No. 20-6270

IN THE
UNITED STATES SUPREME COURT

DAVID MERRITT, *pro se* - PETITIONER

v.

WARDEN, JAMES T. VAUGHN CORRECTIONAL CENTER, ET AL.
AND ATTORNEY GENERAL FOR THE STATE OF DELAWARE - RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

David Merritt, *pro se*
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Date: 10/30/2020

QUESTION PRESENTED

1. Did the Third Circuit's denial of a Rule 60(b)(6) motion constitute clear error in declining to issue a certificate of appealability by sanctioning the district court's enhanced version of the *Martinez* rule "*substantial claim*" requirement when dismissing insufficient evidence as unexhausted and procedurally defaulted but then adjudicating the matter beneath ineffective assistance of counsel to ultimately resolve the merits of the appeal although the barred claim made a "*substantial showing of the denial of a constitutional right*" based on the existence of a wrongful conviction?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

PETITIONER, DAVID MERRITT ("Merritt"), *pro se*, prays that a writ of certiorari issue to review the judgment below of the United States Court of Appeals for the Third Circuit, entered in this case on August 14, 2020.

OPINIONS BELOW

The January 27, 2011 order of the Delaware Supreme Court affirming the convictions is reported at *Merritt v. State*, 12 A.3d 1154 (Del. Supr. Ct. Jan. 27, 2011). App. 1 - App. 10. A corresponding June 14, 2011, memorandum opinion of the United States District Court for the District Court of Delaware regarding dismissal of defense counsel is reported at *Merritt v. Edinger, et al.*, 2011 WL 2442610 (D. Del. June 14, 2011). App. 11 - App. 15. The accompanying order is set forth at App. 16. The Superior Court Commissioner's Report on November 20, 2012 recommending that a First Rule 61 Postconviction Motion be denied is reported at *State v. Merritt*, 2012 WL 5944433 (Del. Super. Ct. Comm'r's Nov. 20, 2012). App. 17 - App. 33. The January 25, 2013 order of the Superior Court adopting the Commissioner's judgment is reported at *State v. Merritt*, CA I.D. No. 0903001739 (Del. Super. Ct. Jan. 25, 2013) which is set forth at App. 34 - App. 35. The September 24, 2013 order of the Supreme Court, which also adopted the Superior Court's decision, is reported at *Merritt v. State*, 77 A.3d 272 (Del. Supr. Ct. Sept. 24, 2013). App. 36 - App. 39.

The August 24, 2016 decision of the District Court denying summary judgment prior to the resolution of the first petition for a writ of habeas corpus is reported at *Merritt v. Pierce*, 2016 WL 4838336 (D. Del. Aug. 24, 2016). App. 40 - App. 42. The accompanying order is set forth at App. 43. The March 6, 2017 memorandum opinion of the District Court denying habeas relief and declining to issue a certificate of appealability ("COA") is reported at *Merritt v. Pierce*, 239 F.Supp. 3d (D. Del. Mar. 6, 2017). App. 44 - App. 59. The accompanying order is set forth at App. 60. The August 9, 2017 order of the Third Circuit adopting the District Court's opinion is reported at *Merritt v. Warden James T. Vaughn Correctional Center, et al.*, 2017 WL 4417849 (3d Cir. 2017). App. 61 - App. 62. A January 22, 2018 separate order from the District Court denying a COA and dismissing the federal petition is set forth at App. 63.

The January 29, 2018 order denying a Second Rule 61 Postconviction Motion from the Delaware Superior Court is reported at *State v. Merritt*, 2018 WL 11690644 (Del. Super. Ct. Jan. 29, 2018). App. 64 - App. 71. The November 5, 2018 order by the Delaware Supreme Court affirming the Superior Court's decision is reported at *Merritt v. State*, No. 104, 2018, Cr. I.D. No. 0903001739 (Del. Super. Ct. Nov. 5, 2018). App. 72 - App. 76.

The January 13, 2020 memorandum opinion of the District Court denying reconsideration of a COA pursuant to Fed.R.Civ.P., Rule 60(b)(6) is unpublished. App. 77 - App. 79. The accompanying order is set-forth at App. 80. The April 7, 2020 order of the Third Circuit denying an application under 28 U.S.C. § 2254 is unpublished. App. 81 - App. 82. The August 14, 2020 opinion of the Third Circuit denying appeal from the denial of the Rule 60(b)(6) motion is unpublished. App. 83 - App. 84.

JURISDICTION

An appeal from the Third Circuit's order denying the Rule 60(b)(6) motion is entered in this Court on this day ___, November 2020. Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. § 1259(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment of the United States Constitution, states in pertinent part:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 2253, states in pertinent part:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals . . .

(c)(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Federal Rules of Civil Procedures, Rule 60(b), provides in pertinent part:

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a

certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rules of Appellate Procedure 22.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representation from final judgment, order, or proceedings for . . .

(6) any other reason that justifies relief.

STATEMENT OF THE CASE

The Third Circuit's denial of Merritt's Rule 60(b)(6) motion constitutes clear error in declining his COA by sanctioning the district court's enhanced version of the *Martinez* rule "substantial claim" requirement when dismissing insufficient evidence as unexhausted and procedurally defaulted but then adjudicating the issued beneath ineffective assistance of counsel to ultimately resolve the merits of the appeal. See, 28 U.S.C. § 2253(c)(1); see also *Martinez v. Ryan*, 132 S.Ct. 1309, 1319-1320 (2012) (citing *Miller-El v. Cockrell,* 537 U.S. 322, 336-337 (2003)). When there was an intervening change in controlling law wrought by *Martinez* during Merritt's 2012 state initial-review collateral proceeding that provided cause to excuse a procedural default, the Third Circuit inverted the statutory order of operations by deciding the federal appeal and then denying the COA based on the actual merits of the defaulted insufficient evidence claim although

the issue made a "substantial showing of the denial of a constitutional right" based on the existence of a wrongful conviction. See, 28 U.S.C. § 2253(c)(2).

Factual and Procedural Background

1. The historical facts in this case are borne out of serious allegations made by Merritt's oldest daughter ("the complainant") who, following a divorce by her parents in January of 2006, suddenly reported that he had been sexually abusing her over the course of a three-year period.[1] She described to her mother and first responding officer Corp. Christiana Haggerty ("Corp. Haggerty") various acts of alleged misconduct that included "*touching her breast*" and "*grind[ing] on her while both were naked.*" The complainant explained that although "*[Merritt's] penis would get hard*" . . . "*he never placed it inside her vagina.*" More specifically, she disclosed they "*never had sexual intercourse.*" The complainant also advised, "*never [being] forced*" and that there was no "*fellatio.*" However, that "*[Merritt] ha[d] performed cunnilingus on her*" by licking the "*outside*" of her vagina. See, Corp. Haggerty's Investigative Narrative on 1-23-2009 at pgs. 3-4 as Atts. C-D.

In response to her initial reporting, the complainant authored an independent sworn out-of-court disclosure letter memorializing her allegations. In the one-paged typed document, she attest, in relevant part, that "*[Merritt] would get behind me and grind on me and would pull down his pants and tell me to pull down mine.*" More specifically, that "*[Merritt] would pull out his private part and put his thing on my private part and rub[e] his*

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[1] The historical facts in support of this case derive from the attached New Castle County Police Investigative narratives, State's Affidavit of Probable Cause, Complainant's Sworn Out-of-Court Disclosure Letter and Children Advocacy Center's Forensic Examination.

thing on my private part not inside of me [sic]." The complainant declared, this "*would happen every weekend*" in that way during the three-year period. See, Complainant's Sworn Disclosure Letter on 2-9-2009 as Att. #2.

In contrast, during a subsequent interview at the Children's Advocacy Center ("CAC") by Det. JoAnne Burton (Det. Burton"), Chief Investigative Officer, the complainant revealed to a forensic examiner, Susan Poley ("Poley") that on three separate occasions Merritt would "*move*"/"*grind*" her up and down on him while they were fully clothed. She further explained that when the clothes started to come off, "*[he] would lay behind me . . . place his penis in my vagina, and move back and forth.*" Moreover, that Merritt would "*suck*" and "*touch*" her breast every time he put his penis in her vagina. Finally, that Merritt "*licked her vagina*" approximately 3-4 times while in the bedroom of his apartment. See, Det. Burton's Investigative Narrative on 3-2-2009 at pgs. 5-6 as Att. M-N. Based largely on Det. Burton's observation of the complainant's out-of-court statements given to the CAC, Merritt was arrested and charged with first-degree rape. See, Id. at pg. 7 as Att. O; see also Affidavit of Probable Cause on 2-19-2009 at pg. 4. ¶3 as Att. H and 3-3-2009 at pg. 4, ¶3 as Att. S. Merritt was subsequently indicted by a New Castle County Grand Jury on eight counts of first-degree rape, one count of continuous sexual abuse of a child, and two counts of unlawful sexual contact first-degree. (D.I. 6).[2] The two counts of unlawful sexual contact were *nolle prossed* on the first day of trial.

2. At trial, there was no physical, medical or direct evidence linking Merritt to the State's charges of first-degree rape other than the complainant's inconsistent and

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[2] "D.I." references are to Delaware Superior Court Criminal Docket Items in *State v. Merritt*, CA I.D. No. 0903001739.

seemingly, contradictory out-of-court statements made during the CAC interview that was recorded to DVD. Therefore, the case would be extremely close and turn squarely on her credibility. During opening arguments, the prosecutor, Diane Walsh ("Walsh") informed the jury that "*it's not going to be what you thing might be your classic rape case.*" See, Tr. 2-23-2010 at 31.[3] Despite the State's Affidavit of Probable Cause attesting that Merritt "*penetrated* [the complainant's] *vagina*" with his penis on numerous occasions, Walsh indiscreetly detracted from that theory by explain the State was not alleging "*full vaginal penetration.*" Rather, Walsh informed the jury that based on the statutory definition of First Degree Rape, specifically "sexual intercourse," the State was only going to show "*penetration . . . inside the lips*" but "*however slight*," a significant variation from the Affidavit of Probable Cause alleging vaginal penetration.[4] See, Tr. 2-23-2010 at 33-34. While at no time during the investigation did the complainant specifically use the language "*inside the lips*," semantically Walsh's inclusive characterization of the anatomy permitted the jury to draw an adverse inference that within the labia (pudendum) established the threshold for where the penis purportedly went in relation to the vagina. Ironically, where the State's probable cause for first-degree rape was based substantially on Det. Burton's belief that there was vaginal penetration and then marginally changed during Walsh's opening argument to "*inside the lips,*" that threshold difference was still in sharp contrast to the complainant's independent sworn disclosure letter.

In support of its first-degree rape case, the State presented (6) six witnesses

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3 "Tr. [date] at pg. #" refers to Delaware Superior Court Trial Transcripts in State v. Merritt, CA I.D. No. 0903001739.

4 Although Det. Burton drafted the Affidavit of Probable Cause on the belief that there was "*penetration*" to "*the vagina*," later on cross-examination when referred to the police reports and Corp., Haggerty's in-court testimony, she affirmed as the Chief Investigative Officer that there was initial disclosure from the complainant of "***no penetration***." See, Tr. 2-23-2010 at 28, 33.

that culminated with the complainant as the principle. Consequently, none were able to offer any direct testimony establishing that there was sexual intercourse (or penetration). The only exception was the inconsistent out-of-court videotaped statements the complainant made at the CAC that was played for the jury. As the case proceeded, first, there was direct testimony from the mother. She provided no evidence of a rape and was never cross-examined by defense counsel (John S. Edinger "Edinger") on the fact that the complainant told her specifically there was "*never . . . sexual intercourse.*" *See, Corp. Haggerty Investigative Narrative* on 1-23-2009 at pg. 3 as Att. C. Next, during direct examination of Det. Burton, the State entered as Exhibit #1, the complainant's independent sworn out-of-court disclosure letter.[5] Although not read into evidence contemporaneously, the sworn disclosure letter described how the sexual acts were purportedly perpetrated upon her "*every weekend*" over the course of the three year period where she attest in relevant part:

> ". . . he would pull out his private part and put his thing **on my private part** and rub[e] his thing o**n my private part not inside of me** [sic]."

See, Tr. 2-23-2010 at 6-7; see also *Complainant's Sworn Disclosure Letter* on 2-6-2009 as Att. #2. Then, where Corp. Haggerty offered no direct testimony supporting evidence of a rape, on cross-examination she explained that the complainant disclosed to her

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[5] Coincidentally, consequent to being admitted into evidence, Merritt advised Edinger that the disclosure letter had been conspicuously altered. Notably, the complainant's handwritten statements and signature affixed at the bottom of the typed letter swearing that the above statements were "*true and correct*" were removed. They were replaced with alternative language suggesting that the alleged sexual conduct was instead the complainant's "*recollection*" to the "*best of her ability*" although the independent sworn statements represented a fresh complaint. So, where Merritt had already obtained a copy of the original disclosure letter from Family Court filings, which he turned over to Edinger prior to trial, the alterations called into serious question Walsh's intentions in attempting to enter the letter as authentic when, in fact, it was clearly underwent changes. See, Tr. 2-23-2010 at 65-66; see also, *Complainant's Altered Disclosure* letter as Att. #1 cf. w/ *Det. Burton's Investigative Narrative* on 3-2-2009 at pg. 5 as Att. M.

specifically there was "**no penetration.**" See, Tr. 2-23-2010 at 111 as Att. #3 cf. w/ *Corp. Haggerty's Investigative Narrative* on 1-23-2010 at pgs. 3-4 as Att. C-D. Following Corp. Haggerty, the State introduced the complainant's unsworn out-of-court CAC videotaped interview as Exhibit #3. See, Tr. 2-24-2010 at 122-124 as Att. #4. During the playing of the DVD, the complainant appears explaining to Poley, the forensic examiner, in relevant part, that Merritt would ". . . *take his pants off and pull my pants down*" . . . "*lay behind me*" and "*placed his penis in my vagina and move back and forth.*" However, where the complainant had not yet testified, the out-of-court CAC videotaped interview was uncorroborated, unauthenticated and embodied clear instances of leading and improper vouching.[6] See, Tr. 2-23-2010 at 122-124 as Att. #4 cf. w/ *Det. Burton's Investigative Narrative* on 3-2-2009 at pgs. 5-6 as Atts. M-N. Finally, there was no direct testimony from Officer Christopher Shananhan (Cell-Phone Expert) supporting that there was sexual intercourse (or penetration).

So, the case turned to the complainant as the eyewitness and the one the sexual abuse allegedly happened to. On direct examination, where the questioning came down to the essential element of the offense and where the penis purportedly went in relation to the vagina, whether there was sexual contact or sexual penetration, the complainant testified specifically:

". . . he put his thing **between my legs.**"

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[6] In fact, on the last day of trial, Merritt advised Edinger that at the end of the CAC interview, Poley made an improper comment in the jury's hearing that vouched for the complainant's credibility by specifically stating, "[*Y*]*ou did the right thing by coming forth.*" See, Tr. 3-1-2010 at 18-19. Where this was an extremely close case that turned squarely on the complainant's credibility, Merritt asked Edinger to have the trial court instruct the jury "*not to consider the statements.*" Id. at 18-19. Although the trial court recognized the vouching and said she would advise the jury, Poley's comments were never mitigated.

See, T. 2-24-2010 at 83 as Att. #5. Then when asked to clarify, she testified further:

> ". . . **it didn't actually go in my private part** but **it rubbed against my private part.**"

See, Tr. 2-24-2010 at 84-85 as Att. #5-#6. Based on an objection to Walsh's (arguably) "*leading*" question concerning the complainant's own understanding of the anatomy, particularly the vagina, (see, Tr. 2-24-2010 at 85 as Att. #6), Edinger was subsequently granted a "*standing objection*" contingent on what she considered her "*private part.*" See, Tr. 2-24-2010 at 87 as Att. # 6. From the sidebar conversation, Edinger reasonably knew that based on Walsh's expressed intent to prove penetration, her requesting additional information regarding the anatomy would clearly conflict with the preliminary written and oral testimony since the complainant's sworn statements already established that the penis rubbed "*on [her] private part*," "*not inside.*" See, Tr. 2-24-2010 at 88 as Att. #6. In fact, during the corresponding anatomy inquiry, the complainant confirmed categorically that the "*outer*" and "*outside*" exterior of "*the lips*" were specifically her "*private part*" and thus established directly where the penis went in relation. See, Tr. 2-24-2010 at 88-90 as Atts. #6-#7. Therefore, where the complainant's affirmative responses were consistent with her preliminary written and oral testimony providing specifically: "**on my private part**," "**not inside**," "**no penetration**," "**in between my legs**," "**it didn't actually go in my private part**" . . . "**it rubbed against my private part**" (i.e. "**the lips**"), any rational trier of fact viewing the evidence even in light most favorable to the prosecution could have reasonably concluded there was independent and factual proof of unlawful sexual contact.

However, in the absence of what should have been a contemporaneous objection from Edinger or *sua sponte* intervention from Judge Jurden, Merritt contends the record

begins to fraudulently reflect Walsh appearing requesting demonstrative evidence in the form of hands and fingers pretentiously representing a vagina and labia lips intended otherwise to prove penetration. (See, accompanying **MOTION FOR EVIDENTIARY HEARING** explaining the relevant portion of transcripts alleged to have been fabricated surrounding the requested hand demonstration). Here, the record falsely reflects the following exchange:

> **THE PROSECUTOR:**
>
> **Q.** When you said he would grind but it wouldn't go in, can you please describe to us, if you can, can you use your hands and pretend that one of your hands, maybe your fingers are the lips?
>
> **THE WITNESS:**
>
> **A.** So what are you trying to tell me to do?
>
> **THE PROSECUTOR:**
>
> **Q.** I'm trying to ask you, with the Court's permission, if you can use your fingers and pretend they're the lips of the vagina and then tell us how your father grinded with his penis?

See, Tr. 2-24-2010 at 90 as Att. #7. According to ABA Standards, § 3-5.6(b), "it is unprofessional conduct for a prosecutor knowingly and for the purpose of bringing inadmissible matters to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions or make other impermissible comments or arguments in the presence of the judge or jury." *ABA Criminal Justice Standards, The Prosecutions Function, § 3-5.6(b).* Accordingly, "a prosecutor should not permit any tangible evidence to be tendered in the view of the judge or jury unless there is a reasonable basis for its admission in evidence." *ABA Criminal Justice Standards, The Prosecutions Function, § 3-5.6(c).* For example, in *U.S. v. Klebig*, the Court easily concluded it was error to allow demonstration and accompanying commentary . . . where "the government's demonstration would assert new facts that seemed to conflict with the testimony of government's own expert." 600 F.3d 700, 710 (2000).

On this record, however, Edinger's performance "fell below an objective standard of reasonableness" in failing to either renew his "*standing objection*" or assert a new objection contemporaneously to Walsh's conflicting request knowing her intended purpose would inject demonstrative evidence that contradicted the complainant's preliminary written and oral testimony. See, Strickland v. Washington, 466 U.S. 668, 687-688 (1984). Edinger's performance "fell outside the wide range of professionally competent assistance" knowing Walsh's request for the hand demonstration was contravening in nature, possessed inherent verification limitations and unpreservable. Strickland, 466 U.S. at 688-689. Since there was no reasonable understanding as to how the hands and fingers would pretentiously represent a vagina and labia lips, Edinger's failure to have timely objected specifically to the inevitable conflict was not part of any strategic or tactical decision knowing the demonstration could not be transcribed, marked or preserved for identification purposes. Strickland, 466 U.S. at 689-690.

Therefore, because the factual finding was predicated on two statutory provisions encompassing the same essential element of the offense, a reasonably competent attorney functioning in accordance with the Sixth Amendment of the U.S. Constitution would have strenuously objected contemporaneously on Rule 403 relevancy grounds to eliminate substantial risks of unfair prejudice, confusion on the issue, or potential of misleading the jury based on the clear and obvious conflict emanating between the complainant's sworn preliminary written and oral testimony and Walsh's contravening request for the hand demonstration. See, Fed.R.Evid., Rule 403. That's because, under the circumstances, *pursuant* to Rule 901 verification requirements any probative value resulting from hands and fingers pretentiously representing a vagina and labia lips would be significantly outweighed by serious dangers of misidentification, adulteration and possible feigning in attempting to use anatomically an unproven and inadequate method intended to establish reasonably accurate identification for authentication and a proper foundation on an essential element of the offense. See, Fed.R.Evid., Rule 901.

3. Here based on what Merritt contends is a fabricated record, where the complainant already appeared responding with uncertainty to Walsh's ambiguous and contravening request, the following is then inconclusively shown:

THE WITNESS:

A. This is my lips (*indicating*), my dad thing would go - - this is my lips and the private part right here, my dad would just go like this with his thing (*indicating*).

See, Tr. 2-24-2010 at 90 as Att. #7. In the absence of a timely objection to ensure a proper foundation, Merritt was denied the right to due process in violation of the Fourteenth Amendment of the U.S. Constitution by what were anatomically incorrect "V-Shaped" fingers. While the complainant appeared specifically stating, "*This is my lips*," the record reflects that she simultaneously held up both the left index and middle fingers in a "V-Shaped" manner already spread apart representing the vagina's labia lips. While stating, "*my dad thing would go*," the tip of the right index finger representing the penis was placed between the left index and middle "V-Shaped" fingers. Although the actual "V" is not stated verbatim for the record, it is however reasonably understood from the complainant's conjunctive description. It does so where she appeared stating, "*this is my lips and the private part right here*" while simultaneously pointing out two separate places. The conjunctive description makes it reasonably clear that the "V-Shaped" fingers as "*the lips*" were initially open showing the labia (pudendum) anatomically incorrect while indicating the tip of the right index finger supposedly "*going up*" between the left index and middle fingers (arguably) designated as the "*private part*." However, in the absence of any mitigation to the obvious verification error, the "V-Shaped" finger" (a) inaccurately represented "*the lips*" as being automatically open when, in fact, it is commonly known that the labia, which resembles a more crescent-shaped, hood-like covering, lie naturally enclosed together to insulate the inside of the lips and (b) made penetration appear

positively certain, even without bringing the hands and fingers together to show whether it was "*against*" or "*inside*" in a "*however slight*" determination.

Because Walsh's request for the hand demonstration was not contemporaneously subjected to a sufficient balancing test under Rules 403 and/or 901 to determine its evidentiary value, it therefore lacked the authenticity required to support a proper foundation for admissibility in furtherance of the complainant's preliminary written and oral testimony. Thus, where the hand demonstration was described in terms using "*this*," "*go*" and "*here*," Walsh appeared without any good-faith basis relying solely on the gestures to the "V-Shaped" fingers as the primary means for a factual assertion that impermissibly vouched for the credibility of the complainant's inconclusive statements. In doing so, Walsh put words directly into the mouth of the complainant she just did not say where the record reflects

THE PROSECUTOR:

Q. And when you're, you're making a Jester - - gesture, excuse me, as if **it's inside the lips**?

THE WITNESS:

A. But it's just going, like, **it's not going in** my hole, **it's just going up**.

THE PROSECUTOR:

Q. **Inside the lips** but not the vagina?

MR. EDINGER: Objection.

THE WITNESS: Yes.

THE COURT: Overruled.

See, Tr. 2-24-2010 at 90-91 as Att. #7.

If Edinger had timely objected specifically to Walsh's contravening request under Rule 403 "relevancy" grounds, he could have persuasively argued contemporaneously

what he inadequately tried to argue subsequently during the corresponding sidebar. That is, while Edinger appeared to have based his untimely objection on misstated evidence knowing the complainant's preliminary written and oral testimony established independent and factual proof that "it rubbed against," it is reasonably clear that prior to Walsh's contravening request for the hand demonstrating, he knew unequivocally "*not once ha[d] she testified it's gone between the lips.*" See, Tr. 2-24-2010 at 90 as Att. #7. In addition, where Edinger had a demonstrated knowledge that the "V-Shaped" fingers were anatomically incorrect while stating for the record, "*I'm showing my fingers going, or my finger going between these finger,*" he also knew the hand demonstration was impermissibly used as the sole means for the factual assertion of "*inside the lips*" although the complainant never said that. See, Tr. 2-24-2010 at 92-93 as Atts. #7-#8. So, even though Edinger inadequately argued, "*I did not hear [the complainant] say that or show that*" [meaning, the penis rub inside], there still was no reasonable basis for the admissibility of the hand demonstration other than to clarify the preliminary written and oral testimony that already established "*it rubbed against.*" See, Tr. 2-24-2010 at 92-93 as Atts. #7-#8.

Had Edinger moved contemporaneously to exclude the contravening request for hands and fingers altogether in lieu of the testimonial evidence he would have effectively eliminated any opportunity for a conflict with the demonstration. That's because, under Rule 901(b)(4), the inconclusive statements describing the gestures did absolutely nothing to clarify the complainant's preliminary written and oral testimony that definitively established "it rubbed against" and "*not inside*" and (b) under Rule 901(b)(9), the

"V-Shaped" fingers represented an inadequate means for sufficient identification necessary to reasonably depict the vagina's labia lips in a "*however slight*" determination. Cf. w/ Tr. 3-1-2010 at 11-12 (on the last day of trial, Edinger appeared expanding the record regarding his misplaced objection to Walsh's contravening hand demonstration request but took no affirmative steps to mitigate the "V-Shaped" fingers verification error based on his own demonstrated knowledge that they were anatomically incorrect).[7]

In light of the complainant's inconclusive statements describing the hand gestures without any mitigation to the verification error, Merritt was substantially prejudiced by Walsh's official endorsement of the "V-Shaped" fingers establishing an improper basis for her factual assertion of "*inside the lips.*" See, Tr. 2-24-2010 at 91 as Att. #7. Knowing the hand demonstration was contravening in nature, possessed inherent verification limitations and unpreservable, Edinger's failure to have timely objected to Walsh's request, more specifically the anatomically incorrect "V-Shaped" fingers, resulted in an unreliable or fundamentally unfair outcome in the proceeding based on the irreconcilable conflict produced in evidence. *Strickland*, 466 U.S. at 691-692. In *Harrington v. Richter*, 131 S.Ct. 770, 771 (2011), the Court explained that "counsel's representation is constitutionally ineffective if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." So, following Edinger's untimely and inadequate objection and an immediate "*Yes*" to what appeared as Walsh's obvious compound question asking again if it went "*inside the lips*," despite the trial court's adverse ruling, although the complainant specifically restated the fact that "*It just rubbed*

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[7] See, *Penson v. Ohio*, 488 U.S. 78, 88 n. 5 (1988) (counsel serves an important function by making sure the record, in the event of appeal, "*accurately and unequivocally*" reflect all that occurred below).

against . . . It rubbed against," ***the damage was already done!*** See, Tr. 2-24-2010 at 91 as Att. #7.

In the absence of any mitigation to the prejudicial effects caused by the contravening hand demonstration, the record reflects that Walsh personally used the "V-Shaped" fingers herself for verification and authentication purposes. See, Tr. 2-24-2010 at 91 as Att. #7. But, according to ABA Standards, § 3-5.6(d), "a prosecutor should not tender tangible evidence in the view of the judge or jury if it would tend to prejudice fair consideration by the judge or jury unless there is a reasonable basis for its admission in evidence." *ABA Criminal Justice Standards, The Prosecutions Function*, § 3-5.6(d). For example, in *Klebig*, the Court concluded that the defendant was prejudiced by the error in allowing the demonstration which did not constitute a single offhand remark and apparently had a strong effect on the jury. *Klebig*, 600 F.3d at 718.

Even though Walsh lacked a good-faith basis for her factual assertion of "*inside the lips*," during the corresponding sidebar regarding Edinger's objection, she further asked the trial court for permission to have the complainant "*use her fingers to explain one more time how the lips were and what [Merritt] did with his penis.*" See, Tr. 2-24-2010 at 94 as Att. #8. But, in the absence of any corrective or curative instruction to the jury to mitigate the prejudicial effects, although the "V-Shaped" fingers were the more obvious means of showing penetration, the complainant instead abruptly rejected the hand demonstration idea altogether although the consequential harm remained. See, Tr. 2-24-2010 at 95 as Att. #8. The complainant suddenly grabbed a nearby Kleenex "tissue box" and initiated her own independent demonstration to show what was proffered in her preliminary written and oral testimony that established "*it rubbed against.*" While sliding

the palm of her hand over and across the flat surface of the tissue box, the complainant testified specifically:

THE WITNESS:

A. . . . Pretend this is the lips, he would go like this, this is the hole, and outside is the lips, he would go like this (*indicating*). So it's not like going in my hole, **it's just rubbing against my thing**.

See, Tr. 2-24-2010 at 95 as Att. #8. Here, in view of the complainant deliberately rejecting the "V-Shaped" fingers altogether, the "tissue box" provided, *ipso facto*, absolutely no logical explanation on its six-sided, rectangular shaped exterior to support any reasonable conclusion that the palm (or any other part) of her hand went "*inside*" beyond that threshold of the flat surface to justify penetration, to any degree. Additionally, the only comparable part to the vaginal area was a hole that was never at issue and which integrated within the flat surface the complainant clearly identified as the "*outside*" of "*the lips.*" More notably, the hole was completely covered by a factory placed plastic lining that prevented no direct contact beyond that threshold of the flat surface necessary to indicate an "*inside the lips*" gesture contrary to the complainant testifying by a preponderance of the evidence that "*it's just rubbing against.*" See, Tr. 2-24-2010 at 95 as Att. #8. Moreover, it is even undisputed by Walsh's very own corresponding statements that the palm (or any other part) of the complainant's hand did not go "*inside*" beyond that threshold of the flat surface to establish penetration, even slightly. When the trial court subsequently instructed Walsh to "*note for the record what the witness used,*" she responded specifically though untimely and without objection, "*Thank you, Your Honor. For the record the witness used a tissue box as a hole and rubbed her palm against the top of the tissue box*" the complainant indicated as the flat surface. See, Tr. 2-24-2010 at 96 as

Att. #8. Furthermore, Edinger failed to object to Walsh impermissibly requesting the use of the "tissue box" to show how the tongue purportedly "*licked between the lips*" of the vagina although the complainant is already shown using the flat surface to testify how "*it's just rubbing against.*" See, Tr. 2-24-2010 at 116-119. Again, Walsh was permitted to overstep the bounds of propriety and fairness required of her office by attempting to "*bootstrap*" the State's remaining case to the flat surface while: (a) pointing to other alleged acts of sexual intercourse, namely "*cunnilingus*" supposedly to show "*inside the lips*" and (b) facilitating a compromised verdict where she already conceded to the fact that the complainant "*rubbed her palm against the top of the tissue box,*" *supra.*

Had Edinger contemporaneously objected to Walsh's contravening request for the hand demonstration, more specifically moved to exclude the resultant "V-Shaped" fingers verification error, this case would have never go to the jury on the eight counts of rape in the first degree. Based on the complainant's preliminary written and oral testimony establishing undisputed proof of unlawful sexual contact and being the exact same testimony demonstrated by a preponderance of the evidence through the flat surface of the "tissue box," there is "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. That's because, on the last day of trial, Edinger upon motion for judgment of acquittal briefly argued to the trial court that "*[t]he State ha[d] not met it's prima facie case of rape first, and the eight counts of rape first and continuous sexual abuse of a minor.*" See, Tr. 3-1-2010 at 4 as Att. #9. Paradoxically, he added, ". . . *the evidence is not sufficient to*

meet that threshold of a prima facie case only the witness's testimony."[8] While Edinger argued in cursory fashion, "*only the witness's testimony*" was sufficient, it is reasonably clear he was referring directly to the demonstrative evidence as "*the evidence*" that was insufficient. Knowing that Walsh relied solely on the "V-Shaped" fingers as the primary means for the factual assertion of "*inside the lips*" to establish the foundation for the penetration element, the only logical conclusion remaining to support Edinger's reasoning for insufficient evidence was the "tissue box" demonstration [itself].

By making the argument that "*only the witness's testimony was sufficient*," Edinger incongruously asked the trial court to acquit Merritt without any reasonably explanation supporting his belief that the evidence was, in fact, insufficient. But, knowing the complainant's preliminary written and oral testimony established independent and factual proof of unlawful sexual contact and was the exact same testimonial evidence demonstrated through he "tissue box," even in light of the anatomically incorrect "V-Shaped" fingers, the flat surface, *a fortiori*, completely dispelled all reasonable inferences of penetration and could not support or sustain a *prima facie* case for rape first, and the eight counts of rape first and continuous sexual abuse of a minor. Therefore, any reasonably competent attorney functioning in accordance with the Sixth Amendment would have effectively moved to mitigate the prejudicial effects of the "V-Shaped" fingers

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[8] On its face, Edinger's argument was incompetent and completely disingenuous when considering Delaware state law where, he should have patently known that "[t]he alleged victim's testimony [alone] concerning sexual contact (or penetration) is sufficient to support a guilty verdict [if] it establishes every element of the offense charged." See, Taylor v. State, 982 A.2d 279, 285 (Del. 2009); Styler v. State, 417 A.2d 948, 950 (Del. 1980). Where "[t]he state of law is central to an evaluation of counsel's performance . . . a reasonably competent attorney patently is required to know that state of applicable law." See, State v. Smith, 991 A.2d 1169, 1174 (Del. 2000). Thus, "[a]n attorney's ignorance of a point of law that is fundamental to his basic research on that point is a quintessential example of unreasonable performance under *Strickland*." See, Hinton v. Alabama, 134 S.Ct. 1087, 1089 (2014).

verification error. That's because, where Walsh' request for the hand demonstration lacked a proper foundation based on its contravening nature, inherent verification limitations and unpreservability, in the absence of a contemporaneous objection from Edinger, there was no *indicia* on the record as to whether the trial court applied any legal standards of state or federal constitutional law in ruling upon the admissibility of the anatomically incorrect "V-Shaped" fingers. Moreover, knowing the hand demonstration could not be transcribed, marked or preserved for identification purposes, had Edinger promptly moved to exclude the "V-Shaped" fingers altogether, he then could have persuasively argued for a judgment of acquittal based on the preponderance of the insufficient evidence demonstrated through the flat surface of the "tissue box" completely dispelling the penetration element.

Although Walsh and the trial court believed the complainant's "*testimony alone [was] more than enough*," their conclusion was completely belied by the fact that both conceded to there being a rational basis in the evidence for the lesser-included offense that was predicated on the preliminary written and oral testimony. And, since the eight counts charging rape first were all inextricably linked by the insufficient "same element" of penetration, where the lesser-included offense of unlawful sexual contact did not require any additional proof of elements beyond that required by the greater offense, the case did not need to go to the jury on rape in the first degree. That's because, where Walsh presented to the jury that the eight counts of rape first were all part of the "*same pattern of conduct*" (see, Tr. 3-1-2010 at 5 as Att. #10 cf. w/ Tr. 2-24-2010 at 116-119) and she and the trial court both acknowledged that the eight counts of rape were part of an "*all-or-nothing*" case (see, Tr. 3-1-2010 at 11), the statute did not require any further

factual finding beyond that proof of the lesser-included offense of unlawful sexual contact. See, *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932) (the Court explained that if the same transaction violates two distinct statutory provisions, the test is if whether each provision require proof of a fact that the other does not); see also Id. at 304 (the *Blockburger* Court also determined that where one offense is a lesser-included offense of another and where multiple charges constitute the same offense, they are therefore barred by double jeopardy).

Despite the trial court completely rejecting Edinger's brief yet incompetent argument for acquittal, although disingenuously declaring, "*I have to stand by my motion*," he subsequently requested the lesser-included offense instead as a jury instruction providing an alternative to acquittal. See, Tr. 3-1-2010 at 5-6 as Att. #10. But, where the Due Process Clause of the Fifth Amendment required the prosecutor to prove beyond a reasonable doubt every element of the crime with which a defendant is charged, Merritt was wrongfully convicted of the eight counts of rape first and continuous sexual abuse of a minor.[9] See, *Jackson v. Va.*, 443 U.S. 317, 319 (1979) (citing *In re Winship*, 397 U.S. 358, 364 (1970)). Because the State's failure to meet its burden of proof results in acquittal, Edinger's failure to have contemporaneously objected to Walsh's contravening request for the hand demonstration, more specifically, the resultant anatomically incorrect

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[9] See, Tr. 3-1-2010 at 48 as Att. #11, Walsh stated to the jury during closing arguments, in relevant part, "*. . . every weekend from the time it started until the time it ended in January 2009, what was the action that [the complainant] described to you she? Used her hands, she also used a tissue box (indicating).* According to *ABA Standards*, § 3-5.8(a), "the prosecutor may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw." *ABA Criminal Justice Standards, the Prosecutions Function*, § 3-5.8(a). *For example*, in *Klebig*, the prosecutor's demonstration and closing argument relating to the demonstration was improper and constituted prosecutorial misconduct. *Klebig*, 600 F.3d at 718.

"V-Shaped" fingers unfairly prejudiced Merritt and "worked to [his] actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions" where he was wrongfully convicted based on insufficient evidence. See, *United States v. Frady*, 456 U.S. 152, 168-170 (1982).

4. Following trial, on May 14, 2010, Merritt was sentenced by the Superior Court to 127 years in prison at Level. (D.I. 30). Edinger filed a timely direct appeal on Merritt's behalf to the Delaware Supreme Court on May 26, 2010. (D.I. 32). However, against Merritt's expressed wishes, Nicole M. Walker ("Walker") raised the claim that "*The Superior Court Denied His Constitutional Right to Self-Representation in Violation of the Sixth Amendment of the United States and Art. I, § 7 of the Delaware Constitution.*" App. 1. On January 27, 2011, the Delaware Supreme Court affirmed the judgment of the Superior Court. App. 10. In addition to Merritt's direct appeal, he also filed a *pro se* federal action *pursuant* to 42 U.S.C. § 1983 requesting dismissal of his public defender for refusing to protect his constitutional rights. App. 12. On June 14, 2011, the complaint was dismissed as "*frivolous.*" App. 14, App. 16.

5. On December 13, 2011, Merritt filed a timely *pro se* motion for postconviction relief *pursuant* to Super.Ct.Crim.P., Rule 61. (D.I. 69). Merritt also filed *pro se* motions for Evidentiary Hearing (D.I. 70) and Appointment of Counsel (D.I. 71). A Superior Court Commissioner summarily dismissed Merritt's motion for appointment of counsel. (D.I. 77, D.I. 81). (See, accompanying **MOTION FOR APPOINTMENT OF COUNSEL** explaining intervening change in Delaware state procedural law effected by *Martinez* requiring constitutional right to postconviction counsel in a movant's initial-review collateral proceeding that raises a claim of ineffective assistance of counsel).

Merritt's Rule 61 Motion as later amended in May 2012, raised (9) nine grounds for relief: (i) altered/inaccurate transcripts; (ii) ineffective assistance of trial counsel; (iii) prosecutorial misconduct; (iv) trial judge's abuse of discretion; (v) insufficient evidence; (vi) ineffective assistance of appellant counsel; (vii) trial judge's *ex parte* communication during jury deliberation; (viii) fatally flawed indictment; and (ix) improperly amended indictment. (D.I. 67, D.I. 68). App. 19.

By report dated November 20, 2012, the Commissioner recommended that Merritt's first postconviction motion should be denied on the grounds that the ineffective assistance of counsel claims were without merit and the remaining claims were procedurally barred under Super.Ct.Crim.P., Rule 61(i)(3) without exception. (D.I. 98). App. 20 – App. 21. The Commissioner also declined to grant Merritt's motion for an evidentiary hearing. (D.I. 98). App. 33. After considering Merritt's objection to the report and the State's response to the objection, the Superior Court trial judge, upon *de novo* review, adopted the Commissioner's report and denied his postconviction motion on January 25, 2013. (D.I. 106). App. 34 – App. 36. Merritt timely appealed *pro se* the Superior Court's decision to the Delaware Supreme Court. (D.I. 107). He raised the claim that "*Trial Counsel Violated [His] Right To Effective Assistance When He Failed To Contemporaneously Object To The State's Failure To Produce Sufficient Evidence To Establish Penetration.*"[10] App. 38. The Delaware Supreme Court affirmed the Superior Court's judgment by also deferring to the Commissioner's Report that dismissed insufficient evidence as procedurally barred but then adjudicated the merits of the defaulted claim beneath ineffective assistance of counsel. App. 38 – App. 39.

6. Merritt then filed a timely *pro se* petition for a writ of *habeas* corpus in the district court of Delaware according to 28 U.S.C. § 2254. (D.I. 2).[11] He also filed several other *pro se* motions and request that included a motion for appointment of counsel which was denied. (D.I. 26). (See, (D.I. 4, 7, 8, 19, 22-25, 30, 34). Merritt raised (3) three grounds for relief: (i) insufficient evidence; (ii) ineffective assistance of counsel; and (iii) denial of appointment of counsel in the initial-review collateral proceeding. App. 40. He essentially argued that in the absence of a rule-based right to postconviction

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[10] The Court declined to address Merritt's other [stand-alone] postconviction claims and determined that they were waved, particularly insufficient evidence although the issue was factually subsumed within the underlying claims of ineffective assistance of counsel. App. 38.

[11] "D.I." references here are to District Court of Delaware Civil Docket Items in *Merritt v. Pierce, et al.*, Case I.D. No. 1:13-cv-01734-GMS att. as **Ex. C**.

counsel in his initial-review collateral proceeding that raised, *inter alia*, ineffective assistance of counsel, the 2012 intervening change in controlling law wrought bay *Martinez* provided legal authority during federal *habeas* review to excuse the procedurally barred insufficient evidence because while independently presented the Fifth Amendment constitutional issue was also factually subsumed as the underlying claim of ineffective assistance and was "*substantial*" and had "*some merit.*"

7. In the meantime, on August 23, 2016, the district court denied a motion for summary judgement filed by Merritt that concluded "*he [was] unable to demonstrate the absence of a genuine issue of material fact regarding his constitutional claims.*" D.I. 36). App. 41 – App. 43. Consequently, in a March 6, 2017 memorandum opinion, the district court denied Merritt's *habeas* corpus petition by determining that his claim of insufficient evidence was procedurally defaulted and could not be excused under *Martinez* because he did not demonstrate cause and prejudice, or a miscarriage of justice from the absence of review. App. 49 – App. 52. The court further determined that Merritt had not established that [Edinger's] performance was deficient because the evidence was sufficient to support the convictions for rape first degree. App. 52 – App. 58. The district court declined to issue a COA by concluding that Merritt failed to satisfy the "*substantial claim*" standard set forth under 28 U.S.C. § 2253(c)(2). App. 58 – App. 60.

8. On appeal, the United States Court of Appeals for the Third Circuit concluded, on the other hand, that "*the rule announced in Martinez could not excuse Merritt's procedural default because the claim [did] not raise an allegation of ineffective assistance of counsel.*" App. 61. The Court further determined that "*Merritt ha[d] not arguably shown that [Edinger] performed deficiently, as [he] did object to [Walsh's] characterization of the [complainant's] testimony and did make a motion for acquittal.*" App. 62. Moreover, that "*Merritt ha[d] also not arguably shown that [Edinger] performed unreasonably in failing to object to [Walsh's] question requesting a physical demonstration from the [complainant].*" App. 62. The Third Circuit dismissed the appeal by adopting the March 6 opinion of the district court *supra* and on August 9, 2017 declined to issue a COA. (D.I. 48). App. 62. The district court denied Merritt a subsequent motion for a COA on January 22, 2018. App. 63.

9. In the process, Merritt had returned to the Delaware Superior Court to raise (2) two claims of ineffective assistance of counsel. D.I. 109). The Superior Court summarily dismissed his

second postconviction motion on January 29, 2018 by procedurally barring the claims as "*repetitive*" under Super.Ct.Crim.P., Rule 61(d)(2). D.I. 120). App. 64 – App. 71. The Delaware Supreme Court affirmed the judgment on November 5, 2018 and denied Merritt relief for the same reasons which he later pursued the issues in the Third Circuit. App. 72 – App. 76.

10. Later, Merritt filed in the district court a motion for reconsideration of his 2017 *habeas* corpus petition under Fed.Civ.P., Rule 60(b)(6) where there was a need to correct a clear error of law and of fact in order to prevent a manifest injustice based on a wrongful conviction. Although Merritt previously relied on *Martinez* for review of his insufficient evidence claim, the district court determined that the Rule 60(b)(6) motion did not assert "*any intervening change in law*" to excuse the procedural default notwithstanding initially resolving its substantive merits beneath the ineffective assistance of counsel claim in the *habeas* corpus proceeding. The court also concluded that Merritt did not make a "*substantial showing of the denial of a constitutional right*" for issuance of a COA. App. 79 – App. 80.

11. In response to the Delaware state-court's denial of his second Rule 61 postconviction motion, *supra*, Merritt also made an application in the third Circuit under 28 U.S.C. § 2244 for leave to file a second *habeas* corpus petition under 28 U.S.C. § 2254. (See Merritt's Mem. In Supp. of Second Habeas Pet. att. as **Ex. D**). The Court denied the application on April 7, 2020 by determining Merritt did not make a *prima facie* showing that his claims of ineffective assistance of counsel relied on either a new rule of constitutional law or newly discovered evidence. App. 81 – App. 82.

12. Merritt also appealed the denial of his Rule 60(b)(6) motion to the Third Circuit. The Court erroneously concluded that the Rule 60(b)(6) motion constituted an unauthorized second or successive 28 U.S.C. § 2254 petition. The Third Circuit determined that the district court lacked jurisdiction to consider Merritt's claims because he "*attack[ed] the federal court's previous resolution of a claim on the merits*," or "*[sought] to add a new ground for relief.*" App. 83. Furthermore, that Merritt could not use the Rule 60(b)(6) process to argue his claims based on the district court's ruling that insufficient evidence was procedurally defaulted although the issue demonstrated "*more*" than the important change in law wrought by *Martinez* where he was wrongfully convicted and actually innocent of rape first, and the eight counts of rape first and continuous sexual abuse of a minor. App. 84. The Third Circuit denied Merritt's appeal and declined to issue a COA on August 14, 2020. App. 84. **THIS IS MERRITT'S PETITION FOR A WRIT OF CERTIORARI.**

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THE HOLDINGS OF *MARTINEZ.*

Only inmates, like David Merritt, must weather the perfect storm of the *Martinez* rule "substantial claim" requirement intensified by procedural lapses that the Third Circuit imposes in the context of federal *habeas* corpus proceedings. The Third Circuit's sanctioning of the district court's enhanced version of the "substantial claim" requirement fundamentally departs from that of other decisions it has applied such a standard to from the precedent of the *Martinez* Court. Martinez v. Ryan, 132 S.Ct. 1309 (2012).

A. The Third Circuit's Sanctioning of the Enhanced Version of the "Substantial Claim" Requirement Fundamentally Departs from that of *Martinez.*

1. The Third Circuit was incorrect in denying Merritt's appeal from his Rule 60(b)(6) motion to reconsider the 2017 refusal to issue a certificate of appealability ("COA") for substantially the reasons provided by the district court in its March 6, 2017 memorandum opinion. App. 59 - App. 60 cf. w/ App. 63. Merritt's motion for reconsideration should have been granted to correct the manifest error of law regarding his claim of insufficient evidence. Where there was an intervening change in controlling law wrought by *Martinez* in 2012, Merritt's insufficient evidence claim was initially dismissed during his federal *habeas* corpus proceeding as unexhausted and procedurally defaulted but then adjudicated beneath ineffective assistance of counsel to ultimately resolve the merits of the appeal and denial of a COA. As there was a need to correct the clear error of law or to prevent a manifest injustice based on a wrongful, applying the

foreclosure feature of 28 U.S.C. § 2253 to the insufficient evidence claim, the Third Circuit originally determined that "*Martinez [could not] excuse Merritt's procedural default because the claim [did] not raise an allegation of ineffective assistance of counsel.*" App. 61 (citing *Martinez*, 132 S.Ct. at 1319-1320).

But, the Court in *Martinez* modif[ied] the unqualified statement in *Coleman* where an attorney's ignorance does not qualify as cause to excuse a procedural default:

> Noting that when a state formally limits the adjudication of claims of ineffective assistance of counsel to collateral review, a prisoner may establish cause for a procedural default when three conditions [were] met: (a) the default was caused by the absence of counsel . . . (b) in the initial-review collateral proceeding . . . and (c) the underlying claim of trial counsel's ineffectiveness under the standard of *Strickland* was "substantial" . . . that is, the claim has "some merit."

Martinez, 132 S.Ct. at 1320 (citing *Coleman v. Thompson*, 501 U.S. 722, 752-753 (1991)). Cf. *Miller-El. V. Cockrell*, 537 U.S. 322, 327 (2003) (describing standards for COA to issue) quoting *Slack v. McDaniel*, 529 U.S. 473, 481 (2000) (outlining principles requiring appellate courts to limit its COA examination to a threshold inquiry into the underlying merits of *habeas* corpus claims).In deciding Merritt's appeal, the Third Circuit sanctioned an enhanced version of the "substantial claim" requirement under § 2253(c)(2) that went beyond the scope prescribed for issuing a COA. The court determined:

> "Jurists of reason would not debate the District Court's procedural ruling nor would jurists of reason debate that Merritt has failed to demonstrate the denial of a constitutional right." *Slack*, 529 U.S. at 484-485. Likewise, "jurist of reason would also not debate the resolution of Merritt's claim that counsel

was ineffective. Merritt has not arguably shown that trial counsel performed deficiently, as trial counsel did object to the prosecutor's characterization of the witness's testimony and did make a motion for acquittal. Merritt has also not arguably shown that trial counsel performed unreasonably in failing to object to the prosecutor's question requesting a physical demonstration for [the] witness." App. 61 - App. 62.

There is no such provision in the *Martinez* rule either in the Third Circuit's ruling or in any of its prior decisions that forecloses a constitutional claim that is "substantial" and has "some merit" but then adjudicate the matter beneath a separate claim to determine the outcome of the appeal and whether to issue a COA.

2. The genesis of the "substantial claim" requirement as discussed in *Miller-El* shows why. In the interest of finality, the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996 (PL 104-132) - which substantially amended the *habeas* corpus statute codified at Title 28, chapter 153 of the United States Code (28 U.S.C. § 2244 *et seq.*) - - constrains a federal courts power to disturb state-court convictions. *Miller-El*, 537 U.S. at 327. According to *Miller-El*, a "court of appeals should limits its examination [at the COA stage] to a threshold inquiry into the underlying merits of [the] claims" and ask "only if the District Court's decision was debatable." Id. at 327. That's because: (1) a COA determination is a separate proceeding, one distinct from the underlying merits; (2) deciding the substance of an appeal, in what should be a threshold inquiry, undermines the concept of a COA; and (3) the question is the debatability of the underlying federal constitutional claim, not the resolution of that debate. Id. at 327-328. Consistent with [this Court's] prior precedent in *Slack* and the test of the *habeas* corpus statute, the Court reiterate[d] that a prisoner seeking a COA need only demonstrate "a substantial showing

of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Merritt thoroughly satisfied this standard by demonstrating that jurists of reason, *first*, could disagree with the district court's procedural ruling and resolution of his constitutional claims and *second*, that jurists could conclude the issues presented were adequate to deserve encouragement to proceed further. Miller-El, 537 U.S. at 327 (citing Slack, *supra* at 484).

Under 28 U.S.C. § 2253(c), COA determination require only an overview of Merritt's claims in his habeas corpus petition and a general assessment of their merits, by: (1) looking to the District Court's application of AEDPA to a petitioner's constitutional claims, and (2) asking whether the resolution was debatable among jurists of reason. This threshold inquiry does not require consideration of the factual or legal basis into a procedurally defaulted claim to make that determination. In fact, the statute forbids it. Miller-El, 537 U.S. at 336-337.

Accordingly, the Third Circuit should not have declined Merritt's application for a COA to consider his procedurally defaulted claim merely because it believed that he did not demonstrate an entitlement to relief based on no showing of insufficient evidence beneath ineffective assistance of counsel where the issue was already barred. App. 61. For, (1) it is consistent with § 2253 that a COA will issue in some instance where there is no certainty of ultimate relief; and (2) when a COA is sought, the whole premise is that the petitioner has already failed in that endeavor. Under the standards imposed by AEDPA - where Congress, in 28 U.S.C. § 2253 has mandated that a state prisoner seeking habeas corpus relief under 28 U.S.C. § 2254 has no automatic right to appeal a denial of such relief, and instead, must first seek and obtain a COA - this requirement is a jurisdictional prerequisite, because 28 U.S.C. § 2253(c)(1) mandates that unless a

"circuit justice or judge" issues a COA, an appeal may not be taken to a Federal Court of Appeals. Therefore, until a COA had been issued, the Third Circuit lacked jurisdiction to rule on the merits of the underlying insufficient evidence claim if it was not also going to consider the full contours of the evidence beneath the procedurally defaulted claim also. *Miller-El*, 537 U.S. at 336. Where the Third Circuit appeared to have sidestepped the appropriate process in declining the COA by resolving the merits of the procedurally defaulted claim *pro forma* beneath ineffective assistance of counsel, it in essence decided Merritt's appeal based on an enhanced version of the "substantial clam" requirement under 28 U.S.C. § 2253(c)(2). By justifying denial of a COA based on the actual merits of a procedurally defaulted claim, the Third Circuit essentially decided Merritt's appeal without jurisdiction. Id. at 336-337.

Diligent research has revealed no other decisions within the Third Circuit's jurisdiction that forecloses independent review of a procedurally defaulted constitutional claim that is "substantial" and has "some merit", but then justifies denial of a COA based on adjudication of those actual merits beneath another claim. That enhancement portends fundamental unfairness in the Third Circuit and potential widespread unequal justice in different regions of the country, so it merits the attention of this Court.

II. THE THIRD CIRCUIT SANCTIONED DEPARTURES FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS UNDER FEDERAL RULES AND AEDPA WHICH CALLS FOR CORRECTION.

The 2012 lightning bolt of the *Martinez* rule is fatal to prisoner's *habeas* corpus claims, like Merritt's, when combined with thunderous anomalies of procedures sanctioned by the Third Circuit. The Third Circuit's sanctioning of the enhanced version of the "substantial claim" requirement, as adopted from the district court's liberal

interpretation of the *Martinez* standard, enabled Merritt to be deprived of key procedural protections due him under Rules 11 and 60 of the Federal Rules of Civil Procedures. That fatal impact for exceeds the intent of Congress, which designed the AEDPA to curb litigation by prisoners without extinguishing it altogether.

A. The Enhanced Version of the "Substantial Claim" Requirement Restricts the Latitude of Pleading Allowed by Rule 11 of the Federal Rules of Civil Procedures.

1. Ground one of Merritt's *habeas* corpus petition alleging insufficient evidence, though deemed unexhausted and procedurally defaulted, was pleaded as an independent Fifth Amendment constitutional claim and was presented as the underlying claim of ineffective assistance of counsel too.[12] The insufficient evidence claim should not have faced facial foreclosure under the district court's liberal interpretation of the *Martinez* rule "substantial claim" requirement where the substantive facts governing the issue were relied upon to adjudicate the merits of the appeal and denial of a COA. App. 49 - App. 52 cf. w/ App. 55 - App. 58. Though procedurally defaulted, the district court turned Merritt's independent Fifth Amendment constitutional claim into a Sixth Amendment issue so as to dispose of the merits bearing upon the facts supporting insufficient evidence through the foreclosure feature of the "substantial claim" requirement under Rule 22(b)(1) and AEDPA without having to actually review to full contours of the evidence corresponding under ground one. To dispose of the merits governing the procedurally defaulted claim of

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[12] According to the Court in *Rose v. Lundy*, the unexhausted insufficient evidence and exhausted ineffective assistance claims created a "*mixed*" petition without proper remedy by the federal courts. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). Since it was "*futile*" for Merritt to return to the state courts to litigated the procedurally defaulted insufficient evidence claim due to its Rule 61(i)(1) time-bar, the issue was unduly subjected to a showing of cause-and-prejudice or a miscarriage of justice from the lack of review. App. 49 - App. 50. See, *Coleman v. Thompson*, 501 U.S. 478, 485 (1991); *Murray v., Carrier*, 477 U.S. 478, 485 (1996); see also, *House v. Bell*, 547 U.S. 518, 535-536 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

insufficient evidence beneath ineffective assistance of counsel, the court disregarded Rule 11(a): "*the district court must issue . . . a certificate of appealability.*"

2. Yet, even if ground one had been formally adjudicated as a genuine independent Fifth Amendment claim under ground two, ground one still should have been procedurally excused and deserving of judicial analysis under *Martinez* because the defaulted claim made a substantial showing of the denial of a constitutional right. Substantial constitutional claims are contemplated by the Federal Rules. "*The court may direct the parties to submit arguments on whether a certificate should issue" . . . "the court must state the specific issue or issues that satisfy the showing required by* 28 U.S.C. § 2253(c)(2)." See, Rule 11(a). Rule 11 bars the problematic claim foreclosure feature that the district court applied from its liberal interpretation of the "substantial claim" requirement of the *Martinez* rule.

On one hand, the district court was mistaken to treat Merritt's procedurally defaulted claim of insufficient evidence distinct from the underlying clam brought beneath ineffective assistance of counsel. The procedurally defaulted claim under ground one established material facts correlative to the underlying claim of ground two that was not relevant to Edinger's ineffective assistance *per se* but fundamental to Walsh's failure to produce sufficient evidence at trial. Ground one entailed clear instances of prosecutorial misconduct - a nuance not captured by obvious incidences of ineffective assistance of counsel under ground two.

On the other hand, the issue was resolved under ground two as the underlying claim of ineffective assistance on the premise that "*Merritt's complaint about defense counsel's alleged failure to raise a contemporaneous objection that there was insufficient*

evidence of penetration [was] meritless." App. 50 cf. w/ App. 52 -- App. 58. The district court's analysis caused Merritt's independent claim of insufficient evidence to undergo a second screening. By doing so, the district court's decision in denying Merritt *habeas* relief or a COA was based silently on the merits of the procedurally defaulted insufficient evidence claim. According to *Ylst v. Nunnermaker*, 501 U.S. 797, 805 (1991), by resolving ineffective assistance of counsel using the merits of the underlying claim of insufficient evidence, "it removed any bar to federal habeas review that might otherwise have been available" on the procedurally defaulted issue too since they were equivalent.[13] Id. at 801.

The district court's deference to the state court's judgment and its own ruling was contrary to *Strickland* and involved unreasonable application of clearly established Federal law. See, 28 U.S.C. § 2254(d)(1); see also *Williams v. Taylor*, 529 U.S. 362, 412 (2000). The district court's procedural error essentially conflated the distinct applications of law administered to Merritt's claims, respectfully, by Rule 11. Merritt's claims were unduly subjected to a double standard of review. The court incorporated an additional element into the *Strickland* "performance-and-prejudice" process that included a *Jackson* "sufficiency of evidence" test. App. 52 - App. 58. See, *Jackson*, 443 U.S. at 319 (the determination is, "whether, after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"); see also, *Strickland*, 466 U.S. at 687 (a defendant who

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[13] In *Ylst*, the Court explained that when the last stated court decision simply affirms summarily the lower state-court's denial of relief, a federal court should look to the "*last explained state-court judgment on the . . . claim*" to determine whether it "*fairly appears to rest primarily on federal law*" or instead relies upon a state procedural bar. *Ylst*, at 802, 805. In this case, the Delaware Supreme Court determined that "*[t]he Superior Court's judgment should be affirmed on the basis of the January 25, 2013 order that adopted the commissioner's (arguably) well-reasoned report and recommendations*" that relied on an unreasonable application of clearly established Federal law in deciding the merits of the ineffective assistance of counsel claim from which the district court also reached its conclusion.

claims to have been denied effective assistance must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice).

The problem with this type of dual application is that it was contrary to *Strickland* to administer a *Jackson* test in deciding ineffective assistance of counsel. That's because, the only relevant question in resolving the ineffective assistance claim was whether there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Merritt was required to show that counsel's deficiency "prejudiced" the defense, which resulted in his conviction. The test in that inquiry was not that a rational trier of fact could have found him guilty. Merritt needed not undergo a *Jackson* "sufficiency of evidence" test to decide the merits of the ineffective assistance of counsel claim if it was not going to consider the full contours of the evidence also. Nor did Merritt need to prove that "counsel's deficient performance more likely than not altered the outcome of the proceeding" or that the evidence would not have been insufficient if not for counsel's errors.[14] See, e.g., Breakron v. Horn, 642 F.3d 126, 140 (3d Cir. 2011) (a defendant need not prove that the evidence would have been insufficient if not for counsel's errors).

Although nothing changed factually regarding the substantive nature of the insufficient evidence claim, the results were different: adjudication implicating the actual merits of the procedurally defaulted claim under ground one, now treated as a Sixth Amendment ineffective assistance of counsel claim and foreclosed from full and proper review by the court's liberal interpretation of the *Martinez* rule "substantial claim"

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[14] See, Saranchak v. Secretary Dept., 802 F.3d 597 (3d Cir. 2015) (the prejudice inquiry focuses on "the effect the same evidenced would have had on an unspecified objective factfinder" rather than a particular decisionmaker in the case).

enhancement. App. 51 - App. 52. Foreclosure under ground one was improper because it happened notwithstanding "a substantial showing of the denial of a constitutional right," no matter what ground it was pleaded under.

3. Substantial claim foreclosure of a procedurally defaulted issue that is disposed beneath a separate claim amounts to impermissible judicial enhancement of the COA process where there is "some merit" showing the denial of a constitutional right. Ironically, the *Martinez* rule "substantial claim" requirement, which ostensibly relies on *Miller-El*, chronicles the suppression of enhanced COA standard by the Untied States Supreme Court before and just after the turn of the century explained:

> "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253. Is straightforward: The petitioner must demonstrated that reasonable jurists would find the district court's assessment of the constitutional right debatable or wrong."

Miller-El, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484)). The Fifth Circuit further explained that this Court wholly rejects the use of COA requirements as a procedural device to weed out certain claims. *Miller-El*, at 337 (citing *Duncan v. Walker*, 533 U.S. 168, 178 (2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 399 (2000)).

Accordingly, the Third Circuit Court of Appeals cannot sanction the enhancement of the rules governing the COA process. Likewise, the district court may not beef up the "substantial claim" requirements with a feature through its liberal interpretation that automatically forecloses colorable constitutional claims by procedurally barring the issue and then disposing of its actual merits beneath a separate claim. The "substantial claim" doctrine is rock solid: it was unchanged by any landmark rulings that followed *Miller-El*.

Merritt was entitled to have the underlying claim of insufficient evidence beneath ground two considered on the full contours of the evidence that he presented under ground one because according to *Martinez*, the issue made a substantial showing of the denial of a constitutional right where there was a factual and legal basis for which relief could be granted. The Third Circuit's constriction of the range of allowable COA pleading contravenes Rule 11 of the Federal Rules of Civil Procedures and calls for correction by this Court.

B. The Enhancement Enabled the District Court to Deprive Merritt of the Benefits of Procedures Ostensibly Available Under Rule 60(b) of the Federal Rules of Civil Procedures.

1. Merritt's case was also before the district court on a motion to reconsider the 2017 refusal to issue a COA under Rule 60(b)(6) of the Federal Rules of Civil Procedures. The court had to consider the Rule 60(b)(6) motion separately from the COA and apply the appropriate standards. See, Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (citing North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995)). Merritt pointed to the intervening change in the controlling law in his appeal to the Third Circuit. His procedural objection was that the *Gonzalez* Court left open the possibility that a change in law, when accompanied by appropriate equitable circumstances support Rule 60(b)(6) relief. Gonzalez v. Crosby, 545 U.S. 524, 535-538 (2005). According to the extraordinary circumstance exception that excuses time-barred petitions as announced under *McQuiggin*, and extended to include procedurally defaulted claims as recognized in *Cox*, the district court abused its discretion in denying Merritt's Rule 60(b)(6) motion based on a showing of "*more*" than the important intervening change in the controlling law wrought by *Martinez* where there was a wrongful conviction and

actual innocence claim asserted. McQuiggin v. Perkins, 569 U.S. 383, 387-388 (2013); Cox v. Horn, 757 F.3d 113, 118 (3d Cir. 2014). Based on *Martinez*, there was ineffective assistance at trial and appeal regarding insufficient evidence and the absence of counsel in Merritt's initial-review collateral proceeding established cause for the procedural default in his federal *habeas* proceeding where the defaulted claim was "substantial" and had "some merit." *Martinez*, 132 S.Ct. at 1318-1319. Additionally, the extraordinary nature of the insufficient evidence established a cognizable claim for *habeas* relief where Merritt was substantially prejudiced by the wrongful conviction and actual innocence of first-degree rape amounting to a fundamental miscarriage of justice.[15] Yet, the district court concluded otherwise. In a truncated and legally flawed analysis, the court had found that Merritt essentially "*re-assert[ed] the same arguments already considered and rejected in 2017 with respect to the original denial of a COA and his] subsequent appeal.*" App. 78 - App. 79. However, the legal and factual conclusions were significantly misplaced by the district court and subsequently conflicts with the Third Circuit's decision that considered Merritt's Rule 60(b)(6) motion an "*unauthorized second or successive petition*" attempting to assert a new ground Cf. w/ App. 83.

2. The invocation of Rule 60(b) provided a mechanism by which Merritt could obtain relief from the district court's final judgment "under a limited set of circumstances including fraud, mistake, and newly discovered evidence." Gonzalez, 545 U.S. at 528. Merritt relied specifically upon (b)(6), the catch-all provision extending beyond the listed circumstances to "any other reason that justifies relief." Despite the open-ended nature

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[15] See, Coleman v. Thompson, 501 U.S. 722, 750 (1991); see also, Murray v. Carrier, 477 U.S. 478, 485 (1996); House v. Bell, 547 U.S. 518, 536-537 (2006) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)).

of the provision, Merritt was entitled to relief under Rule 60(b)(6) where there were extraordinary circumstances, and without such relief, an extreme and unexpected hardship would occur since he essentially faced the rest of his list in prison. Gonzalez, 545 U.S. at 535.

3. The wrongful conviction and actual innocence of first-degree rape based on the insufficient evidence was the gravamen of Merritt's appeal. The Third Circuit neglected to address it. While the Third Circuit considered Merritt's challenges to the sufficiency of evidence, albeit, beneath the ineffective assistance of counsel claim, it completely overlooked the most crucial and compelling part: *namely*, that the district court arbitrarily excluded the Kleenex "tissue box" from its analysis in deciding not to grant habeas relief or a COA when it considered the underlying constitutional claim of ineffective assistance of counsel. App. 54 - App. 58 cf. w/ App. 61, App. 83 - App. 84.

The court's conclusions focused entirely on one aspect of the insufficient evidence associated with Merritt's Fifth Amendment constitutional claim, that is, the hand demonstration. It held, erroneously, that Edinger "*did raise a contemporaneous objection to the State's description of the [complainant's] demonstration.*" App. 54 - App. 55. Moreover, that the issue was "*factually baseless*" despite Merritt's citations to the record showing that the hand demonstration was contravening to the preliminary written and oral testimony. App. 55 cf. w/ *supra* at pgs. 10-17. The evidence considered was drawn entirely from testimony adduced from the prejudicial nature of the hand demonstration, whose substance and form had been effectively rebutted by the complainant's preliminary written and oral testimony that established the rational basis for the lesser included offense of unlawful sexual contact and producing the insufficient evidence that resulted

in the wrongful conviction and actual innocence of first-degree rape in a manner required by Rule 60(b)(6).

Notably missing from the court's analysis was any reference or explanation regarding Merritt's undisputed evidentiary submissions showing the complainant's preliminary written and oral testimony establishing the exact same testimony demonstrated by a preponderance of the evidence through the flat surface of the "tissue box" and completely dispelling all reasonable inferences and factual conclusions of penetration. See, *supra* at pgs. 18-23; see also Atts. 1-8 (consisting of Merritt's undisputed evidentiary submissions).

5. The deviation from the procedural requirement of Rule 60(b)(6) is troubling, or at least puzzling. It appeared to be driven by the court's prior determination that Merritt's case was already lost based on the foreclosure feature of the *Martinez* rule "substantial claim" requirement. See, App. 78 - App. 79 cf. w/ App. 49 - App. 52. Foreclosure seemed to have imparted momentum and a roadmap to the district court's flawed analysis. Dismissing ground one as precluded under *Martinez*, it essentially bypassed proper consideration of Merritt's Rule 60(b)(6) motion without a glance at the full contours of the evidence where the record clearly supported a wrongful conviction and actual innocence of first-degree rape.

The district court, having disposed of ground one by deeming it precluded, in essence neglected to review Merritt's most crucial and compelling evidence in resolving \his habeas petition and denial of a COA. The court disregarded not only Merritt's citations of record in support of his motion for reconsideration - now doomed by the finding of claim

preclusion under *Martinez* - but also Merritt's undisputed evidentiary submissions showing by clear and convincing proof that there was a wrongful conviction and actual innocence of first-degree rape. Merritt's actual innocence claim serves as a gateway through which he may pass where the impediment is a procedural bar of the kind this Court envisioned in *Schlup* and *House*. Schlup, 513 U.S. at 329; see House, 547 U.S. at 538. In light of the wrongful conviction, the fundamental miscarriage of justice exception is grounded in the equitable discretion of *habeas* courts to ensure that federal constitutional errors do not result in the incarceration of innocent person. Herrera v. Collins, 506 U.S. 390, 404 (1993).

6. Where Merritt appealed the denial of his motion for reconsideration to the Third Circuit based on the wrongful conviction setting forth the deviations from the Rule 60(b)(6) procedure, he pointed specifically to facts in the record that the district court appears to have negligently overlooked and failed to consider. Moreover, the Third Circuit simply sidestepped the undisputed evidentiary submissions that provided clear and convincing proof that the complainant's preliminary written and oral testimony establishing the rational basis for unlawful sexual contact and constituting the exact same testimony demonstrated by a preponderance of the evidence through the flat surface of the "tissue box." This was clear error where the flat surface of the "tissue box" completely dispelled all reasonable inferences and factual conclusions of penetration.

7. Merritt's Fifth Amendment claim of insufficient evidence made a "substantial showing of the denial of a constitutional right" as required by 28 U.S. C. § 2253(c). In dismissing insufficient evidence under ground one as unexhausted and procedurally defaulted but then adjudicating the matter beneath ineffective assistance of counsel to

ultimately decide the merits of the *habeas* petition and denial of the COA without considering the full contours of the underlying evidence, reasonable jurists could debate whether or for that matter, agree that the claim should have been resolved in a different manner or that the whole issue presented was adequate to deserve encouragement to proceed further. *Slack*, 592 U.S. at 482.

The Third Circuit's denial of the Rule 60(b)(6) motion constituted clear error in declining to issue the COA by sanctioning the district court's enhanced version of the *Martinez* rule "substantial claim" requirement despite the extraordinary nature of the insufficient evidence establishing a wrongful conviction and actual innocence of first-degree rape. App. 83 - App. 84. The Third Circuit's disregard for the procedures of Rule 60(b)(6) calls for correction by this Court because Merritt's motion for reconsideration demonstrated "*more*" than the important change of law wrought by *Martinez* where he was wrongfully convicted and actually innocent of the eight counts of rape first and continuous sexual abuse of a minor.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment and opinion of the Third Circuit Court of Appeals. Respectfully submitted this 30th day of ~~November~~ October, 2020.

No. _____

IN THE

UNITED STATES SUPREME COURT

DAVID MERRITT, *pro se* - PETITIONER

v.

WARDEN, JAMES T. VAUGHN CORRECTIONAL CENTER, *et al.*

AND ATTORNEY GENERAL FOR THE STATE OF DELAWARE - RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

APPENDIX

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Date: 10/30 2020