No. _____

IN THE SUPREME COURT OF THE UNITED STATES

IAN BRENNER,
Petitioner,
v.
MICHAEL OVERMEYER, SUPERINTENDENT
STATE CORRECTIONAL INSTITUTE-FOREST,

ATTORNEY GENERAL OF THE
COMMONWEALTH
OF PENNSYLVANIA,

DISTRICT ATTORNEY OF YORK COUNTY,
PENNSYLVANIA,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

a. Whether denial of a Certificate of Appealability is proper when the magistrate judge who entered judgment lacked jurisdiction because the Petitioner did not consent to proceed before that magistrate?

b. Whether counsel was ineffective for not objecting on Sixth Amendment Confrontation Clause grounds to the prosecution presenting testimony by a surrogate expert conveying the testimonial statements and report of a non-testifying analyst and the substitute expert was not involved in the testing and merely adopted the non-testifying expert's analysis in creating a report?

c. Whether it is an unreasonable application of *Strickland* to deny an ineffectiveness claim based solely on the failure to present original trial counsel at a State-post-conviction hearing?

PARTIES TO THE PROCEEDINGS

Petitioner is Ian Brenner. Respondents are listed on the cover page. No party is a corporation.

RELATED PROCEEDINGS

Court of Common Pleas of York County, Pennsylvania: *Commonwealth v. Brenner*, CP-67-CR-2170-2006.

Pennsylvania Superior Court: *Commonwealth v. Brenner*, 610 MDA 2020, 256 A.3d 38 (Pa. Super. 2021) (unpublished memorandum filed May 18, 2021).

United States District Court for the Middle District of Pennsylvania: *Ian Brenner v. Michael Overmeyer, Superintendent State Correctional Institute-Forest et al.* (No. 3:22-cv-00157), 2023 U.S. Dist. LEXIS 178434. Judgment entered on October 3, 2023.

United States Court of Appeals for the Third Circuit: *Ian Brenner v. Michael Overmeyer, Superintendent State Correctional Institute-Forest et al.* (No. 23-2975). Denial of COA entered on February 28, 2024. Denial of Rehearing entered on March 21, 2024.

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INTRODUCTION

Petitioner, Ian Brenner, was wrongfully convicted of first-degree murder and is serving a life sentence. The only direct evidence against Brenner was from a single highly flawed juvenile eyewitness smoking marijuana at the time of a nighttime shooting who did not testify at the trial that resulted in Brenner's conviction. That eyewitness was deceased at the time of Brenner's (second) trial and was never cross-examined about the lead investigator in the case having stopped him before Brenner's first trial with drugs but never charging him after he fled and was not immediately recaptured. Trial counsel neglected to present grand jury testimony from the officer about the drug stop that was in counsel's possession, and which would have precluded the eyewitness's prior testimony from being allowed into evidence on Confrontation Clause grounds.

The other supposedly significant circumstantial evidence against Brenner was dubious gun-shot residue ("GSR") evidence that was also introduced in violation of Brenner's Confrontation Clause rights by a surrogate expert who never tested or analyzed the items tested for GSR. Trial counsel admitted to having no strategic basis for not adequately presenting Brenner's Confrontation Clause issues (or in not calling an expert on eyewitness identification). The State post-conviction courts rejected Brenner's ineffectiveness claims on grounds that were, at minimum, arguably "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court; and "resulted in a decision that was based on an

unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d).

Despite Brenner raising significant and, at minimum, debatable constitutional issues via a timely filed first-time federal *habeas* petition, ***no*** federal court with jurisdiction has ever addressed the merits of his claims. Instead, a magisterial district judge, whom Brenner did ***not*** consent to proceed before, purported to deny Brenner's *habeas* petition a mere four days after the matter was "re-assigned" to him. Despite Brenner not consenting to proceed before that magistrate judge, (a judge who worked as a prosecutor in the office that was involved in grand jury proceedings against Brenner related to the facts of this case), that judge purported to deny Brenner's petition and a Certificate of Appealability ("COA").

Brenner, in a timely filed request for a COA, among other claims, raised the issue of the lack of consent to proceed before the magisterial judge and argued that the judgment was void. In response, on January 23, 2024, the Third Circuit issued a letter that requested that Brenner address whether that court had appellate jurisdiction to consider the COA where he did not consent to proceed before the magistrate judge. (Appendix F, 221A). Brenner responded, asserting that the magistrate's judgment was void because the magistrate lacked jurisdiction since Brenner had not consented to proceed before him. 28 U.S.C. § 636(c)(1).

Brenner maintained that the Third Circuit still could issue a COA as to Brenner's jurisdictional issue and that it was arguable whether any COA was necessary for that issue. Brenner requested that the Third Circuit vacate and remand the void judgment and transfer the case to the district court under 28 U.S.C. § 1631 so that a district court *with* jurisdiction could address his underlying constitutional claims. None of the Respondents took any position related to the jurisdictional issue.

Rather than remand or transfer the matter since no federal court with jurisdiction had ruled on the merits of Brenner's claims, the Third Circuit denied Brenner's COA, *i.e.*, it denied jurisdiction over the merits of Brenner's constitutional claims. With respect to the jurisdictional issue and the fact that the magistrate's judgment was void due to a lack of jurisdiction, the Third Circuit found that the magistrate's lack of jurisdiction was no impediment to its *denial* of a COA, citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), and holding that there is "no sequencing of jurisdictional issues[.]" But by *denying* the COA, the Third Circuit *denied* jurisdiction over the merits of Brenner's claims; therefore, no federal court with jurisdiction has ever properly reached the merits of Brenner's claims-- despite federal jurisdiction for *habeas* claims existing.

PETITION FOR WRIT OF CERTIORARI

Ian Brenner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit decision denying rehearing on March 21, 2024 is attached as Appendix A. The Third Circuit judgment entered on February 28, 2024 denying a COA is attached as Appendix B. The Magistrate Judge's (void) judgment entered on October 3, 2023 can be found at *Brenner v. Overmeyer*, 2023 U.S. Dist. LEXIS 17843 (M.D. Pa. 2023) and is attached as Appendix C. The Pennsylvania Superior Court judgment entered on May 18, 2021 is unpublished but can be found at *Commonwealth v. Brenner*, 256 A.3d 38 (Pa. Super. 2021), 2021 Pa. Super. Unpub. LEXIS 1321, and is attached as Appendix D. The State court post-conviction relief decision of the Court of Common Pleas of York County, Pennsylvania is attached as Appendix E.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 2254 and 28 U.S.C. § 2241. However, the magistrate judge that purported to enter the judgment lacked jurisdiction where the Petitioner did not consent to proceed before him. 28 U.S.C. § 636(b)(1)(B) & (c)(1), (c)(3); Fed. R.Civ. P. 73(c). The Court of Appeals entered its judgment on February 28, 2024, and denied Brenner's timely petition for rehearing *en banc* on March 21, 2024. The Court of Appeals had

jurisdiction to consider Petitioner's Certificate of Appealability under 28 U.S.C. § 2253(c). *See also* 28 U.S.C. § 1631 (authorizing transfer of appeal). This Court has jurisdiction under 28 U.S.C. § 1254(1). *See also Roell v. Withrow*, 538 U.S. 580 (2003).

PROVISIONS INVOLVED

Federal Rule of Civil Procedure 73 provides, in relevant part:

> (a) **Trial by Consent**. When authorized under 28 U.S.C. §636(c), a magistrate judge may, if all parties consent, conduct a civil action or proceeding, including a jury or nonjury trial. A record must be made in accordance with 28 U.S.C. §636(c)(5).
>
> (b) **Consent Procedure**.
>
> (1) *In General.* When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. §636(c). To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.
>
> . . .
>
> (c) **Appealing a Judgment**. In accordance with 28 U.S.C. §636(c)(3), an appeal

> from a judgment entered at a magistrate judge's direction may be taken to the court of appeals as would any other appeal from a district-court judgment.

Relatedly, 28 U.S.C. § 636(c) outlines:

> (c)Notwithstanding any provision of law to the contrary—
> (1)Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and

when there is no such concurrence, then by the chief judge.

(2)If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

(3)Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise

> civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.
>
> . . .

28 U.S.C. § 1631 reads, in relevant part:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal,…is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court (or, for cases within the jurisdiction of the United States Tax Court, to that court) in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from – (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
>
> . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

This case further involves a State criminal defendant's constitutional rights under the Sixth and Fourteenth Amendments. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him…and to have the assistance of counsel for his defense."

The Fourteenth Amendment provides in relevant part: "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. . ."

STATEMENT OF THE CASE

A. Factual Background

On October 19, 2005, at approximately 9:30 p.m., an individual approached Jeffrey Mable, Alicia Brittner, Lloyd Valcarcel, Valentine Bonilla, Daniek Burns, and Alfonso King outside of Allison's Bar in York, Pennsylvania and opened fire. King was struck by a bullet in his wrist. (N.T., 8/4-5/14, at 110). A bystander, Anna Witter, who was visiting her friend Tina Ashley, was struck by a bullet, causing Witter's death. (*See id.* at 105). A bullet also hit a homeless individual, Anthony Zawadzinski. (N.T., 8/4-5/14, at 108).

Burns and Valcarcel, both juveniles, fled from the area and were stopped by responding police. (*See* N.T., 8/4-5/14, at 98, 118-19). Burns, who had outstanding warrants for his arrest, was wearing a bullet proof vest and smoking marijuana immediately before the incident. (N.T., 9/12/06, at 96; N.T., 8/4-5/14, at 410, 433). The vehicle on which Burns was sitting had its window shot out. (N.T., 8/4-5/14, at 401).

Police took the juveniles to the York City police station to be interviewed. Burns provided a description at the scene of a light skinned (African American) individual wearing a gray hooded sweatshirt with a goatee. (N.T., 8/4-5/14, at 122). At the police station, Detective Jeffrey Spence and Detective Scott Nadzom interviewed Burns. Brenner previously unsuccessfully sued Spence for false arrest. (N.T., 9/11/06, at 9; N.T., 5/21/14, at 17; N.T., 8/4-5/14, at 428).

After Burns said that the person's initials were I.B, (N.T., 8/4-5/14, at 405), police showed him a line-up with Brenner. Burns identified Brenner. (*Id.*) Despite Burns having open warrants for his arrest, police and a prosecutor permitted Burns to leave. (*See* N.T., 8/4-5/14, at 429-30). Alicia Brittner maintained that Burns later asserted that he was ***not*** able to identify the shooter. (N.T. Vol. 2, 8/6-8/14, at 131).

Police reported that Valcarcel described the shooter as a black male, six-foot-tall, stocky, wearing a black hoodie with the hood up, that the inside of the hoodie was blue, and he was wearing black or gray Jordan sneakers. Valentine Bonilla described the assailant as a six-foot-tall, medium build, black male with light complexion, wearing a beige hooded jacket and a beige baseball hat. (PCRA Petition, 4/20/18, Attachment 9). Police also interviewed Mable, Brittner and Ashley. Mable informed them that the attacker was a black male with a black hood over his head. Mable described the shooter as a littler shorter than him or the same height, medium build and brown skinned. Mable was six foot two or three inches tall. (N.T., 8/4-5/14, at 294).

Brittner stated that she saw a black male, wearing a tan hooded jacket with the hood pulled up, start shooting. She indicated that the shooter was very lanky and thin and approximately Mable's height. (PCRA Petition, 4/20/18, Attachment 6). At trial, Brittner stated the shooter was smaller than Mable and was wearing a gray hoodie. (N.T., 8/6-8/14, at

151). Police questioned King and Zawadzinski at the hospital after the shooting. King initially described the shooter as a black male in a tan hoodie. (PCRA Petition, 4/20/18, Attachment 5). At re-trial, he described the hoodie as dark. (N.T., 8/4-5/14, at 246, 257). After Brenner's arrest, Tina Ashley contacted police and informed them that Brenner was ***not*** the shooter. (N.T., 8/6-8/14, at 96).

Brenner at the time was six foot four and an extremely well built 250 pounds. He turned himself into police six days after the shooting, by voluntarily appearing with counsel at the York City Hall police station. After an attempted interview and taking Brenner into custody, Detective Anthony Fetrow seized Brenner's belt, pants, and sneakers. (N.T., 5/21/14, at 15). Detective Fetrow seized the items and provided them to RJ Lee Group, a private forensics lab. (N.T., 8/4-5/14, at 356-57).

Detective Fetrow did not seize a "Koman" sweatshirt that Brenner was wearing at that time. (N.T., 8/4-5/14, at 295; N.T., 5/21/14, at 15-16, 22). Months later, Detective Fetrow obtained a search warrant to seize that sweatshirt. (N.T., 5/21/14, at 23; *see also* N.T., 8/27/18, at 14). All of the items were tested for gun-shot residue ("GSR") by A.J. Schwoeble of RJ Lee Group. An additional sweatshirt that police later seized from Brenner's home was also submitted for GSR testing. (N.T., 8/27/18, at 17-18). Brenner's belt tested positive for all three components necessary to be considered GSR, having 42 such particles on the

belt.[1] Brenner's pants in contrast only had 3 such particles. Neither sweatshirt tested positive for GSR.

B. Procedural History

1. Proceedings In The State Court

Brenner was originally convicted by a jury of first-degree murder, attempted homicide, three counts of aggravated assault and sentenced to life imprisonment on October 23, 2006. Brenner filed a direct appeal, and the Pennsylvania Superior Court affirmed on the basis that Brenner's claims were waived. The Pennsylvania Supreme Court vacated and remanded for consideration on the merits. On April 6, 2010, the Superior Court again affirmed.

Brenner timely filed a Post-Conviction Relief Act ("PCRA") petition, which the PCRA court denied on June 26, 2012. Brenner appealed. The Pennsylvania Superior Court addressed a single issue and reversed and remanded for a new trial based on ineffective assistance of counsel for failing to present character witnesses. *Commonwealth v. Brenner*, 1313 MDA 2012 (Pa. Super. 2013) (filed May 31, 2013). On May 28, 2014, prior to Brenner's second trial, the Pennsylvania Supreme Court decided

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[1] Brenner was licensed to carry a firearm; however, that information was not known by the jury. (N.T., 8/27/18, at 11-12). When Brenner carried a firearm, he did so inside a holster on his belt--which explains the residue on his belt. (*Id.* at 12). The expert who testified at Brenner's trial has written that an item of clothing if left undisturbed can contain GSR from five years earlier and the "GSR will be the same as the day it was deposited."

Commonwealth v. Walker, 92 A.3d 766 (Pa. 2014), holding that expert testimony on the dangers of eyewitness testimony was admissible. Trial counsel failed to call an expert on eyewitness identification.

At the time of Brenner's second trial, multiple witnesses were also no longer available to testify, including the Commonwealth's sole eyewitness to identify Brenner: Daniek Burns. Burns was deceased at the time of Brenner's second trial. Trial counsel filed a pre-trial motion to preclude Burns' prior testimony, but failed to present evidence in support thereof at a hearing. (N.T., 7/2/18, at 55-60). Specifically, counsel failed to present evidence of Detective Fetrow's federal grand jury testimony from February 15, 2006, regarding Burns fleeing from York police after they found him in possession of illegal drugs. Since counsel did not present this evidence, the trial court permitted Burns' testimony to be read into the record.

GSR testing results were also introduced against Brenner via a surrogate expert. In this respect, the analyst who performed the testing, Schwoeble, did not testify at either of Brenner's trials, (N.T., 8/5/14, at 321-22). His expert report was (improperly) admitted into evidence at the second trial. Instead of presenting Schwoeble, the Commonwealth presented Allison Murtha. Murtha was not involved in any of the testing and merely reviewed Schwoeble's report to write another report, but never analyzed the items that Schwoeble tested.

A jury convicted Brenner of first-degree murder, third degree murder, attempted homicide, and three counts of aggravated assault on August 8, 2014. On September 17, 2014, the trial court sentenced Brenner to life imprisonment without parole plus five to ten years incarceration. Brenner filed a timely direct appeal. The Pennsylvania Superior Court affirmed on August 24, 2017. *Commonwealth v. Brenner*, 156 A.3d 347 (Pa. Super. 2017) (unpublished memorandum). The Pennsylvania Supreme Court denied allocator on January 31, 2017. *Commonwealth v. Brenner*, 165 A.3d 897 (Pa. 2017). Brenner did not seek review in this Court. The date of final judgment under State law therefore was ninety days from the Pennsylvania Supreme Court's denial of allowance of appeal, *i.e.*, May 1, 2017.

Brenner, on April 20, 2018, timely filed his underlying PCRA petition raising and preserving each of the issues presented in his federal *habeas* petition. The PCRA court conducted evidentiary hearings on July 2, 2018 and August 27, 2018. Brenner presented the expert testimony of Dr. Deryn Strange during his PCRA hearing "as an expert in human memory in particular eyewitness memory." (N.T. 7/2/18, at 17).[2] He also presented re-trial counsel and testified himself.

Dr. Strange determined that Burns, based on the lighting conditions and the distance from the shooter, did not meet the conditions for being able to

[2] The Superior Court of Pennsylvania repeatedly misspelled the expert's first name as Dery.

accurately make an identification. (*Id.* at 23). Further, Dr. Strange noted that the shooter was wearing a hood and that a head covering makes identification significantly less reliable. (*Id.* at 26; N.T., 9/12/06, at 103). Re-trial counsel acknowledged having no strategic reason for not adequately pursuing Brenner's various Confrontation Clause and eyewitness expert issues. (N.T., 7/2/18, at 57, 62-63, 71, 73).

The PCRA court, on March 19, 2020, entered a final order and opinion denying the petition, finding no prejudice on the key issues. Brenner timely filed a notice of appeal on March 30, 2020. The Superior Court affirmed on May 18, 2021. Brenner timely filed a petition for allowance of appeal to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court denied allowance of appeal on December 1, 2021.

2. Proceedings In The District Court

Brenner timely filed his first federal *habeas* petition on December 6, 2021. Brenner initially consented to have his petition decided by then Magistrate Judge Karoline Mehalchick and filed a comprehensive 81-page Brief in Support. Brenner did ***not*** consent to proceed before any other magistrate judge. However, the matter was verbally reassigned to Judge Martin Carlson (who had been involved as a prosecutor in grand jury proceedings involving Brenner). Subsequently, the case was again reassigned on September 29, 2023--this time to Magistrate Judge Daryl Bloom. Only four days later, on October 3, 2023, Judge Bloom purported to deny Brenner's

petition and declined to issue a COA.[3] Brenner timely filed a Notice of Appeal on November 1, 2023, and timely filed a request for a COA. Included in Brenner's request for a COA was his claim that the magisterial district judge's decision was void based on a lack of consent.[4]

3. Proceedings In The Third Circuit

The Third Circuit initially, on January 23, 2024, requested that Brenner address whether that Court had appellate jurisdiction, since the parties did not consent to proceed before the magistrate judge. Brenner filed a response requesting that the matter be transferred back to the District Court and/or that the magistrate's void judgment be vacated and remanded. The Third Circuit, instead of addressing the magistrate's lack of jurisdiction and entry of a void judgment, denied the COA on the grounds that "sequencing of jurisdiction" was not required. Its decision therefore improperly left in place a judgment by a court without jurisdiction.

The Court of Appeals further (erroneously) reasoned that no reasonable jurist could disagree with the

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[3] The short time frame between Judge Bloom's assignment and his decision was insufficient time to conclude that Brenner impliedly consented to proceeding before Judge Bloom. Moreover, Brenner would not have consented because Judge Bloom had been a prosecutor in an office that undertook a grand jury investigation of him, and that office also aided the state prosecution during Brenner's original trial.

[4] Brenner also sought review of three ineffectiveness claims related to his Confrontation Clause rights and trial counsel's failure to call an expert on eyewitness identification.

magistrate's (void) determinations regarding Brenner's constitutional claims and that the issues presented were not adequate to deserve encouragement to proceed further. Brenner timely filed a Petition for Reargument. The Third Circuit denied that Petition on March 21, 2024. This timely Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

Because no Circuit has addressed the precise jurisdictional issue implicated herein when a request for a COA arises from a decision by a magistrate judge that lacks jurisdiction, and a void judgment is no judgment at all, this Court should grant this petition and/or summarily reverse and return this matter to the District Court, *cf. Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 392 (1934) ("in the circumstances, it is appropriate that the decree below should be vacated and the cause remanded to the district court for further proceedings."), *or* find that the State appellate court unreasonably applied *Strickland* and grant relief.

Admittedly, courts always have jurisdiction to consider their jurisdiction. *United States v. Corrick*, 298 U.S. 435, 440 (1936) ("While the District Court lacked jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit."). Yet, as the Third Circuit's January 23, 2024 letter infers, there is no precedent concerning the situation where the parties' to a federal *habeas* consent to proceed before a specific magistrate judge

but the matter is reassigned to a *different* magistrate judge and the parties do ***not*** consent to proceeding before that judge. The Third Circuit's letter noted, "it is unclear whether the Court of Appeals can review an order of that Magistrate Judge absent evidence of the parties' consent to proceeding before that Judge." That uncertainty is undoubtedly because the question was an issue of first impression.

The Third Circuit and other Courts of Appeals have recognized that, outside the context of a COA, when a magistrate judge lacks jurisdiction so does the circuit court. *Prater v. Dep't of Corr.*, 76 F.4th 184, 190 (3d Cir. 2023); *see also Burton v. Schamp*, 25 F.3th 198, 205 n. 9 (3d Cir. 2022); *Allen v. Meyer*, 755 F.3d 866 (9th Cir. 2014); *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 472 (6th Cir. 2006); *Geaney v. Carlson*, 776 F.2d 140 (7th Circ. 1985). No case, however, has addressed the proper procedure where a magistrate judge without jurisdiction due to a lack of consent ***denies*** a *habeas* petition *and* ***denies*** a COA. Indeed, there is no appellate mechanism outlined for such an occurrence since a magistrate judge would ordinarily issue a report and recommendation if the parties did not consent and the parties could raise objections with the district court. *Cf. Coleman v. Labor & Indus. Review Comm'n*, 860 F.3d 461, 475 (7th Circ. 2017) ("unless all parties to the action have consented to the magistrate judge's authority to resolve the case finally…Rather than entering final judgments, they must 'issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court.'").

In other contexts, Circuit Courts have differed on the appropriate remedy when a magistrate judge lacks jurisdiction. For example, in *Allen*, *supra*, the Ninth Circuit remanded with directions to vacate a judgment where the magisterial district judge lacked jurisdiction in a Section 1983 action. *See also Coleman*, 860 F.3d 461. However, in *Prater*, the Third Circuit declined to vacate and remand a jurisdictionally defective magisterial district judge's order. It did so, however, on the basis that the party could still seek review with the district court--an avenue foreclosed in this matter by the Third Circuit. *Prater*, *supra* at 202-203. Indeed, the Third Circuit decision in this matter is in tension with *Prater* and this Court's own precedents because its denial of the COA gives the magistrate judge's deficient order "full effect…in violation of a legal or constitutional right." *Prater*, *supra* at 203 (quoting *Stickney v. Wilt*, 90 U.S. 150, 162 (1874)).

Rather than resolve the jurisdictional issue, the Court of Appeals denied Brenner's request for a COA. In doing so, the Court of Appeals overlooked that the magistrate's judgment was void, asserting that the *granting* of a COA is jurisdictional and that sequencing of jurisdiction is not required. The problem with this rationale, however, was that in denying the COA the Court of Appeals was itself *denying* appellate jurisdiction. The Third Circuit's citation to *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), does not support its COA *denial* because the magistrate judge entered an entirely void judgment on the merits, but a district court would have otherwise had jurisdiction. *Ruhrgras* held that,

in cases removed from state court to federal court, as in cases originating in federal court, there is no unyielding jurisdictional hierarchy. Customarily, a federal court first resolves doubts about its jurisdiction over the subject matter, but there are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry. *Ruhrgas*, 526 U.S. at 578. The jurisdictional inquiry in this matter is wholly distinct from the question in *Ruhrgras*.

The Third Circuit's *denial* of *appellate* jurisdiction did not resolve the magistrate judge's lack of jurisdiction. Only by granting the COA, would the "sequencing of jurisdiction" rationale come into play as at that point the Third Circuit could have considered the merits of Brenner's *habeas* petition. Instead, the Court of Appeals COA denial lets stand a void judgment reached by a court that undisputedly lacked jurisdiction.

The Third Circuit's claim that a COA is jurisdictional confuses that there is no appellate jurisdiction absent the *grant* of a COA. In short, the court effectively held that because it had no appellate jurisdiction that whether the magistrate did not have jurisdiction was immaterial. But two courts lacking jurisdiction cannot result in a void judgment becoming valid, yet that is precisely the result reached herein. *Compare Stickney*, 90 U.S. at 162 ("Cases wrongly brought up, it may be admitted, should, as a general rule, be dismissed by the appellate tribunal, but a necessary exception exists to that rule *where the consequence of a decree of dismissal will be to give full effect to an*

irregular and erroneous decree of the subordinate court in a case where the decree is entered without jurisdiction, and in violation of any legal or constitutional right.") (emphasis added).

The Third Circuit's jurisdictional analysis can only be logically explained on the basis that it looked to the underlying merits of the three ineffectiveness claims Brenner forwarded in his COA, and determined that they lacked merit. But the court was, at that time, prohibited from reaching the merits of Brenner's underlying *habeas* claims. *Buck v. Davis*, 580 U.S. 100 (2017); *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003). Thus, although the court "phrased its determination in proper terms--that jurists of reason would not debate that [Brenner] should be denied relief…it reached that conclusion only after essentially deciding the case on the merits." *Buck*, 580 U.S. at 115-116.

Indeed, if the court did not analyze the merits, its "sequencing of jurisdiction" determination makes no logical sense. However, "[w]hen a court of appeals sidesteps the COA process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* at 115; *see also Miller-El*, *supra*.

Instantly, jurists of reason assuredly could disagree with allowing a magistrate court with no jurisdiction to decide the merits of Brenner's *habeas* petition and effectively upholding a void judgment by denying appellate jurisdiction. *Cf. Allen*, 755 F.3d at 869

("Rather than dismiss or transfer this appeal and risk leaving in place the magistrate judge's infirm judgment, we remand this matter to the district court with instructions to vacate the judgment."). That the court requested counsel to evaluate the jurisdictional issue alone shows that reasonable jurists could debate the question.

This Court should grant review because the question presented implicates an important jurisdictional issue of first impression that impacts federal *habeas* proceedings throughout the entire country and, at minimum, this Court should issue an Order returning this matter to the district court for resolution by a court with jurisdiction.

b. The Surrogate Expert Issue.[5]

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[5] Here, there were four related Confrontation Clause violations:

1. An expert report by a non-testifying expert was introduced into evidence;
2. A surrogate testifying expert was permitted to testify concerning the non-testifying expert's findings and reports despite having conducted no independent testing or analysis of the items;
3. The surrogate testifying expert was permitted to testify as to her own report which was based **solely** on her review of the non-testifying expert reports and case notes; and
4. The surrogate expert's report was introduced into evidence.

The State courts purported to rely on the readily distinguishable Pennsylvania Supreme Court decision in *Commonwealth v. Yohe*, 79 A.3d 520 (Pa. 2013), in dismissing Brenner's claim. In that case, unlike here, there was not a separate expert report that was (improperly) admitted and

This Court also recently heard oral argument in *Smith v. Arizona*, 144 S. Ct. 478 (2023), on the question of whether, in light of *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Williams v. Illinois*, 567 U.S. 50 (2012), surrogate expert testimony is a violation of a defendant's Confrontation Clause rights. Hence, it is evident that jurists can reasonably dispute whether it is proper for a surrogate expert with ***no*** involvement in original testing to be permitted to testify based solely on review of another expert's reports.

Although this case involved an ineffectiveness claim, counsel explained he had no basis for not objecting and both State courts found a Confrontation Clause violation via introduction of the original expert's report, but reasoned it was not prejudicial due to use of the surrogate expert. Moreover, courts distinguish between scenarios involving failure to anticipate a change in the law from the failure, as here, to pursue readily available arguments relative to unsettled law. *See*, *e.g.*, *Pelmer v. White*, 877 F.2d 1518, 1523 (11th Cir. 1989) ("That the law is unsettled on a point does not mean the legal basis for arguing the point is unavailable."). *Bullcoming*, *Melendez* and *Williams* all had been decided before Brenner's second trial.

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adopted by the expert that testified. Rather, the *expert who testified in that matter was a supervisor who authored the sole report* that was introduced to establish blood alcohol content in a DUI case. Therein, the expert, Dr. Blum, was directly involved in determining the BAC of the defendant at the time.

Pointedly, this case presents even more Confrontation Clause problems than does the *Smith* case.

As noted, the GSR testing herein was performed by A.J. Schwoeble. Schwoeble created reports and provided them for the purpose of use in a future criminal prosecution. Schwoeble's testimonial reports were introduced into evidence. Since Brenner did not have an opportunity to cross-examine Schwoeble, admission of his reports violated the Confrontation Clause. *Bullcoming*, *supra*.

The State courts *agreed that the introduction of Schwoeble's reports was improper*, but found no prejudice because a second expert, Allison Murtha, testified to the GSR findings of Schwoeble. This rationale was not only an unreasonable application of this Court's precedents it was based on a mischaracterization of the facts.

Despite the *Smith v. Arizona* case, the Third Circuit, in denying the COA, concluded that no reasonable jurist would disagree that Brenner did not suffer prejudice because the surrogate expert purportedly reached an "independent" conclusion despite basing her entire report on her review of Schwoeble's reports ***and*** the State post-conviction court having made a factual finding that Murtha's conclusions and testimony were ***not*** independent.[6] Instantly, but for

[6] To suggest as the Third Circuit did that no reasonable jurist would dispute that Brenner was not prejudiced is refuted by the number of cases in which the precise procedure here has been rejected on Confrontation Clause grounds. *See Gardner v. United States*, 999 A.2d 55 (D.C. 2010); *Martin v. State*, 60 A.2d

trial counsel's ineffectiveness, Brenner could have been Smith.

Critically, Murtha did not participate in or observe the tests performed by Schwoeble nor was she his supervisor and she was only asked to determine if she agreed with the analysis and conclusions of Schwoeble. (N.T., 8/4-5/14, at 338; N.T., 7/2/18, at 73). Murtha's report was based *exclusively* on a review of the reports of Schwoeble and could not be independent. (N.T., 8/5/14, at 337-338). Murtha did not offer testimony based on any sufficient non-hearsay admissible facts--relying solely on Schwoeble's reports--admitting that her report was merely a review of Schwoeble's reports. (N.T., 8/4-5/14, at 324-325, 337); (*Id.* at 338) ("Am I correct to assume that you did not reanalyze the particular items that are in front of you? Yes, sir, that's correct."); (*see also* N.T., 8/4-5/14, at 347) (Q. "You found--he found and you reviewed and accepted, I suppose, his findings that there no particles characteristic of GSR, gun shot residue, on any of those items? A. Yes, sir, that's correct.").

The State PCRA court itself found, "to permit the course of action pursued by the Commonwealth in this case would create a loophole to *Bullcoming* wherein an uninvolved analyst of requisite skill simply reviews a file and signs a second report." (Appendix E, PCRA Court Opinion, 214A). The PCRA court found as a factual matter that the testifying

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1100 (Del. 2013); *State v. Tyus*, 272 A.3d 132 (Conn. 2022); *Leidig v. State*, 256 A.3d 870 (Md. 2021).

expert did ***not*** come to any independent conclusions concerning the GSR testing.

Specifically, the PCRA court concluded, "We do not question Ms. Murtha's skills in her field; but, rather, **we find that she did not perform similar independent verification work** in this case[.]" (Appendix E, 214-215A) (emphasis added). The PCRA court added, "To this Court's mind, **Ms. Murtha's status was more akin to the disallowed surrogate analyst** in *Bullcoming*[.]" (*Id.* at 215A); *see Bullcoming*, *supra* at 662.

The Superior Court panel ignored the PCRA court's factual findings and *erroneously* claimed that Murtha reached a different opinion than Schwoeble. (*See* Appendix D, Superior Court Slip Opinion at 72A) ("Ms. Murtha reached a different opinion than Mr. Schwoebel[sic].") The Superior Court's conclusion that Murtha reached an independent and different opinion was without ANY support in the record. The Third Circuit itself acknowledged that the Superior Court conclusion was wrong because it opined that Brenner suffered no prejudice because Murtha came to the *same conclusion* as Schwoeble. However, the Superior Court's analysis was precisely the opposite, *i.e.*, that Brenner suffered no prejudice because the conclusions were different and therefore independent.

Because Murtha did not re-test the samples and testify about the re-tested results, but created her report and testified about the GSR results based exclusively on Schwoeble's testing and reports, reasonable jurists could find that the Confrontation Clause was violated by Murtha's testimony and

report. *See Bullcoming, supra* at 666 ("New Mexico could have avoided any Confrontation Clause problem by asking Razatos to retest the sample, and then testify to the results of his retest rather than to the results of a test he did not conduct or observe.").[7]

Since this Court is questioning the viability of the fiction of a surrogate independent expert and the trial court here also rejected it, reasonable jurists could debate whether Brenner was prejudiced by counsel's failures. Since reasonable jurists, including this Court, could disagree on this issue, a COA should have issued. *See also Commonwealth v. Brown*, 185 A.3d 316, 334–35 (Pa. 2018) (Donohue, J. concurring) ("A surrogate analyst cannot suffice for Confrontation Clause purposes, as only cross-examination of the 'particular scientist' who did the work provides the defendant with the necessary opportunity to uncover any incompetence or dishonesty in the preparation of a forensic report

[7] The *Bullcoming* Court also plainly rejected that a witness's knowledge of standard operating procedures and the technology used to conduct the testing was adequate to satisfy the Confrontation Clause. *Bullcoming*, *supra* at 660 ("Could an officer other than the one who saw the number on the house or gun present the information in court—so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically 'No.'"). Yet, the Superior Court reached the exact opposite conclusion. (Appendix D, at 71A) ("Murtha then reviewed Mr. Schwoebel's [sic] report to ensure that everything was done according to those standard operating procedures… Like the toxicologist in *Yohe*, she was familiar with standard operating procedures and able to identify deviations from those procedures.").

through rigorous cross-examination."); *Garlick v. Lee*, 1 F.4th 122 (2d Cir. 2021).

At minimum, this Court should hold/grant Brenner's petition due to the pending decision in *Smith v. Arizona*, 144 S. Ct. 478 (2023).

c. It is an unreasonable application of Strickland to deny an ineffectiveness claim based solely on the failure to present original trial counsel at a State-post-conviction hearing.

Adding to the law school exam-like nature of this case, the State appellate court rejected Brenner's ineffective assistance of trial counsel claim for failing to adequately raise a Confrontation Clause issue pertaining to allowing the reading of prior testimony into the record (where the witness had never been confronted with critical impeachment evidence) on the sole basis that post-conviction counsel did not call *original* trial counsel at the state post-conviction hearing and instead presented re-trial counsel. But this Court has, at minimum, suggested that denial of an ineffectiveness claim on the exclusive basis that trial counsel did not testify at the post-conviction hearing stage is an unreasonable application of *Strickland*. *See e.g. Dunn v. Reeves*, 141 S. Ct. 2405, 2413–14 (2021) (Sotomayor, J. dissenting) ("the majority implicitly acknowledges, a *per se* rule that a habeas petitioner's claim fails if his attorney did not testify at an evidentiary hearing is flatly incompatible with *Strickland*."); *see also id.* at 2417 ("*No one disputes that such a rule would be an*

"unreasonable application" of *Strickland* and its progeny.").

By treating the failure to call *original* trial counsel during the PCRA hearings as a *per se* bar to relief, the State appellate court unreasonably applied *Strickland*. In *Dunn*, the Eleventh Circuit determined that trial counsel was ineffective in failing to present an expert on intellectual disability. That Court ruled that the Alabama court had unreasonably applied *Strickland* because it applied a categorical rule that a prisoner will always lose if trial counsel is not called to testify about strategy. This Court reversed on the basis that the Alabama court had **not** applied a categorical blanket rule--implicitly recognizing that such a categorical rule would be inappropriate. In support of its reversal, this Court found that the circuit court had mischaracterized the State court opinion. It reasoned, (unlike here), that there were a host of potential strategic reasons why trial counsel did not pursue calling the expert in question and highlighted that the state court had twice stated there can be *per se* deficient performances. *Id.* at 2412.[8]

[8] In contrast, neither the Pennsylvania Superior Court (nor the PCRA court) offered any potential strategic basis for original counsel not cross-examining the witness about his potential bias based on not being charged with a drug crime by the very law enforcement department and prosecutorial office that investigated and charged Brenner. Indeed, as explained *infra* there is no strategic basis for not cross-examining a witness about such an incident, especially where the witness claims he has not received any promises or benefits for his testimony and counsel cross-examined him about other criminal charges.

This Court added that the State court "twice said that it would consider 'all the circumstances' of the case, and it qualified its supposedly categorical rule by explaining that 'counsel should *ordinarily* be afforded an opportunity to explain his actions before being denounced as ineffective.'" *Id.* The *Dunn* Court also concluded that the State court, "did not merely say, as the Eleventh Circuit wrongly suggested, that Reeves' '"failure to call his attorneys to testify was fatal to his claims."' 836 Fed.Appx. at 744 (brackets omitted). Rather, the opinion prefaced this quote with an important qualifier—"*In this case*." *Id.* at 2413. The distinguishing circumstances in *Dunn* are simply not present here.

The Pennsylvania Superior Court's Categorical Per Se Ruling.

Unlike *Dunn*, where this Court concluded that the State court did not actually apply a *per se* rule, the State appellate court unequivocally improperly applied such a categorical rule. (*See* Appendix D, Unpublished Memorandum, at 62-63A) ("In the absence of any evidence as to what original trial counsel's strategy may have been, we cannot find that the PCRA court abused its discretion in denying relief on this issue. [*Commonwealth v.*] *Jones*, [596 A.2d] at 888-89 [Pa. Super. 1991] (declining to find the reasonable basis prong satisfied after Appellant failed to call the alleged ineffective attorney as a witness at his PCRA hearing).").

The Pennsylvania Superior Court found (in violation of *Strickland*) that, absent testimony from original trial counsel, Brenner could not show that original counsel had no reasonable basis for not questioning Burns about the uncharged York drug incident. (*See* Appendix D, Unpublished Memorandum, at 62A) ("By not calling Attorney Keenheel at the evidentiary hearing at issue herein, Attorney Keenheel was never given the opportunity to explain his strategy, or lack of it, to permit us to determine whether counsel had a reasonable basis designed to effectuate Appellant's interests….Accordingly, this deficiency is fatal to his ineffectiveness allegations surrounding Daniek Burns's cross-examination.").[9]

That is, in stark contrast to the majority finding in *Dunn*, the Pennsylvania Superior Court did not include any "In this case" qualifier nor did it recognize that there are situations where counsel's performance can be deemed deficient without testimony, and that courts are not bound by counsel's testimony concerning strategy. *Compare Commonwealth v. Mangini*, 425 A.2d 734, 737 (Pa. 1981) ("The Superior

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[9] Petitioner notes that his underlying ineffectiveness claim was that *re-trial* counsel was ineffective in failing to introduce evidence in support of the fact that Burns had been stopped by York police with drugs and fled, but was never charged where original counsel had not cross-examined him about that incident. The Superior Court conflated its analysis with a separate issue that Brenner presented before the PCRA court in his PCRA petition, but did not raise on appeal with the issue in question and found that the issue could only succeed if original trial counsel was found ineffective for not cross-examining Burns.

Court correctly rejected his 'reasonable basis' as 'even if counsel's tactic was deliberate, it was ineffective to effectuate his client's interest.'").

That is, even if original trial counsel offered some purported reason for not questioning the witness, the court would not have been bound by it. There can be no reasonable strategic basis to not impeach a witness with such evidence where counsel *did question the witness concerning other criminal matters* wholly unrelated to York County matters--and the witness (falsely) claimed he had received nothing in exchange for his testimony. *See e.g. Commonwealth v. Murphy*, 591 A.2d 278, 280 (Pa. 1991) ("We can perceive of no reasonable basis for counsel's failure to cross-examine Wilson on the basis of her then existing juvenile probation...it is likely that the bias theory could have bolstered the theory that Wilson mistakenly identified Appellant as the gunman."); *Commonwealth v. Davis*, 652 A.2d 885, 889 (Pa. Super. 1995) ("Although the existing record does not enlighten us as to trial counsel's reasons for his conduct, it is highly improbable that trial counsel would intentionally forgo an attempt to demonstrate the victim's possible bias as a matter of trial strategy, since the proposed impeachment could only have helped rather than hurt appellant's defense."). Because of counsel's "unreasonably deficient performance here, the jury was never informed of [Burns' drug arrest] and thus 'could not appropriately draw inferences relating to the reliability of the witness.'" *Grant v. Lockett*, 709 F.3d 224, 238 (3d Cir. 2013) (quoting *Davis v. Alaska,* 415 U.S. 308 (1974)).

What is more, the prosecution had dubiously argued that Burns "when he gave his testimony in 2006 was getting nothing from the police." (N.T., 8/6-8/14, at 345).

The uncharged drug incident referred to by Detective Fetrow in his grand jury testimony was unquestionably material impeachment evidence. Detective Fetrow's grand jury testimony reveals that Burns did not testify to the whole truth during Brenner's original trial and that he had been stopped for possession of drugs but was never charged, despite having fled and eluded York police. This evidence could have been utilized to impeach Burns by showing his bias and that he was within the sphere of influence of the prosecution. It also could have established that the Commonwealth knowingly used testimony that was less than the whole truth. In this respect, even absent a formal agreement, a witness may be hoping for favorable treatment based on testimony that aids the prosecution.

While the jury was apprised of a juvenile drug possession case from 2003 and another drug charge in New York from 2005 and a robbery charge that was dismissed, it was totally unaware that Burns had fled from York police after being found with drugs and had not been charged. Since Burns was not available and he never was cross-examined about the drug incident, **none** of his testimony was admissible under the Confrontation Clause. The Third Circuit should have granted a COA where the magistrate judge both lacked jurisdiction and the issue is one in which

reasonable jurists could disagree.[10] This Court should grant review to clarify that the failure to present an attorney during a post-conviction hearing is not a *per se* bar to relief under *Strickland* as was held by the Pennsylvania Superior Court.

CONCLUSION

For the aforementioned reasons, the petition for a writ of certiorari should be granted.

/s/J. Andrew Salemme
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[10] In denying the COA on this Confrontation Clause ineffectiveness claim, the Third Circuit also egregiously misstated the facts. That Court asserted that reasonable jurists would all agree that Brenner's issue was meritless because the jury was purportedly aware of "several incidents where law enforcement chose not to charge" Burns. (Appendix B, 4A). But that is completely unsupported by the factual record. The jury was ***never*** made aware of ***any*** incidents of ***uncharged*** conduct. What is more, that analysis is itself an erroneous application of constitutional law because Brenner's claim pertained to the admissibility of Burns' testimony in the first instance. The correct *Strickland* prejudice analysis would look to whether there was a reasonable probability of a different outcome if Burns' testimony was not introduced at all, not whether the jury knew of other impeachment evidence.