

No. 21-7112

A rectangular filing stamp with a double-line border. The word "FILED" is centered at the top in large, bold, capital letters. Below it, the date "JAN 31 2022" is stamped in a slightly smaller font. At the bottom, the text "OFFICE OF THE CLERK" and "COURT OF APPEALS" is printed, with "NEW YORK" in smaller letters above "COURT OF APPEALS". The stamp is partially obscured by a large, circular, semi-transparent seal or stamp in the foreground.

IN THE
SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK
JULY 1912
ORIGINALE
STATES

**SOPHANA SOVANN,
Petitioner**

VS.

**SUPERINTENDENT SMITHFIELD SCI; ET AL.
Respondents.**

ON PETITION FOR WRIT OF CERTIORARI TO

THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Mr. Sophana Sovann, #JL-7546
SCI-Smithfield
1120 Pike Street
P.O. Box 999
Huntingdon, PA 16652

QUESTION PRESENTED

.....

Was a pro se state prisoner denied his right to appeal the District Court's order denying his habeas corpus petition where state prisoner **never** received the denial order from the District Court Clerk and when the state prisoner discovered the denial order, prisoner immediately filed a motion pursuant to Federal Rule of Civil Procedure 60(b) and the District Court without opposition from the Respondents restored state prisoner's right to appeal to the Third Circuit requesting a Certificate of Appealability but that Court ruled that the appeal was untimely?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals en banc decided my case was November 18, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 60. Relief from a Judgment or Order

(b) *Grounds for Relief from a Final Judgment, Order, or Proceeding.* On motion and just terms, the court may relief a party or its legal representative from a final judgment, order, or proceeding for the following:

(6) any other reason that justify relief.

STATEMENT OF THE CASE

Petitioner was charged and convicted by a Pennsylvania state jury of third-degree murder, conspiracy and violation of the Uniform Firearm Act (VUFA) and sentenced to 30-60 years in a state correctional facility.

Petitioner filed direct appeal from his conviction in the Pennsylvania Superior Court and on September 14, 2011 the court affirmed the conviction. A timely petition in the Pennsylvania Supreme Court was denied on March 27, 2012.

A timely petition was filed under the Pennsylvania Post Conviction Relief Act, 42 Pa.C.S.A. §9541- 9546, alleging inter alia that trial counsel was ineffective for failing to call Seary Sovann as a material witness at trial. On April 4, 2014, the petition was denied without a hearing.

Thereafter, representing himself pro per⁶ Petitioner filed a timely appeal in the Pennsylvania Superior Court and that court issued a memorandum opinion denying relief. Commonwealth v. Sovann, No. 1230 EDA 2014, 151 A.3d 1148, 2016 WL2910028 (Pa.Super.2016). Petitioner did not seek discretionary review in the state's highest court.

⁶ The PCRA court permitted counsel permission to withdraw.

On August 31, 2016, Petitioner filed a habeas corpus petition pursuant to 28 U.S.C. §2254 in the United States District Court for the Eastern District of Pennsylvania arguing inter alia that trial counsel failed to call material witness, Seary Sovann.

The case was assigned to the Honorable United States District Court Judge Jan E. Dubois who referred the case to Honorable Magistrate Judge Henry S. Perkin. On December 12, 2018 the Magistrate Judge recommended that the petition be denied without a hearing and no issuance of a Certificate of Appealability (COA).

Thereafter, Petitioner filed objections to the report and recommendation (R&R) in large part because the Pennsylvania Superior Court and the Magistrate unreasonably heightened the Strickland standard for prejudice regarding his claim of ineffective assistance of counsel.

Pertinent to the procedural history of this case is the fact that prior to receiving the R&R on December 16, 2018 Petitioner was transferred from SCI-Smithfield in Huntingdon, Pennsylvania to SCI-Phoenix in Collegeville, Pennsylvania.

After filing objections to R&R at SCI-Phoenix, United States District Court Judge Jan Dubois issued an order denying the petition without an issuance of a COA on March 10, 2020.

Petitioner **never** received the March 10, 2020 order denying his habeas corpus

petition. It wasn't until Petitioner's return to SCI-Smithfield on May 12, 2021, when an institutional law library clerk informed him of the denial, did he first became aware that his habeas corpus petition had been denied.

Petitioner immediately filed a Fed.R.Civ.P. 60(b)(6) motion (with institutional documents attached that established that he never received the district court order denying his petition) to restore his right to challenge the district court's ruling by obtaining a COA in the Third Circuit Court of Appeals.

The district court without opposition from the respondents restored Petitioner's right to appeal the decision of that court to the Third Circuit Court of appeals on June 16, 2021. A timely Notice of Appeal Nunc Pro Tunc was filed in the Third Circuit Court of Appeals.

Petitioner requested an extension of time to file a formal application seeking a COA. On October 1, 2021, a panel of the Third Circuit Court of Appeals denied Petitioner's request for an extension of time and in the alternative denied the appeal as untimely citing the court lacked jurisdiction pursuant to Fed.R.App.P. 4 (C)(1)(A)(ii). See Exhibit "B" attached to petition.

Thereafter, Petitioner filed a timely petition for reargument en banc and the court denied the request on November 18, 2021. This timely request for a Writ of Certiorari follows:

REASONS FOR GRANTING THE WRIT

.....
REASONS FOR RESTORING PETITIONER'S RIGHT TO SEEK A
CERTIFICATE OF APPEALABILITY IN THE THIRD CIRCUIT COURT OF
APPEALS CHALLENGING THE DISTRICT COURT'S RESOLUTION OF HIS
HABEAS PETITION AS DEBATALE AMONGST JURIST
.....

Federal Rule of Appellate Procedure Rule 4 in relevant part reads as follows:

- (6) *Reopening the Time to File an Appeal.* The district court may open the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
- (A) the Court finds that the moving party **did not receive** Notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry.
 - (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives Notice under Federal Rule of Civil Procedure 77(d) of the entry, which is earlier, and
 - (C) the Court finds that no party would be prejudiced

In the case at bar, Petitioner filed a motion under Federal Rule of Civil Procedure 60(b) to restore his right to appeal the district court's decision denying his petition for writ of habeas corpus. The reasons behind Petitioner's filing the 60(b) motion

was to restore his right to seek a Certificate of Appealability (COA) in the Third Circuit Court of Appeals to challenge the district court's ruling denying his habeas petition.

After the district court granted Petitioner's right to restore his right to appeal without opposition from the respondents, Petitioner filed an appeal in the Third Circuit Court of Appeals, and after requesting in forma pauperis status and being issued an appeal number, he requested that he be granted an extension of time to file a formal application requesting a COA.

Subsequent to denying the request for an extension, the court issued an order denying Petitioner's request for an extension based on the fact that the appeal was untimely filed in the district court.

In denying Petitioner's request for an extension of time to file formal application for COA, and request for a COA as untimely, the Third Circuit Court of Appeals relied on a local precedent in IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118, 122 n.1 (3rd Cir.1986).

Petitioner contends that the panel's decision was misplaced as the case that was relied on was totally distinguishable from the facts at hand. For example, Barker v.

Williamson, did not file cross-appeal until 35 days later after the original order was entered. Rule 4(a)(1), F.R.A.P. allows a thirty day period for filing appeals after “the entry of the judgment or order appealed from.” Id.

Notably, Barker & Williamson, made no attempt to explain the delinquency of its cross-appeal to obtain an extension under Rule 4(a)(5), F.R.A.P., for excusable neglect or good cause. Id. n.1.

Presently, Petitioner **never received the order of judgment**. When he finally discovered that an order had been issued he filed a 60(b) motion requesting an opportunity to file notice of appeal nunc pro tunc for good cause i.e. **not receiving the dismissal order**.

Fed.R.Civ.P. 60(b) in relevant part states the following, “On motion and just terms, the court may relieve a party or its legal representative from final judgment, order, or proceeding for the following reasons: 60(b)(6) any other reason that justifies relief.

“Rule 60(b) allows a party to seek relief from a final judgment and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence.” Gonzalez v. Crosby, 545 U.S. 524, 528, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005). A motion filed pursuant to Rule 60 (b) is addressed to the sound discretion of the trial court guided by accepted legal principles applied

in light of all relevant circumstances, but may be granted only in extraordinary circumstances. See Moolenaar v. Gov't of Virgin Islands, 822 F.2d 1342, 1346, 23 V.I. 449 (3rd Cir.1987). Notably, a motion for reconsideration is not appropriate to reargue issues that the court has already considered and decided.

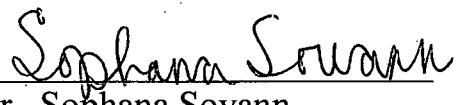
Simply put, if the Third Circuit Court of Appeals order is allowed to stand it would mean that, if a pro se petitioner or any party for that matter, did not receive a timely judgment for whatever reasons, there would be no remedy to appeal the break down in court operations.

What the Third Circuit Court of Appeals has overlooked is the fact that the district court and the respondents alike have acknowledged a breakdown in court operations and in equity obliged that Petitioner's right to appeal should be restored. At a time in this Countries unprecedeted history, with the different variants of this virus, not receiving orders or judgments are likely to occur again to others. For that reasons, this Court should establish precedent so that litigants, especially pro se litigants who rely on mail, can be treated somewhat equal to other parties.

CONCLUSION

The instant petition for writ of certiorari should be granted for the reasons stated within.

Respectfully submitted,


Sophana Sovann
Mr. Sophana Sovann

Date: January 29, 2022