NO. 22-519

In the
Supreme Court of the United States

**SHAWN ROGERS MALLOY,**
*Petitioner,*
v.

**COMMONWEALTH OF PENNSYLVANIA,**
*Respondent.*

On Petition for a Writ of *Certiorari* to the
Supreme Court of Pennsylvania

# BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is this case an unsuitable vehicle for deciding Malloy's federal issues where the Pennsylvania Supreme Court applied state law and did not decide a single question of federal law?

2. Is this case an unsuitable vehicle for deciding Malloy's newly raised federal issues where he failed to present them below, and the state courts consequently neither considered nor addressed them?

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## COUNTERSTATEMENT OF THE CASE

Shawn Malloy assaulted his wife, Claudia Malloy. Following his arrest, Malloy, who had personal knowledge of the criminal justice system from his employment as a police officer, dedicated an inordinate amount of time and energy into harassing, intimidating, and otherwise influencing the victim. In one example, he called her about 200 times.

The Pennsylvania Superior Court adopted the lower court's recitation of the facts as follows:

> Prior to the incidents that brought Appellant to court, he had a lengthy career as a police officer with the Conshohocken Borough Police Department. In the evening hours of November 21, 2017, a domestic incident occurred between Appellant and his wife in the parking lot of the Allstar Bar in New Hanover Township, Montgomery County. This bar is located across the street from their house. Appellant arrived as a customer at the bar at approximately 4:30 [p.m.] that day. Later that evening, [Appellant's wife] (hereinafter "victim") walked over to the bar, and the two verbally argued in the parking lot near where Appellant's truck was parked. Shortly thereafter, Appellant drove away and the victim walked home. Appellant returned to the bar shortly thereafter. Suspecting Appellant would return to the bar, the victim also returned and saw Appellant's truck parked in the parking lot. She gained entry into Appellant's truck by using the code on the door to the vehicle. Appellant was outside the bar on the deck and noticed lights on in his car. He found the victim in his car and a brief scuffle ensued. The victim sustained minor injuries. She then went home.
>
> The victim did not go to the police immediately that night. She claimed she was afraid to report this incident because her husband, Appellant, was a police officer. Appellant had often conveyed to her that "things could happen if [she] were to report to the police." Despite her fears, the victim went to the New Hanover Township Police Department the next day and encountered Detective Michael Coyle. She was still afraid to say anything or make any statement at that time due to the fact that Appellant was a police officer. She testified, "I didn't know what would happen if I said anything, from them not

believing me to, I don't know, losing jobs, everything. I was very scared." She took Detective Coyle's card and went home.

During this time, Appellant obtained a temporary custody order for the children based on his claim that the victim was going to harm herself or the couple's children. He informed her of this. Still very emotional and upset, [the victim] called Detective Coyle from her car, which she parked in a cul-de-sac near her home. Detective Coyle came to her location. She told him she was ready to give a statement, and they went back to the police station where the victim gave a written statement. Appellant arrived at the station at around the same time in order to turn over a copy of the emergency custody order.

As a result of the subsequent investigation, on November 24, 2017[,] police filed charges of simple assault and harassment against Appellant. (Montgomery County docket number CR 1010-2018). On January 11, 2018, the charges were held for court after a preliminary hearing. In the months that followed Appellant's arrest, Appellant engaged in an extensive and pervasive campaign, utilizing letters, text messages and phone calls, in an effort to harass, intimidate, or otherwise coerce the victim to drop the assault charges and/or refrain from testifying. As a result of this behavior, police filed additional charges against Appellant, including intimidation of a witness/victim, criminal use of a communication facility, obstructing administration of law, and harassment, over a span of many dates in late 2017 and 2018....

For conduct that occurred on December 6, 2017, Appellant was found guilty of intimidation of a witness/victim - withhold information and criminal use of a communication facility. On that date, the victim received a text message on her phone from a phone number 484-206-7631, which number was unknown to her. The text message said, "check your mailbox for a very important correspondence." In the mailbox was a letter that said:

> I can't believe they made sure that was in the paper, you and the kids must be so embarrassed. Shows they don't care about anyone but destroying certain people. Evidently Shawns [sic] defense has a couple videos of you attacking him. One with wine and one where you hit him a bunch of times in the back of the head while grabbing his mouth and neither show him fighting back. Check your house for cameras, the angle is downward towards a brown leather couch ... he may still be able to watch them

> or record remotely. If they turned those videos over to independent law enforcement, they may have no choice but to arrest you to cover their ass, the videos are pretty damning. If called DO NOT TALK TO ANYONE, USE YOUR RIGHT TO REMAIN SILENT AND DO NOT GIVE ANY STATEMENTS OR SUBMIT TO AN INTERVIEW regarding the videos. DO NOT COMMENT OR DENY, JUST REMAIN SILENT. And make sure those cameras get taken down.

[The victim] believed this was from Appellant. She testified that upon receipt of this letter she felt very scared because she knew Appellant had gone to wiretap school as part of his police training and had knowledge about how to wire a house with cameras. She was scared that Appellant had been in and around her home, and that he was attempting to instill fear in her related to the recent charges for which he was arrested.

Detective Michael Coyle of the New Hanover Township Police Department investigated this text message and letter. His investigation revealed that phone number 484-206-7631 was traced to a company by the name of Mathrawk, LLC. Mathrawk[ ] is a mobile application development company that sells applications for Android and Apple phones which allows a person to send a text message from a different phone number than their own. Detective Coyle obtained a search warrant for Mathrawk. He learned that the subscriber information associated with the Mathrawk phone number 484-206-7631 was ... Appellant's personal cell phone [number]. Investigation revealed that the Mathrawk account was created on December 2, 2017, approximately ten [ ] days after the date of the incident at the Allstar Bar and eight [ ] days after Appellant was arrested on the charges related to that incident. The records indicated that on December 6, 2017 at 10:34 [p.m.], a text message was sent to the victim's cell phone stating, "check your mailbox for a very important correspondence." This message was sent with Appellant's cell phone using the Mathrawk application to appear as if it was coming from a different phone number, a number that was unknown to the victim. Appellant admitted at trial that he created the fake phone number to send this text message to the victim.

For conduct that occurred on January 10, 2018, Appellant was found guilty of obstructing administration of law or other government function, and criminal use of a communication facility. On that date, [the victim] received an e-mail at approximately 11:04 [p.m.] from an

account with the name Ronald White and the e-mail address "rjresquire@outlook.com." (hereinafter "Ronald White e-mail"). This name and e-mail address were unknown to the victim. The victim received this email on January 10, 2018, the day prior to the preliminary hearing for the assault case related to the incident at the Allstar Bar. The e-mail address contained the word "esquire," appearing as if the correspondence [were] sent from an attorney. While this email purports to be from an attorney, the e-mail does not contain a name, phone number, or address at the bottom of the e-mail as professional emails typically do. It stated:

> [Victim], with the pending preliminary hearing, I am sure you are scared, as I am certain Shawn is as well. It's a shame the police have pushed this far in order to get him, leaving you without any say. They do not care who is embarrassed. It is a shame this process may take a year, involve testifying at the preliminary hearing, a habeas corpus hearing, suppression hearings, and the ultimate jury trial. Win or lose, both you and Shawn's name [sic] will be dragged through the mud, all details[,] your sex life over the years, all personal stuff will now be public record, and your children may be called to testify solely because the Police really wants him bad. There actually is a simple way to end it all. It would stop the criminal process, end all criminal proceedings, and most importantly protect you from any Police harassment or intimidation. This is in no way an attempt to coerce you or push you in any direction, but I don't think anyone has given you any options or told you the truth about all the process will intail [sic]. Let[']s face it, they don't care about Shawn, they don't care about you or your kids, and it's not like Shawn is going to be honest with you about what his defense is going to be, and he probably gave his lawyer full power. There is an option, a simple solution if you have the strength or actual independence to do it. At the preliminary hearing you will be prepped on questions and answers, simply refusing to testify will not help, they can and will proceed without you. If you choose to do so, all criminal stuff could end. Let them prep you, don't say anything, then, when you take the stand, at the very first question, you can make this statement as your answer: 'I have been pushed into this and bullied by the Police without any say. After consulting with a private attorney about the truth of everything that happened, I am

> utilizing my 5th Amendment right and refusing to answer any questions. I will not cooperate any further in any proceedings, or with the authorities.' Then remain silent regardless of what is asked. This simple statement when made exactly as written, completely ends the criminal case and protects you from any repercussions. It acknowledges you are doing so knowingly. Not attempting to influence you, or even asking you to do this, its [sic] just an option if you really want the criminal [sic] to end immediately.
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> Further investigation revealed that this e-mail originated at a known residence of Appellant. Detective Coyle obtained a search warrant for Microsoft for the e-mail account on the correspondence. The rjresquire@outlook.com account was created on January 10, 2018 at 10:55 [p.m.]. Nine (9) minutes later, at 11:04 [p.m.], the message was sent to the victim. The IP address associated with the e-mail was traced to Verizon Business. As a result, Detective Coyle issued a search warrant for Verizon Business. The search revealed that the e-mail account and the message that was sent [to] the victim were created at the address where Appellant resided at the time. Appellant's known e-mail address at the time was srmalloy@msn.com. The Detective learned through his investigation that the Ronald White e-mail and multiple "srmalloy" emails were sent from identical IP addresses.
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> Appellant was also found guilty of six harassment charges for conduct that occurred on May 1, 2018 and May 2, 2018. This conduct consisted of approximately [200] repeated phone calls from Appellant's personal cell phone ... to numbers owned by the victim, from both blocked and unblocked numbers, beginning on May 1st and continuing through the night and into the next day. Some of the calls employed the *67 feature to block the caller ID and appear as if the call was coming from an unknown or blocked number. Appellant admitted to making these phone calls to the victim on these dates.

*Commonwealth v. Malloy*, 2021 WL 4975681 (Pa. Super. Oct. 26, 2021) (quoting *Trial Court Opinion*, 8/21/20 at 3-10) (internal citations and footnotes omitted).

Before trial, Malloy filed a motion for sanctions related to the victim's acquisition of his notebook. During trial, she testified that she found the notebook

in one of the bags her kids typically put dirty clothes in while she was doing laundry. N.T. 11/4/19 at 65-67. When she paged through it, she realized it was Malloy's and noticed it had his handwritten notes about his witness list. N.T. 10/31/19 at 6; N.T. 11/4/19 at 66-67. She took photographs and contacted the prosecutor who was handling the case at the time. He told her not to give the pictures to the Commonwealth, and he contacted the defense attorney to disclose what had happened. N.T. 10/31/19 at 5-6.

Closer to trial, the prosecutor who was assigned discovered photographs of the notebook. She contacted defense counsel, and they agreed that an intern from the District Attorney's Office would review the file and sanitize it. *Id.* at 6-7. This was so the prosecuting attorney would never see the materials. Defense counsel received the materials from the Commonwealth, reviewed them, spoke to Malloy, and determined that "nothing they possessed was of such importance that bringing it to the Court's attention was appropriate[.]" *Id.* at 7.

This case involved about 50,000 pages of discovery. As defense counsel reviewed discovery in preparation for trial, he found a file labeled "witness list" and realized it was a JPEG of his client's notebook.[1] *Id.* at 7-8. Although three different prosecutors were assigned to this case at various points, none of them ever read the

[1] In his writ, Malloy—for the first time—says it was photos of seven pages of the notebook that contained headings such as "prior incidents," "evidence," "witness list," and "divorce custody." Pet. at 4-5. The only item that has ever been at issue, however, is a single file labeled "witness list." N.T. 10/31/19 at 7-8. Malloy's motion for sanctions only discussed a file labeled witness list that contained "details regarding notes from an attorney client conversation regarding witnesses, as well as general thoughts about each witness." *Motion for Sanctions*, 10/30/19 at 3-4. This is a far cry from the seven-page "roadmap of [his] evidence, witnesses, and related testimony" he now says the Commonwealth possessed. Pet. at 14.

contents of the JPEG, and it was not used in any way to prepare for trial. *Id*. at 13-14, 18-19. Defense counsel conceded that dismissal was not an appropriate sanction, but he suggested a jury instruction. *Id*. at 11.

In denying the motion for sanctions, the trial court determined that the Commonwealth "acted at all times to protect the defendant's rights and to ensure that no prosecutor who might be involved in this case did not see this information." *Trial Court Opinion*, 8/21/20 at 30. Additionally, it "did not engage in any misconduct or impermissible retention of the documents to warrant the imposition of sanctions." *Id*. The Commonwealth also did not fail to promptly notify defense counsel. Finally, the victim found the notebook, and she was "not acting as an arm of the commonwealth or an extension of law enforcement when she brought this information to the Commonwealth's attention." *Id*.

During trial, defense counsel had the opportunity to cross-examine the victim about the notebook, and the court gave standard jury instructions related to the credibility of witnesses.

The Pennsylvania Superior Court adopted the lower court's 40-page opinion and affirmed. *Commonwealth v. Malloy*, 2021 WL 4975681 (Pa. Super. Oct. 26, 2021). It denied his application for reargument. The Pennsylvania Supreme Court denied discretionary review. *Commonwealth v. Malloy*, 281 A.3d 1035 (Pa. July 6, 2022) (Table).

This petition for writ of *certiorari* followed.

## REASONS FOR DENYING THE WRIT

Although the underlying decision of the state appellate court is an unpublished memorandum opinion in which the court adopted the trial court's analysis as its own, petitioner stretches a single topic beyond its breaking point and asks this Court to accept jurisdiction to review four new claims.[2] In doing so, he—for the first time—suggests that this case involves violations of his due process rights under the Fifth and Fourteenth Amendments as well as his right to counsel under the Sixth Amendment. He uses his third claim to take issue with a remedy that he failed to object to and, in fact, proposed. His final claim asks which party should bear the burden of proof, which is a question that was neither presented to nor ruled on by the state courts.

### I. THIS CASE DOES NOT PRESENT ANY OF THE QUESTIONS PETITIONER SUGGESTS.

Malloy contends that, in declining to review his case and disturb the findings of the lower courts, the Pennsylvania Supreme Court has "decided important questions of federal law in ways that conflicts with the decisions of this Court." Pet. at 9. He continues, explaining that the state courts failed to recognize violations of his constitutional rights, which led to further violations under prior decisions from this Court. *Id*. at 9-10. The underlying premise for each of Malloy's claims—that the state court decided important questions of federal law—is flawed. In reality, the state court did not apply federal authority or consider a single question of federal

[2] Although Malloy later outlines three arguments, this brief says four claims based on his questions presented. Pet. at i, 10-25.

law. It therefore did not decide important federal questions in a way that conflicts with this Court's decisions.

Malloy never presented the arguments in his writ to the state courts below. In his motion for sanctions, he did not rely on, or even cite to, the United States Constitution or precedent from this Court. To be sure, his motion did not cite authority at all. At the subsequent hearing, he similarly did not suggest sanctions were warranted under federal law. Rather, he concluded his argument by acknowledging that "the case law in Pennsylvania and neighboring jurisdictions" did not call for dismissal. Nonetheless, he suggested a sanction in the form of a jury instruction while admitting that he did not have authority to support his suggestion. N.T. 10/31/19 at 11.

On appeal, the Pennsylvania Superior Court adopted the trial court's opinion in which it concluded that it properly exercised its discretion when it declined to impose sanctions related to the victim's acquisition of Malloy's notebook. The trial court explained:

> Neither of the assistant district attorneys handling this case ever actually saw the challenged material. It was not used in any way in preparation for this case. The Commonwealth acted at all times to protect the defendant's rights and to ensure that no prosecutor who might be involved in this case did not see this information. This information was in the possession of the Commonwealth presumably because an intern failed to recognize this as material to be quarantined. The Commonwealth did not engage in any misconduct or impermissible retention of the documents to warrant the imposition of sanctions. Nor, as Appellant claims, was there any failure by the Commonwealth to promptly notify Appellant and his counsel of the Commonwealth's possession of said notes. These notes were obtained by the complaining witness during a custody exchange. She was not acting as an arm of the commonwealth or an extension of law

> enforcement when she brought this information to the Commonwealth's attention. At trial, defense counsel had an opportunity to cross examine the witness related to this issue. The court instructed the jury on the credibility of witnesses and false in one, false in all. Those jury instructions relate to credibility of the witness and were sufficient to address this issue.

*Trial Court Opinion*, 8/21/20 at 30 (internal record citations omitted). The Pennsylvania Superior Court agreed with the trial court and adopted its opinion. The Pennsylvania Supreme Court denied review.

Malloy suggests that the Pennsylvania Supreme Court, in denying discretionary review, decided four important federal questions in a way that conflicts with this Court's decisions. In reality, however, the state courts did not decide any federal question, or even apply federal authority for that matter.

## II. CERTIORARI IS NOT WARRANTED ON THE UNPRESERVED AND PURELY ABSTRACT QUESTIONS PETITIONER PRESENTS NOW.

Perhaps recognizing the claim he pursued before the state courts does not involve federal law, Malloy now advances four questions that were neither presented to nor addressed in the state courts.

For more than 200 years, this Court has "consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (collecting cases). This is so because "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Id.* at 439. Further, when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper

presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969); *accord Adams v. Robertson*, 520 U.S. 83, 86-87 (1997).

Here, Malloy did not present the Pennsylvania Supreme Court with his theory that his due process rights under Fifth and Fourteenth Amendments were violated as stated in *Brady v. Maryland,* 373 U.S. 83 (1963), and *California v. Trombetta*, 467 U.S. 479 (1984). Rather, his petition for allowance of appeal seemingly acknowledged that his case fell outside the scope of *Brady*, but he implied that the Pennsylvania Supreme Court should use his case to give guidance to lower courts in scenarios where the prosecutor's misconduct involves negligence rather than reckless or intentional misconduct. *Petition for Allowance of Appeal*, 1/31/22 at 25.

In his Pennsylvania Superior Court brief, he presented the issue as follows: "Whether the Trial Court committed error and abused its discretion by failing to appropriately address or issue any sanctions for the Commonwealth's impermissible retention of attorney-client work product?"[3] *Appellant's Brief*, 10/6/20 at 5.

Before the trial court, he framed the issue as whether the court "erred in not imposing sanctions for the [c]omplaining witness's theft of the attorney client notes belonging to the [a]ppellant, as well as for the Commonwealth's impermissible retention of said paperwork and failure to promptly notify the [a]ppellant and his

[3] Had Malloy presented this claim as *Brady* or constitutional violation, the Pennsylvania courts would have analyzed it as a question of law for which its standard of review is *de novo* and its scope of review is plenary. *Commonwealth v. Smith*, 131 A.3d 467, 472 (Pa. 2015).

Counsel of the Commonwealth's possession of said notes." *Appellant's Concise Statement*, 7/21/20 at 5.

Additionally, Malloy did not advance a claim resembling his second, third, or fourth issue before the state court. Rather, he concocted these claims and presented them for the first time before this Court. As such, no state court decided—or even considered— whether his Sixth Amendment right to counsel was violated, whether the court's jury instruction (which Malloy never objected to) violated this Court's *Morrison* decision, or whether he properly bore the burden of proof.

This case does not present a suitable vehicle for deciding the unpreserved and (here) largely abstract questions Malloy now presents. The petition for a writ of *certiorari* should be denied.

## CONCLUSION

**WHEREFORE**, the Commonwealth respectfully requests that this Court deny the petition for writ of *certiorari*.

RESPECTFULLY SUBMITTED:

*/s/ Marissa A. Booth*
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