No. 22-6360

IN THE

SUPREME COURT OF THE UNITED STATES

TYRELL HART – PETITIONER
(Your Name)

vs.

LAWRENCE MAHALLY, ET AL., – RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO

United States Court of Appeals for the Third Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

TYRELL HART
(Your Name)

1000 Follies Road
(Address)

Dallas, PA 18612
(City, State, Zip Code)

None
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

1. The lower federal and state courts unreasonably applied this Court's holdings finding that Hart was not denied effective assistance of counsel regarding an involuntary confession claim committed by detectives with a documented history of unconstitutional practices in obtaining false confessions (and newly presented evidence demonstrating same) justifying certiorari by this Court.

(pgs. 9-13)

2. Did the lower courts (federal and state) unreasonably apply this Court's holdings in finding that Hart was not denied his substantive Sixth (6th) and Fourteenth (14th) U.S.C.A. rights to retained counsel of choice pursuant to this Court's holding implicating, inter alia, United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006) and ineffective assistance of counsel under the material facts of the claim demonstrating a structural error in the state court trial proceedings justifying certiorari?

(pgs. 13-21)

3. Whether this Court should grant certiorari to enter a clear holding in a habeas corpus case to decide whether a petitioner is legally entitled to have the federal courts mandate the state to produce all that transpired in the state court proceedings for purposes of federal review consistent with Rules Governing 2254 cases, Rule 5(c), where a habeas petitioner has raised substantive claims of ineffective assistance of counsel in failing to review relevant transcriptions of trial proceedings

(pgs. 22-34)

4. Whether the lower court's have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power and/or have decided an important federal question in a way that conflicts with relevant decisions of this Court regarding Hart's denial of his Sixth Amendment right to a Speedy Trial

(pgs. 34-40)

LIST OF PARTIES

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

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Tyrell Hart,
Petitioner

vs.

Lawrence Maisally, Superintendent SCI Dallas;
The Attorney General for the
Commonwealth of Pennsylvania; The District Attorney for the

County of Philadelphia,
Respondent(s)

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

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

[ ] For cases from **federal courts:**

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

[ ] reported at _____; or
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

[ ] reported at _____; or
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] reported at _____; or
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was July 20, 2022

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 27, 2022, and a copy of the Order denying rehearing appears at Appendix "A".

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was 12-01-17. A copy of that decision appears at Appendix "G".

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Sixth U.S.C.A. guarantees that "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 shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."..... passim

The Fourteenth U.S.C.A. Section 1 [Citizens of the United States] states "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."..... passim

2254. State Custody; remedies in Federal Court

(d) An application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits of the State court <u>unless</u> the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonably 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..... passim

STATEMENT OF THE CASE

On April 25, 2012, after a jury trial in Philadelphia County, Pennsylvania Tyrell Hart ("Hart" or "Petitioner") was convicted of first-degree murder, third-degree murder of an unborn child, carrying a firearm without a license, and possessing instruments of crime (see Appendix "F" at pgs. 3-1-4). Hart was sentenced to life imprisonment without parole for the first-degree murder conviction and a concurrent term of 20-40 years' imprisonment for the murder of an unborn child conviction. On April 13, 2012, Hart file a timely notice of appeal with the Pennsylvania Superior Court. On that counseled appeal Hart counsel argued that his constitutional rights to a fair trial were violated when he was not represented by the attorney of his choice (i.e., right to retained counsel of choice) and when he was denied a continuance in order to be represented by the attorney of his choosing. On January 8, 2014 Hart also file a motion for remand for an evidentiary hearing, arguing that the detectives coerced a false confession and attaching a newspaper article stating that the homicide detectives involved in this case had a recently discovered history of coercing confessions from other criminal suspects/defendants. On March 21, 2014, the Superior Court denied the claim, denied Hart's pro se motion to remand for an evidentiary hearing, and affirmed the judgment of sentence. Hart did not seek review with the Pennsylvania Supreme Court. On July 13, 2014, Hart file a timely pro se petition for

collateral review under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. subsections 9541-9546. Counsel was appointed but subsequently filed a "no-merit" letter and moved to withdraw. The PCRA Court, on November 18, 2016, granted counsel's petition to withdraw and "no-merit" letter. Hart proceeded pro se raising the following issues for review to the Superior Court: (1) trial counsel was ineffective in failing to raise a meritorious speedy trial motion pursuant to Pennsylvania Rule of Criminal Procedure 600; (2) direct appeal counsel was ineffective for failing to argue for a remand based on after-discovered evidence related to an involuntary concession claim; (3) direct appeal counsel was ineffective for failing to properly argue Hart's claim that he was denied his right to retained counsel of choice; (4) trial counsel was ineffective in failing to following-through on a requested mistrial due to prejudicial prosecutorial misconduct and direct appeal counsel was ineffective regarding this claim; (5) direct appeal counsel was ineffective in failing to ensure the jury selection process was transcribed and failing to even review relevant trial court proceeding; and (6) the PCRA court erred in failing to conduct an evidentiary hearing. On December 1, 2017 the Superior Court affirmed dismissal of Hart's PCRA. Hart did not seek review with the Pennsylvania Supreme Court but filed a timely federal habeas corpus petition with memorandum of law and exhibits in support and presented in terms that could not be misunderstood: I. Jurisdiction and standard of review (memo. pgs. 1-4);

II. Petitioner Hart has exhausted his state court remedies (memo pgs. 4-7);

III. Factual and procedural history of the case and of the claims presented to the state court demonstrating Hart's denial of his federal constitutional rights under the Sixth and Fourteenth Amendments (memo pgs. 8-15);

IV. The applicability of Martinez v. Ryan, 132 S. Ct. 1309 (2012) and Trevino v. Thaler, 133 S. Ct. 1911, 185 L. Ed. 2 1044 (2013) where court-appointed counsel unreasonably filed a "no-merit" letter prejudicing development of the federal based claims (memo pgs. 15-17);

V. Claims raised on Hart's first federal habeas corpus petition for adjudication of the merits that were fairly presented to the state courts (memo pg. 17);

1. The state courts' unreasonably and prejudically found Hart was not denied effective assistance of counsel regarding an involuntary confession claim committed by detectives with a documented history of unconstitutional practices in obtaining false confessions justifying invocation and granting the writ and/or an evidentiary hearing where the state courts would not permit expansion nor development of the record (memo pgs. 18-34);

2. The state courts unreasonably held Hart was not denied his substantive Sixth (6th) and Fourteenth (14th) U.S.C.A. right to retained counsel of choice pursuant to and consistent with United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006) and ineffective assistance of counsel under the material facts of the claim (pgs. 35-42);

3. The state courts unreasonably applied the objective of Berger v. United States, 295 U.S. 78, 55 S. Ct. 629 (1935) and its progeny in finding that petitioner was not denied petitioners substantive Sixth (6th) U.S.C.A. right at trial and on direct appeal for failure of counsel to follow-through on a requested mistrial due to prejudicial prosecutorial misconduct utilized to deprive petitioner of a fair trial (memo pgs. 42-48);

4. The state courts' finding that Hart was not denied his Sixth (6th) U.S.C.A. right to effective assistance of counsel on direct appeal and initial-review PCRA counsel was not ineffective in failing to have transcribed and review the voir dire transcripts can be adjudicated on the merits consistent with Martine v. Ryan, 132 S. Ct. 1309 (2012) and Trevino v. Thaler, 133 S. Ct. 1911 (2013) (memo pgs. 48-59);

5. The state court's finding Hart was not denied his Sixth (6th) and Fourteenth (14th) U.S.C.A. right to effective assistance of counsel during pre-trial, direct appeal and collateral review proceedings on all prior counsels' failure to submit a meritorious Speedy Trial claim is (was) contrary and unreasonable applications of clearly established federal law and holdings warranting the granting of the writ (memo pgs. 50-95);

V. Consistent with rules governing 28 U.S.C. subsection 2254 cases Hart requests this Court to permit discovery, expansion of the record and an evidentiary hearing respectively (memo pgs. 95-96);

VI. In compliance with Rule 5 Governing 28 U.S.C. subsection 2254 Cases Hart requests an order entered by the court that Respondents Answer with all exhibits be served upon Hart for competent and thorough presentation of his substantive based claims (memo pgs. 96-100);

VII. Conclusion and Relief Requested (memo pg. 100).

The District Court for the Eastern District of Pennsylvania referred the matter to United States Magistrate Judge Marilyn Heffley for a Report and Recommendation ("R&R"). The December 29, 2021 the R&R was issued recommending denial of the petition. A copy of this R&R is attached as Appendix "E" (28 pages). Hart filed timely objections that are attached as Appendix "E" (12 pages). The District Court adopted Judge Heffley's R&R and denied also a Certificate of Appealability ("COA") and attached as Appendix "D" (13 pages). Hart filed a timely notice of appeal to the United States Court of Appeals for the Third Circuit and awaited notification when his COA was due. However, for reasons unknown to Hart, he never received notice when his Application for a Certificate of Appealability was due to be filed. However, on July 14, 2022 a panel construed Hart's timely notice of appeal as a request for a certificate of appealability and denied the appeal (see Appendix "B", 4 pages). When Hart

received the July 14, 2022 denial of his COA Hart timely submitted as "Application for Panel Rehearing and Rehearing by the Court En Banc" which is attached as Appendix "C" (15 pages). This relevant application was presented in the following terms:

I. Statement of Material Facts (pg. 1);

II. A Certificate of Appealability is Warranted (pgs. 1-3);

III. Factual and Procedural History (pgs. 3-5);

IV. Substantial Reasons and Grounds for Panel Rehearing and Rehearing by the Court En Banc (pgs. 5-15);

V. Newly Discovered Material Facts Further Demonstrating Harts' Involuntary Confession Implicating Police Abuse/Misconduct (pgs. 15-16).

VII. Conclusion and Relief Requested (pg. 16).

On September 27, 2022 the United States Court of Appeals denied "Sur Petition for Rehearing" which is attached as Appendix "A" (2 pages). Hart submits this timely petition presenting claims involving important federal questions that the lower courts decided in a way that conflicts with relevant decisions of this Court that warrants relief from the judgment.

REASONS FOR GRANTING THE PETITION

1. The lower federal and state courts unreasonably applied this Court's holdings finding that Hart was not denied effective assistance of counsel regarding an involuntary confession claim committed by detectives with a documented history of unconstitutional practices in obtaining false confessions (and newly presented evidence demonstrating same) justifying certiorari by this Court

It is beyond cavil and an established constitutional fact that a criminally accused defendant is deprived of due process of law if his or her conviction is founded, in whole or in part, upon an involuntary confession. U.S. Const. Amends. V, XIV. Jackson v. Denno, 378 U.S. 368 (1964); see also Commonwealth Perry, 475 Pa. 1, 379 A.2d 545 (1977); Commonwealth ex rel. Gaito v. Maroney, 422 Pa. 171, 220 A.2 629 (1967). The introduction of such a confession constitutes reversible error even if there is otherwise sufficient evidence to support the conviction. Commonwealth v. Hallowell, 444 Pa. 221, 282 A.2d 327 (1971). The ultimate test remains that which has been the only clearly established test in Anglo-American courts for 200 years; the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice of its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne, and his capacity for self-determination critically impaired, the use of his confession offends due process. Rogers v. Richmond, 365 U.S. 534 (1961). The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession. Columbe v. Connecticut, 367 U.S. 568, at 602 (1961).

See also Commonwealth v. Walker, 470 Pa. 534, 368 A.2d 1284 (1977). In determining voluntariness, the court must consider and evaluate the totality of the circumstances attending the confession. This includes, the duration, and the methods of interrogation; the conditions of detention, the manifest attitude of the police toward the defendant, the defendant's physical and psychological state and all other conditions present which may serve to drain ones powers of resistance to suggestion and undermine his self-determination. The burden rests with the State to show voluntariness of a confession by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477 (1972); Commonwealth v. Moore, 454 Pa. 337, 311 A.2d 630 (1973). In Commonwealth ex rel. Butler v. Rundle, 206 A.2 283 (Pa. 1965) the Pennsylvania Supreme Court reversed and remanded the record for an evidentiary hearing on whether that Appellant's confession was held to have been voluntary given and, if not, and the confession was found to have been given involuntarily then the common pleas court as directed to grant a new trial. The Pennsylvania Supreme Court noted in Rundle that "When liberty is denied without constitutional assurances of due process of law, the conviction may not be permitted to stand." Id. 206 A.2d at 287-288, 415 Pa. at 329-331. The appellant in Butler asserted that he was beaten and coerced into giving an involuntary confession. This was Hart's exact factual and legal circumstances and pleadings presented to the lower federal and state courts. The Butler Court noted the strain on the lower

courts in holding these evidentiary hearings but also noted the overriding constitutional concerns that when liberty is denied without constitutional assurances of due process of law, the conviction is not permitted to stand. Butler, supra. As this Court held in Lego, 404 U.S. 477, at 485-489 "Exclusion of unreliable confessions is not purpose that voluntariness hearing is designed to serve; sole issue in such hearing is whether confession was coerced and there may be no inquiry into whether confession is true or false and judge must ignore implications of reliability in facts relative to coercion and shut from his mind any internal evidence of authenticity that confession itself may bear." Id. This is because "use of a coerced confession, whether true or false, is forbidden because the method used to extract them offends constitutional principles." Id. As presented in Hart's pro se state and federal filings it was demonstrated Hart presented, inter alia, a Notarized Affidavit, Detective James Pitts ("Pitts") did not provide the warnings against self-incrimination as required in Miranda v. Arizona, 384 U.S. 436 (1966) until AFTER Pitts had obtained an involuntary confession where such deceit was contrary to law. E.g., Commonwealth v. Bland, 450 Pa. 566, 301 A.2d 651 (1973) (reversing conviction because confession should have been suppressed, as it was involuntary based upon the totality of the surrounding circumstances, the confession was the result of psychological coercion). This issue was presented as addressed for exhaustion purposes to this Court.

Hart exhausted his state and federal claim by presenting this in his pro se state and federal submissions. This claim was presented on Hart's timely filed state postconviction petition and Hart's pro se federal habeas corpus petition under 28 U.S.C. subsection 2254. See Hart's pro se habeas corpus memorandum of law at pgs. 18-35; see also Appendix "C" to this petition sub judice at pgs. 15-16 (Newly Discovered Material Facts Further Demonstrating Hart's Involuntary Confession Implicating Police Abuse/Misconduct); Appendix "D" District Court's memorandum opinion at pgs. 5-7); Appendix "E" Hart's Objections to Magistrates Report and Recommendation at pgs. 1-3); Appendix "F" Magistrates Report and Recommendation at pgs. 7-14); Appendix "G" Superior Court of Pennsylvania Opinion at pgs. 11-13). It is clear the lower federal and state courts' entered decisions contrary to this Court's holdings implicating involuntary confessions. Hart clearly and convincingly demonstrated, with competent evidence, a documented history of Philadelphia Police Detectives misconduct in obtaining false confessions utilized to deprive criminally accused Citizens of due process of law in violation of the Fourteenth Amendment. It was also competently demonstrated that Hart received ineffective assistance of trial and direct appeal counsel on this claim as demonstrated in the pro se filings in this petition. The lower state and federal courts should not be upheld in this case under the particular facts of this claim and additional newly presented prima facie evidence implicated in the important constitutional claim.

Both Philadelphia Police Detectives, James Pitts and DiMarr Jenkins ("Jenkins") were recently "accused, charged, convicted and/or disciplied" (see Appendix "C" at pgs. 15-16 Hart's "Application for Panel Rehearing and Rehearing by the Court En Banc Pursuant to Fed. R. App. P. 35(b)(3)" regarding charges involving coerced confessions by these detectives that was utilized to convict criminally accused defendant's including, but not limited to, charges of perjury. This was presented in addition to the relevant facts and exhibits that were demonstrated in Hart's habeas corpus memorandum of law. This Court should consider also an evidentiary hearing be conducted regarding this claim.

2. Did the lower courts (federal and state) unreasonably apply this Court's holdings in finding that Hart was not denied his substantive Sixth (6th) and Fourteenth (14th) U.S.C.A. rights to retained counsel of choice pursuant to this Court's holding implicating, inter alia, United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006) and ineffective assistance of counsel under the material facts of the claim demonstrating a structural error in the state court trial proceedings justifying certiorari.

This denial of Hart's substantive right to retained counsel of his choosing was thoroughly presented at all levels of state and federal review for purposes of exhaustion for this Court to merit certiorari review (see Hart's federal habeas corpus at pgs. 35-41; Appendix "C" "Application for Panel Rehearing and Rehearing by the Court En Banc" at pgs. 6-10; Appendix "D" District Court Memorandum at pgs. 7-9; Appendix "E" Hart's Objections to Magistrates Report and Recommendation" at pgs. 4-5; Appendix "F" Magistrates Report and Recommendation at pgs.

14-19; Appendix "G" Superior Court Opinion at pgs. 14-17). The courts also unreasonably applied judicial abuse of discretion in the state trial court failing to probe why Hart wanted to retain counsel of his choosing. Martel v. Clair, 565 U.S. 648, 664 (2012) ("As all Circuit agree, courts cannot properly resolve substitution motions without probing why a defendant wants a new lawyer."). This claim truly commenced when Hart filed his timely pro se initial review collateral (PCRA) petition (PCRA memorandum of law at pgs. 34-40). Direct appeal counsel raised the sole issue that Hart was denied his right to retained counsel of choice under Gonzalez-Lopez. However Hart demonstrated direct appeal counsel failed to effectively present the claim. Direct appeal counsel raised the following, sole claim as such:

"Appellant's Sixth Amendment and Article 1, Section 9 rights were violated because he was not represented by counsel of his choosing."

The Superior Court of Pennsylvania denied the claim. Hart's trial counsel was court-appointed. However Hart and his family wanted retained counsel to represent Hart for trial purposes. At Hart's preliminary hearing on January 12, 2010, Hart was represented by privately-retained counsel, Charles Peruto, Sr., Esquire ("Peruto"). Hart had not retained Peruto for trial and Peruto did not enter his appearance. The trial court appointed David Scott Rudenstein, Esquire ("Rudenstein"). The trial court ultimately scheduled trial for March 27, 2012, but on that date Rudenstein requested a continuance, claiming that Hart wanted

additional time to retain Peruto. The trial court contacted Peruto, who said he would not represent Hart at trial, and the trial court denied the continuance request. However, the trial court asked Peruto to come to the courthouse to meet with Hart to explain that he would not be representing Hart, which Peruto did the same day. The case then proceeded through the completion of jury selection as well as a suppression hearing, with Rudenstein representing Hart. The following day, the parties appeared for trial, with Shaka Johnson ("Johnson") present at the request of Hart's family. Johnson explained that he was contacted at 11:00 p.m. the previous evening by a family member who sought to retain him for Hart's trial. Johnson did not accept any payment, because he wanted to speak with the court before taking the case, had not met Hart or the family member previously, and was not prepared for trial. The Commonwealth objected to any additional continuances, and the trial court noted that it would not delay the start of the trial. However, the trial court did order a one-hour recess for Johnson to meet Hart and discuss the Commonwealth's plea offer. Hart ultimately declined the plea offer, and trial commenced with Rudenstein representing Hart. The trial court then commenced the proceedings with the selection of the jury and a suppression hearing (Appendix "F" at pgs. 14-18). In the District Court acceptance of the Magistrates R&R the Court stated in its findings that "It is clear from the record that the trial court conducted

as 'extensive inquiry'. After Hart's counsel requested a continuance on the day that trial was set to begin, the trial court discussed the issue with Hart's counsel and with the attorney that Hart wanted to represent him, Mr. Peruto" and that "Again, the court discussed the issue with Johnson, noting that the start of trial would not be delayed, and gave Johnson multiple opportunities to talk with Hart" and that "Hart had multiple opportunities to discuss his case with three different sets of counsel" (Appendix "D" at pgs. 8-9) (emphasis' by Hart). The factual records demonstrate that not one time did the state trial court conduct an inquiry of Hart about Rudenstein's representation to discern why Hart wanted to retain counsel of choice. The Magistrates R&R and District Court's memorandums omits crucial details and mischaracterizes other crucial details regarding material facts of the substantive based claim because the state trial court never provided Hart an opportunity to present the reasons underlying the breakdown with court appointed counsel Rudenstein. As this Court has held "courts cannot properly resolve substitution motions without probing why a defendant wants a new lawyer", Martel v. Clair, 565 U.S. 648, 664-665 (2012). This Court in Martel explained that an "on-the-record inquiry into the defendant's allegations 'permits meaningful appellate review' of a trial courts exercise of discretion." Id. at 664 (quoting United States v. Taylor, 487 U.S. 326, 336-37 (1988). Thus, where a defendant's request for substitution of counsel could warrant a continuance, the court

must determine the defendant's reasons for the request to properly balance the defendant's Sixth Amendment rights against "fairness" and "the demands of its calendar." United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2012). What is significant is that the state trial court still scheduled the trial even though the court was fully aware that Hart was attempting to obtain retained counsel of choice when notified by Rudenstein of this material fact on March 27, 2012. Nevertheless the state trial court still scheduled trial for the next day without conducting any inquiry (let alone an extensive inquiry) into the reasons Hart wanted to change counsel. The trial court never provided Hart with an opportunity to present the reasons underlying the breakdown. Martel; see also McMahon v. Fulcomer, 821 F.2d 934, 942 (3rd Cir. 1987) (concluding that "when a defendant requests substitution of counsel on the eve of trial," the trial court "must engage in at least some inquiry as to the reasons for the defendant's dissatisfaction with his existing attorney" (quoting United States v. Welty, 674 F.2d 185, 187 (3rd Cir. 1982); see also Randolph v. Secretary Pennsylvania Department of Corrections, 5 F.4d 362, 2021 U.S. App. LEXIS 21401, Lexis at 31-37 (3rd Cir. 2021); Smith v. Superintendent Mahany SCI, 2022 U.S. App. LEXIS 10623, at LEXIS at 9-11 (3rd Cir. 2022) (vacating and remanding for an evidentiary hearing on a right to retained counsel of choice issue that "Based on the present record, we are unable to determine whether the court considered or probed why Smith

wanted to reemploy retained counsel."); see also Carlson v. Jess, 526 F.3d 1018, 1025-1028 (7th Cir. 2008) (concluding the trial judge ignored the presumption in favor of Carlson's counsel of choice and insisted upon expeditiousness for its own sake. The judge made no effort to ascertain the facts and follow up on Carlson's reasonable justifications for seeking a substitution. The reasons the judge did cite for denying a continuance were weak, and he made no attempt to balance them against the effect of Kaiser's possible failings and Carlson's interest in having his attorney of choice defend him against serious charges. Thus, the trial court's denial of Carlson's motion for substitution and a continuance was arbitrary and in violation of the Sixth and Fourteenth Amendments), id. at 526 F.3d at 1027. Hart, as in Carlson, remained in jail from the time of his arrest; thus, he had nothing to gain by needlessly delaying the trial. He had never requested to substitute counsel previously and had no history of "gaming" the system. Id. The Sixth Amendment secures the right to the assistance of counsel. It also includes the right to select, and be represented by, one's preferred attorney; thus, trial courts must recognize a presumption in favor of defendant's counsel of choice. Wheat v. United States, 486 U.S. 153, 164 (1988). Accordingly, the Sixth Amendment bars a court from denying a defendant the right to retain counsel of his choice arbitrarily or unreasonably. Ford v. Israel, 701 F.3d 689, 692 (7th Cir. 1983). The Fourteenth Amendments Due Process Clause

also bars a court from denying a defendant's motion for a continuance arbitrarily or unreasonably. Ungar v. Sarafite, 376 U.S. 575, 589 (1964). Thus, motions for substitutions of retained counsel and for a continuance can implicate both the Sixth Amendment right to counsel of choice and the Fourteenth Amendment right to due process of law. Morris v. Slappy, 461 U.S. 1, 11 (1983). Hart's would have testified, at an evidentiary hearing to the following facts: (1) Hart wanted to testify at the suppression motion because his credibility would have been judged against the detectives credibility surrounding the coerced "confession" that was utilized at trial (it has now been demonstrated also that these detectives had a history of lying under judicial oath involving coerced confessions); (2) that court-appointed counsel Rudenstein advised Hart against testifying even though Hart wanted (and needed) to testify to the circumstances of events surrounding this supposed "confession"; (3) that Rudenstein inadequately investigated the case; (4) communication between Rudenstein and Hart was insufficient under the facts of the case; (5) Hart disagreed with Rudenstein's overall approach to defending him. These are facially valid reasons for the trial court to have inquired into his dissatisfaction with court appointed counsel and the trial court needed to explore them, and because Hart (through Rudenstein) requested a continuance, balance them against the reasons for not granting Hart's motion for a continuance to

retain counsel. The trial judge, however, made no such effort as to inquire directly with Hart. The trial court only had two attorneys (Perutto and Johnson) inquire as to whether Hart was open to a plea bargain and to possibly consider taking a plea. Carlson, 525 F.3d at 1026-27. If the Sixth Amendment's guarantee to one's counsel of choice is to mean anything, it must mean that a criminal defendant may select and retain the counsel of his choice, and the trial court must make every reasonable accommodation to facilitate that representation. Randolph, 2021 U.S. App. LEXIS at 36. Because an erroneous deprivation of counsel choice is a structural error not subject to harmless-error review, a defendant need not demonstrate prejudice resulting from the deprivation. Gonzalez-Lopez, 548 U.S. 140, at 146-147; see also Smith, 2022 U.S. App. LEXIS 10623, 2022 U.S. LEXIS at 7-9 (3rd Cir. 2022) (noting as "on-the-record inquiry into the defendant's allegations 'permit meaningful appellate review' of a trial court's exercise of discretion."), citing Martel, 565 U.S. 648, 664 (2012) (quoting United States v. Taylor, 487 U.S. 326, 336-37 (1988). Under AEDPA, for Hart to prevail on his habeas petition, carried the burden of demonstrating that the lower court's decision was "contrary to' federal law then clearly established in the holdings of this Court," "involved an unreasonable application of such law," or "'was based on an unreasonable determination of the fact' light of the record before the state court." Harrington v.

Richter, 562 U.S. 86, 100 (2011) (quoting 28 U.S.C. subsections 2254(d)(1), (2). A state court decision is 'contrary to' clearly established federal law if it 'applies a rule that contradicts the governing law set forth' in this Court's precedent, or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from that reached by this Court." Williams v. Taylor, 529 U.S. 362, 405-06 (2000). A "decision adjudicated on their merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). The lower court's rulings and findings were contrary to this Court's precedent and/or involved an unreasonable application of such law and/or was based on an unreasonable determination of the facts in light of the record before the state court on Hart's denial of his Sixth and Fourteenth Amendments right to retained counsel of choice for his jury trial proceedings. This claim should warrant this Court's attention for consideration under the unique facts of this legal claim. It is clear that based upon the present record the lower courts were unable to determine whether the court considered or probed why Hart wanted to retain counsel of his choosing. An evidentiary hearing, at a minimum, should have been conducted in this case.

3. Whether this Court should grant certiorari to enter a clear holding in a habeas corpus case to decide whether a petitioner is legally entitled to have the federal courts mandate the state to produce all that transpired in the state court proceedings for purposes of federal review consistent with Rules Governing 2254 cases, Rule 5(c), where a habeas petitioner has raised substantive claims of ineffective assistance of counsel in failing to review relevant transcriptions of trial proceedings

This claim was raised in Hart's 2254 habeas petition at pgs. 48-59 and raised in the following way:

4. The State courts' finding Hart was not denied his Sixth (6th) U.S.C.A. right to effective assistance of counsel on direct appeal and initial-review PCRA counsel was not ineffective in failing to have transcribed and review the voir dire transcripts can be adjudicated on the merits consistent with Martinez v. Ryan, 132 S. Ct. 1309 (2012) and Trevino v. Thaler, 133 S. Ct. 1911 (2013).

This issue was exhausted for purposes of adjudication of the merits by this Court in Hart's "Application for Panel Rehearing and Rehearing by the Court En Banc" (Appendix "C" at pgs. 10-13); District Court memorandum (Appendix "D" at pgs. 10-11); Hart's pro se objections (Appendix "E" at pgs. 8-9); Magistrates Report and Recommendation (Appendix "F" at pgs. 22-23); Superior Court of Pennsylvania opinion (Appendix "G" at pgs. 18-19). The factual predicate for this claim was direct appeal counsel's failure to have relevant notes of testimony regarding voir dire proceedings transcribed nor to even review such critical transcripts. This claim implicates Hart's Sixth and Fourteenth right to effective assistance of trial/direct appeal proceedings and due process of law. The Magistrates Report and Recommendation addressed this claim as Claim D in the R&R ("Hart's claim that his counsel was ineffective for failing to have the jury voir

proceedings transcribed is meritless"). The R&R stated that "Hart provides no additional explanation as to how the transcripts of the voir dire could have permitted him to further develop a claim that this juror could not be fair and impartial." (Appendix "D" at pg. 23) citing Hall v. Rozam, No. 11-0921, 2012 WL 355925 (M.D. Pa. Aug. 16, 2012 ("Petitioner has not demonstrated that there was a reasonable probability that if his trial attorney had a transcript of the preliminary hearing, the result of the trial would have been different."). Consequently, this claim must fail." Id. Hart submitted this legal finding was contrary to law and factually flawed in its reasoning. The District Court's memorandum of 07/12/22 at pgs. 10-11 of 14 (see Appendix "D") state ("On PCRA appeal, the Superior Court rejected this clam because it found that Hart failed to demonstrate how he was prejudiced by his appellate counsel's decision not to review a transcript of the voir dire proceedings."). In all of Hart's state and federal filings, other than trial and direct appeal, he was pro se as court-appointed PCRA counsel filed a "no-merit" letter forcing pro se representation. Hart submitted in his filings he was denied his constitutional rights to effective assistance of counsel at trial and on direct appeal, see e.g., Evitts v. Lucey, 469 U.S. 387 (1985) ("First appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of counsel") (Hart's objections Appendix "E" pgs. 8-9). It is beyond cavil that transcriptions

of voir dire proceedings is a necessary part of trial by jury and is a "critical stage". Jury selection is a critical stage of a defendant's criminal proceedings consistent with this Court's holdings. Lewis v. United States, 146 U.S. 370, 374 (1892) ("Where the indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins."); see also Swain v. Alabama, 380 U.S. 202, 219 (1965) (noting that because voir dire allows for peremptory challenges, it is "a necessary part of the trial by jury"), overruled on other grounds by Batson v. Kentucky, 476 U.S. 79, 100 n. 25 (1986) (emphasis by Hart). Further, jury selection is the primary means by which a defendant's counsel (and the trial court) may enforce the defendant's right to be tried by a jury free form ethnic, racial, or political prejudice, or predisposition about the defendant's culpability. Flowers v. Mississippi, 139 S. Ct. 2228, 2238-43 (2019). Randolph v. Superintendent Greene SCI, 2012 U.S. App. LEXIS 21401, 2021 U.S. App LEXIS at 30 (3rd Cir. 2021). Hart has been diligent in his attempts to develop, pursue, and present to the state and federal courts on a timely basis a full, complete and accurate record of all that transpired before the trial court. Adherence to that obligation assures that a habeas court has before it all that is needed to conduct meaningful collateral review. This is consistent with Rules Governing 2254 cases, Rule 5(c), 28 U.S.C. foll. subsection 2254; PA. R.A.P. 1921. The United States Court of Appeals for the Third Circuit has

recently reaffirmed this principle in Gaines v. Superintendent Benner Township SCI, 33 F.4th 705, 2022 U.S. App. LEXIS 12792 (3rd Cir. 2022). In Gaines the court was presented with a legal situation regarding absence of state voir dire transcripts for purposes of a state prisoner's habeas corpus adjudication of the merits. The court noted (in an exact legal claim that Hart is presenting to this Court) that:

"Unfortunately, the District Court did not have the benefit of the voir dire when it was asked to rule on Gaine's habeas petition. Additionally, no Pennsylvania court had the opportunity to examine the voir dire transcripts. That is because it was not produced until after the District Court granted habeas relief." The court further noted "Yet we lack a reasonable explanation for why neither the Commonwealth nor petitioner thought to inquire into the existence of a voir dire transcript despite its obvious absence from the record. That could and courts would need a complete transcript for use in post-trial proceedings following a first-degree murder conviction seems beyond question". Id. 2022 U.S. App. LEXIS at 19. The court noted that it "uses this opportunity, then, to remind all parties to habeas proceedings that they have an obligation, both in federal court and in the Pennsylvania courts, to develop, pursue, and present to us on a timely basis a full, complete, and accurate record of ALL that transpired before the trial court."

Gaines, 2022 U.S. App. LEXIS 12792, at 19-20 (emphasis' by Hart). What is clear is that an appellate court (state or federal) cannot conduct an ineffective assistance of counsel claim without a complete transcription "of all that transpired before the trial court". The overarching questions to this Court for purposes of certiorari then become: (1) How could any attorney deemed not ineffective when he or she (deliberate or not) unreasonably fails to review a complete transcription "of all that transpired before the trial court," and (2) how could any state or federal habeas court find that a criminal defendant

did not receive ineffective assistance of counsel when that court (PCRA court, state appellate court, or federal habeas court) did not have "all that transpired before the trial court" on a substantive ineffective assistance of counsel claim. Moreover, failing to provide relevant transcripts of "critical stages" of trial court proceedings for purposes of appellate review obviously denies an appellate of due process of law and fundamental fairness in appellate court/habeas proceedings. This would implicate this Court's decision in United States v. Cronic, 466 U.S. 648 (1984) (constructive denial of counsel) and the lower courts should have recognized it as such, in fair judicial appellate proceedings. Hart raised material facts that his jury was biased, resulting in a impartial jury, under the facts of the case (see Appendix "F" at pgs. 22-23, "Moreover, to the extent Hart argues that a juror who was pregnant should not have been allowed on the jury, Pet. 72-74, that claim is likewise meritless."). Hart presented material facts and prima facie evidence that his jury was tainted further demonstrating substantial reasons for the voir dire transcripts in his habeas proceedings implicating ineffective assistance of counsel claims under the Sixth and Fourteenth Amendments. Rule 5(c) (Contents) Transcripts of habeas Rules Governing subsection 2254 Cases also demonstrate furnishing the voir dire transcripts was (is) required for a habeas court to competently rule on the merits. Rule 5 (Answer; Contents) reads as follows:

"The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state including also his right to appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded but not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer."

It is established law that consistent with federal habeas corpus petitions filed pursuant to 28 U.S.C. subsection 2254 cases the Respondents Answer and service of same is mandated to also be served upon the Petitioner under Rules Governing 2254 Cases Rules 1, 5, 11 and Fed. R. Civ. P. 5(a), 10(c), 81(a)(2), Rules Governing 2254 Cases U.S. District Courts 1 provides that the Habeas Rules are applicable to a petition by a person in custody pursuant to a judgment of a state court. Rules Governing subsection 5 describes the mandatory contents of an answer: There shall be attached to the answer such portions of the transcripts as the answering party deems relevant and a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall be filed by the respondent with the answer. The Habeas Rules thus view the exhibits contained in a habeas corpus answer to be part of the answer itself, without which a habeas corpus answer must be deemed incomplete without such vital and important records attached.

Federal R. Civ. P. 81(a)(2) provides in part that the Federal Rules of Civil Procedure are applicable in habeas corpus proceedings to the extent that the practice in such proceedings is not set forth in statutes of the United States or Habeas Rules and has heretofore conformed to the practices in civil actions. Fed. R. Civ. P. 10(c) provides in part that a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes. It follows from Rule 10(c) that if an attachment to an answer is a written instrument, it is part of the pleading. Under Rule 10(c), the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference. The Federal Rules of Civil Procedure clearly mandate service on an adversary of pleadings and their contents. Fed. R. Civ. P. 5(a) requires that service be made on all parties not in default of every pleading subsequent to the original complaint unless the court orders otherwise, including all papers relating to discovery, motions, notices, designation of record on appeal, and other similar papers. Thompson v. Greene, 427 F.3d 263, 268-71 (4th Cir. 2005). The Thompson Court noted that the Courts' to have considered similar issues have concluded that service of an answer's exhibits on a habeas corpus petitioner is mandated. Pindale v. Nunn, 249 F. Supp. 2d 361, 365 (D.N.J. 2003), where a New Jersey district court concluded that "Habeas Rule 5 required the State to serve the Answer on

the petitioner, and Chavez v. Morgan, 932 F. Supp. 1152 (E.D.Wis. 1996) (dismissing the State's response to a habeas corpus petition for failure to provide an "appropriate answer" which would include "copies of the relevant judgment of conviction, any available and relevant transcripts, and any post-conviction pleadings and decisions," as required by Habeas Rule 5); see also Moore's Federal Practice, subsection 671.04(4) (Matthew Bender 3d ed. 1997) (recognizing that "the answer should be served on the petitioner or the petitioner's attorney" and must "set forth" the following: relevant portions of transcripts; briefs filed by petitioner and government; opinions and orders of state courts); Randy Hertz and James S. Liebman, Federal Habeas Corpus Practice and Procedure, subsection 19.2 (4th ed. 2001) ("Because Habeas Rule 5 states 'relevant' portions of the record 'shall be attached to the answer, any order under Rules 4 and 5 of the Rules Governing 2254 Cases requiring the State to answer the petition and to serve its answer to the petitioner...also presumedly requires the state to serve on the petitioner -- whether indigent or not -- the 'attached' portions of the record.'"). Thompson, 427 F.3d at 269-270; see also, Rodriquez v. Florida Dept. of Corrections, 748 F.3d 1073, 1077 (11th Cir. 2014) (same), cert. denied 135 S. Ct. 1170 (2015); Sixto v. Tisler, 615 F.3d 569, 572 (5th Cir. 2010) (same) cert. denied, 562 U.S. 1184 (2011); Thurlow v. Zenk, 2018 DNH 007, 2018 U.S. Dist. LEXIS 2755, No. 15-cv-512-SM (D.N.H. Jan. 8, 2018), Steven J. McAuliffe, U.S. District Judge (same). It

was presented in Hart's habeas corpus memorandum of law in support that these documents were necessary for Hart to properly present his constitutional claims under the Sixth and Fourteenth U.S.C.A. (Hart's habeas memorandum at pgs. 96-100) and presented in Claim VI, which reads:

VI. In Compliance with Rule 5 Governing 28 U.S.C. 2254 Cases Hart Requests an Order Entered by the Court that Respondents Answer with All Exhibits Being Served upon Hart for Competent and Thorough Presentation of his Substantive Based Claims

Hart requested the following be provided, as required by the Rules Governing and Civil Procedure Rules applicable to habeas corpus proceedings:

(1) Transcripts of Hart's Arraignment held on February 2, 2010 (02/02/10) conducted in the Court of Common Pleas;

(2) all motions submitted by the parties in State court;

(3) all hearing notices;

(4) all motions for continuances submitted by either party;

(5) transcripts of the Scheduling Conference hearing conducted/held on September 20, 2010 (09/20/10) held before Hon. Judge Carolyn Engel Temin;

(6) jury selection notes of testimony (voir dire) and as well as any polling of the jury transcripts;

(7) all petitions/motions/pleadings submitted by Hart to the Pennsylvania Supreme Court after denial of his appeal to the Superior Court as well as all relevant transcripts of trial court proceedings.

Hart then requested in his Conclusion and Relief Requested that the Court enter any other Order that the Court deems necessary, as justice requires, in conjunction with his pleadings of record thus far presented and the law in relation to these material facts for adjudication of the substantive based merits.

Under Rule 6(a) of the Rules Governing Section 2254 cases, a judge may, for good cause, authorize a party to conduct discovery under Fed. R. Civ. P. and may limit the extent of such discovery. In determining whether to permit discovery the burden rests upon the petitioner to demonstrate that the sought-after information is pertinent and that there is good cause for its production. Williams v. Beard, 637 F.3d 195, 209 (3rd. Cir. 2011); see also Bracy v. Gramley, 520 U.S. 899 (1997). Under the 'good cause' standard, a district court should grant leave to conduct discovery only 'where specific allegations before the court show reason to believe that the petitioner may, if the facts are more fully developed, be able to demonstrate that he is entitled to relief." Harris v. Nelson, 394 U.S. 286 (1969). The District Court's decision to deny discovery in this case regarding Hart's requested production of relevant state court trial proceedings is preventing Hart from developing meritorious juror bias issues. It has already been demonstrated that Hart had a pregnant juror in his jury (in a case where the State argued Hart committed homicide upon a pregnant woman). The lower court's order are preventing Hart from demonstrating, if more fully developed, additional structural errors in his state trial court proceedings where that juror should have been dismissed for cause. United States v. Martinez-Salazar, 528 U.S. 304, 316 (2000) ("The question of whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror who should have been dismissed for cause requires

reversal of the conviction"). Failure to remove biased jurors taints the entire trial, and therefore...the resulting conviction must be overturned. Wolf v. Brigano, 232 F.3d 499, 503 (6th Cir. 2000). As succinctly stated by the Sixth Circuit in Hughes v. United States, 258 F.3d 453, p. 15, 16 (6th Cir. 2001):

"If counsel's decision not to challenge a biased venireperson could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury. However, if counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury "without the fully informed and publicly acknowledged consent of the client." Taylor v. Illinois, 484 U.S. 400, 417, n. 24 (1988), then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury. Indeed, given that the presence of a biased juror, like the presence of a biased judge, is a 'structural defect in the constitution of the trial mechanism' that defies harmless error analysis, Johnson v. Armontrout, 961 F.2d 748 at 756 (quoting Arizona v. Fulminate, 499 U.S. 259, 309 (1991), to argue sound trial strategy in support of creating such a structural error seems brazen at best. We find that no sound trial strategy could support counsel's effective waiver of a petitioner's basic Sixth Amendment right to an impartial jury."

See also Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. (en banc) (bias jurors mandating a new trial); Oswald v. Bertrand, 374 F.3d 475, p. 9 (7th Cir. 2004) (holding that every criminal defendant is entitled to be tried before an impartial tribunal, and this is one of the handful of rights of a criminal defendant that is not subject to the doctrine of harmless error) (collecting cases). This was thoroughly presented also in Hart's habeas corpus memorandum of law at pgs. 55-59 (collecting structural error cases). Strickland v. Washington, 466 U.S. 668, 687 (1984) requires that finding ineffective assistance of counsel requires first finding that counsel's performance

was objectively unreasonable under the Sixth Amendment, and second, that counsel's deficient performance prejudiced defendant). It was patently obvious trial counsel was ineffective and Hart suffered prejudiced in the material facts of this case implicating another structural error in the trial court proceedings. As further demonstrative proof that it was necessary for Hart to obtain jury voir transcripts implicating obvious juror bias/impartial juror issue, the District Attorney utilized the fact the case involved the death of a pregnant women to attempt to bring political and/or emotional issues in an obvious blatant attempt to arouse the prejudice to Hart where the following prejudicial prosecutorial misconduct occured:

> During the prosecutions closing argument, the prosecutor said: "[Hart] acted as [the victim's] judge, her jury, and her executioner and a self-proclaimed abortionist of that baby, because when he shot her in the head, the baby died, too." (N.T. trial 03/30/12 at pgs. 52). Trial counsel also objected because the prosecutor's actions of calling Hart a "murderer" before verdict, was it and of itself, prejudicial but to call Hart an abortionists was pointedly unduly prejudicial and requested a mistrial. (N.T. trial 03/30/12 at pgs. 77-85).

This was presented as a separate and distinct claim throughout Hart's State collateral and federal habeas corpus filings (see Hart's pro se habeas corpus memorandum of law at pgs. 42-48:

> 3. The State court's unreasonably applied the objective of Berger v. United States, 395 U.S. 78, 55 S. Ct. 629 (1935) and its progeny in finding that Petitioner was not denied Petitioner's substantive Sixth (6th) U.S.C.A. right at trial and on direct appeal for failure of counsel to follow-through on a requested mistrial due to prejudicial prosecutorial misconduct utilize to deprive Petitioner of a fair trial

The prejudicial prosecutorial misconduct and ineffective assistance of trial and direct appeal could claim is demonstrated in Hart's Habeas Corpus memorandum of law at pgs. 42-49; Appendix "D" District Court memorandum at pgs. 9-10; Appendix "E" Hart's substantive based Objections at pgs. 6-7; Appendix "F" Magistrates Report and Recommendation at pgs. 19-22; Appendix "G" Superior Court Opinion at pgs. 17-18. This is submitted to put the facts of this claim in context of the reasons Hart has demonstrated good cause and consistent with Rule 5(c) involving production of material documents to develop demonstrated impartial juror claims. The lower court's reasoning and decision in this claim were (are) decided in a way that conflicts with the relevant decisions of this Court and Rules Governing Habeas Corpus actions and certiorari should be granted to resolve this important federal claims.

4. Whether the lower court's have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power and/or have decided an important federal question in a way that conflicts with relevant decisions of this Court regarding Hart's denial of his Sixth Amendment right to a Speedy Trial.

This substantive and substantial claim was presented throughout Hart's federal and state habeas proceedings. This claim has been thoroughly exhausted in the lower court proceedings and is not procedurally defaulted warranting consideration of the substantive merits by this Court (see Hart's Habeas Corpus memorandum of law at pgs. 50-95; Appendix "D" District Court's memorandum at pgs. 11-13; Appeix "E" Hart's

pro se Objections at pgs. 9-10; Appendix "F" Magistrates Report and Recommendation at pgs. 23-25; Appendix "G" Superior Court Opinion at pgs. 7-11). Hart raised this claim in his federal habeas 2254 petition in the following terms:

5. The state courts' finding Hart was not denied his Sixth (6th) and Fourteenth (14th) U.S.C.A. right to effective assistance of counsel during pre-trial, direct appeal and collateral review proceedings on all prior counsel's failure to submit a meritorious Speedy Trial Claim is (was) contrary and unreasonable applications of clearly established federal law and holdings warranting the granting of the Writ

In Hart's Superior Court appeal this substantive based claim was raised in the following terms:

1. Whether prior counsel were ineffective for filing to raise a meritorious Pa.R.Crim.P. 600 (speedy trial rule) motion to dismiss that deprived [Appellant] of his substantive Sixth (6th) and Fourteenth (14th) United States Constitutional Amendments and/or the Pennsylvania Constitutional right under Article 1, subsection 9 depriving a basic human right?

See Appendix "G" Superior Court opinion at pg. 5. The lower state and federal courts, as submitted by Hart, unreasonably applied this Court's holdings regarding Speedy Trial claims and the material facts demonstrating a meritorious Speedy Trial claim under the Sixth Amendment. The Sixth Amendment Speedy Trial Clause provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial." U.S. Const. amend. VI. The Clause embodies "one of the most basic rights preserved by our Constitution." Klopfer v. North Carolina, 386 U.S. 213, 266 (1967) (right to speedy trial applies in state under the Due Process Clause of the Fourteenth Amendment). The right to a speedy trial is essential to protect

all presumptively innocent criminal defendants, and it does so "by 'preventing undue and oppressive incarceration prior to trial...minimizing anxiety and concern accompanying public accusations, and...limiting the possibilities that long delay will impair the ability of an accused to defend himself.'" Betterman v. Montana, 136 S. Ct. 1609, 1614 (2016). This Court has repeatedly held its position that there is only one remedy when a defendant demonstrates his/her Speedy Trial Rights were violated. "The sole remedy for a violation of the speedy trial right [is] - dismissal of the charges." Betterman, id. 194 L. Ed. 2d at 732 citing Strunk v. United States, 412 U.S. 434, 440 (1973); Barker v. Wingo, 407 U.S. 514, 522 (1972). The Due Process Clause may be violated if instances demonstrate prosecutorial delay that is "tactical" or "reckless" Id. Citing United States v. Lovasco, 431 U.S. 783, 789 (1977). Prior to trial Defendant's are accused of a crime. The presumption of innocence of United States Citizens criminally charged in any particular State is maintained until conviction upon trial or guilty plea. Betterman, id. 194 L. Ed. 2d at 730. Prior to conviction, an accused is shielded by the presumption of innocence, the "bedrock, axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." Id. Citing Reed v. Ross, 468 U.S. 1, 4 (1984). The Speedy Trial Clause implements that presumption by "preventing undue and oppressive incarceration prior to trial... minimizing anxiety and concern accompanying public accusation, and...limiting the possibilities that long delay

will impair the ability to an accused to defend himself." Id. Citing United States v. Marion, 404 U.S. 307, at 320 (1971); Barker, 407 U.S. 514, 532-35. The only legally pertinent time a criminally accused Citizens looses the presumption of innocence is upon conviction. Id. 194 L. Ed. 2d at 730. The State may not permit a presumpively innocent United States Citizen to be worn and wasted by long periods of pretrial imprisonment but...speedily come to his trial. Id. This reflects the framers of the United States Constitution mandate that a presumptively innocent person should not languish under an unresolved charge. Thus, the Speedy Trial Clause guarantees "the accused" 'the right to a speedy...trial.'" U.S. Const. Amend. 6. Relevant to this claim is the legal finding that an "accused" is descriptive of a status preceding "convicted". See e.g., 4 W. Blackstone, Commentaries on the Laws of England 322 (1769). When a State habeas petitioner competently demonstrates his speedy trial are violated the sole remedy for this violation is dismissal of the charges. Id. 194 L. Ed. 2d at 732. This Court has repeatedly demanded that violation of the Speedy Trial Clause requires termination of the prosecution. Betterman, id. 194 L. Ed. 2d 734, at 732 (FN5) (2015). In order to prevail on an ineffective assistance of counsel claim Hart must demonstrate both that counsel's representation fell below an objective standard of reasonableness, Strickland v. Washington, 466 U.S. 668 (1984), and that there exists a reasonable probability that, but for counsel's unprofessional errors, the

results of the proceedings would have been different. Id. Where the principle allegation is ineffectiveness, Hart must prove that his Speedy Trial claim is meritorious and that there is a reasonable probability that the outcome of the proceedings would have been different in order to demonstrate actual prejudice. While Hart's claim is one element of proof on his Sixth Amendment claim, the two claims have separate identities and reflect different constitutional value. Id. 477 U.S. at 375. The factual predicate for Hart's substantive Speedy Trial Rights violations and ineffective assistance of counsel in this regard show that Hart was charged by criminal complaint on October 16, 2009 (10/16/09) and was arrested also on that date. Hart was incarcerated and not permitted bail prior to trial per Pa.R.Crim.P. Rule 520(B) (Bail Before Verdict) ("All prisoner shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it."). Hart's criminal charges were a non-bailable offense under Pennsylvania law. Hart's trial commenced on March 27, 2012 (03/27/12). Hart was incarcerated in pretrial detention for eight-hundred ninety three (893) days after he was arrested. Hart never agreed to

any continuances nor waived his Speedy trial rights. The inclusive dates of Hart's incarceration are from October 15, 2009 to March 27, 2012 as demonstrated:

1. October 15, 2009 (15 days);
2. November 2009 (30 days);
3. December 2009 (31 days);
4. Entire year of 2010 (365 days);
5. Entire year of 2011 (365 days);
6. January 2012 (31 days);
7. February 2012 (29 days);
8. March 2012 (27 days);
9. Trial commenced on March 27, 2012.

The trial should have commenced on or before Wednesday April 14, 2010 (see Hart's pro se habeas corpus memorandum of law at pgs. 55-59). The lower state and federal courts' attempt to justify the obvious denial of Hart's Speedy Trial rights as excusable for reasons implicating "unexplained judicial delay" (Hart's habeas memo. at pgs. 72-77) in the difficulty of the state court in scheduling a death penalty case for trial. Id. The Magistrates R&R (Appendix "F" at pgs. 23-24) accepted this factually incorrect premise accepting the state courts findings:

"In the instant case, 188 days of the delay were excludable; 35 days due to [Hart] not having an attorney, and 153 days due to defense requests for continuances. In addition, 540 excusable days were due to the difficulty, by the court, in scheduling a capital case for trial. [For instance, on September 20, 2010, the trial court listed the case for trial on March 26, 2012, ruling all but twelve days, which was attributed to the Commonwealth's request not to schedule the trial during the weeks of Christmas and New Year's Day, was excusable.] When all excludable and excusable time is considered, [Hart] was brought to trial 155 days after his arrest. Thus, the case was tried with the time allotted by Rule 600."

This is factually incorrect in that the Commonwealth withdrew seeking the death penalty early in the criminal proceedings.

The 540 days of "unexplained judicial delay" is simply being utilized as a ruse to deter Hart's Speedy Trial claim and ineffective assistance of counsel claims from being properly adjudicated on their substantive merits that would merit relief from this unconstitutionally obtained judgment of sentence. Hart request the entry of any order entered by this Court in conjunction with the pleading including discharge or an evidentiary hearing being held on any/all claims.

CONCLISON

The petition for writ of certiorari should be granted.

Respectfully submited,

Tyrell Hart

Tyrell Hart, pro se