

23-6848

NO. 23A199

IN THE
SUPREME COURT OF THE UNITED STATES

STEWART C. SMITH,

Petitioner

v.

LAUREL HARRY, SUPERINTENDENT—SCI CAMP HILL, ET. AL.,

Respondent

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

FILED

DEC 01 2023

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL

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QUESTIONS PRESENTED FOR REVIEW

WAS PETITIONER'S GUILTY VERDICT OBTAINED AND SUSTAINED IN VIOLATION OF DUE PROCESS, PROSECUTORIAL MISCONDUCT, INEFFECTIVE ASSISTANCE OF COUNSEL, BIAS, PARTIAL PCRA JURIST WARRANTING HABEAS RELIEF WHERE THE DISTRICT COURT FAILED TO LIBERALLY CONTRUE *PRO SE* PETITION WHICH PROVIDED *CAUSE* TO EXCUSE HIS DEFAULTED CLAIMS?

DID THE COURTS BELOW COMMIT REVERSIBLY ERROR DENYING PETITIONER'S CERTIFICATE OF APPEALABILITY ("COA") ON THE ISSUE OF *CAUSE* TO EXCUSE HIS PROCEDURALY DEFAULTED CLAIMS WHERE PETITIONER PROVIDED *CAUSE* IN, *INTER ALIA*, HIS HABEAS PETITION CLAIM SEVEN?

DID THE COURTS BELOW COMMIT REVERSIBLE ERROR DENYING PETITIONER'S HABEAS PETITION WHEN IT FAILED TO LIBERALLY CONTRUE PETITION WITHOUT CONDUCTING AN EVIDENTIARY HEARING ON BOTH HIS CLAIMS AND *CAUSE* TO EXCUSE HIS PROCEDURALY DEFAULTED CLAIMS?

PARTIES TO THE PROCEEDINGS

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RESPONDENT

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I.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 25, 2023. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

II.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment of the United States Constitution provides:

"no person shall be... deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Sixth Amendment of the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to... be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

3. The Fourteenth Amendment of the United States Constitution provides:

"... nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The Statute under which petitioner sought habeas corpus relief was 28 U.S.C. §2241 and 2254 which states in pertinent part:

§2254(a) The Supreme Court... shall entertain an application for writ of habeas corpus pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States;

(b)(1) an application for a writ of habeas corpus... shall not be granted

unless it appears that—

- (A) . . . or
- (B)(i) There is an absence of available State corrective process; or
 - (ii) Circumstances exist that render State process ineffective to protect the rights of the applicant.
- (2) An application [...] may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
- (3) . . .
- (c) . . .
- (d) An application. . . shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim —
 - (1) resulted in a decision that was contrary to, or an unreasonable application of clearly established federal law, as determined by the supreme court of the united states; or
 - (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.
- (e)(1) . . .
- (2) If the applicant has failed to develop the factual basis of a claim in state court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
 - (A) the claim relies on—
 - (i) . . .
 - (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
 - (B) The facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the under lying offense.

III.

STATEMENT OF THE CASE

Over ten years ago, Mr. Smith was falsely accused of raping his then live-in girlfriend.

Complainant delayed reporting false allegations that he was drunk, bit, and raped her the previous evening. During an inept Police video recorded interview (VRI), police tainted, tampered complainant providing responses what to say in court proceedings to "help win their case." (**See Exhibit A—Habeas Petition Attachment).**

Prosecution followed in Police footsteps, knowing presented tainted, tampered complainant witness, a speculative at best intoxication theory, introduced , highlighted, repeatedly emphasized petitioners prior crimes, parole and present state prison incarceration, withhelp favorable impeachment evidence (Matt Hilkens cell phone tower data) permitting it's witnesses to comit perjury to intentionally deny Mr. Smith a fair trial.

Trial counsel condoned Commonwelath's acts and omissions failing to put the Commonwealth's case to the adversarial test. Mr. Smith was forced to proceed pro se at various critical stages in state court proceedings and maintained his innocence at all times, never waiving.

The state courts bias, partiality and unreasonable decision making impeded and prevented Mr. Smith from reaching the truth, prejudicially interfering with his ability to raise constitutional claims before state tribunals only to be intentionally ensnared in procedural traps. That is not what justice and fair process should appear like.

Thus, Mr. Smith seeks therelief from this court that both the Commonwealth and lower courts has unconstitutionally denied him. I Am Innocent

IV.

RELEVANT FACTUAL AND PROCEDURAL HISTORY¹

Petitioner defers the the District Court's Memorandum Order dated March 1, 2023, (Attached hereto as Appendix A). However, Petitioner respectfully submits the following facts, seemingly overlooked by the lower courts.

During initial collateral review² Petitioner complained trial counsel was withholding case file, specifically, the video recorded interview (VRI) of complainant by way of motion for in camera hearing 4/11/16. Trial never revealed this critical evidence to her client at, during, or after trial, thus, blocked petitioners right to make fundamental choices about his own defense.

Petitioner also advised PCRA Court Commonwealth intentionally withheld favorable impeachment evidence, specifically, Matt Hilker's cell phone tower data,³ that allowed Commonwealth witnesses to comit perjury before the jury to go uncorrected.

Further, petitioner requested twice to Amend both his intial pcra and 1925(b) statement of errors and was twice denied providing cause to excuse.^{4,5}

¹ Admittedly, this section does not contain all factual and procedural history in this case.

² Post Conviction Relief Act, 42 Pa.Con.Stat. §9541 *et. seq.*, only requires ONE complete round of the state established appellate review process. 526 U.S. 835, 845 (1996). Petitioner should not be required or even expected to file additional PCRA petitions or piecemeal his claims for meaningful review as was done here.

³ This material should have been disclosed pursuant to Brady and its progeny and is still being withheld providing cause to excuse. **Banks, 540 U.S. 668.**

⁴ The court "must Order 1925(b) statements. . . and [petitioner] must fail to comply with such directive before finding waiver." **Thomas, 451 A.2d 470 (Pa. Sup. 1982).**

⁵ PCRA Court's bias, partiality, and unreasonable decision making was insurmountable as a *pro se* litigant. The denials unconstitutionally ensnared petitioner in procedural traps manifesting injustice providing cause to excuse.

PCRA Court went on to resentence petitioner without jurisdiction and without counsel, thus, a structural error occurred. The unreasonable decisions of pcra court forced petitioner to give up right to defend himself seeking counsel on two appeals making matters worse, also providing cause to excuse.

Attorney Wilson was appointed for both appeals. On the resentencing appeal (977 MDA 2016, attached hereto appendix B) Attorney Wilson raised improper issues amounting to a serial pcra not properly before the court. Superior Court lacked subject matter jurisdiction to even entertain the issues advanced by counsel.^{6,7} The Superior Court utilized that improvident decision as a basis to intentionally deny pcra appeal (1127 MDA 2016, Attached hereto Appendix C), As such, did not conduct a proper **Strickland** analysis.

Petitioner hired private counsel Sembrot to litigate a second pcra petition in a timely manner prescribed by PCR Act but he failed to take a timely procedural step that deprived petitioner the review he was entitled to seek.⁸

Petitioner filed his third pcra petition timely as prescribed by the Act which alleged exceptions to the timebar, namely, governmental interference and per se ineffectiveness. State court denied as untimely. (See, 80 MDA 2021, attached **hereto Appendix D**).

⁶ **McKeever, 947 A.2d 782 (Pa.Super. 2008)** only permits "issues pertaining to the resentencing procedure itself" not trial court errors that were raised here, no exception existed here.

⁷ 6th Amendment protections attached at this point providing cause to excuse defaults as well.

⁸ New facts developed during initial collateral review. Petitioner has a right to seek redress and counsel's conduct must comport with some minimum norms which should include filing a timely pcra petition. **571 U.S. 263, 274 (2004)**(citing **529 U.S. 302, 395 (2000); 477 U.S. at 385; Pa.R.Prof.Conduct, 1.1, 3.1, 8.4(a)&(d).** *per se* ineffectiveness has also contributed to cause to excuse.

V.

A. COURSE OF PROCEEDINGS IN THE SECTION § 2254 CASE BEFORE THE COURT⁹

On March 1, 2019, Petitioner filed a 28 U.S.C. § 2254 petition that was stayed from April 29, 2019, until March 10, 2022.

On April 20, 2022, the District Court issued a show and cause Order directing the District Attorney, Francis T. Chardo, to respond.

On May 6, 2022, Petitioner filed Memorandum of Law in support for 2254 petition.

On May 13, 2022, Respondent District Attorney filed its response.

On May 16, 2022, Petitioner filed Application for Leave and Memorandum of Law in support for Discovery in this case.

On June 8, 2022, Petitioner filed an Oppositional Brief to Respondent's Answer.

On August 22, 2022, The District Court Ordered Petitioner to file an amended Habeas petition.

On December 1, 2022, Petitioner complied filing an Amended Habeas petition, attached hereto Appendix Exhibit E, and attached Exhibits.

On January 19, 2023, Respondent District Attorney filed combined Answer and Memorandum to Petitioner's Amended Habeas petition.

On March 1, 2023, the District Court filed Memorandum Order denying writ of habeas and Certificate of Appealability ("COA"), attached hereto Appendix Exhibit A.

Petitioner timely sought COA in the Third Circuit on sole issue of cause to excuse procedurally defaulted claims.

On July 25, 2023, the Third Circuit denied COA and Habeas petition. Attached hereto Appendix Exhibit F.

⁹ Petitioner did not receive Respondent's Answer to discovery motion or Court Order resolving the matter

VI.

REASONS FOR GRANTING THE WRIT

B. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN DIRECT CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT

1. The Third Circuit Panel Opinion affirming the District Courts denial of Petitioner's § 2254 petition holding that "Smith has not made a substantial showing of the denial of a constitutional right. . . Jurists of reason would not debate the correctness of the district courts decision because Smith's claims lack arguable merit" is outrageous. the guilty verdict was obtained and sustained in violation of due process, prosecutorial misconduct, ineffective counsels, bias, partial state tribunals and is in direct conflict with this courts decision in **Strickland, Kimmelman, Mooney, Napue, Kyles, Banks, Williams, Tumey, Weaver**; and
2. The Third Circuit Panel Opinion affirming the District Courts denial of Petitioner's § 2254 petition holding that "Smith has not made a substantial showing of the denial of a constitutional right[,] thus, the foregoing request for Certificate of Appealability is denied" is also outrageous and in direct conflict with this courts decision in **Miller -El, Coleman, Martinez**; and
3. The Third Circuit Panel Opinion affirming the District Courts denial of Petitioner's § 2254 petition erred when it failed to liberally construe the petition and without remanding to the district court on exhausted claims and cause to excuse procedurally defaulted claims

Petitioner respectfully urges that all aspects of the Circuit Court decision are erroneous and at variance with this courts decision as explained below.

VII.

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE CONVICTION ON THE BASIS THAT PETITIONER "HAS NOT MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT... BECAUSE SMITH'S CLAIM LACK ARGUABLE MERIT."¹⁰

While we have long recognized that States have an interest in securing the finality of their judgments, finality is NOT a stand-alone value that trumps a State's overriding interest in ensuring that justice is done in its court and secured to its citizens. **McClesky v. Zant, 499 U.S. 467, 491-92 (1991)**. That is precisely what is going on here.

The guilty verdict was obtained in violation of due process because the Commonwealth knowingly presented tainted, tampered, coached complainant witness, two witnesses whom presented corroborating false, perjured testimony, introduced, repeatedly emphasized petitioners prior crimes, parole, state priosn incarceration, withheld favorable impeachment evidence (Matt Hilker's cell phone tower data— he was not present at those times both he and complainant conspired at trial; Complainant's text messages from her social media accounts and cell phone—revealing her sexual proclivities with petitioner proving perjury; the video recorded interview with complainant proceeding her first interview) allowing

¹⁰ Because the District Court relied upon the Superior Courts "last reasoned Decision" defaulting most of Petitioner's claims, only those issues that have been deemed exhausted will be argued in this section. Petitioner incorporates herein by reference Amended Habeas petition, attached Exhibit E, as if fully set forth herein showing substantial denial of constitutional rights.

perjured testimony to go unnoticed, uncorrected, all to intentionally infect petitioners trial with fundamental unfairness corrupting the truth determining process.

The guilty verdict was obtained in violation of ineffective assistance of counsel because trial counsel blocked petitioners right to make fundamental choices about his own defense withholding VRI, essentailly forcing petitioner to take the stand, condoned Commonwealth's acts and omissions, failed to introduce impeachment evidence and permitted a trial where Rules, Statutes, and Caselaw hold a trial should not proceed concerning prior bad acts evidence.

Strickland established a two-pronged test for evaluating claims of ineffective assistance based on inadequate legal assistance.

First, petitioner must show that defense counsel's performance was objectively deficient. Here, Petitioner asserted ineffective for:

Ground 2: failing to prevent and/or object Commonwealth from introducing, highlighting, and constant reminders of petitioner's prior crimes, parole, present state prison incarceration references; **Ground 5A:** opening the door to Commonwealth's interrogation of petitioner concerning prior crimes, parole, present state prison incarceration; **Ground 5B:** State Court decisions violated due process, equal protection, was contrary to and unreasonable application of federal law; **Ground 6:** Denied due process, effectiveness due to allowing

Commonwealth to introduce prior crimes, parole, present state prison incarceration, without objecting or seeking mistrial; **Ground 11:** denied due process, ineffectiveness, equal protection, confrontation clause, failing to introduce VRI as impeachment evidence, structural error.

The District COurt found Ground 2 and portions of ground 5 & 6 not appealed to the Superior COurt, citing waiver rule for failing to include issues in 1925(b) statement of errors as an independent and adequate state ground.

As Explained previously, petitioner requested twice to amend his initial pcra petition and 1925(b) statement of errors and was twice denied. Attorney Wilson also requested a remand for the purpose of amending 1925(b) in his appplcation for reconsideration. this too, was denied.

As a pro se litigant during initial pcra hearing and having been denied twice his requests to amend pcra and 1925(b) statements by bias, partial, unreasonable decision maker, provides cause to excuse.¹¹

Petitioner "cannot be faulted if she did everything she could do to comply with the applicable state rule." e.g., Correll v. Stewart, 137 F.3d 1404, 1413 (9th Cir. 1998) (cert. denied, 525 U.S. 996 (1998)) ("Simply put, the state cannot successfully oppose a petitioner's request for a state court evidentiary hearing, then argue in Federal habeas proceedings that the petitioner should be faulted for not succeeding."). Brown v. Allen, 344 U.S. 443, 481 (1953); See also, Williams, 136 S.Ct. at 1910 (citing Turney v. Ohio, 273 U.S. 510, 532 (1927)).

¹¹ Johnson, 520 U.S. 461, 468-69 (1997)(recognizing that the participation of a partial jurist is a structural error

The portions of grounds 5 & 6 District OCurt found exhausted proceeding to merits review concern abuse of discretion fialing to hold an evidentiary hearing concerning trial Counsel's strategy of allowing the Commonwealth to introduce evidence of defendant's prior crimes, parole, present state prison incarceration without objecting or seeking a mistrial.

The District Courts reliance on Superior Courts 977 MDA 2016 finding:

"In ruling on Smith's direct appeal, this court determined that trial counsel's strategy of allowing the Commonwealth to introduce evidence of Smith's prior crimes, parole, present state prison incarceration without objecting or seeking a mistrial was meritless"

is not only improper but also illegal for several reasons:

- (1) Pennsylvania law prohibits ineffective counsel claims from being raised on direct appeal without exception, none exists here. Those are deferred until collateral review;
- (2) Trial Counsel's stewardship was nevercalled into question by Appellate Counsel
- (3) Trial Counsel's stewardship was never discussed in 977 MDA 2016 Opinion;
- (4) Superior Court lacked subject matter jurisdiction¹² to even entertain the arguments advanced by Appellate Counsel. **McKeever, Supra**; and
- (5) Resentencing Court lacked jurisdiction to resentence petitioner, Both ADA Cardinale and Judge Curcillo knew it, but proceeded to manifest injustice anyway. See, **Resentencing, 5/10/2016, Exhibit L, Habeas Petition.**

¹² A challenge to subject matter jurisdiction presents a question of law, so the standard of review is *de novo* and the scope *plenary*. **Salley**, 957 A.2d 320, 322 (Pa. Super. 2008) "An objection to lack of subject matter jurisdiction can never be waived. . ." **Little**, 314 A.2d 270, 272 (Pa. 1974). Petitioner questioned courts authority to resentence even tho unaware ADA Cardinale and Judge Curcillo *ex parte* it secret from *pro se* litigant knowing the existence of the potential jurisdictional issue, finding it to be harmless error in it's Opinion. This challenge is timely as PCRA only requires ONE complete round. PCRA Judge Curcillo, an objective external factor, blocked petitioner from complying with the states procedural rules when it denied twice leave to amend initial pcra petition and 1925(b) statements. *Further, para count 1.c in its opinion why it denied leave to Amend. see claim seven, Habeas for more details.*

Strickland requires the reviewing court to consider the totality of the evidence before the judge or ~~Jury~~. The State Courts adjudication of the claims did not consider all the times prior crimes, parole, state prison incarceration came up.¹³

By the Superior Courts own admission, it was **constrained and limited** to closing argument references (977 MDA 2016, Op. at 7). Thus, it did not conduct a proper Strickland analysis and is contrary to this courts decision in **Strickland**.

The Third Circuit has held that Pennsylvania's application of Strickland is unreasonable because it does not consider the totality of the evidence. **Jacobs v. Horn, 395 F.3d 92, 105-07 (3rd Cir. 2005)**.

No reasonable strategy exists for allowing prior crimes, parole, present state prison incarceration to permeate a trial as was done here. **See, Habeas, Attached Exhibit E**, for full detailed discussion and consideration of the claim. A new trial is in order on this claim alone.

In CLAIM 11, failing to introduce impeachment evidence, the District Court again relied upon Superior Court's Opinion that: "Smith's claim was meritless and trial counsel had an objectively reasonable basis for not procuring such evidence. . . trial counsel diligently cross-examined the victim on whether or not

¹³ See, **Rompilla v. Beard, 545 U.S. 374, 383 (2005)**(Trial counsel was ineffective when he failed to investigate prior conviction file when defendant's felony history was critical to the case). It is submitted petitioners felony history was critical, improperly introduced by Commonwealth, repeatedly highlighted with constant reminders to the jury, likely impacted the verdict

she and Smith had previously engaged in rough sex. . .reiterated Smith's defense for biting [] neck during intercourse. . .thus, Smith was not entitled to an evidentiary hearing on this issue."¹⁴

Kimmelman v. Morrison, 477 U.S. 365, 384 (1986) clearly states in relevant part:

"[A] single serious error may support a claim of ineffective assistance of counsel." the Court added that "this single serious error" could cause counsel's performance to fall "below the level of reasonable professional assistance" **even where** "counsel's performance was generally creditable enough," **and where counsel made "vigorous cross-examination, attempts to discredit witnesses, and an effort to establish a different version of facts."**(Emphasis mine) **Id. 477 U.S. at 386; Harrington v. Richter, 131 S.Ct. 770, 791-92 (2011).**

Trial counsel should have introduced VRI to show jury how police were only concerned with locking petitioner up, tampering, coaching, providing responses what to say in court to help win their case, coercing medical treatment, how here story changed from then to trial, and revealing lack of hue and cry and the perjury.

Matt Hilker's cell phone tower data should have been introduced to show theres no possible way he was there witnessing anything at the times both he and complainat conspired and perjured at trial.

¹⁴ As demonstrated in habeas CLAIM SEVEN, pcra courts bias, partiality *blocked* petitioner from complying with states rules denying twice requests for leave to amend initial pcra petition and 1925(b) statement of errors. It's no surprise pcra court would deny petitioner an evidentiary hearing on any claim

Text messages between complainant and defendant should have been introduced to show complainant's sexual proclivities and how she didn't mind being bitten during, and was into rough, sex, preventing the perjured testimonies from both. *Falso in uno, falso in toto.*

Commonwealth had a duty to disclose, regardless of request, this favorable material impeachment evidence (and it became aware of it when it went on its fishing expedition receiving petitioner's prison phone calls under wiretap—all were topics of discussion during those calls—it turned a blind eye), however, it intentionally corrupted the truth determining function to deny Smith a fair trial in this he said/she said case.

Given the rest of the evidence consisted of testimony from a disgruntled ex-girlfriend whom was tampered by police, told different stories at different times, and is also consistent with consent, there is a strong probability of a different result had trial counsel and/or prosecution disclose this impeachment evidence to the jury. It is especially true since petitioner was acquitted of the most serious counts and the jury had two questions.

The State Court's reliance upon "diligent cross-examination" and "reiterating defendant's testimony for biting neck" does not even come close to rising to the level of professional legal assistance by this court in Kimmelman whereas even vigorous cross-examination, counsel can still be found ineffective.

Petitioner's testimony was made in large part because Commonwealth introduced Petitioners prior crimes, parole, and state prison incarceration and allowed its witnesses to commit false, perjured testimony. Petitioner made involuntary, unintelligent, unknowing decision to testify because trial counsel failed to reveal the VRI to her own client, blocking his ability to make fundamental choices as to his own defense, to alleviate the prejudicial impact of the damaging testimony. Trial counsels strategy certainly was not designed to effectuate client's interests here.

"[A]n attorney's ignorance of a point of law that is fundamental to his case combined with failure to perform basic research on that point is a quintessential example of unreasonable performance." **Hinton v. Alabama, 134 S.Ct. 1081, 1088-89 (2014)**. It is submitted the above claims are substantial, impacted the verdict and was mishandled by the state court intentionally as discussed above.

The district court relied upon Superior Courts determination that Smith failed to include issues set forth in ground 2 and portions of grounds 5 & 6 in his Rule 1925(b) Statements "[B]ecause Smith filed pro se Rule 1925(b) statements, the reason for the default is entirely attributable to his own failures to comply with the state procedural requirements." What the District Court and State Court evaded is the fact that Petitioner was blocked by bias, partial pcra jurist from complying, an objective external factor impeded petitioners efforts when it **denied twice** leave

to amend both his intial pcra and 1925(b) statements, which is clearly stated throughout Habeas petition.

The District Court evaded fact Superior Court unreasonably applied Strickland as well—Claim 5B, *when it relied upon Direct appeal / decision to deny pure appeal.*

The lower courts unreasonably disregard the impeachment value of certain evidence that would discredit prosecutions key witnesses. It has never conducted Brady analysis or even discussed withheld evidence or the perjury that went uncorrected. The District Court misconstrued Claim 12. Besides the VRI, the other discoverable evidence prosecution had duty to disclose but chose not to.

In **Williams v. Taylor, 529 U.S. 362, 395-98 (2000)** defense counsels performance was deficient for failing to adequately investigate witnesses criminal history and parole status; Under **Wiggins v. Smith, 539 U.S. 510, 534 (2003)** The prejudice factor [] reviewed de novo [] because state court pegged it's decision solely on deficient performance.

Clear and convincing evidence of State Court error exists here rebutting the presumption of correctness district court applied to both appeals.

As previously stated, Superior Court lacked subject matter jurisdiction 977 MDA 2016 to even entertain the issues advanced by counsel (per se ineffectiveness providing cause on resentencing appeal) and even if this court finds superior court had subject matter jurisdiction, Pennsylvania law forbid

ineffectiveness claims from being raised on direct appeal, thus Pennsylvania law must forbid superior court from making any findings on that issue. Further, Superior Court unreasonably applied Strickland during pcra appeal utilizing that improvident decision as a basis to deny relief. Even if this court finds that too was proper, it certainly failed to consider all the times prior crimes, parole, state prison incarceration came up during trial, admitting that much in its own decision.

Ironically, In **Pierce**, Pennsylvania's precedent for ineffective claims, determined that counsel was not ineffective for opening door to defendants prior crimes as the evidence was overwhelming. Here, the opposite occurred, the evidence was not overwhelming and it was the Commonwealth who first introduced defendants prior crimes, parole, present state prison incarceration.

In CLAIM SEVEN District Court found procedurally defaulted, however, petitioner respectfully submits Superior Court determined bias, partial pcra court recusal to be previously litigated, as such, is exhausted. See, 80 MDA 2021, Op. at fn. 15. For the reasons outlined in claim seven petitioner sought recusal due to Judge Curcillo's bias, partial treatment of pro se litigant and the unreasonable decision making which ultimately blocked, oppressed petitioner, undermining the truth determining process. The Superior Court failed to consider the additional facts that proceeded the first recusal request. Petitioner did not rely on the same factual basis and from all appearances, partiality ultimately denied petitioner due

process, and impeded his ability to bring constitutional claims before the court, both Superior Court and District Court failed to fully analyze this claim to circumvent due process implications. Due process requires both pcra and appellate process to be fair. Petitioners case defies fairness.

Petitioner has been victimized through legal process for years by both Commonwealth and State tribunals for years and now lower federal courts are following suit the path of least resistance.

Petitioners intial pcra process impugn the legitamacy of the judicial process and Judge Curcillos appearance of bias and demonstrated partiality as outlined in claim seven amounted to a structural error, fundamentally unfair and unconstitutional. **520 U.S. 461, 468-69.**

The Superior Court is the final arbiter of whether or not a jurist has engaged in misconduct, however, it refused/evaded passing judgment here, rather, simply employed previously litigated rule, thus, is exhausted. Judge Curcillo even lied in her opinions, those are fully found in CLAIM SEVEN, Habeas Petition.

For the reasons discussed above, and those demonstrated in amended habeas petition, petitioner pray this Court reverse the lower court and order a new trial in this horrendous case. At minimum, order an evidentialy hearing so that petitioner can develop facts, obtain those materials commonwelath withheld or order them to turn said meterial over, or whatever other relief this court determines appropriate.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE CONVICTION ON THE BASIS THAT PETITIONER "HAS NOT MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT[,"] THUS, "CERTIFICATE OF APPEALABILITY IS DENIED"

Petitioner respectfully submits that if the claims asserted in his habeas petition are true, certainly a constitutional violation has resulted in the conviction of an innocent person. This deserves encouragement to proceed further in the interests of justice and equity principles.

A habeas petitioner may not appeal the denial of his habeas petition unless the district court or court of appeals "issues a certificate of appealability." **28 U.S.C. §2253(c)(1); See also, Gonzalez v. Thaler, 565 U.S. 134, 143 (2012).**

Under ADEPA Act of 1996, a COA "may issue. . . only if the applicant has made a substantial showing of the denial of a constitutional right." **§ 2253(c)(2).**

Petitioner submits the claims raised violated his rights, are substantial and is debatable. To make that showing, a habeas petitioner must demonstrate that "reasonable jurists would debate whether. . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement or proceed further." **Slack, 529 U.S. 473, 484 (2000).**

ADEPA does not "require petitioner[s] to prove before the issuance of a COA, that some jurist would grant the petition for habeas corpus." **Miller-El, 537 U.S. at 338 (2003).** Rather, "[a]t the COA stage, the only question is whether the claim is

reasonably debateable. **Buck v. Davis, 580 U.S. –, – (2017).**

Petitioner submits no reasonable minded jurist can say with confidence that petitioners trial was fair, or that the claims raised are ~~not~~ debatable.

Petitioner presented sole issue of cause to excuse to Third Circuit. The Third Circuit cited Strickland and "[b]ecause Smith's claims lack arguable merit" as a basis to deny COA, completely evaded the issue presented to it, which was whether or not petitioner presented cause to excuse his procedurally defaulted claims, which, Petitioner submits that is also debateable.

The District Court faulted petitioner on claims 1,2,3,4,5,6,7,8,9,10, and 12, albeit, on different procedural categories.

What the District Court fails to acknowledge is petitioner requested twice to amend his initial pcra and 1925(b) statements, thus, petitioner did not fail to comply but was *blocked* by bias, partial jurist, *impeding his efforts* to comply. The State and lower courts *cannot* fault petitioner for failing to follow the state established procedures on adequate and independent grounds when petitioner in fact *did comply* but was prejudicially denied by bias, partial jurist to be intentionally ensnared in procedural traps as was done here. **See, Correll, Supra, Johnson, Supra, Williams, Supra, Tumey, Supra.**

VIII.

CONCLUSION

Petitioner has been deprived of basic fundamental rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and seeks the relief in this court to restore those rights. Based on the arguments and Authorities presented herein, Petitioner's guilty verdict was obtained and sustained in violation of due process, effective assistance of counsel, and bias, partial PCR jurisdiction, petitioner prays this court will issue a writ of certiorari and reverse the judgment of the Third Circuit Court of Appeals, grant the writ of habeas corpus vacating conviction and sentence and Order a new trial.¹⁵

Respectfully Submitted,



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¹⁵ If this court elects not to address the issues presented in his habeas petition at this time, it is requested that the writ issue and the matter be remanded for consideration of this court's opinion in Strickland, Kimmelman, Miller-El, permitted a new PCR petition, discovery, Commonwealth answer, and court resolution before different jurist in state court.