Case No. _____

In The
Supreme Court of the United States

SEIFULLAH ABDUL-SALAAM,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Post-AEDPA, can a nonexhaustion defense be deemed expressly waived based on a party's litigation conduct, where the Commonwealth suppressed arguably exculpatory, material evidence at trial and throughout initial state post-conviction proceedings?

2. Did the Court of Appeals for the Third Circuit err in denying a certificate of appealability, where the state court's decision was at least debatably an unreasonable application of this Court's *Brady* jurisprudence?

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Petitioner, Seifullah Abdul-Salaam, respectfully petitions for a writ of certiorari to review the decision of the Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the Court of Appeals for the Third Circuit denying a certificate of appealability (COA) is attached at App-6.[1] The District Court's Memorandum Opinion denying habeas corpus relief is attached at App-8. The Supreme Court of Pennsylvania issued two opinions denying relief under *Brady v. Maryland*, 373 U.S. 83 (1963): *Commonwealth v. Abdul-Salaam*, 42 A.3d 983 (Pa. 2012) (suppression of blood evidence and cumulative materiality), App-70; and *Commonwealth v. Abdul-Salaam*, 808 A.2d 558 (Pa. 2001) (suppression of identification evidence), App-89.

JURISDICTION

The court of appeals entered judgment on July 12, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."

The Fifth Amendment to the United States Constitution provides: "No person shall be ... deprived of life, liberty, or property, without due process of law..."

28 U.S.C. § 2254(b)(3) states, "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless

[1] Orders denying reargument of the denial of COA are attached at App-3 and App-5.

the State, through counsel, expressly waives the requirement."

STATEMENT

Petitioner was arrested on August 19, 1994, and charged with the first degree murder of Police Officer Willis Cole during the robbery of D & S Coins in the town of New Cumberland, Cumberland County, Pennsylvania. Crucial to the Commonwealth's case was evidence that the blood recovered from the steering wheel of the getaway car belonged to Petitioner. At trial, Petitioner was prevented from challenging this highly incriminating blood evidence because the Commonwealth falsely claimed that all the blood had been consumed in testing, thus precluding independent analysis. When it was learned in federal habeas corpus proceedings that in fact blood remained in sufficient quantity to conduct DNA testing, such testing showed the very opposite of the trial evidence—the blood on the wheel belonged solely to alleged co-conspirator Scott Anderson, and not Petitioner. The violation was compounded by the prosecution's suppression of an eyewitness who said the man who planned the robbery with Anderson prior to its execution was not Petitioner.

Petitioner's conviction and death sentence were affirmed by the state court. In habeas corpus proceedings, Petitioner sought a certificate of appealability on his claim alleging a violation of *Brady v. Maryland*, which was denied; COA was limited to a single penalty-phase claim. On July 12, 2018, the court of appeals granted penalty-phase relief. *Abdul-Salaam v. Sec'y of Pennsylvania Dep't of Corr.*, 895 F.3d 254 (3d Cir. 2018). Petitioner now seeks certiorari review of the denial of a COA as

to his *Brady* claims.[2]

A. Suppression of Blood Evidence.

At Petitioner's 1995 trial, Donald P. Bloser, Jr., a forensic scientist with the Pennsylvania State Police Crime Laboratory, testified that enzyme testing showed that the blood recovered from the steering wheel of the getaway vehicle was consistent with Abdul-Salaam's, although the results were incomplete. He further excluded Scott Anderson, Petitioner's co-defendant, as the source of the blood. When the Commonwealth asked why he did not get results on two of the enzymes he had tested, Mr. Bloser stated.

> A: I did not get a result. There was not enough blood there to do those two.
>
> Q: Not enough blood on the steering wheel?
>
> A: Yes.

App-22.

This was reiterated on cross-examination:

> Q: Now, can you recognize on that photograph [of the steering wheel] discolored areas on the steering wheel consistent with the blood which you found when it was delivered to you for testing?
>
> A: Yes.
>
> Q: And your testimony is that even with this quantity of discoloration that we see, there was insufficient blood for the purposes of doing the Isoenzyme tests?

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[2] Prior to the Third Circuit's grant of sentencing relief, Petitioner sought relief from his death sentence in state court. Petitioner's petition for a writ of certiorari to the Supreme Court of Pennsylvania challenging the constitutionality of an aggravating circumstance was denied on October 1, 2018. *Abdul-Salaam v. Pennsylvania,* No. 17-9022, 2018 WL 2322672 (U.S. Oct. 2, 2018).

> A: On some I got three of the five enzymes. So I used most of it for the three. And I did not have enough—what I used for the last two did not give me results.
>
> * * *
>
> Q: And I guess you tried to remove all of the blood from the wheel?
>
> A: As much as I could.

Id.

In state post-conviction proceedings, Petitioner asserted that the Commonwealth violated his due process rights pursuant to *Arizona v. Youngblood*, 488 U.S. 51 (1988), when it consumed, in bad faith, the entire blood sample for testing.

But in discovery proceedings before the district court, Bloser produced for the first time his bench notes which contradicted his trial testimony:

> Inside [an evidence box] is one dark green steering wheel with suspected blood. **Lots of blood, but on different areas.**

App-23.

The district court thereafter ordered the steering wheel be made available for testing by Petitioner. It was quickly established that sufficient blood remained on the steering wheel to conduct DNA testing. The court summarized the results.

> Pursuant to the Court's directives, Abdul-Salaam's DNA expert, Dr. Edward T. Blake of the Forensic Science Associates in Richmond, California, conducted the DNA testing of the biological evidence remaining on the steering wheel in cooperation with Respondents. Dr. Blake subsequently authored three reports, which were provided to Respondents and the Court. (See Docs. 99, 101, 116.) These reports, read together, establish that the blood recovered from the steering wheel according to our protocol was that of the co-defendant, Scott

> Anderson, rather than Abdul-Salaam's. Respondents did not contest the results of this DNA testing.

App-23. *See also* App-77 ("The results of testing established that the blood gathered from the steering wheel was not Abdul-Salaam's; rather, the blood on the wheel was that of the co-defendant, Scott Anderson.").

B. Suppression of Identification Evidence.

Multiple witnesses, all of whom had a minimal opportunity to observe and gave contradictory or inaccurate descriptions, identified Petitioner as the one who shot Officer Cole. But the Commonwealth suppressed a statement by Tony Clifton, a witness who was present at the planning of the robbery that resulted in Officer's Cole's death.

Detective John Harlacker had learned of Clifton and interviewed him in January of 1995, two months before the commencement of trial. Clifton explained to Detective Harlacker that he had been with Scott Anderson in a car driven by another man in the early morning hours of August 19, 1994 (the robbery was committed late morning of August 19). Anderson and the other man were discussing a plan to rob a coin shop. Clifton later saw television news account of the robbery of D & S Coins and the death of Officer Cole, including video of the two accused. He recognized Anderson but had doubts about the identity of the second man arrested, Seifullah Abdul-Salaam. Clifton told Detective Harlacker that he was willing to look at a photographic array or a lineup in order to identify the man from the vehicle. Detective Harlacker testified that neither he nor, to his knowledge, any other detective followed up with Mr. Clifton about such an identification. Clifton's

statement to Detective Harlacker was never disclosed. App-21.

Upon learning of the undisclosed Harlacker report, Petitioner raised a claim alleging a *Brady* violation. At the state post-conviction hearing, Clifton confirmed Petitioner was not the second man planning the robbery of a coin store:

> Q: Mr. Clifton, the other individual that was in the car along with Mr. Anderson, did you have an opportunity to see that individual?
>
> A: Yeah, I saw him.
>
> Q: You saw him approach the vehicle and get into the front of the vehicle with Mr. Anderson?
>
> A: No, I didn't see him get in, but when I looked up he was like I told you. You know, I was like leaning out the window. When he got in the car and started the car, I looked up to see who was getting in and who was driving, right, okay?
>
> Q: Okay.
>
> A: I looked up and I seen the dude, the other guy.
>
> * * *
>
> Q: You did see the other gentleman in the car; is that correct?
>
> A: Yeah.
>
> Q: Okay. Were you able to see the other gentleman's profile, the side of his face?
>
> A: Yeah.
>
> Q: Okay. Were you able to see the back of his head?
>
> A: Yeah.
>
> Q: Were you able to get an idea of his approximate size?
>
> A: Yeah.
>
> * * *

[Petitioner's counsel]: Mr. Abdul-Salaam, please stand up.

Q: Mr. Clifton, I would ask you to look at the gentleman that's standing next to me right now, is this the gentleman that was in the car with Scott Anderson on the early morning hours of August the 19th, 1994?

A: Not when I was in the car.

App-21-22.[3]

C. State Court Opinion.

The state court found the suppressed identification and blood evidence not to be exculpatory. App-71-72. As to the cumulative effect of the evidence it found:

> [A]ssuming that both the Clifton evidence and the new blood evidence should be considered in a *Kyles* cumulation analysis, the cumulative effect of these allegedly suppressed items of evidence does not warrant relief. In the *Brady* context, materiality includes an assessment of whether there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Kyles*, 514 U.S. at 433–34, 115 S.Ct. 1555; see also *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *Commonwealth v. Lambert*, 584 Pa. 461, 884 A.2d 848, 854 (2005). Notably, in his argument on *Brady* materiality, appellant fails to address the breadth of the trial evidence. That evidence makes clear that whatever marginal use may have been made of Clifton's account and the blood evidence, its collective effect does not establish a reasonable probability that the result of the trial would have been

[3] Similarly, Clifton stated in his declaration:

> Later that same day I was watching TV when the show I was watching was interrupted for a special news report about a shooting of a police officer that had taken place in New Cumberland. . . . I immediately recognized one of those men as Scott Anderson, the same man planing [sic] the robbery as he was driving me home. However, the pictures of the other man in custody I did not recognize and had never seen before. This man was most definitely not the man that was in the front seat with Scott Anderson as Scott discussed his plans for a robbery.

App-20.

different, i.e., that appellant would have been acquitted.

> The trial evidence included the following. The robbery and murder here occurred on a Friday morning during business hours on a commercial street. No less than four eyewitnesses identified appellant as Officer Cole's shooter at trial. The getaway car, driven by Anderson, was followed by an off-duty police officer. When appellant and Anderson abandoned the car and fled on foot, the off-duty police officer observed them and identified appellant as the individual exiting the passenger side of the car. In addition, trial evidence showed that the shooter was injured at the scene of the crime by Officer Cole; notably, when appellant was apprehended mere hours after the crime, he was transported to a hospital for a bullet wound to his leg. After appellant was apprehended, police conducted a consensual search of his girlfriend's residence where they found bloody clothing and a briefcase containing ammunition. Finally, appellant told the police officer who transported him to the hospital that he would tell his lawyer that "Scotty Love did it," further implicating himself by revealing his knowledge of the fresh crime and Anderson's involvement. Given this overwhelming evidence, and considering the minimal, if any, effect of the Harlacker report and the blood/DNA evidence in exculpating appellant, he has not established a reasonable probability that the outcome of the trial would have been different.

App-72-73 (footnotes omitted).

D. District Court Proceedings and Exhaustion.

Petitioner wanted further testing of the blood evidence, but since the Commonwealth asserted that no blood remained to be tested, he sought relief under *Youngblood v. Arizona*, 488 U.S. 51 (1988), alleging bad faith destruction of the evidence. Only in federal discovery was it learned that testable amounts of blood remained on the steering wheel. On April 6, 2007, following the hearings in district court and the revelation that the thought-to-be-destroyed blood evidence in fact existed and was exculpatory, Petitioner filed a motion for relief the merits. Petitioner asserted that because he had exhausted the *Youngblood* claim, further

exhaustion was not required. *See Motion for Relief of the Merits*, April 7, 2007 (Doc. 118) (arguing, "The exhaustion doctrine does not require petitioner to afford the state courts multiple opportunities to review a claim particularly when the prosecution withheld the evidence related to the claim"). The district court disagreed. App-85 ("[W]e are no longer dealing with an allegation of blood destroyed, but rather, one that involves blood withheld. As a result, the PCRA court is entitled to review this claim under *Brady* rather than *Youngblood*.").

Petitioner returned to state court to exhaust the *Brady* claim. The denial of relief in the post-conviction court was affirmed by the Supreme Court of Pennsylvania. App-72-73. When the habeas corpus proceedings resumed, the district court employed the deferential standard of review applicable under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), rather than the *de novo* standard applicable had further exhaustion not been required:

> In sum, in light of the overwhelming evidence of Abdul-Salaam's guilt, the Court finds that even if the Commonwealth had produced the Clifton and new blood evidence, it cannot be said that a reasonable probability exists that the outcome of the trial would have been different. Therefore, the Pennsylvania Supreme Court's decision on these issues is not contrary to, or an unreasonable application of, clearly established federal law, nor is it an unreasonable determination of the facts. See 28 U.S.C. § 2254(d)(1)-(2). Habeas relief on Claims I and IV will be denied.

App-28.

Having denied relief, the district court denied a COA with no further analysis. App-68. The Court of Appeals for the Third Circuit also declined to grant a COA, adopting the district court's reasoning. App-6-7 ("For substantially the

reasons stated by the District Court, Appellant has not shown that reasonable jurists would find its decision debatable").

REASONS FOR GRANTING THE WRIT

I. A NONEXHAUSTION DEFENSE CAN BE WAIVED THROUGH LITIGATION CONDUCT.

A major goal of AEDPA is promoting comity. *See, e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 185, (2011) (noting "AEDPA's goal of promoting comity"); *Carey v. Saffold*, 536 U.S. 214, 220 (2002) (noting "AEDPA's goal of promoting 'comity, finality, and federalism' by giving state courts 'the first opportunity to review [the] claim,' and to 'correct' any 'constitutional violation in the first instance'"), *quoting Williams v. Taylor*, 529 U.S. 420, 436 (2000). But comity should work both ways.

Here, the Commonwealth decided it would fare better by continuing to hide the evidence through the initial state post-conviction proceedings. This invidious manipulation of the process should carry some consequences. Yet, despite its malfeasance, it claims the significant procedural advantage of having the federal courts review the constitutional violation through the highly deferential lens of AEDPA, instead of the otherwise applicable *de novo* standard. *See, e.g., Miller v. Dretke*, 431 F.3d 241, 244 (5th Cir. 2005) ("Obviously, because Miller's *Brady*-claim was not presented in state court, such AEDPA deference does not apply in this instance.").

Justice is simply not furthered by a system that encourages the government to hide evidence—by affording favorable AEDPA deference—where that lack of exhaustion is directly attributable to malfeasance by the state. And that is the

windfall the Commonwealth to date has exploited in this case. Petitioner was faced with the dilemma of proceeding in district court, but risk that the claim would ultimately be deemed unexhausted, or return to state court, which carried the penalty of having to overcome AEDPA deference once he returned to federal court, this despite that he made every effort to exhaust his due process claim in the regular course of state post-conviction.[4] This is an unfair quandary for a state prisoner seeking to secure habeas corpus review of his conviction. *See Scott v. Hubert*, 635 F.3d 659, 667 (5th Cir. 2011) ("AEDPA is not a Hobson's choice").

Petitioner seeks only to be returned to the status he enjoyed but for the misconduct of the Commonwealth, and have his *Brady* claims be reviewed *de novo* for the purposes of his application for a certificate of appealability, notwithstanding the state court has since issued a merits ruling. This Court has not hesitated to fashion equitable remedies when justice required. *McQuiggin v. Perkins*, 569 U.S. 383, 393 (2013) (claim of actual innocence may provide an equitable basis to overcome the expiration of AEDPA's one-year statute of limitations; "The miscarriage of justice exception, our decisions bear out, survived AEDPA's passage."); *Holland v. Florida*, 560 U.S. 631 (2010) (AEDPA's statutory limitations period may be tolled for equitable reasons); *Calderon v. Thompson*, 523 U.S. 538 (1998) (a federal court may, consistent with AEDPA, recall its mandate to revisit

[4] *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999) ("We have not interpreted the exhaustion doctrine to require prisoners to file repetitive petitions" ... [W]e conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process").

the merits of a decision); *Rhines v. Weber*, 544 U.S. 269, 277 (2005) (where dismissal of mixed petition could cause petitioner to run afoul of AEDPA's statute of limitations, stay and abeyance is appropriate upon showing of good cause); *Martinez v. Ryan*, 566 U.S. 1, 9 (2012) (establishing an "equitable" rule that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.")

The Commonwealth's conduct, in suppressing the evidence not only at trial but throughout the initial post-conviction proceedings, should be deemed an express waiver of exhaustion. As this Court has recognized, the pre-AEDPA rule clearly allowed courts to consider the conduct of the state in assessing nonexhaustion:

> [U]nder pre-AEDPA law, exhaustion and procedural default defenses could be waived based on the State's litigation conduct. *See Gray v. Netherland*, 518 U.S. 152, 166, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996) (failure to raise procedural default in federal habeas court means the defense is lost); *Granberry v. Greer*, 481 U.S. 129, 135, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987) ("if a full trial has been held in the district court and it is evident that a miscarriage of justice has occurred, it may ... be appropriate for the court of appeals to hold that the nonexhaustion defense has been waived").

Banks v. Dretke, 540 U.S. 668, 705 (2004).

However, the 1996 AEDPA legislation included language requiring that any waiver of nonexhaustion be "express." 28 U.S.C. § 2254(b)(3) ("A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the

requirement."). Section 2254(b)(3) does not specify what constitutes an express waiver.

This case presents the opportunity to clarify whether a nonexhaustion defense can, post-AEDPA, be deemed waived as a result of litigation conduct. Some courts have found a party's conduct is still relevant in determining express waiver. *See, e.g., D'Ambrosio v. Bagley*, 527 F.3d 489, 496 (6th Cir. 2008) (a state can expressly waive the exhaustion requirement by failing to correct the District Court's stated understanding that the state had conceded exhaustion); *Hoop v. Andrews*, No. 1:06-CV-603, 2010 WL 1253979, at *2 (S.D. Ohio Mar. 24, 2010) (citing *D'Ambrosio*, court commented, "Particularly in a non-capital case such as this where the Petitioner's interest in her liberty is eroded by delay, the State should not be allowed to hold its failure to plead lack of exhaustion as a trump card to be played whenever it chooses to do so."). But most jurisdictions, with little explication, have found that *Granberry* is no longer good law. *See, e.g., Rockwell v. Yukins*, 217 F.3d 421, 423-24 (6th Cir. 2000) ("In the years since *Granberry* was decided, AEDPA has been amended to provide that a state will no longer be found to have waived the defense of nonexhaustion unless it does so expressly and through counsel. See 28 U.S.C. § 2254(b)(3). Thus, the state's failure to object when Rockwell moved to add an unexhausted claim to her petition did not constitute a waiver of the defense."); *Lambert v. Blackwell*, 134 F.3d 506, 515 (3d Cir. 1997) ("Given the new express waiver requirement of the AEDPA, it is doubtful that *Granberry*

continues to have any import in a situation other than where the state has expressly waived the nonexhaustion defense.").

While it is clear that under AEDPA simply standing mute will not be deemed a waiver, AEDPA does not define "express," nor explicitly bar consideration of litigation conduct in determining whether a waiver is expressly made. In a different context, one court had this to say:

> Refined to its essence, waiver by litigation conduct represents a kind of tit for tat: a state's decision to avail itself of a federal forum as a means of garnering a material benefit that otherwise would not be available to it is deemed to betoken a willingness to subject itself to the federal court's jurisdiction with respect to the particular claim or claims at issue. Put in colloquial terms, the state must take the bitter with the sweet.

Bergemann v. Rhode Island Dep't of Envtl. Mgmt., 665 F.3d 336, 340, (1st Cir. 2011).

There is no principled reason to conclude Congress intended "express" to equate with the kind verbal waiver akin to those associated with fundamental rights, such as the right to counsel or to be tried by a jury. In other contexts, courts have not been so literal when defining "express waiver." *See e.g., Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003) (discussing distinction between implicit and express waiver of attorney-client confidentiality, the court stated, "An express waiver occurs when a party discloses privileged information to a third party who is not bound by the privilege, or otherwise shows disregard for the privilege by making the information public."); *Val/Del, Inc. v. Superior Court*, 703 P.2d 502, 509 (Ariz. Ct. App.1985) (because the Tribe has "agree[d] that any dispute would be arbitrated

and the result entered as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign immunity"). It does no disservice to the intent of Congress for a court to rule that certain conduct can equate to an "express" waiver.

Similarly, there is no bar to ruling that under certain circumstances a state can forfeit a nonexhaustion defense. All manner of rights can be forfeited on the basis of misconduct. *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (right to be present at trial may be forfeited if a defendant conducts himself in a "disorderly, disruptive, and disrespectful" manner that prevents the trial from being conducted with him present); *United States v. Lamplugh*, 334 F.3d 294, 301 (3d Cir. 2003) ("We hold that Mrs. Lamplugh forfeited the right to the effective assistance of counsel because of her extremely serious misconduct in presenting falsified copies of federal income tax returns, in a willful attempt to obstruct the proper administration of justice."); *N.L.R.B. v. Cmty. Motor Bus Co.*, 439 F.2d 965, 966 (4th Cir. 1971) (finding striking employees had forfeited their right to reinstatement on account of picket line misconduct); *United States v. McLeod*, 53 F.3d 322, 325–26 (11th Cir.1995) (verbally abusive and threatening defendant forfeited his right to counsel); *In re Interest of Eric O. & Shane O.*, 617 N.W.2d 824, 832 (Neb. 2000) (parental rights "may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.") (internal citation omitted).

The *Banks* Court itself recognized that wrongdoing should not be rewarded when it found, ruling a *Brady* proponent was relieved of the duty to search for evidence the state says does not exist, a "rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 696. As in *Banks*, a system that rewards continued suppression of exculpatory evidence is inconsistent with due process. The state hid evidence helpful to the accused and continued to hide the evidence throughout the initial state post-conviction process. This Court should grant certiorari to settle the question of whether the pre-AEDPA rule that a nonexhaustion defense can be waived based on a state's litigation conduct survived the enactment of AEDPA.

II. THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED IN DENYING A CERTIFICATE OF APPEALABILITY BECAUSE THE CORRECTNESS OF THE STATE COURT'S RESOLUTION OF PETITIONER'S *BRADY* CLAIM WAS CLEARLY DEBATABLE AMONG JURISTS.

The district court deferred to the state court's finding both as to whether the evidence was even exculpatory, and whether Petitioner met his burden of proving materiality. Even under the deferential AEDPA standards, a COA should have issued.

Under 28 U.S.C. § 2253(c)(2), a certificate of appealability ("COA") should issue if the appellant has made a "substantial showing of the denial of a constitutional right." To meet this standard, the applicant need only show that "reasonable jurists could debate ... whether the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve

encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (internal quotation marks omitted); *see also Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) ("We look to the district court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable among jurists of reason"). And as this Court emphasized in *Miller-El*, "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338.

A. The Suppressed Blood Evidence was Exculpatory.

The Supreme Court of Pennsylvania found the new blood evidence was not even exculpatory, a finding granted deference by the district court. App-27 ("We agree with the state court that the new blood evidence only proves to be further inculpatory to Mr. Anderson rather than exculpatory to Abdul-Salaam."). This conclusion is completely belied by the record. The blood evidence was a significant part of the Commonwealth's case. It ostensibly put Petitioner in the getaway car, proved that he was in the company of Scott Anderson in the immediate aftermath of the incident, corroborated the officer's identification of Petitioner as one of two persons seen fleeing the getaway car, and undermined Petitioner's claims as to how his injuries were in fact incurred.

Petitioner has consistently maintained his innocence, insisting the blood recovered from the getaway car could not have been his. But Petitioner's plea of

innocence fell on deaf ears; the scientific evidence adduced at trial ostensibly placed him in the driver's seat of the getaway car. Moreover, Bloser claimed that the blood belonged *solely* to Petitioner.[1] But conveniently for the Commonwealth, Petitioner could not challenge this result because, according to Bloser, insufficient blood remained for further testing. This proved to be false, as established at the hearing before the district court. It was also established that Bloser likely knew it was a lie as his bench notes, also suppressed, included the notation, "Lots of blood, but on different areas."

Once the existence of the remaining blood was disclosed and after thorough additional testing—in which the Commonwealth declined to participate—Petitioner's expert found the exact opposite of the trial evidence; the blood was Anderson's and only Anderson's. Dr. Edward Blake's report, fully documented with photographs, revealed testable blood at four separate locations, belonging to a single unknown male. *Blake Report 1.* Subsequent testing excluded Petitioner as the "unknown male," *Blake Report 2*, and confirmed it was co-defendant Scott Anderson's blood. *Blake Report 3*.

As Dr. Blake's reports make clear, Anderson's blood was found on multiple locations on the wheel, and Petitioner's blood was not found anywhere on the wheel. The Commonwealth did not contest these findings, notwithstanding they directly contradicted Mr. Bloser's testimony.

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[1]NT 3/14/95, 128 ("All the blood gave me one blood type and gave me enzymes the same as Mr. Salaam's. If it had been a mixture, it would have given me someone else's type.").

The district court erred by crediting, as not unreasonable under § 2254(d)(2), the Supreme Court of Pennsylvania's ruling that the Blake reports do not even tend to exculpate Petitioner. It cannot be presumed the jury would have rejected the plain import of the new evidence: Bloser's analysis was at best slovenly and grossly negligent, or at worst, allowed for the inference he fabricated the results and then falsely claimed the evidence was consumed so as to hide the truth. *See e.g.*, *Banks v. Dretke,* 540 U.S. 668, 701 (2004) ("Had *jurors* known of [the informant's] continuing interest in obtaining [officer's] favor, in addition to his receipt of funds to "set [Banks] up," . . . *they might well have distrusted [the informant's] testimony*, and, insofar as it was uncorroborated, disregarded it."); *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014) (defendant prejudiced by counsel's deficient performance "if there is a reasonable probability that Hinton's attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton's guilt" by challenging state's ballistics evidence). Whether innocent mistake or malicious manipulation, the evidence is unquestionably favorable to Petitioner. *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (suppressed information was material because "it would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well"); *id.* at 446 n.15 ("indications of conscientious police work will enhance probative force [of the prosecution's evidence] and slovenly work will diminish it").

B. The Suppressed Identification Evidence was Exculpatory.

Similarly, the state court took an unreasonably narrow approach to the Clifton evidence, finding that evidence that someone else was discussing the robbery with Anderson in the hours preceding its execution was not exculpatory. The district court deferred to this finding. App-26 ("Turning first to whether the Clifton evidence was favorable to Abdul-Salaam, even assuming as true Clifton's later statement that the man in the vehicle with Anderson on the night before the incident was someone other than Abdul-Salaam, we agree with the state court that this information does nothing to exculpate Abdul-Salaam."). Again the state court simply ignores the plain import of the Clifton evidence. Where the robbery was committed by two persons, it is a fair inference that the two who planned the robbery were the two who committed it, an inference that would exclude Petitioner as a perpetrator. This evidence is clearly favorable to Petitioner not only because it shows that someone else committed the crime (unreasonably rejected by the state court), but also because it would have impeached eyewitness accounts. The state court decision that this new evidence was not exculpatory was unreasonable.

C. The Suppressed Evidence was Material, Individually and Cumulatively.

The most unreasonable of the state court findings, also endorsed by the district court through the lens of AEDPA, was that even cumulatively the new evidence could not have made a difference. The flaw in the state court's reasoning was that in finding the materiality burden was not met, it relied on the very "facts" the suppressed evidence would have undermined.

The state court cited to the multiple witnesses who identified Petitioner. App-27. But the identification evidence was already rendered questionable by the complete absence of procedures designed to ensure its reliability (such as a line-up or photo array), the subsequent taint of the suggestive in-court confrontations, the minimal opportunity to observe, and initial descriptions notable mostly for their paucity and inconsistency. It ignored that the suppressed evidence significantly undermined this already suspect identification evidence. That someone other than Petitioner planned the robbery with Anderson casts doubt on the reliability of the witness identifications at the scene by affirmatively showing that someone else was the second perpetrator.

The state court pointed to the testimony of an off-duty police officer identifying Petitioner as the suspect who fled from the getaway car. But it ignored that this identification is substantially undermined by the new evidence showing the blood in the car was not Petitioner's, but Scott Anderson's. The officer's opportunity to observe was fleeting at best and thus acceptance of his identification by the jury likely hinged on the corroboration supplied by Bloser's testimony, now proven to be false.

But most significantly, the new evidence casts doubt not only on the identification and forensic evidence, but raises well-founded questions about the integrity of the rest of the police investigation. *Kyles* makes clear that suppression of exculpatory evidence can render the *entire* investigation suspect. This is even more the case here where there are not only multiple instances of suppression of

exculpatory evidence, it is likely a key part of the case against Petitioner was falsified. Armed with knowledge of the new and inconsistent blood results, the jury could well have looked askance at the remaining evidence. Again, the state court's resolution was unreasonable in light of *Kyles*, which held that confidence in the verdict is undermined when the withheld evidence casts doubts on the reliability of the remaining evidence. *Kyles*, 514 U.S. at 453. Had the jury learned the Commonwealth's forensic case may have been fabricated, it would have likely found all aspects of the Commonwealth's case suspect. The state court's failure to recognize, and consequently address, that the blood and Clifton evidence raise questions about the *reliability of the balance of the evidence* is contrary to and misapplies *Kyles,* and the district court was wrong to credit this analysis.

This Court, on multiple occasions, has emphasized that "[t]he COA inquiry . . . is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Rather, at the COA stage, the only question is whether the petitioner has demonstrated that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.*, at 336–337.

The court of appeals here made the same error as in *Buck*. In a single line it stated, "For substantially the reasons stated by the District Court, Appellant has not shown that reasonable jurists would find its decision debatable." App-6-7. But reference to the district court opinion shows its denial of a COA was based on nothing beyond that court's denial of relief on the merits:

> It is right and proper to insure that criminal defendants are given fair and open trials that fully comport with the protections afforded to them in the Constitution. But we fear that a process has evolved that in reality is based on the goal of perfection rather than constitutionality. There are no perfect trials, and Abdul-Salaam's was no exception. However, at the end of the day, this Court is fully convinced that Abdul-Salaam was afforded a trial and sentencing that did not violate the Constitution of the United States in any single respect.

App-68.

The district court then, in the following paragraph, lumped all the issues presented below together and summarily declared they were not debatable, without any further discussion: "In the present matter, the Court will deny a certificate of appealability because jurists of reason would not debate whether the Court properly resolved the issues presented." *Id.* The court of appeals failed to consider whether the issues presented herein are truly debatable, instead adopting the merits ruling of the district court in denying the application.

CONCLUSION

The prosecution should not be permitted to invoke the benefits that attend comity when, through its own conduct, it failed to avail itself of the opportunity.

Petitioner's *Brady* claims, both as to their merits and the COA application, should have been reviewed *de novo*.

The state court patently misapplied this Court's *Brady* jurisprudence and the courts below were wrong in finding Petitioner's entitlement to relief was not even debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 342(2003) ("[A] COA determination is a separate proceeding, one distinct from the underlying merits . . .The question is the debatability of the underlying constitutional claim, not the resolution of that debate."). Petitioner was entitled to a COA. Certiorari should be granted.

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