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 PHOENIX; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT HOUTZDALE,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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The Commonwealth never disputes that the Third Circuit rewrote a state court's opinion to reach the decision below—first, by changing the number of witnesses to whom a prosecutor had given assurances about "the possibility for later negotiation based on the witnesses' cooperation," then, by adding a finding that one of those witnesses had not committed perjury. *See* Pet. at 3–5 (quoting Pet. App. 150a (footnote omitted)). This Court need look no further than the Commonwealth's silence regarding these two rewrites to see why this case warrants summary reversal.

But what the Commonwealth does say cries out for that result. According to the Commonwealth, the Third Circuit did not need to presume the correctness of any state-court factual determination so long as the Circuit deemed it "immaterial to the [state] court's judgment" or "the [state] court's disposition" of Rega's legal claims. *See* BIO at 12–15 (footnote omitted). That newfangled materiality exception to the presumption of correctness is contrary to 28 U.S.C. § 2254(e)(1), not to mention decades of precedent from this Court and the lower federal courts. And the purported application of that exception to facts at the heart of Rega's claims—facts which a state court considered important

enough to find after an evidentiary hearing and to include in a published opinion—underscores how undeferential the Third Circuit was to state-court fact-finding in this case. Without appreciating § 2254(e)(1) or well-settled precedent, the rest of the BIO amounts to nothing more than an effort to show that the state court should not have made the findings it did and the Third Circuit could have applied different legal reasoning in the decision below. Yet this effort sidesteps the question presented and repeats the Third Circuit's mistake of relieving the Commonwealth of its burden to overcome the presumption of correctness.

At bottom, the BIO shows why this case demands summary reversal: The Third Circuit gave itself a remarkable power to rewrite a state court's factual findings. By doing so, the decision below "so far departed from" black-letter habeas law "as to call for an exercise of this Court's supervisory power." *See* Sup. Ct. R. 10(a).[1]

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[1] Rega is adding the Superintendent of the State Correctional Institution at Houtzdale to the caption of this Reply Brief, because Rega was transferred to that facility after filing his petition for a writ of certiorari, making the facility's Superintendent the appropriate Respondent in this case. *See* Sup. Ct. R. 35.3–35.4; Fed. R. App. P. 43(c)(2).

1. The Commonwealth acknowledges that the state supreme court decided that "the record" in Rega's post-conviction proceedings "plainly support[ed] [a state trial-level] court's finding" that a prosecutor provided four witnesses who testified against Rega "no agreements or incentives, other than maintaining the possibility for later negotiation based on the witnesses' cooperation." *See* BIO at 12 (quoting Pet. App. 150a).[2] But, according to the Commonwealth, the Third Circuit properly declined to presume the correctness of that sentence's final clause because it "was merely a reference to a matter of record which was immaterial to the [state] court's judgment" denying Rega's *Brady v. Maryland*, 373 U.S. 83 (1963), claim. *See* BIO at 12 (footnote omitted). That selective review is not how deference to state-court fact-finding works. In fact, that sort of

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[2] Although the Commonwealth considers it "noteworthy" that the state supreme court "did not even mention the names of the individual witnesses," the Commonwealth neglects to mention that the state trial-level court did. *See* BIO at 12 n.8. That court (whose findings the state supreme court adopted) expressly found that the prosecutor had "said nothing more than that should Sharp and Stan[ford] Jones testify, [the prosecutor] would consider their cooperation when it came time to assemble a plea deal." Pet. App. 183a. And, in a paragraph about Susan Jones, Bair, and Fishel, that court found that the prosecutor "conveyed nothing more than that he would 'probably' take any cooperation into account when later considering plea deals." Pet. App. 187a.

materiality exception casts aside the plain text of § 2254(e)(1) and decades of settled precedent, not to mention the plain text of the state court's opinion in this case.

Congress spoke clearly about the presumption of correctness and left no room for the Commonwealth's (and the Third Circuit's) apparent materiality exception. Section 2254(e)(1) mandates that federal habeas courts "presume[] to be correct" "a determination of a factual issue made by a State court." There is no statutory carveout for factual issues the Third Circuit considers "immaterial." *But see* BIO at 12.

Nor does the Commonwealth point to any federal case applying that sort of materiality loophole—except for the decision below. In fact, federal courts (including the Third Circuit) have uniformly applied § 2254(e)(1)'s presumption to state-court factual findings even when a state court did not adjudicate the merits of a petitioner's legal claim or reach a decision that would warrant deference under § 2254(d)(1). *See Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001); *Austin v. Davis*, 876 F.3d 757, 778–79 (5th Cir. 2017); *Crittenden v. Chappell*, 804 F.3d 998, 1011 (9th Cir. 2015); *Rever v. Acevedo*, 590 F.3d 533, 537 (7th Cir. 2010) (per curiam); *Hodges v. Att'y Gen., State of Fla.*, 506 F.3d 1337, 1348 (11th Cir. 2007); *Robinson*

v. Howes, 663 F.3d 819, 825 (6th Cir. 2011); *Cosey v. Lilley*, 62 F.4th 74, 83 (2d Cir. 2023); *Fontenot v. Crow*, 4 F.4th 982, 1034–35, 1061 (10th Cir. 2021); *Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010); *Storey v. Roper*, 603 F.3d 507, 524 (8th Cir. 2010); Brian R. Means, Postconviction Remedies § 28:2 n.25 & accompanying text (2024); *id.* § 25:9 n.23 & accompanying text. This uniformity is well grounded in the history of the presumption of correctness and this Court's precedent. The predecessor to § 2254(e)(1) similarly mandated that federal courts apply a presumption of correctness to a state court's "*determination* after a hearing on the merits of a *factual issue*." *See Burden v. Zant*, 498 U.S. 433, 437 n. 3 (1991) (per curiam) (emphases added) (quoting version of 28 U.S.C. § 2254(d) enacted in Act of Nov. 2, 1966, PL 89-711, 80 Stat. 1105–06). And this Court's interpretation of that nearly identical language did not even hint at the sort of materiality exception the Third Circuit apparently created here. To the contrary: "State-court findings" regarding "questions" that "set" "the scene" and "reconstruct[]" "the players' lines and actions"—i.e., "scene- and action-setting questions"—"attract a presumption of correctness." *See Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

The Commonwealth's attempt to rely on *Burden* to justify the Third Circuit's break from this line of authority rests on an obvious misreading of that decision. This Court never concluded that a state court's finding must be "central" to its adjudication of a claim when this Court summarily reversed a decision that had neither applied the presumption of correctness nor explained why any exception to the presumption should apply. *See Burden*, 498 U.S. at 436–37. All this Court required to trigger the presumption was that a state court had made "a determination of historical fact." *See id.* at 434–37. The Commonwealth suggests that *Burden* endorsed some sort of "central fact" loophole only by misreading another part of this Court's opinion. *See* BIO at 12, 14. *Burden* went on to recognize the centrality of the fact to the petitioner's federal claim when rejecting an entirely separate argument—that the petitioner had "'waived' reliance on § 2254(d) in the Court of Appeals by failing sufficiently to emphasize the [state] court's finding" before seeking certiorari. *See Burden*, 498 U.S. at 437–38. That conclusion had nothing to do with which findings trigger the presumption of correctness. And Rega unquestionably relied on the presumption in the Third Circuit. *See, e.g.*, Step-One Br. for Appellant/Cross-Appellee at 24–25, 27, 66, *Rega v.*

Sec'y, Pennsylvania Dep't of Corr., Nos. 18-9002, 18-9003 (3d Cir. filed Dec. 20, 2019). The Third Circuit's refusal to apply the presumption in the face of Rega's reliance on it and the state court's findings calls for the same result this Court reached in *Burden*: summary reversal.

The BIO itself reflects the unworkability of the Third Circuit's brand-new exception. According to the Commonwealth, the Third Circuit properly decided that the state court's determination about what the prosecutor was "maintaining" with four witnesses in this case was rendered "immaterial" because the state supreme court *silently* adopted an *intermediate* state appellate court's decision in a *different* case. *See* BIO at 12–15 (quoting Pet. App. 150a). To describe that theory is to refute it. Needless to say, it is a decidedly undeferential way of reading state supreme court decisions (especially ones that follow evidentiary hearings and expressly adopt factual findings, as the state supreme court did in this case). And both Congress and this Court long ago foreclosed it.

Even when looking at the intermediate state appellate court's decision in that other case, the Commonwealth mixes up fact and law. The Commonwealth wrongly conflates findings of fact (that a prosecutor "indicate[d] that truthful testimony and cooperation would be considered

in future proceedings") with the legal significance of those findings (whether *Brady* mandated disclosure of that information). *See* BIO at 13 (quoting *Commonwealth v. Burkhardt*, 833 A.2d 233, 243 (Pa. Super. Ct. 2003) (en banc)). The Commonwealth also asserts that the state supreme court's finding that Rega's trial "attorneys were well aware of" each witness's "incentive" to cooperate with the Commonwealth and "questioned various of the Commonwealth's witness[es] about their desires for leniency" proves that the state supreme court silently adopted that intermediate appellate court's legal analysis. *See* BIO at 14 (quoting Pet App. 150a n. 3). But this assertion is wholly non-responsive to Rega's explanation of why that separate finding is irrelevant to the question presented. The fact that Rega's counsel knew that four critical witnesses were *looking for* leniency is meaningfully distinct from the separately-found fact that the prosecutor had given all four witnesses reason to think they would find what they were looking for after they testified against Rega. *See* Pet. at 30–31. And whether the state supreme court agreed with a different intermediate state appellate court's *legal* analysis of both types of *factual* findings does not undo the existence of these

findings, all of which deserve a presumption of correctness—not just the one the Commonwealth deems "material."

If the Commonwealth is right, the Third Circuit's new exception will have far-reaching effects well beyond this case. Imagine, for instance, that a state court held a post-conviction hearing regarding a *Strickland v. Washington*, 466 U.S. 668 (1984), claim aimed at a trial attorney's alleged failure to investigate and present a petitioner's history of childhood abuse as a mitigating circumstance in a capital case. And imagine the state court found that the petitioner had never experienced abuse. But imagine the state court rejected the *Strickland* claim solely on prejudice grounds because the petitioner "had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different," even assuming the petitioner had experienced abuse and trial counsel had rendered deficient performance. *Cf. Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). In federal habeas proceedings, the Third Circuit could decline to defer to the state court's prejudice conclusion under § 2254(d)(1). *See Williams*, 529 U.S. at 405–06. But, on the BIO's telling, the Third Circuit also could make a de novo determination of whether the petitioner had experienced childhood

abuse. Why? Because the state court's finding that the petitioner had not experienced that abuse "had nothing to do with the [state] court's disposition" of the *Strickland* claim on prejudice grounds. *See* BIO at 12. That remarkable power to deem a fact "immaterial" and decline to defer to it has no basis in the law. *But see* BIO at 12.

Without appreciating the breadth of this Third-Circuit-made loophole to state-court deference, the Commonwealth spends most of the BIO's pages trying to undo the state court's findings and to place the burden on Rega to prove those findings were correct. *See* BIO at 2–10, 15. Yet those pages cannot erase the state trial-level court's findings about all four critical witnesses, Pet. App. 183a, 187a, or the state supreme court's adoption of them, Pet. App. 150a. Nor can those pages justify the clear misapplication of well-settled habeas law when the Third Circuit followed the Commonwealth's similar effort below to ignore the presumption of correctness, rewrite the state court's findings, and place the burden on Rega to prove what the state court had already found as to all four witnesses. *See* Pet. App. 9a–11a, 16a.

The Commonwealth's other assertion—that what the state trial-level court found "was a limitation that *nothing more* would have been

said regarding [Sharp's] cooperation" and "not a definite fact-finding that such a statement had, in fact, been made"—misreads either that court's words or their plain meaning. *See* BIO at 6–7, 9. As Rega quoted (without refutation), that court found that the prosecutor had "said nothing more than that should Sharp and Stan[ford] Jones testify," the prosecutor "would consider their cooperation," Pet. App. 183a, and "conveyed" to attorneys for Susan Jones, Bair, and Fishel "nothing more than that [the prosecutor] would 'probably' take any cooperation into account when later considering plea deals," Pet. App. 187a. *See* Pet. at 10–11, 21–22. And as Rega explained (without refutation), the phrase, "nothing more than" means "only," i.e., the prosecutor conveyed only that he would probably take any cooperation into account when later considering plea deals. *See* Pet. at 21–22 (quoting *Nothing more than*, Cambridge Advanced Learner's Dictionary & Thesaurus, available at https://dictionary.cambridge.org/us/dictionary/english/nothing-more-than).

The Commonwealth also ignores Rega's point that the state trial-level court held a hearing, assessed credibility, and cited testimony from attorneys for Bair, Stanford Jones, Susan Jones, and Sharp about the

prosecutor's "established policy." *See* Pet. at 21–22 (quoting Pet. App. 183a–88a). The Commonwealth may try to overcome the presumption of correctness on remand. But its effort to undo those findings while placing the burden on Rega to prove them anew confirms that we are a long way from giving a state court the deference it deserves.[3] And that underscores the need for summary reversal.

2. One word in the Third Circuit's opinion regarding Rega's *Napue v. Illinois*, 360 U.S. 264 (1959), claim cannot be found in the BIO or the state court's opinion: perjury. *See* Pet. App. 17a–18a. And this Court should view the BIO as rightly conceding that the Third Circuit wrongly rewrote the state court's opinion in yet another way—by attributing to the state court a new finding about whether Bair had "perjure[d] himself

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[3] The Commonwealth uses two footnotes to suggest alternate legal bases the Third Circuit could have used to deny relief in this case. *See* BIO at 14 nn.9–10. But neither footnote responds to Rega's argument that this case deserves summary reversal because the Third Circuit cast aside deference to state-court fact-finding which Congress has mandated, thereby "present[ing] important questions regarding the role to be played by the federal courts in the exercise of the habeas corpus jurisdiction." *See* Pet. at 28–29 (quoting *Sumner v. Mata*, 449 U.S. 539, 543 (1981)). And both theories are better left for the Third Circuit to address in the first instance on remand, because this Court is "a court of review, not of first view." *See Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005).

when he denied being made any promises" at Rega's trial. *See* Pet. at 24 (quoting Pet. App. 17a). The Third Circuit's second rewrite, like the first, is indefensible.

3. Clear language from Congress and an unbroken line of authority that includes *Burden*'s on-point summary reversal shows why this Court should summarily reverse and remand for the Third Circuit to conduct proper analyses of Rega's *Brady* and *Napue* claims in the first instance. The Commonwealth never questions that, if this Court agrees that the Third Circuit overstepped the bounds of its authority under AEDPA, reversal and remand is the proper course. This Court should follow that course to ensure that the Third Circuit affords the proper deference to all of the state court's factual findings when adjudicating those claims.

CONCLUSION

This Court should summarily reverse the decision below.

Respectfully submitted,

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