No. _____

IN THE

Supreme Court of the United States

ANTHONY BARRY and BRIAN CAHILL,

Petitioners

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent

Petition for Writ of Certiorari
to the
Supreme Judicial Court for the
Commonwealth of Massachusetts

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Questions Presented for Review

1. This Court has never finally resolved the question of whether intentional pre-trial withholding of exculpatory information violates the Confrontation Clause. This Court should grant this petition to review the decision of the Massachusetts Supreme Judicial Court ("SJC") that the Confrontation Clause is only a trial right, and that court's rejection of the argument that Commonwealth's intentional pre-trial withholding of exculpatory impeachment information concerning its star witness violated federal constitutional Confrontation Clause rights despite the fact that without this material, the defense was unable to effectively cross-examine the star witness and the law enforcement witnesses at trial. This issue should be finally decided by this Court and not the Massachusetts Supreme Judicial Court.

2. Whether the Massachusetts Supreme Judicial Court misapplied federal law on whether the Commonwealth's intentional pre-trial withholding of exculpatory impeachment information concerning its star witness undermined confidence in the verdicts against the petitioners Barry and Cahill.

3. Whether the Massachusetts Supreme Judicial Court relieved the Commonwealth of its duty to disclose exculpatory evidence and infringed upon Barry and Cahill's right to a jury trial where it overlooked a *Brady*

violation because of the Commonwealth's post-trial investigation which allegedly revealed new evidence implicating Barry in the shooting.

4. This Court should grant this petition to determine the important question of whether the Government has an affirmative obligation to disclose exculpatory evidence it learns of after the conviction under the principle of fundamental fairness.

List of Parties

The parties before the Court are Anthony Barry, Brian Cahill and the Commonwealth of Massachusetts.

The parties before the Massachusetts Supreme Judicial Court ("SJC") were Anthony Barry, Brian Cahill and the Commonwealth of Massachusetts.

Table of Contents

Index to the Appendix

Table of Authorities

CASES

CONSTITUTIONAL PROVISIONS AND AUTHORITIES

OTHER AUTHORITIES

Petition for Writ of Certiorari

Petitioners Anthony Barry and Brian Cahill ("Barry and Cahill") respectfully petition for a writ of certiorari to the Massachusetts Supreme Judicial Court in this case.

Citations to the Opinions Below

The opinion of the Massachusetts Supreme Judicial Court (App. 1a-19a) is reported as *Commonwealth v. Anthony Barry and Brian Cahill*, 481 Mass. 388, 116 N.E.3d 554 (2019).

Statement of Jurisdiction

The Massachusetts Supreme Judicial Court issued its opinion in this case on February 12, 2019. (App. 1a). Neither party petitioned that court for a rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Relevant Constitutional and Statutory Provisions

United States Constitution
Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Concise Statement of the Case

Barry and Cahill were tried jointly and each was convicted by a jury on April 21, 2000 of murder in the first degree for the shooting death of Kevin McCormack, armed assault with intent to murder, two counts of assault and battery by means of a dangerous weapon, and unlawful possession of a firearm. (App. 7a, 18a). The issues raised in this petition were not raised at trial.

In 2002, Barry and Cahill jointly filed a motion for new trial. (App. 9a). After a three-day evidentiary hearing, the motion was denied and Barry and Cahill timely appealed. (App. 7a, 9a). The federal issue raised in Section 1 of this petition was raised and decided in this motion for new trial.

In November 2014 Barry and Cahill jointly filed a second motion for new trial. (App. 9a). In December 2015, Barry and Cahill sought further discovery regarding a confidential informant. (App. 17a). Barry and Cahill's motions were denied. (App. 9a, 17a). Both defendants timely appealed. (App. 7a). The federal issues raised in Sections 2 and 3 of this petition were raised and decided in this motion for new trial.

On February 12, 2019, the Massachusetts Supreme Judicial Court issued a decision denying Barry and Cahill's direct appeal and their appeals from both motion for new trial. (App. 1a-19a). All federal issues raised in

this petition were passed on by the Massachusetts Supreme Judicial Court in its decision.

Facts Material to Consideration of Questions Presented

A. **Evidence at Trial**. Shortly after midnight on April 17, 1999, two men approached a vehicle in the parking lot of Cremone's Restaurant in Malden, Massachusetts. The gunmen fired multiple shots into the vehicle, killing the driver, Kevin McCormack, injuring two companions, Lindsay Cremone and Brian Porreca; another occupant, Kristen Terfrey, was unharmed. (App. 7a-8a)

Porreca was the government's star witness, and only he identified Barry and Cahill as the gunmen. (App. 7a-8a). At Cremone's, he encountered McCormack, drank 4 to 5 beers, and was in the process of entering McCormack's car in the company of McCormack, Terfrey, and Cremone when the two gunmen approached. (App. 7a-8a). Porreca testified that as he was preparing to enter McCormack's car, he heard voices behind him, turned, and saw Barry and Cahill running toward him. (App. 8a).

He placed Barry as headed toward the driver's side of the car, wearing a head covering which left only his face exposed; he placed Cahill as approaching the passenger side, wearing a dark hood-like head covering which was cinched tightly around his face. (App. 8a). According to Porreca, he saw a gun in Cahill's hand but did not observe any exposed skin, saw

him fire, realized he had been wounded, and fled to Cremone's. (App. 8a). Porreca did not see either Barry or Cahill shoot McCormack. T6:156-159. [1] He described seeing a mid-size dark car pull out of the parking lot at high speed, T6:159-160, saying "Fuckin' Barry and Cahill" to bystander John Whitson (who did not testify but later in an affidavit denied hearing this statement) and saying "Tell Gene I'm going to blow his fucking head off" to Gene Giangrande's girlfriend Karen Minichiello who did testify, and reported Porreca kept repeating that he would "put two in his f-ing head." T6:163-170; T7:152; (App. 8a). Porreca failed to identify the shooters to three persons he saw immediately after the shooting. T5:117, 127-128, 141; T7:161-162.

During the shooting incident, Porreca sustained gunshot wounds to his abdomen and left wrist, and was later admitted to Massachusetts General Hospital for treatment. T6:156-157. According to the paramedic who treated him at the scene, Porreca was "very emotional," his attitude and behavior were alternately belligerent and tearful, and although he did not appear drunk on alcohol, he was acting like "an asshole." T7:172-178.

While in the hospital, he reportedly told a friend Charles Guarino that he could not identify the shooters because they wore masks. T10:206.

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[1]The trial transcript will be cited as ("T [volume]:[page]") and the transcript of the hearing on the motion to suppress as ("MTS:[page]").

According to Guarino, Porreca also instructed him to contact Barry and threaten that he would implicate him unless Barry gave him $25,000.00, money he needed to flee from federal prosecution. T10:207-208. Another friend, Lucio Pepe, testified that in his presence, Porreca identified the shooters only as "two niggers," and that he commented that if the government offered him a deal, he might "start remembering something." T10:223-227.

Porreca testified that he had known Barry and Cahill for a number of years, and had seen Barry keeping company with Gene Giangrande and Billy Angelesco in the months prior to the shooting. T6:100-101, 104-107, 109-111. He reported that on April 16, 1999 he encountered Brian Cahill and Anthony Barry in downtown Medford, and Cahill said they were on their way to meet Giangrande. T6:124-125, 131-132.

As an outgrowth of his earlier career as a local boxer, because he viewed himself as "good with my hands," Porreca periodically worked for drug dealer Giangrande as his enforcer, collecting the proceeds of drug and gambling activities in exchange for payment in Percocets and money. T6:91-93, 103; T7:28-29. He testified people would pay because of his reputation as a fighter. T7:28-29. His own son Brendan testified that Porreca had a poor reputation in the community for truthfulness and a history of drug abuse. T10:194-196.

Porreca admitted having used heroin in the past, but repeatedly denied having an active habit at the time of this incident, admitting only to taking two or three Percocets on the morning before the shooting. T6:133, 139; T7:17, 23-24, 45, 74-75. According to Porreca, whatever the effect of his earlier use of Percocet, he was sober before the events of April 16-17, 1999. T6:133, 139. Porreca maintained that although he was given painkillers in the hospital and a prescription for Percocet on leaving, he took that medication "as directed." T7:47, 83. He denied any memory that those Percocets gave him a buzz, and also denied having asked any of his acquaintances to bring him heroin while in the hospital. T7:23-24, 47, 83.

Porreca, who had convictions for a lengthy series of drug, theft, and assault offenses, had been negotiating with federal authorities prior to the McCormack shooting concerning an impending indictment for kidnapping and extortion. (App. 8a). He admitted that during the incident underlying the federal investigation, he and an accomplice had kidnapped a drug dealer, tied him up, doused him with lighter fluid, and threatened to set him on fire and held a gun to his head in an effort to force him to disclose the location of a shipment of marijuana. (App. 8a).

Days prior to the April 17, 1999 shooting, Porreca had met with federal authorities and was afforded the option of cooperating in exchange for a five year sentence or otherwise facing a sentence of--by his

description–"fifteen or more years". (App. 8a). An expert in administering the federal sentencing guidelines testified that had Porreca gone to trial and been convicted on his extortion case, he would have been sentenced to no less than 30 years; a guilty plea would have resulted in a sentence of approximately 22 to 27 years. T11:32-34. Porreca's deadline for reaching a decision was early the week following the McCormack shooting. T6:123.

Although when first questioned by investigators Porreca professed an inability to identify the gunmen, describing them only as either "two white guys" or "two black guys," (App. 8a) his position changed in the aftermath of (1) an investigator's suggestion, "those black guys weren't named Anthony and Brian, were they?" T6:175; (2) another investigator's mention--in the context of encouraging Porreca's cooperation--that he was involved in the federal investigation centering on Porreca T6:183-184; T8:146; (3) that Porreca thought he would be violated on his probation and wasn't going to get out of the hospital T6:187, 188-189; and (4) an ultimatum from his common law wife that he wasn't welcome at home. T6:189. Porreca then initiated negotiations with the state police, ATF, and U.S. Attorney's office. T6:191-193; T7:52; T8:148-154. Having secured their promise that he would "not do[] a day in jail," he agreed to identify Cahill and Barry as the gunmen and testified before the grand jury, then was relocated and furnished state and federal assistance during the months before trial,

including an automobile and direct subsidies totaling $39,483.00. T6:191-195, 205, 220-222; T7:17, 66-68, 71-73, 83. To cooperate was, Porreca testified, "taking a big stance [sic]" because "I had a certain amount of respect on the streets" which would be lost as a result of working with the police. T6:190. In support of that notion, a Medford detective who knew Porreca testified he had never cooperated with her in the past. T7:124.

B. **Evidence at First Motion for New Trial**

By discovery motion after trial, the defense obtained a hospital record that on Tuesday April 21, 1999--two days after his release from Massachusetts General and the same day he appeared before the grand jury--Porreca came to an emergency room in Lowell complaining he was "drug sick" and asking for methadone. (App. 106-107a). According to the nurse who interviewed Porreca's state police escorts, he had been "up most of [Monday] night throwing up." (App. 107a).

The motion judge ruled Porreca's treatment was exculpatory evidence improperly--and purposefully--withheld from the defense. (App. 116a). In support of their claim that suppression of that evidence was prejudicial, the defendants presented the testimony of Brian Johnson, M.D., a psychiatrist specializing in treatment of chemical addiction. NTM3:15-16. Based on Dr. Johnson's evaluation of Porreca's treatment records, it was his opinion that Porreca was in acute heroin withdrawal on April 21, 1999, as evidenced by

his history, nausea, sleeplessness, and elevated rate of respiration. NTM3:26-27, 29. In Dr. Johnson's opinion the anxiety effects of withdrawal peak after approximately three days. NTM3:22-23. If an active heroin user had intervening treatment with narcotic painkillers, as did Porreca, and presented to an emergency room on April 21, 1999 with the symptoms described by Porreca, Dr. Johnson reasoned that this active heroin user would have been intoxicated on heroin on the morning of April 17, 1999. NTM3:29-30. Dr. Johnson described Porreca's behavior the night of the shooting -- walking or running in an agitated state in the Cremone's parking lot, extremely agitated, uncooperative and combative, as fitting the "classic descriptions of an intoxicated individual." NTM3:80.

Given an active user's need for a new fix at approximate eight hour intervals, Dr. Johnson opined that Porreca was either intoxicated or beginning withdrawal on the morning of April 18, and therefore suffering the effects of one or the other, with probable symptoms ranging from disinhibition to impaired self control, cognition, and memory, confusion to acute physical discomfort. NTM 3:20-21, 22, 30-31, 32. Those symptoms would have been further exacerbated by alcohol ingestion--which was evidenced by Porreca's serum alcohol level of .0735% at the hospital after the shooting. NTM3:74.

The motion judge made the following findings:

> The Saints Memorial Hospital records certainly possessed irrefutable impeachment value. They were different in kind, and arguably more objective than the testimony of defense witnesses on the topic of Porreca's drug abuse. Armed with this record, defense counsel might have cast serious doubt on Porreca's claim that he was not an active addict at the time of the shooting. The records reveal that Porreca claimed to be suffering symptoms of withdrawal within a day and a half of his testimony before the grand jury. The record would have permitted defense counsel to argue at trial that Porreca continued to use drugs while in the custody of the investigators and began suffering symptoms of withdrawal after the drugs ran out ... Under the circumstances of this case, the withheld evidence could have been used to challenge Porreca's testimony as unreliable, as his ability to perceive, recall, and recount the events surrounding the shooting were likely impaired by opiate intoxication or withdrawal, both of which could have affected his cognitive functions and perceptions and caused him to search out any available means to gain access to heroin or another opiate. (App. 117a).

Notwithstanding those findings, the motion judge instead relied on the opinion of William A. Stuart, the emergency room doctor who examined Porreca, who submitted an affidavit but who did not testify at the hearing. (App. 110a). Although not having any independent memory, Dr. Stuart stated that he had been unpersuaded Porreca was genuinely suffering from heroin withdrawal, prescribing a skin patch as a precaution. (App. 110a).

Although deeming it cumulative, on the issue of Porreca's addiction, the motion judge also credited the testimony of Porreca's common law wife, Anne Lynch, who testified he was a six to ten bag a day user at the time of the shooting, and that Porreca had reported to her that the police had taken him to the hospital and were helping to "get him 'straight.'" NTM1:29-30,

61-62. She described Porreca as using drugs when the family was secreted in Maine, including a binge while in Massachusetts for his deposition. NTM1:69-71, 75.

Steven Luongo testified that he had been a close friend to Porreca and during the period leading up to the shooting, an almost daily companion. NTM1:239-240. At the time, they were both using heroin; Porreca had a five to ten bag a day habit, and would do more if he had the money to buy it. NTM 1:245-246. Luongo did not see Porreca for more than a month after the shooting, but at that time, Porreca came by his house and asked for heroin. NTM 1:249. The motion judge did not credit Steven Luongo's testimony. (App. 106a).

C. **Evidence - Second Motion for New Trial**

After trial, defense counsel discovered two reports authored after the trial by Sergeant Nunzio Orlando of the Massachusetts State Police. (App. 9a). One report was dated July 17, 2001 ("7/17/2001 Report"), was heavily redacted but states that a confidential informant stated in part that:

> The CI stated that William "Billy" Angelesco is a made member of the Boston LCN. Angelesco was sponsored by Carmen DiNunzio, and is a soldier in his crew. The CI stated that Angelesco "got straightened out" because he shot and killed "Mucka" McCormack in Malden. (App. 9a).

The second report was dated July 25, 2001 ("7/25/2001 Report") and it states that:

> The CI has personal knowledge that Billy Angelesco is a made member of the LCN and was sponsored by Carmen DiNunzio. According to the CI, Angelesco "earned his bones" by killing "Mucka" McCormack. The CI stated that contrary to popular belief, Anthony Barry was not the shooter in the McCormack murder. Barry was behind the scenes as far as orchestrating McCormack's assassination, but Angelesco and Cahill were the actual shooters. In addition, Gene Giangrande allegedly drove the getaway vehicle. (App. 10a).

The author of these reports was Trooper Nunzio Orlando. (App. 9a). Orlando submitted an affidavit dated November 10, 2015 – over fourteen years after he wrote the two Reports – stating that the informant did not actually have the "personal knowledge" as stated in the 7/25/2001 Report and instead that the information was based upon "unattributed hearsay, or 'word on the street'". (App. 17a).

Prior to trial, Mark Silverman informed Officer Montana of the Malden Police Department that a Robert Rannell[2] committed the homicide, and that Porreca requested $100,000 to change his story to implicate Barry and Cahill. (App. 10a, 13a-14a, 30a). Officer Montana notated on his report that he provided the information to Trooper Manning, a lead investigator in the case. (App. 32a). The Commonwealth did not turn over this report to defense counsel until June 2004, well after trial. (App. 30a).

[2] Robert Rannell was an associate of Giangrande and Angelesco.

Reasons for Granting the Petition

1. This Court should decide the important and open issue of whether the Sixth Amendment right of confrontation applies to the intentional pre-trial withholding by the State of exculpatory impeachment evidence.

In their second new trial motion, the defendants raised a Sixth Amendment Confrontation Clause challenge to the pre-trial withholding by the Commonwealth of evidence regarding Porreca's drug addiction. The motion judge denied this claim on the basis that the right to confrontation does not include rights to pre-trial disclosure of impeachment evidence. (App. 53a). In ruling on this issue on direct appeal, the Massachusetts Supreme Judicial Court declined to extend the right of confrontation to pre-trial discovery stating that the right to confrontation is a only trial right under the Sixth Amendment to the United States Constitution and cited this Court's opinions in *Pennsylvania v. Ritchie*, 480 U.S. 39, 53, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), *Crawford v. Washington*, 541 U.S. 36, 50, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). See *Commonwealth v. Barry*, 116 N.E.3d 554, 409 (2019); (App. 17a).

This Court should grant certiorari to decide this issue because the Massachusetts Supreme Judicial Court has decided a federal issue that has not been, but should be definitively decided by this Court. It is an open question at the federal level as to how the Confrontation Clause applies to

discovery issues. In a plurality opinion in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1986), this Court could not reach a majority consensus about the proper application of the Confrontation Clause to pretrial discovery. This Court has never re-visited this issue in order to provide definitive guidance.

In the lead opinion in *Pennsylvania v. Ritchie*, four justices expressed the view:

> that the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination.... The ability to question adverse witnesses ... does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.

See *Pennsylvania v. Ritchie*, 480 U.S. at 52-53 (opinion of Powell, J., joined by Rehnquist, C.J., White and O'Connor, JJ.) In two separate opinions, three other justices indicated they believed that denying a defendant pretrial access to information necessary to make cross-examination effective could in some circumstances violate the Confrontation Clause. *Id.* at 61-66 (conc. opinion of Blackmun, J.); *id.* at 66-72 (dis. opinion of Brennan, J., concurred in by Marshall, J.). The two remaining justices expressed no view on this issue. See *Pennsylvania v. Ritchie*, 480 U.S. at 72-78, (dis. opinion of Stevens, J., joined by Scalia, J., as well as by Brennan and Marshall, JJ.).

Justice Blackmun's view was that unless the defendant is afforded pretrial discovery of relevant information pertaining to the witness so that cross-examination at trial is actually effective, the guarantee of the right of

confrontation could be rendered meaningless. See *id.* at 62; see also *Kentucky v. Stincer*, 482 U.S. 730, 738 n. 9 (1987). In some cases simply cross-examining the witness at trial without the benefit of specific information gained through pretrial discovery which could be used for impeachment would actually harm the defendant by making it appear to the jury that defense counsel was harassing a "blameless witness" and leaving the defendant in a worse position than if no cross-examination at all were available. *Ritchie* at 64 (Blackmun, J., concurring). Justice Brennan noted that narrowly reading the Confrontation Clause as applying only to trial ignores that the cross-examination right secured by the Confrontation Clause may be significantly infringed by events outside of trial, such as the wholesale denial of access to material that would have supported a significant line of inquiry at trial. See *id.* at 66 (Brennan, J., dissenting).

Because there was no agreement at all in *Ritchie* on the extent to which the Confrontation Clause grants discovery rights to a defendant, the plurality's analysis of the confrontation clause issue in Ritchie does not constitute binding precedent. See Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756, 778 (1980) ("The practical effect of plurality decisions is to give the lower courts increased discretion in analyzing and applying precedent, and a more responsible role in

developing the law."). This Court still has not affirmatively stated in a majority opinion whether the right of confrontation exists prior to trial.

This Court should grant this petition to decide that the Blackmun concurrence and Brennan dissent in *Ritchie* are the correct view of the intersection of confrontation rights and discovery rights. The Commonwealth's pre-trial withholding of Porreca's heroin treatment records violated federal confrontation rights because Porreca and the law enforcement witnesses could not be effectively confronted and cross-examined without the withheld evidence. Where, as here, the Commonwealth intentionally shielded its star eyewitness from being confronted with the Saints Memorial records (App. 116a), this Court must protect the Sixth Amendment guarantee of the right of confrontation by considering the role of events outside of trial which have infringed the effective cross-examination at trial. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 62 (1986)(conc. opinion of Blackmun, J.)("If I were to accept the plurality's effort to divorce confrontation analysis from any examination into the effectiveness of cross- examination, I believe that in some situations the confrontation right would become an empty formality."); *id.* at 66 (dis. opinion of Brennan, J.)("the right of cross-examination also may be significantly infringed by events occurring outside the trial itself, such as the wholesale denial of access to material that would serve as the basis for a

significant line of inquiry at trial."). It is exactly this situation of intentional pre-trial prosecutorial subversion of the right of confrontation that Justices Blackmun and Brennan would find violated the Sixth Amendment here.

2. The decision of the Massachusetts Supreme Judicial Court misapplied federal law in ruling that the intentional suppression of exculpatory evidence by the Commonwealth did not undermine confidence in the verdicts against the petitioners.

The Massachusetts Supreme Judicial Court misapplied federal law and erred in ruling that the Commonwealth's intentional pre-trial withholding of exculpatory impeachment information concerning its star witness did not undermine confidence in the verdicts against Barry and Cahill (App. 12a). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). See also *Giglio v. United States*, 405 U.S. 150, 153–154 (1972)(clarifying that the rule stated in *Brady* applies to evidence undermining witness credibility). Evidence qualifies as material when there is " 'any reasonable likelihood' " it could have " 'affected the judgment of the jury.' " *Giglio*, 405 U.S. at 154, (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). To prevail on their *Brady* claim, Barry and Cahill need not show that they "more likely than not" would have been acquitted had the new

evidence been admitted. *Smith v. Cain*, 565 U.S. 73, 75-76 (2012)(internal quotation marks and brackets omitted). They must show only that the new evidence is sufficient to "undermine confidence" in the verdict. *Wearry v. Cain*, 136 S.Ct. 1002, 1006 (2016).

Based on the irrefutable proof supplied by hospital records, the first motion for new trial judge concluded the state police had intentionally suppressed exculpatory evidence that Porreca had required treatment at Saints Memorial Hospital for reported heroin withdrawal four days after the shooting, and the day after he testified before the grand jury. T7:87; (App. 116a). This withholding of evidence violated Barry and Cahill's rights to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendment to the United States Constitution. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963); see also *Kyles v. Whitley*, 514 U.S. 419, 421 (1995) (prosecutor responsible even if police did not bring favorable evidence to the prosecutor's attention). However, the motion judge denied the motion, ruling that the drug evidence was not "significant" and was cumulative of evidence of Porreca's drug addiction that was presented to the jury. (App. 119a). The Massachusetts Supreme Judicial Court rejected Barry and Cahill's *Brady* claim finding no substantial risk of an impact on the verdicts of the withheld evidence because it was cumulative of evidence of Porreca's

drug use already before the jury. See *Commonwealth v. Barry*, 116 N.E.3d at 566-567; (App. 12a).

The Massachusetts Supreme Judicial Court was wrong it its evaluation of the impact on the verdicts due to the intentionally withheld evidence that Porreca sought treatment for heroin withdrawal four days after the shooting. In fact, the newly revealed evidence suffices to undermine confidence in Barry and Cahill's convictions.

At trial, while Barry and Cahill strove to establish Porreca was an active heroin addict and intoxicated at the time of the incident, he evaded the first accusation and denied the second accusation, admitting only that he had taken two or three Percocet tablets early the morning preceding the shooting but wasn't intoxicated with Percocets at the time of the shooting. T6:133, 139; T7:17, 44-45, 74-75. Porreca also minimized the effect that Perocets had on him at every turn. T7:47, 75. Porreca denied asking friends to bring him heroin in the hospital. T6:224; T7:23-24. Although the defendants had access to witnesses Charles Guarino and Robert Santasky, who could have contradicted Porreca, both were of dubious credibility because of their criminal records and close associations with Barry. T6:177, 185; T7:57-58.

By obvious contrast, the Saints Memorial record lacked either the fault of bias or unreliability. It was a hospital record, a species of evidence

so neutral and trustworthy as to be admissible by state statute. See M.G.L. c. 233, §79. On its face, it recorded Porreca's admission to being "drug sick," and on “heroin”, direct contradictions of his trial testimony. (App. 106-107a). The recorded medical history included his guardians' statements he had been "up most of [the] night throwing up," and the nurse's observation his respiratory rate was significantly elevated. (App. 106-107a); NTM3:27.

Defense counsels’ pre-trial knowledge of Porreca’s drug history did not actually help them get this defense before the jury. Defense counsel did not directly ask Porreca if he was a heroin addict at the time of the shooting. T7:17, 45. But defense counsel knew that more aggressive questioning of Porreca at trial about his heroin addiction at the time of the shooting wouldn’t have yielded a good result. Porreca’s deposition testimony made clear his position that he was not on heroin on the day of the shooting, and was not taking Percocets regularly. Without the Saints Memorial records, no amount of “skill” on defense counsel’s part could have gotten this defense in front of the jury.

Both defense counsel associated Porreca with drugs in their closing arguments – Barry’s trial counsel stated Porreca may want “money for his addictions, we don’t know. He denies that.”, T13:13, and that Porreca started off the day “popping drugs” T13:15; Cahill’s trial counsel called Porreca “a dope addict” and that he “got Percocets” as payment from

Giangrande. T13:44. But these comments were brief and not the focus of the closings. However "skillful" defense counsel were in calling Porreca names, they could not change the fact that there was no trial evidence that Porreca was an active heroin addict at the time of the shooting or that he was withdrawing from opiates immediately thereafter.

The Saints Memorial records supplied documentary proof of three crucial facts that never made it in front of the jury: (1) Porreca was an active heroin user at the time of the shooting; (2) he was a witness who would lie to the jury to suit his ends; and (3) the state police had neglected mention of Porreca's hospitalization in their official reports, willing to mislead all concerned in order to secure these convictions. The lead investigator testified he wrote 9 separate reports. T8:201. Plainly, Porreca's emergency room treatment was not a detail too minor to escape mention in at least one of those reports, and the intentional omission would have been fertile ground for cross-examination. Individually, each was powerful evidence undermining the government's case. Cumulatively, this new evidence was sufficient to "undermine confidence" in the verdict. *Wearry v. Cain*, 136 S.Ct. 1002, 1006 (2016).

Given that Porreca was the only witness to identify Cahill and Barry as the gunmen, the inconsistencies in his early reports, and the weak evidence corroborating his testimony, a substantial basis existed for finding

prejudice on account of the prosecution withholding the Saints Memorial records. Where the Commonwealth's case depended so heavily on the credibility of the "key prosecution witness" and the withheld records were the "most concrete evidence available to impeach" Porreca, the suppressed records undermined confidence in the verdict. See *Wearry v. Cain*, 136 S. Ct. at 1006.

The defense, while benefitting marginally from establishing Porreca was a past abuser, was deprived of the chance to undermine his identification with evidence of apparent heroin intoxication and ensuing withdrawal. Lacking the necessary documentary evidence, that theory was never adequately developed. See generally *Tucker v. Prelesnik*, 181 F.3d 747, 750, 756-757 (6th Cir. 1999)(defendant deprived of fair trial by failure to introduce medical records that the victim was in a lengthy coma after assault, which would undermine the reliability of his eventual identification.)

As described by Dr. Johnson, and particularly in light of Porreca's ongoing legal predicaments, he could only have been a physical and emotional ruin throughout the weekend following the shooting. The jury were entitled to know that, and that both Porreca and the police had attempted to deceive them about it--as when Porreca specifically denied enlisting professional help for his addiction. T7:17-18. Nondisclosure

therefore directly violated federal constitutional rights to due process and prejudiced the defendant. *Brady v. Maryland*, 373 U.S. at 87.

3. The Massachusetts Supreme Judicial Court's decision relieves the Commonwealth of its *Brady* obligations, and violates Barry and Cahill's right to a jury trial.

The SJC found that although the Commonwealth withheld exculpatory evidence, the *Brady* violation was inconsequential to Barry and Cahill because the Commonwealth conducted a post-trial investigation into the withheld evidence and found additional evidence allegedly implicating Barry. (App. 14a, 19a). The standard employed by the SJC relieved the Commonwealth of its *Brady* obligations, and heightened the bar for demonstrating prejudice as a result of the withheld evidence. It also sets a dangerous precedent that the Commonwealth can cure a discovery violation by presenting untested information that was never presented to the jury to argue, essentially, that the *Brady* obligation is inconsequential because the defendant is guilty anyway. Due process, however, is about whether the defendant received a fair trial in the face of the withheld evidence, not guilt or innocence. *See United States v. Bagley*, 473 U.S. 667, 676 (1985) (*citing United States v. Agurs*, 427 U.S. 97, 108 (1976)).

Prior to trial, Mark Silverman informed Officer Montana of the Malden Police Department that a Robert Rannell[3] committed the homicide,

[3] Robert Rannell was an associate of Giangrande and Angelesco.

and that Porreca requested $100,000 to change his story to implicate Barry and Cahill. (App. 13a-14a, 30a). Officer Montana notated on his report that he provided the information to Trooper Manning, a lead investigator in the case. (App. 32a). The withheld Montana report was exculpatory in two ways: (1) it provided third-party culprit evidence while conjunctively impeaching the thoroughness of the investigation, and (2) it provided further evidence undermining Porreca's credibility. The Commonwealth claimed that investigation into this report – conducted four years after trial, but not disclosed to Barry and Cahill until 2016 – revealed that Barry purchased the murder weapon prior to the homicide. Silverman also allegedly denied ever making statements to Officer Montana.

Barry and Cahill are both indigent and requested funds from the court to hire an investigator. They also both requested an evidentiary hearing in conjunction with the motion for new trial. Both requests were denied by the motion for new trial judge, decisions which were affirmed by the Massachusetts Supreme Judicial Court. *See Commonwealth v. Barry*, 481 Mass. 388, 402 (2019).

The Supreme Judicial Court found that the Commonwealth's withholding of this information did not prejudice Barry and Cahill because evidence that merely impeaches the credibility of a witness cannot be material, and the Commonwealth conducted an investigation into the

report – evidence of which it disclosed in 2016 – where Silverman allegedly provided *more* information inculpating Barry than previously known. *See Barry*, 481 Mass. at 402.

The SJC used the new information allegedly gleaned during the Commonwealth's investigation into the Montana report in analyzing the strength of the case against Barry and Cahill, and in weighing whether other withheld and newly discovered evidence would have made a difference at trial. (App. 13a-14a, 30a). The motion judge and SJC usurped the jury's function by determining that because Silverman denied making the statement to Officer Montana, and was able to provide information relating to the murder weapon, that Barry is even more guilty, so the withheld evidence is immaterial. Because of the *Brady* violation, however, Barry and Cahill were foreclosed from presenting any of the evidence to the jury, for the jury to determine whether they believed the information contained within the withheld report, or whether they believed the information allegedly obtained during the post-trial investigation. Instead, the court found the withheld evidence immaterial because the Commonwealth was able to offer some evidence to weaken the value of the undisclosed information.

As established by this Court, in determining if withheld evidence is material, a court analyzes whether there is "any reasonable likelihood" it

could have "affected the judgment of the jury." *Wearry v. Cain*, 136 S.Ct. 1002, 1006 (2016), *(citing Giglio v. United States*, 405 U.S. 150, 153-54 (1972)). Instead of analyzing the effect the withheld information would have had on the jury, the SJC examined the withheld evidence in conjunction with information the Commonwealth learned four years after trial about Barry's alleged procurement of the murder weapon, which obviously was never before the jury; Barry and Cahill never had the opportunity to confront or cross examine this information, and the Commonwealth did not even disclose it until 12 years after they learned of it. The SJC's *Brady* analysis was incorrect, and the practice of considering evidence bearing on Barry's guilt without affording him *any* due process protections or the right to confront the evidence violated Barry's 5th and 14th Amendment and Art. XII rights. *See Kentucky v. Stincer*, 482 U.S. 730 (1987); *Pointer v. Texas*, 380 U.S. 400 (1965); *Commonwealth v. Johnson*, 417 Mass. 498 (1994).

This Court should accept the petition because the SJC's narrowing of *Brady* contradicts this Court's established precedent. The SJC's decision permits the Government to withhold exculpatory evidence, then conduct a new investigation post-trial in an attempt to argue that its discovery violations are inconsequential because the defendant is guilty anyway. The defendant is never given an opportunity to test the new investigation, or in any way challenge it as it would have been at trial. This rule will create a

dangerous precedent, and relieves the Commonwealth of its *Brady* obligations. Just as the dissent warned in *Agurs:*

> With all respect, this rule is completely at odds with the overriding interest in assuring that evidence tending to show innocence is brought to the jury's attention. The rule creates little, if any, incentive for the prosecutor conscientiously to determine whether its files contain evidence helpful to the defense. Indeed, the rule reinforces the natural tendency of the prosecutor to overlook evidence favorable to the defense, and creates an incentive for the prosecutor to resolve close questions of disclosure in favor of concealment.
>
> More fundamentally, the Court's rule usurps the function of the jury as the trier of fact in a criminal case. The Court's rule explicitly establishes the judge as the trier of fact with respect to evidence withheld by the prosecution.
>
> 427 U.S. at 117 (Marshall, J.) (dissenting).

The SJC's decision sanctions the act of withholding evidence that could have provided a third-party culprit and failure to investigate defense, and would have provided valuable impeachment evidence at trial, so long as the Commonwealth can come up with new evidence, post-trial, that may implicate the defendant to convince the court that the defendant is guilty. This new evidence, however, has not in any way been tested, challenged, confronted or cross-examined. The Commonwealth waited over 12 years to disclose evidence of the new investigation, and the court denied Barry and Cahill's request for an investigator, so they did not even have the benefit of conducting an independent investigation into the information. Putting aside the inherent incredibility of the fruits of the new investigation – that

Officer Montana apparently completely fabricated the conversation with Silverman – any issue of credibility is for the jury. The SJC's decision usurped the jury function.

Additionally, the SJC erred in determining that evidence Porreca requested $100,000 to implicate Barry and Cahill was not material because "evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial." *Commonwealth v. Barry*, 481 Mass. 388, 402 (2019). As this Court has repeatedly stated, impeachment evidence falls within the Brady rule. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule."); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying that a defendant's life or liberty may depend.").

While this Court has expressly determined that the withholding of impeachment evidence does not warrant automatic reversal, the SJC's determination that evidence impeaching the sole surviving identification witness to the murder does not warrant a new trial runs afoul with this Court's established principles. *See United States v. Bagley*, 473 U.S. 667,

677 (1985). *See also Smith v. Cain*, 132 S.Ct. 627 (2012) (murder conviction reversed; where alleged surviving eyewitness's testimony was only direct evidence linking defendant to a murder, withheld discovery that could have impeached the eyewitness was material to conviction).

Porreca clearly provided key testimony relating to Barry and Cahill; he identified them as the shooters. Any evidence undermining his credibility was crucial, and that he was potentially a witness for hire could most certainly have "affected the judgment of the jury" under these circumstances. *Wearry v. Cain*, 136 S.Ct. 1002, 1006 (2016). The SJC's unwillingness to even consider whether such evidence would warrant a new trial circumvented this Court's established precedent, and this Court should grant the petition.

4. **This Court should decide the important issue of whether the Government has an affirmative obligation to disclose exculpatory evidence it learns of after the conviction.**

While this Court determined in *District Attorney's Office v. Osborne* that *Brady* due process protections to not extend to a defendant's right to obtain potentially exculpatory evidence post-trial, this Court has not squarely determined whether the Government has an affirmative obligation to disclose exculpatory evidence learned after a conviction under principles of fundamental fairness. 557 U.S. 52 (2009).

Under the current state of the law, the members of the "prosecution team" have no affirmative duty to disclose plainly exculpatory information that undermines the integrity of a conviction. *See Kyles v. Whitley*, 514 U.S. 419, 446-48 (1995) (police investigators are part of prosecution team for purposes of exculpatory evidence). In *Imbler v. Pachtman* this Court recognized that a "prosecutor is bound by the ethics of his office to inform the authority of after-acquired or other information that casts doubt upon the correctness of the conviction," however, this duty provides no recourse for a defendant where the exculpatory information is held only by the police investigators involved in the case, but where the police have not disclosed the information to the prosecutor. 424 U.S. 409, 427 n. 25 (1976). This case provides the prime example of an instance in which the Government is not obligated to turn over after-acquired exculpatory information, and the defendant suffers.

A confidential informant notified Trooper Orlando Nunzio – after Barry and Cahill's trial, but before they filed a motion for new trial – that Angelesco committed the shooting where the primary claim was based on newly discovered evidence that Giangrande and Angelesco committed the shooting, not Barry and Cahill. (App. 14a, 17a). Barry and Cahill learned of this information only because someone within the Middlesex District Attorney's Office sent an anonymous letter to defense counsel. (App. 46a).

Counsel for Barry and Cahill then sent a letter to the Middlesex District Attorney's Office with the exculpatory report, and requested that the office review their files for any other exculpatory reports. The prosecutor replied that the issue relating to Giangrande and Angelesco had already been fully litigated in the first motion for new trial, and declined to conduct a review.

Barry and Cahill filed a second motion for new trial on November 25, 2014, including the report as one basis for the motion. The Commonwealth then disclosed an additional exculpatory report on September 2, 2015, which also indicated that Angelesco and Giangrande were the real killers. While the disclosed report drafted by Trooper Nunzio indicated that the informant had first-hand information, to combat Barry and Cahill's arguments in their second motion for new trial, Trooper Nunzio penned an affidavit dated November 10, 2015 alleging that despite his report to the contrary, the informant did *not* have first-hand information, but rather only "word on the street." (App. 14a).

The prosecution team's act of withholding this evidence post-trial, even in the context of the "limited liberty interest in postconviction relief," violates fundamental fairness principles. *See Herrera v. Collins*, 506 U.S. 390, 399 (1993). Holding onto evidence that Barry and Cahill were not guilty of the murder, and that two other individuals were the actual perpetrators, "transgresses any recognized principle of fundamental

fairness in operation." *District Attorney's Office v. Osborne*, 557 U.S. 52 (2009) (*quoting Medina v. California*, 505 U.S. 437, 446 (1992)).

Under the SJC's decision, an individual could go to the police and confess to committing a crime for which another individual is serving a sentence, and the defendant would not have a constitutional right to that evidence. Fundamental fairness dictates that a defendant have some recourse under those circumstances, other than a prosecutor's ethical duty to turn over the information, given that the evidence may not ever even reach the prosecutor. The evidence was of equal import in this case – the police received information that two other individuals committed the homicides – and not imposing an obligation to provide that information to the two individuals serving a life sentence for the murders "transgresses any recognized principle of fundamental fairness in operation." *Osborne*, 557 U.S. at 52; *Medina*, 505 U.S. at 446.

In addition to the act of withholding the information from Barry and Cahill, where they only learned of the report through the anonymous letter, they have also been completely precluded from fully investigating the information contained within the reports. Barry and Cahill filed a motion for funds for an investigator, a motion to reveal the identity of the confidential informant, and an evidentiary hearing in order to question Trooper Nunzio as to new recollection that the CI's information was based

on word on the street. All three requests were denied. Subsequently, the SJC denied Barry and Cahill relief finding that the information would not have made a difference at trial because the CI did not have first-hand information, despite the fact that the defendants were completely foreclosed from challenging Trooper Nunzio's claims, or interviewing and/or cross-examining the CI. (App. 14a).

This Court should grant the petition to decide the important question of whether the Government can actively hold onto exculpatory evidence that raises serious doubt as to the integrity of a conviction under principles of fundamental fairness.

Because the decision of the Massachusetts Supreme Judicial Court violates Barry and Cahill's right to due process, this Court should grant this petition to rectify this deprivation of constitutional rights.

Conclusion

For the reasons set forth above, this Court should grant this petition for writ of certiorari.

Respectfully submitted,
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