No. 19-5295

IN THE SUPREME COURT OF THE UNITED STATES

Larry Charles,
Petitioner

v.

Laurel Harry,
Respondent

ON PETITION FOR WRIT OF MANDAMUS

TO THE THIRD COURT OF APPEALS

PETITION FOR REHEARING

Larry Charles
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TABLE OF CONTENTS

Appendix

STATUTES

RULES

of appeals from habeas petitioners.

It appears that District Court Judges and Circuit Court Judges fail to appreciate that the issuance of a C.O.A. is not a discretionary act. The Supreme Court of the United States makes this clear in **Barefoot v. Estelle**, 463 U.S. 880 (1983), where the Court states that a C.O.A. "must be issued" if a petitioner meets the requirements set by the Court. A petitioner seeking a C.O.A. need only demonstrate "a substantial showing of the denial of a constitutional right." See **Slack v. McDaniel**, 529 U.S. 473 (2000).

Recently, 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." On page six of the 2012 Superior Court Decision, the Court stated that the Petitioner's claims had "arguable merit." This finding is contrary to the untrue statement made by Magistrate Judge Heffley that said that the State Courts found Petitioner's claims to be meritless. This untrue statement, despite argument presented by the Petitioner at every appellate level, was ignored, accepted, repeated, and left uncorrected by more than a dozen Federal Judges. It is hard to imagine that Supreme Court Justices, if the Petitioner's argument could ever survive the screening-out process, would disagree with Petitioner's argument that the statement of untrue facts by a Judge in order to rule against a petitioner impugns the integrity of the habeas process. In fact the Supreme Court has consistently held that a state violates the Fourteenth Amendment's due process guarantee when it knowingly presents or fails to correct false testimony. See **Napue v. Illinois**, 360 U.S. 264 (1959); **Giglio v. United States**,

405 U.S. 150 (1972). The Petitioner argues that the same standard of truthfulness should apply to Judges also.

In **Haskell v. Superintendent of Greene SCI**, 866 F.3d 139 (3d Cir. 2017), a Certificate of Appealability and a Writ of Habeas Corpus were granted to the petitioner who established that the State Court knowingly presented and failed to correct false testimony. Judge Ambro authored the opinion, and Judges Vanaskie and Restrepo were also part of the panel. These Judges were also on both en banc panels that ignored and left uncorrected the false statement made by Judge Heffley. Judge McKee, the author of the **Bey** opinion cited above, was also a member of both en banc panels. He failed to vote in favor of a C.O.A. for the Petitioner in spite of the fact that his very own opinion establishes that the "arguable merit" finding by the State Courts means the Petitioner meets the **Slack** standard and is entitled to a C.O.A.

WRIT OF MANDAMUS

The Writ of Mandamus has been used to "confine an inferior court to a lawful exercise if its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." **Will v Calvert Fire Ins. Co.**, 437 U.S. 655 (1978). To obtain the writ the petitioner must (1) Have no other means to attain the desired relief; and (2) Meet the burden of showing the right to the writ is clear and indisputable. The Petitioner has met both of these requirements. The United States Supreme Court has held that a Mandamus will lie in appropriate case to correct a lower courts willful disobedience to the prosedural rules laid down by the Supreme Court. **Will v. United States**, 389 U.S. 90 (1967), A rehearing must be granted to the Petitioner

who has clearly demonstrated that the willful disobedience of the lower Federal Court Judges impugns the integrity of the habeas process.

The Petitioner is not bringing a second or successive petition. He is attacking the clearly and indisputably erroneous denial of a C.O.A. The Supreme Court Justices must be given the opportunity to correct and thereby forestall future error on the part of lower Federal Court Judges. Granting a rehearing to the Petitioner and granting him the Writ of Mandamus and ordering the Third Circuit Court to grant him a C.O.A. will prevent hundreds if not thousands of future petitions from flooding the Supreme Court when lower Federal Courts receive the message they received in **Tennard v. Dretke**, 542 U.S. 274 (2004), which is that incorrect resolutions of C.O.A. applications will be rejected.

REASONS MERITING REHEARING

Our Constitution works. Our great republic is a government of laws and not of men. Here, the people rule. (Gerald R. Ford's Inaugural Address, 1974) These words are true and can only remain true if our Supreme Court Justices get the opportunity to use their supervisory powers to correct clearly erroneous violations of constitutional rights. The constitutional rights violations suffered by the Petitioner are so numerous and varied that his case qualifies for review under each section of the United States Supreme Court Rule 10. His case also qualifies for review under Federal Rules of Appellate Procedure Rule 35.

The Petitioner's Petition for Rehearing is brought in good faith. Good faith brings to mind words like honesty, fairness, and lawfulness of purpose. The Petitioner argues that

these words should also apply to the habeas corpus process and to the process used to decide which cases survive the rehearing screening process. Honesty, fairness, and lawfulness of purpose have been seriously absent in the habeas process that the Petitioner has been engaged in for the past several years. When over a dozen Federal Judges ignore Supreme Court precedent, ignore Third Circuit Court precedent, and ignore Petitioner's argument that showed that rulings against him are in conflict with decisions of courts in every circuit and every state in America, then these Federal Judges have not shown good faith.

If a woman was denied the right to vote because she was female she would not have to spend years in court proving that she was denied a constitutional right. If a person was told he had to sit in a certain section of a train because of his race he would not have to spend years in court proving that he was denied a constitutional right. If a gay couple were denied a marriage license they would not have to spend years in court proving that they were denied a constitutional right. The Petitioner has been denied constitutional rights that are just as clear and as important as the rights of the people just referenced. In fact the rights the Petitioner seeks to vindicate have deeper historical roots than some of the rights mentioned above.

Just because the Petitioner is incarcerated does not mean Federal Judges, with no concern whatsoever about accountability, can erect artificial barriers between the Petitioner and the United States Constitution. The Petitioner has the constitutional right to the effective assistance of counsel. He also has the

right to directly appeal his sentence. In addition he has the right to be sentenced in accord with with due process by a Judge who follows statutory sentencing factors and not caprice. These rights, like the rights mentioned above, are so axiomatic as to not need citation to authority. The Petitioner will however cite authority and once prove his case.

SUGGESTIONS IN SUPPORT OF REHEARING

I. Trial Counsel was ineffective in failing to perfect a direct appeal on his behalf.

In **Rodriguez v. United States**, 395U.S. 327 (1969), the Supreme Court held that in situations where deficient assistance of counsel deprives a defendant of his right to appeal, courts have not required a showing of prejudice or likelihood of success upon appeal. In **Grimes v. Superintendent Graterford SCI**, (M.D. Pa. Civ. No. 3-13-cv-01122), Judges Smith, Hardiman, and Nygaard had no problem understanding and following Supreme Court precedent and granted a C.O.A. to Mr. Grimes not withstanding the fact that they ruled against him on the underlying claims. See **Appendix A.** Grimes presented the same ineffective assistance of counsel issue that was presented by the Petitioner. See **Appendix B.** In Petitioner's case Judges Chargares, Greenway Jr., and Garth quoted **Slack**, cited above, but arrived at a totally contrary conclusion and denied the Petitioner a C.O.A. These opposing Orders, without more, establish that jurists of reason would find Petitioner's first claim to be debatable. Judges Smith and Hardiman were members of en banc panels that denied rehearings to the Petitioner. See **Appendixes** C and E. As **Rodriguez** and **Grimes** demonstrate, the liklihood of success

on appeal is not a factor in deciding whether or not a C.O.A. is to be issued.

Like Grimes, the Petitioner did not receive an evidentiary hearing. According to **Townsend v. Sain**, 83 S.Ct. 745 (1963), the District Court must hold an evidentiary hearing when a habeas petitioner's factual claims were not given a full and fair hearing. See **Heiser v. Ryan**, 951 F.2d 559 (1991). A petitioner is entitled to a hearing if he alleges facts which, if proved, would grant him relief. It goes without saying that quoting from clear Supreme Court precedent like **Rodriguez** meant that facts were alleged by the Petitioner that entitled him to relief.

In **Peguero v. United States**, 526 U.S. 23 (1999), a concurrence by Justice O'Connor was joined by Justices Stevens, Ginsburg, and Breyer noted that prejudice is presumed when a defendant loses his right to appeal through no fault of his own. Justice O'Connor stated further that "there is no reason why a defendant should have to demonstrate that he had meritorious grounds for an appeal." Id., p. 30.

Justice Alito was Judge Alito when he authored **United States v. Jeffries**, 73 Fed. Appx. 535 (2003), and observed that prejudice is presumed when counsel fails to perfect his client's appeal. Justice Sotomayor was Judge Sotomayor when she authored the frequently cited case, **Compusano v. United States**, 442 F.3d 770 (2006), where she held that prejudice is presumed and the petitioner is entitled to a direct appeal without any showing on collateral review that his appeal would have likely had merit. In the instant case the District Court unreasonably applied **Strickland v. Washington**, 466 U.S. 668 (1984), and required

that the Petitioner prove that he "would" have won his appeal on the merits. If Petitioner's Petition for Rehearing survived the weeding-out process would any competent person think that Justice Alto and Justice Sotomayor would rule that the Petitioner has not clearly established his entitlement to a rehearing, a Writ of Mandamus and a Certificate of Appealability?

In **United States v. Bai**, 795 F.3d 363 (3d Cir. 2015), Judge Greenway Jr. who was a part of the three Judge panel that denied Petitioner a C.O.A. in 2016 (See **Appendix** B), authored the opinion in which a Writ of Habeas Corpus was granted to a defendant that received ineffective assistance of counsel in obtaining a sentence reduction. The irony of this ruling is that Bai received a Writ of Habeas Corpus even though the applicable statute would not have permitted a sentence reduction. On the other hand, the Petitioner has been unable to receive a C.O.A. that he is entitled to.

Every Circuit Court in America finds that prejudice is presumed and no showing of meritorious issues is required when counsel fails to perfect a client's first direct appeal as of right. Every State Court in America rules the same way.

II. The State Courts erroneously denied the Petitioner a direct appeal nunc pro tunc.

In **Evitts v. Lucey**, 469 U.S. 392 (1985), the Supreme Court held that a first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have effective assistance of counsel. In the Third Circuit we find **Lewis v. Johnson**, 359 F.3d 646 (3d Cir. 2004), where the Court held that the Sixth Amendment's guarantee of effective assistance of

counsel extended to the first appeal as of right. If it is humanly possible for it to be unclear whether or not the Petitioner should be granted a rehearing, a Writ of Mandamus, and a C.O.A. the Petitioner directs the reader to a case repeatedly argued upon but ignored by the Federal Judges who are sworn to uphold the law of the land without any bias. The case is **Commonwealth v. Hernandez**, 755 A.2d 1 (Pa. Super. 2000). The Court made it clear that a PCRA Petitioner is entitled to an appeal nunc pro tunc where prior counsel's actions denied his right to a direct appeal. If counsel fails to perfect the direct appeal his conduct falls beneath the range of competence demanded of attorneys in criminal cases, denies the constitutional right to the assistance of counsel and the right to the direct appeal, and constitutes prejudice for the purpose of the Post Conviction Relief Act; and the defendant is not required to establish the merits of his issue or issues which would have been raised on appeal. U.S.C. Const. Amend. 6; Pa. Const. Art. 1, Section 9; Pa. Const. Art. 5, Section 9; Pa. C.S.A. Section 9543(a)(2)(ii). Is it possible for any honest and fair person who is dedicated to carrying out a lawful purpose to read this paragraph and conclude that the Petitioner has not demonstrated that he is entitled to the relief he has diligently sought for the past several years?

The Magistrate Judge and the District Court Judge were well aware of the fact that the Petitioner did not receive the direct appeal that the United States and Pennsylvania Constitutions guarantee him. They used the feckless excuse that the Petitioner received an "appellate process." As the Court stated in **Bell v. Lockhart**, 795 F.2d 655 (CA 8 1986) (the

Arkansas Supreme Court's review of Bell's Post-Conviction petition was not a constitutionally adequate substitute for a direct appeal). By using the term "appellate process" the District Court Judges made it clear that the Petitioner didn't receive a "direct appeal." If they thought he received a "direct appeal" they would have used the words "direct appeal" instead of "appellate process." The Superior Court never referred to their review of the denial of a nunc pro tunc appeal by the PCRA Court to be a direct appeal. It would make no sense at all for the Superior Court to grant a direct appeal in order to affirm the denial of a direct appeal.

The defendant in **Evitts**, cited above, received an "appellate process" when the state appellate court denied him relief. If that "appellate process" was the same as a direct appeal, the Supreme Court wasted time reviewing the case and deciding that Evitts did not receive a direct appeal. Mr. Grimes, referenced above, filed five PCRA Petitions. His case went to the Superior Court twice, in 2012 and 2013, where both PCRA denial of his nunc pro tunc appeal requests were affirmed. Judge Hardiman, the author of the **Grimes** Order and the other panel members didn't conclude that Grimes had received a direct appeal, an "appellate process," or any other proceeding that could be used an excuse to deny relief to him. Judges Hardiman and Smith granted a C.O.A. to Grimes and denied a C.O.A. to the Petitioner on the same issue. They impugned the integrity of the habeas process when they refused to even acknowledge that their own conflicting decisions establish that the Petitioner is entitled to a C.O.A.

III. The Petitioner was sentenced in a manner that clearly violated his constitutional rights.

The errors that occurred during Petitioner's sentencing that the lower Federal Courts ignored are listed below.

(1) The sentencing judge erroneously stated that amenability to treatment (one of the statutory sentencing factors a judge must consider to comply with due process) is best left to the discretion of the Parole Board. See **Townsend v. Barke**, 334 U.S. 736 (1998)(materially false statements relied upon by the sentencing court violates defendant's right to due process).

(2) **Maggio v. Fulford**, 467 U.S. 111 (1983), was violated when the sentencing court, with no support from the record, referred to expert evidence from both sides of the aisle to be "speculative." The defense psychologist stated, without challenge for the Commonwealth expert, that with short-term incarceration and treatment the Petitioner is unlikely to re-offend.

(3) **Harris v. United States**, 382 U.S. 162 (1965), was violated when the sentencing judge stated that he was unaware of the Petitioner's rehabilitative needs.

(4) The sentencing judge ignored all evidence in mitigation See **U.S. v. Malcolm**, 432 F.2d 809 (2nd Cir. 1970)(failure to seriously consider mitigation evidence violates due process). In **Benny Lee Hodge v. Kentucky**, 568 U.S. 1056 (2012), Justice Sotomayor's dissenting opinion pointed out that the Supreme Court has "consistently rejected States' attempts to limit as irrelevant evidence of a defendant's background and character

that he wishes to offer in mitigation."

(5) Commonwealth v. Archer, 722 A.2d 203 (Pa. Super. 1988), was violated when the sentencing court improperly considered the Petitioner's remorse by displaying a dismissive attitude and making a dismissive remark.

(6) The sentencing court referred to the Petitioner using an animal name. In Pennsylvania this act alone violates a defendant's due process and will result in a resentencing in front of a different judge. See Commonwealth v. Spencer, 496 A.2d 1156 (Pa. Super. 1985). See also U.S. v. Cronic, 839 F.2d 1401 (CA 10 1985)(case remanded due to name-calling and hostility displayed by the trial judge).

(7) The sentencing judge used his "personal viewpoint" in deciding what sentence to impose. See Chapman v. California, 386 U.S. 18 (1967)(judicial bias is a structural error that can never be considered harmless).

Every one of the above listed errors taken individually represent numerous cases in which defendants have had their sentences vacated and remanded. Every one of the above listed claims represent numerous cases in which citizens have received Certificates of Appealability and Writs of Habeas Corpus. Every one of the cases cited above support the Petitioner's argument that his constitutional rights were violated.

The Petitioner has demonstrated that Supreme Court precedent, Circuit Court precedent from every circuit in America, and State Court precedent from every state in the country lead to the unassailable conclusion that the Petitioner has been inexplicably denied justice.

The Petitioner could write additional pages providing more examples of decisions by lower Federal Court Judges who ruled in favor of similarly situated petitioners but ruled against the Petitioner. As was the case with Mr. Grimes and Mr. Bai, the Petitioner has dozens of other cases where the petitioner presented meritless cases but still received Certificates of Appealability or Writs of Habeas Corpus. The constitutional violations experienced by the Petitioner, like the ones in the hypotheticals presented above, are so clear and well-defined that the Supreme Court could provide a remedy in a summary fashion. There is no need for extended briefing and oral argument in order to decide whether or not the supervisory powers of the Supreme Court must be exercised.

Like the petitioner in **Phelps v. Alameida**, 569 F.3d 1120 (CA 9 2009), who fought for eleven years before he was lucky enough to finally have a Federal Judge review his Habeas Corpus petition on the merits and rule in his favor, the Petitioner hopes that he gets lucky and his instant petition is reviewed by a Case Analyst who not only reads, but actually reflects on the argument presented.

The Petitioner has presented substantial grounds not previously presented. The Petitioner can only hope that his Petition for Rehearing is reviewed by someone who will read it in the way that the Supreme Court Justices would review it.

The Petitioner concludes his argument with words that summarize what he is seeking from the Supreme Court of the United States: Equal Justice Under Law.

CONCLUSION

For the reasons stated, this Court must grant a rehearing of it's denial of the Writ of Mandamus dated February 20, 2018, and order the Third Circuit Court to follow Supreme Court precedent and grant the Petitioner a Certificate of Appealability

Respectfully submitted,

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Petitioner

NO. 17-7060

IN THE SUPREME COURT OF THE UNTIED STATES

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Respondent

CERTIFICATE OF GOOD FAITH

COMES NOW, Petitioner, Larry Charles, and makes Certification his Petition for rehearing is presented to this Court in good faith pursuant to Rule 44. Mr. Charles further states the following:

This Court entered it's judgment denying Petitioner a Writ of Mandamus on February 20, 2018. Petitioner believes that he presents this Court with adequate grounds to justify the granting of rehearing in this case and said Petition is brought in good faith and not for delay. Furthermore, Petitioner believes that based upon the law of this Court and the facts of this case, Mr. Charles is entitled to relief which has been unjustly denied him. He further believes that if the Third Circuit Court of Appeals is continually allowed to apply the law of the land improperly, a number of people will be denied their Constitutional Right to effective assistance of counsel and the Constitutional Right to Due Process.

I declare under the penalty of perjury that the forgoing is true and correct.

Executed on this 13 Day of October, 2019

Larry Charles