No 23-5701 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DENNIS LEE WALLS, SR., — PETITIONER
(Your Name)

vs.

SUPERINTENDENT SMITHFIELD
SCI, ET AL., — RESPONDENT(S)

ON PETITION FOR A 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

DENNIS LEE WALLS, SR.
(Your Name) Petitioner
Inmate No. MN5932, B-B/Cell 19
SCI-Smithfield
(Address) P.O. Box 999
1120 Pike Street
Huntingdon, Pennsylvania 16652
(City, State, Zip Code)

Prison No.: 814-643-6520
(Phone Number)

QUESTION(S) PRESENTED

1. Did the Third Circuit in denying Petitioner a COA (Appendix A) substantially deviate from this Court's established procedures in **Miller-El v. Cockrell**, 537 U.S. 322, 336-337, 123 S. Ct. 1029, 154 L. Ed. 2d 931, 950 (2003), by first adjudicating the merits of Petitioner's underlying claims of ineffective assistance of counsel and then, based on that merits determination, denying Petitioner's request for a COA?

2. Did the Third Circuit not only apply statutorily prohibited procedures in adjudicating Petitioner's motion for a COA (set forth above in Question #1), erroneously and prematurely concluding that Petitioner's claims lacked arguable merit as the basis for denying issuance of a COA, but also err in concluding, therefore, that this Court's ruling in **Martinez v. Ryan**, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) did not apply to excuse the procedural default regarding Petitioner's two claims (Appendix A)?

3. Did the Third Circuit impermissibly deviate from this Court's extablished procedures for deciding a motion for issuance of a COA and abuse its discretion by claiming that "jurists of reason would agree, without debate, that [Petitioner's] claims lack merit or are inexcusably procedurally defaulted" (Appendix A) when, in fact, the federal district court judge who denied Petitioner's habeas petition issued an opinion stating that Petitioner's claims appeared to possess arguable merit (Appendix

QUESTION(S) PRESENTED, CONTINUED

C) and state and federal courts have previously granted relief in similar cases, showing that jurists of reason could indeed differ?

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:

Chad Wakefield, Superintendent, SCI-Smithfield, 1120 Pike Street, Huntingdon, Pennsylvania 16652.

Michelle Henry, Esquire, Attorney General of Pennsylvania, Strawberry Square, 4th & Walnut Street, 16th Floor, Harrisburg, Pennsylvania 17120.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[X] 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,
[ ] is unpublished.

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

[X] reported at 2022 U.S. Dist. LEXIS 181862; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

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

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

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was May 23, 2023.

[ ] 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: August 2, 2023, and a copy of the order denying rehearing appears at Appendix D.

[ ] 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 _____. A copy of that decision appears at Appendix _____.

[ ] 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 this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> No State shall ... deprive any person of life, liberty, or property, without due process of law[.]

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28 U.S.C. § 2253 provides, in pertinent part:

> (c) (1) Unless a circuit justice or judge issues a certificate of appeability, an appeal may not be taken to the court of appeals from--
>
> (A) the final order in a habeas corpus proveeding in which the detention complained of arises out of process issued by a State court....
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

The text of 28 U.S.C. § 2254 is appended in its entirety in Appendix J as authorized under Supreme Court Rule 14(1)(f).

Constitutional and Statutory Provisions Involved, Continued

Rule 22 of the Federal Rules of Appellate Procedure provides, in pertinent part:

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

Third Circuit Local Appellate Rule 22.1 provides, in pertinent part:

22.1. Necessity of Certificate of Appealability

(a) When a certificate of appealability is required, a formal application must be filed with the court of appeals, but the court may deem a document filed by a habeas corpus petitioner that discloses the intent to obtain appellate review to be an application for a certificate of appealability, regardless of its title or form. If an application is not filed with the notice of appeal, the appellant may file and serve an application within 21 days of either the docketing of the appeal in the court of appeals or of the entry of the order of the district court denying a certificate,

whichever is later. The appellees may, but need not unless directed by the court, file a memorandum in opposition to the granting of a certificate, within 14 days of service of the application. The appellant may, but need not, file a reply within 10 days of service of the response. The length and form of any application, response, or reply must conform to the requirements of FRAP 27 governing motions.

NOTICE

The pages from the state trial and PCRA hearing transcripts referenced in the Statement of the Case are attached for this Court's convenience as Appendices H and I, respectively. The transcript pages are arranged in numerical order by transcript page number to facilitate easy access to the referenced information.

STATEMENT OF THE CASE

Introduction

Your Petitioner, Dennis Lee Walls, Sr., is seeking a writ of certiorari from this Honorable Court with regard to the Third Circuit Court of Appeals' May 23, 2023, Order denying his request for a certificate of appealability (COA) from the October 4, 2022, decision of the United States District Court for the Middle District of Pennsylvania denying his federal petition for writ of habeas corpus. In denying Petitioner's application for a COA, the Third Circuit impermissibly inverted the review process by first adjudicating the merits of Petitioner's claims and then, based on that merits determination, denied issuance of a COA. This inverted process, as this Court has explained in **Miller-El v. Cockrell**, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 and **Buck v. Davis**, 580 U.S. 100, 137 S. Ct. 759, 197 L. Ed. 2d (2007), is prohibited under 28 U.S.C. § 2253 and is tantamount to the Third Circuit's deciding an appeal without jurisdiction. The relevant facts are as follows:

Procedural History

A. Summary of State Proceedings. On December 8, 2015, Petitioner was convicted following a jury trial in the Court of Common Pleas of Adams County, Pennsylvania, of rape by forcible compulsion, sexual assault, intimidation of a victim or witness, terroristic threats, indecent assault, and simple assault. See

Adams County Criminal Docket No. CP-01-CR-288-2015. Several months later, on April 18, 2016, he was sentenced by the Honorable Thomas R. Campbell to an aggregate sentence of 16 to 34 years of imprisonment in a state correctional institution.

On April 13, 2017, approximately one (1) year after sentencing, Petitioner, represented by Thomas R. Kelley, Esquire, filed a state PCRA petition[1] rather than a direct appeal, raising one claim of ineffective assistance of trial counsel,[2] which Mr. Kelley then divided into fourteen (14) subparagraphs or issues. Mr. Kelley did not legally support or meaningfully argue **any** of the fourteen issues, and the PCRA petition was subsequently denied by Judge Campbell on April 4, 2018 (Appendix F). An appeal from Judge Campbell's decision to the Pennsylvania Superior Court was subsequently denied on December 28, 2018. See **Commonwealth of Pennsylvania v. Dennis Lee Walls, Sr.**, No. 766 MDA 2018, reported at 2018 Pa. Super. Unpub. LEXIS 4889 (Appendix E).

In its memorandum affirming denial of PCRA relief, the Superior Court panel excoriated Mr. Kelley for raising an inordinate number of issues and not legally supporting any of them (Appendix E, Opinion at pg. 3). The state appellate court judges, apparently because of the large number of legally unsupported issues raised by PCRA counsel, **presumed** them all to

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[1]Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541 - 9546.

[2]Petitioner was represented at trial by Jason Gary Pudleiner, Esquire.

be lacking in merit, conducting no independent analysis of them, and merely adopted the PCRA court's adjudication of Petitioner's claims at face value.

On January 24, 2019, Petitioner, represented by William C. Costopoulos, Esquire, timely filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, which was docketed at 44 MAL 2019, in an effort to correct the serious defects in Mr. Kelley's Superior Court appellate brief and obtain a proper merits review of Petitioner's claims. Allocatur was denied on July 8, 2019. **See Commonwealth of Pennsylvania v. Dennis Lee Walls, Sr.**, 654 Pa. 519, 216 A.3d 231, 2019 Pa. LEXIS 3679 (Appendix G).

B. Summary of Federal Proceedings. On or around July 24, 2019, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania challenging the constitutionality of his state conviction and detention under 28 U.S.C. § 2254. **See Dennis Lee Walls, Sr. v. Supt. Chad Wakefield, et al.**, Civ. No. 3:19-cv-1288 (M.D. Pa.). Although the district judge assigned to the case acknowledged that Petitioner's habeas petition appeared to possess arguable merit (see **Walls v. Luther** [Respondent's name was subsequently changed to **Wakefield**], 2020 U.S. Dist. LEXIS 18196 (M.D. Pa., decided February 4, 2020) (Appendix C, Opinion at pg. 2), he nevertheless delayed ruling on the merits of Petitioner's claims for over three years, prompting Petitioner to

file a motion for writ of mandamus in this court on September 27, 2022. See In Re: Dennis Lee Walls, Third Circuit Case No. 22-2773; reported at 2022 U.S. App. LEXIS 30226 (October 31, 2022).

Then on October 4, 2022, before the Third Circuit panel had an opportunity to rule on Petitioner's mandamus application, the district judge hurriedly issued a final decision denying Petitioner's federal habeas petition. See Dennis Lee Walls v. Chad Wakefield, 2022 U.S. Dist. LEXIS 181862 (M.D. Pa., October 4, 2022) (Appendix B). In so doing the district judge merely adopted and rubber stamped the state courts' adjudication of Petitioner's case, which as discussed below was based on a blatantly unreasonable determination of the facts. The district judge also declined to issue a certificate of appealability (COA), impeding Petitioner's efforts to obtain a full, fair, and judicious review of his important claims.

Petitioner timely filed a notice of appeal to the Third Circuit as well as a motion for issuance of a COA regarding the following two substantial and meritorious claims:

> 1. Reasonable jurists could differ as to whether the district court properly dismissed Petitioner's claim that trial counsel rendered ineffective assistance in failing to demur to or otherwise challenge the sufficiency of the evidence to sustain his conviction for rape by forcible compulsion and sexual assault when the alleged victim herself testified to facts establishing that she effectively consented to the sexual intercourse with Petitioner, negating the required and essential element of forcibile compulsion.
>
> 2. Reasonable jurists could differ as to whether the district court properly dismissed Petitioner's claim that trial counsel rendered ineffective assistance by failing to present available evidence of, argue to the jury about, or request an available instruction based

> upon the complainant's failure promptly to report the alleged rape and sexual assault during several occasions right after the alleged incident when she safely could have done so and, in fact, did promptly report the alleged initial threat from Petitioner to police but said nothing at the time about an alleged rape or sexual assault.

Neither of the above two substantial claims was raised in the state courts due to PCRA counsel's grossly deficient handling of Petitioner's PCRA petition. Rather than properly raising and arguing the above two claims, which were evident and fully factually supported in the state court record, as discussed below, PCRA counsel unreasonably ignored them, instead raising fourteen (14) mostly frivolous and weak claims of ineffective assistance of counsel, which he totally failed to develop or legally support. **See Commonwealth of Pennsylvania v. Dennis Lee Walls, Sr.**, 2018 Pa. Super. Unpub. LEXIS 4889 (Appendix E, Opinion at pg. 3). As a result, Petitioner's PCRA petition was dismissed.

Pennsylvania law at that time did not allow a petitioner to raise PCRA counsel's ineffectiveness on appeal from denial of PCRA relief,[3] and therefore Petitioner raised the claims for the

[3] In 2021, the Pennsylvania Supreme Court in **Commonwealth v. Bradley**, 261 A.3d 381, 2021 Pa. LEXIS 3819 (Pa. 2021), created a remedy comparable to this Court's holding in **Martinez v. Ryan**, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), permitting state prisoners to raise claims of ineffective assistance of PCRA counsel for the first time on appeal from denial of PCRA relief. However, this remedy **was not available** to Petitioner when he filed his state PCRA petition or sought federal habeas corpus relief under 28 U.S.C. § 2254. Petitioner, accordingly, sought and is seeking excusal of the procedural default of his vitally important claims under **Martinez**.

first time on federal habeas corpus review and sought excusal of the procedural default under this Court's ruling in **Martinez v. Ryan**, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

On May 23, 2023, a panel of the Third Circuit denied Petitioner's motion for a COA, essentially adopting the District Court's rationale for denying his habeas corpus petition. The order denying issuance of a COA stated that "For the same reasons given by the District Court, jurists of reason would agree, without debate, that [Petitioner's] claims lack merit or are inexcusably procedurally defaulted." **See** Panel Decision denying Petitioner's motion for a COA, which is attached to this filing as Appendix A.

From the Third Circuit's rationale stated in its May 23, 2023, order (Appendix A), it is apparent that the Circuit Court improperly **inverted** the procedures set forth by this Court in **Miller-El** and **Buck** by adopting the merits determination of the District Court at face value and then, based on that merits determination, denying issuance of a COA. The Circuit Court improperly focused on the alleged lack of merit of Petitioner's claims as determined by the District Court rather than upon the debatability of the District Court's decision. Nowhere in its decision did the Third Circuit panel ever mention much less address Petitioner's challenge to the District Court's decision presented in the motion for a COA and set forth below.

Improperly concluding that Petitioner's claims lacked merit, based upon the District Court's merits determination, the Third

panel then erroneously held that **Martinez** therefore did not apply to excuse the procedural default. Because of this improperly inverted review process employed by the Third Circuit in denying Petitioner's motion for a COA, Petitioner was unfairly deprived of his right to a full, fair, and judicious review of his important claims.

On May 30, 2023, Petitioner filed in the Circuit Court a motion requesting reargument en banc from the panel's decision denying his application for a COA. In support of reargument, Petitioner argued that the panel's decision, to the extent that it relied upon the District Court's merits determination, was based upon an unreasonable determination of the facts and an unreasonable application of state and federal law for the following reasons:

1. the District Court unreasonably conflated the facts of two distinct and separate events separated by a substantial period of time to create the totally false impression that Petitioner forcibly compelled the alleged victim to have sexual intercourse with him;

2. the District Court unreasonably suggested that, under Pennsylvania law, an alleged victim's testimony that she was "raped" or "sexually assaulted," mere conclusions of law without facts to back them up, is sufficient by itself to support a conviction for rape or sexual assault; and

3. the District Court erroneously concluded that Petitioner's procedurally defaulted claims lacked merit and

therefore **Martinez v. Ryan** did not apply to excuse the default.

Petitioner, in his motion for reargument en banc, suggested that the Circuit Court panel had applied an improper standard of review by erroneously focusing on the merits of his claims as the basis for denying a COA (**see** Reargument Petition, pg. 5, ¶ 8). As more fully discussed below in the section "Reasons for Granting the Petition," the correct standard, set forth by this Court in **Miller-El** and **Buck**, is not whether Petitioner's claims on preliminary examination appear to possess sufficient merit to warrant relief but rather whether the District Court's decision is debatable among jurists of reason. The Third Circuit "inverted" the established procedures, thereby depriving Petitioner not only a fair and full opportunity to develop and present the full merit of his claims but also to fully set forth his reasons for why the District Court's decision should be vacated.

Notwithstanding the above discussion, the Third Circuit denied Petitioner's motion for reargument en banc (**see** Order, Appendix D). This timely Petition for Writ of Certiorari follows.

Factual Background of Claims Raised

A. Summary of Facts in Support of Claim #1. Petitioner's first claim is that trial counsel was ineffective for failing to demur to or otherwise challenge the sufficiency of the evidence to sustain his conviction for rape by forcible compulsion and sexual assault when the alleged victim herself testified to facts

establishing that she consented to the sexual intercourse in question.

Petitioner's convictions for rape by forcible compulsion and sexual assault originated from allegations by the complainant, Jessica Dillman, with whom Petitioner had been involved in an intimate relationship from February 2013 until March 2015, that on March 7, 2015, Petitioner allegedly forcibly compelled her to engage in sexual intercourse with him. During trial, however, Ms. Dillman testified to facts consistent with the sexual intercourse being consensual, noting that she not only told Petitioner to "go ahead" and have sexual relations with her but that she never told him to stop and that Petitioner never threatened her, tried to restrain her in any way, or prevent her from getting up and leaving if she had wanted. This important testimony is quoted below for this Court's consideration:

Cross-Examination of Ms. Dillman by Attorney Pudleiner:

Q. Did he -- he asked you to have sex; is that correct? He didn't threaten you to have sex at that moment?

A. He didn't say, can we have sex. He said I want to have sex.

Q. Did he -- was there a threat involved with that? Like he earlier you were saying that he indicated that if you didn't do something, he was going to kill you. He didn't say if you don't have sex with me, I'm going to kill you?

A. No, he did not say that.

Q. Did he make any motions for the gun **[as discussed below, this was a plastic BB gun that shot plastic BB's]**?

A. No.

Q. It's correct that after went back and forth a little bit, that you did finally say something to the effect of, fine, just get it over with?

A. Yes.

Q. Was that essentially your wording?

A. Yes.

Q. While the sex was occurring, did you at any point say -- tell him to stop?

A. No.

Q. Did you at any point during the sex or right before attempt to get up and leave?

A. No.

Q. Did he hold you down in any fashion to make sure you didn't get up and leave?

A. No.

Q. Did you at any point say, I'm only consenting, I'm only saying get it over with because I'm afraid that you had this gun earlier and I'm scared you're going to use it, something to that effect?

A. No.

N.T. (Trial), 12/8/15, at 49, 75-77.

A couple hours earlier, according to Ms. Dillman, she and Petitioner had a rather emotional encounter when she had announced her plans to end their relationship. During the above encounter, Petitioner allegedly threatened Ms. Dillman with a plastic BB gun and even threatened to shoot himself in order to persuade her to stay in relationship with him; however, she testified that Petitioner quickly relented and sought thereafter to sooth and comfort her, apologizing for frightening and

upsetting her. N.T. (Trial), 12/8/11, 45, 57-58. According to Ms. Dillman, after Petitioner had clamed down and became his normal self again, they lay in bed together for a while discussing their relationship together and why she wanted to end it. N.T. (Trial), 12/8/15, 48.

Prior to the emotional encounter, discussed above, Petitioner had tried to initiate sex with Ms. Dillman; however, when she told him to stop and that she did not want to have sex with him at that time, he respected her wishes, got up from the bed they shared together, and left the room. N.T. (Trial), 12/8/15, 39-40. Then, approximately two hours later, after the relationship appeared to be getting back on track and the two were lying in bed together discussing relational matters, Petitioner again asked Ms. Dillman to have sex with him, hoping thereby to rekindle her affections for him.

This second time when Petitioner requested to have sex with her, Ms. Dillman did not tell him to stop or that she did not want to have sex with him; rather, she "told him to wait until tomorrow" (N.T. [Trial], 12/8/15, 48-49), which led Petitioner to believe that she was <u>still</u> <u>willing</u> to have sexual intercourse with him. Believing that Ms. Dillman was still willing to engage in sex with him, Petitioner persisted in his desire that they have sex together at that time, again hoping thereby to strengthen their emotional bond together, and he began to initiate sex with her.

Unlike the initial time Petitioner had tried to have sex with her two hours earlier, Ms. Dillman, rather than telling him to stop, commented something to the effect of "[You] might as well rape me," to which Petitioner replied, according to Ms. Dillman, "I don't want to do that." Ms. Dillman then gave in to Petitioner's persistent requests for sex and told him "to just get it over with." N.T. (Trial), 12/8/15, 49.

When Ms. Dillman gave in and consented to Petitioner's sexual advances, she was not, by her own testimony quoted above, being threatened or restrained or otherwise compelled to have sex with him in any way, nor did she ever tell him to stop or leave her alone as she had done the first time he tried having sex with her a couple hours earlier. Moreover, Petitioner had clearly let Ms. Dillman know that she was perfectly free to decline to have sex with him and that, had she done so, he would have respected her wishes as he had done the first time when she declined his advances.

Ms. Dillman thus consented to the sexual intercourse. In Pennsylvania the fact that Petitioner persuaded Ms. Dillman, a reluctant partner, to have sex with him does not establish the forcible compulsion required under the state's rape statute. See **Commonwealth v. Rhodes**, 510 Pa. 537, 557 n.15, 510 A.2d 1217, 1226, n.15 (1986) (persuading an initially reluctant partner to have sex does not, by itself, constitute "forcible compulsion" required for rape).

As Petitioner argued in the Third Circuit, the District Court, in denying his habeas corpus petition, improperly and unreasonably conflated the above two distinct and separate incidents to give the totally erroneous and misleading impression that the sexual intercourse between Ms. Dillman and Petitioner occurred contemporaneously with the alleged incident involving the plastic BB gun and threats of violence over Ms. Dillman's plans to end their relationship. See District Court Decision, Appendix B at pgs. 7-8. That earlier incident, however, assuming arguendo that it occurred as Ms. Dillman claimed, had nothing whatsoever to do with Petitioner's trying to have sex with the complainant but rather was apparently aimed at persuading Ms. Dillman not to leave him.[4]

In fact, when around that time Petitioner initially attempted to initiate sex with Ms. Dillman and she told him to stop, he, by Ms. Dillman's own testimony, got up and left the room, honoring her wishes. N.T. (Trial), 12/8/15, 39-40.

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[4]Note especially how the District Court's summation of the facts, based on the Pennsylvania Superior Court's decision (Appendix E), fails to distinguish the earlier threat incident involving the plastic BB gun from the sexual intercourse that occurred some two hours later with Ms. Dillman's consent. The lower court decisions, by conflating and commingling the facts from the two separate incidents, make it seem as though Petitioner's earlier alleged threat, which had nothing to do with inducing Ms. Dillman to have sex with him, was somehow the "forcible compulsion" to support the rape and sexual assault charges. However, Ms. Dillman herself, as quoted and discussed above, testified that when she gave consent she was not being threatened or restrained or otherwise forced to do so. Petitioner requested to have sex with her, and she did not tell him "no"; rather, she told him to go ahead and get it over with. At the time she was perfectly free to say "no" had she wanted.

Two hours later, however, when Petitioner again requested to have sex, Ms. Dillman, again by her own testimony, quote above in this application, was perfectly free to say "no" and get up and leave had she wanted. Instead, she gave in to Petitioner's persistent requests to have sex at that time and told him to go ahead and "get it over with." N.T. (Trial), 12/8/15, 49. Ms. Dillman may have reluctantly consented to having sex with Petitioner, but such consent under Pennsylvania law, as stated above, is not invalid simply because it was given reluctantly. Persuasion employed to get a reluctant partner to engage in sex does not constitute "forcible compulsion" under Pennsylvania's rape statute, certainly not when, in Ms. Dillman's own words, no threats or physical force were used to induce her to consent. See **Rhodes, supra**, as well as Ms. Dillman's testimony quoted above in this application.

The District Court also erroneously and unreasonably construed Pennsylvania law, suggesting that Ms. Dillman's testimony that Petitioner had "raped" her and that she never "consented" was sufficient by itself to sustain Petitioner's conviction, notwithstanding her testimony to the contrary that she gave effective consent, quoted above. See District Court Decision, Appendix B at pg. 8. Ms. Dillman's testimony that Petitioner "forced" her to have sex with him and that he "raped" her are mere conclusions of law, which are not facts upon which a conviction can be based. The complainant testified to the "fact" that she consented to have sex with Petitioner, and the fact that

she may have reluctantly consented or later regretted her decision does not render the consent invalid or coerced under Pennsylvania law. See Rhodes, supra.

The District Court thus erroneously and unreasonably determined the facts in the case and unreasonably construed and applied state law. To the extent that the Third Circuit relied upon the District Court's faulty rationale in denying Petitioner's application for a COA, that decision is likewise fatally flawed and should be vacated.

B. Summary of Facts in Support of Claim #2. Petitioner's second substantial claim for which a COA is sought concerns trial counsel's failure to ensure that the jury was properly informed and instructed about Ms. Dillman's failure to promptly report that she had been raped or sexually assaulted and of the importance of that with respect to the essential element of consent, which was the central issue in dispute during Petitioner's trial.

Under Pennsylvania law the failure of an alleged victim to promptly report being raped or sexually assaulted can justify "a negative inference ... be[ing] drawn regarding the credibility of the victim and against whether she consented to the sexual contact." See Commonwealth v. Jones, 449 Pa. Super. 58, 68, 672 A.2d 1353 (Pa. Super. 1995). The court in Jones noted "'that a victim of a violent assault would be expected to complain of the assault at the first safe opportunity.'" Id., 449 Pa. Super. at 65, 672 A.2d at 1356; quoting Commonwealth v. Snoke, 525 Pa. 295,

300, 580 A.2d 295, 297 (Pa. 1989) (internal citations omitted). As the Pennsylvania Supreme Court noted in **Snoke**, "It has been said that 'hue and cry follow rape like smoke follows fire." **Id.**, 525 Pa. at 300, 580 A.2d at 297, **quoting Commonwealth v. Freeman**, 295 Pa. Super. 467, 476, 441 A.2d 1327 (Pa. Super. 1982).

Consent, as discussed above, was of critical importance during Petitioner's trial, and the absence of forcible compulsion was the focus of the defense. Trial counsel himself, testifying during Petitioner's PCRA hearing, testified that, based on Ms. Dillman's testimony, the sexual intercourse was "pretty obvious[ly] consensual." See N.T. (PCRA Hearing), 10/23/19, pgs. 66-67. Thus evidence that Ms. Dillman failed to promptly report being raped or sexually assaulted would be vitally important in Petitioner's case to establish that the sexual intercourse was consensual.

In denying this important, substantial claim, the district judge unreasonably, given the facts of the case, stated:

> [The] victim was unable to immediately report the incident due to Petitioner's actions and threats and that she did report at the earliest opportunity outside of his presence. Initially, the victim testified that the defendant had put a gun to her head, (Doc. 23-1 at 85) and threatened her with violence by his gang if she called the police. (Doc. 23-1 at 90-92). She feared that she felt if she reported anything to law enforcement, she or her family would be harmed. (Doc. 23-1 at 92). Moreover, she could not immediately report the incident because Petitioner had taken her phone, and she had no access to a landline. (Doc. 23-1 at 100-101). Even after defendant returned her phone, she explained that she did not contact police because of the threats he had previously made. (Doc. 23-1 at 102-105). The victim reported the incident at the

> first opportunity she was out of the home and Petitioner's presence, namely, when she arrived at work, approximately seven hours after the incident. (Doc. 23-1 at 104-106).

See District Court Decision, Appendix B at pg. 9.

The district judge, however, unreasonably overlooked or deliberately chose to ignore the uncontroverted case evidence that the complainant, **despite** the alleged threat of violence from Petitioner's alleged gang if she called the police and her alleged fear for her family's safety, nevertheless **did immediately and promptly** report to her work supervisor and police that Petitioner had allegedly threatened her with the plastic BB gun that she had better not break off her relationship with him. However, Ms. Dillman, although being perfectly safe to do so at that time in the presence of her work supervisor, police officers, and a forensic nurse, **said nothing whatsoever** about being raped or sexually assaulted. The allegations of an alleged rape and sexual assault came much later, **after** Ms. Dillman had come under the influence of counsel and investigators from the district attorney's office.[5]

In fact, had Ms. Dillman been raped and sexually assaulted, there were no less than six separate occasions that she safely and promptly could have reported that, but she did not do so. On four of these occasions, Ms. Dillman separately and promptly reported Petitioner's alleged threat with the plastic BB gun to

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[5]As the record will reveal, Petitioner was charged and prosecuted for rape only after refusing to plead guilty to sexual assault, an offense he did not commit and to which he would not plead guilty.

her work supervisor at the Sheetz store where she worked at the time (see N.T. [Trial], 12/8/15, pgs. 32 and 60), to two police officers (see N.T. [Trial], 12/8/15, pgs. 62, 84, 66-67, and 94-97), and to a forensic nurse who was requested to examine her for any injuries from the alleged threat incident involving the plastic BB gun (see N.T. [PCRA Hearing], 10/23/17, pgs. 30 and 115-117). However, during none of these separate interviews, during which she was perfectly safe to do so, did Ms. Dillman ever imply or suggest that Petitioner had raped or sexually assaulted her.

The district judge's ruling, quoted above, is deceptive and misleading in that, although Ms. Dillman did report at that time that Petitioner had threatened her with the plastic BB gun that she had better not leave him, it was not until much later that she alleged that Petitioner had raped her. Petitioner's claim here turns not on when Ms. Dillman reported being threatened by Petitioner **but rather her unexplained delay in reporting that she had been raped**, despite safe opportunities to do so when she was formally accusing Petitioner of the other alleged criminal wrongdoing that led to his being arrested.

The district judge's ruling was thus an unreasonable determination of the facts and involved an unreasonable interpretation and application of state law as applied to the state rape charge. To the extent that the Third Circuit denied Petitioner's application for the COA based upon the faulty

rationale of the district judge, as discussed at length above, the Circuit Court's decision denying the COA is likewise fatally flawed and should be vacated.

As discussed above under "B. Summary of Federal Proceedings," the district judge, in an opinion denying appointment of counsel, actually stated that Petitioner's arguments appeared to possess arguable merit. See **Walls v. Luther** [Respondent's name was subsequently changed to **Wakefield**], 2020 U.S. Dist. LEXIS 18196 (M.D. Pa., decided February 4, 2020) (Appendix C, Opinion at pg. 2). This, Petitioner respectfully submits, directly undercuts the Circuit Court's determination that no jurist of reason could disagree with the district judge's decision. The district judge himself apparently had doubts and deliberated over the case for more than three years.

REASONS FOR GRANTING THE PETITION

Petitioner is seeking issuance of a writ of certiorari for the following three reasons:

Reason #1. This Honorable Court should grant certiorari not only to correct the errors committed in Petitioner's case but also to clarify for the federal judiciary the proper procedures and standards of review to be applied when deciding whether to grant or deny a COA. In **Miller-El v. Cockrell**, this Court instructed that "a court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable." **Id.**, 537 U.S. 322, 327, 348, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). Since **Miller-El**, Circuit Court judges have frequently displayed confusion over how exactly to apply the Court's procedures as set forth in that case, impermissibly inverting the analytical process in violation of 28 U.S.C. § 2253(c).

In **Buck v. Davis**, for example, this Court granted relief where the Circuit Court inverted the review process, improperly ruling that the petitioner's underlying claims lacked merit for the reasons stated by the lower courts and, based upon that determination, denied issuance of a COA. **Id.**, 580 U.S. 100, 137 S. Ct. 759, 197 L. Ed. 2d 1 (2017). Instead of merely determining whether the District Court decision was debatable

among jurists for the reasons given in the application for the COA, the Circuit Court in **Buck** adopted as its own the merits determination of the District Court in that case and then held that therefore a COA was not warranted.

In granting relief in **Buck**, this Court likened the review process employed by the Circuit Court to an appellate court's deciding an appeal without jurisdiction. Moreover, the Circuit Court denied the application for a COA without even affording the petitioner a fair opportunity to fully develop, present, and obtain full consideration of his arguments as to why the District Court's decision should be reversed.

This is precisely what happened in your Petitioner's case. As occurred in **Buck v. Davis**, the Third Circuit employed the recommended terminology in denying the request for a COA, stating that "jurists of reason would agree, without debate, that [Petitioner's] claims lack merit or are inexcusably procedurally defaulted" (**see** Appendix A), but, again, as occurred in **Buck**, the Third Circuit erroneously came to this conclusion "only after essentially deciding the case on the merits." **See Buck**, 580 U.S. 100, 115-116, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1, 16 (2017).

As this Court emphasized in both its **Miller-El** and **Buck** decisions, the only issue before a Circuit Court deciding a motion for a COA is whether the District Court decision at issue is reasonably debatable for the reasons being advanced by the petitioner on appeal. **See Buck**, 580 U.S. at 115, 137 S. Ct. at 773, 197 L. Ed. 2d at 16. In Petitioner's case, however, the

Third Circuit panel, as its Order denying issuance of a COA makes clear, essentially adopted the District Court's adudication of the merits as its own and then, based on that determination that Petitioner's claims lacked merit, denied issuance of a COA (**see** Appendix A). This was erroneous and amounted to an abuse of discretion by the Circuit Court panel.

In reaching its determination, the Third Circuit panel apparently concluded that because the District Court denied Petitioner's claims on the merits, the claims were therefore not debatable among jurists of reason. However, as this Court clarified in **Buck**, "[t]he COA inquiry, we have emphasized, is not coextensive with a merits analysis." **Id.** Simply because a habeas petitioner has failed to convince a District Court or panel of Circuit Court judges that his or her issue is of arguable merit does not mean that it is not debatable.

Had the Circuit Court panel conducted a proper review of Petitioner's application for a COA, the judges almost certainly would have concluded that the facts as set forth above in the Statement of the Case, which Petitioner incorporates by reference as though fully set forth herein, are indeed of arguable merit and that jurists of reason could disagree with the District Court's decision. It bears repreating that the District Court judge himself expressed his belief that Petitioner's arguments appeared to possess arguable merit. **See Walls v. Luther** (Respondent's name was subsequently changed to **Wakefield**), 2020

U.S. Dist. LEXIS 18196 (M.D. Pa., decided February 4, 2020) (Appendix C, Opinion at pg. 2).

In denying Petitioner's request for a COA, the Third Circuit panel in essence applied the heightened standard for deciding a motion for summary judgment in a civil case without affording Petitioner a fair opportunity to fully develop and present the merits of his claims. As this Court noted in **Buck v. Davis**, such an approach "place[s] too heavy a burden on the prisoner at the COA stage." **Id.**, 580 U.S. 100, 117, 137 S. Ct. 759, 774, 197 L. Ed. 2d 1, 17 (2017). Petitioner respectfully suggests that the correct standard of review on a COA is or should be that applied under Fed.R.Civ.P. 12(b)(6) -- i.e. whether Petitioner has presented a claim upon which, if factually supported, relief can be granted. The facts presented above in the Statement of the Case, Petitioner respectfully submits, are substantial and warrant the granting of habeas corpus relief. At the very least, Petitioner's claims warrant the issuance of a COA and further consideration by the Circuit Court.

Reason #2. This Honorable Court should grant certiorari to correct the errors committed in Petitioner's case as a result of the Third Circuit panel's improperly inverting the review process in deciding a request for a COA as discussed above.

As discussed in the Statement of the Case, the District Court's decision denying habeas corpus relief was based on an unreasonable determination of the facts as well as an unreasonable application of Pennsylvania law as applied to the

rape and sexual assault charges. Based on that, the Third Circuit panel, adopting the District Court's merits determination, prematurely ruled, without affording Petitioner a fair and meaningful opportunity to fully develop and present arguments in support of the merits of his claims, that "jurists of reason would agree, without debate, that [Petitioner's] claims lack merit or are inexcusably procedurally defaulted" (**see** Appendix A). However, as discussed above with reference to this Court's ruling in **Buck**, the Circuit Court panel came to this erroneous conclusion after inverting the proper review process and "essentially deciding the case on the merits." **Id.**, 580 U.S. at 115-116, 137 S. Ct. at 773, 197 L. Ed. 2d at 16 (2017).

The facts as discussed above in the Statement of the Case, Petitioner respectfully suggests, establish rather convincingly that his claims possess strong arguable merit. Not only did the District Court judge himself admit that Petitioner's claims appeared to possess arguable merit (**see** Appendix C, Opinion at pg. 2), but the judge held the case under advisement for over three years pondering the merits of Petitioner's claims, which eventually prompted Petitioner to file in the Third Circuit a petition for writ of mandamus in order to compel the judge to rule. **See In Re: Dennis Lee Walls**, Third Circuit Case No. 22-2773; reported at 2022 U.S. App. LEXIS 30226 (October 31, 2022).

This certainly flies in the face of the Circuit Court's erroneous and improperly derived conclusion that no reasonable

jurist would disagree with the District Court's determination. As this Court clarified in **Buck**, an issue can be debatable among jurists of reason even though, after full consideration by the Circuit Court, no judge finds that the claims possess merit sufficient to grant relief.

Based on the facts as set forth above in the Statement of the Case, Petitioner would ask the Justices of this Honorable Court the following two questions:

1. How was Petitioner ever charged with much less convicted of rape by forcible compulsion and sexual assault when the alleged victim herself, by her own testimony quoted above, unequivocally stated that she essentially consented to the sexual intercourse in issue and that, when she consented, Petitioner was not threatening or otherwise acting to force her to do so?

2. How does the fact that the alleged victim failed to promptly report that she had been raped or sexually assaulted, despite having had several safe opportunities to do so, not have a substantial bearing on the issue of whether the alleged victim actually consented to the sexual intercourse, which was the central issue at trial?

Petitioner respectfully suggests to this Court that the facts establish, contrary to the erroneous and unreasonable conclusions of the Circuit Court panel, that his issues are not only debatable among jurists of reason but also possess strong arguable merit sufficient to warrant further consideration by the

Circuit Court. See, e.g., **Miller-El v. Cockrell**, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039 (2003), citing **Barefoot v. Estelle**, 463 U.S. 880 (1983).

Reason #3. Lastly, this Honorable Court should grant certiorari and reverse the Circuit Court's erroneous conclusion that Petitioner's claims lack merit and therefore **Martinez v. Ryan** does not apply to excuse the procedural default in his case. Petitioner suggests that the facts of his case, which are all matters of record and are summarized in the Statement of the Case, fully support his two claims of trial counsel's ineffectiveness, which claims qualify as substantial under **Martinez**. Moreover, since claims of ineffective assistance of trial counsel in Pennsylvania must be raised on PCRA review, which PCRA counsel very unreasonably failed to do with respect to the claims being presented herein, Petitioner asserts that the Third Circuit panel erred in concluding that **Martinez** did not apply to excuse the procedural default from PCRA counsel's unreasonable failure to pursue these two obvious and meritorious claims.

As discussed above in this petition, the Third Circuit panel, relying upon and adopting the District Court's merits determination, prematurely ruled that Petitioner's underlying claims lacked merit and therefore **Martinez** did not apply to excuse the procedural default. This inverted, analytical approach to deciding a request for a COA, according to this Court's decision in the **Buck** case, is highly improper and

unlawful under 28 U.S.C. § 2253(c).

As this Honorable Court found in the **Buck** case, Petitioner respectfully suggests that the facts as set forth above in the Statement of the Case support his two claims for relief, which claims possess arguable merit and are substantial under **Martinez**. The Third Circuit's merits determination was based entirely on the District Court's unreasonable determination of the facts and application of state rape law which, because of the highly improper review procedures employed by the appeals court, deprived Petitioner of a full, fair, and meaningful opportunity to fully develop and argue his claims on appeal against the District Court's decision and have his arguments fairly and impartially considered.

In essence the Third Circuit panel took the District Court's decision, which Petitioner was seeking to challenge, at face value and, without affording Petitioner an opportunity to present and fully argue his claims, employed the District Court's disputed findings to deprive him of a fair opportunity to challenge them.

That, Petitioner respectfully suggests, is not how meaningful judicial review is supposed to function.

Petitioner contends that he did not commit and was wrongly convicted of rape and sexual assault because of the ineffective assistance of trial counsel as set forth above. Based on the foregoing, he respectfully prays that this Honorable Court will

vacate the Third Circuit's order and remand the case to the Third Circuit for issuance of a COA and a full, fair, and judicious review of his vitally important claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dennis J Walls

Date: 9-16-23