No. 19-5354

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

RAHEEM BROWN — PETITIONER
(Your Name)

vs.

SUPERINTENDENT SMITHFIELD SCI, ET AL. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Raheem Brown
(Your Name)

#JE-7697, K-B1/Cell 34
SCI-Smithfield
(Address)

P.O. Box 999
1120 Pike Street
Huntingdon, Pennsylvania 16652
(City, State, Zip Code)

Prison Phone Number: 814-643-6520
(Phone Number)

10

QUESTION(S) PRESENTED

Did the United States Court of Appeals for the Third Circuit (Third Circuit) err and abuse its discretion by refusing to grant Petitioner a Certificate of Appealability since jurists of reasons could differ as to whether:

1. the district court judge unreasonably adopted the magistrate judge's Report and Recommendation (R&R) that erroneously concluded that the Third Circuit's ruling in ***Gregg v. Rockview,*** 596 Fed. App'x 72, 76 n. 4 (3rd Cir. 2015) (citing ***Grant v. Lockett***, 709 F.3d 224, 239 n. 10 (3rd Cir. 2013), declaring that a witness's willingness to testify is irrelevant under ***Strickland*** since such a witness could be subpoenaed, was not a constitutional ruling even though the case was based on and clarified ***Strickland***, a constitutional ruling;

2. the district court judge in dismissing Petitioner's habeas application unreasonably adopted the magistrate judge's R&R that erroneously concluded that the state appellate court's decision affirming Petitioner's conviction was based on an erroneously perceived lack of prejudice in counsel's not calling Edwards and Williams at trial, not in the fact that the witnesses had expressed an unwillingness to testify and the state courts cited to "willingness to testify" as being a requisite for a finding of ineffectiveness; and

3. the district court erred and unreasonably determined that Petitioner was not prejudiced by trial counsel's failure to call two exculpatory eyewitnesses to the homicide for which Petitioner was convicted, including the victim's wife, who would have implicated someone other than Petitioner as being the perpetrator and/or raised substantial doubt as to Petitioner's involvement in the offense?

LIST OF PARTIES

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

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

Raheem Brown
Petitioner

JE-7697, K-B1/Cell 34
SCI-Smithfield
P.O. Box 999
1120 Pike Street
Huntingdon, Pennsylvania

Prison Phone Number: 814-643-6520

Superintendent Smithfield SCI
Respondent

Jamey Luther, Superintendent
Office of the Superintendent
SCI-Smithfield
1120 Pike Street

Prison Phone Number: 814-643-6520

John F.X. Reilly, Esquire
Counsel for Respondent

Delaware County Office of the
District Attorney
201 West Front Street
Media, Pennsylvania 19063

Phone: 610-891-4202
Email: reillyjfx@co.delaware.pa.us
Fax: 610-892-0677

LIST OF PARTIES, CONTINUED

Attorney General Pennsylvania
Respondent

The Hon. Josh Shapiro
Attorney General of Pennsylvania
Strawberry Square, 16th Floor
Harrisburg, Pennsylvania 17120

Phone Number: 717-787-3391
Fax: 717-783-1107
Internet: www.attorneygeneral.gov

John F.X. Reilly, Esquire
Counsel for Respondent

Delaware County Office of the
District Attorney
201 West Front Street
Media, Pennsylvania 19063

Phone: 610-891-4202
Email: reillyjfx@co.delaware.pa.us
Fax: 610-892-0677

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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**:

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

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

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

[X] reported at 2018 U.S. Dist. LEXIS 55851; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] 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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished. See 2017 Pa. Super. Unpub. LEXIS 2138 (June 1, 2017)

The opinion of the Philadelphia Court of Common Pleas court appears at Appendix E to the petition and is

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was April 15, 2019.

[ ] 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: May 14, 2019, 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

This appeal involves Petitioner's right to the effective assistance of counsel and his right to present exculpatory evidence in his behalf as set forth in the Sixth and Fourteenth Amendments to the United States Constitution.

The Sixth Amendment to the U.S. provides as follows:

> 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 defense.

The Fourteenth Amendment, Sections 1 and 5, provide in pertinent part:

Fourteenth Amendment, Section 1

> 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.

Fourteenth Amendment, Section 5

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Petitioner is contending that his state conviction was based on both an unreasonable application of clearly established federal law as well as an

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED, CONTINUED

unreasonable determination of the facts and that, therefore, the federal courts are empowered to grant him habeas corpus relief.

The pertinent portion of the federal habeas corpus statute, 28 U.S.C. §2254(d) (1) and (2) states as follows:

> (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 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 State Court proceedings.

STATEMENT OF THE CASE

Introduction

Petitioner contends that he is ***actually innocent*** of the homicide for which he was convicted and that there are at least two highly credible exculpatory eyewitnesses, Lynda Williams (the victim's wife), and Ta'Kia Edwards who, had they been presented during Petitioner's trial, would have established his innocence and/or at the very least so undermine the Commonwealth's evidence against him that, Petitioner respectfully suggests to the Honorable Court, no fair, reasonable juror would have voted to convict him. These witnesses, as discussed more fully below, would have implicated Christopher Loper, a main Commonwealth witness against Petitioner, as having been the actual shooter.

However, because both Williams and Edwards had expressed an unwillingness to testify on Petitioner's behalf, Pennsylvania state courts, holding that the unwillingness of Edwards and Williams to get involved and testify precluded Petitioner from establishing trial counsel's ineffectiveness for failing to call them under ***Strickland v. Washington***, denied Petitioner's post-conviction appeal on this issue without an evidentiary hearing, effectively blocking Petitioner from getting his vitally important evidence of innocence on the record. Moreover, the federal courts unfortunately merely ***rubberstamped*** the state courts' erroneous and unreasonable

application of ***Strickland***, again effectively denying Petitioner a fair and meaningful opportunity to have his evidence of innocence presented and properly considered.

Petitioner now turns to this Honorable Court in the prayerful hope that it will carefully look at the evidence, which the lower courts incredibly have so far refused to do, vacate the order denying and dismissing Petitioner's federal habeas corpus petition, and at least send the matter back down to the federal district court for appointment of counsel and an evidentiary hearing to properly present and argue his vitally important exculpatory evidence.

A. Procedural History

1. ***Arrest and Trial.*** Your Petitioner was arrested on October 30, 2008, and charged in Delaware County, Pennsylvania, with murder in the first degree (18 Pa. C.S. §2502(a)), possession of an instrument of crime (18 Pa. C.S. §907(b)), and firearms not to be possessed by a former convict (18 Pa. C.S. §6105(a.1) (1)) in connection with the shooting death of Mitchell Williams.[1] These serious charges stemmed from the incident that occurred on November 26, 2007, during which Mr. Williams was fatally shot in the chest with a revolver in an alley near 227 Engle Street, Chester, Pennsylvania.

[1] ***See Commonwealth v. Brown***, Delaware County Criminal No. 7153-2008.

The Honorable Gregory M. Mallon presided over a jury trial held on the charged offenses from September 15 to 17, 2009, after which Petitioner was found guilty of murder of the first degree and possessing an instrument of crime. The trial judge, sitting as fact-finder on the charge of firearms not to be possessed by a former convict, thereafter found Petitioner guilty of that offense.

On November 20, 2009, Judge Mallon sentenced Petitioner to life imprisonment for the first-degree murder conviction and a consecutive term of four-to-eight years on the charge of firearms not to be possessed by a former convict. No sentence was imposed on the charge of possession of instruments of crime.

2. ***Direct Appeal.*** A direct appeal[2] taken to the Pennsylvania Superior Court, docketed at No. 678 EDA 2010, was denied on February 3, 2011. ***See Commonwealth v. Brown***, 24 A.3d 443 (Pa. Super. 2011). Allowance of appeal to the Pennsylvania Supreme Court, docketed at No. 174 MAL 2011, was denied on June 30, 2011. ***See Commonwealth v. Brown***, 23 A.3d 1054 (Pa. 2011).[3]

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[2] On direct appeal Petitioner, through his court-appointed attorney, Scott D. Galloway, Esq., raised the following three issues: 1. Was the trial court in error in denying Defendant's pretrial omnibus motion challenging the photographic identification of the defendant? 2. Was the trial court in error in denying Defendant's post-sentence motion challenging the weight of the evidence as it pertains to murder in the first degree? 3. Was there sufficient evidence presented at the time of trial to convict the Defendant of murder in the first degree?

[3] In his petition for allowance of appeal, Petitioner's direct appeal counsel raised the same three issues that were presented to the Pennsylvania Superior Court (*see* footnote #2 above).

*3. **State Post-Conviction Proceedings.*** On May 21, 2012, Petitioner prepared and filed a timely state PCRA Petition raising trial counsel's ineffectiveness for, among other things,[4] failing to properly investigate and produce the testimony of Ms. Williams and Edwards, two exculpatory eyewitnesses to the shooting who, as mentioned above and more fully argued below, would have implicated Loper, a main Commonwealth witness against Petitioner, as being the triggerman.

Shortly after Petitioner filed his PCRA Petition, on May 29, 2012, Judge Mallon appointed Stephen D. Molineux, Esq., to represent Petitioner on post-conviction review. Mr. Molineux, however, rather than raising and arguing Petitioner's important claims, filed a no-merit letter claiming, among other things, that Petitioner was not entitled to PCRA relief because he could not prove that his witnesses, Ms. Williams and Edwards, were ***willing*** to testify favorably for him. ***See*** Appendix L, App. 126-127.

On August 31, 2015, after pondering Petitioner's case for several months, Judge Mallon issued a notice of intent to dismiss his PCRA Petition without a

[4] Petitioner also raised ineffectiveness claims in connection with three other witnesses, Dante Norman, Leroy Lewis, and Francesca Granados, who gave information implicating another individual, Christopher Cosmen, in the shooting death of Mr. Williams. However, because of procedural hurdles arising from the fact that Norman, the eyewitness implicating Cosmen, cannot presently be located and both Lewis and Granados would merely corroborate Norman's account, Petitioner has decided at this time to forego his claims regarding these three witnesses and focus instead on the claims involving Ms. Williams and Edwards.

hearing pursuant to Pa.R.Crim.P. 907. Judge Mallon's reasons for dismissal were, among other things, that Petitioner could not prove that witnesses Ms. Williams and Edwards were available and willing to testify for Petitioner. ***See*** PCRA Ct. Op., pgs. 6-7 (Appendix E, App. 33-34).

On September 5, 2015, Petitioner filed detailed "Objections to No-Merit Letter" and Judge Mallon's dismissal notice raising issues of PCRA and trial counsel's ineffectiveness. In his Objections, Petitioner raised, among other things, PCRA counsel's ineffectiveness for failing to properly investigate, raise, and present at an evidentiary hearing the testimony of Ms. Williams and Edwards in support of Petitioner's factual innocence and trial counsel's ineffectiveness for failing to produce this available evidence during trial. ***See*** Objections 1 to 4 as reproduced in Petitioner's Federal Habeas Petition, page 7, ¶11 (b) (5) and Additional Pages 7a-1 to 7a-2.

Judge Mallon denied Petitioner's Objections on April 21, 2016, dismissing his PCRA Petition.[5]

4. ***Appeal from Denial of PCRA Relief.*** On May 6, 2016, Petitioner filed a timely appeal from Judge Mallon's dismissal and denial of his PCRA Petition

[5] A copy of Judge Mallon's Rule 1925(a) Opinion in support of denial of PCRA relief is included as Petitioner's Appendix E, App. 27-36.

without a hearing to the Pennsylvania Superior Court[6] raising the following layered claim of PCRA and trial counsel's ineffectiveness:

> Whether PCRA counsel rendered ineffective assistance by failing to properly investigate and present at a PCRA evidentiary hearing, utilizing compulsory process if necessary, several important, exculpatory witnesses in support of Appellant's claim of trial counsel's ineffectiveness for failing to utilize compulsory process to compel the attendance at trial of these same exculpatory witnesses, including eyewitnesses, to testify regarding information contained in audiotaped or written statements given to police shortly after the homicide for which Appellant was convicted, which exonerates Appellant and actually implicates two other individuals as having committed the homicide for which Appellant was convicted, including one of the main Commonwealth witnesses against him?

In his Superior Court brief, Petitioner, among other things, raised and argued trial counsel's ineffectiveness for failing to investigate and produce at trial, utilizing compulsory process if necessary, the exculpatory testimony and/or audiotaped statements of Ms. Williams and Edwards. These witnesses, ***eyewitnesses*** to the actual shooting, would have established, as fully discussed below, that Loper, ***not*** Petitioner, committed the homicide in question.

The Pennsylvania Superior Court affirmed denial of PCRA relief on June 1, 2017.[7]

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[6] Petitioner's appeal was docketed in the Superior Court at No. 1489 EDA 2016.

[7] A copy of the Superior Court Opinion affirming denial of PCRA relief is included as Appendix D, App. 15-26.

5. ***Federal Habeas Corpus Petition.*** In June 2017, Petitioner filed in the United States District Court for the Eastern District of Pennsylvania a timely petition for federal habeas corpus relief pursuant to 28 U.S.C. §2254, which was docketed as ***Raheem Brown v. Superintendent Eric Tice,*** C.A. No. 17-2778, raising, among other things, trial counsel's ineffectiveness for failing to call Ta'Kia Edwards and Lynda Williams to testify at his trial. As mentioned above and more fully discussed below, these witnesses would have implicated Christopher Cosmen as being the shooter.

On October 3, 2018, U.S. District Judge Mitchell S. Goldberg, over Petitioner's objections, adopted the Report and Recommendation (R&R) of Magistrate Judge Timothy R. Rice and denied Petitioner's application for habeas corpus relief. ***See*** Appendix B, App. 6-12.[8] Petitioner thereafter applied to the Third Circuit Court of Appeals for a COA, which was denied on April 15, 2019. ***See*** Appendix A, App. 2-3. A request to the Third Circuit Court of Appeals for reargument *en banc* of the court's decision denying a COA was denied on May 14, 2019. ***See*** Appendix C, App. 14.

[8] In his Order dismissing Petitioner's habeas corpus petition, Judge Goldburg claimed that Petitioner's habeas petition was untimely. ***See*** Appendix B, App. 7. That, however, is not the case at all, and Petitioner raised this issue in his request for a certificate of appealability. The Third Circuit Court of Appeals, in denying the COA, seemed to agree that Petitioner's application had been timely (***see*** Appendix A, App. 2), as even Magistrate Judge Rice acknowledged (***see*** Appendix B, App. 9), but then denied the COA request on other grounds.

Neither the district court nor the circuit court of appeals explained how the failure of trial counsel to produce at trial the testimony of two exculpatory eyewitnesses who would have implicated ***someone other than Petitioner*** in the homicide was not exceedingly prejudicial.

6. Petitioner for Writ of Certiorari. Petitioner hereby appeals to the Honorable Justices of this Court for a writ of certiorari. Specifically, Petitioner prays that this Court will afford him a meaningful review of the evidence of his innocence, which he so far has been wrongly denied, and grant him whatever relief is deemed just and appropriate.

B. Factual Background

On November 26, 2007, Mitchell Williams, the decedent herein, was shot in the chest with a revolver in an alley near 227 Engle Street, Chester, Pennsylvania, while fleeing from an altercation with James Smith over a domestic dispute. Initially, witnesses in the area denied knowing anything about the shooting, including who was responsible for it, or they identified one of two individuals ***other than Petitioner*** as being the shooter. Later on, however, several of these witnesses, including James Smith, Mynisha Collier, Christopher Loper, and James Reynolds, most facing outstanding criminal charges of their own carrying substantial prison sentences if

convicted, changed their initial stories and implicated Petitioner in the shooting death of the decedent.

Smith, Collier, and Loper, the main Commonwealth witnesses against Petitioner,[9] changed their stories and implicated Petitioner in the shooting death of Mr. Williams pursuant to guilty plea agreements in their own respective cases in which the Commonwealth, in exchange for their cooperation and testimony against Petitioner, agreed to disclose to their sentencing judges their assistance against Petitioner at trial. Although no specific promises were allegedly made to the witnesses regarding the sentences that would actually be imposed based on their cooperation, it is certainly reasonable to assume that they all were acting in the expectation of leniency in their cases as a result.

There was, however, highly credible, available evidence that was never presented during Petitioner's trial and which strongly suggests that the above witnesses testified falsely. Specifically, several other highly credible eyewitnesses to the shooting, including Lynda Williams, the victim's wife; Ta'Kia Edwards, the niece of Mynisha Collier; Dante Norman; Leroy Lewis; and Francesca Granados, ***gave independent statements*** to police right after the incident, including audiotaped

[9] Reynolds was not present in the area when the shooting of Mr. Williams occurred and was offered mainly as a corroborating witness for Loper. He had no firsthand knowledge regarding the actual shooting.

statements, that served to exonerate Petitioner and implicate either Christopher Loper, one of the main Commonwealth witnesses against Petitioner, or Christopher Cosmen as being the actual shooter of Mr. Williams. According to Norman, Ms. Williams, and Edwards, both Loper and an individual resembling Cosmen were armed with pistols and ran up on Mr. Williams just prior to the fatal shot being fired.

Dante Norman, Leroy Lewis, and Francesca Granados implicated Cosmen as being the shooter. However, because Norman, the main eyewitness implicating Cosmen as being the shooter, cannot presently be located and the evidence from Lewis and Granados would support and corroborate Norman's version, Petitioner is unable to litigate his ineffectiveness claims regarding counsel's failure to call these particular witnesses and, accordingly, withdrew them from the district court's consideration on habeas review.

Petitioner is herein pursuing trial counsel's ineffectiveness for failing to call Williams and Edwards. These two witnesses, as discussed more fully below, implicated Christopher Loper as being the shooter and, in the process, they thereby ***effectively exonerated*** Petitioner. Moreover, Collier, who initially gave statements consistent with her niece Edwards implicating Loper, subsequently recanted her initial statements implicating Loper and, along with Smith, Loper, and Reynolds, testified for the Commonwealth against Petitioner. Smith, Loper, and Collier all were facing outstanding, unrelated criminal charges of their own and, Petitioner

believes, testified falsely for the Commonwealth against him in the hope of obtaining sentencing relief in those outstanding cases.

The evidence from Williams and Edwards, which will be summarized below, is important not only in that these witnesses, ***who never recanted***, implicate Loper as the shooter, exonerating Petitioner, but they also call into question the credibility of Collier's recantation testimony, lending credence to her initial statements to police which, along with Edwards and Williams, also implicated Loper. According to Edwards and Williams, not only was the shooter wearing clothing ***substantially different*** from the descriptions given by Collier and Loper at trial, but the shooter's face was concealed by a ski mask and black hoodie, again contrary to the Commonwealth witnesses' testimony.

Edwards and Williams, very shortly after the incident, told police that the shooter was wearing a black ski mask, black hoodie, black shirt, and blue jeans, and he was carrying a silver gun. ***See*** Det. Slowik's Witness Interview Summary ("Slowik's Summary"), 11/27/07, pg. 125 (Appendix F, App. 39-40); Statement of Ta'Kia Edwards ("Edwards's Statement"), 2/5/08, pgs. 3-6 (Appendix G, App. 44-47); Statement of Lynda Williams ("Williams's Statement"), 3/18/08, pg. 2 (describing the shooter as wearing a black hoodie at the time of the incident) (Appendix H, App. 55). Williams also told police investigators that the shooter was wearing "dark pants." ***See*** Williams's Statement, pg. 7, Appendix H, App. 60. These

statements by Edwards and Williams, as discussed more fully below, were vitally important in that they directly contradict the descriptions of what the shooter was wearing as given by Collier and Loper. In fact, as discussed above, the witnesses, specifically Edwards, directly implicate Loper as being the shooter.

According to what Edwards told Det. Slowik right after the shooting, the gunman, whom she specifically identified by name as "Chris"[10] (Slowik's Summary, Appendix F, App. 39-40), ran back inside of 227 Engle Street, the residence where he was then staying. Shortly thereafter, Edwards observed Chris [Loper] and the driver of a white BMW (Petitioner) leave the house together and walk to the trunk of the car. Chris [Loper] was carrying the silver gun, ski mask, and a black t-shirt, which he placed in the trunk, and the other guy (Petitioner) then got in the car and drove away. ***See*** Slowik's Summary, Appendix F, App. 39-40; also Edwards's Statement, Appendix G, App. 44-47.

Collier, Edwards's aunt, initially gave police a description of the gunman virtually identical to that given by Edwards. Like Edwards, Collier told police right after the incident that the shooter was wearing a black hoodie, ski mask, and blue jeans. And she also stated that the shooter was armed with a silver gun. ***See*** Slowik's

[10] Edwards claimed that this individual she observed was "Chris," but it is obvious from the context that she was referring to Christopher Loper, whom she personally knew to reside at 227 Engle Street.

Summary, Appendix F, App. 39; also First Statement of Mynisha Collier ("Collier's First Statement"), 3/18/08, pg. 3-4 (Appendix I, App. 72-73). As discussed above, however, Collier subsequently recanted her initial statement and agreed to testify against Petitioner as part of a plea agreement in her own outstanding drug case. At Petitioner's trial, pursuant to her plea agreement, Collier implicated Petitioner as being the shooter, claiming that on the day of the shooting he was wearing a white t-shirt and blue jeans. Collier also denied at trial that Petitioner was wearing a hoodie, and she claimed that she managed to get a look at his face. Third Statement of Mynisha Collier ("Collier's Third Statement"),[11] 1/15/09, pgs. 3-7 (Appendix J, App. 84-88); also N.T. (Trial), 9/15/09, pgs. 125-126 (Appendix M, App. 143-144.

This description of what the gunman was allegedly wearing, given by Collier following her recantation, differed significantly from that of Edwards (Collier's niece) and Williams (the victim's wife). Moreover, as stated above, the descriptions of Edwards and Williams, given to police shortly after the shooting, were virtually identical to Collier's initial statement to police. All three witnesses had independently described the shooter as wearing a black ski mask, black hoodie, black shirt, and blue jeans, and they claimed that he was carrying a silver gun.

[11] Collier gave a second statement to police on 5/19/08.

Edwards and Williams, had they been called at Petitioner's trial, would have directly contradicted Collier's description, following her recantation, of what the shooter was wearing, calling into question the credibility of her recantation testimony implicating Petitioner. Moreover, to the extent that Smith, another Commonwealth witness against Petitioner, implied that the gunman's face was not concealed by a mask or hoodie and that is how he was allegedly able to recognize and identify Petitioner, his testimony against Petitioner, which Petitioner suggests was offered for the purpose of taking the focus off his friend Cosmen, whom Norman implicated as the shooter, the evidence from Edwards and Williams would have called his testimony into question as well.[12]

Loper, a main Commonwealth witness against Petitioner, whom Edwards, Williams, and Collier (in her initial statement to police) implicated as being the shooter, gave still another description of what Petitioner was allegedly wearing at the time. According to Loper, Petitioner, right after the shooting, allegedly ran back inside his cousin James Reynolds's residence at 227 Engle Street, where Loper was then staying, and was dressed in a pair of light bluish jeans, Buttertown Timberland boots, a gray under thermal, and a burgundy-colored t-shirt with some gray going

[12] As discussed above, the claims related to Norman's implicating Cosmen as being the shooter are not presently before this Court as Norman cannot presently be located and, accordingly, Petitioner, who is a prisoner without funds to hire an investigator to track Norman down, is unable at this time to litigate the claims.

through it and some sort of design that was mustard or yellow in color. ***See*** First Statement of Christopher Loper ("Loper's First Statement"), 1/10/08, pg. 11 (Appendix K, App.102). At trial, however, Loper testified inconsistently with his initial statement to police, claiming that the t-shirt was gray in color. ***See*** Loper's Testimony, N.T. (Trial), 9/15/09, pg. 96 (Appendix M, App. 141).

Of special significance is that Loper never suggests that Petitioner's face was concealed by a hoodie or ski mask right after the shooting, when he allegedly ran back inside 227 Engle Street. In fact, Loper claimed that when Petitioner allegedly ran back inside the residence, he demanded that Loper give him his hat. Loper's First Statement, Appendix K, App. 98-99, 106; ***also*** N.T. (Trial), 9/15/09, 79-82 (Appendix M, App. 137-140). The description given by Loper clearly suggested to the jury that Petitioner's face was not covered at the time.

As discussed above, however, Edwards, Williams, and Collier (prior to her highly questionable recantation) establish that the gunman, contrary to the statements and trial testimony of Smith, Loper, and Collier (after her recantation), was wearing a black hoodie, ski mask, and blue jeans. Moreover, Petitioner, as described by Loper, was wearing clothing ***entirely different from the shooter*** as described by Edwards and Williams. According to Loper, Petitioner was wearing a burgundy-colored t-shirt with some gray going through it and some sort of design that was mustard or yellow in color. Loper's First Statement, Appendix K, App. 102;

also N.T. (Trial), 9/15/09, pg. 96 (t-shirt was gray in color) (Appendix M, App. 141). This differed significantly from Edward's and Williams's descriptions of the shooter as wearing a black hoodie, black t-shirt, ski mask, and blue jeans. Also, Loper claimed that Petitioner was wearing light bluish jeans (Loper's First Statement, Appendix K, App. 102) whereas Williams, the victim's wife, claimed that the shooter was dressed in "dark pants." Williams's Statement, pg. 7, Appendix H, App. 60.

Thus the evidence from Edwards and Williams describing the shooter as wearing clothing substantially different from the descriptions given by Collier and Loper,[13] and especially their agreement that the shooter was wearing a black hoodie and ski mask at the time of the incident, directly contradicts and calls into question the credibility of the identification testimony of Smith, Loper, and Collier regarding Petitioner. If Petitioner was dressed at the time of the shooting as described by Loper and Collier, the two main Commonwealth witnesses against him, then he definitely was not the gunman as described by Edwards, Williams, and Collier (in her initial statement to police prior to her recantation), whom they claimed was wearing a black hoodie, black t-shirt, ski mask, and dark pants. The evidence from Edwards and Williams was therefore critically important to the defense as it both undermined the

[13] Smith claimed that he could not recall what type of clothing the shooter had on.

credibility of the identification testimony of Smith, Loper, and Collier and also tended to exculpate Petitioner from involvement in the shooting.

According to Edwards, it was Loper, ***not*** Petitioner, who at all times up to and immediately following the shooting was in direct possession of the gun and/or was wearing the clothes allegedly used by or observed on the gunman. ***See*** Slowik's Summary, Appendix F, App. 39-40; also Edwards's Statement, Appendix G, App. 44-47. Edwards in fact told police that she observed Loper walk out front of 227 Engle Street with Petitioner and place the black thermal, ski mask, and silver gun allegedly worn and used by the gunman in the trunk of Petitioner's car. ***Id.***

This Court is urged to keep in mind that ***none*** of the Commonwealth witnesses at trial described Petitioner as wearing or in possession of the black hoodie, ski mask, blue jeans, and silver gun that Edwards, Williams, and Collier (at least in her initial statements to police) claimed that the gunman had on or possessed. According to Edwards, the individual who was wearing or in direct possession of this clothing and silver handgun was Loper, ***not*** Petitioner.

Finally on this point, Loper, a main Commonwealth witness who claimed that he observed Petitioner immediately after the shooting and before Petitioner would have had a chance to change clothes, described Petitioner as wearing clothing substantially different from what the gunman was observed wearing by Edwards,

Williams and Collier (in her initial statements to police), but he, Loper, actually put himself in possession at that time of a black thermal, clothing ***consistent*** with that worn by the gunman as described by Edwards, Williams and Collier (in her initial statements to police), which he claimed that he threw to Petitioner by mistake. ***See*** Loper's First Statement, Appendix K, pgs. 7-8 (App. 98-99); ***also*** N.T. (Trial), 9/15/09, pgs. 79-82 (Appendix M, App. 137-140).

In reviewing Edwards's statements to police, it is important to keep in mind that she describes ***two entirely different*** observations of the gunman. In describing the shooting to Det. Slowik in her initial unrecorded statement given on November 27, 2007, the day after the incident, Edwards said that "Chris" (Loper) was "wearing a black ski mask, black hoodie, black shirt, and blue jeans and ... carrying a silver gun." ***See*** Slowik's Summary, Appendix F, App. 39-40. However, in her recorded statement, which she gave on February 5, 2008, Edwards described Loper as carrying "[t]he ski mask and the gun" and wearing "a white (inaudible) some blue jeans." Edwards's Statement, Appendix G, App. 47.

As explained above, Edwards gave ***two separate observations*** of Loper, one ***before*** (the unrecorded statement to Slowik) and the other ***after*** (Edwards's recorded statement, Appendix G) the shooting of Mr. Williams. In her second observation, Edwards noted that Loper was no longer wearing the black hoodie. Rather, he was observed carrying the black hoodie "on his shoulder" and placing it, along with the

ski mask and silver gun, in the trunk of Petitioner's car. Edwards's Statement, Appendix G, App. 47.

This ***second observation*** of Loper by Edwards is very significant. Loper himself claimed that he threw Petitioner a black thermal by mistake when he, Petitioner, demanded his hat. Petitioner contends that that was the ***same black hoodie*** Edwards observed Loper wearing when he shot and killed Mr. Williams. Once back inside 227 Engle Street, Loper quickly removed the black hoodie and tossed it to Petitioner, again by his own admission, when Petitioner asked for his hat. Loper then carried that black hoodie along with the gun and ski mask he had been wearing when he shot Mr. Williams and placed the items in the trunk of Petitioner's car. ***At that time***, of course, Loper would not have been wearing the black hoodie, accounting for the difference in the color of his shirt when Edwards observed him walking out to Petitioner's car.

In recommending dismissal of Petitioner's habeas corpus application, which was granted by the district judge, Magistrate Judge Rice misconstrued and misstated the evidence regarding Edwards's description of the shooter, erroneously claiming that Edwards did not state to police that Loper (whom Edwards referred to as "Chris") was "wearing a black ski mask, black hoodie, black shirt, and blue jeans and ... carrying a silver gun" but rather "that Loper was carrying '[t]he ski mask and

the gun' and was wearing 'a white (inaudible) some blue jeans.'" Magistrate Judge Rice's R&R, Discussion, §I Ineffective Assistance of Counsel, n. 9; App. 10-11.

Again, however, Edwards's statement that Loper was "wearing a black ski mask, black hoodie, black shirt, and blue jeans and ... carrying a silver gun" was the initial, unrecorded statement she gave to Det. Slowik on November 27, 2007, the day after the shooting. Slowik's Summary, Appendix F, App. 39-40. The other statement that Magistrate Judge Rice quotes in footnote 9 of his R&R is from Edwards's recorded statement, which she gave on February 5, 2008, and is of her observation of Loper ***after*** the shooting as she saw him carrying the black hoodie, ski mask, and silver gun out to the trunk of Petitioner's car. Contrary to Magistrate Rice's very unreasonable determination of the facts, Edwards did in fact very clearly identify Loper as the shooter in her initial statement to Det. Slowik and described him as carrying clothing she observed him wearing when he shot Mr. Williams to Petitioner's car in her second, recorded statement, which she gave on February 5, 2008.

Petitioner believes that the lower state and federal courts were inclined to ***rubberstamp*** his conviction, without regard to the facts of the case showing that someone else had committed the homicide, because of the evidence suggesting that Loper had deposited the black hoodie, ski mask, and silver gun in the trunk of Petitioner's car and that he was observed driving away with the items. But even if

true, this evidence does not make Petitioner out to be a murderer. It is at worst evidence of Petitioner's poor judgment at the time and his attempt to protect his cousin Reynolds, whose gun Loper had used in the shooting, from potential legal trouble by removing and concealing the murder weapon and other evidence of the crime. Again, though, that only makes Petitioner an ***accessory after the fact***, not a murderer.

Petitioner respectfully suggests to this Court that for the state to prosecute and convict Petitioner of this murder, which the evidence very clearly shows was committed by Loper, a main state witness against him, is an egregious miscarriage of justice. This prosecution against Petitioner for murder never should have been undertaken in the first place, and the conviction certainly should not have been affirmed on appeal.

In denying post-conviction relief, the state courts unreasonably concluded that the testimony from Edwards and Williams, which as stated above very clearly implicated Loper, would not have exonerated Petitioner. But the courts failed to properly evaluate prejudice under ***Strickland*** by failing to evaluate the effect of the proposed evidence from Edwards and Williams on the testimony of Smith, Loper, and Collier in undermining their credibility and raising reasonable doubt as to Petitioner's guilt. The courts also failed to explain how evidence showing that Loper committed the shooting did not exonerate Petitioner of the homicide. If, as Edwards

told Det. Slowik the day right after the shooting, "Chris" shot Mr. Williams, then Petitioner could not have committed the murder. If the shooter, as both Edwards and Williams state, was wearing clothing entirely different from what Loper and Collier claimed that Petitioner was wearing at the time, then Petitioner was not the shooter. The state courts, in denying Petitioner relief on PCRA review, unreasonably ignored this very strong evidence of Petitioner's innocence.

Moreover, the federal district and circuit courts also ignored and failed to properly evaluate the effect of the evidence from Edwards and Williams on the Commonwealth's case against Petitioner, unreasonably concluding that their evidence, implicating Loper as the shooter, would not have exonerated Petitioner. The lower federal courts failed to adequately explain how credible evidence pointing to ***someone other than Petitioner*** as being the shooter was not strongly exculpatory. Unfortunately, the federal courts, as the state appellate courts had done, merely rubberstamped Petitioner's convictions, depriving him of a fair and meaningful opportunity to get the evidence of his innocence on the record and have it fairly and properly considered.

Lastly, the state PCRA court, in denying Petitioner relief, not only falsely claimed that the testimony from Edwards and Williams, pointing to someone other than Petitioner as being the shooter, would not have exonerated Petitioner, the PCRA judge also claimed that because these witnesses had expressed an unwillingness to

testify on Petitioner behalf, Petitioner could not prevail on his ineffective assistance of counsel claims against trial counsel under existing state law. This, in fact, was a major reason why Stephen D. Molineux, Esq., Petitioner's court-appointed PCRA counsel, filed a no-merit letter and then withdrew from Petitioner's case. ***See*** Appendix L, App. 126-127.

Under Pennsylvania's interpretation of the requirements for finding trial counsel ineffective for failing to call a witness, a petitioner must establish that the witness was ***willing*** to testify favorably for the defense. This is an essential element of an IAC claim in Pennsylvania, and without being able to make such a showing, a petitioner is not even entitled to an evidentiary hearing – even though a reluctant witness possessing information favorable to the defense could always be subpoenaed, as more full discussed below. In Petitioner's case, both Edwards and Williams expressed an unwillingness to testify on Petitioner's behalf. Neither witness, however, ever recanted the exculpatory information in her statements to the police, nor did she claim that she would refuse to testify if subpoenaed.

In essence, because of the way Pennsylvania applies ***Strickland*** on this issue, Petitioner was deprived of an evidentiary hearing to get on the record the very helpful evidence from Edwards and Williams that would have established his innocence or, at the very least, raised substantial doubt of his guilt, and the courts then turned around and claimed that he had failed to establish his claim. However,

the courts ignored the fact that the reason he failed to establish his claim was their, the courts', refusal to conduct a proper evidentiary hearing to enable Petitioner to get the important evidence of his innocence on the record. They thus blamed Petitioner for the very thing they denied him a fair opportunity to do!

REASONS FOR GRANTING THE PETITION

Petitioner files this petition for *certiorari* in the hope that this Honorable Court will agree to resolve a troubling question that has arisen over the proper application of ***Strickland v. Washington*** and whether, in a claim of ineffectiveness for failing to call or produce a witness, a petitioner/appellant must establish, as an essential element for obtaining relief, that the witness in question was ready and willing to testify favorably for the defense. In addition, Petitioner is requesting that this Honorable Court grant *certiorari* to clarify and establish the proper scope and standard of review required of appellate courts under ***Strickland*** when evaluating prejudice arising from trial counsel's deficient performance. Specifically, is an assertion of deficient performance evaluated by itself in isolation, or must a reviewing court evaluate the effect of the deficient performance on the other evidence in the case?

***Strickland* and Willingness to Testify for the Defense**

First, Petitioner is requesting that this Honorable Court grant certiorari and clarify just what the proper pleading requirements are under ***Strickland*** for a petitioner challenging trial counsel's ineffectiveness for failing to call an important witness. Must a petitioner establish that a witness was ***willing*** to testify favorably for the defense, as Pennsylvania presently requires, ***see, e.g., Commonwealth v.***

Williams, 636 Pa. 105, 137-138, 141 A.3d 440, 460 (Pa. 2016), citing ***Commonwealth v. Chmiel,*** 585 Pa. 547, 889 A.2d 501 (Pa. 2005),[14] but which ***Strickland,*** as articulated by this Court, does not expressly mandate, or is the ***controlling factor*** under ***Strickland*** not the willingness of the witness to testify but rather the ***content*** of the witness's proposed testimony and whether it would have been beneficial to the defense, as the United States Court of Appeals for the Third Circuit declared in ***Zettlemoyer v. Fulcomer,*** 923 F.2d 284, 298 (3rd Cir. (Pa.) 1989)?[15]

To Petitioner's knowledge, this Honorable Court has not yet addressed this important issue.

In at least two other cases, the Third Circuit has stated that, in its opinion, "whether a witness is ***ready and willing*** to testify is irrelevant since defense counsel can compel testimony through a trial subpoena." ***See Gregg v. Superintendent Rockview SCI,*** 596 Fed. Appx. 72, 76 n. 4 (3rd Cir. (Pa.) 2014), quoting ***Grant v.***

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[14] The state courts cited and relied upon ***Chmiel***, among other cases, in denying Petitioner's state post-conviction petition and appeal, stating that Petitioner had not proven that his two witnesses were ***willing*** to testify in his behalf.

[15] The Third Circuit, in this case discussing the requirements under ***Strickland*** for finding counsel ineffective for failing to call a witness, declared that a habeas petitioner would have to identify the witness in question, the facts to which the witness would have testified, and that "such testimony was ***forthcoming or available*** upon reasonable investigation" (emphasis added). Nowhere in ***Zettlemoyer***, however, did the Third Circuit even suggest that a petitioner had to establish that an important witness was ***willing*** to testify before counsel could be held ineffective under ***Strickland*** for failing to call him or her.

Lockett, 709 F.3d 224, 239 n. 10 (3rd Cir. (Pa.) 2013). This is squarely in keeping with the Third Circuit's rationale in ***Zettlemoyer*** emphasizing the importance of the ***content*** of a proposed witness's testimony, ***not*** the willingness of the witness to testify as to that content. Petitioner respectfully suggests that where, as in his case, witnesses, although unwilling to testify, possess information highly favorable to the defense, it is ineffective assistance for counsel to fail to subpoena them to elicit their testimony.

Nevertheless, despite the Third Circuit's very clear expression of concern in ***Gregg*** and ***Grant***, discussed above, the federal district court,[16] in denying and dismissing Petitioner's habeas corpus petition raising trial counsel's ineffectiveness for failing to call Lynda Williams and Ta'Kia Edwards to present their exculpatory evidence, which would have been highly beneficial to Petitioner, refused to be guided by ***Gregg*** and ***Grant***. In his recommendation that Petitioner's habeas petition be denied, U.S. Magistrate Judge Timothy R. Rice explained that the Third Circuit, although expressing concern about Pennsylvania's requirement that a witness be "ready, willing, and able" to testify, has never actually addressed the constitutionality of that requirement. ***See Brown v. Tice, et al.,*** 2018 U.S. Dist. LEXIS 55851 at n. 11 (E.D. Pa., March 29, 2018) (Appendix B, App. 12).

[16] The United States District Court for the Eastern District of Pennsylvania.

Magistrate Judge Rice circumvented Petitioner's argument regarding the state courts' unreasonable application of ***Strickland*** in light of ***Gregg*** and ***Grant***, erroneously concluding that even though the PCRA court had expressly cited to the unwillingness of Williams and Edwards to testify as rendering Petitioner ineligible for post-conviction relief, citing ***Commonwealth v. Chmiel, supra.,***[17] the Pennsylvania Superior Court's decision affirming denial of PCRA relief,[18] which he determined was "the final [state court] decision on the merits," ***see*** Magistrate Judge Rice's R&R (Appendix B, App. 10-11), "cited lack of prejudice as its sole ground for affirming." ***See*** Super. Ct. Op. at 6 (Appendix D, App. 21-22).

Although, as Magistrate Judge Rice noted, the Superior Court claimed that trial counsel's failure to call Williams and Edwards to testify at trial, two exculpatory witnesses who would have implicated someone other than Petitioner as being the shooter (i.e., Christopher Loper), was somehow not prejudicial, rubberstamping the PCRA court's highly unreasonable assessment of the evidence, the Superior Court ***affirmed the PCRA court's ruling***, including the PCRA court's finding that Petitioner was not entitled to relief under ***Strickland***, which Pennsylvania expressly

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[17] ***See Commonwealth v. Brown,*** Delaware County, Pennsylvania, Crim. No. 7153-08, Opinion by the Hon. Gregory M. Mallon, Judge, dated 9/7/16, denying Petitioner's state application for Post-Conviction Collateral Relief (PCRA), pgs. 6-7 (Appendix E, App. 33-34).

[18] ***See Commonwealth v. Brown,*** No. 1489 EDA 2016, denial of PCRA relief affirmed, 6/1/17 (Appendix D).

adopted as its own standard,[19] because he could not establish that Williams and Edwards were ***willing*** to testify on his behalf. ***See*** Super. Ct. Op. at 10 (Appendix D, App. 25) (affirming the PCRA court's ruling in the case) and PCRA Ct. Op. at 6-7 (Appendix E, App. 33-34). As the Petitioner argued in his objections to Magistrate Judge Rice's R&R, the Superior Court's opinion ***affirming*** the PCRA court's opinion in support of denial of PCRA relief necessarily incorporated those portions of the lower court opinion not modified or overruled. Objections to R&R at pg. 19.

Regarding the Superior Court opinion, on which the federal district court based its review, it may have been the final state-court opinion, as Magistrate Judge Rice noted (Appendix B, App. 11), but since it essentially adopted the PCRA court's opinion in its entirety and did not even discuss all the more important matters contained therein, e.g. Petitioner's important federal constitutional question involving whether ***Strickland*** requires proof that a witness is ***willing*** to testify favorably for the defense before counsel may be held ineffective for failing to call him or her, Petitioner respectfully suggests to this Court that the PCRA court's opinion, which was more extensive and reasoned than the Superior Court's opinion, should rightly have been regarded as the last reasoned opinion in the state courts. In ***Bond v. Beard***, for instance, the Third Circuit determined that the PCRA court's

[19] Pennsylvania courts adopted and applies ***Strickland*** as its standard for judging claims of ineffective assistance of counsel. ***See Werts v. Vaughn***, 228 F.3d 178, 203 (3rd Cir. 2000); ***Commonwealth v. Sneed***, 899 A.2d 1067, 1075-76 (Pa. 2006).

opinion was "the state courts' last reasoned opinion" where the Superior Court, as in Petitioner's case, added nothing to the PCRA court's opinion. ***Id.,*** 539 F.3d 256, 289-290 (3rd Cir. 2008).

Even though ***Gregg*** and ***Grant*** sought to clarify the proper requirements under ***Strickland***, which is clearly established federal law and is of constitutional dimension, the federal district court held that the Third Circuit did not rule whether those two cases, expressing concern about Pennsylvania's requirement that a witness be ready and willing to testify, violates the constitution. It is worth nothing here that judges in ***Gregg*** and ***Grant***, while not expressly stating so, certainly strongly intimated that denying an otherwise meritorious ineffectiveness claim based on a witness's unwillingness to testify would amount to an unreasonable application of ***Strickland.***

In ***Henry v. Horn,*** 218 F. Supp. 2d 671, 706 (E.D. Pa. 2002), the U.S. District Court for the Eastern District of Pennsylvania, the same court which adjudicated Petitioner's habeas corpus application, did come out and declare that a state appellate court's refusal to entertain an otherwise valid ***Strickland*** claim for failure of a defendant to meet one or more of the additional state-law requirements for establishing an ineffectiveness claim for failing to call a witness, *e.g.* establishing the witness's willingness to testify, could be construed as an unreasonable application of ***Strickland.***

Prejudice Evaluation under Strickland

Second, Petitioner respectfully requests that this Honorable Court grant *certiorari* in this case to clear up the misunderstanding and confusion that exists in the state and federal courts over the proper scope and standard for reviewing courts to apply in evaluating the prejudicial impact of errors under ***Strickland.*** As more fully discussed below, state courts, especially in Pennsylvania, have been applying an overly narrow scope of review, affirming convictions that very clearly should not have been allowed to stand.

In denying Petitioner's PCRA petition, the trial judge claimed that he was unable to uncover the statements from Edwards and Williams which, as discussed above, strongly implicate Christopher Loper as being the shooter. ***See*** PCRA Ct. Op., pg. 7 (Appendix E, App. 34). The PCRA judge, however, clearly had access to these witnesses' statements, which are included in the Appendix of Supporting Exhibits as Appendices F (App. 37-40) and G (App. 41-52). It was not that the PCRA judge could not uncover the exculpatory statements from Edwards and Williams; rather, the evidence suggests that he ***deliberately chose*** not to consider their important evidence which would have exonerated Petitioner or, at the very least, raised substantial doubt as to Petitioner's guilt.

The importance of the evidence from Edwards and Williams cannot be overstated. First, as stated above, Edwards specifically identified "Chris" (Loper) as being the gunman in her initial statement to Det. Slowik, which she gave him the day right after the shooting. Specifically, she told Det. Slowik that she observed "Chris com[ing] from the back yard.[20] He was wearing a black ski mask, black hoodie, black shirt, and blue jeans. He [Chris] shot Mitch [Williams] in the chest with a silver gun." ***See*** Appendix F, App. 39. In her recorded statement, given on February 5, 2008, 71 days after the shooting, Edwards again described the shooter as wearing a black hoodie (Appendix G, App. 44-45) and she claimed that, right after the shooting, she observed Chris carrying the black hoodie (which he was no longer wearing),[21] ski mask, and gun out to a white BMW, which was identified as belonging to Petitioner, and placing the items in the trunk. ***See*** Appendix G, App. 46-47.

Likewise, Williams, the victim's wife, also described the shooter as wearing a black hoodie at the time of the shooting. ***See*** Williams's Statement, pg. 2,

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[20] It is clear from the context that Edwards is identifying Christopher Loper, who was then staying at 227 Engle Street, the residence from which Edwards saw him emerge.

[21] As discussed above at page 22 of this *certiorari* petition, the evidence suggests that Loper quickly removed the black hoodie right after the shooting and, by his own admission, threw it at Petitioner when Petitioner allegedly demanded his hat. ***See*** Loper's trial testimony, N.T. (Trial), 9/15/09, pgs. 79-82 (Appendix M, App. 137-140); also Loper's First Statement, Appendix K, pgs. 7-8 (App. 98-99). This accounts for why Loper was not wearing the black hoodie when Edwards observed him walking out to Petitioner's car after the shooting.

Appendix H, App. 55. She also told police investigators that the shooter was wearing "dark pants." ***See*** Williams's Statement, pg. 7, Appendix H, App. 60. Because the shooter's face was concealed by the hoodie, Williams testified at Petitioner's sentencing hearing that she could not say that Petitioner was, in fact, the gunman. ***See*** N.T. (Sentencing), 11/20/09, pg. 36.

The descriptions of the gunman given by Edwards and Williams ***directly contradicted*** the descriptions given at trial by Collier and Loper, the main Commonwealth identification witnesses against Petitioner, of what Petitioner was allegedly wearing at the time as discussed at length above at pages 15 to 21 of this *certiorari* petition. Accordingly, if Petitioner was dressed at the time of the shooting as described by Loper and Collier, the two main Commonwealth witnesses against him, then he definitely was not the gunman as described by Edwards, Williams, and Collier (in her initial statement to police prior to her recantation), whom they claimed was wearing a black hoodie, black t-shirt, ski mask, and dark pants.

In evaluating the prejudice from counsel's failure to present the important testimony of Edwards and Williams, the reviewing courts failed to evaluate *just how* their testimony, which was not presented at Petitioner's trial, would have affected the credibility of the testimony from Smith, Loper, and Collier. This was especially important in Petitioner's case given that each of the Commonwealth's main witnesses against Petitioner had recanted earlier statements denying knowledge of

who shot Mr. Williams and agreed to testify against Petitioner as part of guilty plea deals in their own outstanding cases. Their credibility was thus very much in dispute.

With respect to the state PCRA court's decision, for instance, the PCRA judge claimed that he could "not uncover" the important statements and information from Edwards and Williams, which have been discussed above and were ***readily available*** to the PCRA judge as part of the ***official record*** of the case, to which the judge had direct access. The PCRA judge, however, disingenuously relied upon his own deliberate refusal to evaluate the evidence from Edwards and Williams to support his baseless and unwarranted conclusion that Petitioner had somehow failed to show how he had been prejudiced from trial counsel's failure to produce the witnesses. ***See*** PCRA Ct. Op., pg. 7 (Appendix E, App. 34). The PCRA court's opinion, however, as discussed above, was based mainly on Petitioner's failure to establish that Edwards and Williams were ***willing*** to testify for him, which Petitioner contends is not even a requirement of ***Strickland.***

As the state PCRA court had done, the Pennsylvania Superior Court likewise denied that Petitioner had established prejudice without conducting any meaningful evaluation of the effect of the proposed testimony from Edwards and Williams on the Commonwealth's disputed evidence from Loper, Collier, and Smith. ***See*** Super. Ct. Op. at 6-7 (Appendix D, App. 21-22). In dismissing Petitioner's important claim, the Pennsylvania Superior Court applied the same "unduly narrow scope of ...

prejudice analysis" that the federal district court condemned recently in ***Shubert v. Smith***:

> It is well-settled that: "in considering whether a petitioner suffered prejudice, '[t]he effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial: "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" ... (quoting ***Strickland***, 466 U.S. at 696, 104 S. Ct. 2052)." ***Rolan v. Vaughn***, 445 F.3d 671, 682 (3d Cir. 2006). ***Grant v. Lockett,*** 709 F.3d 224, 235 (3d Cir. 2013). ***Here, the state courts' prejudice analysis did not fully take into consideration the totality of the evidence, as required by federal law. Nor did that analysis fully consider the degree to which the verdict was weakly supported by the evidence. Finally, because of the unduly narrow scope of this prejudice analysis, the state courts' decisions did not completely account for the numerous ways in which this evidence, which was not presented at Schubert's trial due to his counsel's oversight, fundamentally altered the quantum of proof in this case.***

Id., 2018 U.S. Dist. LEXIS 192665, at 45-46 (M.D. Pa. 2018) (emphasis added).

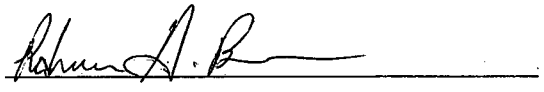
The federal district and circuit courts, as discussed above, merely ***rubberstamped*** the state courts' unreasonable application of ***Strickland's*** prejudice standard in Petitioner's case. As a result, Petitioner is today sitting in prison serving a life sentence for a murder he did not commit, convicted based largely upon the testimony of the very individual, Christopher Loper, the evidence very strongly suggests actually committed the homicide.

For the above reasons, Petitioner requests that this Honorable Court grant *certiorari* to clarify and emphasize the importance of applying the ***Strickland*** prejudice analysis properly.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 7-22-2019