No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY ALAN ROWE, Petitioner

VS.

SUPERINTENDENT ALBION SCI, et al., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gregory Alan Rowe
SCI-Albion, No. GN-3174
10745 Route 18
Albion, PA 16475-0002

QUESTIONS PRESENTED

I. Does a properly filed application for post-conviction DNA testing constitute "a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending," as to toll AEDPA's limitation period pursuant to 28 U.S.C. §2244(d)(2), a question the Circuit Courts of Appeals are divided on, which has deprived petitioners of their right to Federal Habeas Corpus review, an issue of first impression with this Court?

II. Did the Circuit Court of Appeals err in finding the District Court did not violate the Rules Governing 28 U.S.C. §2254 Federal Habeas Corpus proceedings when the Court impermissibly vacated its own Final Order that held Rowe's habeas petition timely filed, whereupon the Court then permitted Respondent to relitigate timeliness that was already finalized, thereby circumventing the concepts of finality, an issue of first with this Court?

III. Did the Circuit Court of Appeals violated Rowe's Due Process and Equal Protection rights when the Court held statutory and equitable tolling of AEDPA's limitation period did not apply to his habeas petition, and that the State Post-Conviction Court did not forfeit his right to Federal Habeas Corpus Review - without notice - as to create a miscarriage of justice where other Courts have granted such tolling?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Office of the District Attorney
Pike County, Pennsylvania
506 Broad Street
Milford, PA 18337
(Counsel for Respondent)

This Brief was prepared on a electronic Typewriter. Petitioner apologizes for any type of inconvenience this makes in the review of this Writ.

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APPENDIX A-11: Jenkins v. Supt. of Laurel Highlands, 705 F.3d 80 (3d Cir. 2013) AEDPA tolling.

TABLE OF AUTHORITIES CITED

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit appears at APPENDIX A to the petition's appendix in support and is unpublished at C.A. No. 17-1650.

The opinion of the United States District Court, Middle District of Pennsylvania appears at APPENDIX B, C, D, E, F, G, to the petition's appendix in support and is unpublished, at No. 3:13-cv-02444.

The opinion of the United States Court of Appeals for the Third Circuit appears at APPENDIX H to the petition's appendix in support and is unpublished at C.A. No. 17-1650.

The opinion of the highest state court to review the merits appears at APPENDIX J, L, to the petition's appendix in support and is unpublished at 397 MAL 2007 and 70 MAL 2011.

The opinion of the Superior Court of Pennsylvania appears at APPENDIX I, K, to the petition's appendix in support and is unpublished at 369 EDA 2006 and 116 EDA 2010.

II. JURISDICTION

The date on which the United States Court of Appeals decided my case was January 11, 2018. A timely petition for rehearing was denied by the United States Court of Appeals on February 22, 2018, and a copy of the order denying rehearing appears at APPENDIX H.

An extension of time to file the petition for a writ of certiorari was granted to and including July 20, 2018 on May 3, 2018 in Application No. 17A1209.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment. . ., nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law;. . ."

2. The Sixth Amendment of the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . ., be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

3. The Eight Amendment of the United States Constitution provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

4. The Fourteenth Amendment of the United States Constitution provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. . .No state shall make or enforce any law which shall abridge the privileges or immunities of citizens. . .; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Statutes and Rules involved are lengthy in their definitions and for that reason, they appear in the following manner which are appended to the Brief of Appendices in Support of Petition:

5. Title 28, United States Code, Section 2244 - Finality of determination - APPENDIX A-9.

6. Title 28, United States Code, Section 2254 - State Custody; remedy in federal court - APPENDIX A-10.

7. Title 42, Pennsylvania Consolidated Statute Annotated, Section 9543.1 - Post-Conviction DNA testing - APPENDIX A-8

8. Pennsylvania Rules of Criminal Procedure, Rule 120 - Attorney's Appearance and Withdrawals - APPENDIX W.

9. Pennsylvania Rules of Criminal Procedure, Rule 576 - Filing and Service by Parties - APPENDIX X.

10. Pennsylvania Rules of Criminal Procedure, Rule 902 - Content of Post-Conviction Petition APPENDIX Y.

11. Pennsylvania Rules of Criminal Procedure, Rule 903 - Docketing and Assignment - APPENDIX Z.

12. Pennsylvania Rules of Criminal Procedure, Rule 904 - Entry of Appearance and Appointment of Counsel - APPENDIX A-1.

13. Pennsylvania Rules of Criminal Procedure, Rule 905 - Amendment and Withdrawal of Post-Conviction Petition - APPENDIX A-2.

14. Pennsylvania Rules of Criminal Procedure, Rule 906 - Answer to Petition for Post-Conviction Relief - APPENDIX A-3.

15. Pennsylvania Rules of Criminal Procedure, Rule 907 - Disposition without Hearing - APPENDIX A-4.

16. Pennsylvania Rules of Criminal Procedure, Rule 908 - Hearing - APPENDIX A-5.

17. Pennsylvania Rules of Appellate Procedure, Rule 3304 - Hybrid Representation - APPENDIX A-6.

IV. STATEMENT OF THE CASE

On January 25, 2006 – in a Death Penalty seeking trial – Rowe was convicted before the Court of Common Pleas, Pike County, Pennsylvania of two (2) counts of First Degree Murder and two (2) counts of Third Degree Murder for the deaths of Kristin and Kaylee Fisher that occurred in 2004 when Rowe was 18 years of age [Double Jeopardy]; one (1) count of Endangering the Welfare of a Child; and one (1) count of Possession of an Instrument of Crime. On February 8, 2006, Rowe was sentenced to two (2) consecutive life sentences, followed by eighteen (18) months to ten (10) years of imprisonment.

The evidence utilized in convicting Rowe at trial was circumstantial. Physical evidence; DNA, trace and soil impressions were found at the crime scene, specifically; blood under the victim's fingernails and defensive wounds on her hands; a unknown cigarette-butt found next to the victim; tire tracks in mud near the victim's residence, and rope that was used as a ligature on the victim. None of the physical evidence linked Rowe to the crime. He had no scratches or bruises on his body, did not smoke and his vehicle's tires did not match the tire tread tracks at the crime scene, nor could Rowe's DNA be matched to that found on the rope.

Rowe was implicated in the crime due to (1) an alleged threat made by Rowe to the victim which the victim then allegedly told her friend Dawn Santos – a statement the Respondent admitted at trial was false and not offered for the truth but solely offered to establish motive – over objection; (2) a highly suggestive single photo line-up procedure that utilized Rowe's junior driver's license that contained all of his physical and personal information, with the words "Ex. Boy, Baby's Father" hand written accross the top of the enlarged picture, which placed Rowe in the area on the day of the crime in a hardware store asking about rope, as alleged by Respondent witness Eric Story. Story indicated this encounter lasted only a couple seconds and could recall nothing else about the day, no other customers, nothing. Store records were checked and it was found that no rope was purchased or stolen, nor did any of the rope in the store match that found at the crime scene. Story's statements and descriptions changed numerous times, at one point describing the persons hair and then stated the person had a hat down low over his eyes, that the person was in their 20's and had a scruffy beard. Rowe was only 16 years of age in the single photo line-up and just turned 18 when this crime occurred with no scruffy beard. Another store employee, Joanne Kellerman gave a statement that she worked the register counter on the same day and time as Story but

did not see anyone ask about rope, nor did she see Rowe. Kellerman's statement contradicted Respondent's key witness but was never called to testify; (3) the victim's Mother, Kathleen Fisher, alleged she spoke to Kristin on the morning of May 4, 2004, where Kristin stated Rowe was at the Fisher residence earlier, had tracked mud all over the house and his Honda Civic was stuck in mud down the road, that Rowe had left and everything was OK. The Respondent motioned the trial court to preclude the jury from hearing the second part of the conversation that indicated Rowe had left the residence and the victim's were OK, effectively leaving the jury to believe Rowe never left and was the last person to see the victims alive. The trial court denied the defense objection to include the second half of the conversation. No mud was found in residence, nor where there any foot prints in the muddy soil around the newly built Fisher residence. There was no trace soil samples in or under Rowe's vehicle that matched the crime scene; (4) Respondent witness, Frank Berry, alleged he seen a vehicle matching the license plate number of Rowe's vehicle in a muddy area near the victim's residence. The vehicle description Berry gave did not match Rowe's vehicle and he admitted that he intentionally destroyed his original notes that contained the information of a vehicle he seen earlier in the day, only after talking to police at the crime scene who he knew, where he then rewrote them which now contained Rowe's license plate number - information in the police vehicle registration database. Berry stated he saw a vehicle in "show-room condition" stuck in mud, that he walked around it and looked inside. Rowe's Honda Civic was just purchased from a salvage yard and had severe damage to the front bumper and hood, a smashed in driver's side front fender, different colored body panels and had less than three (3) inches of ground clearance making it impossible for a vehicle that low to have been parked where it was alleged to have been. Importantly, tire tread impressions were found but did not match Rowe's vehicle, nor were there any foot prints found where Berry alleged to have been; (5) Respondent witness, Rachel Shavelson, Rowe's then girlfriend, testified that Rowe had her look up how to tie a slip-know at the request of his Mother, Cheryl Kunkle. This request was also made to Kunkle's brother in-law, Skip Lick, prior to the crimes occurring but was never interviewed or called to testify. Cheryl Kunkle was arrested for tampering with evidence related to Rowe's case. While in custody she made numerous incriminating statements inculpating herself and other suspects in the commission of this crime. Such evidence was never investigated by trial counsel and counsel made an agreement with Respondent to exclude Cheryl Kunkle as an alternative suspect for the defense to present to the jury; and (6) inconclusive DNA results of the

rope found on the victim could not exclude or include Rowe as a minor contributor due the available DNA testing technology that was available at the time of trial. Three (3) DNA samples were found on the rope: one (1) female (victim), and two (2) unknown males.

Trial counsel, Gavin P. Holihan, believed Respondent failed to meet its burden of proof beyond a reasonable doubt so he chose to present evidence, witnesses or defense. Alternative theories and suspects were available, as well as exculpatory and character witnesses who were ready and willing to testify for the defense. Trial counsel did no investigation, even failing to visit the crime scene or investigate any of Respondent's witnesses, nor did he consult with any experts in forensics, trace analysis, Time of Death, DNA and tire tread impressions. Notably, during the course of trial numerous jurors were told by a local employee where they ate lunch, "I know you can't talk, but Hang Him" referring to convicting Rowe. Only two (2) of the jurors were individually polled and asked if they could still be fair. The remaining jurors who heard the statement were never polled and the jury remained tainted. Numerous other constitutional errors occurred during trial - which are briefly presented herein - that resulted in the trial being an unfair adversarial testing process. Even the conviction constitutes Double Jeopardy as Rowe was convicted of two (2) counts of First Degree Murder and two (2) counts of Third Degree Murder for the deaths of two (2) victims. [4 counts of murder].

On February 8, 2006, trial counsel filed an appeal to the Pennsylvania Superior Court at Commonwealth v. Rowe, 928 A.2d 1128 (Pa. Super. 2007) (unpub.), raising (1) trial court erred in admitting certain evidence and testimony: hearsay statements, inflammatory photo's of the victim's autopsy, inflammatory 911 audio recording, highly suggestive single photo line-up, computer printouts, demonstration evidence; (2) the evidence was insufficient to support the conviction, and (3) the verdict was against the weight of the evidence. The Superior Court found the trial court made several errors in favor of Respondent, specifically, the trial court erred in permitting the alleged threat (motive) testimony as it was inadmissible hearsay; erred when it excluded Kathleen Fisher's testimony that Rowe had left the Fisher residence, and erred in permitting the jury to hear the inflammatory 911 audio recording. Even though the Superior Court found numerous errors, the Court denied relief on April 9, 2007. (APPENDIX I). Trial counsel then sought allocatur with the Pennsylvania Supreme Court at Commonwealth v. Rowe, 940 A.2d 364 (Pa. 2007) (unpub.), presenting the same claims for review. The court denied relief on December 28,

2007. (APPENDIX J). No petition for a writ of certiorari was sought. Rowe's conviction became final on March 27, 2008, for purpose of AEDPA's tolling period.

On December 11, 2008, Rowe filed a timely pro se post-conviction petition pursuant to Pennsylvania's Post-Conviction Collateral Relief Act ["PCRA"], 42 Pa.C.S.A. §9541 et seq, requesting DNA testing and presenting numerous constitutional errors for review; ineffective assistance of counsel in failing to seek DNA testing of the blood found under the victim's fingernails, rope and cigarette-butt; failing to object to inadmissible evidence that placed Rowe's vehicle in the area of the crime scene; failure to consult with experts to review the incomplete Coroner's Report on Time of Death; failure to interview exculpatory witnesses who contradicted Eric Story's single photo line-up testimony; failure to present any defense, evidence and available witnesses. On January 4, 2009, Rowe filed a supplement to the PCRA to include speedy trial violations; fair and impartial jury violation; trial counsel's failure to present character witnesses; failure to present an alibi defense; failure to consult with expert witnesses in tire tread impressions; right to be confronted with witnesses violation, and cumulative errors claim.

The PCRA court appointed Oressa P. Campbell as PCRA counsel who filed a brief in opposition to Respondent's motion to dismiss on December 8, 2009. On April 30, 2009, PCRA counsel filed an amended PCRA presenting trial counsel failed to raise numerous evidentiary ruling on appeal; argue the cumulative effect of errors on appeal; introduce existing evidence that established Rowe's innocence; shift the focus of the case against other known suspects; request DNA testing; consult with medical experts; reasonably investigate the case prior to trial; call numerous exculpatory witnesses for the defense; and that Rowe was denied a fair trial, right to confrontation clause, right to compulsory process, effective assistance of counsel, and due process and equal protection of the law. On August 7, 2009, PCRA counsel filed a brief in support of PCRA relief. On October 6, 2009, an evidentiary hearing was held where PCRA counsel presented only one (1) of the five (5) available witnesses and failed to request DNA testing and litigate numerous claims of trial counsel's ineffectiveness that Rowe raised in his pro se PCRA.

On December 23, 2009, the PCRA court denied relief. On December 30, 2009, PCRA counsel filed an appeal with the Pennsylvania Superior Court, presenting the same claims for relief. PCRA counsel wrote Rowe a letter on January 19, 2010 (APPENDIX Q), indicating she is filing an appeal and for Rowe to file a second PCRA should counsel render ineffective assistance. On December 9, 2010, the Superior Court denied

relief at Commonwealth v. Rowe, 23 A.3d 574 (Pa. Super. 2010) (unpub.), (APPENDIX K). Rowe then wrote PCRA counsel several letters, (APPENDIX S, T, U), inquiring into the status of his appeal to the Pennsylvania Supreme Court. Not hearing from counsel, on December 6, 2010 - three (3) days before the thirty-day (30) period to appeal expired - Rowe filed a pro se petition for allocatur with the Supreme Court that was to be time-stamped and forwarded to PCRA counsel, per Pennsylvania law, as she was still counsel of record and never sought permission with withdraw from the case, (APPENDIX P, W, X, A-6). Erroneously, the Prothonotary of the Supreme Court docketed the pro se petition, failed to forward it to PCRA counsel and submitted it to the penal where it was denied on July 25, 2011 at Commonwealth v. Rowe, 24 A.3d 864 (Pa. 2011), (APPENDIX L). Rowe never heard from PCRA counsel after Superior Court review, and per Pennsylvania law, had to wait until first PCRA review had concluded in the Supreme Court before he could file his second PCRA petition.

On August 31, 2011, per PCRA counsel's instructions and under Pennsylvania law, Rowe filed his timely pro se second PCRA petition and a separate petition for post-conviction DNA testing of the blood found under the victim's fingernails, rope and cigarette-butt, pursuant to 42 Pa.C.S.A. §§ 9545(b)(1)(ii) and 9543.1, within sixty (60) days of first PCRA final review, pursuant to 9545(b)(2). (APPENDIX A-8). Both petitions were docketed separately. (APPENDIX A-7).

Rowe plead that PCRA counsel was ineffective for failing to present numerous errors of trial counsel ineffectiveness on first PCRA review, request DNA testing, inform him of his appellate rights to federal habeas review, and abandoned him during first PCRA review in the Supreme Court. Additionally, Rowe plead a prima facie case of his innocence in order to obtain DNA testing, per Pennsylvania law. On September 8, 2011, the PCRA court gave a directive to Rowe that his petitions were timely filed pursuant to the Rules that govern PCRA proceedings in Pennsylvania, (APPENDIX V, Y, Z, A-1 to A-5), and the attorney abandonment exception announced in Commonwealth v. Bennett, 930 A.2d 1264 (2007), where the court ordered an evidentiary hearing for October 26, 2011, which was continued twice. On September 19, 2011, Rowe filed an objection to Respondent's request for a continuance and requested the court to appoint counsel, per Pennsylvania law, to represent Rowe during the hearing. The Court refused to appoint counsel. On October 7, 2011, Respondent requested the court to dismiss both petitions and to advise Rowe of his appellate rights. The court denied Respondent's request and continued with the proceedings. On October

28, 2011, an evidentiary hearing was held, where without the assistance of counsel, Rowe litigated his request for DNA testing, his actual innocence and his claims of PCRA counsel's ineffectiveness. On November 28, 2011, Rowe filed an application for transcripts of the evidentiary hearing. On January 9, 2012, the court denied relief after reviewing the conviction and facts of the case, finding Rowe failed to establish a prima facie case of innocence in order to obtain DNA testing and that the claims in the second PCRA were previously litigated. (APPENDIX M). A timely pro se appeal was filed with the Pennsylvania Superior Court at 623 EDA 2012, presenting the same claims for relief. The Court denied relief on January 9, 2012. (APPENDIX N). A timely petition for allocatur was sought with the Pennsylvania Supreme Court at 543 MAL 2013, presenting the same claims for review. The Court denied relief on December 3, 2013. (APPENDIX O).

When the Supreme Court denied allocatur, Rowe still had seventy-two (72) days remaining on AEDPA's limitation period. At no point did any of the state courts or Respondent ever assert or dismiss Rowe's second PCRA petition as untimely filed, where under Pennsylvania law, they are required to do so if a petition is untimely as the state courts would lack jurisdiction to entertain such an improperly filed petition since Pennsylvania's post-conviction limitation period is jurisdictional in nature and subject to due process protection.

On September 17, 2013, Rowe filed his pro se petition for a writ of habeas corpus with the United States District Court, Middle District of Pennsylvania, pursuant to 28 U.S.C. §2254, and a petition for stay and abeyance pending final review of his second PCRA petition by the Supreme Court, at Gregory Alan Rowe v. Supt. Nancy Giroux, et al., 3:13-cv-02224. On December 20, 2013, the Court entered a Rule to Show Cause order, directing Respondent to respond only to Rowe's motion for stay and abeyance, and to address any argument to the timeliness of his habeas petition. This was Respondent's first time to address the timeliness, which it did in its response, asserting Rowe's second PCRA and habeas petitions were untimely filed. Rowe filed his response, asserting both petitions were timely and properly filed. At no point did Rowe consent to a Magistrate handling his habeas petition pursuant to 28 U.S.C. §636(c).

On August 10, 2015, the Magistrate entered a Report and Recommendation ["R&R"], recommending Rowe's habeas petition be dismissed as untimely. The Magistrate held Rowe's first PCRA petition was timely filed and tolled AEDPA's limitation period, but that the second PCRA petition was that solely that of a motion

for post-conviction DNA testing and that such a post-conviction petition did not toll AEDPA's limitation period, noting this was an issue of "first impression with the Court" and the Courts have been split on this issue. However, in the R&R-I the Magistrate contradicts her own analysis when she states "On August 31, 2011, Rowe filed a second PCRA petition reiterating earlier ineffective assistance of counsel claims to a motion requesting post-conviction DNA testing," and "The Superior Court reasoned that the motion for post-conviction DNA testing included a second PCRA petition." (APPENDIX G, pg. 2-5). Rowe objected, asserting his second PCRA petition and petition for post-conviction DNA testing was properly filed, was never dismissed as untimely, thus, tolled AEDPA's limitation period when they were on state review.

On October 14, 2015, the District Court rejected the Magistrate's R&R-I and remanded the matter back for adjudication of the merits, that timeliness was fully litigated and finalized. (APPENDIX F). In the Court's Order/Memorandum, the Court held: (1) the second PCRA should have been construed as a second PCRA petition, rather than solely a motion for DNA testing; (2) the second PCRA petition was timely filed, as well as the habeas petition; and (3) the habeas petition is ordered to proceed on the merits. This constituted a final order on timeliness and indicated the habeas petition moved past Habeas Rule 5, the Answer and Reply.

More so, the District Court also held the issue of whether a petition for post-conviction DNA testing tolled AEDPA's limitation period "is an issue of first impression with this Circuit." (APPENDIX F, pg. 6). The Court held such a petition for post-conviction DNA testing did not toll AEDPA's limitation period but recognized other Circuit Courts have.

On October 26, 2015, the Magistrate issued an order that stated "In light of the District Court's finding that the petition cannot be fully disposed of on the asserted threshold issue of timeliness, the parties shall be directed to brief the merits of Petitioner's claims." (APPENDIX E, pg.2). Respondent was ordered to only brief the merits within twenty (21) days.

In response to the October 14, and 26, 2015 orders, the Respondent and Rowe filed their replies. Unlawfully, Respondent relitigated timeliness once more, for the third time. On June 1, 2016, the Magistrate issued a second R&R ["R&R-II"] (APPENDIX D), also relitigating the same timeliness argument it asserted in the R&R-I, claiming Rowe's habeas petition was untimely instead of addressing the merits as ordered by the Court.

This relitigation tactic by Respondent and the Magistrate circumvented the Court's October 14, 2015 order on timeliness. The only recourse Respondent had was to motion for reconsideration of the October 14, 2015 order with the Court or file an appeal with the Third Circuit Court of Appeals as it was a final appealable order. The October 14, 2015 order did not remand the matter back to the parties to address timeliness again or to conduct further consideration on the matter. To the contrary, timeliness was fully briefed and lititaged which is why the Court ordered the parties to address the merits. Nevertheless, Rowe filed his objections to the Magistrate's R&R-II, addressing both timeliness and the merits.

Astonishingly, on August 23, 2016, the District Court reversed its October 14, 2015 order, adopted the Magistrate's R&R-II, denied a Certificate of Appealability ["COA"], and dismissed the habeas petition as untimely filed. (APPENDIX C). The District Court's reasoning for reversing is October 14, 2015 order was that the Court was "not fully briefed and had an inadequate record" when it rendered its previous order. This assertion by the Court is fraud upon the Court and unsupported by the habeas record.

In the October 14, 2015 order/memorandum the Court states he "has all the relevant parts of the state record," and has taken judicial notice of the available dockets," that Respondent and Rowe addressed the issue of timeliness and filed the required documents in their response to the Court's December 20, 2013 Show Cause order on timeliness. In fact, Respondent sent the entire procedural record, as did Rowe. There was no new evidence, facts, or law to reconsider after the Court held the second PCRA and habeas petition timely filed. In effect, the District Court gave Respondent an unauthorized "second bite at the apple" to relitigate an issue that was final and binding throughout the proceeding, thereby circumventing the appellate process.

Essentially, in order for the District Court to have issued its October 14, 2015 order it had to have been "fully briefed" and had the "adequate records" or it would have been issuing an order the Court knew to have been made while it was uninformed. Such an action is most troubling either way its viewed and violated Rowe's right to due process.

Furthermore, the District Court held that statutory and equitable tolling of AEDPA's limitation period did not apply during the time Rowe's second PCRA and post-conviction DNA testing petitions were on state review, though had they, the habeas petition would be timely filed. However, the Court did acknowledge the PCRA court committed errors in the handling of the petitions and improperly commingled them together

and is the reason why there was confusion as to the timeliness of the second PCRA petition. The Court did find Rowe was diligent in pursuing his constitutional rights, but that none of the extraordinary circumstances Rowe presented warranted equitable tolling.

On September 1, 2016, Rowe filed for reconsideration, asserting statutory and equitable tolling was warranted and the Court failed to consider that under Pennsylvania law the PCRA court was required to dismiss the second PCRA petition if it was untimely; that Rowe received directives the second PCRA petition was timely filed; the PCRA court denied Respondent's motion to dismiss; the PCRA court refused to appoint counsel and provide Rowe transcripts of the PCRA hearing; Rowe had to exhaust the claims of PCRA counsel's ineffectiveness in failing to present trial counsel ineffectiveness; that PCRA counsel abandoned Rowe which is an exception to the PCRA's limitation period (APPENDIX V): and Pennsylvania law is still unsure how to enforce the enforceable right to PCRA counsel. On March 1, 2017, the Court denied relief, giving no proper reconsideration and misapplied the facts to the law and law to the facts.

On March 20, 2017, Rowe filed a COA with the Third Circuit Court of Appeals, asserting the District Court abused its discretion and committed plain error when it vacated its own final order and denied Rowe a fair habeas review proceeding when it held statutory and equitable tolling of AEDPA's limitation period did not apply to his habeas petition. On January 11, 2018, the Court of Appeals denied relief "for substantially the reasons provided by the District Court." (APPENDIX A). On January 21, 2018, Rowe filed for rehearing, asserting the Court's decision was in conflict with the decisions of this Court, the Courts of Appeals and the District Courts. On January 22, 2018, the Court of Appeals denied rehearing. (APPENDIX H). On April 21, 2018, Rowe filed a motion to extend the time to file this writ of certiorari which was granted by the Honorable Justice Alito.

It is evident this case has a tortured procedural history and that the below State and Federal Courts committed egregious errors in the handling of it when Rowe sought review of his constitutional claims. Rowe prays this Honorable Court will grant certiorari review and give clarification to the questions presented herein, especially whether a petition for post-conviction DNA testing tolls AEDPA's limitation period pursuant to 28 U.S.C. §2244(d)(2), a question the Circuit Courts are split on which has worked to deny petitioners' their right to Federal Habeas Corpus relief.

V. REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS ERRED IN DETERMINING A PROPERLY FILED PETITION FOR POST-CONVICTION DNA TESTING DOES NOT CONSTITUTE A PROPERLY FILED APPLICATION FOR STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW WITH RESPECT TO THE PERTINENT JUDGMENT OR CLAIM IS PENDING, PURSUANT TO 28 U.S.C. §2244(d)(2), AS TO TOLL AEDPA'S LIMITATION PERIOD.

On August 31, 2011, Rowe filed his second PCRA petition and a separate petition for post-conviction DNA testing that was not available at trial, pursuant to Pennsylvania's Post-Conviction Collateral Relief Act ["PCRA"], 42 Pa.C.S.A. §§ 9545(b)(1)(ii) and 9543.1 (APPENDIX A-8), within 60 days of first PCRA final review, pursuant to 9545(b)(2). On September 8, 2011, the PCRA court held both petitions timely filed pursuant to Pennsylvania's Rules of Criminal Procedure that govern PCRA proceedings, (APPENDIX V to Z; A-1 to A-5), and ordered an evidentiary hearing. On October 28, 2011, the hearing was held and without the assistance of counsel, Rowe litigated his request for post-conviction DNA testing where he plead that the conviction rested solely on circumstantial evidence - most of which was held inadmissible on direct review - and the DNA evidence sought to be tested would establish his innocence in light of what was presented at trial. Rowe also litigated claims of PCRA counsel's ineffectiveness.

Respondent's witnesses testified the victim, Kristin, had defensive wounds on her hands from defending herself and that blood was found under her fingernails which was never tested by a DNA lab, and Rowe had no scratches or bruises on his person; the rope utilized as a weapon found on the victim, Kristin, contained two male DNA profiles but the available testing procedures used in 2004 were inadequate to reach a conclusion on the minor types which could not include or exclude Rowe as a contributor; and the cigarette found next to the victim, Kristin, was never tested by a DNA lab, and the victim's Mother testified at trial the cigarette-butt did not belong to her and had no idea where it came from, nor did Rowe smoke.

Rowe requested to have all three items tested using modern DNA testing procedures that became available in 2007 called "Mini STR" by Applied Biosystems utilizing their "Amp FISTR Mini Filer Kit" which can find definitive results on small trace samples of DNA, degraded DNA or samples containing multiple contributors. This technology was not available during the time period of Rowe's trial.

After reviewing the evidence presented at trial, the complete case file, and Rowe's filings and argument during the evidentiary hearing, the PCRA court denied Rowe's second PCRA petition and the request

for post-conviction DNA testing on January 9, 2012. (APPENDIX M). Rowe then filed a timely pro se appeal to the Pennsylvania Superior Court, presenting the same claims for relief which was denied on June 20, 2013. (APPENDIX N). Rowe then sought allocatur with the Pennsylvania Supreme Court which denied relief on December 3, 2013. (APPENDIX O).

The petition for petition for post-conviction DNA testing constituted "a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment" as to toll AEDPA's limitation period pursuant to 28 U.S.C. §2244(d)(2), of which Rowe had 72 days remaining on to file his habeas petition.

While Rowe's petition for allocatur was pending in the Pennsylvania Supreme Court, he filed his timely pro se habeas petition and stay and abeyance on September 7, 2013, with the United States District Court of Pennsylvania. On August 10, 2015, the Magistrate issued her first Report and Recommendation [R&R-I"] (APPENDIX G), asserting the habeas petition was not timely filed and the petition for post-conviction DNA testing did not toll AEDPA's limitation period. The Magistrate stated:

> "Accordingly, the timeliness of the petition turns to whether Rowe's motion requesting post-conviction DNA testing in state court also tolled the statute of limitations from September 6, 2011, the date this motion was filed in state court, through December 3, 2013, the date the Supreme Court of Pennsylvania denied allocatur. . .The issue of whether a post-conviction request for DNA testing constitutes a 'properly filed application for. . .other collateral review' under §2244(d)(2) is apparently an issue of first impression in this circuit. . .Rowe contends this motion qualifies as an application for collateral review within the meaning of §2244(d)(2), and as such his §2254 petition is timely filed." (Id. APPENDIX G, pg. 5).

At the same time the Magistrate stated the petition for post-conviction DNA testing was not considered a form of post-conviction or other collateral review, the Magistrate stated "Pennsylvania state courts have recognized. . .a motion for post-conviction DNA testing is considered a post-conviction petition under the PCRA." See Commonwealth v. Williams, 409 A.2d 383, 384 n.1 (Pa. Super. 2006). (Id. APPENDIX G, pg. 6).

On October 14, 2015, the District Court rejected the Magistrate's R&R-I, finding Rowe's petition for post-conviction DNA testing did not constitute a "properly filed application for. . .other collateral review" under §2244(d)(2), an issue of first impression in the Circuit, but that Rowe's habeas petition was timely filed due to his second PCRA petition tolling AEDPA's limitation period. (APPENDIX E). The Court cited three Circuit Courts that have confronted this issue who came to the conclusion that post-

conviction DNA petitions do not toll AEDPA's limitation period, but also cited to other Circuit Courts that have reached an opposite conclusion that they do toll. On August 23, 2016, the Court reversed its October 14, 2015 final order on timeliness after it permitted Respondent to relitigate an issue the Court previously rejected, as presented in QUESTION II herein. (APPENDIX C). The Court noted that had Rowe's petition for post-conviction DNA testing constituted an "application for state post-conviction or other collateral review," his habeas petition would be timely filed. On January 11, 2018, the Court of Appeals denied a COA for substantially the same reasons provided by the District Court;" that Rowe's "habeas petition is untimely. . ." (APPENDIX A).

The Third Circuit Court of Appeals has yet to reach a consensus on this matter and has left the District Courts in Pennsylvania, New Jersey and Delaware, as well as The Virgin Islands, to navigate this unsettled question of law. Even within the Third Circuit, the District Courts have reached a different consensus in each state which has lead to more confusion and created concerns of due process and equal protection violations.

In Pennsylvania the District Courts have both held a petition for post-conviction DNA testing does and does not toll AEDPA's limitation period. Here the District Court held it did not but in Santiago v. DiGuglielmo, et al., 2010 U.S. Dist. LEXIS 100773 (E.D. Pa. Aug. 18, 2010) the Court held a post-conviction DNA testing petition did toll. In New Jersey and Delaware the District Courts have held that such a petition tolls. In McGee v. Johnson, 2018 U.S. Dist. LEXIS 12995 (N.J. Jan. 26, 2018) and Wolf v. Carroll, 2005 U.S. Dist. LEXIS 22605 (Del. Oct. 5, 2005) both Courts held petitions for post-conviction DNA testing constitutes a "properly filed application for state post-conviction or other collateral review" under §2244(d)(2). Remarkably, New Jersey's post-conviction DNA statute, N.J.R.S. 2A:84A-32a(d) mirrors Pennsylvania's 42 Pa.C.S.A. §9543.1 (APPENDIX A-8). where the same prerequisites must be met in order to obtain DNA testing. [Unable to obtain Delaware's and The Virgin Islands' post-conviction DNA statute].

Pennsylvania provides a comprehensive system of collateral attack through its Post-Conviction Collateral Relief Act, 42 Pa.C.S.A. §9541 et seq., which provides for an "action by which persons convicted of crimes they did not commit and serving illegal sentences may obtain collateral relief." §9542. A PCRA petition is the only means for obtaining collateral relief and encompasses all other common law and

statutory remedies, including habeas corpus. In November of 1995, the Legislature amended the PCRA to include time limits, special petition requirements when an evidentiary hearing is requested, and a requirement that no PCRA petition may be dismissed due to delay in filing except upon a motion to dismiss and after a hearing. If a claim does not challenge the propriety of a petitioner's conviction or sentence, the appellate court will not consider the petition. See **Commonwealth v. O'Brian**, 811 A.2d 1068 (Pa. Super. 2002).

In 2001, the Legislature enacted §9543.1, where Senator Greenleaf stated convicted defendants "would be allowed to have [DNA testing] if the evidence would prove their innocence. . ." Id. Legislative Journal, Sentate, June 19, 2001, Session 2001, 185th of the General Assembly, p. 475. The Legislature placed §9543.1 within the statutory framework of the PCRA. In **Commonwealth v. Scarborough**, 2013 Pa. LEXIS 505 (Pa. 2013), the Pennsylvania Supreme Court stated:

> "The sole claim which a convicted individual may make in a motion filed pursuant to §9543.1, is that he of she is entitled to DNA testing of evidence 'related to the investigation or prosecution that resulted in the judgment of conviction. [9543.1 (a)(1)]'"

In order to obtain post-conviction DNA testing under §9543.1(c), the petition must:

> "Assert the applicant's actual innocence of the offense for which the applicant was convicted; present a prima facie case demonstrating that the: identity of the participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction and sentencing; and DNA testing of the specific evidence, assuming exculpatory results, would establish; the applicant's actual innocence of the offense for which the applicant was convicted:"

Additionally, §9543.1(d)(1) states:

> "Except as provided in paragraph (2), the Court shall order the testing requested in a motion under subsection (a) under reasonable conditions designed to preserve the integrity of the evidence and the testing process upon a determination, after review of the applicant's trial that the: requirements of subsection (c) have been met; evidence to be tested has been subject to a chain of custody. . .; and motion is made in a timely manner and for the purpose of demonstrating the applicant's actual innocence. . ."

Furthermore, §9543.1(d)(2) states:

> "The Court shall not order the testing requested in a motion under subsection (c) if after review of the record of the applicant's trial, the Court determines that there is no reasonable possibility that the testing would produce exculpatory evidence that: would establish the applicant's actual innocence of the offense for which the applicant was convicted."

In **Commonwealth v. Heilman**, 867 A.2d 542 (Pa. Super. 2005) the Pennsylvania Superior Court

stated:

> ". . .on its face, the prima facie requirement set forth in §9543.1(c)(3) and reinforced in §9543.1(d)(2) requires an appellant to demonstrate that favorable results of the requested DNA testing 'would establish' the applicant's actual innocence of the crime of conviction. . ."

When reviewing a petition for post-conviction DNA testing, the PCRA court is required to order a hearing when the petition raises material issues of fact, here being the facts and conviction under review to determine whether DNA testing should be granted. Pa.R.Crim.P. 908. (APPENDIX A-5).

New Jersey's statute for post-conviction DNA testing, N.J.R.S. 2A:84A-32a(d) states a Court shall:

> ". . .not grant the motion for DNA testing unless, after conducting a hearing. . . certain prima facie showings are made. Those showings include that the evidence to be tested is available and in a condition that would permit the DNA testing that is requested in the motion; the identity of the defendant was a significant issue in the case; and the evidence sought to be tested is material to the issue of the eligible person's identity as the offender." Id. N.J.R.S. 2A:84A-32a(d)(1)(3)(4).

It is apparent District Court's in Pennsylvania, New Jersey, Delaware and The Virgin Islands have reached two different conclusions on the same question even though each state's [PA-NJ] prerequisites for obtaining DNA testing are the same or similar. This is a conflict within the Third Circuit Court of Appeals which has created a due process and equal protection concern when one group of petitioners are permitted to toll AEDPA's limitation period when they seek post-conviction DNA testing [NJ-DE] and another group of petitioners are denied the same tolling protection who sought the same relief [PA].

In the same context, numerous District and Circuit Courts have also been split of the issue of whether a petition for post-conviction DNA testing tolls AEDPA's limitation period pursuant to §2244(d)(2) and has lead to confusion which has substantially affected petitioners' right to federal habeas review. The uncertainty of this issue is of grave concern in each state for every petitioner who seeks DNA testing in his or her case to establish their innocence, especially in light that DNA is playing an ever more important role in criminal and civil cases.

From the minimal research Rowe was able to do, District and Circuit Courts in the First, Second, Fourth, Fifth, Sixth, Eight and Ninth Circuits have held a petition for post-conviction DNA testing constitutes a "petition for post-conviction or other collateral relief" pursuant to §2244(d)(2). See e.g.:

> D'Amario v. Sturdy, 2015 U.S. Dist. LEXIS 165700 (1st Cir. Dec. 2015); McDonald v. Smith, 2003 U.S. Dist. LEXIS 16929, 2003 WL 22284131, at *5 (2nd Cir. E.D.N.Y. Aug. 21, 2002); Ross v. Ball, 2013 U.S. Dist. LEXIS 26725 (4th Cir. Feb. 27, 2013); Huston v.

Quarterman, 508 F.3d 236 (5th Cir. 2007); Grimes v. Davis, 2018 U.S. Dist. LEXIS 37995 (5th Cir. March 8, 2018); Elliot v. Dewitt, 10 Fed. Appx. 311; 2001 U.S. App. LEXIS 9390 (6th Cir. May 8, 2001); Graham v. Norris, 2007 U.S. Dist. LEXIS 12451 (8th Cir. E.D.Ark. Jan. 12, 2007); Moore v. Schuetzle, 2008 U.S. Dist. LEXIS 99306 (8th Cir. D.N.D. Oct. 29, 2008); Munoz v. Hubbard, 2012 U.S Dist. 67248 (9th Cir. S.D.Cal. May 14, 2012).

In the Eleventh Circuit there is confusion where the Court of Appeals in Brown v. Sec. for the Dep't of Corr., 530 F.3d 1335 (11th Cir. 2008) held a petition for post-conviction DNA testing did not toll AEDPA's limitation period, then 10 years later a District Court held it does in Hunnicutt v. Sec. Dep't of Corr., 2018 U.S. Dist. LEXIS 37408 (11th Cir. March 7, 2018).

The Seventh Circuit in Price v. Pierce, 617 F.3d 947, 952 (7th Cir. 2010) held that Illinois post-conviction DNA testing statute - ILCS 5/116-3 - did not toll AEDPA's limitation period because the statute did not lead to a Court's determination of the defendant's innocence and does not review the facts presented at trial. Similar, in Woodward v. Cline, 693 F.3d 1289, 1293-94 (10th Cir 2012) the Court held applicant's request for DNA testing under Kansas law "did not call for judicial re-examination of the judgment imposing" his sentence. Meaning, it contained no requirement that the facts presented at trial be reviewed in the process of determining whether the Court should grant or deny DNA testing.

Due to Rowe's limited access to prison law library [1½ hour, once per week] he was unable to review every states holding on whether post-conviction DNA testing tolls AEDPA's limitation period. Nevertheless, the majority of District and Circuit Courts have held that a post-conviction DNA testing constitutes a "properly filed application for state post-convictionor other collateral review" pursuant to §2244(d)(2) under the same or similar prerequisites as Pennsylvania and New Jersey. Unfortunately, the minority has been denied the same tolling protection of §2244(d)(2) due to misunderstanding what constitutes a form of "post-conviction or other collateral relief".

In Wall v. Kholi, 562 U.S. 545 (2011) this Court held the following in pertinent part:

> "'Collateral review' of a judgment or claims means a judicial re-examination of a judgment or claim in a proceeding outside of the direct review process. Just because the phrase 'collateral review' encompasses proceedings that challenge the lawfulness of a prior judgment, it does not follow that other proceedings may not also be described as invoking 'collateral review'. It is certainly true that a purpose - and perhaps the chief purpose of tolling under §2244(d)(2) is to permit the exhaustion of state remedies . . .but that is not §2244(d)(2)'s only role. The tolling provision provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts. Tolling the limitation period for all 'collateral review' motions

provides both litigants and states with an opportunity to resolve objections at the state level, potentially obviating the need for a litigant to resort to federal court. If for example, a litigant obtains relief on state law grounds there may be no need for federal habeas. . .this furthers the principles of comity, finality and federalism." Id. Internal quotations omitted..

Moreover, the Wall Court went on to hold:

". . .the methods for filing for post-conviction or collateral review vary among the states. . .[given the states] different forms of collateral review, the application of AEDPA's tolling provision should not turn on such formalities. Congress may have refrained from exclusive reliance on the term 'post-conviction' so as to leave do doubt that the tolling provision applies to all types of state collateral review after a conviction. . .'Collateral review" to its ordinary meaning: It refers to judicial review that occurs outside the direct review process." Id. Internal quotations omitted.

In Duncan v. Walker, 533 U.S. 167, 178 (2001) this Court held the following in pertinent part:

"'State post-conviction review' means all collateral review of a conviction provided by a state. . .Congress also may have employed the construction 'post-conviction or other collateral' in recognition of the diverse terminology that different states employ to represent the different forms of collateral review that are available after a conviction. In some jurisdictions, the term 'post-conviction' may denote a particular procedure for review of a conviction that is distinct from other forms of what is considered to be post-conviction review." Id. Internal quotations omitted.

Moreover, the Duncan Court went on to hold:

"The tolling provision of §2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period. Section 2244(d)(2) promotes the exhaustion of state remedies by protecting a state prisoner's ability to later apply for federal habeas relief while state remedies are being pursued."

"By tolling the limitation period for the pursuit of state remedies and not during the pendency of application for federal review, §2244(d)(2) provides a powerful incentive for litigatns to exhaust all available state remedies before proceedings in the federal courts. . .AEDPA's clear purpose is to encourage litigants to pursue claims in the state court prior to seeking federal collateral review. Section 2244(d)(1) limitation period and §2244(d)(2)'s tolling provision, together with §2254(b)'s exhaustion requirement, encourage litigants first to exhaust all state remedies and then to file their federal habeas petitions. . ." Id. Internal quotations omitted.

Under the above guidance of this Court in Wall and Duncan, a petition for post-conviction DNA testing in Pennsylvania and in similar situated states constitutes an "application for state post-conviction or other collateral review: which requires the tolling of AEDPA's limitation period. Pennsylvania's post-conviction DNA statute, §9543.1 (APPENDIX A-8) is incorporated within the state's Post-Conviction Collateral Relief Act, 42 Pa.C.S.A. §9541 et seq., the only form of post-conviction relief available outside the direct review process.

More so, in order to obtain post-conviction DNA testing in Pennsylvania the applicant must file

the petition in a timely manner, assert his actual innocence, make a prima facie case in how DNA testing will establish his innocence of the crimes convicted of; and how the DNA would change the outcome of the trial, among other prerequisites. In order for the Court to grant such DNA testing, the Court must "review the record of the applicant's trial." §9543.1(d)(1). The Legislature was clear in this requirement of judicial re-examination" of the conviction that the Legislature stated the Court "must review the record" twice. §9543(d)(2).

In Wade v. Monroe County D.A., 2017 U.S. Dist. LEXIS 164006 (M.D.PA. Sept. 29, 2017) the Court noted:

> "In affirming the trial court decision, the Superior Court found that, in light of the evidence presented at trial, even assuming DNA testing would reveal DNA from someone other than [Wade] or the victim on the multiple items [Wade] seeks to have tested, [Wade] does not demonstrate it is more likely than not that no reasonable juror confronted with the DNA and other evidence would find [Wade] guilty beyond a reasonable doubt." Id. Wade, 2013 Pa. Super. Unpub. LEXIS 4310, 2013 WL 11273719, at *3.

Here, this requirement of judicial re-examination of the conviction is present in the PCRA court's denial of Rowe's petition for post-conviction DNA testing (APPENDIX M, p. 2-4) where the court stated:

> "Further, §9543.1 requires that the applicant not only assert his innocence, but also present a prima facie case demonstrating that the DNA testing on the specific evidence, assuming exculpatory results, would establish the applicant's actual innocence of the offense for which applicant was convicted. 42 Pa.C.S.A. §9543.1(c)(3)(ii)(A)."
>
> "Further, §9543.1 provides that the court shall not order DNA testing is after review of the record of applicant's trial, the court determines that there is no reasonable possibility the testing would establish the applicant's actual innocence of the offense for which the applicant was convicted. 42 Pa.C.S.A. §9543.1(d)(2)(i)." Id.

Moreover, the PCRA court went on to hold:

> "Further, the undersigned Judge was trial judge and PCRA [first/second] Judge in this matter and is fully familiar with the record in this case. Following a review of that record, this Court is convinced that no reasonable probability exist that a DNA test of the victim's fingernail's would establish the defendant's innocence." Id.

Additionally, when Rowe appealed the PCRA court's denial of post-conviction DNA testing to the Pennsylvania Superior Court requirement of "judicial re-examination" of the conviction is present in the Court's denial of relief (APPENDIX N, p. 10-11) where the Court stated:

> "The trial court also assessed the request in light of the trial record to see if there was a reasonable possibility that the testing would establish his actual innocence. 42 Pa.C.S.A. §9543.1(c)(3) and (d)(2). It is clear from the statute that s court shall not order DNA testing if, after review of the applicant's trial, it

> determines that there is no reasonable possibility that the testing would produce exculpatory evidence that would his actual innocence of the offense."
>
> "The trial court concluded that Appellant had failed to present a prima facie case that DNA results, if exculpatory, would have established his actual innocence. After thorough review of the record, we agree and affirm."

It is apparent Rowe's petition for post-conviction DNA testing was filed "collateral" to, and "outside of the direct appeal process," which involved a form of "judicial review" of the trial record and conviction, as to constitute a "petition for post-conviction or other collateral relief" under §2244 (d)(2)'s tolling provision. This is precisely the definition of "collateral review" announced by this Court in Wall v. Kholi, 562 U.S. 545 (2011) and Duncan v. Walker, 573 U.S. 167 (2001).

Rowe's petition for post-conviction DNA testing sought to challenge the conviction by requiring the PCRA court to hold a hearing to determine whether DNA evidence, if tested, would establish his innocence, and would not have been convicted given the DNA results. In short, Rowe's petition was a request for "judicial review" of the judgment pursuant to which he is incarcerated.

Because Rowe's petition for post-conviction DNA testing under Pennsylvania law is not part of the direct review process, and in fact is a petition for collateral relief - a defined by this Court - Rowe's petition tolled AEDPA's limitation period pursuant to §2244(d)(2), making his federal habeas petition timely filed. The Court of Appeals and the District Court's reluctance to properly apply §2244(d)(2)'s tolling mechanism which the petition for post-conviction DNA testing was on state review denied him his right to federal habeas review.

Therefore, this conflict within the Third Circuit Court of Appeals, and the split among the remaining Circuit and District Courts in whether to apply §2244(d)(2)'s tolling provision to petitions for post-conviction DNA testing when they are on state review warrants this Honorable Court to grant this writ so that petitioners are not denied their right to federal habeas review in violation of their due process and equal protection rights under the United States Constitution.

II. THE COURT OF APPEALS ERRED IN DETERMINING THE DISTRICT COURT DID NOT VIOLATE THE RULES GOVERNING HABEAS CORPUS PROCEEDINGS AND DUE PROCESS WHEN THE COURT VACATED ITS OWN FINAL ORDER THAT HELD ROWE'S HABEAS PETITION TIMELY FILED, WHEREUPON, RESPONDENT WAS PERMITTED TO RELITIGATE TIMELINESS THAT WAS FULLY ADDRESSED PREVIOUSLY, THEREBY CIRCUMVENTING THE CONCEPTS OF FINALITY.

On December 20, 2013, the District Court issued a "Rule to Show Cause" order directing Respondent to "respond to the petitioner's motion to stay and whether petitioner's habeas petition is timely filed," to "address any arguments with respect to timeliness," pursuant to 28 U.S.C. §2254 Habeas Rule 5. On January 9, 2014, Respondent filed its response addressing timeliness in full briefing and submitted the complete state procedural record. Respondent acknowledged Rowe filed his second PCRA petition, but asserted it was untimely filed, an assertion and non-waivable defense it never raised during any of the state review proceedings, therefore, waiving its right to challenge it on federal review by sandbagging Rowe with a statute of limitation bar.

On January 28, 2014, Rowe filed his response and also submitted the state procedural record, asserting his state and federal petitions were timely filed pursuant to §2244(d)(1)-(2). On August 10, 2015, the Magistrate issued her Report and Recommendation ["R&R-I"] (APPENDIX G) acknowledging Rowe filed his second PCRA petition and addressed timeliness, recommending his habeas petition be dismissed as untimely. On August 20, 2015, Rowe filed his objections. Respondent filed no response.

On October 14, 2015, the District Court issued an order and memorandum (APPENDIX F) where it stated:

> "Accordingly, I have taken judicial notice of the publicly available dockets of criminal and collateral post-conviction proceedings in the Court of Common Pleas of Pike County; [relying on Respondent's records] To be sure, even Respondents acknowledged that Rowe filed two separate documents - a motion for post-conviction DNA and a second PCRA petition." (Id. APPENDIX F, pg. 1-2; 11).

Importantly, the Court held: (1) Rowe had in fact filed the second PCRA petition; (2) the second PCRA petition was timely filed, making the habeas petition timely; (3) rejected the Magistrate's R&R-I, and (4) ordered that habeas petition to "be recommitted to the Magistrate. . .for adjudication on the merits in accordance with this memorandum" (Id. APPENDIX F, pg. 15) as the issue of timeliness had been fully briefed, litigated and final. On October 26, 2015, the Magistrate issued an order for Respondent to address the merits. (APPENDIX E).

Though the District Court ordered the parties to address the merits pursuant to Habeas Rule 5 – as timeliness was final – Respondent ignored the Court's order and relitigated the same timeliness argument once more in its response on February 8, 2016. On February 25, 2016, Rowe filed a traverse, objecting to Respondent's relitigation tactic. On June 1, 2016, the Magistrate issued her second R&R ["R&R-II"] (APPENDIX D) where she failed to address the merits and relitigated the same timeliness argument the District Court already denied. Neither Respondent or the Magistrate presented any new argument, evidence or change in law the Court did not already consider when it held Rowe's habeas petition timely filed. Respondent and the Magistrate intentionally disregarded the Court's October 14, 2015 final order for a merits determination as a way to take an unauthorized "second bite and the apple" outside the proper appellate process.

Astonishingly, on August 23, 2016, the District Court adopted the Magistrate's R&R-II, reversed its October 14, 2015 order that held the habeas petition timely filed and dismissed the proceedings. (APPENDIX C). On September 1, 2016, Rowe filed a motion for reconsideration, asserting the Court was bound by the October 14, 2015 order as it was a final order, that Respondent had waived its right to challenge the Court's prior order, that statutory and equitable tolling was warranted. On March 1, 2017, the Court denied reconsideration. (APPENDIX B).

On March 20, 2017, Rowe sought a COA with the Third Circuit Court of Appeals, asserting the District Court's October 14, 2015 order was a final order and the Court was bound by it – among other reasons that warranted a COA. On January 4, 2018, the Court denied a COA and adopted the District Court's assessments for dismissing the habeas petition. (APPENDIX A). Rehearing was sought and denied on February 22, 2018. (APPENDIX H).

The District Court's reasoning for reversing it October 14, 2015 order and now holding the habeas petition untimely is unsupported by the record and fraud upon the Court when it claimed it did not have "the benefit of a complete record and full briefing" when it held the petition timely. To the contrary, in the Court's October 14, 2015 Memorandum, the Court indicated it had the complete state record and full briefing from the parties when it held the habeas petition timely filed. If the Court was not fully informed and did not have the adequate state record when it gave its October 14, 2015 order, the Court would have ordered the parties to submit the required records and directed them to readdress timeliness

once more for the fourth time, or in the alternative as the Court asserted, it made an order knowing the Court was not fully informed. Such a conclusion can not be found as the Court indicated timeliness was final, finding the second PCRA and habeas petition timely filed, whereupon it ordered a merits analysis.

The District Court's August 23, 2016 order vacating its October 14, 2015 order is plain error and a fraud which permitted Respondent to relitigate timeliness for the third time, denying Rowe his right to due process. There was no further discovery on the pint of timeliness after the Court held the habeas petition timely. There remained no genuine issue to debate or a substantial controversy to address. The October 14, 2015 order was controlling throughout the subsequent stages of the habeas proceedings. See Arizona v. California, 460 U.S. 605, 681 (1983).

There is no Habeas Rule that permits relitigation of orders on the same arguments already made by parties after a Court already heard / rejected them – outside the appropriate means of a motion for reconsideration and/or appeal to the Court of Appeal – as the order is final and binding on the proceeding. There is also no Habeas Rule that permits a District Court to reverse its prior order when the parties were already given their full and fair opportunity to present their arguments. Such an action would violate the concepts of finality of Court orders and judgments, constituting abuse of the process and violate a parties right to due process. See In re Winship, 397 U.S. 358, 382 (1970).

There are Doctrines that preclude the type of action the District Court made in reversing its order holding the habeas petition timely filed, Doctrines the District and Circuit Courts ignored:

> LAW OF THE CASE DOCTRINE – Directs courts to refrain from deciding issues that were resolved earlier in the litigation. The Doctrine promotes finality and judicial economy. Courts apply the Doctrine when their prior decision in an ongoing case either expressly resolved an issue or necessarily resolved it by implication. The Doctrine limits relitigation of an issue once it has been decided in an earlier stage of the same litigation. The Doctrine bars courts from considering matters actually decided. This rule protects against the agitation of settled issues.
>
> RES JUDICATA DOCTRINE – Is applied to final judgments issued by courts. The Doctrine is commonly called issue preclusion, which refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, regardless of whether the issue arises on the same or different claim.
>
> COLLATERAL ESTOPPEL DOCTRINE – Similar to Res Judicata – bars a party from litigating an issue determined against that party in an earlier action, even if the action differs significantly from the first one. The common law Doctrines of Collateral Estoppel (as to cases) and Res Judicata (as to claims) should be applied to those determinations of administrative bodies that have attained finality.

The District Court's October 14, 2015 order is the "law of the case" and the Court was bound by it. To permit Respondent and the Magistrate an opportunity to relitigate timeliness, on the same argument, after the Court found the habeas petition timely filed violated the Doctrines of Res Judicata and Collateral Estoppel. Based upon sound salutary principles of judicial finality - that all litigation should end - the issue of timeliness ended on October 14, 2015.

The October 14, 2015 order was an appealabe final decision. It was not an opportunity for Respondent to relitigate an issue it was fully heard on. 28 U.S.C. §1291 permits jurisdiction over appeals from final orders and a small category of collateral orders that do not terminate litigation but are appropriately deemed final. See **Cohen v. Beneficial Ind. Loan Corp.**, 337 U.S. 541, 545-46 (1949).

The only remedy Respondent had to challenge the October 14, 2015 order was to either file for reconsideration pursuant to Fed.R.Civ.P. 52(b) or 59(e), and/or appeal to the Court of Appeals. Respondent failed to do either which waived their ability to challenge timeliness after the period for such expired.

An example of the proper procedure Respondent could have taken can be found in **Pace v. Vaughn**, 2002 U.S. Dist. LEXIS 5473 (E.D.PA. March 29, 2002) where the respondent challenged the District Court's order finding Pace's petition timely by filing for reconsideration of the Court's order.

The timeliness of Rowe's petition was final on October 14, 2015 when the District Court ordered the parties to address the merits pursuant to Habeas Rule 5. The order was a decision that ended all lititgation on timeliness and there was nothing left for the Court to do but exercise the judgment. This is the classic definition of a "final decision". See **Quackenbush v. Allstate, Ins. Co.**, 517 U.S. 706 (1996) (quoting **Catlin v. United States**, 324 U.S. 229, 223 (1945).

The Court of Appeals' decision to not hold the District Court to its October 14, 2015 order finding Rowe's habeas petition timely is in direct conflict with the Doctrines herein and this Court's holdings in **Arizona c. California**, 460 U.S. 605 (1983) and **Quackenbush v. Allstate, Ins. Co.**, 517 U.S. 706 (1996).

This Honorable Court must grant this writ as failure to do so will allow the Court of Appeals and the District Court to violate the concepts of finality, judicial fairness and the Rules Governing §2254 Habeas Corpus proceedings. Its this Court's obligation to hold the below Courts accountable and to see to it that justice is administered fairly.

III. THE COURT OF APPEALS ERRED IN DETERMINING THAT STATUTORY AND EQUITABLE TOLLING OF AEDPA'S LIMITATION PERIOD DID NOT APPLY TO ROWE'S HABEAS PETITION AND THAT THE STATE POST-CONVICTION COURT DID NOT FORFEIT ROWE'S RIGHT TO FEDERAL HABEAS REVIEW - WITHOUT NOTICE - AS TO CREATE A MISCARRIAGE OF JUSTICE AND CONFLICT WHERE OTHER FEDERAL COURTS HAVE GRANTED SUCH TOLLING.

On January 11, 2018, the Court of Appeals denied a COA (APPENDIX A) "for substantially the same reasons provided by the District Court." This was an abuse of discretion in light of the law and facts governing the filing of Rowe's second PCRA petition. The District Court refused to acknowledge three state reviewing courts held Rowe's second PCRA petition timely filed under Pennsylvania law. The District Court's reluctance to defer to the state courts' rulings (APPENDIX M, N, O) violated Rowe's right to due process and a fair habeas proceeding.

To compound the Court of Appeals's failure to defer to the state record and law, the Court refused to apply equitable tolling for the time period the second PCRA petition was on state review. This is beyond egregious considering the District Court admitted "that impoer docketing at the state court likely contributed to the PCRA court's failure to expressly acknowledge that Rowe's second PCRA petition was not timely filed.(APPENDIX B, pg. 12). Though the Court acknowledged the state court committed errors during the second PCRA proceedings that lead to the untimeliness of Rowe's habeas petition, the Court found this state court error did not warrant equitable tolling. This decision has created a conflict where other federal courts have granted equitable tolling due to court errors.

More so, the Court of Appeals gave no consideration to other factors that warranted equitable tolling. The District Court misconstrued the state record and erroneously asserted Rowe wasn't abandoned by PCRA counsel on first PCRA appellate review. If none of Rowe's extraordinary circumstances warrant equitable tolling on their own, then cumulatively they do, an assessment both Courts failed to make.

Either the PCRA court held Rowe's second PCRA timely filed or it knowingly forfeited his right to habeas review without notice as the court was required under Pennsylvania law to dismiss the petition as untimely filed. Thus, it is under the following that Rowe's habeas petition was timely filed. The Court of Appeals's decision to deny Rowe a COA so far departed from the accepted and usual course of judicial proceedings as to create a miscarriage of justice. Reasonable jurist would conclude Rowe is entitled to both statutory and equitable tolling.

(A) STATUTORY TOLLING: Under Pennsylvania law, a judgment of sentence becomes final at the conclusion of direct review, or the expiration of time for seeking review, which is 90 days. 42 Pa.C.S.A. §9543(b)(3). Here, the Pennsylvania Supreme Court denied direct review on December 28, 2007, (APPENDIX J). Rowe had until March 27, 2008 to petition for a writ of certiorari, making his conviction final on March 27, 2008. Rowe's habeas was filed on September 17, 2013, but accordingly, both statutory and equitable tolling are applicable for the time period between March 27, 2008 and September 17, 2013.

A person may toll AEDPA's limitation period during the time a properly filed application for state post-conviction is pending. 28 U.S.C. §2244(d)(2). (APPENDIX A-9). Rowe filed his first PCRA petition on December 11, 2008, which was 259 days after his conviction became final. This tolled AEDPA's limitation period from December 11, 2008 until July 25, 2011 when the Pennsylvania Supreme Court denied allocatur. (APPENDIX L). Rowe had 106 days remaining to file his habeas petition. Upon the instruction of PCRA counsel (APPENDIX Q), and under Pennsylvania law, Rowe filed his second PCRA petition on August 31, 2011 (APPENDIX A-7), pursuant to 42 Pa.C.S.A. §§ 9545(b)(1)(ii) ["Newly Found Evidence Exception"] and 9543.1 ["DNA Testing Exception"], within 60 days of first PCRA final review pursuant to 9545(b)(2). This further tolled AEDPA's limitation period until December 3, 2013 when the Pennsylvania Supreme Court denied allocatur (APPENDIX O). Rowe had 72 days remaining on AEDPA's limitation period, making his September 17, 2013 habeas petition timely filed.

In denying Rowe habeas review, the District Court noted:

> "If Rowe's second PCRA petition was 'properly filed', the statute of limitations for his habeas petition would have been further tolled from September 6, 2011 [docketing date] (the date the second PCRA petition was filed in state court) through December 3, 2013 (the date the Pennsylvania Supreme Court denied his petition for allowance of appeal), making his September 24, 2013 [docketing date] habeas petition timely. Thus, the relevant issue is whether Rowe's second PCRA petition was 'properly filed.'" (Id. APPENDIX C, pg. 7).

In Artuz v. Bennett, 531 U.S. 4, 8 (2000) this Court held "[A]n application it 'properly filed' when its delivery and acceptance are in compliance with the applicable law and rules governing filings." Because the language of the AEDPA limits statutory tolling to "properly filed" applications for state post-conviction or other collateral relief, the federal court applying the AEDPA must look to the state law governing when a petition for collateral relief is properly filed.

Rowe filed his second PCRA petition pursuant to 42 Pa.C.S.A. §9545(b)(1)(ii)-(2), which provides

in pertinent part:

> (b) Time for filing petition-
> (1) Any petition under this subchapter, including a second or successive petition, shall be filed within one year of the date judgment becomes final, unless the petition alleges and the petitioner proves that:
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claims could have been presented.

Section 9545(b)(1)(ii) does not require any merits alanysis of the underlying claim, consistent with **Artuz**. Rather, the exception required the facts upon which the claim is predicated were unknown to the petition, and could not have been obtained by due diligence. If the petitioner proves these two components, the PCRA court has jurisdiction over the claims. See **Commonwealth v. Bennett**, 930 A.2d 1264 (Pa. 2007) **(APPENDIX V)**; **Commonwealth v. Lambert**, 884 A.2d 848 (Pa. 2005).

Here, Rowe was represented by court appointed PCRA counsel on first PCRA review who rendered ineffective assistance during those proceedings which is what prompted him to file his second PCRA Petition. This decision was guided by Pennsylvania law and PCRA counsel who instructed Rowe to "file an additional PCRA perhaps claiming that [I] was ineffective. . ." **(APPENDIX Q)**. Rowe presented claims in the second PCRA petition that PCRA counsel was ineffective by abandoning her duties on appellate review, failed to present claims of trial counsel's ineffectiveness, failed to presented newly discovered evidence and failed to request modern DNA testing of the victim's fingernails, rope and cigarette-butt.

In **Commonwealth v. Albrecht**, 720 A.2d 693 (Pa. 2008) the Pennsylvania Supreme Court held that Pa.R.Crim.P. 904 **(APPENDIX A-1)** makes the appointment of counsel in PCRA proceedings mandatory; that the right to counsel includes the right to effective assistance of counsel. Thus, the court held a PCRA petitioner has an enforceable right to effective PCRA counsel. Pa.R.Crim.P. 904(F)(2) and (H)(2)(b) hold "appointed counsel retains his or her assignment until final judgment which includes all avenues of appeal through the Pennsylvania Supreme Court." See **Commonwealth v. Holmes**, 79 A.3d 562 (Pa. 2013). The Pennsylvania Supreme Court guarantees that "a person seeking allowance of appeal is entitled to assistance of counsel." **Commonwealth v. Daniles**, 420 A.2d 1323 (Pa. 1980). The failure of counsel to file a petition for allowance of appeal constitutes a "wholesale denial of counsel." See **Commonwealth v. Liebel**, 825 A.2d 630 (2003).

Under Pa.R.Crim.P. 120(A)(2) (APPENDIX W), when counsel is appointed, the appointment is effective from appointment, through final judgment and any appeal, unless permitted to withdraw as counsel under 120(B). See Commonwealth v. Tate, 2013 Phila. Ct. Com. P. LEXIS 653 (2013). Under 120 (B)(2), counsel must file a motion to withdraw in all cases and counsel's obligations to represent petitioner remain until leave is granted by the court. See Commonwealth v. Librizzi, 810 A.2d 692 (Pa. Super. 2002). Counsel must also inform petitioner of his appellate rights. See Commonwealth v. Soto, 2017 Pa. Super. Unpub. LEXIS 3861 (2017). Court must hold a hearing in order to permit a petitioner to proceed pro se – after colloquy on the record – indicating the "waiver of counsel is knowing, intelligent and voluntary." See Commonwealth v. Grazier, 713 A.2d 81 (Pa. 1998).

Here, PCRA counsel informed Rowe she would seek appellate review of the denial of first PCRA relief, that "many of the arguments raised were arguments to be pursued on appeal" (APPENDIX Q) and the case "contains complex issues." (APPENDIX R). At no point did PCRA counsel seek permission to withdraw as counsel. PCRA counsel was still counsel of record throughout the first PCRA appellate review process. (APPENDIX P, A-7). Nor did the PCRA court ever hold a hearing to permit Rowe to proceed pro se.

Rowe wrote several letters to PCRA counsel, stating:

> "Let me know whats going on with the appeal and which steps you think we have to tale. (APPENDIX S). Have you heard anything yet from the Superior Court? Are you preparing the allowance of appeal to the Supreme Court as we discussed. . .I haven't heard from you in a while and I'm unsure what to do and what steps to take. You're January 19, 2010 letter said I should file a second PCRA if you're ineffective. (APPENDIX T). Please file the allowance of appeal before the thirty days were allowed to. . .Just in case your filing is late, I will do my best to preserve the allowance of appeal and file a petition the best I can, which should be forwarded to you by the court. If your petition comes prior to mine the court should reject mine as you're still counsel representing me in this appeal." (APPENDIX U).

Due to Rowe not hearing from PCRA counsel, he filed the protective pro se petition for allowance of appeal with the Pennsylvania Supreme Court 3 days prior to the 30 day period expiring. The Court's Prothonotary accepted the January 6, 2011 pro se petition and made entry of it into the docket but failed to forward it to PCRA counsel as required by Pa.R.Crim.P. 576(A)(4). (APPENDIX X). Grounded in the prohibition against "hybrid representation," the Pennsylvania Supreme mandated that petitioners who are represented by counsel are precluded from filing pro se filings, that all pleadings are to be forwarded by counsel pursuant to Pa.R.A.P. 3304 (APPENDIX A-6). See Commonwealth v. Jette, 23 A.3d 1032

(2011). Nevertheless, the Prothonotary failed to review the appellate court dockets that indicated Rowe was still represented by counsel (APPENDIX P) and erroneously submitted Rowe's pro se petition for panel review on the merits, which was denied on July 25, 2011. (APPENDIX L).

Rowe could not have ascertained PCRA counsel had completely abandoned him until counsel failed to file the petition by January 8, 2011 [the day the 30 day period for filing expired], which is when the 60 day period began to run for Rowe to file his second PCRA petition pursuant to §9545(b)(1)(ii)-9545(b)(2).

Since the Pennsylvania Supreme Court erroneously took jurisdiction of Rowe's pro se allowance of appeal, he could not file the second PCRA petition while the allowance of appeal was on review as Pennsylvania law prohibits a petitioner from filing a second PCRA while his first PCRA is pending review by the highest state court in which review is sought. See **Commonwealth v. Lark**, 746 A.2d 585 (Pa. 2010).

Rowe's August 31, 2011 second PCRA petition was filed within the 60 day period upon the Supreme Court denying allocatur, where he plead claims of PCRA counsel's abandonment and ineffective assistance pursuant to **Commonwealth v. Bennett**, 930 A.2d 1264 (2007). (APPENDIX V). In **Bennett** the Supreme Court held §9545(b)(1)(ii) is a limited extension of the one year requirement under circumstances that were beyond a petitioner's control - the abandonment of PCRA counsel. In such instances, the petitioner must be given the opportunity to seek review to which he was entitled, the assistance of counsel of PCRA appellate review. Here, that did not happen, a fact Respondent has never refuted, which the Court of Appeals and the District Court failed to recognize when presented with this fact and exception.

More so, on September 6, 2011 the PCRA Clerk of Courts entered the second PCRA into the docket (APPENDIX A-7, pg. 35) and transmitted it to the judge for adjudication of the merits pursuant to Pa.R.Crim.P. 903 (APPENDIX Z), indicating to Rowe that he complied with the content of the petition pursuant to Pa.R.Crim.P. 902 (APPENDIX Y). Promptly, on September 8, 2011, the court entered an order for an evidentiary hearing for October 26, 2011 [postponed-October 28, 2011] pursuant to Pa.R.Crim.P. 908 (APPENDIX A-5). Again, the court indicated the petition was properly filed, never ordering the petition to be amended to correct any defects pursuant to Pa.R.Crim.P. 905 (APPENDIX A-2).

On September 12, 2011 Respondent requested a continuance. On September 19, 2011 Rowe filed an objection to the request and stated: "In the event this court chooses to make its decision upon oral argument. . .Defendant requests an attorney be assigned to represent the interests of the defendant"

pursuant to Pa.R.Crim.P. 904 (APPENDIX A-1) and 908(c) (APPENDIX A-5). On October 7, 2011 Respondent requested the court to dismiss the petition pursuant to Pa.R.Crim.P. 907 (APPENDIX A-4). The court denied Respondent's request and held an evidentiary hearing on October 28, 2011, where Rowe was forced to proceed pro se. Rowe outlined PCRA counsel's ineffectiveness in abandoing him on first PCRA review and failure to present claims of trial counsel's ineffectiveness and request DNA testing. On November 28, 2011 Rowe filed an application for transcripts of the October 28, 2011 hearing in order to properly supplement the petition and perfect an appeal if denied relief as he argued the facts and claims freely in open court. Just like refusing to appoint counsel for the hearing, the court refused to provide a copy of the transctipts pursuant to **Commonwealth v. Shields**, 383 A.2d 844, 846 (Pa. 1978).[1]

On January 9, 2012 the PCRA court denied relief. (APPENDIX M). The court found the claims in the second PCRA were previosuly litigated in the first PCRA proceedings. Such a finding is erroneous as PCRA counsel's abandonment and ineffectiveness could not have been litigated on first PCRA review while Rowe was still represented by counsel. Rowe subsequently appealed the denial of PCRA relief to the Pennsylvania Superior and Supreme Courts which denied relief on December 3, 2013. (APPENDIX N, O). Nevertheless, the state courts still held the second PCRA peition properly properly filed under **Artuz.**

Pennsylvania courts have been clear, a PCRA reviewing court can not take jurisdiction and hold a hearing on an untimely petition. See e.g.:

> "The time restriction in 42 Pa.C.S.A. §9545(b)(1) of the PCRA is jurisdictional in nature, thus, if a PCRA petition is filed untimely, the court lacks jurisdiction and has no legal authority to address the claims." **Commonwealth v. Robinson**, 2016 Pa. LEXIS 1269 (2016). "The Supreme Court has repeatedly stated that PCRA timeliness requirements are jurisdictional, and accordingly, a PCRA court cannot hear untimely PCRA petition." **Commonwealth v. Rienzi**, 827 A.2d 369, 371 (Pa. 2003). "If a petition is untimely filed, the court must dismiss it by issuing a 907 notice." **Commonwealth v. Marshall**, 947 A.2d 714 (Pa. 2008). "PCRA time limitations implicate a court's jurisdiction and may not be altered or disregarded in order to address the merits of a claim." **Commonwealth v. Baldwin**, 2017 Pa. Super. Unpub. LEXIS 3870 (2017). "Hearing on a petition under the ["PCRA"] is not a matter of right, and a PCRA court will not hold a hearing if there is no genuine issue concerning any material of fact and the defendant is not entitled to relief as matter of law." **Commonwealth v. Morrison**, 872 A.2d 102 (Pa. 2005).

Here, the PCRA court indicated to Rowe that he satisfied the burden of §9545(b)(1)(ii) and (B)(2)

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1 The PCRA court has refused to provided the October 28, 2011 transcripts to both the state and federal courts. See (APPENDIX N, pg. 10).

in order for his second PCRA petition to be held timely filed to the extent necessary to take jurisdiction, afford him a hearing, never hold the petition defective or untimely filed, and adjudicated the merits therein. Most telling is the court denied Respondent's motion to dismiss pursuant to Pa.R.Crim.P. 907, which is an explisive directive the court held the petition timely filed. Rule 907 states the following:

> "(1) The judge shall promptly review the petition, any answer. . .or other matters of record relating to the defendant's claim(s). If the judge is satisfided from this review that there are no genuie issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge sgall give notice. . .of the intention to dismiss. . . and shall state. . .the reasons for dismissal. The defendant may respond. . .The jusdge thereafter shall order the petition dismissed, grant leave to file an amended petition, or direct that the proceedings contunie. [See Rule 907 Comments]."

It is clear the PCRA court held and/or gave every indication to Rowe that his second PCRA petition was properly filed under Pennsylvania Rules of Criminal Procedure that govern PCRA proccedings. See (APPENDIX W to A-5).

The Court of Appeals and the District Court were in error when they held statutory tolling of AEDPA's limitation period was not warranted for the time petiod Rowe's second PCRA petition was of state review. Both Courts failed to recognize that in Pennsylvania a PCRA petition is automatically held properly filed unless a court dismisses it as untimely filed pursuant to Pa.R.Crim.P. 907. Meaning, as long as the PCRA court takes jurisdiction of the petition, adjudicates the merits and does not dismiss it pursuant to Rule 907, the petition is deemed "properly filed" according to Artuz v. Bennett, 531 U.S. 4 (2000); §2244 (d)(2), and §9543(b)(1)(ii).

Furthermore, the Court of Appeals and the District Court miscontrued the PCRA court's findings by asserting the court construed Rowe's petition for post-conviction DNA testing and the second PCRA petition as solely that requesting DNA testing. The record is clear (APPENDIX A-7) the PCRA court docketed them separately and gave two separate opinions for denying each filing (APPENDIX M), finding (1) Rowe did not establish a prima facie case of his actual innocence to warrant DNA testing, and (2) the claims of ineffective assistance were previously litigated.

Under the law that governs post-conviction relief in Pennsylvania, Rowe's second PCRA petition was properly filed and tolled AEDPA's limitation period, rendering his habeas petition timely filed. The Court of Appeals finding to the contrary constitutes a miscarriage of justice.

(B) EQUITABLE TOLLING: 28 U.S.C §2244(d) is subject to equitable tolling. A petitioner is entitled to equitable tolling if he shows (1) that he has been pursuing his rights diligently, and (2) some extraordinary circumstances stood in his way and prevented timely filing. **Holland v. Florida**, 560 U.S. 631, 649 (2010). In Jones v. Norton, 195 F.3d 153, 159 (3d Cir. 1999) the Court of Appeals found equitable tolling appropriate in four cirumstances:

> "(1) If the state has actively mislead the petitioner; (2) if the petitioner has in some extraordinary way been prevented from asserting his rights; (3) if the petitioner has asserted his rights mistakenly in another forum; or (4) where the state has mislead the petitioner into belieivng he had done everything required of him."

Here, Rowe asserted that if he was not entitled to statutory tolling for the period his second PCRA petition was on state review, he was then entitled to equitable tolling. The Court of Appeals and the District Court held Rowe had been diligent in asserting his rights but that he did not establish an extraordinary circumstance to warrant equitable tolling. Such a finding by the Courts does not comport with this Court's precedent on what constitutes an extraordinary circumstance and has created a conflict within the Third Ciruit, as well as with other Circuit Courts who have granted equitable tolling for the same and/or similar circumstances Rowe faced of state review.

In **Holland** this Court found equitable tolling applied when an attorney's unprofessional conduct is negligent and doesn't satisfy the standard of care required of counsel. In Pennsylvania the standard of care is effective assistance of PCRA counsel throughout the entire PCRA proceeding, including review in the Superior and Supreme Court. See Commonwealth v. Bennett, 930 A.2d 1264 (2007) (APPENDIX V).

As exspounded upon in (A) STATUTORY TOLLING, Rowe requested PCRA counsel to file an appeal to the Pennsylvania Superior and Supreme Court, which counsel agreed to do, indicating the case contained complex issues that required review in the appeallate courts. Counsel also directed Rowe to file a second PCRA stating: "If we're unsucessful on appeal, you may file an additional PCRA claiming that I was ineffective. (APPENDIX Q, R). Rowe wrote counsel numerous times inquiring into the status of his appeals and for counsel to stay in contact, that he was unsure that to do and that she was still counsel of record. (APPENDIX P, S, T, U). Rowe filed his second PCRA petition upon counsel's directive.

It was unprofessional conduct that PCRA counsel abandoned Rowe on first PCRA appellate review, and worse, instruct him to file the second PCRA petition if he was not permitted to. It was PCRA counsel's

instructions and abandonment that resulted in Rowe seeking another round of PCRA relief which worked to prevent him from timely filing his habeas petition sooner than he did on September 17, 2013.

The standard announced in **Holland** and its progeny applies here as Rowe was affirmatively mislead, misadvised and abandoned by PCRA counsel on first PCRA review. Rowe cannot be held at fault for the ineffectiveness of PCRA counsel as counsel was duty bound by state and federal law to effectuate his best interest and due process rights on first PCRA review. If Rowe did not have a right to file a second PCRA petition, it was most egregious of PCRA counsel to direct him to file such where relief is not available.

This extraordinary circumstances of PCRA counsel's abandonment and ineffectiveness warranted equitable tolling. The Court of Appeals and the District Court gave no consideration to this fact and mistated the state record and asserted Rowe was not abandoned in the Supreme Court, that PCRA counsel filed a brief. **(APPENDIX B, pg. 9)**. Such a mischaracterization of the state record is plain error and beyond erroneous.

More so, the PCRA court's handling of the second PCRA proceeding warrants equitable tolling. As stated in **(A) STATUTORY TOLLING**, Rowe filed his second PCRA petition within 60 days of first PCRA final review, invoking the exceptions of 42 Pa.C.S.A. §§ 9545(b)(1)(ii) and 9543.1, doing all that was required of him to advance the petitions under Pennsylvania law. The PCRA court took jurisdiction pursuant to Pa.R.Crim.P. 903; never filed a notice to filed pursuant to Pa.R.Crim.P. 905(A); directed Respondent to file an answer pursuant to Pa.R.Crim.P. 906; never gave a notice of intent to dismiss as untimely under Pa.R.Crim.P. 907; and ordered an evidentiary hearing pursuant to Pa.R.Crim.P. 908. Nor did Respondent ever seek to have the petitions dismissed as untimely under Pa.R.Crim.P. 908(A)(1).

If the second PCRA petition was untimely filed, the PCRA court was required by Pennsylvania law to dismiss it under Rule 907 on September 8, 2011 after the court reviewed it and scheduled a hearing. The court indicated the petition was timely filed when it held a hearing on the merits as such a hearing can only be granted when the petition is properly before the court. **(APPENDIX M, pg. 5)**. It was reasonable for Rowe to rely on the PCRA court's September 8, 2011 order that held his petition timely filed as it satisfied Pa.R.Crim.P. 902 to 908. Had the court stated the petition was untimely filed on September 8, 2011, Rowe still had 66 days remaining on AEDPA's limitation period in which to file his habeas petition.

If the second PCRA petition was untimely filed, all the state courts implied that is was timely as they never invoked the required Pennsylvania Rules to dismiss it as such. It would be misleading and an

abuse of Rowe's due process rights for the state courts to permit the petition to proceed past the initial prompt review stage of September 8, 2011, take jurisdiction and lull him into continuing the proceeding if it was untimely because it would forfeit Rowe's right to federal habeas review without notice. Rowe relied on the PCRA court's September 8, 2011 order and believed his habeas petition was being tolled.

As stated before, the District Court acknowledged the PCRA court mishandled Rowe's second PCRA petition and petition for post-conviction DNA testing where the Court stated on March 1, 2017 (APPENDIX B, pg. 12) "The Court recognizes that improper docketing at the state court likely contributed to the PCRA court's failure to expressly acknowledge that Rowe's second PCRA petition was not timely filed." The District Court's finding qualified for equitable tolling as Rowe can not be held accountable for state court errors that indicated his second PCRA petition was timely filed, which subsequently worked to deny him his right to habeas review by sandbagging him years later with a procedural bar.

In Pliler v. Ford, 542 U.S. 225, 234 (2004), this Court held "if the petitioner is affirmatively mislead. . .by the state, equitable tolling is appropriate." In Jenkins v. Superintendent of Laurel Highlands, 705 F.3d 80 (3d Cir. 2012) (APPENDIX A-11), the Court of Appeals held that equitable tolling was warranted due to the state court not holding Jenkin's pleading untimely and he relied on state court's implied notice pleading was timely as it otherwise satisfied the relevant Rules applicable to those proceedings. That had the court's notice stated his pleading was untimely, Jenkins could have timely filed his habeas petition.

Here, the District Court stated "Rowe's reliance on Jenkins. . .no entirely without merit." (APPENDIX B, pg. 9). However, the Court overlooked that the PCRA court's September 8, 2011 order was a directive indicating the second PCRA petition was properly filed as it qualified for an evidentiary hearing which can only be held on timely filed petitions. Rowe's circumstances mirrored that in Jenkins, yet he was denied the same equitable tolling relief, violating his equal protection rights.

Numerous District Courts under the Third Circuit's jurisdiction have held court errors, implied notices that filings were timely, and misleadment of petitioners warranted equitable tolling. See e.g.:

> Copeland v. Windgard, No. 14-5754, 2015 WL 6688073, at 7-8 (E.D.PA. Sept. 21, 2015); Haskell v. Folina, No. 10-149, 2015 U.S. Dist. LEXIS 11920, 2015 WL 5227855, at 8 (W.D.PA. Sept. 8, 2015); Walker v. Ricci, No. 09-5235, 2013 U.S. Dist. LEXIS 88946, 2013 WL 3223553, at 11-12 (D.N.J. June 25, 2015).

Furthermore, the other Courts of Appeals have held court errors, implied notices that filings were timely, and misleadment of petitioners warranted equitable tolling. See e.g.:

> Holmes v. Spencer, 605 F.3d 51, 65 (1st Cir. 2012); Munchinski v. Wilson, 694 F.3d 308, 29-30 (3d Cir. 2012); Spottsville v. Terry, 476 F.3d 1241 (11th Cir. 2007); Rudin v. Myles, 781 F.3d 1043, 1057-58 (9th Cir. 2015) (Equitable tolling due to state court error on review, coupled with state's failure to brief on timeliness or move to dismiss late post-conviction petition mislead Rudin into believing petition was timely filed); Loftis v. Chrisman, 812 F.3d 1268, 1275-76 (10th Cir. 2016) (Equitable tolling due to state's failure to comply with its mandatory duty).

Like any equitable consideration, whether a petitioner is entitled to equitable tolling under AEDPA will depend upon a fact-specific inquiry by the habeas court which may be guided by "decisions made in other similar cases." Holland, 130 S.Ct. at 2563.

Here, the facts are the state courts held, or in the very least implied, Rowe's second PCRA petition was properly filed pursuant to the Rules that governed the proceedings. The PCRA court took jurisdiction, denied Respondent's motion to dismiss, held a hearing, did not dismiss it as untimely under Rule 907 and adjudicated the merits. Under the above examples, equitable tolling is warranted for the time period the second PCRA petition was on state review due to the courts' implied notices that held it timely filed.

Furthermore, Rowe had to exhaust the constitutional claims that PCRA counsel failed to preserve and litigate on first PCRA review. Prior to this Court's holding in Martinez v. Ryan, 566 U.S. 1 (2012), a claim of PCRA counsel ineffectiveness would not excuse a procedural default of a claim that was not presented during post-conviction review proceedings where that was the only opportunity to present claims of trial counsel ineffectiveness.

Additionally, the law in Pennsylvania has been unclear and ambiguous on how to enforce the enforceable right to effective assistance of PCRA counsel which has caused confusion among the state courts and petitioners. Numerous attempts have been made but nothing has been settled. The state law is also unclear on the operation in how a petitioner can enforce this right. If the state court can not be clear and settled on how a petitioner can seek relief to correct errors made by PCRA counsel, then surely a petitioner can not be sure which operation to follow - direct review, post-conviction, etc.

Pennsylvania courts have recognized that a paradox exists in regard to challenges of PCRA counsel ineffectiveness, but to this very day have refused to reach a solution. See e.g.:

Commonwealth v. Ligons, 971 A.2d 1125, 1140 (Pa. 2009) (Acknowledging the difficulty a petitioner faces in enforcing his right to effective PCRA counsel - PCRA petitioners must be afforded a meaningful opportunity to challenge PCRA counsel's ineffectiveness); Commonwealth v. Holmes, 79 A.3d 562, 584 (Pa. 2013) (This Court has struggled with the question of how to enforce the 'enforceable right' to effective PCRA counsel. Nor has this Court fully come to terms with the standard for reviewing claims sounding in the ineffectiveness of PCRA counsel. No definitive resolution has emerged); Commonwealth v. Pitts, 981 A.2d 875, 879 (Pa. 2009); Commonwealth v. Bennett, 930 A.2d 1264 (Pa. 2007); Commonwealth v. Robinsoin, 2016 Pa. LEXIS 1269 (2016) (same).

Instead of correcting this problem, the state has sat by the wayside which has resulted in more confusion among PCRA petitioners who must navigate a relief procedure that is unsettled, ambiguous, opaque and always changing. If the law is ambiguous and contradictory, equitable tolling is appropriate due to the state court's reluctance to correct it. Pennsylvania continues to violate a petitioner's due process right to a fair PCRA proceeding and refuses to enforce the rights it has afforded during those proceedings.

Lastly, Rowe established a showing of his actual innocence which further qualifies for equitable tolling. Trial counsel failed to subject the prosecution's case to a meaningful adversarial testing process by not presenting available exculpatory evidence, witnesses and testimony that established other suspects committed this crime. Had trial counsel presented any form of a defense the jury would not have convicted Rowe, especially in light of the numerous constitutional violations that occurred at trial. (APPENDIX I). The prosecution's case was entirely circumstantial, contradictory and a complete fabrication which is why the physical evidence that was found does not link Rowe to the crime. There was no eyewitnesses, no DNA, no corroborating evidence that implicated Rowe. The prosecution utilized hearsay evidence that it admitted was untrue; suppressed exculpatory evidence that established Rowe had left the residence and the victims were OK; relied on a highly suggestive single photo line-up procedure; as well as numerous other illicit tactics in order to secure a conviction at all costs. Even the jury was tainted to begin with. The odds were stacked against Rowe by the trial court, the prosecution and trial counsel, to the point the entire trial was unconstitutional which resulted in the conviction of an innocence man.

The Court of Appeals and the District Court relied on evidence already held unconstitutional and inadmissible by the state courts and evidence Rowe is seeking to challenge as unconstitutional when it held Rowe did not make a colorable claim of innocence. Such a conclusion by the below Courts is unsupported by the facts of the case. No consideration was given to the unconstitutionality of the evidence presented.

Equitable tolling is warranted due to the confluence of the facts outlined herein. The Court of Appeals and the District Court never reviewed the facts as a whole or cumulative of each other. They only half-heartedly searched for one trump card, rather than an evaluation of the entire hand Rowe was dealt. In **Holland**, 560 U.S. at 650, this Court disapproved of such a single minded approach.

It is extraordinary that: (1) PCRA counsel was ineffective and abandoned Rowe; (2) PCRA counsel directed Rowe to file the second PCRA should counsel be ineffective; (3) Rowe had to exhaust the claims in the second PCRA [prior to **Martinez**], (4) Pennsylvania law is unsettled on how to challenge claims of PCRA counsel ineffectiveness on state review; (5) The PCRA court erred in the commingling of the second PCRA with the petition for post-conviction DNA testing which caused confusion among the federal courts; (6) The PCRA court and Respondent did not invoke Pa.R.Crim.P. 905 to 908 and dismiss the petition as untimely as its required to do by law if in fact it was untimely filed; (7) The PCRA court gave numerous directives and held a hearing pursuant to Pa.R.Crim.P. 908 which implied the second PCRA was timely; (8) The PCRA court refused to appoint counsel pursuant to Pa.R.Crim.P. 904 as required by law and Rowe was forced to proceed pro se during the hearing and on review; (9) The PCRA court refused to provide a copy of the second PCRA's hearing to Rowe and the state and federal reviewing courts; (10) The PCRA court and the state appellate courts never held Rowe's second PCRA untimely filed, all retained jurisdiction and ruled on the merits; (11) All the state courts indicated to Rowe the second PCRA was properly filed under Pennsylvania law, thereby tolling AEDPA's limitation period; (12) Had the PCRA court found Rowe's second PCRA untimely filed, he still had time to file his habeas petition; and (13) Rowe is actually innocent of the crimes convicted of.

The Court of Appeals decision finding that equitable tolling was not warranted for the time period Rowe's second PCRA petition was on review was created a conflict with the Third Circuit and among the remaining Circuit Courts, as well with this Court where similarly situated petitioners have been granted equitable tolling for the same extraordinary circumstances Rowe faced.

Every indication was made to Rowe that his second PCRA petition was properly filed pursuant to **Artuz v. Bennett**, 531 U.S. 4, 8 (2000). If Rowe's second PCRA petition was not properly filed, then the PCRA court knowingly forfeited his right to habeas review by proceeding with the PCRA and not properly dismissing it pursuant to Pa.R.Crim.P. 907. Failure to hold the post-conviction reviewing courts to the

law they must follow when they are examining a post-conviction petition will only permit the courts to operate outside the law and abuse a petitioner's due process and equal protection rights, denying him or her their right to federal habeas corpus review.

Had the Court of Appeals and the District Court properly upheld the law to the facts, and applied the facts to the law, they would have held statutory and equitable tolling of AEDPA's limitation period applies for the time period Rowe sought post-conviction relief, making his habeas petition timely filed which warranted relief due to the numerous constitutional errors that occurred during the state proceedings that violated Rowe's 5th, 6th, 8th and 14th Amendment rights under the United States Constitution.

The trial court violated Rowe's right to the Confrontation Clause, Due Process and a Fair Trial when it permitted Respondent to: introduce inadmissible hearsay testimony over objection that placed Rowe at the victim's residence; suppress exculpatory evidence that supported Rowe's innocence; introduce an unconstitutional highly suggestive single photo line-up identification and testimony; introduce inadmissible hearsay within hearsay evidence that was not offered for truth but to establish a motive; introduce inadmissible highly inflammatory 911 audio recording that inflamed the passions of the jury; introduce numerous inadmissible highly inflammatory photos of the victims that served no probative value; introduce inadmissible demonstration evidence that was not based on fact. The trial court further abused its discretion when it: permitted a tainted jury to remain empaneled after they were told to convict Rowe; allowed Rowe to be convicted on both First and Third Degree Murder for each victim – constituting Double Jeopardy. Respondent violated Rowe's due process right when it failed to present sufficient evidence to prove every element of the crimes convicted of. The cumulative errors of the state court and Respondent denied Rowe a meaningful adversarial testing process.

Trial counsel violated Rowe's right to the Confrontation Clause, Due Process, Compulsory Process, Fair and Impartial Jury, Fair Trial, Double Jeopardy Protection and Effective Assistance of Counsel. Trial counsel presented no defense as his trial strategy was to "rely on the weakness of" Respondent's case, that "there wasn't enough evidence to convict." Trial counsel failed to: make himself familiar with the case; prepare for trial; object to unconstitutional and inadmisslble vehicle identification testimony; investigate any witnesses or evidence [Respondent's or Defense's]; consult with experts; present exculpatory witnesses that supported Rowe's innocence who offered an alternative theory and suspects;

object to unconstitutional and inadmissible evidence; failed to move for a mistrial due to jury tampering; failed to request DNA tsting of the blood found under the victim's fingernails, rope and cigarette-butt; and failed to preserve constitutional violations at trial on direct appeal of the double jeopardy violation, tainted jury violation, confrontation clause violation and the cumulative effect of trial court errors on appeal.

VI. CONCLUSION

The petition for a writ of certiorari should be granted in the interest of justice, fairness and integrity.

Respectfully Submitted,

July 9, 2018
Date

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