No. 19-7818

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

KRISTOPHER ERIC BENJAMIN — PETITIONER
(Your Name)

vs.

SUPERINTENDENT, et al., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

KRISTOPHER ERIC BENJAMIN # KT 1994
(Your Name)

1 WOODLAND DRIVE
P.O. Box 307
(Address)

MARIENVILLE, PA 16239
(City, State, Zip Code)

(814) 621-2110
(Phone Number)

QUESTIONS PRESENTED

I.

WHETHER UNDER §2254(e)(1) DISTRICT COURT REQUIRED TO GIVE DEFERENCE TO STATE APPELLATE COURT'S FINDING OF HISTORICAL FACTS AND UPON FINDING THAT PETITIONER AND/OR OTHER SIMILARLY SITUATED STATE PRISONERS HAVE REBUTTED THE EXPLICIT STATE APPELLATE COURT RULING OF WAIVER/PROCEDURAL DEFAULT BY EVIDENCE THAT IS CLEAR AND CONVINCING THAT STATE COURT'S PRESUMPTION OF CORRECTNESS IS REFUTED SUCH THAT STATE PRISONERS ARE ENTITLED TO DE NOVO REVIEW OF CONSTITUTIONAL CLAIMS?

II.

WHETHER THE FACTS SET FORTH PREVIOUSLY AND HEREIN ESTABLISH THAT JURISTS OF REASON COULD DISAGREE WITH THE DISTRICT COURTS §2254(d) AEDPA APPLICATION AS OPPOSED TO STATE APPELLATE COURTS WAIVED/PROCEDURALLY DEFAULTED DETERMINATION SUCH THAT THE THIRD CIRCUIT SHOULD HAVE ISSUED A COA TO REVIEW THE DISTRICT COURT'S DENIAL OF HABEAS RELIEF?

III.

WHETHER STATE APPELLATE COURT RELIANCE ON FED.R.CRIM.P. RULE 30 DURING STATE APPELLATE MATTERS (RELATIVE TO PA.R.CRIM.P., RULE 647 BEING THE PENNSYLVANIA COUNTERPART TO FED.R.CRIM.P. RULE 30) AND JONES V. U.S. (1999) prevents the PA STATE COURTS FROM AN INDEPENDENT STATE-LAW DEFENSE UNDER AKE V. OKLAHOMA SUCH THAT THE THIRD CIRCUIT SHOULD HAVE ISSUED A COA TO REVIEW THE DISTRICT COURT'S DENIAL OF HABEAS RELIEF?

IV.

WHETHER THE DISTRICT COURT'S INTERPRETATION OF §2254(d)(2) RELATIVE TO CLAIM UNDER STRICKLAND V. WASHINGTON (1984), IS INAPPROPRIATELY RESTRICTIVE SUCH THAT IT CONFLICTS WITH OTHER CIRCUIT COURTS?

V.

WHETHER THIRD CIRCUIT HOLDING OF DENIAL OF A COA FOR "SUBSTANTIALLY THE SAME REASONS PROVIDED BY THE DISTRICT COURT" CONFLICTS WITH THE RULING OF OTHER CIRCUIT COURTS AND U.S. SUPREME COURT PRECEDENT AS SUCH A RULING IS BEYOND THE THRESHOLD INQUIRY REQUIRED FOR ISSUANCE OF A COA?

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;

KRISTOPHER ERIC BENJAMIN,
Petitioner

v.

SUPERINTENDENT THOMAS S. MCGINLEY, SCI-COAL TOWNSHIP; ALLEGHENY COUNTY OFFICE OF DISTRICT ATTORNEY STEPHEN A. ZAPPALA, JR.,
Respondents

OPINIONS BELOW

Federal Opinions

(Appx: A) - Nov. 26, 2019 [19-1678] (2 pages)
Order of Third Circuit Court of Appeals denying Petition For Rehearing

(Appx: B) - Oct. 9, 2019 [19-1678] (2 pages)
Order Of Third Circuit Court of Appeals denying Cert. of Appealability ("COA")

(Appx: C) - Feb. 27, 2019 [16-268] (31 pages)
OPINION and ORDER of Honorable Chief Magistrate Judge Maureen Kelly (Kelly, J)
(Hereinafter "District Court"); consent pursuant to 28 U.S.C. §636(c)(1)

PA State Court Opinions

(Appx: D) - July 31, 2015 [125 A.3d 469 (Pa. Super. 2015) (15 pages)]
PA Superior Court - PCRA OPINION denying Post-Conviction Relief Act Petition

(Appx: E) - Sept. 8, 2014 [#CC200913466] (1 page)
Trial Court (Judge Edward J. Borkowski) - ORDER OF COURT / "1925(a) OPINION"

(Appx: F) - June 5, 2014 [#CC200913466) (2 pages)
Trial Court (Judge Edward j. Borkowski - NOTICE OF INTENT TO DISMISS...907

(Appx: G) - July 24, 2013 [143 WAL 2013] (1 page)
PA SUPREME COURT - Direct Appeal denial of P.A.A. - per curium

(Appx: H) - Feb. 28, 2013 [1689 WDA 2010] (17 pages)
PA SUPERIOR COURT - Direct Appeal denial at 68 A.3d 374 (Pa. Super. 2013)

(Appx: I) - Jan. 20, 2012 [#CC200913466] (24 pages)
Trial court (Judge Edward J. Borkowski) - OPINION/denial Direct Appeal

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases:

TABLE OF AUTHORITIES (cont.)

JURISDICTION

For cases from **Federal Courts:**

The date on which the United State Court of Appeals decided my case was **October 9, 2019**; and a copy of the ORDER denying the request for a COA appears at **Appx: B.** C.A. No. **[19-1678]**

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: **November 26, 2019**; and a copy of the ORDER denying rehearing appears at **Appx: A.** C.A. No. **[19-1678]**

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

For Statutory and Constitutional Provisions please see Table of Authorities.

STATEMENT OF THE CASE

Following an April 5-14, 2019 JURY TRIAL before Judge Edward J Borkowski, Petitioner Benjamin was adjudged GUILTY of the following charges:

First-Degree Murder; Kidnapping; Abuse of A Corpse; and, Conspiracy.

Petitioner was SENTENCED on April 22, 2010. The aggregate term imposed being: **LIFE w/o Parole** and **Eleven to Twenty-Two years**; served consecutive.

Petitioner sets forth the following facts relevant to hereto separately for this Honorable Courts' convenience:

A.

Jury Instruction #6

During defense testimony, the prosecution submitted a written request of points for charge, therein offering proposed jury instructions to be provided to the seated jurors. (See **T.T. Pgs. 912-923**). Defense counsel specifically addressed the Commonwealth's proffered Jury Instruction #6 during that time. (See **T.T. Pgs. 916-919**). As a result thereof. the trial court responded in the following manner: **THE COURT: "All right. Well, Im not going to give that particular instruction as stated and/or requested." (T.T. Pg. 917).** However, upon instructing the jury, the trial court did give this particular instruction. **(T.T. Pgs. 1105-1106).**

As evidenced by the trial transcript, trial/defense counsel (Veronica Brestensky, Esq.), objected to this instruction after the court finished charging/instructing the jury thereby properly preserving this issue for appellate review. **(T.T. Pgs. 1142-1144).**

Thereafter, the record clearly reflects the trial courts' erroneous ruling:

> **THE COURT: I inquired about the basis of that and she offered -- she made her offer, and then I indicated -- I thought I indicated that I would give it. So my recollection of the record was I inquired about that, but ultimately I decided to give it.**
> (Trial Court - Honorable Judge Edward J Borkowski) **(T.T. Pg. 1143)**

Accordingly, this is completely contrary to the trial courts' previous ruling. Compare **(T.T. Pg. 917).**

As presented to the state court during direct appeal, and addititional as this litigants' request for habeas review, Petitioner Benjamin herein submits that giving this Commonwealth requested instruction after informing the defense that this specific instruction would not be given effectively circumvents the reasoning and protections afforded by **Pa.R.Crim.Proc., Rule 647** (Pennsylvania's counterpart to **Fed.R.Crim.Proc., Rule 30).**

Petitioner Benjamin contends that the trial court's misleading indication (that Jury Instruction # 6 would not be given), infringed upon his right to Due Process of Law under the **Fourteenth Amendment**, infringed upon his right to a fair trial, impaired the effectiveness of defense counsel's closing argument, and caused Petitioner Benjamin to suffer actual prejudice as a result thereof. Compare **BRIEF FOR APPELLANT at 1689 WDA 2010, Pgs. 39-49;** see also **(Doc. 2)** and **(Doc. 3)** at Civil Action No. **[16-268].**

B.

Ineffective Assistance of Counsel

The record reflects that during the critical stage of closing argument trial counsel/defense counsel Veronica Brestensky, Esq., therein submitted to the jury that they had heard specific testimony from Commonwealth witness Andre Drewery, however, the following portion relative thereto is not supported by the certified record:

> He said that. And I specifically asked him, well, what was mr. Benjamin's role in this argument about the money? And he said, No, he didn't have anything to do with the actual argument, that was completely between Amy and Tim Brunner.

(cont. next page)

> Okay. So then we hear from Ceira Brown, and actually Timothy Brunner, and the two of them also reiterate those essential facts: Mr. Benjamin had absolutely nothing to do with any kind of accusations at that parking lot about missing money and ID, anything along those lines. As a matter of fact, he had nothing to do with Amy Kucsmas at that point in time. He was off in a dark area of the parking lot conducting a drug deal. All three of them agree on that.
> (Trial Counsel - Veronica Brestensky, Esq.,) **(T.T. Pgs. 994-995).**

As presented to the state nd lower federal courts, Petitioner Benjamin submits that this misleading statement; telling the jury they were presented with testimony that is clearly devoid of the transcript in this case, destroys the credibility of the defense in its entirety thereby rendering the truth-determining process as unreliable due to the actions of trial counsel in a case with no overwhelming evidence of guilt, and that Petitioner Benjamin suffered actual prejudice as a result thereof. See Petitioner Benjamin's **PCRA BRIEF, Pgs. 12-31, at 1182 WDA 2014;** see also **(Doc. 2)** and **(Doc. 3)** at Civil Action No. **[16-268].**

REASONS WHY THE PETITION SHOULD BE GRANTED

Rule 10. Considerations Governing Review on Certiorari

Review on certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

I.

WHETHER UNDER §2254(e)(1) DISTRICT COURT REQUIRED TO GIVE DEFERENCE TO STATE APPELLATE COURT'S FINDING OF HISTORICAL FACTS AND UPON FINDING THAT PETITIONER AND/OR OTHER SIMILARLY SITUATED STATE PRISONERS HAVE REBUTTED THE EXPLICIT STATE APPELLATE COURT RULING OF WAIVER/PROCEDURAL DEFAULT BY EVIDENCE THAT IS CLEAR AND CONVINCING THAT STATE COURT'S PRESUMPTION OF CORRECTNESS IS REFUTED SUCH THAT STATE PRISONERS ARE ENTITLED TO DE NOVO REVIEW OF CONSTITUTIONAL CLAIM?

1. Petitioner Benjamin respectfully submits that the ruling of the District Court (**Appx: C**), and acceptance thereof by the Third Circuit Court of Appeals (**Appx: B**), conflicts with U.S. Supreme Court precedent and the clear mandates of The Antiterriorism and Effective Death Penalty Act of 1996 ("AEDPA").

2. First and foremost, in the case now before this Honorable Court, there can be no doubt that the PA state appellate courts did not address the claim presented on the merits. See **Com. v. Benjamin**, 68 A.3d 374 (Pa. Super. 2013) (unpublished memorandum decision) (**Appx: H**):

> "With regard to issue number three, we note that Appellant waived the issue for failing to specifically object that a certain jury instruction was given in violation of Pa.R.Crim.P. 647(a)." Feb. 28, 2013 Direct Appeal at 1689 WDA 2010 (PA Superior Court) (**Appx: H, Pg. 6**).

3. This is an extremely important historical fact as the Attorney for the Commonwealth (hereinafter "Respondent"), unequivocally relied upon the ruling of the PA Superior Court to present a waiver/procedural default defense after the filing of Petitioner's habeas petition. Compare:

> Petitioner raised this issue on direct appeal, so it is exhausted. However, the Pennsylvania Superior Court found the claim to be waived. ... If a state court finds a claim to be waived, it becomes procedurally defaulted, thereby barring Federal habeas review. ... As such, the within claim is defaulted and must be dismissed. (**Pg. 12**) In the instant case, no objection was made. ... Therefore, any challenge to the instruction is waived - as the Superior Court found. ... Based on the above, Respondents submits that this claim fails as it is procedurally defaulted, non-cognizable, and meritless. As such, it must be dismissed. (**Pgs. 16-17**). See RESPONDENT'S ANSWER PETITION FOR WRIT... (**Doc. 13**) **[16-268]**.

4. Notably, Petitioner has consistently argued, first to the District Court, and thereafter to the Third Circuit Court of Appeals, that since there was no PA appellate court determination on the merits, that §2254(d) does not apply. See also **Wilson v. Sellers**, 138 S.Ct. ___, 200 L.Ed.2d 530, 537 (2018) ("Similarly where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not disregard that bar and consider the merits." (Citation omitted)).

5. Petitioner has additionally submitted that even if §2254(d) would be applicable to the herein case, that he would be entitled to habeas review under §2254(d)(2), for the reasons set forth in the habeas petition filed.

6. However, ans with no regard for the affirmative defense presented by Respondent; see **Trest v. Cain**, 522 U.S. 87, 89, 118 S.Ct. 478 (1997) (finding that procedural default is an affirmative defense that the government must prove); the District Court went rogue without explaining why the previous state court determination of historical fact was not entitled to the presumption of correctness under §2254(e)(1), and/or why Respondent would not be afforded the application of the well-known U.S. Supreme Court precedent.

7. Without a doubt, under **Coleman v. Thompson**, 501 U.S. 722, 111 S.Ct. 2546 (1991), the law is well settled:

> "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state ground is substantive or procedural." (internal citations omitted). **Coleman**, 501 U.S. at 729.

8. Unfortunately, neither the District Court, nor Third Circuit took issue with what is required under AEDPA, habeas law, or other applicable standards whereby this litigant respectfully requests this Honorable to exercise jurisdiction in accordance with the law.

9. Petitioner herein submits that under §2254(e)(1), the District Court is required to defer to the state appellate court; that under AEDPA's mandate: When a federal court reviews a habeas petition challenging a state court decision, "...a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Quoting 28 U.S.C. §2254(e)(1); see also **Wood v. Allen**, 558 U.S. 290, 293 (2010).

10. Whereby Petitioner Benjamin submits that similarly situated prisoners have always been afforded the 'look through' presuption under **Ylst v. Nunnemaker**, 501 U.S. 797, 111 S.Ct. 2590 (1991), and that the failure to extend the mandates of **Ylst**, supra, to the herein case would facilitate the vehicle by which the lower federal courts could sidestep the mandates of §2254(e)(1), "and if left uncorrected, it is likely to interfere with the proper handling of a significant number of federal habeas petitions" filed by state prisoners. Quoting **Rapelje v. McClellan**, 571 U.S. 1036, 187 L.Ed.2d 442, 443 (2013) (Alito, J. dissenting).

11. However, in this case it is evident that the District Court finds that Petitioner Benjamin has rebutted the presumption of correctness by clear and convincing evidence therein setting forth a finding of **the exact opposite** of what the state courts and Respondent have carried throughout the state appellate process; then blatantly ignoring that this state prisoner has, in fact, rebutted the presumption of correctness under §2254(e)(1). Compare:

12. Direct Appeal - Trial Court (emphasis added)

> Appellant **did not object** to the instruction as given but requested clarification in light of the defense of alibi that he offered. (Borkowski, J.) (trial court) Jan. 20, 2012 at #CC200913466; see **(Appx: I)** (Pg. 13); see also Resp. Answer...**(Doc. 13**, Comm.Ex. 3, Pg. 13)

13. Direct Appeal - Brief For Appellee (emphasis added)

The Appellant **made no objection** at trial that the at issue jury instruction was given in violation of Pa.R.Crim.P. 647; accordingly, the claim is waived. the Commonwealth would add that, absent waiver, the appellant still could not establish the requisite prejudice even if such a violation had occurred. **Pg. 32** (Francesco L. Nepa, ADA) (Oct. 17, 2012) [1689 WDA 2010]

14. Direct Appeal - PA Superior Court (emphasis added)

"With regard to issue number three, we note that Appellant **waived** the issue for failing to specifically object that a certain jury instruction was given in violation of Pa.R.Crim.P. 647(A)." Feb. 28, 2013 (Pa. Super) **(Appx: H, Pg. 6)** [1689 WDA 2010]

15. Resdpondent's Answer...at 16-268 (emphasis added)

Petitioner raised this issue on direct appeal, so it is exhausted. However, the Pennsylvania Superior Court found the claim to be waived. ... If a state court finds a claim to be waived, it becomes procedurally defaulted, thereby barring Federal habeas review. ... As such, the within claim is defaulted and must be dismissed. **(Pg. 12) In the instant case, no objection was made.** ... Therefore, any challenge to the instruction is waived - as the Superior Court found. ... Based on the above, Respondent submits that this claim fails as it is procedurally defaulted, non-cognizable, and meritless. As such, it must be dismissed. **(Pgs. 16-17).** See RESPONDENT'S ANSWER PETITION FOR WRIT... **(Doc. 13) [16-268].**

16. Memorandum Opinion - (Kelly, J. [16-268] (emphasis added)

"**Petitioner's trial attorney objected,** and noted that she had thought the trial judge indicated that he would not give Instruction No. 6. Specifically, **she objected as follows:**
THE COURT: Okay. Well, do you object to that?

MS. BRESTENSKY: Yes. Actually, **the only objection I do have** - and this is for the record - my client's specific defense was that he was not present when this alleged statement that she fought hard was made, so therefore he would not have had the opportunity to say I don't know, or to voluntarily reject that statement by his co-defendant. **That's the objection that** I **have.** (Kelly, J.) **(Appx: C, Pg. 10 fn. #3)**

17. Notably, and immediately above, the District Court unequivocally supports this litigants claim that: (a) "The state court found that Petitioner waived this claim'... **(Appx: C, Pg. 10)** [16-268]; (b) "Petitioner's trial attorney objected,..." **(Appx: C, Pg. 10)** [16-268]. This litigant submits that this is where the presumption of correctness ceased exist as the actual underlying claim was based on an objection that the state courts simply claimed did not exist.

18. However, this evidence (out of the District Courts' own mouth) has been ignored; after the presumption of correctness was rebutted the District Court additionally ignored the necessary standard of review. Compare: "We are not persuaded even were we to review this claim de novo." (**Appx: C, Pg. 15**); as if under AEDPA the standard of review is optional which does not comport with the holdings of other Federal Circuits. Compare: "Under AEDPA the standard of review applicable to particular claim depends on how that claim was resolved by the state courts." Quoting **Byrd v. Workman**, 645 F.3d 1159, 1165 (10th Cir. 2011); see also **Bond v. Beard**, 539 F.3d 256, 263 (3rd Cir. 2008) ("We review de novo issues that the state court did not decide on the merits.").

19. Clearly, the claim presented was never waived or otherwise defaulted; and with proper deference afforded to the highest state court this would not be a merits determination under **Ylst**, supra. Compare **Ford v. Stepanik**, 1998 U.S. Dist. LEXIS 8436 (E.D. Pa. 1998) ("Therefore, the Court must 'look through' to the Superior Court's opinion, as the last state court to articulate its reasons for denying petitioner's ... petition, to determine whether the denial of this claim was based on an 'independent and adequate state procedural rule.").

20. Whereby being that the PA appellate court did not address the claim on the merits, upon such a finding by the District Court said lower federal court cannot simply evaluate the constitutional claim without a proper standard of review. Additionally, the conclusion reached by the District Court memorandum somehow subjects this state prisoner to additional 'findings' that are not fairly supported by the record and prove to be seriously lacking and inadequate for the ascertainment of the truth. See **Dawson v. Marshall**,

555 F.3d 798, 799 (9th Cir. 2008) ("De novo review means that the reviewing court does not defer to the lower court's ruling but freely considers the matter anew, as if no decision had been rendered below." (internal quotation marks and citation omitted)).

21. Wherefore, this litigant respectfully requests that the writ of cert. issue as the state appellate courts' claim of waiver/procedural default being disregarded by the District Court is impermissible under §2254(e)(1), after finding clear and convincing evidence that rebuts the presumption of correctness, and similarly situated state prisoners are entitled to de novo review under AEDPA. See **U.S. v. George**, 971 F.2d 1113, 1118 (4th Cir. 1992) ("By definition, de novo review entails consideration of an issue as if it had not been decided previously. It follows, therefore, that the party entitled to de novo review must be permitted to raise before the court any argument as to that issue that it could have raised before the magistrate. The district court cannot artifically limit the scope of its review by resorting to ordinary prudential rules, such as waiver, provided that proper objection to the magistrate's proposed finding or conclusion has been made and the appellant's right to de novo review by the district court thereby established.").

II.

WHETHER THE FACTS SET FORTH PREVIOUSLY ND HEREIN ESTABLISH THAT JURISTS OF REASON COULD DISAGREE WITH THE DISTRICT COURTS §2254(d) AEDPA APPLICATION AS OPPOSED TO STATE APPELLATE COURTS WAIVED/PROCEDURALLY DEFAULTED DETERMINATION SUCH THAT THE THIRD CIRCUIT SHOULD HAVE ISSUED A COA TO REVIEW THE DISTRICT COURT'S DENIAL OF HABEAS RELIEF?

22. Petitioner submits that in accordance with **Miller-El v. Cockrell**, 537 U.S. 322, 123 S.Ct. 1029 (2003), "...when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merits of his claims." Quoting **Miller-El**, id., 537 U.S. at 327.

23. Furthermore that: "...a prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right'. **28 U.S.C. §2253(c)(2)**. And, finally, that "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." **Miller-El**, id., at 327.

24. In this case, the District Court's assessment points to a substantial showing of the denial of a constitutional right: "We construe this argument to be that because the trial court stated he would not give the instruction but then gave the instruction to be an argument that Petitioner was denied substantive due process or fundamental fairness in the trial." See (**Appx: C**, Pg. 15) (Kelly, J.) **[16-268]**; see also (**Doc. 26** at 16-268) (same).

25. The Third Circuit did not issue a COA; see (**Appx: B**) **[19-1678]**; and, this litigant submits that the Third Circuit additionally failed to "limit its examination to a threshold inquiry." Cf. **Wolff v. United States**, 135 S.Ct. 2647, 192 L.Ed.2d 948, 952 (2015).

26. However, under the assumption that state court judges can be considered jurists of reason, it would immediately appear that jurists of reason would disagree, and/or find it debatable being that the PA Superior Court rendered this state prisoner's constitutional claim waived in the state appellate courts. Compare:

> "With regard ti issue number three, we note that Appellant waived the issue for failing to specifically object that a certain jury instruction was given in violation of Pa.R.Crim.P. 647(A)." **(Appx: H, Pg. 6)** [1689 WDA 2010].

27. Clearly, this is contrary to the District Courts' position and finding as evidenced by the following: "The state courts found that Petitioner waived this claim"... (Kelly, J) **(Appx: C, Pg.10)** [16-268]. Thereafter coupled with the District Court finding that: "Petitioner's trial attorney objected,..." (Kelly, J.) **(Appx: C, Pg. 10)** [16-268]. Which itself is the disputed factual matter that the claim is derivative thereof.

28. Additionally, 'Respondent', who may or may not be a 'jurist of reason', clearly advocated for dismissal of the claim presented; as waived/procedurally defaulted for lack of an objection. See **(Doc. 13,** Pgs. 12-17) **[16-268].**

29. Ironically, the District Court's finding of an objection (the objection that the state court's simply insisted did not exist), would likely have entitled similarly situtated state prisoners to the issuance of a COA, if the procedural ground relied upon by the state was upheld by the District Court, as the law holds:

> "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Quoting **Slack v. McDaniel**, 529 U.S. 473, 120 S.Ct. 1595, 1604 (2000).

30. In the case now before this Court, Petitioner was afforded nothing from the District Court, and even less from the Third Circuit Court of Appeals, even upon submitting thereto that similarly situated prisoners reasonably be entitled to de novo review upon such a finding. "We are not persuaded even were we to review this claim de novo." (**Appx: C, Pg.15**) [16-268].

31. Furthermore, the Third Circuit simply failed to adhere to a standard that remotely resembles a "threshold inquiry" as envisioned in **Miller-El:**

> "This threshold inquiry does not require full consideration of the factual or legal bases dduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in issence deciding an appeal without jurisdiction." **Miller-El**, 537 U.S. at 337.

32. Whereby, for all the reasons set forth herein it would appear that the Third Circuit denial of this litigants' request that a COA issue, on the generic basis of "substantially the same reasons provided by the District Court." See (**Appx: B**) [19-1689], ignores the 'threshold inquiry' and that jurists of reason find the claim debatable such that the Third Circuit effectively decided the actual merits without jurisdiction to do so.

33. Moreover, the necessity of issuance of a COA in this case would be apparent as similarly situated prisoners would be, no less debatably, entitled to de novo review, or, alternatively, that the Respondent would be entitled to the protections afforded by the procedural default doctrine such that jurists of reason would find the district court's assessment if the constitutional claim debatable or wrong such that the issue presented is adequate to deserve encouragement to proceed further.

34. Accordingly, this litigant urges this Honorable Court to entertain this matter of public importance under **U.S. Supreme Court Rule 10.**

III.

WHETHER STATE APPELLATE COURT RELIANCE ON FED.R.CRIM.P. RULE 30 DURING STATE APPELLATE MATTERS (RELATIVE TO PA.R.CRIM.P., RULE 647 BEING THE PENNSYLVANIA COUNTERPART TO FED.R.CRIM.P. RULE 30) AND JONES V. U.S. (1999) PREVENTS THE PA STATE COURTS FROM AN INDEPENDENT STATE-LAW DEFENSE UNDER AKE V. OKLAHOMA SUCH THAT THE THIRD CIRCUIT SHOULD HAVE ISSUED A COA TO REVIEW THE DISTRICT COURT'S DENIAL OF HABEAS RELIEF?

35. Petitioner herein submits that when presented with this important federal question the District Court simply did not answer it. See **(Appx: C, Pg. 12)** ("Petitioner apparently makes such an argument to bring himself within AEDPA's standard of review. Petitioner's argument both misses the point and is unavailing.") (Kelly, J.) **[16-268].**

36. Rather than answer the constitutional question using the relevant U.S. Supreme Court precedent, the District Court impermissibly forwarded a mere string-citation that was lacking in substance. See **Parker v. Matthews**, 567 U.S. 37, 183 L.Ed.2d 32, 132 S.Ct. 2148 (2012) ("circuit precedent does not constitute clearly established Federal law, as determined by the Supreme Court").

37. In **Jones v. U.S.**, 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999), the U.S. Supreme Court squarely addressed the procedural adequacy regarding a timely objection to challenges lodged during the charge/jury instruction phase of trial, therein causing the 'waiver' rationale as forwarded by the PA Superior Court to conflict with U.S. Supreme Court precedent.

38. Under **Ake v. Oklahoma**, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) "When resolution of the state procedural law depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law."

39. As set forth in this litigant's habeas petition; rebutting the notion that the state-law ground supposedly relied upon, would be 'independent' this state prisoner set forth that Pennsylvania's consistent reliance on **Fed.R.Crim.P. Rule 30**, has been consistently referenced apparently starting with **Commonwealth v. Hendricks**, 546 A.2d 79 (Pa. Super. 1988); as a matter of first instance, until most recently at **Commonwealth v. Orie Melvin**, 103 A.3d 1 (Pa. Super. 2014).

40. Notably, **Orie Melvin**, supra, was decided after **Commonwealth v. Benjamin**, 68 A.3d 374 (Pa. Super. 2013); see also (**Appx: H**) Feb 28, 2013 **[1689 WDA 2010]** however, it is worth noting that in **Orie Melvin**, supra, the PA Superior Court went on ("Noting that Rule 647(A) effectively mirrors Rule 30 if the Federal Rules of Criminl Procedure,..."); in any event, the law still holds:

> "The Supreme Court has 'consistently held tht the question of how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.'" **Johnson v. Mississippi**, 486 U.S. 578, 587, 108 S.Ct. 1981 (1988); (quoting **Henry v. Mississippi**, 379 U.S. 443, 447, 85 S.Ct. 564 (1965).

41. Wherefore, this litigant submits that it is extremely likely that the state courts will continue to misapply the relevant U.S. Supreme Court cases and precedent without proper guidance thereon. See also **Williams v. Taylor**, 529 U.S. 362, 120 S.Ct. 1495 (2000) ("We have always held that federal courts, even on habeas, have an independent obligation to say what the law is." (citation omitted). See **Williams**, 529 U.S. at 384.

42. Accordingly, the Third Circuit ignored the 'threshold inquiry' and no court has squarely addressed whether the state can lawfully maintain an 'independent and adequate' state-law defense tht does not conflict with the rulings of the U.S. Supreme Court.

IV.

WHETHER THE DISTRICT COURT'S INTERPRETATION OF §2254(d)(2) RELATIVE TO CLAIM UNDER STRICKLAND V. WASHINGTON (1984), IS INAPPROPRIATELY RESTRICTIVE SUCH THAT IT CONFLICTS WITH OTHER CIRCUIT COURTS?

43. Petitioner herein submit that contrary to every other circuit, the Third Circuit and lower federal courts relative thereto, are requiring petitioners to meet a standard that far exceeds wht is required under §2254(d), and/or under the Sixth Amendment right to effective assistance of counsel.

44. The record in the case now beofre this Honorable Court reflects that during the critical stage of closing argument; (See **Yarborough v. Gentry**, 540 U.S. 1, 5, 124 S.Ct. 1, 157 L.Ed.2d 1 (2002) ("The right to effective assistance of counsel extends to closing argument.") (additional citations omitted)); trial counsel/defense counsel, Veronica Brestensky, Esq., thereby submitted to the jury that they had heard specific testimony by Commonwealth witness Andre Drewery, however, the following portion relative thereto is not supported by the certified record:

> He said that. And I specifically asked him, well, what was Mr. Benjamin's role in this argument about the money? And he said, No, he didn't have anything to do with the actual argument, that was completely between Amy and Tim Brunner.
>
> Okay. So then we hear from Ceira Brown, and actually Timothy Brunner, and the two of them also reiterate those essential facts: Mr. Benjamin had absolutely nothing to do with any kind of accusations at that parking lot about missing money and ID, anything along those lines. As a matter of fact, he had nothing to do with Amy Kucsmas at that point in time. He was off in a dark area of the parking lot conducting a drug deal. All three of them agree on that.
>
> See (T.T. Pgs. 994-995) (Attorney Brestensky - trial counsel).

45. As presented to the state courts, petitioner herein submits that this misleading statement; telling the jury they were presented with testimony that is clearly devoid of the transcript in this case, destroyed the credibility of the defense in its entirety thereby rendering the truth-determining process as unreliable due to the actions of trial counsel in a case with no overwhelming evidence of guilt, and that Petitioner Benjamin suffered actual prejudice as a result thereof.

46. Petitioner has, in fact, repeatedly expressed that in this case there is no record evidence that the state court and/or Respondent can point to in support of the summation given by trial counsel. "If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it." **Massaro v. U.S.**, 538 U.S. 500, 505, 123 S.Ct. 1690, 1694, 115 L.Ed.2d 714 (2003).

47. Moreover, under §2254(d) there is no reasonable argument that counsel satisfied Strickland's deferential standard, in fact, this application has not even been considered by the Third Circuit and district court that answers thereto. "The question under §2254(d) is not whether counsel's actions were reasonable, but whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Quoting **Harrington v. Richter**, 131 S.Ct. 770, 778, 178 L.Ed.2d 624 (2011).

48. This litigant has consistently maintained that according to U.S. Supreme Court precedent, state prisoners are entitled to have a court "reconstruct the circumstances of counsel's challenged conduct" and to have a court "evaluate the conduct from counsel's perspective at the time." Quoting **Strickland v. Washington**, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

49. However, and contrary to the record evidence available, it is the state court who simply 'claims into existence' what the record is devoid of, i.e., the portion of the certified record that supports trial counsel's closing argument. See **Cave v. Singletary**, 971 F.2d 1513, 1516 (11th Cir. 1992) ("Although state court findings of fact may be inferred from its opinion and the record they cannot be imagined from thin air." (internal citation omitted)).

50. The law has remained consistent under the Sixth Amendment protection:

> "To make a successful claim of ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient; and (2) that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." id. To make such a showing, a defendant must demonstrate that "no competent counsel would have taken the action that his counsel did take." **United States v. Freixas**, 332 F.3d 1314, 1319-20 (11th Cir. 2003) (quotation marks omitted). Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. Quoting **Muoio v. United States**, 2019 U.S. App. LEXIS 32334, *2 (11th Cir. 2019).

51. Notably, and as argued by Petitioner Benjamin, pursuant to **Nix v. Whiteside**, 105 S.Ct. 988 (1986), it is impermissible to ask counsel to submit to the court 'falsehoods' and/or lies, therefore, it is impermissible for counsel to disregard the facts for any reason. In fact, that this is unreasonable to the point where: "no competent counsel would have taken the action".

52. This litigant and similarly situated state prisoners would have a reasonable expectation that counsel would maintain credibility, in fact, this would be wrong under any standard. See **Harrington**, supra, ("To support a defense argument that the prosecution has not proven its case it sometimes is better to try to cast pervasive suspicion of doubt than to prove a certainty that exonerates."); **Harrington**, 131 S.Ct. at 790.

53. This claim has been presented on habeas pursuant to §2254(d)(2), with and "...based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding", being that upon reviewing the trial court's responses; see (**Appx: E**) Sept. 8, 2014 (ORDER OF COURT); see also (**Appx: F**) Jun. 5, 2014 (NOTICE OF INTENTION TO DISMISS ... 907), both documents forwarded by the trial court are completely devoid of any references to the record and/or trial transcript. See **28 U.S.C. §2254(g)**: "A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the state court shall be admissible in the Federal court proceeding."

54. Petitioner does not claim the above to be fatal to the State court determination as the PA Superior Court issued an OPINION; see (**Appx: D**) July 31, 2015 (PA Superior Court - PCRA OPINION); which has been challenged pursuant to §2254(d)(2), the District Court did not address this litigants' challenges to the defective fact-finding process as set forth in Petitioner Benjamin's habeas petition (**Doc. 2**) and (**Doc. 3**, see Pgs. 19-27) MEMORANDUM OF LAW IN SUPPORT OF RELIEF REQUESTED...**[16-268]**.

55. However, and rather than considering the Sixth Amendment claim presented by this litigant, the District Court simply disregards the actual ineffective assistance claim, claiming that: "**a silent record supports a state court conviction in federal habeas proceedings**"; (Kelly,J.) (**Doc. 26, Pg. 27**); without regard for the requirement that the supposed 'evidence' that would be being 'summarized' during closing argument would reasonably be available as 'evidence' elsewhere in the certified record.

56. The District Courts' reasoning is completely contrary to the law as set forth in **Herring v. New York**, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975):

> Closing argument is not simply a pro forma aspect of the criminal case, but an essential one; [C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendants' guilt.... In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity to finally marshal the evidence for each side before submission of the case to judgment. **Herring**, 422 U.S. at 862.

57. This litigant is not requesting a new, rigid standard that does not comport with the standards as set forth previously. Notably, in **Harrington**, supra, the Court stated: "Rare are the situations in which the latitude counsel enjoys will be limited to any one technique or approach." quoting **Harrington**, 131 S.Ct. at 779. Petitioner submits that similarly situated state prisoners rely on this Honorable Court to protect the protections of the Sixth Amendment, and that this is possibly the only place that counsel will be 'limited to one technique or approach'; that the right to effective assistance of counsel envisions counsel acting within the laws of reason.

58. It is additionally absurd, for the District Court to require a state prisoner to point to and/or be held to make reference to 'evidence' that the litigant submits does not exist, and then use the same lack of record evidence as support via. 'a silent record'. The Third Circuit is, in effect, requiring a petitioner to document the very evidence that the litigant says does not exist without regard for the truth-determining process.

59. Petitioner has submitted that the necessity of an evidentiary hearing, so that trial counsel may be utilized to develop the record, does not encroach upon the **§2254(d)(2)** requirement being that the nonexistent fctor has already been estblished; i.e., unreasonable determination. See also **Massaro**, supra, ("Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial."); quoting **Massaro**, 538 U.S. at 505.

60. Petitioner Benjamin respectfully submits that the argument presented to the state courts regarding prejudice and the prejudicial effect of telling the jury they had been presented with evidence that has no basis in the trial record, whether by inference of otherwise, has simply been ignored.

61. As presented to the state courts, the action complained of was of a substantial and injurious effect "because the verdict rested in a credibility determination, and the comments would appear to have had the effect of, raising in the jurors' minds the inference that petitioner was, or at least believed himself to be guilty. Such an inference might certainly tend the jury to disbelieve [Petitioners] version of the story." Quoting **Marshall v. Hendricks**, 307 F.3d 36, 76 (3rd Cir. 2002) (internal quotation marks and citations omitted).

62. Whereby this litigant respectfully requests this Honorable Court to exercise jurisdiction and allow the habeas petition as submitted to the District Court to be reviewed with regard for performance and prejudice under the Strickland standard.

V.

WHETHER THIRD CIRCUIT HOLDING OF DENIAL OF A COA FOR "SUBSTANTIALLY THE SAME REASONS PROVIDED BY THE DISTRICT COURT" CONFLICTS WITH THE RULING OF OTHER CIRCUIT COURTS AND U.S. SUPREME COURT PRECEDENT AS SUCH A RULING IS BEYOND THE THRESHOLD INQUIRY REQUIRED FOR ISSUANCE OF A COA?

63. Petitioner Benjamin submits that he and other similarly situated state prisoners are being subjected to assembly line denials of lawful requests for COA's by the Third Circuit apparently under a higher standard than that of what the law requires.

64. In **Miller-El v. Cockrell**, 537 U.S. 322, 123 S.Ct. 1029 (2003), the U.S. Supreme Court elaborated as follows:

> "The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claim. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." Quoting **Miller-El**, 537 U.S., at 336-337.

65. However, upon submitting an APPLICATION FOR CERTIFICATE OF APPEALABILITY, in this case, the Third Circuit Court of Appeals issued the following:

ORDER

Benjamin's request for a certificate of appealability is denied because he has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Jurists of reason would agree, without debate, with the District Court that all of Benjamin's claims either lack merit or are not cognizable on habeas review, for substantially the same reasons provided by the District Court. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). The District Court also did not err in denying Benjamin's request for an evidentiary hearing, as Benjamin's claims could properly be addressed on the record. See Schriro v. Landrigan, 550 U.S. 465, 474 (2007) ("[I]f the record retues the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing."). See (**Appx: B**) Date Filed Oct. 9, 2019 **[19-1678].**

66. Petitioner submits that it is apparent that the 'threshold inquiry' envisioned in **Miller-El**, supra, has been reduced to 'the reasons of the District Court', which essentially stands as a merits determination being that the District Court was not limited to a 'threshold inquiry'.

67. However, this practice seems to be limited to a new trend that only shows up in the Third Circuit, this is contrary to what is required by the U.S. Supreme Court. See **Buck v. Davis**, 137 S.Ct. 759, 775, 197 L.Ed.2d 1 (2017) ("A court of appeals should limit its examination at the COA stage to a threshold inquiry into the underlying merits of the claims, and ask only if the District Court's decision was debatable." (alterations adopted and quotation marks omitted)); quoting **Muoio v. United States**, 2019 U.S. App. LEXIS 32334, *1 (11th Cir. 2019); see also **Tharpe v. Sellers**, 583 U.S. ___, 138 S.Ct. ___, 199 L.Ed.2d 424 (2018) (per curiam) ("the court of appeals' review should not have rested on the ground that it was indisputable among reasonable jurists that Gattie's service on the jury did not prejudice Tharpe.") **Tharpe**, 199 L.Ed.2d at 425.

68. Petitioner Benjamin submits that in the Third Circuit habeas petitioners have no workable model in which to separate-the-wheat-from-the-chaff because substantially the same reasons provided by the district court, includes, all the reasons provided by the District Court; which far exceeds anything even remote to a 'threshold inquiry'. See **Hunter v. United States**, 559 F.3d 1188, 1191 (11th Cir. 2009) (stating that, in order to meet deficiency prong of Strickland such that a COA should issue, the petitioner must make a substantial showing that "no competent counsel would have taken the action that his counsel did take"), vacated on other grounds, 558 U.S. 1143, 130 S.Ct. 1135, 175 L.ed.2d 967 (2010).

69. To believe that the for "substantially the same reasons provided by the District Court; decides the merits of an appeal, and thejustifies its denial of a COA based on its adjudication of the actual merits, being that that is exactly what the District Court decided - the merits, whereby the Third Circuit has effectively decided an appeal without jurisdiction. The law says this cannot stand, whereby this litigant asks this Honorable Court to exercise jurisdiction and intervene on behalf of similarly situated state prisoners. See also **Williams v. Taylor**, 529 U.S. 362, 120 S.Ct. 1495, (2000) ("We have always held that federal courts, even on habeas, have an independent obligation to say what the law is." (citation omitted). **Williams**, 529 U.S. at 384.

CONCLUSION

For all of the reasons set forth herein the writ of certiorari should be GRANTED.

Dated: February 23rd, 2020

Respectfully submitted,

K. B.

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