No. 23-5528

IN THE SUPREME COURT OF THE UNITED STATES

******

LAHME PERKINS,
Petitioner

v.

SECRETARY OF THE DEPARTMENT OF CORRECTIONS; SUPERINTENDENT SCI FRACKVILLE; PENNSYLVANIA ATTORNEY GENERAL'S OFFICE,
Respondent

******

ON PETITION FOR WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

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PETITION FOR WRIT OF CERTIORARI

*****

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QUESTIONS PRESENTED

After Petitioner filed his application and memorandum of law pursuant to **28 U.S.C. §2254**, and without ordering a response from the State, the District Court sua sponte raised a procedural default defense to Petitioner's grounds for relief.

Did the Third Circuit Court of Appeals err in failing to grant the certificate of appealability where the District Court dismissed Petitioner's habeas application after failing to give Petitioner fair notice of the defense before dismissal?

Petitioner filed appeal from the denial of his first petition for post-conviction relief (PCRA). The PCRA Court informed the appellate court that it did not receive Petitioner's Concise Statement or Error in Petitioner's first PCRA appeal. The appellate court found waiver of all Petitioner's issues. On federal habeas, the District Court and Third Circuit Court of Appeals followed suit, finding no cause and prejudice for procedural default of petitioner's PCRA petition and appeal.

Did the Third Circuit Court of Appeals, and the District Court, err in finding that Petitioner had not demonstrated cause and prejudice to excuse procedural default where Petitioner provided evidence that he had done all that he could do as an incarcerated individual to comply with the rules of procedure in his first PCRA appeal and where the waiver was no fault of his own?

Petitioner further filed appeal from his second PCRA petition. The PCRA Court found the issues to be untimely, failing to meet any of the excpetions to the statutory limitations. The state appellate court found waiver for failure to meet the timeliness exceptions. On federal habeas, the District Court and Third Circuit Court of Appeals found no cause and prejudice for excusing the procedural default.

Did the Third Circuit Court of Appeals and the District Court err in finding that Petitioner had not demonstrated cause and prejudice to excuse procedural default caused by (1) ineffective assistance of PCRA counsel for failure to raise and/or litigate the underlying issues in his first PCRA petition; and (2) newly discovered facts that met the timeliness requirements of the PCRA statute?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THRID CIRCUIT

The Petitioner, Lahme Perkins, respectfully prays that the Writ of Certiorari issue to review the judgment and opinion of the Third Circuit Court of Appeals rendered in these proceedings July 21, 2023.

OPINION BELOW

The Third Circuit Court of Appeals denied a Petition for Rehearing in a federal habeas corpus case, No. 2301229, on July 21, 2023, on appeal from the Middle District of Pennsylvania, No. 1-22-cv-0087. The Order and Opinion denying Rehearing is reprinted in Appendix 6 of this Petition.

JURISDICTION

The original Application of Certificate of Appealability was denied by the Court of Appeals on June 1, 2023. A timely petition for rehearing was denied by the Court of Appeals on July 1, 2023.

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

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case:

U.S. CONSTITUTIONAL 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; 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.

U.S. CONSTITUTIONAL AMENDMENT XIV

Sec. 1. [Citizens of the United 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 citizens of the United States; nor shall any State 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.

28 U.S.C. §2254

State custody; remedies in Federal courts

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) (1) 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 unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of

the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the

sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 .

STATEMENT OF THE CASE

In December of 2008, Lahme Perkins (Hereinafter, "Petitioner") was convicted of first-degree murder and related charges following a jury trial in the Dauphin County Court of Common Pleas. He was sentenced to life in prison.

Petitioner appealed to the Pennsylvania Superior Court, arguing that there was insufficient evidence to convict him. The Superior Court affirmed. Petitioner filed petitions for leave to appeal to the Pennsylvania Supreme Court and the United States Supreme Court, both of which were denied. See, Commonwealth v. Perkins, 60 A.3d 849(Pa.Super.2012)(unpublished memorandum); appeal denied, 63 A.3d 1246(2013; certiorari denied, Perkins v. Pennsylvania, 134 S.Ct. 139(2013).

Petitioner filed a petition for state collateral relief under Pennsylvania's Post-Conviction Relief Act ("PCRA") on January 22, 2014. He sought PCRA relief because of trial counsel's purported ineffectiveness in failing to conduct a pretrial investigation, consult or retain a DNA expert, interview and present character witnesses, or object to inflammatory photographs. The Court of Common Pleas dismissed the PCRA petition on April 11, 2019. Petitioner appealed.

The Superior Court affirmed, holding that Petitioner waived all of his claims on appeal by failing to file a concise statement of errors in accordance with Pennsylvania Rule of Appellate Procedure 1925 ("1925(B) Statement"). Commonwealth v. Perkins, 245 A.3d 1077 (Pa.Super.2020).

Petitioner filed for Reargument, providing the Court with evidence that he had filed the 1925(B) Statement with the Clerk of Court. The Superior Court ignored this evidence and the standard of proof for these situtations under Commonwealth v. Keffer,

2014 Pa. Super. Unpub. LEXIS 3306. (See, **Appendix 1, Commonowealth v. Perkins, 159 A.3d 46 (Pa. Super. 2016))**. Petitioner filed for allowance of appeal to the Pennsylvania Supreme Court, but review was denied. Commonwealth v. Perkins, 263 A.3d 552 (Pa. 2021). He did not file for Writ to this Court.

Petitioner filed a second PCRA petition on November 4, 2021, arguing (1) that the Commonwealth failed to meet its burden to establish a prima facie case at his preliminary hearing, and (2) that his right to effective assistance of counsel was violated where his trial counsel was unfit to litigate a murder trial because he was dealing with substance abuse issues, depression, and his own attorney discipline matters at the time of trial.

While his second PCRA was pending, Petitioner filed the instant habeas corpus petition, under 28 U.S.C.§2254, on February 1, 2022, and the Court docketed the petition on February 8, 2022.

Petitioner raised six (6) claims for habeas corpus relief: the four ineffective assistance of counsel claims that he raised in his first PCRA petition and the two claims he raised in his second PCRA petition. Petitioner moved to stay the case pending the litigation of his second PCRA petition. the Court granted the motion to stay on March 17, 2022, and directed Petitioner to move to lift the stay within 30 days of the completion of his attempt to exhaust state remedies.

The Court of Common Pleas denied Petitioner's second PCRA petiton as untimely on March 16, 2022. After the Superior Court affirmed that denial on September 23, 2022, (See, **Appendix 2, Commonwealth v. Perkins, 285 A.3d 949 (Pa. 2022))**, Petitioner moved to lift the stay of this case on October 2, 2022 and the District Court granted said motion

The District Court, without ordering a response from the State, and after sua sponte raising procedural default as a defense to the §2254 application, dismissed the application.

The District Court stated:

> The court finds that Perkins's claims are procedurally defaulted. His first four claims were raised in his first PCRA proceeding but were deemed waived on appeal for his failure to file a concise statement of errors in accordance with Pennsylvania Rule of Appellate Procedure 1925. Perkins, 245 A.3d 1077, 2020 WL 7386201, at *2. His fifth and sixth claims were raised in his second PCRA petition but were denied as untimely for failure to comply with the PCRA's statute of limitations. Perkins, 2022 Pa. Super. Unpub. LEXIS 2244, 2022 WL 4392699, at *1-3. Hence, his claims are procedurally defaulted because the state courts declined to consider them on their merits based on independent and adequate state procedural rules.

(See, **Appendix 3, Perkins v. Superintendent, 2022 U.S. Dist. LEXIS 191075 (M.D.Pa.), Memorandum by Judge Conner, Civil Action No. 1:22-CV-187 at pages 4-5.)**

Petitioner filed a Motion to Alter or Amend Judgment in which he asked the Court to consider the tortured procedrual history, abandonment by counsel(s) during his PCRA and PCRA appeals, that Petitioner had provided all possible and necessary evidence to prove that he had, in fact, filed the 1925(B) Statement, that his first four issues for relief should have never been found to be waived, and that he had shown cause and prejudice for procedural default. See, **Appendix 4, Motion to Alter or Amend Judgment, @ 2-7.** Petitioner further argued to the Court that contrary to its assertion, *he had* actually raised his fifth issue, the preliminary hearing issue, in his first pro se PCRA, but that counsel had ignored it, and the PA Supreme Court had only recently made that issue valid, and that his sixth issue was newly discovered evidence of trial counsel's addictions, depression and incompetence during Petitioner's trial. **Id. @ 8-10.**

The District Court denied the **Motion to Alter or Amend Judgment** (which the Court restyled as a Motion for Reconsideration), on January 13, 2023. See, **Appendix 5, Order dated 1/13/23.**

Petitioner filed an Application for Certificate of Appealability with the Third Circuit Court of Appeals, but it was denied on June 1, 2023 and Petition for Rehearing was denied on July 21, 2023. See, **Appendix 6, Order denying Petition for Rehearing, 7/21/23.**

The case is now ripe for this Court's review.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit Court of Appeals erred in failing to issue the certificate of appealability after the District Court sua sponte raised a procedural defense to the §2254 application and dismissed the application without giving Petitioner fair notice of the defense.

The Third Circuit Court of Appeals routinely grant certificates of appealability in cases such as Petitioner's:

> The request for a certificate of appealability is granted. See 28 U.S.C. 2253. Jurists of reason could debate whether the District Court properly dismissed McKinley's petition as time-barred without providing notice and opportunity to respond, see Day v. McDonough, 547 U.S. 198, 210, 126 S. Ct. 1675, 164 L. Ed. 2d 376(2006); United States v. Bendolph, 409 F. 3d 155, 169 (3d Cir. 2005)(en banc).

McKinley v. Superintendent of Rockview, 2022 US App LEXIS 27563(3d Cir. 2022).

See also:

> Other Circuits agree that a district court may sua sponte dismiss a §2254 petition if the petition's untimleiness is clear from the face of the petition." Kilgore v. Att'y Gen. of Colo., 519 F.3d 1084, 1089(10th Cir. 2008); see, Valdez v. Montgomery, 918 F.3d 687, 693(9th Cir. 2019)(holding that the district court did not err by sua sponte dismissing plainly untimely §2254 petition where the court provided the petitioner with "adequate notice and opportunity to respond."(quotations omitted)); cf. Shelton v. United States, 800 F.3d 292, 295 (6th Cir. 2015)(holding that the district court erred by sua sponte dismissing habeas petition on timeliness grounds because the petitioner did not have an "opportunity to challenge the arguments that the district court invoked in finding the motion untimley.").

Paez v. Sec'y, Fla. Dep't of Corr, 947 F.3d 649, 654 (11th Cir. 2020).

The Distrcit Court in the instant case, never assigned the Petitioner's §2254 to a magistrate, and without ever ordering a response from the State, dismissed the §2254 application after sua sponte raising procedural default defense to deny Petitioner's grounds for relief.

When Petitioner attempted to argue against the procedeural default (**Appendix 4, Motion to Alter Amend, pp.5-6**) the District Court stated:

> [P]etitioner did not assert any of the three arguments to excuse the procedural default that he rasies in the instant motion for reconsideration prior to the court's dismissal of his petition, and the court observing that motions for reconsideration may not be used to raise new arguments that could have been raised before the issuance of the order in question[.]

(Appendix 5, Order denying the Motion to Alter or Amend, dated 1/13/23 @ pp.2-3) The District Court never gave Petitioner an opportunity to properly argue to excuse procedural default. It dismissed his application without ever giving Petitioner any notice of the procedural default defenses it was dismissing on.

In Thomas v. Payne, 2021 US LEXIS 3726(2021), this Court said:

> "'Of course, before acting on its own intiative, a court must accord the parties fair notice and an opportunity to present their posititons.' This lack of notice left Thomas without a meaningful opportunity to dispute the grounds on which the court reversed the District Court's decision to grant him habeas relief." (quoting Day).

Petitioner's arguments for cause and prejudice have never been evaluated or addressed by any of the Third Circuit courts.

Because the Third Circuit Court of Appeals, and the District Court have obfuscated Petitioner's rights of habeas corpus review uner 28 U.S.C. §2241 et seq., by failing to give him fair "notice and opportunity" to respond to the defenses, this Court must grant the writ of certiorari.

II. The Third Circuit Court of Appeals, and the District Court, erred in finding Petitioner had not demonstrated cause and prejudice to excuse procedural default where the state court found waiver in his first PCRA, but evidence was provided that Petitioner had done all that he could as an incarcerated individual to comply with state rules of procedure appeal and the waiver was no fault of his own.

Grounds for relief 1-4 of Petitioner's habeas application were issues of ineffective assiatnce of trial and/or PCRA counsel. These were the same four issues that had been heard by the PCRA court, and raised by Petitioner in the appeal from denial of his PCRA.

The District Court found that all four of these issues were procedurally defaulted because while these issues were raised in Petitioner's first, timely PCRA petition in the state court, they were later deemed waived on PCRA appeal because the PCRA court alleged Petitioner had not filed a Concise Statement of Matters (1925(**Appendix 3, Memorandum dated 10/19/22 @ 4.**

The facts concerning the 1925(B) are as follows: On appeal after his first PCRA was denied by the PCRA court, the Superior Court remanded the case because the PCRA court had granted appointed counsel's Petition to Withdraw without appointing new counsel or conducting a Grazier[1] hearing. Commonwealth v. Perkins, 159 A.3d 46(Pa.Super.2016). The Court stated:

> On remand, we direct the PCRA court to appoint counsel to represent Perkins, or conduct a **Grazier** hearing should Perkins wish to proceed *pro se*. Newly appointed counsel for Perkins, within 30 days from his/her appointment, is directed to file an amended PCRA petition to include Perkins' claim of ineffective assistance of PCRA counsel, and seek an evidentiary hearing if necessary.

Id. @ 5. On remand, the PCRA court appointed new counsel, but new PCRA counsel failed to follow the Superior Court remand Order, and simply filed a No-Merit **Finley**[2] letter and Petition to Withdraw.

After counsel withdrew, Petitioner filed a Notice of Appeal and a 1925(B) when ordered. The PCRA court stated Petitioner had not filed the 1925(B) and the Superior Court found waiver.

[1] Commonwealth v. Grazier, 713 A.2d 81(Pa.1998)
[2] Commonwealth v. Finley, 544 A.2d 927 (Pa.1988)

Petitioner filed for Reargument after the Superior Court found waiver, providing the Court with evidence that he ***had*** served four copies of his 1925(B) on the Dauphin County Clerk of Court: the Department of Corrections Cash Slips that were used to pay for postage. In Pennsylvania:

> To support application of the Maibox Rule, a prisoner bears the burden of ***proving delivery of [the filing] to prison authorities within*** the prescribed time period for its filing.

Commonwealth v. Keffer, 2014 Pa.Super.Unpub. LEXIS 33026. This is the standard because inmates can prove no more. An inmate's only ability is to hand the mail to prison authorites, along with approved Cash Slips to pay for postage, and trust that they will deliver it to the USPS for mailing to the recipient. The ONLY evidence inmates can ever show of this process is the processed Cash Slips showing that the postage was paid for on the day it was handed to prison authorities.

> 'Reasonably verifiable evidence' of timely mailing may include a cash slip, certificate of mailing, certified mail, or affidavit of date of deposit with prison authorities. **Commonwealth v. Jones**, 700 A.2d 423 (Pa.1997).

Commonwealth v. Craig, 2020 Pa. Super. LEXIS 291. See also, Paris v. Comm. of PA, 2021 U.S. Dist. LEXIS 182512, citing Jones and Pennsylvania Rules of Appellate Procedure, Rule 121.

Petitioner also pointed out to the Superior Court that he had not ***chose*** to liigate this PCRA appeal *pro se*, but had been abandoned by one counsel and had the other ignore the Superior Court's remand Order to file an amended petition. Petitioner not having counsel was actually a direct contradiction of the Superior Court's Order, but that was somehow ignored.

Nevertheless, Petitioner provided all the proof available and necessary by rule, and the Superior Court remanded again so the PCRA court could conduct an investigation into whether Petitioner had served the 1925(B).

Unfortunately, after the PCRA court filed a statement alleging that there was no evidence the 1925(B) was ever served, the Superior Court again deemed all of Petitioner's issues waived and affirmed the dismissal of his PCRA. **(Appendix 1)**.

This Court can see from the ***tortured procedural history*** of Petitioner's first PCRA petition and appeal that Petitioner was, among other things, abandoned by counsel, had the PCRA court and second counsel ignore orders of the appellate courts, and was held to a higher standard that the appellate courts of PA actually require, and of what is possible, for proof of service.

Now, the Middle District Court of Pennsylvania, without ordering a response from the state or notifying Petitioner of the procedural bar defense it was raising sua sponte, dismissed the application and when Petitioner attempted to raise those arguments on reconsideration, (*Petitioner's first opportunity after the summary dismissal of his application*) the Court refused to acknowledge the 'new' arguments. (**Appendix 4 @ 5-6**). The District Court stated:

> [P]etitioner did not assert any of the three arguments to excuse the procedural default that he raises in the instant motion for reconsideration prior to the court's dismissal of his petition, and the court observing that motions for reconsideration may not be used to raise new arguments that could have been raised before the issuance of the order in question.

Appendix 5 @ 2-3.

The District Court never gave Petitioner an opportunity to properly argue to excuse procedural default. It dismissed his application without any prior notice of the procedrual default defense it would dismiss on.

Setting aside for the moment the fact that the District Court erred in failing to accord Petitioner "fair notice and opportunity to present" his position on procedural default, by dismissing the application before giving Petitioner a chance to respond and refusing to hear those arguments on reconsideration (as explained earlier in this petition), Petitioner argues he ***has*** shown actual cause and prejudice for his procedural default. McKinley v. Sup't Rockview, 2022 US App. LEXIS 27563 (2/4/22).

While there doesn't appear to be any binding Third Circuit precedent, other Circuit Court's opinions are instructive. In Hampton v. Kelly, 1990 U.S. Dist. LEXIS 20850 (E.D.Ny. 1990), the Court said that a miscarriage of justice occurs when a *pro se* prisoner made a good faith attempt to comply with state procedures and failed through no fault of his own.

In Wiggins v. Clark, 2008 U.S. Dist. LEXIS 104363(E.D.Cal.2008):

> Errors by the Court or their staff which impede a petitioner's efforts to comply with a state 's procedural rules has been found to constitute "cause" to excuse a procedural bar. See, **Hartman v. Bagely**, 492 F.3d 347, 358(6th Cir. 2007); **Roberts v. Sutton**, 217 F.3d 1337, 1340-41(11th Cir. 2000); **Alexander v. Duggan**, 841 F.2d 371, 374(11th Cir. 1988). In a similar case, the Tenth Circuit held that a "failure of the clerk to provide [petitioner] with a certified copy made compliance with [the state procedural rule] practically impossible," establishing "cause" to excuse procedural default. **Johnson v. Champion**, 288 F.3d 1215, 1228(10th Cir. 2002).

Wiggins @ 10.

Petitioner asks this Court to find that he has shown actual cause to excuse procedural default, and that failure to review the merits of legitimate constitutional violations of ineffective assistance of counsel because of problems outside of his control is prejudicial.

Petitioner is serving a life sentence for a crime he did not commit. He asks this Court to find cause and prejudice and to grant the writ.

III. The Third Circuit Court of Appeals, and the District Court, erred in finding that Petitioner had not demonstrated cause and prejudice to excuse procedural default caused by (1) ineffective assistance of counsel for failure to raise and litigate the underlying issues in his first PCRA petition; and (2) newly discovered facts that met the timeliness requirements of the PCRA statute.

Petitioner's fifth and sixth claims in his §2254 application were, respectively, that his Due Process and Confrontation rights were violated at his preliminary hearing, and that newly discovered facts of trial counsel's depression, addiction and his own legal issues at the time of Petitioner's trial proved that he was incapable of litigating a first degree homicide case.

In dismissing Petitioner's fifth claim as procedurally defaulted, the Third Circuit Court of Appeals affirmed the District Court's opinion. The District Court stated that Petitioner has not established cause and prejudice because he didn't raise the claim sooner. "[Petitioner] does not explain what prevented him from raising the claim in his first PCRA petition, and it would not be procedurally defaulted had he done so." **Appendic 3 @ 6.**

Petitioner explained to the Court in the **Motion to Alter or Amend** that he did not raise the preliminary hearing issue on direct appeal because state law at the time barred the issue. See, Commonwealth v. Ricker, 120 A.3d 349 (Pa.2015). **Appendix 3 @ 8-10.**

Incidentally, Petitioner ***did*** raise the issue in his first PCRA petition. Following remand from the Superior Court on PCRA appeal for new counsel to be appointed to file an amended petition, Petitioner sent new counsel a letter with 18 issues for counsel to review. Issue #1 was trial and appellate counsel's failure related directly to the preliminary hearing issue.

Furthermore, when the Pennsylvania Supreme Court decided Commonwealth v. McClelland, 233 A.3d 717 (Pa.2020), it reversed Ricker and announced for the first time that "hearsay evidence alone is insufficient to establish a prima facie case at a preliminary hearing." See, Commonwealth v. Henninger, 260 A.3d 116 (Pa.2021).

McClelland was decided during the pendency of Petitioner's PCRA appeal for his first PCRA. By state law, he could not raise the issue until the completion of his first PCRA, in a second PCRA. Despite Petitioner's best efforts, the fifth issue could not be raised sooner.

The District Court said in relation to Petitioner's sixth habeas corpus issue, that Petitioner failed "to provide specific information as to when he discovered counsel's alleged personal issues, [therefore, Petitioner] has failed to meet his burden to show that an external factor impeded his ability to comply with the PCRA's statute of limitations." **Appendix 3 @ 6**.

The Court was correct that Petitioner failed to state in his §2254 application or memorandum of law *when* he had discovered the information about trial counsel's addiction and legal troubles. It was an oversight.

However, if the District Court had followed the procedures set out by this Court in Day and others, and provided Petitioner notice of the procedural defense, Petitioner could have sought to amend the petition with the missing information.

Petitioner actually did include the issue in the same letter to Attorney DeStefano on remand from the Superior Court on appeal from his first PCRA, but counsel ignored this issue as well. When counsel ignored the issue and filed a Finley letter, state law dictated that Petitioner had no choice but to raise the issue in a second PCRA petition.

In that second PCRA petition, Petitioner alleged that he did not discover this information until February of 2018, while in the prison law library, during the pendency of his first PCRA. Petitioner had requested information on his trial lawyer numerous times through the Dauphin County Clerk of Court and the Disciplinary Board, and researched his name in the prison law books, but never found anything until 2018.

Petitioner alleges that the Disciplinary Board suspension of trial counsel, combined with his admissions at the PCRA hearing (of lack of experience in homicide and DNA trials) proves that Petitioner was completely and wholly deprived of effective assistance of counsel.

Petitioner argues that he has shown cause and actual prejudice to excuse procedural default, and that the issues of constitutional violations at his trial demand a merits review. This Court should grant the writ.

CONCLUSION

For the reasons stated herein, the Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals.

8.19.23
Date

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