No. 24-6038

In the Supreme Court of the United States

ROBERT WHARTON,
Petitioner

v.

JOSEPH TERRA, SUPERINTENDENT,
STATE CORRECTIONAL INSTITUTION AT PHOENIX,
Respondent

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

BRIEF OF THE PENNSYLVANIA OFFICE OF ATTORNEY GENERAL, AMICUS CURIAE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Interest of Amicus Curiae[1]

Under Pennsylvania law, the Attorney General is "the chief law enforcement officer of the Commonwealth." 71 P.S. § 206(a). Most criminal cases, however, are handled by local prosecutors who are not under the Attorney General's authority. In this federal habeas case, the district court, concerned about the local prosecutor's candor, asked the Office of Attorney General (OAG) to assist the court by participating as an amicus. As explained below, OAG continues in that effort here.

A local district attorney's office prosecuted this capital case in 1985 and defended the conviction through a series of appeals over three decades. In 2019, a newly elected district attorney, who had pledged opposition to the death penalty, made a "complete about-face." *Wharton v. Vaughn*, 2022 WL 1488038, *3 (E.D. Pa. 2022). At the time, all of Wharton's legal claims had been rejected, except one: that trial counsel was ineffective for not presenting, as mitigation, evidence of his "positive adjustment to prison." *Id.* at *1. The court of appeals had remanded the case, directing the district court to hold an evidentiary hearing to explore the alleged mitigation and the counter-mitigation. The district attorney's office informed the district court – after the office had "carefully reviewed the facts" – that no anti-mitigation

[1] Counsel of record received timely notice of the intent to file this amicus brief.

evidence existed, that no hearing need be held, and that Wharton's sentence should be vacated. *Id.* at *18.

The district court called upon the Attorney General's Office to investigate. The Office discovered that there was in fact serious anti-mitigation evidence, in particular Wharton's well-planned, near-successful escape from custody in the midst of his supposed positive adjustment to prison. The district court proceeded with the evidentiary hearing that had been ordered by the court of appeals. At the court's direction, OAG took part in the hearing, while the district attorney's office advocated for Wharton. Following the hearing, the district court found that the prison-adjustment ineffective counsel claim was without merit. The court also found that the district attorney's office had violated Rule 11 by representing that its careful review had uncovered no relevant evidence.

On appeal, the district attorney's office continued to advocate in Wharton's favor. The circuit court upheld the denial of habeas relief, as well as the Rule 11 determination. Wharton then filed this certiorari petition. The Attorney General's Office provided timely notice of its intention to file an amicus curiae brief. In the absence of a response to the notice, the Attorney General is without knowledge of the position that the district attorney's office will take in this Court. Accordingly, OAG files this brief to advise the Court of factual and legal considerations that may not otherwise be presented, but may bear on the exercise of discretionary review.

Counter-Statement of the Case

Incensed over a pay dispute, Wharton embarked on a six-month "campaign of terror" against a young couple, their church, and their infant daughter. *Wharton v. Vaughn*, 2012 WL 3535866, *45 (E.D.Pa. 2012). In the end Wharton and his cohort choked the mother and father to death in their home, and left the baby to die. Fortuitously, she managed to survive and live to play a role in the proceedings below.

The crime

Bradley Hart was a deacon of the Germantown Christian Assembly, a church in Philadelphia. The church had been founded by his father, Rev. Samuel Hart. The church operated a radio station, which Bradley managed. *Commonwealth v. Wharton*, 607 A.2d 710, 713 (Pa. 1992).

In the summer of 1983, Wharton was employed as a worker doing renovations at the station and at Bradley's home. Disagreement over payment arose because of subpar work. Wharton complained to friends that Bradley was just being "too picky." Wharton repeatedly threatened Bradley's brother that, if Bradley didn't pay up, he was "going to get him." 2012 WL 3535866 at *45-*46.

On Sunday, August 14, 1983, when he knew the Harts would be at church, Wharton took a friend, Larue Owens, to the Hart's house. They broke in through a basement window and stole several items,

leading the Harts to install an alarm system. 2022 WL 1488038 at *12.[2]

But later that month Wharton managed to break in again, with Owens and another friend, Eric Mason. This time they didn't just take things; they also left a surfeit of sinister messages. The walls were smeared with mustard, pancake batter, and tomato sauce. The refrigerator was left open and food was thrown into the oven, which was left turned on. Clothes were piled on a bed and splattered with paint and turpentine. Urine and human excrement were left on the floors and the thermostat was turned up. Faces in family photos of Bradley, his wife Ferne, and baby Lisa were blotted out with paint. The baby's mattress was slashed in the form of an X. A doll was left hanging with a rope around its neck. 2022 WL 1488038 at *12.

And in case these signs were too subtle, the intruders left a taunting note: "Thanks Bradley G.I. Hart, You Have Got to Go Better Than This To Keep Us Out. Clean Up Good, Didn't We. Thank You, Ha Ha Ha." 2012 WL 3535866 at *46.

The physical damage was in the thousands of dollars. Stolen items included televisions, stereo equipment, cameras, telephones, appliances, and other electronics. 607 A.2d at 713.

On September 4, 1983, Wharton and Mason broke into the Harts' church. They stole a computer and

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[2] *See also* trial transcript, 12/14/92 at 118-19, 12/15/92 at 112 and 122, 12/16/92 at 45.

cash. They stabbed a photo of Bradley to the wall with a letter opener. 2022 WL 1488038 at *13. The next day, police saw Mason carrying the computer, and he was arrested for burglary. 607 A.2d at 713-14.

Following Mason's arrest, Wharton's campaign went quiet for several months. But in early January 1984, he went back to the Hart's house – this time intending to find the family at home. Wharton recruited a friend, Thomas Nixon, who had not participated in the prior break-ins. The plan was for Nixon, armed with a gun, to gain entry by knocking on the door, claiming his car had broken down, and asking to use the phone. Wharton and Mason waited outside. Once Nixon was admitted, however, he saw that another man was in the house, in addition to the Harts. He abandoned the scheme. 2012 WL 3535866 at *48; 607 A.2d at 714.

Wharton tried again a few weeks later, on January 30, 1984, at 10pm. He forced entry at knifepoint, and then let Mason in. Wharton made Bradley write him a check for the money he thought he was owed. He and Mason then tied up Mr. and Mrs. Hart and left them to dread their fate for hours, while the intruders took over the house, watching television and deciding what to steal. They removed silverware, cameras, jewelry, and the victims' wallets, and put them in Bradley's car. 2012 WL 3535866 at *47; 2022 WL 1488038 at *13.

Then they returned and got down to work. Bradley was taken to the basement. His head was wrapped in duct tape, and electrical cords were wound around his

neck. Mason then forced his face down into a pan of water, put a foot on his back, and pulled and kept pulling on the cords, until he was dead. *Id.*

Meanwhile, Wharton dragged Mrs. Hart upstairs, along with the baby. He duct-taped her face from eyebrows to chin, strangled her with her husband's necktie, and then held her head underwater in the bathtub, "until the bubbles stopped." He left her there, draped over the side of the tub, with her shirt pulled up to the shoulders and her pants pulled down to the ankles. *Id.*

But Wharton was not quite done. Before leaving, the thermostat was adjusted, just as it had been during the August burglary. But instead of being turned up in the heat of summer, this time it was turned down, in the cold of winter. Lisa, the Hart's infant daughter, was left behind, either to freeze to death or starve to death. She was seven months old. *Id.*

By February 2, 1984, the third day after the break-in, Bradley's father had grown concerned that he had not heard from the family. Rev. Hart went to the house and forced his way in. He found his dead son in the basement and his dead daughter-in-law upstairs. And he found his granddaughter Lisa, a foot or two from her mother's body. Miraculously, the baby was still alive, severely dehydrated and in hypothermia. The temperature in the house had dropped to 50 degrees. On the way to the hospital, Lisa went into respiratory arrest. Doctors managed to save her. 2012 WL 3535866 at *47, *62; 2022 WL 1488038 at *13.

Shortly afterward, Wharton was with his friend Nixon, who had taken part in the aborted early January visit to the Hart home. Nixon had read about the murders in the paper. He asked Wharton if Wharton and Mason were responsible. At first Wharton claimed they had nothing to do with it. But Nixon knew he was lying. He asked Wharton why they hadn't made sure to kill the baby along with the parents. Wharton responded that "we couldn't do it." 2012 WL 3535866 at *48.

Then police received a tip. The mother of Wharton's girlfriend told them he had given her a camera. Police searched the girlfriend's house and found the camera and several other items that had been stolen from the Harts. Wharton was arrested, was read his rights, and was asked if he wanted to remain silent. "Naw," he responded, "it's over now anyway. Naw, you got me." He then gave a detailed confession that exactly matched the evidence found at the crime scene, and named Mason as his partner in the murders. 607 A.2d at 714; 2012 WL 3535866 at *39, *47.

Police searched Mason's house and found property stolen from the victims. They also found a sneaker that matched the footprint left on Bradley's back when he was strangled to death. Police searched Wharton's house as well. There they found the stolen silverware and Ferne's wallet – and also Bradley's checkbook, with a check dated January 30, the night he died. It was made out to Wharton. 607 A.2d at 714-15; 2012 WL 3535866 at *48.

Pennsylvania proceedings

Wharton was tried together with Mason in 1985. The jury convicted both and sentenced Wharton to death. On direct appeal, the Pennsylvania Supreme Court rejected Wharton's new trial claims, including the *Bruton* claim[3] that Wharton raises in his current certiorari petition. The court held that, assuming a *Bruton* violation *arguendo*, any error was harmless. 607 A.2d at 716-19. As to penalty, however, the court held that the jury had been mis-instructed on one of the aggravating circumstances. The court vacated the sentence and remanded for a new penalty hearing. 607 A.2d at 723-24.

The penalty was retried in 1992. The jury again voted unanimously for death. This time the state court upheld the sentence. *Commonwealth v. Wharton*, 665 A.2d 458 (Pa. 1995). A series of failed state post-conviction petitions followed. *See Commonwealth v. Wharton*, 811 A.2d 978 (Pa. 2002); *Commonwealth v. Wharton*, 886 A.2d 1120 (Pa. 2005); *Commonwealth v. Wharton*, 961 A.2d 107 (Pa. 2008); *Commonwealth v. Wharton*, 263 A.2d 561 (Pa. 2021).

Federal habeas proceedings

By the new century, much of the action had moved to federal court. Wharton filed a habeas petition in 2003, and then various amendments and discovery requests that delayed its resolution. In 2011, the

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[3] *Bruton v. United States*, 391 U.S. 123 (1968).

district court granted Wharton's request for an evidentiary hearing on two of his new trial claims. 2012 WL 3535866 at *3-*4. The next year the court issued a 156-page opinion addressing Wharton's almost two dozen assertions of guilt- and penalty-phase error. The court denied relief but granted Wharton a certificate of appealability on two of the new trial claims, including the *Bruton* harmless error issue presented here. *Id.* at *84.

The court of appeals upheld the district court's rulings on all of Wharton's trial error claims. But the court expanded the COA to include one additional issue. That was a penalty phase ineffectiveness claim. Wharton contended that his lawyer should have presented evidence that he had been well behaved in prison in the years between his first sentencing hearing, in 1985, and the second sentencing hearing, in 1992. Such evidence, according to Wharton, would have bolstered the lawyer's jury argument that a life sentence would fully protect society, because "he is never coming out of jail." 2022 WL 1488038 at *14.

The court of appeals held that Wharton was entitled to de novo review and an evidentiary hearing on that issue. But the court recognized that, had the defense presented evidence of positive prison adjustment at the penalty trial, the prosecution would have presented evidence of negative prison adjustment. A new hearing before the district court would therefore have to include both Wharton's new mitigation and the Commonwealth's anti-mitigation. The court remanded, directing the district court to

proceed accordingly. *Wharton v. Vaughn*, 722 Fed. Appx. 268, 283-84 (3rd Cir. 2018).

Wharton sought certiorari review in this Court as to some of his new trial claims, which had all become final with the Third Circuit's ruling. He chose not to include the *Bruton* harmless error claim. This Court denied review. *Wharton v. Vaughn*, No. 18-5791 (U.S., Dec. 3, 2018).

Once the new trial question was settled, the district court moved forward in February 2019 to schedule the penalty phase ineffectiveness hearing that had been mandated by the circuit. But before a date could be selected, the district attorney's office filed a declaration to preempt the hearing, conceding that Wharton should be granted relief on his prison adjustment claim. The office stated that it had come to this conclusion after careful review of the facts and law, and after "communication with the victims' family." 2022 WL 1488038 at *3. In the absence of any new law or facts to warrant the about-face, the district court asked for further explanation. The district attorney's office responded that the existing evidence of Wharton's behavior between the 1985 and 1992 penalty hearings showed that he "posed no danger to inmates or staff if he were sentenced to life." *Id.* at *18.

At that point, the court called upon the then-Pennsylvania Attorney General[4] to participate as an amicus. The court asked the Attorney General to look

[4] Josh Shapiro, now Governor of Pennsylvania. The current elected state attorney general is David W. Sunday.

into the claims made by the district attorney's office. After OAG reported back on its findings, the court determined that it must proceed with the evidentiary hearing. *Id.* at *4.

Evidentiary hearing: escape and further attempts

At the hearing, Wharton, assisted by the district attorney's office, largely relied on the prison records that had been submitted with his habeas petition. As the district court summed these up: "Wharton's positive behavior was that he attended … meetings, actively pursued his education, took part in a poetry activity, attended chapel services, was polite to staff, and handled disagreements through the proper grievance process rather than acting out." *Id.* at *14.

Evidence uncovered by the Attorney General, and presented at the hearing, revealed a far different picture. In 1986, a year after he was first sentenced to death, Wharton was in a courtroom in Philadelphia City Hall. He was there to be sentenced for a home invasion burglary wholly unrelated to his attacks on the Harts. He told the judge that he now understood he had "caused a lot of people pain and suffering.... I'm sorry and any time I serve I will use to better myself." *Id.* at *5.

As he said these words, however, Wharton knew that he did not intend to serve any time, let alone to better himself while doing so. He had a plan. He had feigned an injury in prison, so that one arm was in a sling or cast, and only his other arm was handcuffed.

He had also somehow smuggled in a handcuff key. As he was led out of the courtroom down a public hallway to a lockup, Wharton assaulted his guard, uncuffed himself, and bolted down a stairwell that led directly to the street. *Id.* at *5, *11.

The guard was now too far away to catch him, and so was forced to use his firearm. He shot twice, managing to hit Wharton in the leg and slow him down. The fleeing murderer still made it out to the sidewalk, where he was finally apprehended, in the midst of Philadelphia rush hour traffic at the very center of the city. Had he been just a bit quicker, the guard would have been unable to use a weapon given the crowds of people and cars. *Id.* at *5.

Later that year Wharton underwent a prison intake assessment. The assessment found that Wharton "used a great deal of denial and rationalization." He "impresses as a sociopath." The assessment concluded that Wharton "was an extremely high public risk." *Id.* at *5-*6.

Nonetheless, Wharton was indeed often polite and cooperative as he served his time. But he wasn't done trying to abscond. *Three years* after the City Hall escape, Wharton was caught with pieces of wire antenna hidden behind the toilet in his single cell – and fashioned into a handcuff key. He claimed someone else must have left it there. But just four days later, he was caught with more antenna wire, hidden in the binding of his own legal materials. These disciplinary violations for implements of escape were classified as the most serious short of murder or

rape, and were upheld through an extensive appeals process. But Wharton never admitted any responsibility. He continued, as in his initial assessment, to deny and rationalize. *Id.* at *6-*7, *15.

Wharton presented experts who insisted that this record was overall a "positive" one, despite the recurrent escape efforts. One of the experts refused even to consider the City Hall escape in relation to Wharton's prison behavior, because he wasn't escaping directly from state prison. Experts presented by the Attorney General included Dr. Jeffrey Beard, a career corrections official who served as Secretary of the Pennsylvania Department of Corrections, and later as Secretary of the California Department of Corrections. Beard stressed that Wharton's "politeness," while secretly planning escapes, threw into question all the positive reports, and was typical of inmates waiting for staff to let their guard down. *Id.* at *9-*11, *15.

Having observed the witnesses, the district court found that OAG's evidence was persuasive and its experts more credible. The court concluded that the full story of Wharton's prison behavior would actually have hurt more than helped. Indeed, it would have utterly discredited counsel's central promise to the jury: that with a life sentence, Wharton "is never coming out of jail." *Id.* at *14-*15. As a result, Wharton did not meet his burden to prove *Strickland* prejudice.[5]

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[5] *Strickland v. Washington*, 466 U.S. 668 (1984).

Separately, the court also heard from members of the victims' family. As it turned out, only one had been contacted by the district attorney's office, a brother of Bradley Hart. He had been led to believe the concession was a done deal, and that the family would have no say. *Id.* at *19-*20.

Then there was the baby, who was no longer a baby. Lisa Hart-Newman, now a grown woman with her own family, would logically have been the first and foremost family member contacted, but never was. As she told the court, Wharton left her alone in the house "in hopes that I would die. I am the sole survivor of this tragedy and I am alive despite his efforts." *Id.* at *19.

The court held a separate hearing to consider the D.A.'s office's lack of candor concerning Wharton's record and the family contact. The court concluded that Fed. R. Civ. P. 11 had been violated, but imposed only two mild "sanctions": that the office apologize to the family, and that it provide a "full, balanced explanation" for any future concessions. *Wharton v. Superintendent Graterford SCI*, 95 F.4th 140, 146 (3rd Cir. 2024).

Despite that leniency, the district attorney's office engaged outside counsel and appealed. The circuit court affirmed. "In our adversarial system," held the court, "within the bounds of good faith, parties may choose what positions to advocate.... But in advocating them, they must not distort or misrepresent the facts." *Id.* at 150.

Wharton also appealed, from the denial of habeas relief. Again the circuit court affirmed, in a separate opinion. After a detailed review of the record, the court concluded that "there is not a reasonable probability one of the jurors" would have voted differently, if only they had known that Wharton was purportedly adjusting positively to prison, while at the same time surreptitiously scheming to escape it. *Wharton v. Superintendent SCI Graterford*, 95 F.4th 113, 127 (3rd Cir. 2024).

Wharton then filed this certiorari petition, raising not only his mitigation ineffectiveness claim but also the *Bruton* harmless error claim disposed of in his 2018 appeal.[6] Both claims are glossed as important legal issues but amount only to Wharton's displeasure that the lower courts did not value particular facts as he would have desired. The petition should be denied.

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[6] It is at best unclear whether the *Bruton* claim is properly presented in the current petition. Certificate of appealability on the *Bruton* issue was granted by the district court in 2012 and was resolved by the circuit's 2018 judgment. Wharton had the opportunity to pursue further review on that question then, but elected not to raise it in his 2018 cert petition. After that petition was denied, subsequent proceedings in the district court were governed by the terms of the 2018 remand order, which restricted the mandate to the penalty phase ineffectiveness claim. When the district court denied that claim in 2022, Wharton filed a new appeal under a new docket number. The *Bruton* issue played no part in that appeal. *See, e.g.,* 28 U.S.C. § 1254 (limiting certiorari jurisdiction to the scope of a "case in the court of appeals"); U.S. Sup. Ct. R. 13.3 ("The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed"). Amicus notes the issue here in the event that it is not raised in the respondent's filing.

Summary of Argument

Wharton has been appealing his conviction for the last four decades. Now he says he has two compelling, unsettled issues of law that require resolution by the highest court. In fact he just wants error-correction. But there was no error, and there is no legal question worthy of review.

First, Wharton says the Court's guidance is needed on ineffective assistance of counsel claims involving the weighing of positive against negative capital mitigation evidence. That is well-paved ground, however, and the courts below had no difficulty properly applying this Court's existing precedents. Wharton says his lawyer should have told the sentencing jury about his "positive" prison behavior during a six-year period preceding his penalty retrial. The "positive" was that he was generally "polite" and participated in various prison activities.

The negative, as the district court learned only after a lengthy evidentiary hearing, was that, when he wasn't busy with poetry projects and chess, he was busy making plans to escape. When authorities first tried to arrest him – for murdering a young couple and leaving their baby to die – Wharton fled and had to be chased down and tackled. Two years after that, he fled again, after smuggling a handcuff key into a courtroom, releasing himself, and assaulting a guard. He was stopped only when a sheriff shot him in the leg as he fled City Hall in the middle of downtown Philadelphia. Three years after that, he was caught

with a sophisticated homemade handcuff key in his cell. Four days after that, he was again caught with wire for a handcuff key, hidden in his legal materials.

Counsel's whole argument for a life sentence was that, despite Wharton's callous crimes, he could be securely incarcerated. The last thing the jury needed to hear was that he was an escape artist.

Second, Wharton says the Court must clarify the prosecution's burden of proving harmlessness under *Brecht*. As this Court has already held, however, there is no burden of proof under *Brecht*. Wharton's co-defendant's confession was redacted to refer to him as "the other guy." The state court, pre-*Gray*,[7] chose to resolve the claim on harmless error grounds, and the federal courts properly applied the *Brecht* standard.

Wharton challenges that ruling by trying to trivialize the evidence of his guilt, even going so far as to suggest that the victims were responsible for their own murders. But the facts cannot be contorted to his liking. Claiming that Mr. Hart owed him $900, Wharton told others he would "get" him, repeatedly broke into the family home, left a series of sadistic threats before ultimately strangling and drowning the victims, admitted his involvement to a friend, gave a detailed confession of his own to police, and when arrested was in possession of a check, for $900, written by Mr. Hart the night he was killed. The alleged *Bruton* error was indeed harmless, beyond any grave doubt.

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[7] *Gray v. Maryland*, 523 U.S. 185 (1998).

Argument

The petition paints a thin veneer of legal novelty over a host of incomplete and inaccurate factual assertions. The questions presented are not cert-worthy.

I. There is no novel "one juror" weighing issue: Wharton simply fails to acknowledge the egregiousness of the facts contradicting his new mitigation evidence.

Wharton portrays his argument as if it were one of first impression in this Court: "what happens," he says, "when the evidence is mixed?" Petition at 10. In other words, how can courts assess *Strickland* prejudice if the introduction of newly-claimed mitigation evidence would have resulted in the introduction of anti-mitigation evidence?

But there is nothing new about this question. The Court has been handling it for years. *See, e.g., Wong v. Belmontes*, 558 U.S. 15, 26 (2009) (courts simply weigh "all the evidence – the good and the bad"); *Cullen v. Pinholster*, 563 U.S. 170, 201 (2011) (new mitigation evidence "would have opened the door to rebuttal"). Wharton's characterization of his claim as in any way original "misses *Strickland*'s point." 558 U.S. at 26. The weighing of mitigation and anti-mitigation evidence is a straightforward application of the *Strickland* Court's now 40-year-old prejudice test.

Nor does the supposed "one-juror standard" add any novelty. The Court has spoken of "one juror" in the *Strickland* prejudice context simply because a criminal verdict generally requires unanimity and a single juror, obviously, can prevent it. But, as this Court has long made clear, indeed since *Strickland* itself, the "one juror" in question is not one who just may happen to be inclined in favor of the defense evidence. "The assessment of prejudice [does] not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency." 466 U.S. at 695. Rather, the inquiry assumes that all jurors, *i.e.*, juries as a whole, are reasonable.

Nothing in the lower courts' analysis suggests that they failed to grasp this standard. Wharton just doesn't like the result they reached. But his challenges to that result aren't just fact-tied; they are factually wrong.

He claims, for example, that he never engaged in any "assaultive" behavior while in custody. But that is exactly what he did when he escaped in City Hall: he assaulted his guard. That is how he got the head start that nearly set him loose.

He claims there was no evidence he used a handcuff key to effectuate that escape. But in fact the Attorney General introduced exhibits, cited by the district court, 2022 WL 1488038 at *5, that showed that's exactly what he did.

He claims that his subsequent prison misconducts were merely for "contraband," as if he'd been caught with a cigarette or two. In fact they were for "implements of escape" – an offense classified almost as seriously as prison murder. And when his toilet tank proved to be an inadequate hiding place, he took the trouble to conceal more such implements in the binding of his legal materials. They did not get there by accident.

He claims that these implements were nothing more than wire, that no one "tested" them. But in fact a corrections officer testified that Wharton's hand-made key was the first he'd ever seen, in 28 years on the job, that could actually have worked. 2022 WL 1488038 at *6.

Here, as in *Wong*, Wharton's proposed mitigation might have helped him only "if one ignores the elephant in the courtroom," 558 U.S. at 26. As counsel recognized, his best argument against death was life – that a life sentence would leave this vicious double murderer safely contained behind bars. By opening the door to all the escape evidence, counsel would have done worse than just jeopardize his case: he would have made himself out to be a liar. And we can safely bet that Wharton's current counsel would be here attacking him now for doing so.

There was no error, let alone any cert-worthy error.

II. There is no novel Brecht *issue: Wharton simply fails to acknowledge the extent of the overwhelming evidence of his guilt.*

Wharton contends that the court of appeals misapprehended the *Brecht* harmless error standard[8] by failing to place the burden of proof on the prosecution. But as this Court has held, there is no such burden under *Brecht*. The reviewing court must simply determine for itself whether there is "grave doubt" that the alleged error is harmless. *O'Neal v. McAninch*, 513 U.S. 432, 436-37 (1995) (court must decide harmlessness question "without benefit of such aids as presumptions or allocated burdens of proof").

As above, the court of appeals applied the correct standard, with great care. 722 Fed. Appx. at 276-78. Wharton just doesn't like the result. He claims the alleged *Bruton* violation of admitting co-defendant Mason's statement harmed him, because it undermined his contention that his own confession was beaten out of him. He claims that, other than his confession, there was practically no other evidence of his guilt.

But the reason the jury didn't buy Wharton's confession claim wasn't because of Mason. It was because the evidence of involuntariness was so flimsy, and because the confession was convincingly corroborated by other evidence, and because, even without the confession, the evidence against Wharton

[8] *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

left no real doubt, let alone a grave doubt, that he was a murderer.

As Wharton's lawyer admitted, the only reason he even raised the voluntariness claim with the jury was because "there was really no other defense." 2012 WL 3535866 at *18. Other than Wharton's own assertions, the only arguable evidence that he was beaten into confessing was a small bruise on the back of his head. The arresting officer explained, however, that (consistent with his subsequent escape history) Wharton tried to flee when police came to apprehend him. The officer had to tackle Wharton to bring him into custody. Afterward he noticed a "slight abrasion" on Wharton's head. *Id.* at *17. That was all before Wharton got to the station for interrogation.

In addition to the officer's trial testimony, the district court conducted its own thorough hearing on the issue, heard from every relevant witness, examined photos taken of Wharton promptly after his confession, and reviewed the prison medical intake form, prepared shortly thereafter, which revealed that Wharton had no indication of injury or bleeding. *Id.* at *17-*31.

In any case, Wharton's confession essentially established its own credibility. He was able to describe the crime scene in accurate detail, in a way that no one could have done who had not been there. Nor could police have put all these words in his mouth, because Wharton told them things they didn't know yet. He identified Mason, for example, as the one who had killed Bradley in the basement – before police had

matched Mason's sneaker to the footprint on Bradley's back.

But there was ample evidence linking the murders to Wharton even aside from his confession – starting with his months-long crusade against the victims. Those crimes were established by the testimony of Larue Owens and Thomas Nixon, who participated in them. And Wharton himself had admitted them, in an entirely separate confession given months after the first one – a confession whose voluntariness Wharton has never challenged.

Wharton dismisses all this evidence as mere "ill will between Mr. Wharton and the Harts" – as if the victims were equally responsible for the "ill will." He claims that this "ill will" evidence "comes nowhere close" to indicating his part in the murders. Nowhere close? Wharton made repeated threats that he was going to "get" Bradley if he didn't pay up. He slashed the baby's mattress with a knife. He hanged her doll with a rope. He stabbed Bradley's photo onto a church wall. He sent Nixon to the house with a gun. As the district court recognized, Wharton was "the driving force behind the murders." *Id.* at *50.

That conclusion was confirmed by Wharton's own admission after the crime, to his friend Nixon. Wharton dismisses this evidence as "ambiguous," because at first he tried to deny his involvement. But there is no mistaking his next words, when asked why he didn't just kill the baby outright: "we couldn't do it." There is no scenario in which that statement is "ambiguous."

And finally, there are the stolen goods, taken from the Harts' home the night of their murder, that somehow wound up at Wharton's house. Most damning among these is one particular item: the check. That check was Bradley Hart's last act, on the last night of his life, written out to the same man who just happened to have been terrorizing the family for half a year. Not even Wharton can dismiss that.

This was not a close case. There was no grave doubt, let alone any cert-worthy error.

Conclusion

For these reasons, the Pennsylvania Office of Attorney General suggests that the petition for writ of certiorari be denied.

Respectfully submitted,

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