

IN THE SUPERIOR COURT OF PENNSYLVANIA  
PHILADELPHIA DISTRICT

FILED IN  
SUPERIOR COURT

FEB 25 2013

EASTERN DISTRICT

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No. 3059 EASTERN DISTRICT 2012

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COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

MUMIA ABU-JAMAL,

Appellant.

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**INITIAL BRIEF OF APPELLANT**

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On Appeal from Judgment of Sentence entered on August 13, 2012 (Dembe J.) and the Memorandum and Order of the Philadelphia County Court of Common Pleas (October 1, 2012, Dembe J.) denying Appellant's *Pro Se Motion for Post-Sentence Relief and/or Motion to Reconsider Sentence*.

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Dated: February 25, 2013

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## STATEMENT OF JURISDICTION

This is a direct appeal from a final order of the Court of Common Pleas, Philadelphia County, sentencing Appellant to life imprisonment. Jurisdiction is founded at Pa.R.App.P. 341 and 301(a)(2), and 42 Pa. C. S. § 742.

## ORDERS/DETERMINATIONS IN QUESTION

The first Order appealed from was entered by the Court of Common Pleas (Dembe J.), on August 13, 2012, sentencing Appellant to life imprisonment. The second Order appealed from was a Memorandum and Order denying Appellant's *Pro Se Motion for Post-Sentence Relief and/or Motion to Reconsider Sentence* entered by the Court of Common Pleas (Dembe J.) on October 1, 2012. Both Orders are appended hereto.

## STATEMENT OF SCOPE AND STANDARD OF REVIEW

Appellant's claims in Section I below pertain to violations of Pennsylvania Statutes. These claims – which detail the trial court's failure to adhere to statutory sentencing requirements with respect to notice of sentencing, the opportunity to present information/evidence prior to sentencing, the opportunity to be present at sentencing, and the trial court's duty to notify Appellant of his appellate rights -- require reversal unless the Commonwealth is able to demonstrate that the trial court's errors are harmless beyond a reasonable doubt. *See Commonwealth v. Story*, 383 A.2d 155, 162 (1978). Appellant's claims in Section II below pertain to violations of the Constitutions of the United States and the Commonwealth of Pennsylvania. These claims – which detail how Appellant was denied his constitutional right to notice, counsel and to appear at sentencing – allege structural error, and, as such, Appellant need not demonstrate prejudice to prevail. *Chapman v. California*, 386 U.S. 18,

43-44 (1967) (some types of constitutional error are not susceptible of harmless error analysis); *United States v. Cronin*, 466 U.S. 648, 659 n. 25 (1984).

### **STATEMENT OF QUESTIONS INVOLVED**

1. Were Appellant's rights under Pa. R. Crim. P. § 704 violated where the trial court *sua sponte* re-sentenced Appellant to life imprisonment without parole without providing notice to Appellant or his counsel of the re-sentencing, without providing Appellant or his counsel the opportunity to be present and offer information/argument before the re-sentencing, and without ensuring that Appellant was informed, on the record, of his appellate rights?
2. Were Appellant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Section Nine of the Pennsylvania Constitution violated where Appellant was re-sentenced without notice to himself or counsel, without a hearing and without the right to be present or be heard?

### **STATEMENT OF THE CASE<sup>1</sup>**

This is an appeal from the life sentence imposed upon Appellant and the denial of Appellant's *Post-Sentence Motion*.

### **FORM OF ACTION AND PROCEDURAL HISTORY OF THE CASE**

After a 1982 trial by jury in the Philadelphia County Court of Common Pleas, Appellant was convicted of first degree murder and possession of an instrument of crime and sentenced to death plus two and one half to five years respectively under docket number CP-51-CR 0113571-1982. The Pennsylvania Supreme Court affirmed Appellant's conviction and death sentence on

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<sup>1</sup> All emphasis herein is provided unless otherwise indicated.

direct appeal, *Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989), and denied post-conviction relief, *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998).

On federal review, the United States District Court for the Eastern District of Pennsylvania granted, in part, Appellant's request for habeas relief. Specifically, that court found Appellant's death sentence unconstitutional pursuant to *Mills v. Maryland*, 486 U.S. 367 (1988). *Abu-Jamal v. Horn*, No. CIV. A. 99-5089, 2001 WL 1609690 (E.D. Pa. Dec. 18, 2001). Although the United States Court of Appeals for the Third Circuit affirmed the District Court's decision, *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008), the United States Supreme Court granted the Commonwealth's Petition for a Writ of Certiorari challenging the appellate court's decision, vacated that decision, and remanded Appellant's case for further review in light of the intervening decision, *Smith v. Spisak*, 129 S. Ct. 1319 (2009). *Beard v. Abu-Jamal*, 130 S. Ct. 1134 (2010). On remand, the Third Circuit once again declared Appellant's death sentence to be unconstitutional. *Abu-Jamal v. Secretary*, 643 F.3d 370, 372 (3d Cir. 2011). The United States Supreme Court rejected the Commonwealth's request for review of the Circuit Court's decision. *Wetzel v. Abu-Jamal*, 132 S.Ct. 400 (2011).

By Order dated April 26, 2011, the Third Circuit affirmed the District Court's 2001 grant of sentencing relief and by Order dated December 6, 2011, the District Court directed the Commonwealth to conduct a new sentencing hearing within 180 days of its Order or sentence Appellant to life imprisonment. On December 7, 2011, the Philadelphia County District Attorney announced that it would not seek another death sentence for Appellant.

On August 14, 2012, the Philadelphia County Court of Common Pleas – *sua sponte* and without notice to Appellant, without notice to counsel for Appellant, without notice to counsel for the Commonwealth, without affording Appellant the opportunity to be present or to be heard

– re-sentenced Appellant to life imprisonment. (hereinafter “*Re-sentencing Order*”). On August 23, 2012, Appellant filed a *Pro Se Motion for Post-Sentence Relief and/or Motion to Reconsider Sentence* (hereinafter “*Post-Sentence Motion*”) challenging the trial court’s re-sentencing. Specifically, Appellant alleged, *inter alia*, that “[t]he imposition of the sentence of life without parole on August 13, 2012 was in violation of the fundamental requirements that must be adhered to under Pennsylvania state law and the United States Constitution and as such was illegal and should be considered null and void.” *Post-Sentence Motion* at 2. In response, the Commonwealth filed a *Motion to Dismiss Untimely Fifth PCRA Petition*, wherein it incorrectly characterized Appellant’s *Post-Sentence Motion* as a petition for post-conviction relief. On October 1, 2012, the Court of Common Pleas denied Appellant’s *Post-Sentence Motion*, finding that “8<sup>th</sup> amendment challenges to mandatory life sentences, policies of the Department of Corrections and policies of the Commonwealth regarding the housing of death row inmates are not the type of issues that post sentence motions were designed to address. Additionally, the defendant does not have standing to challenge the treatment of death row inmates.” See Memorandum and Order, *Commonwealth v. Mumia Abu-Jamal, Pro Se*, CP-51-CR-0113571-1982 (dated October 1, 2012) (hereinafter “*Re-sentencing Memorandum and Order*”).

A timely Notice of Appeal was filed on October 31, 2012. The lower court ordered Appellant to file a *Statement of Errors Complained of on Appeal* and Appellant did so on November 28, 2012 (attached). According to the Docket sheet, the trial court issued an Opinion in response on January 9, 2013.

#### **STATEMENT OF FACTS**

Since the relevant facts are procedural, for ease of review, they are discussed in the body of this Brief.

## **SUMMARY OF ARGUMENT**

In 1982, Appellant was convicted of first-degree murder and sentenced to death by a jury in the Philadelphia County Court of Common Pleas. In 2001, Appellant's death-sentence was declared unconstitutional by the Federal District Court for the Eastern District of Pennsylvania. In 2011, after years of appeals, Appellant's death-sentence was vacated and the federal court directed the Commonwealth to re-sentence Appellant to life without parole or seek another death sentence within 180-days of its Order. Days later, in December of 2011, the Commonwealth announced that it would not seek another death-sentence for Appellant. In July of 2012, the Philadelphia County Court of Common Pleas *sua sponte* re-sentenced Appellant to life imprisonment. This re-sentencing was conducted off-the-record, without notice to Appellant or his counsel, without affording Appellant an opportunity to be present, and without providing Appellant an opportunity to provide information or argument to the court. Furthermore, the trial court made no attempt to ensure that Appellant was notified of his appellate rights. This re-sentencing was wholly improper. It violated Appellant's rights under Pa. R. Crim. P. § 704, the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I § 9 of the Pennsylvania Constitution.

## **ARGUMENT**

The trial court erred in re-sentencing Appellant to life imprisonment without affording him notice of the re-sentencing hearing, the opportunity to be present and heard (personally or through counsel) at the sentencing, the opportunity to present information/argument prior to sentencing, and without taking any steps to ensure that Appellant was notified of his appellate rights.

**I. APPELLANT'S RIGHTS UNDER PENNSYLVANIA RULE OF CRIMINAL PROCEDURE 704 WERE VIOLATED WHERE THE TRIAL COURT RE-SENTENCED APPELLANT WITHOUT PROVIDING NOTICE OF THE RE-SENTENCING TO APPELLANT OR HIS COUNSEL, WITHOUT AFFORDING APPELLANT AN OPPORTUNITY TO BE PRESENT AND TO OFFER INFORMATION/ARGUMENT BEFORE THE RE-SENTENCING, AND WITHOUT ENSURING THAT APPELLANT WAS NOTIFIED, ON THE RECORD, OF HIS APPELLATE RIGHTS.**

As detailed above, the trial court *sua sponte* re-sentenced Appellant to life imprisonment without possibility of parole without providing notice to Appellant or his counsel of the re-sentencing, without affording Appellant or his counsel an opportunity to be present and/or offer information/argument before re-sentencing, and without notifying Appellant, on the record, of his appellate rights. Appellant's rights under Pennsylvania Rule of Criminal Procedure § 704 were violated. He is entitled to a new sentencing hearing.

Pennsylvania Rule of Criminal Procedure § 704 sets forth the procedures to be followed at sentencing. It provides, *inter alia*, that the sentencing court must:

- “[A]fford counsel for both parties the opportunity to present information and argument relative to sentencing”;
- “[S]tate on the record the reasons for the sentence imposed”;
- Ensure, on the record, that the defendant has been advised of “the right to file a post-sentence motion and to appeal, of the time within which the defendant must exercise those rights, and of the right to the assistance of counsel in the preparation of the motion and appeal”;
- Ensure that a defendant who is represented by retained counsel knows that he can/will proceed with retained counsel “unless the court has granted leave for counsel to withdraw”;
- Ensure that the defendant is made aware, on the record, “[o]f the time limits within post-sentence motions must be decided”
- Ensure that the defendant is made aware, on the record, “[t]hat issues raised before or during trial shall be deemed preserved for appeal whether or not the defendant elects to file a post-sentence motion.”

Pa. R. Crim. P. § 704 (c) (1), (2), (3) (a), (b) (ii), (c), (d). Given the critical significance of the required notifications (especially with respect to perfecting an appeal) and the fact that the defendant has a right to present “information and argument” prior to sentencing, a defendant (and his counsel) must be notified of any (re)sentencing hearing and be afforded the opportunity to appear. The trial court simply cannot properly fulfill its statutory sentencing obligations otherwise.

It is for this reason that it is “well established” that Rule 704 requires that “a criminal defendant and his attorney should be present during all aspects of sentencing.” *Commonwealth v. Hobson*, 452 A.2d 22, 23 (Pa. Super. 1982) (analyzing Pa. R. Crim. P. § 1405, the predecessor statute to Pa. R. Crim. P. § 704). *See also Commonwealth v. Mullen*, 467 A.2d 871, 873 (Pa. Super. 1983) (the defendant must be present when the judgment of sentence is imposed against him).

Even in cases, like this one, where the Commonwealth does not seek the death penalty and the court is imposing a mandatory life sentence, it “must comply with the applicable requirements of Rule 704 (c).” *Commonwealth v. Williams*, 900 A.2d 906, 911 n.7 (Pa. Super. 2006).

Rule 704 is equally applicable to re-sentencings. Indeed, this Court has made clear that “[a] court is empowered to modify a sentence ... only if it notifies the defendant and the district attorney of its intention to do so.” *Commonwealth v. Horsman*, 239 Pa. Super. 534, 538 (1976). Thus, this Court has vacated sentence modifications, which, like the one herein, were made without prior notice to the defendant and without affording the defendant an opportunity to appear at the re-sentencing. *See id.* (trial court’s reduction of an unlawful sentence without notice

to the defendant or counsel violated the statute); *Commonwealth v. Parker*, 419 A.2d 748 (Pa. Super. 1980) (holding that the lower court may not modify sentence without notifying the defendant); *Commonwealth v. Reed*, 254 Pa. Super. 461, 463-464 (1978) (vacating lower court modification of sentence for failure to notify the defendant and provide an opportunity to be present upon re-sentencing). Similarly, this Court has held that Rule 704's requirement that the sentencing court state, in open court, its reasons for imposing sentence applies at not just the original sentencing hearing, but also "all subsequent re-sentencing hearings." *Commonwealth v. Thomas*, 537 A.2d 9, 12 (Pa. Super. 1988). *See also* 42 Pa. Cons. Stat. Ann. § 9721(b) ("in every case in which the court imposes a sentence for a felony or misdemeanor, modifies a sentence ... or resentsences following remand, the court shall make as part of the record, and disclose in open court at the time of the sentencing, a statement of the reason or reasons for the sentence imposed.").

First-degree murder sentencings are governed by 42 Pa. Cons. Stat. § 9711. Although the Pennsylvania Supreme Court has held Rule 704's right to allocution does not apply to first-degree murder re-sentencings,<sup>2</sup> it has made no such holding with respect to Rule 704's rights to notice of sentencing, to be present at sentencing, to offer information/argument prior to sentencing, or to be informed of appellate rights at sentencing. To the contrary, this Court has held that where the Commonwealth has announced that it will not seek the death penalty for first-degree murder and the court must impose a mandatory life sentence, the court "must comply with the applicable requirements of Rule 704 (c)." *Williams*, 900 A.2d at 911 n.7. Thus, notwithstanding the fact that Rule 704's requirements of notice of sentencing, the right to be

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<sup>2</sup> The court held that by enacting a statute specifically governing first-degree murder sentencings and by including no provision for allocution in those statutes, the legislature intended to abrogate the general right to allocution in first-degree murder cases. *Commonwealth v. Abu-Jamal*, 555 A.2d 846, 857-858 (Pa. 1989)).

present, the right to present information/argument, and the right to notice of appellate rights do not appear in the text of § 9711, they are routinely provided by the sentencing courts. 3

By re-sentencing Appellant to life without parole without affording him or his counsel notice of the re-sentencing, the opportunity to be present at the re-sentencing, the chance to present information/argument prior to re-sentencing, or notice, on the record, of his appellate rights, the trial court violated Appellant's rights under Pa. R. Crim. P. § 704. He is entitled to a new sentencing. *See Commonwealth v. Story*, 383 A.2d 155, 162 (1978) (state law error requires reversal unless the Commonwealth is able to demonstrate that the trial court's errors are harmless beyond a reasonable doubt).

**II. APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION NINE OF THE PENNSYLVANIA CONSTITUTION WERE VIOLATED WHEN HE WAS RE-SENTENCED WITHOUT NOTICE TO HIMSELF OR COUNSEL, WITHOUT A HEARING AND WITHOUT THE RIGHT TO BE PRESENT OR BE HEARD.**

**A. Due Process**

A criminal defendant has a fundamental right to be present at all stages of the proceedings against him including sentencing. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). This right is guaranteed by the Fourteenth Amendment's Due Process Clause, *see id.* ("the sentencing process as well as the trial itself must satisfy the requirements of the Due Process Clause") and includes the right to notice of any proceedings. *Id.* ("The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process).

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3 It would be incongruous for the legislature to afford offenders convicted of first-degree murder *fewer* rights with respect to notice of sentencing and notice of appellate rights than offenders convicted of lesser offenses.

Appellant's re-sentencing was carried out by the trial court judge without prior notice to Appellant or his counsel. Thus there was no opportunity for Appellant to appear at the re-sentencing in any fashion nor was there an opportunity for him to hear his sentence imposed or to offer information, argument or a statement prior to sentencing. In fact, there is no record that the sentencing took place in open court at all. While Appellant acknowledges that the Due Process Clause may not require as many protections at sentencing as it does at a trial, *see Williams v. New York*, 337 U.S. 241, 245-46 (1949), it surely demands that a defendant be given notice of his own sentencing and a right to appear before the sentencing court. *See United States v. Faulks*, 201 F.3d 208, 211 (3d Cir. 2000) ("the oral pronouncement of sentence in the defendant's presence is...of special importance"); *United States v. Villano*, 816 F.2d 1448, 1452 (10<sup>th</sup> Cir. 1987) ("sentencing should be conducted with the judge and defendant facing each other and not in secret").

Appellant's entitlement to notice of his sentencing and an opportunity to be heard is in no way undermined by the fact that the sentence to be imposed was mandatory, and not discretionary. In *Faulks, supra*, the defendant's case had been remanded to the lower court for re-sentencing. The lower court held a re-sentencing hearing at which Faulks was present, represented by counsel and addressed the court. Nevertheless, the Third Circuit set aside the second sentence and remanded for a third sentencing simply because Faulks was not in the courtroom when the new sentence was announced. *See Faulks*, 210 F.3d. at 210. In reversing the sentence the court characterized the right to be present at sentence as, "a fundamental procedural guarantee that places the defendant before the judge at a culminating moment in the criminal justice process." *Id.* at 211.

Although *Faulks* involved a re-sentencing for which the trial court had discretion, Faulks

had been present for a full hearing on his re-sentencing and was only absent on the day his sentence was announced. Nonetheless, the Third Circuit rejected the prosecution's argument that Faulks suffered no prejudice. Relying on *United States v. Moree*, 928 F.2d 654, 655-56 (5<sup>th</sup> Cir. 1991) -- a case overturning a sentence which was imposed without the defendant being present, despite the fact that the new sentence was *less onerous* than the original sentence -- the Third Circuit recognized a distinction between a sentence modification and the imposition of a new sentence and held that the defendant's presence at the latter was crucial. The court concluded that:

“[t]he defendant's presence at sentencing is a deeply rooted procedural protection and no mere formality. We see no reason why that principle should not carry full force at re-sentencing.” *Faulks*, 201 F.3d at 211.4

Moreover, the fact that Appellant's re-sentencing involved a mandatory life sentence does not mean that there were no issues that Appellant could have raised at his re-sentencing had he been given notice and an opportunity to appear. There was the question of whether or not Appellant's newly imposed life sentence was to run concurrently or consecutively to the two and one half to five year sentence that had been imposed upon his related conviction for possession of an instrument of crime. This could be important should there be any future modification of sentence or application for pardon or clemency. Furthermore, while Appellant may have no right to a favorable ruling, Appellant at least has the right to raise and preserve claims regarding the constitutionality of a mandatory life without parole sentence under both the United States and

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<sup>4</sup> Both *Faulks* and *Moree* involved violations of Federal Rule of Criminal Procedure 43, which addresses trial and sentencing in absentia. Nevertheless they provide precedent for Appellant's case because the Third Circuit recognized that Rule 43 implicated fundamental constitutional concerns. See *United States v. Nappi*, 243 F.3d 758, 770 (2001) citing *Faulk*, 201 F.3d at 213. See also *United States v. Villano*, 816 F.2d 1448, 1452 (10<sup>th</sup> Cir. 1987) (“Rule 43 has its source in the confrontation clause of the sixth amendment and the due process clause of the fifth and fourteenth Amendments”).

Pennsylvania's Constitutions. Indeed, the United States Supreme Court recently declared such sentences unconstitutional for juvenile offenders. *See Miller v. Alabama*, 132 S.Ct. 2455, 2475 (2012). It is not impossible to imagine that a court might re-examine the constitutionality of mandatory life without parole sentences in additional contexts.

In many, if not all, of the situations in which the due process or other constitutional requirements for the sentencing phase have been limited, it has been the result of a balancing test between the rights of a defendant and the efficient functioning of the criminal justice process. *See e.g., Williams v. New York*, 337 U.S. at 249-50 (holding that requiring a full evidentiary hearing at sentencing would be impractical and deprive judges of the best available and broadest based information); *United States v. Bradford*, 237 F.3d 1306, 1314-15 (2001) (sentencing *in absentia* was acceptable when defendant voluntarily absented herself from the proceedings). These concerns are not implicated in Appellant's case. There is no reason why Appellant could not have been notified that he was scheduled to be re-sentenced and been produced to court for re-sentencing like all other Pennsylvania offenders. Appellant did not place any demands on the court with respect to his re-sentencing. He did not request an evidentiary hearing with the ability to cross-examine Commonwealth witnesses. Nor can there be any suggestion that Appellant expressly or implicitly waived his rights. While a defendant who voluntarily absents himself from a proceeding imposes a potentially unfair burden on the system (as it may be impractical and/or unnecessarily costly to postpone sentencing until such time as the defendant makes himself available), these considerations are completely inapplicable to Appellant's case. To the contrary, when Appellant fortuitously learned after the fact that he had been re-sentenced, he timely filed a post-sentence motion pursuant to Criminal Procedure Rule 720 (*see attached*) in which he complained, *inter alia*, that his sentencing did not comport with state or federal law.

Thus, rather than waiving his rights, Appellant asserted his rights at the earliest possible moment.<sup>5</sup> There were no practicalities weighing against affording Appellant the basic due process right of receiving notice and an opportunity to appear and be heard prior to re-sentencing. *Cf. Specht v. Patterson*, 386 U.S. 605, 606 (1967) (discussing impracticalities of open court testimony with cross-examination at a sentencing).

After 29 years, Appellant was removed from solitary confinement on Pennsylvania's death row where he had been confined pursuant to a sentence ruled unconstitutional ten years earlier.<sup>6</sup> Appellant was entitled to notice that he was to be re-sentenced to a life sentence without the chance of parole and afforded the opportunity to offer information, argument or a statement to the court prior to sentencing.

#### **B. Right to Counsel**

In addition to being denied his right to due process, the lower court's actions also deprived Appellant of his right to counsel as guaranteed by the Sixth Amendment of the United States Constitution and Article 1, § 9 of the Pennsylvania Constitution. It is well established that a criminal defendant's right to the effective assistance of counsel applies to sentencing. *See Lafler v. Cooper*, 132 S.Ct. 1376, 1385-86 (2012) citing *Mempa v. Rhay*, 389 U.S. 128, 133 (1967); *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973); *Gardner v. Florida*, 430 U.S. at 358.

Neither Appellant nor his counsel was notified of his re-sentencing until after it had taken place. This amounted to the total absence of counsel at a critical stage. As explained above in

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<sup>5</sup> Judge Dembe re-sentenced Appellant presumably *in camera* on August 14, 2012. After learning about this, counsel for Appellant checked with Assistant District Attorney Hugh Burns, Jr. who indicated that his office had not been made aware of the re-sentencing. Counsel for Appellant then phoned Judge Dembe's chambers and left a message of inquiry with her law clerk. The law clerk left a responsive message indicating that the court would, that day, serve notice of the newly imposed sentence to counsel. That notice was issued on August 21, 2012.

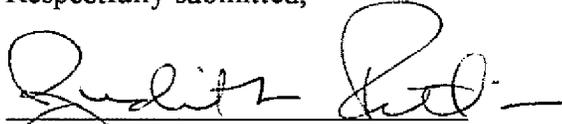
<sup>6</sup> Appellant remained confined on death row after his death sentence was set aside by a federal court because the Philadelphia District Attorney appealed to the United States Circuit Court of Appeals and sought *certiorari* in the United States Supreme Court and the Pennsylvania Department of Corrections' policy is to continue to keep a prisoner on death row until the expiration of the appeals process.

section II.A, it is not a foregone conclusion that there were no issues that could have been addressed had Appellant been represented at re-sentencing. The complete denial of counsel (to be contrasted with deficient representation) is presumptively prejudicial. *United States v. Cronin*, 466 U.S. 648, 659 n. 25 (1984); *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

**CONCLUSION**

For all of above reasons, this Court should grant Appellant a new sentencing hearing of which he is given notice and an opportunity to be heard.

Respectfully submitted,



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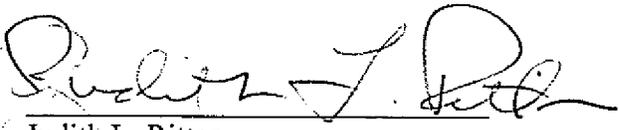
Dated: February 25, 2013

Wilmington, Delaware

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Initial Brief of Appellant was served by FIRST CLASS MAIL, upon the following person:

Hugh Burns, Esq.  
Philadelphia District Attorney's Office  
Three South Penn Square  
Philadelphia, PA 19107



Judith L. Ritter

Dated: February 25, 2013  
Wilmington, Delaware

# **APPENDIX**

**Commonwealth v. Mumia Abu-Jamal**  
**Index to Appendix**

1. Memorandum and Order, *Commonwealth v. Abu-Jamal*, CP-51-CR-0113571-1982 (Dembe, J.), October 1, 2012.
2. Order, *Commonwealth v. Abu-Jamal*, CP-51-CR-0113571-1982 (Dembe, J.), August 13, 2012.
3. Statement of Matters [Complained of on Appeal] Pursuant to Pa.R.App.P. 1925 (b), *Commonwealth v. Abu-Jamal*, CP-51-CR-0113571-1982, November 28, 2012.
4. Defendant's Pro Se Motion For Post-sentence Relief And/Or Motion To Reconsider Sentence, *Commonwealth v. Abu-Jamal*, CP-51-CR-0113571-1982, August 23, 2012.

COMMONWEALTH

:

vs.

:

CP- 51-CR-0113571-1982

Mumia Abu-Jamal *Pro Se*

**FILED**

OCT 01 2012

**Post Trial Unit**

MEMORANDUM AND ORDER

Mumia Abu-Jamal (a/k/a Wesley Cook) fatally shot Philadelphia Police Officer Daniel Faulkner on December 9, 1981. A Jury convicted him of murder in the first degree and sentenced him to death. He filed a direct appeal and the Pennsylvania Supreme Court affirmed the judgment of sentence. *Commonwealth v. Abu-Jamal*, 555 A.2d 846 ( PA 1989). The Supreme Court of the United States denied his petition for writ of certiorari, *Abu-Jamal v. Pennsylvania*, 498 U.S. 881 (1990). Then Governor Pennsylvania Thomas Ridge signed a writ of execution of June 1, 1995.

On June 5, 1995, the defendant filed his first PCRA petition in the lower court and the hearings were presided over by trial Judge Honorable Albert Sabo who granted a stay of execution but denied PCRA relief by order dated September 15, 1995.

The defendant filed an appeal to the Pennsylvania Supreme Court and while the appeal was pending petitioned to have the case remanded to the lower court for the presentation of newly-discovered evidence and other relief. The Supreme Court remanded the case for the sole purpose of taking additional testimony on after- discovered evidence.

After a hearing the additional evidence, Judge Sabo denied relief by order dated July 24, 1997. The Pennsylvania Supreme Court affirmed this order on November 15, 1995 and Governor Ridge signed a second death warrant on October 13, 1999.

On October 15, 1999, the defendant filed for a writ of Habeas Corpus in Federal District Court for the Eastern District of Pennsylvania along with a petition to stay his execution. On December 18, 2001, the Honorable William H. Yohn entered an order denying all of Abu-Jamal's claims except the one pertaining to his sentencing hearing where he determined that the instructions to the jury during the penalty phase were ambiguous. He entered the following order:

The execution of the writ of habeas corpus is STAYED for 180 days from the date of this order, during which period the Commonwealth of Pennsylvania may conduct a new sentencing hearing in a manner consistent with this opinion; After 180 days, should the Commonwealth of Pennsylvania not have conducted a new sentencing hearing, the writ shall issue and the Commonwealth shall sentence petitioner to life imprisonment.

*Abu-Jamal v. Horn*, at 269, No. 99-5089 (E.D.Pa.December 18, 2001)

The Commonwealth appealed this ruling to the Third Circuit Court of Appeals,<sup>1</sup> starting another round of appeals, petitions for rehearing, and requests for reconsideration in the Federal Courts. Ultimately the Commonwealth filed an appeal to the Supreme Court of the United States who, on October 11, 2011 declined to hear the case. The effect of this was to make Judge Yohn's order of December 18, 2001 operative, giving the Commonwealth 180 days to decide whether to hold a new penalty hearing. On or about December 8, 2011, the Commonwealth announced that it would not seek the death penalty. The defendant was transferred to the general population at SCI Mahanoy on January 27, 2012. Neither the Commonwealth nor the defendant

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<sup>1</sup> In the meantime, the defendant petitioner filed his third petition for PCRA relief on December 8, 2003. The lower court denied relief on May 27, 2005 and the Pennsylvania Supreme Court affirmed on February 19, 2009. On April 20, 2009, petitioner filed his fourth Post Conviction Relief Act petition. The lower court dismissed the petition without a hearing on December 16, 2009 and on March 26, 2012, the Pennsylvania Supreme Court affirmed the order. *Commonwealth v. Abu-Jamal*, 40 A.3d 1230 (Pa. 2012)

requested the lower court to take any action. On August 14, 2012 the lower court imposed a sentence of life imprisonment in accordance with the instructions in Judge Yohn's order and all relevant orders were placed on the public docket.

The defendant filed post sentence motions on August 23, 2012 and raised five issues, challenging the constitutionality of the imposition of a life sentence without parole, and solitary confinement of inmates who have been sentenced to death.

PA R Crim P 720 (Post Sentence Motions) provides in pertinent part.

(B) Optional Post-Sentence Motion.

(1) *Generally.*

a) The defendant in a court case shall have the right to make a post-sentence motion. All requests for relief from the trial court shall be stated with specificity and particularity, and shall be consolidated in the post-sentence motion, which may include:

- (i) a motion challenging the validity of a plea of guilty or nolo contendere, or the denial of a motion to withdraw a plea of guilty or nolo contendere;
- (ii) a motion for judgment of acquittal;
- (iii) a motion in arrest of judgment;
- (iv) a motion for a new trial; and/or
- (v) a motion to modify sentence.

Pa. R. Crim. P. 720.

A common sense reading of rule 720 shows that 8<sup>th</sup> amendment challenges to mandatory life sentences, policies of the Department of Corrections and policies of the Commonwealth regarding the housing of death row inmates are not the type of issues that post sentence motions

were designed to address. Additionally, the defendant does not have standing to challenge the treatment of death row inmates.

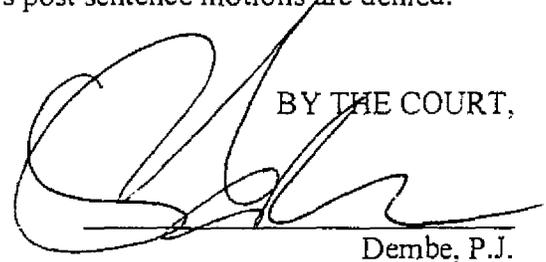
The Commonwealth's response, entitled "Motion to Dismiss Untimely Filed Fifth PCRA Petition," does not require additional comment.

In light of the above, there is no need for a hearing, additional briefs, or a thirty day extension that was requested in a letter to the court dated September 21, 2012 by Christina Swarns of the NAACP Legal Defense and Educational Fund. Additionally, it should be noted that Ms. Swarns has not entered her appearance in the case and her name does not appear as counsel on the post sentence motions.

COMMONWEALTH :  
vs. : CP- 51-CR-0113571-1982  
Mumia Abu-Jamal

ORDER

AND NOW, this 1<sup>st</sup> day of October, 2012, the defendant's post sentence motions are denied.

  
BY THE COURT,  
Dembe, P.J.

PROOF OF SERVICE

I hereby certify that on this day I am serving the foregoing order upon the person(s) indicated below, which service satisfies the requirements of Pa. R. Crim. P. 114

MUMIA ABU-JAMAL  
AM 8335  
SCI MAHANOY  
301 MOREA ROAD  
FRACKVILLE, PA 17932

*Pro Se*

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Clerk of Court 310B CJC

Interoffice Mail

/S/Dembe  
Dembe, J.

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

COMMONWEALTH  
Respondent

v.

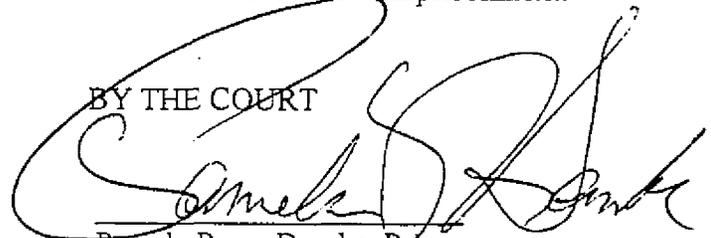
CP-51-CR 0113571-1982

MUMIA ABU-JAMAL  
(a/k/a Wesley Cook)  
Petitioner

ORDER

AND NOW this 13<sup>th</sup> day of August 2012, the Commonwealth having not requested a new sentencing hearing in the above-captioned matter within 180 days as provided in the Order entered on December 6, 2011, *Mumia Abu-Jamal v. Martin Horn, et. al*, No. 99-CV-050809 (ED PA 2011), it is HEREBY DECREED that Mumia Abu -Jamal is sentenced to life imprisonment. This order is entered pursuant to P A R A P 2591.

BY THE COURT

  
Pamela Pryor Dembe, P.J.

COURT OF COMMON PLEAS • PHILADELPHIA COUNTY

COMMONWEALTH OF PENNSYLVANIA     )  
  )  
                                  vs.     )  
  )  
MUMIA ABU-JAMAL,                    )  
  )  
                                  Pro Se     )

CP-51-CR-0113571--1982  
Hon. P. Dembe, P.J.

STATEMENT OF MATTERS PURSUANT TO PA.R.CR.PROC. 1925(b)

NOW COMES, Mumia Abu-Jamal, Pro Se, who pursuant to R. 1925 (b) sets forth the following Statement of Matters in objection to the procedures employed by the Court in the sentencing as had instantly;

1) The Court below provided neither process nor procedure as set forth in the Pa. R. Crim. Proc. (Rule(s) 700 et seq. regarding sentencing), but adopted an automatic pro forma sentencing that has no support in the said rules.

2) There is no Rule authorizing the pro forma sentencing procedure adopted by the Court, and as such, her action was ultra vires; i.e., beyond the scope of her duly delegated authority.

3) As the instant case is no longer designated a capital case, then the relevant rule governing the case is that held by Com. v. Thomas, 553 A.2d 918 (Pa. 1989), and noted at Rule 704 (C)(1).

4) The Court erred by improper service of the instant sentencing notice, by being delatory, and delivering belated notice thereof, whereupon counsel were not timely informed of the action.

5) Inasmuch as the notice of the sentencing was defective, untimely and did not provide sufficient notice, the same should be declared a nullity, and counsel for Appellant provided with sufficient time to consider the implications thereof.

6) As the actions of the court were violative of both the

spirit and the text of the relevant rules of procedure (Pa. R. Cr. Proc. 700 et seq.) the instant action should be remanded to the status quo ante, and as such the proceeding should be set forth as that contemplated by the relevant rules of court, as aforesaid.

WHEREFORE, for the reasons set forth in the instant pleading, the proceedings should be voided, and sent back for a proper proceeding pursuant to the rules governing same, and not made as a pro forma act, where notice, opportunity to be heard, and the like are ignored by the said Court.

Respectfully submitted,

s/ \_\_\_\_\_  
Mumia Abu-Jamal, Pro Se

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**Certificate of Service**

By signature below, the affiant doth hereby certify that a true and correct copy of the instant Statement of Matters document is served upon the parties below-named, in the manner set forth below:

ADA Hugh Burns, Esq.  
D.A.'s Office  
3 S. Penn Sq.  
Phila., PA 19107

Court of Com. Pleas, Appeals  
Unit • Crim. Justice Center  
13th & Filbert Sts.  
Phila., PA 19107

Court of Common Pleas, Appeals Unit  
c/o Hon. Pamela P. Dembe, P.J.  
386 City Hall  
Phila., PA 19107

The enclosed pleadings are sent via 1st Class U.S. Mail, by placing same in the receptacle set aside for secure mailing at SCI Mahanoy, Frackville, Pa. 17932.

Date Mailed: \_\_\_\_\_

s/ \_\_\_\_\_  
Mumia Abu-Jamal  
Pro Se  
(#AM-8335)  
SCI Mahanoy  
501 Morea Rd.  
Frackville, PA 17932

cc: file

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
CRIMINAL TRIAL DIVISION**

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**COMMONWEALTH OF PENNSYLVANIA**

**V.**

**MUMIA ABU-JAMAL**

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**No: CP-51-CR-0113571-1982**

**DEFENDANT'S *PRO SE* MOTION FOR POST SENTENCE RELIEF  
AND/OR MOTION TO RECONSIDER SENTENCE**

NOW COMES, the Defendant, Mumia Abu-Jamal, *pro se*, and pursuant to Rule 720 of the Pennsylvania Rules of Criminal Procedure moves this Court for post sentence relief and/or reconsideration of sentence, and in support thereof states as follows:

1. On December 9, 1981, the Defendant was arrested and charged with murder in the first degree, and related offenses.
2. On June 17, 1982 a jury trial commenced before Judge Albert Sabo and, on July 2, 1982 the jury returned a verdict of guilty of murder in the first degree.
3. On May 25, 1983, the Court sentenced the Defendant to death.
4. On December 18, 2001, after the exhaustion of direct appeal and state post-conviction relief act petitions, Judge William Yohn of the United States District Court for the Eastern District of Pennsylvania on federal habeas corpus vacated said death sentence.
5. On December 6, 2011, after the U.S. Court Appeals for the Third Circuit filed an opinion April 26, 2011 affirming that order; and the District Attorney's petition for certiorari, docketed at the U.S. Supreme Court #11-49 having been denied by the United States Supreme

Court; and the order and mandate of the U.S. Court of Appeals for the Third Circuit filed October 19, 2011; Judge Yohn ordered that the Commonwealth of Pennsylvania may conduct a new sentencing hearing within 180 days of this order, during which period the execution of the writ of habeas corpus will be stayed, or shall sentence the petitioner to life imprisonment.

6. After the December 6, 2011 order, which gave the Philadelphia District Attorney's Office an opportunity to retry the Defendant on the issue of penalty, the Philadelphia District Attorney's Office publicly announced that it would not seek death in a penalty retrial.

7. On August 13, 2012, Judge Pamela Pryor Dembe of this Court entered an Order imposing a sentence of life without parole.

8. Pursuant to Rule 720 of the Pennsylvania Rules of Criminal Procedure, the Defendant requests post sentence relief and raises the following issues:

#### **Issues**

(1) The imposition of the sentence of life without parole on August 13, 2101 was in violation of the fundamental requirements that must be adhered to under Pennsylvania state law and the United States Constitution and as such was illegal and should be considered null and void.

(2) The sentence of life without parole for defendant following almost thirty years in solitary confinement on death row under an illegal and unconstitutionally-imposed death sentence violates due process, is inhumane and cruel and unusual punishment, inconsistent with America's evolving standards of decency and violates the Eighth Amendment of the United States Constitution and the analogous provisions of the Pennsylvania Constitutions.

(3) The sentence of life without parole is inhumane and cruel and unusual punishment, inconsistent with America's evolving standards of decency and violates the Eighth Amendment of the United States Constitution and the analogous provisions of the Pennsylvania Constitutions. It is also violative of similar provisions of international law as promulgated in the Convention Against Torture (CAT).

(4) The practice and policy of the Commonwealth isolating those under death sentences in solitary confinement is violative of the Eighth Amendment's proscriptions against cruel and unusual punishment, analogous provisions of the Pennsylvania Constitution and various international law conventions, among them the Convention Against Torture (CAT), as the same constitutes torture.

(5) The conditions noted at §(4), *supra*, are hereby referenced as if here restated fully, and as such, are violative of the official opinion of the Attorney General, Pennsylvania, and codified at 1971 Op. Atty. Gen. Pa. 1, applied, "provides no legal authority for holding prisoners" in such solitary conditions as aforesaid. *Id.*

9. This motion does not waive any issues of arguable merit of innocence or any governmental misconduct conducted in the underlying case.

10. Defendant reserves the right to file a brief in support of the instant Motion within sixty (60) days, more fully setting forth the issues as well as requests for discovery and an evidentiary hearing.

WHEREFORE, for the foregoing reasons, the Defendant requests post sentence relief and/or modification of sentence.

Respectfully submitted,

Dated: August , 2012

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MUMIA ABU-JAMAL, *pro se*  
Inmate #AM 8335  
SCI Mahanoy  
Frackville, PA