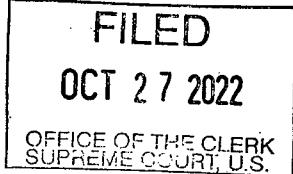


ORIGINAL

22-6030  
No.

Term



IN THE  
SUPREME COURT OF THE UNITED STATES

*In Re:*

Jason Paul Maple  
*Petitioner, Pro se*

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On Petition for Writ of Mandamus  
to the United States Court of Appeals  
for the Third Circuit (No. 20-2514)

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PETITION FOR WRIT OF MANDAMUS

Jason Paul Maple  
*Pro se*  
Prisoner No. HV3555  
SCI Mercer  
801 Butler Pike  
Mercer, PA 16137

## **Question(s) Presented**

1. Whether the United States Court of Appeals for the Third Circuit acted in excess of its jurisdictional power with respects to, *inter alia*, an abuse of discretion, deviation from the law and manifest disregard for controlling precedent, and infringement upon those rights guaranteed by the United States Constitution, as it relates to the adjudication of a constitutional trial error in this case.

## **Parties**

1. *Petitioner*, Jason Paul Maple, is a *Pro se* litigant, Prisoner No. HV3555, housed at the State Correctional Institution ("SCI") of Mercer, 801 Butler Pike, Mercer, PA 16137.

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## **Decisions Below**

### From Federal Courts

1. Reported at, *Maple v. Superintendent Albion SCI*, 2021 U.S. App. LEXIS 36623 (3d Cir. 2021), is the decision of the United States Court of Appeals for the Third Circuit.
2. Reported at, *Maple v. Clark*, 2020 U.S. Dist. LEXIS 115052 (W.D. Pa. 2020), is the decision of the United States District Court for the Western District of Pennsylvania.

## **Jurisdiction**

### From Federal Courts

1. On December 13, 2021, the United States Court of Appeals for the Third Circuit issued its judgment in the matter sought for review with this Court.
2. On December 23, 2021, a timely Petition for Rehearing was presented to the Third Circuit Appellate Court; and was denied on January 27, 2022.
3. On April 13, 2022, a timely Petition for Writ of Certiorari was presented to the Supreme Court of the United States; and was denied on June 27, 2022.
4. On July 11, 2022, a timely Petition for Reargument was presented to the Supreme Court; and was denied on August 22, 2022.
5. The statutory provision conferring on the Supreme Court of the United States the jurisdiction to review the judgment against which Mandamus is sought is 28 U.S.C. § 1652 (a).

## Legal Provisions Involved

1. This case involves Article VI of the United States Constitution, which states in pertinent part:

**Article VI § 2.** This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. This case also involves Amendments V, VI, and XIV to the Constitution of the United States, which provides in pertinent part:

**Amendment V.** No person shall...be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

**Amendment VI.** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...[and] to be confronted with the witnesses against him.

**Amendment XIV § 1.** No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. This case further involves the requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2254. The text of § 2254 states in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

4. Additionally, this case involves the Canons under Title 28 United States Code Service, Code of Conduct for United States Judges, which provides in pertinent part:

**Canon 1.** A judge should uphold the integrity and independence of the judiciary.

**Canon 2.** A judge should avoid impropriety and the appearance of impropriety in all activities.

**Canon 3.** A judge should perform the duties of the office fairly, impartially and diligently.

## Statement of the Case

### Factual History

1. The facts of this case brought out at Petitioner's trial were summarized by the Pennsylvania Superior Court (and referenced in the Western District Court's Memorandum and Order) as follows:

At approximately 4:00 A.M. on May 30, 2006, William Teck and Patrick Altman were walking along railroad tracks in Manor, Pennsylvania. Mr. Teck and Mr. Altman had been staying at the residence of Jennifer Vinsek, who was [Petitioner's] girlfriend and Mr. Altman's cousin. [Petitioner] shot and killed Mr. Teck with a shotgun and then fired his weapon at Mr. Altman. While Mr. Altman was not struck with a bullet, he dropped a bag that he was carrying as he fled the scene.

[Petitioner's] accomplices in the crime included Jennifer Vinsek, Dewayne Shank, Dewayne's brother Nathan Shank, and Ryan Bronowski. Following the shootings, Nathan removed a backpack from Mr. Teck's body, and [Petitioner] retrieved Mr. Altman's abandoned bag. Dewayne, Nathan, and Bronowski testified against [Petitioner] at trial. The Commonwealth witnesses also included Mr. Altman, Amu Kujawa, who was Vinsek's roommate, and Robert Johnson, a friend of Ms. Kujawa and Vinsek.

The motivation for the crimes generated from events that started about a week prior to the shooting on May 23, 2006. At that time, Mr. Johnson inadvertently walked in on Vinsek and Mr. Teck engaged in consensual sexual intercourse at Ms. Kujawa's and Vinsek's residence at 12 B Division Street, greensburg, Pennsylvania. On Thursday, May 25, 2006, Vinsek left with [Petitioner] to go camping, where they stayed until May 29, 2006. During their camping trip, Vinsek told [Petitioner] that Mr. Teck had assaulted and attempted to rape her.

When Vinsek and [Petitioner] returned to greensburg on May 29, 2006, they went to Vinsek's apartment, which was in disarray. Vinsek claimed that Mr. Teck and Mr. Altman were responsible for the damages and that they also had stolen items. Vinsek and [Petitioner] immediately tracked down Mr. Teck and Mr. Altman, who were drinking at Clear Waterz Bar in Greensburg, where Ms. Kujawa worked as a bartender. At about 12:30 A.M. on May 30, 2006, [Petitioner] and Vinsek confronted the two men and, at approximately 1:00 A.M., were ejected from Clear Waterz Bar by the owner.

[Petitioner] and Vinsek then returned to 12B Division Street and contacted police to report a burglary had occurred. Greensburg Police Officer's Donald Sarsfield and Kerry Dieter responded to the burglary report. Mr. Johnson was presented because he had seen Mr. Teck and Mr. Altman at the apartment during the day of May 29, 2006. Vinsek

informed police that Mr. Altman and Mr. Teck burglarized her apartment and that Mr. Teck had attempted to rape her the previous week. In the presence of police officer Sarsfield, police officer Dieter, and Mr. Johnson, [Petitioner] threatened to retaliate against Mr. Teck and Mr. Altman.

After officers Dieter and Sarsfield left Vinsek's apartment, [Petitioner] contacted Dewayne Shank and asked him for assistance in confronting Mr. Teck and Mr. Altman. [Petitioner] told Dewayne to enlist the aid of Nathan Shank and Bronowski and informed the Shank brothers that Mr. Teck had guns, money, and drugs in his backpack, and that he wanted to retaliate against Mr. Teck and Mr. Altman for certain crimes that they had committed against Vinsek. [Petitioner] promised the Shanks that they could keep the guns, money, and drugs in Mr. Teck's possession in return for their assistance.

While [Petitioner] was arranging for help, Mr. Teck and Mr. Altman left Clear Waterz Bar and went to Manor Diner. Vinsek located the two men through Ms. Kujawa. Nathan, Dewayne, and Bronowski drove to Manor and rendezvoused with [Petitioner] and Vinsek. Vinsek then induced Ms. Kujawa to invite Mr. Teck and Mr. Altman to a party at 12B Division Street so that the two victims, who did not have a vehicle, would leave the diner to walk to Greensburg. When the two men left Manor Diner and started out toward Greensburg along the railroad tracks, [Petitioner] followed the two men and fired his shotgun twice at them, killing Mr. Teck.

*See, Reproduced Record ("RR"), P. 1536-37.*

#### Procedural History

1. On or about May 30, 2006, Jason P. Maple ("Petitioner") was charged by criminal information with criminal homicide in the shooting death of William Teck; criminal attempt and aggravated assault of Patrick Altman; criminal conspiracy; and other related offenses. *RR, P. 88-91.*

2. On December 20, 2006, the Court of Common Pleas held a pretrial hearing regarding Petitioner's Omnibus Pretrial Motion which sought to suppress confessions made by himself on the grounds that they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). On May 21, 2007, the Court of Common Pleas entered an order denying Petitioner's motion to suppress. *RR, P. 91-95.*

3. On May 13, 2008, a jury trial in the matter of *Commonwelath v. Jason P. Maple*, 2544 & 2545 c 2006, Commenced with deliberations beginning on May 21, 2008. On May 22, 2008, a mistrial was granted due to jury tampering by Teck's family. A second jury trial commenced on September 8, 2008. The jury returned a verdict of guilt on September 16, 2008, to the following: first degree murder, criminal attempt homicide, aggravated assault, three counts of criminal conspiracy, and robbery.

4. By amended order filed on December 2, 2008, Petitioner was sentenced to "life" in prison without a possibility of parole, followed by 12 to 23 years consecutive imprisonment. *RR, P. 467-72*. Subsequent to sentencing, a timely Direct Appeal was taken to the Pennsylvania Superior Court, where Petitioner took issue *inter alia* with the trial court's error in not finding a violation of his *Miranda* warnings had occurred and allowing the admission of his confession into evidence at trial. *RR, P. 552-624*.

5. On August 6, a three judge panel of the Pennsylvania Superior Court unanimously concluded that Petitioner's confession was indeed procured in violation of his Fifth Amendment rights and erroneously admitted into evidence at trial. However, the Majority found that its admission into evidence constituted harmless error. *No. 2150 WDA 2008*. (In a concurring statement, Judge Musmanno emphasized his reluctance to find harmless error where the Majority had acknowledged that a constitutionally-infirm confession was improperly admitted into evidence). *RR, P. 699-732*. *See, Appx. E*.

6. On January 30, 2014, Petitioner filed a *nunc pro tunc* Petition for Allowance of Appeal to the Pennsylvania Supreme Court, challenging the Superior Court's harmless-error determination regarding the erroneously introduced illegally obtained confession. *RR, P. 1189-1263*. On June 12, 2014, the Supreme Court entered an order denying the petition. *No. 54*

WAL 2014.

7. On April 24, 2017, Petitioner presented a timely *Pro se* Petition for Writ of Habeas Corpus (28 U.S.C. § 2254) to the United States District Court for the Western District ("Western District") of Pennsylvania (amended August 21, 2017), where Petitioner took issue *inter alia* with the decision below regarding the harmlessness of his erroneously introduced illegally obtained confession.

8. On May 15, 2018, the Western District Magistrate Judge issued a Report and Recommendation ("R&R") to the Court that Petitioner's petition be dismissed and a Certificate of Appealability be denied. *See, Appx. C.* On June 23, 2018, Petitioner filed timely objections to the R&R.

9. On June 30, 2020, the Western District issued its judgment, GRANTING Petitioner's Writ and VACATING his conviction. No. 2:17-cv-00529. *See, Appx. B.*

10. On November 10, 2020, counsel for the respondent in the matter filed an appeal to the United States Court of Appeals for the Third Circuit ("Third Circuit") contending the Western District's order granting the Writ. On December 13, 2021, the Third Circuit issued judgment, REVERSING and REMANDING back to the Western District for denial of habeas relief. *See, Appx. A.*

11. On December 23, 2021, Petitioner filed a timely *Pro se* Petition for Rehearing with the Third Circuit, bringing to its attention that its judgment reflected a departure from judicial precedent and custom, constituting an error of law. On January 27, 2022, the Third Circuit denied Petition for Rehearing. *See, Appx. D.*

12. On April 13, 2022, Petitioner filed a timely *Pro se* Petition for Writ of Certiorari to the Third Circuit with the Supreme Court of the United States ("SCOTUS"), where the question

presented was whether the Third Circuit adhered to the terms of harmless-error review, judged by the standard set-forth by SCOTUS, as it relates to a constitutional trial error in this case.

13. On June 27, 2022, the Petition for Writ of Certiorari was denied. *See, Appx. F.* On June 11, 2022, Petitioner filed a timely *Pro se* Petition for Reargument with SCOTUS; and on August 22, 2022, the Petition for Reargument was denied. *See, Appx. G.*

14. Petitioner now proceeds *Pro se* to SCOTUS with a Petition for Writ of Mandamus to the Third Circuit. Aver as follows:

## Statement Pursuant To Extraordinary Writ (SCOTUS Rule 20)

The matter at hand presents circumstances that are truly exceptional which justify the issuance of this Writ sought by Petitioner in this case. As discussed in detail below, the United States Court of Appeals for the Third Circuit ("Third Circuit") has adjudicated a matter presented to it in a manner that is clearly erroneous as a matter of Federal law and constitutional principle, amounting to an indisputable abuse of discretion and judicial power.

Understanding of this matter requires considering a trial at which the defendant's illegally obtained confession was introduced into evidence, further impelling his trial testimony. In the context of Habeas Corpus (28 U.S.C. § 2254) proceedings, the Federal harmless-error analysis and relative standards-of-review to be applied in such a case are clearly set-forth by the Supreme Court of the United States ("SCOTUS"). *See, e.g., Brecht v. Abrahamson, 507 U.S. 619 (1993); Harrison v. United States, 392 U.S. 219 (1968).*

Here, however, the Third Circuit has exceeded its jurisdiction by adjudicating such a matter with the appearance of discriminatory predisposition. In doing so, it manifestly disregarded the mandates of controlling precedent in this case and abused its power in order to improperly secure a result that was within the interests of a biased and prejudicial tribunal.

Compounding this outrageous miscarriage of justice, the Third Circuit's conduct further frustrates the 'beyond a reasonable doubt' standard; the jury-trial guarantee; the confrontation clause; the substantive and procedural due processes; and the equal protection doctrine -- of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Judicial discretion in this case required the exercise of judgment based on what is fair under the circumstances and guided by the rules and principles of law. However, because the

Third Circuit abused that discretion and deviated from the law, it created a jurisdictional defect.

The Third Circuit's judgment in this case is therefore invalid, and a clear right to relief exists.

This right to relief exists in that [some act to be done] was due to Petitioner by binding authority and constitutional guarantee. There was a duty to act, and it is a breach of that duty which created this right. The Third Circuit's error is plain in that it is so obvious and substantial that failure to correct it would infringe upon that right and damage the integrity of the judicial process.

The Third Circuit had a duty in this case to exercise its discretion in a manner consistent with the objects of law. This duty was to apply at all times during the Court's activities, including the discharge of the judge's adjudicative responsibilities. Moreover, this duty was to be guided by those Canons underlying the Code of Conduct for United States Judges. It's the Court's adherence to this code and to the law that preserves public confidence in the impartiality of the judiciary.

Conversely, public confidence in the judiciary and our system of government is eroded by violations of this code, the law, court rules, the constitution, or any other conduct by judges that has the appearance of impropriety or can reasonably be interpreted as prejudice or bias.

It follows, then, that this matter presented for consideration is also of great public importance as its resolve will demonstrate to the public (including the media that covers the courts) a correction of abuses perceived as severely detrimental to societal interests, thereby promoting respect, trust and confidence in the fundamental principles of American jurisprudence. Resolution will demonstrate fairness and uniformity of treatment where adjudications are based solely on relevant law as it's applied to the facts at issue, irregardless of personal belief and preconception.

The exercise of this Court's discretionary power to remedy this dysfunctional phenomenon

would go a long way toward guarding against extreme malfunction in the criminal judicial system. Resolve is necessary so as to avoid offending constitutional principle and prevent a serious disruption of our laws. Without it, there is no more undermined the incentives of lower federal and state courts to honor the commands of precedential law than there is undermined the incentives of law enforcement to adhere to the requirements of *Miranda* and the Fifth Amendment.

It is necessary here to advance the recognized need for certainty, stability, and uniformity of law. *Lemon v. Kurtzman*, 411 U.S. 192, \_\_\_ (1973). It is necessary to promote the evenhanded, predictable, and consistent development of legal principle; to foster reliance on judicial decisions; and to contribute to the actual and perceived integrity of the judicial process. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

Lastly, review of Petitioner's conviction was initially sought by way of Direct Appeal and Direct Collateral Review in the state courts. The conviction was then challenged through the posture of Federal Habeas Corpus review (§ 2254). Habeas proceedings pursued all the way to SCOTUS where Petitioner's for Writ of Certiorari and Reargument were denied. This Honorable Court now is presented with this Petition for Writ of Mandamus. To the best of Petitioner's knowledge, he is left without any other means by which adequate relief can be obtained. It cannot be obtained in any other form or from any other court. This mandamus petition is the only remaining option and hope.

Petitioner has not "slept upon his rights". His active litigation posture has been far from neglect or delay. "In light of the drastic nature of mandamus and [SCOTUS] precedents holding that mandamus may not issue so long as alternative avenues of relief remain available, [Petitioner] cannot be faulted for attempted to resolve the dispute through less drastic means. The

law does not put litigants in the impossible position of having to exhaust alternative remedies before petitioning for mandamus, on the one hand, and having to file the mandamus petition at the earliest possible moment to avoid laches, on the other". *Cheney v. United States District Court for D.C.*, 542 U.S. 367, 379-80 (2004).

Therefore, this petition is properly before SCOTUS for its consideration. And if anyone is responsible for ensuring the commands of Federal law are adhered to, it is this Honorable Court. It is within this Court's power, but also it's duty to provide the proper resolution to this case or controversy. Without it, Federal law, 'as determined by [SCOTUS]', might be applied one way by the lower court's in Pennsylvania, another way in Virginia, and yet another way in California.

## Reasons For Granting The Writ

**Background.** Previously on Direct Appeal, a three-judge panel of the Pennsylvania Superior Court unanimously concluded that Petitioner's confession in this case was indeed procured in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) and his Fifth Amendment Rights, and was erroneously admitted into evidence at trial. However, the Court found that the violation amounted to harmless error, and affirmed Petitioner's sentence. *See, Appx. E.* (In a concurring statement, Judge Musmanno emphasized his reluctance to find harmless error where the Majority had acknowledged that a constitutionally-infirm confession was improperly admitted into evidence). *See, Appx. E33.*

On Writ of Habeas Corpus, the United States District Court for the Western District of Pennsylvania ("Western District") found that the state Superior Court's *Miranda* violation ruling was *not harmless error* in that the harmlessness determination was contrary to, or involved an unreasonable application of, clearly established Federal law under 28 U.S.C. § 2254 (d) - namely, *Brecht v. Abrahamson*, 507 U.S. 619 (1993); and, *Harrison v. United States*, 392 U.S. 219 (1968). The Western District ultimately concluded that the admission of Petitioner's confessions at trial - including both of his confessions obtained in violation of *Miranda* and his "testimony impelled thereby" - "had a substantial and injurious effect or influence in determining the jury's verdict". *See, Appx. B19 to B24 (quoting, Harrison, 392 U.S. at 222; Brecht, 507 U.S. at 637).* Petitioner's Writ was therefore GRANTED and his conviction VACATED.

Pursuant to the Commonwealth's appeal to the United States Court of Appeals for the Third Circuit ("Circuit Court"), the Third Circuit REVERSED the Western District Court's judgment and REMANDED the matter back for denial of habeas relief. *See, Appx. A.*

***Complaint.*** Firstly, the Third Circuit's judgment in this case reflects a biased approach of review in its opening statement: "Not every murder is a mystery. Here, we know who did it: Jason Maple". *See, Appx. A2.* Quite obviously we know who did it as this case involves the erroneous introduction of an infirm confession. However, because of the fact that Petitioner's confession to the crime was obtained (although illegally), it appears the Third Circuit was of a preconceived opinion - that is, a predisposition to decide the case against Petitioner without proper consideration of the facts and relative law applicable to the matter.

The substantive Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution requires fairness, impartiality and reasonableness in the manner by which a court exercises its authority. But because the Third Circuit was unable to exercise it's functions impartially and without prejudice to the subject-matter involved, an outrageous miscarriage of justice has ensued. And because the Third Circuit has allowed itself to violate it's neutral functionary duties, and abandoned the integrity, authority and jurisdiction of it's Court, it's judgement in this case should be disqualified. *See further, "Code of Conduct" of this petition.*

Secondly, the Third Circuit's bias is further evidenced where it disregarded the requirements of the procedural Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution. The procedural Due Process Clause requires fairness, impartiality and reasonableness in the manner in which rules and modes of procedure are exercised and enforced. Here, however, the Third Circuit has deliberately ignored the Commonwealth's procedural requirements and circumvented enforcing such in order to erroneously allow it the opportunity to secure a different resolution of the underlying *Miranda* violation - an opportunity that the Commonwealth had previously allowed to pass by in the state courts.

In order to intervene in the matter and save the illegality of Petitioner's confession, the Third Circuit attempted to sneak in the back door by opining that the Western District erred in relying on the exhaustion doctrine pursuant to 28 U.S.C. §2254 (B)(1), as it only applies to prisoners seeking habeas relief, and not states defending convictions. *See, Appx. A4 to A5.* This, however, is a misrepresentation of the record. Nowhere in the Western District's memorandum do the terms of an exhaustion doctrine come into play regarding the *Miranda* violation. *See, Appx. B.* Rather, the Western District simply alluded to the Commonwealth's qualification to perform according to professional norms and procedural rule:

With respect to the underlying *Miranda* violation, the Court agrees with Petitioner that, if the Commonwealth wished to challenge the Superior Courts finding, it should have pursued that argument on Direct Appeal. Because the Commonwealth did not do so, the determination is entitled to this Court's deference, and the undersigned finds no reason to disturb it. Rather, the issue presented by Petitioner is the harmless error determination.

*See, Appx. B19 (footnote 13).*

The *Miranda* issue was conclusively settled by judgment. The Third Circuit was therefore precluded from calling the matter back into question as the Commonwealth was *estopped* by its own acts (or lack thereof) from relitigation. Thus, the Third Circuit exceeded its jurisdictional power by dealing with a matter about which it was without authority to do so. Even though it had jurisdiction over the parties to the proceeding, the Third Circuit had no authority to open that door to the *Miranda* violation because it lacked subject-matter jurisdiction.

Finally, with its foot now in the door, the Third Circuit was able to conduct *de novo* review, and ultimately reversed the Western District's judgment, remanding the case back for denial of habeas while holding that the state Superior Court's harmless-error ruling was "reasonable". *See, Appx. A6.*

As an initial point, *de novo* review required the harmlessness issue to be addressed anew,

the same as if it had not been heard before and if no decision had been previously rendered.

However, the judgment of the Third Circuit reflects a review of the state Superior Court's harmless-error analysis under AEDPA's unreasonableness standard. 28 U.S.C. §2254(d).

[I]n 2254 proceedings, a Federal court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set-forth in *Brecht*, whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set-forth in *Chapman*.

*Fry v. Pliler*, 551 U.S. 112, 121-22 (2007) (citations omitted). See, e.g., *Davis v. Ayala*, 135 S.Ct. 2187, 2199 (2015) ("[A] prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, and if the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA"); *Bond v. Beard*, 539 F.3d 256, 275-76 (3d Cir. 2008) (where a court considering a habeas petition must perform its "own harmless error analysis under *Brecht v. Abrahamson*, rather than review the state court's harmless-error analysis under the AEDPA standard").

Thus, where the Third Circuit explicitly conducted *de novo* review, it was to conduct its own harmless-error analysis under the *Brecht* standard of review (set-forth in detail below) rather than test its confidence in the state-court's harmless-error analysis under AEDPA. But because it did not, the Third Circuit's adjudication was an unreasonable departure from settled precedent and judicial custom, constituting an error of law.

In the context of habeas corpus review, the Third Circuit's adjudication of this case has "resulted in a decision that is contrary to, or involved an unreasonable application of, clearly established federal law, as determined by [SCOTUS]". 28 U.S.C. §2254 (d)(1). If the adjudication was fairly consistent with the requirements of Federal law, then yes, it might be considered reasonable. In this case, however, the Third Circuit *unreasonably* refused to extend a legal standard from SCOTUS precedent to a context where it should apply. This was not an incorrect interpretation of Federal law, but rather an unreasonable application thereof.

Furthermore, the ultimate basis for the Third Circuit's judgment was that, after weighing

the evidence against Petitioner as being "very strong" and finding that he "doubtless would have been convicted of first-degree murder" absent the erroneous admission of his illegally obtained confession. *See, Appx. A6*

The judgment of the Third Circuit proceeded as if harmless-error analysis is synonymous with weight and sufficiency-of-the-evidence review, and focused on whether the state could theoretically sustain a conviction without the erroneously admitted confession. However, this is not and cannot be the test.

Set-forth in detail below, it bears repeating that the determinative consideration is **not** the strength of the evidence or the probability of reconviction. It is **not** whether there is other legally sufficient evidence of guilt on which the accused could have been convicted. The court is **not** to weigh evidence or search for evidence to support a **harmlessness** determination. **Nor** is it to assume the role of hypothetical jurors at a hypothetical retrial.

Rather, the correct inquiry was under *Brech v. Abrahamson*, 507 U.S. 619 (1993), where the focus should have been on the jury and whether the erroneous admission of Petitioner's infirm confession "had a substantial and injurious effect or influence in determining [their] verdict". *Id. at 623*. The Third Circuit in this case was to inquire into the actual effect the error had on the jury's verdict, and whether the error substantially affect the actual thinking of the jurors or the deliberative processes by which they reached their verdict.

***The Brecht/Kotteakos Standard.*** In *Brech v. Abrahamson*, 507 U.S. 619 (1993), the Supreme Court held that the less stringent harmless-error standard used by Federal courts in cases on non-constitutional trial error - the *Kotteakos* standard - applies, as well, in determining whether habeas relief should be granted in cases of constitutional trial error. *Id. at 638*. The test

under *Kotteakos v. United States*, 328 U.S. 750 (1946), is whether the error "had a substantial and injurious effect or influence in determining the jury's verdict". *Id. at 756.*

In the context of a harmless-error review in this case, the Third Circuit was given a very comprehensive legal standard to which it was to adhere when applying it. *Brech*t controls that context, and the standard to which it's Court repeatedly referred, drawn from *Kotteakos*, is plain: "[T]he standard for determining whether habeas relief must be granted is whether ... the error had a substantial and injurious effect or influence in determining the jury's verdict." *Brech*t, 507 U.S. at 623 (quoting, *Kotteakos*, 328 U.S. at 776).

*Kotteakos* could not be clearer on this point, given its repeated descriptions of the actual-effect focus of harmless-error analysis. *See, Kotteakos*, 328 U.S. at 762 (analysis focuses on "relation of the error asserted to casting the balance for decision on the case as a whole"); *Id. at 764* ("effect the error had or reasonably may be taken to have had upon the jury's decision"); *Id.* ("impact of the thing done wrong in the minds of [the jurors]"); *Id.* (whether the error "influence[d] the jury"); *Id. at 765* (whether "the judgment was ... substantially swayed by the error"); *Id.* ("whether the error itself had a substantial influence"); *Id. at 776* (whether "error had substantial and injurious effect or influence in determining the jury's verdict").

The determinative consideration under the *Brech*t/*Kotteakos* standard is not the strength of the evidence or the probability of conviction at a hypothetical retrial absent the error. *See, Brech*t, 507 U.S. at 642 (Stevens, J., concurring) ("The habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place. *Kotteakos* is full of warnings to avoid that result".)

Rather, the relevant question is whether the error substantially affected the actual thinking of the jurors or the deliberative processes by which they reached their verdict. Once again, the

words of Justice Rutledge in *Kotteakos* are instructive as he eloquently expounded on the proper way in which the reviewing court should assess whether the error was harmless in the context of determining the effect of errors in a criminal case:

[I]t is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impression. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error.

But this does not mean the appellate court can escape all together taking into account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

*Kotteakos*, 328 U.S. at 763-65 ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error"); See, *Brech*t, 507 U.S. at 642 (Stevens, J., concurring) (passage quoted in text above is one "that should be kept in mind by all courts that review trial transcripts").

The best way to illustrate proper application of the *Brech*t harmless-error review is to consider the approach in the case in which it was established - *Kotteakos*. In *Kotteakos*, the court reversed a lower court conclusion that an instructional error was harmless "since guilt was so manifest". *Kotteakos*, 328 U.S. at 775. Although agreeing with the lower court that guilt was manifest, the court nonetheless found the error prejudicial because the error "pervaded the entire charge", *Id.* at 768; and accordingly made "highly probable that the error had a substantial and injurious effect or influence in determining the jury's verdict". *Id.* at 776.

In reaching this result, the *Kotteakos* court took great pains to make clear to lower court judges that the touchstone of harmless error is not whether "there was enough [evidence] to

support the result, apart from the phase affected by the error"; or whether "the evidence offered specifically and properly to convict each defendant would be sufficient to sustain his conviction, if submitted in a separate trial"; or whether "conviction would, or might probably, have resulted in a properly conducted trial"; or even whether "the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden, if it had been presented in [proper] trials". *Id.* at 763-65, 767, 775-76.

As the Supreme Court has stated, the question of harmless error is not simply whether there is other legally "sufficient evidence [of guilt] on which the accused could have been convicted without the evidence complained of". *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963). "Further, it has been held to be inappropriate to ask whether there was sufficient evidence to support the result, apart from the phase of trial affected by the error. Rather, the correct inquiry is whether the error had a substantial and injurious influence on the verdict despite sufficient evidence to support the result apart from the error". *Hassine v. Zimmerman*, 160 F.3d 951, 955 (3d Cir. 1998). See, *Gov't of the Virgin Islands v. Martinez*, 620 F.3d 321, 337-38 (3d Cir. 2010) (where the court reiterated that constitutional harmless error analysis is not merely a review of whether the jury "could have" returned a verdict absent the constitutional error. Such an analysis improperly conflates sufficiency-of-the-evidence review with the appropriate ... [harmless error] standard).

***Actual Prejudice.*** Petitioner does not attempt to minimize the significance of relevant evidence that was presented at trial. Notably, the jury *could have* found sufficient evidence to convict him without his confession. However, it is not the province of the court to weigh the evidence or search for evidence to support a harmlessness determination. While Petitioner

recognizes that there is evidence in support of the jury's verdict, this is not a sufficiency-of-the-evidence issue. The question is whether the error had a substantial and injurious influence on the verdict. That there was sufficient evidence for a conviction without the confession does not prove an absence of prejudice.

"[U]nder the *Chapman* standard reserved for constitutional error ... the government must prove beyond a reasonable doubt that the defendant was uninjured by the error ... There must be 'no reasonable possibility' of prejudice for an error to be deemed harmless". *United States v. Toliver*, 330 F.3d 607, 613 (3d Cir. 2002). Likewise, "[i]n 2254 proceedings, a court must assess the prejudicial impact of constitutional error in a state court criminal trial under the 'substantial and injurious effect' standard articulated in *Brecht. Fry v. Pliler*, 551 U.S. 112, 121 (2007). Under this standard, habeas petitioner's are not entitled to relief unless they can establish that it resulted in "actual prejudice". *United States v. Lane*, 474 U.S. 438, 449 (1986).

The presence of 'actual prejudice' in this case is first made apparent through the Pennsylvania Superior Court's harmless-error analysis under *Commonwealth v. Hutchison*, 811 A.2d 556, 561 (Pa. 2002) (where, in part, a finding of harmlessness requires conclusion that the error did not prejudice the defendant or the prejudice was *de minimis*). Yet, not even the Superior Court could come to such a conclusion - that is, that the admission of Petitioner's confession did not prejudice him or that the prejudice was *de minimis*. See, *Appx. E18*. This is for good reason too.

The context of Petitioner's statement - a full confession - contained many highly damaging admissions that substantially bore plainly on issues central to the jury's verdict. In his confession, Petitioner acknowledges his provocation (motive) for the shooting; his intent to kill; his presence at the scene of the crime; his guilt and role as the shooter; what type of weapon was

used; and more. Petitioner's confession locked him into a highly incriminating depiction of the shooting. Indeed, it was "probative and damaging", *Brecht*, 507 U.S. at 642-43; "infecting his entire trial with error of constitutional dimensions". *United States v. Frady*, 456 U.S. 152, 170 (1982).

When such a powerfully incriminating extrajudicial statement of a defendant who stands accused is deliberately spread before the jury, "the practical and human limitations of the jury system cannot be ignored". *Bruton v. United States*, 391 U.S. 123, 135 (1968). As the Third Circuit has explained:

[A] classic example arises during a joint criminal trial, in which one defendant has confessed to the crime and the confession implicates his co-defendant. The confession is admitted into evidence, and the jury is instructed to ignore the confession as evidence against the co-defendant. This asks the impossible of our jurors. In *Bruton v. United States*, 391 U.S. 123 (1969), the Supreme Court held that in these circumstances we cannot rely on a juror's ability to put such an inculpatory statement out of their minds.

*Johnson v. Superintendent Fayette SCI*, 949 F.3d 791, 794 (3d Cir. 2020) (holding that the error was not harmless because co-defendant's confession, when viewed in tandem with the prosecution's witnesses' less-than-credible testimony, eliminated the space for reasonable doubt in the juror's minds).

Likewise, the Supreme Court in *Arizona v. Fulminate*, 499 U.S. 279 (1991), also explains:

A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him ... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so. *Id.* at 296 (citing *Bruton*, 391 U.S. at 139-40).

That said, the court conducting a harmless error inquiry must appreciate the indelible impact a full confession may have on the trier of fact ... [I]f the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case. Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence. *Id.* at 313 (Justice Kennedy, concurring in the judgment, in that he cannot, with confidence, find admission of the confession to be harmless).

*See, Appx. E33 (Pennsylvania Superior Court's August 6, 2010 Memorandum) (Judge Musmanno, quoting Fulminante above in text when emphasizing reluctance in finding harmless error); see also, Appx B21-22 (Western District Court's June 30, 2020 Memorandum) (Judge Bisson, quoting Fulminante above in text when listing driving considerations for the Court's conclusion).*

In the case at hand, the prejudicial impact on the jury cannot be ignored. It was very real indeed! The jury was faced with a sharply incriminating confession, of which they could not unhear. First, the prosecution alerted the jury to the existence of Petitioner's confession in his opening statement. *RR, P. 1783*. Next, Detective Kuhns took the witness stand and testified regarding the interview he had with Petitioner leading up to and during the tape recorded version of the confession. *RR, P. 2802-2902*. Then, the prosecution played the tape recorded version of the confession for the jury to hear. In addition to the recording, the jury was also provided a typed transcript of the confession so they could even read along with what they were hearing. *RR, P. 2841-45*. Moreover, the statement was repeatedly referenced in the closing arguments. *RR, P. 3155-90*. The devastating impact of such a multifold introduction and admission of Petitioner's confession doubtless affected the actual thinking of the jury or the deliberative process by which it reached its verdict.

The prejudicial effect of Petitioner's confession further became impacted where its admission induced him to take the witness stand himself in order to provide a defense to and overcome the impact of the confession. With the improper use of Petitioner's extrajudicial confession impelling his testimonial admission of guilt, his testimony also became tainted by the same illegality that rendered the confession itself inadmissible - the fruit of the poisonous tree.

*See, Harrison v. United States, 392 U.S. 219 (1968)*. This tainted testimony is testimony that a jury would certainly have difficulty forgetting when deciding Petitioner's culpability.

*Harrison's Exclusionary Rule.* The judgment of the Third Circuit in the present case conflicts with *Harrison v. United States*, 392 U.S. 219 (1968), which mandates what is essentially an exclusionary rule, where the principle that prohibits the use of wrongfully obtained confessions also prohibits the use of any testimony impelled thereby. *Id.* at 222. With respect to this issue, the Western District in this case succinctly summarized *Harrison*:

[T]he defendant was charged with felony murder. Defendant made three confessions which were used in evidence at his trial, and he testified after the confessions were admitted. He was found guilty, but on appeal, his convictions were reversed after the court of appeals determined that his confessions were illegally obtained. At the defendant's second trial, the prosecution did not introduce the confession, but it did introduce the defendant's trial testimony from the first trial. The defendant was again convicted, and this conviction was upheld by the court of appeals.

The Supreme Court held that because the defendant testified only after the illegally obtained evidence was wrongfully introduced at trial, his testimony was the fruit of the poisonous tree. Under such circumstances, the Supreme Court found it was improper to "demand a demonstration by a petitioner that he would not have testified as he did if his inadmissible confession had not been used".

*See, Appx. B20 (citations omitted).*

*Harrison* applies to the case at hand because, as in *Harrison*, it was only after the prosecution introduced Petitioner's wrongfully obtained confession into evidence did he take the stand at trial and testify as to his guilt "in order to overcome the impact of confessions illegally obtained and hence improperly introduced". *Harrison*, 392 U.S. at 223.

"Having 'released the spring' by using [P]etitioner's unlawfully obtained confession against him, the government must show that its illegal action did not induce his testimony".

*Harrison*, 392 U.S. at 225. Having placed his confession before the jury, however, the State can hardly demonstrate that Petitioner would have testified as he did even if his inadmissible confession had not been used. But even if Petitioner would have decided to testify whether or not his confession had been used, it does not follow that he would have admitted being at the scene

of the crime and holding the gun when the fatal shot was fired. "The more natural inference [would be] that no testimonial admission so damaging would have been made if the prosecutor had not already spread the petitioner's confession before the jury". *Id. at 225-26*. In the Western District's words, "[the petitioner's] trial testimony cannot excuse the constitutional violation; it is part and parcel of the same constitutional harm". *See, Appx. B21.*

***The Right To Trial By Jury.*** "There is ... a distinction of true importance between a harmless-error test that focuses on what the jury did decide, rather than on what appellate judges think the jury would have decided if given an opportunity to pass on an issue". *Neder v. United States*, 527 U.S. 1, 27 (1999) (*Stevens, J., concurring*). "Harmless-error analysis is not an excuse for overlooking error because the reviewing court is itself convinced of the defendant's guilt. The determination of guilt is for the jury to make, and the reviewing court is concerned solely with whether the error may have had a substantial effect upon that body". *United States v. Lane*, 474 U.S. 438, 465 (1986) (*Brennan, J., concurring in part and dissenting in part*).

Because of its apparent judicial desire to affirm the verdict supported by 'very strong' evidence, the Third Circuit assumes it can "reconstruct the world of the criminal trial" by subtracting the constitutionally inadmissible evidence that was presented to the factfinder, so as to determine whether the violation contributed to the verdict. *Robert Weisburg, Forward: Criminal Procedure Doctrine: Some Versions of the Skeptical*, 76 J.Crim.L. & Criminology 832, 846 (1985). Such reconstruction requires a court to speculate regarding a counter-factual reality and, a substantial leap of faith. How can a court say with confidence what a jury would have done in that entirely and non-existent world? *See, Sullivan v. Louisiana*, 508 U.S. 275, 284 (1993) (*Chief Justice Rehnquist, concurring*) ("[A]ny time an appellate court conducts harmless-

error review it necessarily engages in some speculation as to the jury's decision making process; for in the end no judge can know for certain what factors led to the jury's verdict").

By focusing on the reliability of the verdict, the Third Circuit de-emphasizes the values of the United States Constitution underlying a trial by jury. *See, Rose v. Clark*, 478 U.S. 570, 588 (1986) (Stevens, J., concurring) ("Our constitution, and our criminal justice system, protect other values besides the reliability of the guilt or innocence determination").

A hallowed principle of criminal law is a defendant's "presumption of innocence" which succinctly conveys the principle that no person may be convicted of a crime unless the government proves every element of a crime beyond a reasonable doubt. *Black's Law Dictionary*, 823 (6th ed. 1991). Under the Due Process Clause of the Fifth Amendment to the United States Constitution, the prosecution must prove every element necessary to constitute the crime with which the defendant is charged. *See, In re Winship*, 397 U.S. 258, 364 (1970) (holding that government must prove "every fact necessary to constitute the crime" beyond a reasonable doubt).

The *Winship* "beyond a reasonable doubt" standard protects four interests: First, it protects the defendant's liberty interests. *Winship*, 397 U.S. at 363-64. Second, it protects the defendant from the stigma of conviction. *Id.* Third, it encourages community confidence in criminal law by giving "concrete substance" to the presumption of innocence. *Id.* Fourth, it encourages individual confidence in the presumption of innocence because the prosecution must convince the factfinder with "utmost certainty". *Id. at 364. See, Id. at 372 (Harlan, J., concurring)* (noting that the standard is founded on "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free").

Furthermore, a Justice Scalia concluded in *Sullivan*, the proper approach to harmless-

error analysis is dictated by the Sixth Amendment to the United States Constitution, which protects a defendant's right to trial by an impartial jury, which includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of guilt". *Sullivan*, 508 U.S. at 277. In view of the Fifth Amendment's Due Process Clause requirement of proof beyond a reasonable doubt, "jury verdict required by the Sixth Amendment is a jury verdict of guilt beyond a reasonable doubt". *Id.* at 278. Accordingly, a jury verdict reached at a level of certainty less than beyond a reasonable doubt is not valid under the Sixth, as well as the Fifth, Amendments to the United States Constitution and must be replaced by a verdict that is valid under both Amendments.

In proceeding with its *de novo* review by imagining the behavior of hypothetical jurors at a hypothetical new trial, the Third Circuit in this case deprived Petitioner of a jury trial altogether; or, at best, of putting the reviewing judges in the role of jurors, in violation of the Sixth Amendment requirement of a jury-trial of one's peers drawn from one's community. As the Court in *Sullivan* explains:

Consistent with the jury-trial guarantee, the question ... the reviewing court [is] to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which the jury actually rested its verdict. The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the findings to support that verdict might be - would violate the jury-trial guarantee.

*Sullivan*, 508 U.S. at 279 (*citations and quotations omitted*). See also, *Id.* at 280 ("not enough" to "conclude that a jury would surely have found petitioner guilty beyond a reasonable doubt") (*citations and quotations omitted*); *Id.* at 281 (improper for "reviewing court" to "engage in pure speculation - its view of what a reasonable jury would have done"; "when it does that, the wrong entity judge[s] the defendant guilty") (*citations and quotations omitted*).

Where the Third Circuit simply presumed that Petitioner 'doubtless would have been convicted of first-degree murder' absent the erroneous admission of his illegally obtained confession, it removed the prosecution's burden of proving an element beyond a reasonable doubt. The Supreme Court has cautioned that a presumption of guilt is unconstitutional if it "undermine[s] the factfinder's responsibility ... to find the [elements of a crime] beyond a reasonable doubt". *Cty. Court of Ulster Cty. v. Allen*, 442 U.S. 140, 156 (1976). See, *Francis v. Franklin*, 471 U.S. 307, 316 (1985) (due process prohibits use of presumption that relieves the State of its burden of persuasion on essential element of intent).

Because the Sixth Amendment's jury trial guarantee allocates to *actual jurors* the exclusive responsibility to render criminal verdict's, those same actual jurors must be the focus of harmless-error analysis. If those jurors deliberated to a verdict free of influence from an error, then their verdict satisfies the Constitution's jury-verdict requirement and may stand. In Petitioner's case, however, those jurors deliberated to a verdict under the influence of a constitutional error; their verdict was tainted and a new verdict, produced by a new set of actual jurors who are not influenced by the error, must supplant the first verdict.

***The Right Of Confrontation.*** The Goverment's case against Petitioner seems lacking in direct physical evidence. At trial, the prosecution introduced no DNA, no blood, no hair, no fingerprints, no gunshot residue, nor any gun registration or serial numbers that directly linked Petitioner to the crime or the murder weapon. Aside from Petitioner's admissions, the only evidence introduced that did directly link him to the crime consisted entirely of prosecution witness testimony, of which were corrupt source accomplices who were substantially impeached and suffered significant credibility issues. And although some circumstantial evidence was

introduced at trial, it was not compelling taken alone.

Here, the error - the erroneously admitted confession and its tainted 'fruits' - significantly corroborated and bolstered the testimony of prosecution witnesses. The effect of the error furthered the prejudicial impact on the conduct of the defense where Petitioner's admissions undercut the defense counsel's ability to raise doubt about witnesses in that their version of events should not be believed. This directly conflicts with Petitioner's right of confrontation.

Extending to state prosecutions through the Due Process Clause of the Fourteenth Amendment to the United States Constitution, is the Sixth Amendment's Confrontation Clause. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). The confrontation right gives the defendant a "full and fair opportunity to probe", *United States v. Watson*, 76 F.3d 4, 9 (1st Cir. 1996); allows a defendant to impeach witnesses by challenging witness credibility, *United States v. Rivera*, 799 F.3d 180, 184-85 (2d Cir. 2015); allows a defendant to expose falsehoods and inconsistencies, challenge a witness's credibility by demonstrating bias, prejudice, ulterior motive, or untruthful disposition, *United States v. Ramos-Cruz*, 667 F.3d 487, 503-04 (4th Cir. 2012); and allows a defendant to expose a witness's bias, possible incentives to lie, or motivation for testifying, *United States v. Williams*, 892 F.3d 242, 247 (7th Cir. 2018).

Given the substantial flaws of prosecution key witnesses, a reasonable jury may very well have received a significantly different impression of the witness's version of events if defense counsel was able to pursue a line of cross-examination without the prejudicial effects of Petitioner's admissions bolstering witness credibility. Speculation as to the effect of the remaining evidence, without the error, on the jurors' finding of guilt cannot justify a finding of harmlessness where such a strong potential to demonstrate the falsity of witness testimony exists. This potentially violates Petitioner's right of confrontation - that is, his right to directly confront

adverse witnesses and challenge their testimonial accounts WITHOUT the bolstering influence of his confession. This certainly is enough to leave any judge in 'grave doubt' about the harmlessness of the error.

Even if it may be found that all the prosecution's witnesses, taken together without the error, created a 'strong' case by establishing Petitioner's role in the shooting, this assumes the jury believed these witnesses absent the corroborating force of his admissions. However, it is not for the reviewing court to decide what they think that 'they' would have voted to convict. "The question, rather, is whether the erroneous admission of [Petitioner's] confession had a substantial and injurious effect on the jury's decision. It was for the jury to decide the credibility of the witnesses", and absent the impact of Petitioner's admissions, they very may well not have found their version of events to be credible and reasonably could have concluded that Petitioner had not participated in the crime to the extent in which he confessed. *Wood v. Ercole*, 644 F.3d 83, 96 (2d Cir. 2001).

*See, Gov't of the Virgin Islands v. Davis*, 561 F.3d 159, 165-66 (3d Cir 2009) (where the reviewing Circuit Court was unsatisfied with the conclusion of the Appellate Court's finding that the testimony of three eyewitnesses was "significant evidence from which the jury could have found guilt" and therefore the constitutional trial error could not have affected the outcome of the trial, insofar as the Appellate Court focused on whether the evidence was sufficient to convict despite the error, as opposed to whether there was a reasonable possibility that the error contributed to the jury's verdict).

***The Supremacy Of Law.*** The Supremacy Clause of Article VI to the United States Constitution declares that all laws made in pursuance of the Constitution and all treaties made

under the Authority of the United States shall be the "supreme law of the land" and judges in every state shall be bound thereby.

With reference to its origin, "law" is derived from judicial precedents. The word embraces established standards, principles and rules, prescribed by controlling Authority, and having binding legal force. The rule of law, sometimes called "the supremacy of law", provides that decisions should be made by application of known principles or laws without the intervention of discretion in their application. *See, Blacks Law Dictionary, \_\_\_\_ (6th ed. 1991).*

The great principle, *stare decisis*, is so fundamental to law that it must be taken into account in this case. The doctrine of "stare decisis" is a policy of courts that, when a point of law has been settled by decision, it forms precedent which is not afterwards to be departed from. This doctrine should be strictly adhered to, especially where the established law is of long-standing and rights have been acquired under it. *See, Blacks Law Dictionary, 978-79 (6th ed. 1991).*

As has been evidenced in this petition above, the Third Circuit's adjudication of this case was clearly erroneous as a matter of Federal law and Constitutional principle, amounting to an indisputable abuse of discretion and judicial power. Thus, where the Third Circuit refused to adhere to law when it was required to, or took action it was not empowered to take, Writ of Mandamus lies.

***Fair And equal Process.*** By allowing the Third Circuit to flagrantly disregard the mandates of Federal law and the United States Constitution, Petitioner is being denied fair and equal protection of the law. The concept of the Equal Protection Clause of the Fifth and Fourteenth Amendment's to the United States Constitution has traditionally been viewed as

requiring the uniform treatment of person's standing in the same relation to the governmental action questioned or challenged. *See, Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Equal protection requires that all persons under like circumstances or conditions be subject to the same standards and modes of procedure.

It is the Court's duty to act impartially and on the basis of reason which requires that Petitioner be treated alike similarly situated litigants. Petitioner is entitled to the same evenhanded and consistent application of well-established Federal and Constitutional law that has governed previously considered cases relative to that of his, i.e., regarding an erroneous admission of an infirm confession. *See, e.g.*

*Arizona v. Fulminate*, 499 U.S. 279 (1991); *Harrison v. United States*, 392 U.S. 219 (1968); *Abela v. Martin*, 380 F.3d 915 (6th Cir 2004); *Alvarado v. Hickman*, 316 F.3d 841 (9th Cir. 2002); *Collins v. Brierly*, 492 F.2d 735 (3d Cir. 1974); *Harison v. Chandler*, 1998 U.S. App. LEXIS 27744 (6th Cir. 1998); *Hart v. Attorney General*, 323 F.3d 884 (11th Cir. 2003); *Moore v. Berghuis*, 700 F.3d 882 (6th Cir. 2012); *Sessoms v. Grounds*, 776 F.3d 615 (9th Cir. 2014); *Smith v. Estelle*, 527 F.3d 430 (5th Cir. 1976); *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2003); *United States v. Barns*, 713 F.3d 1200 (9th Cir. 2013); *United States v. Brownlee*, 353 F.3d 131 (3d Cir. 2006); *United States v. Williams*, 435 F.3d 1148 (9th Cir. 2006); *Wood v. Ercole*, 644 F.3d 83 (2d Cir. 2011); *Collins v. Brierly*, 336 F.Supp. 1024 (W.D. Pa. 1971); *United States v. Tyler*, 2000 U.S. Dist. LEXIS 21891 (M.D. Pa. 2000).

**Code Of Conduct.** Under Title 28 of the United States Code Service are provided the Canons for the Code of Conduct for United States Judges. Relatively, these Canons provide that judges should uphold the integrity and independence of the judiciary; they should avoid impropriety and the appearance of impropriety in all activities; and they should perform the duties of the office fairly, impartially and diligently. These Canons should be applied consistently with Constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances.

An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this code. A judge must therefore avoid all impropriety and appearance of impropriety - this, to include behavior that could reasonably be interpreted as prejudice or bias.

*See, Canon 2(A) (commentary).*

Pursuant to a judge's duty under Canon 3(C)(1)(a), a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which: the judge has a personal bias or prejudice concerning a party. Accordingly, "an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote". *Williams v. Pennsylvania*, 579 U.S. 1, 14 (2016).

Instantly, the Third Circuit's judgment illustrates an unacceptable risk of actual bias. This risk so endangers the appearance of neutrality that the decision of this tribunal must be vacated because of the participation of a member who had an interest in the outcome of the case ... it "must be forbidden if the guarantee of Due Process is to be adequately implemented". *Williams*, 579 U.S. at 14 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

Here, Petitioner's case was before a multimember tribunal of the Third Circuit - AMBRO, KRAUSE, and BIBAS, *Circuit Judges*. BIBAS, J. delivered the opinion of the Court. The deliberations of an appellate panel, as a general rule, are confidential. As a result, it is neither possible nor productive to inquire whether the interests of one member of the panel might have influenced the views of his or her colleagues during the decisionmaking process. *See, Williams*,

579 U.S. at 15. As Justice Brennan wrote in his *Lavoie* concurrence:

The description of an opinion as being 'for the court' connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition.

*Williams*, 579 U.S. at 15 (citing, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (1986)).

A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not of just one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of the judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless. *Williams*, 579 U.S. at 15-16.

Moreover, Petitioner points out that ordering a rehearing before the Third Circuit may not provide complete relief to him because judges who were exposed to disqualifed judge may still be influenced by their colleague's view when they rehear the case. An inability to guarantee complete relief for a constitutional violation, however, does not justify withholding a remedy altogether. Allowing an appellate panel to reconsider a case without the participation of the interested member will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations. *Williams*, 579 U.S. at 16.

Where the risk of actual bias in the judicial proceeding rises to an unconstitutional level, Petitioner is entitled to an opportunity to present his case to a court unburdened by any "possible

temptation ... not to hold the balance nice, clear and true between the State and the accused". Due process entitles Petitioner to a "proceeding in which he may present his case with assurance" that no member of the Court is "predisposed to find against him". *Williams*, 579 U.S. at 16-17 (citing, *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); and, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)).

***Miscarriage Of Justice.*** Defined, a "miscarriage of justice" is described as a decision or outcome of a legal proceeding that is prejudicial or inconsistent with substantial rights of a party. See, *Blacks Law Dictionary*, 690 (6th ed. 1991). As used in constitutional standard of reversible error, "miscarriage of justice" means a reasonable probability of a more favorable outcome for the petitioner. *Id.*

In this case, a miscarriage of justice has clearly ensued, warranting reversal, as it is quite reasonable or reasonably probable that a result more favorable to Petitioner would have been reached in absence of the Third Circuit's error(s). This becomes evident by the Western District Court's adjudication of the matter. See, *Appx. B.*

Accordingly, the Western District in this case concluded that it was *perfectly clear* that Petitioner's erroneously introduced infirm confession had a 'substantial and injurious effect' on the jury's deliberations. This determination should not be second-guessed as a deferential standard of review demands that it be given the benefit of the doubt. The Western District's independent judgment should prevail!

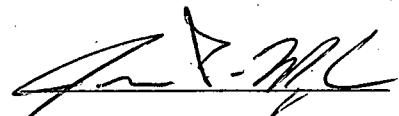
See, *Calderon v. Coleman*, 525 U.S. 141, 147 (1998) (per curiam) (reversing and remanding because Court of Appeals did not adequately "inquire into the actual effect of the error on the jury's verdict" and emphasizing that "court must find that the error, in the context of

the particular case, had a substantial and injurious effect or influence on the jury's verdict"); *Id. at 150* (*Stevens, J., dissenting*) (concluding that reversal and remand for further harmless-error analysis is unnecessary because "it is perfectly clear that [ District Court Judge] was convinced that the [error] had a substantial and injurious effect on the jury's deliberations ...").

## Conclusion

**WHEREFORE**, Petitioner prays this Honorable Court exercise its discretionary power with issuance of Writ of Mandamus to the United States Court of Appeals for the Third Circuit, directing appropriate and adequate relief in accordance to.

Respectfully Submitted:



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11-3-22