19-5295 ORIGINAL

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

*****

In re LARRY CHARLES,

Petitioner

v.

LAUREL HARRY

ON PETITION FOR WRIT OF MANDAMUS TO THE THIRD CIRCUIT

COURT OF APPEALS

*****

PETITION FOR WRIT OF MANDAMUS

*****

Larry Charles, Pro se
SCI # HJ2769
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QUESTION PRESENTED

The Petitioner has urged upon the Federal Courts an argument that presented three issues. First, the Petitioner argued that trial counsel violated his right to the by not perfecting his right to appeal the discretionary aspects of his sentence. Second, the Petitioner argued that the Superior Court and the PCRA Court violated his Sixth of Fourteenth Amendment Rights by not granting him an appeal nunc pro tunc and by instead reviewing his case on the merits and stating that he need to show prejudice as a result of counsel's alleged ineffectiveness. Third, the Petitioner's Constitutional Rights by sentencing him in a manner that deprived him of the right to due process. The case thus presents the following question:

Do exceptional circumstances exist in the Petitioner's case that justify granting his Petition seeking a Writ of Mandamus when he has demonstrated a clear and indisputable right to its issuance especially in light of the fact that the lower Federal and State Courts have ignored United States Supreme Court precedent?

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PETITION for WRIT of MANDAMUS TO

THE THRID CIRCUIT COURT OF APPEALS

The Petitioner, Larry Charles, respectfully prays that a Writ of Mandamus be granted directing The Third Circuit Court of Appeals to issue a Certificate of Appealability in order that the Petitioner's case can be reviewed on the merits.

OPINION BELOW

The Third Circuit Court of Appeals denied Petitioner's Petition for Writ of Mandamus at C.A. No. 18-2139. See Appendix A. The Order denying rehearing is reprinted in Appendix B.

JURISCITION

The opinion denying Petitioner's Petition for Writ of Mandamus was entered on October 19, 2018. Rehearing was denied on January 11, 2019.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 and 28 U.S.C. Section 1651(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitutional Amendment 6

United States Constitutional Amendment 14

STATEMENT OF THE CASE

The Petitioner was arrested on January 15, 2007 and charged with Sexual Assault and related crimes. On September 10, 2007, Petitioner entered an open "no contest" plea before the Honorable Albert A. Stallone. On December 20, 2007, the Petitioner was sentenced to twenty-five (25) to fifty (50) years in state incarceration.

Petitioner's counsel, Angelo L. Cameron, Esq., who failed to raise any objections during the sentencing proceedings, filed a Motion for Reconsideration of Sentence that was denied on February 21, 2008.

In a two-to-one decision filed on May 3, 2010, the Superior Court of Pennsylvania affirmed the Petitioner's Judgment of Sentence and determined that the Petitioner's claim as to the discretionary aspects of sentencing was waived because Petitioner in his Motion (unlike his Appellate Brief) failed to state that the sentence was "arbitrary, excessive, unreasonable, shocking to the conscience, disproportionate to the crimes, and amounted to abuse of discretion."

On November 16, 2010, the Supreme Court of Pennsylvania denied allocatur.

On January 13, 2011, Petitioner filed a Pro Se Petition for Relief under the Post-Conviction Relief Act. On March 20, 2012, the PCRA Court denied relief, ruling that although Trial Counsel's performance was deficient, Petitioner had not

demonstrated prejudice. On August 17, 2012, the Superior Court affirmed. The Pennsylvania Supreme Court denied allocatur on March 27, 2013.

On December 23, 2013, Petitioner filed a Habeas Corpus Petition alleging the three claims listed above.

On July 30, 2015, District Court Judge Diamond overruled Petitioner's Objections to the Magistrate Judge's Report and Recommendation. A Certificate of Appealability was not issued.

On May 16, 2016, the Third Circuit Court denied Petitioner's Motion for a Certificate of Appealability. On June 14, 2016, an en banc panel denied a rehearing.

On June 14, 2017, the Third Circuit Court of Appeals denied Petitioner's Motion in the Nature of a Mandamus. On November 7, 2017, the court denied Petitioner a rehearing.

On February 20, 2018, the United States Supreme Court denied Petitioner's Petition for a Writ of Mandamus. On April 16, 2018, the United States Supreme Court denied the Petitioner a rehearing.

The Petitioner filed a Petition for Writ of Mandamus with the Third Circuit Court of Appeals on June 28, 2018. The Petition was denied on October 19, 2018. The Court denied a rehearing on January 11, 2019.

CERTIFICATE OF APPEALABILITY

As mandated by Federal statute, a state prisoner seeking a Writ of Habeas Corpus has no absolute entitlement to appeal a District Court's denial of his petition. 28 U.S.C. Section 2253. Before an appeal may be entertained, a prisoner who was denied habeas relief in the District Court must first seek and obtain a Certificate of Appealability from a circuit justice or judge. As a result, until a C.O.A. has been issued, Federal Courts of Appeal lack jurisdiction to rule on the merits of appeals from habeas petitioners. The issuance of a C.O.A. is not process subject to the discretion of Federal Court justices or judges. A petitioner is absolutely entitled to a C.O.A if he demonstrates "a substantial showing of the denial of a constitutional right." 28 U.S.C. Section 2253(c)(2). A Petitioner satisfies this standard by demonstrating "that reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). If a ground for relief presented by the Petitioner was dismissed by the District Court on procedural grounds, a C.O.A. must be issued if the Petitioner meets the Barefoot v. Estelle, 463 U.S. 880, 893 (1983).

The Petitioner meets all of the requirements of the above standards. The Petitioner has demonstrated "a substantial showing of the denial of a constitutional

right." In Bey v. Superintendent, SCI Greene, 2017 U.S. App. Lexis 8280 (3d Cir. 2017), the court held that the word "substantial" means arguable merit. The Petitioner has clearly demonstrated that his claims have arguable merit and therefore has made a "substantial" showing of the denial of his constitutional rights. Judge McKee is the author of the Bey Opinion and like the other Third Circuit Court Judges he has ignored United States Supreme Court precedent and his own published opinions that absolutely support the Petitioner's claims concerning the Slack standard. The Petitioner has spent the better part of a decade, with the support of over 200 cases, demonstrating that reasonable jurists would find that his constitutional rights have been violated.

Concerning the Barefoot standard, the Third Circuit Panel, May 16, 2016, Order establishes that the Magistrate Judge and the District Court Judge were wrong in finding a procedural default and by concluding that Petitioner's sentencing claim was not cognizable in Federal Court. In spite of the fact that the Panel extinguished the excuse used by the District Court Judges to rule against the Petitioner on procedural grounds, the Panel without explanation maintained the feckless procedural default excuse to rule against the Petitioner. It should be noted that subsequent arguments pointed out the illogical nature of the Panel's ruling on the procedural issue. No subsequent rulings by the Third Circuit Courts have even mentioned procedural default again. The Court has continued to ignore U.S.

Supreme Court precedent and has continued to act like they have no accountability to the Supreme Court and to the American people. This Court should find these actions particularly troubling.

In Tennard v. Dretke, 542 U.S. 274 (2004), this Court held that incorrect resolutions of C.O.A. applications will be rejected. The Petitioner's case, which contains virtually every compelling reasons listed in United States Supreme Court Rule 10, provides this Court with the opportunity to send a message that will resonate throughout all of the U.S. Circuit Courts and potentially affect hundreds if not thousands of Petitioners, Appellants and Defendants. This Court's caseload would be decreased substantially when the lower Federal courts grant C.O.A.s to inmates who clearly are entitled to them, thus avoiding the need to see review by the Supreme Court.

If a gay couple were denied their 14th Amendment right to marry, the Federal Courts would not, as has been done in the instant case, go out of their way to deny applying precedent and would make sure the couple received the rights they are entitled to. No Federal Court would extract a quote from an inapplicable case dealing with the powers of the President of the United States and present this quote a justification to deny the relief that the law calls for. The Third Circuit Court Opinion, October 19, 2018, quotes from Cheney v. U.S. Dist. Court, 542 U.S. 367, 380-81 (2004). See Appendix A. This case has absolutely nothing to do

with a Petitioner being denied his 14th Amendment right to a first direct appeal as a right to challenge what is in essence a life sentence. In the same way that the Hodges case would not have to be re-litigated, Evitts v. Lucy, 469 U.S. 392 (1985), does not have to be redone in order to provide long overdue justice to the Petitioner. In a near-perfect judicial system, inmates, like the Petitioner, who absolutely present a case in which the law is clearly on their side, the highest Court in the land would order the lower Federal Court to grant a C.O.A. and this would be done absent the need for any extensive briefing and without the need for any oral argument. If an American citizen is denied a clearly defined constitutional right, the Supreme Court can exercise its supervisory powers to correct an injustice.

WRIT OF MANDAMUS

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. 28 U.S.C. Section 1651. The Writ of Mandamus has been used "to confine an inferior court to a lawful exercise of its authority when it is its duty to do so." Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661 (1978).

Two prerequisites for issuance of a writ are: 1) that the Petitioner have no other adequate means to attain the desire relief, and 2) the Petitioner meet its

burden of showing its right to the writ is clear and indisputable. Hahneman Univ. Hosp. v. Edgar, 74 F.3d 456, 462 (3d Cir. 1996). The Petitioner has in a diligent manner over the course of several years clearly established that he is entitled to a Writ of Mandamus ordering the lower Federal Court to grant a C.O.A. to the Petitioner.

In a country with the greatest legal system on earth, the Petitioner should not have to work so hard to get Federal judges to follow the law. It is beyond shameful when Third Circuit Court Judges ignore their own published opinions repeatedly presented to them by the Petitioner and chose instead to go out of their way to avoid the fact that their own words support the Petitioner's arguments.

In Mackey v. United States, 401 U.S. 667 (1971), the Supreme Court observed that the integrity of the judicial review requires consistent application of our best understanding of governing constitutional principles and fairness requires allegiance to the principles of treating similarly situated defendants the same. There is no way the Third Circuit Judges can honestly explain why Roe v. Flores-Ortega, 528 U.S. 470 (2000), and Slack v. McDaniel, 529 U.S. 473 (2000), justify granting a certificate of appealability for Mr. Grimes, the Petitioner whose Panel Order is found in Appendix E, but fail to justify granting a certificate of appealability to the Petitioner. Mr. Grimes and the Petitioner presented the identical issue; "whether the District Court erred in denying, without an

evidentiary hearing, Petitioner's claim that his counsel was ineffective for failing to perfect a direct appeal on his behalf." The illogical denial of a C.O.A. to the Petitioner violates Mackey and impugns the integrity of the habeas corpus process. The action of the lower Federal courts in denying a C.O.A. is the focus of the Petitioner's attack and the Petitioner is not attacking the underlying ruling by the District Court on the merits. As can be seen by the Order granting a C.O.A. to Mr. Grimes, the decision to grant a C.O.A. does not depend on any merit analysis. This Court must grant a Writ of Mandamus because he is entitled to one. It is very telling that no court during the several years of litigation of the instant case has ever directly responded to the Petitioner's arguments and attempted to prove that he is wrong about anything he has urged upon the Courts.

Instead of even attempting to prove the Petitioner wrong the Court have provided feckless excuses and "out of context" quotes from inapplicable cases to avoid ruling in favor of the Petitioner. The Third Circuit Court cited from Cheney, Supra, and opined that the Petitioner "may not now use mandamus as yet another attempt at an appeal." Id., p. 280-81. Yet the Court refused to attempt to address the Petitioner's argument explaining that the Writ of Mandamus is a legitimate part of our judicial system and is used not as an alternate to an appeal, but an alternate to injustice. Petitioner's argument concerning the multiple decisions in Cheney was also ignored. Justice Scalia's dissenting opinion observed that Vice President

Cheney's request for a Writ of Mandamus was denied by the lower court which failed to consider the totality of the Vice President's argument. Quoting Justice Scalia would have been more instructive than a quote used to simply dismiss the Petitioner's case absent any real attempt to analyze his arguments.

The Petitioner will conclude by providing the Court with a brief summary of his underlying issues.

I. TRIAL COUNSEL VIOLATED PETITIONER'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY NOT PERFECTING HIS RIGHT TO APPEAL THE DISCRETIONARY ASPECTS OF HIS SENTENCE.

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to the assistance of counsel for his defense. U.S. Const. amend. 6. The right to counsel is not a mere hollow formality satisfied by trial alongside a person who happens to have a law degree. See McMann v. Richardson, 25 L. Ed. 2d 763 (1970). "It is axiomatic that the right to counsel includes the concomitant right to effective assistance of counsel." Commonwealth v. Albert, 561 A.2d 736, 738 (Pa. 1989). In a recent decision by the Pennsylvania Supreme Court the Court relied up the above cited law and numerous other Federal and State cases and held that the failure of counsel to perfect a requested direct appeal is the functional equivalent of having no

representation at all and resulted in a finding of ineffectiveness per se. See United States v. Cronic, 466 U.S. 468 (1984). The reader and the Court should be appalled over the fact that over a dozen Federal judges have gone out of their way to continuously, year after year, deny a C.O.A. to the Petitioner without valid justification. The recent Pennsylvania Supreme Court decision the Petitioner is referring to is Commonwealth v. Rosado, 150 A.3d 425 (Pa. 2016). After analyzing numerous federal and state cases that address ineffective assistance of counsel, the Court made it clear that a failure to file or perfect a defendant's direct appeal results in a denial so fundamental as to constitute prejudice per se. Why is this clear statement of the law so hard for the Third Circuit Judges to apply to the Petitioner's case? As stated above, over the years no attempt has ever been made to directly respond to the Petitioner's arguments. The Courts have found it easier to just ignore his clear statements of the law and rule against him while ruling in favor of other Petitioners who present the same claims.

How is it possible for judges to ignore their own opinions, their own words, and their own conclusions in order to not admit that the Petitioner is correct in his arguments and is entitled to a C.O.A.? Judge Diamond is the District Court Judge who ruled against the Petitioner and denied him a C.O.A. Yet in Stovall v. Warden, New Jersey State Prison, 2005 U.S. Dist. Lexis 6758, Judge Diamond granted a Writ of Habeas Corpus to Stovall because counsel failed to perfect the petitioner's

request for a discretionary appeal to the State Supreme Court. In this case, without any merit analysis, counsel was presumed to be ineffective. Mr. Stovall lost his direct appeal on the merits. This fact was of no moment to Judge Diamond who cited McIntyre v. Klem, 347 F. Supp. 2d 206 (E. D. 2004), which held that trial counsel is ineffective for failure to prefect a client's appeal. Over a dozen Circuit Court Judges refused the invitations to explain why Grimes, Stovall, and McIntyre received the benefit of the law while the Petitioner who has never had the direct appeal he is entitled to is denied a C.O.A. The Judges also refused to challenge, contradict, or even mention Petitioner's arguments that debunked the excuse used by District Judge Diamond that the Petitioner has had an "appellate process." See Appendix D. Being aware that proclaiming that the Petitioner has already had a "direct appeal" would be an attempt to prove too much, the "appellate process" excuse is bandied about and used as reason to deny justice to the Petitioner. Petitioner Grimes filed five PCRA Petitions and was denied the direct appeal he had been seeking to the Pennsylvania Superior Court. The Third Circuit Court granted him a C.O.A. without regard to his underlying claims and no attempt was made to claim that the denial of relief to him by the State Court was an "appellate process" that provided him a direct appeal. After Grimes was granted a C.O.A he was successful in Federal Court and has returned to the State Court and is currently receiving the direct appeal that every criminal defendant is entitled to. Mr. Stovall

received a direct appeal and Judge Diamond found counsel to be per se ineffective in failing to perfect a discretionary appeal to the State Supreme Court. Why didn't Judge Diamond rule that Stovall has already had an "appellate process" and deny him the requested Writ of Habeas Corpus? Why didn't the District Court find that McIntyre had received an "appellate process" and was therefore not entitled to relief? The reason these Petitioner's were successful is because the law was not ignored, but was followed. The U.S. Supreme Court states that defendants are entitled to a "direct appeal." The Court says nothing about an "appellate process." All defendants get an "appellate process" when they appeal PCRA decisions. Evitts v. Lucy, 469 U.S. 387 (1985), would be a feckless case if a state appellate court denial of a direct appeal is the same as a direct appeal. In the instant case the Petitioner has never received a direct appeal of his sentence. His trial counsel was ineffective per se in not perfecting his direct appeal. A Writ of Mandamus must be issued to correct the erroneous decisions that have refused to grant the Petitioner a C.O.A.

II. THE SUPERIOR COURT AND THE PCRA COURT VIOLATED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY NOT GRANTING HIM AN APPEAL NUNC PRO TUNC.

In Evitts, cited previously, the Supreme Court held that a first appeal as of right is not adjudicated in accord with due process of laws if the appellant does not

have effective assistance of counsel. The Pennsylvania Supreme Court referred to Evitts when it decided Commonwealth v. Halley, 870 A.2d 795 (Pa. 2005), and held that counsel's failure to perfect a defendant's sole issue on appeal leads to a presumption of prejudice. The Court stated that the remedy is a nunc pro tunc appeal, not a review on the merits by the PCRA Court.

Thee Petitioner appended a copy of Commonwealth v. Harris, 114 A.3d 1 (Pa. Super. 2015), to his argument presented to the Third Circuit Court. Here the Court held that once the Post Conviction Court finds that the Petitioner's appellate right have been abridged, it should grant leave to file a direct appeal and end it inquiry there. This case is consistent with Evitts. Concerning Evitts, it is telling that not once during the past several years of litigation have any of the judges dared mention Evitts. The superficial decisions ruling against the Petitioner erected an "Evitts-Free" zone. The Petitioner is entitled to a direct appeal and this Court has the power to make sure he gets that appeal. Justice can be provided to the Petitioner without the need for extensive briefing and oral argument. Instantly, there is no need to re-litigate the law that the lower courts are comfortable with ignoring.

III. THE PETITIONER WAS SENTENCED IN A MANNER THAT DEPRIVED HIM OF THE RIGHT TO DUE PROCESS.

The Fourteenth Amendment to the United States Constitution states in part that "No state shall deprive any person of life, liberty, or property, without due process of the law. The Petitioner never received his direct appeal and was therefore deprived of his opportunity to challenge what is a virtual life sentence. PCRA Counsel was aware of Federal and State law and was aware of the fact that since 1985 when Evitts was decided by this Court, that the Philadelphia District Attorney's Office routinely conceded the nunc pro tunc appeal issue when trial counsel failed (as was done instantly) to perfect a defendant's direct appeal. PCRA counsel "fairly presented" the sentencing issue to the State Courts but understandably felt no need to present a full-blown discourse recounting all the sentencing errors that that took place when a complete argument would be presented when the appeal was granted. Instead of following the Federal and State law and granting leave to file a direct appeal, the PCRA Court made an unauthorized review of Petitioner's case on the merits. The Superior Court, as was done in the Grimes case, simply affirmed a denial of a direct appeal and this was not the same as a direct appeal.

The Petitioner never got the chance to present a brief specifically challenging the errors that took place during his sentencing that deprived him of his due process rights.

In the instant case the following errors took place:

1) The sentencing judge failed to perform his statutorily imposed duty to assess Petitioner's amenability to treatment.

2) The sentencing judge with no record support stated that the expert testimony for both sides of the aisle was "speculation."

3) The sentencing judge sentenced the Petitioner and stated that he was unaware of the Petitioner's rehabilitation needs.

4) The sentencing judge ignored all evidence in mitigation.

5) The sentencing judge blatantly displayed a dismissive attitude and made a dismissive remark regarding Petitioner's expression of remorse at sentencing.

6) The sentencing judge referred to the Petitioner using an animal name during the sentencing process.

Judge McKee authored United States of America v. Luis Carrion-Soto, 493 Fed. Appx. 340; 2012 U.S. App. Lexis 17314 (3d Cir. 2012). In this case Judge McKee shows the importance of carefully reviewing the record to detect factors that may have influenced the sentence imposed by the judge. Judge McKee vacated the defendant's sentence, and remanded the case for resentencing. In the instant case the Petitioner was sentenced by a judge who operated under the false assumption that it was the Parole Board's role to assess amenability to treatment when actually assessing amenability to treatment by the sentencing judge is part of

the due process any American citizen is entitled to when he is facing a substantial sentence. See Townsend v. Burke, 344 U.S. 736 (1998) (materially false assumptions relied upon by the sentencing judge violated defendant's right to due process). The Carrion-Soto case is just one of the several dozen cases that establish that every judge from the Third Circuit has decided cases that support the three issues presented by the Petitioner.

The discussion above clearly demonstrates that the Petitioner is entitled to a Writ of Mandamus ordering the lower court to issue a Certificate of Appealability. Instantly, we have a case in which the Third Circuit Court has used cases to rule in favor of some Petitioners while the same cases are cited in decisions to rule against the Petitioner. It makes no sense after all these years for so many judges to ignore the fact that the Petitioner has demonstrated "a substantial showing of the denial of a constitutional right." Slack, cited above. It is not possible to have Circuit Court Panels render totally opposite decisions on the same issues presented by Petitioners and ignore the fact that this means "reasonable jurists" would find the District Court's assessment of the Petitioner's constitutional claims debatable or wrong.

We live in a time when American citizens are losing faith in the Executive and Legislative branches of our government. The Supreme Court is all we have left.

CONCLUSION

Based on the foregoing, the Petitioner requests that the Court issue a Writ of Mandamus ordering the lower court to issue the Petitioner a Certificate of Appealability.

Date: 2-1-19

Larry Charles, pro se