

June 13, 2017

Hon. Leon W. Tucker
Supervising Judge
Philadelphia Court of Common Pleas, Criminal Division
Juanita Kidd Stout Center for Criminal Justice, Suite 1201
1301 Filbert Street
Philadelphia, PA 19107

Re: *Commonwealth of Pennsylvania v. Mumia Abu-Jamal*, Nos. 1357-1359 (1981)

Dear Judge Tucker:

On April 28, 2017, this Court issued an Order granting the *Motion for Discovery* that Mumia Abu-Jamal filed in conjunction with the *Petition For Habeas Corpus Relief Pursuant to Article I, Section 14 of the Pennsylvania Constitution and Statutory Post-Conviction Relief Under 42 Pa.C.S. § 9542 et seq. and Consolidated Memorandum of Law* (PCRA Petition) that Mr. Abu-Jamal filed on August, 7, 2016. On May 30, 2017, the Commonwealth filed a letter, along with publicly filed pleadings bearing District Attorney Castille's name, in response to this Court's Discovery Order. With the instant letter, Mr. Abu-Jamal details his responses and objections to the Commonwealth's response to this Court's Discovery Order. Please accept this letter as Mr. Abu-Jamal's motion for more complete compliance with the Discovery Order.

Pre-April 24, 2017 Pleadings and April 24 Hearing

In his PCRA Petition, Mr. Abu-Jamal contends that the decision of the United States Supreme Court, in *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016), establishes that he is entitled to relief from the Pennsylvania Supreme Court's decisions in which Ronald Castille participated as a Justice. Specifically, Mr. Abu-Jamal claims that his right to due process of law was violated where Mr. Castille participated in the adjudication of the appeals of Mr. Abu-Jamal's PCRA denials because Mr. Castille had significant personal involvement in the prosecution of Mr. Abu-Jamal when he was the elected District Attorney for Philadelphia.

Public statements by Mr. Castille and other Philadelphia prosecutors demonstrate that Mr. Castille prioritized and had substantial, personal involvement in, high-profile capital cases, like Mr. Abu-Jamal's. As detailed in his PCRA Petition at 10-12, public documents show that when Mr. Castille served as the District Attorney, he took an active role in cases that involved the application of the death penalty, like the case of Mr. Abu-Jamal's. When he subsequently ran for office, Mr. Castille publicly took credit for obtaining the death penalty in high profile cases as District Attorney. See Martin Pflieger, *Ex-Philadelphia District Attorney Touts Crime-Fighting Record in Judgeship Bid*, THE MORNING CALL, Mar. 20, 1993, http://articles.mcall.com/1993-03-20/news/2896830_1_judges-district-attorney-death-row (quoting Mr. Castille's bragging that he had

prosecuted *some of the city's most notorious criminals* in recent years). *See also Williams*, 136 S.Ct. at 1907 (noting that in (then) Chief Justice Castille's election campaign he touted the fact that he "sent 45 people to death row."). Consistent with Mr. Castille's own statements, in 1994, former Assistant District Attorney, Mark E. Gottlieb, told the Philadelphia Inquirer that Mr. Castille was directly involved in high profile death penalty cases after being elected District Attorney. Emilie Lounsberry & Henry Goldman, *Castille Says He Won't Step Aside*, THE PHILADELPHIA INQUIRER, Jan. 25, 1994 at B1. This information clearly raises an inference of significant personal involvement in Mr. Abu-Jamal's case, particularly given that it is the highest profile case ever handled by the Philadelphia District Attorney's Office.

On March 20, 2017, the Commonwealth responded to Mr. Abu-Jamal's PCRA Petition by filing a *Motion to Dismiss*. On April 3, 2017, Mr. Abu-Jamal filed a *Reply to the Commonwealth's Motion to Dismiss His Petition For Habeas Corpus Relief Pursuant to Article I, Section 14 of the Pennsylvania Constitution and Statutory Post-Conviction Relief Under 42 Pa.C.S. § 9542 et seq. and Consolidated Memorandum of Law* (PCRA Reply).

This Court heard oral argument on April 24, 2017. At that time, counsel for Mr. Abu-Jamal explained the critical importance of discovery in this proceeding. Counsel emphasized the fact that Mr. Abu-Jamal's case was one of the most high profile capital cases ever handled by the Philadelphia District Attorney's Office and, as such, it is very likely that Mr. Castille, as the elected District Attorney, took a more active role in Mr. Abu-Jamal's case than he did in other, more routine, cases.¹ In addition, counsel reminded this Court that the Commonwealth repeatedly suppressed evidence of Mr. Castille's involvement in other capital cases, including the *Williams* case itself. *See* PCRA Reply at 5-8. Shortly thereafter, this Court determined that it had jurisdiction over Mr. Abu-Jamal's PCRA Petition and granted Mr. Abu-Jamal's request for discovery.

This Court's Discovery Order

This Court ordered the Commonwealth to disclose the following information regarding Mr. Castille's involvement, as a prosecutor, in the trial and post-trial proceedings in Mr. Abu-Jamal's case:

- (1) Any and all memoranda regarding pre-trial, trial, post-trial and direct appeal proceedings in Mr. Abu-Jamal's case;
- (2) Any and all notes or memoranda regarding any meetings between Mr. Castille and members of his staff regarding Mr. Abu-Jamal's case;
- (3) Any and all press releases and/or public statements by Mr. Castille and/or the District Attorney's Office regarding Mr. Abu-Jamal's case during and after Mr. Castille's tenure with the Office.

The Commonwealth's May 30th Response

In response to this Court's Discovery Order, the Commonwealth produced 54 documents which appear to come from its *Commonwealth v. Abu-Jamal* case file. Mr. Castille's name appears on each document, as the District Attorney of Philadelphia. Virtually every sheet of paper is part of the public record. Specifically, the Commonwealth disclosed:

- Mr. Abu-Jamal's handwritten *pro se* petition for a writ of certiorari.
- Cover pages to briefs filed by the Philadelphia District Attorney's Office in the Pennsylvania Supreme Court which include Mr. Castille's name in the signature block.

¹ In addition to having his name at the top of the signature block on each Commonwealth brief in the direct appeal of the case.

- Cover pages to briefs filed by the Philadelphia District Attorney's Office in the United States Supreme Court which include Mr. Castille's name in the signature block.
- Petitions to the Pennsylvania Supreme Court by the Philadelphia District Attorney's Office (for extensions of time to file, leave to file excess pages and a request for clarification as to whether a *pro se* brief would be considered) where Mr. Castille is designated as the movant.
- Letters on District Attorney's Office letterhead which bears Mr. Castille's name to the Pennsylvania Supreme Court and the United States Supreme Court.
- Letter from the Pennsylvania Supreme Court to Gov. Robert P. Casey, copying Mr. Castille.²

The Commonwealth did not turn over any memoranda, case notes, emails or letters,³ from any stage of the proceedings in Mr. Abu-Jamal's case. Nor did the Commonwealth disclose any press statements or public statements made by, approved by, reviewed by or authorized by Mr. Castille.

Mr. Abu-Jamal's Objections to the Commonwealth's Response to this Court's Discovery Order

This Court directed the Commonwealth to disclose all of the above-described categories of documents in the possession of the District Attorney's Office. In response, the Commonwealth appears to have produced only a fraction of the information covered by this Court's Order. Although no aspect of this Court's Order authorized the District Attorney's Office to limit its production to documents contained in the case file or documents that are already part of the public record, with one possible exception, every document produced by the Commonwealth in response to this Court's Discovery Order is already part of the record and public filings in this case. The Commonwealth has not produced a single memorandum, note page, or email to or from Mr. Castille regarding Mr. Abu Jamal's case. And although the Commonwealth has represented that all documents containing any reference to the District Attorney's Office as a whole have been produced, no press releases or media statements issued by Mr. Castille or the D.A.'s Office concerning Mr. Abu-Jamal's case have been disclosed, notwithstanding the fact that the Pennsylvania Supreme Court affirmed Mr. Abu-Jamal's conviction and death sentence on direct appeal and the United States Supreme Court denied Mr. Abu-Jamal's petition for a writ of certiorari during Mr. Castille's tenure as the elected District Attorney. Thus, it appears that the Commonwealth failed to comply with this Court's Discovery Order because it conducted an inappropriately constricted search for information.

Furthermore, the Commonwealth has offered absolutely no information about the measures it took to search for the additional types of documents identified by this Court. There is no listing of files that were examined. There is no information about whether and to what extent counsel for the Commonwealth reached out to any internal District Attorney's Office departments – such as the Office's Executive Division or the Communications Division – regarding the existence of files involving Mr. Castille and Mr. Abu-Jamal. And, the Commonwealth's letter does not mention a Privilege Log which might demonstrate that documents were identified, but not disclosed pursuant to a claim of privilege.

This Court's Order for Discovery was broad and the Commonwealth's compliance with it required a focused search for materials beyond that which is contained in the official District Attorney's Office case file. By its terms, the Discovery Order required the D.A.'s Office to reach out to various internal departments and personnel where notes, memoranda and press releases concerning this case were likely to be found. Mr. Abu-Jamal has alleged that Mr. Castille, as the District Attorney, played an oversight or consultant type role in

² A complete list of all documents disclosed by the Commonwealth is attached as Appendix.

³ The Commonwealth disclosed one letter from the Pennsylvania Supreme Court in which Mr. Castille was listed among those who were copied for service. No letters prepared by the Philadelphia District Attorney's Office were disclosed.

defending against the appeal of this high profile conviction. Therefore, the materials that are (a) most likely to exist, and (b) be probative and responsive to this Court's Order include:

- Documents revealing Mr. Castille's attendance at and/or participation in meetings relating to the Abu-Jamal case;
- Documents demonstrating Mr. Castille's receipt of and responses to memoranda containing updates or reports on Mr. Abu-Jamal's case;
- Documentation of conversations between Mr. Castille and any of the District Attorney's Office staff concerning the status of Mr. Abu-Jamal's case (perhaps in the context of other pending capital cases); and
- Documents memorializing Mr. Castille's participation in discussions concerning important legal issues involved in Mr. Abu-Jamal's appeals.

For example, the issue of racial discrimination in jury selection was particularly likely to have provoked significant, personal involvement in Mr. Abu-Jamal's case by Mr. Castille given that during Mr. Castille's tenure, the Supreme Court issued its decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), and racial discrimination in the prosecutor's exercise of peremptory challenges was a significant issue in Mr. Abu-Jamal's direct appeal. Moreover, it is now uncontroverted that the Philadelphia District Attorney's Office had produced a training video, now known as the "McMahon tape," that encouraged prosecutors to use peremptory challenges to exclude otherwise qualified Black prospective jurors from service in criminal cases.⁴ As detailed in Mr. Abu-Jamal's PCRA petition, Mr. Castille was a member of the Pennsylvania Supreme Court when, in 1998, that Court affirmed the denial of Mr. Abu-Jamal's first PCRA petition, which also included a *Batson* claim. Other issues likely to have drawn Mr. Castille into a personal involvement in Mr. Abu-Jamal's case sufficient to have been memorialized in a written fashion include allegations of racial bias in Philadelphia law enforcement and procedural issues in the penalty phase of capital trials.⁵

Logic dictates that the kind of documents and notes described above might well be held in files other than the main case file. Notes of this kind might be found in Mr. Castille's personal files or the separate files of appellate lawyers and/or Division Chiefs. This Court's Order requires Counsel for the Commonwealth to determine whether these additional files exist, to examine them for discoverable material and to report its findings to this Court. Likewise, the Discovery Order requires the Commonwealth to search the files and archives of its Communications Department for press releases and public statements that are not likely to be maintained in the official litigation file.

Mr. Abu-Jamal's Request for Full Enforcement of this Court's Discovery Order

Given the foregoing, it is reasonable to conclude that the Commonwealth is likely in possession of additional documentary evidence of Mr. Castille's personal involvement in Mr. Abu-Jamal's case. The Commonwealth has not produced this information, notwithstanding this Court's Order, nor does it appear that the Commonwealth has conducted the kind of diligent search for documents that is warranted by this Court's order. Mr. Abu-Jamal therefore respectfully requests the following:

⁴ Because of the statements made on "The McMahon Tape," several capital convictions were reversed on *Batson* grounds. See, e.g. *Wilson v. Beard*, 426 F.3d 653 (3d Cir. 2005)(setting forth specifics discussed in the McMahon tape and granting *habeas* relief notwithstanding that tape was produced years after Wilson's conviction); *Commonwealth v. Basemore*, 744 A.2d 717 (2000)(noting that the "practices described in the transcript [of the McMahon tape] support an inference of invidious discrimination.").

⁵ While Mr. Abu-Jamal's appeal was pending, the United States Supreme Court decided *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell* the Supreme Court vacated a death sentence where the prosecutor's summation implied that responsibility for imposing the death penalty rests with an appellate court, not the jury. Applying *Caldwell*, the Pennsylvania Supreme Court vacated a death sentence in *Commonwealth v. Baker*, 511 Pa. 1 (1986) where the same Assistant District Attorney who tried Mr. Abu-Jamal's case told the jury that that any death sentence would be reviewed in "appeal after appeal" Mr. Abu-Jamal's direct appeal raised a similar issue.

A. An Order directing the Commonwealth to search for relevant documentation from sources beyond the District Attorney's Office litigation case file including, but not limited to: individual files of Ronald Castille, Division Chiefs, appellate lawyers who worked on this case and from the Communications or Public Relations Divisions.

B. An Order directing the Commonwealth to list/index the details of their search for complying documents.

C. If after broadening its search for relevant material, the Commonwealth reports that no such material has been located, Mr. Abu-Jamal respectfully requests:

i. An Order for an in camera review by this Court, of all files potentially containing relevant documents; and

ii. An Order permitting Counsel for Mr. Abu-Jamal to take the deposition of Ronald Castille and appellate lawyers and Division Chiefs responsible for the appeals in this case.⁶

D. An Order requiring that any further response include a Verification signed by Counsel for the Commonwealth, that all assertions are true and correct.

E. The opportunity to file an amended PCRA petition within 15 days after the production of any and all materials disclosed through additional discovery.

Respectfully Submitted,

/s/ Christina Swarns

CHRISTINA SWARNS
Pennsylvania Attorney ID# 83616
NAACP Legal Defense & Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, New York 10006
Telephone: (212) 965-2200
E-mail: cswarns@naacpldf.org

JUDITH L. RITTER
Pennsylvania Attorney ID# 73429
Widener University Delaware Law School
P.O. Box 7474
4601 Concord Pike
Wilmington, Delaware 19801
Telephone: (302) 477-2121
Facsimile: (302) 477-2227
E-mail: JLRitter@widener.edu

Counsel for Mumia Abu-Jamal

⁶ This is necessary because personal involvement can be shown not only through documentary evidence but through the testimony of individuals about who was and who was not involved in Mr. Abu-Jamal's case.

APPENDIX

Commonwealth v. Mumia Abu-Jamal
Philadelphia Court of Common Pleas, Criminal Division
CP-51-CR0113571-1982
Discovery Documents: Former District Attorney Ronald Castille

Doc No.	Description of Document	Former District Attorney Ronald Castille's name appears in:
1	Brief for Appellee, <i>Commonwealth v. Abu-Jamal</i> , No. 51 (Pa. 1983)	Signature block, cover page
2	Appellee's Brief in Response to Defendant's <i>Pro Se</i> Brief in Addendum, <i>Commonwealth v. Abu-Jamal</i> , No. 51 (Pa.)	Signature block, cover page
3	Brief for Respondent in Opposition to Petition for Writ of Certiorari, <i>Abu-Jamal v. Pennsylvania</i> , No. 89-7430 (U.S. Oct. Term, 1989)	Signature block, cover page
4	Brief for Respondent in Opposition to Petition for Writ of Certiorari, <i>Smith v. Pennsylvania</i> , No. 89-6758 (U.S. Oct. Term 1989)	Signature block, cover page
5	Appellee's Brief in Response to Defendant's <i>Pro Se</i> Brief in Addendum, <i>Commonwealth v. Abu-Jamal</i> , No. 51 (Pa.)	Signature block, cover page
6	Letter from Marlene F. Lachman, Prothonotary, Pa., to Hon. Robert P. Casey, Gov. of Pa., re: Death Penalty, <i>Commonwealth v. Abu-Jamal</i> , No. 51, (Pa.) (Enclosing Supreme Court docket entries, Opinion and Judgment Order, and Trial Court Record), dated March 23, 1989	Carbon copy (CC)
7	Motion Made Pursuant to Supreme Court Rule 42 for Leave to File <i>Pro Se</i> Supplemental Petition for Writ of Certiorari to Petition for Writ of Certiorari as filed by Counsel of Record, <i>Abu-Jamal v. Pennsylvania</i> , No. 89-7430 (U.S.)	Certificate of Service

Doc No.	Description of Document	Former District Attorney Ronald Castille's name appears in:
8	Letter from Gaelle McLaughlin Barthold, Deputy District Attorney, to Joseph F. Spaniol, Jr., Clerk, U.S. Supreme Court, re: <i>Abu-Jamal v. Pennsylvania</i> , No. 89-7430 (U.S.) (Enclosing Respondent's Brief in Opposition to Petition for Writ of Certiorari), dated June 29, 1990	Letterhead
9	Letter from Ronald Eisenberg, Chief, Appeals Unit, to Marlene F. Lachman, Prothonotary, Supreme Court of Pennsylvania, re: <i>Commonwealth v. Abu-Jamal</i> , No. 51 (Pa.) (Responding to Defendant's Petition to Expand Page Limitations for the Filing of Appellant's brief), dated August 27, 1986	Letterhead
10	Petition to Expand Page Limitations for the Filing of Appellant's Brief in a Capital Case, <i>Commonwealth v. Abu-Jamal</i> , No. 51 (Pa. Aug. 15, 1986)	Certificate of Service
11	Letter from Marianne E. Cox, Assistant District Attorney, and Ronald Eisenberg, Chief, Appeals Unit, to Marlene F. Lachman, Prothonotary, Supreme Court of Pennsylvania, re: <i>Commonwealth v. Abu-Jamal</i> , No. 51 (Pa.) (Responding to Defendant's Petitions for Reargument), dated March 29, 1989	Letterhead
12	Letter from Gaelle McLaughlin Barthold, Deputy District Attorney, to Joseph F. Spaniol, Jr., Clerk, U.S. Supreme Court, re: <i>Abu-Jamal v. Pennsylvania</i> , No. 89-7430 (U.S.) (Requesting an Extension to File Opposition to Writ of Certiorari and entering Appearance), dated May 24, 1990	Letterhead
13	Petition for Extension of Time to File Brief for Appellee, <i>Commonwealth v. Abu-Jamal</i> , No. 51 (Pa.)	Petition, ¶ 1

Doc No.	Description of Document	Former District Attorney Ronald Castille's name appears in:
14	Petition for Extension of Time to File Brief for Appellee, <i>Commonwealth v. Abu-Jamal</i> , No. 51 (Pa. Nov. 13, 1986)	Petition, ¶ 1
15	Petition for Extension of Time to File Brief for Appellee, <i>Commonwealth v. Abu-Jamal</i> , No. 51 (Pa. Feb. 24, 1987)	Petition, ¶ 1
16	Petition for Leave to File a Brief for Appellee in Excess of the Page Limitations of Pa. R.A.P. 2135, <i>Commonwealth v. Abu-Jamal</i> , No. 51 (Pa. Feb. 24, 1987)	Petition, ¶ 1
17	Petition for Determination of Whether Court Will Consider Untimely <i>Pro Se</i> Brief Filed by a Counseled Defendant Without Permission, and If So, Petition for a Continuance of Oral Argument and for an Extension of Time in Which to File Responsive Brief, <i>Commonwealth v. Abu-Jamal</i> , No. 51 (Pa.)	Petition, ¶ 1
18	Petition for an Extension of Time in Which to File Response to Defendant's <i>Pro Se</i> Addendum Brief, <i>Commonwealth v. Abu-Jamal</i> , No. 51 (Pa. Nov. 16, 1987)	Petition, ¶ 1