No. _____

SUPREME COURT OF THE UNITED STATES

JOSH POMPEY,

Petitioner,

vs.

ADMINISTRATOR NEW JERSEY STATE PRISON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC V. KLEINER, ESQ.
385 Sylvan Ave.
Suite 29, 2nd Floor
Englewood Cliffs, NJ 07632
Tel: (201) 394-6229
Fax: (845) 353-7828
Email: erickleiner@verizon.net
Pro Bono Attorney for Petitioner,
Josh Pompey

QUESTIONS PRESENTED

1. HAVING OBTAINED FAVORABLE NEW DNA RESULTS VIA POST-CONVICTION DNA TESTING, IS PETITIONER ENTITLED TO EQUITABLE TOLLING UNDER *HOLLAND V. FLORIDA*, 560 U.S. 631 (2010) ON A FIRST FEDERAL HABEAS PETITION?

2. UNDER *NAPUE V. ILLINOIS*, 360 U.S. 264 (1959), DO NEW DNA TEST RESULTS THAT PROVE PETITIONER'S CONVICTION WAS PREDICATED UPON A FALSE CONFESSION REQUIRE REVERSAL OF THE CONVICTIONS OR AN EVIDENTIARY HEARING?

3. DO SCIENTIFIC AND LEGAL ADVANCEMENTS IN THE FIELDS OF FALSE CONFESSION SCIENCE AND EDTA BLOOD TAMPERING TESTNG REQUIRE A NEW TRIAL WHEN THE JUDGE PRECLUDED PETITIONER'S EXPERT WITNESSES ON THESE SUBJECTS AND PREVENTED THE PRESENTATION OF A COMPLETE DEFENSE?

TABLE OF CONTENTS

PETITIONER'S APPENDIX C

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit denying Petitioner's Application for a Certificate of Appealability appears in the Appendix to this Petition (Appendix A) at Pet. a1 and is unpublished. The opinion of the United States District Court for the District of New Jersey denying Petitioner's Petition for a Writ of Habeas Corpus appears in this Petition (Appendix B) at Pet. a3 and is unpublished. The New Jersey Supreme Court denial of a Petition for Certiorari appears in this Petition (Appendix B) at Pet. a29. The opinion of the Superior Court of New Jersey, Law Division, denying Petitioner's Petition for Post-Conviction Review appears in the Appendix to this Petition (Appendix B) at Pet. a48 and is unpublished. The opinion of the Superior Court of New Jersey, Appellate Division, denying Petitioner's Appeal of Denial of Post-Conviction Review appears in the Appendix to this Petition (Appendix B) at Pet. a30 and is unpublished.

PARTIES TO THE PROCEEDING

The Petitioner is Josh Pompey. The Respondents are the State of New Jersey; Warden Bruce Davis; and Administrator, New Jersey State Prison.

TABLE OF AUTHORITIES

Cases:

Statutes:

JURISDICTION

The date on which the United States Court of Appeals for the Third Circuit decided this matter was August 16, 2024. Petitioner invokes the jurisdiction of the United States Supreme Court under 28 U.S.C. § 1254(1), having timely filed this Petition for a Writ of Certiorari within ninety days of the final judgment by the United States Court of Appeals for the Third Circuit

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 2244(d):

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

N.J.S.A. 2A:84A-32a:

> Any eligible person may make a motion before the trial court that entered the judgment of conviction for the performance of forensic DNA testing.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb;

nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and 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.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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.

STATEMENT OF THE CASE

Petitioner Josh Pompey, a prisoner currently confined in New Jersey State Prison, has been incarcerated since 1989 for sexual assault and double murder. Following an initial capital trial resulting in a hung jury, Petitioner was convicted in 1998 and sentenced to more than two terms of life imprisonment with a 70-year period of parole ineligibility. Mr. Pompey, by and through his undersigned pro bono counsel, respectfully requests a Writ of Certiorari to the United States Supreme Court upon denial of his request for a Certificate of Appealability to the United States Court of Appeals for the Third Circuit, and hereby challenges the District Court for the District of New Jersey's dismissal of his Petition for a Writ of Habeas Corpus as untimely.

This Petition involves police and prosecutorial misconduct, suppression and concealment of exculpatory evidence, and post-trial DNA test results that are highly exculpatory and point to a gateway claim of innocence. The new DNA results 100% rule out and exclude Petitioner and any male as being a potential contributor to the DNA samples found on the gloves he is alleged to have owned, worn and bled upon during the murders. Investigators targeted Mr. Pompey—a brain damaged professional boxer—arrested him using a pretextual method under questionable circumstances, and coerced him into giving a false confession. The crux of the confession was that Mr. Pompey murdered two victims wearing a pair of women's gloves that were recovered by the police. Authorities then tampered with the gloves in order to match elements of the coerced, false confession. At trial, the prosecution

engaged in a conscious and knowing use of this false confession, manufactured forensic evidence, and false testimony, all in violation of due process.

The key physical evidence in this case was a matching pair of women's gloves. The hallmark central theme essential to the State's case was that the killer wore these gloves while committing the murders. Mr. Pompey purportedly "confessed" to slipping on the knife during the stabbing and bleeding all over the gloves. But it was all untrue. DNA testing on the seized knife had no DNA on it other than the victim's DNA, and during the confession Mr. Pompey initially denied he knew what the knife looked like. Following Mr. Pompey's successful motion for post-conviction DNA testing, the State's own lab of choice, the respected and accredited New Jersey State Police ("NJSP") DNA Lab, proved that Pompey never possessed, owned, or wore the gloves in his life. Pet. a190-200. The gloves belonged to one of the victims, "AR"—to the exclusion of the entire rest of the world's population—and otherwise had nothing to do with the murders, except that the left glove was planted in a tertiary wooded area after being cut or torn to fit aspects of Mr. Pompey's false confession, and a bloody shirt was planted in a dumpster. Pet. a84-105, 215-245. The new DNA results also implicated the police in unlawfully tampering with the left glove to make cuts or tears to match cuts on Petitioner's hand sustained from an unrelated incident. Pet. a201-208. At the time of the murders in 1989, and until the mid 2000s, the science had not yet caught up to testing mere skin particles to determine the owner/chronic wearer of a particular garment.

Tragically, the lower reviewing courts have all failed to grasp the true significance of the new DNA evidence. Without question, the new DNA results conflict with and are incompatible with the purported "confession" and would have changed the outcome at trial. Pet. a248. Page after page of the stenographic transcript of Petitioner's supposed confession centers on the gloves as they supposedly moved from crime scene to crime scene. If the undersigned had access to the newly-discovered evidence showing Mr. Pompey could not have worn the gloves, the jury would have come to a different decision. In addition, several other new DNA tests further exculpated Mr. Pompey and provide a gateway claim of innocence. The evidence was so clearly exculpatory that counsel for the State candidly admitted during the habeas proceedings that the glove results are impeaching as to the veracity of the confession. Moreover, the glove evidence impeaches the entire forensic case under the doctrine of "false in one, false in all."

As to the procedural bar, the District Court dismissed Mr. Pompey's habeas petition on grounds that Mr. Pompey failed to file within one year from the date on which his judgment became final by "'the conclusion of direct review or the expiration for the time for seeking such review'—here, September 21, 2006." (Pet. a3-28) (quoting 28 U.S.C. § 2244(d)(1)(A)). But the court failed to recognize that Mr. Pompey's habeas petition pertains to newly-discovered DNA results properly obtained via the State of New Jersey's post-conviction DNA testing statute and therefore statutory and equitable tolling should be applied.

The New Jersey Appellate Division consolidated all post-conviction appeals and the New Jersey Supreme Court denied Mr. Pompey's petition for certification of the consolidated appeal on January 28, 2022, and the habeas petition was filed on January 20, 2023, within the one-year cutoff. Petitioner's *pro bono* counsel, a solo practitioner, digested thousands of pages of exhibits and briefs going back thirty years to construct the habeas petition.

Thus, Mr. Pompey and his attorney diligently sought DNA testing, reasonably relied upon the state appellate court's judgment consolidating all appeals, and took all reasonable steps to exhaust all available state and then federal remedies before filing this Petition for Certiorari.

As a matter of basic commonsense, there could be no federal appeal until all state court claims were finalized. It could not be done in piecemeal fashion. In other words, exhaustion of state remedies could not occur until the DNA results were obtained and litigated. When Petitioner moved for post-conviction DNA testing, the testing he sought involved a cutting-edge, newly-developed method known as Short Tandem Repeat ("STR") testing which was not in existence when he was convicted in 1998, and was not recognized in New Jersey as viable scientific evidence until 2002. See State v. Deloatch, 354 N.J. Super. 76 (Law Div. 2002). It took longer still for the NJSP to perfect STR testing techniques for scientifically proving who wore a garment based on testing of skin cells left in the garment. See State v. Calleja, 414 N.J. Super. 125 (App. Div. 2010), rev'd on other grounds, 206 N.J. 274 (2011).

Without these advanced STR DNA testing techniques, Petitioner could never have obtained the current DNA results in the first place, so equitable tolling is justified.

Also, the lower courts did not permit an entire line of defense regarding blood and evidence tampering. The trial court precluded the expert testimony of Dr. Richard Ofshe, one of the fathers of false confession science, who determined that this is indeed a false confession case. Renowned toxicology experts Dr. Kevin Ballard and Dr. Fred Reiders tested inculpatory blood DNA evidence and found heightened levels of EDTA, indicating that police had salted physical evidence with Mr. Pompey's blood taken from a EDTA purple top reference sample of Mr. Pompey's blood and/or using highly processed white blood cell DNA provided to the State in 1990 by the FBI. The blood tampering experts also found that police tried to wash away EDTA to erase previous acts of blood tampering after the hung jury occurred, but their testimony was excluded on all aspects of their findings. The newly-discovered DNA evidence now vindicates the wrongfully precluded experts' conclusions pointing to evidence tampering. False confession experts and EDTA testing in the criminal forensic settings have gained acceptance in the both the scientific community and in the courts since the preclusion of this evidence in 1990s.

Lastly, follow-up DNA testing could inculpate a particular third-party suspect by connecting him to potential blood evidence on his belongings. The victim AR's boyfriend was a viable suspect in 1989 and remains a viable third-party suspect today. The trial court committed gross abuse of discretion precluded

testimony from defense expert John Mendres, who had newly discovered that the original suspect Edward Hoffman left a bloody fingerprint on a kitchen utensil drawer or placed his finger on a bloody portion of the drawer. Pet. a117, 259-260. According to police, one of the knives used in the murder came from this same drawer. But the State's fingerprint expert concealed this finding. Two reputable DNA and blood experts have identified the third-party suspect's belongings (which he secreted from the crime scene before authorities arrived) as likely to contain testable DNA due to their visual appearance of containing blood. Pet. a120-123, 246-258. Defense expert Mr. Taylor identified that he could also test Hoffman's print lifting to see if it contains blood. Pet. a119, 354-356. Also, there are a pair of latex gloves found at the crime scene which requires testing. Pet. a128, 131, 253. The reviewing courts should have ordered additional DNA testing on swabs and stains obtained from AR's rape victim kit, which the State surreptitiously withheld from the NJSP Lab (NJSP No. 84) during the post-conviction DNA testing process. Pet. a164-189, 251-252. The State's concealment of this evidence is admissive conduct indicating that the rape kit evidence could exonerate Mr. Pompey. Follow-up DNA testing of the third-party suspect's patent fingerprints found in or around blood at the scene are essential to the pursuit of truth and justice as well. At a minimum, an evidentiary hearing is required in a case where the evidence used to convict Mr. Pompey was false and manufactured. To turn away this case leaves open for time immemorial the question as to why so much evidence-planting and false evidence was needed if Mr. Pompey is truly guilty.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S SUCCESSFUL MOTION FOR STATUTORY - CONVICTION DNA TESTING UNDER STATE LAW CONSTITUTES A PROPERLY FILED APPLICATION FOR COLLATERAL REVIEW UNDER 28 U.S.C. § 2244(d) AND SHOULD TRIGGER EQUITABLE TOLLING.

On August 14, 2007, Mr. Pompey's pro bono counsel filed a Motion for Performance of Forensic DNA Testing pursuant to N.J.S.A. 2A:84A-32. The State judge denied Mr. Pompey's motion for state post-conviction review ("PCR"), but separately granted a properly-filed motion to secure DNA testing. Today, the results of this powerful new DNA testing provide continuing grounds for both equitable and statutory tolling. Imposing a procedural bar in this case violates due process for the following reasons:

First, the state courts determined that all post-conviction DNA testing-related issues would be consolidated into a single appeal and the prosecution never objected to a consolidated appeal process. As stated by the Appellate Division: "The Court provided this relief to the defense so that ... ***all post-conviction proceedings can be considered in one appeal.***" State of New Jersey v. Josh Pompey, A- 860-07T4 (App. Div. Aug. 15, 2008) (internal citation and quotation marks omitted) (emphasis added); Pet. a73.

As stated in full:

> The appeal is dismissed without prejudice and the matter is remanded to the Law Division. Defendant may file a new appeal or cross appeal after the DNA testing is completed and the proceedings based thereon are concluded. In that matter, all post-conviction proceedings can be considered in one appeal, and defendant can raise therein any issue he

> could have raised on this appeal and issues relating to the DNA testing and impact thereof.

Id. Mr. Pompey and his attorney acted in reasonable reliance upon the court's ruling and the State should be estopped from invoking the limitations period at this late hour. In view of this consolidating order preserving all DNA-related issues for further review, Mr. Pompey and his counsel had no way of knowing that, years later, federal habeas review would be precluded on timeliness grounds alone. Strict application of the one-year statute of limitations foreclosed Mr. Pompey's habeas claim before it even arose, in violation of due process and principles of equity.

Second, although the federal habeas statute prescribes a one-year statute of limitations, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation..." 28 U.S.C. § 2241(d)(2). To fall within the statutory tolling provision, a petition for state post-conviction testing must be pending and "properly filed." Fahy v. Horn, 240 F.3d 239, 243 (3d Cir.), cert. denied, Horn v. Fahy, 534 U.S. 944 (2001). An application is deemed "properly filed" when it is submitted in compliance with State's procedural requirements. See Pace v. DiGuglielmo, 544 U.S. 408, 413 (2005). The statute of limitations is then tolled while an "application for State post-conviction or other collateral review ... is pending." Lawrence v. Florida, 549 U.S. 327 (2007) (quoting 28 U.S.C. §2244(d)(2)). Further, a state postconviction application "remains pending ... until the application has achieved final resolution through the State's postconviction procedures." Carey v. Saffold, 536 U.S. 214, 220 (2002). Here, the

DNA testing application was properly filed and remained pending until the New Jersey Supreme Court denied certification, entitling Petitioner to statutory tolling.

Third, the prosecutor committed post-conviction misconduct also. The State concealed and withheld a vaginal rape kit sample (NJSP No. 84) that had tested positive for seminal fluid according to a presumptive acid phosphatase test done by the NJSP in 1989. Pet. a164-169. See, generally, Banks v. Dretke, 540 U.S. 668, 693, 696 (2004). The prosecutor took advantage of the non-transparency aspect of the testing process holding back from the lab the one sample that had shown promise to contain semen. Thus, prosecutorial misconduct weighs heavily in favor of granting equitable relief and permitting federal judicial review on the merits.

With regard to the Third Circuit's timeliness decision, in particular, obtaining a certificate of appealability "does not require a showing that the appeal will succeed," and "a court of appeals should not decline the application . . . merely because it believes the applicant will not demonstrate an entitlement to relief." Miller-El v. Cockrell, 537 U.S. 322, 337 (2003). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Id. at 327. As this Court has stated:

> [W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a certificate of appealability should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a

> constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Given the totality of circumstances surrounding new cutting-edge post-conviction DNA testing, Mr. Pompey's properly-filed motion for post-conviction DNA testing by statute triggered equitable tolling or started a new timeline with respect to any and all issues impacted by the DNA test results and therefore the habeas petition should not be deemed time-barred by 28 U.S.C. § 2244(d)(1)(A).

Petitioner qualifies for both equitable and statutory tolling. In Holland v. Florida, 560 U.S. 631, 649-50 (2010), the Supreme Court held that the one-year limitations period is subject to equitable tolling in appropriate instances to be determined on a case-by-case basis. Equitable tolling requires a showing of two elements: "(1) that [the petitioner] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Id. 560 at 649. "The diligence required for equitable tolling is reasonable diligence, not maximum feasible diligence." Id. at 653. "This obligation does not pertain solely to the filing of the federal habeas petition, rather it is an obligation that exists during the period appellant is exhausting state court remedies as well." LaCava v. Kyler, 398 F.3d 271, 277 (3d Cir. 2005) (citation omitted); see also Alicia v. Karestes, 389 F. App'x 118, 122 (3d Cir. 2010).

Reasonable due diligence is examined under a subjective test, and it must be considered in light of the particular circumstances of the case. See Ross v. Varano,

712 F.3d 784, 799 (3d Cir. 2013); see also Schlueter v. Varner, 384 F.3d 69, 74 (3d Cir. 2004). Equitable tolling can be triggered only when "the principles of equity would make the rigid application of a limitation period unfair, such as when a state prisoner faces extraordinary circumstances that prevent him from filing a timely habeas petition and the prisoner has exercised reasonable diligence in attempting to investigate and bring his claims." LaCava, 398 F.3d at 275-276.

Extraordinary circumstances have been found where (a) the respondent has actively misled the plaintiff, (b) the petitioner has in some extraordinary way been prevented from asserting his rights, (c) the petitioner has timely asserted his rights mistakenly in the wrong forum, or (d) the court itself has misled a party regarding the steps that the party needs to take to preserve a claim. See Brinson v. Vaughn, 398 F.3d 225, 230 (3d Cir. 2005).

Mr. Pompey is entitled to equitable tolling because the DNA test results upon which his habeas Petition is based were not previously available. New Jersey's post-conviction DNA testing statute did not even exist until 2002, five years after Mr. Pompey's conviction. Moreover, the prosecutor on PCR committed misconduct by intentionally concealing for submission in the post conviction relief process the vaginal rape kit sample as previously mentioned, and delayed release of exculpatory glove results, and withheld DNA lab discovery. Prosecutors also tampered with the label taken from a windbreaker jacket in evidence. Pet. a261-269. It took several years for the prosecution to disclose their DNA results. Several defense motions were filed to compel disclosure of the new DNA testing results. It then took several

more years to force the prosecution to provide all of the discovery as they withheld, according to the defense expert, significant forensic lab data and tangible items. The testing was a non-transparent process but the State learned that the new DNA glove results were impeaching and exculpatory in 2014. Pet. a190-198. In fact, the NJSP's laboratory director tried to call the head county prosecutor to warn him. Pet. a209.

On appeal, in what amounts to a smoking gun admission, counsel for the State conceded that the new DNA glove evidence is impeachment evidence. Impeachment evidence in this case means that it impeaches the confession's veracity and confirms the truth about photos of evidence planting and in blood tamper testing. Pet. a215-245, 308-353. In State v. Ways, 180 N.J. 171 (2004), the Court reversed the defendant's murder conviction on the basis of third-party guilt evidence pointing to another possible killer. The Court reversed despite a confession the defendant admitted he voluntarily gave. The Court found that evidence which raises a reasonable doubt as to the evidence used to prove defendant's guilt could not be described as merely "cumulative", "impeaching" or "contradictory... "[T]he power of the newly discovered evidence to alter the verdict is the critical issue, not the label to be placed on the evidence."" Ways, 180 N.J. at 189, 191-192. The New Jersey Supreme Court applied this holding as prescribed in State v. Behn, 375 N.J. Super. 409, 431-432 (App. Div. 2005), where the Court stated that the question is not whether the evidence is impeaching, but rather whether the evidence would likely change the outcome of the case. Id. at 432. The analysis is analogous to Brady

claims where the question is whether the suppressed evidence, if available, would probably have changed the outcome. Here, the questioned newly discovered evidence is material in that it very well could raise a reasonable doubt and alter the verdict.

The DNA results providing the impetus behind the habeas Petition did not exist before testing was ordered pursuant to the post-conviction DNA testing statute, which does not contain any time limitation. The consolidated PCR remained pending until the New Jersey Supreme Court denied certification. State review ends when the state courts have finally resolved an application for state postconviction relief. Petitioner acted with reasonable diligence and took the proper steps to exhaust available state court remedies. See Martin v. Administrator New Jersey State Prison, 23 F.4th 261, 273 (3d Cir. 2022). No other state avenues for relief remained open after the New Jersey Supreme Court denied certiorari. Lawrence, supra, 549 U.S. at 332.

Furthermore, it must be noted that Mr. Pompey's intellectual difficulties, both innate and those wrought by years of blows to the head sustained as an amateur and then professional fighter, are well documented. It is also well documented that Petitioner had an ineffective public defender at the direct appeal stage and has sat alone in jail since 1989. On the basis of this record, equitable relief is clearly warranted.

Petitioner's counsel acted within one year of the New Jersey Supreme Court's final denial with respect to the post-conviction DNA results, and this should be

deemed sufficient to trigger federal review. Any delay on the part of either Mr. Pompey or his attorney is due to extraordinary circumstances outside of their control, including the development and adoption of reliable DNA testing over time, and delays caused by the State's initial concealment of the glove results. As a matter of due process and fundamental fairness, Mr. Pompey is entitled to review on the merits by a federal court.

II. THE LOWER COURTS FAILED TO GRASP THAT THE NEW DNA RESULTS PROVE THAT PETITIONER'S CONVICTION DEPENDED UPON A COERCED, FALSE CONFESSION.

In this voluminous and exceedingly complex case, the reviewing courts were unable to marshal the true significance of the new DNA results. The courts held no hearings and took no testimony. Instead, they jettisoned this case without getting to the crux of the matter and failed to grant an evidentiary hearing to allow for a proper record to be made concerning the newly-discovered exculpatory DNA evidence. But federal habeas proceedings should never be a rubber stamp when the rest of a man's life is at stake and the convictions are polluted with false and perjured evidence.

By way of contrast, super precedent for reversing these convictions is found in Napue v. Illinois, 360 U.S. 264 (1959), wherein the Court will never allow a conviction to be based on false or perjured evidence. In Napue, new DNA test results indicating that the petitioner's conviction was predicated on a false confession, manufactured forensic evidence, and false testimony required reversal so that the innocent are always protected. The same reasoning in Napue should be

applied here. This Court should reverse Petitioner's convictions outright because the new glove DNA evidence, by any objective measure, would probably cause a different outcome at trial in and of itself and the results are not disputable. At a minimum, an evidentiary hearing is due.

The DNA science has finally caught up with the State's lies and misconduct during the investigation and prosecution of Mr. Pompey. The new DNA test results strongly support the defense's theory of the case at trial. Pet. a190-253. The new DNA evidence already establishes that the prosecution relied upon a false confession to ensure a conviction in a second noncapital trial after a death penalty trial ended in a hung jury in the guilt phase. Pet. a270-307. The new test results exclude Mr. Pompey as a potential contributor to the DNA samples found on one glove (exculpating him on the other glove in turn, since they are a pair, as conceded by the prosecution). Pet. a87-106, 190-208, 246-253. This not only eviscerates the veracity of the confession and corroborates the evidence-planting revealed in other submissions, but also creates a gateway claim to innocence. Pet. a201-208, 210-245, 270-307. See Schlup v. Delo, 513 U.S. 298, 327 (1995). Additional follow-up DNA testing could now inculpate a named third-party suspect. See Holmes v. South Carolina, 547 U.S. 319 (2006) (holding that a criminal defendant's federal constitutional rights were violated when the trial court refused to admit evidence of third-party guilt).

It has been known since 1989 that serology ABO blood type testing exculpated the Petitioner. Yet, according to the alleged "confession," blood droplets

on the driveway leading to victim AR's car came from the cuts on Petitioner's left, gloved hand, caused by him slipping on the knife during the stabbings. Pet. a270-307. Serology testing confirmed the blood was from AR (Type B) and excluded Petitioner by blood type analysis from being a contributor to the blood drops. The lower courts have all bought into an excuse posited by the prosecution that somehow Pompey's skin cells are not in the glove's interior area because the victim pulled the glove off during the attack. This argument has no support from any expert in the case and is sheer nonsense. The owner/chronic wearer result on the interior side of the fingers in an area of the glove that first was screened and tested negative for blood yielded results indicating AR was the owner and chronic wearer of the glove, and Petitioner was 100% excluded. Since the gloves are an identical pair, the exonerating results on the right glove (NJSP No. 57-3) circumstantially excluded Petitioner from being the owner or chronic wearer of the left glove as well. Pet. a190-208, 246-253. Chronic wearer DNA testing now allows us to confirm that the gloves belonged to AR and Mr. Pompey never wore them. Further, the gloves did not belong to Mr. Pompey's parents, as stated in the false confession. Pet. a278. On PCR, defense expert Marc Taylor confirmed the NJSP lab results and made clear in a sworn declaration that Petitioner never wore the gloves in his life.

Petitioner's "confession" initially sounded feasible on the surface, but police lied, stating the confession led them to two other crime scene locations where Petitioner dumped bloody evidence, including a bloody shirt in a dumpster, a plastic bag, and the left glove, among other bloody items found in a wooded area. Pet. a96-

107, 199-253. Upon close inspection of the pathology records, however, the crime scene reports, photos from the crime scene locations, and the trace, fiber and serology and DNA evidence tells a different story.

Petitioner initially tried to resist the coercive interrogation, but he lacked the intelligence and will to resist his interrogators' strongarm tactics. Police hid the fact that at least one officer was visibly armed with a handgun while interrogating Petitioner, and that Petitioner was handcuffed during the interrogation. The police claimed they brought no paperwork with them during the interrogation, but uncropped negatives from the local newspaper show a thick, Redweld-type legal folder right after the interrogation ended, which suggests they coached Petitioner and fed him information to repeat for the stenographic confession.

Petitioner's false confession repeatedly incorporates the wholly invented fact that he wore women's acrylic gloves on the hot and sunny day the murders took place. Petitioner said the acrylic gloves belonged to his parents and that he took them from his family home and wore them to break into the victims' residence. He claimed he wore the gloves during sex with AR on her bed while holding a knife. But when asked by police to describe the gloves more distinctly, Petitioner could not do it accurately. Pet. a 270-307. Similarly, when Petitioner was told to describe the murder weapon, he spontaneously stated, ***"I don't know for a fact, you know."*** Pet. a284 (emphasis added). Petitioner's denials now ring true. Indeed, while giving his alleged confession Mr. Pompey could not describe the gloves even though the police coached him and fed him information from their crime scene memoranda in a

file folder. Police admitted that after the confession Petitioner asked them when blood tests could be done on the evidence, seemingly indicating that he believed that blood testing would exculpate him.

Respondents have long argued that Mr. Pompey bled all over the gloves despite the total absence of his DNA ever being found on the gloves ever after a plethora of attempts. At trial, the State went to great lengths to make a false argument through an FBI DNA expert that environmental factors caused degradation of the DNA on the glove and other evidence and this explained why Petitioner's DNA could not be found. Pet. a79. This argument carried the day with the jury but is now has been exposed as a falsehood by highly sophisticated STR owner/wearer testing on the gloves.

The new chronic/wearer skin deposit test results also inculpate law enforcement in a crime wherein the glove was cut up by police to fit the cuts on Pompey's hands. Pet. a201-208, 210-214. The gloves had nothing to do with the murders except that they happened to be amongst a pile of clothes in the bloody crime scene bedroom. Technology and science now prove the confession to be false. Petitioner could not describe the key murder evidence—the gloves and the knife. He said the gloves played a role in all aspects of the murders, from breaking into the house while wearing the gloves, then stabbing the victims and cutting himself on a knife and bleeding into the glove and then discarding a glove in the woods. Pet. a270-307. Since the gloves were owned and worn by victim AR and never worn by Petitioner, how is this fact compatible with the confession? And since the gloves

were never worn by the killer, how and why were they torn or cut to fit the cuts on Mr. Pompey's hands as depicted in photographs at the time of his arrest? Pet. a96-99, 201-208? Respondents remain silent on this issue and the courts up until now have inexplicably ignored these facts.

Respondents have also cherrypicked the DNA evidence. Focusing on AR's car, the confession stated that Petitioner tried to hot wire the car after he broke the key off in the ignition. Police reports suggest that the car had been processed prior to the interrogation and did not yield any evidence corroborating the confession. Only after the confession took place did the car interior upon further inspection suddenly produce evidence of a broken key and evidence of an attempted hotwiring.
The defense learned that that police retrieved no blood from Petitioner's home, despite the alleged confession that Petitioner cleaned up blood at his home after the murders. The confession indicated further that Petitioner used a plastic bag from home to carry bloody crime scene evidence to the dumpster and wooded area. Pet. a215-245. The police had recovered a brown Hefty trash bag in evidence taken from the wooded area post confession. The police claimed they took a Hefty bag box and unused hefty bags remaining in the box at Petitioner's home to compare to the bag found in the wooded area. Police photos depicting the search of Petitioner's home fail to display any Hefty box or any brown bag ever being recovered. The prosecution also concealed the fact that the plastic bag in the wooded area had no fingerprints. Evidence seen in a plastic bag in the crime scene became known as the vessel used by police to later plant physical evidence framing Pompey.

New DNA testing results also found no blood on a plastic bag found at tertiary crime scene that Pompey confessed to using such a bag to transport wet bloody evidence from the crime scene to discard it. Pet. a241-245. This has become another piece of exculpatory evidence revealing more proof of evidence planting. New DNA evidence also found that the belt around AR's neck that strangled her had no evidence of Pompey's DNA found on it. Pet. a251. New DNA testing also found that all hairs found at crime scene excluded Pompey after the respondents told the jury there were hairs that could possibly be Pompey's hairs. Pet. a251. The State has always claimed the confession is corroborated by the blood evidence at the car of the victim AR. Throughout the proceedings the tampered blood evidence shielded by the preclusion of two defense experts who should have never been precluded. Purple top EDTA preserved reference samples of Petitioner taken by the police shortly after his arrest without proper chain of custody and/or a pristine white blood cells with a high DNA concentration of Petitioner's DNA preserved reference sample was received by the local authorities from the FBI as early as 1990 and were salted on many items of evidence, including a bra, mattress, and the car blood swabs. The jury was inexplicably denied this evidence. Pet. a308-353.

However, the newly discovered DNA evidence, either standing alone or when factored in with the exculpatory knife results, would have made all the difference because the new DNA results effectively render the confession false. The new test results suggest that prior inculpatory DNA and blood evidence was a product of police tampering, as indicated in the precluded EDTA testing and other

photographic evidence. The new glove results exposed new proof that someone cut the left glove up in locations where Petitioner's cuts were photographed to manufacture the false impression that he cut his hand on the knife while wearing the glove. Moreover, the photographic and forensic evidence establishing not only planting the left glove in a wooded area to fit a false confession, but it also now brings into focus the planted bloody shirt embedded under the victim AR's body then found in a dumpster two day later to fit the false confession. Pet. a215-245. There is only one bloody shirt in evidence. The one from the crime scene planted in the dumpster. If that is not enough, the defense located in a photo the translucent plastic bag vessel that the police use to plant the evidence in the wooded area, as a glove can be seen with bloody pants and the bloody shirt. These items were all photographed again in the wooded area two days later. Pet. a215-245.

III. SCIENTIFIC AND LEGAL ADVANCEMENTS IN THE FIELD OF FALSE CONFESSION SCIENCE AND EDTA BLOOD TAMPERING TESTING REQUIRE A NEW TRIAL BECAUSE THE TRIAL COURT PRECLUDED PETITIONER'S EXPERT WITNESSES AND PREVENTED THE DEFENSE FROM PRESENTING ITS CASE.

The trial court committed reversible error in this case by precluding several of Petitioner's expert witnesses from testifying, for no legal reason, and effectively denying him the right to mount almost any defense. There cannot be a fair trial if the defense has an entire defense precluded in every facet of the case. See State v. Middleton, 299 N.J. Super. 22 (App. Div. 1997).

In New Jersey it has long been held that the defense has a lower threshold standard of production for admitting expert evidence as opposed to the State. See,

e.g., Windmere, Inc. v. International Ins Co., 105 N.J. 373 (1987); State v. Prudden, 212 N.J. Super. 608, 617 (App. Div. 1986). At Petitioner's second trial following a hung jury, the blood tamper experts, the forensic experts pointing to fiber and pattern images on the bloody shirt pointing to evidence planting, the false confession expert, and the defense fingerprint evidence e identifying to third party guilt scientifically were all precluded in a clear abuse of discretion that cannot be considered fair in any forum. Pet. a236-240, 290-353.

Since the time of the trial, the threshold for expert admissibility has been lowered and diluted, as is referenced and shown in Calleja, 414 N.J. Super. 125 (App. Div. 2010) (admitting into evidence inconclusive DNA result that did not include or exclude defendant as being a contributor to DNA found at the crime scene); See also Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579 (1993); and see State v. Olenowski, 253 N.J. 133 (2023) (embracing lessened expert admissibility standards announced in Daubert).

The late, great Dr. David Bing of CBRL Laboratories in Boston, a pioneer in the use of modern-day forensic DNA analysis techniques, testified in this double murder case that DNA is like a puzzle and the pieces must fit together to ensure the innocent are protected and the guilty are held accountable. As Dr. Bing testified, here, the pieces don't fit. If only Dr. Bing had lived long enough to see the new DNA glove results he would have had the missing piece to the puzzle.

In addition to Petitioner, the police also initially investigated AR's other boyfriend, Eddie Hoffman, who allegedly discovered the bodies. Hoffman lived with

the victims at the time and he acted strangely by not going into the home himself until he had a witness with him when the bodies were first discovered. An autopsy workup put the estimated time of deaths of the two victims within a time range that included the afternoon of September 5, 1989. Hoffman was alone on the porch of the crime scene with no alibi at the time.

The authorities interrogated Hoffman, who provided a stenographic statement. On post-conviction review, however, it was learned through a press statement Hoffman gave in 1998, that Hoffman was about to be arrested for the murders just before Hackensack Police Department Sergeant Mike Mordaga, who worked in the Narcotics Division, vouched for Hoffman, a suspected informant to Mordaga, causing Hoffman to not be investigated any further. Pet. a113-116.

Mordaga had a checkered career filled with hobnobbing with members of organized crime, excessive use of force, and confabulating official police reports. Mordaga had a history of always being in a location where a crime occurred by coincidence or happenstance, and this case involves the same type of fabricated claims by Mordaga. See e.g., State v. Jones, 143 N.J. 4 (1995); State v. Farrad, 164 N.J. 247 (2000).

On September 7, 1989, despite Mordaga's claims to the contrary, Mordaga surveilled Petitioner while walking and then abruptly got out of his vehicle and staged a physical confrontation. Mordaga claimed he approached Petitioner on foot because he wanted to see if his hands had any cuts on them. Petitioner told Mordaga he had cut his hands a few days prior hopping the chain link fence at

Hackensack High School to run on the track. Petitioner's claim about his hand injuries were corroborated at trial by Dr. Frederick Zugibe, a defense expert in pathology. Pet. a210-214. At trial, the judge erred when he refused Petitioner the right to show his hands could not fit into the gloves in front of the jury.

Mordaga was admittedly at the location of the double murder crime scene shortly after the bodies were discovered. Although he was not authorized to enter the scene, Mordaga knew there had been a stabbing involving multiple blood trails. Hackensack police officers loyal to Mordaga assigned to guard the crime scene perimeter did not keep it secure. Pet. 80-82. A pair of surgical gloves were also recovered on the porch of the home. To this day, no police witness can account for them being left at the crime scene. In fact, the police hid the mere existence of these surgical gloves for years and did not have them tested by any laboratory. Pet. a128. Indeed, Mordaga ran a shadow operation while the official investigation was ongoing. Lead Homicide Detective Jay Alpert left the interrogation room never to return after Mordaga put Petitioner under duress. Alpert later testified that no hard evidence supported probable cause to arrest Petitioner at the time Mordaga arrested him. Pet. a82. Mordaga offered to release Petitioner but hold his confession over his head if he would agree to work as an informant for Mordaga in narcotics investigations.

Back in the 1990s, the FBI conducted extensive DNA testing on the gloves using RFLP and PCR DNA testing techniques. Suspected bloody areas of the gloves yielded no results that identified to Petitioner as being a contributor to the blood.

The defense then ran extensive DNA testing on the knife used to murder AR, whose DNA was found on the knife, but Petitioner was excluded as being a contributor to every DNA blood sample result on the knife. The knife also yielded no evidence of glove fibers being on the blade. Unfortunately, at the time of the trial, labs could not test small skin cells found inside the glove's interior to determine the owner and chronic wearer of the garment, so the State was able to argue that Petitioner's DNA merely degraded due to environmental factors. In light of the new DNA results the State can no longer make this excuse.

Some of the 1990s DNA testing yielded results on the gloves and knife exculpating Petitioner, whereas other DNA evidence from blood found in the car and on some other articles of clothing seemingly inculpated Petitioner. Given the foregoing, the defense hired criminalist Dr. Peter DeForest, EDTA blood tamper experts Dr. Kevin Ballard and Dr. Fred Reiders, fingerprint expert Jon Mendres, and false confession expert Dr. Richard Ofshe.

Dr. DeForest determined that fiber evidence and a glove pattern found on the bloody white shirt was evidence of it being potentially planted in the dumpster to fit the facts of the false confession. However, the trial court precluded this expert's testimony. Dr. Ofshe also determined that this was a false confession case. And the lower court again precluded this expert from testifying unless Petitioner agreed to testify.

Dr. Ballard and Dr. Reiders performed significant testing on inculpatory blood DNA evidence and found heightened levels of EDTA only where Petitioner's

DNA profile appears on blood evidence, indicating that police had salted physical evidence with Petitioner's blood originating from a purple top reference sample taken from his person. The blood tampering experts also retested this evidence after the first trial, finding that police tried to wash away EDTA to erase previous acts of blood tampering. These experts were inexplicably precluded from testifying.

During the retrial, defense expert John Mendres discovered that third-party suspect Eddie Hoffman had potentially left his fingerprints in or on top of a bloody utensil drawer in the victims' house, but the State's fingerprint expert concealed this finding. The lower court once again precluded this testimony, in violation of Banks, supra, 540 U.S. at 693. At the conclusion of retrial, the State convinced the jury that the reason Petitioner's DNA was not found on the gloves and the knife was due to environmental factors and degradation., but today we know this to be false because of the chronic wearer/owner DNA test results.

At trial, the State countered the evidence planting photos by having Mordaga bring one of AR's family members to court to give incredulous testimony that right before the first trial she had viewed the crime scene photos and noticed a bloody shirt, which she then claimed for the first time that she had found thirteen days after the murders while cleaning AR's bedroom but then threw in the garbage. AR died on the white shirt and it was under her body, as depicted in crime scene photos. No forensic crime scene unit would leave a bloody shirt behind, but nonetheless the jury believed the witness. If available at the time, the additional

owner/wearer DNA test results on the glove would have repelled against the veracity of this witness, and likely would have led the jury to a different outcome.

The newly discovered evidence vindicates the wrongfully precluded defense experts' conclusions pointing to evidence tampering. Moreover, false confession experts and EDTA testing in the criminal forensic settings have gained acceptance in both the scientific community and in the courts since the preclusion of this evidence in the late 1990s. Pet. a290-355.

The science and acceptance of EDTA testing has progressed since the time of Petitioner's conviction. See United States v. States v. Quiles, 618 F.3d 383, 392 (3d Cir. 2010). In cases from California, see e.g., Cooper v. Brown, 565 F.3d 581 (9th Cir. 2009), and in the Wisconsin murder case against Stephen Avery, EDTA testing was admitted to show that blood from a sample was planted on the physical evidence. EDTA testing pointed to potential tampering was also admitted at the O.J. Simpson trial. Given the advancements in the EDTA science and the positive FBI testimony that occurred in the Avery case supporting Ballard and his EDTA testing techniques, which were also used in Petitioner's case, the tamper testing experts as to the blood associated EDTA should have been admitted.

Also, third-party suspect Eddie Hoffman entered back into the picture in the 1990s when the State at last released fingerprint reports indicating Hoffman's fingerprints on AR's bloody utensil drawer where the murder weapons came from and on AR's bloody car. It was discovered that Hoffman's gym bag contained a spoon with white powder on it and suspected blood drops were seen, with no acceptable

explanation, on magazines in the gym bag, and sensitive family court documents of Hoffman's were located in the glovebox of AR's vehicle. These items should be tested using modern day methods. The state PCR courts abused their discretion in denying discovery and a plenary hearing to further develop evidence of third-party guilt. Pet. a246-258.

Prosecutorial misconduct in the form of Brady violations, false testimony, and intentional tampering and destruction of exculpatory physical evidence denied Petitioner's right to due process and a fair trial. Thus, Mr. Pompey's convictions should be reversed for violations of his 4th, 5th, 6th and 14th Amendment rights, including the right to confront witnesses and to fundamental fairness and a fair trial. The false confession and fruits of the search of Defendant and his home and belongings should have been suppressed under the 4th, 5th, 6th and 14th Amendments.

The lower courts failed to consider the law applicable to the prehearing stage, which affords a petitioner all inferences and benefits from the evidence brought forth. Moreover, the trial court would not have precluded Petitioner's experts and scientific evidence had the STR DNA evidence been available at the time of trial.

False confession science and case law has also evolved since Petitioner's trials in the 1990s. The case law on false confession expert testimony has since favored admission rather than preclusion. See, e.g.,, State v. Free, 351 N.J. Super. 203 (App. Div. 2002); State v. Patton, 362 N.J. Super. 16 (App. Div. 2003), State v. Chippero, 164 N.J. 342 (2000) (false confession expert Dr. Ofshe testified). It can no longer be

disputed that a frighteningly high percentage of people confess to crimes they never committed. See Corley v. United States, 556 U.S. 330, 321 (2009).

In State v. King, 387 N.J. Super. 522 (App. Div. 2006), it was acknowledged that because the indices prevalent in false confession cases are not readily apparent, false confession evidence should be permitted. Based on the decision in King, there is no legal reason to support the experts' preclusion. Had the jury heard the false confession expert at trial, there is a probability that the result would have been different. False confessions are prevalent in the American legal system and are "commonly thought to be obtained as a result of interrogation tactics." Shawn Armbrust, "Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look", 28 B.C. Third World L.J. 75, 95 (2008) (citation omitted). Moreover, the vast majority of false confession cases also involve official misconduct. See Nat'l Registry of Exonerations, Exoneration Detail List (the "National Registry"); Samuel R. Gross and Michael Shaffer, "Exonerations in the United States," 1989-2012: Report by the National Registry of Exonerations (2012). An ever-growing body of evidence shows that police interrogation tactics are the primary cause of false confessions. See Richard A. Leo et al., "Bringing Reliability Back in: False Confessions and Legal safeguards in the Twenty-First Century," 2006 Wis. L. Rev. 479, 516 (2006).

Respondents have argued that Petitioner already had the opportunity to prove the confession was false at trial by presenting chain of custody reports; internally inconsistent police testimony regarding the date of discovery and location

of the glove; and photos of clothing collected as evidence depicted in the original crime scene where the murders occurred and the same clothes appearing two days later in secondary and tertiary crime scenes. If the undersigned had the new DNA results the tables would be turned against the prosecution and it would have made all the difference with the jury.

As in State v. Carter, 84 N.J. 384 (1980) and 91 N.J. 86 (1982), and Carter v. Rafferty, 826 F.2d 1299 (3d Cir. 1987), the unpleasant facts implicate police officers in serious acts of misconduct, together with prosecutorial acts of suppression and manipulation of exculpatory evidence. Thus, Petitioner implores this Court to grant Certification and order a plenary evidentiary hearing, along with additional DNA testing previously denied by the lower courts, which abused their discretion by refusing to order additional DNA testing. These tests should be ordered now before Mr. Pompey dies in prison.

CONCLUSION

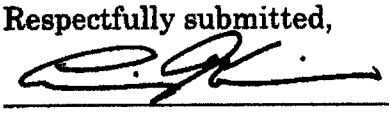
Petitioner has grown weary in his last and final grasp for justice yet turns now to this Honorable and Highest Court seeking relief. The new DNA results from the glove prove that the defense's theory, and all of the precluded defense experts, were correct about the purported confession being false. New testing results also support the defense's theory that authorities salted Petitioner's blood (obtained from a "purple top" sample vial that contained pristine blood rife with DNA) on physical evidence while taking photographs of the crime scene. This is the only possible explanation for the conflicting DNA results in this case. There is actual

proof now that the glove was torn by the police to roughly fit to the cuts on Petitioner's hand. These were the hallmark centerpieces of the State's case-in-chief, and therefore the truth and equitableness of Mr. Pompey's convictions depend upon the veracity of this evidence, which has been shown to be compromised.

Today, however, follow-up DNA testing could inculpate a named third-party suspect whose belongings were at the scene of the crime and appears to have left a patent fingerprint on top of a blood stain. Any possible fingerprints in or around blood from the drawer where the murder weapon came from should be tested, along with the semen sample from the rape kit, and any other items that tested presumptively positive for the presence of semen but were surreptitiously withheld by the State.

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

by: 

ERIC V. KLEINER, ESQ.
385 Sylvan Ave.
Suite 29, 2nd Floor
Englewood Cliffs, NJ 07632
Pro Bono Attorney for Petitioner,
Josh Pompey

Dated: November 9, 2024

No. _____

SUPREME COURT OF THE UNITED STATES

JOSH POMPEY,

Petitioner,

vs.

ADMINISTRATOR NEW JERSEY STATE PRISON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

PETITIONER'S APPENDIX A

PETITIONER'S APPENDIX A

CLD-156

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **24-1048**

JOSH POMPEY, Appellant

VS.

ADMINISTRATOR NEW JERSEY STATE PRISON; ET AL.

(D.N.J. Civ. No. 2-23-cv-00324)

Present: KRAUSE, FREEMAN, and SCIRICA, Circuit Judges

Submitted are:

(1) By the Clerk for possible dismissal due to a jurisdictional defect;

(2) Appellant's jurisdictional response;

(3) Appellees' reply to the jurisdictional response;

(4) Appellant's application for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

(5) Appellees' motion to file an opposition brief to the application for a certificate of appealability; and

(6) Appellees' response in opposition

in the above-captioned case.

Respectfully,

Clerk

Pet. a 1

JOSH POMPEY, Appellant

VS.

ADMINISTRATOR NEW JERSEY STATE PRISON; ET AL.
C.A. No. **24-1048**
Page 2

ORDER

Because the District Court granted Appellant's motion to extend the time to appeal under Federal Rule of Appellate Procedure 4(a)(5), we decline to dismiss the appeal as untimely. The request for a certificate of appealability is denied. As the District Court explained, Appellant's habeas corpus petition is time barred and statutory tolling does not render his petition timely. 28 U.S.C. § 2244(d)(2). In particular, even assuming that a motion for DNA testing under N.J.S.A. § 2A:84A-32a could toll the limitations period under 28 U.S.C. § 2244(d)(2), the petition was untimely filed. Before the DNA motion was filed in 2007, 104 days of the limitations period expired; it would have resumed on January 28, 2022, when the Supreme Court denied certification from the order affirming the denial of the "successor" PCR petition and the motion for a new trial, and then run for the next 261 days until expiring on Monday, October 17, 2022 (the 365th day being a Sunday). Pompey did not file his habeas petition until January 20, 2023, over three months later. Nor is there a sufficient basis in the record for equitably tolling the limitations period. See Holland v. Florida, 560 U.S. 631, 645 (2010) (§ 2244(d) is subject to equitable tolling). For substantially the reasons provided by the District Court, Appellant has failed to demonstrate "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." See McQuiggin v. Perkins, 569 U.S. 383, 399 (2013) (citation omitted). Accordingly, we conclude that jurists of reason would not "find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citing 28 U.S.C. § 2253(c)). Appellees' motion to file an opposition brief to the application for a certificate of appealability is granted.

By the Court,

s/Anthony J. Scirica
Circuit Judge

Dated: August 16, 2024
CJG/cc: Eric V. Kleiner, Esq.
William P. Miller, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

Pet. 92