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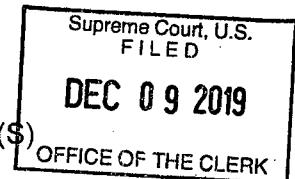
IN THE

SUPREME COURT OF THE UNITED STATES

Sean M. Donahue — PETITIONER
(Your Name)

vs.

Superior Court of Pennsylvania et. al. — RESPONDENT(S)



ON PETITION FOR A WRIT OF CERTIORARI TO

US Court of Appeals for the Third Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Sean M. Donahue
(Your Name)

625 Cleveland Street
(Address)

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

570-454-5367
(Phone Number)

QUESTION(S) PRESENTED

Q.1 DOES *COMMONWEALTH V. DESCARDES, 136 A.3d 493 (Pa. 2016)* VIOLATE FEDERAL PREEMPTION IN FOREIGN POLICY AND IMMIGRATION LAW?

SUGGESTED ANSWER: YES

Q2. ARE THE FOLLOWING PENNSYLVANIA STATUTES CONSTITUTIONALLY INFIRM?

18 Pa. C.S. §2709(a)(4);

42 Pa. C.S. §9542;

42 Pa. C.S. §9543(a)(1)(i);

42 Pa. C.S. §9545(b)(4);

42 Pa. C.S. §9545(a);

42 Pa. C.S. §9545(b)(1).

SUGGESTED ANSWER: YES

Q.3. SHOULD A WRIT OF CORAM NOBIS BE GRANTED TO PROVIDE RELIEF IN THE MATTERS RAISED IN THIS CASE?

SUGGESTED ANSWER: YES

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:

STATE COURT PARTIES

Superior Court of Pennsylvania

Supreme Court of Pennsylvania

Luzerne County Pennsylvania Court of Common Pleas

Court of Common Pleas of Dauphin County Pennsylvania

Court of Common Pleas of Montgomery County Pennsylvania

AND

STATE COURT JUSTICES AND JUDGES

Pennsylvania Supreme Court Justice Max Baer

Pennsylvania Supreme Court Justice Christine Donohue

Pennsylvania Supreme Court Justice Kevin M. Dougherty

Pennsylvania Supreme Court Justice Sallie Updyke Mundy

Pennsylvania Supreme Court Chief Justice Thomas G. Saylor

Pennsylvania Supreme Court Justice Debra Todd

Pennsylvania Supreme Court Justice David N. Wecht

Unknown Pennsylvania Supreme Court Justices

Pennsylvania Superior Court Judge Mary Jane Bowes

Pennsylvania Superior Court Senior Judge James J. Fitzgerald

Pennsylvania Superior Court Judge H. Geoffrey Moulton, Jr

Pennsylvania Superior Court Judge Mary P. Murray

Pennsylvania Superior Court Senior Judge John L. Musmanno

Pennsylvania Superior Court Judge Jack A. Panella

Pennsylvania Superior Court Judge Jacqueline O. Shogan

Pennsylvania Superior Court Judge Victor P. Stabile
Pennsylvania Superior Court President Judge Correale F. Stevens
Unknown Pennsylvania Superior Court Judges
Common Pleas Judge Joseph A. Smyth of Montgomery County
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TABLE OF CONTENTS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
Pennsylvania's Preemption in US Foreign Policy and US Immigration Law in Commonwealth v. Descardes, 136 A.3d 493 (Pa. 2016)	5
Exemptions to 42 U.S.C. §1981- Equal Rights Under The Law For Non White Foreign Nationals Who Petition From Abroad.....	6
Failure by Pennsylvania's State Supreme Court to Strike Its Own Findings in Commonwealth v. Descardes, 136 A.3d 493 (Pa. 2016)....	7
Failure by Pennsylvania's State Supreme Court to Strike Constitutionally Infirm Language in the Pennsylvania Post Conviction Relief Act (PCRA)	7
Language Present in the Pennsylvania Harassment Statute Is Infirm Under the US Constitution	8
Relief Properly Lies in the Ancient Writ of <i>Coram Nobis</i>	8
REASONS CERTIORARI SHOULD BE GRANTED	9
Preemption In Foreign Policy and Immigration Law.....	9

Constitutionally Infirm Language in the Pennsylvania Post Conviction Relief Act (PCRA) Must be Struck	16
The Supreme Court of Pennsylvania Erred by Wholey Rewriting PCRA Through Construction.....	17
42 Pa. C.S. §9543(a)(1)(i) is Constitutionally Infirm	18
42 Pa C.S. §9542 is Constitutionally Infirm	19
42 Pa. C.S. §9545(b)(4) is Constitutionally Infirm	20
42 Pa. C.S. §9545(a) is Constitutionally Infirm	22
42 Pa. C.S. §9545(b)(1) is Constitutionally Infirm	23
The Pennsylvania Harassment Statute is Unconstitutional	
18 Pa. C.S. §2709(a)(4) is Constitutionally Infirm	24
Petitioner Has Been Abandoned by Counsel On These Matters	32
Requests of The Court.....	32
CONCLUSION	33

TABLE OF LAWS

All Writs Act of 1789	passim, 21
Title 8 of the US Code	3, 5, 9, 15
42 U.S.C. §1981- Equal Rights Under The Law.....	3, 6, 10, 12
US Constitution	3, 7-9, 16-32
US First Amendment	3, 5, 8, 26-17
18 Pa. C.S. §2709(a)(4)	3, 25, 31-32
Pennsylvania Post Conviction Relief Act (PCRA)	7, 14,16-24
42 Pa C.S. §9542	3,19
42 Pa. C.S. §9543(a)(1)(i)	3, 18-23
42 Pa.. C.S. §9545(b)(4)	3, 20, 21
42 Pa. C.S. §9545(a)	3, 22
42 Pa. C.S. §9545(b)(1)	3, 23
Pennsylvania LABOR ANTI-INJUNCTION ACT of Jun. 2, 1937, P.L. 1198, No. 308; YEAR 2010- 18 Pa C.S. §2709(e)	8
Pennsylvania Statutory Construction Act of 1972, 1 Pa.C.S.A. §1921(b)	17-18, 30

UNDERLYING CASES

Donahue v. Superior Court of Pennsylvania et al,
US Third Circuit Docket No.19-CV-1625, (2019)passim, 4

Donahue v. Superior Court of Pennsylvania et al, US Middle District of
Pennsylvania Docket No. 3:18-cv-01531 (2018)passim, 16

PENNSYLVANIA CASE LAW

Commonwealth. v. Bell, 516 A.2d 1172 (Pa. 1986).....17, 18, 24, 30

Commonwealth v. Delgros, 169 A.3d 538 (Pa. 2017)7, 12, 16-19,
23-24

Commonwealth v. Descardes, 136 A.3d 493 (Pa. 2016)5-7, 9-17

Com. v. Finley, 550 A.2d 213, (Pa. 1988)32

Hobbs v. Fogg, 6 Watts 553 (PA 1837)10

Commonwealth v. Holmes, 79 A.3d 562 (Pa. 2013)7, 12, 16-19,
23-24

Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973, 975 (1987)....21, 32

Commonwealth v. Porter, 2018 WL 1404542,
*1 n. 5 (Pa. Super. 2018).....16-17

Commonwealth v. Sheehan 446 Pa. 35,*39-*41 (1971)9, 21, 32

US CASE LAW

Anders v. California, 386 U.S. 738 (1967)	32
Arizona v. United States, 567 U.S. 387 (2012), 132 S. Ct. 2492, 183 L. Ed. 2d 351, 2012 U.S. LEXIS 4872.....	15-16
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	8, 17, 20, 24, 32
Brandenburg v. Ohio, 395 U.S. 444, 447-8 (1969)	8
Virginia v. Black, 538 U.S. 343, 359-360 (2003)	8
United States v. Cronic, 466 U.S. 648 (1984).....	21, 32
United States v. Drobny, 955 F.2d 990, 996 (5th Cir. 1992)	21-22
Hager v. United States, 993 F.2d 4, 5 (1st Cir. 1993)	21
Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575–76 (1840)	15-16
U.S. v. Jose Mendoza-lopez and Angel Landeros-Quinones, 481 U.S. 828,107 S.Ct. 2148, 95 L.Ed.2d 772	10
Lozano v. City of Hazleton, No. 07-3531 (3d Cir. 2013)	15-16
Maleng v. Cook, 490 U.S. 488 (1989).....	21
US v. Morgan, 346 U.S. 502, 98 L. Ed. 248, (1954)	9, 32
Nicks v. United States, 955 F.2d 161, 167 (2d Cir. 1992)	21
United States v. Osser, 864 F.2d 1056, 1059–60 (3d Cir. 1988)	21
United States v. Pink, 315 U.S. 203, 233–34 (1942)	15-16

Ross v. David Varano; PA State Attorney General PA State Attorney General, Appellant, No. 12-2083, 712 F.3d 784 (2013)	9, 21, 32
United States v. Salerno, 481 U.S. 739 (1987)	20, 24, 31
Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)	10
Scales v. United States, 367 U.S. 203 (1961)	17-18, 24, 31
Steward v. United States, 446 F.2d 42, 43-44 (8th Cir. 1971).....	21-22
Strickland v. Washington, 466 U.S. 668 (1984)	21, 32
Peyton v. Rowe, 391 U.S. 54 (1968)	21
Thornhill v. Alabama, 310 U.S. 88, 95 (1940)	8, 17, 24, 31
Zschernig v. Miller, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683, (1968)	15-16

OTHER CASE LAW

People v Golb, 23 N.Y.3d 455, NY Slip Op 3426; 2014 WL 1883943	8, 17, 25-31
--	--------------

TABLE OF APPENDICES

APPENDIX A	ORDER DISMISSING CASE US THIRD CIRCUIT	4
APPENDIX A.1	ORDER US DISTRICT COURT DISMISSING CASE & US DISTRICT COURT MEMORANDUM	16
APPENDIX A.2	REPORT & RECOMMENDATIONS BY MAGISTRATE JUDGE	passim
APPENDIX A.3	ORDER BY MAGISTRATE JUDGE	passim
APPENDIX E.1	OLD PENNSYLVANIA HARASSMENT STATUTE (2014)	3, 25
APPENDIX E.2	CURRENT PENNSYLVANIA HARASSMENT STATUTE	3, 25
APPENDIX E.3	2015 Act 59 - PA General Assembly, Striking the act of June 2, 1937 (P.L.1198, No.308), known as the Labor Anti- Injunction Act	3
APPENDIX E.4	PA Title 1 Pennsylvania Statutory Construction Act	18, 30
APPENDIX E.5	001 Pa. Code § 1.7. Statutory Construction Act of 1972	8, 18, 30
APPENDIX F	Pennsylvania Post Conviction Relief Act ..	7, 14,16-24

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

For cases from **federal courts**:

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

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

The opinion of the United States district court appears at Appendix A.1 to the petition and is

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

For cases from **state courts**:

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

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

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

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

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was SEPTEMBER 5, 2019.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: NOT RESPONDED TO, and a copy of the order denying rehearing appears at Appendix A.

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

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

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Preemption in Foreign Policy and Immigration Law:

Title 8 of the US Code

42 U.S.C. §1981- Equal Rights Under The Law

US Constitution

US First Amendment

Constitutional Infirmity of Pennsylvania State Statutes:

18 Pa. C.S. §2709(a)(4) (APPENDICES E.1, E.2, & E.3)

Pennsylvania Post Conviction Relief Act (PCRA) (APPENDIX F)

42 Pa C.S. §9542;

42 Pa. C.S. §9543(a)(1)(i);

42 Pa. C.S. §9545(b)(4);

42 Pa. C.S. §9545(a);

42 Pa. C.S. §9545(b)(1).

STATEMENT OF THE CASE

An appeal at US THIRD CIRCUIT DOCKET No.19-CV-1625 was dismissed on September 5, 2019 for failure to prosecute. (APPENDICES A, A.1, A.2, A.3) The Petitioner became overwhelmed with *pro se* briefs and other related *pro se* filings due in numerous courts and mistook 8/19/19 (the due date) to be 9/18/19. The Petitioner RESPECTFULLY REQUESTS that the case be heard in this Court or that it be remanded to the US Third Circuit to be heard.

The Petitioner had briefings and other filings due in the US Supreme Court at Docket Nos. 19-5808, 19-6628, 19-6605, 19-6487, 19A491, 19A488; the PA Superior Court at Docket Nos. 920 MDA 2019, 1876 MDA 2018, 1179 MDA 2019, 1168 MDA 2018, 364 MDA 2019, ancillary filings due at other dockets in that court; the PA Supreme Court at Docket No. 36 MM 2019; US District Court at Docket Nos. 3:14-cv-01351, 3:19-cv-1859 (Middle District of Pennsylvania); numerous *pro se* filings at PA Luzerne County Docket CP-40-CR-3501-2012; numerous *pro se* filings at PA Dauphin County Docket CP-22-CR-3716-2015; AND numerous cases in the PA State

Civil Service Commission. The Petitioner also had to prepare for an interview with the Pennsylvania Board of Pardons.

The Petitioner avers that the matters raised herein are merit worthy matters of federal interest that involve Pennsylvania's circumvention of federal preemption in US foreign policy and immigratin law, unauthorized international extraterritorial jurisdiction that was exercised by the Pennsylvania courts and the nonuniformity of the enforcement of US First Amendment rights in both the US Third Circuit and The US Second Circuit.

Pennsylvania's Preemption in US Foreign Policy and US Immigration Law in Commonwealth v. Descardes, 136 A.3d 493 (Pa. 2016).

The Supreme Court of Pennsylvania carved out an exemption to federal preemption in foreign policy at *Commonwealth v. Descardes, 136 A.3d 493 (Pa. 2016)*. In so doing, the state court created a pathway through which foreign nationals who have been previously deported by federal authorities can gain reentry into the US to attend state level post conviction hearings that arise through the common law path of *coram nobis*. In most cases, the moving parties will have long since

completed all state sentences and it will not be possible to hold them in custody upon their reentry into the US. Despite their status as federal deportees, they will be free to disappear into the US population, assume new identities and live their lives as undocumented immigrants.

Exemptions to 42 U.S.C. §1981- Equal Rights Under The Law For Non White Foreign Nationals Who Petition From Abroad

Because Descardes is a non white foreign national who stood on foreign soil and who had no contractual relationship with any other party within the US or Pennsylvania at the time he filed his state level petition for a *Writ of Coram Nobis*, he was not eligible for standing in US or state courts. If he had been standing on US soil at the time he filed his petition, his only path to standing in US or state courts would have been 42 U.S.C. §1981- Equal Rights Under The Law. This path is not available to non whites who are not located within the US or its territories and who have no legitimate contractual relationship with anyone within the US at the time they file their petition. Because US citizens are entitled to equal rights under the law, it is unjust to apply the ruling in *Descardes supra* to US citizens.

**Failure by Pennsylvania's State Supreme Court
to Strike Its Own Findings in
Commonwealth v. Descardes, 136 A.3d 493 (Pa. 2016)**

The Supreme Court of Pennsylvania fails to acknowledge that its own rulings in *Commonwealth v. Delgros*, 169 A.3d 538 (Pa. 2017) and *Commonwealth v. Holmes*, 79 A.3d 562 (Pa. 2013) implicitly overruled its previous findings in *Descardes supra*. Pennsylvania is obligated by *stare decisis* to strike its ruling in *Descardes supra*.

**Failure by Pennsylvania's State Supreme Court to Strike
Constitutionally Infirm Language in the Pennsylvania
Post Conviction Relief Act (PCRA)**

The Supreme Court of Pennsylvania fails to acknowledge that its own rulings in *Delgros supra* and *Holmes supra* explicitly found that the language present in the Pennsylvania Post Conviction Relief Act (PCRA) is infirm under the US Constitution. Pennsylvania is obligated by *stare decisis* to strike parts or all its PCRA.

**Language Present in the Pennsylvania Harassment Statute Is
Infirm Under the US Constitution**

Identical language in the Pennsylvania and the New York harassment statutes has been found to be violative under the First

Amendment of the US Constitution in New York but acceptable under the US Constitution in Pennsylvania. Because neither the Pennsylvania courts nor the US courts will review this matter, it must be resolved by the Supreme Court of the United States, as was done in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 447-8 (1969); *Virginia v. Black*, 538 U.S. 343, 359-360 (2003); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). (Pennsylvania LABOR ANTI-INJUNCTION ACT of Jun. 2, 1937, P.L. 1198, No. 308 (APPENDIX E.5); YEAR 2010- 18 Pa C.S. §2709(e); *People v Golb*, 23 N.Y.3d 455, NY Slip Op 3426; 2014 WL 1883943)

Relief Properly Lies in the Ancient Writ of *Coram Nobis*

State trial courts have repeatedly appointed appellate counsel to represent the Petitioner in the matters raised herein. Those counsel have repeatedly abandoned the Petitioner on these merit worthy issues. Therefore, relief for the Petitioner properly lies in the ancient writ of *coram nobis*. (*Ross v. David Varano*; PA State Attorney General PA State Attorney General, Appellant, No. 12-2083, 712 F.3d 784 (2013);

Commonwealth v. Sheehan 446 Pa. 35,*39-*41 (1971); *US v. Morgan*,
346 U.S. 502, 98 L. Ed. 248, (1954))

REASONS CERTIORARI SHOULD BE GRANTED

These matters raised herein are of importance to all Americans and should be heard by this Court or remanded to the US Third Circuit to be heard there.

Preemption In Foreign Policy and Immigration Law

It was unconstitutional for the Pennsylvania courts to grant standing in court to Descardes because he is a Haitian foreign national. *Descardes supra* continues to arise anew in numerous state proceedings involving the Petitioner. *Descardes* is cited regularly but is inapposite to proceedings involving US citizens simply because Descardes had no standing in US courts. (*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Hobbs v. Fogg*, 6 Watts 553 (PA 1837))

Descardes was a US immigration case in disguise as a state level petition for a writ of *coram nobis*. *Descardes*' standing in court was similar to the standing of the foreign nationals in *U.S. v. Jose*

Mendoza-lopez and Angel Landeros-Quinones, 481 U.S. 828, 107 S.Ct. 2148, 95 L.Ed.2d 772. The core issue at hand in *Descardes* was immigration, which is not a state level issue. The Pennsylvania courts had no jurisdiction to entertain *Descardes*' petition.

Because *Descardes* did not stand on US soil when he filed his petition, he was not protected by 42 U.S.C. §1981 and could not be heard in a Pennsylvania court. Because *Descardes* stood on Haitian sand at the time he filed his petition, because he was without a single legitimate contractual relationship with any party located within the US and because he remained on foreign soil throughout the adjudication of his case, *Descardes* should have been considered "out of court" and out of luck.

To find hardened Reconstruction Era precedent as to why *Descardes* was "out of court", one need only search for Pennsylvania appellate court opinions arising from petitions for emancipation filed by black slaves located in Brazil in the years between 1863 and 1888. One cannot find any such Pennsylvania appellate court rulings because Pennsylvania courts had no jurisdiction over slave cases in Brazil.

Since that era, there have been no changes in jurisdictional authority that have granted the Pennsylvania courts international jurisdiction over non white foreign nationals who reside in foreign lands and who have no contractual relationships with any party located within Pennsylvania or the US. The Pennsylvania courts were legitimately forbidden from allowing Descardes to seek redress on immigration matters through a state court process. Therefore, the state courts were required to treat Descardes as unequal to a US Citizen under the law.

“(a)Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.” (42 U.S.C. §1981)

Because Descardes is unequal to any US citizen under the law, any judicial precedent arising from the Pennsylvania court’s ruling in *Descardes supra* are inapposite to cases involving US citizens and/or foreign nationals who stand on US soil. What is more, numerous

Pennsylvania Supreme Court rulings since *Descardes*, including *Delgros supra* and *Commonwealth v Holmes supra*, have overruled the findings of the Supreme Court of Pennsylvania in *Descardes*.

The *Descardes* case was flawed from the start simply because *Descardes* was a previously deported foreign national who stood on foreign soil at the time he filed his petition. This meant that *Descardes* stood no chance at prevailing in his case. Yet, a US citizen who is similarly positioned to *Descardes* can prevail in such a case. The state courts in *Descardes* had a secure safety net that guaranteed their rulings could not be challenged in US federal courts because *Descardes* had no standing to bring matters before the federal courts. This circumstance allowed the Pennsylvania appellate courts to carve out a judicial precedent, without the benefit of adversarial arguments from US citizens who are impacted much differently than are foreign nationals by the *Descardes* ruling.

Unlike in *Descardes*, the Petitioner is a US citizen who is entitled to review of all merit worthy matters, not a foreign national residing on foreign soil who does not share the same rights as a US citizen. When foreign nationals, like *Descardes*, lose state level criminal cases, they

serve their sentence and then, by way of deportation, enjoy immediate reinstatement of their status *quo ante*. When back in their homelands, their convictions in the US impose no lasting collateral impact on their lives. The same is not true for US citizens who loses similar or lesser criminal cases.

Descardes abused a state appellate process in an attempt to beat a federal deportation case. Had Descardes been ordered to appear at a state PCRA hearing, he would have gained reentry into the US under the guise of a Pennsylvania state court issued international extradition order demanding his appearance at a local county courthouse. In *Descardes*, the state court ruled that there was no point in allowing Descardes back into the US to attend hearings because he could not win his post conviction appeal.

However, in other cases, a state court may find that a previously deported individual will likely win a state level PCRA appeal and allow that foreign national to reenter the US to attend a hearing. This circumstance may arise in a case in which a foreign national has multiple convictions in other states and is barred from reentry into the US. Such an order from a state court would allow a previously deported

and federally barred foreign nationals to reenter the US and disappear into the US population.

If such an individual has no outstanding criminal sentence, there will be no legitimate grounds for detaining that person within the custody of a jailhouse warden upon his or her reentry into the US.

Unless the state of Pennsylvania is willing to treat such foreign nationals as prisoners of war, they will be free to travel about while state level matters are being adjudicated. The individual could easily disappear into the US population and assume a new identity. Such an allowance of reentry into the US by state courts would be an overreach of state court jurisdiction that greatly undermines federal preemption in US foreign policy and in immigration law. (*Title 8 of the US Code*;

Lozano v. City of Hazleton, No. 07-3531 (3d Cir. 2013); *Arizona v. United States*, 567 U.S. 387 (2012), 132 S. Ct. 2492, 183 L. Ed. 2d 351, 2012 U.S. LEXIS 4872; *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575–76 (1840); *United States v. Pink*, 315 U.S. 203, 233–34 (1942); *Zschernig v. Miller*, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683, (1968))

If *Descardes supra* is allowed to stand, then previously deported foreign nationals can file belated state court appeals from abroad as a

means of circumventing US immigration law. They will be able to show their state court extradition orders at the gates of the US, gain reentry and then disappear into the US population. What is more, foreign nationals who cannot gain entry or reentry into the US can commit a cybercrime from abroad that involve Pennsylvania and then use those crimes as a way to gain entry or reentry into the US to stand trial. Even if they are eventually deported by federal authorities, they can later file petitions in their state cases from abroad and use those petitions as vehicles for gaining reentry into the US to attend state hearings. Because *Descardes* creates possibilities that undermine federal preemption in foreign policy and immigration law, it must be struck. (*Lozano supra*; *Arizona supra*; *Holmes v. Jennison supra*; *Pink supra*; *Zschernig supra*)

Constitutionally Infirm Language in the Pennsylvania Post Conviction Relief Act (PCRA) Must be Struck

The Pennsylvania Supreme Court rulings in *Commonwealth v Holmes supra* and *Delgros supra* greatly undermine the reasoning of the US District Court in the instant case. (*Donahue v. Superior Court of*

Pennsylvania et al, US Middle District of Pennsylvania Docket No. 3:18-cv-01531 (2018)) The district court relied on *Com. v. Porter, 2018 WL 1404542, *1 n. 5 (Pa. Super. 2018)*¹. However, *Porter* sidesteps the fact that *Commonwealth v Holmes* *supra* and *Delgros* *supra* implicitly overruled *Descardes* in the Petitioner's "short sentence" circumstance. The district court also emphasized the Superior Court of Pennsylvania's reliance on the Pennsylvania Statutory Construction Act of 1972, 1 Pa.C.S.A. §1921(b) in *Porter*. Yet the existence of that very statute is exactly why *Descardes* must be overruled and also why the constitutionally infirm statutory language in the Pennsylvania Post Conviction Relief Act (PCRA) must be struck.

In *Commonwealth v Holmes* *supra* and *Delgros* *supra* the Supreme Court of Pennsylvania acknowledged that the statutory language within the Pennsylvania PCRA is infim under the US Constitution. When statutory language is infim, the proper path of remedy is for the courts to strike the language, not to carve out a way around it. (*Com. v.*

¹ Appellant does not have access to WestLaw. *Com. v. Porter, Docket No. 1645 MDA 2017, J-S16018-18 (Pa. Super. 2018)*, is available online at the Superior Court of Pennsylvania webpage and appears to be the very same case.

Bell, 516 A.2d 1172 (Pa. 1986); 1 Pa.C.S.A. §1921(b); Scales v. United States, 367 U.S. 203 (1961); Golb supra; Thornhill supra; Broadrick supra)

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

In *Commonwealth v Holmes supra* and *Delgros supra*, the Supreme Court of Pennsylvania wholey rewrote 42 Pa. C.S. §9543(a)(1)(i) by constructing a away around its plain language in two separate broad categories of short sentence circumstances. In so doing, the state court of last resort failed to adhere to *Bell supra*, 1 Pa.C.S.A. §1921(b) (APPENDICES E.4, E.5) and *Scales supra*. The findings of the Supreme Court of Pennsylvania in both *Commonwealth v Holmes supra* and *Delgros supra* require that both 42 Pa. C.S. §9543(a)(1)(i) and 42 Pa. C.S. §9542 be struck for constitutional infirmity.

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

“§9543. Eligibility for relief.

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

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

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

42 Pa. C.S. §9543(a)(1)(i) imposes too short a time constraint that denies petitioners with merit worthy issues access to any path of relief under PCRA. *Commonwealth v Holmes* *supra* and *Delgros* *supra* carved out an exception that allows petitioners to circumvent 42 Pa. C.S. §9543(a)(1)(i). In so doing, the state court of last resort found the constraint imposed by 42 Pa. C.S. §9543(a)(1)(i) to be unconstitutional.

42 Pa C.S. §9542 is Constitutionally Infirm

"§ 9542. Scope of subchapter.

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

The plain language of 42 Pa. C.S. §9542 does not allow for the pursuit of any common law path outside of PCRA. Yet, *Commonwealth v Holmes* *supra* and *Delgros* *supra* created common law paths to circumvent this constraint. In so doing, the state court of last resort found the constraints imposed by the plain language of 42 Pa. C.S. §9542 to be unconstitutional.

“The fact that the [][PCRA] might operate unconstitutionally under some conceivable set of circumstances is []sufficient to render it wholly invalid...”. (*United States v. Salerno*, 481 U.S. 739 (1987)) The true purpose of 42 Pa. C.S. §9543(a)(1)(i) and 42 Pa. C.S. §9542 is to use short sentences as a tool for cutting petitioners off at the pass so that they cannot pursue merit worthy issues. Both subparagraphs are unconstitutional and must be struck. (*Thornhill* *supra*; *Broadrick* *supra*)

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

“§9545. Jurisdiction and proceedings...

(b) Time for filing petition.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;...

(4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained."(42 Pa. C.S. §9545(b)(4))

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

Public defenders are still accountable to their clients in their capacity as government officials. They must be held accountable for ineffectiveness when their offices choose not to pursue merit worthy matters simply because their caseload is too large. (*Sheehan supra*;

Ross supra; Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 466 U.S. 648 (1984); Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973, 975 (1987); Peyton v. Rowe, 391 U.S. 54 (1968); Maleng v. Cook, 490 U.S. 488 (1989); All Writs Act of 1789; Hager v. United States, 993 F.2d 4, 5 (1st Cir. 1993); Nicks v. United States, 955 F.2d 161, 167 (2d Cir. 1992); United States v. Osser, 864 F.2d 1056, 1059-60 (3d Cir. 1988); United States v. Drobny, 955 F.2d 990, 996 (5th Cir. 1992); Steward v. United States, 446 F.2d 42, 43-44 (8th Cir. 1971)).

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

“§9545. Jurisdiction and proceedings.

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

42 Pa. C.S. §9545(a) is constitutionally infirm because it impedes the Plaintiff's proposed constitutional solution to work around the unconstitutionality of 42 Pa. C.S. §9543(a)(1)(i) in the short sentence circumstance. To work around the “short sentence” circumstance, the Petitioner requested that he be granted stays of sentences or appeal

bail in his two state cases so that he would have time to pursue appeals under PCRA. The state trial courts denied those requests and did so with the intent of cutting PCRA off at the pass so that merit worthy issues could not be heard.

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

“§9545. Jurisdiction and proceedings...

(b) Time for filing petition.--

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

In a short sentence circumstance as defined by *Commonwealth v Holmes* *supra* and *Delgros* *supra*, 42 Pa. C.S. §9545(b)(1), taken together with 42 Pa. C.S. §9543(a)(1)(i) and 42 Pa. C.S. §9542, completely eviscerate any possible pursuit of a PCRA appeal. This is because a short sentence will likely end before a direct appeal is final and newly discovered evidence may not surface until more than one year after a direct appeal is final.

These kinds of circumstances are exactly why common law paths to equitable relief have evolved. Yet, 42 Pa. C.S. §9542 forbids their pursuit outside the context of PCRA. Thus, the true intent, i.e., the shadow intent, of PCRA was not to provide a “*means of obtaining collateral relief and..all other common law and statutory remedies*” but was instead “*intended to limit the availability of remedies in the trial court or on direct appeal from the judgment of sentence*”. (42 Pa. C.S. §9542) Likewise, 42 Pa. C.S. §9543 and 42 Pa. C.S. §9545 do more to prevent the pursuit of merit worthy matters than they do to enable such pursuits. For these reasons, PCRA is unconstitutional in broad categories of circumstances. Attempts by the state court of last resort to construct ways around the infirmity of the statute, as was done in *Commonwealth v Holmes* *supra* and *Delgros* *supra* are forbidden by *stare decisis*. The proper remedy is to strike PCRA. (*Scales* *supra*; *Bell* *supra*; *Salerno* *supra*; *Thornhill* *supra*; *Broadrick* *supra*)

The Pennsylvania Harassment Statute is Unconstitutional

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

“§ 2709. Harassment.

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

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

The wording of the Pennsylvania harassment statute under which the Petitioner was convicted is identical to the wording of the former New York state harassment statute, which was struck by the New York Court of Appeals as being constitutionally infirm. (*Golb supra*; APPENDICES E.1, E.2, & APPENDICES H.1, H.2).

“BILL NUMBER: A10128
SPONSOR: Rules (Weinstein)

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

PURPOSE: Recently, in the case of

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

SUMMARY OF PROVISIONS:

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

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

Section 3 would provide for an immediate effective date.

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

JUSTIFICATION:

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

There are approximately 7,600 open matters statewide where Penal Law § 230.40(1) is the most serious charge; it is a crime that impacts many people. Moreover, an alleged

violation of this law is an important tool for domestic violence victims, where it forms the predicate for issuing an order of protection by a court to protect such victims.

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

This legislation would correct that omission.

LEGISLATIVE HISTORY: This is a new bill.

BUDGET IMPLICATIONS: None.

EFFECTIVE DATE: This bill would take effect immediately.

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

A10128 Text:
STATE OF NEW YORK

10128
IN ASSEMBLY

June 16, 2014

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

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

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

1 Section 1. Section 240.30 of the penal law, as amended by chapter 510
2 of the laws of 2008, subdivision 4 as added and subdivisions 5 and 6 as
3 renumbered by section 4 of part D of chapter 491 of the laws of 2012, is
4 amended to read as follows:
5 § 240.30 Aggravated harassment in the second degree.
6 A person is guilty of aggravated harassment in the second degree
7 when [with intent to harass, annoy, threaten or alarm another person,
8 he or she]:
9 1. [Either] With intent to harass another person, the actor either:
10 (a) communicates [with a person], anonymously or otherwise, by tele-
11 phone, by [telegraph,] computer or any other electronic means, or by
12 mail, or by transmitting or delivering any other form of [written]
13 communication, [in a manner likely to cause annoyance or alarm] a threat
14 to cause physical harm to, or unlawful harm to the property of, such
15 person, or a member of such person's same family or household as defined
16 in subdivision one of section 530.11 of the criminal procedure law, and
17 the actor knows or reasonably should know that such communication will
18 cause such person to reasonably fear harm to such person's physical
19 safety or property, or to the physical safety or property of a member of
20 such person's same family or household; or
21 (b) causes a communication to be initiated by mechanical or electron-
22 ic means or otherwise with a person] anonymously or otherwise, by tele-
23 phone, by [telegraph,] computer or any other electronic means, or by
24 mail, or by transmitting or delivering any other form of [written]
25 communication, [in a manner likely to cause annoyance or alarm] a threat
26 to cause physical harm to, or unlawful harm to the property of, such
27 person, a member of such person's same family or household as defined in

EXPLANATION—Matter in italics (underlined) is new; matter in brackets
[] is old law to be omitted.

LBD12102-01-4

1 subdivision one of section 530.11 of the criminal procedure law, and the
2 actor knows or reasonably should know that such communication will cause
3 such person to reasonably fear harm to such person's physical safety or
4 property, or to the physical safety or property of a member of such
5 person's same family or household; or
6 2. [H]as, with intent to harass or threaten another person, he or she
7 makes a telephone call, whether or not a conversation ensues, with no
8 purpose of legitimate communication; or
9 3. [s]trikes with the intent to harass, annoy, threaten or alarm
10 another person, he or she strikes, shoves, kicks, or otherwise subjects
11 another person to physical contact, or attempts or threatens to do the
12 same because of a belief or perception regarding such person's race,
13 color, national origin, ancestry, gender, religion, religious practice,
14 age, disability or sexual orientation, regardless of whether the belief
15 or perception is correct; or
16 4. [s]trikes with the intent to harass, annoy, threaten or alarm
17 another person, he or she strikes, shoves, kicks or otherwise subjects
18 another person to physical contact thereby causing physical injury to
19 such person or to a family or household member of such person as defined
20 in section 530.11 of the criminal procedure law[]; or
21 5. [c]ommits he or she commits the crime of harassment in the first
22 degree and has previously been convicted of the crime of harassment in
23 the first degree as defined by section 240.25 of this article within the
24 preceding ten years.
25 [6. For the purposes of subdivision one of this section, "form of
26 written communication" shall include, but not be limited to, a recording
27 as defined in subdivision six of section 275.00 of this part.]
28 Aggravated harassment in the second degree is a class A misdemeanor.
29 5. 2. Subdivision 12 of section 631 of the executive law, as amended by
30 chapter 534 of the laws of 2011, is amended to read as follows:
31 12. Notwithstanding the provisions of subdivisions one, two and three
32 of this section, an individual who was a victim of either the crime of
33 menacing in the second degree as defined in subdivision two or three of
34 section 120.14 of the penal law, menacing in the first degree as defined

...

35 in section 120.13 of the penal law, criminal obstruction of breathing or
36 blood circulation as defined in section 121.11 of the penal law, harass-
37 ment in the second degree as defined in subdivision two or three of
38 section 240.26 of the penal law, harassment in the first degree as
39 defined in section 240.25 of the penal law, aggravated harassment in the
40 second degree as defined in subdivision [four] five of section 240.30 of
41 the penal law, aggravated harassment in the first degree as defined in
42 subdivision two of section 240.31 of the penal law, criminal contempt in
43 the first degree as defined in paragraph (ii) or (iv) of subdivision (b)
44 or subdivision (c) of section 215.51 of the penal law, or stalking in
45 the fourth, third, second or first degree as defined in sections 120.45,
46 120.50, 120.55 and 120.60 of the penal law, respectively, who has not

47 been physically injured as a direct result of such crime shall only be
48 eligible for an award that includes loss of earning or support, the
49 unreimbursed cost of repair or replacement of essential personal proper-
50 ty that has been lost, damaged or destroyed as a direct result of such
51 crime, the unreimbursed cost for security devices to enhance the
52 personal protection of such victim, transportation expenses incurred for
53 necessary court expenses in connection with the prosecution of such
54 crime, the unreimbursed costs of counseling provided to such victim on
55 account of mental or emotional stress resulting from the incident in

1 which the crime occurred, reasonable relocation expenses, and for occu-
2 pational or job training.
3 5.3. This act shall take effect immediately.

.... " (APPENDIX H.1)

The striking of the New York statute occurred at the urging of several US Second Circuit judges who themselves ruled in different cases that the New York harassment statute was constitutionally infirm. (*Golb supra*). Pennsylvania's own statutes and case law require that the identically worded statute, 18 Pa. C.S. §2709(a)(4), must also be struck in Pennsylvania. (*Bell supra*; 1 Pa.C.S.A. §1921(b))

(APPENDIX E.4, E.5) Federal case law also requires that 18 Pa. C.S.

§2709(a)(4) be struck. (*Scales supra; Salerno supra; Thornhill supra; Broadrick supra*)

The identical wording in a harassment statute cannot be violative to the US Constitution in New York but not violative to the US Constitution in Pennsylvania. State sovereignty does not allow for 50 different interpretations and applications of the US Constitution. The Fourteenth Amendment of the US Constitution grants the Petitioner a right to sue for uniformed interpretation and a uniformed application of inalienable US Constitutional rights throughout the United States and its territories. Numerous state and federal courts in Pennsylvania and in the US Third Circuit are well aware of the contradicting interpretations of the two identical harassment statutes across state lines but they have failed to do anything about it. Therefore, this Court must intervene to create US Constitutional uniformity across interstate lines.

Petitioner Has Been Abandoned by Counsel On These Matters

While state trial courts have repeatedly appointed appellate counsel to represent the Petitioner on these matters, all counsel have repeatedly abandoned the Petitioner in the pursuit of these merit worthy matters. Despite the abandonment by counsel, some issues have made it to state panel review despite counsel having filed Anders Briefs and Finely letters being filed by counsel. (*Anders v. California*, 386 U.S. 738 (1967); *Com. v. Finley*, 550 A.2d 213, (Pa. 1988); *Ross supra*; *Sheehan supra*; *Morgan supra*)

The chronic abandonment of merit worthy arguments has prompted the Luzerne County state trial court to state that the Petitioner is better off representing himself. (*Strickland supra*; *Cronic supra*; *Pierce supra*) In all of his state cases, the Petitioner has repeatedly had to meet deadlines that appointed counsel have repeatedly intentionally allowed to lapse or attempted to allow to lapse.

Requests of The Court

The Petitioner RESPECTFULLY REQUESTS a *de novo* review of the instant case.

The PETITIONER RESPECTFULLY requests that he be allowed to participate in oral argument for the instant case.

The PETITIONER RESPECTFULLY AVERS that a foreign national convicted of a greater crime should not enjoy a full selection of horses at the livery stable while a US citizen who is convicted of a lesser offense is offered no horse at all.

CONCLUSION

The petition should be granted.

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

Respectfully Submitted,

Dec 3, 2019

Date

Sean M. Donahue

Sean M. Donahue

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 19-1625

Sean Donahue v. Superior Court of Pennsylvania, et al

(U.S. District Court No.: 3-18-cv-01531)

ORDER

Pursuant to Fed. R. App. P. 3(a) and 3rd Cir. Misc. LAR 107.2(b), it is

ORDERED that the above-captioned case is hereby dismissed for failure to timely prosecute insofar as appellant failed to file a brief and appendix as directed. It is

FURTHER ORDERED that a certified copy of this order be issued in lieu of a formal mandate.



A True Copy

Patricia S. Dodszuweit

For the Court,

s/ Patricia S. Dodszuweit

Clerk

Patricia S. Dodszuweit, Clerk

Certified Order Issued in Lieu of Mandate

Dated: September 05, 2019

SLC/cc: Sean M. Donahue

Martha Gale, Esq.

APPENDIX A IMG_20191126_0001