

No.:

IN THE SUPREME COURT OF THE UNITED STATES

In re LARRY CHARLES,
Petitioner

v.

LAUREL HARRY,
Respondent

ON PETITION FOR WRIT OF MANDAMUS
TO THE THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

The Petitioner has urged upon the Federal Courts an argument that presented three issues. First, the Petitioner argued that trial counsel violated his right to the effective assistance of counsel by not perfecting his right to appeal the discretionary aspects of his sentence. Second, the Petitioner argued that the Superior Court and the PCRA Court violated his Sixth and Fourteenth Amendment Rights by not granting him an appeal nunc pro tunc and by instead reviewing his case on the merits and stating that he needed to show prejudice as a result of counsel's alleged ineffectiveness. Third, the Petitioner's argued that the Sentencing Court violated the Petitioner's Constitutional Rights by sentencing him in a manner that deprived him of the right to due process. The case thus presents the following question:

Do exceptional circumstances exist in the Petitioner's case that justify granting his Petition seeking a Writ of Mandamus when he has demonstrated a clear and indisputable right to its issuance?

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PETITION FOR WRIT OF MANDAMUS TO
THE THIRD CIRCUIT COURT OF APPEALS

The Petitioner, Larry Charles, respectfully prays that a Writ of Mandamus be granted directing the Third Circuit Court of Appeals to issue a Certificate of Appealability in order that the Petitioner's case can be reviewed on the merits.

OPINION BELOW

The Third Circuit Court of Appeals denied Petitioner's Motion in the Nature of a Mandamus at C.A. No. 15-3064. The Order is reprinted in Appendix A of this Petition. The Order of the Third Circuit Court of Appeals denying rehearing is reprinted in Appendix B of the Petition.

JURISDICTION

The denial of the Petitioner's Motion in the Nature of a Mandamus was entered on June 14, 2017. A timely Petition to that Court for rehearing was denied on November 7, 2017.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 and 28 U.S.C. Section 1651(a).

STATUTORY AND CONSTITUTIONAL

PROVISIONS INVOLVED

United States Constitutional Amendment 6

United States Constitutional Amendment 14

28 U.S.C. Section 1651

28 U.S.C. Section 2244

28 U.S.C. Section 2253

28 U.S.C. Section 2254

STATEMENT OF THE CASE

The Petitioner was arrested on January 15, 2007 and charged with Sexual Assault & related crimes. On September 10, 2007, Petitioner entered an open "No Contest" plea before the Honorable Albert A. Stallone. On December 20, 2007, following a Megan's Law Hearing, the Petitioner was sentenced to twenty-five (25) to fifty (50) years in State Incarceration.

Petitioner's counsel, Angelo L. Cameron, Esq., who failed to raise any objections during the Sentencing Proceeding, filed a Motion for Reconsideration of Sentence on December 26, 2007 that was subsequently denied February 21, 2008.

In a two-to-one decision filed on May 3, 2010, the Superior Court of Pennsylvania affirmed the Petitioner's Judgment of Sentence and determined the Petitioner's claim as to the discretionary aspects of sentencing was waived because Petitioner in his Motion (unlike his Appellate Brief) failed to state that the sentence was "arbitrary, excessive, unreasonable, shocking to the conscience, and disproportionate to the crimes, and amounted to abuse of discretion."

On November 16, 2010, the Supreme Court of Pennsylvania denied allocatur.

On January 13, 2011, Petitioner filed a Pro Se Petition for relief under the Post-Conviction Relief Act. On March 20, 2012, the PCRA Court denied relief, ruling that although Trial Counsel's performance was deficient, Petitioner had not demonstrated prejudice. August 17, 2012, the Superior Court affirmed. The Pennsylvania Supreme Court denied allocatur on

on March 27, 2013.

On December 23, 2013, Petitioner filed the instant Pro Se Petition that: 1. Trial Counsel was ineffective in failing to preserve the sentencing challenge for Appeal; 2. The State Courts erroneously failed to grant a Nunc Pro Tunc Appeal; and 3. The Petitioner was sentenced in a manner that violated his Constitutional Rights.

Judge Haffley filed her Report and Recommendation on February 27, 2015, concluding that all of the Petitioner's claims were meritless. Petitioner filed objections on March 16, 2015. On July 30, 2015, District Court Judge Diamond overruled the Petitioner's objections and accepted Judge Haffley's Report and Recommendation. A Certificate of Appealability was not issued.

On September 2, 2015, the Petitioner filed a Motion for Certificate of Appealability. On May 16, 2016, the Third Circuit Court denied the Motion. On June 14, 2016, a Third Circuit Panel denied a rehearing en banc.

On January 9, 2017, the United States Supreme Court denied Petitioner's Petition for a Writ of Certiorari. On March 20, 2017, the United States Supreme Court denied a petition for rehearing.

On June 14, 2017, the Third Circuit Court of Appeals denied Petitioner's Motion in the Nature of a Mandamus. On November 7, 2017, the Third Circuit Court of Appeals denied Petitioner a rehearing en banc.

CERTIFICATE OF APPEALABILITY

As mandated by federal statute, a state prisoner seeking a Writ of Habeas Corpus has no absolute entitlement to appeal a District Court's denial of his petition, 28 U.S.C. Section 2253. Before an appeal may be entertained, a prisoner who was denied habeas relief in the District Court must first seek and obtain a Certificate of Appealability from a circuit justice or judge. As a result, until a C.O.A. has been issued, federal courts of appeal lack jurisdiction to rule on the merits of of appeals from habeas petitioners.

A petitioner seeking a C.O.A. need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. Section 2253(c)(2). A Petitioner satisfies this standard by demonstrating "that reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The standard for obtaining a C.O.A. does not require a petitioner to prove that some jurists would grant the Petition for Habeas Corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the C.O.A. has been granted and the case has received full consideration, that the Petitioner will not prevail. *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). Therefore, doubts whether to issue a Certificate of Appealability should be resolved in favor of the Petitioner. *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997); and *Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir. 1991).

If a ground was dismissed by the District Court on

procedural grounds, a C.O.A. must be issued if the Petitioner meets the **Barefoot v. Estelle**, 463 U.S. 880, 893 (1983) standard as to the procedural question, and shows, at least, that jurists of reason would find debatable whether the ground of the petition at issue states a valid claim of a constitutional right. **Slack v. McDaniel**, 529 U.S. 473, 483-484 (2000).

Directing the Court's attention to the language used by the Supreme Court in **Barefoot**, it should be noted that the Court makes it clear that a C.O.A. "must be issued" if a petitioner meets the requirements set by the Court. Although, as stated above, a petitioner seeking a Writ of Habeas Corpus has no absolute entitlement to an appeal when the District Court denies his petition, but when a petitioner satisfies the requirements for the issuance of a Certificate of Appealability, the issuance of the C.O.A. becomes a ministerial act. A ministerial act is an act done after ascertaining the existence of a specified state of facts in obedience to legal and especially statutory mandate without the exercise of personal judgment or discretion. Simply stated, the issuance of a C.O.A. is not subject to the discretion of a circuit justice or judge.

When we apply the above standards to the instant case it is clear that the Petitioner is entitled to a Certificate of Appealability and that this Court must grant his Petition for Writ of Mandamus and order the Third Circuit Court of Appeals to issue him one.

The Petitioner has demonstrated "a substantial showing of the denial of a constitutional right." 28 U.S.C. Section 2253(c)(2). The May 16, 2016, Order (see Appendix C) erred by

stating that the Petitioner failed to make a "substantial" showing of the denial of a constitutional right. Recently, in **Bey v. Superintendent, SCI Greene**, 2017 U.S. App. Lexis 8280 (3rd Cir. 2017), the Court held that the word "substantial" means arguable merit. On page six of the Supreme Court Decision 2012 (See Appendix G) the Court stated that the Petitioner's claims had "arguable merit." If the word "substantial" means "arguable merit" then the Superior Court has established that the Petitioner has in fact made a "substantial (arguable merit) showing of the denial of a constitutional right." Justice McKee is the author of the **Bey** opinion. He was also a member of both en banc panels that denied the Petitioner a rehearing.

The Petitioner has also demonstrated that reasonable jurists would find the District Court's assessment of his constitutional claims to be wrong, more accurately , the Petitioner has demonstrated that reasonable jurists have already found the District Court's assessment of his constitutional claims to be wrong. This means that according to **Slack**, cited above, the Petitioner is entitled to a C.O.A. The Magistrate Judge and the District Court Judge concluded that the Petitioner's sentencing claim was not cognizable in federal court and was therefore procedurally default. The May 16, 2016, Order found that this conclusion was erroneous. The "Appellant is correct that his third claim is cognizable." Order, p.1. When the Panel found that the District Court's assessment of this constitutional claim to be wrong, the basis for finding a procedural default was eliminated. In spite of the fact that the Panel dispelled the motion of a procedural default, the Panel illogically

maintained procedural default as the reason to deny the Petitioner a C.O.A.

The Petitioner has also demonstrated that he meets the **Barefoot v. Estelle**, standard as to the procedural question. Without question when the 2016 Panel eliminated and maintained a procedural default in the same Order a situation was created that would be debatable among jurists of reason. Furthermore, when the Panel found that the Petitioner's sentencing claim was cognizable, the Panel established that the Petitioner had stated "a valid claim of a constitutional right." **Slack**, 483-484. When counsel failed to perfect a cognizable claim he provided ineffective assistance and a C.O.A. should issue for all three of Petitioner's claims.

In the instant case we have Justice McKee and over a dozen other Circuit Court Justices and the District Court ignoring the law, some of it of their own making, in order to deny the Petitioner the C.O.A. that he is clearly entitled to. What is called for is a message from this Court to the Third Circuit Court of Appeals. The message that should be sent is the same one that was sent to the Fifth Circuit Court of Appeals in this Court's decision in **Tennard v. Dretke**, 542 U.S. 274 (2004). The Court held that incorrect resolutions of C.O.A. Applications will be rejected. A ruling in favor of the Petitioner will not only vindicate his constitutional rights but will also impact hundreds if not thousands of C.O.A. applicants across the country. When District Courts and Circuit Courts are reminded again (See **Miller-El v. Cockrell**, cited above) that the decision to grant or deny a C.O.A. is not a matter of discretion, hundreds if

not thousands of cases presenting actual or debatable claims can be resolved in the lower federal courts and reduce the number of petitions submitted to this Court. In the instant case the Third Circuit Court has ruled that the Petitioner has a cognizable constitutional claim while maintaining a procedural default that the Court eliminated in the process of validating that claim. A Writ of Mandamus must be granted.

WRIT OF MANDAMUS

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. 28 U.S.C. Section 1651.

The writ of mandamus has been used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978).

Two prerequisites for issuance of a writ are: 1. that the petitioner have no other adequate means to attain the desired relief, and 2. that petitioner meet its burden of showing its right to the writ is clear and indisputable. *Hahnemann Univ. Hosp. v. Edgar*, 74 F.3d 456, 462 (3d Cir. 1996). Concerning the first prong above, the Petitioner has exhausted all the practical avenues for seeking a Certificate of Appealability. As to the second prong, Petitioner's right to relief is clear and indisputable. *Rhone-Poulenc Rover Inc. v. Home Indem. Co.*, 32 F.3d 851, 861 (3d Cir. 1994).

In *Will v. United States*, 389 U.S. 90 (1967), the United

States Supreme Court stated that a Mandamus will lie in appropriate cases to correct a lower court's willful disobedience of the procedural rules laid down by the United States Supreme Court. What could be a greater example of "willful disobedience of the procedural rules laid down by the United States Supreme Court" than having members of the Third Circuit Court and members of the District Court ignoring the law and even ignoring their own opinions and ruling against the Petitioner when it was clear that they knew he was entitled to a Certificate of Appealability.

The Petitioner is well aware of the fact that the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) cast the Federal Courts of Appeal in the role of "gate-keeper", charging them with the responsibility of "preventing the repeated filing of habeas petitions." *Blystone v. Horn*, 664 F.3d 397, 411 (3d Cir. 2011). To fulfill this "gate-keepinge" role, the AEDPA directs the courts to dismiss any claim presented in a second or successive petition that the petitioner presented in a previous application. 28 U.S.C. Section 2244(b)(1).

The Petitioner directs the Court's attention to *Gonzales v. Crosby*, 545 U.S. 528 (2005). Although this case involved Federal Rule of Civil Procedure 60(b), the rationale of this case informs Petitioner's argument in reference to any potential "second or successive petition" argument. In *Gonzales*, this Court stated that if a motion attacks some defect in the integrity of the federal habeas proceedings or asserts that a previous ruling in which precluded a merits determination was in error (for example a finding of procedural default) then the motion does not fit the definition of a "second or successive petition." In the instant case the Petitioner asserts a defect

in the integrity of the federal habeas proceedings and asserts that the decisions that denied the Petitioner a C.O.A. (which precluded a merits determination) were in error. Therefore, the instant petition does not fit the definition of a "second or successive petition."

The Petitioner's case is not like an ineffective assistance of counsel claim where the petitioner is asking a court to determine if an additional alibi witness may have changed the outcome of a criminal trial. The instant case is mainly driven by the law as opposed to an ineffective assistance case mainly driven by the facts. The Petitioner's case is not subject to factual nuances, second-guessing, or discretionary judgment calls. The controlling law applicable to the instant case is so axiomatic as not to require citation to authority. If trial counsel fails to perfect the Petitioner's first direct appeal of right he is presumed to be ineffective. The remedy for the failure of counsel to perfect the direct appeal is an appeal nunc pro tunc. If a sentencing court judge states on the record during sentencing that he is not going to consider statutory sentencing factors; that he is not going to consider expert testimony from both sides of the aisle to be anything other than speculation; and that he will use his personal viewpoint in sentencing the Petitioner; then the judge has sentenced the Petitioner in a biased manner and violated his right to due process and the Petitioner must be resentenced by a different judge. Although the law just stated has been expressed by this Court so often as to not require citation to authority, in the pages that remain the Petitioner will make citation to authority

and prove his case.

REASONS FOR GRANTING THE WRIT

I. Trial Counsel violated Petitioner's right to the effective assistance of counsel by not perfecting his right to appeal the discretionary aspects of his sentence.

In *Rodriguez v. United States*, 395 U.S. 327 (1969), the Supreme Court held that in situations where deficient assistance of counsel deprives a defendant of his right to appeal, courts have not required a showing of prejudice or likelihood of success upon appeal. In spite of this clear pronouncement from this Court, and in spite of Petitioner's exhaustive argument, the District Court Order (See Appendix D) erred by concluding that the *Strickland v. Washington*, 466 U.S. 668 (1984), prejudice standard was properly applied by the Pennsylvania Superior Court (See Appendix G). This standard that should not have been applied at all was applied in an erroneous manner by requiring the Petitioner to establish that he "would have been entitled to have his sentence vacated." Superior Court Decision (2012), p. 7. Like the District Court, the Third Circuit Court of Appeals ignored the clear pronouncement from this Court in *Williams v. Taylor*, 529 U.S. 362 (2000), that shows a clear error of law was made by applying the *Strickland* prejudice standard when prejudice should have been presumed. In committing these errors both federal courts joined the state court and acted contrary to, and engaged in an unreasonable application of *Strickland*. See 28 U.S.C. Section 2254(d)(1). See also *Rhone-Poulenc v. Rover Inc.*, cited previously, (where a court commits

a clear error of law a right to a Writ of Mandamus is clear and indisputable).

The Petitioner directs the Court's attention to *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989). Here the Supreme Court held that a mandamus can apply to discretionary acts where petitioners can demonstrate a "clear abuse of discretion." The Petitioner argues that if a mandamus can apply to discretionary acts on the part of a court certainly a mandamus must be granted when a court engages in "willful disobedience of the procedural rules laid down by the United States Supreme Court." *Will v. United States*, cited above.

During the past decade the courts have refused to acknowledge and respond to Petitioner's argument that clearly pointed out the flaw that existed in their analysis even if a properly applied *Strickland* analysis had been used. *Strickland* is concerned with attorney performance in the course of representation. If counsel is alleged to be ineffective during trial, the trial is the focus of the court's attention. In the instant case Counsel failed to perfect the Petitioner's appeal of his sentence. This failure to have Petitioner's case heard on the merits should have been the focus of the court. Properly applying *Strickland*, but for Counsel's error the "outcome" that would have been different is that the Petitioner would have had the benefit of his right to appeal his sentence. This is a right available to every United States citizen without preconditions like establishing that the appeal "would" have been successful.

Referring to *Rodriguez v. United States*, cited *supra*, the

Court in *U.S. v. Peak*, 992 F.2d 39 (CA4 1993) observed that a criminal defense attorney's failure to perfect his client's appeal deprives the defendant of his 6th Amendment Right to effective assistance of counsel, notwithstanding that the lost appeal may not have had a reasonable probability of success. Counsel's incompetency is established merely by showing that the Petitioner's appeal was dismissed without a ruling on the merits. *Robinson v. Wyrick*, 635 F.2d 757 (CA 81981).

Echoing the law of the land that is clearly stated in *Rodriguez* and in every circuit across the country, *Harrington v. Gillis*, 456 F.3d 118 (3d Cir. 2006), stated that an appeal is a critical stage in the criminal proceedings, and a defendant is entitled to effective assistance of counsel in perfecting an appeal. This case makes it clear that Superior Court's affirmance of an erroneously decided denial of the Petitioner's direct appeal by the Post Conviction Court was not a constitutionally adequate substitute for a direct appeal. Justice Fuentes, was a member of the 2016 en banc panel that denied the Petitioner a rehearing. He participated as a panel member in the *Harrington* case. *Harrington* alleged nothing more than his counsel failed to perfect the appeal of his sentence. He didn't have to spend a decade submitting over 400 pages of legal argument supported by hundreds of cases. He didn't have to establish prejudice, or face allegations of a procedural default. He didn't have to prove that he "would" have won his appeal if it had been protected. He didn't even state whether he was challenging his sentence under state or federal law. The panel in *Harrington* along with Judge Fuentes saw no reason for *Harrington* to not receive a C.O.A. The denial of his habeas

petition by the District Court was vacated and remanded.

The Court in *Lusardi v. Lechner*, 855 F.2d 1062, 1069 (3d Cir. 1988), held that a Writ of Mandamus should be issued when the court below has committed a clear error of law that approaches a failure to use judicial power. During the past decade federal courts have failed to use its judicial power to protect the constitutional rights of the Petitioner who received ineffective assistance of counsel. A Writ of Mandamus must be granted.

II. The Superior Court and the PCRA Court violated Petitioner's Sixth and Fourteenth Amendment Rights by not granting him an appeal nunc pro tunc.

In *Evitts v. Lucey*, 469 U.S. 392 (1985), the Supreme Court held that a first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have effective assistance of counsel. The Pennsylvania Supreme Court in *Commonwealth v. Halley*, 870 A.2d 795 (Pa. 2005), referred to *Evitts* and several other U.S. Supreme Court cases and held that failure of counsel to perfect a defendant's sole issue on appeal leads to a presumption of prejudice. The remedy for the deprivation of the right to appeal is a nunc pro tunc appeal not a review on the merits by the PCRA Court and the Superior Court completed without the benefit of a fully developed brief specifically detailing all of the sentencing errors. PCRA Counsel was aware of the fact that since *Evitts* was decided in 1985 the Commonwealth of Pennsylvania routinely concedes the nunc pro tunc appeal issue if counsel fails to perfect the defendant's

right to his first direct appeal. PCRA Counsel "fairly presented" the sentencing issue to the state courts but he saw no need to submit a complete dossier of the numerous constitutional violations that took place during Petitioner's sentencing. The Superior Court acknowledged that "the underlying issue involves appellant's sentence." Superior Court Decision (2012), p.6. (See Appendix G) Unless we are to believe that the Superior Court was unaware that sentencing is an issue that involves the 14th Amendment, the Superior Court was aware that a federal due process issue had been "fairly presented." See Justice Douglas' dissent in *Picard v. Connor*, 404 U.S. 270 (1971) (state court judges are aware of a due process issue when they see one).

In the instant case there never was a procedural default. A C.O.A. should have been issued because the Petitioner was denied a nunc pro tunc appeal. Referring again to *Harrington*, the Petitioner points out that *Harrington* appealed the PCRA Court denial of his nunc pro tunc appeal and the Pennsylvania Superior Court affirmed that denial. This is exactly what happened to the Petitioner. Justice Fuentes and the other members of the *Harrington* panel didn't consider the Superior Court affirmance of the PCRA Court denial to be the direct appeal *Harrington* was seeking. Justice Fuentes and the other members of the Third Circuit Court should follow the precedent set in *Harrington* and afford the Petitioner the same constitutional protection given to *Harrington* and any other petitioners in the Third Circuit represented by attorneys who fail to perfect their direct appeals. See *Bell v. Lockhart*, 795 F.2d 655 (CA 8 1986) (the Arkansas Supreme Court's review of Bell's Post-

Conviction petition was not a constitutionally adequate substitute for a direct appeal).

At the point in time when the Petitioner brought his claim to the attention of the PCRA Court he had been denied the direct appeal that he would have received with no preconditions if counsel would have been effective. If the PCRA Court is allowed to ignore the law and deny a Petitioner's claim on the merits and if the State Appellate Court can simply affirm the denial of the direct appeal then *Evitts v. Lucey* would be a feckless case and would have been nothing more than a waste of this Court's time. The Petitioner points out to the Court that every court at every appellate level established *Evitts*-free zones when reviewing his case. The courts also took great care to not mention *Halley*, *Harrington*, *Picard*, *Bell*, and the countless other cases cited and discussed by the Petitioner that proved his case.

There is absolutely no reason for the Third Circuit Court of Appeals and the District Court to have blatantly ignore the cases presented by the Petitioner. A review of opinions authored by every justice who has taken part in reviewing Petitioner's case reveals that they would all qualify as reasonable jurists who would have not only voted for issuing a C.O.A. to the Petitioner but would have also voted for issuing him a Writ of Habeas Corpus.

The federal courts totally ignored *Commonwealth v. Hernandez* 755 A.2d 1 (Pa. Super. 2000). The Court made it clear that a PCRA Petitioner is entitled to an appeal nunc pro tunc where prior counsel's actions denied his right to a direct appeal. The Court also made it clear that if counsel fails to perfect

the direct appeal his conduct falls beneath the range of competence demanded of attorneys in criminal cases, denies the constitutional right to assistance of counsel and the right to the direct appeal, and constitutes prejudice for the purpose of the Post Conviction Relief Act; and the defendant is not required to establish the merits of his issue or issues which would have been raised on appeal. U.S.C. Const. Amend. 6; Const. Art. 1, Section 9; Art. 5, Section 9; 42 Pa. C.S.A. Section 9543(a)(2)(ii).

The above paragraph standing alone demonstrates that the Petitioner has been substantially denied his constitutional rights. 28 U.S.C. Section 2253(c)(2). The Third Circuit Court of Appeals is ne step below the United States Supreme Court. When this esteemed body ignores a case like **Commonwealth v. Hernandez**, which is supported by the law of the land from the United States Constitution down to a State Post Conviction Statute, we have the type "drastic and extraordinary" circumstance that calls for the invocation of the Writ of Mandamus.

III. The Petitioner was sentenced in a manner that deprived him of the Right to Due Process.

The Fourteenth Amendment to the United States Constitution states in part that "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 laws." In spite of this clear language over fourteen federal jurists ignored Petitioner's detailed argument that demonstrated that he was sentenced in a manner that violated his Fourteenth Amendment right to due process. Federal jurists take an oath to protect and defend the United States Constitution and this includes protecting and defending the rights of defendants, appellants, and petitioners who appear before them. When the Third Circuit Justices ignored their constitutional responsibilities and ruled against the Petitioner's case, they impugned the integrity of the habeas corpus process.

What are the errors that took place during the Petitioner's sentencing that the Third Circuit Court took such great efforts to ignore? they are listed below:

1. The sentencing judge failed to perform his statutorily imposed duty to assess Petitioner's amenability to treatment. He made a "materially false" statement and violated Petitioner's right to due process when he said amenability to treatment is an issue which is best left to the discretion of the Board of Probation and Parole. Sentencing Court Order, p.9 (See Appendix J). See *Townsend v. Burke*, 334 U.S. 736 (1948) (materially false statements relied upon by the sentencing court violates defendant's right to due process and calls for the sentence to be vacated and remanded). It goes without saying that having the sentencing judge assess the defendant's amenability to treatment before imposing a virtual life sentence is part of the process due.

2. The sentencing judge stated that the expert testimony from both sides of the aisle was "speculation." Calling expert testimony "speculation" without record evidence violated *Maggio*

v. Fulford, 467 U.S. 111 (1983). In *United States of America v. William Assumus*, 365 Fed. Appx. 414, 2010 U.S. Appx. Lexis 3013, Judge Diamond, the District Court Judge in the instant case, held that a sentence is not substantially reasonable if the sentencing judge fails to properly consider the evidence presented by the defense expert. In presenting his argument to the courts the Petitioner spent 20 pages analyzing the *Assumus* case and demonstrated that Judge Diamond's own opinion supported not only the Petitioner's argument for a C.O.A. but his argument for the Writ of Habeas Corpus as well. Justices Fuentes (who also participated in the *Harrington* case cited above) and Fisher were both members of the 2016 en banc panel that denied the Petitioner a hearing, they were also participants on the panel that decided the *Assmus* case. Here again we have members of the Third Circuit Court ignoring their own precedent in order to rule against the Petitioner. Judge Diamond is not the only judge from the District Court to fail to respond to Petitioner's argument that a judge's own words supported the Petitioner's case. Magistrate Judge Heffley made no mention of the argument presented by the Petitioner in his Reply Brief that asserted that briefs that she wrote when she was a partner in a Philadelphia law firm supported aspects of Petitioner's argument.

3. The sentencing judge sentenced the Petitioner and stated that he was unaware of the Petitioner's rehabilitation needs. Lacking knowledge of the Petitioner's rehabilitative needs meant that the Petitioner was sentenced by a judge lacking the "insight and understanding" required by the Supreme Court. See *Harris v. United States*, 382 U.S. 162 (1965).

4. The sentencing judge ignored all evidence in mitigation. See *U.S. v. Malcolm*, 432 F.2d 809 (2nd Cir. 1970) (failure on the part of the sentencing judge to give serious consideration to information material to mitigation constitutes a violation of due process). In *Benny Lee Hodge v. Kentucky*, 568 U.S. 1056 (2012), Justice Sotomayor's dissenting opinion pointed out that the United States Supreme Court has "consistently rejected States' attempts to limit as irrelevant evidence of a defendant's background or character that he wishes to offer in mitigation." The sentencing court gave no consideration to Petitioner's service in the United States Air Force as a Security Policeman or to Petitioner's work history.

5. The sentencing judge blatantly displayed a dismissive attitude and made a dismissive remark regarding Petitioner's expression of remorse at sentencing. See *Commonwealth v. Archer*, 722 A.2d 203 (Pa. Super. 1998) (the expression of remorse by a defendant should be properly considered if the judge is to render a sound judgment of sentence). See also *Gardner v. Florida* 430 U.S. 349 (1977) (the sentencing process is subject to the due process clause).

6. The sentencing judge referred to the Petitioner using an animal name during the sentencing process. In *Commonwealth v. Sherinda Williams*, 69 A.3d 735 (Pa. Super. 2013), Justice Donohue who was Judge Donohue before moving to the State Supreme Court, stated that she would have vacated the defendant's sentence, that she and the entire Court vacated as excessive, based solely on the name-calling by the sentencing judge. Another factor that led to the sentence reduction was the failure of the judge to properly consider the expert psychological evidence

presented in mitigation by the defense psychologist. This is exactly what happened to the Petitioner. Justice Donohue cited *Commonwealth v. Spencer*, 496 A.2d 1156 (Pa. Super. 1985), a case establishing that in Pennsylvania it is a violation of a defendant's due process right to be sentenced by a judge who engages in name-calling during sentencing and the defendant's sentence will be vacated and the defendant will be resentenced by a different judge. This would have been the likely result if counsel had perfected the Petitioner's direct appeal. See *U.S. v. Cronin*, 839 F.2d 1401 (CA 10 1985) (case remanded due to name-calling and hostility displayed by the trial judge who called the defendant a "swindler"). Justice Fitzgerald, a former member of the Pennsylvania Supreme Court, dissented in 2010 and voted to hear the Petitioner's sentencing appeal on the merits. (See Appendix I). Justice Donohue and Justice Fitzgerald would have made up the majority on the 2010 Superior Court panel if Petitioner's appeal had been perfected. Justice Fitzgerald's dissent cited improper consideration of the Petitioner's remorse as an issue to be considered on the merits. Would a former member of the State Supreme Court vote to hear the Petitioner's case if it had no merit. A review on the merits, that was denied because of ineffective assistance of counsel, may have resulted in a sentence reduction based on the name-calling and the improper consideration of remorse issues. Although prejudice is presumed when counsel fails to perfect a direct appeal, if a properly applied *Strickland* test had been applied to the Petitioner's case by the 2012 Superior Court panel the Court would have concluded that there was a reasonable probability

that the Petitioner's sentence would have been vacated and remanded for resentencing in front of a different judge.

The petitioner would like to direct the Court's attention to p.10 of the 2012 Superior Court Decision (See Appendix G). Here the Superior Court explains the justification for a sentence reduction for the defendant in *Commonwealth v. Coulverson*, 34 A.3d 135 (Pa. Super. 2011). The Court pointed out that the sentencing court had not properly considered the defendant's rehabilitative needs. This is exactly what happened to the Petitioner. Please turn to page nine where we see in the third paragraph that the sentencing judge says he doesn't know what the Petitioner's rehabilitative needs are. If he didn't know what the Petitioner's rehabilitative needs were, how could they be properly considered. The Superior Court on p. 10 also includes childhood abuse as a mitigating factor the sentencing court failed to consider. Here again we have another court, this time the state court, ignoring its own precedent to rule against the Petitioner. Dr. Zakirch, a psychologist who submitted a detailed written report and in-court testimony in mitigation and provided evidence of childhood abuse that was ignored by the sentencing court. Like the federal courts, the Superior Court overlooked evidence presented by the Petitioner even as the Court discussed a case that had a defendant that shared identical mitigating factors with the Petitioner.

7. The sentencing judge used his "personal viewpoint" in deciding what sentence to impose. The Petitioner's right to due process was violated when he was not afforded the opportunity to rebut the biased person/opinion of the judge that the Petitioner would continue his unlawful behavior if he were ever

released. Superior Court Decision, 2012, p.9 (See Appendix G). This personal opinion was contrary to the evidence presented by the defense psychologist who stated that with "short-term incarceration and treatment it was unlikely that the Petitioner would re-offend." The Commonwealth expert did not dispute these findings. If the Petitioner had been given a nunc pro tunc appeal a brief could have been submitted that cited *Chapman v. California*, 386 U.S. 18 (1967) (judicial bias is a structural error that can never be considered harmless).

Every one of the above -listed errors taken individually represent numerous cases in which defendants have had their sentences vacated and remanded. What possible sense does it make to say that the Petitioner has not made "a substantial showing of a denial of a constitutional right" when all of these errors occurred together in his case? The members of the United States Supreme Court (and the law clerk pre-screening cases for the Court) should agree that it makes no sense at all for individuals to be resentenced due to any one of the constitutional errors mentioned above and yet the Petitioner, who has seven times as many of the same constitutional errors is denied a Certificate of Appealability. A Writ of Mandamus must be granted.

The case that the Petitioner brings before the Court may not be one of first impression but it should be one of lasting impression. It is a case that is frightening in its Orwellian aspect. State and federal judges and most certainly Circuit Court Justices should not be allowed to ignore the law in order to rule against habeas corpus petitioners. The Constitution of the United States is not a mere policy statement. It is the

most important document in America. When jurists willfully ignore the Constitution and the cases derived from it as interpreted by the Supreme Court a Writ of Mandamus is called for. In the instant case we have lawyers of jurists who have reviewed the Petitioner's C.O.A. motion as if they had discretion to deny them. A cascade of constitutional errors were overlooked as jurists "abused their discretion" in carrying out their duties in situations where they had no discretion. As stated above, a C.O.A. "must be issued" if a petitioner meets the requirements set by this Court. *Barefoot v. Estelle*, p.893.

If we lived in North Korea, Iran, or Afghanistan the facts, issues, and law involved in the instant case wouldn't matter. Crimes were committed, a finding of guilt has been made, sentence has been passed, and the guilty party is in custody. But we don't live in the countries just listed. We live in the United States of America. We live in a country where the United States Supreme Court views the dismissal of a first habeas petition as a particularly serious matter because that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty. *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). We live in a country where citizens feel secure in the fact that our judges go to work each day with an eye towards "the ends of justice." *Sanders v. United States*, 273 U.S. 1 (1963).

In America the higher a petitioner climbs the appellate ladder the more likely it is that the petitioner will encounter jurists of increasing competence. The irony of this climb is that the higher one goes up the ladder the more difficult it becomes to have those increasingly competent jurists to actually

review the petitioner's case on the merits.

The Petitioner argues that a crowded Supreme Court docket; the refusal of en banc panel members to vote for a rehearing when their own published opinions support every claim brought by the Petitioner; and the submission by three-member panels of rulings denying relief when Third Circuit precedent supports ruling in favor of the Petitioner, should not serve as excuses for the continued denial of the Petitioner's constitutional rights.

Before concluding, the Petitioner will highlight his observations concerning the Panel Opinion denying his Mandamus Motion. (See Appendix A). The Petitioner will also highlight his observation concerning the manner in which the lower courts decided his cases.

Let's look at the Opinion. The text of the Opinion and the decision to rule against the Petitioner is supported by one case. What was the case that was chosen to respond to the Petitioner's argument that is supported by hundreds of cases from the Supreme Court and every circuit in America? It was a case that involved Vice President Cheney's right to petition for a Writ of Mandamus to protect the President's constitutional prerogatives. See *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004). Instead of citing *Kerr v. U.S. Dist. Court*, 426 U.S. 394 (1976), and discussing Petitioner's argument that this case supported his request for relief, the Third Circuit panel finds an irrelevant case and cites an irrelevant quote and rules against the Petitioner with a three-paragraph superficial analysis that could have been written by someone who had not read the

Petitioner's Mandamus Motion. Following the template of previous courts, the panel Opinion ignored the Petitioner's well-developed and well-supported argument. Not one reference is made to any argument contained in Petitioner's 30 page argument. No attempt was made to show that the Petitioner failed to establish an attack on the integrity of the habeas proceedings or that the Petitioner failed to establish the existence of "clear errors of law" that impugned the integrity of the habeas proceedings. Ignoring 30 pages of argument that proved the Petitioner's case is itself an action that impugns the integrity of the habeas proceedings.

Although the **Cheney** case has no relevance to the Petitioner's case, without even realizing it by using the **Cheney** case the Opinion actually helps supports the Petitioner's argument for a Writ of Mandamus. In **Cheney** we see four separate Opinions. The majority Opinion held that the Court of Appeals prematurely terminated inquiry to relevant facts before dismissing the defendant's mandamus petition. This is exactly what happened to the Petitioner. The majority Opinion also held that the Court of Appeals ignored arguments presented by the defendant. This is exactly what happened to the Petitioner. Justice Thomas submitted a concurring in part and dissenting in part Opinion that was joined by Justice Scalia. Here the view was expressed that the Court of Appeals should issue the Writ of Mandamus. This is exactly what should have happened to the Petitioner. What we learn from the **Cheney** case is that the proper decision to grant or deny a Writ of Mandamus cannot be reached by ignoring all the issues crucial to an informed decision. See *Will v. United States*, 389 U.S. 90 (1967).

The Opinion on page two states that the Petitioner has exhausted all avenues to appeal the District Court's denial of his request for a C.O.A. But on page one we see an irrelevant quote that says mandamus may "not be used as a substitute for the regular appeals process." **Cheney**, pp. 380-381. In its rush to rule against the Petitioner while totally ingoring his argument the author of the Opinion fails to notice that these statements are contradictory. If the Petition has exhausted all avenues of appeal how is his Petition for a Mandamus a substitute for the regular appeals process that has already been completed? This is just another example of the superficial manner in which the lower courts have decided the Petitioner's case.

The footnote to the Opinion states that the Petition cannot meet Section 2244(b)'s gatekeeping requirements because he does not claim to have newly discovered evidence of actual innocence, or rely on a new rule of constitutional law, made retroactive to cases on collateral review. The footnote also cites **United States v. Winkelman**, 746 F.3d 134 (3d Cir. 2014). If the panel would have read and reflected upon Petitioner's argument it would have been apparent that the gatekeeper issue was exhaustively discussed. Concerning **United States v. Winkleman**, this case has nothing to do with the Petitioner's case. The Winkleman brothers brought a meritless case in which they motioned the Court to recall its mandate so they could challenge the constitutionality of their sentences based on new Supreme Court decision in **Alleyne v. United States**, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). The Petitioner's case is based on established cases like **Rodriguez**, **Evitts**, and **Townsend**, all

cited previously. These cases establish the Petitioner's right to effective assistance of counsel, the right to the direct appeal that Petitioner has yet to receive, and the right to be sentenced by a judge who bases his sentence on statutory sentencing factors and not his personal opinion. None of these cases and none of these rights were even mentioned in the Opinion

The Petitioner would like for the Court to note that in the **Winkleman** case the Commonwealth was asked to file a response. The Petitioner hoped that a similar request would have been made in his case. The panel avoided asking for a Commonwealth response in order to make it easier to rule against the Petitioner. The Commonwealth would have agreed with the Petitioner that he was correct in stating that since 1985 when **Evitts** was decided by this Court the Commonwealth has conceded the nunc pro tunc appeal issue when trial counsel failed to perfect the direct appeal. The Petitioner's research has failed to find any other Pennsylvania case except his that required a Petitioner to prove he would win his appeal before regaining his appellate right lost due to ineffective assistance of counsel

The Petitioner now makes some final observations concerning the manner in which the lower courts decided his case. The Petitioner directs the Court's attention to **Ruis v. Quarterman**, 504 F.3d 523, 532 (5th Cir. 2007). In this case the Court held that "where denial or relief precluded examination of the full merits of the cause even a slight abuse may justify reversal." The Petitioner argues that if a slight abuse may justify the grant of extraordinary relief, surely more serious instances of judicial abuse would require the grant of extraordinary relief. The two most serious examples of judicial abuse that took place

during the habeas proceedings can be identified. The Courts below made untrue statements in order to rule against the Petitioner and the courts below ignored the fact that there was no procedural default bar to prevent the issuance of a Certificate of Appealability.

Concerning the untrue statements we look to p.10 of Magistrate Judge Heffley's Report and Recommendation (See Appendix E) where she wrote, "The Superior Court found [Petitioner's] claim was meritless under Pennsylvania Law." This is not true. As stated above, on page six of the Superior Court Decision 2012 (See Appendix G) the Court stated that Petitioner's claims had "arguable merit." In the very next sentence on p.10 Judge Heffley wrote that the Superior Court held that [Petitioner] had not demonstrated "that he was prejudiced" by trial counsel's failure to perfect his direct appeal. What the Magistrate Judge overlooked in her rush to rule against the Petitioner is the fact that these two sentences side by side are contradictory. If the Petitioner's case was meritless the Superior Court would have terminated its analysis after such a finding and the Superior Court would have never continued its analysis to reach the conclusion that the Petitioner was not prejudiced. This is just another example of the superficial manner in which the lower courts have decided his case.

District Court Judge Diamond continued to promote and accept Magistrate Judge Heffley's untrue statement and on p.10 of his Order (See Appendix D) he also erroneously stated that Petitioner's claims were meritless. Following the template of Judge Heffley, District Judge Diamond in his rush rule against

the Petitioner ignored contradictions in his own Order. On page three of his Order he acknowledged that the PCRA Court found trial counsel's performance to be deficient, but that the Petitioner had not demonstrated prejudice. If the Petitioner's case was meritless the PCRA Court would not have found that the Petitioner's claim had "arguable merit" (See Appendix H p.1) and would not have found trial counsel's performance to be deficient. This is just another example of the superficial manner in which the lower courts have decided the Petitioner's case.

On page one of the 2016 Panel Order (See Appendix C) we see again the untrue statement that the Petitioner presented an issue that was without merit. In his rush to rule against the Petitioner, Justice Chagares, the author of the 2016 Order, ignored contradictions in his own words. His Order found that the district court judges committed an error by stating that Petitioner's sentencing challenge was not cognizable. If the sentencing challenge was cognizable then trial counsel was ineffective in failing to perfect that issue. A C.O.A. should have been issued for Petitioner's third claim and the other two claims would have "come along for the ride." This is just another example of the superficial manner in which the lower courts have decided the Petitioner's case. Two en banc panels have ignored the "untrue statements issue."

The Petitioner cannot imagine this Court reaching the conclusion that federal judges making untrue statements in their rulings against a federal habeas petitioner is not an extraordinary circumstance that impugned the integrity of his

habeas proceedings.

The second most serious error committed by the courts below was to ignore the fact that there was no procedural default bar to prevent the issuance of a Certificate of Appealability. When the 2016 Order referred to above found error on the part of the district court judges in reference to the claim that forms the essence of Petitioner's case, the basis for the procedural default was eliminated. The Panel Opinion (See Appendix A) avoided mentioning this important non-frivolous issue because ruling in the Petitioner's favor on the procedural default issue would have required the issuance of a C.O.A. In **United States of America v. Cunningham**, 429 F.3d 673 (7th Cir. 2005), the Court observed that "a judge who fails to mention a ground of recognized legal merit is likely to have committed an error or oversight." Deliberately avoiding an issue in order to rule against the petitioner unquestionably impugned the integrity of the habeas proceedings.

As the Petitioner inches toward his conclusion he argues that above he has shown that: "1. No other adequate means to attain the relief he desires, 2. the party's right to issuance of the writ is clear and indisputable, and 3. the writ is appropriate under the circumstances." **Hollingsworth v. Perry**, 558 U.S. 183 (2010). The writ is appropriate under the circumstances because the Petitioner presented issues important to "proper judicial administration in the federal system." **LaBuy v. Howes Leather Co.**, 352 U.S. 249, 259-260 (1957). The writ is appropriate under the circumstances because granting relief to the Petitioner will forestall future error in the courts below and "add importantly to the efficient administration of

justice." *Colonial Times Inc. v. Gasch*, 166 U.S. App. D.C. 184, 509 F.2d 517, 524 (D.C. Cir. 1975). The writ is appropriate under the circumstances because never before in the history of habeas corpus jurisprudence has an argument like the Petitioner's been presented to this Court that is supported by such an abundance of rulings by the state and federal judges and Circuit Justices that were involved in deciding the Petitioner's case and these rulings, establish a clear and indisputable right to relief. The Petitioner has no "other adequate means to attain the relief he desires." *Allied Chem. Corp. v. DaiFlon, Inc.*, 449 U.S. 33, 35 (1980).

But for page limitations, the Petitioner could survey cases and statements by past and current members of the United States Supreme Court that support the Petitioner's argument. Concerning past members of this Court, the Petitioner looks to Justice Scalia's dissent in *Day v. McDonough*, 547 U.S. 198 (2006). Justice Scalia stated that "the passage of time alone could not extinguish the habeas corpus rights of a person subject to unconstitutional incarceration." Concerning current members of this Court, the Petitioner is reminded of the words of Justice Gorsuch when he accepted his nomination to the Supreme Court and stated that if a judge goes home satisfied with all of his decisions, he must be a bad judge. The Petitioner hopes that there is a good judge or a few good judges who will review the Petitioner's argument and agree that his argument is firmly supported by the opinions of this Court.

In the argument presented above and in the argument presented to the Third Circuit Court of Appeals the Petitioner has established that the manner in which his case has been decided impugns the integrity of the habeas corpus process. The panel decisions conflict with the decisions of the United States Supreme Court, they conflict with authoritative decisions of other United States Courts of Appeal, and they conflict with other panel decisions in the Third Circuit.

The Petitioner brings his argument to an end by directing the Court's attention to the Third Circuit Panel Orders in Appendix C and Appendix N. The order denying the Petitioner a Certificate of Appealability and the Order Granting a Certificate of Appealability to another Petitioner both cite *Slack v. McDaniel*, cited previously. But in the Petitioner's case *Slack* is cited to deny relief while in the case involving the other Petitioner *Slack* is cited to grant the C.O.A. If counsel's failure to perfect the direct appeal justifies granting a C.O.A. in the *Grimes* case, then the failure of Petitioner's counsel to perfect his direct appeal also justifies granting a C.O.A. to the Petitioner.

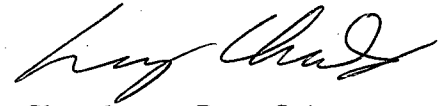
A Writ of Mandamus must be granted to the Petitioner. Moreover, that fact that two panels cited *Slack* and reached totally opposite conclusions concerning the "failure to perfect the direct appeal" issue is proof that this issue is debatable among jurists of reason.

A Writ of Mandamus must be granted.

CONCLUSION

For these reasons, a Writ of Mandamus should be granted directing the Third Circuit Court of Appeals to issue a Certificate of Appealability in order that the Petitioner's case can be reviewed on the merits.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Larry Charles".

Larry Charles, Pro Se