No. 19-6833

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

GREGORY ALAN ROWE, Petitioner

VS.

SUPERINTENDENT ALBION SCI; et al., Respondent(s)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gregory Alan Rowe
Petitioner, Pro Se
SCI-Albion, No. GN-3174
10745 Route 18
Albion, PA 16475-0002

QUESTIONS PRESENTED

This matter presents an issue of first impression. Petitioner has been unlawfully denied his right to a Federal Habeas Corpus Review proceeding due to a U.S. District Court's and Court of Appeals' refusal to follow and apply the prevailing rule of State and Federal law. The Court of Appeals acknowledged the below District Court's findings are in conflict with the highest court of the State and every District Court under the Third Circuit's jurisdiction – thereby violating Petitioner's Equal Protection and Due Process rights – but has refused to restore those rights back to Petitioner.

I. If the highest court of a State, such a Pennsylvania's Supreme Court, holds that the State's post-conviction DNA testing provision constitutes a "post-conviction review proceeding" under its Post-conviction Relief Act Statute, is a U.S. District Court and Court of Appeals bound by that State's interpretation of the Statute's effect and purpose when sitting in Federal Habeas Review, thereby requiring AEDPA's limitation period to be tolled when such a State proceeding is on review?

II. Does one or more, new or old decisions of a Federal Appellate Court constitute an "intervening change in the law which govern a petitioner's case" where a District Court made a prior decision on statutory law, stating it "was a matter of first impression in [the] Circuit", without reviewing, nor applying the well settled rule of law, as to create a conflict with every District Court under the Court of Appeals' jurisdiction, thereby constituting an extraordinary circumstances warranting Federal Rules of Civil Procedure 60(b) relief?

III. Does denying a petitioner his right to a Federal Habeas Corpus Review proceeding on a unconstitutional application of statutory law constitute an abuse of discretion and manifest injustice where the petitioner's habeas petition was properly filed under State and Federal law?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Office of the District Attorney
Pike County
506 Broad Street
Milford, PA 18337
(Counsel for Respondent)

RELATED CASES

Commonwealth v. Rowe, 369 EDA 2006, Superior Court of Pennsylvania, Eastern District [Direct Appeal], judgment entered April 9, 2007.

Commonwealth v. Rowe, 397 MAL 2007, Supreme Court of Pennsylvania, Middle District [Direct Appeal], judgment entered December 28, 2007.

Commonwealth v. Rowe, 181-2004, Court of Common Pleas, Pike County, Pennsylvania [PCRA-Petition], judgment entered December 23, 2009.

Commonwealth v. Rowe, 116 EDA 2010, Superior Court of Pennsylvania, Eastern District, [PCRA-Appeal], judgment entered December 9, 2010.

Commonwealth v. Rowe, 70 MAL 2011, Supreme Court of Pennsylvania, Middle District, [PCRA-Appeal] judgment entered July 25, 2011.

Commonwealth v. Rowe, 181-2004, Court of Common Pleas, Pike County, Pennsylvania [2nd PCRA-Petition], judgment entered January 9, 2012.

Commonwealth v. Rowe, 623 EDA 2012, Superior Court of Pennsylvania, Eastern District, [2nd PCRA-Appeal], judgment entered June 20, 2013.

Commonwealth v. Rowe, 523 MAL 2013, Supreme Court of Pennsylvania, Middle District, [2nd PCRA-Appeal], judgment entered December 3, 2013.

Rowe v. Supt. Nancy Giroux, et al., 3:13-cv-02444, U.S. District Court for the Middle District of Pennsylvania [Habeas], judgment entered August 23, 2016; Reconsideration judgment March 1, 2017.

Rowe v. Supt. Albion SCI, et al., 17-1650, U.S. Court of Appeals for the Third Circuit [C.O.A.], judgment entered January 11, 2018, Rehearing judgment entered February 22, 2018.

Rowe v. Michael Clark, Supt. Albion, et al., 18-5312, U.S. Supreme Court [Certiorari], judgment entered October 1, 2018.

Rowe v. Supt. Nancy Giroux, et al., 3:13-cv-02444, U.S. District Court for the Middle District of Pennsylvania [Rule 60(b)], judgment entered April 20, 2017; Reconsideration judgment July 3, 2018.

Rowe v. Supt. Albion SCI, et al., 18-2699, U.S. Court of Appeals for the Third Circuit [C.O.A.], judgment judgment entered December 13, 2018.

Rowe v. Supt. Nancy Giroux, et al., 3:13-cv-02444, U.S. District Court for the Middle District of Pennsylvania [2nd Rule 60(b)], judgment entered August 31, 2018; Motion to 2nd Rule 60(b) judgment entered February 7, 2019; Reconsideration judgment March 5, 2019.

Rowe v. Supt. Albion SCI, et al., 19-1744, U.S. Court of Appeals for the Third Circuit [C.O.A.], judgment entered September 9, 2019; Rehearing judgment entered October 16, 2019.

TABLE OF CONTENTS

INDEX OF APPENDICIES

INDEX OF APPENDICIES CONTINUED

TABLE OF AUTHORITIES CITED

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.

For cases from Federal Courts:

The opinion of the United States Court of Appeals for the Third Circuit appears at APPENDIX A and APPENDIX E to the petition and is unpublished.

The opinion of the United States District Court appears at APPENDIX B, APPENDIX C, and APPENDIX D.

JURISDICTION

For cases from federal Courts:

The date from which the United States Court of Appeals for the Third Circuit decided my case was on September 9, 2019.

A timely petition for Rehearing and/or Rehearing En Banc was denied by the United States Court of Appeals for the Third Circuit on October 16, 2019, and a copy of the order denying Rehearing and/or Rehearing appears at APPENDIX E.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). "Jurisdiction under 28 U.S.C. §1254(1) to review denials of applications for certificate of appealability by a Circuit Judge or a Panel of a Court of Appeals." **Hohn v. United States**, 524 U.S. 236, 252 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 1, Section 9 of the United States Constitution:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in cases of Rebellion or Invasion the public Safety may require it."

2. Fifth Amendment of the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against him, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. Eight Amendment of the United States Constitution:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

4. Fourteenth Amendment of the United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. Title 28, United States Code, Section 2244, Finality of Determination:

The provisions enumerated under and provided for by 28 U.S.C. §2244, Finality of Determination is lengthy, thereby requiring its full text to be appended hereto as **APPENDIX F.**

6. Title 28, United States Code, Section 2254, State Custody; Remedies in Federal Court:

The provisions enumerated under and provided for by 28 U.S.C. §2254, State Custody; Remedies in Federal Court is lengthy, thereby requiring its full text to be appended hereto as **APPENDIX G.**

7. Title 42, Pennsylvania Consolidated Statute, Section 9543.1, Post-Conviction DNA Testing:

The provisions enumerated under and provided for by 42 Pa.C.S. §9543.1, Post-Conviction DNA Testing is lengthy, thereby requiring its full text to be appended hereto as **APPENDIX H.**

STATEMENT OF THE CASE

On January 25, 2006 Petitioner was convicted of 2 counts of First Degree Murder and other related offenses, based upon circumstantial evidence. On February 8, 2006 he was sentenced to 2 consecutive life sentences, followed by 18 months to 10 years imprisonment. On February 8, 2006 trial counsel filed a direct appeal which was denied by the Superior Court of Pennsylvania on April 9, 2007. Allocatur was sought with the Supreme Court of Pennsylvania which was denied on December 28, 2007. No writ of certiorari was sought, and his conviction became final on March 27, 2008 for purpose of AEDPA's limitation period.

On December 11, 2008 a timely post-conviction petition was filed pursuant to the Post-Conviction Relief Act ["PCRA"], 42 Pa.C.S. §§ 9541-9646. PCRA counsel was appointed. On December 23, 2009 the PCRA court denied relief. On December 30, 2009 counsel filed an appeal to the Superior Court which was denied on December 9, 2010. Counsel then abandoned Petitioner during the time period for seeking allocatur with the Supreme Court. Petitioner filed a pro se petition with the Supreme Court on January 6, 2010 to be forwarded to counsel of record, but the Court took jurisdiction and denied relief on July 25, 2011.

On August 23, 2011 Petitioner filed a timely second PCRA petition pursuant to 42 Pa.C.S. §9543 and an accompanying PCRA petition for post-conviction DNA testing pursuant to 42 Pa.C.S. §9543.1 (See **APPENDIX H**) within 60 days of first PCRA final review pursuant 42 Pa.C.S. §9545(b)(2). On September 8, 2011 the PCRA court held the petitions timely filed and ordered an evidentiary hearing on October 28, 2011 where Petitioner, pro se, litigated the evidence at trial was entirely circumstantial and DNA testing of the blood found under the victim's fingernails, rope and cigarette butt would establish his innocence. After reviewing the trial record, presented evidence and arguments, the court denied relief on January 9, 2012. A timely pro se appeal was taken to the Superior Court which was denied on June 20, 2013. Allocatur was sought with the Supreme Court which was denied on December 3, 2013.

Prior to the Supreme Court of Pennsylvania denying allocatur, on September 17, 2013 Petitioner filed his timely pro se petition for a Federal Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 (See **APPENDIX G**) and an accompanying motion to stay the habeas proceedings pending final state review of his pending PCRA petitions [§9543 and §9543.1] before the Supreme Court. On December 20, 2013 the U.S. District Court for the Middle District of Pennsylvania entered a rule to show cause order. The Respondent asserted Petitioner's §9543.1 PCRA petition for DNA testing did not toll AEDPA's limitation period. On April 20, 2014 Petitioner

filed his response where he established his §9543.1 PCRA petition for DNA testing did toll AEDPA's limitation period pursuant to 28 U.S.C. §2244(d)(2) (See APPENDIX F) rendering his habeas petition timely filed.

On August 10, 2015 the Magistrate entered her first Report and Recommendation ["R&R"] asserting Petitioner's habeas petition was untimely, that the second PCRA petition was that solely that of a motion for post-conviction DNA testing and that "such a post-conviction petition [§9543.1] did not toll AEDPA's limitation period," noting this was an "issue of first impression with the Court" and "the Courts have been split on this issue." However, she also held "Pennsylvania state courts have recognized. . .a motion for post-conviction DNA test[ing] is considered a post-conviction petition under the PCRA. . ." Petitioner filed objections to the R&R, asserting his §9543.1 PCRA petition for DNA testing tolled AEDPA's limitation period while it was on state review, rendering his habeas petition timely filed.

On October 14, 2015 the District Court rejected R&R and remanded the matter back to the parties to address the merits. The District Court held Petitioner's second PCRA petition timely filed, therefore making his habeas petition timely filed, but that "the issue of whether a motion for post-conviction DNA testing constitutes a 'properly filed application for. . .other collateral review' under section 2244(d)(2) is an issue of first impression in this Circuit," concluding Petitioner's §9543.1 PCRA petition for DNA testing did not toll AEDPA's limitation period while it was on review, though had it, Petitioner's habeas petition would be timely filed. The Respondent filed its response and relitigated timeliness once more and addressed the merits.. Petitioner filed a response on the merits.

On June 1, 2016 the Magistrate filed her second R&R, relitigating timeliness once more without addressing the merits of the habeas petition as ordered, where she stated in part "this Court considered as a matter of first impression the narrow issue of whether a post-conviction request for DNA testing under 42 Pa. Con. Stat. §9543.1 constituted a 'properly filed application for. . .other collateral review'"; finding ". . .§9543.1 is more akin to a discovery motion than that of a collateral inquiry into the validity of the conviction, and thus held that "the motion could not operate to toll the one-year statute of limitations to file a writ of habeas corpus in federal court." Petitioner filed timely objections, asserting the District Court's October 14, 2015 order finding the habeas petition

timely filed was a "final order" and the Magistrate was bound by it.

On August 23, 2016 the District Court unexpectedly reversed its October 14, 2015 order, adopted the second R&R, denied a Certificate of Appealability and dismissed the habeas petition as untimely filed. On September 1, 2016 Petitioner filed a motion for reconsideration which was denied on March 1, 2017. On March 17, 2017 Petitioner filed a timely appeal where he presented the District Court "**erroneously held Rowe's post-conviction motion. . .for DNA testing. . .did not toll AEDPA's limitation period.**" The appeal was denied on January 11, 2018. On January 21, 2018 Petitioner filed for Rehearing and presented the District Court erroneously held "**the motion for DNA testing did not toll AEDPA's limitation period. . .**" Rehearing was denied on February 22, 2018. A petition for a writ of certiorari was sought with this Honorable Court on April 21, 2018 and denied on October 1, 2018.

Before certiorari was filed, on March 1, 2018 Petitioner filed his first Fed.R.Civ.P. 60(b) motion presenting the District Court abused its discretion in misstating facts and law applicable to the state post-conviction filings. First Rule 60(b) relief was denied on April 20, 2018, which Petitioner did not receive until after he filed the April 21, 2018 certiorari. On April 27, 2018 Petitioner filed a motion for reconsideration with the District Court to alter its April 20, 2018 judgment. The Court denied relief on July 3, 2018, but in doing so noted in its memorandum "**AEDPA's limitation period does not toll upon the filing of a motion for DNA testing**" [referring to Petitioner's §9543.1 PCRA petition for DNA testing]. Petitioner then filed a timely appeal on July 23, 2018 which was denied on November 29, 2018. [Petitioner's motion to stay the appeal/C.O.A. proceedings pending second Rule 60(b) review was also denied on the same date].

During this time period, on or around April 29, 2018 while researching updated District Court and Court of Appeals case law in the SCI-Albion Law Library[1] to see if the Courts under the Third Circuit's jurisdiction gave a new prevailing opinion on whether state post-conviction DNA petitions tolled AEDPA's limitation period while on state review - since the below District Court previously held "it did not toll" and "was a matter of first impression in this Circuit"- Petitioner came across the opinion of **McGee v.**

1. Petitioner is only afforded law library once per week for 1½ hours to utilize word processors, research computers/books and photocopying. The library is consistently closed due to staff shortage and lock-downs. He has to rely on family for legal research and this should be taken into consideration.

Johnson, 2018 U.S. Dist. LEXIS 12995 (D.N.J. Jan. 26, 2018) which held New Jersey's post-conviction DNA testing statute N.J.S.A. §2A:84A-32(a) constituted a form of post-conviction review as to toll AEDPA's limitation period pursuant to §2244(d)(2). This was the only updated opinion in the Third Circuit's jurisdiction at this time.

The **McGee** opinion briefly outlined §2A:84A-32(a), but not its entirety. Due to this, Petitioner was unable to compare §2A:84A-32(a)'s statutory scheme to that of §9543.1, he immediately requested his Aunt Cynthia Reiman to locate §2A:84A-32(a) in its entirety, as well as the post-conviction DNA statute in Delaware and the Virgin Islands. After numerous attempts at locating the correct statute, Mrs. Reiman was able to locate §2:84A-32(a) and forwarded it to Petitioner, which he received on June 20, 2018. Mrs. Reiman was unable to locate Delaware's and the Virgin Islands. Mrs. Reiman had occasion to speak with Petitioner's Cousin Amanda Carrasco who offered to assist in the search. Mrs. Carrasco located Delaware's post-conviction DNA statute Title 11, §4504, where she forwarded it to Mrs. Reiman via email, where upon she forwarded it to Petitioner on or around July 17, 2018. Neither were able to locate the Virgin Islands' statute at this time. Both have signed affidavits attesting to the above facts.

During this time period Mrs. Reiman and Mrs. Carrasco were searching for all the post-conviction DNA statutes, Petitioner researched every old Third Circuit Court of Appeals case file in the SCI-Albion law library, when he was permitted to do so. After months of fruitless searching, he was able to locate two District Court opinions in Pennsylvania and Delaware that held the time period during which a post-conviction DNA testing petition is pending on state review will toll AEDPA's limitation period pursuant to §2244(d)(2) as it constitutes a form of "post-conviction or other collateral review with respect to the pertinent judgment."

In **Santiago v. DiGuglielmo**, 2010 U.S. Dist. LEXIS 100773 (E.D.Pa. Aug. 18, 2010) and **Santiago v. DiGuglielmo**, 2010 U.S. Dist. LEXIS 100760 (E.D.Pa. Sept. 23, 2010) the District Court held that the time period during which **Santiago's** §9543.1 PCRA petition for DNA testing was on state review tolled AEDPA's limitation period pursuant to §2244(d)(2). In **Wolf v. Carroll**, 2005 U.S. Dist. LEXIS 22605 (D.DE. Oct. 5, 2005) the District Court held **Wolf's** post-conviction DNA testing motion tolled AEDPA's limitation period while it was on state review under §2244(d)(2).

Still unable to locate the Virgin Island's statute, Petitioner obtained numerous addresses from Mrs.

Reiman for state and federal agencies and wrote over 15 letters inquiring into the Virgin Islands' statute, which as of this date, there has been no response.

After the discovery McGee, Santiago and Wolf, Petitioner received notice from Mrs. Reiman on August 10, 2018 that she located the Virgin Islands' statute, Title 5, V.I.C.A. §4210 and submitted another affidavit attesting to such facts.

Extraordinarly, it is apparent New Jersey's and Delware's post-conviction DNA testing statutes mirror that of Pennsylvania's in their statutory construction and effect, requiring the same prerequisites to be met in order to obtain DNA testing, that the petitioner must firmly establish their innocence in light of the evidence presented at trial prior to being permitted to receive DNA testing, and once the testing is granted and the results thereof in-fact establish the petitioner's innocence, each petitioner in each state must file a subsequent motion for a new trial based on the results in a separate proceeding. Most relevant is that all of the post-conviction DNA testing statutes under the Third Circuit's jurisdiction [PA, N.J., DE, V.I.] toll AEDPA's limitation period while they are on review as they are a form of "post-conviction or other collateral review" pursuant to §2244(d)(2).

It was the opinions in McGee, Santiago, and Wolf, and the research of Mrs. Reiman and Mrs. Carrasco that prompted Petitioner to file his second Fed.R.Civ.P. 60(b) motion on August 22, 2018 as it is extraordinary the below District Court held that a petition for post-conviction DNA testing under §9543.1 did not toll AEDPA's limitation period" and "was a matter of first impression within the Circuit" as that was clearly incorrect when the Court held Petitioner's habeas petition untimely filed. The Third Circuit's then governing precedent and rule of law on October 14, 2015 held that a petition for post-conviction DNA testing in Pennsylvania, New Jersey, Delaware and the Virgin Islands tolled AEDPA's limitation period while they were on state review. It is extraordinary the below District Court and Court of Appeals did not correct this issue on first appellate review when Petitioner exhaustively asserted his §9543.1 PCRA petition for DNA testing tolled AEDPA's limitation period, rendering his habeas petition timely filed.

From the below District Court's October 14, 2015 judgment and all the way up till its July 3, 2018 judgment denying first Rule 60(b) relief, the Court stated "AEDPA's limitation period does not toll upon the filing of a motion for DNA testing pursuant to §9543.1." Such a finding by the Court is extraordinary in light of the fact ever District Court within the Third Circuit Court of Appeals' jurisdiction, including

the Eastern, Western and Middle District of Pennsylvania [except the below Judge Caputo] all hold such a petition does in fact toll AEDPA's limitation period while state review and a §9543.1 PCRA petition is considered a post-conviction review proceeding under state law.

The below District Court had jurisdiction and full discretion to correct this manifest error of law and miscarriage of justice after it became plainly obvious the Court's previous procedural rulings are erroneous. This procedural ruling created a hardship upon Petitioner as he was unlawfully denied his precious right to a habeas review proceeding on his substantial constitutional claims that warrant the overturning of his convictions. Yet, when presented with this extraordinary issue, the Court denied Rule 60(b) relief on August 31, 2018, stating it "lacked jurisdiction" due to the pending appeal before the Court of Appeals. (APPENDIX D).

Upon receiving the District Court's denial, Petitioner filed a motion to stay the pending appeal/C.O.A. proceedings on September 16, 2018 with the Court of Appeals so the District Court could have jurisdiction to review and grant Rule 60(b) relief. The request for a stay of the pending appeal/C.O.A. was denied on December 13, 2018.

Petitioner then filed a motion to reopen his second Rule 60(b) motion on December 22, 2018 now that the Court of Appeals no longer had jurisdiction. On February 7, 2019 the District Court denied relief for "lack of jurisdiction" and never addressed the issue of §9543.1 tolling AEDPA's limitation period. (APPENDIX C). Petitioner then filed a motion for reconsideration on February 14, 2019. On March 5, 2019 the Court denied relief. (APPENDIX B). A timely notice of appeal was filed on March 28, 2019 and a C.O.A. was denied on September 9, 2019 (APPENDIX A). The Court of Appeals never addressed the issue of §9543.1 tolling AEDPA's limitation period, but did agree the District Court's procedural rulings were erroneous as every District Court within its jurisdiction has ruled the opposite on this issue, thereby acknowledging there is a conflict within its jurisdiction as to create a plain and obvious violation of Petitioner's Equal Protection and Due Process rights. A petition for Rehearing and/or Rehearing En Banc was filed on September 19, 2019 where Petitioner asserted the Court failed to address this intercircuit conflict and manifest injustice. Rehearing was denied on October 16, 2019 (APPENDIX E).

The below District Court and the Court of Appeals abused their discretion, resulting in a manifest injustice as Petitioner was denied his constitutional right to a Federal Habeas Corpus review proceeding.

For this obvious error to have occurred and to have been ignored on appellate review should shock this Court's sense of judicial fairness and ethics. This error is most serious as Petitioner is serving two consecutive life sentences and was precluded from having his meritorious constitutional claims heard on Federal Habeas Corpus review.

Leaving this manifest injustice uncorrected will undermine the public's confidence in the judicial process and support the current status quo of the Court of Appeals for the Third Circuit that a petitioner's right to a Federal Habeas Corpus can be unlawfully suspended by a District Court for no reason. Such an arbitrary deprivation of Petitioner's basic rights to a habeas corpus proceeding is unconscionable, yet easily correctable. Here, that being the restoration of Petitioner's constitutional right to a Federal Habeas Corpus review proceeding on the merits.

A reasonable jurist would conclude the below Courts abused their discretion in denying Petitioner his right to a Federal Habeas Corpus review proceeding on the merits. Additionally, a reasonable jurist would further conclude the below District Courts abused their discretion in refusing to correct this obvious error when they were put on notice that the below Courts' procedural rulings are in direct conflict with the highest court of the state, every District Court under the Third Circuit's jurisdiction, Court of Appeals and this Honorable Court.

Simply put, Petitioner did everything required of him under state and federal law to advance his constitutional claims, exhausting all state remedies, in a timely fashion as prescribed by law, yet when he arrived at the Federal Habeas Corpus stage the below District Court denied him his right to be heard on the merits. Every stated reason for denying a merits determination by the District Court is unsupported by the law. Prior to, during, and after the District Court gave its opinion to dismiss Petitioner's habeas petition, it was well settled law that a §9543.1 PCRA petition in Pennsylvania tolled AEDPA's limitation period pursuant to §2244(d)(2) as the highest court of the state holds that a §9543.1 PCRA petition is considered a "post-conviction review proceeding". This was not a "matter of first impression", nor was "there a conflict within the Third Circuit" on this issue. The below District Court is the only Court to have ruled the way it did, thereby being the sole creator of this conflict now before this Honorable Court which has been at the cost of Petitioner's constitutional rights being violated.

Petitioner prays this type of error will be resolved so it does not happen to another petitioner.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals erred by not accepting the Pennsylvania Supreme Court's interpretation of state law where the Supreme Court holds that Pennsylvania's Post-Conviction DNA Testing provision constitutes a post-conviction review proceeding under the State's Post-Conviction Relief Act, thereby tolling AEDPA's limitation period while such review is sought.

In Pennsylvania, the Post-Conviction Relief Act ["PCRA"] 42 Pa.C.S. §§ 9541-9546 is the only means to collaterally attack a state court conviction. Any post-conviction petition is evaluated under the PCRA, regardless of the title of the document filed. "The Legislature's intent was to make the PCRA the exclusive vehicle for obtaining collateral review and relief which encompasses all other common law remedies." **Commonwealth v. Cruz**, 851 A.2d 870, 875 (Pa. 2004). "All motions filed after the judgment of sentence is final are to be construed as PCRA petitions." **Commonwealth v. Taylor**, 65 A.3d 462, 466 (Pa. Super. 2013).

In 2001 42 Pa.C.S. §9543.1 (**APPENDIX H**) was enacted to provide post-conviction DNA testing under the PCRA. The statute is regarded as a remedial provision and interpreted liberally in favor of those who are intended to benefit therefrom, those wrongfully convicted of a crime. Numerous prerequisites must be met in order to entitle a petitioner to such DNA testing; namely:

> (c)(2)(1) assert the applicant's actual innocence of the offense for which the applicant was convicted; and
> (3) present a prima facie case demonstrating that the;
> (ii) DNA testing of the specific evidence, assuming exculpatory results, would establish;
> (A) the applicant's actual innocence of the offense for which the applicant was convicted;
> (d)(1). . .the court shall order the testing requested. . .after review of the applicant's trial, that the:
> (iii) motion is made in a timely manner and for the purpose of demonstrating the applicant's actual innocence. . .
> (2) The court shall not order the testing. . .(a) if, after review of the applicant's trial, the court determines that there is no reasonable possibility that the testing would produce exculpatory evidence that:
> (i) would establish the applicant's actual innocence of the offense for which the applicant was convicted. (See APPENDIX H for full Text)

Moreover, Pennsylvania Courts hold that the §9543.1 PCRA petition for DNA testing must establish that no juror being presented with the evidence provided at trial and the exculpatory DNA results would convict petitioner beyond a reasonable doubt of the judgment for which the petitioner is imprisoned under. In **Commonwealth v. Conway**, 14 A.3d 101, 109 (Pa. Super. 2011) the Court held:

> ". . .the prima facie requirement set forth in §9543.1(c)(3) and reinforced in §9543.1(d)(2) requires that an appellant demonstrate. . .a 'reasonable possibility' that 'favorable results of the DNA testing would establish the applicant's actual innocence'. . .The definition of

> 'actual innocence' that is to be applied in the evaluation and effect of the new evidence is that articulated by the United States Supreme Court in. . .Schlup v. Delo, 513 U.S. 327. . . that the new evidence must make it 'more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt.'"

The Pennsylvania Supreme Court clarified that a §9543.1 PCRA petition for DNA testing is not "akin to a discovery request" in its statutory purpose and how it is reviewed by a PCRA Court. In **Commonwealth v. Scarborough**, 64 A.3d 602 (Pa. 2013) the Court held:

> "It is because of this explicit demarcation between the culmination of the DNA testing litigation and the commencement of the litigation of a later filed PCRA petition [after testing has been granted and exculpatory results arising therefrom] that we must reject the Superior Court's analogy of an order granting DNA testing to a trial court's ruling on a discovery motion during the pendency of a PCRA petition. In the latter situation, a trial court's order granting a PCRA petitioner's discovery request does not end the PCRA proceeding, as after discovery has been conducted, further litigation on the claims raised in the petition will inevitably follow. Consequently, the discovery request order is but a step in the overall litigation process on the merits of the underlying substantive claims raised in the PCRA petition. However. . .an order granting a motion for DNA testing terminates the existing process between the parties and decides the merits of the sole claim in the motion."

In **Derrickson v. Del. County Dist. Atty's Office**, 2006 U.S. Dist. LEXIS 51476 (ED.Pa. Jan. 26, 2006) the Court held:

> ". . .request for examination and testing of evidence [discovery] does not fall under the post-conviction DNA testing provision of 42 Pa.C.S. §9543.1. Rather, it falls under the category of a discovery request which is not permitted under the PCRA except upon leave of court with a showing of exceptional circumstances. 42 Pa.C.S. §9545(d)(2)."

Though a §9543.1 PCRA petition for DNA testing is a "separate and distinct claim" of relief compared to those claims brought under §9543 [every other claim], under the PCRA a §9543.1 petition is still a post-conviction remedy in Pennsylvania. In **Commonwealth v. Brooks**, 875 A.2d 1141, 1146-48 (Pa. Super. 2005) the Court clarified what "separate and distinct" means in the context of claims brought pursuant to §9543.1 and §9543.:

> "Appellant's petitions were filed pursuant to §9543.1; his 'Crawford' claim would have to be raised separately, in a timely PCRA petition. Appellant cannot use section §9543.1 to raise extraneous issues not related to DNA testing in an effort to avoid the one-year time bar. We have held that a [9543] PCRA petition cannot be used to make a motion for DNA analysis; and reverse is surely true as well. Although section 9543.1 is contained within the PCRA, a motion for forensic DNA testing evidence filed there under is clearly 'separate and distinct' from a petition filed pursuant to other section of the statute [9543]."

"Separate and distinct" means claims brought pursuant to §9543 cannot be raised in a §9543.1 petition, and vice-versa, as a §9543 petition falls under the PCRA's one-year jurisdiction time bar, which §9543.1 does not. **Commonwealth v. Williams**, 35 A.3d 44, 50 (Pa. Super. 2011).

Pennsylvania Courts have stated a §9543.1 PCRA petition for DNA testing is a form of post-conviction relief under the PCRA in Pennsylvania "because any exculpatory results arising from the DNA testing would be enough to establish actual innocence of the crimes convicted of." **Commonwealth v. Wright**, 14 A.3d 798, 813-14, 819 (Pa. 2011). See e.g.:

> **Williams v. Erie County Dist. Atty's Office**, 848 A.2d 967, 969-70 (Pa. Super. 2004) ("Williams' [9543.1] petition constitutes a request for post-conviction relief); **Commonwealth v. Williams**, 909 A.2d 383, 384, n.1 (Pa. Super. 2006) ("Motion for DNA testing constitutes a post-conviction petition under the Post Conviction Relief Act."); **Commonwealth v. Slowe**, 2019 Pa. Super. Unpub. LEXIS 3174 (Pa. Super. Aug. 2019) ("Motion for post-conviction DNA testing considered post-conviction petitions under the PCRA.")

Though Pennsylvania has "flexibility in deciding what procedures are needed in the context of post-conviction relief" **Dist. Atty's Office v. Osborne**, 557 U.S. 52, ___ (2009), to be sure a §9543.1 PCRA petition constitutes "post-conviction or other collateral review" as to toll AEDPA's limitation period pursuant to 28 U.S.C. §2244(d)(2) (**APPENDIX F**), in **Duncan v. Walker**, 533 U.S. 167, 176 (2011) this Court held:

> "'State post-conviction review' means all collateral review of a conviction provided by a state . . .Congress also may have employed the construction 'post-conviction or other collateral' in recognition of the diverse terminology that different states employ to represent the different forms of collateral review that are available after a conviction. In some jurisdictions, the term 'post-conviction' may denote a particular procedure for review of a conviction that is distinct from other forms of what is considered post-conviction review.

Judicial re-examination of Petitioner's conviction is exactly what occurred when the PCRA courts reviewed his §9543.1 PCRA petition for DNA testing where they stated:

> "Further, §9543.1 provides that the Court shall not order DNA testing if after review of the record of the applicant's trial, the court determines that there is no reasonable possibility that testing would establish the applicant's actual innocence of the offense for which the applicant was convicted."
>
> "Further, the undersigned judge was trial and PCRA judge in this matter and is fully familiar with the record in this case. Following a review of the record, the court is convinced that no reasonable probability exist that a DNA test of the victim's fingernails would establish the defendant's innocence." Id. PCRA Court January 7, 2012 order denying PCRA DNA testing.

The Pennsylvania Superior Court made the following statement in affirming the PCRA Court's denial of PCRA DNA testing on June 20, 2013:

> "The trial court assessed the request in light of the trial record, to see if there was a reasonable possibility that the testing would establish his actual innocence. Its clear from the statute that a court shall not order DNA testing if, after review of the applicant's trial, it determines that there is no reasonable possibility that the testing would produce exculpatory evidence that would establish his innocence of the offense."

Based on the above, Petitioner's §9543.1 PCRA petition for DNA testing was filed "collateral" to and "outside of the direct appeal process," which involved a form of "judicial re-examination" of the trial record and conviction in the pursuit of establishing his innocence as to constitute a petition for "post-conviction or other collateral review" under §2244(d)(2).

On August 10, 2015 the Magistrate of the below District Court stated in her Report and Recommendation "Pennsylvania State Courts have recognized. . .a motion for post-conviction DNA testing is considered a post-conviction petition under the PCRA," yet in the same breathe held such a petition was not a post-conviction petition under state law. This plain and obvious error infected the entire habeas review proceeding from that point on as the District Court adopted the Report and Recommendation, dismissed the habeas petition as "untimely filed", denied a C.O.A. and the Court of Appeals ignored this issue altogether.

The highest court of Pennsylvania, the Supreme Court, holds that a §9543.1 PCRA petition for DNA testing constitutes post-conviction review under the Post Conviction Relief Act, thereby requiring a federal habeas court to accept the Supreme Court's interpretation of its own law. "A state court's interpretation of state law. . .binds on federal court sitting in habeas corpus" **Bradshaw v. Richey**, 546 U.S. 74, 76 (2005) and that "principles of comity require federal courts to defer to a state's judgment on issues of law, and more particularly, on issues of state procedural law." **Engle v. Issac**, 502 U.S. 107, 128-29 (1982).

Moreover, "it is not the province of a federal court to re-examine state court determinations on state law questions." **Estelle v. McGuire**, 502 U.S. 62, 67-68 (1991). **McGuire**, thus forbids habeas courts from second guessing a state court's resolution of a state law question, yet that is exactly what that below District Court and Court of Appeals did by refusing to accept the Pennsylvania Supreme Court's interpretation of its own law which holds that a §9543.1 PCRA petition for DNA testing constitutes post-conviction review as to toll AEDPA's limitation period pursuant to §2244(d)(2).

Section §2244(d)(2) provides:

> "The time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section."

Reading this language to require the state post-conviction proceeding raise the claims presented in the habeas petition ignores the word "judgment" in the statute. Any properly filed "state post-conviction

or other collateral review" challenging the judgment for which the petitioner is incarcerated tolls the time to seek federal collateral review pursuant to 28 U.S.C. §2254. (APPENDIX G).

It is well settled a petitioner's claim of actual innocence can constitute the basis for federal habeas relief when combined with an independent constitutional error that occurred at trial. See **Herrera v. Collins,** 506 U.S. 390 (1993). A §9543.1 PCRA petition for DNA testing is just that, a claim of actual innocence during state post-conviction review, which in turn is a claim for federal habeas relief. As such, the claim must be properly exhausted prior to seeking habeas review in order to avoid a procedural default. Failure to exhaust such state post-conviction review will also bar a petitioner from seeking DNA testing on federal habeas review under Rule 6 of the Rules Governing §2254 cases.

Here, Petitioner timely filed his §9543.1 PCRA petition for DNA testing as prescribed by Pennsylvania law, exhausting his state remedies prior to seeking federal habeas review where he brought forth the claim of his innocence - among other constitutional claims - yet he was denied the privilege of tolling AEDPA's limitation period pursuant to §2244(d)(2) while it was on state review.

The below District Court and Court of Appeals erred in not accepting the Pennsylvania Supreme Court's interpretation of its own law. The decisions of the above Courts are in conflict "with a decision by a state court of last resort" 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."

II. The Court of Appeals erred by finding one or more, new or old decisions of a U.S. District Court, Court of Appeals and this Honorable Court do not constitute an intervening change in the law which govern Petitioner's case, as understood and applied by the below District Court and therefore did not warrant Rule 60(b) relief.

As stated in the "Statement of the Case," when the below District Court dismissed Petitioner's habeas petition as untimely filed, the Court stated:

> "Such a post-conviction petition [9543.1] did not toll AEDPA's limitation period; issue of first impression with the Court; the Courts have been split on this issue; the issue of whether a motion for post-conviction DNA testing constitutes a 'properly filed application for. . .other collateral review' under section 2244(d)(2) is an issue of first impression in this Circuit; this Court considered as a matter of first impression the narrow issue of whether a post-conviction request for DNA testing under 42 Pa. Const. Stat. §9543.1 constituted a 'properly filed application for. . .other collateral review; the motion could not operate to toll the one-year statute of limitations to file a writ of habeas corpus in federal court; AEDPA's limitation period does not toll upon the filing of a motion for DNA testing."

The above statements establish the District Court was under the belief, and of the opinion, that no other Court under the Third Circuit Court of Appeals' jurisdiction had ever addressed the question of whether a §9543.1 PCRA petition for DNA testing constituted "post-conviction or other collateral review" as to toll AEDPA's limitation period pursuant to §2244(d)(2). Meaning, there was no opinion for the Court to defer to, that it was "a matter of first impression in the Circuit."

Instead of relying on the Pennsylvania Supreme Court's holding that a §9543.1 PCRA petition for DNA testing constitutes post-conviction review, as well as reviewing the opinions of the sister District Courts, Court of Appeals and this Court, the below District Court looked to the Court of Appeals for the Seventh and Eleventh Circuit. Such a decision to rely on outer-circuit opinions is most alarming and egregious as those opinions were made in reference to the DNA testing statute of those particular states under the Seventh and Eleventh Circuit, not Pennsylvania.

Therefore, the below District Court did not rely on any opinion of the highest court of the state, any sister District Courts, nor the Court of Appeals and this Court. As such, any opinion, whether one or more, new or old would constitute an intervening change in the law that governed Petitioner's case because the District Court made its decision to dismiss Petitioner's habeas petition based upon the opinions of the Court of Appeals for the Seventh and Eleventh Circuit which do not govern Petitioner's case.

It is extraordinary the below District Court would look outside of the Third Circuit's jurisdiction for guidance on an issue that dealt exclusively with Pennsylvania statutory law being applied to federal

statutory law when this question of law was well-settled within the Third Circuit. This was not an "issue of first impression," nor was there any type of conflict on this question of law, that is to say, until the District Court chose to create a conflict where one did not exist.

Because of the below District Court's extraordinary decision to ignore the law of the highest state court and its refusal to review the well-settled law within the Third Circuit Court of Appeals' jurisdiction on the issue of a post-conviction petition for DNA testing tolling AEDPA's limitation period, the newly discovered opinion of McGee v. Johnson, 2018 U.S. Dist. LEXIS 12995 (D.N.J. Jan. 26, 2018) constituted an intervening change in the law governing petitioner's case as applied by the District Court.

It was the opinion of McGee that prompted an immediate review of every Third Circuit Court of Appeals' opinion on post-conviction DNA testing in Pennsylvania, New Jersey, Delaware and the Virgin Islands, and whether they tolled AEDPA's limitation period while on state review. An assertion Petitioner exhaustively pleaded throughout his entire habeas proceeding prior to filing for second Rule 60(b) relief.

Upon the assistance of family - after discovery of McGee - numerous District Court and Court of Appeals for the Third Circuit opinions were discovered, all of which hold a §9543.1 PCRA petition for DNA testing constitutes post-conviction review as to toll AEDPA's limitation period pursuant to §2244(d)(2). This is also the case for those post-conviction DNA statutes in New Jersey, Delaware and the Virgin Islands. See e.g. below:

> Santiago v. DiGuglielmo, 2010 U.S. Dist. LEXIS 100773 (ED.Pa. Aug. 18, 2010); Palmer v. DA Office, 2017 U.S. Dist. LEXIS 129023, *10 (WD.Pa. Aug. 14, 2017) ("Motion for DNA testing . . .constitutes a post-conviction petition under the PCRA"); Accord Edwards v. Dougherty, 2014 U.S. Dist. LEXIS 130425 (WD.Pa. Aug. 13, 2014); Wade v. Monroe County Dist. Atty., 2018 U.S. Dist. LEXIS 100293 (MD.Pa. June 15, 2018); Laughman v. Pennsylvania, 2007 U.S. Dist. LEXIS 60079 (ED.Pa Aug. 16, 2007); Young v. Phila. County Dist. Atty's Office, 341 Fed. Appx. 843 (3d Cir. 2009); Grier v. Klem, 591 F.3d 672, 679 (3d Cir. 2010); Hadjar Brooks, 2008 U.S. Dist. LEXIS 89094 (ED.Pa. Oct. 30, 2008); Oliver v. McGrady, 2012 U.S. Dist. LEXIS 151487 (MD.Pa. Oct. 22, 2012); Foy v. Lamas, 2013 U.S. Dist. LEXIS 30210 (WD.Pa. March 6, 2013); Privolos v. Montgomery County DA Office, 2018 U.S. Dist. LEXIS 25590 (ED.Pa. Feb. 15, 2018) ("9543.1 petition a 'collateral attack on his conviction and judgment of sentence'").

Under the unique facts of this case, all of these opinions, new and old, are an intervening change in the law of Petitioner's case in how the below District Court understood and applied the law. This is so because the District Court and Court of Appeals did not apply any law of the highest state court, nor any of the well-settled law of the Court of Appeals for the Third Circuit and this Court.

It was reasonable for Petitioner to have filed his second Rule 60(b) motion when he did. The below District Court's application of the statutory state and federal law is unconstitutional and an abuse of discretion resulting in a manifest miscarriage of justice. The "previous ruling which precluded a merits determination was in error" and as such, the District Court had authority and a obligation to grant relief but once again chose to ignore the prevailing rule of law. **Gonzalez v. Crosby**, 545 U.S. 524, 532 (2005). This is most extraordinary.

Surely, the "risk of injustice to the [Petitioner]" and the "risk of undermining the public's confidence in the judicial process" was never considered when the below District Court and Court of Appeals denied Rule 60(b) relief. **Buck v. Davis**, 137 S.Ct. 759, 778 (2017). The Respondent "has experienced a windfall while. . .[Petitioner] has been deprived - contrary to congressional intent - to his valuable right to one full round of federal habeas review." **Gonzalez**, 545 U.S. at 541.

A reasonable jurist would conclude Rule 60(b) relief is warranted in this case under the extraordinary circumstances herein as the below District Court and Court of Appeals abused their discretion and violated Petitioner's Equal Protection and Due Process rights in dismissing his habeas petition.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceeding and decided an important question of federal law - [one or more, new or old decisions of a court do not constitute an intervening change in the law where the District Court refused to review and apply well settled law of the Circuit where the Court's jurisdiction lies] - that has not been, but should be, settled by this Court, as to call for an exercise of this Court's Supervisory Power.

III. The Court of Appeals erred in findings it is permissible for a District Court to unlawfully deny a petitioner his right to a full Federal Habeas Corpus Review Proceeding in violation of the U.S. Constitution, and that such a violation does not constitute an abuse of discretion or a manifest miscarriage of justice when the habeas petition was timely filed.

In denying Petitioner a Certificate of Appealability ["C.O.A."] (**APPENDIX A**) the Court of Appeals acknowledged the below District Court's reason for dismissing Petitioner's habeas petition is in direct conflict with every sister District Court and Court of Appeals opinion on whether a §9543.1 PCRA petition for DNA testing tolls AEDPA's limitation period. The Court of Appeals also acknowledged the District Court's opinion was given after the law was well settled within the Circuit, establishing Petitioner's habeas petition was in fact timely filed, thereby violating his Equal Protection, Due Process and Cruel and Unusual Punishment rights under the United States Constitution.

(a) Timeliness of Petitioner's Habeas Petition: Under Pennsylvania law, a judgment becomes final at the conclusion of direct review, or the time for seeking review, which is 90 days, Here, the Pennsylvania Supreme Court denied direct review on December 28, 2007. Petitioner had until March 27, 2008 to petition for a writ of certiorari, making his conviction final on March 28, 2008. Petitioner's habeas petition was filed on September 17, 2013, but a statutory tolling is applicable for the time period between March 27, 2008 and September 17, 2013.

Petitioner filed his first §9543 PCRA petition on December 11, 2008, which was 259 days after his conviction became final. This tolled AEDPA's limitation period from December 11, 2008 until July 25, 2011 when the Pennsylvania Supreme Court denied allocatur. Petitioner had 106 days remaining on AEDPA's limitation period to file his habeas petition.

Petitioner filed his §9543.1 PCRA petition for DNA testing and a second §9543 PCRA petition on August 31, 2011, within 60 days of first PCRA review. This further tolled AEDPA's limitation period until December 3, 2013 when the Pennsylvania Supreme Court denied allocatur. Petitioner had 72 days remaining on AEDPA's limitation period to file his habeas petition, making his habeas petition timely filed on September 17, 2013 when he filed it and sought stay and abeyance protection pending final review of the §9543.1 PCRA petition for DNA testing and his second §9543 PCRA petition by the Pennsylvania Supreme Court.

A habeas petitioner is entitled to atleast "one full bite," at least one meaningful opportunity for review in a District Court and Court of Appeals. **Duncan v. Walker**, 121 S.Ct. 2120, 2135 (2001). All

prisoners deserve one federal court appeal as of right of their federal constitutional claims. "The writ . . .commands general recognition as the essential remedy to safeguard a citizen against imprisonment by state or nation in violation of his constitutional rights." **Darr v. Burford**, 339 U.S. 200, 203 (1950). "Dismissal of a first federal habeas petition is a particularly serious matter for that dismissal denies the petitioner the protections of the Great Writ Entirely, risking injury to an important interest in human liberty." **Lonchar v. Thomas**, 517 U.S. 314, 324 (1996).

Because a state petitioner has a constitutionally protected right to one full federal habeas corpus review proceeding, a Court of Appeals has an inherent duty and judicial oath to ensure that the right to a habeas review proceeding is properly restored to a petitioner when it was unlawfully suspended by a rogue District Court. Otherwise, there would be no accountability in vindicating a violation of a petitioner's constitutionally protected right.

Dismissing a petitioner's federal habeas petition as "untimely filed" when it was actually timely filed under state and federal law – as here – is an abuse of discretion resulting in a manifest miscarriage of justice. Such egregious conduct of a District Court must be corrected by a Court of Appeals. Yet here, the Court of Appeals for the Third Circuit has failed to do so, thereby continuing the proposition that is it permissible for a District Court to violate a Petitioner's right to a Federal Habeas Corpus proceeding in violation of Article I, Section 9 of the United States Constitution.

The Court of Appeals has decided an important question of federal law – [its permissible for a District Court to unlawfully suspend a petitioner's right to federal habeas review in violation of the Constitution] – that has not been, but should be, settled by this Court and decided an important federal question in a way that conflicts with relevant decision of this Court.

IV. The Court of Appeals erred in not granting a Certificate of Appealability. A reasoanble jurist would debate and/or conclude Petitioner met the standards for relief under Rule 60(b) in light of the extraordinary circumstances of this case that has never occurred to another habeas petitioner on Federal review.

A Certificate of Appealability ["C.O.A."] is required to challenge an order denying a Rule 60(b) motion. A Court of Appeals may issue it if the petitioner had made a substantial showing of the denial of a constitutional right. **Barefoot v. Estelle**, 463 U.S. 880, 893 (1983). The petitioner must "show that reasonable jurist would debate whether the petition should have been resolved in a different manner or that the issue presented were 'adequate to deserve encouragement to proceed further.'" **Slack v. McDaniel**, 529 U.S. 473, 484 (2000).

Obviously, issues of fact or law that the District Court itself found to be close, difficult, of first impression, subject to conflicting outcomes, or simply a matter of judgment beyond simple deduction from applicable legal precepts provide sufficient substance to require a C.O.A. **Barefoot**, 463 U.S. at 894. Although a matter may be well-settled adversely to the petition in the relevant District Court or Court of Appeals, the fact that other coequal or higher Courts have reached conflicting views suffices to require a C.O.A. See **Lynce v. Mathis**, 519 U.S. 433, 436 (1997).

Among other identifiable reasons for granting a C.O.A. are (1) the legal question presented by the petitioner has never before been decided by the Circuit Court [**Houston v. Lack**, 487 U.S. 266, 269 (1988) discussing lower court's grant of C.O.A. on "'question of first impression' in the jurisdiction'"]; (2) there is a split on the question among different panels or different district judges in the same court [**Barefoot**, supra, 463 U.S. at 893, n.4 - C.O.A. should issue on claims "'debatable among jurist of reason'"]; (3) the same or similar issue had been resolved favorably to a petitioner by a state court, a district judge in another district, or a panel in another circuit [**Lozada v. Deeds**, 498 U.S. 430, 431-32 (1991) "Court of Appeals erred in denying [petitioner]. . .a C.O.A." because "at least two Court of Appeals have presumed prejudice in this situation"]; (4) a reasonable doubt exists as to whether the district court fully and fairly adjudicated the matter, given the actions of the district court.

Here, a reasonable jurist would debate that the District Court's February 7, 2019 and March 5, 2019 orders should have been resolved in a different manner. A reasonable jurist would also debate that Petitioner has established extraordinary circumstances that warrant Rule 60(b) relief.

Petitioner established equitable factors warranting relief of the claims presented in his second Rule 60(b) motion as prescribed by this Court in **Buck v. Davis**, 137 S.Ct. at 778.

(1) there is a clear risk of injustice in unlawfully denying Petitioner his right federal habeas review. Such a violation of Petitioner's constitutional rights would undermine the public's confidence in the judicial process; (2) an extreme and unexpected hardship would, and has been, inflicted upon Petitioner where he was denied a merits determination on his constitutional claims for habeas review; (3) the Rule 60(b) motion was not used as a substitute for appeal; (4) the issues contained within the Rule 60(b) motion were never addressed by the District Court and Court of Appeals; (5) there has been an intervening change in the law in how the below District Court applied it to Petitioner's case; (6) there has been a manifest error of law and fact; (7) there would be no harm to Respondent or the District Court in granting Rule 60(b) relief; (8) the timeliness of the Rule 60(b) motion was made as soon as possible upon the discovery of all the facts relevant thereto; (10) there is an equitable importance that the merits of the claims be heard; (11) the time between the commencement of the habeas proceedings was short; (12) Petitioner has been diligent in pursuing his available state remedies as prescribed by state law; and (13) Petitioner's sentence is most grave as he is serving two consecutive life sentences without the possibility of parole in violation of the United States Constitution.

The below District Court and Court of Appeals failed to consider any of the above equitable circumstances. Nor did either Court address the issue that Petitioner's habeas petition was dismissed by a District Court who refused to review and apply the applicable state and federal statutory law under the Third Circuit's jurisdiction which renders his habeas petition timely filed.

Every reason the below District Court cited for dismissing Petitioner's habeas petition is erroneous and a malfeasance which has been ignored and left uncorrected by the Court of Appeals. It is extraordinary the Court of Appeals would allow such a plain and obvious error to escape their review and correction.

It is extraordinary the District Court acknowledged and stated "Pennsylvania state Courts have recognized. . .a motion for post-conviction DNA testing is considered a post-conviction petition under the PCRA," yet ignores this fact and refused to toll AEDPA's limitation period pursuant to §2244(d)(2) while Petitioner's §9543.1 PCRA petition was on state review.

Nevertheless, the District Court stated "this was an issue of first impression" and "there was a

conflict within the Circuit" on this question of law. Because of this, the Court of Appeals should have issued a C.O.A. as a reasonable jurist would debate this question of law, and more so, would debate whether the district Court was correct in its findings since they are unsupported by the prevailing rule of law within the Third Circuit Court of Appeals' jurisdiction.

The point of Rule 60(b) relief is that is provides a Court with a grand reservoir of equitable power to do justice in a case and "enable them to vacate judgments whenever such action is appropriate to accomplish justice." **Liljeberg v. Health Serv. Acquisition Corp.**, 468 U.S. 487, 864 (1998).

Restoring a petitioner's right to a Federal Habeas Corpus Review Proceeding that was dismissed on a defective procedural ground, without ever reaching the merits - as here - is the sort of justice Rule 60(b) relief was designed to accomplish.

Petitioner has been treated differently than every other identically situated habeas petition under the Third Circuit Court of Appeals' jurisdiction. This fact was acknowledged by the Court of Appeals when it denied a C.O.A. by stating the opinions Petitioner relied upon for requesting second Rule 60(b) relief were rendered prior to, and after the District Court dismissed the habeas petition. Meaning, every habeas petitioner under the Third Circuit Court of Appeals' jurisdiction, except this instant Petitioner, was afforded the privilege of tolling AEDPA's limitation period while they pursued state post-conviction DNA testing in Pennsylvania, New Jersey, Delaware and the Virgin Islands.

The Court of Appeals abused its discretion in not granting a C.O.A. where there has been a stated "issue of first impression" and a "conflict within the Circuit". Such a denial 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.

CONCLUSION

Wherefore, based on the foregoing, Petitioner prays this Honorable Court will grant this petition for a writ of certiorari and restore Petitioner's right to a Federal Habeas Corpus proceeding on the merits of his constitutional claims that warrant relief.

Respectfully Submitted,

Executed on November 12, 2019.

Gregory Alan Rowe
Petitioner, Pro Se
SCI-Albion, No. GN-3174
10745 Route 18
Albion, PA 16475-0002

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GREGORY ALAN ROWE, Petitioner

VS.

SUPERINTENDENT ALBION SCI; et al., Respondent(s)

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

BRIEF OF APPENDICIES FOR PETITION FOR WRIT OF CERTIORARI

Gregory Alan Rowe
Petitioner, Pro Se
SCI-Albion, No. GN-3174
10745 Route 18
Albion, PA 16475-0002