SUPREME COURT OF THE UNITED STATES

LESTER B. LYNCH,

RECORD NO:

Petitioner – Appellant,

V.

BETH CABELL, WARDEN,
SUSSEX II STATE PRISON,

Respondent – Appellees.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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I. Question Presented

1. Were the petitioner's 5th and 14th Amendment rights violated when the Commonwealth failed to provide the trial court with exculpatory evidence?
    a. Did the trial court err in failing to consider the Petitioner's initial Post-Trial Brief in its ruling?
    b. Did the trial court err in considering only Attorney Anderson's hearing testimony in denying Petitioner's Writ of Habeas Corpus?
    c. Did the trial court err in holding that the Petitioner did not meet the burden of proving that the Commonwealth suppressed the statements at issue?
2. Did the trial court err in interpreting *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936 (1999) to require a Petitioner for Writ of Habeas Corpus to carry the burden to prove that the evidence was suppressed?

I. Corporate Disclosure Statement

Pursuant to Rule 29.6 of his Court's Rules, Petitioner Lynch states that he has no parent company, and no publicly held corporation owning 10% or more of any parent company's stock.

II. List of All Proceedings

Norfolk Circuit Court, No. CR01003499-00/01/02/03/04/05, Commonwealth v. Lester Bernard Lynch, Jr., October 7, 2002, March 24, 2003.

Norfolk Circuit Court, No. CR01003499-12/13/14/15/16/17, Commonwealth v. Lester Bernard Lynch, Jr., December 12, 2003.

Lester Bernard Lynch, Jr. v. Commonwealth of Virginia, 46 Va. App. 342, 617 S.E.2d 399 (2005).

Lester Bernard Lynch, Jr. v. Commonwealth of Virginia, 272 Va. 204, 630 S.E.2d 482 (2006).

Norfolk Circuit Court, No. CL17-583, Lester B. Lynch, #1162173 v. Beth Cabell, Warden, Sussex II State Prison, October 11, 2018.

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The Supreme Court of Virginia, Record No. 190048, Lester B. Lynch v. Beth Cabell, Warden, Sussex II State Prison, February 13, 2020, App. 1a–5a.

VI. Jurisdiction

The Supreme Court of Virginia affirmed the Norfolk Circuit Court's judgment on February 13, 2020. Mr. Lynch invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for writ of certiorari within ninety days of the Virginia Supreme Court's judgment. The Petitioner intends to file an application for the Federal District Court in addition to filing this Petition to the highest Court.

VII. Constitutional Provisions and Statutes Involved

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV

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

United States Constitution, Article I, Section 9, Clause 2

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

28 U.S.C. 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(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.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant

shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the records pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State

official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State Court's final determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceedings.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

On June 9, 2001, three men entered the home of Belinda Scott. One of the men shot and killed Ms. Scott. Two of the men then entered the bedroom of Ms. Scott's son, Ronald Scott. Ronald Scott and his friend, Tamika Reid, were in the room. The two men then threatened Mr. Scott and Ms. Reid with a gun, stole money, and heroin from the room, and fled the scene.

Petitioner avers that Norfolk Detective Robert Glenn Ford first contacted him regarding the shooting before Petitioner became a suspect.[1] (App. 32a, ¶ 22.) Ford asked for Petitioner's cooperation as a witness against Kenneth Parker and another unknown suspect. (*Id.*) Petitioner told Ford that he was unable to assist because he had no knowledge of the shooting nor who may have been involved. (*Id.*) It was at that time that Petitioner became a suspect in the eyes of law enforcement. (*Id.*)

Petitioner was charged with First Degree Murder, Burglary, Robbery, and three counts of the Use of a Firearm in the Commission of a Felony in the Circuit Court for the City of Norfolk. Petitioner pled not guilty to all charges.

Petitioner's trial counsel, Attorney George Anderson, filed a Motion for Discovery and Inspection and a Motion for Exculpatory Evidence on August 16, 2001. The Motion for Exculpatory evidence specifically requested any and all exculpatory evidence in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963). (*Id.*)

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[1] Detective Ford is currently serving a 12.5 year federal sentence for extortion and lying to the FBI regarding his illegal activities during criminal investigations while employed as a Detective with the Norfolk Police Department. At this time, Petitioner is unaware what, if any, involvement Ford had with the making of the tapes in question. The trial court denied the Petitioner the ability to inquire into Ford's involvement in these matters at the evidentiary hearing.

In response to Petitioner's request, the Commonwealth produced a number of discovery items to Petitioner's trial counsel on September 27, 2001. (App. 47a.) The recorded witness statements were neither identified in the discovery letter filed with the court, nor were they provided to defense counsel. (*See id.*) Rather than producing the statement, the Commonwealth briefly paraphrased the statements in a discovery letter without stating that there were four recorded and transcribed statements of these cooperating Commonwealth witnesses. (*Id.*)

Petitioner was subject to three jury trials. The first trial was held from October 2, 2002 through October 7, 2002. (App 104a–479a.) The prosecution relied solely on the testimony of witnesses Ronald Scott, Tamika Reid, and Kenneth Parker. (*Id.*) At the close of trial, the jury was unable to make a unanimous decision on any of the indictments. (App. 8a–9a.) The Court again declared a mistrial. (*Id.*)

The second trial was held from March 18, 2003 through March 24, 2003. (App. 480a–721a.) The prosecution, again, relied solely on the testimony of witnesses Ronald Scott, Tamika Reid, and Kenneth Parker. (*Id.*) At the close of the trial, the jury was unable to make a unanimous decision on any of the indictments. (App. 10–11a.) The court declared a mistrial. (*Id.*)

The third trial was held from April 29, 2003 through May 1, 2003. (App. 722a–1139a.) Once more, the prosecution relied solely on the testimony of witnesses Ronald Scott, Tamika Reid, and Kenneth Parker. (*Id.*) At the close of the trial, the jury found Petitioner guilty of all charges. (App. 12a–13a.) On January 5,

2004, the trial court sentenced Petitioner to 68 years in the Virginia Department of Corrections. (App. 14a–15a.)

Petitioner filed a Notice of Appeal on January 9, 2004. At that time, Petitioner argued that the trial court erred in admitting the hearsay evidence of the prosecution's witness Kenneth Parker. The Court of Appeals of Virginia issued a written opinion on August 16, 2005, affirming Petitioner's convictions, finding that the trial court did not abuse its discretion in admitting hearsay statements into evidence. *Lynch v. Commonwealth*, 46 Va. App. 342, 617 S.E.2d 399 (2005); *see also* App. 16a–25a.

Petitioner appealed the decision to the Supreme Court of Virginia. Petitioner was represented by Steven Emmert, Esq. The Supreme Court of Virginia affirmed the Petitioner's convictions on June 8, 2006. *Lynch v. Commonwealth*, 272 Va. 204 (2006); *see also* App. 26a–29a. It should be noted that neither Petitioner nor his counsel knew of the existence of the *Brady* statements while he pursued his appeal.

Petitioner filed a Petition for Writ of Habeas Corpus, *pro se*, in the Norfolk Circuit Court on June 7, 2007. He argued that his detention was unlawful because of (1) the trial court's error in allowing the entry of hearsay statements of Kenneth Parker; (2) inadequate investigation by police; and (3) ineffective assistance of counsel. The Habeas Petition was dismissed on September 10, 2007.

Petitioner subsequently filed a Motion for Storage and Preservation of Tangible Evidence pursuant to Virginia Code § 19.2-270.4:1 on March 15, 2016. The Norfolk Circuit Court appointed the undersigned counsel to represent

Petitioner for that Motion. Counsel disclosed to the court that he did not believe there to be any evidence which might be relevant to the Petitioner's Motion. The court then instructed counsel to investigate any other motions or causes of action the Petitioner may have the right to pursue.

In response to Petitioner's Motion for Storage and Preservation of Tangible Evidence, the Commonwealth produced a number of evidence vouchers from the Norfolk Police. One voucher was dated June 22, 2001 and documented the existence of statements taken from Ronald Scott, Tamika Reid, and Kenneth Parker. Counsel inquired about the transcription of the tapes upon learning of the existence of the recordings and of their destruction. The Norfolk Police Department initially told the Commonwealth that the recorded tapes of the statements were destroyed on July 9, 2015. The department's records indicate, however, that the taped statements were destroyed on October 10, 2007, while Petitioner's original Habeas Petition was still on appeal.

Counsel inquired whether any of the statements were transcribed. The first time that Petitioner learned of the existence of said statements was following the Attorney General's response to Petitioner's Motion for Storage and Preservation of Tangible Evidence that was filed on or about October 4, 2016. The taped statements were not provided to Petitioner or his trial counsel, George Anderson, Jr. ("hereafter Attorney Anderson").

Counsel interviewed Attorney Anderson about whether he ever knew of the existence of the recorded statements. Attorney Anderson said he did not. Attorney

Anderson signed an Affidavit on October 5, 2017, testifying that he was never informed of the existence, nor was he provided with the four witness statements. (App. 41a–43a.) Attorney Anderson signed a supplemental affidavit on July 11, 2018, reaffirming the content of his prior affidavit and stating that after reviewing the transcripts of the statements, he was certain that he was not provided with the information contained in the statements. (App. 44a–46a.)

Petitioner filed a Writ of Habeas Corpus, represented by undersigned counsel, on January 18, 2017. Petitioner nonsuited the Habeas Petition after argument on Respondent's Motion to Dismiss arguing that Petitioner had failed to prove that a *Brady* violation had occurred because no one knew what was on the destroyed tapes. (App. 30a–31a.)

Petitioner refiled a Petition for Writ of Habeas Corpus on November 13, 2017. This time Petitioner had his former trial counsel, Attorney Anderson, review, sign and file an affidavit stating that the statements in question had never been produced in discovery. (App. 32a–40a.)

An evidentiary hearing was originally scheduled for May 3, 2018. On May 1, 2018, two days prior, transcripts of the material witnesses' statements to police were finally produced to the undersigned, despite the Habeas matter having been pending since March 15, 2016. (App. 49a.)

Counsel and Petitioner learned for the first time that the suppressed evidence in question included two contradictory statements from Ronald Scott, one statement from Tamika Reid, and one statement from Kenneth Parker—the only

three witnesses to testify against Petitioner in the three jury trials. (*Id.*) Each of the statements contradicted the other, and in many aspects, contradicted their continuous evolving trial testimony over the course of three separate jury trials.

On August 2, 2018, the trial court held an evidentiary hearing for both parties to present evidence on the question of whether the Commonwealth committed a *Brady* violation for failing to produce the transcribed statements. Petitioner presented two affidavits from Attorney Anderson, stating that the transcribed statements were not provided to him during his representation of Petitioner over the course of three jury trials. (App. 41a–46a.) Attorney Anderson testified that he never had access to the transcripts nor the details contained in the transcripts. He added that he would have used the transcripts at trial if he had access to them. (App. 1162a, 1164a, 1168a.) Attorney Anderson also testified that fifteen (15) years had passed since he tried the case and that he was never able to locate Petitioner's file. (App. 1166a, 1193a.) Of note, although the trial prosecutor, Ronald Batliner, was subpoenaed by Respondent for the hearing, he did not testify. At the end of the hearing, the trial court permitted the parties submit post-hearing briefs in lieu of oral argument.

Petitioner filed a Memorandum in Support of Petitioner's Habeas Corpus Petition on August 31, 2018. (App. 1220a–1237a.) In addition to Attorney Anderson's affidavits and hearing testimony, Petitioner's brief discusses, at length, the trial testimony of the three witnesses in comparison with their statements to the police. Petitioner argued that this comparison not only showed the prejudicial

nature of the statements, but also that Attorney Anderson did not have access to the statements for use at trial.

Respondent filed a post-hearing brief on September 17, 2018, primarily arguing that Petitioner had not proven that the government had suppressed the statements. Petitioner filed a reply brief on September 21, 2018. (App. 1238a–1247a.)

The trial court entered an order on October 11, 2018, denying Petitioner's Writ of Habeas Corpus. (App. 6a–7a.) The court's order references consideration of the evidentiary hearing held on August 2, 2018, Respondent's post-hearing brief filed on September 17, 2018, and Petitioner's reply brief filed on September 21, 2018. (*See id.*) Of note, the Order does not mention Petitioner's Memorandum in Support of Petitioner's Habeas Corpus Petition. In support of its ruling, the court relied on Attorney Anderson's testimony at the hearing that he could not recall whether he received the police statements.

Petitioner filed a notice of appeal on October 18, 2018. The Supreme Court of Virginia awarded an appeal on May 10, 2019. The court heard argument on January 8, 2020. The Supreme Court of Virginia affirmed the trial court's ruling on February 13, 2020. (App. 1a–5a.)

ARGUMENT

I. Petitioner was denied his 5th and 14th Amendment rights when the Commonwealth failed to disclose exculpatory evidence

a. The trial court erred in failing to consider the Petitioner's initial Post-Trial Brief in its ruling.

i. Legal Standard for Reviewing Habeas Decisions in Virginia

"Because entitlement to habeas relief is a mixed question of law and fact, the habeas court's findings and conclusions are not binding upon this Court, but are subject to review to determine whether the court correctly applied the law to the facts." *Zemene v. Clarke*, 289 Va. 303, 306, 768 S.E.2d 684, 686 (2015). The Virginia Supreme Court "review[s] questions of law de novo, including those situations where there is a mixed question of law and fact." *Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co.*, 270 Va. 566, 574, 621 S.E.2d 114, 118 (2005).

ii. Analysis

A trier of fact "may not arbitrarily or without any justification therefor give no weight to material evidence, which his uncontradicted and is not inconsistent with any other evidence in the case . . . ." *Spratley v. Commonwealth*, 154 Va. 854, 864, 152 S.E. 362, 365 (1930); *see also Chesson v. Commonwealth*, 216 Va. 827, 832, 223 S.E.2d 923, 926 (1976) ("[A] trier of fact may not arbitrarily or without justification discredit evidence which is uncontradicted and not inconsistent with other evidence in the case.").

It is undisputed that the petitioner never received the statements recorded on tape, nor the transcripts of the statements. (App. 47a–48a.) trial court held a hearing on Petitioner's Writ of Habeas Corpus on August 2, 2018. Petitioner filed a Memorandum in Support of Petitioner's Habeas Corpus Petition ("Memorandum in

Support") on August 31, 2018. Respondent filed a post-hearing brief on September 17, 2018. Petitioner filed a reply brief on September 21, 2018.

In the first paragraph of its order entered October 11, 2018, the Court outlines the sources on which it relied in denying the Petitioner's Writ of Habeas Corpus. It mentions the hearing, Respondent's post-hearing brief, and Petitioner's reply brief. Of significance, the Court does not mention Petitioner's Memorandum in Support.

Petitioner's Memorandum in Support discusses at length all of the evidence from Petitioner's three jury trials that demonstrates that Attorney Anderson did not have access to the statements. The evidence described in Petitioner's Memorandum in support is not mentioned as a consideration in the trial court's order. The trial court's failure to consider Petitioner's post-hearing arguments constitutes error, and such error cannot be deemed harmless for the reasons stated herein.

b. The trial court erred in considering only Attorney Anderson's hearing testimony in denying Petitioner's Writ of Habeas Corpus.

i. Legal Standard for Reviewing Habeas Decisions in Virginia

"Because entitlement to habeas relief is a mixed question of law and fact, the habeas court's findings and conclusions are not binding upon this Court, but are subject to review to determine whether the court correctly applied the law to the facts." *Zemene v. Clarke*, 289 Va. 303, 306, 768 S.E.2d 684, 686 (2015). The Virginia Supreme Court "review[s] questions of law de novo, including those situations where there is a mixed question of law and fact." *Westgate at*

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In its order entered on October 11, 2018, the trial court references only the fact that Attorney Anderson could not specifically recall whether he received the statements of Tamika Reid, Ronald Scott, and Kenneth Parker in denying the Petition for Writ of Habeas Corpus. Relying solely on that testimony, the Court ruled that the Petitioner did not meet his burden in showing that the Commonwealth suppressed the statements at issue or that Defense counsel did not receive the statements.

The trial court's analysis disregards Attorney Anderson's testimony that he believes he did not receive the statements because he would have undoubtedly used the statements at trial. The record shows that none of the statements in question were ever referred to over the course of three separate jury trials. The analysis also ignores the content of the transcripts of the witness statements and trials which

demonstrate that Attorney Anderson did not have the transcripts of the statements. Of significance, it is clear from transcript of the evidentiary hearing that Attorney Anderson confused the transcripts of the three trials with the transcripts of the statements made by the witnesses. (App. 1192a.)

It should also be noted that Attorney Anderson testified that fifteen (15) years has passed since Lynch's conviction and that he had been unable to locate his file to review what it contained. Reviewing Attorney Anderson's testimony clearly reflects a witness who had a poor recollection of the details of the case given the passage of fifteen (15) years and his inability to locate his file.

Accordingly, it was error for the trial court to only consider Attorney Anderson's strained memory without considering the other evidence presented that show that the statements were never provided.

c. The trial court erred in holding that the Petitioner did not meet his burden of proving that the Commonwealth suppressed the statements at issue.

i. Legal Standard for Reviewing Habeas Decisions in Virginia

"Because entitlement to habeas relief is a mixed question of law and fact, the habeas court's findings and conclusions are not binding upon this Court, but are subject to review to determine whether the court correctly applied the law to the facts." *Zemene v. Clarke*, 289 Va. 303, 306, 768 S.E.2d 684, 686 (2015). The Virginia Supreme Court "review[s] questions of law de novo, including those situations where there is a mixed question of law and fact." *Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co.*, 270 Va. 566, 574, 621 S.E.2d 114, 118 (2005).

ii. Analysis

In *Brady v. Maryland*, the Supreme Court of the United States held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of good faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963). The Court expanded the duty in *United States v. Agurs*, in which it held that the duty to disclose the evidence even when the accused has not made a request. 427 U.S. 97, 107, 96 S. Ct. 2392, 2399 (1976). "Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380 (1985).

Brady "encompasses evidence 'known only to the police investigators and not the prosecutor.'" *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 1948 (1999) (quoting *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S. Ct. 1555, 1568 (1995)). An individual prosecutor, therefore, "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles*, 514 U.S. at 437, 115 S. Ct. at 1568. "There are three components to a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the State; either willfully or inadvertently; and prejudice must have ensued." *Strickler*, 527 U.S. at 281, 119 S. Ct. at 1948.

a. The suppressed evidence was favorable to the accused because it constituted both exculpatory and impeachment evidence.

The testimony of the Ronald Scott, Kenneth Parker, and Tamika Reid was the prosecution's sole evidence linking Petitioner to the crime. The statements taken from these individuals by the police, as discussed in detail above, were exculpatory in not only implicating suspects other than the Petitioner to have perpetrated the crimes, but also contained significant impeaching evidence that was inconsistent with each statement and the witnesses' subsequent trial testimony.

b. The evidence was suppressed by the State.

Petitioner presented the trial court with two affidavits and oral testimony from Attorney Anderson to show that the evidence was suppressed by the Commonwealth. The affidavits from Attorney Anderson stated that the transcribed statements were not provided to him during his representation of Petitioner over the course of three jury trials. Attorney Anderson again stated on direct examination that he did not have the transcripts nor the detailed information contained in the transcripts, and that had he been provided the transcripts, he would have used them during the trials.

Petitioner also provided the court with the transcribed statements at issue and transcripts from Petitioner's three jury trials to further show that Attorney Anderson did not have access to the transcribed statements. Petitioner then contrasted each transcribed statement, showing both the prejudice discussed *infra* and that Attorney Anderson was not provided the transcribed statements.

Ronald Scott gave two transcribed statements to the police. (App. 50a–75a.) In Ronald Scott's first statement he stated that Gregory "Tyree" Williams, his brother Christopher "Q" Williams, and Kenneth Parker were the three individuals who entered his room on the night that his mother was shot. (App. 50a–60a.) Scott stated that he definitely recognized Gregory Williams and Christopher Williams because he saw them almost every other day, and he knew their voices. (*Id.*) Scott gave another statement to the police the next day, in which he stated that it was Gregory Williams and two other men, but not Christopher Williams and Kenneth Parker. (App. 61a–75a.)

Mr. Anderson was provided a single-paragraph account of Scott's inconsistent statements to the police, but this paragraph lacked the detail in the transcription of Scott's statements. (App. 47a–48a.) Specifically, the summary lacked Scott's language regarding certainty of the identities of the individuals when he made his first statement to the police. (*See id.*) Accordingly, at trial, Mr. Anderson asked Scott general questions about his changes in statements during the trials. (App. 1223a–1232a.) When Scott attempted to justify his inconsistent statements by referring to his first statement, Mr. Anderson did not impeach him with the transcript of his first statement. (App. 1228a–1232a.) Mr. Anderson did not mention Scott having initially stated that he knew that Gregory Williams, Christopher Williams, and Kenneth Parker were there because he knew each assailant and recognized their appearance and the sound of their voices. (App. 1224a–1226a.)

Scott was also inconsistent about more discrete details. In his statement to the police, Scott stated that the first two men both had guns. (App. 1225a.) In his trial testimony, however, Scott states that he was unsure whether the second assailant, who he asserted was the Petitioner, had a firearm. (App. 1227a.) Scott also told the police that the assailants were wearing scarves on their foreheads and chins, but in the second trial Scott testifies that they were not wearing anything on their faces. (App. 1224a, 1230a.)

Scott's trial testimony "evolved" from his two transcribed statements regarding the amount of heroin which was alleged to have been stolen. In his first statement on June 9th, he said $400.00 worth was taken. (App. 56a.) In his next statement on June 10th, he said $400.00 worth was taken. (App. 70a.) At trial, he testified that $1,200.00 worth of heroin was taken. (App. 143a.) Additional discrepancies include Scott describing in his second statement to the police that the perpetrator had "golds in his mouth" and was "red skinned." (App. 52a–54a.) Mr. Anderson did not have access to the earlier statements, with which he could have cross-examined the witnesses about these discrepancies. Instead of questioning Scott about the inconsistent details of his statements, Mr. Anderson concerns his cross-examination with characteristics of the individuals Scott remembered and general questions about his change in story. (App. 1226a–1232a.) This is undoubtedly based upon the single paragraph summary contained in the discovery letter. (App. 47a–48a.)

The lack of questioning regarding Scott's inconsistent statements proves that Mr. Anderson did not have access to the transcribed witness statements. Had the statements been produced, it would have been unconscionable for Mr. Anderson not to have questioned, at the very least, the accounts of events that Scott gave in his first statement to the police in relation to the account he gave in his subsequent statement. Failure to produce the two inconsistent statements alone is sufficient to show a *Brady* violation.

In addition to Ronald Scott's inconsistent statements, witnesses Kenneth Parker and Tamika Reed gave inconsistent statements to the police. In his statement to the police, Parker states that someone told him that a young dark-skinned individual shot the victim. (App. 1233a.) At the initial trial, Parker testified that he told the police that the assailant was a light-skinned individual with corn rows, which he identified as the defendant. (App. 1234a.) Then, in the second trial, Parker definitively changed his story when he testified that the defendant, who he identified as a light-skinned individual, was the one who shot the victim, although the dark-skinned individual was also present. (*Id.*) In the third trial—which resulted in Petitioner's conviction—it is not clear which individual Parker was describing when stated that Gregory had informed him that "the young kid" just shot a woman. (App. 1234a–1235a.)

In spite of the inconsistency and lack of clarity in Parker's testimony, Attorney Anderson did not use Parker's statement to the police, in which Parker implicates a "dark-skinned" individual as the perpetrator, rather than the light-

skinned individual. This was a clear change in the description of the perpetrator to match Petitioner's complexion. It is not reasonable to assume that Attorney Anderson had access to the statements, but failed to make use of them in cross-examining the witnesses over the course of three separate jury trials.

In Tamika Reid's statement to the police, she stated that Petitioner took the gun from a darker skinned suspect after the men entered the room and that Petitioner called the other suspect "trigger happy." (App. 1235a–1236a.) These statements are not only exculpatory, they are also inconsistent with Reid's trial testimony. (App. 1236a.) Reid stated at trial that Petitioner was the first one to come through the door and that he had the gun at the time. (*Id.*) Although Attorney Anderson cross-examines Reid regarding the events surrounding the victim being shot, and the statements she made to the police *generally*, he does not reference a single specific statement that Reid made to the police. (App. 996a–1017a.) It is clear that Attorney Anderson did not have, and had not reviewed, Reid's recorded statement to the police.

iii. The suppression of the evidence was prejudicial to Petitioner's trial.

In *Smith v. Cain*, a case strikingly similar to the case at bar, the United States Supreme Court reversed and remanded a state court's refusal of the defendant's post-conviction relief where contradictory eyewitness statements were withheld from the defense. 565 U.S. 73, 77, 132 S. Ct. 627, 631 (2012). The Court acknowledged that "evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict." *Id.* at

76, 132 S. Ct. at 630. It is material, however, if the witness testimony is the only evidence linking the defendant to the crime. *Id.*

The specifics contained in the statements made to the police would have cast significant doubt on the testimony of the prosecution's three witnesses and would cast doubt as to whether Petitioner committed the crimes in question. It is clear from the from the first two hung juries that the evidence was not overwhelmingly in favor of conviction. The suppressed evidence likely would have caused the jury to reach a different verdict. The suppression of these statements was thus prejudicial to Petitioner's trials. [2]

Of note, the Virginia Supreme Court questioned during oral argument whether the information that was disclosed through testimony over the course of the mistrials compensated for the Commonwealth's failure to disclose the statements. This line of inquiry does not uncut the prejudicial effect off the failure to disclose the statements for two reasons.

First, the disclosure of information over the course of the two mistrials was vague in contrast to the content of the transcribed statements. As is evidenced by witness's trial testimony, and especially that of Ronald Scott, the witnesses were

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[2] Of note, the trial court determined that the prejudicial element of the Brady analysis was met: "Clearly, under these circumstances, the Petitioner has satisfied the third element of Brady in that he was clearly prejudiced." (App. 6a–7a.)

able to use the fact that Anderson did not have the specific language of the statements to talk their way out of the inconsistencies.

Second, although counsel understands the view that the mistrials should not "count" in determining whether to grant habeas, it is undoubted that the violations of Mr. Lynch's constitutional rights in all three trials, led to his incarceration. The two mistrials before the petitioner's third trial relied enormously on the testimony of the keys witnesses who gave the undisclosed inconsistent statements to the police. With that testimony, the juries were still unconvinced of the petitioner's guilt. Without the credibility of the key witnesses, the jury would have had no evidence on which to convict. With an acquittal in the first trial, the petitioner would not have faced the second or the third trial that led to his incarceration.

II. *Strickler v. Greene*, 527 U.S. 263 (1999) should not require a petitioner for Writ of Habeas Corpus to carry the burden to prove that the evidence was suppressed in cases in which the Commonwealth or the State is in the best position to prove that the evidence was disclosed.

Petitioner has met his burden and shown that favorable, prejudicial evidence was suppressed by the Commonwealth. Regardless of whether this court finds this fact, he contends that the principles set out in *Brady v. Maryland* require the Commonwealth to affirmatively show that it produced the statements rather than placing the burden upon the petitioner to prove that the statements were suppressed. Due process dictates that this burden be on the Government to prove that the evidence was produced.

Brady v. Maryland, and the cases that expand it, "illustrate the special role played by the American prosecutor in the search for truth in criminal trials."

Strickler v. Green, 527 U.S. 263, 281, 119 S. Ct. 1936, 1948 (1999). "Within the federal system, for example, we have said that the United States Attorney is 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Id.*

In *Strickler v. Greene*, the Virginia Supreme Court discussed "three components of a true Brady violation: The evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Id.* at 281–82, 119 S. Ct. at 1948. In discussing these requirements, the Court focused on the fact that a suppression of evidence alone is not sufficient to constitute a *Brady* violation. *Id.* at 281, 119 S. Ct. at 1948. Rather, there is a *Brady* violation only when "the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Id.*

In the case at bar, Respondent did not present any evidence that the witness statements were provided to the defense at trial. Although present at the time of the hearing, the trial prosecutor did not testify that he disclosed the statements to the defense. Respondent entered a discovery letter into evidence that listed all the items disclosed to the defense. The list did not include the statements. Although Attorney Anderson's memory is strained due to the length of time since the trial,

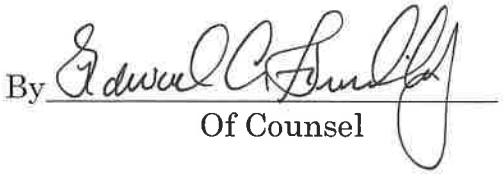
Attorney Anderson provided two affidavits and testified at the August 2, 2018 hearing that he has no recollection of receiving the statements or the information contained within them. Attorney Anderson also testified that he would have used the contents of the statements at trial if he had knowledge of them. In reviewing all three trial transcripts from petitioner's three trials, there is no reference by Attorney Anderson to the content of the statements other than the consistency he learned of in the discovery letter and the information he learned over the course of testimony at trial.

This evidence prove that the witness statements were suppressed at Petitioner's trial. Even if does not, the government is in the best position to show that the statements were provided. Rather than a defendant or petitioner having to show a negative, the government should be required to show that the evidence was disclosed. Of significance, the discovery letter submitted to the court at the evidentiary hearing on this Habeas Petition is the only such disclosure the Commonwealth has made. The discovery letter notably does not include the witness statements.

CONCLUSION

WHEREFORE, Petitioner requests that this Court reverse the trial court's decision and GRANT the Petition for Writ of Habeas Corpus. In the alternative, Petitioner requests that the case be remanded to the trial court in accordance with the aforementioned arguments and for consideration of the arguments contained in Petitioner's Memorandum in Support.

LESTER B. LYNCH

By 
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CERTIFICATE OF SERVICE

I hereby certify as follows:

1. The Petitioner is Lester B. Lynch, and Counsel for the Petitioner is Edward A. Fiorella (VSB #26176), Fraim & Fiorella, P.C. Town Point Center, Suite 601, 150 Boush Street, Norfolk, VA 23510, (757)227-5900 (phone) (757)227-5901 (fax), eafiorella@ff-legal.com.

2. The Respondent is Beth Cabell, Warden, Sussex II State Prison, and Counsel for the Respondent is Rosemary V. Bourne (VSB #41290), Office of the Attorney General, 202 N. 9th Street, Richmond, VA 23219, (804) 786-4820 (phone) (804) 371-0151 (fax), rbourne@oag.state.va.us.

3. I have complied with the Court's Order of April 15, 2020 by filing one hard copy of the foregoing Petition for Writ of Certiorari with the Clerk's office and electronically filing the same on this 13th of May 2020, and that I have served the foregoing Petition for Writ of Certiorari on opposing counsel with a PDF copy via electronic mail and a hard copy by depositing same in the United States Mail this same day.

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