IN THE UNITED STATES SUPREME COURT

24-5093

ORIGINAL

DAVID NAM

Petitioner

V.

JOHN E. RIVELLO, et al.

(U.S. Court of Appeals No. 23-1202)

(E.D. Pa.Dist.Court. No. 2:20-CV-02701)

PETITION FOR A WRIT OF CERTIORARI

David Nam
JK5651
1100 Pike Street
Huntingdon, PA 16654-1112

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J U R I S D I C T I O N A L S T A T E M E N T

This appeal derives from Petitioner, David Nam, properly exhausting his claims presented herein within previous claims that were required for presentation with The United States District Court For the Eastern District of Pennsylvania under AEDPA 28 U.S.C.A. §2254(b)(1)(A). The Petitioner presented these same claims within one complete round of the state's appellate review process. See O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999).

The Petitioner properly filed an Application For Certificate of Appealability ("COA" hereinafter) pursuant to 28 U.S.C.A. §2253(c) and Rule 22(b) of the Federal Rule of Appellate Procedure presenting the same claims that are being brought herein to which was denied. Followed by a timely filed petition for rehearing and en banc hearing pursuant to Fed.R.App.P. 35(b)(1), (A) & (b)(3) to which was also denied. All previous orders aforementioned, supra, are attached as the following exhibits. Response to Petition For Rehearing & En Banc Rehearing as Exhibit-A attached hereto. Response Denying COA is attached as Exhibit-B hereto. U.S. District Court's Report & Recommendation ("R&R" hereinafter) and Final Order adopting the R&R and Denying/Dismissing Petitioner's Writ of Habeas Corpus is attached as Exhibit-C & D hereto. All State Court Decisions within The Court of Common Pleas, Philadelphia County, Pa. Superior Court & Pa. Supreme Court are attached as Exhibit-E, F & G hereto.

Thus, said appeal by way of a petition for a writ of certiorari now gives The United States Supreme Court the requisite jurisdiction to review the final decisions by the U.S. Court of Appeals (3d Circuit) under Rules of The Supreme Court of the United States, Rule 10(c).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court's reasonable doubt jury instruction was unconstitutional as expressed in Sullivan v. Louisiana, 508 U.S. 275 (1993)?

2. Whether Petitioner received ineffective assistance of counsel for counsel's failure to object to the trial court's unconstitutional reasonable doubt instruction?

3. Whether the U.S. Court of Appeals' decision conflicts with United States Supreme Court Decision within Strickland v. Washington, 466 U.S. 668 (1984) defining actual prejudice?

4. Whether all previous decisions by state and federal courts conflicts with United States Supreme Court decision within Sullivan v. Louisiana, 508 U.S. 275 (1993) defining erroneous reasonable doubt jury instruction?

5. Whether the U.S. Court of Appeals For the Third Circuit has completely ignored an important question of federal law that should now be settled by This United States Supreme Court as said Third Circuit's failure to give a decision conflicts with relevant decisions of This U.S. Supreme Court pertaining to Equal Protection rights (U.S.C.A.14)?

6. Whether a Stare Decisis Application is warranted?

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Petitioner was arrested on the above-docketed matter on January 19, 1997, and was charged with, *inter alia*, Murder, Conspiracy, Robbery, and Possession of an Instrument of Crime ("PIC").

On February 19, 2010, Following a jury trial before the Honorable Renee Cardwell Hughes, Petitioner having been found guilty of, *inter alia*, Murder, in the Second Degree, was sentenced to a mandatory life sentence.

Petitioner was represented at trial and on direct appeal by Michael E. Wallace, Esquire.

The Superior affirmed judgement of sentence on March 25, 2011 and the Supreme Court denied Allocatur on September 14, 2011.

Petitioner timely filed his present *pro se* PCRA Petition on August 2, 2012.

An amended PCRA Petition was dismissed on December 19, 2018 and Petitioner filed Notice of Appeal on the same day.

The PCRA court did not request a 1925(b) Statement. The PCRA court filed its Opinion on February 28, 2019. The Superior Court affirmed by Order and Opinion on August 21, 2019.

Petitioner timely filed his *pro se* Petition for Allowance of Appeal on September 4, 2019 in the PA Supreme Court.

The PA Supreme Court denied Petitioner's petition for Allowance of Appeal on February 11, 2020.

Petitioner's petition for Writ of Habeas Corpus was filed May 13, 2020.

On July 9, 2020 Petitioner filed an amended Memorandum of Fact and Law.

The Respondents filed a response to the petition on August 17, 2021.

Petitioner's petition for Writ of habeas Corpus is denied by Report and Recommendation given by Magistrate Judge David R. Strawbridge on September 2, 2022.

On October 6, 2022 Petitioner filed Objections to Magistrate's Report and Recommendation.

On December 27, 2022 Magistrate's Report and Recommendation is approved and adopted. Writ is denied.

On January 25, 2023 Petitioner filed an Application for Certificate of Appealability with The United States Court of Appeals(3rd Circuit).

Petitioner's Request for a Certificate of Appealability is denied on June 5, 2023.

A Petition for Rehearing and En Banc Rehearing is filed July 3, 2023.

Petition for Rehearing and En Banc Rehearing is denied August 31, 2023.

FACTUAL HISTORY:

All of the factual testimony against Petitioner at trial was gleaned from three individuals, Robert Souvannavong, Louis Frattaroli, and Bolla Nam. All of these individuals were 14 years of age at the time of the Murder of Decedent, Anthony Schroeder. All of these individuals were involved in the Murder of Decedent and all of these individuals entered into negotiated guilty pleas to third-degree Murder with considerable sentencing consideration for their cooperation against Petitioner. NT, 1/26/2010, at 195, 200; 1/27/2010, at 65, 67, 169-170. Moreover, Souvannavong and Frattaroli were arrested for a separate home invasion using Decedent's gun on the night following the Murder of Decedent and there was sentencing consideration associated with this offense. NT, 1/27/2010, at 51-53, 157, 243.

Petitioner fled to South Korea while on house arrest and there were documents that were recovered wherein Petitioner accepted responsibility. However, these documents were prepared by Petitioner in preparation for appearing before a South Korean judge in order to accept responsibility, show remorse and potential for rehabilitation, and to discourage the South Korean judge from ordering extradition to the United States. NT, 1/28/2010, at 171-178.

SUMMARY OF ARGUMENT

The Petitioner addresses the fact that the state court either deemed the erroneous reasonable doubt jury instruction given at his trial constitutional or failed to decide the claim altogether to which Petitioner asserts is a violation of his due process rights under U.S.C.A.5 and 14 as said jury instruction given by Trial Judge Renee Hughes presented a hypothetical that elevated the level of doubt beyond the reasonable doubt standard thereby violating the decision held with **Sullivan v. Louisiana**, supra, to which warrants an automatic reversal as even The Pennsylvania Supreme Court has held said instructions unconstitutional within **Commonwealth v. Drummond**, No. 28 EAP 2021 (Decided Jan. 27, 2022) attached as **Exhibit-H, at pg. 29** hereto.

The Petitioner asserts that the erroneous reasonable doubt jury instruction given at his trial rendered trial counsel ineffective in his assistance as counsel for counsel's failure to object to the trial court's unconstitutional reasonable doubt instruction in violation of Petitioner's Sixth Amendment rights under the U.S. Constitution and Pennsylvania Constitution Article 1, Section 9 and said deficient performance prejudiced the Petitioner as a proper objection to said instruction would have warranted a mistrial or reversal on direct appeal in accordance with **Strickland v. Washington**, supra, to which entitles Petitioner to a reversal and remand for a new trial.

The U.S. Court of Appeals decision of Petitioner being unable to show actual prejudice for ineffective assistance of counsel claim based on counsel's failure to object to an erroneously given reasonable doubt instruction conflicts with This Said Court's decision within **Strickland v. Washington**, 466 U.S. 668, 695 (1984)) concerning what all is included in determining actual prejudice as evidence of the actual process of a decision that is a part of the record of the proceeding under review is included within This Court's prejudice determination held within **Strickland**. This important question of federal law is to be settled by This Court's authority as This Said Court established the precedent concerning this matter.

The Petitioner presents the fact that the U.S. Court of Appeals and all

other subordinate courts (State & federal) have decided the decision held within Sullivan v. Louisiana, supra, in a way that conflicts with This Court's reached decision within said case as Sullivan, concludes by assertion "the reasonable-doubt instruction given at Sullivan's trial which (it is conceded) violates due process...and thus cannot be harmless regardless of how overwhelming the evidence of guilt is," to which the U.S. Court of Appeals have all but rendered a decision that overrules said precedent which can only be settled by This Court.

The Petitioner presents the claim of an Equal Protection right to the decision held within Sullivan v. Louisiana, supra, under U.S.C.A. 14 as the Petitioner's set of circumstances are identical and/or similar to the circumstances situated within Sullivan which would entitle the Petitioner to the same relief granted to Sullivan as well as other cases granted relief based on Sullivan's said holding and the fact that this asserted claim has not been previously addressed despite being raised, and thereby completely ignored by all previous lower courts presents questions of federal law that should be settled by This Court as Petitioner cited equal protection cases of This Court's precedence within City of Cleburne v. Cleburne Living Ctr, Inc., 473 U.S. 432 (1985); Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000); Lee v. Washington, 390 U.S. 333 (1968) and several other U.S. Supreme Court precedents asserting equal protection right mandates. This claim has not been previously given an erroneous finding of fact analysis nor a misapplication of a rule of law determination as no response to said claim has been given at all.

The Petitioner presented a claim of a "stare decisis" being justifiably considered to the upholding of This Court's precedence within Sullivan v. Louisiana, supra, as well as all other supporting legal authorities cited by Petitioner of which was also brought to the attention of the U.S. Court of Appeals within Petitioner's Petition for Rehearing & En Banc Rehearing citing Third Circuit legal authorities in Riccio v. Sentry Credit, Inc., 954 F.3d 582 (3d Cir. 2020) and U.S. Supreme Court's Kimble v. Marvel Entm't, LLC, 576 U.S. 446 (2015) and other precedent cases. Said claimed considerations were to justifiably be implemented in nexus with Petitioner's asserted claims to which the U.S. Court of Appeals denied, en banc. And of which the Third Circuit

decided an important question of federal law in a way that conflicts with relevant decisions of This Court of which warrants relief for said reasons.

ARGUMENT

The instant Petitioner, David Nam, has properly exhausted his previous claims presented supra and herein as required under AEDPA 28 U.S.C.A. § 2254(b)(1)(A). Petitioner has presented his Due Process Clause violation claim and ineffective-assistance-of-counsel claim in "one complete round of the state's established appellate review process." **O'Sullivan v. Boerckel**, 526 U.S. 838, 845 (1999). The Court of Common Pleas considered and rejected this claim. Opinion, at 4-8, Nam, No. CP-51-CR-0302561-1997 (Phila. Ct. C.P. Feb. 28, 2019). The Pennsylvania Superior Court also considered and rejected it. Nam, No. 3641 EDA 2018, 2019 WL 3946049, at 3-7 (PA. Super. Ct. Aug. 21, 2019). Pennsylvania Supreme Court denied discretionary review.

I. THE TRIAL COURT'S REASONABLE DOUBT INSTRUCTION WAS UNCONSTITUTIONAL.

The Petitioner asserts that January 29, 2010, in her final charge to the jury, Judge Renee Hughes gave an improper/deficient and/or erroneous jury instruction as to the description of reasonable doubt, to which trial counsel, Michael E. Wallace, Esq., failed to object to, by which was explained as follows:

> Now, ladies and gentlemen, this burden we talk about, proof beyond a reasonable doubt, is the highest standard in the law. There is nothing greater and that is the burden the Commonwealth bears. But this does not mean that the Commonwealth must prove its case beyond all doubt.
>
> The Commonwealth is not required to meet some mathematical certainty. The Commonwealth is not required to demonstrate the complete impossibility of innocence. The Commonwealth is in fact not required to answer every single question you may have. The Commonwealth's burden is to prove the elements of each and every crime beyond a reasonable doubt.
>
> Now, a reasonable doubt is a doubt that would cause a reasonably careful and sensible person to pause, to hesitate or to refrain from acting upon a matter of the highest importance to their own affairs or their own interests.

A reasonable doubt must fairly arise out of the evidence that was presented or out of the lack of evidence that was presented with respect to some element of each of the crimes charged.

* I find it useful to think about reasonable doubt this way. Now, because I was fortunate to speak with each and everyone of you, I know each and every one of you has someone in your life you love; a sibling, a spouse, a significant other, a parent. Each one of you love somebody. What if you were told that your precious one had a life-threatening condition and that the only medical protocol for that life-threatening condition was a surgery. Now, if you're like me, you're probably going to ask for a second opinion. You might ask for a third opinion.

You'd probably do research; what is this condition, what are the accepted protocols for this conditions, what's the likelihood of success, probably go on the internet, do everything you can, and if you're like me, you're going to go through your Rolodex, and everybody that you know who has any relationship to medicine you're going to call them. You're going to talk to them, but at some moment the question is going to be called. You are going to have to cut your research.

Do you allow your love one to go forward. If you allow your loved one to go forward with the surgery, its not because you have moved beyond all doubt. Ladies and gentlemen, there are no guarantees in life. If you forward, it's because you have moved beyond all reasonable doubt.*

A reasonable doubt must be a real doubt, ladies and gentlemen; it may not be a doubt that is imagined or manufactured to avoid carrying out an unpleasant responsibility. You may not find David Nam guilty based upon a mere suspicion of guilt. The Commonwealth's burden is to prove David Nam guilty beyond a reasonable doubt.

If the Commonwealth has met that burden, then David Nam is no longer presumed to be innocent and you should find him guilty. If on the other hand the Commonwealth has not met its burden, then you must find him not guilty. (Emphasis [*] supplied)

[Trial N.T. 1/29/10, p. 99-101 as Exhibit-I] Again, Trial counsel did not object and PCRA counsel did not attempt to get a declaration from trial counsel stating whether he had any strategic reason for that omission. [See adopted PCRA petition submitted by PCRA Counsel Stephen T. O'Hanlon, Esq., on

February 10, 2018 and all PCRA Court filings recorded].

Fair minded jurists would not disagree that this was an unreasonable application of **Cage**, which found the reasonable doubt instruction to be unconstitutional where, like here, a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." See **Moore v. Rivello**, 2022 U.S. Dist. LEXIS 96997, at *30 (E.D. PA., May 31, 2022)(emphasis added)(citing **Cage v. Louisiana**, 498 U.S. 39, 41 (1990) and **Mathias v. Superintendent Frackville SCI**, 876 F.3d 462, 476 (3d Cir. 2017)). In the instant case of the Petitioner, District Court's Magistrate Judge ("M.J." hereinafter) David R. Strawbridge concedes to the unconstitutionality of the trial judge's reasonable doubt jury instruction by stating; "[E]ven the inapt example employed by Judge Hughes regarding reasonable doubt did not prejudice Nam." See M.J.'s report and recommendation ("R&R") at Docket Entry #24, p.18. The Respondents also concede to said instruction being unconstitutional. See Respondents [District Attorney] reply at Docket Entry #28, p.12. Even District Court Judge Wendy Beetlestone's Order denying Petitioner's Habeas relief (See Docket Entry #38)(See Exhibit-N Attached) contradicts her Order of granting habeas relief in **Edemunds v. Tice**, No. 19-1656 (E.D. PA. Nov. 19, 2020) on grounds of Prejudice being established under Strickland and presumed as structural error. A missing or improper jury instruction may deprive a defendant of his due process rights under the Fourteenth Amendment. See Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979)(Precedent Case); Bennett v. Superintendent Gratetford SCI, 886 F.3d 268, 284-85(3d Cir. 2018). In every criminal trial, the court must instruct the jury that the defendant may be found guilty only if the prosecution has proved his guilt beyond a reasonable doubt. This reasonable doubt instruction is so important that a court's failure to give any reasonable doubt instruction "is a structural error that so infects the trial process that the verdict cannot be said to reflect a proper verdict in a criminal case" Baxter v. Superintendent Coal Township SCI, 998 F.3d 542, 548 (3d Cir. 2021).

Where a trial court does give a reasonable doubt jury instruction, however, "the rules concerning evaluating a jury instruction apply," such that the court must assess the instruction for accuracy. See **Weaver v. Massachusetts**, 137 S.Ct 1899, 1908, 198 L.Ed 2d 420 (2017). Jury instructions must state the law accurately and clearly. In assessing a particular instruction's accuracy, the reviewing court must "ascertain how a reasonable jury would have interpreted the instructions at issue." See **Tyson v. Superintendent Houtzdale SCI**, 976 F.3d 382, 392 (3d Cir. 2020)(quoting **Smith v. Horn**, 120 F.3d 400, 413 (3d Cir. 1997)). Though it is said that most courts, including those in Pennsylvania, tend to follow standard proposed jury instructions, "no particular set of words is mandated." See **United States v. Isaac**, 134 F.3d 199, 202 (3d Cir. 1998). The language used in the instruction must be examined "in its totality" so as to determine "whether the instructions correctly captured the applicable legal concepts." See Baxter, 998 F.3d at 548. "No particular sentence or paragraph should be assessed in isolation." See **United States v. Thayer**, 201 F.3d 214, 221 (3d Cir. 1999). The Petitioner, here, expresses for This Court to keep in mind that, put simply, a U.S. Supreme Court assertion stating; "[A]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." See **Miles v. United States**, 103 U.S. 304, 312 (1880). Now even with This Court examining in its totality the language used in the Petitioner's jury instruction for reasonable doubt **Cage**, 498 U.S. at 40-41 adamantly states as a whole; "The Supreme Court of Louisiana rejected petitioner's argument. The court first observed that the use of the phases 'grave uncertainty' and 'moral certainty' in the instruction, 'if taken out of context, might overstate the requisite degree of uncertainty and confuse the jury'. But 'taking the charge as a whole', the court concluded that 'reasonable persons of ordinary intelligence would understand the definition of 'reasonable doubt'. It is our view, however, that the instruction at issue was contrary to the 'beyond a reasonable doubt' requirement articulated in Winship.

In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole. [Francis v. Franklin, 471 U.S. 307, 316, 85 L.Ed. 2d 344, 105 S.Ct. 1965 (1985)] The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a 'grave uncertainty' and an 'actual

substantial doubt', and stated that what was required was a 'moral certainty' that the defendant was guilty. It is plain to us that the words 'substantial' and 'grave', as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to 'moral certainty', rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." Id. Petitioner, herein, readily acknowledges that half of the court's charge correctly defined the governing standard of proof. With the other half of the challenged instruction, however, Judge Hughes inserted a requirement that any doubt worthy of acquittal must be so serious and grave that it would, as just one example by Judge Hughes; account someone in a person's life of whom they love could mean a child, rise to the level of thereby causing a mother to reject surgery for her dying child when surgery was the best protocol that could save the child. As discussed below, raising the stakes in this manner is unconstitutional and the prospect and high probability that the image of a child was the first thought that plagued the mind of any potential juror only further substantiates the unconstitutionality of such an inflammatory instruction. This prosecution friendly instruction relieved the Commonwealth of its heavy burden of proof and invaded the province of each juror to apply the standard consistent with his or her own life experience and values.

The court used a situation--a life-threatening illness of a child or other loved one <u>for which only one good treatment existed</u>--where of course any reasonable person would authorize moving forward and accept the risk. If "the best protocol" was surgery, who among us would not proceed and take that last chance to save our child? The court posed the choice between (1) on the one hand saving our loved one's (child's) life by moving forward and resolving the doubts and (2) on the other hand watching our loved one (child) die. The court's instruction thus equated the decision to move forward and authorize the surgical treatment with resolving doubts about Petitioner, Nam's guilt and moving forward to convict. This made it overly easy for a juror to resolve or simply ignore altogether whatever reasonable hesitations she[Judge Hughes] harbored about Petitioner's guilt.

With that being said, just because an instruction states part of the correct legal standard does not mean that the instruction as a whole is accurate. If an instruction contains a "defect," "other language in the instruction" that "correctly explains the law" might not "serve to cure the error," especially where the correct language "merely contradicts and does not explain the defective language." See Bey v. Superintendent Green SCI, 856 F.3d 230, 241 (3d Cir. 2017)(quoting Whitney v. Horn, 280 F.3d 240, 256 (3d Cir. 2002)) That is because, given our cultural and legal adherence to the sanctity of the jury deliberations, "a reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." See Bennett, 886 F.3d at 285 (quoting Francis v. Franklin, 471 U.S. 307, 322 (1985))(U.S. Supreme Court Precedent).

For reasonable doubt instructions that are alleged to be defective, the reviewing court must determine if there is "'a reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." See Waddington v. Saraused, 555 U.S. 179, 191 (2009)(quoting Estelle v. McGuire, 502 U.S. 62, 72 (1991)). It requires the jury "to reach a subjective state of near certitude of the guilt of the accused" Jackson v. Virginia, 443 U.S. 307, 315 (1979). To be constitutional, a reasonable doubt instruction must make this clear. The reasonable doubt instruction in the instant Petitioner's case (See attached Exhibit-I) as a whole takes the jurors in two completely different directions within the same instruction which is thus conflicting and confusing. See Taylor v. Kentucky, 436 U.S. 478, 488 (1978)(definition of reasonable doubt as a "substantial doubt" is confusing). If the reasonable doubt instruction is found to be unconstitutional, it, too, is a structural error requiring automatic reversal. See Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993). To date, eight (8) Pennsylvania district courts have found the instruction, described herein, unconstitutional. Brooks, was the first case to examine this said instruction in detail and found that the instruction permitted the jury to convict the defendant on a degree of proof below the reasonable doubt standard. See Brooks v. Gilmore, No. 15-cv-5659, 2017 WL 3475475, at *3 (E.D. PA. Aug. 11, 2017)(citing Cage, 498 U.S. at 41); also see the other seven habeas reliefs held in Grant v. Giroux, No. 15-cv-04468 (E.D. PA. Oct. 4, 2018); Brown v. Kauffman, No. 17-2236 (E.D. PA. Dec. 4, 2019)(J.

Slomsky); **McDowell v. DelBalso**, No. 18-1466 (E.D. PA. Jan. 3, 2020)(J. Brody); **Jackson v. Capozza**, No. 17-5126 (E.D. PA. Mar. 10, 2021)(J. Tucker); **Edmunds v. Tice**, No. 19-1656 (E.D. PA. Nov. 19, 2020)(J. Beetlestone); **Lewis v. Sorber**, No. 18-1576 (E.D. PA. Feb. 1, 2021)(M.J. Hey), and; **Moore v. Rivello**, No. 20-838, 2022 U.S. Dist LEXIS 96997 (E.D. PA. May 31, 2022)(J. Pratter). Even the Pennsylvania Supreme Court has now officially recognized Judge Hughes reasonable doubt instruction as unconstitutional in their opinion asserted in Commonwealth v. Gerald Drummond, No. 28 EAP 2021 (Decided on Nov. 23, 2022) in which it states; "The hypothetical presented to the jury in this case conflicted with the court's other instructions to remain objective and neutral, tugged at the juror's heartstrings in a powerful and intimate way, and directed the jurors to reach a verdict using a real-life scenario that rarely, if ever, is (or even could be) resolved by proof beyond a reasonable doubt. Much more frequently, the average person charts the course of his or her life using a much lower burden of proof. With the trial court's instructions here, it was not merely reasonably likely that the jury used an unconstitutional standard; it was almost a certainty." (underline emphasis added) See **Commonwealth v. Drummond**, No. 28 EAP 2021, pg. 29 (opinion) **attached as Exhibit-H**. Most importantly, in accordance with **Sullivan**, at 282 and **Cage**, at 41 (precedent cases) the reasonable doubt instruction given in Petitioner's case is deemed unconstitutional as to violate said Petitioner's 5th and 14th Amendment U.S. Constitutional right to the Due Process Clause.

II. PETITIONER RECEIVED INEFFECTIVE-ASSISTANCE-OF-COUNSEL AS TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT FOR FAILING TO OBJECT TO THE TRIAL COURT'S UNCONSTITUTIONAL REASONABLE DOUBT INSTRUCTION

Due to both the district court's R&R (See Docket Entry *28, p. 18) and the Respondent's [District Attorney] (Reply Brief Dkt #24, p. 12) acquiescence to the reasonable doubt instruction at issue here being unconstitutional, the Petitioner asserts that his trial counsel Michael E. Wallace was ineffective for his failure to object to said unconstitutional instruction thereby depriving the Petitioner of his Sixth Amendment Right to effective assistance of counsel under the U.S. Constitution and the Pennsylvania Constitution Article 1, Section 9. To succeed on an ineffective-assistance-of-counsel claim, a petitioner must demonstrate both that his counsel's performance was

deficient and that the deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel is assumed to have rendered effective assistance and the burden to prove otherwise always remain on the petitioner. To show that his counsel's performance was deficient Petitioner must show 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Now in assuming that petitioner demonstrates that his counsel's performance was deficient, he must also show that he was prejudiced. Where a state court addressed a petitioner's claim that his counsel was ineffective and the state court applied the correct legal standard, a petitioner must show that the state court decision "applied Strickland to the facts of his, that being the Petitioner's, case in an objectively unreasonable manner." See Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

On PCRA review, the Pennsylvania Superior Court concluded that Petitioner, Mr. Nam, failed to establish that his counsel's performance was ineffective because the Superior Court concluded that the underlying claim about the reasonable doubt instruction lacked merit. See Commonwealth v. Nam, 3641 EDA 2018, 2019 WL 3946049, at *6 (PA. Super. Ct. Aug. 21, 2019) The Superior Court's decision constitutes a decision on the merits for purposes of the AEDPA, thus earning federal court deference. See Johnson v. Williams, 568 U.S. 289, 301, 304 (2013).

Pennsylvania courts have turned the Strickland analysis into a three-part test instead of the federal two-part test. See Commonwealth v. Spotz, 624 PA. 4, 84 A.3d 294, 311 (PA. 2014). Under the first prong of the Pennsylvania test, a petitioner must show that "his underlying claim is of arguable merit." Id. Because the state court addressed the deficiency element of Petitioner's ineffective-assistance-of-counsel claim, as well as the district court, the Petitioner respectfully asserts that This Court defer to it. See Thomas v. Varney, 428 F.3d 491, 501 (3d Cir. 2005); Porter v. McCollum, 558 U.S. 30, 39 (2009). Again, Petitioner refers to the concession of district attorney's Respondent that the state court's deficient-performance ruling amounts to an unreasonable application of clearly established federal law (See Dkt. #24, p. 12) in accordance with the Commonwealth's concession being persuasive under

the party presentation rule, See United States v., Sineneng-Smith, 140 S. Ct. 1575, 1579, 206 L. Ed 2d 866 (2020) in order for Petitioner to prove both the state's arguable merit (Prong #1) and deficient performance (Prong #2) as it pertains to ineffective assistance of counsel claim. Spotz, 84 A.3d at 311. Prongs are met.

The reasonable doubt standard in a criminal jury trial is of the utmost and undeniable importance. This is true both broadly, to society at large, and more narrowly, to each individual defendant. The founders recognized the importance of a jury as a "valuable safeguard to liberty" and "the very palladium of free government." See Federalist No. 83, at 484 (Alexander Hamilton)(Am. Bar. Assoc. ed. 2009). Jurors rely on the parties, counsel, and the court to supply the correct legal standards and the parties, counsel, and the court, in turn, rely on the jury to correctly apply those standards. When that system breaks down, as when a jury is given an improper reasonable doubt instruction, it undermines the jury's sacrosanct role in the justice system and in society more broadly. And when a jury then applies a faulty reasonable doubt standard to deprive a fellow citizen of his right to life or liberty, it risks usurping the role of the people, via a jury, to retain control over the outer bounds of punishment that our Constitution will abide.

Reasonable doubt is a central (and sometimes the sole) defense strategy available to a criminal defendant. Often an entire case rises and falls on the single issue of reasonable doubt. The United States Supreme Court has explained that the reasonable doubt standard "plays a vital role in the American scheme of criminal procedure" because it "symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. See **Jackson v. Virginia**, 443 U.S. 307 at 315 (1979); **In Re Winship**, 397 U.S. 358, 363 (1970).

The aforementioned revelations unequivocally highlight the ineffective performance rendered by counsel in this instant case matter. With the understanding that a federal court reviewing an ineffective-assistance-of-counsel claim must not merely second guess the defendant's attorney years later and with the benefit of hindsight. See Strickland, 466 U.S. at 689. However, given the importance of a reasonable doubt instruction, the lengthy,

incorrect and emotionally charged hypothetical posed to the jury by the trial court here should have been "instinctively problematic" to any reasonable defense counsel. See **Brooks**, 2017 WL 3475475, at *6. Keep in mind that there would be no Brooks decision in federal court if someone did not instinctively find the reasonable doubt instruction problematic which speaks volumes to why it was incumbent upon a professional attorney to had seen this type of instruction as deficient. Therefore, "it is difficult to fathem how any criminal defense lawyer could fail to object." See **Brooks**, 2017 WL 3475475, at *6. This is especially when Petitioner's counsel highlighted the importance of the state's burden to prove the Petitioner guilty beyond a reasonable doubt. See Jan. 29, 2010 Trial N.T. at pg. 9, line 8-pg. 10, line 16.

The severe penalty that is being faced by Petitioner, Mr. Nam, on a first-degree murder charge (initially charged with "general murder" placing all three degrees of murder on the docket) further underscores the prejudice caused by this counsel's ineffective performance. The penalty for first and second degree murder in Pennsylvania is, at a minimum, life in prison. For this reason, it would be hard to "fathom a strategic reason for counsel's failure to object to an instruction that eliminates the state's burden to prove an element of a crime that carries a mandatory sentence of life imprisonment." See **Tyson v. Superintendent Houtzdale SCI**, 976 F. 3d 382, 396 (3d Cir. 2020)(Petitioner is serving life for second degree murder). This was such a grave instruction that defense counsel's failure to object to it requires, if nothing else, an extremely convincing explanation. In Petitioner's case, however, there is no explanation for failing to object to the reasonable doubt instruction as given, let alone a particularly convincing one. In fact, Petitioner's counsel did not object to **any** of the jury instructions at his trial. See January 29, 2010 Trial N.T. Vol. 1-2. Petitioner's counsel neither suggested a different reasonable doubt instruction with any language more favorable to the Petitioner. A "trial counsel's stewardship is constitutionally deficient if he or she 'neglects to suggest instructions that represent the law that would be favorable to his or her client supported by reasonably persuasive authority' unless the failure is a strategic choice." See **Tyson**, 976 F.3d 391 (quoting **Bey v. Superintendent Green SCI**, 856 F.3d 230, 238). By failing to engage at all with the reasonable-doubt instruction, Petitioner's counsel did not "advocate

[Petitioner's] cause" and "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." See **Strickland**, 446 U.S. at 688. For said reasons, Petitioner's counsel rendered ineffective assistance. See **Corbin v. Tice**, 2021 WL 2550653, at *5 (E.D. PA. June 22, 2021); **Brooks**, 2017 WL 3475475, at *6-7; also see **Tyson**, 976 F.3d at 396 (concluding that trial counsel's failure to object to faulty accomplice jury instruction to first-degree murder case constituted ineffective assistance of counsel).

If, by chance, there's a colorable argument that Petitioner's counsel could not have anticipated that subsequent courts would find this instruction to be unconstitutional. Since at least 2004, Pennsylvania state courts have held that this instruction was not unconstitutional and maintained that position even after federal courts have frequently come to the contrary conclusion. See, Commonwealth v. Nam, No. 3641 EDA 2018, 2019 WL 3946049, at *3 (PA. Super. Ct. Aug. 21, 2019) The First federal district court in Pennsylvania to issue an opinion finding the reasonable doubt instruction at issue herein to be unconstitutional was not until the **Brooks** decision in 2017, after the Petitioner's trial in 2010. See **Brooks**, 2017 WL 3475475, at *3-5. Such reasoning, however, is a red herring. As explained above, in analyzing the reasonable doubt instruction, the state court has misapplied longstanding Supreme Court precedent. Properly examined, a defense counsel faced with the reasonable doubt instruction as in this instant matter did not need to anticipate future changes in law; instead, he only needed to make an objection based on then-establshed Supreme Court precedent. In fairness, Petitioner's counsel could have pointed to the Supreme Court's decisions in **Cage** and **Sullivan** to make this argument, but counsel did not. This decisions was not a strategic choice, but a careless blunder.

Such deficient performance in conclusion is further supported by a line of cases establishing that certain objections at trial are so critical or crucial that a counsel's failure to make such an objection renders a counsel's performance ineffective. Courts routinely find that a counsel's performance was deficient where "counsel failed to make a crucial objection or to present a strong defense because counsel unfamiliar with clearly settled legal principles." See 3 Wayne Lafave et al., Criminal Procedure § 11.10(c) (4th ed.

2021 up.). A counsel's failure to object to a misstatement of Pennsylvania law "on a point that could play a critical rule in the jury's decision" constituted deficient performance. See **Carpenter v. Vaughn**, 296 F.3d 138, 157-58 (3d Cir. 2002); Also **Breakiron v. Horn**, 642 F.3d 126, 137-38 (3d Cir. 2011).

At Petitioner's trial, the reasonable doubt standard played a critical role and, therefore, his counsel's failure to object to this flawed instruction constituted deficient performance as to violate Petitioner's Sixth Amendment right to the U.S. Constitution (U.S.C.A.6). Again, the Commonwealth [Respondents] conceded that a failure to object to this said instruction constituted deficient performance. (district court Docket #24, p.12). The district court was made aware of the Commonwealth's concession in the above regard as well as the Petitioner asserting through his federal habeas corpus argument said unconstitutional reasonable doubt instruction and the ineffectiveness of counsel for his failure to object to it in all violating Petitioner's 5th, 6th and 14th U.S. Const. Amendment rights.

III. A Clear Misaplplication of Law And Law to Fact As Panel Decision Conflicts With United States Supreme Court Decision within Strickland v. Washington, Defining Actual Prejudice.

Within **Federal Rules of Appellate Procedure 35(b)(1)(A)**, it establishes;

"(1) The petiton must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions."

The Petitioner asserted that the Third Circuit panel decision conflict with the decision of The United States Supreme Court case **Strickland v. Washington**, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed 2d 674

(1984) when defining "actual prejudice." Pennsylvania Supreme Court has formulated its definition of "actual prejudice" from the precedent blueprint mandated by **Strickland**, supra, for Pa. Supreme Court case **Commonwealth v. Crispell**, 193 A.3d 919, 932 (Pa. 2018) cites **Strickland**, at 694, verbatim to establish proof of actual prejudice by stating; "[Appellant] is required to prove actual prejudice. This is defined as follows: [A] Reasonable probability that, but for counsel's lapse, the result of the proceeding would have been different." See **Strickland**, 694. ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different") However, in reference to a lawless decisionmaker, **Strickland**, at 695, states; "Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review,... should not be considered in the prejudice determination." However, in the instant Petitioner's case, the process of the decision by trial judge to give an erroneous reasonable doubt jury instruction "**is**" part of the record of the proceeding under review, thereby, permitting it to be considered in the prejudice determination. **Id.**, asserts; "Some errors will have had a pervasive effect on the inference to be drawn from the evidence, altering the entire evidentiary picture,... A court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." With the above legal excerpts asserted, the actual prejudice that occurred in the instant Petitioner's case is the fact that if it were not for counsel's unprofessional error in his failure to object to an erroneous reasonable doubt jury instruction, which is an irreparable fundamental error prejudicial to a defendant, counsel could have followed an objection with a declaring of a "mistrial" which clearly presents the same exact affect as evidence convincing at least one juror to harbor a reasonable doubt resulting in a ***"hung jury"*** as the two terms are interwined in correlation as a ***"hung jury"*** constitues a ***"mistrial."*** See **Barron's Law Dictionary, Seventh Edition,** Defining ***"Mistrial"*** and ***"Hung Jury"*** **all as Exhibit-A.** Both a singular juror's not guilty verdict causing a hung jury and a trial counsel's objection declaring a mistrial based on an incurable fundamental error shall bring about the same different resulted outcome in proceeding that are both of a reasonable probability if not for counsel's unprofessional error in failing to object to an prejucidial error. A MISTRIAL!! It is this means of showing actual prejudice that is being oversighted and/or overlooked in the appellate decisionmaking process by the panel assigned to Petitioner's case within This Court. This inclusive means of showing actual prejudice was raised in Petitioner's initial Certificate of Appealability ("COA" hereinafter) filing as a factored claim presented to This Court. See **Petitioner's "COA," pg.15-16** disclosed with **This Court.** In

Buck v. Davis, 137 S.Ct. 759, 776(2017), opines; "The very fact that the concept of "reasonable doubt" is fundamental to the question of prejudice under **Strickland** underscores why error of this kind must neccessarily be considered structural in nature." Adherence to what **Strickland** has established (reference above) is required as to not run contrary to precedent law. See **Williams v. Taylor**, 120 S.Ct. 1495(2000), stating; "A ... Court decision will certainly be contrary to our clearly established precedent if the... Court applies rule that contradicts the governing law set forth in our case." The 3rd Circuit Court asserted in **Potter v. Cozen & O'Conner**, 2022 U.S. App. Lexis 23686, at 11 (3d Cir. 2022); "We teached this conclusion based on Supreme Court precedent." Petitioner would like for this Court to respectfully acknowledge that the Petitioner must not be further punished for asserting his constitutional rights to established language in precedent law. **U.S. v. Goodwin**, 457 U.S. 368, 327, 102 S. Ct. 2485(1982), states; "To punish a person because he has done what the law allows him to do is a 'Due Process violation' of the most basic sort." Petitioner asserts that he has equal protection rights in this regard ~~that's~~ held in **City of Cleburne v. Cleburne Living Ctr., Inc.**, 473 U.S. 432, 439(1985); **Bd. of Trustees v. Garrett**, 531 U.S. 356, 367(2001); and **Lee v. Washington**, 390 U.S. 333, 88 S.Ct. 994(1968).

It is also inapropriate for the 3rd Circuit Court 's decision of "Given the substantial evidence of guilt presented at trial, jurist of reason would agree without debate that Nam cannot show prejudice." (Underline emphasis added) **(See U.S. Court of Appeals' June 5, 2023 Order As Exhibit-B)** to be a full drawn conclusion based on the "overlooked" substantiated actual prejudice factor carified above. The term "actual prejudice" is defined by the United States Supreme Court within case **Brown v. Davenport**, 596 U.S.____,142 S.Ct.____,212 L.Ed.2d 463, 491(2002), as a definition of; "That means the court has to find "actual prejudice" -more specifically, that there is "grave doubt" about whether an error had a "substantial and injurious effect or influence" on a verdict." (Underlined emphasis added) (Citing **Brecht v. Abrahamson**, 507 U.S. 619, 637, 113 S.Ct. 1710(1993). Surely an erroneous reasonable doubt jury instruction is deemed incurable as to be defined as structural error (See **Sullivan v. Louisiana**, 508 U.S. 275, At 282(1993)). And, as stated above, had trial counsel objected to said erroneous jury instruction and verbally declared a mistrial on the court record immediately after, it is a reasonable probability that a different outcome in proceeding would have resulted absent trial counsel's unprofessional error in failing to do the aforementioned acts as this initial particular error (erroneous jury instruction) aforementioned as incurable as to be classified as a structural errror that's ruled to have "substantial and injurious effect or influence" and, thereby, counsel's errors carries with it the same substantial and

injurious effect. Due to said factor, That Court's June 5, 2023 order in agreement without debate that Petitioner cannot show prejudice cannot stand and, in the interest of justice, must be reversed and remanded for further review to address the conflict between the reasoning given for the COA denial order (Exhibit-B) and what's mandated as being permitted to show actual prejudic in an ineffective assistance of cousel claim within **Strickland**, at 695.

IV. A Misapplication of Law and Fact as All Prior Decision Conflicts with United States Supreme Court Decision of Sullivan v. Louisiana and Several Others

With an acceptance by This Court of the oversighted factor presented above, the Petitioner asserts that all the claims presented in his Certificate of Appealability and below are supported by United States Supreme Court decisions to which all prior decisions given is in direct conflict with these unexceptionable precedent cases. The primary case in this matter would be **Sullivan v. Louisiana**, 508 U.S. 275(1993) which according to the recorded facts of the trial proceeding Sullivan's trial counsel did not initially object to the trial court's erroneous reasonable doubt jury instruction during trial. Even on direct appeal the appellate court denied Sullivan's appeal for the error in jury instruction being harmless error, only, never finding that trial counsel was ineffective for failure to object to the erroneous jury instruction. Nor did the U.S. Supreme Court in **Sullivan**, supra, ever stipulate that an ineffective assistance of cousel claim had to be perfected in order to seek relief from the erroneous reasonable doubt jury instruction despite trial counsel's initial failure to object to the instruction at trial. Said case was reversed and remanded. Instead this Court deemed said action structural error, thereby, causing an automatic prejudice.

Arguendo, the errroneous instruction is not on nor "up to" counsel to fix by objection, due to the fact that the erroneous jury instruction for reasonable doubt is incurable and is a procedure that a judge must follow to insure that the jury understands the amount of doubt a juror may or may not cast. An example of a procedure being the sole responsibility of the Trial Court is in Pennsylvania with what the Pennsylvania Supreme Court established in **Commonwealth v. Davido**, 582 Pa. 52, 868 A.2d 431, 437(Pa. 2005), that the claim raised in said case was; "properly addressed as the error of the trial court, since Rule 121 of the Pennsylvania Rules of Criminal Procedures [set] forth the procedure a judge must follow to determine whether the waiver of counsel was made knowingly, intelligently, and voluntarily."

Id. at 437-38, continues with; "Thus, we determined that it is up to the trial court, not counsel, to ensure that a colloquy is performed if the defendant has invoked his right to self-representation." (underline emphasis added).

Even if the court disagrees with this said theory, the erroneous reasonable doubt jury instruction given in this instant matter has not only been conceded as being unconstitutional by the Pennsylvania Supreme Court (See **Commonwealth v. Drummond**, No.28 EAP 2021 (Decided November 23, 2022) at pg.29 attached to Petitioner's Writ of Certiorari Petition as Exhibit-H hereto) and the U.S. District Court (See Brooks v. Gilmore, No. 15-5659 (E.D. Pa. Aug. 11. 2017) (McHugh J.); Edmunds v. Tice, No. 19-1656 (E.D. Pa. Nov. 19, 2020)(Beetlestone, J. [the same Judge that, in contradiction, subsequently denied the instant Petitioner's case]; and Moore v. Rivello, 2022 U.S. Distr. LEXIS 96997, at *30 (E.D. Pa. May 31, 2022) but also by Third Circuit Court's June 5, 2023 Order (Exhibit-B) as the assigned Circuit Judges all concede that the reasonable-doubt instruction is "indistinguishable" which, thereby, substantiates its unconstitutionality as that Court had previously confirmed indistinguishable jury instructions as being unconstitutional within **Bey v. Superintendent Green SCI**, 856 F.3d 230, 241 (3d Cir. 2017), by expressing; "If an instruction contains a 'defect', 'other language in the instruction' that 'correctly explains the law' might not 'serve to cure the error', especially where the correct language 'merely contradicts and does not explain the defective language." (underline emphasis added)(quoting **Whitney v. Horn**, 280 F.3d 2400, 256 (3d Cir. 2002), **Bennett v. Superintendant Graterford SCI**, 886 F.3d 268, 284-85(3rd Cir. 2018), further elaborates, stating; "A reviewing court has no way of knowing which of the two irreconcilable instructionsthe jurors applied in reaching their verdict." (underline emphasis added)(Quoting **Francis v. Franklin**, 471 U.S. 307,322 (1985). So for The 3rd Circuit to assert that a reasonable doubt instruction is materially indistinguishable is to assert its unconstitutonality by U.S. Supreme Court precedent **Francis**, at 322. For if it is indistinguishable to the reviewing court then said court must conclude that it was indistinguishable to the jury as well relieving the state of its burden of proving every element of the crime beyond a reasonable doubt, and, thereby rendering said jury instruction unconstitutional. And to assert the unconstitutionality of the instant Petitioner's reasonable doubt jury instruction is to establish that a prejudice has occurred within any attempt of conducting an actual prejudice review. The reviewing court's "reasonable likelihood" determinations within **Waddington v. Sarausad**, 555 U.S. 179, 191 (2009) and **Estelle v. McGuire**, 502 U.S. 62, 72 (1991) are confirmed in this case by the PA. Supreme Court and U.S. District Court opinions aformentioned and even the U.S. District Court's previous decision in Petitioner's case at 2:20-

V. A United States Court of Appeals For The Third Circuit Has Decided An Important Question of Federal Law that has not been, but should be, settled by This Court, and has therefore decided an important Federal Question In A Way That Conflicts With Relevant Decisions of This Court Pertaining To Equal Protection Rights And The Violation Ensued By A Complete Failure To Address Such Claim.

In this same instant matter, the Petitioner has asserted his Right to Equal Protection of the law within his petition filed with the District Court (See Petitoner's Habeas Corpus Petition at pg. 35 and his objections to The Report and Recommendation at pg. 9~10 as exhibit- J and K.) As well as his Application For Certificate of Appealability ("COA") and Petition For Rehearing both filed with the U.S. Court of Appeals. See Application For COA at pg.25 and Petition for Rehearing And En Banc Rehearing at pg.3 & 7 as Exhibits L and M. Despite Petitioner's asserted claim to Equal Protection Clause of the 14th Amendment of the United States Constitution, said claim was **never addressed** at any stages of either U.S. District Court, supra, nor the U.S. Court of Appeals, supra, and said failure to apply said constitutional Right to Petitioner's claims herein is a violation of Petitioner's 14th Amendment Right (U.S.C.A.14) as the Petitioner's entitlement to said constitutional Right applies to his claims in the following manner.

Petitioner is similarly situated to the circumstances and grounds for relief declared in **Sullivan**, supra, and **Cage**, supra, and based on the **Sullivan** and **Cage** decisions, the U.S. District Court granted habeas relief within **Lewis v. Sorber**, 2021 U.S. Dist. LEXIS 266050(E.D. PA. Feb. 1, 2021) to which the similarities between Petitioner's facts within his case and Lewis, supra, are identical in the following regards:

1.) The emotionally charged life-and-death surgical hypothetical given within the reasonable doubt jury instruction that effectively elevated the level of doubt required for an acquittal expressed above represent the exact same error given by the same trial court judge (Judge Renee Cardwell Hughes). See **Lewis**, 2021 U.S. Dist. LEXIS at *21-23 and Petitioner's brief herein at pg. 9-10., and;

2.) The evidence used against ***Lewis*** in the homicide case was assessed as being strong (See ***Lewis***, 2021 U.S. Dist. LEXIS at *50-58) which is identical to the evidence used against the instant petitioner. See ***"Factual History" herein at pg. 5 .***

Both Lewis, supra, and Petitioner had multiple eye-witnesses testify against them; both had self-incriminating statements and additional incriminating evidence used against them (See **Lewis**, at 50-57 and Petitioner's Factual History (pg. 5)). However, based on a conclusion that "Relief is recommende on this claim because the trial court's reasonable doubt jury instruction is constitutionally infirm, and prejudice is presumed," (underline emphasis added) **Lewis**, supra,(citing both **Cage**, supra, and **Sullivan**, supra, within **Lewis**, at*39-40) had his habeas corpus petition "**GRANTED**" by the U.S. District Court.

Now, based on the similarly situated circumstances within Petitioner's case and the facts disclosed in **Lewis**, supra, the Petitioner is being treated differently from the other similarly situated defendant within **Lewis**, supra, and there is no rational basis for the difference in treatment as the District Court (presided over by Magistrate Judge Elizabeth T. Hey) weighed all overwhelming evidence against the defendant in **Lewis**, supra, and still came to the conclusive decision of granting ***Lewis*** relief by finding the reasonable doubt jury instruction constitutionally infirm and prejudice being presumed. Under the Fourteenth Amendment of the United States Constitution(Const. Amend.14) the Petitioner was and still is entitled to the same relief in all fairness and interest in justice. The Equal Protection Clause of the Fourteenth Amendment provides a state shall not "deny to any person within its jurisdiction the equal protection of he laws." **U.S. Const. Amend. 14.** As such, the Equal Protection Clause redquires that all persons "similarly situated" be treated alike by state actors. See **City of Cleburne v. Cleburne Living Ctr., Inc.**, 473 U.S. 432, 439(1985). An equal protection claim can be brought by a "class of one," a plaintiff alleging he has been "intentionally treated differently from others similarly situated and... there is no rational basis for the difference in treatment. See **Vill. of Willowbrook v. Olech**, 528 U.S. 562, 564(2000) and **Bd. of Trustees v. Garrett**, 531 U.S. 356, 367(2001). Said Petitioner asserts his right to the safeguard entitlement of the reliefs awarded under the Equal Protection Clause as well as the rights afforded within **Article 7 of the Universal Declaration of Human Rights**, which states; "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination." The Petitioner in this instant case matter is similarly situated to the cited relief in support of Petitioner's claims cited, supra, held within all legal authorities referenced (as are specifically cited) in this Writ herein and the grounds for reliefs articulated within all said case citings referenced herein. See **F.S. Royster Guano Co. v. Virginia**, 253 U.S. 412, 415(1920) (under the Equal Protection Clause, "All persons similarly circumstanced shall be treated alike" by governmental entities); **McGowan v. Maryland**, 366 U.S. 420, 425(1961) (establishing treatment... is the first step in a successful equal protection claim"); **Lee v. Washington**, 390 U.S. 333, 88 S.Ct. 994(1968) (equal protection of laws extends to the incarcerated). Due to the failure and/or blatant disregard to acknowledge and respond to Petitioner's Equal Protection Clause claim concerning his ***similarly situated circumstances*** to **Sullivan** and **Cage**, This said Court should settle this ignored claim factor as it is an important question of federal law and is also supported by relevant decisions rendered by This United States Supreme Court.

Stare Decisis Application Is Warranted

The Petitioner requested a "stare decisis" analysis to be conducted by the United States Court of Appeals within Petitioner's Petition for Rehearing and En Banc Rehearing (see said petition at pg.9) as it pertained to all legal authorities cited by Petitioner in support of his claims and grounds for relief based on an incurably erroneous reasonable doubt jury instruction and the presumed prejudice that ensued to which said petition was denied without explanation. Therefore, the Petitioner now humbly ask that this U.S. Supreme Court hollistically consider and apply the precedent cases cited herein above "Stare Decisis." The U.S. Court of Appeals cited **This Court** when asserting in **Riccio v. Sentry Credit, Inc.**,

954 F.3d 582, 590(3d. Cir. 2020); "Stare decisis-in English, the idea that today's Court stand by yesterday's decision-is 'a foundation stone of the rule of law.'" Citing **Kimble v. Marvel Entm't, LLC**, 576 U.S. 446, 135 S.Ct. 2401 2409, 192 L.Ed. 2d 463(2015)(quoting ***Michigan v. Bay Mills Indian Cmty.***, 572 U.S. 782, 798, 134 S.Ct. 2024, 188 L.Ed. 2d 1071(2014)). **Riccio**, Id., continues with; "To be sure, stare decisis 'is not an inexorable command,' but it is critical to 'promote [ ] the evenhanded, predictable, and consistent development of legal principles, foster[ ] reliance on judicial decisions, and conrtribute [ ] to the actual and perceived integrity of the judicial process. "Citing **Payne v. Tennessee**, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed. 2d 720(1991). In the vein of a stare decisis analysis, Petitioner cites, in closing, **Sullivan**, at 280, which asserts; "A review court can only engage in pure speculation-its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" **Sullivan**, at 282, asserts; "The Court holds today that the reasonable-doubt instruction given at Sullivan's trial which (it is conceded) violates due process under our decision in Cage [v. Louisiana, 498 U.S. 39, 112 L.Ed 2d 339, 111 S.Ct. 328(1990)], amounts to structural error, and thus cannot be harmless regardless of how overwhelming the evidence of Sullivan's guilt."

C O N C L U S I O N

For the aforementioned reasons, Petitioner humbly request that This Court's precedent cases cited herein are upheld and asserted as applying the Petitioner's similarly situated circumstances within his case, and by said similarities, awarded Petitioner relief by way of reversing the lower court's decision and remanding Petitioner's case for a new trial or any other further proceedings as This Court sees fit in its discretion.