NO. 20-5501

IN THE
SUPREME COURT OF THE UNITED STATES

Andrew Darvin Hersh,

Petitioner

V.

Mark Garman, Superintendent, State Correctional Institution at Rockview, Et. Al.,

Respondent

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari from the Order of the United States Court of Appeals for the Third Circuit, at docket number 19-2125 affirming the Order of Robert D. Mariani, District Judge for the United States District Court of the Middle District of Pennsylvania at Docket Number 3:16-cv-02290-RDM-CA denying a Petition for Writ of Habeas Corpus pursuant to **28 U.S.C. § 2254**.

Andrew Darvin Hersh, JW2630
Pro Se, Petitioner
State Correctional Institution at Rockview
1 Rockview Place
Bellefonte, PA 16823-0820

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Ground I. Does a "non-custodial" confession uttered under the influence of the prescription drug, "Ativan," render a confession involuntary and inadmissible when the drug administered to Mr. Hersh was never proven by state's evidence to not significantly hinder Mr. Hersh's cognitive ability while Appellate Counsel, Thomas R. Nell Esq.'s actions denied Mr. Hersh the ability to raise this claim of ineffective assistance of counsel for Trial Counsel, Warren P. Bladen Esq.'s failure to suppress said confession?

(Proposed Answer in the Positive)

Ground II. Do flawed credibility determinations of a State Court permanently insulate the State Court's findings from Federal Court review where objective evidence within the certified record obviously contradicts the credibility determinations made by the State Court?

(Proposed Answer in the Positive)

PARTIES

The Petitioner in the above captioned matter is Mr. Andrew Darvin Hersh, (Mr. Hersh), *Pro Se*, who currently is incarcerated within the State Correctional Institution at Rockview, 1 Rockview Place, Bellefonte, PA 16823.

Respondent in the above captioned matter is the Commonwealth of Pennsylvania represented by Assistant District Attorney, Kelly L. Margetas, Esq. whose office is located within the Adams County District Attorney's Office, Adams County Courthouse, 111 Baltimore Street, Rm. 6, Gettysburg, PA 17325.

Mark Garman is represented by Joshua Shapiro, Esq., the Attorney General of Pennsylvania, whose office is located at 15th Fl. Strawberry Square, Harrisburg, PA 17120.

CONCISE STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari by Andrew Darvin Hersh, (Mr. Hersh), from the denial of Certificate of Appealability and an Application for Rehearing to the United States Court of Appeals of the Third Circuit, at Docket Number 19-2125.

On August 10, 2010, Mr. Hersh was adjudicated guilty on Count 1, Rape of a Child, **18 Pa.C.S.A. § 3121(c)**, a Felony of the First Degree; Count 3, Indecent Assault, Person Less than 13 Years of Age, **18 Pa.C.S.A. § 3126(a)(7)**, a Felony of the Third Degree; and Count 4, Corruption of Minors, **18 Pa.C.S.A. § 6301**, a Misdemeanor of the First Degree after a jury trial. On November 12, 2010, the Honorable Michael A. George sentenced Mr. Hersh to a sentence of thirteen (13) to thirty (30) years at a State Correctional Institution, based on the Mandatory Minimum provisions pursuant to **42 Pa.C.S.A. § 9718**. The Court determined that Counts 3 and 4 merged with Count 1 for sentencing purposes.

Mr. Hersh, through counsel, filed Notice of Appeal. On May 20, 2011, Mr. Hersh's Direct Appeal was dismissed for a failure to file a brief, at Superior Court Docket Number 1872 MDA 2010.

Mr. Hersh filed a Pro Se, Post Conviction Relief Act, (P.C.R.A.), Petition on June 17, 2011. After a pre-hearing video conference regarding the P.C.R.A. Petition, the Court issued an Order dated September 8, 2011 granting the P.C.R.A. Petition by reinstating Mr. Hersh's appellate rights. A Notice of Appeal was filed, through Counsel on September 15, 2011. On June 20, 2012, Mr. Hersh's Direct Appeal to the Superior Court of Pennsylvania was affirmed at Docket Number 1639 MDA 2011. Mr. Hersh, through counsel, did not file a Petition for Allowance of Appeal.

Mr. Hersh, through counsel, filed a P.C.R.A. Petition on August 22, 2012. On December 20, 2012, after a pre-hearing conference regarding the P.C.R.A. Petition, an Evidentiary Hearing was scheduled for March 25, 2013. The Evidentiary Hearing was then continued in an Order by the Honorable Michael A. George to June 17, 2013. At the conclusion of the June 17, 2013, Evidentiary Hearing, the Court stated that it would issue an opinion. On August 6, 2013, the Court issued an Opinion and Order dismissing the P.C.R.A. Petition. A Notice of Appeal was filed on August 22, 2013. On November 9, 2013, Mr. Hersh's Counsel, Thomas R. Nell, Esq., filed a Petition to Withdraw as

Counsel. On November 27, 2013, Mr. Hersh filed an Application to Proceed Pro Se to the Superior Court of Pennsylvania. The Superior Court granted the Pro Se Application on December 4, 2013. Mr. Hersh filed a Pro Se brief on December 19, 2013. On April 11, 2014, the Superior Court of Pennsylvania affirmed the Order dismissing Mr. Hersh's P.C.R.A. Petition at Docket Number 1535 MDA 2013.

Mr. Hersh then filed a timely Petition for Allowance of Appeal with the Supreme Court of Pennsylvania on April 24, 2014. The Commonwealth filed a "No Answer" letter to Mr. Hersh's Petition for Allowance of Appeal on May 2, 2014. Mr. Hersh filed an Application for Leave to Amend on May 16, 2014. On May 24, 2014, the Commonwealth filed a "No Answer" letter to Mr. Hersh's Application for Leave to Amend. On August 21, 2014, the Supreme Court of Pennsylvania granted Mr. Hersh's Application for Leave to Amend, but denied his Petition for Allowance of Appeal at Docket Number 271 MAL 2014.

On August 25, 2014, Mr. Hersh filed a second P.C.R.A. Petition. On September 16, 2014, the Honorable Michael A. George issued an Order of Intent to Dismiss Mr. Hersh's P.C.R.A. Petition pursuant to

Pa.R.Crim.P. Rule 907(1). Mr. Hersh filed an Objection to Intent to Dismiss Post Conviction Relief Act Petition Without a Hearing on September 25, 2014. On January 12, 2015, Mr. Hersh filed an Application for Leave to Amend Post Conviction Relief Act Petition. On February 5, 2015, the Honorable Michael A. George issued an Opinion and Order denying Mr. Hersh's P.C.R.A. Petition without a hearing.

On February 17, 2015, Mr. Hersh filed a Notice of Appeal. On March 3, 2015, the Honorable Michael A. George issued an Order for Mr. Hersh to file a Concise Statement of Matters Complained on Appeal. Mr. Hersh filed a Concise Statement of Matters Complained on Appeal on March 10, 2015. On March 25, 2015, the Honorable Michael A. George issued an Opinion pursuant to **Pa.R.A.P. Rule 1925(a)**. On April 15, 2015, the Superior Court of Pennsylvania issued an Order requiring Mr. Hersh to file briefs on the matters on or before May 26, 2015. Mr. Hersh filed his Brief for Appellant on April 15, 2015. On April 23, 2015, upon receipt of Mr. Hersh's Brief for Appellant, the Superior Court of Pennsylvania issued an Order requiring the Commonwealth to file briefs on or before May 20, 2015. On May 19, 2015, Mr. Hersh filed an Application to Set Bail Pending Appeal. On

May 19, 2015, the Commonwealth, through counsel, filed Brief for Appellee. On May 27, 2015, the Superior Court of Pennsylvania issued an order denying Mr. Hersh's request for Bail Pending Appeal. On August 21, 2015, the Superior Court issued an Order and Opinion affirming the Order of the P.C.R.A. Court at Docket Number 317 MDA 2015.

On August 29, 2015, Mr. Hersh filed an Application for Re-Argument with the Superior Court of Pennsylvania. On October 29, 2015, the Superior Court of Pennsylvania denied Mr. Hersh's Application for Re-Argument at Docket Number 317 MDA 2015.

On November 13, 2015, Mr. Hersh filed a Petition for Allowance of Appeal, (Allocatur), with the Supreme Court of Pennsylvania. The Commonwealth declined to answer the Allocatur. The Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal, (Allocatur), at Docket Number 921 MDA 2015 on March 8, 2016.

On April 29, 2016, Mr. Hersh filed a Writ of Certiorari with the United States Supreme Court. The Commonwealth declined to answer the Writ of Certiorari. The United States Supreme Court denied Writ of Certiorari at Docket Number 15-9217 on June 13, 2016.

On June 24, 2016, Mr. Hersh filed a Petition for Writ of Habeas Corpus with the Pennsylvania Supreme Court at Docket Number 87 MM 2016. The Commonwealth declined to answer the Writ of Habeas Corpus. The Pennsylvania Supreme Court denied the Writ of Habeas Corpus on August 22, 2016.

On September 23, 2016, Mr. Hersh filed a Petition for Writ of Habeas Corpus pursuant to **28 U.S.C. § 2241** with the United States District Court of the Middle District of Pennsylvania. On October 17, 2016, the Honorable Robert D. Mariani, dismissed the Petition for Writ of Habeas Corpus without prejudice for lack of jurisdiction.

On November 4, 2016, Mr. Hersh filed a Writ of Habeas Corpus pursuant to **28 U.S.C. § 2254** with the United States District Court of the Middle District of Pennsylvania at Docket Number 3:16-cv-02290-RDM-CA, regarding issues filed previously with this Honorable Court on previously erroneous filed Writ of Habeas Corpus pursuant to **28 U.S.C. § 2241**.

On May 10, 2019, the Honorable Robert D. Mariani denied the Petition for Writ of Habeas Corpus.

On May 14, 2019, Mr. Hersh filed a Notice of Appeal to the United States District Court of the Middle District of Pennsylvania appealing the ruling of the Honorable Robert D. Mariani to the United States Court of Appeals for the Third Circuit.

On May 29, 2019, Mr. Hersh filed an Application for Certificate of Appealability to the United States Court of Appeals for the Third Circuit at Docket Number 19-2125.

On February 7, 2020, the United States Court of Appeals for the Third Circuit denied Mr. Hersh's Application for Certificate of Appealability.

On February 11, 2020, Mr. Hersh filed a Motion for Extension of Time to File a Petition for Rehearing of the Application for Certificate of Appealability.

In lieu of an answer from the United States Court of Appeals for the Third Circuit, Mr. Hersh filed a Petition for Rehearing of the Application for Certificate of Appealability on February 23, 2020.

On March 6, 2020, the United States Court of Appeals for the Third Circuit granted the Motion for Extension of Time by filing the

Petition for Rehearing of the Application for Certificate of Appealability that day.

On May 18, 2020, Mr. Hersh's Petition for Rehearing of the Application for Certificate of Appealability was denied, giving rise to this instant appeal.

REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The Orders of the United States Court of Appeals for the Third Circuit are reproduced in its entirety at Appendix A. The Order of the United States District Court of the Middle District of Pennsylvania is reproduced at Appendix B.

CONCISE STATEMENT OF JURISDICTION

The jurisdiction of this Honorable Court applies to Mr. Hersh's instant appeal based on the Constitutional jurisdiction granted to the United States Supreme Court by the founding fathers in **Article III § 2** of the United States Constitution which states in relevant part:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; - to all cases affecting Ambassadors, other public Ministers and Consuls; - to all cases of admiralty and maritime jurisdiction; - to controversies to which the United States shall be a party; - to controversies between two or more states; - between a State and citizens of another State; - between citizens of different states; - between citizens of the same state claiming lands under the grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

In the case *sub judice*, this Honorable Court retains appellate jurisdiction upon the collateral review challenge to multiple instances of Ineffective Assistance of Counsel during the representation of Counsel, Mr. Warren P. Bladen, Esq., (Mr. Bladen), challenging the judgment of

sentence imposed upon him in the Adams County Court of Common Pleas, Adams County, Pennsylvania.

REASONS RELIED UPON FOR WRIT OF CERTIORARI

Ground I. Does a "non-custodial" confession uttered under the influence of the prescription drug, "Ativan," render a confession involuntary and inadmissible when the drug administered to Mr. Hersh was never proven by state's evidence to not significantly hinder Mr. Hersh's cognitive ability while Appellate Counsel, Thomas R. Nell Esq.'s actions denied Mr. Hersh the ability to raise this claim of ineffective assistance of counsel for Trial Counsel, Warren P. Bladen Esq.'s failure to suppress said confession?

Within **Thompson v. Keohane, 516 U.S. 99 (1995)** this Honorable Court opined:

> "The ultimate 'in custody' determination for **Miranda v. Arizona, 384 U.S. 436 (1966)** purposes, we are persuaded, fits within the latter class of cases. Two discrete inquiries are essential to the determination: [F]irst, what were the circumstances surrounding the interrogation; and [S]econd, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry': '[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."
>
> (**Thompson, 516 U.S. at 112**)(citing **California v Beheler, 463 US 1121, 1125, (1983) (per curiam)** and **Oregon v. Mathiason, 429 US 492, 495 (1977)**).

Within **United States v. Jacobs, 312 F. Supp. 2d 619 (2004)**, the Third Circuit Court of Appeals further opined that:

"The key inquiry in the determination of whether an individual is in 'custody' for the purposes of **Miranda** is 'whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.' Stated another way, custody means the deprivation of an individual's 'freedom of action in any significant way.' A conclusion of custody is 'not susceptible of an exact definition[,] . . . the determination . . . must be made on a case-by-case basis... Further, the determination of custody is an objective inquiry, one that evaluates the circumstances of the interrogation... A custodial interrogation may occur outside of a police station, and, moreover, have taken place absent a formal arrest... However, 'station-house' interrogations should be scrutinized with extreme care for any taint of psychological compulsion or intimidation because such pressure is most apt to exist while a defendant is interviewed at a police station... The protections of **Miranda** are not required merely because law enforcement officers suspect the person they are questioning of a crime. However, 'the more cause for believing the suspect committed the crime, the greater the tendency to bear down in interrogation and to create the kind of atmosphere of significant restraint that triggers **Miranda** . . . But this is simply one circumstance, to be weighed with all the others...' Further, if undisclosed to the individual being questioned, a law enforcement officer's subjective view that an individual he or she is questioning is a suspect does not bear upon the question of whether an individual is in custody for the purposes of **Miranda**."

(**Jacobs, 312 F. Supp. 2d at 627, 628**)(citing **United States v. Leese, 176 F.3d 740, 743 (3d Cir. 1999)**; **Steigler v. Anderson, 496 F.2d 793, 798 (3d Cir. 1974)**; ***Miranda*, 384 U.S. at 444**; **Orozco v. Texas, 394 U.S. 324, 326-327 (1969)**; **Stansbury v. California, 511 U.S. 318, 324 (1994)** and **F. Inbau, J. Reid, & J. Buckley, Criminal Interrogation and Confessions at 232, 236, 297-298 (3d ed. 1986)**).

Instantly, Mr. Hersh was interrogated within a "station house,"[1] yet was alleged to have been a "non-custodial" interview due to the fact that Mr. Hersh was "free to leave." This principle of being "free to leave" is not the sole guise of determining custodial versus non-custodial. Had the interview been custodial, **Miranda** would have directly applied. Since Mr. Hersh never was given his proper **Miranda** warnings, Mr. Hersh's "confession" would have simply been invalid for lack of proper application of **Miranda**, yet strategically, the prosecution utilized the "non-custodial" label to allow the "confession" be admissible.

However, this Honorable Court held within **Beckwith v. United States, 425 US 341 (1976)** that:

> "[N]on[-]custodial interrogation[s] might possibly[,] in some situations, by virtue of some special circumstances, [can] be characterized as one where "the behavior of... law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined...' ***When such a claim is raised, it is the duty of an appellate court, including this Court, 'to examine the entire record and make an independent determination of the ultimate issue of voluntariness...'*** Proof that some kind of warnings were given or that none were given would be relevant evidence only on the issue of whether the questioning was in fact coercive."

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[1] Pennsylvania State Police Barracks, 3303 Old Harrisburg Road, Gettysburg, PA 17325.

(**Beckwith, 425 US at 348**)(emphasis added)(citing **Rogers v Richmond, 365 US 534, 544 (1961)**; **Davis v North Carolina, 384 US 737, 740, 741-742 (1966)**; **Frazier v Cupp, 394 US 731, 739 (1969)**).

Instantly, the United States District Court, along with the United States Court of Appeals had a "[duty] 'to examine the entire record and make an independent determination of the ultimate issue of voluntariness'"[2]

The independent appellate court(s) failed in this duty, eliminating a constitutional challenge in Mr. Hersh's matter due to the simple fact that even in the event of a non-custodial interrogation, "[the Court] must still examine the totality of the circumstances surrounding the interrogation to determine if his confession was voluntary because a non[-]custodial interrogation 'might possibly in some situations, by virtue of some special circumstances,' result in an involuntary confession."[3]

Further, under this auspice, along with the **Jacobs** court analysis, such interrogations "should be scrutinized with extreme care for any taint of psychological compulsion or intimidation because such

[2] **Beckwith, 425 US at 348**

pressure is most apt to exist while a defendant is interviewed at a police station,"[4]

Trial Counsel, Warren P. Bladen, Esq., (Mr. Bladen), failed to adequately determine if Mr. Hersh was interrogated through an actual "non-custodial" interview and if the "psychological compulsion"[5] on Mr. Hersh was such during said interview that Mr. Hersh believed he was in custody at the time.

Mr. Hersh through the certified record was proven to be under the influence of the prescription Benzodiazepine drug, Ativan, (Lorazepam) as shown within the notes of testimony.[6]

Mr. Hersh's intoxication during the interrogation on the Benzodiazepine drug, Ativan is well established. Although, within both Pennsylvania and American jurisprudence, it is well settled that:

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[3] **Commonwealth v. Nester, 709 A.2d 879, 882 (1998)**(citing **Beckwith, 425 U.S. at 348**).

[4] **Id at 628**.

[5] **Id at 628**.

[6] *Accord* N.T., Transcripts of Proceeding of Jury Trial, August 9, 2010, 147:18-25, 148:1-12; N.T., Transcripts of Proceeding of Jury Trial, August 9, 2010, 182:9-17, 182:23-25; N.T., Transcripts of Proceeding of Jury Trial, August 9, 2010, 183:1-5, 183:9-15; N.T., Transcripts of Proceeding of Jury Trial, August 9, 2010, 184:10-25, 185:1-25; N.T., Transcripts of Proceeding of Jury Trial, August 9, 2010, 186:25, 187:1-3; and N.T., Transcripts of Proceeding of Jury Trial, August 9, 2010, 201:3-13; N.T., Transcripts of Proceeding of Jury Trial, August 9, 2010, 203:1-23.(Exhibit A); (See also Page 1, Police Report, Exhibit B).

"'[i]ntoxication is a factor to be considered, but is not sufficient, in and of itself to render a confession involuntary...' 'The test is whether there was sufficient mental capacity for the defendant to know what he was saying and to have voluntarily intended to say it...' The duty of the suppression court is to determine whether the Commonwealth has established by a preponderance of the evidence that the confession was voluntary and that the waiver of constitutional rights were knowing and intelligent."[7]

As such, it was the duty of Counsel, Mr. Bladen to file a suppression motion prior to trial, call an expert toxicologist at a suppression hearing, call an expert toxicology witness or object to the sarcasm as prejudicial during trial to support Mr. Hersh's claims of what occurs during an overdose of "Ativan." Mr. Bladen, however, failed in this duty.

Mr. Hersh contends that the written admission of guilt/ confession referenced *supra* is blatantly inadmissible due to the fact the written admission of guilt/ confession was not willing, knowing, or voluntary.

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[7] **Fahy v. Horn, 516 F.3d 169, 196 (2008)**(citing **Commonwealth v. Jones, 322 A.2d 119, 125 (1974)**; **Commonwealth v. Culberson, 358 A.2d 416, 417 (1976)**; **Commonwealth v. Manning, 435 A.2d 1207 (1981)**; and **Commonwealth v. Smith, 291 A.2d 103 (1972)**).

As said written admission of guilt/ confession was rendered during the intoxication of a known mind altering substance.

Such a failure was further hindered by Court Appointed P.C.R.A. Counsel, Thomas Richard Nell, Esq.'s, (Mr. Nell), inaction. Mr. Nell filed a "Petition to Withdraw as Counsel" as an "**Anders** Brief"[8] to the Superior Court of Pennsylvania on November 9, 2013, only months after filing a Notice of Appeal on August 22, 2013, along with a Statement of Matters Complained of on Appeal pursuant to Pennsylvania Rules of Appellate Procedure, (**Pa.R.A.P.**), **Rule 1925(b)** on September 12, 2013.[9]

With Mr. Nell's "**Anders** Brief" being filed Mr. Hersh was left with no choice but to proceed *Pro Se* without the proper assistance of counsel.

Mr. Nell's failure to raise the instant claim of ineffectiveness of trial counsel into the **Pa.R.A.P. Rule 1925(b)** statement prohibited Mr. Hersh from raising this relevant issue before the Superior Court of

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[8] **Anders v. California, 386 U.S. 738 (1967)**(describing the requirements of an **Anders** brief that is filed when appointed counsel seeks to withdraw from a direct appeal [/collateral attack] based on a determination that the issues presented are wholly frivolous.).

[9] See **Pa.R.A.P. Rule 1925(b)**, Statement of Matters Complained of on Appeal.

Pennsylvania on "initial-review collateral proceeding"[10] appeal. **Pa.R.A.P. Rule 1925(b)(4)(vii)**.[11] Waiver of the claim would have been predicated under the fact that the claim was never raised, therefore, Mr. Hersh was denied the opportunity by Counsel, Mr. Nell to properly exhaust his remedies on this extremely relevant issue.

Along with Mr. Nell's failure when Mr. Hersh finally raising this issue Mr. Hersh relied on the second exception within **Martinez v. Ryan, 566 U.S. 1 (2012)** "where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of **Strickland v. Washington, 466 U.S. 664 (1984)**,"[12] therefore a procedural default will not bar Mr. Hersh from proceeding with the relevant claim presented.

Within **Martinez** this Honorable Court addressed whether the issue of "ineffective assistance of counsel in an initial review collateral proceeding on a claim of ineffective assistance at trial,"[13] "[could] provide cause for a procedural default in a federal habeas proceeding."[14]

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[10] **Martinez, 566 U.S. at 14**
[11] "(vii) Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived."
[12] **Martinez, 566 U.S. at 14**
[13] **Id. at 9**.
[14] **Id. at 9**.

The **Martinez** Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."[15] Specifically, the Court determined a standard where two (2) exceptions establish "cause" in this context:

> "[W]hen a State requires a prisoner to raise an ineffective-assistance of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of **Strickland**. To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."
>
> (**Martinez, 566 U.S. at 14**)(Citing **Miller-El**)

Then, within **Trevino v. Thaler, 569 U.S. 413 (2013)**, the Court ruled that the ruling in **Martinez** applied to states like Texas, in which:

> "[the] state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal."

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[15] **Id. at 9**.

(**Trevino, 569 U.S. at 429**).

Further, within **Gallow v. Cooper, 570 U.S. 933 (2013)**, a Louisiana case, where "state habeas counsel neglected to 'properly presen[t]' the petitioner's ineffective assistance claim in state court,"[16] the United States Supreme Court deemed this claim 'indistinguishable' [from **Trevino**]"[17]

Specifically, within Pennsylvania jurisprudence, claims of ineffectiveness are deferred to "initial-review collateral proceedings."[18] Within **Commonwelath v. Grant, 813 A.3d 726 (Pa. 2002)**, the Court declared that:

> "We now hold that, as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review."

(**Grant, 813 A.3d at 738**).

With the **Grant** decision, Pennsylvania joins states like Texas, Louisiana, and others who defer such claims to a form of "initial-review collateral proceedings."[19], such as a writ of habeas corpus, or, in

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[16] **Id at 933**.
[17] **Id at 933**.
[18] **Martinez, 566 U.S. at 14**.
[19] **Martinez, 566 U.S. at 14**.

Pennsylvania, a Petition pursuant to the Post Conviction Relief Act, (P.C.R.A.), **42 Pa.C.S.A. § 9541, et seq**.

Thereby, utilizing the *stare decisis* mentioned *supra*, along with the standards for ineffective assistance of counsel set forth in **Strickland**, *supra*, Mr. Hersh's claim has arguable merit due to his constitutional right against self incrimination guaranteed to him by both the **Fifth Amendment** of the United States Constitution and **Article 1 § 9** of the Pennsylvania Constitution. Along with his right to adequate, effective counsel protected by both the **Article 1 § 9** of the Pennsylvania Constitution and the **Sixth Amendment** of the United States Constitution was violated when Mr. Bladen failed to suppress the involuntary confession, prior to trial, call an expert toxicology witness at a suppression hearing, or call an expert toxicology witness at trial to support the claims of Mr. Hersh.

Mr. Hersh was clearly prejudiced by the fact that Mr. Bladen did not properly suppress the unwilling, unknowing, and involuntary confession, as the conviction was primarily supported by said confession. Mr. Bladen's blatant inaction deprived Mr. Hersh of a truly impartial tribunal, which without a written admission of guilt/

confession obviously would have significantly modified the outcome of the proceedings, as Mr. Hersh may never have been charged with a crime, or if charged been found guilty of a crime by a jury of his peers.

Mr. Hersh was additionally prejudiced as the United States District Court, along with the United States Court of Appeals failed in their "[duty] 'to examine the entire record and make an independent determination of the ultimate issue of voluntariness [of the alleged confession made under the intoxication of Ativan]'"[20]

It is clear from the argument, *supra,* that Mr. Hersh satisfies the requirements of **Martinez**, permitting the procedural default to be excused in the instant matter. Furthermore, Mr. Hersh has "sho[wn] that reasonable jurists would debate whether the [initial] petition should have been resolved in a different manner [based upon the application of **Martinez** which]... [was] 'adequate to deserve encouragement to proceed further.'"[21]

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[20] **Beckwith, 425 US at 348**

Ground II. Do flawed credibility determinations of a State Court permanently insulate the State Court's findings from Federal Court review where objective evidence within the certified record obviously contradicts the credibility determinations made by the State Court?

Within this Honorable Court's decision in **Anderson v. Bessemer City, 470 U.S. 564 (1985)** the Court determined that:

> "When findings are based on determinations regarding the credibility of witnesses, **Rule 52(a)** demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said... This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact[-]finder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination... ***But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.***"
>
> (**Anderson, 470 U.S. at 575**)(emphasis added)(citing **Wainwright v Witt, 469 US , (1985)** and **United States v United States Gypsum Co., 68 S Ct 525 (1948)**).

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[21] **Slack, 529 U.S. at 484**

However, in direct violation of **Anderson**, *supra*, the prior Courts of the Federal jurisdiction have prevented review based upon flawed credibility determinations.

It is true that "[C]ourts must always be sensitive to the problems of making credibility determination on the cold record,[22] [however], "[the] Constitution leaves it to [the] jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence."[23]

In such a context, several Circuit Courts of the United States contemplated that:

> "[T]he language of **§ 2254(d)(2)** and **§ 2254(e)(1)** implies an important distinction: **§ 2254(d)(2)**'s reasonableness determination turns on a consideration of if the totality of the 'evidence presented in the state-court proceeding,' while **§ 2254(e)(1)** contemplates a challenge to the state court's individual factual determinations, including a challenge based wholly or in part on evidence outside the state trial record." We therefore read **§ 2254(d)(2)** and **§ 2254(e)(1)** together as addressing two somewhat different inquiries. The fundamental prerequisite to granting the writ on factual grounds is consideration of the evidence relied upon in the state court proceeding. Section **2254(d)(2)** mandates the federal habeas court to assess whether the state court's determination was reasonable or unreasonable given that evidence. If the state court's decision based on such a

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[22] **United States v. Raddatz, 447 U.S. 667, 669 (1980)**.
[23] **Ramonez v. Berghuis, 490 F.3d 482, 490 (6th Cir. 2007)**.

> determination is unreasonable in light of the evidence presented in the state court proceeding, habeas relief is warranted. Within this overarching standard, of course, a petitioner may attack specific factual determinations that were made by the state court, and that are subsidiary to the ultimate decision. Here, section **2254(e)(1)** comes into play, instructing that the state court's determination must be afforded a presumption of correctness that the petitioner can rebut only by clear and convincing evidence."[24]

In the matter *sub judice*, the testimony at issue was determined by a judicial officer acting as the fact-finder, and not a jury, yet, "[w]hen a P.C.R.A. hearing is held and the P.C.R.A. Court makes findings of fact, we expect the P.C.R.A. Court to make necessary credibility determinations."[25]

Within Pennsylvania jurisprudence, a credibility determination of a judicial officer as a fact-finder typically is given "great deference" by appellate courts. However, within **Johnson**, the Court challenged this, when it determined:

> "[T]hat assessing credibility for purposes of **Strickland** prejudice is not necessarily the same thing as assessing credibility at trial... Logically, however, credibility assessments in the **Strickland** context, are not absolutes, but must be made with an eye to the governing standard of a

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[24] **Lambert v. Blackwell, 387 F.3d 210, 236 (3rd Cir. 2004)**(citing **Taylor v. Maddox, 366 F.3d 992, 999-1000 (9th Cir. 2004)**; and **Valdez v. Cockrell, 274 F.3d 941, 951 n. 17 (5th Cir. 2001)**).

[25] **Commonwealth v. Johnson, 966 A.2d 523 (2009)**.

"reasonable probability" that the outcome of the trial would have been different."

(**Johnson, 966 A.2d at 541**).

Strickland defines a "reasonable probability" as "a probability sufficient to making a finding of prejudice and to undermine confidence in an outcome."[26]

The United States District Court and the Court of Appeals for the Third Circuit granted "great deference"[27] to the credibility determinations of the P.C.R.A. Court based strictly on a statement of incredibility from the Court, and a statement of credibility on that of Trial Counsel, Warren P. Bladen, Esq., (Mr. Bladen).

This "deference"[28] prevented further appellate review of the matter on credibility determinations. Specifically, those witnesses presented by Mr. Hersh were deemed by the P.C.R.A. Court to be incredible.

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[26] **Strickland, 466 U.S. at 693**.

[27] "[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding... Yet, 'deference does not imply abandonment or abdication of judicial review...' In other words, 'deference does not by definition preclude relief.' Thus a federal habeas court can 'disagree with a state court's credibility determination.'" (Accord **Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)** and **Wiggins v. Smith, 539 U.S. 510 (2003)**).

[28] **Miller-El, 537 U.S. at 340**).

Although, within **Ramonez**, the Sixth Circuit Court of Appeals found "a **Strickland v. Washington, 466 U.S. 668 (1984)** violation where counsel failed to present three favorable witnesses even though the state post-conviction court said that one witness was 'not particularly helpful' and another was incredible."[29]

Instantly, however, the determinations of the P.C.R.A. Court are not sufficiently supported by the certified record. In-fact, testimony of Mr. Bladen states that: "[Mr. Hersh] indicated that the witness was giving a thumbs up every time she answered a question. I believe I saw that on **at least** one occasion. That's about all he indicated..."[30]

Mr. Bladen's determination within testimony undermines the very foundation of the credibility assessment of the P.C.R.A. Court. Mr. Hersh's witnesses, not only testified to this very factor of the witness giving a "thumbs up" each time a question was asked by the prosecution, but further eludes to the fact that the witness was extremely tainted by "the implantation of false memories or the distortion of real memories ... [through] interested adults"[31] Yet their

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[29] **Ramonez, 490 F.3d at 485-86**.

[30] N.T., Transcripts of Proceeding of PCRA Hearing, June 17, 2013 at 8:45 a.m., 37:21-25, 38:1-3, 38:25, 39:1-2)(emphasis added).

[31] **Commonwealth v. Delbridge, 855 A.2d 27, 39 (2003)**.

testimony is deemed to be "incredible" by the P.C.R.A. Court, even when corroborated by Mr. Bladen's "credible"[32] testimony.

The P.C.R.A. Court deeming Mr. Hersh, and the additional witnesses as incredible is a legal impossibility, if Mr. Bladen's testimony is in-fact found to be credible. The certified record also does not support this credibility determination, instead it supports the position of Mr. Hersh. Mr. Bladen admits through testimony that Mr. Hersh had indicated seeing "thumbs up" hand signals from both the witness "every time she answered a question."[33] This testimony is corroborated continuously throughout testimony of a menagerie of sequestered witnesses. Yet, this flawed determination of the P.C.R.A. Court is continuously determined to be fact throughout appellate proceedings allowing Mr. Hersh to be denied proper appellate review.

Instantly, Mr. Bladen had a duty to Mr. Hersh, to eliminate the "interested adults" when he had failed to object, orally motion for mistrial, request a curative jury instruction or other applicable remedy when a "thumbs up" hand signal was given from the testifying victim to

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[32] The P.C.R.A. Court determined that Mr. Bladen as "Counsel[,] *credibly testified...*" throughout the P.C.R.A. evidentiary hearing. (N.T., P.C.R.A. Court Opinion, August 6, 2013, 5:12).

the victims mother in the gallery, then back to the testifying victim. Such was clearly a violation of established norms of attorney conduct, along with tribunal decency.

Had the victim's testimony been deemed inadmissible or in the most severe of circumstances, a mistrial declared based upon the uncouth conduct of the victim and members of the gallery, the confidence in the tribunal would have been severely undermined, meeting the standards of **Strickland**.

Instead, the Pennsylvania Courts, along with the United States District Court unreasonably applied the proper credibility standards bolstering the actions of those "interested adults" from the gallery who sought to undermine the fundamental fairness of a tribunal.

It is clear by the argument *supra,* "that reasonable jurists would debate whether the [Mr. Hersh's] petition should have been resolved in a different manner [when] the issues presented were 'adequate to deserve encouragement to proceed further,'"[34] based upon the

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[33] N.T., Transcripts of Proceeding of PCRA Hearing, June 17, 2013 at 8:45 a.m., 37:21-25, 38:1-3, 38:25, 39:1-2).
[34] **Slack, 529 U.S. at 484**.

"unreasonable application" of the State Court's credibility determination that is not supported by the certified record.

CONCLUSION

As briefed *supra*, the United States District Court of the Middle District of Pennsylvania along with the United States Court of Appeals for the Third Circuit erred in denying Mr. Hersh's Petition for Writ of Habeas Corpus and Certificate of Appealability due to the fact the issues presented *supra* "sho[w] that [a] reasonable jurist[ ] would debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"[35]

WHEREFORE, for the reasons, supra, Mr. Andrew Darvin Hersh, *Pro Se*, Appellant in the above captioned case, prays this Honorable Court vacate the judgment of sentence by the Adams County Court of Common Pleas, and/or any other prudent relief this Honorable Court deems appropriate.

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[35] **Slack, 529 U.S. at 484**

Respectfully Submitted,

Date: August 12, 2020

(signature)

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