

No. 23-5528

IN THE SUPREME COURT OF THE UNITED STATES

Lahme Perkins,
Petitioner

v.

Laurel Harry, Secretary,
Pennsylvania Department of Corrections, et al.,
Respondent

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

PETITION FOR REHEARING

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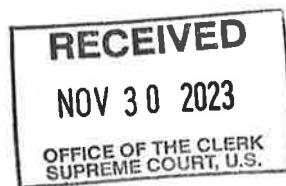


TABLE OF CONTENTS

TABLE OF CITATIONS.....	i
PETITION FOR REHEARING AND SUGGESTIONS IN SUPPORT.....	1
STATEMENT OF FACTS.....	1
REASONS FOR GRANTING REHEARING.....	2
1. No Fair Notice and Opportunity.....	2
2. Petitioner did show cause and prejudice for procedural default.....	4
CONCLUSION.....	7

TABLE OF CITATIONS

Judicial Decisions

Coleman v. Thompson , 111 S. Ct. 2546, 2565(1991).....	4
Commonwealth v. Craig , 2020 pa. Super. LEXIS 291.....	5
Commonwealth v. Jones , 700 A.2d 423(Pa.1997).....	5
Commonwealth v. Keffer , 2014 Pa. Super. Unpub. LEXIS 33026.....	5
Commonwealth v. McClelland , 233 A.3d 717(Pa.2020).....	6
Day v. McDonough , 126 S.Ct. 1675(2006).....	infra
Hampton v. Kelly , 1990 U.S. Dist. LEXIS 20850(E.D.Ny.1990).....	6
Martinez v. Ryan , 132 S. Ct. 1309(2012).....	4
McKinley v. Superintendent of Rockview , 2022 US App LEXIS 27563(3d Cir. 2022).....	3
Paris v. Comm. of PA , 2021 U.S. Dist. LEXIS 182512.....	5
Perez v. Sec'y Fla. Dep't or Corr. , 947 F.3d 649, 654(11th Cir. 2020).....	3
Shinn v. Ramirez , 596 U.S. ____(2022).....	4
Thomas v. Payne , 2021 US LEXIS 3726(2021).....	3
United States v. Bendolph , 409 F.3d 155, 169(3d Cir. 2005).....	3
Wiggins v. Clark , 2008 U.S. Dist. LEXIS 104363(E.D.Cal.2008).....	6

Statutory and Constitutional Provisions

Rule 1925(B), Pennsylvania Rules of Appellate Procedure.....	1
18 U.S.C.A. §2254.....	infra
Rule 44 of the Supreme Court of the United States.....	1

PETITION FOR REHEARING
AND SUGGESTIONS IN SUPPORT

COMES NOW Petitioner, Lahme Perkins, pro se, and prays this Court to grant Rehearing pursuant to Rule 44, and thereafter, grant him a Writ of Certiorari to review the decision of the third Circuit Court of Appeals. In support of said petition, he avers the following:

STATEMENT OF FACTS

Following conviction for First Degree Murder and an unsuccessful direct appeal, Petitioner filed a Petition for Post-Conviction Relief, seeking relief for ineffective assistance of counsel for failing to conduct a pre-trial investigation, consult or retain a DNA expert, interview and present character witnesses, and failing to object to inflammatory photographs.

The Pennsylvania Superior Court affirmed, holding that all of his claims were waived for failure to file a 1925(B) Concise Statement of Errors Complained of on Appeal in accordance with PA Rules of Appellate Procedure 1925(B).

Under Reargument, Petitioner provided evidence that he had filed the 1925(B) with the Clerk of Court. The Superior Court ignored this evidence and the standard of proof for these situations.

In a second post-conviction petition, Petitioner argued that the state had failed to meet its burden at the preliminary hearing stage, according to new state law, and that Petitioner had newly discovered facts of trial counsel's legal and addiction issues. This was dismissed as untimely.

Petitioner raised six (6) claims for federal habeas relief under §2254: the four (4) claims from his first PCRA and the two (2) claims from his second PCRA.

the District Court, without ordering a response from the state, and after sua sponte raising a procedural default defense to the §2254 application, dismissed the application without giving Petitioner an opportunity to answer the procedural defense.

Petitioner attempts to remedy this mistake and get relief have gone unanswered since, culminating with this Court denying Writ of Certiorari on November 6, 2023.

Petitioner now seeks rehearing from this Court.

REASONS MERITING REHEARING

1. No Fair Notice and Opportunity to Respond

The Third Circuit's decision not to grant 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, is in clear conflict with the precedent of this Court.

In **Day v. McDonough**, 126 S.Ct. 1675(2006), this Court stated:

In sum, we hold that district court are permitted, but not obliged, to consider, sua sponte, the timeliness of a state prisoner's habeas petition. **Of course, before acting on its own initiative, a court must afford the parties fair notice and an opportunity to present their positions.**

Day @ 1684. (Emphasis added).

Here, there is not doubt that the District Court dismissed Petitioner's habeas petition without giving "fair notice and opportunity" to respond. **Id.**

Furthermore, the Third Circuit Court of Appeals routinely grants certificates of appealability in cases such as Petitioner's. See, **McKinley v. Superintendent of Rockview**, 2022 US App LEXIS 27563 (3d Cir. 2022); **United States v. Bendolph**, 409 F.3d 155, 169(3d Cir. 2005) (en banc); and **Perez v. Sec'y Fla. Dep't or Corr.**, 947 F.3d 649, 654(11th Cir. 2020).

When Petitioner attempted to argue against the procedural default in his **Motion to Alter or Amend**, 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[.]

Motion to Alter or Amend, 1/13/23 @ 2-3. The District Court never gave Petitioner an opportunity to "assert any of the three arguments" against procedural default before dismissal.

This Court recently held:

'Of course, before acting on his own initiative, a court must afford the parties fair notice and an opportunity to present their positions.' This lack of notice left Thomas without meaningful opportunity to dispute the grounds on which the court reversed the District Court's decision to grant him habeas relief. (Quoting **Day**)

Thomas v. Payne, 2021 US LEXIS 3726(2021).

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

Because the Third Circuit Court of Appeals, and the District Court have obfuscated Petitioner's right of habeas corpus review under 28 U.S.C. §2241, et seq. by failing to give him "fair notice and an opportunity" to respond to the procedural defenses, this Court should grant the rehearing, and grant the Writ.

2. Petitioner did show cause and prejudice for procedural default.

This Court has held:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule; federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 111 S. Ct. 2546, 2565(1991).

In **Martinez v. Ryan**, 132 S. Ct. 1309, this Court extended cause to claims of ineffective post-conviction counsel. "[i]neffective assistance of post-counsel may be cited as cause for the procedural default of an ineffective assistance of trial counsel claim." **Shinn v. Ramirez**, 596 U.S. ____ (2022).

In his §2254 petition, Petitioner's grounds for relief 1-4 were issues of ineffective assistance of trial and/or PCRA counsel. These were the same four issues that had been heard by the PCRA court, and raised on PCRA appeal. 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 1925(B) statement. The Superior Court found waiver of the issues.

Petitioner filed for reargument in the Superior Court, and provided evidence in the form of DOC Cash Slips that he **had** served four copies of the 1925(B) on the clerk of court of Dauphin County, as required.

To support application of the Mailbox Rule, a prisoner bears the burden of proving delivery of [the filing] to prison authorities[.]

Commonwealth v. Keffer, 2014 Pa. Super. Unpub. LEXIS 33026. This is the legal standard because inmates can prove no more. An inmate's only ability is to hand the mail to prison authorities, along with approved Cash Slips to pay for the postage, and trust they will deliver the mail to the USPS for mailing.

'Reasonable 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).

Unfortunately, ignoring this evidence after the PCRA court filed a statement alleging the court had never received the 1925(B), the Superior Court again found waiver and denied the appeal.

Setting aside that the District Court here failed to provide "fair notice and an opportunity" to argue against the procedural default, Petitioner avers that he *has shown cause and prejudice* for his procedural default.

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 held 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 of 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); **Robert 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's fifth and sixth claims in his §2254 application were, respectively, due process and confrontation clause violations at his preliminary hearing and that newly discovered evidence 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 the fifth claim, the District Court, and therefore the Third Circuit, stated that petitioner has not established cause and prejudice because he didn't raise the claim sooner. " Petitioner explained to the Court in his **Motion to Alter or Amend** that state law prevented him from raising the issue sooner.

However, when the Pennsylvania Supreme Court decided **Commonwealth v. McClelland**, 233 A.3d 717(Pa.2020), it reversed previous

law and said for the first time that "hearsay evidence alone is insufficient to establish a *prima facie* case at a preliminary hearing." **McClelland** was decided during the pendency of Petitioner's PCRA appeal for the first PCRA. By state law, he could not raise the issue sooner.

The District Court said in relation to Petitioner's sixth 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." **Opinion @ 6.**

Petitioner alleges that if the District Court had followed the dictates of **Day** it would have reviewed Petitioner's allegations and found he had shown cause for the procedural defaults that were outside of his control. Further, it would have found that Petitioner is serving a life sentence for a crime he did not commit and the issues in his §2254 petition deserve a merits review.

CONCLUSION

Therefore, for the stated reasons, this Court must grant Rehearing of its judgment entered November 6, 2023, and issue a Writ of Certiorari to hold the Third Circuit accountable for failing to properly apply the law of this Court, ordering a merits review of the habeas application.

11-19-23

Date



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CERTIFICATE OF GOOD FAITH

COMES NOW Petitioner, Lahme Perkins, pro se, and hereby makes certification that his petition for rehearing is presented to this Court in Good faith and pursuant to Rule 44. Petitioner further states the following:

1. This Court entered its judgment denying Petitioner a Writ of Certiorari on November 6, 2023. Petitioner believes that he presents this Court with adequate grounds to justify the granting of rehearing in this case and that said petition is brought in good faith and not for delay of any sort.

2. Petitioner further believes that, based upon the law of this Court and the facts of his case, Petitioner is entitled to relief that has been denied him.

3. Petitioner further believes that if the Third Circuit Courts are allowed to continue to apply an incorrect standard under this Court's precedents, many more people will be denied their constitutional rights to due process and a legitimate review of their cases.

I declare under penalty of perjury that the foregoing is true and correct.

11-19-23

Date



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CERTIFICATE OF SERVICE

I, Lahme Perkins, do hereby certify that I have on this day served true and correct copies of the attached **PETITION FOR REHEARING** upon the persons below by First Class postage paid mail.

Laurel Harry, Secretary DOC
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11-19-23

Date

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