IN THE UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

Nos. 01-9014 and 02-9001

MUMIA ABU-JAMAL,

Appellee in No. 01-9014,
Appellant in No. 02-9001,

v.

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

Appellants in No. 01-9014,
Appellees in No. 02-9001.

RESPONSE OF APPELLEE AND CROSS-APPELLANT, MUMIA ABU-JAMAL, TO SUR-REPLY BRIEF

On Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania (Yohn, J.), No. 99 Civ. 5089

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Dated: November 27, 2006

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INTRODUCTION

Most of the Commonwealth's brief rehashes what it said in prior briefs. Sur-Reply Brief for Appellants, Nov. 13, 2006. However, Mr. Abu-Jamal is compelled to briefly respond to the few new points raised.

Further, the Commonwealth has repeated in its Introduction the false claim earlier alleged—that Mr. Abu-Jamal was not a journalist but "a taxi driver." *Id.* at 1, n.1; *see* Commonwealth's Third Step Brief, at 5, Aug. 21, 2006. Of course at the time of arrest he was working a second job driving a cab to support his family, yet he continued to work daily as a stringer reporter for various radio outlets, e.g., NPR, AP, WDAS. He was President of the Philadelphia Chapter of the Association of Black Journalists. Eleven months before the homicide Mr. Abu-Jamal was publicly recognized because his "eloquent, often passionate, and always insightful interviews bring a special dimension to radio reporting." *Philadelphia Magazine*, Jan. 1981; *see* Petition for Writ of Habeas Corpus, ¶ 13, Oct. 14, 1999.

When evidence was presented to the district court that the trial judge had made offensive racist remarks regarding Mr. Abu-Jamal, the Commonwealth presented no facts in opposition. *See* Argument 4; Supp.App. 151-53 (Declaration of Terri Maurer-Carter (court stenographer), *Abu-Jamal v. Horn*, U.S. Dist. No. CIV 99-5089 WY (Doc. 110), Aug. 28, 2001. Judge Albert F. Sabo was available at that time to prepare a sworn statement, yet he remained mute. Thus it is unfair for the Commonwealth to now raise a hearsay account allegedly reported in the news that was never presented to

any court, when the trial judge made no effort to legally refute the recollections of the court stenographer, Terri Maurer-Carte. Sur-Reply Brief for Appellants, at 1.

ARGUMENT

1. The Prosecutor Engaged In Racially Discriminatory Practices In Jury Selection, In Contravention of *Batson v. Kentucky*, 476 U.S. 79 (1986)

The Commonwealth again asks this Court to abandon *Batson*'s burden-shifting framework, a request this Court must reject for the reasons stated earlier. Commonwealth's Sur-Reply Brief at 4-8. Mr. Abu-Jamal's Fourth-Step Brief at 11-17. The Commonwealth, however, now adds a new wrinkle to its argument. According to the Commonwealth, the fact that some courts have erroneously abandoned *Batson* shows that the Pennsylvania Supreme Court's rejection of Mr. Abu-Jamal's *Batson* claim must be "reasonable" because the Pennsylvania Supreme Court *could have* held that *Batson* does not apply. *See* Commonwealth's Sur-Reply Brief at 7-8. The Commonwealth is wrong.

The Supreme Court's AEDPA decisions show that, under 28 U.S.C. § 2254(d)-(e), the federal habeas courts address the *actual rationale of the state court* at least when, as here, the state court gives one. *See Wiggins v. Smith*, 539 U.S. 510, 529-30 (2003); *Williams v. Taylor*, 529 U.S. 362, 391-98, 413-16 (2000). In *Wiggins* it was explained that arguments raised by the state in the federal habeas courts, but not expressly relied upon in the state court's opinion, have "no bearing on whether the [state court] decision reflected an objectively unreasonable application of" Supreme Court

law. *Williams v. Taylor*, 539 U.S. at 529-30. Here, the Commonwealth's abandon-*Batson* argument was not relied upon by the Pennsylvania Supreme Court and, thus, has "no bearing" on the reasonableness *vel non* of the state court decision.

As stated in Mr. Abu-Jamal's prior briefs, support for the prima facie case is found in his association with the Black Panther Party. *See* Mr. Abu-Jamal's Second-Step Brief at 22; Mr. Abu-Jamal's Fourth-Step Brief at 28-30; *see also* Brief of Amicus Curiae The NAACP Legal Defense and Educational Fund, Inc., at 12-17. The Commonwealth claims the Black Panther Party was "well known for violent hostility toward police." Commonwealth's Sur-Reply Brief at 15 & n.15 (citing http://en.wikipedia.org/wiki/Black_Panther_Party).* No doubt it was "well known" for that among some people. For many others, however, it was "well known" for "instituting a variety of community programs to alleviate poverty and illness among the communities they deemed most needful of aid, or most neglected by the American government," for trying "to stop abuse perpetrated by local police departments," and for "operat[ing] on love for black people, not hatred of white people." Http://en.wikipedia.org/wiki/Black_Panther_Party (viewed Nov. 25, 2006). Clearly different people have different views of the Black Panther Party. A prosecutor who

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* Wikipedia bills itself as "the free encyclopedia that anyone can edit." http://en.wikipedia.org/wiki/Main_Page. The Commonwealth's specific quotation from Wikipedia cited as "authority" for its claims about Black Panther killings of police officers *a memorial website for Officer Daniel Faulkner* which, in turn, refers to Mr. Abu-Jamal as "a member of the racist group Black Panthers." *See* http://en.wikipedia.org/wiki/Black_Panther_Party at n.2 (citing http://www.odmp.-org/officer.php?oid=4764).

was "of a mind to discriminate" (*Batson v. Kentucky*, 476 U.S. at 96-97), likely would use race as "an unconstitutional proxy" for those views which in this case was Mr. Abu-Jamal's association with the Black Panther Party. *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994). That contributes to the prima facie case.

2. Bias of the Judge Who Presided Over the 1995 PCRA Hearing

Mr. Abu-Jamal's Fourth-Step Brief, at 60-63, demonstrates that a due process challenge to Judge Albert F. Sabo's bias was exhausted under the analysis of *Evans v. Court of Common Pleas*, 959 F.2d 1227 (3d Cir. 1992). The Commonwealth incorrectly argues that *Evans* was overruled by *Duncan v. Henry*, 513 U.S. 364 (1995) (per curiam). *See* Commonwealth's Sur-Reply Brief at 26-28. Such a claim has been refuted by this Circuit, which determined that *Evans* remains good law after *Duncan*:

> The exhaustion rule requires applicants to "fairly present" federal claims to state courts before bringing them in federal court. *See Duncan v. Henry,* 513 U.S. 364, 365 (1995); *Picard v. Connor,* 404 U.S. 270, 275 (1971); *Lambert v. Blackwell,* 134 F.3d 506, 513 (3d Cir. 1997). . . .
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> . . . .
>
> To "fairly present" a claim, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. *See Anderson v. Harless,* 459 U.S. 4, 6 (1982); *Picard v. Connor,* 404 U.S. 270, 277-78 (1971). It is not sufficient that a "somewhat similar state-law claim was made." *Harless,* 459 U.S. at 6. Yet, the petitioner need not have cited "book and verse" of the federal constitution. *Picard,* 404 U.S. at 277.
>
> The Supreme Court most recently applied these principles in *Duncan v. Henry,* 513 U.S. 364, 115 S.Ct. 887 (1995) . . . .

> We read *Duncan* as reaffirming the teaching of *Harless* and *Picard* that the absence of explicit reference to federal law does not resolve the issue of whether a federal claim was fairly presented. It also reaffirms, however, that petitioners must have communicated to the state courts in some way that they were asserting a claim predicated on federal law. . . .
>
> . . . .
>
> In *Evans v. Court of Common Pleas, Del. County, Pa.*, 959 F.2d 1227 (3d Cir. 1992), we noted some of the ways in which petitioners may communicate that they are asserting a federal claim without explicitly referencing specific portions of the federal constitution or statutes. Quoting from *Daye v. Attorney General of New York*, 696 F.2d 186 (2d Cir. 1982) (en banc), we observed that the required message can be conveyed through "(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation." *Evans*, 959 F.2d at 1232. . . .

McCandless v. Vaughn, 172 F.3d 255, 260-62 (3d Cir. 1999) (parallel citations omitted).

After *Duncan*, as before, *Evans* describes "some of the ways" in which a claim may be fairly presented in state court. *Id.* at 262. Applying *Evans*, the Commonwealth *does not dispute* that Mr. Abu-Jamal exhausted his due process claim.

CONCLUSION

For the foregoing reasons presented herein and in the previously filed briefs on behalf of Mr. Abu-Jamal, this Court should reverse the judgment and grant habeas corpus relief from the conviction, and deny the Commonwealth's appeal.

Date: November 27, 2006

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP/GOOD STANDING

I, Robert R. Bryan, Esq., hereby certify that I am a member in good standing of the Bar of this Court.

Date: November 27, 2006

ROBERT R. BRYAN

CERTIFICATE REGARDING FED. R. APP. P. 32(A)(7)(C)

I, Robert R. Bryan, Esq., hereby certify that this brief consists of six pages and 1,403 words as determined by the Microsoft Word 2002 word processing system used to prepare the brief.

Date: November 27, 2006

ROBERT R. BRYAN

CERTIFICATION THAT E-BRIEF AND HARD COPY ARE IDENTICAL, AND OF VIRUS CHECK

I, Robert R. Bryan, Esq., pursuant to Third Circuit Rule 31.1(c), hereby certify that the text of the e-brief and hard copies filed this date are identical, and that that a virus check was performed this date of the E-Brief in this matter utilizing McAfee Virus Scan software and no viruses were detected.

Date: November 27, 2006

ROBERT R. BRYAN

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and correct copy of the foregoing **RESPONSE OF APPELLEE AND CROSS-APPELLANT, MUMIA ABU-JAMAL, TO SUR-REPLY BRIEF** to be served by United States Mail, first class postage prepaid, upon the following:

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