

20-8237

No.

IN THE UNITED STATES SUPREME COURT

CHRISTOPHER RAD

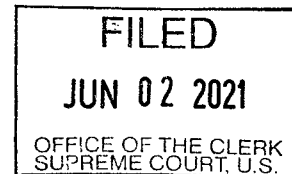
Petitioner

V.

UNITED STATES OF AMERICA

Respondent

PETITION FOR CERTIORARI Third Circuit Court of Appeals No. 19-3694



ORIGINAL

**Christopher Rad
Pike County Correctional Facility
175 Pike County Blvd
Lords Valley, PA. 18428**

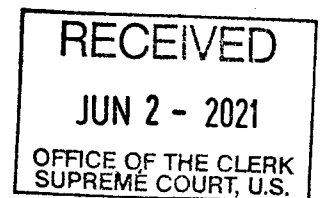


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I. QUESTIONS PRESENTED FOR REVIEW

(1) In federal habeas proceedings when violations of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) and *Napue v. Illinois*, 360 U.S. 264, 271, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) are found is the effect of multiple violations to be addressed cumulatively or may an appeals court ignore the cumulative effects and concentrate on a single violation?

(2) When a criminal defendant shows multiple violations of the above must a habeas petitioner show an acquittal to merit a new trial?

(3) When the government fails to prove essential conduct elements of all convicted counts at trial does this affect the court's materiality analysis in the context of the above violations?

(4) Is the government in a criminal trial required to provide impeachment evidence relating to a cooperating witnesses' criminal history that is in their possession?

II. JURISDICTION

The habeas court had jurisdiction in this matter pursuant to 28 U.S.C. § 2255. The Third Circuit Court had jurisdiction pursuant to 28 U.S.C. § 1291 and § 2253. This Court has jurisdiction pursuant to 28 U.S.C. § 1252. The Petition is timely as it is filed within 90 of the Third Circuit's April 1, 2021 decision denying rehearing *en banc*.

III. STATEMENT OF THE CASE

On or about November 15, 2012 the Petitioner went to jury trial in the District of New Jersey on a 9 count indictment that was returned by the grand jury on January 12, 2012 (3-11-cr-00161-001) that alleged violations of 18 U.S.C. §1037. On November 30, 2012 after a 2 week trial the jury returned guilty verdicts on counts 1 and 5-9 of the indictment Count 1 for conspiracy to violate 18 U.S.C. 1037(a)(3) and (4), Count 5 conspiracy to violate 18 U.S.C. 1037(a)(1) and Counts 6-9 aiding and abetting violation of 18 U.S.C. 1037(a)(1). The Third Circuit affirmed the convictions on March 14, 2014 in *United States v. Rad*, 559 Fed. Appx. 148,

2014 U.S. App. LEXIS 4816 (3d Cir. 2014). On or about October 28, 2015 the Petitioner filed a timely 28 U.S.C. 2255 petition challenge the convictions docketed as 3:15-cv-07740-AET. The Petitioner filed a timely suppliant on November 9, 2015 (15-7740 Doc. No. 4) and was given permission to file an amendment due to newly discovered evidence, which was filed on January 18, 2018(15-7740 Doc. No. 37). On September 7, 2018¹ the habeas court issued an order granting an evidentiary hearing on two of the Petitioner's ineffective assistance claims that (1) his trial counsel failed to properly advise him of the law to which he was indicted, and indicated there were valid defenses, which the trial court rejected; and (2) that he trial counsel failed to inform him of his sentencing exposure. The habeas court then denied relief and denied a certificate of appealability (COA) on the Petitioner's other claims. On December 17, 2018 the habeas court held an evidentiary hearing. The habeas court then issued its final decision on November 13, 2019², where it denied all of the Petitioner's remaining claims and denied a COA. The Petitioner appealed the denial of the COA and on April 9, 2020 the Third Circuit granted a COA on the Petitioner's claims regarding cooperating witness James Bragg that: (1) the Government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose evidence relating to Bragg's Michigan case; and (2) the government violated *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959), by knowingly presenting or failing to correct Bragg's allegedly false or misleading testimony. The COA also included the issue that the District Court erred in denying Petitioner's request for *Brady* related discovery regarding Bragg. The Third Circuit denied the habeas appeal on February 19, 2021³. The Petitioner applied for *En Banc* rehearing which was denied on April 1, 2021⁴. This Petition follows.

¹ *Rad v. United States of America*, 2018 U.S. Dist. LEXIS 152740 (D.N.J. September 7, 2018)

² *Rad v. United States of America*, 2019 U.S. Dist. LEXIS 223567 (D.N.J. November 13, 2019)

³ February 19, 2021 Third Circuit denial attached as Exhibit "A"

⁴ April 1, 2021 rehearing denial attached as Exhibit "B"

IV. ARGUMENT

1. **In federal habeas proceedings when violations of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) and *Napue v. Illinois*, 360 U.S. 264, 271, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) are found is the effect of multiple violations to be addressed cumulatively or may an appeals court ignore the cumulative effects and concentrate on a single violation?**

As part of the Petitioner's argument regarding the government's *Brady* and *Napue* violations the Petitioner argued that:

- A. **Bragg testified falsely about when his cooperation began in the Petitioner's case related to his Michigan case⁵.**

At the Petitioner's trial Bragg testified that he was not working with the government before his Michigan sentence:

Exhibit "C" P.138 L.16 (Exhibit "C" is relevant pages from Petitioner's 2012 trial)

Q. Before that [Michigan] sentence, were you working for the government.

A. No, I was not.

(Bragg was clearly working with the government before his Michigan sentence. his cooperation agreement is dated 9-12-2009⁶, Bragg's sentencing was 11-24-2009⁷)

Exhibit "C" P.193 L.20

Q. When did you become aware. Mr. Bragg, ... of the government's investigation into this case?

A. When I was already serving jail time for the previous case.

(Bragg was not serving jail time; Bragg was in pretrial waiting to plea.)

Exhibit "C" P.312 L.4

Q And would you please tell the jury what the date is on that document?

A 8/6/09.

Q Okay. And where were you at that time?

A In prison.

(Bragg was not in prison Bragg was in pretrial.)

⁵ Bragg had a previous criminal conviction that was pending when he agreed to cooperate against the Petitioner Michigan Case No. 2:07-cr-20627

⁶ Exhibit "H" Bragg's Cooperation in the Petitioner's case.

⁷ Exhibit "E" Bragg's Michigan Sentencing transcript.

Bragg's testimony about when his cooperation began is literally untrue as it conflicts with the term "sentence", and further in the in the interrogatories⁸ Bragg testified that he did not work with the government before he was "sentenced"⁹, which the habeas court credits to faulty memory¹⁰. Even if Bragg's testimony about when his cooperation began was not perjured, due to faulty understanding of "sentence", or faulty memory, it was not true, and the government was obligated to correct it¹¹. Bragg's false testimony about him not cooperating until after his Michigan sentence¹² gave the jury a false impression that Bragg had no motivation to get a deal in his Michigan case. The habeas court decision that Bragg misunderstanding of the term "sentence" rendered his false testimony harmless to the Petitioner is clearly erroneous. The government's failure to correct Bragg's false testimony that he testified that his cooperation began after his Michigan sentence violated the Petitioner's rights to due process and a fair trial.

B. Bragg testified falsely when he testified that was not in prison for using proxies.

At the Petitioner's trial Bragg testified that:

Exhibit "C" P.331 L.1

Q So in this case, you were suggesting using illegal proxies?

A Yes.

Q Even though you had just been to prison for that?

A **I wasn't in prison for using proxies.** I was in prison for spamming and security fraud.

⁸ The Petitioner sued Bragg in the District of Arizona cv 15-01078-PHX-DJH, the interrogatories are attached as Exhibit "F", No. 12 P.3 and P.8

⁹ In the interrogatory the Petitioner included the date of Bragg's sentencing as November 24, 2009 as so there would be no confusion.

¹⁰ *Rad v. United States of America*, 2018 U.S. Dist. LEXIS 152740, 2018 U.S. Dist. LEXIS 9-14 (D.N.J. September 7, 2018)

¹¹ Testimony is false if it was perjured or "created a false impression of facts which are known not to be true.". See *United States v. Boyd*, 55 F.3d 239, 243 (7th Cir. 1995)

¹² See *United States v Kenrick*, 306 Fed. Appx. 794 (3d Cir. 2009) "It strains common understanding to restrict the term "sentence" to mean only the length of imprisonment. See THE AMERICAN HERITAGE COLLEGE DICTIONARY 1242 (defining "sentence" as "a judicial decision of the punishment to be inflicted on one adjudged guilty") (3d ed. 1993)."

Bragg's Michigan plea agreement went into detail that was absolutely in prison for using illegal proxies¹³. Bragg plead guilty to count 5 of his Michigan indictment¹⁴. Count 5 P.16 No. 52 states:

"From on or about June 1, 2005, through on or about August 1, 2005, defendants RALSKY and Bradley directed and paid defendants JUDY M. DAVENOW and JAMES E. BRAGG to conduct several unlawful spam e-mail campaigns using **proxy computers** to send the spam...."

A **proxy computer** is defined in (Exhibit "G") Page 3 No.7 of the Michigan indictment:

"A "proxy computer" or "**open port computer**," is a computer that will accept incoming connections from any computer and then make outgoing connections to other computers..."

At Bragg's Michigan plea conference the Michigan court went into detail about Bragg's use of illegal proxies¹⁵. When the Michigan court asked "This is what you did in this case"? Bragg answered "This is exactly what I did Your Honor"¹⁶. The above shows that Bragg was in prison for using "illegal" proxies. In *United States v. Perdomo*, 929 F.2d 967, 970-971 (3d Cir. 1991) The Third Circuit held:

"The prosecutor's argument that he did not have any knowledge of Hector Soto's criminal history is without merit. The prosecutor was obliged to produce information regarding Soto's background because such information was available to him."¹⁷

Based on the rule set by the Third Circuit in *Perdomo* the government is also impugned knowledge of Bragg's criminal history. Further, the record clearly shows that the government met with Bragg and secured a cooperation agreement in Michigan while his Michigan case was

¹³ Exhibit "D" P.6-7 Showing Bragg referring to his proxies as peas p-s and proximate, Bragg's use of Nexus port scanning/spamming software, showing Bragg's constant need to find new sources of proxies.

¹⁴ See Exhibit "G" relevant pages of Bragg's indictment.

¹⁵ Exhibit "I" Bragg's Michigan plea conference P.8-12

¹⁶ Exhibit "I" P.12 L.13

¹⁷ See also *Id.* (holding that a prosecutor had constructive knowledge of information held by another arm of the government accessible to the prosecutor).

still pending. The government cannot claim ignorance to the nature of Bragg's Michigan conviction.

The government's knowingly used of Bragg's perjured testimony, which is that he testified that he was not in prison for using proxies, when he clearly was in prison for using proxies.

C. Bragg testified falsely about never incriminating himself on logged chat.

At trial Bragg testified that he nor the entire spamming community would incriminate themselves on any kind of logged chat¹⁸. As shown in Bragg's Michigan plea agreement Exhibit "D" page 6. Bragg was hung in his Michigan case by his incriminating chats. Due to the rule the Third Circuit established in *Perdomo* the government is impugned knowledge that Bragg's testimony that he never incriminated himself on logged chats was false is impugned. During closing arguments the government reinforced Bragg's false testimony:

Exhibit "C" P.1360 L.18 – P.1361 L.15

"James Bragg also testified about ICQ discussions, discussions that didn't occur in the Skype chats. He was cross-examined about this extensively, what do you mean it's not in the Skype chats? ...Bragg's theory is borne out, right? The Skype chats have been logged and we haven't been able to use ICQ chats. Special Agent Allen said there aren't these long lists of ICQ chats for us to be able to use. So that corroborates Bragg's testimony about that."

Exhibit "C" P.1362 L.3

"Ladies and gentlemen, why, why? You're talking on Skype. Why would you have a discussion about whether you're also on some other messages service? You're talking on Skype. Why would you need to even consider going to another messaging service when you're going to talk about that stock game? You need to consider it because **maybe James Bragg testimony is exactly right**, maybe the fact that we have the Skype chats but no ICQ chats is exactly right, ladies and gentlemen...people in the spam underworld, thought that the Government can get your Skype chats maybe and these are logged and maybe found but the ICQ, not so much. They considered switching to it."

¹⁸ Exhibit "C" P.99 L.18 - L.23, P.144 L.1, P.146 L.6, P.205 L.23, P.207 L.8, P.253 L.17, P.286 L.21, P.287 L.5, P.288 L.16, P.301 L.15, P.338 L.24, P.341 L.17, P.343 L.9, P.349 L.25, P.364 L.6-15.

The government's knowingly used of Bragg's false testimony and then arguing it as a relevant matter for the jury to consider.

D. Bragg had numerous pending criminal cases when agreed to cooperate against the Petitioner.

At Bragg's Michigan sentencing the government stated:

Exhibit "E" P.13 L.18

"Numerous additional conspiracies to having stock pump and dump...there are other districts that are looking at defendants in, connection with this case."

Exhibit "E" P.15 L.2

"And as I mentioned a minute ago, beyond New Jersey, there's at least one other U.S. Attorney's office that is looking at some defendants in this case, to include Mr. Bragg. It's possible for even other further unrelated conduct; it's possible there may be additional charges that are brought in this case."

Exhibit "E" P.15 L.9

"And, you know, we've learned of additional conduct in other points in time, or during and after our charged conduct."

Bragg's Michigan sentencing further showed that at the time Bragg had a net worth of negative \$12,032¹⁹. The fact that Bragg was not only facing his New Jersey case, but also cases in numerous other district, and after indictment conduct in Michigan while have no money to defend himself when he agreed to cooperate against the Petitioner is clearly impeaching, and shows Bragg's motivation to curry favor with the government.

Also Bragg's cooperation in the Petitioner's case was brought to the attention of the Michigan sentencing court:

Exhibit "E" P.12 L.2

"I'm confident will result in a government motion at the end of that process"

Bragg's cooperation in the Petitioner's case was clearly an issue for consideration in his Michigan sentencing, it was also material for the Jury to assess Bragg's motivation to cooperate.

¹⁹ Exhibit "E" P.17 L.10

Was the Third Circuit required to address all of the above violations cumulatively, or is it permissible to only address Bragg's false statement at his Michigan sentencing shown below?

2. When a criminal defendant shows multiple violations of the above must a habeas petitioner show an acquittal to merit a new trial?

In the Third Circuit Court's February 19, 2021 order affirming the denial of the Petitioner's habeas petition the Third Circuit ignored the mass of *Brady* and *Napue* violations listed above and only focused on Bragg's Michigan sentencing when speaking of his pending New Jersey case with the Petitioner Bragg stated:

Exhibit "E" P.14 L.11

"I talked to them up until 2008, but I didn't work. I technically never sent spam e-mail for him, but he did talk to me and I, in my chat logs I actually told him multiple times that I didn't want to work with him, his group., because the guy he was using was breaking the law; he was hacking and things like that. That's said multiple times in the logs. But he did send me money. He did send me \$20,000 that I can recall, but \$10,000 of it was taken back, \$10,000 I did keep. But other than that, I really actually never, I never proceeded to send e-mail for him."

Which clearly conflicts with the facts presented at the Petitioner's trial and Bragg's trial testimony where he testified that he did work with the Petitioner. At the Petitioner's trial Bragg testified that:

Exhibit "C" P.282 L.9

Q. Okay.

And do you recall your contract being -- well, do you recall that **Mr. Rad** sent you \$10,000?

A. Yes, I recall that.

Q. Okay. And do you recall that somehow the account got, your account got credited **\$20,000**? Do you recall that?

A. That is correct.

Exhibit "C" P.283 L.4

Q Okay. But, in fact, that money went to your account at billybob68, didn't it?

A That account was frozen and the assets were taken by e-gold.

Q I'm sorry?

A That account was -- e-gold took that account, they froze the account, they took the assets.

Q I see.

A I believe I withdrew roughly 7,000 of that. The e-gold held the rest.

There are numerous examples in the transcript where Bragg claimed that he did work with the Petitioner, but the Petitioner will only cite this one example, as it clearly conflicts with Bragg's Michigan sentencing:

Exhibit "C" P.115 L.1

Q When you sent -- did you send out an e-mail based on this?

A Yes, I did.

The Third Circuit held that:

"Given all for these circumstances, there is no reasonable probability that the **jury would have found Rad not guilty of Count One too** if Rad had been able to further impeach Bragg with Bragg's statement's at his Michigan sentencing."²⁰

The question now is must an appellant show an acquittal to show a *Brady* or *Napue* violation? Or is the possibility of a different result for *Brady* violations, or the possibility of affecting the judgement of the jury for *Napue* violations enough to merit a new trial?

3. When the government fails to prove essential conduct elements of all convicted counts at trial does this affect the court's materiality analysis in the context of the above violations?

On page 7 of Exhibit "A" the Third Circuit refers to evidence that corroborates the conspiracy conviction in count one of the Petitioner's conviction, but none of these prove a crime.

I. Bragg sent Rad test emails with false header information.

Regarding the test emails that Bragg sent the Petitioner Bragg requests the Petitioner's email address, and that the emails were just tests of Bragg's e-mail, and not seeds of the email

²⁰ Exhibit "A" P.7 L15

campaign. The government however claimed “We saw chats that the defendant requested it and received it every 10,000 or 15,000 e-mails.”²¹ This was the government arguing what it knew was false to the jury. One does not use real information in a test, this is why it is a test, but further the emails shown at trial merely had a false name placed next to a functional email address²². On December 21, 2020 The Third Circuit decided the Petitioner’s Immigration case, *Rad v. Attorney General*, No. 19-1404 (December 21, 2020), where on page 17 the Third Circuit specifically held that:

“business often have occasion to promote their services with addresses that pay homage to fictional mascots (‘Bulldog@Almamater.edu’), celebrity endorsers (‘Famous_Athlete@Nike.com’) or long-gone founders (‘Benjamin_Franklin@Printingpress.com’).

Nothing in §1037(a)(3) criminalizes these commonplace practices. By its terms, that subsection prescribes penalties only for individuals who ‘falsify,’ 18 U.S.C. §1037(a)(3), the ‘source, dentation, and routing information attached to an electronic mail message,’ 15 U.S.C. §7702(8). In other words, the information displayed in an email’s header information must match the address from which the message was actually sent---but not necessarily the sender’s true identity. When a business owner conveys communications from ‘Jane@Sportsfan.com,’ for example, the emails’ headers will report that address, foreclosing the application of §1037(a)(3) no matter what her name is or weather she follows sports.”

According to the Third Circuit Court’s December 21, 2020 order in *Rad v. Attorney General* the test emails that Bragg sent the Petitioner with a fake name next to the functioning email address (I.e the email’s header information matched the address from which the message was actually sent---but not necessarily the senders true identity) are not criminal in violation of §1037(a)(3), and do not prove a crime.

II. Bragg informed Rad that his emails were bypassing spam filters.

²¹ Exhibit “C” P.1358 L.1

²² Exhibit “J” test emails

Bypassing a spam filter is not illegal, and all email, bulk or not, can get caught in a spam filter. If one does a Lexus Nexus search for spam in any district court they will find many cases where the court's notifications are marked as spam and sent to spam boxes²³. The fact that Bragg's mail bypassed spam filters is normal business practice and not a crime.

III. Rad continued to work with Bragg even after learning that he had been indicted for illegal spamming in Michigan.

Defendants are innocent until proven guilty, including James Bragg, the Petitioner clearly made a mistake by hiring Bragg, but Bragg also represented to the Petitioner that he did nothing wrong in his Michigan case. Further, a conspiracy is not an association with bad people, the government must prove that the Petitioner agreed with Bragg to commit an illegal act, which the government failed to do²⁴.

IV. Rad initially denied having known at the time.

The Petitioner did not deny that he knew that Bragg was indicted for illegal spamming. The Petitioner never denied anything relating to his working with Bragg, but either way this does not prove a §1037 crime.

The text of the convicted statutes are as follows:

1037. Fraud and related activity in connection with electronic mail

(a) In general. Whoever, in or affecting interstate or foreign commerce, knowingly

(1) accesses a protected computer without authorization, and intentionally initiates the transmission of multiple commercial electronic mail messages from or through such computer, (counts 5-9)

²³ *Akinsanmi v. Nationstar Mortgage*, 2017 U.S. Dist. LEXIS 106009 (D.N.J., July 10, 2017); *KASHKASHIAN, JR. v. SHANAHAN, JR.*, 2014 U.S. Dist. LEXIS 157159 (E.D.PA November 5, 2014) are only two examples, the Petitioner could cite dozens more.

²⁴ See *United States v. Bell*, 954 F.2d 232, 236 (4th Cir. 1992) "More than mere association with bad people who are committing crimes is required for a conspiracy conviction. . . . A conspiracy is not shown until the government has presented evidence of a **specific agreement to commit a specific crime**, for the same criminal purpose, on the part of all indicted conspirators." *Id.* at 237

(3) materially falsifies header information in multiple commercial electronic mail messages and intentionally initiates the transmission of such messages, (count 1)

Multiple is defined as:

§ 1037(d)(3)

Multiple. The term “multiple” means more than 100 electronic mail messages during a 24-hour period, more than 1,000 electronic mail messages during a 30-day period, or more than 10,000 electronic mail messages during a 1-year period.

The Third Circuit tuned the above *Brady* and *Napue* violations into a sufficiency of evidence test, but at trial the government failed to prove any sort of knowing *mens rea* as to the purpose of false headers, failed to show any intentional modification of headers and the Third Circuit itself held in *Rad v. Attorney General* a false name in an email header does not violate §1037(a)(3)²⁵. Further §1037(a)(1) requires that multiple emails, as defined above, be sent through a protected computer. The government failed to prove this element. Even assuming that it is permissible to turn *Brady/Napue* materiality into a sufficiency of evidence test, if the government fails to prove a crime can a conviction be affirmed after *Brady* and *Napue* violations where the government failed to prove a crime at trial?

4. Is the government in a criminal trial required to provide impeachment evidence relating to a cooperating witnesses’ criminal history that is in their possession?

As shown above the government is in possession of incriminating chats from Bragg’s Michigan case as well as information of numerous pending charges that Bragg was facing when he was cooperating against the Petitioner. When, as shown above, the government’s case hinged on Bragg’s testimony that neither he nor the entire spamming community would incriminate themselves on any kind of logged chat, then the government argues that as a matter that the jury to consider is it permissible to suppress evidence of Bragg’s incriminating chats?

²⁵ Attached as Exhibit “K” is the Petitioner’s Judgement that shows his conviction on count one was predicated on §1037(a)(3) only.

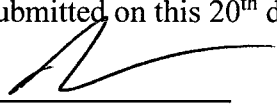
The questions for this Court to now answer are:

- (1) In federal habeas proceedings when violations of *Brady*, *Giglio* and *Napue* are found is the effect of multiple violations to be addressed cumulatively or may an appeals court ignore the cumulative effects and concentrate on a single violation?
- (2) When a criminal defendant shows multiple violations of the above must a habeas petitioner show an acquittal to merit a new trial?
- (3) When the government fails to prove essential conduct elements of all convicted counts at trial does this affect the court's materiality analysis in the context of the above violations?
- (4) Is the government in a criminal trial required to provide impeachment evidence relating to a cooperating witnesses' criminal history that is in their possession?

V. CONCLUSION

WHEREFORE, based on the above, the attachments and the Petitioner prays that this Honorable Court GRANTS Certiorari and answers the above questions.

Submitted on this 20th day of May 2021.



Chris Rad
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Lords Valley, PA 18428

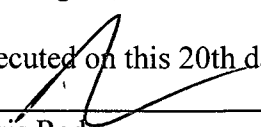
CERTIFICATE OF SERVICE Rule 29(4)(a)

I declare under the penalty of perjury that the foregoing is true and correct:

I served a copy of the enclosed PETITION FOR CERTIORARI Third Circuit Court of Appeals No. 19-3694 to the Solicitor General of the United States via USPS first class postal mail on May 20, 2021 at the following address:

Solicitor General of the United States
Room 5614, Department of Justice, 950
Pennsylvania Ave., N. W.
Washington, DC 50530-0001

Executed on this 20th day of May 2021.



Chris Rad
175 Pike County Blvd.
Lords Valley, PA 18428