

No. 00-0000

IN THE SUPREME COURT OF
THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA
Petitioner

v.

RODERICK JOHNSON
Respondent

ON PETITION FOR WRIT OF *CERTIORARI* TO THE
SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF *CERTIORARI*

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the prosecution's nondisclosure of arguably impeaching information relating to a witness who linked the defendant with two murders can be material for purposes of a *Brady* analysis when the trial record establishes via the unrefuted testimony of other witnesses that the defendant twice knowingly and voluntarily confessed to police to being an accomplice to both murders with an intent to kill, which confessions were corroborated by other evidence?
2. Whether it is permissible for a court conducting a *Brady* analysis to find that undisclosed information is material based upon speculation regarding how the information might have been used by the defense at trial when a record was developed on the *Brady* claim on state collateral review that establishes how the reports would have been used at trial and compels the conclusion that no difference in the outcome is reasonably probable?
3. Whether this Court will countenance the transformation of *Brady* and its progeny by convicted criminals from a due process shield into a litigation sword that can be used to invalidate lawful judgments of sentence?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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B. The Pennsylvania Supreme Court's determination that the police reports are material under <i>Brady</i> based on speculation regarding how the defense might have used the reports at trial requires reversal because a record was developed on the <i>Brady</i> claim which establishes how the reports would have been used at trial and compels the conclusion that a different outcome is not reasonably probable	36
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OPINIONS BELOW

The majority opinion of the Supreme Court of Pennsylvania (“the state supreme court”) affirming the state collateral review court’s grant of a new trial is published at *Commonwealth of Pennsylvania v. Roderick Andre Johnson*, 174 A.3d 1050, 1050-1059 (Pa. 2017) and is reprinted at Pet. App. 1a. The minority opinion of the state supreme court dissenting from the majority’s determination is published at *Commonwealth of Pennsylvania v. Roderick Andre Johnson*, 174 A.3d 1050, 1059-1060 (Pa. 2017) and is reprinted at Pet. App. 1b. The opinion and order of the Berks County Court of Common Pleas (“the state collateral review court”) following remand granting a new trial on the grounds that the prosecution violated the defendant’s due process rights pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) is unpublished and reprinted at Pet. App. 1c.

The state supreme court’s order reversing in part the state collateral review court’s dismissal of the Respondent’s third petition for collateral review relief and remand for the conduct of an evidentiary hearing on the merits of Respondent’s *Brady* claim is unpublished and reprinted at Pet. App. 1d. The opinion of the state collateral review court dismissing the Respondent’s third petition for collateral review relief is unpublished and reprinted at Pet. App. 1e. The state collateral review court’s first and second orders and notices of intent to dismiss Respondent’s third petition for collateral review relief are unpublished and reprinted at Pet. App. 1f and Pet. App. 1g, respectively.

The state supreme court's opinion affirming the state collateral review court's dismissal of Respondent's second petition for collateral review relief is published at *Commonwealth of Pennsylvania v. Roderick Andre Johnson*, 863 A.2d 423 (Pa. 2004) and reprinted at Pet. App. 1h. The state collateral review court's notice of intent to dismiss and order dismissing Respondent's second petition for collateral review relief are unpublished and reprinted at Pet. App. 1i and 1j, respectively.

The state supreme court's opinion affirming the state collateral review court's dismissal of Respondent's amended first petition for collateral review relief is published at *Commonwealth of Pennsylvania v. Roderick Andre Johnson*, 815 A.2d 563 (Pa. 2002) and reprinted at Pet. App. 1k. The state collateral review court's first and second orders and notices of intent to dismiss Respondent's amended first petition for collateral review relief are unpublished and reprinted at Pet. App. 1l and 1m, respectively. The state collateral review court's order/opinion denying a stay of execution and addressing Respondent's initial petition for collateral review relief is unpublished and reprinted at Pet. App. 1n.

The state supreme court's opinion affirming the judgment of sentence on direct appeal is published at *Commonwealth of Pennsylvania v. Roderick Andre Johnson*, 727 A.2d 1089 (Pa. 1999) and reprinted at Pet. App. 1o. The state trial court's opinion denying Respondent's post-sentence motions in their entirety is unpublished and reprinted at Pet. App. 1p.

STATEMENT OF JURISDICTION

On December 19, 2017, the Supreme Court of Pennsylvania filed a decision which affirmed the state collateral review court's grant of a new trial based on a finding that the Commonwealth of Pennsylvania had violated Respondent's federal due process rights as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a); *see Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975) (judgment of the highest state court on a federal issue is "final" for purposes of Supreme Court review).

CONSTITUTIONAL PROVISION INVOLVED

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

U.S.C.A. Const. Amend. XIV Sect. 1 (emphasis added).

STATEMENT OF THE CASE

More than 20 years ago, Respondent Roderick Johnson ("Johnson") was convicted by a jury of two counts of first-degree murder. *The jury heard unrebutted evidence that Johnson confessed to police on two separate occasions to being an accomplice to the two murders in question with an intent to kill. Those confessions were corroborated by and supplemented with other evidence.* The jury also heard testimony from Commonwealth witness George Robles ("Robles") that directly tied Johnson to the murders. The state trial judge instructed the jury on the law governing liability for first-degree murder as an accomplice. Today, the parties are before this Court disputing whether, under these circumstances, the nondisclosure of tangential information relating to Robles' own prior interactions with police can be impeaching and material under the *Brady* rule.

In December 1996, cousins Damon Banks and Gregory Banks were shot to death in Berks County, Pennsylvania in retaliation for a robbery they had committed. Three days after the murders, Johnson was interviewed by police officers at a hospital where he was recovering from a gunshot wound, at which time he confessed to the officers that he had been involved in the murders. Specifically, he informed the officers both orally and via a signed written statement following the provision of *Miranda* warnings that he, Shawn Bridges ("Bridges"), and Richard Morales ("Morales") had jointly planned and carried out the execution of the Banks cousins as an act of revenge for the Banks' robbery of Bridge's girlfriend. Johnson denied that he had shot anyone but admitted that he had driven the van that transported the victims to the

murder scene with knowledge that the shootings would take place, that he believed the victims should be shot, and that he served as the getaway driver.

Johnson's lengthy and detailed confession was read to the jury at trial and stated in pertinent part:

Saturday night we were in *George Robles'* house playing cards. I went to sleep because I was drunk. Jason and Tahir...stopped by a club...They...came back to the house.

While they were at the club, they spoke to Shawn Bridges...They [subsequently] told me what happened. They said that Shawn told them that somebody broke into the house with guns and masks on...

...I immediately got dressed and went to the club with them at five o'clock a.m...

...I saw Shawn...

He said that some guys had come to the house and had a girl knock on the door by the name of Betsy. Madelyn asked who it was, and they rushed in. They pushed Madelyn on the floor and put a gun to her head. She asked them what they were there for, and they said that they weren't stupid, they wanted the drugs and the money. She said she had no idea what they were talking about. She said the baby was there and was crying; she asked them

if she could get the baby, and they said, no. They weren't going to be there long.

They took the play station and the camcorder and left. They ransacked the house, bathroom, bedroom everything. I asked Shawn if he had any ideas who did it. At that point, he said, no.

That's when he mentioned to me about the visit earlier that day by Damon and Gregory Banks. I also mentioned the visit I had on Pear Street. When I saw Gregory, he had on a green mask and a green hoodie and a black army flight jacket. When I mentioned that to Shawn, he was, like, there's too much of a coincidence that they would come by the house and Pear Street right after leaving the house. I asked him, what did the guys have on at the house? He said, a mask and a hoodie with no mention of color.

Later on in the day, he came by the house, *George Robles'*, Shawn, and picked me up in an ice-blue Plymouth Voyager...

* * *

We went up the street...We saw Madelyn walking up the block. I pulled the van over. Shawn got out and was talking to Madelyn. He was asking her questions about what happened the previous night, about the robbery. What colors did the guys have on and what were they

wearing. She said that he had on a green mask and a green hoodie.

Once she said that, we automatically knew who it was, who did the robbery...

Me and Shawn, from there, we went to Richie's house, Richard Morales...We went back to Shawn's house...From there, Shawn grabbed a shotgun. Shawn was going to get back at them for doing what they did.

He was asked what he meant about getting back, *he said he was going to shoot them. We said fine. Shawn said that he had a Glock nine millimeter on him, which I saw.* He said that he was going to go talk to Gregory and Damon Banks to see their reaction to what he had to say to them. *[If] [h]is reaction was what he expected, he was going to shoot them.*

He grabbed a shotgun, Shawn, out of the closet. We had no shells, so we went to Kmart on Fifth Street Highway. Bought a box of .410 shotgun shells...

Got back to Shawn's house, *Shawn pulled out the Glock, cocked it and put one in the chamber. He pulled out the shotgun and loaded it and handed it to Rambo [Morales]. Richie wrapped the shotgun up in his jacket and we went to the van. I was driving, Shawn was in the passenger seat, Richie was directly behind me.*

We got to Gregory and Damon's house at 545 South Seventeenth-and-a-half Street. We sat outside and Shawn went and knocked on the door...Gregory and Damon came out of the house...

Gregory, Damon and Shawn walked into the house. About two, five minutes later, Shawn came walking out of the house by himself. He said that they was coming with us. They followed out of the house. They got into the van and Shawn said to drive to Mount Penn.

I was driving, Shawn was in the passenger seat, Rambo was directly behind me. Damon was in the middle and Gregory was on the end by the door. We proceeded out to Mount Penn to pick up the drugs that Shawn "so-called" had out there. Shawn told Gregory and Damon that he was going out of the town for three to five days and he wanted them to watch over his business until he came back. He was going to show them where the drugs was at...

...We stopped in the cemetery...

* * *

Then I made a U-turn and drove out of the cemetery. As I am driving out the cemetery, Shawn tells me to drive to his uncle's car lot, Battle's Salvage. As we were driving up to the car lot...we went onto a little road...that's where we stopped.

We stopped there, Shawn and Rambo got out of the van and walked ahead. Gregory and Damon asked where they was going. They said

to get the drugs. Shawn came back empty-handed. They asked again, where is the drugs? Shawn told them, come with me, I am going to show you where they're at.

That's when the three of us -- me, Gregory and Damon -- got out of the van and started walking. Gregory and Damon started complaining that they wasn't going to go over there. They didn't know why he had his drugs over there and it didn't make sense. It was too cold and they was going to sit in the van. So we got back in the van, me, Gregory and Damon... We was in the van talking, Shawn was asking them why they didn't want to come down there where the drugs were. They was, like, no, it was too cold and it didn't make no sense to have the drugs down there like that. He told them, Gregory and Damon, that it wasn't in the woods, it was in his cousin's house. So, they told him, go get it and bring it so we could leave. He told them, no, just come on, I'm going to -- gonna show you where it's at.

So, they got out of the van again, and was standing by the side door, me, Rambo, Gregory, Damon and Shawn...

* * *

As I am getting back in the van, Shawn says to me, on three I am gonna start shooting. Shawn was walking around the front of the van. I just got back in the van, tells me at the

count of three, I'm going to start shooting, *and I say, okay...*

I'm in the driver's seat, Damon is directly behind me and Gregory beside Damon. *Shawn figured, since he couldn't get them out of the van, he was going to shoot them in the van. That's why he told me to get back in the van and start it up...*

Shawn, from there, said to me, what's on stations two and three? *When he said that, I pushed "three" on the radio, turned to get out of the van* because my door was opened, as I'm turning to get out, Shawn pulled out the gun...

He looks directly at me and shoots. The first bullet hits me on my side. I grabbed my stomach and said, I been shot. Then I ran. As I looked back, he's shooting in the van at Gregory and Damon...

See Pet. App. 7p.

Thereafter, Johnson was released from the hospital and *went to Robles's house*. Around midnight, police officers contacted him via telephone to inform him that friends of the victims were threatening to harm him, at which time Johnson agreed to meet with police officers a second time to elaborate on his prior statement. At the ensuing meeting, Johnson again informed the police that he, Bridges, and Morales had jointly planned and executed the murders of the Banks cousins with the intent to kill.

Johnson provided the following additional details:
(1) upon seeing Bridges after the robbery, Johnson

stated "we should take care of this business right away;" (2) the initial plan was for Bridges to approach the Banks' residence with the Glock pistol and to shoot the victims on the porch with Morales standing behind with the shotgun as "backup;" (3) *Johnson's role was the driver of the getaway van and "he had pulled the van into a position so that...he could drive away quickly;"* (4) while Bridges was talking with the victims on the porch, a neighbor woman approached them carrying groceries and *Johnson thought to himself that he (Johnson) would have shot the Banks cousins on the porch and shot the woman in the head "so there would be no witnesses;"* and (5) when driving to the cemetery, *Johnson thought to himself that the cemetery "would have been a good place to do the shooting..."*

Johnson's two confessions were corroborated by physical evidence found by detectives during their investigation. Robles told the police that:

...he went to visit the Defendant in the hospital after the surgery. While there, the Defendant recounted the story of the murders of Greg and Damon Banks, saying that he, along with Shawn Bridges and Richard Morales, took the Banks cousins and murdered them and left them on West Neversink Road. The Defendant further told Mr. Robles that he had a .38 caliber gun with him the night of the shooting. The Defendant said that he took the gun; wiped it off with his shirt and threw it on the side of the road, within a quarter mile of the murder scene.

See Pet. App. 11p (citations to record omitted).

On direct appeal, the state supreme court summarized the relevant facts of record. The opinion tracked Johnson's confessions admitted into evidence.¹ It further stated that:

...At trial, the Commonwealth presented a crucial piece of evidence that contradicted Appellant's claims that he was not involved as a shooter. The Commonwealth presented testimony from a forensic pathologist that one of the bullets recovered from the body of Damon Banks was a .38 caliber bullet. A .38 caliber handgun was recovered close to the murder scene and, according to the testimony of the Commonwealth's ballistics expert, was the weapon used to fire that bullet. George Robles testified at trial that Appellant possessed a .38 caliber handgun like the one found at the murder scene. Robles testified that Appellant told him, while he was visiting Appellant at the hospital, that he had taken the .38 caliber handgun with him, had wiped it off with his shirt and threw it on the side of the road within a quarter mile of the murder scene.

See Pet. App. At 20-40.

The following additional evidence of guilt was presented to the jury:

¹ To read the entirety of the summary, *see Pet. App. 10.*

1. Johnson appeared at the restaurant on the night of the murders with a bullet in his stomach and told a false story that reflected consciousness of guilt;
2. Johnson was shot with a .32 caliber handgun. According to Courtney Johnson, *Damon Banks had a .32 caliber gun in his possession on the day of the murder, a fact contradicting Johnson's story that he had been shot by Bridges, who was carrying a 9-mm Glock pistol;* and
3. Police officers found a .38 caliber handgun a quarter-mile from where the victims' bodies were found, consistent with Johnson's statement to Robles.

On November 25, 1997, following the presentation of evidence in Johnson's guilt phase jury trial, the state trial court accurately instructed the jury as to the governing law. Specifically, the court explained: (1) that Johnson had been charged with first-degree murder as an accomplice; (2) what the elements of first-degree murder were; and (3) what the law governing accomplice liability for first-degree murder was. The jury found Johnson guilty of two counts of first-degree murder. The following day, after a penalty stage jury trial, the state trial court imposed two sentences of death upon Johnson.

Johnson's convictions were affirmed by the state supreme court on direct appeal on March 26, 1999. *See* Pet. App. 1o. One of Johnson's unsuccessful claims on direct appeal was that the Commonwealth had violated

his due process rights per *Brady* by failing to disclose prior to trial *evidence of a corrupt relationship* between Commonwealth witness Robles and local police which could have been used to impeach Robles at trial. The claim was based on the fact that after Robles was arrested on a material witness warrant shortly before trial in order to ensure that he would appear and testify for the Commonwealth at the trial, Robles wrote a letter to the police from his prison cell indicating that he would do anything to obtain his release. The state courts determined that *Brady* was not violated because the defense had been notified prior to trial about the existence of this letter. This Court declined Johnson's request to issue a writ of certiorari. *See Johnson v. Pennsylvania*, 528 U.S. 1163 (2000).

On April 11, 2000, Johnson filed in the trial court a motion for stay of execution as well as a petition for collateral review relief pursuant to Pennsylvania's post-conviction relief statute. The state trial court refused to stay the execution. *See Pet. App. 1n.* Thereafter, the state supreme court granted an emergency stay of execution.

On April 26, 2000, Johnson filed a counseled amended collateral review petition. That petition again alleged that the Commonwealth had violated the *Brady* rule by failing to disclose in pretrial discovery *evidence of a corrupt relationship* between Robles and local police officers which could have been used to impeach Robles ("the Robles/*Brady* claim"). The state collateral review court on February 23, 2001 entered an order denying Johnson's first collateral review petition. *See Pet. App. 1l.* It found that the *Robles/Brady* claim had been previously litigated on

direct appeal. The state supreme court affirmed. *See* Pet. App. 1k.

On September 11, 2003, Johnson filed a second collateral review petition. That petition continued to advance the Robles/*Brady* claim. On October 23, 2003, while the second collateral review petition was pending, Johnson filed a counseled petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania (“the District Court”) seeking relief from his judgment of sentence in this capital case. *See Johnson v. Beard*, No. 03-CV-2156 (U.S. District Court, E.D. Pa.). In that petition, Johnson raised the same Robles/*Brady* claim.

Shortly thereafter, on November 26, 2003, the state collateral review court dismissed the second collateral review petition as being untimely and thereby depriving the court of jurisdiction to conduct a merits review. *See* Pet. App. 1j. The state supreme court affirmed. *See* Pet. App. 1h.

On March 15, 2004, the District Court in the capital murder habeas corpus proceedings entered an order suspending Johnson’s federal habeas proceedings until his state court claims had been exhausted. In April of 2005, Johnson filed a third state court collateral review petition. That petition again advanced the Robles/*Brady* claim.

Meanwhile, in other federal court proceedings, Johnson was engaged in a challenge via habeas corpus petition of a life imprisonment judgment of sentence that had been imposed upon him in 1998 by the Court of Common Pleas of Berks County. This was for his

separate conviction by a jury on July 14, 1998 of first-degree murder for the 1996 fatal shooting of a man named Jose Martinez. *See Johnson v. Folino*, No. 04-CV-2835 (U.S. District Court, E.D. Pa.). Among the claims advanced by Johnson in his non-capital habeas corpus petition – which has not yet been disposed of – is the Robles/*Brady* claim. This is because Robles was called as a witness by the Commonwealth in both the capital and non-capital murder trials.

During the years 2008 and 2009, in the non-capital habeas corpus proceedings, Johnson sought and obtained discovery from the Commonwealth. Specifically, the Commonwealth produced five police reports unrelated to Johnson's cases that referenced George Robles in one form or another. The reports were prepared by the Reading Police Department and documented five separate investigations in the two-year period prior to Johnson's capital murder trial where Robles' name came up but insufficient evidence was found to justify the filing of criminal charges against anyone.

A report dated February 27, 1996 documents that approximately 21 months prior to Johnson's capital murder trial, two people accused Robles of threatening them with a gun in an episode unrelated to Johnson's criminal charges, an accusation that Robles denied and *his accusers refused to cooperate with police on*. Hence, no criminal charges were filed against Robles, no criminal conviction ensued, and no

charges were pending at the time Robles testified in Johnson's trial.²

A report dated April 25, 1996 documents that approximately 19 months prior to Johnson's capital murder trial, police conducted an investigation of a reported shooting unrelated to Johnson's criminal charges and discovered a bag containing a cigar box that contained drugs and also had Robles' fingerprint on its exterior surface. *The cigar box had been in the physical possession of multiple people other than and after Robles before its discovery by police that day.*³ The report also indicates that a third party reported that Robles maintained drugs and a gun in a safe that he kept at a location other than his residence, but *when police subsequently located the safe it was empty*. No criminal charges were filed against Robles, no criminal conviction ensued, and no charges were pending at the time Robles testified in Johnson's trial.

A report dated August 1, 1997 documents that approximately three months prior to Johnson's capital murder trial, police responded to a report of shots fired

² The state supreme court majority opinion omits any mention of the record fact that the accusers of Robles refused to cooperate in a criminal prosecution for the incident. Moreover, at the state court collateral review evidentiary hearing, Robles gave *unrebutted* testimony that he did not utilize a firearm during his interaction with his accusers, a fact ignored by the state supreme court.

³ The state supreme court majority opinion omits reference to this record fact and instead adopts Johnson's characterization of the cigar box's significance.

unrelated to Johnson's criminal charges, at which time a person refusing to identify himself alleged that *a person other than Robles had fired a firearm*. The other person denied the claim and the approximately 20 people in the vicinity at the time of the alleged shooting said they knew nothing. Hence, no criminal charges were filed against Robles, no criminal conviction ensued, and no charges were pending at the time Robles testified in Johnson's trial.⁴

A report dated September 18, 1997 documents that approximately two months prior to Johnson's capital murder trial, police responded to a report of shots fired unrelated to Johnson's criminal charges, at which time the witness stated that she heard gunshots *but did not see anyone at the time of the shooting*. Robles was questioned about the event and denied having any knowledge about it. Hence, no criminal charges were filed against Robles, no criminal conviction ensued, and no charges were pending at the time Robles testified in Johnson's trial.⁵

⁴ Strangely, although someone other than Robles was accused, the state supreme court majority opinion mystifyingly characterizes this as a criminal investigation of Robles.

⁵ Disturbingly, the state supreme court majority opinion notes that the author of the police report "suspected Robles was involved in drug dealing" but fails to acknowledge that *the same police officer unambiguously testified at the state court collateral review hearing that he had no proof to substantiate his suspicions and he wanted to charge Robles but lacked sufficient evidence to file drug-related charges against the man*.

A report dated November 7, 1997 documents that six days prior to the commencement of Johnson's trial, police responded to a report of shots fired unrelated to Johnson's criminal charges, at which time *no witness identified who the shooter was*. Although officers subsequently went to Robles' residence and found a freshly-fired firearm with shells that matched the casings found at the shooting scene, *Robles was located at a bar at the time of the shooting and denied any knowledge of who had fired the weapon*. Because there was insufficient evidence to prove that Robles had fired the gun, no criminal charges were filed against Robles, no criminal conviction ensued, and no charges were pending at the time Robles testified in Johnson's trial.⁶

Following the production of these reports, the parties in the non-capital habeas corpus proceedings filed briefs in the District Court addressing the significance of the five police reports to Johnson's *Brady* claim in that case. Meanwhile, Johnson amended his state court collateral review petition in the capital case four more times and cited the police reports in support of his Robles/*Brady* claim.

On November 23, 2009, the District Court filed an opinion denying relief on Johnson's Robles/*Brady* claim. *See Johnson v. Folino et al.*, 671 F.Supp.2d 658 (E.D. Pa. 2009), *reversed*, 705 F.3d 117 (3rd Cir. 2013). In its opinion, the District Court determined that

⁶ The state supreme court majority opinion omits mention of the record fact that many individuals had access to Roble's residence on the day in question.

Johnson's Robles/*Brady* claim was procedurally defaulted and ineligible for merits review. In reaching its procedural default determination, the Court analyzed the potential prejudice caused by Johnson's failure to raise his *Brady* claim in a timely manner in the state courts and *found that Johnson suffered no prejudice because the information contained in the police reports was not "material" under Brady*. In the words of that Court:

Petitioner cannot establish prejudice with respect to any of the allegedly withheld evidence regarding Robles because it does not satisfy the materiality standard under *Brady*. Petitioner relies upon a litany of evidence demonstrating Robles was at least tangentially involved in criminal investigations in order to assert that a corrupt relationship existed between Robles and the Reading Police Department. It is true that information regarding a witness' arrangement with the prosecution regarding criminal charges can affect the credibility of the witness and may satisfy *Brady*. Petitioner, however, cannot point to any express or implied agreement between Robles and Commonwealth prosecutors which resulted in the dismissal of any charges against Robles. Instead, Petitioner emphasizes that Robles' "uncharged criminal conduct" demonstrates the existence of a corrupt relationship and constitutes material impeachment evidence under *Brady*.

Petitioner fails to recognize, however, that because this evidence pertaining to "uncharged

criminal conduct" is inadmissible under Pennsylvania law to impeach a witness, it cannot be considered material for purposes of *Brady*...It is clear that under Pennsylvania law, uncharged criminal conduct may not be used to test the veracity of a witness, where such prior conduct has not led to convictions. Here, none of the evidence presented by Petitioner with respect to Robles' run-ins with law enforcement resulted in any convictions, let alone any formal charges being filed. Therefore, the uncharged criminal conduct asserted by Petitioner cannot be considered material under *Brady* and its progeny.

Furthermore, assuming *arguendo* that the evidence alleged by Petitioner with respect to Robles' interaction with Reading police would have been available to impeach Robles, it does not rise to the level of materiality required under *Brady*...

* * *

...Petitioner argues that a trier of fact could have drawn the inference that the Reading Police documented these alleged criminal activities in the police incident reports in order to hold them over Robles' head in the event he refused to cooperate in the future. *An equally plausible inference that could be drawn is that Robles was investigated with respect to several criminal matters, but that insufficient evidence existed to initiate any formal charges against him. Thus, since this evidence is subject to*

equally plausible inferences, it would not “put the whole case in such a different light as to undermine confidence in the verdict,” and the required showing of materiality is absent.

Johnson, 671 F.Supp.2d at 669-670 (emphasis added) (citations omitted).

Johnson obtained review of that determination by the United States Court of Appeals for the Third Circuit (“the Third Circuit”). Meanwhile, on February 29, 2012, the state collateral review court in the capital case dismissed the third collateral review petition as untimely. *See* Pet. App. 1e. Johnson appealed that decision to the state supreme court.

On January 16, 2013, following briefing and argument, a panel of the Third Circuit filed an opinion in the non-capital murder habeas corpus case reversing the District Court’s decision and remanding to that Court with instructions to reassess Johnson’s Robles/*Brady* claim based on information referencing George Robles that was *not of record, prepared by Johnson’s counsel, and simply attached to Johnson’s pleadings in the District Court. See Johnson v. Folino et al.*, 705 F.3d 117 (3rd Cir. 2013).⁷ The Third Circuit panel directed the District Court to re-determine whether the police reports would be admissible under

⁷ The District Court did not conduct an evidentiary hearing in connection with Johnson’s Robles/*Brady* claim. The only court to have developed a record on the Robles/*Brady* issue is the state collateral review court in the instant capital case, subsequent to the Third Circuit panel’s ruling.

state law or would have led to the discovery of admissible, favorable, material evidence.

On March 25, 2013, the state supreme court filed a *per curiam* order affirming in part and reversing in part the state collateral review court's denial of the supplemented third collateral review petition in the capital case. *See Pet. App. 1d.* Specifically, that court reversed the determination that Johnson's Robles/*Brady* claim was untimely, stating that: (1) the police reports produced in federal court constituted "newly discovered facts;" (2) the trial court's alternative holding on the merits of the Robles/*Brady* claim was inadequate; and (3) the trial court must conduct an appropriate merits review of the Robles/*Brady* claim.

The state collateral review court conducted an evidentiary hearing to develop the record on the issue. At the hearing, *Johnson failed to call any witnesses to flesh out the significance of the police reports. Johnson did not place his trial attorneys on the witness stand to testify about what they would have done differently if they had received the police reports in pretrial discovery. Johnson did not place a defense investigator on the stand to testify about what he/she would have done with the information. Johnson did not put a single person listed as a witness in any of the five police reports at issue onto the witness stand to answer questions about his/her personal knowledge regarding the events referenced in the police reports and to confirm the veracity of the statements referenced therein.*

Instead, Johnson (and ultimately the state courts) simply assumed the truth of the allegations recorded in

the police reports themselves. This blatantly ignored the fact that the truth of the contents of the police reports *was never admitted into the record or proven by Johnson*. The collateral review court repeatedly stated during the evidentiary hearing that the police reports were admitted solely to show what policemen had documented and were not admitted for the truth of the matters asserted therein.

Nonetheless, Johnson took the information documented in the police reports, presented it to the trial court as magically transmogrified facts of record, and argued a violation of *Brady*. He failed to establish the truth and significance of the representations documented in the police reports via live witness testimony and other evidence. He disregarded the fact that each of the police officers who authored one or more of the five reports at issue testified at the hearing that to the extent a report conveyed what someone else told him, he could not say whether the statements made to him by the witnesses were actually true.⁸

At the hearing, Johnson fully examined Robles about the five police reports. That examination yielded *no meaningful evidence of impeaching value*. Specifically, Robles gave unrebutted testimony that:

- (1) the February 1996 incident involved a verbal altercation with Angel Alvarez in which Robles possessed a miniature baseball bat that

⁸ The state supreme court ignored these facts.

the complainants mistakenly thought was a gun;

(2) Detective Cabrera would come to him from time to time seeking information about what was going on in the streets, and on one occasion he told the detective about a rumor he had heard about the murder of Ricky Cintron in New York City;

(3) he had some recollection of the April 26, 1996 incident involving Edwin Ruiz, that he accompanied Ruiz to City Hall after the shooting because he was trying to assist Ruiz, that he did not recall most of the things Johnson's counsel inquired about, and that Detective Cabrera played "the game" of trying to trick him into believing he could be charged for the drugs but he did not fall for it;

(4) he used drugs, did not sell drugs, but sometimes would connect a person on the street looking for "weed" with a person on the street selling "weed" and thereby make a little profit;⁹

(5) he was questioned by the police about the August 1, 1997 incident and told them that he did not fire the shots;

(6) he did not remember an incident involving shots fired on September 18, 1997;

⁹ The state supreme court majority apparently relied on this meager testimony to find that Robles was a drug dealer.

(7) he did not remember much about an incident involving shots fired on November 7, 1997, other than that he was not at home when the incident occurred but was at work as a bartender at the A Town Café; and

(8) he wrote the letter to Detective Cabrera asking for help while he was incarcerated on the material witness warrant because he ignorantly believed at the time that the detective might help him out in light of how cooperative Robles had always been with the police, *but he learned before testifying at Johnson's trial that the belief was incorrect.*

According to Robles, Detective Cabrera tried to implicate him in criminal conduct but was unsuccessful. Robles believed Cabrera wanted to put him in jail, but Cabrera was never able to do so. Robles characterized it as like a chess game:

...[W]hen there's a crime committed, it's a chess match. *It's a game because it's not what you know more so but what you can prove. So even though, you know, ten people could tell you I'm a drug dealer, you can't just lock me up.* You got to prove it. So he would have his tactics. And he would then either know, okay, this isn't true or I can't prove that; or this is true, ha ha I got you. And, you know what I mean, that's basically what the game is in the street when it comes to police and people committing mischief I guess you would say.

On July 6, 2015, the collateral review court filed an order and opinion finding that: (1) **there was no corrupt relationship between Johnson and the local police**; (2) Johnson's Robles/*Brady* claim is meritorious because Robles had *multiple interactions with police* in the years prior to Johnson's trial which was evidence of *potential bias*; and (3) a new trial is required. *See* Pet. App. 1c.

On August 4, 2015, the Commonwealth appealed that determination to the state supreme court. On December 17, 2017, the state supreme court filed majority and dissenting opinions. *See* Pet. App. 1a, 2a. The majority opinion held that:

- (1) "Robles was the linchpin to the Commonwealth's case against Johnson" because his testimony tied Johnson to a gun used in the shooting, thereby rebutting the defense that Johnson was merely present when the murders occurred;¹⁰
- (2) "Without Robles' testimony, the Commonwealth was left with Johnson's account of the shootings, which fell short of

¹⁰ This conclusion by the majority ignores the fact that Johnson's two confessions to the police rebutted "the defense that Johnson was merely present when the murders occurred." In addition, the majority opinion is strangely silent on the law governing accomplice liability in Pennsylvania, which – given the content of the confessions – rendered Johnson liable for two counts of first-degree murder.

proving the intent required for a first-degree murder conviction;"¹¹

(3) the five police reports "detailed distinct investigations into Robles' criminal conduct;"¹²

(4) the police reports would not be admissible as substantive evidence at a trial of Johnson but the substance of the police reports could be used to impeach Robles' credibility at the trial;¹³

¹¹ This conclusion by the majority conflicts with the content of Johnson's statements to police admitted into evidence, including his admissions that: (a) he joined Bridges' and Morales' scheme after Bridges indicated that he was going to shoot the Banks cousins; (b) he would have shot the Banks boys on the front porch as well as shoot the neighbor woman in the head to ensure there were no witnesses to the murders; and (c) he thought the cemetery would have been an appropriate place for the murders to have occurred.

¹² This conclusion conflicts with the contents of the reports, which document that Robles was only alleged to have been a criminal perpetrator in two of the five incidents.

¹³ The majority did not elaborate upon why the truth of the matters asserted in the reports would be inadmissible but the truth of the matters asserted could nonetheless be relied upon as evidence to impeach Robles on cross-examination. It also failed to address its contrary precedent holding that uncharged criminal conduct is not admissible to impeach a witness. See, e.g., *Commonwealth v. Hanible*, 30 A.3d 426, 456-458 (Pa. 2011) (citing Pa.R.E. 608(b) and 609(a)); *Commonwealth v. Chmiel*, 889 A.2d 501, 534 (Pa. 2005).

(5) the police reports "suggest that Robles sought to curry favor with the police in the face of ongoing criminal investigations and mounting evidence of his own criminal conduct" and suggest that Robles "benefited from his relationship with the police by being able to engage in drug sales without fear of repercussions,"¹⁴

(6) a thorough cross-examination would have revealed that "Robles hoped to receive favorable treatment from the authorities in exchange for providing information" and had an "ongoing collaboration with the Reading Police Department,"¹⁵ and

¹⁴ These conclusions have no basis in the record developed on collateral review and instead mirror the allegations contained in Johnson's state supreme court brief.

¹⁵ **This finding is directly contradicted by an explicit finding of the state collateral review judge.** See Pet. App. 12c-13c:

...the Court wishes to make a specific factual finding that neither Detective Angel Cabrera nor Detective Bruce Dietrich were engaged in corrupt or improper dealings with George Robles during their time with the Reading Police Department...

See Pet. App. 12c-13c. **With this finding, the heart of Johnson's *Brady* claim for the past 21 years was judicially extinguished. Without explanation, the state supreme court revived it.**

(7) “Contrary to the Commonwealth’s suggestion, *Wood [v. Bartholomew]* does not stand for the proposition that undisclosed impeachment evidence must be admissible or lead to the discovery of admissible evidence before it can be considered material.”¹⁶

See Pet. App. 1a.

The dissenting opinion held that the undisclosed police reports, when considered in the context of all the evidence presented at trial, do not undermine confidence in the outcome of Johnson’s trial and therefore are not material under *Brady*. In support of this conclusion, the dissent noted that: (1) the evidence in the case corroborating Robles’ testimony tends to confirm the truthfulness of that testimony; (2) even discounting Robles’ testimony, the evidence of Johnson’s guilt overwhelmingly supports the jury’s verdict, most significantly Johnson’s two confessions admitting accomplice liability to first-degree murder; and (3) significant evidence of record contradicts Johnson’s trial defense. *See Pet. App. 1b.*

¹⁶ The majority mischaracterized the Commonwealth’s appellate argument, simplifying it to be “materiality hinges upon admissibility.” The Commonwealth’s argument was that inadmissible information cannot be *Brady* material unless it leads to the discovery of admissible, favorable, material evidence.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for writ of *certiorari* for the following reasons.

A. The Pennsylvania Supreme Court's determination that the undisclosed police reports are material under *Brady* notwithstanding the unrebutted evidence that Johnson twice confessed to first-degree murder as an accomplice directly conflicts with this Court's holdings that: (1) the materiality determination must be made in the context of the entire record rather than in a vacuum; (2) a defendant's confession is a significant factor in determining whether undisclosed evidence is material under *Brady*; and (3) the purpose of the *Brady* rule is to prevent a miscarriage of justice.

The record irrefutably shows that Johnson confessed to police on two separate occasions to being a willing and enthusiastic accomplice to the murder of the Banks cousins with a specific intent to kill. The incredibly thorough and detailed nature of the confessions as well as their consistency with one another lent them credibility. The confessions' version of what happened was strongly corroborated by other evidence.

Moreover, the jury was presented with additional evidence of Johnson's guilt, including the fact that he lied to first responders about the cause of his injuries and the fact that Johnson was shot at the scene with a .32 caliber handgun and it was the murder victim Damon Banks – not codefendant Shawntafe Bridges – who possessed a .32 caliber handgun on the day of the murders. The latter fact obliterated Johnson's

contention at trial that he had been unexpectedly shot by Bridges, whom the record reflects was carrying a 9-mm Glock pistol.

Against this backdrop, the state supreme court majority's determinations that Robles was an essential witness for the state, that his credibility was crucial to a successful prosecution, and that the police reports could have tipped the scales are *incoherent*. Even without Robles' testimony, the evidence of Johnson's guilt of first-degree murder under Pennsylvania's accomplice theory of liability is overwhelming,¹⁷ rendering the police reports non-material under *Brady*.

This Court has made clear that the materiality determination must be made "in the context of the entire record," and that "evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict." *See, e.g., Turner, et al. v. United States*, 137 S.Ct. 1885, 1893 (2017); *Smith v. Cain*, 565 U.S. 73, 76 (2012); *United States v. Agurs*, 427 U.S. 97, 112–113 and n. 21 (1976). "If there is no reasonable doubt about guilt whether or not the additional evidence is

¹⁷ In Pennsylvania, a person is an accomplice of another in the commission of an offense if, acting with the intent to promote or facilitate the commission of the offense, he solicits the other person to commit it or aids, agrees, or attempts to aid the other person in planning or committing it. *Commonwealth v. Knox*, 105 A.3d 1194, 1196 (Pa. 2014). In order for a person to be found guilty of first-degree murder as an accomplice, the record must support a finding that the person had a specific intent to kill. *Commonwealth v. Bennett*, 57 A.3d 1185, 1200 (Pa. 2012).

considered, there is no justification for a new trial.” *Agurs*, 427 U.S. at 112–113. This is because the *Brady* rule’s purpose is not to achieve perfection in criminal trials, but to ensure that a defendant’s verdict is worthy of confidence and not a miscarriage of justice. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *United States v. Bagley*, 473 U.S. 667, 675–676 (1985).

On a related note, this Court has repeatedly indicated that a defendant’s confession to a crime is highly significant and can constitute overwhelming evidence of guilt. *See, e.g., Turner, et al.*, 137 S.Ct. 1885 (finding confessions significant part of evidence supporting verdict and rendering suppressed information non-material under *Brady*); *Arizona v. Fulminante*, 111 S.Ct. 1246, 1255, 1266 (1991) (five Justices in agreement that a defendant’s confession is highly damaging to the defense and has an “indelible impact” on a trier of fact); *Cruz v. New York*, 107 S.Ct. 1714, 1720 (1987) (White, J., dissenting); *Milton v. Wainwright*, 92 S.Ct. 2174, 2175 (1972); *Schneble v. Florida*, 92 S.Ct. 1056, 1059 (1972).

In the words of Justice White:

[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it relates. Even the testimony of an eyewitness may be less reliable than the defendant's own confession. An observer may not correctly perceive, understand, or remember the acts of another,

but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Confessions of defendants have profound impact on juries...

Cruz, 107 S.Ct. at 1720 (White, J., dissenting) (emphasis added) (quotations and citation omitted).

Last year in *Turner*, this Court affirmed the denial of *Brady* claims, finding that the strong evidence of guilt, including the confessions of two codefendants, precluded a finding that the undisclosed information had a reasonable probability of impacting the outcome of trial. The Court noted that:

the issue before us here is legally simple but factually complex. We must examine the trial record, “evaluat[e]” the withheld evidence “in the context of the entire record,” and determine in light of that examination whether “there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” Having done so, we agree with the lower courts that there was no such reasonable probability.

Id. at 1893 (citations omitted). In reaching its determination, the Court noted that *the codefendants’ confessions were compelling evidence of the defendant’s guilt and that the jury was unlikely to believe that the confessions were false.*

The state supreme court’s conclusion about the importance of the police reports inexplicably dismisses the significance of Johnson’s confessions and ignores

the other evidence of Johnson's guilt in derogation of the foregoing precedent.¹⁸ Missing the forest for the trees, the court impermissibly conducted its materiality "analysis" in a vacuum, failing to explain why Johnson's jury would not credit his confessions, why Johnson's statements did not reflect an intent to kill, and what significance the jury would find in the proof of Johnson's consciousness of guilt and the evidence contradicting Johnson's claim that he was not shot by a victim.

The reliability of a prosecution witness who ties the defendant to the murders cannot be determinative of guilt or innocence when the jury is presented with *independent and unchallenged evidence that the defendant twice confessed to the crimes, including a desire to see the victims killed, which confessions were corroborated by and supplemented with other evidence.* Under these circumstances, the police reports cannot be material for purposes of *Brady* because they cannot "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *See Kyles*, 514 U.S. at 435.

¹⁸ The state supreme court's omission of any reference to the damning evidence that Johnson was shot by one of the victims rather than by his codefendant as Johnson claimed, and its determination that Johnson's confessions failed to reflect an intent to kill are outrageous in light of the record.

B. The Pennsylvania Supreme Court's determination that the police reports are material under *Brady* based on speculation regarding how the defense might have used the reports at trial requires reversal because a record was developed on the *Brady* claim which establishes how the reports would have been used at trial and compels the conclusion that a different outcome is not reasonably probable.

The state collateral review court permitted Johnson to fully develop the state court record on "where" the pretrial disclosure of the police reports would have led the defense in its efforts to undermine Robles' credibility. That 358-page record included 19 exhibits, the testimony of 13 witnesses, including George Robles, the two police officers whom Johnson repeatedly accused of unethical behavior, eight police officers, and the former District Attorney who prosecuted him.

However, the state supreme court majority opinion fails to acknowledge and incorporate into its analysis major portions of this collateral review record. Specifically, the court ignored: (1) Johnson's inability to show via the police reports that Robles had committed any crime, had a corrupt relationship with the police, was an informant for the police department, sought to curry favor with the police, or received or expected a *quid pro quo* for his testimony; (2) Johnson's failure to meaningfully impeach Robles' credibility when given an opportunity to cross-examine Robles with the police reports; (3) Johnson's failure to establish the truth of virtually any of the contents of the five police reports, which were not admitted into evidence for the truth of the matters asserted therein;

and (4) the state trial court's express finding that Robles did not have a corrupt relationship with the police.

Instead, the majority relied upon conjecture divorced from the record regarding how the defense *might have used* the reports at trial. Without explanation, that court opted for theoretical musings about the conceivable significance of the reports even though an evidentiary record palpably demonstrating how the defense would have used the reports at trial was available to it. This violated the mandate of *Brady* and its progeny that the entirety of the record be factored into the equation. *See Turner*, 137 S.Ct. at 1894 and *Agurs*, 96 S.Ct. at 2402.

C. Persons convicted of crimes should not be permitted to transform *Brady* and its progeny from a due process shield into a litigation sword to invalidate lawful judgments of sentence.

This Court has emphasized that a trial is not a sporting event, but rather a search for the truth, and that the underlying concern of the *Brady* rule is to ensure that a miscarriage of justice does not occur. *See, e.g., Bagley*, 105 S.Ct. 3375. Notwithstanding this, the court below has allowed Johnson to turn this meaningful due process protection into a cynical litigation weapon, seizing upon the discovery of five documents unrelated and irrelevant to Johnson's judgment of sentence in order to tie up the courts and obstruct justice for decades. The state supreme court's accedence to Johnson's argument that the police reports are "impeaching" constitutes an irrational application of *Brady*.

Specifically, the record establishes that: (1) Robles' interactions with police were pursuant to investigations unrelated to Johnson's case; (2) insufficient evidence was found to justify the filing of criminal charges against Robles; (3) at the time of trial, Robles had no prior convictions, no pending criminal charges, and no open matters with law enforcement; (4) Robles was not a paid informant; (5) Robles did not have a corrupt relationship with law enforcement officials; (6) no evidence exists that a *quid pro quo*, cooperation agreement, or other inducement was utilized by the government to obtain Robles' testimony; (7) Robles was forced to testify at trial against his will; and (8) Robles believed at the time of his testimony that law enforcement officials could not assist him in any way. **There is no evidence that the police had any leverage whatsoever over Robles at the time of his testimony.**

In light of this, the conclusion that the reports were *Brady* material constitutes a perversion of *Brady* that turns the law on its head and produces a profound miscarriage of justice that cries out for this Court's intervention. The citizens of Pennsylvania need -- and are entitled to -- a fair and just resolution of Johnson's criminal case.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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