Case No. 18-35

In The
Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA
Petitioner,

v.

RODERICK ANDRE JOHNSON,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Pennsylvania

BRIEF FOR RODERICK ANDRE JOHNSON IN OPPOSITION

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QUESTIONS PRESENTED

The Commonwealth seeks review of a decision of the Supreme Court of Pennsylvania granting relief pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The questions presented are:

1) Should this Court deny the petition for a writ of certiorari: (a) because the Commonwealth of Pennsylvania simply disagrees with the state court's fact-findings and application of correctly stated, and well-settled, law; (b) because the Commonwealth did not present to the Supreme Court of Pennsylvania the principal argument that it is presenting to this Court; (c) because the Commonwealth's arguments to this Court raise no important federal question, but rather are based on interpretations of state law; and (d) because the Commonwealth has unclean hands in this case where the trial prosecutor knowingly made false repesentations to the state court about the existence of suppressed police reports and exploited these misrepresentions in earlier related state court briefing?

2) Did the Supreme Court of Pennsylvania correctly find a violation of *Brady v. Maryland* where the Commonwealth suppressed multiple police reports that a crucial witness, a prolific informant, was the subject of numerous criminal investigations, information which would have exposed the witness's bias and interest in cooperating with the police and which would have discredited the Commonwealth's investigation?

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INTRODUCTION

Both the state court trial judge and the state supreme court held that the Commonwealth of Pennsylvania suppressed multiple police reports that Respondent could have used to impeach the key Commonwealth witness, George Robles, in Respondent's capital murder trial. The withheld police reports, from the Reading, Pennsylvania police department, describe investigations of Robles for various crimes including assault, firearms violations and drug dealing. They include a report of Robles's actitivity as a confidential informant for a drug-related homicide in New York that had its genesis in Reading. Robles, who was aware of the investigations into his wrongdoing, admitted giving the police information approximately fifty times while the investigations were pending. The state courts determined that the Commonwealth violated *Brady v. Maryland*, 373 U.S. 83 (1963).

Now, the Commonwealth asks this Court to "correct" what it claims is error in the application of correctly stated and well-settled law. It does not identify any precedent from this Court that the state courts did not follow. Instead, in this highly fact-bound case, the Commonwealth simply disagrees with the resolution. The case is not appropriate for this Court's review.

Moreover, the Commonwealth urges this Court to grant review based on a state law argument that it never made to the state courts. A grant of certiorari is inappropriate because this Court disfavors petitions based on arguments not raised in the lower state courts and defers to state courts on issues of state law.

Review should also be denied because of the Commonwealth's unclean hands. The trial prosecutor, the former District Attorney of Berks County, denied on the record the existence of the exculpatory evidence that provided the basis for relief in this case. Shortly after the capital

trial, the District Attorney falsely represented in Mr. Johnson's non-capital case that he (the prosecutor) did not know of any "criminal activities charged and uncharged, past and present of George Robles." But the District Attorney had already been personally informed of at least one of the investigations into Robles. The prosecutor's deception went uncorrected for almost a decade.

The withheld evidence was material. On direct appeal, years before the disclosure of the *Brady* material, the Pennsylvania Supreme Court described Robles as a "crucial witness" because his was the only testimony linking Mr. Johnson to a .38 caliber weapon that the Commonwealth asserted was used in the murders. The suppressed evidence demonstrates, however, that Robles had considerable motivation to curry favor with the police. Using the factual record Mr. Johnson developed at an evidentiary hearing, the Supreme Court of Pennsylvania scrupulously respected, and reached a result compelled by, this Court's precedent.

Certiorari should be denied.

STATEMENT OF FACTS

1. Evidence presented at trial

The decedents, Gregory and Damon Banks, were suspected of robbing co-defendant Shawnfatee Bridges's girlfriend. The Banks joined Bridges, Mr. Johnson, and Richard Morales in a van that Bridges drove to Exeter Township, where the Banks were shot to death on a dirt road. In his statement, Mr. Johnson admitted driving the van and being at the scene of the shooting, but denied being a shooter. Rather, Mr. Johnson maintained it was Bridges who shot and killed the Banks brothers and, after Bridges had shot Johnson in the torso, Bridges abandoned him at the scene. Pet. App. 3a-4a.[1]

The Commonwealth presented testimony that numerous 9 millimeter bullets were found at the location and attributed these to the weapon fired by Bridges. R. 479a; 504a. But the body of Damon Banks contained a .38 caliber bullet as well. Relying on informant George Robles, the Commonwealth sought to prove Mr. Johnson was responsible for that wound. The Supreme Court of Pennsylvania summarized the evidence linking Mr. Johnson to the .38 caliber bullet, emphasizing the significance of Robles's testimony to the Commonwealth's case:

> To refute Johnson's version of events, the Commonwealth called George Robles as a trial witness. Robles testified that Johnson owned a .38 caliber handgun like the one found near the crime scene. He also testified that he visited Johnson in the hospital just after the murder, and that Johnson confessed to taking the .38 caliber murder weapon from the murder scene, wiping it off with his shirt, and then throwing it on the side of the road about a quarter mile from the construction site. At trial, Robles provided the crucial link between Johnson and the murder weapon, and supplied the testimony that countered Johnson's defense.

Pet. App 4a-5a.

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[1] Citations to the appendices submitted below are denoted "Pet. App" followed by the applicable page number. Citations to the trial record, included in the reproduced record submitted to the Supreme Court of Pennsylvania, are denoted as "R" followed by the applicable page number.

As the Pennsylvania Supreme Court noted, defense counsel, John T. Adams, attempted at trial to impeach Robles by showing that he was "involved in ongoing criminal activities and was an informant" and thus had a motive to cooperate with the police. Pet. App. 5a. District Attorney Mark Baldwin objected:

> [MR. ADAMS]: Now, in July of 1997, were you employed?
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> MR. BALDWIN: Objection, Your Honor.
>
> THE COURT: I will see you at sidebar.
>
> (Sidebar Discussion)
>
> THE COURT: What's the relevance of that?
>
> MR. ADAMS: Well, the relevance is that this individual I had—doesn't work, hasn't worked and
>
> THE COURT: So?
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> MR. ADAMS: And I think he's a dealer of drugs or a paid informant by the Reading Bureau of Police.
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> MR. BALDWIN: That's absurd. He's on material witness bail.
>
> * * *
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> MR. BALDWIN: He's on material witness bail, Your Honor. Material witness bail, not bail for any known or charged crimes, Your Honor.
>
> THE COURT: He is not charged with anything?
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> MR. BALDWIN: No, sir, which we will be bringing out on our redirect now that Mr. Adams brought it up. In fact, he's not been convicted of or arrested on any crime, Your Honor.

R. 589-90a. Counsel argued that nevertheless "it does go to credibility," but in the absence of any "hard evidence" from which bias could be inferred, the court refused to allow counsel to pursue this line of questioning, and sustained the objection. *Id.* As the Pennsylvania Supreme

Court observed, on cross-examination, Robles only admitted his nickname was "Gambino," but he denied being the head of a gang. Pet. App. 6a. On redirect, Robles told the jury he had "never been arrested for, charged with, or convicted of, any crime." *Id*.

In the guilt-phase closing, the prosecutor urged the jury to accept Robles's testimony linking Mr. Johnson to the .38 caliber weapon. R. 879a ("defendant's own friend said in the hospital the day after being shot, the defendant told him he had a .32 a .38—excuse me, that after being shot, he wiped the .38 off and he threw it by the side of the road."); R. 887a (urging the jury to "look at the circumstantial evidence in this case," including "George Robles, saying [Mr. Johnson] had a .38.").

Roderick Johnson was convicted of two counts of first degree murder and related offenses.

At the penalty phase, to support an aggravating circumstance related to drug dealing, Robles was recalled to testify he observed Mr. Johnson selling "crack cocaine." R. 1019a. The prosecutor similarly urged the jury to accept this testimony. R. 1100a ("You heard George Robles tell you about his friend, Roderick Johnson, how every day he took part in the sale of crack cocaine at a location here in the City of Reading. That every day poison was peddled on our streets."). Mr. Johnson received two death sentences.

On March 26, 1999, the Supreme Court of Pennsylvania affirmed the judgments of sentence. *Commonwealth v. Johnson*, 727 A.2d 1089 (Pa. 1999), Pet. App. 1o-34o; *see id*. at 4o and 5o (holding that Robles was a "crucial witness" who testified that "Appellant possessed a .38 caliber handgun like the one found at the murder scene."). On December 27, 2002, the Court affirmed the lower court's denial of Mr. Johnson's first Pennsylvania Post-Conviction Relief Act (PCRA) petition. *Commonwealth v. Johnson*, 815 A.2d 563 (Pa. 2002). Pet. App. 1k-54k. The

denial of Mr. Johnson's second post-conviction petition was affirmed on December 20, 2004. *Commonwealth v. Johnson*, 863 A.2d 423 (Pa. 2004). Pet. App. 1h-10h.

On October 23, 2003, Mr. Johnson filed a Petition for Writ of Habeas Corpus in federal district court in this case. *See Johnson v. Beard*, Civ. Act. No. 03-2156 (E.D. Pa.). That matter was stayed on March 15, 2004, pending exhaustion of state court remedies. On June 25, 2004, Mr. Johnson filed a Petition for Writ of Habeas Corpus in another Berks County homicide case in which he received a life sentence. *Johnson v. Folino*, Civ. Act. No. 2:04-cv-02835 (E.D. Pa.). The cases were related because George Robles was a key witness in both. In the non-capital case, the district court issued a number of discovery orders which resulted in the disclosure of the police reports at issue in this appeal.[2]

Based on these disclosures, on April 7, 2005, Mr. Johnson filed a successor post-conviction petition alleging that the Commonwealth withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). He timely supplemented multiple times as additional reports were made available.[3]

On January 20, 2012, the PCRA Court issued an Order dismissing the pending PCRA petition as untimely. Mr. Johnson appealed and on March 25, 2013, the Supreme Court of

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[2] The district court denied Mr. Johnson relief but issued a Certificate of Appealability. The United States Court of Appeals for the Third Circuit reversed, holding the district court misapplied *Brady*, noting that "the Commonwealth possessed copious evidence linking Robles to various criminal investigations," and remanded to that court for further proceedings. *Johnson v. Folino*, 705 F.3d 117, 122 (3d Cir. 2013), *cert. denied*, 571 U.S. 939 (2013). The non-capital case is currently pending in district court.

[3] Supplements were filed June 19, 2007, August 2, 2007, November 16, 2007, and September 3, 2010, in response to new disclosures regarding Robles as they were made.

Pennsylvania reversed the timeliness ruling and remanded to the PCRA Court.[4] *Commonwealth v. Johnson*, 64 A.3d 621 (Pa. 2013) (per curiam), Pet. App. 1d-3d. The Court instructed:

> [O]n remand, the PCRA court is directed to conduct an appropriate merits review of [Mr. Johnson's] *Brady* claim. Furthermore, in assessing *Brady* materiality, the court is reminded of the requirement to consider the 'cumulative' or 'collective' effect of all of the relevant undisclosed evidence. *Kyles v. Whitley*, 514 U.S. 419 (1995); *see also Bell v. Cone*, 129 S.Ct. 1769, 1782-86 (2009) (discussing *Kyles* and considering whether cumulative or collective effect of undisclosed evidence was material).

Id. at 2d. A hearing was held on October 20 and 21, 2014.

2. The post-conviction evidence: George Robles's role as an informant and undisclosed police investigations into his criminal activities

The newly disclosed reports are rich in detail about the extent of Robles's informant activities and the breadth of criminal investigations targeting him right up until the time he was to testify against Mr. Johnson. They open with Robles's apparent first contact with the police and, in the face of accusations of criminal conduct, his first attempt to parlay "information" into favorable treatment.

On February 27, 1996, Reading Police investigated a complaint of an assault. Robles, known to the victims as "Giovanni," along with an unknown male, sought out Angel Alvarez and threatened him and Alberta Collins on the street with a "large, black handgun," which the victims believed to be of .45 caliber. R. 1417-19a; R. 1602a. According to the report:

> "Giovanni" then pointed the gun at the head of Alberta, and stated, "I know your family, and where you live." "Giovanni", and the other male then left. Angel, Jr. stated that he watched them walk down the street, and turn the corner. When they turned the corner they had heard a shot, and assumed that it was "Giovanni" shooting the gun.

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[4] Pet. App. 10a, R. 2049a ("This Court concludes that [Mr. Johnson] has demonstrated that the information discovered during the federal habeas proceedings constitutes 'newly discovered' facts for purposes of the (b)(1)(ii) exception to the jurisdictional time bar. *See* 42 Pa. C.S. § 9545(b)(1)(ii).").

R. 1604a. Brenda Alvarez said Robles later admitted the offense, quoting him as saying, "I'm tired of Angel talking shit and yea I did pull a gun on him and he's lucky I didn't blast the little mother fucker." R. 1602-03a.

Detective Angel Cabrera was assigned to the investigation. Learning the police had come looking for him, Robles appeared for questioning soon after. He denied using a gun but admitted being in an altercation with the victims. R. 1258a; R. 1605a.

Faced with the accusations of assault and intimidation by three witnesses, Robles – as the Pennsylvania Supreme Court observed – "attempted to avoid arrest by offering to provide information about an unsolved murder." Pet. App. 8a. The court added that Robles "ultimately identified to police the perpetrator of that homicide." *Id*. Robles was not charged with the assault. *Id*.

This was the first of numerous contacts between Robles and Detective Cabrera where Robles provided information to the police.[5]

Soon Robles became a major suspect in a gang-related shootout and drug investigation. The incident occurred on April 25, 1996. In a confrontation between Robles's drug gang, the Nite Life Clique ("NLC"), and the rival gang headed by the Borelli brothers (Jason, Peter, and Christopher), multiple shots were exchanged at 7th and Bingaman Streets in Reading. Some

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[5] Robles explained that many of his contacts with Detective Cabrera originated because Detective Cabrera suspected him of criminal wrongdoing:

> I wouldn't say that he would come ask me information, *per se*. He would more along the lines of being directed towards me as a possible suspect in a situation. And then the conversation would just unfold the way it would unfold, which would usually be me explaining that it couldn't have been me; or it wasn't me; or I heard it was over here; I heard it was over there. But it wasn't me.

R. 1474a.

struck Robles's home at 644 Bingaman Street; others were fired from a rooftop at the rear of the Robles residence. R. 1660-62a; R. 1346a.

The shootings led to a related drug and gun seizure. In the immediate aftermath of the shootout, a juvenile staying in Robles's home, Edwin Ruiz, R. 1277a, R. 1289a, was seen by police taking a red bag from Robles's residence to a home across the street located at 345 7th Street. R. 1673-79a. The police recovered the bag. R. 1688a; R. 1284a. Inside was a pouch and two Phillies cigar boxes containing guns, drugs, and cash. All told, Ruiz possessed two semi-automatic firearms, nearly $1,000 in cash, and 199 packets of crack cocaine. R. 1679a; R. 1284a; R. 1289a.

When Ruiz was taken into custody, Robles appeared. As the Pennsylvania Supreme Court stated, Robles "falsely claimed he was the juvenile's guardian so that he could remain present during the interview." Pet. App. 9a; *see* R. 1686a; R. 1443a. As "guardian," Robles was transported to City Hall with Ruiz and was permitted to be present for the police interrogation. R. 1674a. The police allowed Robles, Ruiz's professed "adult cousin," to have "some private time" with Ruiz. Ruiz then gave a statement admitting his own involvement. R. 1686a. The Pennsylvania Supreme Court pointed out that Robles "advised the juvenile to confess in a manner that did not implicate Robles." Pet. App. 9a. The police did record, however, that both Robles and Ruiz admitted handling the guns earlier and that therefore their fingerprints might be on the weapons. R. 1687a; R. 1312a. That Robles remained a suspect was clear; he was also fingerprinted and photographed (along with his tattoo, which evidenced his "NLC" gang affiliation). R. 1667a; R. 1511a.

Neighbors implicated Robles as someone who "was selling drugs out of his residence." Pet. App. 9a. Detective Cabrera interviewed Rafael Melendez and Amy Sell who lived near the

site of the shooting. Melendez revealed how a juvenile living in the Robles home was enlisted to ferry a large cache of drugs from that location to the Sell/Melendez residence. For a fee, Melendez and Sell allowed 345 South 7th Street to be used by Robles as a stash house for his drugs, guns, and other items. Melendez stated that Robles sold drugs from 644 Bingaman Street and paid him $20 a week to maintain a safe for Robles. Robles tended to the safe twice a week, where he kept "Phillies" cigar boxes with cocaine, a gun, and a cell phone. R. 1291a; R. 1691a. Melendez said that in the aftermath of the shooting, he instructed another person present, Juan Rodriguez, to "take the safe out of the apartment before he would get caught with it." R. 1693.[6]

Detective Cabrera found Juan Rodriguez and recovered the now-empty safe from a neighbor. Pet. App. 9a. Rodriguez told the police, "I was paid $20.00 by Rafael [Melendez] to get rid of it." R. 1667a. Instead of seizing the safe as evidence, Detective Cabrera returned it to Robles. Pet. App. 9a. When he dropped off the safe, Detective Cabrera told a woman at the back door of Robles's house, "[H]ave Geo call me." R. 1669a.

The evidence seized from Ruiz was submitted for fingerprints, including the guns and the cigar boxes containing the drugs. A fingerprint on "Cigar Box #2" (containing 103 bags of "crack" cocaine and $299 in cash) belonged to Robles. R. 1669a; R. 1703a; R. 1309. The Pennsylvania Supreme Court stated, "[A]lthough Detective Cabrera discovered Robles' fingerprint on [the] cigar box . . . and although Detective Cabrera threatened to arrest Robles, the police never charged Robles in connection with the incident." Pet. App. 9a.

Later, Robles was the subject of another criminal investigation. On August 1, 1997, officers responded to a call of shots fired at 10th and Elm Streets in Reading. R. 1800a. The officers seized a weapon from Robles, a Starfire 9mm semi-automatic pistol. The officers also

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[6] Robles would later falsely report the safe stolen. R. 1667a; R. 1411a; R. 1714a.

found four spent shell casings that matched the ammunition in Robles's pistol. Robles was not charged. Pet. App. 9a.

On September 18, 1997, Robles was again suspected in a shooting incident after reports of multiple shots fired near Robles's new home at 545 Cedar Street in Reading. Reading Police Officer James Gresh questioned Robles and another resident, Orlando Alvarado. "The responding officer . . . wrote in the report that he suspected Robles was involved in drug dealing." Pet. App. 10 a.

Just days before the commencement of trial in this case, Robles was suspected in yet another shooting incident. On November 7, 1997, a week before jury selection, gunshots were reportedly fired at three men from Robles's home at 545 Cedar Street. R. 1314a.

> Upon arrival, the police recovered shell casings from a .40 caliber weapon. Robles told the police that he was not home when the shots were fired, and he denied owning a .40 caliber weapon. Despite Robles' denials, Detective Cabrera recovered a .40 caliber pistol that was registrered to Robles. The police did not follow up with Robles or the witnesses.

Pet. App. 10a.

Detective Cabrera contacted the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to trace the ownership of the weapon used in the shooting. Detective Cabrera's ATF trace occurred while Mr. Johnson was on trial in this case, which demonstrates that Robles was under active investigation when he testified at the trial. The prosecuting attorney knew that Robles was under investigation at the time because Detective Cabrera told him. R. 1724a. The ATF report showed that the gun belonged to Robles. R. 1726-27a. Again, Robles was not charged. Pet. App. 10a.

3. The "I will do anything" to get out of jail letter Robles sent Detective Cabrera while Robles was incarcerated on material witness bond

The suppression of undisclosed impeachment evidence relating to Robles was first raised on direct appeal. After the verdict, counsel discovered that the Commonwealth had failed to disclose a letter Robles wrote to Detective Cabrera while incarcerated on material witness bail in the non-capital case. In the letter, written before trial in this case, Robles wrote that he would "do anything" to get out of jail. Pet. App. 6a.

> Angel. Look I can't take this jail. I am doing everything possible to help you. Please, [p]lease help me. I'm not a runner you know that I just want to go home. I can't eat. I can hardly sleep and I feel like I'm in here forever. Angel, I feel like I'm dying here. I am begging you and [Detective] Vega with my word as a man and father to be. I'm not running. Just send me home please. I will do anything . . . .

Pet. App at 20l; R. 1853a. The letter was the subject of a post-verdict evidentiary hearing held on February 26, 1998, and relief was denied. On appeal, the Commonwealth argued that the letter was not material. The Supreme Court of Pennsylvania agreed, finding that "[a]lthough the letter may have been useful in undermining Robles' credibility, we do not conclude that such an impeachment strategy would have created a reasonable doubt that did not otherwise exist, particularly in light of Robles' testimony that his cooperation was not pursuant to any agreement with the police." Pet. App. 12o; R. 1853a; *see* Pet. App. 6a-7a. At the time of this earlier appeal, the other police reports about the investigations of Robles, his implication in drug dealing, and connection to the firearms incidents had not been produced to Mr. Johnson or his counsel.

4. Actual bias adduced at the hearing

As the Supreme Court of Pennsylvania and Judge Keller, who presided at trial and during the post-conviction hearing, found, Mr. Johnson was handicapped at trial because he did not have the suppressed police reports. At the 2014 post-conviction hearing, when confronted with

the now-available reports and reminded of his "I will do anything" letter to Detective Cabrera, Robles admitted being a drug dealer which he vehemently had denied at trial. *See* Pet. App. 18a ("When confronted with the police reports at the PCRA hearing, Robles admitted that he was, in fact, a drug dealer."). Robles further conceded he feared arrest by Detective Cabrera, R. 1527-29a, but expressed his belief that, "given our many conversations and the fact that I was cooperative in the past, he would, you know, try to do what he could for me." R. 1507a.

Detective Cabrera also recognized Robles's self-interest, characterizing him as a "brazen leach[] on society" whom he knew to be "involved" in criminal activities. He further acknowledged that Robles harbored a "hidden agenda" and had a "vested interest" in cooperating with the authorities. R. 1333-34a; R. 1342-43a; R. 1353a.

5. State court opinions

Following post-hearing briefing, on July 6, 2015, Judge Keller granted a new trial, finding that the Commonwealth had suppressed material exculpatory evidence. Pet. App. 1c-15c. Judge Keller determined that the suppressed material was favorable to Mr. Johnson. He held that:

> The volume of Mr. Robles' interactions with the Reading Police Department is clearly relevant to his bias and desire to assist the police and the Commonwealth to avoid interference with his own activities.
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> * * *
>
> Defense counsel was clearly hampered by the inability to impeach Mr. Robles without evidence of his interactions with the police. The Court also emphasizes that the prosecuting attorney had knowledge of the criminal investigation of Mr. Robles within the months leading to Defendant's trial.

Pet. App. 8c, 10c.

The Commonwealth appealed Judge Keller's decision to the Pennsylvania Supreme Court. When briefing the appeal, the Commonwealth did not advance any argument grounded in

accomplice liability, the theory it now presses before this Court. Indeed, the word "accomplice" does not appear in its brief. Instead, it argued that the suppressed evidence was inadmissible.

The Supreme Court of Pennsylvania affirmed. After reviewing controlling precedent of this Court, it ruled:

> [T]he PCRA court concluded that the withheld police reports would have given defense counsel a basis to impeach Robles, and it discerned a reasonable probability that the cumulative effect of the reports would have changed the result of Johnson's trial. We have little difficulty agreeing with the PCRA court. The reports are textbook impeachment evidence. They 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 they would have guided defense counsel's efforts to expose to the jury the "subtle factors" of self-interest upon which Johnson's life or liberty may have depended.
>
> Robles was the linchpin to the Commonwealth's case against Johnson. Competent counsel could have used the information in the police reports to cross-examine Robles and to weaken his credibility by exposing his bias and interest in cooperating with the Reading Police Department. A thorough cross-examination would have revealed that Robles hoped to receive favorable treatment from the authorities in exchange for providing information. For example, the first police report revealed that Robles had responded to the investigation into his criminal activity by providing information regarding an unsolved murder; ultimately, Robles was not charged in connection with the incident under investigation. Evidence that Robles had provided information to the police out of his own self-interest might have cast doubt upon the veracity of Robles' testimony against Johnson. The police reports further evidenced Robles' motive to cooperate with the police in order to discern the status of investigations into his own crimes. *See* N.T. PCRA Hearing, 10/20–21/2014, at 105–106 (Detective Detective Cabrera testifying that he believed that Robles' had a "vested interest," and was motivated to provide information to the police in order to ascertain the extent of police investigation into his own activities).

Pet. App. 16a-17a (footnotes omitted).

On the question of materiality, the court found that, "without Robles' testimony, the Commonwealth was left with Johnson's account of the shootings, which fell short of proving the intent required for a first-degree murder conviction." The court explained, "Robles' testimony

was the only evidence linking Johnson to the .38 caliber gun, and that gun was the only physical evidence linking Johnson to the Banks cousins' murders." Pet. App. 19a-20a.

The Commonwealth now seeks review in this Court.

ARGUMENT

In the pending petition, the Commonwealth does not point to a compelling consideration favoring the grant of certiorari. It identifies no split between courts, no important question of law to be settled by this Court, and no conflict between the decision and this Court's precedent. Rather, it offers no more than its disagreement with the resolution, an insufficient basis for this Court's review. U.S. Supreme Ct. Rule 10. "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of properly stated rule of law." *Id*.

The Commonwealth articulates three separate issues as worthy of review. With respect to the first two issues, the Commonwealth never developed below its disagreement with the state court's materiality analysis which serves as the basis for those arguments. It focused on admissibility, relegating its materiality analysis to footnote 7 of the brief it filed with the state high court. There, it simply complained that the lower court should be reversed and that the suppression did not matter because of the "truly insignificant nature of the information contained in the five reports." *See* Pet. App. 19a. It now contends that Respondent's statements, admitted at trial, would make him criminally liable as an accomplice, thus rendering the suppression immaterial. This theory was never urged below.

In its third "issue," it presents no issue at all, and instead grouses about how "[p]ersons convicted crimes . . . should not be permitted to transform *Brady* . . . into a litigation sword to invalidate lawful judgments of sentence." This "issue" flouts the longstanding jurisprudence of

this Court; the Constitution is the law and it cannot be said that convictions obtained in violation of it are lawful ones.

Here, the prosecutor suppressed 138 pages of police reports that could have been used to impeach his main witness, George Robles, the only witness to tie Respondent to one of the guns used. Robles's repeated interactions with the police and seemingly cozy relationship with them would have gone a long way to discrediting the Commonwealth's investigation. On direct appeal in this case, and long before the production of the *Brady* material at issue, the Supreme Court of Pennsylvania held that Robles was a crucial witness for the Commonwealth. On post-conviction review, it properly ordered a new trial because the Commonwealth suppressed the reports of the multiple investigations into Robles's criminal wrongdoing. Robles was subject to a steady stream of police pressure that went unrevealed. As the Pennsylvania Supreme Court held: the suppressed reports were "[e]vidence that Robles benefited from his relationship with the police by being able to engage in drug sales without fear of repercussions." Pet. App. 18a.

Certiorari should be denied.

1. The Commonwealth's materiality argument was not pursued in the state courts and thus should not be considered here.

This Court "has, with very rare exceptions, refused to consider petitioner's claims that were not raised or addressed below." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992). In *Yee*, this Court held that "[b]ecause petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here." *Id*.; *see McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940) ("[I]t is also the settled practice of this Court, in the exercise of its appellate jurisdiction that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers

questions urged by a petitioner or appellant not pressed or passed upon in the courts below . . . .").

The Commonwealth's principal argument, urged here for the first time, is that Johnson's statements, in which he denies participating in the actual shooting, nevertheless render him guilty as an accomplice, and that in light of these admissions, Johnson failed to meet *Brady*'s materiality prong. *Commonwealth's Writ of Certiorari*, 31 ("Johnson twice confessed to first-degree murder as an accomplice"). The Commonwealth does not acknowledge – as it should – that it never argued its accomplice liability theory below. Instead, it inexplicably complains that the "majority opinion is strangely silent on the law governing accomplice liability in Pennsylvania." *Id.* at 27, n.10. This omission, it argues, renders this case worthy of review.

There is no mystery why the Supreme Court of Pennsylvania did not address the state law on accomplice liability. The Commonwealth did not pursue the theory below. The word "accomplice" does not appear anywhere in its brief to the state high court. Rather, the Commonwealth's complaint to the Supreme Court of Pennsylvania centered on the *admissibility* of the suppressed evidence. *See* Commonwealth's *Brief for Appellant*, July 8, 2016, at 26 ("threshold question is whether the five police reports at issue would have been admissible at Johnson's trial under the governing rules of evidence"); *id.* at 34 ("Under Pennsylvania law, the police reports at issue were and are inadmissible at Johnson's trial."); *id.* at 35 ("prior unrelated acts of violence, prior unrelated distribution of drugs, and prior unrelated dishonesty simply were not admissible at trial to impeach the witness' credibility"); *id.* at 42 ("the trial court's ruling that the reports were admissible evidence of bias was inexplicably wrong").

The Commonwealth's novel theory that the lower court failed to address accomplice liability was not raised, nor addressed, below and should not be considered here.

2. The Commonwealth's arguments hinge on interpretation of state law

It is a bedrock principle of federalism that "state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *see also Bell v. Maryland*, 378 U.S. 226, 237 (1964) (noting the Court's "tradition of deference to state courts on questions of state law"). Accordingly, this Court has long recognized that it lacks authority to review whether a state court has correctly interpreted that state's own laws. *See Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 626, 633 (1874).

Here, the Commonwealth seeks review even though it concedes that its principal argument to this Court – concerning accomplice liability – is an argument about state law. *See* Pet. 32 n.17 (reciting the law of accomplice liability "[i]n Pennsylvania"); *id*. at 27 n.10 ("the majority opinion is strangely silent on the law governing accomplice liability in Pennsylvania"). As the cases cited demonstrate, on appeals from the state courts, this Court is reluctant to wade into the waters of interpreting state law because the "state courts are the ultimate expositors of state law." *Mullaney*, 421 U.S. at 691. This should be especially true when the petitioner before this Court did not brief to the state court the state law argument it now seeks to have this Court adjudicate.

Even if they had been presented to the state courts, the Commonwealth's arguments under a theory of accomplice liability are unpersuasive. The Commonwealth is wrong as a matter of state law, which squarely holds that for first degree murder, the mental state of an accomplice may not be imputed to a co-conspirator. *See Commonwealth v. Huffman*, 638 A.2d 961 (Pa. 1994). Without Robles, the Commonwealth was left only with Mr. Johnson's account to police, a statement of limited value, at most evidencing knowledge only of Bridges's intent, but falling

well short of an admission of the shared intent required under the law for a first degree murder conviction, as the Supreme Court of Pennsylvania has found.

Even if correct (which it is not), the Commonwealth's theory presumes sufficiency alone is the touchstone of materiality, a proposition this Court has many times rejected. *Kyles v. Whitley*, 514 U.S. 419, 434-35 & n.8 (1995) ("[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict"); *accord Strickler v. Greene*, 527 U.S. 263, 290 (1999); *Banks v. Dretke*, 540 U.S. 668, 699 (2004). It is not a given, as the Commonwealth assumes, that the jury would have decided that the statements made by Johnson exhibited intent. Pet. App. 19-20a (the evidence without Robles fell short of proving intent).

The Commonwealth refuses to accept its own supreme court's determination that the suppressed police reports "are textbook impeachment evidence." Pet. App. 15-16a & n.5. The Pennsylvania Supreme Court cited Pennsylvania rules and multiple Pennsylvania state court decisions supporting that determination. *Id*. Despite that, the Commonwealth complains to this Court that the state high court did not adequately explain why the reports could be used "as evidence to impeach Robles on cross-examination." Pet. 28 n.13. However, the Commonwealth does not acknowledge the Pennsylvania rules and decisions the state court cited in support of its holding. Nor does the Commonwealth acknowledge that this Court defers to state high court rulings on issues of state law.

3. The Commonwealth does not come before this Court with clean hands

The Commonwealth does not have clean hands, having made affirmative misrepresentation to the state court. "Public policy not only makes it obligatory for the court to deny relief, once a party's unclean hands are established, but to refuse the case." *Gaudiosi v.*

Mellon, 269 F.2d 873, 881 (3d Cir. 1959), *cert. denied*, 361 U.S. 902 (1959). Similarly, in *Olmstead v. United States*, 277 U.S. 438 (1928), Justice Brandeis stated: "The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands." *Id*. at 484 (Brandeis, J., dissenting) (citations omitted).[7]

In his direct appeal, Respondent sought relief based on the suppression of Robles's "I will do anything letter," to Detective Cabrera. The Commonwealth strenuously, and successfully, argued that standing alone, the letter did not evince a material bias, all the while suppressing additional compelling impeachment evidence. As the Pennsylvania Supreme Court determined, the Commonwealth's concealment impacted the prior adjudication:

> On direct appeal, this Court found that, although this letter would have been "useful" in cross-examining Robles, it was, standing alone, insufficient to warrant a new trial. *Johnson*, 727 A.2d at 1096. It now turns out that the letter did not stand alone. Placed into the context of the other withheld evidence, the impeachment value of this letter becomes even stronger.

Pet. App. at 19a.

Morrevover, it cannot be said the suppression was inadvertent. At Mr. Johnson's non-capital trial, District Attorney Baldwin denied the existence of the suppressed impeachment evidence, a blatant lie. It was later disclosed the police had personally consulted Baldwin about at least one of the investigations. In Mr. Johnson's non-capital case, defense counsel asked the trial court to direct the Commonwealth to produce "all information and reports in possession of the Reading Police Department and DANET [drug task force] concerning any and all criminal activities charged and uncharged, past and present of George Robles . . . ." R. 1740-41a. Baldwin

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[7] Justice Brandeis's views in dissent on the merits in *Olmstead* later prevailed in *Katz v. United States*, 389 U.S. 347 (1967).

denied thatsuch information or reports existed, and the court's order denying the request relied on that false representation.[8]

4. The Commonwealth's petition includes false and misleading averments.

The Commonwealth's certiorari petition contains false and misleading statements. It asserts that the evidence showed Robles "did not sell drugs," an important fact when assessing how beholden Robles was to the police. Pet. 25. Yet, Robles testified at the PCRA evidentiary hearing that he was a financial "opportunist" who facilitated drug sales for profit. R. 1493-94a ("if I saw a financial gain anywhere around me that was harmless, I would usually, you know, involve myself for financial gain"). As a result of his "lifestyle," Robles voiced fear of imprisonment at the hearing. "I was always in fear of [being charged with a crime] that because, you know, my lifestyle at the time. I could – you know, once again, I was heavily, I believed, in, like, guilty by association and conspiracy . . . . I never trusted [Detective Cabrera]. I always thought he was – he wanted to put me in jail." R. 1527a, R. 1529a.

Thus, contrary to the Commonwealth's assertions, Pet. 29 n.14, the record supports the Pennsylvania Supreme Court's determination that the reports "suggest that Robles sought to curry favor with the police in the face of ongoing criminal investigations and mounting evidence of his own conduct." Pet. App. 15-16a. The hearing record shows Robles took the opportunity to

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[8] THE COURT: So, we agree that you are stating he has no convictions and you have no information about any police reports which name him as a suspect?

MR. BALDWIN: That's correct, Your Honor, in addition to any materials turned over at this time, I believe there was a report turned over by Mr. Millman with Exhibit Number Two, where M.r Robles may have been shot at, which we submit was retaliation for his cooperation in this case, but I believe that's the only report I am aware of Mr. Robles being involved in any criminal activities and, thereofore, being a victim as opposed to the defendant.

R. 1744a.

offer the police information when suspected of criminal behavior. R. 1474a ("I wouldn't say that [Detective Cabrera] would come ask me information, per se. He would more along the lines of being directed towards me as a possible suspect in a situation."). Detective Cabrera confirmed this approach, testifying, "We knew George was involved in some way, shape, or form." R. 1353a.

The Commonwealth is again incorrect when it asserts that Respondent was unable to show that Robles was an informant for the police department, or that there was no evidence of a *quid pro quo*, or that Robles believed law enforcement officials could not assist him. Pet. 36. Detective Cabrera's testimony rebuts these misstatements. He recognized Robles's self-interest, characterizing him as a "brazen . . . leech[] on society" whom he knew to be "involved" in criminal activities, and that Robles harbored a "hidden agenda," and had a "vested interest" in cooperating with the authorities. R. 1333-34a; R. 1342-43a; R. 1353a.

5. *Turner v. United States* is inapposite

The Commonwealth's reliance on *Turner v. United States*, 137 S. Ct. 1885 (2017), is misplaced. There, "[t]he only question before [the Court was] whether th[e] withheld evidence was 'material' under *Brady*." *Id*. at 1888. This case is nothing like *Turner*, where a plethora of uncontested evidence fatally undermined any claim that it was material. Here, by contrast, the state supreme court found that, if the suppressed impeachment material had been available at trial, the prosecution was left with a case "which fell short of proving the intent required for a first-degree murder conviction." Pet. App. 20a.

Turner involved a federal prosecution of several individuals for the kidnaping, robbery, and murder of Catherine Fuller. It was uncontested that the assault was conducted by a *group* of perpetrators, with each defendant seeking only to minimize his role in the assault. Undisclosed

evidence, however, supported a different theory, that the attack was committed by one, or possibly two, individuals, including possibly someone not part of group that was charged. Other impeachment evidence, involving drug use and prior inconsistent statements, also went undisclosed.

In *Turner*, both the district court and court of appeals found the defendants failed to meet their burden to demonstrate materiality, and this Court affirmed. Justice Breyer, writing for the majority, first noted the case was "fact-intensive." 137 S. Ct. at 1893. As to materiality, the majority noted the alternative theory urged in post-conviction required acceptance that "single perpetrator (or two at most) had attacked Fuller." 137 S. Ct. at 1893. But the Court, "[c]onsidering the withheld evidence 'in the context of the entire record,'" noted "virtually every witness to the crime itself agreed as to a main theme: that Fuller was killed by a large group of perpetrators." *Id.* at 1894. Because of the sheer volume of evidence pointing to a group attack and the largely cumulative nature of the impeachment evidence, the defendants failed to meet *Brady*'s materiality standard.

Conversely, in this case the lower courts, including the trial judge, found materiality was amply demonstrated. The defense was that, although present, Respondent played no role in the killings, and was himself a victim, having been shot by his later-to-be co-defendant and abandoned to die. Robles was the crucial, indeed, only witness, that could refute this defense. It was his testimony that alone tied Respondent to a possible murder weapon. Pet. App. 20a. Thus, unlike *Turner*, the undisclosed impeachment evidence made all the difference; without Robles's testimony, the Commonwealth had no case for capital murder. *See Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) ("The State's trial evidence resembles a house of cards, built on the jury crediting [the witness'] account rather than Wearry's alibi."); *Dennis v. Sec'y, Pennsylvania*

Dep't of Corr., 834 F.3d 263, 296 (3d Cir. 2016) ("Had the Commonwealth disclosed the receipt [undermining the testimony of an alibi-turned-Commonwealth-witness], the jury may well have credited Dennis's alibi defense.").

6. Certiorari should be denied.

In the petition before the Court, the Commonwealth seeks this Court's review of a decision based on a state law theory it never presented to the state high court. It comes with unclean hands, having misrepresented to a trial judge and Mr. Johnson twenty years ago that the evidence now produced did not exist.

This is a case where the suppressed evidence would have convincingly impeached a crucial prosecution witness and discredited the Commonwealth's case. The jury could have found from the suppressed evidence that the key witness was biased and "benefited from his relationship with the police by being able to engage in drug sales without fear of repercussions." Pet. App. 18a. But the Commonwealth prevented Respondent from testing its case.

Mr. Johnson requests that this Court deny review.

Respectfully submitted,

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Dated: September 5, 2018.