IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

125 EM 2019

IN RE: CONFLICT OF INTEREST OF THE OFFICE OF THE PHILADELPHIA DISTRICT ATTORNEY

PETITION OF MAUREEN FAULKNER
Widow of Deceased Police Officer Daniel Faulkner

THE PHILADELPHIA DISTRICT ATTORNEY'S RESPONSE TO THE PETITION FOR KING'S BENCH JURISDICTION

Response to the Petition for King's Bench Jurisdiction over the Matter Pending Before the Superior Court in *Commonwealth v. Wesley Cook, a/k/a Mumia Abu-Jamal*, 290 EDA 2019, CP-51-CR-0113571-1982.

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COUNTER-STATEMENT OF THE CASE

Petitioner Maureen Faulkner, the widow of deceased Philadelphia police officer Daniel Faulkner, has filed a petition requesting this Court to grant King's Bench jurisdiction and disqualify the Philadelphia District Attorney's Office from prosecuting this case and order the matter referred to the Pennsylvania Attorney General. The Philadelphia District Attorney respectfully opposes Mrs. Faulkner's petition.

In 1982, defendant Wesley Cook, a/k/a/ Mumia Abu-Jamal, was convicted of first-degree murder and possessing an instrument of crime and sentenced to death in connection with the shooting death of Officer Faulkner. Defendant Cook's judgment of sentence was affirmed by this Court.

In the ensuing years, Defendant Cook filed four PCRA petitions, each of which was denied by the PCRA court, and in each case the dismissal of the petition was affirmed by this Court. Defendant Cook's death sentence was eventually vacated by the federal courts due to an instructional error at the penalty hearing. Although it could have pursued a death sentence at a new penalty hearing, the Commonwealth, which was then represented by a different district attorney in Philadelphia, elected not to pursue the death penalty. Accordingly, Defendant Cook was sentenced to life imprisonment for his first-degree murder conviction.

In August of 2016, Defendant Cook filed a fifth PCRA petition. Relying on a recent United States Supreme Court case, *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016), Defendant Cook claimed he was entitled to reinstatement of his PCRA appellate rights from the dismissal of his four prior PCRA petitions. Defendant Cook argued reinstatement of his PCRA appellate rights was warranted because Justice Castille had served as the district attorney of Philadelphia during his direct appeal and had later declined to recuse himself from considering the PCRA appeals. The current Philadelphia District Attorney, Lawrence S. Krasner, acting on behalf of the Commonwealth, opposed Defendant Cook's request for PCRA relief. Nevertheless, the PCRA court (the Honorable Leon W. Tucker) reinstated Defendant Cook's PCRA appellate rights from the dismissal of his four prior PCRA petitions. Defendant Cook's *nunc pro tunc* appeal from the dismissal of his first four PCRA petitions is currently pending before the Superior Court.

On September 3, 2019, Defendant Cook filed his appellate brief in the Superior Court for his reinstated appeals. On that same date, he also filed a motion for a remand to the PCRA court to consider what he contends is newly-discovered evidence, specifically a number of documents his attorneys found while reviewing a portion of the Commonwealth's file in this case. The Commonwealth subsequently filed a response to Defendant Cook's motion stating it did not oppose a remand to

the PCRA court so the documents could be presented to that court for its review.[1] On September 23, 2019, the Superior Court deferred decision on Defendant Cook's motion to the panel assigned to decide the merits of his appeal.[2]

On September 18, 2019, before the Superior Court issued its order regarding Defendant Cook's motion for a remand to the PCRA court, Mrs. Faulkner filed a Petition for Intervention in the Superior Court. In her petition, Mrs. Faulkner asked the Superior Court to remove the Philadelphia District Attorney's Office from the case and replace it with the Attorney General's Office. Mrs. Faulkner claimed that removal of the District Attorney's Office was necessary because the Office supposedly faces conflicts of interest that prevent it from properly representing the Commonwealth's interests in this case. The Commonwealth filed a response in the Superior Court opposing Mrs. Faulkner's request.[3] On October 10, 2019, the Superior Court denied Mrs. Faulkner's petition. Mrs. Faulkner did not seek permission to appeal the Superior Court's denial of her petition to this Court.

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[1] A copy of the Commonwealth's response to Defendant Cook's motion for a remand to the PCRA court to consider the newly-discovered evidence is attached as Exhibit A.

[2] The Commonwealth has not yet filed its brief as appellee in the Superior Court. The Commonwealth's brief is currently due December 2, 2019; however, the Commonwealth has filed a request seeking a sixty-day extension of time to file its brief.

[3] Defendant Cook also filed a response to Mrs. Faulkner's petition.

On November 12, 2019, Mrs. Faulkner filed this petition for King's Bench jurisdiction, to which the Philadelphia District Attorney hereby responds.

ARGUMENT

THIS COURT SHOULD DENY THE PETITION FOR KING'S BENCH JURISDICTION.

Petitioner Faulkner asks this Court to grant King's Bench jurisdiction and remove the Philadelphia District Attorney's Office from this case, which is currently on appeal before the Superior Court, and replace it with the Attorney General's Office. Petitioner Faulkner contends removal of the Philadelphia District Attorney's Office is necessary because of alleged conflicts of interest the Office has that supposedly prevent it from properly representing the Commonwealth's interests.

Mrs. Faulkner's counseled petition contains a number of significant misstatements with respect to the Philadelphia District Attorney's Office and why its removal from this case, and replacement by the Attorney General's Office, is supposedly necessary. In fact, there is no basis for removing the Philadelphia District Attorney's Office; nor is there any reason for this Court to exercise King's Bench jurisdiction and disrupt the proceedings currently ongoing in the Superior Court. Accordingly, the petition for King's Bench jurisdiction should be denied.

A. King's Bench Jurisdiction is not Appropriate in this Matter.

This Court's King's Bench jurisdiction "should be exercised with extreme caution." *Commonwealth v. Williams*, 129 A.3d 1199, 1207 (Pa. 2015). This special authority "is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law." *Id.* at 1206. It should not be invoked where there were other means by which the petitioner could have had her complaints heard. *See In re Bruno*, 101 A.3d 635, 670 (Pa. 2014) (the purpose of this Court's King's Bench jurisdiction is not to encourage or allow persons to avoid other, already existing procedures for adjudicating their complaints); *Commonwealth v. Fahy*, 737 A.2d 214, 224 (Pa. 1999) (rejecting the defendant's attempt to have his PCRA petition reviewed under the Court's King's Bench jurisdiction).

In criminal matters, this Court's King's Bench jurisdiction is most appropriate where the issue involved goes beyond a single case and implicates the criminal justice system on a broader scale, thereby affecting a large number of persons involved in the system. *See, e.g., Gass v. 52nd Judicial District, Lebanon County*, 2019 WL 5588926 (Pa., Oct. 30, 2019) (granting King's Bench jurisdiction in case brought on behalf of all probationers affected by policy prohibiting the use of medical marijuana while under county supervision); *Commonwealth v. Williams*, *supra*

(granting King's Bench jurisdiction in a case challenging the governor's death-penalty moratorium, which affects all of the defendants on Pennsylvania's death row); *The Philadelphia Community Bail Fund, et al v. Arraignment Court Magistrates of the First Judicial District*, 21 EM 2019 (Pa. July 8, 2019) (exercising King's Bench jurisdiction to review alleged systemic failures in administering cash bail in Philadelphia); *In re J.V.R.*, 81 MM 2008 (Pa. Feb. 11, 2009) (exercising King's Bench jurisdiction over the Luzerne County "kids for cash" scandal).

While King's Bench jurisdiction is sometimes invoked by this Court with respect to a single criminal case, it is usually granted in those cases in order to conserve judicial resources, to expedite the criminal proceedings, and to provide guidance to the lower courts regarding a question that is likely to recur. *E.g. Commonwealth v. Martorano*, 634 A.2d 1063, 1067 n. 6 (Pa. 1993); *Commonwealth v. Lang*, 537 A.2d 1361, 1363 (Pa. 1988).

In this case, there are no special factors that warrant this Court's exercise of its King's Bench jurisdiction. Petitioner Faulkner contends that removal of the Philadelphia District Attorney's Office from the case is necessary due to alleged conflicts of interest harbored by the office. Almost all of the alleged facts that supposedly show these conflicts of interest were known or knowable to Mrs. Faulkner while the case was pending in the PCRA court. Mrs. Faulkner, however, did not file a motion in the PCRA court seeking removal of the District Attorney's Office.

That would have been the appropriate time to raise the alleged conflicts of interest. *See Commonwealth v. Williams*, 980 A.2d 510, 521 (Pa. 2009) (appellant's claim that his attorney labored under a conflict of interest was waived where he could have raised the alleged conflict earlier but failed to do so).

Mrs. Faulkner did file a petition for intervention in the Superior Court where she raised some of these alleged conflicts of interest. The Superior Court denied that petition. Mrs. Faulkner did not attempt to appeal the Superior Court's denial of her petition to this Court. Instead, she waited until 33 days had passed from the Superior Court's denial of her petition and then filed this King's Bench petition. Because Petitioner Faulkner had earlier opportunities to raise the alleged conflicts of interest but failed to advance her claims then, she should not be permitted to raise the conflicts now through this Court's exercise of its special King's Bench jurisdiction.

Additionally, this is not the type of matter where King's Bench jurisdiction would be appropriate. The Philadelphia District Attorney recognizes the extreme pain Mrs. Faulkner has endured as a result of the murder of her husband and the seemingly never-ending legal proceedings that have prevented this case from coming to a close. This case, like every murder case, is an important one. However, this matter involves a single defendant, and the relevant circumstances (or at least the alleged relevant circumstances) are unique to this matter. This simply is not a

situation where this Court's exercise of its King's Bench jurisdiction will resolve an issue that affects many involved in the criminal justice system or that will provide guidance to the lesser courts regarding an issue that is likely to recur.

Nor will the exercise of King's Bench jurisdiction save judicial resources or expedite a final resolution of the case, something desired by both Mrs. Faulkner and the Philadelphia District Attorney. Granting King's Bench jurisdiction will actually do the opposite. It will prolong the matter and disrupt the appellate proceedings that are already well underway.

Finally, and as will be demonstrated at length below, the reasons advanced by Mrs. Faulkner's attorneys for disqualifying the District Attorney's Office are largely based on mischaracterizations (and sometimes outright misrepresentations) of the relevant facts. When the overblown and inaccurate representations made by Mrs. Faulkner's attorneys are seen for what they are, it becomes evident that this petition stems from nothing more than a disagreement between Mrs. Faulkner and the District Attorney's Office over a strategic decision that was made by the Office.

There are no special reasons for this Court to grant King's Bench jurisdiction over this case, and on that basis alone, the petition should be denied.

B. There are no Grounds for Disqualifying the Philadelphia District Attorney's Office from this Case.

Even if this Court were to consider the merits of Mrs. Faulkner's petition, there would be no basis for granting the relief she seeks: removal of the District Attorney's Office from the case.

1. The Commonwealth Attorneys Act.

Mrs. Faulkner contends that this Court should remove the Philadelphia District Attorney's Office from this case and replace it with the Attorney General's Office. According to her attorneys, such a result is required by the Commonwealth Attorneys Act, specifically 71 P.S. § 732-205 (King's Bench Petition, 24). Mrs. Faulkner's attorneys are wrong.

The powers of the Attorney General are "strictly a matter of legislative designation and enumeration." *Commonwealth v. Carsia*, 517 A.2d 956, 958 (Pa. 1986). Accordingly, "the attorney general may intervene in criminal prosecutions only in accordance with provisions enumerated by the legislature." *Commonwealth v. Briggs*, 12 A.3d 291, 328 (Pa. 2011). Those provisions are set forth in the Commonwealth Attorneys Act, 71 P.S. § 732-205.

This case is presently on appeal before the Superior Court. The Commonwealth Attorneys Act states that "[i]n any criminal action in which there is an appeal, the Attorney General may in his discretion, *upon the request of the district*

attorney, prosecute the appeal; he may intervene in such other appeals as provided by law or rules of court." 71 P.S. § 732-205(c) (emphasis added).

Here, the District Attorney has not asked the Attorney General to prosecute the appeal (there is no reason for him to do so), and there is no other basis for the Attorney General to intervene in the case. Accordingly, the Attorney General has no authority to prosecute the present appeal. *See Commonwealth v. Carsia, supra* (the Attorney General had no authority to prosecute the charges against the defendant where such authority was not expressly granted in the Commonwealth Attorneys Act); *see also Commonwealth v. Khorey*, 555 A.2d 100, 109 (Pa. 1989) (in the absence of a valid request from the district attorney, the attorney general lacked the authority to conduct the prosecution).

2. The alleged conflicts of interest.

Mrs. Faulkner's attorneys claim that removal of the District Attorney's Office is necessary because "high ranking officials from the [Office]—including the District Attorney himself—suffer from undeniable personal conflicts of interest which are so obvious and so incendiary that the Office's continued representation of the Commonwealth all but guarantees a biased and unjust adjudication of [this] case" (King's Bench Petition, 2). This is a gross mischaracterization.

a. Paul M. George, Esquire.

Mrs. Faulkner's attorneys identify only a *single* attorney in the District Attorney's Office who has a personal conflict of interest with respect to this case, and even with respect to that individual, they misrepresent the facts.

Paul M. George, Esquire, is currently a prosecutor in the District Attorney's Office (George Affidavit, ¶ 4).[4] Years ago, when Defendant Cook was appealing the dismissal of his third PCRA petition, Mr. George served as local counsel on a single brief (one among the very many filed in this protracted litigation) filed on Defendant Cook's behalf in this Court (*id.*, ¶¶ 2-3). As Mr. George explains in his affidavit, he agreed to serve as Defendant Cook's "Local Counsel" during the prior appeal because his then-existing defense team lacked an attorney who was qualified in Pennsylvania to represent capital defendants, as was Mr. George (*id.*, ¶ 2). Mr. George never met with Defendant Cook, he did not formulate any of the arguments presented in the brief, and he did not play any role in strategizing about the case or even in writing the brief (*id.*, ¶ 3). He simply read the appellate brief after it had been written by Defendant Cook's other attorneys and, along with one of those attorneys, signed his name to it (*id.*).

In any event, even if Mr. George had played an active role in the representation of Defendant Cook, that would not require disqualification of the District At-

[4] *See* Affidavit of Paul M. George, Esq., attached as Exhibit B.

torney's Office. As Mr. George further states in his affidavit, since he joined the Philadelphia District Attorney's Office, he has been screened from any participation in the prosecution of this case (*id.*, ¶ 5). Thus, his prior representation of Defendant Cook does not warrant removal of the office from the case. *See Commonwealth v. Wright*, 961 A.2d 119, 135-36 (Pa. 2008) (although lawyer who previously represented defendant, and had met with one of the victims in the context of that representation, joined the prosecutor's office, the office was not disqualified from prosecuting the case where the lawyer recused herself from the matter); *see also Commonwealth v. Ford*, 650 A.2d 433, 443 (Pa. 1994) (fact that trial judge became district attorney during post-verdict phase of case did not mean conflict of interest existed where district attorney screened herself from the case upon taking office); *Commonwealth v. Faulkner*, 595 A.2d 28, 38 (Pa. 1991) (disqualification of prosecutor's office was not required even though the office hired an investigator who had been part of the defense team and had discussed the case with defendant on several occasions; the investigator did not speak with anyone in the prosecutor's office about the case).

Petitioner Faulkner's attorneys claim that screening Mr. George from the prosecution of this matter is not sufficient because, according to them, he is "the current head of the Appellate Unit responsible for defending [Defendant Cook's] conviction" (King's Bench Petition, 2). As Petitioner Faulkner's attorneys tell it,

being "the current head of the Appellate Unit," or the "Chief of the Appeals Unit," Mr. George is the "immediate supervisor" of the assistant district attorney who has been assigned to handle Defendant Cook's appeal (*id.* at 2, 16, 19). According to Petitioner Faulkner's attorneys, "[a]s the ADA's immediate supervisor, George is responsible for his performance evaluations, opportunities for promotion, salary increases and other fundamental terms of his employment" (*id.* at 16).

The above statements are factually incorrect. As a simple review of the District Attorney's Office's public website or any of the hundreds of appellate briefs the Office has filed in this Court or the Superior Court since January 2018 shows (and would have shown Mrs. Faulkner's lawyers), Mr. George is *not* the "head of the Appellate Unit," or the "Chief of the Appeals Unit," of the District Attorney's Office (King's Bench Petition, 2, 19).[5] Rather, Lawrence J. Goode, Esquire, is the head of the Appeals Unit (George Affidavit, ¶ 7). He has served in that role since the first week of the current District Attorney's administration (before that time, Mr. Goode served as the long-term Assistant Chief of the Philadelphia District Attorney's Office's Appeals Unit). It is thus Mr. Goode, and not Mr. George, who is

[5] *See* Law Division webpage of the Philadelphia District Attorney's Office's website, https://www.phila.gov/districtattorney/aboutus/divisions/Pages/Law.aspx (last visited November 26, 2019), attached as Exhibit C.

the assigned prosecutor's "immediate supervisor" (King's Bench Petition, 16) (*see* George Affidavit, ¶ 7).

Mr. George's title is (and has been since he joined the Office in February, 2018) the Assistant Supervisor of the District Attorney's Office's Law Division (George Affidavit, ¶ 6). The Law Division consists of four units: the Appeals Unit, PCRA Unit, Federal Litigation Unit, and Civil Litigation Unit (*id.*, ¶ 6). In his role, Mr. George is not responsible for the assigned prosecutor's written performance evaluations (*id*, ¶ 8). It is Mr. Goode, the Supervisor of the Appeals Unit, who is responsible for the assigned prosecutor's written performance evaluations (*id.*).

The head of the District Attorney's Office's Law Division is Nancy Winkelman, Esquire. In terms of handling Defendant Cook's appeal, the assigned attorney reports directly to Ms. Winkelman, who, along with District Attorney Krasner, is ultimately responsible for the brief the Commonwealth will be filing in response to Defendant Cook's pending Superior Court appeal. Nowhere in the King's Bench petition do Petitioner Faulkner's attorneys claim that Ms. Winkelman has any conflict of interest with regard to the appeal (nor does she).

In short, as shown above, there is only one attorney in the District Attorney's Office—Mr. George—who has a conflict of interest in regard to Defendant Cook's appeal based on his minimal prior involvement, and he has been screened from the case. While Mrs. Faulkner's attorneys claim the Office must be disqualified be-

cause it "is full of high ranking attorneys whose conflicts and public statements show bias in favor of the defense" (King's Bench Petition, 11), her attorneys fail to back up this assertion. Nowhere in the petition do they identify any "high ranking attorney" in the office (*id.*), other than Mr. George, who has advocated on behalf of Defendant Cook.[6]

b. Michael Coard, Esquire.

Petitioner Faulkner's attorneys refer to civil rights and criminal defense attorney Michael Coard, Esquire. They state that he has publicly asserted that Defendant Cook is innocent and years ago posted offensive comments on social media regarding the shooting of police officers in Dallas, Texas. Mrs. Faulkner's attorneys claim that because Mr. Coard endorsed the District Attorney when he was running for office and then served on his transition committee, the District Attorney suffers from a conflict of interest in this case.

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[6] Petitioner Faulkner's attorneys state that Mr. George's former law partner, Patricia McKinney, Esquire, is currently a supervisor (she is actually an assistant supervisor) in the District Attorney's Office. Mrs. Faulkner's attorneys, however, do not claim that Ms. McKinney herself ever represented Defendant Cook. Further, Ms. McKinney is not (and has never been) involved in the prosecution of this case. Petitioner Faulkner's attorneys also point out that, almost 20 years ago, the District Attorney's wife, the Honorable Lisa M. Rau of the Philadelphia Court of Common Pleas (Retired), was a partner in a law firm in which another partner represented Defendant Cook in post-conviction proceedings. Petitioner Faulkner's attorneys do not claim that Judge Rau has ever represented Defendant Cook, and in fact she has never done so. Further, Judge Rau is not a member of the District Attorney's Office.

Mr. Coard, however, has never been a member of the District Attorney's Office (Prabhakaran Affidavit, ¶ 7).[7] He did publicly endorse the District Attorney (who was then just a candidate) during his campaign and did serve on his transition committee.[8] However, a wide variety of individuals and groups publicly endorsed the District Attorney during his campaign (*see id.*, ¶ 3). They included persons such as the Mayor of Philadelphia, state representatives, city councilpersons, members of the clergy, and various community leaders; and organizations such as the Guardian Civic League of Philadelphia, the Philadelphia Federation of Teachers, academic organizations, and numerous labor unions.[9] Similarly, a variety of individuals served on the District Attorney's transition committee, including former Philadelphia District Attorney and Chief Justice Ronald D. Castille, and former Philadelphia Police Commissioner Sylvester Johnson (*id.*, ¶ 6), neither of whom is known to be a supporter of Defendant Cook or opposed to the police.

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[7] See Affidavit of Arun S. Prabhakaran, Chief of Staff of the Philadelphia District Attorney's Office, attached as Exhibit D.

[8] Petitioner Faulkner's attorneys point out that the campaign's website includes a video of Mr. Coard explaining why he was endorsing the District Attorney (King's Bench Petition, 21-22). Mr. Coard does not mention Defendant Cook or this case during the video.

[9] *See* Krasner for District Attorney website endorsements page, https://krasnerforda.com/endorsements (last visited November 26, 2019), attached as Exhibit E.

As the District Attorney's Chief of Staff explains in his affidavit,[10] one of the goals of the campaign was to obtain endorsements from a diverse group of individuals and groups; ultimately, over 40 organizations and numerous individuals endorsed the campaign (*id.*, ¶ 3). Similarly, one of the goals of the transition was to obtain wide-ranging input and support from a diverse group of individuals and groups (*id.*, ¶ 4). The District Attorney and his staff also endeavored to put together a transition committee that included individuals with a variety of perspectives regarding the criminal justice system (*id.*, ¶ 5).

This latter point is made clear by the very article that Mrs. Faulkner's attorneys attach to their petition to show that Mr. Coard has advocated on Defendant Cook's behalf. In that article, Mr. Coard criticizes Chief Justice Castille—a fellow member of the Krasner transition committee—for his involvement in this case (King's Bench Petition, Exhibit K). Mr. Coard also asserts in the article that Defendant Cook is not guilty of the murder of Officer Faulkner and that the PCRA court should reinstate his prior PCRA appeals because they were considered by this Court while Justice Castille was on the bench (King's Bench Petition, 21; and King's Bench Petition, Exhibit K). Justice Castille, of course, was the District Attorney when the Office successfully defended Defendant Cook's convictions on

[10] Mr. Prabhakaran previously served as a high-ranking volunteer advisor to the District Attorney's campaign and later directed the District Attorney's transition committee (*see* Prabhakaran Affidavit, ¶ 2).

direct appeal, and later, as a Supreme Court justice, he repeatedly voted to affirm the orders denying Defendant Cook PCRA relief.

Mrs. Faulkner's attorneys ignore the fact that after taking office, the current District Attorney argued in the PCRA court that Justice Castille's involvement in the prior appeals did *not* provide a basis for reinstating the PCRA appeals, and the current District Attorney asked the PCRA court to deny relief and *uphold* Defendant Cook's conviction.[11] In other words, in this very case, the Philadelphia District Attorney *opposed* the positions advocated by Mr. Coard. This shows that, contrary to what Mrs. Faulkner's attorneys claim, the District Attorney is not beholden to Mr. Coard's views, and the fact that he endorsed the District Attorney and served on the transition committee does not mean that the District Attorney is somehow biased in favor of Defendant Cook.

c. Jody Dodd.

Petitioner Faulkner's attorneys claim that Jody Dodd, a non-attorney member of the District Attorney's Office, was previously "an active and vocal member of 'the International Concerned Family and Friends of Mumia Abu-Jamal' ('Friends of Mumia')" (King's Bench Petition, 20). According to Petitioner Faulk-

[11] A sample of the documents the current District Attorney filed in the PCRA court opposing Defendant Cook's request for PCRA relief is attached to this response as Exhibits F, G, and H.

ner's attorneys, this group "describes itself on its website as a 'collective of individuals and groups in the New York metropolitan area organizing for the freedom of [Defendant Cook] based on the overwhelming evidence of his innocence'" (*id.*) (footnote and citation omitted).

Contrary to what Mrs. Faulkner's attorneys claim, Ms. Dodd has never been a member of the above group (Dodd Affidavit, ¶ 2).[12] Before joining the District Attorney's Office, Ms. Dodd volunteered with Up Against the Law (*id.*, ¶ 3). Up Against the Law provides support to groups in the context of those groups' exercise of their First Amendment right to protest (*id.*, 4). This support is available to any protest group as long as it does not promote racism, sexism, or homophobia (*id.*). The support consists of know your rights training, legal observing, and assistance with lawyers in the event someone is arrested while protesting (*id.*). It was in this context that Up Against the Law provided support to the "Friends of Mumia" group (*id.*). As a volunteer organization, Up Against the Law does not advocate the views expressed by the protestors; it simply supports the people's right to protest (*id.*).

The fact that Ms. Dodd volunteered for an organization that provided support to "Friends of Mumia," among other groups, in the context of that group's exercise of its right to protest, does not mean that Ms. Dodd has publicly supported

[12] *See* Affidavit of Jody Dodd, Attached as Exhibit I.

the group's claim that Defendant Cook is "innocent." But even if she had publicly supported that group's allegation regarding Defendant Cook's alleged "innocence," that would not require removal of the District Attorney's Office from this case. This is because, as she states in her affidavit (Dodd Affidavit, ¶ 5), Ms. Dodd has not been involved in the Office's handling of the case. *See Commonwealth v. Faulkner*, *supra* (disqualification of prosecutor's office was not required, even though the office hired an investigator who had been part of the defense team and had discussed the case with the defendant on several occasions, where the investigator was not involved in the prosecution of the case).

d. The District Attorney's criticism of former prosecutors.

Petitioner Faulkner contends that the District Attorney's Office is laboring under a conflict of interest due to criticism the District Attorney had for some of the prosecutors who formerly worked in the Office (King's Bench Petition, 2-3, 18-19). Petitioner Faulkner's attorneys state that the District Attorney "has publicly referred to former Philadelphia prosecutors, who now work for the State Attorney General, as 'war criminals' as a result of their work as prosecutors in Philadelphia" (*id.* at 18-19) (footnote omitted). As Petitioner Faulkner's attorneys describe it, "[t]wo of the lawyers [the District Attorney] has characterized as 'war criminals'—Hugh Burns, Esquire and Ron Eisenberg, Esquire—both worked on defending the guilty verdict in [Defendant Cook's] case" (*id.* at 19).

Contrary to what Mrs. Faulkner's attorneys claim, the District Attorney's comments do not somehow show that he has a conflict of interest with regard to this case. The "war criminals" comment was hyperbolic humor about a very serious topic (prosecutorial misconduct, often in the form of egregious *Brady*[13] violations at trial, that was responsible for the convictions and decades-long sentences of, to date, ten apparently innocent people whose exonerations have been court-approved in the new administration). The comment contained no reference to Mr. Burns or Mr. Eisenberg; it did not refer to this particular case; and it did not make any mention of the above prosecutors' handling of the case.

In almost any situation where, as occurred in Philadelphia, an outsider is elected as district attorney to reform an office perceived to have committed abuses, that district attorney is bound to have offered harsh criticism of some of the former administration's prosecutors. Mrs. Faulkner's attorneys have not provided any support for the notion that in those situations the new administration is prohibited from handling any of the cases previously prosecuted by any of the attorneys who may have been criticized. Such a rule (were it to exist) would seriously undermine the very will of the people who elected the new district attorney precisely because he promised to remedy those past abuses. Here, the District Attorney did not criti-

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13 *Brady v. Maryland*, 373 U.S. 83 (1963).

cize any of the former attorneys for their work on this case; thus, his criticism cannot be seen as any sort of bias in regard to the case.

e. The Communication Director's tweet.

Earlier this year, the *Philadelphia Inquirer* ran an article about a Fraternal Order of Police-led protest regarding the District Attorney's Office's handling of this case.[14] The article included a photograph of some of the protest participants, a number of whom were prominently holding what appeared to be professionally printed signs saying "Dump Krasner." In response to the photograph, the Office's Communications Director sent out a tweet criticizing the lack of diversity among the protestors depicted in it.[15] She deleted the tweet, at the District Attorney's direction, immediately after it was brought to his attention (Prabhakaran Affidavit, ¶ 10).[16]

Petitioner Faulkner's attorneys assert that the tweet shows the District Attorney's Office's supposed bias in this case. They are wrong. The Communications Director's tweet was not authorized by the District Attorney or any of the prosecutors involved in this case. In fact, as the Chief of Staff explains in his affidavit,

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[14] Petitioner Faulkner was also involved in the protest.

[15] Petitioner Faulkner is not in the photograph.

[16] *See* Affidavit of Arun S. Prabhakaran, Chief of Staff of the Philadelphia District Attorney's Office, attached as Exhibit D.

when he became aware of the tweet, he brought it to the District Attorney's attention; the District Attorney determined that it violated the Office's established Social Media Policy; the District Attorney spoke with the Communications Director about the matter; and the Communications Director was provided written notice that her tweet violated the Office's media policy (Prabhakaran Affidavit, ¶¶ 11-14). Thus, contrary to what Mrs. Faulkner's attorneys claim, the inappropriate tweet cannot be taken as showing that the District Attorney's Office has a conflict of interest in this case.

3. The District Attorney's strategic decision to not oppose Defendant Cook's remand request.

Petitioner Faulkner has failed to identify any conflicts of interest requiring the District Attorney's Office's disqualification from this case. At bottom, it appears that her request to have the Office removed is based on nothing more than her disagreement with (or misunderstanding of) a strategic decision made by the Office. Specifically, Mrs. Faulkner is displeased that the Office did not oppose Defendant Cook's request for the case to be remanded to the PCRA court for the consideration of alleged newly-discovered evidence.[17] Petitioner Faulkner's disagreement with this decision is not a basis for removing the Office from the case.

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[17] As explained above, almost all of the facts that Mrs. Faulkner relies upon to argue that the District Attorney's Office has a conflict of interest were known (or knowable) to her when this case was in the PCRA court. Mrs. Faulkner, however, (footnote continued . . .)

The relevant facts are as follows: While Defendant Cook's fifth PCRA petition was pending in the PCRA court, the PCRA court judge directed the Philadelphia District Attorney's Office to produce for his review its complete file for the case. The Office subsequently provided the PCRA court judge with 32 boxes, which it believed constituted the complete file.

After the PCRA court reinstated Defendant Cook's appellate rights, the District Attorney's Office discovered six additional boxes containing documents relating to this case. These six boxes had been stored in a different location than the 32 boxes previously turned over to the PCRA court. The District Attorney's Office informed the PCRA court judge that it had discovered these additional boxes, and, in the interests of full transparency, it made them available to Defendant Cook's attorneys for review.

Defendant Cook subsequently filed his appellate brief in the Superior Court for his reinstated PCRA appeals. On that same date, he also filed a motion for a remand to the PCRA court to consider what he contends is newly-discovered evidence his attorneys found while reviewing the contents of the six boxes. The alleged newly-discovered evidence consists of a letter written by an eyewitness to

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did not seek removal of the District Attorney's Office in that court. Instead, as she concedes in her petition, it was the Office's decision not to oppose Defendant Cook's remand request that led her to seek the Office's removal from the case (*see* King's Bench Petition, 5).

the trial prosecutor asking about money supposedly owed to him; handwritten notes Defendant Cook contends show the prosecutor kept track of the races of the prospective jurors during jury selection; and documents relating to the prosecution of a second eyewitness's prostitution cases. Defendant Cook stated that these newly-discovered documents relate to the claims he has raised in his present appeal before the Superior Court. Accordingly, he asked the Superior Court to remand the case to the PCRA court so it could consider the alleged new evidence.

The District Attorney's Office filed a response to Defendant Cook's remand motion. In the response it stated that, "[w]ithout, at the present time, taking a position on the relevance and/or significance of these newly-discovered documents, the Commonwealth does not oppose a remand so that the documents may be presented to the PCRA court."[18] The Superior Court subsequently entered an order stating that it was deferring decision on Defendant Cook's remand motion to the panel assigned to decide the merits of his appeal (and so the motion there pends).

In the King's Bench petition, Mrs. Faulkner's attorneys assert that by not opposing the remand motion, the District Attorney's Office has essentially "refuse[d] to carry out [its] responsibility to enforce the law and defend the prosecution of a stone-cold murderer" (King's Bench Petition, 5). Unfortunately, Mrs.

[18] Commonwealth's Response to Defendant's Motion for Remand to the PCRA Court to Consider Newly-Discovered Evidenced, attached as Exhibit A.

Faulkner's attorneys have, once again, made an exaggerated allegation that simply is not true.

The District Attorney's Office did not oppose the remand request because it desires to bring the case to a conclusion as expeditiously as possible. Defendant Cook has claimed that the "newly-discovered evidence" relates to the issues raised in his current appeal. Were the District Attorney's Office to oppose the remand request, and were the Superior Court to deny the remand request, then once the current round of appeals is completed, Defendant Cook would no doubt file yet another PCRA petition based on the supposed new evidence. This would then entail another whole round of PCRA and appellate proceedings regarding issues similar to those currently on appeal.

The District Attorney's Office's desire to bring this case to a conclusion in the quickest way possible is fully reasonable. As her own attorneys state, Mrs. Faulkner "has had to endure [Defendant Cook's] seemingly never ending, serial appeals and PCRA petitions over the course of the last 38 years" (King's Bench Petition, 16). The District Attorney's Office believed that opposing the remand request would do nothing more than to extend the litigation for many more years, which is something neither the District Attorney nor Mrs. Faulkner desires.

It is notable that in a different section and context of the King's Bench petition, Mrs. Faulkner's attorneys acknowledge that after Defendant Cook's death

sentence was vacated, a prior administration decided not to re-seek the death penalty (King's Bench Petition, 15). According to Mrs. Faulkner's attorneys, this decision was made "in an effort to bring this matter to a close after nearly 30 years" of litigation (*id.*). Mrs. Faulkner's attorneys reference this prior decision without offering any criticism of it, even though, unlike the current District Attorney's decision regarding a procedural matter, that decision effectively granted substantive relief to Defendant Cook. The current District Attorney is similarly not criticizing the prior administration's decision not to re-seek the death penalty "in an effort to bring this matter to a close" (*id.*). He makes this observation simply to demonstrate that his own desire to bring this matter to a close as soon as possible is not at all remarkable.

A second reason for the District Attorney's decision not to oppose Defendant' Cook's remand request was its conclusion that a remand might be the best way to address the claims regarding the "newly-discovered evidence." If the Superior Court granted the remand and if the PCRA court determined that an evidentiary hearing was necessary, the District Attorney's Office planned to present the trial prosecutor, Joseph McGill, Esquire, at that hearing. Defendant Cook's newly-discovered-evidence claims all involve Mr. McGill. Mr. McGill (like many who were involved in Defendant Cook's trial) is advancing in age. Thus, the District Attorney believed it would be advantageous to obtain his testimony now, while he

is unquestionably available, than it would be to push this issue years down the road when, due to the passage of time, he may no longer be available to testify.

Petitioner Faulkner's attorneys seem to believe that the Philadelphia District Attorney could have "contested the legitimacy of the so-called 'new evidence'" in the Superior Court (*see* King's Bench Petition, 4). They do so by pointing to the numerous factual statements Mr. McGill makes in his affidavit regarding Defendant Cook's claims. What Mrs. Faulkner's attorneys fail to appreciate, however, is that the Superior Court is not a fact-finding court. Thus, a remand to the PCRA court would be necessary so a fact finder (the PCRA court judge) could determine their credibility. It was for this reason too that the District Attorney did not oppose Defendant Cook's remand motion.

That the District Attorney agreed to a remand in this case as part of a strategic decision is not at all without precedent. For example, in 1997, a different Philadelphia District Attorney (the Honorable Lynne Abraham) informed this Court she did not oppose "a limited remand [to the PCRA court] for the purpose of taking any relevant and admissible testimony with respect to these [Defendant Cook's] withheld allegations."[19] The prior District Attorney did not oppose the remand be-

[19] Commonwealth's Answer to Defendant [Cook's] Petition for a Second Pre-Appeal Remand, ¶ 5, filed April 14, 1997, attached as Exhibit J.

cause she believed it would be the best way to conclusively dispose of Defendant Cook's claim.[20]

The present District Attorney similarly decided not to oppose Defendant Cook's most recent remand request because he believed a remand could be the best and most expeditious way to resolve this matter. The District Attorney understands that Mrs. Faulkner may not agree with this strategic decision. That disagreement, however, does not provide a basis for removing the District Attorney from this case. *Cf. Commonwealth v. Williams*, 980 A.2d at 521-22 (the fact that the defendant might fault the strategy pursued by his attorney, did not mean that the attorney was acting under a conflict of interest).

4. The case law supplied by Mrs. Faulkner's attorney's does not support her claim.

Mrs. Faulkner's attorneys fail to identify any cases that demonstrate that disqualification of the District Attorney's Office would be proper here. Curiously, the case they devote the most attention to is *Commonwealth v. Robinson*, 204 A.3d 326 (Pa. 2018) (*see* King's Bench Petition, 25-28, 31-33). Mrs. Faulkner's attorneys appear to be unaware that the four justices who heard the case were "equally divided." *Commonwealth v. Robinson*, 204 A.3d at 326 (*per curiam* order). Thus, the PCRA court's dismissal of Robinson's PCRA petition (which was preceded by

[20] See Exhibit J, ¶ 5.

its denial of his motion to remove the district attorney's office due to an alleged conflict of interest) was *affirmed*. *Id.* Additionally, this Court's *per curiam* order *denied* Robinson's motion to disqualify the district attorney's office, finding the issue was moot. *Id.*

The *Robinson* opinion that Mrs. Faulkner's attorneys rely on is the two-justice opinion in support of reversal (OISR). Being one opinion of an equally divided Court, it carries no precedential value—a point Mrs. Faulkner's attorneys fail to acknowledge. But even if it did, it would not require the District Attorney's Office's removal in this case. In *Robinson*, the OISR would have held that the Cumberland County District Attorney's Office should have been removed from the case because the then-current District Attorney and the previous District Attorney themselves had personal conflicts of interest with respect to the case. In the present matter, on the contrary, Petitioner Faulkner has failed to demonstrate that the Philadelphia District Attorney himself has a personal conflict of interest with respect to this case. Thus, the OISR does not support her claim that removal of the District Attorney's Office is required.

For this same reason, Petitioner Faulkner's reliance on *Commonwealth v. Eskridge*, 604 A.2d 700 (Pa. 1992), and *Commonwealth v. Lowery*, 460 A.2d 720 (Pa. 1983), is misplaced. In *Eskridge* the District Attorney himself had a conflict of interest because he "had a direct financial interest in obtaining [the] conviction."

Id. at 701. Thus, the entire prosecutor's office had to be disqualified. Similarly, in *Lowery*, the District Attorney himself had a conflict of interest because he had represented the defendant in that case prior to taking office. Thus, the entire office had to be disqualified. Here, unlike in *Eskridge* and *Lowery*, the Philadelphia District Attorney himself does not have a financial interest in this case and he has not represented Defendant Cook. Thus, unlike in those cases, there is no basis for disqualifying the entire office.

In *Commonwealth v. Briggs*, 12 A.3d 291 (Pa. 2011), another cased cited by Mrs. Faulkner's attorneys, this Court upheld the Bradford County District Attorney's decision to recuse his office under the Commonwealth Attorneys Act. There, the district attorney represented that he did not have sufficient resources to prosecute the case due to its magnitude and complexity. He further acknowledged that he had a personal conflict of interest because he had a "close personal relationship" with the victims, and there was a possibility he would testify at trial. *Id.* at 329-31. In the present case, the Philadelphia District Attorney has not invoked the Commonwealth Attorneys Act, and there is no reason for him to do so. His office has sufficient resources to prosecute the matter, and he does not have a personal con-

flict of interest with respect to it. Thus, *Briggs*, just like the other cases Mrs. Faulkner's attorneys cite, provides no support to her claim.[21]

5. The Allegation of an "appearance of impropriety."

Implicitly acknowledging they have failed to demonstrate any actual conflicts of interest requiring removal of the District Attorney's Office, Mrs. Faulkner's attorneys claim the Office should be disqualified under an "appearance of impropriety" standard (King's Bench Petition, 25). This Court, however, has held that a prosecutor may be removed from a case only when an "actual impropriety" is demonstrated. *Commonwealth v. Breakiron*, 729 A.2d 1088, 1092 & n. 2 (Pa. 1999) (removal of the prosecutor was not warranted where the appellant "did not meet his burden of showing that there was any actual impropriety in [the prosecu-

[21] Petitioner Faulkner's attorneys attach to their King's Bench petition a motion the Philadelphia District Attorney filed in a case completely unrelated to the present one in which the District Attorney argued that the trial judge should be disqualified from the case. Petitioner Faulkner's attorneys somehow think that this motion lends weight to their claim that the District Attorney's Office should be disqualified from the present matter. It does not. The motion to disqualify the judge is based on the fact that the judge's domestic partner previously worked for the District Attorney's Office and that after her employment there ended, she filed a complaint with the Pennsylvania Human Relations Commission claiming that the Office had discriminated against her based on her race. At the time the District Attorney filed the disqualification motion, the dispute between the judge's domestic partner and the Office was ongoing. The present case does not involve facts that are even remotely similar to those involved in the case in which the District Attorney has filed the disqualification motion. Petitioner Faulkner's attorneys' reliance on the motion is non-sensical.

tor's] conduct;" distinguishing the case from others where there was an "actual conflict").[22]

In any event, even if the "appearance of impropriety" standard applied to prosecutors, removal of the District Attorney's Office would, still, not be warranted. In this case, try as they might, Mrs. Faulkner's attorneys have not demonstrated an "appearance of impropriety" with respect to the District Attorney's handling of the matter. Instead, what her attorneys have done is attempted to *manufacture* an appearance of impropriety by repeatedly misrepresenting the facts and assigning nefarious and inaccurate motives to the Office's actions. The District Attorney has spent the bulk of this response responding to each of the claims advanced by Mrs. Faulkner's attorneys and demonstrating that, in almost every instance, things are not what they make them out to be.

The District Attorney agrees that this case is a "polarizing" one (King's Bench Petition, 12). It has been that way from well before the current District Attorney took office. That Mrs. Faulkner's attorneys have included so many careless

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[22] In *Commonwealth v. Robinson, supra*, the two-justice opinion in support of reversal (OISR) noted that *Breakiron's* "actual impropriety" standard "arguably conflicts with the Canon 1 of the Code of Judicial Conduct and the statute making the canons applicable to prosecutors." *Robinson*, 204 A.3d at 349 n.26 (OISR). The *Robinson* OISR, however, explicitly declined to discuss this question beyond pointing out the apparent conflict. *Id.*

accusations in their petition does not help matters, and it certainly does not provide a basis for disqualifying the District Attorney's Office.

6. Summation.

Under our state constitution, it is up to the people of each county to elect their local district attorney. Pa. Const. Art. 9, § 4; *accord McGinley v. Scott*, 164 A.2d 424, 431 (Pa. 1960) ("A district attorney is a constitutional officer, elected by the people of the county which he serves"). Two years ago, the citizens of Philadelphia chose District Attorney Larry Krasner to represent the Commonwealth in their county and to "seek justice" on their behalf. *Commonwealth v. D'Amato*, 526 A.2d 300, 314 (Pa. 1987) (the prosecutor's duty "is to seek justice"). Before a private individual—even a crime victim—may thwart the will of the people and have an elected prosecutor removed from a case, a high burden should be required. In this case, the Philadelphia District Attorney respectfully submits, that burden has not been met. Accordingly, the petition for King's Bench jurisdiction should be denied.

CONCLUSION

For the foregoing reasons, the Philadelphia District Attorney respectfully requests that this Court deny the petition for King's Bench jurisdiction.

Respectfully submitted,

/s/ Grady Gervino

GRADY GERVINO
Assistant District Attorney
LAWRENCE J. GOODE
Supervisor, Appeals Unit
NANCY WINKELMAN
Supervisor, Law Division
CAROLYN ENGEL TEMIN
First Assistant District Attorney
LAWRENCE S. KRASNER
District Attorney of Philadelphia

EXHIBIT A

Received 9/17/2019 4:08:59 PM Superior Court Eastern District

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290 EDA 2019

IN THE
SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA : 290 EDA 2019
Appellee

V. :

WESLEY COOK, a/k/a MUMIA ABU-JAMAL :
Appellant

COMMONWEALTH'S RESPONSE TO DEFENDANT'S MOTION FOR REMAND TO THE PCRA COURT TO CONSIDER NEWLY-DISCOVERED EVIDENCE

The Commonwealth does not oppose defendant's motion for a remand to the PCRA court for defendant to present newly-discovered evidence, and in support of this position, respectfully states the following:

1. On December 27, 2018, the PCRA court (the Honorable Leon W. Tucker) entered an order, pursuant to defendant's fifth PCRA petition, reinstating defendant's right to appeal from prior orders dismissing his first four PCRA petitions.

2. Pursuant to the PCRA court's order, defendant filed the present *nunc pro tunc* appeal from the 1997, 2001, 2005, and 2009 orders denying relief on his first four PCRA petitions.

3. While defendant's fifth PCRA petition was pending below, the PCRA court judge directed the Commonwealth to produce for his review the complete file

of the Philadelphia District Attorney's Office regarding the prosecution of this case. The Commonwealth subsequently provided the PCRA court judge with 32 boxes that it believed was the complete file for this case.

4. On December 28, 2018, after the PCRA court had reinstated defendant's appellate rights, the Commonwealth discovered six additional boxes containing documents relating to this case. These six boxes had been stored in a different location than the 32 boxes previously turned over by the Commonwealth to the PCRA court. The Commonwealth informed the PCRA court judge that it had discovered these additional six boxes, and it made them available to defense counsel for review.

5. On September 3, 2019, defendant filed his appellate brief in this Court for his reinstated appeals. On that same date, he also filed a motion for a remand to the PCRA court to consider what he contends is newly-discovered evidence he found while reviewing the contents of the six boxes. This alleged newly-discovered evidence consists of a letter written by an eyewitness to the trial prosecutor asking about money supposedly owed to him; handwritten notes defendant contends show the prosecutor kept track of the races of the prospective jurors during jury selection; and documents relating to the prosecution of a second eyewitness's prostitution cases. Defendant states that these newly-discovered documents

relate to the claims he has raised in the present appeal and asks this Court to remand the case to the PCRA court so it may consider this new evidence.

6. Without, at the present time, taking a position on the relevance and/or significance of these newly-discovered documents, the Commonwealth does not oppose a remand so that the documents may be presented to the PCRA court.

WHEREFORE, the Commonwealth does not oppose defendant's motion for a remand to the PCRA court for the presentation of newly-discovered evidence.

Respectfully submitted,

/s/ Grady Gervino

GRADY GERVINO
Assistant District Attorney

EXHIBIT B

AFFIDAVIT OF PAUL M. GEORGE, ESQUIRE

I, Paul M. George, Esquire, on my oath hereby affirm the following to be true and correct based upon my personal knowledge of the case *Commonwealth v. Wesley Cook, a/k/a Mumia Abu-Jamal*, and my experience as a prosecutor in the Philadelphia District Attorney's Office:

1. I have been a member in good standing of the Bar of the Pennsylvania Supreme Court since 1977. My Supreme Court Attorney Identification number is 25722.

2. More than ten years ago, when defendant Wesley Cook was appealing the dismissal of his third PCRA petition, I served as "Local Counsel" for the appeal. I did so based on the request of defendant Cook's attorneys because, unlike them, I was qualified in Pennsylvania to represent capital defendants. Before being contacted by his attorney, I had no involvement with defendant Cook's case. Defendant Cook's attorney explained to me that she would be unable to file the defendant's brief unless an attorney with the requisite qualifications for capital representation also signed it.

3. During my role as local counsel, I never met with defendant Cook; I did not formulate any of the arguments presented in the brief; and I did not play any role in strategizing about the case or even in writing the brief. I simply read the appellate brief after it had been written by defendant Cook's other attorneys and,

along with one of those attorneys, signed my name to it. After agreeing to sign the brief, I had no further involvement in defendant Cook's case.

4. In February of 2018, I joined the Philadelphia District Attorney's Office.

5. Since joining the District Attorney's Office I have been screened from any participation in the prosecution of this case.

6. I have never served as the head of the District Attorney's Office's Appeals Unit. Instead, I am the Assistant Supervisor of the Law Division, which is made up of the Appeals Unit, PCRA Unit, Federal Litigation Unit, and Civil Litigation Unit.

7. During my entire time in the District Attorney's Office, Lawrence J. Goode, Esquire, has served as the head of the Appeals Unit. Mr. Goode is the direct supervisor of all of the members of the Appeals Unit, including the Assistant District Attorney who is assigned to handle defendant Cook's current appeal in the Superior Court.

8. As the Assistant Supervisor of the Law Division, I am not responsible for the written performance evaluation of the attorney who is assigned to handle defendant Cook's appeal. Mr. Goode is responsible for the written performance

evaluations of all of the attorneys in the Appeals Unit, including that of the attorney assigned to handle defendant Cook's appeal.

PAUL M. GEORGE, ESQUIRE

Sworn to and subscribed before me

On this 26th day of November 2019

NOTARY PUBLIC

Commonwealth of Pennsylvania - Notary Seal
HEATHER WAMES, Notary Public
Philadelphia County
My Commission Expires December 30, 2022
Commission Number 1259706

EXHIBIT C

Law

Divisions

- Administration and Technology Division
- Public Nuisance Task Force, Gun Violence Task Force, Private Criminal Complaints Unit
- Investigations Division
- Juvenile
- » Law
- Pre-Trial
- Trial

The Law Division is supervised by Nancy Winkelman, 215-686-5700, nancy.winkelman@phila.gov.
Assistant Supervisor is Paul George, 215-686-5730, paul.george@phila.gov

Appeals Unit

The attorneys of the Appeals Unit represent the Commonwealth when a defendant challenges his or her criminal conviction via either a direct appeal, or an appeal from the denial of a state post-conviction relief petition. In addition, they handle Commonwealth appeals and offer advice and legal support to other divisions in the DAO. These attorneys practice in the Pennsylvania Superior and Supreme Courts.

The Supervisor of the Appeals Unit is Larry Goode, 215-686-5729, lawrence.goode@phila.gov.

PCRA Unit

Federal Litigation Unit

Civil Litigation Unit

Government Affairs Unit

EXHIBIT D

AFFIDAVIT OF ARUN S. PRABHAKARAN

I, Arun S. Prabhakaran, hereby affirm the following to be true and correct:

1. I am Chief of Staff of the Philadelphia District Attorney's Office.

The District Attorney's Campaign Endorsements and Transition Committee

2. I previously served as a high-ranking volunteer advisor to then candidate for District Attorney Larry S. Krasner during his campaign and later directed the District-Attorney-elect Larry S. Krasner's transition committee.

3. One of the goals of the campaign was to obtain endorsements from a diverse group of individuals and groups; in the end, over 40 organizations and innumerable individuals endorsed the campaign.

4. One of the goals of the transition was to obtain wide-ranging input and support from a diverse group of individuals and groups.

5. The then District Attorney-elect Larry S. Krasner and his transition staff also sought to put together a transition committee that included individuals with a variety of perspectives regarding the criminal justice system.

6. Among the persons who served on the District Attorney's transition committee were former Philadelphia District Attorney and Pennsylvania Supreme Court Chief Justice Ronald D. Castille, former Philadelphia Police Commissioner Sylvester Johnson, and Michael Coard, Esquire.

7. Although Mr. Coard endorsed the District Attorney and served on the transition committee, he has not been a member of the District Attorney's Office.

Communications Director Tweet

8. On or about October 7, 2019, I was made aware of a tweet posted on October 4, 2019, by Jane Roh, Communications Director at the Philadelphia District Attorney's Office.

9. In her October 4 tweet, Ms. Roh commented on the lack of diversity in an FOP-led protest involving the case *Commonwealth v. Wesley Cook, a/k/a Mumia Abu-Jamal*, and referenced the protesters being overwhelmingly white ("qwhite").

10. Ms. Roh subsequently deleted the tweet, at the District Attorney's direction, immediately after it was brought to his attention.

11. After I became aware of this tweet, I discussed the matter with District Attorney Krasner.

12. District Attorney Krasner concluded that Ms. Roh's tweet violated the District Attorney's Social Media Policy, which, among other things, prohibits employees from making any comment about a pending or future case (except as provided in the Media Policy, inapplicable here).

13. District Attorney Krasner spoke with Ms. Roh directly and the matter was handled internally.

14. At District Attorney Krasner's direction, I informed Ms. Roh via written memorandum of the violation of the policy.

ARUN S. PRABHAKARAN

Sworn to and subscribed before me

On this 2nd day of December, 2019

NOTARY PUBLIC

Commonwealth of Pennsylvania - Notary Seal
REGINA PURTELL, Notary Public
Philadelphia County
My Commission Expires September 3, 2022
Commission Number 1256446

EXHIBIT E

Endorsements

See the organizations and individuals who support real change
in the District Attorney's Office

Organizations • Individuals

These organizations are supporting justice that makes us all safer

The Philadelphia Tribune **(http://www.phillytrib.com/commentary/editorials/tribune-endorses-krasner-rhynhart-and-woodruff/article_1500d255-b4af-5f4a-8c20-38c6d6917fb5.html)**

"The Tribune endorses Larry Krasner, a prominent civil rights lawyer, to become the city's next district attorney over Republican Beth Grossman. Krasner represents change."

Philadelphia Council AFL-CIO (https://krasnerforda.com/the-latest/2017/10/25/teachers-septa-workers-hotel-workers-endorse)

"The Philadelphia AFL-CIO is proud to endorse Larry Krasner, who will be a champion for workers as our District Attorney."

International Alliance of Theatrical Stage Employees Local 8 (http://www.iatse8.com)

"The members support politicians who represent their interests. Go Vote Nov 7."

Philadelphia Federation of Teachers (https://krasnerforda.com/the-latest/2017/10/25/teachers-septa-workers-hotel-workers-endorse)

"We need a DA who understands that there's more to keeping our city safe than prosecuting criminals and adding to the prison population. Real 'justice' means stopping the school-to-prison pipeline."

32BJ Service Employees International Union (https://krasnerforda.com/the-latest/2017/10/25/teachers-septa-workers-hotel-workers-endorse)

"At a time when the White House eagerly fans the flames of racism and anti-immigrant fervor, Philadelphia has a rare opportunity to be a beacon of hope and progress by electing Krasner."

Transport Workers Union Local 234 (https://krasnerforda.com/the-latest/2017/10/25/teachers-septa-workers-hotel-workers-endorse)

"The Executive Board of Local 234 has endorsed Larry Krasner for District Attorney of Philadelphia based on his life-long commitment to civil liberties, equal justice under the law, and fair play when it comes to the prosecution of those who do violate our criminal laws."

Action United Philadelphia (http://actionunited.org/philadelphia/)

Philadelphia Building & Construction Trades Council (/the-latest/2017/7/20/krasner-building-trades)

"On virtually every Building Trades issue, Larry Krasner is 100 percent with us. We look forward to delivering the labor movement's significant votes for Mr. Krasner."

AFSCME District Council 47 (/the-latest/2017/6/28/krasner-afscme-dc47)

"We know Larry will fight for the people and ensure that the criminal justice system works for all Philadelphians."

Guardian Civic League of Philadelphia (/the-latest/2017/6/20/krasner-guardian-civic-league-endorse)

"We have always been on the side of the fight for our civil rights. ...We support you, and we hope you win this one."

Latino Empowerment Alliance of the Delaware Valley (LEAD) (https://www.facebook.com/philly.lead/photos/a.263088827194084.1073741827.260878110748489/784365518399743)

"Larry Krasner's policy stances on the justice system were the change that the Latino community needed ... an end to mass incarceration while focusing DA resources on violent and major crimes."

Black Clergy of Philadelphia and Vicinity (http://www.phillytrib.com/news/the-black-clergy-endorse-krasner-for-d-a-rhynhart-for/article_6be033ff-73d9-5170-a5a4-cb85d037fb27.html)

Krasner "has the sort of progressive view points that really make him somebody who could bring a new approach to criminal justice in the city"

Northeast Regional Council of Carpenters (http://www.northeastcarpenters.org/endorsements_for_may_16th_pennsylvania)

AFSCME District Council 33 (/the-latest/2017/5/9/dc33-endorses)

"Our members made it clear that they want a District Attorney who is fair, honest and able to understand the needs of our communities. We believe that Lawrence Krasner is that person."

Global Women's Strike Philadelphia (https://www.facebook.com/GlobalWomensStrikePhiladelphia/)

"Let's end Rizzo-era police/prosecution corruption and violence we still suffer from, and show Trump we won't go back. Larry Krasner can help. Vote Krasner on May 16. Our children's lives depend on it!"

***Philadelphia Gay News* (http://www.epgn.com/opinion/editorials/11956-vote-vote-vote)**

"Krasner has both a solid record of progressive leadership and a solid vision ... Krasner has been a strong ally to groups like Black Lives Matter, ACT UP and more, and it's that commitment to community that we need in our city's top law-enforcement agent."

Temple Association of University Professionals (TAUP) AFT L.4531 – AFL-CIO (http://taup.org/)

"At this point in time, criminal justice reform is incredibly important to undocumented students and faculty and to all in the Temple community who face the threat of unjust prosecution."

Faculty and Staff Federation of Community College of Philadelphia (FSFCCP) AFT L.2026 – AFL-CIO (http://drupal.aft2026.net/cms/node/92)

"Krasner's demonstrated commitment to civil rights and equality aligns with CCP's mission to provide affordable and quality educational options for all who may benefit."

Philly SURJ (Standing up for Racial Justice) (https://www.facebook.com/PhillySURJ/posts/517068321796807)

"Krasner has embodied SURJ's essential mission of showing up for racial justice through his decades long career of defending the civil rights of all Philadelphians ... Philly SURJ has never endorsed a candidate before."

UNITE HERE Locals 274 and 634 (https://krasnerforda.com/the-latest/2017/4/28/unite-here-endorse)

"When I see schools closing and prisons opening in my community, it's clear to me what this city is planning for my grandchildren. We need a district attorney who understands the injustice of the current system who is also willing to fight to change it."

Americans for Democratic Action, SE PA (http://www.adasepa.org/statement_on_may_16th_primary)

"ADA endorsed Larry Krasner for District Attorney given his civil rights litigation record and campaign platform centered on criminal justice reform, including reversing mass incarceration, eliminating cash bail for nonviolent offenders ... and correcting the abuses of civil asset forfeiture."

MoveOn.org (https://krasnerforda.com/the-latest/2017/4/28/moveon-endorse)

"Philadelphia voters can strike a blow for justice and end decades of racist and unjust policies in the city's criminal justice system by electing Krasner."

Neighborhood Networks (https://krasnerforda.com/the-latest/2017/4/26/neighborhood-networks-endorse)

"Larry Krasner and only Larry Krasner can be depended upon to deal with the mass incarceration problem that plagues Philadelphia."

Right to Redemption, Lifers Inc. (http://www.right2bredeemed.com/)

"Godspeed in your quest for a more just city and society."

Real Justice PAC (https://krasnerforda.com/the-latest/2017/4/24/real-justice-endorse)

"Philadelphia is the most incarcerated city in the country. It's time for a modern District Attorney, and Larry Krasner is the only candidate that we can trust to take decisive action."

Erotic Service Providers Union (https://espu-ca.org/)

"Erotic Service Providers Union endorses Krasner for District Attorney as we fight towards gaining support against poverty, violence and punitive abuses."

The Political Revolution PAC (https://krasnerforda.com/the-latest/2017/4/24/political-revolution-endorse)

"Larry Krasner has fought his entire life for civil rights and justice. It's time for the Philadelphia District Attorney's Office to do the same."

Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP) (https://krasnerforda.com/the-latest/2017/4/23/pasnap-endorse)

"PASNAP is excited to support to Larry Krasner for DA. Larry shares our values and will use the office to fight for justice for everyone, regardless of race or wealth or status."

Democracy for America (http://democracyforamerica.com/site/page/democracy-for-america-backs-larry-krasner-for-philadelphia-districts-attorn)

"In Philadelphia, generations of families and neighborhoods have been destroyed by racist police practices and prosecutors who turn a blind eye to the abuses in the justice system. Larry Krasner is Philadelphia's best chance to change that."

Color of Change PAC (https://krasnerforda.com/the-latest/2017/4/20/color-of-change-pac-endorse)

"Krasner has a clear track record of specializing in criminal defense and police brutality matters, representing activists including members of the Black Lives Matter movement and advocating for fair law enforcement treatment toward minority and poor communities."

Our Revolution (https://ourrevolution.com/candidates/lawrence-krasner/)

"Philadelphia voters have the opportunity to be heard in this election, and Our Revolution is honored to endorse a candidate that's been listening for the last 30 years — Lawrence Krasner."

215 People's Alliance (http://215pa.com/)

"Krasner has a 30-year track record of standing up for people's movements ... 215 People's Alliance is proud to endorse Larry Krasner as the Democratic candidate for District Attorney."

Food & Water Action Fund (https://krasnerforda.com/the-latest/2017/4/18/food-water-action-endorse)

"Philadelphians need a District Attorney who will protect our community from environmental criminals, and Larry Krasner is the candidate to do that job. The movement to resist the regressive Trump administration must begin close to home."

Liberty City LGBT Democratic Club (https://krasnerforda.com/the-latest/2017/4/13/libertycity-lgbt-endorse)

"Larry has served Philadelphia's LGBT community for years and, under his leadership, we are confident the District Attorney's office would combat systemic injustice like never before."

Penn Democrats (https://www.facebook.com/penndems/photos/a.284441244905940.90460.121373981212668/1727647480585302/?type=3&theater)

"Philadelphia must elect a Defense Attorney dedicated to executing and expanding proposed reforms. Penn Democrats is proud to endorse Larry Krasner for District Attorney of Philadelphia."

AFSCME District 1199C National Union of Hospital and Health Care Employees – AFL-CIO (https://krasnerforda.com/statements/2017/4/7/1199c-endorses-krasner)

"We believe you have the experience and values required for this office. We are looking forward to a long and positive relationship with you as an elected official."

The B.L.O.C. Party - Build, Lead, Organize, Campaign (http://philadelphia.cbslocal.com/2017/04/12/new-political-action-committee-for-formerly-incarcerated-endorses-da-candidate/)

"He wants to end mass incarceration, stop seeking the death penalty, end stop and frisk. He's a civil rights attorney who has always been on the side of the people."

Philly for Change (https://krasnerforda.com/statements/2017/4/6/philly-for-change)

"The times demand a D.A. who can reimagine the justice system and fundamentally change the plague of incarceration that sabotages our city. That's why we overwhelmingly supported Larry Krasner."

Pennsylvania Working Families (http://workingfamilies.org/states/pennsylvania)

"Larry Krasner is the right person to lead law enforcement in Philadelphia. Larry knows that stop and frisk policies, mass incarceration, and prosecution of low level, nonviolent crimes condemn a significant portion of our city's residents and families to disrupted lives, and diminished life outcomes."

Center for Carceral Communities (https://news.upenn.edu/news/center-carceral-communities-hosts-opening-event)

"Larry understands that the single biggest epidemic in Philadelphia is the rate of incarceration. Larry is right at the front lines of that fight."

Reclaim Philadelphia (http://reclaimphiladelphia.org/)

"The District Attorney is a key position in defining how criminal justice is conducted in Philadelphia and Larry's platform combined with his experience make him a natural ally in our battle."

Pennsylvania Federation Brotherhood of Maintenance of Way Employees Division (BMWED) – IBT (https://www.bmwe.org)

"Beyond a doubt, Krasner is the man to represent the people of Philadelphia as the new District Attorney. He would advocate for fair treatment and uphold people's civil rights."

The latest endorsement news

Coard: My endorsements for the Nov. 7 election (/the-latest/2017/11/4/coard-endorse)
Nov 4, 2017

Tribune endorses Krasner, Rhynhart and Woodruff (/the-latest/2017/11/3/tribune-endorses-krasner)
Nov 3, 2017

Mayor Kenney Endorses Krasner for District Attorney (/the-latest/2017/8/3/kenney-endorses-krasner)
Aug 3, 2017

See more endorsement news > (/the-latest?category=Endorsements)

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Here are some of the people backing the reform we need

Movita Johnson-Harrell
Victim advocate, founder of CHARLES Foundation

"I'm a big fan of Larry Krasner. Because when we talk about social justice, we have to talk about racial justice, we have to talk about educational justice, we have to talk about economic justice ... I can't see anybody I'd rather put my son's and my grandson's life in their hands, other than Larry Krasner for district attorney.."

Movita Johnson-Harrell: Why I supp

Jed Dodd: Why I support LARRY KR

Jed Dodd
General Chairman, Pa. Brotherhood of Maintenance of Way Employees Division (BMWED-IBT)

"It's very rare that we have an opportunity to vote for somebody that's going to stand up for the rights of all the people ... that's going to defend the rights of victims and not the corporations and the rich ... Larry Krasner is the man who will do that, and we're very happy to support him."

Margie Politzer
Volunteer, West Philadelphia resident

"If I see somebody that I really feel can make a difference, I want to help them, because I want my city to be a better place for everybody."

Margie Politzer: Why I s...

Bernard Hopkins
Boxing champion and returning citizen

"We have Larry, who's going up against a big old force in the city of Philadelphia, but I know we've got the right man for the job ... Larry, who I know will fight to the end, like I fight in the ring."

Reverend Isaac Miller
Former pastor, Church of the Advocate

"Larry represents ... somebody who's in the fight, who's been in that fight for a long time. That's the kind of person we need in the DA's Office."

Jim Kenney
Mayor, City of Philadelphia

(/the-latest/2017/8/3/kenney-endorses-krasner)

"Larry Krasner is a determined and tenacious fighter. He has a history of standing up for — and with — the underdog ... Larry Krasner believes in the cause of equal justice for all Philadelphians. He will bring a new perspective to the criminal justice system ... I trust Larry Krasner. I'm voting for Larry Krasner, and I ask Democrats and Republicans throughout the city to join me in voting for Larry Krasner."

Vincent Hughes, State Senator, 7th District • Minority Chair, Senate Appropriations Committee

"You can't ignore the 30 years of civil rights advocacy. It is my honor to support Larry Krasner for District Attorney." (video (https://www.facebook.com/LawrenceKrasnerforDA/videos/1260407327389821/))

Marian Tasco, Former Councilwoman, 9th District • Member, DNC • Democratic Leader, 50th Ward

"I like what he stands for...his history and working for 30 years in Philadelphia being a lawyer for people's rights, and I like that because I care about people and their having a fair shot ... The prosecution has to be fair, and that is his mantra, and that is what I believe in: fairness."

Helen Gym, Philadelphia City Council, at-large

"He has shown us what it means to fight from the outside and win. He will bring us into the center of the system and we will make change. We will make change that will transform this city and transform the lives of our families ... I believe in Larry Krasner."

Marc Stier, Community activist and teacher, West Mount Airy

"I plan to vote for Larry Krasner for DA. I'm not just a little with him. I feel the same way about him that I did about Helen Gym two years ago. ... Larry Krasner may be the only person ever to run for DA in this city who will challenge the traditional approach. He will put justice first. I've got little confidence that much has changed or will change if anyone but Larry Krasner wins the election."

Kitty Heite: Why I support LARRY KI

Kitty Heite
Parent and activist

"Larry wants to take money out of the prison system and put it back into the public coffers so we can use it to help our families stay together, we can use it to promote education and health care and keep that family unit cohesive."

Maria Quiñones-Sánchez, Philadelphia City Council, 7th District

"We need a DA with the courage to do the right thing even when it's unpopular. And after decades of DAs looking to run for higher office and playing careful with the lives of black and brown boys, and I'm a mother of two black and brown boys... we have to change that tide and that sentencing of people to poverty."

Cherelle Parker
Philadelphia City Council, 9th District

"Krasner has spent his life's work dedicated to fighting for human and civil rights, and pursuit of the administration of justice. What makes me feel a little different about him is that if he's elected, I wholeheartedly believe that he will pursue the administration of justice."

Chris Rabb
State Representative, 200th District

"Sanctuary from police brutality, sanctuary from abuse, from the prison industrial complex. This is systemic, and we need leaders, we need doers, who understand the structural implications of all of these things, not just the fancy rhetoric. It's very easy to be on the right side now, but when you have a track record for 30 years, that means something."

Isabella Fitzgerald, State Representative, 203rd District • Democratic Leader, 10th Ward

"For far too long, the thought has been to lock people up rather than seeking preemptive measures to keep young people out of jail. In Larry Krasner, we see someone who has the fortitude to address the true criminal element while having the courage to seek alternatives to mass incarceration and to resist the school-to-prison pipeline."

Michael Coard, Esq.
Lawyer and columnist

"When it comes to candidates for political office, they shouldn't tell the Black community what they're gonna do for us. Instead, they should show us what they've already done. And Larry's done a lot. A whole lot."

Michael Coard, Esq: Why I support L

Elaine Tomlin, Democratic Leader, 42nd Ward

"Larry Krasner stood out among all the candidates. He answered the questions with substance. He knew what he was talking about, you couldn't pull anything over on him, he didn't tell an untruth. He spoke it as he thought. He did 30 years of civil rights work, and 30 years of civil rights work speaks for a lot."

Camille Sheron Turner
Host and commentator, WURD 1680AM

Dr. Khadijah Costley-White
Professor, Rutgers University

"Larry Krasner is a candidate that truly believes in justice, in protecting all citizens regardless of race or creed, and fighting for what's right. I've seen it

"Larry Krasner, who I wholeheartedly support and believe in, is the only candidate worth my time. ... You must support the man that has given his time, experience, expertise and passion to the cause of justice!" (post (https://www.facebook.com/camille.turnertownsend/posts/817929861697533))

firsthand. And this is why I'm endorsing Krasner for Philadelphia District Attorney."

Barry Scheck
Co-founder of the Innocence Project

"I've been all around this country, and we are electing progressive district attorneys ... This is the race everybody's looking at, because there is no more creative, dedicated advocate for civil rights than Larry Krasner."

Barry Scheck: Why I sup...

Thomas Earle, Esq., of Disabled in Action and Liberty Resources

"I have known Larry for over 15 years ... he understands the social justice impact of our criminal justice system, the importance of keeping families together -- he's uniquely qualified to restore justice and integrity to the District Attorney's Office."

Asa Khalif
of Black Lives Matter

"I believe that his heart is in the right place. I believe he is on the right side of justice for black and brown and poor people."

Shaun King
Senior Justice Writer, *New York Daily News*

John Legend
Musician, Advisory Board Member, Quattrone Center for the Fair Administration of Justice

"I am endorsing Larry Krasner for DA of Philadelphia. Watch this video (https://youtu.be/lsEFPHMrAKc?list=PLchoEu3VkULa6T7aClSnzEDSgFlHOjWkd) and you'll see why. Watch it all. Philly!!! It's your time to show up and vote for Larry!" (post (https://www.facebook.com/shaunking/videos/1399048073467440))

"I'm endorsing Larry Krasner for Philly DA — he knows that schools and opportunity, not jails, are the answer to crime." (post (https://www.facebook.com/johnlegend/posts/10155341451513023))

Rev. Robin Hynicka, of Arch Street United Methodist Church

"Larry has the wisdom, the will and the way to address the systemic racism and other elements of dysfunction that currently operate within the District Attorney's office and the entire criminal justice system. He is a "modern abolitionist" who believes and boldly works to center justice for black and brown folks. I believe that Larry has the courage, the character, and the community and civic charisma to seek justice. Please join me in voting for Larry Krasner for District Attorney."

Waheedah Shabazz-El
Philadelphia resident

"Larry defended my son about ten years ago. I know him to be a human spirit, I know him to understand the human condition, and that's what we need in this city."

Áine Fox
Irish Philadelphians Against Oppression
Up Against The Law legal collective

"Larry Krasner has defended hundreds of people like myself who actively participate in demanding change and real justice in our society. Larry's lifelong dedication to these shared values didn't begin when he decided to run for DA!"

Oskar Castro
Quaker activist, Southwest Philadelphia

"Living in Southwest Philadelphia, one of the most marginalized and ignored areas of the City of Philadelphia, I am excited to see a true reform-oriented candidate for Philly DA whose record speaks for itself."

Jacqueline Ambrosini, LCSW
Psychotherapist

"Larry defended me for free as part of his commitment to uphold our civil rights. Larry always had our backs and it made me feel safe and have courage to risk arrest for what I believe in. He has always believed in the Martin Luther King Jr quote "Injustice anywhere is a threat to Justice everywhere." That is why I endorse him with all my heart, he represents what could be a truly fair and democratic justice system."

Jose de Marco
ACT UP Philadelphia

"Larry Krasner is not beholden to anyone or anything except fair justice, especially for poor people of color that have been abused by the criminal justice system and disproportionately incarcerated. Larry Krasner will be the difference between persecution and prosecution."

Daylin Leach
State Senator, 17th District
Minority Chair, Senate Judiciary Committee

"Larry Krasner ... has the intelligence and the integrity and the ideology and the viewpoint to enable us to make real progress on a very important area of public policy in Pennsylvania."

Help make Larry's vision of justice a reality! (/donate)

Learn more about our campaign for criminal justice reform

Sign up here to receive updates

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Opt in to updates from Krasner for DA

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EXHIBIT F

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
TRIAL DIVISION - CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	**:CP-51-CR-0113571-1982**
v.	**: PCRA**
MUMIA ABU-JAMAL, AKA WESLEY COOK	**:**

COMMONWEALTH'S SUPPLEMENTAL RESPONSE

TO THE HONORABLE LEON W. TUCKER, SUPERVISING JUDGE OF SAID COURT:

LAWRENCE S. KRASNER, District Attorney of Philadelphia County, by his Assistant, TRACEY KAVANAGH, respectfully represents:

I. Introduction and Factual Background

In 1982, defendant was tried, convicted and sentenced to death by a jury for the 1981 killing of Police Officer Daniel Faulkner. Edward Rendell was the DA at the time and authorized seeking the death penalty. Although Ronald Castille was an assistant district attorney in 1982, he was not involved in defendant's trial, which was prosecuted by Joseph McGill, Esquire.

On January 1, 1986, Castille became DA. At that time, defendant's direct appeal was pending. On March 6, 1989, the Pennsylvania Supreme

Court affirmed the judgment of sentence on direct appeal. On October 1, 1990, the United States Supreme Court denied defendant's petition for a writ of *certiorari* and, on November 26, 1990, his petition for rehearing. On May 15, 1991, defendant filed a Petition for Leave to File a Second Petition for Rehearing, which the United States Supreme Court denied on June 10, 1991.

On March 12, 1991, Castille resigned as DA. On January 3, 1994, he was sworn in as a Justice of the Pennsylvania Supreme Court. On January 14, 2008, Justice Castille became Chief Justice of the Pennsylvania Supreme Court. He remained in that position until he retired on March 16, 2014.

Defendant filed his first PCRA petition on June 5, 1995, which the PCRA court denied. Defendant appealed and moved for Castille's recusal on the grounds, *inter alia*, that he was biased because he was DA at the time the case was on direct appeal and his name was on the appellate briefs. Castille denied the motion, explaining in his opinion that he had no bias and had no personal involvement in defendant's case as DA:

> … during my tenure as District Attorney from January 1986 through February of 1991, the Philadelphia District Attorney's Office (consisting of approximately 225 attorneys and a total of 475 staff employees) each year disposed of over 65,000 criminal matters and several thousand appeals in both the Superior and Supreme Courts of Pennsylvania, as well as in the federal courts. Given the enormous volume of criminal cases processed in Philadelphia County, it is virtually impossible for any duly-elected District Attorney administering

> such a caseload to be personally familiar with the details of each and every criminal case and appellate proceedings prosecuted by over 225 Assistant District Attorneys, Chiefs, or Deputy District Attorneys employed in that office. Indeed, with respect to appellant's matter, despite my position as District Attorney while his appeal was pending, I did not participate personally in the Office's appellate response to his appeal or otherwise gain knowledge of information exclusively within the control of the District Attorney's Office by virtue of my position.... I have not prejudged appellant's matter nor would I prejudge it simply because I served as District Attorney of Philadelphia and had a general responsibility for all matters that fell within my official capacity, this being but one of the hundreds of thousands.....

Commonwealth v. Abu-Jamal, 720 A.2d 121, 123 (Pa. 1998) (Recusal Opinion of Castille, J.). The Pennsylvania Supreme Court affirmed the denial of PCRA relief. Commonwealth v. Abu-Jamal, 720 A.2d 79 (Pa. 1998).

Defendant filed a writ of *habeas corpus* in federal court. The Federal District Court denied relief on defendant's guilt phase claims, but held that the penalty phase jury instructions were defective and ordered the Commonwealth to conduct either a new sentencing hearing or impose a life sentence. Both sides appealed to the Third Circuit Court of Appeals.

The federal proceedings were stayed while defendant litigated his second PCRA petition, which was denied. Defendant appealed and also filed a motion for remand to depose Justice Castille and a motion to recuse

him, claiming that Castille was biased because his name and title appeared on an opening slide of the Jack McMahon training tape. Castille again denied recusal. The Pennsylvania Supreme Court denied the motion to remand and affirmed the denial of PCRA relief. Defendant filed third and fourth PCRA petitions, both of which the PCRA court denied. The Pennsylvania Supreme Court affirmed the denials of both petitions.

The federal proceedings concluded when the Third Circuit Court of Appeals affirmed the grant of penalty phase relief, and the U.S. Supreme Court denied the Commonwealth's *certiorari* petition. The Commonwealth thereafter agreed not to pursue the death penalty, and the trial court imposed a life sentence. Defendant appealed, raising challenges to his resentencing hearing, and the Superior Court affirmed.

On August 7, 2016, defendant filed this PCRA petition, relying primarily on the United States Supreme Court decision in Williams v. Pennsylvania, 136 S.Ct. 1899 (2016). In Williams, the U.S. Supreme Court held that Williams' due process rights were violated when Justice Castille sat as a justice in Williams' appeal because Castille had "significant, personal involvement in a critical decision" in the case while the District Attorney. Specifically -- and critically, unlike here -- the "significant, personal involvement in a critical decision" that was dispositive in Williams was that

Castille was the DA who authorized seeking the death penalty in Williams' case and then reviewed Williams' appeal as Chief Justice of the Pennsylvania Supreme Court. (As noted above, in this case, Rendell was the DA who authorized seeking the death penalty). In the alternative, defendant argues that after-discovered evidence shows that Castille harbored disqualifying bias against him that warranted his recusal.

Following briefing and argument, this Court held that defendant met the new fact exception to the PCRA time-bar and ordered discovery of any evidence of DA Castille's personal involvement in defendant's case. This Court conducted its own *in camera* review of the Commonwealth's voluminous files in defendant's case, and this Court granted the Commonwealth several continuances to conduct its own extensive search, not just of defendant's file, but also those of approximately seventy-two other defendants (listed in a March 27, 1990 memo from Gaele Barthold to DA Castille), who might possibly have relevant material in their files.[1] The

[1] The Commonwealth initially believed that it had reviewed all boxes in connection with the seventy-two defendants listed in the Barthold memo. Upon realizing that certain boxes had been missed, a senior paralegal in the PCRA Unit reviewed the Commonwealth's search and determined that the initial search missed 193 boxes in total. All but thirteen of those boxes were immediately located and searched. The Commonwealth continues to attempt to locate the remaining thirteen boxes and to confirm it has identified the universe of relevant files. Defendant's boxes were all accounted for in the initial search. The so-called "missing" memo (discussed *infra* at 13) was not found in any of these boxes, nor was any other material showing or even suggesting in any way that Castille had any significant, personal involvement in any critical decision in defendant's case.

Commonwealth also produced Barthold, who was head of the Law Division of the Philadelphia District Attorney's Office under DA Castille, for a deposition. Finally, the Commonwealth contacted Castille for any documents relevant to the issues raised in this PCRA proceeding. The few documents Castille had in his possession were provided to the defense.

Following additional oral argument on April 30, 2018, this Court allowed defendant time to file an amended petition, which he filed on July 9, 2018. This is the Commonwealth's response.

1. Defendant has failed to establish that DA Castille had significant, personal involvement in a critical decision in his case.

In Williams, the United States Supreme Court held that "under the Due Process Clause there is an impermissible risk of bias when a judge earlier had **significant, personal involvement** as a prosecutor in a **critical decision** regarding defendant's case." 136 S.Ct. at 1905 (emphasis added). The Court held that Justice Castille's authorization to seek the death penalty in Williams' case "amount[ed] to significant, personal involvement in a critical decision" and that "Chief Justice Castille's failure to recuse from Williams's case presented an unconstitutional risk of bias." Id. at 1907.

The Court emphasized that the decision to pursue the death penalty is a "critical choice in the adversary process" and characterized Castille as

having had a "significant role in the decision" because "[w]ithout his express authorization, the Commonwealth would not have been able to pursue a death sentence against Williams." Id.

Here, Castille was not the DA when defendant was arrested; he was not the DA who decided to authorize seeking the death penalty; he was not the DA when defendant was tried, convicted, and sentenced. Rather, Edward Rendell was the DA during all this time, and it was Rendell who made the critical decision to approve the death penalty in defendant's case. By the time Castille became DA, defendant's case was winding its way through the routine direct appeal process. Because Castille did not have "significant, personal involvement in a critical decision" in defendant's case, defendant cannot meet his burden of proving that he is entitled to relief under Williams.

As discussed below, none of the documents upon which defendant now relies puts Castille any closer to the requisite significant, personal involvement in a critical decision in his case. There is no due process violation and no basis for relief.

A. Castille's recent statements to the *Legal Intelligencer* and defendant's previously-rejected arguments

Defendant claims that Castille admitted his personal involvement in defendant's case during a recent interview with the *Legal Intelligencer*

(Amended Petition at 13). He cites specifically the following comment by Castille: "As DA I didn't have anything to do with it until it went up on appeal."

This is far from the significant personal involvement in a critical decision that would implicate the Williams due process concerns. Castille's comment was referring to the undisputable fact that he was not the DA at the time the death penalty was authorized to be sought, nor at trial and sentencing, and did not become DA until defendant's case was already pending on direct appeal.

In an attempt to corroborate his claim that Castille had personal involvement in his case, defendant repeats arguments that he made in his prior recusal motions. For example, defendant speculates that Castille was personally involved in his case as DA because it involved a high profile killing of a police officer (Amended Petition at 13). The fact that the case involved a high profile killing of a police officer is irrelevant to the legal question at hand: whether Castille had significant, personal involvement in a critical decision in defendant's case. The answer to that question plainly is that he did not.

Defendant also points to the presence of Castille's name on the appellate briefs in his case to support his argument that Castille was

personally involved as DA (Amended Petition at 13). The fact that Castille's name was on these appellate briefs (just as it was on every other appellate brief filed during his tenure as DA, as well as on office letterhead and the front door to the DA's Office) does not prove that Castille was aware of the contents or had any involvement in the preparation of the briefs.[2]

Finally, defendant argues that DA Castille "had a strong incentive to monitor Batson claims" because he was DA when the Jack McMahon training tape was made and it bore Castille's name and title in an opening slide. Defendant does not explain how Castille's interest in Batson claims proves that he had a significant, personal involvement in any critical decision in defendant's case (Amended Petition at 13-14).

In any event, the fact that Castille's name was on an opening slide of the training tape (just like it was on the letterhead, all appellate briefs and front door) does not prove that Castille knew about the training tape or

[2] The inclusion of the DA's name on all appellate briefs is a long-standing convention of the Philadelphia DA's Office; it says nothing about any particular DA's involvement in the case – much less the significant, personal involvement in a critical decision required by Williams.

endorsed its message, much less that he had any significant, personal involvement in a critical decision in defendant's case.[3]

B. Castille's other public statements

Defendant points to public statements that Castille made during his judicial campaign in 1993 to argue that he had the requisite significant, personal involvement in a critical decision in defendant's case (Amended Petition at 14). These statements do not establish Castille's personal involvement in the case, much less any significant, personal involvement in any critical decision.

Defendant claims that Castille "bragged" to a reporter that he had prosecuted "some of the city's most notorious criminals in recent years" (Amended Petition at 14). Yet defendant does not allege that Castille identified him as one of those notorious criminals. Nor could he since it was ADA Joseph McGill who prosecuted defendant -- not ADA Castille.

Defendant also points to Castille's comment that "he sent forty-five people to death row[]" as DA, a fact that the Supreme Court deemed relevant

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[3] Nor does Barthold's July 1991 testimony before Congress regarding the potential impact of proposed Batson legislation prove Castille's personal involvement in a critical decision in defendant's case (Amended Petition at 14). Barthold's testimony occurred four months after Castille resigned as DA and therefore cannot be attributed to him. In any event, Barthold did not refer to defendant or his case in her testimony.

in Williams. But, of course, defendant was not one of these people -- because, again, Castille was not the DA who authorized seeking the death penalty in defendant's case. Moreover, the Williams Court did not find that such comments alone gave rise to a due process violation. Rather, it was Castille's significant, personal involvement in the critical decision of authorizing seeking the death penalty in Williams' case that was determinative.[4]

C. Castille's June 15, 1990 letter to Governor Casey and Related Documents

Defendant claims that a June 15, 1990 letter that DA Castille sent to Governor Casey urging him to sign death warrants in seventeen other capital cases -- not defendant's -- is proof that Castille had significant, personal involvement in a critical decision in his case (Amended Petition at 15). This claim too fails.

In the June 15, 1990 letter, Castille advised Governor Casey that the U.S. Supreme Court had upheld the constitutionality of the death penalty in Blystone v. Pennsylvania, 494 U.S. 299 (1990), and so there was no

[4] Defendant also claims that former ADA Mark Gottlieb told a reporter that "Mr. Castille was directly involved in high profile death penalty cases" as DA (Amended Petition at 15). Yet defendant does not claim that Gottlieb identified defendant as one of those cases. Such a vague allegation falls far short of what Williams requires.

impediment to him signing death warrants in the seventeen cases. Castille pointed out in his letter that capital defendants had "little incentive" to file for collateral review absent issuance of a death warrant, and urged the governor to sign death warrants in the seventeen listed cases. (In those cases, appellate review had concluded, but the defendants had not initiated collateral review proceedings).

Castille did not even mention defendant in his June 15, 1990 letter, much less ask Governor Casey to sign defendant's death warrant. This is because defendant's direct appeal was ongoing at the time (he had a petition for *certiorari* before the U.S. Supreme Court), and so his conviction was not yet final.

Defendant argues that the June 15, 1990 letter entitles him to Williams relief even though his name was not included, because the letter demonstrates that DA Castille had a "policy" to "expedite" the signing of death warrants for defendants who were convicted of killing a police officer (Amended Petition at 15-17). According to defendant, the "development and execution of this policy was a most critical decision in the evolution of convictions involving the death of police officers" (Amended Petition at 15).

Regardless of the merits of this argument in the abstract, it does not bring defendant any closer to Williams relief: the undeniable fact is Castille

neither authorized seeking the death penalty nor made any other critical decision in defendant's case.

In any event, Castille's request as the DA that Governor Casey sign death warrants in seventeen cases where the appeal had concluded and the defendant had not yet filed for collateral review, not just cases where the defendant killed a police officer, is not proof of a critical policy decision to expedite the death sentences of defendants convicted of killing police officers.

Defendant also cites a March 27, 1990 memo from Gaele Barthold to DA Castille, entitled "Status of Death Penalty Cases," which reads in part as follows:

> Pursuant to your request for the above information by March 27, 1990 (copy of your memo and list attached), here follows a listing as to the February 27, 1990 status of most of these defendants. (This information was updated by Ron Eisenberg in February after Blystone was affirmed). As you will see, typically these defendants have little incentive to file PCRA's after their direct appeals are disposed of. The signing of death warrants seem to prompt such actions (e.g., Beasley (#2); Maxwell (#5))....

The memo then lists the status of seventy-two capital cases, including defendant's case.

Contrary to defendant's argument, Castille's request for an update on all capital cases in the wake of the February 28, 1990 Blystone decision and

in anticipation of sending the governor the June 15, 1990 letter is not a critical decision under Williams. Such a routine update request is far different than a decision to authorize seeking the death penalty, which the Williams Court described as a "one of the most serious discretionary decisions a prosecutor can be called upon to make," a decision with "profound consequences" and "a significant exercise of his or her official discretion and professional judgment." 136 S.Ct. at 1907. In contrast, a request for an update of cases affected by a recent Supreme Court decision (here, Blystone) is the bread-and-butter of a DA's job.[5]

D. Spoliation: Castille's missing memo

Defendant claims that an adverse inference is warranted because the Commonwealth failed to produce the Castille memo that Ms. Barthold referred to in her March 27, 1990 memo to Castille (Amended Petition at 20).[6] Despite all other evidence to the contrary, defendant urges this Court to

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[5]Defendant claims that an August 21, 1990 memo that Barthold sent to Castille advising him that she intended not to object to a stay request in Commonwealth v. Leslie Beasley and intended to move to dismiss Beasley's *habeas* petition is somehow proof that Castille was personally involved in his own case (Amended Petition at 20). The August 21, 1990 memo does not mention defendant. Nor is it surprising that Barthold would consult Castille about how she intended to proceed with Beasley's case since Castille discussed Beasley's case in his June 15, 1990 letter to the governor.

[6] The Commonwealth went to great lengths to find this memo. As detailed in the Commonwealth's verifications, two experienced ADAs reviewed the Commonwealth's boxes in defendant's case, as did this Court. An experienced ADA also conducted a search of the law division and other divisions in the DA's Office looking for the memo. The Commonwealth then devoted a paralegal full-time to the search for months; for the

draw an adverse inference that this memo contained evidence of Castille's significant, personal involvement in a critical decision in his case. No adverse inference is warranted.

To determine the appropriate sanction for spoliation of evidence, the Court must weigh three factors: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future. Schroeder v. Com., Dept. of Transp., 710 A.3d 23, 27 (Pa. 1998). "In this context, evaluation of the first prong, 'the fault of the party who altered or destroyed the evidence,' requires consideration of two components, the extent of the offending party's duty or responsibility to preserve relevant evidence, and the presence or absence of bad faith." PTSI, Inc. v. Haley, 71 A.3d 304, 316 (Pa. Super. 2013) (quoting Mount Olivet v. Wiegand, 781

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reasons discussed in fn. 1, his review has continued beyond that initial period and is continuing. That paralegal once again searched through defendant's boxes, as well as other units and divisions in the DA's Office. The same paralegal searched all available boxes for the seventy-two defendants listed on Barthold's March 27, 1990 memo, which totaled approximately 634 boxes. In addition, the parties flew to Florida where Barthold was deposed about the missing memo and the assigned attorney contacted Castille in an attempt to locate it. The Commonwealth regrets that it has been unable to find this memo, but believes that the totality of circumstances do not warrant an adverse inference for the reasons discussed in the text.

A.2d 1263, 1270 (Pa. Super. 2001)). One sanction that a court may choose to impose when evidence is lost or destroyed is to instruct the jury that it may infer "that the destroyed evidence would have been unfavorable to the position of the offending party." Gavin v. Loeffelbein, 161 A.3d 340, 354 (Pa. Super. 2017).

Even if defendant could establish that the Commonwealth had reason to know that this memo would be relevant to litigation twenty-five years after its creation, defendant would not be entitled to an adverse inference, as he argues. Rather, the remedy for spoliation is merely that -- depending on the totality of the circumstances -- an adverse inference may be drawn. See Schroeder, 710 A.2d at 28 (summary judgment not appropriate sanction for spoliation; rather, "Appellees may present evidence of spoliation at trial and the court may instruct the jury that it may infer that the truck's parts would have been unfavorable to Schroeder"); Parr v. Ford Motor Co., 109 A.3d 682, 704 (Pa. Super 2014) (permissive adverse inference jury instruction was appropriate sanction for passengers' spoliation of evidence); Commonwealth v. Wright, 282 A.2d 323, 325 (Pa. 1971) ("[W]hile it is permissible for a jury to draw adverse inferences … such inferences are not mandatory); Wisler v. Manor Care of Lancaster PA, LLC, 124 A.3d 317, 326

(Pa. Super. 2015) ("The failure to produce evidence raises a permissible inference, not a mandatory inference or presumption").

Under the totality of the circumstances here, no adverse inference is warranted. Because Barthold's response to the Castille memo merely lists the status of the seventy-two active death penalty cases at the time, the most likely scenario is that in the memo referenced in Barthold's response, Castille had simply requested a status update of all active capital cases in light of the Blystone decision -- not that he had inquired into any specific case.

In any event, the memo could not possibly have contained evidence of Castille's significant, personal involvement in a critical decision in defendant's case. At the time, defendant's case was merely one of seventy-two cases on a list of capital cases pending in the office; his case was simply proceeding through the normal appellate process.

Under these circumstances, no reasonable fact-finder could infer that the memo would be adverse to the Commonwealth's position, or that it would show that Castille had some unknown significant, personal involvement in some unknown critical decision in defendant's case. Nor, in fact, could Castille possibly have had such significant, personal involvement in such a critical decision since the decision to authorize seeking the death

penalty was Rendell's and there was no other critical decision that was or could have been made while Castille was DA

2. There is no after-discovered evidence that would have warranted Justice Castille's recusal.

Defendant argues in the alternative that DA Castille's June 15, 1990 letter to Governor Casey asking him to sign death warrants in other cases constitutes after-discovered evidence that would have changed the outcome of his motions to recuse Justice Castille from his PCRA appeals. According to defendant, the letter would have caused "a reasonable observer [to] conclude that Mr. Castille ... harbored disqualifying bias against [defendant] as a person convicted of killing a police officer" because he singled out "police killers" by asking the governor to send them a dramatic message by signing death warrants (Amended Petition at 26). Defendant's argument fails.

To sustain a claim based on after-discovered evidence under the PCRA, the following requirements must be satisfied: (1) the evidence must have been discovered only after trial and must not have been discoverable through the exercise of reasonable diligence; (2) the evidence is not cumulative; (3) it is not being used solely to impeach crediblity; and (4) **it would likely compel a different verdict.** 42 Pa.C.S. § 9543(a)(2)(vi); Commonwealth v. Brown, 111 A.3d 171, 176 n 4 (Pa. Super. 2015)

(emphasis added). The June 15, 1990 memo would not have compelled a different result because it would not have compelled Castille to recuse himself.

"The party who asserts a judge must be disqualified bears the burden of producing evidence establishing bias, prejudice, or unfairness necessitating recusal, and the 'decision by a judge against whom, a plea of prejudice is made will not be disturbed except for an abuse of discretion.'" Commonwealth v. Druce, 848 A.2d 104, 107 (Pa. 2004), quoting Commonwealth v. Darush, 459 A.2d 727 (Pa. 1983). There are two varieties of recusal claims. The first involves an assertion that the judge cannot be impartial due to personal bias or interest, and requires the judge to "make an independent, self-analysis of the ability to be impartial...." Commonwealth v. Druce, 848 A.2d at 110. The second involves conduct by the judge that would objectively cause "a significant minority of the lay community [to] reasonably question the court's impartiality." Commonwealth v. Darush, 459 A.2d at 732. Defendant pursues both varieties of claims, but his after-discovered evidence shows neither.

Here, Castille's June 15, 1990 letter to Governor Casey does not prove that Castille had any personal bias against defendant: indeed, Castille does not mention defendant's name in the letter at all.

Nor does the letter prove that Castille had some disqualifying bias against defendants who killed police officers. Castille's letter was a request that a governor (who had shown himself not inclined to do so) sign death warrants. Castille asked the governor to sign death warrants in seventeen cases where the appeals had concluded and the defendants had not yet filed for collateral review -- not just in cases where the defendant had been convicted of killing a police officer. Moreover, Castille discussed Beasley's case in the letter because it illustrated Castille's point about delay and his general concerns about persons who had killed police officers. There is certainly nothing remarkable about a DA being concerned about police officer killings; that concern does not give rise to the sort of personal bias the law requires for recusal.

Castille's request as DA that Governor Casey sign death warrants in cases where appeals had concluded and collateral review petitions had not yet been filed -- not just in the cases where a police officer was killed and not in defendant's case -- does not establish that Castille was biased against defendant or defendants who killed police officers years later when he became a justice. See Laird v. Tatum, 409 U.S. 824, 831 (1972) (Justice Rehnquist refused to disqualify himself even though as Assistant Attorney General he made public comments and provided expert testimony in support

of the government's use of electronic surveillance, which was the subject matter of the lawsuit; "My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy **prior to ascending to the bench**") (emphasis added).

Defendant's reliance on Commonwealth v. Lemanski, 529 A.2d 1085, 1089 (Pa. Super. 1987), is misplaced. In Lemanski, the defendant argued that the trial judge abused his discretion in denying recusal because he had personal bias against drug defendants. Defendant cited a number of drug cases where the judge's sentence had been overturned on appeal, as well as the judge's public comments indicating that the maximum penalty should be imposed in all drug cases. The Superior Court agreed, ruling that the record established that the judge had "a predetermined policy with respect to sentencing drug offenders," which "supported [defendant's] allegations of personal bias against a 'particular class of litigants.'" Id. at 1089.

This case is distinguishable. In Lemanski, it was the sentencing judge who made comments demonstrating he was biased against drug offenders like the defendant. Here, in contrast, Castille sent the June 15, 1990 letter to the governor in his role as DA, not as a justice. Under these circumstances,

the letter is not proof that Castille would have a "predetermined policy" with respect to the death penalty or bias against defendants convicted of killing a police officer years later when he sat as a justice.

Nor is this case like Commonwealth v. Rhodes, 990 A.2d 732, 748 (Pa. 2009), upon which defendant also relies. In Rhodes, the Court found "ample basis in the record upon which to question the []court's impartiality," which raised "significant concerns that the trial court may have prejudged this case or reached a decision at sentencing on the basis of improper considerations." Id. at 748. The Court pointed to the trial judge's insistence at sentencing that the defendant had intentionally killed her baby even though she pled guilty to voluntary manslaughter; he ignored the presentence report and relied instead on police reports that he obtained *ex parte* from the DA's Office; and he stated that an aggravated sentence was required because the case involved a child victim regardless of the facts to which defendant pled guilty. Nothing of the sort occurred here. As explained above, Castille sent the June 15, 1990 letter to the governor in his role as DA, not as a justice. Under these circumstances, the letter is not proof that Justice Castille could not be impartial in cases involving defendants convicted of killing police officers when he sat as a justice years later.

For these reasons and those stated in the Commonwealth's previous filings, PCRA relief should be denied without further discovery[7] and without an evidentiary hearing.[8]

LAWRENCE S. KRASNER
District Attorney

By: _____
TRACEY KAVANAGH
Assistant District Attorney
PCRA Unit

[7] This Court has already permitted extensive discovery. Defendant's request for further discovery should be denied. See Commonwealth v. Edmiston, 65 A.3d 339, 353 (Pa. 2013) ("Discovery in PCRA proceedings cannot be used as an excuse for engaging in a 'fishing expedition'") (citation omitted).

[8] See Commonwealth v. Keaton, 45 A.3d 1050, 1094 (Pa. 2012) (PCRA petitioner not entitled to evidentiary hearing as a matter of right but only where petition presents genuine issues of material fact; evidentiary hearing is not a fishing expedition for any possible evidence that may support a speculative claim).

EXHIBIT G

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(215) 686-8000

LAWRENCE S. KRASNER
DISTRICT ATTORNEY

October 26, 2018

The Honorable Leon W. Tucker
Supervising Judge - Criminal
Suite 1201, Criminal Justice Center
1301 Filbert Street
Philadelphia, Pa. 19107

Re: Commonwealth v. Mumia Abu-Jamal, aka Wesley Cook
CP-51-CR-0113571-1982 PCRA

Dear Judge Tucker,

Please accept this letter brief as the Commonwealth's response to defendant's October 22, 2018 supplemental amended petition.

After searching its legislative files, the Commonwealth produced a May 25, 1988 letter from ADA Kathleen McDonnell to Senator Fisher's office, in which ADA McDonnell responded to the senator's "request" by providing a list of the "current status of certain death row inmates" including defendant and eight others, all of whom had appeals or post-verdict motions pending (Attached as Exhibit A). The Commonwealth also produced a September 23, 1988 letter from DA Castille to

Senator Fisher (Attached, with enclosures, as Exhibit B).[1] In that letter, Castille asked Fisher for his help in enacting "Senate Bill 956 (directing the Supreme Court to remand vacated death penalty cases for new sentencing hearings)," discussed the related impact of the United States Supreme Court's decision in Mills v. Maryland, 108 S.Ct. 1862 (1988),[2] and mentioned torture, wiretap and forfeiture legislation. Contrary to defendant's claim, these documents do not put Castille any closer to the requisite significant, personal involvement in a critical decision in defendant's case for purposes of relief under Williams. Nor do the documents show that Castille harbored disqualifying bias against defendant.

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[1] As explained in its October 3, 2018 Verification, the Commonwealth found the May 25, 1988 McDonnell-Fisher letter in its legislative files in May 2018 but regrettably overlooked it and did not produce it until shortly before the August 30, 2018 listing of this case. Although the letter does not show Castille's personal involvement in defendant's case, the Commonwealth had agreed to produce all documents that referenced defendant and Castille, even if the reference to Castille was merely his name on the letterhead, like it was on the McDonnell-Fisher letter.

The assigned attorney has since personally reviewed the legislative files for the Castille and Lynne Abraham administrations, as did the PCRA paralegal. We did not find any additional documents referencing defendant and DA Castille that were not previously disclosed. Nor were any documents found relating to the 1988 McDonnell-Fisher letter, including (if it was in writing) Senator Fisher's "request" for the information that is referenced in the letter. The only correspondence between Castille and Fisher found in the legislative files is the September 23, 1988 letter that Castille wrote to Fisher referenced above, which does not mention defendant.

[2] In Mills, the United States Supreme Court vacated a death sentence after finding that the penalty phase instructions and the verdict form created a substantial probability that the jurors may have believed they could not consider mitigating evidence unless all jurors agreed on the existence of that mitigating circumstance. 486 U.S. 367, 384. In a 1998 PCRA appeal, the Pennsylvania Supreme Court, which included Justice Castille, rejected defendant's Mills claim. Commonwealth v. Abu-Jamal, 720 A.2d 79, 119 (Pa. 1998). In 2011, the Third Circuit Court of Appeals vacated defendant's death sentence after finding a Mills violation and remanded for a new sentencing hearing or the imposition of a life sentence. Following the denial of its certiorari petition, the Commonwealth agreed to a life sentence.

The May 25, 1988 McDonnell-Fisher letter listed nine capital cases where appeals or post-verdict motions were pending, including defendant's. Because Castille did not author this letter and his name was merely on the letterhead as it was on every single letter that was generated while he was DA, it is not evidence of his personal involvement in defendant's case, much less his significant, personal involvement in any critical decision. Nor does the letter establish any personal bias by Castille against defendant.

The September 23, 1988 letter in which DA Castille lobbied Senator Fisher for legislation that would require the appellate courts to remand vacated death penalty cases for new sentencing hearings, rather than for the imposition of a life sentence as then required by statute, does not mention defendant. As such, it is not proof of Castille's significant, personal involvement in any critical decision in defendant's case. Nor does it establish that Castille harbored disqualifying bias against defendant.

Defendant argues that the Commonwealth's failure to produce Senator Fisher's written request for the information provided to him in ADA McDonnell's May 25, 1988 letter supports an adverse inference that the request was made directly to Castille and that Castille and Fisher "collaborat[ed]" to use defendant's case as a "tool" "to push new death penalty legislation in Pennsylvania" (Defendant's Second

Amended Petition at 19, 22, 30).[3] This inference is not a reasonable one. Rather, the more reasonable inference is that Senator Fisher had requested a list of "all death row inmates" in Philadelphia who had appeals or post-verdict motions pending, which ADA McDonnell provided to him in her May 25, 1988 letter.[4]

Even if Senator Fisher had directed his request for a status of a category of cases to Castille, who then passed the request along to ADA McDonnell, defendant still would not be entitled to relief. Such minimal involvement would not constitute significant, personal involvement by Castille in any critical decision in defendant's case. Nor would such minimal involvement prove that Castille harbored disqualifying bias against defendant.

Finally, there is nothing remarkable about a DA lobbying a senator for legislation favorable to his office. The September 23, 1988 Castille-Fisher letter was one of many letters in the legislative files that DA Castille wrote to countless other legislators regarding all different types of legislation. The mere fact that this bill could potentially impact defendant because his direct appeal was pending, just like it could impact all other capital defendants in the Commonwealth whose appeals were pending, does not constitute proof of Castille's significant, personal involvement in a

---

[3] Senator Fisher's request could have been oral, which would explain why no written request was found in the legislative files.

[4] It is not surprising that a state senator might be interested in monitoring how many cases throughout the Commonwealth, including those from its largest city, certain legislation might impact.

critical decision in defendant's case. Nor does it show that Castille harbored disqualifying bias against him.[5]

What the documents show and what this comes down to is this: Castille was indisputably a vocal and active proponent of the death penalty while he was DA. But that does not mean that he had any significant, personal involvement in any critical decisions in defendant's case, or harbored a disqualifying bias against defendant.

For these reasons and those stated in the Commonwealth's August 9, 2018 response, this Court should deny PCRA relief.

Respectfully submitted:

Tracey Kavanagh

Tracey Kavanagh
Assistant District Attorney
Supervisor, PCRA Unit
215-686-5707

cc: Judy Ritter, Esquire
Samuel Spital, Esquire

[5]DA Castille and Senator Fisher were far from the only supporters of this bill. According to Castille's September 23, 1988 letter, the bill had already "passed 45-1 in the Senate back in 1987."

Nancy - Chr

DISTRICT ATTORNEY'S OFFICE
1421 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19102

RONALD D. CASTILLE
DISTRICT ATTORNEY

May 25, 1988

Honorable D. Michael Fisher
71 McMurray Road
Suite 103
Pittsburgh, PA 15241

Attention: Christopher Lee

Dear Chris:

Pursuant to Senator Fisher's request, the following is the current status of certain death row inmates:

1. Mumia Abu-Jamal - direct appeal pending in the Pennsylvania Supreme Court (case argued on January 1, 1988).

2. Herbert Lee Baker - direct appeal pending in the Pennsylvania Supreme Court; PCHA petition denied November, 1987; appeal from PCHA order pending in the Pennsylvania Supreme Court (case has been briefed, although, argument date has not yet been scheduled).

3. James Jones - direct appeal pending in the Pennsylvania Supreme Court (case has not yet been briefed or argued).

4. Thomas Jones - direct appeal pending in Pennsylvania Supreme Court (case has been briefed and argument is expected in the next session).

5. Reginald Lewis - post-verdict motions pending in common pleas court.

6. Jerome Marshall - direct appeal pending in Pennsylvania Supreme Court (case argued in December, 1987).

7. Florencio Rolan - direct appeal pending in Pennsylvania Supreme Court (case argued in January, 1988).

8. Herbert Watson - direct appeal pending in Pennsylvania Supreme Court (case argued in April, 1988).

9. Robert Wharton - direct appeal pending in Pennsylvania Supreme Court (case argued in December, 1987).

Exhib. + A

Fortunately, I was able to get this information to you more quickly than I had projected, as most of these individuals are on direct appeal. In any event, please do not hesitate to contact me for any further information.

Sincerely,

Kathy McDonnell

KATHLEEN A. McDONNELL
Assistant District Attorney
686-5775

/mm

File

RONALD D. CASTILLE
DISTRICT ATTORNEY

DISTRICT ATTORNEY'S OFFICE
1421 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19102
686-8000

September 23, 1988

Honorable D. Michael Fisher
Senate of Pennsylvania
Room 172, Main Capitol Building
Harrisburg, PA 17120

Dear Senator Fisher:

I am writing to seek your help in getting Senate Bill 956 (directing the Supreme Court to remand vacated death penalty cases for new sentencing hearings) enacted before the end of the 1987-1988 legislative session. As one of the chief sponsors of Senate Bill 956, you doubtless are aware that this bill was passed 45-1 by the Senate back in 1987. Senate Bill 956 has now been roadblocked by House Judiciary Committee Chairman William DeWeese for nearly a year.

The United States Supreme Court's recent pronouncement in Mills v. Maryland, 108 S.Ct. 1862 (1988) has dramatically escalated the potential damage caused by Representative DeWeese's dilatory actions. As you know, the Mills decision invalidates jury instructions or juror verdict slips that fail to clarify each juror's individual duty to consider and weigh mitigating circumstances. Depending on the facts of each Pennsylvania case where the death penalty has been imposed, Mills may lead to the vacating of scores of death penalties. Without remand legislation, these defendants, who committed the most abominable killings in the past decade, will be entitled to automatic life sentences. It is imperative that Senate Bill 956 be enacted as expeditiously as possible.

I am enclosing copies of amendments to Senate Bill 956 proposed by Justice Rolf Larsen, which would provide that the remand sentencing proceedings be heard by the trial judge, and not a new jury. With those amendments are correspondence between Gary Tennis and Kathy Eakin addressing the constitutionality of such a procedure. Possible amendments to the "torture" provisions are also discussed. The decision between Senate Bill 956 as it now exists and Justice Larsen's proposal is, of course, a matter for your judgment. I will have Gary Tennis keep in contact with Roberta Kearney about these matters.

Exhibit B

On another matter, I have been informed that you will be the key legislator in ensuring the ultimate passage of our wiretap legislation. Please accept my appreciation for your effective leadership on behalf of Pennsylvania law enforcement in these areas, as well as your past efforts in helping to enact important new directions in law enforcement such as the new forfeiture statute.

Sincerely yours,

Ronald D. Castille

RONALD D. CASTILLE
District Attorney

/mm

Encl.

cc: Honorable George C. Yatron, President,
Pennsylvania District Attorneys Association
Roberta Kearney, Legislative Director for Senator Fisher
Gary Tennis, Chief, Legislation Unit

DISTRICT ATTORNEY'S OFFICE
1421 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19102

RONALD D. CASTILLE
DISTRICT ATTORNEY

July 6, 1988

Kathleen Eakin, Counsel
Senate Judiciary Committee
Room 353, Main Capitol Building
Harrisburg, PA 17120

Dear Kathy:

Enclosed please find a memorandum from one of our summer interns, detailing the problems with the proposed statutory explanation of torture. The bottom line is that, under Maynard v. Cartwright, 56 U.S.L.W. 4501 (slip op. filed 6/7/88) the aggravating circumstance of the murder being "especially heinous, atrocious, or cruel" was held to be unconstitutionally vague (I can't say that I understand why). This unconstitutionally vague language is too similar to the proposed language "unnecessarily heinous, atrocious, or cruel, manifesting exceptional depravity".

We would suggest instead the following approach:

> Torture may be inferred from the infliction of severe physical or emotional pain not necessary to the commission of the murder.

Some of the reasons for this are set forth in Andy Bernknopf's memorandum at page 4.

Thanks for your patience in considering these suggestions.

Sincerely,

GARY TENNIS
Chief, Legislation Unit

/mm

Encl.

cc: Ronald D. Castille, District Attorney
William G. Chadwick, First Assistant District Attorney
Andrew Bernknopf, Summer Intern

Exhibit B Enclosures

MEMORANDUM

DATE: 7/1/88

TO: Gary Tennis, Chief of Legislation

FROM: Andrew Bernknopf, Summer Intern AB

RE: **Proposed Definition of "Torture" as an Aggravating Circumstance in Pennsylvania Death Penalty Statute**

Pennsylvania Senate Bill No. 956 (1987) seeks, inter alia, to amend 42 Pa.C.S. §9711, the aggravating circumstances to be considered during death sentencing, by defining "torture". The proposed legislation states that "Torture may be inferred from the infliction of pain and suffering on a victim which is unnecessarily heinous, atrocious, or cruel, manifesting exceptional depravity. It shall include the killing of one family member in the presence of another family member." For reasons discussed below, a better statutory definition of torture would be: "Torture may be inferred from the infliction of severe physical or emotional pain not necessary to the commission of the murder." This formulation would encompass the scenarios sought to be addressed by the proposed legislation, and would not stand at risk of serious constitutional challenges for vagueness.

At issue is the fact that the proposed legislation seeks to define the word "torture" with language deemed impermissibly vague by the United States Supreme Court as applied in two cases.[1]

In Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the Court reversed and remanded a death penalty sentence in which the jury found the presence of the aggravating circumstance that the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." The Court noted that the Georgia Supreme Court had elucidated the meaning of the particular aggravating circumstance in three ways. First, that in order to show the presence of this aggravating

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[1] Substantially similar language designating an aggravating circumstance in a Georgia death penalty statute, viz, "the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim", was upheld on its face under the Eighth Amendment in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1975).

circumstance the state must demonstrate "torture, depravity of mind, or an aggravated battery to the victim." Godfrey v. Georgia, 446 U.S. at 431, 100 S.Ct. at 1766. Second, the Georgia Supreme Court ruled that the phrase "depravity of mind" comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. Id. Third, the Georgia Supreme Court held that the word "torture" must be construed in pari materia with the Georgia definition of "aggravated battery" so as to require evidence of serious physical abuse of the victim before death. Id. The United States Supreme Court noted that a number of Georgia death sentences prior to the Godfrey decision met all three of these criteria. Id.

However, as applied in Godfrey, the aggravating circumstance was found to be impermissibly vague, thus violative of the Eighth Amendment's prohibition against cruel and unusual punishment. In Godfrey, the trial judge failed to instruct the jury as to what exactly "outrageously or wantonly vile, horrible or inhuman..." meant. Godfrey v. Georgia, 446 U.S. at 426, 100 S.Ct. at 1763. He merely recited verbatim the aggravating circumstance during his jury charge. Id., 446 U.S. at 426, 100 S.Ct. at 1764. In fact, during the course of his sentencing argument, the prosecutor stated that the case involved no allegation of "torture" or of an "aggravated battery", yet the jury nonetheless found the existence of the above aggravating circumstances. Id.

The Supreme Court held that, under the circumstance, the imposition of death was arbitrary and capricious in violation of the Eighth Amendment. Justice Stewart wrote:

> In the case before us the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder, as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the numbers of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions." Godfrey v. Georgia, 446 U.S. at 428-29, 100 S.Ct. at 1765.

A recent Supreme Court decision affirmed the reasoning of the Court in Godfrey and overturned a death sentence based on a similarly worded Oklahoma death penalty statute. The aggravating

circumstance found to be unconstitutionally vague as applied in Maynard v. Cartwright, 56 U.S.L.W. 4501 (June 7, 1988), was to be found if the murder was "especially heinous, atrocious, or cruel". At the time of the defendant's sentencing, the Oklahoma Supreme Court had considered the attitude of the killer, the manner of the killing, and the suffering of the victim to be relevant and sufficient to support the aggravating circumstance, but the court had "refused to hold that any one of these factors must be present for a murder to satisfy this aggravating circumstance". Id. at 4502 (emphasis in original). This was held in Cartwright to be constitutionally insufficient.[2]

The proposed Pennsylvania legislation would effectively reverse the defining process mandated by the Supreme Court. It would define "torture", a term which the Court has found to give constitutionally valid guidance to capital sentencing juries, with language which itself must be defined to a jury to be constitutionally acceptable. A more reasoned approach to define "torture", and one undertaken by state courts throughout the country, would utilize the commonly understood English language definition of the word.

The California Supreme Court has defined torture as an aggravating circumstance in the state death penalty statute to be "the infliction of extreme physical pain no matter how long its duration". See California v. Davenport, 41 Cal.3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1986) (upholding torture as constitutionally valid aggravating circumstance in vagueness challenge). Idaho has used two definitions of torture: 1) the intentional infliction of extreme and prolonged pain with the intent to cause suffering, and 2) the infliction of extreme and prolonged acts of brutality irrespective of proof of intent to cause suffering. See Idaho v. Stuart, 110 Idaho 163, 715 P.2d 833 (1985). The Louisiana Supreme Court definition of torture as an aggravating circumstance is a "serious physical abuse of the victim before death". See Louisiana v. Lowenfield, 495 So.2d 1245 (1985). Nebraska finds the presence of torture "where the victim is subjected to serious physical, sexual, or psychological abuse before death". See Nebraska v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984). Tennessee defines torture as the "infliction of severe physical or mental pain upon the victim while he or she

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[2] Subsequent to the sentencing in Cartwright, the Oklahoma Court of Criminal Appeals has restricted the "heinous, atrocious, or cruel" aggravating circumstance to those murders in which torture or serious physical abuse is present. Id. at 4503. The United States Supreme Court expressly refused to hold that torture or serious physical abuse could be the only constitutionally acceptable definition for such an aggravating circumstance. Id.

remains alive and conscious". See Tennessee v. Williams, 690 S.W.2d 517 (1985).

The definition of torture proposed herein as "the infliction of severe physical or emotional pain not necessary to the commission of the murder" fits squarely within this array of definitions. More importantly, this definition can provide proper guidance to a lay jury faced with the challenge of imposing death. Moreover, the above definition would itself adequately address cases where a family member is killed in the presence of another family member. A prosecutor would have little trouble convincing a jury that such a method of murder would inflict severe emotional pain on its victims. By omitting specific examples, the statute would more adequately address the infliction of torture by methods unimaginable to the drafters.

In sum, if the goal is to properly guide death sentences so that they are not imposed arbitrarily or capriciously, the definition should be clear and precise enough to give real guidance while far-reaching enough to address the wide range of circumstances in which a death sentence is appropriate. The definition of torture proposed in this memorandum effectively achieves that goal.

/mm

7 re

DISTRICT ATTORNEY'S OFFICE
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PHILADELPHIA, PENNSYLVANIA 19102

RONALD D. CASTILLE
DISTRICT ATTORNEY

June 21, 1988

Kathleen Eakin, Counsel
Senate Judiciary Committee
Room 353, Main Capitol Building
Harrisburg, PA 17120

Dear Kathy:

Enclosed please find two memoranda addressing, and I believe putting to rest, the constitutional concerns I initially had concerning Justice Larsen's proposal.

There is a possible answer to the claim that it violates due process to take away the defendant's right to have a jury do the sentencing because of someone else's mistake at the initial sentencing proceeding (item #4 of my memo). This issue can be analogized to the "harmless error" rule, where an appellate court finds error at the trial but finds beyond a reasonable doubt that the jury would have convicted the defendant even if the error had not occurred. Commonwealth v. Story, 476 Pa. 391, 405-10, 383 A.2d 155 (1978). In such cases, the courts reject a defendant's argument that his right to have his guilt or innocence decided by an untainted jury was taken away from him by someone else's error (in a certain sense, the appellate court acts as a kind of fact-finder when it concludes that the jury would have convicted defendant even without the error). This defense argument does not prevail because it would waste scarce judicial resources to require a new trial in a situation where, all circumstances taken into account, the defendant fairly has been adjudicated guilty.

Similarly here, although the defendant technically would lose the opportunity to have a jury determine his penalty due to error by others outside his control, he nonetheless would receive a fair adjudication of the sentencing issue and therefore would have no grounds for reversal of the sentence. This is the case for two reasons: first, it is axiomatic that a judge's determination of such issues is every bit as fair as that of a jury's, see Commonwealth v. Council, 491 Pa. 434, 438, 421 A.2d 623 (1980) ("a judicial fact-finder is more capable of disregarding prejudicial evidence than a lay jury"); second, the trial judge would be in a position to come to a more reliable sentencing hearing since the judge heard all of the trial evidence, rather than the abbreviated version of the trial that, as a practical matter, would be necessary were a new jury to be impanelled.

Finally, the definition of torture refers to the killing as "unnecessarily heinous, atrocious, or cruel...". Our intern noted to me that most states instead use the word "especially heinous, atrocious, or cruel...". This might be mildly preferable since an especially cruel killing should not be mitigated by the fact that the killer felt he had to be unusually cruel in order to carry out the murder. I don't have strong feelings about this language, but just wanted to bring my intern's observation to your attention.

Thanks for consulting with me about the language.

Sincerely,

Gary

GARY TENNIS
Chief of Legislation

/mm

cc: Ronald D. Castille, District Attorney
William G. Chadwick, First Assistant District Attorney

bcc: Ronald Eisenberg, Chief, Appeals Unit

MEMORANDUM

DATE: 6/16/88

TO: Gary Tennis, Chief of Legislation

FROM: Andrew Bernknopf, Summer Intern

RE: Constitutionality of Judge-Imposed Death Sentence

ISSUES:

1. Is there a constitutional right to have a death sentence imposed by a jury?

2. What states give the responsibility of imposing the death sentence to the trial judge?

3. Where the initial death penalty sentencing is performed by the jury, but sentence is reversed due to error at the sentencing hearing, is there any constitutional proscription against requiring that the new death penalty hearing be before a judge?

Conclusions:

1. Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) squarely holds that the sentence of death is not constitutionally required to be imposed by a jury.

2. As of July 1984, four states, Arizona, Idaho, Montana and Nebraska, gave responsibility to the judge alone to impose the death sentence. In Nevada, responsibility for imposing the death sentence rests with the jury, but if the jury cannot agree, a panel of three judges may impose the death sentence. In Florida, Alabama and Indiana, the jury's role in the death sentencing phase is advisory in nature. A judge may override a jury's recommendation of life.

3. Although no Supreme Court decision exists exactly on point, it follows directly from Spaziano that a remanded capital sentencing determination may be conducted by a judge sitting alone even if the initial death was imposed by a jury.

However, the Eleventh Circuit, reviewing Florida's particular advisory jury system has created a narrow exception to Spaziano in Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) in which it holds that if a constitutional error occurs during the advisory jury sentencing proceeding so as to taint the jury's recommendation, on remand a new advisory jury must be called to make a new recommendation.

DISCUSSION:

1. In Spaziano, the defendant was convicted of first degree murder. A majority of the unpolled jury recommended a life sentence, but under Florida's death penalty statute, the jury's sentencing recommendation in a capital case is only advisory. The trial judge decided to impose death notwithstanding the jury recommendation.

On appeal, the Florida Supreme Court affirmed the conviction, but reversed the death sentence because the trial judge had taken into account a confidential portion of the pre-sentence investigation report that contained prejudicial information concerning the defendant's prior criminal record.

On remand, the trial judge, sitting without a jury, sentenced the defendant to death. The entire procedure was held valid under the Constitution by the United States Supreme Court. Spaziano directly holds that there is no constitutional requirement that a death sentence must or even should be imposed by a jury. Spaziano, 104 S.Ct. 3154, 3161-64.

2. See attached page from Spaziano for citations to all thirty-seven death penalty statutes broken down by judge/jury responsibility for sentencing.

3. Although the particular aspect of the Florida capital sentencing procedure which allowed the trial judge in Spaziano to impose death on remand without any new jury recommendation was not challenged in that case, Spaziano's central holding that a jury sentence of death is not constitutionally mandated would seem to support the procedure delineated in the proposed amendment to the Pennsylvania death penalty statute. No subsequent United States Supreme Court decisions have addressed the issue, nor have any state supreme courts rejected Spaziano's central holding on state constitutional grounds.

However, the Eleventh Circuit has carved out a narrow exception to Spaziano in Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987). In Magill, the Florida Supreme Court found that there had been a constitutional error committed during the sentencing phase of the defendant's capital trial by a failure to instruct the jury to consider non-statutory mitigating circumstances as mandated by Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). It remanded the case to the trial judge who reimposed the death penalty, although he did find the presence of one non-statutory mitigating factor.

The Federal Court of Appeals for the Eleventh Circuit on habeas corpus review found this procedure constitutionally defective and ordered the Florida Supreme Court to remand the case once again for sentencing with the aid of a new advisory jury. The trial judge, it noted, had expressly taken into account the original jury's sentencing recommendation on remand,

thus failing to erase the taint from the original defective proceeding.

The Eleventh Circuit harmonized this decision in Magill with Spaziano by noting that "Although Spaziano indicates that a state may allocate the sentencing power as it wishes between the judge and jury, it does not stand for the proposition that the state may arbitrarily alter this allocation as it applies to particular defendants." Magill v. Dugger, 824 F. 2d 879, 894 (11th Cir. 1987) (emphasis added). The court appears to be saying that once a state establishes a jury system of capital sentencing it cannot take away a defendant's right to a jury on remand. The court does not expressly go this far, perhaps because it did not wish to defy Spaziano's central holding outright.

The court does go on to note that it is the standard practice of the Florida Supreme Court to remand for resentencing in capital cases by a new advisory jury if it believes that the original sentencing proceeding is marred by serious error. See, e.g. Lucas v. State, 490 So.2d 943, 946 (Fla. 1986); see also Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987) (instructing federal district court to grant writ of habeas corpus unless Florida Supreme Court provides new sentencing hearing before advisory jury).

The Magill holding is an extremely narrow one. The decision expressly upholds two previous Eleventh Circuit decisions in which resentencing was conducted by a judge sitting without a new advisory jury. In Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985), cert. denied, 106 S.Ct. 1242, 89 L.Ed.2d 349 (1986) and Proffitt v. Wainwright, 756 F.2d 1500 (11th Cir. 1985) the constitutional errors which occurred had no effect on the sentencing hearing before the original advisory jury. As such, and as Magill expressly notes, no purpose would be served by ordering a defendant to be resentenced by a jury. Magill, 824 F.2d 879, 894, n.17.

One question that can only be answered speculatively considering the complex absence of caselaw on the subject is what difference it might make constitutionally to a Pennsylvania court or local federal circuit that the Pennsylvania death penalty statute places complete responsibility for capital sentencing in the hands of the jury while Florida's capital jury serves only an advisory sentencing role. It is worth noting that the Florida jury's "recommendation" is generally given great weight by the sentencing judge. The standard for overriding the jury in Florida is "facts so clear and convincing that virtually no reasonable person could differ as to the appropriateness of the death penalty." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). As we have seen in Spaziano, however, cases do arise in which the judge does reject a jury recommendation. The Florida statute requires, regardless of the jury's recommendation, that the trial judge conduct an independent review of the evidence and make his own findings regarding aggravating and mitigating circumstances.

If the judge imposes death he must set forth in writing the findings on which the sentence is based.

Whether a court would find the proposed resentencing by a judge in the face of the initial plenary grant of sentencing power to the jury an "arbitrary" deprivation of a constitutional right as the court found in Magill is an open question. It is the author of this memorandum's belief that were this hypothetical challenge ever litigated up to the Supreme Court it would pass constitutional muster. See Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986) (Spaziano cited as good authority); see also Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985), cert. denied, 106 S.Ct. 1242, 89 L.Ed.2d 349 (a986) (cert. denied in Florida case where resentencing conducted by judge without advisory jury).

/mm

Att.

[5] We also acknowledge the presence of the majority view that capital sentencing, unlike other sentencing, should be performed by a jury. As petitioner points out, 30 out of 37 jurisdictions with a capital sentencing statute give the life-or-death decision to the jury, with only 3 of the remaining 7 allowing a judge to override a jury's recommendation of life.[9] 1464The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. "Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment" is violated by a challenged practice. See *Enmund v. Florida*, 458 U.S. 782, 797, 102 S.Ct. 3368, 3376, 73 L.Ed.2d 1140 (1982); *Coker v. Georgia*, 433 U.S. 584, 597, 97 S.Ct. 2861, 2868, 53 L.Ed.2d 982 (1977) (plurality opinion). In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme. See *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); *Zant v. Stephens*, 462 U.S., at 884, 103 S.Ct., at 2747; *Gregg v. Georgia*, 428 U.S., at 195, 96 S.Ct., at 2935 (joint opinion). The Court twice has concluded that Florida has struck a reasonable balance between sensitivity to the individual and his circumstances and ensuring that the penalty is not imposed arbitrarily or discriminatorily. *Barclay v. Florida*, 463 1465U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Proffitt v. Florida*, 428 U.S. 242,

case than on the constitutionality of the judge's doing so. We have no particular quarrel with the proposition that juries, perhaps, are more capable of making the life-or-death decision in a capital case than of choosing among the various sentencing options available in a noncapital case. See ABA Standards for Criminal Justice 18–1.1, Commentary, pp. 18.21–18.22 (2nd ed. 1980) (reserving capital sentencing from general disapproval of jury involvement in sentencing). Sentencing by the trial judge certainly is not required by *Furman v. Georgia, supra*. See *Gregg v. Georgia*, 428 U.S., at 188–195, 96 S.Ct., at 2932–2935 (joint opinion). What we do not accept is that, because juries may sentence, they constitutionally must do so.

9. Twenty-nine jurisdictions allow a death sentence only if the jury recommends death, unless the defendant has requested trial or sentencing by the court. See Ark.Stat.Ann. § 41–1301 (1977); Cal.Penal Code Ann. § 190.3 (West Supp.1984); Colo.Rev.Stat. § 16–11–103 (1978 and Supp.1983); Conn.Gen.Stat. § 53a–46a (1983); Del.Code Ann., Tit. 11, § 11–4209 (1979 and Supp.1982); Ga.Code Ann. §§ 17–10–30 to 17–10–32 (1982); Ill.Rev.Stat., ch. 38, ¶ 9–1 (Supp.1984); Ky.Rev.Stat. § 532.025(1)(b) (Supp.1982); La.Code Crim.Proc.Ann., Art. 905.8 (West Supp.1984); Md.Ann.Code, Art. 27, § 413 (Supp.1983); Mass.Gen.Laws Ann., ch. 279, §§ 68, 70 (West Supp.1984); Miss.Code Ann. § 99–19–101 (Supp.1983); Mo.Rev.Stat. § 565.006 (Supp.1982); N.H.Rev.Stat.Ann. § 630.5 (Supp.1983); N.J.Stat.Ann. § 2C:11–3(c) (West 1982); N.M.Stat.Ann. § 31–20A–3 (1981); N.C.Gen.Stat. § 15A–2000 (1983); Ohio Rev. Code Ann. § 2929.03 (1982); Okla.Stat., Tit. 21, § 701.11 (1981); 42 Pa.Cons.Stat. § 9711(f) (1982); S.C.Code § 16–3–20 (Supp.1983); S.D. Comp.Laws Ann. § 23A–27A–4 (1979); Tenn. Code Ann. § 39–2–203 (1982); Tex.Code Crim. Proc.Ann., Art. 37.071 (Vernon 1981 and Supp. 1984); Utah Code Ann. § 76–3–207 (Supp.1983); Va.Code § 19.2–264.4 (1983); Wash.Rev.Code § 10.95.030 (1983); Wyo.Stat. § 6–2–102 (1983); 49 U.S.C.App. § 1473(c). In Nevada, the jury is given responsibility for imposing the sentence in a capital case, but if the jury cannot agree, a panel of three judges may impose the sentence. Nev.Rev.Stat. §§ 175.554, 175.556 (1981). In Arizona, Idaho, Montana, and Nebraska, the court alone imposes the sentence. Ariz.Rev. Stat.Ann. § 13–703 (Supp.1983–1984); Idaho Code § 19–2515 (1979); Mont.Code Ann. § 46–18–301 (1983); Neb.Rev.Stat. § 29–2520 (1979). Besides Florida, the only States that allow a judge to override a jury's recommendation of life are Alabama and Indiana. Ala.Code § 13A–5–46 (1982); Ind.Code § 35–50–2–9 (Supp.1984).

MEMORANDUM

DATE: 6/17/88

TO: Andrew Bernknopf, Summer Intern

FROM: Gary Tennis, Chief of Legislation

RE: **Follow-up on Your Memorandum Concerning Death-Penalty Remands**

It looks to me like the Magill court reversed because the trial judge continued to give weight to the original sentencing jury's tainted recommendations. Thus, the taint (the failure to properly instruct the jury) persisted even in the remand sentencing. Is this correct?

My further questions are:

1. Had the Magill judge expressly disavowed any reliance on the original jury's sentencing recommendation, would that have avoided the error found by the 11th Circuit (since the independent determination would not be tainted by the original jury's flawed sentencing recommendation)? RIGHT

2. Or, would there still be reversible error because the defendant had a statutory right to a properly founded jury recommendation, and denial of that right would "arbitrarily alter this allocation [of sentencing power between judge and jury] as it applies to particular defendants"? POSSIBLY

3. Either way it appears that Magill shouldn't be a problem where the statute expressly takes away the right to a jury determination on demand. Your thoughts? YES, EXACTLY

4. What is our response to this potential defense argument?

"Under the proposed statute, my statutory right to jury sentencing can be taken away from me arbitrarily, i.e. due to factors beyond my control such as prosecutorial misconduct, erroneous jury instructions or other error. This arbitrary taking away of a benefit I would have had, simply because of the errors or wrongdoing of others beyond my control, constitutes a denial of due process." ?

Finally, that was a great memo. (But what is a "complex absence of caselaw"?)

TYPO

/mm

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Senate of Pennsylvania

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PENNSYLVANIA COMMISSION ON SENTENCING

May 25, 1988

Gary Tennis, Esq.
Assistant District Attorney
1300 Chestnut Street, 10th Floor
Philadelphia, Pa. 19107

Dear Gary:

I recently met with Justice Rolf Larsen to discuss his concerns regarding Senate Bill 956.

As a result of our discussion, I have had the enclosed amendment drafted. It is intended to make the bill applicable to all cases and effective immediately.

In addition, Justice Larsen feels that an objective test for determining torture as an aggravating circumstance should be included based on the language in Commonwealth v. Pursell, 495 A.2d 183 (1985), rather than relying solely on the subjective intent of the murderer. Finally, the aggravating circumstances of killing a witness to prevent him from giving testimony is expanded to include all types of proceedings.

I am sending a copy to Representative DeWeese to request that he introduce the amendment when the bill is brought before the committee. If he is unwilling to offer the amendment, I plan to introduce a new bill with these changes. Should you have any comments regarding the amendments, please contact Kathy Eakin of my Harrisburg office. Thank you

Sincerely,

Stewart J. Greenleaf

STEWART J. GREENLEAF

SJG/agm

S0956B1691A2583 MRD:EW 05/25/88 #90 A2583

LEGISLATIVE REFERENCE BUREAU

AMENDMENTS TO SENATE BILL NO. 956

Mr.

Printer's No. 1691

Amend Sec. 1 (Sec. 9711), page 3, lines 2 and 3, by inserting a bracket before "TO" in line 2 and after "DEFENDANT" in line 3

Amend Sec. 1 (Sec. 9711), page 3, line 5, by inserting a bracket before and after "GRAND JURY OR"

Amend Sec. 1 (Sec. 9711), page 3, line 5, by inserting after "CRIMINAL"

or civil

Amend Sec. 1 (Sec. 9711), page 3, lines 5 and 6, by inserting brackets before and after "INVOLVING SUCH OFFENSES"

Amend Sec. 1 (Sec. 9711), page 3, line 13, by striking out "INCLUDES, BUT IS NOT LIMITED TO," and inserting

may be inferred from the infliction of pain and suffering on a victim which is necessarily heinous, atrocious, or cruel, manifesting exceptional depravity. It shall include

Amend Sec. 1 (Sec. 9711), page 4, lines 29 and 30, by striking out "a new" in line 29, all of line 30 and inserting

resentencing by the trial judge who shall determine whether the defendant shall be sentenced to death or life imprisonment based on the record and argument of counsel.

Amend Bill, page 5, lines 3 through 5, by striking out all of said lines and inserting

Section 2. This act shall take effect immediately.

EXHIBIT H

LAWRENCE S KRASNER
DISTRICT ATTORNEY

DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499
(215) 686-8000

December 17, 2018

The Honorable Leon W. Tucker
Supervising Judge - Criminal
Suite 1201, Criminal Justice Center
1301 Filbert Street
Philadelphia, Pa. 19107

Re: Commonwealth v. Mumia Abu-Jamal, aka Wesley Cook
CP-51-CR-0113571-1982 PCRA

Dear Judge Tucker,

On December 7, 2018, this Court ordered counsel to file a memorandum of law "regarding Canon 3(C) of the Pennsylvania Judicial Code (1974, as amended), and its relevance to the issues currently before this court as set forth in Williams v. Pennsylvania, 136 S.Ct. 1899 (2016)." This is the Commonwealth's memorandum.

A. Disqualification Was Not Required Under the Judicial Code.

When Justice Castille served on the Pennsylvania Supreme Court, Canon 3(C) provided, in relevant part, as follows:

> 1. A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Pa. Code of Judicial Conduct (1974, as amended).

The Pennsylvania Judicial Code did not require Justice Castille's disqualification from defendant's PCRA appeals. As to subpart (a), there is no evidence to suggest that Castille had "personal bias or prejudice" against defendant or that he had "personal knowledge of disputed evidentiary facts" at issue. As fully explained in the Commonwealth's prior briefing in this matter, Castille's letter to Governor Casey urging him to sign death warrants in seventeen other capital cases – not defendant's and not just the cases of defendants who were convicted of killing police officers – is not proof of Castille's personal bias or prejudice concerning defendant. Castille's letter to Senator Fisher lobbying him to support various legislation did not mention defendant and is not proof of Castille's "personal bias or prejudice concerning" defendant. Finally, Castille's request for a routine status update on all capital cases, not just defendant's case, is not proof of

"personal bias or prejudice concerning" defendant. Nor do any of these documents show that Castille had "personal knowledge of disputed evidentiary facts" at issue.

As to the first clause of subpart (b), Castille did not "serve as lawyer in the matter in controversy" within the meaning of this clause. Castille was not the DA when defendant was arrested, tried and sentenced, and he did not make the critical decision to approve the death penalty. Rather, Castille did not become DA until defendant's case was winding its way through the routine direct appeal process. The fact that Castille's name appeared on briefs is irrelevant: it was and is the District Attorney's Office's custom for the DA's name to be listed on every appellate brief. This does not make him the "lawyer in the matter in controversy."

The second clause of subpart (b), advising that a judge should disqualify himself if a "lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter," also does not apply here.[1] To state the obvious, Castille was not a lawyer in a law firm at the time he was the DA. The Commentary to Canon 3 recognizes the critical distinction between an attorney in a law firm and an attorney in a governmental agency. Specifically, the Commentary to Canon 3(C) provides that a "lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency

[1] The third clause of subpart (b), advising a judge to disqualify himself when "the judge or a lawyer with whom he previously practiced law ... has been a material witness concerning" the matter is not relevant here.

within the meaning of this subsection; judges formerly employed by a governmental agency, however, should disqualify themselves in a proceeding if their impartiality might reasonably be questioned because of such association."

The Canon's distinction between government lawyers and private lawyers is evident from Muench v. Israel, 524 F.Supp. 1115, 1117 (E.D. Wis. 1981). In Muench, a federal judge declined to recuse himself under 28 U.S.C. Section 455(b)(3)[2] from adjudicating defendant's habeas petition even though he had served as the Attorney General during the time the defendant's criminal conviction was on appeal. As here, the judge had not personally participated in the appeal other than in his official capacity.

In determining whether disqualification was required, the Court considered the legislative history of Section 455(b)(3). That legislation was "derived largely from" the Congressional testimony of Professor E. Wayne Thode, the chairman and reporter for the ABA Committee that adopted the Code of Judicial Conduct and its Commentary. Id. The Court focused on Professor Thode's testimony about the then-version of the ABA Canon and Commentary (which Pennsylvania adopted) and specifically the clause at issue here – that a judge should disqualify

[2] Section 455(b)(3) provided that disqualification is mandatory when a judge "has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding...[,]"

himself when a "lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter."

Importantly, the Court emphasized Professor Thode's testimony about the critical distinction between government and law firm attorneys:

> The commentary clarifies the status of the judge who was formerly a lawyer in a governmental agency. An agency, for example, the Justice Department, is not fully equated with a private law firm, in that a former agency lawyer is not considered to have been associated with all other lawyers in the agency. I might say we started out by equating the two and, as we went along the committee decided that that really was taking too hard a line because to say that all lawyers in the Justice Department or the FCC or any other agency are to be considered in the same way you would consider the lawyers in a private law firm, that was too sweeping a disqualification and there was not good reason for it....

Muench, 524 F.Supp. at 1117 (quoting Professor Thode's testimony).

The Court relied on Professor Thode's testimony "that the Code's requirement of disqualification was applicable **only if** the judge who had previously been in a governmental agency had 'served as lawyer' in the same or similar proceeding." Id. at 1118 (emphasis added). Because the judge had not so served, disqualification was not warranted. See also Turner v. State of Mississippi, 573 So.2d 657, 678-80 (1990) (relying on Professor Thode's testimony to hold that

State Supreme Court Justice's tenure as Attorney General when defendant was extradited and his appeal was pending did not require Justice's disqualification).[3]

Case law also shows that Castille was not required to disqualify simply because of his official position as the DA when defendant's direct appeal was pending. Judges who served as the head of a prosecutor's office have routinely declined to disqualify themselves absent personal participation in the case. See, e.g. Laird v. Tatum, 409 U.S. 824 (1972) (Chief Justice Rehnquist declined to disqualify himself from hearing Laird's case on appeal, even though he held a high-level supervisory position in the Department of Justice while Laird was being investigated and prosecuted and publicly commented at that time on the subject matter of the litigation,

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[3] The 2007 ABA amendments to Canon 3(C), which Pennsylvania adopted in 2014, codifies the distinction between private and government attorneys for purposes of disqualification. The Canon now provides:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> ...
>
> (6) The judge:
>
> (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
>
> (b) served in government employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy; [...]

Canon 2.11: 207 PA. Code 33 (2014).

because he did not personally participate in the prosecution); Commonwealth v. Darush, 459 A.2d 727, 731 (Pa. 1983) (judge who was District Attorney when defendant's offenses were committed not required to recuse for that reason where record was "barren" of evidence that judge had "knowledge of, or participated in the investigation of the offense").

In point of fact, the case law is clear that a judge's prior position as head of a prosecutor's office does not warrant disqualification where the judge was not personally and directly involved in the case when it was pending in his or her office. E.g. Muench v. Israel, supra (federal judge declined to recuse himself from adjudicating defendant's habeas petition even though he had served as the Attorney General during time defendant was extradited and appealed his criminal conviction, since judge had not personally participated in the case other than in his official capacity); Turner v. State of Mississippi, supra (State Supreme Court Justice's tenure as Attorney General when defendant was extradited and his appeal was pending did not require his recusal); Matter of Searches Conducted on March 5, 1980, 497 F.Supp. 1283, 1294 (E.D. Wis. 1980) (recusal not required where judge had been state Attorney General when investigations involving defendant began; judge had supervised staff of almost 500 employees handling thousands of cases, and had no direct involvement in defendant's prosecution); Payne v. State, 48 Ala. App. 401, 408, 265 So.2d

185, appeal denied, 288 Ala. 748, 265 So.2d 192, cert. denied, 409 U.S. 1079 (1972) (judge not required to recuse merely because he previously held prosecutorial office, as opposed to personally working on particular piece of litigation); see also People v. Thomas, 199 Ill. App.3d 79, 145 Ill. Dec. 344, 556 N.E.2d 1246, 1253 (1990) (recusal not required where judge had been chief of criminal division with supervisory authority over defendant's case, but had no actual involvement in prosecution); Rodriguez v. State, 489 S.W.2d 121, 123 (Tex. Crim. 1972) (recusal not required where judge had been first assistant district attorney when prosecution began, but did not actually participate in case).

In short, Castille was not required to disqualify himself under the Canon simply because of his official title. Nor does Williams suggest otherwise. Rather, the Williams Court limited its holding to "the circumstances of [the Williams] case," i.e., a case where Castille personally and substantially participated as an attorney. Williams, 136 S.Ct. at 1908.

Moreover, there is sound practical reasoning for why the Canon distinguishes between government and private lawyers. Should this Court rule that Castille's official title as DA during the pendency of defendant's direct appeal alone required his disqualification under the Judicial Code, then his disqualification would be required in every appeal that came before him as justice for the more than 65,000 criminal matters and several thousand appeals his office handled each year while

he was the DA from 1986 to 1991.[4] To put it another way, under this scenario, this Court, in assessing PCRA petitions that raise Williams claims, would have to make only the following inquiry to determine if a defendant was entitled to relief: was the defendant's case pending in the DA's Office while Castille was DA? This is not the holding of Williams or any other authority.

B. This Court has no Jurisdiction to Enforce the Judicial Code.

Even if the Judicial Code did require Castille's recusal – it did not – defendant would still not be entitled to relief. The law is clear that "Canon 3 ... creates no right of recusal on behalf of litigants, but merely prescribes standards by which judges should exercise their discretion in ruling upon questions of recusal." Goodheart v. Casey, 523 Pa. 188, 198, 565 A.2d 757, 762 (1989);[5] Reilly v. Southeastern Pennsylvania Transp. Auth., 489 A.2d 1291, 1298 (Pa. 1985).

In Commonwealth v. Kearney, 92 A.3d 51 (Pa. Super. 2014), the defendant argued that Canon 3 of the Pennsylvania Judicial Code required the trial court's recusal from his bench trial because he and the trial court had an "acrimonious and adversarial relationship." Id. at 61, 62. The Superior Court rejected the claim,

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[4] Commonwealth v. Abu-Jamal, 720 A.2d 121, 123 (Pa. 1998) (Justice Castille denies recusal, noting that during his tenure as DA from 1986-1991, his office "*each year* disposed of over 65,000 criminal matters and several thousand appeals") (emphasis in original).

[5] As the Court explained in Goodheart, even if the lower court's failure to recuse did constitute a violation of the Code of Judicial Conduct, that would not automatically result in the vacation of the judgment of sentence because Canon 3 does not confer substantive rights upon the parties to the litigation in question. Rather, entitlement to relief on the recusal claim must be assessed under the substantive law regarding recusal.

explaining that "enforcement of the Code of Judicial Conduct is beyond [its] jurisdiction...." Id. at 62-63. The Court cited the following language of the Supreme Court in Reilly v. SEPTA, supra at 1298:

> In furtherance of our exclusive right to supervise the conduct of all courts and officers of the judicial branch of government pursuant to Article V, Section 10 (c) of our Constitution, we have adopted rules of judicial conduct for ourselves and all members of the judicial branch. (See Rules of Judicial Conduct, effective January 1, 1974, and reported at 455 Pa. XXXIX.) The enforcement of those rules, however, is beyond the jurisdiction of the Superior Court and to the extent that it has attempted to interpret Canon 3C, by creating new standards of review on recusal motions, procedures for raising recusal questions, or for enforcement of violations of the Code, they are without effect, as unwarranted intrusions upon this Court's exclusive right to supervise the conduct of all courts and officers of the judicial branch....

Kearney, 92 A.3d at 63. The Court explained, "Canon 3C, like the whole of the Code of Judicial Conduct, does not have the force of substantive law, but imposes standards of conduct upon the judiciary to be referred to by a **judge** in his **self-assessment** of whether he should volunteer to recuse from a matter pending before him." Kearney, 92 A.3d at 63, quoting Reilly, supra at 1298 (emphasis in original).

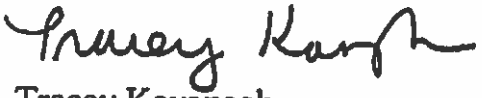
It is no doubt for this reason that defendant has never cast his claim for relief as a violation of the Judicial Code. Rather, defendant's sole avenue for relief is under the PCRA. Under the PCRA, defendant is required to "plead and prove" that his "conviction or sentence" resulted from a "violation of the Constitution of

this Commonwealth or the Constitution or laws 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 would have taken place." 42 Pa.C.S.A. Section 9543(a)(2)(i).[6] Here, defendant has failed to demonstrate that his new evidence – the Castille letters and memos – showed that Castille was biased against him or so involved in his case while DA that his recusal was constitutionally required. See Williams v. Pennsylvania, 136 S.Ct. at 1905 ("The Court now holds that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding defendant's case"); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821 (1986) (stating that "[c]ertainly only in the most extreme cases would disqualification on [the basis of bias or prejudice] be constitutionally required"); Federal Trade Comm'n v. Cement Inst., 333 U.S. 683, 702 (1948) (stating that "[m]ost matters relating to judicial disqualification [do] not rise to a constitutional level").

[6] Defendant is not eligible for relief under Section 9543(a)(2)(vi), which requires him to plead and prove that his conviction or sentence resulted from the "unavailability at the time of trial of **exculpatory** evidence that has subsequently become available and would have changed the outcome of the **trial** if it had been introduced" (emphasis added). That is because defendant has not uncovered exculpatory evidence and the evidence that he did uncover – the Castille letters and memos – would not have changed the outcome of his trial.

For these reasons and those stated in the Commonwealth's prior filings, this Court should deny PCRA relief.

Respectfully submitted:



Tracey Kavanagh
Assistant District Attorney
Supervisor, PCRA Unit
215-686-5707

cc: Judith Ritter, Esquire
Samuel Spital, Esquire

EXHIBIT I

AFFIDAVIT OF JODY DODD

I, Jody Dodd, on my oath hereby affirm the following to be true and correct:

1. Since January of 2018, I have been a non-attorney employee of the Philadelphia District Attorney's Office. I am currently the Office's Restorative Justice Facilitator.

2. I have never been a member of a group know as "the International Concerned Family and Friends of Mumia Abu-Jamal" or "Friends of Mumia."

3. Before joining the District Attorney's Office, from 2002 until the Summer of 2017, I volunteered with Up Against the Law.

4. Up Against the Law provides support to groups who exercise their First Amendment right to protest. This support is available to any organization that does not promote racism, sexism, or homophobia. In this capacity, the group provides know your rights training, legal observing, and assistance with lawyers in the event someone is arrested while protesting. It is only in this capacity that Up Against the Law provided support to Friends and Family of Mumia Abu-Jamal. Up Against the Law does not, as a volunteer organization, advocate for the protests; it supports the people's right to protest.

5. As a member of the District Attorney's Office, I have not been involved in the prosecution of *Commonwealth v. Wesley Cook, a/k/a Mumia Abu-Jamal.*

JODY DODD

Sworn to and subscribed before me

On this 2nd day of December, 2019

Commonwealth of Pennsylvania - Notary Seal
ERICKA M. JETER, Notary Public
Philadelphia County
My Commission Expires November 30, 2022
Commission Number 1078847

NOTARY PUBLIC

EXHIBIT J

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA Appellee	:	NO. 119
V.	:	
MUMIA ABU-JAMAL a/k/a WESLEY COOK	:	CAPITAL APPEAL DOCKET

ANSWER TO DEFENDANT'S PETITION FOR A SECOND PRE-APPEAL REMAND

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT:

LYNNE ABRAHAM, District Attorney of Philadelphia County, by her Assistants, RONALD EISENBERG, Deputy, Law Division, CATHERINE MARSHALL, Chief, Appeals Unit, and HUGH J. BURNS, JR., Assistant District Attorney, respectfully answers defendant's second motion for a pre-appeal remand ("application for relief in the form of a remand to take additional testimony and take discovery regarding police and prosecution misconduct"); and in support thereof states:

1. A seriatim answer is dispensed with for the sake of clarity.

2. This is a direct appeal from the Common Pleas Court's September 15, 1995 denial of defendant's PCRA petition, challenging his 1982 conviction for his 1981 murder of a police officer.

3. Having already received one pre-appeal remand for the purpose of taking additional testimony in October 1996, defendant now requests another. The instant application is consistent with the now well-established defense pattern of withholding claims and

introducing them piecemeal for their hoped-for dramatic effect.[1]

4. As a matter of law, defendant is not entitled to a hearing with respect to this withheld claim. Pamela Jenkins became notorious in 1993 -- two years before defendant's PCRA petition was even filed. At that time, attorneys for Raymond Carter, who had been convicted of murder on the strength of Jenkins' testimony, claimed at a PCRA proceeding that she had lied at his trial. On

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[1] On May 23, 1996 -- just before the Commonwealth's appellate brief was to be filed -- defendant's attorneys called a press conference and announced "dramatic" new evidence in the form of Veronica Jones, a prostitute who testified for defendant at trial in 1982. This Court granted a limited remand for the purpose of taking testimony. The PCRA court determined that Jones' new version of events was not only non-exculpatory, but untruthful. Further, defense counsels' elaborate explanation as to why Jones had not been called at the PCRA hearing in 1995 was clearly mendacious.

On December 25, 1996 -- shortly after the PCRA court's determination that Jones' new version was not credible -- defendant's attorneys held a press conference announcing that "new federal authority" required the overturn of his conviction. This claim in fact referred to a civil suit to which the Commonwealth was not a party, involving a waived claim having to do with defendant's prison mail. What defendant's prison mail has to do with his deliberate murder of a police officer in 1981 has never been explained. Further, defense counsel knew about this claim during the 1995 PCRA hearing, but withheld it. In its answer to defendant's frivolous petition to file another supplemental brief with respect to this withheld claim, the Commonwealth stated:

> One can be certain that, when defense counsel next feels that defendant's case has gone too long without media attention, another new issue will be "discovered."

Commonwealth's Answer at 10, n.8.

As predicted, on March 10, 1997, the defense called a press conference announcing the instant claim, based on the alleged "affirmation" of a non-witness, Pamela Jenkins. The alleged "affirmation" was dated January 9, 1997 -- i.e., approximately the same time that the second "new" (i.e., withheld) piecemeal claim was being presented to this Court.

September 5, 1996, following extensive and well-publicized hearings,[2] the Honorable Joseph I. Papalini vacated Carter's conviction based on, inter alia, his conclusion that Jenkins had apparently committed perjury -- at Carter's trial, as well as in other proceedings -- with respect to various matters including her relationship with one Thomas Ryan, who was then a police officer. Ryan worked in the 39th Police District and is now a convicted felon. He has no connection to the investigation of defendant's 1981 murder case, which occurred in the 6th police district. As a result of Jenkins' contradictory statements under oath, Carter's conviction for the murder she witnessed was overturned.

Jenkins' alleged January 9, 1997 "affirmation" indicates that she is not an eyewitness in this case; that she has no personal knowledge of it; and that she is being offered to testify to hearsay.[3]

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[2] Defense counsel's alertness to all forms of media communication is well documented in the record.

[3] This hearsay would supposedly include assertions that Cynthia White supposedly told Jenkins that her 1982 trial testimony was altered because she was "afraid" of the police (Application at 4). (Previously, as this Court will recall, defendant argued that White should not have been believed because she was supposedly in league with the police, and supposedly received "favors" from them -- e.g., Brief for Appellant, 44).

This is more of the usual nonsense. The record shows that Cynthia White gave a description of the shooting implicating defendant, which was consistent with her trial testimony, within twenty minutes of seeing the murder take place (N.T. 6/21/82, 4.164-165). There was no earthly reason for the police to wish to influence Ms. White, because she had already given a statement that was consistent with that of the other eyewitnesses, establishing defendant's guilt.

Other portions of defendant's application make even less sense. For example, he tosses off a cryptic reference to "the

(continued...)

5. Nevertheless, even though defendant is clearly not entitled to one, the Commonwealth believes that a hearing will establish that this latest withheld claim, like those that preceded it, is frivolous in fact as well as in law. For this reason the Commonwealth would not oppose a limited remand for the purpose of taking any relevant and admissible testimony with respect to these withheld allegations.

6. The Commonwealth respectfully requests that any remand order strictly limit the defense to new factual averments in the instant application, subject to the ordinary rules of evidence.[4]

7. The various other demands and wild assertions[5] in the

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[3](...continued)
white paper investigation reports" (application at 4 n.1). There are no "white paper investigation reports." Defendant identifies "Kenneth Freeman" as "the man who was the source of the driver's license" [sic; application] found in the victim's pocket; but the evidence at the PCRA hearing established that the document belonged to Arnold Howard, not someone named Freeman. A week prior to the murder, Howard had left the application in the volkswagen owned by defendant's brother, William Cook (N.T. 8/9/95, 70-75, 84-91). Cook apparently presented the document as his own, leading to his arrest by Officer Faulkner. Defendant murdered the officer while his brother was resisting the arrest.

[4] On the prior remand in October 1996, this Court was required to amend its order because the defense claimed that the remand reopened the entire PCRA proceeding, and attempted to re-litigate issues previously decided. Further, at that hearing the defense repeatedly proffered irrelevant testimony.

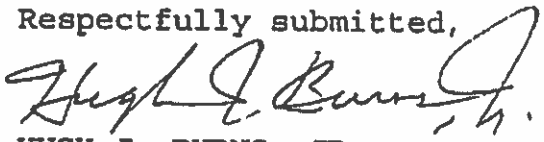
[5] For example defendant refers, as if it were a fact, to a supposed "pattern" of "police/prostitute collusion" that Jenkins' hearsay supposedly corroborates. As usual, defense counsel assumes as true something he has never managed to prove, and announces that something else he has never proven "corroborates" it. Indeed, Veronica Jones stated in her trial testimony for the defense that, as a Center City prostitute, she disliked being around police -- "hookers do not stand in the area where there is too many police cars" (N.T. 6/29/82, 114).

defense application should be summarily rejected. Defendant's demand that the case be assigned to "a new PCRA judge" (application at 14) has been repeatedly rejected, and should be rejected again. There is no basis for such relief, and reassigning the judge who is most familiar with the case at this late date would make little sense. The request that this Court order the PCRA court "to reconsider its rulings, findings, conclusions and adjudication" is plainly overbroad, absurd, and dilatory. So too is the request that, on the strength of new unproven hearsay assertions, this Court should grant PCRA relief "in all respects." Defense counsel seems to forget that he has yet to prove a single one of his outrageous assertions to date, including the hearsay claims made in the instant application. Since the defense demand for additional discovery is likewise premised on the supposed validity of these latest unproven assertions, that demand should be denied with prejudice unless the PCRA court finds that these latest assertions have (for the first time ever) been proven.

8. Whether or not this Court does order a limited remand, the Commonwealth respectfully requests an explicit ruling that the record will henceforth be closed for appeal. The year is now 1997. Absent such a ruling, experience has shown that defendant's attorneys will continue to abuse this Court's process by presenting frivolous piecemeal claims that should have been investigated and raised, if not on direct appeal in 1986, at the 1995 PCRA proceeding.

WHEREFORE, the Commonwealth respectfully requests a ruling or rulings as set forth above.

Respectfully submitted,



HUGH J. BURNS, JR.
Assistant District Attorney
CATHERINE MARSHALL
Chief, Appeals Unit
RONALD EISENBERG
Deputy District Attorney
LYNNE ABRAHAM
District Attorney

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA : NO. 119
Appellee

V. :

MUMIA ABU-JAMAL
a/k/a WESLEY COOK : CAPITAL APPEAL DOCKET

PROOF OF SERVICE

I hereby certify that I am on this day serving the attached document upon the person(s) and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121:

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