

OCT 10 2018

OFFICE OF THE CLERK

18-8319

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Jason Bay Flick - Pro-Se — PETITIONER
(Your Name)

vs.

NANCY GIROUX 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

Jason Bay Flick
(Your Name)

10745 Route 18
(Address)

Albion PA 16475
(City, State, Zip Code)

N/A
(Phone Number)

ORIGINAL

IV Question(s) Presented

I) Was petitioner denied a fair trial by trial courts abuse of discretion?

1. Groppi v Wisconsin, 91 S.Ct. 490 (1971)
2. Shepard v Maxwell, 384 U.S. 333 at 351 (1966)
3. Commonwealth v. Karenbauer, 715 A.2d 1086 (Pa. 1988) cert. derived, 119 S.Ct. 1258 (1999)
4. United States v Olano, 113 S.Ct. 1770 (1993)
5. Commonwealth v Krasner, 258 Pa.Super. 389, 427 A.2d (1981)
6. Commonwealth v Cohen, 489 Pa. 167, 413 A.2d 1066 (1980)

II) Was petitioner denied effective assistance of counsel when counsel failed to appeal the trial court's order denying change of venue?

1. Strickland v Washington, 104 S.Ct. 2052 (1984)
2. Virgil v Dretke, 446 F.3d 598 (5th Cir. 2006)
3. Mickens v Taylor, 535 U.S. 162 at 166 (2002)
4. United States v Shendrick, 493 F.3d 292 at 300-02 (3rd Cir. 2007)

III) Was petitioner denied due process of law by ineffective assistance of counsel by counsels failure to prepare for trial?

1. Strickland v Washington, 104 S.Ct. 2052 (1984)
2. Dudas v Coplan, 428 F.3d 317 at 332 (1st Cir. 2005)
3. Marshal v Cathel, 428 F.3d 452 at 465-71 (3rd Cir. 2005)
4. Goodman v Bertrand 467 F.3d 1022 at 1023-31 (7th Cir. 2006)
5. Pavel v Hollins, 261 F.3d 710 217-18 (2nd Cir. 2001)
6. Kimmelman v Morrison, 477 U.S. 365 at 385 (1986)
7. Gonzalez-Sobreal v United States, 244 F.3d 273 at 279 (1st Cir. 2001)
8. Bell v Miller, 500 F.3d 149, 154-57 (2nd Cir. 2007)
9. Berryman v Morton, 100 F.3d 1089 (3rd Cir. 1996)

IV) Was petitioner denied due process of the law and a fair trial by ineffective assistance of counsel when trial counsel failed to object to the prejudicial influence of the jury?

1. Strickland v Washington, 104 S.Ct. 2052 (1984)
2. Virgil v Dretke, 446 F.3d 598 at 213-14 (5th Cir. 2006)
3. Hughes v United States, 258 F.3d 453 (6th Cir. 2001)

QUESTIONS PRESENTED

I. PETITIONER WAS DENIED A FAIR TRIAL BY TRIAL COURT'S ABUSE OF DISCRETION

The state court's determination that Petitioner was not denied a fair trial before an impartial jury is contrary to or an unreasonable application of clearly established Federal law, as determined by the United States Supreme Court in Groppi v. Wisconsin, 91 S.Ct. 490 (1971) holding; when pretrial publicity is so persuasive or inflammatory, the defendant need not prove actual prejudice. Also see Shepard v. Maxwell, 384 U.S. 333 at 351 (1966) and Commonwealth v. Karenbauer, 715 A.2d 1086 (Pa. 1998) cert. denied, 119 S.Ct. 1258 (1999).

Where petitioner filed a pretrial motion for change of venue, in which Petitioner exercised his right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §8 of the Pennsylvania Constitution. Citing; pretrial publicity was so sensational and inflammatory, slanted towards conviction rather than factual evidence, revealing Petitioner's prior criminal record, in such a small rural community as Somerset County, Pennsylvania with a limited jury pool. The sensational and inflammatory publicity continued up until the day of jury selection commenced. The trial court's denial of Petitioner's request for a change of venue denied him a substantive right to a fair trial. Trial court's abuse of discretion in this instance constitutes plain error. See United States v. Olano, 113 S.Ct. (1993).

When determining the factors warranting a change of venue, the courts have held that the size and character of the area are concerned and whether there has been a sufficient cooling-off period between the public and trial must be evaluated to determine whether the community has become saturated with prejudicial publicity. Commonwealth v. Krasner, 285 Pa. Super. 389, 427 A.2d 1169 (1981). Even though the court must determine within its sound discretion whether a fair and impartial jury can be impaneled, the record indicates that on the day of the jury selection, a clear number of potential jurors had heard about the case, read about the case, and knew about the subject

of the case to alert the court that a problem exists. (R. 125a-134a). While percentages of the jury panel were not conclusive, Pennsylvania courts have held that where a number of people have been questioned and have an opinion on a defendant, refusal to grant a change of venue was an abuse of discretion. Commonwealth v. Cohen, 489 Pa. 167, 413 A.2d 1066 (1980).

A change of venue cannot be granted unless the defendant can prove actual prejudice which would prevent the paneling of an impartial jury. Commonwealth v. Karenbauer, 552 Pa. 420, 715 A.2d 1086 (1998). A presumption of prejudice, which must be shown by the defendant, does not arise from pretrial publicity alone. Id. Furthermore, "sensational" or "inflammatory" publicity as well as any public revealing the defendant's prior criminal record or confession will be cause for a court to presume prejudice. Id.

The substance of the instant case is sensational in and of itself. The charges against the Petitioner were voluminous in total and heinous in nature, not necessarily because of the alleged acts themselves, but more appropriately because such alleged acts were to have occurred against a child. (R. 70a-112a).

Prior to the commencement of trial in this action, multiple print articles appeared in local newspapers not only stating the facts of the circumstances, but also including statements that Petitioner had been previously arrested for a multitude of criminal acts, including, but not limited to aggravated assault, simple assault and burglary. (R. 74a). The public's immediate and consistent response thereafter was that of abhorrence towards Petitioner. Internet blogs posted about the Petitioner stated that Petitioner "would surely have a seat reserved... in hell" due to the unimaginable abuse the child allegedly endured at the hands of the Petitioner. (R. 70a-112a). The continued onslaught of internet activity and blogs in response to each new release of information regarding Petitioner's case was met with negative public responses and labeling Petitioner as "sadistic," "sick," and "violent." (R. 70a-112a).

The Commonwealth's own Rule of Criminal Procedure 584(A) dictates that when "a fair and impartial trial cannot be otherwise had in the county where the case is currently pending," a change of venue is necessary. Finding a pool of impartial jurors within the confines of the small rural community of Somerset County in this particular action would be unlikely at best and profoundly prejudicial at worst. The articles, newspapers, internet blogs, and public conversations had Petitioner convicted long before being tried before a court of law. (R. 70a-112a). In the instant case, the trial court had a responsibility to the Petitioner to ensure his right of a fair and impartial jury and trial, but failed to uphold its duty to petitioner by not allowing this case to be tried outside of Somerset County.

**II. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE
OF COUNSEL WHEN COUNSEL FAILED TO APPEAL THE
TRIAL COURT'S ORDER DENYING CHANGE OF VENUE.**

Where Trial Counsel properly presented substantial evidence of pretrial and continuing inflammatory publicity surrounding the case, Trial Counsel did not file an interlocutory appeal to the Pennsylvania Superior Court. Where the evidence presented to the trial court clearly established egregious publicity in the matter, which was demonstrated by the voir dire, should have prompted Trial Counsel to promptly act. Where interlocutory appeals are discretionary under Pennsylvania Law, the inflammatory and emotionally charged publicity of the case, along with the clear taint to the jury pool, necessitated such an appeal. Trial Counsel's ineffective assistance in this matter resulted in the conviction of one who is actually innocent of the crimes convicted of. The Sixth Amendment guaranteed every defendant the right to effective assistance of counsel as determined in Strickland v. Washington, 104 S.Ct. 2052 (1984).

The factual circumstances relating to the pretrial publicity as outlined in the procedural history and Claim I of this Memorandum, required Counsel to advocate the matter, due to the clear affect the prejudicial publicity had on Petitioner's

right to a fair trial and the plain error committed by the trial court, under the rights guaranteed by the Sixth Amendment. See Virgil v. Dretke, 446 F.3d 598 (5th Cir. 2006); counsel ineffective for proceeding to trial with jurors who could not be fair and impartial. See Strickland, 466 U.S. at 692. See also Mickens v. Taylor, 535 U.S. 162 at 166 (2002); prejudice presumed during critical stage in the proceeding. Also United States v. Shedrick, 493 F.3d 292 at 300-02 (3rd Cir. 2007); counsel ineffective for failing to file a timely appeal. Trial Counsel's acts and omissions in this instance denied Petitioner his Sixth and Fourteenth Amendment right to a fair trial before an impartial jury.

III. PETITIONER WAS DENIED DUE PROCESS OF
LAW BY INEFFECTIVE ASSISTANCE OF COUNSEL BY
COUNSEL'S FAILURE TO PROPERLY PREPARE FOR TRIAL

Trial Counsel's failure to properly prepare for trial denied Petitioner the opportunity to present exculpatory and impeachment evidence. This failure so affected the truth determining process as to have resulted in Petitioner's wrongful conviction for crimes he is actually innocent of. Trial Counsel's failure to develop and present evidence known to counsel, was unprofessional conduct. The acts and omissions prejudiced to the extent, no confidence can be placed in the verdict. Strickland v. Washington, 104 S.Ct. 2052 (1984) holds, the Sixth Amendment requires counsel to be fully informed of the case to conduct an investigation and interview potential defense witnesses.

Petitioner informed Trial Counsel there were several witnesses who were present when Rogi Spangler stated that investigating Police Officers threatened to prosecute Spangler if she did not incriminate Petitioner. These witnesses also were present when Commonwealth's witnesses Amber Lynn Clark, Sharon Baron, Jennifer Jacobs and Dawn Wilkins would meet with Spangler at her residence collaborate on the testimony they all would give to incriminate Petitioner. These witnesses were also present when Spangler would state she had to do what the prosecution wanted even though Petitioner was innocent, because

she did not want to be prosecuted. Spangler also stated the Police and Prosecutor threatened to remove her from Public Housing, Public Assistance and place K.F. in Foster Care.

Petitioner presented Trial Counsel with the names of these witnesses, gave Counsel the contact information, and that these witnesses were willing and available to testify for the defense. The witnesses provided to Trial Counsel were Rebecca Shaffer, Joseph Halle, Missy Halle, Brad Shaffer, Lisa Shaffer and Shame Johnson. Given the fact that petitioner is incarcerated and isolated from society, he does not now have contact information, along with the fact there is no time left on the jurisdictional timeliness requirement of 28 U.S.C. §2244(b) for Petitioner to obtain the contact information and affidavits in support, but Petitioner is certain if given the opportunity, the before said witnesses would testify to the before said facts.

These witnesses clearly establish corrupt motive for the Commonwealth's witnesses to testify against Petitioner. There could be no rational or tactical decisions not to interview and present the named witnesses to impeach the credibility of the Commonwealth's witnesses.

Petitioner did provide impeachment evidence to Trial Counsel in the form of a witness, Jeremy Sigmund, owner and operator of JMS Recycling. Mr. Sigmund would have offered evidence that impeached the Prosecution's allegation that Petitioner was unemployed. Also impeaching the credibility of the Commonwealth's witnesses testimony to the same. Again, there can be no rational or tactical decisions not to interview and present Petitioner's employer, especially since it was the Prosecution's contention that Petitioner was an unemployed person who sat around all day drinking beer, etc. To not dispel this claim and impeach one of the critical Prosecution element of the case was ineffective assistance of counsel.

Petitioner informed Trial Counsel that he was actually innocent of the crimes alleged as demonstrated in a letter to Trial Counsel. .. Petitioner requested Trial Counsel contact an accident reconstruction expert to establish the injuries suffered by K.F. were the results of the fall down the steps. This was a critical request made by Petitioner to

Trial Counsel, as the Prosecution's medical expert was alleging the injuries were from a twisting motion done by Petitioner. When in fact the accident reconstruction expert would offer evidence that the child's foot being caught on the railing would have resulted in the injury, as this is what actually occurred. Rather than investigating this matter, Trial Counsel wrote Petitioner a letter telling him not to bother him again. That Petitioner was wasting Trial Counsel's time. Trial Counsel further stated that he was in charge of the case and would make the decisions in this case. :).

Petitioner provided Trial Counsel with the names of character witnesses who would testify to his good character, that Petitioner was a good father who always provided for his son and was gainfully employed. Trial Counsel was provided the names, contact information and the witnesses were willing and available to testify to these facts. These witnesses were Shane Johnson, Brad Shaffer, Lisa Shaffer, Ernie Kabina, Mike Owens, Monica Owens, Regina Bailey, Donnie Blair, Barbara Blair and Megan Jacobs.

Trial Counsel never contacted the named witnesses. There can be no rational or tactical decision not to interview and present the witnesses. This omission becomes glaring, considering it was the Prosecution's case that Petitioner was an unemployed stay at home dad who drank all day and abused his son. Not to present evidence that discredits these allegations can not be said to have been a professional decision designed to effectuate Petitioner's best interest.

The United States Supreme Court, along with the Courts of Appeals have long held, trial counsel's failure to properly prepare for trial is an abdication of his duty to his client. Strickland, 466 U.S. at 691, "Counsel's actions are usually based quite properly on informed strategic choices made by the defendant and on information supplied by the defendant...[what] investigation decisions are reasonable depends critically on such information.

Petitioner provided Trial Counsel with exculpatory evidence

that if presented would have impeached the Prosecution's case. Character evidence that if presented would have placed Petitioner in a different light before the jury. Rather than act on the information provided by Petitioner, Trial Counsel admonished Petitioner, instructing Petitioner not to bother him, etc.

(. Thereafter, Petitioner was fearful of questioning Trial Counsel's decisions, in fear that he would agitate Trial Counsel and this would be detrimental to his case. This Court must determine whether, in light of the circumstances, the acts and omissions were outside the wide range of professionally competent assistance, pursuant to the standard set forth in Strickland v. Washington, 104 S.Ct. 2052 (1984). Also see Dugas v. Coplan, 428 F.3d 317 at 332 (1st Cir. 2005); counsel's failure to investigate possible defense was ineffective assistance of counsel. Marshall v. Cathel, 428 F.3d 452 at 465-71 (3rd Cir. 2005); counsel's lack of preparation at a critical stage in the proceeding, failure to prepare and review evidence was ineffective assistance. Trial Counsel was ill prepared to properly cross-examine Rogi Spangler, Amber Lynn Clark, Sharon Baron, Jennifer Jacobs, Dawn Wilkins and Roger Powell. Trial Counsel conducted no pretrial investigation into the witnesses to determine their propensity to be truthful, nor did Counsel request a criminal background check on each witness, along with the failure to properly review prior to trial the prior statement of the witnesses. These acts and omissions resulted in an ineffective cross-examination of each witness in failing to impeach each witness with prior inconsistent statements, and a corrupt motive to testify against Petitioner.

Due to the constraints of this filing, Petitioner has not been able to review the voluminous case material to present exact instances of Counsel's ineffective assistance. Petitioner does know that during trial, Counsel repeatedly was unaware of the inconsistencies in each witness's testimony and rendered ineffective assistance of counsel. See Goodman v. Bertrand, 467 F.3d 1022 at 1023-31 (7th Cir. 2006); Counsel's failure to subpoena critical witness, request mistrial based on prosecutorial misconduct, impeach the credibility of prosecution's witness was ineffective assistance of counsel.

Also, see Pavel v. Hollins, 261 F.3d 710, 217-18 (2nd Cir. 2001); Counsel's failure to call important fact witness and expert witness at trial was ineffective because testimony would have rebutted the prosecution's case.

Trial Counsel was provided the prior statements and testimony of the Prosecution's witnesses, but became very agitated when Petitioner attempted to inform Trial Counsel about this issue. Petitioner desires to further develop this claim given the opportunity to review the case file. Strickland v. Washington 104 S.Ct. 2052 (1984) does require counsel to properly prepare for trial and vigorously advocate his cause. The most essential element of defense counsel's duties is to conduct a proper cross-examination of witnesses against his client. This is the foundation of the confrontation clause of the Sixth Amendment. Trial Counsel's failure to prepare and conduct a proper cross-examination was ineffective assistance that so prejudiced the Petitioner as to have affected the truth determining process. See Kimmelman v. Morrison, 477 U.S. 365 at 385 (1986); Gonzalez-Sobreal v. United States, 244 F.3d 273 at 279 (1st Cir. 2001); Bell v. Miller, 500 F.3d 149, 154-57 (2nd Cir. 2007) and Berryman v. Morton, 100 F.3d 1039 (3rd Cir. 1996); where the Court of Appeals have held counsel's failure to prepare and conduct a proper cross-examination is ineffective assistance of counsel.

IV. PETITIONER WAS DENIED DUE PROCESS OF LAW AND
A FAIR TRIAL BY INEFFECTIVE ASSISTANCE OF COUSEL
WHEN TRIAL COUNSEL FAILED TO OBJECT TO
THE PREJUDICIAL INFLUENCE OF THE JURY

At the conclusion of the presentation of the case, the District Attorney prepared a verdict slip that editorialized the alleged incident. The verdict slip had a heading for each alleged criminal act:

"Incident of September 30, 2007", "drinking beer incident", "snake incident", "drawing incident",
"a child unsupervised incident", "closet door

incident".

"July 4/5 incident", "air soft gun incident".

"June 2007 incident".

"December 2006/January 2007 incident".

"Second December 2006/January 2007 incident", "hot sauce incident".

The verdict slip failed to state how these incidents are alleged, an omission whether intentional or not, lead an already tainted and partial jury to believe incidents actually occurred. The very nature and characterization of these counts as incidents created a prejudice in the minds of the jury to convict Petitioner. Remarkably, Trial Counsel reviewed the verdict slip and informed the trial court that he did not "have any corrections or issues with the verdict slip. "N.T. 3/26/10. p. 216.

Any competent trial attorney would have most certainly objected to the prejudicial nature of the verdict slip form, and the prejudicial reading of the verdict slip's editorialization during the charging of the jury. N.T. 3/26/10, pp. 218-220. A competent defense counsel would have requested the statutory language be utilized in the preparation of the verdict slip and charging of the jury.

Trial Counsel's remarkable and unprofessional conduct, letting such a prejudicial verdict slip form and charging of the jury lead the jury to convict Petitioner. By the mere reading of the verdict slip any rational person would conclude these acts occurred.

Moreover, Appellate/PCRA Counsel recognized the prejudicial nature of the verdict slip form but failed to properly develop Trial Counsel's ineffective assistance pursuant to the standard set forth in Strickland v. Washington, 104 S.Ct. 2052 (1984). In Virgil v. Dretke, 446 F.3d 598 at 613-14 (5th Cir. 2006) the court held; counsel's failure to use challenge to remove biased jury was ineffective assistance because counsel had no

rational reason for such inaction. Also see Hughes v. United States, 253 F.3d 453 (6th Cir. 2001). In Davis v. Sec'y. Dept. of Corr., 341 F.3d 1310 (11th Cir. 2003) the court held; counsel was ineffective for failing to object to biased jury and preserve claim for appeal and in Reagan v. Morris, 365 F.3d 161 (8th Cir. 2004) the court held; counsel was ineffective in failing to object to prejudicial jury instruction.

Appellate/PCRA Counsel represented Petitioner from post-sentence stage of proceedings and throughout state collateral proceedings. Not to recognize and develop the before said meritorious ineffective assistance of Trial Counsel claim, in itself was ineffective assistance of Appellate/PCRA Counsel. In Martinez v. Ryan, 132 S.Ct. 1309 (2012) the court held; when a habeas petitioner can demonstrate that initial collateral counsel rendered ineffective assistance of counsel by failing to advance meritorious claim of trial counsel's ineffectiveness, a habeas court may excuse the procedural default of the claim for cause, if the state court requires petitioner to present ineffective assistance of counsel claims during initial-collateral-review petition. Under Pennsylvania Post Conviction Collateral Relief Act 42 Pa.C.S.A. §§9541-9546, a petitioner must await until collateral review to present claims of ineffective assistance of trial counsel. Petitioner has presented factual circumstances and rules of law that demonstrate Trial Counsel and Collateral Counsel's ineffective assistance render this claim ripe for review and relief by this Habeas Court.

~~V. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF~~
COUNSEL DURING STATE COLLATERAL REVIEW OF CONVICTION

Collateral Counsel was retained to represent Petitioner at Post-Sentences stage of proceedings in this matter. Collateral Counsel had ample time to prepare the claims as presented in this Memorandum, "I through IV". The failure to properly develop said claims constitutes ineffective assistance of counsel, warranting excuse of the procedural defaults of the claims pursuant to the decision in Martinez v. Ryan, 132 S.Ct. 1309

(2012).

Collateral Counsel recognized the Constitutional deprivation of Petitioner's right to a fair trial before an impartial jury, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. In the initial appeal from the judgment of sentence, Collateral Counsel understood the prejudicial nature of the verdict slip form, but erroneously argued the issues before the appellate court. The unprofessional errors can be evaluated by the Superior Court's decision at 1571 WDA 2010 on August 31, 2011, where the reviewing court held these claims waived due to Trial Counsel's failure to make timely objections to the prejudicial conduct of the Prosecution and instances of judicial abuse of discretion. Collateral Counsel waited almost a full year to file the initial-collateral petition. All the factual circumstances presented in this Memorandum were known to Collateral Counsel from the post-sentence stage. This failure to properly develop the before said claims for collateral review denied Petitioner effective assistance of counsel during state court collateral review.

Further, Collateral Counsel's lack of preparation and presentation of meritorious claims of Trial Counsel's ineffective assistance can be established by the appeal of the denial of collateral relief, by the Superior Court of Pennsylvania in the decision of June 20, 2014, at 1720 WDA 2013, where the court found Collateral Counsel recognized the Sixth Amendment ineffective assistance of Trial Counsel claim under Strickland v. Washington, 104 S.Ct. 2052 (1984). But Collateral Counsel's failure to develop the claims properly and only making boiler-plate claims with no substance resulted in the dismissal of the claims as having no-merit. Failing to interview and present known witnesses and evidence to the initial PCRA court, when Collateral Counsel had full knowledge and opportunity to so rendered deficient and unprofessional conduct that denied Petitioner due process of law and a meaningful opportunity to present meritorious claims for collateral review by the state courts. Martinez v. Ryan, 132 S.Ct. 1309 (2012) provides, if

a habeas petitioner demonstrates that the state court requires a petitioner to present trial counsel's ineffective assistance during initial-collateral review petition; and under Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002), Pennsylvania requires the same requirement, and when collateral counsel fails to develop and present meritorious claims of trial counsel's ineffectiveness, then petitioner was denied effective assistance of initial collateral counsel, establishing cause to excuse the procedural default of the ineffective assistance of counsel claims being presented to a habeas court. Petitioner has demonstrated cause and prejudice suffered by Collateral Counsel's unprofessional conduct in this matter, warranting the excuse of the procedural defaults of the claims presented, reviewable on merit by this Honorable Writ of Certiorari Court.

LIST OF PARTIES

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

☒ 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>

Attorney General of Pennsylvania

16th Floor, Strawberry Square
Harrisburg, PA 17120

Petitioner

Jason Ray Flick
SCI-Albion #JT4062
10745 Route 18
Albion, PA 16475

Michael A. Carbonara

111 E. Union Street, Suite 30
Somerset, PA 15501

Respondent

Nancy Giroux, SCI Albion
10745 Route 18
Albion, PA 16475

Tara M. Yutzy Collier, Esq.

111 E. Union Street, Suite 30
Somerset, PA 15501

Supreme Court of the United States

Washington, D.C. 20543-0001

TABLE OF CONTENTS

	<u>Pages</u>
OPINIONS BELOW	17
JURISDICTION.....	100
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	101
STATEMENT OF THE CASE	102
REASONS FOR GRANTING THE WRIT	108
CONCLUSION.....	109

INDEX TO APPENDICES

<u>APPENDIX A</u> Post sentence motion pursuant to P.A.B.C.R.I.M.P. 720 motion in arrest of Judgement for new trial.	20-28
<u>APPENDIX B</u> Denied by Judge Cascio - Post sentence Motion	29
<u>APPENDIX C</u> Judgement from Superior Court wherein Judgement of Sentence Affirmed	30-41
<u>APPENDIX D</u> Petition for Allowance of Appeal to The Supreme Court is Denied	42-43
<u>APPENDIX E</u> P.C.R.A. Denied by Judge Cascio	44
<hr/>	
<u>APPENDIX F</u> Judgement from Superior Court wherein affirmed	45-52
<u>APPENDIX G</u> Order from Supreme Court wherein petition for Allowance of Appeal Denied	53-54
<u>APPENDIX H</u> Motion to Dismiss Writ of Habeas Corpus. Assistant District Attorney, Somerset County, Michael Carbonaro	55-68
<u>APPENDIX I</u> Magistrate Judge Lisa Puno Lenihan. Report and Recommendation, asking to Deny writ of Habeas Corpus.	69-93

INDEX TO APPENDICES

	<u>Pages</u>
<u>APPENDIX J</u> Report and Recommendation of The Magistrate Judge is adopted as the Opinion of the Court - United States District Judge Kim R. Gibson - - - - -	94-95
<u>APPENDIX K</u> Motion for Reconsideration is denied - District Judge Kim R. Gibson - - - - -	96-98
<u>APPENDIX L</u> Appellants request for certificate of appealability is Denied by United States Court of Appeals for the THIRD CIRCUIT - - -	99

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

STATUTES AND RULES

OTHER

TABLE OF AUTHORITIES CITED

<u>Cases</u>	<u>Page numbers</u>
<u>Bell v. Miller, 500 F.3d 149, 154-57</u>	<u>9</u>
<u>Berryman v. Morton, 100 F.3d 1069 (3rd Cir. 1996)</u>	<u>9</u>
<u>Davis v. Sec'y. Dept. of Corr., 341 F.3d 1310 (11th Cir. 2003)</u>	<u>11</u>
<u>Supps v. Coplan, 428 F.3d 1022 (7th Cir. 2005)</u>	<u>8</u>
<u>Goodman v. Bertrand, 467 F.3d 1022 (7th Cir. 2006)</u>	<u>8</u>
<u>Groppi v. Wisconsin, 91 S.Ct. 490 (1971)</u>	<u>2</u>
Harlow v. Frank, 100 S.Ct. 2878 at 2882 (1980)	
<u>Hughes v. United States, 258 F.3d 453 (6th Cir. 2001)</u>	<u>11</u>
<u>Marshall v. Cathel, 428 F.3d 452 (3rd Cir. 2005)</u>	<u>17</u>
<u>Martinez v. Ryan, 132 S.Ct. 1309 (2012)</u>	<u>11, 12</u>
<u>Mickens v. Taylor, 535 U.S. 162 at 166 (2002)</u>	<u>5</u>
<u>Pavel v. Hollis, 261 F.3d 710 (2d Cir. 2001)</u>	<u>9</u>
<u>Reagan v. Norris, 365 F.3d 161 (8th Cir. 2004)</u>	<u>11</u>
<u>Shepard v. Maxwell, 384 U.S. 333 at 351 (1966)</u>	<u>2</u>
<u>Strickland v. Washington, 104 S.Ct. 2052 (1984)</u>	<u>45, 78, 7, 12</u>
<u>United States v. Olano, 113 S.Ct. 1770 (1993)</u>	<u>2</u>
<u>United States v. Shedrick, 493 F.3d 292 (3rd Cir. 2007)</u>	<u>5</u>
<u>Virgil v. Dretke, 466 F.3d 598 (5th Cir. 2006)</u>	<u>5, 10</u>
<u>Gonzalez-Sobreal v. United States, 244 F.3d 273 at 279 (1st Cir. 2001)</u>	<u>9</u>
<u>Kimelman v. Morrison, 477 U.S. 365 at 385 (1986)</u>	<u>9</u>
<u>Commonwealth v. Cohen, 498 Pa. 167, 413 A.2d 1066 (1980)</u>	<u>3</u>
<u>Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002)</u>	<u>13</u>
<u>Commonwealth v. Karsbauer, 715 A.2d 1086 (Pa. 1998)</u>	<u>2, 4</u>
<u>Commonwealth v. Krasner, 285 Pa. Super. 389, 427 A.2d 1169 (1981)</u>	<u>2</u>
42 Pa.C.S.A. §9541-9546	<u>11</u>
Pa.R.C.P. 584(A)	<u>4</u>
Sixth Amendment	<u>2, 4, 5</u>
Fourteenth Amendment	<u>2, 101</u>
Article 1 §8, Pa. Const.	<u>2, 101</u>
28 U.S.C. §2244(b)	<u>6</u>

STATUTES AND RULES

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

☐ For cases from **federal courts**:

The opinion of the United States court of appeals 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 United States district 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.

☐ 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

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 10-2-2013.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals 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. § 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

- 1.) Ineffective Counsel (6th Amendment/Article (1) Section(9)),
In That pursuant to the law and Constitution of The United States,
all persons must be afforded effective assistance of Counsel.

WHEREBY Appellants Counsel Failed to Act in The Appellants
Best interests and ABANDONED The Appellant in the Post-trial and
Appellant Process

- 2.) Due Process Violations (14TH Amendment), IN That Pursuant to law
and Constitution of The United States; All persons charged with a
Criminal offense must be afforded Due Process of The Law.

WHEREBY The Appellant was Denied Due Process of the Law as
Described Herein by The Abuse of Discretion of The Court of
Common Pleas of Somerset County, Pennsylvania, Deliberate
Indifference of The law by Court of Common Pleas of Somerset County,
Pennsylvania, and The Excessive Mandatory Sentencing Scheme.

Sixth Amendment found on Pages 2, 4, 5 and 101
Fourteenth Amendment found on Pages 2 and 101

XI Statement of the Case

The charges arose from a series of events alleged to have occurred between December 2006 and September 2007, in which the victim was petitioner's son, Kaleb Spangler, who was born April 15, 2005. The acts alleged involved petitioner striking the child to the extent of causing bruising, allowing the child to drink alcohol and endangering the welfare of a child, under information contained in CP-56-CR-0000141-2008.

In Dec. 2007, the Commonwealth charged petitioner with offenses stemming from twelve incidents. On August 28, 2009, petitioner filed for Motion For Change Of Venue. Petitioner asserted that the voluminous pretrial publicity so tainted the jury pool that no prospected jurors in Somerset could render a fair and impartial verdict.

The trial court denied petitioners pretrial motion November 3, 2009. The court denied without prejudice, subject to the opportunity to attempt to pick a jury. On March 8, 2010, jury selection was held. The Commonwealth and defense counsel conducted voir dire of potential jurors. Nineteen of the forty five perspective jurors admitted to hearing about the case in the media. Seven more potential jurors were removed because they could not be impartial. Two jurors who said they knew about the case, but could still give petitioner a fair trial were seated. Petitioner's counsel used two preemptory challenges, waiving six of them. A jury trial began on March 24, 2010. At conclusion of the evidence, the trial court asked the Commonwealth to draft a verdict slip for the jury's use during deliberation, which the trial court and trial counsel reviewed.

Before the trial court charged the jury and gave the proposed verdict slip to the jury, trial counsel affirmed that he did not have any correction or issues with the proposed verdict slip 3/26/10. The verdict slip had a heading for each indictment: Incident of September 30, 2002, drinking beer incident, snake incident, closet door incident, child unsupervised incident and second December 2006/January 2007 incident.

On March 26, 2010, the jury found petitioner guilty of

the above listed incidents.

On June 2, 2010, the trial court imposed an aggregated sentence of seventeen to thirty five years.

Timely post sentence motion for a new trial and arrest of judgment were filed with the trial court presenting: (1) trial court abused its discretion in denying petitioners Motion For Change Of Venue; (2) Denial of due process of law by trial courts abuse of discretion in appointing a former District Attorney who had conflict of interest; (3) denial of due process of the law by ineffective assistance of counsel in failing to object to the prejudicial verdict slip and the trial courts abuse of discretion in providing the verdict slip to the jury at the beginning of deliberations.

On August 2, 2010, the trial court denied motion. The trial court did not consider the ineffective assistance of counsel claims, citing the issue is relegated to Post-Conviction Collateral Relief Act 42 Pa.C.S.A. §9541-9546, pursuant to Commonwealth v. Grant, 813 A2d 726 (Pa. 2002).

A timely appeal was taken to the Superior Court of Pennsylvania at 1571 WDA 2010, presenting the following claims of error:

I whether the court erred in not challenging the case to be tried outside Somerset County?

II Whether the court erred in submitting a verdict slip which contained editorialization, thereby creating a prejudice in the minds of the jurors to convict appellant?

On August 30, 2011, the Superior Court of Pennsylvania affirmed the judgment of sentence 1571 WDA 2010. A timely petition for allowance of appeal was taken to the Supreme Court of Pennsylvania and denied and entered on April 9, 2012. A timely petition for collateral review pursuant to Pennsylvania's Post-Conviction Collateral Relief Act, 42 Pa.C.S.A. §§9541-9546 was filed. The PCRA Court held a preliminary review of the petition on May 29, 2013, during which PCRA Counsel and the Commonwealth provided argument on whether an Evidentiary Hearing was necessary. Following that argument, the PCRA Court ordered PCRA Counsel to brief the issue of timeliness and the issues presented in the initial collateral review petition. The PCRA Court also ordered the Commonwealth to respond to PCRA Counsel's brief,

following the briefing on August 16, 2013. The PCRA Court found that the PCRA Petition was timely, but that an Evidentiary Hearing was unnecessary.

Subsequently, the PCRA Court issued Notice Of Intent To Dismiss, pursuant to Pa.R.Crim.P. 907. On Sept. 13, 2013, PCRA Counsel filed a response to the Rule 907 notice, raising one issue: (ineffective assistance of counsel for failure to call certain witnesses) that had not been raised in the initial or amended petition or during oral arguments. On Sept. 25, 2013, the PCRA Court dismissed the PCRA Petition.

A timely appeal was taken to the Superior Court of Pennsylvania at 1720 WDA 2013. One claim of error was presented for review:

I. Whether court erred in denying petition for relief under Post-Conviction Collateral Relief Act.

The Superior Court affirmed the decision of the PCRA Court denying relief on June 20, 2014, at 1720 WDA 2013. A timely petition for allowance of Appeal was taken to the Supreme Court of Pennsylvania. On January 21, 2015, allowance of appeal was denied at 336 WAL 2014.

March 25, 2015 Petitioner filed a timely Writ of Habeas Corpus.

March 26, 2015 Magistrate Judge Lisa Pupo Lenihan granted Motion To Amend/Correct; denied Motion To Appoint Counsel; and denied Motion For Hearing.

April 29, 2015 Magistrate Judge Lisa Pupo Lenihan granted Motion For Extension Of Time To Amend Habeas Petition.

August 24, 2015 Magistrate Judge Lisa Pupo Lenihan order striking [III] Answer to Writ filed by District Attorney of Somerset County.

September 14, 2015 Magistrate Judge Lisa Pupo Lenihan made an Order granting the Motion To Substitute Assistant District Attorney Lisa L. Lazzari.

September 14, 2015 Magistrate Judge Lisa Pupo Lenihan made an order granting the Motion For Extension of time to file a response to the Habeas Petition.

November 13, 2013 Counsel for defendants, Michael A. Carbonara, Assistant District Attorney, telephone chambers

indicating that he was having technical difficulties filing his answer.

September 16, 2015 Magistrate Judge Lisa Pupo Lenihan made an Order Dismissing Respondents Motion To Dismiss.

January 15, 2018 Petitioner filed a Motion To Commence.

January 18, 2018 Magistrate Judge Lisa Pupo Lenihan made an order granting in part, denying in part.

February 26, 2018 Magistrate Judge Lisa Pupo Lenihan made a report and recommendation, recommending that the Petition For Writ Of Habeas Corpus and the Supplement to that petition [8] be denied and that Certificate of Appealability also be denied.

March 8, 2018 Petitioner filed Objection to Report and Recommendation.

April 16, 2018 United States District Judge Kim R. Gibson upheld the United States Magistrate's Decision: That the Report and Recommendation of the Magistrate Judge (ECF No. 38) is adopted as opinion of the court. Also, further ordered that the Petition For Writ of Habeas Corpus (ECF No. 1) and Supplement thereto (ECF No.8) is Denied, and also Ordered that a Certificate of Appealability is Denied and that the Clerk of Court make this case closed pursuant to Rule 4 (a)(1) of the Federal Rules of Appellate Procedure, petitioner has 30 days to file a Notice of Appeal as provided by Rule 3 of the Federal Rules of Appellate Procedure.

March 18, 2018 Petitioner filed a Motion For Reconsideration.

April 9, 2018 United States District Judge Kim R. Gibson ordered that the Petitioners Motion For Reconsideration is Denied (ECF No. 41)

May 3, 2018 Petitioner filed a Notice Of Appeal.

May 11, 2018 United States Court of Appeals informing Petitioner that his case Number is 18-2051.

May 24, 2018 Petitioner filed a Motion For Informa Pauperis and reduced copies, Motion For Certificate of Appealability.

June 4, 2018 United States Court of Appeals For The Third Circuit Granted petitioners request to proceed In Forma Pauperis

with request to file reduced number of copies of petitioners
Motion For Certificate of Appealability.

10-2-2018 Denied by Third Circuit - United States Court of Appeals

REASONS FOR GRANTING THE PETITION

Petitioner presents that he is actually innocent of the crimes committed, but for the Constitutional violation of the petitioner's right to Due Process of the Law and a fair trial before an impartial jury of his peers, petitioner would not have been found guilty of these crimes. These violations so prejudiced petitioner as to have resulted in the conviction of one who is actually innocent of the crimes convicted of. The rights guaranteed to the petitioner by the protection of Due Process Clauses of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, as determined by the United States Supreme Court. In support of the Constitutional Rights violations warranting relief.

Petitioner has demonstrated trial counsels unprofessional conduct resulted in prejudice so great that no confidence can be placed in the verdict by the jury, warranting relief by this Honorable United States Supreme Court.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted

Jason Ray Flick

Jason Ray Flick

Date: October 6th 2018

Feb 20th 2019