NO._____

IN THE SUPREME COURT OF THE UNITED STATES

GERALD DRUMMOND - PETITIONER

VS

COMMONWEALTH OF PENNSYLVANIA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

TO THE PENNSYLVANIA SUPREME COURT

# PETITION FOR WRIT OF CERTIORARI

GERALD DRUMMOND

INMATE ID# JW-3732

S.C.I. DALLAS, PA D.O.C.

1000 FOLLIES ROAD

DALLAS, PENNSYLVANIA 18612

## QUESTION PRESENTED

MR. GERALD DRUMMOND, PETITIONER, ALLEGES THE PENNSYLVANIA COURTS ARE PURPOSEFULLY REFUSING TO GRANT SOUGHT RELIEF WHILE KNOWING THAT PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR AND IMPARTIAL TRIAL AND DUE PROCESS CLAUSE WAS VIOLATED BY THE TRIAL JUDGE WITHIN THE CHARGE TO THE JURY, SPECIFICALLY, THE REASONABLE DOUBT INSTRUCTION. THE TRIAL JUDGE HAS USED THIS SAME INSTRUCTION IN NUMEROUS HOMICIDE TRIALS AND THE THIRD CIRCUIT, AS WELL AS THE PENNSYLVANIA SUPREME COURT, HAS ACKNOWLEDGED THE INSTRUCTION AS UNCONSTITUTIONAL, THOUGH THE STATE CONFLICTS OPINIONS WITH THE FEDERAL COURTS AS TO WHETHER COUNSEL IS INEFFECTIVE FOR FAILING TO OBJECT TO THE UNCONSTITUTIONALITY OF THE INFIRM INSTRUCTION. THE LOWER COURTS ARE REFUSING TO GRANT RELIEF BECAUSE IT WOULD CAUSE A GATEWAY EFFECT FOR DEFENDANTS THAT SUFFERED THIS SAME INJUSTICE, OVERTLY OVERCROWDING AN ALREADY CONGESTED SYSTEM. RATHER THAN PROVIDING RELIEF FOR THE AFFLICTED, THE STATE COURTS ARE USING THE FEDERAL COURT AS THEIR PERSONAL DUMPING GROUNDS AND IGNORING THE MERITORIOUS CLAIMS FILED IN THEIR COURT; LIKE THAT OF THE PETITIONER'S.

1. IS THE PENNSYLVANIA COURTS INAPPROPRIATELY DENYING THE UNITED STATES CONSTITUTIONAL PROTECTIONS OF THE PETITIONER RIGHTS IN THEIR DENIAL OF RELIEF TO INEFFECTIVENESS OF TRIAL COUNSEL'S FAILURE TO OBJECT TO THE STRUCTURAL ERROR IN THE UNCONSTITUTIONAL REASONABLE DOUBT INSTRUCTION?

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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 JUDGEMENT BELOW.

OPINION BELOW

THE OPINION OF THE HIGHEST STATE COURT TO REVIEW THE MERITS APPEAR AT APP.: A (39 PAGES (CASE NUMBER, 28 EAP 2021) OPINION FROM THE PENNSYLVANIA SUPREME COURT). AS OF THIS MOMENT, PETITIONER IS UNAWARE OF ANY PUBLICATION OF THE OPINION.

JURISDICTION

THE DATE ON WHICH THE HIGHEST STATE COURT DECIDED THE MERITS ON THE CASE WAS NOVEMBER 23, 2022. A COPY OF THAT DECISION APPEARS AT.: A (SEE: PAGE# 1). THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. § 1257(d)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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 HAVE 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 OF NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH 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 THE LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAW.

U.S. U.S.C. § 1257(a)

FINAL JUDGEMENT OR DECREES RENDERED BY THE HIGHEST COURT OF THE STATE IN WHICH A DECISION COULD BE HAD, MAY BE REVIEWED BY THE SUPREME COURT BY WRIT OF CERTIORARI WHERE THE VALIDITY OF A TREATY OR STATUE OF THE UNITED STATES IS DRAWN IN QUESTION ON THE GROUND OF ITS BEING REPUGNANT TO THE CONSTITUTION, TREATIES, OR LAWS OF THE UNITED STATES, OR WHERE ANY TITLE, RIGHT, PRIVILEGE, OR IMMUNITY IS SPECIALLY SET UP OR CLAIMED UNDER THE CONSTITUTION OR THE TREATIES OR STATUES OF, OR ANY COMMISSION HELD OR AUTHORITY EXERCISED UNDER, THE UNITED STATES.

PA. CONST., ART. I, § IX

IN ALL CRIMINAL PROSECUTIONS THE ACCUSED HATH THE RIGHT TO BE HEARD BY HIMSELF AND HIS COUNSEL, TO DEMAND THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM, TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM, TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND, IN PROSECUTIONS BY INDICTMENT OR INFORMATION, A SPEEDY PUBLIC TRIAL BY AN IMPARTIAL JURY OF THE VICINAGE; HE CANNOT BE COMPELLED TO GIVE EVIDENCE AGAINST HIMSELF, NOR CAN HE BE DEPRIVED OF HIS LIFE, LIBERTY, OR PROPERTY, UNLESS BY JUDGEMENT OF HIS PEERS OR OF THE LAW OF THE LAND. THE USE OF A SUPPRESSED VOLUNTARY ADMISSION OR VOLUNTARY CONFESSION TO IMPEACH THE CREDIBILITY OF A PERSON MAY BY PERMITTED AND SHALL NOT BE CONSTRUED AS COMPELLING A PERSON TO GIVE EVIDENCE AGAINST HIMSELF.

PA CONST., ART. V, § 10(c)

THE SUPREME COURT SHALL HAVE THE POWER TO PRESCRIBE GENERAL RULES GOVERNING PRACTICE, PROCEDURES AND THE CONDUCT OF ALL COURTS, JUSTICES OF THE PEACE AND ALL OFFICERS SERVING PROCESS OR ENFORCING ORDER, JUDGEMENT OR DECREES OF ANY COURT OR JUSTICE OF THE PEACE, INCLUDING THE POWER TO PROVIDE FOR ASSIGNMENT AND REASSIGNMENT OF CLASSES OF ACTION OR CLASSES OF APPEAL AMONG THE SEVERAL COURTS AS THE NEEDS OF JUSTICE DO REQUIRES, AND FOR ADMISSION TO THE BAR AND THE PRACTICE OF LAW, AND THE ADMINISTRATION OF ALL COURTS AND SUPERVISION OF ALL OFFICERS OF THE JUDICIAL BRANCH, IF SUCH RULES ARE CONSISTENT WITH THE

CONSTITUTION AND NEITHER ABRIDGE, ENLARGE NOR MODIFY THE SUBSTANTIVE RIGHT OF ANY LITIGANT, NOT EFFECT THE RIGHT OF THE GENERAL ASSEMBLY TO DETERMINE THE JURISDICTION OF ANY COURT OR JUSTICE OF PEACE, NOR ALTER ANY STATUE OF LIMITATION OR REPOSE. ALL LAWS SHALL BE SUSPENDED TO THE EXTENT THAT THEY ARE INCONSISTENT WITH RULES PRESCRIBED UNDER THESE PROVISIONS. NOTWITHSTANDING THE PROVISIONS OF THIS SECTION, THE GENERAL ASSEMBLY MAY BY STATUTE PROVIDE FOR THE MANNER OF TESTIMONY OF CHILD VICTIMS OR CHILD MATERIAL WITNESSES IN CRIMINAL PROCEEDING, INCLUDING THE USE OF VIDEO DEPOSITION OR TESTIMONY BY CLOSED-CIRCUIT TELEVISION.

42 PA. C.S. § 706

AN APPELLANT COURT MAY AFFIRM, MODIFY, VACATE, SET ASIDE OR REVERSE ANY ORDER BROUGHT BEFORE IT FOR REVIEW, AND MAY REMAND THE MATTER AND DIRECT THE ENTRY OF SUCH APPROPRIATE ORDER, OR REQUIRE SUCH FURTHER PROCEEDINGS TO BE HAD AS MAY BE JUST UNDER THE CIRCUMSTANCES.

42 PA. C.S. § 722

THE SUPREME COURT SHALL HAVE EXCLUSIVE JURISDICTION OF APPEALS FROM FINAL ORDERS OF THE COURTS OF COMMON PLEAS IN THE FOLLOWING CLASSES OF CASES:

(1) MATTERS PRESCRIBED BY GENERAL RULES;

(2) THE RIGHT OF PUBLIC OFFICE;

(3) MATTERS WHERE THE QUALIFICATIONS, TENURE OR RIGHT TO SERVE, OR THE MANNER OF SERVICE, OF AN MEMBER OF THE JUDICIARY IS DRAWN

IN QUESTION;

(4) AUTOMATIC REVIEW OF SENTENCES PROVIDED BY 42 PA. C.S. §§9546(d) (RELATING TO RELIEF AND ORDER) AND 9711(h) (RELATING TO REVIEW OF DEATH SENTENCE);

(5) SUPERSESSION OF A DISTRICT ATTORNEY BY AN ATTORNEY GENERAL OR BY A COURT OR WHERE THE MATTER RELATES TO THE CONVENING, SUPERVISION, ADMINISTRATION, OPERATION OR DISCHARGE OF AN INVESTIGATING GRAND JURY OR OTHERWISE DIRECTLY AFFECTS SUCH A GRAND JURY OR ANY INVESTIGATION CONDUCTED BY IT;

(6) MATTERS WHERE THE RIGHT OF THE COMMONWEALTH OR ANY POLITICAL SUBDIVISION TO CREATE OR ISSUE INDEBTEDNESS IS DRAWN IN DIRECT QUESTION;

(7) MATTERS WHERE THE COURT OF COMMON PLEAS HAS HELD INVALID AS REPUGNANT TO THE CONSTITUTION, TREATIES OR LAWS OF THE UNITED STATES, OR TO THE CONSTITUTION OF THE COMMONWEALTH, ANY TREATY OR LAW OF THE UNITED STATES OR ANY PROVISION OF THE CONSTITUTION OF, OR OF ANY STATUTE OF, THIS COMMONWEALTH, OR ANY PROVISION OF ANY HOME RULE CHARTER;

(8) MATTERS WHERE THE RIGHT TO PRACTICE LAW IS DRAWN IN DIRECT QUESTION.

## STATEMENT OF PROCEDURE HISTORY OF THE CASE

THE DEFENDANT, PETITIONER HEREIN, WAS ARRESTED AND CHARGED WITH TWO (2) COUNTS OF FIRST DEGREE MURDER AND RELATED OFFENSES; AND CAME TO BE REPRESENTED BY LEAD COUNSEL, MICHAEL WALLACE, ESQ., AND, WILLIAM BOWE, ESQ., AS PENALTY PHASE COUNSEL FOR THE TRIAL WHERE THE

COMMONWEALTH SOUGHT THE DEATH PENALTY. THE CASE WAS ASSIGNED TO THE HONORABLE RENEE CARDWELL HUGHES, AND JOINED BY COMMONWEALTH V. ROBERT MCDOWELL, WHO WAS REPRESENTED BY COUNSEL, GARY SERVER, ESQ., AT TRIAL AFTER LEAD COUNSEL, DAVID RDDENSTEIN, ESQ., NECESSITATED BACK SURGERY ON THE EVE OF TRIAL, WITH MR. MCDOWELL CHOOSING TO HAVE MR. SERVER TRY THE CASE.

AFTER HEARING THE EVIDENCE OVER A NUMBER OF DAYS, THE JURY RETURNED ITS VERDICT, FINDING THE DEFENDANT(S) GUILTY OF THE TWO (2) COUNTS OF MURDER IN THE FIRST DEGREE AND RELATED OFFENSES. THEREAFTER, AND ON JANUARY 13TH, 2011, THE COURT SENTENCED THE DEFENDANT(S) TO TWO (2) CONSECUTIVE TERMS OF LIFE IMPRISONMENT, WITHOUT THE ELIGIBILITY OF PAROLE, ON THE MURDER BILLS, AND AGGREGATED THIRTY (30) YEARS ON ALL OTHER RELATED BILLS. THEREAFTER, A TIMELY APPEAL WAS FILED. ATTORNEY, WILLIAM BOWE AND MICHAEL WALLACE, WERE PERMITTED TO WITHDRAW AND THE COURT APPOINTED NEW COUNSEL, LEE MANDELL, ESQ. THE TRIAL JUDGE, HONORABLE RENEE CARDWELL HUGHES, RETIRED FROM THE BENCH AND DID NOT ISSUE AN OPINION IN THE CASE. COUNSEL THEREAFTER FILED AN ADVOCATE'S BRIEF ON BEHALF OF DEFENDANT. THE SUPERIOR COURT AFFIRMED THE LOWER COURT'S DECISION AND DENIED THE APPEAL ON SEPTEMBER 9TH, 2013. THEREAFTER, A TIMELY PETITION FOR ALLOWANCE OF APPEAL WAS FILED WITH THE PENNSYLVANIA SUPREME COURT. THE PENNSYLVANIA SUPREME COURT DENIED THE PETITION FOR ALLOWANCE OF APPEAL ON APRIL 9TH, 2014. THEREAFTER, PETITIONER FILED A TIMELY WRIT OF CERTIORARI WITH THE SUPREME COURT OF THE UNITED STATES; WHICH DENIED THE WRIT OF CERTIORARI ON OCTOBER 6TH, 2014.

THEREAFTER, THE PETITIONER FILED A TIMELY PETITION FOR RELIEF VIA POST-CONVICTION RELIEF ACT (HENCEFORTH PCRA) WITH THE PENNSYLVANIA COURT OF COMMON PLEAS, IN THE COUNTY OF PHILADELPHIA, PENNSYLVANIA ON OTCTOBER 1ST, 2015. THEREAFTER, PETITIONER SUBMITTED A SUPPLEMENTAL PRO SE PETITION FOR PCRA ON MAY 3RD, 2016. THEREAFTER, ATTORNEY JAMES BERARDINELLI WAS APPOINTED TO REPRESENT PETITIONER WITH RESPECT TO THE PCRA CLAIMS. A COUNSELED AMENDED PCRA PETITION WAS FILED ON SEPTEMBER 11TH, 2017. THE HONORABLE CHARLES A. EHRLICH, PRESIDING AS THE PCRA COURT, HELD A PCRA HEARING ON MAY 7TH, 2018, AT WHICH THE PARTIES PRESENTED ARGUMENTS BUT NO TESTIMONY OR EVIDENCE WAS PERMITTED. JULY 16TH, 2018, THE PCRA COURT ENTERED AN ORDER DISMISSING THE PCRA PETITION.

THEREAFTER, PETITIONER, THROUGH COUNSEL, FILED A TIMELY NOTICE OF APPEAL AND STATEMENT OF MATTERS COMPLAINED OF ON APPEAL PURSUANT TO PA.R.A.P. 1925. ATTORNEY, BERARDINELLI, FOR PETITIONER, FILED A TIMELY BRIEF AND THEREAFTER, BEFORE THE SUPERIOR COURT OF PENNSYLVANIA RENDERED A DECISION, ATTORNEY BERARDINELLI SOUGHT LEAVE TO WITHDRAW AS COUNSEL DUE TO CHANGE IN EMPLOYMENT; TO WHICH THE COURT GRANTED AND APPOINTED NEW COUNSEL, JAMES LlOYD, TO REPRESENT THE PETITIONER. THEREAFTER, ON FEBRUARY 16TH, 2021, THE SUPERIOR COURT OF PENNSYLVANIA DISMISSED PETITIONER'S APPEAL AND AFFIRMED THE ORDER DISMISSING THE PCRA PETITION.

THEREAFTER, THROUGH COUNSEL, ON MARCH 9TH, 2021, PETITIONER FILED A TIMELY PETITION FOR ALLOWANCE OF APPEAL WITH THE SUPREME COURT OF PENNSYLVANIA AND WAS GRANTED ALLOWANCE OF APPEAL IN A PER CURIAM ORDER

WHICH PROVIDED THAT THE FOLLOWING ISSUE WOULD BE ADDRESSED: "WAS TRIAL COUNSEL INEFFECTIVE FOR NOT OBJECTING TO THE TRIAL COURT'S JURY INSTRUCTION ON REASONABLE DOUBT?"

THEREAFTER, THE PETITIONER, THROUGH COUNSEL, AND THE PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, AS WELL AS BRIEFS FOR AMICUS CURIAE BY THE OFFICE OF THE ATTORNEY GENERAL, THE PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION, AND THE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FILED TIMELY BRIEFS FOR THEIR RESPECTIVE PARTIES.

THEREAFTER, THE SUPREME COURT OF PENNSYLVANIA DENIED THE PETITIONER'S APPEAL AND AFFIRMED THE ORDER DISMISSING THE PCRA PETITION ON NOVEMBER 23RD, 2022, WITH A FIVE TO ONE DECISION, WHERE THE CHIEF JUSTICE TODD AND JUSTICE DOUGHERTY AND BROBSON JOINED THE OPINION; JUSTICE DONOHUE FILES A CONCURRING OPINION; JUSTICE MUNDY FILES A CONCURRING AND DISSENTING OPINION.

THEREAFTER, PETITIONER FILED A WRIT OF HABEAS CORPUS WITH THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ON NOVEMBER 24TH, 2022. THE PETITIONER FILED AN APPLICATION TO STAY MATTER BEFORE THE SAID COURT SO THE PETITIONER CAN FILE THIS WRIT OF CERTIORARI WITH THIS HONORABLE COURT ON FEBRUARY 4TH, 2023.

## FACTUAL STATEMENT OF THE CASE

THE DEFENDANT, PETITIONER HEREIN, WAS ARRESTED AND CHARGED WITH TWO (2) COUNTS OF FIRST DEGREE MURDER, AND RELATED OFFENSES. THE

DEFENDANT ELECTED TO PROCEED WITH A JURY TRIAL, AND CAME TO BE REPRESENTED BY LEAD COUNSEL, MICHAEL WALLACE (TRIAL PHASE) AND WILLIAM BOWE (PENALTY PHASE). THE CASE WAS ASSIGNED TO THE HONORABLE RENEE CARDWELL HUGHES, AND WAS JOINED BY COMMONWEALTH V. ROBERT MCDOWELL, REPRESENTED BY ATTORNEY GARY SERVER, AFTER HIS COUNSEL NECESSITATED BACK SURGERY ON THE EVE OF TRIAL; RATHER THAN POSTPONING THE TRIAL DATE, MR. MCDOWELL ELECTED TO HAVE MR. SERVER TRY THE CASE IN HIS DEFENSE.

AFTER HEARING THE CASE OVER A NUMBER OF DAYS, THE JURY RETURNED A VERDICT OF GUILTY FOR BOTH DEFENDANTS ON ALL CHARGES. THE PENALTY PHASE COMMENCED, WHERE THE COMMONWEALTH SOUGHT THE DEATH PENALTY, AND REACHED A DECISION OF UNDECIDED BY THE JURY REGARDING WHETHER THE DEATH PENALTY SHOULD BE RENDERED; ULTIMATELY FORCING THE COURT TO RELEASE THE PANEL AND THE COURT RENDER SENTENCING OF TWO (2) CONSECUTIVE LIFE TERMS WITHOUT THE ELIGIBILITY OF PAROLE FOR EACH OF THE MURDER COUNTS, AND THIRTY (30) YEARS CONSECUTIVELY FOR THE RELATED OFFENSES ON JANUARY 13TH, 2011.

ON JULY 13TH, 2007, AT APPROXIMATELY 2:20AM, 15 YEAR OLD TIMOTHY CLARK AND 28 YEAR OLD DAMIEN HOLLOWAY WERE SHOT AND KILLED ON THE 6900 BLOCK OF VANDIKE STREET, PHILADELPHIA, PENNSYLVANIA 19135. THE DEFENDANTS WERE ARRESTED FOURTEEN MONTHS LATER, ON SEPTEMBER 6TH, 2008, AFTER THE HOMICIDE DETECTIVES OBTAINED SWORN STATEMENTS FROM LOCALE DRUG ADDICTS FROM THE NEIGHBORHOOD. HOWEVER, THE EVIDENCE, IF BELIEVED, DEMONSTRATED THAT THE PETITIONER HEREIN DID THE ACTUAL KILLING AND THE CO-DEFENDANT (MR. MCDOWELL) HELPED. IF BELIEVED, THE

EVIDENCE AT BEST REFLECTED THAT THE PETITIONER TOOK A WEAPON OFF THE CO-DEFENDANT AND COMMITTED THE KILLING OF THE TWO VICTIMS.

POLICE OFFICER, ROMMEL, RESPONDED TO THE SCENE AND SPOTTED THE TWO VICTIMS (N/T 12-8-10, p. 267).

POLICE OFFICER, JACONI, OF THE CRIME SCENE UNIT, ARRIVED AT THE SCENE AND TOOK PHOTOGRAPHS; AND ATTEMPTED TO FIND ANY TYPE OF EVIDENCE (N/T 12-9-10, p. 12 et seq.).

ANTONIA TISDALE WAS A NEIGHBOR, AT HOME AND HEARD SHOTS. SHE CAME OUTSIDE AND THEREAFTER SAW THE VICTIMS (N/T 12-9-10, p. 46). THE WITNESS TESTIFIED THAT ONE OF THE VICTIMS, MR. HOLLOWAY, AND THE DEFENDANT, PETITIONER HEREIN, WERE ALLEGEDLY HAVING TROUBLE BEFORE THE INCIDENT (N/T 12-9-10, p. 95).

SHARICE TISDALE WAS HOME AND ALSO HEARD THE SHOTS. SHE LOOKED OUT THE WINDOW AND SAW A WHITE MALE WITH A BLACK HOODIE ON RUNNING, BUT COULD NOT IDENTIFY THE PERSON (N/T 12-9-10, p. 95). YET, ANOTHER TISDALE FAMILY MEMBER, DANYELL TISDALE, HEARD SHOTS AND SAW THE WHITE MAN RUNNING (N/T 12-9-10, pp. 134-135).

AFTER THE INCIDENT, AMY RUDNITSKIS, SPOKE TO DETECTIVES, ALLEGING THAT THE DEFENDANT HEREIN AND HER HAD SPOKEN AND WITHIN THE CONVERSATION THE DEFENDANT SAID THAT HE WAS THE PERPETRATOR OF THE OFFENSES THAT MORNING, AND ALLEGEDLY SPOKE WITH THE CO-DEFENDANT AND OBTAINED SOME VERBAL STATEMENT FROM HIM ALLEGING HIS PART IN THE MATTER (N/T 12-9-10, p. 203 et seq.).

DESIREE ZABOROWSHI WAS ANOTHER COMMONWEALTH WITNESS THAT WAS FAMILIAR WITH THE ARGUMENTS BETWEEN THE DEFENDANT (PETITIONER HEREIN) AND THE VICTIM, MR. HOLLOWAY (N/T, 12/10/10, p. 22). MS. ZABOROWSHI ALLEGED TO WITNESS PETITIONER SCREAMING AT MR. HOLLOWAY AND THREATENING TO KILL HIM. MS. ZABOROWSHI ALLEGED THAT PETITIONER USED THE "N-WORD" (N/T, 12/10/10, p.23-24).

MS. ERICA MARRERO, FORMER GIRLFRIEND OF THE CO-DEFENDANT OF THE PETITIONER, TESTIFIED THAT THE CO-DEFENDANT DID NOT TELL MS. MARRERO ANYTHING ABOUT THE KILLING OF MR. HOLLOWAY OR MR. CLARK (N/T, 12-10-10, p. 58). HOWEVER, SHE GAVE AN OUT-OF-COURT STATEMENT AND IN THAT STATEMENT SHE CLAIMED THAT THE CO-DEFENDANT ADMITTED BEING PRESENT; ADMITTED TO HAVING A GUN; AND TOLD MS. MARRERO THAT PETITIONER TOOK THE GUN FROM THE CO-DEFENDANT AND KILLED THE VICTIMS (N/T, 12-10-10, p. 69-70). MS. MARRERO THEN EXPLAINED TO THE COURT THAT SHE WAS PLACED UNDER DURESS AND COERCION AND THIS WAS THE ONLY REASON SHE GAVE INTO THE DEMANDING OFFICERS DEMAND FOR MS. MARRERO TO SIGN THE FALSIFIED STATEMENT (N/T, 12-10-10, p. 64-65); MS. MARRERO WAS THREATENED, HELD FOR HOURS IN HOLDING CELLS, THREATENED WITH ARREST, THREATENED TO HAVE HER KID TAKEN FROM HER, HER FATHER IS A POLICE OFFICER AND THE DETECTIVE THREATENED TO CALL HIM AND CAUSE ALL KINDS OF OTHER ISSUES FOR MS. MARRERO IF SHE DID NOT SIGN WHAT THE DETECTIVE DAMNED OF HER, MS. MARRERO FURTHER TESTIFIED THAT SHE HAS NEVER TOLD ANYONE THAT THE PETITIONER OR CO-DEFENDANT TOLD HER ANYTHING ABOUT A MURDER OR HER TELL ANYONE THAT THEY COMMITTED SUCH A CRIME TOGETHER (N/T/, 12-10-10, p. 113).

THE COMMONWEALTH PRESENTED MR. THOMAS ZEHDNER, ALSO KNOWN AS TURTLE, WHO ALLEGED TO HAVE HAD MEMORY PROBLEMS IN THE COURTROOM. HOWEVER, IN HIS OUT-OF-COURT STATEMENT, MR. ZEHDNER CLAIMED THAT THE PETITIONER TOLD MR. ZEHDNER THAT THE PETITIONER HAD KILLED THE TWO VICTIMS (N/T, 12-10-10, p. 161).

THE COMMONWEALTH PRESENTED MR. JOSEPH BRANNAN WHO RECALLED A TIME WHEN THE PETITIONER'S CO-DEFENDANT ARGUED WITH MR. HOLLOWAY AFTER MR. HOLLOWAY ALLEGEDLY CALLED THE CO-DEFENDANT'S SISTER A BITCH (N/T, 12-13-10, p. 12-13); MR. MCDOWELL, CO-DEFENDANT, WAS REMEMBERED TO HAVE SAID "DON'T FUCK WITH MY SISTER".

THE COMMONWEALTH PRESENTED MS. SUSAN COULTER, WHO ALLEGED TO HAVE HAD A CONVERSATION WITH MS. MARRERO REGARDING THE KILLING OF THE TWO VICTIMS (N/T, 12-13-10, p. 74, et seq.). ALLEGEDLY, MS. MARRERO TOLD MS. COULTER THAT THE PETITIONER HAD KILLED THE VICTIMS (N/T, 12-13-10, p. 77). THEN, ACCORDING TO MS. COULTER, ALLEGED THAT MS. MARRERO SAID THAT THE PETITIONER AND CO-DEFENDANT DISAPPEARED DOWN THE STREET (N/T, 12-13-10, p. 77). HOWEVER, THEN MS. COULTER TOLD THE COURT THAT MS. MARRERO NEVER TOLD HER THAT THE CO-DEFENDANT, MR. MCDOWELL, SHOT ANYONE (N/T, 12-13-10, p. 93-94).

THE COMMONWEALTH CALLED DR. GULINO (N/T, 12-13-10, p. 109 et seq.) WHO TESTIFIED THAT THE CAUSE OF DEATH FOR EACH OF THE VICTIMS WAS A GUNSHOT WOUND WITH THE MANNER OF DEATH BEING HOMICIDE.

COMMONWEALTH WITNESS, DETECTIVE WATKINS, TESTIFIED AS TO THE

STATEMENT TAKEN FROM MS. MARRERO AND OFFERED THAT NO UNDUE PRESSURE HAD BEEN PUT UPON MS. MARRERO, THAT HIS INTERACTIONS WITH MS. MARRERO HAD BEEN PLEASANT (N/T, 12-13-10, p. 158).

COMMONWEALTH WITNESS, MS. NICOLE PENROSE, CLAIMED THAT THE PETITIONER WAS THE PERPETRATOR. ACCORDING TO MS. PENROSE OUT-OF-COURT STATEMENT, MS. PENROSE SAID THAT THE PETITIONER TOLD HER THAT HE AND ANOTHER PERSON WALKED UP ON THE VICTIMS, THAT THE OTHER PERSON HAD THE GUN BUT "COULD NOT DO IT", SO THE PETITIONER TOOK THE GUN AND KILLED THE VICTIMS (N/T, 12-14-10, p. 20). MS. PENROSE ALLEGED TO HAVE HAD TWO SUBSEQUENT CONVERSATIONS WITH THE PETITIONER WHERE THE PETITIONER ALLEGED TO HAVE CONFIRMED HIS ACTION WITHIN THE CRIME (N/T, 12-14-10, p. 26-27).

COMMONWEALTH WITNESS AND LEAD DETECTIVE, MR. THOMAS GAUL, RELATED TO THE COURT THAT HE HAD SPOKEN TO SEVERAL WITNESSES DURING THE INVESTIGATION AND STATED TO THE "WE HAD THE TWO PEOPLE THAT WE HAD CHARGED WITH THE MURDERS, THE TWO PEOPLE WHO COMMITTED THE MURDERS OF DAMIEN HOLLOWAY AND TIMOTHY CLARK" (N/T, 12-14-10, p. 143-144). DETECTIVE GAUL THEN WENT INTO TESTIFYING TO THE ALLEGED CONVERSATION THAT HE AND PETITIONER'S CO-DEFENDANT HAD, THOUGH THE INTERVIEW WAS NOT RECORDED AND THE ALLEGED WARNINGS WERE GIVEN ORALLY; DURING WHICH TIME THE CO-DEFENDANT ALLEGEDLY GAVE DETECTIVE GAUL NUMEROUS STATEMENTS OF HIS WHEREABOUTS DURING THE TIME OF THE CRIME AND BECAUSE OF THE SEVERAL ALTERNATIVE LOCATIONS, DETECTIVE GAUL ALLEGEDLY ENDED THE INTERVIEW WITH THE CO-DEFENDANT AT HIS REQUEST (N/T, 12-14-10, p. 165-167).

THE COMMONWEALTH RESTED AND DEFENSE CALLED DOMINIC GIORGI (N/T, 12-15-10, p. 20, et seq.). AFTER HEARING SHOTS, THOUGHT TO BE FIREWORKS AT FIRST, THE WITNESS LOOKED OUT THE WINDOW AND SAW A TALL, MEDIUM BUILD, AFRICAN AMERICAN MAN, RUNNING DOWN THE STREET FROM THE LOCATION OF THE SHOTS (N/T, 12-15-10, p. 21).

BY STIPULATION OF ALL PARTIES, IF WITNESS SHANE MADONNA WERE TO TESTIFY, THIS WITNESS WOULD HAVE TESTIFIED THAT THIS WITNESS LOOKED OUT THE WINDOW AFTER HEARING THREE GUN SHOTS AND SAW WHAT APPEARED TO BE A GUY RUNNING FROM VANDIKE STREET ONTO LONGSHORE AVENUE, CARRYING WHAT HE BELIEVED APPEARED TO BE A HANDGUN, BUT COULD NOT DESCRIBE THE PERSON THAT HE SAW RUNNING (N/T 12-15-10, p. 70-71).

THE PARTIES STIPULATED TO THE COMMONWEALTH'S REBUTTAL EVIDENCE THAT IF MR. SHAWNDELL JOHNSON HAD BEEN CALLED TO TESTIFY, HE WOULD HAVE RELATED THAT HE HAD MET A YOUNG LADY NAMED DAWN SNYDER AND HAD GONE BACK TO HER HOUSE; THEY WERE IN THE BACK YARD AND AFTER BEING INTIMATE, HE HEARD SHOTS; HE LEFT AND WAS STOPPED BY POLICE (N/T, 12-15-10, p. 73). A STIPULATION TO THE TESTIMONY OF DAWN SNYDER REFLECTED THAT SHE WOULD HAVE SAID THAT MR. JOHNSON DID LEAVE HER PROPERTY THROUGH THE ALLEY WAY, BUT THAT SHE DID NOT KNOW HIS WHEREABOUTS THEREAFTER (N/T, 12-15-10, p. 74).

WHILE OTHER EVIDENCE WAS ENTERED INTO THE RECORD, THE CASE WENT TO THE FACT-FINDERS PRIMARILY ON THE EVIDENCE SUMMARIZED ABOVE.

## REASON FOR GRANTING THE PETITION

**STATE AND FEDERAL COURTS AGREE THAT THE TRIAL JUDGE'S REASONABLE DOUBT INSTRUCTION IS UNCONSTITUTIONAL, BUT HAVE CONFLICTING OPINIONS OF WHETHER COUNSEL CAN BE, OR IS, INEFFECTIVE FOR FAILING TO OBJECT TO THE UNCONSTITUTIONALLY DEEMED INSTRUCTION.**

A PETITIONER'S ELIGIBILITY FOR RELIEF IN THE STATE COURT'S OF PENNSYLVANIA IS GOVERNED BY THE EXPRESS PROVISIONS OF THE POST-CONVICTION RELIEF ACT (PCRA), WHICH PROVIDE FOUR FACTORS THAT MUST BE PLED - AND ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE - BEFORE RELIEF MAY BE GRANTED. 42 PA. C.S.A. § 9542(a).

FIRST, A PETITIONER MUST DEMONSTRATE THAT HE HAS BEEN CONVICTED OF A CRIME UNDER THE LAWS OF THE PENNSYLVANIA'S COMMONWEALTH, AND THAT "AT THE TIME RELIEF IS GRANTED" PETITIONER IS CURRENTLY SERVING A SENTENCE OF IMPRISONMENT FOR THE CRIME. 42 PA. C.S.A. § 9543. IN THE MATTER SUB JUDICE, NEITHER THE PCRA COURT, SUPERIOR COURT, NOR THE COMMONWEALTH DISPUTE THAT PETITIONER IS CURRENTLY "SERVING A SENTENCE" FOR THE PURPOSE OF § 9543.

SECOND, PETITIONER MUST SHOW THAT THE ALLEGATION OF ERROR HAS NOT BEEN PREVIOUSLY LITIGATED, OR WAIVED. 42 PA C.S.A. § 9543(a)(3). IN THE MATTER SUB JUDICE, NEITHER THE PCRA COURT, SUPERIOR COURT, NOR THE COMMONWEALTH DISPUTE THAT THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AT ISSUE HEREIN HAVE NOT BEEN PREVIOUSLY LITIGATED, OR WAIVED. (IN PENNSYLVANIA, ALL CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST WAIT TO BE RAISED IN THE PCRA COURT, AFTER THE DIRECT APPEAL STAGES. SEE: COMMONWEALTH V. HOLMES, 79 A.3d 562, 563-64 (PA. 2013).

PETITIONER WAS UNABLE TO RAISE THE CLAIMS AT AN EARLIER OCCURRENCE AS A RESULT).

THIRD, THE PETITIONER MUST SHOW THAT THE FAILURE TO LITIGATE THE ISSUE PRIOR TO OR DURING TRIAL, OR ON DIRECT, COULD NOT HAVE BEEN THE RESULT OF ANY RATIONAL, STRATEGIC OR TACTICAL DECISION BY COUNSEL. PA. C.S.A. § 9543(a)(4). IN THE MATTER SUB JUDICE, NEITHER THE PCRA COURT, NOR THE SUPERIOR COURT, CONTEND THAT PETITIONER DID NOT THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AT ISSUE HEREIN ON DIREST APPEAL AS A RESULT OF ANY STRATEGIC OR TACTICAL PLOY.

FINALLY, THE PETITIONER MUST HAVE A COGNIZABLE CLAIM UNDER THE ACT. 42 PA. C.S.A. § 9543(a)(2). THIS MEANS THAT THE PETITIONER'S CONVICTION MUST HAVE RESULTED FROM ONE (OR MORE) OF SEVEN CATEGORIES OF ERRORS AND VIOLATIONS SPECIFIED IN THE ACT. Id. THE PCRA COURT ALLOWS NUMEROUS GROUNDS FOR COLLATERAL RELIEF, INCLUDING WHERE A CONVICTION RESULTED FROM "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." PA. C.S.A. § 9543(a)(2)(ii). IN THIS MATTER, PETITIONER RAISED A CLAIM IN HIS TIMELY PCRA FILINGS THAT HIS COUNSEL WAS INEFFECTIVE.

BECAUSE PETITIONER SATISFIED THE PCRA'S INITIAL FOUR-PRONG TEST, THE STATE COURT (STARTING WITH THE PCRA COURT AND ENDING WITH THE SUPREME COURT) HAD JURISDICTION TO CONSIDER THE MERITS OF THE PETITIONER'S CLAIMS.

THE CLEARLY ESTABLISHED FEDERAL LAW REGARDING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS FOUND IN STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984). THE SAME STANDARD IS USED BY PENNSYLVANIA COURTS IN

ASSESSING INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE PENNSYLVANIA CONSTITUTION. WERTS V. VAUGHN, 228 F.3d 178, 203 (3d. CIR. 2000); ACCORD COMMONWEALTH V. PIERCE 527 A.2d 973, 976 (PA. 1987) (RECOGNIZING THAT STRICKLAND AND THE INEFFECTIVENESS STANDARD APPLIED IN PENNSYLVANIA "CONSTITUTE THE SAME RULE").

THE LAW IS WELL SETTLED LAW IN PENNSYLVANIA THAT IN ORDER TO BE ELIGIBLE FOR PCRA RELIEF BASED UPON A CLAIM ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL, A DEFENDANT MUST ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT: (1) THE UNDERLYING CLAIM IS OF ARGUABLE MERIT; (2) COUNSEL'S PERFORMANCE LACKED A REASONABLE BASIS; AND (3) THE INEFFECTIVENESS OF COUNSEL CAUSED THE PETITIONER PREJUDICE. COMMONWEALTH V. MILLER, 987 A.2d 648 (PA. 2009) (CITATIONS OMITTED). IN ORDER TO ESTABLISH PREJUDICE, IT MUST BE DEMONSTRATED THAT "BUT FOR THE ACT OR OMISSION IN QUESTION, THE OUTCOME OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT." COMMONWEALTH V. RIOS, 920 A.2d 790 (PA. 2007).

BECAUSE COUNSEL IS PRESUMED TO BE EFFECTIVE, THE DEFENDANT BEARS THE BURDEN OF ESTABLISHING INEFFECTIVE ASSISTANCE OF COUNSEL. COMMONWEALTH V. BREAKIRON, 729 A.2d 1088 (PA. 1999).

IT IS WELL-ESTABLISHED THAT IN ORDER TO FIND THAT COUNSEL'S ASSISTANCE IS CONSTITUTIONALLY EFFECTIVE, A COURT MUST HOLD "THAT THE PARTICULAR COURSE CHOSEN BY COUNSEL HAD SOME REASONABLE BASIS DESIGNED TO EFFECTUATE HIS CLIENT'S INTEREST." COMMONWEALTH V. JONES, 437 A.2d 958, 959 (PA. 1981) (CITING COMMONWEALTH EX REL. WASHINGTON V. MARONEY, 235 A.2d 349, 352 (PA. 1967)). AS TO THE SECOND OF THE INEFFECTIVENESS TEST, A CHOSEN STRATEGY WILL NOT BE FOUND TO HAVE BEEN UNREASONABLE UNLESS IT IS PROVEN THAT THE PATH NOT CHOSEN "OFFERED A POTENTIAL FOR SUCCESS SUBSTANTIALLY GREATER THAN THE COURSE ACTUALLY

PURSUED." COMMONWEALTH V. MILLER, 987 A.2d AT 648-649 (CITATIONS OMITTED) (QUOTATIONS IN ORIGINAL).

WITH RESPECT TO THE THIRD PRONG OF THE INEFFECTIVENESS TEST, "IN ORDER TO PROVE PREJUDICE, A DEFENDANT MUST SHOW THAT BUT FOR COUNSEL'S ERROR, THERE IS A REASONABLE PROBABILITY, i.e., A PROBABILITY THAT UNDERMINES CONFIDENCE IN THE RESULT, THAT THE OUTCOME OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT." COMMONWEALTH V. MILLER, 987 A.2d AT 649 (CITING COMMONWEALTH V. SNEED, 899 A.2d 1067, 1084 (PA. 2006)) (AND CITING STRICKLAND V. WASHINGTON, 466 U.S. AT 694).

A DEFENDANT CAN OBTAIN PCRA RELIEF PREMISED UPON A CLAIM THAT COUNSEL IS INEFFECTIVE WHERE TRIAL COUNSEL DOES NOT OBJECT TO AN IMPROPER JURY INSTRUCTION. COMMONWEALTH V. BLOUNT, 647 A.2d 199 (PA. 1994); COMMONWEALTH V. GEATHERS, 847 A.2d 730 (PA. SUPER. 2004).

IN THE TRIAL COURT'S FINAL CHARGE TO THE JURY IN THE MATTER SUB JUDICE, JUDGE HUSHES QUOTED EXTENSIVE PORTIONS OF "PENNSYLVANIA'S SUGGESTED STANDARD CRIMINAL JURY INSTRUCTION § 7.01, ENTITLED : PRESUMPTION OF INNOCENCE - BURDEN OF PROOF - REASONABLE DOUBT." HOWEVER, EMBEDDED IN THE MIDDLE OF THE LANGUAGE GARNERED FROM THE STANDARD INSTRUCTION, JUDGE HUGHES PROVIDED THE JURY WIT AN "EXAMPLE" TO HELP THEM UNDERSTAND REASONABLE DOUBT. THE EXAMPLE CONCOCTED AND PROFFERED BY THE TRIAL COURT IS NOT CONTAINED IN THE SUGGESTED STANDARD JURY INSTRUCTIONS OR CONDONED BY THE PENNSYLVANIA COURT IN ANY BINDING PRECEDENT. WITH RESPECT TO REASONABLE DOUBT AND THE PRESUMPTION OF INNOCENCE, JUDGE HUGHES INSTRUCTED THE JURY AS FOLLOWS:

> NOW, LADIES AND GENTLEMEN, THE COMMONWEALTH BEARS THIS BURDEN, PROOF BEYOND A REASONABLE DOUBT. IT IS THE COMMONWEALTH THAT MUST PROVE. SO

NOW WE HAVE THE THIRD LEG OF THE HOUSE, THE BURDEN. IT IS THE COMMONWEALTH"S BURDEN TO PROVE BEYOND A REASONABLE DOUBT EACH AND EVERY ONE OF THE ELEMENTS OF THE CRIMES THAT ARE BEFORE YOU.

IT IS THE HIGHEST STANDARD IN THE LAW. THERE IS NOTHING GREATER BUT THAT DOES NOT MEAN THAT THE COMMONWEALTH MUST PROVE ITS CASE BEYOND ALL DOUBT. ~~THE COMMONWEALTH IS NOT REQUIRED TO ANSWER ALL OF~~ THE QUESTION.

IN EVERY TRIAL, THERE ARE MILLIONS OF QUESTIONS YOU COULD ASK. WELL, I WONDER IF THIS HAPPENED? WELL, I WANT TO KNOW ABOUT THAT. THAT IS NOT THE COMMONWEALTH'S BURDEN. THE COMMONWEALTH IS NOT REQUIRED TO MEET SOME MATHEMATICAL CERTAINTY. THE COMMONWEALTH IS NOT REQUIRED TO DEMONSTRATE THE IMPOSSIBILITY OF INNOCENCE.

A REASONABLE DOUBT IS A DOUBT THAT WOULD CAUSE A REASONABLY CAREFUL AND SENSIBLE PERSON TO PAUSE, TO HESITATE, TO REFRAIN FROM ACTING UPON A MATTER OF HIGHEST IMPORTANCE TO THEIR OWN AFFAIRS.

A REASONABLE DOUBT MUST FAIRLY ARISE OUT OF THE EVIDENCE THAT WAS PRESENTED OR OUT OF THE LACK OF EVIDENCE THAT WAS PRESENTED WITH RESPECT TO SOME ELEMENT OF EACH THE CRIMES CHARGED.

NOW, LADIES AND GENTLEMEN, **I FIND IT HELPFUL TO THINK ABOUT REASONABLE DOUBT IN THIS WAY.** BECAUSE I HAD THE GREAT FORTUNE TO SPEAK WITH

EVERY ONE OF YOU INDIVIDUALLY, I KNOW THAT EACH ONE OF YOU HAS SOMEONE IN YOUR LIFE THAT YOU LOVE, A PRECIOUS ONE, A SPOUSE, A SIGNIFICANT OTHER, A SIBLING, A NIECE, A NEPHEW, A GRANDCHILD. EACH ONE OF YOU LOVES SOMEBODY.

IF YOU WERE TOLD BY YOUR PRECIOUS ONE THAT THEY HAD A LIFE-THREATENING CONDITION AND THE DOCTOR WAS CALLING FOR SURGERY, YOU WOULD PROBABLY SAY, STOP. WAIT A MINUTE. TELL ME ABOUT THIS CONDITION. WHAT IS THIS?

YOU PROBABLY WANT TO KNOW WHAT'S THE BEST PROTOCOL FOR TREATING THIS CONDITION? WHO IS THE BEST DOCTOR IN THE REGION? NO. YOU ARE MY PRECIOUS ONE. WHO IS THE BEST DOCTOR IN THE COUNTRY? YOU WILL PROBABLY RESEARCH THE ILLNESS. YOU WILL RESEARCH THE PEOPLE WHO HANDLE THIS, THE HOSPITALS.

IF YOU ARE LIKE ME, YOU WILL CALL EVERYONE WHO YOU KNOW WHO HAS ANYTHING TO DO WITH MEDICINE IN THEIR LIFE. TELL ME WHAT YOU KNOW. WHO IS THE BEST? WHERE DO I GO? BUT AT SOME MOMENT THE QUESTION WILL BE CALLED. DO YOU GO FORWARD WIT THE SURGERY OR NOT? IF YOU GO FORWARD, IT IS NOT BECAUSE YOU HAVE MOVED BEYOND ALL DOUBT. THERE ARE NO GUARANTEES. OF YOU GO FORWARD, IT IS BECAUSE YOU HAVE MOVED BEYOND ALL REASONABLE DOUBT.

A REASONABLE DOUBT, LADIES AND GENTLEMEN,

MUST BE A REAL DOUBT. A REASONABLE DOUBT MUST NOT BE IMAGINED OR MANUFACTURED TO AVOID CARRYING OUT AN UNPLEASANT RESPONSIBILITY. THE FACT THAT YOU STOP AND THINK ABOUT AN ISSUE DOESN'T MEAN YOU HAVE REASONABLE DOUBT. RESPONSIBLE PEOPLE THINK ABOUT WHAT THEY ARE DOING AND I'M ASKING YOU TO THINK DEEPLY ABOUT MY EVIDENCE. YOU MAY NOT FIND A CITIZEN GUILTY BASED UPON A MERE SUSPICION OF GUILT. THE COMMONWEALTH'S BURDEN IS TO PROVE A CITIZEN WHO HAS BEEN ACCUSED OF A CRIME GUILTY BEYOND A REASONABLE DOUBT.

IF THE COMMONWEALTH HAS MET THAT BURDEN, THEN THE CITIZEN IS NO LONGER PRESUMED TO BE INNOCENT AND YOU SHOULD FIND HIM GUILTY; ON THE OTHER HAND, IF THE COMMONWEALTH HAS NOT MET ITS BURDEN, YOU MUST FIND HIM NOT GUILTY.

(N/T, 12/17/2010, pp. 18-22)

PETITIONER'S TRIAL COUNSEL DID NOT OBJECT TO THE FOREGOING JURY INSTRUCTION.

THE ESSENCE OF DUE PROCESS IS THE FUNDAMENTAL FAIRNESS. SEE: ESTELLE V. WILLIAMS, 425 U.S. 501, 502 (1979) ("THE RIGHT TO A FAIR TRIAL IS A FUNDAMENTAL LIBERTY SECURED BY THE FOURTEENTH AMENDMENT."). "THE DUE PROCESS CLAUSE PROTECTS THE ACCUSED AGAINST CONVICTION EXCEPT UPON PROOF BEYOND A REASONABLE DOUBT OF EVERY FACT NECESSARY TO CONSTITUTE THE CRIME WITH WHICH HE IS CHARGED." IN RE WINSHIP, 397 U.S. AT 364. THEREFORE, ANY JURY CHARGE THAT REMOVES THE BURDEN OF

PROVING EVERY ELEMENT OF A CRIME BEYOND A REASONABLE DOUBT VIOLATES DUE PROCESS. SEE, E.G., CAGE V. LOUISIANA, 498 U.S. 39 (1990).

IN CAGE V. LOUISIANA, THIS COURT FOUND THAT A JURY INSTRUCTION WHICH EQUATED REASONABLE DOUBT TO "GRAVE UNCERTAINTY" AND "SUBSTANTIAL DOUBT," ABOUT THE EVIDENCE PRESENTED, VIOLATED DUE PROCESS PROTECTIONS BECAUSE JURORS COULD INTERPRET THOSE TERMS TO IMPLY A HIGHER BAR FOR THE DOUBT THAN THE CORRECT STANDARD. Id., 498 U.S. AT 41. IN HOLLAND V. UNITED STATES, 348 U.S. 121 (1954), THIS COURT STATED THAT REASONABLE DOUBT SHOULD BE EXPRESSED "IN TERMS OF THE KIND OF DOUBT THAT WOULD MAKE A PERSON HESITATE TO ACT RATHER THAN THE KIND ON WHICH HE WOULD BE WILLING TO ACT." Id., 348 U.S. AT 348. THIS IMPORTANT DISTINCTION - EXPLAINING REASONABLE DOUBT TO JURORS IN TERMS OF TAKING ACTION AS OPPOSED TO HESITATING - HAS BEEN RECOGNIZED AS VIOLATIVE OF DUE PROCESS.

HERE, THE TRIAL JUDGE INSTRUCTED THE JURY TO THINK ABOUT REASONABLE DOUBT AS IF THEY "WERE TOLD BY YOUR PRECIOUS ONE THAT THEY HAD A LIFE-THREATENING CONDITION AND THE DOCTOR WAS CALLING FOR SURGERY." Id. THE TRIAL COURT CONCLUDED THE ABOVE BY USING THE TERM "GO FORWARD" THREE TIMES IN SHORT SUCCESSION AND INSTRUCTING THE JURY THAT IF THEY CHOSE TO GO FORWARD WITH THE SURGERY TO COMBAT A LIFE-THREATENING CONDITION IN THEIR PRECIOUS ONE, "IT IS BECAUSE YOU HAVE MOVED BEYOND ALL REASONABLE DOUBT." Id.

THE MEDICAL EXAMPLE EMPLOYED BY TRIAL COURT - IN ADDITION TO BEING GRAPHIC AND EXCEEDINGLY EMOTION - COMPRISED A SIGNIFICANT PORTION OF THE TOTAL REASONABLE DOUBT INSTRUCTION. JUDGE HUGHES' IMPROPER ILLUSTRATION OF WHAT DOES NOT CONSTITUTE REASONABLE DOUBT COMPRISED 38% OF HER TOTAL INSTRUCTION ON REASONABLE DOUBT (36 OUT OF

95 LINES OF TRANSCRIPT). MOREOVER, JUDGE HUGHES HIGHLIGHTED THE EXAMPLE PORTION OF THE INSTRUCTION BY POINTEDLY PREFACING IT BY NOTING FOR THE JURORS **"I FIND IT HELPFUL TO THINK ABOUT REASONABLE DOUBT IN THIS WAY."** (N/T 12/17/2010, pp. 20).

THIS INSTRUCTION EXPLAINS REASONABLE DOUBT IN TERMS OF TAKING ACTION, THIS IS, "GOING FORWARD." THIS COMPLETELY CONTRAVENES THE FUNDAMENTAL PRECEPTS THAT DEFINE REASONABLE DOUBT AS EXPLAINED BY THIS COURT IN HOLLAND V UNITED STATES. IN **HOLLAND,** THIS COURT STATED THAT REASONABLE DOUBT SHOULD BE EXPRESSED "IN TERMS OF THE KIND OF DOUBT THAT WOULD MAKE A PERSON HESITATE TO ACT RATHER THAN THE KIND ON WHICH HE WOULD BE WILLING TO ACT." HOLLAND V. UNITED STATES, 348 U.S. AT 140 (INTERNAL CITATION OMITTED). THIS IMPORTANT DISTINCTION - EXPLAINING REASONABLE DOUBT TO JURORS IN TERMS OF TAKING ACTION AS OPPOSED TO HESITATING - HAS BEEN RECOGNIZED AS VIOLATIVE OF DUE PROCESS REPEATEDLY BY COURT ANALYZING JUDGE HUGHES' REPEATED USE OF THIS VERY EXAMPLE. THUS, IT IS PARTICULARLY EGREGIOUS THAT JUDGE HUGHES ADMONISHED THE JURORS THAT IT IS "HELPFUL TO THINK ABOUT REASONABLE DOUBT THIS WAY." THIS COURT, THE HIGHEST COURT IN THE NATION, HAS DETERMINED THAT IT IS NOT "HELPFUL" TO THINK ABOUT REASONABLE DOUBT IN TERMS OF TAKING ACTION. TO THE CONTRARY, THIS COURT HAS EXPRESSLY INSTRUCTED THAT DUE PROCESS IS VIOLATED WHEN A COURT DOES NOT EXPLAIN REASONABLE DOUBT IN TERMS OF HESITATING.

IT IS BEYOND PERADVENTURE THAT THE DUE PROCESS CLAUSE OF THE CONSTITUTION PROTECTS THE ACCUSE AGAINST CONVICTION EXCEPT UPON PROOF BEYOND A REASONABLE DOUBT OF EVERY FACT NECESSARY TO CONSTITUTE THE CRIME WITH WHICH HE IS CHARGED. BROWN V. KAUFMAN, 425 F. SUPP. 3d 395, 408-409 (E.D. PA. 2019) (CITING IN RE WINSHIP, 397 U.S. AT 364. "DUE

PROCESS IS VIOLATED WHEN A JURY INSTRUCTION RELIEVES THE GOVERNMENT OF ITS BURDEN OF PROVING EVERY ELEMENT BEYOND A REASONABLE DOUBT." BROWN V. KAUFMAN, 425 F. SUPP. 3d AT 409 (CITING WADDINGTON V. SARAUSAD, 555 U.S. 179, 190-91 (2009)0 (FURTHER CITATIONS OMITTED). TO DETERMINE WHETHER THE JURY INSTRUCTION VIOLATED THE DUE PROCESS CLAUSE, A REVIEWING COURT ASKS "WHETHER THERE IS SOME 'AMBIGUITY, INCONSISTENCY, OR DEFICIENCY,' IN THE INSTRUCTION, SUCH ... THAT THERE IS A 'REASONABLE LIKELIHOOD' THAT THE JURY APPLIED THE INSTRUCTION IN A WAY THAT RELIEVED THE STATE OF ITS BURDEN OF PROVING EVERY ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT." BROWN V. KAUFMAN, 425 F. SUPP. 3d AT 409 (QUOTING WADDINGTON V. SARAUSAD, 555 U.S. AT 190-91) (FURTHER CITATIONS OMITTED).

ALTHOUGH SOME PORTION OF THE REASONABLE DOUBT CHARGE WERE CORRECT STATEMENTS OF THE LAW, THE TRIAL JUDGE NEVER DISAVOWED THE ERRONEOUS PARTS OR EVEN ATTEMPTED TO MITIGATE THE DEFECT. WHERE A JUDGE GIVES BOTH A CORRECT AND AN INCORRECT STATEMENT OF THE LAW, AND FAILS TO CORRECT THE MISSTATEMENT, THERE IS NO WAY FOR A REVIEWING COURT TO KNOW WHICH INSTRUCTION THE JURY FOLLOWED. FRANCIS V. FRANKLIN, 471 U.S. 307, 315 (1985); WHITNEY V. HORN, 280 F.3d 240, 256 (3d CIR. (2002) (REVERSAL STILL REQUIRED WHERE INSTRUCTION CONTAINED A "CONSTITUTIONAL FLAW" DESPITE PRESENCE OF OTHER CORRECT STATEMENTS OF THE LAW).

IN BROWN V. KAUFMAN, THE FEDERAL COURT HELD THAT COUCHING REASONABLE DOUBT IN TERMS OF "GOING FORWARD WITH THE SURGERY FOR YOUR LOVED ONES" TO TREAT A "LIFE-THREATENING MEDICAL CONDITION" RUNS AFOUL OF THIS COURT'S GUIDANCE IN **CAGE**, 498 U.S. AT 41, ..., AND **HOLLAND**, 348 U.S. AT 140, ..., IN HOLDING THAT THE INSTRUCTION COULD CAUSE A

REASONABLE JUROR TO MISCONSTRUE THE ACTUAL STANDARD OF PROOF "IN A WAY THAT WOULD ENCOURAGE THE JURY TO RESOLVE ANY DOUBT." BROWN V. KAUFMAN, 425 F. SUPP. 3d AT 410 (CITING BROOK V. GILMORE, No. 15-5659, 2017 WL (AT PAGE 4) 3475475, 2017 U.S. DIST. LEXIS 127703 (E.D. PA. AUG. 11, 2017).

BECAUSE THE TRIAL COURT'S MEDICAL EXAMPLE PREMISED UPON "GOING FORWARD" TO SAVE THE LIFE OF A PRECIOUS LOVED ONE DOMINATED AND SUBVERTED THE REASONABLE DOUBT INSTRUCTION IN THIS CASE, IT VIOLATED **CAGE** AND **HOLLAND.** THE FAILURE TO OBJECT TO THIS INSTRUCTION RAISES A CLAIM OF INEFFECTIVENESS THAT IS OF ARGUABLE MERIT - THUS, SATISFYING THE FIRST PRONG OF THE INEFFECTIVENESS TEST.

THE PENNSYLVANIA SUPREME COURT AND THIRD CIRCUIT ARE IN AGREEMENT OF THE TRIAL JUDGE'S CHARGE OF REASONABLE DOUBT TO THE JURY CONSTITUTES PREJUDICE, THOUGH THE STATE COURT CONFLICTS THAT THE REPRESENTING ATTORNEY IS INEFFECTIVE FOR FAILING TO OBJECT. NEVERTHELESS, PETITIONER SHOWS THIS COURT THAT THE FIRST PRONG OF THIS COURT'S STANDARD HAS BEEN MET.

ANOTHER FACT THAT ILLUSTRATES THAT THE INSTANT CLAIM IS OF ARGUABLE MERIT, IS THE FACT THAT NUMEROUS FEDERAL COURTS HAVE FOUND THAT THE MEDICAL EXAMPLE USED BE JUDGE HUGHES TO EXPLAIN REASONABLE DOUBT VIOLATES DUE PROCESS WHILE THE PENNSYLVANIA SUPERIOR COURT AND PCRA COURT IN THIS CASE ARRIVED AT THE OPPOSITE DETERMINATION. THIS IRRECONCILABLE SPLIT IN AUTHORITY PRESENTS CLEAR EVIDENCE THAT THIS CLAIM IS OF ARGUABLE MERIT - i.e., DIFFERENT COURTS HAVE REACHED OPPOSITE RESULTS ON THE IDENTICAL ISSUE.

THE FEDERAL COURTS DISAPPROVING OF THIS INSTRUCTION HAVE GRANTED WRITS OF HABEAS CORPUS ON INEFFECTIVENESS CLAIMS BASED UPON COUNSEL'S

FAILURE TO OBJECT TO IDENTICAL - AND NEARLY IDENTICAL - REASONABLE DOUBT INSTRUCTIONS THAT INCLUDED THE MEDICAL EXAMPLE GIVEN BY JUDGE HUGHES. SEE BROOKS V. GILMORE, No. 15-5659, 2017 WL 3475475, 2017 U.S. DIST. LEXIS 127703 (E.D. PA. AUG. 11, 2017) (McHUGH, J.) AT *3-5 (GRANTING RELIEF ON GROUNDS THAT INSTRUCTION IS UNCONSTITUTIONAL AND COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT: COMMONWEALTH FILED, THEN DISCONTINUED, AN APPEAL); GANT V. GIROUX, No. 15-4468 (E.D. PA. OCT. 11, 2018) (SAVAGE, J.) (GRANTING RELIEF ON GROUNDS THAT INSTRUCTION IS UNCONSTITUTIONAL AND COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT; COMMONWEALTH CONCEDED RELIEF WAS DUE); BROWN V. KAUFMAN, 425 F. SUPP. 3d AT 406 (E.D. PA. 2019) (SLOMSKY, J., AND SITARSKI, M.J.) (GRANTING RELIEF ON GROUNDS THAT INSTRUCTION IN UNCONSTITUTIONAL AND COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT: COMMONWEALTH DID NOT APPEAL); McDOWELL V. DELBALSO, No. 2:18-CV-01466-AB, 2020 WL 61162, 2020 U.S. DIST. LEXIS 1806 (E.D. PA. JAN. 3, 2020) (BRODY, J., AND WELLS, M.J.) (GRANTING RELIEF ON GROUNDS THAT INSTRUCTION IS UNCONSTITUTIONAL AND COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT; COMMONWEALTH DID NOT APPEAL); JACKSON V. CAPOZZA, No. 17-5126, 2019 U.S. DIST. LEXIS 34018 (E.D. PA. FEB. 28, 2019) (CARACAPPA, C.M.J.) (GRANTING RELIEF ON GROUNDS THAT INSTRUCTION IS UNCONSTITUTIONAL AND COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT; COMMONWEALTH DID NOT APPEAL); EDMOND V. TICE No. 19-1656 (E.D. PA. NOV. 19, 2020) (BEETLESTONE, J.) (GRANTING RELIEF ON GROUNDS THAT INSTRUCTION IS UNCONSTITUTIONAL AND COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT; COMMONWEALTH DID NOT APPEAL); CORBIN V. TICE, No. 16-4527 (E.D. PA. JUNE 22, 2021) (TUCKER, J.) (GRANTING RELIEF ON GROUNDS THAT INSTRUCTION IN UNCONSTITUTIONAL AND COUNSEL WAS

INEFFECTIVE FOR FAILING TO OBJECT; COMMONWEALTH FILED, THEN DISCONTINUED, AN APPEAL); SHIELDS V. SMITH, No. 18-750, 2020 WL 6888466 (E.D. PA. NOV. 24, 2021) (DUBOIS, J.) (GRANTING RELIEF ON GROUNDS THAT INSTRUCTION IS UNCONSTITUTIONAL AND COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT; COMMONWEALTH DID NOT APPEAL); RAMOS V. MARSH, No. 19-666 (E.D. PA. NOV. 24, 2020) (KEARNEY, J. AND LLORET, M.J.) (GRANTING RELIEF ON GROUNDS THAT INSTRUCTION IN UNCONSTITUTIONAL AND COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT; COMMONWEALTH DID NOT APPEAL). IN ALL THESE CASE WITH THE PARAGRAPH, THE SAME INSTRUCTION WAS USED NEARLY TO THE WORD.

MOST NOTABLE IN THE PRECEDING STRING CITATION OF CASES HOLDING THE INSTRUCTION AT ISSUE UNCONSTITUTIONAL (AND COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE SAME) IS **MCDOWELL.** MCDOWELL IS PARTICULARLY NOTABLE AS **IT REVERSED THE CONVICTION OF THE PETITIONER'S CO-DEFENDANT IN THE MATTER SUB JUDICE** AND ORDERED A NEW TRIAL (OR RELEASE FROM CUSTODY) **BASED UPON THE FAILURE OF MCDOWELL'S TRIAL ATTORNEY TO OBJECT TO THE REASONABLE DOUBT INSTRUCTION GIVEN AT THEIR JOINT JURY TRIAL.** THE **McDOWELL** COURT OBSERVED IN THE CO-DEFENDANT'S MATTER THAT, "NOTABLY, ... THE COMMONWEALTH ... DOES NOT ARGUE THAT THE INSTRUCTION COMPLIES WITH DUE PROCESS." McDOWELL V. DELBLASO, AT p.5 (REPORT AND RECOMMENDATION OF 1/23/2019). THE **McDOWELL** COURT NOTED THAT THIS APPARENT CONCESSION THAT THE INSTRUCTION VIOLATES DUE PROCESS "IS IN ACCORDANCE WITH THE COMMONWEALTH'S OFFICE-WIDE DECISION TO DECLINE TO ARGUE THAT THE INSTRUCTION - WHICH PETITIONER'S TRIAL JUDGE USED IN SEVERAL OTHER MURDER TRIALS - COMPLIES WITH FEDERAL CONSTITUTION REQUIREMENT." Id. (CITING BAXTER V. SUPERINTENDENT SCI COAL TOWNSHIP, CIV. A. No. 18-46, N.T. 5/3/18 AT 14 (E.D. PA.)).

UNDER SUCH UNIQUE CIRCUMSTANCES, PETITIONER RESPECTFULLY SUBMITS THAT IT IS BEYOND DISPUTE THAT HIS CLAIM IS OF AT LEAST ARGUABLE MERIT. IF FACT, A COURT HAS SPECIFICALLY HELD THE IDENTICAL CLAIM TO BE MERITORIOUS AND GRANTED RELIEF UPON IT. THE COMMONWEALTH APPARENTLY CONCEDED THAT THE CLAIM IS OF ARGUABLE MERIT - i.e., THE REASONABLE DOUBT INSTRUCTION VIOLATES DUE PROCESS - IN THE CO-DEFENDANT'S CASE. THIS CERTAINLY ESTABLISHES BY A PREPONDERANCE OF THE EVIDENCE THAT THE CLAIM IS OF ARGUABLE MERIT.

WHILE THE SUPERIOR COURT BELOW CONCLUDED THAT "WE DO NOT BELIEVE THERE IS A 'REASONABLE LIKELIHOOD' THAT THE JURY APPLIED THE REASONABLE DOUBT STANDARD IN AN UNCONSTITUTIONAL MANNER," THE COURT REACHED THIS CONCLUSION WITHOUT ANY REFERENCE WHATSOEVER TO HOLLAND -THIS COURT'S CASE WHICH RENDERS THE INSTRUCTION AT ISSUE CONSTITUTIONALLY DEFECTIVE, SCO, pp. 10-11. WHILE IGNORING THE DUE PROCESS REASONING OF OUR NATION'S HIGHEST COURT, THE SUPERIOR COURT INSTEAD RELIES ON TWO UNPUBLISHED MEMORANDA FROM THE SUPERIOR COURT. SCO, p. 11 (CITING COM. V. NAM, 2019 WL 3946049, AT *3 (PA. SUPER. FILED AUG. 21, 2019) (UNPUBLISHED MEMORANDA); (AND CITING COM. V. VANDO, 2020 WL 7028618 (PA. SUPER. FILED NOV. 30, 2020) (UNPUBLISHED MEMORANDA).

THE FEDERAL COURTS WHICH HAVE ANALYZED THIS JURY INSTRUCTION IN LIGHT OF THE AUTHORITY OF **HOLLAND** HAVE HELD THAT IT IS REASONABLY LIKELY THAT JURORS GIVEN THIS INSTRUCTION APPLIED A STANDARD LOWER THAN REASONABLE DOUBT.

THE **BROOKS** COURT, RELYING ON **HOLLAND**, EXPLAINED THAT "THE PROBLEM IS COMPOUNDED BY THE FACT THAT THE TRIAL JUDGE STRUCTURED THE HYPOTHETICAL IN TERMS OF THE JURY PROCEEDING TO TAKE ACTION ON BEHALF

OF THEIR FAMILY MEMBER, TWICE USING THE PHRASE 'IF YOU GO FORWARD ... .'" BROWN V. KAUFMAN, 425 F. SUPP. 3d AT 409 (CITING **BROOKS**, 2017 WL 3475475, AT *4). THE **BROOKS** COURT REASONED "WHEREAS THE CONCEPT OF REASONABLE DOUBT IS GROUNDED IN A HESITATION TO ACT, HERE THE COURT'S EXAMPLE POSITED A SITUATION CREATING STRONG MOTIVATION TO ACT." Id. ACCORDINGLY, THE **BROOKS** COURT FOUND IT WAS REASONABLY LIKELY THE JURY APPLIED A STANDARD LOWER THAN REASONABLE DOUBT BECAUSE THE JURY CHARGE "DEFINED THIS FUNDAMENTAL PRINCIPLE BY MEANS OF AN EMOTIONALLY CHARGED EXAMPLE WEIGHED IN FAVOR OF RESOLVING DOUBT FOR THE PURPOSE OF PROVIDING LIVE-SAVING CARE TO A LOVED ONE." BROWN V. KAUFMAN, 425 F. SUPP. 3d AT 410 (CITING BROOKS, 2017 WL 3475475, AT *5) (AND CITING VICTOR V. NEBRASKA, 511 U.S. AT 6).

THE **BROWN** COURT IDENTICALLY CONCLUDED THAT THE TRIAL COURT'S USAGE OF A SURGICAL PROCEDURE ANALOGY TO ILLUSTRATE THE CONCEPT OF REASONABLE DOUBT VIOLATED THE DUE PROCESS CLAUSE. BROWN V. KAUFMAN, 425 F. SUPP. 3d AT 410. THE COURT FOUND THAT EQUATING REASONABLE DOUBT WITH WHETHER TO UNDERTAKE THE ONLY AVAILABLE MEDICAL PROCEDURE FOR A LOVED ONE CREATED A REASONABLE LIKELIHOOD THAT THE JURY APPLIED THE INSTRUCTION IN A WAY THAT RELIEVED THE COMMONWEALTH OF ITS BURDEN OF PROVING EVERY ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT. Id. (QUOTING WADDINGTON V. SARAUSAD, 555 U.S. AT 190-91). AS NOTED ABOVE, THE **BROWN** COURT FURTHER HELD THAT COUCHING REASONABLE DOUBT IN TERMS OF "GOING FORWARD WITH THE SURGERY FOR YOUR LOVED ONES" TO TREAT A "LIFE-THREATENING MEDICAL CONDITION" RUNS AFOUL OF THE U.S. SUPREME COURT'S GUIDANCE IN **CAGE**, U.S. AT 41, ..., AND HOLLAND, 348 U.S. AT 140, ..., IN HOLDING THAT THE INSTRUCTION COULD CAUSE A REASONABLE JUROR TO MISCONSTRUE THE ACTUAL STANDARD OF PROOF "IN A WAY THAT WOULD

ENCOURAGE THE JURY TO RESOLVE ANY DOUBT." BROWN V. KAUFMAN, 425 F. SUPP. 3d AT 410 (CITING BROOKS, 2017 WL 3475475, AT *4). BOTH COURTS CONCLUDED THAT BY EXPLAINING REASONABLE DOUBT AS THE TRIAL COURT DID IN THE MATTER SUB JUDICE, A REASONABLE JUROR COULD MISAPPLY THE STANDARD AND RESOLVE INFERENCES IN FAVOR OF THE COMMONWEALTH BECAUSE, "OBVIOUSLY SPEAKING, ANY PERSON OF DECENCY AND MORALS WOULD STRIVE TO PUT ASIDE DOUBT WHEN FACED WITH A SINGLE LIFE-SAVING OPTION FOR A LOVED ONE." Id.

ALTHOUGH NOT CONTROLLING, THE ANALYSIS OF **CAGE** AND **HOLLAND** IS APT AND THE APPLICATION OF THAT CONTROLLING AUTHORITY TO THE INSTRUCTION REPEATEDLY UTILIZED BY JUDGE HUGHES IS SOUND AND PERSUASIVE. AT A MINIMUM, THE ANALYSIS - AND RESULTANT HOLDING - ESTABLISH THAT PETITIONER RAISED A CLAIM OF ARGUABLE MERIT. THIS SATISFIES THE FIRST PRONG OF THE INEFFECTIVENESS TEST IN BOTH, FEDERAL AND STATE COURT.

TO SATISFY THE SECOND PRONG OF THE INEFFECTIVE ASSISTANCE OF COUNSEL TEST, A DEFENDANT MUST ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT COUNSEL'S PERFORMANCE LACKED A REASONABLE BASIS.

IN ORDER TO FIND THAT COUNSEL'S ASSISTANCE IS CONSTITUTIONALLY EFFECTIVE, A COURT MUST HOLD "THAT THE PARTICULAR COURSE CHOSEN BY COUNSEL HAD SOME REASONABLE BASIS DESIGNED TO EFFECTUATE HIS CLIENT'S INTEREST." COMMONWEALTH V. JONES, 437 A.2d AT 959) (CITING COMMONWEALTH EX REL. WASHINGTON V. MARONEY, 235 A.2d AT 352). WITH RESPECT TO THIS SECOND PRONG, A CHOSEN STRATEGY WILL NOT BE FOUND TO HAVE BEEN UNREASONABLE UNLESS IT IT PROVEN THAT THE PATH NOT CHOSEN "OFFERED POTENTIAL FOR SUCCESS SUBSTANTIALLY GREATER THAN THE COURSE ACTUALLY PURSUED." COMMONWEALTH V. MILLER, 987 A.2d AT 648-649 (CITATIONS OMITTED) (QUOTATIONS IN ORIGINAL).

IN THIS CASE, OBJECTING TO THE CONSTITUTIONALLY INFIRM JURY INSTRUCTION CRAFTED BY JUDGE HUGHES WOULD HAVE OFFERED A SUBSTANTIALLY GREATER POTENTIAL FOR SUCCESS. MORE THAN ONE-THIRD OF THE REASONABLE DOUBT INSTRUCTION ACTUALLY DELIVERED TO THE JURORS WAS DEDICATED TO AN EMOTIONALLY HARROWING EXAMPLE WHICH SPOKE OF REASONABLE DOUBT IN TERMS OF "GOING FORWARD" EVEN IN THE FACE OF QUESTIONS AND HESITATION. WORSE YET - CONSTITUTIONALLY SPEAKING - THE EXAMPLE LEFT THOSE WHO CHOSE NOT TO MOVE FORWARD WITH A LOVED ONE SENTENCED TO DIE AS A RESULT OF THE FAILURE TO GO FORWARD. PERHAPS MOST PROBLEMATIC IS THE FACT THAT THE JUDGE INSTRUCTED THE JURORS THAT, "I FIND IS **HELPFUL TO THINK ABOUT REASONABLE DOUBT IN THIS WAY.**" (TR. N/T 12-17-2010, pp. 20). THIS FOCUSED THE JURORS' ATTENTION ON THE HEART WRENCHING SCENARIO CONJURED UP BY THE TRIAL JUDGE,RATHER THAN THE CAREFULLY VETTED AND REVIEWED PORTION OF THE CHARGED CONDONED BY THE PENNSYLVANIA APPELLATE COURTS OVER DECADES. NOTABLY, THE JUDGE FAILED TO CHARACTERIZE THE PORTIONS OF THE STANDARD REASONABLE DOUBT CHARGE AS "HELPFUL."

BECAUSE THE FAILURE TO OBJECT TO SUCH AN INJURIOUS JURY INSTRUCTION COULD NOT HAVE BEEN THE RESULT OF REASONABLE PROFESSIONAL JUDGEMENT, AND BECAUSE EXISTING SUPREME COURT LAW - i.e., **CAGE** AND **HOLLAND** - WOULD HAVE REQUIRED THE COURT TO UPHOLD THE OBJECTION, TRIAL COUNSEL PERFORMED DEFICIENTLY AND PETITIONER MET HIS BURDEN ON THE DEFICIENT PERFORMANCE PRONG OF **STRICKLAND.** THERE CAN BE NO DEBATE AS TO WHETHER A DEFECTIVE INSTRUCTION ON REASONABLE DOUBT MANDATES CORRECTIVE ACTION BY DEFENCE COUNSEL. THE **BROOKS** DECISION, WHICH ADDRESSED THE SAME INSTRUCTION, SUCCINCTLY SUMMARIZES THE POINT, HOLDING THAT "WHERE THE DEFENDANT DOES NOT TESTIFY [AS HERE], AND THE NAUTRE OF THE COURT'S HYPOTHETICAL WAS SO INSTINCTIVELY PROBLEMATIC,

IT IS DIFFICULT TO FATHOM HOW ANY CRIMINAL DEFENCE LAWYER COULD FAIL TO OBJECT." **BROOKS, SUPRA, AT *6.**

IN THE MATTER SUB JUDICE, PETITIONER'S TRIAL COUNSEL EXPRESSLY RELIED UPON THE PROTECTIONS AFFORDED BY THE REASONABLE DOUBT STANDARD IN ADVANCING A DEFENSE. AT THE OUTSET OF HIS CLOSING ARGUMENT, DEFENSE COUNSEL TOLD THE JURORS: "NOBODY IS GOING TO FORCE YOU INTO THAT ROOM AND SAY YOU HAVE TO COME OUT WITH A DECISION. YOU HAVE TO COME OUT WITH A DECISION IF 12 OF YOU ARE CONVINCED BEYOND A REASONABLE DOUBT THAT THE COMMONWEALTH HAS MET ITS BURDEN," (TR. N/T, 12-16-10, p. 28). HOWEVER, THE REASONABLE DOUBT INSTRUCTION DELIVERED BY THE TRIAL COURT ATTEMPTED TO FORCE A DECISION FROM THE JURY. THE COURT GAVE THE JURORS A "HELPFUL" EXAMPLE IN WHICH THOSE WHO DID NOT COME OUT WITH A DECISION WERE DOOMED TO WATCHED THEIR LOVED ONE DIE.

AT THE CLOSE OF HIS ARGUMENT, DEFENSE COUNSEL IMPLORED THE JURORS" "I SUGGEST THAT WHEN YOU EXAMINE THE CREDIBILITY OF THESE WITNESSES AND YOU EXAMINE THE CREDIBILITY OF THE OTHER FOUR WITNESSES, YOU WILL COME TO THE CONCLUSION THAT MY CLIENT IS NOT GUILTY **"BASED UPON THE REASONABLE DOUBT."** (TR. N/T, 12-16-10, p. 77) (EMPHASIS SUPPLIED). THUS, IT WAS OF PARAMOUNT IMPORTANCE TO THE PETITIONER'S DEFENSE THAT THE COURT PROVIDE THE JURY WITH AN ACCURATE REASONABLE DOUBT INSTRUCTION WHICH DID NOT SEEK TO ELICIT JURORS "GOING FORWARD" AT THE EXPENSE OF EXPLAINING THAT HESITATION CONSTITUTES REASONABLE DOUBT. THE TRIAL COURT FAILED TO DO SO AND DEFENSE COUNSEL FAILED TO OBJECT. IN LIGHT OF THE CONTROLLING LAW WITH RESPECT TO REASONABLE DOUBT JURY INSTRUCTIONS, AND THE DEFENSE PROFFERED BY PETITIONER'S TRIAL COUNSEL, THERE WAS ABSOLUTELY NO REASON FOR DEFENSE COUNSEL TO NOT OBJECT TO THE REASONABLE DOUBT INSTRUCTION GIVEN IN THIS CASE. A

PROPER INSTRUCTION WOULD HAVE SERVED THE DEFENSE AND IT'S THEORY OF THE CASE, BUT THE INSTRUCTION GIVEN DIRECTLY UNDERMINED IT AND VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHT. INDEED, "THE NATURE OF THE COURT'S HYPOTHETICAL WAS SO INSTINCTIVELY PROBLEMATIC, IT IS DIFFICULT TO FATHOM HOW ANY CRIMINAL DEFENSE LAWYER COULD FAIL TO OBJECT." BROOKS, SUPEA, AT *6.

THE FAILURE TO OBJECT TO THE REASONABLE DOUBT INSTRUCTION IN THIS CASE WAS NOT A COURSE OF ACTION THAT WAS DESIGNED TO EFFECTUATE THE PETITIONER'S INTERESTS. **SEE COMMONWEALTH V. JONES, 437 A.2d AT 959 (CITING COMMONWEALTH EX REL. WASHINGTON V. MARONEY, 235 A.2d 352).** THIS SATISFIED THE SECOND PRONG OF THE INEFFECTIVENESS TEST.

WITH RESPECT TO THE THIRD PRONG OF THE INEFFECTIVENESS TEST, "A PETITIONER NEED ONLY ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THERE IS A REASONABLE PROBABILITY - i.e., A PROBABILITY THAT UNDERMINES CONFIDENCE IN THE RESULT - THAT THE OUTCOME OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT." **COMMONWEALTH V. MILLER, 987 A.2d AT 649 (CITING COMMONWEALTH V. SNEED, 899 A.2d AT 1084) (AND CITING STRICKLAND V. WASHINGTON, 466 U.S. AT 694).** ACCORDINGLY, A PCRA PETITIONER NEED ONLY ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THERE IS A REASONABLE PROBABILITY THAT ONE JUROR MAY HAVE POSSESSED A REASONABLE DOUBT. **BUCK V. DAVIS, 580 U.S. ___, 137 S.Ct. 759, 776 (2017)** (PETITIONER SEEKING COLLATERAL RELIEF NEED ONLY SHOW A REASONABLE PROBABILITY THAT "ONE JUROR WOULD HAVE HARBORED A REASONABLE DOUBT."). THE PREJUDICE STANDARD IS NOT A HIGH ONE, AS IT IS "LESS DEMANDING THAN THE PREPONDERANCE STANDARD." **BEY V. SUPERINTENDENT GREEN SCI, 856 F3d. 230, 242 (3d CIR. 2017).**

GIVEN THE CENTRAL IMPORTANCE OF PROPERLY CONCEIVED REASONABLE

DOUBT TO DEFENSE - AND THE CONCOMITANT IMPORTANCE OF JURORS NOT BEING CAJOLED TO IGNORE OR OVERCOME HESITATION FOR THE SAKE OF GOING FORWARD - THERE IS A REASONABLE PROBABILITY THAT THE ARGUMENTS FOR ACQUITTAL PROFFERED BY THE DEFENSE COUNSEL WOULD HAVE BEEN BETTER RECEIVED BY AT LEAST ONE JUROR HAD THE COURT GIVEN A REASONABLE DOUBT INSTRUCTION THAT COMPLIED WITH THIS COURT'S HOLDING IN **CAGE** AND **HOLLAND.** THIS IS PARTICULARLY SO IN LIGHT OF THE CIRCUMSTANCES OF THIS CASE. NAMELY, ~~THE COMMONWEALTH'S CASE-IN-CHIEF INCLUDES NO PHYSICAL, FORENSIC OR~~ VIDEO EVIDENCE LINKING THE PETITIONER TO THE CRIME. THE PETITIONER DID NOT MAKE ANY INCULPATORY STATEMENTS TO POLICE.

UNDER THE CIRCUMSTANCES OF THIS CASE, NO RELIABLE ADJUDICATION OF GUILT OR INNOCENCE COULD HAVE TAKEN PLACE DUE TO THE INEFFECTIVENESS OF TRIAL COUNSEL WHO VIOLATED THE PETITIONER'S RIGHTS UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, § 9 OF THE PENNSYLVANIA CONSTITUTION. SPECIFICALLY, TRIAL COUNSEL FAILED TO OBJECT TO THE IMPROPER, MISLEADING, AND INACCURATE JURY INSTRUCTION REGARDING THE REASONABLE DOUBT STANDARD WHICH IS THE POLESTAR OF JURY DELIBERATIONS IN CRIMINAL MATTERS. THE INSTRUCTION GIVEN TO THE JURY INCLUDED LANGUAGE WHICH APPEARS NOWHERE IN THE PENNSYLVANIA'S SUGGESTED STANDARD JURY INSTRUCTIONS (OR, THE PENNSYLVANIA BENCH BOOK, WHICH IS OFTEN USED). THE INSTRUCTION REGARDING REASONABLE DOUBT WAS PATENTLY MISLEADING, OVERLY EMOTIONAL, AND INSUFFICIENT TO PROPERLY GUIDE THE JURY THROUGH ITS DELIBERATIONS. THE MODIFIED, HYBRID INSTRUCTION GIVEN BY TRIAL COURT DID NOT CONVEY A SUCCINCT, STRAIGHTFORWARD, CLEAR STATEMENT OF THE LAW REGARDING REASONABLE DOUBT NECESSARY TO GUIDE A JURY IN IT DELIBERATIONS UNDER PENNSYLVANIA (AND FEDERAL) LAW. INSTEAD, MORE THAN ONE-THIRD OF THE INSTRUCTION WAS

COMPRISED OF AN EXAMPLE WHICH URGED JURORS TO "GO FORWARD" WHEN FACED WITH MAKING AN IMPORTANT DECISION BECAUSE THAT WAS TO ONLY MEANS TO SAVE THE LIFE OF A LOVED ONE. IN FACT, THE COURT HIGHLIGHTED THIS PORTION OF THE INSTRUCTION BY TELLING THE JURY THAT THE EXAMPLE WAS HELPFUL.

THE DEFECTIVE JURY INSTRUCTION WAS OF THE UTMOST SIGNIFICANCE IN THE CASE SUB JUDICE BECAUSE THE COMMONWEALTH'S EVIDENCE WAS SO WEAK. THE ENTIRE DETERMINATION OF GUILT OR INNOCENCE TURNED UPON WITNESSES WHO ALLEGEDLY HEARD THE PETITIONER OR CO-DEFENDANT ORALLY ADMIT THEIR PARTICIPATION IN THE CRIME. EACH WITNESS HAD SIGNIFICANT ISSUES IMPACTING THEIR CREDIBILITY AND MOTIVES TO TESTIFY.

AMY RUDNITSKAS TESTIFIED THAT SHE TOLD DETECTIVES THAT SHE DISCUSSED THE MURDERS AT ISSUE WITH BOTH PETITIONER AND CO-DEFENDANT MCDOWELL AND EACH ADMITTED TO HER THAT HE HAD PARTICIPATED. (TR. N/T 12-9-10, pp. 205-220). HOWEVER, RUDNITSKAS ALSO TESTIFIED THAT SHE LATER TOLD THE POLICE THAT SHE HAD MADE EVERYTHING UP IN HER INITIAL INTERVIEW. (TR. N/T 12-9-10, pp. 224-32); TRIAL EXHIBIT C-27. RUDNITSKAS WAS AN ADMITTED HEROIN ADDICT WHO EXPLAINED THAT SHE WAS GOING THROUGH HEROIN WITHDRAWAL AT THE TIME SHE PROVIDED THIS INFORMATION TO POLICE. (TR. N/T, 12-9-10, pp. 198, 232).

NICOLE PENROSE TESTIFIED THAT SHE WAS PRESENTED DURING A CONVERSATION INVOLVING RUDNITSKAS (THOUGH RUDNITSKAS NEVER STATE SUCH) AND CO-DEFENDANT AND PETITIONER IN WHICH THEY ADMITTED TO THE KILLING. HOWEVER, PENROSE ALSO TESTIFIED THAT IN EXCHANGE FOR HER TESTIMONY, PROSECUTORS PROMISED HER LENIENCY IN UNRELATED CRIMINAL CASES FOR HER NEW JERSEY AND PENNSYLVANIA. (PRELIMINARY N/T 12-10-08, pp. 103-104; PCO, pp. 7-8 (CITING TR. N/T 12-16-10, pp. 71-72); (TR. N/T 12-14-10,

pp. 37-48).

THOMAS ZEHDNER TESTIFIED THAT HE WAS AT A PARTY WHERE HE **OVERHEARD** THE PETITIONER BRAGGING ABOUT THE KILLING. (TR. N/T, 12-10-10, pp. 150-151). ZEHDNER ALSO TESTIFIED, HOWEVER THAT HE COULD NOT REMEMBER WHAT HE OVERHEARD THE PETITIONER SAY AT THE PARTY. (TR. N/T, 12-10-10, pp. 151-74).

ERICA MARRERO GAVE A STATEMENT TO THE POLICE IN WHICH SHE INDICATED CO-DEFENDANT MCDOWELL ADMITTED TO HER THAT HE AND ANOTHER PERSON KILLED THE DECEDENTS. (TR. N/T, 12-10-10, p. 69). THESE STATEMENTS ATTRIBUTED TO MARRERO WERE NOT MADE UNDER OATH. ALSO, WHEN TESTIFYING UNDER OATH, BOTH AT TRIAL AND AT THE PRELIMINARY HEARING, MARRERO DENIED MAKING ANY OF THESE STATEMENTS. (TR. N/T, 12-10-10, pp. 58, 97). MARRERO WAS ALSO ABUSING HEROIN AT THIS TIME. (TR. N/T, 12-10-10, p. 56).

SUSAN COULTER TESTIFIED THAT MARRERO CONFIDED IN HER THAT ON THE NIGHT OF THE KILLING CO-DEFENDANT MCDOWELL AND PETITIONER CAME TO MARRERO'S APARTMENT AND **MCDOWELL** GAVE HER A GUN AND TOLD HER TO DISPOSE OF IT, WHICH SHE DID. (TR. N/T, 12-13-10, pp. 76-77). COULTER SAID THAT MARRERO WAS HIGH ON HEROIN AT THE TIME SHE TOLD HER THIS. (TR. N/T, 12-13-10, pp. 77, 87, 102). COULTER WAITED THREE YEARS FROM WHEN MARRERO PURPORTEDLY CONFESSED THIS INFORMATION BEFORE COMING FORWARD AND REPORTED IT FOR THE FIRST TIME ONE WEEK BEFORE SHE TESTIFIED. (TR. N/T, 12-13-10, p. 75). NOTABLY, MARRERO WAS NOT CHARGED WITH ANY CRIME RELATED TO ALLEGEDLY DISPOSING OF A GUN USED IN A MURDER.

DANYELL TISDALE, TESTIFIED THAT SHE SAW PETITIONER RUNNING FROM THE AREA OF THE CRIME SCENE ON THE NIGHT OF THE KILLING. HOWEVER,

TISDALE ALSO TOLD DETECTIVES THAT SHE WAS NOT SURE IF THE MAN SHE SAW RUNNING WAS PETITIONER. (TR. N/T, 12-9-10, pp. 134). SPECIFICALLY, DANYELL, SHARICE, AND ANTONIA TISDALE WERE AT THEIR HOME NEAR THE SCENE OF THE MURDERS ON JULY 13, 2007, WHEN THEY HEARD GUNSHOTS. DANYELL WENT TO HER WINDOW AND SAW A WHITE MAN WEARING A BLACK HOODIE RUNNING PAST HER HOME IN THE DIRECTION OF THE STREET WHERE PETITIONER LIVED. SHE GAVE THIS INFORMATION TO THE POLICE ON JULY 15, 2007. HER BROTHER, SHARICE, ALSO REPORTED SEEING A WHITE MALE WEARING A HOODIE RUN PAST THEIR HOUSE. **OVER THREE YEARS LATER**, ON NOVEMBER 29, 2010, DANYELL GAVE A SECOND STATEMENT TO THE POLICE, FOR THE FIRST TIME IDENTIFYING THE PETITIONER AS THE MAN SHE SEEN RUN BY HER ON THE NIGHT OF THE MURDERS. (TR. N/T, 12-9-10, pp. 40-46, 95-102, 133-135, 141-142, 147-154).

CO-DEFENDANT PRESENTED THE TESTIMONY OF DOMINIC GIORGI, WHO LIVED ON THE SAME STREET AS THE TISDALES. GIORGI TESTIFIED THAT HE SAW A **BLACK** MAN, INCONSISTENT WITH CO-DEFENDANT AND THE PETITIONER, RUNNING BY HIS HOUSE JUST AFTER THE MURDERS. (TR. N/T, 12-9-10, pp. 215-220; TR. N/T, 12-10-10, pp. 58-97; TR. N/T, 12-15-10, pp. 20-34).

IT IS CLEAR THAT NONE OF THE COMMONWEALTH'S WITNESSES WITNESSED THE KILLING. EACH OF THESE AFTER THE FACT WITNESSES WHO ATTEMPTED TO INCULPATE THE PETITIONER HAD AT LEAST ON SIGNIFICANT REASON FOR A JUROR TO HESITATE BEFORE ACCEPTING THEIR TESTIMONY. SPECIFICALLY:

1. RUDNITSKAS WAS A HEROIN ADDICT WHO RECANTED HER INCULPATORY TESTIMONY;
2. PENROSE, WHO MERELY OVERHEARD THE CONVERSATION RUDNITSKAS WAS ALLEGEDLY INVOLVED IN, TESTIFIED IN ORDER TO RECEIVE FAVORABLE TREATMENT IN HER OWN

PENDING CRIMINAL CASES IN TWO DIFFERENT STATES;

3. ZEHDNER MERELY OVERHEARD A CONVERSATION, BUT THEN TESTIFIED THAT HE COULD NOT REMEMBER THE INCULPATORY SPECIFICS OF THIS ALLEGED CONVERSATION AT TRIAL;

4. MARRERO ALLEGEDLY HEARD TO **CO-DEFENDANT** ADMIT TO THE MURDERS, BUT THEN RECANTED THIS TESTIMONY AND CONCEDED THAT SHE WAS A HEROIN ADDICT;

5. MARRERO ALLEGEDLY RELATED **CO-DEFENDANT'S** ADMISSION TO COULTER, BUT COULTER THEN INEXPLICABLY WAITED OVER **THREE YEARS** BEFORE REPORTING THE SAME TO ANY LEGAL AUTHORITY;

6. TISDALE TOLD POLICE THAT SHE SAW A MAN RUNNING FROM THE AREA AFTER THE SHOOTING; SHE THEN CURIOUSLY WAITED THREE YEARS BEFORE TELLING THE POLICE THAT THE MAN WAS THE PETITIONER.

TO COUNTER THE ONLY "IDENTIFICATION" WITNESS PRESENTED BY THE COMMONWEALTH, THE DEFENSE OFFERED THE TESTIMONY OF GIORGI WHO TOLD THE POLICE ON THE NIGHT OF THE INCIDENT THAT THE MAN SEEN FLEEING THE SEEN (IN THE AREA OF TISDALE'S HOME) WAS BLACK - i.e., NOT THE PETITIONER OR CO-DEFENDANT.

GIVEN THE QUALITY OF EVIDENCE PRESENTED BY THE COMMONWEALTH, THE REASONABLE DOUBT JURY INSTRUCTION WAS OF PARAMOUNT SIGNIFICANCE IN THE CASE SUB JUDICE. INDEED, THE PETITIONER'S COUNSEL SPECIFICALLY REFERENCED REASONABLE DOUBT AT THE BEGINNING AND END OF HIS CLOSING. SEE (TR. N/T 12-16-10, p. 28) ("NOBODY IS GOING TOP FORCE YOU INTO THAT ROOM AND SAY YOU HAVE TO COME OUT WITH A DECISION. YOU HAVE TO

COME OUT WITH A DECISION IF 12 OF YOU ARE CONVINCED BEYOND A REASONABLE DOUBT THAT THE COMMONWEALTH HAS MET ITS BURDEN."); AND SEE (TR. N/T 12-16-10, p. 77) ("I SUGGEST THAT WHEN YOU EXAMINE THE CREDIBILITY OF THESE WITNESSES AND YOU EXAMINE THE CREDIBILITY OF THE OTHER FOUR WITNESSES, YOU WILL COME TO THE CONCLUSION THAT MY CLIENT IS NOT GUILTY BASED UPON REASONABLE DOUBT.")

THE REASONABLE DOUBT INSTRUCTION GIVEN BY THE COURT DID NOT ACCURATELY REFLECT THE LAW REGARDING THE BURDEN OF PROOF NECESSARY TO RETURN AND SUSTAIN A CONVICTION. CURIOUSLY, THE MEDICAL DECISION EXAMPLE INJECTED INTO THE INSTRUCTION BY THE TRIAL COURT WAS ODDLY PRESAGED BY THE ASSISTANT DISTRICT ATTORNEY'S CLOSING ARGUMENT DURING WHICH HE EXPLAINED REASONABLE DOUBT IN TERMS OF PROVIDING MEDICAL TREATMENT TO A SICK CHILD. (TR. N/T, 12-16-10, p. 112). SHORTLY BEFORE USING THIS EXAMPLE THE PROSECUTOR ALSO PRAISED THE TRIAL JUDGE AS "A MASTER OF THE LAW." (TR. N/T, 12-16-10, p. 110). THE INSTRUCTION AS GIVEN WAS NOT SUFFICIENT TO GUIDE THE JURY THROUGH ITS DELIBERATION S AS REQUIRED BY DUE PROCESS.

THE EFFECT OF THIS IMPERFECT JURY INSTRUCTION AS TO THE KEYSTONE ELEMENT OF THE JURY'S DUTY TAINTED THE ENTIRE PROCEEDING IN THIS CASE. IN LIGHT OF THE INCONSISTENT EVIDENCE PRESENTED IN THIS CASE THROUGH WITNESSES OF CONCEDEDLY LOW CHARACTER AND SUSPECT MOTIVES, IT IS RESPECTFULLY SUBMITTED THAT THE PETITIONER - BY A PREPONDERANCE OF THE EVIDENCE - ESTABLISHED THAT A REASONABLE DOUBT COULD HAVE BEEN RAISED IN THE MIND OF A JUROR HAD THE JURORS BEEN APPROPRIATELY INSTRUCTED WITH REGARD TO THAT LINCHPIN CONCEPT OF AMERICAN JUSTICE. THERE IS A REASONABLE PROBABILITY UNDER THE FACTS OF THIS CASE THAT A PROPER JURY INSTRUCTION WOULD HAVE ALTERED THE OUTCOME OF THIS TRIAL. HAD THE JURY

NOT BEEN REPEATEDLY IMPLORED TO "GO FORWARD" AS IF THE LIFE OF THEIR LOVED ONE DEPENDED ON IT, IT IS MORE LIKELY THAN NOT THAT AT LEAST ONE JUROR WOULD HAVE PAUSED, OR HESITATED, AND THUS HELD A REASONABLE DOUBT AS TO THE PETITIONER'S GUILT. THUS, PETITIONER SUFFERED PREJUDICE FOR PURPOSES OF THE APPLICABLE THREE-PRONG INEFFECTIVENESS TEST.

NOTABLY, IN THE SUPERIOR COURT BELOW, THE PANEL DID NOT FIND THAT THE PETITIONER FAILED TO ESTABLISH PREJUDICE.

IN ADDITION, PREJUDICE IS PRESUMED WHERE THERE IS AN ERRONEOUS REASONABLE DOUBT INSTRUCTION. **BROWN V. KAUFMAN, 425 F. SUPP. 3d AT 411-412 (CITING BROOKS, 2017 WL 3475475, AT *7) (AND CITING SULLIVAN V. LOUISIANA, 508 U.S. 275, 281 (1993)) ( AND CITING WEAVER V. MASSACHUSETTS, 582 U.S. ___, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017))** THE **SULLIVAN** COURT HELD A DEFECTIVE REASONABLE DOUBT INSTRUCTION IS A "STRUCTURAL ERROR" BECAUSE "A MISDESCRIPTION OF THE BURDEN OF PROOF ... VITIATES ALL THE JURY'S FINDINGS" AND HAS "CONSEQUENCES THAT ARE NECESSARILY UNQUANTIFIABLE AND INDETERMINATE." **BROWN V. KAUFMAN, 425 F. SUPP. 3d AT 411-412 (CITING SULLIVAN, 508 U.S. AT 281-82).**

TO THE EXTENT THAT THIS HONORABLE COURT DOES NOT PRESUME PREJUDICE AS A RESULT OF AN INCORRECT REASONABLE DOUBT INSTRUCTION IN THE CONTEXT OF A COLLATERAL CLAIM UNDER THE PCRA, THE PETITIONER HAS ESTABLISHED **STRICKLAND** PREJUDICE IN ANY EVENT, THUS SATISFYING THE THIRD PRONG OF THE INEFFECTIVENESS TEST.

THE PENNSYLVANIA SUPREME COURT HAS ACKNOWLEDGE THE UNCONSTITUTIONALITY OF THE REASONABLE DOUBT INSTRUCTION GIVEN BY THE TRIAL COURT. THOUGH ACKNOWLEDGING THE VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHT, BOTH STATE AND FEDERAL, STILL THE COURT REFUSES

TO ACKNOWLEDGE THE HOLDINGS OF THIS COURT IN **CAGE** AND **HOLLAND**, WHICH WERE BOTH DECIDED MANY YEARS BEFORE THE PETITIONER WAS CHARGED OR CONVICTED OF THIS MATTER SUB JUDICE AND USING THE DISGUISE THAT THIS COURT HAS YET TO MAKE PROPER RULINGS OF IMPROPER REASONABLE DOUBT INSTRUCTION, STANDING ON THIS REASONING AS THE AVENUE TO DISMISS THE PETITIONER'S RIGHT TO BE PROTECTED BY THE LAW THIS COURT, LEGISLATORS (BOTH, FEDERAL AND STATE) OPINED PROPER AND JUST, AS WELL AS THIS NATIONS STRONGHOLD OF THE UNITED STATES CONSTITUTION PROTECTS.

THE PENNSYLVANIA SUPREME COURT STATED IN COMMONWEALTH V. DRUMMOND, 28 EAP 2021, J-17-2022, DECIDED: NOV. 23, 2022, "ACCORDINGLY, WE FIND ARGUABLE MERIT TO GERALD DRUMMOND'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. HOWEVER, BECAUSE COUNSEL CANNOT BE DEEMED TO BE INEFFECTIVE FOR FAILING TO ANTICIPATE A CHANGE IN THE LAW, WE AFFIRM THE SUPERIOR COURT'S ORDER AFFIRMING THE DENIAL OF DRUMMOND'S PCRA PETITION." RATHER THAN PROVIDE THE PETITIONER THE JUSTICE DEEMED PROPER BY THIS COURT, AND FEDERAL COURTS, THE PENNSYLVANIA COURTS REFUSE TO PROVIDE THE FUNDAMENTAL ESSENTIALS THIS NATION WAS BUILT UPON WITH REGARDS TO A FAIR AND IMPARTIAL TRIAL, TO THE REPRESENTATION OF EFFECTIVE ASSISTANCE OF COUNSEL, TO BE HEARD BY A JURY OF HIS PEERS, TO BE INNOCENT UNTIL PROVEN GUILTY BEYOND A REASONABLE DOUBT.

THE PENNSYLVANIA SUPREME COURT KNOWS THAT BY GRANTING THE PETITIONER'S CLAIMS, THE PENNSYLVANIA COURTS WOULD HAVE TO ALLOW ALL THE OTHER CASES WHERE THIS TRIAL JUDGE VIOLATED THE RIGHTS OF THE DEFENDANTS SUFFERING THE SAME INJUSTICE, ALLOWING THEIR CLAIMS OF COUNSEL'S FAILURES TO OBJECT TO THIS ISSUE TO BE RAISED, MAKING IT ELIGIBLE THROUGH THE PCRA COURTS ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE FAILURE TO OBJECT TO THE INFIRM INSTRUCTION

UNDER NEWLY DECIDED LAW IN THE PENNSYLVANIA COURTS; OVERTLY OPENING A GATEWAY FOR THE LOWER COURTS TO BE FURTHER CONGESTED WITH THE NUMEROUS PETITIONERS CLAIMING INJUSTICE ON THIS SAME ISSUE BY THIS SAME TRIAL JUDGE'S IDENTICAL REASONABLE DOUBT INSTRUCTION.

THE PENNSYLVANIA SUPREME COURT HAS ADMITTED THE PETITIONER'S FUNDAMENTAL DUE PROCESS RIGHT WAS VIOLATED, OPENLY ADMITTING THE "STRUCTURAL ERROR" OF THE TRIAL COURT, YET HERE WE STAND, WITH THE PENNSYLVANIA COURTS FORCING THE PETITIONER TO FILE AND SEEK RELIEF THROUGH A WRIT OF HABEAS CORPUS WITH THE FEDERAL COURT IN ORDER TO HOPEFULLY FIND ADEQUATE JUSTICE AND RESOLUTION TO THE VIOLATIONS OF THE JURISPRUDENCE THAT THIS NATION WAS FOUNDED UPON. (COM. V. DRUMMOND, 28 EAP 2011, J-17-2022 (OPINED NOV. 23, 2022) ("WE CONCLUDE THAT INSTRUCTIONS OF THIS NATURE ARE REASONABLY LIKELY TO CAUSE A JURY TO APPLY A DIMINISHED STANDARD OF PROOF IN CRIMINAL CASES, THUS POSING SIGNIFICANT RISKS TO THE DEFENDANT'S DUE PROCESS RIGHTS. ACCORDINGLY, WE FIND ARGUABLE MERIT TO GERALD DRUMMOND'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. HOWEVER, BECAUSE COUNSEL CANNOT BE DEEMED INEFFECTIVE FOR FAILING TO ANTICIPATE A CHANGE IN THE LAW, WE AFFIRM THE SUPERIOR COURT'S ORDER AFFIRMING THE DENIAL OF DRUMMOND'S PCRA PETITION.").

THE PETITIONER HAS STATED AND PROVED ALL INEFFECTIVENESS PRONGS THIS COURT HAS DEEMED NECESSARY TO SUFFICE AN ADEQUATE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL THROUGH THE ESTABLISHMENTS IN **STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984),** AS WELL AS THE PENNSYLVANIA COURT UNDER **COMMONWEALTH V. PIERCE, 527 A.2d 973 (1987).** THERE IS NO REASON THE STATE SHOULD BE HOLDING TO CONFLICTING STANDINGS AND THE PETITIONER SUBMITS THIS MATTER BEFORE THIS HONORABLE COURT SEEKING THE HELP THAT ONLY THIS COURT CAN PROVIDE.

## CONCLUSION

WHEREFORE, THE PETITIONER PRAYS THAT FOR THE ABOVE STATED REASON, THE PETITION FOR A WRIT OF CERTIORARI SHOULD AND WILL BE GRANTED.

RESPECTFULLY SUBMITTED,

DATED: FEBRUARY 18TH, 2023.

/s/

GERALD DRUMMOND
PRO SE PETITIONER
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