

No. 23 - 6316

FILED
AUG 10 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL VINCENT,

Petitioner,

v.

JAMEY LUTHER, *et al.*,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**PETITION FOR A WRIT OF
CERTIORARI**

DANIEL VINCENT, #KH7761
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QUESTIONS PRESENTED

Mr. Vincent alleged that his trial counsel was grossly ineffective for presenting an incomplete defense of mistaken identification, which was neither supported by an identification instruction or supporting, favorable eyewitness testimony which were both at trial counsel's disposal. Mr. Vincent was convicted, solely on the unreliable identification of a single witness although several witnesses identified other suspects. The omitted identification instructions would have lead the much needed guidance that the jury was seeking in evaluating the identification evidence in this case, as evident in the several questions asked by the jury during deliberations, all pertaining to the identification of Mr. Vincent. Further the omitted eyewitnesses would have testified to witnessing other suspects at the scene of the crime that were not Mr. Vincent. The Third Circuit relied on the State Court's decision which failed to adjudicate claims that was properly presented to all courts, and it's ruling is in conflict with the circuits and inconsistent with its prior rulings. The case thus presents the following question :

- I. Is a defendant denied due process of law if he properly presents a claim to both the State and Federal Courts and neither Court addresses the claim ?

- II. Does an Attorney's performance meet the minimum requirement of effective assistance of trial counsel guaranteed under the Sixth and Fourteenth Amendment to the United States Constitution where the defense strategy is mistaken identification and trial counsel failed to; (1) request any identification instruction whatsoever, be it **Cautionary, Standard, Sexton**, or otherwise; (2) failed to call eyewitness who witnessed other suspects other than Petitioner coming from crime scene; (3) failing to cross-examine lead investigator about other suspects who were arrested in relation to this crime ?

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

Petitioner:

Daniel Vincent

Respondents:

United States of America

Jamey Luther, Superintendent,
State Correctional Institution at Smithfield

The Pennsylvania Attorney General

The District Attorney for Delaware County

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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

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

The opinion of the United States court of appeals appears at *Appendix (A)*, to the petition and is reported at *Vincent v. Luther, No. 22-3258*

The opinion of the United States district court appears at *Appendix (B)*, to the petition and is reported at *Vincent v. Luther, No. 19- CV-2399*

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

The opinion of the highest state court to review the merits appears at *Appendix (C)*, to the petition and is reported at *Commonwealth v. Vincent, 2019 Pa. Super. Unpub. LEXIS 4509; 225 A3d 1132; No. 1135 EDA 2018*

The opinion of the Post Conviction Relief Acts Court appears at *Appendix (D)*, to the petition and is reported at *Commonwealth v. Vincent, 2018 Pa. Dist. & Cnty. Dec. LEXIS 8366 CP-23-CR-6201-2010*

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was February 22, 2023.

A timely petition for rehearing was denied by the United States Court of Appeals on March 24, 2023, and a copy of the order denying rehearing appears at *Appendix C*

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

The date on which the highest state court decided my case was Feb. 5, 2020. A copy of that decision appears at *Appendix D*; *Commonwealth v. Vincent, No. 1135 EDA 2018*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

U.S. CONST., AMEND. VI

STATEMENT OF THE CASE

Mr. Vincent was convicted of the Attempted Murder, Robbery, Burglary, and related offenses committed upon Alex Adibisi. According to Alex Adibisi, the victim of said crimes, he was at a party at a neighbors home when a group of about 8-10 unfamiliar faces showed up. N.T. 9/13/11, at. 70-77; Mr. Adebisi stated that he then moved the gathering to his home next door where he placed a food delivery for he and his guest. Upon answering a knock at the door believing that it was the food delivery, two hooded men that Mr. Adebisi told stated that he never seen before entered into his apartment and shot him, he further stated that one was short and dark skin, and that he could not tell them them anything about the second guy alleged to be petitioner. N.T. 9/14/11, at 125-126 vol. III. At Mr. Vincent's trial, during deliberations, the jury returned with several questions, all pertaining to the identification of Mr. Vincent, which the trial court refused to answer. N.T. 9/15/11 at. 31. Without any guidance from the court on how to evaluate eyewitness identification evidence, the jury returned with a verdict of guilty. Mr. Vincent's conviction was affirmed on direct appeal. *Commonwealth v. Vincent*, 62 A.3d 462, 2012 Pa. Super. LEXIS 4717 (Pa. Super. Ct., Oct. 22, 2012). State post-conviction proceedings were filed; relief was denied. *Commonwealth v. Vincent*, 2018 Pa. Dist. & Cnty. Dec. LEXIS 8366. The Superior Court affirmed on appeal from Post-conviction relief. *Commonwealth v. Vincent*, 225 A.3d 1132 (Pa. Super. 2019). Mr. Vincent then filed a habeas corpus action under 28 U.S.C. § 2254. Relief was denied by the district court. *Vincent v. Luther*, 2019 U.S. Dist. LEXIS 205951 (E.D. Pa., Nov. 27, 2019).

REASON FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S FAILURE TO ADJUDICATE THE MERITS OF CLAIMS THAT WERE PROPERLY PRESENTED TO THE STATE AND FEDERAL COURTS WARRANTS THIS HONORABLE COURT'S ATTENTION.

i. Identification Instructions

The Third Circuit much like the State Courts, in addressing Petitioner's three (3) part *Kloiber Identification Instruction* arguments inadvertently, or deliberately neglected to address two (2) of the three (3) claims which were properly presented to all courts from the inception of Petitioner's post-conviction proceedings in state court, all the way up through the Third Circuit Court of Appeals. see [Counseled PCRA filed November 19, 2013] and [Amended pro se PCRA filed August 15, 2016]. The two (2) claims which every court below failed to address are, the *Standard Identification Instruction* and the *Sexton Identification Instruction*.

While the State Court did address one (1) of the three (3) Identification Instruction claims raised, which is the *Cautionary Kloiber Identification Instruction*, they all failed to adjudicate the *Standard Identification Instruction*, or the *Sexton Identification Instruction*. These instructions' are not one size fit all, catch all, nor are they interchangeable, therefore the reasoning of the state court in rejecting the *Cautionary Identification Instruction* would not, and could not have been the same utilized in rejecting a *Standard Identification Instruction*, or a *Sexton Identification Instruction* as they all possessed different requirements necessary to trigger the suggested instructions.

A *Cautionary Identification Instruction* is warranted under *Kloiber* only were one (1) of three (3) requirements are met;

(1) where the eyewitness is not in a position to clearly observe the assailant, or (2) he is not positive as to identity, or (3) his positive statements as to identity are weakened by qualification or by failure to identify defendant on one or more prior occasions.....only then is the accuracy of the identification so doubtful that the court should warn the jury that the testimony as to identity must be received with caution. Commonwealth v. Kloiber, 378 Pa. 412, 106 A.2d 820

(Pa. 1954).

A *Standard Identification Instruction*, is found in *Commonwealth v. Yarris*, 519 Pa. 517, 549 A.2d 513, 529 (1988). Pennsylvania Supreme Court held the instruction given there to be the correct identification instruction, taking pains to note that it is the Cautionary Kloiber charge that is not always required if the requisite qualifications are not present. That instruction is as followed :

Because identifications can be mistaken, an individual can make a mistake as to identification even when the individual is trying to tell the truth. In determining whether or not to accept as accurate the identification testimony..... you must take into consideration the following factors. You should consider first whether the testimony of the identification witness is generally believable. Second, did the witness have the opportunity to observe and was that opportunity sufficient for the witness to make an accurate identification. You should consider how the witness arrived at the identification that the witness made, on what did they base it, what observations. You should consider all of the circumstances indicating whether or not the identification was accurate. You should consider whether the {519 Pa. 602} identification testimony is supported by other evidence in the case.

This charge, Pennsylvania Supreme Court held to be one which correctly instructed the jury as to how this evidence [identification] should be evaluated," and this instruction is found in *Yarris*, and indeed in the *Kloiber* case itself, as well as *Pennsylvania Suggested Standard Jury Instructions*; *4.07 (a) Identification Testimony*.

A *Sexton Identification Instruction*, found in *Commonwealth v. Sexton*, 485 Pa. 17, 400 A.2d 1289, 1290 (1979). There the Pennsylvania Supreme Court held that the appropriate remedy for an arbitrary denial of a line-up was not the exclusion of the in-court identification, but rather instructions that the defendant "had been denied the opportunity for a more objective identification and for that reason the subsequent less reliable identification could be viewed with caution." *Id.* at 1293; this instruction is found in *Sexton*, *Kloiber*, and *Pennsylvania Suggested Standard Jury Instructions 4.07B (crim) Identification Accuracy*, and are as followed:

*The Standard Jury Instructions include the following Kloiber instruction:
The instruction reads:*

4.07B (Crim) Identification Testimony-Accuracy in Doubt

2. A victim or other witness can sometimes make a mistake when trying to identify the criminal. If certain factors are present, the accuracy of identification testimony is so doubtful that a jury must receive it with caution. Identification testimony must be received with caution..... [if, before the trial, the defendant's request for a [lineup] [specify request] to test the ability of the witness to make an identification was denied and the witness subsequently made a less reliable identification] [if, [give specifics]].

Clearly, each of the above mentioned claims were presented to the State and Federal Courts, and each instruction would have required different analysis from said Courts, as they all possessed different requirements. So the State Courts rational in denying the *Cautionary Kloiber* aspect of this three (3) part arguement could not have suffice to have addressed the *Standard Identification Instruction* nor the *Sexton Identification Instruction* claims.

Moreover, as the United States District Court acknowledged in its Report and Recommendation filed [January 21, 2022 at. 23]. "Petitioner properly presented this claim in his PCRA proceedings. See Nov. 2013 PCRA Pet.; Aug. 2016 PCRA Pet.; Concise Statement of Errors; PCRA Apeellate Brief. Nevertheless, somehow that same Court and all courts below still denied due process by failing to adjudicate the merits of said claims.

ii. Other Suspects / Misidentification Evidence

Much like the above mentioned *Identification Instructions*, this claim was properly presented to all Courts from the inception of post-conviction proceedings. This claim was also a two part claim alleging trial counsel's ineffectiveness for failing to cross-examine lead detective Lieutenant Richard Gibney, with evidence of "*Other Suspects*" who were arrested and investigated in connection to this case, and the "*Misidentification of Petitioner in a Similar Crime*". See [PCRA petition filed on August 14, 2011 at. 36]; [Reply filed January 16, 2017]; [Superior Court Brief June 19, 2019]; [Superior Court Reargument En Banc, December 17,

2019]; [Traverse, September 13 2020]; [Objections to R&R]; [Rehearing En Banc, March 6, 2023];

While the Courts below addressed the "*Other Suspect*" portion of the argument, they all either inadvertently, or deliberately ignored the "*Misidentification of Petitioner in Similar Crime*" portion of the argument.

Wherefore, those claims that were properly presented to the State and Federal Courts where never adjudicated on the merits as evidenced in review of the State and Federal Court record. Therefore these claims are entitled to *de novo* review, as AEDPA does not apply, and 28 U.S.C. 2254(D)(1)-(2) is not applicable.

"[W]hen, as here, the state courts do not adjudicate a claim on the merits, and that claim is presented properly to a federal court in a petition for a writ of habeas corpus, the deferential standards of the AEDPA do not apply [and] our review is entirely *de novo*." *Mason v. Wetzel*, 2021 U.S. Dist. LEXIS 157560. An 'adjudication on the merits' has a well settled meaning: a decision finally resolving the parties' claims, with *res judicata* effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground." *Rompilla v. Horn*, 355 F.3d 233, 247 (3d Cir. 2004), rev'd on other grounds, *Rompilla v. Horn*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005).

Likewise, if a petition has presented the claims raised in a federal habeas application to a state court, and the state court opinion addresses some but not all of those claims, the federal habeas court must presume (subject to rebuttal) that the state court adjudicated the unaddressed federal claims on the merits. *Johnson v. Williams*, 568 U.S. 289, 133 S. Ct. 1088, 1095-96, 185 L. Ed. 2d 105 (2013). The consequence of this presumption is that the federal habeas court will now review the previously unaddressed (but clearly presented) claim under § 2254(d) whereas, in

the past, federal habeas courts often assumed "that the state court simply overlooked the federal claim[s] and proceed[ed] to adjudicate the claim[s] de novo." *Id.* at, 133 S. Ct. at 1091-92. *Lockhart v. Patrick*, 2014 U.S. Dist. LEXIS 118724.

This Honorable Court has previously stated that; there is no federal constitutional mandate requiring collateral review. *Pennsylvania v. Finley*, 481 U.S. 551, 556-57, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). It is not part of the criminal process, and is, in fact, civil in nature. *Id.* Therefore, under the Fourteenth Amendment to the United States Constitution, the procedural due process protections are less stringent than for purposes of either a criminal trial or direct appeal. *Id.* Nevertheless, due process requires that the post conviction process be fundamentally fair. *Id.*; see also *Commonwealth v. Haag*, 570 Pa. 289, 809 A.2d 271, 283 (Pa. 2002). Thus, petitioners must be given the opportunity for the presentation of claims at a meaningful time and in a meaningful manner. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982).

Because the Third Circuit Court of Appeal's denial of due process in failing to adjudicate the merits of the above mentioned claims which were properly presented to all State and federal Court's *is so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power*, this Honorable Court must grant Certiorari.

II. THE THIRD CIRCUIT'S MISAPPLICATION OF THE PREJUDICE STANDARD OF STRICKLAND WARRANTS THIS COURT'S ATTENTION.

KLOIBER IDENTIFICATION INSTRUCTION

The Third Circuit's opinion misapplied the *Strickland v. Washington*, 466 U.S. 668,

687-688 (1984), test for prejudice in two important ways. This Court requires, in making the prejudice analysis under *Strickland*, that the reviewing court consider all of the evidence in the record, both that which was admitted at the trial which is developed at the post-conviction stage.

Strickland v. Washington, 466 U.S. 668, 687-88 (1984). *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *William (Terry) v. Taylor*, 529 U.S. 362 (2000). Under this test, it is inappropriate to consider the evidence in the light most favorable to the verdict. It is clear that the Court of Appeals here disregarded this principle. As it has in several other cases, the court began its analysis by setting out the version of the facts given by the Pennsylvania Superior Court. See *Vincent v. Luther*, No. 19- CV-2399; *Commonwealth v. Vincent*, 2019 Pa. Super. Unpub. LEXIS 4509; 225 A3d 1132; [*adopting lower Court's Opinion*] *Commonwealth v. Vincent*, 2018 Pa. Dist. & Cnty. Dec. LEXIS 8366.

The Court then went on to hold, based on this recitation and its factual error discussed above, "Based on the substantial inculpatory evidence presented at trial, we determine that Mr. Vincent was not prejudiced by trial counsel's failure to request an *Identification Instruction*. But this analysis ignored *conflicting* evidence that was presented at trial but not recited by the Third Circuit Court of Appeals.

For example, the Third Circuit relies solely on the State Court's findings that, Mr. Adebisi had several interactions with his attacker's prior to being shot and robbed, and had no issues in terms of having a clear view of his attacker's. The record belies these facts. Considering the testimony of Officer Charles Schuler, that Mr. Adebisi told Officer Schuler that "*he was shot by two men that he never saw before*". N.T. 9/14/11, at 125-126 Vol. III

Next, the Third Circuit again relying solely on the State Court claims that Mr. Adebisi saw his assailants and another man in his friend Max's (Adetokumbo Maximus Adeore)

apartment. (Report and Recommendation at. 23). As the record belies, Mr. Adebisi initially saw his attacker's in a dimly lit party in his neighbors basement, a scene of strippers, prostitutes and clouds of marijuana smoke. Were all Mr. Adebisi testified to seeing was a group of 8-10 unfamiliar faces. N.T. 9/13/11, 70-77;

Next the Court of Appeals much like the State Court claims that Mr. Adebisi spoke directly to his attacker's, R&R at. 24, it was alleged that Mr. Adebisi discussed with his attacker's how they were both from Flatbush New York and both Nigerian, N.T. 10/6/10, at 25. Later in the investigation Mr. Adebisi's story changed yet again, from not being able to identify his attacker at all, to his attacker being from where he's from "Nigeria, and then to his attacker being Haitian. N.T. 9/13/11, at. 81-82.

The next encounter that the Court of Appeals adopts, is the exchanging of change for the \$100.00 bill. Mr. Adebisi, testimony belies this point as well. Mr. Adebisi was specifically asked where was the other suspect, (*alleged to be Petitioner*) when he was exchanging change for the \$100.00, with the short dark skin male, and he replied that he did not know where the other guy alleged to be petitioner was at, he did not see him, the little guy was by himself. N.T. 10/6/10, at. 19.

It is next alleged that Mr. Adebisi got a good look at the suspects when they came to his door and attacked him. This assertion is also unreliable. Mr. Adebisi testified that as soon as he opened the door he was punched in the eye so hard that it caused him to stagger and he was stunned. N.T. 10/6/10, at. 7, 10 and 24-27. Immediately after being punched in the eye, he was shot, then he tried to grab the gun from the shooter and was shot again.

Therefore any suggestion that Mr. Adebisi had a clear view and opportunity to see his attackers is unreasonable, especially taking into account the fact that Mr. Adebisi still got it

wrong. Mr. Adebisi told Officer Schuler that one of the suspects was "**short dark skin**" and that he could not tell him anything about the second guy. N.T. 9/14/11, at 125-126. Vol. III. When questioned on this point at trial Mr. Adebisi acknowledged that the shorter male was in fact "**light skin**" not dark skin as he previously believed. N.T. 9/14/11, at. 233-236.

The Third Circuit, like the state court, suggest that Mr. Adebisi's statement to Officer Schuler in the ambulance was less then reliable because of the circumstances in which it occurred. It is worth noting that Dr. Allen, gave a statement to the Commonwealth which was stipulated to by the defense. Dr. Allen described Mr. Adebisi as "being combative and agitated secondary to pain". 9/14/11, at. 109. Likewise, EMS/Paramedic Kathy Pinto stated " that the patient [Mr. Adebisi] was anxious, but was conscious, alert and oriented." N.T. 9/14/11, at. 107. " Mr. Adebisi had no problem answering questions clearly and accurately while in the ambulance. Mr. Adebisi related clear responses that were accurately recorded by the paramedics and Officer Schuler, everything from his name, date of birth, social security number, current address, previous address, current phone number, previous phone number, emergency contacts, what medications he was allergic to, what drugs he was on, and what happen that night. N.T. 9/13/11, at. 223-225.

While the Third Circuit suggest that Mr. Adebisi simply gave a vague description of the assailants, petitioner submits that Mr. Adebisi's statement was more than simply a vague description. Mr. Adebisi's statement, mistakenly identified "a short dark skin male" as oppose to the "short light skin male" that he later identified at trial, and that statement failed to identify or describe anything at all about the second suspect, *[alleged to be petitioner]*. This was not simply a vague description, this was a clear demonstration of Mr. Adebisi's lack of opportunity to clearly view his attacker's. Thus triggering an appropriate ***Cautionary Kloiber Instruction***.

Moreover, as the United States District Court acknowledged in its Report and Recommendation filed [January 21, 2022 at. 23]. "Petitioner properly presented this claim in his PCRA proceedings. See Nov. 2013 PCRA Pet.; Aug. 2016 PCRA Pet.; Concise Statement of Errors; PCRA Apeellate Brief. Judge Bradley found no basis to support a Kloiber charge." The District Court went on to cite the state courts reasoning in denying this claim only addressing the Cautionary aspect of this instruction, that citation is as follows :

Where a "witness is not in a position to clearly observe the assailant, or he is not positive as to identity, or his positive statements as to identification have been weakened by qualification or by fialure to identify defendant on one or more occasions," the jury will be instructed that the witness's testimony must be received with caution.
Commonwealth v. Kloiber, 106 A.2d 820 (1954)...

....
Petitioner here did not allege, and in fact conceded that Mr. Adebisi's identification was not rendered suspect by a lack of opportunity or an inability to observe his assailants. Through his trial testimony the Commonwealth established that Mr. Adebisi recognized both [Vincent] and Shaw from two interactions earlier in the day. His assailants forced their way into his apartment and he recognized them immediately. He quickly identified both [Vincent] and Shaw when he came out of his coma days after the shooting. At trial his in-court identification was unequivocal on both direct and cros-examination. See N.T. 9/13/11 pp. 135, 156. Under these circumstances, the statements Mr. Adebisi gave during his ambulance ride where he unable to give a description of [Vincent] provided trial counsel an opportunity to challenge his credibility but it was not a "mis-identification" warranting a Kloiber instruction.

R&R at. 23

FAILURE TO CALL KATHY TORARO

The decision of the Third Circuit is in conflict with another decision in this Circuit. The Third Circuit Court of Appeals has held the following in *Williams v. Superintendent Mahanoy SCI*, 45 F.4th 713; 2022 U.S. App. LEXIS 23009 :

"Before explaining why Williams's ineffective-assistance claim fails, we pause to address the District Court's holding. According to the District Court, to succeed on his ineffective-assistance claim, Williams bears the burden of showing that Rochon was willing to testify at Williams's trial. The District Court derived this requirement not from federal law, but from a Supreme Court of Pennsylvania decision setting forth a five-factor test of uncertain origin. Under that test, Pennsylvania courts generally require a defendant to show that:

(1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial. *Clark*, 961 A.2d at 90.

The dispute here is about the fourth requirement—showing{2022 U.S. App. LEXIS 12} a witness's willingness to testify. The Commonwealth argues that this requirement aligns with *Strickland* and urges us to apply it here. We decline to do so. As we have said before, and reiterate once again, "[a]bsent extenuating circumstances, such as the existence of a privilege or the witness's incapacity or death, whether a witness is ready and willing to testify is irrelevant since defense counsel can compel testimony through a trial subpoena." *Grant v. Lockett*, 709 F.3d 224, 239 n.10 (3d Cir. 2013). Compulsory process, after all, is guaranteed in criminal trials by the Sixth and Fourteenth Amendments. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) ("Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial"). Unwilling witnesses can be made to testify....Williams need not prove that Rochon would have been a willing witness. **We reject Pennsylvania's contrary rule**".

Further, it is worth mentioning, that the State Court relied on a procedural rule in rejecting this claim; [Pa. R. Crim. P. Rule 905]. Interestingly enough the State Court itself did

not follow this rule in disposing of this claim. Under Pennsylvania law, Pennsylvania Supreme Court has held, if a PCRA petition has a defect, the court is to notify the Petitioner of the defect and give the opportunity to correct the defect. *Commonwealth v. Robinson*, 596 Pa. 580, 947 A.2d 710 (Pa. 2008)(Pennsylvania Supreme Court has held that "it is improper to dismiss a PCRA petition based on a failure to submit a witness certification, without providing notice of that defect."). As evident by the record petitioner was never provided any notice or opportunity to correct the defect.

This Honorable Court has indicated; when a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of appeals on the same important matter, that this Honorable Court may consider Certiorari. Here, certiorari should be granted to correct this error.

CROSS-EXAMINE LT. GIBNEY ABOUT OTHER SUSPECT

It is well established that evidence which tends to show that the crime for which an accused stands trial was committed by someone else is relevant and admissible. See *Commonwealth v. Ward*, 529 Pa. 506, 605 A.2d 796 (1992); *Commonwealth v. Boyle*, 470 Pa. 343,368 A.2d 661 (1977). It is equally well established that evidence that a defendant has committed a crime other than the one for which he or she stands accused is admissible where the crime possess substantial similarities such that part of one tends to establish logically the identity of the accused as the perpetrator of the other. See *Commonwealth v. Morris*, 493 Pa. 164, 425 A.2d 715 (1981). Clearly, the converse is also true: evidence that a defendant has previously been misidentified as the perpetrator of one or more crimes bearing substantial similarities to the crime for which the defendant now stands accused is also relevant for the same reasons and should

likewise be deemed admissible. See also *Campbell v. Vaughn*, 296 F.3d 138 (3d Cir. 2002).

Petitioner asserts that trial counsel's performance fell below the objective standard of reasonableness, when he failed to elicit on the crossd-examination of Lt. Gibney that the Darby police department were investigating and arrested "*other suspects*" in connection to this crime, and the fact that Petitioner was "*misidentified in a similar crime*".

The State Court's decision which was adopted by the Court of Appeals, concedes that evidence of "*other suspects*" is fodder for cross-examination. But somehow the Court of Appeals unreasonably sides with the state in holding that "the evidence presented to the PCRA Court [PCRA Petition. Exhibit "D"] "provided no support for the convoluted and speculative claim".

Clearly, a review of [exhibit "D" attached to PCRA petition] provides a Darby police department investigative report which clearly demonstrates that the Darby Borough Police department was investigating and arrested Marias Freeman, and David Julue in connection to the November 30, 2009 shooting. Also attached thereto, [at exhibit "F"] is a "witness certification" of Ruth Washington -stating that on December 2, 2009 Lt. Gibney came to her home in search of Joel Vincent [Petitioner's brother] believing that Joel Vincent may have been the other suspect with Anthony Shaw, because the two where wanted for similar charges in a separate case.

Clearly, this claim, and the evidence presented in support thereof, is neither "convoluted" nor "speculative". The various police reports attached to petitioner's PCRA petition all demonstrate simply that there were two other suspects arrested in relation to this crime, and at least one other [Joel Vincent] sought in relation to this crime.

The "touchstone of materiality is a 'reasonable probability' of a different result." *Kyles*, 514 U.S. at 434. Materiality "does not require demonstration by a preponderance that disclosure

of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . [Rather], [a] 'reasonable probability' of a different result is . . . shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." Id.; Dennis, 834 F.3d at 285.

Under Strickland's deficiency prong, a habeas petitioner "must show that counsel's representation fell below an objective standard of reasonableness."¹⁵ Under the prejudice prong, the inquiry is whether counsel's errors were "so serious as to deprive the defendant of a fair trial" with a reliable result.¹⁶ To make this showing, the petitioner must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."¹⁷ Both prongs must be met for the petitioner{2022 U.S. App. LEXIS 5} to succeed.¹⁸

Under Strickland, to establish prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

CUMULATIVE EFFECT

As illustrated more comprehensively within the contents of the actual argument, Petitioner was denied his right to compulsory process. In addition, trial counsel's failure to investigate, interview, and call available witnesses, who would have supported counsel's defense.

Trial counsel's failure to interview and subpoena Kathy Totaro further undermined confidence in the verdict. Ms Totaro statement was a part of the "discovery package" supplied by

the Commonwealth. Ms. Totaro told police that she witnessed 3-4 teenaged boys "between" 16-18 years of age, running from the victim's home after the shooting. Ms. Totaro was delivering food to the victim's home at the time of the shooting. This also would have supported the defense theory of mistaken identification, as Petitioner did not fit the description of any of those described by Ms. Totaro, as seen fleeing the scene of the crime.

Furthermore, trial counsel failed to cross-examine Lt. Gibney in regards to other suspect's who was arrested and being investigated in connection with this crime, and the misidentification of Petitioner in a similar crime. As stated above, and discussed more fully within the contents of the actual argument, these errors by trial counsel heads inexplicably to his failure to request not only a *Cautionary Kloiber Instruction* but the *Standard Identification Instruction* as well as the *Sexton Identification Instruction*, or any discussion of identification whatsoever. It cannot be underscored enough the questions that were asked by the jury during deliberations all pertaining to the identification by Mr. Adebisi, had counsel acted within the realms of professional norms the jury's questions would have been answered and would have undoubtedly lead to a different outcome.

The defense presented by trial counsel was much weaker than the one available to him. But for trial counsel's error's Petitioner would have presented an overwhelmingly stronger case. The prosecution's case against Petitioner was not overwhelming, "A verdict or conclusion only weakly supported by the record is more likely to have been affected by error's than one with overwhelming record support." *Strickland v. Washington*, 466 U.S. 668, 687-97 (1984).

An accused sixth Amendment right to the assistance of counsel is one of the most fundamental components of our criminal justice system... the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate". The

right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing... but if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

In the instant matter, it cannot be said that the Commonwealth's case was forced to undergo or to survive the crucible adversarial testing envisioned by the Sixth Amendment, where counsel failed to call critical witnesses and present their exculpatory testimony to the jury, or where counsel failed to even cross-examine witnesses who took the stand with their prior statements and identifications of someone other than Petitioner, and their exculpatory testimony of other suspects who were arrested in connection to this crime and the misidentification of Petitioner in a similar crime, in addition to trial counsel's failure to present a complete defense supported by an appropriate instruction.

With this arsenal of evidence proving Petitioner's actual innocence at counsel's disposal, his failure to confront the Commonwealth's overwhelmingly weak case with the very evidence that was supplied to him by the Commonwealth but was never presented to the jury by either he or the Commonwealth was indeed a break down in the adversarial process, where **no** reliable adjudication of innocence or guilt could have taken place.

Here the Commonwealth's case consisted of only one eyewitness and his unreliable identification with no corroborating evidence. It cannot be said that trial counsel's actions individually and cumulatively did not severely prejudice Petitioner and denied him a fair trial.

Based upon the foregoing, Petitioner prays that this Honorable court and the Honorable Judges herein reach the only logical and lawful conclusion, as envisioned by our forefathers in inking the U.S. Constitution, and conclude that Counsel did in fact fall below the standard of reasonableness of the effective representation guaranteed by the U.S. Constitution and the

Constitution of this State, and find that counsel's actions undermined the truth-determining process where no reliable adjudication of innocence or guilt could have taken place.

Taking into consideration the issues mentioned above, Petitioner contends that they warrant relief individually. However, if this Court disagrees, then Petitioner respectfully request relief based upon the cumulative effect of trial counsel's errors which surely denied Petitioner of a fair trial.

CONCLUSION

The petition for a writ of Certiorari should be granted.

Respectfully Submitted,
Daniel Vincent
date: