forbes also recovered two handguns from the scene: a five-shot Charter Arms .38 caliber revolver with a two-inch barrel and a standard police-issue six-shot Smith and Wesson .38 caliber Police Special revolver with a six-inch barrel.

(23) The Smith and Wesson revolver was registered as issued to Officer Faulkner. It contained six Remington .38 special cartridges, one of which had been fired.

(24) The Charter Arms revolver had been purchased by petitioner on June 27, 1979 and was registered to him. It contained five ‘Plus-P‘ high-velocity spent bullet shell casings.

(25) Petitioner was taken into custody at the scene and carried over to the police van, violently resisting arrest by striking and kicking the officers attempting to handcuff him.

(26) Eyewitness Robert Chobert was escorted by the police to the police van. Mr. Chobert immediately identified petitioner as the man who shot Officer Faulkner.

(27) Petitioner was then transported to Jefferson Hospital. The officers had to carry petitioner into the hospital because he refused to walk on his own accord. Petitioner was then placed on the floor of the lobby at the entrance to the emergency room.

(28) While awaiting medical attention, Priscilla Durham, a Jefferson Hospital security guard, heard petitioner twice make the statement that he ‘shot the motherfucker, and I hope the motherfucker dies.‘ Police officer, Gary Bell, then responded, ‘if he dies, you die.‘ The hospital security guard who also overheard petitioner's admission described it as bragging. Petitioner was then taken into the emergency room for treatment.

(29) Petitioner did not testify on his own behalf, nor did his brother, William Cook. Counsel thoroughly cross-examined Commonwealth witnesses, petitioner presented eight fact witnesses on his own behalf, and in addition, petitioner presented nine character witnesses.

(30) On July 2, 1982, the jury found petitioner guilty of first degree murder and possession of instrument of crime.

(31) On Saturday, July 3, 1982, this court presided

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over petitioner's penalty phase hearing. The Commonwealth relied heavily on the evidence presented at trial. Petitioner took the stand in his own behalf, was sworn, and refused to be questioned by his attorney. Rather, he read a prepared statement to the jury in which he claimed he had been denied the right to be represented by counsel of his choice, John Africa (N.T. 7/3/82, 10-16).[FN5] In addition, petitioner did not allow counsel to call any mitigating witnesses. As a result, this court instructed the jury that they could consider all the trial testimony in their deliberations to determine aggravating and mitigating circumstances.

> FN5. This issue was raised by petitioner at trial almost every day. This court made it abundantly clear that John Africa could not act as counsel to petitioner because he was not a licensed attorney in any state nor had he ever gone to law school. Furthermore, it was petitioner's constant disregard for this court's decision and his constant disrespect, contempt, and disruptiveness regarding the issue of John Africa that caused petitioner to be removed as pro se counsel and to be removed from the courtroom on numerous occasions.

(32) On that same day, the jury returned with a unanimous sentence of death, finding one aggravating circumstance and one mitigating circumstance. The aggravating circumstance was the killing of a police officer acting in the line of duty. The mitigating circumstance was that petitioner had no significant criminal record.

(33) On May 25, 1983, post-trial motions were heard and denied. Thereafter, a formal sentence of death was imposed by this court (N.T. 5/25/83, 163-66).

(34) This court filed its opinion on September 27, 1983.

(35) New counsel, Marilyn J. Gelb, Esquire, was appointed to represent petitioner.

(36) A direct appeal to the Supreme Court of Pennsylvania followed wherein, this court's decision was affirmed on March 6, 1989.[FN6] *Commonwealth v. Abu-Jamal*, 521 Pa. 188, 555 A.2d 846 (1989), *rehearing denied*, 524 Pa. 106, 569 A.2d 915 (1990).

> FN6. Petitioner raised the following issues in his direct appeal to the Supreme Court of Pennsylvania: (1) That the prosecution utilized their peremptory challenges in a discriminating manner; (2) That the trial court erred in denying defendant's challenge for cause to Juror Number Thirteen; (3) That trial counsel was ineffective during voir dire; (4) That the trial court erred by allowing character witnesses to be cross-examined about bias and motives in testifying; (5) That the prosecutor committed misconduct during summation and the guilt phase; (6) That the trial court abused its discretion in conducting voir dire; (7) That the defendant was unable to contact witnesses and was denied a fair trial due to lack of investigative resources; (8) That the trial court erred in excusing for cause a juror who expressed total opposition to the **death penalty**; (9) That the **death penalty** is unconstitutional; (10) That the trial court erred as to the scope of cross-examination at the penalty phase; (11) That defendant should have been exempt from cross-examination; (12) That improper and extraneous evidence was presented and argued at the penalty phase; and (13) That the court did not properly review the defendant's claims.

(37) Petition for Certiorari with the United States Supreme Court was filed on May 2, 1990. The petition was denied on October 1, 1990. *Abu-Jamal v. Pennsylvania*, 498 U.S. 881 (1990). Petitioner filed a petition for rehearing on October 29, 1990, which was denied on November 26, 1990. *Abu-Jamal v. Pennsylvania*, 501 U.S. 1214 (1991). On May 15, 1991, petitioner filed a second request for rehearing with the United States Supreme Court which was denied on June 10, 1991.

(38) On June 1, 1995, Governor Thomas Ridge signed petitioner's writ of execution. Petitioner's sentence was to be carried out on August 17, 1995.

(39) On June 5, 1995, counsel for the defendant, Leonard I. Weinglass, Esquire, Rachel Wolkenstein, Esquire, Steven W. Hawkins, Esquire, David Rudovsky, Esquire, Daniel R. Williams, Esquire, and Jonathan B. Piper, Esquire, filed a Petition for Recusal of this court, a Petition for Stay of Execution, a Petition for Discovery, and a Petition for Post Conviction Relief.[FN7]

> FN7. Mr. Rudovsky acted as local counsel only, in this matter. Mr. Weinglass and Ms. Wolkenstein were admitted to this jurisdiction *pro hac vice* by the Honorable Legrome D. Davis. Mr.

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Hawkins, Mr. Williams and Mr. Piper were admitted to this jurisdiction *pro hac vice* by this court.

(40) On July 12, 1995, petitioner presented a motion challenging the jurisdictional authority of this court to preside over this case. Petitioner argued that because this court is designated as Senior Status and assigned to the Complex Litigation Center, that we lack the authority and jurisdictional basis for any consideration of the above-referenced petition for PCRA relief. Petitioner's challenge was denied.

(41) Additionally, on July 12, 1995, this court denied petitioner's request for recusal. Immediately thereafter, petitioner filed an emergency appeal with the Supreme Court of Pennsylvania for this court to be removed from the proceedings. The appeal was denied. On July 12, 1995, this court further held petitioner's motion for stay of execution under advisement and granted petitioner's request for an evidentiary hearing.

(42) On July 14, 1995, this court dismissed petitioner's motion for discovery after consideration of the Commonwealth's response to petitioner's motion.

(43) Additionally, on July 12 and 14, 1995, this court granted petitioner's request for an evidentiary hearing and scheduled it to commence on July 18, 1995.

(44) On July 17, 1995, petitioner presented the Pennsylvania Supreme Court with an emergency application for temporary stay of an evidentiary hearing which was denied without prejudice.

(45) Reconsideration of our orders denying petitioner's motion for recusal, denying petitioner's motion for discovery and ordering petitioner to commence an evidentiary hearing on July 18, 1995, was denied on July 18, 1995.

(46) On July 18, 1995, the Supreme Court of Pennsylvania, by Justice Frank J. Montemuro, Jr., granted petitioner's emergency application for temporary stay of an evidentiary hearing and further ordered the hearing to commence on July 26, 1995.

(47) The evidentiary hearing in this matter commenced on July 6, 1995 and concluded on August 15, 1995. Oral argument and proposed findings of fact and conclusions of law were presented to this court by petitioner and the Commonwealth on September 11, 1995. On September 12, 1995, this court held the matter under advisement.

(48) During the course of the evidentiary hearing, this court quashed the subpoenas by petitioner of the following proposed witnesses: Gary Bell (fact witness), Pennsylvania Governor Thomas J. Ridge, Paul A. Tufano, Esquire, (General Counsel Commonwealth of Pennsylvania), John Taylor (Deputy Press Secretary to Governor Ridge), Timothy Reeves (Press Secretary to Governor Ridge), Syndi L. Guido, Esquire, (Deputy General Counsel to Governor Ridge), William G. Chadwick, Jr., Esquire, (Executive Deputy General Counsel to Governor Ridge), The Honorable Paul Ribner (Philadelphia Court of Common Pleas--Pre-trial Calendar Judge at time of petitioner's trial), George Ewalt (jury foreman at time of trial), Jere Krakoff, Esquire, (petitioner's attorney in an unrelated federal civil matter), Alma Cranchall (peremptorily struck juror--stipulation that she was African-American), Debbie Sampson Campbell (peremptorily struck juror--stipulation that she was African-American), Michael J. McAllister (Philadelphia Jury Commissioner), Charles Kenney (police officer present at Jefferson Hospital December 9, 1981), John Heftner (police officer present at Jefferson Hospital December 9, 1981), William Hinkel (police officer present at Jefferson Hospital December 9, 1981), Steven Cooke (police officer present at Jefferson Hospital December 9, 1981), Richard Dunne (police officer present at Jefferson Hospital December 9, 1981), Howard Bobb (police officer present at Jefferson Hospital December 9, 1981), Dr. John Lamberth (expert on jury deliberations), Carole Young (nurse at Jefferson Hospital), Peggy Garvin (Philadelphia Court of Common Pleas Administrative Officer), Savannah Davis (juror), Steven Hawkins, Esquire, (an attorney who allegedly interviewed appellate counsel), Zygmont Pines, Esquire (Chief Legal Counsel of the State Court Administrative Office), Kathleen Radwanski (Administrative Coordinator of the State Court Administrative Office), Ward Churchill (FBI and police political surveillance expert), Dr. Charles Hunts (polygraph expert), and Alfonso Giordano (police officer at the scene of the crime).[FN8]

FN8. It should be noted that petitioner claims this court refused to permit Joseph McGill, the trial prosecutor, to testify at these PCRA proceedings (*See* petitioner's Proposed Findings of Fact, No. 193 at 58). Such is just not true. Mr. McGill's subpoena was held in abeyance until

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> the defense had laid the proper foundation for his testimony. Once the foundation was presented, this court allowed them to call Mr. McGill to testify. It was their choice, not the decision of this court, not to put Mr. McGill on the stand.

(49) Each of the above-mentioned subpoenas was properly quashed based on a review of the record and prevailing law because: (1) the issues were not raised in the defendant's PCRA petition; (2) there was no offer of proof or affidavit presented to this court; (3) the proffered testimony was not relevant to these proceedings; (4) the proffered testimony was not related to issues cognizable under 42 Pa.C.S.A. §9541 *et seq.;* (5) the proffered testimony was cumulative at best; (6) the proffered testimony was privileged under the attorney-client privilege or the executive privilege; (7) petitioner failed to lay the proper foundation; and/or (8) the testimony was proffered to prove issues that were previously litigated.

(50) On August 7, 1995, this court granted petitioner's motion to stay his execution noting that the order was ‘not an expression of an opinion on the merits of defendant's motion for Post Conviction Relief, the law dictates that this court grant the defendant ample time to have these proceedings reviewed by the highest court of this Commonwealth and the highest court of the United States. Therefore, since further appellate review is certain, the necessity of this order is obvious.‘ (*See* order of this court, 8/7/95)

(51) As a result of the instant evidentiary hearing, oral argument and a thorough review of the record,[FN9] this court makes the following:

> FN9. The entire Quarter Sessions file was placed and accepted into evidence on July 27, 1995 (N.T. 7/27/95, 182).

III. FINDINGS OF FACT

A. Trial and Appellate Counsel

Trial Counsel--Anthony E. Jackson, Esquire

Competency as appointed counsel.

(52) Anthony Jackson represented defendant at trial and testified for defendant at the PCRA hearing. Prior to representing defendant, Mr. Jackson had tried approximately twenty cases in which his clients were charged with murder in the first degree, resulting in six convictions and no death sentences (N.T. 7/27/95, 92-93).

(53) Before becoming an attorney, Mr. Jackson gained extensive experience in law enforcement. He worked as an evidence technician for the Philadelphia Police Department, as an investigator for the Defender Association of Philadelphia, and as an investigator for Marilyn Gelb, Esquire (N.T. 7/27/95, 95-101).

(54) As an attorney, Mr. Jackson briefly worked as an assistant district attorney. Additionally, he worked as a federal master involved with reforming the Philadelphia prison system and as the Director for the Public Interest Law Center Police Project for three years. There, he established procedures by which citizens could pursue claims of police misconduct, and trained other lawyers in representing clients in this area. In addition, Mr. Jackson represented police officers in employment actions against the police department (N.T. 7/27/95, 31-34).

(55) Mr. Jackson became involved in the case when he was contacted by defendant's friends and met with defendant. He was then court-appointed (N.T. 7/27/95, 117-21).

Availability and accessibility of defense funds.

(56) The Honorable Paul Ribner, Calendar Judge at the time of trial, allotted Mr. Jackson funds to hire experts and an investigator. As was the standard practice, the initial amount for each expert was $150. Judge Ribner ruled that additional funds would be provided when Mr. Jackson submitted itemized bills to justify each charge. (N.T. 3/18/82).

(57) At the same time, the defense was receiving an undisclosed amount of money from various sources prior to and during trial, including an ‘independent defense fund‘; the Mumia Abu-Jamal Defense Committee, a fundraising entity; the Association of Black Journalists; and other organizations and individuals (N.T. 4/1/82, 11; 7/26/95, 65; 7/27/95, 175-77, 240-43).

(58) The court provided over $1,300 for investigation and expert assistance.

(60) [sic] Consistent with the Pennsylvania Supreme Court's observation, this court finds as a fact that the claim that there were insufficient funds was simply an attempt by Mr. Jackson to create an appellate issue for his client.

Counsel's preparation and discovery.

(61) Mr. Jackson conducted thorough and intensive

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pretrial preparation for a period of five months (N.T. 3/18/82, 9; 7/28/95, 55-59, 67-68).

(62) Mr. Jackson filed a civilian complaint against the police department, alleging petitioner had been mistreated by the police. The resulting internal affairs investigation generated a large number of statements. It was Mr. Jackson's intention that these statements would provide additional discovery, which would be to petitioner's advantage.

(63) Approximately two weeks prior to trial, on or about May 13, 1982, defendant decided to represent himself (N.T. 7/27/95, 69). At that time, Mr. Jackson turned over all of the witness statements produced in discovery to petitioner (N.T. 6/26/82, 139-40).

Mr. Jackson as backup counsel; petitioner's control of trial strategy, decisions, and tactics.

(64) As early as the June 1, 1982 motion to suppress, petitioner demonstrated that he was not cooperating with Mr. Jackson, who was then acting as backup counsel. Defendant demanded to be represented by John Africa, a non-lawyer (N.T. 6/1/82, 18, 31; 6/2/82, 2.79-2.90).

(65) During voir dire, several prospective jurors were frightened by petitioner, who was also belligerent and torpid in questioning the members of the venire panel.

(66) This court ordered Mr. Jackson to see the court at sidebar to discuss questions that Mr. McGill wanted to ask but he refused, stating that he had to honor his client's order not to participate in this proceeding. We held in abeyance a criminal contempt charge of Mr. Jackson for failure to discuss with this court the aforesaid proposed questions by the Commonwealth. This court contempt in order to proceed with jury selection. [sic] At that point, this court took over questioning of prospective jurors (N.T. 6/9/82, 3.17-3.40, 3.45; 6/15/82, 247).

(67) This court finds petitioner personally directed the use of peremptory challenges (N.T. 6/9/82, 3.47, 3.48, 3.50, 3.57, 3.65, 3.74, 3.85, 3.90, 3.92, 3.97, 3.99).

(68) On the first day of trial, Mr. Jamal so disrupted the proceedings that the entire day was wasted, and defendant had to be removed from pro se status. The Pennsylvania Supreme Court directed Mr. Jackson to continue as defendant's attorney (N.T. 6/17/82, 1.44-1.126; 6/18/82, 2.2-2.4). Mr. Jackson stated he would proceed in conventional fashion unless otherwise directed by defendant. Petitioner, through Mr. Jackson, announced he would pursue ‘the strategy of John Africa,‘ that he would not accept the assistance of a ‘legal trained lawyer,‘ and that he would not cooperate with Mr. Jackson (N.T. 6/19/82, 7-8; 6/21/82, 4.2; 7/27/95, 139-44; 6/26/82, 155-57; 6/28/82, 28.48; 7/1/82, 53). According to Mr. Jackson, petitioner ‘didn't think that the system, the rules, my competence or incompetence, or a lawyer, quite frankly, was going to do him much good.‘ (N.T. 7/27/95, 76)

(69) Petitioner chose to exercise personal control of his trial strategy. He personally decided what character and exculpatory witnesses would be called on his behalf, refusing to even tell his trial attorney who these persons were (N.T. 6/24/82, 2-6; 6/25/82, 136).

(70) Mr. Jackson turned over all copies of witness statements to petitioner who had apparently refused to return them; Mr. Jackson had to ask the prosecutor for additional copies of statements (N.T. 6/26/82, 139-40; 6/29/82, 5-7).

(71) Petitioner ordered his attorney away while petitioner conferred with John Africa (N.T. 6/24/82, 2).

(72) Petitioner was abusive toward Mr. Jackson on a myriad of occasions during the course of his representation (N.T. 7/28/95, 167-72).

(73) On June 26, 1982, when Mr. Jackson went to sidebar, defendant complained that Jackson was ‘disobeying my orders.‘ (N.T. 6/28/82, 28.45)

(74) On the last day of the guilt phase, Mr. Jackson moved to dismiss the charges on the ground that murder as ‘previously defined by the courts‘ had not been defined to defendant's ‘satisfaction.‘ He explained that defendant had ordered him to make this motion (N.T. 7/1/82, 44, 55).

(75) This court further finds that it was petitioner's decision not to call his brother, William Cook, as a witness at trial. Petitioner contends it was William Cook's attorney Daniel Paul Alva, Esquire, who made the decision for his client not to take the stand (N.T. 7/27/95, 192; *see also* petitioner's Proposed Findings of Fact, No. 145 at 41). This contention was directly contradicted by Mr. Alva during the last day of these PCRA proceedings where he stated that his client told him, approximately

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thirteen years ago, that ‘it has been decided that I [Mr. Cook] will not take the stand‘ and that Mr. Cook did not indicate to Mr. Alva who made that decision (*See* N.T. 8/12/95). Again, this court finds it was petitioner who made such a decision not to call an alleged vital exculpatory witness and as noted, *infra* in the Conclusions of Law, this court draws an adverse inference against petitioner regarding Mr. Cook's failure to testify at the PCRA proceedings.

(76) In the penalty phase, petitioner decided to personally read a written statement to the jury without consulting Mr. Jackson (N.T. 7/28/95, 172-75).

(77) At the PCRA hearing, Mr. Jackson denied that defendant exercised a significant degree of control over trial strategy, but this disavowal was incredible. Mr. Jackson had no sufficient explanation for the numerous indications demonstrating petitioner controlled the trial strategy (N.T. 7/27/95, 106-109, 140-44; 7/28/95, 116-17).

Credibility as PCRA defense witness.

(78) Mr. Jackson holds the defendant in high personal regard, and admitted that obtaining a new trial for defendant would also serve a personal interest; at the time defendant was convicted, this was the first capital case, of approximately twenty Mr. Jackson had handled, that had resulted in a death sentence. Jackson indicated that this blow to his ego would be negated if a new trial was granted (N.T. 7/27/95, 92-93; 7/28/95, 161-62, 167-68).

(79) Mr. Jackson frequently made assertions in his PCRA testimony that were inconsistent with the trial record or otherwise incredible. For example, Mr. Jackson asserted in the PCRA hearing that he could not obtain money to hire an investigator or expert witnesses prior to trial. In his affidavit Jackson claimed that he did not even know how to obtain such funds (N.T. 7/28/95, 48). [FN10] This was false. Upon being confronted with the record and having been shown his own fee petition--which showed that he did know how to seek such funds, and had in fact obtained them--Mr. Jackson admitted that he had been ‘incorrect‘ in his earlier assertions, and that his claim that there had been ‘no‘ funds had been ‘just a slip.‘ (N.T. 7/28/95, 32, 45; 7/31/95, 153-55, 158) [FN11] Similarly, Mr. Jackson admitted that he ‘may have misspoke‘ when he claimed in his affidavit that his trial investigator spent most of the investigation funds in a vain effort to find a single witness, Cynthia White. The investigator's own affidavit, attached to the PCRA petition, showed that the investigator knew where White lived and that he saw her in person (N.T. 7/28/95, 53-54; 7/31/95, 160-61). Further, the investigator, Robert Greer, later contradicted Mr. Jackson on this point in his own PCRA testimony (N.T. 8/1/95, 214).

FN10. Mr. Jackson testified that his unsworn affidavit attached to petitioner's PCRA petition was prepared by current defense counsel. The prosecutor asked to see the notes of any statement Mr. Jackson had made, whereupon petitioner's current counsel responded the notes were privileged. When this court pointed out that there was no applicable privilege, counsel claimed there were no notes (N.T. 7/27/95, 110-15).

FN11. Mr. Jackson claimed not to know whether the defense also received the assistance of additional money from organizations such as the Mumia Abu-Jamal Defense Committee or the Association of Black Journalists before or during the trial (N.T. 7/27/95, 175-77, 240-43). This assertion was not credible. Further, the record shows a number of volunteers were working on petitioner's behalf before trial (N.T. 6/3/82, 3.58-3.64). Mr. Jackson's assertion at the PCRA hearing, that these volunteers were working for petitioner, but not for Jackson, does not support a conclusion that petitioner lacked the resources necessary to conduct a defense (N.T. 7/27/95, 170-73). To the contrary, it confirms petitioner was not cooperating with his attorney *(e.g.*, N.T. 6/1/82, 18).

80) Mr. Jackson claimed that the trial prosecutor had in some way kept witness Deborah Kordansky from being interviewed by the defense. The trial record, however, demonstrated that Mr. Jackson in fact contacted Ms. Kordansky, using information provided by the prosecutor (N.T. 7/27/95, 216-21). Mr. Jackson insisted that it was the trial record, not he, that was incorrect, and appeared to break down emotionally (N.T. 7/27/95, 221).

(81) Mr. Jackson claimed that his pretrial preparation was handicapped by his brief pretrial status as backup counsel, as he supposedly did not know what a backup counsel was expected to do. However, the period in which Mr. Jackson was backup counsel lasted less than a month (May 13, 1982 to June 17, 1982), and followed five months of intensive preparation. Further, Mr. Jackson had earlier been co-counsel for Robert Mozenter in a capital case, where Mr. Mozenter was ‘the lawyer‘ and Jackson

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'played no major role.' (N.T. 7/27/95, 69, 104) It is not credible that Jackson was mystified by the concept of being backup counsel for defendant, or that his temporary standing as backup counsel--a condition imposed by defendant--impaired his representation.

(82) Mr. Jackson's testimony at the PCRA proceeding was motivated by a desire to portray his actions at trial as constitutionally ineffective. His testimony was not credible.

Appellate Counsel--Marilyn Gelb, Esquire

(83) Based on sealed conferences among this court, the defense and the Commonwealth, this court has determined that Ms. Gelb was unavailable to testify at the instant PCRA proceeding (N.T. 7/31/95 [under seal]). Her son, Jeremy Gelb, Esquire, who contributed to the appellate review of this matter, testified as to his knowledge of appellate counsel's contributions to this case.

Jeremy Gelb, Esquire

(84) Mr. Gelb assisted petitioner's appellate counsel, Marilyn Gelb, Esquire, in the direct appeal. In this capacity he researched specific issues designated by appellate counsel. He himself did not review the entire trial record, determine the issues to be raised, discuss matters not identified by Ms. Gelb, or work on issues appellate counsel had not assigned.

(85) Ms. Gelb had all of the trial notes as well as Mr. Jackson's file, and she met with Jackson at length on at least two occasions. She also met with petitioner.

(86) Appellate counsel reviewed the entire trial record.

(87) Mr. Gelb was not apprised of every issue appellate counsel was considering or researching, only those he was assigned to research. He could not state which issues were considered and omitted by appellate counsel for strategic reasons.

(88) This court finds, as a result of Mr. Gelb's testimony, that appellate counsel's work was uniformly excellent. Moreover, defendant filed his own pro se brief in his direct appeal, and an amicus brief was filed by the National Conference of Black Lawyers *(See* N.T. 7/31/95, 211-37, 241-42, 244-46).

B. Character/Mitigation Witnesses

(89) Petitioner presented a number of character witnesses at the PCRA hearing, in support of the proposition that Mr. Jackson was ineffective for failing to call these persons at the penalty phase of the trial. We find petitioner was in control of trial strategy, particularly with regard to character witnesses. In addition, we find that it was the defendant's decision not to call additional character witnesses in the penalty phase.

(90) As so accurately stated by the prosecutor in oral argument, and paraphrased and adopted by this court: the essence of the character testimony was that this petitioner is a man of great intelligence and talent. The defense would have liked the penalty jury to conclude that as a result, petitioner was somehow less culpable; that if petitioner had no creative ability, low intelligence, low charisma, no family life, that his act of murder would have been worse. This man had opportunities others did not have; gifts to which others would not even aspire, talents that left others in absolute awe, a family that loved him, friends and professional colleagues who admired him. But somehow this is supposed to mitigate the fact that petitioner shot Officer Faulkner in the back and face, killing him. This court consequently concludes that this argument would have been less than persuasive to a Philadelphia jury which possessed a great deal of common sense (*See* generally N.T. 9/12/95).

(91) In addition, this matter was argued to the jury by trial counsel, Mr. Jackson, referring to the character witnesses in the guilt phase of trial. This court, in its charge to the jury, told the jury that they were to consider all evidence presented in the guilt phase during their deliberations as to the appropriate penalty.

(92) This court also makes the following findings as to the specific character witnesses presented at the PCRA hearing.

Representative David P. Richardson

(93) State Representative David P. Richardson testified that he knew petitioner as a community activist, and had known him personally since 1965 (N.T. 7/26/95, 39). Mr. Richardson visited Mr. Jamal twice during the trial, testified for defendant at a pretrial bail hearing, attended the trial, and praised petitioner's character at the PCRA hearing. Petitioner did not call this witness during the guilt or penalty phases, nor did Mr. Richardson volunteer to be a character witness at any time, even though he knew both defendant and his attorney.

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(94) Although Mr. Richardson testified that petitioner was uniquely dedicated to the cause of peace, he saw no inconsistency in the fact that petitioner owned and carried a gun. Moreover, although Mr. Richardson understood petitioner to be a journalist, he was unaware petitioner was employed as a cab driver, and was unaware of how he became separated from his former employment as a journalist (N.T. 7/26/95, 55-72).

(95) Although this court finds Representative Richardson's testimony to be credible, we cannot fathom how his testimony would have benefited petitioner at the sentencing hearing. It offers nothing of a mitigating nature.

(96) This court finds petitioner was in control of the trial strategy and tactics. He was well aware that Mr. Richardson was available and willing to testify on his behalf at trial, and it was his decision not to call Representative Richardson to testify.

E. Steven Collins

(97) Mr. Collins is currently a radio talk show host. He testified that petitioner was his mentor in the area of broadcast journalism, and he was an extremely close friend of petitioner and his family (N.T. 7/26/95, 80-87, 93-94).

(98) Mr. Collins also knew Mr. Jackson; in fact, Mr. Jackson testified that it was Mr. Collins who introduced him to petitioner and asked him to take the case (N.T. 7/27/95, 119).

(99) Furthermore, this court finds it was petitioner's choice not to call him as a witness at trial, as petitioner had called nine character witnesses of his choice.

(100) Mr. Collins described petitioner as an extraordinarily gifted radio journalist, comparing him to Charles Osgood (N.T. 7/26/95, 88-91). This court cannot disagree, but Mr. Jamal's learned success and skill as a radio journalist cannot mitigate the fact that he shot and killed a police officer from point-blank range and without provocation.

(101) Despite his close personal friendship and professional mentoring relationship with petitioner in the field of broadcasting, however, Mr. Collins claimed to be unaware of the fact that, at the time of the murder, Mr. Jamal had become separated from the broadcasting field and was driving a cab. Mr. Collins also claimed he did not contribute money to petitioner's defense fund (N.T. 7/26/95, 99-103).

(102) This court fails to see how the fact that petitioner was a successful radio journalist prior to becoming a cab driver and killing Officer Faulkner contributes to any possible circumstances of mitigation. His literacy and power of persuasion in no way mitigate the fact that he turned to violence on December 9, 1981.

(103) Although Mr. Collins testified that he would have ‘jumped‘ to testify as a character witness, he stated that he never ‘verbalized‘ this to petitioner or Mr. Jackson (N.T. 7/26/85, 78, 100).

Kenneth Hamilton, Jr.

(104) Mr. Hamilton was petitioner's history teacher at Benjamin Franklin High School in the late 1960's. Mr. Hamilton stated Mr. Jamal was a ‘student-mediator‘ who had a ‘calming effect‘ on gang members in gang wars (N.T. 7/26/95, 105-111).[FN12]

> FN12. In stark contrast to the assertion that petitioner made peace among warring gangs, defense witness Arnold Howard, in his verbatim prior statement, mentioned he and Mr. Jamal ‘gang warred together.‘ (N.T. 8/11/95, 136) This statement was admissible for the truth of its content under *Commonwealth v. Lively*, 530 Pa. 464, 610 A.2d 7 (1992), and *Commonwealth v. Burgos*, 530 Pa. 473, 610 A.2d 11 (1992).

(105) Mr. Hamilton characterized petitioner as an outstanding student (N.T. 7/26/95, 112-14). He had a personal relationship with petitioner outside the classroom (N.T. 7/26/95, 118-19).

(106) Petitioner did not call Mr. Hamilton as a character witness, Mr. Hamilton did not attend the trial, and there is no evidence to suggest that Mr. Jackson had any means, absent petitioner's cooperation, of knowing of Mr. Hamilton's existence.

(107) Furthermore, Mr. Hamilton's claim that he attempted in vain to contact the defense and volunteer to testify as a character witness was not credible (N.T. 7/26/95, 128-30, 132-33).

(108) Mr. Hamilton admitted petitioner dropped out

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of high school and never graduated. Mr. Hamilton assisted petitioner in entering a college that did not require a high school diploma, where petitioner failed to graduate (N.T. 7/26/95, 127-28, 130-31).

(109) Even though this court finds that it was no fault of Mr. Jackson that this witness was not called at the sentencing hearing, this court also finds that had he been called, his testimony would have been trivial at best and would have contributed nothing to mitigate petitioner's sentence from death to life imprisonment.

Lydia Wallace

(110) Ms. Wallace is petitioner's sister and was present during the trial, but was not called as a witness.

(111) Ms. Wallace indicated Mr. Jamal was such a peaceful individual that he became a vegetarian so he would not be involved in harming animals. Although Ms. Wallace described her relationship with defendant and her other family members as very close, she did not know at what age her brother dropped out of high school, and was not aware of what discussion, if any, took place between petitioner and their parents regarding that decision.

(112) Ms. Wallace was not involved in the process of selecting petitioner's attorney. She did not attend her brother's bail hearing.

(113) Petitioner never discussed the shooting with Ms. Wallace and petitioner's brother, William Cook, even though she knew he, Mr. Cook, had been present.

(114) Ms. Wallace was unaware that petitioner owned and carried a gun.

(115) Although she attended most of the trial, Ms. Wallace claimed she never heard her brother chide Mr. Jackson, or state that he wanted to be represented by John Africa instead of a lawyer (N.T. 7/26/95, 138-69, 170-72, 177, 184, 189-93).[FN13]

> FN13. This assertion was particularly incredible. It would have been impossible to miss these events, which were an almost daily occurrence throughout the trial (N.T. 6/9/82, 3.45; 6/17/82, 1.44-1.128; 6/18/82, 2.61-2.92; 6/19/82, 4-8; 6/21/82, 4.1-4.5; 6/22/82, 5.4-5.22; 6/23/82, 6.116-6.129; 6/24/82, 16-26, 85-95; 6/25/82, 8.2-8.4, 8.13-8.16; 6/26/82 156-60; 6/29/82, 6; 7/1/82, 41-53; 7/3/82, 16).

Ruth Ballard

(116) Ms. Ballard testified that she knew petitioner since he was a child and attended part of the trial. She did not know Mr. Jackson.

(117) Petitioner did not ask Ms. Ballard to testify at trial, nor did she volunteer. There is no evidence that Mr. Jackson had any means, other than petitioner, of knowing that this witness existed let alone whether she was available and willing to testify at trial (N.T. 7/26/95, 207-221).

Joseph Davidson

(118) Mr. Davidson is a Washington D.C. journalist. He knew petitioner from being a fellow member of the Association of Black Journalists, and he also knew Mr. Jackson.

(119) Petitioner did not ask Mr. Davidson to testify at trial, nor did he volunteer. There is no evidence that Mr. Jackson could or should have known that Mr. Davidson could serve as a character witness (N.T. 6/27/95, 225-42).

Edith Cook

(120) Petitioner contends that Mr. Jackson failed to call Edith Cook, petitioner's mother, as a mitigation witness. Unfortunately, petitioner's mother passed away prior to this PCRA proceeding and was therefore, unavailable to testify.

(121) Ms. Cook testified on behalf of petitioner at his bail hearing (N.T. 7/27/95, 48-49). She was present in court for a large amount of her son's trial and was available to testify on his behalf. As with the other familial character witnesses (as well as other character and exculpatory witnesses), this court finds as fact, that it was Mr. Jamal who failed to call his mother to testify since he was in control of calling each and every witness at his trial and sentencing hearing.

(122) Failure to call Edith Cook as a mitigation witness was no fault or oversight of Anthony Jackson, Esquire.

C. Fact Witnesses

Gary Wakshul

Unavailability at trial.

(123) Officer Gary Wakshul was a police officer who had been guarding petitioner at the hospital where peti-

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tioner admitted,--in front of witnesses Priscilla Durham and Officer Gary Bell, who so testified at trial--that he had shot the victim.

(124) Unfortunately, at the time of trial, when the defense announced it wanted to call Officer Wakshul, the officer had gone on vacation and was unavailable. As a result, this court declined to grant a continuance due to the last-minute nature of the request (N.T. 7/1/82, 33-38, 47-53).

(125) Mr. Jackson testified at the PCRA hearing that, through his own fault, he did not make a timely attempt to call Officer Wakshul as a witness. At trial, however, Mr. Jackson stated he had no advance knowledge that the defense would be calling Officer Wakshul (N.T. 7/1/82, 33-34). This court finds Mr. Jackson's actions and statements at trial to be much more reliable than his incredible statements made at the PCRA hearing.

(126) We find that it was petitioner's personal decision to call Officer Wakshul at the last minute over Mr. Jackson's better judgment and that Officer Wakshul was unavailable.

(127) We further find that petitioner gave no advance notice, and in fact did not announce his intention to call Officer Wakshul until the last day of trial, after the officer was already on vacation. Indeed, Mr. Wakshul testified and we find that he had been available for the early part of his vacation, which lasted from June 25, 1982 through July 8, 1982, but that he was never notified that he was to be called as a defense witness, and he left the city during the latter part of his vacation. No one asked, ordered, or suggested that he absent himself at that time (N.T. 8/1/95, 94, 99-101, 118-22).

Substantive testimony.

(128) Petitioner further claims Officer Wakshul was told by the prosecution to take his vacation when he was allegedly under the Police Department's order not to take a vacation. He bases this argument on the fact that there was a notation on Wakshul's first statement, ‘no vac.‘ The notation ‘no vac‘ indicated only that the officer had no vacation scheduled at the time he gave the first statement (N.T. 7/27/95, 63-66; 7/28/95, 176-88). Furthermore, petitioner presented no evidence that the prosecution told Officer Wakshul to take a vacation.

(129) Officer Wakshul explained that all police vacations are scheduled by lottery in advance, usually between March and June of each year, and cannot readily be altered. The regular practice was for the witness to be scheduled in advance to avoid conflict with his vacation. At the time of his December 9, 1981 report, Officer Wakshul did not have any vacation scheduled, and the assignments for the coming year had not yet been made. Thus, the detective noted ‘no vac‘ on the interview record.

(130) At some point a general request was made for officers on vacation to ‘try‘ to remain available during their vacations, but there was no order or instruction that they were required to do so (N.T. 8/1/95, 80-83, 86-93, 111-12).

(131) We find that neither the police nor the prosecution took steps to make Officer Wakshul unavailable at the time of trial.

(132) Mr. Wakshul, a police officer at the time of the murder, transported defendant to the hospital. He was not with defendant every moment, and other officers, none of whom he could recall, were also present. He did not recall seeing any hospital personnel (N.T. 8/1/95, 22-24, 55). After placing defendant on the floor he heard defendant say ‘I shot him and I hope the motherfucker dies.‘ Stunned, Officer Wakshul stumbled into an alcove and started to cry. He went outside and sat in a police wagon until he regained his composure. Returning inside the hospital, he saw Officer Faulkner's dead body. Later, attempting to drive home, he ran his car into a cement pole (N.T. 8/1/95, 25-26).

(133) Wakshul made two statements prior to trial. In the first, he indicated that petitioner had made ‘no comments‘; in the second, he reported hearing the admission, explaining that he had failed to report this in the first statement due to his emotional trauma resulting from Officer Faulkner's murder. The second statement corroborated the account of prosecution witnesses Bell and Durham and this court finds as fact that petitioner did in fact make such an admission which was heard by Officer Wakshul.

(134) The defense argues it was not credible that Officer Wakshul would fail to note petitioner's admission in his first statement, and that he later fabricated it in order to divert the internal affairs investigation of Mr. Jackson's complaint alleging police misconduct. However, Officer Wakshul's testimony concerning his devastated mental and emotional state at the time of Officer Faulkner's death credibly explained his failure to report the admission in

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his first statement.

(135) The defense theory that Wakshul fabricated the admission in order to divert the internal affairs investigation is not credible, because in that same internal affairs interview Wakshul reported that another officer stated to defendant, in a tear-choked, emotional voice, 'If he [the victim] dies, you die.' Wakshul knew this revelation could have led to disciplinary action against that officer, making his report--which was later corroborated by Officer Bell, who made the emotional response Wakshul reported--especially reliable (N.T. 8/1/95, 112-16).

(136) Moreover, security guard Priscilla Durham reported the exact same admission to her superiors the day after defendant made it (N.T. 6/24/82, 45-52), and there is no evidence that Officer Wakshul could have been aware of this fact at the time he independently reported the same admission. Officer Wakshul does not know Priscilla Durham (N.T. 8/1/95, 117), and Ms. Durham testified at trial that she had not told anyone about her next-day statement, because no one had asked (N.T. 6/24/82, 48-52).

(137) We find that had he testified at trial, Officer Wakshul would have presented testimony which would not have been favorable to petitioner and would have been cumulative to that of Officer Gary Bell and Priscilla Durham. Officer Bell testified regarding petitioner's admission to the murder. Like Wakshul, he omitted this fact in his initial statement and revealed it for the first time to an internal affairs investigator (N.T. 6/24/82, 133-36, 154-58). Like Bell, Wakshul's account of the admission would have been corroborated by the testimony of Ms. Durham, who reported the admission the following day. FN14

> FN14. Bell's testimony was especially credible because he admitted being the officer who said to defendant, 'if he dies, you die,' which could very well have been construed as a threat by a police officer to an arrestee (N.T. 6/24/82, 28-29, 135-36).

Robert Greer

(138) Robert Greer was petitioner's pretrial investigator. He worked on the case for a period of five months.

(139) In addition to being paid through Mr. Jackson, Mr. Greer stated he was 'retained,' by which he meant 'paid by,' the Mumia Abu-Jamal Defense Committee.

(140) He worked approximately four hours for every hour he billed Mr. Jackson, such that the true value of his service to petitioner was approximately $1,750, not the $562 recorded on Mr. Jackson's fee petition (N.T. 8/1/95, 193, 197-98, 212, 242).

(141) Mr. Greer had no difficulty in locating the witnesses Mr. Jackson asked him to find (N.T. 8/1/95, 219-21, 228-29, 240-41).

(142) On one or more occasions, Mr. Greer claimed, he had the opportunity to interview someone who may have been Cynthia White, whom he saw standing on a street corner at 12th and Locust Streets. He claimed he did not interview this person because he concluded, solely from the fact that they were present, that two people in a nearby car were police officers. Mr. Greer also claimed to know where Ms. White lived, but was supposedly unable to find her there; he could not recall how long he waited for her at her home (N.T. 8/1/95, 175-77, 201-212). This account was not credible.

George Fassnacht

(143) Mr. Fassnacht, a ballistics expert, assisted petitioner's trial counsel. He did not testify at trial but testified for Mr. Jamal at the PCRA hearing.

(144) Mr. Fassnacht admitted that, had he testified at trial, he would have been unable to opine that petitioner did not shoot Officer Faulkner.

(145) The witness could not demonstrate that any of the ballistic evidence or testimony submitted at trial was false or incorrect. This is not surprising, as Mr. Fassnacht did not examine any of the physical evidence in the case, perform any experiments, look at photographs, or read the trial transcript. In fact, he refused to look at the physical evidence when the prosecutor invited him to do so, claiming that to do so would somehow be 'unethical.' (N.T. 8/2/95, 150-54) Given this testimony, Mr. Fassnacht's opinions are given only limited weight.

(146) The heart of Mr. Fassnacht's direct and redirect testimony was that, based solely on his reading of the ballistics report, certain scientific tests were not done, and that the Commonwealth's ballistic evidence was therefore somehow inadequate. He was unable to opine, however, as to what the results of these additional tests would or should have been if they had been done, or what would or

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should have been proven or disproved thereby (N.T. 8/2/95, 170-71).

(147) Mr. Fassnacht repeatedly asserted that he was unavailable as an expert witness during petitioner's trial due to lack of funds to pay his fee. This contention is completely rejected as absurd.

(148) Mr. Fassnacht was constantly referred to in the trial record as petitioner's expert ballistics witness; prior to the instant PCRA proceeding, there was never any indication that this witness was unavailable for monetary reasons (N.T. 6/1/82, 99-100; 6/2/82, 2.78-2.79; 6/7/82, 12; 6/23/82, 6.136).

(149) Moreover, Mr. Jackson's fee petition demonstrates that he consulted with Mr. Fassnacht before and throughout the trial, from March 30, 1982 through June 30, 1982.

(150) Mr. Fassnacht also testified at the PCRA hearing regarding Dr. Hoyer's alleged conclusion as to the caliber of the bullet recovered from the murder victim's head. Petitioner's own expert contradicted his PCRA claim, testifying that the ballistic report confirmed that the victim was shot with a .38 caliber bullet, not a .44 caliber bullet as petitioner postulates.

(151) Mr. Fassnacht hesitantly conceded that even the naked-eye measurement made by the pathologist with a ruler--10 millimeters--was consistent with the projectile being a .38 caliber bullet, not a .44 caliber bullet (N.T. 8/2/95, 155-60).[FN15]

> FN15. Dr. Hoyer later testified that his '44' notation, on which defendant's PCRA claim was based, was a mere guess. It was probably made before he even saw the bullet. The notation was written on an intermediate work product sheet that did not constitute a report and was to be thrown away (N.T. 8/9/95, 186-93, 198-200).

(152) Mr. Jackson acted in a manner designated to effectuate his client's interests when he did not call Mr. Fassnacht as a witness, because, as demonstrated by the witness' PCRA testimony, he had nothing helpful to add to petitioner's case. Rather, his testimony corroborated the ballistic evidence introduced at trial.

Robert Harkins

(153) Mr. Jamal's PCRA petition claims Mr. Harkins, who did not testify at trial, was shown a photo array by the police, the results of which were suppressed by the Commonwealth. The petition contained no affidavit from Mr. Harkins, but contained the affidavit of an investigator who claimed to have interviewed him.

(154) Mr. Harkins credibly testified at the PCRA hearing.

(155) This court finds Mr. Harkins was never shown any photographs. He witnessed the shooting, and stated the only people involved in the shooting were the victim and a single perpetrator, and that, after the shooting, the perpetrator walked to the curb and sat down (N.T. 8/2/95, 205-210).

(156) Mr. Harkins' account of the shooting corroborates the testimony of other eyewitnesses who testified at trial. At trial, Officer Robert Shoemaker testified that he arrived within forty-five seconds after the assist call made by Officer Faulkner and found the defendant sitting on the curb, with the murder weapon inches from his hand (N.T. 6/19/82, 115). Robert Chobert testified that after shooting the victim in the face, petitioner walked over to the curb and fell (N.T. 6/19/82, 211-12). Albert Magilton testified that, after the shooting, he saw the officer lying on the ground and someone else on the curb, whom he later identified as Mr. Jamal. William Cook at this time was standing by the wall with 'a shocked expression on his face.' (N.T. 6/25/82, 6.75-8.79, 8.98, 8.138)

(157) The defense attorneys requested an opportunity to re-interview Mr. Harkins to determine if the PCRA petition should be amended. Notwithstanding his rather damning testimony, they suggested that Mr. Harkins could somehow prove petitioner's innocence. They did not, however, make any factual offer of proof in this regard. Mr. Harkins agreed to speak with defense counsel only if the interview was held in the presence of Detective Joseph Walsh, whom he had previously met. He complained to the defense attorneys, 'every time I say something you come back with something different than what I say to you, and I do not like that.' (N.T. 8/2/95, 211-28)

(158) Detective Joseph Walsh testified for the Commonwealth at the PCRA hearing on August 15, 1995, that a meeting was arranged at the Police Administration Building between defense counsel and Robert Harkins, in the detective's presence as Mr. Harkins had requested. Before defense counsel arrived Mr. Harkins stated he had

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changed his mind and did not want to give a further statement, and that he did not trust the defense attorneys. Mr. Harkins twice repeated this to the defense attorneys when they arrived. Defense counsel nevertheless began questioning Mr. Harkins, who again told counsel that he did not wish to be interviewed. Detective Walsh then respectfully asked defense counsel to leave (N.T. 8/15/95, 33-36).

(159) Mr. Harkins was not recalled to testify at the PCRA hearing. We find that had he appeared at trial, Mr. Harkins' testimony would not have been beneficial to petitioner; rather it would have corroborated other Commonwealth evidence.

Dessie Hightower

(160) Mr. Jamal's PCRA petition alleged that the Commonwealth suppressed the results of a polygraph examination which Dessie Hightower passed, which was favorable to the defense.

(161) In his PCRA testimony, Mr. Hightower stated that he met Mr. Jamal four or five years prior to the murder of Officer Faulkner (N.T. 8/3/95, 61).

(162) Fourteen years after the shooting, Mr. Hightower asserted that he saw a man running from the scene before the police arrived. He also claimed he was told that he passed his polygraph examination.

(163) He testified at trial that he did not see the shooting, but he and a male companion saw someone, who could have been a man or a woman, ‘going in the opposite direction from‘ the shooting location shortly after the shots were fired (N.T. 6/28/82, 120-48).

(164) Detective William Thomas, another witness called by the defense at trial, testified that the individual seen by Mr. Hightower had been another defense witness, Veronica Jones (N.T. 6/29/82, 86).

(165) On May 3, 1982, Mr. Hightower also gave a verbatim statement to defense investigator Greer, in which he stated that ‘by then it [the area of the shooting] was flooded with police officers,‘ and he ‘saw somebody running past the hotel.‘ (N.T. 8/3/95, 43-46) This statement, made within four months of the shooting, indicated that police were already at the scene when Mr. Hightower allegedly saw the running individual.

(166) In fact, the polygraph operator told Mr. Hightower he was lying when he was asked if he saw petitioner with a gun in his hand and he answered ‘no‘ (N.T. 8/3/95, 66, 85; N.T. 8/4/95, 124).

(167) In light of his demeanor, his fallacious testimony as to what he was told about the result of his polygraph test, and the fact that his recent account is inconsistent with the one he gave in 1982, this court finds as a fact that Mr. Hightower's PCRA testimony is not credible.

(168) We further find that the Commonwealth did not withhold favorable polygraph results from the defense.

Lt. Craig Sterling

(169) Lt. Sterling administered the polygraph examination to Dessie Hightower on December 15, 1981. After analyzing the results of the test, Lt. Sterling told Mr. Hightower the test revealed deception on his part when Mr. Hightower indicated that he had not seen petitioner with a gun in his hand (N.T. 8/4/95, 121-24).

Detective William Thomas

(170) Retired Det. William Thomas was called by the defense at the PCRA hearing and testified he was the assigned homicide detective in the instant case. He was responsible for keeping track of all paperwork and reports (N.T. 8/3/95, 117-18).

(171) Detective Thomas was unaware of any supposed ‘deal‘ between the Commonwealth and witness Cynthia White. He had no knowledge relating to Mr. Greer's allegation that two people in a parked car watched Ms. White. He did not recall if Ms. White was arrested, or how many times she was interviewed. He played no role in making her available for trial.

(172) Detective Thomas did not know which members of the police department conducted polygraph examinations in 1981 and 1982, or what their qualifications were. He did not know how polygraph examinations were administered, and did not recall whether any witnesses were polygraphed in this case. He had nothing to do with department policy regarding polygraphs.

(173) Detective Thomas did not recall whether any witnesses were shown photographs of petitioner.

(174) Detective Thomas did not recall Officer Wakshul being asked whether he should be available to testify

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for the prosecution, nor did he recall whether any other efforts were made to secure Officer Wakshul's attendance at trial (N.T. 8/3/95, 131-32, 138, 141-42, 147, 150-74, 179, 183).

(175) Detective Thomas was served his subpoena by the defense by an abuse of process. He and his wife were harassed at his place of business (N.T. 8/3/95, 194-99).

Deborah Kordansky

(176) During the trial, Ms. Kordansky was contacted by Mr. Jackson, who asked her to testify for Mr. Jamal. At the time, Ms. Kordansky had been in a bicycle accident and had serious facial injuries. Furthermore, she advised Mr. Jackson she had an uncomfortable attitude toward black men as a result of being raped in 1978. Additionally, she told him she did not think she could be of any help to the defense, and that her December 9, 1981 statement was the most accurate account of what she had seen compared with her later memory.

(177) On April 13, 1982, two months before trial, Ms. Kordansky gave a second statement to an internal affairs investigator in which she indicated she could no longer fully remember the incident. Ms. Kordansky repudiated defense counsel's accusation that she lied in her December 9, 1981 statement, or was feigning memory loss, as a result of her prejudice toward black men (N.T. 8/3/95, 209-212, 216, 221-23, 225, 242-44).[FN16]

FN16. Ms. Kordansky told defense counsel:

> 'Can I tell you something else about my character? Because you seem to want to defame my character in implying that I would conspire to not reveal evidence because of prejudice. I was raped and I did have some problems, I felt discomfort with black people--with black men. But my honesty and my sense of what was true would preclude that. I would never lie and conspire. I don't know this man (indicating Mr. Jamal). I just wouldn't do it.' (N.T. 8/3/95, 244)

(178) At the time of the murder Ms. Kordansky was living in an apartment in the St. James House at 13th and Walnut Streets. From there, she was able to see approximately half of the block of Locust Street between 12th and 13th Streets.

(179) On December 9, 1981, between 3:45 and 4:00 a.m., Ms. Kordansky heard what she thought were firecrackers. She did not immediately look out her window. After she heard a number of sirens, she went to her window, looked out, saw between eight and ten police cars and vans, and then saw someone running.

(180) She saw the running individual after she saw the police cars and vans.

(181) Ms. Kordansky never stated the person she saw was running 'away.' She said she saw him running from 13th to Locust Street toward 12th Street. This testimony is consistent with the runner going toward the scene of the murder and not away. This testimony contradicts the defense's other incredible witnesses who saw a person running away from the scene toward 12th Street.

(182) The person she saw could have been male or female, and could even have been a police officer (N.T. 8/3/95, 229-33, 240-43, 248, 250-51, 253-54). [FN17]

FN17. Ms. Kordansky's testimony was also consistent with the May 3, 1982 account given by Mr. Hightower to petitioner's investigator (N.T. 8/3/95, 43-46).

(183) We find that trial counsel acted in a manner designed to effectuate his client's interests when he failed to call Ms. Kordansky because her testimony would not have aided the defense.

John Hayes, M.D.

(184) Dr. Hayes is an associate medical examiner for the city of New York, and was called by petitioner as an expert witness in the instant PCRA hearing.

(185) Dr. Hayes opined, and this court agrees, that the gunshot wound to Officer Faulkner's face was instantaneously lethal (N.T. 8/4/95, 60-61).

(186) From examining photographs of the officer's body, Dr. Hayes opined that there was a neck wound in addition to the neck exit wound corresponding to the entry wound to the back; he was unable to opine that this injury constituted a second exit wound, or that it was in fact caused by a bullet (N.T. 8/4/95, 62-63).[FN18]

FN18. Later testimony established that this second wound was the result of hospital treatment, not the shooting (N.T. 8/11/95, 188-89, 195-97).

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(187) Dr. Hayes also testified that he could not determine if an X-ray of the victim's body had been performed (N.T. 8/4/95, 43).

(188) In his direct testimony, Dr. Hayes initially opined the track of petitioner's gunshot wound ruled out the possibility that he was shot from the ground, and also ruled out being shot by the victim while the victim was falling (N.T. 8/4/95, 18-19). On cross-examination, however, Dr. Hayes admitted that his opinion with regard to the victim falling depended on the assumption that the officer's gun was pointed horizontally or upward; had it been pointing downward while Mr. Jamal was slightly bent, that too would have been consistent with the wound track in Mr. Jamal's abdomen (N.T. 8/4/95, 77-79). He conceded it was not necessary for Officer Faulkner to have been standing upright for him to have shot petitioner; the officer could have fired just before falling (N.T. 8/4/95, 114-15).

(189) Moreover, Dr. Hayes admitted that, in forming his opinion for his direct testimony, he had not reviewed the testimony of the eyewitnesses to the shooting, and had instead simply assumed as true a scenario supplied by defense counsel (N.T. 8/4/95, 100-104).

(190) Dr. Hayes had been misinformed by defense counsel; none of the eyewitnesses to the murder were able to testify to the victim's precise posture at the instant he returned petitioner's fire.[FN19]

> FN19. Robert Chobert testified that he heard a shot, looked up, and saw the victim fall, then saw Mr. Jamal shoot the victim in the face (N.T. 6/19/82, 209-210).
>
> Cynthia White saw the officer grab for something at his side after petitioner shot Officer Faulkner in the back, but Ms. White's view of the officer was then momentarily obstructed by Mr. Jamal (N.T. 6/21/82, 4.93-4.104).
>
> Michael Scanlon saw Mr. Jamal attack and shoot Officer Faulkner from behind, saw the officer fall, and then saw petitioner stand over the victim and shoot him in the face (N.T. 6/25/82, 8.6-8.8).
>
> Albert Magilton heard shots and then saw the officer on the ground, and Mr. Jamal on the curb (N.T. 6/25/82, 8.76-8.78).

(191) Dr. Hayes' opinions are of limited value as to the extent they are founded on what the defense attorneys told him rather than on the facts of the case. This caveat notwithstanding, Dr. Hayes offered no opinion that would be inconsistent with the trial evidence. That evidence showed petitioner shot Officer Faulkner in the back, petitioner was shot by the officer in turn, and then petitioner blatantly executed Officer Faulkner by shooting him in the face as he lay helpless on the ground.

(192) Dr. Hayes also sought to dispute a supposed opinion of the Commonwealth's trial witness, pathologist Dr. Paul Hoyer, that the gunshot wound to Officer Faulkner's back was a significant cause of death (N.T. 8/4/95, 29-30). At trial, however, Dr. Hoyer had actually testified that the back wound was a small, contributing cause, not a significant or direct cause, of the victim's death (N.T. 6/25/82, 6.183; 8/4/95, 55-58). Such testimony by Dr. Hayes was neither compelling nor relevant.

(193) The distinction between Dr. Hayes' opinion at the PCRA hearing and that of Dr. Hoyer at trial is minuscule. Dr. Hoyer opined that the wound to the victim's back made a small contribution to his death. Since the back wound caused the victim to fall to the ground and made it that much easier for defendant to deliver the fatal shot, Dr. Hoyer's opinion was correct. Dr. Hayes at the PCRA hearing contended that the sole and instantaneous cause of death was the gunshot wound to the victim's face. While this is clearly not incorrect in the narrowest medical sense, Dr. Hayes himself testified that a forensic pathologist, by definition, should consider a wide variety of information in determining cause of death (N.T. 8/4/95, 71-74).[FN20]

> FN20. Indeed, Dr. Hayes conceded that he failed to consider all of the information available. For example, he did not examine any of the existing physical evidence, such as the clothing of the victim and the defendant, and did not review any of the eyewitnesses' testimony. He did not review Dr. Hoyer's trial testimony until the day before he took that stand at the PCRA hearing (N.T. 8/4/95, 52). This was several months after Dr. Hayes purported to disagree with Dr. Hoyer, as stated in his May 26, 1995 affidavit, which was attached to defendant's PCRA petition.

(194) Dr. Hoyer's testimony at trial was at least as ac-

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curate, if not more so, as that of Dr. Hayes at the PCRA hearing.

(195) Dr. Hayes was still in medical school at the time this case was tried, and so he personally could not have testified in this case (N.T. 8/4/95, 47). Had testimony similar to his been offered at trial, however, it could not have changed the outcome. Dr. Hayes did not contradict or dispute any assertion of any trial witness, beyond the largely academic disputation of Dr. Hoyer's opinion noted above.

(196) Consequently, Dr. Hayes' opinion would not have been slightly useful, let alone materially helpful to defendant's position at trial.

Paul Hoyer, M.D.

(197) Dr. Hoyer, a forensic pathologist, was the Commonwealth's witness at trial. He was called by petitioner at the PCRA hearing as a fact witness rather than as an expert.

(198) Dr. Hoyer testified that X-ray equipment was available to him in 1981, but he did not recall whether or not he actually used it in this case. He explained, however, that X-rays are not required where, as here, the location of the bullet is known (N.T. 8/9/95, 135, 150, 162, 194). He testified that his official report indicated a single exit wound to the victim's neck, and acknowledged that he was questioned at trial about a second, alleged exit wound on the neck, that appeared in the photographs. However, the victim received medical treatment at the hospital before being brought to Dr. Hoyer for autopsy (N.T. 8/9/95, 167-69, 196).

(199) Dr. Hoyer also testified that the wound to the victim's head was ‘immediately lethal‘ (N.T. 8/9/95, 185).

(200) Dr. Hoyer addressed what petitioner characterized in his PCRA petition as his ‘finding‘ that the fatal bullet was .44 caliber. He explained he wrote the notation ‘Shot 44 cal‘ on a sheet of paper for intermediate notes that was not part of his report, and which was ordinarily written before he even began the autopsy. The ‘44‘ reference was a mere lay guess on his part, not a ‘finding.‘ (N.T. 8/9/95, 186-93, 198-200)

Furthermore, Dr. Hoyer is not a ballistics expert nor is there any evidence that he had the bullet casings at that time.

Ian Hood, M.D.

(201) Dr. Ian Hood, a forensic pathologist, testified for the Commonwealth. He established that the second neck wound referred to during the testimony of Dr. Hoyer appeared to be a large-bore intravenous line inserted during hospital treatment after the shooting. Needle wounds resulting from treatment are easily missed during an autopsy, and there is little reason to describe them in reporting the cause of death (N.T. 8/11/95, 188-89, 195-99).

Arnold Howard

(202) On December 9, 1981, the police interviewed Arnold Howard because his application for a duplicate driver's license had been found in Officer Faulkner's uniform pants pocket. Mr. Howard stated that he knew nothing about the murder, and that he had lost his application for a duplicate driver's license in the back of William Cook's Volkswagen when Mr. Cook had given him a ride on November 30, 1981 (N.T. 8/9/95, 70-75, 84-91). He was not called to testify at trial.

(203) Mr. Howard was called as a witness by petitioner at the PCRA hearing. He testified that he has known defendant all of his life. Mr. Howard now claims that, before sunrise on December 9, 1981, a group of police officers came to his home and took him into custody, indicating that he ‘was some kind of fourth person that was supposed to be down there.‘ He was supposedly held incommunicado for up to seventy-two hours, during which time police allegedly ‘put some kind of powder on my hands.‘ Howard claimed the police told him that ‘by my license being found at the scene of a homicide, that I was somewhat involved in it.‘ (N.T. 8/7/95, 5-8)

(204) After the alleged process involving putting dust on his hands ended, Mr. Howard claims he was placed in a lineup room at the Police Administration Building--on a stage with a large glass partition--along with a neighborhood friend, Kenneth ‘Poppy‘ Freeman.

(205) Mr. Howard further claims he loaned his driver's license to Mr. Freeman, that he saw a person known to him as ‘Sweet Sam‘ being held by the police, that two people wearing suits took ‘Sweet Sam‘ away, and that was the last time Mr. Howard ever saw him.

(206) Mr. Howard allegedly gave the police a time-stamped sales receipt from a store on Aramingo Avenue that proved he could not have been at the scene at the time of the murder. He testified that he nevertheless agreed to

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take a polygraph examination, but could not recall if he did so (N.T. 8/7/95, 9-13).

(207) Mr. Howard claims that photographs of himself and Mr. Freeman were taken by police. He identified Mr. Freeman as William Cook's partner and stated they ran a vending stand where Mr. Howard occasionally worked. He further identified ‘Sweet Sam‘ as ‘a pimp down there on Locust Street.‘ (N.T. 8/7/95, 14-15)

(208) Defense counsel supplied Mr. Howard with the name of Cynthia White, who he identified as a girl who worked for ‘Sweet Sam.‘ According to Mr. Howard, Mr. Freeman was picked out of the alleged lineup by an African-American girl ‘behind that glass.‘ He added that Mr. Freeman had died sometime in 1983 or 1984, after supposedly being handcuffed and ‘shot up‘ with drugs (N.T. 8/7/95, 15-22).

(209) On cross-examination it was conclusively established that Mr. Howard has a record of convictions for two counts of forgery, theft by receiving stolen property, and two convictions for burglary. He was on probation at the time he testified. He claimed that, while supposedly being held by the police for three days, he was not once taken through the main or parking lot entrances of the Police Administration Building, but was always taken in handcuffs through the basement entrance through which prisoners are transported (N.T. 8/7/95, 27-54).

(210) Mr. Howard was confronted with his statement of December 9, 1981, which was entirely inconsistent with his present account (N.T. 8/7/95, 64-75, 84-91).

(211) Mr. Howard testified that the purported lineup in which he and the late Mr. Freeman allegedly participated was conducted at the Police Administration Building. Howard added, in contradiction of his direct testimony, that he was unable to see the persons behind the glass during this purported procedure (N.T. 8/7/95, 75-78).

(212) Mr. Howard was confronted with the Police Administration Log Book for December 9, 1981, which indicated that he had signed in at 12:30 on 12/9/95 and had signed out at 2:30 on that same date (N.T. 8/7/95, 95-98).

(213) Despite supposedly having been held without cause for seventy-two hours, Mr. Howard could not recall whether he made any complaint to the police department (N.T. 8/7/95, 100).

(214) In rebuttal, the Commonwealth called two witnesses: Officer Joseph Brown, and Captain Edward D'Amato, retired. Officer Brown, the custodian of the sign-in book at the Police Administration Building, verified the log for December 9, 1981. Persons who are in police custody, persons who are in handcuffs, are not brought through the lobby portion of the building and do not sign this log, as Mr. Howard did. As already noted, the log showed that Arnold Howard had signed in at 12:30 p.m. and signed out at 2:30 p.m. on December 9, 1981.[FN21]

> FN21. The murder occurred at approximately 4:00 a.m. on December 9, 1981, and Mr. Howard was interviewed as part of the investigation of that murder. The log notations for 12:30 and 2:30 therefore refer to 12:30 p.m. and 2:30 p.m.; 12:30 a.m. and 2:30 a.m. on that date had already passed before Mr. Howard arrived.

(215) Officer Jones also established that, contrary to Mr. Howard's account of a lineup, there is no lineup facility anywhere in the Police Administration Building (N.T. 8/11/95, 61-87).

(216) Captain Edward D'Amato took Arnold Howard's statement on December 9, 1981. The reason he was interviewed was that an application for a duplicate driver's license in his name was found in the victim's clothing. Mr. Howard came to the interview voluntarily. At his request, the police did not come to his apartment, but met him on the street and drove him to the Police Administration Building. He was never handcuffed. The interview began at 12:35 p.m. and ended two hours later at 2:30 p.m. The statement was taken verbatim, and Mr. Howard read and signed every page. As note above, Mr. Howard stated he had lost the application in William Cook's Volkswagen on November 30, 1981, that he was not at the murder scene, and that he knew nothing about the crime. Mr. Howard also stated that he knew Mr. Jamal because they had ‘gang warred together.‘ (N.T. 8/11/95, 117-39)

(217) In light of the above testimony, the demeanor of the witness, and his lack of credibility due to his many *crimen falsi* convictions, this court finds Mr. Howard's testimony at the PCRA hearing was a misrepresentation of what actually occurred and was therefore not credible. We find he was in the Police Administration Building for

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two hours, not seventy-two hours. He was in no way mistreated. Mr. Howard's verbatim December 9, 1981 statement, with which he was confronted, and the PCRA testimony of Officer Jones and Captain D'Amato, were not only credible but are accepted as factual in this case.

Sharon Gaines Smith

(218) Sharon Gaines Smith claims that on December 9, 1981 she was living at the Midtown Hotel. She heard arguing, and then gunshots. She instantly looked out her window and saw five or six police officers beating a black man with dreadlocks. According to Ms. Smith the officers were voicing racial slurs while beating the man with sticks and their feet. She stated she had an ‘impression‘ or ‘thought‘ that the man being beaten might be a long-haired man she had previously seen in the area handing out pamphlets and talking about black people. She claimed that this beating was so horrible that it made her ill; the alleged beating victim was repeatedly kicked in the head, and it appeared to her that every bone in his body was being broken (N.T. 8/9/95, 112-19, 124-26).

(219) Ms. Smith never reported the alleged beating.

(220) Ms. Smith was aware that petitioner was being tried for the first degree murder of Officer Faulkner and that the Commonwealth was seeking the **death penalty** but did not come forward in 1982.

(221) Ms. Smith stated she became a witness in the instant PCRA proceeding because she did not feel as though Mr. Jamal should be executed (N.T. 8/9/95, 119-22, 133).

(222) No police officers, other than the murder victim, were present within three seconds of the shots being fired. No other witness claimed to see the events Ms. Smith purported to witness. Contrary to petitioner's argument, Ms. Smith did not identify the man being beaten as the supposed ‘street preacher,‘ but stated she had an ‘impression‘ that it was he. There is no evidence, other than Ms. Smith's incredible testimony, that this ‘street preacher‘ ever existed.

(223) Assuming *arguendo* that a man was beaten by police that night, the supposedly beaten individual could not have been Mr. Jamal. Petitioner's treating physician testified at trial, as a defense witness, that Mr. Jamal had no injuries consistent with having been beaten (as Ms. Smith described), and Mr. Jamal did not complain to him of having been beaten (N.T. 6/28/82, 28.92-28.103). Furthermore, petitioner offered no evidence at trial or at this PCRA proceeding that would tend to prove he was beaten by anyone. The only evidence of injury to Mr. Jamal was the gunshot wound which was conclusively proven to have been caused by Officer Faulkner's last-ditch attempt to save his own life and protect any innocent bystanders as he was trained to do as a police officer.

(224) This court finds Ms. Smith's testimony unbelievable as to the events that occurred on December 9, 1981.[FN22]

FN22. It is possible that Ms. Smith recalls actual events that took place outside her place of residence, but this court is convinced that the events she recalls did not occur on December 9, 1981.

William Harmon

(225) William Harmon is currently a prisoner incarcerated at SCI-Mercer on a drug charge (N.T. 8/10/95, 45). He wrote a letter to his attorney asking that petitioner's lawyers be advised that he had exculpatory information in the instant matter (N.T. 8/10/95, 48-49).

(226) Defense counsel interviewed William Harmon at the state correctional facility at Mercer on August 3, 1995 and took his affidavit (N.T. 8/10/95, 16-17). Contrary to this court's order, this affidavit was withheld from the Commonwealth until the day Mr. Harmon testified (N.T. 8/10/95, 50-51). [FN23]

FN23. Defense counsel attempted to justify this action by claiming that no notary public was available. This contention is rejected. The very first affidavit appended to defendant's PCRA petition, that of Anthony Jackson, was not notarized.

(227) At defense counsel's request, Mr. Harmon was transported by Philadelphia sheriffs from prison to this court on August 10, 1995.

(228) Defense counsel requested this court's permission to interview the witness that morning, which we granted and the sheriff verified. Counsel then requested a second interview with the witness which this court denied as a result of a sidebar conference wherein defense counsel was informed by the district attorney that there was another alleged witness who would come forward and testify that petitioner's brother, William Cook, shot Offi-

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cer Faulkner. This alleged witness was never called to testify at the PCRA hearings (N.T. 8/10/95, 3-7).

(229) On that date, after a sidebar conference, defense counsel indicated for the first time that they had limited confidence in Mr. Harmon's recollection unless Mr. Harmon was permitted to view photographs of the scene from the court file. The photographs had previously been sent out to be copied at defense counsel's request. The court ordered that the photographs be retrieved, which took until after the luncheon recess. Defense counsel then refused to call the witness unless first allowed to discuss the photographs with Mr. Harmon.

(230) This court denied a further continuance and ordered the witness to take the stand and tell the truth over defense counsel's anticipated objection (N.T. 8/10/95, 8-36).[FN24]

> FN24. It should be noted for the record that defense counsel repeatedly claimed to be unable to locate the Commonwealth photographs during the course of the PCRA proceedings. This court's law clerk, Gina Furia, Esquire, informed Detective Walsh, who was ordered the custodian of all records and exhibits during the PCRA proceedings, that the photographs were located in the Post Conviction Relief Unit of the Philadelphia Court of Common Pleas (‘PCRA Unit‘), City Hall room 788, and that the detective should inform the defense of same. Defense counsel still insisted they tried to locate the photographs to no avail. Upon inquiry by this court's law clerk, the photographs miraculously were located in the PCRA Unit (N.T. 8/7/95, 79-81). This court finds that defense counsel's affirmation was just another tactic to delay the proceedings.
>
> Once the photographs were turned over to the Commonwealth, they were immediately ordered to have them reproduced for the defense at the defense's expense. Although the photographs were reproduced, the defense never paid for them and as a result, does not have copies.

(231) Defense counsel then claimed, for the first time, that the witness had been required to sleep on a wooden bench because of a shortage of beds, had ‘some feeling‘ of ‘sleep deprivation,‘ and was ‘tired.‘ (N.T. 8/10/95, 37-38) This court, having observed the demeanor and considering the testimony of Mr. Harmon, which was infinitely detailed, finds he showed no sign of any deprivation and was perfectly fit to testify.

(232) This court further finds defense counsel's representation was false, and intended solely for the purpose of creating delay.

(233) Thereafter, this court allowed Mr. Harmon to review the 33 photographs for as long as he wished, approximately 14 minutes, before beginning his testimony (N.T. 8/10/95, 38-40). This court also directed the witness to review the photos a second time and after the witness had selected a number of photos which helped to refresh his recollection, we allowed the remaining photos to remain near the witness in the event that he needed them.

(234) William Harmon, a/k/a ‘Bippy,‘ claims he was in a restaurant at 13th and Locust with a prostitute at 4:00 a.m. on December 9, 1981, and saw Mr. Jamal outside. He supposedly went outside to talk to petitioner, who he knew by name, and that Mr. Jamal stated he was meeting his brother. The two then allegedly heard loud voices from Locust Street, and walked through a parking lot to investigate. Mr. Harmon supposedly heard a shot and saw a police officer fall. He stopped while Mr. Jamal continued walking. He testified that the officer was lying on the pavement with his back against a wall. Then, the officer allegedly shot Mr. Jamal from a sitting position against the wall, at a distance of approximately ten feet. Mr. Jamal, who allegedly did not possess a gun, fell against a car.

(235) Mr. Harmon continued to testify that he then saw a man running down 12th Street. At that point, a car drove up behind the victim's police car. A man with straight shoulder-length hair got out of the passenger side, shot down at the officer, and hit him in the face. This man then got back in the car, which backed away on Locust Street and drove south on 13th Street. Mr. Harmon then fled the scene because, he explained, he was a pimp.

(236) Moreover, Mr. Harmon testified that after telling his mother what he had witnessed, she instructed him not to get involved. As a result of her demand, this supposed eyewitness to the murder of a police officer and the shooting of his friend, Mr. Jamal, never came forward to give this account. Mr. Harmon also stated that he knew William Cook, but claimed he was not present during these events (N.T. 8/10/95, 55-73).

(237) Mr. Harmon testified that the name ‘Sweet

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Sam‘ ‘sounded familiar,‘ and that he knew a pimp known as ‘Detroit‘ who had straight, shoulder-length hair (N.T. 8/10/95, 74-75).

(238) On cross-examination, Mr. Harmon claimed that the man who supposedly first shot the officer did so while facing him (N.T. 8/10/95, 92-93). The witness was unable to describe this man (N.T. 8/10/95, 93-94).

(239) Mr. Harmon also claims Mr. Jamal was standing upright when the officer supposedly shot him from below, from a sitting position (N.T. 8/10/95, 98). According to Mr. Harmon, before the officer shot Mr. Jamal he said, ‘You son of a bitch you.‘ Then the witness claimed that the long-haired man who supposedly drove up and shot the officer also said ‘You son of a bitch you.‘ (N.T. 8/10/95, 99, 107) Mr. Harmon then recalled that the first shooter had dreadlocks (N.T. 8/10/95, 108).

(240) Mr. Harmon did not come forward for fourteen years, even though he supposedly knew he could clear Mr. Jamal, who he knew and admired. Mr. Harmon also claimed to know petitioner's brother, and knew one of defendant's radio colleagues (N.T. 8/10/95, 117-20).

(241) Mr. Harmon's explanation that he had promised his mother he would not get involved only recently changed as a result of his mother's death (N.T. 8/10/95, 122-23). However, Mr. Harmon's regard for his mother apparently did not prevent him from being a pimp, a thief, a forger, a drug-user, a confidence man, or a burglar; it did not dissuade him from committing mail fraud, and it did not deter him from selling drugs out of the house he shared with his wheelchair-bound mother.

(242) In addition, during these activities, Mr. Harmon was a police informant; he regularly gave authorities information about criminal activity (other than his own), and suffered no ill effect (N.T. 8/10/95, 123-38, 141-46). Mr. Harmon's explanation as to why he had not come forward for fourteen years was just as unreliable and incredible as the rest of the testimony he presented to this court.

(243) Mr. Harmon's account of the shooting is at odds with all of the scientific and physical evidence presented to this court and to the jury. A week before Mr. Harmon testified that Officer Faulkner shot Mr. Jamal from the ground while he was standing erect, the defense presented Dr. Hayes to prove that this very scenario was physically impossible (N.T. 8/4/95, 18-19). Furthermore, Mr. Harmon's testimony that the officer shot the defendant from a distance of ten feet away is contradicted; in fact, primer lead residue on petitioner's clothing proved he was shot from a distance of twelve inches (N.T. 6/26/82, 32).

(244) Additionally, Mr. Harmon's claim that Officer Faulkner was initially shot from the front is countered by the physical evidence which proved that he was shot in the back (N.T. 6/21/95, 4.9-4.10; 6/25/95, 8.167; 6/26/95, 15).

(245) In light of these facts, the trial record, Mr. Harmon's behavior and defense counsel's attempt to delay or prevent the testimony of this witness, this court finds as fact that Mr. Harmon's testimony was absolutely incredible.

(246) Furthermore, petitioner would obviously have been aware that Mr. Harmon was present during the shooting since the two of them were allegedly together moments before the incident. Defendant offered no evidence that he ever told trial counsel about Mr. Harmon or attempted to locate him. There was no evidence presented that Mr. Harmon could not be located at the time of trial by the exercise of reasonable diligence.

William Singletary; Officer Vernon Jones; Det. Edward Quinn

(247) Before calling William Singletary to testify, defense counsel characterized him as ‘a person whose recollection of what happened on the night in question we believe not to be entirely accurate. We believe his recollection today is not entirely accurate.‘ (N.T. 8/11/95, 9-10)

(248) Mr. Singletary, who did not testify at trial, claims he was a witness to the shooting. He stated he was interviewed at the Police Administration Building on December 9, 1981 shortly after 4:00 a.m. by a ‘Detective Green.‘ According to Mr. Singletary, this detective ‘Green,‘ who was black, forced him to write out what he had seen in longhand on yellow legal paper, over and over again, and each time tore up or balled up the resulting document and threw it in the trash. This went on (Mr. Singletary claimed that he was held until 9:00 a.m.) until Mr. Singletary at last wrote what ‘Green‘ wanted him to write. ‘Green‘ supposedly told Mr. Singletary that he would be taken to the elevator and beaten up, and that his business would be ‘destroyed.‘ After Mr. Singletary allegedly wrote out in longhand what ‘Green‘ dictated, ‘Green‘ then typed the statement and forced Mr.

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Singletary to sign it (N.T. 8/11/95, 209-214, 234, 242-44).

(249) Mr. Singletary claims he registered a protest about his treatment with State Representative Alphonso Deal, and had numerous discussions with him, but that nothing came of this alleged report. Mr. Singletary did not attempt to contact petitioner or his attorney, nor did he report these alleged events to any other person until August 31, 1990, when he was deposed by defense attorneys in this case (N.T. 8/11/95, 214-16, 250-53, 283-89, 292). State Representative Deal subsequently died (N.T. 8/11/95, 291).

(250) The day after his interview, Mr. Singletary claims he was visited at the gas station he managed by four unknown men who stated they were a burglary detail from the D.A.'s office investigating a homicide. These men allegedly displayed weapons and made him lie on the floor. They supposedly said, 'this will give you something to remember.'

(251) Mr. Singletary further claims on December 24, 1982, all the windows of his gas station were broken by unknown persons and that somehow this was the Commonwealth's intimidation (N.T. 8/11/95, 216-19, 253).

(252) Mr. Singletary closed the business in February 1982 because he 'couldn't afford the glass that kept getting broke.' He also claims the police harassed his tow truck drivers. After closing his business, he moved away from Philadelphia (N.T. 8/11/95, 223-24).

(253) Mr. Singletary testified he recalled Detective 'Green's' name because the detective supposedly kept repeating, 'My name is Detective Green and you will stay here until you say what I want you to say or you won't leave. ' (N.T. 8/11/95, 232)

(254) Mr. Singletary's supposedly discarded statements allegedly showed that he saw an officer frisking the driver of a Volkswagen against the wall, and that a passenger exited the Volkswagen, pulled a gun, and began yelling and screaming. This individual supposedly shot two times, hitting the officer once in the face from a distance of three to five feet. The gunman, a tall man with dreadlocks, supposedly tossed his gun to the right side of the Volkswagen, then ran away. The driver of the Volkswagen ran after him (N.T. 8/11/95, 234-36, 241, 302).

(255) At this point, according to the witness, petitioner appeared on the scene and said, 'Oh, my God, we don't need this.' Then, petitioner, who was unarmed, allegedly walked over and bent down to the officer saying 'is there anything I could do, anything I could do to help you,' whereupon the officer's gun, which was in his lap, 'discharged,' hitting Mr. Jamal in the chest.

(256) The witness testified that at that point, police officers, captains and lieutenants, immediately came out of the parking lot, took his name and address, and told him to wait for detectives. These captains and lieutenants then 'disappeared.' As he waited, Mr. Singletary allegedly saw a large group of police abusing the petitioner, 'beating him, stomping him, kicking him, sticking sticks in his wound,' and kicking him in the testicles. They also used Mr. Jamal as a battering ram against the side of a police van; four men allegedly picked up defendant and dashed his head repeatedly against the vehicle with 'tremendous force,' enough force to fracture his skull. The officers allegedly did this in full view of a crowd of between twenty-five to thirty-five people.[FN25]

> FN25. As noted previously, there was testimony to the contrary by petitioner's treating physician at Jefferson Hospital that there was no evidence of injury other than the gunshot wound to Mr. Jamal's abdomen. Doctor Anthony Coletta testified that petitioner's injuries were not consistent with a beating, and that Mr. Jamal did not complain of having been beaten (N.T. 6/28/82, 28.58, 28.92-28.100, 28.102-28.103).

(257) Mr. Singletary added that there was a large variety of police vehicles present, including a helicopter that was orbiting and shining its floodlight on the area (N.T. 8/11/95, 236-40, 292, 295-97, 299).[FN26]

> FN26. There was no other testimony by credible (or incredible) witnesses that any helicopters were present. Such an omission would have been highly unlikely since a helicopter hovering over a street in the center of Philadelphia would have drawn a great deal of attention.

(258) Mr. Singletary gave a deposition under oath to one of defendant's current attorneys on August 31, 1990 (N.T. 8/11/95, 256-59). In it, Mr. Singletary claimed to have seen and heard the gunman fire only one shot, which struck the officer in the eye (N.T. 8/11/95, 265-68, 308). In that same deposition, Mr. Singletary claimed Officer Faulkner spoke to Mr. Jamal after being shot in the eye,

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telling him ‘to get Maureen or get the children or something like that.‘ When confronted, Mr. Singletary confirmed that he recalled hearing the victim speak to Mr. Jamal (N.T. 8/11/95, 269-71). In another part of the same deposition, however, Mr. Singletary stated that the officer ‘didn't say anything. He just laid back, grabbed his gun and fired. ‘ This contradicted Singletary's recent testimony that the officer spoke and that his gun ‘discharged.‘ When confronted with this contradictory portion of his deposition, Mr. Singletary stated that it was correct (N.T. 8/11/95, 276). Moments later, he stated that it was not correct (N.T. 8/11/95, 278).

(259) Mr. Singletary then claimed at the time of the shooting, Mr. Jamal was wearing ‘a safari outfit … like the Arabs wear‘--‘harem‘ pants, with elastic ankles, greenish and khaki in color, long and flowing (N.T. 8/11/95, 279).

(260) In rebuttal, the Commonwealth presented two witnesses: Officer Vernon Jones and Detective Edward Quinn.

(261) Officer Jones testified he encountered William Singletary, who he knew, at the shooting scene on December 9, 1981. Mr. Singletary walked up to Officer Jones and asked him what happened. When Jones answered that a police officer had been shot, Mr. Singletary replied, ‘I heard some shots but I thought they were firecrackers. Then that's when I started seeing all those police cars.‘ (N.T. 8/14/95, 20-21) In his own testimony, Mr. Singletary identified Officer Jones as a friend (N.T. 8/11/95, 224).

(262) Officer Jones asked Singletary if he had seen the shooting; Singletary answered ‘no.‘ Officer Jones then returned to his duties (N.T. 8/14/95, 21).

(263) This account was recorded by Officer Jones in a statement to homicide detectives on December 17, 1981, and was turned over to the defense before trial. Officer Jones testified he had no present recollection of these events, and adopted, as does this court, his December 17, 1981 statement as true (N.T. 8/14/95, 15-17, 21-22).

(264) Detective Edward Quinn, who is white (Detective ‘Green‘ was supposedly black), testified he interviewed William Singletary at the homicide unit in the Police Administration Building. He typed Mr. Singletary's statement verbatim. Mr. Singletary did not write anything, and was not asked to do so. Detective Quinn did not tell Mr. Singletary what to say in his statement. No other detective questioned Mr. Singletary (N.T. 8/14/95, 48-52).

(265) In his statement to Detective Quinn, Singletary again admitted that he did not see the shooting. He stated that after the shooting, he claimed to see three figures, the officer and two other men, one of whom was sitting on the curb. The latter individual had ‘dray locks‘ and green pants. Mr. Singletary said he saw no one in the Volkswagen. He then read and signed his statement (N.T. 8/14/95, 52-57).

(266) Further, certain elements of Mr. Singletary's account of the incident, including his description of defendant's supposed ‘Arab‘ garb, a helicopter that was seen by no other witness, and the captains and lieutenants appearing and disappearing from a parking lot, border on the fantastic.

(267) Mr. Singletary claimed that the victim spoke to, then shot, the defendant after being shot in the face. However, defendant presented two physicians, Dr. Hayes and Dr. Hoyer, who established that this was utterly impossible. Both experts agreed that Officer Faulkner was killed instantly when he was shot in the face (N.T. 8/4/95, 60-61; 8/9/95, 185). Additionally, Dr. Hayes established it was physically impossible for petitioner to have been shot from the ground, as Mr. Singletary claims (N.T. 8/4/95, 18-19).

(268) Mr. Singletary had no credible explanation for his failure to come forward for fourteen years. His purported fear that the police would harass him and damage his business has less weight in light of the fact that he closed the business and moved out of the city. If his supposed fear of the police prevented him from coming forward in 1982, Mr. Singletary failed to explain why this ceased to be true in 1995.

(269) Finally, it is not credible that police officers investigating the murder of a police officer would discard an eyewitness report implying the existence of an additional suspect or suspects. While petitioner contends there was a police ‘conspiracy‘ to ‘frame‘ him due to his supposed fame as a political figure, there is no evidence that officers conducting interviews on December 9, 1981 knew anything about Mr. Jamal apart from his involvement in the murder, such that they would ignore evidence of the ‘real‘ killer in order to implicate Mr. Jamal.

(270) Defense counsel's doubts as to Mr. Singletary's

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accuracy were thus justified (N.T. 8/11/95, 9-10).

(271) This court finds as a fact that William Singletary's testimony at the PCRA hearing was not credible. It finds that the testimony of Officer Jones and Detective Quinn was credible and consistent with other testimony presented at petitioner's trial and during the instant PCRA proceeding.

Robert Chobert

(272) Robert Chobert, a cab driver and previously a school bus driver, testified as a Commonwealth witness at trial. He was called by petitioner at the PCRA hearing. Defendant offered to prove that Mr. Chobert testified at trial pursuant to a 'deal,' in which the prosecutor promised Mr. Chobert that he would help him recover his chauffeur's license (N.T. 8/14/95, 11).

(273) At the PCRA hearing, Mr. Chobert testified that his driver's license was suspended during December 1981. At some point during the trial, he asked the prosecutor to help him 'find out how I could get my license back.' The prosecutor said he would 'look into it.' Chobert never heard from the prosecutor after that. Chobert also testified that he lived in a hotel under police protection during trial, because he feared for his safety (N.T. 8/15/95, 3-15).

(274) Mr. Chobert testified on cross-examination that being provided protection by the police did not influence his testimony as to what he saw during the shooting. He also testified that he may have spoken to the trial prosecutor about his license after he testified, rather than before. He did not expect, from the prosecutor's statement that he would 'look into it,' that the prosecutor would restore his license, but rather expected that the prosecutor would merely tell him what he had to do to get the license back.

(275) Mr. Chobert testified that his trial testimony was based only on what he had witnessed, not on what anyone told him (N.T. 8/15/95, 15-20).

(276) Finally, Mr. Chobert's pretrial statements were introduced by the Commonwealth. Those statements, which were consistent with his trial testimony, were made prior to the so-called 'deal' with the prosecutor (N.T. 8/15/95, 11-15).

(277) At the PCRA hearing, defendant never asked Mr. Chobert any questions about how or whether his probationary status for arson affected his trial testimony, or whether he sought or expected to gain some benefit or avoid some detriment with regard to his probationary status via his testimony.

(278) This court found Mr. Chobert's testimony at trial to be credible (as it is assumed that the jury did as well). Predictably, this court finds his testimony at the PCRA proceeding to be consistent and trustworthy and adopts same as fact.

William Cook

(279) On September 11, 1995, following closing arguments, the defense announced their wish to call petitioner's brother, William Cook, as a PCRA fact witness. In 1982, Mr. Cook entered a guilty plea to simple assault with respect to his part in the events of December 9, 1981. He was represented by Daniel Paul Alva, Esquire.

(280) Petitioner's attorneys met Mr. Cook in Pittsburgh during the week of September 4, 1995.[FN27] Petitioner did not subpoena Mr. Cook at that time, nor did he obtain an affidavit, detailing his proposed testimony.

> FN27. On September 5, 1995, William Cook unexpectedly appeared at a civil hearing for Mr. Jamal in the courtroom of The Honorable Kenneth Benson. While in attendance, he indicated to petitioner's counsel that he (Mr. Cook) wished to testify on his brother's behalf.

(281) Mr. Cook's attorney, Mr. Alva, advised this court that he was in contact with Mr. Cook and wished to counsel him further with regard to testifying.

(282) There were two outstanding bench warrants on Mr. Cook, for relatively minor charges that do not entail pretrial incarceration. On August 11, 1995, an agreement was reached between Mr. Alva and the Commonwealth whereby Mr. Cook would surrender to the common pleas court bench warrant unit after he testified.

(283) The following day, September 12, 1995, Mr. Alva appeared and advised this court that he had last seen Mr. Cook in his office at 12:00 p.m. on September 11, 1995. At that time he told Mr. Cook to return to his office by 4:00 p.m., in order to discuss his possible appearance in court the following day. Mr. Alva characterized Mr. Cook's demeanor as 'anxious to testify and emotionally unstable.' However, Mr. Cook did not return, nor did he

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call Mr. Alva's office, which has a 24-hour answering service. A defense process server appeared at Mr. Alva's office after 4:00 p.m. and returned in twenty minute intervals for approximately two hours.

(284) Mr. Alva also advised this court that, following Mr. Cook's guilty plea to simple assault in 1982, it had been an open question whether Mr. Cook would testify at his brother's trial. Mr. Cook had kept Mr. Alva advised of the trial proceedings, which Mr. Cook attended.

(285) Mr. Cook did not resolve to assert a Fifth Amendment claim for refusing to testify if called to testify, although Mr. Alva raised this as a matter for Mr. Cook's consideration. Rather, at some point during the trial, Mr. Alva was advised by his client merely that 'it was decided he would not take the stand. ' (N.T. 9/12/95) Mr. Cook never indicated who made that decision. Mr. Alva did not communicate with Mr. Jackson with regard to Mr. Cook's availability during the trial.

(286) In an affidavit presented to this court on September 14, 1994, Mr. Alva stated that he had advised Mr. Cook during trial that his testifying would be 'risky,' as it was possible for Mr. Cook to be charged with homicide.

(287) During the instant PCRA proceeding, Anthony Jackson, Esquire, claimed that Mr. Alva had prevented Mr. Cook from testifying for the defense at trial. This court finds that this was not true. Given Mr. Jackson's responses and demeanor on cross-examination; the representations of Mr. Alva; and the totality of the relevant trial and PCRA testimony, including the many instances in which petitioner demonstrated personal control of his own trial strategy; this court again finds as a fact that petitioner personally decided not to call William Cook as a witness at trial.

(288) This court also finds that petitioner had a clear opportunity to present William Cook at the PCRA hearing. Petitioner's attorneys met Mr. Cook in Pittsburgh during the week of September 4, 1995. At that time, defense counsel had sufficient contact with Cook to be able to obtain a detailed, written offer of proof as to Mr. Cook's anticipated testimony. Furthermore, it defies credulity that counsel did not immediately obtain a subpoena (one could have been faxed to Pittsburgh by local counsel, if none was on hand) for this supposedly vital and long-missing witness. Defense counsel did not even purport to make arrangements to contact Mr. Cook in the future.

(289) Moreover, Mr. Cook was present in Mr. Alva's office during the entire morning of September 11, 1995, yet defense counsel made no attempt to subpoena him even then. Petitioner was represented by four attorneys at that listing. Any one of them could easily have walked over to Mr. Alva's office--at One East Penn Square, which is across the street from the courthouse--and subpoenaed Mr. Cook.

D. Stipulation

(290) The parties stipulated that three individuals--Darlene Sampson, Beverly Greene, and Alma Lee Austin, would state under oath that they were African-Americans, were on the jury panel in this case, and were peremptorily struck (N.T. 8/3/95, 258-60). The record reflects that an Alma Austin, a Beverly Greene, and a Darlene Sampson were peremptorily struck by the Commonwealth. The races of these persons was not recorded at trial, but petitioner claimed in his direct appeal that each was African-American.

(291) Defendant later withdrew from this stipulation with regard to Beverly Greene (N.T. 8/11/95, 52-53).

IV. CONCLUSIONS OF LAW

A. Burden of Proof

(1) The Post Conviction Relief Act, 42 Pa. C.S.A. §9541 *et seq.*, is the sole form of state habeas corpus collateral relief available to an individual in custody after conviction. The act states, in pertinent part:

'The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis. This subchapter is not intended to limit the availability of remedies in the trial court or on direct appeal from the judgment of sentence, nor is this subchapter intended to provide a means for raising issues waived in prior proceedings.' 42 Pa.C.S. § 9542.

(2) To be eligible for PCRA relief, 'a person must plead and prove' that his conviction resulted from:

'(i) A violation of the Constitution of Pennsylvania or laws of this Commonwealth or the Constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

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'(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

'(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused an individual to plead guilty.

'(iv) The improper obstruction by Commonwealth officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

'(v) A violation of the provisions of the Constitution, law or treaties of the United States which would require the granting of Federal habeas corpus relief to a State prisoner.

'(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced.

'(vii) The imposition of a sentence greater than the lawful maximum.

'(viii) A proceeding in a tribunal without jurisdiction.' 42 Pa.C.S. § 9543(a)(2).

(3) A petitioner is not entitled to PCRA review on an issue that has been previously litigated. *Commonwealth v. Buehl*, 403 Pa. Super. 143, 588 A.2d 522 (1991), *appeal denied*, 528 Pa. 627, 598 A.2d 281 (1991). It is his burden to plead and prove that 'the allegation of error has not been previously litigated and one of the following applies:'

'(i) The allegation of error has not been waived.[FN28]

> FN28. An issue is waived 'if the petitioner failed to raise it and if it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or other proceeding actually conducted or in a prior proceeding actually initiated under this subchapter.' 42 Pa.C.S. § 9543(b). Since the instant matter resulted in a sentence of death, this court will relax the waiver rule and make findings and conclusions based on the merits of each issue presented.

'(ii) If the allegation of error has been waived, the alleged error has resulted in the conviction or affirmance of sentence of an innocent individual.

'(iii) If the allegation of error has been waived, the waiver of the allegation during pretrial, trial, post-trial or direct appeal proceedings does not constitute a State procedural default barring Federal habeas corpus relief. ' 42 Pa.C.S. §9543(a)(3); *Commonwealth v. Travaglia*, --- Pa. ---, 661 A.2d 352 (1995); *Commonwealth v. Maxwell*, 534 Pa. 23, 26, 626 A.2d 499, 501 (1993), *cert. denied*, --- U.S. ---, 114 S.Ct. 558, 126 L.Ed. 2d 459 (1993).

(4) An issue has been previously litigated if: '(1) it has been raised in the trial court, the trial court has ruled on the merits of the issue and the petitioner did not appeal; (2) the highest appellate court in which petitioner could have had review as a matter of right has ruled on the merits of the issue; or (3) it has been raised in and decided in a proceeding collaterally attacking the conviction or sentence.' 42 Pa. C.S.A. §9544(a).

(5) 'An issue may not be relitigated merely because a new or different theory is posited as a basis for reexamining an issue that has already been decided. ' *Commonwealth v. Senk*, 496 Pa. 630, 634-35, 437 A.2d 1218, 1220 (1981); *Commonwealth v. Tenner*, 377 Pa. Super. 540, 546, 547 A.2d 1194, 1197 (1988), *appeal denied*, 522 Pa. 603, 562 A.2d 826 (1989).

(6) To be eligible for relief the petitioner must plead and prove that failure to litigate an issue at or before trial or on direct appeal 'could not have been the result of any rational strategic or tactical decision by counsel. ' 42 Pa.C.S. §9543(a)(4).

(7) The burden of proving the ground upon which post-conviction relief is requested, rests solely upon petitioner. *Commonwealth v. Baker*, 352 Pa. Super. 260, 507 A.2d 872 (1986); *Commonwealth v. Fox*, 272 Pa. Super. 8, 414 A.2d 642 (1979).

B. Issues Raised in PCRA Petitions

(8) Petitioner raised a host of claims in his original petition for post-conviction relief and his supplement thereto. Each legal issue is addressed separately herein:

B1. Claim That the Commonwealth Violated *Brady* and

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Knowingly Used False Evidence

(9) Suppression of evidence favorable to an accused by the Commonwealth violates due process where the evidence is material either to guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83 (1963).

(10) Although under normal circumstances this issue would be deemed waived because petitioner fails to allege or prove that the allegations on which the instant claim is based were unavailable during the direct appeal, this court relaxes the waiver standard because this is a capital case. 42 Pa.C.S. § 9543(a)(3); *Commonwealth v. Mumia Abu-Jamal*, 521 Pa. 188, 555 A.2d 846 (1989); *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982).

(11) Petitioner fails to prove his allegation that the Commonwealth withheld any materially favorable evidence or knowingly used false evidence.

Bias of police investigators.

(12) Petitioner argues that 'bias' by investigators, without more, occasions relief under *Kyles v. Whitley*, --- U.S. ---, 115 S.Ct. 1555 (1995). This is incorrect. In *Kyles*, Louisiana police suppressed exculpatory witness statements. The court ruled that because the suppressed evidence could have been used by the defense at trial to argue that the police had reason to believe the ostensibly incriminating evidence used to convict the appellant had been planted, suppression of the statements was a *Brady* violation. *Kyles, supra*, 115 S.Ct. at 1572.

(13) *Kyles* thus concerns a case where the police suppressed evidence which should reasonably have led them to doubt the accused's guilt. *Kyles* is not support for petitioner's claim that the Philadelphia police were 'biased' in the sense that they disliked him, where no material exculpatory evidence was suppressed.[FN29]

> FN29. Indeed, petitioner seems to assume, without evidence, that in 1981 he was somehow famous among the patrol officers and detectives who investigated this case. There has been no evidence, and no offer to prove, that Mr. Jamal was known to any of the officers involved, in any capacity, other than as the murderer of Officer Faulkner.

Statements of William Singletary.

(14) Petitioner claims the Commonwealth withheld or destroyed statements by William Singletary. In fact, the two statements made by Mr. Singletary--one at the scene, and another to homicide detectives--were turned over to the defense before trial, and contained nothing exculpatory. No statements by this witness were destroyed.

Testimony of Officer Wakshul.

(15) Petitioner argues his hospital admission of guilt was 'false,' and that the Commonwealth 'falsely' claimed at trial that Officer Wakshul, who petitioner asserts could refute the admission, was unavailable when called to testify at the last moment because of Commonwealth corruption (*See* Amended Petition at 31). No credible evidence to support these claims was offered at the PCRA hearing. This court previously found that Officer Wakshul was not ordered to be available or unavailable; he became unavailable because petitioner personally decided not to attempt to call him until it was too late.

(16) Moreover, had Wakshul testified at trial, he would have confirmed that petitioner admitted murdering Officer Faulkner.

Dessie Hightower's polygraph results.

(17) Petitioner fails to prove the Commonwealth withheld from the defense the 'fact' that Dessie Hightower passed a polygraph examination (*See* Amended Petition at 32). Polygraph results are not material or admissible. *Commonwealth v. Brockington*, 500 Pa. 216, 455 A.2d 627 (1983); *Commonwealth v. McIntosh*, 291 Pa. Super. 352, 435 A.2d 1263 (1981); *Commonwealth v. Gee*, 467 Pa. 123, 354 A.2d 875 (1976). Such evidence is considered inaccurate and unreliable. *Commonwealth v. Johnson*, 441 Pa. 237, 272 A.2d 467 (1971).

(18) Moreover, this court finds as fact that Mr. Hightower was told by the police that he had failed the polygraph test.

Alleged police files.

(19) Petitioner fails to prove the Commonwealth withheld police files pertaining to Mr. Jamal's political activities and affiliations (*See* Amended Petition at 32). There is no proof that such files exist, or ever existed, nor any evidence showing that they are exculpatory.[FN30]

> FN30. Petitioner repeatedly attempted to introduce copies of alleged FBI files into evidence. This court explained that, even aside from questions of relevance and materiality, hearsay documents cannot simply be moved into evidence.

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Witness intimidation.

(20) Petitioner refers in his PCRA petition to the Commonwealth intimidating witnesses, causing a witness to flee the jurisdiction, failing to disclose an alleged 'deal' with witness Cynthia White, and failing to disclose a supposed offer of 'a similar deal' to witness Veronica Jones (*See* Amended Petition at 32-33). Petitioner fails to prove each of these allegations as noted in the above Findings of Fact.

Robert Harmon--Photo array.

(21) Petitioner failed to sustain his burden of proving that witness Robert Harmon was shown a photo array, or that Mr. Harmon misdescribed petitioner, or that this nonexistent information was withheld (*See* Amended Petition at 33).

Addresses and telephone numbers of witnesses.

(22) Petitioner further asserts that it was a *Brady* violation because the Commonwealth redacted witness addresses and telephone numbers before turning statements over to the defense. Such an allegation is incorrect.

(23) The analysis of this claim must be conducted based on a review of Pa. R.Crim.P. 305B(2)(a) which states in pertinent part:

'[I]f the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, upon a showing that they are material to the preparation of the defense …

'(a) the names and addresses of eyewitnesses….'

(24) The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense. *Commonwealth v. Rose*, 483 Pa. 382, 396 A.2d 1221 (1979); *Commonwealth v. Woodell*, 344 Pa. Super. 487, 496 A.2d 1210 (1985). The test to determine whether evidence is material is whether the omitted evidence would have created areas of reasonable doubt that did not otherwise exist. *Commonwealth v. Hicks*, 270 Pa. Super. 546, 411 A.2d 1220 (1979). Furthermore, the defendant seeking relief from a prosecutor's failure to disclose favorable, material evidence must also demonstrate prejudice. *Commonwealth v. Gordon*, 364 Pa. Super. 521, 528 A.2d 631 (1987).

(25) The fact that addresses and telephone numbers of civilian witnesses were not disclosed to the defense was established on the record prior to trial and is not disputed.

(26) Petitioner's reference to 'police regulations and procedures' (*See* Amended Petition at 33) with regard to this claim is a non-sequitur.

(27) Judge Paul Ribner ruled that any civilian witness would be made available to the defense upon request (N.T. 3/18/82, 67-69). Petitioner's investigator was able to locate every civilian witness defense counsel selected. Therefore, such redaction was neither material nor prejudicial and did not affect the outcome of the instant case.

Police brutality and bigotry.

(28) Petitioner failed to sustain his burden of proving by credible evidence that the police 'brutally beat' him or 'hurled racial epithets at him.' (*See* Amended Petition at 33)

(29) No witnesses were coerced or intimidated, nor is there any evidence that these nonexistent events were 'part of the Philadelphia police department's pattern and practice.' (*See* Amended Petition at 33-34)

(30) Furthermore, petitioner fails to explain how these alleged facts are relevant to his many theories of defense.

Bullet fragment.

(31) Petitioner failed to present evidence to support his allegation that the Commonwealth 'destroyed a bullet fragment,' let alone how this fragment would somehow have 'established' that his gun was not the murder weapon (*See* Amended Petition at 34).

Second bullet wound in victim's throat.

(32) Petitioner fails to prove there was a second bullet wound in the victim's throat, nor has he explained how this information, had it existed, would have been exculpatory.

False preliminary police report.

(33) Petitioner's claim that the Commonwealth failed to disclose before trial a report stating that 'arriving officers' shot him is false. This matter was examined during

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trial. The evidence established that the defense was fully on notice of this report, which proved to be false (N.T. 6/26/82, 156-60; N.T. 6/28/82, 28.4-28.11).

Ballistician's bench notes.

(34) The allegation that the Commonwealth 'failed to disclose the ballistician's bench notes and whether the gun smelled of gun powder' (*See* Amended Petition at 34) is a non-sequitur, as petitioner fails to establish such evidence even existed in the first place, and he fails to explain how it would have been exculpatory.

B2. Claim That This Court Deprived Defendant of His Right To Present a Defense

Defense funds allotted to petitioner.

(35) This court did not deprive petitioner of his fundamental right to present a defense because the court only allowed $150 for an investigator, $150 for a photographer, $150 for a pathologist and $150 for a ballistician. In 1981, $150 per expert was the standard allotment of money where counsel was appointed for a defendant. On the contrary, as noted by the Pennsylvania Supreme Court, petitioner was offered appropriate financial support, and had more than adequate resources with which to investigate and try his case.

(36) Moreover, this issue has been previously litigated on the merits by the Supreme Court of Pennsylvania in *Commonwealth v. Abu-Jamal, supra,* and is not subject to further review under the Post Conviction Relief Act, 42 Pa. C.S.A. §9544(a).[FN31] This issue may not be relitigated merely because a new or different theory is posited as a basis for reexamining a claim that has already been decided. *Commonwealth v. Senk, supra* at 634-35, 437 A.2d at 1220; *Commonwealth v. Tenner, supra* at 546, 547 A.2d at 1197.

FN31. The Pennsylvania Supreme Court held:

> 'The appellant also claims he was deprived of meaningful ability to present a defense, in violation of his due process rights, by failure of the court to afford adequate investigative resources. According to the appellant, the court's allowance for investigators was insufficient to enable him to contact two witnesses.
>
> 'We will not dwell on this argument beyond noting that our review of the record confirms the Commonwealth's assertions that the allowance for investigative resources was more than what is represented in the appellant's brief; that there is no indication that other requests were made, or would have been denied had they been made; that the witnesses alluded to were not unavailable to the appellant for lack of funds but merely because appellant chose not to pursue their testimony until it was too late; and that there is no indication that these witnesses would have been helpful to the appellant.' *Commonwealth v. Abu-Jamal, supra* at 201, 555 A.2d at 852.

(37) Finally, we note that two expert witnesses testified at the PCRA hearing, George Fassnacht and John Hayes, M.D. The testimony of each was of minimal assistance to the defense, and should not have influenced the outcome, if similar testimony had been given at trial.

Testimony of Officer Wakshul.

(38) Petitioner claims he was 'effectively barred' at trial from presenting evidence 'proving' that he 'never' admitted the shooting (*See* Amended Petition at 36). No such evidence was offered at the PCRA hearing.

(39) Petitioner was properly denied a continuance when, on the last day of the guilt phase of his trial, he made a last-minute demand to call Officer Wakshul, who by then was on vacation and unavailable (N.T. 7/1/82, 33-38, 48-53).

(40) Petitioner had no excuse for waiting until the last day of the trial to attempt to call this witness. *Commonwealth v. Birdsong,* 538 Pa. 587, 650 A.2d 26 (1994) (late request for continuance to call witness properly denied at trial court's discretion). Defendant fails to prove his claim that Officer Wakshul was available to testify when petitioner finally decided to call him.

(41) Furthermore, Officer Wakshul's testimony would have been cumulative to that of Officer Bell, which was inculpatory, not exculpatory.

Testimony of Veronica Jones.

(42) Petitioner claims he was barred at trial from examining Veronica Jones as to whether Cynthia White was 'coaxed and coerced' to testify (*See* Amended Petition at 36-37). Petitioner called neither person to testify at the PCRA hearing, has never explained how Ms. Jones would have had any way of knowing the mental state or experiences of Ms. White, and has failed to prove the existence of the alleged coaxing or coercion underlying his claim. He fails to sustain his burden of proof on this matter.

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Testimony of Robert Chobert.

(43) Petitioner contends he was improperly 'barred' at trial from confronting eyewitness Robert Chobert with DUI convictions and his probationary status for arson to prove bias (*See* Amended Petition at 37). This is inaccurate.

(44) It is true that, at trial, the defense was prevented from cross-examining Mr. Chobert with a prior conviction for arson. This conviction, however, was offered only for *crimen falsi* impeachment, not bias. Arson is not a *crimen falsi* crime (N.T. 6/19/82, 217-23). The ruling that the conviction could not be so used was correct.

(45) Since petitioner fails to raise a bias theory under *Davis v. Alaska*, 415 U.S. 308 (1974), his citation of that case in his PCRA petition to support this claim is misplaced. Moreover, petitioner fails to explain how *Davis* would have applied had it been raised. In *Davis*, the witness had reason to fear for his probationary status because he was implicated in the same crime as the accused. Here, Mr. Chobert was not implicated in any crime, and had no reason to be concerned for his probationary status.

(46) Contrary to petitioner's argument in his PCRA petition, he did not attempt at trial to introduce Mr. Chobert's DUI convictions, much less offer them for the inadmissible premise that the witness 'was a drinker.'

(47) Additionally, petitioner claims that, at trial, Mr. Chobert 'retracted' a prior statement 'that he saw an individual running from the scene.' (*See* Amended Petition at 37) At trial, however, Mr. Chobert explained that he had been referring in his prior statement to William Cook, and that Cook had merely moved further along the wall; he had not 'run away.' (N.T. 6/19/82, 242-43) Chobert identified Mr. Jamal as the shooter on the scene, and testified at trial that he had 'no doubt' petitioner was the gunman (*Id.*, 212). Petitioner fails to explain how Mr. Chobert's DUI or arson convictions would have negated this testimony.

(48) Finally, it must be noted that petitioner called Mr. Chobert at the PCRA hearing, but never asked him about the above matters. Petitioner therefore failed to plead and prove that Mr. Chobert would have been effectively impeached even if he had been confronted at trial. Indeed, this court has found that Mr. Chobert testified credibly at the PCRA hearing, basing his testimony solely on what he witnessed on December 9, 1981.

Defense ballistics expert.

(49) Petitioner's claim that he was unable to hire a ballistics expert is false. He in fact hired ballistician George Fassnacht during his trial. Mr. Fassnacht's testimony at the PCRA hearing established that he was not called as a witness at trial because he had nothing to say that would assist petitioner in his quest for a not guilty verdict.

(50) Petitioner's assertions that the supposedly unavailable ballistician would have 'pursued' the autopsy 'finding' that the fatal bullet was .44 caliber, and the 'mysterious disappearance or destruction of a bullet fragment, ' are seriously misplaced. There was no 'autopsy finding' as to the caliber of the bullet, and there was no evidence that the bullet fragment either disappeared or was destroyed (*See* Amended Petition at 38). At the PCRA hearing Mr. Fassnacht, petitioner's own witness, contradicted the instant PCRA claim that the fatal bullet was .44 caliber.

Defense pathologist.

(51) Petitioner never requested funds to employ a pathologist before or during trial. He has also failed to prove that any pathologist's testimony would have differed from that of the expert he presented at the PCRA hearing, who offered no exculpatory opinion. Petitioner claims that a pathologist at trial would have 'refuted' a supposed prosecution 'theory' that Mr. Jamal was shot while standing over the officer, who was lying on the ground (*See* Amended Petition at 38-39). This theory does not fit within the facts of the case since no such evidence was ever offered by the prosecution.

(52) The trial evidence showed, contrary to Mr. Jamal's PCRA petition (*See* Amended Petition at 38), that the absence of nitrate residue on Officer Faulkner's jacket was meaningless in light of the presence of primer lead. The latter proved Officer Faulkner was shot in the back at a distance of twelve inches or less, corroborating the eyewitnesses who saw petitioner shoot the victim in the back. Nitrates do not cling to fabric, and are rarely found in testing. This matter was extensively examined by petitioner at trial, to no avail (N.T. 6/25/82, 10-17, 46-91). Furthermore, petitioner's ballistic evidence at the PCRA hearing did nothing to dispute the trial evidence on this point.

Defense investigator.

(53) Petitioner asserts in his PCRA petition that he

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had no funds to hire an investigator (*See* Amended Petition at 38). This claim was invalidated by his own witness, Robert Greer, who worked on petitioner's case for five months. As noted in the instant Findings of Fact, Mr. Greer worked four hours for every one he billed, was retained by the Mumia Abu-Jamal Defense Committee, and was also paid by the court. There is credible evidence that petitioner was receiving funds from a variety of sources in addition to those funds supplied by the court.

B3. Claim That Petitioner Was Denied the Right To Be Present During Two In Camera Conferences

(54) This issue would normally be deemed waived because petitioner fails to allege or prove that the allegation on which the instant claim is based was unavailable during the direct appeal. This court relaxes the waiver standard because of the 'extreme, indeed irreversible, nature of the **death penalty** …. ' *Commonwealth v. Mumia Abu-Jamal, supra; Commonwealth v. Zettlemoyer, supra; See also* 42 Pa.C.S. §9543(a)(3).

(55) At trial, petitioner was properly removed on a number of occasions due to his repeated, intentional disruption of the proceedings (N.T. 6/9/82, 3.45; 6/17/82, 1.44-1.128; 6/18/82, 2.61-2.92; 6/19/82, 4-8; 6/21/82, 4.1-4.5; 6/22/82, 5.4-5.22; 6/23/82, 6.116-6.129; 6/24/82, 16-26, 85-95; 6/25/82, 8.2-8.4, 8.13-8.16; 6/26/82, 156-60; 6/29/82, 6; 7/1/82, 41-53; 7/3/82, 16). His removal was proper under *Illinois v. Allen*, 397 U.S. 337 (1970).

(56) Petitioner was not present for two in camera conferences because he chose not to be present (N.T. 6/28/82, 28.10-28.11).

B4. Claims That Trial Counsel Was Ineffective

(57) Again, where this issue would normally be deemed waived because petitioner fails to allege or prove that the allegation on which the instant claim is based was unavailable during the direct appeal, this court relaxes the waiver standard because of the nature of the sentence. *Commonwealth v. Mumia Abu-Jamal, supra; Commonwealth v. Zettlemoyer, supra; See also* 42 Pa.C.S. § 9543(a)(3).

(58) The determination whether counsel rendered ineffective assistance is arrived at through a three-prong test. First, we must ascertain whether the issue underlying the claim has arguable merit. This requirement is based upon the principle that we will not find counsel ineffective for failing to pursue a frivolous claim or strategy. Second, if the petitioner's claim does have arguable merit, we must determine whether the course chosen by counsel had some reasonable basis designed to serve the best interests of the petitioner. If a review of the record reveals that counsel was ineffective, we must then determine whether the petitioner has demonstrated that counsel's ineffectiveness worked to his prejudice. *Commonwealth v. Douglas*, 537 Pa. 588, 597, 645 A.2d 226, 230 (1994); *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987). Petitioner bears the burden of proving all three prongs of this standard. *Commonwealth v. Baker*, 531 Pa. 541, 562, 614 A.2d 663, 673 (1992).

(59) In order to establish prejudice, petitioner must show 'counsel's ineffectiveness was of such magnitude that the verdict essentially would have been different absent counsel's alleged ineffectiveness.' *Commonwealth v. Howard*, 538 Pa. 86, 100, 645 A.2d 1300, 1308 (1994). *See also Commonwealth v. Petras*, 368 Pa. Super. 372, 534 A.2d 483 (1987); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

(60) In the context of a PCRA claim, petitioner must not only establish ineffective assistance of counsel, he must also plead and prove that counsel's stewardship 'so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.' *See* 42 Pa. C.S.A. §9543(a)(2)(ii); *Commonwealth v. Rowe*, 411 Pa. Super. 363, 601 A.2d 833 (1992).

(61) Counsel is never ineffective for failing to make a frivolous objection or motion. *Commonwealth v. Groff*, 356 Pa. Super. 477, 484, 514 A.2d 1382, 1386 (1986), *appeal denied*, 515 Pa. 610, 531 A.2d 428 (1987); *Commonwealth v. Davis*, 313 Pa. Super. 355, 362, 459 A.2d 1267, 1271 (1983). Similarly, counsel is never ineffective for failing to raise a frivolous issue in post-verdict motions or on appeal. *Commonwealth v. Lewis*, 430 Pa. Super. 336, 634 A.2d 633 (1993); *Commonwealth v. Thuy*, 424 Pa. Super. 482, 497, 623 A.2d 327, 335 (1993); *Commonwealth v. Tanner*, 410 Pa. Super. 398, 600 A.2d 201, 206 (1991).

(62) The law in Pennsylvania presumes that trial counsel was effective. *Commonwealth v. Quier*, 366 Pa. Super. 275, 278, 531 A.2d 8, 9 (1987); *Commonwealth v. Norris*, 305 Pa. Super. 206, 210, 451 A.2d 494, 496 (1982). Therefore, when a claim of ineffective assistance of counsel is made, it is the petitioner's burden to prove such ineffectiveness, and that burden does not shift. *Commonwealth v. Cross*, 535 Pa. 38, 43, 634 A.2d 173, 175 (1993); *Commonwealth v. Marchesano*, 519 Pa. 1, 5,

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544 A.2d 1333, 1335-36 (1988); *Commonwealth v. Tavares*, 382 Pa. Super. 317, 321, 555 A.2d 199, 201 (1989), *appeal denied*, 524 Pa. 619, 571 A.2d 382 (1989).

(63) Petitioner fails to meet any of the minimal standards required to establish a claim of ineffective assistance of counsel. As a result, all of the following issues of ineffectiveness raised by petitioner in his PCRA petition and supplement thereto are deemed meritless.

(64) Petitioner alleges '[d]eep and irreconcilable conflicts between [himself] and his attorney.' (*See* Amended Petition at 44) He fails to prove, however, that Mr. Jackson was in any way at fault for any difficulties that occurred or how such difficulties hindered Mr. Jackson from properly representing petitioner.[FN32]

> FN32. Petitioner refers to 'constant fighting' between himself and his counsel. While Mr. Jamal was exceedingly rude to Mr. Jackson, there is no evidence that Mr. Jackson responded in kind, or that there was any 'fighting,' which implies the necessity of two or more participants.

(65) The record shows petitioner was deliberately uncooperative with his counsel, and was not prepared to cooperate with *any* attorney. He repeatedly insisted, as part of his strategy of portraying himself as the victim of political intrigue, that any 'legal-trained lawyer' was an 'employee' of the court, and would attempt to 'hang' him; he demanded that he be 'represented' by a layman, John Africa (N.T. 6/9/82, 3.45; 6/17/82, 1.44-1.128; 6/18/82, 2.61-2.92; 6/19/82, 4-8; 6/21/82, 4.1-4.5; 6/22/82, 5.4-5.22; 6/23/82, 6.116-6.129; 6/24/82, 16-26, 85-95; 6/25/82, 8.2-8.4, 8.13-8.16; 6/26/82 156-60; 6/29/82, 6; 7/1/82, 41-53; 7/3/82, 16).

(66) Petitioner's trial counsel testified that Mr. Jamal was dissatisfied with 'the system,' and concluded that cooperating with counsel would not be to his advantage (N.T. 7/27/95, 76).

(67) As a result of petitioner's unrest with having legallytrained counsel appointed for him, he chose to exercise personal control of his trial strategy, including the selection of character witnesses and the omission of mitigating witnesses (N.T. 6/24/95, 2-6; 6/25/82, 136; 6/26/82, 139-40; 6/28/82, 28.45; 6/29/82, 5-7; 7/1/82, 44, 55; 7/27/95, 106-109, 119, 140-44, 192; 7/28/95, 116-17, 167-75).

(68) Because petitioner did not cooperate with his attorney but retained personal control of trial strategy, any supposed 'ineffectiveness' in the penalty phase or at trial was petitioner's own responsibility. *Commonwealth v. Heidnik*, 526 Pa. 458, 587 A.2d 687 (1991) (appellant allowed to instruct his counsel to abandon his right to non-mandatory aspects of **death penalty** appeal); *Commonwealth v. Appel*, 517 Pa. 529, 539 A.2d 780 (1988) (same); *Commonwealth v. Blystone*, 519 Pa. 450, 549 A.2d 81 (1988) (appellant refused to allow counsel to present mitigating evidence at sentencing), *aff'd*, 494 U.S. 299, 110 S.Ct. 1078, 103 L.Ed. 2d 255 (1990); *Commonwealth v. Szuchon*, 506 Pa. 228, 484 A.2d 1365 (1984) (accused who makes his own strategic choice to his prejudice may not blame counsel, but 'must be prepared to accept the consequences'); *Commonwealth v. Weinstein*, 499 Pa. 106, 110 n.2, 451 A.2d 1344, 1345 n.2 (1982) (counsel properly did not interfere with appellant's decision to plead guilty in order to 'get [it] over with'); *Commonwealth v. Hertzog*, 492 Pa. 632, 638, 425 A.2d 329, 332-33 (1981) (decision whether to contest criminal charges or admit guilt is solely that of the defendant not the attorney); *Commonwealth v. Garrett*, 425 Pa. 594, 596 n.1, 229 A.2d 922 (1967) (same); *Commonwealth v. Boyd*, 461 Pa. 17, 334 A.2d 610 (1975) (client's personal waiver overrides counsel's advice or preferences to the contrary).

(69) Petitioner's references in the instant claim to the supposed 'deficient' performance of his attorney as a result of his 'conflict' with petitioner are irrelevant, as any supposed conflict was caused by petitioner.[FN33] His absolute refusal to cooperate with any attorney was a problem of his own creation, that he alone could solve. If petitioner has now decided in hindsight that his decision to take personal control of his trial strategy led to an inadequate defense, that in no way entitles him to relief.

> FN33. Petitioner refers to a number of witnesses that Mr. Jackson refused to call, who supposedly 'could have rebutted' his hospital confession (*See* Amended Petition at 45). At the PCRA hearing, petitioner not only never asked Mr. Jackson about these witnesses, he never offered to prove they were in his (petitioner's) presence at the time the confession was made. Thus, not only does he fail to prove that these persons could have rebutted his confession; petitioner fails to even offer to prove this.

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(70) Petitioner argues that his trial counsel 'failed to exercise rudimentary skills' during voir dire (*See* Amended Petition at 45). This assertion is so vague as to be meaningless. *Commonwealth v. Pettus*, 492 Pa. 558, 424 A.2d 1332 (1981) (ineffectiveness claims in a vacuum will not be heard). Trial counsel conducted the voir dire questioning under petitioner's direction (N.T. 6/9/82, 3.17-3.40; 6/15/82, 247); petitioner personally approved the use of peremptory challenges (N.T. 6/9/82, 3.47, 3.48, 3.50, 3.57, 3.65, 3.74, 3.85, 3.90, 3.92, 3.97, 3.99).

(71) Petitioner argues that his trial counsel 'failed to arrange for the testimony of Debbie Kordansky or Officer Wakshul sufficiently in advance of trial.' (*See* Amended Petition at 45) Since, as demonstrated at the PCRA hearing, the testimony of the former would have been worthless to the defense, and the testimony of the latter would have corroborated petitioner's admission, trial counsel had an objectively reasonable basis for calling neither. Moreover, petitioner's PCRA evidence disproved the element of prejudice.

(72) Petitioner also complains that Mr. Jackson failed to call 'witnesses who could have rebutted the false 'confession' claim.' (*See* Amended Petition at 45) Petitioner fails to prove that any such witnesses existed.

(73) This court quashed subpoenas for several witnesses allegedly related to this claim--Carol Young, Officer Trombetta, Charles Kenney, William Hinkel, Steven Cooke, Richard Dunne, and Howard Bobb--because petitioner never asked Mr. Jackson about them, and because petitioner made no offer to prove that these persons were present at the time petitioner made the statement they were supposed to rebut.

(74) The trial record establishes and this court has found that petitioner made his admission while outside the door to the emergency room, before being taken inside, and then to a treatment room (N.T. 6/19/82, 176-99, 263-64; 6/21/82, 4.109, 4.194-4.199; 6/24/82, 27-30, 34, 56-61, 67-68, 74, 112-16, 123, 126, 133-36).

(75) The affidavits submitted by the uncalled witnesses show that if they encountered petitioner at all, it was in some other location. This court advised petitioner at the PCRA hearings that it would reconsider its quashal if he would lay a foundation for calling the witnesses, such as by recalling Mr. Jackson (N.T. 8/2/95, 19, 237; 8/3/95, 107-108). Petitioner never attempted to recall Mr. Jackson to lay the proper foundation for these witnesses, therefore, this court properly barred their PCRA testimony. Thus, petitioner offered no proof as to this claim.

(76) Petitioner's claim that Mr. Jackson was ineffective for failing to raise a *Batson* claim or make a *Batson* record at voir dire (*See* Amended Petition at 45) is meritless, since that case was handed down after the trial. Trial counsel will not be deemed ineffective for failing to anticipate a change in the law or failing to make a motion unsupported by existing law. *Commonwealth v. Pizzo*, 529 Pa. 155, 159, 602 A.2d 823, 825 (1992); *Commonwealth v. Roach*, 479 Pa. 528, 388 A.2d 1056 (1978); *Commonwealth v. Triplett*, 476 Pa. 83, 381 A.2d 877 (1977). *See also Strickland v. Washington*, 466 U.S. 668, 690 (1984) (counsel's performance is judged under 'prevailing professional norms,' not later developments); *Commonwealth v. Yarris*, 519 Pa. 571, 606, 549 A.2d 513, 531 (1988), *cert. denied*, 109 S.Ct. 3201 (1989) (counsel not ineffective for not predicting later-decided case).

(77) Petitioner complains his counsel improperly agreed to the dismissal of a juror who broke sequestration (*See* Amended Petition at 45). Trial counsel's decision was reasonable, as it was evident from the voir dire that this juror disliked petitioner (N.T. 6/4/82, 177-78; 6/18/82, 2.35-2.46). Moreover, petitioner had Mr. Jackson on the stand for two days during the PCRA hearing and never inquired about this event.

(78) Petitioner complains Mr. Jackson failed to obtain testimony from a ballistician or a pathologist (*See* Amended Petition at 45). The PCRA evidence fails to establish any such expert would have been helpful to his case, let alone change the outcome. In fact, some of the expert testimony petitioner presented at the hearing not only contradicted his own PCRA claims, it corroborated the Commonwealth's evidence from trial. Mr. Jackson obviously had a reasonable basis for not presenting such evidence at trial.

(79) Petitioner states that Mr. Jackson failed to cross-examine Dr. Hoyer about his notation that the bullet that killed the victim was a .44 caliber, 'and the disappearance of a bullet fragment removed from that wound.' (*See* Amended Petition at 45) Petitioner never proved that a bullet fragment 'disappeared,' in fact, he failed to prove that a bullet fragment even existed.

(80) The PCRA evidence established that had Dr. Hoyer been cross-examined regarding his preliminary

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notations, he would have explained that he wrote the notation 'Shot 44 cal' on a sheet of paper for intermediate notes that were not part of his report, and which were ordinarily written before he even began the autopsy. In addition, he explained that the '44' reference was a mere lay guess on his part (N.T. 8/9/95, 186-93, 198-200). This testimony would not have benefitted petitioner and therefore, trial counsel was not ineffective.

(81) Petitioner states that Mr. Jackson failed to 'adequately' attack the credibility of Robert Chobert by using his criminal history as proof of 'bias and susceptibility to police pressure.' (*See* Amended Petition at 45)

(82) Petitioner appears to be relying on *Davis v. Alaska*, *supra.* He, however, was in quite a different posture than the accused in that case. *Davis* involved a witness who allegedly feared his own probation would be revoked because of his participation in the same crime with which the accused was charged. It was thus error to prevent him from being cross-examined on this point. *Davis*, 415 U.S. at 311. No such claim was possible as to Mr. Chobert; the fact that he was on probation for arson, without more, did not bring him within the rule in *Davis*, because there was no reason--nor has petitioner suggested any--for Mr. Chobert to fear having his probation revoked.[FN34]

> FN34. Cases decided after petitioner's trial have expanded the scope of the rule in *Davis. E.g., Commonwealth v. Murphy*, 527 Pa. 309, 591 A.2d 278 (1991). As already noted, however, trial counsel cannot be ineffective for failing to apply later-decided cases.

(83) Moreover, it was petitioner's burden to prove prejudice at the PCRA hearing. *Commonwealth v. Howard, supra;* 42 Pa.C.S. §9543(a)(2)(ii); *see Commonwealth v. Hoffman*, 301 Pa. Super. 312, 447 A.2d 983 (1982) (failure to allow cross-examination for bias was harmless error where other witnesses independently sufficed to prove the charges). Mr. Chobert was called to testify by petitioner at the PCRA hearing, but petitioner never questioned him about this claim. When his arson offense was mentioned at sidebar during trial, Mr. Chobert did not see why it was even relevant, stating 'it doesn't matter about anybody else, it's my background.' (N.T. 6/19/82, 223) Thus, the only testimony on point refutes, rather than supports, an inference of bias.

(84) Furthermore, two other sequestered eyewitnesses independently described the shooting exactly as Mr. Chobert did, Mr. Chobert immediately identified petitioner as the shooter at the scene, and Mr. Chobert's pretrial statements were consistent with his description of the shooting at trial. Consequently, petitioner fails to prove prejudice.

(85) Finally, petitioner complains that Mr. Jackson 'failed to object to certain improper comments in the Commonwealth's guilt phase summation.' Since there were no such comments, this claim is frivolous.

B5. Claims of After-Discovered Evidence

(86) Petitioner claims that new evidence establishes his actual innocence. In order for petitioner to prevail on this claim, he must first meet his burden of proof.

(87) Pursuant to Section 9543(a)(2)(vi) of the PCRA, a defendant is entitled to post-conviction relief if he pleads and proves that his conviction resulted from: 'The unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced.'

(88) In *Commonwealth v. Frey*, 512 Pa. 557, 517 A.2d 1265 (1986), *cert. denied*, 481 U.S. 1007, 107 S.Ct. 1633, 95 L.Ed. 2d 206 (1987), our Supreme Court interpreted a previous, identical provision to mean that, as to element one, a defendant must prove the evidence could not have been obtained at or prior to the conclusion of trial by the exercise of reasonable diligence. With respect to the second element, a defendant must establish the evidence is of such a nature and character that a different verdict will likely result if a new trial is granted.

(89) Petitioner fails to meet the standards enumerated in 42 Pa. C.S.A. § 9543(a)(2)(vi) and explained in *Commonwealth v. Frey*, *supra*, for each of the following allegations of after-discovered evidence.

William Harmon

(90) Petitioner fails to prove that William Harmon was unavailable at trial through the exercise of reasonable diligence. Mr. Harmon's account of his supposed unavailability was not credible. He claimed he did not come forward for fourteen years, even though he supposedly knew he could clear petitioner, who he knew and admired. This witness also knew petitioner's brother, and one of petitioner's radio colleagues (N.T. 8/10/95, 117-20).

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(91) Mr. Harmon incredibly explained that he promised his mother he would not get involved, and that his situation had only recently changed as a result his mother's death (N.T. 8/10/95, 122-23). However, as this court stated in the instant Findings of Fact, ‘Mr. Harmon's regard for his mother apparently did not prevent him from being a pimp, a thief, a forger, a drug-user, a confidence man, or a burglar, nor did not dissuade him from committing mail fraud, or from selling drugs out of the house he shared with his wheelchair-bound mother. ‘ (N.T. 8/10/95, 123-38, 141-42)

(92) Even if Mr. Harmon's testimony were believable, petitioner would obviously have been aware that Mr. Harmon could have testified on his behalf since Mr. Harmon was supposedly present during the shooting. Petitioner fails to prove that Harmon was unavailable at trial given the exercise of reasonable diligence.

(93) Furthermore, Mr. Harmon's account of the shooting, which supposedly shows petitioner's ‘actual innocence,‘ was found to be incredible by this court. As a result, even if petitioner could establish the unavailability requirement under the PCRA rules, this evidence is not of such a nature and character that a different verdict will likely result if a new trial is granted.

Sharon Gaines Smith

(94) Ms. Smith claims that on December 9, 1981 she was living at the Midtown Hotel. She heard arguing, and then gunshots. She immediately looked out her window and allegedly saw five or six police officers beating a black man with dreadlocks. She claimed she had an ‘impression‘ or ‘thought‘ that the man being beaten might be a long-haired man she had previously seen in the area handing out pamphlets and talking about black people (N.T. 8/9/95, 112-19, 124-26).

(95) Ms. Smith's testimony that she was unavailable for trial was not credible. She supposedly failed to report the alleged beating for fourteen years, yet freely did so for purposes of the PCRA hearing. She knew of petitioner's trial, but did not come forward in 1982. It is unclear what prevented Ms. Smith from coming forward in 1982 and how such mystery circumstances ceased to have effect in 1995.

(96) Indeed, Ms. Smith admitted that she became a witness in the PCRA proceeding because she did not feel as though petitioner should be executed (N.T. 8/9/95, 119-22, 133). As a result, this court finds that Ms. Smith's testimony was not trustworthy.

(97) Moreover, this evidence, had it been introduced, was not exculpatory and would not have affected the outcome of the trial.

George Fassnacht

(98) The trial record and PCRA evidence show that Mr. Fassnacht was available for trial. Moreover, nothing in his testimony, had it been introduced, would have affected the outcome of the trial. Indeed, Mr. Fassnacht unwillingly corroborated several points of the prosecution's case. Therefore, once again, petitioner fails to meet his burden of proof as to how this witness constitutes after-discovered evidence.

Dr. John Hayes

(99) While Dr. Hayes was personally unavailable at trial--he was in medical school at the time--petitioner fails to prove that similar expert testimony was unavailable.

(100) Contrary to petitioner's argument, Dr. Hayes said nothing that would establish that the account of the shooting given by the Commonwealth's eyewitnesses was ‘medically impossible.‘ To the extent he expressed a generalized opinion that the autopsy was ‘incomplete‘ or ‘unreliable,‘ this opinion was given no weight in light of Dr. Hayes' truncated review of the record. Had similar testimony been introduced, it would not have affected the outcome of the trial.

Deborah Kordansky

(101) Ms. Kordansky was not unavailable; petitioner's trial counsel spoke to her during the trial, and she told him she had no information that would help the defense.

(102) At the PCRA hearing, Ms. Kordansky recounted that, on the night of the murder, between 3:45 and 4:00 a.m., she heard what she thought were firecrackers. She did not immediately look out of her window. After she heard a number of sirens, she went to her window, looked out and saw between eight and ten police cars and vans. She then saw someone running.

(103) Ms. Kordansky saw the running individual after she saw the police cars and vans. She did not state that the person she saw was running ‘away‘; as a matter of fact, the person was running from 13th Street toward 12th

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Street, which would pass the scene of the crime. She added that the person she saw could have been male or female, and could even have been a police officer.

(104) This evidence, had it been introduced, would not have affected the outcome of the trial and would have rebutted the defense witness who claimed he saw someone run from the scene toward 12th Street.

'Evidence' of 'police or prosecution bias.'

(105) As already noted, free-floating evidence of investigators' 'bias' is legally irrelevant. Petitioner in any event fails to prove such bias.

(106) Petitioner failed to prove that Officer Wakshul had been 'instructed to be available to testify' or that he was in fact available when petitioner attempted to call him on the last day of trial.

(107) In addition, his testimony would have been cumulative to that of Officer Bell and Priscilla Durham, and inculpatory.

(108) Petitioner fails to prove the alleged 'disappearance' of a bullet fragment, or what this fragment could have established.

(109) Sharon Gaines Smith did not testify that police beat or abused petitioner. She stated her 'impression' that the police beat and abused a so-called 'street preacher,' whose existence has not been proven.

(110) Carol Young, a Jefferson Hospital nurse, did not testify at the PCRA hearing. In her February 11, 1982 statement, which petitioner proffered as an offer of proof, she repeatedly stated that the police *did not* abuse petitioner.

(111) Robert Greer was plainly available at trial. His opinion at the PCRA hearing that plainclothes police were guarding Cynthia White was not supported by any facts, and was not credible. The sole basis Greer alleged for this assertion was that he supposedly saw two people in a parked car near where Ms. White was standing (N.T. 8/1/95, 175-77, 201-212). Even if true, the fact that two people were loitering in a parked car does not support an inference that Ms. White was being guarded by plainclothes police. Further, even if Ms. White was being guarded by plainclothes police, that would not amount to evidence of petitioner's innocence. Had Greer's PCRA testimony been introduced at trial, it would not have affected the outcome.

(112) Police did not 'compel' Dessie Hightower to take a polygraph examination; he took the test voluntarily. The evidence showed that he was told by the examiner that he had failed the test. This evidence was introduced to contradict Hightower's claim that he had been told he had passed.[FN35] Petitioner fails to prove that no other witnesses, including Cynthia White or Robert Chobert, were polygraphed. Even had he done so, the information would nevertheless be neither material nor relevant. To the extent it was admissible, all of the evidence referred to was available at trial, and none of it would have affected the outcome.

> FN35. Although such testimony would have been inadmissible in any event, defendant never offered to prove that Mr. Hightower had 'really' passed the examination. The sole offer of proof was the affidavit of an expert, which stated that the expert was unable to offer an opinion (N.T. 8/7/95, 66-68).

(113) Petitioner fails to present any credible, admissible evidence that he is actually innocent.

William Cook

(114) Where one's brother has been implicated in the shooting death of a police officer (which subsequently resulted in a sentence of death) and one has information as to his brother's innocence, this court cannot fathom any reason where such familial exculpatory witness would need a subpoena, would care how many warrants were outstanding against him, or would invoke his Fifth Amendment right. As stated so perfectly by our Superior Court, 'one would expect a relative who possessed exculpatory evidence to come forward of his own volition ….' *Commonwealth v. Dorman*, 377 Pa. Super. 419, 436, 547 A.2d 757, 765 (1988).

(115) This court concludes that Mr. Cook's failure to testify on his brother's behalf, where the defense proffered that Mr. Cook would testify favorably and was available for the instant PCRA evidentiary hearing, an adverse inference can be drawn against petitioner regarding the proffered testimony of his brother, William Cook. *See Dorman, supra; Commonwealth v. Harley*, 275 Pa. Super. 407, 418 A.2d 1354 (1980).

(116) Furthermore, petitioner fails to prove Mr. Cook

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was unavailable at trial. 42 Pa.C.S. §9543(a)(2)(vi) (after-discovered evidence not a basis for relief unless unavailable at time of trial). Indeed, petitioner fails to prove Mr. Cook was unavailable to testify at the PCRA hearing. Furthermore, since Mr. Cook did not testify at the PCRA hearing, petitioner also fails to prove that his testimony 'would have affected the outcome of the trial if it had been introduced.'

(117) This court similarly finds that Mr. Jackson was not ineffective for failing to call Mr. Cook as a witness at trial. The evidence established that this was petitioner's own decision.

(118) In addition, we conclude that had he testified at the PCRA hearing in accordance with the exculpatory theory posited by defense counsel (*i.e.*, that some unidentified third party in Mr. Cook's car murdered the victim), Mr. Cook's credibility would have been highly questionable, if not completely unreliable and definitely biased.

(119) After the shooting, Mr. Cook blurted to arriving police officers that he had nothing to do with the shooting (N.T. 6/10/82, 131, 155). He did not say, for example, 'My brother didn't do it,' or claim that the 'real' attacker fled, even when he saw the police arrest his brother. Moreover, Mr. Cook later pleaded guilty to simple assault of Officer Faulkner. He attended his brother's trial, but gave no indication that he possessed exculpatory information. Any attempt by Mr. Cook to claim that the victim was killed by an unknown third party rather than his brother, fourteen years after the fact, would have to be viewed with the utmost caution. *See Commonwealth v. Scott*, 503 Pa. 624, 630, 470 A.2d 91, 94 (1983) (where co-indictee of appellant disclaimed any complicity in assault on victim in his own trial, but allegedly confessed to shooting the victim and attempted to exonerate appellant following appellant's trial, post-verdict statement was 'clearly untrustworthy and unreliable, bordering on charade'). His counsel, moreover, described Mr. Cook as 'emotionally unstable' at the September 12, 1995 listing.

(120) Since petitioner has failed to produce Mr. Cook's testimony, we conclude that he cannot prove Mr. Jackson's failure (even assuming *arguendo* that it was Mr. Jackson's failure and not petitioner's) to call him at trial 'so undetermined [sic] the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.'

(121) We also conclude petitioner has failed to prove Mr. Cook's testimony would not have been inculpatory. Thus, he also cannot prove that Mr. Jackson's decision (if it was his decision) 'could not have been the result of any rational strategic or tactical decision by counsel.' 42 Pa.C.S. §9543 (a)(2)(iv), (a)(4).

B6. Claim of Improper Denial of Self-Representation; Appointment of Counsel

(122) Petitioner, as an indigent accused of an offense punishable by imprisonment, had the right to have counsel appointed for him; in this case, Anthony Jackson, Esquire. *See Commonwealth v. Brown*, 327 Pa. Super. 505, 476 A.2d 381 (1984); 42 Pa. C.S.A. §316(b) & (c).

(123) This court properly did not allow John Africa to represent petitioner because Mr. Africa was not a trained, licensed or practicing attorney anywhere in the United States of America. 'Counsel,' which must be assigned to an indigent petitioner, is defined as an attorney or counselor. 'Counselor' is defined as 'an attorney; lawyer. Member of the legal profession ….' *See Black's Law Dictionary*, 6th Ed., 347-48. Assuming *arguendo* that John Africa was an attorney, while an indigent petitioner is entitled to free counsel, he is not entitled to free counsel of his own choosing. *Commonwealth v. Chumley*, 482 Pa. 626, 394 A.2d 497 (1978), *cert. denied*, 440 U.S. 966, 99 S.Ct. 1515, 59 L.Ed. 2d 781 (1980).

(124) Petitioner had the absolute right to waive assigned counsel. In this case, petitioner's waiver of appointed counsel was knowing, intelligent and voluntary. *See Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975). *See also* 42 Pa. C.S.A. §316 (comment).

(125) Even though petitioner properly waived appointed counsel, this court appropriately retained Mr. Jackson as 'backup counsel.' The designation as 'backup counsel' is synonymous with 'standby counsel.' Anthony Jackson, Esquire, was fully aware of his duties as 'backup counsel,' which is defined in 42 Pa. C.S.A. §318(d) under the auspice of 'standby counsel.' *See also Mayberry v. Pennsylvania*, 400 U.S. 455, 468, 91 S.Ct. 499, 506, 27 L.Ed. 2d 532 (1971); *Faretta v. California, supra; Commonwealth v. Africa*, 466 Pa. 603, 353 A.2d 855 (1976). Moreover, the Supreme Court of Pennsylvania has stated that 'standby' counsel should be appointed where a petitioner who seeks to represent himself may be disruptive, which was apparent in this case. *Commonwealth v. Africa*, *supra* at 621, 353 A.2d at 864.

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(126) Neither this court nor the Honorable Paul Ribner erred or abused discretion by denying petitioner's and Mr. Jackson's requests for Mr. Jackson to be removed from the case and for appointment of new 'backup' counsel. Petitioner fails to present any substantial reasons for this court to grant his request. *Commonwealth v. Johnson*, 309 Pa. Super. 117, 454 A.2d 1111 (1983). *See also Commonwealth v. Person*, 345 Pa. Super. 341, 498 A.2d 432 (1985).

(127) It was highly improper for petitioner to continually disrupt the proceedings by demanding representation by John Africa. *See Commonwealth v. Grant*, 229 Pa. Super. 419, 323 A.2d 354 (1974) (petitioner may not frustrate or obstruct the orderly procedure of the court and the administration of justice by continual insistence on representation by private counsel or by the continual refusal of the services of the public defender).

(128) This court properly removed petitioner as pro se counsel and required 'backup' counsel, Anthony Jackson, Esquire, to take over as primary counsel. Petitioner refused to heed this court's warnings that petitioner would be removed for disruptive behavior (For example, *see* N.T. 6/17/82, 1.44-1.128). *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed. 2d 353 (1970) ('a petitioner can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on [misbehaving]'). *See also Commonwealth v. Africa, supra* at 621, 353 A.2d at 864; *Faretta v. California, supra.* These incidents were preceded by similar behavior that occurred throughout pretrial proceedings (N.T. 6/1/82, 31-93; 6/2/82, 2.79-2.92; 6/3/82, 3.17, 3.41; 6/4/82, 4.110-4.125; 6/7/82, 177-78; 6/8/82, 2.138-2.144; 6/9/82, 3.18-3.40).

B7. Claim That the Trial Court Improperly Removed Petitioner When He Disrupted the Proceedings

(129) This issue has been fully discussed in the immediately preceding paragraphs and is not the subject of additional review. This court concludes petitioner's claim is entirely meritless.

B8. Claim That the Prosecutor's Guilt Phase Closing Argument Was Improper

(130) Petitioner, without explanation, cites a page of the record and concludes that the prosecutor 'invited the jury to draw a negative inference from [petitioner's] decision not to take the stand.' *(See* Amended Petition at 54) The page cited, N.T. 7/1/82, 172, contains no such thing. There is a reference to the defense strategy and arguments, which was in no way improper, and which made no reference to petitioner's failure to testify.

(131) Citing N.T. 7/1/82, 169-70, petitioner states that the prosecutor 'ridiculed [his] assertion of the right to counsel,' and 'exploited [his] … difficulties with the court because of his desire to proceed pro se, characterizing [him] as 'vicious'.' *(See* Amended Petition at 54) The record petitioner cites simply does not comport, in any way, with his argument. The prosecutor argued that petitioner's statement, 'I shot him and I hope he dies, ' was arrogant, and that petitioner's murder of the victim was a 'vicious act.' This does not remotely resemble petitioner's representations.

(132) Petitioner cites N.T. 7/1/82, 171, and claims that the prosecutor 'improperly vouched for two key prosecution witnesses,' and 'exploited' the court's supposed prevention of his presenting a full defense. In reality, the prosecutor argued that two detectives, and others, had worked hard on the case, and that petitioner's argument that the purpose of this work was to frame him was not worthy of belief. Again, the record does not remotely resemble petitioner's argument.

(133) 'Finally,' petitioner states--this time without citing a page--the prosecutor 'invoked a rhetorical strategy that called upon the jury to take action as a means to vent the community's outrage against crime.' *(See* Amended Petition at 54) Assuming petitioner is referring to N.T. 7/1/82, 171, the prosecutor's argument was that the instant crime was an 'uncompromising vicious act' that 'demands action. This act demands a reasonable view and the result of responsibility and courage.' Thus, the prosecutor asked the jury to act properly on the evidence, which is not consistent with petitioner's characterization. This claim is frivolous.

(134) Moreover, this issue has been previously litigated on the merits by the Supreme Court of Pennsylvania in *Commonwealth v. Abu-Jamal, supra,* and is not subject to further review under the Post Conviction Relief Act, 42 Pa. C.S.A. §9544(a). This issue may not be relitigated merely because a new or different theory is posited as a basis for reexamining a claim that has already been decided. *Commonwealth v. Senk, supra* at 634-35, 437 A.2d at 1220; *Commonwealth v. Tenner, supra* at 546, 547 A.2d at 1197.

B9. Claim That the Trial Court Improperly Removed a

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1995 WL 1315980, 30 Phila.Co.Rptr. 1
(Cite as: 1995 WL 1315980 (Pa.Com.Pl.), 30 Phila.Co.Rptr. 1)

Juror

(135) This court did not err by dismissing juror number one, an African-American female named Jeannie Dawley, selected by petitioner, who wanted to go home to take her cat to the veterinarian. After this court declined the juror's request, she violated this court's sequestration order.

(136) Furthermore, this juror was dismissed pursuant to defense counsel's agreement, as a result of her willful violation of sequestration. Defense counsel's decision was reasonable as it was evident from the voir dire that this juror disliked petitioner a great deal. (N.T. 6/4/82, 177-78; 6/18/82, 2.35-2.46). Petitioner's claim that the court 'engineered' the juror's removal *(See* Amended Petition at 55) has no basis in fact, and petitioner presented no evidence to prove this assertion at the PCRA hearing.

(137) Moreover, this issue has been previously litigated on the merits by the Supreme Court of Pennsylvania in *Commonwealth v. Abu-Jamal, supra,* and is not subject to further review under the Post Conviction Relief Act, 42 Pa. C.S.A. §9544(a). This issue may not be relitigated merely because a new or different theory is posited as a basis for reexamining a claim that has already been decided. *Commonwealth v. Senk, supra* at 634-35, 437 A.2d at 1220; *Commonwealth v. Tenner, supra* at 546, 547 A.2d at 1197.

B10. Claim of a *Batson* Violation

(138) The *Batson* requirements for establishing a prima facie case of intentional racial discrimination are: (1) that the petitioner is a member of a cognizable racial group and that the prosecution used peremptory challenges to remove from the venire, members of the petitioner's race; (2) that the petitioner can rely on the presumption that peremptory challenges to veniremen permit discrimination by those inclined to do so; and (3) that the facts and relevant circumstances raise the inference that the prosecutor used the peremptory challenges to racially discriminate. *Batson v. Kentucky, supra.* Once these three requirements are satisfied, the burden shifts to the prosecution to explain the adequate racial exclusion. *Commonwealth v. McCormick,* 359 Pa. Super. 461, 519 A.2d 442 (1986).

(139) The Commonwealth did not intentionally or racially discriminate against African-American jurors in its use of peremptory strikes in violation of *Batson* and its progeny.

(140) Furthermore, this issue has been previously litigated on the merits by the Supreme Court of Pennsylvania in *Commonwealth v. Abu-Jamal, supra,* and is not subject to further review under the Post Conviction Relief Act, 42 Pa. C.S.A. §9544(a). This issue may not be relitigated merely because a new or different theory is posited as a basis for reexamining a claim that has already been decided. *Commonwealth v. Senk, supra; Commonwealth v. Tenner, supra.*

(141) Although this claim was previously litigated, the Commonwealth withdrew its objection to petitioner introducing evidence regarding it at the PCRA hearing. Petitioner, however, presented only a stipulation, to the effect that three individuals not originally noted on the record as being black would testify that they were African-American veniremembers who had been peremptorily challenged by the Commonwealth. Later, petitioner withdrew from the stipulation as to one of the alleged venirepersons, but called no witnesses (N.T. 8/3/95, 259-60). Petitioner subpoenaed the trial prosecutor, but did not call him to testify.

(142) Petitioner's stipulation fails to suggest that the Pennsylvania Supreme Court's alternative resolution of this claim was incorrect. The stipulation goes solely to the number of black jurors who were removed. The Supreme Court's analysis, however, did not turn on whether eleven (as petitioner claimed on appeal), ten (as claimed at the PCRA hearing), or eight (as shown in the trial record) of the venirepersons removed by the Commonwealth were black. Rather, the court focused on the third prong of the *Batson* prima facie analysis--whether 'any other relevant circumstances' existed to support an inference of discriminatory intent. *Commonwealth v. Abu-Jamal, supra* at 195, 555 A.2d at 849; 476 U.S. at 96.

(143) The Supreme Court found the relevant circumstances refuted petitioner's claim. Specifically, it noted that petitioner struck at least one black venireperson who had been accepted by the Commonwealth; the record failed to show how many other black venire members accepted by the Commonwealth were removed by petitioner; an undetermined number of black jurors were removed for cause or hardship; and the Commonwealth had five unused peremptory challenges-- it used a total of fifteen out of twenty available--yet the first juror selected was black, and three additional black persons were later selected. Only two black jurors ultimately heard the case because James Burgess, who was accepted by the Commonwealth, was peremptorily struck by petitioner and

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Jeannie Dawley was dismissed for violating sequestration.

(144) The Commonwealth could have removed both black jurors with its unused peremptories if its actions were motivated by racial prejudice. *Abu-Jamal, supra* at 197-98, 555 A.2d at 850.

(145) Finally, the Supreme Court stated,

'[W]e have examined the prosecutor's questions and comments during *voir dire*, along with those of the appellant and his counsel, and find not a trace of support for an inference that the use of peremptories was racially motivated.' *Id.* at 198, 555 A.2d at 850.

(146) To the extent the instant claim was cognizable, it was petitioner's burden to prove that the above analysis was in some respect incorrect. This, he fails to do.

B11. Claim That Jury Pool Selection Was Not 'Random'

(147) Petitioner claims the jury in his case was selected using the same methods as those described in *Commonwealth v. Rosado*, 26 Phila. Co. Rptr. 22 (1993) (*i.e.*, jury pool selected randomly from voter registration list) with respect to the period prior to 1992.[FN36] His claim is that those methods were unconstitutional because they are not 'random.' *(See* Amended Petition at 58)

FN36. The current system includes a list of licensed drivers.

(148) This claim should be deemed waived as it was not raised before trial. Furthermore, a challenge to the jury array must be raised 'not later than five days before the first day of the week the case is listed for trial of criminal cases for which the jurors have been summoned and not thereafter [[[[.]' Pa.R.Crim.P. 1104(b); *Commonwealth v. Brown*, 396 Pa. Super. 171, 578 A.2d 461 (1990) (claim that Philadelphia jury selection practice underrepresented minorities waived where raised on third day of voir dire); *see also Commonwealth v. Jackson*, 336 Pa. Super. 609, 486 A.2d 431 (1984). This claim should also be waived because it was not mentioned at trial, on post-trial motions, or on appeal. Since this court has relaxed the waiver standard while analyzing other issues in this matter, we will do the same here and address the claim on the merits.

(149) Petitioner's theory is the jury selection procedure used in 1982 was not sufficiently random because the jury pool was drawn from the local voter registration list. His complaint is that blacks and other minorities allegedly do not register to vote in proportion to their numbers and thus, are underrepresented.

(150) As a matter of law, this claim has been repeatedly rejected by our appellate courts. This court must conclude that the jury pool in this matter was derived from a non-random selection process because it utilized voter registration lists. Such is not a violation of state and/or federal law. *Commonwealth v. Henry*, 524 Pa. 135, 569 A.2d 929 (1990); *Commonwealth v. Brown, supra* at 184, 578 A.2d at 467; *Commonwealth v. Terry*, 513 Pa. 381, 405-406, 521 A.2d 398, 410 (1987); *Commonwealth v. Bell*, 328 Pa. Super. 35, 48-49, 476 A.2d 439, 446-47 (1984); *Commonwealth v. Edwards*, 493 Pa. 281, 426 A.2d 550 (1981); *Commonwealth v. Martinez*, 475 Pa. 331, 380 A.2d 747 (1977); *Commonwealth v. Dessus*, 262 Pa. Super. 443, 461-62, 396 A.2d 1254, 1263 (1978); *Commonwealth v. Jones*, 465 Pa. 473, 479, 350 A.2d 862, 866 (1976).

(151) The Pennsylvania Supreme Court case of *Commonwealth v. Jones*, definitively states:

'We reject this argument because we do not believe the Constitution requires a source of prospective jurors other than those names gathered from the voter registration lists simply because one identifiable group of individuals may vote in a proportion lower than that of the general population. … 'Use of (voter registration) lists as the sole source of names for jury duty is constitutionally permissible *unless this system results in the systematic exclusion of a cognizable group or class of qualified citizens.*' And a group of persons who have failed to register to vote has never been considered to constitute a 'cognizable group.' ' *Jones, supra* at 479, 350 A.2d at 866 (citations and emphasis omitted).[FN37] The court approved the use of a voter registration list as the source for qualified jurors, holding that '[t] he choice of the registered voter list as the source of names for jury selection is surely not invidious or systematic discrimination. … ' *Jones, supra* at 479-80, 350 A.2d at 866.[FN38]

FN37. The court in *Jones* excepted a situation where the voter registration list itself reflected discriminatory practices, noting that no such allegation had been made there. *Jones, supra* at 479-80, 350 A.2d at 866. No such allegation has been made in this case. *See Commonwealth v. Edwards*, 493 Pa. 281, 426 A.2d 550 (1981) (ap-

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pellant cannot prevail on discriminatory jury selection claim on theory that voter registration selection improper, without showing discrimination in voter registration).

FN38. The *Jones* court noted that Philadelphia County's use of the voter registration list to generate its pool of prospective jurors had been approved by federal courts. *Id.* at 480 n.8, 350 A.2d at 866 n.8. The court indicated its approval of the method used to choose names from the voter registration list: a bunch of names is drawn to determine the first name and then every 'nth' name is selected on the voter registration list. *Id.* at 477-78 & n.4, 350 A.2d at 865 & n.4. This method is essentially the same as the one that was used in Philadelphia County in 1982.

(152) The Supreme Court has repeatedly reaffirmed *Jones*, and most recently stated in *Commonwealth v. Henry:*

'[A]ppellant's argument is that jury panels selected from voter registration lists systematically exclude blacks because blacks, so it is claimed, do not register to vote in proportion to their numbers.

'This court has repeatedly held that a criminal defendant may not attack the racial composition of jury panels drawn from voter registration lists on the theory that blacks are underrepresented in voter lists.' *Commonwealth v. Henry, supra* at 144, 569 A.2d at 933 (citations omitted).

(153) The Supreme Court held that because voter registration lists have been established as an acceptable source of the master list, and because the jury panels were formed by computer without regard to race, this claim of error is 'without merit.' *Id.* at 145, 569 A.2d at 933.

(154) Petitioner's theory that a jury selection system must be 'random' is also incorrect. It is permissible, for example, to exclude from consideration persons who are not qualified to serve; such as minors, people who do not speak English, and noncitizens. *See* 42 Pa. C.S.A. §4502(1) (persons 'unable to read, write, speak, and understand the English language' excluded from service). *See also Fay v. New York*, 332 U.S. 261, 276, 67 S.Ct. 1613, 1622 (1947) (improper to use census figures not limited to persons who meet qualifications of citizenship, age, and language). Of course the selection system may not unconstitutionally exclude potential jurors based on their race or other impermissible factors, but it need not select persons for jury service with statistical randomnimity.

(155) This court concludes that petitioner made no offer to prove that potential jurors in Philadelphia were ever excluded on the basis of their race or other impermissible factors. This claim fails under any degree of scrutiny.

B12. Claim That Three Jurors Discussed the Case Prematurely

(156) Petitioner failed to raise this claim at trial or on direct appeal, and made no offer to prove that the information on which the claim is based was unavailable at trial or on appeal given the exercise of reasonable diligence. Therefore, this claim was waived.

(157) Even though this court concludes petitioner waived review of this issue, a discussion on the merits follows because this court has relaxed the waiver standard due to the nature of petitioner's irreversible sentence.

(158) Petitioner complains he was not allowed to call former jurors in this case to testify to alleged premature deliberations by members of the jury. Such post-verdict testimony is unquestionably inadmissible. *Commonwealth v. Patrick*, 416 Pa. 437, 206 A.2d 295 (1965) (after trial, jurors may not impeach a verdict by their own testimony); *Commonwealth v. Stark*, 363 Pa. Super. 356, 526 A.2d 383 (1987), *alloc. denied*, 517 Pa. 622, 538 A.2d 876 (1988) (after trial, juror's belief that other juror had falsely answered voir dire question inadmissible); *Commonwealth v. Williams*, 279 Pa. Super. 28, 420 A.2d 727 (1980) (after trial, juror's testimony that other members engaged in separate deliberations inadmissible). Petitioner was entitled to call persons other than jurors who had witnessed alleged premature deliberations, but he did not offer to do this.

(159) One of the proffered witnesses was one of petitioner's current attorneys, Steven Hawkins, Esquire. Petitioner did not claim Mr. Hawkins was present at his 1982 trial or witnessed the interaction of the jurors. Given the absence of any offer to lay a proper foundation, this court concludes Mr. Hawkins could not competently testify about supposed premature deliberations.

(160) This court further concludes petitioner failed to show how his inadmissible evidence, assuming *arguendo*

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that it was previously unavailable, was exculpatory or that it would have affected the outcome of the trial if it had been introduced.

(161) Petitioner relies on two inapposite cases. In *United States v. Resko*, 3 F.3d 684 (3rd Cir. 1993), premature deliberations were brought to the trial court's attention during the trial, but the trial judge failed to determine if such deliberations had occurred or whether they were prejudicial. This court found no such claim here. *Commonwealth v. Kerpan*, 508 Pa. 418, 498 A.2d 829 (1985), merely held that trial counsel was ineffective for not objecting to an erroneous instruction that jurors should discuss the evidence before deliberations. This court gave no such instruction in this case.

B13. Claim That the Homicide Program of the Philadelphia Court of Common Pleas Violates the Pennsylvania Constitution and Due Process

(162) Although this claim should be waived because petitioner failed to raise it at any stage prior to these PCRA proceedings, this court has relaxed the waiver standard and will address the issue on the merits.

(163) The existence of a homicide unit within the court of common pleas does not violate Article 1, §15 of the Pennsylvania Constitution. That provision does not apply to a court erected by law with general criminal jurisdiction. *Common wealth v. Moore*, 534 Pa. 527, 550, 633 A.2d 1119, 1130 (1993), *cert. denied*, 115 S.Ct. 908 (1995); *Commonwealth v. Green*, 58 Pa. 226, 232 (1868).

(164) Petitioner cites no authority for his due process argument. He states in his PCRA petition that homicide judges are 'hardened' and biased in favor of the prosecution, but he offered no evidence to prove this assertion at the PCRA hearing.

(165) Moreover, petitioner fails to explain how hearing homicide cases would somehow bring about this result. The same argument could be made as to any judge that hears criminal cases generally. The notion that there is a constitutional 'due process' requirement barring judges from being administratively assigned to criminal cases, or a specific class of criminal cases, is ludicrous.

B14. Claim That the Pennsylvania **Death Penalty** Is Unconstitutional As Applied

(166) This court concludes that the Pennsylvania **death penalty** is not applied disparately, unequally, arbitrarily, and freakishly and is not applied in violation of the federal or state constitutions. *Commonwealth v. Zettlemoyer, supra, rehearing denied*, 463 U.S 1236, 104 S.Ct. 31, 77 L.Ed. 2d 1452 (1983); *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed. 2d 255 (1990); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976).

(167) Petitioner fails to raise this claim at trial or on direct appeal. Therefore, this claim is waived. As petitioner has not overcome that procedural bar, the claim is precluded from PCRA review and may not be further considered. 42 Pa.C.S. §9543(a)(3). The following discussion of the merits is undertaken in the alternative.

(168) Petitioner argues that the Pennsylvania **death penalty** is unconstitutional because of the alleged 'geographical and racial disparity' with which it is applied. Petitioner made no offer of proof as to how this is so, however.

(169) Moreover, petitioner's legal analysis is flawed. 'Consistency' in capital sentencing is not measured by comparing its frequency of use within individual cities, counties or other localities within a state. It is achieved by defining aggravating circumstances which narrow the class of death-eligible murderers. *E.g., Blystone v. Pennsylvania*, 494 U.S. at 303, 110 S.Ct. at 1081; *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733 (1983); *Gregg v. Georgia, supra* (joint opinion); *Proffitt v. Florida*, 428 U.S. 242, 255, 96 S.Ct. 2960, 2968 (1976) (joint opinion); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976) (joint opinion).[FN39]

FN39. Assuming *arguendo* that Philadelphia has '15 times as many' *(See* Amended Petition at 60) capital offenders as Allegheny County, this suggests no disparity. Philadelphia has many times more murder cases than Allegheny County. Indeed, Philadelphia is by far the most populous county in the state, and has more murder cases than all other Pennsylvania counties combined. Publicly available data from the Administrative Office of Pennsylvania Courts (AOPC) show that, from 1978 through 1994, there were 1,902 persons convicted of murder in the first degree in Pennsylvania, 171 of whom have been sentenced to death--a rate of 8.99% statewide. Philadelphia was the scene of 1,079 of those murders, in which 97 offenders were sentenced to death--a rate of 8.98%. In all of Pennsylvania's 66 other counties combined, there were only 823 persons

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> convicted of first degree murder in the same period, 74 of whom were sentenced to death--a rate of 8.99%. Thus, there is no geographical disparity.

(170) Nor may constitutional 'inconsistency' be shown by merely alleging, as petitioner has done, that 60% of the murderers sentenced to death in Pennsylvania are African-American. *See McCleskey v. Kemp*, 481 U.S. 279 (1987). The sentencing statute provides for individualized consideration of the offender, his record, and his offense. Petitioner made no offer of proof to support his implication in his PCRA petition that there is some undescribed form of racial discrimination built into the Pennsylvania capital sentencing statute.

B15. Claim That the Verdict Form Was Unconstitutional

(171) Petitioner fails to raise this claim at trial or on direct appeal. Therefore, this claim should be waived. As petitioner has not overcome that procedural bar, the claim should be precluded from PCRA review and may not be further considered. 42 Pa.C.S. §9543(a)(3). The following discussion of the merits is undertaken in the alternative.

(172) Petitioner claims the verdict form in this case violated the rule in the later-decided case of *Mills v. Maryland*, 486 U.S. 383 (1988). Petitioner offered no evidence with respect to this claim at the PCRA hearing.

(173) The constitutionality of similar verdict forms, along with the instructions given here, has repeatedly been upheld. *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 306-308 (3rd Cir.) *(rehearing denied), cert. denied*, 502 U.S. 902, *rehearing denied*, 502 U.S. 1000 (1991); *Griffin v. Delo*, 33 F.3d 895, 905-906 (8th Cir. 1994) *(rehearing and rehearing en banc denied)* (instructions that jury must be unanimous as to the outcome of the weighing stage did not imply that jury must be unanimous in finding a mitigating circumstance); *Maynard v. Dixon*, 943 F.2d 407, 418-20 (4th Cir. 1991), *cert. denied*, 502 U.S. 1110 (1992) (instructions identical to those given here); *Commonwealth v. Travaglia*, *supra; Commonwealth v. Tilley*, 528 Pa. 125, 595 A.2d 575 (1991); *Commonwealth v. Williams*, 524 Pa. 218, 570 A.2d 75 (1990); *Commonwealth v. O'Shea*, 523 Pa. 384, 567 A.2d 1023 (1989), *cert. denied*, 498 U.S. 881 (1990); *Commonwealth v. Billa*, 521 Pa. 168, 555 A.2d 835 (1989); *Commonwealth v. Frey*, 520 Pa. 338, 554 A.2d 27 (1989), *cert. denied*, 494 U.S. 1038 (1990).[FN40]

FN40. *See Battle v. Delo*, 19 F.3d 1547, 1560-61 (8th Cir. 1994) *(rehearing en banc denied)* (alternative holding) (no error to charge that jury must return life sentence if it unanimously decided that one or more mitigating circumstances outweighed any aggravating ones); *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1208 (1994) (same: court charged that jury must unanimously find that aggravating circumstances outweighed 'any' mitigating circumstances); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120-21 (6th Cir 1990) *(en banc) (rehearing and rehearing en banc denied), cert. denied*, 499 U.S. 970 (1991) (same: court charged that jury must be unanimous in finding any aggravating circumstance but was silent on how many jurors had to find any mitigating circumstance); *DeShields v. Snyder*, 829 F. Supp. 676, 688-89 (D. Del 1993) (court instructed that jury must unanimously find that aggravating circumstances outweighed any mitigating circumstances).

(175) [sic] Petitioner failed to sustain his burden of proving the merits of this claim.

B16. Claim That the Prosecutor's Penalty Phase Closing Argument Was Improper

(176) This claim was previously litigated on direct appeal. *Abu-Jamal, supra* at 207-211, 555 A.2d at 855-57.

(177) Citing N.T. 7/3/82, 56, petitioner claims the prosecutor told the penalty jury that their function was 'simply' a matter of aggravation and mitigation *(See* Amended Petition at 63). This reference is taken out of context. In reality, the prosecutor contrasted his argument to that of defense counsel--who had questioned the philosophical justification for capital punishment--stating:

'Now, ladies and gentlemen, what we're talking about in terms of sentencing is aggravating and mitigating circumstances. That is it. I'm not going to come up with philosophy or the statutes, or whatever, except perhaps on one or two circumstances, and I will attempt to rebut something that Mr. Jackson said. But, other than that, what you're concerned about is just that. Aggravating and mitigating circumstances and the effect of either.' N.T. 7/3/82, 56.

(178) This statement was in no way improper, nor does petitioner explain why it should be considered objectionable.

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(179) Next, citing N.T. 7/3/82, 58-59, petitioner states that the prosecutor 'urged the jury to view its task mechanistically.' *(See* Amended Petition at 63) The prosecutor stated:

'[I]f the aggravating outweighs the mitigating, then the law requires the **death penalty**. … [I]f you find those facts, it's mandated by the statute; it's really not a question of discretion ….' N.T. 7/3/82, 58-59.

(180) This was a correct statement of the law. If the jury determines that one or more aggravating circumstances outweigh any mitigating circumstances, the sentence 'must' be death. 42 Pa.C.S. §9711(c)(iv). The jury has no discretion at that point.

(181) The mandatory feature of §9711 has been approved by the Supreme Court of Pennsylvania and the Supreme Court of the United States. *Blystone v. Pennsylvania*, *supra* (Pennsylvania capital sentencing statute not unconstitutional because it mandates a death sentence where the jury finds aggravating circumstances and no mitigating circumstances, or aggravating circumstances that outweigh mitigating circumstances); *Commonwealth v. Peterkin*, 511 Pa. 299, 326-28, 513 A.2d 373, 387-88 (1986), *cert. denied*, 479 U.S. 1070 (1987). The purpose of this feature is to forestall the problems of potential jury nullification and arbitrariness identified in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972) (plurality) and *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978 (1972).[FN41]

> FN41. *Furman* concluded that allowing a sentencer unfettered discretion to impose or not impose the **death penalty** resulted in its being employed arbitrarily. In *Woodson*, the court concluded that a statute that removed all discretion and required a death sentence in all cases of capital murder did not properly address the *Furman* problem, because in practice juries would arbitrarily nullify the death sentence by improperly refusing to convict some defendants of capital murder.

(182) As the Pennsylvania Supreme Court explained in *Peterkin:*

'Although it is true that the Pennsylvania **death penalty** statute does not allow a jury to avoid imposition of a death sentence through the exercise of an unbridled discretion to grant mercy or leniency, the statute permits the defendant to introduce a broad range of mitigating evidence that can support the finding of one or more mitigating circumstances which may outweigh the aggravating circumstances found by the jury. Appeals for mercy and leniency can be founded upon and made through introduction of evidence along this broad spectrum of mitigating circumstances. The channelling of considerations of mercy and leniency into the scheme of aggravating and mitigating circumstances is consistent with the mandate of Furman v. Georgia … that the discretion of the sentencing body in capital cases 'be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' ' *Peterkin, supra* at 327-28, 513 A.2d at 387-88 (citations omitted). *See Commonwealth v. Graham*, No. 38 Capital Appeal Dkt. (Pa., July 18, 1995) (where sentencing judge found that aggravating circumstances outweighed mitigating, judge had no discretion to make death sentences consecutive to a life sentence).

(183) The Pennsylvania Supreme Court further explained the purpose of the mandatory feature of §9711 in *Commonwealth v. Young*, 536 Pa. 57, 637 A.2d 1313 (1993), *cert. denied* 114 S.Ct. 1389 (1994), where the lower court properly denied an instruction that the sentencing jury could impose life for 'any reason whatsoever:'

'[S]uch an instruction would inject arbitrariness and capriciousness into the capital sentencing process. In the absence of a standard to guide the jury's expression of mercy and leniency, there would be no guarantee of consistency in sentencing across cases. Appellant was allowed to present and argue any evidence which was relevant and admissible in an attempt to convince the jury that the death sentence should not be imposed in his case. That is all that is constitutionally required.' *Young, supra* at 76, 637 A.2d at 1322.

(184) Thus, the prosecutor did not 'urge the jury to view its task mechanistically.' He correctly stated the law.

(185) Petitioner contends the prosecutor at N.T. 7/3/82, 62, 'impermissibly' told the jury that the case was about 'law and order.' *(See* Amended Petition at 64) This was a response to petitioner's closing argument, which questioned the validity of making the murder of a police officer an aggravating circumstance (N.T. 7/3/82, 42-43). The prosecutor replied that the Pennsylvania legislature made the murder of a police officer an aggravating circumstance because police are essential to maintaining law and order (N.T. 7/3/82, 62-65). Even having taken the

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prosecutor's argument out of context, moreover, petitioner fails to explain what makes it 'impermissible.' *See Commonwealth v. Burton*, 491 Pa. 13, 22, 417 A.2d 611, 615 (1980) (references to law and order during trial summation permissible).

(186) Furthermore, the prosecutor's comments were a fair response to petitioner's earlier remarks.

(187) Petitioner argues that the prosecutor should not have been allowed to refer to petitioner's own courtroom conduct *(See* Amended Petition at 64). He cites no authority for this claim, nor does any exist. Of course petitioner's own conduct before the jury was a relevant consideration, and fully open to comment in the prosecutor's closing.

(188) Next, citing N.T. 7/3/82, 59-60, petitioner complains that the prosecutor 'exploited' his 'decision not to testify during the guilt phase.' In reality, the prosecutor argued that there was no evidence to support the mitigating circumstance of emotional disturbance, and pointed out that petitioner, who had testified in the guilt phase, 'did not choose to take the stand and testify what the circumstances were.' Moreover, the prosecutor stated that petitioner had an 'absolute right' to proceed in that manner. This did nothing to 'exploit' petitioner's action or inaction in the guilt phase.

(189) Since petitioner had recently taken the stand and testified in the penalty phase, it is unlikely that the jury could have understood this penalty phase argument as a reference to his decision not to testify in the guilt phase.

(190) Petitioner claims that the prosecutor 'improperly referred to his mother's views of [defendant's] future dangerousness and the appropriateness of the **death penalty**.' *(See* Amended Petition at 64) This misrepresents the record. In reality, the prosecutor was referring to the defense argument that the murder of a police officer should not be an aggravating circumstance. He proffered an illustrative anecdote in which his elderly mother supposedly told him, '[I]f you can come up and kill a police officer, who is going to protect me?' (N.T. 7/3/82, 65). There was no specific reference to petitioner, and nothing that could remotely be characterized as a reference to his 'future dangerousness.' Nor was this a comment on the appropriateness of the **death penalty**. It was a direct response to the defense argument that it was wrong to make the murder of a police officer an aggravating circumstance.

(191) Petitioner complains that the prosecutor 'improperly introduced evidence of Officer Faulkner's police personnel record, which had nothing to do with the aggravating or mitigating factors at issue.' *(See* Amended Petition at 64) This is frivolous. First, it is self-evident that the victim's standing as a police officer was an element of the aggravating circumstance at issue. Second, as a matter of law the Commonwealth is not restricted to introducing evidence that is relevant only to aggravating and mitigating circumstances.

(192) Just as the murderer is entitled to be considered by the sentencer as an individual, *e.g., Lockett v. Ohio*, 438 U.S. 586 (1978), so too the murder victim must be considered as an individual, whose death represents a unique loss to society and to his family. The law permits the defense to introduce witnesses in the penalty phase to praise the character and background of the convicted murderer; it would be strange indeed if it held that nothing could be said of the character of the victim. *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597 (1991).

(193) Thus, Pennsylvania law permits evidence allowing individualized consideration of the victim, so that the just consequence to the taker of that victim's life may be accurately determined by the sentencer.

(194) It is well established that the penalty statute does not restrict the Commonwealth's case to proof of specific aggravating circumstances alone. Section 9711(a)(2) states:

'In the sentencing hearing, *evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed* and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e). Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).' (emphasis added).

(195) Construing the above language *in this case*, the Pennsylvania Supreme Court noted:

'If matters relating to the aggravating and mitigating circumstances were the only matters capable of being explored, the first phrase emphasized above [[[[evidence allowed on 'any matter'] would be surplusage, indeed,

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misleading surplusage. Such a reading would, of course, be contrary to the most basic rules of statutory construction.' *Abu-Jamal, supra* at 213, 555 A.2d at 858.

See Commonwealth v. Bracey, No. 26 Capital Appeal Dkt. (Pa., July 21, 1995) (evidence of murdered police officer's character admissible to rebut defense mitigation claims in penalty phase).

(196) Finally, petitioner points to nothing in the record to support his conclusory assertion that the prosecutor somehow 'conveyed the impression that the **death penalty** was warranted based upon the experience of the prosecutor. ' *(See* Amended Petition at 65)

B17. Claim That Trial Counsel Was Ineffective in the Penalty Phase

(197) Petitioner argues that his trial counsel was ineffective in the penalty phase for failure to call mitigation witnesses.

(198) In order for a petitioner to establish that trial counsel was ineffective for failing to investigate or call a witness, he must establish: (1) the witness's identity and existence; (2) the witness was available; (3) that counsel was informed of the existence of the witness or should have known of him or her; (4) that the witness was prepared to cooperate and would have testified on petitioner's behalf; and (5) that the absence of the testimony prejudiced petitioner so as to deny him a fair trial. *Commonwealth v. Crawley*, 1995 WL 497874 (Pa.), *citing Commonwealth v. Gonzalez*, 415 Pa. Super 65, 608 A.2d 528 (1992); *see also Commonwealth v. Parker*, 387 Pa. Super. 415, 564 A.2d 246 (1989), *appeal denied*, 526 Pa. 632, 584 A.2d 315 (1990).

(199) As has already been noted, however, petitioner chose to exercise personal control of his trial strategy, including the selection of character witnesses. Petitioner fails to prove that he restored this control to his attorney in the penalty phase. On the contrary, the PCRA testimony established only that petitioner chose not to consult with his attorney with respect to the speech petitioner had prepared for the penalty phase (N.T. 7/28/95, 71-72, 173-75, 188-90). *See Commonwealth v. Szuchon*, *supra* (accused who makes his own strategic choices 'must be prepared to accept the consequences').

(200) Petitioner contends that Mr. Jackson did not consult with him with respect to strategy-in the penalty phase *(See* Amended Petition at 65-66). This court found as a fact that there was no consultation because that was petitioner's choice. This, indeed, was consistent with his trial-long practice of refusing to cooperate with his attorney.

(201) Thus, the fact that certain family members were not called as character witnesses is not evidence of ineffectiveness, as petitioner instructed his counsel not to call his family members in the penalty phase (N.T. 7/28/95, 188-90).

(202) It is well settled, particularly with respect to character witnesses, that counsel's effectiveness is critically dependent on the accused's cooperation. *Commonwealth v. Peterkin*, *supra*, *cert. denied*, 479 U.S. 1070 (1987). Petitioner withheld his cooperation at every turn.

(203) Petitioner complains that his trial counsel 'failed to incorporate into the penalty phase the testimony of the character witnesses who testified at trial.' *(See* Amended Petition at 66) In addition to what was stated above, such action was unnecessary. The penalty phase jury was instructed,

'All the evidence from both sides, including the evidence you heard earlier during the trial-in-chief as to aggravating or mitigating circumstances is important and proper for you to consider.' (N.T. 7/3/82, 92)

Thus, petitioner's guilt phase character evidence was available for the jury's consideration in the penalty phase under §9711(e)(8) (character of petitioner may constitute mitigation) *(See* defense closing 7/3/82, 34-54).

(204) Petitioner argues that Mr. Jackson failed to object when he supposedly was cross-examined on his 'political history and abstract views.' *(See* Amended Petition at 66) No such cross-examination ever occurred. The prosecutor's cross-examination in the penalty phase went to petitioner's prior statement, 'political power grows out of the barrel of a gun,' which was offered to rebut petitioner's claim (based on the testimony of nine character witnesses) that he was a peaceful individual. At that point, petitioner, not the prosecutor, chose to inform the jury of his 'political history and abstract views,' including the fact that he was a former Black Panther Party member (N.T. 7/3/82, 24-30).

(205) Since it was petitioner who made the decision

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to refer to his 'abstract views,' his counsel could hardly object.

(206) Further, even if Mr. Jackson had objected, the objection would have been futile. This precise claim was rejected by the Pennsylvania Supreme Court on direct appeal in *Commonwealth v. Abu-Jamal, supra* at 214-15, 555 A.2d at 858-59, and *certiorari* was denied by the Supreme Court of the United States. Petitioner cannot now benefit from this rejected claim by claiming that his trial counsel was ineffective for failing to raise it.

(207) Petitioner claims that Mr. Jackson 'failed to request an instruction that life imprisonment means life without parole.' Petitioner was not entitled to such an instruction. *Commonwealth v. Edwards*, 521 Pa. 134, 158-59, 555 A.2d 818, 830-31 (1989) (court required to instruct that penalty jury should not concern itself with whether petitioner sentenced to life might be paroled). FN42

FN42. If petitioner is making an indirect reference to *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994) (plurality), that case applies only where future dangerousness is used as an aggravating circumstance. Moreover, it was decided five years after defendant's direct appeal was decided, and so is not a ground for relief on collateral review. *Commonwealth v. Christy*, --- Pa. ---, 656 A.2d 877, 883 & n.7 (1995) *(Simmons* not applicable on state collateral review as it was decided eight years after appellant's direct appeal was final).

(208) Petitioner complains that Mr. Jackson failed to object to the verdict form. As already noted, petitioner has identified nothing about the verdict form that was objectionable.

(209) Without citing authority, petitioner complains that Mr. Jackson failed to object to the court's instruction that a police officer is also a peace officer *(See* Amended Petition at 66). This point is simply inane. So too is petitioner's argument that the victim was 'beating' William Cook, and so was supposedly acting--in petitioner's words--'*ultra virus*' [sic]. The trial evidence showed that Mr. Cook assaulted the officer by punching him in the face, and that the officer was defending himself (N.T. 6/21/82, 4.92-4.93). Indeed, Mr. Cook later pleaded guilty to simple assault. There was no ground for objection.

(210) Petitioner states that the reason for the above 'failures' was Mr. Jackson's supposed failure to prepare for the penalty phase *(See* Amended Petition at 66). This court rejected Mr. Jackson's testimony on that point on credibility grounds. In any case, petitioner may not obtain relief via a generalized assertion of ineffectiveness, but must raise a specific claim that counsel either mishandled or failed to raise. The specific claims petitioner has raised, as noted above, are without merit.

B18. Claim That Petitioner Was Improperly Cross-examined in the Penalty Phase

(211) This claim was previously litigated on direct appeal. *Abu-Jamal, supra* at 214-15, 555 A.2d at 858-59. Petitioner concedes this in his PCRA petition *(See* Amended Petition at 67-68). As the instant claim is thus procedurally barred, and petitioner has not overcome that bar, the claim is precluded from PCRA review and may not be further considered. 42 Pa.C.S. § 9543(a)(3). The following discussion of the merits is undertaken in the alternative.

(212) As already noted, the prosecutor's cross-examination in the penalty phase went to petitioner's prior statement, 'political power grows out of the barrel of a gun,' and was offered to rebut petitioner's claim that he was a peaceful individual. Petitioner, not the prosecutor, then chose to inform the jury of his 'political history and abstract views.' (N.T. 7/3/82, 24-30) The Pennsylvania Supreme Court correctly decided this issue. *United States v. Abel*, 469 U.S. 45 (1984) (that relevant evidence also happened to reveal the accused's political beliefs did not violate the First Amendment).

(213) Petitioner relies on *Dawson v. Delaware*, 503 U.S. 159 (1992), which held that it was error to admit a stipulation of the appellant's membership in a white-racist prison gang where that information was irrelevant to any issue in the case. Here, petitioner's prior statement was relevant to his claim of having a peaceful character. Moreover, *Dawson* was not decided when petitioner's direct appeal was decided, and cannot be a basis for PCRA relief. *Commonwealth v. Christy*, --- Pa. ---, 656 A.2d 877 (1995) (later U.S. Supreme Court decision not applicable on state collateral review); *Commonwealth v. Gillespie*, 512 Pa. 349, 355, 516 A.2d 1180, 1183 (1986) (application of later decisions on state collateral review limited to cases in which that decision was handed down during the pendency of the appellant's direct appeal).

B19. Claim That *Simmons v. South Carolina* Was Vio-

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(214) Petitioner claims that the jury was 'precluded' from knowing that life imprisonment does not permit parole. As a matter of law, this was not a matter for the jury's consideration. *Commonwealth v. Edwards*, *supra*. By the same token, the jury was not told that the Governor can commute a life sentence and permit parole.

(215) Petitioner relies on *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994) (plurality), which held that parole eligibility is relevant where future dangerousness is used as an aggravating circumstance. Here, the sole aggravating circumstance was that petitioner murdered a police officer.

(216) Moreover, *Simmons* was decided five years after petitioner's direct appeal was decided. It is not a ground for relief on collateral review. *Commonwealth v. Christy*, *supra* at ---, 656 A.2d at 883 & n.7 *(Simmons* not applicable on state collateral review as it was decided eight years after appellant's direct appeal was final); *Commonwealth v. Gillespie*, *supra.*

B20. Claim That Petitioner's Appellate Counsel Was Ineffective

(217) Petitioner offered no evidence to support his claim that his appellate counsel was ineffective. Indeed, his own evidence proved the opposite (N.T. 7/31/95, 211-37, 241-42, 244-46).

(218) In support of his claim, petitioner called as a witness an attorney who worked under appellate counsel's direction. This witness did not purport to know all of the issues appellate counsel considered, or her strategic reasoning for raising or not raising claims, but was able to confirm that appellate counsel was an excellent advocate. This testimony fails to support petitioner's claim that his appellate counsel (1) 'never read the trial record' [the evidence was that counsel read the entire record]; (2) 'did not include a statement of evidence in her brief' [the brief speaks for itself]; (3) 'failed to order the transcripts of several pretrial proceedings' [defendant offered no evidence whatever on this point]; or (4) that counsel 'failed to consider or research' various issues and 'had no strategy or judgmental reason' for not raising them [again, defendant presented no such evidence] *(See* Amended Petition at 69).

(219) This court concludes that petitioner's claims regarding appellate counsel added up to nothing more than abstract allegations. Such allegations, represented in a vacuum, neither afforded a basis for the grant of an evidentiary hearing nor for post-conviction relief. *Commonwealth v. Silo*, 509 Pa. 406, 411, 502 A.2d 173, 176 (1985); *Commonwealth v. Floyd*, 506 Pa. 85, 92, 484 A.2d 365, 368 (1984); *Commonwealth v. Pettus*, 492 Pa. 558, 563, 424 A.2d 1332, 1335 (1981); *Commonwealth v. Bazabe*, 404 Pa. Super. 408, 415, 590 A.2d 1298, 1302 (1991).

(220) The Superior Court has repeatedly held 'abstract allegations of ineffectiveness will not be considered.' *Commonwealth v. DeHart*, 539 Pa. 5, 650 A.2d 38 (1994), *citing Commonwealth v. Baker*, 531 Pa. 541, 562, 614 A.2d 663, 673 (1992). Therefore, petitioner must assert actual prejudice and be able to mark a specific factual predicate which describes how a different course of action by prior counsel would have better served petitioner's interest. *Commonwealth v. Forrest*, 508 Pa. 382, 390, 498 A.2d 811, 815 (1985); *Commonwealth v. Alexander*, 495 Pa. 26, 38, 432 A.2d 182, 187 (1981).

(221) Moreover, since petitioner chose to file his own pro se brief on direct appeal, he may not now complain that his appellate counsel omitted issues that he himself chose not to raise.

(222) Furthermore, the evidence at the PCRA hearing, particularly the cross-examination of petitioner's former trial counsel, made it abundantly clear that petitioner's appellate counsel could not have raised trial counsel's ineffectiveness without highlighting petitioner's own, persistently offensive behavior. Petitioner has thus failed to prove that appellate counsel's failure to raise certain issues on direct appeal 'could not have been the result of any rational strategic or tactical decision by counsel.' 42 Pa.C.S. §9543(a)(4).

(223) This court concludes that appellate counsel was in no way ineffective, rather, she acted zealously to protect the rights of her client.

B21. Claim for Relief Due to the 'Cumulative Effect' of the Above Claims

(224) This argument is waived, procedurally barred, and is also mere bootstrapping. Since petitioner's PCRA claims are individually meritless, they can have no 'cumulative effect.' *Commonwealth v. Craig Williams*, 532 Pa. 265, 278, 615 A.2d. 716, 722-23 (1992). To hold otherwise would be to encourage litigants to exercise their imaginations in concocting meritless claims, for the sole purpose of having a large number of them. Since, by defi-

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nition, they have no effect to begin with, no number of meritless issues can attain collective merit by their 'cumulative effect.'

B22. Claim of Denial of Due Process Through the Commonwealth's Interference With Petitioner's Relations With Counsel, and Through Denial of Petitioner's Right To Prepare, Investigate, and Present His Claims

(225) This court has no 'hostility' toward petitioner. Our denial of petitioner's recusal motion was made in good faith, and is subject to review by the Supreme Court of Pennsylvania. It should be noted that defense counsel has made public statements admitting that the defense strategy was to direct public pressure against this court.[FN43] Furthermore, this court received so many telephone calls, faxes, letters, and postcards from anti-**death penalty** activists throughout the world, that it became almost impossible for our staff to conduct any other business. Such tactics neither influenced nor prejudiced this court.

> FN43. *E.g.,* the *Philadelphia Daily News,* August 9, 1995, page nine. The article is apparently based in part on an interview of defense counsel Leonard I. Weinglass, Esq., and repeatedly quotes him.
>
> '… Weinglass has developed a repertoire of tactics, inside and outside the courtroom. Chief among them is to attack the government--prosecutors and judges--for supposedly persecuting his clients because of their political views. …
>
> 'In court, Weinglass accuses Sabo of being pro-prosecution and 'injudicious,' bringing a threat of contempt; in front of the television cameras, he says Sabo's courtroom is the 'nastiest, most vindictive' he has ever seen, and accuses the prosecution and police of framing his journalist-turned-cabdriver client.
>
> 'And Weinglass encourages street demonstrations by Abu-Jamal supporters, including a July 16 march on Sabo's house, saying such actions call attention to his cause.'

(226) Petitioner claims that he was rushed into the PCRA hearing he requested 'on just two court days notice.' This claim is fatuous. Petitioner's PCRA petition, complete with supporting affidavits, was filed on June 5, 1995. Testimony began almost two months later, on July 27, 1995. The PCRA evidence, moreover, indicated that at least one of petitioner's current PCRA counsel was representing him as early as August 31, 1990 (N.T. 8/11/95, 256-59). This was almost five full years before the PCRA petition was even filed.

(227) This court concludes that the defense protestations of unreadiness were mere posturing to delay a meritorious review of his PCRA claims.[FN44]

> FN44. This conclusion is supported by defense counsel's disingenuousness with this court with regard to other matters *(See e.g.,* N.T. 8/1/95, 152-58; 8/7/95, 58-59; 8/7/95, 48-52, 78-80; 8/7/95, 66-68; 8/9/95, 210; 8/10/95, 50-51, 148-49).

(228) This court did not threaten to arrest defense witnesses; it indicated that it would enforce properly issued subpoenas by having the witness who defied the subpoena brought to court.

(229) This court did not refuse to allow petitioner to subpoena material witnesses or documents. It did quash subpoenas where there was no foundation or showing of relevance or materiality *(See* Findings of Fact *supra,* Nos. 48-49).

(230) Furthermore, we offered to allow defense counsel to lay the proper foundation (N.T. 8/2/95, 19, 237; 8/3/95, 107-108); this invitation was ignored.

(231) Petitioner failed to prove that the Commonwealth in any way interfered with his communications with counsel, or 'surveilled,' 'intercepted,' or 'copied' his legal mail. The sole offer of proof with regard to this claim at the PCRA hearing was the hearsay affidavit of one of petitioner's attorneys. Since petitioner never offered to call a witness with personal knowledge of these alleged events, or any otherwise admissible evidence, this claim is factually unsupported.[FN45]

> FN45. Notably, petitioner has made no claim that anyone involved in the prosecution of this case was involved in these events. His complaint of 'interference' and 'interception' is lodged solely against prison officials.

B23. Claim That the Trial Court Improperly Conducted Juror Voir Dire

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(232) This court did not prematurely nor unjustifiably strip petitioner of his right to self-representation because this court conducted juror voir dire.

(233) To the contrary, this court properly and expediently took over voir dire of potential jurors because petitioner failed to follow the proper procedures in doing same.

(234) Moreover, we conclude this issue has been previously litigated on the merits by the Supreme Court of Pennsylvania in *Commonwealth v. Abu-Jamal*, *supra*, and is not subject to further review under the Post Conviction Relief Act, 42 Pa. C.S.A. §9544(a). This issue may not be relitigated merely because a new or different theory is posited as a basis for reexamining a claim that has already been decided. *Commonwealth v. Senk*, *supra* at 634-35, 437 A.2d at 1220; *Commonwealth v. Tenner*, *supra* at 546, 547 A.2d at 1197.

B24. Alleged Bias of This Court--Denial of Recusal Motion

(235) A motion for recusal is properly directed to and decided by the jurist whose participation is challenged. *Good-heart v. Casey*, 523 Pa. 188, 565 A.2d 757 (1989). In disposing of a recusal request, a jurist must first make a conscientious determination of his or her ability to assess the case before the court in an impartial manner, free of personal bias or interest in the outcome. 'This is a personal and unreviewable decision that only the jurist can make.' *Id.* at 201, 565 A.2d at 764; *see also Nemeth v. Nemeth*, 306 Pa. Super. 47, 451 A.2d 1384 (1982); *Commonwealth v. Stanton*, 294 Pa. Super. 516, 440 A.2d 585 (1982). Once satisfied with that self-examination, the jurist must then consider whether or not continued involvement in the case would tend to undermine public confidence in the judiciary. *Id.* at 201-202, 565 A.2d at 764.

(236) When the Supreme Court of Pennsylvania reviews a lower court's decision regarding recusal, they 'recognize that [lower court] judges are honorable, fair and competent [and] [o]nce this decision is made, it is final …' unless there is an abuse of discretion. *Commonwealth v. Cherpes*, 360 Pa. Super. 246, 261, 520 A.2d 439, 446-47 (1987), *citing Reilly by Reilly v. SEPTA*, 507 Pa. 204, 222, 489 A.2d 1291, 1300 (1985).

(237) Petitioner attempts to maintain that this court was biased against him throughout the PCRA hearing and thus should have recused itself. Petitioner raised every instance where this court overruled his objections and allowed the Commonwealth to use leading or compound questions *(See* Petitioner's Proposed Findings of Fact, Nos. 178-204, at 53-61). But petitioner fails to concede that this court gave petitioner so much latitude during the hearing that defense counsel was permitted to call almost every witness without benefit of first having been presented with the required affidavits.

(238) Furthermore, this court permitted defense counsel to use improper leading questions throughout the entire PCRA hearings so as to expedite the matters which they had repeatedly and intentionally delayed. Moreover, this court allowed *pro hac vice* counsel to continue to represent petitioner, even after Leonard I. Weinglass, Esquire, and Rachel Wolkenstein, Esquire, were held in contempt for failure to comply with this court's orders.

(239) It should also be noted that this court failed to hold counsel in contempt on a myriad of occasions where counsel failed to comply with this court's order to produce to this court and the Commonwealth with unabridged lists of the witnesses they intended to call.

(240) Such forbearance and temperance on this court's part discredits the defense claim of bias.

V. CONCLUSION

Consequently, this court denies petitioner's request for a new trial and finds that petitioner fails to prove by a preponderance of the evidence each and every claim presented to this court.

VI. ADJUDICATION

AND NOW, TO WIT, this 15th day of September, 1995, it is hereby ORDERED and DECREED that the petitioner, Mumia Abu-Jamal's, Petition for Post Conviction Relief is DENIED.

Commonwealth of Pennsylvania v. Wesley Cook a/k/a Mumia Abu-Jamal
1995 WL 1315980, 30 Phila.Co.Rptr. 1

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