23-5750

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TODD FERRY, *Petitioner, pro-se*

vs.

MELISSA HAINSWORTH, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO
Third Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the State and the Federal Habeas courts' decision that ineffective assistance of trial and direct appeal counsel issues were defaulted because of an unartful couching of the claim as a **Brady** violation, conflict with this Court's precedents and other Circuit Court decisions that hold that *pro-se* litigants' petitions are to be liberally construed especially when as here, the last state court made a factual interpretation that the claim "was really" a claim against both counsels; and "sounds in ineffective assistance of counsel"?

2. Was trial counsel ineffective for failing to use available interrogation/polygraph transcripts during a suppression hearing that deprived the court of conclusive evidence that self-incriminating statements were involuntary due to law enforcement's overbearing, coercive tactics and lies over the course of nearly eight hours to compel the inculpatory statements?

3. Was direct appeal counsel ineffective for violating a rule of appellate procedure that waived an issue that the trial court comitted reversible error by disallowing trial counsel requested time to review critical suppression information handed over by the Commonwealth on the day of the pretrial hearing?

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

- Petitioner is Todd Ferry, a *pro-se* state prisoner.
- Respondents are: Superintendent Hainesworth, SCI Laurel Highlands;
- Pennsylvania Attorney General; and
- The District Attorney of Bedford County, Pennsylvania (who has been the attorney of record handing the litigation for the Respondents).

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is not yet reported and was filed on June 27, 2023.

The opinion of the United States District Court appears at Appendix B to the petition and is reported at **Ferry v. Hainesworth, et al.,** 2023 U.S. Dist. LEXIS 9615 (U.S. West. Dist of Pa. 2023) and was filed on January 17, 2023.

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is reported at **Commonwealth v. Ferry**, 249 A.3d 1164 (Pa.Super. 2021) and was filed on February 19, 2021.

The opinion of the Superior Court that denied the direct appeal in **Commonwealth v. Ferry**, 193 A.3d 1062 (Pa. Super. 2018) is attached hereto as Appendix D and was filed on June 8, 2018.

JURISDICTION

The United States Court of Appeals for the Third Circuit decided my case on June 27, 2023.

No Petition for Rehearing was filed.

This Petition for Writ of Certiorari was filed well within 90 days after the Court of Appeals filed its final order on June 27, 2023. Appendix A

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."

The Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment Due Process Clause. **Gideon v. Wainwright**, 372 U.S. 335, *342* (1963).

The Fourteenth Amendment Due Process Clause provides that "[n]or shall any state deprive any person of life, liberty, or property without due process of law."

The Fifth Amendment to the United States Constitution provides that "[n]o person...shall be compelled in any criminal case to be a witness against himself."

The Fifth Amendment privilege against self-incrimination applies to the states through the Fourteenth Amendment. **Malloy v. Hogan**, 378 U.S. 1, *8* (1964).

The Fifth Amendment Due Process Clause also provides that no person shall "[b]e deprived of life, liberty or property without due process of law."

STATEMENT OF THE CASE

All facts unless noted otherwise derive from the written opinion of the District Court that denied the Petition for Writ of Habeas Corpus--Appendix B.

During a dark evening on November 14, 2014, in the County of Bedford, Pennsylvania, a Mennonite girl was bicycling home from her job when a person grabbed her, knocked her off the bicycle and repeatedly instructed her to "get in the car." Unable to see the perpetrator's face, she was dragged toward a truck when she managed to effectuate an escape. The next day, her mother discovered in the home's mailbox, an apology letter from the assailant. Op. *id.* at page 5.

Petitioner who lived in the general area and had Mennonite friends and neighbors became a suspect in the case and agreed to appear at police headquarters for questioning. After **Miranda** rights were read, two-and-a-half hours of interrogation ensued but yielded no inculpatory statements. Dated, February 22, 2015, the transcripts to this first of two interviewing segments show that through progressively intense interrogation Petitioner maintained his innocence. N.T. at pages 27, 32, 42, 50, 59, 61, 64, 67, 70, 76, 86 and 98.

The Interviewer, a State Trooper named Martini, accused Petitioner of lying during the questioning, N.T. 58, 65, 72, 76, 78, 90, 94, 96 and explained that is

why "I'm being hard on you.", at page 82. Petitioner was accused of harboring bad intentions toward the Menonite girl and was told all the investigations led to him, at 62. All suspects had been ruled out. "It was you.", at page 81.

At length, Petitioner asserted his right to remain silent, N.T. "Nothing to add.", page 34; "That's all I got to say,", pages 35 and 89; "So you know, that's it.", page 62; After telling the truth, "not saying anymore", 104; "That's all I got to say. Don't want to be here all afternoon", page 79.

Petitioner also asserted his right to counsel, asking whether he was going to be arrested or let go, at pages 94-95. "If it goes any farther, I'd probably be willing to talk to an attorney" because..."I don't want to be here ten hours.", at page 95. Towards the end of this session, Petitioner expressed the belief to Trooper Martini that, "I can't leave. You're going to have me arrested. I can't leave. I know how this works.", at page 102.

Afterwards, Petitioner remained within the locked interrogation room by himself for another two hours and fifteen minutes. At that time, a new State Trooper named Mahalko, entered the room and asked if Petitioner would undergo a polygraph test. Petitioner agreed.

Dated February 22, 2015, the transcripts to the polygraph examination that lasted another two-and-one-half hours, revealed that Petitioner maintained his

innocence on many occasions, N.T. 46, 48-49, 51, 53, 56 but was ultimately informed that the test showed he was lying, at page 70. "You were there." Asking if he would "go to jail", Trooper Mahalko replied: "No you're not going to jail. Tell me what happened." , at page 72. Inculpatory statements spewed forth and when finished, the request to go home was denied: "The District Attorney would make that decision.", at page 83.

At trial by jury, the self-incriminating statements constituted the chief thrust of the Commonwealth's case after which the jury unanimously declared that Petitioner was guilty beyond a reasonable doubt of luring a minor into a motor vehicle, false imprisonment of a minor, attempted kidnapping and simple assault. A sentence of ten to twenty years imprisonment was subsequently imposed. Appendix B at page 1.

In the pretrial stage of the criminal proceedings, trial counsel attempted to suppress the self-incriminating statements on the basis of a **Miranda** violation. The interrogation/polygraphs transcripts were not utilized though counsel had had a copy of the transcripts provided by the Commonwealth. Appendix B, at page 12: and counsel informed the Court that he would "[f]ile an additional brief if necessary.", *id*, which never transpired. At that time the court denied the motion to suppress which was affirmed on direct appeal to the Superior Court.

The Superior Court found the **Miranda** issue substanceless and was "confused" why the issue was raised. Petitioner had not been in custody and had waived his **Miranda** rights. Appendix B at page 8. The Superior Court also found that direct appeal counsel had waived a related issue that the Court should have allowed defense counsel ample time to review the subject transcripts. Appendix B at pages 8-9 (counsel failed to follow a rule of appellate procedure).

Petitioner then filed a timely Post-Conviction Relief Act --*PCRA*--petition in the Bedford County Court of Common Pleas, raising, *inter alia,* the claims of ineffective counsel, *id.* at page 9. An evidentiary hearing was held on February 20, 2020 where the claims against counsel for not using the interrogation/polygraph transcripts at the pretrial suppression hearing were addressed, N.T. at pages 9-10 and 50.

After the PCRA petition was denied, a *pro-se* appeal was taken (counsel had been permitted to withdrawal) but the Superior Court ruled the claims against trial and direct appeal counsel were waived because they were not couched "in terms of the effectiveness of counsel..." Appendi B, middle of Op. pg. 11. The claims were inartfully termed, **Brady** vilolations"--*id.*--yet the Superior Court interpreted the underlying facts to indicate Petitioner "was really arguing was

that trial and appellate counsel were ineffective for failing..." to use the interrogation transcripts to support the Suppression motion. It "sounded" in ineffective counsel. *Id.* At page 14 of the *pro-se* Appellant's Brief, it was argued that prejudice ensued because trial counsel failed to challenge the trial judge's ruling whereas prior to and during the trial, the prosecution used the "defendant's statement that was obtained" subsequent to **Miranda** invocations "without any challenge of suppression itself." At page 15 of the same Brief, it was argued that appeal counsel failed "at that time to disclose and or present to the Superior Court the...Martini interview which clearly shows...invocations of right to silence...and to counsel...."

On Federal habeas corpus appeal, the District Court sided with the Superior Court that the claim had been defaulted because "[t]he ineffectiveness claim itself has to be properly presented. The initial place to do this was in the PCRA petition. *Id,* at page 13.

A timely Application for a Certificate of Appealability to the Third Circuit was denied--Appendix A--and the claim was briefly deemed "procedurally defaulted" and had no merit because the record was silent on the invocations of silence and counsel before the end of the police interviews.

This timely petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

Reason 1. *Supreme Court Rule 10, (a),(b) and (c).* The state and federal habeas courts' ruling that ineffective counsel claims were defaulted because they were not headlined properly although understood by the courts to "really" be a claim against both counsels which "sounded in ineffective assistance of consel" conflicted with several of this Court's precedential holdings in **Estelle v. Gamble**, 97 S.Ct. 285 (1976)(must liberally construe *pro se* peittion), **Slack v. McDaniel**, 529 U.S. 473, *483* (2000)(liberal construction carries particular weight in *pro se* habeas proceedings) and **Erickson v. Pardus**, 551 U.S. 89, *94* (2007) as well as many federal circuit courts of appeals: **Green v. United States**, 260 F.3d 78, *83* (2nd Cir. 2001)(well settled *pro se* litigants are entitled to a liberal construction of their pleadings which should be read to raise the strongest arguments they suggest), **United States v. Fiddler**, 688 F.2d 45, *48-49* (8th Circuit. 1982)("inartful" pleading does not justify dismissing petition when court understands substantive argument being made), **Osborn v. Shillinger**, 997 F.2d 1324, *1328 & n.1* (10th Cir. 1993)(liberally construing *pro se* attack upon validity of guilty plea as encompassing claims of ineffective assistance of counsel) and **United States v.**

Washington, 1999 U.S. App. Lexis 1481, at *6 (10th Cir. 1999)(*pro se* pleading "certainly conveys the requisite idea" even though they "did not use the requisite words."). *See also*, **Hopper v. United States**, 2022 U.S. Dist. Lexis 223655 (U.S. Dist. Ct. for S. Dist. of Illinois (2022)(court should have liberally construed a *pro-se* motion that indicated certain failures of counsel as a claim based on ineffective assistance of counsel).

Under the liberal construction requirement, the habeas court may have properly determined that the state's strict construction of the issue may have applied to attorneys but not *pro-se* litigants thereby finding reason under the Antiterrorism Effective Death Penalty Act to provide the ineffective counsel claims a *de novo* review since the state's decision was contrary to clearly established federal law, *inter alia*, **Estelle v. Gamble**, *supra*, and as case law interpretations show, *supra*, there is no fairminded disagreement. **Harrington v. Richter**, 562 U.S. 86, *at 102-103* (2011).

This Court may also take this opportunity to approve what some federal circuit courts have undertaken in *pro-se* cases that provide an "opportunity to remedy" "give clear guideance" or to "hold an evidentiary hearing" to determine

the relevant intent of the pleading, **Estremera v. United States**, 724 F.3d 774, *777* (7th Cir. 2013); **Whalem/Hunt v. Early**, 233 F.3d 1146, *1148* (9th Cir. 2000)(*en banc*).

Reason 2. *Supreme Court Rule 10 (b).* A liberal reading of the *pro-se* ineffective counsel claims demonstrate that counsel's constitutionally deficient performance resulted in inadmissible evidence being used to convict Petitioner in violation of his Fifth Amendment right against self-incrimination.

The issue goes to the basic tenets announced in **Gideon v. Wainwright**, 372 U.S. 335, *344* (1963) that counsel is indispensible to ensure that, *inter alia,* Petitioner would not be convicted on "evidence...otherwise inadmissible."

Petitioner had a Sixth and Fourteenth Amendment right to reasonably effective counsel, **McMann v. Richardson**, 397 U.S. 759, *771 n.14* (1970).

Under **Strickland v. Washington**, 466 U.S. 668 (1984) counsel's assistance "fell below an objective standard of reasonableness", at 688. The Courts have found that the interrogation/polygraph transcripts were available to counsel at the pretrial hearing and that counsel indicated to the suppression court that after a

review of them he would file a supplemental brief but in the end counsel "did not avail himself of that opportunity", Appendix B at page 12, District Court referencing Superior Court's Opinion.

As the transcripts of the interrogations show Petitioner's self-incriminating, custodial statments were involuntary and suppressible due to law enforcement's overbearing, coercive tactics and lies over the course of nearly eight hours that culminated in a confession after Petitioner was told, "No, you're not going to jail. Tell me what happened." Any reasonable attorney would have utilized the definitive information within the transcripts to provide the suppression court a view of the "totality of the circumstances", **Miranda v. Arizona,** 384 U.S. 436, *444* (1966)(must consider the totality of the circumstances); **Arizona v. Fulminante,** 111 S.Ct. 2246 (1991)(inquiry requires "examination of the totality of the circumstances....").

Under prevailing professional norms--**Strickland,** at 694--counsel's omission rendered his peformance constitutionally unacceptable. There is that vitiation of fundamental fairness of the suppression hearing, **Strickland,** *supra,* at 692, that was bereft of evidence not subject to judicial review for resolution of the suppression motion.

Had counsel provided the suppression court with relevant portions of the transcripts in question, under the prejudice prong, there is reasonable probability that but for counsel's failure the result of the proceeding would have been different, **Strickland** at 694.

Preliminarily, the suppression court ruled that Petitioner was not in custody. The transcripts refute that finding. After the first two-and-one-half hour interrogation, Petitioner voiced to the Trooper, "I can't leave. You're going to have me arrested. I can't leave." N.T. 2/2/15, at page 102. This belief of impending arrest is objective evidence that Petitioner was in custody. **Howes v. Fields**, 565 U.S. 499, 509 (2012). Under hours worth of progressively intense interrogation under the total circumstances a reasonable person would believe to be in custody. **Stansbury v. California**, 511 U.S. 318 (1994). These objective circumstances --Statement of the Case, *supra*, at pages 4-6--shown in the transcript record involve Petitioner's adamant and continuous assertion of innocence and a dedicated assertion of the right to remain silent and a request for counsel if it meant an arrest was imminent. These circumstances were in the face of the Trooper "being hard", making multiple accusations that Petitioner was guilty and was lying and that investigations ruled out everyone as the culprit except Petitioner.

After the polygraph test Petitioner was told he was lying. "You were there." *Supra* at page 6. Petitioner then asked if he would "go to jail" and the Trooper affirmatively stated: "No, you're not going to jail. Tell me what happened." *Id.*

The Trooper realized the statement would likely elicit an incriminating response. There exists a causal nexus between the assurance and the confession. **Rhode Island v. Innis,** 466 U.S. 291, *301* (1980). Guilty or not a reasonable person beaten down psychologically over the course of nearly eight hours, lied to, and feeling "nervous" and believing the polygraph results were "foolproof" would end the ordeal with telling the authorities what they wanted to hear all along particularly if the confessor believed ..."[y]ou're not going to jail."

In this case, the involuntary, self-incriminating statements should not have been used as evidence because they are inherently flawed thus precluding them from admission into evidence as an untrustworthy product of Petitioner's overborne will. **Schneckloth v. Bustamonte**, 93 S.Ct. 2041 (1973).

Reason 3. *Supreme Court Rule 10 (b).* A liberal reading of the *pro-se* ineffective counsel claims demonstrate that direct appeal counsel's constitutionally deficient performance resulted in an important suppression issue being waived for counsel's failure to follow a standard rule of appellate procedure.

In this issue, direct appeal counsel attempted to raise a reversible trial court error on the appeal to the Superior Court. When trial counsel received the interrogation/polygraph transcripts on the same day as the suppression hearing the court refused to grant a continuance for counsel to review then submit a supplement to the motion to suppress. Although as stated in **Reason 2,** *id.*, top of page 12, the Superior Court found that trial counsel had the chance to amend the Brief with information from the transcripts but "did not avail himself of that opportunity." no amendment was filed on the matter.

The Superior Court went on to rule that the issue was waived because it was not raised in counsel's Pa.R. Appellate Procedure, 1925(b) statement of matters complained about on appeal; nor did the trial court have the chance to write an opinion on the matter.

The failure to include all issues in the 1925 (b) statement has long been held to constitute waiver of any such issues not presented. **Commonwealth v. Hill,** 16 A.3d 484, *494* (Pa. 2011).

Under **Strickland's** performance prong, the failure to abide by longstanding Rules of Appellate Procedure falls below an objective standard of reasonableness. *Id.* 466 U.S. at 688.

As to the prejudice prong, **Strickland**, *id.* at 694, there is a reasonable probability that an appellate court would have reversed the conviction in this case to allow counsel ample time to review and submit an amendment to the motion to suppress. For the reasons stated in **Reason 2.**, adopted herein, the facts and pertinent legal citations clearly show that with the facts contained within the interrogation/polygraph transcripts, the court would have been constrained to suppress the inculpatory statements made by Petitioner as violative of his Fifth Amendment rights against self-incrimination. It is unacceptable to basic constitutional concepts that after hours of intense interrogation a citizen's incriminating statements remains voluntary after being assured he would not be going to jail in exchange for an admission to the crime.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court is also asked to summarily remand this case to the Third Circuit Court of Appeals on the basis of **Reason 1** which shows a clear and compelling abandonment of this Court's precedent that *pro-se* petitions are to be liberally construed in order for the Circuit Court to rule on the matter or decide if the case should be remanded to the District Court for finding of facts and applicable legal standards.

Respecfully submitted,

Todd Ferry (MT-7996)
Todd Ferry *Pro-se*

Date: August 8th, 2023