

ORIGINAL

No. 19-8346

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IN THE  
SUPREME COURT OF THE UNITED  
STATES

..... ♦ .....

NAEEM JONES,  
*Petitioner,*  
vs.

SUPERINTENDENT FAYETTE SCI *et al*  
*Respondent(s)*

..... ♦ .....

ON PETITION FOR WRIT OF  
CERTIORARI TO THE SUPREME COURT  
OF THE UNITED STATES

..... ♦ .....

Naeem Jones,  
HV-9384  
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### Question(s) Presented

1. Does a freestanding claim of actual innocence stand a basis of relief for a state prisoner in the context of a federal habeas proceeding?
2. Does the first prong of Strickland v. Washington, 466 U.S. 688 (U.S. 1984) permit a reviewing court to create hypothetical reasons counsel may have had for his/her actions or inactions without first conducting a hearing.
3. Did not the District Court incorrectly apply this Court's ruling in Strickland v. Washington, 466 U.S. 668, 694 (U.S. 1984) where it found that trial counsel was not ineffective when he failed to interview witness Charles Waters concerning the misconduct of Detective Ronald Dove.

**List of Parties**

1. Superintendent of State Correctional Facility at Fayette.
2. Attorney General of Pennsylvania.

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**IN THE SUPREME COURT OF THE  
UNITED STATES**

**PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

**OPINIONS BELOW**

- Third Circuit Court of Appeals decision in Jones v. Superintendent Fayette SCI et al, C.A. No. \_\_\_\_\_ (3d Cir. 2020) (\_\_\_\_\_), denying certificate of appealability).
- United States District Judge Wendy Beetlestone's OPINION and ORDER adopting Magistrate \_\_\_\_\_ Report and Recommendation Issued at 2:18-cv-01347.
- Jones v. Capozza, \_\_\_\_\_ (Magistrate Judge Marilyn Heffley Report and Recommendations).



## JURISDICTION

The date of which the United States Court of Appeals denied rehearing in my case was February 6, 2020. Jones v. Superintendent Fayette SCI et al, C.A. No. 19-2302 (3d. Cir. 2020)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

**Constitutional and Statutory Provisions Involved**

28 U.S.C. § 2254(d).....*passim*

The Fifth Amendment to the United States  
Constitution.....*passim.*

The Sixth Amendment to the United States  
Constitution.....*passim*

The Fourteenth Amendment to the United States  
Constitution.....*passim.*

## Statement of the Case

### Introduction:

Petitioner presents this Court with two issues of first impression, and another worthy of certiorari where the District Court grossly misconstrued clearly established law as determined by this Court.

Petitioner's first issue revolves around the question of whether a freestanding claim of actual innocence can stand as a basis of relief for a state prisoner in the context of a federal habeas proceeding.

Petitioner's second issue presents the Court with a question of whether the first prong of *Strickland v. Washington*, 466 U.S. 688 (U.S. 1984) permits a reviewing court to create hypothetical reasons counsel may have had for his/her actions and inactions without first conducting a hearing.

Neither of these questions have been answered by this Court and as a result the lower courts are in conflict.

Petitioner's third issue presents this Court with a question of whether the District Court, in the instant matter, incorrectly applied this Court's ruling in *Strickland v. Washington*, 466 U.S. 668, 694 (U.S. 1984) where it found that trial counsel was not ineffective when he failed to interview a critically important witness named Charles Waters, concerning the misconduct of Detective Ronald Dove, a corrupt

Philadelphia Homicide Detective who played a intricate part in Petitioner's case.

### **A. Procedural History**

On November 8, 2016, Naeem Jones was arrested and charged with murder and related offenses concerning the shooting death of Steven Bartley. On August 25, 2008, before the Honorable Carolyn Temin, a jury returned guilty verdicts to First Degree Murder and Possession of an Instrument of Crime. On December 18, 2008, Judge Temin imposed a mandatory term of life imprisonment without the possibility of parole for the first degree murder conviction. No direct appeal was filed.

On May 13, 2009, Petitioner filed a Post-Conviction Relief Act ("PCRA") petition, seeking the reinstatement of his Petitioner rights. On November 19, 2011, said rights were reinstated. On December 9, 2010, Petitioner filed an appeal with the Pennsylvania Superior Court alleging that the evidence was insufficient to support first degree murder. On November 15, 2011, the Superior Court denied relief.

On December 7, 2011, Petitioner filed a Motion to Vacate and/or Reconsider Fines, Costs, and Restitution, which Judge Temin denied on December 21, 2011. On April 4, 2012, the Pennsylvania Supreme Court denied Petitioner's Petition for Allowance of Appeal.

On December 21, 2011, Petitioner filed a PCRA Petition. On August 12, 2015, Counsel Susan Burt was appointed to represent Petitioner during his PCRA proceedings. Counsel Burt filed an amended petition alleging layered claims of ineffective assistance of counsel and a claim of after-discovered evidence. On October 15, 2015, Counsel Burt filed an addendum to that petition. On December 28, 2015, the Commonwealth filed a Motion to Dismiss, but did not oppose an evidentiary hearing concerning Petitioner's after-discovered evidence claim. On January 20, 2016, Counsel Burt filed a motion to supplement evidence of ineffectiveness of trial counsel alleging an additional claim of ineffective assistance of counsel.

On January 21, 2016, an evidentiary hearing was held in the Courtroom of the Honorable Barbara A. McDermott, where Robert Corbin testified in regard to Petitioner's after-discovered evidence claim. Trial Counsel, Fred Harrison, also testified concerning Petitioner's claims of ineffective assistance of counsel. On April 28, 2016, the PCRA Court denied relief. On May 4, 2016, a Notice of Appeal was filed. On April 19, 2017, the Superior Court denied relief, *Commonwealth v. Jones*, 2017 Pa. Super. Unpub. LEXIS 1471 (Apr. 19, 2017). On November 16, 2017, the Pennsylvania Supreme Court denied Allowance of Appeal. *Commonwealth v. Jones*, No. 216 EAL 2017.

Petitioner then filed a Petition for Writ of Habeas Corpus in the United States District Court for Eastern Pennsylvania. Said Petition was denied on March 21, 2019. Petitioner filed a Notice Appeal and subsequent petition for Certificate of Appealability (COA) with the Third Circuit Court of Appeals. On February 6, 2020, The Third Circuit Court of Appeals denied COA. Petitioner then sought rehearing, which was denied on March 6, 2020.

#### **B. Factual History:**

In the earlier morning of February 21, 2006, Steven Bartley was shot and killed outside Big Fells'a sports bar at 33<sup>rd</sup> and Reed Streets in Philadelphia.

Testimony was presented that the victim died of multiple gunshot wounds and the manner of death was homicide. Dr. Gregory McDonald testified that the victim sustained approximately nine to twelve gunshots wounds fired from at least two semi-automatic weapons. A Cobra Arms M-11 semi-automatic weapon was found in an abandoned lot behind the bar around the corner from 33<sup>rd</sup> Street. Officer Ernest Bottomer, a forensic ballistics expert, testified that the gun was one of the murder weapons. Officer Bottomer also testified that there was at least one other gun used in the murder.

Evidence was introduced that prior to the shooting, Mr. Bartley and his friend, Terrance Speller,

went to Big Fells's sports bar. Although Speller was treating the bar's patrons to drinks, he and the victim were not warmly received. At some point during the night, Mr. Bartley was involved in a heated argument with James Frager over a woman.

Later in the evening, another incident occurred, where Kamira Woods was overheard screaming in the bar's men's bathroom. James Frager and others rushed in and found Speller with his pants unbuttoned and his hands around Woods' neck. Woods' had allegedly dated Petitioner for five years, but they had broken up the year before. Frager testified that Petitioner and others argued with Speller and the victim about the incident until the bartender announced "last call" and most the bar patrons thereafter poured onto the street.

Frager testified that when he left the bar, Petitioner was standing outside with the victim, Speller, Waters, and Curtis Scott. A police officer driving to the scene of an unrelated accident observed four males on the corner talking to another man outside the bar. As Frager got into his car, he heard gunshots, but did not observe anything. Frager then alleged to have observed Petitioner and others standing over the victim immediately after the shooting.

On February 21, 2006, Ms. Woods provided police with a statement. In her statement she did not make any reference as to Petitioner's involvement in

the shooting. However, on November 3, 2006, she provided another statement. This time, she claimed that she observed Petitioner point a gun at the victim, stretch out his arm, and shoot at the victim numerous times. Woods' information was in stark contrast to the incontrovertible evidence provided by the medical examiner that **two** firearms were involved in the shooting.

The Commonwealth also presented an out of court statement Vincent Dickerson that Petitioner told him that there had been a problem with Woods at the bar—Woods had apparently been prostituting herself and Petitioner shot a man that was trying to get involved on Woods' behalf.

Petitioner presented the testimony of Debbie Royster. Ms. Royster testified that she was in the bathroom using drugs with Petitioner during the time of the shooting. She explained that after hearing gunfire, she and Petitioner ran to the bar's front door, but that they could not get out because the bartender had locked them inside. Thus, according to Ms. Royster, it was impossible for Petitioner to have been the culprit.



### C. Argument

**Question One: Does a freestanding claim of actual innocence stand a basis of relief for a state prisoner in the context of a federal habeas proceeding.**

In Petitioner's habeas petition he raised a claim that his trial attorney was ineffective for failing to interview Ronneta Williams and that PCRA counsel was ineffective for failing to include this claim in his initial PCRA petition. Ms. Williams provided Petitioner with an affidavit explaining that Petitioner was **inside** Big Fellas Sports Bar with her at the time she heard shots fired, thus proving Petitioner could not have been the culprit and that he is actually innocent. Petitioner also raised a claim that is entitled to habeas relief on the basis of the newly discovered evidence provided from Robert Corbin, which Corbin explained that while he was out purchasing cigarettes he witnessed someone other than Petitioner shooting at the victim. The Third Court of Appeals denied certificate of appealability via the premise that actual "innocence is not cognizable on habeas review."

The Third Court Appeals in declining to grant a certificate of appealability failed to appreciate the fact that this Court left open the question of whether a truly persuasive actual innocence claim may establish a constitutional violation sufficient to state a claim for

habeas relief. See *Herrera v. Collins*, 506 U.S. 390, 417, 419, 430-37 (1993) (plurality of this Court assuming that a freestanding substantive claim of actual innocence is cognizable under federal law). In *McQuiggin v. Perkins*, 569 U.S. 383, 392 (U.S. 2013) the Court reaffirmed that it has not resolved whether a prisoner may be entitled to habeas corpus relief based on a freestanding claim of actual innocence. Petitioner on rehearing suggested that the lack of ruling on this issue, however, did not preclude the Court of Appeals from finding that a freestanding claim of actual innocence is cognizable in a federal habeas proceeding.

As this Court has explained in the context of the application of the AEDPA, “[c]ertain principles are fundamental enough that when new factual permutation arise, the necessity to apply the earlier rule will be beyond doubt.” *Yarborough v. Alvarado*, 541 U.S. 652, 666 (U.S. 2004). A finding that a freestanding claim of actual innocence is not cognizable in a federal habeas proceeding simply because this Court has not said so is in and of itself contrary to clearly establish federal law.

Several Federal Courts of Appeal have in fact found that a freestanding claim of actual innocence *is* cognizable in a federal habeas proceeding. For example, the Ninth Circuit Court of Appeals in *Jones v. Taylor*, 763 F.3d 1242, 1246 (9<sup>th</sup> Cir. 2014) stated that it “assume[s] that such a claim is viable.” (quoting

Osborn v. Dist. Attorney's Office for the Third Judicial Dist., 521 F.3d 1118, 1130 (9<sup>th</sup> Cir. 2008), *rev'd on other grounds*, 557 U.S. 52 (U.S. 2009). Also See Moore v. Woods, 2018 U.S. App. LEXIS 17812 \*7 (6<sup>th</sup> Cir. 2018) (same); Titsworth v. Mullin, 415 Fed. Appx. 28, 32 (10<sup>th</sup> Cir. 2011) (Same); In re Jalowies, 2019 U.S. App. LEXIS 25455 (6<sup>th</sup> Cir. 2018)(Same); Carriger v. Stewart, 132 F.3d 463, 476 (9<sup>th</sup> Cir. 1997) (en banc) (“[A] habeas Petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocence.”).

Likewise, several Courts of Appeal have found that free-standing claims of actual innocence are not cognizable in the context of a federal habeas proceedings. See Cress v. Palmer, 484 F.3d 844, 855-55 (6<sup>th</sup> Cir. 2007); In re: Raby, 925 F.3d 749 (5<sup>th</sup> Cir. 2019) (The United States Court of Appeals for the Fifth Circuit does not recognize freestanding claims of actual innocence on federal habeas review.); Bryant v. Thomas, 725 Fed. Appx. 72 (2<sup>nd</sup> Cir. 2018)(The federal actual innocence inquiry differs from New York state law, which allows freestanding actual innocence claims.); Stockton v. Angelone, 70 F.3d 12, 13 (4<sup>th</sup> Cir. 2995) (rejecting “freestanding claim of innocence which is unconnected to any other cognizable constitutional violation).

This question has never been answered by the Court and as a result the lower courts are in conflict.

**Question Two: Does the first prong of Strickland v. Washington, 466 U.S. 688 (U.S. 1984) permit a reviewing court to create hypothetical reasons counsel may have had for his/her actions or inactions without first conducting a hearing.**

Petitioner raised a claim in his Petition for Writ of Habeas Corpus that his post-conviction attorney rendered ineffective assistance of counsel when she failed to include in Petitioner's post-conviction petition the claim that trial counsel was ineffective for failing to interview and call as witness Ronnetta Williams.

Ronnetta Williams was a friend of Kamira Woods—the Commonwealth's key witness. Ms. Williams was at Big Fellas Sports Bar on the night Steven Barley was killed. In fact, after the shooting, Ms. Williams made a statement to law enforcement that she had let the deceased out of the bar prior to the shooting. At the time of trial, counsel was in possession of Ms. Williams' statement.

Prior to trial, Petitioner explained to his attorney that Ms. Williams was a close friend of Ms. Woods and that if interviewed would explain the following: that Williams had seen Petitioner coming

out of the bathroom with Debbie Royster at the time shots were being fired; that Ms. Woods did not witness the shooting, but was rather told about it from Ms. Williams; and lastly, that Petitioner and Ms. Woods were never romantically involved. Petitioner asked his trial counsel to interview and call Ms. Williams as a witness on his behalf, but counsel failed to do so. Aside from Petitioner informing trial counsel of Ms. Williams, counsel should have been aware of Ms. Williams' value as a witness from the fact that she was mentioned by Kamira Woods in her first statement to law enforcement.

During Petitioner's PCRA proceedings he requested that his court appointed PCRA Counsel include the claim that trial counsel was ineffective for failing to call Ronneta Williams. But counsel failed to do so. An evidentiary hearing was granted on several claims of ineffective assistance of trial counsel and a newly discovered evidence claim. During said hearing, PCRA Counsel attempted to raise the IAC claim surrounding trial counsel's failure to investigate which Petitioner had asked her to raise in an amended petition. Those IAC claims concerned counsel's failure to investigate Ms. Williams, Terrence Speller, Charles Waters, and others. Despite Petitioner's plea for PCRA counsel to raise these claims she failed to do.

At Petitioner's PCRA hearing, PCRA counsel attempted to raise these claims, but was told it was too late. **H.T. 4-1-16, 64-65.**

**Q.** Mr. Harrison, do you recall the case of Commonwealth v. Naeem Jones back in 2006?

**A.** I do.

**Q.** How did you come to get involved in representing Mr. Jones?

**A.** I had represented Mr. Jones on many occasions prior to this particular incident. I've known him through his family and other associates.

**Q.** Were you retained originally in this case?

**A.** Partially.

**Q.** When you say 'partially,' what do you mean?

**A.** I didn't get all the fees because I don't think the family had enough money, but I stayed in the case.

**Q.** You stayed in the case. At some point before trial before Judge Temin did you ask to have the matter continued or to be relieved of the matter?

**A.** I don't have a specific recollection of that, but I'm sure I probably did.

**THE COURT:** Did or did not?

**THE WITNESS:** I don't have a specific recollection of whether I did, but I probably did.

**BY MS. BURT:**

**Q.** Why would you have done that?

**A.** Just to see if I could have some more time to get additional funds.

**Q.** What would those additional funds from family have meant to you? How would you have been able to do what you were not able?

**MR. RITTERMAN:** Objection.

**THE COURT:** Sustained – well, I will let – I will reverse myself.

**THE WITNESS:** I would have tried to obtain the services of an investigator.

**BY MS. BURT:**

**Q.** I take it that you were not able to retain an investigator?

**A.** That's correct.

**Q.** Did you on your own, did you search for Terrence Speller?

**MR. RITTERMAN:** Objection

**THE COURT:** I'm trying to see, what does this apply to in the motion?

**MS. BURT:** Your Honor, there is an additional motion that was filed by defendant back in December of 2012 and he raises generally failure to investigate.

**THE COURT:** Except all that – you entered your appearance, you filed the amended petition, that's what you're confined to.

**MR. RITTERMAN:** Right.

**MS. BURT:** So, it's your position and Commonwealth's position that the petition that that the petition that Mr. Jones filed is, therefore, invalid or is overwritten?

**THE COURT:** Well, it's certainly the petition [sic] of the appellate courts that once counsel enters and files an amended petition that those are the issues that are preserved. There is no such thing as hybrid representation in Pennsylvania.

The above testimony displays three critical points: one, the only reason that this issue was not properly presented to the PCRA court was counsel's error of not including it in her amended petition; two, PCRA Counsel had no reasonable basis for failing to include this claim in her amended PCRA petition; and three, the only reason trial counsel failed to call Ronneta Williams as a defense witness is his failure to hire an investigator.

In denying Petitioner's claim, the District Court found that Petitioner could not prove *Strickland's* first prong of proving that counsel did not have a reasonable basis for his failing to interview Ms. Williams.

The Magistrate Judge's Report and Recommendation which was adopted by the District Judge found that "[e]ven if [Petitioner] did tell counsel that Ms. Williams may have something different to say, trial counsel is not ineffective if he choose not to call a witness who had already lied about [Petitioner] in a police interview." (R&R at p. 10).

The Report and Recommendations' findings are not supported by the record and strain reason. The R&R claims that because Ms. Williams did not



mention Petitioner in her initial statement to police, this means that counsel had a reasonable basis for failing to have her interviewed, (which could have been accomplished with a simple phone call.) The R&R pays lip service to the critical fact that Petitioner told his trial attorney to interview Ms. Williams because Ms. Williams would explain to him that Petitioner was inside the bar at the time of the shooting. The R&R ignores the fact that at an evidentiary hearing counsel was questioned concerning his failure to investigate witnesses generally. At said hearing, counsel did not state that he felt an investigator was unneeded, but instead that he simply did not have the funds to hire one. (See H.T. 4-1-16, 64-65; original objections at pp. 7-9).

The R&R's reasoning is difficult to comprehend. As this Court is aware, witnesses change their stories all the time. Many times, a witness's trial testimony will differ from statements they made to law enforcement. Indeed, the Commonwealth themselves depend on these very witnesses to convict the vast majority of defendants on their caseload. It is common practice for juries to be instructed with special directions on how to evaluate a witness's testimony in comparison to statements they made to law enforcement that are inconsistent. The Pennsylvania Standard Jury Instruction (criminal) 4.08A regarding prior

inconsistent statements is frequently used in criminal trials:

You have heard evidence that a witness made a statement on an earlier occasion that was inconsistent with his/her present testimony. You may consider this evidence for one purpose only to help you judge the credibility and weight of the testimony given by the witness at this trial. You may not regard the evidence of an earlier inconsistent statement as proof of the truth of anything said in the statements.

It is certainly not reasonable for counsel to entirely forgo interviewing a witness on the basis of a statement they made to law enforcement, particularly in light of the comments his client made to him that Ms. Williams would attest that he was inside the bar at the time of the shooting. In fact, jurist of reason have said that “[i]t is untenable to conceive a reasonable justification for appearing in a first degree murder case without thorough preparation, including interviewing a known potential alibi witness.” *Commonwealth v. Stewart*, 84 A.3d 701, 718 (Pa. Super. 2013). Also See *Commonwealth v. Jones*, 437 A.2d 958, 960 (Pa. 1981), where the Pennsylvania Supreme Court specifically found trial counsel ineffective for failing to interview a witness where the key issue turned on the credibility of the defendant and an undercover police officer. In doing so it opined, “[i]t is not for this Court to decide what effect [the witness’s] testimony may have had on the jury of he

had been called to testify. Matters of credibility are best left to the fact finders.” However, this is exactly what the District Court did in the instant case.

This is a prototypical example of ineffective assistance of counsel. See *Martinez v. Fla. Dept. of Corr.*, 684 Fed. Appx. 915, 924 (11<sup>th</sup> Cir. 2017) (“Once [counsel] learned of the possible alibi defense from his client, [counsel] had a professional duty either to investigate the alibi or to make a reasonable choice not to investigate it.”). The reviewing Court in the instant matter, simply conjured up a hypothetical reason counsel could have had for not interviewing Ms. Williams. Attorneys are provided great latitude when it comes to trial strategy. However, that does not mean while evaluating a claim of ineffective assistance of counsel, a reviewing court can, without any record support, simply come up with reasons why counsel may have had a reasonable basis for his actions or inactions.

Likewise, had Petitioner’s jury heard from Ms. Williams there is a “reasonable probability that... at least one juror would have harbored a reasonable doubt.” *Buck v. Davis*, 137 S.Ct. 759, 776 (U.S. 2017). Importantly, Ms. Williams’ testimony would have undermined Kamira Woods’ second out-of-court statement alleging that she saw Petitioner involved in the shooting. It should be noted that the jury requested to see Ms. Woods’ statements. The District

Court entirely ignored this facet, and instead simply created a hypothetical reason for counsel's inaction.

This question is of great importance and has never been answered by this Court. Answering this question would serve to guide the lower courts.

**3. Did not the District Court incorrectly apply this Court's ruling in Strickland v. Washington, 466 U.S. 668, 694 (U.S. 1984) where it found that trial counsel was not ineffective when he failed to interview witness Charles Waters concerning the misconduct of Detective Ronald Dove.**

At trial, it was alleged that one of Petitioner's friends, Charles "Biggie" Waters, was engaged in a heated argument with the victim when the victim tried to talk to a woman whom Frager said Waters stated was there with him and Petitioner. The Commonwealth used this information to argue that there was an adversarial dynamic between Petitioner's group and the victim's group.

Counsel had every reason to interview Mr. Waters, particularly where he was central to the Commonwealth's theory of the case. Prior to trial, Petitioner asked his trial counsel to interview Mr. Waters, but counsel failed to do so. Had counsel interviewed Mr. Waters, counsel would have been informed that Detective Ronald Dove asked Mr. Waters to lie in a statement inculcating Petitioner in

the killing of Steven Bartley.<sup>1</sup> This information would have been extremely beneficial to Petitioner where it would have supported Vincent Dickerson's testimony that Detective Dove made him lie in his statements. Had Petitioner's jury heard from Mr. Waters about Detective Dove's insistence that he lie about Petitioner's involvement in the murder there is a reasonable probability that the outcome of his trial would have been different since every piece of evidence in the case against Petitioner came from Detective Dove.

Petitioner requested that his PCRA counsel raise this claim in his PCRA petition, but counsel failed to do so. PCRA counsel had no reasonable basis for failing to raise this claim, as the claim had substantial merit. While this claim was not raised in state court it is still properly before this Court as Petitioner has established cause and prejudice for the default. See Martinez v. Ryan, 132 S.Ct 1309 (U.S. 2012). Petitioner has established that his PCRA counsel was ineffective

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<sup>1</sup> It should be noted that Detective Dove was fired by the Philadelphia Police Department for covering up evidence in a homicide involving his mistress. Detective Dove was arrested and charged with: obstructing justice, unsworn falsification to authorities, tampering with/fabricating evidence, hindering prosecution, flight, and conspiracy. See Commonwealth v. Ronald Dove, CP-51-CR-0001382-2015. On April 26, 2017, Detective Dove plead guilty in connection the above mentioned charges. See Commonwealth v. Johnson, 179 A.3d 1105 (PA Super. 2018).

in failing to raise this claim during the initial review stage of his collateral review proceeding, therefore this Court may review this claim. *Lambert v. Green*, 861 F.3d 459, 472 (3d Cir. 2017).

In deposing of this claim the Magistrate alleged that counsel could not be ineffective for failing to call Charles Waters as a witness because in doing so trial counsel would have been introducing another statement from an individual that placed Petitioner outside the bar with the victim at the time of the shooting. (See R & R, p. 38). Reasonable jurist could debate whether the Magistrate deposed of this claim correctly.

The Magistrate overlooked the fact that Charles Waters did not sign any statement stating that Petitioner was outside the bar at the time of the shooting.

The Report and Recommendation also overlooked the fact that Mr. Waters would have provided critical testimony that Detective Dove wanted him to lie and implicate Petitioner in the murder. Waters's testimony would have bolstered the testimony of Kamira Woods and Vincent Dickerson concerning their assertion that Dove threaten them into lying. Moreover, Mr. Waters's testimony would have refuted James Frager's account of what happened leading up to the incident, and corroborated Petitioner's defense that Petitioner was not the one arguing with the man over the jukebox. Waters would have also

corroborated the fact that Petitioner was not arguing with the victim and Waters and would have testified that he was not present when Kamira Woods was assaulted in the bar's bathroom. The Magistrate Judge said that Charles Waters had credibility problems because he and Petitioner are friends. However, Mr. Waters would not have had any credibility issues that the Commonwealth's witnesses did not also have. Frager served a prison sentence for drugs and a firearm and in the 80s he was convicted of murder. Vincent Dickerson at the time of trial was in the state prison system's custody for influencing the minor of a child. And Ms. Woods had a warrant at the time of trial. So Mr. Water's credibility should not be an issue.

### **REASONS FOR GRANTING APPEAL**

The questions Petitioner presented are matters of first impression. The question of whether a freestanding claim of actual innocence can stand as a basis of relief for a state prisoner in the context of a federal habeas proceeding is a question that the lower courts have consistently been conflicted on. Likewise, the question of whether *Strickland* permits a reviewing court to create hypothetical reasons counsel may have had for his/her actions and inactions without first conducting a hearing has never been determined by this Court, and guidance would greatly

equip the lower Courts with evaluating claims of ineffective assistance of counsel.

**Conclusion**

Petitioner requests that this Honorable Court grant his Petition for Certiorari.

Respectfully submitted,

*Naeem Jones*

Naeem Jones, HV-9384

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