

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

* * * * *

DARNELL GRIMSLEY
PETITIONER,

v.

TOM MCGINLEY
RESPONDENT.

* * * * *

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

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PETITION FOR WRIT OF CERTIORARI

* * * * *

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QUESTION PRESENTED

Mr. Grimsley alleges that his trial counsel was ineffective for failing to have a face to face visit prior to his second trial, after receiving crucial information from the District Attorney's office, Also Mr. Grimsley alleges Prosecution Misconduct were the prosecutor failed to inform the jury, Judge and the accused about an arrest and violation of probation of their star witness prior to his trial testimony. A Sequestration order being violated and Mr. Grimsley also challenges the true nature of sufficiency of evidence. And whether Mr. Grimsley claim of ineffectiveness have legal merit. Mr. Grimsley was convicted, in large part, upon a recording the prosecutor played for the jury during trial implying that Mr. Grimsley had something to do with a witness not appearing at trial, misleading the jury by not informing them about the true nature of the arrest of a testify star witness, family members of the deceased who were never apart or involved with the case being allowed to become witnesses for the state. The case thus presents the following question:

Did the Third Circuit err in deferring to the district court's opinion that this issue was procedurally defaulted and finding that Mr. Grimsley was not prejudiced by his counsel's failure to visit after receiving information which led to his conviction in the second trial?

Did the Third Circuit err in deferring to the district court's opinion that the petitioner's prosecution misconduct claim is procedurally defaulted?

Did the Third Circuit err in deferring to the district court's opinion that Mr. Grimsley suffered no prejudice by family members of the deceased becoming witnesses for the state at both trials after violating the judges sequester order?

Did the Third Circuit err in deferring to the district court's opinion that the sufficiency of evidence should be dismissed without any relief when the evince was based on the flagrant misreading of the trial evidence?

TABLE OF CONTENTS

Question presented	i
Table of contents	iii
Table of authorities	iv
Opinion below	1
Jurisdiction	1
Statutory and constitutional provision involved	2
Statement of the case	7
Reason for Granting the Writ	
I.The Third Circuit improperly deferred to the district court's decision	10
II.The Third Circuit improperly deferred to the district court's decision	12
III.The Third Circuit improperly deferred to the district court's decision	15
IV.The Third Circuit improperly deferred to the district court's decision	19
Conclusion	23
Appendix	
Decision of the Third Circuit Court of Appeals	24
Order denying Certificate of appealability	25
Report and Recommendation	27
Order denying Rehearing	71
Exhibit	
Exhibit A	73
Exhibit B	76
Exhibit C	79
Exhibit D	82
Exhibit E	83
Exhibit F	84
Exhibit G	85
Exhibit H	86
Exhibit I	88
Exhibit J	89
Exhibit K	90
Exhibit L	91
Proof of Service	92

TABLE OF AUTHORITIES

Cases

Boyd v. Walmart, 579 F.3d 330, 367 (3d cir. 2009)	12
Brady v. Maryland, 373 U.S. 83, 87 (1983)	13
Com v. Grimsley, No. 905 EDA (2009)	9
Davis v. Alaska, 415 U.S. 308 (1974)	12
Jackson v. Virginia, 443 U.S. 307 (1979)	15
Kyles v. Whitley, 514 U.S. 419, 437 (1995)	13
Lambert v. Blackwell, 387 F.3d 210, 233-34 (3d cir. 2004)	12
Sieh v. Crace, 561 F.3d 189, 199 (3d cir. 2009)	10
Strickland v. Washington, 466 U.S. 668, (1984)	11, 22
United states v. Agurs, 427 U.S. 97, 106 (1976)	13
United States v. Bagley, 473 U.S. 667, 676 (1985)	13
United States v. Cropp, 127 F.3d 354 (4th cir. 1997)	22
United States v. Warren, 578 F.2d 1058 (5th cir. 1978)	22

Statutes

28 U.S.C. § 1254	1
28 U.S.C. § 2254	3
U.S. CONST., AMEND. VI	2
U.S. CONST., AMEND. XIV	2

PETITION FOR WRIT OF CERTIORARI TO
THE PENNSYLVANIA SUPREME COURT

The Petitioner, Darnell Grimsley, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Third Circuit courts of appeals, rendered in these proceedings on July 6, 2018.

OPINION BELOW

The Third Circuit Court of Appeals Affirmed petitioner's conviction in its cause no. 17-3809. The opinion is unpublished.

The Order of the Third Circuit Court of Appeals denying rehearing on 7/6/18, and a copy of the order denying rehearing appears at appendix D.

JURISDICTION

The original opinion of the Third Circuit court of appeals was entered June 5, 2018. A timely motion to that court for rehearing was overruled on July 6, 2018.

The Jurisdiction of this court is invoked under 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the states 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 in his favor, and to have the assistance of counsel for his defense.

U.S. CONST., AMEND. XIV

Section 1. all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without Due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit Judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution or laws or treaties of the UNITED STATES.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that...

(A) the applicant has exhausted the remedies available in the courts of the state; or

(B)(i) there is an absence of available state corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state.

(3) A state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the state, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of the section, if he has the right under the law of the state to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in the state court proceedings unless the adjudication of the claim

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination of a factual issue made by a state court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in state court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

(A) the claim relies on-

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such state court proceeding to support the state court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the state shall produce such part of the record and the Federal court shall direct the state to do so by order directed to an appropriate state official. If the state cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the state court's factual determination.

(g) A copy of the official records of the state court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the state court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the controlled substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under the section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or state collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

Mr. Grimsley was convicted of the murder of Devin Dunbar. On April 8, 2006, Devin Dunbar was killed, that evening two witnesses (Paula Bluster and William Cooper), who were on the scene were taken down to the police station to give their statements, which were Identical. (Clothing being worn by the perpetrator). On April 27, 2006, nineteen days later, Quincy Bass under a false name gave a statement accusing Mr. Grimsley with a different version of the murder. On May 5, 2006, Mr. Grimsley was arrested. During questioning Mr. Grimsley was unable to provide any information about the homicide, so he was charged with the homicide of Devin Dunbar. From April 8, 2006 to May 5, 2006, Petitioner Grimsley was never brought in for questioning. Mr. Grimsley received the discovery of the proceedings on 12/10/2006. Preliminary hearing proceedings were suppose to be held on 5/17/2006, and had to be continued due to Quincy Bass failure to appear, on 7/11/2006, the preliminary hearing was continued again due to the same results failure to show. On June 19, 2006, Quincy Bass was arrested for possession of controlled substance and violating his parole/probation. On 8/30/2006, the preliminary hearing was finally held, during the preliminary hearing Mr. Grimsley discovered that the alleged witness Quincy Bass used a false name when he gave his statement to the authorities and signed the statement under a false name. Quincy Bass true and real name is Eric Barnes. Also during the preliminary hearing the actual two eyewitnesses who were present during the homicide and who testified that Mr. Grimsley was not the perpetrator during both trials were excluded from the preliminary hearing proceedings. Only the alleged witness who after nineteen (19) days after the homicide gave false statement under a false name and signed the statement under a false name Eric Barnes/Quincy Bass was included in the preliminary process. During the preliminary hearing Mr. Barnes claimed that he did not actually see who the person was that did the shooting because their backs were turned away from him with their hood up (P/T, 08/30/06, p.7 2-5). At the end of the proceedings the court for some reason held petitioner for trial.

During the first trial Micheal Barry, represented the commonwealth and after various misconducts by Mr. Barry and witnesses testifying that Mr. Grimsley was not the perpetrator on the day in question and commonwealth's star witness Quincy Bass/Eric Barnes testified that he was unable to see who the shooter was due to the fact that the shooter was 20 feet away and facing him with their hood being up, and not knowing the time of the homicide, the Judge declared a mistrial.

During the second trial for the same criminal matter, Brian Zarallo was selected to represent the commonwealth the second time around. Introducing new evidence that was not included in the first trial which violated petitioner's right to a fair trial. Actual eyewitnesses testified to the same exact thing as the first trial. Commonwealth's witness Mr. Barnes testified to the same thing almost cause in the second trial the murder happened at 5:00pm instead of late morning/early afternoon as he claimed in the first trial (N/T, 10/10/08, p. 75-95). After convincing the jury that the petitioner had something to do with a witness not showing up for trial, by playing a recording of the petitioner having a conversation with a friend about a female, prosecutor Zarallo used the recording to inflame the minds of the jury by having them believe that the petitioner was guilty of doing something wrong.

In all of the many opinions issued by the Pennsylvania Courts addressing this case over the years, none pointed out that without the testimony of Eric Barnes there was no evidence of Mr. Grimsley's guilt, or that actual eyewitnesses at the scene stated unequivocally that the petitioner was not the perpetrator. Even on the stand Paula Bluster, who observed both perpetrator and victim walking up Chestnut street in her direction, while she was sitting in her van smoking a cigarette testified that the perpetrator had a hood over his head and was an inch taller than the victim and that there was not a single person out on the corner during the time she witnessed the perpetrator and victim turn on to Redfield street off of Chestnut before hearing the shot. Two of the points pointed should be highly considered,

since the record would show that the petitioner is 5'10", the victim in this matter is 5'11" and according to the medical reports the victim was wearing new timberlands boots which would add 2 to 3 inches to the victims already tall frame. And second commonwealth's star witness testified that he was on the corner of Redfield and Chestnut and witnessed the murder, not according to an actual eyewitness who sat in her van directly in front of that corner and testified to seeing different (N/T, 08/07/08, P. 277). No murder weapon was ever found and no investigation was ever launched to search the residence of the petitioner, nor was the petitioner ever brought in for questioning. Trial counsel Micheal Wallace, against petitioner's wishes due to petitioner requesting the attorney to be removed from the case, (EXHIBIT.C) filed a timely post-sentence motion, which was denied on February 27, 2009, crim. Docket at 12. On March 20, 2009, Appellant counsel Lee Mandell, filed a notice of appeal to the Superior court raising claims of Sufficiency of evidence and weight of evidence and nothing else, the Superior court affirmed the conviction on November 4, 2010. crim. Docket 12, 14; Com v. Grimsley, No. 905 EDA 2009, slip op. at 1 (Pa. Super. Nov. 4, 2010). Appellant counsel sought allowance of appeal in the Pennsylvania Supreme court, which was denied on May 25, 2011. crim. Docket 14-15.

On April 30, 2012, petitioner Grimsley filed a pro se petition for relief under Pennsylvania Post-Conviction relief act, 42 Pa. cons. stat. §§ 9541. et seq. ("PCRA"). crim. Docket at 15; (Mot. for Post conviction collateral relief SCR N.O. D16). The PCRA court dismissed petitioner's petition on March 21, 2014. crim. Docket at 16; (order, SCR NO. D12). Petitioner filed a pro se notice of appeal to the Superior court and the Superior court affirmed the PCRA court's decision on September 15, 2014. Petitioner Grimsley sought allowance of appeal in the Supreme court, and was denied on Febraury 8, 2016. On March 1, 2016, Petitioner filed a pro se petition for Writ of Habeas Corpus, which was denied on November 28, 2017. Petitioner filed a petition to the Third Circuit, which was denied on April 5, 2018. Petitioner filed a petition for rehearing, which was denied on july 6, 2018.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S DISMISSING THIS INEFFECTIVE ASSISTANCE ISSUE AS PROCEDURALLY DEFAULTED WARRANTS THIS COURT'S ATTENTION

This issue was raised for the first time in the PCRA courts. The lower courts and the District court analysis of the facts and the prejudice that resulted is debatable among jurists of reason. It therefore will be helpful to examine the full trial evidence a bit more closely this finally time around. Petitioner had two trials on the same criminal matter. Having been visited by defense counsel for ten (10) minutes prior to the first trial should have nobearing on the second trial. Since the first trial ended in a mistrial on 10-16-2007. Trial counsel for Mr. Grimsley provided ineffective assistance by failing to have a face to face visit with the petitioner for preparation for the second trial, after receiving critical information from the District Attorney's Office on 7-15-2008, (See EXHIBIT A). On 10-16-07, Mr. Grimsley first trial ended in a mistrial as mentioned earlier. From 10-16-07 to 8-6-08, 292 days, petitioner sat in the county jail awaiting to be re-tried. Defense Attorney received the information from the prosecutor on 7-15-08, twenty-two (22) days before Mr. Grimsley second trial was to began, which commenced on 8-6-08. Defense Counsel made no attempts whatsoever to contact Mr. Grimsley through a visit or mail or by any means pertaining to this information to see if there was any validity to the information regarding the nature of the phone conversation Mr. Grimsley had with a friend about a female, that had nothing whatsoever to do with the trial proceedings. Defense Counsel made no attempts to even contact the alleged witness to see if she was indeed threatened by Mr. Grimsley or anyone associated with Mr. Grimsley. This recorded conversation was played during trial and at closing arguments. Counsel is ineffective if their strategic choices are made without full investigation. Siehl v. Crace, 561 F.3d 189, 199 (3d cir. 2009). Here Mr. Grimsley counsel appears

to have had indolence as his guiding strategy. No investigation of any kind took place, no communication or visit by defense counsel occurred. Here Petitioner's Sixth Amendment rights were violated due to trial counsel's lack of professionalism, trial counsel representation fell below an objective standard of reasonableness and that deficient performance prejudiced the petitioner's defense. As in *Strickland v. Washington*, 466 U.S. 668, (1984), this court held that in representing a criminal defendant, counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest, a duty to advocate the defendant (s) cause, a duty to consult with the defendant on important decisions, a duty to keep defendant informed of important development's in the course of the prosecution, and a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. In petitioner's case trial counsel failed his duties to advocate petitioner's cause as well as consult with the petitioner as to inform Mr. Grimsley of important developments in the course of the prosecution. Petitioner asserts that had trial counsel reviewed the alleged new evidence with the petitioner the defense strategy would have been different, which would have potentially changed the outcome of trial.

Certiorari should be granted to correct this error.

The legal question here is whether the petitioner's **Sixth Amendment** rights were violated due to **INEFFECTIVENESS OF TRIAL COUNSEL**.

**II. THE THIRD CIRCUIT DISMISSING THIS
PROSECUTION MISCONDUCT ISSUE AS
PROCEDURALLY DEFAULTED WARRANTS
THIS COURTS ATTENTION**

In Pennsylvania, one complete round includes presenting the Federal claim through the Superior court on direct or collateral review. See *Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d cir. 2004). The habeas petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Walmart*, 579 F.3d 330, 367 (3d cir. 2009). The petitioner's claim of prosecutorial misconduct, ineffective assistance of trial counsel, family members becoming witnesses for the state and sufficiency of evidence, were squarely raised and litigated in the state courts, including in the Pennsylvania Supreme Court.

The record is very clear that Quincy Bass/Eric Barnes was the commonwealth's indispensable witness in petitioner's murder trial, without Mr. Bass/Barnes, there was no basis for even charging Mr. Grimsley with the crime. Mr. Barnes significant criminal record never came to the jury's attention, nor did the fact that Mr. Barnes was arrested for possession of controlled substance and violating probation prior to his trial testimony at both trials. Defense counsel could have readily impugned the character of Mr. Barnes and impeached him with the benefits a probation violator, could secure if he assisted the commonwealth, by testifying untruthfully if necessary. But this would only have been possible if counsel and the court had known of Mr. Barnes arrest right before trial, and his violation of probation status at the time of his trial testimony;

(See Barnes Docket, EXHIBIT. B). The prosecution failed to disclose the true nature of arrest and the violation situation to the court or defense counsel, and may in fact have deliberately concealed it. It is quite irrelevant that Mr. Barnes prior convictions may not have been admissible under Pennsylvania court rules, as not being crimes of false statement or "crimen falsi," because the confrontation clause of the Sixth Amendment and *Davis v. Alaska*, 415 U.S. 308 (1974) and its progeny control and mandate their admission (where the court held that the

confrontation clause overcame an Alaska procedural rule). In any event, it is certainly arguable that the arrest for controlled substance prior to Mr. Barnes testimony was admissible regardless, and there is no question that Mr. Barnes probation status was.

A review of Brady Jurisprudence is call for, in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme court held that "the suppression of evidence favorable to the accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Then in *United States v. Agurs*, 427 U.S. 97, 106 (1976), the court held that the disclosure obligations of the prosecution under Brady extend even to situations where there has been no specific request for such information by defense counsel. In *United States v. Bagley*, 473 U.S. 667, 676 (1985), the court held that impeachment by the prosecution as well as exculpatory evidence, as this is evidence favorable to the accused under Brady. Court extended the requirements of Brady in *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), to hold that "a prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police."

Mr. Barnes arrest and his probation violation status went directly to his credibility. His own admission and lying to the authorities about his identity indicate that he was a person who held obedience to the law, and personal honor, in low regard, and doubtlessly was just as inclined to distort or misstate the truth as to obey his oath as a witness. As to his probation situation, his own testimony showed that he liked to spend his days drinking and smoking reefer, (N/T, 08-07-08, p.209), behavior clearly frowned upon and forbidden by probation rules. His understandable desire to please his probation authorities and avoid a revocation and return to prison for a longer stay would have inclined him to do anything possible to please the police and the prosecution, even if it involved distorting the truth in his testimony at Mr. Grimsley trial. Since Both his

full criminal record and the fact that he was arrested and charged with a crime prior to his trial testimony, not to mention violating his probation these important facts were hidden by the prosecution from the defense, the court and the Jury, this fertile and critically important area of impeachment was foreclosed. This case is remarkable for the fact that not only did none of the actual eyewitnesses to the shooting not identify Mr. Grimsley as the shooter, but coomonwealth's star witness only identified Mr. Grimsley by an alleged description of clothing being worn. The likelihood of Mr. Grimsley's actual innocence is very high; only the testimony of Barnes/Bass, who was never at the actual scene, a fact made known by an actual eyewitness that was sitting directly in-front of the corner Mr. Barnes alleges he was on with four to five other people, stated that the corner was empty. Not a single person was on the corner where the eyewitness **Paula Bluster** witnessed the victim and perpetrator turn that very same corner seconds before hearing the shot. (N/T, 08-07-08, p.277). Mr. Barnes story contradicts that of the other actual eyewitnesses who were present the night of the murder and who gave statements the same night of the murder to detectives. Not waiting twenty days after the fact. Any impeachment of Mr. Barnes/Bass by the defense was therefore of critical importance.

The rejection of the Brady issue as to Mr. Grimsley over the years of post-conviction litigation in the Pennsylvania courts was clearly an unreasonable application of established Supreme court precedent.

Certiorari should be granted to correct this error.

The legal question here is whether the petitioner's XIV Amendment of the Constitution of Due Process were violated due to prosecution misconduct.

**III. THE THIRD CIRCUIT ERRED BY
DISMISSING SUFFICIENCY OF EVIDENCE
ISSUE WARRANTS THIS COURTS ATTENTION**

This issue was previously litigated in the lower courts, however due to appellant counsel's ineffectiveness for failing to properly present this issue, petitioner is properly raising this issue. The lower courts and the District court analysis of the facts and the prejudice that resulted is debatable among jurists of reason. Commonwealth's case against the petitioner was weak and inconclusive. The prosecutor deliberately misstated material facts to deceive the courts and the Pennsylvania courts failing to conduct its own independent review, relied upon the prosecutor misrepresentation of facts to deny petitioner relief. Every opinion the courts issued, based their decision by the misrepresentation of the prosecutor. The ruling was contrary to, and is an unreasonable application of, clearly established federal law. The federal constitutional standard for evaluating a due process claim based upon the sufficiency of the evidence is found in *Jackson v. Virginia*, 443 U.S. 307 (1979), under Jackson, a court must assess the evidence in the light most favorable to the prosecution, and decide if the fact-finder's determination of guilt was so unreasonable that no rational trier of fact could have found the elements of the crime beyond a reasonable doubt, *Jackson*, 443 U.S. at 318-319. Here the elements of the crime in noway should have resulted in a conviction. It should be noted that this case involved no fingerprints, no shell casings, no murder weapon, no actual physical evidence were ever presented at trial. Commonwealth would have the courts believe that the evidence against the petitioner was clearly sufficient to establish his identity as the perpetrator and to establish his guilt beyond a reasonable doubt. Which is clearly a misrepresentation of material facts. The only inculpatory testimony offered by the commonwealth was that of Ouincy Bass who lied to the authorities about his true identity, Mr. Barnes true name is Eric Barnes, (see Exhibit D).

Mr. Barnes testified that he observed two men standing on the side of a wall, and upon further observation he witnessed one of the individuals pass something small to the petitioner believed to be a gun, (see Exhibit E), yet during cross-examination Mr. Barnes testified that he did not see the petitioner receive what was believed to be a gun, (see Exhibit F). Furthermore, Mr. Barnes testified that the murder happened ("late morning, early afternoon"), (see Exhibit E). The murder in said case occurred on or about 6:48pm in the evening, not late morning, early afternoon. During cross-examination in the second trial proceedings, Mr. Barnes provided a coached statement, when asked again about the time of the murder to which he testified that the murder happened ("sometime after 5:00pm"), (see Exhibit G). Also when asked ("were you able to see the face of the person at the moment they did the shooting, Mr. Barnes testified ("No"), (see Exhibit D). Commonwealth would have the courts believe that all commonwealth witnesses created a chain in which the logical inference can be made that the petitioner was the perpetrator, misstating material facts. There were three witnesses, two of the witnesses were actual eyewitnesses, who were present on the scene during the homicide and provided statements to the detectives in regards to what they witnessed using their true identity at the homicide unit. The two witnesses are Paula Bluster and William Cooper, Both witnesses gave the same exact description of the perpetrator, which was a **black hoodie, dark jeans, About 25 years of age, the hood was up, and Paula Bluster added that the perpetrator was an inch taller than the victim.** (see Exhibit H). Mr. Barnes description was totally different from that of the two actual eyewitnesses who were on the scene, his description of the alleged perpetrator was (**Gray hoodie, Black gloves with nike on them, blue and white nike sneakers, a navy blue dickie pants**), a total head scratcher, makes a person question whether if this is the same case or not (see Exhibit E). Furthermore, the corner that Mr. Barnes claimed to witnessed this murder from, was disputed by

an actual eyewitness Paula Bluster, who was sitting in her mini van on chestnut street, when she observed two males walking in her direction before they turned onto Redfield Street, seconds later she heard a single gun shot. Paula Bluster testified that when both the victim and perpetrator turned onto Redfield street there was no individuals on the corner during the homicide or when she exited her van a minute later to see what had happened, she did testified that a man who lived on chestnut street got somethings out of his car and disappeared into his house. (see Exhibit I). William Cooper testified that the petitioner was not the shooter and that he knew the petitioner for years, and that after he gave his initial statement to the detectives down at the homicide unit, he was arrested five times, being beaten and intimidated to give a false second statement. Being held as a suspect for hours on end by law enforcement forcing him to lie, Saying ("you know who did it, you know who did it") beating on for 12 hours. (see Exhibit J). Mr. Cooper was asked during direct ("Did you recognize that person that ran by you with the hoodie") And Mr. Cooper testified ("No, I didn't, I told them that, but they telling me what I seen"). (see Exhibit K). Two of the actual eyewitnesses did not identify the petitioner as the perpetrator, they only described what they witnessed on the night of the homicide.

Commonwealth star witness Quincy Bass/Eric Barnes did not positively and unequivocally identify the petitioner as the perpetrator, In fact Mr. Barnes story had many flaws which render his veracity questionable. He testified that he was on the corner and witnessed the murder, yet it was contradicted by an actual eyewitness who testified that there was no one on the corner during the time of murder. Minutes after the murder with sirens blaring in the air, he witnessed the petitioner the next block over rolling a blunt behind a white van with a smile on his face, is a highly unlikely scenario: Mr. Barnes time frame of the crime is fictional, Later morning, early afternoon, instead of 6:48pm when the crime actually occurred, maybe in another country.. Compared to the testimony of actual eyewitnesses,

Mr. Barnes story was peculiar, and required quite a leap of faith to accept, impeachment with his record, having been arrested and charged with a crime, not to mention violating his probation, should and would have very likely have caused Mr. Barnes credibility to crumble, yet due to prosecution misconduct and poor representation from all court appointed counsel petitioner suffered a miscarriage of Justice.

Certiorari should be granted to correct this error.

The legal question here is whether the petitioner suffered a miscarriage of Justice due to misrepresentation of material facts and the deliberate misstatement of evidence by the prosecution.

**IV. THE THIRD CIRCUIT ERRED BY
DISMISSING THIS SEQUESTER ORDER
VIOLATION AS PROCEDURALLY DEFAULTED
WARRANTS THIS COURTS ATTENTION**

Petitioner alleges that his Constitutional right of due process to a fair and meaningful trial, have been violated. Commonwealth would have the courts believe that the petitioner failed to provide a meaningful argument, and that petitioner did not suffer any prejudice as a result of the Constitutional violation, which is a misstatement of material facts.

This violation of petitioner's constitutional rights occurred during the first trial and carried over into petitioner's second trial, were the same damaging results prejudice the petitioner.

Commonwealth intentionally misstated material facts pertaining to petitioner arguments of this claim, when the petitioner filed a pro se PCRA petition on April 30, 2012, alleging a violation of a sequester order for allowing family members of the deceased to become witnesses for the state, after a sequester order was placed in effect. Said family members of the deceased were in attendance during the first day of trial and heard the testimony of all of the actual witnesses, then the following day gave statements to the authorities. And on the second day of trial the Judge allowed these family members of the deceased to become witnesses for the state and allowed them to take the stand.

Said family members who's names are Andre Dunbar and Akeya Spearman, were never apart of petitioner's discovery process nor were they included in the discovery package. Furthermore, for eighteen (18) months these family members made no reports to law enforcement or any legal agency for that matter involving the case.

As stated earlier, petitioner presented this claim in his PCRA petition, issue number seven (7) starting on line five: Where it states the following:

Said family members of the deceased
were never apart of the discovery, or trial,

yet they were in attendance and heard statements from all witnesses being questioned during trial. Furthermore, prosecution made family members of the deceased witnesses of the commonwealth the day after trial, without proper establishment for the admissibility of their testimony. Therefore said family members became prejudicial induced, and polluted prosecutorial witnesses which undermine the proper functioning of the criminal justice system. Where said improper solicitation violates the canon of judicial ethics, and is in a direct violation of the defendants right to a full and meaningful opportunity to cross-examine as warranted under the confrontation clause.

The Pennsylvania courts relied on deceptive measures as to deny petitioner relief on this claim. Petitioner's claim failed due to PCRA counsel's misrepresentation and altering petitioner's claim to undermine the servarity of the claim which is fraud. PCRA counsel claimed this issue lacked merit and cited case law to support his fraudulent findings. In his Finley Letter.

In reviewing petitioner's claim, PCRA counsel concluded that: The Petitioner raises the issue decedent's family members were in the courtroom during the trial.

PCRA counsel responds

The petitioner raised the issue in his PCRA petition that the presence of the decedent's family members in the courtroom had a chilling effect on his trial. The courtroom is a public forum, and anyone is welcome to attend as long as there is room. The decedent's family had a legitimate interest in seeing justice served from their point of view. The decedent's family did not disrupt the court or cause any prejudice to the defendant. The defendant had a right for his family and supporters to be present in the courtroom to support him. Anyone else in the public was allowed to attend the court

proceedings. The presence of supporters from the side of either the prosecution or the defense has no bearing on whether or not a defendant will be found guilty. Guilt or innocence is determined by the jury based on the evidence that comes forth from the witness stand. Therefore, this issue has no legal merit.

Case Law on Public Trials

"There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously and generally give the public an opportunity to observe the judicial system." Commonwealth v. Hayes, 489 Pa. 419, 425-426, 414 A.2d 318, 1980 Pa. LEXIS 577, 6 Media L. Rep. 1273 (Pa. 1980)

PCRA counsel intentionally and deliberately sabotaged petitioner's claim. PCRA court agreed with PCRA counsel, stating that PCRA counsel meant the Finley letter requirements, when PCRA counsel did not address the claim petitioner raised nor did he show why this claim lacked merit.

Trial Judge even admitted that her order was violated. (See Exhibit. L). Trial Judge after admitting that her order was violated, still allowed the violation to go un-corrected. Trial counsel was ineffective for failing to object to the use of these witnesses. These witnesses testified in petitioner's second trial and as a result petitioner suffered the same miscarriage of justice by these family members who played no part of the trial proceedings, yet were allowed to be included as if they were apart of the proceedings all along. For a family member who is still mourning the loss of a love one, will do anything to see the individual who they believe to be guilty, to be found guilty at any cost. Petitioner's trial was emotionally compromised, the testimony of these family members were prejudicial and harmful to the proceedings at petitioner's first and second trial proceeding. Petitioner suffered a miscarriage of justice by allowing these family members to become witnesses for the state, after violating a sequester order and after hearing testimony from all witnesses who were actual witnesses and were included in petitioner's discovery process, to testify

against the petitioner. The Supreme court has identified three remedies that are appropriate when a sequestration order has been violated. 1). Sanctioning the witness; 2). Instructing the jury that it may consider the violation with regard to the issues of credibility; or 3). Excluding the witness testimony, } See United States v. Cropp, 127 F.3d 354 (4th cir. 1997) also see, United States v. Warren, 578 F.2d 1058 (5th cir. 1978). Where it states that; 1). It prevents witnesses from tailoring testimony to that of other witnesses; and 2). It aids in detecting false testimony.

Petitioner asserts that due to commonwealth misstating material facts, and all court appointed counsel's misrepresentation, petitioner's sixth amendment rights were violated. Trial counsel performance "fell below an objective standard of reasonableness and counsel deficient performance prejudiced the petitioner, resulting in an unreliable or fundamentally unfair outcome in the trial proceedings. Strickland v. Washington, 466 U.S. 668, (1984).

Certiorari should be granted to correct this error.

The legal question is whether any witnesses should be allowed to testify after hearing testimony from other witnesses while a sequester order was in effect, then be allowed to give a statement to the authorities the following day to testify.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Third Circuit Court of Appeals.

Respectfully Submitted,



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