19-6628

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Sean M. Donahue
(Your Name) — PETITIONER

vs.

Commonwealth of Pennsylvania — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Common Pleas of Dauphin County Pennsylvania
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Sean M. Donahue
(Your Name)

625 Cleveland Street
(Address)

Hazleton, PA 18201
(City, State, Zip Code)

570-454-5367
(Phone Number)

QUESTION(S) PRESENTED

Q1. ARE THE FOLLOWING PENNSYLVANIA STATUTES CONSTITUTIONALLY INFIRM?

18 Pa. C.S. §2709(a)(4);

42 Pa C.S. §9542;

42 Pa. C.S. §9543(a)(1)(i);

42 Pa. C.S. §9545(b)(4);

42 Pa. C.S. §9545(a);

42 Pa. C.S. §9545(b)(1).

SUGGESTED ANSWER: YES

Q2. SHOULD A COMMON LAW REMEDY FOR POST CONVICTION APPEAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE US CONSTITUTION BE MADE AVAILABLE BY THE PENNSYLVANIA STATE COURTS TO PETITIONERS WHO FACE A SHORT SENTENCE CIRCUMSTANCE IN PENNSYLVANIA?

SUGGESTED ANSWER: YES

Q3. SHOULD A COMMON LAW REMEDY FOR POST CONVICTION APPEAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE US CONSTITUTION BE MADE AVAILABLE BY THE US COURTS TO PETITIONERS WHO FACE A SHORT SENTENCE CIRCUMSTANCE IN PENNSYLVANIA?

SUGGESTED ANSWER: YES

LIST OF PARTIES

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

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A.2 to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the Trial Court court appears at Appendix A.2 to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____; and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[✓] For cases from **state courts**:

The date on which the highest state court decided my case was July 9, 2019. A copy of that decision appears at Appendix B.2.

[✓] A timely petition for rehearing was thereafter denied on the following date: August 8, 2019, and a copy of the order denying rehearing appears at Appendix B.1.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The below listed statuts are constitutionally infirm;

18 Pa. C.S. §2709(a)(4);

42 Pa C.S. §9542;

42 Pa. C.S. §9543(a)(1)(i);

42 Pa. C.S. §9545(b)(4);

42 Pa. C.S. §9545(a);

42 Pa. C.S. §9545(b)(1).

STATEMENT OF THE CASE

The *pro se* Petitioner, Sean M. Donahue, petitions to the Supreme Court of the United States for a *writ of certiorari* regarding PA state Supreme Court case 47 MAL 2019 (PA Superior Court case 1417 MDA 2018), which is an appeal that originated from a Pennsylvania trial court order issued by the county trial court of Dauphin County, Pennsylvania at Docket No. CP-22-CR-3716-2015 of the Court of Common Pleas of Dauphin County. (APPENDICES A, B & C)

The Pennsylvania Superior Court impede the Petitioner's ability to advance the arguments being made herein by ruling that they arise from an interlocutory order which cannot be appealed, regardless of the appeal's merita. This practice enables the Pennsylvania courts to evade finality as a means of also evading having to rule on important but controversial issues that have legitimate merit. The practice of evading the burden to judge and rule prevents the issues complained of herein from ever rising on their merits through the state appellate courts to this court. If they do rise, as through this petition, the cases are underdeveloped and leave this Court to review the matters complained of as if it was an exercise of original jurisdiction. This is a systemic problem in the Pennsylvania appellate system that enables the advancement of injustice.

In the instant case, the Superior Court of Pennsylvania, on December 7, 2018, quashed an appeal.[1] (APPENDIX C) The Supreme Court of Pennsylvania

[1] Commonwealth of Pennsylvania v. Sean M. Donahue, Docket No. 1417 MDA 2018 in the Superior Court of Pennsylvania

denied further appeal on July 9, 2019. The state court of last resort then denied reconsideration on August 8, 2019.[2] (APPENDIX B)

The Petitioner argues that the issues he raised are valid issues of merit. The Petitioner challenges both the Pennsylvania harassment statute under which he was charged (18 PA Cons Stat §2709 (2014), APPENDIX E.1, E.2, E.3) and the Pennsylvania Post Conviction Relief Act (PCRA) (APPENDIX F) as being constitutionally infirm.

The trial court order and trial court opinion being appealed in this petition addressed Petitioner's requests to strike all or portions of both the state harassment statute and the state PCRA statute. The trial court denied all requests, except for a request for copies of hearing and trial transcripts. (APPENDIX A.1, A.2)

In addition to requesting that constitutionally infirm statues be stuck, the Petitioner also made requests for workable remedies around the circumstantial infirmity of the two statutes. The Petitioner requested relief in the form of either appeal bail or a stay of sentence. Either one would have extended the time available to file a PCRA petition. Those requests were also denied in the same trial court order. (APPENDICES A.1, A.2)

The Plaintiff asks this Court to take judicial notice of the fact that requests for the very same remedies were approved in a different Pennsylvania criminal case, in which the former Pennsylvania Attorney General, Kathleen Kane was convicted of criminal acts. This enabled Kathleen Kane to have more time to file

[2] Commonwealth of Pennsylvania v. Sean M. Donahue, Docket No. 47 MAL 2019 in the Supreme Court of Pennsylvania

pcra appeals of her criminal conviction.[3] This was widely published in public media reports and is also reported on publicly available docket sheets.

(https://ujsportal.pacourts.us/DocketSheets/CP.aspx)

18 Pa. C.S. §2709(a)(4) is Constitutionally Infirm

"§ 2709. Harassment.

(a) Offense defined.--A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person: ...

(4) communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures;" (18 Pa. C.S. §2709(a)(4))

The wording of the Pennsylvania harassment statute under which the Petitioner was charged is identical to the wording of the former New York state harassment statute, which was struck as being constitutionally infirm.

(APPENDICES E.1, E.2, & APPENDICES H.1, H.2).

"BILL NUMBER: A10128
SPONSOR: Rules (Weinstein)

TITLE OF BILL: An act to amend the penal law and the executive law, in relation to aggravated harassment in the second degree

PURPOSE: Recently, in the case of

PEOPLE V. GOLB, the New York State Court of Appeals struck down as unconstitutional subsection 1 of the Aggravated Harassment in the Second Degree statute (Penal Law §240.30(1)).{1} This bill would cure the constitutional defect of the original statute by amending Penal Law § 240.30 thereby reviving that law. This bill would also amend the Executive Law as it relates to the physical injury requirement

[3] Comm v. Kane, Docket Number: CP-46-CR-0006239-2015, Montgomery County Pennsylvania; Comm v. Kane, Docket Number: CP-46-MD-0002457-2015, Montgomery County Pennsylvania; Comm v. Kane, Docket Number: CP-46-CR-0008423-2015, Montgomery County Pennsylvania

exceptions for award eligibility from the Office of Victims Services ("OVS").

SUMMARY OF PROVISIONS:
Section 1 would amend Penal Law § 240.30 to address the constitutional issues raised in the GOLB decision by expressly addressing harassing communications that threaten to cause physical harm or harm to property of another which a defendant knows or reasonably should know will cause a victim to fear such harm.

Section 2 would amend Executive Law § 631(12) to make a conforming change in light of amendments made to the law in 2012.

Section 3 would provide for an immediate effective date.

EXISTING LAW: Currently, subdivision 1 of Penal Law § 240.30 criminalizes communications intended to harass, annoy, threaten, or alarm another person. The Court of Appeals found this subdivision to be unconstitutionally vague and overbroad under the First Amendment. Currently, subdivision 12 of Executive Law § 631 provides exceptions to the physical injury requirement related to the OVS award eligibility for victims of certain crimes. Penal Law § 240.30(4) is listed as one of these exceptions. A 2012 amendment renumbered the subsections in § 240.30, however, there was no corresponding amendment to the Executive Law.

JUSTIFICATION:
In PEOPLE V. GOLB, the Court of Appeals struck down as unconstitutional subsection 1 of Aggravated Harassment in the Second Degree (Penal Law § 240.30(1)). The Court found the statute "unconstitutionally vague and overbroad" under the First Amendments of both State and federal constitutions, because it "criminalizes, in broad strokes, any communication that has the intent to annoy." This bill would cure that defect.

There are approximately 7,600 open matters statewide where Penal Law § 230.40(1) is the most serious charge; it is a crime that impacts many people. Moreover, an alleged violation of this law is an important tool for domestic violence victims, where it forms the predicate for issuing an order of protection by a court to protect such victims.

Executive Law § 631(12) provides compensation to victims, who are often victims of domestic violence-related crimes, who suffer harm that is not "physical injury" but nonetheless are injured. In 2012 the Penal Law was amended without making certain technical, conforming

changes to the Executive Law to ensure the continued viability of this compensation.

This legislation would correct that omission.

LEGISLATIVE HISTORY: This is a new bill.

BUDGET IMPLICATIONS: None.

EFFECTIVE DATE: This bill would take effect immediately. {1} A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she: 1. Either (a) communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm; or (b) causes a communication to be initi-ated by mechanical or electronic means or otherwise with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm.

A10128 Text:
STATE OF NEW YORK

10128
IN ASSEMBLY

June 16, 2014

Introduced by COMMITTEE ON RULES -- (at request of M. of A. Weinstein, Lentol) -- (at request of the Governor) -- read once and referred to the Committee on Codes

AN ACT to amend the penal law and the executive law, in relation to aggravated harassment in the second degree

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 240.30 of the penal law, as amended by chapter 510 of the laws of 2008, subdivision 4 as added and subdivisions 5 and 6 as renumbered by section 4 of part D of chapter 491 of the laws of 2012, is amended to read as follows:

§ 240.30 Aggravated harassment in the second degree.

A person is guilty of aggravated harassment in the second degree when[~~, with intent to harass, annoy, threaten or alarm another person, he or she~~]:

1. [~~Either~~] With intent to harass another person, the actor either:

(a) communicates [~~with a person~~], anonymously or otherwise, by telephone, by [~~telegraph,~~] computer or any other electronic means, or by mail, or by transmitting or delivering any other form of [~~written~~] communication, [~~in a manner likely to cause annoyance or alarm~~] a threat to cause physical harm to, or unlawful harm to the property of, such person, or a member of such person's same family or household as defined in subdivision one of section 530.11 of the criminal procedure law, and the actor knows or reasonably should know that such communication will cause such person to reasonably fear harm to such person's physical safety or property, or to the physical safety or property of a member of such person's same family or household; or

(b) causes a communication to be initiated [~~by mechanical or electronic means or otherwise with a person,~~] anonymously or otherwise, by telephone, by [~~telegraph,~~] computer or any other electronic means, or by mail, or by transmitting or delivering any other form of [~~written~~] communication, [~~in a manner likely to cause annoyance or alarm~~] a threat to cause physical harm to, or unlawful harm to the property of, such person, a member of such person's same family or household as defined in

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD12102-01-4

subdivision one of section 530.11 of the criminal procedure law, and the actor knows or reasonably should know that such communication will cause such person to reasonably fear harm to such person's physical safety or property, or to the physical safety or property of a member of such person's same family or household; or

2. [~~Makes~~] With intent to harass or threaten another person, he or she makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication; or

3. [~~Strikes~~] With the intent to harass, annoy, threaten or alarm another person, he or she strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of a belief or perception regarding such person's race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct; or

4. [~~Strikes~~] With the intent to harass, annoy, threaten or alarm another person, he or she strikes, shoves, kicks or otherwise subjects another person to physical contact thereby causing physical injury to such person or to a family or household member of such person as defined in section 530.11 of the criminal procedure law[~~.~~]; or

5. [~~Commits~~] He or she commits the crime of harassment in the first degree and has previously been convicted of the crime of harassment in the first degree as defined by section 240.25 of this article within the preceding ten years.

[~~6. For the purposes of subdivision one of this section, "form of written communication" shall include, but not be limited to, a recording as defined in subdivision six of section 275.00 of this part.~~]

Aggravated harassment in the second degree is a class A misdemeanor.

§ 2. Subdivision 12 of section 631 of the executive law, as amended by chapter 534 of the laws of 2011, is amended to read as follows:

12. Notwithstanding the provisions of subdivisions one, two and three of this section, an individual who was a victim of either the crime of menacing in the second degree as defined in subdivision two or three of section 120.14 of the penal law, menacing in the first degree as defined

...

in section 120.13 of the penal law, criminal obstruction of breathing or blood circulation as defined in section 121.11 of the penal law, harassment in the second degree as defined in subdivision two or three of section 240.26 of the penal law, harassment in the first degree as defined in section 240.25 of the penal law, aggravated harassment in the second degree as defined in subdivision [~~four~~] five of section 240.30 of the penal law, aggravated harassment in the first degree as defined in subdivision two of section 240.31 of the penal law, criminal contempt in the first degree as defined in paragraph (ii) or (iv) of subdivision (b) or subdivision (c) of section 215.51 of the penal law, or stalking in the fourth, third, second or first degree as defined in sections 120.45, 120.50, 120.55 and 120.60 of the penal law, respectively, who has not been physically injured as a direct result of such crime shall only be eligible for an award that includes loss of earning or support, the unreimbursed cost of repair or replacement of essential personal property that has been lost, damaged or destroyed as a direct result of such crime, the unreimbursed cost for security devices to enhance the personal protection of such victim, transportation expenses incurred for necessary court expenses in connection with the prosecution of such crime, the unreimbursed costs of counseling provided to such victim on account of mental or emotional stress resulting from the incident in

...

which the crime occurred, reasonable relocation expenses, and for occupational or job training.

§ 3. This act shall take effect immediately.

.... " (APPENDIX H.1)

The striking of the New York statute occurred at the urging of several US Second Circuit judges who themselves had ruled in different cases that the New York harassment statute was constitutionally infirm. *(See People v Golb, 23 N.Y.3d 455, PART III, Court of Appeals of New York 2014,* APPENDIX H.2). Pennsylvania's own statutes and case law require that the identically worded statute, 18 Pa. C.S. §2709(a)(4), must also be struck in Pennsylvania. (*Com. v. Bell, 516 A.2d 1172 (Pa. 1986),* the Pennsylvania Statutory Construction Act of 1972, 1 Pa.C.S.A. §1921(b)) (APPENDIX E.4, E.5) Federal case law further requires that 18 Pa. C.S. §2709(a)(4) be struck. (*Scales v. United States, 367 U.S. 203 (1961))*

The identical wording in a harassment statute cannot be violative to the US Constitution in New York but not violative to the US Constitution in Pennsylvania. State sovereignty does not allow for 50 different interpretations and applications of the US Constitution. The Fourteenth Amendment of the US Constitution grants the Petitioner a right to sue for uniformed interpretation and a uniformed application of inalienable US Constitutional throughout the United States and its territories. Numerous state and federal courts in Pennsylvania and in the US Third Circuit are well aware of the contracting interpretations of the two identical harassment statutes across state lines but they resist doing anything about it.

42 Pa C.S. §9542 is Constitutionally Infirm

> "§ 9542. Scope of subchapter.
> This subchapter provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief. The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis. This subchapter is not intended to limit the availability of remedies in the trial court or on direct appeal from the judgment of sentence, to provide a means for raising issues waived in prior proceedings or to provide relief from collateral consequences of a criminal conviction. Except as specifically provided otherwise, all provisions of this subchapter shall apply to capital and noncapital cases." (42 Pa. C.S. §9542)

The Pennsylvania PCRA contains language that subsumes all historical and ancient forms of post conviction relief; "*...this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory*

remedies." 42 Pa. C.S. §9542 also states; *"This subchapter is not intended to limit the availability of remedies in the trial court or on direct appeal from the judgment of sentence..."*. Yet, both the shadow intent of the statute and the practical result of implementing the plain language in other parts of the statute is that Petitioners are denied any access whatsoever to ancient common law writs to seek remedy and relief from wrongful convictions. The true purpose of 42 Pa. C.S. §9542 is to cut petitioners off at the pass so that they cannot get merit worthy issues before the courts through any unforeseen avenue. The legislative intent of this statute was not to limit and finalize the amount and time length of justice available to petitioners. The end result of this practice is that it enables injustice.

In passing the PCRA law, the state legislature went out of its way to ensure that there would be no path available to exercise one's US Fourteenth Amendment rights to seek justice and relief from injustices that result from one having been denied access to the inalienable fundamental rights that are recognized in the US Constitution. When taken in whole alongside *Heck v. Humphrey, 512 U.S. 477 (1994),* the Heck Doctrine and 42 Pa. C.S. §9542 serve to ensure that unjust outcomes of state criminal trials face no risk whatsoever of being undermined by any justice enabling common law path to post conviction relief.

42 Pa. C.S. §9543(a)(1)(i) is Constitutionally Infirm

"§9543. Eligibility for relief.

To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

(i) currently serving a sentence of imprisonment, probation or parole for the crime" (42 Pa. C.S. §9543(a)(1)(i))

In a short sentence circumstance as defined by *Commonwealth v. Holmes, 79 A.3d 562 (Pa. 2013) & Commonwealth v. Delgros 183 A.3d 352 (Pa. 2018),* 42 Pa. C.S. §9543(a)(1)(i) imposes too short a time constraint that denies petitioners with merit worthy issues access to any path of relief under PCRA. While many common law paths to relief ex PCRA have evolved, 42 Pa. C.S. §9543(a)(1)(i) & 42 Pa. C.S. §9542, taken together with the Heck Doctrine deny access to any of those paths. The practical end result is that relief from injustice is completely inaccessible in a short sentence circumstance.

Taken together, these three statutes enable both state and federal courts to willfully ignore merit worthy issues that, if heard on their merits, would mandate the reversal of convictions based on constitutional concerns and also based on well settled law. Both state courts and federal district courts hide behind the statutory technicalities of these laws to evade their difficult and controversial constitutional duties to issue rulings that reverse state convictions when there fundamental flaws to those convictions.

The Supreme Court of Pennsylvania Erred by Wholey Rewriting PCRA Through Construction

In *Commonwealth v. Holmes, 79 A.3d 562 (Pa. 2013) & Commonwealth v. Delgros 183 A.3d 352 (Pa. 2018),* the Supreme Court of Pennsylvania wholey

rewrote 42 Pa. C.S. §9543(a)(1)(i) by uniformly constructing a away around its plain language in two separate short sentence circumstances. In so doing, the state court of last resort failed to adhere to *Com. v. Bell, 516 A.2d 1172 (Pa. 1986)*, the Pennsylvania Statutory Construction Act of 1972, 1 Pa.C.S.A. §1921(b) (APPENDIX E.4, E.5) and *Scales v. United States, 367 U.S. 203 (1961).* The findings of the Supreme Court of Pennsylvania in both *Holmes supra and Delgros supra* require that both 42 Pa. C.S. §9543(a)(1)(i) and 42 Pa. C.S. §9542 be struck for constitutional infirmity.

42 Pa. C.S. §9543(a)(1)(i) must be struck because the state court of last resort found that the statue denies a broad swath of the population access to the fundamental inalienable right to appeal injustice under the First Amendment of the US Constitution. *Thornhill v. Alabama, 310 U.S. 88, 95 (1940)), Broadrick v. Oklahoma, 413 U.S. 601 (1973) "The fact that the [][PCRA] might operate unconstitutionally under some conceivable set of circumstances is []sufficient to render it wholly invalid...". (United States v. Salerno, 481 U.S. 739 (1987))*

42 Pa. C.S. §9542 must be struck because *Holmes supra* and *Delgros Supra* created common law paths around PCRA. Yet the plain language of 42 Pa. C.S. §9542 does not allow for the pursuit of any common law path outside of PCRA, which is exactly what the state court of last resort allowed for by constructing (and reconstructing) PCRA through *Holmes supra* and *Delgros supra.*

Holmes and *Delgros* both say that 42 Pa. C.S. §9543(a)(1)(i) is infirm in the short sentence circumstance. *Bell supra* says that *Holmes* and *Delgros* can't exist at

all because they violate the plain language doctrine in an attempt to bolster the nominal legislative intent to "*not...limit the availability of remedies in the trial court or on direct appeal from the judgment of sentence...*". (42 Pa. C.S. §9542) *Salerno, Thornhill* and *Broadrick* say that because 42 Pa. C.S. §9543(a)(1)(i) is unconstitutional in an entire set of circumstances, it is therefore constitutionally infirm. *Scales supra* and 42 Pa. C.S. §9542 say that 42 Pa. C.S. §9543(a)(1)(i) cannot be reconstructed but must be wholly struck. The above cited case law and statutes CANNOT coexist. Each opinion and each statute contradicts the other.

The Path of Executive Pardon Does not Remedy the Constitutional Infirmity

At the federal level, a parallel circumstance arises with the unavailability of access to relief through *habeas corpus* after one's sentence has been served. This is sadly true even if one can prove a wrongful prosecution. In such circumstances, petitioners are often guided to pursue a federal pardon from the President of the United States. However, in Pennsylvania, it is the political policy of the state Pardon Board that pardon's are not granted for wrongful convictions and that complaints of wrongful conviction must be pursued through the courts.

> ***"Wrongfully Convicted Persons or Prospective Clemency Applicants***
>
> It should be noted that the Board does not engage in the practice of re-litigating the underlying criminal case(s) for which clemency is being sought...." (APPENDIX I)

Yet, for the reasons stated above, a path of relief through the courts is unavailable in the short sentence circumstance.

There is no Path to Remedy a Failure by an Ineffective Appellate Counsel to Pursue Unitary Review

In the case in question, the Petitioner requested that his appellate counsel pursue PCRA issues along with direct appeal issues. Although the Petitioner did not use the term "unitary review", he explicitly instructed his attorney that he wanted to pursue issues during direct appeal that his appellate counsel repeatedly kept telling him were PCRA issues, not direct appeal issues. The Petitioner repeatedly communicated to the trial court and to his appellate counsel that he wanted to pursue ineffectiveness issues simultaneously alongside of direct appeal issues. (See APPENDICES J.0 through J.7) If *certiorari* is granted, numerous *pro se* filings in the original record will also show that the Petitioner wanted to pursue ineffectiveness issues during direct appeal and that he informed the court appointed appellate counsel and the trial court of this desire in a very timely manner. Whatismore, the appellate counsel and the chief public defender of the county repeatedly acknowledged the fact that the Petitioner wanted to pursue PCRA issues alongside direct appeal issues during the same appeal.

Appellate counsel refused to include any PCRA issues in direct appeal. (See APPENDICES K.1 through K.8) Yet, unbeknownst to the Plaintiff, the state court of last resort had already created a common law path under *Holmes supra* that would have allowed the Plaintiff to raise PCRA issues and direct appeal issues in

the same appellate proceeding. Appellate counsel was just too lazy to pursue unitary review. Appellate counsel instead lied to Plaintiff and told Plaintiff that no such path existed. (See APPENDIX L, ATTACHMENT A.6.5; Also see APPENDICES L, ATTACHMENT A.5 through A.6.4)

42 Pa. C.S. §9545(b)(4) is Constitutionally Infirm

> "§9545. Jurisdiction and proceedings...
>
> (b) Time for filing petition.--
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;...
>
> (4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained."(42 Pa. C.S. §9545(b)(4))

The reason 42 Pa. C.S. §9545(b)(4) is infirm is because it grants immunity from accountability to appointed counsel and their offices if they interfere with the pursuit of an appeal that contains merit worthy issues. Public defenders simultaneously hold two offices. Their first office is in their capacity as a public official and the second is in their capacity as an appointed counsel. While a counsel who works for the public defender's office may represent an appellant, the Office of the Public Defender does not represent the appellant but is instead an official

government office. Whatismore, unless the Chief Public Defender has entered his or her personal appearance on a docket, he or she functions solely in the capacity of an elected or appointed government official.

In the instant case, the Office of the Public Defender and the court appointed appellate counsel enforced an official policy that ensured ineffectiveness issues would not be raised on direct appeal. This policy required that private trial counsel file all post sentencing motion material before the court appointed counsel was willing to enter his appearance. (APPENDIX M) This court appointed appellate counsel's enforcement of the official government policy not only coerced $5,000 out of the Petitioner's family but it also guaranteed the suppression of legitimate trial counsel ineffectiveness issues. The suppression of ineffectiveness issues is the inevitable result of allowing trial counsel to file post sentencing motions because no trial counsel is likely to raise his own ineffectiveness as an issue at post sentencing proceedings.

Clearly, the Office of the Public Defender, through the Chief Public Defender, interfered with and suppressed the Petitioner's US First Amendment right to petition for the appeal of trial counsel ineffectiveness issues. This was a plain text violation of 42 Pa. C.S. §9545(b)(1)(i). However, the Chief Public Defender, the court appointed appellate counsel and the Office of the Public Defender can hide behind 42 Pa. C.S. §9545(b)(4). Because this statute empowers suppression of the US First Amendment, it is unconstitutional and it must be struck.

42 Pa. C.S. §9545(a) is Constitutionally Infirm

"§9545. Jurisdiction and proceedings.

(a) Original jurisdiction.--Original jurisdiction over a proceeding under this subchapter shall be in the court of common pleas. No court shall have authority to entertain a request for any form of relief in anticipation of the filing of a petition under this subchapter." (42 Pa. C.S. §9545(a))

42 Pa. C.S. §9545(a) is constitutionally infirm because it impeded the Plaintiff's proposed constitutional solution to work around the unconstitutionality of 42 Pa. C.S. §9543(a)(1)(i) in the short sentence circumstance that existed in the instant case. The unconstitutional circumstance was compounded by the refusal of the government office, the Office of the Public Defender, to pursue the unitary review that was the Petitioner's right to pursue. *(Holmes supra; Delgros supra)* To work around this problem, the Petitioner requested that he be granted a stay of sentence or appeal bail so that he would have time to pursue PCRA. The trial court denied that request and did so with the intent of cutting PCRA off at the pass so that merit worthy issues would not have to be ruled upon. The trial court knows that its own failures in the instant case, if evaluated on the merits of the Plaintiff's complaints about them, would mandate both a reversal of the conviction and an acquittal.

42 Pa. C.S. §9545(b)(1) is Constitutionally Infirm

"§9545. Jurisdiction and proceedings...

(b) Time for filing petition.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:" (42 Pa. C.S. §9545(b)(1))

In a short sentence circumstance as defined by *Holmes supra* and *Delgros supra,* 42 Pa. C.S. §9545(b)(1), taken together with 42 Pa. C.S. §9543(a)(1)(i), 42 Pa. C.S. §9542, the Heck Doctrine and the aforementioned official policy of the Office of Public Defender completely eviscerated any possible pursuit of the Petitioner's US First Amendment right to petition for an appeal based on trial counsel ineffectiveness. Circumstances like the instant case are the reason that common law paths to equitable relief have evolved. Yet, 42 Pa. C.S. §9542 forbids their pursuit outside the context of PCRA. Thus, the true intent (the shadow intent) of PCRA was not to provide a *"means of obtaining collateral relief and..all other common law and statutory remedies"* but was instead *"intended to limit the availability of remedies in the trial court or on direct appeal from the judgment of sentence".* (42 Pa. C.S. §9542)

REASONS CERTIORARI SHOULD BE GRANTED

Certiorari should be granted to allow the Petitioner to seek relief on several merit worthy issues that mandate both reversal of conviction and acquittal.

The Trial Court Sua Sponte Removed the Presumption of Innocence

The lead issue that undermines the conviction in the instant case is that the trial judge removed the presumption of innocence prior to opening arguments. Well settled case law requires that the underlying conviction be quashed and that an acquittal be granted under *United States v. Julio Hernandez, 176 F.3d 719, (3rd Cir. 1999), 3rd Cir Docket No. 98-5266; Hernandez supra Sloviter, Circuit Judge, Dissenting; United States v. Menichino, 497 F.2d 935, 945 (5th Cir. 1974); Francis v. Franklin, 471 U.S. 307, 322 (1985); Coffin v. United States, 156 U.S. 432 (1895); Guam v. Ignacio, 852 F.2d 459 (9th Cir. 1987); McKenzie v. Montana, 443 U.S. 903 (1979); McKenzie v. Montana, 433 U.S. 905 (1977); Sandstrom v. Montana, 442 U.S. 510 (1979); United States v. Olano, 507 U. S. 725 (1993).*

The trial judge removed the presumption of innocence at the beginning of trial by telling the jury that it was their job to determine that the state *"does so or --does so"* meet its burden of proof.

> "We're going to be beginning opening statements very shortly. In the opening statements, the Commonwealth will give you a brief outline of what they intend to prove.
>
> The charges, as I indicated to you, are terroristic threats and two counts of harassment. As I indicated, the Commonwealth has to prove the elements of each of these charges to you beyond a reasonable doubt. And whether the Commonwealth does so or -- does so is your decision when you go out to render the verdict.
>
> Because this is a criminal case, ladies and gentlemen, your verdict must be unanimous. That means all 12 of you must decide the case and you must agree to it ." (See Notes of Trial, APPENDIX N pp7-8)

The Petitioner initially raised this issue with appellate counsel during the post verdict stage of the trial (APPENDICES J.0 - J.7) and again via numerous *pro se* filings at the county trial court docket. Appellate counsel, who himself informed the Petitioner of additional PCRA issues and who warned of a short sentence circumstance (APPENDICES K.1- K.8, APPENDIX L, ATTACHMENTS A.5- A.6.5), failed to pursue a unitary review. (*Commonwealth v. Sheehan, 446 Pa. 35, (1971); Ross v. David Varano; PA State Attorney General PA State Attorney General, Appellant, No. 12–2083, 712 F.3d 784 (2013); Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 466 U.S. 648 (1984); Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973, 975 (1987); Peyton v. Rowe, 391 U.S. 54 (1968); Maleng v. Cook, 490 U.S. 488 (1989); All Writs Act of 1789; Hager v. United States, 993 F.2d 4, 5 (1st Cir. 1993); Nicks v. United States, 955 F.2d 161, 167 (2d Cir. 1992); United States v. Osser, 864 F.2d 1056, 1059–60 (3d Cir. 1988); United States v. Drobny, 955 F.2d 990, 996 (5th Cir. 1992); Steward v. United States, 446 F.2d 42, 43–44 (8th Cir. 1971)).*

The preemptive removal of *"the presumption of innocence...* [that] *is characterized by the civilians as a presumtio juris" (Coffin supra 460)* is an issue of an easily discerned *"'error' that is 'plain' and that 'affect[s] substantial rights.'...* [T]*he decision to correct the forfeited error* [is] *within the sound discretion of the court of appeals". (Olano supra at 732)* Correcting the error is justified and warranted because *"the error "'seriously affect[s] the fairness, integrity* [and] *public*

reputation of judicial proceedings.'" United States v. Young, 470 U. S. 1, 15 (1985) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936))." (ibid)

Regarding such cases, US Justice Gorsuch *wrote;*

> "We remand in cases like these not only when we are certain that curing the error will yield a different outcome, but also in cases where we think there's a reasonable probability that will happen. See, e.g., Skilling v. United States, 561 U. S. 358, 414 (2010) (harmless error); Tapia v. United States, 564 U. S. 319, 335 (2011) (plain error); United States v. Marcus, 560 U. S. 258, 266–267 (2010) (plain error). To know this much is to know what should be done in our current case." *(Hicks v. United States, 582 U.S. __ (2017) & id Gorsuch, J., concurring)*

The Petitioner repeatedly instructed appellate counsel to raise this issue during the post verdict phase and again during direct appeal, which could have and should have been done through a unitary review under *Holmes supra.* The District Attorney (DA) did not object to the removal of the presumption of innocence. Therefore, both the DA and the trial court both waived their rights to tri the defendant to the low standard of *"proof beyond a reasonable doubt".* In the instant case, the trial court approved, and the DA stipulated by default to accept, a trial to the higher and impossible to reach standard of *"beyond doubt"* which is taken to mean *"[absolute proof] beyond [any and all] doubt" (Coffin supra citing Morehead at p457).* We are told by this Court in *Coffin* that no prosecutor can reach the standard of "beyond doubt". We are also told by the jury in the instant case that it found the presence of at least some doubt because the jury was hung and could not reach a verdict on the lead charge.

The state did not object to the erroneous preliminary jury instruction of *"whether the Commonwealth does so or -- does so is your decision"* (APPENDIX N pp7-8), nor did the state object to the removal of the presumption of innocence that the erroneous instruction achieved. Instead of objecting, the state basqued in the glory of being up against a defense counsel who failed to become consciously aware of the fact that the trial judge intentionally used psychologically manipulative and subliminally suggestive MindShark techniques to wrongfully communicate to the jury that the court was instructing the jury, before they even heard the opening arguments, that the court expected it to return a verdict of guilty. The state willfully and eagerly accepted the trial judge's removal of the presumption of innocence.

Because both the prosecution and the defense counsel failed to object to the removal of the presumption of innocence, *stare decisis* requires the trial court's adherence to the precedent established by this court in *Coffin supra p457,* which requires an increase by default in the prosecutor's burden of proof from proof "beyond a reasonable doubt" *(United States v. Haymond, 588 U. S. ____ (2019))* to proof "beyond doubt". *(Coffin p457)*

> "[I]t has been held not error to refuse to charge the presumption of innocence where the charge actually given was, 'that the law required that the State should- prove the material elements of the crime beyond doubt' Morehead v State, 34 Ohio St. 212." *(Coffin supra at 457)*

Because the trial court *sua sponte* removed the presumption of innocence before opening arguments in a case in which the Petitioner pleaded "not guilty", the court had no choice but to also *sua sponte* raise the standard of proof to "beyond doubt". Because no prosecutor could ever succeed in proving a case "beyond doubt", and because the jury found the presence of some doubt, the court had no choice other than to *sua sponte* grant an acquittal.

The Petitioner Was Immune From Prosecution Under 18 Pa. C.S. §2709(e)

> "§ 2709. Harassment.
>
> (a) Offense defined.--A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person:
>
> ...
>
> (4) communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures;" (18 Pa. C.S. §2709(a)(4))
>
> ...
>
> (e) Application of section.--This section shall not apply to conduct by a party to a labor dispute as defined in the act of June 2, 1937 (P.L.1198, No.308), known as the Labor Anti- Injunction Act, or to any constitutionally protected activity."

The trial court also *sua sponte* found the case to rise from a labor dispute. (APPENDICES A.2, A.3, A.4) The plain language of 18 Pa. C.S. §2709(e), which existed at the time charges were filed, rendered the Plaintiff non prosecutable for any charge under 18 Pa. C.S. §2709(a)(4) within the context of a labor dispute. (APPENDICES E.1 through E.5)

CONCLUSION

Certiorari should be granted.

The forgoing document is true in fact and belief and submitted under penalty of perjury.

Respectfully Submitted,

Nov 7, 2019
Date

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COMMONWEALTH OF PENNSYLVANIA	**: IN THE COURT OF COMMON PLEAS,**
	: DAUPHIN COUNTY, PENNSYLVANIA
	:
v.	**: NO. 3716 CR 2015**
	:
SEAN DONAHUE	**: CRIMINAL MATTER**

ORDER OF COURT

AND NOW, this 24th day of April, 2018, upon consideration of Petitioner's Motion for Nominal Appeal Bail, Request for Production of Full Transcripts of Trial and All Pre-Trial Hearings and Request for Complete Records on Jury filed on or about April 3, 2018, his Amended from Motion Submitted on April 3, 2018, and his Application for Relief it is HEREBY ORDERED as follows:

1) The Motion for Nominal Appeal Bail or Stay of the Sentence is DENIED.

2) The Request for Production of Full Transcripts of Trial and All Pretrial Hearings is DENIED. Petitioner must follow the Request for Transcripts procedure. See Pa.St.J.Admin. Rule 4007 and D.C.J.A. 4007.

3) The request for Complete Records on Jury is DENIED.

4) The request for Stay of Sentence to Preserve PCRA is DENIED.

5) The Motion for the Instatement/Reinstatement of STATE Coram Nobis Procedure or Similar Procedure to Allow for the Post Conviction Correction of State Court Errors when State Post Conviction Relief is NOT Available is DENIED.

6) The Motion to Quash the portion of Pennsylvania PCRA requiring Petitioners to still be serving a sentence is DENIED.

7) The Motion to Quash the portion of Pennsylvania PCRA requiring petitions to be filed within one year of entry of final judgment is DENIED.

APPENDIX A.1 Order from which appeal is taken