No. 13-9002

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT WHARTON — PETITIONER
(Your Name)

vs.

DONALD T. VAUGHN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

~~THIRD CIRCUIT COURT OF APPEALS~~
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ROBERT WHARTON
(Your Name)

SCI-PHOENIX, BOX 244
(Address)

COLLEGEVILLE,PA. 19426
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

CAPITAL CASE

DID THE THIRD CIRCUIT ERRONEOUSLY APPLY, ENLARGE AND/OR IGNORE SEVERAL ESTABLISHED FEDERAL LAWS IN DENYING PETITIONER RELIEF?

LIST OF PARTIES

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

[ ] 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:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

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 Wharton v. Vaughn, 2018 U.S. App. LEXIS 699; 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[ ] is unpublished.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 Wharton v. Vaughn, 2012 U.S. Dist. LEXIS 115598; 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[ ] is unpublished.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 _____ 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[ ] is unpublished.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 _____ court appears at Appendix _____ to the petition and is

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[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 11, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 16, 2018, 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

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT 6

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 the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On February 7, 1984, petitioner was arrested for the murders of Bradley and Ferne Hart. Sundry property was missing from their home at the time of their discovery. Their infant daughter, who remained in the home after the parents' deaths, was unharmed.

Subsequent to the arrest, petitioner was taken to police headquarters for questioning. There, Detective Charles Brown("Brown") commenced to physically abusing petitioner with blows to the ear, one to the back of petitioner's head with a heavy metallic objectic and choking petitioner(petitioner's prison records note a scalp laceration and neck abrasions) until a statement was produced.

At a pretrial suppression hearing, Brown claimed petitioner ran, he gave chase, grabbed petitioner by the neck and tackled petitioner. He speculated that petitioner struck his head during the tackling as afterwards he claimed to have seen petitioner

Failing to address the decedents' surviving child, Lisa, would inevitably lead to the state narrating their false and inflammatory version, which unfortunately was adopted by both the district court, Appx. B at 4-5, and the Third Circuit, Appx. A at 4. Lisa Hart was found unharmed. At trial, Dr. Bado, a relative through marriage to the Harts, testified that Lisa was suffering severe dehydration and hypothermia, trial transcript 6/20/85, p.54. He also testified that en route to the hospital she suffered a ten-second respiratory arrest, Id. at 53. This testimony was the impetus for a finding by the jury of the aggravating circumstance Grave Risk of Death.

Eight years later at a remanded penalty hearing, Dr. Bado reiterated his testimony and added that the child was cyanotic. Penalty hearing transcript 12/15/92, p.36. At the same hearing a different prosecutor produced Lisa's hospital record(unseen previously by the defense), created hospital staff. It showed the child was diagnosed with a bit of dehydration(not "severe") and there was nothing in the record about cyanosis, hypothermia nor respiratory arrest. On that occasion the jury did not find the Grave Risk of Death aggravator. However, these facts have not stopped the state from perpetuating their inflammatory version.

holding his head.

Conveniently, this explained petitioner's injuries and petitioner's counsel, without presenting any evidence, conceded the voluntariness of the statement.

However, at trial he claimed the statement was the product of physical coercion without presenting sufficient evidence for the jury to agree. Petitioner was convicted and sentenced to death.

Procedure History

After several rounds of state direct and post-conviction appeals, petitioner sought relief and discovery in federal court. The district court granted discovery and, amongst other favorable evidence, petitioner discovered that Brown had authored a report that did not reflect that he had chased petitioner and indicated that petitioner was "uninjured" when arrested.

This and other evidence was presented at a federal evidentiary hearing and although the district court, to some extent, found the evidence credible, it denied relief but granted a COA regarding counsel's suppression hearing and trial representation and also two Bruton claims. Reconsideration of the decision was sought and denied. A timely appeal was taken to the Third Circuit Court of Appeals, which expanded the COA to include a penalty phase ineffective claim. That court ultimately denied relief on the guilt phase claims but remanded to the district court for an evidentiary hearing on counsel's representation at the penalty phase.

This appeal followed.

A. COUNSEL WAS INEFFECTIVE AT THE SUPPRESSION HEARING

Prior to trial counsel filed a motion to suppress petitioner's alleged statement on physical/psychological coercion grounds, but after listening to the state's evidence at the suppression hearing and presenting no evidence of his own to support his motion, counsel conceded, Appx. A. p.9, there was no justification for the court to conclude the statement was anything other than voluntary Appx. D, p.83.

At the heart of petitioner's physical coercion claims are injuries suffered the night of arrest and the contention as to the locale of occurrence.

The state presented testimony that alleged petitioner approached the front door of his home in response to loud knocking. At some point, Detective Brown("Brown") saw petitioner through the window in the door and shouted "police!" Petitioner turned and started back up the stairs and Brown broke the door down. A chase ensued with Brown eventually tackling petitioner on the second floor landing of the home. As a result of Brown grabbing petitioner's neck, in order to effectuate the tackle, petitioner suffered neck abrasions. A scalp laceration was due to petitioner possibly hitting something during the fall.

Petitioner contended Brown did knock but when a response was not forthcoming soon enough he forcibly entered the home, ran up the stairs past petitioner's family on the second floor landing and up another flight of stairs to the third floor where he arrested petitioner without incident. The neck abrasion and scalp laceration were the result of Brown physically abusing petitioner during the interrogation in order to extract an involuntary

statement from petitioner.

At a two-day evidentiary hearing before the federal district court, petitioner presented witness and documentary evidence to support the claims of ineffective assistance of counsel.

Margaret Wharton, petitioner's mother, testified she was on the second floor landing when the police came into the home and that petitioner was not on that floor until brought downstairs by the police. She also testified that she did not see any injuries on petitioner when being escorted past her. Appx. B p.55. The Third Circuit concluded her testimony had a "little" impeachment value, Appx. B, p.54-55.

Beverly Young("Young"), petitioner's sister, reiterated her trial testimony that she was on the second floor landing also and that she did not see any "scuffle," Appx. B, p.53-54. The Third Circuit found her testimony had "little" impeachment value, Appx. A. p.11, and also that she had a "bias," Id. at 15.

Tywana Wilson-Carter(Wilson-Carter), petitioner's erstwhile fiancee, testified that she did not see any injuries on petitioner prior to the arrest, Appx. B, p.56, but at the police station, after being reunited, she saw a "scrape" or "scratch," Id. at 57 on petitioner's neck and smudges on the thigh of petitioner's pants, Id.

The Third Circuit conluded her testimony would have "little" value towards impeachment, Appx. A, p.11.

Police officer Duffy ("Duffy") testified that it was his practice to "thoroughly search" persons that he was to transport and that the fact that the 75-48 form he filled out the night of petitioner's arrest had no mark/comment in the 'injury' box

indicated to him petitioner was uninjured, Appx. p.47.

The Third Circuit concluded this testimony was of "limited impeachment value," Appx. A, p.12 n8.

Petitioner also presented four forms of documentation in support of his allegations that he was abused by Brown. The first was Duffy's 75-48 report. Second, a 75-229 investigator's aid form that although it does not have a specific designated section to note an injury, counsel testified that it has been his experience(as a 41-years practicing attorney, Appx, D, p.74) that sometimes injuries are noted on it, Id. at 91. Third, was a police activity sheet which had no indication of injuries on petitioner. Counsel testified that in his experience injuries are noted on such forms, Id. at p.95. Finally, petitioner presented the 75-49/52 report written by Brown. Within that report Brown indicated petitioner "had no apparent injuries"(nor does it mention a chase and tackle scenario at the time of arrest), Appx. D, p.85.

Regarding the 75-229 and police activity sheet, the Third Circuit panel determined they were of "little impeachment value," Appx. A. p.12. Brown's 75-49/52 and Duffy's 75-48 reports, the Third Circuit concluded they were not "necessarily inconsistent" with Brown's testimony, Id., and would have "little impeachment value," Id.

Petitioner also put forth two distinct testimonies by Brown highlighting inconsistencies between his suppression hearing testimony and trial testimony. First, Brown testified pre-trial and at trial that he confiscated from petitioner's bedroom a camera "data back" attachment because the decedents owned a

similar one that was not found when they were discovered. However, Brown's 75-49/52 report indicated he had not found the item in petitioner's home, but rather at petitioner's fiancee's home. Appx. A. p.14. The Third Circuit concluded this "inconsistency is not significant," Appx. A. Id., which petitioner interprets as not without value.

Second, petitioner put forth that Brown testified inconsistently about petitioner being handcuffed while interrogated. Brown, at the suppression hearing, testified three distinct time that petitioner was handcuffed in the interrogation room. However, at trial he testified that petitioner was never handcuffed. The Third Circuit deemed this deviation "[im]material," Appx. A. p.14.

Petitioner also argued counsel should have impeached Brown's colleagues, Detectives Ansel("Ansel") and Alexander("Alexander"). These two testified about police activity at petitioner's home. Both testified they were <u>at</u> the front door, knocked, a negroe female responded, she was shown the warrants and they were executed. Both, suspiciously, would change their positions from the porch to the side of the house, where they neither saw nor heard knocking. The Third Circuit determined that both detectives' testimony would have "limited impact."

Finally, trial counsel appeared at the hearing and his testimony reads like a litany of ineptitude; replete with repeated concessions regarding evidence he candidly agreed should have been investigated and/or presented at the suppression hearing and at trial but was not.

Trial counsel agreed that all evidence presented at the

evidentiary hearing would have been "helpful":(Duffy, Appx. D, p.85; Margaret Wharton, Id., at 104; Young, Id., at 105 Wilson-Carter, Id. at 99; 75-48 report, Id. at 104; 75-49/52 report, Id. at 90; 75-229 report, Id. at 92; police activity sheet, Id. at 95. He also agreed he had no tactical nor strategic reason for not investigating or presenting said evidence:Duffy, Id. at p.85-86; Margaret Wharton, Id. at 98-99; Young, Id. at 104-106; Wilson-Carter, Id. at 104-106; 75-48 report, Id. at 85-86; 75-49/52 report, Id. at 104-106; 75-229 report, Id. at 92; police activity sheet, Id. at 96.[1]

In denying this claim the Third Circuit employed the holdings of Kimmelman v. Morrison, 477 U.S. 365(1986). Petitioner asserts such reliance was erroneous. Strickland v. Washington, 466 U.S. 668(1984), requires a defendant prove; 1) deficient performance and, 2) prejudice from that poor performance, Id. at 687. The Third Circuit assumed, Appx. A, p.10, petitioner had established counsel's actions were unsound and proceeded to analyze whether counsel's performance prejudiced petitioner. But rather than decide if, at the suppression hearing, there was a "reasonable probability that, but for counsel's unprofessional

[1]Counsel justified his decision not to have petitioner testify at the suppression hearing because he was "fear[ful] [petitioner] would make statements that would be injurious to [petitioner] at the trial. Appx. D at 108. Counsel's decision was ignorant of the holdings in Simmons v. U.S., 390 U.S. 377(1968), which held a defendant need not surrender one right in order to assert another. Simmons was adopted by this Commonwealth in Com. v. Knowles, 459 Pa. 70(1974)("The defendant may testify at such hearing(on a motion to suppress evidence obtained in violation of his constitutional rights);and if he does so, he does not thereby waive his right to remain silent during trial").

errors the result of the proceeding would have been different," Strickland, 466 U.S. at 694, the Third Circuit inserted into that prejudice equation the holdings of Kimmelman, which, according to the Third Circuit bifurcates the Strickland prejudice prong into two components: 1) the "suppression claim is meritorious," and 2) "there is a reasonable probability that the verdict [at trial] would have been different absent the excludable evidence," Appx. A, p.10, citing Kimmelman, 477 U.S. at 375.

The Third Circuit then went on to deny petitioner's suppression hearing ineffective claim based on the Kimmelman additional proof: "Wharton has failed to show that his motion to suppress would have been meritorious if [counsel] had presented the proffered evidence. See Morrison, 477 U.S. at 375," Appx. A at p.13.

Kimmelman is inapplicable to an ineffective assistance of counsel claim where the primary source of the claim emanates from counsel's failure to effectively litigate any suppression claim outside of one regarding the Fourth Amendment.

Petitioner has not implicated counsel's representation in a Fourth Amendment context, the claim raised was a pure Sixth Amendment claim regarding counsel's performance at a suppression hearing. The Third Circuit has erroneously interpreted Kimmelman's holding, obviously restricted to suppression on Fourth Amendment grounds, to any issue(be it a suggestive identification, a defendant's prior record or the results of law enforcement scientific tests) raised for suppression. Proof of Kimmelman's limitation can be found in its language:

> "In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness, Strickland at 688, and that there exists a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id., at 694. [However,] [w]here defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice," Id. at 375(emphasis added).

See Lockhart v. Fretwell, 506 U.S. 364, 374(1993), "Kimmelman refers to the necessity for a 'meritorious' Fourth Amendment claim..," concurrence, J. O'Connor, and also n.6.

Should this Court disagree with petitioner's analysis, it is asserted that under Kimmelman and/or Strickland the Third Circuit should have determined that petitioner proved the prongs of Kimmelman and/or Strickland.

1. Deficient Performance/Merit

The states main evidence, in trial counsel's estimation, the only piece of evidence by which jurors could convict petitioner, see counsel's testimony, infra at p.15, was a physically coerced statement that counsel made no effort to suppress, supra, at p. . Petitioner has submitted ample credible evidence that counsel now agrees he should have either presented or investigated and presented, supra at p.

Combined with counsel's admissions, once the Third Circuit validated petitioner's evidence with having some beneficial weight towards petitioner's defense, those determinations established not only deficient performance, but the merit of the claim.

The Third Circuit stated that "Given this relatively low standard[of preponderance], the limited impact of Wharton's proffered evidence, and Brown's detailed hearing testimony, Wharton had failed to show that his motion to suppress would have been meritorious if [counsel] had presented the proffered evidence. See Morrison, 477 U.S. at 375."

Petitioner was only obligated to demonstrate by a preponderance the involuntariness of the statement. Petitioner has put forth twelve distinct pieces of evidence towards demonstrating that petitioner's injuries, documented the day of his arrest, were inflicted at the police station. Or the evidence at least makes such a finding possible. Based on the Third Circuit's interpretation of the evidence of the evidence and its awareness of the proper standard, see Appx. A, p.12, its denial is perplexing and diametric with this Court's precedence on these matters.

In Stein v. New York, 346 U.S. 156, 183(1952), this Court established that when establishing physical coercion "[s]light evidence, even interested testimony that violence occurred during the period of detention or at the hands of police...might well have tipped the scales of decision below."

In light of the holding in Stein, the "limited impact" or "bias" of petitioner's evidence/witnesses is of no consequence as all the evidence tends to point to the violence perpetrated against petitioner during the "period of detention." Plus, any bias is erased by the police witnesses testimony and documentation that mirrors the testimony of the "interested" witnesses. The Third Circuit relied on Brown's "detailed

[suppression hearing] testimony," but the only reason his testimony is credible is due to counsel's failure to challenge it.

Under the totality of the circumstances, it is clear that petitioner has established deficient performance and, if needed, merit.

2. Prejudice

The aforementioned arguments likewise would establish Strickland's prejudice prong which can be shown by demonstrating that counsel's deficient performance prejudiced the defense. This requires a showing of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, Strickland, 466 U.S. at 694.

Several reasons inform such an outcome: 1) the low preponderance standard; 2) the amount of evidence presented--some of it from law enforcement; 3) the new evidence has been duly credited as having some weight by four federal judges, and; 4) the district court's sua sponte granting of a Certificate of Appealability("COA").

> "A [COA] should 'issue only if the applicant has made a substantial showing of the denial of a constitutional right.' 28 U.S.C.§2253(c)(2). To satisfy this burden, the petitioner must show 'that a reasonable jurist would find the district court's assessment of the constitutional claims to be debatable or wrong." Slack v. McDaniel, 529 U.S. 473(2000).

Having convinced one judge of a "substantial showing of the denial of a constitutional right(and that his decision may be "wrong")," petitioner opines that there is a reasonable

probability that the new evidence would convince a judge(or jury) to suppress the coerced statement.[2]

The Sixth Amendment guarantees a defendant effective assistance of counsel at "critical stages of a criminal proceeding, Lafler v. Cooper, 566 U.S. 156, 165(2012), and that counsel can deprive a defendant of his effective assistance by failing to render "adequate legal assistance," Cuyler v. Sullivan, 466 U.S. 335, 344(1980). Challenges to counsel's representation requires that a defendant first show that counsel's performance was deficient and, then, that the deficient performance prejudiced the defense, Strickland, 466 U.S. at 687. Instantly, the district court "conclude[d]" that petitioner had proven step one of the Strickland protocol, Appx. B, p.43, while the Third Circuit believed that the district court "assumed" the

[2]Petitioner further opines that the district court may have ruled in petitioner's favor were it not for several errors in its factual analysis--errors used to diminish credibility in petitioner's witnesses and evidence. For instance: 1) the court concluded Wilson-Carter saw petitioner "through an interrogation room window," Appx. B at p.58, but that does not appear in her testimony nor affidavit and Brown testified that there are no windows in the interrogation room, TT 6/24/85, p.19; 2) the court concluded petitioner was removed from a certain job, Id. at 87, but petitioner's boss testified petitioner "finished the job..." TT 6/17/85, p.77; the court determined that petitioner had "declined treatment" after the interrogation, but what was actually "declined" was currently(then) being treated at a medical facility. TT 5/22/85, p.82, and; 4)the court determined that petitioner had been "convicted of a crime and served jail time [for it]," Id. at n.54. However, the incident the court was referring to was dismissed at the preliminary hearing stage.

first prong was proven, Appx. A, p.10, which it adopted, Id.644[3]

3. Fairness of the Proceeding

In determining the prejudice prong the Third Circuit erroneously applied Strickland's bedrock principles of adversarial testing and fairness, of which Strickland speaks often and forcefully as to the import of both.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," Strickland, 466 U.S. at 686. Also, "[A] fair trial is one in which evidence subject to adversarial testing is presented...," Id. at 685; Strickland's prejudice prong is proven by a showing of deprivation of a "fair trial" and both prongs proven demonstrate a "breakdown in the adversarial process..." Id. at 687; and "[C]ounsel's function...is to make the adversarial testing process work..." Id. at 690(All emphasis added).

While the guiding legal standard established in Strickland is required in that they establish a basic format for evaluating an ineffectiveness claim, Strickland makes clear that what is

[3]The district court "conclude[d]" that petitioner overcame the presumption that counsel's alleged errors were part of a sound strategy. Appx. B at 43. However, it claimed petitioner needed to prove that "trial counsel's performance fell below objective standards of attorney conduct." Under the circumstances, petitioner asserts this two-part analysis is an inappropriate addition to Strickland's performance prong and/or is so equivalent to the Strickland performance prong that the conclusion of one part similarly concluded the other.

"[m]ost important" is that the performance and prejudice prongs "do not establish mechanical rules," and "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether...the particular proceeding is unreliable because of a breakdown in the adversarial process..." Id. at 696, all emphasis added.

Clearly the Third Circuit's rote application of Strickland's prongs, a "basic format", without further consideration as to the fairness of the adversarial proceedings was an egregiously erroneous non-application of Strickland.

Petitioner posits that the circumstances of the instant case require no great and lengthy argument to conclude the suppression hearing was unfair--the facts speak for themselves: a suppression hearing where counsel presents no evidence in support of his claim of physical coercion, listened to the state's case and conceded the voluntariness of the proceeding without presenting a single piece of evidence, although ample supportive evidence existed, cannot be categorized as fair and/or an adversarial proceeding.

4. Cronic

Carrying the foregoing Strickland argument to its next logical point, petitioner asserts that based on all the favorable evidence presented at the evidentiary hearing--counsel's admissions that the new evidence would have been "helpful," his failure to investigate the case or impeach Brown in furtherance

of his defense strategy, despite possessing Brown's 75-49/52 report, and how he had no tactical/strategic reasons for doing/not doing so--the Third Ciircuit should have presumed prejudice and granted petitioner a new suppression hearing and new trial.[4]

This assertion is warranted under U.S. v. Cronic, 466 U.S. 648(1984), which allows for a "presum[ption] without inquiry into actual performance at trial," Id. at 661, if "counsel entirely fails to subject the prosecutions' case to meaningful adversarial testing," Id. at 659.

The Sixth Amendment does not merely provide for the appointment of counsel but "[a]ssistance" which is to be "for the defence," Id. at 654, and "[if] no actual '[a]ssistance' 'for' the accused's 'defence' is provided, Id., then the constitutional guarantee has been violated. In some cases, the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to 'have Assistance of Counsel' is denied," U.S. v. Decoster, 624 F.2d 196, 219(D.C. Cir. 1976).

"Meaning adversarial testing," taken to define the testing of the most salient, most damaging and incriminatory evidence against a defendant, combined with the Sixth Amendment mandate of "[a]ssistance] and "for the defence" leads ineluctably to a

4Because petitioner has two opportunities for suppression, one before a judge, the other before a jury, because the basis of counsel's trial strategy was to argue the involuntariness of the statement to jurors, infra at B, and all the reasons argued therein petitioner asserts the appropriate remedy for either claim would be the grant of a new trial.

conclusion that, in the instant matter, petitioner was constructively denied counsel. At the suppression hearing counsel's abandonment was complete. Without presenting any evidence he stood up and conceded the most damaging piece of evidence a defendant could face in a courtroom--a statement purporting to represent his admission in the crime; "A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him," Bruton v. U.S. 391 U.S. 123, 139-40(1968). Instantly, trial counsel "entirely fail[ed]" petitioner.

For all the above stated reasons, petitioner prays this Court will conclude the Third Circuit misapplied or under-applied Strickland, failed to apply Cronic and erroneously applied Kimmelman and grant petitioner a new suppression hearing and new trial.

Alternately, petitioner prays this Court find that:

1) under Strickland and/or Kimmelman, petitioner was denied effective counsel and a new suppression hearing and trial is warranted;
2) under Cronic petitioner was constructively denied counsel and a new suppression hearing and trial is warranted;
3) remand for reconsideration consistent with the arguments above.

Petitioner would finally request that if a remand is granted that this Court order that any conclusion resulting in a finding of ineffective assistance of counsel be considered cumulatively with the two Bruton errors found by the Pa. Supreme Court--a finding never upset by the district or circuit courts. See 607 A.2d 710 ,718("we agree"...petitioner, in the codefendant's statement was the "other guy," and Id. at 719("[a]gree[ing] a second Bruton violation occurred.)

B. Trial counsel was ineffective

Petitioner's trial counsel rendered ineffective representation in failing to investigate and present evidence in support of his defense strategy. After the pre-trial concession that escorted, untrammeled, the statement into the trial phase, counsel decided the best chance of success was convincing the jury that the statement was involuntary. Counsel's testimony is illustrative:

> Q And do you recall that the..[]..alleged confession that Mr. Wharton gave was in fact coerced by the police department?
>
> A. Yes.
>
> Q. And that it was -- that the injuries that Mr. Wharton sustained were not obtained in the manner in which the police testified that they have been obtained?
>
> A. Yes. I mean, I contended it was an involuntary statement. Appx. D, at 79-80.
>
> Q. Why did you make that argument in front of the jury after telling Judge Piano at the end of the suppression hearing that you believed there wasn't any evidence -- that the confession was voluntary?
>
> A. Well, because there really was no other defense. There was -- there was no physical evidence linking Mr. Wharton to the homicides,, there were no eyewitnesses called to testify. The link before the jury of Mr. Wharton to the homicides was that statement. And there for[sic] the only way that Mr. Wharton could fail to be convicted of these murders would be if the jury concluded that the statements had been coerced and they followed Judge Piano's jury instruction to the effect that if they found they should discard the statements. Id., D at 109.
>
> Q. Would you agree with me that impeaching the credibility of Detective Brown as the lead investigator and the person who took the alleged confession from Mr. Wharton would have been important to you?
>
> A. Well, it was -- it was <u>everything</u> when it came to trying to have the confession suppressed. Id., at

90(emphasis added).

Counsel's efforts at "[a]ssist[ing]" petitioner's "defence" were paltry at best. Petitioner's medical record(from the prison intake) was produced and although it did have a notation indicating two recent injuries, it lent nothing to the defense of impeaching Brown, i.e., determining if the injuries were the result of the circumstances surrounding petitioner's arrest or inflicted while in police custody.

Counsel put petitioner's sister, Beverly Young, on the witness stand to testify that Brown did not tackle petitioner, but having failed to conduct a pre-trial investigation he was unaware that she had witnessed anything. Thus, her testimony was deprived of its full effect because she had been present in the courtroom when Brown gave his version of events. Therefore, the court gave a cautionary instruction regarding her testimony. Whatever benefit that could have been drawn from her testimony was negated by counsel's unpreparedness. Counsel's one effort to advance petitioner's defense was counteracted by the efforts he did not.

These two efforts were the weakest and most feckless ones counsel could have chosen. He failed to investigate and discover or utilize evidence under his control to the extreme detriment of petitioner.

The evidence petitioner argues should have been presented at trial is the same that should have been presented at the suppression hearing: various police documents, witnesses and prior sworn inconsistent testimony. In denying relief on this claim the Third Circuit referenced most of this evidence. Again,

crediting some value to it but not enough to warrant relief, Appx. A at 13-16. Ultimately, concluding petitioner had not proven the Strickland prejudice prong, Id. at 16.

Largely, for the same reasons cited above, petitioner asserts the Third Circuit misapplied Strickland by failing to consider the fairness of the trial and adversarial testing of the state's case.

1. Prejudice

Prejudice requires a showing of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," Strickland 466 U.S. at 694. The Third Circuit concluded its analysis of the guilt phase ineffectiveness claim by referencing the evidence outside of the statement, Appx. A at p.15, as a contributing factor as to why there is not "reasobable probability that the outcome" of the trial would have been different. Petitioner disagrees.

In Pennsylvania, a prosecutor is obligated, in order to obtain a first degree murder conviction, to prove beyond a reasonable doubt that: 1) a human being was unlawfully killed, 2) the defendant perpetrated the killing, 3) the defendant acted with malice, and 4) a specific intent to kill, Com. v. Johnson, 160 A.3d 127(2016). Quite simply, none of the remaining evidence lends support for proving these elements as the following examination of the evidence will demonstrate.

The most salient evidence remaining, assuming, arguendo, that the coerced statement has been suppressed, in the state's bag came from Thomas Nixon(Nixon). Nixon testified that he had

asked petitioner if petitioner and [codefendant] had anything to do with the deaths of the decedents, and that petitioner responded "[I] didn't have anything to do with it," TT 6/25/85, p. 111. Inexplicably,, and incongruent with the alleged response, Nixon says, "If they were going to kill the mother and father, they should have killed the baby, also" Id. at 112. Nixon alleged petitioner responded, "We couldn't do it," Id.

Evidence at trial casts doubt on Nixon's credibility. It was brought to juror's attention that Nixon managed to get himself a very favorable deal where he was allowed to plead guilty as juvenile and be remanded to a juvenile facility of his choosing, Id. at 114-121. The plea allowed him to avoid a lengthy sentence on burglary and robbery charges, had he been certified as an adult, Id. at 118, which he did not want to do, Id.. at 157, and, in his mind, the deal protected him from any culpability in the murders, Id.

Nixon was confronted with inconsistencies in his statement, Id. at 60, that he had been treated by a psychiatrist, id. at 140, and also admitted that he was a "good liar," Id. at 165. Nixon's guilty pleas made his testimony fall under the court's corrupt source instruction, which directed jurors to view his testimony with "disfavor," and "caution," 7/01/85, p.21-22.

The deal alone was sufficient to undermine his credibility; if it can be assumed that a jury that has not heard about a witness's deal could conclude a witness is unworthy of belief, Napue v. Illinois, 360 U.S. 264(1959), then it can equally be assumed that when a jury has heard of a witness's deal the same conclusion can be drawn. When viewed in its entirety, it cannot

be said with any great confidence that Nixon's testimony was credited.

Robert Hart, the brother of the decedent, testified that petitioner allegedly told him, "He said [the decedent] wasn't paying [the boss], so that [the boss] couldn't pay us, and if [the decedent] didn't pay him he was going to get him," TT 6/18/85, p.77. Because there was testimony of the decedent and the boss owing(in excess of $2,000, Id. at 106) petitioner, it is unclear if this alleged threat, if believed, was aimed at the decedent or the boss. Additionally, Robert Hart's own father-in-law testified that Robert Hart and petitioner did not get along, 6/17/85, p.133, as did the boss, Id. at 108. There was also testimony that suggested Robert Hart was harboring anger towards petitioner due to a used car engine that got damaged and a lack of reimbursement. TT 6/18/85, p.90-94.6/18/85, p.90-94.

The state also presented the testimony of Sam Galetar, the previously mentioned father-in-law, who testified that petitioner said, [petitioner] would get money owed by "some means," 6/17/85, p.118, but when asked if his recollections of nearly two years were verbatim quotes, Galetar admitted that he "add[ed] some" "specific words," Id. at 125.

It could hardly be said that any of this testimony offered by these witnesses would have carried the day for the state. Indeed, the Third Circuit did not even mention Hart an Galetar in their evidence summary.

Petitioner believes that based on the dubious remaining evidence, had counsel presented the substantial evidence, cited supra at claim A, there is a reasonably probability the outcome

of the trial would have been different.

This argument and facts would also satisfy the Kimmelman "different verdict" prong.

2. Fairness

Petitioner hereby incorporates by reference the previous argument, supra at claim A, and further asserts that due to the lack of adversarial testing of the state's case, the trial was rendered unfair under Strickland. See also Engle v. Isaac, 456 U.S 107(1982)(referencing fundamental fairness as the central concern of the writ of habeas corpus), Id. at 126.

3. Cronic

The facts of this case also implicate a manifest constructive denial of counsel stewardship and petitioner hereby incorporates by reference, the reasoning of the U.S. v. Cronic argument, supra.

4. Kyles v. Whitley cumulative analysis

Only the briefest of references indicate that the Third Circuit indulged in any type of cumulative analysis: "We cannot conclude that, had [counsel] done all of the above there is a reasonable probability that the jury would have found Wharton's confession to be involuntary," Appx. A at 15. To the extent that they may have, petitioner argues their limited application, or

the lack thereof, was an erroneous application of established federal law.

Again, although the Third Circuit found the new evidence of some measurable impeachment value[5]--of the twelve things it analyzed only one(the handcuffs discrepancy) was deemed "not material, but it concluded that none of the evidence would have benefited petitioner at the trial and/or suppression hearing. Appx. A at 10-15.

Kyles v. Whitley, 514 U.S. 419(1995), has disapproved such cumulative assessment. First, Kyles' Court of Appeals stated they were "not persuaded of the reasonable probability that Kyles would have obtained a favorable verdict if the jury had been 'exposed to any or all of the undisclosed materials'(citation omitted). The circuit opinion also contains repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone," i.e., nondisclosure of a transcript was "insignificant," and the Court of Appeals was not sure if the notes were "material." This Court said, "The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required...," Kyles, Id., at 441, and went on to assess the evidence with an eye towards what jurors might conclude from the evidence. Two of these

[5]While petitioner believes the valuation of the testimony/documents enhances this argument, a reading of the relevant law does not appear to make a favorable appraisal necessary for success.

assessments("(b)" regarding the credibility of a detective, and "(c)," regarding evidence planting) mirror findings petitioner asserts a jury could have concluded had they heard the new evidence.

Using Kyles' guidance, petitioner will endeavor to demonstrate what jurors could have found had counsel presented evidence to them.

Had jurors heard the finely detailed report by Brown omitted any reference to him chasing and tackling petitioner, that Brown indicated petitioner was "uninjured" and that he had not found evidence in petitioner's home that he claimed he had, jurors could have concluded:

> 1. Brown never chased/tackled petitioner;
> 2. that petitioner was uninjured prior to the interrogation;
> 3. Brown was not being truthful about the source of the injuries;
> 4. Brown is a corrupt detective who planted evidence at petitioner's home;
> 5. that if Brown was willing to plant evidence and lie under oath, he was not going to read Miranda rights;
> 6. that if Brown was willing to lie under oath and plant evidence he surely was not above physical violence.

The Third Circuit deemed the handcuffs testimony "not material," but had the jurors heard the full scope of the testimony, much could have been drawn from it. Brown's testimony from the suppression hearing:

> Q. Where was he situated in the homicide division when you saw him?
>
> A. He was seated in a metal chair which is basically bolted to the floor and one of his arms or hands, I don't recall which hand, was handcuffed to the arm of the chair. TT 5/22/85, p.61.
>
> Q. Was Miss Wilson placed in the interrogation room in the

same manner Mr. Wharton was?

A. With the exception of not being handcuffed, Id. at 106.

Q. Cuffs were removed at what point?

A. I recall when I first saw him in the interview room he was handcuffed at that point to even being advised of his rights I unhandcuffed him. I knew he wasn't going anywhere. So he was unhandcuffed, Id. at 124.

Brown's trial testimony:
Q. Did you ever kick him while he was bolted to the chair in the interrogation room?

A. Counselor, the defendant was not bolted to the chair nor handcuffed... TT 6/25/85, p.89.

Q. He was handcuffed to that chair when he was placed inside that room, is that correct?

A. No, he was not.

Q. Are you relying on some report to tell the jury that he was not handcuffed to the chair when he was placed in there?

A. I'm relying on two things, counsel; one, the document which lists the events or actions concerning the defendant; also, my recollection that he was not handcuffed when I saw him. TT 6/24/85, p.120.

Q: And detective, what is it about the chronology on Mr. Wharton that tells you he was not handcuffed to the chair when he was placed in the interrogation room?

A. Because it's not noted there. As I said, the second reason is my recollection that when I saw him, he wasn't handcuffed.

Redirect:
Q. Now, at that point in time you went in the room to observe Mr. Wharton, was he handcuffed to the chair?

A. No he was not. TT 6/25/85, p.92

Had jurors heard about Brown's pre-trial testimony they could have concluded that:

1. Brown was being less than truthful about the handcuffs;
2. that if he was not being truthful about something they could probably understand(i.e., a handcuffed homicide suspect), what else was he being untruthful about;
3. that Brown's ability to accurately "recollect[]" facts was suspect.
4. that Brown was sanitizing the record of anything jurors could consider coercive.

Also, counsel could have argued that Brown perjured himself as under Pa. Statutes, Title 18, §4902, perjury is defined as "A person...if "in any official proceeding he makes a false statement under oath or equivalent affirmation or swears or affirms the truth of a statement previously made when thes statement is material and he does not believe it to be true."

Had jurors heard the conflicting testimony of Brown's colleagues, detectives Ansel and Alexander, they could have concluded that:

1. the reason they altered their testimony to reflect different positioning at petitioner' home was because they could/would not confirm that Brown had chased petitioner;
2. that these two police witnesses had no problem lying under oath and could not be trusted;
3. their fabrications combined with Brown's established them as perjurors and removes some of the lustre and public trust associated with law enforcement.

Margaret Wharton's, Young's, Wilson-Carter's, Police Officer Duffy's testimonies and the police reports would have added favorably to the attack on Brown's credibility demonstrating Brown is unworthy of belief and that:

1. petitioner was not injured at home;
2. petitioner was observed at the police station injured, and;
3. no police officer saw petitioner injured prior to the interrogation.

For all the above stated reasons, petitioner prays this Court will conclude the Third Circuit:

1) misapplied or under-applied Strickland, find counsel ineffective and grant petitioner a new trial;

2) failed to apply Cronic, that a constructive denial of counsel occurred and that petitioner is deserving of a new trial;

3) erroneously applied Kyles, that the remaining evidence does not nullify counsel's actions and that a new trial is warranted.

Alternately, petitioner requests this Court remand this case to the Third Circuit for considerations consistent with the arguments contained herein. Also, that if error is found, it be considered in conjunction with the two Bruton errors previously mentioned above.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert Wharton

Date: Aug 19, 2019