No. _____, October Term, 2022

IN THE

Supreme Court of the United States

RAHMAEL SAL HOLT,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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QUESTIONS PRESENTED

CAPITAL CASE

1. Does the United States Supreme Court have jurisdiction to hear Petitioner's *Brady* claim because the Supreme Court of Pennsylvania's default ruling was neither adequate nor independent of federal law?

2. Is *Brady* violated when an agreement between the prosecution and their star witness can be proven circumstantially, even if both parties deny that such an understanding exists?

PARTIES TO THE PROCEEDING

Rahmael Sal Holt, a death-sentenced Pennsylvania prisoner, was the appellant in the Supreme Court of Pennsylvania.

Respondent, the State of Pennsylvania, was the appellee in the Supreme Court of Pennsylvania.

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Petitioner Rahmael Holt respectfully requests that this Court grant a writ of certiorari to review the decision of the Supreme Court of Pennsylvania in this capital case.

OPINIONS BELOW

Mr. Holt seeks certiorari review of the Supreme Court of Pennsylvania's April 28, 2022 opinion denying relief on direct appeal. *Commonwealth v. Holt*, 273 A.3d 514 (Pa. 2022).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Supreme Court of Pennsylvania affirmed Mr. Holt's conviction and death sentence on April 28, 2022. On July 15, 2022, Justice Alito extended the time for filing this petition for certiorari from July 27, 2022, to August 26, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

I. STATEMENT OF THE CASE

A. Relevant Factual History

On November 17, 2017, Officer Brian Shaw attempted to stop a vehicle allegedly carrying Tavon Harper and Rahmeal Sal Holt. Immediately thereafter, Officer Shaw reported seeing a man run from the car. Officer Shaw chased after the man, was shot, and died soon after. Security camera footage caught, but could not identify, the perpetrator. At trial, the prosecution staked its case on the word of Tavon Harper—the car's alleged driver—who claimed that Holt had been a passenger in the car and that Holt had fled from Officer Shaw. Notably, Harper also claimed that Holt had possessed a firearm the day of the shooting—the only prosecution witness to do so.

Harper initially lied to the police, having his wife tell the police that she was the driver of the car that Officer Shaw pulled over. NT 11/5/19 281. Harper later changed his story after he was arrested on a drug offense and claimed that he was the driver. *Id.* When working with the

prosecution on Holt's case, Harper frequently mentioned his desire to leave jail. When Harper was deposed, he repeated six or seven times how much he wanted to go home. *Id.* at 326. At trial, Harper stated that he had been in jail "a long two years." *Id.* at 232. Despite denying the existence of a deal at trial, a few weeks after the close of trial, Harper was released on December 2, 2019. *Charges dropped against key witness who testified against convicted police killer Rahmael Holt*, GREENSBURG TRIB. REVIEW, December 2, 2019, https://triblive.com/local/valley-news-dispatch/charges-dropped-against-key-witness-against-convicted-police-killer-rahmael-holt/.

B. Procedural History

The Supreme Court of Pennsylvania summarized Petitioner's *Brady* claim:

> Holt alleges that the Commonwealth had an undisclosed agreement with Harper that he would testify at trial in exchange for the dismissal of his outstanding charges and his release from custody. Holt's Brief at 23-24. Holt draws attention to the fact that Harper was being held in the Westmoreland County Jail for the two years leading up to Holt's trial and faced felony drug charges and a parole revocation. N.T., 11/5/2019, at 232. Shortly after testifying, Harper was released from custody and the charges against him were dismissed. Holt's Brief at 24. Holt asks this Court to infer from the circumstances that there was a plea agreement, arguing that "[i]t offends one's sense of justice and defies logic to conclude that [Harper] did not have an agreement with the prosecution to set him free by testifying against [Holt]." Id. at 26. Holt complains that the Commonwealth's failure to disclose the alleged plea agreement violates the principle established in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and continued in *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). He contends that the jury could have been "significantly influenced" by Harper's undisclosed plea bargain and may have rejected Harper's testimony and rendered a different verdict as a result. *Id.* at 27.

Commonwealth v. Holt, 273 A.3d 514, 533-324 (Pa. 2022).

Notwithstanding that the proof of the deal came only after trial, the Supreme Court of Pennsylvania found default, noting that, under Pennsylvania procedural law, "[i]ssues not raised in the trial court are waived and cannot be raised for the first time on appeal." *Id.* at 535 (citing Pa.R.A.P. 302(a)). The Court also noted its previous holdings that "*Brady* claims are subject to waiver" under Pa.R.A.P. 302(a). *Id.* at 534 (citing *Commonwealth v. Hannibal*, 156 A.3d 197, 209-10 (Pa.

2016) (failure to raise *Brady* claim at trial or on direct appeal resulted in waiver); *Commonwealth v. Roney*, 79 A.3d 595, 609 (Pa. 2013) (*Brady* issues which could have been raised at trial and/or on direct appeal but were not, were waived for collateral review)). Accordingly, because "Holt did not raise the present claim — a *Brady* claim based on the Commonwealth's failure to disclose Harper's alleged plea agreement — in his Rule 1925(b) statement or at any point before the trial court," the Supreme Court of Pennsylvania declined to reach the merits of Petitioner's claim and instead found it waived. *Id.*

SUMMARY OF REASONS FOR GRANTING THE WRIT

Petitioner Rahmeal Holt was convicted and sentenced to death on the word of witness Tavon Harper who provided the sole foundation for the prosecution's case. Tavon Harper was the only one who could place Mr. Holt at the scene of the shooting and his testimony was the only evidence that Mr. Holt had a firearm at that scene. NT 11/5/19 275, 271. Harper was facing felony drug charges and a state parole revocation when he testified. At trial, Harper outright denied that any agreement or deal was made with the prosecution and the prosecution did not correct this claim. NT 11/5/19 325-26. However, after being jailed for two years, just a few weeks after he gave testimony favorable to the prosecution, Harper was inexplicably released from prison and his charges were dismissed.

Other facts support the inference of a deal. Harper had initially lied to the police about his involvement with Holt at the scene of the shooting, having his wife tell the police that she was the driver. NT 11/5/19 281. However, when Harper was deposed and when he testified at trial, he claimed that he was the driver. *Id.* That Holt has changed his statements and that his testimony was indispensable to the prosecution's case, further support a finding that an understanding was reached. *See Douglas v. Workman*, 560 F.3d 1156, 1184 (10th Cir. 2009).

Harper's testimony was subject to impeachment and likely materially affected the outcome of Holt's trial. This Court should grant certiorari to clarify that the existence of an inducement to testify, otherwise subject to *Brady* disclosure, can be proved circumstantially, even when the prosecution and the witness deny that such an understanding exists.

Despite compelling evidence of an undisclosed deal, including the witness's windfall *after trial*, the Supreme Court of Pennsylvania found default, applying a state rule that was neither adequate nor independent. In *Cruz v. Arizona*, 142 S. Ct. 1412 (2022) (No. 21-846), this Court recently granted a writ of certiorari to decide a similar procedural question regarding the independence and adequacy of a state procedural rule. The Court should therefore hold this petition for a writ of certiorari pending the decision in *Cruz*, and then dispose of the petition as appropriate in light of that decision.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT OF PENNSYLVANIA'S DEFAULT RULING WAS NEITHER ADEQUATE NOR INDEPENDENT; THIS COURT'S GUIDANCE IS NEEDED TO ENSURE STATES ENFORCE THE CONSTITUTION.

This Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution." 28 U.S.C. 1257(a). When the "highest state court is silent on a federal question," *Adams v. Robertson*, 520 U.S. 83, 86 (1997), and instead holds that a petitioner's claim is procedurally barred under non-federal law, this Court must determine "whether the asserted non-federal ground independently and adequately supports the judgment," *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 455 (1958) (quoting *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931)). This Court retains jurisdiction if "the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment." *Adams*, 520 U.S. at 87.

Here, because the Supreme Court of Pennsylvania's decision is both dependent upon federal law and inadequate to support the judgment, this Court retains jurisdiction and may reach the merits of Petitioner's claim.

A. The Supreme Court of Pennsylvania's Decision is Dependent Upon Federal Law.

The Supreme Court of Pennsylvania's application of Pa.R.A.P. 302(a) to Petitioner's *Brady* claim rests upon principles of federal law. As such, its decision is not independent of federal law and this Court retains jurisdiction.

A state law ground is not independent of federal law if "there is strong indication . . . that the federal constitution as judicially construed controlled the decision below." *Michigan v. Long*, 463 U.S. 1032, 1040 (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 556 (1940)). As such, when a state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [this Court] will accept as the most reasonable explanation that the state court" made its decision "because it believed that federal law required it to do so." *Florida v. Powell*, 559 U.S. 50, 56-57 (quoting *Long* at 1040-41); *see also Kansas v. Carr*, 577 U.S. 108, 117-18 (2016) (finding a state court's decision to rest on federal law when a key rule of state law relied upon federal law). To rebut this presumption, the state court must indicate "clearly and expressly that [its decision] is alternatively based on bona fide separate, adequate, and independent grounds." *Powell*, 559 U.S. at 57 (quoting *Long* at 1041).

In its decision below, the Supreme Court of Pennsylvania noted that "*Brady* claims are subject to waiver." *Holt*, 273 A.3d at 534. To support this proposition, the Court cited its own prior decisions in *Commonwealth v. Hannibal*, 156 A.3d 197, 209-10 (Pa. 2016) and *Commonwealth v. Roney*, 79 A.3d 595, 609 (Pa. 2013). In *Hannibal*, the Supreme Court of Pennsylvania found that, because the

petitioner had known about a potential *Brady* claim but failed to raise it on direct appeal, the petitioner had waived their *Brady* claim on collateral review. 156 A.3d 197, 210 (Pa. 2016). To support its decision, the Court stated that "*Brady* claims *may* be subject to waiver," a proposition it cited to *Roney*, 79 A.3d at 609-12. *Id.* at 209 (emphasis added).

In *Roney*, the Supreme Court of Pennsylvania held that a *Brady* claim that was not presented to the lower court in a timely manner was waived on appeal. *Roney*, 79 A.3d at 611 (citing Pa.R.A.P. 302(a)). To support its decision, the Court found it "well-established by [Pennsylvania] precedent" that *Brady* claims can be waived if an appellant raises a claim for the first time on appeal. *Id.* (citing *Commonwealth v. Chmiel*, 30 A.3d 1111, 1129-30 (Pa. 2011)) and *Commonwealth v. Spotz*, 18 A.3d 244, 275 n.17 (Pa. 2011)).[1] In *Spotz*, the Court similarly found that a *Brady* claim had been waived on appeal for failure to raise it in the court below. *Spotz*, 18 A.3d at 275 n.17.

Yet neither *Spotz* nor Pa.R.A.P. 302(a) suggest that a *Brady* claim is protected from waiver if its claimant is wholly ignorant of the alleged *Brady* material. Instead, *Roney*—and, through it, *Hannibal*—appears to derive such a principle from *Chmiel*. When an appellant "does not explain why prior counsel could not have uncovered the alleged violations with reasonable diligence" or "when or how [appellant] first became aware of the alleged *Brady* violations," the *Roney* court held, the *Brady* claim "could have been raised at trial and/or on direct appeal" and is therefore waived on collateral review. *Roney*, 79 A.3d at 609 (citing *Chmiel* at 1129-30).

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[1] The *Roney* court also cited to its opinion in *Commonwealth v. Ligons*, which held that, because a "*Brady* claim [based upon evidence that was equally accessible to the defense] could have been raised on direct appeal, but was not," the claim had been waived. 971 A.2d 1125, 1146 (Pa. 2009). The Supreme Court of Pennsylvania provided no support for this proposition except a citation to *Commonwealth v. Brown*, 872 A.2d 1139, 1148 (Pa. 2005), in which it had held that "the Commonwealth has no obligation to provide [*Brady* evidence that] is equally accessible to the defense." As support for its decision, the *Brown* court cited to *Commonwealth v. Spotz*, 756 A.2d 1139, 1154 (Pa. 2000), which held that there is "no violation of *Brady* where [the] prosecution fail[s] to turn over evidence readily obtainable by, and known to, [the] defendant." The holding in *Ligons*, therefore, is clearly founded upon principles of federal law.

In *Chmiel*, the Supreme Court of Pennsylvania held that, because an appellant "provide[d] no indication as to when or how he became aware of the alleged *Brady* material, all of which would appear to have been available at the time of his trial . . . or on direct appeal," his *Brady* claims were "waived for failure to raise them in an earlier proceeding." *Chmiel*, 30 A.3d at 1129. To support its decision, the Court cited to *Commonwealth v. Pursell*, 724 A.2d 293, 306 (Pa. 1999) and *Commonwealth v. Morris*, 822 A.2d 684, 696 (Pa. 2003). Yet *Pursell* does not support *Roney*'s "reasonable diligence" exception to waiver.

Instead, the Supreme Court of Pennsylvania appears to take this principle from *Morris*. In *Morris*, the Court held that, because "[a]ppellant fail[ed] to make clear that trial counsel did not have access to [*Brady*] information at the time of trial," his claim was not timely, and the Court lacked jurisdiction. 822 A.2d at 696. However, the language of "reasonable diligence" appears not in that section, but in a subsequent paragraph on the same page, in a context entirely divorced from the issue of waiver. Instead, the relevant section merely states that "no *Brady* violation occurs where the parties had equal access to the information or *if the defendant knew or could have uncovered such evidence with reasonable diligence*," *id.* (emphasis added), for which the Court cites to *Commonwealth v. Paddy*, 800 A.2d 294, 305 (Pa. 2002), which, in turn cites to *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984) and *United States v. Campagnuolo*, 592 F.2d 852, 861 (5th Cir. 1979). In short: *Chmiel*'s "reasonable diligence" exception to waiver is derived entirely from principles of federal law as decided by federal courts.

Notably, the Third Circuit expressly overruled *Starusko* in its subsequent decision in *Dennis v. Sec'y, Pa. Dep't of Corr.* 834 F.3d 263, 290 (3d Cir. 2016) ("The imposition of an affirmative due diligence requirement on defense counsel would erode the prosecutor's obligation under, and the basis for, *Brady* itself."). Had the Supreme Court of Pennsylvania relied upon *Dennis* instead of

Starusko, it may well have conditioned waiver on *actual knowledge* of *Brady* material, rather than the ability to uncover such material through reasonable diligence.

The Supreme Court of Pennsylvania's decision therefore appears to "rest primarily on federal law, or to be interwoven with the federal law." None of *Holt*, *Hannibal*, *Roney*, *Chmiel*, *Morris*, or *Paddy* indicate "clearly and expressly" that the state court's decision is "alternatively based on bona fide separate, adequate, and independent grounds." Accordingly, this Court is bound to "accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Because the state court's decision is not independent of federal law, this Court retains jurisdiction.

B. The Procedural Default Ruling is Inadequate to Support the Judgment.

In holding that Petitioner was not entitled to rely on the Commonwealth's representation that all *Brady* material had been disclosed, the Supreme Court of Pennsylvania's finding of waiver violates Petitioner's due process rights. As such, its holding under Pa.R.P. 302(a) is inadequate to support the judgment and this Court enjoys jurisdiction.

This Court has never exhaustively defined the essential components of an inquiry into the adequacy of a state law ground. *Cf. Lee v. Kemna*, 534 U.S. 362, 389 (2002) (dissent of Kennedy, J.) (attempting in dissent to clarify the "essential components of the adequate state ground inquiry"). However, this Court has held that there are "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (majority opinion).

This Court has found that such "exceptional" cases arise when, for example, the rule "would serve 'no perceivable state interest.'" *Id.* at 378 (2002) (quoting *Osborne v. Ohio*, 495 U.S. 103, 124 (1990)); *see also James v. Kentucky*, 466 U.S. 341, 349 (1984) (holding that allowing state-law rules that

"further no perceivable state interest" to bar jurisdiction would "force resort to an arid ritual of meaningless form" (quoting *Henry v. Mississippi*, 379 U.S. 443, 448-49 (1965) and *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958)). This Court has also found, in the case of "a federal constitutional claim," that a rule is inadequate when it is not "not strictly or regularly followed," *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964), when it is not "firmly established," *id.* at 423-24 (quoting *James v. Kentucky*, 466 U.S. 341, 348-351 (1984)), or when a petitioner "could not be 'deemed to have been apprised of its existence.'" *Id.* at 423 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958)). Altogether, this Court has held that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, *in justified reliance* upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.* at 423 (quoting *ex rel. Patterson*, 357 U.S. at 457) (emphasis added).

To support this principle, this Court in *ex rel. Patterson* cited its prior holding in *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673 (1930). *Ex rel. Patterson*, 357 U.S. at 457. There, the Supreme Court of Missouri "refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because . . . the plaintiff did not first seek an administrative remedy . . . which [was] not now open to it." 281 U.S. at 679. However, because this "administrative remedy . . . in fact, was never available," the state court's ruling had "den[ied] to [the plaintiff] the only remedy ever available for the enforcement of its right[s]," and therefore "transgress[ed] . . . the due process clause of the Fourteenth Amendment." *Id.* at 679-80.

In making *Brinkerhoff-Farris Tr. & Sav. Co.* the foundation of its adequate-grounds jurisprudence, this Court incorporated *Brinkerhoff-Farris Tr. & Sav. Co.*'s due process analysis into *ex rel. Patterson*—an incorporation that it would later extend to *James*, *Barr*, and *Ford*. It is clear, then, that under *ex rel. Patterson*, a state law procedural ground is inadequate to bar this Court's review if its

application in the instant case would deny the petitioner "the only remedy ever available for the enforcement of their rights" and thereby violate the petitioner's right to due process.

This Court has thus far declined to address the adequacy of state-law waivers in the *Brady* context. *Cf.*, *Cone v. Bell*, 556 U.S. 449, 467-68 (2009) (declining to reach the issue because the state "appellate court did not hold that [the petitioner's] *Brady* claim was waived."). However, under *ex rel. Patterson* and *Brinkerhoff-Farris Tr. & Sav. Co.*, applying Pennsylvania's waiver rule in the instant case would violate Petitioner's due process rights, rendering the Supreme Court of Pennsylvania's judgment inadequate to bar this Court's review.

A *Brady* claimant has no obligation to "scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed"—even when such material is "published in a local newspaper." *Banks v. Dretke*, 540 U.S. 668, 695 (2004). This Court has wholly rejected the principle that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence." *Id.* at 696. "A rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.*; *see also Dennis*, 834 F.3d at 290 (noting that this Court "has never recognized an affirmative due diligence duty of defense counsel as part of *Brady*").

Instead, because courts must ordinarily "presume that public officials have properly discharged their official duties," *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)), a defendant is entitled to rely upon the government's assertion that it has "fully disclosed all relevant information." *Banks* at 693. If the government denies concealing Brady material, it "'confirm[s]' [the defendant's] reliance on the prosecution's representation that it had fully disclosed all relevant information its file contained." *Id.* (quoting *Strickler v. Greene*, 527 U.S. 263, 289 (1999)).

Here, Petitioner specifically requested pretrial discovery of any plea agreements between the Commonwealth and any co-defendants or witnesses. None were indicated or disclosed. *see also* NT 10/19/18 ("[T]he Commonwealth has complied with every [discovery] request we made to date."). At trial, the Commonwealth elicited testimony from Tavon Harper denying the existence of a deal on direct examination:

> Q. Now, regarding the charges that are pending from Westmoreland County or the parole violation that's been filed against you, have you been told anything in terms of receiving favorable treatment in return for your cooperation in this case?
>
> A. I'm still in jail.
>
> Q. You're still in jail?
>
> A. Yes.
>
> Q. Has anybody from the District Attorney's Office or from law enforcement told you that if you testify and cooperate you'll be given consideration regarding that outstanding case and your Parole Board detainer?
>
> A. No, sir.

(NT 11/5/19 292). In closing argument, defense counsel attempted to impeach Harper through an allegation that he would do "anything to avoid going back to state prison":

> Now, Tavon Harper, is he an honest, credible prosecution witness that you can hang your hat on and base a verdict on or is he a liar? Is he a man desperate to do anything to avoid going back to state prison? The reasons he has to lie are many. You know he is on state parole . . . . If he has a gun and he is caught with a gun in his car, he is going back to state prison. If he gets caught with drugs in his car, he goes back to state prison. He has individual charges pending as he testified before you in the case.

Id. at 1007-08. The Commonwealth then reiterated its denial and attempted to rehabilitate Harper's credibility:

> You may have heard the phrase snitches gets stitches . . . . There is some fear that's appropriate and proper when a person gets on that witness stand and informs and tells the truth about another person there may very well be retribution. I'm sure Tavon Harper feared that from all of his former associates back in Homewood where he grew up, but he did identify the Defendant.

Id. at 1038-39. The Commonwealth therefore confirmed Petitioner's reliance on its representation that no agreement existed. Petitioner was entitled to rely upon this representation.

In requiring Petitioner to raise his *Brady* claim before the trial and appellate courts, the Supreme Court of Pennsylvania has effectively required Petitioner to forgo this reliance and instead "scavenge for hints of undisclosed *Brady* material" in the same kind of search—a survey of local newspapers—that this Court rejected in *Banks*. In applying Rule 302(a) to a *Brady* claim on direct review, the Supreme Court of Pennsylvania has ruled that "prosecutor may hide, defendant must seek," creating a world in which "the prosecution can lie and conceal and the prisoner still has the burden to discover the evidence."

In both the trial court and on direct review, Petitioner neither knew nor suspected that the Commonwealth had betrayed its obligation to disclose *all* exculpatory material to the defense. This revelation—and Petitioner's *Brady* claim—became available only on appeal to the Supreme Court of Pennsylvania. Yet the exceptional burden imposed by Rule 302(a) effectively denies Petitioner "the only remedy ever available for the enforcement of his rights"—review of his *Brady* claim on direct appeal—and thereby violates due process. This violation, under *ex rel. Patterson* and *Brinkerhoff-Farris Tr. & Sav. Co.*, renders the state court's decision inadequate to support the judgment. This Court retains jurisdiction.

II. THE SUPREME COURT OF PENNSYLVANIA'S APPROACH TO PROOF OF A *BRADY* VIOLATION IS UNDULY RESTRICTIVE AND CONFLICTS WITH THIS COURT'S DUE PROCESS JURISPRUDENCE.

The Supreme Court of Pennsylvania has held that the existence of a deal may not be inferred based on subsequent favorable treatment. *See Commonwealth v. Chmiel*, 30 A.3d 1111, 1131 (Pa. 2011) (stating that "mere conjecture" is insufficient to establish a *Brady* violation. *See also Commonwealth v. Champney*, 832 A.2d 403, 411 (Pa. 2003) (holding that the Commonwealth did not commit a *Brady*

violation by failing to disclose to the defense how it secured cooperation of the witness because there was no evidence of any "deal" that was fully corroborated by the Commonwealth); *Commonwealth v. Treiber*, 632 Pa. 449, 462 (Pa. 2015) (finding that the defendant failed to establish a *Brady* violation due to insufficient evidence). However, it is understood that "[i]mpeachment evidence which goes to the credibility of a primary witness against the accused is critical evidence and it is material to the case whether that evidence is merely a promise or an understanding between the prosecution and the witness." *Commonwealth v. Strong*, 761 A.2d 1167, 1175 (Pa. 2000). Yet, the Supreme Court of Pennsylvania has often dismissed cases in which the petitioner has claimed that the circumstances point to a deal. *See Commonwealth v. Simpson*, 66 A.3d 253, 266-67 (Pa. 2013) (holding that the PCRA court correctly dismissed this claim without a hearing because appellants simply suggested that, under the circumstances, a deal "must have been made" without proffering any evidence); *see Commonwealth v. Morales*, 701 A.2d 516, 523 (Pa. 1997). The Pennsylvania Court's narrow construction deprives litigants of their due process rights and rewards continued prosecutorial misconduct by creating an insurmountable burden so long as the witness and prosecutor deny that an understanding was reached.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution requires a prosecutor to "disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *United States v. Bagley*, 473 U.S. 667, 676 (1985). The evidence "must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Favorable evidence includes impeachment evidence as well as exculpatory evidence. *Bagley*, 473 U.S. at 676 ("This Court has rejected any such distinction between impeachment evidence and exculpatory evidence.").

This Court's precedent compels disclosure of favorable treatment: "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States,* 405 U.S. 150, 153 (1972). *Brady* claims are necessarily adjudicated after-the-fact because they arise only once the prosecution has withheld exculpatory, material evidence that deprived the defendant of the benefit of that evidence at trial. Furthermore, though *Bell v. Bell*, 512 F.3d 223, 233 (6th Cir. 2008) (en banc) found no tacit agreement due to insufficient evidence, the dissent made sure to note that tacit agreements, as opposed to explicit agreements "may be *more* likely to skew the witness's testimony." *Id.* at 245 (Clay, J., dissenting). In the case of an explicit agreement, the testifying witness will know what he can expect to receive in exchange for his testimony, and will know the conditions he must fulfill. When a witness is instead led to believe that favorable testimony will be rewarded in some unspecified way, the witness may justifiably expect that the more valuable his testimony, the greater the reward." *Bell*, 512 F.3d at 245 (Clay, J., dissenting). *See also* R. Michael Cassidy, "*Soft Words of Hope:"* Giglio, *Accomplice Witnesses, and the Problem of Implied Inducements,* 98 NW. U.L.REV. 1129, 1154 (2004) ("The more uncertain the inducement, the greater the witness's incentive to tailor his testimony to please the government, precisely because the witness does not know exactly what he will get for his cooperation, and hopes for the very best."); *cf. Bagley,* 473 U.S. at 683, 105 S.Ct. 3375 ("The fact that the [witnesses'] stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction."). If the intended favorable treatment is not disclosed, the defendant has no evidence and can only argue to attempt to counter the credibility that improperly accrues to the witness on account of his supposedly pure motive. However, the witness may be

more heavily incentivized to testify favorably to the prosecution when there is not an explicit deal and they only hope to receive favorable treatment. *See Bell*, 512 F.3d at 245-46 (Clay, J., dissenting).

A. This Court's Guidance is Needed to Clarify for the Lower Courts that the Existence of an Undisclosed Inducement to Testify May be Proved Circumstantially, and to Articulate a Framework for Such Proof.

Though it is established that mere conjecture is insufficient, what constitutes evidence of a deal is unclear. There is a lack of an analytical framework to guide the factfinder even in jurisdictions that allow for circumstantial proof of deal. The only instruction to prove a deal is that "there must be some assurance or promise from the prosecution that gives rise to a *mutual* understanding or tacit *agreement*." *Ragheed Akrawi v. Booker*, 572 F.3d 252, 263 (6th Cir. 2009) (emphasis in original) (citing *Bell v. Bell*, 512 F.3d, 223 233 (6th Cir. 2008)). This leads to disparate determinations of what constitutes a deal and what compels *Brady* disclosure. *Douglas v. Workman*, 560 F.3d 1156, 1184 (10th Cir. 2009) held that the variation in the star witness's testimony at trial from his pretrial statements created the inference of a deal and was therefore subject to *Brady*. *Cf. Romano v. Gibson*, 239 F.3d 1156, 1175 (10th Cir. 2001) (noting that a record strikingly similar to *Workman* raised significant suspicions about the existence of a deal for the witness's testimony, "particularly in light of the timing of these events and the significant benefit [the witness] derived...." but nevertheless refusing to find deal where the district court's determination to contrary was a factual finding and standard of review was therefore clear error). The Eighth Circuit has also held that even in the absence of a deal with the prosecution, favorable treatment post-trial still should have been disclosed under *Brady*. *See Reutter v. Solem*, 888 F.2d 578, 582 (8th Cir.1989) (holding that the fact that a sentence commutation hearing was to take place soon after the witness's appearance at a criminal trial constituted exculpatory material that should have been disclosed under *Brady*). This Court should provide guidance on when circumstantial evidence is subject to *Brady* disclosure in order to safeguard due process rights.

B. The Circumstances Surrounding Tavon Harper's Testimony and His Release Indicate that a Deal was Made.

In *Douglas v. Workman*, 560 F.3d 1156, 1184 (10th Cir. 2009) the court held that where an "indispensable witness's trial testimony varied significantly from his pretrial statements, an inference arises that the prosecution needed a deal to make its case." At trial, Harper testified that he initially had his wife tell the police that she was the driver because he was on parole and did not want to go to jail (NT 11/5/19 283). It was only after Harper was arrested that he admitted to being the driver. (*Id.* at 281). Once arrested, Harper's desire to leave jail was pervasive. In a videotaped statement prior to trial, Harper said "at least six or seven times that [he] just want[s] to go home" (*Id.* 326). This desire remained strong at trial where Harper testified that he had been in jail for "a long two years" (*Id.* at 281). Despite Harper's desires to leave jail, Harper denied that he had any deal with the prosecution:

> Q: "Now, regarding the charges that are pending from Westmoreland County or the parole violation that's been filed against you, have you been told anything in terms of receiving favorable treatment in return for your cooperation in this case?"
>
> A: "I'm still in jail."
>
> Q: "You're still in jail?"
>
> A: "Yes."
>
> Q: "Has anybody from the District Attorney's Office or from law enforcement told you that if you testify and cooperate you'll be given **consideration** regarding that outstanding case and your Parole Board detainer?"
>
> A: "No, sir."

(*Id.* at 292). Later on when questioned by the defense counsel, Harper again denied the existence of a deal and claimed his sole motivation for testifying was to help the truth come to light.

> Q: "And you told us on Direct or telling Mr. Peck that you have **no deal** in this case, right?

A: "Right."

Q: "You're certainly hoping to gain some advantage to get out of jail, correct?"

A: "I'm hoping. I just want the truth to be out there."

Id. at 325-326. Yet, just a few weeks after trial, Harper was released and the felony drug charges and state parole revocation were dismissed. As the only witness who could place Holt at the scene of the shooting with a gun, Harper was an indispensable witness. Harper's testimony also varied significantly from his previous statements. Under *Workman*, the circumstances surrounding his testimony and his subsequent release from prison would indicate that Harper had a deal with the prosecution. This deal should have been disclosed at trial to impeach Harper. Harper's agreement with the prosecution would have revealed that Harper's primary motivation was not candor, but his desire to go home after being in jail for a long two years. This Court should grant certiorari to clarify for the lower courts the analytical guidelines necessary for circumstantial evidence to prove a deal.

C. Harper's Incentive to Testify in Favor of the Prosecution Undermines Confidence in Holt's Conviction.

Under *Brady*, evidence is material and prejudice is found "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. Considerable precedent from the Supreme Court and lower courts indicates that the defendant is prejudiced from the withholding of favorable impeachment evidence when the prosecution's case hinges on the testimony of one witness. *Banks v. Dretke,* 540 U.S. 668, 700–01 (2004); *Giglio v. United States,* 405 U.S. 150, 154–55 (1972); *see also Bagley,* 473 U.S. at 683; *Napue v. Illinois,* 360 U.S. 264, 269 (1959); *Robinson v. Mills*, 592 F.3d 730 (6th Cir. 2010) (holding that suppressed impeachment evidence of the prosecution's star witness was material under *Brady*); *see also Joseph v. Coyle*, 469 F.3d 441, 471–72 (6th Cir. 2006).

Here, the prosecution's case hinges on Tavon Harper's testimony: Harper was the sole witness to place Holt at the scene of the shooting of Officer Shaw and the only witness to place a firearm in the hands of Holt at this scene. NT 11/5/19 275, 271. In *Harris v. Lafler*, 553 F.3d 1028, 1033–34 (6th Cir. 2009), the government's star witness, Richard Ward, made a deal for his release in exchange for testifying. Ward's testimony "was the *only* piece of eyewitness evidence that directly linked Harris to the shooting. *Id.* Without Ward's testimony, the prosecution's case was circumstantial: none of the other witnesses could identify the gunman or place Harris at the scene, and there was no forensic or physical evidence connecting Harris to the crime." *Id.* The court found that because Ward's credibility was discredited due to his deals with law enforcement and given that no other evidence directly linking Harris to the crime, the court's confidence in the conviction was undermined. *See id. Cf. Strickler*, 527 U.S. at 293 (noting that failure to disclose impeachment material was not prejudicial in part because "there was considerable forensic and other physical evidence linking petitioner to the crime").

As in *Harris*, Harper is the only evidence linking Holt to the crime. "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio,* 405 U.S. at 154 (citing *Napue*, 360 U.S at 269). Harper's reliability was entirely determinative of Holt's conviction because the prosecution could not have made their case against Holt without Harper. Holt had every incentive to testify and prove the prosecution's theory of the case. His desire to go home undoubtedly influenced his testimony as he likely understood that the more valuable his testimony the greater the likelihood of his release. *See Bell*, 512 F. 3d at 245 (Clay, J., dissenting). The failure to disclose a tacit agreement constitutes a *Brady* violation and deprived Petitioner of his right to a fair trial.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that the Court issue a writ of certiorari.

Respectfully submitted,

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