NO. 19-7360

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY LEE SIMONTON JR.,
Petitioner

V.

MARK GARMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL.,
Respondent

PETITION FOR WRIT OF CERTIORARI

Appeal from the Order of the United States Court of Appeals for the Third Circuit, at docket number 18-3575 affirming the decision of the United States District Court of the Middle District of Pennsylvania at Docket Number 1:15-cv-01454.

Terry Lee Simonton Jr., # HH-1155
Pro Se, Petitioner
State Correctional Institution at Rockview
1 Rockview Place
Bellefonte, PA 16823-0820

QUESTIONS PRESENTED FOR REVIEW

Ground I. Did a panel of the United States Court of Appeals for the Third Circuit err in denying Mr. Simonton a Certificate of Appealability by stating that he failed to raise an issue of federal or constitutional substance when the decision of the panel conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue?

(Proposed Answer in the Positive)

Ground II. Did the Honorable Christopher C. Connor err in denying Mr. Simonton's Petition for Writ of Habeas Corpus when Megan Ryland-Tanner committed blatant prosecutorial misconduct when allowing known perjured testimony to be presented by Detective James Grumbine?

(Proposed Answer in the Positive)

Ground III. Did the Honorable Christopher C. Connor err in denying Mr. Simonton's Petition for Writ of Habeas Corpus, albeit Mr. Simonton presented said claim of weight and sufficiency in vain, when the statutory provision, **18 Pa.C.S.A. § 3106** underlying such a claim was unconstitutional on its face, as it shifts the burden of proof to the defendant?

(Proposed Answer in the Positive)

Ground IV. Did the Honorable Christopher C. Connor err in denying Mr. Simonton's Petition for Writ of Habeas Corpus when Counsel, Attorney Deiderick at the first trial, and Attorney Zimmerer at the second trial failed to call witnesses on Mr. Simonton's behalf?

(Proposed Answer in the Positive)

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The Pro Se Petitioner in the above captioned matter is Mr. Terry Lee Simonton, Jr., (Mr. Simonton), who resides at the State Correctional Institution at Rockview, 1 Rockview Place, Bellefonte, PA 16823. Respondent in the above captioned matter is the Commonwealth of Pennsylvania represented by a District Attorney, whose office is located within the Lebanon County District Attorney's Office, 400 South Street, Rm. 11, Lebanon, PA 17042. Mark Garman is represented by Theron Richard Perez, Esq., Chief Counsel of the Department of Corrections, whose office is located at 1920 Technology Parkway, Mechanicsburg, PA 17050.

REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The Order of the United States Court of Appeals for the Third Circuit is reproduced in its entirety at Appendix A. The Order of the United States District Court of the Middle District of Pennsylvania is reproduced at Appendix B.

CONCISE STATEMENT OF JURISDICTION

The jurisdiction of this Honorable Court applies to Mr. Simonton's instant appeal based on the Constitutional jurisdiction granted to the United States Supreme Court by the founding fathers in **Article III § 2** of the United States Constitution which states in relevant part:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; - to all cases affecting Ambassadors, other public Ministers and Consuls; - to all cases of admiralty and maritime jurisdiction; - to controversies to which the United States shall be a party; - to controversies between two or more states; - between a State and citizens of another State; - between citizens of different states; - between citizens of the same state claiming lands under the grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

In the case sub judice, this Honorable Court retains appellate jurisdiction upon the collateral review challenge to legality of Mr.

Simonton's sentence imposed upon him in the Lebanon County Court of Common Pleas, Lebanon County, Pennsylvania.

CONCISE STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari by Terry Lee Simonton Jr., (Mr. Simonton), from the denial of the United States Court of Appeals of the Third Circuit, at Docket Number 18-3575.

The judgment which is to be reviewed is the United States Court of Appeals for the Third Circuit. The pertinent procedural history giving rise to the instant Petition for Writ of Certiorari can be summarized as follows:

Based upon alleged incidents that were reported on March 24, 2005, Mr. Simonton was charged with Rape, **18 Pa.C.S.A. § 3121**, a felony of the first degree; Involuntary Deviate Sexual Intercourse, **18 Pa.C.S.A. § 3123**, a felony of the first degree; Statutory Sexual Assault, **18 Pa.C.S.A. § 3122.1**, a felony of the second degree, Endangering the Welfare of Children, **18 Pa.C.S.A. § 4304**, a misdemeanor of the first degree.

After a lengthy pre-trial history, a trial[1] was held on May 10-11, 2007 the charges, supra. During said trial a competency hearing has

[1] At the preliminary hearing, pre-trial hearing, and first trial, Mr. Simonton was represented by Brian L. Deidrick, Esq., (Mr. Deidrick).

conducted with respect to the victim, J.S. Following an in camera hearing, J.S. was declared to be competent. The jury of the first trial convicted Mr. Simonton of indecent assault and corruption of minors, but was unable to reach a unanimous verdict to which a mistrial was declared.

On August 7, 2007, a second trial[2] was held based upon the mistrial of the first trial. On August 9, 2007, Mr. Simonton was convicted on the above listed charges by a jury of his peers.

On October 24, 2007, Mr. Simonton was sentenced to an aggregate term of eight (8) to twenty-two (22) years in a state correctional institution.

On September 10, 2008, Mr. Simonton filed a *pro se* petition for post conviction collateral relief pursuant to the Post Conviction Relief Act, (P.C.R.A.), **42 Pa.C.S.A. § 9541 et seq.**, The P.C.R.A. Court appointed John Gragson, Esq., (Mr. Gragson), as Counsel, who filed an amended P.C.R.A. Petition. Upon review of the initial petition, Mr. Simonton's appellate rights were reinstated on June 15, 2009.

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[2] At the conclusion of the first trial, Mr. Simonton retained private Counsel, Erin Zimmerer, Esq., (Ms. Zimmerer).

Mr. Gragson filed a Notice of Appeal on July 15, 2009. Mr. Gragson raised the claims of errors occurring at the preliminary hearing, Court error in admitting testimony as evidence, and challenged the weight and sufficiency of the evidence presented within the Direct Appeal with the Superior Court of Pennsylvania at docket number 1234 MDA 2009. The Superior Court of Pennsylvania affirmed the judgment of sentence through an unpublished memorandum on July 29, 2010.

On March 24, 2011, Mr. Simonton filed a second *pro se* P.C.R.A. Petition. The P.C.R.A. Court appointed David R. Warner, Jr., Esq., (Mr. Warner), who filed an amended petition. On August 11, 2011, the P.C.R.A. Court held a hearing and, on October 12, 2011, the P.C.R.A. court denied the petition. On November 1, 2011, Mr. Warner filed a Notice of Appeal to the Superior Court of Pennsylvania. Due to several procedural issues, on February 22, 2013, the P.C.R.A. court reinstated Simonton's right to appeal from the October 12, 2011 Order as to all issues properly before the court at the time of the August 11, 2011 P.C.R.A. Hearing. The P.C.R.A. Court excluded issues not presented on August 11, 2011. Simonton filed a timely Notice of Appeal. On April 18, 2013, the P.C.R.A. Court determined that all of Simonton's issues,

except one, were previously addressed in the Court's October 11, 2011 opinion. Therefore, the P.C.R.A. Court forwarded the October 12, 2011 and April 18, 2013 opinions to the Pennsylvania Superior Court for review. On February 11, 2014, the Pennsylvania Superior Court affirmed the P.C.R.A. Court's decision on July 30, 2014. On July 30, 2014, the Pennsylvania Supreme Court denied the Petition for Allowance of Appeal filed by Mr. Simonton.

On April 17, 2013, Mr. Simonton filed a third P.C.R.A. Petition. On October 8, 2013, the P.C.R.A. Court dismissed the Petition as untimely.

Mr. Simonton filed the instant Petition for Writ of Habeas Corpus on July 28, 2015. Said Petition was denied by the Honorable Christopher C. Conner on November 7, 2018 leading to a Certificate of Appealability.

The United States Court of Appeals denied review, and rehearing in this matter relating to the instant appeal.

REASONS RELIED UPON FOR WRIT OF CERTIORARI

Ground I. Did a panel of the United States Court of Appeals for the Third Circuit err in denying Mr. Simonton a Certificate of Appealability by stating that he failed to raise an issue of federal or constitutional substance when the decision of the panel conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue?

In the instant matter, Mr. Simonton raises a claim of fabricated evidence through the auspice of prosecutorial misconduct, this Honorable Court determined that such a claim does not pass federal nor constitutional muster. Mr. Simonton disagrees.

Specifically, within the Fifth Circuit's decision in **Cole v. Carson, 802 F.3d 752 (5th Cir. 2012)** the Court recognized:

> "[A] due process right not to have police deliberately fabricate evidence and use it to frame and bring false charges against a person... [deliberate framing by officials] offends the most strongly held value of our nation... [E]ven when a trial functions properly to vindicate a person's innocence, fabrication of evidence deprives a person of his or her due process rights... [A] victim of intentional fabrication of evidence by officials is denied due process when he is either convicted or acquitted."
>
> **(Cole, 802 F.3d at 767, 771, 772)**

Further, several Courts of Appeals differ regarding the requirement of a conviction to violate due process. Within the Seventh Circuit, in **Saunders-El v. Rohde, 778 F.3d 556, 562 (7th Cir. 2015)** the Court held that: "[A] police officer does not violate an acquitted defendant's due process rights when he fabricates evidence." Yet, the Fourth Circuit, within **Massey v. Ojaniit, 759 F.3d 343 (4th Cir. 2014)** determined that:

> "Fabrication of evidence alone is insufficient to state a claim for a due process violation; a plaintiff must plead adequate facts to establish that the loss of liberty – i.e., his conviction and subsequent incarceration – resulted from the fabrication."
>
> (**Massey, 759 F.3d at 354**)

While the **Massey** Court proved little analysis to support its holding, the

Saunders-El Court pointed out that the only "liberty deprivation" in a fabricated evidence case where one is acquitted "stems from his initial arrest."[3] Moreover, the Court rejected the view that "the burden of appearing in court and attending trial, in and of itself, constitute[s] a

[3] **Saunders-El, 778 F.3d at 561** (quoting **Alexander v. McKinney, 692 F.3d 553, 557 (7th Cir. 2012)**.

deprivation of liberty [because] [i]t would be anomalous to hold that attending a trial deprives a criminal defendant of liberty."[4]

This Honorable Court within **Halsey v. Pfeiffer, 750 F.3d 273 (3rd Cir. 2014)** centered upon which constitutional right was implicated via a fabricated evidence claim, in addition to whether a claim of fabricated evidence could stand alone. Particularly, the Court observed:

> "[an untenable possibility] 'that there would not be a redressable constitutional violation when a state actor used fabrication evidence in a criminal proceeding if the plaintiff suing the actor could not prove the elements of a malicious prosecution action that a defendant later brought against him...' [W]hen falsified evidence is used as a basis to initiate the prosecution of a defendant, or is used to convict him, the defendant has been injured regardless of whether the totality of the evidence, excluding the fabricated evidence would have given the state actor a probable cause defense in a malicious prosecution action that a defendant later brought against him... '[N]o sensible concept of ordered liberty is consistent with law enforcement cooking up its own evidence.'"
>
> (**Halsey, 750 F.3d at 292**)

In the matter *sub judice*, Mr. Simonton contends that A.D.A., Megan Ryland-Tanner (Ms. Ryland-Tanner), knowingly permitted Detective James Grumbine (Detective Grumbine), to present fabricated

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[4] **Saunders-El, 778 F.3d at 561** (quoting **Alexander, 692 F.3d at 557 n. 2**).

evidence of his background stating that he had successfully completed over one hundred eighty (180) hours of specialized training. Said testimony was utilized throughout the first trial, then again in the second trial, creating a false sense of trust with the jury, as a learned Detective who was credible. However, Detective Grumbine, whose background has now been exposed as false, was far from credible, yet Ms. Ryland-Tanner utilized this false information again within her closing arguments to support the basis for the "credible" testimony given by Detective Grumbine. Such testimony is reproduced *infra*:

> "Detective Grumbine has years of experience He's got, I believe, he testified over 200 hours of training"
>
> (Transcript of Proceeding, Jury Trial, May 11, 2007 at 8:33 a.m., Vol 2, 248:6-8)

Within documents submitted to the United States District Court by Mr. Simonton which were excepted as evidence by District Judge Conner, Mr. Grumbine is exposed to have completed only two (2) total hours of training, such is a far cry from the embellishment of two-hundred (200) hours given in testimony under oath by Detective Grumbine.

It is clear by the misrepresentation of the facts found within the testimony shown *supra* of both Detective Grumbine and Ms. Ryland-Tanner regarding Detective Grumbine's education that she had prior intimate knowledge of Detective Grumbine's extreme lack of Education. The fabricated evidence, gave the prosecution an advantage by grossly inflating Detective Grumbine's credentials to show iron clad testimony of a experienced expert, rather than a layman inventing a career out of thin air.

As held within **Halsey**, [Mr. Simonton is] injured regardless of whether the totality of the evidence, excluding the fabricated evidence would have given the state actor a probable cause defense in a malicious prosecution action that a defendant later brought against him

Ground II. Did the Honorable Christopher C. Connor err in denying Mr. Simonton's Petition for Writ of Habeas Corpus when Megan Ryland-Tanner committed blatant prosecutorial misconduct when allowing known perjured testimony to be presented by Detective James Grumbine?

In the instant matter, Detective Grumbine alleges within the affidavit of probable cause that he had successfully completed over one hundred eighty (180) hours of specialized training. However, during testimony Counsel for Mr. Simonton blew that apart by showing that, in fact, Detective Grumbine only had a total of two (2) hours of training. Said testimony is shown infra in an excerpt:

> "Q. Now, Detective Grumbine, you said you attended a special training on interacting with individuals with developmental difficulties.
> A. Yes
> Q. You told us the name of it I apologize --
> A. Interviewing Special Populations
> Q. When was that school?
> A. I'll tell you exactly when it was, that was back in October of '03
> Q. How long was that school?
> A. That particular training was two hours."
>
> (Transcript of Proceeding, Jury Trial, May 11, 2007 at 8:33 a.m., Vol 2, 190:3-16)

Not Only did Detective Grumbine falsely swear to incorrect facts, Ms. Ryland-Tanner then knowingly utilized those false facts to close her argument, as shown in an excerpt of testimony infra:

> "Detective Grumbine has years of experience He's got, I believe, he testified over 200 hours of training"
>
> (Transcript of Proceeding, Jury Trial, May 11, 2007 at 8:33 a.m., Vol 2, 248:6-8)

It is well understood that a Public Official/Officer is held to the standards of ethics and law(s) found within both the United States Code and the Pennsylvania Consolidated Statutes Annotated, along with the Constitutions of the Commonwealth of Pennsylvania and the United States. In Pennsylvania, historically, this was contained within the **Public Official and Employee Ethics Act** found at **65 Pa.C.S.A. § 409(e) et seq.**, although that set of Statutes was repealed by the **1998, Oct. 15, P.L. 729, No. 93 § 6(a)(2)**.

While most of the Statutes were codified into the current **Public Official and Employee Ethics Act**, found at **65 Pa.C.S.A. § 1101 et seq.**; the remaining repealed Statutes were modified, then re-codified into the Pennsylvania Crimes Code. The definitions of said Statutes

are reproduced infra in relevant part. The relevant Pennsylvania Statutes in this matter are: First, Perjury, found at **18 Pa.C.S.A. § 4902** which states that:

> "**§ 4902. Perjury.**
>
> **(a) Offense defined.** — A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.
>
> **(b) Materiality.** — Falsification is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.
>
> **(c) Irregularities no defense.** — It is not a defense to prosecution under this section that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at any time when the actor presents it as being so verified shall be deemed to have been duly sworn or affirmed.
>
> **(d) Retraction.** — No person shall be guilty of an offense under this section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.

(e) Inconsistent statements. — Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

(f) Corroboration. — In any prosecution under this section, except under subsection (e) of this section, falsity of a statement may not be established by the uncorroborated testimony of a single witness."

Secondly, Obstructing administration of law or other governmental function found at **18 Pa.C.S.A. § 5101** which states:

§ 5101. Obstructing administration of law or other governmental function.

A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

The United States Code has Statutes that directly mirror the Pennsylvania Statutes supra, which, in this matter are: First, Perjury generally, found at **18 U.S.C. § 1621** which states:

§ 1621. Perjury generally

Whoever--

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Secondly, False declarations before grand jury or court, found at **18 U.S.C. § 1623** which states:

§ 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if--

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

> **(d)** Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.
>
> **(e)** Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

It is clear by the misrepresentation of the facts found within the testimony shown supra of both Detective Grumbine and Ms. Ryland-Tanner regarding Detective Grumbine's education that she had prior intimate knowledge of Detective Grumbine's extreme lack of Education. However, Ms. Ryland-Tanner knowingly utilized blatantly incorrect information to support her standing with the Court, thereby violating **18 Pa.C.S.A. § 4902(a)**, **18 Pa.C.S.A. § 5101**, **18 U.S.C. § 1621(1)**, and **18 U.S.C. § 1623(a)** respectively.

Ground III. Did the Honorable Christopher C. Connor err in denying Mr. Simonton's Petition for Writ of Habeas Corpus, albeit Mr. Simonton presented said claim of weight and sufficiency in vain, when the statutory provision, **18 Pa.C.S.A. § 3106** underlying such a claim was unconstitutional on its face, as it shifts the burden of proof to the defendant?

While it is true that Mr. Simonton presented a claim of Weight and Sufficiency, in previous filings, said argument had no proper base in law, as the road block of **18 Pa.C.S.A. § 3106**, (Testimony of Complainants) prevented him from properly presenting said claim before the Courts as it is a violation of both the **Article 1 § 9** of the Pennsylvania Constitution and the **Sixth Amendment** of the United States Constitution.

Both the **Sixth Amendment** of the United States Constitution and the **Article 1 § 9** of the Pennsylvania Constitution clearly establish the unalienable right of a criminal defendant to be found guilty by an impartial jury of his peers along with the requirement that the defendant's guilt be proven beyond a reasonable doubt by fulfilling the burden of proof Constitutionally mandated to the prosecuting attorney. This principle has been solidified over many years of jurisprudence. This absolute right cannot and must not be infringed

upon as it is a principal foundation to the blind justice afforded all defendants accused of a crime in American jurisprudence.

The jury has a constitutional duty to consider all of the "ingredient[s]" (**Id.**, *infra*) of a crime when deliberating the outcome of a criminal trial. These ingredients are an essential part of the "proof" required to convict an individual. This principle was reiterated in the United States Supreme Court decision in **Alleyne v. United States, 133 S.Ct. 2151 (2013)** when the Court opined:

> "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense"

The statute in question, **18 Pa.C.S.A. § 3106** provides that:

> "**§ 3106. Testimony of complainants**
>
> The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. The testimony of a complainant need not be corroborated in prosecutions under this chapter. No instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants testimony is viewed."

The statute found at **18 Pa.C.S.A. § 3106** does not allow for the elements of the crime to be proven beyond a reasonable doubt due to the fact that it allows for the distinct possibility that "hearsay" or other testimony could be used solely to convict the defendant. The evidence underlying the testimony of the complainant need not be shown to convict any person charged with a crime under Chapter 31 of the Crimes Code, (relating to Sexual Offenses such as Rape, **18 Pa.C.S.A. § 3121**; Statutory Rape, **18 Pa.C.S.A. § 3122** (Repealed); Statutory Sexual Assault, **18 Pa.C.S.A. § 3122.1**; Involuntary Deviate Sexual Intercourse, **18 Pa.C.S.A. § 3123**; Voluntary Deviate Sexual Intercourse, **18 Pa.C.S.A. § 3124** (Repealed); Sexual Assault, **18 Pa.C.S.A. § 3124.1**; Institutional Sexual Assault, **18 Pa.C.S.A. § 3124.1**; Aggravated Indecent Assault, **18 Pa.C.S.A. § 3125**; Indecent Assault, **18 Pa.C.S.A. § 3126**; Indecent Exposure, **18 Pa.C.S.A. § 3127**; Spousal Sexual Assault, **18 Pa.C.S.A. § 3128** (Repealed); and Sexual Intercourse with Animal, **18 Pa.C.S.A. § 3129**), thereby unconstitutionally shifting the burden to the defendant to prove that the testimony given is a falsity.

The **Alleyne** Court has clarified that every "element" of an aggravated offense must be proven beyond a reasonable doubt by a jury of the defendant's peers when the Court opined:

> "[T]hose 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt...The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an element or ingredient of the charged offense...In **Apprendi**, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed... While **Harris** declined to extend this principle to facts increasing mandatory minimum sentences, **Apprendi**'s definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment"
>
> (**Alleyne Slip Op at 3, 6, 7**)(citing **Apprendi v. New Jersey, 147 L.Ed.2d 435 (2000)**; and **Harris v. United States, 536 U.S. 554 (2002)**)(remaining internal citations omitted)(emphasis added)

Prior to the **Alleyne** Constitutional mandate, Pennsylvania jurisprudence was well settled that the usage of evidence must be proven beyond a reasonable doubt by the trier of fact. This principle

was defined by the Superior Court of Pennsylvania in **Commonwealth v. Lehman, 820 A.2d 766 (2003)** which declares:

> "[W]e note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proof or proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence."
>
> **(Lehman at 820 A.2d 771)**(citing **Commonwealth v. Distefano, 782 A.2d 574 (2001)**)

As **18 Pa.C.S.A. § 3106** unconstitutionally shifts the burden of proof to the defendant to prove his own innocence, it is in direct violation of the **Lehman** Court's analysis of burden of proof. In the case of **18 Pa.C.S.A. § 3106**, the trier of fact, (the jury), is not given an ample opportunity to properly examine the evidence in a criminal case, forcing them to believe the "complainant's" testimony as fact unless the

defendant proves himself innocent by presenting evidence and witnesses on his own behalf.

The Statute, **18 Pa.C.S.A. § 3106** by legislative intent, does not allow for the jury to properly consider the evidence behind the testimony as an element of the crime charged, under the prior mandate of the **Lehman** Court and the United States Supreme Court's decision in **Alleyne**, violates the Constitutions of both the United States and the Commonwealth of Pennsylvania. The presumptions of the legislative intent of a statute is defined by the General Assembly in **1 Pa.C.S.A. § 1922** which states:

> **"§ 1922. Presumptions in ascertaining legislative intent**
>
> In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:
>
> (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable
>
> (2) That the General Assembly intends the entire statute to be effective and certain.
>
> (3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth

(4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes and the same subject matter intends the same construction to be placed upon such language.

(5) That the General Assembly intends to favor the public interests as against any private interest."

Under these basic principles supra, it was clearly not the intention of the General Assembly for **18 Pa.C.S.A. § 3106** to "violate the United States Constitution or the Constitution of this Commonwealth." (**Id.**). Yet, under the **Alleyne** Court, **18 Pa.C.S.A. § 3106** does just that. The statutory construction allows for the testimony of the complainant to be sufficient evidence to convict a defendant, not allowing for the proof beyond a reasonable doubt Constitutionally required to prove all elements of the alleged crime, and strictly relying on the preponderance of the evidence based solely on the presumed "word" of a complainant, as such proof. In such a case where a statute is in clear violation of the Constitution, the General Assembly has set up provisions that allow for severability. Those provisions are found within **1 Pa.C.S.A. § 1925** which provides:

"**§ 1925. Constitutional construction of statutes**

> The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent."

Mr. Simonton contends that **18 Pa.C.S.A. § 3106** "standing alone, [is] incomplete and [is] incapable of being executed in accordance with the legislative intent" of that statute. (**Id. supra**) Ergo, if any part of the statute in question, (**18 Pa.C.S.A. § 3106**), is severed than it will destroy the statute in its entirety. Following these basic principles, set forth by the General Assembly, renders **18 Pa.C.S.A. § 3106** inoperable without a complete rewrite of the statute. For the reasons supra, this Honorable Court should deem the statute, **18 Pa.C.S.A. § 3106**, unconstitutional.

Notwithstanding this principle, Mr. Simonton would have been able to present the fact that evidence was not presented by the Court to find him guilty, other than that of circumstantial value.

Ground IV. Did the Honorable Christopher C. Connor err in denying Mr. Simonton's Petition for Writ of Habeas Corpus when Counsel, Attorney Deiderick at the first trial, and Attorney Zimmerer at the second trial failed to call witnesses on Mr. Simonton's behalf?

Pennsylvania jurisprudence on failure to call witnesses was determined by the Supreme Court of Pennsylvania in **Commonwealth v. Sneed, 45 A.3d 1096 (2012)** to be the identical requirements of the **Strickland/Pierce**[5] test, supra when the **Sneed** Court opined:

> "When raising a claim of ineffectiveness for the failure to call a potential witness, a petitioner satisfies the performance and prejudice requirements of the **Strickland** test by establishing that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial...To demonstrate **Strickland** prejudice, a petitioner 'must show how the uncalled witnesses' testimony would have been beneficial under the circumstances of the case...' Thus, counsel will not be found ineffective for failing to call a witness unless the petitioner can show that the witness's testimony would have been helpful to the defense...'A failure to call a witness is not per se ineffective assistance of counsel for such decision usually involves matters of trial strategy.'"

Thereby, under the premise of stare decisis, it stands to reason that meeting the "prongs" of **Sneed**, supra, in turn, meet the prongs required by the **Strickland/Pierce** standard.

This Honorable Court recently agreed with this logic and upheld the Supreme Court of Pennsylvania's decision in **Sneed** along with its recognition of the ineffective assistance of counsel standards found within **Strickland/Pierce** in its decision in **Deshields v. Kerestes, 2014 U.S. Dist Lexis 81238**, when the Court opined:

> "In order for a [Petitioner] to prevail on a claim of ineffectiveness of counsel, he must show, by a preponderance of the evidence, ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place... [Petitioner] must demonstrate: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the proceeding would have been different... [I]n order to establish arguable merit for a claim that counsel was ineffective for failing to call a witness, the petitioner must prove the following: (1) that the witness existed, and was available and willing to testify for the defense; (2) that counsel knew of, or should have known of, the existence of the witness; and (3) that the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial...A petitioner must show how the uncalled witness' testimony would have been beneficial under the circumstances of the case."
>
> (**Deshields, 2014 U.S. Dist Lexis 81238**)(internal citations omitted).

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[5] **Strickland v. Washington, 466 U.S. 668 (1984)**; **Commonwealth v. Pierce, 527 A.2d 973 (1987)**

The line of stare decisis referenced supra, shows that the applicable standards for Ineffectiveness in this Honorable Court are identical to that in the Pennsylvania State Courts.

Specifically, Mr. Simonton contends that both Mr. Deiderick and Mr. Zimmerer were ineffective for failure to call witnesses on his behalf. Mr. Simonton contends that several witnesses were identified at the P.C.R.A. Hearing, of which were Vinnie Vasquez, (Mr. Vasquez) and Benny Williams. (Mr. Williams). Mr. Deiderick stated that the witnesses "did not come across well" and described them as "dirty and disheveled," however, it is the fact finder, not Counsel that determines credibility. It was then the duty of Counsel to present whatever witness would have furthered Mr. Simonton's defense.

Applying the relevant standards of **Sneed/ Deshields** first, to Mr. Deiderick, Mr. Simonton through presentation, can show that both Mr. Vasquez and Mr. Williams existed; Both Mr. Vasquez and Mr. Williams were available to testify for the defense; Mr. Deiderick knew of, or should have known of, the existence of both Mr. Vasquez and Mr. Williams; Both Mr. Vasquez and Mr. Williams were willing to testify for

the defense; and the absence of the testimony of Mr. Vasquez and Mr. Williams was so prejudicial as to have denied Mr. Simonton a fair trial.

Mr. Simonton presented names of potential witnesses to Ms. Zimmerer, specifically Carla Fuller, (Ms. Fuller), Rick Farner, (Mr. Farner), Steve Simonton, (Mr. S. Simonton), Vinnie Vasquez, (Mr. Vasquez) and Benny Williams, (Mr. Williams). Ms. Zimmerer did not speak with either Mr. S. Simonton or Mr. Farner because Mr. Deiderick had stated relevant information was not able to be presented by those individuals. Ms. Zimmerer did attempt to contact Ms. Fuller, however, did not return her calls.

Applying the relevant standards of **Sneed/ Deshields** secondly, to Ms. Zimmerer, Mr. Simonton through presentation, can show that Ms. Fuller, Mr. Farner, Mr. Simonton, Mr. Vasquez and Mr. Williams existed; Ms. Fuller, Mr. Farner, Mr. S. Simonton, Mr. Vasquez and Mr. Williams were available to testify for the defense; Ms. Zimmerer knew of, or should have known of, the existence of Ms. Fuller, Mr. Farner, Mr. S. Simonton, Mr. Vasquez and Mr. Williams; Ms. Fuller, Mr. Farner, Mr. S. Simonton, Mr. Vasquez and Mr. Williams were willing to testify for the defense; and the absence of the testimony of Ms. Fuller, Mr.

Farner, Mr. S. Simonton, Mr. Vasquez and Mr. Williams was so prejudicial as to have denied Mr. Simonton a fair trial.

CONCLUSION

WHEREFORE, for the reasons, supra, Mr. Terry Lee Simonton Jr., *Pro Se*, Appellant in the above captioned case, prays this Honorable Court vacate his illegal sentence, and remand to the P.C.R.A. Court for re-sentencing consistent with the sentencing guidelines, pre-sentence investigation, and any other mitigating factors or any other applicable relief it deems appropriate.

Respectfully Submitted,

Date: JAN 3th, 2020

Terry Simonton Jr
(signature)

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Respectfully Submitted,

Date: Jan 27th, 2020

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