

No. 24-6038 (CAPITAL CASE)

In the Supreme Court of the United States

ROBERT WHARTON,
Petitioner,

v.

JOSEPH TERRA, SUPERINTENDENT SCI PHOENIX, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

KATHERINE ERNST
Supervisor, Law Division
Counsel of Record
ANTHONY SALZETTA
Assistant District Attorney
DAVID J. NAPIORSKI
Assistant District Attorney
LAWRENCE S. KRASNER
District Attorney of Philadelphia

Philadelphia District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107
Katherine.Ernst@phila.gov
(215) 686-9898
Counsel for Respondents

QUESTIONS PRESENTED

- I. The Court of Appeals issued a fact-bound decision that Petitioner failed to show a “reasonable probability” of a different outcome at sentencing under *Strickland v. Washington* and *Wiggins v. Smith*, where sentencing counsel omitted mitigating evidence that may have been rebutted by aggravating evidence.

Should *certiorari* be denied where the Court of Appeals’ fact-bound decision does not conflict with the precedent of this Court, of any other Court of Appeals, or of any state supreme court?

- II. The Court of Appeals issued a fact-bound decision that Petitioner’s alleged Confrontation Clause right violations were harmless because any impact of the alleged errors “was dwarfed by the weighty evidence” of Petitioner’s guilt.

Should *certiorari* be denied where the Court of Appeals’ fact-bound decision does not conflict with the precedent of this Court, of any other Court of Appeals, or of any state supreme court?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES	iii
INTRODUCTION.....	1
STATEMENT OF THE CASE	3
A. The Crime and State Proceedings	3
B. Federal Proceedings.....	7
REASONS FOR DENYING THE PETITION.....	9
A. Wharton Has Not Identified Any Compelling Reason to Grant His Petition.....	9
B. The Third Circuit Correctly Applied this Court’s Precedent in its Adjudication of Both Issues.	10
1. The Ineffective Assistance of Counsel Claim.	10
2. The Confrontation Clause Claim.....	12
C. This Case is an Inappropriate Vehicle to Decide Petitioner’s Second Question for the Additional Reason that the Third Circuit did not Decide an Antecedent Question.....	15
CONCLUSION	17

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Brecht v. Abrahamson</i> , 507 U.S. 619 (1993)	2, 7, 13
<i>Bruton v. United States</i> , 391 U.S. 123 (1968)	13
<i>Commonwealth v. Wharton</i> , 607 A.2d 710 (Pa. 1992).....	3, 5, 16
<i>Commonwealth v. Wharton</i> , 811 A.2d 978 (Pa. 2002).....	6
<i>Davis v. Ayala</i> , 576 U.S. 257	13
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011)	10
<i>O’Neal v. McAninch</i> , 513 U.S. 432	13
<i>Porter v. McCollom</i> , 558 U.S. 30 (2009)	12
<i>Richardson v. Marsh</i> , 481 U.S. 200 (1987)	16
<i>Samia v. United States</i> , 599 U.S. 635 (2023)	2, 15, 16
<i>Strickland v. Washington.</i> , 466 U.S. 668 (1984)	1, 7, 9, 10
<i>Thornell v. Jones</i> , 602 U.S. 154 (2024)	12
<i>Unite Here Local 355 v. Mulhall</i> , 571 U.S. 81 (2013)	15
<i>Wharton v. Superintendent Graterford SCI</i> , 95 F.4th 113 (3d Cir. 2024).....	Passim
<i>Wharton v. Vaughn</i> , 722 F. App’x. 268 (3d Cir. Jan. 11, 2018).....	Passim
<i>Wharton v. Vaughn</i> , 2022 WL 1488038 (E.D. Pa. May 11, 2022)	9

<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	11
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000)	9, 11

Statutes

28 U.S.C. § 2254	7
28 U.S.C. § 2254(d)	7
42 Pa. Cons. Stat. § 9541	6
42 Pa. Cons. Stat. § 9711(c)(1)(iv)	5
42 Pa. Cons. Stat. § 9711(d)(6, 10).....	6
42 Pa. Cons. Stat. § 9711(e)(8)	6

Rules

U.S. Sup. Ct. R. 10.....	9, 10
U.S. Sup. Ct. R. 14.1(a).....	3, 16

INTRODUCTION

In 1985, Petitioner Robert Wharton and his co-defendant, Eric Mason, were convicted of killing Bradley and Ferne Hart. The evidence at trial included police statements containing detailed confessions from both defendants, that police found several items stolen from the Harts' home in Wharton's possession, and that Wharton made incriminating statements to a friend. The stolen items recovered from Wharton's home included the Harts' checkbook and a wallet containing the Harts' identifications and family photos. The jury sentenced Wharton to death. And, after Wharton's sentence was overturned for issues not relevant here, in 1992 a second jury sentenced Wharton to death.

Wharton challenged his sentence on the basis, *inter alia*, that he received ineffective assistance of counsel at his 1992 resentencing. Wharton asserted that counsel should have introduced evidence of his positive conduct in prison in the seven years between his two sentencings. A hearing on this claim demonstrated that Wharton had adjusted positively to prison in some ways, but that he also had committed multiple misconducts in that period, including two citations for possessing "implements of escape." Additionally, while he was in county custody in 1986, Wharton attempted to escape while at court on an unrelated matter.

The Third Circuit rejected Wharton's ineffective assistance of counsel claim on prejudice grounds under *Strickland v. Washington*. 466 U.S. 668, 688 (1984). The Third Circuit held that there was "not a 'reasonable probability' that Wharton's prison records would have caused a juror to change his or her sentencing vote given the compelling rebuttal evidence the prosecution would have presented." *Wharton v. Superintendent Graterford SCI*, 95 F.4th 113, 123 (3d Cir. 2024) (quoting *Strickland*, 466 U.S. at 688).

Wharton also challenged his conviction on the basis that his Confrontation Clause rights were violated by (1) the introduction of Mason's confession, and (2) a detective's

statement that Mason and Wharton incriminated each other. Wharton's name was redacted from Mason's statement to read "the other guy," and the judge issued limiting instructions to the jury that Mason's confession and the detective's statement were not to be considered as evidence against Wharton. Without deciding whether either Mason's confession or the detective's statement violated Wharton's rights, the Third Circuit rejected this claim on harmless grounds. The Third Circuit held that the impact of the alleged errors "was not substantial and injurious because it was dwarfed by the weighty evidence demonstrating [Wharton's] guilt." *Wharton v. Vaughn*, 722 F. App'x. 268, 278 (3d Cir. Jan. 11, 2018) (citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993)).

In his petition for writ of certiorari, Wharton asserts that the Third Circuit misapplied this Court's decisions in *Brecht* and *Strickland* to his case. This Court should not grant review. In its adjudication of both questions presented, the Third Circuit properly stated this Court's applicable precedents, paid careful attention to the relevant facts, and issued a well-reasoned opinion applying the law to those facts. Wharton disputes the conclusions reached by the Third Circuit, but does not identify ways in which the Third Circuit ran afoul of this Court's precedent. Nor does he identify any other reason why this Court should exercise its certiorari jurisdiction—the Third Circuit's reasoning did not diverge from any other circuit court or any state court of last resort. In short, Wharton seeks review merely for the purpose of error correction, which is not a reason to grant certiorari.

This case is not a suitable vehicle for certiorari for another reason. The Third Circuit did not evaluate whether Wharton's Confrontation Clause rights were violated, and instead resolved his claims on harmless grounds. And no court has reviewed this case in light of this Court's decision in *Samia v. United States*, 599 U.S. 635 (2023), which may have mooted Wharton's Confrontation Clause claims. As a result, there are antecedent questions that this Court would need to address before reaching the second

question presented. U.S. Sup. Ct. R. 14.1(a) (“The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.”). This Court would be ill-advised and ill-equipped to decide those antecedent questions without the benefit of an opinion from the court below.

STATEMENT OF THE CASE

In 1985, a Philadelphia jury convicted Robert Wharton and Eric Mason of two counts of first-degree murder and related offenses for the 1984 murder of Bradley and Ferne Hart in their home and the abandonment of the Harts’ infant child in the home after turning off the heat. Wharton was sentenced to death.

A. The Crime and State Proceedings

In January 1984, after repeatedly burglarizing and vandalizing the Harts’ home, Wharton and Mason forced entry into their home at knifepoint. Wharton forced the Harts to write a check to him. AI-1819–20.¹ Wharton and Mason then tied up Bradley and Ferne Hart before separating and murdering them. AI-1820–21. Bradley “was forced to lie face down in a pan of water while one of the intruders stood with one foot on his back, as shown by a footprint on the victim’s shirt, pulling on an electrical cord tied around his neck.” *Commonwealth v. Wharton*, 607 A.2d 710, 714 (Pa. 1992). Wharton and Mason left the Harts’ infant child on a bed on the second floor and turned off the heat in the house. AI-1820. They then stole various items from the house, locked the door, and left. AI-1820–21. Three days later, Bradley Hart’s father discovered the crime scene and found the Harts’ child suffering from dehydration and hypothermia. She suffered respiratory arrest on the way to the hospital, but survived. *Wharton*, 607 A.2d at 714.

¹ Respondents follow Petitioner’s citation format: Citations to AI refer to the appendix filed in the Third Circuit in the initial habeas appeal (CA3 No. 13-9002); citations to AII refer to the appendix filed in the Third Circuit in the second habeas appeal (CA3 No. 22-9001).

Police quickly suspected Wharton. Investigators found items stolen from the Hart residence in both Wharton's home and his girlfriend's home, including the check he forced the Harts to write and a wallet containing pieces of identification and photographs of the Harts. AI-1670, 1725, 1728. Wharton gave a police statement confessing to his involvement in the home invasion and killing Ferne. AI-1819–22. He admitted that he and Mason put duct tape around Bradley's face and neck, but identified Mason as the person who killed Bradley. AI-1820–21. When asked why they killed the Harts, Wharton responded, "Cause they knew me and would turn us in." AI-1828.

Mason was arrested and a search of his home found other items stolen from the Hart residence. AI-2098, 2119. Police also found a shoe in Mason's home that matched the footprint found on the back of Bradley's shirt. AI-2121, 2364–65. Mason likewise confessed to police. His account largely matched Wharton's but asserted that Wharton had killed Bradley. AI-2168–76.

The confessions were introduced at trial, but redacted by replacing the named accomplice with "the other guy." However, during Detective Charles Brown's testimony, the trial prosecutor asked why no one else was suspected in the murder. Detective Brown responded, "[b]ecause the two defendants implicated each other in their statements." AI-2046. Both defendants' trial counsels objected and moved for a mistrial. AI-2048–49. The trial court denied the defendants' motions, but instructed the jury: "you will strike that from your memory. It has absolutely no relevance in deciding this case. Do not consider that in any way in your verdict or arriving at your verdict." AI-2050.

An associate of Wharton's, Thomas Nixon, testified that he called Wharton and asked if Wharton and Mason were responsible for the crimes and that Wharton denied being involved. AI-2216. However, Nixon testified that he then said, "[I]f [you] were going to kill the mother and the father, [you] should have killed the baby," and Wharton replied, "We couldn't do it." AI-2217.

The jury found Wharton and Mason guilty of first-degree murder and related charges. AI-2682–84. At the penalty phase, the jury sentenced Wharton to death and Mason to life in prison. AI–3042, 3053.

Wharton challenged his conviction on several grounds, including that the introduction of Mason’s confession violated his Confrontation Clause rights because the jury could infer that Wharton was “the other guy” in Mason’s account. *See Wharton*, 607 A.2d at 716. In 1992, the Pennsylvania Supreme Court rejected this claim, determining that any improper use of the codefendant’s confession was harmless error. *Id.* at 718–19. However, the Pennsylvania Supreme Court also determined that Wharton’s sentencing suffered from an erroneous penalty-phase jury instruction and vacated Wharton’s sentence. *Id.* at 724. Wharton was resentenced later that year.

At the 1992 resentencing hearing, Wharton was represented by his trial counsel, William T. Cannon. Cannon presented testimony from Wharton’s family members showing his positive attributes as a child and as an adult, including positive behavior toward his family while incarcerated in the seven years between his two sentencing hearings. *See Wharton v. Vaughn*, 722 F. App’x. 268, 279 (3d Cir. Jan. 11, 2018).

During its deliberations, the jury asked whether “evidence of mitigation concerning the character and record of the defendant ha[d] to be present at [the] time of the offense.” AI-3989. The court instructed the jury that it could consider post-offense mitigation evidence. *Id.* After about seven hours of deliberation, the jury declared itself deadlocked, but the judge instructed them to continue. AI-3992. In total, the jury deliberated for about thirteen hours over the course of three days before returning its verdict of death.

In Pennsylvania, for a jury to return a sentence of death when presented with both aggravating and mitigating circumstances, it must “unanimously find[] one or more aggravating circumstances which outweigh any mitigating circumstances.” 42 Pa. Cons.

Stat. § 9711(c)(1)(iv). The prosecution sought four aggravating factors, but the jury found only two: (1) commission of “a killing while in the perpetration of a felony,” and (2) conviction of another offense, “committed . . . at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable.” AI-4001; 42 Pa. Cons. Stat. § 9711(d)(6, 10). The jury found one “catch-all” mitigating circumstance: “[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.” AI-4002; 42 Pa. Cons. Stat. § 9711(e)(8). The jury found that the two aggravating factors outweighed the one mitigating factor and returned a sentence of death. AI-4000.

In 1996, Wharton filed a petition for post-conviction relief under Pennsylvania’s Post-Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541–46. In his petition, Wharton claimed, among other claims not relevant here, that Cannon was ineffective at his 1992 resentencing for failing to introduce evidence of Wharton’s positive adjustment to prison. In support of his claim, Wharton provided his prison records for that time period and an affidavit by Harry Krop, PhD., a psychologist who, after the 1992 penalty hearing, interviewed Wharton and evaluated his prison records. Dr. Krop concluded that (1) Wharton’s crimes were “anomalous and out-of-character,” (2) “Wharton made a positive adjustment to prison life,” (3) “[Wharton] would be a prime candidate for constructive rehabilitation in the general prison population,” and (4) “[Wharton] would not pose a future danger to the prison community in the event he were to serve a [life] sentence.” AI-4655–57. The Pennsylvania state courts dismissed this claim without a hearing, determining that Wharton had failed to show deficient performance by counsel or prejudice arising from the alleged deficient performance. *Commonwealth v. Wharton*, 811 A.2d 978, 988–89 (Pa. 2002).

B. Federal Proceedings

In 2001, Wharton filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the Eastern District of Pennsylvania. Among other issues not raised here, Wharton claimed that (1) his trial counsel was ineffective when he failed to introduce evidence at the 1992 resentencing of Wharton's positive prison adjustment during the seven years between his two penalty-phase trials, and (2) his Confrontation Clause rights were violated by the admission of Mason's confession and Detective Brown's comment that Wharton and Mason incriminated each other. *Wharton*, 722 F. App'x. at 272. The District Court rejected both claims, determining that relief was foreclosed by 28 U.S.C. § 2254(d) because the state court adjudications were not unreasonable. *Id.*

On appellate review of Wharton's ineffective assistance claim, the Third Circuit initially determined that the Pennsylvania Supreme Court's deficient performance and prejudice analyses were unreasonable applications of *Strickland v. Washington*, 466 U.S. 668 (1984). On de novo review, the Third Circuit determined that a hearing on this claim was not barred, vacated the District Court's denial of relief, and remanded for a hearing. *Wharton*, 722 F. App'x at 284.

Additionally, the Third Circuit affirmed the District Court's denial of Wharton's Confrontation Clause claim on harmlessness grounds. Applying *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Third Circuit determined that Wharton's arguments did not create "grave doubt as to whether the alleged Confrontation Clause errors had a substantial and injurious effect or influence in determining the jury's verdict in this case." *Wharton*, 722 F. App'x. at 278.

On remand, the Commonwealth conceded that Wharton was entitled to a resentencing as a result of counsel's ineffectiveness at the 1992 resentencing. *Wharton v. Superintendent Graterford SCI*, 95 F.4th 113, 120 (3d Cir. 2024). The District Court appointed the Pennsylvania Office of the Attorney General (OAG) as amicus curiae. *Id.* The OAG

argued that introduction of positive prison adjustment records at the 1992 resentencing would have opened the door to other evidence of Wharton's negative behavior in prison, and so Wharton was not prejudiced by his counsel's alleged deficient performance.

The District Court then held a hearing concerning Wharton's behavior in prison during the years between his two sentencing hearings. *Id.* at 120–21. Wharton presented favorable evidence of his prison adjustment, including positive views by the prison's Program Review Committee. *Id.* at 121.

However, the hearing also included negative evidence of Wharton's adjustment to prison, including discipline for "possessing implements of escape" twice in 1989, and other less-serious misconduct. *Id.* at 121–22. Additionally, the OAG introduced evidence that Wharton attempted to escape from county custody while at a courthouse in 1986 on an unrelated charge.

Cannon, Wharton's trial and sentencing counsel, also testified at the evidentiary hearing. Cannon confirmed that he did not obtain or review Wharton's prison records prior to the 1992 resentencing. He testified that he did not know he could have introduced prison adjustment records as mitigation evidence. AII-534, 571. Each side also presented conflicting expert testimony concerning whether Wharton presented a risk of future danger or escape. *Wharton*, 95 F.4th at 122.

Following the hearing, the District Court held that Wharton did not show *Strickland* prejudice as a result of his counsel's failure to present evidence of positive prison adjustment. *Id.* The District Court reasoned that, "[g]iven 'the overwhelming aggravating factors,' and the fact that Wharton's multiple efforts to escape would have rebutted any mitigation based on Wharton's adjustment to prison, 'there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the

sentence imposed.” *Wharton v. Vaughn*, No. 01-cv-6049, 2022 WL 1488038, at *16 (E.D. Pa. May 11, 2022) (quoting *Strickland*, 466 U.S. at 700).

On appeal to the Third Circuit, Wharton argued, and Respondents agreed, that there was a reasonable probability that the prison adjustment records—though containing both positive and negative evidence—would have convinced at least one juror that the mitigating factors outweighed the aggravating factors. The Third Circuit rejected this argument, reasoning that, “while the prison records provide some evidence that Wharton was reforming himself, his escape attempts during this same period negate any reasonable probability that a juror would have changed his or her vote during Wharton’s resentencing hearing.” *Wharton*, 95 F.4th at 123–24.

This petition for a writ of *certiorari* followed.

REASONS FOR DENYING THE PETITION

A. Wharton Has Not Identified Any Compelling Reason to Grant His Petition.

This Court grants petitions for writs of *certiorari* only for “compelling reasons.” U.S. Sup. Ct. R. 10. None exists here.

Wharton has not even attempted to show that the Third Circuit’s decisions in this case involve a circuit split or conflict with decisions by any state court of last resort. Nor has Wharton shown that the Third Circuit decided “an important question of federal law that has not been, but should be, settled by this Court.” U.S. Sup. Ct. R. 10.²

Instead, Wharton is left to arguing, in effect, that this Court should grant *certiorari* because the Court of Appeals got it wrong. As to his ineffective assistance claim, Wharton

² As to his ineffective assistance claim, Wharton argues that his case is worthy of review because 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.” Pet. at 11. But this Court has decided cases in which evidence excluded from sentencing could have cut both ways, and the Third Circuit’s holding comports with those decisions. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 396 (2000).

urges this court to grant certiorari because “some jurors . . . could reasonably find the positive behaviors” and expert testimony “more persuasive” than the negative conduct and expert testimony. *Id.* at 15. Similarly, in his second question presented, Wharton argues that the Third Circuit reached the wrong conclusion because the alleged Confrontation Clause violations undermined his defense and, according to him, the other evidence against him at trial was slight. *See* Pet. at 20–21. In other words, Wharton seeks certiorari because he believes that the Third Circuit gave insufficient weight to his arguments and would like this Court to engage in error correction. Of course, that is not a reason for this Court to exercise its certiorari jurisdiction. *Id.* (“A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.”).

Because Wharton has not shown that this case satisfies any of this Court’s considerations governing certiorari review set forth in Supreme Court Rule 10, this Court should deny his petition.

B. The Third Circuit Correctly Applied this Court’s Precedent in its Adjudication of Both Issues.

1. The Ineffective Assistance of Counsel Claim.

Wharton argues that the Third Circuit misapplied this Court’s precedents regarding the effect of a failure to use certain mitigation evidence during capital sentencing. It did not.

The Third Circuit began its analysis by properly stating *Strickland*’s standard for prejudice and defining a “reasonable probability” as “one ‘sufficient to undermine confidence in the outcome’ of the proceeding.” *Wharton*, 95 F.4th at 123 (quoting *Strickland*, 466 U.S. at 694). Also in accordance with this Court’s precedent, the Third Circuit acknowledged that a reasonable probability “is a lower standard than a preponderance of the evidence.” *Id.* (citing *Harrington v. Richter*, 562 U.S. 86, 112 (2011)).

Because the alleged ineffective assistance of counsel occurred in the sentencing phase, the Third Circuit “reweigh[ed] the aggravating factors ‘against the *totality* of available mitigating evidence.’” *Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)) (emphasis in original). And because capital sentencing requires a unanimous jury, the Third Circuit asked “whether the new evidence ‘would have convinced [even] one juror’ to find that the mitigating factors outweighed the aggravating factors.” *Id.* (citation omitted) (alteration in original). Applying the foregoing law to the facts, the Third Circuit determined that, in light of the “compelling rebuttal evidence the prosecution would have presented,” there was no reasonable probability that “Wharton’s prison records would have caused a juror to change his or her sentencing vote.” *Id.*

In his petition for a writ of certiorari, Wharton disagrees with the court’s conclusion, repeatedly arguing that a single juror “could” have been persuaded by the positive aspects of Wharton’s prison records. Pet. at 15, 16. Wharton argues that the Third Circuit’s analysis conflicts with this Court’s precedent because this Court has found prejudice even in cases where “not all of the additional evidence was favorable.” Pet. at 17 (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). But no precedent from this Court even suggests, much less establishes, that a petitioner has been prejudiced where the complained-of error “could” conceivably have led to a different outcome or where *any* favorable evidence was omitted from sentencing. In its disposition of this case, the Third Circuit did not announce a categorical ban on sentencing relief where “not all of the additional evidence was favorable,” and its determination that the aggravating evidence overwhelmed the mitigating evidence in this case cannot be said to run afoul of *Williams v. Taylor*.

Wharton also argues that the Third Circuit’s decision in this case conflicts with *Porter v. McCollom*, in which this Court held that the lower court erred when it failed to engage at all with mitigation evidence, including childhood abuse and military service.

558 U.S. 30, 43–44 (2009) (per curiam). This does not conflict with the Third Circuit’s handling of Wharton’s case. Here, the Third Circuit engaged with the mitigating and aggravating evidence presented at the hearing, considered the potential impact on Wharton’s 1992 resentencing, and found Wharton’s arguments wanting. Just because a different court may have weighed the evidence differently does not mean the Third Circuit “failed to engage” with it. Indeed, a petitioner gets appellate review on federal habeas only when the merits of the claims are debatable by reasonable jurists.³

Wharton has not shown any way in which the Third Circuit’s decision conflicts with decisions of any other United States Court of Appeal or any state court of last resort. Nor has he shown that the Third Circuit’s decision conflicts with any decision of this Court. The Third Circuit properly stated and applied this Court’s precedent to Wharton’s ineffective assistance of counsel claim. This Court should deny the petition.

2. *The Confrontation Clause Claim.*

In his second question presented, Wharton asks this Court to review the Third Circuit’s application of the *Brecht* harmless error standard to his Confrontation Clause claim. Wharton claims that the Third Circuit improperly heightened the standard. His supporting arguments are unavailing.

In *Bruton*, this Court determined that, even with a proper jury instruction, a defendant is deprived of their Sixth Amendment right to confrontation when a facially incriminating confession of a non-testifying codefendant is introduced at their joint trial. *Bruton v. United States*, 391 U.S. 123, 135–36 (1968). Wharton asserts that he suffered two

³ Wharton also claims that the Third Circuit’s decision here conflicts with this Court’s recent decision in *Thornell v. Jones*, 602 U.S. 154 (2024), because *Thornell* “suggests a showing of prejudice is attainable” when new evidence has both mitigating and aggravating qualities. Pet. Br. at 18. But as Respondents have already pointed out, the Third Circuit here did not announce a categorical ban on relief in such circumstances, holding only that here, after a thorough review of the facts, the aggravating evidence outweighed the mitigation.

Confrontation Clause violations: (1) the introduction of his co-defendant Mason's confession, in which Wharton's name was substituted with "the other guy," and (2) Detective Brown's testimony that Wharton and Mason implicated each other in their statements to police. Mason's confession was paired with a jury instruction that it was to be considered as evidence only against Mason, and Detective Brown's statement was followed by a jury instruction to strike it from their memory and not to consider it.

Without evaluating whether the alleged violations ran afoul of *Bruton*, the Third Circuit resolved Wharton's claim on harmlessness grounds. *Wharton*, 722 F. App'x. at 278 ("Assuming for the sake of argument that his Confrontation Clause rights were indeed violated, we conclude that the impact of that error was not substantial and injurious because it was dwarfed by the weighty evidence demonstrating his guilt."). As the Third Circuit explained, when there has been a Confrontation Clause violation, "[o]n habeas review, the proper test is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Wharton*, 722 F. App'x. at 277 (quoting *Brecht*, 507 U.S. at 623). The Third Circuit cited to this Court's precedent to elucidate the *Brecht* standard:

To satisfy *Brecht*, "[t]here must be more than a 'reasonable probability that the error was harmful.'" [*Davis v. Ayala*, 576 U.S. 257, 268] (quoting *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710). However, if the habeas court is in "grave doubt" as to whether an error had a substantial and injurious effect or influence in determining the jury's verdict, the error cannot be deemed harmless. See *O'Neal v. McAninch*, 513 U.S. 432, 445 . . . (1995).

Wharton, 722 F. App'x. at 277.

To determine whether the alleged errors had a substantial and injurious effect or influence, the Third Circuit evaluated the other evidence of Wharton's guilt, including his confession, his inculpatory statement to Nixon, and his possession of items stolen from the victims' home. The Third Circuit also addressed and rejected each of the reasons Wharton argued that the alleged errors were harmful. *Id.* As a result, the Third Circuit

concluded that there was no “grave doubt as to whether the alleged Confrontation Clause errors had a substantial and injurious effect or influence in determining the jury’s verdict in this case. . . . because [the errors’ impact] was dwarfed by the weighty evidence demonstrating [Wharton’s] guilt for the murders of both Bradley and Ferne.” *Wharton*, 722 F. App’x. at 278.

Wharton asserts that the Third Circuit “fell short of [the *Brecht*] standard[,]” and that it “substitut[ed] . . . a prejudice analysis for the harmless error analysis required under *Brecht*.” Pet. at 20, 24. Wharton makes this claim because the Third Circuit gave short shrift to his argument that “the admission of Mason’s confession undermined his (Wharton’s) attack on the voluntariness of his own confession,” and referenced an earlier section of its opinion in its decision. *Wharton*, 722 F. App’x. at 277; see Pet. at 20–25. In that earlier section, the Third Circuit addressed an ineffective assistance of trial counsel claim and considered, among other things, that:

[T]he Commonwealth’s case-in-chief at trial “was comprised of significantly more than [Wharton’s] confession.” The Commonwealth’s other evidence established Wharton’s ill-will towards 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 [the Harts’ daughter].

Id. at 276 (citations omitted). It is partially based on this other evidence, all of which corroborates Wharton’s confession, that the Third Circuit concluded that Wharton’s attack on the voluntariness of his confession would have failed regardless of the introduction of Mason’s statement. See *id.* at 277–78.

Wharton asserts that, by referencing its reasoning from the prior section, the Third Circuit violated *Brecht* by substituting the *Strickland* prejudice standard for the harmless standard in its evaluation of the Confrontation Clause claim. Pet. at 24. But

Wharton points to nothing in the Third Circuit’s opinion indicating that it used any standard other than the *Brecht* harmless standard that it accurately stated in the prior paragraph. Indeed, the Third Circuit explicitly and repeatedly couched its discussion of this claim within the language of *Brecht*. *See id.* (“In sum, Wharton’s *Brecht* arguments do not give us grave doubt as to whether the alleged Confrontation Clause errors had a substantial and injurious effect or influence in determining the jury’s verdict in this case.”). It appears the court referenced the earlier section of its opinion only to avoid restating all the evidence against Wharton, not because it was improperly substituting one test for another. *See id.* at 277.

As with his first issue, Wharton again seeks this Court’s review on the basis that the Third Circuit erroneously applied a properly-stated rule of law. It did not. Indeed, the Third Circuit’s decision fully comports with this Court’s precedent and does not conflict with any decision of a United States Court of Appeal or state court of last resort.

C. This Case is an Inappropriate Vehicle to Decide Petitioner’s Second Question for the Additional Reason that the Third Circuit did not Decide an Antecedent Question.

This case is an inappropriate vehicle for Wharton’s second question presented for an additional reason: the Third Circuit did not decide the antecedent question of whether Wharton’s Confrontation Clause rights were violated. *Wharton*, 722 F. App’x. at 278 (“Assuming for the sake of argument that his Confrontation Clause rights were indeed violated, we conclude that the impact of that error was not substantial and injurious because it was dwarfed by the weighty evidence demonstrating his guilt.”) (emphasis added). Additionally, this Court’s intervening decision in *Samia v. United States*, 599 U.S. 635 (2023), may have mooted this claim. As a result, to rule in Wharton’s favor, this Court would be required to address questions that were not evaluated below. *See, e.g., Unite Here Local 355 v. Mulhall*, 571 U.S. 81, 85 (2013) (Breyer, J., dissenting) (“[I]n considering the briefs and argument, we became aware of two logically antecedent questions that

could prevent us from reaching the question [presented].”); U.S. Sup. Ct. R. 14.1(a) (“The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.”).

In *Bruton*, this Court established a “narrow exception” to the “almost invariable assumption of the law that jurors follow their instructions.” *Richardson v. Marsh*, 481 U.S. 200, 206–07 (1987). In *Richardson*, this Court “declined to expand the *Bruton* rule to a redacted confession that inculpated the defendant only when viewed in conjunction with other evidence.” *Samia*, 599 U.S. at 649 (citing *Richardson*, 481 U.S. at 202). And recently, in *Samia*, this Court determined that the admission of a co-defendant’s confession, when accompanied by redaction and a limiting instruction, does not violate the Confrontation Clause. 599 U.S. at 653.

In the very least, *Samia* likely moots Wharton’s first alleged Confrontation Clause violation, since it held that the process followed here, *i.e.*, replacing the defendant’s name with “the other guy” and issuing a limiting instruction, was constitutionally permissible. And the Third Circuit did not consider whether Wharton’s second alleged Confrontation Clause violation involving Detective Brown ran afoul of the *Bruton* rule. Wharton asserts that this Court need not consider whether *Samia* applies to the facts of this case because Detective Brown’s testimony “broke the redaction.” Pet. at 19 n.5. But whether and how the *Bruton* rule and *Samia* apply to Detective Brown’s statement are unanswered legal and factual questions that this Court would need to address to rule in Wharton’s favor.⁴ This is not the forum to undertake an initial evaluation of these questions.

⁴ In 1992, the Pennsylvania Supreme Court addressed whether Detective Brown’s statement violated Wharton’s Confrontation Clause Rights without explaining its analysis. *Wharton*, 607 A.2d at 145 (“The trial court held that Detective Brown’s statement did violate [Wharton’s] rights under the Confrontation Clause and *Bruton*, but that clearly ‘the remark by Detective Brown, although improper, was harmless beyond a reasonable doubt.’ Slip op. at 14. For the reasons set forth in the preceding section, we agree with the trial court that Detective Brown’s remark, although in violation of the *Bruton* rule, was

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Wharton's petition for a writ of certiorari.

Respectfully submitted,

/s/ Katherine Ernst

KATHERINE ERNST
Supervisor, Law Division
Counsel of Record
ANTHONY SALZETTA
Assistant District Attorney
DAVID J. NAPIORSKI
Assistant District Attorney
LAWRENCE S. KRASNER
District Attorney of Philadelphia

Philadelphia District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107
Katherine.Ernst@phila.gov
(215) 686-9898

Counsel for Respondents

harmless."). No federal court has addressed whether Detective Brown's statement violated the Confrontation Clause, and no court has assessed this question since this Court announced its holding in *Samia*.