No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BARRY SOLDRIDGE,

***Petitioner*,**

v.

SUPERINTENDENT DALLAS SCI,
DISTRICT ATTORNEY OF NORTHAMPTON COUNTY, and
ATTORNEY GENERAL OF PENNSYLVANIA,

Respondents.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Jeffrey M. Brandt, Esq.
ROBINSON & BRANDT, P.S.C.
629 Main Street
Suite B
Covington, KY 41011
(859) 581-7777 voice
(859) 581-5777 facsimile
Counsel of Record for Mr. Soldridge

31 August 2018

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BARRY SOLDRIDGE,

***Petitioner*,**

v.

SUPERINTENDENT DALLAS SCI, et al.,

Respondents.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Barry Soldridge respectfully asks leave to file his petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Mr. Soldridge encloses his affidavit of indigence in support of this motion.

Dated: 31 August 2018

Jeffrey M. Brandt
Jeffrey M. Brandt, Esq.
ROBINSON & BRANDT, P.S.C.
629 Main Street
Suite B
Covington, KY 41011
(859) 581-7777 voice
(859) 581-5777 facsimile
Counsel of Record for Mr. Jones

QUESTIONS PRESENTED

The Court has made clear that a defendant's waiver of a constitutional right is valid only if entered knowingly, intelligently and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709 (1969); *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S. Ct. 1019 (1938). The Court has also held that waivers of statutory rights can be invalid if unknowingly or involuntarily entered. *Town of Newtown v. Rumery*, 480 U.S. 386, 393, 107 S. Ct. 1187 (1987); see *Shutte v. Thompson*, 82 U.S. (15 Wall.) 151, 21 L. Ed. 123 (1873)).

In this case, Petitioner filed a state post-conviction action asserting that he had entered a waiver of his post-conviction relief rights (statutory rights, see 42 Pa.C.S. § 9541 et seq.) unknowingly and involuntarily. The state court held a hearing. But no evidence was presented. Upon information and belief, Petitioner's filings averred that he had entered the waiver while on suicide watch and after being told by his attorneys that he was not permitted to view the mitigating evidence they would present at sentencing to avoid the death penalty, that he would be able to file post-conviction action despite the waiver, and that he should answer "yes" to the court's questions about whether he understood the consequences of entering the waiver. The state courts ruled Petitioner's waiver was knowing and voluntarily entered without reference to any of these facts, listing only what Petitioner said—as coached by his attorneys—in open court in response to the court's questions. The first question before the Court, then, is whether the district erred in failing to find that the state court entered a decision that was an unreasonable in light of the full record. An attendant question is whether the circuit court erred in failing to find that the district court's ruling was at least debatable and worthy of a certificate of appealability.

This Court has held that, although a guilty plea prevents a defendant from challenging alleged constitutional rights occurring before entry of the plea, a defendant may challenge the plea on the grounds that he entered it as the result of ineffective assistance of counsel concerning the plea. *Tollet v. Henderson*, 411 U.S. 258, 266-67, 93 S. Ct. 1602 (1973); *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441 (1970)). Building on that principle, circuit courts have held that even an otherwise valid post-conviction relief waiver does not preclude a claim that counsel was ineffective in the conduct leading a defendant to enter the waiver. E.g., *United States v. Bragg*, 554 Fed. Appx. 781, 782 (10th Cir. 2014); *Hurlow v. United States*, 726 F.3d 958, 964 (7th Cir. 2013). This Court has not addressed that particular important question.

In this case, Petitioner presented his federal habeas petition with a claim that he entered the post-conviction action waiver unknowingly and under duress as a result of his trial counsel's ineffectiveness. And yet the district court denied relief on the grounds that the post-conviction waiver precluded Petitioner's claim challenging the waiver, and the Third Circuit affirmed, finding no debatable question despite circuit case law to the contrary. The second question before the Court is whether a petitioner may challenge an otherwise valid post-conviction waiver in an post-conviction action on the grounds that it was entered as the result of ineffective assistance. If not clearly the case, the ancillary question is whether the issue was at least debatable.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Barry Soldridge respectfully petitions the Court to grant a writ of certiorari to the U.S. Court of Appeals for the Third Circuit.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The district court entered a final appealable order, denying Petitioner's petition for writ of habeas corpus under 28 U.S.C. § 2254 and declining to certify any issue for appeal. *Soldridge v. DA of Northampton*, 16-cv-01820 (E.D. Pa., Dec. 15, 2017). Pet. App. at 12a-13a. The U.S. Court of Appeals for the Third Circuit also declined to certify the issue for appeal in an unpublished opinion. *Soldridge v. Superintendent Huntingdon SCI*, No. 18-1102, 2018 U.S. App. LEXIS 20500 (3d Cir., Jun. 4, 2018). Pet. App. at 1a.

STATEMENT OF THE BASIS FOR JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 2254, as Petitioner was confined under an order of a state court and timely filed a petition for writ of habeas corpus based upon claims that he was in custody in violation of the U.S. Constitution—claims he had properly exhausted in the state courts. 28 U.S.C. § 2254(a), (b)(1)(A).

The Third Circuit had jurisdiction under 28 U.S.C. § 1291, 18 U.S.C. § 3742(a), and 28 U.S.C. § 2253, as the district court had entered a final judgment, Pet. App. 12a., Petitioner timely appealed from that opinion and judgment, so that the court of appeals had jurisdiction to determine whether it would certify the matter for appeal.

This Court has jurisdiction under 28 U.S.C. § 1254(1), as the Third Circuit has rendered a final decision denying Petitioner a certificate of appealability, Pet. App. 1a, and because he is filing this petition within 90 days of that ruling. See Sup. Ct. R. 13.1, 13.3, 29.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Fourteenth Amendment's Due Process Clause provides that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV.

The federal courts should grant habeas relief if the prior adjudication of the claim was:

> contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States [or that the decision] was based on an unreasonable determination of the facts.

28 U.S.C. § 2254(d)(1), (d)(2).

A state prisoner whose petition for writ of habeas corpus is denied by a federal district court may appeal only if "a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1).

> A certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253(c)(2).

STATEMENT OF THE CASE

This case presents a question of whether the district court erred in failing to find that the state court rendered a decision that was unreasonable in light of the entire state court record. Although Petitioner often reported that he did not understand and needed to consult with counsel, the transcript and written waiver certainly provided strong evidence that Petitioner understood he was waiving his collateral rights. Focusing on that transcript and written waiver, the state courts found the record supported a finding that Petitioner knowingly and voluntarily entered the collateral waiver. But that was not the entire story.

Petitioner's uncontested statements established that he was on suicide watch when approached by counsel to sign the waiver, that he was significantly pressured by counsel to enter the waiver, that he was told that the waiver was the only option to avoid the death penalty, but that his attorneys refused to show him what they would present in mitigation to avoid the death penalty. Further, the record included that Petitioner's attorneys falsely reported that he would be able to file a post-conviction action despite the collateral waiver, and that he was advised to answer the court's questions in ways that would lead the court to accept the waiver as if Petitioner truly understood the consequences. When denying relief, the state courts did not cite a single one of these facts and only looked to what Petitioner signed and stated in open court. While the state trial court held a hearing, no evidence was taken, denying Petitioner the opportunity to flesh out these additional facts. In light of the entire record, the state court's decision that Petitioner had knowingly and voluntarily entered the waiver was an unreasonable determination.

On habeas review, Petitioner asserted the same facts. Because Petitioner signed his petition under oath, his statement of the facts were sworn and, thus, evidence. But the federal district court did not reference Petitioner's assertions of what happened behind the scene to find that the record overall support the state court's decision. Because the courts have looked only to what Petitioner signed and what he said in open court, ignoring evidence of Petitioner's duress and the false legal advice given him, the district court's ruling on this issue was, at the very least, debatable. But the Third Circuit refused to issue a certificate of appealability.

This case also presents a question of whether a petitioner may challenge an otherwise valid post-conviction waiver in a post-conviction proceeding challenging the waiver itself on the grounds that it was entered as the result of the ineffective assistance of counsel. The Court has held that a defendant is permitted to challenge a guilty plea on the ground that ineffective assistance of counsel led to the improper entry of that plea. The Court has not ruled on whether that logic extends to allow a petitioner to challenge what is otherwise a valid post-conviction relief waiver with a claim. This is an important federal question for which the Court should grant certiorari to address and resolve for the lower courts.

1. In October 2011, a Northampton County, Pennsylvania jury found Petitioner guilty on two counts of first-degree murder. Following the verdict, Petitioner was led out of court to prison, stripped of his clothes, and placed in an isolation cell on suicide watch.

Petitioner's attorneys visited with him that same day, presenting him with a written waiver of his rights to appeal and seek post-conviction relief, aggressively urging him to sign it in exchange for two consecutive terms of life imprisonment rather than facing the death penalty.

Counsel expressed that there was "no way" that Petitioner could avoid the death penalty without entering the waiver. Still in shock from the verdict, Petitioner was unsettled and refused to sign.

The next morning, Petitioner was given a prison jumpsuit to wear. It was oversized and torn so that his genitals were exposed. He was led to a holding cell in the courthouse to await the call of his case and the beginning of the penalty phase. His two attorneys met with him and again aggressively urged him to sign the waiver, asserting again that it was the only way to avoid the death penalty. But when Petitioner asked to see the mitigation evidence they would present in support of something other than the death sentence if he did not sign, the attorneys refused to show it to him, claiming it was "confidential." And when Petitioner questioned whether he could file a post-conviction relief action later, even if he signed and despite what the written waiver said, one attorney reported that, yes, Petitioner would be able to file a post-conviction action. Without an opportunity to review what would be presented in mitigation to avoid the death penalty if he did not sign, and with the assurance that he could still file post-conviction action, Petitioner signed the collateral waiver.

Petitioner appeared in court following that meeting with counsel. His attorneys presented the written waiver in court. The court then questioned Petitioner, asking him, among other things, whether he understood that he could go forward with the penalty phase and whether he had reviewed the written waiver with his counsel. Petitioner repeatedly reported that he had questions about what was happening. But when asked whether he understood that the document meant he was waiving the right to file a direct or collateral appeal in the state of federal courts, he responded that he did. Petitioner's uncontested sworn statements established, however, that he had been told by his counsel to answer the court's questions in ways that would lead to

acceptance of the waiver. Accepting Petitioner's responses, the trial counsel sentenced Petitioner to serve two consecutive terms of life in prison. Days later, Petitioner wrote to his attorneys, asking them to move to withdraw the waiver. Counsel did not take that action.

2. In October 2012, Petitioner filed pro se post-conviction action. Although the warden did not include Petitioner's pro se filings in the appendix entered in the federal district court record when it filed its answer, the undersigned understands that Petitioner informed the court of the facts above, including that his attorneys reported that the waiver was the only way to avoid the death penalty but refused to show him the alternative route—the evidence that they would use in mitigation to avoid the death penalty. He informed the court that one attorney told him that he would be able to file a post-conviction action despite the language of the waiver and coached him to answer the court's questions in a way that would lead the court to accept the waiver. As a result, Petitioner asked the court to set aside the waiver on the grounds that it was entered under duress, as a result of false statements and ineffective assistance, so that it was unknowingly and involuntarily entered. Without taking additional evidence as to what occurred outside the record at the time of the waiver, the trial court denied the post-conviction action based upon the waiver, failing to allow Petitioner to challenge the validity of the waiver itself on the grounds that it had been entered as a result of the denial of his Sixth Amendment right to the effective assistance of counsel.

3. Petitioner, again acting pro se, sought relief in federal court and filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. Petitioner signed his petition under oath, making his statements sworn. The district court nevertheless agreed with the state courts that Petitioner had knowingly and voluntarily waived his collateral appeal rights. Pet. App. 8a. While recognizing

that Petitioner "allege[d]" that he signed the written waiver and orally entered the waiver under duress and after being "inadequately advised by" counsel, the district court looked only to what the written waiver reported and what Petitioner said in open court when weighing the voluntariness of the waiver. Pet. App. 9a.

More than simply "alleging" duress, Petitioner's sworn and uncontradicted statements should have been considered evidence of the duress and undue pressure upon Petitioner. Because it is understood those same facts were presented to the state trial court, and they should have been considered when reviewing whether the state court entered a decision that "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). But without reference to, or apparent recognition of the existence of, Petitioner's uncontested sworn statements of the circumstances of duress and false statements of counsel to induce him to enter the waiver, the district court overruled Petitioner's objections and ruled that the state courts reasonably concluded that the waiver was knowingly and voluntarily entered. Pet. App. 9a-10a.

4. On appeal, the U.S. Court of Appeals for the Third Circuit denied Petitioner's request for certificate of appealability for "substantially the reasons given by the District Court." Pet. App. 1a. Despite the ignored statements of Petitioner and the failure to hold an evidentiary hearing in light of those statements, the Third Circuit found that the district court's ruling was not debatable. *Id*.

Petitioner now timely petitions this Court for review, seeking a writ of certiorari to the Third Circuit. He is currently in custody at Dallas SCI, in Dallas, Pennsylvania, serving two consecutive terms of life imprisonment.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari, as the state court decision finding that Petitioner had knowingly and voluntarily entered the collateral waiver was unreasonable in light of the entire state court record. Neither the state courts nor the district court referenced or even acknowledged Petitioner's uncontested statements establishing: the circumstances of duress (suicide watch, nudity, exposure of private parts in public), his counsel's undue pressure (reporting that the waiver was the sole option to avoid the death penalty but refusing to share the mitigating evidence so Petitioner could properly weigh his options); false statements of counsel (that Petitioner could file post-conviction action despite the waiver); and bad legal advice (that Petitioner should answer the court's questions in ways to urge the court to accept the waiver). The district court decision ignoring that portion of the record has so far departed from the usual course of habeas proceedings so as to call for this Court's supervisory power. See Sup. Ct. R. 10(a). In refusing to certify the issue for appeal, the Third Circuit has found the district court decision is not even debatable, which appears to conflict directly with this Court's relevant decisions. See *id*. at 10(c).

The Court should also grant this petition to take up an important federal question that flows from this Court's precedent and that some circuit courts have addressed but that has not been the subject of an opinion from this Court. See *id*. That question is whether a petitioner may file a state post-conviction relief action to challenge his waiver of his right to file post-conviction relief action on the grounds that the waiver was entered unknowingly and involuntarily as the result of the ineffective assistance of counsel.

I. The Court should Grant the Petition, as the State Court Decision Finding that Petitioner had Knowingly and Voluntarily Entered a Collateral Waiver Failed to Acknowledge Evidence Showing that the Waiver was Entered under Duress and from False and Bad Legal Advice, the District Court Erred in Failing to Find the Decision was Unreasonable, and the Third Circuit Erred in Failing to Find that the Issue was Debatable.

A. A State Court Decision is an Unreasonable Application of Clearly Established Federal Law when it Unreasonably Applies the Correct Governing Legal Principle to the Facts of the Petitioner's Case in Light of the Entire State Court Record.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court has no authority to issue a writ of habeas corpus unless the highest state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A decision is an unreasonable application of clearly established federal law when it correctly identifies the governing legal principle but "unreasonably applies that principle to the facts of the prisoner's case" based upon the state court record. *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S. Ct. 1166 (2003); see *Williams v. Taylor*, 529 U.S. 362, 413, 120 S. Ct. 1495 (2000).

B. The Waiver of a Statutory Right, Such as a Right to File a Post-conviction Relief Action, is Valid Only if Knowingly and Voluntarily Entered.

The Court has made clear that a defendant's waiver of a constitutional right is valid only if entered knowingly, intelligently and voluntarily. "A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *United States v. Mezzanatto*, 513 U.S. 196, 201, 115 S. Ct. 797 (1995); see also *Peretz v. United*

States, 501 U.S. 923, 936, 111 S. Ct. 2661 (1991) ("The most basic rights of criminal defendants are * * * subject to waiver."). By agreeing to plead guilty, for example, the defendant waives the right to a jury trial, the right to confront and cross-examine witnesses, and the right against self-incrimination. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709 (1969). A defendant can also validly waive his rights against double jeopardy and his Sixth Amendment right to counsel. *Ricketts v. Adamson*, 483 U.S. 1, 10, 107 S. Ct. 2680 (1987) (double jeopardy); *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S. Ct. 1019 (1938) (right to counsel).

The Court has applied this same rule to statutory rights, finding waivers of statutory rights invalid if unknowingly or involuntarily entered. See *Town of Newtown v. Rumery*, 480 U.S. 386, 393, 107 S. Ct. 1187 (1987), *Shutte v. Thompson*, 82 U.S. (15 Wall.) 151, 21 L. Ed. 123 (1873). The circuit courts have followed suit, finding that the ability to waive statutory rights logically flows from the ability to waive constitutional rights. *United States v. Mabry*, 536 F.3d 231, 236-37 (3d Cir. 2008) (finding defendants may waive statutory rights if done voluntarily and with knowledge of the consequences of the waiver); *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001); *United States v. Teeter*, 257 F.3d 14, 22 (1st Cir. 2001); *United States v. Nguyen*, 235 F.3d 1179, 1182 (7th Cir. 2000); *United States v. Anglin*, 215 F.3d 1064, 1068 (9th Cir. 2000).

C. Only by Ignoring Petitioner's Uncontested Sworn Statements Reporting Duress and False Legal Advice was the District Court Able to Find that the State Court Record Showed that Petitioner Knowingly and Voluntarily Entered the Collateral Waiver.

A state court record typically shows that a petitioner knowingly and voluntarily entered a waiver if one looks at what was filed with the court and said in open court. After all, the court rarely accepts a waiver as validly entered if the written waiver and oral statements do not strongly

suggest the petitioner understands the consequences of the waiver. If the petitioner hints that he is not knowingly or voluntarily acting, more often than not, the conflict is resolved to the satisfaction of all or the waiver is not accepted. But when collateral action is later filed and additional evidence is presented about what happened behind the scenes, the full court record is materially different.

When a petitioner's post-conviction action presents additional, uncontested statements showing what happened off the record, for example revealing that the signature on the written waiver was induced by counsels' false statements or that he or she was affirmatively directed to answer the court's question in ways to lead the court to accept the waiver, the "facts" must be re-evaluated. Only by ignoring the statements, failing to hold an evidentiary hearing, and looking only to what was filed with the court and stated in open court would a judge be able to find that the evidence continued to show only that the petitioner knowingly and voluntarily entered the waiver. That is precisely what occurred in this case.

Petitioner had just been convicted of two counts of murder and was in shock and on suicide watch when his attorneys came to him and strongly urged him to enter the waiver. Even slight pressure would be undue when a prisoner is nude in a solitary cell on suicide watch, as the prisoner is particularly vulnerable. The question for Petitioner was whether he wanted to risk the death penalty by proceeding with evidence at the penalty phase or waive the rights to appeal and post-conviction relief in exchange for two consecutively-run life sentences. A person in that situation would want to know his chances in the penalty phase and the true consequences of the waiver. Petitioner's attorneys failed him as to both. They refused to show him what evidence they would present in mitigation, claiming it was "confidential," leaving Petitioner unaware of his

chances of avoid the death penalty in the penalty phase (while retaining his rights to appeal and post-conviction relief). And one attorney claimed Petitioner would still be able to file post-conviction action despite the waiver.

Upon information and belief,[1] the state courts had Petitioner's statements as to the above when viewing his claims that he had entered the waiver unknowingly and involuntarily. But those courts focused on Petitioner's written waiver and the transcript of the hearing. The written waiver certainly contained only statements fully supporting the voluntariness of the waiver. During the hearing, the trial court reviewed the waiver with Petitioner, eliciting from him statements that he understood he had a right to proceed to the penalty phase and that he wished to give that up and enter the appeal and post-conviction waiver. The transcript also showed, however, that Petitioner often did not understand and needed time to consult with his counsel. And Petitioner's uncontested statements noted that he truly did not understand and reported that he understood only because he was advised by his counsel to answer in ways that would lead the trial court to accept the waiver and set aside the possibility of the death penalty.[2] If the statements were not considered sworn testimony to be considered a part of the record in state court, they

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[1] As noted above, the warden did not file the full state court record with the federal district court when filings his answer to Petitioner's § 2254 petition. Petitioner's written pro se post-conviction relief documents, for example, were not filed. The undersigned understands from Petitioner, however, that the assertions to which he swore in his pro se § 2254 petition were presented to the state courts before they denied his post-conviction action.

[2] It is certainly true that Petitioner's sworn statements might not have been fully accurate or that he misunderstood his attorneys on some points. But to explore that possibility, the trial court needed to hear evidence, including hearing from the defense attorneys. That court did not do so and, thus, should be stuck with Petitioner's sworn assertions as being considered true for the sake of the record. See *Roundtree v. United States*, 751 F.3d 923, 926 (8th Cir. 2014) (§ 2255 context); *Moreno-Morales v. United States*, 334 F.3d 140, 145 (1st Cir. 2003) (same).

certainly became such when Petitioner signed his § 2254 habeas petition under oath and made these same assertions.

In conclusion, a man on suicide watch and in shock signed a document because, over the course of two days, he was pressured by his attorneys to do so on the grounds that he did not have a choice—that he had to sign it or he would most certainly be given the death penalty. It was an unreasonable conclusion, on this record, that Petitioner was acting knowingly and voluntarily when signing the document and addressing the court. As a result, the district court erred in failing to grant relief under § 2254, and the Court should grant the petition to exercise its supervisory power and correct the district court's decision. See Sup. Ct. R. 10(a).

D. The Court should Grant the Petition, as the Third Circuit Failed to Properly Apply this Court's Precedent to Find the Issue was at Least Debatable.

A COA is appropriate under 28 U.S.C. § 2253(c)(2) when a jurists of reason could disagree with the district court's resolution. *Miller-El v. Cockrell*, 537 U.S. 322, 336, 348, 123 S. Ct. 1029 (2003*)*; *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595 (2000). Petitioner need not establish that he will win on the merits in order to obtain a COA; he need only demonstrate that the questions he raises are debatable among reasonable jurists. *Buck v. Davis*, 137 S. Ct. 759, 773-74, 197 L. Ed. 2d 1 (2017); *Miller-El*, 527 U.S. at 348.

In this case, even if the district court's decision was not clearly wrong, it was at least debatable. The failure of a district court to acknowledge a Petitioner's sworn uncontested statements as a part of the record when reviewing whether the state courts decisions were unreasonable in light of that record was certainly debatable and worthy of further review. See *Miller-El*, 537 U.S. at 336, 348; *Slack*, 529 U.S. at 484. Accordingly, the Third Circuit failed to

properly apply this Court's precedent by failing to certify the issue for appeal. The Court should grant this petition to accept the case and correct the Third Circuit's ruling in conflict with this Court's precedent. See Sup. Ct. R. 10(c).

II. The Court should Grant the Petition to Address and Resolve the Important Question of Whether Prisoners May File Collateral Action to Challenge a Waiver of the Right to File Collateral Action on the Grounds that the Waiver was Invalid as a Result of the Ineffective Assistance of Counsel.

This Court has held that a guilty plea represents a break in the chain of events which has preceded it in the criminal process and prevents a defendant from challenging alleged constitutional rights occurring before entry of the plea. *Brady v. United States*, 397 U.S. 742, 750, 90 S. Ct. 1463 (1970); *McMann v. Richardson*, 397 U.S. 759, 770, 90 S. Ct. 1441 (1970). But a defendant may challenge the plea on the grounds that he entered it as the result of ineffective assistance of counsel concerning the plea. *Tollet v. Henderson*, 411 U.S. 258, 266-67, 93 S. Ct. 1602 (1973); *McMann*, 397 U.S. at 771.

Building on that principle, circuit courts have held that even an otherwise valid post-conviction relief waiver does not preclude a claim that counsel was ineffective in the conduct leading a defendant to enter the waiver. See *Hurlow v. United States*, 726 F.3d 958, 964 (7th Cir. 2013) (holding "that appellate and collateral review waivers cannot be invoked against claims that counsel was ineffective in the negotiation of the plea agreement") (citing *United States v. Jemison*, 237 F.3d 911, 916 n.8 (7th Cir. 2001); *United States v. Hodges*, 259 F.3d 655, 659 n.3 (7th Cir. 2001); *DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000); *Watson v. United States*, 165 F.3d 486, 488-89 (6th Cir. 1999); *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994); *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993); *United States v. Bragg*, 554

Fed. Appx. 781, 782 (10th Cir. 2014). By denying Petitioner relief, the Third Circuit may have demonstrated that it is in conflict with these circuits.

This Court has not addressed that particular important question. It is an important question that should be resolved for this case and others, as the question is likely to arise many more times in the future. In this case, Petitioner presented his federal habeas petition with a claim that he entered the post-conviction action waiver unknowingly and under duress as a result of his trial counsel's ineffectiveness. And yet the district court denied relief on the grounds that the post-conviction waiver precluded Petitioner's remaining claims, including the one challenging the waiver. Pet. App. 11a. The Third Circuit affirmed, finding no debatable question despite abundant circuit case law to the contrary. Pet. App. 1a. The Court should also grant this petition to take up this important federal question that has not been the subject of an opinion from this Court to provide guidance for the lower courts and practitioners and to reverse the Third Circuit's ruling that the issue was not debatable. See Sup. Ct. R. 10(c).

CONCLUSION

Petitioner Barry Soldridge respectfully asks the Court to grant his petition for writ of certiorari and set the matter for full briefing to address the important questions above.

Respectfully submitted,

ROBINSON & BRANDT, P.S.C.

Dated: 31 August 2018

/s/ Jeffrey M. Brandt
Jeffrey M. Brandt, Esq.
629 Main Street, Suite B
Covington, KY 41011
(859) 581-7777 voice
(859) 581-5777 facsimile
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing petition for writ of certiorari, motion for leave to proceed in forma pauperis, and the following appendix were served by U.S. Priority Mail on the date reported and signed below upon Rebecca J. Kulik, Northampton Count Office of District Attorney, 669 Washington Street, Easton, PA 18042; and the Solicitor General's Office, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001.

Dated: 31 August 2018

/s/ Jeffrey M. Brandt
Jeffrey M. Brandt, Esq.

APPENDIX