No. 19-6833

IN THE
SUPREME COURT OF THE UNITED STATES

- GREGORY ALAN ROWE, Petitioner

VS.

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

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

PETITION FOR REHEARING

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

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PETITION FOR REHEARING

COMES NOW, Gregory Alan Rowe, Petitioner, Pro Se, and prays this Court to grant Rehearing pursuant to Rule 44, and thereafter, grant him a Writ of Certiorari to review the opinion of the Third Circuit Court of Appeals. As it currently stands, the Petitioner has unlawfully been denied his right to a Federal Habeas Corpus Review proceeding which has gone uncorrected by the Court of Appeals. If such a plain and obvious constitutional rights violation can escape judicial review and emendation, the public's confidence in the judicial system will surely corrode. A petitioner has a constitutional right to a Federal Habeas Corpus Review proceeding, and when that right has been unlawfully suspended by a United States District Court,, a Court of Appeals is duty bound to ensure that right is restored back to him. This did not occur here and as a result, Rehearing is warranted. The following is presented in support:

STATEMENT OF THE CASE

On January 25, 2006, Petitioner was convicted of 2 counts of First Degree murder and related offenses based upon circumstantial evidence. No physical or corroborating evidence, nor eye-witnesses, linked Petitioner to the crimes convicted of. 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 with the Pennsylvania Superior Court and denied on April 7, 2007. An appeal was taken to the Supreme Court of Pennsylvania and denied on December 28, 2007. Counsel did not seek Certiorari with this Court. For the purposes of AEDPA's limitation period, his conviction became final on March 27, 2008.

On December 11, 2008, a timely post-conviction petition was filed pursuant to Pennsylvania's Post-Conviction Relief Act ["PCRA"], 42 Pa.C.S. §§ 9541-9545. 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. Petitioner did not hear from counsel, so he filed a pro se appeal with the Supreme Court to be forwarded to counsel, per Pennsylvania law. Relief was denied on July 25, 2011.

On August 23, 2011, Petitioner filed a timely second PCRA petition pursuant to 42 Pa.C.S. §9543 and a PCRA petition for DNA testing pursuant to 42 Pa.C.S. §9543.1, within 60 days of first PCRA final review pursuant to 42 Pa.C.S. §9545(b)(2). On September 8, 2011 the Court held the petitions timely filed and ordered an evidentiray hearing on October 28, 2011, where Petitioner, pro se, presented the evidence at trial was circumstantial and DNA testing of the blood found under the victim's fingernails, rope used as

a ligature in commission of the crime and a cigarette butt found next to the victim 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. Alcocatur was sought with the Supreme Court which was denied on December 3, 2013.

Prior to the Pennsylvani Supreme Court 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 and an accompanying motion to stay the habeas proceeding pending final state review of his pending PCRA petitions before the Pennsylvania 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 while it was on state review. On April 20, 2014 Petitioner filed a reply, asserting that his §9543.1 PCRA petition for DNA testing tolled AEDPA's limitation period pursuant to 28 U.S.C. §2244(d)(2), rendering his habeas petition timely filed.

On August 10, 2015 the Magistrate entered her first Report and Recommendation 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 stated "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 Magistrate's findings, 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 the Magistrate's findings and remanded the matter back to the parties to address the merits. The District Court held Petitioner's second PCRA petition was timely filed, making this habeas petition timely, 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." The Court held Petitioner's §9543.1 PCRA petition for DNA testing did not toll AEDPA's limitation period while it was on review, relying on the Fifth and Eleventh Circuit Court of Appeals' interpretation of state law under those Circuit's jurisdiction. The Respondent filed its response and relitigated timeliness once more. Petitioner filed

his response, again asserting his §9543.1 PCRA petition tolled AEDPA's limitation period under state and federal law as it constituted a post-conviction review proceeding of the judgment of sentence.

On June 1, 2016, the Magistrate filed her second Report and Recommendation, relitigating timeliness once more without addressing the merits of the habeas petition as ordered by the Court. 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 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 Court was bound by it throughout the remainder of the habeas proceedings.

On August 23, 2016, the District Court erroneously reversed its October 14, 2015 order, adopted the second Report and Recommendation, denied a Certificate of Appealability - even though this was a matter of "first impression in the Circuit" and therefore debatable among jurist of reason - and dismissed the habeas petition as untimely filed.

On September 1, 2016, Petitioner filed a motion for reconsideration, asserting the District Court was bound by its October 14, 2015 order, that the Court permitted the Respondent to re-litigate the timeliness of the habeas petition that was already settled, and importantly, that his habeas petition was timely under state and federal law as his §9543.1 PCRA petition for DNA testing tolled AEDPA's limitation period pursuant §2244(d)(2). The Court denied reconsideration on March 1, 2017.

On March 17, 2017, Petitioner filed a timely appeal where he presented the District Court "erroneously held Rowe's post-convction motion. . .for DNA testing. . .did not toll AEDPA's limitation period." The Court of Appeals denied a Certificate of Appealability on January 11, 2018, even though this was a matter of "first impression in the Circuit" as to create a serious conflict among the District Courts within the Third Circuit's jurisdiction. 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 Court and denied on October 1, 2018.

Before certiorari was sought, on March 1, 2018 Petitioner filed his first Fed.R.Civ.P. 60(b) motion presenting the District Court abused its discretion. First Rule 60(b) relief was denied on April 20, 2018. Petitioner filed for timely reconsideration. On July 3, 2018 the District Court denied relief, but in doing so be stated "AEDPA's limitation period does not toll upon the filing of a [§9543.1] motion for DNA testing."

On July 23, 2018, Petitioner filed a timely appeal, asserting the District Court abused its discretion. The Court of Appeals denied a Certificate of Appealability on November 29, 2018, even though this was an "issue of first impression within the Circuit" and therefore debatable among jurist of reason. The Court of Appeals also denied Petitioner's motion to stay the July 23, 2018 appeal proceeding pending second Rule 60(b) review by the District Court on the same date.

During this time period, on or around April 29, 2018, while in the SCI-Albion Law Library researching updated Third Circuit Court of Appeals' case law to see if the Courts under its jurisdiction gave a new prevailing rule-of-law opinion on whether a state post-conviction DNA petition tolled AEDPA's limitation period while on state review - since the below District Court held "it did not toll" and was a matter of "first impression in this Circuit" - Petitioner came across the opinion of McGee v. Johnson, 2018 U.S. Dist. LEXIS 12995 (D.N.J. Jan. 26, 2018). McGee held that 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). McGee was the only updated opinion in the SCI-Albion's research files on the issue of a state post-conviction DNA petition tolling AEDPA's limitation period.

Because the McGee opnion only briefly outlined §2A:84A-32(a)'s statutory text, Petitioner was unable to compare it's statutory scheme and purpose to that of Pennsylvania's §9543.1 DNA post-conviction statute. Petitioner then immediately requested his Aunt Cynthia Reiman to locate §2A:84A-32(a) in its entirety, as well as the post-conviction DNA testing statutes in Delaware and the Virgin Islands as they are under the Third Circuit's jurisdiction.

After numerous attempts of locating the correct statute, Mrs. Reiman was able to locate §2A:84A-32(a) and forwarded it to Petitioner on June 20, 2018. Mrs. Reiman was still unable to locate Delaware's and the Virgin Islands' at this time. Mrs. Reiman had occasion to talk to Petitioner's Cousin Amanda Carrasco who offered to assist in the research. Mrs. Carrasco was able to locate Delaware's post-conviction DNA

statute, Title 11, §4504, where she forwarded it to Mrs. Reiman, whereupon Rowe received it on July 17, 2018. Mrs. Reiman and Mrs. Carrasco were unable to locate the Virgin Island's statute at this time.

During this time period of Mrs. Reiman and Mrs. Carrasco conducting their research, Petitioner was able to research every Third Circuit District Court case file in the SCI-Albion Law Library when he could, which was not very often due to the overcrowding and lack of available research materials. After months of searching, he was able to locate two District Court opinions in Pennsylvania and Delaware which held that the time period during which each petitioner pursued state post-conviction DNA testing would toll AEDPA's limitation period pursuant to §2244(d)(2) as they constituted a form of "post-conviction or other collateral review with respect to the pertinent judgment."

Specifically, 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 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). Additionally, in Wolf v. Carroll, 2005 U.S. Dist. LEXIS 22605 (D.DE. Oct. 5, 2005) the Court held that Wolf's post-conviction DNA testing motion tolled AEDPA's limitation period while it was on state review under §2244(d)(2).

At this time Petitioner and his family were unable to locate the Virgin Islands' post-conviction DNA statute. Through Mrs. Reiman Petitioner was able to locate numerous state and federal agencies and wrote over 20 letters inquiring into the Virgin Islands' statute. Petitioner has yet to receive a response.

After the discovery of McGee, Santiago and Wolf, Petitioner received notice from Mrs. Reiman on August 10, 2018 that she located the Virgin Islands' post-conviction DNA statute, V.I.C.A., Title 5, §4210.

Upon reviewing the post-conviction DNA statutes of New Jersey and Delware, it is apparent they are identical in their statutory construction and effect, requiring the same prerequisites to be met in order to obtain DNA testing, namely, the Petitioner must firmly establish their innocence in light of the evidence that was presented at trial which is reviewed by the post-conviction DNA court prior to being permitted such testing. Then once DNA testing is granted and the results thereof in-fact establish the petitioner's innocence, each petitioner, in each state under the Third Circuit's jurisdiction must file a subsequent petition for a new trial based on those DNA results on a separate proceeding.

Contrary to the below District Court's opinions that this was a "matter of first impression in the

Circuit" and "such a post-conviction petition for DNA testing does not toll AEDPA's limitation period" pursuant to §2244(d)(2), every District Court and including the Third Circuit Court of Appeals itself holds that a state post-conviction DNA testing petition in Pennsylvania, New Jersey, Delaware and the Virgin Islands tolls AEDPA's limitation period. It is extraordinary the below District Court would look outside the Third Circuit's jurisdiction for issues concerning state law that is only applicable to the Circuit in which that District Court resides. It is even more extraordinary the below District Court would render the findings it did when they are clearly unsupported by law that was, and still is, well-settled in the Third Circuit when it dismissed Petitioner's habeas petition. As such, it is beyond extraordinary the Court of Appeals would allow such an obvious error to go uncorrected and deny a Certificate of Appealability on first habeas review as there is clear conflict among the District Courts within its jurisdiction which has resulted in this Petitioner's Due Process and Equal Protection rights being violated.

It was the opinions of McGee, Santiago and Wolf - among others recently discovered - that prompted Petitioner to file his second Rule 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." That is plainly incorrect, and as such, the Court was in error to conclude Petitioner's habeas petition was untimely filed. The Third Circuit's then governing precedent and well-settled rule of law on October 14, 2015 was 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, a fact the below Federal Courts refuse to acknowledge.

From the District Court's October 14, 2014 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 beyond extraordinary in light of the fact that every District Court within the Third Circuit's jurisdiction, even including the same Middle District Court [different Judges] of Pennsylvania, as well as the Eastern and Western District of Pennsylvania all hold a §9543.1 PCRA petition does in fact toll AEDPA's limitation period while on state review. Meaning, Petitioner is the only habeas petitioner to have never been afforded the privilege of tolling AEDPA's limitation period while he pursued state post-conviction DNA testing within the Third Circuit. This is a clear and obvious violation of Petitioner's Equal Protection of the law rights, a fact the Court of

Appeals acknowledged, but absolutely refuses to correct.

The below District Court had jurisdiction and complete 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 ruling created a hardship upon Petitioner as he was unlawfully denied his valuable right to a habeas review proceeding on merits of his substantial constitutional claims which warrant the overturning of his conviction.

On August 31, 2018, the District Court denied the second Rule 60(b) motion, stating the Court lacked jurisdiction due to the pending appeal before the Court of Appeals. Upon receiving the August 31, 2018 order, on September 16, 2018 Petitioner filed a motion to stay the pending appeal with the Court of Appeals so that District Court could have jurisdiction to review and grant Rule 60(b) relief. The Court of Appeals subsequently denied the appeal and motion to stay that proceeding on December 13, 2018.

On December 22, 2018, Petitioner filed a motion to reopen his second Rule 60(b) motion now that the Court of Appeals no longer had jurisdiction. On February 7, 2019, the District Court denied relief and never addressed the issue of a §9543.1 PCRA petition for DNA testing tolling AEDPA's limitation period. Petitioner then filed a motion for reconsideration on February 14, 2019, which the Court denied on March 5, 2019.

On March 28, 2019, Petitioner filed a timely appeal, asserting the District Court abused its discretion. The Court of Appeals denied a Certificate of Appealability on September 9, 2019. (**APPENDIX B**). The Court of Appeals never addressed the issue of a §9543.1 PCRA petition for DNA testing tolling AEDPA's limitation period, but did agree with Petitioner that every District Court within the Third Circuit's jurisdiction has ruled the opposite of the below District Court on the issue of a §9543.1 PCRA petition constituting a post-conviction review proceeding under state and federal law. Meaning, the Court of Appeals acknowledged there is a conflict among the District Courts within its jurisdiction as to create a plain and obvious violation of Petitioner's Equal Protection and Due Process rights. A petition for Rehearing was filed on September 19, 2019 where Petitioner asserted the Court of Appeals failed to address this inter-circuit conflict and manifest injustice. Rehearing was denied on October 16, 2019.

On November 12, 2019, Petitioner filed a petition for a writ of certiorari with this Court, presenting an issue of first impression that warranted the exercise of this Court's Supervisory Power as the Court

of Appeals has decided an important federal question in a way that conflicts with a decision by a state court of last resort and has so far departed from the accepted and usual course of judicial proceedings.

The below District Court and Court of Appeals abused its 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 is most extraordinary and beyond egregious. Leaving this manifest injustice uncorrected will undermine the public's confidence in the judicial process and support the current trend that a petitioner's right to a Federal Habeas Corpus can be unlwafully suspended by a District Court for no valid reason. It is expected that when a state petitioner properly pursues and exhausts all his available remedies, including post-conviction review, in the manner as prescribed by state and federal law, he will be afforded his constitutional right to a Federal Habeas Corpus Review proceeding on the merits of his claims. Therefore, when such petitioner does everything required under the law and is not afforded his right to a Federal Habeas Corpus Review proceeding, it is the duty of the Court of Appeals to ensure that right is restored back to him.

The law and facts are clear in this matter, Petitioner did everything required of him under state and federal law to advance his constitutional claims, exhausting all state remedies in a timely manner, yet when he arrived at the Federal Habeas Corpus stage, the below District Court and Court of Appeals denied him his right to be heard on the merits of his claims. Every stated reason for dismissing Petitioner's habeas petition is unsupported by the law. Prior to, during, and after the District Court gave its opinion to deny a merits determination, it was well-settled law that a §9543.1 PCRA petition for DNA testing in Pennsylvania - as well in New Jersey, Delaware and the Virgin Islands - tolled AEDPA's limitation period pursuant to §2244(d)(2). There was no "matter of first impression", nor was there a "conflict within the Third Ciruit" on this issue when held so by the District Court, a fact the Court of Appeals has ignored.

A review of Petitioner's procedural history, and the applicable state and federal law, reveal his 28 U.S.C. §2254 Habeas Corpus Petition was in fact timely filed, thereby entitling him to a merits determination on his constitutional claims therein. The continued refusal to deny Petitioner his right to be heard on those merits requires this Court to grant Rehearing and issue a writ of certiorari in order to hold the below Federal and State Courts accountable for violating Petitioner's constitutional rights.

REASONS MERITING REHEARING

(1). The Third Circuit's opinion is clearly in conflict with Duncan v. Walker, 533 U.S. 167, 176 (2001), and Wall v. Kholi, 562 U.S. 545, 547, 551-56 (2011) where this Court clearly and concisely outlined what constitutes an "Application for state post-conviction or other collateral review with respect to the pertinent judgment or claim" pursuant to 28 U.S.C. §2244(d)(2)'s tolling provision of AEDPA's one-year statute of limitations period.

The Third Circuit and the below District Court within its jurisdiction disregarded the plain meaning and purpose of §2244(d)(2). The only inquiry that a habeas court must make in determining whether a state court petition and/or proceeding constitutes "post-conviction or other collateral review with respect to the pertinent judgment of claim" is whether the state petition "sought review" of the judgment pursuant to which he is incarcerated and that there was a "judicial reexamination of a judgment or claim in a proceeding outside of the direct review process", not that the judgment was in fact reviewed and a specific form of relief given.

Based on this Court's interpretation of what constitutes "post-conviction or other collateral review", and the prevailing rule of law in the Third Circuit, as well as that of Pennsylvania, the Third Circuit's opinion in this matter is erroneous and only furthers the injustice that has been inflicted upon Petitioner in the pursuit of obtaining his right to federal habeas corpus review on his meritorious constitutional claims that warrant substantial relief in the form of vacating his life sentence.

A petition for post-conviction DNA testing in Pennsylvania pursuant to 42 Pa.C.S. §9543.1 constitutes "post-conviction or other collateral review" with respect to the pertinent judgment or claim, per state and federal law, thereby tolling AEDPA's limitation period pursuant to §2244(d)(2) while it is on state review. A fact the Third Circuit has yet to fully recognize with clarity which has permitted uncertainty and confusion to infest the District Courts within its jurisdiction for the past 17 years since §9543.1 was originally enacted and made effective.

(2). The Third Circuit's opinion is clearly in conflict with Artuz v. Bennett, 531 U.S. 4 (2000); Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005); Carey v. Saffold, 536 U.S. 214, 223 (2002), and Engle v. Isaac, 456 U.S. 107, 128-29 (1982), emphasizing that all the Pennsylvania courts held Petitioner's petition for state post-conviction DNA testing pursuant to §9543.1 was "properly and timely filed" as required to toll

AEDPA's limitation period for filing his 28 U.S.C. §2254 habeas petition as its delivery and acceptance are in compliance with the applicable laws and rules governing §9543.1 filings.

The Third Circuit's opinion disregarded the fact that the Court was bound Pennsylvania's interpretation and application of its statutory law that expressly stated that a §9543.1 petition for post-conviction DNA testing is considered an application for "post-conviction relief" under the state's "Post Conviction Relief Act" - 42 Pa.C.S. §§ 9541-9545 - as it requires, among many prerequisites, that a petitioner establish his actual innocence and that the evidence presented at trial must be reexamined by the post-conviction court in assessing whether to grant such DNA testing. In essence, in order for a petition in Pennsylvania to obtain DNA testing from a post-conviction reviewing court, the petitioner must affirmly establish that the testing of the DNA evidence in question will establish his innocence in light of all the evidence that was presented at trial. A direct "judicial reexamination of the judgment" in order to establish actual innocence. Meaning, under this Court's definition of what constitutes "post-conviction or other collateral review", the Pennsylvania Superior and Supreme Courts have applied the exact same analysis and have held a §9543.1 petition for post-conviction DNA testing makes a collateral inquiry into the validity of the conviction.

The Third Circuit has circumvented the factual and legal findings of the state courts, as well as ignored the state's interpretation and application of its own post-conviction statutory law which the Circuit is bound-by law to accept when presiding over Federal Habeas Corpus proceedings. As such, because the Pennsylvania Courts hold that a §9543.1 petition for post-conviction DNA testing constitutes "post-conviction or other collateral review" pursuant to this Court's analysis, the Third Circuit and the District Court's within its jurisdiction, as bound by law to abide by these state courts determinations of state statutory law. A fact the below Courts have, and continue to ignore by allowing Petitioner's Habeas Corpus rights to be unlawfully denied to him for no justifiable reason.

(3). The Third Circuit's opinion is in conflict with Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847, 864 (1998); Buck v. Davis, 132 S.Ct. 759, 778 (2017); Standard Oil Co. v. United States, 429 U.S. 17 (1976) and Stone v. INS, 514 U.S. 386 (1995), emphasizing that Federal Rules of Criminal Procedure, Rule 60(b) provides a court with authority to vacate judgments whenever such action is appropriate to accomplish justice, which is precisely what Petitioner has been repeatedly denied, justice in the form of vacating a prior court non-merits based judgment that was unlawfully entered against him.

Amazingly, in the Circuit Court's opinion denying a "C.O.A.", the Court acknowledges that the District Court's decision to deny Petitioner his right to habeas review was erroneous and unsupported by law. Specifically, the Circuit Court stated numerous District Courts within the Third Circuit's jurisdiction have all held [prior to, during and after the below District Court dismissed Petitioner's habeas petition as untimely filed due to his §9543.1 petition not tolling AEDPA's limitation period] a petition for post-conviction DNA testing in Pennsylvania, New Jersey, Delaware and the Virgin Islands all toll AEDPA's limitation period pursuant to §2244(d)(2) while they are on state review. Clearly the below Court's findings are in error and an injustice was done to Petitioner by denying him his valuable right to Federal Habeas Corpus review. Surely such a fact would undermine the public's confidence in the judicial process that such a clear and obvious error has gone uncorrected by the Circuit Court who has an ethical Supervisory duty to ensure that such errors do not escape its jurisdiction when they are before it for review, especially the most basic right of all, the right to be heard as protected under the United States Constitution.

The Circuit Court's opinion that Petitioner's Rule 60(b) motion was used as a substitute for an appeal ignored the fact Petitioner was not subverting the appellate process by filing an untimely petition to restore his notice of appeal rights. In fact, Petitioner sought Rule 60(b) relief to address the extraordinary circumstances came to light after he sought his original habeas appeal. Specifically, that the District and Circuit Courts denied habeas review on a non-merits based statute of limitations bar without ever looking to prior precedent within the Third Circuit's jurisdiction. Simply put, Rule 60(b) relief was requested to do substantial justice in this particular case after the Circuit Court denied a "C.O.A." without ever acknowledging or addressing the issue of whether a §9543.1 petition for post-conviction DNA testing - or any state post-conviction DNA testing within the Third Circuit's jurisdiction - tolls AEDPA's limitation period. Thereby, Petitioner's Rule 60(b) petition was not a substitute for appeal in any way or manner.

(4). This Court has an ethical Supervisory duty by the United States Constitution and Congress to establish the law of the land and to ensure the Citizens of the United States that the lower Courts apply that law to the proper and fullest extent. When they do not, it is this Court's duty to hold that Court accountable and see to it that justice is administered fairly. This Court must hear this case and hold the Third Circuit, and the below District Courts, accountable for failing to properly apply the law of this Court when they denied Petitioner his right to Habeas Review, and Due Process and Equal Protection of the Law.

SUGGESTIONS IN SUPPORT OF REHEARING

This matter solely involves the interpretation and application of this Court's "post-conviction or other collateral review" analysis as its understood relating to state filings outside of the direct review process that would toll AEDPA's limitation period pursuant to §2244(d)(2). The Third Circuit and the below District Courts within its jurisdiction have failed to adhere to what this Court's precedent holds and what Congress has intended §2244(d)(2) to mean in its effect and purpose. Instead of following what the law clearly states, the below Courts have curtailed it by refusing to properly afford Petitioner his right to Due Process and Equal Protection of the Law when they unlawfully deprived him of his right to Federal Habeas Corpus review, thereby precluding a merits determination on his constitutional claims that warrant the reversal of his convictions and life sentences, rendering this error most serious and grave.

To permit such an obvious error to go unacknowledged and uncorrected for as long as it has is a miscarriage of justice which warrants this Court's Supervisory Power to finally settle this question of Law, a question that is still currently creating conflicts among the District Courts under the Third Circuit's jurisdiction on whether they should toll AEDPA's limitation period, or not, when a Petitioner seeks state post-conviction DNA testing pursuant to §9543.1 in Pennsylvania, or in any of the other states therein.

From the adoption of the Judiciary Act of 1789, Congress has consistently entitled states prisoners incarcerated in violation of any fundamental legal principle to one meaningful federal court review as of right. Together with the Suspension Clause, United States Const. Art. 1, §9, the privilege of the writ of habeas corpus shall not be suspended. The rule of habeas corpus longevity suggests that federal review as of right of the constitutionality of incarceration is constitutionally mandated, especially when he has "been deprived of any right guaranteed to him by the Fourteenth Amendment or any other provision of the constitution or laws of the United States." Frank v, Magnum, 237 U.S. 309, 326-35 (1915).

This Court has held that a habeas petition is entitled to at least one full bite, at least one meaningful opportunity for habeas review in a District Court and a Court of Appeals. See e.g. Duncan v. Walker, 121 S.Ct. 2120, 2135 (2001). "There is no higher duty than to maintain [the writ] unimpaired." Johnson v. Avery, 393 U.S. 483, 485 (1969). "Dismissal of a first federal habeas petition is a particularly serious matter for that dismissal denied 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).

It is clear that Petitioner was denied his basic right to habeas corpus by the below Federal Courts when his habeas petition was dismissed as untimely filed. This finding was solely based on the below Court's erroneous findings that Petitioner's §9543.1 petition for post-conviction DNA testing did not constitute "post-conviction or other collateral review" as to toll AEDPA's limitation period while it was on state review. Amazingly, during the below Court's analysis of Pennsylvania's post-conviction law, the Courts acknowledged that both the Pennsylvania Superior and Supreme Courts hold that a petition for DNA testing pursuant to §9543.1 constitutes post-conviction review under state law. See e.g. Commonwealth v. Conway, 14 A.3d 101 (Pa. Super. 2011); Commonwealth v. Taylor, 65 A.3d 462, 466 (Pa. Super. 2013); Commonwealth v. Williams, 909 A.3d 383, 384, n.1 (Pa. Super. 2006), and Commonwealth v. Scarborough, 64 A.3d 602 (Pa. 2013).

For a Federal Habeas Court to recognize and acknowledge that Pennsylvania Courts hold that a post-conviction petition for DNA testing pursuant to §9543.1 constitutes post-conviction review but then ignore said state law, is most extraordinary because the below Federal Habeas Court was bound by the state's interpretation and application of its own statutory law.

Even more extraordinary is the fact the Circuit Court of Appeals was put on notice about this glarring fact, yet chose to ignore it, thereby permitting the confusion to remain and continue among the District Courts within its jurisdiction on whether a petition for post-conviction DNA testing in Pennsylvania, New Jersey, Delaware and the Virgin Islands tolls AEDPA's limitation period.

This failure of the below Federal Courts to apply the precedent law of this Court, as well as the governing law of Pennsylvania, has denied Petitioner his valuable right to Federal Habeas Corpus review, which is most egregious since he filed his Habeas Petition in a timely manner as mandated under Federal Law.

Rehearing is warranted in this matter to ensure that the Third Circuit Court of Appeals is finally put on notice that Pennsylvania's post-conviction DNA testing provision constitutes "post-conviction or other collateral review" with respect to the pertinent judgment, per the statute's plain text and by the precedent law of the state's highest Courts.

In the very least, it is suggested that this Court direct the Third Circuit to finally address this issue instead of ignoring it. There is a clear conflict within the Third Circuit, a conflict that is directly

affecting Petitioner's right to federal habeas review where most petitioners are afforded the opportunity to seek such habeas review after pursuing post-conviction DNA testing pursuant to §9543.1, and some, such as the Petitioner herein, have been denied that same right. This issue is extraordinary and debatable among jurist of reason. As such, Rehearing is warranted in this matter and Certiorari should be granted to correct this Manifest Injustice.

CONCLUSION

For the reasons stated, this Court must grant Rehearing of its judgment entered on February 24, 2020 and issue a writ of Certiorari to hold the Third Circuit accountable for failing to properly apply the law of this Court and grant Petitioner relief by either making a determination on whether a petition for post-conviction DNA testing in Pennsylvania, New Jersey, Delaware and the Virgin Islands constitutes "post-conviction or other collateral review" as to toll AEDPA's limitation period pursuant to §2244(d)(2), or in the alternative, remand the matter back to the Third Circuit for that Court to finally address this substantial issue so that there is uniformity and equal protection of the law within the Third Circuit's jurisdiction.

Respectfully Submitted,

Date 3/15/20

Gregory Alan Rowe
Petitioner, Pro Se
SCI-Albion, GN-3174
10745 Route 18
Albion, PA 16475

CLD-251 August 1, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-1744**

GREGORY ALAN ROWE, Appellant

VS.

SUPERINTENDENT ALBION SCI; ET AL.

(M.D. Pa. Civ. No. 3:13-cv-02444)

Present: CHAGARES, RESTREPO and SCIRICA, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's application for a certificate of appealability is denied, for reasonable jurists would debate neither the District Court's February 7, 2019 order denying his "motion to reopen and/or refile his second [Federal Rule of Civil Procedure] 60(b) motion," nor the District Court's March 5, 2019 order denying his motion to reconsider its February 7, 2019 order. See Buck v. Davis, 137 S. Ct. 759, 777 (2017); Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant's second Rule 60(b) motion, which specifically invoked subsection (b)(6), revolved around several decisions made by other district judges in this Circuit concerning the statutory tolling of the limitations period for filing a habeas petition. However, all but one of those decisions were made at least two years before the District Court dismissed Appellant's habeas petition as time-barred in 2016, and reasonable jurists would not debate the conclusion that the one "new" district court decision, see McGee v. Johnson, No. 1:17-cv-02746, 2018 U.S. Dist. LEXIS 12995 (D.N.J. Jan. 26, 2018), does not reflect an intervening change in the law governing Appellant's case. Accordingly, reasonable jurists would not debate that Appellant's

second Rule 60(b) motion failed to meet the demanding standard for relief under subsection (b)(6). See Greene v. Superintendent Smithfield SCI, 882 F.3d 443, 449 n.7 (3d Cir. 2018) (explaining that relief under Rule 60(b)(6) is appropriate "only in extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur" (internal quotation marks omitted) (quoting Norris v. Brooks, 794 F.3d 401, 404 (3d Cir. 2015))); id. (indicating that these circumstances "rarely occur in the habeas context" (quoting Gonzalez v. Crosby, 545 U.S. 524, 535 (2005))); see also Smith v. Evans, 853 F.2d 155, 158 (3d Cir. 1988) (explaining that "a Rule 60(b) motion may not be used as a substitute for appeal, and that legal error, without more, cannot justify granting a Rule 60(b) motion"), overruled on other grounds by Lizardo v. United States, 619 F.3d 273, 276-77 (3d Cir. 2010); cf. Satterfield v. Dist. Att'y Phila., 872 F.3d 152, 161, 163 (3d Cir. 2017) (indicating that an intervening change in controlling law, when coupled with "appropriate equitable circumstances" (such as a showing of actual innocence), may warrant relief under Rule 60(b)). Reasonable jurists also would not debate the conclusion that there was no reason for the District Court to grant Appellant's motion to reconsider its February 7, 2019 order. See Blystone v. Horn, 664 F.3d 397, 415 (3d Cir. 2011) (explaining that the scope of a motion to reconsider "is extremely limited," and that "[s]uch motions are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence").

By the Court,

s/Anthony J. Scirica
Circuit Judge

Dated: September 9, 2019
cc: Gregory Alan Rowe
Raymond J. Tonkin, Esq.
Sarah A. Wilson
Ronald Eisenberg, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1744

GREGORY ALAN ROWE,
Appellant

v.

SUPERINTENDENT ALBION SCI;
ATTORNEY GENERAL OF PENNSYLVANIA

(D.C. Civ. No. 3-13-cv-02444)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and SCIRICA*, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

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* As to panel rehearing only.