No. 18-8680

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE RAHSAAN BROOKS,

PETITIONER

V.

SUPERINTENDENT COAL TOWNSHIP SCI,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GEORGE RAHSAAN BROOKS, Pro Se
STATE CORRECTIONAL INSTITUTION
AT COAL TOWNSHIP
1 KELLY DRIVE
COAL TOWNSHIP, PA. 17866-1021

QUESTIONS PRESENTED

1. WHETHER THE DECISION OF MCQUIGGIN V. PERKINS, 133 S.Ct. 1924 (2013) APPLIES RETROACTIVELY BECAUSE IT CHANGED DECISIONAL LAW AND WHETHER THE DECISION IN BUCK V. DAVIS, 137 S.Ct. 759 (2017) APPLIES RETROACTIVELY BECAUSE IT CHANGED DECISIONAL LAW AS IT RELATES TO ARGUING INEFFECTIVE ASSISTANCE OF COUNSEL IN RULE 60(b) CASES?

2. DID PETITIONER SATISFY THE COA STANDARD BY DEMONSTRATING THAT JURIS COULD DISAGREE WITH DISTRICT COURT'S RESOLUTION THAT RULE 60(b) MOTION CONSTITUTED SECOND OR SUCCESSIVE § 2254 PETITION OVER WHICH THE COURT LACKED SUBJECT MATTER JURISDICTION?

3. SHOULD RULE 60(b) MOTIONS BE DENIED BECAUSE OF THE LENGTH OF TIME THAT PASSED BETWEEN THE TIME JUDGMENT WAS ENTERED AND THE TIME THE RULE 60(b) MOTION WAS FILED?

4. UNDER AEDPA'S STANDARD FOR COA, WHEN PETITIONER SOUGHT PERMISSION TO INITIATE APPELLATE REVIEW OF DISTRICT COURT'S DENIAL OF RULE 60(b) MOTION, SHOULD EXAMINATION BE LIMITED TO A JURISDICTIONAL STATUTE, OR SHOULD THERE HAD BEEN A THRESHOLD INQUIRY INTO PETITIONER'S SUBSTANTIAL CONSTITUTIONAL AND ACTUAL INNOCENCE CLAIMS?

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PETITION FOR WRIT OF CERTIORARI

In Rule 60(b)(6) proceeding, petitioner asked the district court to re-open his petition filed under **Brooks v. Johnson**, C.A. No. 00-872 to reargue actual innocence along with newly presented evidence and **Brady** violation due to change in decisional law in the case of **McQuiggin v. Perkins**, 133 S.Ct. 1924 (2013) and **Buck v. Davis**, 137 S.Ct. 759 (2017). The district court ruled otherwise, ruling, where significant time has elapsed between a habeas judgment and the relevant change in law, it would be within a district court's discretion to leave such a judgment. Citing, **Fox v. Horn**, 757 F.3d 113, 125-26 (3d Cir. 2014). The district court denied COA; the Circuit Court affirmed and denied rehearing in banc. Since the district and circuit courts' decisions are contrary to **McQuiggin and Buck**, and not in accordance with stare decisis. See **Saytterfield v. District Attorney of Philadelphia**, 872 F.3d 152 (3d Cir. 2017). Petitioner George Rahsaan Brooks respectfully prays that his writ of certiorari be granted to review the rulings of both the district and circuit courts' denial of Rule 60(b)(6) relief and denial of COA.

OPINIONS BELOW

United States District Court denying Rule 60(b)(6) relief on April 18, 2018 (unpublished opinion) App. 1.a 1.

Third Circuit Court of Appeals denying COA on September 13, 2018. (unpublished opinion) App. 1.b

En banc Court denied Petition for Rehearing on November 30, 2018. (unpublished opinion) App. 1.c

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction under 28 U.S.C. § 1254(1). The judgments of the Third

Circuit September 13 2018. On November 2018 30, 2018, the en banc Court denied Rehearing. On April 18, 2018 the Western District Court denied Rule 60(b)(6) relief and denied COA. (unpublished opinions) App. A-1a, B-.1b, and C, 1c. This Petition is timely filed.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article 6, Clause 2; Fifth Amendment; Sixth Amendment; Fourteenth Amendment:

Article 6, Clause 2 of the United States Constitution provides in pertinent part:

"The Constitution, and the laws of the United States which shall be made in pursuant thereof; and all treaties made or which shall be made, under the Authority of the United States shall be Supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall ... be deprived of life, liberty, or property, without due process of law....."

The Sixth Amendment to the United States Constitution provides in pertinent part, as follows: "In all criminal prosecutions, the accused shall enjoy the right to trial... by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertain by law, and to be informed of the nature and cause of the accusation."

The Fourteenth Amendment to the United States provides in relevant part: "[N]or shall any State deprive any person of life, liberty or property, without due process of law ....."

STATEMENT OF THE CASE

After petitioner was provided with two authentic indictments by the Pennsylvania Innocence Project ("PIP") informing him that two different Grand Juries indicted him, one for robbery and another for intentional murder, (app. 1.f, 2.f, 3.f, and 4.f) and those indictments alerted petitioner they had committed perjury at his suppression hearing and at trial, Petitioner sent $10.00 to the Pennsylvania State Police paying for a copy of his Court Record Information File. After receiving

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1/ Appendix is denoted as app_____,

the authentic and fake charging instruments, petitioner challenged the accuracy of his Criminal History Information ("CHI") 2/ held by the Pennsylvania State Police. ("PSP") The PSP ruled the CHI was accurate and petitioner appealed to the Pennsylvania State Attorney General ("PSAG").

The PSAG ordered a video conference hearing on August 20, 2015. Before the hearing commenced petitioner was provided with bogus charging instruments, 2.h & 3.h. This was the first time Petitioner seen or knew of said documents. At trial, Public Defender Gary Zimmerman stipulated in open court he was satisfied with discovery (Page 2, Ct. Opinion) in spite of having done none.

At the video conference hearing, Charles Cobaugh, an employee of PSP who works in the Access and Review Unit testified his review of the accuracy of petitioner's criminal history was the fingerprint card and mug shot that showed he was not officially arrested for the instant case until November 11, 1975. 3/ (CR., App. 10, pp.26-27; C.R., App. 10 p. 27; C.R. App. 10, pp. 28-29. In addition to this evidence, Mr. Cobaugh testified that he contacted the Clerk of Courts of the Allegheny County Court of Common Pleas seeking records and was told "no probable cause affidavit, criminal complaint, or arrest warrant could be located in petitioners' CHI for CC-750-9310 and CC-750-8889. (Felony Murder or robbery charges of Michael Miller)

2/ 16 P.S. C.S.A. §§ 9101 et seq. 18 Pa. C.S.A. 9115(a)

3/ In **Brooks v. Pennsylvania State Police**, No. 122 C.D. 2017, the Commonwealth Court ruled, petitioner was officially arrested on October 1, 1975 for robbery and arrested on November 11, 1975 for murder. In **Commonwealth v. Brooks**, CC-750-9319 & CC;750-8889, the trial court denied petitioner's suppression hearing that Pa.'s Six Hour Rule was not violated because petitioner was arrested on October 1, 1975 for an "unrelated case," not the present case. App.3.f, 4f, 1h & 2h provided to petitioner by the PSP "was not a part of the trial court's record.' Public defender did not obtain these records by doing discovery and his ineffective assistance of counsel allowed an innocent man to be wrongfully convicted. If he would have obtained these documents, he would have exposed detectives' perjured testimony that petitioner was not informed he was officially arrested on October 1st, proved a grand jury never heard evidence he was charged with felony murder, no probable cause affidavit, criminal complaint or arrest warrant exist for felony murder, no grand jury heard evidence for that charge and the charging documents are manufactured and bogus. The Commonwealth Court's decision also conflicts with the Administrative law judge's ruling in **Broooks v. State Police,** no. CHR 00031.

The Administrative Law Judge ruled petitioner was attempting to use 18 C.S.A. § 9151(a) to circumvent the time bar provision of 42 Pa. C.S. § 9545(b)(1). **Brooks v. Pennsylvania State Police**, No. CHR 00031. Petitioner appealed that decision and a Commonwealth Court judge ruled, the "accurate date of petitioner's arrest was October 1, 1975, not November 11, 1975. This corresponds with detective Robert Spozarski's coroner hearing testimony and conflicts with the trial judge's court opinion. **Brooks v. Pennsylvania State Police**, No. 122 C.D. (2017). This is because the documents petitioner obtained from the PSP was not a part of the trial court's record and the trial counsel did not obtain them. If those documents would have been a part of the trial court's records, petitioner would have prevailed in having the only evidence against him (the lie by detective Spozarski) suppressed. See also App. 3.f.

Decades later, public defender searched through storage and found suppression hearing transcripts and loose documents. (App. 1.i, 2.i. Petitioner signed a release form for those particulars to be released to him. Among the loose documents was a letter petitioner had sent to public defender Gary Zimmerman. (App 3.i, 4.i) Petitioner informed counsel, judge Smith permitted the prosecution to proceed first with their witnesses before dealing with petitioner's pre-trial motions telling the defense pre-trial motions would be dealt with at the conclusion of the suppression hearing, but Bill of Particulars and Discovery Motion were not dealt with, instead, trial commenced without petitioner's pre-trail motions being dealt with. Counsel told petitioner jurors could be removed who had death penalty scruples; petitioner would be provided with a copy of indictments but instead when into private practice without providing petitioner with a copy of indictment, and that this was one of the reasons black defendants feel lawyers and prosecutors work together to

bring about bogus convictions... Black defendants end up having two prosecutors and no defense lawyer. (App. 5.i)

After the Commonwealth Court's decision, petitioner filed a Rule 60(b)(6) Motion to reopen his habeas corpus cases to present innocence evidence, newly presented evidence a **Brady** claim, ineffective assistance of counsel brought about the conviction of an innocent man and to hear all claims because of changes in decisional law.

Magistrate Judge filed a Report recommending the Motion should be denied because more than 40 years after the conviction, and almost 30 years since the Court entered its final order denying habeas corpus relief in **Brooks v. Zimmerman**, 712 F.Supp. 496 (W.D. Pa. 1989) and because the Rule 60(b)(6) Motion constituted a second or successive petition, over which the court lacks subject matter jurisdiction and to the extent petitioner seeks to challenge the disposition of his petition filed under § 2241 in **Brooks v. Johnson**, C.A. No. 00-cv-872 (.W.D. Pa. 2000), the same reasoning of untimeliness applies. To the extent one would be required, a COA should also be denied. (App. 2.a, 9.a)

The District Court adopted the Report and Recommendation on May 4, 2018. (App. 11.a) The Third Circuit Court of Appeals denied COA. (App. 1.b) and denied Petition for Rehearing. (App. 1.c)

The adjudication of petitioner's federal claims and denial of COA: (1) resulted in a decision that is contrary to, or involve an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented and not

in accordance with decisions from the United States Supreme Court. See **Williams v. Taylor**, 529 U.S. 362, 412 (2000). The District and Circuit Courts' decisions are based on an unreasonable determination of the facts in light of the evidence presented. **Miller-El v. Crockell**, 537 U.S. 322, 340 (2003), and also not in accordance with stare decisis. For all of the stated reasons, this Honorable Court should grant certiorari.

A. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Detectives Frank Amity and Charles J. Lenz gave testified on Sep. 30, 1975 before the Allegheny County Grand Jury that petitioner robbed Michael Miller. They did not testify petitioner assaulted him or used his fists and feet. (app. 3.f)

On Nov. 5, 1975, Detectives Robert McKay and Joseph Stotlemyer testified before a different Allegheny County Grand jury so their testimony would coincide with detective Robert Spozarski lie that no robbery occurred but Michael Miller ("The Decease") was intentionally assaulted and murdered as retaliation for attempting to rape petitioner's partner mother. (App. 4.f)

A Preliminary Hearing was conducted by the Coroner's Solicitor on Nov. 18, 1975 on the criminal complaint signed by Detective Robert Mckay in connection with the death of the decease. Coroner hearing transcript "CHT") p. 3. The criminal complaint was not disclosed to petitioner but see App. 4.e. In stead of Detective Mckay who had filed the alleged criminal complaint being called to testify, detective Robert Spozarski who filed no probable cause affidavit and had no arrest warrant colluded with the prosecutor to commit perjury and lie that petitioner gave him a verbal inculpatory statement.

Dr. Jon Lloyd testified the decease's liver was examined with the naked eye and with a microscope and there was a very severe deterioration of the liver. The deterioration had been pre-

sent over a period of time and the deterioration of the liver was not entirely due to the injury. CHT pp. 14-15.

The nature of the liver disease considered by the doctors who examined him and their conclusion the decease was cirrhosis of the liver. During the operation he did poorly, with many complications of cirrhosis. CHT p. 15. The physicians were well aware of the fact he had kidney failure; they tried to correct it but were unable to stop the sequel of the renal failure. CHT p. 16.

Police Officer John Gizler testified the decease told him he was drinking with two buddies and one of them punched him in the stomach and took his money. He did not name or describe no one and the officer did not notice blood or anything of that nature on him or coming from him. CHT pp. 19-21. See also Court Opinion ("C.O.") p. 11 and Trial Transcript ("T.T.") pp 441—448.

Doris Terry testified she was at Presbyterian Hospital on Sept. 30, 1975 She had carried her son there and the deceased was with them. CHT p. 23. She didn't know the relationship of any of the men she saw in the emergency room but Mrs. Miller told her the young boy was the grandson of the lady that use to live on the hill, he was a younger kid and he did tell her, he use to play in an orchestra with her son of the same age. CHT. P. 25 she estimated him to be 25, he had a twin brother if she was not mistaken. He was the grandson of Mrs. Robinson who lived on Burrows Street.

Michael's friend came in the hospital and asked him to go out. Michael told his friend, I don't trust you with my money. The boy kept insisting and he went out with the boy being his friend. She thought at one time she could remember the boy but didn't think so now. Michael left the hospital with one person. CHT pp. 24-25; T.T. pp. 122-127; C.O. p. 11. She thought Michael was

very sick when he came back. Police told her, he had been robbed and said he knew who had done it CHT p. 27

Detective Robert Spozarski ("Spozarski") testified, he has been a police for 10-years. Michael Miller ("the deceased") came to his attention in relation to a criminal complaint being filed on Sept. 30, 1975 to the deceased being robbed. Spozarski went to the Presbyterian Hospital ("the hospital") to interview the deceased. He was poor condition preventing Spozarski from doing so. CHT pp. 30-33-34.

As a result of his investigation, warrants were issued on Oct. 1, 1975 and Spozarski advised petitioner he was under arrest and advised him of his Constitutional Rights in regards to the robbery of the decease. Petitioner waived the Rights Form. CHT pp. 31-34-38-39

Spozarski testified asked the petitioner about robbery where the deceased had been beaten and robbed and petitionertold Spazarski, he did not rob the deceased. That he along with his partner beat the deceased for rapping his partner's mother. Petitioner denied taking any money and did not name who the individual was with him. CHT p. 32; trial transcript ("TT") pp 630-631.

Spozarski testified petitioner told him he pushed the deceased in the alley and knocked him down, his partner did the beating and kicking. CHT pp 32-33, TT p. 630. Spozarski testified petitioner denied participating in removing any personal property or sharing in anything that was taken. That the statement was oral and not reduced to writing. CHT pp. 33-38-39

Spozarski testified he learned there were two black males in the emergency room and the one described as petitioner was wearing a cervical collar and it was explained to him that they left the emergency room together with the deceased. CHT p. 35. Spazarski did not name the person who told him all left together. However Mrs. Terry who was there testified Miller left the hospital with

one person, the young boy. CHT pp. 24-25; TT pp. 122-127, Court Opinion ("CO") p. 11. Spozarski testified he talked to the doctor to determine who the person was, treated at the hospital with a cervical collar. The doctor told him, George Brooks. CHT pp. 35-36. 4/

At the suppression hearing Spozarski testified he never gave testimony at the coroner hearing that he informed petitioner he had a warrant for him, placed him under arrest read him the Mirada warning to a charge relating to the decease and waive form petitioner signed was to an unrelated crime. Suppression Hearing Transcript ("SHT") pp. 56, 108, 113, 123-24, 136, 167, 179, thus committing perjury. Being that the coroner hearing transcript was not disclosed to petitioner and was not a part of the court record, the trial judge ruled Spozarski read petitioner his rights to an "unrelated" robbery to which petitioner gave an inculpatory statement and signed the waiver form. SHT. Pp. 55, 139, 88-89, 99, 132, 875-76, TT p. 629. The trial court denied the statement should not have been suppressed under the rationale of **Commonwealth v. Futch**, 447 Pa. 389 (1972) based upon Spozarskie's perjured testimony. CO pp 15-16-17

Petitioner was charged under 18 Pa. § 2501. 5/ Jury selection began on May 2, 1976. All jurors with death penalty scruples was removed for cause by prosecutor.

4/ Under Pennsylvania law one cannot be convicted on the basis of testimony he was legitimately at a hospital where he received treatment. In re Amos, 430 A.2d 688, 690 (Pa. Super. 1981) (,mere presence at the crime scene is not sufficient circumstances upon which guilt can be predicated.) No one put petitioner at the crime scene and but for Spozarski's perjured testimony, his lie would have been suppressed and no evidence, circumstantial or otherwise would have brought about petitioner's wrongful conviction. Cf. Commonwealth v. Fields, 333 A.2d 747 (Pa. 1975) (Mere presence at the scene of a crime is not, it itself, sufficient to establish that one is an active partner in the intent of another to commit the crime).

5/ **18 Pa. C.S.A. § 2501 CRIMINAL HOMICIDE:**

(a) Offense Defined – A person is guilty of criminal homicide if they intentionally, knowingly, recklessly or negligently cause the death of another human being.

(b) Classification – Ciminal homicide shall be classified as murder, voluntary manslaughter, or involuntary manslaughter. Thus the commonwealth was able pursue charging petitioner with Intentional and felony murders, not being specific to which charge violating the Notice Requirement of the Sixth Amendment to the United States Constitution.

The Court denied all pretrial motions and ruled: (1) All eyewitness identification testimony be suppressed, except that of Mrs. Miller, (2) all testimony regarding statements allegedly made by the defendant after arrest be suppressed except the statement made by defendant to police officer Robert Spozarski; (3) the Application for Bill of Particulars and Discovery be dismissed **without prejudice** in as much as defense counsel's stipulation in open court that he had been satisfied in that regard. CO. p. 2

Lula Miller ("Mrs. Miller") testified from the time she saw petitioner on Sept. 30, 1975 until Nov. 18, 1975, the day of the coroner's preliminary hearing ("hearing") she did not see petitioner and no one showed her a photograph of him even up to trial. TT. P. 27.

She did not testify at the hearing. A white man was at the table with petitioner and petitioner was the only black man at the table. She was already there when petitioner was brought in through a side door. TT. Pp. 27-28-35. She knew why she was there and knew it was about the death of her son. TT pp. 35-36-37.

She knew the name of **George Brooks**. She found out the name **George Brooks** from her daughter who told her **George Brooks** was arrested for the murder of her son. TT. Pp. 36-37. No one asked her to point out and identify **Mr. Brooks**. TT. 37.

On the same day, at city court she was in the back. **Brooks** was sitting in the courtroom. She was the third person from **Brooks** standing up in front of the judge. TT. Pp. 38-39. She could not remember if he was in handcuffs. The description she gave police was that the man had a full face, had on a white hat, with a dark brim and wore a collar. TT. Pp. 38-39. A stipulation was reached in open court that Mrs. Miller never gave a complete and accurate description of petitioner to Spozarski. TT. P. 42. Jurors were sent home for the day, a dying declaration hearing was held. Af-

ter the close of the hearing their testimony was suppressed. TT. Pp. 730, 805, 828, 842. The jury was given the charged of Second Degree Felony Murder. 7/ On May 18, 1975, Post Verdict Motions was filed for a new trial and arrest of judgment. In denying the motion the ruled, "Mrs. Miller gave a complete and accurate description of petitioner to police officer Robert Spozarski on the evening of September 30, 1975". CO. p. 7. The court further ruled, " in response to questioning as to what happened, the victim told his mother that the man with the collar, **Brooks** beat him and took his money. Furthermore, the victim held up two fingers in response to questioning by another sister, Betty Davis, as to how many people there were, the victim kept reiterating the name of **George Brooks** in a whisper. CO. p. 11. 8/ The State Supreme Court in **Commonwealth v. Brooks**, affirmed the lower court's ruling at No. 80-1-175 and the District Court adopting the fake facts of the state courts denied habeas corpus relief in **Brooks v. Zimmerman**, 712 F.Supp. 496 (W.D. Pa. 1989. In **Brooks v. Johnson**, C.A. No. 00-cv-872 (W.D. Pa. 200) the court denied petitioner's innocence claims but petitioner was without all notes of testimony and the authentic and manufactured fake charging instruments he was provided by the Pennsylvania State police in litigation. Evidence for the very first time is newly presented which proves a free standing claim of innocence.

7/ **18 Pa. § 2502(b)** defines Murder in the Second Degree as a criminal homicide committed in while a defendant was engaged as a principal or an accomplice in the perpetration of a felony. Perpetration of a felony is the act of a defendant engaging in or being an accomplice in the commission of, or an attempt to commit, or attempting to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse or force, arson, burglary or kidnapping. See **Commonwealth v. Sleighter**, 433 A.2d 469 (Pa. 1981); **Commonwealth v. Waters**, 418 A.2d 312 (Pa. 1980).

8/ In **Commonwealth v. Brooks**, No. 288 WAL (2018) Asst. District Attorney Rebecca McBride asserted the same falsehood the District Court used to support denying habeas corpus relief. Petitioner filed a complaint against her with the Pennsylvania Supreme Court's Disciplinary Committee for fraud upon the Court. Due to said complaint Asst. District Attorney Rebecca McBride was removed from petitioner's case and on November 2, 2018 her employment with the Allegheny County District Attorney's Office ceased and she was no longer permitted to represent the Commonwealth.

REASONS FOR GRANTING THE WRIT

A. INTEREST OF THE UNITED STATES

In **McQuiggin v. Perkins**, ____ U.S. ____, 133 S.Ct. 1924 (2013) this Honorable Court held, society views the conviction of an innocent person as perhaps the most grievous mistake our judicial system can commit. Reflecting the gravity of such an affront to liberty, the fundamental miscarriage of justice exception has evolved to allow habeas corpus petitioners to litigate their constitutional claims despite certain procedural bars if petitioners can make a credible showing of actual innocence. This Court's decision in **McQuiggin**, extended this doctrine to allow petitioners who can make this showing to overcome the Antiterrorism And Effective Death Penalty Act's ("AEDPA") one year-year statute of limitations. In doing so, this Court recognized that an untimely petition should not prevent a petitioner who can adequately demonstrate their actual innocence from pursuing their claims. This view reflects society's value of judgment that procedure should yield to substance when actual innocence is at stake.

The values encompassed by the fundamental miscarriage of justice exception which drove this Court's decision in **McQuiggin** cannot be divorced from the Rule 60(b) inquiry. **McQuiggin** requires a weighing of the equitable factors at play in a particular case, and the nature of the change in law itself is highly relevant to that analysis. **McQuiggin**, illustrates that where a petitioner makes an adequate showing of actual innocence, the judiciary's interest in avoiding the wrongful conviction of an innocent person permits the petitioner to pursue his constitutional claims in spite of the statute of limitations bar. The interest is so deeply embedded within our system of justice, there can be no set of circumstances under which a change in the law, paired with a petitioner's adequate showing of actual innocence, would not be sufficient to support Rule 60(b) relief unless

there is some other context. Put another way, a proper demonstration by petitioner should permit Rule 60(b)(6) relief unless the totality of equitable circumstances ultimately weighs heavily in the other direction. A contrary conclusion leaves open the possibility of preventing a petitioner who can make a credible showing of actual innocence from utilizing the fundamental-miscarriage-of-justice exception simply because a Court has not yet accepted its applicability at the time his petition was decided – an outcome that would plainly betray the principles upon which the exception was built. Such an outcome would also implicate two factors of Rule 60(b) analysis identified by this Court: "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process. **Buck v. Davis**, ___, U.S. ___, 137 S.Ct. 759 (2017). If allowed to make a showing of actual innocence, **McQuiggin's** change in the law is almost certainly an exceptional circumstance.

The United States has a substantial interest in making sure a man is not framed by police working in collusion with prosecutors or an innocent man is not wrongfully or unlawfully imprisoned. The risk of injustice reoccurring would be too great and such instances reoccurring would profoundly undermine the public's confidence in the judicial process.

The most thorough analysis in favoring or reading a Section of a federal statutory rule section broadly is found in the Third Circuit case of **In re Hoffner**, 870 F.3d 301, 309, 312 (3d Cir. 2017). In **Hoffner**, the Third Circuit interpreted § 2255(h), which requires that the claim "contain" a new rule of Constitutional Law; in accordance with the Supreme Court's reading in similar language in § 2244(b)(2)(A), which requires that a claim relies on a new rule of Constitutional Law. See **In re Heffner** at 308 (Quoting **Tyler v. Cain**, 533 U.S. 656, 662 (2001)). In interpreting "relies on,"

the Third circuit Court of Appeals held that "whether a claim 'relies' on a qualifying new rule, must be construed permissibly and flexibly on case by case basis." Id

At a policy level, the Circuit Court reasoned that construing the new rule flexibly advances 'the need to meet new circumstances as they rise and the need to prevent injustice," which it concluded, are particularly salient concerns in the context of a 2255(h)(2) motion dealing with new substantive rules addressing the potential injustice of an unconstitutional conviction or sentence. Id at 309. Additionally, **Hoffner** cites **Montgomery** for the proposition that the state's countervailing interest in finality is not implicated in habeas corpus petitions that retroactively apply substantive rules. See Id (Quoting **Montgomery**, 136 S.Ct. at 732 (noting that "the retroactive application of substantive rules does not implicate a state's weighty interest in ... finality")). Accordingly, the **Hoffner** Court describes its reading of s 2255(h) as follows:

> [A] motion on a qualifying new rule whether the rule substantiates the movant's claim. This is so even if the rule does not conclusively decide [] the claim or if the petitioner needs a non-frivolous extension of a qualifying rule. § 2255(h)(2) does not require that a qualifying new rule be movant's winning rule, but only that movant rely on such a rule.

Id (internal quotation marks and citations omitted) (Quotation **In re Arnick**, 826 F.3d at 789 (5th Cir. 2016) (Elrod, J. dissenting)).

The Third Circuit then concluded that the question of whether the new rule applies to facts in the specific case is not a part of the preliminary, gate-keeping inquiry under § 2255(h), but instead a "merit question" for the district court to answer in the first instance." Id at 301-11 (emphasis added). In this way the third Circuit agrees with the D.C. Circuit's decision in **In re Williams**, 759 F.3d 70-72 (D.C. Cir. 2014) To support its distinction between the preliminary, gate-keeping in-

quiry and the merits question, the **Hoffner** Court further draws support from other Circuits that have certified successive petitions in analogous situations by finding that whether the rule applies to the facts is a merit question. See **In re Hoffner**, 870 F.3d at 310-11 (citing **In re Pendleton**, 732 F.3d 280, 282, n.1 (3d Cir. 2013); **In re Sparks**, 657 F.2d 258, 260, n.1 (5th Cir. 2010); **In re Hubbard**, 825 F.3d at 231.

Petitioner asserts, the **Hoffner** approach is more in line with the Great Writ. "It (The Great Writ) is not and has never been a static narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." **Schanger v. Seamans**, 401 U.S. 487, 491, n.5 (1971). Thus, this Honorable Court's decision "construing the reach of the habeas corpus statutes," "[t]he Court uniformly has been guided by the proposition that the Writ should be available to afford relief to those 'persons whom society has grievously wronged' in light of the modern concepts of justice" and "has performed its statutory task through a sensitive weighing of the interests implicated by federal habeas corpus adjudication of Constitutional claims." **Kuhlmann v. Wilson**, 477 U.S. 436, 447-48 (1968). While the AEDPA has narrowed the scope of the Writ, the Third Circuit has still weighed interests. In the context of retroactive application of a substantive rule, the State's countervailing interest in finality is less compelling, and the purpose of the Great Writ in prevailing unjust confinement tips the scale in favor of a less narrow reading of U.S.C. § 2244(b). Cf. **In re Hoffner**, 870 F.3d at 309 (citing **Montgomery**, 136 S.Ct. at 732. In fact, the Third Circuit has already held that **McQuiggin v. Perkins**, 133 S.Ct. 1924 (2013) applies retroactively in Rule 60(b)(6) cases because it changed decisional law and that a petitioner can argue in a Rule 60(b)(6) Motion actual innocence and other equitable, substantive claims and that timeliness must yield to

actual innocence. See **Satterfield v. District Attorney Philadelphia**, 872 F.3d 154 (3d Cir. 2017). Thus, denying petitioner's Rule 60(b)(6) relief and COA was not in accords with stare decisis. For these reason this Honorable Court should grant certiorari.

B. FREESTABDING INNOCENCE CLAIM

Petitioner filed a Rule 60(b)(6) Motion to re-open his case, **Brooks v. Johnson**, C.A. No. 00-872 so he could argue his innocence, **Brady**, ineffective assistance of counsel, police perjury and newly presented evidence claims reviewed. (App. 1.e, 2,e, 3.e)

The Fourth Amendment to the United States Constitution demands, there must be probable cause before an arrest. An arrest cannot be orchestrated or manufactured, circumventing the Constitution. No state can establish and guarantee a Grand Jury procedure then circumvent it without violating the Fifth and Fourteenth Amendments to United States Constitution. An attorney cannot provide inadequate representation to their clients without violating the Sixth Amendment to the United States Constitution. No person can be maliciously prosecuted, wrongfully convicted and unlawfully imprisoned, subjecting him to cruel and unusual punishment without violating the Eighth Amendment to the United States Constitution. No citizen can be denied Due Process and Equal Protection under the law without violating the Fourteenth Amendment to the United States Constitution and no state can circumvent the United States Constitution, falsely arresting, trying and convicting a person without violating the Supremacy Clause of the United States Constitution. Petitioner has a freestanding innocence claim because all the above United States Constitutional Amendments were circumvented to falsely arrest and convict an innocent man.

First, malicious prosecution, a wrongful conviction combined with ineffective assistance of counsel violates both the state and federal Constitutions. An innocent person has a constitutional liberty interest in remaining free from underserved punishment. This type of claim is cognizable under 28 U.S.C. § 2254(a) and Rule 60(b)(6). Second, the conviction of an innocent man infringes on the right to be secure in one's person's against an unreasonable seizure; a right not to answer to an infamous crime unless on a presentment of an indictment by a grand jury (App. 2.h, 3.h), nor to be deprived of liberty ... without due process of the law; to be informed of the nature and cause of the accusation and to have assistance of counsel for his defense; not to be subjected to cruel and unusual punishment; not to be subjected to involuntary servitude except as punishment for committing a crime; no state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty ... without due process of law; nor deny to any person within the its jurisdiction the equal protection of the law, precisely because it would violate the Supremacy Clause of the U.S. Constitution.

Petitioner's freestanding actual innocence claim is distinguished from the gateway actual innocence claim based in **Schlup v. Delo**, 513 U.S. 298 (1995). In that case, the Court held that an actual innocence claim accompanied by assertions of Constitutional violations at trial was "not itself a constitutional claim, but instead a gateway" to allow those constitutional claims to pass through without being procedurally barred. A freestanding actual innocence claim, on the other hand, is itself the substantial basis for relief.

Petitioner succeeds on his freestanding actual innocence claim because he can show by clear and convincing evidence no reasonable fact finder would have convicted him of the crimes to which the jury found him guilty in light of the evidence, including collusion by police and prosecution to commit perjury and manufacture false charging instruments, no grand jury indicting him for felony murder, no probable cause affidavit filed by detective Robert Spozarsk and other detectives who gave sworn testimony, they placed petitioner under arrest. Detective Amity testifying before the grand jury to Miller only being robbed. (App. 3.f) then filing a criminal complaint stating petitioner beat him with fists and feet. Detective McKay testifying before a different grand jury, no robbery occurred only an intentional murder avenging the rape of his friend's mother[9]. In **Brooks v. Pennsylvania State Police**, No. CHR 00031, Charles Cobauugh testified he was told by the Clerk of Courts there was no record of an arrest warrant. This may be so because it was issued by the Coroner's Office who lacks constitutional and statutory authorization to do so because that Office lacks arrest powers, a clear violation of the Fourteenth Amendment and the Supremacy Clause. That Office also lacked statutory and constitutional authorization to hold a preliminary hearing, make legal conclusions, hold petitioner for court and set his bail. (App. 1.h, 2.h, 3.h; 1.j, 2.j, 3.j) The only charge Petitioner was indicted for by a grand jury was dismissed for insufficient evidence (App. 1.g) leaving petitioner not indicted by a grand jury for no murder charge at all.

Petitioner's freestanding claim of actual innocence is based on newly presented evidence the prosecutor was obligated to disclose and the attorney was obligated to get through discovery but

[9] 18 Pa. S.C. § 2502(a) defines murder in the First Degree as a criminal homicide committed in an "intentional killing." (d) An intentional killing is a killing by means of poison, or lying in wait, or by any other kind of "willful, deliberate and premeditated killing." (emphasis mine) See, **Commonwealth v. Montalvo**, 986 A.2d 84, 92 (Pa. 2009); **Commonwealth v. Carter**, 643 A.2d 61 (1994) reargument denied, certiorari denied, 115 S.Ct. 1317. See also App. 4.f.

failed to do so and, instead stipulated in open court he was satisfied with discovery when he had done none. The trial court then dismissed petitioner's Bill of Particulars and Discovery Motion without prejudiced and ruled the issue waived, (C.O. p. 2) preventing petitioner from obtaining: (1) any probable cause affidavits; (2) arrest warrants; (3); criminal complaints; (4) indictments; (5); grand jury transcripts; (6) the autopsy report, and (7) the coroner hearing transcript. See App. 1.e.

It took decades and litigation against the PSP to unearth some of these particulars which shows collusion between police, the coroner's office and the prosecution to permit perjury and the manufacturing of false charging instruments and judicial bias of the trial judge who willfully ignored a court stipulation, committed fraud and used evidence it has suppressed to support denying petitioner's post-verdict motion on insufficient evidence, framing an innocent man and willfully violating the Fourth, Fifth, Sixth, Eighth, Fourteenth Amendments and Article 6, Clause 2, of the United States Constitution. Counsel's assistance was not the assistance petitioner was entitled to under the Sixth Amendment and counsel's ineffectiveness brought about the conviction of an innocent man. The evidence submitted to the District Court is material and relevant to petitioner's freestanding innocence claim. This evidence was not disclosed and prevented petitioner was having it reviewed by the District Court in his habeas proceeding. It is more likely than not that if this evidence would have been disclosed, petitioner would have prevailed in his habeas corpus proceeding. It is also more likely than not that no reasonable juror would have convicted him in light of the newly presented evidence. **Lee v. Kemna**, 213 F.3d 1037, 1039 (8th Cir. 2000), cert. denied, 121 S.Ct. 1186 (2001); **Gomez v. Jaimet**, 350 F.3d 673, 679-80 (2003); **Schlup v. Delo**, 513 U.S. 293, 327-28 (1993). The United States has a substantial interest if an in-

nocent man is wrongfully convicted due to counsel's ineffectiveness. **Buck v. Davis**, 137 S.Ct. 759 (2017). This Honorable Court should grant certiorari in this case.

1. **THIS COURT'S RULINGS IN MCQUIGGIN AND BUCK APPLIES RETROACTIVELY BECAUSE THEY CHANGED DECISIONAL LAW AS THEY RELATE TO ARGUING COUNSEL'S INEFFECTIVENESS IN RULE 60(B)(6) CASES**.

The Magistrate judge Recommended that Rule 60(b)(6) Motion be denied and to the extent that one is needed, that COA be denied. (App. 1.a) the Magistrate's Report is contrary to the facts. Petitioner's claim is premised on a freestanding claim of innocence which precludes it from being a second or successive writ and from being addressed under **Gonzalez v. Crosby**, 524, 535 (2005). Petitioner's innocence, change in decisional law, newly presented evidence, **Brady** and ineffective assistance of counsel, bringing about a wrongful conviction claims should have been addressed under **McQuiggin and Buck**. See also **Saytterfield v. district Attorney Philadelphia**, 872 F.3d 154 (3d Cir. 2017) (citing both **McQuiggin and Buck**. See also, **Reeves v. Fayette SCI**, 997 F.3d 154 (2018).

In **Brooks v. Johnson**, No. 00-872 (2000), that Court ruled, petitioner failed to make a freestanding claim of innocence and failed on a gateway claim under **Schlup v. Delo**, (App. 19.d, 20.d; notes 15, 16, 17, and gave his ineffective assistance of counsel claims no merit review. (App. 3.d. With the change in decisional law and newly presented evidence showing a **Brady** and violation, collusion between police and prosecution to commit perjury and manufacture false charging instruments, actual innocence and a wrongful conviction brought about by counsel's i'effectiveness (App. 1.e), along with a ruling in **Brooks v. Pennsylvania State Police**, No. 122 C.D. (2017) which conflicts the trial court's ruling because it reviewed indictments not part of the

the trial court's record. If the indictment provided to petitioner by the Innocent Project (App. 3.f) would have been part of the trial court record, petitioner would have had evidence he would have not only been successful in impeaching detective Spozarki's suppression testimony that no one implicated petitioner until Nov. 11, 1975, petitioner would have also prevailed and had the only evidence against him suppressed under Pennsylvania's Six Hour Rule, the lie by detective Spozarski petitioner gave him an inculpatory statement. Petitioner would have been able to make the bogus charging instruments (App. 2.h, 3.h a part of habeas Court's record and advanced his freestanding innocence claim.

If the bogus charging instruments would have been disclosed to him and he knew no probable cause affidavit or arrest warrant exist for detectives who gave trial testimony that they arrested him, he would have been able to sustain his freestanding innocence claim. **Herrera v. Collins**, 506 U.S. 390 (1993). But since these particulars were willfully not disclosed to him and since his counsel had his Bill of Particular and Discovery Motions waived precluding him from having these and other substantive documentary evidence a part of his court record, he ws precluded from sustaining his burden of factual innocence. App. 20.d notes 15, 16, & 17; 1.e, 2.e. 3.e; 21.d. Courts can take judicial notice of other courts. See, e.g. **Cowell v. Artuz**, 133 F.3d 906 (Table) 1998 WL 11029 at *1 (2d Cir. 1098) ("This court can take Judicial Notice of appeal filed with the Appellate Division [of the state court]. See, Fed. R. Evid. 201; **Schwartz v. Captal Liquidators, Inc**, 984 F.2d 1993 (taking Judicial notice of a docket entry in another court.)

The Report resulted in a decision that is contrary to, or involved an unreasonable application of **McQuiggin v. Perkins**, 133 S.Ct. 1924 (2013); **Buck v. Davis**, 137 S.Ct. 759 (2017) or resulted

in a decision based on an unreasonable determination of facts in light of the evidence presented and not in accordance with those decision. **William v. Taylor**, 229 U,S. 362, 412 (2000) The District and Circuit Courts' decisions are also based on an unreasonable determination of the facts in light of the evidence presented. **Miller-El v. Crockell**, 537 U.S. 322, 340 (2003), and not in accordance with stare decisis. For all of these reasons, certiorari should be granted.

2. PETITIONER SATISFIED COA STANDARD BY DEMONSTRATING JURIST COULD DISAGREE WITH DISTRICT COURT'S RESOLUTION THAT RULE 60(b) MOTION CONSTITUTED SECOND OR SUCCESSIVE § 2254 PETITION OVER WHICH COURT LACKED SUBJECT MATTER JURISDICTION.

Petitioner sought relief from judgment denying habeas relief in **Brooks v. Johnson**, supra (App. D) The magistrate judge ruled petitioner lacked innocence evidence. (aap. 20.d) After obtaining bogus and manufactured charging instrument in case petitioner litigated against PSP, where Charles Cobaugh, an employee of the PSP who works in the Access and Review Unit testified at the video-conference hearing on Aug. 20, 2015, he was told by the Allegheny County Clerk of Courts no probable cause affidavit or arrest warrant could be found under Nos: CC-750-8889 and CC- 750-9310. (CR., App. 10 pp. 26-27; CR., App. 10, p.p. 28-29) **Brooks v. Pennsylvania State Police**, No. CHR 00031.

Petitioner alleged freestanding actual innocence in his Rule 60(b)(6) Motion. In **Satterfield v. District Attorney Philadelphia**, 872 F.3d 153 (2017) petitioner alleged the same credible innocence and ineffective assistance of counsel claims. The reasoning being, if the Supreme Court would have handed down its decision in **McQuiggin v. Perkins**, 133 S.Ct. 1924 (2013), earlier, Satterfield would have had more support to pursue his ineffective assistance of counsel claim in spite of his untimely petition. Id.

In **McQuiggin's** wake, **Satterfield** was permitted to seek relief from the judgment denying him habeas relief. The third Circuit permitted **Satterfield** to pursue relief under Rule 60(b)(6) because "**McQuiggin** was a change in relevant decisional law and an extraordinary circumstance to justify relief under Rule 60(b)(6)." The Court ruled: "a district court addressing a Rule 60(B) premised on a change in decisional law "must examine the full panoply of equitable circumstances in the particular case before rendering a decision." The Court further stated: "separately, and perhaps more importantly, we explained that the nature of the change in decisional law must be weighed appropriately in the analysis of pertinent equitable factors. **McQuiggin** implicates the foundational principle of avoiding the conviction of an innocent man and attempts to prevent such mistakes through the fundamental miscarriage of justice exception." The Court further stated: "If **Satterfield** can make the required credible showing of actual innocence to avail himself of the fundamental miscarriage of justice had **McQuiggin** been decided when his petition was dismissed, equitable analysis would have weighed heavily in favor of deeming change in the law applied to **Satterfiled's** case, an exceptional circumstances justifying Rule 60 (b)(6) relief" Id. **Satterfield** filed his Rule 60(b)(6) Motion 30-years after his arrest and murder. The third Circuit Court ruled, finality and comity **must yield** to the fundamental right not to be wrongfully convicted. (Quoting **House v. Bell**, 547 U.S. 518, 536-37 (2006); **Schlup**, 513 U.S. at 320-21 (citing **Murray**, 477 U.S. at 496). The district court failed to rule in petitioner's case in accordance with stare decisis and both courts erred in not granting COA, denying petitioner's Rule 60 Motion and upholding those denials. (App. 2.a, 3.a, 4a, 6a, 7.a 8.a & 9.a) It is clear that Rule 60(b) is a mechanism that provides litigants to use that mechanism which they may obtain relief from a final judgment under a limited

set of circumstances including fraud, mistake and newly presented evidence. **Gonzalez v. Crosby**, 545 U.S. 524, 528 (2005). The district court failed to rule in accordance to stare decisis when it ruled, finality did not yield to actual innocence or a wrongful conviction. (App. 9.a, n.4) The Court's ruling is in conflict with **McGiggin**, **House**, **Schlup** and **Murray**, supra. The district and circuit courts also erred when denying COA. (App. 1.a. 1.b, 1.c). Both courts' actions were not in accordance with the precedence set by this Honorable court. I am requesting certiorari on these issues.

3. COURT ERRED IN RULING RULE 60(b) MOTION SHOULD BE DENIED BECAUSE THE LENGTH OF TIME THAT PASSED BETWEEN TIME JUDGEMENT WAS ENTERRED AND TIME RULE 60(b) MOTION WAS FILED.

McQuiggin allows a petitioner who makes a credible showing of actual innocence to pursue their constitutional claims in spite of AEDPA's statute of limitation. Thus, the district court erred in applying AEDPA to petitioner's case. (App. 1.a). This Honorable Court has made clear that "the principle of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamental unjust incarceration." **Engle v. Isac**, 456 U.S. 107 (1982). This Honorable Court has underscored the importance of these principles explaining that "concerns about injustice that results from the conviction of an innocent person has long been at the core of the United States Criminal Justice System." That concept is reflected, for example, in the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." **In re Winship**, 397 U.S. 358 (1970). (Harlan J. concurring).

Given the observation about the importance of change in law effected by **McQuiggin** and the weight it should carry in the equitable analysis, the district court should have focused its efforts primarily on determining whether petitioner made an adequate showing of actual innocence to ju-

tify relief, not a time restraint. The district court erred in its application of federal law because petitioner made an adequate showing of actual innocence to justify relief. Petitioner's actual innocence evidence shows manufactured charging instruments, collusion to commit perjury, a **Brady** violation and blatant ineffective assistance of counsel that brought about the conviction of an innocent man. Petitioner satisfied a freestanding claim of actual innocence.

In light of this non-disclosed, newly presented evidence, no juror acting reasonably, would have voted to find petitioner guilty beyond a reasonable doubt. **McQuiggin**, 133 S.Ct. at 1928, 1935. (Quoting **Schlup**, 513 U.S. at 329). The district court erred in applying federal law because petitioner was precluded from making a meritorious ineffective assistance of counsel claim. In **Buck v. Davis**, 137 S.S.Ct. 759 (2017), this Honorable Court established that the severity of the underlying constitutional violation is an equitable factor that may support a finding of extraordinary circumstance under Rule 60(b). The applicant in **Buck**, sought to vacate the court's judgment so he could present an otherwise defaulted claim of ineffective assistance of trial counsel. 139 S.Ct. 777, 779.

McQuiggin, also makes relevant whether the petitioner raised a colorable claim of ineffective assistance of trial counsel, as the actual innocence exception to provide a gateway for the court to review the petitioner's separate claim of constitutional error. See **McQuiggin**, 133 S.Ct. 1931; see also **Schlup**, 513 U.S. at 17 (noting that petitioner seeking habeas relief carry less a burden when their convictions are the result of unfair proceedings --- and the actual innocence threshold standard applies --- that when they have been convicted after a fair trial). Because petitioner's claim of constitutional error --- counsel's unreasonable failure to investigate, stipulated he was

satisfied with discovery when he had done none, having the court dismiss and waive petitioner's Bill of Particulars and Discovery, failed to interview witnesses, failed to ask for a line-up when no one had given a description nor identified petitioner, failed to sequester the victim's family members at the coroner's preliminary hearing which allowed them to make a suggestive in-court identification that same day at a city magistrate's hearing. He failed to challenge the constitutionality of the coroner's office conducting a criminal investigation, issuing an arrest warrant, conducting a preliminary hearing, making legal conclusions then setting bail. (App. 1.e, 2.e, 3.e). These substantive claims should have been given merit review and addressed when they were not, the district court erred in allowing the Rule 60(b) Motion to proceed Substantive claims existed, a colorable freestanding claim of actual innocence was presented and the gravity of those claims and errors bears weight on petitioner's **McQuiggin** claims.

In **Brooks v. Johnson**, supra, the magistrate judge failed to address petitioner's ineffective assistance of counsel claims. (App. 3.d; 1.e, 2.e, 3.e) Counsels' errors prejudiced petitioner. Newly presented evidence clearly shows counsel failed to obtain and failed to recognize charging instruments were bogus and manufactured. This was highlighted in **Brooks v. Pennsylvania State Police**, No. CHR 00031 (2015). Petitioner was not provided with a copy of the probable cause affidavit, arrest warrant or indictments, counsels' constitutionally, deficient performance prejudiced petitioner and caused an innocent man to be convicted. **Strickland v. Washington,** 466 U.S. 668 (1984). Cases like petitioner's are rare. The district court erred in not considering and weighting the totality of these factors in favor of satisfying extraordinary circumstances.

Instead, the district court considered the principles of finality and comity, as expressed through

AEDPA not habeas corpus jurisprudence and the precedence of this Court, considered the habeas proceeding ended years ago then denied Rule 60(b) relief and COA. The Court's ruling resulted in a decision contrary to, or involved an unreasonable application of **House v. Bell**, 547 U.S. 518, 536; **Murray v. Carrier**, 447 U.S. 478, 496, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented and not in accordance with said decisions from this Honorable Court which has ruled: "considerations of finality and comity must yield to the fundamental right not to be wrongfully convicted" **McQuiggin**, supra. The fact petitioner presented a **Brady** claim, the district court further erred, deciding, the state proceeding ended years ago. Petitioner cannot be punished for the state not disclosing favorable evidence this Honorable Court time and time again has told them they are obligated to do. Petitioner was entitled to Rule 60(b) relief because he presented the district court with a colorable freestanding claim of actual innocence. The Court should grant certiorari on this claim.

4. COA WAS DENIED. PETITIONER SOUGHT PERMISSION TO INITIATE APPELLATE REVIEW OF DISTRICT COURT'S DENIAL OF RULE 60 (b) MOTION, EXAMINATION WAS LIMITED TO A JURISDICTIONAL STATUTE AS TO A THRESHOLD INQUIRY INTO PETITIONER'S SUBSTANTIVE CONSTITUTIONAL AND ACTUAL INNOCENCE CLAIM.

Federal magistrate judge filed Report and Recommending petitioner be barred from bringing second or successive petition under AEDPA. The Court supported its ruling citing **Gonzalez v. Crosby**, 545 U.S. 524, 535 (2002) 10/ (app. 3.a, 4.a ,6.a)

10/ Rule 60(b) should be liberally construed for the purpose of doing substantial justice. There is a key difference between **McQuiggin** and **Gonzalez** where the change in the law was a statutory interpretation of AEDPA's statute of limitations, not an equitable exception to the statute's procedural requirement.

The District and Third Circuit Courts erred in law and their decisions was not in accords with stare decisis. (App. 1.b, 1.c); **Satterfield v. District Attorney**, 872 F.3d 154 (3d Cir. 2017); **McQuiggin v. Perkins**, 133 S.Ct. 1924 (2013); **Buck v. Davis**, 137 S.Ct. 759 (2017); **Schlup v. Delo**, 513 U.S. 298 (1995); **House v. Bell**, 547 U.S. 518, 536-37 (2006); **Murray v. Carrier**, 477 U.S. 478, 496 (1986).

The district court erred when it ruled, "even if petitioner could establish that the change in the law brought about by **McQuiggin** and its actual innocence exception to petitioner's case, would not entitled him to relief under Rule 60(b) because of the inordinate amount of time that had passed between the filing of the Rule 60(b) Motion and the time of his conviction and the time since the habeas petition in **Brooks v. Johnson**, C.A. No. 00-872 was filed." (App. 8.a, 9.a n.4; App. 1.d. The District Judge adopted the Report and Recommendation and denied COA. (App. 11.a)

Petitioner satisfied a substantial claims' violation in the cases of **Satterfield**, **McQuiggin** and **Buck**, supra, which could be debatable along with whether his petition was successive. When presented with innocence, a **Brady violation**, newly presented evidence and blatant ineffective assistance of counsel responsible for a wrongful conviction, the district court erroneously reasoned, "if the petition was not successive, it was untimely." (App. 8.a, 9.a, n.4) This was clear error and not in accords with stare decisis. **Satterfield**, **McQuiggin**, **Buck**, **Schlup**, **House** and **Murray**, supra. If the district court's ruling is accepted as rebutting petitioner's clear, convincing, substantive, constitutional claims and prima facie case, the Due Process Clause would be vain and illusory.

Petitioner secure Rule 60(b) relief because he proved a freestanding innocence claim, a **Brady**

violation, manufactured charging instruments, police perjury and blatant ineffective assistance of counsel by clear and convincing evidence, **28 U.S.C. § 2254(c)(1) [28 U.S.C.S. § 2254€(1)**, and the Court's corresponding factual determinations were/are "objectively unreasonable" in light of the record presented to the Court.

The court also determined that petitioner failed to satisfy his burden and that petitioner's Rule 60(b)(6) Motion was actually a successive petition under **28 U.S.C. § 2254(h)** and petitioner was raising new grounds for relief which attacks the validity of his state conviction within the contemplation of **Gonzelez v. Crosby**, 545 U.S. 524, 535 (2005). (App. 2.a, 3.a, 4.a), when in fact, petitioner was presenting same issues presented in **Brooks v. Johnson**, (App.1.d) to which the change in the law, **Brady**, newly presented evidence, ineffective assistance of counsel and freestanding actual innocence claims were litigated under Rule 60(b). (App. 3.d, 19,d, 20.d, notes 15,16,17; 1.e, 2.e, 3.e). Contrary to the Court's ruling, petitioner carried his burden under Rule 60(b)(6)

In **Slack v. McDaniel**, 529 U.S. 473. 484 (2000) the high court held a habeas petitioner seeking to appeal a district court's denial of habeas relief on procedural grounds must not only make a substantial showing of a denial of a constitutional right but also demonstrate that jurist of reason would find in debatable whether the district court was incorrect and the circuit court erred in federal law when it upheld the district court's ruling denying COA.

In applying the Court's COA standard to the instant case, petitioner ask of this Honorable Court to decide whether petitioner made a substantial showing of whether both **McQuiggin** and **Buck** is applicable to his case and whether the district and circuit courts followed stare decisis in **Satter-**

field, supra and whether reasonable jurist could debate whether petitioner was entitled to Rule 60(b) relief. This Honorable court has already decided in **McQuiggin** that AEDPA cannot be applied to a freestanding or gateway actual innocence claims. And the Third Court ruled likewise in **Satterfield**, supra. The district and circuit court ruling contrary to and not in accordance with stare decisis and contrary to and not in accordance with the ruling of this Court.

Petitioner maintains he made a substantial showing whether reasonable jurist could debate whether petitioner presented a freestanding or gateway claim of actual innocence, a **Brady** claim, whether the ineffective assistance of his counsel resulted in him being wrongfully convicted, whether he presented newly presented evidence and separately or combined these claims were substantial and constitutional to the point where they created extraordinary circumstances warranting Rule 60(b)(6) relief and whether finality must yield to a wrongful conviction preventing time bars and giving the district court jurisdiction to hear the above claims.

COA should have been issued because the district court's findings is contradicted by clear and convincing evidence. Petitioner carried his burden of rebutting the presumption of correctness and supported with cases from this Honorable Court and with the ruling in **Satterrfield.**

This Honorable Court's decision in **Hohn v. United States**, 524 U.S. 236, 256 (1998) (Scalia, J. dissenting) held that COA determination constitutes a "case" in the Court of Appeals for purposes of this Court's jurisdiction under **28 U.S.C. § 1254 [U.S.C.S § 1254] Hohn**, does not hold nor does its logic require that the COA determination be regarded as separate from the rest of the habeas corpus proceeding. In fact, **Hohn** rejects the proposition that "a request to proceed before a court of appeals should be regarded as a threshold inquiry separate from the merits ...."

524 at 246 (emphasis added). Indeed, **Horn** analogized the COA to the filing of a Notice of Appeal, id at 247, which in the civil context all would consider to be a part of the same "proceeding" ("instituted by" a complaint) as the trial and merits appeal.

Petitioner contends he refuted the district court's factual finding by clear and convincing evidence. Both the district and circuit courts' decision denying COA was contrary to this Honorable Court's precedence and for that exact reason, certiorari should be granted.

CONCLUSION

By virtue of counsels' blatant ineffective assistance that brought about a wrongful conviction, prosecutorial misconduct, the manufacturing of charging instruments, a **Brady** violation, police perjury and newly presented evidence, which impacts the Commonwealth's whole case, combined with the coroner hearing transcript, probable cause affidavit, arrest warrant, the autopsy report which would have allowed petitioner to show the authentic cause of death, not being disclosed and newly presented evidence neither the state of federal courts heard nor addressed, Petitioner respectfully request of this Honorable Court to grant certiorari in this case.

Respectfully Submitted,

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