IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

Nos. 01-9014 & 02-9001

---

MUMIA ABU-JAMAL,
Appellee, cross-appellant at 02-9001

v.

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS *et al.*,
Appellants, cross-appellees at 01-9014

---

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

---

# BRIEF OF *AMICI CURIAE* NATIONAL LAWYERS GUILD, NATIONAL CONFERENCE OF BLACK LAWYERS, INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS, CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE of HARVARD LAW SCHOOL, SOUTHERN CENTER FOR HUMAN RIGHTS, and NATIONAL JURY PROJECT *IN SUPPORT OF APPELLEE/CROSS-APPELLANT MUMIA ABU-JAMAL*

---


Jill Soffiyah Elijah
Criminal Justice Institute
Harvard Law School
Austin Hall, Room 301
1515 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-8144

*Counsel of record for Amici Curiae*

Heidi Boghosian
National Lawyers Guild
132 Nassau Street, Suite 922
New York, NY 10038

Zachary Wolfe
People's Law Resource Center
1725 I Street, NW, Suite 300
Washington, DC 20006

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Other Authorities**

## SUMMARY OF ARGUMENT

Capital sentencing jurors' sense of responsibility is irreparably undermined by a prosecutor's statement that their decision to impose death is reviewable and may not be final. Such a declaration greatly diminishes the integrity of death penalty proceedings, which require a heightened standard of reliability under the Eighth Amendment. In the context of the entire trial, its prejudicial effect amounts to a denial of due process.

Ample case law precedent, scholarly research and sociological studies leave no room for doubt that the comments made to the jury in the case of Mumia Abu-Jamal cannot be allowed to stand in a system that values fairness and requires due regard for the significance of imposing the ultimate punishment. Capital jurors seize upon any invitation to ignore their awesome responsibility in favor of a belief that a formula or abstract system is responsible for the decision to sentence someone to death. Such invitations in this case violated the rights of Mr. Abu-Jamal and undermined the integrity of the judicial system as a whole.

The prosecutor told the jurors that:

> If your decision of course were to acquit, to allow the Defendant to walk out, that is fine. There is nothing I can do and there is nothing that the judge or anyone could do that would affect that in any way. If you find the Defendant guilty of course there would be appeal after appeal and perhaps there could be a reversal of the case, or whatever, so that may not be final.

(Trial Tr. 146, July 1, 1982). Such an assertion diminishes the constitutional right of Mr. Abu-Jamal to receive heightened reliability and procedural fairness in his capital trial.

In addition, during the trial of this matter, Judge Sabo was overheard by a court stenographer to state, "Yeah, and I'm going to help 'em fry the nigger." (Decl. of Maurer-Carter at ¶ 3) This served for many observers as stark confirmation of the pervasive racism and injustice that exists within the judicial system, as did further evidence of bias by other Judges involved in this case. This Court must not allow a man to be put to death in the face of racist attitudes and comments made by the Judges presiding over his trial and post-conviction proceedings, or in light of the other alarming indications of judicial bias. Mr. Abu-Jamal was entitled to an evidentiary hearing in federal court and the District Court erroneously denied him said hearing.

## INTERESTS OF AMICI CURIAE [1]

As the country's oldest and largest human rights bar association, the National Lawyers Guild is concerned for the rights of the accused and with the proper functioning of the judiciary. The Guild is a national association of lawyers, law students, legal workers and jailhouse lawyers dedicated to using the law as an instrument for attaining social justice. Founded in 1937 as an alternative to the then

[1] Counsel for all parties have consented to the filing of this Brief.

racially segregated American Bar Association, the Guild continually has been working to achieve racial justice in the United States and historically has provided legal services to the civil rights movement and anti-racist activists.

The National Conference of Black Lawyers is an association of lawyers, scholars, judges, legal workers, law students and legal activists. Its mission is to serve as the legal arm of the movement for Black Liberation, to protect human rights, to achieve self-determination of Africa and African Communities in the Diaspora and to work in coalition to assist in ending oppression of all peoples.

The International Association of Democratic Lawyers (IADL) is an association of lawyers and jurists in 90 countries around the world, with consultative status to the United Nation's Economic and Social Counsel (ECOSOC) and the United Nation's Educational, Scientific, and Cultural Organization (UNESCO). Since its founding in 1946, IADL sought to defend and promote human and people's rights; to struggle for strict adherence to the rule of law and the independence of the judiciary and legal profession; to restore, defend and develop democratic rights and liberties in legislation and in practice; and to ensure due process of law. The IADL has consistently opposed the death penalty. IADL members have served as observers at trials of defendants like Nelson Mandela, Jomo Kenyatta of Kenya, Abane Ramdame, and Mumia Abu-Jamal.

The Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) of Harvard Law School brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers in a variety of forums, conferences and meetings. CHHIRJ currently focuses on two areas that are central to the struggle for racial justice: closing the racial achievement gap and reforming criminal justice policies. There currently is an under-representation of African Americans in our nation's colleges and an overrepresentation in juvenile halls and adult prisons. The Institute seeks to reverse these trends on both fronts.

The Southern Center for Human Rights is a non-profit, public interest legal program. Among its missions are protection of the constitutional rights of children and adults accused of crimes, achieving equal justice, ensuring that the criminal justice system operates consistently with the requirements of the Bill of Rights, and protecting the constitutional rights of prisoners.

The National Jury Project is a corporation that engages in extensive research into a variety of areas and issues relating to the American jury system. One of the purposes of the National Jury Project, as reflected in its bylaws, is to conduct studies of the jury system for parties and legal counsel in civil and criminal cases, including cases involving the defense of human and civil rights as protected by law.

## ARGUMENT

## I. INTRODUCTION

This case brings to the fore several extraordinarily troubling issues in the context of an already troubled system. "The use of a racial slur may cost a sports announcer his job, but there have been capital cases in which judges, jurors, and defense counsel have called an African-American defendant a 'nigger' with no repercussions for anyone except the accused." Charles J. Ogletree, Jr., *Making Race Matter in Death Matters, in From Lynch Mobs to the Killing State* 218 (Charles Ogletree, Jr. & Austin Sarat eds. 2006).

Of the three recently certified issues, *amici* first address Claim 14, which deals with the prosecutor's statement in the guilt phase that the capital jurors' decision whether to impose death was reviewable and might not be final. *Amici* will then address Claim 29 in part VII, *infra*, which deals with the denial of due process caused by judicial bias.

It is imperative that the court give due regard to the highly prejudicial effect of the prosecutor's statement and remand the case for a new trial based on its violation of the Due Process clause of the Fourteenth Amendment. Additionally, this Court must not allow a man to be put to death in the face of overt racist attitudes and comments made by the Judges presiding over his trial and post-conviction proceedings, or in light of other alarming indications of judicial bias.

## II. THE PROSECUTOR'S STATEMENT, IN MINIMIZING JURORS' SENSE OF RESPONSIBILITY, RENDERED THE TRIAL UNRELIABLE AND IS GROUNDS FOR REVERSAL

Allowing the prosecutor in Mumia Abu-Jamal's case to say that the jurors' decision is not necessarily final constituted reversible error because it: (1) undermined the jurors' sense of responsibility in their sentencing duty; (2) rendered the proceeding unreliable in violation of the Fourteenth Amendment; and (3) deprived Mr. Abu-Jamal of a fair sentencing proceeding under the Eighth Amendment. Courts and commentators alike agree that declarations of this nature render capital cases unreliable and unfair.

Prosecutors' comments made in violation of the Eighth Amendment were addressed by the Supreme Court in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and its progeny. A plurality in *Caldwell* found that the prosecutor's argument, which included the remark "your decision is not the final decision. . . . Your job is reviewable," minimized the jury's sense of responsibility for sentencing and deprived the defendant of a fair trial. *Id.* at 325. Justice O'Connor, concurring in the *Caldwell* judgment, wrote that the prosecutor's remarks in *Caldwell* were impermissible because they were "inaccurate and misleading in a manner that diminished the jury's sense of responsibility." *Id.* at 342. The plurality opinion "conclude[d] that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the

responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 329.

Suggestions by the prosecution that the jury may shift its responsibility to the appellate court led to unreliable verdicts for several reasons. First, they postpone defendants' right to a fair determination of the appropriateness of death – if not deprive them of it outright, since appellate courts, unlike sentencing juries are not suited to evaluate such appropriateness. *See, e.g., id.* at 330-31.

Such statements are also unreliable in that even if a sentencing jury is not convinced about the appropriateness of death, it may still want to send a message that it disapproves of the defendant's acts. This inclination may render the jury receptive to prosecutorial suggestions that it may err, since errors will be caught and corrected on appeal. *See, e.g., id.* at 331-32.

Finally, the danger exists that the jury will elect to minimize the importance of its role, especially when told that the alternative decision-maker is the state's highest court. *See, e.g., id.* at 332-33.

Pursuant to the *Caldwell* proscription, if a reviewing court identifies an improper penalty argument, it must reverse, unless it further finds that the comment had no effect on the sentencing decision. *Id.* at 341 ("Because we cannot say that this [prosecutorial] effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment

requires."). *See also Riley v. Taylo*r, 277 F.3d 261 (3rd Cir. 2001). A sentence of death should only be upheld if an appellate court affirmatively finds that the prosecutor's statement had no or negligible effect on the sentencers.

### A. Subsequent Research Underscores the *Caldwell* Court's Concerns About Diminishing the Jurors' Sense of Responsibility

Capital jurors are highly likely to attach significant weight to statements by the prosecutor and to make their decisions in light of such statements. "The assistant district attorney is the representative of an elected, presumably popular public official and the mere fact that he is a state employee may create a sense of trust and an expectation of fairness . . . ." Welsh S. White, *The Death Penalty in the Nineties: An Examination of the Modern System of Capital Punishment* 110 (University of Michigan Press 1994).

It has been empirically demonstrated that capital jurors will take advantage of any opportunity to shed personal responsibility for deciding who should die – a fact that courts should consider in applying *Caldwell*:

> If many death penalty jurors actively seek and find ways to deny their personal moral responsibility for the sentencing decision, even without the "help" of inaccurate or misleading information from the prosecutor or judge, then the *Caldwell* rule . . . must do much more than merely prohibit such inaccurate or misleading information. Rather, the *Caldwell* rule should be premised upon the psychologically defensible, and now empirically supported, assumption that death penalty jurors will take advantage of any available opportunity to mislead themselves about the extent of their responsibility for the sentencing decision.

Joseph L. Hoffmann, *Where's the Buck? - Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137, 1138 (1995).

This desire to shift responsibility to another person or body, coupled with prosecutorial statements that diminish jurors' sense of responsibility, has correlative results that are detrimental both to the individual's rights and to the entire capital sentencing system. In later stages of appeals, those able to reverse death sentences may be unlikely to disrupt a decision because several other decision makers have voted otherwise, much like passing the buck backward. In the same vein, the desire to avoid responsibility also results in passing the buck forward – prosecutors leave the decision to the jury, the jury leaves it to the judge, and the judge leaves it to the appeals process. *See* Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* 99 (Cambridge University Press) (1986).

A death sentence does not meet the standard of reliability required by the Eighth Amendment if it was influenced by prosecutorial attempts to minimize jurors' sense of personal responsibility in determining the appropriateness of death as a sentence. The statement in Mumia Abu-Jamal's case infected the trial with unfairness, in violation of the Due Process clause of the Fourteenth Amendment.

## III. CAPITAL JURORS' PROCLIVITY TO IMPOSE DEATH RENDERS THE HEIGHTENED RELIABILITY STANDARD OF PARAMOUNT IMPORTANCE

Courts must be especially vigilant in ensuring that capital trials are conducted with heightened reliability and subjected to a heightened degree of scrutiny. Over thirty years ago, at a seminal point in death penalty jurisprudence, the Court in *Furman v. Georgia* held that a jury-discretionary system was unconstitutional because it created a risk that death would be arbitrarily and randomly imposed in a manner that violated Eight Amendment protections against cruel and unusual punishment. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). The Court acknowledged that capital cases require a standard of heightened reliability – what some call "super due process" [2] – given that death is different in its finality and severity. Procedural reforms included a bifurcated trial procedure in which the jury first decides on guilt and later decides on punishment in a separate proceeding. Four years after *Furman*, the Court, perhaps prematurely, ruled that new statutory "guided discretion" capital-sentencing

[2] *Furman*, 408 U.S. 238; *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *See also California v. Ramos*, 463 U.S. 992, 998-99 (1983) (higher degree of scrutiny required in capital sentencing hearings); *Zant v. Stephens*, 462 U.S. 862 (1983), 885 (1983) (severity of death mandates "careful scrutiny in the review of any colorable claim of error"); Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 Cal. L. Rev. 1143 (1983) (arguing that capital sentencing decisions require a "super due process.").

procedures appeared to have reduced the problem of arbitrary and unreliable death verdicts. *Gregg v. Georgia*, 428 U.S. 153 (1976).

In the years following the *Furman*-induced upheaval of the nation's death penalty system, however, evidence reveals that jurors have been uniformly confused by, rather than assisted by, the complicated statutes. Research shows that jurors do not make their decisions in the manner envisioned by the Supreme Court. In fact, capital jurors around the country consistently say that they have often decided on the penalty by the end of the guilt phase, prior to hearing any penalty phase evidence or receiving instructions from the judge on how they are supposed to make their decision. William J. Bowers and Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. L. Bull. 51, 56 (2003).

Jurors who made premature decisions in favor of death felt especially strongly about their decisions, with slightly over 70% saying they were "absolutely convinced." *Id.* at 57. The subsequent presentation of mitigating evidence during the penalty phase falls on deaf ears and renders moot the due process goals of a bifurcated trial. Data reveals that in fact most of those who did change their position from death to life only did so to avoid a hung jury. *Id.* at 57-58.

The inclination to vote in favor of death is compounded by the fact that many jurors do not understand jury instructions. Interviews with jurors have

shown that high numbers – over 40% – of jurors fail to understand that they were permitted to consider mitigating evidence. *Id.* at 71. These findings were consistent from state to state. *Id.* at 71-73. Likewise, while instructions limit jurors to enumerated aggravated circumstances delineated by statute, a high number – over 63.5% in Pennsylvania – did not know they were limited to the statutory list. *Id.* at 70.

Such misunderstandings are emblematic of how and why jurors shift responsibility for making the decision to impose death, by not taking ownership as individuals and as a jury for bearing the weight of the sentencing decision. When asked who is responsible, over 80% assigned primary responsibility either to the defendant or to the institution of the law. Fewer than 6% said the individual juror was responsible and under 9% thought the jury as a whole was responsible. *Id.*

### A. Heightened Reliability Standard Applies to All Phases of Capital Trials

Heightened reliability applies to all phases of capital trials, consistent with the Supreme Court's evolving death penalty jurisprudence. The fact that "death is different" requires that those who face the risk of death be provided with greater rights than those who do not. A defendant faces the risk of death at the point the prosecutor serves the notice of intent to seek the death penalty, not just after conviction. *Hynes v. Tomei,* 92 NY.2d 613, 619 (1998), *cert. denied* 527 U.S. 1015 (1998). Any error that increases the risk of an unwarranted conviction,

bringing the accused closer to death, must be subject to the heightened reliability standard. *Beck v. Alabama*, 447 U.S. 625, 637 (1980).

The Court applies heightened reliability to the selection of jurors, who under most death penalty statutes, determine the guilt of the defendant, and if guilty, whether the death sentence is appropriate. *A.L. Lockhart v. McCree*, 476 U.S. 162, 182 (1986) (citing *Witherspoon v. Illinois*, 391 U.S. 510 (1968)); *see also Turner v. Murray*, 476 U.S. 28 (1986) (lower court's failure to question prospective jurors on racial bias violated the defendant's right to an impartial jury under the Sixth and Fourteenth Amendments).

The Court also applies heightened reliability to issues arising during the guilt phase. In *Beck*, 447 U.S. 625, the jury found the defendant guilty of intentional killing during a robbery or attempted robbery, and as mandated by the death penalty statute, sentenced him to death. The trial court affirmed the death sentence after holding a hearing in which it considered mitigating and aggravating circumstances. Although there was sufficient evidence to support a jury instruction on felony murder as a lesser included offense, the statute specifically prohibited the judge from charging lesser included offenses. The Court reversed the conviction and the sentence, finding that:

> [t]o insure that the death penalty is imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of

> the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case."

*Beck*, 447 U.S. at 638 (footnote omitted).

Given the need for heightened scrutiny, courts have "extended many of the procedural restrictions" afforded in the guilt phase to the penalty phase. *Thompson v. Oklahoma* 487 U.S. 815, 856 (1988). *Bullington v. Missouri*, 451 U.S. 430, 431-35 (1981), signaled the Court's recognition that the penalty phase closely resembled a trial at which due process tenets applied.

Such heightened scrutiny with regard to all phases of a capital trial is extremely important as a practical matter. A 2000 Columbia University School of Law study found that, over a 22-year period, the error rate in this country's capital punishment system was 68%. James S. Liebman and Jeffrey Fagan, *A Broken System: Error Rates in Capital Cases, 1973-1995* 5 (The Justice Project 2000). This rate was based on the proportion of fully reviewed capital judgments that were overturned at one of the three stages due to serious error." "Serious error" was defined as "error that substantially undermines the reliability of the guilt finding or death sentence imposed at trial." *Id.*

The study identified the most common errors as incompetent defense lawyering and suppression by the prosecution of evidence that the accused was innocent or not deserving of the death penalty. Over 80% of the capital judgments

that were reversed were replaced on retrial with a sentence less than death, or with no sentence at all. *Id.* at 5.

It follows that since the occurrence of serious errors in these cases was not limited to the sentencing stage, it is important that the heightened reliability standard applies to all phases of capital cases. Heightened reliability seeks to avoid constitutional errors that merit reversal. On appeal, heightened reliability acts as a check to ensure that the court does not overlook serious errors.

## IV. JURORS ARE RELIEVED TO ABDICATE PERSONAL RESPONSIBILITY FOR DECIDING WHO DIES

Faced with the awesome responsibility of deciding whether to sanction an accused with the most final of punishments – death – capital jurors seek ways to deny personal responsibility for the decision. This phenomenon is amply documented in death penalty scholarship, including the work of the Capital Jury Project (CJP), which is a National Science Foundation-supported, continuing program of research on how capital jurors make decisions. CJP has demonstrated that jurors distance themselves from their decisions by relying on legal formalities to divest themselves of responsibility. Joseph L. Hoffmann, *Where's the Buck? - Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137 (1995); *see also* Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 Ind. L.J. 1103 (1995) (examining the process through which jurors interpret the law in order to diffuse

responsibility for imposing death). Published CJP studies show that most jurors do not see themselves as responsible for imposing death: only 5.5% of capital jurors believed that any individual juror was responsible for the punishment. Just 8.9% believed that the jury as a whole was responsible. Bowers and Foglia, *supra*, at 74.

Individuals readily abdicate moral responsibility to authority figures. Social psychologists documented this phenomenon as early as the 1970s. *See* Stanley Milgram, *Obedience to Authority: An Experimental View* (Harper & Row 1974). In Prof. Milgram's study, volunteers subjected other "volunteers" to electric shock as part of a learning exercise about negative reinforcement. When the subjects pretended to be in excruciating pain and screamed for the shocks to stop, many volunteers asked the supervisor what to do. The supervisor would merely say, mechanically, that the experiment should continue. When some volunteers asked the scientist if he would assume responsibility for any harm, and he agreed, the volunteers inflicted even higher voltages. Milgram concluded that the primary reason volunteers were willing to abdicate usual moral responsibility for inflicting pain was the reassuring professional authority of the supervisor.

Jurors look to the prosecutor as an authority figure, and view him as having more weight and credibility than the defense attorney. This perceived authority makes it easier to view the prosecutor as a trustworthy, knowing, and reassuring professional. White, *supra*.

Statements to the effect that a panel of jurors' decision is reviewable seem designed to encourage a vote for death. Such information has great potential to render the proceeding unfair by undermining the jurors' sense of responsibility in deciding whether to impose the punishment of death. Faced with the formidable task of deciding if the defendant should die, twelve jurors might feel relieved to know that because another panel of jurors may, in the future, do their unpleasant work for them, their decision is essentially meaningless and is not one upon which they must dwell.

Allowing the prosecutor in Mumia-Abu Jamal's trial to tell the capital jurors that their decision is reviewable, and possibly not final, removed the extra procedural safeguards that the Supreme Court has held must be afforded all capital defendants. Given that jurors look to the prosecutor as a credible authority figure, and given empirical evidence showing that most jurors are predisposed to voting for death and distancing themselves from the responsibility for their decision, such a statement can only aggravate jurors' predisposition to abdicate their responsibility.

## V. CLAIM 29: THE DENIAL OF DUE PROCESS RESULTING FROM JUDICIAL BIAS DURING POST-CONVICTION PROCEEDINGS IS GROUNDS FOR FEDERAL *HABEAS CORPUS* RELIEF

The judiciary is burdened with a racist history, a contemporary perception of racism, and countless experiences of racism, not the least of which in the death

penalty context, as exemplified in the case *sub judice*.[3] When it was revealed that Albert Sabo, the trial Judge in this case, said, "Yeah, and I'm going to help 'em fry the nigger," this served for many observers as confirmation of the pervasive racism and injustice that exists within the judicial system, as did further evidence of bias by other Judges involved in this case. This Court must not allow a man to be put to death in the face of racist attitudes and comments made by the Judges presiding over his trial and post-conviction proceedings, or in light of the other alarming indications of judicial bias described below.

### A. Mr. Abu-Jamal was Denied Due Process During Post-Conviction Proceedings as a Result of Judicial Bias.

Pursuant to 28 U.S.C. Section 2254(e)(1), Mr. Abu-Jamal was entitled to federal *habeas corpus* relief to remedy the denial of due process resulting from judicial bias during his post-conviction proceedings. Mr. Abu-Jamal diligently sought to develop the factual basis of a claim for *habeas corpus* relief, but was denied the opportunity to fully and fairly do so by the state court. Some of those

[3] Mr. Abu-Jamal's case is widely cited by scholars and advocates as a key example of racism within the American death penalty system. *See, e.g.,* Kenneth B. Noble, "As Executions Increase, Appeals Go to the Public," *N.Y. Times*, Dec. 2, 1995, at A1 (observing that Abu-Jamal's case "has been transformed. . . into an international cause celebre . . . ."); Amnesty International United States of America, *A Life in the Balance: The Case of Mumia Abu-Jamal* (Open Media 2000); Cynthia Tucker, "At the Fringes of Justice," *Atlanta J.-Const*., Aug. 13, 1995, at C7, (citing Abu-Jamal case as reason blacks see the system as racist); Dave Lindorff, *Justice Denied: Race and the 1982 Murder Trial of Mumia Abu-Jamal*, *in Murder on Trial, 1620-2002* 107 (Robert Asher et al. eds.,, 2005).

post-conviction proceedings were presided over by the same trial judge, Albert Sabo. Thus, Mr. Abu-Jamal was entitled to an evidentiary hearing in federal court, which the District Court erroneously denied him.

Actual judicial bias was exhibited by Judge Sabo at the trial stage in his infamous statement, overheard by a court stenographer, where he said "Yeah, and I'm going to help 'em fry the nigger." (Decl. of Maurer-Carter at ¶ 3). It is difficult, if not impossible, to imagine a more overt expression of judicial bias and racism. The judicial bias exhibited by Judge Sabo was exacerbated by the fact that he also presided over some of Mr. Abu-Jamal's post-conviction proceedings. Judge Sabo's racially charged comment is a critical factor to be considered and should result in a clear finding of bias.

Judge Sabo's comment and attitude toward Mr. Abu-Jamal creates the appearance of bias, to say the least. Increasing the appearance of partiality and bias is Judge Sabo's membership in the Fraternal Order of Police ("FOP") for 16 years. The FOP has aggressively called for the execution of Mr. Abu-Jamal and pursued numerous avenues of influence to achieve that end. The FOP is the leading organization advocating for the execution of Mr. Abu-Jamal and has done so for almost two decades. For years the FOP has maintained a website with links to, among other sites, the "Justice for Police Officer Daniel Faulkner" website at www.danielfaulkner.com. The lead article on that site is entitled "The Myths

about Mumia" and the site also features a "List of Mumia Abu-Jamal's Supporters." The FOP leadership and the Faulkner website routinely refer to Mr. Abu-Jamal as a "cop killer."

The FOP's focus on Mr. Abu-Jamal continues today. In April 2006 the suburban town of Saint-Denis, France decided to honor Mr. Abu-Jamal by naming a street after him. The FOP immediately responded with a press conference during which it chastised the town for its actions. The FOP also gave its support to the introduction of a Congressional Resolution that condemned the decision of Saint-Denis to name a street after Mr. Abu-Jamal, and even called upon the government of France to sanction Saint-Denis if it refused to change the street name. 152 Cong. Rec. S5967 (June 15, 2006).

Judge Sabo's membership in the FOP for 16 years, coupled with his overtly racist statement and attitude towards Mr. Abu-Jamal, indicate his strong bias against him. Judge Sabo's close affiliation with the FOP, the primary champion of the victim in the case *sub judice*, mandates that he should not have presided over Mr. Abu-Jamal's trial or post-conviction proceedings.

The discussion of Claim 14, *supra*, discussed the prosecutor's misconduct in misleading the sentencing jury and thereby rendering its death determination unreliable in violation of the Eighth Amendment. The bias of Judge Sabo prevented him from providing the "cold neutrality of an impartial judge." *State ex*

*rel. Vahlberg v. Crismore,* 213 P.2d 293, 295 (Okla. 1949). As a result, Judge Sabo was incapable of correcting the prosecutor's improper summation due to his own bias against Mr. Abu-Jamal. "[T]he trial judge has an affirmative obligation 'to ensure that final argument to the jury is kept within proper, accepted bounds.'" *Mitchell v. State*, 136 P.3d 671, 711 (quoting *McCarty v. State,* 765 P.2d 1215, 1221 (1988) (quoting ABA Standards for Criminal Justice, *The Prosecution Function,* §3-5.8(e) (1980)). The Constitutional violation caused by the prosecutor's improper argument was exacerbated by Judge Sabo's bias, which gave the jury the impression that it enjoyed judicial approval. The violation of Mr. Abu-Jamal's due process protections caused by judicial bias is readily apparent.

Justice Ronald D. Castille's role on the Pennsylvania Supreme Court during post-conviction proceedings also violated Mr. Abu-Jamal's Constitutional right to due process because of the appearance of judicial bias. Justice Castille was District Attorney for Philadelphia in 1986 and was involved in litigation in opposition to Mr. Abu-Jamal before the Supreme Court of Pennsylvania in his capacity as the District Attorney during the direct appeal of the conviction at hand. *See Commonwealth v. Abu-Jamal*, 553 Pa. 569 (1998). He held that office until 1991. It has been alleged that the assistant district attorneys in Philadelphia were being trained, under now-Judge Castille's supervision, on how to exercise their peremptory challenges so as to effectively remove Blacks from jury service. *See*

*Court Denies Mumia Abu-Jamal Request for Deposition of Justice*, Associated Press, June 15, 2002 ("On the 1987 videotape, then-prosecutor Jack McMahon teaches young prosecutors how to keep blacks, 'smart' people and others off juries. Castille was McMahon's supervisor."). Judge Castille had been an Assistant District Attorney in Philadelphia in 1982, the year of Mr. Abu-Jamal's trial in that city. In 1988, Judge Castille was counsel of record for the Commonwealth of Pennsylvania on a brief in the appeal of Mr. Abu-Jamal's conviction before the Pennsylvania Supreme Court. *Id.* It was in that same year that the FOP presented him with the "Man of the Year" Award. Honorable Ronald D. Castille -- Biography, http://www.courts.state.pa.us/Index/Supreme/Castille.asp.

Judge Castille should have recused himself from hearing Mr. Abu-Jamal's post-conviction application. Like Judge Elliott in *Mitchell*, Judge Castille had previously been an adversary of Mr. Abu-Jamal. He was counsel of record for the Commonwealth. Such circumstances preclude the appearance of impartiality.

Judge Castille's lengthy tenure with the Philadelphia District Attorney's office and his close ties with the FOP,[4] demonstrated his actual bias against Mr. Abu-Jamal and resulted in a violation of due process, which should have compelled the District Court to grant an evidentiary hearing.

[4] After the FOP awarded Judge Castille "Man of the Year," it later endorsed Castille for mayor of Philadelphia in 1991.

### B. The Importance of History and the Judiciary's Reputation.

An old African proverb says "in order to know where you're going, you must first know where you've been." And so it is in American jurisprudence. Yet, "[m]any public officials, including judges, continue to peddle the notion that we may ignore more than two centuries of history in race relations as easily as we may ignore yesterday's weather. They readily admit racial discrimination up until 1964, or 1972, or even until yesterday, but argue that it suddenly and magically ended. Unfortunately, this does not square with the reality of race relations in the United States today." Stephen B. Bright, *Discrimination, Death and Denial, in From Lynch Mobs to the Killing State,* 241 (Charles Ogletree, Jr. & Austin Sarat eds. 2006).

*In the Matter of Color* was authored by the Honorable Judge A. Leon Higginbotham of the Third Circuit in 1978 with the intention of documenting "the vacillation of the courts, the state legislatures, and even honest public servants in trying to decide whether blacks were people, and if so, whether they were a species apart from white humans, the difference justifying separate and different treatment." A. Leon Higginbotham, Jr., *In the Matter of Color* 7 (Oxford University Press 1978). One might wonder why, over a hundred years following the Civil War, Judge Higginbotham would think it necessary to document this peculiar phenomenon. He explained that in order for us to get a complete picture

of American society we would have to first understand the "interrelationship of race and the American legal process." *Id.*

The lowly status of Blacks in the United States was ensured by the courts, the legislature and law enforcement. For reasons that were devoid of sound logic, people of African descent had their citizenship denied by the United States Supreme Court. When Dred Scott attempted to assert that although he had once been a slave, his residence in Illinois (a free state) for two years effectively conferred upon him freedman status, Chief Justice Taney, writing for the United States Supreme Court, emphatically disabused him of such a "foolish" notion. The Court began by making it clear that Scott was not a citizen nor was he included in the concept of the "people of the United States." *Scott v. Sanford*, 60 U.S. (19 How.) 393, 404-05 (1857). In other words, Blacks were not part of the sovereign people and "had no rights which the white man was bound to respect." *Id.* at 407.

Judge Higginbotham spoke of this era in America and observed that "for black Americans today . . . the early failure of the nation's founders and their constitutional heirs to share the legacy of freedom with black Americans is at least one factor in America's perpetual racial tensions." Higginbotham, *supra*, at 6-7.

Following the Civil War, a Reconstruction Congress in 1864 attempted to establish citizenship for Blacks and confer upon them the same rights as the rest of the citizenry. To that end the Thirteenth Amendment was passed after lengthy

Congressional debate.[5] Despite that legislative victory, Blacks still suffered miserably in their new "free" status.

By 1873, even the United States Supreme Court noted that:

> [Blacks] were [forbidden] to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts of any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

*The Slaughter-House Cases,* 83 U.S. (16 Wall.) 36 (1873). The Court's wise observation was prompted by the reality that despite the Reconstruction Era, in many southern states the effects of the "Black Codes" on the lives of the so-called freedmen had, for all intents and purposes, put them back in bondage.

The judiciary is at the core of America's legal system as it is responsible for overseeing the administration of justice. Oddly, most of the jurisprudence concerning the rights of Blacks prior to the 1900s focused on their status as property. The Court in *Dred Scott* was primarily concerned with the property

[5] The debate centered around the economic impact on the slave states if slavery were abolished. The resultant compromise allowed for forced labor for those persons convicted of a crime. Congressman Charles Sumner of Massachusetts fought valiantly to eliminate the exception for criminally convicted persons. He foresaw that the country would use the ruse of criminal convictions to maintain the subordinate status that had been attributed to its black citizens. Cong. Globe, 38th Cong., 1st Sess. 1324, 1481 (1863-64).

rights of Scott's supposed former and new owners, but more than an appreciation for economic concerns and rights is required to justify the continued withholding of citizenship and the concomitant rights and privileges that go along with it. A morbid tolerance and acceptance of racism has been routinely exhibited by many good occupiers of the bench for centuries. Despite the many gains in this maturing society, there continue to exist many painful vestiges of slavery, racism and intolerance in our legal system. It is difficult, if not impossible, to otherwise explain the relative gains for Blacks in the areas of housing, education, public accommodations and voting, when contrasted against their continued second class citizenship status in the courts.

### 1. Racism and the Death Penalty

For a brief moment in 1972 there was cause for celebration when the Supreme Court struck down Georgia's capital punishment statute and noted the pervasive existence of racism in the criminal justice system. *Furman*, 408 U.S. 238. The Court found disturbing the fact that since 1930, 405 of the 455 defendants sentenced to death for the crime of rape were Black. *Id.* at 364.

Fifteen years later, the Court shocked many observers when it stated that racial disparities in capital sentencing for similarly situated defendants were "an inevitable part of our criminal justice system." *McClesky v. Kemp,* 481 U.S. 279, 312 (1987). The Court went on to explain that it would be problematic for it to

respond to racial bias in death penalty cases because that could force it to confront racial bias in other criminal cases. Thus, the Court reasoned that the Constitution did not demand "totally unrealistic conditions" on the use of the death penalty or the administration of criminal justice. *Id.* at 319.

Justice Brennan did not think the Constitution imposed "totally unrealistic conditions" on the use of the death penalty and made the following observation in his well-reasoned dissent:

> [I]t has been scarcely a generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries . . . [W]e remain imprisoned by the past as long as we deny its influence on the present.

*Id*. at 344 (Brennan, J., dissenting).

One year before the Supreme Court rendered the shockingly disappointing decision in *McClesky*, the Florida Supreme Court refused to reverse the death sentence of Anthony Ray Peek on racial discrimination grounds. Peek's trial judge exclaimed from the bench at the end of the guilt phase, "Since the nigger mom and dad are here anyway, why don't we go ahead and do the penalty phase today instead of having to subpoena them back at cost to the state." *Peek v. Florida*, 488 So. 2d 52, 56 (Fla. 1986). Despite this overwhelming evidence of the trial judge's racist views and his total disrespect for Mr. Peek, his parents and Black people

generally, the Florida Supreme Court did no more than caution trial judges that they should "convey the image of impartiality." *Id.*

Fortunately for Mr. Peek, the Florida Supreme Court reversed on different grounds and a new trial was ordered. *Id.* at 54-55. On retrial, he was acquitted. Although Mr. Peek was cleared of all charges, his dignity was never restored and the humiliation, degradation and disrespect he and his parents were made to suffer remained unaddressed.

Not only are African Americans directly harmed by the seeming lack of commitment to law and fairness, all Americans lose respect for the country's system of justice when it lacks this integrity. Numerous research studies, consisting of detailed statistical analyses, demonstrate the pervasive existence of racism in our criminal justice system. The problem was so significant that Congress charged the General Accounting Office in 1990 with reviewing all of the studies involving capital punishment since 1976. The GAO found a significant bias in favor of death in cases involving homicide of a white victim. U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* 5 (1990).

> Racial bias within the legal system is not just an issue affecting how guilty people are treated in courtrooms across America, but rather one that implicates the moral authority of the law and the promise of equal justice. There is a clear relationship between race and the administration of criminal justice and race relations in this country. The presence of racial bias in the justice system is central to the

> concerns of people of color precisely because our society defines itself by a commitment to law and fairness. To the extent that this commitment is compromised or even abandoned in the context of administering criminal law, African Americans are given every reason to view themselves as excluded from the system that dispenses justice.

Bryan Stevenson and Ruth Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 Wash. & Lee L. Rev. 509, 514 (1994).

Moreover, courts frequently improperly subject "equal protection claims of purposeful racial discrimination in death-sentence cases to a far heavier burden of proof than they apply to evaluate claims in ordinary jury- and employment-discrimination cases and in claims of discrimination by white voters challenging racially motivated legislative redistricting." David Baldus, *et al.*, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 (1998).

## VI. CONCLUSION REGARDING CLAIM 29

The message the courts have been sending to all observers of the judicial system, regardless of race, is that racism does not matter. But matter it must, if we are to enjoy the support of the populace for the existing system for the administration of criminal justice.

Judge Sabo, like the trial judge in *Peek*, was required, at a bare minimum, to "convey the image of impartiality." His lengthy affiliation with the FOP, his racist

remark (never refuted) and his attitude towards Mr. Abu-Jamal provide incontrovertible evidence of judicial bias that violated the requirements of the due process clause of the Constitution.

This Court must not tolerate overt racism from members of the bench. It cannot tolerate emboldened statements of judicial bias. It cannot allow a well-orchestrated campaign on the part of the Fraternal Order of Police fueled with hatred, prejudice, and racism, to influence judicial impartiality. There can be no room in American jurisprudence for racial bias in the judiciary no matter who the defendant may be.

## CONCLUSION

The prosecutorial statements that undermined the capital juror's sense of responsibility, the judge's racist statement and numerous other indicators of judicial bias, independently as well as cumulatively, rise to serious Constitutional violations that this Court cannot allow to stand.

For the foregoing reasons, *amici* urge this Honorable Court to reverse the sentence below.

Dated: July 26, 2006

Respectfully submitted,

Jill Soffiyah Elijah
Criminal Justice Institute
Harvard Law School
Austin Hall, Room 301
1515 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-8144

*Counsel of record for Amici Curiae*

Heidi Boghosian
National Lawyers Guild
132 Nassau Street, Suite 922
New York, NY 10038

Zachary Wolfe
People's Law Resource Center
1725 I Street, NW, Suite 300
Washington, DC 20006

**CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 32(a)(7)(C)**

I, Jill Soffiyah Elijah, counsel for *amici curiae*, hereby certify that this Brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,957 words, by word count of the word processing system used to prepare the brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Jill Soffiyah Elijah

**CERTIFICATE OF COMPLIANCE PURSUANT TO THIRD CIRCUIT LAR 31.l(c)**

Pursuant to Third Circuit Rule 3 l.l(c), I, Jill Soffiyah Elijah, counsel for *amici curiae*, hereby certify that the text in the electronic copy of this Brief is identical to the text in the paper copies. I further certify that the electronic copy of this Brief was scanned for viruses by Norton Internet Security 2006 and no viruses were detected.

Jill Soffiyah Elijah

**CERTIFICATE OF MEMBERSHIP IN THE BAR OF THIS COURT**

I, Jill Soffiyah Elijah, counsel for *amici curiae*, hereby certify that I am member of the bar of the United States Court of Appeals for the Third Circuit.

Jill Soffiyah Elijah

**Certificate of Service**

I certify that on the 26th day of July, 2006, two copies of the foregoing were served via first class mail, postage prepaid, upon counsel of record for all parties:

Robert R. Bryan, Esq.
2088 Union Street, Suite 4
San Francisco, CA 94123

Hugh J. Burns, Jr.
Assistant District Attorney
Chief, Appeals Unit
3 South Penn Square
Philadelphia, PA 19107

Jill Soffiyah Elijah