

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

IN RE TWENTY-TWO MEMBERS OF : No. 00-9008  
THE BRITISH PARLIMENT AND FOR  
CHICANA/CHICANO STUDIES  
FOUNDATION :

COMMONWEALTH'S ANSWER TO PETITION FOR WRIT OF MANDAMUS

LYNNE ABRAHAM, District Attorney of Philadelphia County, by RONALD EISENBERG, Deputy, Law Division; THOMAS DOLGENOS, Chief, Federal Litigation; and HUGH J. BURNS, JR., Assistant District Attorney, on behalf of party-respondents in the court below, respectfully answers the instant petition by non-party putative amicus curiae for a writ of mandamus, by which the putative amici seek to overturn the order of the District Court denying their petitions to permit them to file amicus briefs as advocates for the petitioner in a federal habeas corpus proceeding, and thus states:

1. The memorandum and order of the Honorable William H. Yohn dated August 7, 2000 is incorporated herein. The individuals who filed the instant application (herein, "petitioners") are not parties in the proceeding below, but rather comprise two of four groups of putative amici curiae that sought discretionary leave to litigate as advocates on behalf of the habeas petitioner. The instant matter parallels an attempted interlocutory appeal on the same ground by these same putative amici, docketed at No. 00-9007.

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

Introduction

On December 9, 1981, Officer Daniel Faulkner was shot in the back, and then shot between the eyes as he lay on the ground, by Mumia Abu-Jamal. In July, 1982, Mr. Jamal was convicted by a jury of murder of the first degree and sentenced to death. He finally

exhausted his state court remedies in 1998. In October, 1999, Mr. Jamal filed the habeas corpus action now pending in the District Court. The petition raises twenty-nine (29) separately numbered claims and innumerable sub-issues. To lend some perspective of the nature of the litigation on the habeas petition, the Commonwealth has thus far filed seven substantive briefs, pleadings, and memoranda (exclusive of other correspondence), in excess of four hundred (400) pages. Petitioners are putative amici curiae who (despite what the term implies) wish to litigate as advocates on behalf of Mr. Jamal. The District Court's reasons for denying petitioners' application to participate in this fashion are plainly stated in its opinion, which speaks for itself.

Petitioners now seek a writ of mandamus to overturn the District Court's decision. Their application is frivolous, and should be denied.

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Standard of review

The leading case is Allied Chemical Corporation v. Daiflon, Inc., 449 U.S. 33 (1980) (per curiam). In reversing the grant of a writ of mandamus by the Tenth Circuit Court of Appeals, the United States Supreme Court stressed several important limiting principles:

- \* Mandamus is an "extraordinary remedy" that should "hardly ever" issue.
- \* Mandamus does not lie to address a mere alleged abuse of discretion, but rather applies only to "circumstances amounting to a judicial usurpation of power."
- \* Mandamus may issue only where the petitioner shows that its right to the relief requested is "clear and indisputable."

\* Where the challenged decision was discretionary, "it cannot be said" that there was a clear and indisputable right to a different result.<sup>1</sup>

To these precepts may be added another, of equal import:

\* The mandamus petitioner must show that it will suffer "irreparable injury" from the alleged error. Aerosource Inc. v. Slater, 142 F.3d 572, 582 (3d Cir. 1998).<sup>2</sup>

**Petitioners' application fails each and every one of these requirements.**

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<sup>1</sup> 449 U.S. at 35-36. In Allied Chemical, the Court of Appeals had issued the writ to overturn the district court's grant of a new trial. The Supreme Court reversed, stating (citations, brackets, and indications of quotations from cited cases omitted):

This Court has recognized that the writ of mandamus has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy.

The reasons for this Court's chary authorization of mandamus as an extraordinary remedy have often been explained. Its use has the unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation. ... In order to insure that the writ will issue only in extraordinary circumstances this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires, and that he satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. In short, our cases have answered the question as to the availability of mandamus in situations such as this with the refrain: "What never? Well, hardly ever!"

A trial court's ordering of a new trial rarely, if ever, will justify the issuance of a writ of mandamus. ... The authority to grant a new trial ... is confided almost entirely to the exercise of discretion on the part of the trial court. Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is clear and indisputable.

<sup>2</sup> E.g., United States v. Wexler, 31 F.3d 117, 128 (3d Cir. 1994) (rehearing and rehearing en banc denied), cert. denied, Wexler v. United States 513 U.S. 1190 (1995); Chronicle Pub. Co. v. Hantzis, 902 F.2d 1028, 1031 (1st Cir. 1990); Cippolene v. Liggett Group, Inc., 785 F.2d 1108, 1118 (3d Cir. 1986).

1. Mandamus does not lie for a claimed abuse of discretion.

Petitioners grudgingly admit that it "may be" in the discretion of the District Court "to decide whether to accept an amicus brief." They nevertheless argue that their claim of abuse of discretion, "like any other" claim of abuse of discretion, "is properly reviewable by mandamus" (petition at 15).

Petitioners are plainly wrong as a matter of law. Allied Chemical says just the opposite -- "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" Contrary to petitioners' understanding, mandamus is not available to review a mere abuse of discretion. The circumstances alleged must "amount[] to a judicial usurpation of power." 449 U.S. at 35-36.

As one Court of Appeals has reasoned:

[W]e think it plain that Allied Chemical ... has made it clear that the writ should not issue unless the right of the party seeking mandamus is clear and indisputable, and that clear and indisputable requires considerably more strained circumstances than does a mere abuse of discretion. ... before the writ should issue in a case in which the matter at hand is entrusted to the discretion of the district court, the district court's abuse of discretion must amount to a "judicial usurpation of power." ... it is in cases of abuses of judicial power, not merely abuse of discretion, that mandamus lies.

In re Ralston Purina Co., 726 F.2d 1002, 1005 (4th Cir. 1984) (citations omitted); accord, In re Catawba Indian Tribe of South Carolina, 973 F.2d 1133, 1136 (4th Cir. 1992) (reaffirming "judicial usurpation of power" standard); In re First South Saving Ass'n, 820 F.2d 700, 707 (5th Cir. 1987) (adopting same reasoning);

The "judicial usurpation" standard is the rule in this Circuit. E.g., In re Richards, 213 F.3d 773, 781 (3d Cir. 2000) (reversing grant of writ of mandamus by district court).<sup>3</sup> Indeed, it is universally accepted.<sup>4</sup>

There was no abuse of discretion here. But even if there had been, petitioners do not claim (nor can they claim) that Judge Yohn's decision even remotely resembled a judicial usurpation of power. True, petitioners make liberal use of pejorative adjectives (e.g., stating [on just the contents page] that the District Court acted "arbitrarily" and "capriciously," and supposedly relied on grounds that were "untenable," "irrelevant," or "manifestly unreasonable"; petition at ii). But they point to nothing of substance to suggest that, even when viewed in the rather partisan and subjective manner of the petition, the District Court's ruling amounted to anything more than a garden-variety abuse of discretion. The petition may be rejected on this ground alone. See Communication Workers v. AT&T, 932 F.2d 199,

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<sup>3</sup> In re Patenaude, 210 F.3d 135, 140 (3d Cir. 2000), petition for certiorari filed 69 U.S.L.W. (August 22, 2000); In re Chambers Development Co., Inc., 148 F.3d 214, 223 (3d Cir. 1998); Hahnemann University Hospital v. Edgar, 74 F.3d 456, 461 (3d Cir. 1996); Rolo v. General Development Corp., et. al., 949 F.2d 695, 702 (3d Cir. 1991); see also Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995) ("Mandamus is not available for abuse of discretion"); Trans Penn Wax Corp. v. McCandles, 50 F.3d 217, 227 (3d Cir. 1995) (mandamus requires "a clear error of law 'at least approach[ing] the magnitude of an unauthorized exercise of judicial power, or a failure to use that power where there is a duty to do so.'").

<sup>4</sup> First Union Mortgage Corp. v. Smith, 2000 WL 1528047, \*2 (10th Cir.); In re Otis v. Apfel, 202 F.3d 1050, 1052 (8th Cir. 2000); In re Gregory, 181 F.3d 713, 714 (6th Cir. 1999); In re Williams v. United States, 156 F.3d 86, 93 n.7 (1st Cir. 1998), cert. denied, Cannon v. Williams, 525 U.S. 1123 (1999); Credit Suisse v. United States District Court For The Central District Of Florida, 130 F.3d 1342, 1345 (9th Cir. 1997); In re Goffer, 1993 WL 118097 (D.C. Cir.); Frutiger v. Hamilton Central School Dist., 928 F.2d 68, 73 (2d Cir. 1991); In re Hester v. NCNB Texas National Bank, 899 F.2d 361, 365 (5th Cir. 1990); United States v. Spilotro, 884 F.2d 1003, 1007 (7th Cir. 1989); In re National Developers, Inc. v. Ciba-Geigy Corp., 803 F.2d 616, 619 (11th Cir. 1986).

210 (3d Cir. 1999) (applying judicial usurpation standard, mandamus not warranted even assuming that district court committed a clear error of law in reaching its decision).<sup>5</sup>

2. Petitioners cannot show a clear and indisputable right.

As already noted, a mandamus petitioner must satisfy "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" Sporck v. Peil, 759 F.2d 312, 314 (3d Cir.) (writ granted to prevent production of clearly privileged work product), cert. denied, Peil v. Sporck, 474 U.S. 903 (1985), quoting Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953).<sup>6</sup> This Court "has consistently applied this stringent standard." In re Pasquariello, 16 F.3d 525, 529 (3d Cir. 1994) (denying writ; "we do not find the issue as clear as does appellant"). E.g., Aerosource Inc. v. Slater, 142 F.3d at 582 (mandamus denied where

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<sup>5</sup> "We will assume but not decide that the district court was wrong in its determination ... even were we to find that the district court committed a clear error of law, such a finding does not resolve the mandamus issue ... the district court's decision, even if erroneous, did not rise to a usurpation of judicial power so as to warrant mandamus." 932 F.2d at 210.

Petitioners' fundamental misunderstanding of the nature of mandamus is further illustrated by their reliance on this Court's decision in In re School Asbestos Litigation, 977 F.2d 764 (3d Cir. 1992), which they claim "held that mandamus is a proper means to require a District Court to consider the merits of an issue that it has refused to consider" (petition at 17). In reality, the case does not hold anything of the kind. It held that the facts there "clearly and indisputably" required the District Court judge to disqualify himself -- an issue he had considered, albeit erroneously -- where he had attended a "pro-plaintiff" conference sponsored by the plaintiffs with funds approved by the judge, where his expenses were partially defrayed by those same funds, and the conference featured a "Hollywood-style" preview of the plaintiff's case. 977 F.2d at 778, 782. Here, it would be absurd to contend that the District Court judge "refused to consider" petitioners' claims, in that Judge Yohn wrote a lengthy and detailed opinion in support of his order. And, quite unlike the situation in School Asbestos Litigation, petitioners are unable to show that the facts "clearly and indisputably" required the Judge to permit them to participate as amici.

<sup>6</sup> Miller v. French, 120 S. Ct. 2246, 2254 (2000); Mallard v. United States District Court For The Southern District Of Iowa, 490 U.S. 296, 309 (1989); In re Roberts, 178 F.3d 181, 183 (3d Cir. 1999). E.g., In re FCC, 217 F.3d 125, 133 (2d Cir. 2000) (mandamus appropriate where lower court acted outside its jurisdiction); Byrd v. Reno, 180 F.3d 298, 303 (D.C. Cir. 1999) (mandamus denied where it was "far from clear that the district court erred").

petitioner showed irreparable injury, but not clear and indisputable right); Madden v. Meyers, 102 F.3d 74, 79 (3d Cir. 1996) (writ denied where delay in deciding habeas petition did not deny due process, negating claim of clear and indisputable right); PAS v. Travelers Insurance Co., 7 F.3d 349, 357 (3d Cir. 1993) (not clear and indisputable that state claims not preempted); Travelers Int'l AG v. Robinson, 982 F.2d 96, 98 (3d Cir. 1992), cert. denied, 507 U.S. 1051 (1993) (denying writ because not clear and indisputable that petitioner entitled to a jury trial).<sup>7</sup>

Here, petitioners do not say that they had a "right" to participate as amicus curiae in the District Court, let alone a right that is "clear and indisputable." To attempt this would of course be entirely frivolous. As this Court explained in Newark Branch, NAACP v. Town of Harrison, N.J., 940 F.2d 792, 808-809 (3d Cir. 1991) (citations omitted, emphasis added):

Amicus curiae is a latin phrase for "friend of the court" as distinguished from an advocate before the court. It serves only for the benefit of the court, assisting the court in cases of general public interest ...

An amicus curiae is not a party to the litigation and therefore does not necessarily represent the views or interests of either party. Since an amicus does not represent the parties but participates only for the benefit of the court, it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the amicus.

E.g., In re Lan Associates, 192 F.2d 109, 115 (3d Cir. 1999) (exercise of discretion to address amicus argument that "closely resemble[d]" that of the bankruptcy trustee, but not other arguments, as these were "raised only by amici"); Lever Brothers Co. v. United States, 1992

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<sup>7</sup> See also In re Jacobs, 213 F.3d 289, 290 (5th Cir. 2000) (writ denied where petitioner possessed no clear and indisputable right, but was attempting to thwart district court's determination of whether his underlying suit was frivolous "by filing numerous non-responsive pleadings"); In re Lopez-Lukis, 113 F.3d 1187, 1188 (11th Cir. 1997) (writ denied where petitioner had no clear and indisputable right to recusal of trial judge in criminal case, even though judge was the target of a criminal investigation by the Justice Department).

WL 443768 (D.C. Cir.) (discretionary rejection of amicus participation despite consent of parties).

As it is "solely within the discretion of the court to determine the fact, extent, and manner of [amicus] participation," petitioners, *a fortiori*, cannot possibly claim a "right," much less a clear and indisputable one, to participate as amici. Indeed, since an amicus "participates only for the benefit of the court," their argument logically boils down to a complaint that, in denying them leave to participate, Judge Yohn only failed to benefit himself. Petitioner's zeal to save Judge Yohn from himself is not a ground for mandamus.

Rather than claim to possess a clear and indisputable right, petitioners prefer to rely on the irrelevant contention that the concept of amicus participation "dat[es] back to the days of ancient Rome" (petition at 18-20).

But the amicus of ancient Rome and the amicus of petitioners are very different things. The Roman amici were judicially appointed attorneys, selected by the court to provide opinions on points of law with which the court was unfamiliar. See The Litigating Amicus Curiae: Why Does The Party Begin After The Friends Leave? 41 Am. U. L. Rev. 1243, 1298-99 n.4 (1992). By contrast, petitioners believe that amici appoint themselves, for the purpose of providing advocacy. They do not act on behalf of the court, but on behalf of the party with whom they are allied. Thus, the trouble with petitioners' view that history owes them their preferred result is that most amici, themselves included, reject the historical norms. The "traditional" amicus "dating back to the days of ancient Rome," who acts as a genuine "friend of the court," may not yet have gone the way of the *gladius* and the *plium*; but the trend is not favorable. Modern amici often abandon the historical tradition of objectivity and behave as overzealous advocates for their allied party. The resulting briefs are often

repetitive, duplicative, tedious, and uninformed. It is precisely this that has led courts to become wary of allowing amicus participation. As succinctly explained by Chief Judge Posner of the Seventh Circuit Court of Appeals:

**The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term "amicus curiae" means friend of the court, not friend of a party. We are beyond the original meaning now; an adversary role of an amicus curiae has become accepted. But there are, or at least there should be, limits. An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an amicus curiae brief should be denied.**

**Ryan v. Commodity Futures Trading Organization, 125 F.3d 1062, 1063 (7th Cir. 1997)**

**(citations omitted).<sup>8</sup>**

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<sup>8</sup> Accord National Organization for Women v. Scheidler, 223 F.3d 615 (7th Cir. 2000) (modern amicus briefs "are more often than not sponsored or encouraged by one or more of the parties," even to the extent of amicus attorneys being paid by party; such briefs circumvent normal limits on the parties, such as page limits, and prejudice "any party who does not have an amicus ally"; holding that such amicus briefs will ordinarily not be allowed); see United States v. Michigan, 940 F.2d 143, 164-165 (6th Cir. 1991) (criticizing and reversing district court which had allowed amicus to litigate as if a party; participation of amicus a "privilege" within "the sound discretion of the courts"); New England Patriots Football Club, Inc. v. University of Colorado, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) ("In granting permission [to file amicus brief] we had assumed, wrongly, it proved, that counsel knew what an amicus is," i.e., one who acts "for the assistance of the court" on matters of law); Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970) ("a district court lacking joint consent of the parties should go slow in accepting ... an amicus brief"); see also Northern Securities Co. v. United States, 191 U.S. 555 (1903) (denying amicus application where amicus had no interest in any related pending case and parties were represented by competent counsel); American College of Obstetricians and Gynecologists, Pennsylvania Section, et. al. v. Thornburgh, et. al., 699 F.2d. 644 (3d Cir. 1983) (rejecting amicus brief of law professors who "do not purport represent any individual or organization with a legally cognizable interest in the subject matter"); Amicus Curiae: Friend Or Foe? The Limits Of Friendship In American Jurisprudence, 5 Suffolk J. Trial & Appellate Advoc. 1 (2000) (explaining that latest version of FRAP 29 is designed to discourage amicus briefs that reiterate points made by parties; by requiring brief to be presented along with

History, then, is no substitute for petitioners' total inability to show that they had a clear and indisputable right to the result they sought in the District Court. The petition should be rejected on this ground as well.

3. Petitioners cannot show irreparable injury.

"In addition to demonstrating clear error ... the petitioner must generally show that, other than mandamus, it has no means of adequate relief, and that the error will cause irreparable injury." United States v. Wexler, 31 F.3d 117, 128 (3d Cir. 1994), cert. denied, 513 U.S. 1190 (1995). Mandamus should be withheld unless the petitioners can show that, without it, they will "sustain a specific injury." Glenmede Trust Co. v. Thompson, 56 F.3d 476, 484 (3d Cir. 1995) (petitioners failed to show how they would actually be injured by embarrassing dissemination of privileged documents).<sup>9</sup>

An "irreparable injury" is not, as petitioners seem to assume, anything that frustrates their preferences. It is "an exceptional hardship itself likely to cause injustice." In re Lewis, 212 F.3d 980, 982 (7th Cir. 2000), quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 435 (1981) (Kennedy, J., concurring); Bethlehem

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petition to allow filing, new rule enables court to prevent such amicus briefs from being filed).

Also of interest, given petitioners' appeal to history, are Krislov, The Amicus Curiae Brief: From Friendship To Advocacy, 72 Yale L.J. 694 (1963); Weiner, The Supreme Court's New Rules, 68 Harv.L.Rev. 20 (1954); and Harper & Etherington, Lobbyists Before The Court, 101 U.Pa.L.Rev. 1172 (1953). These works survey the use of amicus briefs in the early twentieth century, and conclude that they have too often been abused as a vehicle for political lobbying and attempts to improperly prejudice or intimidate the judiciary.

<sup>9</sup> Aerosource Inc. v. Slater, 142 F.3d 572, 582 (3d Cir. 1998); In re Martinez-Catala, 129 F.3d 213, 216 (1st Cir. 1997) ("Even where the merits clearly favor the petitioner, [mandamus] may be withheld for lack of irreparable injury"); McDaniel v. United States District Court For The District Of Nevada, 127 F.3d 886, 888 (9th Cir. 1997); see In re Tribune Co. v. FCC, 1997 WL 15056 (D.C. Cir.) (writ denied where petitioner brought injury upon itself).

Steel Corp. v. EPA, 669 F.2d 903, 909 (3d Cir. 1982) (equating irreparable injury with "undue hardship"). In Lewis the petitioners sought mandamus because their attorneys had been disqualified by the District Court. The Court of Appeals rejected the contention that this, in and of itself, amounted to an injury:

Plaintiffs suggest that disqualification may inflict irreparable injury because they may find other good lawyers, so any error will turn out to be harmless, but we do not see why the absence of injury (that's what a finding of harmless error means) should equate to irreparable injury.

212 F.3d at 983.<sup>10</sup>

It would be preposterous to argue that being denied leave to file amicus briefs (something they had no right to do in the first place) inflicted an "irreparable injury" on petitioners merely because they did not get to do as they wished. That, however, is precisely what their argument amounts to. They are able to suggest no real connection between themselves, or any legally cognizable interest of theirs, and the habeas action in the District Court. They instead argue that a non-party may have standing to appeal an order if it "affects his interests" (petition at 21). For example, they cite CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975), in which a television news organization (CBS) was held to have standing to appeal a "gag order" even though the order was not directed at CBS, because the order effectively prevented it from reporting on a news story. The order therefore caused CBS "injury in fact, economic or otherwise." 522 F.2d at 237. But Petitioners allege no "injury" at all -- "economic or otherwise." The law requires an "injury in fact." The Pitt News v.

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<sup>10</sup> Likewise, being required to bear the financial cost of allegedly unwarranted litigation, or being forced to arbitrate, does not amount to an irreparable injury. FTC v. Standard Oil Company of California, 449 U.S. 232, 244 (1980); Nippon Steel Corp. v. United States, 219 F.3d 1348, 1353 (Fed. Cir. 2000); Emery Air Freight v. Local Union 295, 786 F.2d 93, 100 (2d Cir. 1986).

Fisher, 215 F.3d 354, 360 (3d Cir. 2000); Society Hill Towers Owners Assoc. v. Rendell, 212 F.3d 168, 175 (3d Cir. 2000).

An "interest," of course, is a *legally protected* interest. Raynes v. Byrd, 521 U.S. 811, 819 (1997); United States v. Hays, 515 U.S. 737, 742 (1995); Marcopia-Stanfield Irrigation and Drainage Dist. v. United States, 158 F.3d 428, 433 (9th Cir. 1998). The term "interest" does not mean "anything you find interesting." Thus, if petitioners had an "interest" in sauropods, they would not suffer an "injury" by being excluded from a paleontologist's dig site just because they would have liked to help look for dinosaur bones.<sup>11</sup>

Petitioners argue that "ecology and wildlife advocates are routinely (and rightly) permitted to appear as *amici curiae* to defend the rights of sea turtles, owls and species of trees" (petition at 31). But if some amicus briefs are "routinely" allowed in such circumstances, that does not mean that there is a right to file them. On the contrary, in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), the United States Supreme Court rejected, as "beyond all reason," the argument that persons not injured in fact had standing to raise such claims under some form of "nexus" theory:

**Respondents' other theories are called, alas, the "animal nexus" approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the "vocational nexus" approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx**

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<sup>11</sup> Lujan brings to the fore the non-trivial question of whether petitioners are sufficiently injured by the denial of their own petition to even have standing to request any form of review. As it is clear that they suffered no real injury, it would be appropriate for this Court to conclude that the petitioners indeed lack standing. As just one illustration, the "Chicana/Chicano Foundation" petitioners argue that their interest stems from the fact that "500 people [are] on death row in California" (petition at 28), as well as supposed "conduct by the Los Angeles Police Department" (petition at 30). This case, however, took place in Philadelphia, Pennsylvania, not Los Angeles California. Strangely, the Foundation -- a California corporation (petition at 1) -- does not even say that it attempted to file amicus briefs in any of those 500 California cases.

Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Shri Lanka. This is beyond all reason. Standing is not "an ingenious academic exercise in the conceivable," but as we have said, requires, at the summary judgment stage, a factual showing of perceptible harm. ... It goes beyond the limit ... and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.

504 U.S. at 566-567, citations omitted.

That petitioners erroneously construe the term "interest" to mean "anything that we deem interesting" is confirmed by their argument. To demonstrate that "the British amici" have a "direct interest" in this case, petitioners point to these individuals -- British legislators in their spare time -- having been "active supporters" of participants in obscure causes allegedly known as "the Guilford Four," "the Birmingham Six," "the Tottenham Three," and "many other miscarriages of justice victims in Britain, Ireland and world-wide" (petition at 23). Of course, nowhere do petitioners say that they were allowed to appear or argue in court (even a British court) regarding any of these matters. The reason, obviously, is that despite their supposed "direct interest" in them, petitioners had no more connection with those events (even as legislators in their own country) than they do with this one.<sup>12</sup>

Even under petitioner's rather colloquial definition of "interest," their "interest" in this case is apparently far less than it was in the "Birmingham Six" and the like. Officer Daniel Faulkner was murdered by Mumia Abu-Jamal on December 9, 1981 -- nineteen years ago. The well-publicized trial was in 1982. The case was on direct appeal to the state supreme

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<sup>12</sup> Likewise, petitioners deem themselves to be "aggrieved" (petition at 21), but seem to regard this term as synonymous with "offended" or "angry." As a matter of law, an "injury" is not an emotional state, but a concrete and identifiable harm.

court until 1989. A petition for certiorari was filed in the United States Supreme Court that same year. After it was denied, Mr. Jamal filed a state collateral review petition in 1995, resulting in a lengthy, well-publicized evidentiary hearing. Two further evidentiary hearings, also well publicized, occurred in 1996 and 1997, and the well-publicized state supreme court decision in the appeal of the state collateral review decision was handed down in 1998. After filing another unsuccessful but well-publicized petition for certiorari, Mr. Jamal filed a well-publicized federal habeas corpus petition in October 1999. Petitioners were interested in the murder of a London teenager in 1993 (petition at 24), but paid no attention to the 1981 murder of Officer Daniel Faulkner until the summer of the year 2000. The reason for the nineteen year delay is unexplained.

Finally, in addition to having nothing that could be called a legally cognizable injury, petitioners' alleged grievance is not "irreparable." What was noted in the Commonwealth's Response To Notice Of Possible Dismissal Of Interlocutory Appeal By Non-Parties Due To Jurisdictional Defect (docketed in this Court at No. 00-0097) remains equally true here. There is nothing preventing petitioners' ally, Mr. Jamal, from raising the District Court's order denying them leave to participate as a claim of error on appeal of the final judgment -- assuming arguendo that he did not prevail, which would render any such complaint moot. Maloney v. Plunkett, 854 F.2d 152, 154-55 (7th Cir. 1988) (even clear error may not warrant writ of mandamus, because "the error may be mooted by the victory of the party against whom it was committed"). It would be theoretically possible for this Court to grant relief on appeal in the form of a remand, requiring the District Court to consider the arguments of the amicus in reaching a final decision. That such theoretical relief would be inappropriate, given the scope of the District Court's discretion, does not alter the fact that the supposed "injury"

could be corrected in the ordinary course of review. See In re Lewis, 212 F.3d at 985 ("Disputes of this sort illuminate the virtues of the final-decision rule ... we will defer our review to the end, when we can see how matters did play out").<sup>13</sup>

**In short, petitioners have no valid interest at all in this case. They have suffered no injury in not being allowed to participate, and any purely notional grievance of theirs would be correctable on appeal. Their petition should therefore be denied.**

4. Petitioners' arguments on what they believe to be the merits prove only that extraordinary interlocutory review should be denied.

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<sup>13</sup> Toward the end of their 91-page memorandum, petitioners also argue that their case falls within the five-point mandamus test followed in four other circuits (petition at 86-87). E.g., In re Parker, 49 F.3d 204 (6th Cir. 1995). In fact, and as the above discussion demonstrates, petitioners' claims fall within none of the five points of this test:

**1. Alternate means to obtain relief:** petitioners could simply allow their ally, the habeas petitioner, to raise on appeal the issue of the denial of leave for them to participate as amici. That the issue would be meritless would not prevent him from raising it. Further, if he prevailed in the habeas action, the arguments of his amici allies would be moot.

**2. Damage or prejudice not correctable on appeal:** Petitioners have sustained no harm whatsoever from being denied leave to participate as amici in the District Court. Moreover, the supposed harm is correctable on appeal; after a final judgment, the appellate court could (although it obviously should not) remand the case for the District Court to consider the amicus briefs.

**3. Legal error:** Contrary to petitioners' claim that Judge Yohn "did not apply the proper legal standard" (petition at 87), there is no legal standard. Whether and to what extent to allow or disallow a putative amicus to participate is wholly discretionary.

**4. Oft-repeated error or manifest disregard of federal rules:** Petitioners admit that they do not know whether the District Court made this so-called "error" before, or whether it will likely do so in the future (petition at 87). The District Court could not have acted contrary to federal rules, as there are no rules governing amicus participation in the District Court.

**5. New and important problems or legal issues of first impression.** There are no legal issues of first impression here. The District Court's ruling was discretionary. Petitioners' belief that this is somehow an unsettled question (petition at 88) only reflects their evident unfamiliarity with decisions such as this Court's opinion in Newark Branch NAACP v. Harrison N.J. While petitioners plainly regard their arguments as being "important" to them, this test requires some level of legal importance; it is not a measure of sincerity or emotion.

Petitioners strive to illustrate why their participation in the District Court is extraordinarily important, and why Judge Yohn was wrong in not allowing it. They therefore devote much of their pleadings to offering various arguments on the merits, or what they suppose to be the merits, of the habeas proceeding. Rather than serve to show that extraordinary review is warranted, these arguments demonstrate only that petitioners are as ill-informed as they are partisan.

Strictly speaking, there is no need to consider any of the following in order to properly deny the mandamus petition. It is offered solely to rebut the petitioners' improper effort to prejudice this court on issues that the petitioners are not competent to discuss.

A. Petitioners' "McKenzie's Friends" Claim Is Incompetent.

Petitioners explain that their participation is important so that they can litigate a "McKenzie's friends" claim on behalf of the habeas petitioner, who was "refuse[d]" the "assistance" of a layman, John Africa, as his trial counsel (petition at 24-25). The claim is absurd on many levels.

First, proceeding directly to the merits (though, as noted below, they are unreachable), petitioners' "McKenzie's friends" theory is apparently based on some form of English law that permits "ordinary members of the public without legal training" to have "lay advisers" as their only means to "effectively defend themselves" (*Id.*, 24). United States practice disagrees with this rather quaint British convention by, as here, providing the accused with an actual lawyer.

Petitioners attempt to overcome this difficulty by arguing that a defendant must be allowed lay "counsel" as part of his "Faretta rights" (petition at 25). Faretta v. California,

422 U.S. 806 (1975). The trouble with this argument is that it ignores the fact that Faretta permits a defendant to be represented by counsel or to represent himself, not something in between the two:

Faretta recognized two independent Sixth Amendment rights of representation -- the right of self-representation and the right to assistance of counsel. There is no comparable Sixth Amendment source of a right to delegate the power of self-representation to lay persons who do not qualify to render the assistance of counsel.

Similarly, an independent right to the assistance of a non-lawyer cannot be mechanically inferred from the right to waive the assistance of [counsel] and to represent oneself, even though self-representation will usually result in advocacy by a non-lawyer.

United States v. Wilhelm, 570 F.2d 461, 466 & n.12 (3rd Cir. 1978) (citations and internal quotation marks omitted).<sup>14</sup>

Petitioners seem to try to argue that the defendant did not really want to have John Africa as his counsel, but only wanted Mr. Africa to sit beside him, apparently to offer some lesser form of support (e.g., petition at 51, alleging that proposed function of Mr. Africa was merely "to take notes and advise [defendant] *sotto voce* on the conduct of his case"). Even aside from the fact that there is (once again) no such constitutional right, this argument will not wash. The record shows that the defendant constantly demanded to have Mr. Africa as

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<sup>14</sup> While a court has discretion to appoint backup counsel (as initially occurred here), it does not do so pursuant to a constitutional right to such assistance. Faretta, 422 U.S. at 834 n.46 (state "may" appoint standby counsel "even over objection by the accused"); United States v. Kneeland, 148 F.3d 6, 13 (1st Cir. 1998) (no constitutional right to backup or standby counsel). Backup counsel may be appointed in the hope of lessening the "unorthodoxy, confusion and delay [that] is likely ... in pro se cases." United States v. Dougherty, 473 F.2d 1113, 1124 (D.C. Cir. 1972); In Re City of Philadelphia Litigation, 1987 WL 5281 (E.D. Pa., 1987) (rejecting proposal that attorney in civil case be allowed to act in "advisory capacity" for pro se party; no constitutional right to "a mixed pro se/counseled type of representation"). Indeed, allowing a layman to act as "counsel" risks allowing a defendant to build into his trial a claim of *per se* denial of the right to counsel. Vance v. Lehman, 64 F.3d 119, 123 (3rd Cir. 1995).

his "counsel." During the Faretta colloquy, the defendant said that he wanted John Africa to "represent myself":

**THE DEFENDANT:** 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:** 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.

N.T. 6/1/82, 18.

The next day, during his motion to suppress, defendant repeated the request the court had just denied:

**MR. JAMAL:** At this time I would like to renew my motion to have John Africa appointed as counsel for me, backup counsel.

**THE COURT:** We went over that.

**MR. JAMAL:** We did not go over that.

**THE COURT:** Yes, I did. I made a decision on that already.

**MR. JAMAL:** You said I had an absolute right to defend myself, didn't you?

**THE COURT:** That is what you are doing right now.

**MR. JAMAL:** You said 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 defense counsel, how can I have an absolute right to 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 it is your agreement or belief was the smartest or wisest thing, I made that decision.

**THE COURT:** You are defending yourself.

N.T. 6/2/82, 2.79-81 (colloquy). Unimpressed by the court's patient explanations of its ruling, defendant became obstreperous, insisting that he wanted John Africa "appointed" as his "backup counsel":

**THE COURT:** I made a ruling. We are not going to sit here all day. Bring in your next witness.

**MR. JAMAL:** I'm not finished.

**THE COURT:** I am. We are going to proceed.

**MR. JAMAL:** We are not going to proceed if that means you are going to ignore who I might have as backup counsel.

**THE COURT:** I already ruled on it and that's it.

**MR. JAMAL:** What do you mean that that's it?

**THE COURT:** If I'm wrong, you have a right to appeal to the Supreme Court.

**MR. JAMAL:** Why should I wait for an appeal? Why can't you make a decision now?

**THE COURT:** I made a decision. I told you he cannot.

**MR. JAMAL:** Why not?

**THE COURT:** Because I say so. Because the law says so.

**MR. JAMAL:** The law does not say so. You said he's not a member of the law. I don't want a member of the law.

**THE COURT:** That's fine. Go on with your next witness, Mr. District Attorney.

**MR. JAMAL:** Judge, I would like to have John Africa represent me in this case. I would like to have Mr. Jackson withdraw from this case.

**THE COURT:** Mr. Jamal, I made a decision in this case. You are going to make me remove you as counsel.

**MR. JAMAL:** I'm not intimidated by your threats you will remove me as counsel. You can remove me from this courtroom. I will tell you what I wish to have. This is not his trial, it is my trial. Can I decide who I wish to have represent me at this table?

**THE COURT:** No.

**MR. JAMAL:** Why not? Don't I have an absolute right to defend myself?

**THE COURT:** Sure. That is exactly what you are doing.

**MR. JAMAL:** And I can't choose who I want to have as backup counsel?

**THE COURT:** That is exactly what you are doing.

**MR. JAMAL:** In light of that absolute right to defend myself, as you and the Supreme Court agree, I'd like to decide absolutely who I would like to have as backup counsel, John Africa, who is not a member of the bar.

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**MR. JAMAL:** I renew my motion. I would like to have John Africa appointed as backup counsel.

**THE COURT:** Your motion is denied.

N.T. 6/2/82, 2.82-84, 87 (suppression motion).

Defendant continued to repeat the same previously-denied application throughout the motion to suppress:

**MR. JAMAL:** Ok. I'd like to renew my motion for John Africa to assist me as backup Counsel in this trial, Judge.

**THE COURT:** Once again, for the fourth time, that is denied.

N.T. 6/4/82, 4.110 (suppression motion).

When the court temporarily took over the conduct of voir dire for both sides, defendant announced that he wanted the voir dire to be conducted by John Africa:

I don't want to participate ... I want John Africa to sit and ask questions for me. I don't want you. I don't want McGill. I don't want Jackson. So you can play your game. You can select your fair jury. It's a damn farce and you know it, a fair and impartial jury selected by a judge.

N.T. 6/9/82, 3.45 (voir dire).<sup>15</sup>

On the first day of trial, defendant forfeited his "Faretta rights." He refused to allow the prosecutor to make an opening statement, and began insisting -- in front of the jury -- that he be given a microphone, although no one else was using one:

**THE DEFENDANT:** I need a microphone.

**THE COURT:** I do not have a microphone.

**THE DEFENDANT:** You can get one, Judge.

**THE COURT:** Let's go.

**THE DEFENDANT:** I need a microphone, Judge.

**THE COURT:** I'm sorry.

**THE DEFENDANT:** You're sorry?

**THE COURT:** Mr. McGill [the prosecutor], please.

**MR. MCGILL:** Yes, Your Honor.

**THE DEFENDANT:** I'm not finished.

**THE COURT:** Mr. McGill, please.

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<sup>15</sup> Despite his announcement that he would not participate, defendant immediately began consulting attorney Jackson during the ensuing voir dire by the court; and defendant personally exercised his own peremptory challenges (N.T. 6/9/82, 3.47, 48, 50, 57, 74).

**THE DEFENDANT: I need a microphone.**

**THE COURT: You don't need a microphone.**

**THE DEFENDANT: I do need one.**

**N.T. 6/17/82, 1.45-1.46.**

A sidebar conference followed in which defendant, at length, renewed his motion to be represented by John Africa. The court denied the motion, noting that it had already so ruled. Defendant replied, "What does that rule mean to me?" (Id., 1.52-1.59). When the court again directed the prosecutor to begin his opening statement, defendant in front of the jury again demanded that John Africa represent him. The court stated that it had already ruled, to which defendant responded, "You have not ruled on it to my satisfaction" (Id., 1.69-1.70).

The court repeatedly warned defendant that he would forfeit his Faretta status, and might even have to be removed from the courtroom and/or held in contempt if he refused to conduct himself properly. Defendant responded, "That's absolutely meaningless to me" (N.T. 6/17/82, 1.45, 1.86, 1.110-1.111). After the entire day had been consumed in arguing with defendant, the court removed him from pro se status (Id., 1.123). Where, as here, a pro se defendant insists on disrupting the trial, the court may require him to proceed through counsel. Faretta, 422 U.S. at 834 n.46 ("the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct"); United States v. Brock, 159 F.3d 1077, 1079 (7th Cir. 1998) ("when a defendant's obstreperous behavior is so disruptive that the trial cannot move forward, it is within the trial judge's discretion to require the defendant to be represented by counsel").<sup>16</sup>

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<sup>16</sup> Following this completely proper decision by the trial judge, defendant repeatedly indicated that he would pursue "the strategy of John Africa," that he would not accept the assistance of any "legal trained lawyer," and that he would not cooperate with his attorney, Anthony Jackson,

Even after his Faretta rights were terminated by his own misconduct, defendant reiterated his demand to be represented by John Africa throughout the trial, incessantly stating that he wanted John Africa, and not his lawyer, to "represent" him:

**THE DEFENDANT:** I would like to place it on the record that he is not representing me. I would like to have John Africa represent me.

**THE COURT:** I know. It's there on the record numerous times. You don't have to put it in again. Will you please sit down so we can proceed with the trial?

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**THE COURT:** You won't sit down and keep quiet so we can proceed.

**THE DEFENDANT:** Judge, this is my trial --

**THE COURT:** I know it is.

**THE DEFENDANT:** -- and my life at stake here.

**THE COURT:** Okay. Mr. Jamal, I guess you have to leave.

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Esquire. Defendant proceeded to make his own strategic decisions, sometimes without consulting Mr. Jackson. For example, he personally decided what character witnesses would be called, refusing to tell Mr. Jackson who these persons were (N.T. 6/24/82, 2-6; 6/25/82, 136). At one point, Mr. Jackson complained that he no longer had copies of witness statements he had given to petitioner; Jackson had to ask the prosecutor for additional copies (N.T. 6/26/82, 139-140; 6/29/82, 5-7). Defendant was personally abusive toward his attorney on a number of occasions (N.T. 7/28/95, 167-172). On June 26, 1982, he said to Mr. Jackson, in front of the jury, "I want you to get your ass up and get out of here" (N.T. 6/28/82, 28.48). Jackson told the court that "most of the communication [with his client] has been one way" because of defendant's refusal to cooperate (N.T. 6/29/82, 5-6). During post-trial proceedings, defendant said, with Mr. Jackson standing beside him, "I do not have Court-appointed counsel. I have a Court-appointed baboon" (N.T. 5/25/83, 166).

While defendant chose to withhold cooperation from his counsel, the record is devoid of any response in kind on Mr. Jackson's part. On the contrary, the state court found that Mr. Jackson continues to hold the defendant "in high personal regard." Jackson admitted that, after obtaining twenty favorable outcomes (only six convictions and no death sentences) in capital cases, the instant death sentence was a blow to his ego, and that he had a personal interest in obtaining a new trial for Mr. Jamal (**finding of fact 78**; N.T. 7/27/95, 92-93; 7/28/95, 161-162, 167-168).

**THE DEFENDANT:** If I am removed I want it on the record I do not want Mr. Jackson to represent me.

**THE COURT:** I know. It's on the record.

**THE DEFENDANT:** And I do not want him to participate in this case. I want John Africa to represent my interest in this case[.]

N.T. 6/23/82, 6.117-118, 125;

**THE DEFENDANT:** I would like to protest the continued presence of Mr. Jackson as my defense. He is not my counsel. My counsel is John Africa.

N.T. 6/24/82, 19.

Nevertheless, throughout the trial, the court set aside time for defendant to consult with Theresa Africa, Janet Africa, and John Africa -- all of whom defendant referred to as "counsel of my choice" (N.T. 6/17/82, 1.114-115; 6/18/82, 2.85; 6/21/82, 4.2, 71; 6/24/82, 2; 6/26/82, 3-4, 6). Thus, the court did not hinder defendant from accepting advice from whomever he wished, but properly denied his motion to "appoint" John Africa as his "counsel."

Had petitioners more carefully read the trial transcript, they would have noted that the defendant *forfeited* his Faretta rights at the threshold of trial, rendering their "McKenzie's Friends" theory -- which assumes that the "right" to such a "friend" is a component of Faretta -- entirely moot.

Further, through sixteen years of litigation in state court, no "McKenzie's Friends" claim was ever raised by the defendant on appeal. Nor was any such claim mentioned in his habeas petition. While defendant has now sought to amend his just-in-time October 1999 habeas petition with this entirely new issue (supposedly in response to his ally's assertion of it), he did not attempt this until July 2000. Although the District Court has not yet ruled on the petition to amend, this Court has held that allowing such an amendment would impermissibly

subvert the Congressional intent by allowing an end-run around the filing deadline. United States v. Duffus, 174 F.3d 333, 337 (3d Cir.), cert. denied, 120 S. Ct. 163 (1999). This unexhausted, unraised claim is frivolous.

B. Petitioners' Argument Regarding Termination Of The Defendant's Pro Se Status Is Incompetent.

Petitioners argue that they alone are equipped to argue defendant's habeas claim that his pro se status should not have been forfeited (petition, 54). This too is frivolous.

As already noted, the claim itself is without merit. Faretta, 422 U.S. at 834 n.46 (judge may terminate pro se status where defendant "engages in serious and obstructionist misconduct"); United States v. Brock, 159 F.3d 1077, 1079 (7th Cir. 1998) (same). The point here, however, is that petitioners' boast of being the "only" ones able to litigate it is simply nonsense. In fact, they fail even to address the issue as one involving United States constitutional law, and cite no caselaw on point. They instead devote their efforts to a rather odd attempt to analogize this defendant (who murdered a police officer in cold blood) to William Penn (a pacifist); and use Pennsylvania's "colonial charter" as the apparent legal basis for their argument (petition at 54-57). To the extent the Pennsylvania colonial charter could ever have been relevant, it should have been raised in the Pennsylvania courts. But of

course it was not.<sup>17</sup> Needless to say, the District Court has no jurisdiction to rule on a supposed violation of Pennsylvania's colonial charter.

C. Petitioners' "Conspiracy" Argument Regarding A State Supreme Court Justice's Emergency Consideration Of A Defense Pretrial Application Is Incompetent.

Petitioners congratulate themselves for uncovering a supposed "conspiracy" to deprive the defendant of his rights. This "conspiracy," it seems, took the form of "fishy" "apocryphal" "sham" "alleged" proceedings, which petitioners deem a "charade," a "kangaroo court," and a "game" of "let's pretend." In these "fishy" proceedings, the "conspirators" (supposedly, the prosecutor, the defendant's attorney, the trial judge, and a Pennsylvania Supreme Court Justice) "all made believe it was a legal proceeding rather than what it really was -- a farce" (petition at 57-60).

No such claim has ever been raised by the defendant, either on appeal in state court or in his federal habeas petition. The facts are as follows. Anthony Jackson, Esquire, an experienced and successful criminal defense attorney, had been appointed at the defendant's own request to represent him at trial. After conducting considerable preparation, Mr. Jackson was unexpectedly relegated to the role of "back up" counsel when defendant decided to proceed pro se.<sup>18</sup> By what was intended to have been the first day of trial, however, it had become clear that the defendant would not allow the trial to begin, and that his unrelenting

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<sup>17</sup> Of course, the colonial charter was superseded by the revolution. One would have expected British government officials to be cognizant of this point, especially when giving a "history lesson" (petition at 56).

<sup>18</sup> Prior to representing defendant, Mr. Jackson had tried approximately twenty capital cases, resulting in only six convictions, none of which resulted in death sentences (N.T. 7/27/95, 92-93) (**finding of fact 52**). He also had extensive related experience (*Id.*, 53-54). Mr. Jackson conducted thorough and intensive trial preparation for a period of five months before defendant unexpectedly decided to proceed pro se (N.T. 3/18/82, 9; 6/1/82, 18, 31; 6/2/82, 2.79-90; 6/26/82, 139-140; 7/28/95, 55-59, 67-68; 7/27/95, 69) (**findings of fact 61-64**).

effort to bicker with the court would result in his being removed from pro se status. The defendant had made it equally clear that he would refuse to cooperate with Mr. Jackson or any other attorney.<sup>19</sup> Mr. Jackson therefore decided to seek a ruling from the state supreme court:

**MR. JACKSON:** Yes, Your Honor. May it please the Court, I have, of course, asked on numerous occasions to withdraw from this matter, as Your Honor well knows, and Mr. Jamal has indicated his desire for other counsel. Consistent with what I believe to be my fundamental allegiance to my client, I cannot, in all due conscience, but certainly with due respect in this court, I cannot proceed in this matter at this time without some further word from the Supreme Court of this State.

N.T. 6/17/82, 1.116-117.

The trial court decided to formally remove the defendant from pro se status because he had "intentionally disrupted the orderly progression of this trial." It ordered Mr. Jackson to resume representing the him, but gave him leave to immediately ask the Pennsylvania Supreme Court to review its ruling. Mr. Jackson indicated that he would file a written petition (*Id.*, 119-123). Court was adjourned until the following morning.

At Mr. Jackson's request, a hearing was held before the late Honorable James McDermott, Justice of the Pennsylvania Supreme Court, in the latter part of that same day,

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<sup>19</sup> For example, defendant announced, "I don't want any lawyer in the whole world. I want John Africa as my counsel" (N.T. 6/17/82, 1.76). He declared that he would pursue "the strategy of John Africa," which apparently required him to reject the assistance of any "legal trained lawyer." He made it crystal clear that he would not cooperate with Jackson, or any other attorney (N.T. 6/19/82, 7-8; 6/21/82, 4.2; 7/27/95, 139-144; 6/26/82, 155-157; 6/28/82, 28.48; 7/1/82, 53). As Mr. Jackson would later explain, defendant "didn't think that the system, the rules, my competence or incompetence, or a lawyer, quite frankly, was going to do him much good" (N.T. 7/27/95, 76). Defendant repeatedly stated, as part of his theme of portraying himself as a famous radical political figure targeted by the establishment, that any "legal-trained lawyer" was an "employee" of the court, and would attempt to "hang" him (N.T. 6/9/82, 3.45; 6/17/82, 1.44-1.128; 6/18/82, 2.61-2.92; 6/19/82, 4-8; 6/21/82, 4.1-4.5; 6/22/82, 5.4-5.22; 6/23/82, 6.116-6.129; 6/24/82, 16-26, 85-95; 6/25/82, 8.2-8.4, 8.13-8.16; 6/26/82 156-160; 6/29/82, 6; 7/1/82, 41-53; 7/3/82, 16).

June 17, 1982. As noted, by that time the trial judge had already ruled that the defendant would no longer be allowed to proceed pro se due to his ongoing disruption of the trial, and that Mr. Jackson must resume representing him. Mr. Jackson wanted the Supreme Court to overturn that ruling, since the defendant insisted that he did not want representation, and would not cooperate with Jackson or any other lawyer. The hearing, at which defendant was present, was held "in Room 456 [an ordinary City Hall courtroom] at an open hearing where the press and public were permitted to attend and did attend" (N.T. 6/18/82, 2.2). Justice McDermott declined to disturb the trial court's rulings, notwithstanding defendant's objections (Id., 2.3).<sup>20</sup>

As the sole factual basis for their rhetoric about sham proceedings, conspiracies, and fishy kangaroo courts, petitioners claim that the hearing before Justice McDermott was not "on the Supreme Court Docket" (petition at 57). To demonstrate this, however, petitioners append a "certified copy" of the Common Pleas Court docket. Needless to say, the state trial court and the state supreme court are different courts, with different dockets.<sup>21</sup>

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<sup>20</sup> When Justice McDermott got up to leave after the hearing was concluded, defendant shouted at him, "What are you walking away for? What are you walking away for, McDermott?" (N.T. 6/22/82, 5.15).

<sup>21</sup> As further proof of their conspiracy theory, petitioners argue that Mr. Jackson "suggested" that the defendant be removed from the courtroom, with the result that the defendant "spent almost half the trial sitting in a holding cell" (petition at 61).

The apparent basis for this odd assertion is a conference between the court and counsel, in which Mr. Jackson discussed his responsibilities in light of the defendant's possible intended "strategy" of ordering him (Jackson) to sit in his chair and do nothing. In this discussion, Mr. Jackson -- who knew his client well -- anticipated the possibility that the defendant might be removed from the courtroom; he did not "suggest" that the court remove him (N.T. 6/18/82, 2.15-35).

The defendant was repeatedly removed, but did not spend "half the trial" that way. On each occasion it was his own misconduct, not any suggestion of his attorney, that led to his removal. On

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each occasion, removal was clearly proper under Illinois v. Allen, 397 U.S. 337 (1970).

Despite his removal from self-representation on June 17, 1982, the defendant's disruptive conduct continued unabated. The following day, the court asked if the prosecutor could make his opening statement "without any interruptions, please?" Defendant responded, "Can we proceed with John Africa at the defense table?" (N.T. 6/18/82, 2.86). The court warned defendant that he would be removed if he further disrupted the trial. Defendant said, "[T]hat threat is meaningless" (Id., 2.87). After the jury was brought in, defendant began telling the jurors that the court was "afraid of having John Africa's presence in this courtroom" (Id., 2.88). The court asked the prosecutor to begin his opening statement. Defendant interrupted:

THE DEFENDANT: I'm not finished.

THE COURT: We're finished.

THE DEFENDANT: I'm not finished. We are not finished.

MR. MCGILL: May I proceed with the opening before this jury that's been waiting for two days?

THE COURT: Yes.

THE DEFENDANT: I don't care.

MR. MCGILL: You don't care what?

THE DEFENDANT: I have a right to the defense of my choice.

THE COURT: Let's move the jury out just for a minute.

THE DEFENDANT: This does not mean anything to me. They mean absolutely nothing to me.

N.T. 6/18/82, 2.89. The court ordered the Sheriff to remove defendant, explaining that he could be readmitted when willing to conduct himself properly. Defendant said, "That doesn't mean anything to me. ... What does that mean to me? That is not news" (Id., 2.90). It was by now after 4 p.m., and so opening statements were delayed, again, until the following day (Id., 2.92).

The following morning, the court asked defendant if he would behave properly. He answered, "I sure will, Judge" (N.T. 6/19/82, 4). On the morning of June 22nd, however, defendant moved to resume pro se status. The court denied this, but he continued to argue in front of the jury, which had to be sent from the room. Two hours were consumed in the ensuing argument. When the court ordered testimony resumed, defendant refused to sit down and called the judge a "hangman," saying "You can order me thrown out of this courtroom" (N.T. 6/22/82, 5.2-5.4, 5.19-5.21). He was therefore removed again. The jury was instructed to draw no adverse inference from his absence (Id., 5.24). Defendant was allowed to return in the afternoon session after promising, through his counsel, to behave properly (Id., 5.90).

The following day, defendant again began addressing the court in front of the jury. The jury was taken out, whereupon defendant again demanded to be represented by John Africa:

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THE DEFENDANT: I would like to have John Africa represent me.

THE COURT: I know. It's there on the record numerous times. You don't have to put it in again. Will you please sit down so we can proceed with the trial?

THE DEFENDANT: Judge, can we proceed with John Africa? Is that at all possible?

THE COURT: No, it's not possible at all.

THE DEFENDANT: Can we proceed with the assistance of John Africa?

THE COURT: No, we can't.

THE DEFENDANT: Why is his assistance expressly denied?

THE COURT: Mr. Jamal, I'm not going to sit here and argue with you time and time.

N.T. 6/23/82, 6.118.

Defendant continued to demand to be represented by John Africa, repeatedly complained that prior rulings were "not to my satisfaction," repeatedly ignored orders to sit down, and repeatedly ignored the court's warnings that he would be removed if he did not desist. He was ultimately removed again, with the same instruction to the jury (Id., 6.120-129).

The next day defendant advised the court through his counsel that he would no longer disrupt the proceedings (N.T. 6/24/82, 7). Only minutes later, however, after a witness had been excused following defense cross-examination, defendant announced "I have some questions," and began attempting to interrogate the witness in front of the jury. The jury was sent out (N.T. 6/24/82, 16-17). Petitioner continued:

THE DEFENDANT: Judge, I was asking the question in the spirit of proceeding. Obviously I'm not obstructing anything.

THE COURT: Yes, you are.

THE DEFENDANT: Again, I am not.

THE COURT: Yes, you are.

THE DEFENDANT: I would like to protest the continued presence of Mr. Jackson as my defense. He is not my counsel. My counsel is John Africa.

N.T. 6/24/82, 19.

Defendant told the court, "Judge, you can remove me again and again and again and again and again and again" (N.T. 6/24/82, 85). A short time later, he again began directing questions to a different prosecution witness as the jury was being sent in. He also announced, "I want John Africa to assist me in this matter" (Id., 89-90). He was again removed, with the same cautionary instruction (Id., 95). That afternoon, after speaking with his counsel, defendant asked his counsel to

Having incompetently relied on the wrong docket, petitioners proceed to argue, on that basis, that the defense petition before Justice McDermott was analogous to the events in Yohn v. Love, 76 F.3d 508 (3d Cir. 1996). The comparison is absurd.

In Yohn the trial judge excluded inculpatory evidence during the trial, but was persuaded to reverse his ruling following an impromptu ex parte telephone conversation at the behest of the prosecutor, between himself, the prosecutor, and the Chief Justice of the state supreme court. Yohn's counsel could not participate in the argument, and objected to

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tell the court that he planned to continue to disrupt the proceedings (Id., 129).

The following morning defendant instructed his attorney to tell the court that he would "do what was right." The court assumed this meant defendant was promising to act appropriately and allowed him to return (N.T. 6/25/82, 8.2-8.4). Minutes later, however, defendant stood up and began addressing questions to a witness. When the court told him to sit down defendant replied, "I'm cross-examining this witness." The jury was taken out. Defendant accused the judge of "behaving in a way to get me killed"; referring to his counsel, defendant said, "I do not want him working here. I want him out of here. I do not want him to participate in this damn sham." Defendant was removed again, and the jury was again instructed not to draw any adverse inference from his absence (Id., 8.13-8.16).

The court invited defendant to cooperate at the start of proceedings the following day. The prosecutor pointed out that he was giving up the opportunity to assist in his own defense. He replied that he did not wish to attend the trial until he had consulted with John Africa (N.T. 6/26/82, 3-7). He was nevertheless readmitted. After the prosecution rested, defendant addressed the court, at length, demanding to be represented by John Africa instead of a "legal trained lawyer" (Id., 155-159).

The next morning defendant accused the court of hiding evidence. He announced, "My counsel is John Africa. My counsel would be ordered not to hide anything" (N.T. 6/28/82, 28.46). Defendant then accused his attorney of "trying to kill me" (Id., 28.47). Disregarding the court's warning, defendant said he was following "the strategy of John Africa," and told his attorney, "I want you to get your ass up and get out of here. ... on MOVE!" (Id., 28.48). He was removed again. The court instructed the jury to draw no adverse inference from his absence (Id., 28.53).

Defendant returned to court the following day and was asked if he would behave properly. He cryptically replied, "I intend to stay here today." The court deemed this assurance sufficient (N.T. 6/29/82, 3). Defendant chose not to disrupt the trial during the remaining testimony of defense witnesses.

the procedure. This Court found that Yohn was denied his right to counsel and his right to be heard at a critical stage of the proceedings. It rejected the prosecution argument that the telephone conversation amounted to an appeal, since, inter alia, the Chief Justice was not the "duty justice" who would have been authorized to hear an emergency application.

Here, the pretrial application to the state supreme court did not occur over a defense objection at the behest of the prosecution, but was initiated by the defense. Its purpose was not to induce the judge to reconsider a ruling in the defendant's favor, but was sought by the defense on an emergency basis to overturn a ruling that went against the defendant's wishes. Far from being *ex parte*, the proceeding was open to the press and public, and defense counsel fully participated (it was, after all, a defense application). Justice McDermott apparently was the duty justice; in eighteen years, no one has ever alleged otherwise.

Further, the *ex parte* proceeding in Yohn involved a "critical stage" of the trial, i.e., one "in which the potential for incrimination inheres or at which the opportunity for effective defense must be seized or foregone." 76 F.3d at 522, quoting United States ex rel. Reed v. Anderson, 461 F.2d 739 (3d Cir. 1972). The defense pretrial application to the state supreme court here was not a critical stage. Either the state supreme court would disturb the trial court's ruling that Mr. Jackson must resume representing the defendant, or not. Thus, no matter how the state supreme court ruled, the defendant -- either personally or through his attorney -- would still have every opportunity to meaningfully confront the government's case in the ensuing trial. See United States v. Wade, 388 U.S. 218 (1967) (pretrial proceeding not a "critical stage" since its outcome would not prejudice accused's opportunity to meaningfully confront government's case). The state supreme court's ruling did not leave the accused without an effective defense in the middle of trial, as in Yohn, but let stand a proper ruling by

the trial court that afforded the accused the assistance of a well-prepared, highly experienced criminal defense attorney when opening statements began the following day.

In short, petitioners' conspiracy theory is nonsense. Further, no such claim was ever raised by the defendant in state court or in his habeas petition. Thus, any such claim is unexhausted, and indeed, unraised. It cannot even be considered by a federal court on habeas review.

D. Petitioners' Accusation Of Judicial Bias Is Incompetent.

Petitioners argue that the "real" reason that the trial judge would not allow the defendant to have a layman as his "counsel" was "bias and prejudice against Mr. Africa and Mr. Jamal." The judge, it seems, "inadvertently revealed" this "bias and prejudice" in his post-trial opinion, in which he wrote that "[s]uch an appearance [by Mr. Africa] could easily have changed the issues at hand to those of the much publicized life-style of John Africa and/or the MOVE organization" (trial court opinion of 9/27/83, 12).<sup>22</sup>

The judge, in using the word "appearance," was applying its legal meaning -- *viz.*, a lawyer "appears" in a case -- in that the defendant wanted Mr. Africa to appear as his counsel. Petitioners, however, conclude that the judge was referring to Africa's *physical* appearance, which they describe as "a proud Black man with dreadlocks" (petition at 64). (Petitioners go on to surmise that the judge never actually *saw* Africa. Not to worry. This only makes it worse for the judge, according to them, because it proves that he "clearly" must have "relied upon extra-judicial sources of information to form his opinion").

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<sup>22</sup> Mr. Africa was somewhat well known at the time as the founder of "MOVE," an urban "back to nature" cult to which the defendant often referred (E.g., 6/28/82, 28.48).

Since this argument is based solely on petitioners' silly semantic device of pretending not to know what "appearance" means (they seemed to have no difficulty understanding it when their attorneys entered their appearances here), it is nonsense, and needs no further response on its merits (a term that is here used advisedly).<sup>23</sup> Moreover, no such issue was ever presented in state court, nor is it a part of the habeas petition. The petitioners have no ability to raise this unexhausted, unraised claim, even if it had some basis in reality.

E. Petitioners' "AEDPA" Argument Is Incompetent.

Next, petitioners claim that "all factual and legal issues in the federal habeas proceedings" should be reviewed "de novo," rather than under the standard required by 28 U.S.C. § 2254 (AEDPA), because the trial judge supposedly "ordered" the defense to make the June 18, 1982 application to Justice McDermott, which was a "burlesque of a hearing" by a court that did not have "competent jurisdiction" to "justify" denial of the defendant's rights (petition at 65-66).

Petitioners' increasingly overwrought rhetoric thus strays ever further from reality. The trial judge did not "order" the defense to apply to the supreme court. The ensuing proceeding was entirely legitimate. It was not needed to "justify" the trial court's ruling, but was afforded because the defense sought to overturn that ruling. Whether or not the

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<sup>23</sup> However, petitioners' attorneys have moved for admission pro hac vice. Their inappropriate conduct in accusing a jurist of impropriety with no basis in fact other than their feigned inability to understand the meaning of the word "appearance" should be weighed accordingly in deciding that motion.

Petitioners also pretend to find it "[s]trange[]" that the trial court did not "invok[e]" the proceeding before Justice McDermott in explaining its refusal to appoint Africa as counsel (petition at 63; "erratum" letter of October 30, 2000). There was no reason for the court to refer to the defense application to the state supreme court, as its ruling had already been made prior to the application, and the appellate court did not disturb it. The only thing that is "strange" is petitioners' relentlessly paranoid reinterpretation of the record.

**defendant's rights were denied by the trial court's ruling (they were not) was an issue he was free to raise as a claim of error on appeal.**

**Petitioners offer no authority for their notion that AEDPA may be set aside, on this or any other basis. If a habeas litigant wishes to challenge state court fact finding, it is his burden to offer clear and convincing evidence to rebut the legal presumption that such findings are correct. 28 U.S.C. § 2254(e)(1). Neither the habeas petitioner below nor his allies, petitioners here, have purported to do so. Aside from the fact that petitioners' theory is unreachable -- since (once again) it was never exhausted in state court and is not raised in the habeas proceeding -- it is starkly frivolous.**

**F. Petitioners' Claim That The Trial Court "Tossed" Mitigation Evidence Is A Total Fabrication.**

**Petitioners flippantly argue that the trial court "Tossed" mitigation evidence (petition at 67). This is an utter fabrication. No defense character witness (the only type of mitigation evidence offered) was precluded from testifying at trial, even though the defendant (who alone knew who the witnesses would be, refusing to tell even his own attorney) defied the trial court's order to reveal their names in discovery.<sup>24</sup>**

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<sup>24</sup> Mr. Jackson told the court:

[A]side from the difficulties that I'm having with Mr. Jamal, and Mr. Jamal has indicated to me, at least previously, that he intended to present character witnesses ... Judge, let me assure you and Mr. McGill, I have no names at this point. I have absolutely no names.

MR. MCGILL: That is what the discovery rules are meant to avoid.

THE COURT: All that we can hope is that Mr. Jackson will talk to Mr. Jamal and try to get them from him and tell him that if he doesn't give them to us that they may very well not be permitted to testify. That's all I can do. I can't force him to give them to Mr. Jackson.

N.T. 6/24/82, 5-6. The next day, Mr. Jackson was forced to report that the defendant still refused to

The apparent basis for petitioners' argument is the defendant's habeas claim that his trial counsel was ineffective in the penalty phase for not calling six character witnesses *in addition to* the fifteen who testified at trial (see Commonwealth's memorandum of law at 138-142). The state court found, as a matter of fact, that it was the defendant who decided that additional character witnesses would not be called in the penalty phase (Finding of Fact 89). Further, the six new character witnesses the defendant proffered in the 1995 state collateral review hearing, to substantiate his claim that trial counsel should have called them in 1982, were found as a matter of fact to be *cumulative* to the fifteen character witnesses that testified at trial (Finding of Fact 91). The state court thus concluded that trial counsel was not ineffective because it was the defendant's decision not to call additional character witnesses, and because the existing character testimony was *fully available* as mitigation (Conclusions of Law 197 through 203). Under these facts, there was no unprofessional error by trial counsel in the penalty phase; and the omitted evidence would not likely have led to a different result.

Petitioners borrow the defendant's habeas argument, which attempts to exploit the prosecutor's statement during the state collateral review hearings to the effect that the new, 1995 character witnesses testified that defendant's murder of Officer Faulkner was out of character (N.T. 7/26/95, 190-191) (petition at 68-69). But the prosecutor merely acknowledged that the six 1995 character witnesses were cumulative to the fifteen who testified at trial in 1982. It was not enough for the defendant to prove, in 1995, that he had six *more* witnesses who would *also* thus testify. To establish prejudice, he had to prove that evidence reasonably likely to produce a different result was omitted. The prosecutor's recognition that the 1995

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give him the name of any of the character witnesses (N.T. 6/25/82, 138). Thus, the defendant made certain that when his character witnesses did testify, their identities and the substance of their testimony would be a surprise to the prosecution.

evidence was no different than the 1982 evidence recognized only that defendant *failed* to prove prejudice. It is entirely consistent with the findings of fact.

Petitioners copy the defendant's habeas argument that, because the state PCRA court found his 1995 character witnesses to be unpersuasive, it must have believed that mitigation evidence is irrelevant unless it shows the offender to be "less culpable" (petition at 70). This too is simply false. The PCRA court made a credibility finding that the new character evidence was "unpersuasive," not that it was irrelevant or inadmissible as a matter of law. The PCRA court's credibility finding went directly to the issue of whether the new character evidence would likely have produced a different result. Contrary to petitioners' argument, this credibility finding on collateral review is totally unlike the situation in Eddings v. Oklahoma, 455 U.S. 104 (1982), in which the state trial court refused to consider mitigation evidence at the penalty hearing.

G. Petitioners' Jury Selection Claim Is Incompetent.

Petitioners take two of the habeas defendant's claims -- (1) that one juror was improperly removed for cause; and (2) that this "resulted in [a] biased white alternate being seated" -- and add a third, unraised, unexhausted claim, that the trial court erred in not allowing an additional peremptory challenge to remove the "biased white" juror (petition at 72-73).

The two claims actually raised in the habeas petition are meritless.

The defendant's habeas claim 13 alleges that he should have been present at a chambers conference on June 18, 1982, prior to the start of trial, at which a juror who had broken sequestration was discussed. The court crier had informed the judge that, on the previous morning, this juror had complained that her cat was ill. The court did not release

her from sequestration because she had a husband at home who could take care of the animal. When told that she could not leave, she stated "Well, I'm going to go." Later, when court personnel came to take the jury to dinner, the juror was gone. She returned at approximately 9 p.m. that evening and stated, "I don't care what Judge Sabo or anybody says, I do what I have to do. Nobody is going to stop me" (N.T. 6/18/82, 2.35-2.39). Defense counsel agreed with the prosecutor that the court should excuse the roaming juror. Aside from her misconduct, the defendant had visibly alienated her when he had personally questioned her during voir dire; she had been "very belligerent" toward him. Further, she appeared to be mentally unbalanced. Indeed, the prosecutor remarked, without dissent from defense counsel, that this juror seemed to hate the defendant. For his part, defense counsel made clear that he was pleased to be rid of her (N.T. 6/18/82, 2.40-2.46). At the 1995 PCRA hearing, the defendant offered no evidence to establish that his attorney did not inform him of these events, or that he did not agree with the decision to remove the juror. The juror's alleged race (which does not appear on the record) had no bearing on any of this. The habeas claim is meritless because a defendant has a due process right to be present only "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge....[The] presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." United States v. Gagnon, 470 U.S. 522, 526 (1985); Snyder v. Massachusetts, 291 U.S. 97 (1934). Contrary to petitioners' baseless argument that defense counsel was "contriv[ing]" [sic] against his client, defense counsel is "strongly presumed," Strickland v. Washington, 466 U.S. 668, 689-690 (1984), to have been acting reasonably and in his client's interest.

The defendant's habeas claim 18 argues that he was denied due process because the first alternate juror selected, who later served on the jury after a regular juror was dismissed, was biased against him. The record is otherwise. Prospective alternate juror Edward Courchain testified that he would be able to reach a verdict based solely on the evidence (N.T. 6/16/82, 383). He maintained this position through extensive voir dire questioning (E.g., N.T. 6/16/82, 406-409). "The question of individual juror bias is a question of fact." Patton v. Yount, 467 U.S. 1025, 1036 (1984); Wainwright v. Witt, 469 U.S. 412, 429 (1985) (trial court ruling as to juror bias constitutes a fact finding under § 2254). As such, under 28 U.S.C. § 2254(e), the trial court's findings with respect to individual juror bias, or the lack thereof, are presumed to be correct. Parker v. Turpin, 60 F. Supp. 1332, 1362 (N.D. Ga. 1999). There was, and is, no basis for overturning the credibility determination of the trial judge, who was present to hear Mr. Courchain's responses and observe his demeanor.

Petitioners' attempt to add a third claim is based on the state supreme court's ruling on direct appeal, rejecting the defendant's claim that the trial court erroneously denied his attempt to peremptorily remove Mr. Courchain. As explained in the state supreme court opinion, the defendant had previously used all of his peremptory challenges for alternate jurors, and was not entitled to "carry over" unused peremptory challenges for regular jurors. Commonwealth v. Abu-Jamal, 555 A.2d 846, 851 (Pa. 1989). This ruling is a question of state law that is not justiciable on a federal habeas petition. Further, the claim petitioners would like to argue has not been raised in the habeas petition. Finally, it is frivolous, since petitioners do not bother to try to explain why the state supreme court ruling was wrong, even

as a matter of state law.<sup>25</sup> As for petitioners' emotional references to "shenanigans" and "legerdemain" (petition at 74), those who would aspire to meddle in another's case would do well to become familiar with the issues before indulging in such rhetoric.

H. Petitioners' Arguments Regarding Gary Wakshul Are Incompetent.

Petitioners refer to "ineffective representation by counsel, misconduct by the prosecution, and judicial bias" that supposedly kept the defendant "from offering the testimony of Officer Wakshul to rebut the prosecution's phony 'confession' story" (petition at 75). As has become the norm, petitioners' rhetoric is poorly acquainted with the record.

At trial, two witnesses -- Police Officer Gary Bell and a hospital security guard, Priscilla Durham -- testified that the defendant had shouted, "I shot the mother f\_ ker and I hope he dies" before entering the emergency room. In the state PCRA proceeding in 1995, defendant claimed that his admission was "fabricated" because Bell had not mentioned it for several weeks and had initially reported that the suspect had made no statements. The theory was that, because the officers who were present did not report the confession for several weeks, their account must have been an invention. This theory was undermined, however, by

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<sup>25</sup> The closest petitioners come to an argument is a cryptic reference to footnote 1 of the state supreme court opinion. The footnote discusses a question not raised or addressed by the parties -- viz., where the rules afford one peremptory per two alternates, and four alternates are selected, does a party obtain one peremptory for the first two alternates that is waived if not used, or does the party obtain two peremptories that may be used at any time in the alternate selection process? The appellate court noted that the trial court and the parties all assumed that the former was the case, although if the latter was true the defendant would have possessed an additional peremptory with which to remove Mr. Courchain. Contrary to petitioners' apparent understanding, any potential claim based on this footnote is in no way "properly exhausted" (petition at 73). No such claim was ever raised by petitioner, on direct appeal or in any later state proceedings. Further, no such claim is raised in the habeas petition. This is unsurprising, as the unraised question goes solely to how state procedural rules should be interpreted, not any denial of a federal constitutional right.

the fact that Ms. Durham had reported the very same admission to her employers the very next day -- a fact that was unknown to the police (N.T. 6/24/82, 45-52).

At trial, Ms. Durham described the confession as boasting on the defendant's part: "he was doing everything he could to intimidate the police officers" (N.T. 6/24/82, 33-34). Petitioners seem to be unable to explain what makes Ms. Durham's testimony "phony."<sup>26</sup>

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<sup>26</sup> Mr. Jackson was unable to counter Ms. Durham's testimony on cross-examination:

BY MR. JACKSON: Q. Show it to the witness, please. Read it, Miss Durham. You've had an opportunity to review D-14; is that correct?

A. Yes.

Q. Earlier when I questioned you with regard to the statement that you perhaps gave to your supervisor at Jefferson Hospital you indicated that you dictated a statement orally; is that correct?

A. Yes.

Q. Is that the statement?

A. Yes.

N.T. 6/24/82, 97.

Ms. Durham said that the report was originally taken down in handwriting, but rejected Jackson's suggestion that the typed copy presented in court was inaccurate, saying "I'd know if I said it." Jackson nevertheless continued:

Q. So any statement that would be presented to you that purports to be your statement would be a guess on your part. Is that right?

A. No.

Q. It wouldn't be a guess?

A. I'd know if I said it or not.

Q. You would know word for word what you said?

The defendant also claimed at the 1995 PCRA hearing that he was prejudiced because he had not been able to call another police officer, Gary Wakshul, as a witness at trial. His argument was that Wakshul, like Bell, had initially reported that there had been no "statements," which supposedly proved that the confession was "fabricated." This theory still failed to account for the fact that the hospital security guard, Ms. Durham, had reported the confession the day after it happened. Contrary to the defendant's claim that he was prevented from calling Wakshul, moreover, the record showed that Wakshul did not testify because defendant had overridden his attorney, and personally decided not to request Wakshul until the last day of trial (N.T. 7/1/82, 33-34). By then, Wakshul had left the city and was unavailable (N.T. 8/1/95, 94, 99-101, 118-122).

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A. No.

Q. So how would you know if it was your statement, ma'am?

A. Because I know what I said.

Id., 99-100.

The prosecutor on redirect took Ms. Durham through her report line by line, including the following:

Q. Now, would you read the next statement, the next line.

A. "Miss Durham stated that Jamal shouted, "Yeah, I shot the mother fucker and I hope he dies."

Q. You said that on December 10, 1982?

A. Yes, I did.

Id., 113.

Not surprisingly, defendant did not call Ms. Durham as a witness at the 1995 state collateral review proceedings.

In any event, defendant called Wakshul as his own witness at the 1995 PCRA hearing. Wakshul (like Bell and Ms. Durham at trial) testified in 1995 that the defendant had indeed said, "I shot him and I hope the mother f\_ker dies." Upon hearing this vicious exclamation Wakshul became emotionally distraught. He stumbled into an alcove, and started to cry. He went outside and sat in a police wagon until he regained his composure. When he went back into the hospital, he saw his friend Danny Faulkner's dead body. Later, attempting to drive home, he ran his car into a cement pole (N.T. 8/1/95, 25-26). The court found as a fact that this 1995 testimony credibly explained Wakshul's failure to mention the admission in his first report. Further, the state court properly found that, had Wakshul testified at trial, he would only have further inculpated petitioner by confirming the fact of his confession.

The defendant called Wakshul in 1995 already knowing he would so testify, just as he had known this at trial, since Wakshul had disclosed that he heard the confession in a written report he made before trial.<sup>27</sup> Like Officer Bell -- who testified at trial -- Wakshul had earlier reported that the suspect made no statements; but he explained that this error resulted from his emotional devastation over the murder of his friend Danny Faulkner. Moreover, Wakshul was the sole witness for the defense theory that the defendant's confession was "manufactured" -- but Wakshul testified that the confession was real. The PCRA court, as finder of fact, saw Wakshul's demeanor and credited his unrebutted testimony, just as the jury had credited Bell's. Both Wakshul's and Bell's accounts are fully corroborated by the trial testimony of hospital security guard Priscilla Durham. It is hardly surprising that the

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<sup>27</sup> Wakshul's emotional state was manifest even in that written report. Wakshul had been carrying petitioner and had just put him down when he bragged about murdering Officer Faulkner. Wakshul was "disgusted" and "decided I wasn't going to touch him again. I didn't want to be near him." Although he was on duty, he fled to an alcove, and then "walked out of the hospital" (N.T. 7/28/95, 89-90, quoting Wakshul's third report).

judge credited corroborated, uncontradicted testimony of a witness called by the defendant. Thus, the state court's credibility findings are unassailable. (Which is not to say that the defendant or the petitioners have ever assailed them; they merely ignore them).

I. Petitioners' Reliance On Whitney v. Horn Is Incompetent.

Lastly, petitioners argue, citing the district court decision in Whitney v. Horn, No. 99-1993 (E.D. Pa. 2000), that procedural default no longer exists in habeas proceedings. No such claim has been raised in the habeas petition.<sup>28</sup> The ruling in Whitney, which is on appeal to this Court at No. 00-9003, has nothing to do with this case. The issue there concerned the effect on federal habeas corpus review of a state post-conviction filing deadline applicable to PCRA petitions filed after January 16, 1996. Jamal's petition was filed in 1995, and so the PCRA filing deadline in issue in Whitney has never been (and never can be) an issue in his case.

WHEREFORE, the petition should be dismissed.

Respectfully submitted,

HUGH J. BURNS, JR.  
Assistant District Attorney

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<sup>28</sup> The defendant attempted to raise such a claim for the first time in a "reply memorandum" filed following the Commonwealth's filing of its answer to his motion to amend his habeas petition. The Commonwealth's motion to strike that filing or permit a response remains pending in the District Court.

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