**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*

# REPLY BRIEF FOR APPELLANT

***THIS IS A CAPITAL CASE***

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ........ ii

ARGUMENT ........ 1

I. THE WAIVER RULING WAS INADEQUATE BECAUSE THERE EXISTS NO PROCEDURE UNDER PENNSYLVANIA LAW TO RAISE HOLT'S CLAIM ........ 1

II. THE COMMONWEALTH MINIMIZES THE SIGNIFICANCE OF HARPER'S INCENTIVES TO TESTIFY FOR THE PROSECUTION AND OVERSTATES THE ROLE OF OTHER WITNESSES'S TESTIMONY ........ 4

CONCLUSION ........ 6

## TABLE OF AUTHORITIES

### FEDERAL CASES

*Cabrera v. Barbo*, 175 F.3d 307 (3d Cir. 1999) .......... 3

*Chambers v. Mississippi*, 410 U.S. 284 (1973) .......... 3

*Ford v. Georgia*, 498 U.S. 411 (1991) .......... 2

*Giglio v. U.S.*, 405 U.S. 150 (1972) .......... 5

*Green v. Georgia*, 442 U.S. 95 (1979) .......... 3

*James v. Kentucky*, 466 U.S. 341 (1984) .......... 2

*Johnson v. Mississippi*, 486 U.S. 587 (1988) .......... 2

*King v. LaMarque*, 464 F.3d 963 (9th Cir. 2006) .......... 2

*Kyles v. Whitley,* 514 U.S. 419 (1995) .......... 1

*Lee v. Kemna*, 534 U.S. 362 (2002) .......... 2

*Lilly v. Gillmore*, 988 F.2d 783 (7th Cir. 1993) .......... 2

*NAACP v. Alabama*, 357 U.S. 449 (1958) .......... 2

*Reutter v. Solem*, 888 F.2d 578 (8th Cir. 1989) .......... 5

*Spencer v. Zant*, 715 F.2d 1562 (11th Cir. 1983) .......... 2

*Tassin v. Cain*, 517 F.3d 770 (5th Cir. 2008) .......... 5

*Washington v. Texas*, 388 U.S. 14 (1967) .......... 3

*Wearry v. Cain*, 577 U.S. 385 (2016) .......... 5

### STATE CASES

*Commonwealth v. Castro*, 93 A.3d 818 (Pa. 2014) .......... 1

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

*Commonwealth v. Cousar*, 154 A.3d 287 (Pa. 2017) .......... 3

*Commonwealth v. Holt*, 273 A.3d 514 (Pa. 2022) .......... 4

*Commonwealth v. McCracken*, 659 A.2d 541 (Pa. 1995) .......... 1

*Commonwealth v. Morris*, 822 A.2d 684 (Pa. 2003) .......... 3

*Commonwealth v. Pagan*, 950 A.2d 270 (Pa. 2008) .......... 1

*Commonwealth v.(Roy) Williams*, 732 A.2d 1167 (Pa. 1999) .......... 2

*Commonwealth v. (Terrance) Williams*, 168 A.3d 97 (Pa. 2017) .......... 2

**OTHER**

Pa.R.A.P 1925 .......... 2

Pa.R.Crim.P. 720 .......... 1

## ARGUMENT

### I. THE WAIVER RULING WAS INADEQUATE BECAUSE THERE EXISTS NO PROCEDURE UNDER PENNSYLVANIA LAW TO RAISE HOLT'S CLAIM.

The Commonwealth claims that the procedural default ruling of the Supreme Court of Pennsylvania was adequate to support the judgment. Brief in Opposition at 7. It was not. Notwithstanding that *Brady* encompasses impeachment evidence, *Kyles v. Whitley,* 514 U.S. 419, 433 (1995), state post-trial procedures specifically preclude relief if based, as here, solely on new impeachment evidence. And the rule requiring appellants to articulate for the trial judge the grounds for appeal limits issues to those the court actually passed on. A "waiver" finding where the rules offer no avenue for relief cannot be said to be adequate.

Unpacking the applicable rules, it is clear they provide no avenue for relief for *Brady*[1] violations discovered post-trial but prior to perfection of appeal. Under Pennsylvania law, post-sentence motions are governed solely by Pa.R.Crim.P. 720. Rule 720 allows for claims of "after-discovered" evidence. Pa.R.Crim.P. 720(C) ("A post-sentence motion for a new trial on the ground of after-discovered evidence must be filed in writing promptly after such discovery").

But caselaw interpreting the rule precludes relief on claims such as presented here—where the suppressed evidence goes to "impeachment." *Commonwealth v. McCracken*, 659 A.2d 541, 545 (Pa. 1995) (in order to be granted a new trial based upon after-discovered evidence under Rule 720, a party must show that the evidence: (1) has been discovered after the trial and could not have been obtained at or prior to conclusion of the trial by the exercise of reasonable diligence; (2) it is not merely cooperative or cumulative; *(3) will not be used solely to impeach the credibility of a witness;* and (4) is of such a nature that a different verdict will likely result if a new trial is granted) (emphasis supplied);

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

*Commonwealth v. Castro*, 93 A.3d 818, 821 (Pa. 2014) (same); *Commonwealth v. Pagan*, 950 A.2d 270, 292 (Pa. 2008) (same). Thus, there exists under Pennsylvania law *no* procedure to raise such claims in post-sentence proceedings. It can hardly be asserted that the governing procedural rules relied on here are regularly applied—requiring new claims to be raised "promptly" while at the same time barring relief in cases where only "impeachment" is implicated. *See Commonwealth v. (Terrance) Williams*, 168 A.3d 97, 104 (Pa. 2017) (a *Brady* claim cannot be considered waived when there was "no prior proceeding" in which the claim could have been raised).

The only other avenue to raise the claim would be in the statement of errors complained of on appeal. Pa.R.A.P 1925. But Rule 1925 is designed to give the appellate courts the benefit of the trial court's reasoning and thus is tethered to *court rulings*. *Commonwealth v.(Roy) Williams*, 732 A.2d 1167, 1192 (Pa. 1999) (Castille, J. concurring) ("The obvious purpose of Pa.R.A.P. 1925(a) is to facilitate appellate review of a *particular trial court order*.") (emphasis supplied). Here, Petitioner was precluded from even raising the claim before the trial court under one line of state procedural cases (thus no court ruling exists), then found to have waived the claim by failing to identify the resulting non-existent ruling believed to be made in "error." Such a ruling cannot be said to be adequate. Rather, in order to be an "adequate" procedural bar to federal review, a state rule must be "firmly established and regularly followed." *James v. Kentucky*, 466 U.S. 341,348 (1984); *see also Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (state procedural rule must be "consistently and regularly applied"). Rules that are novel fail the adequacy test. *See, e.g., Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (novel rule not "firmly established and regularly followed"); *NAACP v. Alabama*, 357 U.S. 449, 454-58 (1958) (same). *See also Lee v. Kemna*, 534 U.S. 362, 387 (2002) (holding Missouri court's enforcement of rule requiring motions for continuance to be in writing was not adequate to bar federal review because petitioner substantially complied with rule and enforcement served no real governmental interest); *Lilly v. Gillmore*, 988 F.2d 783, 785 (7th Cir. 1993) ("[A] rule applied

infrequently, unexpectedly, or freakishly may not constitute an independent and adequate state ground."); *King v. LaMarque*, 464 F.3d 963, 966 (9th Cir. 2006) ("Novel procedural rules do not bar federal review because petitioners are not put on sufficient notice that they must comply."); *Spencer v. Zant*, 715 F.2d 1562, 1572 (11th Cir. 1983) ("Upon thorough review of the Georgia cases discussing the jury challenge rule, we are convinced that the ruling in Spencer's case falls within the novelty doctrine so as to permit review of his federal claim in spite of the state courts' holdings that he had forfeited it."); *Cabrera v. Barbo*, 175 F.3d 307, 313 (3d Cir. 1999) ("a petitioner should be on notice of how to present his claims in the state courts if his failure to present them is to bar him from advancing them in a federal court").

Similarly, state rules may not be used to trump constitutional rights. Here, Petitioner had a short window under the post-sentence motions rules to find the evidence the Commonwealth hid, under penalty of waiver. The rules must give way to constitutional imperatives. *Chambers v. Mississippi*, 410 U.S. 284, 297 (1973) (trustworthy third party declarations against penal interest which exculpate the accused and are critical to his defense cannot be excluded); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (error to exclude as inadmissible hearsay a statement made by codefendant exculpating Green); *Washington v. Texas*, 388 U.S. 14, 23 (1967) (Sixth Amendment right to compulsory process violated by a state procedural statute providing that persons charged as principals, accomplices, or accessories in the same crime could not be introduced as witnesses for each other).

Here, the prosecution hid evidence of its understanding with its key witness that cooperation would be rewarded with prompt dismissal of all criminal charges. The claim was raised at the earliest time consistent with a fair reading of the applicable state rules, on direct appeal. The Commonwealth seeks to forever evade any consequence for its malfeasance by invoking *irregular* state procedural rules. Rules are meant to promote justice and ensure a petitioner's due process rights, not supply a refuge for prosecutorial misconduct.

Finally, the Commonwealth fails to acknowledge that the circumstances of Petitioner's claim are distinguishable from those in other Pennsylvania cases addressing *Brady* waivers. In *Commonwealth v. Chmiel*, 30 A.3d 1111, 1129 (Pa. 2011), the two witnesses the appellant alleged had deals with the prosecution had already had their sentences reduced *before* trial, and the extreme sentencing leniency was discussed during the trial. In *Commonwealth v. Morris*, 822 A.2d 684, 696 (Pa. 2003), the appellant's defense counsel tried to raise exculpatory evidence regarding a key witness for the Commonwealth during cross-examination *at trial*, but was prevented from continuing the cross examination by the trial court. And in *Commonwealth v. Cousar*, 154 A.3d 287, 301-02 (Pa. 2017), the *Brady* material in question was a police report disclosed by the prosecution *at trial*, and the trial record was inconclusive as to whether defense counsel already had the report in its possession. In contrast to all these cases, the impeachment evidence in Petitioner's case emerged *after* trial. The Commonwealth's assertion that waivers in the *Brady* context are "firmly established and regularly followed" ignores the distinguishing features of Petitioner's case.

## II. THE COMMONWEALTH MINIMIZES THE SIGNIFICANCE OF HARPER'S INCENTIVES TO TESTIFY FOR THE PROSECUTION AND OVERSTATES THE ROLE OF OTHER WITNESSES'S TESTIMONY.

The Commonwealth claims that Petitioner's inference of a deal between Harper and the prosecution is based only on "sequential and temporal proximity." Brief in Opposition at 17. But this minimizes the significance of the broader circumstances surrounding Harper's testimony. Harper had been released from prison less than three months prior to the events of November 17, 2017 and was on parole. *Commonwealth v. Holt*, 273 A.3d 514, 522-523 (Pa. 2022). He enjoyed only a brief respite from incarceration between late August and November of 2017 before being re-incarcerated on felony drug charges for the two years leading up to Petitioner's trial. *Id.* at 533-534. Harper therefore had even more of an incentive to desire release. His repeated statements prior to trial about "just want[ing] to go home" and "hoping" to gain an advantage from testifying, coupled

with his years of incarceration and his release and dismissal of charges mere weeks after Petitioner's trial, form a stronger basis for circumstantial evidence than the Commonwealth is willing to admit (NT 11/5/19 236). Harper had no clear incentive for "the truth to be out there" and every incentive to aid in the prosecution's case with the hope that his charges would be dismissed so he could finally return home after years in prison. The Commonwealth's statement that Petitioner makes a "logical leap of faith" is thus exaggerated.

The Fifth Circuit makes clear that, when it comes to secret deals between witnesses and the prosecution, "the crux of a Fourteenth Amendment violation is deception. A promise is unnecessary." *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008). The jury is entitled to know "evidence of any *understanding*" that is relevant to a witness's credibility. *Giglio v. U.S.*, 405 U.S. 150, 155 (1972) (emphasis supplied). And in *Reutter v. Solem*, the Eighth Circuit emphasized that neither an express or implied agreement between a witness and the prosecution is necessary to find a *Brady* violation, but instead that the mere fact of an impending commutation hearing for a witness was material enough as to require disclosure. *Reutter v. Solem*, 888 F.2d 578, 582 (8th Cir. 1989). Guidance from this Court is necessary to establish an approach for evaluating circumstantial evidence in proving a deal. Otherwise, Petitioners have no clear framework on which to bring *Brady* claims when a deal between a witness and the prosecution can be inferred.

Additionally, the Commonwealth suggests that the testimony of other witnesses during trial so strongly supports the jury's verdict that impeaching evidence would be immaterial. Brief in Opposition at 18. But the testimony from the other witnesses suggests, at most, that Holt and the residents of 1206 Victoria Avenue may have somehow been involved in events relating to the murder *after* it occurred. Only Harper's testimony puts Holt near the scene of Officer Shaw's death, and only Harper's testimony places Holt with a .40 caliber handgun on the day of the murder. In *Wearry v. Cain*, this Court found a petitioner's due process rights violated where the state failed to

disclose evidence impeaching their star witness, whose testimony at trial, like Harper's, provided the only evidence tying the petitioner to the crime. *Wearry v. Cain*, 577 U.S. 385, 392-83 (2016). Here, Petitioner's due process rights depend on clarification from this Court as to the analytical standard necessary for proving a deal based on circumstantial evidence.

## CONCLUSION

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

Respectfully submitted,

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Dated: October 12, 2022

**CERTIFICATE OF SERVICE**

I, Christine M. Selden, hereby certify that on this date I served the foregoing upon the following persons by first class mail, postage prepaid:

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*/s/ Christine M. Selden*
Christine M. Selden

Dated: October 11, 2022