IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY TWITTY, Petitioner v. BARRY SMITH, et. al. Respondents	CIVIL ACTION NO. 17-5016

ORDER

AND NOW, this day of , 2018, upon consideration of the Petition for Writ of Habeas Corpus (Dkt. No. 3);[1] the Response in Opposition to Petition for Writ of Habeas Corpus (Dkt. No. 19); the Pro-Se Petitioner Reply to Respondent's Answer to Writ of Habeas Corpus (Dkt. No. 20); the Surreply in Further Opposition to Petition for Writ of Habeas Corpus (Dkt. No. 22); and after review of the Report and Recommendation ("R&R") of United States Magistrate Judge Henry S. Perkin dated August 8, 2018, **IT IS HEREBY ORDERED** that:

1. the R&R is **APPROVED** and **ADOPTED**;

2. the Petition for Writ of Habeas Corpus is **DENIED** with prejudice and **DISMISSED** without an evidentiary hearing; and

3. there is no probable cause to issue a certificate of appealability.

BY THE COURT:

MITCHELL S. GOLDBERG, J.

[1] Following the filing of his habeas Petition, Petitioner also filed the following documents: (1) Application to Correct Alredy [sic] Filed Writ of Habeas Corpus (Dkt. No. 11); (2) Pro-Se Petitioner's Status Update (Dkt. No. 12); and (3) Supplement to Already Filed Status Update (Dkt. No. 13). These documents were also considered by the Court.

(APPENDIX- A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY TWITTY, Petitioner v. BARRY SMITH, et. al. Respondents	:	CIVIL ACTION NO. 17-5016 FILED AUG - 8 2018

Henry S. Perkin, M.J. **August 8, 2018**

REPORT AND RECOMMENDATION

Presently before the Court is the *pro se* Petition for Writ of Habeas Corpus (Docket No. 3) dated November 24, 2017 and filed November 29, 2017 by the Petitioner, Anthony Twitty ("Petitioner"), pursuant to 28 U.S.C. § 2254. Petitioner's Application to Correct Alredy [sic] Filed Writ of Habeas Corpus (Docket No. 11) was filed January 18, 2018; Pro-Se Petitioner's Status Update (Docket No. 12) was filed January 25, 2018; and Petitioner's Supplement to Already Filed Status Update (Docket No. 13) was filed January 25, 2018. Respondents filed a Response to Petition for Writ of Habeas Corpus (Docket No. 19) on June 21, 2018. The Pro-Se Petitioner Reply to Respondent's Answer to Writ of Habeas Corpus (Docket No. 20) was filed July 5, 2018. Respondents filed a Surreply in Further Opposition to Petition for Writ of Habeas Corpus (Docket No. 22) on July 31, 2018.

Petitioner is currently incarcerated in State Correctional Institution - Houtzdale. By order of January 11, 2018, the matter was assigned to the undersigned for preparation of a Report and Recommendation. For the reasons that follow, it is recommended that the Petition should be denied with prejudice and dismissed without an evidentiary hearing.

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I. PROCEDURAL HISTORY.[1]

State Court Proceedings

On July 14, 2003, following a jury trial before the Honorable Renee Cardwell Hughes in the Court of Common Pleas of Philadelphia County, Petitioner was found guilty of rape, involuntary deviate sexual intercourse, aggravated indecent assault, unlawful contact with a minor, endangering the welfare of a minor, and corrupting the morals of a minor.[2] See State

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[1] This information is taken from the Petition for Writ of Habeas Corpus, Petitioner's subsequent filings including his Reply, Respondents' Response and Surreply in Opposition, and the attachments to those pleadings. In addition, this Court ordered and reviewed the state court record in this matter. See Docket No. 14. The information contained in the state court record has been considered and incorporated into this Report and Recommendation.

[2] The trial court noted the following relevant facts:

> In the early morning of February 17, 2003, sixteen (16) year old [CS] (hereinafter complainant) was at her home, located at 118 North 62nd Street in the City and County of Philadelphia, Pennsylvania with her mother's boyfriend Anthony Twitty (hereinafter appellant), and her siblings. Her mother was snowed in at work as a result of a particularly harsh winter storm. While the complainant watched television in her mother's bedroom, Anthony Twitty repeatedly entered the room to talk with the child. Eventually, he sat on the floor at the foot of the bed and asked her, "Do you want to feel good?" The complainant responded "No". He repeatedly asked this question and each time the complainant responded "No". Despite the child's refusal, Anthony Twitty pulled at the complainant's robe and rubbed the outside of her leg. The appellant, continued the unwanted touches and even offered the complainant fifty ($50.00) dollars, if she allowed him to lick and suck her breasts and vagina. Although the complainant refused his advances, Anthony Twitty forcefully unbuttoned the complainant's robe. The appellant pulled down the complainant's pajama pants and underwear opened her legs and begin [sic] to rub on her vagina and stuck his thumb inside of her vagina. During the course of the assault, the appellant rubbed his penis against her vagina for approximately five (5) to ten (10) minutes and ultimately ejaculated on the complainant's upper thigh area near her vagina. Anthony Twitty went to the bathroom and returned with a washcloth to wipe (CS)'s leg.
>
> Later that morning, the complainant left the home and went to her mother's job. The complainant told her mother about the incident which had occurred the night before as well as other sexual incidents with the appellant that began when she was five (5) years old. The appellant would touch her vagina, (sic) make her perform oral sex and other sexual acts with him. The complainant gave a detailed statement to the police and was taken to the Jefferson Hospital for an examination.

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Court Docket; Court of Common Pleas of Philadelphia County, CP-51-CR-0303181-2003. On September 3, 2003, Judge Hughes sentenced Petitioner to an aggregate sentence of forty-one (41) to eighty-two (82) years of incarceration. See State Court Docket; Court of Common Pleas of Montgomery County, CP-51-CR-0303181-2003.

Petitioner filed a direct appeal with the Pennsylvania Superior Court. See State Court Docket; Court of Common Pleas of Philadelphia County, CP-51-CR-0303181-2003. On May 25, 2005, the Superior Court affirmed the conviction and judgment of sentence of the trial court. Commonwealth v. Twitty, 876 A.2d 433 (Pa. Super. May 25, 2005). Petitioner filed a petition for allowance of appeal to the Pennsylvania Supreme Court, which was denied on December 28, 2005. Commonwealth v. Twitty, 586 Pa. 749, 892 A.2d 823 (Pa. December 28, 2005) (364 EAL 2005) (table).

On February 2, 2007, Petitioner filed a *pro se* petition for collateral review under the Pennsylvania Post Conviction Relief Act ("PCRA"). See State Court Docket; Court of Common Pleas of Philadelphia County, CP-51-CR-0303181-2003. Counsel (Sandjai Weaver, Esquire) was appointed to represent Petitioner. Following the appointment of counsel, an amended PCRA petition was filed on July 27, 2007. The PCRA court filed a notice of dismissal pursuant to Pennsylvania Rule of Criminal Procedure 907, and on April 17, 2008, the amended PCRA petition was formally dismissed without an evidentiary hearing. No appeal was taken as a result of communication problems between Petitioner and PCRA counsel. On November 21, 2008, Petitioner filed a subsequent PCRA petition requesting reinstatement of his appellate rights. On April 29, 2009, the PCRA court reinstated Petitioner's appellate rights *nunc pro tunc*.

Commonwealth v. Twitty, 876 A.2d 433, 435-436 (Pa. Super. May 25, 2005) (citations omitted).

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See State Court Docket; Court of Common Pleas of Philadelphia County, CP-51-CR-0303181-2003.

Petitioner appealed the denial of his PCRA petition to the Pennsylvania Superior Court. On May 27, 2010, the Superior Court affirmed the dismissal of his PCRA petition. Commonwealth v. Twitty, No. 1437 EDA 2009, 4 A.3d 208 (Pa. Super. May 27, 2010). Petitioner filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, which was denied by Order of the Supreme Court dated November 17, 2010. Commonwealth v. Twitty, No. 337 EAL 2010, 608 Pa. 666, 13 A.3d 478 (Pa. November 17, 2010)(table).

On September 1, 2015, Petitioner filed his second *pro se* PCRA petition. See State Court Docket; Court of Common Pleas of Philadelphia County, CP-51-CR-0303181-2003. On March 30, 2016, the PCRA court entered an order giving Pa.R.Crim.P. 907 notice of its intent to dismiss Petitioner's PCRA petition. Petitioner submitted a response to the Rule 907 notice on April 15, 2016, and submitted an amended petition on September 23, 2016. By order dated October 6, 2016, the PCRA court dismissed Petitioner's second PCRA petition as untimely. See State Court Docket; Court of Common Pleas of Philadelphia County, CP-51-CR-0303181-2003. Following the denial of his second PRCA petition, Petitioner filed an appeal to the Pennsylvania Superior Court.

Petitioner filed a third PCRA petition on October 10, 2017. See State Court Docket; Court of Common Pleas of Philadelphia County, CP-51-CR-0303181-2003. On July 13, 2018, the PCRA court dismissed Petitioner's third PCRA petition as premature on the basis of Petitioner's pending appeal in the Superior Court.

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On July 26, 2018, the Superior Court affirmed the PCRA court's dismissal of Petitioner's second PCRA petition as untimely. Commonwealth v. Twitty, No. 3282 EDA 2016, 2018 WL 3582355 (Pa. Super. July 26, 2018). More specifically, the Superior Court noted as follows:

> Appellant's judgment of sentence became final on March 28, 2006, ninety days after the Pennsylvania Supreme Court denied *allocatur* and time expired for Appellant to file an appeal with the United States Supreme Court. 42 Pa.C.S. § 9545(b)(3); U.S. Sup. Ct. R. 13. Therefore, Appellant had to file the current PCRA petition in this matter by March 28, 2007, in order for it to be timely.
>
> Appellant filed the instant PCRA petition on September 1, 2015. Accordingly, Appellant's instant PCRA petition is patently untimely.
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> As previously stated, if a petitioner does not file a timely PCRA petition, his petition may nevertheless be received under any of the three limited exceptions to the timeliness requirements of the PCRA. 42 Pa.C.S. § 9545(b)(1). If a petitioner asserts one of these exceptions, he must file his petition within sixty days of the date that the exception could be asserted. 42 Pa.C.S. § 9545(b)(2).
>
> Appellant argues in his first issue that he is eligible for relief pursuant to a time-bar exception under 42 Pa.C.S. § 9545(b)(1). Appellant maintains that pursuant to a recent federal decision, ***Brooks v. Gilmore***, 2017 WL 3475475 (E.D. Pa. 2017), the jury instructions regarding reasonable doubt issued at his trial resulted in a manifest injustice. Appellant's Brief at 7-8. Specifically, Appellant states that the jury instructions improperly elevated the level of doubt necessary to secure an acquittal. ***Id.*** at 8. Appellant asserts that ***Brooks*** was decided August 11, 2017, and Appellant filed his Supplemental petition on this basis on September 4, 2017. ***Id.*** at 10. Therefore, Appellant contends, he met the requirements necessary to invoke an exception. ***Id.*** at 8, 10.
>
> Despite this assertion, Appellant has failed to establish an exception to the time-bar. To the extent the ***Brooks*** holding could satisfy the new constitutional right exception under Section 9545(b)(1)(iii), it fails. To satisfy this exception to the time bar, Appellant must establish both that the case established a new

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constitutional right and that it applies retroactively. ***Commonwealth v. Ross***, 140 A.3d 55, 58 (Pa. Super. 2016). In ***Brooks***, the appellant had filed a writ for *habeas corpus*. ***Brooks***, 2017 WL 3475475 at * 2. The district court concluded that the jury instruction for reasonable doubt, as explained to the jury through an emotionally charged hypothetical, improperly elevated the level of doubt necessary to secure an acquittal. ***Id.*** at 1. The ***Brooks*** holding did not announce a new constitutional right, nor did it hold that the decision should be applied retroactively. Furthermore, ***Brooks*** was a decision issued by a federal district court, not the Supreme Court of the United States or the Supreme Court of Pennsylvania. ***See*** 42 Pa.C.S. § 9545(b)(1)(iii) ("the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively."). Thus, Appellant has failed to satisfy the new constitutional right exception to the time-bar pursuant to 42 Pa.C.S. § 9545(b)(1)(iii).

Additionally, the ***Brooks*** decision cannot satisfy the newly-discovered fact exception under Section 9545(b)(1)(ii). Our Supreme Court has expressly rejected the notion that judicial decisions can be considered newly-discovered facts pursuant to Section 9545(b)(1)(ii). ***Commonwealth v. Watts***, 23 A.3d 980, 986-987 (Pa. 2011). Thus, Appellant's reliance on ***Brooks*** does not satisfy the newly-discovered fact exception to the time-bar.

Consequently, because the instant PCRA petition was untimely and no exceptions apply, the PCRA court lacked jurisdiction to address the claims presented and grant relief. ***See Commonwealth v. Fairiror***, 809 A.2d 396, 398 (Pa. Super. 2002) (holding that PCRA court lacks jurisdiction to hear untimely petition). Likewise, we lack the authority to address the merits of any substantive claims raised in the PCRA petition. ***See Commonwealth v. Bennett***, 930 A.2d 1264, 1267 (Pa. 2007) ("[J]urisdictional time limits go to a court's right or competency to adjudicate a controversy.").

Commonwealth v. Twitty, No. 3282 EDA 2016, 2018 WL 3582355, at *3 (Pa. Super. July 26, 2018).

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Federal Court Proceedings

Petitioner signed the instant *pro se* Petition for Writ of Habeas Corpus on November 24, 2017, and it was docketed by the Clerk of Court in the United States District Court for the Eastern District of Pennsylvania on November 29, 2017. See Docket No. 3. Pursuant to the prison mailbox rule, this Court will consider the date of filing of the habeas Petition as November 24, 2017.[3] Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1997) (motion is deemed timely filed on date petitioner gave petition to prison officials to mail).

The case was assigned to the Honorable Mitchell S. Goldberg, who referred it to the undersigned for preparation of a Report and Recommendation on January 11, 2018. On January 17, 2018, the undersigned ordered the District Attorney of Philadelphia County added as a Respondent, and directed the District Attorney to file a Response and a Brief or Memorandum in support thereof. See Docket No. 10. On that same date, the undersigned also entered an Order directing that the Prothonotary/Clerk of Courts of Philadelphia County forward copies of all records, including transcripts of notes of testimony at arraignment, pre-trial and suppression hearings, trial, sentencing, and post-conviction hearings and appeals; all trial and appellate briefs and petitions, all pleadings, and all court opinions of proceedings in connection with this matter. See Docket No. 9. The state court record pertaining to Commonwealth v. Anthony S. Twitty, Court of Common Pleas of Philadelphia County, No. CP-51-CR-0303181-2003, was received in

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[3] The undersigned notes that Petitioner filed a Motion to Preserve Filing of Writ of Habeas Corpus on October 30, 2017, which motion was signed by Petitioner on October 26, 2017. See Docket No. 1. By Order dated November 28, 2017, the Honorable Mitchell S. Goldberg denied Petitioner's motion to preserve filing, noting that contrary to Local Civil Rule 9.3(b) and Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts, Petitioner did not use the current standard 28 U.S.C. § 2254 form as has been required by this court since July 2010. See Docket No. 2. Judge Goldberg directed the Clerk of Court to furnish Petitioner with a blank copy of the Court's current standard form for filing a petition pursuant to 28 U.S.C. § 2254. Judge Goldberg directed Petitioner to complete and sign the standard form of petition, and return it to the Clerk of Court within thirty days.

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Chambers of the undersigned on March 13, 2018. See Docket No. 14.

Petitioner's Application to Correct Alredy [sic] Filed Writ of Habeas Corpus was filed January 18, 2018. See Docket No. 11. Pro-Se Petitioner's Status Update (Docket No. 12) was filed January 25, 2018, and Petitioner's Supplement to Already Filed Status Update (Docket No. 13) was filed January 25, 2018.

On June 21, 2018, Respondents filed a Response to Petition for Writ of Habeas Corpus.[4] See Docket No. 19. Respondents contend that the Petition is time-barred, the principles of statutory and equitable tolling do not apply to excuse the untimeliness of the Petition, and the case should be dismissed with prejudice and without an evidentiary hearing. In response, Petitioner filed his Pro-Se Petitioner Reply to Respondent's Answer to Writ of Habeas Corpus on July 5, 2018. See Docket No. 20. In so doing, Petitioner avers that his habeas Petition is entitled to equitable tolling, and fits within the miscarriage of justice exception to the statute of limitations.

By Order dated July 16, 2018, the undersigned directed Respondents to file a surreply with respect to Petitioner's reply brief. In particular, the undersigned ordered Respondents to "address Petitioner's assertion that he is entitled to equitable tolling on the basis

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[4] Prior to filing their response in this matter, Respondents filed a motion for extension of time to submit their response to the habeas Petition. Respondents' *Nunc Pro Tunc* Motion for Extension of Time to Submit Response to Petition for Writ of Habeas Corpus was filed March 23, 2018. See Docket No. 15. Following this Court's Order of March 26, 2018 granting Respondents' motion for extension of time to file their response (see Docket No. 16), Petitioner filed an objection to Respondents' motion for an extension. See Docket No. 17. Although this Court did thoroughly consider Petitioner's objection at the time it was filed, the Court wishes to make it clear that in rendering its decision on the motion for enlargement of time, the undersigned considered the vast caseload assigned to the District Attorney's office, and the limited personnel available in the office to address these matters. The undersigned determined that Respondents set forth good cause to warrant the ninety-day extension of time, and this Court stands by the Order of March 26, 2018, which granted an extension of time to Respondents. When good cause is provided, this Court has freely granted requests for extension of time, by both petitioners and respondents, in the habeas actions pending before us.

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that he 'suffered a miscarriage of justice, due to the hypothetical jury instruction that improperly elevated the level of doubt necessary to secure an acquittal.'" See Docket No. 21. In accordance with the Court's Order, Respondents filed a Surreply in Further Opposition to Petition for Writ of Habeas Corpus on July 31, 2018. See Docket No. 22. In their surreply, Respondents contend that Petitioner fails to meet the requirements for the extraordinary remedy of equitable tolling, and the "miscarriage of justice" exception to AEDPA's timeliness provisions applies only to compelling claims of actual innocence, a claim that Petitioner does not assert.

Having reviewed all of the documents of record in this case, we offer this Report and Recommendation.

II. DISCUSSION.

A. The Federal Habeas Corpus Petition at Issue is Statutorily Time-Barred.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which was enacted on April 24, 1996, requires that federal courts give greater deference to a state court's legal determinations. AEDPA also amended 28 U.S.C. section 2244, to require that a strict one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court.[5] However, if direct review of a

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[5] 28 U.S.C. section 2244 requires that:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented

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criminal conviction ended prior to AEDPA's effective date, a prisoner has one year subsequent to the April 24, 1996 effective date to properly file a habeas action. Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998). In this case, the applicable starting point to examine the limitation period is the latest date on which the judgment of sentence became final, either by the conclusion of direct review or the expiration of the time for seeking such review. See 28 U.S.C. § 2244(d)(1).

Petitioner's judgment of sentence became final on March 28, 2006, ninety days after the Pennsylvania Supreme Court denied his petition for allowance of appeal and the time for seeking discretionary review with the United States Supreme Court expired. See U.S. Supreme Court Rule 13 (allowing ninety days to file a petition for writ of *certiorari*); Kapral v. United States, 166 F.3d 565, 570-571 (3d Cir. 1999) (judgment of sentence becomes final at conclusion of direct review or expiration of time for seeking such review). Accordingly, the one-year time limit for Petitioner to timely file a federal Petition for Writ of Habeas Corpus began on March 28, 2006. In the absence of any statutory or equitable tolling, Petitioner, therefore, would have been required to file his federal habeas petition on or before March 28, 2007. Petitioner, however, did not file his federal habeas Petition until November 24, 2017, more than ten years after the limitation period expired.

> from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

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We note, however, that because AEDPA's one-year statute of limitations is subject to both statutory and equitable tolling, we must examine whether the instant habeas Petition may be considered timely filed under either concept. 28 U.S.C. § 2244(d) (enumerating statutory tolling provisions); Merritt v. Blaine, 326 F.3d 157, 161 (3d Cir.), cert. denied, 540 U.S. 921 (2003) (holding AEDPA's time limit is subject to the doctrine of equitable tolling, a judicially crafted exception).

B. The Federal Habeas Corpus Petition at Issue is Not Eligible for Statutory or Equitable Tolling.

AEDPA's one-year statute of limitations is subject to both statutory and equitable tolling. 28 U.S.C. § 2244(d) (enumerating statutory tolling provisions); Merritt v. Blaine, 326 F.3d 157, 161 (3d Cir.), cert. denied, 540 U.S. 921 (2003) (holding AEDPA's time limit is subject to the doctrine of equitable tolling, a judicially crafted exception).

1. Statutory Tolling

We note initially that Petitioner is not entitled to a new, extended deadline for AEDPA's limitation period pursuant to 28 U.S.C. § 2244(d)(1). Petitioner does not allege, nor is there evidence to demonstrate that state action prevented the timely filing of his habeas action. 28 U.S.C. § 2244(d)(1)(B). In addition, Petitioner has not made a showing that the factual predicate of his claims was not discoverable through the exercise of due diligence long ago. 28 U.S.C. § 2244(d)(1)(D). It appears, however, that Petitioner is attempting to avail himself of 28 U.S.C. § 2244(d)(1)(C) as his basis for why his habeas Petition is timely, noting that it was "filed within 60 days of the court's decision in BASIL BROOKS V. ROBERT GILMORE." See Petition at 19, Docket No. 3.

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Section 2244(d)(1)(C) states that AEDPA's one-year limitations period commences, *inter alia*, on "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Id. The case upon which Petitioner appears to rely, Brooks v. Gilmore, No. CV 15-5659, 2017 WL 3475475 (E.D. Pa. Aug. 11, 2017), appeal dismissed sub nom., Brooks v. Superintendent Greene SCI, No. 17-2971, 2018 WL 1304895 (3d Cir. Feb. 28, 2018), is not a United States Supreme Court case, but, rather, was decided by the Honorable Gerald A. McHugh of this District. Brooks is clearly not a Supreme Court case, nor does it announce a newly recognized constitutional right that is retroactively applicable to cases on collateral review, as § 2244(d)(1)(C) requires. Accordingly, Petitioner's attempt to avail himself of 28 U.S.C. § 2244(d)(1)(C) fails; the claims alleged in the Petition do not rely on a new rule of federal constitutional law of retroactive application. 28 U.S.C. § 2244(d)(1)(C).

➔ With respect to Petitioner's PCRA filing, we note that the limitations period will be statutorily tolled for the time during which a "properly filed" application for state post-conviction or other collateral review is pending. See 28 U.S.C. § 2244(d)(2). However, if a PCRA petition is not timely filed, it is not considered properly filed in order to toll the AEDPA one-year statutory time period. Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005).

Petitioner's first PCRA petition was filed on February 2, 2007, during the running of the one-year habeas clock. Because 311 days of the one-year time period had elapsed, the clock was tolled with approximately 54 days remaining before expiration. See Fed.R.Civ.P. 6(a)(1). On November 17, 2010, Petitioner's PCRA petition was no longer pending when the

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Supreme Court dismissed his appeal. As a result, the one-year statutory period resumed on November 17, 2010,[6] and expired 54 days later on January 10, 2011. The present Petition was filed on November 24, 2017, nearly seven years after the period of limitation expired.[7]

Petitioner's second PCRA petition, filed on September 1, 2015 does not give rise to statutory tolling. This petition has been ruled untimely by both the PCRA court and Superior Court,[8] and was not properly filed.[9] See Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005) ("Because the state court rejected petitioner's PCRA petition as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under § 2244(d)(2)").

2. Equitable Tolling

This Court must next examine whether AEDPA's statute of limitations should be equitably tolled to consider the Petition timely filed. Robinson v. Johnson, 313 F.3d 128, 134

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[6] In the Third Circuit, a timely filed collateral relief petition is considered pending until 30 days after the appeal from its grant or denial is completed, regardless of whether the Petitioner seeks discretionary review of the appellate decision with the Supreme Court of Pennsylvania. See Swartz v. Myers, 204 F.3d 417 (3d Cir. 2000). However, a collateral relief petition is not considered pending during the time after the completion of the state's review during which certiorari could be sought in the Supreme Court of the United States. See Stokes v. The District Attorney of the County of Philadelphia, 247 F.3d 539 (3d Cir. 2001). "'[I]t seems clear that Congress intended to exclude potential Supreme Court review as a basis for tolling the one year limitations period.'" Id. at 542 (quoting Isham v. Randle, 226 F.3d 691, 695 (6th Cir. 2000), cert. denied, 531 U.S. 1201 (2001)(further citation omitted)). In reaching this decision, the Third Circuit recognized that all several other circuits which have discussed this issue have all reached the same conclusion. Id. at 542.

[7] Even if this Court were to consider the date that Petitioner signed his motion to preserve (see Docket No. 1) as the filing date of his habeas Petition, we note that Petitioner would still clearly be time-barred. Petitioner signed his Motion to Preserve Filing of Writ of Habeas Corpus on October 26, 2017, and it was filed on October 30, 2017. See Docket No. 1.

[8] Commonwealth v. Twitty, No. 3282 EDA 2016, 2018 WL 3582355, at *3 (Pa. Super. July 26, 2018).

[9] Petitioner's third PCRA petition, filed on October 10, 2017, was dismissed by the PCRA court on July 13, 2018 as premature on account of Petitioner's then pending appeal in the Superior Court. See State Court Docket; Court of Common Pleas of Philadelphia County, CP-51-CR-0303181-2003. Like Petitioner's second PCRA petition, his third PCRA petition was also untimely, and, therefore, was not properly filed. See Pace, 544 U.S. at 417.

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(3d Cir. 2002), cert. denied, 540 U.S. 826 (2003)(citing Miller v. New Jersey State Dep't of Corr., 145 F.3d 616, 617-618 (3d Cir. 1998)(citation omitted). The limitation period will be equitably tolled when the principles of equity would make the rigid application of a limitation period unfair. Satterfield v. Johnson, 434 F.3d 185, 195 (3d Cir. 2006); Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999).

Miscarriage of Justice

Petitioner asserts that he is entitled to equitable tolling because he fits into the miscarriage of justice exception to AEDPA's statute of limitations. See Pro-Se Petitioner Reply to Respondent's Answer to Writ of Habeas Corpus ("Petitioner's Reply"), Docket No. 20. More specifically, Petitioner avers that he "suffered a miscarriage of justice[] due to the hypothetical jury instruction that improperly elevated the level of doubt necessary to secure an acquittal." See Petitioner's Reply at 2, 5, 7. Petitioner again cites Brooks, supra, arguing that "a denial of a fair trial due to the judge's deficient jury instruction amounts to a miscarriage of justice." See Petitioner's Reply at 2. As correctly noted by Respondents, however, "miscarriage of justice" in the habeas context is a term of art, which follows the same legal requirements as the actual innocence exception. See Surreply in Further Opposition to Petition for Writ of Habeas Corpus (Respondents' Surreply"), Docket No. 22 at 2.

"To show a fundamental miscarriage of justice, a petitioner must demonstrate that he is actually innocent of the crime." Keller v. Larkins, 251 F.3d 408, 415-416 (3d Cir. 2001). In this context, "'actual innocence' means factual innocence, not mere legal insufficiency." Bousely v. United States, 523 U.S. 614, 623 (1998); United States v. Garth, 188 F.3d 99, 107 (3d Cir. 1999). Neither the United States Supreme Court nor the Third Circuit has addressed

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whether there is an "actual innocence" exception to the AEDPA statute of limitations. See LaCava v. Kyler, 398 F.3d 271, 274 n.3 (3d Cir. 2005) (declining to address whether petitioner's actual innocence claim could overcome AEDPA time bar); Hussman v. Vaughn, 67 Fed. Appx. 667, 669 (3d Cir.) (finding petitioner had no basis to assert an actual innocence claim and declining to rule on issue)(not precedential), cert. denied, 540 U.S. 930 (2003).

Assuming, *arguendo*, that an actual innocence exception does apply to the AEDPA statute of limitations, Schlup v. Delo, 513 U.S. 298, 321-324 (1995), requires that a petitioner must present "new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial" showing that in light of that new evidence, "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." Id. at 324, 327. See also Horning v. Lavan, 2006 U.S. App. LEXIS 24678, at *6-*12 (3d Cir. October 2, 2006) (applying Schlup standard and explaining "actual innocence" requires showing of due diligence). Evidence is new if it was not available at trial or could not have been discovered earlier through reasonable diligence. Goldblum v. Klem, 510 F.3d 204, 226 n.14 (3rd Cir. 2007); Hubbard v. Pinchak, 378 F.3d 333, 340 (3d Cir. 2004), cert. denied, 543 U.S. 1070 (2005) (petitioner's own testimony not "new" under Schlup analysis because it was available at trial).

Petitioner cannot satisfy this burden. In fact, as correctly noted by Respondents (Respondent's Surreply at 3-4), the habeas Petition and Petitioner's subsequent filings do not even allege his innocence. Petitioner has not submitted any evidence, such as scientific evidence, eyewitness accounts, or physical evidence, which would tend to support a finding of actual innocence. To the contrary, Petitioner attempts to treat his allegedly meritorious claim as

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evidence that there was a miscarriage of justice sufficient to excuse his noncompliance with AEDPA's statute of limitations. See, e.g., Petitioner's Reply at 2 ("clearly a denial of a fair trial due to the judge's deficient jury instruction amounts to a miscarriage of justice"); 5 ("clearly a denial of a constitutional right to a fair trial premised on a defective jury instruction creates a miscarriage of justice"); 7 ("BASIL BROOKS establishes a miscarriage of justice and a violation of Petitioner's 14th Amendment right to due process of law"). We agree with Respondents in that under Petitioner's "conception of the miscarriage of justice exception, *any* meritorious claim could evade AEDPA's one-year time bar, no matter how untimely filed. Such a limitations period is no limitation at all." Respondents' Surreply at 4. "[W]ithout any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." Schlup, 513 U.S. at 316.

Petitioner does not satisfy the stringent standard set forth in Schlup. Moreover, in connection with an actual innocence evaluation, it is necessary to determine whether it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt. The Supreme Court in Schlup made clear that this was a far more demanding inquiry than merely having the reviewing court determine whether the new evidence created a reasonable doubt. Id. at 329. To the contrary, the reviewing court must be satisfied that, in light of the new evidence, not even one juror acting reasonably would have found the petitioner guilty beyond a reasonable doubt. Id. Petitioner cannot meet this test, and we conclude that Petitioner has failed to meet the actual innocence exception (assuming one exists) to the AEDPA statute of limitations. See Schlup, 513 U.S. at 331-332 (a court evaluating a gateway actual innocence

(APP-A)

claim may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence).

Equitable Tolling Analysis

Courts must be sparing in their use of equitable tolling. Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 239 (3d Cir. 1999). In fact, the United States Court of Appeals for the Third Circuit has held that equitable tolling is proper "only in the rare situation where [it] is demanded by sound legal principles as well as the interests of justice." United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998)(citation omitted). "The two general requirements for equitable tolling: (1) that 'the Petitioner has in some extraordinary way been prevented from asserting his or her rights;' and (2) that the petitioner has shown that 'he or she exercised reasonable diligence in investigating and bringing [the] claims.'" Merritt v. Blaine, 326 F.3d 157, 168 (3d Cir. 2003), citing Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001). Mere excusable neglect is not sufficient. Miller, 145 F.3d at 618 (quoting New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1126 (3d Cir. 1997) and citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990)).

The Third Circuit has set forth the following three circumstances in which equitable tolling is permitted: (1) if the [Respondent] has actively misled the [Petitioner]; (2) if the [Petitioner] has in some extraordinary way been prevented from asserting his rights, or (3) if the [Petitioner] has timely asserted his rights mistakenly in the wrong forum. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001), cert. denied, 534 U.S. 944 (2001)(citing Jones, 195 F.3d at 159 (citations omitted)). "In non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for

(APP-A)

equitable tolling." Fahy, 240 F.3d at 244. The habeas petitioner bears the burden of demonstrating both his entitlement to equitable tolling and his due diligence. Pace, 544 U.S. at 418; Cooper v. Price, 82 Fed.Appx. 258, 260 (3d Cir. 2003); Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982); United States v. Soto, 159 F.Supp.2d 39, 45 (E.D. Pa. 2001) (Van Antwerpen, J.).

Petitioner asserts in his Reply that "he is entitled [to] equitable tolling[] for all the foregoing reasons." See Petitioner's Reply at 6. Other than asserting the "miscarriage of justice" exception, which this Court has already determined does not apply, Petitioner does not assert with any specificity what "reason" would warrant equitable tolling in this matter. Certainly, Petitioner has failed to assert any of the above three circumstances which the Third Circuit has previously determined would permit equitable tolling. In fact, as correctly noted by Respondents, the only point that even remotely may sound in equitable tolling is Petitioner's remark that he "from February 2010 until May 2011 was in the state of Michigan due to overcrowding in [the] Pennsylvania prison system," and that "during this time [he] was outside of Pennsylvania['s] jurisdiction." See Petitioner's Reply at 3. We agree with Respondents that Petitioner "offers no reason why this would constitute an 'extraordinary circumstance,' nor does he explain how his incarceration in Michigan caused his failure to file a timely petition[,] particularly since he waited over six years after his return to Pennsylvania to file his petition." See Respondents' Surreply at 6.

We conclude that Petitioner has failed to make the threshold proffer necessary to justify this Court's further consideration of his demand for equitable tolling,[10] much less to hold

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10. In determining whether extraordinary circumstances exist to warrant the application of equitable tolling, this Court must also examine Petitioner's due diligence in pursuing the matter under the specific circumstances he faced. Traub v. Folio, No. 04-386, 2004 WL 2252115, at *2 (E.D. Pa. Oct. 5, 2004) (citing Schleuter v. Varner, 384 F.3d 69 (3d Cir. 2004))(affirming dismissal of habeas petition as time barred and not

(APP-A)

an evidentiary hearing. See Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 n.12 (3d Cir. 1991) (petitioner not entitled to evidentiary hearing based on "bald assertions and conclusory allegations"); Mayberry v. Petsock, 821 F.2d 179, 185 (3d Cir. 1987) (same), cert. denied, 484 U.S. 946 (1987); Brown, 669 F.2d at 158 (petitioner bears burden as to all factual and procedural requirements). See generally Pace, 544 U.S. at 418 (petitioner bears burden of demonstrating both entitlement to equitable tolling and his due diligence).

C. Certificate of Appealability.

When a district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, a certificate of appealability should issue only if (1) the petition states a valid claim for the denial of a constitutional right, and (2) reasonable jurists would find it debatable whether the district court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000). In this case, reasonable jurists could not disagree that the instant Petition is time-barred. It is statutorily barred, and neither statutory nor equitable tolling apply to this Petition.

For all of the above reasons, I make the following:

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entitled to equitable tolling because lengthy periods of time had elapsed following his conviction before he sought relief). It is Petitioner's burden to show that he acted with reasonable diligence and that extraordinary circumstances caused his petition to be untimely. Id.

Under the circumstances of this case, Petitioner did not act in a reasonably diligent fashion because a reasonably diligent petitioner would have acted promptly to preserve his rights not only in the state court, but also in *this* Court. Petitioner fails to allege any steps that he took to timely file the instant federal habeas petition. None of the circumstances which warrant equitable tolling apply in this case to render the instant Petition timely. Fahy, 240 F.3d at 244.

(App-A)

RECOMMENDATION

AND NOW, this 8th day of August, 2018, IT IS RESPECTFULLY RECOMMENDED that the instant Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Docket No. 1) should be DENIED with prejudice and DISMISSED without an evidentiary hearing. There is no probable cause to issue a certificate of appealability.

The Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to timely file objections may constitute a waiver of any appellate rights.

BY THE COURT:

HENRY S. PERKIN
UNITED STATES MAGISTRATE JUDGE

(APP-A)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY TWITTY,	:	**CIVIL ACTION**
Petitioner,	:	
v.	:	**No. 17-5016**
BARRY SMITH, ET AL.,	:	
Respondents.	:	

ENT'D MAY 14 2019

ORDER

AND NOW, this 13th day of May, 2019, upon careful and independent consideration of the Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2254 (Doc. No. 3), and after review of the Report and Recommendation of United States Magistrate Judge Harry S. Perkin (Doc. No. 23), and Petitioner's Objections thereto (Doc. No. 26), I find as follows:

1. In 2003, Petitioner, Anthony Twitty, was convicted of, among other things, rape and involuntary deviate sexual intercourse.[1] His conviction was affirmed on direct appeal by the Pennsylvania Superior Court, and the Pennsylvania Supreme Court denied direct review in 2005.
2. In 2007, Petitioner filed a petition for state collateral review under the Pennsylvania Post-Conviction Relief Act ("PCRA"). The petition was dismissed without an evidentiary hearing. In 2010, the Pennsylvania Superior Court affirmed the dismissal of the petition, and the Pennsylvania Supreme Court denied review.

[1] The complete factual and procedural background of this matter is not recounted here, as it is fully set out in Judge Perkin's Report and Recommendation. (See R&R 2–9.)

(APPENDIX A) (APP-A)

3. Approximately seven years later, in October 2017, Petitioner initiated these federal habeas proceedings, *pro se*, contending that an improper jury instruction regarding the burden of proof was given during his 2003 trial, and that his trial counsel was ineffective for failing to object to it.

4. In his Report and Recommendation ("R&R"), Judge Perkin recommended denying the Petition as time-barred under the one-year statute of limitations for a federal habeas petition set out in 28 U.S.C. § 2244(d). Judge Perkin noted that Petitioner's conviction became final on March 28, 2006, after the Pennsylvania Supreme Court declined to review the case on direct appeal, and the time for seeking a writ of certiorari from the United States Supreme Court expired. Petitioner, however, did not file his federal petition until late 2017—more than ten years later. Judge Perkin further concluded that the Petition did not satisfy any statutory or equitable grounds for tolling. (See R&R 9–19.)

5. Petitioner has filed objections to the R&R. I will review *de novo* those portions of the R&R to which Petitioner has specifically objected, but will otherwise not re-address the issues discussed in the R&R apart from noting that Judge Perkin addressed the pertinent issues thoroughly and correctly. See Goney v. Clark, 749 F.2d 5, 6 (3d Cir. 1984) (holding that *de novo* review by a district court is not required where no specific objection to the report and recommendation is made).

6. Petitioner essentially raises three objections to the R&R, none of which have any merit. First, Petitioner objects that Judge Perkin did not reach the merits of his ineffective assistance of counsel claim, and instead denied the Petition on the grounds that it was time-barred. (See Pet'r's Objections 5–7.) However, a court need not reach the merits of a habeas claim if the petition is barred by the statute of limitations set out in § 2244(d) and is not

(APP-B)

subject to statutory or equitable tolling. See, e.g., Merritt v. Blaine, 326 F.3d 157, 161 (3d Cir. 2003) (affirming district court's dismissal of petition as time-barred without reaching merits of the habeas claim).

7. Second, Petitioner contends that Judge Perkin erred by finding "the March 28, 2007 date as being the date that he was to file his [federal habeas] petition," and notes that the PCRA court reinstated his right to appeal that court's denial of his PCRA petition on April 29, 2009. (Pet'r's Objections 2, 4.) But that misstates Judge Perkin's conclusion. As Judge Perkin concluded, while Petitioner's PCRA petition did toll the statute of limitations for filing his federal habeas petition (and *but for* the filing of a PCRA petition, Petitioner's federal habeas petition *would have been* due by March 28, 2007), Petitioner's PCRA petition was no longer pending after the Pennsylvania Supreme Court ultimately denied review of the petition in 2010. And yet, Petitioner did not bring his federal habeas petition until nearly seven years later—long after the expiration of the statute of limitations. (See R&R 12-13.)

8. Third, Petitioner objects to Judge Perkin's recommendation that a certificate of appealability ("COA") be denied, contending that, in order to obtain a COA, he "need only show that [a] reasonable jurist would find it debatable whether Petitioner states a valid claim of the denial of a constitutional right, and that [a] jurist of reason would find it debatable whether the district court was correct in its procedural ruling." (Pet'r's Objections 2, 7–8 (citing Slack v. McDaniel, 529 U.S. 473 (2000.))) However, Petitioner does not explain how jurists of reason could debate the timeliness of his federal habeas petition. Indeed, as explained above, the untimeliness of the Petition is beyond serious dispute.

(APP-A)

WHEREFORE, it is hereby **ORDERED** that:

- Petitioner's Objections (Doc. No. 26) are **OVERRULED**.
- The Report and Recommendation (Doc. No. 23) is **APPROVED** and **ADOPTED**.
- The Petition for a Writ of Habeas Corpus (Doc. No. 3) is **DENIED** and **DISMISSED WITH PREJUDICE**.
- No certificate of appealability shall issue because jurists of reason would not find it debatable whether the Petition is barred by the statute of limitations set out in § 2244(d). Slack v. McDaniel, 529 U.S. 473, 484 (2000).
- The Clerk of Court shall **CLOSE** this case.

BY THE COURT:

MITCHELL S. GOLDBERG, J.

(ADD-A)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY TWITTY,)
PETITIONER) NO._____
V.)
BARRY SMITH,) TRIAL COURT #CP-51-CR-0303181-2003
SUPERINTENDENT SCI-HOUTZDALE, PA.)
RESPONDENT

MOTION FOR RELIEF PURSUANT TO RULE 60(b)(6)
AND IN LINE WITH THE COURT OF APPEALS RECENT DECISION

NOW COMES THE PRO-SE PETITTIONER AND DO HEREBY MOVE THE HONORABLE JUDGES TO GRANT THE HEREIN REQUESTED RELIEF, AND AVER THE FOLLOWING:

1. The Petitioner is incarcerated serving a 44 to 82 yearsentence. He is indigent and cannot afford the fees and cost associated with this filing. Housed at P.O. Box 1000, Houtzdale, Pa. 16698-1000

This court has jurisdiction in the interest of justice, wherein a manifest injustice has occurred which no civilized society can tolerate. The U.S. Court of Appeals for the Third Circuit Recently decided Satterfield v. DA Philadelphia. The court held for the first time that a Rule 60 Motion can be based on a change in the law, provided the change is extraordinary. The court granted Rule 60(b)(6) relief. The court reaffirmed McQuiggin v. Perkins, U.S., 133 S.ct. 1924, 185 L.ed.2d 1019 (2013). Which held that a credible claim of actual innocence or miscarriage of justice falls within an exception to the AEDPA's one year Statute of Limitations. Satterfield filed a Rule 60 Motion citing McQuiggin as an intervening change in the law. The U.S. Court of appeals held that McQuiggin was the kind of extraordinary case that supports a Rule 60 Motion. The decision is consistent with Rivas V. Fischer, 687 A.3d 514, 549 (2d Cir. 2012).

cently the U.S. Court of appeals for the Third Circuit, Has decided Satterfield v. Da Philadelphia. After thirty-two(32) years Satterfield filed a Rule 60(b)(6) Motion, where Satterfield was unable to present his defensive evidence which would show his innocence. The court reaffirmed McQuiggin v. Perkins, U.S..., 133 S.ct. 1924, 185 L.ed.2d 1019 (2013).

Pursuant to Thomas, the standard is met for miscarriage of justice if the petitioner can demonstrate either: (a) THE PROCEEDING RESULTING IN HIS CONVICTION WAS SO UNFAIR THAT A MISCARRIAGE OF JUSTICE OCCURRED WHICH NO CIVILIZED SOCIETY

(APPENDIX-A)(APP-A)

CAN TOLERATE: OR (b) HE IS INNOCENT OF THE CRIMES CHARGED. Commonwealth v. Szuchon, 633 A.2d 1098; Commonwealth v. Beasley, 678 A.2d 773 (1996); Commonwealth v. Romansky, 702 A.2d 1064, The case Sub Judice presents one of the rare instances when the above is unambigiously met; Petitioner maintains that he is innocent, as also established in Satterfield. the actions taken violated his Due Process rights and manifest injustice occurred. The court must also consider that Petitioner suffered layered ineffective assistance of counsel, and violation of an effective appeal. Which is guaranteed by the Constitution of Pennsylvania., one of the grounds enumerated in 42 Pa. C.S. §9542(a)(2) involves claims alleging ineffective assistance of counsel. Thus, the PCRA provides relief to those individuals whose convictions or sentences resulted from ineffective assistance of counsel which,in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa. C.S. 9542(a)(2)(ii). The courts have interpreted this to mean that in order to obtain relief on a claim alleging ineffective assistance of counsel, a petitioner must prove that :(1) the claim underlying the ineffectiveness claim has arguable merit; (2) counsel's actions lacked any reasonable basis; and (3) counsel's actions resulted in prejudice to petitioner, Commonwealth v. Collins, 957 A.2d 237 (2008). And the grounds counsel failed to raise offered a potential for success substantially greater than the course actually pursued. Commonwealth v. Williams, 899 A.2d 1060 (2006). Counsels failure to pursue the issues would have produced a better outcome for the defense. Relief is warranted due to the recent decision in Satterfield, Id. And related cases.

Additionally, this Petition is filed within Sixty(60) days of the decision in Satterfield.

Where counsel gave false testimony concerning a crucial alibi witness.

Where Petitioner suffered prejudice by the in court identification, by Popson, while Petitioner was shackled, Which is even more que

WHEREFORE, Petitioner moves for an acquittal, new trial, the right to establish All grounds as stated herein, and in line with Basil Brooks. Not excluding such other relief the court deems in the interest of justice.

RESPECTFULLY

Anthony Twitty

ANTHONY TWITTY, PRO-SE

INST # FM-4476

P.O. BOX 1000, HOUTZDALE, PA. 16698-1000

DATE: Nov, 22, 2017

CC:FILE.

(APP-A)

CERTIFICATE OF SERVICE:

I, DO HEREBY CERTIFY THAT I AM THIS DAY SERVING UPON THE U.S. DISIRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA. MY MOTION FOR RELIEF PURSUANT TO RULE 60(b)(6) AND IN LINE WITH THE COURT OF APPEALS RECENT DECISION. FOR FILING AND DISTRIBUTION.

I AM ALSO SERVING A TRUE AND CORRECT COPY OF THE SAME UPON THE FOLLOWING PERSON:

TO:OFFICE OF THE DISTRICT ATTORNEY PHILADELPHIA
3 SOUTH PENN SQUARE
PHILA, PA. 19107

RESPECTFULLY SUBMITTED
Anthony Twitty
ANTHONY TWITTY, PRO-SE
INSI # FM-4476
P.O. BOX 1000
HOUTZDALE, PA. 16698-1000

DATE: Nov 22, 2017
CC:FILE.

(APP-A)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY TWITTY, Petitioner :

v. : CIVIL ACTION NO. 17-CV-5016

BARRY SMITH, Respondents. :

FILED NOV 28 2017

ORDER

Petitioner filed a "Motion to Preserve Filing of Writ of Habeas Corpus Due to the Courts Recent Decision in Basil Brook v. Robert Gilmorein the Alternative to Apply Rule 60." Therein he attempts to challenge the conviction or sentence imposed by a state court. Contrary to Local Civil Rule 9.3(b) and Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts, Petitioner did not use the current standard 28 U.S.C. § 2254 form as has been required by this court since July 2010. Use of the court's current standard form in proceedings under 28 U.S.C. § 2254 is necessary to assure that a petitioner is made aware of the warnings required pursuant to *United States v. Thomas*, 221 F.3d 430 (3d Cir. 2000) (relating to the statute of limitations set forth in 28 U.S.C. § 2244(d)); and *Mason v. Meyers*, 208 F.3d 414 (3d Cir. 2000) (relating to limitations on the right of the petitioner to file a "second or successive" petition under 28 U.S.C. § 2254). The court notes that the specific *Thomas* and *Mason* warnings are included in the introductory text of the current standard form. The court also notes that Petitioner did not pay the required filing fee or file an application to proceed *in forma pauperis*.

AND NOW, this 28th day of November 2017, **IT IS HEREBY ORDERED** that:

1. Petitioner's motion to preserve filing is **DENIED**;

2. The Clerk of Court shall furnish Petitioner with a blank copy of the Court's current standard form for filing a petition pursuant to 28 U.S.C. § 2254 and an application to

ENTERED
NOV 28 2017
CLERK OF COURT

(APPENDIX - A)

proceed *in forma pauperis* bearing the above-captioned civil action number;

3. Petitioner shall complete this court's current standard form of petition as directed by Local Civil Rule 9.3(b) and Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts, sign the completed petition, and return it to the Clerk of Court within thirty (30) days, failing which this civil action will be dismissed without further notice; and,

4. Petitioner shall complete the application to proceed *in forma pauperis* and return it to the Clerk of Court, or pay the $5.00 filing fee, within thirty (30) days of the date of this Order. If Petitioner does not comply with this provision this action will be dismissed without further notice.[1]

MITCHELL S. GOLDBERG, J.

[1]If Petitioner returns the application to proceed *in forma pauperis*, he shall include the required certification of a prison official.

(APP-A)

BLD-047 November 21, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. **19-2521**

ANTHONY TWITTY, Appellant

v.

SUPERINTENDENT HOUTZDALE SCI; ET AL.

(E.D. Pa. Civ. No. 2:17-cv-05016)

Present: AMBRO, GREENAWAY, JR. and BIBAS, Circuit Judges

Submitted is Appellant's Application for a Certificate of Appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing application for a certificate of appealability is denied. For substantially the reasons given by the District Court, Appellant has failed to show that jurists of reason would debate the District Court's decision to dismiss his 28 U.S.C. § 2254 petition as untimely. See 28 U.S.C. § 2244(d); Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant also has failed to make a substantial showing of "extraordinary circumstances" warranting equitable tolling of the limitation period. See Holland v. Florida, 560 U.S. 631, 649 (2010); McQuiggin v. Perkins, 569 U.S. 383, 392, 398 (2013). Finally, jurists of reason would not debate the District Court's denial of Appellant's "Petition for Hearing or Rehearing En Banc," which essentially sought relief under Federal Rule of Civil Procedure 59(e). See Blystone v. Horn, 664 F.3d 397, 414-15 (3d Cir. 2011).

By the Court,

s/Thomas L. Ambro, Circuit Judge

Dated: December 2, 2019

A True Copy:

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

(APPENDIX A-B)

Tmm/cc: Anthony Twitty
Michael R. Scalera, Esq.
Ronald Eisenberg, Esq

(APP-B)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. **19-2521**

ANTHONY TWITTY,
Appellant

v.

SUPERINTENDENT HOUTZDALE SCI;
THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA;
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

(E.D. Pa. No. 2-17-cv-05016)

Present: AMBRO, Circuit Judge

1. Reply by Appellant to Court's Order dated 12/31/19, Construed as a Motion to File Petition for Rehearing Out of Time.

Respectfully,
Clerk/pdb

ORDER

The foregoing Reply by Appellant to Court's Order dated December 31, 2019, construed as a Motion to file Petition for Rehearing out of time is granted.

By the Court,

s/Thomas L. Ambro, Circuit Judge

Dated: January 21, 2020
PDB/cc: Anthony Twitty
Michael R. Scalera, Esq.

(APPENDIX C)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

19-2521

ANTHONY TWITTY, Appellant

v.

SUPERINTENDENT HOUTZDALE SCI;
THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA;
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

(E.D. Pa. Civ. No. 2:17-cv-05016)

Before: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY and PHIPPS, Circuit Judges

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the

(APPENDIX - C)

panel and the Court *en banc*, is denied.

By the Court,

s/ Thomas L. Ambro, Circuit Judge

Dated: January 31, 2020
Lmr/cc: Anthony Twitty
Michael R. Scalera
Ronald Eisenberg

(App. C)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ANTHONY TWITTY, Appellant — No. 19-2521

V. — (E.D.Pa. Civ. No. 2:17-cv-05016)

SUPERINTENDENT HOUTZDALE SCI; ET AL.)

PETITION FOR HEARING OR REHEARING
EN BANC PURSUANT TO FED. RUL APP. PROC. 35 (b) & 40

NOW COMES APPELLANT PRO-SE AND DO HEREBY PRESENT HIS PETITION FOR HEARING OR REHEARING EN BANC, AND AVER THE FOLLOWING:

1. THE PROCEEDING INVOLVES ONE OR MORE QUESTIONS OF EXCEPTIONAL IMPORTANCE, EACH OF WHICH MUST BE CONCISELY STATED; FOR EXAMPLE, A PETITION MAY ASSERT THAT A PROCEEDING PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE IF IT INVOLVES AN ISSUE ON WHICH THE PANEL DECISION CONFLICTS WITH THE AUTHORITATIVE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS THAT HAVE ADDRESSED THE ISSUE.

2. This court filed an order dated December 2,2019 by Circuit judge Thomas L. Ambro, This order denies the petition for writ of habeas corpus, and denies a certificate of appealability.

3. Judge Ambro, states that appellant has failed to show that jurists of reason would debate the district court's decision to dismiss his writ of habeas corpus as untimely. Apparently judge Ambro totally accepts the district court report and recommendation. To begin with 42 Pa. CS § 9545 (b)(1)(ii),(iii) in which the right asserted is a constitutional right that was recognized by the Supreme court of the united states or the Supreme court of Pennsylvania after the time period provided in this section and has been held by the court to apply retroactively, clearly judge Ambro has not applied 9545 (b)(1)(ii) in line with the Bennett decision in the state Supreme court " Commonwealth V. Bennett, 930 a2d 1264 (Pa.2007) " or the circuit court's decision in Nara V. Frank 488 F3d 187, 199 (3d cir 2003) additionally neither the district court nor judge Ambro applied 9545 (b)(1)(ii) in line with the third circuit decision in Nara V. Frank id,.

4. Judge Ambro's order states the appellant has failed to show that jurist of reason would debate the district court decision to dismiss his 28 USC § 2254 petition as untimely. The district court states in it's R&R page (6) that the the Supreme court has rejected the notion that a judicial decision can be

APPENDIX - C

considered newly discovered fact pursuant to section 9545 (b)(1)(ii). The appellant always had a Constitutional right to a fair trial. So it was not until after the appellant court's determined that judge Renee Cardwell Hughes Jury instruction on reasonable doubt was unconstitutionally flawed.

One good example is the resent decision made in Commonwealth V. Blackson, 2019 PA Super Unpub. Lexis 2235 (6-7-19), the petitioner was convicted of third-degree murder following a bench trial before judge Willis Berry. Following A PCRA hearing, the judge wrote an opinion which appeared to have accepted the basic fact that the killing was in self-defense. Nevertheless, he refused to vacate the conviction or reduce the sentence. Later, the judge himself was convicted and sentenced for a crimes involving dishonesty. The petitioner filed a PCRA petition alleging judicial bias. The new judge assigned to the case held the petition was time barred and not within any exceptions because it was filed more than 60 days after the petitioner should have learned about the judge wrongdoing. The Superior Court reversed, ruling that the 60 days should be measured from the date of the judge's sentencing, which was the date the judgment was entered. Also see COMMONWEALTH V. BURTON, 2017 Pa. Lexis 664 (Pa. March 28,2017). On April 29,2011 Renee Cardwell Hughes announced that she was leaving the court of Common Pleas bench after 16 years this came only one day after the state Supreme Court's removal of her from a death - penalty appeal case for altering the courtroom transcripts, to conceal a disparaging remarks she'd made about the defendant. These revelations of judge Renee Cardwell Hughes pattern of misconduct began in April of 2011, and was unknown to the appellant at the time due to the interstate compact brokered by Pennsylvania with the state of Michigan to combat over crowding in their state run facilities. Appellant had no say in the matter, and was shipped out in February Of 2010 until May-2011 see MEMORANDUM OF LAW IN SUPPORT OF WRIT OF HABEAS CORPUS under section EXTRAORDINARY CIRCUMSTANCES WARRANTING ADDITIONAL REVIEW page (10). Appellant was out of state when this transpired and only became aware shortly before the decision in BASIL BROOKS V. ROBERT GILMORE, SUPERINTENDENT SCI-GREEN & PA. DEPT. OF CORRECTION, Lexis 127705.

5.This information arrived here at SCI Houtzdale facility early September 2017, through the attorney of another inmate here at the facility and was not available in the prison law library until months latter. those cases in line with Brooks are as follow: see: Gant V. Giroux, 2017 U.S. dist Lexis 100176, No. 17-2559 (3cir.); Armel j. Baxter V. Superintendent SCI Coal Township, Civ. A. 18-46, N.T. 5/3/18 at 14 (E.D. Pa); Tyrique Jackson V. Mark Cappozza, 2019

(APP-C)

U.S. dist. Lexis 34018); Anthony Corbin V. Robert Tice, 2019 U.S. dist. Lexis 8579; Robert Mcdowell V. Theresa Delbalso, U.S. dist. Lexis 11542. In these cases non of the defendants were aware immediately that the jury instructions were flawed. The only difference is that there counsel had an opportunity to challenge the jury instructions in a timely manner after becoming aware of Brooks id,. If the court dicision is allowed to stand it would be saying that the violation of a constitutional right to a fair trial due to a tainted, flawed, jury instruction does not matter. Even if it is determined that such an instruction is flawed, or tainted after the fact, and would be saying that such a instruction would not amount to a miscarriage of justice. In the case subjudic, a strong prima - facie showing is offered to demonstrate that a miscarriage of justice may have occurred, Doctor V. Walters, 96 F.3d 675 (3rd cir. 1996). A miscarriage of justice is established in a faulty jury instructions, and denial of direct appeal, Commonwealth V. Roman, 702, A.2d 1064 (Pa.Super.1997). In this cases the jury instruction was so prejudicial as to amount to a violation of due process and fundamental fairness, that it amounts to more than just some judicial decision as alluded to by the district courts R&R (PG 6), Harris V. Moor, 2005 U.S. Dist. Lexis 29265; Grecco V. O'Lone, 661 F. Supp. 408, 412 (D.N.J. 1987. The courts Report And Recommendation (R&R) nor this courts order addresses these claims for relief, as such this court order is not a final order. See: Appellant's objections to district courts R&R (PG.8); See Commonwealth's response to writ of habeas corpus (PG. 9 Ft note); See District court docket of 11/29/2017 and 1/11/2018; See "Pro-se petitioners reply to respondents answer to writ of habeas corpus dated 7/1/2018 (PG. 5); See: "Petitioners Pro-se response to the Commonwealth Surreply response or request to seek leave to respond " (PG. 3). And all though the petition presented the rule 60 (b) issue and was litigated between the appellant and the Commonwealth the court has not addressed the issue either in the R&R, Or this court order dated December 2, 2019. Given niether the 60 (b) issue has not been addressed, nor 35 (b) this order is not a final order. In line with the herein stated case law, which dictated that an order which has not addressed the issue is not a final order. And given the court states that its decision is based substantially on the reasons given by the district court, and the district courts R&R does not address the issues, there is no final order, and this court has not performed and independent reiview of the claim. for these reasons relief is warranted, and that under the circumstances the courts order should be vacated. A rule 60 (b) cannot be deemed untimely. Satterfied V. DA Phila, 2017 U.S. App lexis (3d cir.2017).

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6. That in the alternative the court can grant the relief provided by Governor Wolf, signed into Law with Senate Bill 915 on october 27,2018 expanding the exception for filling a claim based on a previously unknown fact to one year from the date the claim could have been presented.

7. And Fed. Rule App. Proc. 35 (b) Has substantial relevance to this case and has also not been applied in consideration of the requested relief. Or in the prior petition for Hearing or Rehearing En Banc, as filed before the district court. Comm V. Burton, id.

8. The appellant cannot have a meaningful review by this court without the court consideration of rule 60 (b); Satterfield V. Phila, id.; Fed rule App. Proc. 35 (b). Will deny appellant meaningful review before the court.

9. Appellant objects to the courts order which apply's Fed. R. civ. Proc. 59(e). In which the appellant denotes as relating to after conviction claims. In either case the appellant never specifically raised rule 59 (e), as such appellant avers that the courts order by Judge Ambro, raises a new matter, ~~and~~ and that as such appellant should be given the opportunity to meaningfully answer or respond to the courts application of rule 59 (e). Note, also that although the court interjects rule 59 (e), it fails to address Fed. R. civ. Proc. 60 (b) which was presented by the appellant in his filings. The very issues of timeliness is debatable under the circumstance. And for all the reasons stated herein a Hearing or Rehearing En Banc is required and is reasonable.

10. Several courts of appeal have reached the conclusion that a 60 (b),(4) Etc. Motion can never be untimely. see e.g., cent. vt. pub. serv. corp. v. Hebert, 341 F.3d 186 (2d cir. 2003); ser-Land serv., Inc. V. Ceramic Europa II, Inc.,160 f.3d 849, 852 (1st cir 1998); Meadowes V. Dominican republic, 817 F. 2d 517, 521 (9th cir 1987). This reflects the basic premise that no passage of time can render a void judgment valid, and a court may always take cognizance of a judgment void status whenever a rule 60 (b) motion is brought. U.S. V. ONE Toshiba color television, 213 F.3d 147, 157 (3rd cir. 2000). In fact the court of appeals found that a delay of ten years in bringing a 60 (b), or 60 (b)(4) motion did not bar consideration of the request on the merits. See, Christian V. Newfound bay, 103 Fed. Appx. 447, 449 (3rd cir. 2004). These factors all give rise to a debatable question. Rule 60 (b), is extraordinary, and creates a special circumstance that would justify granting relief. The judgment of conviction In this case is void, and one from its inception is a complete nullity, and without legal effect. This request for relief was brought with in a reasonable time after finding out about ~~about~~

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Judge Renee Cardwell Hughes.

11. Finally, Liberal consideration should be given to the appellant under the circumstances of his case because of all these factors. Additionally, Liberal consideration should be given to the appellant regarding his not being present in Pennsylvania from February of 2010 to May 2011 due to his transfer to Michigan, appellant was not aware nor could he have known what was transpiring in Pennsylvania with appellant's Trial, and PCRA judge Renee Carwell Hughes and her pattern of misconduct warrants this court review.

RELIEF SOUGHT:

1. Vacate court of appeals order, and grant COA, ;2. Vacte order remand for determinations or rule 60 (b) requested relief; 3. Vacate order allowing appellant to file answer to new matter concerning Rule 59 (e); 4. grant evidentiary hearing as to INF. counsel regarding claims brought; 5. grant appellant new trial; 6. Remand allowing appellant to seek relief Nunc-Pro-Tunc; 7. stay Judgment pending courts decision of this petition, and any further appeals. 8. Not excluding such other relief the court deems in the the interest of justice

wherefore, APPELLANT PRAYS THAT THIS HONORABLE COURT GRANT RELIEF WITH REGARDS TO THE ABOVE STATED.

DATE: DECEMBER 18, 2019

CC. FILE

RESPECTFULLY SUBMITTED

ANTHONY S. TWITTY PRO-SE
INST # FM-4476
P.O. BOX 1000
HOUTZDALE, PA 16698-1000

(APP-C)

CERTIFICATE OF SERVICE

I Anthony Twitty

do hereby certify that i am this day serving upon the clerk of court, for the third circuit court of appeals my PETITION FOR HEARING OR REHEARING EN BANC PURSUANT TO FED. R. APP. PROC. 35 (b) & 40 for distribution and filing.

I am also serving a true copy upon the following person:
To: Michael Scalera, ADA office of the
District Attorney Three south Penn Square
Philadelphia, PA. 19107

DATE: DECEMBER 18 2019
CC.FILED

RESPECTFULLY SUBMITTED

ANTHONY S. TWITTY PRO-SE
INST # FM-4476
P.O. BOX 1000
HOsTZDALE, PA. 16698-1000

(APP-C)

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ANTHONY S. TWITTY	:	
Appellant	:	No. 3282 EDA 2016

Appeal from the PCRA Order October 6, 2016
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0303181-2003

BEFORE: SHOGAN, J., LAZARUS, J., and DUBOW, J.

MEMORANDUM BY SHOGAN, J.: **FILED JULY 26, 2018**

Appellant, Anthony S. Twitty, appeals *pro se* from the order denying his petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. We affirm.

> On July 14, 2003, following a jury trial before the Honorable Renee Cardwell Hughes, [Appellant] was convicted of rape, involuntary deviate sexual intercourse, sexual assault, endangering the welfare of a minor, corrupting the morals of a minor, and various other related charges stemming from [events] commencing on or about December 22, 1991, and ending on or about February 2, 2007. On September 3, 2003, [Appellant] was sentenced to an aggregate term of forty-one (41) to eighty-two (82) years' incarceration.[2] [Appellant's] judgment of sentence was affirmed by the Superior Court on [May 25, 2005], and the Pennsylvania Supreme Court denied *allocatur* on December 28, 2005.[3]
>
> [2] The trial court sentenced [Appellant] as follows: 10 to 20 years' incarceration for rape; 5 to 10 years' incarceration for aggravated indecent assault; 10 to 20 years' incarceration for unlawful contact with a minor; 2 1/2 to 5 years' incarceration for corrupting

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the morals of a minor; 10 to 20 years' incarceration for involuntary deviate sexual intercourse; and 3 1/2 years to 7 years' incarceration for endangering the welfare of a minor. The trial court directed the sentences be served consecutively.

[3] ***Commonwealth v. Twitty***, 876 A.2d 433 (Pa. Super. 200[5]), *appeal denied*, 892 A.2d 823 (Pa. 2005).

On January 18, 2007, [Appellant] filed his first *pro se* PCRA petition. Sandjai Weaver, Esquire, was appointed and subsequently filed an amended petition. The PCRA court denied the petition without an evidentiary hearing on April 17, 2008. No appeal was taken as a result of communication problems between counsel and [Appellant]. On November 21, 2008, [Appellant] filed a subsequent PCRA petition requesting reinstatement of his appellate rights. On April 22, 2009, the PCRA court reinstated [Appellant's] right to file an appeal [from the dismissal of the first PCRA] *nunc pro tunc*. [Appellant] appealed, and the Superior Court affirmed the PCRA court's order denying relief on May 27, 2010.[4] The Pennsylvania Supreme Court denied *allocatur* on November 17, 2010.[5]

[4] ***Commonwealth v. Twitty***, 4 A.3d 208 (Pa. Super. 2010) (unpublished memorandum).

[5] ***Commonwealth v. Twitty***, 13 A.3d 478 (Pa. 2010) (unpublished memorandum).

On [September] 1, 2015, [Appellant] filed the instant *pro se* PCRA petition. In accordance with Pennsylvania Rule of Criminal Procedure 907, [Appellant] was served notice of the lower court's intention to dismiss his petition on March 30, 2016. [Appellant] submitted a response to the Rule 907 notice on April 15, 2016, and submitted an amended petition on September 23, 2016. On October 6, 2016, the PCRA court dismissed his PCRA petition as untimely. On October 18, 2016,[6] the instant notice of appeal was timely filed to the Superior Court.[7]

[6] Although the docket states the notice of appeal was filed on October 17, 2016, the envelope bearing [Appellant's] notice of appeal was post-marked October 18, 2016. ***See Commonwealth v. Little***,

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716 A.2d 1287, 1288-89 (Pa. Super. 1998) (discussing prisoner mailbox rule).

[7] The Honorable Leon W. Tucker issued the order and opinion in this matter in his capacity as Supervising Judge of the Criminal Section of the Court of Common Pleas of Philadelphia – Trial Division, as of March 7, 2016, as the trial judge is no longer sitting.

PCRA Court Opinion, 1/6/17, at 1-2. The PCRA court did not order a Pa.R.A.P. 1925(b) statement.

Appellant presents the following issues for review, which we restate verbatim:

> #1 DID THE TRIAL COURT ERR IN DENYING APPELLANT THE RIGHT TO A FAIR TRIAL DUE TO HYPOTHETICAL JURY INSTRUCTIONS, AND WAS APPELLANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL RELATED TO THE REASONABLE DOUBT INSTRUCTIONS. AND WHERE MANIFEST INJUSTICE HAS TAKEN PLACE?
>
> #2 WAS APPELLANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL, AND WAS HE DENIED INDEPENDENT COUNSEL FOR THAT PURPOSE?
>
> #3 WAS APPELLANT DENIED HIS CONSTITUTIONAL RIGHT TO FACE HIS ACCUSER WHERE DEFENSE COUNSEL FAILED TO PRESENT FOR TRIAL THE TECHNICIAN WHO PERFORMED THE TESTING IN HIS CASE. AND WAS COUNSEL EFFECTIVE IN FAILING TO PRESENT FOR TRIAL THE TECHNICIAN WHO PERFORMED THE TESTING IN HIS CASE?
>
> #4 DID THE TRIAL COURT ABUSE ITS DISCRETION IN SENTENCING APPELLANT, WAS SENTENCE ILLEGAL, AND WAS COUNSEL INEFFECTIVE FOR FAILING TO PRESENT CHARACTER WITNESSES FOR SENTENCING OR AT TRIAL?
>
> #5 WAS APPELLANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO PRESENT DEFENSE EXPERT, WHERE DNA EVIDENCE WAS QUESTIONABLE, THEREBY DENYING PRO-SE APPELLANT A CONSTITUTIONALLY FAIR TRIAL?

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#6 DID APPELLANT SUFFER LAYERED INEFFECTIVE ASSISTANCE OF COUNSEL ON ALL ARGUMENTS AS RAISED HEREIN?

Appellant's Brief at 3.

Our standard of review of an order denying PCRA relief is whether the record supports the PCRA court's determination and whether the PCRA court's determination is free of legal error. ***Commonwealth v. Phillips***, 31 A.3d 317, 319 (Pa. Super. 2011). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Id.***

A PCRA petition must be filed within one year of the date that the judgment of sentence becomes final. 42 Pa.C.S. § 9545(b)(1). This time requirement is mandatory and jurisdictional in nature, and the court may not ignore it in order to reach the merits of the petition. ***Commonwealth v. Hernandez***, 79 A.3d 649, 651 (Pa. Super. 2013). A judgment of sentence "becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S. § 9545(b)(3).

However, an untimely petition may be received when the petition alleges, and the petitioner proves, that any of the three limited exceptions to the time for filing the petition, set forth at 42 Pa.C.S. § 9545(b)(1)(i), (ii), and

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(iii), is met.[1] A petition invoking one of these exceptions must be filed within sixty days of the date the claim could first have been presented. 42 Pa.C.S. § 9545(b)(2). In order to be entitled to the exceptions to the PCRA's one-year filing deadline, "the petitioner must plead and prove specific facts that demonstrate his claim was raised within the sixty-day time frame" under section 9545(b)(2). ***Commonwealth v. Ward-Green***, 141 A.3d 527, 532 (Pa. Super. 2016). This is true despite the fact that Appellant's petition presents a challenge to the legality of his sentence. ***See Commonwealth v. Fowler***, 930 A.2d 586, 592 (Pa. Super. 2007) ("Although legality of sentence is always subject to review within the PCRA, claims must still first satisfy the PCRA's time limits or one of the exceptions thereto.").

---

[1] The exceptions to the timeliness requirement are:

> (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;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1)(i), (ii), and (iii).

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Appellant's judgment of sentence became final on March 28, 2006, ninety days after the Pennsylvania Supreme Court denied *allocatur* and time expired for Appellant to file an appeal with the United States Supreme Court. 42 Pa.C.S. § 9545(b)(3); U.S. Sup. Ct. R. 13. Therefore, Appellant had to file the current PCRA petition in this matter by March 28, 2007, in order for it to be timely.

Appellant filed the instant PCRA petition on September 1, 2015. Accordingly, Appellant's instant PCRA petition is patently untimely.

As previously stated, if a petitioner does not file a timely PCRA petition, his petition may nevertheless be received under any of the three limited exceptions to the timeliness requirements of the PCRA. 42 Pa.C.S. § 9545(b)(1). If a petitioner asserts one of these exceptions, he must file his petition within sixty days of the date that the exception could be asserted. 42 Pa.C.S. § 9545(b)(2).

Appellant argues in his first issue that he is eligible for relief pursuant to a time-bar exception under 42 Pa.C.S. § 9545(b)(1). Appellant maintains that pursuant to a recent federal decision, ***Brooks v. Gilmore***, 2017 WL 3475475 (E.D. Pa. 2017), the jury instructions regarding reasonable doubt issued at his trial resulted in a manifest injustice. Appellant's Brief at 7-8. Specifically, Appellant states that the jury instructions improperly elevated the level of doubt necessary to secure an acquittal. ***Id.*** at 8. Appellant asserts that ***Brooks*** was decided August 11, 2017, and Appellant filed his Supplemental

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petition on this basis on September 4, 2017. ***Id.*** at 10. Therefore, Appellant contends, he met the requirements necessary to invoke an exception. ***Id.*** at 8, 10.

Despite this assertion, Appellant has failed to establish an exception to the time-bar. To the extent the ***Brooks*** holding could satisfy the new constitutional right exception under Section 9545(b)(1)(iii), it fails. To satisfy this exception to the time bar, Appellant must establish both that the case established a new constitutional right and that it applies retroactively. ***Commonwealth v. Ross***, 140 A.3d 55, 58 (Pa. Super. 2016). In ***Brooks***, the appellant had filed a writ for *habeas corpus*. ***Brooks***, 2017 WL 3475475 at * 2. The district court concluded that the jury instruction for reasonable doubt, as explained to the jury through an emotionally charged hypothetical, improperly elevated the level of doubt necessary to secure an acquittal. ***Id.*** at 1. The ***Brooks*** holding did not announce a new constitutional right, nor did it hold that the decision should be applied retroactively. Furthermore, ***Brooks*** was a decision issued by a federal district court, not the Supreme Court of the United States or the Supreme Court of Pennsylvania. ***See*** 42 Pa.C.S. § 9545(b)(1)(iii) ("the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively."). Thus, Appellant has failed to

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satisfy the new constitutional right exception to the time-bar pursuant to 42 Pa.C.S. § 9545(b)(1)(iii).

Additionally, the ***Brooks*** decision cannot satisfy the newly-discovered fact exception under Section 9545(b)(1)(ii). Our Supreme Court has expressly rejected the notion that judicial decisions can be considered newly-discovered facts pursuant to Section 9545(b)(1)(ii). ***Commonwealth v. Watts***, 23 A.3d 980, 986-987 (Pa. 2011). Thus, Appellant's reliance on ***Brooks*** does not satisfy the newly-discovered fact exception to the time-bar.

Consequently, because the instant PCRA petition was untimely and no exceptions apply, the PCRA court lacked jurisdiction to address the claims presented and grant relief. ***See Commonwealth v. Fairiror***, 809 A.2d 396, 398 (Pa. Super. 2002) (holding that PCRA court lacks jurisdiction to hear untimely petition). Likewise, we lack the authority to address the merits of any substantive claims raised in the PCRA petition. ***See Commonwealth v. Bennett***, 930 A.2d 1264, 1267 (Pa. 2007) ("[J]urisdictional time limits go to a court's right or competency to adjudicate a controversy.").

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/26/18

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Filed 10/31/2017

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ANTHONY S. TWITTY, Appellant	:	No. 3282 EDA 2016 (C.P. Philadelphia County No. 51-CR-0303181-2003)

ORDER

The Appellant's *pro se* "Petition For Remand For The Purpose Of Obtaining New Trial Due To Recent District Court Decision" is DENIED without prejudice to Appellant's right to raise the issues in the petition in the Appellant's brief or in a newly filed application for relief that may be filed after the appeal has been assigned to the panel of this Court that will decide the merits of the appeal.

The Appellant's *pro se* "Petition For Remand For Transcripts Of Trial Court Proceedings In Order To Properly Present A Meaningful Pro-Se Appellant Brief" is DENIED. ***See Commonwealth v. Alcorn***, 703 A.2d 1054, 1057 (Pa. Super. 1997) (holding that the PCRA court was without jurisdiction to entertain a PCRA petition that was time-barred under ***42 Pa.C.S. § 9545(b)***); ***see also Commonwealth v. Beasley***, 741 A.2d 1258, 1261 (Pa. 1999) (noting that exceptions to the PCRA timeliness requirements must be plead and proven in the PCRA petition).

Upon consideration of the Appellant's *pro se* "Application For Reduction Of Copies Of Pro-Se Appellant Brief," Appellant shall be permitted to file one (1) original and three (3) copies of his Appellant's brief no later than thirty (30) days from the date that this Order is filed. Appellant shall serve one (1) copy of the Appellant's brief on the Commonwealth.

The appearance of John B. Elbert, Esq. is WITHDRAWN. Appellant shall notify this Court within twenty (20) days of the date that this Order is filed as to whether he intends to retain new counsel or to represent himself on appeal. The failure of the Appellant to notify this Court of his intention to proceed with this appeal within twenty (20) days shall result in the dismissal of this appeal.

PER CURIAM

APPENDIX – D

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

v.

ANTHONY TWITTY

CP-51-CR-0303181-2003
3282 EDA 2016

OPINION

LEON W. TUCKER, J.

This appeal comes before the Superior Court following the dismissal of a Post Conviction Relief Act ("PCRA")[1] petition filed on November 1, 2015. On October 6, 2016, the PCRA court dismissed this petition for the reasons set forth below.

I. PROCEDURAL HISTORY

On July 14, 2003, following a jury trial before the Honorable Renee Cardwell Hughes, Anthony Twitty (hereinafter referred to as "Petitioner") was convicted of rape, involuntary deviate sexual intercourse, sexual assault, endangering the welfare of a minor, corrupting the morals of a minor, and various other related charges stemming from an incident commencing on or about December 22, 1991, and ending on or about February 2, 2007. On September 3, 2003, Petitioner was sentenced to an aggregate term of forty-one (41) to eighty-two (82) years' incarceration.[2] Petitioner's judgment of sentence was affirmed by the Superior Court

[1] 42 Pa. Cons. Stat. §§ 9541-9546.

[2] The trial court sentenced Petitioner as follows: 10 to 20 years' incarceration for rape; 5 to 10 years' incarceration for aggravated indecent assault; 10 to 20 years' incarceration for unlawful contact with a minor; 2 ½ to 5 years' incarceration for corrupting the morals of a minor; 10 to 20 years' incarceration for involuntary deviate sexual intercourse; and 3 ½ years to 7 years' incarceration for endangering the welfare of a minor. The trial court directed the sentences be served consecutively.

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on October 23, 2003, and the Pennsylvania Supreme Court denied *allocatur* on December 28, 2005.[3]

On January 18, 2007, Petitioner filed his first *pro se* PCRA petition. Sandjai Weaver, Esquire, was appointed and subsequently filed an amended petition. The PCRA court denied the petition without an evidentiary hearing on April 17, 2008. No appeal was taken as a result of communication problems between counsel and Petitioner. On November 21, 2008, Petitioner filed a subsequent PCRA petition requesting reinstatement of his appellate rights. On April 22, 2009, the PCRA court reinstated Petitioner's right to file an appeal *nunc pro tunc*. Petitioner appealed, and the Superior Court affirmed the PCRA court's order denying relief on May 27, 2010.[4] The Pennsylvania Supreme Court denied *allocatur* on November 17, 2010.[5]

On November 1, 2015, Petitioner filed the instant *pro se* PCRA petition. In accordance with Pennsylvania Rule of Criminal Procedure 907, Petitioner was served notice of the lower court's intention to dismiss his petition on March 30, 2016. Petitioner submitted a response to the Rule 907 notice on April 15, 2016, and submitted an amended petition on September 23, 2016. On October 6, 2016, the PCRA court dismissed his PCRA petition as untimely. On October 18, 2016,[6] the instant notice of appeal was timely filed to the Superior Court.[7]

---

[3] *Commonwealth v. Twitty*, 876 A.2d 433 (Pa. Super. 2003), *appeal denied*, 892 A.2d 823 (Pa. 2005).

[4] *Commonwealth v. Twitty,* 4 A.3d 208 (Pa. Super. 2010) (unpublished memorandum).

[5] *Commonwealth v. Twitty*, 13 A.3d 478 (Pa. 2010) (unpublished memorandum).

[6] Although the docket states the notice of appeal was filed on October 17, 2016, the envelope bearing Petitioner's notice of appeal was post-marked October 18, 2016. *See Commonwealth v. Little*, 716 A.2d 1287, 1288-89 (Pa. Super. 1998) (discussing prisoner mailbox rule).

[7] The Honorable Leon W. Tucker issued the order and opinion in this matter in his capacity as Supervising Judge of the Criminal Section of the Court of Common Pleas of Philadelphia – Trial Division, as of March 7, 2016, as the trial judge is no longer sitting.

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II. FACTS

At trial, evidence was presented that on February 17, 2003, sixteen-year-old CS, the complainant, was at her home, located at 118 North 62nd Street, Philadelphia, with her mother's boyfriend (Petitioner), and her siblings. Her mother was snowed in at work. N.T. 7/10/03 at 69, 108, 32.

While CS watched television in her mother's room, Petitioner repeatedly entered the room to talk to the child. Eventually, he sat on the foot of the bed and repeatedly made advances towards CS. Despite her refusal, Petitioner pulled at the child's robe and rubbed the outside of her leg. Petitioner continued the unwanted touches and even offered CS fifty dollars if she allowed him to lick and suck her breasts and vagina. Although CS refused his advances, Petitioner forcefully unbuttoned her robe, pulled down her pajama pants and underwear, opened her legs, began to rub on her vagina, and stuck his thumb inside her vagina. During the course of the assault, Petitioner rubbed his penis against her vagina for approximately five to ten minutes and ultimately ejaculated on CS's upper thigh. N.T. 7/10/03 at 110-119.

Later that morning, CS left the home and went to her mother's job. CS told her mother about the incident which had occurred the night before as well as other sexual incidents with the Petitioner that began when she was five years old. Petitioner would touch her vagina, and make her perform oral sex and other sexual acts with him. CS gave a detailed statement to the police and was taken to Jefferson Hospital for an examination. N.T. 7/10/03 at 121-122, 73-97, 125-128.

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III. DISCUSSION

A. Petitioner's current PCRA petition was manifestly untimely.

Petitioner's PCRA petition challenging the constitutionality of his sentence was facially untimely. As a prefatory matter, the timeliness of a PCRA petition is a jurisdictional requisite. *Commonwealth v. Robinson,* 12 A.3d 477 (Pa. Super. 2011). A PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying judgment becomes final. 42 Pa. Cons. Stat. § 9545(b)(1). A judgment is deemed final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." *Id.* § 9545(b)(3).

Petitioner's judgment of sentence became final for PCRA purposes on or about March 28, 2006, ninety days after the Pennsylvania Supreme Court denied *allocatur* and the time period for filing a petition for writ of *certiorari* in the United States Supreme Court expired. *See id.*; U.S. Sup. Ct. R. 13 (effective January 1, 1990). Petitioner's *pro se* petition, filed on November 1, 2015, was therefore untimely by approximately nine years. *See* 42 Pa. Cons. Stat. § 9545(b)(1).

B. Petitioner was ineligible for the limited timeliness exceptions under 42 Pa. Cons. Stat. § 9545 (b)(1)(iii).

The three statutory exceptions to the timeliness provisions in the PCRA allow for very limited circumstances under which the late filing of a petition will be excused. 42 Pa. Cons. Stat. § 9545(b)(1). To invoke an exception, a petition must allege and the petitioner must prove:

(APP-E)

> (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;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

Id. § 9545(b)(1)(i)-(iii).

In attempt to establish a limited exception to the statutory time-bar, Petitioner advanced the Pennsylvania Supreme Court's decision in *Commonwealth v. Hopkins*, 117 A.3d 247 (Pa. 2015) as a newly-recognized constitutional right exception. *See id.* § 9545(b)(1)(iii).[8] In addition to *Hopkins*, Petitioner invoked the United States Supreme Court's decision in *Alleyne v. United States*, 133 S.Ct. 2151 (2013). Neither case, however, announced a new constitutional right that has been held to apply retroactively to untimely petitions on collateral review. *See Commonwealth v. Washington*, 142 A.3d 810, 813-820 (Pa. 2016) (addressing the retroactivity of *Alleyne*); *see also Commonwealth v. Whitehawk*, 2016 PA Super 185 (Pa. Super. 2016) ("the *Hopkins* decision did not announce a 'new rule'; rather, the Court simply assessed the validity of section 6317 under *Alleyne*. . . ."). Furthermore, Petitioner failed to invoke either *Alleyne* or *Hopkins* within sixty days in accordance with 42 Pa. Cons. Stat. §

---

[8] Subsection (iii) of Section 9545[(b)(1)] has two requirements. First, it provides that the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or [the Supreme Court of Pennsylvania] after the time provided in this section. Second, it provides that the right "has been held" by "that court" to apply retroactively. . . These words mean that the action has already occurred, *i.e.*, "that court" has already held the new constitutional right to be retroactive to cases on collateral review. By employing the past tense in writing this provision, the legislature clearly intended that the right was already recognized at the time the petition was filed. *Commonwealth v. Copenhefer*, 941 A.2d 646, 649–50 (Pa. 2007) (quoting *Commonwealth v. Abdul–Salaam*, 812 A.2d 497, 501 (Pa. 2002)).

(APP-E)

9545(b)(2)[9] as these cases were decided June 17, 2013 and June 15, 2015 respectively; Petitioner did not submit his claim until November 1, 2015, clearly past the sixty day deadline.

C. Petitioner was ineligible for the limited timeliness exceptions under 42 Pa. Cons. Stat. § 9545 (b)(1)(ii).

In his amended petition, Petitioner referenced a Pennsylvania Supreme Court order directing the recusal of Judge Renee Cardwell Hughes from further PCRA proceedings on an unrelated capital murder case as a previously unknown fact. *See* Amended PCRA Petition 9/23/2016 at 2; 42 Pa. Cons. Stat. § 9545(b)(1)(ii).[10] Armed with this information, Petitioner argued that as Judge Hughes presided over his case from trial through his first PCRA, there is "likely contamination and/or bias involved." Amended PCRA Petition 9/23/2016 at 3. Despite these assertions, Petitioner makes no meaningful attempt at overcoming the time bar. Instead, he expounded on the merits of his claim, but failed to state a basis to confer jurisdiction to the courts. Even presuming Petitioner attempted to invoke the after-discovered evidence exception, which appears to be the exception most closely applicable to his claim, he would be unsuccessful as he has failed to demonstrate due diligence[11] in presenting this claim.[12]

---

[9] A PCRA petitioner must present his claimed exception within sixty days of the date the claim first could have been presented. 42 Pa. Cons. Stat. § 9545(b)(2).

[10] The timeliness exception set forth in Section 9545(b)(1)(ii) requires a petitioner to demonstrate he did not know the facts upon which he based his petition and could not have learned those facts earlier by the exercise of due diligence. *Commonwealth v. Bennett,* 930 A.2d 1264, 1271 (Pa. 2007).

[11] Due diligence demands that the petitioner take reasonable steps to protect his own interests. *Commonwealth v. Carr,* 768 A.2d 1164, 1168 (Pa. Super. 2001). A petitioner must explain why he could not have learned the new fact(s) earlier with the exercise of due diligence. *Commonwealth v. Breakiron,* 781 A.2d 94, 98 (Pa. 2001).

[12] Even if Petitioner had successfully pleaded and proved an exception to the statutory time-bar, no relief would be due. To obtain post conviction relief based on after-discovered evidence, a PCRA petitioner must, among other factors, demonstrate: 1) that the evidence

(APP-E)

IV. CONCLUSION

This court has once again evaluated an untimely collateral petition filed by Mr. Twitty. Petitioner failed to satisfy his burden of proof under 42 Pa. Cons. Stat. § 9545(b)(1)(ii) or (iii). Accordingly, for the reasons stated herein, the decision of the court dismissing the PCRA petition should be affirmed.

BY THE COURT:

LEON W. TUCKER, J. /AK

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could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence, and 2) would likely result in a different verdict if a new trial were granted. *Commonwealth v. Foreman*, 55 A.3d 532, 538 (Pa. Super. 2012). Petitioner's "new evidence" regarding the alleged bias of Judge Hughes does not meet the after-discovered evidence test since Petitioner failed to plead or prove any due diligence in raising Judge Hughe's alleged bias prior to the conclusion of trial. Furthermore, Petitioner failed to persuasively demonstrate that such evidence would likely result in a different verdict if a new trial were granted. Petitioner's argument that Judge Hughes may have committed judicial misconduct was purely speculative; Petitioner failed to attach any exhibits or notes of testimony in support of his contention, he failed to explain what harm was caused, and he failed to plead and prove the nexus between Judge Hughes' actions and the alleged harm.

DC-198 MOTION FOR POST CONVICTION COLLATERAL RELIEF
Rev. 4/2012

COMMONWEALTH OF PENNSYLVANIA VS	COURT AND DOCKET NUMBERS
Anthony S Twilley (Name of Defendant)	CP-51-CR-0303181-2003

RECEIVED
OCT 10 2017
PCRA Unit
CP Criminal Listings

To be filled in by Clerk of Court

NOTE: List below those informations or indictments & offenses for which you have not completed your sentence.

INFORMATION OR INDICTMENT NUMBERS:
(1) RAPE (2) Involuntary Deviate Sexual Intercourse (3) Aggravated Indecent Assault (4) Contact with Minor (5) Endangering Welfare of Children (6) Corruption of Minors
CP-51-CR-0303181-2003

I WAS CONVICTED OF THE FOLLOWING CRIMES:
(1) Rape (2) Involuntary Deviate Sexual Intercourse (3) Aggravated Indecent Assault (4) Contact with Minor (5) Endangering Welfare of Children (6) Corruption of Minors

(Appendix - E)

1. MY NAME IS:

2. I AM NOW

(a) ☐ On Parole (b) ☐ On Probation (c) ☒ Confined in (d) ☐ Residing at

3.

I WAS SENTENCED ON SEPTEMBER 3, 2003 TO A TOTAL TERM OF 4 TO 8, COMMENCING ON FEBRUARY 17, 2003 BY JUDGE(S) RENEE CARDWELL HUGHES

FOLLOWING A: ☒ Trial by jury ☐ Plea of Guilty

☐ Trial by a judge without a jury ☐ Plea of nolo contendere

I am ☐ Serving ☐ Waiting to serve the sentence imposed

4. I AM ELIGIBLE FOR RELIEF BECAUSE OF:

☒ (I) A violation of the Constitution of this Commonwealth or the constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

☒ (II) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. .

☐ (III) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

☒ (IV) The improper obstruction of government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court

☒ (V) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced

☒ (VI) The imposition of a sentence greater than the lawful maximum.

☐ (VII) A proceeding in a tribunal without jurisdiction.

(APP. F)

5. I AM ELIGIBLE FOR RELIEF BECAUSE, ALTHOUGH THIS PCRA PETITION IS BEING FILED MORE THAN ONE YEAR AFTER THE DATE OF FINAL JUDGMENT, I HEREBY ALLEGE AND CAN PROVE THAT THE FOLLOWING EXCEPTION HAS BEEN MET:

☐ (i) My failure to raise this 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.

I intend to prove my claim was late due to governmental interference by showing:

☐ (ii) The facts upon which the claims is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence.

The following facts were previously unknown to me:

Decision [illegible] Superintendent [illegible] SEE-[illegible] Pennsylvania Department of Corrections Civil Action NO. 15-5659 (3-[illegible]-17) which is Identical to petitioner's case and involved the Same Judge. Decision in [illegible] Commonwealth v. Jose M. Muniz 2017 PA. LEXIS 1682 (PA July 19, 2017 Decided)

☒ (iii) The right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

The Supreme Court of the United States or the Commonwealth of Pennsylvania has recognized the following retroactive constitutional rights after my period for filing:

IN [illegible] above [illegible] [illegible] [illegible] by [illegible] [illegible] Assistance, ETC.

(APP-F)

6. THE FACTS IN SUPPORT OF THE ALLEGED ERROR(S) UPON WHICH THIS MOTION IS BASED ARE AS FOLLOWS: (State facts clearly and fully; argument, citations, or discussions of authorities shall not be included.)

(A) I know the following facts to be true of my own personal knowledge:

(a) Petitioner was Denied A Constitutionally Fair Trial And Counsel was ineffective in failing to object to Jury instructions specifically related to reasonable doubt And where Judge improperly gave an Elevated instruction where Judge gave Hypothetical instructions. The instructions Given in [redacted] Basil Brooks v. Robert Gilmore are identical to Petitioners case And given By same Judge. Its District Court for the Third Circuit →

(B) The following facts were made known to me by means other than my own personal knowledge (Explain how and by whom you are informed):

Through Recent case Law Decisions; Jailhouse Lawyers; Institute prison Law Library.

(C) In the event my appeal is allowed as requested under #4, the following are the matters which I intend to assert on that appeal (Specify the matters to be asserted if appeal is allowed)

All of the grounds as raised herein. Not Excluding such other grounds that may become available after the fact.

~~PLAIN ERROR~~ DETERMINED THAT BASIL BROOKS WAS entitled to
A NEW TRIAL. As such PETITIONER moves this Court
FOR A NEW TRIAL IN HIS CASE. At the very least
[illegible] be ordered Allowing
PETITIONER TO DEFEND HIS CLAIM FOR
RELIEF IN LINE WITH BASIL BROOKS V.
ROBERT GILMORE, ID. WHICH CLEARLY
ESTABLISHES MY right to a NEW TRIAL
AND GIVEN THAT JEOPARDY ATTACHES AT
[illegible] SUCH ESTABLISHES
THE PETITIONERS right to NEW TRIAL.
THIS PETITION IS filed WITHIN SIXTH(60)
DAYS OF THE DISTRICT COURTS DECISION
IN BROOKS.

2) the petitioner avers his rights to
RELIEF PURSUANT TO COMMONWEALTH V. MUNIZ,
LEXIS 1682, WHICH protects PETITIONERS
RIGHT TO PROTECTION FROM SORNA. SUCH
DEEMED THE REGISTRATION UNDER SORNA DEEMED
TO CONSTITUTE PUNISHMENT AND VIOLATES THE
FEDERAL EX POST FACTO CLAUSE. THIS DECISION
IMPACTS THE PETITIONER. THE COURT DEEMED
THE APPLICATION OF SORNA RETROACTIVELY VIOLATES
THE FEDERAL EX POST FACTO CLAUSE, U.S. CONST.
ART. I, §10, AND THE EX POST FACTO CLAUSE OF
THE PENNSYLVANIA CONSTITUTION.

(APP-F)

7. SUPPORTING EXHIBITS

(A) In support of this motion I have attached as exhibits:

Affidavits [Exhibit(s) No. N/A]

Records [Exhibit(s) No. N/A]

Other Supporting Evidence [Exhibit(s) No. N/A]

(B) I have not attached any affidavits, records or other supporting evidence because Pet. ONLY WISH TO SUBMIT ANY DOCUMENTS AFTER HE HAS HAD AN OPPORTUNITY TO CONFER WITH COUNSEL.

8. I HAVE TAKEN THE FOLLOWING ACTION(S) TO SECURE RELIEF FROM MY CONVICTION(S) OR SENTENCE(S):

(A) Direct Appeal (IF "YES," name the court(s) which appeal(s) as/were taken, date, term and number, and result.) Court of Common Pleas of Phila. County, Direct Appeal

☒ YES ☐ NO

Superior Court # 1537 EDA 2001 AFFIRMED 5-27-02 PA Supreme # 337 EAL 2002 DENIED 11-1-02 NO RELIEF WAS GRANTED

(B) Previous proceedings in the courts of the Commonwealth of Pennsylvania

☒ YES ☐ NO (IF "YES," name the type of proceedings (such as habeas corpus, etc.) – including former proceedings under the Post Conviction Hearing Act the Court(s) in which petition(s) was/were filed, date, term and number, and result.) PCRA FILED 2-15-07 DENIED 4-17-09

(C) Habeas Corpus or other previous in Federal Courts

☐ YES ☒ NO (IF "YES," name the district in which petition(s) was/were filed, date(s), Court Number- civil action or miscellaneous, and result, including all appeals.)

(D) Other legal proceedings

☒ YES ☐ (IF "YES," complete details-type of action, court in which filed, date, term and number, and result, including all appeals.

SEVERAL other Filings into the Court which ARE A part of the trial Court Docket

9. FOLLOWING MY ARREST, I WAS REPRESENTED BY THE FOLLOWING LAWYER(S): (Give the lawyer's name and the proceeding at which he/she represented you.)

(CHRISTINE QUINN - TRIAL)(KARL RAPP - APPEAL) SAMUEL WEAVER - PCRA)(JOHN B. ELLIOTT - PCRA)

10. I PREVIOUSLY CHALLENGED MY CONVICTION IN THE FOLLOWING COURTS:

Court	Caption	Term Number	Attorney	Relief Requested
(1) Appealed to State Superior Court and Supreme Court on Direct Appeal				
(2) Appealed from PCRA to State Superior and Supreme Court				

see page 5

11. THE ISSUES WHICH I HAVE RAISED IN THIS MOTION HAVE NOT BEEN PREVIOUSLY LITIGATED OR ONE OF THE FOLLOWING APPLIES:

☒ (I) The allegation of error has been waived.

☒ (II) If the allegation of error has been waived, the alleged error has resulted in the conviction or affirmation of sentence of an innocent individual.

☒ The failure to litigate this issue(s) prior to or during trial or on direct appeal could not have been the result of any rational, strategic, or tactical decision by counsel.

12. BECAUSE OF THE FOREGOING REASONS, THE RELIEF WHICH I DESIRE IS:

(A) ☒ Release from custody and discharge

(B) ☒ A new trial

(C) ☒ Correction of Sentence

(D) ☒ Other Relief (Specify): FOR A DETERMINATION of all REQUESTED RELIEF Including Ineffective Assistance of Counsel

13. I request an evidentiary hearing. I certify, subject to the penalties for unsworn falsification to authorities set forth at 18 Pa.C.S.§ 4904, that the following persons will testify to the matters stated. I have attached to this petition all documents material to the witness' testimony.

Witness Name: [illegible]
Witness Address: [illegible]
Witness Date of Birth: [illegible]
Witness Testimony: Related to ineffective Assistance of Counsel And Actions Taken by Trial

Witness Name: KARL BAKER, ESQ.
Witness Address: (PD) 1441 Sansom Street Phila, PA 19102
Witness Date of Birth: [illegible]
Witness Testimony: Related to ineffective Assistance of Counsel

Witness Name: SAMUEL STRAUSS, ESQ.
Witness Address: 616 North 24th Street Phila PA 19130
Witness Date of Birth: Unknown
Witness Testimony: Related to ineffective Assistance of Counsel

Witness Name:
Witness Address:
Witness Date of Birth:
Witness Testimony:

14. Based upon the exceptional circumstances set forth below, I request that the District Attorney produce the following documents: to provide a complete copy of the file [illegible]

15. I ask that the Court consider the following argument, citation and discussion of authorities.

(1) BRASIL BROOKS V. ROBERT GILMORE SUPERINTENDENT, SCI-GREEN, AND PENNSYLVANIA DEPARTMENT OF CORRECTIONS, CIVIL ACTION NO. 15-5659 (8-11-17); COMMONWEALTH V. JOSE M. MUNIZ 2017 PA LEXIS 1692) (PA JULY 19, 2017); COMMONWEALTH V. BURTON 2017 LEXIS 2016 (PA MARCH 28, 2017); 42 PA. CS. 9545 (b)(1)(ii).

16.

(A) I am ☐ ABLE ☒ NOT ABLE to pay the cost of this proceeding.

I have $ 20 Dollars in my prison account.

(B) My other financial resources are:

PETITIONER HAS NO OTHER FINANCIAL RESOURCES AT THIS TIME JUST MINIMAL BUT HOUSE PAY

16. (A) ☒ I do not have a lawyer and I am without financial resources or otherwise unable to obtain a lawyer.

(1) ☒ I request the court to appoint a lawyer to represent me.

(2) ☐ I do not want a lawyer to represent me.

(B) I am represented by a lawyer. (Give name and address of your lawyer.)

N/A

(Signature of Defendant)

(APP-F)

UNSWORN DECLARATION

I, Anthony S Twitty, do hereby certify that the facts set forth in the above motion are true and correct To the best of my personal knowledge or information and belief, and that any false statements herein are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa. C.S. § 4904), relating to unsworn falsification to Authorities.

No Notary Required 10-8-17

Anthony S Twitty
(Signature of Defendant)
FM-1676
P.O. BOX 1000 Houtzdale PA 16698-1000

(APP-F)

COMMONWEALTH OF PENNSYLVANIA VS Anthony S. Tuthy (Name of Defendant)	IN THE CRIMINAL COURTS OF THE COUNTY OF Philadelphia Criminal Action No. CP-CR-0303181 of 2003

ORDER

AND NOW this_____day of_____, 2_____ Upon consideration of the foregoing motion:

1. ☐ The motion is returned to defendant for amendment as follows, such amendment to be made on for before

   _____, 2_____

2. ☐ A rule is granted upon the Commonwealth of Pennsylvania to show cause why a hearing should not be granted. The rule is returnable on or before _____, 2_____

3. ☐ The request to proceed as a poor person, without the payment to costs, is ☐ granted ☐ denied.

4. ☐ Upon finding that defendant is unable to obtain a lawyer _____ Esq., is appointed to represent him/her.

5. ☐ The Clerk of Court is ordered and directed to do the following forthwith:

   (a) To serve a copy of his motion and this order upon the District Attorney of _____ County.

   (b) To send a copy of this motion and this order to _____ Esq., the lawyer for the defendant.

   (c) To send a copy of this order to the defendant.

6. ☐

(APP-F)

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	**CP-51-CR-0303181-2003**
v.	:	
ANTHONY TWITTY, **Petitioner**	:	

ORDER

AND NOW, this 13th day of July, 2018, upon consideration of Petitioner's Post Conviction Relief Act Petition filed on October 10, 2017, due to Petitioner's pending appeal in the Superior Court (3282 EDA 2016), it is hereby **ORDERED** and **DECREED** that Petitioner's Post Conviction Relief Act Petition is **DISMISSED AS PREMATURE.**[1]

BY THE COURT:

BRINKLEY, J.

1 *See Commonwealth v. Lark*, 746 A.2d 585, 588 (Pa. 2000) (holding that when a PCRA appeal is pending, a subsequent PCRA petition cannot be filed until resolution of review of the pending PCRA petition by the highest state court in which review is sought, or upon the expiration of the time for seeking such review).

NV

APPENDIX F

BY CERTIFIED MAIL:

TO: ANTHONY TWITTY
FM4476
SCI HOUTZDALE
P.O. BOX 1000
HOUTZDALE, PA 16698-1000

FROM: THE HONORABLE GENECE E. BRINKLEY
POST TRIAL UNIT
206 THE JUANITA KIDD STOUT CENTER FOR CRIMINAL JUSTICE
1301 FILBERT STREET
PHILADELPHIA, PA 19107

RE: POST CONVICTION RELIEF ACT PETITION
COMMONWEALTH V ANTHONY TWITTY, CP-51-CR-0303181-2003

DATE: July 13, 2018

You have thirty (30) days from the date of the order to file a notice of appeal to the Superior Court of Pennsylvania. The notice must be in writing and must be filed at the following address: Active Criminal Records, Criminal Motions Counter, 206 Criminal Justice Center, 1301 Filbert Street, Philadelphia, PA 19107. You must comply with Pennsylvania Rule of Appellate Procedure 906 with respect to service of the notice of appeal. You must serve Judge Brinkley with a copy of the notice of appeal at Suite 1404, Criminal Justice Center, 1301 Filbert Street, Philadelphia, PA 19107. You can file the notice of appeal on your own or you can hire an attorney.

cc: Tracey Kavanagh, Esquire, PCRA Unit, District Attorney's Office

DEFENDANT MUST FILE AN ORIGINAL AND ONE COPY OF:
Notice of Appeal
Proof of Service

NV

(APP-F)

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA)

V.) CASE NO. CP-51-CR-0303181-2003

ANTHONY S. TWITTY)

RULE TO SHOW CAUSE

AND NOW this_____day of_____,20____. Upon consideration of the petitioners Motion and Amended Petition it appearing that relief would be due, a rule to show cause is hereby **GRANTED.**

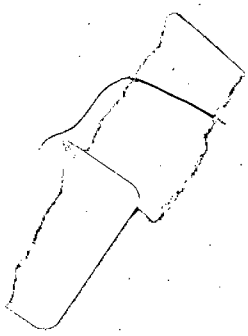
Said rule shall take place the_____day of_____,20____.

At_____A.M./P.M. In court Room #_____.

BY THE COURT

_____

J.



APPENDIX-G

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA)
V.)
ANTHONY S. TWITTY

CASE NO. CP-51-CR-0303181-2003

AMENDMENT TO ALREADY FILED PETITION

NOW COMES THE PETITIONER PRO-SE AND DO HEREBY MOVE THE HONORABLE JUDGES TO GRANT PETITIONER THE RIGHT TO AMEND THE ALREADY FILED PETITION, AND AVER THE FOLLOWING:

1. The Petitioner is currently confined in the State Correctional facility at Houtzdale, Pa. He is indigent and cannot afford the cost & fees associated with the filing. He only receives menial jailhouse pay.

2. The Pro-Se Petitioner currently has filed before the court his P.C.R.A. PETITION, This was filed September 1, 2015. As of this date there has been no Action taken on that filing. There are underlying issue's that are crucial for consideration in this matter. As such Petitioner moves the court to Grant and Amend the following issue to petitioners already filed Petition as follows:

1. The Pro-Se Petitioner is confined at the State Correctional facility at Houtzdale, Pa. He is serving 44 to 82 years. He is indigent and cannot afford the cost and fees associated with this filing.

2. The Petitioner currently has filed before this court his P.C.R.A. PETITION, This is dated 8/31/2015, and filed in the clerk of courts office.

3. The nature of this filing is to Amend the Already filed petition. There would be no prejudice to the Commonwealth by this amendment. Upon any objections to this filing should be followed by a rule to show cause as to why such relief should not be granted. Such will allow the petitioner to defend his petition, it will allow the Prosecution to rebut any, and will also provide a record for any needed appeals.

4. Issue to be amended is as follows:

PETITIONER DENIED RIGHT TO AN IMPARTIAL JUDGE
AT TRIAL OR ON APPEAL DUE TO CONTAMINATION ISSUE'S

At the outset, Its important to note that in the case Sub Judice the judge presiding over the petitioner case Was Judge Renee Cardwell Hughes.

Just as the Sixth Amendment requires an impartial jury, Due Process requires an

APP-C

impartial judge. Petitioner contends that the judge in this case was partial and there are contamination issue's involved. Judge hughes was involved in the Petitioners case for the purpose of trial and in the appeal process. The Petitioner was sentenced in 2003 and finalized his appeal process in 2010. During this entire time judge Hughes presided over the petitioners case.

Judge Hughes, admitted in a March-2008 hearing to using insults and explained herself, "I TOLD [THE COURT REPORTER] TO [REMOVE] WORDS THAT ARE LESS THAN JUDICIAL BECAUSE I'M SOUTHERN AND I SAY WORDS LIKE FLIPPING AND SUCKER..." Judge Hughes ultimately resigned from sitting as judge, when the Supreme court removed her from a death-penalty appeal case for altering the court room transcript to conceal a disparaging remark she'd made about the defendant.

The standard is not actual proof but the likelihood or appearance of bias, or misconduct. Taylor v. Hayes, 418 U.S. 488, 94 S.ct. 2697, 41 L.ed.2d 897 (1974). Contamination issues can be varied. The noted conduct is but one of the judges impropriety's. Including judicial misconducts.

5. Of note, is that Judges Hughes During the time of the Supreme court actions did not recus herself from petitioners trial or appeal. Corbett V. Bordenkircher, 615 F.2d 722, (1980 CA6 KY), cert. den. 449 US 853, 66 L.ed.2d 66, 101 S.ct. 146. Trial before an unbiased judge is essential to Due Process. Johnson V. Mississippi, 403 US 212, 29 L.ed.2d 423, 91 S.ct. 1778 (1971). e.g. judges refusal at trial to allow defense counsel to make motions, to court instructions, heard and denied all motions marked as heard and overruled, denied defendant due process. Painter v. Leeke, 485 F.2d 427 (CA4 SC. 1973); Judges expression of defendants guilt based on evidence; Commonwealth v. Sylvester, 388 Mass 749, 448 NE2d 1106 (1983); Courts determination of credibility of defense witnesses State V. Kish, 4 Ohio App 3d 252, 4 Ohio BR 468, 448 NE2d 455 (1981); Improper sentencing issue's or consideration by judge. State V. Trahan, 367 So 2d 752 (1978. La); The right to jury trial also cannot be narrowed by having elements of the offense determined by the **Trial Judge**. U.S. V. Gaudin, 515 U.S. 506, 115 S.ct. 2310, 132 L.ed.2d 444 (1995)-(on prosecution of defendant for making false statements, as to which materiality is an element of the offense, the trial judge could not instruct the jury that the statements in question were material). This safeguard does not include the determination of the sentence, which may be assigned to the judge even as to capital punishment. Spaziano v. Fla., 468 U.S. 447, 104 S.ct. 3154, 82 L.ed.2d 340 (1984)-(state law could allow judge to override jury recommendation favoring life sentence over capital punishment).

APPENDIX G

However, Apprendi V. New Jersey, 530 U.S. 466, 120 S.ct. 2348, 147 L.ed.2d 435 (2000) warns that the state cannot convert what historically has been an element of the offense into a sentencing factor and thereby take the issue from the jury!

The court there concluded that, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt." This principle was carried forward to capitol sentencing in Ring V. Arizona, 536 U.S. 584, 122 S.ct. 2428, 153 L.ed.2d 556 (2002)-(where death penalty may be imposed only on a finding of enumerated aggravating factors, those factors must be found by a jury), and to Guideline sentencing in Blakely V. Washington, 542 U.S. 296, 124 S.ct. 2531, 159 L.ed.2d 403 (2004)-(where guideline system permits enhanced sentence, though within statutory maximum, to be imposed only on a finding of facts that take the case outside the standard-range sentencing, existence of those facts must be found by a jury); In U.S. v. Booker, 543 U.S. 220, 125 S.ct. 738, 160 L.ed.2d 621 (2005)-(which rendered invalid sentencing guidelines insofar as they rendered conditioned guideline sentencing levels on judicial findings. and though judicial findings would still be required, the guideline levels would thereafter be treated as simply advisory. With judicial discretion.

Here the proof is the likelyhood or appearance of "bias" rather than proof of actual "bias." Taylor V. Hughes, Id.

A verdict may also be challenged because it is learned later of some misconduct. Just as the Sixth Amendment requires an impartial trial by jury, due process requires an impartial judge. In the case Sub Judice Judge Hughes was involved with the petitioners case through out the time that she committed misconduct, ethical violations, or other contaminations issue's. Due to the nature of the misconduct exhibited by judge Hughes, The Petitioner had a right to recusal. Additionally, the issue would be after discovered as the petitioner would not have known The actions of judge Hughes until after the affect!

All Prior counsels failed to present or raise the issue and this is petitioners first opportunity to raise the issue where he is not represented by counsel. Given the likely Contamination and/or bias involved at the very least a rule to show cause is warranted as to why such relief should not be granted. Petitioner avers that the guiding standard is the likelyhood or appearance of bias, rather than proof of actual bias. Taylor V. Hayes, Id. The layered ineffective assistance of counsel also establishing an Extraordinary circumstance, Which also raises a presumption of prejudice Holloway V. Ark., 435 U.S. 475, 98 S.ct. 1173,

(APP-G)

55 L.ed.2d 426 (1978); U.S. v. Cronic, 466 U.S. 648, 104 S.ct. 2039, 80 L.ed.2d 657 (1984)-(defective appointment, amounting to an automatic violation of the Sixth Amendment); Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995)-(cumulative impact of counsels many errors). Under these circumstances counsel was ineffective in failing to seek the desired recusal.

6. The actions of judge Hughes were not an isolated event. and Arguendo, may have resulted from job stress. Many factors can add to job stress. However, a judge is expected to be fair and impartial, regardless of the choices they must make. On the other hand a judge who keeps a tight rein on his/or her emotions, over a period of time isolate her feelings or become uncomfortable in expressing them. This can be analogized to a pressure cooker that has its top spout tightened down so that the steam which builds up cannot escape. Eventually, with the constant buildup of steam, the pressure cooker will explode! (crime & justice in Amerrica 6th Ed. 2004/Territo-Halsted-Bromley).

People v. Lopez, 251 Cal. App.2d 918, 60 Cal.Rptr. 72, 76; People v. Bernhardt, 222 C.A.2d 567, 35 Cal.Rptr. 401,419.

The judge is not immune from acts committed outside of his/or her office and that violate professional codes of ethics.

7. The petitioner moves the court to also consider the underlying grounds relating to the Contamination issue's raised herein. At the very least a record should be established regarding the layered ground of ineffective assistance to the issue. Not excluding such other relief as the court deems in the interest of justice. Petitioner moves that any hearing should be held by Video Conference which is available at this facility by court order.

Oppositions to the requested relief should be followed by a Rule To Show Cause. Such will save the court time, expense and delay. Such will allow petitioner to defend his petition, provide additional grounds as averred herein, and to establish a record for any appeals, this includes layered ineffective assistance of counsel.

A Rule to show cause is attached for the courts convenience.

The case here also involves questions of recusal in which defense counsel failed to seek the relief. recusal is defined as, "DISQUALIFICATION OF A JUDGE, JURY OR ADMINISTRATIVE OFFICER FOR PREJUDICE OR INTEREST IN THE SUBJECT MATTER. A JUDGE MAY BE RECUSED AS A RESULT OF OBJECTION BY EITHER PARTY, OR MAY VOLUNTARILY DISQUALIFY HIMSELF OR HERSELF IF HE OR SHE FEARS THAT HE OR SHE MAY NOT ACT IMPARTIALLY, OR THAT SOME CIRCUMSTANCE WILL LEAD TO A SUSPICION OF BIAS." For all

(APP-G)

of the reasons averred herein petitioner prays the court to grant the requested relief. Absent the court granting a hearing at the very least will deny petitioner meaningful review and there would be a blank record for appellate review.

WHEREFORE, The Pro-Se Petitioner moves the honorable judges to grant the requested relief for new trial; recusal grounds, and ineffective assistance of counsel related to those grounds. Counsel having failed to honor the petitioners wishes.

To grant hearings to resolve those issue's. Not excluding Rule To Show Cause, or such other relief in line with the relief requested or as the court deems in the interest of justice.

RESPECTFULLY SUBMITTED

Anthony S Twitty PRO-SE

ANTHONY S. TWITTY

INST # FM-4476

P.O. BOX 1000

HOUTZDALE, PA. 16698-1000

DATE: September 21 2016

CC:FILE.

(APP- G)

CERTIFICATE OF SERVICE:

I, ANTHONY S. TWITTY, DO HEREBY CERTIFY THAT I AM THIS DAY SERVING UPON THE CLERK OF COURT PHILADELPHIA COUNTY, PENNSYLVANIA. MY AMENDMENT TO ALREADY FILED PETITION, FOR FILING AND DISTRIBUTION.

I AM ALSO SERVING A TRUE AND CORRECT COPY TO THE FOLLOWING PERSON:

TO: OFFICE OF THE DISTRICT ATTAORNEY
3 SOUTH PENN SQUARE
PHILA, PA. 19107

RESPECTFULLY SUBMITTED,
Anthony S. Twitty
ANTHONY S. TWITTY,
INST # FM-4476
P.O. BOX 1000
HOUTZDALE, PA. 16698-1000

DATE: September, 21 2016
CC:FILE.

APP-G

Filed 08/18/2017

IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 3282 EDA 2016
v.	:	
ANTHONY S. TWITTY	:	
Appellant	:	

ORDER

Appellant's *pro se* application for reconsideration is **GRANTED**. This Court's July 12, 2017 dismissal Order is hereby **VACATED**, and the above-captioned appeal is **REINSTATED**.

Further, on December 9, 2016, John B. Elbert, Esquire, entered appearance in this Court on behalf of Appellant. This Court erroneously docketed Attorney Elbert's appearance as court-appointed counsel, although Attorney Elbert was privately retained. Attorney Elbert filed a Pa.R.A.P. 3517 docketing statement on Appellant's behalf, and this Court sent a briefing schedule to Attorney Elbert on January 27, 2017, directing him to file a Brief for Appellant by March 7, 2017. In February 2017, this Court received an extension request from *pro se* Appellant. This Court forwarded Appellant's request to Attorney Elbert, unfiled, pursuant to ***Commonwealth v. Jette***, 611 Pa. 166, 23 A.3d 1032 (2011).

Upon receiving no further correspondence or filings from Attorney Elbert, on April 7, 2017, this Court remanded the matter to the Philadelphia

(APPENDIX - G)

County Court of Common Pleas for a determination of whether Attorney Elbert abandoned Appellant. The PCRA court responded promptly; however, it appears the court did not conduct an abandonment hearing. Rather, the court noted that the above-captioned appeal lies from the denial of Appellant's second PCRA petition, and Appellant was therefore not entitled to counsel. Upon receiving the PCRA court's response, this Court considered Appellant as proceeding *pro se*, and sent *pro se* Appellant a new briefing schedule on April 19, 2017. On July 12, 2017, this Court dismissed the above-captioned appeal because Appellant failed to file a brief.

Upon consideration of the above, this Court finds as follows: Attorney Elbert entered appearance in this Court on behalf of Appellant, and this Court should have noted that Attorney Elbert was privately retained. Nonetheless, this Court appropriately entered the April 7, 2017 remand Order, as there was no indication that Attorney Elbert was ever granted leave to withdraw appearance. ***See*** Pa.R.A.P. 907(b) ("[C]ounsel's appearance for a party may not be withdrawn without leave of court. . . ."); Pa.R.Crim.P. 120(B)(1) ("Counsel for a defendant may not withdraw his or her appearance except by leave of court."). A hearing was therefore necessary to determine if Attorney Elbert abandoned Appellant. Moreover, this Court should not have considered Appellant to be proceeding *pro se* upon receipt of the PCRA court's response.

Accordingly, the following is hereby **ORDERED**: this Court's Prothonotary is directed to correct the December 9, 2016 docket entry to reflect that entry of appearance was by privately retained counsel. The PCRA court is hereby **DIRECTED** to conduct an abandonment hearing to

determine whether Attorney Elbert abandoned Appellant, including consideration of the claims raised regarding Attorney Elbert's representation in Appellant's application for reconsideration. The PCRA court shall submit its findings to this Court, in writing, within thirty (30) days of the date of this Order. The briefing schedule is hereby **STAYED**, pending the findings of the PCRA court.

Appellant's request to dismiss the appeal with prejudice is **DENIED**.

This Court's Prothonotary is directed to send a copy of Appellant's application for reconsideration to the PCRA court and Attorney Elbert. The Prothonotary is further directed to send a copy of this Order to the Honorable Leon W. Tucker, the Philadelphia County Court of Common Pleas, the Commonwealth, Attorney Elbert, and *pro se* Appellant. Finally, this Court's Prothonotary is directed to list Attorney Elbert as Appellant's attorney of record.

PER CURIAM

(APP-G)

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	RECEIVED	
V.	SEP 12 2017	NO. CP-51-CR-0303181-2003
ANTHONY S. TWITTY	PCRA Unit CP Criminal Listings	No. 3282 EDA 2016

ORDER

AND NOW, this 11th day of September 2017, after receiving the Superior Court's Order, filed August 18, 2017 and after a hearing held on September 11, 2017, pursuant to the Order of the Superior Court for the purpose of determining whether Attorney Elbert abandoned Appellant, the court finds that Attorney Elbert did abandon Appellant.

While Attorney Elbert may have had reason to not perform, those reasons are of no moment in as much as Attorney Elbert did not receive permission to not file documents and not continue representing Appellant.

BY THE COURT:

LEON W. TUCKER, J.
Supervising Judge

AP

(APPENDIX E)

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CRIMINAL TRIAL DIVISION

COMMONWEALTH V. ANTHONY TWITTY, CP-51-CR-0303181-2003

ABANDONMENT ORDER

PROOF OF SERVICE

I hereby certify that, on this day, the Clerk of Quarter Sessions is hereby directed to serve the foregoing Court Order upon the person(s) and in the manner indicated below, which service satisfies the requirements of PA. R.CRIM.P. 114:

Counsel/Party: John B. Elbert., Esquire
Pennsylvania Criminal Defense, P.C.
1500 Market St. FL 12 East Tower
Philadelphia, PA 19102

Type of Service: ( ) Personal (X) First Class Mail ( ) Other, please specify

Appellant: Anthony Twitty., Pro-Se
INST # FM-4476
P.O. BOX 1000
Houtzdale, PA 16698-1000

Type of Service: ( ) Personal ( ) First Class Mail (X) Other, please specify

Dated: 9/11/2017

Law Clerk's Signature

(APPENDIX E)

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be referencing pieces of the evidence. The attorneys only referenced pieces of the evidence. You have the responsibility to evaluate all of the evidence in making your decision.

Now, we talked about it briefly. It was in the movie that you saw. We talked about it briefly on your questionnaire. But it is an essential principle of criminal law. It is fundamental that a citizen is presumed innocent. The mere fact that Anthony Twitty was arrested and charged with crimes is not evidence of his guilt. A citizen who is accused of a crime is presumed to remain innocent throughout the trial unless and until you conclude, based upon the careful and impartial consideration of the evidence, that the Commonwealth has proven him guilty beyond a reasonable doubt of all of the charges that have been brought against him. It is not Anthony Twitty's burden to prove that he is not guilty. It is the Commonwealth that always bears the burden of proving each and every

Page 54

element of crimes charged and that Anthony Twitty is guilty beyond a reasonable doubt of those crimes.

A person who is accused of a crime is not required to present evidence or to prove anything in their own defense. If the evidence presented fails to meet the Commonwealth's burden, then your verdict must be not guilty. On the other hand, if the evidence does prove beyond a reasonable doubt that Anthony Twitty is guilty of the crimes charged, then your verdict must be guilty.

Although the Commonwealth bears the burden of proving the defendant is guilty, this does not mean that the Commonwealth must prove its case beyond all doubt or to a mathematical certainty. The Commonwealth is not required to demonstrate the complete impossibility of innocence. A reason reasonable doubt is a doubt that would cause a reasonably careful and sensible person to pause or hesitate, to refrain from acting upon a matter of the highest importance to their

Page 55

own affairs or to their own interest. A reasonable doubt must fairly arise out of evidence which was presented or out of the lack of evidence this was presented.

Now, ladies and gentlemen, let me give you an example of reasonable doubt. Let's say that someone you love dearly, your spouse, your significant other, one of your children, was advised by their physician that they had to have surgery. They had some kind of life-threatening condition and the best medical protocol was this surgery. The physician is not promising you that this life-threatening condition is going to be cured by the surgery, merely that the surgery is the best possible avenue for treatment.

Now, if you're like me, you're going to seek a second opinion. You're probably going to seek a third opinion and you guys have already figured out I'm really close to my family, I'm going to talk to everybody in my family, I'm going to talk to everybody I trust, I'm going to go on the Internet, I'm going to do

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all the research that I can do about this disease, about this surgery, about any way that this can be dealt with. But at some point, the question is going to be called and you're going to be required to make a decision. You're never going to have all the information that you wish you could have, but fundamentally what you want is a promise that it is going to work. But you're never going to have all the information that you want.

If you have sufficient information to get past reasonable doubt, you're going to go forward with the surgery. If you can't get past reasonable doubt, then you won't go forward with the surgery.

Ladies and gentlemen, a reasonable doubt must be a real doubt. It may not be a doubt imagined, nor may it be one that is manufactured to avoid carrying out an unpleasant responsibility. You may not find Anthony Twitty guilty based upon a mere suspicion of guilt. The Commonwealth does bear the burden of proving Anthony Twitty guilty beyond a

(Appendix-H)

BASIL BROOKS, Petitioner, v. ROBERT GILMORE, Superintendent, SCI-Greene, and PENNSYLVANIA DEPARTMENT OF CORRECTIONS, Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2017 U.S. Dist. LEXIS 127703
CIVIL ACTION No. 15-5659
August 11, 2017, Decided
August 11, 2017, Filed

Editorial Information: Subsequent History

Dismissed by **Brooks v.** Greene, 2018 U.S. App. LEXIS 16703 (3d Cir., Feb. 28, 2018)

Editorial Information: Prior History

Brooks v. Gilmore, 2016 U.S. Dist. LEXIS 59266 (E.D. Pa., Apr. 28, 2016)

Counsel {2017 U.S. Dist. LEXIS 1}For **BASIL BROOKS**, Petitioner: DANIEL ALAN SILVERMAN, LEAD ATTORNEY, LAW OFFICES DANIEL SILVERMAN & ASSOC, PHILADELPHIA, PA.

For SUPT. **ROBERT** D. **GILMORE**, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents: JAMES FOSTER GIBBONS, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, PA.

Judges: Gerald Austin McHugh, United States District Judge.

CASE SUMMARY The court granted a petitioner's request for a writ of habeas corpus because the trial court instruction, in which reasonable doubt in juror deliberation was analogized to making a decision about life-saving medical treatment for a loved one where one option existed, violated petitioner's Fourteenth Amendment right to due process.

OVERVIEW: HOLDINGS: [1]-The court granted a petitioner's request for a writ of habeas corpus because the trial court instruction, in which reasonable doubt was explained to the jury through an emotionally charged hypothetical, which asked the jurors to analogize their deliberations to making a decision about life-saving medical treatment for a loved one when only a single option existed, violated petitioner's Fourteenth Amendment right to due process of law as it required an excessively high degree of doubt to reach an acquittal; [2]-By failing to object to the instruction, trial counsel rendered ineffective assistance of counsel under the Sixth Amendment as that failure was both deficient and prejudicial; [3]-The superior court's rejection of petitioner's ineffective assistance claim involved an unreasonable application of clearly established U.S. Supreme Court law.

OUTCOME: Petition for writ of habeas corpus granted, report and recommendation adopted as to remaining challenges.

(APPENDIX I)

where it involves an "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1)-(2). This standard is "difficult to meet... because it was meant to be," *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), but even under AEDPA, habeas corpus remains "a safeguard against imprisonment of those held in violation of the law," calling for "vigilant and independent" federal court review, *id.* at 86, 91. "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).2

B. *Ineffective Assistance of Counsel*

Petitioner's claim to relief for this defective jury instruction sounds in ineffective assistance of counsel. The standard for evaluating this claim is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, Petitioner must show: (1) that counsel performed deficiently, i.e., that his conduct fell below "an objective standard of reasonableness," *id.* at 688; and (2) prejudice, i.e., that confidence in the result of the original proceeding is undermined due to counsel's deficiency, *id.* at 694. *Strickland* prejudice is established where, but for the effect of counsel's errors, there is a reasonable probability that at least one juror would have had a reasonable doubt with respect to the defendant's guilt. *Hinton v. Alabama*, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014); *Strickland*, 466 U.S. at 695.

IV. Discussion

Petitioner claims his trial counsel was ineffective for failing to object to the instruction defining reasonable doubt for the jury. Because this ineffectiveness claim hinges on the constitutionality of the instruction, I will first address whether the instruction was proper, then address whether counsel's assistance was effective, and finally review the Pennsylvania Superior Court's disposition of this claim, applying the deferential standard outlined in 28 U.S.C. § 2254(d).

A. *The trial court instruction defining reasonable doubt violated Petitioner's Fourteenth Amendment right to due process of law.*

The burden-of-proof instruction at Petitioner's trial began without issue. The trial judge employed a near-verbatim passage from the Pennsylvania Suggested Standard Jury Instruction: "A reasonable doubt is a doubt that would cause a careful, sensible person, a reasonably careful and sensible person, to hesitate or to refrain from acting upon a matter of the highest importance to their own affairs or to their own interests." NT 10/09/07 at 149. After this proper introduction, however, the judge interrupted with the following analogy:

> It's helpful to think about reasonable doubt in this manner. Let's say, and I know that each one of you does have someone that you love very much, a spouse, a significant other, a child, a grandchild. Each one of you has someone in your life who's absolutely precious to you. If you were told by your precious one's physician that they had a life-threatening condition and that the only known protocol or the best protocol for that condition was an experimental surgery, you're very likely going to ask for a second opinion. You may even ask for a third opinion. You're probably going to research the condition, research the protocol. What's the surgery about? How does it work? You're going to do everything you can to get as much information as you can. You're going to call everybody you know in medicine: What do you know? What have you heard? Tell me where to go. But at some point the question will be called. If you go forward, it's not because you have moved beyond all doubt. There are no guarantees. If you go forward, it is because you have moved beyond all reasonable doubt. *Id.* at 149-51. After this interlude, the judge finished her charge with a portion of the standard instruction: "[A] reasonable doubt must be a real doubt. It may not be an imagined one nor one that is manufactured to carry out an unpleasant

(App-I)

the trial judge's use of metaphor makes the analysis more complex does not in any way excuse the violation-or lessen the error of the state court in conducting review. A subtle violation of the Constitution, no less than an overt one, is still a violation.

The state court cited two state cases in its opinion, but it did not reasonably apply either of them to the facts of this case. The first case was *Commonwealth v. Willis*, 2010 PA Super 19, 990 A.2d 773 (Pa. Super. Ct. 2010), which the state court used to establish that courts have discretion in defining reasonable doubt so long as they "present[] the law" "clearly, adequately and accurately." The second case was *Commonwealth v. Thomas*, 529 Pa. 149, 602 A.2d 820 (Pa. 1992), cited for the proposition that a jury charge may contain solemnizing language to "focus the jurors" on the heavy task at hand. These cases appropriately resolved their facts under the *Cage* standard for reasonable doubt instructions. However, the state court here failed to relate those cases' holdings to this case or explain how this instruction was clear, adequate, accurate, or solemnizing. Instead, without comparison to these authorities, the suggested standard instruction, or any other metric of constitutionality, the state court simply announced a conclusion that the instant instruction was a "comprehensive and accurate presentation of the law." Sup. Ct. Op. at 12.11

V. Conclusion

A federal court has the responsibility to grant habeas relief if the state court's decision on review depended on an unreasonable determination of the facts or an unreasonable application of clearly established Supreme Court law. *See, e.g.*, *Grant v. Lockett*, 709 F.3d 224, 238 (3d Cir. 2013); *Breakiron v. Horn*, 642 F.3d 126, 143 (3d Cir. 2011); *Showers v. Beard*, 635 F.3d 625, 632 (3d Cir. 2011); *Lambert v. Beard*, 633 F.3d 126, 133 (3d Cir. 2011), *judgment vacated on other grounds sub nom. Wetzel v. Lambert*, 565 U.S. 520, 132 S. Ct. 1195, 182 L. Ed. 2d 35 (2012), *on remand*, 537 F. App'x 78 (3d Cir. 2013). Here the state court's decision to reject Petitioner's ineffective-assistance claim rested on both types of error and thus cannot stand.

Petitioner's request for a writ of habeas corpus will be granted on Claim II of his petition. He must be retried within 180 days or released. An appropriate order follows.

/s/ Gerald Austin McHugh

United States District Judge

ORDER

This 11th day of August, 2017, upon careful and independent consideration of the Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254, and after review of the Report and Recommendation of the Magistrate Judge, it is hereby **ORDERED** that:

1. The Report and Recommendation is **ADOPTED** as to all claims except the claim of ineffectiveness for failure to object to the trial court's reasonable doubt instruction.

2. The Petition for Writ of Habeas Corpus is **GRANTED** as to the reasonable doubt claim. Petitioner must be retried within 180 days or released.

3. Petitioner's remaining claims are **DENIED**.

4. A certificate of appealability is **DENIED** on Petitioner's remaining claims.

/s/ Gerald Austin McHugh

United States District Judge

(APP -I)

MY COPY

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA)
V.) CASE NO. CP-51-CR-0303181-2003
ANTHONY S. TWITTY)

SUPPLEMENT TO THE ALREADY FILED Dnt Sep 4
PETITION FOR HEARING AND TO VACATE ORDER

NOW COMES THE PETITIONER PRO-SE, AND DO HEREBY AVER THE FOLLOWING SUPPLEMENTAL GROUNDS TO BE CONSIDERED ALONG WITH THE ALREADY FILED PETITION:

1. The Petitioner/Appellant is currently confined at SCI-Houtzdale, Pa. He has been denied an appeal or an effective one. Because the petitioner did not receive communication from counsel in his case. As such he moves for liberal consideration of his filings.

2. Currently petitioner/Appellant has received an order from the Superior court dated 8/18/2017 Granting the petitioner/Appellants pro-se Application for reconsideration, reinstating Appellants appeal. And further remanding this matter for a determination regarding abandonment. The "Petitioner/Appellant moves to be present at any hearing regarding the superior courts order and to vacate the order denying relief where petitioner has suffered layered ineffective assistance".

Petitioner filed a sworn statement (notarized) dated April 9, 2009 Seeking to have his direct appeal rights reinstated, Nunc-Pro-Tunc, in the Superior court, and that new counsel be appointed to represent the petitioner. However, Petitioner has suffered due process denial where he was forced to proceed with counsel for appeal from trial and direct appeal from the public defenders office. SEE: Commonwealth v. Kent, 797 A.2d 978 (Pa. Super. 2000). Initial trial counsel Christine Quinn, Esq. (PD). Counsel from same office appointed on 3/19/2003, Petitioner has no Idea of the action of counsel, or any issues counsel sought to have reviewed, in violation of Penson v. Ohio, 109 S.ct. 346 (1988); Roe v. Flores-Ortega, 120 S.ct. 1029 (2000).

Petitioner has no formal knowledge of the PCRA Petition filed by Sanjai Weaver, Esq. He only became aware after receiving a Trial court Docket showing that entry as being filed 11/21/2008. In line with Penson v. Ohio, 109 S.ct. 346 (1988) & Roe v. Flores-Ortega, 120 S.ct. 1029 (2000). Where counsel failed to communicate with the Defendant concerning an appeal or to address issues on

(APPENDIX-G)

Appeal. Additionally, Pursuant to Kent, Id. As such the court should apply Kent, Id., Grant the request to vacate the order dismissing the petition for that purpose, and order petitioners appearance for any hearing in this matter in line with the Superior courts order. Also The court should reinstate Petitioners Direct Appeal rights, and appoint counsel unassociated with the Public defenders office.

3. Petitioner had no knowledge that his case was even on appeal until he received the correspondence in reply to his letter. the reply is dated August 25, 2004.

4. As for Karl Baker, Esq. filing a Brief for the Petitioner, Again the petitioner has no knowledge other than a proof of service he received after request. Mr. Baker was also a member of the Public defenders office. As such the same Relief is requested pursuant to Commonwealth v. Kent, 797 A.2d 978 (Pa. Super. 2000); Penson v. Ohio, 109 S.ct. 346 (1988), and Roe v. Flores-Ortega, 120 S.ct. 1029 (2000). Under these circumstances the petitioner has not received meaningful review of the denial of a Constitutional or Due-Process right. SEE: Commonwealth v. Malone, 823 A.2d 931 (Pa. Super. 2003). Due-Process Suggest that under the circumstances of the Superior courts order a hearing with Petitioner/Appellants Participation will allow the petitioner to support the herein stated, and defend his petition. It will give the Commonwealth and opportunity to rebut any. and finally it will establish a record for any needed appeal. As such Petitioner/Appellant pro-se moves the court that he be present to participate in any hearing concerning the Superior courts order and determination, Absent the court granting such relief will deny Petitioner/Appellant Due-Process of law.

WHEREFORE, the Petitioner/Appellant pro-se, moves the honorable court to grant the above requested relief. To Allow the Petitioner/Appellant the opportunity to participate in any hearing, in line with Due-Process and under the current circumstances. And Given the court has been instructed to determine if counsel Elbert Abandoned Appellant, that determination cannot be made one sided. And such relief as stated herein. VACATE The courts order allowing review of the issues, order petitioners presence at any hearing and re-instate petitioners direct appeal rights.

RESPECTFULLY SUBMITTED

ANTHONY S. TWITTY, PRO-SE

(APP-G)

INST # FM-4476
P.O. BOX 1000
HOUTZDALE, PA. 16698-1000

DATE: Sep 4, 2017
CC:FILE.

CERTIFICATE OF SERVICE:

I, DO HEREBY CERTIFY THAT I AM THIS DAY SERVING UPON THE CLERK OF COURT PHILADELPHIA, MY SUPPLEMENT FOR FILING AND DISTRIBUTION.
I AM ALSO SERVING A TRUE COPY OF THE SAME UPON THE FOLLOWING PERSON:

TO: HUGH J. BURNS, JR., ESQ.
OFFICE OF THE DISTRICT ATTORNEY
3 SOUTH PENN SQUARE
PHILA, PA. 19107

(SERVICE: FIRST CLASS MAIL)

TO: HONORABLE JUDGE LEON W. TUCKER
JUDGES CHAMBERS
COURT OF COMMON PLEAS
1301 FILBERT STREET
PHILA, PA. 19107

(SERVICE BY CLERK)

RESPECTFULLY

ANTHONY S. TWITTY, PRO-SE
INST # FM-4476
P.O. BOX 1000
HOUTZDALE, PA. 16698-1000

DATE: Sep 4, 2017
CC:FILE.

(APP-G)

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA)
V.) CASE NO. CP-51-CR-0303181-2003
ANTHONY S. TWITTY)

ADDITIONAL SUPPLEMENT

DUE TO RECENTLY ACQUIRED INFORMATION:

1. The petitioner moves the court to include these supplements to his already filed proceeding. To make necessary factual findings, and to allow petitioner to properly defend his motion.

2. The Pro-Se Petitioner recently acquired information pertaining to the decision in Basil Brooks v. Robert Gilmore, superintendent, SCI-Greene, and Pa. Dept. Of Corrections, No. 15-5659 (U.S. District court for the Eastern District/decided 8/11/2017). Petitioner seeks to amend his petition with this information which pertains to Judge Renee cardwell Hughes, which was also the petitioners judge,and to jury instructions which contained Hypothetical's related to jury instructions, which improperly elevated the level of doubt necessary to secure an acquittal... In the case Sub Judice Petitioner suffered the same at the hands of Judge Hughes! He ask this court to protect his rights by allowing him to prove the injustices. To defend his petition and the opportunity to present such evidence warranting relief.

WHEREFORE, PETITIONER MOVES THE COURT TO SUPPLEMENT THIS ADDITIONAL ISSUE IN THESE PROCEEDINGS. ALSO THE RECENT DECISION WAS WITHIN 60DAYS OF THIS DATE AS SUCH THIS FILING IS TIMELY PURSUANT TO THE EXCEPTIONS TO THE PCRA. AS SUCH RELIEF IS DUE. THE COURT MUST MAKE A DETERMINATION OF THIS TIMELY FILING.

THE PCRA PROVIDES A MECHANISM FOR VINDICATING EXISTING CONSTITUTIONAL RIGHTS, AND IT ALSO PROVIDES A MECHANISM FOR IMPLEMENTING NEW CONSTITUTIONAL RULES OF RETROACTIVE APPLICATION, NO MATTER WHEN THE NEW RULE IS ESTABLISHED COM. V. FEARS, 86 A.3d 795 (PA. 2014).

RESPECTFULLY SUBMITTED

ANTHONY S. TWITTY, PRO-SE
INST # FM-4476
P.O. BOX 1000
HOUTZDALE, PA. 16698-1000

DATE: Sep 2, 2017

CC:FILE.

SERVED CLERK OF COURTS OFFICE, COURT OF COMMON PLEAS PHILADELPHIA.

COPY SERVED: OFFICE OF THE DISTRICT ATTORNEY 3 SOUTH PENN SQUARE, PHILA, PA. 19107

(APP-G)

Tough-talk jurist mum on transcript tweak

Red Cross, Hughes' new boss, waves it off

By MENSAH M. DEAN
deanm@phillynews.com
215-854-5949

Renee Cardwell Hughes, one of Philadelphia's toughest-talking judges, isn't talking at all about the state Supreme Court's removal of her from a death-penalty appeal case for altering the courtroom transcript to conceal a disparaging remark she'd made about the defendant.

But her new employer says that the controversy won't affect Hughes's upcoming move to become CEO of the American Red Cross Southeastern Pennsylvania Chapter.

"She has the highest integrity, has impeccable credentials, and an outstanding reputation of fairness and being an advocate for justice for the people of Philadelphia," said Michael Coslov, chairman of the Red Cross' board. "The Red Cross is not concerned at all about something that happened several years ago."

Hughes interviewed for the job on Feb. 18 and accepted the position in early April, the Red Cross said.

But Hughes' April 29 public announcement that she was leaving the Court of Common Pleas bench after 16 years came only one day after the Supreme Court's order that another judge must hear a convicted killer's appeal.

Hughes will not comment on the high-court order because she is still a judge, though she is using up court vacation time and will not return to the bench, Red Cross spokesman Dave Schrader said.

The controversy involves the case of Daniel Dougherty, 50, who was convicted in Hughes' courtroom in 2000 and sentenced to death for setting a 1985 fire that killed his two children. Dougherty is appealing on the grounds that his trial attorney was deficient.

Hughes, known for colorful language and fiery outbursts, called Dougherty "vile" during a February 2008 hearing. But when his attorney reviewed the hearing transcript the insult was gone, according to a concurring statement from Justice Max Baer, released with the order.

At a follow-up March 2008 hearing, Hughes, 55, admitted using the insult and explained herself.

"I told [the court reporter] to [remove] words that are less than judicial because I'm Southern and I say words like flipping and sucker . . . ," according to Baer's statement.

When the attorney asked her to remove herself from the case because her actions had created an appearance of impropriety, Hughes "retorted by lambasting" the attorney, the statement said.

"[T]o direct privately a court reporter to alter an official transcript, the only vehicle through which appellate courts can ensure the due process of law, is reprehensible and should be condemned universally," wrote Baer, whose statement was joined by Justices Seamus McCaffery, Joan Orie Melvin and Thomas Saylor.

Her first day at the helm of the Red Cross is May 16. ★

TOM GRALISH / Staff pho

Common Pleas Judge Renee Cardwell Hughes in 2000.

Not the first time judge has made headlines

This [illegible] Renee Cardwell Hughes [illegible] controversy. A look at some of her greatest hits:

➤ She first made headlines after a run-in with police on the Vine Expressway in 1993. She told the *Daily News* then that she had been mistreated after police had to break a window to get her out of her Jeep.

➤ While presiding over the case of Miriam Whitz, who at age 11, in 1999, became the youngest person in the city ever charged with murder, prosecutors accused Hughes of be[illegible] [illegible] [illegible] favo[illegible] [illegible] [illegible] she told [illegible] [illegible] "gorgeous smile," and promised to try to have p[illegible] delivered to her mail.

➤ Hughes, intermittently ny and fiery, typically as cou[illegible] ous to defendants, but does hesitate to tongue-lash the morseless after they've b[illegible] convicted. The Virginia-ba[illegible] was known to slip into a So[illegible] ern drawl when speaking h[illegible] the bench.

➤ Hughes is the ex-wife [illegible] State Sen. Vincent Hug[illegible] with whom she has a son. [illegible]

Staff R

Phila. Daily News, Saturday, May 7, 2011
Page #3

(APPENDIX-J)

JAN 2, 2019
Philadelphia Tribune

THE COURTS

Judge's words threaten old cases

A dozen murder convictions could be overturned because of an odd metaphor used during the jury instructions.

By Samantha Melamed
STAFF WRITER

An imprecise metaphor may sound like a trivial matter. But figurative language deployed by a flamboyant and controversial judge more than a decade ago is now the basis for legal challenges by a dozen or more Philadelphians convicted of murder.

Federal judges have already ordered new trials for two of them, and a third case is being negotiated to avert a similar outcome.

Now it's up to the Philadelphia District Attorney's Office to decide how vigorously to fight those and any other cases overturned on the same grounds: jury instructions given by Allen Common Pleas Court Judge Renee Cardwell Hughes that even the D.A. now concedes were unconstitutional.

Renee Cardwell Hughes said she chose her words carefully.

Following a strongly worded opinion from federal Judge Gerald McHugh calling her instruction deficient, the D.A.'s office said it would no longer defend the instruction, putting itself in a tactically difficult

See INSTRUCTIONS on A3

(APPENDIX-J)

Instructions

Continued from A1

position that may open the door for even more reversals. Now, the office is fighting to contain the fallout.

"We'd have scores — dozens, potentially — you know, I mean, McHugh's opinion is a recipe for relief in every one of these cases," the D.A.'s federal litigation supervisor, Max Cooper Kaufman, said during arguments in federal court in May 2018, according to transcripts.

It began with the case of Basil Brooks, who was convicted of the 2005 slaying of Derrick Jones, shot dead on the street in West Philadelphia. The evidence against Brooks was, by all accounts, thin: primarily, the testimony of a single eyewitness who could not pick Brooks out of a photo array, who was high on Xanax at the time the crime occurred, and who faced pending criminal charges that were dismissed for lack of prosecution shortly after he implicated Brooks.

As the trial concluded, Hughes charged the jury with assessing whether Brooks was guilty beyond a reasonable doubt.

To assist them, she conjured a metaphor: "If you were told by your precious one's physician that they had a life-threatening condition and that the only known protocol or the best protocol for that condition was an experimental surgery, you're very likely going to ask for a second opinion." Anyone would ask questions, do research, she explained — but at some point you have to decide: "If you go forward, it's not because you have moved beyond all doubt. There are no guarantees. If you go forward, it is because you have moved beyond all reasonable doubt."

Daniel Silverman, a lawyer hired by Brooks to comb through his case for errors, believed he'd found one in that instruction and filed a habeas petition seeking relief in federal court.

"The United States Supreme Court has unanimously held that upping the ante in that regard violates the due process clause of the 14th Amendment," he said recently.

In August 2017, McHugh, of the U.S. District Court for Pennsylvania's Eastern District, agreed. Considering that example of a terminally ill loved one, McHugh wrote, "What level of doubt would need to exist before a juror would deny them a chance at life? Necessarily, one would need profound, if not overwhelming, doubt."

The District Attorney's Office filed notice it would appeal McHugh's decision. But after Larry Krasner was elected, it withdrew the appeal, which, if denied, could have led to a precedent-setting ruling. Its position now appears to be that the instruction was improper — but not to the point of voiding all relevant convictions.

Still, it is no mere technicality, said

DA Larry Krasner's office is fighting to contain the fallout after a strongly worded opinion by a federal judge. MATT ROURKE / AP

Shari Seidman Diamond, an expert on jury instruction and a professor at Northwestern University's Pritzker School of Law.

"The whole system of criminal prosecution is based on the notion that we won't convict somebody of an offense unless it is beyond a reasonable doubt — and, by that, we mean that the evidence has to be extremely strong."

She called the instruction Hughes gave "objectionable."

By likening convicting the defendant to securing lifesaving treatment for a loved one, Diamond said, "She kind of loaded the dice in favor of convicting. By this analogy, you sure are going to want to convict, and you should never create in the jurors the sense they want to convict."

While judges have discretion in how they advise juries, many jurisdictions, including Pennsylvania, publish suggested standard jury instructions. Diamond prefers the instruction that U.S. Supreme Court Associate Justice Ruth Bader Ginsburg proposed in a 1994 opinion: "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt."

Hughes, a graduate of Georgetown University Law Center, was known for her unrestrained speech from the bench.

In 2000, D.A. Lynne Abraham unsuccessfully attempted to have her removed from the trial of a 13-year-old girl charged with murder, after Hughes made clear she thought the case belonged in juvenile court, telling the girl she had a "gorgeous smile" and promising to try to have pizza delivered to her in jail.

Hughes resigned her post in 2011 for a job leading the regional office of the Red Cross — an announcement that came just one day after a searing opinion from the Pennsylvania Supreme Court removing her from a death-penalty case and chastising her for ordering a court reporter to strike from the transcript her comments about the defendant, whom she had called "vile" during a 2008 hearing. The high court called the redaction a "reprehensible" breach of conduct. At the time, Hughes explained, "I told the [court reporter] to [remove] words that are less than judicial, because I'm Southern and I say words like 'flipping' or 'sucker.' "

Reached by phone, Hughes said that, when it came to the reasonable doubt instruction, she had selected her words carefully. In each case she added the hypothetical scenario to standard, approved language.

She did not recall when she first began using the analogy, but remembered it was developed in collaboration with lawyers in response to a question from a jury. She found the language so effective that she stuck with it in case after case.

"The lawyers liked it, it withstood appeals, and the jury seemed to get greater clarity out of it," Hughes said.

She disagreed that likening convicting a defendant to procuring lifesaving treatment for a loved one "loaded the dice."

She said, "What the instruction says is, 'Be responsible. Think about it as seriously as you would think about a decision you're making for someone you care about.' "

Indeed, though lawyers have repeatedly challenged Hughes' jury instructions, which she gave in as many as 50 cases, according to one advocate — judges have upheld it on at least seven occasions in state and federal courts, by the D.A.'s count.

Lawyer Sam Stretton in 2011. His appeal to the state Supreme Court was rejected.

One lawyer, Samuel Stretton, objected to it multiple times in the case of Roy Johnson, who shot and killed a man named James Lockett in West Philadelphia in 1997. Johnson claimed the shooting was in self-defense, but he was charged with first-degree murder. After two juries were unable to reach a verdict, a third, in Hughes' courtroom, convicted him of voluntary manslaughter.

Stretton said the instruction was clearly problematic. "It goes fundamentally to the fairness of the trial," he said. But he was not surprised that the Superior Court rejected his appeal. "I've always felt that the Superior Court at times is so overwhelmed that they can't adequately address many of these cases."

Still, federal judges remain divided on the issue: U.S. District Judge Petrese Tucker held in 2018, in the case of Anthony Corbin, that the jury instruction — though perhaps not perfect — was, on the whole, acceptable. Corbin, who was convicted of shooting a courier at a check-cashing place in West Philadelphia in 2003, is appealing that decision based on the D.A.'s subsequent statements agreeing the instruction was flawed.

Now, the Philadelphia District Attorney's Office is arguing that in many cases the instruction, problematic or not, is beside the point and that the guilty verdicts should stand.

In October, the office outlined its position in a letter agreeing to vacate the conviction of Kalif Gant, who is serving a 40- to 80-year sentence for the fatal shooting of Christopher Jones in North Philadelphia.

"The D.A.O. is assessing each case on an individualized, case-by-case basis," the letter noted. "While the D.A.O. will not be arguing in any of these matters that the instruction is constitutionally proper, it may be raising other arguments in opposition to relief, depending on the particular circumstances."

Those determinations could be based on arguments that the jury instructions were not prejudicial — for example, in a slam-dunk conviction where the judge's words likely did not tip the scales. In other cases, where the instruction was not challenged at trial and during appeals, the D.A. is arguing the issue cannot be raised now for procedural reasons. A D.A. spokesperson declined to comment beyond what was said in the court filings.

For now, Gant and Brooks are back in Common Pleas Court and could stand trial again unless they can reach agreements with the D.A.

Negotiations are also underway in the case of Armel Baxter, who was convicted of shooting Demond Brown in Nicetown in 2007. According to court filings, the evidence presented against him hinged on the conflicting testimony of two eyewitnesses, along with corroborating testimony from a woman who was using 45 Xanax a day, admitted to hallucinating the day of the shooting, was held for 30 hours by police before implicating Baxter, and received immunity to testify.

Meanwhile, the D.A. is adamantly opposing other cases, such as those of Tyrique Jackson, convicted of killing Sterling Almond, a cameraman working on a rap video, over a beef about insulting lyrics, and Robert McDowell, who was convicted with another man of murdering Damien Holloway and then, in order to "tie up loose ends," executing 15-year-old witness Timothy Clark.

In both cases, the D.A. argues that the evidence to convict was overwhelming and that the petitions, therefore, are baseless.

In each, it concluded in filings, "No relief is due."

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APPENDIX - J

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA)
V.)
ANTHONY TWITTY) NO. 3282 EDA 2016
TRIAL COURT # CP-51-CR-0303181-2003

PETITION FOR REMAND
THE TRIAL/PCRA COURT HAVING DETERMINED
THAT COUNSEL ABANDONED APPELLANT
AND THERE BEING UNDERLYING ISSUE'S WHICH MAKES THE PETITION NOT UNTIMELY

NOW COMES APPELLANT PRO-SE AND DO HEREBY AVER THE FOLLOWING IN SUPPORT OF THE REQUEST FOR REMAND:

1. The Petitioner is currently confined at SCI-Houtzdale, Pa. He is indigent and cannot afford the fees and cost associated with this filing.

This court currently has Jurisdiction over the Appellants case and appeal.

2. Currently the Appellant has not only suffered abandonment of counsel but has also suffered layered ineffective assistance, Where Trial counsel was ineffective and Where Appellate counsel failed to raise Trial counsel errors, And where Appellant was represented At trial and on appeal by counsels from the Public defenders office. SEE: Commonwealth v. Kent, 797 A.2d 978 (Pa. Super. 2002) The Kent court addressed that Kent had raised that counsel at trial was ineffective, and that the trial court had overlooked the fact that "a public defenders office cannot raise its own ineffectiveness on appeal. Commonwealth v. Ciptak, 665 A.2d 1161 (Pa. 1995); Commonwealth v. Shannon, 608 A.2d 1020 (Pa. 1992). This office would have been forbidden to represent him. And the deprivation of the right to counsel can never be harmless. Commonwealth v. Payson, 723 A.2d 695 (Pa. Super. 1999). The Court in Kent determined that Kent's right to counsel unassociated had been violated. And remanded for appointment of counsel and to reinstate Kent's Right to file a direct appeal. (797 A.2d 981) appeal Nunc-Pro-Tunc. Commonwealth v. Champney, 783 A.2d 837 (Pa. Super. 2001).

3. In the case Sub Judice, just recently This court issued an order dated August 18, 2017, (3282 EDA 2016) directing the trial/PCRA court to hold a hearing regarding Counsel Elbert's Abandonment of the Appellant for appeal. The Hearing in the trial court before Judge Leon W. Tucker, by video conference on September 11, 2017. At which time Judge Tucker found that Counsel Elbert had Abandoned the Petitioner.

At the time of the hearing the Appellant placed on the record that he had been

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denied independent counsel for the purpose of his direct appeal, (especially since both trial and appealate counsel were ineffective and failed to communicate with the Appellant). At the hearing held September 11, 2017 Although the court determined that Counsel Elbert Abandoned the Pro-Se Appellant the judge did not state What relief would be due under the circumstances. Appellant placed on the record at this hearing Commonwealth v. Kent, And the denial of his right to independent counsel unassociated with the public defenders office, Appellant also placed on the record at this hearing, Layered ineffective assistance of counsel. also raised was the Recent Decision in Basil Brooks v. Robert Gilmore, superintendent, SCI-Greene, and Pa. Dept. of Corrections, No. 15-5659 (U.S. District court for the Eastern District Pa. 8/11/2017). Appellant sought to have the court address both his right being denied Independent counsel on appeal, and the recent case in Basil Brooks. The Brooks decision involves the same Judge Renee Cardwell Hughes, and Involves the same issue of Hypothetical's related to jury instructions. The PCRA Provides a mechanism for vindicating existing Constitutional rights, and it also provides a mechanism for implementing new Constitutional rules of retroactive application, no matter when the new rule is established Commonwealth v. Fears, 86 A.3d 795 (Pa. 2014). Remember the PCRA court denied the PCRA Petition as untimely! However, had the PCRA Court addressed these issues the PCRA Petition would not have been untimely. However, due to the nature and status of the current appeal process by counsel who abandoned the Appellant the court was unable to address the underlying issues. Judge Tucker Stated at the September 11, 2017 Hearing, "I AM BOUND BY THE SUPERIOR COURTS ORDER." As such the trial/PCRA court could not hear or address the issues. If the Appellant would in fact be timely under the circumstances of the underlying issues that the court stated it could not address at this time due to the Superior courts August 18, 2017 order, Appellant avers that relief is due. Additionally, Judge Tucker stated, "I HAVE A SMALL WINDOW, MY HANDS ARE TIED." The judge stated that I would have to address the issues at another time. Clearly there would be no other time the Appellant could effectively address these issues Which the judge stated Because of this Courts order he could not address. Remember the court deems the PCRA Petition which is the result of this appeal as being untimely. That being said any filings after the fact would also be untimely absent the court being able to address these issues.

4. Finally, Judge Tucker stated, "THIS DEALS WITH AN ISSUE OF UNTIMELINESS." The judge stated, "I UNDERSTAND, BUT THIS IS NOT THE FORUM FOR THAT." Judge stated I

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would have to address this at a later date. It's clear by the record that the judge stated the reason that he could not address these issue's is because of the nature of this Courts August 18, 2017 order. Judge Tucker stated "I'M GOING TO SEND THIS BACK UP A MOTION OF ABANDONMENT." However, had the trial court been able to address the issues the current petition would not be untimely, under the underlying grounds.

As of this date the Pro-Se Appellant has not had meaningful review in line with Commonwealth v. Malone, 823 A.2d 931 (Pa. Super. 2003) Like in Appellants case PCRA counsel in the first Timely PCRA failed to raise the underlying issue of being denied independent counsel for the purpose of appeal.

And in Malone The court vacated and remanded to the trial court. The trial court was instructed to allow the inmate, with counsel present, to amend his petition to conform to Pennsylvania Rules of Criminal Procedure. The trial court was instructed to determine if a hearing on the petition was necessary and, if required to hold such a hearing and dispose of the petition.

5. Pennsylvania courts have recognized expressly that every post-conviction litigant is entitled to at least one meaningful opportunity to have issues reviewed, at least in the context of an ineffectiveness claim. The point in time at which a trial court may determine that a Pennsylvania Post Conviction Relief Act 42 Pa. C.S.A. §9541 et seq.. Petitioner's claims are frivolous or meritless is after the petitioner has been afforded a full and fair opportunity to present those claims. The Supreme court has recognized that such an opportunity is best assured where the petitioner is provided representation by competent counsel whose ability to frame the issues in a legally meaningful fashion insures a trial court that all relevant considerations will be brought to its attention.

Appellant's right to appointed counsel, guaranteed by Pa. R. Crim. Proc. 904, requires an enforceable right to effective post-conviction counsel. Therefore, PCRA Counsel's assistance may be examined on appeal from the denial of PCRA relief, Commonwealth v. Malone, 823 A.2d 931 (Pa. Super. 2003). Additionally, Pa. Rules of Criminal Procedure 905(a) Provides, "AMENDMENT SHALL BE FREELY ALLOWED TO ACHIEVE SUBSTANTIAL JUSTICE"; PA. R. CRIM. PROC. 907(a) the judge can grant leave to file an amended motion, or direct that the proceedings continue. Clearly according to the trial court Absent this courts order the court would have been able to address the underlying issue's, and recent decision, newly discovered fact. The Trial/PCRA Court would have then had to find that the Appellant's Current Petition would not be untimely! The Appellant will be prejudiced absent

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The court granting this petition for remand under the circumstances. There are two primary issues that the trial/PCRA court stated it could not address because of this courts August 18, 2017 order, that is, the denial of independent counsel unassociated with the public defenders office, ineffective assistance of both trial and appeals counsel; and the recent decision in the District court in Basil Brooks v. Robert Gilmore, Id. Both of which would have made the petition not untimely!

Appellant ask this court to protect his rights by remanding this matter allowing the appellant to finally have meaningful review of his claims. To address the recent decision in Basil Brooks v. Robert Gilmore, Id.

6. Currently the Appellant would not be able to have a meaningful appeal absent this court granting him the right to raise these issues in Appellant's Pro-Se Appellant Brief after being abandoned. However, the trial court would be required to address the issue in its 1925(a) Opinion. Commonwealth v. Fulton, 876 A.2d 342 (Pa. 2002). However, the trial court has not addressed the issue, so it would be called upon to address the issue in its opinion on a blank record. In essence this would be a fruitless appeal process, as Appellant would not be able to present these underlying issues making his Petition timely. And the only reason the court gives now for not addressing the underlying issue is that this court issued its August 18, 2017 order tying its hands! Appellant also absent this court ordering would not be eligible for counsel given the trial court has deemed his filing as untimely. Again these issue's would make Appellant's Petition not untimely. The court granting this request will also give the trial court the opportunity at the very least to perform an independent review of the claims. Commonwealth v. Fulton, 876 A.2d 342 (Pa. 2002). And although the trial court would have had jurisdiction to correct its own defect in orders, Etc. The court determined that it could not hear the issues or reconsider due to this courts August 18, 2017 order. And although Appellant filed in the trial court the following documents; (1) "SUPPLEMENT TO THE ALREADY FILED PETITION FOR HEARING AND TO VACATE ORDER, (Dated September 4, 2017/FILED PRIOR TO THE HEARING BEFORE THE TRIAL COURT"); (2) "PETITIONER/APPELLANT MOVES TO BE PRESENT AT ANY HEARING REGARDING THE SUPERIOR COURTS ORDER AND TO VACATE THE ORDER DENYING RELIEF WHERE PETITIONER HAS SUFFERED LAYERED INEFFECTIVE ASSISTANCE" (Dated August 23, 2017); (3) "SUPPLEMENT TO THE ALREADY FILED PETITION DUE TO SUPREME COURT DECISION" (Dated July 11, 2017).

Appellant avers that if the court grants this request for remand relief would be granted by the trial court under the circumstances. The Appellant would also be

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able to defend his Motion, provide an opportunity for the Commonwealth to refute any, and provide a record for any needed appeal. This would also save the court time, expense and delay. Granted the court may be correct that even if its order was defective under the circumstances that this court issued a specific order, tied its hands from taking any further action. That being said Appellant Pro-Se Prays for this court to grant the request for remand giving him meaningful review of his issues, which would deem the petition as not being untimely under the circumstances. Commonwealth v. Burton, 2017 Pa. Lexis 564 (Pa. March 28, 2017)-(42 Pa. C.S.§9545(b)(1)(ii)).

case and point is that even if the Appellant was to believe the trial courts assertion that he would have to raise the issue's at a later date, such would be an empty promise. Given the trial court has stated that the current petition is untimely, but has failed to address the underlying issues which would make such petition timely. This is Appellant's first opportunity where he is no longer represented by ineffective counsel, or the public defenders office to raise ineffective assistance as all counsels, where he is no longer represented by the ineffective counsels. Commonwealth v. Hughes, 865 A.2d 761 (Pa. 2004); Price v. Johnson, 68 S.ct. 1049 (U.S. Cal. 1948)-(courts cannot make factual determinations which may be decisive of vital rights, where the crucial facts have not been developed). In this case not only was Appellant denied review to which he was entitled through no fault of his own but as a result of layered ineffective assistance. Commonwealth v. Jones, 912 A.2d 268 (Pa. 2006); (42 Pa. C.S. §9545(b)(1)(ii). In Commonwealth v. Ceo, 812 A.2d 1263 (Pa. Super. 2002)-(defendant suffered pattern of dereliction by three successive appointed counsels, extending from abandonment to patent misrepresentation, Etc. every petitioner regardless of seriousness of his underlying offenses, is entitled to meaningful Appellate review). This in fact would be Appellants first opportunity where he is no longer represented by those counsels to raise all ineffective claims (42 Pa. C.S. 9544), Commonwealth v. Ford, 809 A.2d 325 (Pa. 2002). Commonwealth v. Jones, 912 A.2d 268 (Pa. 2006)-(defendant should have been allowed opportunity to develop argument as to ineffective assistance of Appellate counsel). Appellant has suffered adverse effects to both his Direct Appeal rights and to the PCRA Process due to ineffective assistance. Commonwealth v. Stock, 679 A.2d 760 (Pa. 1996); Dickens v. Ryan, 740 F.3d 1302 (9th Cir. App. 2014)-(Petitioner denied effective assistance in post-conviction proceedings).

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CERTIFICATE OF SERVICE:

I, DO HEREBY CERTIFY THAT I AM THIS DAY SERVING UPON THE PROTHONOTARY OF THE SUPERIOR COURT SITTING AT PHILADELPHIA. MY PETITION FOR REMAND, FOR FILING AND DISTRIBUTION.

I AM ALSO SERVING A TRUE AND CORRECT COPY OF THE SAME TO THE FOLLOWING PERSON:

TO: HUGH J. BURNS, JR., ESQUIRE
OFFICE OF THE DISTRICT ATTORNEY
3 SOUTH PENN SQUARE
PHILA, PA. 19107
(FIRST CLASS MAIL)

RESPECTFULLY SUBMITTED

ANTHONY S. TWITTY, ~~PRO-SE~~
P.O. BOX 1000
HOUTZDALE, PA. 16698-1000

DATE: SEP 15, 2017
CC:FILE.

(APP-K)

As in the case Sub Judice, in Commonwealth v. Karanicolas, 836 A.2d 940 (Pa. Super. 2003)-(held that defendant's second PCRA would be considered first petition for purposes of the one year limitation period, and defendant was deprived of meaningful participation by appointed PCRA counsel).

As Outlined in Kent, Id. And the related cases petitioner was denied independant counsel for appeal and counsel had no communications with Appellant. The PCRA is the only means for restoring a defendants appeal rights 42 Pa. C.S.A. §9541 where he is no longer represented by counsel, Commonwealth v. Hall, 771 A.2d 1232 (Pa. 2001).

6. It's for all of the above reasons Appellant seeks this courts Protection of his Rights. Appellant seeks Remand in accordance with Commonwealth v. Jette, 947 A.2d 202 (Pa. Super. 2007).

Absent the court granting this petition will leave the Appellant at a great hardship, and prejudice. The court can remand this matter, or deny such petition without prejudice permitting the Appellant to return to the trial court for such review. *

WHEREFORE, The Appellant pro-se Moves the honorable court to grant the Petition for Remand, not excluding such other relief as the Appellant has stated above and in the interest of Justice.

RESPECTFULLY SUBMITTED

ANTHONY S. SMITH, PRO-SE

INST # FH-4476

P.O. BOX 1000

HOUTZDALE, PA. 16698-1000

DATE: SEP 15, 2017

CC:FILE.

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* SEE: Trial courts recent order dated September 11, 2017. However, This order would not relieve the pro-se Appellant of prejudice under the As his filing would be facially untimely without Appellant being able to Present those issue's as outlined herein. He prays the court to allow to do so. Trial court determined Attorney Elbert did Abandon Appellant.

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Filed 10/11/2017

MONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
THONY S. TWITTY, Appellant	:	No. 3282 EDA 2016 (C.P. Philadelphia County No. 51-CR-0303181-2003)

ORDER

The Appellant's *pro se* "Petition For Remand The Trial/PCRA Court aving Determined That Counsel Abandoned Appellant And There Being nderlying Issue's Which Makes The Petition Not Untimely" is DENIED without rejudice to Appellant's right to raise the issues in the petition in the Appellant's brief or in a newly filed application for relief that may be filed after the appeal has been assigned to the panel of this Court that will decide the merits of the appeal.

PER CURIAM

(APPENDIX-K)