DOCKET NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

VITO PELINO,

Petitioner,

vs.

SUPERINTENDENT GREENE SCI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether jurists of reason can debate that repeated decisions to ignore (not dismiss or deny) a substantive claim constitutes sufficiently "extraordinary circumstances" to reopen a case under Fed. R. Civ. P. 60(b)?

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CITATION TO OPINION BELOW

The Third Circuit Court of Appeals opinion denying Mr. Pelino's certificate of appealability in this case appears as *Pelino v. Superintendent Greene SCI,* Case No. 18-2481 (3d Cir. Apr. 2, 2020), and is Appendix A to this petition. The district court's order denying Mr. Pelino's motion for relief under Fed. R. Civ. P. 60(b) is Appendix B, and the district court's order denying Mr. Pelino's petition for writ of habeas corpus is Appendix E.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Third Circuit Court of Appeals on the basis of 28 U.S.C. § 1254(1). The Third Circuit entered its opinion in this case on April 2, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No persons . . . shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const amend V.

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence." U.S. Const amend VI.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const amend XIV.

Fed. R. Civ. P. 60(b) states in relevant part: "On motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(e); . . . or (6) any other reason that justifies relief."

STATEMENT OF THE CASE

Vito Pelino is serving a sentence of life without the possibility of parole for killing a man in self-defense because his trial counsel failed to present evidence that the key witness against Pelino had a reputation for lying. The mother of the prosecution's star witness' child would have testified that the star witness was known to lie to get out of trouble. Instead, the jury heard that Pelino had talked about where he would hide a body prior to the crime, and the witness testified that Pelino had used a racial slur to describe the victim.[1] The jury was given no evidence to doubt the veracity of the witness' testimony. Even though trial counsel moved for

[1] Pelino comes from multiracial family and was raised in a household where such language and thinking was forbidden. His paternal grandmother is black, and his father is black, Native American, and Italian.

a mistrial[2] and the prosecutor admitted that she was having trouble keeping the witness' answers limited to the questions presented,[3] the jury heard no specific evidence to impeach the prosecution's key witness against Pelino. The mother of the witness' child, however, attended Pelino's trial every day and approached defense counsel daily about the State's witness' propensity to lie. *See* Appendix I.

If the Court does not grant review in this case, the federal courts of appeals will continue to undermine the purpose of Rule 60(b) and Pelino will have no remedy to correct the failure to apply due process in this case. Repeatedly, in every court to hear this case, Pelino has alerted the courts to the claim that the mother of the State's key witness' child was ready and available to present impeachment evidence regarding the witness' reputation for lying. And repeatedly, every court to review this case has ignored—not dismissed or denied—the claim. At times, the reviewing courts have conflated the impeachment evidence with inadmissible character evidence; other times, the courts have claimed that the mother of the witness' child was unavailable or unknown to trial counsel, despite her daily attempts to get counsel's attention. Regardless of the rationale, no court has considered the substance of Pelino's claim that trial counsel had readily available impeachment evidence to support the defense motion for mistrial.

In February 2011, Pelino, a twenty-five year old single father of two, was arrested for the murder and abuse of corpse following the disappearance of William

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[2] T.T. 168. Petitioner uses "T.T." to refer to the trial transcript. The number following "T.T." corresponds to the appropriate page number in the transcript.
[3] T.T. 169.

King in Allegheny County, Pennsylvania. Patrick Thomassey was appointed to represent Pelino. Pelino pled not guilty to both charges. *Commonwealth v. Pelino*, 83 A.3d 1075, 2013 WL 11256503 (Pa. Super. 2013).

An Allegeheny County jury heard Pelino's case on March 13-15, 2012. The jury convicted Pelino on both counts based largely on the testimony of Pelino's co-defendant, Corey Robert. *Id*.

Prior to Pelino's arrest, Corey Robert had a child with Cydney DeDominicis. *See* Appendix I. As a result, DeDominicis was intimately familiar with the primary witness who testified against Pelino. DeDominicis approached Thomassey before Pelino's trial to inform defense counsel that she was willing to testify regarding Robert's reputation for being untruthful. *See* Appendix I. Concerned that DeDominicis' testimony would have opened the door to Pelino's character, however, Thomassey ignored DeDominicis' repeated requests to provide impeaching testimony against Robert. *See* Appendix I.

Following the conviction based on Robert's false testimony, on June 13, 2012, the court sentenced Pelino to life imprisonment without the possibility of parole for the murder conviction with a consecutive sentence of up to two years imprisonment for the abuse of corpse charge. *Pelino*, 2013 WL 11256503, *2.

Pelino hired a new attorney, Paul Gettleman, who appealed Pelino's case to the Superior Court of Pennsylvania. The Superior Court affirmed the convictions and sentences on August 27, 2013. *Pelino*, 2013 WL 11256503, *7.

On December 11, 2013, DeDominicis gave Pelino a sworn affidavit, describing her interactions with Pelino's trial counsel and her availability and willingness to testify. *See* Appendix I.

Gettleman continued to represent Pelino in his initial post-conviction proceedings under the Pennsylvania Post-Conviction Relief Act ("PCRA"). On July 14, 2014, Gettleman filed Pelino's first PCRA petition. *Commonwealth v. Pelino*, 2015 WL 6160114, *2 (Pa. Super. 2015). Grounds 6(b) and (c) of Pelino's initial PCRA petition state:

> Counsel was ineffective for not preparing or calling witnesses whose testimony would have supported petitioner's defense
>
> * * *
>
> (b) Cydney DeDominicis would have testified that Commonwealth witness Corey Roberts has a reputation for being untruthful and the petitioner has a reputation for being honest and peaceful
> (c) Trial counsel was ineffective in not effectively impeaching Commonwealth witness Corey Robert[ ].

See Appendix G at 2. Gettleman amended that petition on October 29, 2014. *Pelino*, 2015 WL 6160114, *2. And on March 15, 2015, the Pennsylvania Court of Common Pleas denied Pelino's PCRA petition without a hearing. *Id*.

The Superior Court of Pennsylvania affirmed the denial of relief six months later on October 14, 2015. *Pelino*, 2015 WL 6160114 at *1. The Supreme Court of Pennsylvania summarily denied the appeal on April 12, 2016. *Commonwealth v. Pelino*, 134 A.3d 97 (Pa. 2016).

Pelino, through the representation of a third attorney, filed a timely petition for writ of habeas corpus in the Western District of Pennsylvania on June 14, 2016. The court denied the petition on July 6, 2017. *See* Appendix E at 2.

Pelino timely filed a notice of appeal and a certificate of appealability to the Third Circuit Court of Appeals. On September 21, 2017, Pelino filed a motion to expand the record to include an affidavit he had received from his appellate and first post-conviction lawyer, Paul Gettleman. In the affidavit, Gettleman conceded that he had been constitutionally ineffective in his representation of Pelino. He added that he had also failed to comply with Pennsylvania's "established procedures for post-conviction relief," adding to his ineffective representation of Pelino during his PCRA proceedings in state court. *See* Appendix H.

The Third Circuit denied Pelino's certificate of appealability on February 5, 2018, and noted "Appellant's motion to expand the record is denied without prejudice to appellant's seeking any relief that may be available under Federal Rule of Civil Procedure 60." *Pelino v. Superintendent Greene SCI*, Case No. 17-2717 (3d Cir. Feb. 5, 2018).

During the course of his appeals, Pelino kept in constant contact with his counsel. He consistently worked with counsel to identify potential legal issues. Following the denial of a certificate of appealability and the perceived advice of the Third Circuit, Pelino filed a *pro se* motion and brief in support of relief from judgment under Fed. R. Civ. P. 60(b) on March 5, 2018, which the District Court

denied on June 5, 2018. *Pelino v. Gilmore*, Case No. 2:16-CV-00796-RCM, Doc. Nos. 48 & 58 (W.D. Pa.); *see* Appendices B & C.

Pelino filed a certificate of appealability with the Third Circuit regarding the denial of his 60(b) motion on December 10, 2019. The Third Circuit denied Pelino's certificate of appealability on April 2, 2020. *See* Appendix A.

A. Trial Proceedings

During Pelino's trial, jurors heard that Pelino arranged to meet Corey Robert and Pelino's half-sister, Nattale Turner, at a local bar on February 12, 2011. (T.T. 64-69, 150, 374-76). Much of what they learned about the events of the evening, particularly regarding the disposal of the body and the precise timing of the disposal, came from Corey Robert. (T.T. 165-77).

During the course of the night, Nattale Turner met William King and introduced King to her half-brother, Pelino. (T.T. 71). The conversation was friendly. King bought Pelino a drink, and after a time, Turner invited King to her visit her apartment to determine whether he might be interested in renting a room. (T.T. 72-73, 377). Before Turner and King left together, Turner ascertained that Pelino would stop by Turner's apartment to give King a ride to his own home. (T.T. 74).

Pelino arrived at Turner's house to retrieve King about ten minutes behind Turner and King. (T.T. 75). When Pelino arrived at Turner's house, the friendly conversation picked up from where it had left off from the bar. (T.T. 75). When King went to the restroom, Turner confided to Pelino that her boyfriend was due to be

home and she needed King to leave so as to avoid a fight with her boyfriend. (T.T. 380-81). Pelino understood, and he and King left Turner's apartment shortly thereafter. (T.T. 79).

King entered Pelino's car. (T.T. 79). After Pelino had driven about a block or two, King's demeanor changed dramatically. (T.T. 383-84). King became belligerent and made disrespectful comments about Pelino's sister. (T.T. 384). Pelino stopped the car and asked King to exit. (T.T. 385). King surprised Pelino, attempting to stab Pelino with a knife and cutting Pelino's hand in the process. (T.T. 387). Pelino grabbed the knife from King and instinctively threw his arm back, striking King in side of the neck. (T.T. 388). King grabbed his neck in surprise and then lunged for Pelino's neck with his bare hands. (T.T. 388). King continued to attack, and Pelino panicked, continuing to defend himself and ultimately stabbing King 72 times. (T.T. 389-90).

After the attack, Pelino called and texted Robert multiple times. (T.T. 156). Robert and Pelino talked around eight or nine o'clock the following evening. (T.T. 157). Robert described Pelino as panicked and begging for help. (T.T. 157, 190). Robert did not know why Pelino needed help initially, but he quickly learned that Pelino needed help disposing of the body. (T.T. 190-91). Robert contacted police and eventually led them to the body. (T.T. 180). He gave the police three statements: a six-page written statement, a 15-line written statement, and a 30-page recorded statement. Each statement differs from others both in length and substance. (T.T. 200).

Robert went on to testify against Pelino, at one point claiming that Pelino asked whether Robert had "see[n] a sign above my door that says Dead Nigger Storage"[4] and at another point stating that he and Pelino had talked about killing someone previously. (T.T. 168). Robert repeatedly testified that Pelino had admitted to killing King "because he thought that he could get away with it." (T.T. 167). During the course of Robert's testimony, trial counsel moved for a mistrial because Robert's answers were prejudicial and non-responsive to the prosecutor's questions. (T.T. 168). His testimony contained so many extraneous details that the trial prosecutor admitted to the court in a sidebar conference that she had asked Robert "many times" to respond the posed question rather than elaborate with unnecessary–and untrue–details. (T.T. 169).

B. Post-conviction Proceedings

On December 11, 2013, Cydney DeDominicis provided written testimony. She stated that she knew both Pelino and Robert. Corey Robert was her son's father, and "[o]ver the years, I have watched Corey lie in order to receive what benefits he could. He has lied numerous times to stay out of trouble." DeDominicis was prepared to testify on Pelino's behalf. "I waited every day of the trail [sic] to be called to testify, but the time never came. I tried to ask why that was the case, and every day when the trial ended [Thomassey] ran from us." *See* Appendix I.

When DeDominicis provided her affidavit, Pelino was preparing his petition for state post-conviction. The initial PCRA counsel, Gettleman, argued that trial

[4] T.T. 165.

counsel was ineffective for ignoring DeDominicis' compelling testimony that Corey Robert–the prosecution's key witness–had a reputation for being untruthful. Gettleman alerted the court to DeDominicis' testimony on July 14, 2014. *Pelino*, 2015 WL 6160114 at *2; *see* Appendix G, p. 2, Grounds 6(b) & (c).

Pelino attached DeDominicis' affidavit to the PCRA petition, and the Pennsylvania Court of Common Pleas' order demonstrates that court read the testimony:

> Claim 6: Petitioner's claim that trial counsel was ineffective for failing to call Armond Bergamasco does not merit relief because Petitioner has failed to establish that he was prejudiced by the omission of this proposed testimony that the automatic locks in Petitioner's car were defective. **Petitioner's claim that trial counsel was ineffective for failing to call Cydney DeDominicis does not merit relief. Petitioner asserts that DeDominicis would have testified that witness Corey Robert[ ] had a reputation in the community for being untruthful and that Petitioner had a reputation for being honest and peaceful. DeDominicis signed her certification that she had a child with Robert[ ] and that he was is not involved in his son's life, but that Petitioner is involved in the child's life. DeDominicis thus was available to be called as a character witness for Petitioner and against Robert[ ]. However, Petitioner completed an oral character witness colloquy wherein he indicated it was his voluntary, knowing, intelligent, and sole decision to not call character witnesses.** (Trial Transcript, March 13-15, 2012, pp. 368-370). Petitioner has failed to establish prejudice.
> Claim 7: . . .

See Appendix F at 3 (emphasis added to highlight findings regarding DeDominicis). Nowhere in the court's order is there mention of impeachment evidence, Claim 6(c) of Pelino's initial PCRA petition. *See* Appendix F at 3 & Appendix G at 2.

When Pelino appealed the state post-conviction order, the Pennsylvania Superior Court added to the error by finding that "neither DeDominicis' statement nor Appellant's PCRA petition set forth evidence to demonstrate that trial counsel knew or should have known of this witness, or the substance of her testimony." *Commonwealth v. Pelino*, 2015 WL 6160114, *7 (Pa. Super. 2015). That court lumped DeDominicis' affidavit with other testimony to support Pelino's claim that trial counsel was ineffective for failing to present character witnesses and repeated the lower court's error of ignoring the separate impeachment evidence of DeDominicis' testimony. *Id*. at *8. And the Superior Court made these findings despite the prosecution's concession that the compelling evidence warranted an evidentiary hearing. *Id*. at n. 5.

The court went on to find "neither DeDominicis' statement nor Appellant's PCRA petition set forth evidence that trial counsel knew or should have known of this witness, or the substance of her testimony." *Id*. at *8. Contrary to the Superior Court's findings, the lower Court of Common Pleas had specifically found that "DeDominicis thus was available to be called as a character witness for Petitioner and against Robert[ ]." *See* Appendix F at 3. The Court of Common Pleas had dismissed DeDominicis' testimony solely on grounds that she was a character witness and Pelino had voluntarily waived character evidence. *Id*.

The federal courts compounded the error from the state post-conviction courts. DeDominicis provided Pelino's newest counsel with a supplemental affidavit, which counsel filed in 2016. *Pelino v. Gilmore*, Case. No. 16-796, Doc. 18 (Dec. 5,

2016). Pelino then asked the federal court to grant him an evidentiary hearing, as one had been acknowledged as necessary yet inexplicably denied during the state PCRA proceedings. *Pelino v. Gilmore*, Case. No. 16-796, Doc. 30 (Mar. 28, 2017).

Rather than rule whether the state court's error was unreasonable, the District Court in this case added to the error, finding:

> Petitioner next contends that counsel was ineffective for 'failing to call certain fact and character witnesses' in defense and failing to offer self-defense evidence. Specifically, petitioner contends that counsel was ineffective for failing to call Cydney DeDominicis to testify to rebut the trial testimony of the Commonwealth's primary witness Corey Robert. In reviewing this issue, the Superior Court wrote, 'neither DeDominicis' statement nor Appellant's PCRA petition set forth evidence to demonstrate that trial counsel knew or should have known of this witness, or the substance of her testimony.' Thus, there is no basis to support the claim of ineffectiveness.

See Appendix E, p. 7. In other words, the District Court repeated the state courts' mistake verbatim.

The District Court added that, although the state post-conviction court was aware of DeDominicis' affidavit, the fact that DeDominicis had not provided her written testimony for Pelino's trial or appeal precluded the post-conviction courts from considering it. *See* Appendix E, n. 17. The court cited *Cullen v. Pinholster*, 563 U.S. 170 (2011), as the basis for its finding regarding the unavailability of DeDominicis' affidavit during post-conviction proceedings. *Id*.

Pelino appealed the District Court's decision to the Third Circuit, and in his certificate of appealability ("COA"), he specifically noted "[i]n his § 2254 petition, Petitioner alleged that his conviction is Constitutionally infirm because: . . . **E. Ground Six:** Trial counsel was ineffective[ ]for failing [A] to call Cydney

DeDominicis, (B) [to] impeach Commonwealth witness Corey Robert, and (C) [to] request a corrupt source." *See* Appendix D at 3. Further in the COA, Pelino described Ground 6 in detail, arguing that the District Court had "simply defer[ed] to the fact findings of the State Court." *See* Appendix D at 7.

Pelino explained that DeDominicis' sworn testimony would have been used to impeach the prosecution's star witness, Corey Robert:

> Trial counsel's failure to impeach Corey Robert was based upon sworn testimony at the preliminary hearing which was in direct conflict with his sworn testimony at trial. The Third Circuit has recently opined that 'If the suppression of evidence (and thereby, the truth) is a serious constitutional error, it's fabrication is a greater error still . . . Presenting false testimony cuts to the core of a defendant's right to due process.' (*See Haskell*). Thus, it is obvious that trial counsel was ineffective for failing to impeach Corey Robert, and thereafter request a corrupt source charge, as a corrupt source instruction advises the jury that if it finds that a certain witness who testified against the accomplice of the defendant in a crime for which he is being tried, then the jury should deem that witness a 'corrupt and polluted source' whose testimony should be considered with caution.

See Appendix D at 8-9 (quoting *Haskell v. Superintendent Greene SCI et al.*, 866 F.3d 139, 152 (3d Cir. 2017)).

The Third Circuit denied Pelino's COA but noted that his motion to expand the record was denied without prejudice to enable Pelino to file a Rule 60(b) motion in district court. *Pelino v. Superintendent Greene SCI*, Case No. 17-2717 (3d Cir. Feb. 5, 2018).

Pelino, now proceeding *pro se*, followed the Third Circuit's recommendation and filed a Rule 60(b) motion one month later. *See* Appendix C. The motion was concise, consisting of only ten pages, and direct. *See* Appendix C. Pelino implored

the District Court to reopen the habeas case under Rule 60(b)(1) and (2) to review evidence that *both* the state and federal courts had inexplicably ignored prior to entering judgment. *See* Appendix C. He focused on the case's procedural history, highlighting "the record contradicts the District Court's Memorandum. The trial judge Edward Borkowski specifically referenced DeDominicis's affidavit on page 3 of his Notice of Intent to Dismiss dated March 9, 2015." *See* Appendix C, p. 6. And Pelino recounted the events that led to DeDominicis' affidavit in the first place, namely that trial counsel had hired an investigator who interviewed several witnesses[5]–including DeDominicis–at the request of trial counsel, thereby putting trial counsel on notice of DeDominicis' availability. *See* Appendix C, p. 5. Nowhere in Pelino's description of the District Court's error regarding DeDominicis and the impeachment of Corey Robert did Pelino discuss the substance of DeDominicis' affidavit, other than to alert the court to the fact that trial counsel was aware that DeDominicis was available.[6] *See* Appendix C.

Despite Pelino's plea that the District Court reopen the case in light of its failure to address the claim that trial counsel was ineffective for failing to call

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[5] Pelino listed the interview dates for three witnesses, but referred the District Court back to DeDominicis' affidavit where DeDominicis explained in her own words that trial counsel had intentionally avoided her. *See* Appendix D, p. 5.

[6] Regarding DeDominicis' affidavit, Pelino stated:

> Cydney DeDominicis's December 11, 2013, affidavit explains that she was told she would be able to testify but was never called and trial counsel intentionally avoided her at trial. (See Appendix 'A') . . . In light of these facts, it is impossible for the District Court to claim, a) "counsel was not aware of these witnesses," and b) "there is nothing in the record to dispute this finding.

See Appendix C at 5.

DeDomincis to impeach Robert, the court dismissed Pelino's 60(b) motion, stating that Pelino had (1) failed to file his motion within the thirty-day period allowed for appeal (defeating a Rule 60(b)(1) claim); (2) failed to articulate how the "newly discovered evidence" of the affidavit testimony appellate and PCRA lawyer, Paul Gettleman, would have changed the outcome of the proceeding "because the Court reached the merits of Petitioner's claims and thus his PCRA counsel's ineffectiveness need not serve as a method to excuse procedural default" (defeating a Rule 60(b)(2) claim); and (3) "presented a veiled attempt at a second habeas corpus petition rather than a true Rule 60(b) motion" (defeating a Rule 60(b)(6) claim). *See* Appendix B.[7]

Pelino filed a COA in the Third Circuit, arguing that a reasonable jurist could debate the applicability of 60(b) to this case. *Pelino v. Superintendent Greene SCI*, Case. No. 18-2481, Doc. 003113429888 (3d Cir. Dec. 10, 2019). The Third Circuit denied the application, stating that Pelino "alleged that the District Court failed to address one of his claims, but he could have raised that argument on appeal, and '[a] request for relief pursuant to Rule 60(b) cannot be used as a substitute for an

[7] The District Court also noted that "a petitioner's diligence is an 'important factor' in determining a true 60(b) motion from a successive habeas petition." *See* Appendix B at 5, quoting *United States v. Doe*, 810 F.3d 132, 152 (3d Cir. 2015). The court stated that because this Court had issued its decision in *Martinez* three months *before* Pelino's conviction in state court but because Pelino did not move to expand the record in federal court until he received his initial collateral counsel's affidavit approximately five years later, Pelino's initial collateral counsel's ineffectiveness could not qualify as extraordinary circumstances sufficient to reopen the case. *See* Appendix B at 6, citing *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

appeal.'"[8] *See* Appendix A (quoting *Morris v. Horn*, 187 F.3d 333, 343 (3d Cir. 1999)).

REASONS FOR GRANTING THE WRIT

I. CONSISTENT AND REPEATED FAILURE OF THE STATE AND FEDERAL COURTS TO REVIEW A CLAIM THAT HAS BEEN APPROPRIATELY RAISED CONSTITUTES "EXTRAORDINARY CIRCUMSTANCES" SUFFICIENT TO REOPEN A CASE UNDER RULE 60(B).

"The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law." *Cash v. Maxwell*, 565 U.S. 1138, 132 S. Ct. 611, 612 (2012) (Sotomayor, J., statement regarding denial of certiorari). "[T]his Court reviews judgments, not opinions." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984). Judgments arising from Fed. R. Civ. P. 60(b) rulings in habeas proceedings–particularly in a case such as this where the petitioner has been denied an evidentiary hearing in both state and federal court even though the prosecution conceded the need for an evidentiary hearing during the state post-conviction proceedings[9]—are an area rife with the need for clarification. *See*, *e.g.*, *Banister v. Davis*, 140 S. Ct. 1698, 1709-10 (2020) (discussing difference between Fed. R. Civ. P.

[8] The Third Circuit added that to the extent Pelino's state post-conviction counsel's self-declaration of ineffectiveness should have excused a procedural default regarding the claim, "jurists of reason would agree with the District Court's conclusion that it had previously 'reached the merits of Petitioner's claims and thus his PCRA counsel's ineffectiveness need not serve as a method to excuse procedural default." *See* Appendix A (quoting *Pelino v. Gilmore*, Case No. 2:16-CV-796 (W.D. Pa. Jun. 5, 2018)).

[9] *Commonwealth v. Pelino*, 2015 WL 6160114, n. 5 (Pa. Super. 2015).

59(e) and 60(b)); *Buck v. Davis*, 137 S. Ct. 759 (2017) (noting the "wide range of factors" a court must consider when ruling on a 60(b) motion).

"Rule 60(b) has an unquestionably valid role to play in habeas cases." *Gonzales v. Crosby*, 545 U.S. 524, 534 (2005). "The Rule is often used to relieve parties from the effect of a default judgment mistakenly entered against them, a function as legitimate in habeas cases as in run-of-the-mine civil cases." *Id.* (citing *Klapprott v. United States*, 335 U.S. 601, 615 (1949)). "A rule 60(b) motion that attacks 'some defect in the integrity of the federal habeas proceedings' . . . does not count as a habeas petition at all, and so can proceed." *Banister*, 140 S. Ct. at 1709 n. 7. Where–as here–a petitioner uses Rule 60(b) to argue that the district court erred by failing to consider a claim raised in his federal habeas petition and he actually raised that claim in his petition, then the motion is a "true Rule 60(b) motion." *Spitznas v. Boon*, 464 F.3d 1213, 1224 (10th Cir. 2006). If the decision of the Third Circuit is left to stand in this case, it will not only clear the way for further decisions to undermine the purpose of Rule 60(b) but will result in fundamental unfairness in this case. *See Gonzalez*, 545 U.S. at 534 (noting "Rule 60(b) has an unquestionably valid role to play in habeas cases").

Over seventy years ago, this Court found "60(b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of [ ] common law remedial tools. In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate

to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949). "[T]he whole purpose of Rule 60(b) is to make an exception to finality." *Buck v. Davis*, 137 S. Ct. at 777 (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005)).

Should the District Court deny a Rule 60(b) motion, the question before the Circuit Court of Appeals becomes whether to grant a certificate of appealability, *i.e.*, "whether a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen the judgment." *Id.*; *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (providing standard for granting COA).

Here, reasonable jurists could debate whether the District Court abused its discretion in refusing to reopen the judgment where the federal courts compounded an error originating in the state post-conviction courts. *See*, *e.g.*, *Buck*, 137 S. Ct. at 767 (noting that the procedural history wherein the error originated in state proceedings but fell to the federal courts to find "extraordinary circumstances" to reopen the case) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003)). "[A] COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 478. Here, the petitioner has repeatedly filed a claim that has been "dismissed without adjudication on the merits," not due to failure to exhaust or by any other fault of the petitioner, but because the courts

have consistently ignored the claim. *See id*. (noting that dismissal without adjudication on the merits is not a second or successive petition).

Although "extraordinary circumstances . . . will rarely occur in the habeas context," they do occur. *E.g.*, *Buck*, 137 S. Ct. at 759 (applying Rule 60(b) to reopen a case after the Court of Appeals had denied COA on the Rule 60(b) motion). This is such a case. A procedural error resulted from a fundamentally flawed process: each court to consider the "merits" of Pelino's claim regarding DeDominicis' impeachment evidence against Robert ignored—not dismissed or denied—the claim. *See* Appendix A, B, E, F, *Pelino*, 2018 WL 732919 (3d Cir. 2018) & *Pelino*, 2015 WL 6160114 at *8. Those courts that claimed to address the impeachment evidence on the merits conflated DeDominicis' statements with character evidence. Pelino doggedly raised the claim again and again in each subsequent court, only to have the Third Circuit deny COA regarding the Rule 60(b) motion by holding that Pelino "could have raised [the impeachment evidence] argument on appeal.'" *See* Appendix A. This error cannot stand.

The repeated failure of the courts to examine the record in front of them is the extraordinary circumstance of this case. *See Gonzalez*, 545 U.S. at 535 (requiring a Rule 60(b) movant to demonstrate "extraordinary circumstances justifying the reopening of the final judgment"). A claim has been asserted appropriately before both the state and federal courts, only to be ignored, and when the last court realized the claim before it, that court held that Pelino should have raised the claim sooner. *See* Appendix A, B, E, F, *Pelino*, 2018 WL 732919 (3d Cir.

2018) & *Pelino*, 2015 WL 6160114 at *8. The courts' logic is nonsensical. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (holding that courts of appeals should limit their examination to the "threshold inquiry" of whether "the District Court's decision was debatable").

The Third Circuit misconstrued Pelino's explanation of the extraordinary circumstances of his case as fodder for an improper successive petition. In reality, "all that petitioner has asked is that the [ ] judgment be set aside so that for the first time he may defend on the merits." *Klapprott*, 335 U.S. at 615. "Fair hearings are in accord with the elemental concepts of justice, and the language of the 'other reason' clause of 60(b) is broad enough to authorize the Court to set aside the [ ] judgment and grant petitioner a fair hearing." *Id*.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Third Circuit in this case.

CERTIFICATE OF WORD COUNT

I hereby certify that Mr. Pelino's petition for writ of certiorari complies with the word count requirements under Rule 33, namely that the petition for certiorari in this case contains 5,963 words.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing petition has been furnished via electronic mail to Rusheen R. Pettit, Assistant District Attorney, Allegheny County District Attorney's Office, 436 Grant Street, Room 303, Pittsburgh, Pennsylvania 15219, at rusheen.pettit@da.allegheny.pa.us on this 31st day of August, 2020.

Respectfully submitted,

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