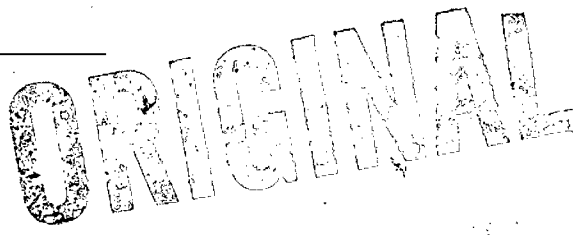
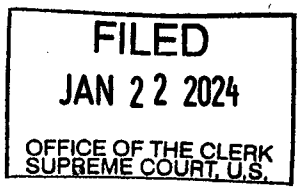
23-6727

NO: _____



IN THE

SUPREME COURT OF THE UNITED STATES



DANIEL JACOB ERB - PETITIONER

VS.

SUPERINTENDENT, SCI-HUNTINGDON, ET AL - RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

THE THIRD CIRCUIT COURT OF APPEALS

(NO: 23-2599)

PETITION FOR WRIT OF CERTIORARI

Daniel Jacob Erb #MY8060

1100 Pike Street

Huntingdon, Pa. 16654

QUESTION(S) PRESENTED

1. In reference to Petitioner's Guilty Plea and Prosecutorial misconduct, the decisions of the lower courts are contrary to, or involv[ing] an unreasonable application of, clearly established Federal law as determined by the Supreme Court and, an unreasonable determination of facts in light of the evidence presented in the State Court proceeding.

2. In reference to ineffective assistance of trial counsel and ineffective assistance of PCRA counsel as cause for default, the decisions of the lower courts are contrary to, or involv[ing] an unreasonable application of, clearly established Federal law as determined by the Supreme Court and, an unreasonable determination of facts in light of the evidence presented in the State Court proceeding.

3. Concerning procedural default and due diligence, the decisions of the lower courts are contrary to, or involv[ing] an unreasonable application of, clearly established Federal law as determined by the Supreme Court and, an unreasonable determination of facts in light of the evidence presented in the State Court proceeding.

LIST OF PARTIES

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

[ ] 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:

RELATED CASES

(See Attached Procedural History)
CP-46-CR-6192-16

1725 EDA 2019

20-CV-3492 (EDPA)

CA3 No.: 23-2599

Procedural History

State Court Proceedings

- Comm. v. Erb, No: 1725 EDA 2019 (Pa. Super. June 11, 2020) attached as Appendix A, Appeal Denied
- Comm. v. Erb, No: CP-46-CR-6192-2016 (C.C.P. August 9, 2019) attached as Appendix A, 1925 (a) Opinion
- Comm. v. Erb, No. CP-46-CR-6192-2016 (October 18, 2018), PCRA denied

Federal Court Proceedings

- Erb v. Superintendent, No: 23-2599 (CA3 December 6, 2023), Certificate of Appealability Denied
- Erb v. Kauffman, No: 20-CV-3492 (ED Pa. August 10, 2023), Report and Recommendation Adopted, Habeas Denied
- Erb v. Kauffman, No: 20-CV-3492 (ED Pa. May 10, 2023), Report and Recommendation issued, Habeas Denied

Table of Contents

Index of Appendix A

-Appendix A-

Index of Exhibits

Exhibit 1, Motion for Continuance, May 17, 2017, pars. 9-10

Exhibit 2, Investigative Interview Record #UM-16-11944, August 2, 2016, pg. 3-4

Exhibit 3, Incident Report UM#16-11944, pgs. 7, 17-18

Exhibit 4, NT Guilty Plea, May 22, 2017 at 6, 15, and 21-23

Exhibit 5, SCI-Huntingdon Legal Mail Receipt Logs from 10/18/18-11/07/18; DC-804 Grievances, 5/30/19 and 7/16/19; DC 804 Grievance Responses from Security Captain and Superintendent, 7/02/19 and 8/05/19; Trial Court opinion 8/09/19 at 5 par. 2 and N. 4

Exhibit 6, 18 Pa. C.S. 3101, Definitions, Sexual Intercourse

Exhibit 7, Written Guilty Plea Questionaire

Exhibit 8, Affidavit, 8/5/16, pg. 7

Exhibit 9, Incident Report, 8/8/16, pg. 20

Exhibit 10, Guideline Sentence Form #W5683073

Exhibit 11, Motion for PCRA Discovery, 7/10/18, par. 5

Exhibit 12, Order, July 12, 2018

Exhibit 13, Colloquy, 5/22/17

Exhibit 14, *Finley* letter, 8/30/18, page 1 par. 2 and page 2 par. 1

Exhibit 15, Orders, 3/6/18

Exhibit 16, Letters to former counsel, 10/15/17 and 12/25/17; Complaints and response to Pa. Disciplinary Board, 11/29/17, 12/20/17, 12/25/17 and 1/19/18; letter to court Adm., 1/22/18

Exhibit 17, Motion for Extension of time, 10/14/18

Table of Citations

Page(s)

U.S. Cases

State Cases

Statutes

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.

Reference to Opinions Below

Erb v. Superintendent, No: 23-2599 (CA3 December 6, 2023). A copy of the Third Circuit Court of Appeals decision and Opinion is unpublished and is attached in Appendix A.

Erb v. Kauffman, No: 20-CV-3492 (Ed Pa. August 10, 2023). A copy of the Third Circuit decision and Opinion is unpublished and is attached in Appendix A.

Erb v. Kauffman, No: 20-CV-3492 (Ed Pa. August 10, 2023). A copy of the U.S. Magistrate's Report and Recommendation is unpublished and is attached in Appendix A.

Commonwealth v. Erb, 1725 EDA 2019 (June 11, 2020). A copy of the Superior Court Decision and Opinion is unpublished and is attached in Appendix A.

Commonwealth v. Erb, CP-46-6192-2016, 1925(a) Opinion (August 9, 2019). A copy of the PCRA court opinion is unpublished and is attached in Appendix A.

Commonwealth v. Erb, CP-46-6192-2016 (October 18, 2018). A copy of the PCRA court Decision is attached in unpublished and is Appendix A.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was December 6, 2023.

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

[ ] A timely petition for rehearing was denied by the United States Court of Appeals 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. § 1254(1).

[✓] For cases from **state courts:**

The date on which the highest state court decided my case was June 11, 2020. A copy of that decision appears at Appendix A.

[ ] 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 following Constitutional and Statutory provisions cited are included but not limited to;

United States Constitutional Amendment 4

United States Constitutional Amendment 6

United States Constitutional Amendment 5

United States Constitutional Amendment 14

Fed. R. Crim. P. 11

18 Pa. C.S. 3101

Pa. P.C.R. 1.16

Pa. R.A.P. 108

Pa. R. Crim. P. 114

Pa. R. Crim. P. 902

Pa. R. Crim. P. 907

Pa. R. Crim. P. 908

Statement of the Case

On August 2, 2016, petitioner was arrested by Upper Moreland Police, Montgomery County, Pennsylvania upon allegations by his step-daughter of abuse.

On May 17, 2017, 2017, assigned trial counsel, John Kravitz, Esq., by Motion for Continuance, openly admitted to having done nothing in Petitioner's case and, in violation of the Sixth Amendment of the U.S. Constitution, that neither he, nor his office, had the time or resources to defend the Petitioner's case. (See Exhibit 1, Motion for Continuance, May 17, 2017, Pars. 9-10).

Merely two (2) working days later, on May 22, 2017, despite both Petitioner and the alleged victim denying penetration, Petitioner was brought before the Hon. Todd Eisenburg for a guilty plea. (See Exhibit 2, Investigative Interview Record #UM-16-11944, August 2, 2016, pgs. 3-4; See also Exhibit 3, Incident Report #UM-16-11944, pgs. 17-18). During this guilty plea, Petitioner was given a false, non-existent definition of the statutes and was never given a colloquy as to whether he committed the acts as defined by statute. (See Exhibit 4, NT Guilty plea, May 22, 2017, at 6, 15, and 21-23).

On May 4, 2018, Petitioner filed a timely Post Conviction Relief Petition (PCRA) with the trial court.

On September 27, 2018, the trial court issued its 907 Intent to Dismiss.

On October 18, 2018, the trial court issued its Final Order of Dismissal of PCRA.

Petitioner did not receive the Final Order of Dismissal, as evidenced by Prison Legal Mail logs, Prison Grievances and Responses, and the trial court's own admission that the certified mail receipt was never returned to chambers. (See Exhibit 5, SCI Huntingdon Legal Mail Reciept Logs from 10/18/18-11/07/18; DC-804 Grievances, 5/30/19 and 7/16/19; DC-804 Grievance Responses from DOC Security Captain and superintendent, 7/02/19 and 8/05/19; See also Trial Court opinion 8/09/19 at par 2 and n. 4, attached).

Reasons for Granting the Petition

1. In reference to Petitioner's Guilty Plea and Prosecutorial Misconduct, the decisions of the lower courts are contrary to, or involv[ing] an unreasonable application of, clearly established Federal law as determined by the Supreme Court and, an unreasonable determination of facts in light of the evidence presented in the State Court proceedings.

Pennsylvania follows F. R. Crim. P. 11 concerning the requirements of the court in accepting guilty pleas. See Comm. v. Flanagan, 578 Pa. 587 (2004). Citing Henderson at 645, the Pa. Supreme Court held that a plea can not be voluntary unless the defendent received "real notice of the true nature of the charges against him, the first and most universally recognized requirement of due process." Citing its own rules, the Flanagan court held that the trial court has a mandatory duty to require the Commonwealth provide "a factual basis for the plea". This is consistent with the rule in Winship, 397 US at 362. This duty falls soundly on the trial court during the colloquy, not counsel or the prosecution. See Comm. v. Minor, 467 Pa. 230, 237 (1976) citing Boykin, 395 US 238, 243-44 (1969).

In Pennsylvania, in order to sustain a charge or conviction for Involuntary Sexual Intercourse, the evidence presented by the Commonwealth must "*establish that the defendent engaged in oral or anal intercourse, which included penetration, however slight.*" See Comm. v. Castelhun, 889 A2d 1228, 1233 (Pa. Super. 2005). It is plain error and requires reversal when the court fails to inform the defendent of the necessary elements of the crime. See U.S. v. Szymanski, 631 F3d 794, 801-802 (6th Cir. 2011); U.S. v. Murphy, 942 F3d 73, 86 (CA2 2019).

It is well settled law that the prosecution engages in misconduct or over-reaching when it prosecutes charges not supported by probable cause. See ABA Model Rule 3.1(1) See e.g. Berger v. U.S., 295 US 78, 88 (1935).

The function of the equitable authority empowering the Habeas Courts comes with the "imperative of correcting a fundamentally unjust incarceration." Bracey v. Superintendent, 986 F3d 274, 296 (CA3 2021). Or, when violations of Federal law rise to the level of a "fundamental defect which inherently results in a miscarriage of justice" or, is "inconsistent with the rudimentary demands of fair procedures". Reed v. Farley, 512 US 339, 348 (1994).

There is nothing in the record that suggests Petitioner was made aware by the court or, any other party during the colloquy, of the necessary elements of Deviate Sexual Intercourse. (See Exhibit 4, NT Sent., 5/22/17 at 6). That is, the element of intercourse which requires "penetration" as a necessary element for conviction. (See Exhibit 6, 18 Pa. C.S. 3101, Definitions, Sexual Intercourse).

There is absolutely nothing in the written Guilty Plea Questionaire that includes any real notice of the true nature of the charges that could have given Petitioner any idea of the required elements of I.D.S.I. (See Exhibit 7, Written Guilty Plea Questionaire).

The only evidence submitted by the State was Petitioner's statement in which Petitioner clearly denied oral sex and there was no evidence of intercourse. (See Exhibit 2, Investigative Interview Record, pgs. 3-4).

Nothing in the victim's statement memorialized in the Police Report reaches the necessary elements required to support the charge and prosecution of Deviate Sexual Intercourse. (See Exhibit 3, Incident Report Form, #UM-16-11944, pgs. 7, 17-18). The victim only stated "Daniel placed his mouth on her private area" and specifically denied ever being penetrated; i.e. having sexual intercourse with Petitioner. Nor, did the State produce the victim's statement in any form before the Court.

In fact, there is absolutely nothing in the Affadavit of Probable Cause to support the charge or prosecution of Deviate Sexual Intercourse. (See Exhibit 8, Affadavit, 8/05/16, pg. 7).

Contrary to the magistrate's Report and Recommendation (R and R) at 3, that the police added I.D.S.I. due to the Mission Kids interview, August 3, 2016, the false I.D.S.I charge was not added until D.D.A. Cauffman was notified by police of Petitioner's pending release on bail. (See Exhibit 9, Incident Report, 8/08/16, pg. 20).

Had the prosecution not engaged in such egregious conduct, according to Petioner's guideline Sentencing Form submitted by the State, his sentence would have been probation. (See Exhibit 10, Guideline Sentence Form #W5863073). Petitioner had no criminal history.

The totality of circumstances, i.e. the failure of the trial court's mandatory duty to notify the defendent of the necessary elements of the offense and, ensure he understood the actions necessary to committing I.D.S.I., the failure of the State to produce any factual basis for said

charge and, the prosecution's over-reaching in charging Petitioner with a crime unsupported by probable cause is clear and convincing evidence of a miscarriage of justice.

All of this was fairly presented to the state PCRA, Superior Court and Habeas Courts.

2. In reference to ineffective assistance of trial counsel and ineffective assistance of PCRA counsel as cause for default, the decisions of the lower courts are contrary to, or involv[ing] an unreasonable application of, clearly established Federal law as determined by the Supreme Court and, an unreasonable determination of facts in light of the evidence presented in the State Court proceedings.

The Court cannot "indulge in post hoc rationalization for counsel's decision making that contradicts the evidence of counsel's actions." Wiggins v. Smith, 539 US 510, 526-27 (2003). "When a defendent shows neglect or inattention rather than reasoned judgment on the part of counsel, regardless of possible strategic reasons offered by the opposing party, the defendent has rebutted presumption." Rompilla v. Beard, 545 US 374, 395-96 (2005). E.g. Strickland v. Washington, 466 US 668, 687-88 (1984) (cautioning against hindsight judgment of counsel's decisions). See also Marshall v. Hendricks, 307 F3d 36, 110 (CA3 2002).

Where counsel's choices are based on inadequate investigation or legal knowledge, those strategic choices are unreasonable. Rompilla at 385-89.

Where counsel's inattention is cause for depriving "the defendent of a substantive and procedural right to which the law entitled him", the prejudice prong in Strickland has been met. Williams v. Taylor, 529 US 362, 391 (2000).

In Pennsylvania, the defendent has a rule based right to appointment of counsel on PCRA and that right comes with the right to effective assistance of counsel. Comm. v. Albrecht, 720 A2d 693, 699-700 (Pa. 1998). Therefore it is a right guaranteed by the State and Federal Constitutions, a cognizable Habeas claim.

Where a State law or its Constitutional provisions provide greater protection, that law or provision supercedes those of the Federal government. E.g. 28 USC 2254(i).

The reviewing court must focus on the merits of a Petitioner's claims rather than treat timeliness or procedural default as its threshold inquiry; i.e. if the claims have some merit, the counsel is presumed ineffective in failing to litigate. Saleem Bey v. Superintendent, 856 F3d 230 (CA3 2017) citing Martinez, 566 US at 14-17 (2012).

It is well settled that trial court Opinions are not part of the record and, cannot serve as basis for adjudication. Wood v. Zappata Corp., 482 F2d 350, 358 (CA3 1978).

Trial Counsel:

The R and R, at pgs. 20-22, relies wholly on the PCRA court's Opinion and the "*PCRA Court's resolution of this ineffectiveness claim*" rather than the "*totality of circumstances surrounding the guilty plea.*" Id. at 22

Factually, Petitioner had no criminal history or any prior contact with lawyers or the legal system and certainly could not have "intelligently" known if counsel's representation was "satisfactory". (R and R at 22).

Trial counsel's Motion for Continuance, May 16, 2017, was certainly presented in PCRA, State, and Third Circuit courts in which, only three (3) working days prior to trial, counsel stated: "*Due to the fact of the extremely high case load in the public defender's office, counsel for the defendent has not had adequate time to prepare for the case at issue.*" (Exhibit 1, Motion for Continuance, pars. 9-10).

Petitioner was not provided a copy of this Motion until he began seeking documents for filing his PCRA, nor did the trial court or, counsel for that matter, at the guilty plea broach the subject.

In other documentation provided to the PCRA, State, and Third Circuit courts, PCRA counsel, in his Motion for PCRA Discovery, clearly stated that the Public Defender's Office and trial counsel had no record whatsoever pertaining to Petitioner's criminal case.

"*The case file in possession of the Public Defender's Office most likely contains the necessary documents, however the Public Defender's Office cannot locate its case file and has been searching for same since May 2017.*" (Exhibit 11, Motion for PCRA Discovery, 7/10/18,

Par. 5).

The same non-existent case file trial counsel used to advise Petitioner on May 22, 2017 to enter a guilty plea.

The fraud stated in the PCRA court Opinion and foisted on the PCRA, state and the Third Circuit courts by "*Attorney Kravitz and Carol Sweeney, Esquire*" can be no less obvious and blatantly egregious. (See R and R at 21, par. 1).

Astonishingly, it was the same trial judge and PCRA judge, T. Eisenburg, who granted the Discovery Motion, July 12, 2018 and was served Attorney Kravitz's Motion for Continuance yet, ignored its own record and the Exhibits presented here on PCRA. (Exhibit 12, Order, July 12, 2018).

Trial counsel's "inadequate knowledge" of the law and, the trial court ignoring its obligations to ensure Petitioner knew the necessary elements that constitute IDSI, of which "penetration" is absolutely required in Pa.'s definition of "Sexual Intercourse" severely prejudiced his plea. (Exhibit 6, 18 Pa. C.S. 3101).

"*Deviate sexual intercouse can occur by putting mouth to the sexual organ of another person. Do you understand that?*" (Exhibit 4, NT Sent., 5/22/17, 6:19-21). Trial Counsel Kravitz.

"*And then specifically...you performed oral sex on her by touching your mouth to her vagina, is that correct?*" (Exhibit 4, NT Sent., 5/22/17, 15:14-18). ADA Brittenburg.

Neither question contained the terms "intercourse" or "penetration", therefore Petitioner did not enter into a knowing and intelligent plea or any "real notice of the true nature of the charge against him" as required by law, either by the court or any other party in record.

The only documentation, proven here and to the Habeas and PCRA court, that "attorney Kravitz and Carol Sweeney, Esquire" could have possibly "conferred with Defendent prior to his guilty plea" was the written Plea Colloquy. (R and R at 21, par. 1).

The written Plea Colloquy certainly did not contain any information concerning the definitions or even the offenses and their elements that Petitioner was pleading to. (Exhibit 13, Colloquy, 5/22/17).

Ultimately, pursuant to the Constitution and clearly established law, Petitioner's

conviction and sentence was illegal.

PCRA Counsel:

PCRA counsel focused his investigation solely on his interview with trial counsel and the plea transcripts, in full knowledge that attorney Kravitz did not have a case file or discovery from the Commonwealth. (Exhibit 14, *Finley* letter, 8/30/18, pg. 1, par. 2 and pg. 2 par. 1).

At paragraph 2, page 1 of this *Finley* letter, counsel admits to having the Mission Kids video statement, during which, the victim specifically denied being penetrated.

Based upon these facts and, in light of them, it cannot be said the PCRA counsel had any strategic basis for his *Finley* letter.

Pennsylvania's appellate court law cited to above is specific concerning the elements that must be proven, the state's duty to produce evidence to the court in support of the guilty plea, and the court's duty to ensure the defendent "fully understands the nature and elements of the charges against him."

Therefore, PCRA counsel's lack of investigative research and legal knowledge was the true "cause for procedural default" on any and all claims concerning prosecutorial misconduct of false charging, trial court error in failing to "expressly address the defendant" with "an understanding of the law in relation to the facts" and, trial counsel's blatant misrepresentation to the Petitioner at sentencing (Exhibit 4, NT Sent, 5/22/17, 6:19-21) and egregious indolence.

Considering trial counsel's Motion for Continuance, May 16, 2017, pleading "*extremely high case load, extremely busy schedule and lack of adequate staff*" (Exhibit 1, Motion for Continuance, May 16, 2017, pars. 9-10) and, PCRA counsel's Motion for PCRA Discovery, July 10, 2018, noting trial counsel had no "case file" and it had been missing "since May 2017", (likely never existing at all); it can be reasonably presumed trial counsel simply rushed into plea to expedite closure. (Exhibit 11, Motion for PCRA Discovery, 7/10/18, par. 5).

3. Concerning procedural default and due diligence, the decisions of the lower courts are contrary to, or involv[ing] an unreasonable application of, clearly established Federal law as determined by the Supreme Court and, an unreasonable determination of facts in light of the evidence presented in the State Court proceeding.

The court "must accept as true the allegations of the petitioner, unless they are clearly frivolous." When the state fails to "evaluate the totality of evidence," that determination is unreasonable. Williams v. Taylor, 529 US 362, 398 (2000). Where the facts are in dispute, the federal Habeas court must hold an evidentiary hearing if the Petitioner did not receive a full and fair hearing in state court. Townsend v. Sain, 372 US 293, 319 (1963).

28 USC 2254(b) requires that a petitioner fairly present his claims to the state's highest tribunal to meet exhaustion requirement. Relevant to this is the state's obligation to provide "a meaningful opportunity to satisfy the requirement of AEDPA." Boumedine v. Bush, 553 US 723 (2008). And, the "due process...right to a fair opportunity in state court to discover and present exculpatory evidence that was not contained in the record on direct appeal." Dist. Attorney's Office v. Osborne, 557 US 52 (2009).

Pa. R. Crim P. 902, in relevant part, and its mandatory language requires a "properly filed" PCRA petition to provide the following:

> *"the fact supporting each ground that:*
>
> *(a) appear in the record, and the place in the record where they appear; and*
>
> *(b) do not appear in the record, and an identification of any affidavits, documents, and other evidences showing such facts."* Pa. R. Crim. P. 902(a)(12)

Pa. Rules of Professional Conduct have a mandatory requirement also relevant to a pro se prisoner's ability to perfect and properly file a timely PCRA petition, i.e. "*Upon termination of representation, a lawyer shall...surrender papers and property to which client is entitled.*" Pa. P.C.R. 1.16 (d).

"A person is not at fault when his diligent efforts to perform and act are thwarted, for example, by the conduct of another or happenstance." Williams at 432. There must be "a lack of diligence, or some greater fault, attributable to the prisoner..." Id. A diligent prisoner is one who "did what he reasonably thought was necessary to preserve his rights based on information he received." Munchinski v. Wilson, 694 F3d 308, 331 (CA3 Pa. 2012). The due diligence requirement requires the court to make a "fact-and-context-specific inquiry focused on the characteristic and reasonable expectations of each petitioner." Bracey v. Superintendent, 986 F3d 274, 285 (2021). "Due diligence requires neither perfect vigilence nor punctilious care, but it requires reasonable efforts by the petitioner based on the particular circumstances..." Comm. v. Burton, 638 Pa. 690, 697 (2017).

Indeed the Burton court, in making its decision, reversed decades of previous rulings on diligence duly considered the onerous hurdles a prisoner faces in accessing prison law libraries and their highly limited resources, prohibitions on access to court officials and public case dockets or pleadings and the lengthy process of obtaining documents through the U.S. mail; the only option available to Pa. prisoners. Burton at 716-19.

It is common knowledge that, in all but a few exceptional cases, a prisoner must rely on other prisoners for assistance with legal cases. See Johnson v. Avery, 393 US 483 (1969).

"Certainly, a prisoner unversed in the law and the methods of legal research will need more time or more assistance than a trained lawyer exploring his case. It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult." Tillery v. Owens, 719 F. Supp. 1256, 1283 (W.D. Pa. 1989).

S.C.I. Huntingdon's library staff and its Security Officials have created a policy that prohibits, under penalty of disciplinary action, any inmate from assisting another in possession or creating legal documents.

Facts

Petitioner was sentenced May 22, 2017. For a period of four (4) months, Petitioner was in temperary custody at S.C.I. Graterford and S.C.I. Camp Hill, until he was classified and

transfered, September 28, 2017, to S.C.I. Huntingdon. Prior to this date, there is no probability that he had any reasonable access to law library or contact with any inmate who could recognize and assist him with the possibility of obtaining his records or filing claims. Owens Id. The State court records themselves prove Petitioner had no prior contact with the criminal justice system at any level.

There is no doubt, from the trial court record, attached as Exhibits to Motions that, Petitioner made every effort to obtain his records and defense file from trial counsel and the Public Defender's office.

Noted above, in PCRA counsel's Motin for Discovery, they had no case file, yet made no effort to notify Petitioner that it did not exist. (See Exhibit 11, Motion for Discovery, 7/10/18, par. 5).

Every effort Petitioner made to Motion the trial court to intervene and provide "a meaningful opportunity to satisfy the requirements of Pa. R. Crim. P. 902 was thwarted by the trial court. (See Exhibit 15, Orders, 3/6/18). It is clear from the record and evidence provided to the state court, Habeas Court, and this Court that Petitioner made every concievable effort to timely obtain the required documents from trial counsel and the trial court to file his PCRA, and was constantly and consistently ignored. (See Exhibit 16, Letters to former counsel, 10/15/17 and 12/25/17; complaints and responses to Pa. Disciplinary Board, 11/29/17, 12/20/17, 12/25/17, and 1/19/18; letter to court Adm., 12/22/18).

Yet interestingly enough, based upon the same pleadings in Petitioner's Motions, the court granted PCRA counsel's requests for the same documents. (See Exhibit 12, Order, 7/12/18).

PCRA counsel filed his *Finley* letter August 30, 2018, which Petitioner received September 6, 2018. Petitioner received the Court's Notice of Intent to Dismiss on October 2, 2018. Pursuant to the Prison Mailbox Rule, Petitioner filed his Motion for Extension of Time to File Objections/Answers to the Notice of Intent on October 14, 2018. (See Exhibit 17, Motion for Extension of Time, 10/14/18).

It is well settled that the "court controls the scope, timing, and pace of the proceedings." The obligation to ensure that the parties are properly provided Notice of entry of an Order soundly rests on the Court. (See Pa. R. Crim. P. 114, 907(d), 908(e) and Pa. R.A.P. 108(1)).

Accordingly, the Pa. appellate courts have recognized that nothing relieves the court of this burden.

The PCRA court admitted that Petitioner had not received a copy of the Order of Dismissal by certified mail as required by law. (See PCRA ct. Op., 8/9/19 at 5). Indeed, Petitioner provided ample evidence to the state courts and Habeas Courts that he had never received a copy of the PCRA court's Final Order. (See Exhibit 5, SCI Huntingdon Legal Mail Reciept Logs from 10/18/18-11/07/18; DC-804 Grievances #804351, 5/30/19 and 7/16/19; DC-804 Grievance Responses #804351 from DOC Security Captain and superintendent, 7/02/19 and 8/05/19).

The Magistrate's Report, in direct conflict of the decision in Burton and these Courts merely shifted the burden of timeliness and procedural default on Petitioner based upon the PCRA court Opinion and Superior Court decision findings, despite the facts and evidence presented that eviserated those findings.

There is absolutely no indication in the record that the PCRA court exercised its discretion in denying Petitioner's Motions for record necessary for preparation and perfection of his PCRA, nor for its denial of Extension of Time and Leave to Amend on October 21, 2018, five (5) days after it issued its Order of Dismissal, October 18, 2018 and nearly 2 weeks after Petitioner mad the request.

Even if Petitioner had somehow obtained a copy of his Docket the week following his request for Extension of Time, it would still have ended in the same result; a procedural bar.

As the Pa. Supreme Court noted in its landmark decision in Bradley, 261 A3d 381 (2021), the process required by Pa. R. Crim. P. 907 is "functionally unsound" and deemed inoperable, citing Trevino, 569 US 413 (2013) and, would even be "a daunting task for a seasoned practitioner".

Petitioner certainly "did what he reasonably thought was necessary" in exhausting remedies by appealing his claims to Superior Court prior to filing Habeas - and, every other effort prior to clearly shows he was not "sleeping on his rights".

Conclusion

In raising a claim of an illegal guilty plea, in which the facts support that the defendant and the victim both denied in official statements the act was committed and, the defendant was never given an adequate reading of the statute, invokes actual innocence of the crime.

There is no statute of limitations or procedural default under our laws and Constitution for actual innocence. To condone such a conviction and sentence is to ratify that the Due Process, Equal Protection of our Constitution are null and void, and that the prohibitions against cruel and unusual punishment under the Eighth Amendment are meaningless.

To agree with the analogy of the lower court that simply because the defendant "could have" received a virtual life sentence if not for the generous plea offer does not address the facts or the State Court's responsibility under its law to notify the defendant of its decision and his right to appeal as well as time for taking the appeal.

Relief Requested

Based upon the foregoing facts, arguments, and authorities, Petitioner requests this Honorable Court to reverse the findings of the lower court, vacate Petitioner's conviction and sentence, order Petitioner's immediate release from custody and, any other relief deemed equitable and just.

Respectfully submitted this 2 day of February, 2024

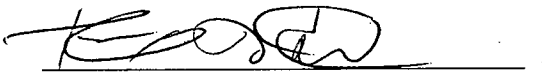
/s/ _____

Daniel Jacob Erb #MY8060
SCI- Huntingdon
1100 Pike Street
Huntingdon, Pa., 16654

APPENDIX A

Verification

I, Daniel Jacob Erb, do hereby verify that the statements made in my Petition for Writ of Certiorari is true and correct to the best of my knowledge, information and belief. I understand that any false statements made herein are subject to the penalties of perjury, 18 Pa. C.S.A. § 4904, relating to unsworn falsification to authorities.



Daniel Jacob Erb #MY8060
1100 Pike Street
Huntingdon, Pa. 16654

Date February 2, 2024

U.S. Supreme Court
Petition for Writ of Certiorari

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

February 2, 2024

Submitted by: Daniel Jacob Erb – Petitioner
(E.g., Appellant, Appellee, Petitioner, Respondent)

Signature: [signature]

Name: Daniel Jacob Erb

Attorney No. (if applicable): N/A

Verification

I, Daniel Jacob Erb, do hereby verify that the statements made in my Motion for Leave to Proceed In Forma Pauperis is true and correct to the best of my knowledge, information and belief. I understand that any false statements made herein are subject to the penalties of perjury, 18 Pa. C.S.A. §4904, relating to unsworn falsification to authorities.

Daniel Jacob Erb #MY8060
1100 Pike Street
Huntingdon, Pa. 16654

Date: February 2, 2024