No. 24-6032

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT GENE REGA,

Petitioner,

v.

SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT PHONENIX,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

Robert Gene Rega (hereinafter "Petitioner") asks this Court to grant a Writ of Certiorari and to summarily reverse and remand the decision of the Third Circuit Court of Appeals (hereinafter "Third Circuit") based on the authority of *Burden v. Zant*, 498 U.S. 433, 111 S. Ct. 862, 112 L. Ed. 2d 962 (1991). Petitioner's argument is premised on the contention that the Third Circuit rejected state court fact-findings in contravention of the Antiterrorism and Effective Death Penalty Act's (hereinafter "AEDPA") "presumption of correctness" found at 28 U.S.C.A. §2254(e). For the reasons which follow, this Court will see that *Burden* is not analogous to the case *sub judice* and a writ should be denied.

Burden involved a federal habeas petitioner's claim that he received ineffective assistance of counsel in a capital case because his prior counsel had labored under a conflict of interest. The record had clearly established that his prior counsel, Kenneth Kondritzer, while representing Burden, also represented Henry Lee Dixon, the witness who "provided the sole evidence directly linking" Burden to the murders.[1] During this dual representation, Kondritzer negotiated a deal with the district attorney whereby, if Dixon testified against Burden, "nothing would happen to him." Based on this, the state trial court expressly found that the

[1] Dixon was also described in the state court as "[t]he witness most damaging to the defendant's case." Id. at 435, 111 S.Ct. at 863.

witness "....was granted immunity from prosecution." Despite these crystal clear and material fact-findings, the Eleventh Circuit Court of Appeals inexplicably held that there was no "factual support" for the "assumption that Dixon received a grant of transactional immunity,..." Importantly, this Court noted that this fact (the grant of immunity) was the "central fact" supporting petitioner's claim. See *id.* at 436-37, 111 S. Ct. at 864-65.[2] Thus, in *Burden*, the Circuit Court of Appeals refused to recognize a crystal-clear, material fact-finding made by the state court that was also the primary fact upon which the petitioner's claim was made.

In the instant case, the Third Circuit Court of Appeals granted a certificate of appealability (hereinafter "COA") from the district court's denial of Petitioner's guilt phase habeas claims on the following claims, *inter alia*,[3]:

> "First, a COA is granted on appellant's claim that his prosecutor violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose (1) that Shawn Bair, Raymond Fishel, Susan Jones and Michael Sharp sought lenient treatment in exchange for their testimony against appellant and that the prosecutor told them that he would or "probably" would consider their cooperation when considering possible pleas,..."; and,
>
> "Second, a COA is granted on appellant's claim that the prosecutor violated Giglio v. United States, 405 U.S. 150 (1972), and Napue v. Illinois, 360 U.S. 264 (1959), by failing to correct: (1) the testimony of Bair, Fishel and

[2] The federal district court had acknowledged the witness's immunity but found that there was no "adverse impact" on the representation of his trial counsel.

[3] Respondents only set forth the portions of the COA that are germane to this Court's consideration of the issue at hand.

> Susan Jones that the prosecutor had not made any "promises" to them;...."

It is important to understand that the claims which were approved by the Third Circuit in the COA were vastly different from the original theories Petitioner propounded in the post-conviction court (hereinafter referred to as "PCRA" inasmuch as Pennsylvania's vehicle for post-conviction relief comes pursuant to the "Post Conviction Relief Act," 42 Pa.C.S.A. §9541 et.seq.). Petitioner's aim in the PCRA court was to prove that the prosecutor provided either specific promises or incentives or that he implied that certain outcomes were likely or, at least, possible. Those claims were gutted because they did not withstand the rigors of the courtroom. The PCRA court found that the Commonwealth did not foster the notion that Bair or "any of them would receive any level of leniency..." Joint Appendix (hereinafter "JA") 278.[4] Being that the fact findings on the original claims were so clear and supported by the record, Petitioner seemingly abandoned the majority of his original claims and requested, and the Third Circuit granted, the above COA.[5]

When Respondents analyzed the wording of the COA, they realized that the language the Third Circuit employed, *viz.* "...the prosecutor told them that he

[4] All references to "JA" are to the Joint Appendix filed in the Third Circuit.
[5] The District Court denied Petitioner's request for a COA. See Rega v. Wetzel, et al, 2:13-cv-01781-JFC. EFC #102.

would or 'probably' would consider their cooperation when considering possible pleas,...," seemed to be a clear reference to the PCRA court's "Opinion on Defendant's PCRA Petition" in which the PCRA court was specifically referring to testimony given only by John Ingros, Shawn Bair's counsel, during Petitioner's PCRA proceedings. See JA275, 278. Ingros testified regarding discussions concerning Bair's cooperation with the prosecution. During that testimony, he stated that Bair "wasn't promised anything to me." When Petitioner's counsel followed up with the question, Q. "So he made no promises in response to your request?" Ingros responded, A. "No. Just probably it would be taken into account or at the end we will see how it all shakes out and we will take and deal with that at that point. Something along those lines." JA1248. In its above-referenced Opinion, the PCRA court specifically referred to and cited the record regarding this "probably" statement made by Ingros. JA275 ("According to lngros, while he obviously wanted as much leniency as possible for his client, [prosecutor] never indicated ahead of time what Bair would get for his cooperation, only that it would 'probably' be taken into account. (Id., 12/14/2009, pp. 25-27)."; JA278 ("Rather, [prosecutor] conveyed nothing more than that he would 'probably' take any cooperation into account when later considering plea deals.").

It is more than obvious that this is the statement the Third Circuit was referring to in its COA. However, the COA referred to prosecutor statements being

made not only to Bair, but also Ray Fishel, Susan Jones and Michael Sharp. The problem with this is that examination of the PCRA record does not even allow the conclusion that this statement was made to any other co-defendant or their counsel. For instance, Petitioner's allegation concerning Fishel was that Fishel and the Commonwealth had an alleged "gentlemen's agreement" that all homicide charges against Fishel would be dropped after Fishel testified against Petitioner and that he would receive a "lenient sentence." Fishel's eventual plea offer did not even remotely approximate this outcome.[6] The PCRA court wholly rejected the claims regarding Fishel for many and substantial reasons. Discussion of those portions of the record is not germane to the issue *sub judice*. However, what is germane is the fact that Petitioner produced no evidence of an alleged statement made by the Commonwealth to Fishel nor his counsel to the effect that the Commonwealth would merely "consider" Fishel's cooperation later.

The same is true of the claim regarding Susan Jones. In the PCRA court, Petitioner's claim was that the Commonwealth had proposed a plea agreement whereby she was promised probation on her charges and would not be charged with any other crimes in exchange for her testimony against Petitioner. Again, this claim was wholly rejected by the PCRA court for many good reasons including

[6] Fishel was originally offered 20-40 years on a plea to Third Degree Murder and eventually received 18-40 years on a plea to that same charge.

Jones' testimony and that of her attorney who both stated that no offers or promises were made until well after the conclusion of Petitioner's trial. JA1851-55; JA1414-1422; JA3265. Again, at the PCRA proceedings, Petitioner produced no evidence of an alleged statement made by the Commonwealth to Susan or her counsel to the effect that the Commonwealth would merely "consider" Susan's cooperation later.

Finally, with regard to Commonwealth witness Michael Sharp, Petitioner points to a statement in the PCRA court's opinion wherein it is stated that, "[prosecutor]...said nothing more than that should Sharp and Stan Jones testify, he would consider their cooperation when it came time to assemble a plea deal, and the attorneys conveyed that to their clients...In both instances, the attorneys' advice to cooperate and testify against Rega stemmed from their understanding of their clients' potential liability, not from any promises or suggestions coming from the Commonwealth." (internal citations omitted). JA274. Respondents would submit that, in light of the PCRA record, that this statement by the PCRA court was not a finding that such a statement was definitely made regarding Sharp by the prosecutor; rather, it was a limitation that *nothing more* would have been said regarding his cooperation. The trial court was only defining the upper limit of what

could have been said. Close scrutiny of the testimony of Sharp's trial counsel, David Inzana, bears this out.[7]

To start with, Inzana did not recall having any specific conversations with the prosecutor. Inzana acknowledged that the prosecutor was interested in calling Sharp as a witness at Petitioner's trial and that "he probably talked to me about presenting him as a witness." He stated that he did not ask for immunity for Sharp because he believed that if Sharp cooperated, it would benefit him at sentencing. When asked if this was based on conversations with the prosecutor, he stated, "It is based partly on conversations, but also upon past practice...." Inzana answered in the affirmative to the question, "There was an understanding if he did cooperate, if he did testify that when it came time to formulate that plea agreement that that would be taken into consideration?" However, Inzana later clarified this answer during subsequent questioning. For instance, when he was asked the question, "Did you feel as though Mr. Burkett lived up to his word and had treated Mr. Sharp fairly for his cooperation?", Inzana answered, "Again, I don't feel [prosecutor] and I had some preconceived like I'm feeling he is going to live up to his word or not. The idea behind my asking Mr. Sharp to cooperate was based upon what I felt if he

[7] Sharp did not testify in the PCRA proceedings.

didn't cooperate he very well could have got hammered in one way or another had he pled or had his trial prior to any of these co-defendants..." JA1438-43.

The following exchange then becomes very important for purposes of this discussion:

> Q. As a lawyer, as an advocate for Mr. Sharp as part of that conversation did you question whether or not Mr. Sharp would at least have his testimony taken into consideration when it came time for sentencing?
>
> A. Yes.
>
> Q. What was said to you in response to that?
>
> A. Maybe I misunderstood your last question, but in terms of lawyering *I* took that into consideration. *I can't say that there was an outright conversation I had with one of the district attorney's* (sic) *regarding that...*" JA 1443-44 (emphasis added).

What is crystal clear from the above exchange is that Inzana had no recollection of any outright conversation with any prosecutor on this case in which he was told that his client's testimony would be taken into consideration later. The entire exchange with Inzana makes it clear that it was his own experiences and past practice that led him to advise Sharp to testify. It had nothing to do with any statements made to him by the prosecutor. The PCRA court also acknowledged this in a footnote, stating, "The Court need not comment about Michael Sharp's expectation of leniency. He did not appear to testify at the PCRA hearing. Nor did

his attorney say anything even suggesting that his client expected leniency because of something the Commonwealth said or did."

Accordingly, in its brief in the Third Circuit, Respondents argued that the statement that "the prosecutor told them that he would or 'probably' would consider their cooperation when considering possible pleas..." could only be supported by the PCRA court record when applied to the claim involving Shawn Bair. As stated above, Respondents argued that the record did not support this claim being made as applied to Fishel, Jones and Sharp. With regard to Sharp, Respondents argued that the statement made by the PCRA court quoted above was merely a reference to the fact that "nothing more" was promised to Sharp and that it was not a definite fact-finding that such a statement had, in fact, been made to Sharp. Respondents extensively cited the record in their brief and invited the Third Circuit to closely examine said record in order to determine whether this "probably" statement could be applied to any other co-defendant.

The Third Circuit clearly accepted that invitation and concluded thus,

> "At the outset, the parties disagree over the witnesses to whom the prosecutor made this statement. Rega argues that the prosecutor made it to Bair, Fishel, Susan Jones, and Sharp. The Commonwealth argues that Rega has shown only that the prosecutor made it to Bair. Having reviewed the issue, we agree with the Commonwealth. Bair's counsel testified at the PCRA hearing that the prosecutor refused to make any promises but told Bair that his assistance 'probably ... would be taken into

> account' in any future plea deal. J.A. 1248. But the evidence that Rega proffers as to Sharp is at best inconclusive; while Sharp's counsel testified to a general "understanding" with the prosecutor that Sharp's cooperation would be considered in a future plea agreement, he later clarified that he did not remember an "outright conversation" with the district attorney concerning the issue. J.A. 1440, 1444. And Rega has adduced no evidence that the prosecutor made a similar statement to Fishel or Susan Jones. Thus, Rega has shown only that the prosecutor made this statement to Bair." *Rega v. Sec'y, Pennsylvania Dep't of Corr.*, 115 F.4th 235, 241–42 (3d Cir. 2024)

The Third Circuit further clarified this holding in a footnote:

> "The only other PCRA witness who testified that the prosecutor made a similar statement was counsel for Stan Jones (as distinct from Susan Jones), who was not a Commonwealth witness and as to whom Rega does not assert this claim. Rega argues that there was other PCRA testimony on this point, but he mischaracterizes the record. For example, Rega argues that Officer Louis Davis testified that the prosecutor made similar statements to Fishel and Susan Jones, but the passage he cites is the prosecutor's characterization of Davis's testimony as to Stan Jones, not Fishel or Susan Jones.
>
> Rega's legal arguments fare no better. Although he contends that the Pennsylvania Supreme Court found that the prosecutor made this statement to all four witnesses, ***the nature of that court's ruling did not require it to make any finding on this point, and it did not.*** Rega also argues that the Commonwealth judicially admitted this point in various filings, but none of the statements he cites constitutes an unequivocal or unambiguous concession that the prosecutor made any such statement to Fishel or Susan Jones...." (internal citation omitted) (emphasis added herein).

The Third Circuit made a very astute observation in holding that the Supreme Court of Pennsylvania (hereinafter "SCOPA") did not make a fact-finding on this point and that "...the nature of that court's ruling did not require it to make..." such a finding. In considering this contention, it is important to evaluate the SCOPA's full statement regarding the fact-findings salient to Petitioner's *Brady/Giglio* claims:

> "Factually, however, the post-conviction court determined that, at all relevant times, the district attorney enforced a policy that plea agreements would be neither offered nor negotiated with witnesses charged with crimes until their cooperation was fully realized. *See Commonwealth v. Rega,* Nos. CP–33–CR–26–2001, *et al., slip op.* at 20 (C.P. Jefferson Oct. 27, 2011). This finding is supported by substantial evidence of record. *See, e.g.,* N.T., Dec. 14, 2009, at 138 (reflecting testimony of a defense attorney that "it's [the district attorney's] established policy that he will not make a deal or offer a specific plea bargain until time to do so."), 145 (elaborating that the relevant time for plea offers, per the district attorney's policy, is after the witness's cooperation is completed). The court also inferred from the evidence presented that any suggestion of "possible verbal agreement[s]" derived from defense attorneys' and witnesses' own hopeful predictions, rather than from actual incentives offered by the district attorney. *See Rega,* Nos. CP–33–CR–26–2001, *et al., slip op.* at 21. We agree with the court that this inference is a reasonable one deriving from evidence concerning the district attorney's practices.
>
> While Appellant references conflicting evidence and evidence from which contrary inferences might be gleaned, *see, e.g.,* Brief for Appellant at 15, the relevant review at this stage is limited to an examination of the

> record to determine whether the material findings of the post-conviction court are supported by it. *See, e.g., Lesko,* 609 Pa. at 152, 15 A.3d at 358. Accordingly, we decline Appellant's invitation, in effect, to reweigh differing portions of the post-conviction evidence. As reflected above, the record plainly supports the PCRA court's finding of no agreements or incentives, other than maintaining the possibility for later negotiation based on the witnesses' cooperation." *Com. v. Rega*, 620 Pa. 640, 648, 70 A.3d 777, 781 (2013).

Respondents would submit that the material fact upon which the SCOPA based its decision was "the PCRA court's finding of no agreements or incentives." That was the "central fact" (see *Burden, supra*) upon which the disposition of Petitioner's claim hung. On the other hand, the SCOPA's reference to "...other than maintaining the possibility for later negotiation based on the witnesses' cooperation," was merely a reference to a matter of record which was immaterial to the court's judgment.[8] In other words, it had nothing to do with the court's disposition. It was merely a reference to the fact that "nothing more" of any significance had happened in the case other than this. This is why the Third Circuit reasoned that the SCOPA did not make a fact-finding here. Accordingly, since this reference had nothing to do with the SCOPA's nor the PCRA court's ruling, it should not be elevated to, as Petitioner asserts, a hard, material fact-finding which was rejected by the Third Circuit.

[8] It is noteworthy that the SCOPA did not even mention the names of the individual witnesses in its discussion on this particular issue.

Indeed, an examination of Pennsylvania law reveals why the PCRA court and the SCOPA would not view "maintaining the possibility for later negotiation based on the witnesses' cooperation" as a material, relevant, or salient fact. For instance, in *Commonwealth v. Burkhardt*, 833 A.2d 233 (Pa. Super. 2003), a unanimous *en banc* panel decision of the Pennsylvania Superior Court, the prosecutor told the witness's counsel that if the witness "cooperated and testified truthfully at all proceedings, that his testimony would be taken into consideration and his cooperation would be taken into consideration at such time as his charges are dealt with." *Id.* at 243. This specific information was not provided to the defense. The *Burkhardt* court opined,

> "....for a District Attorney to indicate that truthful testimony and cooperation would be considered in future proceedings falls far short of any promise of leniency and represents nothing more than the type of general response that D.A.'s have been uttering for decades. It is the kind of general promise of which effective defense counsel is aware and for which counsel would examine a prosecution witness as a matter of course. We decline to conclude that Brady/Bagley/Strong mandate that the Commonwealth has the burden of affirmatively disclosing such a generic statement absent a request from a defendant for such a disclosure." Id. at 243-44

As an *en banc* decision of Pennsylvania's Superior Court, *Burkhardt* has been binding precedent over all panels of the Pennsylvania Superior Court and in all of

Pennsylvania's lower courts since 2003.[9] [10] Clearly, the SCOPA concurred with this principle inasmuch as they stated in a footnote, in reference to the statement about "maintaining the possibility for later negotiation based on the witnesses' cooperation", that, "Certainly, Appellant's attorneys were well aware of this incentive, as they questioned various of the Commonwealth's witness about their desires for leniency in their own criminal cases....." (citations to the record omitted herein). See *Rega, supra,* footnote 3.

The implications of this principle regarding this claim are obvious. In *Burden, supra*, the fact-finding at issue was a clearly established, material, salient fact. It was characterized by this Court as the "central fact." Without any valid reason, the Court of Appeals rejected that material fact-finding. In this case, the Pennsylvania courts merely made reference to matters which had come into the record. The asserted "facts" at issue were not material. They were not supportive of Petitioner's claim and did not merit relief. If the SCOPA and lower court would have found that there were no statements that cooperation would be considered

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[9] Further, it would seem that such a statement has been held to be legally insignificant in the federal courts as well. See e.g. *Tarver v. Hopper*, 169 F.3d 710, 716 (11th Cir. 1999); *McCleskey v. Kemp*, 753 F.2d 877, 884 (11th Cir. 1985) aff'd, 481 U.S. 279 (1987); *Depree v. Thomas*, 946 F.2d 784, 797 (11th Cir. 1991).

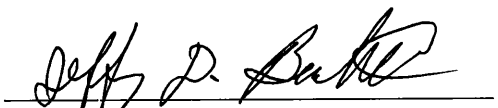
[10] Inasmuch as the standard for a habeas petitioner to prevail is that he must prove state court decisions were "contrary to.....or....an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;...", Petitioner could not prevail because the state courts clearly did not violate any principle of this Court's jurisprudence on this issue. See e.g. *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley,* 514 U.S. 419 (1995).

later, the outcome would have been no different than if those courts had found that such statements had been made.

Finally, Respondents would like to point out one other important distinguishing factor between *Burden, supra,* and the instant case. In *Burden,* the fact at issue was so clearly established by the record that it was not even debatable. However, as can be seen above, the fact Petitioner asserts regarding Fishel, Jones, and Sharp is *not* established by the record as was argued by Respondents and found by the Third Circuit.

CONCLUSION

Based on all of the above, it is clear that the Third Circuit did not reject or fail to afford Pennsylvania court material fact-findings the "presumption of correctness" to which they are entitled under the AEDPA. The statements that Petitioner refers to, for the purposes described above, were merely references to the record of facts that were not legally significant nor material to the Pennsylvania courts' disposition of the matter. Accordingly, the instant Petition for a Writ of Certiorari should be denied.



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