20-6798

IN THE

SUPREME COURT OF THE UNITED STATES

HENRY CHRISTOPHER STUBBS, III,

PETITIONER, PRO SE

ORIGINAL

vs.

KEVIN KAUFFMAN, SUPERINTENDENT AT

SCI HUNTINGDON, AND

OFFICE OF THE LUZERNE COUNTY DISTRICT ATTORNEY OF

THE COMMONWEALTH OF PENNSYLVANIA,

RESPONDENT, et al.

FILED
AUG 03 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI;

BRIEF OF THE PETITIONER

HENRY CHRISTOPHER STUBBS, III, PRO SE

FN7407 / SCI HUNTINGDON

1100 PIKE STREET

HUNTINGDON, PA 16654-1112

I. QUESTIONS PRESENTED

1. Whether, during review of the Petitioner's prior application for a writ of habeas corpus in the United States District Court, the Petitioner was entitled to *de novo* review on his Ineffective Assistance of Counsel (IAC) claims since such claim present a mixed question of law and fact, and, whether the U.S. District Court abused its discretion and denied a fair appellate hearing that violated the Petitioner's right to due process of law under the 14th Amendment of the United States Constitution, when the court applied the AEDPA standard of review to assess and determine the Petitioner's (IAC) claims although State appellate court's failed to adjudicate on the merits of the Petitioner's (IAC) claims?

The Petitioner answers yes.

2. Whether a post-conviction statement made by trial counsel can be used as an exception to the Supreme Court's Brady v. Maryland, 373 U.S. 83 law, to excuse a prosecutors duty to disclose where during state appellate proceeding trial counsel stated that he would not had used an active out of state felony warrant to impeach a state witness; and, whether it denied the Petitioner a fair trial under the 6th Amendment and violated the Petitioner's right to fair appellate hearings and due process of law under the 14th Amendment of the United States Constitution, where the prosecution knowingly and in bad faith suppressed a felony out of state warrant at trial and the state and below federal appellate court's accepted trial counsel's above hindsight statement as a reason that excuses a prosecutor's constitutional duty to disclose material Brady evidence, and, whether the Petitioner is entitled to equitable tolling the statute of limitations on this claim?

The Petitioner answers no to the first part of the question, and he answers yes to the second part of the question, and yes to the last part of the question.

3. Whether a circuit or district judge shall be required under the finality of determination statute 28 U.S.C. § 2244 (a) to entertain a second or successive application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the (legality) of such detention (has not) been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, where an applicant can establish that equitable considerations relating to a prior application, e.g., fraud, fraud upon the court, or the courts abuse of discretion exists to warrant appellate review on a second or successive application; and, whether it denies an applicants right to due process of law in violation of the 14th Amendment of the United States Constitution when a circuit or district judge refuse to exercise jurisdiction under § 2244 (a) after the legality of such detention has not been determined on the prior application for a writ of habeas corpus?

This issue has not been address by the Supreme Court of the United States.

The Petitioner answers yes.

4. Whether it constitutes a departure from the accepted and usual course of judicial proceedings that denied fair appellate review and violated the Petitioner's right to due process of law under the 14th Amendment of the United States Constitution, where the reviewing Court of Appeals denied the Petitioner's application for a Certificate of Appealability (COA) after the court failed to conduct review on the evidence that the Petitioner submitted for the purpose of making a substantial showing of the denial of a constitutional right which the Petitioner was required to show under 28 U.S.C. § 2253(c)(2)?

The Petitioner answers yes.

5. Whether trial counsel denied the accused / Petitioner effective assistance of counsel during trial and entirely failed to subject the prosecutors case to a meaningful adversarial testing, when counsel failed to present defense evidence of the Petitioner's Actual Innocence against the prosecutor's fraudulant criminal charge of felony burglary; and, whether trial counsel's failure to present evidence of the Petitioner's actual innocence violated the Petitioner's Right to a fair trial under the 6th Amendment of the United States Constitution?

The Petitioner answers yes.

II. LIST OF PARTIES AND RELATED CASES

LIST OF PARTIES

The names of all parties appear in the caption of the case on the cover page.

RELATED CASES

Commonwealth of Pennsylvania v. Stubbs, No. 766 MDA 2017. Judgment entered December 15, 2017. The State created exception to Brady v. Maryland, 373 U.S. 83. See APPENDIX-I at pages 5-7.

III. TABLE OF CONTENTS

* NOTICE TO JUSTICES - The relevant parts of the (N.T.) are located at APPENDIX 53.

ABBREVIATIONS

(N.T.) - Notes of testimony, trial transcript.

(P.H.) - PCRA hearing transcript.

IAC - Ineffective Assistance of Counsel.

APPX. - Appendix.

COA - Certificate of Appealability.

IV. TABLE OF AUTHORITIES

FEDERAL STATUTES

STATE CASE LAW

STATE STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

V. PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully pray that a writ of certiorari issue in this matter to review the judgment below at APPENDIX-A2 and APPENDIX-A.

VI. OPINIONS BELOW

For cases from the state courts:

The first OPINION of the PCRA Court appears at Appendix B to this petition and is either unpublished or cannot be accessed from the prison computer.

The first NON-PRECEDENTIAL Memorandum of the Superior Court of Pennsylvania is the highest state court to fail review on the merits, and appears at Appendix C to this petition and is either unpublished or cannot be accessed from the prison computer.

The third OPINION of the PCRA Court appears at Appendix H to this petition and is either unpublished or cannot be accessed from the prison computer.

The second NON-PRECEDENTIAL Memorandum of the Superior Court of Pennsylvania is the highest state court to fail review on the merits, and appears at Appendix I to this petition and is either unpublished or cannot be accessed from the prison computer.

For cases from the federal courts:

The first Memorandum of the United States District Court appears at Appendix D to this petition and is reported at Stubbs v. Curley, 2012 U.S. Dist. LEXIS 132856, 2012 WL4103926 (M.D. Pa. 2010), DOCKET NO. 1:10-cv-1849.

OPINIONS BELOW CONTINUED

Further proceedings in the United States District Court appears at Appendix E to this petition and Docketed at 1:10-cv-1849, Stubbs v. Curley.

The first ORDER of the Court of Appeals denying Certificate of Appealability appears at Appendix F to this petition and is either unpublished or cannot be accessed from prison computer.

The first ORDER of the Court of Appeals denying Rehearing appears at Appendix G to this petition and is either unpublished or cannot be accessed from prison computer.

The second Memorandum of the United States District Court appears at Appendix A to this petition and is reported at Stubbs v. Kauffman, 2018 U.S. Dist. LEXIS 35780 (M.D. Pa. 2018).

The second ORDER of the Court of Appeals denying Certificate of Appealability appears at Appendix A-1 to this petition and is either unpublished or cannot be accessed from prison computer.

The second ORDER of the Court of Appeals denying Rehearing appears at Appendix A-2 to this petition and is either unpublished or cannot be accessed from prison computer.

VII. JURISDICTION

Case from state court:

The date on which the highest state court decided the Petitioner's case was December 15, 2017.

A copy of that decision appears at Appendix I of this petition.

The jurisdiction of the Supreme Court of the United States is invoked in this matter under Title 28 U.S.C. § 1257 (a), and, Title 28 U.S.C. § 1652 (Relating to State laws as rules of decision), also under Fed. R.E. § 302 (Applicability of State Law in Civil Actions and Proceedings).

Cases from federal courts:

The date on which the United States District Court decided the Petitioner's case was May 07, 2019.

A copy of that decision appears at Appendix A of this petition.

A timely filed application for a Certificate of Appealability was denied by the United States Court of Appeals on December 16, 2019. A copy of that decision appears at Appendix A-1 of this petition.

A timely filed Petition for Rehearing was denied by the United States Court of Appeals on March 04, 2020.

A copy of that decision appears at Appendix A-2 of this petition.

The current Petition for a writ of certiorari was timely filed in the Supreme Court of the United States on August 03, 2020, due to Covid-19 Extension.

The jurisdiction of the Supreme Court of the United States is also being invoked in this matter under Title 28 U.S.C. § 1254 (1), Title 28 U.S.C. § 1651, and under Supreme Court Rule 10 (a), where the Court of Appeals for the Third Circuit has entered a decision in this matter that conflicts with the decisions of the Supreme Court of the United States and other United States Court of Appeals on the same important matter, and where the Court of Appeals for the Third Circuit has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of the

Supreme Court's supervisory power. A decision in this matter will also be in aid of the Court's appellate jurisdiction with respect to Questions 1 and 3 of this petition.

VIII. Reasons for granting writ

To grant certiorari in this matter would be in compliance with and justify the Rule of Law and equitable principles founded in the jurisprudence of our country. It will also afford the Supreme Court an opportunity to establish a precedent and give guidance in this case and in cases that are similarly affected under the federal Finality of determination Rule 28 U.S.C. § 2244 (a); where (1) in the instant case, the U.S. District Court made a clearly erroneous judgment on the Petitioner's second application for a writ of habeas corpus by stating that the legality of the conviction was determined on the prior application. But the evidence attached to this petition, including the district court Memorandum, prove that the Rule of Equity was violated and the legality of the Petitioner's conviction (was not) determined by the judge or court on the prior application due to the reviewing courts' (abuse of discretion), and (fraud upon the appellate courts') committed by Respondents'. Due to equity violations committed by the U.S. District Court and the Respondent's during proceeding's involving the Petitioner's prior application, a circuit or a district judge should be and (must) be required by Supreme Court Law to entertain a second or successive application for a writ of habeas corpus under 28 U.S.C. § 2244(a), since the proceeding on the prior application was undermined and violated by a deprivation of due process of law, and, where an applicant's request for approval from a Court of Appeals under 28 U.S.C. § 2244(b)(3)(A) is currently being abused and the process is ineffective to protect the rights of an applicant that's been the target of the arbitrary exercise of the powers of the government, such as which occurred in the instant case. Where equitable considerations such as fraud, fraud upon the court, or a reviewing court's abuse of discretion affected the judgment of a district court, applicant's who has evidence that prove that he/she was denied a fair hearing and the legality of the detention thereby (was not) determined by a judge or court on the prior application (should not) be forced to foreclose on his/her constitutional due process right to a fair and impartial appellate hearing under § 2244 (a). For, where the legality of the detention of 28 U.S.C. § 2244 (a) has not or was not determined by a court or judge of the United States on the prior application for a writ of habeas corpus, a reviewing court failed in its (required) duty to determine federal finality of a state judgment. Under such a diminished U.S. District Court appellate proceeding, an applicant's right to appeal his conviction is compromised, and his/her right to due process of law under the 14th Amendment of the United States Constitution is violated such as in the instant case. The following is a description of why the legality of the detention was not determined on the prior application. Police investigators tampered with critical state evidence and the prosecuting district attorney presented and relied on tainted DNA evidence and other tainted evidence to procure conviction by fraud, while knowing that the evidence was tainted. Because of trial counsel's conflict of interest articulated in this petition, the tainted DNA evidence was not met with a defense that was available at trial, and the Petitioner has since suffered through a wrongful and unconstitutional conviction on a charge of rape without having been afforded a defense against the charge of rape at trial. Rape was the felony predicate that the district attorney fraudulantly charged to deceive the jury into believing that the Petitioner committed first-degree murder. The Petitioner DID NOT commit the crimes of rape or murder. Trial counsel omitted critical defense evidence that would have exposed police corruption and placed the prosecutions case under a different light. The omitted trial evidence (has not) been reviewed by any of the below appellate court's even though the Petitioner has repeatedly submitted the documentary evidence in every court for review. The omitted defense evidence are the merits of the Petitioner's claims, and have been attached to this petition at the APPENDIX. Pursuant to the Supreme Court's decision in Strickland v. Washington, 466 U.S. 668, and its progeny, ineffective assistance of counsel (IAC) claims present a mixed question of law and fact. *Id.* 698. But, as evidenced by (all) of the State and lower Federal court Memorandum, Opinion's, and judgment's attached, NOT ONE of the prior reviewing court's has assessed the Petitioner's IAC claims as if the claims presents mixed question of law and fact. For the purpose of establishing why this writ should be granted, the Petitioner would respectfully remind the Supreme Court of its position on claims that present mixed question of law and fact. The Supreme Court has stated that:

"When a substantial federal question is involved as to whether a right secured by the federal Constitution has been denied, it is the (duty) of this Court to inquire into the evidence, especially when there is a mixed question of law and fact." Prince v. Commonwealth of Mass., 321 U.S. 158, 88 L.Ed. 645, 646 (1944). Citing Sterling v. Constantin, 287 U.S. 378, 77 L.Ed. 375, 53 S.Ct. 190 (1932).

The federal Constitutional violations involved in this matter relating to the first and third Questions of this petition, qualifies this case to receive a Supreme Court review under the standards applied in Prince, and in Sterling, where a substantial federal question is involved at Questions 1 and 3, that raises a right secured by the federal Constitution that's been denied to the Petitioner, (the right to effective trial counsel), which relate to a mixed question of law and fact; (2) where, because of this cases and cases that are similarly affected, the Supreme Court is being asked to consider whether the federal finality of determination Rule 28 U.S.C. § 2244 (a) is subject to Equitable considerations that would (require) a circuit or district judge to entertain a second or successive application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it (does not) appear that the (legality) of the detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, due to violations of the Rule of Equity that made the prior hearing under § 2244 (a) unconstitutional where the judge or court made a clearly erroneous judgment that violate an applicant's right to due process of laws; (3) if the Supreme Court decline to exercise its supervisory power to afford corrective process in this matter, the Commonwealth of Pennsylvania and other states that will rely on this case will have an unconstitutional way of defeating Brady v. Maryland 373 U.S. 83 claims. In the instant case the Petitioner had learned while on appeal that the prosecuting district attorney knowingly and in bad faith suppressed an out-of-state felony warrant that sought the arrest of a Commonwealth witness who testified on behalf of the prosecution to matters related to the criminal charges. The Petitioner raised a timely Brady claim, but, he was denied a copy of the suppressed warrant and couldn't prove his claim during the first state PCRA and federal Habeas Corpus proceedings. During the first PCRA hearing, (the court) invited trial counsel into the Petitioner's Brady claim, and because trial counsel stated that he would not had used the felony warrant to impeach the witness at trial, the PCRA court indulged in the distorting effects of hindsight, by accepting trial counsel's after-trial statement as the reason for determining that there was no Brady violation. In other words, because trial counsel stated at the PCRA hearing that he would not had used the warrant at trial to impeach the state's witness, the PCRA court ruled that there was no Brady violation. The Pennsylvania Superior Court adopted the PCRA court's reasoning, and so to did the U.S. District Court in its unconstitutional decision at Stubbs v. Curley, 2012 U.S. Dist. LEXIS 132856, 2012 WL 4103926 (M.D. Pa. 2010), see APPENDIX D pp. 38. Upon his return to appeal, the Petitioner not only submitted a true and correct copy of the felony warrant that was suppressed at trial and is now at APPENDIX 28, with the Criminal Indictment, the Petitioner also asserted in his argument that (he) (would) have used the warrant to have the witness removed from trial because the Petitioner knew that the witness was lying, and, its the accused that has the

6th and 14th Amendment Right to confrontation and the use of evidence. Defense counsel's function is to protect the Rights of the Accused, not to abridge them. The witness was a fugitive from the State of New Jersey, and the district attorney did not go through the proper legal procedures to secure the fugitive as a witness at trial. The post-conviction hindsight of trial counsel (cannot) be allowed as an exception to the Supreme Court's Brady Law; and (4) this case also presents and have evidence to support a claim of the Petitioner's Actual Innocence and supplemental ineffective assistance of counsel (IAC) claim, and invoke the miscarriage of justice exception handed down by the Supreme Court in McQuiggin v. Perkins, 569 U.S. 383, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013).

Because the prosecuting district attorney Knowingly presented and Relied on tainted evidence at trial to procure conviction, and the tainted evidence went completely without a challenge from defense counsel, the Petitioner was deprived of and denied his constitutional Right to the presumption of innocence, and the Petitioner comes before the Supreme Court of the United States as an INNOCENT MAN, and not as a man who has been afforded a fair trial where his guilt was established beyond a reasonable doubt. This case has unconstitutionally not been governed by law, but by the arbitrary fiat of men in power who targeted an underprivileged citizen that lacked such power and financial resources to effectively defend and protect his rights during trial and post conviction appeals.

The attached documentary evidence at the APPENDIX proves that the Petitioner was convicted by the district attorney's use of tainted evidence, and the judgment of conviction was obtained by fraud. The Petitioner has challenged his wrongful unconstitutional conviction in each of the below state and federal courts twice in each court, and not once did any of the below courts conduct review on the documentary evidence that the Petitioner has repeatedly submitted to support the merits of his claims. The merits of the Petitioner's claims were not reached by any court and the Supreme Court of the United States is the Petitioner's last court of resort. This case is a fundamental miscarriage of justice that warrants being REVERSED. Therefore, the preceding ineffective counsel and Brady claims are being submitted in the Supreme Court of the United States as evidence of how its constitutionally imperative for this Court to establish law that recognize equitable considerations governing the federal finality of determination rule under 28 U.S.C. § 2244 (a), and the lower federal courts (required) duty to afford fair and impartial hearings under the rule and any corrective process that's warranted by law. It is thereby that the Constitution of the United States support granting a writ of Certiorari in this case to establish law.

IX. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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X. STATEMENT OF THE CASE

The case before the Honorable Supreme Court Justices in this matter, establishes a prima facie case that prove that the prosecuting district attorney and police investigators presented and relied on tainted evidence at trial to obtain the judgment and conviction by fraud. Evidence attached at the APPENDIX are reliable documentary evidence that was circulated by the state prove that police officials tampered with criticle state evidence to create elements of felony offenses that the Petitioner did not commit. The tainted evidence had success at trial due to trial counsel's conflict of interest that adversely affected counsel's trial performance where counsel intentionally omitted defense evidence that would have exposed police corruption and place the district attorney's case under a different light. The state conviction and sentences imposed against the Petitioner's liberty is in conflict with and violates the Petitioner's rights under the 6th, 8th, 13th, and 14th Amendment of the United States Constitution and laws of the United States. While on appeal from wrongful imprisonment, both state and lower federal appellate courts departed from Supreme Court precedent and every federal law that demand that the conviction be REVERSED, where the courts; (1) accepted mere excuses for trial counsel's reasons for omitting critical defense evidence, and designated the mere excuses as reasonable strategy; (2) where the courts deliberately failed to conduct federally required *de novo* review ~~review~~ after the state court's failed to reach the merits of the Petitioner's ineffective assistance of counsel claims, and where the claims present a mixed question of law and fact; and (3) where the court's failed to conduct review on the documentary evidence that the Petitioner submitted in each appellate court to prove that trial counsel rendered deficient performance when he failed to present evidence that prove that police officials tampered with the evidence that was used to obtain conviction. The Petitioner did not commit the crimes that he is convicted of. Police officials who had access to the evidence tampered with evidence in a manner that would then contradict segmeants of the Petitioner's tape-recorded statement. The appellate court's denial of relief in this matter were influenced by ill-will and an arbitrary exercise of the powers of the government. The Petitioner do not owe a debt to the Commonwealth of Pennsylvania, and its only by official abuse of power that the Petitioner has been deprived of the enforcement of his rights and forced to reciprocate for the crimes of another person(s).

XI. Argument's For Question One, 1, 1a

1. No *de novo* review conducted on trial counsel's failure to challenge DNA evidence that was tampered with by police officials. *The relevant parts of the (N.T.) located at APPENDIX-53

On December 17, 2001 the Petitioner gave a tape-recorded statement to police investigators to offer details concerning his extramarrital affair with the adult female, and to give an account of his non-involvement with the demise of the victims. In his statement the Petitioner asserted that he removed the panties from Elaina Herring (hereandafter Mrs. Herring), prior to having sex with her the last time they met. See excerpt of Petitioner's statement at APPENDIX 6 page 51. During evidence collecting at the autopsy, the entire outer portions of Mrs. Herring's body was examined for both trace evidence (fibers), and serological evidence (blood and semen). At the conclusion of the examination which was conducted by using scientific equipment known as the Fluorescence Light Source, the examiner observed and noted that "No area's consistent with semen detection fluoresced." Mrs. Herring's clothes were then removed and packaged as evidence. See the bottom and last page of Trooper Edward J. Urban's Report at APPENDIX 7, (hereandafter Tpr. Urban. At trial Tpr. Urban testified that during the post/mortum examinations of Mrs. Herring and her daughter Vicktoria Ivanova, a fluorescence light sourse was used to detect and collect evidence from the (outer) surface of both bodies (N.T. 476-77). Tpr. Urban also testified that at the conclusion of the entire outer body fluorescence light source examination of Mrs. Herring, "nothing consistent with what we would find in semen detection flucresced (N.T. 479-487). The Fluorescence light source examination of Mrs. Herring show and prove that there was no semen detected on Mrs. Herring's outer body or on her clothes prior to the clothes being removed and packaged. Tpr. Urban also introduced a pair of panties that Mrs. Herring was discovered wearing, and he testified that a sexual assault kit was performed on both Mrs. Herring and her daughter (N.T. 479-487). Its that evidence, the sexual assault kit of Mrs. Herring and her panties that police officials tampered with to create the criminal element (forcible compulsion) to sustain a fraudulant charge of rape against the Petitioner. The prosecution called Sandra M. Singer (Ms. Singer), a crime lab technician, to introduce semen stains that was subsequently detected on Mrs. Herring's panties and nightgown by Ms. Singer when she tested the clothes at the Pennsylvania State Police Crime Lab.

Ms. Singer testified that semen was identified on the inner back and inner front of Mrs. Herring's nightgown (N.T. 1411). She also testified that semen was identified on the (inner crotch) and (outer crotch) areas of Ms. Herring's panties (N.T. 1413). The prosecution then called Kenneth M. Mayberry, a forensic scientist supervisor for the Pennsylvania State Police Crime Lab. Mayberry testified that the semen identified on the (outside crotch) of Mrs. Herring's panties was matched to the Petitioner's blood sample (N.T. 1593-94). To connect the semen stains that was subsequently placed on Mrs. Herring's panties to the prosecutions fraudulant rape argument and criminal charge, the prosecution called Dr. Michael Baden (Dr. Baden), the chief forensic pathologist for the New York State Police. During direct examination of Dr. Baden, he offered damaging, unconstitutional expert opinions regarding Mrs. Herring's panties and the Petitioner's semen. Dr. Baden testified before the jury that the manner in which Mrs. Herring's panties were found on her body, with the semen present was indicative of forced nonconsensual sex. The following notes of testimony were offered by Dr. Baden at trial, after being asked by the prosecution; Q. And, Doctor, in this particular case in regard to the death of Elena Herring, without telling us what it is, did you form an opinion as to whether the sexual intercourse with Elena Herring was forcible sexual intercourse at the time or concomitant with the homicide?

A. Yes.

Q. what factors or evidence did you rely on in forming or rendering that opinion?

A. Number one, the opinion takes into consideration the fact that she was strangled and died of homicidal means. Two, that she still had her panties on (N.T. 1743-44). "... that in my opinion the panties were on her and remained on her during the intercourse... These are the factors that I've taken into account in reaching the conclusion that the intercourse was not consensual (N.T. 1745). It is my opinion, it is my experience in forced intercourse that the panties are sometimes not removed from the body of the victim whereas in consensual intercourse the panties are removed (N.T. 1749)... And that in my opinion the time of death and the time of the sexual intercourse are approximately at the same time (N.T. 1755).

Doctor Baden's expert opinions concerning the panties remaining on Mrs. Herring's body while the Petitioner had sex with her contradicted the Petitioner's above statement of removing the panties and violated the Petitioner's 6th Amendment Right to a Fair trial, and his 14th Amendment Right to due process of law under the United States Constitution, where the opinion of the panties remaining on the body while having sex could only have been rendered due to the police officials subsequent placement of the Petitioner's semen on Mrs. Herring's panties after the evidence left the morgue. The prosecutor conveyed the message to the jury in closing argument when the prosecutor stated, "Her underwear had semen on the inside and outside consistent with the underwear being on and maybe just pushed to the side during the sex act, not consistent with consenting adults having sex where someone would take their underwear off and have sex" (N.T. 2329). Also, at the time that Dr. Baden was testifying, the prosecutor committed fraud upon the court during sidebar by stating that the case is consistent with a rape/murder founded upon the Petitioner's semen being located on the inside and outside of Mrs. Herring's panties (N.T. 1736-37).

"Fraud upon the court is present when an officer of the court directs the fraud at the court," Herring v. United States, 424 F.3d 384, 386 (3d Cir. 2005).

The prosecutor's fraud upon the court will be fully developed in the below Rape Kit argument and evidence. Trial counsel made timely objections prior to Dr. Baden taking the witness stand. Counsel argued that Baden's opinions regarding Mrs. Herring's panties being a factor relied on to determine consensual or nonconsensual sex is beyond Dr. Baden's report (N.T. 1734-1744). Trial counsel's repeated objections were overruled and therefore were ineffective to cure the prejudice caused to the Petitioner's defense of removing Mrs. Herring's panties prior to having sex. Its at this critical stage of the prosecutions case that defense counsel completely failed to advocate the Petitioner's cause, where counsel had a constitutional duty to challenge the evidentiary gap between the fluorescence light source examination at the morgue which detected no semen on Mrs. Herring's outer extremities or panties; and the subsequent detection of semen on the panties post-autopsy. In her handwritten lab notes (her ultimate report), Ms. Singer observed and noted that Mrs. Herring's Sexual Assault Evidence Collection Kit (SAECK) arrived at the police crime laboratory sealed with (PSP et) Pennsylvania State Police evidence tape. Ms. Singer further observed and noted that the Rape Kit envelopes that contained swabs and smears that were used on Ms. Herring were not sealed. See Ms. Singer's handwritten laboratory notes at APPENDIX 8. Ms. Singer's handwritten lab notes reflect a completely different, legal, and appropriate method that was used to seal the (SAECK) that was used to collect evidence from Mrs. Herring's daughter Vicktoria Ivanova. Vicktoria's (SAECK) arrived at the police crime lab sealed with (Red Kit tape), and the swabs and smears were not observed not sealed upon Ms. Singer's inspection. See Ms. Singer's handwritten laboratory notes at APPENDIX 9. Therefore, Vicktoria's (SAECK) was sealed with the red Kit tape that's manufactured with the Tri-tech Sexual Assault Evidence Collection Kit, but the red Kit tape of Mrs. Herring's (SAECK) was missing and replaced with (PSP.et). Which means that someone who had custody of the evidence removed the red Kit tape from Mrs. Herring's (SAECK), opened the Kit envelopes containing the swabs and smears, and placed the Petitioner's semen on Mrs. Herring's panties. Defense counsel rendered deficient performance at trial that prejudiced the Petitioner's defense when he omitted Mrs. Singer's above laboratory notes and intentionally failed to cross examine Ms. Singer on the improper sealing that she observed Mrs. Herring's rape Kit in upon its arrival.

"Trial counsel's performanse can be deemed deficient, for the purpose of ineffective counsel claim, based on his failure to properly cross examine prosecution witness", Matthews v. Abramajtys, 92 F. Supp. 2d 615, 635 (E.D. Mich. 2000).

Its no coincidence that the fluorescence lights source examination at the morgue of detecting no semen on the outer crotch of Mrs. Herring's panties, corroborate with the Petitioner's statement of removing the panties prior to having sex. Its also no coincidence for semen to be later detected on the outer crotch of Mrs. Herring's panties and the original red Kit tape was removed from the rape Kit and the envelopes were opened. Pursuant to the Handbook of Forensic Services, generated by the Department of Justice, the manner in which the envelopes of Mrs. Herring's SAECK were not sealed, rendered the DNA evidence inadmissible, which was used at trial to obtain conviction on the charge of rape. Rape is one of the felony predicates that tainted evidence was relied on by the prosecution to deceive the jury into returning a verdict of guilt on first-degree murder. The

Handbook of Forensic Services provides that; "If DNA evidence is not properly documented, collected, packaged, and preserved, it will not meet the legal and scientific requirements for admissibility in a court of law." See page 3 of the Handbook at APPENDIX 10. To show how Mrs. Herring's swab and smear evidence were not properly packaged, and preserved, and therefore did not meet the legal and scientific requirements for admissibility in a court of law, the Petitioner directs the Court's attention to page 6 of APPENDIX 10, where it requires evidence collectors collecting semen evidence to; "Absorb suspected liquid semen onto a clean cotton cloth or swab. Leave a portion of the cloth or swab unstained as a control. Air dry the cloth or swab and pack in clean paper or an (envelope with sealed corners)." The envelopes were not sealed because the swabs and smears were used to contaminate Mrs. Herring's panties in the manner and for the reasons stated above. The jury never heard about the improper packaging of Mrs. Herring's rape kit, therefore, the jury had no other way of weighing the evidence to determine how the Petitioner's semen got on Mrs. Herring's panties other than to believe in the deception, perjury, and tainted evidence provided by a prosecuting district attorney. Trial counsel caused further harm that prejudiced the Petitioner's defense against the charge of rape, when trial counsel actively undermined the Petitioner's defense by submitting a question to Dr. Baden that permitted the jury to infer that the Petitioner did not remove Mrs. Herring's panties prior to having sex. The following reflects that exchange during defense cross examination of Dr. Baden: Q. "I think you'd also agree with me, Doctor, based upon your experience as a pathologist and also based upon your experience in human life that when two people have sexual intercourse that the panties don't necessarily have to be removed; isn't that correct?"

A. "In general, its possible to have consensual sexual intercourse with panties still on. In my experience as a forensic pathologist, its unusual for people to die after consensual intercourse with the panties having not been taken off." (N.T. 1800).

Trial counsel's above question to Dr. Baden had an adverse affect on the Petitioner's defense of removing Mrs. Herring's panties prior to having sex with her. Counsel's question was harmful, was contrary to the Petitioner's statement, and had no sound strategic value to the Petitioner's defense. Therefore, trial counsel actively undermined the Petitioner's defense.

"Ineffective assistance is not limited to omissions of counsel, it also extends to cases in which counsel actively undermines his clients' own defense," Fisher v. Gibson, 282 F.3d 1283, 1310 (10th Cir. 2002).

During prosecution direct examination of Dr. Baden, the prosecutor asked, "whether the finding of semen (inside) the vaginal area of the victim would be one of the factors that he considered in reaching his opinion of forcible sexual contact?" Dr. Baden replied, "Semen would be a factor, that is, the semen would confirm that there was intercourse" (N.T. 1742). Therefore, Dr. Baden's opinion on forcible sexual contact (rape) was based solely on the semen that was subsequently placed on Mrs. Herring's panties by police investigator(s). During the November 29, 2007 (first) PCRA Hearing (P.H.), direct examination of trial counsel in regard to the improper sealing of Mrs. Herring's Rape Kit, the Petitioner asked the following question and was given the following answer; Q. "Prior to or during the course of trial, had any of the defense attorney's observed a difference in the sealing conditions between Elena Herring and Vicktoria Ivanova's sexual assault evidence collection Kit?"

A. "You're referring to the collection Kit of Elena Herring. I, believe, there might be a note in Sandra Singer's personal folder indicating that that collection Kit when she received it was unopened. However, if you look at Sandra Singer's ultimate report that she issued she indicates that when the collection Kit was received it was received in a sealed cardboard box. The reason we did not challenge the collection Kit Henry, is because you admitted, in fact, that you had sexual intercourse with Elena Herring and that you ejaculated into her" (P.H. page 19) at APPENDIX 5. Counsel went on to say that there was any dispute that the semen belonged to the Petitioner. The Petitioner contend on appeal that although Mrs. Herring's Rape Kit did arrive in a cardboard box sealed with the same Pennsylvania State Police evidence tape (PSP.Et) that Mrs. Herring's Rape Kit was sealed with, it does not preclude the fact that the original (Red Kit tape) was removed from the Rape Kit and the Kit envelopes containing the swabs and smears were not sealed prior to being received by Ms. Singer. Also, the Petitioner stating that he had sex with Mrs. Herring is not an admission to rape. And although there was never any dispute that the semen belong to the Petitioner, there is a dispute that the Petitioner's semen was not supposed to been located on Mrs. Herring's panties. That dispute arose in the Petitioner's statement of removing Mrs. Herring's panties prior to sex, the dispute also arose when no semen was detected on the panties or outer portions of the body when Mrs. Herring was examined at the morgue. The Petitioner's above statement of having sex with Mrs. Herring should not and cannot be enough to relieve trial counsel from his 6th Amendment duty to defend against the charge of rape, by challenging evidence that was tampered with by police officials to create the criminal element (forcible compulsion).

"A person commits a felony of the first degree when the person engages in sexual intercourse with a complaintant, (1) by forcible compulsion." 18 Pa. C.S. § 3121 (a) Rape.

The criminal element forcible compulsion was fabricated by police tampering with the rape kit and panties, and trial counsel's failure to challenge the tampered evidence denied the Petitioner of the only defense against the criminal charge of rape. Additionally, in an attempt to conceal the identity of the officer(s) who tampered with the rape kit, the rape kits (chain of possession) form is improperly documented where the form is void of all information thats required by law for identifying who had custody of the evidence. See Elena Herring's Chain of Possession report at APPENDIX 11. With regard to the chain of possession which is the same as the chain of custody, the Supreme Court of the United States ruled that:

"It is the obligation of the prosecution to establish the chain of custody for evidence sent to testing laboratories -- that is, to establish the identity and integrity of physical evidence by tracing its continuous whereabouts. 23 C.J.S., Criminal Law § 1142, p. 66 (2008). Meeting this obligation requires representation -- that one officer retrieved the evidence from the crime scene, that the second officer checked it into an evidence locker, that a third officer verified the locker's seal was intact, and so forth." **Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2546 (U.S. Mass. 2009).**

And pursuant to the Commonwealth of Pennsylvania's own law concerning chain of custody:

"The Pennsylvania State Police shall include, as part of existing training programs for local law enforcement, training to ensure that the chain of custody of (all) rape kits is established to minimize any risk of tampering with evidence included in the rape kit." 35 P.S. § 10172.3 (b)(2).

Trial counsel's above stated (reason) for intentionally and knowingly failing to challenge the improper packaging and improper documentation of Mrs. Herring's rape kit, and counsel's intentional failures to challenge the subsequent placing of semen on Mrs. Herring's panties and the evidence tampering by police official(s), to defend against the criminal element of forcible compulsion and the charge of rape, constitutes a conflict of interest that adversely affected counsel's trial performance, where counsel's stated reason for failing to challenge the improper conditions of the rape kit is based on the Petitioner stating that he had sex with Mrs. Herring. The semen that the police placed on the panties is the (only) evidence that the prosecution was able to rely on to argue forcible compulsion and sustain the fraudulant charge of rape.

"Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest," Cuyler v. Sullivan, 446 U.S. 335, 346, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

"Prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance," Cuyler, supra, at 100 S.Ct. 1708, 1718-19. Also, Strickland v. Washington, 466 U.S. 668, 692 (1984).

Because of trial counsel's deficient performance and his stated conflict of interest, the Petitioner is wrongfully and unconstitutionally convicted on the fraudulant criminal charge of first-degree homicide where the felony predicate to first-degree homicide is forcible compulsion rape, and the Petitioner was not afforded a defense against forcible compulsion rape or first-degree homicide. The Petitioner's right to a fair trial under the 6th Amendment of the United States Constitution; and his right to due process of law under the 14th Amendment of the United States Constitution, was violated when the prosecuting district attorney knowing presented and relied on tainted evidence to obtain conviction and deceived the jury into returning the verdict of guilt, and trial counsel undermined the Petitioner's defense.

"Due process commands that no man shall lose his liberty unless the government has borne the burden of--convincing the factfinder of his guilt," In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). *Id.*

"Fourteenth Amendment cannot tolerate a state criminal conviction obtained by knowing use of false evidence," Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 788 (1967).

Had trial counsel presented the above defense at trial by showing the jury that police official(s) tampered with Mrs. Herring's rape kit, her panties, and the Petitioner's semen to create the forcible compulsion element of rape, the jury would have been able to reach a reasonable doubt on the prosecutions rape/murder charges of Mrs. Herring, and a reasonble doubt on the murder of Vicktoria Ivanova since there was no other evidence presented by the prosecution that permitted the jury to believe that forcible compulsion existed, and no reliable evidence to connect the Petitioner to the death of either of the victims. Therefore, there's a reasonable probability that, but for counsels unprofessional errors of failing to challenge tainted evidence, the result of the trial would have been different where the jury would have reached a reasonable doubt on all of the charges. Because of trial counsel's above and below unprofessional trial errors, the confidence in the outcome is undermined and the conviction must be reversed due to the constitutional errors that resulted in conviction.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome," Strickland v. Washington, 466 U.S. 668, 694.

It was established at trial through the defense cross-examination of lab technician Sandra Singer that the federal guidelines, e.g., the Handbook of Forensic Services at APPENDIX 10, are generally accepted in the scientific community (N.T. 1437), and that the Pennsylvania State Police and Forensic examiner's are required to follow those guidelines (N.T. 1442, 1445-46). The guidelines were in trial counsel's possession during trial and was the controlling authority on the packaging, documenting, and admissibility of Mrs. Herring's Rape Kit and the DNA evidence that was unlawfully admitted at trial. Trial counsel's above failure to challenge tainted evidence, his stated conflict of interest, and failure to use the federal guidelines that governs DNA evidence and its admissibility, fell below an objective standard of reasonableness.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness," Strickland v. Washington, 466 U.S. 668, 687-88.

A review of the PCRA court's first opinion at APPENDIX B, pages 6-9, reveal that the court failed to reach the merits of the above ineffective assistance of counsel (hereandafter, IAC claim) when the court; (1) failed to conduct review on the above evidence that was omitted by defense counsel, e.g., APPENDIX 8, APPENDIX 9, APPENDIX 10, APPENDIX 11, and statutory law that governs when tampering with evidence or forcible compulsion is present; and (2) the court applied an objectively unreasonable application of Strickland v. Washington, 466 U.S. 668, when the PCRA court failed to conduct review of the Petitioner's IAC claim under the mixed question of law and fact standard required by Strickland, supra, 466 U.S. at 698. Because of the objectively unreasonable application of Strickland, the PCRA court failed to conduct *de novo* review on the omitted defense evidence that was submitted, and the laws that were invoked to show the merits of the above and below IAC claims, laws such as the above cited 35 P.S. §10172.3 (b)(2); Melendez-Diaz, supra, 129 S.Ct. 2527; 18 Pa. C.S. § 4910 (related to tampering with evidence); and the Handbook of Forensic Services, all of which was brought to the PCRA court's attention for review. The Petitioner was entitled to review on the documentary evidence and laws.

"The state court's application of clearly established federal law must be objectively unreasonable before a federal court may grant the writ," Lockyer v. Andrade, 538 U.S. 63, 75 (2003). "An objectively unreasonable application of clearly established federal law occurs when a state court identifies the correct governing legal principle from the Supreme Court's decision but applies an objectively unreasonable application to the facts of the case," Rompilla v. Beard, 545 U.S. 374, 380 (2005).

The Pennsylvania Superior Court merely adopted the PCRA court opinion. See page 9 of the Superior Court Memorandum at APPENDIX C. Therefore, the state appellate court's failed to reach the merits of the Petitioner's above and below IAC claims. The United States District Court at docket 1:10-cv-1849, after taking 34 months to disposition of the Petitioner's first application, abused its discretion during review of the Petitioner's IAC claims; when the District Court also failed to conduct appellate review on the omitted trial evidence; failed to review the Handbook of Forensic Services; and failed to consider controlling state laws that governs when tampering with evidence and perjury may be found. Instead of conducting the required *de novo* review on the Petitioner's IAC claims, due to the state court's failure to reach the merits of the claims, the District Court unconstitutionally applied the AEDPA standard of review to the IAC claims. The District Court's review on the prior application for a writ of habeas corpus departed from the Supreme Court's decision in Strickland v. Washington, 466 U.S. 668, when the District Court failed to treat the Petitioner's IAC claims under the mixed question of law and fact standard required by Strickland at 698. Because of the District Court's abuse of discretion, the Court failed to assess evidence that show that the Petitioner was not afforded a trial defense against the charge of rape. During review, the District Court also abused its discretion by affording deference to the state court's finding of fact, and accorded a presumption of correctness to the state courts without reviewing evidence that the Petitioner submitted under 28 U.S.C. § 2254 (e)(1), to overcome the presumption of correctness. Not one state or Federal appellate court, to date, has conducted *de novo* review on the evidence that trial counsel omitted at trial, and not one state or federal court reviewed this IAC claim under the mixed question of law and fact standard required by Strickland. See the District Court review at APPENDIX D, pages 25-29 concerning this claim.

"Federal courts must defer to state court factual findings, according a presumption of correctness that the Petitioner may rebut only with clear and convincing evidence. The presumption ... applies to implicit findings of fact, logically deduced because of the trial court's ability to adjudge the witnesses demeanor and credibility. However, the presumption only applies to basic, primary facts, and not to mixed questions of law and fact, which receive *de novo* review," Gloseclose v. Bell, 130 F.3d 1161, 1163-64 (6th Cir. 1997).

"Ineffectiveness of counsel is not a question of basic, primary, or historic fact but, rather, is a mixed question of law and fact," Strickland v. Washington, 466 U.S. 668, 698 (1984).

"Mixed question of law and fact (are not) governed by § 2254 (d) and therefore (are not) entitled to presumption of correctness," Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995).

On the Petitioner's prior application for a writ of habeas corpus, the U.S. District Court denied the Petitioner of a fair and impartial appellate hearing that violated the Petitioner's right to due process of law under the 14th Amendment of the United States Constitution, by departing from clearly established federal law, and abusing its discretion against the Petitioner's statutory and constitutional rights.

1A. No *de novo* review conducted on IAC claim where trial counsel failed to challenge a police detectives perjury and evidence tampering, the ski mask

The following claim presents compelling evidence that prove that lead detective Robert Zavada (here andafter, Zavada), while in control of Commonwealth evidence, he deliberately and recklessly tampered with evidence in violation of 18 Pa. C.S. § 4910 (1) and (2), by planting a ski mask in the Petitioner's jacket pocket prior to presenting the evidence to the jury. Zavada intentionally, and with disregard for the truth, committed perjury in violation of 18 Pa. C.S. § 4902 (A), by presenting the ski mask to the jury while testifying, and stating to the jury that he found the ski mask in the Petitioner's jacket pocket while knowing that his testimony was not true. In the Petitioner's December 17, 2001 statement, the Petitioner gave an accurate description of the clothes he wore as he set out to meet with Mrs. Herring. He described a pair of blue jeans, a plain white T-shirt, and boots. See statement at APPENDIX 14, pages 49 and 50. During direct examination of Tammy Carroway, Carroway who had a drop felony charges plea agreement with the prosecution, lied to the jury by stating that she witnessed the Petitioner wearing a black ski type hat (ski mask) as he left Mrs. Herring's residence (N.T. 601-02, 613, 618). Carroway was a girlfriend of the Petitioner while the Petitioner was having an affair with Mrs. Herring. On December 11, 2001, while conducting investigative procedures at the Petitioner's mother's residence, 5 Stark Street, Wilkes-Barre, PA., Tpr. Urban noted in his report that he located and (removed) "Two ski mask Knit caps" from 5 Stark Street. See Tpr. Urban's report at APPENDIX 16. Also see APPENDIX 16-2 the Property In Custody report, and APPENDIX 16-3 the Receipt Inventory report, all reflecting December 11, 2001 being the date that two (2) ski mask were removed from 5 Stark Street. On December 12, 2001, a day (after) the investigators removed the above ski masks from 5 Stark Street, Wilkes-Barre, PA., the Petitioner was arrested and taken from a residence located at 2954 Hick Street, Philadelphia, PA., on charges unrelated to this case. Subsequent to the Petitioner's December 12, 2001 arrest, detectives Timothy S. Judge, Robert Simonetti, and Danny Watson, searched the Hick Street residence and removed plus documented the following property items belonging to the Petitioner; a black leather jacket, a Charles Raymond wrist watch, a black Knit hat, a maroon leather belt. See detective Timothy S. Judge's Report describing the Petitioner's property that was removed from Hick Street at APPENDIX 17. Also see APPENDIX 17-2, the Property In Custody Report listing the Petitioner's property removed from Hick Street on December 12, 2001. The evidence that was removed from 5 Stark Street was submitted to the crime laboratory for testing, including item 6.2 (1) black Knit ski mask. See item 6.2 at APPENDIX 18. Also see APPENDIX 18-2, item 6.2 (black ski mask) showing test results that exclude saliva and hair from belonging to Stubbs (Petitioner). The evidence that was removed from Hick Street was submitted to the crime laboratory for testing, including item 49.2 (1) black Knit hat that belong to the Petitioner. See APPENDIX 19 and compare property at APPENDIX 17 and APPENDIX 17-2. During the prosecution direct examination of Zavada, he committed perjury by stating to the jury that he removed item 6.2 black Knit ski mask from the Petitioner's leather jacket when the Petitioner was arrested in Philadelphia on December 12, 2001. Zavada than pulled item 6.2 black Knit ski mask out of the Petitioner's leather jacket pocket at trial and showed it to the jury at (N.T. 1079-1082), while Knowing that he was lying.

"A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true", 18 Pa. C.S. §4902 (A) Perjury.

Therefore, not only did Zavada, (a lead detective) commit a third degree felony by knowing that he made a false statement under oath, but, he also committed a second degree misdemeanor by tampering with a ski mask with the intent to mislead the jury (public servants), and the below courts are saying that trial counsel was not ineffective for failing to challenge Zavada's criminal violations.

"A person commits a misdemeanor of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he: (2) makes, presents or uses any record, document or thing knowing it to be false and with the intent to mislead a public servant who is or may be engaged in such proceeding or investigation", 18 Pa. C.S. §4910 (2) Tampering with or fabricating physical evidence.

"The government has a duty not to exploit false testimony by prosecutorial argument affirmatively urging to the jury the truth of what it knows to be false", United States v. Sanfilippo, 564 F.2d 176, 178 (5th Cir. 1977).

"The prosecution has a duty to refrain from knowingly presenting perjured testimony and from knowingly failing to disclose that testimony used to convict a defendant was false", United States v. Aichele, 941 F.2d 761, 766 (9th Cir. 1991).

"Conviction obtained through use of false testimony, known to be such by representatives of the state, is a denial of due process", Napue v. People of the State of Illinios, 360 U.S. 264, 79 S. Ct. 1173, 1177 (1959).

Trial counsel's performance at trial was deficient and caused prejudice to the defense when counsel intentionally failed to advocate a defense against the prosecutions above knowingly use of false evidence. Additionally, trial counsel's performance was deficient where he failed to cross examine detective Timothy S. Judge, Tpr. Urban, and lab technician Sandra Singer, on the above police and lab reports attached at APPENDIX' 16, 16-2, 16-3, 17, 17-2, 18, 18-2, and 19. Trial counsel deliberately omitted from trial all of the above police and laboratory reports, and the jury never learned that the prosecution planted the ski mask (a burglary tool) to undermine the Petitioner's defense.

"Trial counsel's performance can be deemed deficient based upon the failure to properly cross examine prosecution witnesses," Matthews v. Abramajtys, 92 F. Supp. 2d 615 (E.D. Mich. 2000).

At the PCRA hearing, when the Petitioner asked trial counsel to explain his reason for failing to challenge the prosecutions use of false evidence, the above (ski mask), trial counsel stated; "...because whether its called a black Knit ski cap or a black Knit cap it still doesn't exclude you from being in the house on or about the same time this homicide" -- the Petitioner objected (P.H. pages 37-41 at APPENDIX 5.

Trial counsel's above stated reason for deliberately failing to use available defense evidence at trial to challenge detective Zavada's perjury and evidence tampering constitutes a conflict of interest that adversely affected counsel's trial performance, where counsel actively undermined the Petitioner's defense of not wearing a ski mask (burglary tool) when he last met with Mrs. Herring and left her alive and well.

"Ineffective assistance is not limited to omissions of counsel, it also extends to cases in which counsel actively undermines his client's own defense," Fisher v. Gibson, 282 F.3d 1283, 1310 (10th Cir. 2002).

"Prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interest and that an actual conflict of interest adversely affected his lawyer's performance," Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980). Also Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052 (1984).

By failing to challenge the tainted ski mask evidence due to trial counsel's above stated conflict of interest, the jury was left to believe that the Petitioner possessed criminal intent, and that the Petitioner went to Mrs. Herring's residence wearing a ski mask (burglary tool) to commit felony burglary and the other crimes that was fraudulantly charged by the prosecution.

"Counsel can deprive a defendant of the right to effective assistance, simply by failing to render adequate legal assistance," Cuyler, supra, 446 U.S. at 344. (Actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective) Strickland, supra, 466 U.S., at 686.

In the PCRA court's Opinion on the above and below IAC claims, and the PCRA court's failure to find trial counsel ineffective for not challenging the tainted ski mask, and Zavada's above stated criminal activity, it amounts to an objectively unreasonable application of the Supreme Court's decision in Strickland v. Washington, 466 U.S. 668, where; (1) the PCRA court failed to apply the Strickland test to determine whether, in light of all the circumstances, the act or omissions of trial counsel identified by the Petitioner were outside the wide range of professionally competent assistance required under Strickland, supra, at 690; and (2), the PCRA court failed to reach the merits of the Petitioner's IAC claims, where the claims were not examined under the (mixed question of law and fact) standard with regard to the performance and prejudice components required by Strickland, supra, at 698. Because of the PCRA court's failures to assess the Petitioner's IAC claims as though they presented mixed question of law and fact, the court failed to conduct review on the omitted trial defense evidence and the governing laws and provisions that the Petitioner cited and relied on to support the merits of his claims. A review of the PCRA court's OPINION at APPENDIX B pp. 9-10 reveal that the principles set forth in Strickland was not applied to this IAC claim. The PCRA court only considered what the Petitioner (argued), the Petitioner's documentary evidence was ignored by the state and federal appellate courts. The Superior Court of Pennsylvania merely adopted the PCRA court Opinion on all of the Petitioner's IAC claims, and therefore, the (state appellate courts) failed to reach the merits of the IAC claims. See Superior Court Memorandum at APPENDIX C pp. 9-10. On petition for a writ of habeas corpus, the U.S. District Court abused its discretion and committed clear error by denying habeas relief on the Petitioner's IAC claims after unconstitutionally applying the AEDPA standard of review instead of the required *de novo* review due to the state court's failures to reach the merits of the claims. Also see APPENDIX E where the U.S. District Court abused its discretion and committed clear error by stating that *de novo* review was conducted on one of the Petitioner's original IAC claims, but *de novo* review was not conducted on that IAC claim where the district court failed to review the documentary evidence that the Petitioner submitted for review. Such U.S. District Court review is a departure from federal law.

"If deference to the state court is inapplicable or inappropriate, federal court reviewing habeas claim exercises its independent judgment and reviews the claim de novo," McKenzie v. Smith, 326 F.3d 721, 726 (C.A. 6 (Mich.) 2003).

Argument for Question Two

2. Suppression of Brady v. Maryland, 373 U.S. 83 material, and State created exception to the U.S. Supreme Court Brady v. Maryland law

During trial the prosecuting district attorney called Angela Whitaker-Mayfield (hereinafter, Mayfield), to testify on behalf of the prosecution during the guilt-phase of trial. Some of Mayfield's testimony was fabricated and strategically designed by the prosecution to inculpatate the Petitioner on fraudulantly filed criminal charges of burglary and Robbery. "NOTE: This claim should be considered with the Petitioner's preceding Actual Innocence claim." Initially, Mayfield testified untruthfully by stating that the Petitioner had asked her for money on three seperate occasions within a few hours apart, and on the day prior to the homicide related to this case (N.T. 970-73). The testimony was elicited to give the jury a false impression that the Petitioner was acting desperate for money. It was also elicited to act as corroborating testimony of key witness Tammy Carroway who had previously lied by testifying that the Petitioner told her that he needed some money and had seen some in the house next door (N.T. 592-593). Mrs. Herring lived next door. Carroway's sentencing for her plea agreement was pending the outcome of the Petitioner's trial. In the year 2007, approximately four years after the Petitioner's October 20, 2003 sentencing in this case, the Petitioner learned from his mother that Mayfield had an active out-of-state felony warrant that sought her arrest prior to and during her testimony at the Petitioner's trial. See Affidavit of Witness from the Petitioner's mother at APPENDIX 26. The Petitioner filed a timely PCRA to raise this Brady v. Maryland, 373 U.S. 83 claim. During the PCRA hearing held on November 29, 2007, (the court) invited trial counsel to answer to the Petitioner's Brady claim, even though the Petitioner did not associate trial counsel with his Brady claim at no time. When asked whether the defense was aware of Mayfield's oustanding warrant, and would the warrant had been used at trial to discredit Mayfield's credibility, trial counsel stated, "No," "I don't think that I was aware of it, number one. Had we been made aware of it, would we have used it, the answer is no..." See (P.H. pages 54-56) at APPENDIX 5. The PCRA court accepted trial counsel's above hindsight statement as a reason to deny PCRA Relief on the Brady claim. See the court OPINION at APPENDIX B pages 19-20 creating a state exception to the Supreme Court's Brady law by using an objectively unreasonable application of Brady v. Maryland, 373 U.S. 83 (1963), where Brady does not recognize trial counsel's above statement of not anticipating using Brady evidence as a reason to excuse the prosecutors duty to disclose. Additionally, the State appellate courts used the principles set forth in Strickland v. Washington, 466 U.S. 668 to deny relief on the Brady claim after determining that trial counsel was not ineffective for not using the Mayfield warrant to impeach, which was an unreasonable determination of the facts that warranted federal review under 28 U.S.C. § 2254 (d)(2), where the Petitioner did not raise an IAC claim in

Relation with his Brady claim. The following courts support the State created exception to the Brady law; PCRA court Opinion at APPENDIX B pages 19-20; the Superior Court Memorandum at APPX. C page 9; the U.S. District Court Memorandum at APPX. D page 38; and the latest Superior Court Memorandum at APPX. I pages 5-7 (dismissing Brady claim due to trial counsel's post-conviction hindsight statement). Trial counsels above hindsight statement that was made post-conviction should not have been and cannot continue to be accepted by any court as an exception to the Brady law that forgives a prosecutors non-disclosier of evidence at trial. Its the accused who has the 6th and 14th Amendment Right to confrontation under the United States Constitution, and the accused who has the right to trial and the presentation of evidence in his/her favor. Trial counsel's duty is to protect those rights, not to abridge them.

"In order to make a Brady claim, Petitioner must prove three elements; (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that the evidence must have been suppressed by the state, either willfully or inadvertently; and (3) prejudice must have insued," Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

On March 22, 2017, after exercising reasonable due diligence, the Petitioner obtained a copy of the Mayfield warrant and criminal indictment, see the warrant and related documents at APPENDIX 28. The Luzerne County District Attorney knew during trial that the warrant existed and used the warrant as leverage to coerce Mayfield into testifying falsely in exchange for avoiding being arrested and extradited to the State of New Jersey. Had the warrant been disclosed at trial the Petitioner would have used it to have Mayfield removed as a Commonwealth witness because her testimony was false and slanted towards guilt. The Respondents on appeal are out of the same office that fraudulantly convicted the Petitioner. They submitted false declarations in both state and federal courts by stating that Brady was not violated at trial, see Respondent Brief to state court at APPENDIX 34 pages 13 and 14; and by falsely declaring to the U.S. District Court that the Mayfield warrant and deal do not exists, see Respondent Brief at APPENDIX 32 page 11. According to the attached warrant information, Mayfield was not arrested until April 07, 2005 two years after Petitioner's trial. The Respondent(s) committed the federal crimes of submitting false declarations before the U.S. District Court in violation of 18 U.S.C. §1623(A) (relating to false declarations before grand jury or court); and in violation of 18 U.S.C. §1018 (relating to official certificates or writings). The Respondent's false declarations also violated

Fed. R. Civ. P. § 11(b)(1), where the false declarations at APPENDIX 32 page 11 and APPENDIX 34 pages 13-14 were submitted fraudulantly for the purpose of causing unnecessary delays in the proceedings, and needlessly increase the cost of litigation. Because of the delays caused in the proceedings due to the Respondent's false declarations, the Petitioner was entitled to equitable tolling of the limitations period when he returned in the U.S. District Court at Docket No. 1:18-cv-128 with a petition for a writ of habeas corpus and a copy of the Mayfield warrant that Commonwealth officials suppressed at trial and concealed on appeal.

"...the equitable tolling doctrine calls for the court to extend the statute of limitations beyond the time of expiration," Bornholdt v. Brady, 869 F.2d 57, 67 (2nd Cir. 1989). "The doctrine was developed to address situations in which (fraudulant) or other conduct (concealed the existence of a claim)," Cerborne v. Int. Ladies Garment Workers Union, 768 F.2d 45, 48 (2nd Cir. 1985).

During his investigation to obtain a copy of the warrant in the years 2014-2015, outside of the limitations period, state agencies that are required and have a legal duty to assist and process requests for information, e.g., the Pennsylvania Office of Open Records, denied the Petitioner access to the Mayfield warrant. The evidence of governmental decisions to deny the Petitioner access to Mayfield's warrant is attached to this petition at the following APPENDIXIES 35, 36, 37, 38, 39, 40, 41, 42. In the event that the Petitioner is required to provide additional information or argument to show that he exercised reasonable due diligence to bring his claim to court, the Petitioner is requesting an extension of time to amend this reasonable due diligence claim under Fed. R. Civ. P. § 6(b) Extending Time. The below court dockets will also serve as evidence that the Petitioner has pursued the evidence of his Brady claim since May 14, 2007, and government officials impeded the Petitioner's ability to prove the existence of this claim.

"Given that prisoners possess a right of effective access to the court system, a governmental decision to deny access to evidence with the intent, and with the effect, of preventing a prisoner from exercising his right of effective access to the court system would violate due process," Swekel v. City of River Rouge, 119 F.3d 1259, 1262 (6th Cir. 1997).

3. Argument for question Three; Fraud upon the court, district court abuse of discretion, equitable considerations for filing second or successive applications under 28 U.S.C. § 2244(a) when the legality of the detention was not determined on prior application for a writ of habeas corpus

On February 29, 2016, while the Petitioner was talking to Mayfield via inmate automated telephone system, Mayfield admitted for the first time that she had been arrested in the year 2005, which corroborate with what the Petitioner's mother had informed him of in 2007. Due to that conversation and while the Petitioner still sought a copy of the Mayfield warrant, the Petitioner filed a third PCRA petition in the Court of Common Pleas, and claimed the (interference by government officials) exception to the state statute of limitations filing rule under 42 Pa.C.S. §9545(b)(1)(i); and under §9545(b)(1)(ii) where (the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence). The statutes were invoked to reassert the Petitioner's Brady v. Maryland, 373 U.S. 83 claim. See APPENDIX 43 pages 2 and 9 out of the Petitioner's third PCRA Brief invoking the exceptions. At the conclusion of the March 29, 2017 PCRA hearing, the PCRA court abused its discretion by refusing to exercise its jurisdiction to hear the Petitioner's Brady claim after the court made a clearly erroneous judgment which stated that "the Petitioner failed to establish an exception under the PCRA Act as to jurisdiction." See erroneous judgment at APPENDIX H pages 46-47 and compare with APPENDIX 43 pages 2 and 9, and, APPENDIX 52. Also, the Petitioner raised fraud upon the court claims and appealed to both the State and Federal courts to exercise the inherent power of the Court to review evidence of a judgment obtained by fraud, and to review (evidence) of IAC that the previous courts failed to review. The Petitioner cited and relied on the following state and federal case law to appeal to the inherent power of the below/inferior courts:

"The Superior Court of Pennsylvania affirmed that Pennsylvania courts will not countenance fraud, and when a decision is obtained through its use, the court retains the inherent power to recind that decision,.... even if the order was deemed final for the purpose of section 5505 due to the operation of Pa.R.Crim.P. §910, we will permit it to be opened in this instance because it was procurred by fraud," Commonwealth v. Harper, 2006 Pa. Super. 3 (2006). Id.

"Tampering with the administration of justice gives rise to the Court to enforce its inherent power," Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944).

On July 27, 2017, the Petitioner filed his PCRA Brief in the Pennsylvania Superior Court at Docket No. 766 MDA 2017, along with a copy of the Mayfield warrant that was received by the Petitioner on March 27, 2017. Than on 9/26/2017 the Petitioner filed a motion for leave of court to amend his appellant Brief to include all of the documentary evidence contained in the attached APPENDIX of this petition, documentary evidence that all of the inferior courts deliberately failed to review during proceedings of prior applications. The Superior Court's method and manner in which it relied on in reaching its decision to deny relief on the Petitioner's Brady and fraud upon the court claims at Docket No. 766 MDA 2017, is the unmistakable result of ill will, impropriety, and an arbitrary decision that denied a fair and impartial hearing and violated the Petitioner's right to due process of law under the 14th Amendment of the United States Constitution, where; (1) in the Superior Court's Memorandum filed December 15, 2017, that court inappropriately stated that, "... Appellant claims he was denied a fair trial and due process of law where police investigators tampered with physical evidence and documents. Appellant does not (identify) the physical evidence and/or documents with which the police allegedly tampered." See Memorandum at APPENDIX I page 8. What the Superior Court failed to add is that it filed an ORDER dated October 13, 2017 that denied the Petitioner's 9/26/2017 motion to amend his PCRA Brief. See the October 13, 2017 ORDER at APPENDIX 44. The Petitioner's amended appellate Brief contained the documentary evidence that was relevant to prove the Petitioner's claims. The Superior Court knew that it undermined the Petitioner's appeal and violated his rights, that's why the court did not mention its October 13, 2017 ORDER in its December 15, 2017 Memorandum; and (2) the Superior Court deliberately undermined the Petitioner's appeal when the court unconstitutionally turned the Petitioner's Brady v. Maryland, 373 U.S. 83 claim into an ineffective assistance of counsel (IAC) claim, enforcing a state created exception to the Brady law. See unconstitutional exception at APPENDIX I pages 5-7. That argument is located at pages 25 thru 26 of this petition. Mayfield's warrant constitutes an unknown fact and a new fact for the purpose of appeal because the warrant was not known by the defense at trial. Therefore, the Superior Courts determination at page 7 of APPX. I, stating that "the warrant was not a new fact because the claim was previously litigated is unconstitutional. When the Petitioner raised his Brady claim in his first state PCRA and federal Habeas Corpus petitions, the Commonwealth Respondent(s) concealed the fact that the claim existed. Additionally, the unknown fact and new fact requirements relating to Brady violations and subsequent appellate claims can only be attributed to what occurred at trial, not what occurred on appeal regarding discovery of the violation since the violation of Brady occurs at trial.

"Brady addresses the prosecutions constitutional duty (prior to conviction) and thus fundamentally concerns a criminal defendant's due process right to a fair trial," Harvey v. Horan, 278 F.3d 370, 387 (4th Cir. 2001). Citing Arizona v. Youngblood, 488 U.S. 51, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988).

On January 15, 2018, following the Superior Courts above denial of PCRA relief, the Petitioner filed

A second application for a writ of habeas corpus in the United States District Court (district court) at Docket No. 1:18-cv-128, invoking the district court's jurisdiction under the relevant federal statutes including 28 U.S.C. § 2244 (a), since no circuit or district judge had determined the legality of the Petitioner's detention during proceedings on the prior application for a writ of habeas corpus. Determining the legality of the detention is thee (requirement) of a circuit or district judge under the finality of determination statute of § 2244 (a), that requirement was not met in this case. In his second habeas corpus petition at No. 1:18-cv-128, the Petitioner raised fraud upon the court claims to challenge; (1) where during sidebar at trial, the district attorney made a proffer to the court on evidence of a rape/murder while knowing that the evidence, (semen and panty), had been tampered with by police officials to fabricate the criminal element (forcible compulsion) to sustain a fraudulantly filed rape charge; and (2) where the Respondent(s) submitted false declarations in the district court on prior habeas corpus petition at No. 1:10-cv-1849, by stating that Brady evidence do not exist and no deal was made concerning the Mayfield warrant. See the false declaration at APPX. 32, and the suppressed Mayfield warrant at APPX. 28. The Petitioner cited Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), to invoke the district court's inherent power to reopen this case and review the above stated evidence of fraud. On 5/7/2019 the district court filed an ORDER at No. 1:18-cv-128 that offended the proceeding (again), by depriving the Petitioner of a fair and impartial hearing which violated the Petitioner's right to due process of law under the 14th Amendment of the United States Constitution, when the district court denied habeas relief on the second application without affording a hearing to determine the Petitioner's entitlement to equitable tolling the AEDPA statute of limitations, which the Petitioner was/is entitled to; and, where the district court unconstitutionally and erroneously determined and stated in its ORDER that, "...and it appearing that the court has previously determined the legality of such conviction, Stubbs v. Curley, et al., 1:10-cv-1849..." See district court ORDER at APPENDIX A. By asserting that the court has previously determined the "legality of such conviction" on the prior application, the district court undermined the habeas corpus proceedings and breached its (required) legal duty under 28 U.S.C. § 2244 (a), when; during review on the Petitioner's prior application for a writ of habeas corpus at Stubbs v. Curley, et al., 1:10-cv-1849, the district court abused its discretion, departed from federal law, and rendered an arbitrary decision by, (1) unconstitutionally assessing the Petitioner's ineffective assistance of counsel (IAC) claims under the AEDPA standard of review instead of applying the required *de novo* review after the state courts failed to reach the merits of the IAC claims, and (2) by failing to conduct review on the documentary evidence that the Petitioner had submitted to show and prove the merits of his IAC claims. The district court deliberately failed to treat the Petitioner's IAC claims as if the claims present mixed question of law and fact. Because of the district court's abuse of discretion, the district court failed to review evidence and legal principles that determine that the Petitioner is convicted on a criminal charge of rape without having been afforded a defense against the charge at trial due to trial counsel's conflict of interest raised in CLAIM ONE of this petition. Federal law provides that:

"... the presumption of correctness afforded to state court factual findings only applies to basic, primary facts, and not to mixed questions of law and fact, which receive *de novo* review," Gloseclose v. Bell, 130 F.3d 1161, 1163-64 (6th Cir. 1997).

"Ineffectiveness of counsel is not a question of basic, primary, or historic fact but, rather, is a mixed question of law and fact," Strickland v. Washington, 466 U.S. 668, 698 (1984).

"Mixed question of law and fact (are not) governed by § 2254(d) and therefore (are not) entitled to presumption of correctness," Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995).

It is thereby that the district court at No. 1:10-cv-1849 undermined the habeas corpus proceeding of the Petitioner's prior application and offended the U.S. Constitution and well established federal law, when, omitted trial defense evidence, evidence tampering by police officials, and governing legal principles were not considered by the district court. See the diminished unconstitutional district court review at APPENDIX D pp. 14-36. That type of improper unconstitutional review and its reliance is a broad a common practice in the Commonwealth of Pennsylvania courts, which more likely than not affected and continue to affect the rights of countless applicants in other jurisdictions/states who have yet to figure out the scheme. Because the scheme does exist as evidenced herein, this Petition for a Writ of Certiorari, calls on the Supreme Court of the United States, the Court of last resort, to establish precedent that requires a circuit or district judge to entertain a second or successive application for a writ of habeas corpus under 28 U.S.C. § 2244(a), if an applicant, such as the instant case, can prove that the legality of such detention was not determined on the prior application due to equitable considerations such as fraud, fraud upon the court, district court abuse of discretion, or any other equitable defect that rendered the proceeding on the prior application unconstitutional. Finality determinations must be subject to equitable considerations.

The federal (Finality of determination) statute provides that: "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States (if) it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus..." See 28 U.S.C. § 2244 (a).

In the instant case, and cases similarly affected, it (does not) appear that the "legality" of the detention has been determined by a judge or court of the United States, where the district judge on the prior application at Docket No. 1:10-cv-1849 abused its discretion and rendered clearly erroneous judgments as evidenced at APPENDIX D and APPENDIX E of the court's Memorandums. Notwithstanding the Respondent's fraud upon the court at APPENDIX 32 page 11 denying that Brady law was violated at trial, and, in the instant case where the Petitioner remains convicted on a fraudulant rape charge without having been afforded a defense against the charge at trial.

Therefore, the Supreme Court of the United States is being asked to answer;

"Whether a circuit or district judge is required under 28 U.S.C. § 2244 (a) to entertain a second or successive application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the 'legality' of such detention (has not) been determined by a judge or court of the United States on a prior application for a writ of habeas corpus?"

The Petitioner answers yes because the required duty under § 2244 (a) must be Honored by a circuit or district judge in order to determine federal finality and the "legality" of the detention, and in order to meet the standards of the United States Constitution and laws of the United States, as well as safegard the federal Rights of the applicant to appeal his/her conviction.

"When a criminal defendant fails to obtain fair appellate review of his or her conviction, she or he is deprived of the constitutional right to appellate review of the conviction", Bell v. Lockhart, 795 F. 2d 655, 657 (8th Cir. 1986).

An applicant seeking habeas corpus relief should not be forced to foreclose on the federal right to corrective process sought under § 2244 (a) after the application was undermined by the misconduct of a judge in a manner that offends the Constitution of the United States. The current practice of a U.S. District Court is to order an applicant to seek approval from a Court of Appeals under 28 U.S.C. § 2244 (b)(3)(A), that procedure subjects an applicant to forfeit the original claims under § 2244 (b)(1), or forfeit the right to appeal under § 2244 (b)(3)(E) when an applicant files a second or successive application. A Court of Appeals approval for a district court to hear a second or successive application should only be ordered by a U.S. District Court if it appears that the "legality" of the detention (has) been determined by a judge or court of the United States on a prior application, and, an applicant cannot show and prove that the "legality" of the detention has not been determined..., due to equitable considerations that renders the prior proceeding under §2244 (a) unconstitutional.

"Equitable considerations may make it appropriate for federal court's to fill in perceived omissions on the part of Congress. The United States Supreme Court has historically stressed the need to have habeas relief governed by equitable principles, stating that the very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected and that formalities yield to the imperative of correcting fundamentally unjust incarceration," Stocker v. Warden, 2004 U.S. Dist. LEXIS 5395 (Dist. Ct. 3d Cir. 2004). *Id.* LEXIS 22. "It is a canon of statutory interpretation that if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, a court is obligated to construe the statute to avoid such problems. The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality." *Id.* 23-24.

A Supreme Court ruling in this matter in favor of this petition would constitutionally and justifiably mandate the fact that finality determinations are subject to equitable considerations. With regard to second or successive applications that are filed in a case where there was no adjudication on the merits like in the instant case, the Supreme Court's decision in Slack concluded that such applications are not to be subjected to dismissal for abuse of writ, which comports with the alternative interpretation of §2244 (a) that this petition seeks.

"A federal habeas corpus petition filed by state petitioner, after initial petition was dismissed without adjudication on merits, held not to constitute second or successive petition subject to dismissal for abuse of writ," Slack v. McDaniel, 529 U.S. 473 (2000). *Id.*

Argument for Question four

4. The Court of Appeals departure from the accepted and usual course of judicial proceedings.

The Court of Appeals decision to deny relief in this matter constitutes and contributes to an arbitrary exercise of the powers of the government, and a departure from the accepted and usual course of judicial proceedings where; (1) during both proceedings over the Petitioner's application for a Certificate of Appealability (COA) at

C.A. No. 13-1894 at APPENDIX E, and C.A. No. 19-2270 at APPENDIX A1, the Court of Appeals failed to apply its standard of review to assess the U.S. District Court's decision to deny habeas corpus relief.

The standard of review for the 3d Cir. Court of Appeals that was not applied in this matter states the following:

"Appellate courts review legal determinations *de novo*, factual findings for clear error, and matters committed to the district court's discretion for abuse thereof," United States v. Doe, 810 F.3d 132, 142 (3d Cir. 2005).

Neither the district court or the court of appeals afforded a hearing to determine if tolling the statute of limitations is warranted in this matter upon the Petitioner's return on appeal, but, both courts refused to exercise jurisdiction or its inherent power to review fraud upon the court claims, or the Brady evidence that was suppressed at trial and concealed on appeal. The Petitioner presented evidence to show that he has been pursuing his rights diligently, and that state officials at trial and on appeal prevented the Petitioner from timely raising his Brady claim, and prevented the Petitioner from proving the claims existence while the Petitioner was within the limitation boundaries of the AEDPA statute on prior application. Under Supreme Court law, the Petitioner should have been afforded a hearing to determine the Petitioner's eligability for equitable tolling.

"A habeas petitioner is entitled to equitable tolling only if he shows, (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing", Holland v. Florida, 560 U.S. 631, 649 (2010).

Also, the underlying merits of the Petitioner's claims are; (A) that he is convicted on the charge of rape without having been afforded a trial defense against the charge, (b) that the conviction and judgment was obtained by fraud, (c) that the prosecutor knowingly and in bad faith suppressed material Brady evidence at trial, and (d) the Petitioner was denied fair and impartial appellate hearings by both state and federal courts where not one court conducted review on the documentary evidence that the Petitioner submitted to prove his above claims. During review of the Petitioner's application for COA, the Court of Appeals failed to conduct review on the underlying merits of the claims presented. On the issue of the underlying merits of the claims, the Supreme Court handed down the following law and guidance to both the applicant and the court:

"... when a habeas applicant seeks a COA, the Court of Appeals should limit its examination to a threshold inquiry into the underlying merit of his claims, Slack, 529 U.S. 473, 481. This inquiry does not require full consideration of the factual or legal basis supporting the claims. Consistent with this Court's precedent and the statutory text, the prisoner need only demonstrate a substantial showing of the denial of a constitutional right. § 2253 (c)(2). He satisfy this standard by demonstrating that jurist of reason could disagree with the district courts resolution of his case or that the issues presented were adequate to deserve encouragement to proceed further. *Id.* at 484. He need not convince a judge, or, for that matter, three judges, that he will prevail, but demonstrate that reasonable jurist would find the district courts assessment of the constitutional claims debatable or wrong," Cf. Miller El v. Cockrell, 537 U.S. 322, 154 L. Ed. 2d 931, 941 (2003).

In his application for a COA at C.A. No. 19-2270, the Petitioner asserted that reasonable jurist would find the district courts assessment of his constitutional claims debatable and wrong, where; (1) the district court failed to review the documentary evidence that the Petitioner submitted to support the merits of his claims, and (2) where the district court unconstitutionally applied the AEDPA standard of review to the Petitioners IAC claims instead of conducting *de novo* review after the state courts failed to adjudicate on the merits. The Court of Appeals also committed constitutional error by denying a COA after an erroneous finding that the Petitioner is not entitled to Rule 60 relief, and Rule 60, Fed. R. Civ. P. is not a claim presented in the Petitioners 28 U.S.C. § 2253 (c)(2) application, that was filed June 26, 2019. In his application for a writ of habeas corpus filed in the district court on June 12, 2018, the Petitioner did raise a claim seeking relief under Fed. R. Civ. P. § 60 (d)(3), for an underlying claim where the Respondents committed fraud upon the district court by knowingly submitting false declarations to deceive the court into believing that the Brady law was not violated at trial, which influenced the district court decision to deny habeas relief on the prior application at No. 1:10-cv-1849. See the false declaration at APPENDIX 32 page 11. Also see the Brady evidence at APPENDIX 28. Where the Respondents knowingly committed the above stated fraud upon the district court, the Petitioner is entitled to relief upon a showing of his entitlement to equitable tolling of the AEDPA.

The Supreme Court of the United States in its Gonzalez ruling expressly identifies "fraud on the federal habeas court as one example of a proper basis for Rule 60 relief," Gonzalez v. Crosby, 545 U.S. 524, 528-532, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005).

Therefore, it constitutes a departure from accepted and usual course of judicial proceedings that denied the Petitioner his 14th Amendment right to due process of law under the United States Constitution, where; (1) the Court of Appeals in this matter failed to apply its standard of review, and (2) where the Court of Appeals denied Rule 60 relief on the application for COA, and a Rule 60 claim is not presented for 28 U.S.C. § 2253 (c)(2) review. The Rule 60 claim is presented in the Petitioner's second habeas corpus petition under 28 U.S.C. § 2254, which requires a hearing on the issue of equitable tolling before a ruling can be made on the claims presented in the habeas corpus petition since that petition was filed outside of the AEDPA statute. The substantial showing of the denial of the constitutional right that the Petitioner presented under 28 U.S.C. § 2253(c)(2) was not addressed by the Court of Appeals. With regard to the above stated statutory and constitutional violations that were committed by state law enforcement personnel, and appellate court judges, the attached court Memorandums and ORDERS denying relief in this matter, serve as evidence of a systematic arbitrary exercise of the powers of the government, intended to deprive the Petitioner of his constitutional right to due process of law and the equal protection of the laws under the 14th Amendment, and to deprive the Petitioner of fair and impartial hearings to challenge his unconstitutional conviction.

"Due process of law, within the meaning of the 14th Amend. of the U.S. Const., is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of the government", Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969, 977 (1915).

"When a criminal defendant fails to obtain fair appellate review of his or her conviction, she or he is deprived of the constitutional right to appellate review of the conviction", Bell v. Lockhart, 795 F.2d 655, 657 (8th Cir. 1986).

Had the Petitioner followed the district court directive to seek approval from the Court of Appeals under 28 U.S.C. § 2244(b)(3)(A), the Petitioner would have involuntarily subjected his right to appeal to forfeiture without ever have been afforded a fair and impartial appellate review of his unconstitutional conviction, such as what had occurred in many other cases. A court of appeals refusal to approve the district court to consider a second or successive petition is immune to appeal under § 2244(b)(3)(E). That's the danger of an applicant being forced to foreclose his/her right to a fair and impartial hearing after the hearing was undermined by forces outside of the applicant's own conduct. A Supreme Court precedent on Question 3 of this petition is thereby constitutionally demanding.

Argument for Question Five

5. Petitioner's gateway claim of ACTUAL INNOCENCE and supplemental claim of ineffective assistance of counsel (IAC) claim

The Petitioner is raising his gateway claim of actual innocence under the Supreme Court decision that was handed down in McQuiggin v. Perkins, which states that; actual innocence, if proved, serves as a gateway through which

A petitioner may pass whether the impediment is a procedural bar, as it was in Schlup v. Delo, 513 U.S. 298, and House v. Bell, 547 U.S. 518, or expiration of the AEDPA statute of limitations, recognized in McQuiggin, at 569 U.S. 383, 391-398, 185 L.Ed.2d 1019, 1030-1034 (2013). The Petitioner also qualifies his actual innocence claim under the miscarriage of justice exception recognized in a diversity of Supreme Court cases collected in McQuiggin, at 185 L.Ed.2d 1019, 1031, in order to pursue the IAC claim being raised in this petition. The Petitioner's IAC claim is being raised under and is governed by United States v. Cronic, 466 U.S. 648, 80 L.Ed.2d 657, 104 S.Ct. 2039, where trial counsel entirely failed to subject the prosecutors case to a meaningful adversarial testing against the criminal charge of felony burglary and the prosecutors use of tainted evidence. The claims are as follows:

In the Petitioner's December 17, 2001 statement to police investigators and trial counsel, the Petitioner stated that he was invited to the Herring residence and let into the residence through the first-floor rear door by Mrs. Herring. See pages 19-20 of the statement at APPENDIX 46. On May 23, 2002, the prosecuting detectives and district attorney filed fraudulant criminal charges against the Petitioner, including Burglary under 18 Pa.C.S. § 3502(a), while knowing that detective Robert Zavada and Trooper Urban tampered with and fabricated physical evidence with the intent of falsifying an element of burglary and manufacture another felony predicate for first-degree homicide. There was absolutely no direct or reliable evidence presented at trial by the prosecution that connected the Petitioner to any of the two homicide victims. Upon arriving at the 7 Stark Street crime scene, Sergeant Joseph Coffay, the patrol supervisor, secured the residence and did not find evidence of a breakin after conducting a full three floor sweep. See Sgt. Joseph Coffay Report at APPENDIX 47. At trial Trp. Urban testified that before he began processing the crime scene, he did a walk-through, the purpose of the walk-through gave them an opportunity to evaluate evidence possibilities (N.T. 404-05). After his walk-through, Trp. Urban began processing the crime scene with a video camera. Trp. Urban testified that, while filming the crime scene, he utilized a crime scene filming method referred to as the (four compass points) of the room, which is used to film a 360 degree view of each room. That filming method was used to film the living room (N.T. 411), the dining room (N.T. 412), the kitchen (N.T. 413), the basement (N.T. 434), second floor bathroom (N.T. 470), and other second floor rooms (N.T. 470-471). But when the (third floor) of the crime scene appeared on the monitor via VCR, the bottom threshold of an entry door appeared on the monitor, and as the image of the door moved from the threshold and rose upward until the doorknob came into view, Trp. Urban turned the VCR and monitor off before showing areas of the door above the doorknob. Trp. Urban did not show in the video, nor did he testify to discovering evidence of damage to that third floor door as he turned the video off at (N.T. 472-473). The crime scene video was made on December 8, 2001. Trp. Urban also testified that 35 millimeter photographs were being taken on each level of the crime scene by Trp. Plant who was just minutes behind Trp. Urban (N.T. 523-525). The prosecution introduced more tainted evidence through the perjured testimony of detective Zavada. Zavada is the one who also planted the ski mask. With the assistance of Zavada's perjury, the district attorney knowingly and with reckless disregard for the truth, introduced additional false evidence when they presented photographs depicting (severe) damage to the third floor crime scene door. Commonwealth Exhibit Nos. 140, 141, 142, 143, 146, and 153 are photographs of damage to the (upper half) of the third floor door (above the doorknob), which is the part of the door that was not shown at trial when Trp. Urban showed the crime scene video. The photographs were admitted without defense objection at (N.T. 1039-1048), and the damage was narrated by Zavada at (N.T. 1041, 1042, 1044, 1046). Had such extensive damage been present on the door on December 8, 2001, Sgt. Coffay, Trp. Urban, and Trp. Plant would have all seen it, and such evidence would have been captured with video and 35 millimeter photography with time and date display. According to investigative reports by Trp. Urban and Trp. Plant, the above photographs were taken by them on December 10, 2001. See APPENDIX 48 and 49. But, its impossible, or at least illegal for the photographs to had been taken on 12-10-01, because, according to the Crime Scene Log,[1] NOBODY entered the crime scene on 12-10-01, and the Commonwealth had no reliable or legal way of proving otherwise had defense counsel challenged the admissibility of the tainted photographs at trial. Trial counsel was constitutionally ineffective for failing to challenge the admissibility of the tainted photographs, and for attempting an ineffective defense of convincing the jury into believing that the third floor door was (not) entered by outside force. Defense counsel called in an expert witness, Julius Pereira, III, who testified on direct that, "I'm not seeing forced entry" (N.T. 1868). But during the prosecution cross examination of Pereira concerning the experts report, when the prosecutor asked, "And some of the damage was caused by some force from the outside, isn't that what you indicated?" Pereira said, "Yes" (N.T. 1891). There was absolutely no cure for such prejudice to the Petitioner's defense where Pereira contradicted his own opinion. And if the prosecution was able to foresee Pereira's contradictary opinion, than so to did defense counsel. In his closing argument, the district attorney capitalized on defense counsel's above short-comings and ineffective use of Julius Pereira, by stating that, "So I asked him, well, then you're saying there was

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[1] The Crime Scene Log is located at APPENDIX 50.

forcible entry from the outside. Yes. Thier own experts words, ladies and gentlemen" (N.T. 2328). Had trial counsel moved to have the (upper half) of the third floor door viewed by the jury during the presentation of the crime scene video, the jury would have seen that there was no damage to the door on December 8, 2001 and no evidence of a breakin, and would have been able to reach a reasonable doubt of the Petitioner's guilt against the charge of burglary that was leveled fraudulantly as a felony predicate for first-degree homicide. It was police official(s) who caused the subsequent, post-crime scene video damage to the crime scene third floor door. A review of a full true copy of the crime scene video will show a reviewing court that there is no damage to the door. Had there been damage to the door during the filming of the December 8, 2001 crime scene video, Inp. Urban would have captured the damage as he stood at that door filming it, and that video evidence of a damaged door would have been shown to the jury instead of the tainted photographs that was used to deceive the jury. Trial counsel was ineffective for completely failing to challenge the tainted photographs, and for completely failing to show the part of the video to show that there was no damage to the door. The Petitioner is convicted in violation of the United States Constitution and laws of the United States, and the conviction constitutes a fundamental miscarriage of justice where the district attorney and his officers knowingly used and relied on false evidence to procure conviction against a citizen that they knew was innocent. Such an injustice should never happen to an American Citizen, especially not in his own country and by the hand of his own countrymen. The Petitioner has thus been denied his constitutional right to a fair trial and fair and impartial appeals.

"A conviction obtained by false evidence, known to be such by representatives of the state, must fall under the fourteenth Amendment," Napue v. Illinois, 360 U.S. 264, 268, 79 S.Ct. 1173 (1959).

WHEREFORE, and for all of the above stated reasons, the Petitioner prays that this Honorable Supreme Court of the United States GRANT a Writ of Certiorari in this matter to, (1) overrule the state inspired exception to this Court's Brady v. Maryland law, (2) to afford the first review on evidence that prove that the Petitioner is an INNOCENT MAN who is convicted by prosecutor's use of tainted evidence and trial counsel conflict of interest, and (3) so that this Court can establish precedent that recognize equitable considerations for second or successive petitions filed under 28 U.S.C. § 2244 (a) when the "legality" of the detention was not determined by a judge or court on the prior application for a writ of habeas corpus...

DATED: December 16, 2020

Henry Christopher Stubbs III

HENRY Christopher Stubbs, III, pro se

XII. CONCLUSION

This case, obtained by the prosecutions reliance on tainted evidence, fraud upon the court, and by trial counsel's conflict of interest, constitutes a fundamental miscarriage of justice committed against an INNOCENT American born citizen of the United States. Such injustice occurring against the rights, freedom, immunities, and privileges of the Petitioner, should not happen to any man or woman in the United States, especially not by the reckless disregard and hand of our own countrymen. THIS CASE MUST BE REVERSED!

Under the Supreme Court's well established law that the Petitioner has invoked in his appeals to protect his constitutional rights, the state court judgment of conviction at APPENDIX 51 cannot stand and must be REVERSED where the prosecutors knowingly use of tainted evidence, Napue, supra, 360 U.S. 264, and the prosecutors resort to fraud upon the court, Hazel-Atlas Glass, supra, 322 U.S. 238, to obtain a fraudulant conviction violates the Petitioner's 6th, 8th, 13th, and 14th Amendment Rights under the United States Constitution and laws of the United States. I did not deserve this injustice, and do not owe a debt to the Commonwealth of Pennsylvania.

UNSWORN DECLARATION

I, Henry Christopher Stubbs, III, do hereby declare under penalty of perjury that all of the foregoing statements made in my above and attached Petition for a writ of certiorari and the evidence thereof are all true and correct. I make this declaration under 28 U.S.C. § 1746.

Executed on this 16th day of December, 2020

Henry Christopher Stubbs III

Henry Christopher Stubbs, III, pro se
FN7407 / SCI Huntingdon
1100 Pike Street
Huntingdon, PA 16654-1112

IN THE SUPREME COURT OF THE UNITED STATES

HENRY CHRISTOPHER STUBBS, III,

PETITIONER, PRO SE

vs.

KEVIN KAUFFMAN, SUPERINTENDENT AT

SCI HUNTINGDON

RESPONDENT, et. Al.

XII. APPENDIX - PART ONE (Appx. - A to Appx. - 5)

The above named Petitioner moves to file, admit into evidence, and to publish his APPENDIX and EXHIBITS in support of his Petition for a writ of Certiorari in the Supreme Court of the United States. The authenticity of the exhibits are being certified as correct in accordance with Fed. R. E. § 902, and are relied on to show and prove that the Petitioner is unlawfully in the custody of the Commonwealth of Pennsylvania in violation of the United States Constitution and laws of the United States, where the judgment of conviction was procured by fraud, and the arbitrary exercise of the powers of the government are the reason for such unjust conviction being extended to constitute a fundamental miscarriage of justice. The exhibits attached to their perspective APPENDIX' are being filed for admissibility under Fed. R. E. § 1003 Admissibility of Duplicates, and under Fed. R. E. § 1005 Public Records.

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Pennsylvania. Docketed as 1:18-cv-128. Cited as Stubbs v. Kauffman, 2018 U.S. Dist. LEXIS 35780 (M.D. Pa. 2018). Argued June 12, 2018, Decided on May 07, 2019.

APPENDIX-B, the first Opinion of the PCRA court. Docket No. CP-40-CR-000844-2002. Filed on May 14, 2007, Decided on November 16, 2009.

APPENDIX-C, the first NON-PRECEDENTIAL opinion of the Superior Court of Pennsylvania, Docketed as 871 MDA 2008. Filed on September 12, 2008. Decided on March 24, 2010.

APPENDIX-D, the first Opinion of the United States District Court for the Middle District of Pennsylvania, Cited as Stubbs v. Curley, 2012 U.S. Dist. LEXIS 132656, 2012 WL4103926 (M.D. Pa. 2010). Argued on August 26, 2010. Decided on September 18, 2012. Docket No. 1:10-cv-1849.

APPENDIX-E, further proceeding of the United States District Court, M.D. at docket 1:10-cv-1849, Argued on August 26, 2010. Decided on February 28, 2013.

APPENDIX-F, the first ORDER of the Court of Appeals-Third Circuit. Docketed as C.A. 13-1894. Argued on March 25, 2013. COA denied on September 12, 2013.

APPENDIX-G, the first ORDER of the Court of Appeals-Third Circuit. Docketed as C.A. 13-1894. Argued on September 26, 2013. Rehearing denied on October 17, 2013.

APPENDIX-H, the Second Opinion of the PCRA court. Docket No. CP-40-CR-000844-2002. Filed on April 25, 2016. Decided on June 16, 2017.

APPENDIX-I, the Second NON-PRECEDENTIAL Opinion of the Superior Court of Pennsylvania, Docketed as 766 MDA 2017. Filed on July 27, 2017. Decided on December 15, 2017.

APPENDIX-A1, the Second ORDER of the Court of Appeals-Third Circuit. Docketed as C.A. 19-2270, Filed on June 26, 2019. COA denied on December 16, 2019.

APPENDIX-A2, the Second ORDER of the Court of Appeals-Third Circuit. Docketed as C.A. 19-2270, Filed on December 30, 2019. Rehearing denied on March 4, 2020.

APPENDIX-5, PCRA hearing (P.H) transcript pages from November 29, 2007. First PCRA.

APPENDIX-6, Page 51 of the Petitioner's statement given on December 17, 2001.

APPENDIX-7, Trooper Edward J. Urban, General Investigation Report, dated December 15, 2001.

APPENDIX-8, Laboratory Technician, Sandra Singer's handwritten notes on Elaina Herring's rape kit.

APPENDIX-9, Laboratory Technician, Sandra Singer's handwritten notes on Vicktoria Ivanova rape kit.

APPENDIX-10, U.S. Department of Justice, Handbook of Forensic Services, nine pages, double sided.

APPENDIX-11, Chain of Possession report of "Elana" Herring.

APPENDIX-12, Page 19 of November 29, 2007 PCRA hearing transcript.

APPENDIX-13, Pages 23 and 24 of the Petitioner's statement given on December 17, 2001.

APPENDIX-14, Pages 49 and 50 of the Petitioner's statement given on December 17, 2001.

APPENDIX-15, Pages 60 thru to 64 of the Petitioner's statement given on December 17, 2001.

APPENDIX-16, Trooper Edward J. Urban, General Investigation Report, showing date of December 11, 2001, that evidence was removed from 5 Stark Street in Wilkes-Barre, PA., (showing ski mask);
Property In Custody dated December 11, 2001, reflecting property removed from 5 Stark Street in Wilkes-Barre, PA., (showing ski mask);
Receipt/Inventory Report dated December 11, 2001, also reflecting property removed from 5 Stark St. in Wilkes-Barre, PA., (showing ski mask).

APPENDIX-17, Detective Timothy S. Judge, Supplement Report, showing date of December 12, 2001, Petitioner's arrest and property removed from Hicks Street in Philadelphia, PA., (No ski mask);
Property In Custody report dated December 12, 2001, showing property that detective Judge collected in Philadelphia (No ski mask).

APPENDIX-18, Laboratory Report showing property (ski mask) removed from 5 Stark Street;
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APPENDIX-19, Laboratory report and results showing property that was collected by detective Judge in Philadelphia (No ski mask).

APPENDIX-20, Laboratory test results of kitchen and bathroom sink traps from victim's residence 7 Stark Street; Laboratory test results of washer (washing machine) trap from the Petitioner's mother's residence 5 Stark Street.

APPENDIX-21, Pretrial conference transcript pages 10-13 held on November 18, 2002.

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APPENDIX-24, Page 6 Sections 12 and 13 of Petitioner's PCRA petition filed on May 14, 2007.

APPENDIX-25, PCRA Court ORDER dated June 6, 2007.

APPENDIX-26, Affidavit of Witness, Petitioner's mother.

APPENDIX-27, Letter to Petitioner from First PCRA Attorney Stephen A. Menn.

APPENDIX-28, Two page Criminal Indictment for Angela Michelle Mayfield; and two page Bench warrant showing that the warrant was (issued) on March 01, 2000, and (recinded) on April 07, 2005.

APPENDIX-29, Page 4 Sections 6 and 7 of Petitioner's PCRA petition filed on May 14, 2007.

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APPENDIX-32, Respondent's Brief in U.S. District Court filed at Docket No. 1:10-cv-1849 on June 6, 2011.

APPENDIX-33, County Courthouse Search Result from Internet Server - Yahoo.

APPENDIX-34, Respondents Brief in the Superior Court filed at Docket No. 871 MDA 2008 on 11-25-08.

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APPENDIX-44, Superior Court ORDER dated October 13, 2017 denying Petitioner's Amended Brief.

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APPENDIX-46, Pages 19 and 20 from the Petitioner's December 17, 2001 statement.

APPENDIX-47, Sergeant Joseph Coffay, Supplement Report.

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APPENDIX-49, Trooper Joseph M. Plant, Report

APPENDIX-50, Two page Crime Scene Log

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APPENDIX-52, Title 42 Pa. C.S.A. §9545 State Jurisdiction and Time for filing rule/exceptions

APPENDIX-53, Relevant parts of Trial Notes of Testimony (N.T.)

Henry Christopher Stubbs III

Henry Christopher Stubbs, III, pro se

FN7407 / SCI Huntingdon

1100 Pike Street

Huntingdon, PA 16654-1112