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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

DAMON JONES,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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Dated: October 21, 2019

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QUESTIONS PRESENTED

1. In *Jackson v. Virginia*, 443 U.S. 307, 309 (1979), this Court held "[t]he Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt," citing *In re Winship*; In *United States v. Gaudin*, 515 U.S. 506, 510 (1995), this Court held that the Sixth Amendment "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"; In *Russell v. United States*, 369 U.S. 749 (1962), this Court requires charging documents to contain the essential elements that constitute the crime charged; In *Sandstrom v. Montana*, 442 U.S. 510 (1979), this Court prohibited jury instructions that relieves the Government of its burden of proof enunciated in *In re Winship*. The question presented is:

Are the Sixth and Fourteenth Amendments violated where in a case tried and presented under the transferred intent theory the jury is not instructed on the State's burden of proof regarding the requisite facts against alleged intended victim but is directed and guided to decide immaterial issues, i.e., the accused's alleged specific intent and malice against the bystanders instead, where the jury is provided an evidentiary presumption that has no constitutional underpinnings in the case, where the accused's convictions is upheld upon contradictory theories, i.e., a legally permissible and impermissible theory?

2. In *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000), this Court left unanswered the meaning of "constitutional," that have led to differing interpretations among the circuits. The circuits remain split on this issue. The question presented is:

Does the substituted word "constitutional" requires a more stringent standard than the former certificate for probable cause? Does petitioner's claims: the various jury instructions challenges, the evidence sufficiency challenge, the charging documents challenge merits a COA?

LIST OF PARTIES

The petitioner is Damon Jones, a prisoner at the State Correctional Institution at Phoenix, in Collegeville, Pennsylvania. The respondents is the Commonwealth of Pennsylvania, Jeffrey Beard former Commissioner of the Pennsylvania Department of Corrections, Louis Folino the Superintendent of the State Correctional Institution at Greene, and Franklin J. Tennis the Superintendent of the State Correctional Institution at Rockview.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Damon Jones, respectfully prays that a writ of certiorari issue to review the October 12, 2017 Magistrate Judge's Report and Recommendation ("R&R") denying him habeas corpus relief and a certificate of appealability ("COA"), the June 13, 2018 District Court's Order adopting and approving the R&R in its entirety and denying a COA, the April 1, 2019 Third Circuit Order denying a COA, and the judgment of the Pennsylvania Supreme Court entered on May 21, 1992 affirming his convictions of first degree murder, aggravated assault, and criminal conspiracy, etc., and the December 29, 2006 Pennsylvania Supreme Court's judgment denying petitioner post conviction relief, affirming his convictions.

OPINIONS BELOW

On October 12, 2017, the Magistrate Judge recommended denying petitioner a federal habeas corpus writ. R&R (Oct. 12, 2017)(A-4). And, recommended denying a COA. On June 13, 2018, the District Court approved and adopted the R&R, and also denied a COA. Order (June 13, 2018)(A-5).

On April 1, 2019, the Third Circuit denied petitioner a COA. Order (Apr. 1, 2019)(A-1). And, on July 24, 2019 denied his petition for rehearing. Order (July 24, 2019)(A-2).

On May 21, 1992, the Pennsylvania Supreme Court issued an opinion affirming petitioner's convictions on all charges. Commonwealth v. Jones, 610 A.2d 931 (Pa. 1992)(A-16). And, denied reargument on August 13, 1992. On December 29, 2006, the Pennsylvania Supreme Court issued an opinion denying petitioner post conviction collateral relief. Commonwealth v. Jones, 912 A.2d 268 (Pa. 2006) (A-17).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review denials

of an application for a COA by a circuit judge or panel. See Hohn v. United States, 524 U.S. 236, 238, 252 (1998)(overruling House v. Mayo, 324 U.S. 42 (1945)(per curiam) that the Supreme Court does not have jurisdiction, via certiorari, to review denials of applications for COA). The final judgment of the Third Circuit was entered on April 1, 2019. And, on July 24, 2019 the Third Circuit denied rehearing. This petition seeks review of the denial of Jones' COA.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury".

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Under section 2254(d) of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), it states:

(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 that 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.

28 U.S.C. § 2254(d)(West Supp. 1998).

INTRODUCTION

This case cries out for this Court's intervention. The petitioner have been in custody for nearly four decades, convicted of two counts of first degree

murder, six counts of aggravated assault, one count of criminal conspiracy, and one count of possession of instrument of crime, involving the shooting death of two bystanders and nonfatal gunshot injuries to six other bystanders, where he have not had a trial in accordance with the Federal Constitution: "the right to demand that a jury find him guilty of all the elements of the crime with which he is charged," United States v. Gaudin, 515 U.S. 506, 510-11 (1995); Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993)(recognizing an accused's Sixth and Fourteenth Amendments right to a jury trial on the elements of the crime); Duncan v. Louisiana, 391 U.S. 145, 149 (1968)(holding that the right to jury trial applies to state criminal proceedings).

In this case, petitioner's Sixth and Fourteenth Amendments rights to a jury trial determination of his guilt or innocence, on the key facts necessary to constitute first degree murder, aggravated assault, and criminal conspiracy against eight innocent bystanders, in the State's case tried and presented under the theory of transferred intent--was denied--because of the failure of the trial court to submit those facts to the jury. See In re Winship, 397 U.S. 358, 363, 364 (1970)(the State is barred from depriving an accused of his liberty without due process of law, "'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'").

At petitioner's trial, the State presented its case to the jury during its opening statements as follows:

Ladies and gentlemen, to understand the circumstances or the way of life in this particular case you have to go back to the evening of August 25th. On that evening a person by the name of Ernest Wright, also known as fat Ernie, a drug dealer in the Richard Allen Project, money was taken from him by one Sylvester Williams.

The Commonwealth will show that as the result of these incident three (3) defendants came back to even the score.

We will show through witnesses that the three (3) men that came back to even the score came around with a .38 special revolver, a .22 caliber revolver, and a .380 automatic....

Witness will testify both individually and collectively that

Damon Jones was the leader of this party, Damon Jones commanded the other two ...
And you will hear from Sylvester Williams exactly why they came after him, ...

N.T. 3-18-83 at 116-17, 118.

And, at the end of its case, the State argued to the jury as follows:

You might be tempted to say, ladies and gentlemen, even if we believe Sylvester Williams and if we believe all of the Commonwealth's witnesses, they didn't show us that they specifically intended to kill Maurice Jones or Reginald Hines. We don't have to. If you find under the evidence that they were attempting to kill Sylvester Williams, there is a concept in the law, and the Court will tell you, about transferred intent. They intended to kill somebody. They killed two people, they wounded six others.

N.T. 5-17-83 at 5854.

Yet, the jury in this case was never told about the State's burden of proof regarding the transferred intent element: the criminal intent or malice against Sylvester Williams, or motive issue alleged for the shootings. See Osborne v. Ohio, 495 U.S. 103, 147 (1990)(Justice Brennan, with whom Justice Marshall and Justice Stevens joins, dissenting)(recognizing as a matter of federal due process, "a judge's failure to instruct the jury on every element of an offense violates a "'bedrock, 'axiomatic and elementary,' [constitutional] principle'" "[W]here the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, ... it is necessary to take note of it on our own motion." (citations omitted)).

Under Pennsylvania statutory law, in cases like murder in the first degree, aggravated assault, and criminal conspiracy, the intent element of such offenses is barred against bystanders, absent proof of that element against someone other than the bystander. See 18 Pa.C.S. § 303(b). Section 303(b) in relevant part provides:

When intentionally or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the intent or the

contemplation of the actor unless:

(1) the actual result differs from that designed or contemplated as the case may be, only in respect that a different person ... is injured or affected ...

See Commonwealth v. Fowlin, 676 A.2d 665, 668 (Pa.Super. 1996)(recognizing that section 303(b), is a codification of the common-law transferred intent doctrine, and "was taken verbatim from the Model Penal Code, § 2.03."); Commonwealth v. Gaynor, 648 A.2d 295, 298 (Pa. 1994)(same); cf Model Penal Code § 2.03(2)(1), and see footnote 14 at 260 (1985) ("the actor's lack of purpose to kill the bystander does not bar liability for murder ... so long as there was an intention to kill the original target"); 22 C.J.S. Criminal Law § 43 (1989) ("Under the 'transferred intent' doctrine, defendant's criminal intent towards his intended victim controls his culpability for any unintended result.").

Under Pennsylvania caselaw, the issue of "intent" against the intended victim and "motive" is essential ingredients in a case tried under the theory of transferred intent. See Commonwealth v. Zimmerman, 504 A.2d 1329, 1335 n.4 (Pa.Super. 1986)(recognizing "motive" as "relevant to the question of transferred intent."); also see Commonwealth v. DePhillips, 6 Northumb.L.J. 107, 109 (1922) (recognizing in a case tried under theory of transferred intent that "[i]t follows as a necessary corollary ... that the guilt of the defendant in the killing of the [bystander] is to be tested by the circumstances under which he intended to kill [the intended victim]. Mere proof of the killing is not sufficient; the motive, intent and purpose which animated the defendant in seeking the life of [the intended victim] are material elements"); Commonwealth v. Mosley, 585 A.2d 1057, 1060-61 (Pa.Super. 1991)(recognizing that the criminal intent element against the intended victim is "necessary to establish any ... charges, ranging from murder to recklessly endangering another person, including assault").

Also, under Pennsylvania caselaw, in a prosecution's case in general, the State is required to prove the issue of "motive," like any other element of the offense, if the State elects to establish such issue as part of its case. See Commonwealth v. Shain, 426 A.2d 589, 591 (Pa. 1981); cf. LaFave, Criminal Law § 1.8 (4th ed 2003)(If a party pleads the existence of a fact not yet in issue, that party bears the burden of production on that issue. And, if the party fails to sustain its burden of production, that party is subject to an adverse ruling by the court); and McCormick, Evidence §§ 336-337 (6th ed. 2006) (same).

It is well settled federal law, that a State may define elements for an offense, and what combination of factors on how those elements must be proven, within broad limits, but once it has done so, due process requires the State to prove all elements of the offense charged beyond a reasonable doubt, the jury to be instructed on those elements, and find those elements beyond a reasonable doubt before it could convict. See McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986); In re Winship, supra, 397 U.S. at 364; United States v. Gaudin, supra, 515 U.S. at 509-11; Sullivan v. Louisiana, supra, 508 U.S. at 277-78; also see Patterson v. New York, 432 U.S. 197, 210 (1977); Victor v. Nebraska, 511 U.S. 1, 5 (1994); Sandstrom v. Montana, 442 U.S. 510, 520-22 (1979); Carella v. California, 491 U.S. 263, 265 (1989)(per curiam).

In this case, the miscarriage of justice or breakdown in the administration of justice at petitioner's trial is very conspicuous. The trial court had not only failed to submit to the jury the facts necessary to constitute the crime charges, i.e., the criminal intent and malice against the alleged intended victim Williams (see A-15), as was required by section 303(b) of the Pennsylvania Crimes Code, and submit to the jury the alleged motive issue for the shootings, as argued by the State in its opening statements. The trial court had instead

guided and directed the jury to convict based on whether petitioner possessed a separate and individual specific intent and malice against each of the eight innocent bystanders of the shootings, instead of against the State's alleged intended victim Williams, for his alleged robbery of a person by the name of Ernest Wright, the day before the shootings. See A-15 at 5861-62, 5980-81, 6001-05, 6008-12, 6020-21, 6022-25, 6027-29, 6032.

On these jury instructions, the petitioner argued and believes that the State was improperly relieved of its burden of proof enunciated in Winship. See, e.g., Cool v. United States, 409 U.S. 100, 104 (1972)(hold any jury instructions that "reduce the level of proof necessary for the Government to carry its burden" "is plainly inconsistent with the constitutionally rooted presumption of innocence."); also see Waddington v. Sarausad, 555 U.S. 179, 190-91 (2009)(When a jury instruction relieves the government of its burden of proving every element beyond a reasonable doubt, due process is violated); Sanstrom v. Montana, *supra*, 442 U.S. at 521 (same).

In this case, the trial court even allowed the jury to infer the specific intent to kill and malice elements required for first degree murder based solely upon fatal gunshot injuries the two deceased bystanders Reginald Hines and Maurice Jones had suffered to their vital body organs from a "deadly weapon,"¹ see A-15 at 6020-21, 6027-29, where there was absolutely no evidence that was presented to the jury to justify such inference (supra., N.T. 5854). See Francis

¹ In recognizing the constitutional problem regarding the jury instructions in question, i.e., that it "lacked any rational underpinning in [petitioner's] case," Justice Saylor concurring for different reasons, had elected to reject petitioner's argument because of the State's improper closing remarks and the trial court's erroneous final instructions to the jury that allowed for guilty verdicts on either a "direct [or] transferred intent theor[y]," which ignored the State's opening statements to the jury on the theory of transferred intent and the state court's majority position whom recognized that the State argued transferred intent "in the instant matter." See A-17, Commonwealth v. Jones, 912 A.2d at 279, 298. Here, petitioner argued that this position by Justice

v. Franklin, 471 U.S. 307, 314-15 (1985)(citing Ulster County Court v. Allen, 422 U.S. 140, 157-63 (1979))("A permissive inference [instruction] violates the Due Process Clause ... if the conclusion is not one that reason and common sense justify in light of the proven facts before the jury.").

Yet, for decades this petitioner have been seeking a fair, full and proper hearing on these specific fundamental federal constitutional problems in his trial jury instructions (see A-12 at 59, 68-72, 91-106, 106-114 & nn. 43, 47-50, 57-65, 66-69; A-13 at 13-20, 49-51, 58-60, 60-62 & nn. 16, 63-69, 76-77; A-14 at 58-61, 61-64 & nn. 77-78; also see A-7 at 1-7, 7-11, 11-14; A-8 at 1-4, 4, 4-5; A-9 at 3-9, 9-15, 15-17, 17-22; A-10 at 5-8, 8-9, 9-10, 10-13), that calls into question the validity of the guilty verdicts in his case.

Saylor, violates his due process rights in itself, and is in direct opposition to this Court's well settled rule that convictions cannot rest upon alternative theories where it is impossible to say which theory the jury convicted on (see A-9 at 9 n. 1). See Sandstrom, supra, 422 U.S. at 526 ("It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside."); see also Yates v. United States, 357 U.S. 298, 312 (1957), overruled on other grounds, Burks v. United States, 437 U.S. 1 (1978) ("The proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected"); Stromberg v. California, 283 U.S. 359, 368 (1931) ("If any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld"); Griffin v. United States, 502 U.S. 46, 59 (1991) (since "jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law," a conviction must be overturned if one of the theories that was submitted to the jury was legally erroneous).

Yet, in this case, the magistrate judge had erroneously followed Justice Saylor's constitutionally problematic position, and ignored this Court's well settled rule on the issue of upholding convictions upon alternative theories, concluding in ~~its~~ its R&R, "overwhelming evidence supports Petitioner's conviction ... First, since he and his cohort rained a fusillade of bullets into a crowded courtyard and struck the two decedents in a vital part of their bodies, it was eminently reasonable for the jury to infer that Petitioner had the specific intent to kill even unfortunate bystanders. Likewise, it was reasonable for the state court to affirm the jury's verdict. Additionally, there was sufficient evidence under the prosecution's alternative transferred intent theory. There was evidence presented from which the jury could infer that Petitioner and his cohorts intended to kill Sylvester Williams in retaliation for taking money from Ernest Wright." See A-4, at 20. Here, a COA is warranted.

In considering petitioner's federal constitutional challenges relating to the jury instructions, in which A-15 provided clear and convincing evidence for the bases of his jury instructions claims, the magistrate judge had simply rubber-stamped the state court's decision, by agreeing with most of the State's contentions, on these issues (see A-4 at 11-13, 21-22 & nn. 11-12), including on petitioner's federal constitutional challenges to the sufficiency of the evidence to sustain the jury's verdicts of guilty (see A-4 at 18-21 & n. 18), to the criminal informations failure to set forth all of the necessary facts to constitute the crime charges (see A-4 at 16-18 & 16), etc., that each equally, and likewise, warrants habeas corpus relief or at least a COA. None of these issues are "foreclosed" by this Court's precedents, and by implication of such precedents, are substantial constitutional issues.

For example, on petitioner's challenge to the deficiency in the jury instructions on transferred intent (see A-15 at 6005-06), where the trial court had completely failed to tell the jury in clear and plain language that transferred intent applied to the State's case; had completely failed to tell the jury about the State's burden of proof in relation to transferred intent; had completely failed to guide the jury on how to make application of the legal principles of transferred intent to the evidence in the case; had completely failed to instruct the jury on the requisite mens rea and malice elements against the alleged intended victim Sylvester Williams, and on the motive issue alleged by the State during its opening statements to the jury, but had instead, erroneously guided and directed the jury to determine whether the petitioner had possessed the mens rea and malice against each separate innocent bystander, as opposed to against the alleged intended victim Williams, which relieved the State of its burden of proving beyond a reasonable doubt the mens rea and malice against the alleged intended victim Williams.

All these central factual issues regarding the instant jury instructions challenge were fairly presented to the state court (see Amended PCRA Petition, at 4, 172, 184-86 & n. 66, 188-89; Supplement PCRA Petition, at 2-3; Principal Brief of Appellant, at 5-14, 80-81, 84, 91-92 & n. 49; also see first appeal Addendum Brief for Appellant, at 121-27; Application for Reargument, at 38-44),² but the state court ignored those key issues raised to petitioner's instant jury instructions challenge, and had only addressed one aspect of the challenged jury charge, i.e., the jurors being left in a quandary as to whether or not transferred intent applied to the State's case.

See A-16, Commonwealth v. Jones, 610 A.2d at 948 n. 3 (the state court simply finding that there was "no deficiency" in "the court's charge on transferred intent" that "informed the jury that the principle of transferred intent 'might be applicable to the case,'" without addressing the key issues raised to the challenged charge as to whether it was constitutional error to not tell the jury about the State's burden of proof in relation to transferred intent, or whether it was constitutional error to not guide the jury on how to make application of the legal principles of transferred intent to the evidence in the case, or whether it was constitutional error to not instruct the jury on the requisite mens rea and malice elements against the alleged intended victim Sylvester Williams, and on the motive issue alleged by the State during its opening statements to the jury, or whether it was constitutional error to guide and direct the jury to determine whether the petitioner had possessed the mens rea and malice against each separate innocent bystander instead of against the

² In July 2018, these state court filings were handed over to Pennsylvania correctional officers by the petitioner, for the transition from one state facility to another, but these important filings were lost by them, preventing petitioner from attaching such filings to this petition. However, these filings were referred to in petitioner's initial habeas petition (A-12) to show proper exhaustion of each claim.

alleged intended victim Williams as Pennsylvania law § 303(b) required, and whether on these issues the State was relieved of its burden of proof enunciated in In re Winship; whether this petitioner's Sixth and Fourteenth Amendment rights were violated as a result of these issues).

Also see A-17, Commonwealth v. Jones, 912 A.2d at 288 (the state court simply finding that "[t]he trial court's instruction on the doctrine of transferred intent" "were proper," again without addressing the key issues raised to the challenged charge as to whether it was constitutional error to not tell the jury about the State's burden of proof in relation to transferred intent, or whether it was constitutional error to not guide the jury on how to make application of the legal principles of transferred intent to the evidence in the case, or whether it was constitutional error to not instruct the jury on the requisite mens rea and malice elements against the alleged intended victim Sylvester Williams, and on the motive issue alleged by the State during its opening statements to the jury, or whether it was constitutional error to guide and direct the jury to determine whether the petitioner had possessed the mens rea and malice against each separate innocent bystander instead of against the alleged intended victim Williams as Pennsylvania law § 303(b) required, and whether on these issues the State was relieved of its burden of proof enunciated in In re Winship; whether this petitioner's Sixth and Fourteenth Amendment rights were violated as a result of these issues).

Generally, a federal court owe no deference to a state court's decision where the state court did not address key aspects of a petitioner's contentions. See, e.g., Purkett v. Elem, 514 U.S. 765, 775-78 (1995)(Steven, J., dissenting) (no deference due state court conclusions because governing rule requires three separate determinations and state courts only made first of three); Wilkerson v. Texas, 493 U.S. 924, 925 (1989)(mem.)(Marshall, J., dissenting from denial

certiorari)(direct review case)(state court's factual findings do not discuss prosecutor's admission that race played part in peremptory challenges); also see Armstead v. Scott, 37 F.3d 202, 208-09 (5th Cir. 1994), cert. den., 514 U.S. 1071 (1995)(state court's factual findings did not address one of petitioner's central contentions); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994)(state court's ruling on ineffective assistance of counsel did not include finding on central question of historical fact); Dickerson v. Alabama, 667 F.2d 1364, 1368 (11th Cir.), cert. den., 459 U.S. 878 (1982)(state appellate court's omission of critical factual issues renders its decision "'not fairly supported by the record'"); Schmidt v. Hewitt, 573 F.2d 794, 801 (3d Cir. 1978)(facts suggesting that confessions secured by coercion were "simply ignored" by factfinders).

In this case, the magistrate judge had likewise ignored the key issues raised to petitioner's instant jury instructions challenge, i.e., whether it was constitutional error to not tell the jurors about the State's burden of proof in relation to transferred intent, or whether it was constitutional error to not guide the jury on how to make application of the legal principles of transferred intent to the evidence in the case, or whether it was constitutional error to not instruct the jury on the requisite mens rea and malice elements against the alleged intended victim Sylvester Williams, and on the motive issue alleged by the State during its opening statements to the jury, or whether it was constitutional error to guide and direct the jury to determine whether petitioner had possessed the mens rea and malice against each separate innocent bystander instead of against the alleged intended victim Williams as Pennsylvania law § 303(b) required, and whether on these issues the State was relieved of its burden of proof enunciated in In re Winship; whether this petitioner's Sixth and Fourteenth Amendment rights were violated as a result of these issues.

Here, if "reasonable jurists would find [the magistrate judge's] assessment of [the petitioner's instant] constitutional claim[] debatable or wrong," a COA was warranted in this case because "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." Slack v. McDaniel, 529 U.S. 473, 483-84 (2000)(quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)). Thus, it was error for the lower courts to deny a COA in this case, because petitioner contends it was "wrong" for the magistrate judge to defer to the state court's decision that had ignored the key contentions argued by petitioner regarding the instant jury instruction challenge.

Next, on petitioner's challenge under Francis and Allen, relating to the jury instructions in this case that allowed them to infer -- contrary to the facts proved at trial (supra, N.T. at 5854) and section 303(b) of Pennsylvania statutory law -- the essential elements of specific intent to kill and malice for first degree murder based solely upon fatal gunshot injuries the two deceased innocent bystanders Reginald Hines and Maurice Jones had suffered to their vital body organs from a "deadly weapon."

The magistrate judge had erroneously concluded that this error "simply lacks merit," without even considering "the state court's resolution of this assertion of error" (see A-4 at 11 & n. 11), in order to decide whether such decision "was contrary to" or was "an unreasonable application of" Francis and Allen, and/or in order to decide whether such decision was "an unreasonable determination of the facts," as required by 28 U.S.C. § 2254(d)(1)-(d)(2). See Williams v. Taylor, 529 U.S. 362, 405 (2000)(§ 2254(d)(1) requires federal court to consider state court's decision to determine whether it was "contrary to" or "an unreasonable application of" United States Supreme Court's precedent); Miller-El v. Dretke, 545 U.S. 231, 266 (2005)(§ 2254(d)(2) requires federal

court to consider state court's decision to determine whether its account of the facts is reasonably supported by sufficient evidence); Miller-El v. Cockrell, 537 U.S. 322, 340-41 (2003)(same); and Yung v. Walker, 296 F.3d 129, 136 (2d Cir. 2002) ("The focus of § 2254(d)(2)" is "on whether the [state] court's factual findings are supported by sufficient evidence."); Beck v. Bowersox, 257 F.3d 900, 901 (8th Cir. 2001) (§ 2254(d)(2) "require[s] meaningful federal court review of the evidentiary record considered by the state courts").

In this case, the magistrate judge had denied petitioner "meaningful review," because it failed, and refused, to consider the state court's decision on the instant jury instructions in reaching its judgment. And, in compounding this error, i.e., sharp departure from section 2254(d) standard of review, the magistrate judge had made findings relating to the challenged jury instructions, concluding that "these instructions did not pertain to Williams at all" (id. at 12), that had directly or indirectly contradicted the state court's factfindings on the instructions (its interpretation of the charge), and rendered the state court's findings as being "an unreasonable determination of the facts." See Francis, *supra*, 471 U.S. at 316 ("state court 'is not the final authority on the interpretation which a jury could have given the instruction'" (quoting Sandstrom, *supra*, 442 U.S. at 516-17)).

In considering the instant challenged jury instructions, the state court had read the instructions as being a transferred intent charge pertaining to the State's alleged intended victim Sylvester Williams. See A-17, Commonwealth v. Jones, 912 A.2d at 278-80. Yet, a fair review of the instructions in question (A-15 at 2020-21, 2027-29), and review of the first degree murder instructions itself (id. at 6021-27), reveals that there is nothing mentioned in the whole charge that pertains to Williams; the trial court failed to submit the State's burden of proof on the requisite mens rea and malice elements against the alleged

intended victim Williams, as was required by section 303(b) of Pennsylvania law, but that, that the charge -- contrary to the dictates of section 303(b) of Pennsylvania law -- focused the jury's attention on deciding whether petitioner and his co-defendants had possessed the requisite mental state for the offenses against the two deceased innocent bystanders, Reginald Hines and Maurice Jones, separately.³

The magistrate judge's conclusions about the jury instructions in question as lacking merit, is very problematic, since the magistrate judge had never even made the required Francis or Allen analysis of the instructions as applied in this case, or addressed petitioner's argument about the "invalidity" of the challenged jury instructions "as applied to him." See Francis, *supra*, 471 U.S. at 314 (the court must "determine the nature of the presumption" involved); Allen, *supra*, 442 U.S. at 158 (if the instructions involves a permissive inference, the court must "examine[] the presumption on its face to determine the extent to which the basic and elemental facts coincide").

Petitioner believes that the magistrate judge's denial of habeas corpus relief in this case, regarding the instant challenged jury instructions, deserves review--a COA, since the magistrate judge had correctly identified part of the challenged jury instructions in question (see A-4 at 12 n. 12), and had correctly interpreted that portion of the instructions as not pertaining to the State's alleged intended victim "Williams," which was the crux of this petitioner's

³ This error by the trial court was done because of the defect in the charging papers (criminal informations), in setting forth the essential elements of the offenses against each separate bystander (see A-18), that left out the requisite facts of section 303(b) of Pennsylvania law regarding the offenses, i.e., the specific intent and malice elements against the alleged intended victim Sylvester Williams. In addressing petitioner's federal due process argument on this issue, the state court ignored this Court's precedents on the issue, and decided the issue under state law, representing the issue as a technical error. See A-17, Commonwealth v. Jones, 912 A.2d at 288-89; also see A-12 at 56-91 & nn. 40-56; A-13 at 44-54 & nn. 56-73.

argument (see A-12 at 58-70, 91, 92-97, 99-102; A-13 at 13-17, 49-51 & nn. 64-69), that the charge "did not pertain to Williams at all," but rather, had pertained to the two deceased innocent bystanders, Reginald Hines and Maurice Jones, which petitioner argued had effectively relieved the State of its burden of proving beyond a reasonable doubt the requisite mens rea and malice elements against the alleged intended victim Williams, as was required by Pennsylvania law § 303(b).

The magistrate judge's failure to decide whether the State was relieved of its burden of proof resulting from the use of the jury instructions in this case, deserves review. See Allen, *supra*, 442 U.S. at 156 ("the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt."); Francis, *supra*, 471 U.S. at 313 (due process "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.").

According to section 303(b) of Pennsylvania law, and the conditions of In re Winship, *supra*, the State in this case was required to prove beyond a reasonable doubt the specific intent and malice elements of first degree murder, including aggravated assault, against the alleged intended victim Sylvester Williams, in order for such elements to transfer to any unintended person, Hines and Jones included, to support convictions.

Based on Justice Saylor acknowledged, in its concurring opinion (A-17, Commonwealth v. Jones, 912 A.2d at 298), that the use of the challenged jury instruction in question (the evidentiary device) "lacked any rational underpinning in the case," and the magistrate judge's own findings that is

supported by the state record, which flatly contradicts the state court's findings on the claim, rendering it unreasonable. Petitioner believes habeas corpus relief in this case was justified. See Purkett v. Elem, 514 U.S. at 769 (state court factfindings "may be set aside ... if they are 'not fairly supported by the record'" (quoting superseded 28 U.S.C. § 2254(d)(8))); Townsend v. Sain, 372 U.S. 293, 316 (1963) ("This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights. Fiske v. Kansas, 274 U.S. 380, 385; Blackburn v. Alabama, 361 U.S. 199, 208-209. Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state court record. The duty of the federal district court on habeas is no less exacting." (some citations omitted)).

Petitioner contends that use of the evidentiary device in this case had served only to "undermine the factfinder's responsibility at trial," "to find the ultimate facts," i.e., the specific intent and malice elements against the alleged intended victim Sylvester Williams "beyond a reasonable doubt," violating his federal due process rights.⁴ In re Winship, *supra*; Francis v. Franklin, *supra*; Ulster County Court v. Allen, *supra*; Cool v. United States, *supra*; Sandstrom v. Montana, *supra*; Waddington v. Sarausad, *supra*.

Generally, there is no deference to a state court's factfindings, where a federal habeas court review of the state record finds that the state court's findings are not "fairly supported by the record." See, e.g., Demosthenes v.

⁴ This is so, given the fact that Williams' own sworn testimony at trial, raises serious doubts about the shootings being "apparently intended" for him. See A-16, Commonwealth v. Jones, 610 A.2d at 941 (addressing a separate issue, the Pennsylvania Supreme Court ignoring and misrepresenting key parts of Williams' own sworn testimony; had nonetheless found that "he testified that he did not know at whom the defendants were shooting ..."; which contradicts the State's opening statements to the jury that he will testify that the shooters "came after him"; and seriously raises doubts about the state court's findings on petitioner's challenge to the evidence sufficiency).

Baal, 495 U.S. 731, 735 (1990)(per curiam)(pre-AEDPA case)(petitioner may rebut presumption of correctness of state factfindings by establishing that state court's factfindings "are not 'fairly supported by the record'" (quoting superseded 28 U.S.C. § 2254(d)(8))); Miller-El v. Dretke, 545 U.S. at 266 (under § 2254(d)(2) review, if the state court's account of the facts is not sufficiently supported by the evidentiary record, it is unreasonable, and the petitioner is entitled to habeas relief); Moore v. Johnson, 194 F.3d 586, 602-04 (5th Cir. 1999)(even without holding evidentiary hearing, federal court can find that presumption of correction has been rebutted by critical evaluation of state court record; "deference embodied in the pre-AEDPA version of 2254(d) does not require that the federal court place blinders on its eyes before conducting a habeas corpus review of a state record"); United States ex rel. Ross v. Franzen, 668 F.2d 933, 939 (7th Cir. 1982)(no deference where record flatly contradicts state factfindings).

For the above reasons, petitioner believes that a COA is warranted in this case on the instant claim, because "reasonable jurists would find the [magistrate judge's] assessment of the constitutional claim[] debatable or wrong," in light of the magistrate judge's clear departure from the standard of review required by section 2254(d) for assessment of state prisoners' claims. See Loucher v. Thomas, 517 U.S. 314, 328 (1996)(court's precedents have not "authorized ad hoc departures from the Habeas Corpus Rules").

Next, on petitioner's challenge to the "'conspiratorial liability'" jury instructions that "permitted the jury to convict him of first-degree murder without a separate finding that he, rather than his co-conspirators, possessed a specific intent to kill," where he argued violated the conditions of In re Winship, supra. See A-17, Commonwealth v. Jones, 912 A.2d at 278-79, 280-81; also see A-12 at 91-92, 97-98, 102-05 & nn. 61, 64, 65; A-13 at 13-14, 17-18,

19-20; and A-15 at 5988-89, 6022-23 (charging the jury that, "the act of one is the act of all" "All of the parties to a conspiracy ... are responsible for each and every act of every other co-conspirator" "all of the defendants are accountable for the acts of the other, all of the defendants are guilty for each other's acts" "in order to find the defendant guilty of murder of the first degree you must first find that the defendant caused the death of another person ... or that the accomplice caused the death of another person. That is, you must find that the death of the victims in this case would not have occurred but for the defendant's or his accomplice's act or acts, and thereafter you must determine if the killing was intentional.").

On this jury instruction challenge, the state court had not addressed the key question regarding this claim, i.e., whether "jury was sufficiently aware of what was necessary in order to find Jones guilty of" first degree murder, or whether the jury was impermissibly allowed to convict this petitioner of first degree murder without a separate finding that he, rather than, his alleged accomplices or co-conspirators had possessed the specific intent to kill, and whether on these issues was the State relieved of its burden of proof enunciated in In re Winship, in violation of petitioner's Fourteenth Amendment due process rights.

Here, the state court had circumvented the issue, by addressing a claim different from the claim raised, i.e., whether "[t]he jury was sufficiently aware of what was necessary in order to find Jones guilty of criminal conspiracy" (see A-17, Commonwealth v. Jones, 912 A.2d at 281). See Townsend, supra, 372 U.S. at 313 (no deference when "merits of the factual dispute were not resolved in the state hearing"); Purkett v. Elem, 514 U.S. at 769 (Stevens, J., dissenting) (no deference due to state court conclusion if state court failed to make finding on determinative issue); Minnesota v. Dickerson, 508 U.S. 366,

383 (1993)(Rehnquist, C.J., dissenting)(direct review case)(because state court's findings were "imprecise and not directed expressly to the question" made dispositive by Court's new rule of law, Court should not defer to state court's findings); and Perillo v. Johnson, 79 F.3d 441, 446 & n. 6 (5th Cir. 1996)(state court factfindings on ineffective assistance did not address factual issue that was critical to assessment of counsel's possible conflict of interest); Williams v. Maggio, 730 F.2d 1048, 1050 (5th Cir. 1984)(per curiam)("state court did not address the sole issue presented to it by the habeas petitioner").

Under Pennsylvania law, first degree murder requires the State to prove beyond a reasonable doubt the specific intent to kill the person killed; that the principal, as well as, the accomplice or co-conspirator had, individually, possessed the specific intent to kill; proof of first degree murder "cannot depend upon proof of intent to kill only in the principal." See 18 Pa.C.S. § 2502(a); Commonwealth v. Huffman, 638 A.2d 961, 962-63, 964 (Pa. 1994)(citing Commonwealth v. Bachert, 453 A.2d 931, 935 (Pa. 1982)); and Smith v. Horn, 120 F.3d 400, 410 (3d Cir. 1997); Laird v. Horn, 414 F.3d 419, 425 (3d Cir. 2005); Bennett v. Superintendent Graterford SCI, 2018 WL 1463505 *1, --- F.3d --- (3d Cir. March 26, 2018). Criminal conspiracy is an entirely distinct crime from that of first degree murder, and requires different elemental facts from first degree murder to sustain such offense. See 18 Pa.C.S. § 903 (requiring the State to prove that the defendant acted with intent to promote or facilitate the commission of a crime, agreed with another person or persons to engage in a crime or attempt or solicit such person or persons to commit such crime; or agreed to aid such person or persons in planning the crime or attempt or solicit to commit such crime).

In this case, however, the magistrate judge had erroneously deferred to the state court decision of petitioner's claim, which was never addressed in

the state court (see A-4 at 12-13), thereby denying petitioner meaningful federal habeas corpus review of his claim. Here, justifying the issuance of a COA, because "reasonable jurists would find the [magistrate judge's] assessment of the constitutional claim[] debatable or wrong," in light of the magistrate judge's deference to the state court's decision that does not address the merits of petitioner's instant claim. See A-17, Commonwealth v. Jones, 912 A.2d at 296-97 & n. 2 (Justice Saylor, in its concurring opinion, recognizing that its associate justices of the court had "circumvent[ed]" this petitioner's federal due process claim, and acknowledged that it "remains to be litigated in the federal courts under due process theory."); cf Bennett v. Superintendent Graterford SCI, supra, 2018 WL 1463505 ** 7, 8-11 & n. 14 (same; approving the district court's grant of a COA regarding Bennett's challenge to the jury instructions, that is similar to the claim raised by this petitioner; held that the AEDPA's presumption did not apply to Bennett's claim, citing this petitioner's state case where Justice Saylor reiterated its concurring opinion in Bennett that was first said in the instant petitioner's case).

Next, on petitioner's challenge to the sufficiency of the evidence to sustain the jury's verdicts of guilty (see A-4 at 18-21 & n. 18), the magistrate judge had simply shirk its duty to independently review the evidentiary record to determine whether petitioner's convictions violates federal constitutional law. See Jackson v. Virginia, 443 U.S. 307, 318, 323 (1979) ("A federal court has a duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in state court"; although "[a] judgment by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts, ... Congress ... has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured

in accord with federal constitutional law").

And instead, had deferred to the state court's findings (A-4 at 18-21 & n. 18), which the evidentiary record not only flatly contradicts (see supra, note 4), but the jury instructions (A-15) itself raises serious doubts about such findings, because the requisite facts (see supra, note 3), found by the state court, were not even submitted to the jury to decide beyond a reasonable doubt. See Cabana v. Bullock, 474 U.S. 376, 384-85 (1986) ("A defendant charged with a serious crime has the right to have a jury determine his guilt or innocence, ... and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, ... Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime." (citations omitted)).

In this case, the state court made findings as to motive for the shootings (see A-16, Commonwealth v. Jones, 610 A.2d at 935) that was not submitted to the jury to decide beyond a reasonable doubt. And, it made findings as to the requisite specific intent and malice being "apparently intended" against the alleged intended victim Sylvester Williams (id., 610 A.2d at 935, 938) that was likewise not submitted to the jury to decide beyond a reasonable doubt. Yet, the magistrate judge's deference to the state court's findings, made similar findings (A-4 at 18-21 & n. 18) as if the jury was properly instructed to decide such facts in accordance with the requirements of In re Winship, supra, when no charge was given. No reasonable jurist could conclude that such charge was given to the jury in this case, and that the jury was directed and guided to decide such facts beyond a reasonable doubt. Thus, the deference to the state court's findings in this case was clearly erroneous.

In this case, the magistrate judge had even deferred to the State's argument, supported by Justice Saylor's concurring opinion, that the jury could have either found petitioner guilty on a direct or transferred intent theory of criminal liability that raises serious constitutional problems (see supra, note 1). For example, on the direct theory of criminal liability -- application of Pennsylvania's first degree murder statute (18 Pa.C.S. § 2502(a)) against unintentional victims, i.e., bystanders -- is legally impermissible under Pennsylvania law (18 Pa.C.S. § 303(b)) absent proof of the required intent against someone other than the unintended person. Thus, upholding petitioner's convictions based upon a direct theory of criminal liability is constitutional error under federal law. Sandstrom v. Montana, supra; Yates v. United States, supra; Stromberg v. California, supra; Griffin v. United States, supra.

And, on the transferred intent theory of criminal liability, although legally permissible under section 303(b) of Pennsylvania law, the trial court had failed to tell the jury about the State's burden of proof as to this element of the case, i.e., instruct the jury on the requisite mens rea and malice against the alleged intended victim Sylvester Williams. And, had instead, directed and guided the jury to determine the petitioner's guilt or innocence based upon the legally impermissible direct theory of criminal liability that deprived this petitioner of due process of law under federal law. The magistrate judge's assessment of the instant claim was clear error, as it upheld the convictions in this case that is an affront to this Court's precedents, that is, mentioned above in this petition. These errors by the district court justifies a COA, this Court's intervention to correct a miscarriage of justice.

Had the jury been properly instructed on the State's burden of proof as to the transferred intent element: the requisite mens rea and malice against the alleged intended victim Sylvester Williams, no rational trier of fact could

have found beyond a reasonable doubt those essential elements of the crime to support the first degree murder and aggravated assault convictions. This is so, because every one of the prosecution's eyewitnesses, including Sylvester Williams, had all testified to not knowing at whom the alleged shooters were shooting. See A-12 at 131-32. The state court even acknowledged part of this evidence, see A-16, Commonwealth v. Jones, 610 A.2d at 941, but ignored it, as did the magistrate judge, in assessing the sufficiency of the evidence issue, as it merely concluded that "[t]he Commonwealth produced testimony from at least six eyewitnesses, including Williams, who saw [petitioner] commit the crime." Id., 610 A.2d at 938; also see A-4 at 19-20.

Here, the state court had engaged in surmise, conjecture and speculation, not proof beyond a reasonable doubt, that "the crime" was first degree murder, and nothing else, that was "apparently intended" for Williams, based on its own conclusions, and not that of the jury in this case. See Coleman v. Johnson, 566 U.S. 650, 651 (2012)(per curiam)(this Court held, "it is the responsibility of the jury -- not the court -- to decide what conclusions should be drawn from evidence admitted at trial."). In this case, no deference should have been given either to the jury or the state court's findings, where in this case there was no jury determination of these facts necessary to constitute the crime charged, because the trial court had failed to instruct the jury on these facts. See A-15.

This Court's intervention is urged in light of the injustice in this case. There was no evidence presented at trial by the State to even connect the defendants with Ernest Wright's alleged drug activities, whom Williams allegedly robbed, to support this issue as being the motive for the shootings, even though the state court -- without proof beyond a reasonable doubt -- had concluded that this petitioner's "convictions arose from a drug-related massacre." Id.,

610 A.2d at 935. Williams own sworn testimony negates this issue as he admitted that he was not being shot at. See A-12 at 131-32. On these issues, however, this petitioner was entitled to a trial by jury, as federal law required such issues to be proven beyond a reasonable doubt, to the jury's satisfaction. United States v. Gaudin, supra; Sullivan v. Louisiana, supra; Duncan v. Louisiana, supra; Cabana v. Bullock, supra; In re Winship, supra. But, the state court's decision ignores this legal point. This Court's intervention is called for in this case.

Lastly, on petitioner's challenge to the criminal informations (see A-18) failure to set forth all of the necessary facts to constitute the crime charges, the magistrate judge's assessment of this claim was simply erroneous, because it deferred to the state court's decision that was based on state law (see supra, note 3), and not based on established precedent by this Court. See Schlup v. Delo, 513 U.S. 298, 333 (1995)(O'Connor, J., concurring) ("It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law," (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990))); Thornburg v. Gingles, 478 U.S. 30, 79 (1986)(Civil "Rule 52(a) does not inhibit an appellate court's power to correct ... a finding of fact ... predicated on a misunderstanding of the governing law"); Rogers v. Richmond, 365 U.S. 534, 547 (1961) ("Historical facts found in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions if and merely because a correct standard is later applied to them"); Minnesota v. Dickerson, supra, 508 U.S. at 383 (Rehnquist, C.J., dissenting) (because state court made findings pursuant to "Fourth Amendment analysis which differs significantly from that now adopted by this Court," findings deserve no deference).

Under Hamling v. United States, 418 U.S. 87, 117-19 (1974); Russell v.

United States, 82 S.Ct. 1038, 1046-47 (1982); Jones v. United States, 119 S.Ct. 1215, 1219, 1230 (1999); Amendarex-Torres v. United States, 118 S.Ct. 1219, 1223 (1998), this Court have consistently required the charging documents to set forth all elements that constitute the crime charged, to allowed the accused to prepare for trial and plead double jeopardy to future prosecutions for the same offense, and to prevent surprise to the defense ability to defend at trial. Yet, the instant case at bar, was the product of these abuses, as the State was permitted to switch at mid-trial between two alternative theories of criminal liability that were inconsistent with each other, in order to deprive this petitioner of a defense. A defense regarding the failure of the evidence to prove one theory or the other, in violation of the petitioner's rights to due process.

This Court is called upon to correct a great injustice. This case provides an appropriate vehicle to address the important questions presented for review.

STATEMENT OF THE CASE

On May 19, 1983, the petitioner and his co-defendants, Tsaiyah Givens and Portie Robertson, were convicted of two counts of first degree murder, six counts of aggravated assault, one of criminal conspiracy, and one count of possession of an instrument of crime, regarding the shooting death of Reginald Hines and Maurice Jones, and nonfatal gunshot injuries to Gregory Taylor, Vaughn Carter, Barry Williams, Ronald Otto Green, Nassia Ford and Andrew Gilmer. After a brief sentencing trial, petitioner was sentenced to death on May 20, 1983, and Givens and Robertson received life imprisonment without parole eligibility.

The State's theory of the shooting was that on August 26, 1982, at about 6:45 in the evening, petitioner and his accomplices Givens and Robertson had entered the Richard Allen Housing Project, motivated by retaliation, and started shooting at one Sylvester Williams, intending to kill him. The State's alleged

that Williams had robbed a drug dealer name Ernest Wright, of \$200.00 on August 25, 1982, and that Jones, Givens and Robertson were sent to kill Williams for robbing Wright. The State alleged that the defendants entered the project on August 26, 1982 and started shooting at Williams, intending to kill him, but that, the bullets missed him, and had struck instead eight innocent bystanders, Hines and Jones killing them, and Taylor, Carter, B. Williams, Green, Ford, and Gilmer injuring them. N.T. 3-18-83 at 116-17, 118; N.T. 5-17-83 at 5854; A-16, Commonwealth v. Jones, 610 A.2d at 935.

At trial, the State produced several eyewitnesses, namely: Barbara Sanders (N.T. 3-18-83 at 144 et seq.), Deborah Jones (N.T. 3-18-83 at 204 et seq.), Diane Hopkins (N.T. 3-21-83 at 322 et seq.), Tatifa Ford (N.T. 3-22-83 at 432 et seq.), Sylvia Edwards (N.T. 3-22-83 et seq.; resumed 3-25-83 at 579 et seq.), Sylvester Williams (N.T. 3-23-83 at 615 et seq.; resumed 3-24-83 at 744), and Ernestine Mayo (N.T. 3-25-83 at 994 et seq.; resumed 3-29-83 at 1015 et seq.). None of these witnesses testified, however, to witnessing any person or persons being shot at. The testimony reveals that only Sanders, Jones, Edwards, Williams and Mayo had saw the shooters discharge their firearms, but that, neither witness could say at whom, or if anybody, was being shot at.

Williams the State's key witness testified explicitly that he was not being shot at (N.T. at 618, 710, 711, 744, 762, and 826-27). Regarding the robbery of Wright, he testified explicitly that Wright gave him \$200.00, he did not take the money by force or struggle, no ill feelings was between them (N.T. at 758-59, 698-701). That he told Wright to stop selling drugs in the project, he confronted Wright because drugs was sold to his cousin (N.T. at 721-23). He heard shots being fired and turned around and noticed the defendants shooting (N.T. at 617-18, 624, 667, 669). Sanders testified that when the shooting started, she got out the window, she did not see the direction the defendants

were shooting, but after the shooting she went outside and learned the direction of the shooting (N.T. at 148-49, 176). She heard petitioner tell someone "this is not meant for you-move" (N.T. at 146-48, 169-70). Jones testified that she did not know at whom was being shot at (N.T. at 206-07, 208, 209). Mayo initially testified to seeing the petitioner down in the projects shooting, but during cross examination she testified that she had doubts about that (N.T. at 1029-33, 1055-56, 1061-62). Edwards testified that she did not know at whom was being shot at (N.T. at 515, 516, 519, 595). The other witnesses, Hopkins and Ford testified to seeing petitioner after the shooting, running from the area. N.T. at 326-27, 334, 341, 356, 357, 358, 368, 434, 441, 446-47. On this evidence the State rested its case.

After conviction and sentencing, the petitioner filed timely post-verdict motions that was denied December 30, 1987. An appeal was taken, the Pennsylvania Supreme Court granted petitioner the right to file a pro se Addendum Brief, in additional to his counsel's initial brief filed. Thereafter, it affirmed petitioner's convictions and death sentences on May 21, 1992.

On July 12, 1994, petitioner filed a pro se federal habeas petition in United States District Court of Pennsylvania (Jones v. Love, 94-cv-4257 (E.D.Pa.)), that was later dismissed without prejudice by the United States Court of Appeals for the Third Circuit in May 1999 (Jones v. Love, C.A.No. 96-9005). On July 8 1999, the district court formally dismissed the petition without prejudice to allow for exhaustion of state court remedies.

While state post conviction proceedings were pending, petitioner again filed a pro se federal habeas petition in the eastern district court on August 27, 2008. The proceeding were held in abeyance until completion of his state proceedings. In December 2012, the petitioner was re-sentenced, after his death sentences were vacated, to life imprisonment without parole eligibility.

Subsequently, the eastern district court lifted its stay of abeyance, and in October 2017 the magistrate judge recommended denying petitioner a federal writ. On June 13, 2018, the district court adopted and approved the magistrate judge's recommendation, including the denial of a COA. After post judgment motions were denied, petitioner timely filed an appeal to the Third Circuit. On April 1, 2019, the Third Circuit denied petitioner a COA. Reargument was denied on July 24, 2019. Hence this petition.

REASONS FOR GRANTING THE PETITION

- I. THE SIXTH AND FOURTEENTH AMENDMENTS REQUIRES CHARGING DOCUMENTS TO SET FORTH ALL ELEMENTS NECESSARY TO CONSTITUTE THE CRIME CHARGED, THE ELEMENTS TO BE SUBMITTED TO THE JURY, AND THE STATE TO PROVE BEYOND A REASONABLE DOUBT THOSE ELEMENTS OF THE CRIME TO THE JURY'S SATISFACTION--NOT THE REVIEWING COURT--BEFORE A GUILTY VERDICT COULD BE MADE; ALSO, DUE PROCESS PROHIBITS JURY INSTRUCTIONS THAT RELIEVE THE STATE OF ITS BURDEN OF PROOF ENUNCIATED IN WINSHIP.

This Court have consistently held that charging documents must set forth all of the necessary elements that constitute the crime charged. Russell v. United States, *supra*, and its progeny. That, the elements must be alleged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. Jones v. United States, *supra*. This principle is grounded in the Sixth Amendment right to notice of the charges. In Cole v. Arkansas, this Court declared:

No principle of procedural due process is more clearly established than that notice of the **specific charge**, and a chance to be heard in a trial on the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Id., 68 S.Ct. 514, 517 (1968)(emphasis added). In another case decided the same day as Cole, this Court likewise declared:

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense--a right to his day in court--are basic in our system of jurisprudence

In re Oliver, 68 S.Ct. 499, 507 (1948).

And, in Jackson v. Virginia, this Court observed:

It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process.... These standards no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend.... A meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused.... a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm.

Id., *supra*, 443 U.S. at 314 (citations omitted).

In following this Court's precedent, federal courts have recognized that a defendant "cannot be convicted of a crime for which [he] have not been indicted." See, e.g., United States v. Mignon, 103 F.Supp. 20, 22 (E.D.Pa. 1952); and Usher v. Gomez, 775 F.Supp. 1308, 1313 (N.D.Cal. 1991) ("Due process entitles an accused to know the charges against which he must defend in order to have a reasonable opportunity to prepare and present a defense and not be taken by surprise at trial").

In this case, the constitutional problem with the charging documents (A-18) is self evident. The documents are inadequate as a matter of federal due process law to permit the State to proceed, because there is an absence of the facts necessary to constitute a crime of first degree murder or aggravated assault against unintended persons, i.e., the bystanders whose names are listed in the documents. This is so, because Pennsylvania law prohibits application of its first degree murder, including aggravated assault, statute against unintentional victims, absent proof of such elements against someone other than the bystander. 18 Pa.C.S. § 303(b). No element of causation is set forth in the charging documents in this case.

In this case, the charging documents were made for abuse. Petitioner was prejudiced by the failure of the charging documents to specify the intent element and malice elements against the alleged intended victim Williams. Here, the

jury was not told about the State's burden of having to prove beyond a reasonable doubt the requisite mens rea and malice against the alleged intended victim Williams. This prejudice was compounded where the trial court directed and guided to make immaterial fact findings, i.e., whether petitioner possessed the requisite mens rea and malice against the bystanders of the case, because the flawed charging documents failed to set forth those facts necessary to constitute crimes against bystanders. This violated petitioner's Sixth and Fourteenth Amendments rights to adequate notice, and especially, to demand a jury determination of his guilt or innocence on the very facts that were withheld from the charging documents, and the jury in this case.

In this case, the withholding of the elements required under section 303(b)(1) of Pennsylvania law for murder or assault charges to be permissible against bystanders, had allowed the State to make abuse the process of justice, the ability to switch during mid-trial between two contradictory theories, i.e., a direct and transferred intent theory, which undermined petitioner ability to defend at trial.

Here, the State proceed to trial with a concession that the persons injured, were unintended victims. Once the State's initial theory fails, it is allowed to claim a different theory, i.e., unintended victims were the intended target, without proof, but based upon injuries suffered by these persons. This violated petitioner's due process rights under In re Winship, supra.

Due process protects the accused against conviction except upon proof beyond a reasonable doubt. In re Winship, supra. This principle escaped petitioner's 1983 trial.

This Court's precedent also requires a jury to be instructed on the facts necessary to constitute the crime charged. That the failure to instruct the jury on the essential elements to constitute the crime charged violates due

process. Osborne v. Ohio, *supra*; Gaudin v. United States, *supra*. The federal courts have consistently followed this principle. See Glenn v. Dallman, 686 F.2d 418, 421 (6th Cir. 1982)(the omission of an essential element of the offense "is not rectified solely because a reviewing court is satisfied after the fact of a conviction that sufficient evidence existed that the jury would or could have found that the state proved the missing element had the jury been properly instructed."); Stanton v. Benzler, 146 F.3d 726, 728 (9th Cir. 1998)("While a state is generally free within broad limits to define elements of a particular offense, once it has defined them, due process requires that the jury be instructed on each element and find each element beyond a reasonable doubt before it can convict."). In the instant case, petitioner was deprived of these protections. A fair reading of the jury instructions (A-15) reveals how justice was denied this petitioner, as the jury was given a charge that clearly lacked constitutional underpinnings in this case, and violated this the principles of Francis v. Franklin, *supra*; Ulster County Court v. Allen, *supra*.

Based on the introduction, supra, to this petition and the reasons here. This Court should grant certiorari review and vacate the district court's denial of habeas corpus relief, which violates Petitioner's Sixth and Fourteenth Amendment rights. At least, a COA is justified in this case on all of the claims raised in the introduction.

II. This Court Should Grant Review to Settle A Disagreement Among the Circuits: About the Word "Constitutional" Required for a COA.

A COA was formerly known as a certificate of probable cause. The standard for the issuance of a certificate of probable cause was a substantial showing of the denial of a federal right. See Barefoot v. Estelle, 463 U.S. 880, 893 (1983). In Slack v. McDaniel, this Court ruled that the language of 28 U.S.C. § 2253(c)(2) should be given the meaning of ascribed to it in Barefoot, "with due note for the substitution of the word 'constitutional.'" 529 U.S. 473,

483-84 (2000). For a COA to issue, the petitioner must show that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." Id. at 484. This Court did not specify how courts should interpret the substitution of the word "constitutional," which has led to differing interpretations among the circuits. Compare Grotto v. Herbert, 316 F.3d 198, 209 (2d Cir. 2003)(substantive standard same for denials of COA and certificate of probable cause), Drinkard v. Johnson, 97 F.3d 751, 756 (5th Cir. 1996)(same), overruled on other grounds by Lindh v. Murphy, 521 U.S. 320, 326 (1997), Lennox v. Evans, 87 F.3d 431, 434 (10th Cir. 1996)(same), overruled on other grounds by U.S. v. Kunzman, 125 F.3d 1363, 1365 (10th Cir. 1997), and Byrd v. Henderson, 119 F.3d 34, 36 n. 3 (D.C.Cir. 1997)(same), with Herrera v. Green, 96 F.3d 1010, 1012 (7th Cir. 1996)(denial of certificate of probable cause forecloses possibility of obtaining COA because COA requires substantial showing of denial of constitutional right and certificate of probable cause requires substantial showing of denial of federal right, which appears to be lesser standard), and Williams v. Calderon, 83 F.3d 281, 286 (9th Cir. 1996)(standard for obtaining COA more demanding than former standard for obtaining certificate of probable cause).

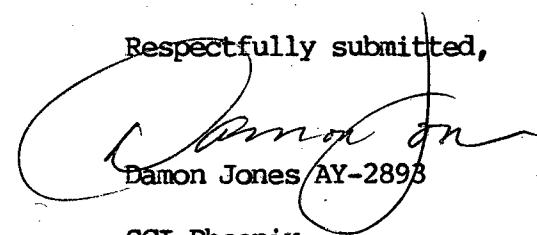
In the instant case, good reasons exists why a COA should issue under either standard. The relevant circuit court or another district court in the district (or possibly, elsewhere) has granted a probable cause certificate (now COA) based on the same or a similar issue. Compare Bennett v. Superintendent Graterford SCI, supra, 2018 WL 1463505 ** 7, 8-11 & n. 14, with the present petitioner's similar due process claim regarding the jury instructions. Further, the magistrate judge's departure from the standard of habeas corpus review regarding this petitioner's claims itself should justify a COA. Neither claim

mentioned regarding the jury instructions, the sufficiency of the evidence, or challenge to the charging documents lacks substance. Each claim are very much serious constitutional issues, evident of the denial of a "federal right" or "constitutional right."

CONCLUSION

WHEREFORE, for all the reasons set forth above, the petitioner respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



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Dated: October 21, 2019.