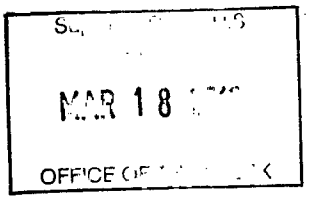
18-8570 ORIGINAL

No. 16-3095



IN THE

SUPREME COURT OF THE UNITED STATES

DAMIEN PRESTON — PETITIONER
(Your Name)

vs.

ATT. GENERAL OF PENNSYLVANIA
SUPERINTENDENT OF SCI PHOENIX
DISTRICT ATT. OF PHILADELPHIA RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

(ON PETITION FOR UNIT OF CERTIORARI TO THE THIRD CIRCUIT OF APPEALS)
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DAMIEN PRESTON
(Your Name)

P.O. BOX 244
(Address)

COLLEGEVILLE, PENNSYLVANIA 19426
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. THE QUESTIONS PRESENTED WAS CREATED AS A RESULT OF THE THIRD CIRCUIT COURT OF APPEALS THREE JUDGE PANEL, MADE A PRECEDENTIAL DECISION, THAT THE PETITIONER'S SIXTH AMENDMENT CONFRONTATION RIGHTS WERE VIOLATED, BUT HE FAILED TO ESTABLISH PREJUDICE UNDER STRICKLAND V. WASHINGTON; AND PETITIONER FAILED TO SHOW A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT.

2. WHETHER THE THIRD CIRCUIT'S PRECEDENTIAL DECISION CREATED A CONFLICT AMONG ITS CONFLICTING DECISION IN BEY V. SUPERINTENDENT GREENE, SCI 856 F3d 230; 244 (3RD 2017), HOLDING A COMPLETE DIFFERENT STANDARD FOR STRICKLAND PREJUDICE, BY HOLDING "THE PREJUDICE STANDARD" IS NOT A STRINGENT ONE "AND IS" LESS DEMANDING THAT THE PREPONDERANCE STANDARD.

3. THE THIRD CIRCUIT'S DECISION ALONG WITH THE NINTH CIRCUIT DECISION IN DETRICH V. RYAN, 740 F.3d 1237, 1246 (9TH CIRCUIT 2013) CREATES A CONFUSED GUIDELINE FOR LITIGANTS WHO STRUGGLED WITH THE CONNECTION OF PREJUDICE IN THE REVIEW OF THE SUBSTANTIVE CONSTITUTIONAL CLAIM, UNDER THE SECOND PRONG UNDER STRICKLAND, AND DOES THE TWO DIFFERENT ANALYSIS CALL FOR THE REVIEW TO SEPARATE THE HARMLESS ERROR DOCTRINE FROM THE SECOND PRONG PREJUDICE ASSESSMENT, FROM THE ADDITIONAL, SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT. THE THIRD CIRCUIT'S PRECEDENTIAL DECISION IS A UNREASONABLE APPLICATION OF THIS COURT'S FEDERAL CONSTITUTIONAL DECISIONS, AND ADDS A SUFFICIENCY OF EVIDENCE CRITERION TO THE PREJUDICE AND HARMLESS ERROR DOCTRINE. CHAPMAN V. CALIFORNIA,
THIS COURT SHOULD TAKE THIS CASE TO CLEARLY SOLVE THE DIVERSE OPINIONS FROM ACROSS THE NATION IN THE ABOVE AREAS OF SUBSTANTIAL CONSTITUTIONAL CLAIMS UNDER THE SIXTH AMENDMENT RELATING TO CONFRONTATION, INEFFECTIVE ASSISTANCE AND THE RIGHT FOR A JURY TO MAKE THE DETERMINATION OF HOW WITNESSES TESTIMONY IS ASSESSED.

4. SHOULD PETITIONERS LITIGATION ACROSS THE NATION BE COMPROMISED DO TO CIRCUIT COURTS MISREADING THE RECORD TO OVERCOME A CONSTITUTIONAL VIOLATION, AND SHOULD PETITIONERS ACROSS THE NATION BE HELD RESPONSIBLE FOR ERRORS COMMITTED BY CIRCUIT COURTS WHEN PETITIONERS SHOWS DILIGENCE AND CAN SHOW CLEAR CUT EVIDENCE OF CONSTITUTIONAL VIOLATIONS.

LIST OF PARTIES

[ ] 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:

DISTRICT ATTORNEY OF PHILADELPHIA, LARRY KRASER
THREE SOUTH SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499

ATTORNEY GENERAL, JOSH SHAPIRO
18TH FLOOR STRAWBERRY SQUARE
HARRISBURG, PENNSYLVANIA 17120

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

STATUTES AND RULES

OTHER

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

[X] For cases from **federal courts:** (THIRD CIRCUIT)

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

[X] reported at PRESTON V. SUPERINTENDENT SCI 902 F.3d 365 (2018); 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 _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

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

[X] reported at COMMONWEALTH V. PRESTON 2171 EDA 2010 (Pa SUPER. Ct COMMONWEALTH V. PRESTON 50 A3d 692 (Pa. AUG.22,2012; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the PCRA JUDGE COMM. V. PRESTON NO CP 51 CR-0607901-2002 court appears at Appendix C to the petition and is

[X] reported at COMM. V. PRESTON NO CP 51 CR-0607901-2002 SLIP]; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was SEPTEMBER 5, 2018.

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

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: DECEMBER 18, 2018, and a copy of the order denying rehearing appears at Appendix E.

[ ] 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 FEB. 23, 2012. A copy of that decision appears at Appendix C.

[ ] 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

SIXTH AMENDMENT

IN ALL CRIMINAL PROSECUTIONS THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY TRIAL AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH 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 DEFENSE.

STATUTORY PROVISIONS
28 U.S.C § 2241 AND 2254
28 U.S.C §§ 1291 AND 2253
RULE OF EVIDENCE 804 (b)
POST CONVICTION RELIEF ACT 42 Pa. CONS. STAT.
§§ 9541-46

STATEMENT OF THE CASE

PETITIONER AND HIS BROTHER LEONARD PRESLEY WERE TRIED SEPARATELY FOR THE DEATH OF KAREEM WILLIAMS. ON JULY 15,2000, A FIGHT BROKE OUT BETWEEN LEONARN AND MR. WILLIAMS.

THE FIGHT BROKE OUT, AND WHILE LEONARD WAS TUSSLING WITH WILLIAMS, PETITIONER CAME UPON THE FIGHT. IT WAS LEONARD AND MR. WILLIAMS FIGHTING. PETITIONER TOOK THE STAND AND TESTIFIED THAT HE CAME UPON HIS BROTHER FIGHTING MR. WILLIAMS, AND HE JOINED IN AND BEGAN SWINGING AT WILLIAMS OVER LEONARD'S SHOULDER. THEN HE HEARD A SHOT, AND RAN AWAY, PASSING MS. BUTLER ON THE CORNER OF WAYNE AVENUE AND DENNIE STREET. CONTRARY TO LEONARD'S PRIOR STATEMENTS AND MS. BUTLER'S VERSION OF EVENTS, PETITIONER TESTIFIED THAT HE DID NOT SHOOT WILLIAMS AND HAD NO IDEA WHERE THE GUNSHOT CAME FROM. APPENDIX C

THERE WAS A DISPUTE CONCERNING WHO WAS GOING TO BE ALLOWED TO SELL DRUGS ON THE BLOCK. MAGISTRATE REPORT. APPENDIX B
MS. BUTLER TESTIFIED SHE SAW LEONARD AND WILLIAMS TUSSLING AND SHE SAW THE BROTHERS HITTING MR. WILLIAMS. MS. BUTLER REACHED THE CORNER AND AT THAT POINT SHE SAW WILLIAMS PINNED AGAINST THE CAR. SHE ALLEGEDLY SAW THE BROTHERS EMPTY WILLIAMS POCKETS. BUTLER TESTIFIED SHE SAW PETITIONER WITH A HOODED SWEATSHIRT WRAPPED AROUND HIS RIGHT ARM. SHE SAW HIM RAISE HIS RIGHT ARM, AIMING AT MR. WILLIAMS AND SHE HEARD A GUNSHOT. MS. BUTLER WENT TO THE HOSPITAL AND GAVE A DESCRIPTION TO THE POLICE.

PETITIONER WAS ARRESTED IN PHILADELPHIA ON MAY 2,2002 BY PHILADELPHIA POLICE.

THE DEFENSE PRESENTED TWO WITNESSES WHO WERE EYEWITNESSES. MR. MOLLEY TESTIFIED HE SAW THE VICTIM REACH IN HIS BACK AND HE HEARD A SHOT. SUGGESTING THE VICTIM POSSIBLY SHOT HIMSELF. (N.T. 10/29/03 AT 101-103, 121, 125-129)
MR. MOLLEY FLED IN HIS OWN CAR, DID NOT WANT TO GET INVOLVED.
MR. MOLLEY TESTIFIED AT PETITIONER'S TRIAL, NOT AT LEONARD'S TRIAL.

MR. STANFIELD TESTIFIED HE DID NOT SEE EITHER BROTHER WITH A GUN, AND DID NOT KNOW WHO FIRED THE GUN. (N.T. 10/29/03 AT 25, 71-72, 75-78)
MS. BUTLER WAS A FRIEND OF THE DECEASED AND SHE KNEW PETITIONER AND HIS BROTHER.
LEONARD WAS TRIED SEPARATEDLY. HE WAS FOUND GUITY OF THIRD DEGREE MURDER. HE WENT TO TRIAL FIRST. HE TESTIFIED AT HIS OWN TRIAL, AND BLAMED THE SHOOTING ON PETITIONER.
LEONARD WAS BROUGHT TO THE PETITIONER'S TRIAL TO TESTIFY AGAINST HIM. HE WAS GRANTED IMMUNITY. HE WOULD NOT COOPERATE. HIS PRIOR STATEMENTS WAS USED BY THE PROSECUTION. HIS PRIOR STATEMENTS PREJUDICED THE PETITIONER, AND FINGERED PETITIONER AS THE SHOOTER. PETITIONER'S ATTORNEY COULD NOT CROSS-EXAMINE THE PRIOR STATEMENTS, VIDEO RECORDED STATEMENT, NOR PRIOR TRIAL TESTIMONY

MADE BY LEONARD FROM HIS PRIOR TRIAL. THE PETITIONER NEVER HAD A MEANINGFUL OPPORTUNITY TO CROSS-EXAMINATION.

PETITIONER'S TRIAL COUNSEL DID NOT OBJECT TO THE CONFRONTATION CLAUSE VIOLATION. SEE APPENDIX A THIRD CIRCUIT OPINION.

THE PCRA COUNSEL DID NOT ALLEGE THAT TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE SIXTH AMENDMENT FEDERAL CONFRONTATION CLAUSE CLAIM. PROCEDURALLY DEFAULTED WAS THE RULING BY THE CIRCUIT COURT, BUT IT WAS EXCUSED BASED ON MARTINEZ.

THE STATE COURT RULED THE CLAIM WAS PROCEDURALLY WAIVED, AND THEY REFUSED TO REVIEW THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. THE MAGISTRATE REPORT AND RECOMMENDATION DENIED RELIEF AND REJECTED PETITIONER'S CHALLENGES. THE MAGISTRATE HELD PETITIONER WAS NOT ENTITLED TO RELIEF AND THE DISTRICT COURT CONCURRED.

THE THIRD CIRCUIT GRANTED A CERTIFICATE OF APPEALABILITY AND APPOINTED THE FEDERAL PUBLIC DEFENDERS OFFICE.

THE COURT OF APPEALS WROTE A 36 PAGE PRECEDENTIAL OPINION AND DENIED RELIEF, THEY HELD THAT PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, AND HIS PROCEDURAL DEFAULT WAS EXCUSED, BUT PETITIONER DID NOT ESTABLISH PREJUDICE UNDER THE STRICKLAND STANDARD. ADDITIONALLY THE COURT RULED THAT PETITIONER PREJUDICED, AND THE FAILURE OF TRIAL COUNSEL TO OBJECT TO THE SIXTH AMENDMENT CONFRONTATIONAL CLAUSE VIOLATION WAS A HARMLESS ERROR, AND PETITIONER FAILED TO ESTABLISH A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT. [APPENDIX A -THIRD CIRCUIT OPINION]

PETITIONER FILED FOR REHEARING ON NOVEMBER 14,2018. PETITIONER ARGUED THAT THE CIRCUIT COURT HAD OVER LOOKED THE RECORD FACTS AND MISSTATED THAT MS. BUTLER'S TESTIMONY WAS CORROBORATED BY THE MEDICAL EXAMINER'S TESTIMONY AND PHYSICAL EVIDENCE RECOVERED FROM THE CRIME SCENE. [REHEARING APPENDIX C]

PETITIONER TESTIFIED HE DID NOT SHOOT THE DECEASED. LEONARD'S PRIOR TESTIMONY, TESTIMONIAL STATEMENTS WERE USED AT PETITIONER'S TRIAL, VIOLATING PETITIONER'S RIGHT TO CONFRONTATION BECAUSE, LEONARD WOULD NOT TESTIFY, HE TOOK THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION. LEONARD WHEN QUESTIONED WOULD RESPOND "NO COMMENT."

COMMONWEALTH SOUGHT TO INTRODUCE BOTH STATEMENTS WRITTEN AND VIDEO RECORDED LEONARD HAD GIVEN TO THE POLICE AFTER HIS ARREST,

AND HIS TESTIMONY FROM HIS OWN CRIMINAL TRIAL AS ADMISSIBLE HEARSAY UNDER COMMONWEALTH V. BRADY 507 A.2d 66(Pa 1986). DEFENSE HAD NO OBJECTION TO THIS TACTIC BY THE PROSECUTION. DEFENSE COUNSEL DID OBJECT TO LEONARD'S PRIOR TESTIMONY. HE NOTED HE DID NOT HAVE A CHANCE TO CROSS-EXAMINE LEONARD, BUT FRAME HIS OBJECTION ALONG THE LINES OF PENNSYLVANIA RULE OF EVIDENCE 804(b) RATHER THAN AS A CONFRONTATION CLAUSE CLAIM.

THE TRIAL COURT ALLOWED THE COMMONWEALTH TO USE BOTH LEONARD'S WRITTEN AND VIDEO RECORDED STATEMENTS, AND HIS PRIOR TESTIMONY. THE PROSECUTOR READ ALOUD PORTIONS OF THE STATEMENTS, OCCASIONALLY STOPPING TO ASK LEONARD IF HE REMEMBERED MAKING THEM STATEMENTS. LEONARD WOULD RESPOND "NO COMMENT." A VIDEO RECORDED STATEMENT WAS PLAYED FOR JURY TO HEAR, IMPLEMENTING THE PETITIONER BY NAME.

THE JURY HEARD LEONARD'S VERSION OF EVENTS, AS DESCRIBED ABOVE. DEFENSE COUNSEL THE ATTEMPTED TO CROSS-EXAMINE LEONARD. WITH THREE EXCEPTIONS, LEONARD REPLIED; "NO COMMENT," TO EVERY QUESTION ASK BY DEFENSE COUNSEL.

DEFENDANT WAS FOUND GUILTY OF THIRD DEGREE MURDER, SENTENCED TO 243 MONTHS NO MORE THAN 540 MONTHS, GUILTY OF POSSESING A CRIMINAL INSTRUMENT OF CRIME.

THIS CERTIORARI FOLLOWS.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE THIRD CIRCUIT'S OPINION HAS REACHED OUTSIDE OF THE PRECEDENTS FROM THIS COURT, AND HAS EQUALLY WENT ALONG WITH THE NINTH CIRCUIT IN FASHIONING A COMPLEX, UNREASONABLE BELIEF THAT THE PREJUDICE REQUIREMENT UNDER STRICKLAND IGNORES THE CONSTITUTIONAL RIGHT THAT CONFRONTATIONAL CLAUSE NOT ONLY ASSURES THE DEFENDANT'S RIGHT TO CROSS-EXAMINATION, CONFRONT HIS ACCUSERS, BUT IT IS THE HALLMARK OF OUR CRIMINAL JUSTICE CONSTITUTIONAL SYSTEM," TO ALLOW THE JURY TO DESCRIBE THE BENEFIT OR HARM OF EVIDENCE THAT SUPPOSE TO ENDURE THE EFFECTIVE CROSS-EXAMINATION OF COUNSEL.

THE RULING BELOW SUFFOCATES THE FEDERAL CONSTITUTIONAL RIGHT THAT DICTATES THAT PREJUDICE SHOULD NOT BE A "IMPOSSIBLE BURDEN" PUT UPON THE DEFENDANTS ACROSS THE NATION. THE PURPOSE OF JURY TRIAL IS TO AFFORD THE ACCUSE A OPPORTUNITY TO TEST THE ADVERSARY SYSTEM VIGOROUSLY WITH THE GUIDING HAND OF COUNSEL.

THE THIRD CIRCUIT HAS WENT BEYOND THE NATIONAL STANDARD IN ASSESSING PREJUDICE AND HOW IT SHOULD BE REVIEWED WHEN ADDRESSING TWO SIXTH AMENDMENT VIOLATIONS OF TRIAL COUNSEL. CONFRONTATION CLAUSE VIOLATION, AND A INEFFECTIVE ASSISTANCE VIOLATION, BROUGHT BEFORE STATE AND FEDERAL COURTS AT EACH TURN THE COURT FOUND INEFFECTIVENESS OF TRIAL COUNSEL UNDER STRICKLAND V. WASHINGTON 466 U.S. 668(1984).

PETITIONER MET THE HIGH STANDARD UNDER STRICKLAND, BUT THE THIRD CIRCUIT ALONG WITH THE NINTH CIRCUIT DOES NOT CONSIDER THAT IT IS THE JURY THAT HAS TO MAKE THE DECISION WHETHER THE CONSTITUTIONAL VIOLATION WOULD HAVE EFFECTED THE JURY'S VERDICT. IN OTHER WORDS, ONCE THE THIRD CIRCUIT HAD AGREED WITH PETITIONER THAT TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE, AND THAT THE CLAIM WAS A SUBSTANTIAL CLAIM, THE PREJUDICE REVIEW SHOULD NOT HAVE BEEN DEPENDED ON A SUFFICIENCY OF EVIDENCE REVIEW OF THE TESTIMONY OF PROSECUTION WITNESSES. THE REVIEW SHOULD BE "WHETHER THE PRIOR STATEMENTS MADE BY THE PROSECUTION'S WITNESS" LEONARD OR ANY OTHER WITNESS IN THE NATION," CONTRIBUTED TO THE VERDICT, AND IS THE RIGHT TO JURY TRIAL DIMINISHED BY ALLOWING THE APPELLATE COURTS TO QUARTER BACK THE GUILTY VERDICT BY SHIFTING THEIR ASSESSMENT TO TWO ADDITIONAL HURDLES, THAT ADDS MORE AND MORE ADVERARIAL AMMUNITION IN THE ARSENAL OF THE COMMONWEALTH.

EVEN AFTER THE TWO PRONG TEST OF STRICKLAND IS TAKEN, THE HARMLESS ERROR DOCTRINE KICKS IN, AND THE CIRCUIT COURT STEPS INTO ANOTHER AREA AND ASK A ADDITIONAL QUESTION DID THE SUBSTANTIAL CLAIM ESTABLISH A SUBSTANTIAL AND INJURIOUS EFFECT UPON THE JURY'S VERDICT?

IS THE COURTS ELIMINATING PREJUDICE CLAIMS, BY SHIFTING THE FOCUS ON HIGHLIGHTING SOME EVIDENCE, AND TAKING THE COMMONWEALTH'S VERSION OF THE EVENTS, AND FOLLOWING UP THE NEXT STEP WITH A SUBSTANTIAL AND INJURIOUS EFFECT UPON THE JURY'S VERDICT. SEE CHAPMAN V. CALIFORNIA 386 U.S. 18. 26(1967). PROVING THAT THE ERROR IS HARMLESS BEYOND A REASONABLE DOUBT, WOULD IN A DOUBLE SIXTH AMENDMENT VIOLATION, BE EXTREMELY DIFFICULT BECAUSE A TRIAL IS A SEARCH IN TRUTH; AND IF ONE; COUNSEL IS PREJUDICIALLY DEFICIENT; AND SECONDLY; THE SUBSTANTIAL CONSTITUTIONAL CLAIM THAT PRIOR STATEMENTS, AND EVIDENCE WAS NOT CROSS-EXAMINED IN ANY MEANINGFUL WAY, AND IT WAS NOT SUBJECTED TO, AND THE TRIAL JUDGE ADMITTED IT; THE ASSESSMENT BY THE APPELLATE COURT IS ASKING THE HIGHER COURTS TO INTERFERE WITH THE RIGHT TO A JURY TRIAL WHOM SUPPOSE TO BE THE PERSONS TO REVIEW ALL THE EVIDENCE IS UPON COURT, WITH WITNESSES UNDER OATH. TO PERMIT THE THIRD CIRCUIT AND THE NINTH CIRCUIT TO SHOW THE RESPONSIBILITY BY USING THE STRICKLAND PREJUDICE STANDARD, AND MAKING A JUDGE REVIEW OF THE TESTIMONY, IGNORES THE IMPACT OF PRIOR TESTIMONY NOT UNDERGOING THE ENGINE OF EFFECTIVE CROSS-EXAMINATION.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE PRECEDENTIAL DECISION WILL HAVE A LONG AND ENDURING EFFECT ACROSS THE NATION, AND WILL ENTICE FURTHER " ELIMINATION OF THE JURORS DUTY TO HAVE CROSS-EXAMINATION OF PREJUDICIAL EVIDENCE, USED AGAINST THE DEFENDANTS ACROSS THE NATION. ESPECIALLY CO-DEFENDANT'S PRIOR STATEMENTS, AND TESTIMONIES. THE APPELLATE COURTS ARE IN NO POSITION TO FAIRLY MAKE THE " CALL IN CASES SUCH AS PETITIONER'S AD OTHERS ACROSS THE NATION.

THE U.S. SUPREME COURT THAT THE THIRD CIRCUIT PRECEDENTIAL OPINION IS IN CONFLICT WITH WELL ESTABLISHED FEDERAL LAW AND THIS COURTS DECISIONS, AND MORE IMPORTANTLY LIVE CREATE EVEN MORE CIRCUIT COURTS," GIVING DEFERENCE TO THE VERDICT "WINNER" EVEN WHEN THE STATE COURT RULED THE CLAIM IS PROCEDURALLY WAIVED.

THE FACT THAT THE RECORD SHOWS THE PRIOR TESTIMONY OF PETITIONER'S BROTHER LEONARD WAS ADMITTED AT PETITIONER'S TRIAL, AND PRIOR POLICE STATEMENTS ADMITTED AT PETITIONER'S TRIAL, "WITHOUT EVER BEING CROSS-EXAMINED, IS NOT ONLY PREJUDICIAL," BUT IT CAUSED SUCH PREJUDICE, THAT PETITIONER SUFFERED A SEVERE DENIAL OF HIS SIXTH AMENDMENT RIGHTS TO CONFRONTATION AND EFFECTIVE ASSISTANCE OF COUNSEL. HOW BAD IT POSSIBLY GET, ONE BROTHER TAKING THE 5TH BEFORE THE JURY, PROSECUTOR ASKING LEONARD "IS YOUR PARENTS IN THE COURTROOM?" PETITIONER SUFFER SEVERE PREJUDICE, AND THE THIRD CIRCUIT DECISION IS NOT SUPPORTED BY THE RECORD AND NO DEFERENCE SHOULD BE GIVEN TO THE STATE COURT, WHEN THE STATE NEVER RULED ON THE CLAIM. SEE THARPE V. SELLERS 583 U.S 138 S.Ct, 199 LE d 2d 424, 2018 U.S. LEXIS 616 (JAN. 8,2018),

HELD THAT THARPE DID SHOW PREJUDICE RELATING TO SEEKING A COA, BECAUSE A JUROR HAD MADE A (AFFIDAVIT) EXPLAINING REUSE WAS A PART OF HIS THINKING IN DECIDING THE SENTENCING OF DEATH. THIS COURT HELD THAT STATE COURT FACTUAL FINDING WAS WRONG. PETITIONER PRESTON, SUGGESTS THAT THIS COURT SHOULD GRANT CERTIORARI, TO GIVE GUIDANCE TO THE COURTS ON HOW TO VIEW THE PREJUDICE PRINCIPLES WHEN THE "STATE COURTS D ID NOT REVIEW THE FEDERAL CONSTITUTIONAL CLAIMS. THERE IS NOTHING TO GIVE DEFERENCE TO, AND SECONDLY, A DEFERENCE GIVEN IN A CLOUD IS NOT A CLEAR AND CONVINCING REVIEW OF ANYTHING. AND WHEN THAT INVISIBLE REVIEW IS BASED ON NO STATE DETERMINATION, OUR APPELLATE REVIEW SYSTEM, BECOMES A MYTH. LIBERTY IS WHAT AMERICA WAS FOUNDED AND DEVELOPED ON, "TO TURN THE EXPERIMENT INTO A APPELLATE MYTH, IS WHY THE COURT SHOULD" GRANT THIS CASE TO ESTABLISH CLEAR FOCUS GUIDANCE FOR THE NATIONS COURT TO REVIEW PREJUDICE, KEEPING IN MIND, THE SIXTH AMENDMENT. BRECHT V. ABRAHAMSON, 507 U.S. 619, 637 113 S Ct. 1710 123 LEd 2d 353 (1993)

THE THIRD CIRCUIT DECISION IN THIS CASE PRESTON V. SUPERINTENDENT OF SCI GRATERFORD 902 F3d 365 (2018) AND THE NINTH CIRCUIT DECISION IN DETRICH V. RYAN 740 F3d 1237 1246 (9TH CIR 2013), SUFFOCATES THE DEFENDANT'S PROOF THAT HE HAS ESTABLISHED A SUBSTANTIAL INEFFECTIVE CLAIM, WHEN IT REACHES A POINT THAT IT RULES THAT THEIR IS NO PREJUDICE WHEN A DEFENDANT ESTABLISHES UNREASONABLE FAILURE OF TRIAL COUNSEL, " DEPRIVES A JURY OF SEEING" PREJUDICIAL EVIDENCE BEING PUT THROUGH THE RIGOROUS CROSS-EXAMINATION AND TESTED BEFORE 12 CITIZENS. THIS TYPE OF VIOLATION, GOES TO THE HEART OF A JURY TRIAL.

THE UNDER LYING CLAIM, IF SUBSTANTIAL, ALONG WITH THE INEFFECTIVE COUNSEL CLAIM, IN SUCH CONFRONTATIONAL AREA OF THE CONSTITUTION SHOULD NOT BE A HARMLESS ERROR, BUT RECOGNIZED AS A STRUCTURAL ERROR AND ENTITLED TO THE GRANTING OF RELIEF. SEE BRECHT V. ABRAHAMSON 507 U.S. 619, 637 (1993), INDEED A SUBSTANTIAL AND INJURIOUS EFFECT LEONARD'S PRIOR TESTIMONY AND POLICE STATEMENTS WERE TESTIMONIAL STATEMENTS AND PETITIONER WAS DEPRIVED OF HIS CONFRONTATIONAL RIGHTS, AND THE ERROR WERE FAR FROM HARMLESS. IT IS TIME TO REVISIT BRECHT AND CHAPMAN TO SET GUIDANCE TO THE CIRCUITS AND STATE COURTS WHEN CONFRONTED WITH A DOUBLE SIXTH AMENDMENT SUBSTANTIAL CLAIMS, AND HOW THE HARMLESS ERROR, SUBSTANTIAL AND INJURIOUS EFFECT MUST NOT BE USED AS AN ANALYZING TOOL, TO TAKE AWAY THE JURY'S DUTY TO HEAR THE EVIDENCE, ONLY WHEN DEFENSE COUNSEL HAS FULL AND MEANINGFUL OPPORTUNITY, FOR CROSS-EXAMINATION. SEE CRAWFORD V. WASHINGTON 541 AT 36, 64 (2004),

CROSS-EXAMINATION IS THE GREATEST INVENTION BY MAN TO SEARCH FOR THE TRUTH. CONFRONTATION IS THE HEART OF A FAIR TRIAL. IT IS TO FAR OF A REACH, TO HAVE SWEPT SUCH A SIXTH AMENDMENT RIGHT UNDER THE RUG.

TO SECURE A NATIONAL AND UNIFORM RULE, THIS COURT SHOULD CONSIDER THAT THE FEDERAL CONSTITUTIONAL RIGHT TO TRIAL BY JURY HAS BEEN INJURED BY THE DIFFERENT APPLICATIONS OF THE STANDARDS APPLIED IN CONFRONTATIONAL CLAUSE. THE THIRD CIRCUIT IS A CLEAR BREACH FROM THIS COURT'S PRECEDENTS.

SEE U.S. V. LORENZETTI, 467 U.S. (1984) CERTIORARI GRANTED FOR INTERPRETATION OF STATUTE. PETITIONER RESPECTFULLY REQUEST THIS COURT TO GRANT REVIEW TO REVISIT THE CHAPMAN, BRECHT, HARMLESS, AND SUBSTANTIAL INJURIOUS EFFECT STANDARD, AND THE EFFECT THAT SIXTH AMENDMENT VIOLATIONS ARE STRUCTURAL, AND UNDERMINES THE RIGHTS OF THE DEFENDANT TO HAVE A JURY TO DETERMINE THE EVIDENCE PRESENTED, AND WHEN DEFENSE IS NOT ABLE TO CROSS-EXAMINE IN A MEANINGFUL ADVOCATES VOICE, "THAT EVIDENCE" SHOULD NOT BE PERMITTED BEFORE THE JURY. THIS COURT SHOULD ADDRESS SUCH A NATIONAL CONFLICT THAT EXISTS, WHICH HAS ENORMOUS IMPLICATIONS TO OUR CHERISHED RIGHT TO A FAIR JURY TRIAL, AND A DEFENDANT'S RIGHT TO DEFEND HIMSELF/HERSELF AGAINST ACCUSERS WHO VERY WELL HAVE SHIFTED BLAME TO A CO-DEFENDANT, AND IN MANY CASES FALSELY ACCUSING THE INNOCENT TO SAVE THEIR SELVES IN WHICH THEY HAD THEIR OWN FAIR TRIAL.

THE THIRD CIRCUIT BASED IT'S PRECEDENTIAL DECISION ON A MISREADING OF THE RECORD FACT, WHEN THE COURTS STATES THAT BUTLER'S VERSION OF WHAT HAPPENED WAS CORROBORATED BY THE MEDICAL EXAMINER. **APPENDIX A** THE MEDICAL EXAMINER AGREED NOT ON FACTS, BUT A ASSUMPTION MADE BY THE PROSECUTOR OF WHAT ALLEGEDLY HAPPENED, THEREFORE, DAMAGING THE PETITIONER INEFFECTIVE ASSISTANCE CLAIM EVEN MORE WHEN APPLIED TO THE SECOND PRONG TO STRICKLAND. (N.T. 10/27/03 Pg.213-214)

THE VARIOUS DECISIONS FROM THIS COURT THAT REQUIRES THAT A PETITIONER'S SIXTH AMENDMENT RIGHTS BE RESPECTED AND NOT SECOND GUESSED BY THE APPELLATE COURT. FEDERAL CONSTITUTIONAL VIOLATIONS OCCURRED, AND THE CIRCUIT COURTS ARE READING ADDITIONAL HURDLES INTO THE HARMLESS ERROR, AND SUBSTANTIAL AND INJURIOUS PRINCPALS WHEN REVIEWING HABEAS CORPUS APPEALS. THIS COURT IS OBLIGATED TO SET NATIONAL STANDARDS.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAMIEN PRESTON

D. Preston

Date: MARCH 9,2019