

No. **25-7559**

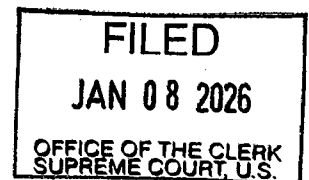
ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

CALEB L. MCGILLVARY
Plaintiff/Appellant

v.

**ATTORNEY GENERAL OF NJ, ADMINISTRATOR NJ STATE
PRISON**
Defendant/Appellee



On Petition for Writ of Certiorari to the United States Court of Appeals
for the 3rd Circuit at Appeal Docket Number 25-2159

PETITION FOR WRIT OF CERTIORARI

CALEB L. MCGILLVARY
Third and Federal Street
New Jersey State Prison
Po Box 861
Trenton, NJ 08625-0861
In Propria Persona

QUESTIONS PRESENTED FOR REVIEW

1.) Is the practice of numerous Courts of Appeals, summarily denying pro se habeas appeals by copy and pasted boilerplate without full review, or sometimes without any judicial review at all of the papers, a deprivation of Due Process requiring the Supreme Court to exercise its oversight and direct the Courts of Appeals to provide sufficient safeguards to guarantee Due Process in pro se habeas corpus cases?

2.) When the issue of exhaustion was waived by the State, and not raised by the District Court; does it wreak a fundamental unfairness and manifest injustice upon Petitioner, for it to be raised by the Court of Appeals sua sponte, without briefing, on application for Certificate of Appealability?

3.) When the factual bases of claims; that Petitioner made a timely pre-trial written request to self-represent, and that the State withheld evidence until after trial that the family of the alleged victim bribed two state witnesses \$150,000 each; have been raised in the District Court but not reached by its opinion; is the finding of the Court of Appeals that the claims lack "arguable merit" on application for COA made without jurisdiction as held by Miller-El v. Cockrell, 537 U. S.

322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)?

LIST OF ALL PARTIES TO THE PROCEEDING

The Respondents to the proceeding below are:

- 1.) Jeffrey Crothers, who has been substituted for Bruce Davis pursuant to Fed. R. Civ. P. 25(d) in his public office as Administrator of the NJ State Prison; and
- 2.) The Attorney General of New Jersey, Matthew J. Platkin.

LIST OF ALL RELATED PROCEEDINGS

- 1.) N.J. Superior Court, Law Div., Dkt. No. UNN 16-05-00344-I, State of New Jersey v. Caleb L. McGillvary, April 24, 2019 Entry of Judgment of Conviction;
- 2.) N.J. Superior Court, App. Div., Dkt. No. A-4519-18, State of New Jersey v. Caleb L. McGillvary, August 4, 2021 Affirmance of Judgment of Conviction;
- 3.) N.J. Supreme Court, Dkt. No. 086174, State of New Jersey v. Caleb L. McGillvary, December 7, 2021 Denial of Ceritification
- 4.) U.S. Supreme Court, Docket number 21-7231, Caleb L. McGillvary v. State of New Jersey, April 18, 2022 Denial of Certiorari
- 5.) U.S Dist. Ct. – D.N.J., Dkt. No. 1:22-cv-04185-MRH, Caleb L. McGillvary v. Bruce Davis, Administrator of NJ State Prison, Attorney General of New Jersey, June 6, 2025 Denial of Writ of Habeas Corpus
- 6.) U.S. Court of Appeals for the 3rd Circuit, Docket Number 25-2159, Caleb L. McGillvary v. Attorney General of New Jersey, September 30, 2025, Denial of Application for Certificate of Appealabiltiy.
- 7.) U.S. Supreme Court, Docket number 25-5855, In Re Caleb L. McGillvary, Pending Petition for Writ of Mandamus

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Exhibit D - The Magistrate's Report & Recommendation, recommending denying Petitioner's 28 U.S.C. 2254 petition

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CITATIONS OF LOWER COURT DECISIONS

1.) The original conviction of Petitioner in the N.J. Superior Court – Law Div. was not reported but is set forth at pp. 3 - 6 of the Appendix.

2.) The original conviction of Petitioner was appealed to the N.J. Superior Court – App. Div., which affirmed the conviction in all respects in an opinion which was not reported but is set forth at pp. 7 - 43 of the Appendix.

3.) The original conviction of Petitioner was petitioned for certification to the N.J. Superior Court – App. Div., which denied certification for review in an opinion reported at State v. McGillvary, 249 N.J. 341; 265 A.3d 1242; 2021 N.J. LEXIS 1308 (Dec. 10, 2021).

4.) The original conviction of Petitioner was petitioned for certiorari to the U.S. Supreme Court, which denied certiorari in an opinion reported at McGillvary v. New Jersey, 212 L Ed 2d 588, 2022 US LEXIS 1920 (Apr. 18, 2022).

5.) The decision of the United States District Court for the District of New Jersey on Petitioner's 28 U.S.C. 2254 petition is not reported, but is set forth at pp. 46 - 82 of the Appendix.

6.) The opinion of the Court of Appeals below is not reported, but is set forth at pp. 83 - 88 of the Appendix.

JURISDICTIONAL STATEMENT

The Judgment of the U.S. Court of Appeals for the 3rd Circuit denying a Certificate of Appealability and summarily ruling on the merits without jurisdiction was entered on September 30, 2025. The

Order of the U.S. Court of Appeals for the 3rd Circuit denying the Petition for Rehearing in this matter was entered on October 27, 2025.

This Court has jurisdiction to issue the writ of certiorari under 28

U.S.C. 1254(1).

CONTROLLING PROVISIONS, STATUTES, AND REGULATIONS

The pertinent provisions of statutes and regulations involved are too lengthy to be set forth verbatim in this petition, but are set forth at

pp. 89 - 153 of the Appendix.

CONCISE STATEMENT OF THE CASE

A. RELEVANT FACTS CONCERNING THE UNDERLYING CONVICTION FOR MURDER

On May 11, 2013 Petitioner was approached in Times Square, New York City, by the alleged victim in this case, Joseph J. Galfy, Jr. (Galfy). DNJ ECF 12.42, P110L1-P111L4 (Hereinafter, in reference to

transcripts, "P" refers to "page" and "L" refers to line, such that "P117L3-14" refers to "Page 117, lines 3 to 14").

Galfy, noticing that Petitioner appeared lost and hungry, zeroed in on Petitioner and offered him a ride to New Jersey and some food. Petitioner, being accustomed to people approaching him with such offers in the past couple months, saw nothing amiss in the offer. Id. at P110L25-P111L22. Petitioner went to Galfy's house, ate food and drank beers, and messaged back and forth with a female fan of his, Kim Conley (Kim), who had expressed an interest in meeting him. Id. at P113L1-P130L18. The last beer of the night tasted bad, and there was a lingering aftertaste like metal, and Petitioner thought perhaps he had a loose filling. Id. at P130L23-P131L8. Galfy then propositioned Petitioner to take a shower with him, at which point Petitioner realized Galfy was homosexual, but Petitioner had stayed at gay people's house before without incident and didn't see it as cause for alarm. Id. at P131L9-24. Petitioner stayed in the guest room that night. Id. at P131L25-P134L4.

When he woke up the next morning, he went to the bathroom and noticed a crusty residue on the side of his face, but didn't realize what it was, thinking it was probably drool. Id. at P134L5-P135L10. He left

the house with Galfy, who gave Petitioner his number and told him he could stay at his place anytime he needed to; Galfy dropped him off at the Rahway train station and bought Petitioner a ticket. Petitioner took the train to Asbury Park, and waited for Kim to show up. Id. at P135L13-P143L12

At Asbury Park Transportation Center, Petitioner cut his hair in the bathroom, using his pocket knife. Id. at P145L16-P146L7. Petitioner waited for Kim for hours, but she didn't show up. Id. at P146L25-P150L19. He took the train back to Long Branch and called Galfy to ask for a place to stay. Id. at 150L24-P153L10. Petitioner went back to Galfy's house with Galfy, who made them both food and poured Petitioner's beer into a glass. DNJ ECF 12.42, P161L14-P168L13.

After eating and drinking, Petitioner saw Galfy rinse the plates and put the dishes in the dishwasher, but Galfy did not run the dishwasher. Petitioner began to feel fuzzy and relaxed, then cannot remember anything until waking up on the floor of the master bedroom. Id. at P168L16-P169L7.

Petitioner noticed Galfy over top of him, tugging on Petitioner's pants, and so Petitioner sat up abruptly and punched Galfy in the face. DNJ ECF 12.42 at P169L12-L25. Petitioner blacked out after sitting up so

fast, and the next thing he can remember is Galfy shoving Petitioner's head into the side of the bed, then frantically fighting his way out from under Galfy as Galfy slammed into him from over top and began writhing on top of him. Id. at 170L1-P172L7. His phone, which he kept in the pocket of his pants, was inundated with urine during the struggle from underneath Galfy. Id. at P178L9-13, P180L4-8; See also Id. at P209L7-P210L19 (Petitioner had urinated underneath Galfy, and the urine had soaked his pants and inundated his phone), P223L13-P224L15 (Same).

Petitioner can't remember leaving the house or changing out of his bloody and urine-soaked clothes, which is consistent with the effects of amnesia from the rape drugs, the effects of his pre-existing post-traumatic stress disorder being triggered, or a combination of both. See DNJ ECF 12.47, P33L13 (Petitioner suffers from post traumatic stress disorder); Id. at P37L14-17 (His PTSD results from childhood physical and sexual abuse).

James Galfy was the brother of Joseph Galfy, and the executor of the Estate of Joseph Galfy. After trial and direct appeal had concluded, Petitioner discovered that James Galfy paid \$150,000 to the workplace of drug effect expert Robert Pandina, the Rutgers University Center

for Alcohol Studies; and another \$150,000 to the workplace of medical examiner Junaid Shaikh, the UMDNJ; after having met Shaikh on May 14, 2013 at Shaikh's workplace, but prior to Shaikh testifying at trial. Respondent admitted that the payment of \$150,000 to Pandina's workplace caused a conflict of interest, and stated that for that reason they would not be calling Pandina to testify. James Galfy certified the will of Joseph Galfy on March 21, 2016, and Respondent wrote a letter to Petitioner's former-counsel Peter A. Ligouri two days later, on March 23, 2016, informing Ligouri that Pandina had a conflict of interest. Ligouri did not provide this letter to petitioner. See Exhibits A-C to Declaration in Support of DNJ ECF 44. Despite Respondent having knowledge of this massive transfer of funds to Shaikh, the most crucial State witness, Respondent has never provided this impeachment evidence to Petitioner, and he was not made aware of such evidence until after his petition for discretionary review was denied by the highest State Court.

B. STATE COURT PROCEEDINGS

On December 27, 2018, Petitioner filed his notice, proposed order, certification, and brief in support of his motion to dismiss the

indictment for Brady¹ violations; and certification of service thereof with the NJ Super Ct – Law Div. Petitioner clearly indicated in these moving papers that he was dispensing with counsel and choosing to self-represent. This motion fully comported with all formal requirements of the State Court, as evidenced by the filing receipt; which shows that the Law Div. Clerk did not find any deficiencies in the filing. See Exhibit A to Petition, P.1. Respondent admitted in “9” and “13” of their answer that this factual ground is fully exhausted through direct appeal. DNJ ECF 12, “9”, “13”. Petitioner set forth in his brief that the NJ Attorney General’s Guide to Providing Services to Victims of Sexual Assault (“AGVSA”); was mandatory procedure for investigators at the crime scene from May 13-16, 2013.

On January 7, 2019, Plaintiff orally renewed his Brady motion, and moved ore tenus to self-represent in full compliance with N.J.C.R. 1:6-2(a), to represent himself on his motion, and to represent himself on his case. He relied on the 6th Amendment as his grounds for his request. DNJ ECF 12.34 P4L3-5. The State Trial Court denied his request solely upon procedural grounds, with no alternative adjudication of the merits; but failed to cite which Court Rule was

¹ Brady v. Maryland, 373 U.S. 83 (1963) (Hereinafter, “Brady”)

being invoked or to make any showing of its adequacy. Petitioner tried again twice during this hearing to address the Court and renew his request for an evidentiary hearing on his motions, but was silenced by the State Court both times. Id. P19L14-15, P21L12-25.

On March 21, 2019, the State Trial Court made the factual finding of Plaintiff's courtroom etiquette up to, and including, and since his 1/7/19 request to self-represent: "he has comported himself lucidly, in my judgment he – cooperatively every time I've had the pleasure of interacting with him in the courtroom." DNJ ECF 12.35 P23L18-21

The State Trial Court indicated that presenting evidence that "would impugn somehow bad faith to the prosecutor" would be "inappropriate." ECF 12.41, P125L4-13. The State Trial Court did not make any findings of fact upon the carpet in the master bedroom; the glasses in the dishwasher or sink; the pill bottles in the fridge; nor the 2 hours of missing NJT video surveillance from Asbury Park on May 12, 2013 from 12:44pm to 2:44pm. ECF 12.43, P38L18-P45L15. The Brady claim raised in the instant habeas petition was never presented to the jury for its consideration. Respondent admitted at trial that "There has been no testimony in this case about what a rape kit actually is or how it works. ECF 12.43, P27L22-23.

On April 24, 2019, the jury convicted Petitioner of First Degree Murder. On May 30, 2019, the trial court sentenced Petitioner to 57 years imprisonment, with an 85% period of parole ineligibility. DNJ ECF 12.5.

On August 4, 2021, as admitted by Respondent in their answer; See DNJ ECF 12, “12” P.20, “Affirmative Defenses”; the NJ Super Ct – App. Div. clearly and expressly based their denial for both of Petitioner’s 1/7/19 motions, to self-represent and to dismiss for Brady violations, solely on State Procedural Grounds. To wit: “on the record on January 7, 2019, Judge Kirsch informed Petitioner that he was striking the motions for failure to comply with the court rules.” DNJ ECF 12, P.45 (Plural “motions” in original); DNJ ECF 12.19 P.34.

On December 11, 2021, The NJ Supreme court denied discretionary review, making the App. Div.’s 8/4/21 opinion the last reasoned State Court Decision. DNJ ECF 12.23. Reconsideration was denied on 3/11/22. DNJ ECF 12.26. Certiorari was denied on 4/18/22. DNJ ECF 12.30.

C. DISTRICT COURT PROCEEDINGS

On June 22, 2022, Petitioner filed a petition for habeas corpus in the instant matter. He incorporated by reference into his grounds for relief his December 27, 2018 motions. DNJ ECF 1.

On July 28, 2022, the District Court decided a related case premised on the same set of facts, and made legal findings applying Brady to the facts underlying the claims in this petition. See McGillvary v. Galfy, 2022 U.S. Dist. LEXIS 134998 at *29-30 (D.N.J. July 28, 2022) ("Plaintiff sufficiently alleges a conspiracy among [his trial counsel and the state prosecutor] to deprive him of his Due Process rights ... the Court credits Plaintiff's allegations that Dr. Pandina's testimony, if offered at trial, would have allowed Plaintiff to prove intoxication by clear & convincing evidence, and this would have changed the outcome of the trial"). As part of this related case, it was discovered that the State was aware of two \$150,000 transactions to key prosecution witnesses, the medical examiner and drug effect expert, but that the State withheld this impeachment evidence until after trial.

On December 2, 2022, the Court screened the Habeas Petition under Habeas Rule 4; and issued an order for Respondent to answer the

Petition, and for Petitioner to file a reply to the answer, under Habeas Rule 5. DNJ ECF 6

On March 30, 2023, Respondent filed an answer to the Petition in this matter. DNJ ECF 12. In their answer, Respondent explicitly admits that Petitioner is in State custody pursuant to a State conviction; DNJ ECF 12 “1”-“11”; that Petitioner has fully exhausted the factual and legal basis of his claims, including the exhibits incorporated by reference therein and attached thereto; DNJ ECF “9”, “13”; and that Petitioner’s Petition is timely filed; DNJ ECF 12 “18”. Respondent also admits that the last reasoned State Court decision clearly and expressly relied on State Procedural Grounds to deny relief for Petitioner’s claims; DNJ ECF 12 “Affirmative Defenses, Point I”; but has not made any showing of what this procedural ground is or whether it was clearly established or regularly followed.

On August 16, 2024, Plaintiff relied on Third Circuit to file a motion for summary judgment,; Carter v Rafferty, 826 F.2d 1299, 1304 (CA3 1987); which obviated the need for discovery or an evidentiary hearing by proffering the evidence which would otherwise be adduced thereat, and requesting expansion of the record under Habeas Rule 7 to include it. Petitioner filed therewith a statement of material facts not in

dispute; See DNJ ECF 44 ("SMF"). He included in his SMF evidence with which he sought to expand the record under Habeas Rule 7, which included impeachment evidence that the prosecutor withheld until after trial: the drug effect expert's and medical examiner's workplaces each received \$150,000 from the family of the alleged victim. Petitioner also included many applications of law to the facts in the SMF, and Respondent's failure to file responsive statements of material fact, deemed each allegation in Petitioner's SMF admitted. See D.N.J. L. Civ. R. 56.1(a); Fed. R. Civ. P. 56.

Notwithstanding all the foregoing, the District Court denied Petitioner's habeas petition, issuing a memorandum opinion that didn't address the December 27, 2018 written request to proceed pro se, nor the State's withholding impeachment evidence of two \$150,000 transactions from the alleged victim's estate to key State witnesses until after trial.

D. PROCEEDINGS IN THE US COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent did not oppose, and thereby conceded, that Petitioner filed a written notice and certification on December 27, 2018; which clearly, explicitly, and unambiguously stated that Petitioner

waived the right to counsel and elected to proceed pro se. See DNJ ECF 1 at page 8; DNJ ECF 16 at page 4; 3rd Cir. ECF 7 at pages 1, 7, and 21-22. Respondent admitted that they deleted these documents from the state court docket and have failed to provide them to the federal courts upon order to do so; See DNJ ECF 12.7 at pages 55a-56a; and further conceded that Petitioner proffered said documents onto the record in open court ore tenus on January 7, 2019; See 3rd Cir. ECF 7 at pages 8 and 22. Respondent did not oppose the contention that F.R.E. 1004 allows Petitioner to attest to the contents of these documents; 3rd Cir. ECF 7 at page 1; nor that Petitioner has done so in his habeas petition; Ibid., see also DNJ ECF 1 at page 8; and in his traverse and reply; see DNJ ECF 16 at page 4. Respondent further conceded that this was exhausted through one round of direct appeal; DNJ ECF 16 at page 54; and was not adjudicated by any state court on the merits, but was rather denied on inadequate state procedural grounds that are insufficient to bar review on petition for federal habeas corpus relief. See 3rd Cir. ECF 7 at pages 6-8. Respondent further conceded that the state court made findings of fact that Petitioner "comported himself like a perfect gentleman" at every point in the state proceedings leading up to his December 27, 2018 and

January 7, 2019 requests to self-represent; DNJ ECF 16 at pages 5-6, 30; and that this state court record contradicts any later findings and renders them unworthy of deference under 28 U.S.C. 2254(e)(1); DNJ ECF 16 at pages 29-30; See also 3rd Cir. ECF 7 at pages 23-24. Respondent further conceded that this clear and unambiguous December 27, 2018 request was renewed and proffered onto the record on January 7, 2019 in open court, and was denied without the hearing mandated by Faretta v. California, 422 U.S. 806 (1975) ("Faretta"), which is a substantial showing of the denial of the 6th Amendment Constitutional Right to self-representation. See 3rd Cir. ECF 7 at pages 24-25.

Respondent did not oppose, and thereby conceded that Petitioner has alleged facts in his Traverse and Reply showing that investigators recognized the exculpatory value of evidence which they destroyed, prior to their destruction of it. See 3rd Cir. ECF 7 at pages 9-17. This includes the testimony of multiple investigators that they recognized the exculpatory value of certain evidence prior to destroying it; 3rd Cir. ECF 7 at pages 14-16; as well as evidence of the routine organizational practice of collection and analysis of drug containers and surfaces upon which a sexual assault is alleged to have happened; 3rd

Cir. ECF 7 at page 15 (Investigator testified to requirements of NJ Attorney General's Guide to Providing Services to Victims of Sexual Assault, which requires collection of these items); Id. at page 16 (Crime scene expert testified to standard police practices imputing knowledge to investigators of the evidentiary value of these items); which practice Respondent conceded existed at the time of such evidence's destruction; 3rd Cir. ECF 7 at page 16; See also F.R.E. 406 (Evidence of routine organizational practice is sufficient to show the state of mind of knowledge of investigators of the exculpatory value of evidence on a given occasion). Respondent further conceded that evidence of the medical examiner and drug effect expert receiving \$150,000 each to their workplaces from the alleged victim's estate existed before trial; 3rd Cir. ECF 7 at pages 2 and 17-19; that the evidence would've provided impeachment evidence of the medical examiner and investigators which would've had a substantial effect on the jury's verdict and changed the outcome of trial; Ibid.; but that this evidence was withheld from Petitioner until after trial; Ibid. Respondents further concede that the record should have been expanded under Habeas Rule 7 to include this impeachment evidence; Ibid. Most importantly, Respondent conceded that the cumulative materiality of

the destroyed exculpatory evidence and withheld impeachment evidence would've cast the entire case in a different light, had a substantial effect on the jury's verdict, and would thereby have changed the outcome of trial; 3rd Cir. ECF 7 at pages 11-14, 19. Respondent has not addressed any of the foregoing factual and legal contentions in their Answer, DNJ ECF 12, which was filed prior to the reply, DNJ ECF 16. Neither did the magistrate judge address these in his May 15, 2025 report & recommendation, DNJ ECF 62. Nor did the district court address these in their June 6, 2025 opinion, DNJ ECF 65.

Respondent did not oppose, and thereby conceded, that Petitioner requested in his motion papers filed on December 27, 2019 to conduct an evidentiary hearing on his Brady claim pre-trial; See DNJ ECF 1 at page 11 ("Petitioner specifically requested a hearing as part of his moving papers"); DNJ ECF 16 at pages 5, 49-52; 3rd Cir. ECF 7 at page 6 (Incorporating the traverse and reply). Respondent also admitted that Petitioner renewed his request for an evidentiary hearing ore tenus in open court on January 7, 2019; DNJ ECF 16 at page 5; 3rd Cir. ECF 7 at page 6 (Incorporating the traverse and reply). Respondent further conceded that all of the evidence which Petitioner requested to expand the record under Habeas Rule 7 to include, in the

document filed below at DNJ ECF 44; was evidence in existence pre-trial that could've been introduced at such hearing if it had been made available to him; 3rd Cir. ECF 7 at pages 2, 17-19. Respondent conceded that Petitioner is therefore not at fault for the failure to develop the record, but has acted diligently to proffer the evidence and would have been able to do so if it had been provided to him at the requested pre-trial hearing. DNJ ECF 12 at page 41 n.8; DNJ ECF 16 at page 51; 3rd Cir. ECF 7 at page 18.

Notwithstanding all the foregoing, the Third Circuit issued a terse, one paragraph summary denial of Petitioner's application for a certificate of appealability.

E. JURISDICTION IN THE COURTS BELOW

Federal Jurisdiction existed in the Court of First Instance by virtue of 28 U.S.C. 2254, which provides federal courts jurisdiction to hear claims of unconstitutionality of state court convictions.

The U.S. Court of Appeals for the 3rd Circuit had jurisdiction under 28 U.S.C. 2253, although Petitioner contends that the Third Circuit acted without jurisdiction in reaching the merits on COA; and the Third Circuit has issued a judgment, attached as pp. ____-____ to the

Appendix; summarily affirming the decision of the District Court denying a COA; which was filed below as 3rd Cir. CM/ECF no. 24.

LEGAL ARGUMENT

POINT I: THE BOILERPLATE AFFIRMANCE OF THE COURT OF APPEALS HAS DEPRIVED PETITIONER OF DUE PROCESS, AND IS PART OF A PRACTICE OF NUMEROUS COURTS OF APPEALS THAT SYSTEMATICALLY DEPRIVES PRO SE HABEAS CORPUS PETITIONERS OF DUE PROCESS

Certain of the Justices of this Court has pointed to the Eleventh Circuit's troubling trend of denying pro se habeas petitions with hardly a semblance of Due Process:

"Under Eleventh Circuit rules, the applicant must confine his or her entire legal argument to a form on which '[f]ew prisoners manage to squeeze more than 100 words.' ... That limited form is the only submission that the court typically accepts: The Government seemingly 'never files a responsive pleading,' and the court never grants oral argument ... Surprisingly still, this perfunctory process affects future claimants too, and not only those who find themselves in the second or successive petition posture. The Eleventh Circuit has published several of its orders denying permission to file a second or successive petition, and determined that all future litigants (including those on direct appeal) are bound to the holdings of these orders unless and until an en banc Eleventh Circuit or this Court says otherwise.

"These factors make out a troubling tableau indeed. Most importantly, they raise a question whether the Eleventh Circuit's process is consistent with due process." St. Hubert v. United States, 590 U.S. ___, 140 S. Ct. ___, 207 L. Ed. 2d 180 (2020) (Statement of Justice Sotomayor respecting the denial of certiorari) (Quoting United States v. Hubert, 918 F.3d 1174, 1198 (2019) (Wilson, J., dissenting from denial of

reh'g en banc); also citing United States v. Hubert, 909 F.3d 335, 346 (2018)).

This same Justice has pointed out an even more disturbing trend in the Fifth Circuit, of judges not bothering to review pro se habeas petitions whatsoever:

"In 2007, a former employee of Louisiana's Fifth Circuit Court of Appeal shot himself in his courthouse office. The employee left a suicide note claiming that he had been tormented by his involvement in that Court of Appeal's secret, 13-year policy of summarily denying pro se appeals ... The note reportedly stated that no judge had reviewed a habeas application filed by a pro se inmate during that time; instead, courthouse staff prepared rulings that judges signed 'without so much as a glance' at the underlying petitions or any review of the applications' merits. ...

"In response to this revelation, the Louisiana Supreme Court approved a procedure whereby a three-judge panel drawn from the same pool of Court of Appeal judges who had allegedly summarily rejected pro se filings would re-review hundreds of pro se submissions that had been dismissed without consideration ... Justice John L. Weimer dissented from that decision, arguing that the cases should be assigned to judges sitting on other courts of appeal to 'avoid any appearance of impropriety.'" Schexnayder v. Vannoy, ___ U.S. ___, ___ S. Ct. ___, 205 L Ed 2d 408 (2019) (Statement of Justice Sotomayor respecting the denial of certiorari) (quoting Johnson v. Parish of Jefferson, 2009 U.S. Dist. LEXIS 51863, 2009 WL 1808718, *4 (ED La., June 19, 2009); State v. Cordero, 2008-1717 (La. 10/3/08), 993 So. 2d 203, 214; also citing Purpura, Fifth Circuit Ordered To Review Appeals; Due Process Denied, Supreme Court Says, New Orleans, La., Times-Picayune, Oct. 7, 2008, p. 1.)

The cases which were exposed by the late Fifth Circuit Clerk's suicide note had a lot in common with each other: they relied on a boilerplated list of case citations with a cursory summary of reasons for affirming the court below. See, e.g. Lewis v. Dretke, 2005 U.S. App. LEXIS 29618 (5th Cir. Dec. 14, 2005); Richard v. Kaylo, 2002 U.S. App. LEXIS 30150 (5th Cir. July 19, 2002); Walker v. Wilkinson, 191 Fed. Appx. 328, 2006 U.S. App. LEXIS 18654 (5th Cir. July 25, 2006); Treece v. Andrews, 200 Fed. Appx. 358, 2006 U.S. App. LEXIS 23908 (5th Cir. Sep. 20, 2006); Dias v. Warden, 92 Fed. Appx. 980, 2004 U.S. App. LEXIS 4953 (5th Cir. Mar. 16, 2004); Williams v. Cain, 85 Fed. Appx. 6, 2004 U.S. App. LEXIS 17 (5th Cir. Jan. 5, 2004). But most tellingly, and most pertinently to this case, each of those cases also had a lot in common with the Third Circuit's boilerplate affirmances in pro se habeas corpus appeals: they follow the exact same structure. See, e.g. Wright v. Warden James T Vaughn Corr. Ctr., 2024 U.S. APP. LEXIS 25904 (3d Cir. July 23, 2024); Copeland v. DA Phila., 2024 U.S. APP. LEXIS 10332 (3d Cir. Feb. 28, 2024); Bethea v. Superintendent Houtzdale SCI, 2024 U.S. APP. LEXIS 22231 (3d Cir. July 8, 2024); Williams v. Superintendent Camp Hill SCI, 2024 U.S. APP. LEXIS 8409 (3d Cir. Jan. 19, 2024); Harrity v. Adm'r NJ State Prison, 2023

U.S. APP. LEXIS 31624 (3d Cir. Sep. 5, 2023). The key difference? The Fifth Circuit gave even more in their proven deprivations of Due Process, than the Third Circuit ever did in their ongoing pattern: Three paragraphs in the Fifth Circuit's, compared to one terse paragraph in the Third Circuit's. And the Third Circuit's summary denial of Petitioner's application for COA is one such paragraph.

Local circuit rules must be consistent with Acts of Congress and rules promulgated by the Supreme Court. F.R.A.P. 47(a)(1). A circuit court may not enforce a local rule imposing a requirement of form in any manner that causes a party to lose rights. F.R.A.P. 47(a)(2).

Appellant respectfully posits that the Court of Appeals' unwritten local circuit rule, enabling the practice of copying and pasting of boilerplate affirmances in pro se habeas cases, causes the loss of Appellant's Constitutional Right to Due Process, because it fails to provide the judicial review of the record below nor the judicial review of the application for COA which is the required procedure of the Rules promulgated by the Supreme Court.

Because the copied and pasted boilerplate issued in this case, the exact same as in numerous others, causes Plaintiff to lose his right to Due Process, such application of the Third Circuit local circuit rules is

prohibited by F.R.A.P. 47(b). And the Third Circuit practice, as applied to this case, is inconsistent with the Supreme Court's rule set forth in Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) ("until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners"); and is thus prohibited by F.R.A.P. 47(a)(1). Petitioner therefore asks the Court to grant certiorari to issue guidance to the Circuits on what standard of review provides Due Process in habeas pro se appeals.

POINT II: THE COURT OF APPEALS' HOLDING THAT THE CLAIMS WERE UNEXHAUSTED AND LACKING ARGUABLE MERIT, WAS CONTRARY TO THE PRECEDENTS OF THIS COURT AND WREAKS A FUNDAMENTAL UNFAIRNESS ON PETITIONER BY DEPRIVING HIM OF NOTICE OF THE ISSUE OF EXHAUSTION, NOR A FULL BRIEFING ON THE MERITS, NOR A FAIR HEARING ON HIS CLAIMS

A. Plaintiff's Brady Claim Raised Cumulative Materiality of Impeachment Evidence Withheld by the State Through One Full Round of State Appellate Review, So the \$150,000 Paid From the Alleged Victim's Estate to Two Key State Witnesses Wasn't Unexhausted Under Vasquez v. Hillary, Because it was the Subject of a Request Under Habeas Rule 7 to Expand the Record to Supplement the Brady Claim Which the State Admits is Exhausted

Plaintiff has raised a claim under Brady v. Maryland, 373 U.S. 83 (1963) ("Brady"), alleging the State withheld impeachment evidence, through one full round of appellate review: fully exhausting the claim.

O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999). The State has

conceded that all of the claims are exhausted; See DNJ ECF 12; and has persisted in this concession even after Plaintiff moved under Habeas Rule 7 to supplement his Brady Claim with the \$150,000 cheques paid from the alleged victim's estate to two key prosecution witnesses. See DNJ ECF 44. Habeas Rule 5(b) puts the burden on the State to raise exhaustion as an affirmative defense, and the State has waived this defense. See Granberry v. Greer, 481 U.S. 129, 134 (1987); See also Jones v. Bock, 594 U.S. 199, 212 (2007) (The usual practice under the Federal Rules of regarding exhaustion as an affirmative defense should be followed).

What's more, the supplementation of the Brady Claim with further evidence of cumulative materiality doesn't unexhaust it, per Vasquez v. Hillery, 474 U.S. 254, 258-260 (1986); see also Stevens v. Del. Corr. Ctr., 295 F.3d 361, 369-370 (3d Cir. 2002). Both the Habeas Rules and abundant Supreme Court precedent stand for the proposition that Petitioner can expand the record, with or without an evidentiary hearing, to include additional facts in support of his exhausted claims, without rendering those claims unexhausted. See Habeas Rule 7, Vasquez, 474 U.S. at 260; See also Shinn v. Ramirez, 2022 U.S. LEXIS 2557 at *22 (2022) (When Petitioner is not at fault for the undeveloped

factual basis of his Brady Claim, 2254(e)(2) does not bar introduction of new evidence in support of it).

Petitioner filed a statement of material facts not in dispute; See DNJ ECF 44; including in it evidence with which he explicitly requested to expand the record under Habeas Rule 7, including this impeachment evidence which the prosecutor withheld until after trial. The State has not disputed that Plaintiff is not at fault for the failure to develop these facts, nor that the State withheld the evidence until after the Discretionary review phase of the Direct Appeal had concluded. In fact, the State has waived any defense of unexhaustion of these facts, conceding to their being admissible under Habeas Rule 7. See DNJ ECF 48; see also Vasquez, 474 U.S. at 257-258 (Presentation of additional facts doesn't evade exhaustion requirement when the substance of claim was presented to State court).

Plaintiff has requested judicial notice of the following facts under F.R.E. 201(b) and also to expand the record under Habeas Rule 7 to include them in support of his Brady Claim: James Galfy was the brother of Joseph Galfy, and the executor of the Estate of Joseph Galfy. James paid \$150,000 to the workplace of drug effect expert Robert Pandina; and another \$150,000 to the workplace of Junaid Shaikh, the

medical examiner; after having met Shaikh on May 14, 2013 at Shaikh's workplace, but prior to Shaikh testifying at trial. Respondent admitted that the payment of \$150,000 to Pandina's workplace caused a conflict of interest, and stated that for that reason they would not be calling Pandina to testify. See McGillvary v. Galfy, 2:21-cv-17121-MCA-CLW at ECF 1.3 (DNJ 2021); See also McGillvary v. Galfy, 2022 U.S. Dist. LEXIS 134998 at *29-30 (DNJ 2022). Shaikh testified, but the impeachment evidence of the \$150,000 cheque to Shaikh's workplace from the alleged victim's estate wasn't provided to Petitioner prior to Shaikh's testimony, despite evidence showing that James Galfy produced the certified letters testamentary to the state prosecutor 2 days before that same prosecutor made the statement regarding Pandina's conflict of interest caused by identical circumstances. See Exhibits A to C of Declaration in Support of DNJ ECF 44.

Shaikh's testimony was perhaps the most crucial evidence which the jury heard, providing the jury with information about the cause and manner of death. Plaintiff's ability to impeach this testimony by showing bias would have had a profound effect on the jury's verdict, by allowing him to show that the doctor had financial incentive to skew his testimony. Likewise, Plaintiff was not provided with the evidence that

James Galfy's signature was on the cheque to Robert Pandina until after trial, which deprived him of Pandina's testimony, which could have substantiated Plaintiff's claims of intoxication and thereby changed the jury's verdict. And there has already been a reasonable jurist who arrived at a different result in its assessment of the Brady materiality of this suppressed evidence. Galfy, 2022 U.S. Dist. LEXIS 134998 at *29-30 ("The Court credits Plaintiff's allegations that Dr. Pandina's testimony, if offered at trial, would have allowed Plaintiff to prove intoxication by clear & convincing evidence, and this would have changed the outcome of the trial").

The evidence therefore meets the 3 criteris for a Brady Claim: (1) it was suppressed by the prosecution, (2) it was impeaching of a material witness, and (3) it would have had an effect on the outcome of the jury's verdict. United States v. Bagley, 473 U.S. 667, 676 (1985). This is a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253; Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). And the panel's finding that the claim is "lacking arguable merit" is contrary to the Supreme Court's admonition that consideration of the merits is forbidden on motion for COA: "Until the prisoner secures a COA, the

Court of Appeals may not rule upon the merits of his case." Ibid.; Buck v. Davis, 137 S. Ct. 759, 773-775 (2017).

Because a reasonable jurist could find that the Respondent has admitted that the withheld and suppressed evidence would have a substantial outcome on the verdict; see DNJ ECF 44, Statement of Material Facts Not in Dispute at paras 35-38; and because Respondent had waived the affirmative defense of exhaustion on this evidence; DNJ ECF 46; a certificate of appealability should have issued on this point.

B. The Allegations in Petitioner's Habeas Petition and Reply Pleadings, That He Filed an Explicit Written Request to Self-Represent On December 27, 2018, Have Been Exhausted Through One Full Round of Appellate Review

State Court opinions are irrelevant to determination of exhaustion; rather, Petitioner's State Court Briefs, and everything adopted by reference therein, must be examined to determine exhaustion. Dye v. Hofbauer, 546 U.S. 1, 3-4 (2005). This examination has, of course, been made impossible by the State's destruction of Petitioner's state court moving papers in support of his written motion filed on December 27, 2018. See DNJ ECF 12.7 at pages 55a-56a. However, Petitioner has explicitly stated under penalty of perjury that he "clearly indicated in his moving papers that he chose to proceed pro

se"; DNJ ECF 1, Page 8; and the State has agreed that all of the factual and legal bases of the Faretta v. California, 422 U.S. 806 (1975) Claim were exhausted, including this written request filed on December 27, 2018. See DNJ ECF 12. The State's waiver of exhaustion on this issue is not only something the Supreme Court has held should be followed; Jones, 549 U.S. at 212; but equity requires it: because in order to prove exhaustion, Petitioner would have to refer to the documents which the State destroyed. Petitioner has claimed that he adopted each of these documents by reference in his appellate briefs to the NJ Super. Ct. - App. Div. and to the NJ Supreme Court, and the State has conceded this. See DNJ ECF 1, DNJ ECF 12.

Yet the District Court did not address, much less analyze, Petitioner's allegation that he had filed a written clear and unambiguous request to self represent, embodied by written notice and certification, in the state trial court on December 27, 2018. See DNJ ECF 1, pg. 8. Respondent has admitted that they have deleted that written notice and certification from the docket, and has failed to provide that portion of the record despite the Court's order directing them to do so. See DNJ ECF 6 (Court order directing Respondent to produce all of the state court record, including Petitioner's briefing papers); DNJ ECF 12.7,

pages 55a-56a (Deleted docket entries). But Petitioner can attest to the contents of the documents from his personal knowledge and recollection, and his verified habeas corpus petition is sufficient to do so. See F.R.E. 1004.

The District Court also erred by not addressing the allegations of the Reply, and failed to apply the law to those facts. For example, Petitioner alleged in his petition that he "clearly indicated in his moving papers that he chose to proceed pro se" on "December 27, 2018." DNJ ECF 1, Pg. 8. The Respondent filed the docket below, confirming that Petitioner had filed the notice and certification clearly setting forth in writing that he was dispensing with counsel and electing to self represent. See DNJ ECF 12.7, pgs. 55a-56a. Petitioner thereafter reiterated in his Reply allegations that "On December 27, 2018, Petitioner filed his notice [and] certification[,] clearly indicating in these moving papers that he was moving pro se." DNJ ECF 15, pg. 4. These allegations in the Reply and Petition are entitled to liberal construction, yet they were not addressed whatsoever by the District Court. Nor did the panel address whether "jurists of reason might debate" whether this written request was clear and unambiguous, or whether this claim deserved encouragement to proceed further, which

is the standard on COA and not whether the claims have arguable merit. See Buck, 137 S. Ct. at 773-775.

The decision to deny Plaintiff's request to self-represent must be reviewed solely on the record at the time the decision was made. Greene v. Fisher, 565 U.S. 34, 38 (2011). That record indicated that the Judge made factfindings that Petitioner had comported himself "cooperatively every time I've had the pleasure of interacting with him in the Courtroom." DNJ ECF 12.35, Page 23 lines 18 to 21. Ex post characterizations don't hold water in the face of this, it is clear that on the record at the time the decision was made, Plaintiff's conduct was that of a "perfect gentleman." Ibid.; See also Thomas v. Horn, 570 F.3d 105, 123-24 (3d Cir. 2009). Likewise, the District Court's finding, echoed by the panel, that the request was "ambiguous"; fails to give deference to the Appellate Division's finding that the January 7, 2019 request to self-represent was a clear and unambiguous one. See Parker v. Dugger, 498 U.S. 308, 320 (1991). Even this doesn't account for the written request for self-representation, which thoroughly rebuts any findings of ambiguity, and which was indeed admitted by the State to be unexhausted. For all these reasons, Petitioner urges the Court to reverse with instructions to grant a COA on this issue.

C. The District Court's Opinion Adopted by the Panel Does Not Address the Allegations in the Reply Pleading, Which Show Bad Faith by the Investigators in Destruction of Exculpatory Evidence

"Federal Rule of Civil Procedure 7(a)(7) specifically classifies a reply to an answer, if ordered by a court, as a pleading allowed in federal court." Zion v. Nassan, 283 F.R.D. 247, 258 (W.D.Pa. June 27, 2012), Aff'd 556 Fed. Appx. 103 (CA3 2014). "The plaintiffs' responses, which are themselves pleadings, serve as the functional equivalent of an amended complaint. Ibid. (citing Thomas v. Independence Twp., 463 F.3d 285, 301 (CA3 2006)).

Notwithstanding this, neither the District Court's Opinion nor the panel's adopting it has addressed the numerous allegations in the Reply, which show the bad faith of investigators in destroying exculpatory evidence:

The regulatory and therefore judicially noticeable NJ Attorney General Guidelines for Providing Services to Victims of Sexual Assault (AGVSA), mandates that samples must be taken of drink or potential drug containers, and of the surface underneath where the rape was alleged to occurred, in this case the carpet where the large stain was found under the alleged victim. Johnny Ho, a supervising Union County Prosecutor's Office investigator in charge of the crime scene at

46 Starlite Drive during the period from May 13-16, 2013, testified that he was required to follow the AGVSA. DNJ ECF 12.41, P117L3-14. Ho testified that the AGVSA mandatorily required him to collect a rape kit, which includes the surface the sexual assault happened on and any drink containers, if a sexual assault was reported within 5 days of the assault. Id. at P102L2-9; and that Petitioner told him on May 16, 2013 that he was assaulted on May 12, 2013, yet Ho did not collect a rape kit from Petitioner; Id. at P102L20-P103L10. Ho also testified that no one ever opened the pill bottles from the fridge to ascertain their contents; Id. at P114L16-P115L3; nor collected samples of the carpet visibly stained with evidence, which he admitted contained other bodily fluids than blood; Id. at P100L13-25; nor collected glassware in the dishwasher or the sink; Id. at P101L1-8. Ho also testified that he "obtained all other videos except for that two-hour period of time [at] Asbury Park"; Id. at P96L13-17. Ho admitted that the investigators stopped looking for DNA evidence as soon as a suspect was developed, despite knowing that Petitioner had stated he was sexually assaulted by Joseph Galfy, and that AGVSA required it; Id. at P129L1-10.

Adrian Gardner was an investigator at the crime scene. At trial, Gardner had her testimony impeached by the fact that, while the scene

was supposed to be secure, an unidentified male broke the crime scene tape, entered the scene, and removed a bag of evidence from the scene. She admitted that the person was not authorized to enter the scene, nor to remove evidence, and that she had no idea what he did in the crime scene; nor what he removed from the scene. There is no record of what was in the bag. DNJ ECF 12.38, P168L3-P170L15.

Monica Ghannam, a crime laboratory technician, testified that the investigators submitted surface fabrics (albeit irrelevant ones) to the crime lab for analysis for blood and semen; and indicated knowledge of the potentially exculpatory nature of such analysis of relevant fabric for bodily fluids; that is, from the surface upon which the sexual assault happened, namely the carpet under which the alleged victim was found. DNJ ECF 12.40, P103L23-P105L20, P109L14-P113L9.

Cheryl Kestlinger, a crime laboratory technician, testified that the investigators submitted pill bottles and containers from the crime scene, for the contents to be analyzed for drugs or drug residue; and indicated knowledge of the potentially exculpatory nature of analysis of pill bottles and containers from the scene for drugs or drug residue. Id. at P153L18-P176L6. Kestlinger admitted that, despite this knowledge, the investigators did not submit the pill bottles from the fridge for

analysis of drugs nor drug residue. *Id.* at P177L8-20; nor the glasses from the kitchen for analysis for drugs nor drug residue; *Id.* at P178L11-13.

The investigators also created a report that an entry for the video surveillance from Asbury Park Transportation Center on May 12, 2013. DNJ ECF 1.18. This report shows descriptions for every entry denoting a time period, except that the substance of the description for the time period of 12:44pm onwards on May 12, 2013 for the relevant location is conspicuously missing. *Ibid.*

Petitioner testified in his defense, and the jury was instructed that they could decide whether Petitioner was justified through self-defense or intoxication, or whether he had the mental state of intent, based on their determinations of his credibility. Petitioner testified at trial that he cut his hair at the Asbury Park Transportation Center bathroom, using his pocket knife. DNJ ECF 12.42 at P145L16-P146L7. He took the train back to Long Branch and called Galfy to ask for a place to stay. *Id.* at 150L24-P153L10.

While he was at Long Branch, he made a call to Kim Conley. A surveillance camera showed him with short hair, on the phone to Kim Conley, during the very time the message indicated he had called her:

from 5:11pm-5:13pm on May 12, 2013. Id. at P153L11-P161L13; See also DNJ ECF 12.40, P25L25-P26L14 (Kim testified to a dropped call and voice message from Petitioner at 5:11pm on May 12, 2013). Petitioner went back to Galfy's house with Galfy, who made them both food and poured Petitioner's beer into a glass. DNJ ECF 12.42, P161L14-P168L13.

After eating and drinking, Petitioner saw Galfy rinse the plates and put the dishes in the dishwasher, but Galfy did not run the dishwasher. Petitioner began to feel fuzzy and relaxed, then cannot remember anything until waking up on the floor of the master bedroom. Id. at P168L16-P169L7. This is because the effects of rape drugs include amnesia, which inhibits the formation of memories after the drug has been ingested. See DNJ ECF 1.17 (Judicially noticeable public records of the Drug Enforcement Administration describing "amnesia" and "memory impairment" as effects of common rape drugs GHB and ketamine).

Petitioner noticed Galfy over top of him, tugging on Petitioner's pants, and so Petitioner sat up abruptly and punched Galfy in the face. DNJ ECF 12.42 at P169L12-L25. Galfy shoved Petitioner's head into the side of the bed, and Petitioner fought his way out from under Galfy as

Galfy slammed into him from over top. Id. at 170L1-P172L7. Petitioner's phone, which he kept in the pocket of his pants, was inundated with urine during the struggle from underneath Galfy. Id. at P178L9-13, P180L4-8; See also Id. at P209L7-P210L19 (Petitioner had urinated underneath Galfy, and the urine had soaked his pants and inundated his phone), P223L13-P224L15 (Same).

Petitioner can't remember leaving the house or changing out of his bloody and urine-soaked clothes, which is consistent with the effects of amnesia from the rape drugs, the effects of his pre-existing post-traumatic stress disorder being triggered, or a combination of both. See DNJ ECF 12.47, P33L13 (Petitioner suffers from post traumatic stress disorder); Id. at P37L14-17 (His PTSD results from childhood physical and sexual abuse).

A mixture of short and long dark hairs, such as would be expected from being cut with a pocket knife, were found on the vertical side of the bed near where Petitioner's head was while he was sitting on the carpet and Galfy was shoving his head into the bed. DNJ ECF 12.41, P89L19-P91L20. Dark hairs were also found on the palms of Galfy's hands, from where he was shoving Petitioner's head into the side of the bed. DNJ ECF 12.7, P43a. The carpet under where Galfy was found was not

examined for hairs, which would've provided crucial corroboration of Petitioner's testimony that he awoke on the floor and fought his way out from under Galfy. DNJ ECF 12.41, P100L7-25.

Galfy's ear was torn by one injury with a linear force, which means that the force was horizontal from Petitioner who was on his back on the carpet, as opposed to overhead stomping down. DNJ ECF 12.39, P26L23-P27L8. The abrasion was caused by fabric from Petitioner's pants being down over his heel, and the fabric of it swiping across Galfy's ear as he kicked Galfy away from him; the abrasion could not be caused by rugburn. Id. at P23L22-P24L5; See also DNJ ECF 12.38, P108L22-P109L8 (Bloody footprints indicate Petitioner's "Pants fabric was under the heel of the foot"). A large stain on the carpet was photographed under Galfy's chest and head, where Petitioner's crotch was urinating as he was struggling out from underneath Galfy. Id. at P99L13-P101L3. There was no urine evident near where Galfy's crotch was, Id. at P100L7-11. The carpet stain was never collected nor sampled by investigators, despite their recognition that it likely contained other fluids besides blood. DNJ ECF 12.41, P100L7-25. That large carpet stain is a different color and characteristic than the bloody footprints around Galfy, and samples of the stain itself would've been

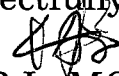
exculpatory: they would show the presence of Petitioner's hair and urine, and metabolites from the rape drugs which Galfy surreptitiously administered him. A rape kit was collected from Galfy, showing conclusively that Galfy was not raped; but no rape kit was performed on Petitioner despite his statement that he was raped by Galfy. The rape kit on Galfy did, however, show the presence of Galfy's semen and unidentified blood on Galfy's penis. Id. at P101L9-P103L10.

So in light of the foregoing, the destroyed evidence would have provided very strong corroboration of Petitioner's testimony, and could have substantiated his affirmative defenses so as to change the jury's verdict. The investigators have both admitted to their individual knowledge of the exculpatory value of the evidence, and its analysis, at the time it was lost or destroyed. And the witnesses also admitted to a routine organizational practice, embodied by the AGVSA, which imputed to them knowledge of the exculpatory value of the evidence and analysis. See F.R.E. 406. All of this converges on the point, that the panel overlooked some very crucial allegations in the reply pleading, and for this reason their judgment should be reversed with instructions to issue a COA on these issues.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully prays the Court to grant the writ of certiorari to address the unconstitutional practice in the Circuits of copying-and-pasting boilerplate affirmances in pro se habeas corpus appeals, instead of providing the Due Process which litigants are entitled to under our Constitution. Petitioner also prays that the writ issue to decide the questions of whether the Third Circuit has acted without jurisdiction in deciding the merits of the petition on COA, or whether the Third Circuit's raising exhaustion sua sponte without briefing was erroneous requiring reversal.

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Respectfully Submitted,

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