No. 21-7033

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

OSCAR ALVARADO,

Petitioner,

V.

SUPERINTENDENT SOMERSET SCI:
DISTRICT ATTORNEY PHILADELPHIA:
ATTORNEY GENERAL PENNSYLVANIA:

PETITION FOR WRIT OF CERTIORARI TO THE
THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

OSCAR ALVARADO
SCI Mahanoy
301 Morea Road
Frackville,PA. 17932

QUESTIONS PRESENTED

I. Whether the United States Court of Appeal's for the Third Circuit entered a decision in conflict with the decision of several other United States Court of Appeal's for the Third Circuit and the Supreme Court of Pennsylvania,on whether a statement provided by a non-testifying co-defendant was harmless err and did not violate Mr. Alvarado's Sixth Amendment Right under the Confrontation Clause. Such a departure by a lower court calls for this Court's supervisory power.

II. Was Mr. Alvarado's trial counsel ineffective for failing to safeguard Mr. Alvarado's Sixth Amendment right to Confront an adverse witness.

III. Whether **Martinez v. Ryan** 566 U.S. 1(2012),excuse the procedural default on Mr. Alvarado's ineffective assistance of counsel claim where Mr. Alvarado's PCRA counsel declined to advance such a claim because PCRA counsel believed that Mr. Alvarado's Sixth Amendment Confrontation Claim had no merit.

IV. Was there sufficient evidence of the crime of Robbery in order to support a conviction of second degree murder without a robbery victim or evidence of a robbery.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution **Page**

Statutes

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The Petitioner,Oscar Alvarado,respectfully prays that a Writ of Certiorari be issued in order to review the judgment and opinion of the Third Circuit Court of Appeals,which rendered it's decision in these proceedings on September 15,2021

OPINION BELOW

The Third Circuit Court of Appeals affirmed petitioner's conviction in its Case No. 20-1142. The opinion is unpublished. The order of the Third Circuit Court of Appeals denying rehearing is reprinted in the appendix to this petition at page a4

JURISDICTION

The original opinion of the Third Circuit Court of Appeals was entered September 15, 2021. A timely motion to that court for rehearing was overruled on

The Jurisdiction of this Court is invoked under 28 U.S.C.§1254

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST.,AMEND. VI

In all criminal prosecutions,the accused shall enjoy the right to a speedy and public trial,by an impartrial jury of the State and district wherein the crime shall have been committed,which district shall have been previously ascertained by law,and to be informed of the nature and cause of the accusation;to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor,and to have the Assistance of Counsel for his defence.

U.S. CONST.,AMEND. XIV

Section 1. 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 or 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 to any person within its jurisdiction the equal protection of the laws.

28 U.S.C.§2254

(a) The Supreme Court,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 groung 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 States;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 Superme Court of the United States;or

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

(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 s 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 record 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 givrn to the State court's factual 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 proceeding.

(h) Except as prôvided 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

Oscar Alvarado is serving a life sentence despite the violation of his Sixth Amendment Confrontation Clause rights arising out of the admission and use of Mr. Alvarado's non-testifying co-defendant's ("Cynthia Alvarado") statement at their joint trial. The Commonwealth agrees with Mr. Alvarado that his Sixth Amendment Constitutional Right to Confront a witness was violated,and that trial counsel was constitutionally ineffective,and that any procedural default is excused based on the ineffectiveness of Mr. Alvarado's appointed post-conviction counsel. The only question remaining in the case is whether the unconstitutionally admitted statement of a non-testifying co-defendant actually prejudiced Mr. Alvarado. Clearly,it did.

Ms. Alvarado's statement substantially and injuriously influenced the jury's decision to convict Mr. Alvarado of second-degree,felony murder based on a non-reported alleged robbery, rather than the suggested third-degree murder by the defense. The statement by Mr. Alvarado's non-testifying co-defendant served as the linchpin for the Commonwealth's robbery charge at trial,bolstering the Commonwealth's only witness to this allege un-reported,victimless robbery,which offered the jury a memorable description of the non-existed,un-known victim of an alleged robbery who the Commonwealth witness **"Edwin Schermety"** named **"old head"**,which was used twice by the Commonwealth against Mr. Alvarado in its closing argument and by the only witness to this allege robbery.

Even the jury was not sure that it was even a robbery until the jury made a request to the court for the non-testifying co-defendant's statement be re-read which stated in part:

Cynthia Alvarado statement read by Police Detective Brian Peters:

> "The person who bought before wanted to get some discount from buying 25 Xannies earlier. They wouldn't do it,so this person took the Xannies off the old head and left..." **NT 7/13/10 pg 200-203**

Even though Mr. Alvarado's name was omitted,the jury knew that the Detective was talking about Mr. Alvarado because the District Attorney informed the jury who was who in the DA's open statement:

District Attorney Open Statement:

> "Oscar [Alvarado] gets out of the car to head into the parkto

> get the drugs. He goes into the park,approaches the drug dealer **[old head]** and robs him...Oscar [Alvarado] return...after robbing the drug dealer...**NT 7/9/2010 pg 34-37**

The Commonwealth offered no direct proof that this so-called **"old head"** drug dealer was ever real or robbed,instead relied on circumstantial evidence and the inference that can be drawn therefrom. It is essential that there be a logical and convincing evidence that there was a victim to a crime,namely in this case a robbery with no complainant,or victim to say that they were in fact robbed by Mr. Alvarado. United States v. Bycer 593 F.2d 549(3d Cir. 1979)

In Bycer the court held that "the difference between an inference and a speculation is that an inference is a reasoned deduction from the evidence,a speculation is a guess".

Therefore,according to Bycer if an inference is merely one of two or more possibilities ofroughly equal appeal or probability,then the proposition has not been proven beyond reasonable doubt and the verdict is a product of speculation and conjecture. see Turner v United States 396 U.S. 398,405,90 S.Ct. 642,24 L.Ed.2d 610(1970)

In this case the jury was force to guess that there was a man within the park with drugs, and Mr. Alvarado mite have robbed this man,which was based on a statement from a non-testiying co-defendant read by the police that a robbery took place,which in itself constitutes assertion to hearsay which violated Mr. Alvarado's Sixth Amendment right's,and Fed.R.Evid. 801(a)(c).

To be clear,Mr. Alvarado's conviction was based on violating the hearsay rules of evidence,along with violating the constitution,without such hearsay would have amounted to an acquittal of robbery and second degree murder.

Hearsay is defind as a statement,other than one made by the declarant while testifying at trial or hearing,offered in evidence to prove the truth of the matter asserted. Fed.R.E. 801 (c).

I. Whether the United States Court of Appeal's for the Third Circuit entered a decision in conflict with the decision of several other United States Court of Appeal's for the Third Circuit and the Supreme Court of Pennsylvania,on whether a statement provided by a non-testifying co-defendant was harmless err and did not violate Mr. Alvarado's Sixth Amendment Right under the Confrontation Clause. Such a departure by a lower court calls for this Court's supervisory power.

The Third Circuit's opinion misapplied the Bruton v United States 391 U.S. 123,20 L.Ed.2d 476,88 S.Ct. 1620(1968) analysis on whether a Confrontation Clause violation amounts to harmless error. First the Court flagrantly misstated the record. It stated that Mr. Alvarado's non-testifying co-defendant Ms. Alvarado's out-of-court statement that was read by a surrogate witness was harmless error because of the overwhelming evidence of the robbery of a drug dealer,and the murder of Yvonne Martinez. When several witnesses saw Mr. Alvarado shoot and kill Ms. Martinez,and the out-of-court statement of the non-testifying co-defendant which was read by a surrogate witness would indeed,have been strong evidence of Mr. Alvarado's guilt to the murder but not to the robbery.

In fact in order to connect Mr. Alvarado with the allege robbery of the phantom drug dealer the Commonwealth relied heavily on out-of-court statement of Ms. Alvarado. Which could not have been cross-examined by the defense. Without Ms. Alvarado's out-of-court statement the defense would have dealt a serious blow to the Commonwealth's case as to the robbery charge.

the United States Supreme Court for the Third Circuit requires,in making the harmless error analysis under Bruton that the reviewing court consider: **(1)** the importance of the witness testimony in the prosecution's case; **(2)** whether the testimony was cumulative; **(3)** the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; **(4)** the extent of cross-exanmination otherwise permitted;and **(5)** the overall strength of the prosecution's case. Cotto v Herbert 331 F.3d 217,254(2d Cir.2003)(quoting Delaware v. Van Arsdall 475 U.S. 673,684,106 S.Ct. 1431,89 L.Ed.2d 674(1986))

Under the Confrontation Clause of the Sixth Amendment,a criminal defendant has a right to confront witnesses against him. Portuondo v Agard 529 U.S. 61,65,146 L.Ed.2d 47,120 S.Ct. 1119(2000).

The lower Court's held that Ms. Alvarado's out-of-court statement was not the linchpin in the prosecutions robbery case,because other witness heard someone say that they were robbed.

A statement by any of the Commonwealth's witnesses that a person was robbed is not proof of a robbery unless the victim of the allege robbery states that he/she was in fact robbed or an attempt robbery of this victim took place.

A **"victim"** is defined as: **"Any person except an offender,who suffered injuries to his of her person[s] or property as a direct result of the crime"** 18 Pa.C.S.§1106 Even though §1106 refer's to "Restitution for injuries to the victim" it is the soul definition under the statute define's the term "victim".

With that said,there were zero evidence that Mr. Alvarado robbed a person within the park by any of the commonwealth's witnesses until Mr. Alvarado's co-defendants testimony was read to the jury confirming that it mite have been a robbery,however even if this court disagree's with Mr. Alvarado's hypothesis that his co-defendants statement was the key to his conviction,this court must still hold that there must be a named victim to the robbery or such a ruling would allow anyone to be found guilty of crimes with no victims,just individual's alleging that they saw a rape,robbery,or theft. Even a Murder has a named victim who cannot speak for them self's but their remain's is clear evidence that there was a named victim.

Thus,examining the plain and ordinary meaning of the definition of "victim" and "crime" under the Statutory Construction Act,there must be a victim to the crime of robbery in order for Mr. Alvarado to be convicted of robbery,or his conviction would read "Mr. Alvarado robbed no-one before killing Yvonne Martinez.

According to the Commonwealth and the lower court's the testimony of Edwin Schermety, Margie Beltran and Elizabeth Ortiz was sufficient to establish the crime of robbery.

As stated above Mr. Schermety said that he saw Mr. Alvarado enter the park and take something from a drug dealer while holding a gun which was never confirmed by any other witnesses for the commonwealth which under the law known as the **"two witness rule"** which was originally used for perjury statute,however in this case it is used to prove that the Commonwealth failed to prove the **"Corpus Delicti"** that there was a Robbery.

Commonwealth witness Margie Beltran testified that Alvarado returned with thirty Xanax, which again does not establish a robbery,because Mr. Alvarado could have paid for them or found them on his way back to the car,or this allege un-known drug deal could have just

given it to him,which we will never know because no such person ever reported a crime.

Known of the Commonwealth's witnesses testimony would have convicted Mr. Alvarado of robbery without a victim of the robbery filing a complaint or the use of his co-defendant Cynthia Alvarado statement.

Mr. Alvarado's Co-defendant's statement "that the other person **"took"** the Xannies off the old head" and the **"stolen"** pill bottle contained 28 Xanax" not only corroborated Mr. Schermety testimony that something was taken from an older man in the park,it also corroborated Ms. Beltran testimony that Mr. Alvarado came back with 30 pills.

Any testimony by the commonwealth witnesses standing alone is insufficient to establish the crime of robbery without the non-testifying co-defendant's statement that facially incriminated Mr. Alvarado. See Bruton v. United States 391 U.S. 123,88 S.Ct. 1620,20 L.Ed.2d 476(1968) ,see also Washington v Secretary Pa. Dept. 726 F.3d 471(2013).

In Washington the Honorable Circuit Judges Smith,Fisher and Chagares of the United States Court of Appeals for the Third Circuit held that the use of Washington's co-defendant Waddy confessional statement which was read to the jury as part of Detective John Cummings testimony violated Washington's Sixth Amendment Right to confront Waddy,even though Washington's name was replaced with words such as **"someone I know","the other guy","the driver","the guy who went into the store"** and **"the shooter".**

Mr. Alvarado and the Washington case are identical,and therefore the District Court should have set aside Mr. Alvarado's conviction such evidence introduced at trial clearly violated his Six Amendment right to confront his accuser,and the unreasonably applied clearly established federal law when it held that court properly admitted into evidence redacted non-testifying co-defendant testimony.

A. Prejudice

Ms. Alvarado's statement was at the heart of the Commonwealth's robbery case and critcally undermined Mr. Alvarado's constitutional right to present a defense by precluding him from presenting evidence that there was no robbery,establishing actual prejudice.

As a threshold matter,actual prejudice does not turn on whether,absent the Bruton error, the evidence in the case could support a guilty verdict;instead,the Court must determine

"whether the error itself had substantial influence" on the outcome. Kotteakos v United States 328 U.S. 750,765(1946).

Where a non-testifying co-conspirator's statement corroborates the testimony of other **"less-than-credible"** witnesses,the error can have a substantial and injurious influence on the outcome of the case even if the witnesses testimony,standing alone,would be sufficient evidence to support the jury's verdict. Johnson vSuperintendent Fayette SCI 949 F.3d 791,803 (3d Cir. 2020)(rejecting argument that non-testifying co-defendant's statement was **"cumulative"** where the statement served to improperly corroborate two other witnesses "less-than-credible testimony,making it more likely that the jury would set aside their doubts in favor of a conviction") see also Washington v Sec'y Pa. Dep't of Corrs. 801 F.3d 160,171-72(3d Cir. 2015)(finding an error not harmless because a co-defendant's statement had a "corroborative effect" on an eyewitness's "less-than-credible statement");Vazquez v Wilson 550 F.3d 270,282-83(3d Cir. 2008)(finding **"substantial and injurious effect"** arising from a Bruton violation despite ballistic,fingerprint,and other testimonial evidence incriminating the defendant).

Where **"the matter is so evenly balanced"** that it presents "virtual equipoise as to the harmlessness of the error","the uncertain judge should treat the error,not as if it were harmless,but as if it affected the verdict". O'Neal v. McAninch 513 U.S. 432,435(1995)

The determination of whether a Bruton violation had a **"substantial and injurious effect"** on the outcome depends on several factors,including **(1)** whether the testimony was cumulative **(2)** the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points **(3)** the importance of the witnesses testimony in the prosecution's case,and **(4)** of course,the overall strength of the prosecution's case. Delaware v Van Arsdall 475 U.S. 673,684(1986)

All of these factors weigh in favor of finding that the admission of Ms. Alvarado's statement caused actual prejudice in this case.

Ms. Alvarado's statement was far from being merely **"cumulative"** of other witness testimony in fact,it offered concrete information and vivid detail about the purport robbery that was not provided elsewhere in the trial.

Ms. Alvarado's statement asserted; "[t]he person who bought [Xannies] before wanted to get some discount from buying 25 Xannies earlier. They wouldn't do it,so this person took the Xannies off the **'old head'** and left." **(N.T. Trial, 7/13/2010 at pg. 2000)**

Ms. Alvarado's statement's **"[t]hey wouldn't do it"** and **"this person took the Xannies off the 'old head'"** closed the gap between Ms. Beltran's testimony **"that she and Ms. Alvarado asked Mr. Alvarado to get a play" N.T. Trial,7/12/2010 pg. 110-12"** and that of Mr. Schermety testimony which offered no information about the conversation between Mr. Alvarado and this alleged drug dealer and did not see what,if anything,was taken. **N.T. Trial,7/9/2010 pg. 65-68.**

The Commonwealth's use of Ms. Alvarado's statement at trial also belies its post hoc argument that the statement was not important to its case. The Commonwealth presented Ms. Alvarado's statement last,ensuring that it was the final piece of evidence the jury heard before closing arguments and deliberations,which was also used in the Commonwealth's closing argument.

In fact the Commonwealth twice adopted a specific phrase from Ms. Alvarado's statement **"old head"** to describe the purported drug dealer. **N.T. Trial,7/13/2010 at pg. 289-90,296"**

Neither of those choiceswould make sence if the non-testifying co-defendant's statement were dispensable to its case,as the Commonwealth now contends.

Notably,the Commonwealth's brief does not even address or defend its use of the phrase "old head",it elides the point by stating that the prosecution's closing argument did not "directly mention Cynthia's statement".

However the Commonwealth did not need to mention Cynthia Alvarado's statement directly.

By using the phrase "old head" it clearly reminded the jury of Ms. Alvarado's evocative and doubled down on its constitutional error by introducing the statement in the first place. See Washington 801 F.3d at 171

In Washington the held that Bruton error was not harmless where "a jury would have difficulty forgetting" details from the non-testifying co-defendant's statement when determining the defendant's guilt.

Without the non-testifying co-defendant's unconstitutionally admitted statement,the Commonwealth's robbery case boils down to inconsistent,unreliable and hearsay testimony.

Only one witness by the name of **"Edwin Schermety"** testified in open court that he saw an alleged robbery with no victim nor complainant alleging that he/she was robbed,along with his lack of key information about the content of the alleged exchange with the alleged drug dealer.

During cross examination and the tesimony of other witnesses revealed Mr. Schermety to be an inconsistent and un-reliable witness whose open charges were dropped after he gave the police an initial statement in Mr. Avlarado's case. **JA 126-27 (N.T. Trial 7/9/10 pp.144-45)**

The Commonwealth witness **"Margie Beltran"** testified to some peripheral events surrounding the purported robbery,however did not see the event itself,offered an account that differed from Mr. Schermety's testimony,including whether the victim of the alleged crime was a woman or a man. **N.T. Trial 7/12/10 pg. 117**

Ms. Beltran was high on Xanax and memory-altering PCP,and under threat of murder charge for her role in the crime,when she gave her initial statement to the police. **JA152,162-64,171-72 (N.T. Trial 7/12/10 pp. 96,135-36,140-41,171-76)**,and a Federal court reviewing the trial record surmised that "the jury did not place great weight on Beltran's testimony". Alvarado v. Wetzel No. 2:16-CV-3586,2019 WL 3037148 at *18(E.D.Pa. July 10,2019) No allege robbery victim ever testified to such crime nor filed a complaint with the police department.

In this context,the non-testifing unconstitutionally admitted and unchallengeable statement assumed heightened significance and improperly bolstred the Commonwealth's otherwise compromised witnesses. It reinforced key aspects of their testmony corroborating Ms. Beltran's testimony that Ms. Alvarado asked Mr. Alvarado to get a "play" **JA156 (N.T. Trial 7/12/10 pp. 110-12)**,for example ,and complemeneting Mr. Schermety's depiction of the alleged robbery by stating that "this person took the Xannies off the 'old head'"**JA248 N.T. Trial 7/13 10 pg. 200 which undercut Mr. Alvarado's ability to raise doubts about the credibility of Mr. Schermety,** the only eyewitness to the alleged robbery.

The non-testifying statement of Mr. Alvarado's co-defendant functioned as the glue holding together the testimony of Commonwealth's witnesses Mr. Schermety and Ms. Beltran,neither of

whom was independently credible.

Thus,this case fits neatly into this Court's line of cases establishing that non-testifying co-defendants statements that corroborate **"less-than-credible"** testimony are likely to affect the jury's verdicts. See Johnson v Superintendent Fayette SCI 949 F.3d 791,803(3d Cir. 2020)(rejecting argument that non-testifying co-defendant's statement was **"cumulative"** where the statement **"served to improperly corroborate"** two other witnesses less-than-credible testimony,making it more likely that the jury would set aside their doubts in favor of a conviction).

All parties agree that the admission of Ms. Alvarado's statement violated Mr. Alvarado's Confrontation Clause rights;the record and several Court's precedent confirm that the statement was an essential part of the Commonwealth's case.

The Commonwealth's attempts to explain away the problems with Mr. Schermety's testimony suffer from three mistakes.

First,the Commonwealth cherry-picks his most favorable statements,ignoring contradictory testimony that demonstrates his unreliability.

Second,the Commonwealth fails to address the real issues at hand. The sheer number of problems with Mr. Schermety's testimony,allowed with the specific gaps in his testimony about the alleged robbery,and the way that Ms. Alvarado's testimony bolstered his credibility.

Third the Commonwealth substitutes its own judgment foe that of the jury on key points like the weight of conflicts in the evidence and the extent of Mr. Schermety's bias.

As to the purported robbery in particular,Mr. Schermety asserted that he **"guess[ed]"** that Mr. Alvarado took something from the purported drug dealer's hands,but he could not see what the purported dealer had in his hands and admitted that he was only speculating that the man was holding pills because,Mr. Schermety's testimony was: **"I'm pretty sure that's what they sell in the park" JA107 N.T. Trial 7/9/2010 pp. 67-68.**

The Commonwealth also misses the larger issue of the way that Ms. Alvarado's statement bridged the gap between Mr. Schermety's and Ms. Beltran's testimony.

Ms. Beltran testified that Mr. Alvarado was supposed to ask for a "play" from the drug dealer. **JA156 N.T. Trial 7/12/2010 p. 112** whereas Mr. Schermety could not offer any information about the conversation between Mr. Alvarado and the so-called dealer. **JA107 N.T.**

Trial 7/9/2010 p. 65-66 Ms. Alvarado's statement that "[t]hey wouldn't do it so this person took the Xannies off the 'old head' and left" **JA248 N.T. Trial 7/13/2010 p. 200**,which is an assertion to hearsay which filled in the gap in Mr. Schermety's testimony and bolstered Ms. Beltran's account about the purported goal of the exchange.

The Commonwealth contends that Mr. Schermety's testimony and Ms. Beltran's testimony corroborate each other,which clearly it does not,because Mr. Schermety's testimony as to the interaction with the allege drug dealer does not support Ms. Beltran's testimony about what was discuss in the car,and Ms. Beltran did not see the purported robbery.

Only the use of Ms. Alvarado's non-testifing statement purports to describe both the discussion in the car **(ie "The person who bought before wanted to get some discount for buying 25 Xannies earlier")** and the purported exchange between Mr. Alvarado and the dealer. **(ie "They wouldn't do it,so this person took the Xannies off the "old head" and left.") JA248 N.T. Trail 7/13/2010 p. 200**

When viewed in context of the trial as a whole,and particularly in light of the fact that the drug dealer was not specifically identified,file a criminal complaint,nor testify at any court proceedings,it is reasonable to think that the witnesses inability to agree about the gender of the purported drug dealer might give a juror pause.

Mr. Schermety identfied the allege drug dealer as a man that was robbed,and Ms. Beltran testified that she heard a woman's voice saying **"he took my pills". JA158 N.T. Trail 7/12/2010 p. 117.** Which caused the jury to ask for clarification as to Ms. Alvarado's "Statement to the detective regarding the number of pills" and "Margie Beltran's statement during her testimony in court regarding how many pills Mr. Alvarado returned with. **JA295 N.T. Trial 7/14/2010 pp. 94-95.**

Questions like these clearly indicate that the jury was considering whether there was a robbery and if so was it a women or a man,however with the use of the non-testifying co-defendant's testimony that an **"old head"** had the allege pills allowed the jury to **"guess"** that a man was robbed.

The lengthy jury deliberations in this case reinforce that the jury found that the Commonwealth had an overall weak case. Without the robbery charge Mr. Alvarado would have been found guilty of third degree murder which was his defense.

It was Mr. Alvarado's defense that there was no robbery which would have caused the jury to find Mr. Alvarado guilty of third degree murder instead of second degree murder.

By the Commonwealth using the non-testifying codefendants statement that a man within the park (ie "old head") was robbed prohibited Mr. Alvarado from cross examining Ms. Alvarado's in violation of his Sixth Amendment right to confront the witnesses against him.

The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. Crane v Kentucky 476 U.S. 683,106 S.Ct. 2142,90 L.Ed.2d 636(1986)

In Schneble v Florida 405 U.S. 427,430,31 L.Ed.2d 340,92 S.Ct. 1056(1972) the Bruton Court further found that the danger of misuse of the confession by the jury was so great that admission of the co-defendant's confession was error,even when the jury is instructed to consider the confession only against the declarant.

Harmless Error

It is now well established that not every Bruton violation will lead to a reversal of a criminal conviction. Instead,á Bruton violation will not result in a reversal where the independent "properly admitted evidence of the defendant's guilt is so overwhelming,and the prejudicial effect of the co-defendant's admission so insignificant by comparison,that it is clear beyond a reasonable doubt that the improper ues of the admission was harmless error. **id. at 430.**

The burden of proof that an error is harmless rests squarely on the Commonwealth. Chapman v California 386 U.S. 18,24,17 L.Ed.2d 705,87 S.Ct. 824(1967)

The Commonwealth proved that the non-testifying co-defendant's statement to the shoting was **"wholly unnecessary"** to Mr. Alvarado's conviction of murder in light of the other witnesses at the scene of the crime,however the Commonwealth failed to carry its burden of proving that Ms. Alvarado's statement was harmless beyond a reasonable doubt to the crime of robbery.

As stated supra,there was no such evidence that there was a man within the park saling drugs,nor that this man was robbed. Therefore such evidence was not so overwhelming to render the admission of Ms. Alvarado's statement harmless.

This Court cannot in any way view Ms. Alvarado's statement as **"merely cumulative"**,because Ms. Alvarado's statement about the allege robbery,and the pills were the most devastating

evidence of Mr. Alvarado's guilt presented to the jury.

Moreover,this Court cannot say with assurance that Ms. Alvarado's statements did not contribute to the guilty verdict.

With the use of Ms. Alvarado's statement the Commonwealth was able to prove that robbery was the motive,which would prove second degree murder,however,without Ms. Alvarado's statement the Commonwealth can only prove that it was third degree murder.

Despite this plain violation of Mr. Alvarado's constitutional rights,the United States court of appeals held that Mr. Alvarado's rights were violated,however it was harmless error. This decision is clearly in conflict with the decision in washington v Secretary Pennsylvania Department of Corrections 726 F.3d 471(2013);and Bruton v United States 391 U.S. 123,126(1968).

Mr. Alvarado's right to confront a witnesses was not harmless. It's clear from the evidence that the non-testifying co-defendant's statement served as the **"linchpin"** of the prosecution's robbery case,blostering the testimony of otherwise unreliable testifying witnesses which influenced the jury's decision to convict Mr. Alvarado for a robbery that never happen,which lead to a conviction of second degree murder,instead of considering the third degree murder charge as the defense had suggested.

Mr. Alvarado's trial counsel missed an opportunity to change the court's mind about admitting the non-testifying statement of Ms. Alvarado,failed to object when the statement was offered at trial,and failed again to object or ask for a mistrial when the prosecution used Ms. Alvarado's statement against Mr. Alvarado,not once but twice during closing arguments and at trial.

Mr. Alvarado's PCRA counsel declined to advance these meritorious claims,instead filed a **"no-merit"** letter that denied any violation of Mr. Alvarado's Confrontation Clause rights.

Mr. Alvarado respectfully request that this Court grant Mr. Alvarado's Writ of Certiorari in order to address these constitutional harms and order a new trial or dismiss all charges.

The On October 21,2008 Mr. Alvarad and his two co-defendantant's went to a park known for the illegal sale of prescription pills. Upon arriving Ms. Beltran suggested to Mr. Alvarado that he try to **"get a play"** on the pills with his purchase. Cynthia Alvarado then told Mr.

Alvarado that **"if he could not get a play,he should pull out his gun"**. Mr. Edwin Schermety teastified for the Commonwealth and stated that he saw Mr. Alvarado walk up **"to a man"**,pull out a gun and stick it into **"the man's"** stomach. Mr. Schermety further testified that he saw Mr. Alvarado tugging,like pulling whatever he was taking out of **[the man's]** hand.

Margie Beltran testified that Mr. Alvarado returned to the car with 30 xanax,however she could not confirm if they were stolen or paid for. According to the record there was no evidence that there was a **"Robbery"** at all,just speculation,in fact there was **"no victim nor complainant"** to comfirm or testify that he or she was robbed by Mr. Alvarado.

Testimony by Mr. Schermety that he saw an allege robbery of an unknown man is not evidence of a Robbery unless the victim of this alleged Robbery state that he/she was robbed.

Robbery has been defined as:

> **§3701 Robbery**
>
> **(a)(1)** A person is guilty of robbery if,in the course of committing a theft,he:
>
> **(i)** inflicts serious bodily injur upon another;
>
> **(ii)** threatens another with or intentionally puts **"him"** in fear of immediate serious bodily injury;
>
> **(iii)** commits or threatens immediately to commit any felony of the first or second degree;
>
> **(iv)** inflicts bodily injury ypon another or threatens another with or intentionally puts **"him"** in fear of immediate bodily injury;
>
> **(v)** physically take or removes property from the person of another by force however slight;or...
>
> **(2)** An act shall be deemed **"in the course of committing a theft"** if it occurs in an attempt to commit theft or in flight after the attempt or commission...

18 Pa.C.S.§§3701

According to the statue no person can be convicted of the crime of robbery unless there is a victim of the robbery who made filed a complaint with the police accusing an individual of robbing him/her.

It's clear that due process requires the prosecution in a criminal case to prove beyond a reasonable doubt every element necessary to constitute the crime of robbery. In re Winship 397 U.S. 358,90 S.Ct. 1068,25 L.Ed.2d 368(1970). This Court must grant certiorari.

II. Was Mr. Alvarado's trial counsel Ineffective for failing to safeguard Mr. Alvarado's Sixth Amendment right to Confront an adverse witness

The Third Circuit's opinion misapplied the Strickland v Washington 466 U.S. 668,687-88(1984) test for prejudice in two important ways.

First,the Court flagrantly misstated the facts,when it stated that the Commonwealth was able to establish the predicate offense of robbery with the testimony of Edwin Schermety,who witnesses Mr. Alvarado enter the park and take something from a drug dealer while holding a gun to his stomach. Such evidence would,indeed have been strong evidence of Mr. Alvarado's guilt to the crime of robbery if there was a none victim who filed a criminal complaint with the police. But such a report or victim did not exist.

Instead,in order to connect Mr. Alvarado with the allege robbery,the Commonwealth relied on a statement of a non-testifying co-defendant which was read by an officer of the Philadelphia police department. Without this testimony there would have been no proof of a robbery,which would have dealt a serious blow to the Commonwealth's case for Second degree Murder.

This Court in the past required that in making the prejudice analysis under Strickland, that the reviewing court consider all of the evidence in the record,both that which was admitted at trial and that which is developed at the post-conviction stage. Strickland v Washington 466 U.S. 668,687-88(1984). Rompilla v Beard 545 U.S. 374(2005) Under this test,it is inappropriate to consider the evidence in the light most favorable to the verdict. It is clear that the Court of Appeals here disregarded this principle. As it has in several other cases,the court began its analysis by setting out the version of the facts given by the Philadelphia Court of appeals in its direct appeal opinion.

Under Strickland v Washington 466 U.S. 668(1984),ineffective assistance of counsel requires a showing **(1)** that counsel's performance was deficient,and **(2)** that counsel's deficient performance prejudiced his client. Albrecht v Horn 485 F.3d 103,127(3d Cir. 2007)(citing Strickland 466 U.S. at 689-92). The first prong requires that counsel's representation fell below an objective standard of reasonableness. Strickland 466 U.S. at 687-88. The second requires a reasonable probability that,but for counsel's unprofessional errors,the result of the proceeding would have been different. **Id. at 694.**

Both prongs are met in this case. Mr. Alvarado's trial counsel's attempts to safeguard

Mr. Alvarado's Confrontation Clause rights were deficient in several key respects.

Although counsel pursued severance to avoid any Confrontation Clause violation,once the joint trial was assured,counsel failed to cite appropriate authority when the trial judge offered an opening to revisit the Confrontation Clause issue,failed to object when the statement was read into the record,including when the reading used "he" to refer to Mr. Alvarado instead of the approved,gender-neutral redactions,and failed to object to the prosecution's direct use of Mr. Alvarado's words against Mr. Alvarado in closing.

These failures prejudiced Mr. Alvarado by improperly bolstering the prosecution's robbery case,which contributing to the convictions for robbery and second degree murder conviction, which undermind Mr. Alvarado'sdefense that he was only guilty of third degree murder.

Strickland's first prong is satisfied where the deficiencies in counsel performance are severe and cannot be characterized as the product of strategic judgment. United States v Gray 878 F.2d 702,711(3d Cir. 1989).

Case law strongly suggests that defense counsel's failure to raise or recognize a Bruton issue is tantamount to ineffective assistance of counsel. **30 Charles Alan Wright & Arthur R. Miller,Federal Practice and Procedure§6681 (2d ed. 2020)(citing cases);**see also Lambert v. Warden Greene SCI 861 F.3d 459,471-72(3d Cir. 2017);Preston v Superintendent Graterford SCI 902 F.3d 365,382(3d Cir. 2018).

Because the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Lambert 861 F.3d at 471(quoting Pointer 380 U.S. at 405),failing to protect a defendant's Confrontation Clause rights is objectively unreasonable.

Because the Third Circuit Court of Appeals has truncated the scope of Strickland v Washington,prejudice review,this Court must grant certiorari.

III. Whether Martinez v Ryan 566 U.S. 1(2012) excuse the procedural default on Mr. Alvarado's Ineffective assistance of counsel claim where Mr. Alvarado's PCRA counsel declined to advance such a claim because PCRA counsel believed that Mr. Alvarado's Sixth Amendment Confrontation Clamm had no merit

A procedurally defaulted claim may be raised only if the petitioner shows **"cause"** and **"prejudice"** or a **"miscarriage of justice"**. Coleman v Thompson 501 U.S. 722,750(1991)

Title 28,United States Code,Section §2254(i) bars habeas relief for ineffective assistance of counsel during collateral proceedings,such as a PCRA hearing. While the statute prohibits a claim based directly on collateral proceeding counsel's ineffectiveness,the ineffectiveness of trial counsel when state law requires the claim to be raiesd initially in a collateral proceeding. See Martinez v Ryan 566 U.S. 1,17(2012)

To qualify under Martinez for an exception to the normal rule of procedural default under Coleman a Mr. Alvarado must show: **(1)** that his ineffective assistance of trial counsel claim has **"some merit"** and **(2)** his state initial-review post-conviction counsel was ineffective under Strickland for failing to present or properly preserve the issue. Workman v Sup't SCI Albion 915 F.3d 928,937(3d Cir. 2019)(Citing Martinez 566 U.S. at 14)

Mr. Alvarado fairly presented the above claims to the state courts,but was denied on state law grounds that was independent of several federal questions which was inadquate to support the verdict. Therefore the above claims were procedurally defaulted.

In this case Mr. Alvarado was convicted of second degree murder after his non-testifying co-defendant's out-of-court statement was admitted in there joint trial in order to prove the crime of robbery,in violation of Mr. Alvarado's Sixth Amendment right to confront Ms. Alvarado under Bruton,which proved that Mr. Alvarardo's trial counsel was constitutionally ineffective and any procedural default at the federal habeas stage is excused under Martinez.

IV. Was there sufficient evidence of the crime of Robbery in order to support a conviction of second degree murder without a robbery victim or evidence of a robbery

A. CONFRONTATION CLAUSE

The Sixth Amendment to the United States Constitution provides in pertinent part:

> **"In all criminal prosecutions,the accused shall enjoy the right...to be confronted with witnesses against him."**

U.S. CONST. amend. VI.

The right to confront adverse witnesses is applicable to the States via the Fourteenth Amendment to the United States Constitution. Pointer v Texas 380 U.S. 400,404,13 L.Ed.2d 923 85 S.Ct. 1065(1965)

The right to confront and cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials. Lee v. Illinois 476 U.S. 530,90 L.Ed.2d 514,106 S.Ct. 2056(1986)

Thus,at its most bacic level,the Sixth Amendment seeks to ensure that the trial is fair and reliable by preserving an accused's right to cross-examine and confront the witnesses against him.

In order to protect thses rights,the Court has developed different analyses under the Confrontation Clause depending on how a statement is used at trial.

In this case Oscar Alvarado's Sixth Amendment right to Confront an adverse witness were violated when his non-testifying co-defendant's statement was admitted in their joint trial and used against him during closing argument.

Mr. Alvarado was accused of robbing a drug dealer and shooting someone while he was at or near the passenger seat of a car. Mr. Alvarado's co-defendant's redacted statement described the person in the passenger seat and asserted that **"this person took the Xannies off the old head"** and **"the person that took the Xannies dhot through the window and then got out of the car and walked out to the back and bust off...a few more shots"** N.T. 7/13.10,p.199-207

The District Court correctly found that the redactions referred directly to Mr. Alvarado, establishing a clear-cut violation of Bruton v United States 391 U.S. 123(1968) and Gray v Maryland 523 U.S. 185(1998)

In reviewing challenges to sufficiency of evidence,the test is whether,viewing evidence in light most favorable to Commonwealth and drawing all proper inferences favorable to the Commonwealth,trier of fact could reasonably have determined all elements of crime to have been established beyond reasonable doubt.

The evidence against Mr. Alvarado was insufficient to support the verdict of the crime of robbery upon a non-exist victim in the course of committing a theft.

The Commonwealth has failed to bring forth a victim of the allege robbery in order to testify to a theft of his property under §3701.

The law makes it clear that the burden is upon the Commonwealth to prove that a person was robbed and that Mr. Alvarado was the individual who robbed the victim. In order to meet this burden the Commonwealth must prove that there is a vicitm that was robbed and that Mr. Alvarado was the man who robbed him/her.

This burden of proof can not be established through hearsay testimony by the Commonwealth witnesses that they heard someone say that they were robbed without a victim to the robbery.

In this case the Commonwealth offered no evidence that Mr. Alvarado robbed a person except the testimony of Mr. Schermety. His testimony standing alone is insufficient to prove that Mr. Alvarado robbed a person within the park. The evidence shows that Mr. Alvarado left the park and got into his car. There is no evidence what soever that Mr. Alvarado did not already have 25 to 30 Xanax pills within his possession before he entered the park and never told his companions.

There was zero testimony that any of the Commonwealth's witnesses searched Mr. Alvarado before he entered the park. Therefore the use of the non-testifying co-defendant's statement that Mr. Alvarado had over 25 Xanax pills was the proof that the Commonwealth needed in order to allege that there mite have been a robbery.

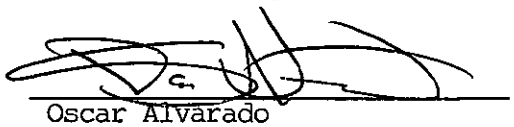
CONCLUSION

Mr. Alvarado is presently serving a life sentence following a jury trial that violated his constitutional rights in a substantial and injurious way. For the foregoing reasons as stated above Mr. Alvarado respectfully requests that this Honorable Court reverse his conviction and a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit Court

of Appeals.

Date: 1-13-22

Respectfully submitted,



Oscar Alvarado
SCI Mahanoy
301 Morea Road
Frackville,PA. 17932