

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

99 Civ.5089 (Yohn)

MUMIA ABU-JAMAL

Petitioner

- against -

**MARTIN HORN
Commissioner, Pennsylvania Department of Corrections, and
CONNER BLAINE
Superintendent of the State Correctional Institution at Greene**

Respondents

**MEMORANDUM OF LAW OF *AMICI CURIAE*
IN SUPPORT OF PETITION FOR
WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. 2254**

(THIS IS A CAPITAL CASE)

**Jeremy Corbyn, Neil Gerrard, Alice Mahon,
Vincent Cable, John Austin, Martin Caton,
Kelvin Hopkins, Oona King, John
McDonnell, Iain Coleman, Andrew Dismore,
Robert Wareing, Derek Wyatt, Bill
Etherington, Ann Cryer, Rudi Vis, Simon
Thomas, Fabian Hamilton, Piara S. Khabra,
Stephen Ladyman, Nick Palmer, Phil
Sawford, all Members of the British
Parliament**

**By: NICK BROWN, ESQ.
4 New Square,
Lincoln's Inn,
London WC2A 3RJ
United Kingdom
(0207) 822 2000**

(Request for Permission for Oral Argument)

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MEMORANDUM OF LAW OF *AMICI CURIAE*
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Amici curiae, Jeremy Corbyn, Neil Gerrard, Alice Mahon, Vincent Cable, John Austin, Martin Caton, Kelvin Hopkins, Oona King, John McDonnell, Iain Coleman, Andrew Dismore, Robert Wareing, Derek Wyatt, Bill Etherington, Ann Cryer, Rudi Vis, Simon Thomas, Fabian Hamilton, Piara S. Khabra, Stephen Ladyman, Nick Palmer, Phil Sawford, all Members of the British Parliament through their undersigned counsel, submit this Memorandum of Law in support of the Petition for Writ of Habeas Corpus of Mumia Abu-Jamal filed pursuant to 2241 and 2254 *et. Seq.* ("Petition"), on the grounds that his conviction was obtained in violation of the Constitution of the United States.

I. STATEMENT OF INTEREST

Amici curiae have not previously addressed the claim presented herein in briefs submitted in support of the Petitioner on his direct appeal to the Pennsylvania Supreme Court or his subsequent appeal to the Court from the denial of his Post Conviction Relief Act petition.

As Members of the British Parliament, we are dedicated to preserving and defending around the world the right to a fair and public trial which, in the United States, is embodied in the Sixth Amendment and the Fourteenth Amendment of the Bill of Rights. We respectfully

seek leave to file this *amicus* brief and leave to offer oral argument, because we are given to understand that there is no specific federal precedent expressly governing the extent to which a defendant in a criminal trial in the United States is allowed to have lay assistance when he represents himself. We believe that the trial court's decision to refuse to allow John Africa to sit at counsel's table to assist the petitioner at his trial resulted in an outcome which was contrary to and cannot reasonably be justified under existing Supreme Court precedent. We would hope that the Court would find that the consideration and the reasoning which the courts in England and Wales have recently given to such issues both illuminating and persuasive.

II. STATEMENT OF SCOPE AND STANDARD OF REVIEW

The claim that the Petitioner's rights to a fair trial and due process under the Sixth Amendment and the Fourteenth Amendment of the United States Constitution have been impermissibly infringed by the refusal to allow John Africa to sit at counsel's table to assist the Petitioner at his trial requires this Court to conduct a review to determine whether the trial court refused to allow John Africa to sit at counsel's table to assist the petitioner at his trial, the reasons for the trial court's refusal and whether the trial court's decision thereby impermissibly infringed the Petitioner's independent constitutional right of self-representation (*Faretta v. California* 422 US 806). Since "the right to defend is personal" and it is "the defendant, and not his lawyer or the State, who will bear the personal consequences of a conviction", "his choice must be honored out of "that respect for the individual which is the lifeblood of the law" *Illinois v. Allen*, 397 U.S. 337, 350-351 (Brennan J. concurring)" *Faretta v. California, supra*, at 834 (Stewart J. concurring). Prejudice must be presumed if the Petitioner was prevented from meaningfully exercising his right to self-representation by presenting his defence as effectively as he is able. "A criminal trial is fundamentally unfair if a state proceeds against an individual defendant without making certain that he has access to raw material integral to building an effective defence" *Ake v. Oklahoma* 470 US 68, 105 S.Ct. 1087, 84 L.ED.2d. 53 (1985) at 1093 (Justice Marshall). The harmless-error analysis is not appropriate for the type of error before this Court today (*Faretta v. California, supra*).

The scope of review on the *Faretta* issue is the record of entire trial and sentencing hearing.

A discussion of the appropriate application of the standards required by Section 2254(d)(1) of the Anti-Terrorism and Effective Death Penalty Act, 1996, follows at pages 43 to 56 and, in particular, pages 56, 57 and 58.

III. STATEMENT OF QUESTION INVOLVED

Did not the trial court err in the voir dire, the guilt hearing and the death penalty sentencing hearing by refusing to allow the petitioner to represent himself or to continue to represent himself as a pro se defendant with the assistance of a friend, John Africa, in violation of the petitioner's Sixth Amendment right to a fair trial and his Fourteenth Amendment right to due process.

IV. STATEMENT OF THE CASE

Amici curiae agree with and adopt the relevant description of the events and proceedings which is set out in the Petition for Habeas Corpus Relief and the supporting Memorandum of Law, with the following addition.

At the time of his arrest, Mr Jamal was a well-known, award-winning journalist in the Philadelphia area. His work included news broadcasts on National Public Radio, the Mutual Black Network and the National Black Network, and his own talk show on WUHY-FM. He is and was an extremely articulate and talented man. In late 1980, although only 26 years old, he was elected chair of the Philadelphia Chapter of the Association of Black Journalists. The January 1981 issue of Philadelphia Magazine named Mr Jamal "one of the people to watch in 1981".

At the time of his arrest, Mr Jamal was also a controversial figure. Thirteen years earlier, at the age of 15, Jamal had been one of the founding members of the Philadelphia Chapter of the Black Panther Party. By 1969, he had become its communications secretary. As a vocal black activist, he was openly sympathetic towards the Move Organisation and fiercely critical of Mayor Rizzo and the police, in particular, on issues of race and police brutality.

As such an activist, charged with the murder of a police officer, it was obvious from the outset that this was going to be a very emotive and politically highly charged trial. As Common Pleas Judge Paul Ribner observed in the first court appearance: "I know there are certain cases that have explosive tendencies in this community, and this is one of them" (5th January 1982, Page 66).

On 21st December 1982, less than one week after Mr Jamal's arrest, the Court appointed Anthony E. Jackson, Esq, as Mr Jamal's attorney. At this time, Mr Jamal was still in hospital, recovering from the injuries which he had sustained on 9th December 1981.

Within a matter of weeks, Mr Jamal decided that, in the particular circumstances of this case, his best interests would be served if he represented himself at his trial.

On 13th May 1982, Mr Jamal successfully applied for permission to represent himself at his forthcoming trial. When granting Mr Jamal's petition, the court also appointed Mr

Jackson as back up counsel. Both Mr Jamal and Mr Jackson objected to this appointment. Mr Jackson professed himself unwilling and unsuitable for the role. In those circumstances, Mr Jamal inevitably felt that his relationship with Mr Jackson was fatally compromised. But the Court overrode both Mr Jamal and Mr Jackson's objections.

On 1st June 1982, Mr Jamal (and Mr Jackson) renewed their objections to Mr Jackson's appointment as back up counsel. During the course of making his objections, Mr Jamal asked if he could select his own back up counsel.

"The Defendant: "Can I select counsel of my choice who I feel is comfortable, who I can work with?"

The Court: "No."

The Defendant: "I cannot?"

The Court: "No. When the Court appoints Counsel, that is the Counsel that you have."

The Defendant: "Whether"

The Court: "If you can afford Counsel and you can go out and pay someone to represent you, that is perfectly alright. But, as I have said before, the Court will not delay the trial."

The Defendant: "I am not asking for delay of the trial. I am not asking for you to pay a single penny. I am saying to you that I would like someone else to represent me."

The Court: "If you have someone else that wishes to come in and is willing to assume the responsibility either as back up Counsel or as direct counsel and he is willing to proceed immediately with the trial, I don't think the Court would have any objection. I cannot allow you to delay the trial however."

The Defendant: "Pardon?"

The Court: "I cannot allow you to delay the trial by such tactics."

The Defendant: "I don't know why you are assuming that I am delaying the trial. At this point in time, this is the first opportunity I ever had to speak to you about Counsel. Is that correct?"

The Court: "Well, it was sent to me for trial, not to speak to me about counsel."

The Defendant: "Well, you asked me about counsel, and I am making it clear to you that there has been a problem with a Court-appointed Counsel functioning as back up Counsel. He said that is not his role he is trained for. He is not comfortable doing that. You have made the point that this is"

The Court: "Well ..."

The Defendant: "May I continue? You have made the point that this is a capital case, that it is, indeed, my life and my freedom

are at stake. I have asked you: do I have the choice of selecting Counsel that I wish to represent myself?"

The Court: "Well, who do you have in mind?"

The Defendant: "John Africa."

The Court: "Is he a member of the Bar?"

The Defendant: "No."

The Court: "If he is not a member of the Bar"

The Defendant: "What does that mean? Am I a member of the Bar?"

The Court: "Well, the law makes an exception when a defendant wants to represent himself, even though he is not a member of the Bar."

The Defendant: "Can't I choose someone to represent myself?"

The Court: "Only if he is a Member of the Bar. Sir, do you understand what you are doing in that you have decided to represent yourself solely?"

The Defendant: "Yes."

The Court: "With full knowledge of the effect this might have on your ability to properly defend yourself? Do you understand that."

The Defendant: "Yep."

The Court: "Gentlemen, may I see you at the sidebar?"

(Transcript 06/01/82; Pages 16 - 19)

In initially refusing Mr Jamal's request that John Africa be allowed to assist him, the Court seems mistakenly to have proceeded as if Mr Jamal was asking for permission for Mr Africa to represent him qua counsel, and not simply to assist him qua back up counsel whilst he, Mr Jamal, continued to represented himself. Mr Jamal never asked for Mr Africa to be granted rights of audience to address the court qua counsel, but the Court mistakenly approached his motion as if he had.

On 2nd June 1982, Mr Jamal renewed his motion for permission for John Africa to assist him qua back up counsel. Again, the Court rejected Mr Jamal's motion on the basis that only person whom the court would allow to sit at counsel's table to advise him was a trained lawyer.

"Mr Jamal: "You said that I have an absolute right to defend myself, right?"

The Court: "That is what the Supreme Court says, yes."

Mr Jamal: "And you agree with that, don't you?"

The Court: "I always agree with the law."

Mr Jamal: "Okay. Well, if I don't have an absolute right to decide

who I want to have as defence counsel, how can I have an absolute right to defend my defense?"

The Court: "Because only a lawyer trained in the law can actively defend you in this courtroom. If you want to be your own lawyer, they make an exception in that case."

Mr Jamal: "I have waived my right."

The Court: "I understand. It isn't the smartest thing, but they waived that exception. They say you are entitled to that, and that is what you have."

Mr Jamal: "Regardless of what is your agreement or belief was the smartest or wisest thing, I made that decision."

The Court: "You are defending yourself."

Mr Jamal: "And I would like to defend ... I would like to decide who I would like to have as defense counsel."

The Court: "You are conversing whenever you want, but only in this courtroom with Mr Jackson."

Mr Jamal: "I am not talking about conversing. I'm making a point to you who I want to sit right next to me as counsel."

The Court: "Mr Jackson will sit next to you."

Mr Jamal: "Mr Jackson has made it clear to ..."

The Court: "I know he has. I made a ruling. We are not going to sit here all day. Bring in your next witness.""

(Transcript 2.80)

As the argument smouldered on, Mr McGill, the Assistant District Attorney, volunteered some submissions.

"Mr McGill "In reference to the question as to the right of counsel, absolute right to counsel, that is true. There is at no time no decision in this Commonwealth or, for that matter, in the Federal jurisdiction, any decision that you have an absolute right to the choice of your back up counsel. The very purpose of back up counsel request requires the direction that has been given us by the Supreme Court. It is not merely to have the defendant choose someone who he would like to have with him. The purpose of back up counsel, as stated yesterday, is, number one, to literally protect. And the law feels this is necessary and, I believe it and understand it. To protect a defendant against himself is one reason why the law allows that or requires that. Secondly, a reason for back up counsel to be a professional member of the Bar is that is in the event that the defendant would want to relieve himself of the right that has been permitted to him by this court, counsel would be presented, would be legally equipped to handle the case throughout. Lastly, if for whatever reason ... and I'm not saying that there

will or is a reason ... that the defendant would for any reason be ejected from the courtroom, at that point back up counsel, a professionally competent member of the Bar, and aware of the procedures in the law, would take over for the defendant maintaining all of his rights. For those reasons, Your Honor, it is necessary that a member that of the Bar be present for Mr Jamal's sake. There is no right ...

Mr Jamal: _____ "You don't give a damn about my think."
The Court: "There is no right, Your Honor, no absolute right to back up counsel of your choice."
Mr Jamal: "I renew my motion. I would like to have John Africa appointed as back up counsel."
The Court: "Your motion is denied.""

(Transcript 2.85)

From these submissions, it is clear that the Prosecutor misunderstood the thrust of Mr Jamal's motion. What Mr Jamal wanted was for John Africa to be allowed to sit at counsel's table and to assist him as he conducted his defense himself. As the Prosecutor correctly identified, there were good reasons why the Court might well want Mr Jackson also to remain in court as back up counsel. But these possible eventualities were not Mr Jamal's concern at the time. Back up counsel and Mr Africa were needed to fulfil different functions. The correct and the practical solution was to allow John Africa to assist Mr Jamal as he wished, and retain Mr Jackson as back up counsel in case the need for him to act qua counsel ever arose.

On 3rd June 1982, Mr Jamal renewed his motion for John Africa to be allowed to assist him qua back up counsel, but it was refused (Page 3.40 - 3.41). Later the same day, Mr Jamal requested that one of his legal runners, Teresa Africa or Ramona Africa be allowed to sit at the defense's table to assist him in his defense and to advise him. The trial court took the matter under advisement (Pages 3.98 - 3.103).

On 4th June 1982, Mr Jamal again renewed his motion for permission for John Africa to assist him qua back up counsel (4.110). He also applied to the Court for a contemporaneous daily transcript of the evidence which the witnesses had given (4.110 et seq.). This was refused on the grounds no transcript could be made available to Mr Jamal on

a daily basis: the shorthand notes would take at least four months to transcribe (4.110 et seq.). Thereafter, Mr Jamal again renewed his motion for John Africa to be permitted to sit beside him at counsel's table to assist him. Again, the court gave him short shrift (4.114 - 4.121).

After the Motions to Suppress were denied, Mr Jackson renewed Mr Jamal's motion that John Africa be allowed to sit at counsel's table to assist him in the conduct of his defense.

Mr Jackson pointed out that, during the proceedings up until then, there had been a number of people with whom Mr Jamal had wished to communicate and who had wished to communicate with Mr Jamal. Because they had not been sitting at counsel's table, Mr Jackson had had to go back and forth to the spectators' gallery bearing messages to and fro. The Court deplored what Mr Jackson had been doing.

"The Court: "Look! You have the District Attorney's entire file. You have all the statements from everybody that is involved in this case. You know as much about the case as the District Attorney does. There is no reason why you have to have questions from spectators in order to examine the witnesses on the bench."

Mr Jackson: "But, Your Honor, I think the problem is that you've characterised these individuals as spectators, and, perhaps, I have, too, and they are more than that, and that is just the point. They are not just spectators. These are people who he believes can advise and counsel him properly. Your Honor, if you will, please .."

The Court: "Yes, but if it is going to be that he needs somebody to hold onto their hand in order to try this case, then maybe he ought to take another look at whether he is really competent to try this case himself."

Mr Jackson: "Your Honor, I understand your comment. Your Honor has never ... and, Mr Jamal has pointed out, I don't think that anyone has suggested that Mr McGill is not competent or that Detective Thomas is holding his hand. And Your Honor knows how many times in front of you, Judge, the District Attorney will have a D.A. or a witness sit at counsel's table. "

The Court: "That is all right, but he can't go to somebody else in the spectators. If he (Mr McGill) is just going to have that one person there, fine, and that's all you are going to have right over here is just the one person (namely you, Mr Jackson). Now, if you need a break, because you want to confer, or if you want to reserve the right to call the witness back later on, fine. There are ways of doing this, but I am not going to have people jumping up and

going and giving questions while he is cross-examining.
Mr Jackson: "But Your Honor and perhaps I am begging the
question and predicting to deny him that is going to
deny him perhaps the right to effectively cross-examine.
The Court: "No, no, no. Well, that's his problem. He wants to be the
attorney. Fine.""

(Transcript 4.138 - 4.140)

At this point, the trial court seems to have specifically conceded that, by refusing to allow John Africa to sit at the defense's table, Mr Jamal's ability to cross-examine effectively would be adversely affected. Moreover, common sense would suggest that it would not be just Mr Jamal's ability to cross-examine which would be adversely affected: his ability to conduct his case at all was bound to be adversely affected.

"Mr Jackson: "And, Your Honor has ..."
The Court: "But, I am saying, you know, when I was an attorney
practicing law and you are an attorney practicing law,
do you stop and go over and say, "Well, give me some
questions to ask." You know your case. I am saying that
you have everything that the District Attorney has. You
should be prepared, or Mr Jamal, since he is the
attorney, should be prepared to know exactly what
questions to ask and how to proceed accordingly. "
Mr Jackson: "I understand that, Your Honor. I am a lawyer. I have
been trained as a lawyer. There is nothing to preclude
me if, in fact, I was representing lawyer for Mr Jamal if
I had a witness on there if I wanted to go back and forth
after every question. Your Honor would not stop me
from doing that."
The Court: "But I think it would be very foolish."
Mr Jackson: "That's one thing. It may be foolish, but the point is that
I wouldn't be precluded from doing it. Mr Jamal
wouldn't be precluded from doing it.""

(Transcript 4.140 - 4.141)

In other words, although Mr Jamal was attempting to represent himself, with all of the obvious difficulties which this would entail, the trial court was prepared to place more constraints on Mr Jamal and the way in which he attempted to represent himself than it would do on a fully trained, highly experienced trial lawyer.

"The Court: "I am not so sure about that. There has to be a certain amount of decorum in the courtroom.

Mr Jackson: "That's what we are trying to insure."

The Court: "The only way you're going to do it is the way I am suggesting. Now, if he wants to get back to the witness, he can always reserve the right to call him back later on. And, when we have a break, he can have this conference, or whatever he wants, in order to get additional questions, if he feels he hasn't covered an area."

Mr Jackson: "Your Honor, many times even defense counsel will have people at the table other than the defendant even in the selection of jurors. In this jurisdiction or other jurisdictions, they will have social scientists and other experts available at counsel's table. At some point in time some of those persons might be removed. I don't think that what he is asking for is anything unreasonable. I don't think that he is asking for anything that is unprecedented. **He is simply asking for someone to sit along with me and him to assist in the preparation and enquiries that he will have of witnesses** (*my emphasis*). And, Your Honor, I think that what he is asking is reasonable.""

(Transcript 4.141 - 4.142)

At this point, Mr Jackson summarised precisely what Mr Jamal is asking for, but the trial court missed the point. The issue was not whether Mr Africa has any particular expertise. Rather, to the extent that there was an issue at all, it was whether Mr Jamal felt that Mr Africa's presence at counsel's table to sit beside him, take notes and advise sotto voce about the conduct of his defense would assist him to present his case effectively. If and to the extent that the answer to this question was in the affirmative, then that should have been the end of the matter, unless the trial court had specific cause to believe that the particular individual whom Mr Jamal wished to assist him would be likely to disrupt the proceedings of the court. Even then the proper course would have been to allow Mr Africa to assist Mr Jamal after giving the appropriate warnings to him about his conduct and then to deal with any disruption if and when it ever occurred. Unfortunately, this was not the approach which the trial court adopted.

"The Court: "I don't think it is really reasonable at all, because he is not requesting somebody who happens to be an expert

in some field that he needs."

Mr Jackson: "I think he is, Your Honor. Whether Your Honor can fully understand or appreciate or accept that individual, Mr Jamal does. He is saying that he wishes to defend himself.

The Court: "If you follow this to a logical conclusion, then you would have twelve people sitting up there."

Mr Jackson: "No. That would be unreasonable, that would be unreasonable."

The Court: "It is unreasonable to me to have anybody but you. And, when it becomes necessary to have somebody else and to confer with somebody else, he can always do that when we take a break. We will take a break, and he can confer and get whatever additional guidance he thinks he needs."

Mr Jackson: "Anticipating the difficulty, Your Honor, the problem I have then is that if he wants to take a break each time he wants to confer with that person, this case will go on forever, and I think, Your Honor, it is reasonable to make this presentation to you now."

The Court: "I have been watching him and he has been cross-examining witnesses all along."

Mr Jackson: "Yes, sir."

The Court: "And, he know how to ask questions. Now, in the end, if he feels he wants to talk to you about something, or he feels he has to have some more questions, we can always take a five minute break."

Mr Jackson: "Your Honor, it is the burden that is being placed on him as a defendant."

The Court: "There are a lot of burden's being placed on me with additional people at counsel's table."

Mr Jackson: "We are only asking for one other person."

The Court: "I don't think that one other person is qualified to assist him in any way. I don't see where that person is necessary."

Mr Jamal: "Judge, you said you don't think the person is necessary and you don't think they are qualified. Isn't that, again, a determination for me to make?"

The Court: "Not necessarily, because I have to run an orderly procedure in this courtroom."

Mr Jamal: "Judge, what you have heard, none of it has been disorderly. We haven't suggested that someone ... as a matter of fact, the scenario that happened the other day was quite disorderly. You made no comment about that, did you Judge?"

The Court: "No. We had no jury here. That is not going to be any problem."

Mr Jamal: "What I am saying to you, Judge "

The Court: "What I am saying to you: After you finish examining, if you want additional time, you ask for a five minute

break?"
Mr Jamal: "Why is it disorderly having someone sitting there?"
The Court: "Why is it so necessary? You mean you don't have the confidence in yourself to try this case as a lawyer?"
Mr Jamal: "Yes, I do have the confidence in myself."
The Court: "That's why I am saying you ought to think about this again, because if you have confidence in yourself, you don't need someone else over there.""

(Transcript 4.142 - 4.145)

The approach adopted by the trial court was completely misconceived. It was not for the trial court to decide whether or not Mr Jamal needed someone who was not a lawyer but whom he trusted to sit beside him and assist him with the conduct of his defense to present his case more effectively. That was a matter for Mr Jamal to decide himself.

"Mr Jamal: "What if I don't have any confidence in him?"
The Court: "Then you don't have to confer with him if you don't want to. You do whatever you want. I told you he is your attorney. If you want to confer with him, fine. If you don't want to, that's your problem, not mine."
Mr Jackson: "Exactly, exactly."
The Court: "Now if you don't have confidence in yourself, if you don't have faith in yourself that you could stand up here as a lawyer and try this case by yourself, then I think you ought to think twice and let Mr Jackson handle it."
Mr Jamal: "That's your opinion, Judge."
The Court: "You don't have to take it, just as you don't have to take his advice, either. If you don't want to take it, fine don't take it. I am giving you good advice.""

(Transcript 4.145 - 4.146)

Thereafter, Mr McGill clarified with the trial court that the order of the court was that the number of people allowed to sit at either the prosecutor's table or the defense's table was limited to two (4.147). However, as Mr McGill was later to concede, this was a concession on his part which he was only too happy to make, because he normally worked alone at counsel's table and was therefore content to do so in this case (Page 211 on 06/11/82).

The voir dire for jury selection began on 7th June, 1982. Initially, Mr Jamal represented himself.

During the afternoon of 8th June, 1982, Mr McGill applied for the trial court to taking over the questioning of the venirepersons. Two reasons were proffered. First, Mr McGill claimed that Mr Jamal questioning was scaring the potential jurors. Secondly, Mr McGill suggested it was necessary to prevent the jury selection process becoming too long and drawn out (Page 2.138 *et seq.*). The trial was adjourned shortly afterwards to allow both sides to prepare to argue fully the point the following morning.

On 9th June, 1982, Mr McGill renewed his petition that the trial court took over the questioning of the venirepersons. The petition was opposed. The best way forward, suggested the trial court, was for Mr Jamal to allow Mr Jackson as back up counsel to conduct the voir dire on his behalf (Page 3.18). Mr Jamal flatly rejected this proposal. Accordingly, the trial court said that it would take over the voir dire. (Page 3.19). During the discussions which followed, Mr Jamal asked for John Africa to be allowed to conduct the voir dire on his behalf, and this was refused (Pages 3.31; 3.33; 3.45). Thereafter, the trial court conducted the voir dire itself for the rest of the morning. After lunch, Mr Jackson told the trial court that, under protest, Mr Jamal had agreed to permit him to conduct the voir dire in his stead, if John Africa was not permitted to do so (Pages 3.106; 3.123). Mr Jackson also formally asked on Mr Jamal's behalf for John Africa to be allowed to assist him and for the trial court to certify the question for appeal. The trial court refused this request (Pages 3.117; Pages 3.124 - 3.127). Mr Jackson conducted the rest of the voir dire on Mr Jamal's behalf on 10th, 11th, 15th and 16th June 1982.

On 11th June, 1982, Mr Jackson renewed Mr Jamal's requests for John Africa to be appointed (Page 5.25) and for Theresa Africa to be permitted to be seated at counsel's table to assist him (Page 5.201- 5.212). Both motions were denied. Again, the stumbling block was whether Ms. Africa could sit at counsel's table. As Mr Jackson observed:

"I believe I think it was yesterday Eric Hinson I believe from the Appeals Department of the DA's Office was here and, of course, counsel did not even request Your Honor whether or not it was all right if he sat at table because it's done. If in fact either of these, Mr Hinson, Mr Richman, or Policewoman or Police Officer Thomas, Gwen Thomas, if either of them sat at the table, no request is even made if they were to sit throughout the trial.

"You Honor, the problem as I see it, Mr Jamal has two people at the table,

himself as a defendant and me as back up counsel. On the other side we have Mr McGill, who is indeed the embodiment of the Commonwealth of Pennsylvania. Then he has additional assistants. It would seem to me in an effort to be fair - he says that he has no objection to Mr Jamal conferring with Miss Africa. The problem is Mr McGill if he wants to confer with Mr Hanson, Mr Richman, or anyone else, he is not obliged to see them in the hall, he is not obliged to request a recess. He can simply sit there and get the necessary and requisite resource information that they can provide.

"However, Mr Jamal, who is the defendant, whose interests are most likely to be affected, must request in front of the jury and, Your Honor, I need to request so that I can confer with Theresa Africa or with someone else, or in the alternative, I would have to go back and forth to the spectators' gallery to receive messages.

"I think, Your Honor, in all fairness to all sides it presents no additional burden to the Commonwealth or to Your Honor. There is no indication whatsoever that Miss Africa or Mr Jamal or myself would pose any threat of any violence, any disruption, or any intimidation to anyone. I think that in all fairness so that this record would be clear and so that Your Honor would feel comfortable as well that to allow Miss Africa to remain at the table, to sit at the table to provide what I think is necessary counsel is no more than Your Honor has implicitly allowed the Commonwealth by allowing the Commonwealth to call at will anyone that they want to sit at counsel's table"

(Transcript 5.208 - 5.210).

The trial court's decision to limit the number of people sitting at each counsel's table to two people was completely arbitrary. But its effect was highly discriminatory. For, whilst Mr McGill could choose whoever he wanted to sit next to him at counsel's table, or, if he wanted, he could have a whole succession of different people take up this spare place at the prosecution's table, Mr Jamal had no choice whatsoever. Mr Jamal was obliged to accept Mr Jackson as the only person who was allowed to sit next to him at the defense's table and thus as the only person to whom he could turn for advice and guidance when the trial was actually taking place.

On 17th June 1982, the trial itself was due to commence. At the outset, Mr McGill informed the trial court that Detective William Thomas would sit behind (not beside) him in courtroom, so as to assist him in marshalling the documents in the case (Page 1.3; 1.6). Thereafter, Mr Jackson informed the trial court that Mr Jamal had obtained the services of a stenographer to assist Mr Jamal by providing daily transcripts of the proceedings (Page 1.25).

Initially, the trial court was unsure whether Mr Jamal should be allowed the benefit of this assistance (Page 1.27), but permission was in fact eventually granted (page 1.98). After the jury was empanelled, Mr Jamal refused to answer the Bill of Information (Page 1.32. and 1.33). Mr Jamal asked to be provided with a microphone, but his request was refused (Pages 1.34; 1.44; 1.45). Mr Jamal then renewed his request to be allowed the assistance of John Africa (Page 1.56 et seq.), stating he could not participate in his own trial unless he had John Africa to assist him.

"I have a right to represent myself. What I have demanded of this court time and again is that I have the right of advice and counsel. It's very clear that Mr McGill can have the advice of whomever he wishes; it can be Gwen Thomas, officer Thomas, Detective Thomas, it can be Brad Richman from the D.A.'s office, it can be whomever he selects. As a matter of fact, this morning you heard him say that Detective Thomas will be assisting him. If he can have his assistance in prosecution why can't I have my assistance in as my own counsel of defence. And the issue you've raised about being a member of the bar is not even germane, because I didn't say that I wanted him to represent me. I want him to assist me in my defense. And in that understanding poses no problem to the Court . You don't have to pay John Africa"

(Transcript 1.90 - 1.91)

The only sticking point was whether or not Mr Africa could sit at counsel's table. Mr McGill did not object if John Africa sat one or two rows back behind the barrier like Detective Bill Thomas and Officer Gwen Thomas, so that Mr Jamal could consult him at recess or in between witnesses (Page 1.95). But as Mr Jamal said:

"I don't need anyone or Mr McGill to suggest who I want in the spectator section. I'm saying I want an assistant at this defense table to help me with my defense and that someone is John Africa

(Transcript 1.97).

After some discussion as to whether Mr Jackson should appeal to the State Supreme Court to obtain an authoritative ruling on the issue (Pages 115 et seq.), the trial court not only refused Mr Jamal's request, but ordered Mr Jamal's removal from the courtroom on the basis that he had been intentionally disrupting the trial (Page 1.122).

During the afternoon on 17th June 1982, the State Supreme Court denied, inter alia, Mr Jamal's petition to stay the trial court's order preventing John Africa from sitting at counsel's table to assist Mr Jamal as a simple friend and advisor and not qua counsel.

The trial court was duly advised of the State Supreme Court's decision the following morning, albeit in the absence of Mr Jamal (Trial Transcript; Pages 2.1-2.5). In the discussions which followed, it emerged that Mr Jamal's current instructions to Mr Jackson were not to cross-examine the prosecution witnesses (Page 2.27). The trial court openly acknowledged that, if Mr Jamal had been allowed to have John Africa sitting beside him at counsel's table, Mr Jamal would probably have taken an active part in representing himself in the proceedings:

"The Court: "You know the reason I say that? If I allow him to have John Africa I'm sure he would be cross-examining."
(Page 2.53)

When Mr Jamal was re-admitted to the courtroom after the luncheon recess, both he and Mr Jackson again renewed his request for John Africa to be allowed to sit at the defense's table to advise him (2.57 et seq.). In the face of Mr Jamal's continuing protests that John Africa should be allowed to assist him in any event, the trial court ordered that Mr Jamal again be removed from the courtroom (2.90).

On 19th June, 1982, Mr Jamal was asked to and gave an assurance that he would not disrupt the proceedings of the court. He was then allowed to return to the courtroom. He was present throughout the day (Page 4).

At the beginning of 21st June, 1982, the next day of the trial, Mr Jackson applied for Mr Jamal to be allowed to resume representing himself in the proceedings. Mr McGill did not object. But the trial court denied this request on the basis that, having once made a decision to remove Mr Jamal's right to represent himself, the decision was final (Pages 4.4 - 4.6).

At the beginning of 22nd June, 1982, Mr Jamal attempted to address the court directly on the issue of representation, but the trial court refused to hear him other than through Mr Jackson (Pages 5.2 - 5.9). On Mr Jamal's behalf, Mr Jackson then asked the trial court to stay

the current proceedings so that Mr Jamal might have an opportunity to petition a Federal District Court for an order to allow him to represent himself and to have the assistance of John Africa when he did so. This motion was refused (Page 5.10 - 5.19). Thereafter, Mr Jamal again tried to address the trial court directly. The trial court refused to hear him and, when he persisted, ordered that he be removed from the courtroom (Pages 5.20 - 5.22). Mr Jamal was therefore not present in court to hear most of the evidence of the main prosecution witness, Cynthia White.

After lunch on 23rd June 1982, Mr Jamal again petitioned the trial court for permission for John Africa to be allowed to represent him or to assist him to represent himself. Again, this petition was refused and again Mr Jamal was removed from the court for the rest of the day (Pages 6.116 - 6.127).

Early on 24th June 1982, Mr Jamal attempted to cross-examine a prosecution witness, Police Officer Land, after Mr Jackson had concluded his own cross-examination. The trial was immediately stopped. Mr Jamal reiterated his request that John Africa be permitted to assist him represent himself. This request was refused. The trial resumed (pages 16 - 26). At the end of Priscilla Durham's cross-examination, Mr Jamal reiterated his request that John Africa be permitted to assist him represent himself and that he be allowed to cross-examine the witness himself. Again, these requests were refused. Again, Mr Jamal was removed from the courtroom (pages 84 - 91).

On 25th June, 1982, Mr Jamal was allowed back into the courtroom. During Mr Jackson's cross-examination of a prosecution witness, a Mr Scanlon, Mr Jamal attempted to assert his right to represent himself and take over the cross-examination of the witness. The trial was stopped and Mr Jamal was removed from the courtroom (Page 8.13 *et seq.*).

Midway through the morning on 26th June 1982, Mr Jamal, acting on the advice of Janet Africa, agreed to come back into the courtroom and remain quiet and not interrupt the trial (Page 37). He was allowed back in. At the conclusion of the prosecution case, Mr Jamal again protested, in the absence of the jury, that he should have been allowed to have John Africa assist him to present his case (Page 155 *et seq.*).

On 28th June 1982, Mr Jackson applied on Mr Jamal's behalf for him to be allowed to

make the defense's opening and closing statements and to cross-examine some witnesses of his choice. The trial court denied all of these motions (Page 28.39 *et seq.*). Thereafter, Mr Jamal objected to the fact a hearing which had just been conducted in chambers was not immediately to be made part of the public record (Page 28.43 *et seq.*). When he persisted in his objections, he was removed from the court (Page 28.48).

Mr Jamal was in court for the remaining days of the trial. But when asked by the trial court on 1st July 1982 whether he wished to give evidence himself, Mr Jamal replied:

"My answer is that I have been told from the duration of this trial, the beginning of the trial, the inception of the trial, that I had a number of constitutional rights. Chiefly among them the right to represent myself. The right to select a jury of my peers. The right to face witnesses and examine them based on information they have given. Those rights were taken from me. It seems that the only right that this judge and members of the court want to confer is my right to take the stand, which is no right at all. I want all of my rights, not some of them. I don't want it piecemeal. I want my right to represent myself and I want my right to make closing argument. I want my rights in this courtroom because my life is on the line and I don't want no gift"

(Page 42).

Again, Mr Jamal's motion to make the defense's closing speech was also denied.

On 2nd July 1982, Mr Jamal was convicted of murdering Police Officer Faulkner.

At the sentencing hearing on 3rd July 1982, one of the consistent themes of the statement which Mr Jamal read to the court was the impact which the court's refusal to allow him to have the assistance of John Africa when he conducted his own defence had had on the course of the trial and how that decision had denied him the opportunity to represent himself fairly and truly and properly (NTSH 10 - 16).

At the conclusion of the hearing, the jury set the penalty of death.

At the Post-Trial Motions Hearing on 25th May 1983, Mr Jackson submitted that the trial court's decision to refuse to allow John Africa to sit at the defense's table to assist Mr Jamal as he himself conducted his defense violated his constitutional right to due process (Page 48, *et seq.*). The point was argued on the basis that the trial court had a discretion as to who was allowed to sit at counsel's table (Page 51). The trial court accepted that this was the

decision which had been made, but then asserted that the reason for this decision was that Theresa Africa had instigated all of the disruption which had caused the trial court to order Mr Jamal's removal from the courtroom.

The record does not bear this assertion out. This was never a reason which the trial court relied upon for refusing to allow John Africa or, for that matter, Theresa Africa from sitting at counsel's table to assist Mr Jamal. Moreover, the trial court barred John Africa and, for that matter, Theresa Africa from sitting at counsel's table before Mr Jamal's was ordered to be removed from the courtroom for the first time. The trial court also barred John Africa and, for that matter, anybody else, from sitting at counsel's table, and not just Theresa Africa. Finally, the inferences which the trial court sought to draw were illogical:

"The Court: "I don't think she was entitled to sit there. I made that decision.

Mr Jackson: "I understand that Your Honor made that decision."

The Court: "Because all of the trouble that I had with the defendant was at her (Theresa Africa's) instigation."

Mr Jackson: "Your Honor, I don't know that for a fact.

The Court: "I know that for a fact, because when I asked if he would behave himself, he would not give me an answer until he talked to her. After I gave him permission to talk to her, he came back and said, "I will behave myself." And he only did that after speaking to her."

(Transcript: Page 53)

The trial court could not reasonably infer that, because Mr Jamal calmed down after he spoke to Theresa Africa, she had instigated him to be disruptive in the first place. On the contrary, the only reasonable inference which the trial court could sensibly have drawn from such an observation was that Theresa Africa would have been likely a calming influence on Mr Jamal and thus that there was all the more reason to allow her to sit with him at counsel's table.

Mr Jackson concluded his submissions by saying:

"And I think, particularly given the fact that Mr Jamal at least at the voir dire stage was granted the right to defend himself, with no cost to the Commonwealth, he asked a reasonable request, that he be given the assistance of John Africa or Theresa Africa or anyone else, but it was denied. However, the Commonwealth says, "I need Officer Gwen Thomas, " and Your Honor said "Fine. That is okay." I am saying that he has been denied equal protection

of the law and for that reason, Your Honor was in error."

(Page 57)

At the beginning of his submissions in reply, Mr McGill said:

"I will point out for the record, and it is all over the record that the Commonwealth did not object to many things in reference to Mr John Africa and Ms. Theresa Africa, or anyone else that he wanted. Your Honor, I believe, did agree and allow the following things: we at no time said that John Africa could not see him, advise him, or talk to him whatsoever. We suggested as a matter of fact, that John Africa, who incidentally never appeared, would be permitted to sit in the audience. He would be permitted to go up to the cellroom, consistent with the regulations of the Sheriff Department. That he would be permitted to consult with Mr Jamal before the trial, during any time of recesses, whether it be at lunchtime or afterwards, and he could be in the trial if he wanted to. He could have sat in the first seat during the course of the entire trial. All of this was permitted"

(Page 59).

In other words, both the trial court and the prosecution tacitly accepted the potential benefit to Mr Jamal of allowing John Africa sit next to him at counsel's table to assist him during the course of the trial whilst he was representing himself. For if it was a benefit for Mr Jamal to be able to see and consult with John Africa at any time before the proceedings actually commenced each day, or during any of the recesses in the course of the day's proceedings, how much more of a benefit it would have been if Mr Jamal had been able to consult John Africa at counsel's table whilst the court was actually in session.

Mr McGill went on:

"It was not permitted and we did object to the fact that he would sit at counsel's table as a legal representative, as one who would represent him legally, because he was not a lawyer."

(Pages 59 - 60)

This is precisely where the trial court erred. Mr Jamal did not want and ultimately did not ask for John Africa to sit at counsel's table in the capacity of a legal representative. Mr Jamal wanted to represent himself. And what he also wanted was to be allowed someone whom he trusted and in whom he had confidence to sit beside him and give him a quiet word

advice, counsel - meaning advice, and not advocacy - about any additional questions he should be asking, whether or not he was successfully getting across the point which he was trying to make, or whether he should be moving along to the next point, or finishing with a particular witness altogether. From time to time, the matters which they might have discussed might have touched upon purely legal issues. But John Africa would not have advised Mr Jamal on those matters as a lawyer. He would have advised Mr Jamal as a friend. Simply sitting at counsel's table did not invest John Africa with a legal training. Nor did it ever have to be seen to do so. If it was really thought desirable or necessary, a simple explanation to the jury as to why John Africa was sitting at counsel's table would surely have sufficed.

Mr McGill then said:

"Secondly, and this was the primary concern of the Commonwealth in this case, in reference to Mr John Africa, and as stated in the record: the reason for our decision to object to that was and still is the fact that during the course of the trial in a case of such magnitude and importance, that the fact of the matter would be that since Mr Africa represents, to say the least, a controversial lifestyle, and I make no comment about its value, but it is indeed controversial, and he certainly represents it by his name as well as by his doctrine, and has many followers of it ... to put that individual at counsel's table, as far as the Commonwealth was concerned, and I believe the court agreed that doing that there was a fear of the Commonwealth that the jury in listening to the evidence may well change the issue from the facts of the case to the lifestyle, sociology or philosophy of one individual, that being John Africa. By doing that, we have said from the beginning and throughout that that changed the focus of what the twelve people were supposed to consider, and that was the facts as they hear them, based on the law as given to them by Your Honor. Where there was possibly, at any time, a possibility that those jurors would change the focus from what their job was, which was the facts and the law to the controversial nature of Mr Africa, and it may well have gone against Mr Jamal, it was the Commonwealth's view then and it still is, that such a change of focus would not be fair to either party in this case. We, however, have no objection if Mr Africa wants to be here today or do anything, since a jury at this point in time will not change its focus. The Court, with its knowledge of the law, would certainly know how to handle issues as they come up"

(Pages 60 - 61).

In fact, this issue was of such concern to the Commonwealth at the time that, as the record clearly shows, the Commonwealth never raised this issue at all. It is an approach which betrays a stunning disregard for the First Amendment. It is extremely patronising and

trespasses on to territory which is of absolutely no concern of the prosecutor. Provided that he or she does not disrupt or abuse the process of the court, every defendant has an absolute right to conduct his or her defence as he or she sees fit.

Moreover, Mr McGill's logic is hard to follow. If Mr McGill was content for Mr Africa to assist Mr Jamal in all of the various ways in which he had just conceded, it is hard to understand how simply allowing Mr Africa to join Mr Jamal and Mr Jackson at counsel's table would have so irredeemably tainted the proceedings and altered the focus of the jury.

Finally, Mr Jackson raised the case of *United States v. Dougherty*, 473 F.2d. 1113, to make the point that trial court could not rely on any subsequent disruption of the proceedings which there may have been to justify its decision to refuse to allow John Africa to sit at counsel's table to assist Mr Jamal at the outset.

At the conclusion of the hearing, the trial court denied the motions submitted on Mr Jamal's behalf for a new trial and an arrest of judgment and proceeded to sentence Mr Jamal to death.

V. SUMMARY OF ARGUMENT

When Mr Jamal first asked the trial court to allow John Africa to "represent" him, the error which the trial court made was to fail to analyse what in substance Mr Jamal was really asking for: it was simply that John Africa be allowed to assist him as a friend at counsel's table in the same way in which a back up counsel would ordinarily assist any *pro se* defendant as part of the job which he was required to do.

John Africa was not actually a trained lawyer. But there was never any question that John Africa would ever have to fulfil any of the functions of a trained lawyer or an admitted member of the Bar during Mr Jamal's trial. That was not what Mr Jamal was asking for. Mr Jamal was going to represent himself in court. He was going to do his own advocacy. And if it had been explained to Mr Jamal that Mr Jackson would also have to sit at counsel's table and that he would therefore be available to assist him in his role as court-appointed back up counsel as well as John Africa, Mr Jamal would have readily agreed to this. Because Mr Jackson had a different function to fulfil as back up counsel, Mr Jamal would have had no problem and no cause to take issue with that. Mr Jamal would have got what he wanted: he would have had John Africa sitting beside him, assisting him as he presented his own case to the court. If he had not wanted to, or felt the need to consult Mr Jackson, he simply would not have done so. But it would have been no skin off Mr Jamal's nose if Mr Jackson had been required to sit at counsel's table as well.

Having got off on the wrong foot and made a ruling that John Africa should not be allowed to assist Mr Jamal, possibly because it was misled and confused by the precise terminology which Mr Jamal used when he first raised the issue, the trial court failed to address itself properly to the submissions which Mr Jamal and Mr Jackson actually made when they subsequently renewed the request that John Africa be allowed to sit at counsel's table to assist Mr Jamal as he presented his case to the court himself.

The reasons upon which the trial court relied when it denied Mr Jamal his right to have John Africa assist him at counsel's table were ill-founded and wrong in principle. In fact, every practical consideration as well as every principle strained to allow him such assistance.

In England and Wales, if Mr Jamal had wanted such assistance when he was representing himself, it would not have been an issue. He would have had it. Except insofar as it might be necessary in order to make the appropriate practical arrangements, he would not even have had to ask permission for John Africa to sit beside him to assist him.

"They (the applicants) have a right to be heard in their own defence. Fairness, which is fundamental to all court proceedings, dictates that they shall be given all reasonable facilities for exercising this right and, in case of doubt, they should be given the benefit of that doubt for courts must not only act fairly, but be seen to act fairly" (Per Donaldson MR, in *Regina v. Leicester City Justices, ex parte Barrow* [1991] 2 QB 260, at page 285).

In practice, this means that every *pro se* defendant should be allowed not only every material assistance which they reasonably require to present their case as best they can, such as a pen, paper, or a pair of spectacles, or a hearing aid, if they so require. It also means that they should be allowed the assistance of someone of their own choosing, in whom they trust and have confidence, to sit beside them, take notes and advise them *sotto voce* about how they are conducting their case (*Ex parte, Barrow, supra*). Anyone representing themselves stands to benefit from such assistance just as much as they would benefit from having a pen and some paper, or their own pair of spectacles.

In the United States, there may be no specific federal precedent governing the extent to which a defendant in a criminal trial is allowed to have lay assistance when he represents himself. But the trial court's decision to refuse to allow John Africa to sit at counsel's table to assist the Petitioner at his trial resulted in an outcome which was contrary and could not reasonably be justified under existing Supreme Court precedent.

The rights enshrined in the Sixth Amendment and guaranteed by the Fourteenth Amendment are the rights necessary to enable a defendant to make a full defence in an adversary criminal trial. The constant theme of a whole battery of cases is that every defendant should have "meaningful access to justice" (*Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L. Ed. 2d. 53 (1985) per Justice Marshall concurring). Meaningful access to justice means having the basic tools which guarantee that a criminal charge may be answered effectively and therefore in a manner which is considered fair.

For a *pro se* defendant, one of the basic tools which he or she requires to present his case as well as he can is the assistance of someone whom he trusts to sit beside him, to take notes and advise him sotto voce on the conduct of his case.

"A Defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard" (*McKaskle v. Wiggins*, 465 U.S. 168, Mr Justice O'Connor delivering the opinion of the Court at 174). The right to such assistance is probably one of the most important specific rights which the *pro se* defendant has. Otherwise, his true voice may not be heard. For all of the reasons that an ordinary defendant has the right to assistance from counsel, the *pro se* defendant has the right to such assistance from someone, whether lawyer or not, whom he or she trusts. In accordance with the three stage test prescribed by the Supreme Court in *Ake v. Oklahoma*, *supra*, at page 77, every *pro se* defendant has such a right.

The trial court and subsequently the State Supreme Court's error was so fundamental that it strikes at the roots of justice and so Mr Jamal does not have to show prejudice. However, if Mr Jamal did have to show that he suffered prejudice as a result of this error, he can surely discharge this burden. For the decision to refuse to allow Mr Jamal the assistance of John Africa as he tried to represent himself shaped the course of the rest of the trial. It led directly Mr Jamal's removal from the courtroom on a total of seven out of the fourteen days of the guilt phase of his trial, as well as his absence from significant parts of the voir dire. It was the primary reason which Mr Jamal offered for his decision not give evidence himself in his own defense. It tainted the whole proceedings in Mr Jamal's mind and coloured his whole approach to the trial. The error was plainly "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable" (*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d. 674 (1984), at 2064; *Lockhart v. Fretwell*, 506 US 364, 369, 113 S.Ct. 838, 122 L.Ed.2d. 180 (1993) at 369). The harmless error analysis is therefore inappropriate (*Faretta, v. California*, *supra*; *Chapman v. California*, 386 U.S. 18, 23 and n.8, 87 S.Ct. 824, 828, 17 L.Ed.2d. 705 (1967); *United States v. Laura*, 607 F.2d. 52 (1979); *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8 (1984); and *Arizona v. Fulminante*, 499 U.S. 279 (1991), at 310).

Moreover, "it is not inconceivable that in some rare instances, the defendant might in

fact present his case more effectively by conducting his own defence" (*Faretta v. California, supra*, at 834). In our submission, this was probably one of those rare cases.

VI. ARGUMENT

The trial court's immediate response to Mr Jamal's request that John Africa be allowed to assist him was that it was out of the question, because John Africa was not a member of the Bar and therefore did not enjoy the necessary rights of audience to "represent" him. Unfortunately, the trial court shot from the hip. It latched on to what proved to be Mr Jamal's fateful choice of the phrase: "counsel that I wish to represent myself" (06/01/82, at page 18) and denied Mr Jamal's request, without pausing to consider or analyse what in substance Mr Jamal was really asking the court to agree to. For in truth, it was simply that John Africa be allowed to assist him at counsel's table in the same way in which a back up counsel would assist any *pro se* defendant.

He was not requesting rights of audience for John Africa. He was certainly not asking John Africa to act as his advocate in the proceedings. He wanted and intended to represent himself. He only used the words "counsel" and "represent", because those were the words which were being used by the trial court and others in relation to Mr Jackson, the court-appointed back up counsel, whom the court was insisting "represent" Mr Jamal as back up "counsel" against both their wishes. As Mr Jamal had made abundantly clear, rightly or wrongly, (but, we would submit, for good reason), Mr Jamal did not feel that he could put his trust and confidence in Mr Jackson to advise him about how best to conduct his own defence. The person whom Mr Jamal did feel he could trust to sit beside him and offer him this advice was John Africa.

Having once peremptorily denied Mr Jamal's motion that John Africa be allowed to assist him and having decided that only Mr Jackson was going to sit at counsel's table with Mr Jamal, the trial court plainly found it difficult to address itself to Mr Jamal and Mr Jackson's renewed motions with a completely open mind. Having made a precipitate decision on the basis of what had become clear was a misunderstanding, which, admittedly, Mr Jamal may have been partially responsible for, the trial court would appear to have been either unable or unwilling to respond to the changed landscape once this confusion was cleared up.

For, by 4th June 1982, it was crystal clear that the assistance which Mr Jamal was asking that John Africa be allowed to provide would not entail Mr Africa fulfilling any of the

functions of a trained lawyer or admitted member of the Bar at Mr Jamal's trial. Mr Jamal was going to represent himself in court. He was going to do his own advocacy. And Mr Jackson was going to fulfil the role of back up counsel. As Mr Jackson said in terms at Page 4.142 on 06/04/82:

"He (Mr Jamal) is simply asking for someone to sit along with me and him to assist in the preparation and enquiries that he will have of witnesses."

The suggestion that to be allowed to sit at counsel's table and assist at a trial you have to have to some form of qualification or particular expertise was a complete red herring (Page 4.142 on 06/04/82). There is no necessary qualification for who is allowed to sit at counsel's table to assist during the course of a trial. In cases up and down the country, all sorts of different people do it every day. It was up to the *pro se* defendant to decide whether he needed somebody to assist him at counsel's table and, if so, who that person would be and what qualities they had.

The decision to limit, for both parties, the number of people who could sit at counsel's table to just two was completely arbitrary. There was no necessary or logical reason why it should be two rather than three. There was plenty of room for three. Frequently, two or more counsel sit at counsel's table.

Moreover, the trial court specifically and implicitly acknowledged the potential benefit which Mr Jamal would derive from having John Africa sit beside him at the defense's table. The trial court specifically conceded that, without having John Africa sitting beside him, Mr Jamal's ability to cross-examine effectively would be adversely affected (Page 4.140 on 06/04/82). Logically, if Mr Jamal's ability to cross-examine was likely to be adversely affected, his ability to deal with all of the other aspects of his case was likely to be adversely affected as well.

By the same token, the trial court and the prosecution tacitly accepted the potential benefit which Mr Jamal could derive from having John Africa sit next to him at counsel's table to assist him in the course of the trial. For the trial court and Mr McGill were perfectly prepared to agree to and allow Mr Jamal to consult John Africa and whoever else he wanted

before the trial commenced each day and during any recesses. They were even content for John Africa to be allowed up into the cellroom provided the Sheriff acquiesced (Page 4.143. on 06/04/82; Pages 5.207- 5.208 on 06/11/82; Pages 1.94- 1.96 on 06/17/82; Page 59 of Post Trial Motions Hearing on 05/25/83). If Mr Jamal was likely to benefit from conferring with John Africa at these times, how much more would he benefit from being able to confer with John Africa at counsel's table whilst the court was actually in succession. Potentially, it would also have been a lot less disruptive, because it would be much less likely that Mr Jamal would need recesses, or to call witnesses back.

Drawing a line in the sand and refusing to allow John Africa to sit at counsel's table, whilst agreeing to afford all of these other opportunities for consultation, was completely arbitrary. If the trial court was concerned that John Africa might thereby unworthily assume the mantle of a lawyer in the eyes of the jury simply by sitting at counsel's table, the trial court could simply and quickly have disabused the jury.

The trial court also accepted that, ordinarily, counsel is entitled to return to counsel's table and confer with whom he wants and needs to whilst he is conducting cross-examination (Page 4.141 on 06/04/82). If counsel is entitled to and regularly does this, there is all the more reason that a *pro se* defendant should be entitled to do so as well: his or her need is likely to be much greater than counsel's.

If one effect of the trial court's decision to limit the number of people allowed at each counsel's to two was to place Mr Jamal in worse position than defence counsel would ordinarily be, another was to leave Mr Jamal in a worse position than Mr McGill and the prosecution. For Mr McGill, as he was happy to concede, normally worked alone at counsel's table. Therefore, he was content to agree to do so in this case. Moreover, whilst Mr McGill could summon any number of different assistants to come counsel's table to confer with whenever he wanted, and could do so without requesting a recess or waiting for a gap between witnesses, Mr Jamal had no choice of who or when whatsoever. Mr Jamal was forced to accept that only Mr Jackson could sit with at counsel's table and thus that Mr Jackson was the only person to whom he could turn for advice and guidance when the trial was actually taking place. Forbidding John Africa from sitting at counsels' table was bound to

give the prosecution a completely unfair advantage, even if Mr Jamal had been allowed to remain in court throughout the trial.

At the time of the trial, it was never suggested that John Africa would disrupt the proceedings or otherwise deliberately abuse the process of the court if he was allowed to sit at counsel's table. There were no grounds for such a suggestion.

The trial court's approach smacks of the ostrich, who knows or suspects that he has made a mistake and sticks his head in the ground, because he does not want to look to the right or to the left.

To the extent that the trial court had any discretion as to whether John Africa sat at counsel's table, the trial court did not exercise its discretion justly or fairly.

In England and Wales, the absolute right of every litigant to represent himself has long been recognised and accepted. As Viscount Caldecotte CJ observed in *R. v. Woodward* [1944] 1 KB 118 at Page 119:

"In our opinion, no person charged with a criminal offence can have counsel forced upon him against his will."

In the United States, the right of every defendant to represent himself in criminal proceedings was recognised and accepted in *Faretta v. California*, 42 U.S. 806 (1974).

Although obiter, the right of every litigant in England and Wales who is representing himself to enjoy the assistance of a friend (who may or may not have any legal training) to assist him when he represents himself was acknowledged as long ago as 1831. In *Collier v. Hicks* (1831) " B. & Ad. 663, Lord Tenterden CJ observed at Page 669:

"Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices."

Although the courts have deplored the use of the phrase, these lay advisors have been popularly known as McKenzie's friends in England since the early 1970's, following the decision of the Court of Appeal in *McKenzie v. McKenzie* [1971] P 33. *McKenzie v.*

McKenzie, supra, was a defended divorce suit in which there were cross charges of cruelty and adultery. The husband's legal aid certificate was discharged before the hearing. His former solicitors sent a young Australian barrister to assist the husband, gratuitously, in the conduct of his case by sitting beside the husband in court and prompting him. Having ascertained that the Australian barrister represented the husband's former solicitors, the judge told him that he must not take part in the proceedings, which was understood by the barrister as meaning that he must not assist the husband by prompting, and he left the court. At the end of the trial, the judge dismissed the husband petitions alleging cruelty and adultery, but granted the wife's cross-petition alleging cruelty. The husband's appeal succeeded. The Court of Appeal held that everyone who represents himself or herself has the right to have a friend present in court beside him to assist him by prompting, taking notes, and quietly giving advice. Since the husband had been deprived of that right as a result of the judge's intervention and the wife could not show that her husband had not been prejudiced thereby, a re-trial on the issue of adultery was ordered.

As Sachs LJ observed at Page 42D:

"It is moreover always, to my mind, in the public interest that litigants should be seen to have all available aid in conducting cases in court surroundings, which must of their nature to them seem both difficult and strange."

More recently, the right to have such lay assistance in court was reconsidered and authoritatively dealt with by the Court of Appeal in *Regina v. Leicester City Justices, ex parte Barrow* [1991] 2 QB 260. In the late 1980's a new tax had been introduced in the United Kingdom, the community charge, or poll tax as it was more popularly known. Because of its perceived unfairness, it was deeply unpopular. Many people refused to pay and were taken to court to enforce payment. At the outset of one such hearing in front of the Leicester City Justices, a solicitor acting on behalf of a Mr and Mrs Barrow, asked that a friend, a representative of the Anti-Poll Tax Federation, be allowed to sit with them to give advice and assistance when they defended the summons. The justices refused the application, and having heard the matter, made the liability orders sought. In proceedings for judicial review, Mr and

Mrs Barrow challenged the justices' decision on the basis that they had been entitled to the assistance of their friend in opposing the summonses, and that the justices had acted unfairly and to their prejudice by depriving them of that right. The Divisional Court dismissed their applications but the Court of Appeal allowed their appeals.

The Court of Appeal approached the matter on the basis of principle. Lord Donaldson MR gave the leading judgment:

"There are many basic rules covering the the administration of justice by the courts, but they can be summed up by saying that it must be administered fairly and, unless the interests of justice otherwise require, it must be administered openly and its administration must not only be fair but be seen to be fair" (Page 284H).

Lord Donaldson MR then went on to acknowledge the right of every litigant to represent himself or herself in any court proceedings:

"It is against this background that everyone who is of full capacity is entitled to be heard in person by any court which is concerned to adjudicate in proceedings to which he is a party. This is a universal entitlement whether the proceedings are in a magistrates' court or in the House of Lords or in an intermediate court" (Page284H).

Having noted that, in the instant case, the Court were not concerned with rights of audience or rights to conduct litigation, Lord Donaldson MR went on at Page 285G:

"They (Mr and Mrs Barrow) have a right to be heard in their own defence. Fairness, which is fundamental to all court proceedings, dictates that they shall be given all reasonable facilities for exercising this right and, in case of doubt, they should be given the benefit of that doubt for courts must not only act fairly, but must be seen to act fairly."

Thus,

"A party to proceedings has a right to present his own case and in so doing to arm himself with such assistance as he thinks appropriate, subject to the right of the court to intervene. Thus he can bring books and papers with him, pens, pencils, his spectacles, a hearing aid and any other form of material assistance which he may think appropriate. Subject to their not being of extraordinary volume or unusual nature, there is no need for the matter to be mentioned to the justices or their clerk. If he wishes to have an advisor, as contrasted with

an advocate, it is convenient that he should mention this fact to the justices or to their clerk in order that they may know why the person concerned is sitting next to the defendant rather than in the space reserved for the general public. Furthermore, the justices or their clerk may reasonably wish to know whether this advisor is likely to be called as a witness and should not hear the evidence of other witnesses, if exclusion from court whilst that evidence is being given is usual in that class of case. They may reasonably wish to know that the advisor is not claiming rights of audience or proposing to exercise them on behalf of the party and that he is not a party to another case or a member of the public who has lost his way. But if a party arms himself with assistance in order the better *himself* to present his case, **it is not a question of seeking the leave of the court** (*my emphasis*). It is a question of the court objecting and restricting him the use of this assistance, if it is clearly unreasonable in nature or degree or if it becomes apparent that the "assistance" is not being provided bona fide, but for an improper purpose or is being provided in a way which is inimical to the proper and efficient administration of justice by, for example, causing a party to waste time, advising the introduction of irrelevant issues or asking of irrelevant or repetitious questions" (Page 289A-E).

In other words, in England, every litigant who represents himself or herself has the right to have a lay assistant or friend to sit beside him in court to help him to present his or her own case. It is not a question of asking the court's permission. Anyone who is representing himself or herself has a right to have such an assistant there, in the same way that they have a right to have a pen, paper, a pair of spectacles or a hearing aid in court. They are all simply the tools which any defendant needs to represent himself or herself properly and effectively and they should be seen as such, no more and no less. No one has or could ever sensibly attempt argue that any defendant should be obliged to defend himself in a criminal trial without a pen, or his spectacles, or a hearing aid. No distinction should be made between such material assistance and the assistance which a friend or lay advisor can give, provided that a lay advisor does not disrupt or otherwise abuse the process of the court. Both the lay advisor and the pro se defendant's pen simply serve to assist the pro se defendant to present his case as effectively as possible.

In the instant case, the Court of Appeal pointed out, the approach which the Leicester City Justices had adopted when faced with this issue was entirely misconceived. They had simply asked themselves the wrong questions and were therefore led into error.

"The point is that it was not for the court to consider in advance whether the applicant needed assistance. Unless there are clear grounds, in the interests of

the proper administration of justice, for denying the applicants such assistance as (in this instance) Mr John could provide, it suffices that the applicants should have thought that they needed it" (Per Lord Donaldson MR, *Ex Parte Barrow*, at Page 290A-B).

In our respectful submission, the trial court when conducting Mr Jamal's original trial made precisely the same mistake. The trial court took it upon itself to try and decide whether or not Mr Jamal would benefit from any assistance which Mr Africa might be able to provide and decided that he would not. The trial court should have accepted that, in the absence of clear grounds for believing that it was in the interests of the administration of justice to deny Mr Jamal the assistance of Mr Africa (in fact there were no such grounds, because there was no suggestion at the time that the trial court had reasonable grounds to believe that Mr Africa would inevitably disrupt or otherwise abuse the process of the court), it was sufficient that Mr Jamal should have thought that he would benefit from Mr Africa's assistance. Due process demands that the trial court should have adopted this approach. Thereafter, Mr Jamal should have continued to enjoy the assistance of Mr Africa as of right, unless and until Mr Africa disrupted and abused the process of the court and continued to do so in the face of clear and appropriate warnings from the trial court about the consequences of doing so. Again, due process demands no less.

In his concurring judgment in *Ex parte Barrow, supra*, Staughton LJ made the additional point that to deprive Mr and Mrs Barrow of the right to be assisted by the friend of their choice would, in effect, deprive them of one of the potential benefits of the right to a public trial which is enjoyed by litigants and defendants in England and Wales and which, in the United States, is guaranteed under the Bill of Rights.

As Staughton LJ observed at Page 290G-H:

"In my opinion, there are no general grounds for objecting to a litigant in person being accompanied by an assistant, who will sit beside him, take notes and advise sotto voce on the conduct of his case. If the court is open to the public, the assistant is entitled to be present in his own right provided there is room; and if the litigant wishes him as an assistant, he should be accorded priority over the public in general. Any member of the public is entitled to take notes. And I can see no reason why a litigant in person should not, if he wishes, receive quiet and unobtrusive advice from a member of the public."

Slightly different considerations will of course apply if a court ever sits in chambers or in camera. It is accepted that, in certain situations, the interests of justice may best be served if the public generally is denied access to the proceedings. But the underlying reasons why a defendant or other litigant who is representing himself or herself should continue to enjoy the assistance of someone whom he trusts to help when he or she presents their case remain just the same. He or she still has a right to every reasonable assistance to present his or case as effectively as possible. Accordingly, Staughton LJ cautioned at Page 291, *Ex parte Barrow, supra*:

"But the judge should consider whether this difference is a sufficient reason for excluding a person whom the litigant wishes to assist him."

Ex parte Barrow, supra, is a civil case and it is therefore not binding authority in criminal cases in England and Wales. As Staughton LJ observed in *Ex parte Barrow, supra*, at Page 291A, it is possible that there may be concerns over security if a member of the public is allowed to be in close communication with a defendant in the dock in certain criminal cases. However, again, such theoretical concerns do not touch upon the principles which would otherwise justify the recognition of such a right as much within the criminal context as is already fully recognised and accepted in all civil proceedings in England and Wales. Therefore, to deprive a defendant who is representing himself in criminal proceedings of his right to such assistance, the Court would be bound to require evidence that was a real risk to security if such a defendant were to be permitted to exercise his right to such assistance in any particular case.

In practice, such theoretical concerns as there may be over security have probably never been an issue when a defendant has wished to represent himself or herself in criminal proceedings in England and Wales with the assistance of another. The right of defendants who are representing themselves in criminal proceedings in England to have the assistance of a friend to sit by near them, take notes and advise sotto voce on the conduct of the case has been readily accepted by the courts. Indeed, it is a regular occurrence.

For instance, on 17th May 2000, the trial of Malcolm Horsman, a millionaire city

financier accused of murdering his wife, began at the Central Criminal Court in London. As the report in the *London Evening Standard* reveals, "Mr Horsman, who is defending himself, was allowed to sit in the well of the court with his daughter, Juliette, who is helping him conduct his case." Mr Horsman's daughter's presence and the assistance which she was giving her father was simply not an issue.

In England and Wales, back up counsel are sometimes appointed or retained if a defendant is representing himself or herself in a criminal trial. But their function is very different from the function of someone whom the defendant has chosen to help him or her present their case themselves. Back up counsel are there as a back up, in case the defendant changes his or her mind and decides that he does want to be legally represented after all. They are also there to act as *amici curiae* in the event that difficult points of law arise. Finally, if the defendant himself chooses to ask them for advice about the law or conduct of the proceedings, they will certainly assist.

What they do not and cannot do is replace the assistance which someone of the defendant's own choosing can give. Although he was actually referring to the role which a court clerk can fulfil in helping a litigant in person in a magistrates' court, the following observations of Staughton LJ would be equally pertinent to the role of a back up counsel in any criminal proceedings:

"It was said by Mr Havers in his outline argument that a litigant in person before magistrates can be assisted by the clerk of the court. So he can, and I understand that such assistance is given in a proper and professional manner. But the litigant, wisely or not as the case may be, is in my judgment entitled to prefer assistance of the type which I have described from someone of his own choosing; his perspective of the clerk's role may be different from that of the magistrates."

In this case, Mr Jamal's perception of the role of Mr Jackson, the court-appointed attorney, was, throughout, plainly very different from the perception which the trial court had of Mr Jackson.

In the United States, there may be no specific federal precedent expressly governing the extent to which a *pro se* defendant in a criminal trial is allowed to have lay assistance

when he represent himself or herself. But, perhaps unsurprisingly, in analagous situations in the United States, the approach and even the language of the Courts has been remarkably similar to that of the Courts in England and Wales.

In *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L. Ed. 2d. 53 (1985), the issue was whether due process requires that a state provide access to a psychiatrist's assistance when a defendant has made a preliminary showing that his sanity at that time of the offence is likely to be a significant factor at trial and he cannot otherwise afford to pay for a psychiatrist's assistance. The Supreme Court held that it does. Mr Justice Marshall gave the judgment of the Court (76).

"This Court has long recognised that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamaental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate in a judical proceeding in which his liberty is at stake. In recognition of this right, this Court held almost 30 years ago that once a State offers to criminal defendants the opportunity to appeal their cases, it must provide a trial transcript to an indigent defendant if the transcript is necessary to a decision on the merits of an appeal. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L. Ed 891 (1956). Since then this court has held that an indigent defendant may not be required to pay a fee before filing a notice of appeal of his conviction, *Burns. v. Ohio*, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d. 1209 (1959), that an indigent is entitled to assistance of counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d. 779 (1963), and on his first direct appeal as of right, *Douglas v. California*, 372 U.S. 132, 83 S.Ct. 814, 9 L.Ed.2d. 811 (1963), and that such assistance must be effective. See *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d. 821 (1985); *Strickland v. Washington* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d. 674 (1984); *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d. 763 (1970). Indeed, in *Little v. Streeter*, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d. 627 (1981), we extended this principle of meaningful participation to a "quasi-criminal" proceeding and held that, in a paternity action, the State cannot deny the putative father blood grouping tests, if he cannot otherwise afford them."

The principle underpinning all of these decisions is not simply that the indigent should be afforded an adequate opportunity to defend himself as effectively as the wealthy defendant. Rather it is that every defendant should be afforded every opportunity to defend

himself or herself as effectively as is reasonably possible, so that every defendant can meaningfully participate in his or her trial.

Mr Justice Marshall continued (77):

"Meaningful access to justice has been the consistent theme of these cases. We recognised long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw material integral to the building of an effective defense. Thus, while the court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross v. Moffit*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d. 341 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," *id*, at 612, 94 S.Ct., at 2444. To implement this principle, we have focussed on identifying the "basic tools of an adequate defense or appeal," *Britt v. North Carolina*, 404 U.S. 226, 227, 92, S.Ct. 4341, 433, 30 L.Ed.2d. 400 (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them."

If, in the above passage, one was to substitute a *pro se* defendant for the indigent defendant of whom Mr Justice Marshall speaks, one of the basic tools which such a defendant would require in order to present his or her defense adequately is, if they want it, assistance from someone whom he or she trusts and has confidence in, who can give the *pro se* defendant the quiet word of advice as to whether the point he or she is making is working, whether it is time to move on to the next point, or whether there was a question or two which they have forgotten to ask. For advocacy is an art. So often, it is a matter of judgment. For the *pro se* defendant above all, particularly in a capital case, when his or her own life is on the line, he or she is probably the least well equipped to make those, sometimes, fine judgments as they try to advocate for themselves.

As Mr Justice O'Conner said when delivering the opinion of the Court in *McKaskle v. Wiggins*, 465 U.S. 168, page 174:

"A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard."

One of those rights must be the right to lay assistance from someone whom the *pro se*

defendant trusts to sit beside him, to take notes and advise him sotto voce on the conduct of his case

If you apply the three-fold test set out by Mr Justice Marshall in *Ake v. Oklahoma, supra*, (77) to determine whether a *pro se* defendant should be allowed to represent himself with the assistance of a friend sitting beside him, to take notes and advise him sotto voce on the conduct of his case, it is clear that every *pro se* defendant should have the right to such assistance.

The first factor is the private interest which is to be effected if this safeguard is provided. As Mr Justice Marshall observed in *Ake v. Oklahoma, supra*, (78):

"The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis."

The second factor is the State's interest which is to be effected if this safeguard is to be provided. Permitting such lay assistance is in the State's interests, too. It will not cost the State a penny. Moreover, as Mr Justice Marshall observed in *Ake v. Oklahoma, supra*, (79):

"The State's interest in prevailing at trial - unlike that of a private individual - is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases. Thus, also unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage of the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained."

The third and final factor is the probable value of this safeguard, and the risk of error in the proceeding if such a safeguard is not provided.

In *Faretta v. California, supra*, itself, Mr Justice Stewart observed at Page 834:

"It is undeniable in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realised, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe

that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyers or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." *Illinois v. Allen*, 397 U.S. 337, 350-351 (Brennan J. concurring)".

If a *pro se* defendant, who wants the assistance of a friend to sit beside him and advise him sotto voce about the conduct of his defense, is deprived of such assistance, he will justifiably believe that the law contrives against him. For he will feel that he is not being afforded the opportunity to present his case either effectively or in the manner in which he would like to present it. Indeed, this is practically what seems to have happened in this case. The court's decision to bar John Africa from assisting Mr Jamal in court and the consequent sense of grievance which Mr Jamal developed led inexorably to Mr Jamal's removal from large sections of his capital trial.

In a great many cases, it will be of incalculable assistance to a *pro se* defendant to have someone whom he trusts and has confidence in to sit beside him and to advise him sotto voce how best to conduct his defense. Such a person may well be able to be objective when a *pro se* defendant is not. Such an assistant will see and understand a great deal which the *pro se* defendant will not, because he or she is inexperienced and just too close to what is happening in the case, and what is at stake. It is extremely difficult for anyone representing themselves confidently to find or maintain any reliable perspective on the proceedings in which they are involved. Few lawyers ever represent themselves. But someone whom the *pro se* defendant trusts, and who is one step removed, can supply the *pro se* defendant with that perspective. They can ground a *pro se* defendant.

If a layman who is assisting a *pro se* defendant takes notes, they can remind the *pro se* defendant of precisely what a witness has said, so identifying quickly and precisely any additional points which a *pro se* defendant ought to be dealing with in cross-examination or summation. It is almost impossible to take proper notes of a witness' evidence and cross-

examine effectively at the same time. Ordinarily, any lawyer trying a case of this nature would have the assistance of another lawyer to take notes of the evidence which is being given. In this case, the prosecutor, Mr McGill, had opportunity to have at least one assistant sitting at counsel's table during the trial. Before Mr Jamal sought the court's permission for John Africa to be allowed to sit at the defense's table, a succession of different people sat at the prosecutor's table. In other cases, expert witnesses, lay witnesses and the like frequently sit at counsel's table to advise.

It is certainly possible that the trust and confidence which any particular *pro se* defendant places in the particular friend or member of the public whom he or she selects to assist him or her in the conduct of their trial may well be misplaced. Their advice may be worse than valueless. But, as Mr Justice Stewart observed in *Faretta v. California, supra*, at Page 834:

"the right to defend is personal ... It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored".

It is also possible that a layman who is assisting a *pro se* defendant might disrupt the proceedings of the court. But that can be effectively dealt with, if and when it actually happens. In this case, there was no suggestion at the time that this was the reason why the trial court refused permission for John Africa to sit with and assist Mr Jamal. In any event, if the trial court had been afraid that this was what would happen, the appropriate course of action would have been, initially, to allow Mr Africa to sit with Mr Jamal after giving the appropriate warnings about the need to conduct himself properly and then deal with any misconduct appropriately, if and when it ever occurred.

The rationale and privilege of the rights of audience enjoyed by the Bar will not be infringed by the recognition of the right of the *pro se* defendant to have a friend of his choice sit beside him at counsel's table, take notes and advise him as to the conduct of his defense. For there is no question that such an assistant should enjoy or be allowed to exercise any rights of audience as such.

The assistance which a *pro se* defendant derives from having someone whom he or she trusts to sit beside him and advise him about how best to conduct his case mirrors the assistance which an ordinary defendant gains from an effective lawyer who is actually conducting his case on his behalf. Both fulfil the function of trying to ensure the defendant's "true voice" is heard during the trial. Both attempt to ensure that there is "a proper functioning of the adversary process", which is the principle which runs through the heart of both the Sixth Amendment and the Fourteenth Amendment.

The idea that, since Mr Jamal had the assistance of backup counsel in the person of Mr Jackson, he might not need the help of John Africa flies in the face of reasons why the court and the Constitution recognises the right of every individual to represent himself. For, as Mr Justice Stewart observed in *Faretta v. California, supra*, at Page 834:

"But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realised, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him."

The trial court did not respect Mr Jamal's decision to represent himself and honor Mr Jamal's choice out of "that respect for the individual which is the lifeblood of the law." *Illinois v. Allen*, 397 U.S. 337, 350-351 (Brennan J. concurring). The trial court therefore deprived Mr Jamal of one of the basic tools which he required to defend himself adequately as a *pro se* defendant, namely the assistance of a friend in whom he trusted and had confidence, to sit beside him, take notes and advise him sotto voce about the conduct of his defense.

The trial court's decision runs counter to the spirit and the substance of the Sixth Amendment and the Fourteenth Amendment and the multitude of cases which stand as "safeguards fashioned by this Court (the Supreme Court) over the years to diminish the risk of erroneous conviction stands as a testament to that concern" (Per Mr Justice Marshall in *Ake v. Oklahoma, supra*, (78)).

The right of a criminal defendant to present his defence as effectively as is reasonably possible is enshrined in the Sixth Amendment and the Fourteenth Amendment and this steady

stream of cases.

In delivering the judgment of the Court in *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357 (1938), Mr Justice Black said at Pages 462 to 463:

"The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done" (*Palko v. Connecticut*, 302 U.S. 319, 325, 58, S.Ct. 149, 152, 82 L.Ed. 854, 70 A.L.R. 263). It embodies the realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty The "right to be heard" would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel He (the intelligent and educated but unrepresented layman) lacks both the skill and and knowledge adequately to prepare his defence even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him" (*Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55,64, 77 L.Ed. 158, 84 A.L.R. 527(1932)).

That every defendant should be afforded every reasonable opportunity to present his defence as effectively as possible was the principle underlying the Court's decision in *Powell v. State of Alabama*, supra. Delivering the opinion of the Court, Mr Justice Sutherland said (52):

"However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court to having their cases in charge to see that they were denied no incident of a fair trial."

At page 53, Mr Justice Sutherland went on:

"It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard."

At Page 71, Mr Justice Sutherland concluded:

"it is the duty of the court, whether requested or not, to assign counsel to him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

In this case, the refusal to allow John Africa to sit with Mr Jamal at counsel's table amounted, in the circumstances, to the denial to Mr Jamal of effective aid at his trial, despite Mr Jackson's presence at counsel's table. For Mr Jamal wished to represent himself. He did not feel able to place his trust and confidence in Mr Jackson. Rather, the person in whom Mr Jamal did feel that he would be able to trust and in whose advice about the conduct of the case he did have confidence was John Africa. Yet, the trial court precluded Mr Jamal from receiving this assistance from John Africa at counsel's table as he presented the case himself, and thereby denied Mr Jamal effective aid in presenting his case at trial.

Similarly, the principle that every appellant should be afforded every reasonable opportunity to present his appeal as effectively as possible was the principle underlying the Court's decision in *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, 55 A.L.R. 2d. 1055 (1956). In delivering the opinion of the Court, Mr Justice Black said (18, 19, 20):

"There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an **adequate** (*my emphasis*) appellate review accorded to all who have money enough to pay the costs in advance (18). Thus to deny **adequate** (*my emphasis*) review to the poor means that many of them may lose their life, their liberty, or property because of unjust convictions which appellate courts would set aside (19) We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording **adequate and effective** (*my emphasis*) appellate review to indigent defendants. For instance, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases (20)."

Just as every appellant should be afforded every reasonable opportunity to present his appeal as effectively as possible, so, too, should every *pro se* defendant be afforded every reasonable opportunity to present his defense at his original trial as effectively as possible.

As Mr Justice Marshall observed in *Ake v. Oklahoma, supra*, at Page 76 and 77, the same principle underlies the Court's decisions that "an indigent is entitled to assistance of counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d. 779 (1963), and on his first direct appeal as of right, *Douglas v. California*, 372 U.S. 413, 83 S.Ct. 814, 9 L.Ed.2d. 811 (1963), and that such assistance must be effective. See *Evitts v. Lucey*, 469 U.S.

387, 105 S.Ct. 830, 83 L.Ed.2d. 821 (1985); *Strickland v. Washington* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d. 674 (1984); *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d. 763 (1970)".

Mr Justice Brennan delivered the opinion of the Court in *Evitts v. Lucey*, *supra*. At page 395, he said:

"As we have made clear, the guarantee of counsel "cannot be satisfied by mere formal appointment," *Avery v. Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940). "That a person person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command ... An accused is entitled to be assisted by an attorney, whether retained or appointed, who ensures that the trial is fair." *Strickland v. Washington*, 466 U.S. at 685, 104, at 2063; see also *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d. 763 (1970) ("It has long been recognised that the right to counsel is the right to effective assistance of counsel"); *Cuyler v. Sullivan*, 446, U.S. , at 344, 100 S.Ct. at 1716. Last term, we emphasized this point while clarifying the standards to be used in assessing claims that trial counsel failed to provide effective representation. See *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d. 657 (1984); *Strickland v. Washington*, *supra*. Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."

By analogy, the Constitution cannot tolerate trial in which a *pro se* defendant is unable to obtain a fair decision on the merits, because he has been denied the opportunity to present his case as effectively as he would otherwise have been able to do by the trial court's refusal to allow a friend in whom he has trust and confidence to sit beside him to take notes and advise him sotto voce as to how best to conduct his own defence.

The fact that the trial court insisted that Mr Jackson sat beside Mr Jamal as back up counsel does not rectify the error which was made when the trial court refused to allow John Africa to sit beside Mr Jamal and advise him sotto voce how best to conduct his own defence. As Mr Justice Stewart observed in *Faretta v. California*, *supra*, at Page 834:

"the right to defend is personal ... It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored".

Similarly, in giving the opinion of the Court in the United States Court of Appeals, Third Circuit, in the case of *United States v. Laura*, 607 F.2d. 52 (1979), Circuit Judge Higginbotham said at Page 58:

"Nor do we consider it decisive that after the dismissal of her local counsel Laura continued to have the services of Castelerio. By the time, of her hearing, she had a defense team composed of two attorneys who may have served distinct and important functions on her behalf. As she wished to retain both attorneys we can only presume that she felt that she needed both attorneys. That choice is hers to make and not the court's, unless some appropriate justification for the dismissal is provided.

"Moreover, as long as Rothstein performed a defense function, we do not believe that the defendant should be faced with the burden of proving the importance of his assistance. Therefore, Laura need not show that the dismissal was prejudicial. The right to counsel is among those "constitutional rights (which are) so basic to a fair trial that their infraction can never be treated as a harmless error." *Chapman v. California*, 386 U.S. 18, 23 and n.8, 87 S.Ct. 824, 828, 17 L.Ed.2d. 705 (1967)."

In the same way, in this case, Mr Jackson and John Africa would have served distinct but important functions on Mr Jamal's behalf, if John Africa had been allowed to sit at counsel's table. As Circuit Judge Higginbotham makes clear, by analogy, in this case the choice was Mr Jamal's as to whether he wanted the assistance of John Africa sitting beside him at counsel's table as well as Mr Jackson in his role of back up counsel. The trial court should simply have accepted Mr Jamal's choice and decision, unless and until some appropriate justification for forbidding John Africa from continuing to sit at counsel's table arose.

For, as Circuit Judge Higginbotham had observed earlier at Page 56: "Embodied within the Sixth Amendment is the conviction that a defendant has the right to decide within limits, the type of defense he wishes to mount. See *Faretta v. California, supra; Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1981, 32 L.Ed.2.d 358 (1972). It is from this principle and belief that the defendant's right to select a particular individual to serve as his attorney is derived. For the most important decision a defendant makes in shaping his defense is his selection of an attorney."

Or, as in the instant case, the most important decision which a defendant makes is the

decision to act *pro se* with a particular individual to sit beside him and advise him as to how best to conduct his case. For, as Circuit Judge Higginbotham went on to say at Page 56:

"We would reject reality if we were to suggest that lawyers are a homogeneous group. Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their, trial strategy, their oratory style, or the importance they give to particular legal issues. These differences, all within the range of effective and competent advocacy, may be important in the development of the defense. It is generally the defendant's right to make a choice from the available counsel in the development of his defense. Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense which he will make and thus falls within the ambit of the Sixth Amendment."

If lawyers are not a homogeneous group and different lawyers can reasonably develop very different types of defenses within an range of effective and competent of defenses, it almost goes without saying that Mr Jamal could and would have developed a very different type and style of defense than the type of defense which Mr Jackson presented on his behalf, if Mr Jamal had been allowed to represent himself with John Africa sitting at his side. Mr Jamal decision to represent himself with John Africa sitting at his side to advise him sotto voce as to how best to conduct his defense clearly falls within the Sixth Amendment. The trial court's decision to refuse to allow John Africa to sit beside him deprived Mr Jamal of the opportunity to presented his chosen type of defense either effectively or at all. The trial court's thereby deprived Mr Jamal of the opportunity of presenting his chosen type of defense successfully or at all.

The mere fact that Mr Jamal might not have taken every legal technicality which he otherwise might have done if he had been legally represented is neither here nor there. As Circuit Judge Higginbotham said, again, at page 56:

"Further, the defendant's decision to select a particular counsel will affect other constitutional rights. For example, a defendant, on the advice of counsel, may decide not to object to at trial to the introduction of evidence seized in violation of his Fourth Amendment rights."

Those sorts of decisions are often made for good tactical reasons depending upon the

overall nature of the defense which is being run.

Accordingly, it is clear that, even if it were only the law at the time of Mr Jamal's original trial or his subsequent appeals which is relevant, the trial court's decision to refuse to allow John Africa to sit at counsel's table and advise Mr Jamal sotto voce as to how best to conduct his own defense was, at the time, as a matter of law, "a decision which was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States", as required by Section 2254(d)(1) of the Anti-Terrorism and Effective Death Penalty Act, 1996.

The core constitutional principles applicable in this case, namely that every defendant should be given every reasonable opportunity to present his or her defense as effectively as is reasonably possible, have long been very well-established. Therefore, the recognition of the right of every *pro se* defendant to have a friend without any legal training sit beside him, take notes and advise sotto voce about the conduct of his defense does not amount to a "new rule", which would fall foul of the rule in *Teague v. Lane*, 489 U.S. 288 (1989) and so the Anti-Terrorism and Effective Death Penalty Act, 1996.

As Mr Justice Stevens observed in *Williams v. Taylor*, 529 U.S. 1 (2000) at Page 17:

"In the context of this case, we also note that, as our precedent interpreting *Teague* has demonstrated, rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalised standard rather than a bright-line rule. As Justice Kennedy has explained:

"If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule ... Where the beginning point is a rule of this general application, a rule designed for the specific purposes of evaluating a myriad of factual contexts, it will be the infrequent case which yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright v. West*, 505 U.S. 277, 308-309 (1992) (opinion concurring in judgment)."

Furthermore, as Mr Justice Stevens continued at Pages 17 to 18:

"Moreover, the determination whether or not a rule is clearly established at the time a state court renders its final judgment of conviction is a question as to which the "federal courts must make an independent evaluation." *Id.* (*Wright*

v. West, supra), at 305 (O'Connor J., concurring in judgment); accord *id.*, at 307 (Kennedy J. concurring).

This independent obligation subsists (Per Mr Justice Stevens, *Williams v. Taylor, supra*, at Page 19).

For the purposes of Section 2254(d)(1) of the Anti-Terrorism and Effective Death Penalty Act, 1996, it is the law at the time of Mr Jamal's subsequent appeals in 1990 and 1991 which is relevant: as Mr Justice Stevens said in *Williams v. Taylor*, 529 U.S. 1 (2000) at Page 16:

"But *Teague* established some guidance for making this determination, explaining that a federal habeas court operates within the bounds of comity and finality if it applies a rule "dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S., at 301."

Alternatively, to the extent that it may be necessary, it is respectfully submitted that any failure to raise the issue of the trial court's refusal to allow John Africa to sit at counsel's table and advise Mr Jamal sotto voce as to how best to conduct his own defense on direct appeal or subsequently amounts to the denial of effective counsel in accordance with the two pronged test in *Strickland v. Washington, supra*.

In conclusion, there is and always was every reason in principle and in practice why the right of the *pro se* defendant to be allowed to have a friend without any legal training sit beside him, take notes and advise sotto voce about the conduct of his defense should be recognised. There is and always was no practical or other reason why it should not.

The decision to refuse to allow Mr Jamal the assistance of John Africa effectively prevented Mr Jamal from meaningfully exercising his right to self representation at his trial. Mr Jamal's trial was therefore fundamentally unfair and prejudice must be presumed, as in *Faretta v. California, supra; Chapman v. California, supra; United States v. Laura, supra*, at page 58; *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8 (1984); and *Arizona v. Fulminante*, 499 U.S. 279 (1991), at 310.

Moreover, the error which occurred in this case is analogous to the errors which occurred in those cases when counsel was completely inert, or the defendant was otherwise

deprived of the raw materials with which to mount an effective defense.

"A criminal trial is fundamentally unfair if a state proceeds against an individual defendant without making certain that he has access to the raw material integral to mount an effective defence" *Ake v. Oklahoma, supra* (77) (Mr Justice Marshall).

Similarly,

"The language of the Sixth Amendment which "requires not merely the presence of counsel for the accused, but "Assistance" which is to be "for his defence" ... If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated." *Cronic*, 466 US at 654 n. 11 (noting that in some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to have assistance of counsel is denied.") "To hold otherwise could convert the appointment of counsel to into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Id* at page 654 (citation omitted). *Martin Daniel Appel v. Martin Horn* 1999 WL 323805 at page 10.

Just as prejudice is presumed in these cases, so should it be in the instant case.

Otherwise, the bare right to represent oneself would be reduced to a into nothing more than a sham.

In any event, the prejudice which Mr Jamal in fact suffered from the trial court's refusal to allow John Africa to sit at the defense's table was enormous. For the decision to refuse to allow Mr Jamal the assistance of John Africa as he tried to represent himself shaped the whole course of the subsequent trial. It led directly to Mr Jamal's removal from the courtroom on a total of seven out of the fourteen days of the guilt phase of his trial, as well as his absence from significant parts of the voir dire. It was the primary reason which Mr Jamal offered for his decision not give evidence himself in his own defense. It tainted the whole proceedings in Mr Jamal's mind and coloured his whole approach to the trial. The error was plainly "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable" (*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d. 674 (1984), at 2064; *Lockhart v. Fretwell*, 506 US 364, 369, 113 S.Ct. 838, 122 L.Ed.2d. 180 (1993) at 369).

Moreover, "it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defence" (*Faretta v. California*,

supra, Page 834). In our submission, this was probably one of those rare cases. Politically, this was a very highly charged and emotive trial. Someone as articulate and talented as Mr Jamal would probably have been uniquely well placed to get his defence across effectively, if he had been given the opportunity to do so with John Africa sitting at his side.

"Any unfairness, whether apparent or actual and however inadvertent, strikes at the roots of justice. I cannot be sure that the applicants' were not prejudiced and accordingly I have no doubt that the justices' order should be quashed" (Per Donaldson MR, *Ex Parte Barrow*, at Page 290).

If Mr Jamal had represented himself with John Africa at his side, we would have been able to mount the type and style of defense which he wished to run effectively and successfully.

In the light of the extensive body of Sixth Amendment and Fourteenth Amendment jurisprudence which existed at the time of Mr Jamal's original trial and his subsequent appeals, *amici curiae* respectfully urge this court to grant the Petition for Writ of Habeas Corpus for all of the reasons which are set out in this brief, and to give careful consideration to Mr Jamal's remaining claims.

CONCLUSION

For all of the above reasons, it is respectfully requested that this Court grant the Petition for Habeas Corpus filed by the Petitioner Mumia Abu-Jamal based upon the Sixth Amendment and Fourteenth Amendment, pursuant to 28 U.S.C. 2254.

Respectfully submitted,

By

NICK BROWN, ESQ.

4 New Square,

Lincoln's Inn,

London WC2A 3RJ

United Kingdom

(0207) 822 2000