CASE NO._____ (CAPITAL CASE)
OCTOBER TERM 2024

In The
Supreme Court of the United States

ROBERT WHARTON,

Petitioner,

v.

SUPERINTENDENT, S.C.I. PHOENIX,

Respondent.

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

Stuart B. Lev
Assistant Federal Defender
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(212) 920-0520

Counsel for Petitioner, Robert Wharton
Member of the Bar of the Supreme Court

QUESTIONS PRESENTED (CAPITAL CASE)

1. How should the "one juror" standard of prejudice set forth in *Wiggins v. Smith* be applied where the mitigation that counsel failed to investigate would have led to the development of both positive and negative evidence; can a court simply presume that every juror would have rejected the positive evidence in favor of the negative?

2. Under *Brecht v. Abrahamson*, where the prosecution bears the burden of proving harmless error, must a reviewing court consider the impact of the error on the proffered defense and did the Third Circuit wrongly substitute a *Strickland* prejudice standard where the defendant bears the burden of proof?

PARTIES TO THE PROCEEDING

Petitioner Robert Wharton was Appellant in the court below and is an indigent prisoner within the Pennsylvania Department of Corrections. Respondent Superintendent, S.C.I. Phoenix maintains custody of Petitioner.

No party is a corporation.

RELATED PROCEEDINGS

United States Court of Appeals for the Third Circuit:

Wharton v. Vuaghn (Wenerowicz), et al., No. 13-9002 (initial habeas appeal)

Wharton v. Superintendent Graterford SCI, et al., No. 22-9001 (habeas appeal after remand)

United States District Court for the Eastern District of Pennsylvania

Wharton v. Vaughn, No. 2:01-cv-06049

Supreme Court of Pennsylvania

Commonwealth v. Wharton, No. 114 CAP (direct appeal) (1992)

Commonwealth v. Wharton, No. 50 CAP (second direct appeal) (1995)

Commonwealth v. Wharton, No. 170 CAP (appeal of denial of post-conviction relief)

Court of Common Pleas Philadelphia County

Commonwealth v. Wharton, CP-51-CR-0222-581-1984 (trial and retrial)

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PETITION FOR WRIT OF CERTIORARI

Robert Wharton respectfully petitions for a writ of certiorari to review a judgment and decision of the Third Circuit Court of Appeals.

OPINIONS BELOW

The Third Circuit's precedential opinion affirming the denial of habeas relief is published as *Wharton v. Superintendent, Grateford S.C.I.,* 95 F.4th 113 (3d Cir. 2024) is attached as Appendix A. The Third Circuit's order denying Mr. Wharton's timely petition for rehearing and rehearing en banc is unpublished and is attached as Appendix B. The Third Circuit's earlier non-precedential opinion affirming the denial of guilt phase relief but remanding for an evidentiary hearing on a penalty phase claim can be found at *Wharton v. Vaughn*, 722 F. App'x. 268, 270 (3d Cir. 2018) and is attached as Appendix C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Third Circuit issued its opinion on March 8, 2024, and denied a petition for panel and en banc rehearing on June 19, 2024. Justice Alito extended the time for filing a petition for certiorari until November 18, 2024. This petition timely follows.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the U.S. Constitution provides, in part "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel in his defense."

The Fourteenth Amendment to the U.S. Constitution provides, in part "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Procedural History

In February 1984, Mr. Wharton and his co-defendant, Eric Mason, were arrested for the murders of Bradley and Ferne Hart. Wharton and Mason were tried together, and the jury found both defendants guilty of two counts of first-degree murder, robbery, and related offenses. The jury sentenced Mr. Wharton to death but spared Mason's life.

In 1992, the Pennsylvania Supreme Court reversed Mr. Wharton's death sentence and remanded for a new penalty hearing. *Commonwealth v. Wharton*, 607 A.2d 710 (Pa. 1992) (*Wharton I*). At that resentencing hearing, after over thirteen hours of deliberation spanning three days, including a reported deadlock after seven hours, the jury returned a death sentence. The jury rejected two of the aggravating circumstances sought by the prosecution (torture and grave risk of danger to the surviving baby) but found that two other aggravating circumstances (multiple murders and commission during a felony) outweighed the mitigating circumstances. *See Wharton v. Vaughn*, 722 F. App'x. 268, 270 (3d Cir. 2018) (*Wharton II*).

After exhausting his state court remedies, Mr. Wharton sought habeas corpus relief. Following an evidentiary hearing on two guilt-innocence claims, the district court denied relief on all claims, including Mr. Wharton's claim that his counsel was

ineffective for failing to present evidence of his positive adjustment in prison during the years between his initial death sentence and his resentencing ("*Skipper* claim").[1] After expanding the COA, the Third Circuit affirmed the denial of relief on his guilt-innocence phase claims but remanded the *Skipper* claim for an evidentiary hearing. *Wharton II*, 722 F. App'x. at 285.

On remand, the Philadelphia District Attorney's Office ("DAO") concluded that the ineffectiveness/*Skipper* claim was meritorious, and the parties submitted a proposed order to the district court. The district court refused to accept the agreement and appointed the Office of the Attorney General ("OAG") to submit an amicus brief on whether relief should be granted and whether an evidentiary hearing was necessary. AII-65-68.[2]

After an evidentiary hearing, in which the OAG fully participated, the district court denied relief and granted COA. Mr. Wharton appealed. On March 8, 2024, the Third Circuit (Hardiman, Bibas, Phipps, JJ.) issued a precedential opinion, authored by Judge Hardiman, affirming the district court's denial of relief. *Wharton v. Superintendent, Graterford S.C.I.,* 95 F.4th 113(3d Cir. 2024) (*Wharton III*). A petition for rehearing en banc was subsequently denied.

[1] *Skipper v. South Carolina*, 576 U.S. 1 (1986).
[2] Citations to AI.—refer to the Appendix filed in the Third Circuit in the initial habeas appeal. Citations to AII- refers to the Appendix filed in the Third Circuit in the appeal after remand.

B. Summary of Relevant Facts

1. The offense

Mr. Wharton and co-defendant Eric Mason were prosecuted for the homicides of Bradley and Ferne Hart in their Philadelphia home. The Harts were killed during a burglary. Their infant daughter, Lisa, was found alone in the house with the heat turned down when the bodies were discovered by family members three days later.

Detective Charles Brown of the Philadelphia Police Homicide Unit led the investigation. He learned that both the Harts' home and their family-run church had been burglarized and vandalized on separate occasions in the summer preceding the murders. Detective Brown discovered that Eric "Phoenix" Mason had been stopped near the church on the night of that burglary in possession of proceeds of the burglary, and that Mason was wanted on an outstanding arrest warrant for a separate robbery and burglary in South Philadelphia. Through their investigation of Eric Mason, police learned that his friend, Robert Wharton, had done construction work at both Bradley Hart's residence and the Christian radio station owned by the Hart family. According to Mr. Hart's father (Reverend Hart), his son had complained about the quality of Wharton's work to Wharton's boss, Norman Owens, which ultimately led to a dispute over payment for the job. Police also learned that Mr. Wharton had recently given his girlfriend, Tywana Wilson-Carter, a Minolta 35mm camera which matched the description of a camera stolen from the Harts' residence.

Wharton and Mason were tried together in a joint trial. The Commonwealth's evidence depended largely on confessions given by the two defendants. Other than

Mr. Mason's assertion that Mr. Wharton killed Bradley Hart (in contrast to Mr. Wharton's statement attributing that act to Mr. Mason), the statements were virtually identical. No footprints, hair, fiber, or other trace or forensic evidence linked Mr. Wharton to the scene of the homicide.

2. Facts relevant to the confrontation issue

Upon his arrival at the homicide unit, Mr. Wharton was placed in a 10x10 room and handcuffed to a metal chair. Tywana Wilson-Carter was placed in a similar interrogation room. Detectives Brown and Miller questioned Mr. Wharton. According to Detective Brown, he first had an off-the-record discussion with Mr. Wharton in which he laid out the evidence against him and explained how he already had enough evidence to convict him of the murders. This preliminary conversation was not memorialized in any police reports or paperwork. AI-1913-14. Detective Brown admitted that during the course of this discussion he wanted Mr. Wharton to believe that if he did not give a statement of his involvement in the Hart murders, Detective Brown would charge Ms. Wilson-Carter with murder. AI-1920-23. After this informal discussion, Mr. Wharton waived his constitutional rights and gave a full statement implicating both himself and Eric Mason in the murders of Bradley and Ferne Hart. AI-5238. Mr. Wharton stated that he killed Ferne Hart and that Eric Mason killed Bradley Hart. AI-5242.

Mr. Wharton has steadfastly maintained that police obtained this false confession through physical coercion and that he sustained physical injury as a result.

The trial court permitted the Commonwealth to present both Mr. Mason's statement and Mr. Wharton's statement with redactions that substituted the phrase "the other guy" for each of their names. The jury learned that Mr. Wharton was the "other guy" mentioned in Mr. Mason's statement when Detective Brown testified that "the two defendants implicated each other in their statements . . ." *See Wharton II,* 722 Fed. App'x at 276.

On direct appeal, the Pennsylvania Supreme Court correctly found that Detective Brown's testimony violated the Sixth Amendment. *Wharton I*, 607 A.2d at 719 ("[W]e agree . . . that Detective Brown's statement did violate Appellant's rights under the Confrontation Clause and *Bruton* . . . ."). The Court found that the error was harmless. *Id.*

3. Facts relevant to the sentencing ineffectiveness issue

Although Mr. Wharton had been in state custody for six years prior to the resentencing trial, trial counsel did not order Mr. Wharton's incarceration records or investigate his prison adjustment. AII-534. Trial counsel explained that his failure to investigate this area of mitigation was not based on any strategy: "It was just pure ignorance." *Id.* He stated that his "failure to present, investigate [prison] records, present those records, present the expert testimony, [was] simply a failure on my part to be knowledgeable about the *Skipper* case . . . ." AII-571.

Had he investigated, trial counsel would have learned that following his 1985 death sentence, Mr. Wharton, who was only twenty-one years old at the time of his crimes, was transferred to the state prison system in 1986. Because of his death

sentence, he was placed in the restricted housing unit (RHU), where he was generally confined to his cell for twenty-two hours a day, was not allowed to participate in educational or vocational programs, and had limited visitation and telephone contact. AII-1581-1653. For the next three years, Mr. Wharton regularly obtained positive reports for his behavior and had only three minor misconduct reports. *Id.* There were no incidents of assaultive, violent, or threatening behavior. *Id.*

In May of 1989, on two occasions a few days apart, a search of Mr. Wharton's cell uncovered pieces of a broken antenna. AII-1555-72. One piece had been bent into the shape of a handcuff key, though no one ever tested it to see if it could actually unlock a handcuff. AII-972-73; AII-1011. Mr. Wharton received two misconducts for possession of contraband, a serious violation of prison rules.[3] AII-1555-72. Although he denied knowledge of these objects, a prison hearing examiner found Mr. Wharton guilty and he was given 90 days of disciplinary time for each infraction, where most of the few privileges he was allowed as a death row prisoner were taken from him. *Id.*

Mr. Wharton served his disciplinary time without further incident and was released early on good behavior. AII-1616. For the next three years, up until the time of his resentencing trial, Mr. Wharton had only one minor misconduct for doing

[3] The Third Circuit appeared to treat this as an escape attempt *Wharton III* at 124 (referencing repeated escape attempts). However, Mr. Wharton was never disciplined for, or charged with, attempting to escape. There was no evidence that the makeshift key could have unlocked any handcuffs and no evidence that he ever tried to use the broken antenna pieces in any way.

martial arts exercises when he was alone in a locked cage used for RHU prisoners to exercise. AII-1643. No disciplinary action was taken.

Thus, Mr. Wharton's disciplinary record shows that, except for the two misconducts in May 1989, he behaved well. He got along with correction officers and prison authority. He followed the rules. He sought out appropriate persons when he had a problem or used the prison grievance system to address issues as they arose. He had no assaultive, threatening, or violent conduct. Most importantly, for the three years prior to his resentencing, he caused no problems, except for the one minor misconduct.

There was also evidence that in 1986, while he was in county custody before his transfer to a state prison, Mr. Wharton was brought to City Hall in Philadelphia (which, at that time, served as the courthouse), for sentencing on an unrelated offense. After the sentencing, while being escorted through a public hallway back to the cell room, Mr. Wharton pushed a deputy sheriff and attempted to flee, running down the stairs. His escape attempt ended when he was shot in the stairwell by a sheriff's deputy. *Id.* Other than Mr. Wharton, no one was injured in the incident. Mr. Wharton eventually pled guilty to escape in December of 1986 and all other charges (simple assault, possession of implements of escape) were nolle prossed. AII-1534-43.[4]

[4] Charges relating to the possession of a handcuff key were dropped, there was no evidence presented at the evidentiary hearing that a handcuff key was used, and there was no property receipt confirming the seizure of a handcuff key. Nor was there any evidence that Mr. Wharton admitted to using a handcuff key at the time of his guilty plea to escape. Nevertheless, the panel wrote that a handcuff key was used and

In addition to evidence from the prison records, Mr. Wharton and the OAG both presented expert witnesses who reviewed the records. Mr. Wharton's experts concluded that the records showed a generally positive adjustment that was likely to continue in the future. Although Dr. Beard, the OAG corrections expert, agreed that the records reported examples of positive behavior, Dr. Beard concluded that Mr. Wharton's overall development was negative in light of the City Hall escape and his two major misconducts. Dr. Beard agreed, however, that the Pennsylvania DOC had maximum-security facilities that could safely house Mr. Wharton. A1115, 1168-71.

Even without the evidence of Mr. Wharton's good prison conduct, the resentencing jurors struggled with their verdict. They deliberated for more than thirteen hours over the course of three days. AII-316-19, AII-332-33, AII-339. They asked a question about finding mitigation that arose after the crime, found that there were mitigating circumstances, and rejected two of the four aggravating circumstances that had been submitted to them. AII01662-65.

At one point after more than six hours of deliberation, the jury sent a note informing the judge that they were deadlocked. Although the judge could have sentenced Mr. Wharton to life at that point, he ordered the jury to continue deliberations. Yet, the deadlock note shows that there were one or more jurors who were willing to vote for life, despite the presence of aggravating circumstances. Had those jurors been informed of Mr. Wharton's prison conduct, there is a reasonable

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linked that use to the prison misconduct. *Wharton III* at 121. Such belief is just not supported by the record

probability that at least one juror, who was already disposed to vote for life, would have done so.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD ADRESS THE PROPER APPLICATION OF THE ONE JUROR STANDARD OF PREJUDICE WHEN WEIGHING BOTH POSITIVE AND NEGATIVE EVIDENCE.

A. The Question Presented is Worthy of Review

In most cases where a defendant claims that his counsel was ineffective for failing to investigate and present mitigating evidence, the defendant tries to prove prejudice by pointing to the favorable mitigation evidence that could have led the jury to impose a life sentence. But what happens when the evidence is mixed – where counsel failed to uncover substantial favorable evidence but also would have found substantial negative evidence which the state could argue makes its case for death even stronger? What happens when some jurors might have been persuaded by the negatives, but others could reasonably find the positive behaviors to be more compelling? *See Massey v. Superintendent, SCI Coal Township*, 19-2808, 2021 WL 2910930 at *6 (3d Cir. July 12, 2021) (unpublished) ("The fact that one or more jurors may have made those findings does not *per se* negate the possibility that at least one juror could have found otherwise.").

These questions are particularly acute in capital cases, because of the "one juror" standard of prejudice applied in ineffectiveness claims. A habeas court must view prejudice not from the eyes of the jury as a whole but from the perspective of a

single juror. How is the reviewing court to distinguish between the juror who would eye the evidence favorably and the juror who would eye it negatively?

This Court has shown its willingness to adjust the pendulum of prejudice when it swings too far. In *Thornell v. Jones*, 144 S. Ct. 1302 (2024), this Court held that the Court of Appeals erred in granting habeas relief because it "downplayed the serious aggravating factors present here and overstated the strength of mitigating evidence that differed very little from the evidence presented at sentencing." *Id.* at 1314. In this case, the Court below employed the opposite, but equally erroneous, approach. It downplayed the significance of the mitigating evidence and overestimated the strength of the aggravating evidence. And it assumed that each and every juror would view the evidence in the same way. If certiorari was appropriate in *Thurnell*, it is just as appropriate here, particularly because the one juror standard allows that different jurors may weigh the evidence in different ways.

This Court has never specifically addressed the application of the one juror rule where the value of the evidence may be judged differently by different jurors. his is an important question that may arise with some frequency. The discovery of favorable evidence that defense counsel failed to investigate may often open the door for the prosecution to investigate and discover unfavorable new evidence. Mr. Wharton's case starkly presents these questions. This Court can provide much needed guidance on the proper application of the one juror standard where the impact of the evidence on individual jurors can cut in different directions.

B. This Case is an Appropriate Vehicle to Address the Question

To succeed on a claim of ineffective assistance, a habeas petitioner must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). In *Sears v. Upton*, 561 U.S. 945 (2010), this Court held that the prejudice inquiry "requires precisely [a] probing and fact-specific analysis." *Sears*, 561 U.S. at 955.

In a state like Pennsylvania, where a death sentence can be imposed only by a unanimous jury, prejudice results from counsel's deficient performance when there is a reasonable probability that *one juror* would have reached a different result and voted for a life sentence but for counsel's error. *See Andrus v. Texas*, 140 S. Ct. 1875, 1886 (2020) (prejudice requires a reasonable probability that a single juror would weigh all the evidence and strike a different balance) (citing *Wiggins v. Smith*, 539 U.S. 510, 536 (2003)).

Here, counsel's deficient performance led to the omission of evidence that was both favorable and unfavorable to the defendant. Trial counsel failed to investigate and present evidence of Mr. Wharton's positive adjustment to prison following his transfer to state custody. Counsel conceded that his error was not the product of a strategic decision but was based on his ignorance of the law. AII-534, 571. Because of counsel's errors, the jury never learned that in the three years prior to resentencing, Mr. Wharton displayed exemplary conduct. The jury also never learned of the many positive reports about his conduct, the absence of any reports of violence or threatening behavior, or expert testimony that, if sentenced to life, he could be safely housed by the DOC.

Mr. Wharton presented facts and circumstances that weighed in favor of finding that counsel was deficient and that Mr. Wharton was prejudiced by those deficiencies:

- For the three years prior to the trial, Mr. Wharton had a near perfect record of behavior except for one minor misconduct for which he received a warning;
- Mr. Wharton had no instances of violent or assaultive behavior during his six and a half years in state custody;
- Trial counsel testified that he failed to investigate Mr. Wharton's prison adjustment because he was not aware that such evidence could be used at the resentencing trial;
- Trial counsel testified that he believed the prison records showed that Mr. Wharton had adjusted well in prison;
- Trial counsel testified that he would have presented such evidence to the jury even if it would have allowed the Commonwealth to present evidence of the escape and misconducts;
- Trial counsel testified that the adjustment evidence would have been consistent with his penalty phase strategy;
- After more than a full day of deliberation, the jury submitted a note that it was deadlocked; and
- After another six hours of deliberation, the jury rejected two aggravating circumstances alleged by the Commonwealth (torture and grave risk to another) and found three mitigating factors, but ultimately sentenced Mr. Wharton to death.

Records from the prison's Program Review Committee were overwhelmingly positive. AII-1656-57. The district court found that "[t]he PRC noted in various reviews that Wharton was polite, cordial, well-mannered, well-behaved, and had regular contacts with his counselor. Wharton did not exhibit any signs of assaultive, predatory, or violent behavior while incarcerated at SCI Huntington during the

relevant time period. According to Wharton's corrections expert, the PRC repeatedly noted that Wharton was "adjusting well." AII-10. In addition, the four yearly Prescriptive Program Plans documented that Mr. Wharton "maintain[s] misconduct free behavior," "sustain[s] positive housing reports," "exercise[s] routinely," "maintain[s] counselor contacts," and "continue[s] with educational development." *Id.* (citations omitted). Mr. Wharton maintained contact with family and friends. He received regular visits. He attended chapel services. Most importantly, "Wharton received no negative housing reports or negative psychiatric reports." AII-11.

This is strong evidence of a positive adjustment to prison. The evidence shows Mr. Wharton's peaceful, non-violent behavior and overall ability to comply with prison rules and directives. There is a reasonable probability that this evidence, in combination with the evidence presented at trial, could have led any one juror to vote for life. Defense counsel testified that he could have used the records to argue that Mr. Wharton was accepting of his situation and did not "hang his head, he pursues things that around him to be a semi-vibrant member of the prison community by seeking educational opportunities, doing writings, doing drawings and participating to the extent that he can in prison life in a meaningful way." AII-544.

There were, however, unfavorable aspects to Mr. Wharton's prison record, including the City Hall escape and four minor and two serious misconducts. A reasonable juror could find, however, that the City Hall escape had limited relevance, as the circumstances of the escape from a public place were unlikely to be repeated in a secure state prison serving a life sentence.

Counsel testified that had he known the content of his client's record he would not have been deterred from presenting the evidence of positive prison adjustment because the confiscated items noted in the records "were not used by him in some creative way that would imperil prison security" and, overall, "these records were very favorable." A553.

The bottom line is this – some jurors might have been persuaded by the negatives, but others could reasonably find the positive behaviors to be more compelling. The same is true regarding the experts who presented differing views on whether Mr. Wharton's behavior was more positive or negative and what that might mean for the future. Some jurors could reasonably find that Mr. Wharton's experts were more persuasive; others might be persuaded by the amicus experts.

Under the one juror standard, this should have been enough to prove prejudice. The Third Circuit, however, discounted Mr. Wharton's positive achievements and ignored the reasonable probability that any one juror could have favorably weighed Mr. Wharton's overall positive adjustment and lack of violent or assaultive conduct and, in combination with all other mitigation that counsel presented, voted for a life sentence. *Wharton III* at 123-24. Instead, the Court simply presumed that every juror would weigh the negative behavior more heavily than the positive.

The Third Circuit similarly discounted the expert testimony, finding that there were reasons to discount their respective opinions and concluding that they generally balanced out. *Id.* at 124. Again, this analysis distorts the one juror standard. Even if the experts were equally impeachable, any one juror could have concluded that

Petitioner's experts were more credible. any one juror also could have relied on the amicus expert's admissions that the records reveal positive aspects to Mr. Wharton's prison adjustment and that the Pennsylvania DOC could safely house Mr. Wharton in a maximum-security prison to discount any suggestion of future dangerousness and vote for a life sentence. A1115, 1168–71. Dr. Beard also agreed that Mr. Wharton's time in disciplinary custody was difficult and that his good behavior under those conditions was a positive factor in his adjustment. A1190. He acknowledged that Mr. Wharton's attendance at religious services, educational pursuits, good housing reports, contact with family, and lack of violence were all evidence of positive adjustment to incarceration. AII-1162, 1167, 1200, 1213, 1221.

Dr. O'Brien, the amicus mental health expert, also agreed that Mr. Wharton displayed positive traits while in custody. He agreed that Mr. Wharton's efforts to further his education represented a constructive use of his time. AII-778. He acknowledged that the PRC reports documented that Mr. Wharton was polite, cooperative, and interactive with staff, and that his PPP reports showed that Mr. Wharton met his yearly institutional goals of maintaining positive contacts with his counselor, pursuing his education, and engaging in physical exercise. A786–87; A828.

Any single juror could have relied on the positive aspects of the amicus expert testimony and voted for life knowing that that Mr. Wharton would be securely confined and become a productive and cooperative inmate. Indeed, such a finding would have accurately predicted what has happened. Mr. Wharton's spotless record of good behavior since the 1992 resentencing demonstrates that he had made a

positive adjustment and that the amicus expert predictions that he was a future risk were wrong. *See* Appellee Brief at 2–4, 15, 21, 26, 31 n.7.

This Court should review the appropriateness of the Third Circuit's dismissal of the positive aspects of Mr. Wharton's behavior and address the proper manner in which to weigh positive and negative behavior under the one juror test of prejudice.

The Third Circuit's analysis conflicts with opinions from this Court. This Court has recognized that although mitigation evidence may have negative aspects, that does not negate its overall value or render counsel's error harmless. *Williams v. Taylor*, 529 U.S. 362 (2000), found that the defendant had been prejudiced even though "not all of the additional evidence was favorable." *Id.* at 396. *Porter v. McCollum*, 558 U.S. 30 (2009), held that it was unreasonable to discount import of mitigating evidence about the defendant's military record because it had aggravating components, including that the defendant had gone AWOL more than once. *Id.* at 42. The Third Circuit committed the same errors here.

Thornell underscores the critical nature of the evidence Mr. Wharton's counsel failed to present. *Thornell* recognizes prejudice is not shown where "[m]ost of the [postconviction] mitigating evidence . . . was not new." *Id.* at 1311. Jones presented "extensive evidence" of cognitive impairment and "much on [the] topic" of abuse at trial, and in post-conviction proceedings he sought "a second look at essentially the same evidence." *Id.* at 1312. Here, the evidence concerning Mr. Wharton's prison adjustment is far different from any of the evidence presented at trial. While counsel did present witnesses who testified about their relationships with Mr. Wharton while

incarcerated and their view of his character, there was no evidence of his positive prison reports, educational accomplishments, disciplinary history, or non-violent behavior. Because the evidence at issue here is materially different from the evidence presented at trial, *Thornell* suggests that a showing of prejudice is attainable.

Bear in mind that this was a close case despite the disturbing facts of the crime. The jury struggled to reach a sentencing verdict. The deadlock note showed that one or more jurors was willing to vote for life even without the evidence of Mr. Wharton's prison record. Even after the judge ordered them to return the next day to continue their deliberations, the jurors took most of that next day before they ultimately rejected two of the requested aggravating circumstances but nevertheless reached the decision to impose a death sentence. Particularly for those jurors already inclined to vote for life, there is a reasonable probability that positive prison adjustment evidence could have led a single juror to maintain their belief a life sentence was appropriate. *See Bridges v. Beard*, 941 F. Supp. 2d 584, 619-20 (E.D. Pa. 2013) (finding prejudice from counsel's failure to introduce mitigation evidence in death penalty case "particularly" because the jury was deadlocked). *See also Williams v. Stirling*, 914 F.3d 302, 318-19 (4th Cir. 2019) (finding counsel's failure to present evidence of Fetal Alcohol Syndrome prejudicial where jury deliberated for two days and was deadlocked at one point). Indeed, the first jury to hear this case sentenced Mr. Wharton's equally responsible co-defendant to life.

The proper application of the one juror standard of prejudice is an important question for this Court to consider. The Third Circuit distorted that test. Certiorari should be granted.

II. UNDER *BRECHT V. ABRAHAMSON*, WHERE THE PROSECUTION BEARS THE BURDEN OF PROVING HARMLESS ERROR, A REVIEWING COURT MUST CONSIDER THE IMPACT OF THE ERROR ON THE PROFERRED DEFENSE; THE THIRD CIRCUIT DID NOT; BUT, INSTEAD SUBSTITUTED A *STRICKLAND* PREJUDICE STANDARD WHERE THE DEFENDANT BEARS THE BURDEN OF PROOF

The Sixth Amendment to the United States Constitution guarantees the right of an accused to "be confronted with the witnesses against him." Detective Brown's testimony indicating that Mr. Mason and Mr. Wharton "implicated each other" in their statements to the police, violated that right because Mr. Wharton had no opportunity to cross examine Mason, who did not testify at trial. The Pennsylvania Supreme Court so held, *Wharton I,* 607 A.2d at 718-19; A-4992-93, and the Third Circuit assumed that ruling was correct.[5] *Wharton II*, 722 F. App'x at 268. The Third Circuit concluded, however, that the error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

Brecht held that habeas review of the prejudicial impact of a constitutional violation examines the "substantial and injurious effect or influence in determining

[5] The Pennsylvania Supreme Court also held that under the particular facts of this case, the substitution of "the other guy" where Mason and Wharton implicated each other was insufficient to protect Mr. Wharton's confrontation rights. This Court need not consider whether its recent decision in *Samia v. United States*, 143 S. Ct 2994 (2024), impacts that conclusion because Detective Brown's testimony was both an independent violation of the Sixth Amendment and broke the redaction because he directly and explicitly identified "the other guy" in Mason's statement as Mr. Wharton.

the jury's verdict" standard set forth in *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). *Brecht*, 507 U.S. at 622-23. *Brecht* "places the burden on prosecutors to explain why those errors were harmless." *Brecht*, 507 U.S. at 640-41 (Stevens, J. concurring).[6] The Third Circuit's analysis fell far short of these standards.

In this case, there was no direct evidence linking Mr. Wharton to the murders of Fern and Bradley Hart – no DNA, fingerprint, footprints, hair, fiber, or other trace or forensic evidence. The key evidence was Mr. Wharton's confession to the police that the defense contended was physically coerced and untrue. Mr. Wharton has steadfastly maintained that police obtained his statement about the murders of Bradley and Ferne Hart through physical and psychological intimidation. The defense admitted that he had been involved in the prior burglaries of the Hart residence but argued that he had received a beating during his interrogation and that his statement about the murders was false. Trial counsel admitted that his sole strategy at trial was to challenge the voluntariness of Mr. Wharton's statement.

Physical evidence supported the coerced confession defense. Medical records from his intake to the county prison documented the presence of then recent injuries to Mr. Wharton's head.[7] Police did not report or acknowledge those injuries at the time. Although police later claimed that those injuries occurred during the course of a forcible arrest, a report completed by Detective Brown at the time of Mr. Wharton's

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[6] In *Brecht*, Justice Stevens provided the controlling fifth vote.

[7] At trial, the Commonwealth stipulated that Mr. Wharton had sustained injuries, including a laceration to his head. AI-2429-2431.

arrest stated, "Defendant Wharton was arrested in maroon colored, multi-length leather zipper jacket" and "did not appear to be under the influence of alcohol or narcotics and *had no apparent injuries*." AI-5174. Another detective testified at a motion to suppress that Mr. Wharton was arrested peacefully and without the use of force. AI-0694. On this evidence, a jury could easily find that the police beat Mr. Wharton and that his confession was involuntary and unreliable.

Mr. Mason's confession undermined that defense. His statement was virtually identical to Mr. Wharton's purported confession and supported the Commonwealth allegations that the statements were true and accurate. Because Mr. Mason's confession largely corroborated many of the details in Mr. Wharton's confession, any chance that the jury would believe Mr. Wharton's coercion defense was largely eviscerated. *Wharton I,* 607 A.2d at 716 ("The confessions were substantially 'interlocking,' that is . . . substantially corroborated the account of each other.").

This is particularly so because, as part of his defense, Mr. Mason embraced the voluntariness and accuracy of his confession. By largely mimicking Mr. Wharton's alleged confession, Eric Mason's improperly redacted confession severely undermined Mr. Wharton's defense because it gave undue credibility to the confession Mr. Wharton sought to disavow as coerced. *See Cruz v. New York*, 481 U.S. 186, 192 (1987) ("[A] codefendant's confession that corroborates a defendant's confession *significantly harms* the defendant's case, where one that is positively incompatible gives credence to the defendant's assertion that his own alleged confession was

nonexistent or false."). As explained by Justice Scalia who authored the majority opinion:

> [I]nterlocking bears a positively inverse relationship to devastation. A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, and enormously damaging if it confirms, in all essential respects, the defendant's alleged confession. It might be otherwise if the defendant was standing by his confession, in which case it could be said that the codefendant's confession does no more than support the defendant's very own case. But in the real world of criminal litigation, the defendant is seeking to avoid his confession . . . In such circumstances a codefendant's confession that corroborates a defendant's confession significantly harms the defendant's case.

Id. at 192; *Pabon v. S.C.I. Mahanoy*, 654 F.3d 385, 394 (3d Cir. 2011) (damage from admission of interlocking co-defendant confession can be "devastating" in a case where a defendant is seeking to avoid his confession) (citing *Cruz*, 481 U.S. at 192).

Mr. Wharton suffered "substantial and injurious" harm because as part of his defense at trial, Mr. Mason embraced the voluntariness and accuracy of his confession. During cross-examination of the Detective, Mr. Mason's attorney elicited that at the time of Mr. Mason's statement, Mr. Mason was "coherent," "cooperative," and "serious." AI-2189. Mr. Mason's counsel also asked Detective Kane if Mr. Mason had been physically coerced during his interrogation. *Id.* When Detective Kane responded that he had not hit Mr. Mason, co-counsel stated, "Of course, I know that." *Id.* Unquestionably, the evidence presented through counsel's questions, that Mr. Mason was not physically coerced into confessing, greatly undermined Mr. Wharton's defense that his very similar confession was coerced. *Id.*

The facts of this case fall squarely within the circumstances identified by *Cruz* of when a *Bruton* violation "significantly harms the defendant's case." Mr. Wharton disavowed his confession, but the jury was told that Mason gave a virtually identical statement that he continued to endorse. Jurors could readily rely on Mason to reject Mr. Wharton's defense.

The Third Circuit paid lip service to the harm to Mr. Wharton when it conceded that "[t]o be sure, the admission of Mason's confession did not bolster that attack." *Wharton II*, 722 F. App'x at 277. The court also had to recognize this Court's holding in *Cruz* that a non-testifying co-defendant's confession is "enormously damaging" where it confirms, in all essential respects, the defendant's alleged confession. *Id.* at n.10. Yet it quickly skipped over any harm.

In fact, this case presents the same serious harm identified by this Court in *Cruz*. The defense was centered on attacking his own alleged confession. Testimony that Mason incriminated Mr. Wharton, and that Wharton was the "other guy" who Mason claimed had planned and committed the murders, decimated Mr. Wharton's attempts to raise a reasonable doubt in the jury's mind about whether Mr. Wharton was physically beaten to obtain a false confession. Detective Brown's testimony negated the trial court's efforts to redact the confessions and caused substantial and injurious harm to Mr. Wharton's defense.

For this reason alone, that should have been the end of the *Brecht* analysis. But the Third Circuit quickly dismissed the seriousness of the error, speculating that Wharton's defense would not have succeeded even if Mason's confession were

eliminated. *Id.* To do so, the court referred to its previous discussion of the evidence in rejecting a claim of ineffective assistance for failing to investigate and present additional evidence to attack the voluntariness and truthfulness of Mr. Wharton's alleged confession. Thus, the court wrongly substituted its prejudice analysis under *Strickland* where defendant bears the burden of proof for the *Brecht* harmless error analysis where the Commonwealth bears the burden of proof. Because of the different standards and burdens, the Third Circuit failed to properly consider the impact of the "enormously damaging" impact on the trial as a whole.

This Court should grant certiorari to review the Third Circuit's improper disregard of the enormous harm caused by the Sixth Amendment violation and its substitution of a prejudice analysis for the harmless error analysis required under *Brecht*.

In any event, the other evidence cited by the court is largely circumstantial and hardly determinative of Mr. Wharton's guilt without consideration of the purported confession.

> The Commonwealth's other evidence established Wharton's ill-will toward the Harts (particularly Bradley), Wharton's history of escalating crimes against them, his possession of items stolen from the Harts during the January 1984 home invasion (including the check from Bradley for the money that Wharton believed that he was owed), and Wharton's conversation with Nixon indicating that Wharton and Mason could not go through with killing Lisa.

Wharton II, 722 F. App'x at 276. At trial the defense conceded the ill will between Mr. Wharton and the Harts because of the payment disputes as well as Mr. Wharton's participation in the prior burglaries. But such evidence comes nowhere close to

proving he committed the murders. Motive and prior bad acts cannot alone prove guilt of murder. Nixon's testimony was ambiguous at best. Mr. Nixon testified that Mr. Wharton said he "didn't have anything to do" with the killings, but made a comment that they could not kill Lisa. AI-2216-17. Cherry-picking from inconsistent and ambiguous testimony does not overcome the enormous prejudice created by the Sixth Amendment error.

This Court should consider the impact of the constitutional error on sentencing. Mason's statement to the police placed the majority of the blame on Mr. Wharton. Mason claimed that it was Wharton's idea to kill the Harts and that Wharton killed both victims (in contrast to Mr. Wharton's alleged confession that admitted killing Ferne Hart but alleged that Mason killed Bradley Hart). The sentencing jury apparently believed Mason's statement, which Mason did not challenge at trial, that placed greater culpability on Mr. Wharton and thus sentenced Mr. Wharton to death but Mason to life. Thus, Mason's confession, which Mr. Wharton could not confront, had a substantial and injurious effect on the sentencing jury as well.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

/s/ Stuart B. Lev
STUART B. LEV
Federal Community Defender Office
for the Eastern District of
Pennsylvania, Capital Habeas Unit
601 Walnut Street, Suite 545W
Philadelphia, PA 19106
215-928-0520

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