

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Barry L. Crespo Pro-se — PETITIONER
(Your Name)

vs.

Theresa DelBalso, et. al. RESPONDENT(S)

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

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Barry L. Crespo JD-1371
(Your Name)

301 Morea Road
(Address)

Frackville, Pa. 17932
(City, State, Zip Code)

(570) 773-2158
(Phone Number)

QUESTION(S) PRESENTED

1). DOES THIS CASE PRESENT AN ISSUE OF FIRST IMPRESSION UNDER CIRCUMSTANCES WHERE, PETITIONER ACCUSED SEX OFFENDER WAS PROSECUTED BY AN ACCUSED SEX OFFENDER, AND DEFENDED (REPRESENTED), BY YET ANOTHER ACCUSED SEX OFFENDER, WHICH DENIED PETITIONER A FUNDAMENTALLY FAIR TRIAL ?

2). SHOULD THE PROCEDURAL DEFAULT DOCTRINE (STANDARD) OF MARTINEZ, AS APPLIED TO COUNSEL ON COLLATERAL REVIEW BE EXPANDED OR EXTENDED TO INCLUDE TRIAL AND DIRECT APPEAL COUNSEL(S) ?

3). WAS PETITIONER DEPRIVED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL THROUGH CONFLICT OF INTEREST, ADVERSE IMPACT AND A COMPLETE LACK OF DEFENSE AT TRIAL, SUBJECT TO GREATER ANALYSIS THAN THE TWO-PRONGS OF STRICKLAND ?

4). FOR PROPER AND THOROUGH ANALYSIS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS, SHOULD THE STATE AND FEDERAL COURTS HAVE RECOGNIZED AND UTILIZED CRONIC'S PRESUMED PREJUDICE AND OPPOSED TO STRICKLAND'S TWO-PRONG APPROACH ?

LIST OF PARTIES

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

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Respondent, Theresa DelBalso, Superintendent of S.C.I.
Mahanoy located at 301 Morea Road Frackville, Pa.
17932. Tel. (570) 773-2158.

Respondent, Jonathan Thomas, Esq., District Attorney
Bedford County Courthouse 200 S. Juliana Street
Bedford, Pa. 15522. Tel. (814) 623-4855 (counsel for
respondent, William Higgins, Bedford County District
attorney).

Respondent, Joshua Shapiro, Attorney General of
Pennsylvania, located at Office of The Attorney General
16th. Floor, Strawberry Square Harrisburg, Pa. 17120.
Tel. (717) 787-3874.

Petitioner, is Barry L. Crespo, JD-1371 an incarcerated
individual who resides at the Stata Correctional
Institute at Mahanoy, located at 301 Morea Road
Frackville, Pa. 17932.

TABLE OF CONTENTS

	PAGE NO(S).
OPINIONS BELOW _____	1.
JURISDICTION _____	2.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED _____	3.
STATEMENT OF THE CASE _____	4.
REASONS FOR GRANTING THE WRIT _____	5.
CONCLUSION _____	37.

INDEX TO APPENDICES

APPENDIX A Barry Crespo v. District Attorney, William J. Higgins Jr., et. al. No. (C.A. No. 17-1618) United States Court of Appeals For The Third Circuit Order denying Certificate of Appealability dated June 29, 2017, issued by Circuit Judge, L. Felipe Restrepo, (unpublished).

APPENDIX B Barry Crespo v. William J. Higgins, Jr., District Attorney of Bedford County; John Kerestes, Superintendent; and John Wetzel, Secretary, Pennsylvania Department of Corrections.
United States District Court For Western District of Pennsylvania
Memorandum Opinion in Civil Action No. 3:14-cv-0239, dated February 28, 2017, issued by United States District Judge, Kim R. Gibson. (reported at 2017 U.S. Dist., LEXIS 28418).

APPENDIX C Barry Crespo v. William J. Higgins, Jr, et. al. No. (C.A. No. 17-1618), United States Court Of Appeals For The Third Circuit Sur Petition For Rehearing (denied) dated July 25, 2017, issued by Circuit Judge, L. Felipe Restrepo (unpublished).

APPENDIX D Barry Crespo v. William J. Higgins, Jr., District Attorney of Bedford County, et. al., (Civil Action No. 3: 14-cv-0239) United States District Court, Western District of Pennsylvania, December 12, 2016, Magistrate Judge's Report and Recommendation before United States District Judge, Kim R. Gibson and United States Magistrate Judge Cynthia Reed Eddy. Report and Recommendation issued by United States Magistrate Judge, Cynthia Reed Eddy (reported at 2016 U.S. Dist., LEXIS 172136).

APPENDIX E Commonwealth of Pennsylvania v. Barry Lee Crespo No. 462 WDA 2013, Supreme Court of Pennsylvania Order and Opinion Petition For Allowance of Appeal (denied) dated March 24, 2013, issued Per Curiam. (reported at Commonwealth v. Crespo, 624 Pa. 694, 87 A.3d. 814, 2014 Pa. LEXIS 746 (Pa. 2014)).

APPENDIX F Commonwealth of Pennsylvania v. Barry Crespo, No. 788 WDA 2012, Superior Court of Pennsylvania, Western District Non-Predental Decision (Journal No. J-S02025) and Concurring Memorandum dated August 28, 2013, before Ford Elliot, P.J.E., Bowes & Donohue, JJ., Memorandum Opinion by Bowes, J. and Concurring Memorandum by Donohue, J. (unpublished)

APPENDIX G Commonwealth of Pennsylvania v. Barry Lee Crespo No. CR-343 for 2008, Court of Common Pleas, Bedford County, Pennsylvania Memorandum Opinion dated April 26, 2012, before Thomas S. Ling (P.J.) (unpublished).

TABLE OF AUTHORITIES CITED

<u>UNITED STATES SUPREME COURT CASES</u>	PAGE NUMBER
Alleyne v. United States, 133 S.Ct. 2151, 186 L.Ed.2d. 314 (2013) _____	34.
Banks v. Dretke, 540 U.S. 668, 696 (2004) _____	15.
Bell v. Cone, 535 U.S. 685, 697, 122 S.Ct. 1843, 152 L.Ed.2d. 914 (2002) _____	19.
Halloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173 (1978) _____	13.
Kyles v. Whitley, 115 S.Ct. 155, 166 (1986) _____	20.
Martinez v. Ryan, ____ U.S. ____, 132 S.Ct. 1309 (2012) _____ (Flagrant).	
Montgomery v. Louisiana, 136 S.Ct. at 731 (2016) _____	31.
Oregon v. Ice, 555 U.S. 160, 172 L.Ed.2d. 517, 129 S.Ct. 711 (2009) _____	36.
Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d. 674, 104 S.Ct. 2052 (1984) _____ (Flagrant).	
United States v. Cronin, 466 U.S. 648, 80 L.Ed.2d. 657, 104 S.Ct. 2039 (1984) _____ (Flagrant).	
United States v. Frady, 466 U.S. 152 (1982) _____	19.
In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948) _____	23.
<u>Federal Cases</u>	
Carroll v. Student Transp. Inc, 2011 WL 382563 (E.D. Pa.) February 4, 2011 _____	22.
Childress v. Johnson, 103 F.3d. 1221 (C.A. 5 1997) _____	36.
Edwards v. Lamarque, 439 F.3d. 504 (C.A. 9 2005) _____	22.

Fusi v. O'Brien, 621 F.3d. 1 (C.A. 1 2010)	20-21.
Hunt v. Houston, 563 F.3d. 695 (C.A. 8 2009)	28.
Huntley v. McGrath, 261 F. Appx. 4, 6 (9th. Cir. 2007)	21-22.
Marcum v. Luebbers, 509 F.3d. 489 (C.A. 8 2007)	27.
Pilchak v. Camper, 935 F.2d. 148 (8th. Cir. 1991)	11.
Scott v. Marshall, 2010 WL 785282 (M.D. Pa.) (March 3, 2010)	9.
Stoia v. United States, 109 F.3d. 392 (C.A. 7 1997)	10.
United States v. Blitch, 622 F.3d. 658 (C.A. 7 2010)	29.
United States v. Gambino, 864 F.2d. 1064, U.S. App., LEXIS 17690 (3rd. Cir. 1988)	11.
Van v. Jones, 475 F.3d. 292 (C.A. 6 2007)	27.

Pennsylvania Cases

Commonwealth v. Edmiston, 65 A.3d. 339, 352 (Pa. 2013)	16.
Commonwealth v. Muniz, (J-121B-2016) No. 47 MAP 2016 (Decided July 19, 2017)	34.
Commonwealth v. Matthew Bryan Wolfe, (Journal No. J-24- 2016) Docket No. 68 MAP 2015	34.

Other Provisions

Pennsylvania Statutes

42 Pa. C.S.A. § 5914	22.
42 Pa. C.S.A. § 9718.2	32-33.
204 Pa. Code § 303.7(f)	33.

United States Supreme Court

Rule 10	(Flagrant).
2 Bishop Criminal Law § 1032 (9th. Ed. 1932)	29.
1 Russell, O'rimes, 298 (10th. Ed. Turner 1950)	29.

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

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

☒ reported at 2017 U.S. Dist., LEXIS 28418; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Pennsylvania Supreme Court court appears at Appendix E to the petition and is

☐ reported at 87 A.3d. 814, Pa. LEXIS 746 (Pa. 2014); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 29, 2017.

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

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 25, 2017, and a copy of the order denying rehearing appears at Appendix C.

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

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C.A. AMENDMENT I, provides in relevant part; The Right of access to the courts and to petition the government for redress of grievances.

U.S.C.A. AMENDMENT V, provides in relevant part; No person shall be deprived of life, liberty or property without due process of law.

U.S.C.A. AMENDMENT VI, provides; in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S.C.A. AMENDMENT VII, provides in relevant part; nor shall cruel and unusual punishment be inflicted.

U.S.C.A. AMENDMENT XIV, provides in relevant part; no state shall make or enforce any law which shall abridge the privileges or immunities of the 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 it's jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Petitioner avers this case to be a matter of "First Impression" where, petitioner standing trial for charges of Involuntary Deviate Sexual Intercourse was subjected to prosecution by District Attorney who was facing pending sex offense charges (Rape), and represented by defense counsel also facing sex offense charges (sexual misconduct in office), as a former member of the District Attorney's Office of Centre County, Pennsylvania.

As such, petitioner's case presents a question of law that has not been previously decided by any controlling legal authority under the circumstances presented.

Petitioner to prove a "dual conflict of interest" must plead a real or seeming incompatibility between the individual's private interests and one's public duties.

Under the combined circumstances of this case, the petitioner was deprived of both, a fair trial and the effective assistance of counsel as guaranteed by the Due Process and Equal Protection Clauses of the United States Constitution.

The standard of *Martinez v. Ryan*, for procedural default can or should be extended to include trial and direct appeal counsel before denial of relief and review. *Strickland*, is not a one-size-fits-all case for analysis.

REASONS FOR GRANTING THE PETITION

The Commonwealth of Pennsylvania (prosecution) was represented at trial by William Higgins, the District Attorney of Bedford County. Prosecutor Higgins was himself accused on August 22, 2008 of raping [K.B.] in his courthouse office on July 10, 2008. The victim [K.B.] alleged that after a political function they both attended, Higgins arranged to sneak [K.B.] into the District Attorney's Office where they had sex against her will.

The rape allegations against Higgins were Pending during almost the entire period Higgins was prosecuting petitioner Crespo. The review process of [K.B.'s] complaint against Higgins was pending during petitioner's trial. On March 15, 2010, the Attorney General's decision declining prosecution of Higgins was upheld and [K.B.] appealed that decision to the Superior Court of Pennsylvania. On May 5, 2011, the Superior Court affirmed. The trial in petitioner's case began on Thursday, March 12, 2009.

This is a case of an accused sex offender being prosecuted by an accused sex offender. As an accused sex offender under investigation, incompatibility arises between Higgin's private interest and his public duties as based upon the following; (1) Higgins had unusually strong motives to treat petitioner (also an accused sex

offender), more harshly than he normally would have, (2) Higgins was an elected official-subject to stand for re-election, (3) Higgins served political capacity as Vice-Chairman of the county GOP and would have feared losing that position as a result of any lurid publicity, and (4) Higgins had a viable interest to appear to the public as being "tough of sex offenders" for voter appeal (many who were women), and/or may have been repulsed by his rape allegations.

Higgin's incompatibility/conflict is further shown where, He decided to prosecute petitioner personally when he had assistant district attorneys that could have easily handled this case. Higgin's disqualification should have been mandated under such circumstances, because such professional behavior is offensive and Higgins was encouraged to misuse the judicial process for the sake of his own enrichment, public approval, seeking publicity and it necessarily traded upon the misery of petitioner and his family. Higgins' conduct related to pending charges he faced and the nature of the charges for which petitioner was on trial created one of two actual conflicts. First, if the rape allegations against Higgins were founded (true), concerns arise that Higgins would fear that a less than spirited prosecution could serve to uncover evidence of his own wrongdoing or provoke official action against him, and Second, even "if" Higgins is demonstrably innocent of the charges unfounded,

or the allegations completely false, the defense is impaired because vital cross-examination becomes unavailable for the benefit of petitioner's defense.

Here, Higgins had a separate vested interest in the outcome of petitioner's case. To establish a violation of Due Process and Equal Protection Clauses of the United States Constitution, petitioner has shown; (1) District Attorney Higgins actively represented conflicting interests, and (2) the actual conflict of interest drove Higgins' prosecution of petitioner for like charges "pending" against Higgins during petitioner's trial. Thus, the end result served to render petitioner's trial fundamentally unfair under due process and equal protection of law.

In March 2009, petitioner was tried by a jury before the Honorable Daniel Howsare. Petitioner was represented by Phillip Masorti and Lance Marshall. Masorti handled the trial and meetings with witnesses. Marshall was responsible for most of the pre-trial preparation, drafting and litigation of motions, consultation with petitioner, researching various legal issues, preparation of sentencing and appearance at sentencing. Lance Marshall handled both appeals to the State-Appellate Courts, being Superior and Supreme Courts of Pennsylvania. Petitioner's trial began on Thursday, March 12, 2009 and concluded late in the afternoon of Friday, March 13, 2009, when the jury convicted petitioner of all counts. Here, the Bedford County District Attorney's Office was actively

prosecuting the petitioner while the State Attorney Generals' Office and Centre County District Attorney's Office were investigating defense counsel (Marshall) for pending criminal charges wherein, Marshall had to be extremely concerned that his alleged misconduct would thereby, subject him to sanctions by the Disciplinary Board of the Supreme Court of Pennsylvania. Pending charges of advocating the release of a criminal defendant in exchange for sexual favors and suborning perjury are ethical violations of the highest order.

Defense counsel in Marshall's position would have felt pressured to keep a low profile and temper his defense of petitioner. Marshall as an accused sex offender, in a small county where local media would naturally follow the case, would avoid drawing unwanted attention to his own sexual transgressions and Marshall would have felt the necessity/pressure to avoid provoking the Bedford County District Attorney (Higgins) or the presiding Judge with a meaningful defense, at trial or on appeal for fear of retaliation where, those individuals possessed such powers. Thus Marshall, certainly could not afford to read a newspaper headline that stated; **"one accused sex offender prosecutes second accused sex offender who is defended by a third accused sex offender"**. Headlines of this magnitude would clearly subject the integrity of the judiciary to severe public scrutiny, to say nothing of the fairness of petitioner's trial that would have fallen by the wayside in such a media circus.

Common sense and logic dictate that it most certainly matters that petitioner being prosecuted in one County (jurisdiction), and Marshall being investigated by another raises immediate concerns of Marshall's relationships with both District Attorney Maderia (Centre County), who had previously worked as a prosecutor with the Attorney General's Office under former Atty. General, now Governor Tom Corbett. Given the history the Attorney General's Office had with both Maderia and Higgins, it would only be natural for Marshall to assume that Maderia still maintained connections with the powerful decision-makers in the Attorney General's Office, as well as those closely maintained by Higgins as close friend of Tom Corbett (political allies). Higgins and Maderia both elected Republican District Attorneys in nearby counties, as colleagues both belonged to the statewide District Attorneys Association. As a result of the Civil suits naming both Marshall and Maderia as defendants wherein, any increased scrutiny of Marshall's misconduct brought to Maderia's attention (supervision) would display a showing that Marshall's legal interests coincided with those of Maderia's. Scott v. Marshall, 2010 WL 785282 (M.D. Pa., March 3, 2010) at *4.

Confronted with serious allegations of wrongdoing, Marshall would have sought to curry favor or benefits through any potential advantage he could obtain through friends in high places. Under the circumstances, Marshall

clearly chose courses of action that furthered his own private interests and diminished petitioner's. Marshall under no circumstances could have sought to recuse himself, nor could he have sought the disqualification or recusal of Higgins for fear the Attorney General's Office would be tasked with sorting out the ironic thicket of one sex offender going after another. This plausible avenue for petitioner's benefit and defense strategy was incompatible or unavailable through Marshall and creates adverse impact (conflict). Stoia v. United States, 109 F.3d. 392 (C.A. 7 1997);

An actual conflict exists if the defense attorney was required to make a choice advancing his own interests to the detriment of his client's interests. (quoting Stoia 1, 22 F.3d. at 77). Such a conflict has an adverse effect if "but for the attorney's actual conflict of interest, there is a [reasonable] likelihood that counsel's performance somehow would have been different".

An attorney has the burden to come forward with potential conflicts, it must be recognized that there are pressures upon defense counsel that countervail against the performance of this ethical responsibility in

accordance with the right to effective assistance of counsel, as set forth by the United States Court of Appeals For The Third Circuit in United States v. Gambino, 864 F.2d. 1064, U.S. App. LEXIS 17690 (3rd. Cir. 1988);

The U.S. Const. amend. VI.
guarantee of effective assistance of
counsel includes two correlative
rights, the right to adequate
representation by an attorney of
reasonable competence and the right
to the attorney's undivided loyalty
free of conflict of interest. An
actual conflict of interest which
adversely affected the Attorney's
performance, appellant is not
obligated to demonstrate prejudice
as it will be presumed. A lapse in
representation adversely affecting the
defendant's interests can be
demonstrated not only by what the
attorney does, but by what he
refrains from doing.

The personal problems (legal) of both Higgins and Marshall, support a stand-alone 6th. Amendment Claim. Pilchak v. Camper, 935 F.2d. 148 (8th. Cir. 1991).

Phillip Masorti upon hiring Marshall did so with the knowledge that Marshall had resigned from the District Attorney's Office of Centre County under a cloud of suspicion and possible wrongdoing, a fact never disclosed to petitioner. On September 8, 2014, within 60-days of discovering this evidence, a successor PCRA Petition for the "newly-discovered" conflict of interest was filed.

Petitioner's timely habeas petition was stayed pending exhaustion of state remedies on the conflict of interests.

Subsequently both the State and Federal Appellate Court Systems refused to address the conflict claims on the merits, as set forth by U.S. Judge, Kim R. Gibson;¹

Both the PCRA trial court and appellate court refused to address the conflict claims on the merits, finding that the claims were untimely and without exception to be heard in a second PCRA petition.

Thus the claims are procedurally defaulted. Crespo relying on Martinez v. Ryan, -- U.S. --, 132 S.Ct. 1309 (2012), argues that he

FOOTNOTES

1. Appendix B Memorandum Opinion dated February 28, 2017, Id. page 3 @ ¶ 2, and page 4 @ ¶ 1 and 2.

can overcome the procedural default.

A petitioner cannot be excused from default if the underlying claim is insubstantial, lacks merit or factual support, or the attorney on collateral review did not perform below constitutional

standards. Martinez, 132 S.Ct. 1319.

Here, there was no conflict inquiry by the State and Federal Appellate Courts. Thus being contrary to this Honorable Court's holding in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173 (1978) wherein, this Court has been absolutely clear that the court must make a thorough inquiry into the factual basis for the defendant's complaint;

That inquiry [p956] should be on the record and must be of the kind to ease the defendant's dissatisfaction, distrust, or concern. Smith, 923 F.2d. at 1320. If the trial court fails to make a sufficient inquiry, prejudice is presumed and "reversal is automatic." Holloway, 435 U.S. at 488.

This case clearly shows that there was no inquiry by the trial court, neither defense counsels Masorti or

Marshall disclosed potential conflicts to petitioner and it's virtually impossible to believe that in a county as small as Bedford, with only two Judges ² that these officials were not aware, nor possessed informal knowledge of Higgins and Marshall's pending legal troubles, either by water-cooler gossip, or the courthouse rumor-mill. Thus it's abundantly clear that neither of these two judges wanted petitioner's conflict of interest claims to come to light, the lack of inquiry (hearing) and meaningful appellate review by the state and federal appellate courts displays that "under no circumstances" would they kick this perverted legal hornet's nest for fear of stinging court officials of misconduct.

For all intents and purposes it appears as if the state and federal judiciaries have gone to great lengths, extremes or overboard to protect those certain individuals OTHERWISE, had petitioner's conflict of interest claims been answered according to law, the outcome would have been different, or at least, petitioner would have been granted or received a new trial devoid of unfairness.

U.S. District Judge, Kim R. Gibson essentially barred petitioner's conflict claims utilizing procedural default

2. Daniel S. Howsare, President Judge and Thomas S. Ling, Court of Common Pleas Judge.

standard (doctrine) of Martinez, solely limited as applied to an attorney on collateral review. The majority of the states, including Pennsylvania permit "layered ineffective assistance of counsel claims" on collateral review.

Layered ineffective assistance of counsel and procedural default form a legal nexus to trial and direct appeal counsel by way of "Relation-back Theory. To hold otherwise is contrary to this Court's previous decision in Banks. v. Dretke, 540 U.S. 668, 696 (2004);

The conflict of interests by itself constitutes cause to excuse procedural default. There is no difference if the time set for default is at trial, or on appeal, it is excused regardless because of the conflict itself. Otherwise defendant's prior counsels exhibited divided loyalties. (contrary to defense).

In this case, as with Banks, counsel knew and failed to disclose essential conflict of interest information to petitioner which, rises to constructive corroboration, not normal ineffective assistance of counsel. Banks, 540 U.S. 668, 696. Thus, it would be of great public importance and benefit to the courts, for this Honorable Court to render a final or definitive determination of whether the procedural default standard of Martinez in light of the

layered ineffective assistance nexus, can be expanded or extended to include trial and direct appeal counsel and under what circumstances expansion would be justified ?

The relevant factors and circumstances of the matter at bar is as follows;

1). William J. Higgins, Jr., District Attorney of Bedford County, Pa. 200 South Juliana Street Bedford Pa. 15522, Tel. (814) 623-4855, possessed actual and intimate knowledge of the conflict of interest,

2). Defense counsels, Phillip Masorti of Masorti and Sullivan, 301 South Borrowes Street State College Pa. 16801 and Lance Marshall 209 Beaver Avenue State College Pa. 16801, trial, sentencing and direct appeals counsels had personal and intimate knowledge of the conflict of interest,

3). PCRA counsel, Matthew R. Gover of Gover, Perry & Shore 2411 North Front Street Harrisburg, Pa. 17110 Tel. (717) 232-9900. (Atty. Gover was diagnosed with stage IV brain cancer in May 2012, and succumbed to said illness in November 2012), upon Atty. Gover's untimely demise, Kristen L. Weisenberger, Esq. of Gover, Perry & Shore resumed representation for petitioner. Neither attorneys, Gover and Weisenberger, for purposes of cause analysis were under an obligation to sniff out the conflict of interest, or anything else that state has concealed.

Commonwealth v. Edmiston, 65 A.3d. 339, 352 (Pa. 2013),

4). Federal habeas corpus counsel, Daniel Silverman, Esq. of Daniel Silverman & Associates 123 Broad Street, Suite

2500 Philadelphia, Pa. 19107 Tel. (215) 735-1771 by pure coincidence inadvertently stumbled upon the conflict of interest while conducting a "Google search" of Marshall either July 28 or early morning July 29, 2017, in preparation for the federal habeas petition and a meeting later the morning of the 29th. with Phillip Masorti, Lead Counsel in petitioner's trial. Upon speaking with Masorti, Atty. Silverman uncovered the following;

Atty. Masorti further said that he felt bad for Marshall and decided to hire him as a favor, to give him some work. Silverman resumed an internet search of Marshall and discovered that two women had come forward to claim that, when they were in high-school Marshall had acted sexually inappropriately with them as well ³ and,

5). Atty. Silverman, obtained from Lance T. Marshall a sworn affidavit pertaining to lead trial counsel, Phillip Masorti, which disclosed the following facts;

Based on what we had prepared

3. Sworn affidavit of Daniel Silverman dated August 30, 2014.

for trial and based on our discussions regarding trial strategy, I was surprised that Mr. Masorti did not present a defense at trial. In the weeks and days leading up to trial, I was also surprised that Mr. Masorti was not preparing for trial in a manner I would consider diligent. He was spending time on his music recording career and not preparing for trial that I was concerned that I would be asked to step in as lead counsel to try the case. 4

Thus, there exists a matter of great public importance and benefit to the courts as it pertains to layered ineffective assistance and procedural default of Martinez, because this issue in it's current state " creates a question of law with conflicting legal resolutions. (a rule thus, declaring the prosecutor (State) may hide, defendant (defense or appellate counsel), must seek, is not tenable in a system constitutionally bound to accord

4. Sworn Affidavit of Lance T. Marshall dated July 21, 2014.

defendant's due process. Banks, 540 U.S. 668, 696.

Petitioner was subjected to corrupted prosecution, conflicted counsel, and afflicted representation during trial, sentence and direct appeal. Petitioner has demonstrated, not merely errors, but actual conflict created the very real possibility of prejudice, and it worked to his actual and substantive disadvantage, infecting his entire legal proceedings with deprivations and errors of constitutional dimensions. United States v. Frady, 466 U.S. 152 (1982).

The burden of proof is on the petitioner to show either that his attorney's representation was unreasonable and non-existent, or counsel was inert. Petitioner may present ineffective assistance of counsel claims under Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d. 674, 104 S.Ct. 2052 (1984), which requires a case-by-case analysis of whether counsel's deficiencies affected the outcome of the trial, or petitioner may present claims of ineffective assistance of counsel under United States v. Cronin, 466 U.S. 648, 80 L.Ed.2d. 657, 104 S.Ct. 2039 (1984) which, permits a presumption of prejudice if an actual or constructive denial of counsel occurs during a critical stage of trial. Both types of claims concern Sixth Amendment violations, they are distinct legal claims and the difference between the two "is not of degree, but of kind". Bell v. Cone, 535 U.S. 685, 697, 122 S.Ct. 1843, 152 L.Ed.2d. 914 (2002).

This very court in Bell, defined three types of cases warranting Cronick's presumption-of-prejudice analysis; First, is the complete denial of counsel at a critical stage, Second, is when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, and Third, is when counsel is placed in circumstances in which competent counsel very likely could not render assistance.

Pursuant to Strickland, the defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice. The reasonable probability standard is not a "sufficiency of evidence test". Kyles v. Whitley, 115 S.Ct. 1155, 1166 (1986). Rather, [a] reasonable probability is a probability sufficient to undermine confidence in the outcome [verdict]. Accordingly when the defendant can establish that counsel was not merely incompetent, but inert, prejudice will be presumed Cronick, 466 U.S. at 659.

Petitioner will establish the necessity of the Cronick ~~presumption of prejudice~~ for his ineffective assistance of counsel claims, and at most, petitioner's filings did display the requisite legal foundations for the state and federal courts to recognize a Cronick claim. Fusi v. O'Brien, 621 F.3d. 1 (C.A. 1 2010). Supreme Court Rule 10(a).

The Court in Fusi made clear;

Seldom do circumstances arise that justify a court in presuming prejudice (and, concomitantly, in forgoing particularized inquiry into whether a denial of counsel undermined the reliability of a judgment)." Ellis v. United States, 313 F.3d. 636, 643 (1st. Cir. 2002). With respect to an incompetent attorney, the attorney's incompetence must rise to the level of a complete denial of counsel; "bad lawering, regardless of how bad" is insufficient. Scarpa, 38 F.3d. at 13.

The state and federal courts have decided important federal questions, in such a manner that conflicts with relevant decisions of this court viewed through Strickland as opposed to Cronic. The vast majority of courts, as in this case, seem to be stuck in the "Strickland rut", and in essence, assert Strickland's two-prong approach as continuing/enduring without fundamental change (permanent), as contrasted with being an actual element or of the ultimate nature of a Cronic claim (Strickland is of degree and Cronic is of kind). The thorough reliance on one does not exhaust the other. Huntley v. McGrath,

261 F. Appx. 4, 6 (9th. Cir. 2007).

By incorporation of the conflict of interest claims, counsel further rendered ineffective assistance under the 6th. Amendment, as claimed by the following;

- 1). By permitting Petitioner's wife to testify as the Commonwealth's witness,
- 2). By failing to deliver on promises to the jury he made in his opening statement,
- 3). By failing to object to the trial court's erroneous, improper and prejudicial jury instruction surrounding the alleged victim's failure to file a prompt complaint, and
- 4). By failing to object at sentencing when the court failed to comply with well-established State Law in the calculation of applicable sentencing ranges.

(i). Pennsylvania Law (42 Pa. C.S. § 5914) provides an absolute privilege regarding communications between spouses. Carroll v. Student Transp. Inc., 2011 WL 382563 (E.D. Pa. February 4, 2011) (Baylson J.). Neither petitioner, nor his wife waived their respective privileges (rights) in this regard. Trial counsel's evident misconceptions about the nature and scope of marital privilege, clearly ~~shows he was incapable of competent tactical or strategic~~ decisions of the sort, both the state and federal courts imagined to dismiss under the two-prongs of Strickland, and is contrary to Edwards v. Lamarque, 439 F.3d. 504 (C.A. 9 2005). Supreme Court Rule 10(a).

(ii). Counsel's failure to deliver on promises made to the jury in his opening statement, violates the 6th. Amendment's compulsory process, which has been described as what is regarded as the most basic ingredient of the due process of law. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). Supreme Court Rule 10(c) and the most significant recognition of this claim stems from the Superior Court Concurring Memorandum of Judge Donohue;

She was deeply troubled by counsel's performance in this case. However, she further stated, I observe that crespo did not specifically preserve an argument that counsel was ineffective for failing to deliver on promises of his opening statement. Thus, this is not an appropriate case to analyze this issue more thoroughly. Concurring Opinion, at 4. (ECF No. 17-3 at 31).

For the purposes of legal recognition, PCRA counsel (Weisenberger) failed to raise and preserve this claim and the state and federal courts refusal to acknowledge this fact, is a blatant violation of the procedural default standard of Martinez. Supreme Court Rule 10(c).

Both the state and federal courts evaluated trial counsel's PCRA testimony; which, explained unexpected developments of victim's admission of lying (perjury) warranted changes in the previously announced trial strategy, as set forth below;

What I did in my opening statement was I told the jury everybody would be testifying. And then to, and it was make an erratical, unexpected departure from that trial strategy based on her statement she lied. So my radical departure was I was trying to convince the jury was that we're now not calling anybody. we're not going to dignify these falsehoods, this stuff that you've heard so far. We're not going to dignify this with the defendants. I don't think at the time I could have told the jury initially we were going to call all of these people and then just parcel the fact witnesses out 5

5. Appendix D, Magistrate Judge Eddy's Report and Recommendation 12/12/16, Pg. 23 paragraph indentation.

That wasn't how it went down. It went down like: This is, all or nothing ... I thought I could reconcile telling the jury I've changed my plan. And the reason I changed my plan is it was completely unforeseeable that this young lady would look at you and say she's lying. ... I didn't think I could have said, I've changed my plan. You're not going to hear from good character and not Barry or the fact witnesses. I didn't---that just wasn't--- it was all or nothing when we changed the attitude was: They didn't prove it. ⁶

Compare Counsel's closing argument as explained to the jury;

May it please the court, Ladies and Gentlemen, it's my privilege to be here and representing Mr. Crespo in this obviously very serious

6. Appendix D, Magistrate Judge Eddy's Report and Recommendation 12/12/16, Pg. 24 Id. at ¶ 1 indentation.

matter and make decisions in the course of a trial about what to do procedurally. And it was my decision to offer no evidence. You can infer probably pretty reasonably that we had something to present, if not a massive amount of information to present. But we presented nothing. And that was my decision of course for Mr. Crespo. And the reason why I opted not to present any evidence, number one, is it's late. However, this trial could go to Saturday into Sunday. But more importantly because in reviewing the evidence last night when I couldn't sleep, and this morning it became very clear to me that the Commonwealth was not even close by any legal standard of proving their case ... And that's my argument to You.

There is evidence of record that counsel was scheduled to leave for vacation the very next day (Saturday) [N.T. dated September 16, 2011, Page 38]. Obviously, the jury felt differently. Not surprisingly, in closing arguments, the prosecution hammered defense counsel for promising all

this evidence that he completely failed to deliver and asked the jury to hold defense counsel's empty promises against petitioner [N.T. dated March 13, 2009, pp. 160-61] wherein, both the state and federal courts should have realized that defense counsel's disingenuous PCRA testimony needed to be heard by the actual jury, because it's one and only import at PCRA stage permitted counsel belatedly to cover his own a**. Counsel, once again put his own private interest (vacation) over that of petitioner's life and liberty (conflict-secondary in nature). The state and federal court's analysis under the two-prongs of Strickland must fail, because neither court can say with certainty whether petitioner's jury subconsciously considered the broken promises of defense a boldface lie and counsel's concession of petitioner's guilt which, essentially admits the Commonwealth's points claimed in argument. The state and federal courts review under Strickland, has no place or bearing upon this claim, when constructively inventing or justifying strategies for counsel. Marcum v. Luebbers, 509 F.3d. 489 (C.A. 8 2007) Supreme Court Rule 10(a).

Defense counsel by and through his own closing argument and PCRA testimony established proof of a total and complete denial of counsel, and at the immediate critical stage of jury deliberations. The Critical Stage Doctrine was analyzed in Van v. Jones, 475 F.3d. 292 (C.A. 6 2007) (Boggs J.);

Common law teaches that the Sixth Amendment views "critical stages" of a defendant's pretrial and trial differently from other parts.

If closing argument was a critical stage, and because counsel was essentially absent, there is no need to make a showing of prejudice. Whether it was a critical stage depends on whether there was a reasonable probability that petitioner's case could suffer significant damage or consequences from the denial of counsel at the stage.

Pursuant to Van, the best way of reaching an answer to that query is to ask whether petitioner had any opportunity, subsequent to the closing argument and jury deliberation, to recover or exercise whatever privilege he lost ? Supreme Court Rule 10(a). Cronin applies when the failure of defense counsel is complete and petitioner must assert counsel failed to oppose the prosecution throughout the proceeding as a whole, rather than just at specific points. Hunt v. Houston, 563 F.3d. 695 (C.A. 8 2009).

(iii). Counsel's failure to object to the trial court's erroneous, improper and prejudicial jury instruction as it pertains to the alleged victim's failure to file a prompt complaint. During his charge to the jury, the judge included the following on the prompt complaint;

"YOU MUST NOT CONSIDER HER DELAY IN MAKING A

COMPLAINT AS CONCLUSIVE EVIDENCE THAT THE ACT DID NOT OCCUR."

The lack of prompt complaint by a victim of a crime, although not dispositive of the merits of the case, may justifiably produce a doubt as to whether the offense indeed occurred, or whether it was a recent fabrication.

This is especially so where, the alleged victim has already lied, (committed perjury). Hence, the courts erroneous jury instruction is in fact "material", and in this case may be defined to embrace anything which would be capable of an influence, having a natural tendency to influence, impede or dissuade. 2 Bishop, Criminal Law § 1032 (9th. Ed. 1923) ("whatever evidence tends to influence the result on the direct or any collateral issue") and 1 Russel, Orimes 298 (10th. Ed. Turner 1950) (tendency to mislead). Here, where the alleged victim has already lied or made inconsistent statements, it is obvious that one of them must be false and there is some probability that the falsity was intentional or with purpose. The jury instructions from the judge were coercive without counsel's objection United States v. Blitch, 622 F.3d. 658 (C.A. 7 2010);

The principle that jurors may not be coerced into surrendering views conscientiously held, is so clear as to require no elaboration

"Jenkins v. United States, 380 U.S. 445, 446, 85 S.Ct. 10, p.59 (1965) (per curiam). Our assessment of whether the court's instructions to the jury were impermissibly coercive looks to whether the court's communications pressured the jur[ors] to surrender their honed opinions for the mere purpose of returning a verdict. United States v. Crotteau, 218 F.3d. 826, 835 (7th. Cir. 2000) [omitted].

The state and federal courts found that the claim in this instance lacks merit and petitioner had failed to meet the requirements of Martinez and Strickland to overcome procedural default.

The procedural default standard of Martinez should be extended to include trial and direct appeal counsel, the two-prongs of Strickland do not permit analysis of the coercive nature or possible impact of the jurors state of mind wherein, Cronin is the proper standard because counsel was inert.

(iv). Counsel's failure to object at sentencing to the court's failure to comply with well-established State Law in calculating the applicable sentencing ranges does in fact implicate the legality of sentence.

Magistrate Judge, Cynthia Reed Eddy's Report and Recommendation marks legal recognition of illegal sentence;

"Petitioner does not contend that the sentence meted out to him was illegal; but rather that trial counsel failed to object at sentencing hearing when trial court failed to comply with established state law in calculating the applicable ranges." 7

The ultimate finding by Magistrate Judge, Eddy, once again states the claim lacks merit and does not meet the requirements of Martinez and Strickland to overcome procedural default (Id. P.21 at ¶ 2). For appellate review purposes, challenges to criminal sentence typically fall into one of two categories, implicating either the legality of the sentence or the discretionary aspects of sentence. A challenge to the legality of the legality of a particular sentence may be reviewed by any court, it need not be preserved in the lower court to be reviewable and may even be raised sua sponte. Montgomery v. Louisiana, 136 S.Ct. at 731 (2016);

Because a conviction or sentence

Legal Analysis

7. Magistrate Judge, Cynthia Reed Eddy's Report and Recommendation 12/12/16, P. 19 Id. at ¶ 3.

imposed in violation of a substantive rule is not just erroneous, but contrary to law and as a result, void [i]t follows, as a general principle that a court has no authority to leave in place a conviction or sentence that violates substantive law (Citing Ex parte, Siebold, 100 U.S. 371, 376 —(1880)).

Pennsylvania's Mandatory Sentencing is provided for by 42 Pa. C.S.A. § 9718.2 and is based upon recidivist philosophy for purposes of enhancement. § 9718.2(a)(1) provides in relevant part;

Any person who is convicted in any court of this Commonwealth of an offense set forth in Section 9799.14 (relating to sexual offenses and tier system) shall, if at the time of the commission of the current offense the person had "previously been convicted" of an offense set forth in section 9799.14 ...

42 Pa. C.S.A. § 9718.2(a)(2), provides in relevant part;

Where the person had at the

time of the current offense
previously been convicted of two or
more offenses arising from separate
criminal transactions set forth in
section 9799.14 or equivalent
crimes ...

42 Pa. C.S.A. § 9718.2(c), Proof at Sentencing clearly
states; "the provisions of this section shall not be an
element of the crime ... "

204 Pa. Code § 303.7(f), [Sentencing Guidelines], Past
Convictions;

When the maximum sentence
applicable to the current offense
is dependent upon past convictions,
those convictions shall not be used
in computing the prior record score
... offenses are subject to longer
period of confinement when the
defendant has been previously
convicted of the same offense.

During the course of petitioner's appeals there have
been many important United States Supreme Court Decisions
that have trickled down to the State Supreme Courts
that have resulted in mandatory sentencing as rendered
unconstitutional, through a new rule of constitutional
law starting with Alleyne v. United States, 133 S.Ct.

2151, 186 L.Ed.2d. 314 (2013) and have transcended to Pennsylvania Courts through cases such as Commonwealth v. Matthew Bryan Wolfe, Journal No. J-24-2016 at Docket No. 68 MAP 2015, addressing multiple offenses of involuntary deviate sexual intercourse under § 9718(a)(1) and (c) holding both such factors violate Alleyne, by the state not providing notice of mandatory sentencing before trial and the absence of pretrial notice of aggravation is in substance also contrary to Alleyne. Most recently the Pennsylvania Supreme Court found the Pennsylvania Sex Offender Registration Notification Act (SORNA), to be unconstitutional under both the United States and State Constitutions. Commonwealth v. Muniz, [J-121B-2016], No. 47 MAP 2016, (decided July 19, 2017). SORNA's effective date of December 20, 2012 applied retroactively to any person serving a sentence for sex offenses or any person who had not completed their registration before the effective date of SORNA. Thus, those people, like this petitioner were automatically subjected to life-time registration under SORNA based upon the offense convicted.

SORNA's law of collateral consequences of conviction, upon date of effectiveness replaced all prior versions of Megan's Law, and serve to render Megan's Law expired.

To date there is no law in place to govern previous registration of sex offenders, nor will any exist until the General Assembly [Legislature] enact new law under

Pennsylvania's Statutory Construction Act. If any provision of law is held invalid or unconstitutional, it is held as being void or invalid from the date of it's actual enactment, not the date of the court's decision. The aforementioned caselaw or decisional theory clarifies that any fact(s) that increase the penalty for ~~all crime~~ is an element of the offense, and the accused has a right to know what the full penalty for a crime will be by looking at the indictment. The accused should know what the possible sentence should be from the day of the indictment.

There are more than enough reasons for petitioner to obtain new sentencing through any of several new rules of Constitutional Law since petitioner's conviction that can call into questions his sentence's legality.

Both the state and federal courts have dismissed all of petitioner's claims under Martinez and Strickland, but failed to acknowledge one key point of Martinez where, this Court in Martinez stated; "Determining whether trial counsel was ineffective often requires a court to develop evidence beyond the trial record. Martinez, 132 S.Ct. at 1317-18." Supreme Court Rule 10(c).

The state and federal courts have failed to determine if the trial court's starting point for calculation of sentence was in accord with the proper statute's intent of the Legislature, such specification of the regime for administering multiple sentences has long been considered

the prerogative of the State's Legislature to which the courts (judge's) are bound. Oregon v. Ice, 555 U.S. 160. 172 L.Ed.2d. 517, 129 S.Ct. 711 (2009).

For the state and federal courts to solely evaluate all of petitioner's claims under Strickland, where the petitioner was represented by two attorneys (team) at varying critical stages of trial, is about as effective as closing the barn doors after the horses have already run away. As many cases indicate, a critical question in assessing a Sixth Amendment right to counsel claim is whether the accused asserts that he received incompetent counsel, or none at all. Petitioner claims the latter. Childress v. Johnson, 103 F.3d. 1221 (C.A. 5 1997).

Both the state and federal courts failed to be mindful of Defense Counsel, Lance T. Marshall's Sworn Affidavit stating; "I was surprised that Mr. Masorti did not present a defense at trial." **NO DEFENSE AT TRIAL, IS NO DEFENSE AT ALL !!!**, and it is not hard to imagine or believe that counsel was **inert at sentencing.**

Should this Honorable Court fail to grant the Writ of Certiorari, petitioner will forfeit at a minimum 20 years, and at the maximum 40 years of his life for crimes he did not commit. Petitioner is actually innocent of all the crimes charged, and those of which he was convicted. Petitioner without the guiding hand of counsel did not know how to prove his innocence, nor was I

provided a full and fair opportunity based upon inert counsel. The interests of justice have not been served, the State and Federal courts have failed to render any determination according to Law, or petitioner at most would have won a new trial and/or at least a new sentence.

CONCLUSION

The Petition For Writ of Certiorari should be granted.

Respectfully submitted, *Barry Lee Crespo*

Barry Lee Crespo

Date October 3, 2017.

Barry Lee Crespo
JD-1371 G/A/1013
S.C.I. Mahanoy
301 Morea Road
Frackville, Penna.
17932