No. 22-5463

In the

Supreme Court of the United States

RAHMAEL SAL HOLT,
Petitioner

V.

COMMONWEALTH OF PENNSYLVANIA
Respondent

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

James T. Lazar
Assistant District Attorney
Westmoreland County District Attorney's Office
2 N. Main Street Suite 206
Greensburg, PA 15601
jlazar@co.westmoreland.pa.us
724-830-3949
PA ID No: 307469
Member of the Bar of the Supreme Court
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. STATEMENT OF JURISDICTION 1

II. STATEMENT OF THE CASE 1

A. Relevant Factual History 1

B. Procedural History 3

III. ARGUMENT IN OPPOSITION TO THE WRIT 5

A. This Honorable Court lacks jurisdiction because the decision of the Supreme Court of Pennsylvania rests on adequate and independent state grounds 5

B. The grant of a writ of certiorari in this matter would be imprudent, due to the lack of development of the facts necessary to decide the underlying federal question 11

C. This Honorable Court's recent grant of certiorari in Cruz v. Arizona, 142 S.Ct. 1412 (2022) (No. 21-846), does not compel a delayed denial of certiorari in this matter 13

D. Certiorari should not be granted in order to provide guidance in proving a Brady violation where, as here, Petitioner failed to offer any evidence in the court below 14

a. Petitioner conflates circumstantial evidence with a lack of evidence 15

b. Petitioner creates a "conflict" in the lower courts out of whole cloth 16

c. Petitioner is not entitled to a presumption of a Brady violation built upon an inference unsupported by evidence 16

d. The circumstances of Harper's testimony and the evidence at trial do not give rise to an "inference of a deal" and no prejudice could be established even if such a deal could be inferred 17

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Federal Cases

Adams v. Robertson, 520 U.S. 83 (1997)……11, 12

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)……12

Brady v. Maryland, 373 U.S. 83 (1963)……*passim*

Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673 (1930)……10

Cruz v. Arizona, 142 S.Ct. 1412 (2022) (No. 21-846)……13, 14

Douglas v. Workman, 560 F.3d 1156 (10th Cir. 2009)……15, 16

Ford v. Georgia, 498 U.S. 411 (1991)……7

Foster v. Chatman, 578 U.S. 488 (2016)……7

Harris v. Reed, 489 U.S. 255 (1989)……7

James v. Kentucky, 466 U.S. 341 (1984)……7

Lynch v. Arizona, 578 U.S. 613 (2016)……13

Michigan v. Long, 463 U.S. 1032 (1983)……11

Simmons v. South Carolina, 512 U.S. 154 (1994)……14

Strickler v. Greene, 527 U.S. 263 (1999)……17

Webb v. Webb, 451 U.S. 493 (1981)……12

Yee v. City of Escondido, 503 U.S. 519 (1992)……11

Federal Statutes

28 U.S.C. § 1257……1, 5

State Cases

Commonwealth v. Chmiel, 30 A.3d 1111 (Pa. 2011)……8

Commonwealth v. Hannibal, 156 A.3d 197 (Pa. 2016)……7

Commonwealth v. Holt, 273 A.3d 514 (Pa. 2022)……*passim*

Commonwealth v. Morris, 822 A.2d 684 (Pa. 2003)……8

Commonwealth v. Pursell, 724 A.2d 293 (Pa. 1999)……8

Commonwealth v. Roney, 79 A.3d 595 (Pa. 2013)……………………………………..……7

Commonwealth v. Simpson, 66 A.3d 253 (Pa. 2013)……………………………………15

State of Arizona v. Cruz, 487 P.2d 991 (Az. 2021)………………………………...13, 14

State Rules

Pa.R.A.P. 302……………………………………………………………..………5, 6, 9

Pa.R.A.P. 1925…………………………………………………..…………….4, 5, 6, 9

I. STATEMENT OF JURISDICTION

The Commonwealth of Pennsylvania submits that this Honorable Court lacks jurisdiction, because the Pennsylvania Supreme Court's decision in this matter rested on adequate and independent state grounds. Petitioner has averred that this Court has jurisdiction under 28 U.S.C. § 1257(a).

II. STATEMENT OF THE CASE

A. Relevant Factual History

On November 17, 2017, City of New Kensington Patrolman Brian Shaw conducted a traffic stop of a Jeep operated by Tavon Harper. The Jeep slowed, allowing Rahmael Sal Holt, Petitioner herein, to exit the vehicle and flee on foot. During a short foot pursuit, Holt fired multiple shots from a .40 caliber handgun, killing Patrolman Shaw. Shaw's radio communications did not identify the perpetrator, and a private video surveillance system that recorded the incident was not clear enough to make an identification. After providing differing stories to investigators, Tavon Harper identified Shaw's killer as Holt. Harper also observed Holt with a gun on the day of Shaw's murder. Commonwealth v. Holt, 273 A.3d 514, 523 (Pa. 2022).

In addition to this identification evidence, Holt's cellular phone was found in the back yard of a residence less than one block (165 yards) away from the scene. Holt, 273 A.3d at 523-24. Three residents of 1206 Victoria Avenue, a house located immediately next door to the house where Holt's phone was discovered, identified

Holt as a frequent visitor to the house and romantic interest of one of their housemates. Id., at 524. On the night of Patrolman Shaw's murder, one of those residents, Antoinette Strong, heard gunshots out her window, followed very shortly by tapping at the back door. When she opened the door, Strong found Holt. Holt immediately went into the basement at 1206 Victoria Avenue before going upstairs to see the other residents of the house. Id., at 524. Holt was identified as having an injury to his hand, between his thumb and index finger, referred to as "slide bite," an injury inflicted from the slide of a semi-automatic handgun when the gun is discharged. Id., at 526; Notes of Trial Testimony (hereinafter "N.T."), 11/6/19, at 409-10, 445-46.

Despite repeated visits by canvassing law enforcement officers to 1206 Victoria Avenue, the residents initially concealed the fact that Holt had been seen there immediately after Patrolman Shaw's murder. N.T., 11/6/19, at 418. On November 18, 2017, Holt's cousin, Lisa Harrington, arrived at the residence with several children, went into the basement, returned with a bag, and left the residence without her children for a short period of time. Holt, 273 A.3d at 524-25. Neither Harrington nor these children were regular visitors to this home. Antoinette Strong's aunt, Lakita Cain, told one of the housemates, Holly Clemens, that Harrington was getting Holt's gun out of the house. N.T., 11/6/19, at 502-3. The murder weapon was never recovered by investigators.

Holt's flight from the New Kensington area was swift. The night of the murder, Harrington drove him to a girlfriend's home in Natrona Heights, across the

Allegheny River from New Kensington. Id., at 525. From there, his girlfriend drove him to his mother's home in the Homewood section of Pittsburgh. Id. Holt was next observed arriving at the Duquesne home of his cousin, Marcel Mason. Mason's girlfriend, Asya Benson, explained that she and Mason drove Holt to the residence of another cousin, Lateef Mason, in the Hazelwood section of Pittsburgh. Holt, 273 A.3d at 525. Holt was ultimately apprehended there in the early morning of November 21, 2017.

In addition to this evidence, the trial jury received letters to Harper, one of which was identified by a handwriting expert as being handwritten by Holt, asking Harper to tell investigators that he dropped off Holt prior to the shooting and picked up another unknown individual, who Harper was to suggest was the shooter. In exchange, Holt offered to "take" the drug charges Harper was facing. N.T., 11/5/19, at 299-304; N.T., 11/6/19, at 633; Commonwealth's Exhibit 23.

B. Procedural History

Petitioner was tried before a jury from November 4, 2019 through November 12, 2019. He was found guilty of Murder of a Law Enforcement Officer, Murder of the First Degree, and firearms offenses. The jury considered Petitioner's penalty immediately following the guilt phase, ultimately issuing a verdict in support of the death penalty on November 14, 2019.

Although it does not appear in the official record, evidenced by Petitioner's citation to an online newspaper article, charges against Tavon Harper were dismissed in early December of 2019.[1]

Petitioner was sentenced on February 12, 2020. On February 25, 2020, he filed Post Sentence Motions with the trial court. The issue Petitioner is currently requesting that this Honorable Court consider was not raised at that time. The trial court imposed a briefing schedule and the parties submitted briefs. Petitioner did not raise the instant issue in his brief to the trial court. On August 21, 2020, the trial court denied Petitioner's Post-Sentence Motions, not addressing a Brady claim that was never raised at that level. On September 10, 2020, Petitioner filed a Notice of Appeal; the trial court thereafter ordered Petitioner to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925. On November 23, 2020, Petitioner filed a concise statement and, once again, did not raise the instant Brady issue. The trial court issued an Opinion pursuant to Pa.R.A.P. 1925, on December 21, 2020. The matter was thereafter before the Supreme Court of Pennsylvania for review.

---

[1] The Commonwealth acknowledges this fact, while steadfastly and unequivocally rejecting the suggestion that this resolution was decided upon, communicated to, or in any other way offered as an inducement to Tavon Harper prior to his testimony at or the conclusion of Petitioner's trial. The Commonwealth does, however, take issue with the claim that Harper was released on December 2, 2019. There is no doubt that Harper was ultimately released, but he had a detainer from the Pennsylvania Parole Board, and his actual release date is not of record.

In his brief to the Supreme Court of Pennsylvania, Petitioner raised the instant Brady claim for the first time. On April 28, 2022, the Supreme Court of Pennsylvania affirmed Petitioner's conviction for first degree murder and the death sentence. Commonwealth v. Holt, 273 A.3d 514 (Pa. 2022). In that published opinion, the Supreme Court of Pennsylvania ruled:

> Holt did not raise the present claim – a Brady claim based upon 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. He did not claim that Harper had a secret plea agreement or assert that the prosecution suppressed evidence of such a plea agreement. Thus, the Commonwealth is correct that the claim is waived. Pa.R.A.P. 302(a) ("Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.")

Holt, 273 A.3d at 535.

III. ARGUMENT IN OPPOSITION TO THE WRIT

The Petition for Writ of Certiorari should be denied for want of jurisdiction, as imprudent, and because Petitioner has failed to articulate an important question of federal law in need of settlement or clarification.

A. This Honorable Court lacks jurisdiction because the decision of the Supreme Court of Pennsylvania rests on adequate and independent state grounds.

Petitioner asks this Honorable Court to find jurisdictional support in 28 U.S.C. § 1257(a), conferring jurisdiction "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or the statutes of… the United States." Id. The underlying claim, an allegation of prosecutorial suppression of an inducement offered to Tavon Harper prior to his

testimony at Petitioner's trial, is of course based upon this Honorable Court's interpretation of the 14th Amendment in Brady v. Maryland, 373 U.S. 83 (1963), and its progeny.

Holt's petition, however, seeks "review" of a matter he waived in the Supreme Court of Pennsylvania. That waiver was founded upon two state procedural rules. In the first instance, the Pennsylvania appellate rules require an appellant, upon order of the trial court, to issue a "concise statement of errors complained of on appeal." Pa.R.A.P. 1925(b). The rules make clear that issues not raised in accordance with the Rule 1925 concise statement are waived. Pa.R.A.P. 1925(b)(4)(vii). The concise statement is meant to aid the trial court in identifying issues, because the trial court is required to issue an opinion justifying the order appealed from for the appellate court. Pa.R.A.P. 1925(a). Neither the concise statement of Petitioner nor, consequently, the Rule 1925(a) opinion of the trial court addressed the Brady issue he now raises with this Honorable Court.

The second procedural rule was the clear and express foundation of the Pennsylvania Supreme Court's waiver determination. In addition to Rule 1925(b)(4)(vii), the rules also independently state: "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Petitioner, however, raised the instant Brady claim for the first time in his brief to the Pennsylvania Supreme Court. In its opinion, the Supreme Court of Pennsylvania noted Petitioner's failure to raise the Brady claim in his Rule 1925 concise statement, "or at any point before the trial court." Holt, 273 A.3d at 535.

“This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment ‘if that judgment rests on a state law ground that is both ‘independent’ of the merits of the federal claim and an ‘adequate’ basis for the court’s decision.’” Foster v. Chatman, 578 U.S. 488, 497 (2016) (quoting Harris v. Reed, 489 U.S. 255 (1989)). The adequacy of the state court decision to obviate consideration of the merits of a federal claim is established when the state law relied upon is “firmly established and regularly followed.” Ford v. Georgia, 498 U.S. 411, 423-24 (1991) (quoting James v. Kentucky, 466 U.S. 341 (1984)).

The decision of the Supreme Court of Pennsylvania was both independent of the federal Brady claim herein raised and adequate to support the judgment of that Court. Although the high court of Pennsylvania described the legal parameters of a Brady claim, including the elements that must be proven by a defendant raising such a claim, the waiver determination was entirely independent of this issue of federal law. The waiver discussion and holding would have been no different if the issue raised had been a purely state law issue, such as an evidentiary ruling.

The state Supreme Court also made clear that the waiver holding was “firmly established and regularly followed,” noting various prior holdings, finding waiver of Brady claims. Specifically, the Court stated the following:

> Significantly, *Brady* claims are subject to waiver. *Commonwealth v. Hannibal*, 638 Pa. 336, 156 A.3d 197, 209-10 (2016) (failure to raise *Brady* claim at trial or on direct appeal resulted in waiver); *Commonwealth v. Roney*, 622 Pa. 1, 79 A.3d 595, 609 (2013) (*Brady* issues which could have been raised at trial and/or on direct appeal but were not, were waived for collateral review).

Holt, 273 A.3d at 534. Further research reveals additional evidence that waivers in the Brady context are "firmly established and regularly followed." See Commonwealth v. Chmiel, 30 A.3d 1111, 1129-30 (Pa. 2011) (citing Commonwealth v. Pursell, 724 A.2d 293 (Pa. 1999) and Commonwealth v. Morris, 822 A.2d 684 (Pa. 2003)).

Petitioner's efforts to find a basis for jurisdiction are nothing short of contortionism. Petitioner spends considerable effort avoiding the conclusion that a waiver based upon a codified state procedural rule is independent of federal law, despite the clarity with which the Holt opinion was written. Instead, Petitioner dives deep into Pennsylvania jurisprudence, not surprisingly finding language in Morris which dealt with the merits of a Brady claim – language that suggested that a Brady violation did not occur if the defendant could have discovered the material through the exercise of reasonable diligence. See Commonwealth v. Morris, 822 A.2d at 696. Again, unsurprisingly, Petitioner finds federal case law cited for this proposition. The historical citation to federal decisional law concerning the merits of a prior federal question, however, has no bearing on the independence of a state waiver of a similar question.

The upshot of Petitioner's argument in this regard is the suggestion that Pennsylvania waiver jurisprudence somehow "conditions" the waiver on the "ability to uncover [Brady] material through reasonable diligence." Petition for Writ of Certiorari, at 8. This "condition" does not exist, was not relied upon by the Supreme Court in this case, and does not establish a dependence upon federal law.

Perhaps Petitioner seeks to interject a "reasonable diligence" condition to excuse his waiver because he suggests he was "wholly ignorant of the alleged Brady material." Petition for Writ of Certiorari, at 6. However, Petitioner ignores the fact that he was aware of the facts underpinning his claim *prior to* the filing of his post-sentence motions and *prior to* the filing of his Rule 1925 concise statement. We know he was aware of these facts because of his references to the factual allegations. The Supreme Court of Pennsylvania recognized these references:

> Despite being aware of the facts underlying his claim, Holt did not raise a *Brady* claim before the trial court. Instead, he recited the facts underlying this claim in his Pa.R.A.P. 1925(b) statement in support of a claim he entitled "the verdict of death was a product of passion, prejudice and arbitrary factors." *See* Holt's 1925(b) statement, 11/20/2020, ¶ 8.[13] In his Rule 1925(b) statement, Holt attacked Harper's credibility by stating that Harper "was released from prison and parole a few weeks after trial, despite the prosecution and Harper claiming he had no plea agreement with the prosecution to testify," and also asserting that Harper "lied repeatedly" in his pre-trial statements. *Id*. Holt attacked Harper's credibility to support his weight of the evidence claim. 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. He did not claim that Harper had a secret plea agreement or assert that the prosecution suppressed evidence of such a plea agreement. Thus, the Commonwealth is correct that the claim is waived. Pa.R.A.P. 302(a)

Holt, 273 A.3d at 534-35.

Next, Petitioner mischaracterizes the finding of waiver as a "holding that Petitioner was not entitled to rely on the Commonwealth's representation that all Brady material had been disclosed." Petition for Writ of Certiorari, at 8. This mischaracterization is the lead into several pages of Petitioner attempting to frame state waiver as inadequate by further exaggeration, analogizing the state court's

holding as requiring Petitioner to "scavenge for hints," or allowing the Commonwealth to play "hide and seek" with a criminal defendant. Petition for Writ of Certiorari, at 9-10. The state court decision in this case did not even intimate that the Commonwealth could impose a burden on Petitioner to discover the alleged Brady material.

In his petition, Holt claims that the application of the state waiver effectively denies him "the only remedy ever available for the enforcement of [his] rights," see Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673, 679 (1930), because "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." Petition for Writ of Certiorari, at 12. This is a bold mischaracterization. First, as explained above, Petitioner cannot genuinely assert a lack of knowledge in the trial court of the factual allegations his claim is based upon, when he referenced them in other arguments in the trial court. Second, to suggest that Petitioner's "only remedy ever available" is to raise this issue before this Honorable Court ignores the available avenues of collateral review which are certain to follow, and would include the ability of Petitioner to develop this issue in the context of an ineffective assistance of counsel claim.

These claims by Petitioner are false, and do nothing to call into question the adequacy of the state waiver to support the judgment of the state court. As will be articulated more fully below, such a waiver is a well-established justification for a

reviewing court to avoid consideration of an issue without the benefit of a fully developed record.

In Michigan v. Long, 463 U.S. 1032 (1983), this Honorable Court held that where a state court articulates "clearly and expressly" a reliance on "bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." Id., at 1041. In accordance with this standard, the Commonwealth submits the adequacy and independence of the state law ground is clear from the face of the opinion of the Pennsylvania Supreme Court. The waiver is both independent of federal law and adequate to support the judgment, depriving this Honorable Court of jurisdiction.

B. The grant of a writ of certiorari in this matter would be imprudent, due to the lack of development of the facts necessary to decide the underlying federal question.

Although not necessarily distinct from considerations of jurisdiction, this Court's jurisprudence has recognized significant prudential concerns that require that the federal question first be raised before the state court. In Adams v. Robertson, 520 U.S. 83 (1997), this Honorable Court noted that only rarely will the Court "consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." Id., at 86 (quoting Yee v. City of Escondido, 503 U.S. 519 (1992) (emphasis added)). This Court explained that this principle "serves an important interest of comity… it would be unseemly in our dual system of government to disturb the finality of state court judgments on a federal ground that the state court

did not have occasion to consider." Adams, 520 U.S. at 90 (citing Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 79 (1988) and Webb v. Webb, 451 U.S. 493, 500 (1981)).

A waiver operates as a bar to a state court's consideration of a federal issue to the same extent that a complete failure to raise the issue would be, because of the lack of an opportunity to develop a record on which a reviewing court can rely. These considerations are further highlighted in the Adams opinion, wherein this Court stated:

> Our traditional standard also reflects "practical considerations" relating to this Court's capacity to decide issues. Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state-law grounds, but also assists us in our deliberations by promoting the creation of an adequate factual and legal record. Here, even if the state court's construction of its class-action rules would not obviate the due process challenge, it would undoubtedly aid our understanding of those rules as a predicate to our assessment of their constitutional adequacy. And not incidentally, the parties would enjoy the opportunity to test and refine their positions before reaching this Court.

Adams v. Robertson, 520 U.S. at 90–91 (citing Webb, 451 U.S. at 500).

Indeed, these practical and prudential concerns are undoubtedly the underpinnings of the Pennsylvania Rules of Appellate Procedure governing waiver. Had Petitioner raised his Brady claim in his post-sentence motions before the trial court, an evidentiary hearing could have been held. The record could have been developed with testimony from counsel for the Commonwealth, counsel for Tavon Harper, Harper's arresting officer concerning any prior decision regarding the disposition of Harper's case, and/or any communications about such a decision.

Without intending to suggest facts not of record, the undersigned also submits that testimony from the family of Patrolman Shaw could also have been relevant to a factfinder in considering whether discussions concerning Harper's disposition were ongoing after Petitioner's trial. After such a hearing, the trial court, the tribunal best situated for examination of credibility in the first instance, would have been capable of issuing factual findings, which would permit full review of any legal determination based thereupon.

Put simply, Petitioner's failure to raise a Brady claim, which is based upon a factual allegation of which he was aware, has prevented meaningful review. The prudential and practical considerations this Court has previously acknowledged militate strongly against the grant of certiorari.

C. This Honorable Court's recent grant of certiorari in Cruz v. Arizona, 142 S.Ct. 1412 (2022) (No. 21-846), does not compel a delayed denial of certiorari in this matter.

Petititoner asks this Honorable Court to delay consideration of this petition pending the disposition of Cruz v. Arizona, 142 S.Ct. 1412 (2022) (No. 21-846). Cruz is an adequate and independent state grounds case which appears to rise and fall on a rather subjective Arizona Supreme Court decision – a decision that Lynch v. Arizona, 578 U.S. 613 (2016), did not constitute "a significant change in the law," barring post-conviction relief in Arizona. State of Arizona v. Cruz, 487 P.2d 991 (Az. 2021). The application of such a subjective bar, however, is subject to potentially higher scrutiny where, in the context of that matter, this Court's decision in Lynch v. Arizona, 578 U.S. 613, held that the same Arizona court had

misapplied Simmons v. South Carolina, 512 U.S. 154 (1994). The applicability of Simmons is at the core of the issue barred in State of Arizona v. Cruz, 487 P.2d 991.

In the instant matter, the adequacy and independence of a state procedural waiver is based upon an objective finding. The question of whether Petitioner raised a Brady claim in his post-sentence motions and/or in his Rule 1925 concise statement is one that does not require interpretation. Further, unlike in Cruz, this Honorable Court need not consider the state procedural bar in the context of a larger history of the state court's denial of an established federal right.

Cruz is entirely distinct from this matter and certiorari should be denied without regard to this Court's decision in Cruz.

D. Certiorari should not be granted in order to provide guidance in proving a Brady violation where, as here, Petitioner failed to offer any evidence in the court below.

This matter is ill-equipped to serve as a vehicle for this Honorable Court to offer the "framework" for circumstantially proving a Brady violation, as Petitioner requests.

a. Petitioner conflates circumstantial evidence with a lack of evidence.

In an effort to establish that Pennsylvania law is "unduly restrictive," in the context of establishing a Brady violation, Petitioner merely cites multiple cases in which Pennsylvania courts have found that defendants failed to prove Brady violations. Such an argument is akin to the Commonwealth arguing that proof beyond a reasonable doubt is too restrictive a burden of proof by pointing to a

number of acquittals. Petitioner's argument is further "supported" by his citation to Commonwealth v. Simpson, 66 A.3d 253, 266 (Pa. 2013), where the Pennsylvania Supreme Court approved the denial of a post-conviction relief claim where a Brady claim was unsupported by "any evidence."

Petitioner claims Pennsylvania'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." Petition for Writ of Certiorari, at 13 (emphasis added). Petitioner is here guilty of begging the question. In a discussion about the proof necessary to establish a Brady violation, Petitioner avers that requiring any amount of proof rewards the misconduct which has not been proven.

Petitioner is not asking this Honorable Court for a framework for proving Brady violations circumstantially. He is asking this Court to authorize a presumption that the prosecution commits a Brady violation supported merely by an allegation, but never requiring proof.

b. Petitioner creates a "conflict" in the lower courts out of whole cloth.

In contrast to the Pennsylvania cases he cites, Petitioner points to Douglas v. Workman, 560 F.3d 1156 (10th Cir. 2009), as evidence that other courts have found a Brady violation based upon an "inference of a deal." However, that which Petitioner calls an "inference of a deal" in Douglas is far more appropriately regarded as evidence of a deal. In Douglas, there was not only evidence that the

prosecutor had discussed "coop credit" toward a witness' sentence prior to his testimony, and a letter by the witness documenting expected benefits from his testimony and "intimating that he had previously received benefits for his testimony" in a prior matter with the same prosecutor, but the prosecution conceded that the witness had received a benefit prior to his testimony. Douglas, 560 F.3d at 1183-84.

Petitioner offers Douglas as contrasting with other cases in which Brady violations were not proven, without regard for the fact that Douglas was based upon evidence, that which was found lacking in the other cases he cites. This is not a conflict in courts applying Brady, but merely a distinction between cases involving evidence of a Brady violation, and cases without such evidence. Petitioner has failed to demonstrate a real need for clarity among the courts across the country addressing Brady claims.

c. Petitioner is not entitled to a presumption of a Brady violation built upon an inference unsupported by evidence.

Petitioner insists that "the circumstances surrounding Tavon Harper's testimony and his release indicate that a deal was made." Petition for Writ of Certiorari, at 16. This logic is flawed. First, while the Commonwealth has conceded, in candor to this Tribunal, that the charges against Harper were dismissed after Holt's trial, the circumstances surrounding that dismissal do not exist in the record. Petitioner, as of the drafting of his petition, was not even armed

with that concession. Yet he seeks an inference that a deal was made in reliance on a fact he failed to establish on the record when he had an opportunity to do so.

Next, what Petitioner seeks as an "inference" is an ill-disguised presumption. Petitioner seeks an inference based only on sequential and temporal proximity. He suggests that this Honorable Court should find that because Harper's dismissal occurred soon after Holt's trial, that dismissal was a pre-planned and communicated disposition designed to incentivize Harper's testimony. This would be a logical leap of faith – or, more apropos, a leap of mistrust.

d. The circumstances of Harper's testimony and the evidence at trial do not give rise to an "inference of a deal" and no prejudice could be established even if such a deal could be inferred.

The circumstances that Petitioner cites as supporting a Brady violation presumption, of course, undermine it. Obviously without conceding that a Brady violation occurred, the Commonwealth points out that a Brady violation is required to be assessed in the context of the record as a whole. This Honorable Court has held that

> the term 'Brady violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called 'Brady material'—although, strictly speaking, there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.

Strickler v. Greene, 527 U.S. 263, 281 (1999) (emphasis added). In Strickler, this Court found, despite the prosecution's suppression of multiple documents casting doubt on the credibility and/or memory of an eyewitness, "the record provides strong

support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if [the eyewitness] had been severely impeached." Id., at 294-95. As such, the prejudice required to establish a Brady violation was lacking.

The record here similarly bears strong support for the jury's verdict, even if the Court were to assume the existence of an undisclosed "deal." Indeed, Harper initially lied, multiple times. The jury heard this. The jury also heard that after Harper was caught lying about his communications with Petitioner, he was arrested. Holt, 273 A.3d at 524. The jury also heard substantial corroboration of Harper's later statements and trial testimony. Harper explained that Petitioner had a .40 caliber handgun on the day of the murder, and Michael Luffey testified that he had observed Petitioner with a .40 caliber handgun in the weeks before Patrolman Shaw's murder. Holt, 273 A.3d at 535. Harper identified Petitioner as the individual fleeing from Patrolman Shaw as he was killed. Petitioner was observed, immediately after the murder, to have injuries to his hand consistent with those caused by the slide of a semi-automatic handgun. Holt, 273 A.3d at 526. Further, residents of 1206 Victoria Avenue identified Harrington, Petitioner's cousin, as arriving at the residence the day after the murder and removing an item from the basement, where there was discussion of a firearm. Holt, 273 A.3d at 525.

Harper testified that Petitioner told him, "I'm fucked … I dropped my phone." Id., at 524. Petitioner's girlfriend Vanessa Portis testified that Petitioner called her the night of the murder from Lisa Harrington's phone, telling Portis that he had

lost his phone. Holt, 273 A.3d at 525. Finally, Harper's testimony was corroborated by a handwritten letter, identified by a handwriting expert to have been penned by Petitioner, in which Petitioner urges Harper to contact Holt's attorney and provide a statement claiming that Harper dropped off Petitioner before the shooting and picked up an unknown individual, who Harper was to suggest was the real killer. Petitioner further offered to "take" Harper's drug charges once Harper puts "all that [the fabrication] on paper." Commonwealth's Exhibit 23; N.T., 11/5/19, at 299-304.

The record herein, and the corroboration of Harper's testimony, tends to defeat, rather than support, Petitioner's "inference" that a deal had to be made in order to secure his testimony. At the same time, this corroboration and other evidence of Petitioner's guilt preclude Petitioner from establishing prejudice.

IV. CONCLUSION

The Supreme Court of Pennsylvania appropriately found a waiver of Petitioner's claim, due to his failure to raise and develop this issue before the trial court. Such a waiver is an adequate and independent state law basis for the judgment below, depriving this Honorable Court of jurisdiction. Even if this Honorable Court had jurisdiction over the matter, Petitioner's failure to raise this issue at the trial court and the failure to develop the issue, has deprived the Court of a factual record upon which to base a decision. Finally, Petitioner has failed to establish an unsettled question of federal law. Consequently, the writ of certiorari should be denied.

Respectfully submitted,

/s/ James T. Lazar

James T. Lazar
Assistant District Attorney
Westmoreland County District Attorney's Office
2 N. Main Street Suite 206
Greensburg, PA 15601
jlazar@co.westmoreland.pa.us
724-830-3949
Counsel for Respondent,
Commonwealth of Pennsylvania