

IN THE COURT OF COMMON PLEAS
FOR THE COMMONWEALTH OF PENNSYLVANIA
FIRST JUDICIAL DISTRICT

COMMONWEALTH,)	
)	
)	
Respondent,)	
)	Case Nos. 1357-1359
vs.)	
)	
MUMIA ABU-JAMAL,)	
)	
Petitioner.)	
_____)	

**MEMORANDUM ON EFFECT OF *COMMONWEALTH V. JOHNSON*,
2004 Pa. LEXIS 3118 (DEC. 20, 2004), ON PENDING PCRA PETITION**

COMES PETITIONER, MUMIA ABU-JAMAL, through the undersigned counsel who submit the following memorandum on the effect of *Commonwealth v. Johnson*, 863 A.2d 423 (Pa. 2004), 2004 Pa. LEXIS 3118 (Dec. 20, 2004), on the pending PCRA petition. Petition for Habeas Corpus Relief Pursuant To Article I, Section 14 of the Pennsylvania Constitution, and for Statutory Post-Conviction Relief Under the Post Conviction Relief Act, 42 Pa. C.S. § 9541 *et seq.*, Dec. 8, 2003.

INTRODUCTION

The parties have been asked to file briefing on whether under *Commonwealth v. Johnson*, 2004 Pa. LEXIS 3118 (Dec. 20, 2004), this Court “lacks jurisdiction to consider Petitioner’s pending PCRA petition.” Order, Jan. 5, 2005. An analysis of *Johnson* reflects that it is not applicable, and the Court has jurisdiction to consider the petition.

ARGUMENT

1. ***Johnson's Holding Does Not Affect This Court's Jurisdiction Over Petitioner's PCRA Petition.***

In *Commonwealth v. Johnson*, 863 A.2d 423, 2004 Pa. LEXIS 3118, the court dismissed appellant's second PCRA petition as untimely pursuant to 42 Pa. C.S. § 9546(d). It was determined that neither the "governmental interference" exception under sec. 9545(b)(1)(i), nor the "newly-discovered evidence" exception of sec. 9545(b)(1)(ii), applied in the case because no violation had occurred under *Brady v. Maryland*, 373 U.S. 82 (1963). In each instance, the court found that the appellant either had prior knowledge of the information allegedly withheld by the government, or he failed to show that he could not have obtained it from other sources or by exercising reasonable diligence.

In *Johnson* the appellant's claim was solely based on the information included in the affidavit of a prosecution witness, George Robles, which tended to show that Robles was a drug dealer who colluded with the police. Appellant claimed that the Commonwealth withheld this impeaching evidence found in the affidavit in violation of *Brady*. The court, however, easily rejected each of appellant's contentions by referring back to the record. There was not a single fact alleged to be withheld by the Commonwealth that was not shown to also appear somewhere else on the record. In other words, the appellant was aware of the information.

The *Johnson* court also rejected the "disingenuous" claim that appellant "could not have discovered any of the information contained in Robles' affidavit, even with due diligence," because "Robles threatened defense investigators when they approached him . . . and that 'the investigators could not interview Robles earlier.'" *Johnson* at 6. As it turned out, there was evidence that "appellant's counsel did in fact interview Robles *twice* prior to appellant's trial." *Id.* (emphasis in original).

In short, *Johnson* does not shed any light onto the case at hand for it is distinct and different. Unlike the case at hand, it is not a case in which the prosecutors and the police are even alleged of any wrongdoing. There is no any assertion that there was prosecutorial suppression of exculpatory evidence, or any presentation of false evidence. Johnson merely alleged that the Commonwealth did not share information that already was known—or should have been known—to the defense.

2. The Petition Was Timely Filed

As previously argued in Petitioner's Reply to Motion to Dismiss, the controlling applicable case is *Commonwealth v. Lark*, 746 A.2d 585 (2000). Under the standards set out in that decision, the pending petition is timely.

The facts upon which the claims are predicated were previously unknown to Petitioner and could not have been ascertained by the exercise of due diligence. Had the prosecution not engaged in fraudulent conduct and a cover-up of its misdeeds, the new evidence would be unnecessary. Further, the claims involve the prosecutorial suppression of exculpatory evidence and the presentation of false evidence in contravention of the right to a fair trial, reasonable access to the courts, due process of law, and equal protection of the laws guaranteed by Amendments Five, Six and Fourteen of the United States Constitution. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The pending claims are within two of the exceptions to the statutory time bar. They involve governmental interference and newly discovered evidence that could not have been discovered through the exercise of due diligence. Petitioner's situation falls within these exceptions:

- (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

- (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence

...

42 Pa.C.S. § 9545(b)(1)(i)-(ii).

The failure to raise the evidence earlier was the result of interference by government officials with the presentation of the claim in violation of the constitutional mandate of *Brady*. The prosecution concealed its wrongful acts from Petitioner. It was the product of prosecutorial fraud and the suppression of exculpatory evidence.

The newly discovered evidence could not have previously been obtained by Petitioner in the exercise of due diligence because its discovery was wholly dependent upon Yvette Williams coming forward as a witness.

3. Petitioner Has Met The After-Discovered Evidence Exception To The Timeliness Requirement

A. Cynthia White Admissions Against Interest and Unavailability

The sworn statement made by Yvette Williams establishes that the prosecution's most important witness, Cynthia White, now unavailable through death according to the Commonwealth, lied at trial and falsely identified him as the person who shot Daniel Faulkner. Declaration of Yvette Williams, *supra*. In fact, White did not even see the shooting. Ms. Williams' affidavit also establishes that it was the police who caused White to falsely testify through the use of a combination of threats and bribery. It certainly has an indicia of reliability.

The proffered declaration of Yvette Williams is admissible as an exception to the hearsay rule since it concerned an admission against interest:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Pa. Rules of Evidence 804(b)(3).

The admissions of Cynthia White were clearly against her interest. *See Rudisill v. Cordes*, 5 A.2d 217 (1939); *Commonwealth v. Williams*, 640 A.2d 1251 (1994). She admitted to Ms. Williams that she was planning to commit perjury. The police had persuaded her to lie and identify Petitioner as the killer. She also admitted to committing various crimes, e.g., drug use, prostitution.

The incredulous nature of White's testimony is further evidenced by the fact that none of the other witnesses who claimed to have seen some of the events in question recalled seeing her in the vicinity of the shooting. In fact, two witnesses, William Singletary and Dessie Hightower, recalled seeing her at a different location. Moreover, Mr. Singletary recalled White asking him, after the police arrived: "What happened?"

The Williams declaration provides undeniable evidence of White's fabrication and the reasons for it. In light of this new information, it is established that the conviction of Petitioner was obtained through the knowing use of perjured testimony. The information provided by Ms. Williams reveals that White was induced and coerced by police to testify falsely against Petitioner, even though she did not even witness the shooting.

Substantial evidence corroborates the statement of Ms. Williams. For example, if convicted and sentenced for all of her outstanding charges and for contempt, White was facing a substantial period of imprisonment. Moreover, the police were in a position to make it impossible and possibly dangerous for her to continue to work the streets or to continue to even live in Philadelphia.

The inconsistencies in White's various accounts of the events of December 9, 1981, can only be explained by the facts confirmed in Yvette Williams' affidavit. Cynthia White's state-

ments and testimony inculcating Petitioner were the result of police coercion and inducement since she did not even witness the shooting.

B. Priscilla Durham's Admissions Against Interest

The prosecution presented evidence that allegedly Petitioner exclaimed, while lying nearly unconscious on a hospital emergency room floor on December 9, 1981, that he shot the officer and hoped he would die. The evidence again was false. Kenneth Pate now reveals in a sworn declaration that Priscilla Durham, a hospital security guard who claimed to have heard the statement, admitted to concocting the story. Declaration of Kenneth Pate, *supra*. In fact, it is now known that Durham never heard any purported admission by Petitioner. By her own admission, Ms. Durham lied:

6. Priscilla said that the police told her that she was part of the "brotherhood" of police since she was a security guard and that she had to stick with them and say that she heard Mumia say that he killed the police officer, when they brought Mumia in on a stretcher.

7. *I asked Priscilla: "Did you hear him say that?" Priscilla said: "All I heard him say was 'Get off me, get off me, they're trying to kill me.'"*

Exhibit 2, Declaration of Kenneth Pate, *supra* (emphasis added).

The tendered declaration of Mr. Pate is admissible as an exception to the hearsay rule since it concerned an admission against interest. Pa. Rules of Evidence 804(b)(3). The admissions of Durham were clearly against her interest. She essentially admitted to Mr. Pate that had committed perjury. The police had persuaded her to lie.

No police officer reported the alleged confession until nearly two months after its supposed elicitation. Further, the allegations that Petitioner confessed did not surface until shortly after he filed complaints of police brutality. It is inconceivable that if Petitioner had shouted out "I shot the motherfucker and I hope he dies", all of the police officers and other hospital personnel who surrounded him at the time would not likewise have reported such a statement. It is

equally beyond belief that Officer Gary Wakshul, who was at Petitioner's side, would have stated in his report that Petitioner "made no comments" and his partner, Officer Trombetta, would likewise fail to report it. Ms. Dunham's admissions to Kenneth Pate regarding police inducement and her fabrication demonstrate the reason for this lengthy delay in reporting the alleged confession that should have been dramatic enough to prompt immediate disclosure. Durham conceded at trial that she met and spoke with officers from the Sixth Police District virtually every day of the week. N.T. 6/24/82, 44-45. She also knew and had spoken to officer Faulkner, the last occasion being only about two hours before he was shot. N.T. 6/24/82, 37. At trial she claimed that Petitioner shouted the confession twice: as he was being brought into the emergency area and being laid on the floor just inside the doors (N.T. 6/24/82, 28, 55), and, immediately before he was taken into the emergency room itself (N.T. 6/24/82, 30). She further testified that when Petitioner made his initial confession, he was uncontrollable and screaming. N.T. 6/24/82, 59-61.

At the trial, Dr. Coletta gave evidence that Petitioner was critically wounded, that he did not hear any statement from him (N.T. 6/28/82, 69), and that he was in no condition to struggle as Durham claimed. "He was weak. He could move, but he was weak." *Id.* at 73. "I would say he was on the verge of fainting. . . in other words, if you tried to stand him up, he would not have been able to stand up." *Id.* at 76.

CONCLUSION

Johnson v. Commonwealth does not address any issues raised in Petitioner's pending Petition for Habeas Corpus Relief, or the timeliness arguments put forth in support of the Respondent's Motion to Dismiss. Therefore, this Court has jurisdiction.

DATE: February 15, 2004

Respectfully submitted,



ROBERT R. BRYAN
2088 Union Street, Suite 4
San Francisco, California 94123-4124
Telephone: (415) 292-2400
Facsimile: (415) 292-4878

Lead counsel for Petitioner, Mumia Abu-Jamal

JUDITH L. RITTER
Pennsylvania Attorney ID# 73429
Widener University School of Law
P.O. Box 7474
4601 Concord Pike
Wilmington, Delaware 19801
Telephone: (302) 477-2121
Facsimile: (302) 477-2227

Local and Associate counsel for Petitioner, Mumia
Abu-Jamal

STEVEN W. HAWKINS
120 Wooster Street, Second Floor
New York, New York 10012-5200
Telephone: (212) 965-0400
Facsimile: (212) 966-9606

Associate counsel for Mumia Abu-Jamal

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PROOF OF SERVICE

I, Robert R. Bryan, hereby certify that on this day I served the foregoing MEMORANDUM ON EFFECT OF *COMMONWEALTH V. JOHNSON*, 2004 Pa. LEXIS 3118 (DEC. 20, 2004), ON PENDING PCRA PETITION upon the following person by depositing the same in the United States Mail, first class postage prepaid at the following address, in accordance with Pa.R.A.P. 121:

Hugh J. Burns, Jr.
Assistant District Attorney
Office of the District Attorney
1421 Arch Street
Philadelphia, PA 19102

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

Executed on this the 15th day of February, 2004, at San Francisco, California.



ROBERT R. BRYAN
2088 Union Street, Suite 4
San Francisco, California 94123-4124