

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

REGINALD S. LEWIS

Petitioner,

v.

DAVID WETZEL, Commissioner, Pennsylvania Department of Corrections;
CYNTHIA LINK, Superintendent of the State Correctional Institution at
Graterford; DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY; ATTORNEY
GENERAL OF PENNSYLVANIA

Respondents.

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

REGINALD S. LEWIS, *PRO SE*
#AY2902
SCI-Graterford
Box 244
Graterford, Pennsylvania 19426

November 8, 2017

QUESTIONS PRESENTED

Should the Court review Your Petitioner's *WILLIAMS V. PENNSYLVANIA* claim, where Third Circuit Judge D. Michael Fisher, a former State Senator, and twice-elected Attorney General, refused to recuse himself from petitioner's Capital Habeas Corpus proceeding?

Should the Court review the Third Circuit's Federal Forfeiture Rule, first adopted in *Abu-Jamal* and subsequently used to procedurally bar Your Petitioner's *Batson* claim and other Pennsylvania death row appeals raising *Batson* claims thereafter?

Should the Court review Your Petitioner's *Brady* claim, where the Commonwealth suppressed exculpatory evidence supporting Petitioner's alibi defense?

Should the Court remand Your Petitioner's Rule 60(b)(6) Motion to the Third Circuit Court of Appeals for a Merit Analysis pursuant to the Court's ruling in *Buck v. Davis*?

LIST OF PARTIES

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

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APPENDIX A ORDER: Dated: August 15, 2017. SUR PETITION FOR REHEARING, IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DC-00802, DENIED. BEFORE: SMITH, *Chief Judge*, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and SCIRICA, Circuit Judges.

APPENDIX B ORDER: Dated: July 13, 2017. IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, C.A. No. 17-1604, (E.D. PA. Civ. No. 2-00-cv-00802.) (1) APPELLANT'S REQUEST FOR A CERTIFICATE OF APPEALABILITY Under 28 U.S.C. § 2253 (c) (1); and APPELLANT'S REQUEST FOR A CERTIFICATE OF APPEALABILITY, DENIED, BEFORE: AMBRO, GREENAWAY, JR., and SCIRICA, Circuit Judges.

APPENDIX C ORDER: Dated: February 16, 2017. IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA. No: 00-802. Petitioner's *Pro Se* MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(6). Document 89. DENIED. BEFORE: BERLE M. SCHILLER.

APPENDIX D ORDER: Dated: September 14, 2009. UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT. Nos. 06-9007 and 06-9008. (D.C. No. 00-cv-00802), AFFIRMED in part, VACATED in part. Matter remanded to the District Court for further Proceedings. BEFORE: SMITH, FISHER and VAN ANTWERPEN, Circuit Judges.

APPENDIX E OPINION. (Filed: September 14, 2009), Nos. 06-9007 and 06-9008, (D.C. No. 00-cv-00802), BEFORE: SMITH, FISHER, and VAN ANTWERPEN, *Circuit Judges*. OPINION OF THE COURT: FISHER, Circuit Judge.

APPENDIX F MEMORANDUM AND ORDER. Dated: August 9, 2006. IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA. (Capital Case). No. 00-cv-802. BEFORE: Judge BRUCE KAUFFMAN. Entered: August 10, 2006.

APPENDIX G OPINION. *Commonwealth v. Lewis*, 567 A.2d 1376 (PA. 1989).

APPENDIX H NOTICE TO DENY/DISMISS POST-CONVICTION RELIEF, PURSUANT TO PA.R.C.P. 1507. MEMORANDUM. Dated: January 15, 1997. Court of Common Pleas, Philadelphia County. BEFORE: ALBERT F. SABO, Judge.

APPENDIX I OPINION. *Commonwealth v. Lewis*, 743 A.2d. 907 (2000).

APPENDIX J REGINALD LEWIS' MOTION FOR RECUSAL OF JUDGE FISHER.

Dated: January 2, 2008.

APPENDIX K Pennsylvania's CODE OF JUDICIAL CONDUCT.

APPENDIX L OPINION. *Abu-Jamal v. Horn*, 520 F. 3d 272, (3rd Cir. 2008).

APPENDIX M LAST PAGE OF DIRECT APPEAL BRIEF TO THE PENNSYLVANIA STATE SUPREME COURT. Donald M. Padova, Appellate Counsel for Your Petitioner, "Request for Remand and Evidentiary Hearing" on the *Batson* claim.

APPENDIX N Application for a *Pro Se* MOTION FOR POST CONVICTION RELIEF.

Dated: August 3, 1995. Appended to PRO SE BRIEF IN SUPPORT OF DEFENDANT'S POST-CONVICTION RELIEF ACT MOTION, (Raising *Batson* claim).

APPENDIX O ARTICLE: Entitled: "Debunking the Prosecution's Motive Which Prejudiced the Defendant and Inflamed the Passions of the All-White Jury." AUTHOR: REGINALD S, LEWIS.

APPENDIX P Transcript: Court of Common Pleas, Philadelphia County. Relevant parts of Cross-Examination of Commonwealth Witness Hattie English.

APPENDIX Q "New Evidence:" TRANSCRIPT: ARGUMENT ON MOTIONS FOR A NEW TRIAL AND/OR ARREST OF JUDGMENT/SENTENCING.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253 (c) (1) and (2)

28 U.S.C. § 2254 (d) (1), and (e) (2)

42 PA. C.S.A. Sec. 9545 (d)

Article V, Section 10, Constitution of Pennsylvania

Pennsylvania **CODE OF JUDICIAL CONDUCT**

Federal Rule 60 (b) (6)

28 U.S.C. § 455 (a)

Fourteenth Amendment to the U.S. Constitution

Sixth Amendment to the U.S. Constitution

42 Pa. C.S. § 9711

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix E to the petition and is

☒ reported at Lewis v. Horn, 581 F.3d 92, (3d. Cir. 2009); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix F to the petition and is

☒ reported at Lewis v. Horn, No.00-civ-802,2006 WL 233409, or, (E.D. Pa. 8-9-2006)
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix G to the petition and is

☒ reported at Commonwealth v. Lewis, 567 A.2d 1376, (Pa. 1989), or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the PCRA/Pennsylvania Supreme Court court appears at Appendix I to the petition and is

☒ reported at ~~Commonwealth v. Lewis, 743 A.2d. 907, (2000)~~, or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 14, 2009.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 15, 2017, and a copy of the order denying rehearing appears at Appendix A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

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

☒ For cases from **state courts**:

The date on which the highest state court decided my case was December 22, 1989. A copy of that decision appears at Appendix G.

☒ A timely petition for rehearing was thereafter denied on the following date: April 10, 2000, and a copy of the order denying rehearing appears at Appendix I.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATEMENT OF THE CASE

Your Petitioner, REGINALD S. LEWIS, African-American, was charged with the stabbing death of Christopher Ellis, a 250lb pimp in a barroom on November 21, 1982. Several eye-witnesses gave statements to the Philadelphia police that contained descriptions of the culprit that significantly varied in size, height, age, weight and complexion. During *voir dire*, in the Court of Common Pleas, before Judge Albert F. Sabo, both your Petitioner and defense counsel objected to the prosecutor using twelve peremptory challenges to strike African-Americans from the jury. An *all-white* jury was seated. On August 12, 1983, your petitioner was convicted of first degree murder and following a penalty phase hearing was subsequently sentenced to death. At trial, your petitioner asserted the affirmative defense of alibi. From the time of arrest on January 25, 1983, petitioner maintained that he was in San Diego, California, visiting his younger brother, U.S. Marine Sergeant Michael Bernard Lewis, before, during, and after the offense. A self-employed ladies jewelry and perfume salesman, this petitioner, at the time of arrest, had a black briefcase in his possession that also contained documentary evidence that substantiated his alibi including dated bus ticket stubs from Philadelphia, Pennsylvania, to San Diego, California. The arresting officer, a white Philadelphia Homicide Detective, named Robert Kane, seized the black briefcase without a warrant. Petitioner never saw it again. At the suppression hearing (and when no jury was seated) Detective Kane testified that he had, indeed, examined the contents of the briefcase; he saw the dated bus ticket stubs, and testified that he'd removed two documents from the briefcase.

However, at trial, Detective Kane changed his testimony. He testified to seeing the dated bus ticket stubs, among other items but left the contents inside the briefcase. The Commonwealth failed to correct Detective Kane's testimony. And had full knowledge that your petitioner, at the time of arrest, possessed exculpatory evidence and withheld it from the defense. When this petitioner was informed Third Circuit Judge D. Michael Fisher, a former twice elected Attorney General, and state senator who'd co-authored Pennsylvania's death penalty statute, would be sitting on a panel hearing petitioner's (then) Capital Habeas Corpus appeal, petitioner filed a Motion for Recusal because his participation as a judge on the three-judge panel violated this petitioner's Due Process Rights under the Fourteenth Amendment to the U.S. Constitution, as well as 28 U.S.C. § 455(a), and several canons of Pennsylvania's CODE OF JUDICIAL ETHICS. Your petitioner's Recusal Motion was denied. The panel subsequently denied petitioner's *Brady* claim, and imposed a "Federal Forfeiture Rule," first adopted in *Abu-Jamal*, procedurally barring this petitioner's *Batson* claim.

REASONS FOR GRANTING THE PETITION

Your petitioner, **REGINALD S. LEWIS**, asks this Honorable Court of the United States Supreme Court to grant this Writ of Certiorari for the following "Compelling Reasons:"

Third Circuit Chief Judge D. Michael Fisher was one of the Chief architects of Pennsylvania's death penalty statute. He was twice elected Attorney General of Pennsylvania, where he has expressed adversarial views about his ardent support of Capital Punishment, and has received funding while in office to track, monitor, and oppose appeals by death row inmates, and your petitioner's appeal was among one of those cases Judge Fisher should have recused himself from on the Third Circuit. This refusal conflicts with the Court's ruling in WILLIAMS V. PENNSYLVANIA.

The "Federal Forfeiture Rule," the Third Circuit first implemented in Abu-Jamal v. Horn, should be reviewed by this Court for the following compelling reasons: (a) The United States Court of Appeals for the Third Circuit Federal Forfeiture Rule is a decision that has far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court, meaning the District Court for the Eastern District of Pennsylvania and the Pennsylvania Supreme Court, which did not impose such a procedural bar on Capital Case petitioner's-and the rule is unconstitutional and conflicts with the decisions of other circuits as well as this Court. The rule has been imposed on numerous other petitioners seeking relief from judgment on Batson violations. No state or federal court in Pennsylvania has ever granted your petitioner an evidentiary hearing on the prosecutor's use of

peremptory strikes to remove eight(8) African-Americans from the jury in violation of Batson v. Kentucky, though the record is replete with the names, numbers of each juror, evidence abounds of the illegally impaneled Death-qualified, Conviction-prone, "All-White Jury" in your petitioner's case-these compelling questions has never been answered because every court in the state of pennsylvania has ignored them.

A white Homicide Philadelphia Detective admitted to illegally removing documents from this petitioner's black briefcase that would have supported his alibi defense and exonerated your petitioner-yet, again, these important questions of constitutional law have been long ignored and conflicts with the relevant decisions of this Court.

These are compelling reasons why the Court should grant Certiorari.

ARGUMENT

I. JUDGE FISHER'S REFUSAL TO DISQUALIFY HIMSELF VIOLATED THE COURT'S RULING IN *WILLIAMS V. PENNSYLVANIA*

Shortly after the Court's powerful ruling in *WILLIAMS V. PENNSYLVANIA*, your petitioner, REGINALD S. LEWIS, filed a Motion for Relief from Judgment pursuant to Rule 60(b) (6), in the District Court for the Eastern District of Pennsylvania, wherein petitioner cited the new constitutional rule of law announced in *Williams* definitively responding to "The question is whether the justice's denial of the recusal motion and his subsequent participation violated the Due Process Clause of the Fourteenth Amendment."

Well before the briefing schedule, filings, supplemental motions, oral arguments in your petitioner's Habeas Corpus proceeding in the 3rd Circuit Court of Appeals, a REGINALD LEWIS' MOTION FOR RECUSAL OF JUDGE FISHER, dated, January 2, 2008, was filed in the 3rd Circuit. (See APPENDIX J). On January 23, 2008, the 3rd Circuit denied the recusal motion-"without any explanation."

Your petitioner had asked the District Court to examine the new rule of law and Constitutional mandate from the U.S. Supreme Court, where, Justice Kennedy, writing for the majority, in his infinite wisdom, stated: "This Court has little trouble concluding that a due process violation arising from the participation of an interested

¹So as to remove any confusion as to the identity of the writer of this petition in the constant usage of the first person pronoun "I" or "Me," petitioner refers to oneself as "Your Petitioner" or "This Petitioner."

judge is a defect not 'amenable' to harmless-error review, regardless of whether the judge's vote was dispositive." *Puckett v. United States*, U.S. 129, 141, (2009).

Judge D. Michael Fisher' participation as an interested judge during your petitioner's habeas proceeding is certainly a "defect not amenable to harmless-error review." How advantageous for the judge to have been the sole author delivering the opinion in ²*Lewis v. Horn*, 581 F.3d 92 (3rd Cir. 2009), wherein he clearly demonstrated a bias which "...is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal C.*, 556 U.S. 868, 872(2009).

Under 28 U.S.C. § 455(a), states, in part:" [a]ny...judge...of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The spirit and motivation of the language governing the ethical behavior and conduct of judges is not dissimilar in Pennsylvania's Code of Judicial Conduct. Rule 2.11. Disqualification, (a), which states, in part: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned..." (See APPENDIX K).

Before being appointed to the Federal Bench-Judge Fisher enjoyed a long, illustrious career as a prominent State Senator, where he became the architect and co-author of Pennsylvania's Death Penalty Statute. (See *42 Pa. C.S. § 9711*). He went on to become the twice-elected Attorney General of Pennsylvania. His office requested

²*Lewis v. Horn*, 581 F.3d 92, (3d Cir. 2009), is listed in the Index of APPENDICEX as APPENDIX E, and will be referred to as *LEWIS-4*. Opinions *Commonwealth v. Lewis*, 567 A.2d 1376(Pa. 1989), *Commonwealth v. Lewis*, 743 A.2D 907(Pa. 2000), and *Lewis v. Horn*, No. 00-Civ-802, 2006 WL 233409 (E.D. Pa. Aug 9, 2006), are cited herein, as is.

and received significant funding for an “Orwellian-like” Capital Habeas Unit responsible for tracking, monitoring, opposing, and ultimately defeating every stage and level of countless Pennsylvania death row inmates’ appeals. Section (b), Code of Judicial Conduct, also ask of Judges to disqualify themselves if they “Served in Governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy.” The Attorney General, we know, serves in a “governmental capacity,” represents the governmental arm of the state, opposes appeals, prosecutes crimes, implements policies, and takes an adversarial position against litigants and plaintiffs and defendants who do not represent the interests of the state.

Third Circuit Judge D. Michael Fisher has often publicly expressed views concerning “particular matters in controversy”- CAPITAL PUNISHMENT- and boasted that he is the architect of Pennsylvania’s death penalty.

As the Court explained in *WILLIAMS*, “When a judge has served as an *advocate for the state* in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome.” *WILLIAMS* at 7.

More egregiously, Robert Graci, Esquire, served as a “Senior Attorney” in the Pennsylvania office of the Attorney General and is listed among counsel for the Commonwealth in the reported opinion, *Commonwealth v. Lewis*, 743 A.2d 907 (Pa.2000). Code of Judicial Conduct, 2.11.(6) (a), states, in part: “....serve as a lawyer

in the matter in controversy or was associated with a lawyer who participated substantially as a lawyer in the matter during such association.”

We can more than assume the Court was deeply concerned about this issue which was addressed in *WILLIAMS*: “The involvement of other actors and the passage of time are consequences of a complex criminal justice system, in which a single case may be litigated through multiple proceedings taking place over a period of years...within a large, impersonal system, an individual prosecutor might still have an influence that, while not so visible as the one-man grand jury in *Murchinson*, is nevertheless significant.”

During a debate with Democratic opponent Edward Rendell in (Fisher’s) unsuccessful campaign run for Governor of Pennsylvania, Third Circuit Judge Fisher discussed the critical need to expedite or speed up death row appeals and he said “I’ve fought since [the death penalty was enacted] to make sure it’s been enforced.” And on the question of why there were so few executions in the state of Pennsylvania: “It’s been frustrating because of all the delays and hurdles thrown up by the courts,” Fisher said. (See Chris Osher, *Views on Abortion Split Rendell, Fisher*, Pittsburgh Tribune-Review, October 28, 2002.)

And as in *WILLIAMS*, where the Court noted Pennsylvania Supreme Court Justice Castille’s adversarial remarks about *the matter in controversy* in “multiple news outlets” during his campaign election-so too, had Fisher made similar remarks about *the matter in controversy* in “multiple news outlets.”

I was one of the architects of our death penalty statute in 1978, as attorney general I’m a strong supporter of the death penalty for those

cases of heinous capital offense where someone has been killed and they fall into that category-when you kill a police officer, where it's a contract killing-and once the courts have spoken and once the jury has spoken and once a case has been reviewed by the appellate courts time after time, it's the governor's obligation to sign those death warrants.

(See: Interview, Attorney General D. Michael Fisher, by Stacy Smith and Tracey Matisak, "Issues PA: Meet the Candidates," April 23, 2002.)

At the *Confirmation Hearings on Federal Appointments Before the Committee on the Judiciary*, Senator Diane Feingold referenced Judge Fisher's earlier testimony before the Committee where he complained about the judicial process involving the "...delay between the imposition of a death sentence and having it carried out is already too great." (S. Hrg. 108-135, pt. 5.)

In the Lancaster Intelligencer Journal, February 23, 2000, Fisher said he "has found no evidence of innocent people sentenced to death." In another interview: "We don't need a moratorium," Fisher has said. "We need justice to be done. Enough is enough." (Lancaster Intelligencer Journal, July 13, 2000 at B-1.)

In other media interviews Fisher clearly showed a bias and racial insensitivity demonstrative of a mindset with a predisposition to dismiss your petitioner's *Batson* claim. Of an Amnesty International study that found Philadelphia was the "most racially biased jurisdiction in the United States," Fisher rebutted that assertion as being "absolutely devoid of any foundation." (See *State Accused of Race Bias for Death Row*, Pittsburgh Post-Gazette, November 27, 1997 at B-9).

At his Confirmation Hearing for Appointment to the Federal bench, Fisher told the panel that in Philadelphia, African-American capital case defendants

“...have an overwhelming number of blacks on those juries.” (See *Pa. Official, Death-Penalty Foes Debate; The State Bar Association Has Come Out Against It. One Objection is the Number of Blacks on Death Row*, Philadelphia Inquirer, May 15, 1998 at B-4.) During the same panel discussion, Judge Fisher rebutted arguments that the “state’s legal system is inherently discriminatory.”

Code of Judicial Conduct, Rule 2.11. (a) (5), states, in part: “the judge, while a judge or a judicial candidate, has made a public statement *other than in a court* proceeding, judicial decision, or opinion, that commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy.”

Then what more of a “critical decision” Judge Fisher has made in the “matter in controversy” than to have been the chief architect of the death penalty statute in Pennsylvania, then to go on to be twice-elected as Pennsylvania’s “Top Cop,” or Attorney General, where he’d unabashedly voiced his staunch conservative views as an ardent proponent of capital punishment, and his office was approved was approved for funding for an all-encompassing intelligence unit that tracked, monitored, opposed and in most cases ultimately defeated countless appeals by Pennsylvania death row prisoners. Your petitioner was one of those cases tracked and monitored by the Attorney General’s Capital Habeas Unit. Your petitioner’s appeals were pending throughout both terms of Fisher’s position as Attorney General.

In *WILLIAMS V. PENNSYLVANIA*, “The Court asks not whether a judge harbors an actual, subjective bias, but instead, whether, as an objective matter, ‘the

average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for .’” *Caperton*, 556 U.S. at 88

Returning to Pennsylvania’s Code of Judicial Conduct, Rule 2.3. Bias, Prejudice, and Harassment, (a), states: “A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.”

The above-mentioned rules were promulgated by the Pennsylvania State Supreme Court that intends the entire rules to be effective, certain, and enforceable. That the Pennsylvania Supreme Court does not intend to violate the Constitution of the United States or of the Commonwealth of Pennsylvania. Yet, Judge D. Michael Fisher violated “multiple” canons of Pennsylvania’s Code of Judicial Conduct in his refusal to recuse himself from your petitioner’s habeas proceedings. The judge’s assertion that the state did impose the death sentence “In an arbitrary or discriminatory fashion,” is both blatantly false and intellectually disingenuous. The facts show that Philadelphia County has a long, painful history of racial discrimination in the jury selection process. This was made evident in the Pennsylvania Supreme Court’s “Committee on Racial and Gender Bias in the Justice System,” where the committee found “*alarming results*” in Capital cases of white

prosecutors “striking African-Americans from the jury twice as often as non-blacks.(See “Bias Report.” (www.courts.state.pa.us/index/Supreme/biasreport.htm.)

The shocking statistics tragically mirrors the findings pointing to racial discrimination in the jury selection process compiled during the decade long study by University of Iowa Professors David Baldus and George Woodworth-(The “Baldus/Woodworth study.”). And while Judge Fisher feigned ignorance of the historical data of race bias in Philadelphia County’s jury selection process-he had to have known that at the time of your petitioner’s murder trial in 1983-Pennsylvania case law permitted prosecutors to exclude blacks and women from serving on juries.(See *Commonwealth v. Henderson*, 438 A.2d 951 (Pa. 1981.) And judge Fisher had to have known that a mere few months after the Court handed down *Batson v. Kentucky*, 476 U.S. 79, (1986)-a videotape revealed that it was actually common policy and practice for prosecutors to discriminate against blacks during jury selection. (See “DATV Productions,” *Jury Selection*, with Jack McMahon,(“Training Tape.) This was a scandal that was covered by almost every major news outlet in the United States-and several countries abroad.

Judge Fisher’s intrinsic, and deeply entrenched views on race is a defect that tainted the entire proceeding in *Lewis-4*. As the Court stated in *WILLIAMS*, due process entitles your petitioner to “...a proceeding in which he may present his case with ‘assurance’ that no member of the court is ‘predisposed to find against him’.” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242. (1980).

II. THE UNITED STATES SUPREME COURT SHOULD REVIEW THE THIRD CIRCUIT'S FEDERAL FORFEITURE RULE

Your petitioner avers that the 60(b) (6) Motion filed in the District Court for the Eastern District of Pennsylvania, met the "extraordinary-circumstances" requirement in the showing of reasonable diligence in seeking relief moreso based on the new constitutional rule of law in *WILLIAMS*, and that your petitioner clearly showed that there is probable merit to the underlying *Batson* and *Brady* claims.

In 60 (b) (6) motion, your petitioner presented questions of "exceptional importance" in showing the Third Circuit's "Federal Forfeiture Rule" violates the "contrary to" clause as well as "involved an unreasonable application of...clearly established Federal law, as determined by the Supreme Court of the United States. In the 60 (b) (6) motion, your petitioner also cited cases that made the showing that the Third Circuit's Federal Forfeiture Rule clearly conflicts with decisions of other Courts of Appeal.

In *Lewis-4*, the Third circuit denied your petitioner's *Batson* claim by applying the *Federal Forfeiture Rule* that was first implemented in *Abu-Jamal v. Horn*, 520 F. 3d 272 (3d Cir. 2008). Writing for the three-judge panel, Judge Fisher misrepresented the facts and ignored the District Court's ruling that rejected the alleged procedural bar. Judge Fisher wrote: "The Pennsylvania Supreme Court determined that this claim was waived because '[T]he version of the PCRA in effect at the time [Lewis] filed the instant petition provided that an issue is waived 'if it could have been raised...in a prior proceeding. It also explained that this particular claim was 'not raised before the PCRA court in [Lewis's] Objection to the PCRA

court's notice of intent to dismiss," at 909 n. 2, and the doctrine of 'relaxed waiver' does not apply to claims made in capital PCRA petitions." (*Lewis-4*, at Page 24.)

But Judge Fisher knew full well that District Court Judge Bruce Kauffman rejected the Commonwealth's argument that the *Batson* claim was procedurally barred. Judge Kauffman wrote: "Thus, at the time of Petitioner's direct appeal in 1984, the Pennsylvania Supreme Court *did not consistently and regularly apply the PCRA waiver rules*. To the contrary, the Court appeared to disregard the PCRA waiver rule in favor of a more relaxed standard that permitted review of all capital claims, even those not raised on direct appeal. Accordingly, because the PCRA waiver rule applied by the Pennsylvania Supreme Court in Petitioner's appeal was *firmly established and regularly followed until 1998*, several years after the alleged procedural default occurred, it cannot be considered 'adequate,' and this Court is not barred from considering claims...and on the merits despite the Supreme Court's ruling that they were procedurally waived." (Emphasis added.)

Thus, the Federal Forfeiture Rule, used as the basis to deny your petitioner relief from judgment in his habeas proceeding, and thereafter, 60(b) (6) motion, is *ad hoc*, "legal fiction," a cruel invention never heard of before in a state court proceeding.³Your petitioner has at no time during the appeal process waived the *Batson* claim.

³See APPENDIX M, which is the "Last Page of Direct Appeal Brief to the Pennsylvania Supreme Court requesting a "Remand and Evidentiary Hearing on the *Batson* claim. APPENDIX N: *Pro Se* MOTION FOR PCRA RELIEF, Attached to *Pro Se* Brief raising *Batson* claim.

The court should note that although *Abu-Jamal v. Horn* was decided one year before your petitioner's habeas proceeding *Lewis-4* unfortunately, followed, where the Third Circuit imposed the draconian federal forfeiture rule. (See APPENDIX L, *Abu-Jamal v. Horn*, 520 F. 3d 272, (3rd Cir. 2008). The United States Supreme Court has said a rule cannot be "adequate" unless it is "firmly established and regularly followed" at the time the alleged default occurred. *Ford v. Georgia*, 498 U.S. 411, 423-24, (1991). Also *James v. Kentucky*, 466 U.S. 341, 348, (1984). (Rule must be "clear, firmly established, and regularly followed.") Moreover, both the Pennsylvania District Court and the Third Circuit (*well before Abu-Jamal*) rarely prevaricated from their collective reasoning and uniformity on this issue in past rulings and even the Third Circuit has clearly ruled on this issue in *Cabrera v. Barbo*, 175 F. 3d 307, 313, (3d Cir. 1999.) Writing: "[A]n adequate procedural ground is predicated on procedural rules that *speak in unmistakable* terms...[T]he procedural disposition must comport with similar decisions in other cases so there is a *firmly established* rule that is *applied in a consistent and regular manner in the vast majority of the cases*. Of course, these conditions must have *existed at the time of the state court procedural default*."

In *Lewis-4* and in support of their reasoning for applying the procedural bar of my claims Judge Fisher cited *Doctor v. Walters*, 96 F. 3d 675, 678, 684-86, (3d Cir. 1996), but Fisher mischaracterizes the intent of the language. Writing: *See Doctor*, 96 F.3d at 684, ("Explaining that the relevant time for determining whether

a rule was firmly established and regularly applied is not when the state court relied on it, 'but rather...the date of the waiver that allegedly occurred.'")

But this, of course, is garbled "doublespeak," because the language in *Doctor* is clear: ("State rule that Petitioner waived direct appeal claims by escaping from prison during 1986 trial, not adequate because not firmly established at the time of the escape; relevant date for determining 'whether the rule was firmly established and regularly applied, [was] not in 1993, when Superior Court relied upon it [to bar the claims], but rather as of the date of the waiver that allegedly occurred when Doctor escaped in 1986. ' ") In other words, the Judges on the Third Circuit clearly admitted that *Doctor's claims were* not procedurally barred at the time of his escape from prison in 1986 and the Superior Court's reliance on it in 1993 was incorrect.

Going further on the issue the Commonwealth cannot produce to the Court "a single state case" where the "federal forfeiture rule" was used to bar a state prisoner's claims in any level of appeals in this state. The ink indelibly etched in cases on this issue compiled in the law books lining shelves in law libraries are empty. Because there are none. However, there's a long line of cases in Pennsylvania have consistently held that there was and is no adequately, regularly, and firmly established procedural bar rules in Pennsylvania capital cases. For the sake of brevity, I will mention several herein. See *Laird v. Horn*, 159 F Supp. 2d. 58, 73-75, (E.D. Pa. 2001)-was one of the "first" death penalty cases to address the adequate state procedural posture that did not bar federal review of habeas claims unless the state procedural rule was firmly established and regularly followed at the time the

alleged default occurred. There are similar holdings following *Laird* in *Jermyn v. Horn*, 266 F.3d 257, 278-79 (3d Cir. 2001.) (“Pennsylvania Supreme Court’s denial of capital PCRA claims on procedural grounds not adequate state ground.”) Also *Banks v. Horn*, 126 F.3d 206, (3d Cir. 1997). *Fahy v. Horn*, 240 F.3d 239, 245, (3d Cir. 2001). *Jacobs v. Horn*, 129 F. Supp. 2d 390, 397-99, (M.D. Pa. 2001). *Peterkin v. Horn*, F. Supp. 2d-2001 WL 1382512 *4-* 6(E.D. Pa. Nov 7, 2001.) *Bronshtein v. Horn*, 2001 WL 767593 (E.D. Pa. July 5, 2001.)

In *Walker v. Attorney General*, 167 F. 3d 1339, 1344-45, (10th Cir. 1999), the Court explained: “A Defendant cannot be expected to comply with a procedural rule that does not exist at the time, and should not be deprived of a claim for failing to comply with a rule that only comes into being after the time for compliance has passed.” Returning to the Third Circuit’s own rulings on this issue, *Reynolds v. Ellingsworth*, 843 F. 2d. 712, 712, (3d Cir. 1988), held: “State Court bar on Post-Conviction claim, because not preserved by objection at trial, not adequate because contemporaneous objection requirement not clearly and firmly established at time of trial.”

In the dissent in *Abu-Jamal*, 520 F. 3d 272, (3rd Cir. 2008), Judge Scirica agreed with the Third Circuit’s earlier and (correct) reasoning on this issue. Writing: “we are not aware of any of our prior state habeas corpus cases (28 U.S.C. § 2254) squarely raising the issue of whether a timely or contemporaneous objection is a prerequisite to a *Batson* claim, so we have not yet directly addressed the issue in any of our prior state habeas cases.” (*Dissent at 1.*)

Judge Scirica then pointed us to *Gov't of Virgin Islands v. Forte*, 806 F. 2d 73, (3d Cir. 1986). Forte was a "white" defendant and "Federal" prisoner convicted of the rape and sexual assault of a black woman in the Virgin Islands. He'd raised a claim of discriminatory jury selection after prosecutors struck whites from the jury, in violation of *Batson v. Kentucky*. His claim was barred under Federal Rules of Criminal Procedure 52 (b), of the "Contemporaneous Objection Rule," a rule this Court has cautioned, should be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." (quoting *United States v. Frady*, 456 U.S. 152, 163 & N. 14, 71 L. Ed. 2d 816, 102 S. Ct. 1584 (1982); *United States v. Atkinson*, 297 U.S. 157, 160, 80 L. Ed. 555, 56 S. Ct. 391 (1936).

In denying *Forte relief*, the 3rd Circuit went on to state that "...during trial, the court and opposing parties are justified in expecting litigants to raise their objections at the procedurally correct moment, and in assuming that objections not so raised have been waived." *United States v. Baylin*, 696 F.2d 1030, 1036 (3d Cir. 1982.) But, again, *Forte* and *Frady* and *Atkinson* and *Baylin* are all "federal prisoners," whose claims were barred by Fed. R. Crim. P. 52(b), we can assume, became the fodder for the the Third Circuit's artificial construct of the "Federal Forfeiture Rule," which was never adequately or consistently applied in the state court. This Court should grant certiorari on the question of the "Clearly Established," and "Unreasonable Application" and "Contrary to Clause" of section 2254(d) (1)

III. THE COURT SHOULD REMAND YOUR PETITIONER'S *BRADY* CLAIM FOR AN EVIDENTIARY HEARING

On January 25, 1983, the day of your petitioner's arrest-I gave a statement to a white Philadelphia Homicide Detective named Robert Kane, informing him that I was 3000 miles away, visiting my brother, U.S. Marine Sergeant Michael B. Lewis, and his young family, in San Diego, California, before, during and after the commission of the offense.

In my possession was a black briefcase, containing (1) dated receipt for an item of clothing in a cleaners in San Diego; (2)⁴ my salesman receipt book with names, dates of purchases from female clients I sold perfume and jewelry to; (3) a job application from "Chess King," a men's clothing store in Fashion Valley, (San Diego); (4) two dated bus ticket stubs from Philadelphia, Pennsylvania, (Trailways)-and from San Diego, California back to Philadelphia. (Greyhound).

Detective Kane seized my black briefcase without a warrant- and your petitioner never saw the briefcase again. The Commonwealth failed to produce exculpatory evidence nor has ever disclosed the whereabouts of the missing documents inside the black briefcase that was in possession of your petitioner at the time of arrest. (See N.T. MTS, 7-27-1983)

⁴ On June 16, 1983, your petitioner submitted a "Notice of Alibi," to the Commonwealth, listing several alibi witnesses trial counsel was granted funds to hire an investigator to call: U.S. Marine Sergeant John Turner, Jackie Simmons, Lissa Layne, Linda Gibson, Herman Branche, and April Williams. On July 7, 1983, an Additional Notice of Alibi was submitted to the Commonwealth.

Your petitioner was never presented with an inventory list of items inside the black briefcase and detective Kane admitted he had not prepared one on the night of the Arrest. The detective couldn't produce a property receipt for the missing briefcase but testified that he knew "what happened to it."

In *Dennis v. Secretary , Pennsylvania Department of Corrections*, 834 F.3d 263, 2016 U.S. App. LEXIS 15434, (August 23, 2016., the Third Circuit held: (1) "Petitioner, sentenced to death, was entitled to habeas relief under 28 U.S.C.S. § 2254, on petitioner's *Brady* claims, based on evidence that included a witness's receipt that corroborated petitioner's alibi, a police activity sheet memorializing that a witness had given a previous statement inconsistent with her testimony at trial, documents regarding a tip from an inmate, and their cumulative prejudice."

At your petitioner's suppression hearing, on July 27, 1983, the detective was questioned about the whereabouts of the black briefcase:

Defense Counsel: Did he have a briefcase?

Detective Kane: That would be the briefcase.

Defense Counsel: Sir, did you open the briefcase?

Detective Kane: Yes, Sir, I did.

Defense Counsel: And were there bus tickets and other papers in there?

Detective Kane: I believe there were.

Defense Counsel: The bus tickets and all are still in the briefcase?

Detective Kane: pardon me?

Defense Counsel: The bus tickets and all are still in the briefcase?

Detective Kane: (Nods head affirmatively).

Defense Counsel: But there were papers and there were tickets, bus tickets, and there were other things.

Detective Kane: And it was left in there.

Defense Counsel: But there are no records or anything that is kept of that?

Detective Kane: No, Sir, I removed two(2) papers from the briefcase.

Defense Counsel: Pardon me?

Detective Kane: I took two(2) papers out of that briefcase. (Notes of Testimony, 7-27-1983.)

During cross-examination at the trial and before the judge and all-white jury- Kane changed his testimony about the missing documents:

Defense Counsel: And where was that bus ticket from, Sir?

Detective Kane: It didn't indicate any date or location on it.

Defense Counsel: Pardon me?

Detective Kane: It didn't indicate any date or location on it.

Defense Counsel: Did it show where it was from?

Detective Kane: No, Sir.

Defense Counsel: Do you mean to tell me there was just a blank bus ticket?

Detective Kane: (No answer).

Defense Counsel: To nowhere?

Moreover, the white detective admitted that he hadn't followed police procedure, protocol, or chain-of-custody. He couldn't produce a property receipt for the black briefcase and further admitted that he knew "what happened to it." (The briefcase.) The detective's own testimony confirmed the existence of the "bus tickets," (plural), among other papers and documents.

The Court addressed this issue in the (*Per Curiam*) ruling *Wearry v. Cain*, 136 S.Ct. 1002, (March 7, 2016), Holding: (1) "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt;" (2) "A cumulative evaluation of the materiality of wrongfully withheld evidence is required."

The Commonwealth was put on notice of the defendant's affirmative defense of alibi. defendant had called several witnesses who'd testified that petitioner was not in the state at the time of the murder for which he was accused and being tried for. The Commonwealth knew that the Detective's testimony was perjurious, and did nothing to correct it. Moreover, the Commonwealth withheld exculpatory evidence your petitioner's innocence when they failed to turn it over to the defense.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court stated: "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, Supra, at 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215. *Giglio v. United States*, 405 U.S. 150, 153-154, 92 S. Ct. 763, 31 L.

Ed. 2d. 104 (1972), clarified that the rule stated in *Brady* applies to evidence undermining witness credibility.

The Third Circuit made a blind determination of Detective Kane's testimony as credible. And further accepted his "unbelievable" testimony that the bus ticket stubs were "blank," strains credulity. Requires the suspension of disbelief.

In *Lewis-4*, Judge Fisher wrote: "Although Lewis challenges Detective Kane's credibility, he has not proffered clear and convincing evidence to overcome the presumption of correctness that attached to the state court's factual determinations."

See § 2254 € (1).

But there were no "factual determinations" in the state court on this issue. Your petitioner has made numerous requests for discovery and evidentiary hearings in the state and federal courts of Pennsylvania. *Denied*. No state or federal court has ever made a material finding. Your petitioner has asked District Court Judge Bruce Kauffman for discovery and an evidentiary hearing in the Eastern District Court of Pennsylvania *denied*. A request for an evidentiary hearing was made in the Third Circuit Court of Appeals ditto. No state or federal court in Pennsylvania has held a proceeding where a determination of Detective Kane's credibility could be assessed. The Commonwealth withheld exculpatory evidence of your petitioner's innocence.

The Court should remand your petitioner's *Brady* claim for an evidentiary hearing.

IV. THE COURT SHOULD REMAND YOUR PETITIONER'S 60(b) (6) MOTION TO THE THIRD CIRCUIT FOR A MERIT ANALYSIS

Both the en banc's decision of July 13, 2017 and the SUR PETITION FOR REHEARING, before SMITH, *Chief Judge*, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and SCIRICA, *Circuit Judges*, Dated: August 15, 2017, conflicts with this Court's recent decision in *Buck v. Davis*, 137 S.Ct. 759 (2017), which stated, in part: "The COA inquiry, we have emphasized, is not coextensive with a merit analysis. At the COA stage, the only question is whether the applicant has shown 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 137, 123 S.Ct. 1029..

The Court went even further on the issue: [A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S., at 338, 123 S.Ct. 1029.

The Third Circuit panel(s) couldn't even agree that your petitioner's claims were deserving of *any* discussion of the merits of his claims. The en banc panel(s) completely overlooked the fact that your petitioner clearly made a "substantial showing of the denial of a constitutional right" in the request and application for a COA in Judge D. Michael Fisher's refusal to recuse himself from petitioner's habeas proceeding, where he violated "multiple" canons of Pennsylvania's CODE OF JUDI-

CIAL CONDUCT, which relied on the Court's ruling in *WILLIAMS V. PENNSYLVANIA*.

As in *Buck*, your petitioner returned to federal court by filing a motion to reopen his § 2254 habeas proceeding under *Federal Rule of Civil Procedure 60(b)(6)*, and under the rule's "catchall" category in (b)(6), which allows a federal court to reopen a judgment for "any other reason that justifies relief," and in addition to the question of whether your petitioner "made a substantial showing of the denial of a constitutional right," provided the federal court(s) with several reasons justifying relief from judgment. On January 23, 2008, the 3rd Circuit Court of Appeals, denied this petitioner's recusal motion "without any explanation. Then a "Question of Extraordinary Importance' exist, in this matter, where, in *Abu-Jamal*, Judge Fisher recused himself. (See *Abu-Jamal v. Horn*, Nos. 01-9014 & 02-9001, *Per Curiam Order* at 1 (3d Cir. April 20, 2007.)

I ask these questions for the Court to consider: (a) What are the particulars and details and legal reasoning why Judge Fisher made a hasty retreat from Mumia Abu-Jamal's appeal? (b) Which of the canons in the **CODE OF JUDICIAL CONDUCT** Judge Fisher acknowledged violating if he chose to remain seated on the panel hearing Jamal's habeas petition? (c) Then if both this petitioner and Jamal were on death row at the same time, in the same Third Circuit Court, and Fisher immediately recused himself from Jamal's appeal, but chose to remain on the panel hearing your petitioner's habeas proceeding then how did Judge Fisher *not* violate "multiple" canons of Pennsylvania's **CODE OF JUDICIAL CONDUCT** in the instant matter?

There was no “Merits Analysis” of the *Brady* claim in both the District Court and the Third Circuit denying relief from judgment of this petitioner’s 60(b)(6) motion, where a white Philadelphia Homicide detective, Robert Kane, illegally removed documents/papers from this petitioner’s black briefcase at the time of arrest, that could have been favorable to the defense in substantiating his alibi.

The Third Circuit overlooked the denial of your petitioner’s constitutional right in their use of a *Federal Forfeiture Rule* which barred your petitioner’s *Batson* claim, first applied in *Abu-Jamal*, which *ad hoc*, a cruel invention, artificial construct, a legal fiction, never applied in the state court, and rejected by the District Court, writing: “Thus, at the time of Petitioner’s direct appeal in 1984, the Pennsylvania Supreme Court *did not consistently and regularly apply the PCRA waiver rules.*”

In *Buck v. Davis*, 137 S.Ct. 759(2017), the Court stated: “We have held that a litigant seeking a COA must demonstrate that a procedural ruling barring relief is itself debatable among jurists of reason; otherwise, the appeal would not ‘deserve encouragement to proceed further.’” The further explained that “Rule 60(b) enumerates specific circumstances in which a party may be relieved of the effect of a judgment, such as mistake, newly discovered evidence, fraud, and the like. The Rule concludes with a catchall category subdivision (b) (6)-providing that a court may lift a judgment for ‘any other reason that justifies relief.’ “ *Id.* at 12.

Then the question should be asked of this court, why the Third Circuit Court of Appeals blatantly ignored, passed over, your petitioner’s “Newly-Discovered

Evidence” attached as EXHIBIT C to the 60(b)(6) Motion, which is the transcript of the ARGUMENT ON MOTIONS FOR A NEW TRIAL AND/OR ARREST JUDGMENT/SENTENCING, dated Monday, June 25, 1984. What the transcript shows is defense counsel putting the trial court on notice that he’d objected to the racial composition of the jury, and the prosecutor using peremptory challenges to strike eight (8) African-Americans from the jury solely on account of their race. The newly-discovered evidence was a significant development in the instant matter, because the Pennsylvania State Supreme Court’s reasoning for denying relief on this petitioner’s *Batson* claim was that there was no prima facie case made by petitioner of a *Batson v. Kentucky* violation. (See APPENDIX G, *Commonwealth v. Lewis*, 567 A.2d 1376 (Pa. 1989). In *Lewis-4*, the Third Circuit echoed the Pennsylvania Supreme Court’s legal reasoning for denying this petitioner’s relief on the *Batson* claim.

In *Robert Lark v. Secretary Pennsylvania Department of Corrections*, 645 F.3d 596, (2011), the Third Circuit stated: “Thus, in *Abu-Jamal*, the petitioner forfeited his *Batson* claim because he ‘did not object to the prosecutor’s use of peremptory challenges at any point during voir dire or at his 1982 trial.’ “*Id.* at 83-84. “Likewise, in *Lewis*, we held that petitioner’s statement of ‘So prejudiced. So prejudiced,’ and ‘I knew he would do that’ after the prosecutor’s use of peremptory strikes was not sufficient to alert the trial judge to a claim that the prosecution was striking venire members in a racially discriminatory manner.” *Lewis*, 581 F. 3d at 102.

But the newly-discovered evidence contained in the transcript of the "ARREST OF JUDGMENT/SENTENCING MOTION FOR A NEW TRIAL" before Judge Sabo, in Common Pleas Court, Philadelphia County, states otherwise.⁵ It clearly indicates defense counsel had alerted the trial court during voir dire that the prosecutor had struck African-Americans from the jury in a discriminatory manner.

DEFENSE COUNSEL: I respectfully submit that the Court erred in refusing, denying a challenge, voir dire challenge, by the defense and granting a voir dire challenge by the District Attorney.

THE COURT: You have to be specific. I don't have no way of answering that. That's so general. Where in the voir dire did this happen?

DEFENSE COUNSEL: It was, your Honor, when we challenged the jurors as being prejudicial. We were refused the motion.

THE COURT: Well, which ones? You can't be general that way. No way in the world for me to know that...I'm not conceding you're right, but letting you exclude certain people for cause doesn't make any difference.

Yet, the en banc panel claimed my objections were insufficient to put the trial

⁵ These black jurors are listed as follows: 1. Ms. Zellie Coleman, (N.T. Voir Dire, 7-27-1983 at 36). 2. Ms. Colleen White, (N.T. Voir Dire, 8-1-83 at 40). 3. Mr. Jesse Davis, Jr., (N.T. Voir Dire at 50). 4. Ms. Mary Winfield, (N.T. Voir Dire, 8-1-83 at 59). 5. Mr. Lacy Quick, (N.T. Voir Dire, 8-2-83 at 63). 6. Mr. Bruce Lincoln, (N.T. Voir Dire 8-1-83 at 88). 7. Ms. Deborah Teasley, (N.T. Voir Dire, 8-1-83 at 126). 8. Ms. Armelee Harvey, (N.T. Voir Dire, 8-2-1983, at 170). The Court should note that your petitioner made copious notes of the names of each black juror stricken and avers that there's even more) including the seating arrangements and names of each white juror, recorded on copies of the actual, tread worn jury sheets still available.

court on notice that the prosecutor was excluding blacks from the jury in a racially discriminatory manner. This wild assertion is both false and disingenuous. In addition to your petitioner's excited utterance during the voir dire process of "So prejudiced. So prejudiced." And "I knew he would do that," after noting the pattern of the young white prosecutor striking black juror after black juror-my grievance was reiterated in the following exchange with the sentencing judge:

DEFENDANT: I submitted a petition for an evidentiary hearing.

THE COURT: Speak to your attorney.

(See APPENDIX Q, AT SA 38).

But this petitioner refused to remain silent, as indicated by another heated exchange between the judge and this petitioner:

DEFENDANT: ...I was never given the benefit of the Constitution to have a fair trial by jury where certain things were overruled, certain things were denied the defendant which the Framers of the Constitution would cry out if they actually could see what went on in this courtroom.

THE COURT: I don't know either, but if he has information that he knows--all I'm saying, I didn't select this jury, I had nothing to do with it... I'm sorry to hear you feel so badly about it. (See APPENDIX Q, Pages 21-22).

Yet, the Third Circuit said in Lark: "...Roger's statements that the prosecutor was striking all of the black jurors put the trial court on notice of Lark's claim and distinguishes his case from Lewis and Abu-Jamal." However, if the Third Circuit would have simply not have ignored the transcript-which clearly noted your petitioner's objections during voir dire and both trial counsel and defendant's objections during the Motions for a new Trial and Arrest of Judgment/Sentencing-

a threshold inquiry into the merits of my Batson claim supported by the above-mentioned powerful new evidence-should mean that fair-minded jurists of reason could reach the conclusion and agree that Lewis's defense counsel did the same thing as Lark's attorney-objected to the prosecutor striking blacks from the jury, which makes the Lark and Lewis cases **INDISTINGUISHABLE.**

The Court should ask the Third Circuit what are the compelling reasons it abandoned Stare Decisis, which results in a grave injustice to this petitioner.

Recently, this Honorable Court discussed the distinct differences between harmless-error and structural-error in Weaver v. Massachusetts, 2017 U.S. LEXIS 4043, (June 22, 2017). The Court cited an earlier ruling in Arizona v. Fulminante, 499 U.S. 279, 306.111 S.Ct. 1246.113 L.Ed. 2d 302, (1991) in defining the feature of a structural error that "affect[s] the framework within which the trial proceeds," rather than being 'simply an error in the trial process itself.' Id., at 310, 111 S.Ct. 1246. 113 L.Ed. 2d 302. The defining features, of course, the Court expalined, were laid out in "Three broad rationales." Among them, the Court made clear that a proper remedy for the violation of a structural right is "...where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to automatic reversal regardless of the error's actual effect on the outcome." Neder v. United States, 527 U.S. 1, 7, 119 S.Ct. 1827, (1999).

Moreover, in Weaver, the Court stated that it "...has granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury. See Batson v. Kentucky, 476 U.S. 79, (1986.) J.E.B. v. Alabama, 511 U.S. 127, 114. S.Ct. 1419, (1994.)

Surely, fair-minded jurists of reason could agree that an illegally impaneled, all-white jury, selected in violation of the Court's Batson ruling- can be said to affect the framework within which the trial proceeded. The Court has stated, in Buck v. Davis, "Such concerns are precisely among those we have identified as supporting relief under Rule 60 (b)(6)." (See Liljberg, 486 U.S., at 864, 108 S.Ct. 2194.

In the instant matter, your petitioner has made a more than adequate record of the purposeful exclusion of African-American jurors struck by the prosecutor solely on the account of their race. No thought or consideration was given to this petitioner that in spite of Swain v. Alabama, 380 U.S. 202, (1965), and Commonwealth v. Henderson, 438 A.2d 951, (Pa. 1981), were historical precedents that permitted prosecutors to exclude minorities and women from juries-that at the time of your petitioner's trial, in 1983, Batson had not yet been decided. At the time, this young defendant, was still cognizant of how the Commonwealth was using its peremptories in a racially discriminatory manner-and your petitioner made notations on the record, objected, vehemently. The Commonwealth cannot claim finality, because no state or federal court in Pennsylvania has ever complied with the mandates of Batson v. Kentucky. Even though the United States Supreme Court has emphasized that "Compliance with Batson is essential to ensure that defendants receive a fair trial and to preserve the public confidence upon which our system of criminal justice depends." Foster v. Chapman, -S.Ct.- (2016).

This petitioner's claims have never been heard on the merits in any court in Pennsylvania. And did exactly what the Court stated in Bucks v. Davis, when, in the instant matter, the reviewing courts... "...sidesteps [The COA] process by first deciding the merits of an appeal,

and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." Miller-El v. Cockrell, Id. at 336-337, 123 S. Ct. 1029.

Your petitioner, in his 60(b)(6) motion, clearly made a substantial showing of the denial of a constitutional right under 28 U.S.C. § 2553 (c)(2), and presented an extraordinary question the state and federal courts in Pennsylvania purposely evaded and ignored.

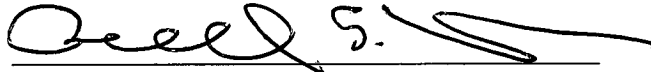
Your petitioner showed this Honorable Court that he was never granted an evidentiary hearing on the constitutional claims of Batson and Brady and Williams v. Pennsylvania.

This Court should grant certiorari, and remand for a hearing so this petitioner can prove the Commonwealth withheld documents that could have supported his alibi, as well as discrimination in the jury selection process, and that Third Circuit Judge D. Michael Fisher violated your petitioner's Due Process Rights in his refusal to recuse himself from this petitioner's habeas proceeding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted

A handwritten signature in black ink, appearing to read "Reginald S. Lewis", written over a horizontal line.

Reginald S. Lewis, *Pro Se*
#AY2902
SCI-Graterford
Box 244
Graterford, Pennsylvania 19426

Date: November 8, 2017

CERTIFICATE OF COMPLIANCE

No. _____

REGINALD S. LEWIS

Petitioner

V.

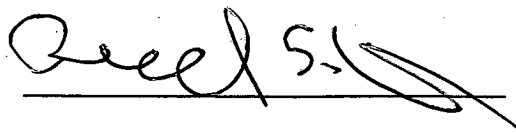
DAVID WETZEL, Commissioner, Pennsylvania Department of Corrections;
CYNTHIA LINK, Superintendent of the State Correctional Institution at
Graterford; DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY; ATTORNEY
GENERAL OF PENNSYLVANIA

Respondents

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 6646 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 8, 2017.

A handwritten signature in dark ink, appearing to read "Reginald S. Lewis", is written over a horizontal line.