NO. 18-6258

IN THE
SUPREME COURT OF THE UNITED STATES

STEVEN LAZAR,
Petitioner,

v.

MARK CAPOZZA, SUPERINTENDENT, S.C.I. FAYETTE, ET AL.,
Respondents

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

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NANCY WINKELMAN
Supervisor, Law Division
(Counsel of Record)
JOHN W. GOLDSBOROUGH
Assistant District Attorney
MAX C. KAUFMAN
Supervisor, Federal Litigation Unit
CAROLYN ENGEL TEMIN
First Assistant District Attorney
LAWRENCE S. KRASNER
District Attorney of Philadelphia

Three South Penn Square
Corner of Juniper and S. Penn Square
Philadelphia, Pennsylvania 19107-3499
nancy.winkelman@phila.gov
215-686-5700

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Did the Third Circuit correctly reject Lazar's claim that the state court's application of the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984), involved an unreasonable application of clearly established federal law, where the state court determined, after a fact-intensive, state-court evidentiary hearing, that Lazar failed to prove prejudice?[1]

[1] Lazar's second question alleges that the state court did not adjudicate the prejudice prong of his Strickland claim. Petition at ii. Actually, it did. See U.S. Sup. Ct. R. 15.2 (obligation to point out misstatements in brief in opposition). See Supplemental Appendix (SA), filed in Third Circuit on 9/22/17, at SA152-181 (state court opinions). As the Magistrate Judge, District Court, and Third Circuit properly ruled, the state court denied this claim on the merits. Appendix A-D.

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COUNTER-STATEMENT OF THE CASE

Petitioner Steven Lazar is a life-sentenced Pennsylvania state prisoner convicted of robbery and second-degree murder. After a collateral relief hearing, the state court rejected his claim that his trial counsel was ineffective for failing to locate and present at his jury trial a final portion of his pre-arrest methadone clinic records, finding no Strickland prejudice. Lazar argued these records would have shown that the last of his three progressively incriminating police statements was involuntary due to his allegedly severe withdrawal symptoms.

The state court disagreed, finding that, although defense counsel had performed deficiently, the new records, expert testimony for both sides, and medical records showed that Lazar's withdrawal symptoms were only mild and did not affect the voluntariness of his last police statement. The state court also found that, given the other, overwhelming evidence of Lazar's guilt -- including his five other murder confessions to testifying friends and neighbors, his two other police statements, and his suitcase containing his identification found at the murder scene -- there was no reasonable probability the result would have differed even if the last statement (in which Lazar confessed) had been excluded. The Magistrate Judge, District Court, and Third Circuit Court of Appeals each held (in unpublished, non-precedential opinions) that, under 28 U.S.C. § 2254(d)(1), the state court had reasonably applied Strickland v. Washington, 466 U.S. 668 (1984), and denied habeas relief.

Because the petition presents no issue worthy of certiorari, and because the Third Circuit correctly rejected this fact-bound claim in its five-page unpublished decision, the petition should be denied.

Factual and procedural history

The following history focuses on the inherently fact-bound lack of Strickland prejudice, showing not only that Lazar's last statement was voluntary, but also that even without it, there was more than enough evidence to convict, as all courts have found.

The Third Circuit recited the facts as follows:

> In January 2007, an elderly man, Dario Gutierrez, was killed in his home. Gutierrez's daughter discovered her father's body and observed that his keys and wallet were missing. Police officers observed that drawers appeared ransacked and that there was a gold chain on the floor. The police, however, neglected to process the victim's yard as part of the crime scene.
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> In April 2007, the victim's daughter returned to her father's home, found a suitcase in the yard, and contacted the police. The suitcase contained Lazar's identification and other personal items. In July 2007, the police questioned Lazar, who admitted that the suitcase was his. He told the police that he had been using drugs with someone named "John" who took the suitcase and, in turn, gave it to an older man to hold. The police released Lazar with the suitcase.
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> Lazar then told his roommate, Russell Angely, that he had been questioned by the police and confessed to Angely that he committed the murder. In November 2007, Lazar and Angely got into a fight. Angely called the police and informed them that Lazar had confessed to murder. Lazar also confessed to four other civilian witnesses. All five civilian witnesses testified at trial, although Lazar challenged their credibility. Two of these witnesses also testified to seeing Lazar with weapons, such as hatchets, consistent with the murder weapon.
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> On the morning of November 19, 2007, the police arrested Lazar on a bench warrant and questioned him about the murder. At around 7:30 p.m., Lazar gave his second statement to the police. He said that he had been using drugs with John when John left, armed with a hatchet, to recover a debt allegedly owed by the victim. Lazar told the police that he later entered the victim's house where he saw the victim dead and John, covered with blood, ransacking the drawers.
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> The police held Lazar overnight. He gave a third and final statement to the police the next day, November 20, 2007, from 2:45 to 4:20 p.m. This time, Lazar confessed that he was present when John struck the victim with the hatchet; that Lazar himself struck and punched the victim; that John took the victim's wallet and searched his drawers; and that Lazar accepted money from John.
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> Around 10:00 p.m. that night, the police took Lazar to a hospital emergency room after he reported pain while urinating. At the hospital, Lazar

> complained of shaking leg pain, stomach pain, dizziness, nausea, diarrhea, and stated that he was suicidal. Lazar was examined by a doctor in the psychiatric department, who found that Lazar was "irritable and cooperative," that his "thought process was goal directed," that he was "oriented and expressed suicidal ideation but had no plans," and that his "insight and judgment were fair." Lazar also tested positive for cocaine, marijuana and benzodiazepine. He was given a low dose of medication prescribed for withdrawal and was discharged after only a few hours.

Lazar v. Superintendent Fayette SCI, 731 Fed. Appx. 119, 120-121 (2018) (not precedential) (footnote and state-court record citation omitted), also at Appendix A.

1. Pretrial suppression hearing

Lazar moved to suppress his last two post-arrest police statements as involuntary due to methadone withdrawal and alleged police coercion. The Philadelphia Court of Common Pleas held a suppression hearing. N.T. 5/3/10, 5/4/10. There, it was assumed that Lazar's last dose of methadone was shortly before his arrest, and that he was experiencing some degree of withdrawal while giving his post-arrest police statements. Police who took those statements testified that during, before, and after them, Lazar was alert, did not seem high or in withdrawal, never mentioned withdrawal, slept between his second and third statements, and first expressed discomfort over five hours after finishing his third statement, complaining of pain while urinating.

Police took him to the hospital. Hospital records found him coherent and articulate and did not mention methadone withdrawal, but noted symptoms that might be associated with withdrawal. The hospital discharged him in a few hours, diagnosing hypertension and depression, and prescribing low doses of drugs for nausea and hypertension. SA30-42.

Based on this evidence, the court denied suppression. SA43-56 (N.T. 5/4/10, 18-45).

2. Jury trial and direct appeal

At trial, both sides stipulated (erroneously, as would later be revealed) that Lazar's last methadone dose was approximately one month before his arrest and final two police statements. The jury heard other evidence of Lazar's guilt that did not relate to his third police statement. For example, five friends and neighbors testified that Lazar confessed to each that he and another person (John) killed an elderly man using a hatchet or axe. The jury also heard that when police returned Lazar's suitcase to him in July, they withheld the manner of the victim's killing from him, describing it only as a beating, and did not release that information to the public. Yet Lazar told his friends and neighbors the details of how the victim was killed.

After giving first a statement admitting the suitcase and identification were his but otherwise denying involvement, and then another, more incriminating one in which he admitted arriving at the murder scene after John murdered the victim, Lazar gave his third statement, the one at issue here. In that last statement, Lazar confessed to arriving at the murder scene with John before they murdered the victim, taking and leaving his own suitcase, hitting the victim, being present while John murdered him, and sharing in the robbery proceeds. This was not the only evidence of the robbery underlying his felony-murder conviction. His confession was corroborated by the physical evidence (the victim's missing wallet and keys and ransacked dresser drawers) and by Lazar's second statement (agreeing to rob the victim). In his third statement, Lazar also revealed a previously unknown detail: the victim had ejaculated while Lazar and John were acting as gay prostitutes for him. Police had been unaware of any sexual element to the crime before that but later confirmed it, finding semen on the victim's clothes. This further corroborated his third police statement. SA24-29.

After hearing this evidence, the jury convicted Lazar of second-degree murder and robbery. N.T. 5/4/10 – 5/11/10. The court imposed the mandatory sentence of life imprisonment. N.T. 5/11/10. The Pennsylvania Superior Court affirmed, finding meritless Lazar's claim that his confession was coerced. Commonwealth v. Lazar, 32 A.3d 820 (Pa. Super. 2011) (table) (unpublished).

3. The PCRA ineffectiveness claim, evidentiary hearing, and decision

Lazar first raised his current claim – that trial counsel was ineffective for not presenting certain records of his treatment at the methadone clinic – in a petition under Pennsylvania's Post-Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541 et seq. He presented updated clinic treatment records, showing his last dose of methadone had actually been the day before his arrest (not a month before, as the parties erroneously stipulated at trial). He contended these records would have shown he had severe withdrawal symptoms while giving his last statement, rendering it inadmissible, and that without it, the evidence would have been insufficient to convict him.

The PCRA court – the same court that heard suppression and presided over the jury trial – held a hearing on this claim. SA84-151 (N.T. 5/30/13). It examined the medical records, reviewed reports and heard testimony from methadone withdrawal experts from both sides, and heard testimony from trial counsel and interviewing police. (As set forth infra, the PCRA court ultimately denied relief.) The hearing showed the following.

A. Contemporaneous statements and records showed no withdrawal

During his last two police statements and period of custody after arrest, Lazar said nothing about withdrawal. He did not appear to have typical withdrawal symptoms, with which police questioning him were familiar. When police took him to the hospital

after he reported pain while urinating over five hours later, he did not mention or have symptoms of withdrawal. Hospital records showed he complained of discrete symptoms possibly associated with withdrawal but did not mention withdrawal as a complaint. The hospital did not diagnose methadone withdrawal. Lazar told the hospital he was taking methadone at a clinic and had used many legal and illegal drugs just before being arrested. Hospital blood tests confirmed that. SA84-151 (N.T. 5/30/13 & exhibits).

B. Expert testimony showed any withdrawal symptoms were mild

The experts disagreed on the likely onset time, progression, and severity of Lazar's methadone withdrawal symptoms. They agreed, however, on the following. The onset of methadone withdrawal symptoms is later after last ingestion, and its progression through symptoms slower, than withdrawal from other drugs. Exclusively subjective symptoms, such as aches from a virus, would slowly first appear. This would progress to include mild and ambiguous objective ones, such as sniffles and runny eyes. Finally, the addict would feel more severe objective symptoms, such as vomiting and extended bouts of diarrhea. Lazar's progression through these symptoms would have started later and progressed more slowly, and his symptoms' severity would have been reduced, than is typical, due to the many other drugs he told the hospital he had taken before arrest that suppress withdrawal symptoms. Due to timing since his last dose, Lazar's second statement would have been unaffected by withdrawal symptoms. A person experiencing withdrawal can give a voluntary statement, and Lazar's third statement may have been voluntary even if he had withdrawal symptoms while giving it.

Most compellingly, the Commonwealth's expert testified that the hospital records from over five hours after his last statement (when his symptoms would still have been

increasing), strongly indicated Lazar was not in severe withdrawal when giving his third statement. Hospital personnel found him oriented, articulate, and with fair insight and judgment. The history and details Lazar provided there, plus his hospital psychiatric interview, showed he was able to give, and gave, a voluntary and rational statement to the hospital about his medical history and complaints.

Further, opined the Commonwealth expert, the hospital would not have made the treatment decisions it did if Lazar had been in severe withdrawal. Had his symptoms been severe, the hospital would have given him higher medication doses and admitted him. Its decisions to prescribe only low doses, to discharge him 20 minutes later (before that medication had a chance to take effect), and to release him after only several hours with a diagnosis of hypertension and depression -- but not withdrawal -- confirmed his symptoms were mild and slow to progress. They must have been even milder earlier, during his third police statement. This was confirmed by Lazar's admission to using many drugs that block withdrawal symptoms, and by his articulate last police statement. Although Lazar was likely beginning to feel symptoms such as aches and/or a runny nose during that statement, these would not have impaired his ability to give a voluntary and rational statement, and would not have been obvious to police. The detailed statement was signed on each page and indicated no impulsivity or discomfort. The expert found Lazar's last police statement to be knowing, voluntary, and intelligent.

C. PCRA court decision

The PCRA court denied the claim on the merits. SA152-159 (N.T. 7/15/13, oral opinion), SA160-164 (written opinion incorporating oral opinion). While crediting the

Commonwealth expert, the court gave the greatest weight to the post-statement hospital records, because they contained observations of disinterested medical personnel showing Lazar was coherent and able to give a voluntary statement.

The court found that although counsel performed unreasonably in failing to find and present the clinic's final weeks of methadone treatment records, there was no reasonable probability of a different outcome had he done so, so the claim failed. The court had reviewed the post-statement hospital records at suppression so was already aware then that, in them, Lazar had self-reported taking methadone at a clinic. Even had counsel presented the later-revealed clinic records at suppression, the court would not have suppressed the third statement. Further, the court found, the jury would have found the statement voluntary even with the new records. There was thus no "reasonable probability that the outcome of this trial would have been different had the jury received this information." SA156. Finally, even had the jury excluded the statement, the other, overwhelming evidence of guilt showed there would still have been no reasonable probability of a different outcome. SA157.

The Pennsylvania Superior Court affirmed. Commonwealth v. Lazar, 105 A.3d 799 (Pa. Super. 2014) (table). The Pennsylvania Supreme Court declined review. Commonwealth v. Lazar, 104 A.3d 524 (Pa. 2014) (table).

4. Federal habeas

Lazar then filed a counseled federal petition for a writ of habeas corpus. After extensive briefing and oral argument, the Magistrate Judge issued a 13-page Report and Recommendation, recommending that the writ be denied under 28 U.S.C. § 2254(d) (AEDPA), finding the state court's merits denial of the claim a reasonable application of Strickland. Appendix D; SA182-200.

The District Court denied relief but granted a certificate of appealability. Appendix C; SA201-212; Lazar v. Coleman, No. 14-cv-6907, 2017 WL 783666 (E.D. Pa., Mar. 1, 2017) (unpublished). The Third Circuit affirmed. Lazar, 731 Fed. Appx. 119; Appendix A.

As the Court of Appeals explained:

> Lazar's claim was adjudicated on the merits in state court, which "heard and evaluated the evidence and [his] argument[ ]" that he was prejudiced by trial counsel's failure to review the methadone records. Johnson v. Williams, 568 U.S. 289, 302 (2013) (emphasis, quotation marks, and citation omitted). Therefore, the question before us is whether the state court's application of the prejudice prong of Strickland "involved an unreasonable application of" that precedent. 28 U.S.C. § 2254(d)(1).
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> Under Strickland, prejudice is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A 'reasonable probability' is one 'sufficient to undermine confidence in the outcome.'" Bey v. Superintendent, 856 F.3d 230, 242 (3d Cir. 2017) (quoting Strickland, 466 U.S. at 694). We cannot hold that the state court unreasonably applied this standard. While Lazar ably critiques the Superior Court's decision in several ways, each falls short. He points out (1) that the civilian witnesses to whom he confessed were impeached; (2) that the element of robbery for felony murder was proven primar[il]y through his third statement; and (3) that the Government referred to his third statement in its closing argument. As to the first two points, the Superior Court considered them. As to the third, on this record we are constrained by Section 2254(d)(1) to affirm, as there was no unreasonable application of clearly established federal law.

Id. at 122-123 (footnotes and record references omitted).

Acting pro se, Lazar now seeks certiorari review by this Court. Because this fact-intensive Strickland prejudice claim presents no issue worthy of the grant of certiorari and was correctly rejected by the Third Circuit Court of Appeals, the petition should be denied.

REASONS FOR DENYING THE WRIT

I. THERE IS NO REASON FOR CERTIORARI, MUCH LESS A COMPELLING ONE

There is no reason for certiorari review here. The Third Circuit's decision does not conflict with those of any other Circuit, depart at all (much less significantly) from the typical course of judicial proceedings, raise a novel issue not previously addressed by this Court, or decide an important federal question in a way that contravenes this Court's decisions. Nor does Lazar so argue. Rather, the Third Circuit issued an unpublished, non-precedential opinion on the inherently fact-bound subject of Strickland prejudice, correctly applying settled law to the particular circumstances of Lazar's case.

Though there was none, any hypothetical error would not present a proper basis for certiorari. Mere error correction is not a compelling reason to grant discretionary review. See Sup. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); Martin v. Blessing, 134 S.Ct. 402, 405 (2013) (statement of Alito, J., regarding denial of certiorari) ("we are not a court of error correction"); Cavazos v. Smith, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) ("Error correction is outside the mainstream of the Court's functions") (quotation marks and citation omitted).

II. THE THIRD CIRCUIT CORRECTLY REJECTED LAZAR'S CLAIM THAT THE STATE COURT UNREASONABLY APPLIED STRICKLAND

Lazar makes various arguments as to why the Third Circuit erred in holding that the state court reasonably applied Strickland. None is persuasive, and his emphasis on reliability is misplaced.

Lazar contends that in evaluating Strickland prejudice, the state and federal courts wrongly limited their consideration to whether it was reasonably probable that the

suppression judge, then the jury, would have found the final confession involuntary and, without it, would have reached a different result. He argues that the state and federal courts also should have considered whether the final methadone records would have affected the jury's determination of the confession's accuracy or reliability, i.e., credibility and weight. The state court, he says, did not consider this argument, so AEDPA deference should not apply. Petition at ii, 2, 23-27.

None of this is correct, however, and it is all misguided. Matters of credibility and weight are for the jury and are not under consideration in habeas. See Marshall v. Lonberger, 459 U.S. 422, 434-435 (1983) (the habeas statute "gives federal courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them. …. Thus, the factual conclusions which the federal habeas court [are] bound to respect in assessing respondent's constitutional claims [are] … the finding[s] of the [State] trial court … and the inferences fairly deducible from those facts.").

In a Strickland prejudice analysis, credibility and weight are relevant only insofar as the court is called upon to render a hypothetical verdict-impact analysis of the matter counsel omitted (here, the last portion of records and the defense's methadone expert), plus what the prosecution would have presented if counsel had done that (here, the Commonwealth's methadone expert). Further, this analysis is conducted in light of that judge's own credibility determinations at the evidentiary hearing, to find whether there would have been a reasonable probability of a different outcome had the omitted material (and rebuttal) been presented. That occurred here. The court – the same

judge who, having presided over suppression and trial, was familiar with all the evidence – found no reasonable probability. There was no error.

Lazar discusses non-ineffectiveness cases including Jackson v. Denno, 378 U.S. 368 (1964), Crane v. Kentucky, 476 U.S. 683 (1986), and Arizona v. Fulminante, 499 U.S. 279 (1991). These cases, however, do not support his argument that the Third Circuit erred in assessing his ineffectiveness claim under AEDPA; in fact, the state court adhered to them fully. Pennsylvania follows what the Jackson court approved as the "Massachusetts procedure," in which the trial judge first independently determines whether a confession is voluntary during a suppression hearing; only thereafter does the jury pass upon its voluntariness a second time as a prerequisite to its evidentiary consideration in deliberations. That is precisely what happened here. Jackson, 378 U.S. at 378-79 & 378 n.8. In addition, testimony about the circumstances under which Lazar gave the confession was permitted and elicited by both sides at trial, in compliance with Crane. And, unlike in Fulminante, no court has found Lazar's confession coerced, so no harmless error analysis has been used by any court, state or federal, regarding this Strickland claim. Instead, the state courts found no Strickland prejudice, meaning that the ineffectiveness claim had no merit, and the federal courts upheld that as reasonable, per AEDPA.

This Court's opinion in Premo v. Moore, 562 U.S. 115 (2011), shows those cases are not germane to this AEDPA Strickland claim. Moore confessed to police; he and his accomplice also confessed to his brother and his accomplice's girlfriend. The latter two went to police and would have testified had Moore not entered a no contest plea. Moore claimed counsel was ineffective for failing to move to suppress his police

statement. Like Lazar, Moore argued that the state-court ruling that counsel was not ineffective violated Fulminante. He convinced the Ninth Circuit. This Court reversed, holding the Ninth Circuit improperly imported Fulminante into the Strickland context, and that a state-court finding of constitutionally adequate performance "cannot be contrary to Fulminante". Moore, 562 U.S. at 128.

As for prejudice, the Court stated: "[T]here is no sense in which the state court's finding could be contrary to Fulminante, for Fulminante says nothing about prejudice for Strickland purposes…." Moore at 129-130. This Court observed that Fulminante is not "a *per se* rule of prejudice, or something close to it, in all cases involving suppressible confessions." Id. at 130. In Fulminante, the evidence other than the confession at issue was weak, while in Moore – as here – it was strong. Thus, "[t]o the extent Fulminante's application of the harmless-error standard sheds any light on the present case, it suggests that the state court's prejudice determination was reasonable." Moore at 130.

Just so here. Lazar's argument about reliability remains as opaque a distraction today as it has been before. This is an ineffectiveness claim. Once the suppression court and then the jury found the statement voluntary, it was up to the jury to decide whether it was worthy of belief, and how much weight to give it. Lazar's last police statement was both voluntary and reliable. As the jury knew, its details were corroborated by, among other things: (1) later testing of the victim's pants for semen (which the police did not know to test for before Lazar's last statement); (2) the other evidence of robbery; (3) Lazar's admission in his second statement that he agreed to rob the victim; (4) Lazar's confession to five other testifying witnesses that he and John had murdered an old man with an axe or hatchet (despite police not publicizing that

factual detail); and (5) the physical evidence, including the suitcase and the body of the 79-year-old victim, who had been killed with a hatchet.

There was no error in the state court's Strickland analysis, or in the Third Circuit's holding that the state court's denial of this claim was a reasonable application of Strickland. The PCRA court found that if the jurors had heard the PCRA hearing evidence, including both experts, they would not have found the statement involuntary, given the objective hospital records. That was correct. See Wong v. Belmontes, 558 U.S. 15, 20, 26 (2009) (per curiam) (court must "consider all the relevant evidence that the jury would have had before it if [counsel] had pursued the different path" – i.e., "must consider all the evidence – the good and the bad – when evaluating prejudice.") (citing Strickland, 466 U.S. at 695-696). The PCRA court emphasized that even without the statement, Lazar would have been convicted, given his five confessions to friends, his suitcase, and his other two statements. Thus, there was no Strickland prejudice.

In short, the Third Circuit correctly found that, under 28 U.S.C. § 2254(d)(1), the state court reasonably applied Strickland in denying this claim by finding, after an evidentiary hearing, that had counsel presented the final methadone treatment records, there would have been no reasonable probability of a different verdict.

Because there was no error by the Third Circuit, and there is no compelling reason for discretionary review, the petition should be denied.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully Submitted,

/s/ Nancy Winkelman
NANCY WINKELMAN
Supervisor, Law Division
(Counsel of Record)
JOHN W. GOLDSBOROUGH
Assistant District Attorney
MAX C. KAUFMAN
Supervisor, Federal Litigation Unit
CAROLYN ENGEL TEMIN
First Assistant District Attorney
LAWRENCE S. KRASNER
District Attorney of Philadelphia

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