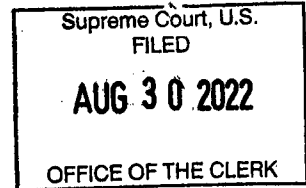


22-6226 ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES



James Armstrong — PETITIONER  
(Your Name)

vs.

Kathy Brittain, et al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Third Circuit Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James Armstrong # KL-5105

(Your Name)

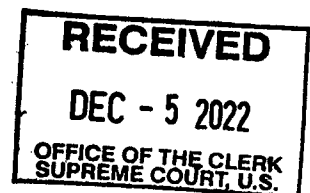
S.C.I. Frackville  
1111 Altamont Blvd.

(Address)

Frackville, Pa 17931

(City, State, Zip Code)

(Phone Number)



Question Presented

Did the third Circuit Court of Appeals fail to apply it's face of opinion on petitioner habeas corpus petition on "Presumption Of Correctness" mandated by 28 U.S.C. §2254(e)(1) to the state court determination in accordance with the United States Supreme Court principles as well as many other Circuit Court's of Appeals?

### List of Parties

[X] All parties appears in the caption of the cover page.

[ ] All parties do not appear in the caption of the case on the cover page.

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

### Related Cases

Jacobs v. Horn, 395 F.3d 105 (3rd Cir. 2005)

Jefferson v. Upton, 560 U.S. 284, 130 S.Ct. 2217, 176 L.Ed. 2d 1031(2010)

Jermý v. Horn, 266 F.3d 257(3rd Cir. 2001)

Marshall v. Lonberger, 459 U.S. 422, 432, 74 L.Ed. 2d 646, 103 S.Ct. 843 (1983)

Meyers v. Gillis, Superintendent et al., 93 F.3d 1147(3rd Cir. 1996)

Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 1039(2003)

Parker v. Dugger, 498 U.S. 308, 320, 111 S.Ct. 731, 112 L.Ed. 2d 812 (1995)

Purkett v. Elem, 131 L.Ed. 2d 834, 115 S.Ct. 1769(1995)

Rolan v. Vaughn, 455 F.3d 671(3rd Cir. 2005)

Strickland v. Washington, 466 U.S. 668, 694(1984)

Sumner v. Mata, 455 U.S. 591, 518, 71 L.Ed. 2d 480, 102 S.Ct. 1303(1981)

Townsend v. Sain, 372 U.S. 293, 318, 9 L.Ed. 2d 770, 83 S.Ct. 745(1963)

## Table Of Contents

Question Presented...	(i)
Table of contents...	(iii)
Table of Authoritties...	(iv)
Opinion Below...	(1)
Jursidiction...	(1)
Constitutional and Statutory Provision Involved...	(v)
Statement of the Case...	(vi)
Reason for Granting Petition...	The Third Circuit Court of Appeals failed to apply it's face of opinion on "Presumption Of Correctness"...Page 3
Conclusion...	page 10 & 11

## Appendix

Appendix A-	Decision of the Third Circuit Court of Appeals
Appendix B-	Order of The District Judge
Appendix C-	Magistrate Judge Report and Recommendation
Appendix D-	Order Denying Rehearing En Banc
Appendix E-	State Superior Court Opinion
Appendix F-	Jury's Question
Appendix G-	Trial Judge Ruling on the Jury's Question

### Table Of Authorities

Jacobs v. Horn, 395 F.3d 105 (3rd Cir. 2005)... Page 6

Jefferson v. Upton, 560 U.S. 284, 130 S.Ct. 2217, 176 L.Ed. 2d 1031 (2010)... Page 1, 2

Jermy v. Horn, 266 F.3d 257 (3rd Cir. 2001)... Page 6, 7

Marshall v. Lonberger, 459 U.S. 422, 432, 74 L.Ed. 2d 646, 103 S.Ct. 843 (1983)...Page 4

Meyers v. Gillis, Superintendent, et al., 93 F.3d 1147 (3rd Cir. 1996)...  
Page 1

Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 1039 (2003)... Page 2, 3

Parker v. Dugger, 498 U.S. 308, 320, 111 S.Ct. 731, 112 L.Ed 2d 812 (1995)...Page 2, 4

Purkett v. Elem, 131 L.Ed. 2d 834, 115 S.Ct. 1769 (1995)... Page 4

Rolan v. Vaughn, 455 F.3d 671 (2005)... Page 6, 7

Strickland v. Washington, 466 U.S. 668, 694 (1984)... Page 6, 7, 9

Sumner v. Mata, 455 U.S. 591, 518, 71 L.Ed. 2d 480, 83 S.Ct. 1303 (1981)...  
Page 4

Townsend v. Sain, 372 U.S. 293, 318, 9 L.Ed. 2d 770, 83 S.Ct. 745 (1963)...Page 3, 4

### Statutes

28 U.S.C. §2254(b)(1), (A)

28 U.S.C. §2254(d)(1)

28 U.S.C. §2254(d)(2)

28 U.S.C. §2254(d)(8)

28 U.S.C. §2254(e)(1)

IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

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

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

[ ] reported at N/A; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

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

[ ] reported at N/A; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

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

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

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

The opinion of the Pennsylvania Superior State court appears at Appendix E to the petition and is

[x] reported at No. 1337 EDA 2017; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 18, 2022.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 15, 2022, and a copy of the order denying rehearing appears at Appendix D.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Constitutional and Statutory Provisions Involved

The following constitutional and statutory provisions are involved in this case.

**U.S. CONST. AMEND., VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**U.S. CONST. AMEND., XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction therefore, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**28 U.S.C. §2254**

(a) The Supreme Court, a Justice therefore, a circuit judge, or district judge shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) 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



unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State;

(d) An applicant 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 merit in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(f)

## STATEMENT OF THE CASE

### (i) State Court Proceedings:

On March 8, 2012, prior to the conclusion of the jury, The trial court sent out the preliminary transcripts of Craig Gibson to the jury during deliberation on trial, counsel failed to object. The jury requested for the "Statement: of Craig Gibson (N.T. 3/8/12 Pg. 115-117). Petitioner was convicted of first degree murder and firearms violation. On May 17, 2012, the Honorable Judge James R. Bradley imposed a life sentence for the murder conviction and consecutive three and one-half to seven years for the firearm violation. Following Petitioner conviction, Petitioner filed a direct appeal. The Pennsylvania Superior Court affirmed the judgment of sentence on July 23, 2013. On March 5, 2014, the Pennsylvania Supreme Court denied Appellant allowance of appeal. See Commonwealth v. Armstrong, 624 Pa. 658, 87 A.3d 317 (Pa.2014). On August 4, 2014 Petitioner filed a timely Pro se PCRA petition. On March 22, 2017, the PCRA court dismissed petitioners petition. On May 24, 2017 appointed counsel filed 1925(b) Statement. On May 31, 2018, the Pennsylvania Superior Court denied the PCRA petition. On December 20, 2018, the Pennsylvania Supreme Court denied allowance of appeal.

### (ii) Federal Habeas Corpus Proceedings:

Petitioner filed the instant habeas corpus petition in the Eastern District Court of Pennsylvania on November 4, 2019. The case was assigned to district Judge Berle M. Schiller, who originally assigned the case to Magistrate Judge Lynne A. Sitarski who order the respondent to file a detailed answer with the court order.

On May 4, 2020, the Commonwealth filed a answer in the opposition to the petition. On March 23, 2021, the Magistrate Judge Schiller issued an "R&R" denying the petition for writ of habeas corpus without an evidentiary hearing and without an issuance of a certificate of appealability. Petitioner filed a timely objection to the "R&R", however the District Judge Schiller adopted the Magistrate conclusion and dismissed the petition on July 14, 2021. Petitioner tiled a timely COA application, which was denied on March 18, 2022. Petitioner filed a timely rehearing en banc application an was denied on June 15, 2022.

### Reason For Granting Writ

I. The Third Circuit Court of Appeals failed to apply it's face of opinion on "Presumption of Correctness" mandated by 28 U.S.C. §2254(e)(1) to the state court factual determination...

Petitioner provided the Third Circuit Court of Appeals with clear and convincing evidence that, the jury [never] requested the preliminary hearing testimony transcripts of Craig Gibson during it's deliberation.

The Third Circuit Court of Appeals Circuit Judges; McKee, Greenaway, Jr. and Porter denied petitioner habeas corpus petition for substantial reasons provided by the District Court and The PCRA Court.

The District and PCRA Court assertion that, the jury requested the preliminary hearing testimony transcripts of Craig Gibson was objectively unreasonable determination of the facts in light of the evidence in the state court proceeding. Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 1039(2003).

The District Court made a clear error with it's decision to adopt the state court findings because it can't be supported by the record.

In the instance case, the factual and legal determination was that during deliberation the jury requested the "STATEMENT" of Craig Gibson (N.T. 3/8/12 Pg.115-116) (APPENDIX F). Wherefore, the burden lawfully shift; Townsend v. Sain, 372 U.S. 293, 318, 9 L.Ed. 2d 770, 83 S.Ct. 745 (1963).

Under 28 U.S.C. §2254(e)(1)'s Presumption of Correctness, applies to

factual issues that are "basic", primary or historical facts; Facts in sense of recital or external events credibility of their narrators...

The United States Supreme Court held in Jefferson v. Upton, Warden, 560 U.S. 284, 130 S.Ct. 2217, 176 L.Ed. 2d 1031 (2010) ( the statutory presumption of correctness of the state court's findings was improperly applied base solely on the ground that the findings were fairly supported by the record, since there were no consideration (specifically 28 U.S.C. §2254(d)(8)) to the presumption under former §2254(d) the judgment upholding the state court findings of the fact was vacated.

Title 28 U.S.C. §2254(d)(8) provides that a state court's factual determination generally "must be presumed to be correct unless (they are) not fairly supported by the record". See Purkett v. Elem, 131 L.Ed. 2d 834, 115 S.Ct. 1769 (1995) ( In habeas proceeding in federal court's, the factual findings of the state court are presumed to be correct, and may be set aside, procedure error, only if they are 'not fairly supported by the record' (quoting 28 U.S.C. §2254(d)(8)). The statute "requires the federal courts to show a high measure of deference to the factfinding made by the state courts" Sumner v. Mata, 455 U.S. 591, 598, 71 L.Ed. 2d 480, 102 S.Ct. 1303 (1981). Thus, the question in federal habeas proceeding is not whether federal courts agree with the state courts factual findings but whether that finding is fairly supported by the record. e.g. Marshall v. Lonberger, 469 U.S. 422, 74 L.Ed. 2d 646, 103 S.Ct. 843 (1983) well settle law.

If the state courts findings is fairly supported by the record, then petitioner must "establish by clear and convincing evidence that the factual determination by the State Court was erroneous". See Parker v. Dugger, 498 U.S. 308, 320, 111 S.Ct. 731, 112 L.Ed 2d 812 (1995) (granting federal habeas relief after rejecting the state court finding under 28 U.S.C. §2254(d)(8)). The rule of 28 U.S.C. §2254(d)(8) is that a federal court ruling on a petition for habeas corpus is not to overturn a state court conclusion, unless the conclusion is " not fairly supported by the record", applies equally to the finding of trial court and the appellate court.

Although 28 U.S.C. §2254(d)(8) was not cited or discussed by the Third Circuit Court of Appeals or the District Court in petitioner habeas corpus petition, this provision should have furnish the starting point of the District Court inquiry.

It's absolutely nothing in the record that assert, the jury requested the preliminary hearing testimony transcripts of Craig Gibson. (SEE AGAIN) The jury requested the "STATEMENT" of Craig Gibson (N.T. 3/8/12 Pg. 115-116) (APPENDIX F).

The Third Circuit Court of Appeals are not in unifirmity with the, Second, Fourth, Fifth, Sixth, Seventh, Nineth and Tenth Circuit Court of Appeals with "Presumption of Correctness" mandate by 28 U.S.C. §2254(e)(1) to the state court factual determination...

Venture, Jr. v. Meechum, 957 F.2d 1048 (2nd Cir. 1992), The District Court erred in failing to defer to the Appellate Court of Connecticut's determination that such findings had been made, and failing to acknowledge the Superior's Courts findings). John v. Watkins, Superintendent of Alexander Corr., 3 Fed. Appx. 70 (4th Cir. 2001)(quoting Sumner v. Mata, 449 U.S. 539, 551, 66 L.Ed 2d 722, 101 S.Ct. 764 (1981), federal court should include in its opinion the reasoning which led to conclude that the state court finding was "not fairly supported by the record"). Moody v. Quarter, 476 F.3d 260 (5th Cir. 2007)(quoting Marshall v. Lonberger, 459 U.S. 422, 432, 103 S.Ct. 843, 74 L.Ed. 2d 646 (1983) the presumption was rebuttable and the findings could be set aside if they are "not fairly

supported by the record"). Franklin v. Bradshaw, 695 F.3d 439 (6th Cir. 2012)(solong that fairminded jurist could disagree on the correctness of the state court decision relief is precluded under AEDPA). Boobo v. Kolb, 969 F.3d 391 (7th Cir. 1992) (under the mandate of 28 U.S.C. §2254(d), "state court factual findings that are reasonably based on the record are accorded a presumption of correctness"). Deere A.K.A Running Deer v. Cullen, 718 F.3d 1124 (9th Cir. 2013)(quoting Sumner v. Mata, supra state court findings of fact, including finding made by appellate court based on review of the record, are entitled to a presumption of correctness and are reviewed for clear error 28 U.S.C. §2254(d)(8)). Al-Yousif v. Trani, Warden, 779 F.3d 1173 (10th Cir. 2015)(the presumption of correctness applies to factual findings made by the state court of review based on trial record).

Petitioner respectfully assert that, petitioner has establish the presumption of correctness standard to the factual and legal determination with clear and convincing evidence pursuant to 28 U.S.C. §2254(e)(1).

II. The Third Circuit Court of Appeals misapplied Strickland v. Washington, 466 U.S. 668, 694 (1984) standard of the prejudice component.

The prejudice component requires petitioner to show that there is a reasonable probability that, but for counsel unprofessional error, the result of the proceeding would of been different, Strickland, 466 U.S. at 694. Petitioner need not to show that counsel deficient peworkformance more likely than not alter the outcome in the case, rather petitioner must show only a reasonable probability sufficient to undermine confidence in the outcome. Jacobs v. Horn, 395 F.3d 105 (3rd Cir. 2005)(quoting Strickland,

466 U.S. 693-94). This standard is not a stringent one, although Strickland does not set a high bar with respect to the prejudice inquire.

This Court requires, in making the prejudice analysis under Strickland, that reviewing court consider all of the evidence in the record. Jermy v. Horn, 266 F.3d 257 (3rd Cir. 2001), in considering whether a petitioner suffered prejudice the effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial; a verdict or conclusion only weakly supported by the record is more likely to have been affected by error than one with overwhelming record support. Rolan v. Vaughn, 445 F.3d 671 (3rd Cir. 2005).

The District Court and the PCRA Court assert, petitioner failed to demonstrate prejudice on the account of trial counsel failed to object to the trial courts abuse of discretion with sending out the preliminary hearing testimony transcripts of Craig Gibson that the jury had not requested. Examination of the record will demonstrate that petitioner did suffer prejudice from trial counsel actions in failing to object.

At the conclusion of trial court's charge, the jury retired to deliberate (N.T. 3/8/12 Pg. 115). Following intial deliberation, the record thereafter reflect that the jury return with a note, which was marked as J-1 at trial (SEE APPENDIX F). One of the inquires within J-1 was related to the "STATEMENT" of Craig Gibson, in which petitioner move for the exhibit admission as D-16. Whose redacted/amended preliminary hearing testimony was admitted as trial testimony by way of audiotape (N.T. 3/6/12 Pg. 70-72). The audiotape testimony was marked as C-18 at trial, and the transcripts of the audiotape was marked as C-19. The jury was permitted to read along C-19 while the audio portion C-18 was being palyed during trial (N.T. 3/6/12 Pg. 71).



Following the jury's submission of J-1 (APPENDIX F), the Court inter alia, addressed the jury. " With respect to Craig Gibson", I can give that transcript to you that was read in court and that you followed along. I can give you that. (N.T. 3/8/12 Pg. 116) (APPENDIX G).

Craig Gibson preliminary hearing testimony was that, he (Gibson) observed petitioner and codefendant Ishmail chase the victim and then saw petitioner raise and fire a weapon ( P.H. 9/23/11 Pg. 22-25). Trial counsel should have been aware that, sending out with the jury transcripts of any kind was a direct violation of Pa. R. Crim. P. 646(C)(1) former rule 646(B)(1). The Rule 646(C)(1) provides relevant parts, that during deliberation the jury shall not be permitted to have (1) a transcript of any trial testimony or (2) a copy of any written or otherwise recorded confession by the defendant. Commonwealth v. Canales, 311 A.2d 572 (Pa. 1973)( Where the Supreme Court explained that transcripts are forbidden in the jury room because "the physical embodiment of a portion of the trial testimony in written form" might convince jurors to accept the testimony as true).

The record clearly reveals that, the trial court ran afoul of Rule 646(C)(1), unduly emphasizing the testimony of a witness that the jury had not requested and the recitation of such unsolicited testimony was prejudicial against the petitioner. Trial counsel failed to make a crucial objection to the court's action that provided the jury with a verbatim copy of Mr. Gibson's preliminary hearing testimony transcripts that was admitted into evidence [C-19] in direct contravention of Pa. R. Crim. P. 646(C)(1). Had trial counsel made the proper objection to the trial court's action, there is a reasonable probability the result of the proceeding would have been different.

In considering whether petitioner suffered prejudice from trial counsel

deficient performance in failing to object to the trial court's action, it is the District and Third Circuit Court of Appeals application of governing federal law that is challenge.

Mr. Gibson eyewitness testimony was vital to the Commonwealth case therefore, "his credibility was vital importance". With many inconsistencies in Mr. Gibson preliminary hearing testimony in just four months prior to given his statement to police, there is a reasonable probability had trial counsel made the proper objection to the trial court action's the result of the proceeding wouldof been different.

Trial counsel had a duty to protect the petitioner best interest, it can't be held that trial counsel failure to object to the trial court's action with sending out the transcripts of Craig Gibson preliminary hearing was in the best interest of the petitioner.

Here, trial counsel error was so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment of the United States of the Constitution, depriving petitoner of a fair trial, a trial whose result is unreliable, Strickland, 466 U.S. 668 (1984).

Other Circuit Court of Appeals are in bound uniformity with, trial counsel failure to object...

Cofsk v. United States, 290 F.3d 437, 443 (1st Cir. 2002) (Court's tend to be somewhat less forgiving where counsel altogether a possible objection). Thomas v. Varner, 428 F.3d 491 (3rd Cir. 2005) (Third Circuit Court of Appeals held; Court's rountinely declared assistance ineffective when the [r]ecord reveals that counsel failed to make a crucial objection or to present a strong defense soley because counsel was unfamiliar with settled principles).

Cox v. Donnelly, 387 F.3d 193 (2nd Cir. 2004) (Petitioner's 28 U.S.C. §2254 habeas petition was granted after finding that petitioner's Sixth Amendment right to effective counsel was violated when trial counsel failed to object to an unconstitutional jury instruction). Cossel v. Miller, 299 F.3d 649 (7th Cir. 2000) (Habeas corpus pursuant to 28 U.S.C. §2254 was granted, holding that victim's in-court identification of petitioner lacked sufficient independent reliability to be admissible, that petitioner's counsel was ineffective for failing to object to it's and that the state court's rejection of petitioner's ineffective assistance claim was an unreasonable application of clearly establish federal law). Beaudreaux v. Soto, Warden, 734 Fed. Appx. 387 (9th Cir. 2017) (Inmate was granted habeas relief on ineffective assistance of counsel based on counsel's failure to object to move or to exclude an eyewitness's testimony as the product of impermissibly suggestive photographic identification procedure). Velazques v. Superintendent Fayette SCI, 937 F.3d 151 (3rd Cir. 2019) (Petitioner was granted habeas relief on his ineffective assistance of counsel claim because counsel failure to object to the defective guilty but mentally ill plea procedure 18 Pa. Const. Stat. §314(b) constituted ineffective assistance of counsel in violation of the Sixth Amendment).

### Conclusion

Petitioner has exhausted all the remedies available in the court of the state, and has met the standard of 28 U.S.C. §2254(d)(1), §2254(d)(2) and §2254(e)(1) to obtain relief in this Honorable Court.

The District Court and the PCRA Court's aspect of the record is a defect in the fact finding process and was objectively unreasonable of the facts in light of the evidence presented in the state court proceedings. The Third

Circuit Court of Appeals made it's decision on a flaw process because it can't be supported by the record.

For the foregoing reasons, petitioner James Armstrong prays that this Honorable Court grant him relief an vacate conviction and sentence an order that petitioner be afforded a new trial within 60 days or release him from custody.

Date: 11/27/2022  
cc:

Respectfully Submitted,

/s/ James Armstrong  
James Armstrong # KL-5105  
S.C.I. Frackville  
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(11).