18-6719

No. 17 - 3662

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Bobby K. Williamson, — PETITIONER
(Your Name)

vs.

Jamey Luther, Warden, et al. RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ...
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mr. Bobby K. Williamson, #DO - 9200
(Your Name)

Post Office Box 999, 1120 Pike Street
(Address)

Huntingdon, Pennsylvania 16652 -
(City, State, Zip Code)

Not applicable !
(Phone Number)

QUESTION(S) PRESENTED

(1) Did the Third Circuit err i rendering petitioners's Post Conviction Relief Act Petition untimely and "THE END OF THE MATTER," without the Pennsylvania Supreme Court rule that:

(a) Petitioner had been given a proper written notice of the final judgment of sentence order, of February 12th, 1995, pursuant to Pa.R.App.P #108(a)(1),

(b) Or whether petitioner **"has alleged and proved"** that petitioner fell within any statutory exception to 42 Pa.C.S.A. §§9545(b)(1)(i)-(iii),

Conflicts with Jeminez Vs. Quarterman, 129 S. Ct. (2009).

(2) Where the Third Circuit decision not to accept the Seventh and Ninth Circuits decisions in accepting **"newly presented" evidence**, is a recognized split between the Third/Ninth Circuits over what counts as **"new evidence under the** Schlup Vs. Delo, 115 S. Ct. 851 (1995) standard, Versus **"newly presented" evidence under** United States Vs. Davies, 394 F. 3d 182, @ 191 (3rd. Cir. 2005).

(3) Whether the Third Circuit decision in finding that petitioner should have filed a Protective Habeas Corpus Petition, where 42 U.S.C.A. §2244(d)(2), is tolled until July 25th, 2004, running the 1-year statute of limitation period through July 25th, 2005, despite the evidence necessary for filing the PCRA Petition were Unavailable, would still require asking the District Court to stay & obey that federal habeas proceedings until state remedies are exhausted, is an important federal law that, should be settled by the Supreme Court.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] 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:

(1) SCI, Smithfield Warden, Mrs. Jamey Luther,

(2) District Attorney for Philadelphia, Pa., Mr. Larry Krazner, and

(3) Assistant District Attorney, Mr. John W. Goldsborough, Esq.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[XX] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 5th, 2018.

[ ] No petition for rehearing was timely filed in my case.

[XX] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 12th, 2018, and a copy of the order denying rehearing appears at Appendix A.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including November 12, 2018 (date) on _____ (date) in Application No. A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Sixth Amendment,

United States Constitution, Fourteenth Amendment,

28 U.S.C. §2244,

28 U.S.C. §2254,

42 Pa. C.S.A. §5572, and

42 Pa. C.S.A. §9545 !

STATEMENT OF THE CASE

Trial testimony of defendant, and confirmed by trial counsel that, alibi witnesses were known but counsel failed to locate them and they were rendered **"unavailable," until their whereabouts were discovered, and newly discovered evidence.**

The shooting incident occurred on a street corner in the city of Philadelphia, Pennsylvania, at of about 3 :40am, on July 5th, 1987. The Medical Center pronounced the victim **"dead on arrival."** During the police investigation, within minutes of the shooting they learned that, prior to the shooting the perpetrators had arrived in a small vehicle and that an argument ensued between the victim and one of the assailants. This assailant was relieving himself against a building, in plain view of where the victim and his pregnant girlfriend stood leaning against their car parkeed at the curb, a few feet away. The victim, his girlfriend and another couple had drove from Prince George's County, Maryland, to attend a party.

An uninterested party to this matter was sitting on the steps of a library when that witness observed the occupants of a little white car existed their vehicle, and moments later shot the victim. This witness immediately telephoned his childhood friend, who happened to be a Philadelphia Police Officer - she took the call at home and this witness told her what he saw. After the officer spoke with that witness she then called her platoon officer at the precinct and relayed what she was told. She emphasized to her platoon officer that the investigators doesn't realized that the car in question is a part of the crime scene. Neither the police officer nor this witness was called to testify at the 1992 trial.

The victim's girlfriend gave a singed statement to investigators that, at the time of the shooting, her and the victim was leaning against their vehicle when two guys walked across from across a small side street, when one of the men began to urinate against the wall, directly in front of her, and that her boyfriend told the

guy relieving himself to go somewhere else and urine and to have some respect for her. Treats were exchanged between the men and both of the perpetrators pulled guns from their persons shoot her boyfriend.

Likewise, the other couple signed statement to the effect as follows: the male said that he was sitting in the vehicle the vehicle while the victim and his girlfriend stood outside, on the curb, when he noticed the victim appears to be an argument with another man, whom he had never seen before. He exited the vehicle to inquire what was going on ... the victim told him that the man had relieved himself in front of his girlfriend, upon hearing that, he smiled/laugh and proceeded back to sit inside the vehicle. Continuing he said, as he walk to the back of the car gunshots rang out, and he quickly jumped into the driver's seat of the vehicle and attempt to drive away from the gunfire. His girlfriend also gave a signed statement that, she didn't actually saw the shooting but that, she saw the two perpetrators fleeing the scene as they continued to fire their guns.

A sixth eyewitness gave signed statement on the morning of the shooting, that he worked across the street, and that he was working when they had a Jamaican Party. He said that, at some point he went out the back door and into the back yard by the bushes looking onto a small street, to dump the trash. At that time he then observed the manager of establishment where he worked, as well as others. he saw a little gray car parked at the curb, and somebody, a black guy is sitting inside of it ... the guy who was shot and a girl is standing there by the car, onto the curb. Then he saw a Jamaican guy walked from a white car with Florida Tag. Then they pulled guns and began shooting this man talking to the girl, they both dropped to the curb and everybody takes off, running. He described one of the perpetrator as being, **about 30, black bush hair, stocky built, about 5'9", yellow shirt and brown pants and the he is known by the name "Ricky."** Weeks later this sixth witness gave a second statement and add the following, that prior to the shooting, he saw one of the perpetrator urinating against the wall, and that he recognized the driver of the white car, as someone he

knew six months and goes by the name of "Ricky."

Petitioner is a British Citizen, and in April of 1987, had travelled to America as for the first time on a B1-Visa, arriving at Baltimore Washington International Airport, with the male from the second couple who travelled with the victim on July 5th, 1987, (and was also friends with his girlfriend who would join us latter) and resided in various hotels in and around the tri-state area. Not long after my arrival I met and became friends with the victim in this matter. Petitioner was arrested in Prince George's County, Md., for possession of firearms about late April thru early May 1987. About May 27th, 1987, I was involve in an incident which had result in the stabbing death of a man, in a down-stairs apartment in P.G. County, Maryland. I immediately flee the crime scene, went back to my hotel room, at the Red Roof Inn Lodge, in Silver Spring Maryland, with a friend I knew by the name of Michael Johnson. I retrieved my belongings and we headed for the BWI, Airport, where I purchase two ticket to Miami Florida, to see a friend from London England who was also here on a B1-Tourist Visa; while there we stayed at the Royal Ponseya Hotel ... A few day later we flu to Houston Texas, to see anther friend from London England who was also here visiting, by this time it was no more than about a week or so into the month of June 1987. I destroyed my British Passport and decided that, I would over stay my Visa, in order to avoid being arrested for the Maryland murder. I live with my friend in Houston and never left the state until about September of 1987, when I travelled to Los Angeles, California and back a few month later.

Supposedly, an investigator from the Maryland murder said that, he received information from an unknown/disclosed source whom told him that petitioner and the man who travelled with the victim to Philadelphia had committed a murder in Philadelphia, over the 4th/5th weekend of July 1987. That investigator already had a mugshot from the gun possession case in Prince George's County, Md., and so he made contact with Philadelphia Homicide Division, and convey that information. The Philadelphia Police

told him that they had several murders during that time frame, however, they narrowed it to the victim's in this matter. By that time Maryland authorities had already obtained a second photograph from British authorities, in their effect to apprehend me, and so they travelled to Philadelphia and gave them copies of those photographs. The Philadelphia Homicide investigating the victim's murder in this matter gave the Prince George's County, Maryland, Sheriff a Picture of one of the perpetrators, which he returned to Maryland and assembled a photo-array consisting of the following fillers: (1) one photo of the petitioner, a photo of a light-skinned black man, with broad face, 220Lb, about 5'8", the British photo of Petitioner, and a single photograph of the male and "female," friends of the victim who witness the victim being shoot. The Maryland investigator then went to the residence of the victim's girlfriend and showed her that photo-array, under the pretext of trying to locate petitioner for the matter he was investigating in his jurisdiction (keep that in mind). However, when he display the photo-array to her, soon as she saw the first photo of me, she said that, "the eyes look like the guy who shot and kill her boyfriend, when she saw the picture of the perpetrator's photograph who had been identified as the shooter, she said nothing, but then when she saw a second photograph of petitioner, she supposedly threw the photo on the table and said, "thats the guy who shot my boyfriends."

When the witness who was working when he witness the shooting as he went out to the back yard to dump trash, was shown that very photo-array, he identified the light skinned man in the array as being the perpetrator and the guy he knows by the name of "Ricky."

The Maryland investigator then conveyed what had transpired to the Philadelphia Homicide Division and in turn travelled to this identifying witness' Maryland residence and conduct another interview. In that interview, she told investigators that someone told her that her boyfriend had been set-up by the man whom he travelled

to Philadelphia, Pennsylvania with. The person she received this information from is a known informer, name Mr. Ben Hamilton.

At the 1992, jury trial, the prosecution presented an eleventh hour witness, this woman claimed that, she met me in early January of 1987, that I shared a room with her at her mother's apartment in Prince George's County, Maryland, and that she saw me every day because she work with me, and that on July 4th, 1987, she saw me and the victim at about 5PM, outside of her appartment, dressed in the exact clothing as one of the perpetrators who was described in the shooting death of the victim hours later in Philadelphia, and that the victim was wearing the outfit he shot and killed wearing, when I supposedly invited her along to the party in Pennsylvania, which she declined. This 11th, hour testimony told the jury that she remembered what the couple who accompanied the victim to Pennsylvania were wearing because she saw then before they headed out for Pennsylvania, because they had just returned from the mall that day with those outfit they had bought (keep that in mind).

When the victim in this matter's girlfriend took to the witness stand she testified that, when the P.G. County sheriff came to her apartment he told he that he was investigating the shooting death of her boyfriend.

Other than those two private citizens and other prosecution witnesses from the police department and medical personnels, no witnesses were call to the stand from the defense side, not even the witness who identified another person as been the real perpetrator. I was advised by counsel not to testify because if I did, the district attorney would bring out the fact that I was convicted on the Maryland matter and was serving a 15 year sentence for a separate murder, and that if the jury heard that, they would return a guilty verdict. Ultimately, I was found guilty of first degree murder. During the Death Penalty Phase of the trial, I testified that the jury had made a mistake, because I was a friend of the victim and had no reason to kill him, and furthermore, I had no grievance with the 11th, hour witness and was puzzled as to

why she would want to lie against me, adding that I never worked with her and that I first met her in later April 1987, at which time I was living in and out of various hotels (Keep that in Mind). Petitioner told the trial court that, on the weekend of July 4th/5th, 1987, I was living in Houston Texax and that since about May 28th, 1987, I fled Maryland and never returned until I was brought back in the summer of 1989, to face murder charges. During petitioner's testimony I gave specific names of the people I was with on the day in question, namely, Hughie Johnson, Michael, and Steppa, a.k.a, Mr. Harold Thompson (keep that in mind). I was spared the death penalty, and the judge sentenced petitioner to life in prison without parole. Counsel immediately told the sentencing judge that he would appeal the conviction, and in 1994, I returned to Maryland to serve out their sentence which preceded the Pennsylvania life sentence.

While in Maryland I made diligent efforts in keeping up with the status of the appeal by calling and writing letters to trial counsel as well as City Hall, in Philadelphia, to no avail. In late February 1997, I asked a member of the British Embassy In Washington, D.C. to contact the court in Philadelphia and in order to ascertain the status of my appeal, and Petitioner was informed that the appeal was was dismissed due to trial/appellate counsel's failure to file a timely Brief. Said counsel was also dismissed from the case, however, neither counsel nor the clerk of the superior Court informed petitioner of those developments, nor after the Supreme Court entered its Final Judgement of Sentence Order on February 11th, 1996. Armed with this new information Petitioner filed a first Post Conviction Relief Act Petition on or about March 18th, 1997. The PCRA Judge dismissed that appeal on April 17th, 1997. Petitioner filed a timely notice of appeal, which the court received on May 19th, 1997, Certified Mail! The Court has never process by docketing and filed that appeal. Over the ensuing years Petitioner has made numerous formal and informal request for a copy of the Supreme Court's Final Judgment of Sentence Order to no avail. Petitioner has filed several PCRA Petitions, right to appeal was restored but short lived.

On November 10th, 2005, Petitioner received the **discovery documents regarding the May 27th, 1987 murder in Prince George's County, Md., which was resolve in a guilty plea.** In these discoveries I learned for the first time that a man whom I had assaulted with a knife was not only the brother of the victim's girlfriend but also the boyfriend of the 11th, hour witness. I also learned from those documents that the 11th, hour witness' mother gave authorities a statement that she first met petitioner in April or May 1987, and that I stayed a various hotel, she also add that, since May 27th, 1987, she has not seen me in the area.

On September 25th, 2010, I obtained documents from the British Passport Office in London, England, showing that their office issued a British Passport to me on about early April 1987, and that I had also applied for and received a tourist visa to entered the country on or about late April 1987.

On August 11th, 2011, Mr. Harold Thompson, a.k.a. Steppa, in an affidavit represent that he was staying in Miami Florida in April 1987, and that about May 28th, 1987 he met me briefly and that at that time I told him I was going to Houston Texas to stay with Mr. Hughie Johnson. (The letter and circumstances surrounding how petitioner and Mr. Harold Thompson was reconnected, are available.)

On June 13th, 2012, Mr. Hughie Johnson, in an affidavit represent that he was with petitioner in early June 1987 thru July 4th/5th and beyond. (Two separate affidavits, i.e., one from a friend who travelled from Brooklyn New York, to London, England and met with my daughter who gave a second affidavit, outlining the circumstances that lead up the search and locating of Mr. Johnson living in England).

Lastly, petitioner's May 13th, 1987, arresting documents for carrying a concealed weapon.

On June 21st, 2012, Petitioner filed an Amended PCRA Petition, claiming Miscarriage of Justice / Actual Innocence. Then on August 23rd, 2012, the PCRA Court dismissed that petition. A Timely notice of appeal was filed on September 24th, 2012,

but because of the institution's short mistake in processing that appeal,it was received by the court outside of the time in which to file an appeal. However, on November 2nd, 2012, petitioner filed a timely PCRA Petition, i.e., for the sole purpose of restoration of the right to appeal the PCRA Court's August 23rd, 2012, dismissal Order. having waited two years for the state court to rule on the nunc pro tunc petition, petitioner decided that, that was more than reasonable time in which that court could have ruled on the matter; requiring petitioner to filed a first Petition for a Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, on November 15th, 2014, docket @ Civ. No. 14 - 5964.

On January 7th, 2015, Respondent responded claiming that "on January 7th, 2015, the PCRA Court sent petitioner its Notice of Intent to Dismissed due to untimeliness. In a timely Reply, Petitioner informed the Court that staff at the institution where Petitioner currently housed at, did a target check of the institution's legal Mail Log Book for January 2015, and beyond and yet they did not locate any entry of receiving the PCRA Court's Notice of Intent to Dismiss.

On May 19th, 2015, Magistrate Judge Elizabeth T. Hey wrote a Report and Recommendation, recommending that the habeas court petition be dismissed as untimely. In a foot note, the Magistrate Judge said that, the Docket Sheet doesn't contain any information to explain the delay of more than two years in processing the Fifth PCRA ... and that, in his response, the District Attorney avers that the petition "was located when undersigned counsel inquired about it." Doc. 7 @ 8. She then add that, "the Fifth PCRA plays no role in the outcome of the present habeas petition, and therefore it is not necessary to determine the cause of the delay. The first PCRA Petition was filed on March 21st, 1997, as she found - and more than two years after the end of his direct appeal -" The Magistrate Judge found that "the most critical piece of evidence" the alibi contained in the June 13th, 2012, affidavit of Hughie Johnson..." and that Petitioner did asserts that he submitted the affidavit in his

June 13t, 2012, PCRA Petition, however, although she was unable to confirm without the state court record in and when he in fact presented the affidavit to the state courts. In a foot note, Judge Hey said, "However, the state court docket entry disclose that, Petitioner filed an amended petition on June 26th, 2012, and he submitted the affidavit to the state court." Finally, in her conclusion she found that, Petitioner's conviction became final on February 11th, 1995, and therefore, the petition is not subject to statutory tolling.

The United States District Judge: Joseph F. Leeson, Jr. adopted Magistrate Judge Hey's Report and Recommendation, dismissing the petitioner's petition as untimely, and the request for an evidentiary hearing as well, due to the reasons below.

(1) That the October 15th, 2014, habeas petition was filed over seventeen year past the expiration of the statute of limitations on April 23rd, 1997,

(2) That statutory tolling of the statue of limitation doesn't apply because the PCRA Petitions were untimely - And that Petitioner didn't diligently pursue the claims nor can petitioner avoid the statute of limitation through a gateway claim of actual innocence, because the June 13th, 2012, affidavit of Hughie Johnson presents in support i **not newly discovered**, and a reasonable jury could still have found him guilty **"even in light of the affidavit."**

(3) That where a state court's decision that a Post Conviction Petition is untimely is **"the end of the matter" for purpose of federal habeas.** Pace Vs. DiGugliemo, 125 S. Ct. 1807 (2005),

(4) That petitioner failed and could have filed a protective habeas petition between July 25th, 2004 - July 25th, 2005.

(5) And that Petitioner has not produced new evidence, so petitioner's actual innocence claim fails. The July 13th 2012, affidavit of Hughie Johnson petitioner offered, an alleged alibi witness who attests that petitioner was with him in Houston from June through September 1987, so petitioner could not have

committed the murder in Philadelphia in July 1987. That although petitioner argues that **"new evidence" includes "newly presented evidence,"** the Third Circuit Court of Appeals considers evidence **"new" under Schlup only if it was not available at trial and could not have been discovered earlier through the exercise of diligence, except in situations where evidence was not discovered because of ineffective assistance of trial counsel.**[4] Citing Houck Vs. Stickman, 625 F. 3d 88, @ 93-94 (3rd. Cir. 2010); Pirela Vs. District Attorney of the City, Philadelphia, No. Civ. A. 00-5331, 2014 WL 20115365, @ *5-6 (E.D. Pa. May 16, 14). Specifically, evidence of an alibi is not new evidence when the alibi is known by the petitioner at the time of trial. Citing Cruz Vs. Wetzel, No. CV 14-2681, 2015 WL 6855637, @ *5 (E.D. Pa. July 30th, 2015), adopted, No. CV 14-2681, 2015 Wl 6811324 (E.D. Pa. Nov. 6th, 2015), cert. of appealability denied (May 31st, 2016) (finding that affidavits submitted by petitioner to establish alibi did not satisfy Schlup). The at his foot note District Judge said:

4

"One district court in this Circuit has recognized a circuit split over what counts as **"new"** evidence under Schlup: while the Third and Eighth Circuits requires newly discovered evidence, or evidence that could not have been discovered through reasonable diligence, the Seventh and Ninth Circuits view **"new"** evidence as evidence not **"presented"** at trial. See Phlipot Vs. Johnson, No. CV 14-383-RGA, 2015 WL 1906127, @ *4 n.6 (D. Del. Apr. 27, 2015). The case Petitioner cites in support of his position, U.S. Vs. Davies, does not control because the court in that case did not decide the meaning of **"new" evidence**, but merely referenced Seventh and Ninth Circuit decisions accepting **"newly presented" evidence.** 394 F. 3d 182, @ 191 (3rd. Cir. 2005) (**"We need not weigh in today on the "newly presented" Vs. "newly discovered" issues because, as we note below, we write in the context of a claim that a post conviction Supreme Court decision has held that the statute of conviction does not reach the petitioner's conduct."**).

After the Honorable District Judge: Joseph F. Leeson adopted Magistrate Judge Hey's Report and Recommendation, filed May 19th, 2015, a case came before him, which involves the date a court failed to docket/mail a Final Order, the following in an accurate account of the relevant procedural history of that case. On September 26th, 2014, the Superior Court affirmed the denial of Kendall C. Richardson's PCRA petition.

See Commonwealth Vs. Richardson, No. 2204 EDA 2012, 2014 Pa. Super. Unpub. LEXUS 92 (Pa. Super. 2014). Richardson filed an application for reconsideration/reargument on October 6th, 2014, and a application for remand on November 5th, 2014 with the Superior Court. See Superior Court of Pennsylvania Appeal Docket Sheet, Docket No. 2204 EDA 2012, @ 4, 2014 Pa. Super. Unpub. LEXUS 92. The Superior Court docket sheet indicates that the Superior Court denied Richardson's application for remand on November 12th, 2014, and denied the application for reargument/reconsideration on November 26th, 2014. Id. The Superior Court denial of Richardson's applications for remand and reargument/reconsideration "were not entered on the Court of Common pleas of Lehigh County Docket until January 23rd, 2015. See Docket, CP-39-0000217-2008. On August 21at, 2015, Richardson filed a second pro se PCRA petition. On August 28th, 2015, the PCRA court issued a letter of intent to dismiss pursuant to Pa.R.Crim.P. 907, and subsequently dismissed that petition on September 21st, 2015. Richardson filed a notice of appeal which was pending in the Pennsylvania Superior Court when he filed his petition for a writ of habeas corpus on November 23rd, 2015, docketed @ 15-CV-6362. U.S. Chief Magistrate Judge, Lina K. Caracappa, filed a Report and Recommendation on January 30th, 2017, indicating November 12th, 2014 and November 26th, 2014, as the dates on which the Superior Court denied Richardson's applications for remand and reconsideration respectively. Richadson filed objections to the R & R and argued that he was not notified of the November 12th, 2014 and November 26th, 2014 Superior Court decisions until there were entered on the Court of Common Pleas of Lehigh County on January 23, 2015. See Docket #27, Objs 8-15. The Honorable Joseph F. Leeson reviewed Richardson's objection and noted that, "While Pennsylvania Rules of Appellate Procedure 108 does not require the Superior Court clerk to make a notation on the docket when notice is given for criminal orders, petitioner was correct in his

argument that an order is not considered entered until the clerk of the court "MAILS" or delivers copies of the order to parties," see Pa.R.App.P. 108(a); see 15-CV-6362, Doc #29. Then Judge Leeson remanded that case the Magistrate Judge Caracappa for further report and recommendation on whether the court is able to determine if Richadson was in fact, given notice of the Superior Court's denial of Richardson's application for reconsideration on November 26th, 2014. After review of the state court record, Judge Caracappa was unable to find any documentation that indicates when petitioner was given a copy of the Superior Court's rulings. Therefore Judge Caracappa treat the January 23rd, 2015, the date the Superior Court's denial of Richardson's application for remand and reargument/reconsideration was entered on the Court of Common Pleas Docket, as the date in which Richardson was given notice of the Superior Court decisions.

REASONS FOR GRANTING THE PETITION

(Argument Summary.)

(1) THE 3rd, CIRCUIT'S DECISION CONFLICTS WITH THE HOLDINGS OF THE SUPREME COURT.

The amended 42 Pa.C.S.A §9545(b)(1) states that, "[a]ny postconviction petition, including a second or subsequent petition, shall be filed within one year, from the date the petitioner's conviction becomes final." The amended 28 U.S.C. §2244(d)(2) states that "the time during which a properly filed application for state postconviction ... with respect to the pertinent judgment ... is pending shall not be counted towards any period of limitation under this subsection. Pennsylvania's legislatures fashioned §9545(b)(1), supra., as the 1-year gate keeping rule to be the triggering point the date the petitioner's conviction became final - Also, Congress has fashioned §22444(d)(2), supra., in order to provide strong **"incentive for individuals to seek relief front state courts before filing their first federal habeas petition."** The Third Circuit departed from the holding in **Artuz Vs. Bennett, 121 S. Ct. 361 (2000).**

(1)(a) Writing for the unanimous court,Justice Scalia said that, §2244(d)(2), supra., provides that the time during which a properly filed application for state postconviction or other collateral review with respect to the pertinent judgment or claim is pending **shall** not be counted towards any period of limitation under this subsection ... And an application is "properly filed" when it's delivered and acceptance are in compliance with the applicable laws and rules governing the filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee.

The Third Circuit's acceptance of the PCRA Court's Order based on "untimeliness," and that being "the end of the matter," conflicts with Artuz definition of what is a properly filed PCRA in compliance with applicable state law and rule

governing filings.

For purpose of determining what are filing conditions, there is an obvious distinction between time limits, which go to the very initiation of a petition and a court's ability to consider that petition, and the type of **"rule of decision"** procedural bars at issue i Artuz, which go to the ability to obtain relief. For purpose of §2244(d)(1), supra., under state laws governing filing of PCRA Petition, @ §9545(b)(1), supra., the triggering of the 1-year in which to "properly file" must be i compliance with **Rule 108(a), supra.,** therefore, it follows that the Third Circuit has no Supreme Court authority that modified or expand Artuz, which allows it accept the state court "dismissal order, due to untimeliness" while proper issuance of of notice of the February 12th, 1995, Final Judgment of Sentence Order, or the Superior Court's dismissal Order on January 11th, 1095, for that matter, pursuant to state rule, 108(a) supra., is not being complied with.

Pertinent part of rule 108 ...

(a)(1) Except as otherwise prescribed in this rule, in computing any period of time under these rules, involving the date of entry of an order by a court, ... the day of the entry shall be the day the clerk of the court ... **mail** o' delivers copies of the order to the parties.

Under Supreme Court's precedent, direct appeal review process is a critical stage of a criminal proceedings where, like the actual trial, and appellant retains a number of constitutional rights, in order to effectively challenge the underline conviction. **Evitts Vs. Lucey**, 105 S. Ct. @ 830 (1985). For example, petitioner's claim that, the absence of notice of final judgment of sentence order, is a critical stage and constitutes a substantive Due Process violation, under the United States Constitution's 14th Amendment. Therefore, for purpose of §2244(d)(1), the 1-year limitation period in this case did not **run** on February 12th, 1995. Congress did not intend for the statute of limitation to expire without proper notice to petitioners

under conviction, nor has the Supreme Court interprets §2244(d)(1) to include premature final judgment of sentence order date, **not yet mail to the parties, as it requires in** Artuz, **would essentially be incoherent.**

The Third Circuit's acceptance of the PCRA Court's adoption of the February 12th, 1995, as the day of entry of the Final Judgment of Sentence Order conflicts with Supreme Court's precedents and inconsistent with §9545(b)(1) and 28 U.S.C. §2244 (B) - (D).

Based in part on 42 Pa..C.S.A. §5572 **(time of entry of order)**, the purpose of Rule 108(a)(1) is to fix a date from which the time period, so that all appellate time periods computes on the same basis. The PCRA Court and or the federal courts cannot utilize the clause in Rule 108(a)(1) proviso "... the day of entry of an order May be the day of its adoption by the court ..." in order to run the 1-year statute of limitation.

(1)(b) The §9545(b (1)(i)-(iii), 1995 amendment, affords potential PCRA petitioner's three exceptions to the 1-year limitation and "**shall**" apply to petitions filed after [January 16th, 1996] and whose judgment of sentence became final on or before [January 16th, 1996]. And **shall** be deemed to have filed a timely petition.

§9545(b)(1)(i):

If government interference prevented filing, or

§9545(b)(1)(ii):

If a new constitutional rule is made retroactive, or

§9545(b)(1)(iii):

If new facts arise that could not have been discovered through due diligence. Similarly, §2244(d)(1) provides that a 1-year period of limitation **shall apply to an application for a writ of habeas corpus.** The subsection then provides one means of calculating the statutory limitation's **run date**, with regard to the "application" for writ of habeas corpus to be the date of the final judgment but three other subsection

require claim-by-claim consideration:

§2244(d)(1)(B):

Governmental interference; or

§2244(d)(1)(C):

New right made retroactive; or

§2244(d)(1)(D):

New factual predicate ...!

The Third Circuit should have granted relief because the PCRA And AEDPA sets up judicial reviewable exceptions to the time limit, in that, the PCRA/AEDPA is a "condition to obtaining relief." **Artuz supra.** In petitioner's June 26th, 2012, PCRA, petitioner invoked statutory exceptions §§9545(b)(1)(i) and (b)(1)(iii), and then in petitioner's November 15th, 2014, petition for a writ of habeas corpus, (as well as throughout the pleadings) petitioner invoked §§2244(d)(1)(B) and (D). In doing that, petitioner did advanced the claim of actual innocence, miscarriage of justice, lack of notice of the January 11th, 1995, Superior Court's dismissal order and the Supreme Court's February 12th, 1995, Final Judgment of Sentence Order, (which that court have yet to enter on the docket, filed), governmental interference, and new facts, within a reasonable time of their availability. The Third Circuit did not apply the **Artuz Rule** to test whether or not the state court and the federal court did review the claims elucidated in the June 26th, 2012, PCRA Petition, in order for those court to make a determination whether any of those individual claim triggered the applicability of the exceptions, for purpose of COA.

Because the state court has not yet enter the February 12th, 1995, Final Judgment of Sentence Order on the docket, and or **mail** a copy of that Order to this petitioner, therefore, the judgment of is not yet **"final,"** for purpose of §2244(d)(1). Third Circuit should have remanded this case to the appropriate court so that, the state court may comply with Rule 108(a), supra., and upon conclusion of direct review

process, the date the state court enters either the Superior Court's January 11th, 1995, dismissal order, or the Supreme Court's February 12th, 1995, Final Judgment of Sentence Order would be the date that judgment becomes final pursuant to §2244(d)(1)(A). Relying on Jimenez Vs. Quarterman, 129 S. Ct. 681 (2009).

(2) THE THIRD CIRCUIT DEFINITION OF 'NEW' EVIDENCE UNDER SCHLUP IS IN CONFLICT WITH THE NINTH CIRCUIT'S DEFINITION OF 'NEW' EVIDENCE.

This Court should reject the Third Circuit definition of "new" evidence and adopt the Ninth Circuit's Schlup definition of "new evidence" to include "newly presented evidence" that was unknown at the time of trial but remain unavailable until it become available after trial.

1. In Schlup Vs. Delo, 115 S. Ct. 851 (1995) the Supreme Court established a standard that, to establish an actual innocence claim, a petitioner must "persuade the district court that, in light of the 'new evidence,' no juror acting reasonable would have vote to find him guilty beyond a reasonable doubt." The court then define "new reliable evidence" to be, exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial.

2. In Houck Vs. Stickman, 625 F. 3d 88, @ 94 (3rd. Cir. 2010), the Third Circuit held that evidence is "new" only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence. In doing so, the Third Circuit explicitly rejected a definition of "new" as NEWLY PRESENTED. However, the Houck Court specified on narrow limitation to its definition "if the evidence was not discovered for use at trial because trial counsel was ineffective, the evidence may be regarded as new provided that it is the very evidence that petitioner claims demonstrates his innocence."

3. In Griffin Vs. Johnson, 350 F. 3d 956, @ 963 (9th, Cir. 2003) "held that habeas petitioner may pass Schlup test by offering NEWLY PRESENTED EVIDENCE of actual innocence." Previously, in Carriger Vs. Stewart, 132 F. 3d 463 (9th, Cir. 1997),

Cert. denied, 118 S. Ct. (1998) held that when the evidence cast doubt over the reliability of a conviction by undercutting the evidence presented at trial, it will suffice to open the gateway.

Under **Schlup** the Supreme Court permits a court who is task with analyzing whether all the evidence considered together, i.e., new reliable evidence, old evidence presented at trial, inadmissible evidence, exculpatory evidence, inculpatory evidence and suppressed evidence proves that the petitioner is actually innocent, so that no reasonable juror would vote to convict. If any reliable evidence not considered in any Schlup **Analysis, where that piece of evidence undercuts an inference of guilt, that would be direct circumvention of the Schlup Standard,** and a miscarriage of justice. Of the mountain of reliable evidence petitioner presented the the state and federal courts for their consideration pursuant to **Schlup** is, the Hughie Johnson June 13th, 2012, alibi affidavit, because this evidence single-handedly and conclusively puts the prosecution's central evidence of an identifying witness connecting petitioner to the crime in question. Schlup **doesn't bar evidence, despite it being known at the time of trial if that very evidence was truly** Unavailable **to the accuse,** instead what Schlup envisioned is, any evidence "not" available to trial, whenever it becomes available, length/reason for the delay, the timing of its presentation to the court is a factor bearing on the reliability of that evidence, purporting to show actual innocence, **Schlup,** @ 851 supra. ("...Court may consider how the timing of the submission and the likely credibility of [a petitioner] affiants bear on the probable reliability of ... evidence [of actual innocence]."

In Houck the Third Circuit specified a narrow limitation to its definition of **newly presented evidence** that, "if the evidence was not discovered for use at trial because trial counsel was ineffective, the evidence may be regarded as **"new"** provided that it is the very evidence that petitioner claims demonstrate his innocence." by this narrow **Third Circuit definition of** new presented evidence, the Hughie Johnson's

June 13th, 2012, alibi affidavit qualifies as **"new."** This definition falls squarely within those **Schlup** envisioned. **Schlup's** Sixth Amendment Constitutional claim of ineffective assistance of counsel claims deprived the jury of critical evidence that would have established his innocence. However, this definition is not broad enough, as required by **Schlup.**

By Third Circuit's narrow limited definition, the June 13th, 2012, affidavit is **"new"** because at trial this petitioner told the court that, petitioner had been living in Houston Texas with Mr. Hughie Johnson on the day the victim was murdered, and counsel confirmed on the record that he did not search for said Mr. Johnson and others.

(3) **THE THIRD CIRCUIT ERRED IN DENYING CERTIFICATE OF APPEALABILITY, CLAIMING THAT PETITIONER FAILED TO FILE A PROTECTIVE HABEAS CORPUS PETITION IN FEDERAL COURT**

A prisoner seeking state postconviction relief might avoid trying in good faith to exhaust state remedies may litigate in state court for years only to find out at the end that he was never **"properly filed,"** and thus that his federal habeas petition is time barred, however, by filing a "PROTECTIVE HABEAS CORPUS PETITION" in federal court, pursuant to Pace Vs. DeGuglielmo, 125 S. Ct. 1807 (2005), and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted. Rhines Vs. Weber, 125 S. Ct. 1525 (2005). A petitioner's reasonable CONFUSION about whether a state court filing would be timely will ordinarily constitute "good cause" for him to file in federal court.

At no time between the filing of petitioner's **First PCRA Petition** on March 21st, 1997, through July 2004, thirty days after the Superior Court affirmed the denial of petitioner's **reinstated First PCRA Petition,** was petitioner CONFUSED about whether any state court filing would be timely, for purpose of filing a **Protective Habeas Corpus Petition** in federal court. And even if the federal court is correct in tolling all that period referenced about, requiring that petitioner file a protective petition on

or before July 25th, 2005, that wouldn't have been possible or practical, i.e., without the after-discovery of the first piece of **new/newly presented reliable evidence.**

Firstly, a petitioner bears the burden of proving that he has exhaust available state remedies. 28 U.S.C. §225(b)(1)(A), Landano Vs. Rafferly, 897 F. 2d 661, @ 668 (3rd. Cir. 1990). Unlike the petitioners in **Pace and Rhines,** this petitioner presented not a **"mix" petition,** containing exhausted and unexhausted claims - none of petitioner's claims are yet exhausted but most importantly, petitioner could not meet that burden because petitioner's direct appeal remains pending in state court, and where petitioner filed a first PCRA Petition on March 21st, 1997, in order to restore direct review pursuant to **Evitts**, supra., doesn't count as real collateral review PCRA, that is, because the petitioner's time to file a timely habeas corpus petition in federal court, for purpose of §2244(d)(1), has not yet begun to run, there was no possibility that petitioner may miss the 1-year deadline for filing due to **confusion** on when petitioner's time expires. **Therefore, the Third Circuit should have denied the application for a certificate of appealability because the November 15th, 2014, habeas corpus petition was simply premature,** instead of the reasons given by the Magistrate Judge and the District Court ...

Secondly, as mentioned earlier that, it wasn't until about November 10th, 2005, (nearly three months after the June 25th, 2005, supposedly expiration of the 1-year in which to bring a timely habeas corpus petition) when petitioner received the first piece of **new-reliable-evidence,** and then in June 2012, when petitioner received the last piece of **newly-presented-evidence,** where after the petitioner was able to file a properly filed PCRA Petition, pursuant to two of the exception to the 1-year statute of limitation, and within 60 days. See §§9545(b)(1)(i) & (ii), and (B)(2). **Therefore, the Third Circuit should have rejected the District Court Judge's run date of the AEDPA statute of limitation, for purpose of a Pace Protective Petition.**

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: November 8, 2018