

ORIGINAL

No. \_\_\_\_\_

\_\_\_\_\_

IN THE

SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_

ROBERT MICKENS — PETITIONER  
(Your Name)

vs.

Superintendent SCT ALBION et.al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Pennsylvania Supreme Court/  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ROBERT MICKENS  
(Your Name)

10745, Route 48  
(Address)

ALBION, PA 16475-0002  
(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

**IN THE  
SUPREME COURT OF THE UNITED STATES**

**DECEMBER 2017**

**No. \_\_\_\_\_**

**ROBERT MICKENS  
PETITIONER**

**-AGAINST-**

**SUPERINTENDENT SCI ALBION  
AND; THE ATTORNEY GENERAL OF THE  
STATE OF PENNSYLVANIA**

**(DC. No. 2-120-CV-01039)**

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

**ROBERT MICKENS  
CT-7015  
10745, ROUTE 18  
ALBION, PA. 16475-0002**

**PHONE:  
(814) 756-5778**

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## **QUESTIONS PRESENTED**

- I. WHETHER DISTRICT JUDGE MARK HORNAK AND; THIRD CIRCUIT JUDGES IN THE COURT OF APPEALS ABUSED THEIR DISCRETION, DISMISSING PETITIONER'S RULE 60 (b) MOTION AS AN UNAUTHORIZED SECOND AND SUCCESSIVE?**
- II. WHETHER THIRD CIRCUIT JUDGES DECISION WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES?**
- III. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ERRONEOUSLY DISCARDED EQUAL PROTECTION AND IGNORED STRUCTURAL ERRORS, TO PROSECUTORIAL MISCONDUCT UNDER BRADY V. MARYLAND?**
- IV. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN AFFIRMING DISTRICT JUDGE HORNAK'S DECISION TO CONVERT THE 60 (b) MOTION UNDER {"EXTRAORDINARY CIRCUMSTANCES"} RELATING TO FRAUD, MISREPRESENTATION OR MISCONDUCT BY AN OPPOSING PARTY?**
- V. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ABUSED ITS DISCRETION IN DENYING A REHEARING EN BANC ON 60 (b) MOTION UNDER BRADY RELATING TO; WITHHOLDING EVIDENCE/ GOVERNMENT INTERFERENCE/ CONCEALING/ ALTERING EVIDENCE/ EXTREME EGREGIOUS DUE PROCESS VIOLATIONS?**

## **PARTIES**

The pro se petitioner is Robert Mickens, a prisoner confined at SCI Albion institution, the respondents are the Superintendent of SCI Albion, and The Attorney General of the State of Pennsylvania.

## **JURISDICTION**

The judgment of the United States Court Of Appeals For The Third Circuit was entered on September 1, 2017, an Order denying a petition for rehearing ***En Banc*** by a full panel was entered on October 10, 2017, and a copy of that Order is attached hereto as **Exhibit {C}**.

United States Court Of Appeals has entered a decision in conflict with the decisions of The Third Circuit Court Of Appeals, on the same important matter; or has far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a Lower Court, as to call for an **Exercise of This Court's Supervisory power; under {Extraordinary Circumstances}**, Jurisdiction is conferred by **28 U.S.C § 1254 (1)**.

### **DECISIONS BELOW**

The decision of the United States Court Of Appeals For The Third Circuit is unreported, **Case No. C.A. No. 18-2155 (D.C. No. 2-120-CV-01039** and a copy is attached as **Exhibit {A}** to the petition. The Order of The United States District Court For The Western District Of Pennsylvania is attached as **Exhibit {B}** to the petition.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This case involves **Amendment XIV** to the United States Constitution which provides:

### **Section 1.**

All persons born or naturalized in the United States, and  
Subject to the Jurisdiction thereof, are citizens of the  
United States and of the State wherein they reside  
No State shall make or enforce any law which shall  
Abridge the privileges or immunities of citizens of the  
United States; Nor shall any State deprive any person of  
Life; Liberty, or Property, **without DUE PROCESS** of Law;  
Nor deny to any person within its jurisdiction the  
**EQUAL PROTECTIONS** of the laws.

Criminal Docket Nos. **CC 9415959 and  
9502554**

***Criminal Homicide, Criminal Conspiracy,  
And violation of the Uniform Firearms Act: Firearms  
Not To Be Carried Without A License.***

## **STATEMENT OF THE CASE**

In November 1995, petitioner was tried and convicted by jury trial under the accomplice theory before Judge Donna Jo. McDaniel, Court of Common Pleas Of Allegheny County, alongside his brother, who were sentence life without parole for first degree murder of John Williams. Attorney for petitioner during direct appeal filed a ***No Merit Ander's Brief*** into the Superior Court Of Pennsylvania, petitioner was denied counsel and Superior Court affirmed judgment of sentence and petitioner filed a ***(PCRA)***, where P.A. Superior and P.A. Supreme Court denied petitioner's claim of ineffective assistance of trial counsel. Petitioner filed an initial Habeas Corpus relating to the ineffective claim that went denied in the U.S. District Court for the Western District. Petitioner on August 7, 2006, filed a PCRA into the court of Common pleas alleging ***Prosecutorial Misconduct/withholding evidence Brady violations/Government Interference Altering evidence/Due Process violations.*** And the Commonwealth erroneously denied the PCRA as time barred, while the P.A. Superior Court affirmed the Judgment and the P.A. Supreme denied Allowance of Appeal Per Curiam. Petitioner sought relief under ***"EXTRAORDINARY CIRCUMSTANCE"*** in the District Court and Magistrate Amy Reynolds Hay at **No. 2:08-cv-0950**, recommended that petition be ***dismissed pre-services*** and on September 11, 2008, district Judge adopted her opinion as that of the Court. Petitioner's objections were denied, on October 22, 2009, petitioner filed a **§2244** petition in the U.S. Court Of Appeals at **C.A. No. 08-409** which was denied. At **No. 08-4009** Petition For ***Rehearing En Banc*** was denied. Petitioner again filed in the District Court at **2:12-cv-1039**, district Judge Mark Hornak Adopted Magistrate Judge Cynthia Reed eddy's recommendation to ***dismiss pre-service*** as opinion of the Court.

## **STATEMENT OF CASE(2)**

And; on February 14, 2017, petitioner filed a **60 (b) Motion** to reopen his civil case, under “Extraordinary Circumstances” in light of **James Dennis V. Secretary of Pennsylvania Dept. of Corrections as No. 13-9003 No. 2-11-cv-01610**. See petitioner’s **60 (b) Motion** attached here to as **Exhibit {D}**. District judge Mark Hornak on April 28, 2017, issued an opinion at **2:12-cv-01039**, dismissing the Motion without prejudice, as a Second and Successive, stating the District Court lacks jurisdiction and Authority, see Judge Hornak’s opinion attached as **Exhibit {B}**. May 21, 2017, petitioner filed an application for certificate of Appealability in the U.S. Court Of Appeals For The Third Circuit at **Civil No. 2:08-00950/2:12-01039**, for abuse of discretion of the District Court under ‘Extraordinary Circumstances’, requesting that a Cert. issue, and that **60 (b) Motion** move forward in the confines of a **60 (b)** and not a successive petition. See Application for Certificate attached hereto as **Exhibit {E}**. Attached as **Exhibit {A}**, the U.S. Court Of Appeals for The Third circuit **No. C.A. 18-2155 (D.C. No. 2-120-cv-01039** denied Cert. On September 13, 2017, petitioner filed a statement for rehearing **En Banc**, at **Exhibit {F}** in the United States Court Of Appeals and; as **Exhibit {C}**, on October 10, 2017, a full panel in the U.S. Court Of Appeals denied a rehearing **En Banc**. The petitioner now humbly approaches this Honorable Court and respectfully request that the Court invokes its extraordinary discretionary powers, specifically utilizing the **miscarriage of Justice doctrine** where the petitioner has had “**NO**” avenue to redress the violations to his constitutional right to due process as the petitioner was unable to prevail under the “**gatekeepers rules**” since he was denied direct review and locked out of court when counsel of record entered an Ander’s No Merit Brief into the P.A. Superior Court.

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## **REASONS FOR GRANTING PETITION**

The United States Court Of Appeals has rendered a decision in conflict with the decisions of The Third Circuit Court Of Appeals and The U.S. Supreme Court on the same important matter, or has departed from the accepted and usual course of judicial proceedings, in affirming the District Court's denial of petitioner's Rule **60 (b) (6) Motion**, in the conversion of a second and successive petition. The Third Circuit Court panel ignored the heightened prejudice attached to the **60 (b) Motion** which seriously burdened the petitioner, as the District Judge Mark Hornak abused his discretion as he systematically rubberstamped, in his analysis, under **extraordinary Circumstances**, the **60 (b) Motion** that petitioner is, in fact, entitled to seek relief utilizing this avenue after initially filing first, a **2254** incorrectly in the district Court at **C.A. No. 2:08-0950**, without authorization from the U.S. Court of Appeals for The Third Circuit. And then, a **2244** Petition which was denied as failing to make a **prima facie showing** see Order's attached hereto as **Exhibit {G}. 2:08-0950**, and **Exhibit {H} No. 08-4009**. Also, petitioner attempted to seek relief again pertaining to the violation of due process relating to **Brady**, at **No. 12-01039**, which Judge Mark Hornak denied relief as **Exhibit {I}** attached hereto, as having no jurisdiction. Thus, **60 (b) Motion** was in fact ripe for petitioner and not a second and successive. The comity and Federalism would suffer no intrusion into the State' sovereign powers, to punish offenders, when agents for the State dishonor, in bad faith; the Constitutional values.

First, denying the defendant the requested evidence at trial which the judge instructed them to turn over by the end of the day. And; turn over altered evidence during the defendant's appellate process, and then fabricate evidence to bolster the claim as to why the evidence was first withheld during trial and then was altered during appeal. This being deliberate and egregious violations of due process of prosecutorial misconduct, does infect the integrity of the proceedings as to warrant the grant of habeas relief. The Court of Appeals ignored a litany of cases, as district Judge Hornak states in his opinion to convert the **60 (b) Motion** into a successive petition, in pertinent parts:

*July 8, 2008, Mickens filed a second federal habeas action in this court, which was docketed as Civil Action No. 08-00950 (W.D.P.a) September 17, 2008. U.S. district Judge Arthur J. Schwab dismissed the petition for lack of subject matter jurisdiction. On October 22, 2008, the U.S. Court Of Appeals denied Mickens Application to file a second or successive petition. Mickens petition for rehearing En Banc was also denied. Undeterred, four years later, on July 25, 2012, Mickens filed his third federal habeas petition in this Court, which was docketed at Civil Action No. 12-01039 (W.D.Pa) ( the 2012 petition) Mickens attempted to raise ineffective assistance of counsel claims, and he reasserted his Brady violation claims. On August 20, 2012, I dismissed the petition as a second or successive §2254 petition*

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*Over the years Mickens has also filed two additional applications with the Court of Appeals for the Third Circuit requesting Authorization to file a second or successive §2254 petition. Both were denied order of November 4, 2011, C.A No. 11-3586 ECF No. 16-27 and order of September 24, 2013, C.A. No. 13-3652, ECF No. 16-29.*

See Exhibit {B} Judge Hornak's opinion. Abuse of discretion, a district Court's denial of a **Motion under rule 60 (b) (6),**.

**Brown v Phila Hous, Auth. 350 F. 3d 338, 342 (3<sup>rd</sup> cir 2003)**, A district Court abuses its discretion when it based its decision upon a clearly erroneous finding of fact, an erroneous conclusion of law, or an improper application of law to fact. **Morris v. Horn, 187 F. 3d 333, 341 (3<sup>rd</sup> Cir. 1999)**. In his opinion, district judge Mark Hornak agreed with the Commonwealth Court in an clearly erroneous decision, in denying petitioner relief, in a decision contrary to established federal law by the Supreme Court, Judge Hornak's opinion in pertinent parts:

***Federal Rule of Civil Procedure 60 (b) "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, newly discovered evidence," Gonzalez v. Crosby, 545 U.S. 528 (2005). In this Motion, Mickens appears to be rehashing the same Brady claims that he raised in his 2008 and 2012 petitions, because those were new claims and because Mickens had not received prior authorization from the Court Of appeals, the Court do not review those claims on the merits, but rather dismisses both petitions for lack of subject matter jurisdiction. It does not appear that Mickens' reliance on Dennis will not aid in his attempt to persuade the Court of Appeals that he has made A "Prima facie showing" that he should be authorized to file a second and successive petition. Mickens' assertion that Dennis changed the substantive law applicable to Brady claims is without merit. Dennis reiterated the element necessary to prove Brady claim remained unchanged. To prove a Brady violation, A defendant must show the evidence at issue meets the critical elements.***

*First, the evidence "must be favorable to the accused either because it is exculpatory or because it is impeaching." Second, it "must have been suppressed by the State, either wilfully or inadvertently," Third, the evidence must have been material such prejudice resulted from its suppression. In addition, the holding of Dennis does not change the fact that the Superior Court of Pennsylvania affirmed the PCRA Court's decision that Mickens had failed to establish his Brady claims because he had not demonstrated (1) that he was prejudiced by receiving incorrect information from the Commonwealth with regard to the victim's criminal record and (2) that the Commonwealth had withheld material exculpatory evidence regarding its witness Theresa Somerville.*

This analysis stands incorrect, where petitioner's Brady claims were never adjudicated on the merits where the Commonwealth Court stated that petitioner's failed to hurdle the time bar exception, and that Court barred the **PCRA** as being time barred and the Superior Court affirmed that decision. See opinion of the common pleas Court attached hereto as Exhibit {J} and PA Superior Court's at Exhibit{K}. Jurisdictional bases were satisfied for element of an action under federal **Rule of Civil Proc. 60 (b)** according to the Court of Appeals, **(1)** A judgment which ought not, in equity and good conscience, to be enforced **(2)** A good defense to the alleged cause of action on which judgment is founded, **(3)** Fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense **(4)** the absence of or negligence to the part of the defendant.

And (5), the absence of any adequate remedy at law. 114 F. 3d 484, 487, (c.a. 5 1997). The Court of Appeals departed from many cases in discarding petitioner's **60 (b) Motion** to reopen 2-08-0950, including; citing cases, Kyles v. Whitley, 514 U.S. 419, 435 (1995); Brady v. Maryland, 373 U.S. 83 (1963). Agurs, 427 U.S. at 112). The Writ of Habeas Corpus has historically been regarded as an extraordinary remedy, a Bulwark against convictions that violate fundamental fairness, 507 U.S. at 633, if suppression of evidence (and thereby, the truth) is a serious constitutional error, its fabrication is a greater error, that is why the Supreme Court set out differing materiality standards for three types of error that implicate Brady, Haskell, No 15-3427 866 F.3d 139 (3<sup>rd</sup> Cir.). Clearly district Judge Hornak, upon concluding that the **60 (b) Motion** is a second and successive petition, Judge Hornak bases his decision on a review of the State Court Record, that petitioner had never received a merits determination to the facts and points of law because the Court from which Judge Hornak based his decision has based its decision erroneously with an unreasonable misapplication of the law of those facts related to the 60 (b) Motion, nor has any Court ever held an evidentiary hearing.

As a panel of the Third Circuit Court Of Appeal, in February 2015,  
**Dennis V. Sec'y Pa Dep't of Corr. 777 F. 3d 642 (3d Cir. 2015),**

discuss in pertinent part:

**Branch v. Sweeny, 758 F. 3d 226, 232 (3d Cir. 2014); Brown V. Wenerowicz, 663 F. 3d 619, 627 (3d Cir. 2011).** The Antiterrorism and Effective Death Penalty Act (**AEDPA**) dictates that the manner in which we conduct our review, federal habeas Courts cannot grant relief “with any respect to any claim that was adjudicated on the merits in a State Court” unless the adjudication **(1)** “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court Of The United States”, or **(2)** “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding”. **28 U.S.C. §2254 (d). Williams V. Taylor, 529 U.S. 362, 412 (2002).** **AEDPA** allows federal Courts to grant habeas relief only if the State Court decision is contrary to, or an unreasonable application of, clearly established federal law. **28 U.S.C. §2254 (d) (1). Under 28 U.S.C. §2254 (d) (2)** A State Court decision is based on an “unreasonable determination of the fact” if the State Court’s factual findings are “objectively unreasonable in light of the evidence presented in the State Court proceedings”, which requires review of whether there was sufficient evidence to support the State Court’s factual finding. See **Miller El V. Cockrell, 537 U.S. 322, 340 92003).** In **Banks**, the Supreme Court explicitly rejected the notion that “the prosecution can lie and conceal and the prisoner still has the burden to.... Discover the evidence, Banks concluded that “[a] Rule.. declaring ‘prosecutor may hide, defendant must seek, is not tenable in a system constitutionally bound to accord defendant’s due process”.

See also *U.S. V. Tavera*, 1719 F. 3d 705, 712 (6<sup>th</sup> Cir. 2013) (recognizing that “the clear holding *Banks*” does away with any belief that *Brady* imposes a due diligence requirement. “*Due diligence*” plays no role in the *Brady* Analysis. In *Wilson v. Beard*, 589 F. 3d 651, 663-64 (3d Cir. 2009) we got it right, the fact that a criminal record is a public document cannot absolve the prosecutor of her responsibility to provide that record to defense counsel. Indeed, we have granted habeas relief of the basis of a “significant difference” between the suppressed impeached and other types impeachment evidence used at trial, *Slutzker v. Johnson*, 393 F. 3d 373, 387 (3d Cir. 2004).

As pointed out by the district Court, the Supreme Court instructed in *Kyles* that [a] defendant need not demonstrate that after discounting the exculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict, 514 U.S. at 434-35 rather, the *Kyles* Court rebuked the dissent for assuming that Kyle must lose on his Brady claim because there would still have been enough to convict, even if the favorable evidence had been disclosed. “*The rule is clear*”, and none of the Brady cases has ever suggested that sufficiency of the evidence (or insufficiency) is the touchstone”. The rationale behind *Brady* itself rests on the principle that prosecutors bear an obligation to structure a fair trial for defendants. Most Federal Courts have concluded that suppressed evidence may be material for *Brady* purposes even where it is not admissible.

In this instance, the petitioner has demonstrated that first, he had been pursuing this Brady claim even before he was denied a direct appeal when counsel submitted an Ander's brief into the P.A. Superior Court casing the petitioner to operate under *[PCRA]* "gatekeeper's rule". It is also clear of record as stated by district judge Mark Hornak, that petitioner was undeterred in pursuing the Brady claims in the Federal Court where the Brady claims were never reviewed on a merits determination where Court after Court discarded the *miscarriage of justice doctrine*. The petitioner is denied *Equal Protection under the 14<sup>th</sup> Amendment*, where case after case in the U.S. District Courts, where a defendant was not indigent and pro se and represented by an attorney, who asserted a Brady violation and that assertion was prove by fact to law, defendant's case was indeed remanded/overtured and given appropriate adjudication. In the petitioner's case, each Court has determined that, "OKAY"; evidence was suppressed during the trial, evidence was altered during the appeals by attorney for the Commonwealth. Evidence was fabricated by attorney for the Commonwealth but; petitioner is not entitled to relief because the Federal Court denied entry based on an erroneous decision of the Commonwealth Court.

Thereby, leaving the petitioner with no avenue to redress an egregious violation of his guaranteed Constitutional right to a fair trial under due process of law under the **14<sup>th</sup> Amendment**. The petitioner's **60 (b) Motion** was not a second and successive where, his **2244** petition requesting a **COA** should have been granted at **No. 08-4009** relating to **No. 08-950**, where petitioner's **[PCRA]** petition was erroneously dismissed when the evidence presented was Newly Discovered at the time it was presented to the Court of Common Pleas. Therefore, the Federal Court could have assumed jurisdiction, the U.S. Court Of Appeals for the Third Circuit could have issued a **COA**. See **Exhibit [D]**, **60 (b) Motion**. Also, see Lower Court's opinion at **Exhibit {K}**. And **Exhibit {L}**, letter from attorney John Knorr prior to locking dead-locking petitioner out of Court by filing an **Ander's No Merit Brief** into the P.A. Superior Court, where he instructed the petitioner to pursue the Brady violation of withholding evidence at trial by the D.A. under ineffective assistance of counsel, and then filed the no merit brief, see **exhibit {M}** **No. 1961 PGH 95**, with petition for leave to withdraw. At **exhibit {N}** petition for appointment of counsel. At **Exhibit {O}**, Order of Court August 6, 1998 denying without prejudice petition for appointment of counsel.

Petitioner was left without counsel on direct appeal and was forced to file a **(PCRA)** petition. This evidence was presented in Writ of Habeas Corpus, presented **"CAUSE AND PREJUDICE"** which demonstrated diligence in pursuit of an appeal to every claim presented surrounding the ***Prosecutorial Misconduct, Brady, due process violations.*** Without the supervisory discretion of this Honorable Court, petitioner will have zero opportunity at a right to redress and has been denied under appeal since his direct appeal, where the federal Court in every aspect, and in every Court since the petitioner was denied direct review. Counsel initiated procedural bars against the petitioner and each Court has erroneously enforced those procedural bars to deny petitioner entry to the Courts to a merits determination to the extreme egregious violations to the petitioner's rights. Without this Court's review, each Court would have denied petitioner protections guaranteed to him under the equal protections clause, when all others, that has laid the facts against the weight of the laws surrounding ***Brady/due process violations*** that were represented by counsel, who weren't indigent, that they not only received the right to redress, but; a merits determination to the facts and points of the law jarring reversals of their unlawful convictions.

Petitioner's ~~§2244~~ Authorization petition was erroneously denied the U.S. Court Of Appeals, thus, causing the petitioner to strongly illuminate the violations from which they had derived, the (PCRA) Court. In petitioner's **60 (b) Motion**, the holding in Dennis No. 13-9003 2016 U.S. App. Lexis 15434, in the U.S. Court of Appeals for *The Third circuit where the P.A. Supreme Court* unreasonably applied Brady standard and its progeny, and determined that a police activity sheet, had it been disclosed, the jury would have had a reasonable doubt as to the petitioner's guilt. Thus, in this instance, the petitioner suffered that and the same, and was entitled to enter the federal Court upon requesting authorization where his *newly discovered claims were erroneously barred from the Common Pleas Court as untimely*. Therefore; **Rule 60 (b) Motion** that attacked 'defect in the integrity of federal habeas proceeding' or that challenged a procedural ruling that precluded a merits determination will not be treated as a second or successive petition, Gonzales, 545, U.S. at 538, Canales v Quarterman, 507, F. 3d 884, 887 (5<sup>th</sup> Cir. 2007). (A **Rule 60 (b) Motion** is not to be treated as a successive habeas petition if the Motion attacks a defect in the integrity of the federal habeas proceeding and does not raise a new ground for relief.

Or, district Court's resolution of the claims on the merits). **60 (b) Motion** challenging the dismissal is not treated as a second or successive petition, *Phelps v Alameida*, 569 F. 3d 1120 (2009). (**Granting rule 60 (b)** relies to habeas petition who's claims were erroneously time barred). [See] *Harbison v Bell*, 556 U.S. 173 L. Ed 344 (2009). *Triestman V United States*, 124 F. 3d 361, 377 (2d Cir. 1997). ("Rule 60 (b) Motion is available and is not subject to restrictive petition standards and procedures when Motion is based on [f]raud on the federal Court, *Rodriguez v. Mitchell*, 252, F.3d 191, 199 (C.A. 2001). Rule 60 (b) (3) claim that "previously denied habeas petition [should be reopened] on grounds that the Court's decision was the product of a fraud upon the Court once [Movant] established that the *fraud was material and deliberate*," *United States v MacDonald*, 1998 U.S. App. Lexis 22073, (4<sup>th</sup> Cir. Sep. 8, 1998) (*Per Curam*). (Classic function of **A Rule 60 (b) Motion** is to procure a judgment to a procedural defect denying relief, which calls for treating the Motion within its usual confines of **Rule 60 (b)**, *Gonzalez*, 545, U.S. 539, (quoting *Rodwell V Pepe*, 324, F. 3d at 70). The Antiterrorism and Effective Death Penalty Act (**AEDPA**) allows federal Courts to grant habeas relief on if a State Court decision is contrary to, or an unreasonable application--.

Of clearly established federal law **28 U.S.C.S. §2254 (d) (1)**, A State Court decision is “**contrary to**” clearly established federal law if the state Court **(1)** applies a rule that contradicts the governing law set forth in the U.S. Supreme Court precedent or **(2)** confronts a set of facts that are materially indistinguishable from a decision of the U.S. Supreme Court and nevertheless, arrives at a result different from that reached by the U. S. Supreme Court interpreting U.S. Supreme Court precedence in a manner that adds an additional element of the legal standard for proving a constitutional violation is “**contrary to**” clearly established federal law. United States Supreme Court may exercise revising power on all questions arising under constitution and laws of union and its decisions are final and obligatory upon all other judicial tribunals, state or federal, and while state has right to consider and such questions and determine them, its decision must conform to that of the Supreme Court, or corrective power may be exercised, **Green v Lessee of Neal, (1832) 31 U.S. 291, 6 pet. 291, 8 L. Ed 402.** Thus, this Honorable Court has jurisdiction as to whether the District Court and the Federal Court of Appeals, abused its discretion in the conversion of the petitioner’s **60 (b) Motion.**

On certiorari to review judgments affirming convictions of murder, U.S. Supreme Court must make an independent determination on undisputed facts of question whether there had been violations of fourteenth Amendment of the constitution. See Mislinski v New York (1945) 324 US 401, 89 L.Ed 1029, 65 S. Ct. 781. **60 (b) (6) (3) and (d) Motion**, was ripe for the U.S. District Court to reopen judgment under **C.A. 2:08-0950**, which settled construction of **14th Amendment** presupposes possibility of abuse by State officer and deals with such contingency, where that officer of the state, in exercise of authority with which he is clothed, misuses power possessed to do wrong forbidden by Amendment, and federal judicial power is competent to afford reverses for wrong by dealing with officer ad result of his assertion of power, Defoule v. Ellis, (1947, DC Ga) 74 F.Supp 336. District Judge Mark Hornak, as a federal Judge, held an obligation to direct the **60 (b) Motion** at **C.A. No. 2:08-0950** to district Judge Arthur J. Schwab, where it was magistrate Judge Amy Reynolds Hay that recommended that the petition be dismissed pre-services, as the petitioner left the **(PCRA)** Court under an erroneous decision by that Court, contrary to U.S. Supreme Court laws under **Brady/due process violation** under the Newly Discovered doctrine.

See Magistrate Judges report and recommendation, Amy Reynolds Hay as Exhibit {P}. Where Judge Hornak specifically applied the same erroneous determination of the facts that the Commonwealth Court had when Judge Hornak stated; [“The Pennsylvania Superior Court has already determined that Mickens failed to establish his Brady claim in how the Commonwealth had turned over the wrong information”]. There was never a merits determination as to petitioner’s Brady claim, and the P.A. Superior Court had erroneously unreasonably made that determination under the ineffective assistance of counsel doctrine not under Brady as Judge Hornak stated. The drafters of the Fourteenth Amendment, understood Habeas to allow for more than simply a review of the jurisdiction of a court. All that Habeas review permitted, violations of the state-court with proper jurisdiction, but acting unconstitutionally-could not have been redressed. For federal habeas to be able to protect constitutional rights, particularly at a time where states’ biases were apparent, review in the federal system require some ability to examine the process by which the state court reached its determination. ***The Judiciary Act of 1867*** permitting claims addressing constitutional claims. See **Frank v. Mangum, 237 U.S. 309, 59 L. Ed. 969, 35 S. Ct 582 (1915).**

**Ex parte McCordle, 73 U.S. (6 Wall.) 318, 325-26, 18 L. Ed. 816**

**(1867)**, brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. Habeas review was available to overcome any corrupt state court process, including those: that relied upon unconstitutional statute, issued from a court that lacked jurisdiction, or were the product of patently unfair state procedures. The Supreme Court has described habeas corpus as "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action,"

**Harris v. Nelson, 394 U.S. 286, 290-91, 22 L. Ed. 2d 281, 89 S. Ct.**

**1082 (1969)**, that is designed "to interpose the federal courts between the States and the people, as guardians of the people's federal right-to protect the people from unconstitutional action."

**Reed v. Ross, 468 U.S. 1, 10 82 L. Ed. 2d 1, 104 S. Ct. 2901 (1984).**

The Supreme Court has also historically stressed the need to have habeas relief governed by equitable principles, stating "the very nature of the Writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."

**Harris V. Nelson, (1969).** And that formalities “yield to the imperative of correcting... fundamentally unjust incarceration,”  
**Engle v Isaac, 456 U.S. 107, 135, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982).** Federalism cannot shelter a state from knowingly and continuously preventing review for an individual suffering a continuous deprivation of liberty .Jurisprudence is the concept that the violation of any right has a remedy in law. When a state is alleged to have violated a protected right, it is necessary for some remedy to be available, the fourteenth amendment commands, No state shall deprive any person of *life, liberty, or property, without due process of the law* presupposes that the federal court will be available to order redress for state infringement of a protected right. The United States Supreme Court has explicitly included the privilege of habeas corpus in its list of rights protected from state infringement. The Due Process Claus is to require states to provide persons with due process, meaning a “[**Full and Fair**]” opportunity to litigate the matter. If a state fails to provide such, federal habeas must be available as a means to safeguard constitutional protections. The states court’s factual findings are presumed to be correct unless, the state court’s findings are not “fairly supported by the record”.

**Pemberthy v. Beyer, 19 F. 3d 864 (3d Cir. 1994) (quoting 28 U.S.C. §2254 (d))** but, of course, as the Supreme Court has recognized, “a State Court’s incorrect legal determination had [Never] been allowed to stand because it was reasonable, **Williams, 529 U.S. at 402 (O’Connor J., concurring) (quoting Wright v West, 505 U.S. 277, 305 (1992))**. Justice O’ Connor reiterated “[W]e have always held that federal Court, even on habeas, have an independent obligation to say what the law is. In **Winship, 397 U.S. 358 (1970)**, the Supreme Court state, “lest there remain any doubt about the Constitutional stature of the reasonable-doubt standard, we explicitly hold that the due process clause protects, the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime which he is charged.” 397 U.S. at 364, **Marbury v Madison, 1 Cranch 137, 2 L. Ed 60 (1807)**; No clause within the constitution is intended to be without effect. And no state shall abridge a criminal defendant’s right under the fourteenth Amendment, Unconstitutional deprivation of a cause of action is violated where government officials obstruct legitimate efforts to seek judicial redress and thwart vindication of a claim when violating basic principles that enable the defendants to assert their rights effectively.

**Whalen v County of Fulton, 126 F. 3d 400, 575 460-07 (2d Cir. 1997). Barrett v United States, 798 F. 2d 565 (2d Cir. 1986).** “The only way to effectively repair the Constitutional deprivation [the petitioner] suffered at the hands of the attorney for the Commonwealth is to restore him to the position in which he would have been had the deprivation not occurred”. **Lewandowski v Makel, 949, F. 2d 884, 889, (6<sup>th</sup> Cir. 1991). 28 U.S.C. § 1291 and 2253** applies because the District Court did not hold an evidentiary hearing and based its conclusion on the review of the State Courts record, with the decision being a erroneous misapplication of the law. **60 (b) (6)**, the circumstances are extraordinary, where, without such relief, an extreme and unexpected hardship would occur. Courts are to dispense their broad powers under **60 (b) (6) in extraordinary circumstances**. The U.S. Court of Appeals for The Third Circuit has long employed a flexible multifactor approach to **Fed. R. Civ. P. 60 (b) (6) Motions**, that takes into account all the particulars of a movants case. The fundamental point of **60 (b)** is that it provides a grand reservoir of equitable power to do justice in a particular case. **Cox v Horn, 757 F. 3d 113, 2014 U.S. App. Lexis 15207 89 Fed. R. Serv. 3d Callaghan 73.**

**28 U.S.C. §2243** requires that the Writ be awarded, or an order to show cause issue, “unless it appears from the application that the applicant or person detained is not entitled thereto” such consideration, may properly encompass any exhibits attached to the petition including, but not limited to, transcripts, sentencing records, and copies of state court opinions. Magistrate judge Amy R. Hay cited **Barber v Cockrell, No. 4:01-cv-930, 2002 WL 63079** and stated, “the face of the petition, and from **[STATE]** Court records of which this court can take judicial notice, accordingly, in deciding this petition, this court takes judicial notice of the record in **Mickens v Johnson, No. 02-1064 (W.D. Pa).** **28 U.S.C. §2244 (b) (3) (C)** provides:

*The court of appeals may authorize the filings of a second or successive application only if it determines that the application makes a prima facie showing that the applicant satisfies the requirement of this section- petitioner 60 (b) Motions, reflects and raised the argument to the very same claims and violation in his 2008 petition in both the U.S. Dist. Court of Western P.A. and the U.S. Court of Appeals For The Third Circuit as laid out also in petitioner’s application for certificate of Appealability at EX-{F}.*

A certificate of Appealability (**COA**) should issue only when a petitioner had made a sufficient showing of a denial of a constitutional right. **28 U.S.C. §2254 (C) (2)**. Magistrate Judge Amy R. Hay, cited **Slack v McDaniel, 529 U.S. 473 (2002)**.

**Walker v Government of The Virgin Islands, 230 F. 3d 82, 89-90**

**(3d Cir. 2000)**, to procedurally deny the petitioner's **Writ of (COA)**,

when under **Slack V McDaniel**, the Supreme Court held that, "when

a district court denies a habeas petition on procedural grounds

without reaching the petitioner's underlying constitutional claims,

a **COA** should issue when the prisoner shows at least, that jurist of

reason would find it debatable whether the district court was

correct in its procedural ruling. **Slack v McDaniel, 529 U.S. at 478.**

In her opinion in relevant parts; Common pleas judge McDaniel

stated:

*A review of the record reveals that the defendant has failed to present any meritorious issues on appeal, and, therefore, this court's order dismissing the PCRA petition should be affirmed. August 18, 2006, when her filed a pro se PCRA petition alleging after-discovered evidence of prosecutorial misconduct, given his allegation of what this court thought may have been an exception to time limitation requirements of the PCRA, it ordered the defendant to file an amended PCRA petition which he did on Sept. 6, 2006. After a thorough review of the amended petition, this court dismissed it without a hearing on Dec, 27, 2006. "In Brady, the U.S. Supreme court held that 'the suppression by the prosecutor of evidence favorable to an accused upon request violates due process whether the evidence is material either to guilt or punishment. FURTHER, in order to prevail under the newly discovered evidence exception, applicant must prove the facts could not have been ascertained earlier by the exercise of due diligence...*

***MOREOVER, not only had the defendant failed to satisfy, the PCRA requirement regarding the time to raise his Brady claim, he also fails to satisfy the requirements of the underlying Brady claim, as noted above, in order to prevail on Brady claim, he must establish prejudice. However, in his appeal following the dismissal of his first PCRA, the defendant argued that trial counsel was ineffective for failing to present evidence of the victim's violent propensities, in affirming this court's dismissal of the PCRA, the Superior Court held that the trial transcripts was already replete with evidence of the victim's violent tendencies, and any other evidence would have been cumulative and would not have affected the verdict.***

This determination stands in absolution as being erroneously unreasonable in how the U.S. Supreme Court laid out the Brady doctrine. As the petitioner cites Dennis, in his Rule 60 (b) (6) Motion, at trial, the record was replete of testimony of the victim in how he carried a gun, and had the tendency towards violence which testimony came from the petitioner and his co-defendant. But; D.D. A. Anthony Krastek not only refused to turn over the requested evidence which could have altered the jury's verdict as to the degree of homicide we he went on record at II. 212-213 and testified as fact; [I CAN TELL YOU RIGHT NOW, AS TO THE VICTIM, THE ONLY CRIME OF VIOLENCE IS A RESISTING ARREST PERIOR!] In her opinion, judge McDaniel in relevant parts:

*As to the criminal record information of the commonwealth witness Theresa Somerville, the defendant argued that the commonwealth improperly withheld evidence of her crimen falsie conviction which should have impeached her credibility. A careful review of Ms. Somerville's record reveals that the claim lacks merit. The trial of this matter was held in May, 1995, Ms. Somerville was not charged with a crimen falsie crime until 2005, ten (10) years after the trial was held. At the time of her testimony in 1995, Ms. Somerville had no crimen falsie conviction thus, the Commonwealth could not have disclosed evidence of her conviction when she had not yet committed the crime, this claim must also fail.*

Magistrate judge Amy R. Hay, ignored the Exhibits of evidence attached to the petition at the time where the petitioner presented evidence that showed, At **Ex-[D]** page 5 of the **60 (b) Motion**, petitioner showed that Ms. Somerville's, on 08/17/1995 plead guilty to criminal conspiracy of the drug cos. Act. And on **10/19/1994**, just one month prior to the death of the victim, the father of her children, **Ms. Somerville plead guilty (2) two years' probation for terroristic threats M1/Simple Assault, and harassment.** Judge McDaniel also failed to observe that fact in petitioner's PCRA petition. Thus, being an absolute violation under Brady and was in fact enough for magistrate judge to recommend that district Judge Arthur J. Schwab issue a **COA**. And that **60 (b) Motion** should have been viewed in the confines of the **60 (b) Motion** based on an erroneous unreasonable determination.

By both the district court and the U.S. Court of Appeals, See Ex-{J}, opinion of the Common Pleas Court. In her recommendation in relevant parts; Magistrate judge Cynthia eddy and district Judge Mark Hornak adopted as opinion of the court surrounding the Brady violation at No. 2:12-1039:

*In addition to ordering state records, and/or opinions a federal court may take judicial notice of state court records and/or state court opinions citing Barber v Cockrell, No. 4:01-cv-930, 2002 WL 31 2014. On August 18, 2006, petitioner filed a second PCRA petition alleging after-discovered evidence of prosecutorial misconduct, On July 8, 2008, petitioner filed another petition for Writ of Habeas Corpus in this Court which was docketed at Civil Action No. 08-950. On September 17, 2008, district judge Anther J. Schwab dismissed petition and as a successive petition. On October 22, 2008, civil action No. 08-4009, the Court of Appeals for the Third Circuit denied the request for a Certificate of Appeal holding as follows:*

*The foregoing application under 18 U.S.C. §2244 to file a second or successive petition for Writ of Habeas Corpus under U.S.C §2254 is denied. Mickens has failed to meet the §2244 standard of authorization to file a second or successive petition. Mickens has made no "PRIMA FACIE SHOWING" that his proposed §2254 petition would rely on a "new rule of constitutional law" see 28 U.S.C §2244 (b) (2) (A) and (b) (3) (C). Indeed, Mickens asserts claims that have been previously rejected by this court. Further, neither of his claims is based on a factual predicate that 91) "could not have been disclosed previously through the exercise of due diligence" and (2) "would be sufficient to establish by clear and convincing evidence that, but for const., error, no reasonable fact finder would have found the applicant guilty of the underlying offense. 28 U.S.C §2244 (b) (1) (B) (i-ii) and (b) (1) (c), Ex-{H}.*

This is clearly an abuse of discretion and an erroneous decision against Brady when Judge Hornak steps even further any from United States Supreme Court findings as he states in his memorandum Order at Ex-{B} to convert **60 (b) Motion**.

*"Mickens attempted to raise ineffective assistance of counsel claims and he reasserted his Brady violation claims. On August 20, 2012, I dismissed the petition as a second and successive §2254 petition. If I concluded that the Motion is actually an unauthorized second or successive habeas petition, it must be dismissed for lack of subject matter jurisdiction or be transferred to the Court of Appeals for consideration in this Motion, Mickens appears to be rehashing the same Brady claims that he raised in his 2008 and 2012 petitions. Mickens now request the courts reopen his federal habeas proceedings and argue that he is entitled to pursue those same Brady claims in light of the decision of the U.S. Court of Appeals for The Third Circuit in Dennis V Secretary Pennsylvania department of corrections, 834 F. 3d 263 (2016) (En Banc). Mickens' assertion that Dennis changed the substantive law applied to Brady is without merit.*

Even as Judge Hornak strongly suggest that petitioner's claims has no standing to Brady under Dennis, Judge Hornak correctly cites the doctrine surrounding Brady and then; matter-of-factly applied an unreasonable misapplication of the law determining that petitioner sees a change in law under Dennis as to Brady, when, petitioner has rigorously stated, plead and proven that; each and every Court.

Has followed the erroneous decision of the *PCRA* Court in dismissing the petitioner's *Newly Discovered* claims under *Brady* as Untimely and the federal Court in their own opinions, and Orders tethered the erroneous misapplication of the *PCRA* Court when determining that petitioner failed to present the *Brady* claims in his 2002 petition specifically when the evidence went undisclosed until 2006 when petitioner retrieved the evidence from the state police repository. Thus, petitioner's *60 (b) (6) Motion* to reopen is not a second petition. See *Ex-{B}* Opinion of judge Hornak and also *Ex-{P}* recommendation of Magistrate Judge Amy R. Hay. Also *Ex-{Q}* Objections to that report and recommendation *2:08-cv-0950*. Also, *Ex-{R}* Docket 3<sup>rd</sup> Cir. Court of Appeals at *08-4009*. Which demonstrates forma puperis has been granted. *Ex-{S}* docket 3<sup>rd</sup> Cir. Court of Appeals at *13-3652*, forma puperis was grated. *Ex-{T}*, Statements showing that petitioner was in fact granted forma puperis relating to the Brady petition's being filed in the U.S. Court of Appeals.

## **CONCLUSION**

For all points of reasons within the margins of this petition for Certiorari, where district judge Mark Hornak abused his discretion and erroneously converted the Movant's *Rule 60 (b) (6)*.

**Motion** to reopen the judgment relating to **2:08-0950**, responding to **C.A. 1039**, and the United States Court of Appeals on **Rehearing En Banc**, abused its discretion in affirming judge Hornak's decision in the erogenous conversion of the Motion which denies petitioner's due process, the right to redress to the blatant egregious violations of his protected **14<sup>th</sup> Amendment** rights under the United States Constitution. The petitioner respectfully request that this Honorable Court issue a decision consistent with the interest of Justice and remand the petitioner's case back down to the United States Court Of Appeals, granting Certiorari, with instructions forth wit, to remand the petitioner's case back down to the Court of Common Pleas of Allegheny County, based on the claims and evidence set forth to support them within the confines of the **Rule 60 (b) (6) (3) Motion** relating to **FRAUD** to set aside the verdict and release the petitioner from custody where the panel's decision is contrary to the decisions of the United States Supreme Court and; that, consideration by this Honorable Court is necessary to secure and maintain uniformity of the decisions of this Honorable Court and that the United States Court of Appeals for The Third Circuit.

Where the panel's decision is contrary to the decision of the United States Supreme Court, this appeal involves questions of exceptional importance, to-wit [set forth one's unlawful conviction and mandatory **LIFE WITHOUT** parole sentence]. A stringent Miscarriage of Justice suffocates and stifles the petitioner's chance to redress without the discretion of this Court where the petitioner was denied due process FIRST HAND, prior to trial, clear on through the appellate process and was stripped of his **LIBERTY** because of that direct denial.

WHEREFORE, the petitioner prays for the foregoing relief that this Honorable Court issues a Certiorari consistent to the interest of justice.

Dates: December 6, 2017.

Respectfully Submitted,



Robert Mickens CT-7015  
10745, Route 18  
Albion Pa. 16475-0002