

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

MUMIA ABU-JAMAL : CIVIL ACTION  
Petitioner :  
V. :  
MARTIN HORN, et. al. : NO. 99-5089

**COMMONWEALTH'S ANSWER TO PETITIONER'S EMERGENCY  
MOTION FOR ORDER AUTHORIZING DEPOSITION**

LYNNE ABRAHAM, District Attorney of Philadelphia County, by RONALD EISENBERG, Deputy District Attorney, Law Division, THOMAS DOLGENOS, Chief, Federal Litigation, and HUGH J. BURNS, JR., Assistant District Attorney, on behalf of respondents, respectfully submits the following answer to petitioner's "emergency motion for order authorizing deposition and request for expedited consideration of motion" (herein, "emergency motion"), and thus states:

1. A seriatim answer is dispensed with for the sake of clarity.
2. Petitioner seeks discovery in the form of a deposition of one Arnold Beverly, whom he claims "has confessed to the murder of Police Officer Daniel Faulkner" (emergency motion, ¶1).
3. Petitioner does not specify when he allegedly obtained the alleged confession. However, the "declaration of Arnold Beverly" attached to the copy of the emergency motion served on the Commonwealth is dated June 8, 1999.
4. Petitioner's habeas corpus petition was filed on October 15, 1999, approximately six months after the date of the alleged confession by Mr. Beverly. The habeas petition made no mention whatever of Mr. Beverly or his alleged confession. Nor did any such mention occur in petitioner's subsequently-filed emergency motion for a stay of execution; memorandum of law;

motion to review for reasonableness state court fact finding; motion for evidentiary hearing; traverse; supplemental memorandum of law; or application for leave to amend the habeas petition; all of which were filed on various dates through July 11, 2000.

5. Prior to filing the habeas petition, petitioner did not file a second petition under Pennsylvania's Post Conviction Relief Act, which specifically allows new factual assertions to be developed in state court by filing such a petition within 60 days of their being discovered.<sup>1</sup> Thus, petitioner's purported desire to preserve, on an "emergency" basis, the "exculpatory evidence" that allegedly would be supplied by Mr. Beverly, now, in 2001 (emergency motion, ¶3), seems to be contradicted by his unexplained failure to avail himself of state procedures for doing so in 1999.

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<sup>1</sup> Subsection (b)(1)(i)-(iii) of 42 Pa.C.S. § 9545 (Act of November 17, 1995, Special Session No. 1, P.L. 1118, No. 32, effective January 16, 1996) states that a one-year jurisdictional time bar applies "unless the petition alleges and the petitioner proves" one of the three exceptions stated in subsection (b)(1), which includes a specific exception for new evidence:

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

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

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

(Emphasis added).

6. Petitioner states "there is sound basis to believe that" people "involved" in "the plot," as he calls it, "may be interested in silencing" Mr. Beverly (emergency motion, ¶2). But the "sound basis" to which petitioner refers is not specified. Neither the emergency motion nor the purported declaration of Mr. Beverly actually identifies anyone who was supposedly involved in "the plot." Mr. Beverly supposedly "came forward" in or before June of 1999, which was nearly two years ago. It is therefore unclear why there is an "emergency" now, but there was evidently no emergency then. Petitioner's assertion of an alleged belief that members of a supposed "plot" might be "interested" in "silencing" Mr. Beverly is not a fact, and is not based on any specific facts.

7. Petitioner was fully aware of the alleged confession of Mr. Beverly in the spring of 1999, at which time he made a counseled, knowing, and informed decision to withhold it because, inter alia, he knows it to be false.

#### Discussion

Unless a petitioner can establish that a hearing at which the discovered evidence might be admitted is at least permissible under AEDPA standards, he cannot show good cause, and there is no basis for discovery. Cherix v. Braxton, 131 F. Supp.2d 775, 776 (E.D. Va. 2000) (under AEDPA, "If the petitioner is not entitled to a hearing, then 'good cause' is not shown, and the full ambit of discovery is not available"); Charles v. Baldwin, 1999 WL 694716 (D.Or.); 1999 U.S. Dist. LEXIS 13909 (D. Ore., No. CV-97-380-ST, filed August 2, 1999) (same).

Petitioner has failed to show good cause for his discovery request, because the claim that is the basis for the request cannot be heard in the habeas proceeding. Although the alleged assertions of Mr. Beverly were obviously known to petitioner at least as early as June 1999, he withheld the claim from his subsequent habeas petition filed on October 15, 1999. Under AEDPA, the statute of

limitations for asserting the instant claim expired, at the latest, on June 8, 2000.<sup>2</sup> Petitioner is not permitted to amend his petition to raise a claim he withheld, by mentioning it for the first time nearly a year after the filing limit expired, and nineteen months after the petition was filed. United States v. Thomas, 221 F.3d 430, 435 (3d Cir. 2000) (habeas petition may not be amended after AEDPA filing limit has passed); United States v. Davenport, 217 F.3d 1341, 1345 (11th Cir. 2000), cert. denied, 121 S. Ct. 1232 (2001) (same); United States v. Pittman, 209 F.3d 314 (4th Cir. 2000) (same) Hull v. Kyler, 190 F.3d 103-104 (3d Cir. 1999) (same); United States v. Duffus, 174 F.3d 333, 337 (3d Cir.), cert. denied, 528 U.S. 866 (1999) (same). Since petitioner cannot raise the instant claim at all, he cannot request court-ordered discovery as to that claim.

In addition to the bar imposed by the statute of limitations, petitioner is separately and

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<sup>2</sup> 28 U.S.C. § 2255 states, in pertinent part:

A 1-year statute of limitations shall apply to a motion under this section. The limitation period shall run from the latest of -

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such government action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Petitioner could conceivably allege (although so far, he has not) that the facts he now wishes to raise could not have been discovered through the exercise of due diligence before June 8, 1999. In that event, the AEDPA deadline for raising the claim would have been June 8, 2000 -- nearly a year ago.

additionally barred from obtaining a hearing on the withheld claim. 28 U.S.C. § 2254 states, in pertinent part:

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) *If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -*

(A) the claim relies on -

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(Emphasis added).

Section 2254 (e)(2) plainly states that the court "shall not" hold a hearing unless the requirements of (e)(2)(A)(ii) -- A(i) being inapplicable here -- and (e)(2)(B), are met. Petitioner does not claim that he is able to meet these conditions, and of course any such argument would be futile. His own motion makes clear that he knew about the instant claim on or before June 8, 1999. State law provided a mechanism by which he could have raised the present allegations in state court. He chose not to do divulge it. Since the instant allegations were never presented in state court, and petitioner's own averments rule out any possibility of his meeting the requirements of §

2254(e)(2)(A)(ii), a hearing is precluded.<sup>3</sup>

It is also apparent that petitioner cannot satisfy § 2254(e)(2)(B), which requires "clear and convincing evidence" that "no reasonable factfinder" who heard the new evidence would have convicted. There were eyewitnesses to the murder. The eyewitnesses saw petitioner commit the murder. Petitioner tried to pick up his gun and shoot the first police officers to arrive after the murder. None of the eyewitnesses saw anything resembling the preposterous scenario petitioner would now introduce, two decades after the murder. Petitioner withheld the instant claim because he knew it to be a "patently outrageous story" and "a lie." The following appears in a book written, with petitioner's permission, by petitioner's former attorney:

The Jenkins debacle really shook Len and me up. Like all other self-respecting lawyers, we were highly sensitive to the question of our credibility. A lawyer who loses credibility is a lawyer who loses effectiveness. I felt that the defense team took a major hit in the credibility department with Pamela Jenkins. The only salutary effect from it, I hoped, would be greater cautiousness in who we would embrace as a witness in the future. Perhaps, I thought, the embarrassment from it would actually heal the rift between me and the PDC contingent on the team inasmuch as we all would now be on the same page when it came to evaluating strategy.

My hope proved to be naive. In the spring of 1999, over seventeen years after the

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<sup>3</sup> In addition, the instant claim is unexhausted, procedurally barred, and thus defaulted. In this case any unexhausted claim is procedurally defaulted because petitioner is barred from further state post-conviction review. 42 Pa.C.S. § 9545 (jurisdictional bar to PCRA petitions filed more than one year after conclusion of direct review); Commonwealth v. Peterkin, 722 A.2d 638, 642 (Pa. 1998) (upholding jurisdictional bar). (As already noted, petitioner could have invoked an exception to this bar by raising the instant claim in a second PCRA petition within 60 days of becoming aware of it, but he failed to do so). If the highest state court has not ruled on the merits of a claim and would not now do so for procedural reasons, the claim is procedurally defaulted and may not be reviewed by a federal habeas court. Coleman v. Thompson, 501 U.S. 722 (1991) Teague v. Lane, 489 U.S. 288, 297-298 (1989); Castille v. Peoples, 489 U.S. 346, 351 (1989) (claim not fairly presented in state court not exhausted). Even if the default could somehow be overcome, moreover, that would not excuse petitioner's failure to comply with the AEDPA statute of limitations, nor permit a hearing notwithstanding the prohibition of § 2254(e)(2).

killing and nearly four years after the lengthy hearings before Sabo, Rachel [Wolkenstein] and Jon [Piper] announced that they had discovered yet another "explosive new witness." According to them, this new witness would testify that he and another unidentified individual received money from the mob to kill Officer Faulkner. The killing, however, was not to be a mob hit; rather, the mob was merely some sort of conduit for a killing which was sought out by high-level officials within the Philadelphia police department. Although the details were never fleshed out completely, this new account portrayed Officer Faulkner as an inside informant for federal authorities investigating corruption within the department. Exposed as such, Faulkner became the target of corrupt police officials who feared that he would be their ultimate undoing. According to this new witness, Faulkner was killed at the behest of corrupt Philadelphia officers to silence him.

When I heard the story at a defense team meeting at Len's loft, I bit my lip to avoid another unpleasant argument with Rachel. Actually, I was enraged, convinced that bona fide lunacy had set in. When the meeting ended, I stayed behind to speak further with Len, fearful that we were close to ruining years of work and threatening to extinguish Mumia's hopes for justice.

"Are you *seriously* considering this?" I asked. Len was visibly distressed. He had been aware for a few months that Rachel was working on bringing this witness around to helping the defense. He agreed that the story was insane, but Rachel had already lobbied Mumia, as she had when [William] Singletary was the issue. Concerned that Mumia would insist upon our presenting this evidence, Len sought out ways to push this witness onto the trash heap without further rupturing the defense team. We even had the witness undergo several lie detector tests (with mixed results, which further complicated the situation). Most frightening, the story somehow leaked out and was mentioned in a major attack piece on the pro-Mumia movement published in *Vanity Fair* in August 1999.

But what if Mumia wanted the witness? On the one hand I felt that he was absolutely entitled to present him, because it was his life on the line. On the other hand, a lawyer must protect his client against his own tendency to destroy himself, especially in a capital case where desperation might cause a client to opt for an irrational course of action. But even if Mumia's wishes prevailed, that didn't mean he was entitled to have a *particular* lawyer do it for him. I made it clear to Len that I would not participate in what I regarded as an assisted suicide. I have to admit, I also wasn't about to embarrass myself by running with such a patently outrageous story on the most visible death penalty case in the world. I don't know Len's analysis of the situation, but he ended up with the same conclusion: if Mumia wanted the witness, he'd have to get another lawyer to present him.

Rachel and Jon took the same position, but on the flip side: If we convinced Mumia *not* to use this witness, then they would leave the defense team. Jon presented his position exactly as I presented mine: he too would not stand by and watch a client make a decision that might result in his death. He accused Len, Steve, and me of becoming the first death penalty lawyers in history who turned their back on an exculpatory witness. It was a shallow analysis inasmuch as it totally ignored the implausibility, if not the absurdity, of the story that we were rejecting.

Rachel and Jon are no longer on the case. They ceased their involvement in August of 1999, after Mumia decided that he would not demand that we use this witness. In retrospect, I feel somewhat ashamed for even thinking that Mumia would opt to pin his hopes for a new trial on such an absurd account. An innocent man on death row might grab at anything to get justice; but I should have had faith that Mumia would never get *that* desperate.

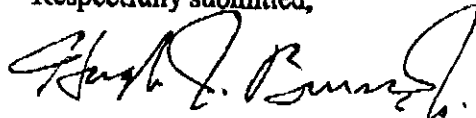
Remarkably, as I reflect on this particular episode, it actually deepened my commitment to this case and heightened my already enormous respect for my client. It became apparent to me that Mumia is far too honorable to propagate a lie upon which to build a case for his freedom.

Dan Williams, Esq., "Executing Justice" (St. Martin's Press, 2001), pp. 328-330.

Since petitioner decided to withhold this claim as a matter of his litigation strategy, and is not entitled to raise it now or amend his petition to include it, he is not entitled to any form of discovery based thereon. There is no emergency.

**WHEREFORE**, respondents respectfully request that the "emergency motion for order authorizing deposition and request for expedited consideration of motion" be denied.

Respectfully submitted,



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