No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

JEROME MARSHALL,
PETITIONER,

- VS. -

JEFFREY A. BEARD, JOHN E. WETZEL, ROBERT D. GILMORE, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA AND WILLIAM STICKLAND,
RESPONDENTS.

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

PETITION FOR WRIT OF CERTIORARI

The petitioner, Jerome Marshall, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit issued on August 14, 2019.

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Third Circuit Court of Appeals erred by denying Petitioner's request for a certificate of appealability after Petitioner made a substantial showing of the denial of a Constitutional right namely that: (1) trial counsel failed to investigate the case to any reasonable degree, (2) trial counsel failed to investigate appellant's mental health and the factors that contributed to his mental health and failed to present those findings as they affected Petitioner's competency, mental illness, insanity and/or diminished capacity; (3) trial counsel failed to allege that Petitioner was unable to knowingly, intelligently or voluntarily waive his Miranda warnings or make a voluntary confession due to mental illness; (4) trial counsel failed to investigate the criminal background of and cross-examine Commonwealth witnesses Eugene Marshall, Jr. and his wife Irene Marshall and to look for or speak to any witnesses prior to trial; (5) PCRA counsel failed to raise several errors and failures committed by trial counsel that undermined the truth determining process, all of which deprived the proceedings of the reliability and accuracy demanded by the procedures contained in United States Constitution.

OPINIONS BELOW

On August 29, 1984, Petitioner was convicted after a jury trial in the Court of Common Pleas of Philadelphia County. Commonwealth v. Marshall, Nos. 1721-32, November Term 1983 (Philadelphia C.P.) (Honorable Francis A. Biunno, presiding). On August 30, 1984, the jury returned two sentences of death and one sentence of life imprisonment.

In 1989, the Pennsylvania Supreme Court affirmed the three murder convictions and one of the sentences of death but remanded the second death sentence for a rehearing. *Commonwealth v. Marshall*, 568 A.2d 590 (Pa. 1989).

On July 27, 1990, rehearing jury again sentenced Mr. Marshall to death on the count of murder. The trial court formally imposed the death sentence on March 25, 1991. Mr. Marshall appealed the re-imposition of the death sentence to the Pennsylvania Supreme Court. On May 24, 1994, the Court affirmed the sentence of death. *Commonwealth v. Marshall*, 643 A.2d 1070 (Pa. 1994).

Mr. Marshall filed a pro se Motion for Post Conviction Collateral Relief. On March 13, 1998, the PCRA court dismissed Petitioner's PCRA without a hearing. On December 18, 2002, the Supreme Court of Pennsylvania affirmed the PCRA court's ruling. *Commonwealth v. Marshall*, 812 A.2d 539 (Pa. 2002).

On May 22, 2003, Petitioner filed a Petition for Writ of Habeas Corpus in Federal District Court. On November 6, 2018, the court Granted in part and Denied in part, granting only the vacating of the two sentences of death. *Marshall v. Beard, et al*., 2:03-cv-03308

Petitioner filed a Notice of Appeal on November 21, 2018. On August 14, 2019, the Third Circuit Court of Appeals denied Petitioner's request for a Certificate of Appealability. *Marshall v. Beard, et al*., 18-9007

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BASIS FOR JURISDICTION

On August 14, 2019, the Third Circuit Court of Appeals denied Petitioner's request for COA. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). See also *Hohn v. United States*, 524 US 236 (1998)

CONCISE STATEMENT OF FACTS

A. Procedural History

On August 29, 1984, Petitioner was convicted of the first degree murder charges after a jury trial in the Court of Common Pleas of Philadelphia County. *Commonwealth v. Marshall*, Nos. 1721-32, November Term 1983 (Philadelphia C.P.) (Honorable Francis A. Biunno, presiding). On August 30, 1984, following the penalty phase proceeding was held the same jury imposed a life sentence on one of the murder convictions, and death sentences on the remaining two counts of murder.

Petitioner appealed to the Pennsylvania Supreme Court, which affirmed the convictions and one of the death sentences, but reversed the other death sentence because the jury had improperly found an aggravating factor that did not apply. *Commonwealth v. Marshall,* 568 A.2d 590 (Pa. 1989). The court remanded the case back to the trial court for another penalty trial with respect to that death sentence.

The new penalty phase trial took place in July 1990, again before Judge Biunno. On July 27, 1990, after five hours of deliberations, the retrial jury again sentenced Mr. Marshall to death, finding one aggravating and three mitigating circumstances. The trial court formally imposed the death sentence on March 25, 1991. Mr. Marshall appealed the re-imposition of the death sentence to the Pennsylvania Supreme Court. On May 24, 1994, the Court affirmed the sentence of death. *Commonwealth v. Marshall*, 643 A.2d 1070 (Pa. 1994).

On November 16, 1996, Mr. Marshall filed a pro se Motion for Post Conviction Collateral Relief. The PCRA court appointed counsel to represent Mr. Marshall, and an amended and

supplemental petitions were filed. On March 13, 1998, the trial court denied relief without holding an evidentiary hearing. The Pennsylvania Supreme Court affirmed the trial court's denial on December 18, 2002. *Commonwealth v. Marshall*, 812 A.2d 539 (Pa. 2002) ("Marshall-3").

Mr. Marshall was represented at trial and on his initial direct appeal by Michael McAllister, Esq. At the penalty phase retrial and on appeal therefrom, he was represented by Bernard L. Siegel, Esq. He was represented in the PCRA proceedings by James S. Bruno, Esq.[1]

On May 22, 2003, Petitioner filed a Petition for Writ of Habeas Corpus in Federal District Court after being appointed to the Federal Defender's Office. On January 27, 2006, Petitioner filed a second PCRA petition alleging newly-discovered evidence that demonstrated a policy of racial discrimination in jury selection within the Philadelphia District Attorney's office, which directly contravened the holdings of the United States Supreme Court in *Kentucky v. Batson*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d. 69 (1986). On August 7, 2006, the trial court denied this PCRA petition and on May 20, 2008, the Pennsylvania Supreme Court affirmed the trial court's decision.

Petitioner filed Motion to Remove Counsel on his federal habeas corpus petition on December 11, 2014. On December 22, 2014, the Federal Defender's Office filed a Motion to Withdraw from Representation. That Motion was granted on January 9, 2015. Current counsel were appointed to represent Petitioner on January 13, 2015. Counsel for Petitioner filed a new Petition

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[1] Respondent admitted to violating numerous Rules of Professional Conduct in eleven individual client matters. All of his misconduct generally involved neglect and consisted of failure to file responses to pleadings, failure to comply with court orders, failure to timely file Petitions for Allowance of Appeal and Notices of Appeal to the Superior Court, failure to keep clients informed of the status of matters being handled and failure to respond to clients' letters and telephone calls. All of the clients but one had been convicted of homicide1 and were serving lengthy prison sentences. None of the clients suffered irreparable harm, because all were ultimately permitted to pursue their appellate and PCRA claims despite Respondent's failure to file them on time.
See Office of Disciplinary Counsel v. James Bruno, No. 180 DB 2011, Report and Recommendations of the Disciplinary Board of the Supreme Court of Pennsylvania, page 8 Discussion IV, July 18, 2014

and Memorandum for Habeas Corpus. On November 6, 2018, the court Granted in part and Denied in part, granting only the vacating of the two sentences of death. Petitioner filed a Notice of Appeal on November 21, 2018. On August 14, 2019, the Third Circuit Court of Appeals denied Petitioner's request for COA.

B. Trial Evidence

The following is the recitation of the facts stated by the Supreme Court of Pennsylvania as reported in *Commonwealth v. Marshall*, 568 A.2d 590, 594 (Pa.1989):

> "On January 25, 1983, James Burley, the brother of Sharon Saunders, in the company of his mother, went to the victims' apartment in the City of Philadelphia. Upon entering the apartment, James noticed that it was very hot in the apartment and that a foul odor permeated the air. Upon searching, he found the bodies of his sister, niece, and Myndie McKoy, under a mattress in one of the bedrooms. James also noticed that Sharon's stereo and speakers were missing. Upon viewing this grizzly scene, James and his mother contacted the police, who immediately responded to the call and conducted an investigation.
>
> Among the items recovered during this investigation was a manilla envelope containing Appellant's name and address and documents indicating the time and place where Appellant was scheduled to pick up his welfare check. On the front of the envelope was inscribed the following "Jerome and Sharon 4 ever".
>
> Armed with this information, the police conducted a search for Appellant by going to his listed address and waiting for him at the bank and by visiting his parents and aunts and uncles. As part of the search for Appellant, they went to his brother's home

where the police saw the stereo and speakers that James Burley had described as belonging to his sister Sharon. The police obtained a search warrant for these items and returned to Eugene and Irene **594 Marshall's home and seized the stereo and speakers as well as other items from the victim's apartment. Irene admitted that Appellant brought these items into her home and that he sold them to Eugene. Eugene told the police that he found his brother on a corner very near to where the victims lived near their time of death, carrying a knife and that he had blood on his shirt. He also told the police that he harbored Appellant in his home for a few days and knew that Appellant returned to the victims' apartment following the murders to retrieve some of his belongings and the stereo, which he sold to Eugene. Finally, Eugene told the police that his brother had confided to him that he had, in fact, killed the women. Eugene admitted to disposing of several of the items.

The post-mortem examination of the victims indicated that they were all strangled to death and that the time of death was from one and one-half to five and one-half days from their discovery on January 25, 1983. Myndie McKoy's corpse also revealed that she had been stabbed in the back, which wound was listed as a contributing factor to her death.

Based upon this information, a warrant for the arrest of Appellant was obtained and, following an extensive search for Appellant, he was finally apprehended on November 10, 1983, and brought to the Norristown Police Station. Petitioner denied any involvement in the murders for twenty minutes. After that, the police informed him of the evidence they had gathered including the fact that Petitioner's brother told them that Peti-

tioner had confessed to him. Appellant then waived his Miranda rights and gave a statement.[2]

Appellant recounted that he and Sharon had been lovers. On the day of the murders, he had sex with the twenty-year old Sharon. After Sharon fell asleep, Petitioner stated that 'a lot of things had been working on [his] mind at this time,' that she 'was like a witch' and that she had just told him that he would have to leave the house because her boyfriend was coming back from the army. While she slept, he put a clothes line around her neck and strangled her to death. He then went into Myndie McKoy's room to tie her up. When she awoke and began to scream, he found a knife and stabbed her in order to quiet her and tied her up. He then dragged her into the bathroom and filled the tub up with water. She pleaded with him to leave her alone and she promised not to tell anyone and again began to scream, and then Appellant plunged Myndie's head under the water in the tub and held it there until Myndie no longer moved. Having permanently silenced Myndie, he dragged her body into Sharon's bedroom and laid her corpse next to Sharon. Appellant also admitted that he killed Sharon's two-year-old baby, Karima, by holding her head under water in the bathroom sink until she stopped moving because the baby was awakened by the commotion and called out for her mother. When little Karima was

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[2] Q: When was it then that he had this change of heart from denial to admission? What was it that you can remember that changed him?

A: I think it was after we told him his brother had told us that he killed her, the two girls, and the baby, that he gave us a statement.

Statement of Jerome Marshall as read by Detective Grace at suppression hearing of *Commonwealth v. Marshall*, 568 A.2d 590 (8/14/84) at p.86

dead, Appellant put her between the bodies of Sharon and Myndie and covered their bodies with a mattress.[3]

When he left the premises, he ran into his brother and then went to his brother's home where he changed his bloody shirt and stayed for a few days. He went back to the apartment to retrieve some of his belongings and took the stereo and speakers. He stated that he sold these items to Eugene and then left town because he knew that the Philadelphia police were looking for him."

Commonwealth v. Marshall, 523 Pa. 556, 564–65, 568 A.2d 590, 594 (1989).

It is clear from Dr. Aronson's testimony, that Petitioner's statement did not match the facts of the case. The other evidence presented against Petitioner came from his brother, Eugene Marshall, Jr. Trial counsel did not meet with or talk to Eugene Marshall, Jr at any time prior to Petitioner's trial, despite knowing that Eugene Marshall would be the main witness for the Commonwealth. Nor did trial counsel impeach Eugene Marshall in any meaningful way with regard to his criminal history for dishonesty and his motive to lie. Additionally, there was no evidence that trial did much of any investigation in the case. Despite that fact that there was evidence from many sources available to trial counsel that Petitioner had a severe mental illness, trial counsel neither had petitioner evaluated prior to trail nor introduced any evidence of petitioner's mental illness.

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[3] It should be noted that the facts relied upon by District Court at page 12 of the opinion finds that: 'Appellant also admitted that he killed Sharon's two-year old baby, Karima, by strangulation and drowning ...' when that does not appear anywhere in Petitioner's statement. In fact, Detective Grace questions Petitioner:

Q: Do you remember putting any rope, cord or belts around the baby's neck?

A: I can remember holding the baby's head underwater (sic) but I don't remember putting nothing around her neck. Id., at 50.

After petitioner was convicted and sentenced, he was evaluated by Dr. Carol Armstrong, Dr. Jethro Toomer and Dr. Kirk Heilbrun. Dr. Armstrong found that petitioner suffered from neurocognitive deficits, Dr. Toomer determined petitioner suffered from organic brain damage and Dr. Heilbrun found that petitioner was unable to conform his conduct to the requirements of the law at the time of the murders.

PCRA counsel failed to raise any of the issues alleged above to have been deficient in trial counsel's obligations.

DIRECT AND CONCISE ARGUMENT

By denying Petitioner's request for COA, The Third Circuit Court of Appeals has entered a decision in conflict with decisions of other courts on this same important matter and has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power.

The Third Circuit Court of Appeals stated the following in its Order:

> ORDER (MCKEE, JORDAN and FUENTES, Circuit Judges) The foregoing request for a certificate of appealability is denied. We may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. Section: 2253(c)(2). When the District Court denies a habeas petition on procedural grounds without reaching the merits of the underlying claims, we will issue a certificate of appealability when the prisoner shows that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and debatable whether the District Court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Jurists of reason would not debate the District Court's denial of Marshall's claim that counsel was ineffective for failing to investigate and present a diminished capacity defense. *See Strickland v. Washington*, 466 U.S. 668, 687-96 (1984); *Commonwealth v. Hutchinson*, 25 A.3d 277, 312 (Pa. 2011) (defendant must admit criminal liability and establish that his cognitive abilities were compromised such that he could not formulate the specific intent to kill.)

I. STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), imposes procedural requirements and standards on federal courts for analyzing federal habeas corpus petitions. Under 28 U.S.C. §2254(d)(1)-(2), relief is barred unless the state court determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."

Under 28 USC 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure, a habeas petitioner who wishes to appeal from a final order of a district court must obtain a certificate of appealability ("COA") for each claim he wishes to present to the Court of Appeals. In this case, the district court determined that there was no basis for the issuance of a COA.[4] The purpose of the COA requirement is "to prevent frivolous appeals." *Barefoot v. Estelle*," 463 U.S. 880, 893 (1983). COA must be granted if the issue is "debatable among jurists of reason"; "a court could resolve the issue [in a different manner]"; or "the question [is] adequate to deserve encouragement to proceed further." *Id.* at 893 n.4.

In Miller-El v. Cockrell, 537 U.S. 322 (2003), the Supreme Court held that the standard for the issuance of a certificate of appealability in an AEDPA case is as follows: "Under the controlling standard, a petitioner must 'sho[w] that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that

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4 District Court Order 11/6/2018

the issues presented were adequate to deserve encouragement to proceed further.'" *Id.* at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000))

In *Miller-El*, the Court emphasized that in order to grant a COA, a court need not be convinced of the ultimate merits. "[W]e decide again that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." *Miller-El*, 537 U.S. at 327. While the COA standard includes application of the AEDPA standard for review of state court decisions, that review is preliminary and general:

> We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it.

Id. at 336.

Finally, where (as here) COA is sought with respect to a district court's procedural rulings, in order to decide whether to grant COA the reviewing court must consider both whether the procedural rulings are "debatable amongst jurists of reason" and also whether the underlying claims raise a constitutional issue that is similarly debatable. *Slack*, 529 U.S. at 484-85.

II. IT IS AT LEAST DEBATABLE THAT PETITIONER CAN OVERCOME ANY PROCEDURAL DEFAULT.

A procedural default may be overcome by showing cause and prejudice, *see* Part A below, or by a sufficient showing of actual innocence. *See* Part B below. On either issue, it is appropriate to hold an evidentiary hearing when there are disputed issues of fact. *Cristin v. Brennan*, 281

F.3d 404, 412-13 (3d Cir. 2002). The District Court rejected Petitioner's arguments and factual proffers without holding a hearing. It is at least debatable that the District Court erred.

A. It is at Least Debatable That There Is Cause and Prejudice for any Default.

When a habeas petitioner demonstrates "cause" for a default and prejudice resulting therefrom, the federal court must consider the petitioner's claims on the merits, regardless of any default.[5] *Murray v. Carrier*, 477 U.S. 478, 489 (1986); *Hull v. Freeman*, 932 F.2d 159, 165 n.7 (3d Cir. 1991). The Supreme Court has held that ineffectiveness of initial post-conviction counsel may establish cause and prejudice. *Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). Petitioner can establish cause and prejudice under Martinez and Trevino.

Petitioner asserts the Court erred in it's decision as the one-year requirement as laid out in 42 Pa. Cons.Stat. Ann. § 9545(b), does not apply to this case because the state procedural rule at issue in this case — the rule strictly requiring a capital defendant to file a PCRA petition within one year after the end of direct review — was not firmly established and regularly followed at the time in question.

In *Martinez*, the Court addressed the issue of cause and prejudice in a state that did "not permit a person alleging ineffective assistance of trial counsel to raise that claim on direct review," but rather forced such a person to "bring the claim in state collateral proceedings." 566 U.S. at 4. The Court held that in such a state, "Inadequate assistance of counsel at initial-review

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5 Because the state courts denied those claims on procedural grounds rather than the merits, if Mr. Marshall overcomes the procedural default – as he argues here – review of these claims is *de novo*, without deference. *Cone v. Bell*, 556 U.S. 449, 472 (2009).

collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id*. at 9.

In *Trevino*, the Court applied and expanded the limited exception to procedural default first recognized in *Martinez*. Together, *Martinez* and *Trevino* support application in this case of the exception to procedural default first recognized in *Martinez*. Courts of appeals have found that the procedures in several states so closely resembled those in Texas (and Pennsylvania) that application of *Trevino* was required. *See id.* at 510-13 ("procedural design" and "systematic operation" of Indiana practice require application of *Trevino*); *Coleman v. Goodwin*, 833 F.3d 537, 542-43 (5th Cir. 2016) (same as to Louisiana); *Runningeagle v. Ryan*, 825 F.3d 970, 980-82 (9th Cir. 2016) (same as to Arizona, even before Arizona required ineffective assistance claims to be brought in collateral proceedings); *Woolbright v. Crews,* 791 F.3d 628, 632-36 (6th Cir. 2015) (same as to Kentucky).

In *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014), this Court noted but did not decide the question "whether, as a general matter, Pennsylvania's pre-Grant landscape falls within the ambit of the *Martinez* rule," Id. at 125 n.8, and two Pennsylvania district courts have assumed that it does. *See Glass v. Vaughn*, No. 91-963, 2016 WL 3538614, at *5 (E.D. Pa. June 29, 2016) (assuming that *Martinez* applied but denying Rule 60 relief); *Rhone v. Larkins*, No. 99-743, 2016 WL 3181757, at *3-4 (E.D. Pa. June 8, 2016) (same).

This Court should grant COA to decide the question left open in *Cox* and assumed but not decided in *Glass* and *Rhone*.

At the time of Petitioner's direct appeal the rule applied by the Pennsylvania Supreme Court was not firmly established and regularly applied until after Petitioner missed the PCRA's

one-year filing deadline. The pertinent statutory provision, 42 Pa. Cons.Stat. Ann. § 9545(b), which took effect on January 16, 1996, appears on its face to impose a one-year deadline in all cases except those falling within three limited categories.

As the District Court in *Bronshtein* observed, strict enforcement of the provision did not begin immediately:

> Well before the enactment of this provision, the Pennsylvania Supreme Court had begun to apply a "relaxed waiver rule" in capital cases. See Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978). … As we have observed, McKenna for a time "firmly established that a claim of constitutional error in a capital case would not be waived by a failure to preserve it."

Szuchon v. Lehman, 273 F.3d 299, 326 (3d Cir.2001)

In Pennsylvania, as in Texas, the "procedural system – as a matter of its structure, design, and operation – d[id] not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 133 S. Ct. at 1921.

At the time of Petitioner's 1984 trial, the rule governing post-verdict or post- sentence motions provided as follows:

> A. In cases in which the imposition of death is authorized by law, once a sentence has been determined, the court may immediately thereafter impose the sentence.
> . . ..
> C. Post-sentence motions shall be filed within ten (10) days of the imposition of sentence.
> Pa. R Crim. P. 1410 (1978)(rescinded March 22, 1993);

Pa. R. Crim. P. 359 (1993) (rescinded Jan. 1, 1994) (current version at Pa. R. Crim. P. 720).

This strict time limitation, which meant, among other things, that no transcript would ordinarily be available when the motion was filed, in itself posed a barrier to bringing an ineffective assistance of trial counsel claim in the direct appeal proceedings. *See Trevino*, 133 S. Ct. at

1918 (noting inhibiting effect of time constraints where motion for new trial had to be made within 30 days of sentencing).

Given the short amount of time involved, the rule contemplates that in most cases the post-verdict or post-sentence motion will be filed by trial counsel. When it is filed by trial counsel, counsel is precluded from alleging her own ineffectiveness. *See Commonwealth v. Green*, 709 A.2d 382, 384 (Pa. 1998) (counsel cannot raise his or her own ineffectiveness); *Commonwealth v. Albert*, 561 A.2d 736, 737 (Pa. 1989) (same). As *Cox* makes clear, "defendants who . . . were represented by the same counsel at trial and on direct appeal did not have a realistic opportunity to raise an ineffective assistance of counsel claim until collateral review." *Cox*, 757 F.3d at 124 n.8.

In this case, the trial counsel also filed the direct appeal. Therefore, petitioner was precluded from raising issues of trial counsel's ineffectiveness in the first post-sentence motion filing. In this respect, Pennsylvania made it more difficult than Texas to raise ineffective assistance claims on direct appeal, as Texas routinely appointed new counsel for direct appeal. *See Trevino*, 133 S. Ct. at 1919 (new counsel was appointed eight days after sentencing, but still had insufficient time to investigate and present ineffective assistance claim); *Sasser,* 735 F.3d at 852 (Texas "provides new appellate counsel as a matter of course and did so in the *Trevino* case, yet the Supreme Court still found Texas's procedure insufficient.").

Perhaps because of this impossibility of raising ineffectiveness claims within the confines of procedural law, for capital cases, the Supreme Court of Pennsylvania established the practice of applying a relaxed waiver rule. *Commonwealth v. Zettlemoyer,* 454 A.2d 937, 955 n.19 (1982). As such, the Pennsylvania Supreme Court would not adhere strictly to the normal rules of waiver

and would consider the merits of claims otherwise waived for failure to properly preserve for appellate review. *Id.: see also Szuchon v. Lehman*, 273 F.3d 299 (3d Cir.2001). Defendants were expected to raise ineffective assistance claims on direct appeal, those who did not do so or who failed to develop the record in support of such claims had this purported default forgiven. *See, e.g.*, *Commonwealth v. Keaton*, 45 A.3d 1050, 1064 (Pa. 2012) (counsel's "stated belief that extra-record claims would be available in PCRA proceedings was not unreasonably erroneous"; court gives "effect to the reasonableness of appellate counsel's decision by . . . reviewing the merits of underlying extra-record claims pertaining to trial counsel."); *Commonwealth v. Moore,* 860 A.2d 88, 96-100 (Pa. 2004) (affirming grant of relief in PCRA proceedings on claim of trial counsel ineffectiveness that had first been raised on direct appeal, but without making any showing of prejudice). Again, Pennsylvania's practice in these regards is similar to that of Texas. *See Trevino*, 133 S. Ct. at 1919.

Accordingly, Pennsylvania shares the features that led the Supreme Court to conclude in *Trevino* that *Martinez* should be extended to Texas. At a minimum, it is debatable whether *Martinez* and *Trevino* should apply here. Therefore, this Court should grant a COA.

In *Bronshtein v. Horn*, the District Court found, "Although some of Bronshtein's claims had been raised in the state courts for the first time in the second PCRA petition, which the state supreme court had found to be untimely, the District Court held that these claims were not procedurally defaulted, 'because the procedural rule that the Supreme Court of Pennsylvania relied upon in rejecting his claims was not clearly established or regularly followed at the time of his alleged default, [and] therefore was not sufficiently `adequate' to bar federal habeas review.'" *Bronshtein v. Horn*, 404 F.3d 700 at 706 (2005).

Because this rule was not firmly established and regularly applied in 1985, the one-year date from petitioner's conviction, the doctrine of procedural default does not apply in this case.

The Third Circuit erred by denying the COA for the following reasons:

First, because Pennsylvania courts have consistently ruled that there is not even jurisdiction for a court to consider a claim of PCRA issues raised for the first time after the disposition of the direct appeal, (*i.e.*, *Commonwealth v. Gamboa-Taylor*, 753 A.2d 780 (Pa. 2000), there was no legitimate way for Petitioner to raise these issues in any other fashion. In fact, petitioner has made a claim that his PCRA counsel was also ineffective for failing to raise many of the issues contained in this Habeas Corpus petition because he had essentially handed the decision making over to attorneys from the federal defender's habeas unit and did not consult in any way with petitioner regarding the issues to pursue.

Second, to raise an ineffective assistance claim on direct appeal at the time of trial, the defendant had to affirmatively make a *pro se* motion for appointment of new counsel. That fact alone means that the system was inadequate: "[A] procedure to assure adequate representation cannot depend on a defendant's acting *without* representation." *Sasser*, 735 F.3d at 852.

Third, because Petitioner was convicted in 1984, his one-year deadline for filing of a PCRA would have tolled in 1985. This rue was not firmly established nor regularly followed in 1985.

B. It is at least debatable that petitioner can overcome any default by a showing of actual innocence.

The evidence in the case at trial consisted mainly of Petitioner's statement to the police and testimony given by Petitioner's brother. Petitioner's statement was rambling, illogical state-

ment that is in part inconsistent with the physical evidence. Petitioner told the police that he drowned both Myndi McKoy and Karima Saunders. He admitted that there were belts around Ms. McKoy's mouth, but claimed they loosened and fell off, and that he "held her under the water until she stopped moving." Statement of Jerome Marshall at 4. He indicated that he killed Ms. Saunders by drowning her but did not remember putting anything around her neck. Id. at 6.
In his post-mortem reports, Dr. Aronson made no mention whatsoever of drowning, and did not list drowning as even a contributing cause of death. He set forth in detail the evidence of ligature strangulation for both of these victims.

When the case came to trial, the prosecution tried to explain away Petitioner's claims that he drowned the victims by their directed questions to Dr. Aronson. Dr. Aronson responded by indicating that although the victims were strangled while alive, he could not rule out the possibility of a prior attempted drowning. NT 8/3/84 at 51-52. He further testified that he could not exclude drowning as a contributing cause of death. NT 8/3/84 at 57-58. At the penalty phase retrial, Dr. Aronson testified that he could not eliminate that drowning was some factor somewhere along the line, but that he could eliminate in all three that drowning was a cause of death. NT 7/25/90 at 83. The testimony continued:

> Q: In the situation that you had in front of you with two of these victims, Miss McKoy, and Miss Saunders, if someone were to have said that they had drowned these two people, would it be your position that that would not be an accurate statement?
>
> A: If by that statement they meant that they had immersed these people in water and produced their deaths, yes that would be an inaccurate statement.
>
> Q: Even if someone said, I did that, you would say that would not be true?
> A: That is correct.

Id. at 84.

This testimony, coupled with Petitioner's mental illness at the time of the statement that is discussed further in this document, could raise a doubt as to the reliability of the statement.

The other evidence presented against Petitioner came from his brother, Eugene Marshall, Jr. Trial counsel did not meet with or talk to Eugene Marshall, Jr at any time prior to Petitioner's trial, despite knowing that Eugene Marshall would be the main witness for the Commonwealth. Nor did trial counsel impeach Eugene Marshall in any meaningful way with regard to his criminal history for dishonesty and his motive to lie. Had trial counsel done an effective job and impugned the witness' credibility, trial counsel could have raised a reasonable doubt in the minds of the jury as to Petitioner's guilt.

Therefore, Petitioner avers that, but for trial counsel's ineffectiveness, any procedural default has been overcome by a sufficient showing of actual innocence.

III. IT IS AT LEAST DEBATABLE THAT TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE COMMITTED ERRORS AND FAILURES THAT UNDERMINED THE TRUTH DETERMINING PROCESS, DEPRIVED THE PROCEEDINGS OF THE RELIABILTY AND ACCURACY DEMANDED BY THE UNITED STATES CONSTITUTION AND, HAD THE EVIDENCE BEEN PRESENTED, THERE IS A REASONABLE PROBABILITY THAT DEFENDANT WOULD HAVE BEEN FOUND INCOMPETENT TO STAND TRIAL, NOT GUILTY BY REASON OF INSANITY, FOUND GUILTY BUT MENTALLY ILL, BEEN FOUND GUILTY OF A LESSER CHARGE, OR FOUND TO HAVE SUFFERED FROM A DIMINISHED CAPACITY.

The right to effective assistance of counsel includes a duty to investigate. *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989). "Defense counsel is under an ethical obligation to conduct a prompt investigation of the circumstances of a case and to explore all avenues leading to facts relevant to guilt and degree of

guilt or penalty." *United States v. Bayne*, 622 F.2d 66, 69 (3d Cir. 1980) (quotation omitted). A lawyer who fails to uncover and present available evidence that raises significant doubt about the prosecution's case performs deficiently and renders the trial fundamentally unfair. *See generally Gray*, 878 F.2d at 712.

As alleged in the Petition, trial counsel was ineffective and PCRA counsel was ineffective to investigate, develop and present any kind of evidence of petitioner's mental illness. As stated in the Petition, there was evidence from many sources available to trial counsel that Petitioner had a severe mental illness. Had trial counsel taken the time to speak to any of Petitioner's family members, trial counsel would have discovered: (1) that Petitioner's father and grandfather both suffered from severe mental illnesses, his father having been court ordered to Fairview State Psychiatric Hospital after his first murder trial; (2) that Petitioner's mother was murdered by his father when Petitioner was four years old, (3) that Petitioner's mother was consistently severely beaten by Petitioner's father, once having thrown her down a flight of stairs while pregnant with Petitioner, (4) that Petitioner, at two years old, suffered a closed head injury for which he was never taken to the doctor, (5) that Petitioner suffered severe depression as a child, (6) that Petitioner was beaten by his uncle after his mother was murdered, (7) at the age of thirteen, his grandparent decided to turn Petitioner and his two siblings over to the state where they were separated from one another, and (8) at the age of fourteen, Petitioner became addicted to methamphetamine and alcohol. Trial counsel, however, never spoke to anyone. As a result, none of this evidence was presented to the court or the jury.

Moreover, trial counsel was ineffective for failing to hire a mental health expert. As described in the Petition, several mental health experts were hired by subsequent counsel to evalu-

ate Petitioner. These experts found that Petitioner suffered from several different types of mental illnesses. One such example is Dr. Toomer who found that 'Jerome can decompensate into a frankly psychotic state in which he is out of contact with reality. There is evidence suggesting that he was in such a state at the time of the offense.'[6]

Longstanding professional norms require that an attorney must investigate a case, whenever there is cause to do so, in order to provide minimally competent professional representation. *See, e.g., Showers v. Beard*, 635 F.3d 625, 632 (3d Cir. 2011) (finding deficient performance where counsel "failed to investigate readily available evidence in support of the defense's chosen theory . . ., or make a reasonable decision that investigation was unnecessary."); *Rolan v. Vaughn*, 445 F.2d 671, 682 (3d Cir. 2005); *United States v. Kauffman*, 109 F.3d 186, 188, 190 (3d Cir. 1997); *Gray*, 878 F.2d at 711.

Here, based upon Dr. Toomer's evaluation alone, Petitioner avers that trial counsel's failure to investigate and present this evidence constitutes a fundamental miscarriage of justice and that it is more likely than not that no reasonable juror would have convicted Petitioner of first-degree murder had they been made aware of Petitioner's diagnosis.

Under *Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002), a federal court may still consider the merits of petitioner's procedurally defaulted claim if a petitioner can establish cause and prejudice for his failure to comply with the state procedural rule, or that a fundamental miscarriage of justice would result, requiring excusal of the procedural default. A fundamental miscarriage of justice can be established only in extraordinary cases, and 'petitioner must prove that

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6 Affidavit of Jethro Toomer, Ph.D., ¶¶ 17-18, 20.

it is more likely than not that no reasonable juror would have convicted him.' *Werts v. Vaughn*, 228 F.3d 178, 193 (Cir. 2000). Ineffective assistance of counsel pursuant to the Sixth Amendment can constitute cause for procedural default. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L. Ed. 2d 397, 409 (1986).

Here, Petitioner is able to establish prejudice as trial counsel's ineffectiveness 'worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.' *Werts*, 228 F.3d at 193. Where ineffective assistance of counsel is the alleged 'cause,' 'prejudice occurs 'where there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.' *Werts*, 228 F.3d at 193.

As stated above, the Supreme Court in *Martinez v. Ryan,* held that a prisoner may establish cause for the procedural default of an ineffective assistance of counsel claim by demonstrating the ineffectiveness in an 'initial review collateral proceeding.' An 'initial review collateral proceeding' is defined as a collateral proceeding that 'provide[s] the first occasion to raise a claim of ineffective assistance at trial.' *Martinez*, *supra.*

Here, all of Petitioner's claims raised regarding guilt phase ineffective assistance were raised for the first time in this Petition. This was Petitioner's first occasion to raise these claims of ineffective assistance by trial counsel for several reasons.

First, these issues were not raised by prior PCRA counsel. Petitioner is alleging that PCRA counsel was ineffective for not raising these issues of ineffectiveness on the part of trial counsel in the above paragraphs. Although, prior PCRA counsel's petition would have been 'the first occasion to raise a claim a claim of ineffectiveness of trial counsel' as required by *Martinez*, Petitioner was unable to do so because of PCRA counsel failure to raise the issue. Petitioner

should not be penalized for PCRA counsel's ineffectiveness. The current petition was filed by new counsel who then raised the issue of trial counsel and PCRA counsel's ineffective assistance for failure to raise these issues.

Second, as argued above, trial counsel did not raise the issues of ineffectiveness at the direct appeal because attorneys cannot allege their own ineffectiveness. As such, it was incumbent upon PCRA counsel to raise these particular issues of trial counsel ineffectiveness. This federal habeas petition was then the first opportunity Petitioner had to raise ineffective assistance of counsel of both trial counsel and PCRA counsel.

In these circumstances, it is at least debatable that there is a reasonable probability that Petitioner would not have been convicted of first-degree murder. Petitioner was prejudiced because counsel's "failure to investigate the [mental health evidence] deprived [Petitioner] of a substantial argument and set up an unchallenged factual predicate for the State's main argument." *Draughon v. Dretke*, 427 F.3d 286, 296 (5th Cir. 2005). Petitioner avers that this dereliction of duty constitutes ineffective assistance of counsel and, therefore, the district court's rulings are debatable amongst jurists of reason and the underlying claim raises a constitutional issue that is similarly debatable.

IV. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ALLEGE THAT PETITIONER WAS UNABLE TO KNOWINGLY, INTELLIGENTLY OR VOLUNTARILY WAIVE HIS MIRANDA WARNINGS OR MAKE A VOLUNTARY CONFESSION DUE TO MENTAL ILLNESS.

After Petitioner's conviction and sentencing, he was evaluated by several medical professionals. District Court highlighted several of those evaluations:

1. Neuropsychologist Carol Armstrong, Ph.D. evaluated Petitioner and found that he suffers from neurocognitive deficits that make [Petitioner] more vulnerable and less able to deal with stressful situations;
2. Clinical psychologist Jethro Toomer, Ph.D. evaluated Petitioner and found that Petitioner can become psychotic in stressful situations, suffers from cognitive and emotional impairments as a result of organic brain damage, and was psychotic at the time of the killings;
3. Clinical psychologist Kirk Heilbrun, Ph.D. evaluated Petitioner and found that, at the time of the offense, Petitioner suffered from a mental or emotional disturbance and his capacity to conform his conduct to the requirements of the law was impaired.

Petitioner argues that the Court erred in it's finding as it is at least debatable, based on these three evaluations alone, that trial counsel was ineffective for failing to allege that Petitioner was unable to waive his Miranda warnings in any meaningful way and give a reliable confession. Moreover, it is because this information was not **presented** to the State court at the suppression that trial counsel was ineffective.

Dr. Carol Armstrong found that, due to neurocognitive deficits, Petitioner is 'vulnerable' in stressful situations. Being arrested and taken to jail is arguably one of the most stressful situations anyone could face in life. Petitioner sat with several seasoned members of the Philadelphia Police Department for hours as they continuously prodded him with questions, crime scene photographs, witness interviews and prior inculpatory statements. It is possible that Dr. Armstrong would have testified that, due to Petitioner's Neurocognitive deficits, he was unable, in that stressful environment, to waive his rights in any legitimate fashion, moreover, as the

stress intensified over the time that he was with the detectives, to give a coherent or reliable confession.

Dr. Jethro Toomer likewise determined that Petitioner, due to organic brain damage, could become psychotic[7] in stressful situations. Again, this evidence was not presented to the State court and clearly would have an effect on Petitioner's ability to knowingly, intelligently and voluntarily waive his Miranda rights or give a truthful or reliable statement to police. Despite this information, the Court made an issue that this evaluation was done several years after the statement was given. This reasoning was misplaced as, arguably, Dr. Toomer relied on his finding of organic brain damage on an untreated brain injury Petitioner suffered when he was two years old.

Dr. Kirk Heilbrun found that Petitioner was unable to conform his conduct to the requirements of the law at the time of the murders. If trial counsel had offered this witness to the suppression court, this witness could possibly have convinced the judge that petitioner was unable to waive his rights.

If these medical experts (or family members) had been given the opportunity to address the State court regarding Petitioner's ability to waive his Miranda warnings or give a reliable statement, there is a great possibility that the State court's ruling would have been different. But, because trial counsel did virtually nothing to present this evidence, he was clearly deficient in his performance.

District Court found that because Petitioner 'refused to be evaluated by a mental health professional,' "trial counsel cannot be faulted for failing to present evidence that petitioner him-

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[7] Psychosis is defined a 'a serious mental illness characterized by defective or lost contact with reality often with hallucinations or delusions.' Merriam-Webster

self rendered unavailable."[8] Surely this was not an effective means of handling the situation. Trial counsel could have called family members to the stand (none of whom he spoke to prior to trial), he could have asked the court to order a competency evaluation, he could have argued that the case be postponed until Petitioner agreed to an evaluation. Instead, trial counsel did nothing. Clearly, this was ineffective assistance of counsel and at least merits an argument.

There is a reasonable probability that Petitioner would not have been convicted of first-degree murder. Petitioner was prejudiced because counsel's "failure to investigate the [mental health evidence] deprived [Petitioner] of a substantial argument and set up an unchallenged factual predicate for the State's main argument" *Draughon v. Dretke*, 427 F.3d 286, 296 (5th Cir. 2005). Petitioner avers that this dereliction of duty constitutes ineffective assistance of counsel and, therefore, the district court's rulings are debatable amongst jurists of reason and the underlying claim raises a constitutional issue that is similarly debatable.

V. IT IS AT LEAST DEBATABLE THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RESEARCH THE CRIMINAL BACKGROUND OF AND CROSS-EXAMINE WITNESSES EUGENE MARSHALL, JR. AND HIS WIFE IRENE OR TO LOOK FOR OR SPEAK TO ANY OTHER WITNESSES PRIOR TO TRIAL

In addition to conducting no mental health investigation, Petitioner avers that trial counsel also conducted virtually no witness investigation. When counsel's performance is deficient because of inadequate investigation, "counsel's effort to present some . . . evidence" does not preclude finding that counsel's "deficient investigation . . . prejudiced the defendant."

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[8] District Court Opinion, p. 25

See Showers, 635 F.3d at 633-34 (state court no-prejudice finding unreasonable, although counsel argued reasonable doubt, where but for counsel's deficient performance, jury would have heard expert testimony casting doubt on prosecution's case).

As set forth above, counsel did not attempt locate any family members for himself; instead, he allowed the prosecutor to do that for him, on the eve of penalty phase. Counsel never talked to any of them until the morning of penalty phase:

> MR. KING: Your Honor, yesterday I made an offer to the defense to use my offices to subpoena certain family members of the defendant, Jerome Marshall. I'm reporting back to the court and counsel that I did have about a half hour conversation with Mrs. Fleming and I impressed upon her the need for her presence and the need for her to testify. She exhibited some reluctance, but she did agree to come, and I believe she's in the courtroom today.
>
> The father, Eugene Marshall Senior, we did locate last night. We did talk to him last night. His representation to us was that although he is the father, he gave up Jerome for adoption in '67 or '68 and that the person who had the most information about him would be Mrs. Fleming, I believe. He, too, said he would be here today.
>
> Also, I looked out in the courtroom and to my surprise the brother who was incarcerated during testimony, Eugene Marshall, is present. I introduced Mrs. Fleming to [defense counsel] Mr. McAllister and I believe that upon interviewing her he will put her on the stand.

NT 8/30/84 at 2.

It is a dereliction of defense counsel's most basic duties to fail to contact persons who should be helpful witnesses and leave it up to the prosecution to force them to come to court and then meet them for the first time the day they will testify (or on which a decision will be made not to have them testify). It is not surprising that in these circumstances potential witnesses expressed reluctance about appearing. Relying on any help provided by the prosecutor is of course no substitute for an independent investigation by defense counsel. Where, as here, counsel's in-

vestigation of relevant facts is limited to what is provided by the prosecution, counsel's actions are not professionally reasonable.

Counsel also never even talked to Jerome's brother Eugene, instead trial counsel sent out a person from his office to speak to the witness.[9] Since Eugene was an important Commonwealth witness at guilt phase, competent counsel would have wanted to talk to him to prepare for cross examination and impeachment. But Eugene was also an important potential mental health witness. Counsel neglected to talk to him in that capacity because he "testified against" Jerome at guilt phase.[10]

Trial counsel was also ineffective in his failure to obtain Eugene and Irene Marshall's criminal history. The detectives had originally looked at Eugene and Irene as persons of interest in the murders because they had items that had been taken for the victims in their apartment.[11] In addition, Eugene had destroyed evidence taken from the victims' apartment upon learning that the murders were in the newspaper. Trial counsel learned, through direct examination by the Commonwealth, that both Eugene and Irene had criminal histories. When trial counsel complained to the Judge during the trial that the Commonwealth had not told him about the witnesses' criminal histories, the Commonwealth attorney correctly pointed out that that information was available to trial counsel for months through the court computer system. Because trial counsel did not ascertain this exculpatory information prior to the witnesses' testimony, he completely

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9 Marshall trial, p. 155, 8/24/84

10 Marshall trial p. 5, 8/30/84

11 Marshall trial, p. 141-142, 8/24/84

gave up the opportunity for any meaningful cross examination and, therefore, an opportunity to cast doubt on the witnesses' testimony.[12]

Petitioner alleges that trial counsel failed to speak to a witness that was with Eugene Marshall when he alleged saw Petitioner with blood on his shirt, holding a knife at 13th and Market Streets in Philadelphia. Trial counsel seemed shocked at finding out from Eugene Marshall, on cross examination, that, not only was there a witness to this encounter, but that the police had his address and interviewed the witness' girlfriend.[13] Had trial counsel spoken to Eugene Marshall prior to trial, he would have potentially had, not only exculpatory information, but also cross examination material to cast doubt on Eugene Marshall's credibility.

Petitioner was prejudiced because counsel's "failure to investigate the [potentially exculpatory evidence] deprived [Petitioner] of a substantial argument, and set up an unchallenged factual predicate for the State's main argument . . . ." *Draughon v. Dretke*, 427 F.3d 286, 296 (5th Cir. 2005). Petitioner avers that this dereliction of duty constitutes ineffective assistance of counsel and, therefore, the court's rulings are debatable amongst jurists of reason and the underlying claim raises a constitutional issue that is similarly debatable.

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[12] Minutes before Eugene Marshall is called to the stand, the Commonwealth handed trial counsel Eugene Marshall's criminal record consisting of eleven arrests, listing dispositions for only three of the arrests. Trial counsel complains to the judge that he 'should have been given full and complete copies of the criminal extracts with certifications as to the actual dispositions.' Marshall Trial, p. 79, 8/24/84. The Commonwealth attorney responds, 'Counsel is not foreclosed. The same photo number, same date of birth can be gotten by punching it into the court's computer.' Marshall Trial, p. 79.

[13] Marshall Trial, p. 145, 8/24/84

VI. IT IS AT LEAST DEBATABLE THAT PCRA COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE SEVERAL ERRORS AND FAILURES COMMITTED BY TRIAL COUNSEL THAT UNDERMINED THE TRUTH DETERMINING PROCESS, DEPRIVED THE PROCEEDINGS OF THE RELIABILTY AND ACCURACY DEMANDED BY THE UNITED STATES CONSTITUTION AND, HAD THE EVIDENCE BEEN PRESENTED, THERE IS A REASONABLE PROBABILITY THAT THE RESULT OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT.

In *Workman v. Superintendent, Albion SCI*, No. 16-1969, 2018 U.S. App. Lexis 32345 (3d Cir. Nov. 15, 2018, the Court found that petitioner must simply show that jurists of reason could debate the issue of whether the issue was adequate to deserve encouragement. In *Workman*, that standard was met because post-conviction counsel missed a "significant and obvious" claim that trial counsel completely failed to test the Commonwealth's murder case.

Here, as described above, trial counsel failed Petitioner in many different respects in the trial. PCRA counsel was ineffective for failing to raise the issues described above in any meaningful fashion. All of the information described above was available to PCRA counsel through, not only the trial transcripts, but all of the information developed after the trial, the penalty phase and the re-sentencing hearing. This information included several mental health evaluations conducted by medical experts. The fact that PCRA counsel failed to raise any claims regarding the issues readily available to him that showed the ineffective assistance on the part of trial counsel, is evidence of PCRA's ineffective assistance.

By denying relief on this claim without an evidentiary hearing, the court's rulings are debatable amongst jurists of reason and the underlying claim raises a constitutional issue that is similarly debatable.

CONCLUSION

For the reasons presented herein, this Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

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Dated: November 7, 2019

CERTIFICATE OF SERVICE

I, Maureen Coggins hereby certify that on this 8th day of November, 2019, I served a copy of the foregoing via the Court's electronic delivery system on:

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CERTIFICATE OF WORD COUNT

I, Maureen Coggins certify that this brief complies with the word limitation of 9,000 words exclusive of the exceptions listed in Rule 33(d). The total number of words is 8,999.

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