

OCTOBER TERM, 2026

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARCEL EMANUEL JOHNSON,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

— CAPITAL CASE —

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CAPITAL CASE

QUESTIONS PRESENTED

On post-conviction review in this capital murder case, the state court held that the prosecution's failure to disclose exculpatory impeachment evidence from the prison file of a jailhouse informant – a key witness who provided the only direct evidence of guilt by testifying that Petitioner had confessed to him – did not violate Petitioner's due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). The state court held that there was no prosecutorial duty to disclose because the evidence could have been obtained by the defense using reasonable diligence and that the non-disclosure was not material because other circumstantial evidence was "sufficiently compelling" to sustain the conviction and sentence. The questions presented are:

1. Should this Court resolve the deep circuit split about whether a prosecutor's duty to disclose exculpatory evidence under *Brady v. Maryland*, is excused when the evidence could have been discovered with the exercise of reasonable diligence by the defense?
2. Did the Pennsylvania Supreme Court's materiality determination apply a standard that was contrary to this Court's precedent and in conflict with the trial prosecutor's arguments to the jury about the importance of the jailhouse informant's testimony?

PARTIES TO THE PROCEEDINGS

Petitioner, Marcel Emanuel Johnson is a Pennsylvania prisoner under sentence of death.

Respondent is the Commonwealth of Pennsylvania.

No party is a corporation.

RELATED PROCEEDINGS IN LOWER FEDERAL COURTS

United States District Court for the Eastern District of Pennsylvania, habeas corpus, *Johnson v. Wetzel*, No. 2:18-cv-01553 (E.D. Pa.).

RELATED PROCEEDINGS IN LOWER STATE COURTS

Supreme Court of Pennsylvania, direct appeal, *Commonwealth v. Johnson*, 160 A.3d 127 (Pa. 2017).

Supreme Court of Pennsylvania, appeal of the denial of post-conviction relief, *Commonwealth v. Johnson*, 353 A.3d 609 (Pa. 2026).

Court of Common Pleas of Bucks County, denial of post-conviction relief, *Commonwealth v. Johnson*, CP-09-CR-0001413-2014 (April 5, 2024).

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PETITION FOR WRIT OF CERTIORARI¹

Petitioner Marcel Emanuel Johnson respectfully requests that a writ of certiorari issue to review the decision of the Supreme Court of Pennsylvania affirming the Bucks County Court of Common Pleas' denial of post-conviction relief.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania affirming the Bucks County Court of Common Pleas' denial of state post-conviction relief (attached as Appendix A), is reported at *Commonwealth v. Johnson*, 353 A.3d 609 (Pa. 2026). The Bucks County Court of Common Pleas' opinion denying state post-conviction relief is not reported and is attached as Appendix B.

JURISDICTION

The Supreme Court of Pennsylvania issued its opinion below on March 26, 2026. On June 18, 2026, Justice Alito granted an extension of time until July 24, 2026, in which to file this Petition. Docket No. 25A1394. This Petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

¹ In compliance with this Court's communication of July 28, 2026, this Petition for Certiorari has been corrected to include the identification of the parties and to correct any misspelling of Petitioner's middle name, which is correctly spelled as Emanuel, with one m. No changes have been made to the substance of the Petition.

STATEMENT OF THE CASE

A. Procedural History

Petitioner was convicted by a jury of two counts of first-degree murder (for the death of Ebony Talley and her daughter RR), one count of third-degree murder (for the death of Ms. Talley's unborn child), arson and possessing an instrument of crime on June 3, 2015, in the Court of Common Pleas of Bucks County. The jury returned a verdict of life imprisonment as to Ms. Talley and death on the first-degree murder charge as to RR. The Pennsylvania Supreme Court affirmed Petitioner's conviction and death sentence on May 25, 2017. *Commonwealth v. Johnson*, 160 A.3d 127 (Pa. 2017) *cert den Johnson v. Pennsylvania*, 138 S. Ct. 508 (2017).

After holding an evidentiary hearing in 2023, the trial court denied Johnson's petition for post-conviction relief under Pennsylvania's Post Conviction Relief Act ("PCRA"). See 42 Pa. C.S. §§ 9541–9546. The Pennsylvania Supreme Court affirmed. See *Commonwealth v. Johnson*, 353 A.3d 609 (Pa. 2026).

B. Evidence at Trial

On November 25, 2013, Ebony Talley and her four-year-old daughter, RR, spent the day with her mother, sisters, and Mr. Johnson in her friend's apartment. TT-5/27/15, 112. Her mother and sisters left around 2:30 p.m., leaving Ms. Talley with RR and Mr. Johnson. *Id.* at 113. Around 3:30 p.m. a maintenance worker at the complex noticed smoke from that apartment and called 911. TT-5/27/15, 68. Mr. Johnson regularly used and stayed in that apartment with Ms. Talley. A neighbor noticed a Burgundy Cadillac, which belonged to Ms. Talley's friend, pull out fast and hit another car in the parking lot. *Id.* at 58-59, 76.

Fire personnel responded to the scene and while putting out the blaze, observed the body of RR underneath a couch in the living room and Ms. Talley, naked from the waist down in the bedroom. *Id.* at 138, 153, 246; PCRA Ex-69, Bates-2063. Police found numerous empty yellow drug packets stamped “#1 way to go” around and underneath her body and in a nearby shoe box. TT-5/27/15 at 226-27. Ms. Talley’s body had 35 stab wounds and showed evidence of post-mortem burning. TT-5/28/15, 204-205. RR died of a single fatal stab wound below the right collar bone. *Id.* at 194. The unborn child died due to the mother’s traumatic event. *Id.* at 229.

Ms. Talley and Mr. Johnson were good friends. Family members at the apartment that day described no hostility or animosity between Ms. Talley and Mr. Johnson. Ms. Talley and Mr. Johnson sold drugs from her apartment. At the time of Ms. Talley’s death, she was under investigation for drug sales by Bristol Township’s special investigation narcotics unit. TT-6/1/15, 151. Less than two weeks before her murder, she had sold heroin to a confidential informant (with her daughter present) inside the apartment. *Id.* at 152. On the day of her murder, Ms. Talley was reported to have been using her cell phone to set up drug deals, up until minutes before her murder, but her cell phone was never found at the crime scene. NT-8/9/23 at 14, 69, 155-56.

After the killing, Mr. Johnson spoke to the victim’s family and admitted that he was at a nearby apartment complex with the Burgundy Cadillac. TT-5/28/15, 274. Mr. Johnson was detained shortly thereafter without incident. TT-5/29/15, 8-11. Police recovered 11 clear empty packets, commonly used for the packaging of narcotics,

from Petitioner's pants pocket. *Id.* Following his arrest, detectives interrogated Mr. Johnson for three hours. TT-5/29/15, 268-69. He denied harming Ms. Talley and RR and told the police that he left the apartment before the murders because Ms. Talley had a "trap" (drug customer) on the way. PCRA Ex-69, Bates-2289, 2354. A search of Mr. Johnson's body detected a piece of skin missing from his pinkie finger and a cut in the crease of his left palm but no scratches on his head, torso, or arms. TT-6/1/15, 18. When questioned by detectives, Mr. Johnson explained that he had sustained these injuries when he jumped from a well window at the apartment complex earlier in the day. Ex-69, Bates 2290. A maintenance worker at the complex confirmed he had chased someone out of that apartment earlier that day and that individual jumped through the well window and escaped. TT-5/29/15, 102-03.

The only direct evidence of Mr. Johnson's guilt came from the testimony of jailhouse snitch, George Lewis. PCRA Ex-253, Bates-6056. Lewis, an inmate at the Bucks County Correctional Facility (BCCF), told prison authorities that just moments after meeting Mr. Johnson (and within hours of Johnson being interrogated by detectives), he confessed to killing Ms. Talley and RR. TT-6/1/15, 230. Lewis admitted that he heard people speak about the case in the jail and saw some television news coverage but denied reading any newspaper accounts of the case. *Id.* at 231, 250. Lewis explained that he originally hoped he could receive leniency on his charges of prison misconduct but, ultimately, he came forward because "people got hurt." *Id.* at 223, 244. He explained that he hoped the Commonwealth would help him with his probation violation in Bucks County but that no promises had been made to him. *Id.*

at 222. In the words of the prosecutor, written in a post-trial email to the New Jersey prosecutor handling Lewis's case there, Lewis was the "linchpin" of the Commonwealth's case and "[t]he only witness who gave direct testimony relating to the defendant's commission of the murders." PCRA Ex-253, Bates 6056.

C. Evidence Presented in Post-Conviction

At the post-conviction hearing, Petitioner demonstrated that the police had done very little to investigate who had motive and opportunity to kill Ms. Talley. Lead detective Jack Slattery testified that he believed that the person who killed Ms. Talley took her cell phone. He could not explain why police did not seek her cell phone records until months after Petitioner's arrest, and when they received her call log, they conducted no investigation of any individuals that Ms. Talley had contact with on the afternoon of her murder. NT-8/9/23 at 12-14, 23. Detective Slattery admitted that evidence on the phone was important because Ms. Talley was on her phone managing her drug business up until minutes before her death. *Id.* at 14, 69, 155-56. Using Ms. Talley's call log, Petitioner demonstrated that on the day of her death, Ms. Talley communicated with numerous people advertising large quantities of drugs for sale for a very low price, making her a prime target for a robbery. Many of those people had a history of violence and/or had been romantically involved with Ms. Talley at some time.

Instead, law enforcement focused on building a case against Petitioner through the testimony of George Lewis, a jailhouse informant who claimed that Petitioner had confessed to him. Petitioner's post-conviction investigation, however, showed that there was ample evidence that could have been used to impeach Lewis, yet was not

disclosed by the prosecution. Included in that evidence were records from the Bucks County prison that showed Lewis had a history of lying to authorities in order to benefit himself, including claiming, as he did here, that another inmate had confessed to him (about an unrelated crime) – an allegation that was later shown to be false. PCRA Ex-243.

The records showed that shortly before claiming that Mr. Johnson confessed to him, Lewis told a prison investigator (on condition that he receive leniency on his prison misconducts) that another prisoner, Shaquel Rock, had confessed to a high-profile murder of a prison guard in Trenton, New Jersey. *Id.* Much like Petitioner's case, the Trenton murder case was covered in newspapers which were available to inmates at BCCF and Rock was named as a person of interest. NT-6/28/23, 130-139. Prison investigators, however, learned from law enforcement in New Jersey that Mr. Rock had been cleared of the crime to which Lewis alleged he confessed. Ex-243.

In addition to the false allegation of an inmate's confession, the prison records also showed that on the day of his sentencing in Bucks County, Lewis made a desperate attempt to avoid his prison sentence (11 1/2 to 23 months plus probation) by fabricating a funeral service for his granddaughter to obtain furlough. NT-6/30/23, 3-30. Prison records detail that the staff quickly determined that Lewis' claim was false and thereafter labeled him an escape risk. Ex-255, Bates-6140-47.

The prison records alone contained enough information to destroy Lewis's credibility but were never disclosed to the defense until they were subpoenaed by post-conviction counsel. But the post-conviction hearing showed that there was even more

evidence that could have been used to impeach Lewis and demonstrate his desire to curry favor with the prosecution that was likewise never revealed to the defense at trial. Petitioner presented evidence that Lewis knew how to work the system and had a long history of providing, or attempting to provide, information to authorities for his own benefit. Just a few weeks after his arrest in Bucks County, he offered to work as an informant in exchange for favorable treatment or otherwise work the system to avoid jail time. PCRA Ex-239; PCRA Ex-259. When those attempts were unsuccessful, and he was facing jail time on his Bucks County offenses, he wrote a letter to then Bucks County District Attorney, David Heckler, in May of 2013, offering information in exchange for benefits. PCRA Ex-240. Neither the letter nor the offers were disclosed to the defense.

That was not all. At the PCRA hearing, the prosecutor, Mr. Weintraub, admitted he had communicated with the prosecutor in New Jersey about Lewis' open charges, and he knew before Mr. Johnson's trial that Lewis would receive leniency in exchange for his testimony against Petitioner. NT-6/28/23, 97. Those communications were not disclosed to the defense. Although Mr. Weintraub claimed he did not remember if he told Lewis he would receive leniency, the transcript from Lewis' material witness hearing in New Jersey demonstrates that Lewis knew about the deal before he was returned to Bucks County to testify against Mr. Johnson. *See* PCRA Ex-446.

Post-conviction evidence also showed that Marquis' Johnson's trial testimony that his brother, Marcel Johnson, was desperate and willing to shoot someone for

money was in direct conflict with his prior statements to police in which he said he saw his brother the Saturday before the murder but noticed nothing odd or troubling about his demeanor. Ex-69, Bates-2102. In fact, he told police his brother had recently applied for a good job, a fact that was verified by police. *Id.* Marquis only provided information helpful to the Commonwealth after he was in danger of violating his probation and told he could be charged in the murder. NT-6/28/23, 122-23.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE DEEP CIRCUIT SPLIT ABOUT WHETHER A PROSECUTOR’S DUTY TO DISCLOSE EXCULPATORY EVIDENCE UNDER *BRADY V. MARYLAND*, IS EXCUSED WHEN THE EVIDENCE COULD HAVE BEEN DISCOVERED WITH THE EXERCISE OF REASONABLE DILIGENCE BY THE DEFENSE

This case presents a question on which the Courts of Appeal are sharply divided – whether there is a due diligence exception to the prosecution’s duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). As discussed below, the majority and dissenting opinions in the Pennsylvania Supreme Court reflect that same division.

The Second and Third Circuits explicitly reject the argument that *Brady* requires due diligence by the defendant. *Lewis v. Connecticut Com’r of Correction*, 790 F.3d 109, 121 (2d Cir. 2015) (“The Supreme Court has never required a defendant to exercise due diligence to obtain *Brady* material.”); *Dennis v. Sec’y, Pennsylvania Dep’t of Corr.*, 834 F.3d 263, 291 (3d Cir. 2016) (“[T]he concept of ‘due diligence’ plays no role in the *Brady* analysis.”).

Likewise, the Sixth, Ninth, and Tenth Circuits emphasize that there is no basis for a due diligence requirement in light of *Banks v. Dretke*, 540 U.S. 668, 698 (2004), where this Court declared, “[a] rule thus declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process.” See *United States v. Tavera*, 719 F.3d 705, 712 (6th Cir. 2013) (“Prior to *Banks*, some courts, including the Sixth Circuit, as our dissenting colleague argues, were avoiding the *Brady* rule and favoring the prosecution with a broad defendant-due-diligence rule. But the clear holding in *Banks* should have ended that practice.”); *Amado v. Gonzalez*, 758 F.3d 1119, 1137 (9th Cir. 2014) (“No *Brady* case discusses a [due diligence] requirement, and none should be imposed”) (citing *Banks*, 540 U.S. at 691); *Fontenot v. Crow*, 4 F.4th 982, 1065 (10th Cir. 2021) (“A due diligence requirement under *Brady* is not the law in this circuit.”).

In contrast, the First, Fourth, Seventh, Eighth, and Eleventh Circuits impose a “reasonable diligence” requirement, which seems to mirror due diligence. *United States v. Cruz-Feliciano*, 786 F.3d 78, 87 (1st Cir. 2015) (“*Brady* does not require the government to turn over information which, with any reasonable diligence, the defendant can obtain himself”) (internal citations and quotations omitted); *United States v. Parker*, 790 F.3d 550, 561-62 (4th Cir. 2015) (same); *United States v. O’Hara*, 301 F.3d 563, 569 (7th Cir. 2002) (same); *LeCroy v. Sec’y, Fla. Dep’t of Corr.*, 421 F.3d 1237, 1268 (11th Cir. 2005) (same). Similarly, the Fifth Circuit requires due diligence. *United States v. Dvorin*, 817 F.3d 438, 450 (5th Cir. 2016) (“To constitute suppressed evidence under *Brady*, the evidence must not have been discoverable through the

defendant's due diligence"); *see also United States v. Anwar*, 880 F.3d 958, 969 (8th Cir. 2018) ("[T]he government does not suppress evidence in violation of *Brady* by failing to disclose evidence to which the defendant had access through other channels.").

This case reflects that divide, as the majority applied a due diligence test to Petitioner's *Brady* claim, and is therefore an appropriate vehicle to resolve this important question. In state post-conviction proceedings, Petitioner argued that his due process rights were violated when the prosecution failed to disclose several pieces of material, exculpatory evidence that could have been used to impeach the prosecution's key witness – a jailhouse informant named George Lewis. Lewis provided the only direct evidence of Petitioner's guilt, alleging that Petitioner had confessed to him. Lewis's credibility was, thus, a critical issue at trial. Among the evidence that the prosecution should have disclosed was evidence in Lewis's correctional files showing that Lewis, in the past, had lied to authorities in order to obtain favorable treatment—lies that included allegations of confessions by another inmate (about an unrelated crime).

The Pennsylvania Supreme Court held that the failure to disclose the correctional files did not violate *Brady* because those files could have been obtained by the defense if trial counsel had requested them from the Bucks County prison. The state court held:

Brady is not violated when the appellant knew or, with reasonable diligence, could have uncovered the evidence in question, or when the evidence was available to the defense from other sources. [I]n order to be entitled to a new trial for failure to disclose evidence affecting a witness'

credibility, the defendant must demonstrate that the reliability of the witness may well be determinative of his guilt or innocence.

Johnson, 353 A.3d at 632 (internal citations and footnotes omitted). Applying this rule to the evidence in Lewis’s prison files, the Court majority found no error in the post-conviction court’s holding that there was no *Brady* violation because the evidence was not in the exclusive control of the prosecution and could have been discovered by the defense with reasonable diligence. *Id.* at 634, 639-40.

The dissent below took issue with the majority’s reasonable diligence analysis. “I also write to express my concern with the application of a due diligence requirement to claims raising violations of the constitutional rule announced in *Brady*.” *Id.* at 674 (Donohue, J., dissenting). Agreeing with the 9th Circuit’s decision in *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997), the dissent would find that Pennsylvania’s application of a reasonable diligence requirement violated *Brady*, and that the prosecution had an obligation, when presenting testimony from a jailhouse informant, to disclose favorable evidence contained in the prison files to the defense. *Johnson*, 353 A.3d at 681-83.

This Court’s *Brady* jurisprudence has never imposed a defense due diligence requirement that limited the prosecution’s duty to disclose under *Brady*. To the contrary, this Court held that: “A rule thus declaring ‘prosecutor may hide, defendant must seek’ is not tenable in a system constitutionally bound to accord defendant’s due process.” *Banks*, 540 U.S. at 696. (internal quotations omitted). Nevertheless, the circuit courts remain sharply divided.

As the above cases exemplify, the due diligence requirement is a recurring question that should be addressed by this Court. The extent of the prosecution's obligations under *Brady* and the limits of a defendant's due process right should not differ between jurisdictions. This Court should clarify that the prosecution's obligations under *Brady* and the Due Process clause are independent of the defense duty to investigate and that there is no due diligence requirement under *Brady*.

This case is an ideal vehicle to resolve the split. The question was clearly presented in the dispute between the majority and the dissent below. And the question is an important one here, as George Lewis was the prosecution's most important witness, and his credibility was squarely in issue in both the guilt and penalty stages of the trial.

The fact that this petition arises from a state court post-conviction ruling, rather than a habeas petition, allows this Court to resolve this important question without the limitations imposed by AEDPA. Compare *Klein v. Martin*, 607 U.S. 213, 222-25 (2026) (holding in a habeas case under AEDPA that the state court did not unreasonably apply *Brady*). Here, by contrast, this Court can focus on the substantive question, rather than on the reasonableness of the state court decision.

Although rare, it is not unusual for this Court to accept cases arising from a state court post-conviction decision. In *Wearry v. Cain*, 577 U.S. 385 (2016), this Court reversed a state court decision denying a *Brady* claim on post-conviction review. Responding to the dissent's criticism that this Court should not have acted prior to habeas proceedings, this Court emphasized its jurisdiction and authority to review

state post-conviction proceedings in appropriate cases. “The alternative to granting review, after all, is forcing Wearry to endure yet more time on Louisiana’s death row in service of a conviction that is constitutionally flawed.” *Id.* at 396. The same is true here. This Court should grant certiorari and review the important constitutional question present here that has divided the Courts of Appeal.

II. THE PENNSYLVANIA SUPREME COURT’S MATERIALITY DETERMINATION APPLIED A STANDARD THAT WAS CONTRARY TO THIS COURT’S PRECEDENT AND IN CONFLICT WITH THE TRIAL PROSECUTOR’S ARGUMENTS TO THE JURY ABOUT THE IMPORTANCE OF THE IMPEACHABLE WITNESS’S TESTIMONY

A prosecutor’s failure to disclose *Brady* evidence requires a new trial where there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985). In proving materiality, the question is “not whether the defendant would more likely than not have received a different verdict with the [suppressed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Nor is materiality a sufficiency of the evidence test. A defendant need not demonstrate that “in light of the undisclosed evidence, there would not have been enough left to convict . . . sufficiency of [the remaining] evidence [is not] the touchstone” of materiality. *Kyles*, 514 U.S. at 434-35 & n.8. The materiality of suppressed evidence must be “considered collectively, not item by item.” *Id.* at 436.

Further, if the withheld evidence could have affected the “preparation or presentation of the defendant’s case” or “the course that the defense” pursued, it is

material. *Bagley*, 473 U.S. at 683. Materiality must be assessed in light of what “competent counsel” would have done with the suppressed evidence. *Kyles*, 514 U.S. at 441. Conversely, materiality analysis requires courts to consider how the suppressed evidence “would have raised opportunities to attack ... the thoroughness and even the good faith of the [State’s] investigation.” *Kyles*, 514 U.S. at 445-46

“The likely damage [of suppressed evidence] is best understood by taking the word of the prosecutor.” *Kyles*, 514 U.S. at 444. In his opening statement, the prosecutor told the jury that “George Lewis is one of the most important people in this case,” because he says that “Marcel confessed a murder to him.” NT 5/27/15, 42-43. The prosecutor’s reliance on Lewis continued in closing argument. As the Pennsylvania Supreme Court noted, the prosecutor’s closing repeatedly referenced Lewis’s testimony and urged the jury to believe him. *Johnson*, 353 A.3d at 637 and n.86. After trial, Mr. Weintraub wrote in an email that Lewis was an “excellent witness” and the “linchpin” to the case and “[t]he only witness who gave direct testimony relating to the defendant’s commission of the murders.” PCRA Ex-243. At the evidentiary hearing, Mr. Weintraub confirmed that Lewis was “critical” to the case. NT-6/28/23, 113.

This Court has held that *Brady*’s materiality standard is satisfied when the withheld information bears on a key witness’s credibility. *See Bagley*, 473 U.S. at 690 (“Whenever the Government fails, in response to a request, to disclose impeachment evidence relating to the credibility of its key witnesses, the truth-finding process of trial is necessarily thrown askew.”); *Banks*, 540 U.S. at 675 (prosecution’s concealment

of evidence discrediting “two essential prosecution witnesses” prejudiced defendant because their testimony was the “centerpiece” of the prosecution’s case).

In sum, the materiality analysis must examine the effect of the prosecution’s suppression on the jury’s consideration of the evidence. Reviewing courts should not merely speculate on what the result of a trial would have been had the prosecution complied with its constitutional obligations. Rather, the court must examine the impact of the suppressed evidence on the trial as it was had.

The Pennsylvania Supreme Court’s analysis did not apply these rules. Instead, the state court held that “in order to be entitled to a new trial for failure to disclose evidence affecting a witness’ credibility, the defendant must demonstrate that the reliability of the witness may well be determinative of his guilt or innocence.” (citations and internal quotations omitted). By requiring a defendant to show that the reliability of an affected witness was determinative of guilt or innocence, the court below imposed a higher burden on the defense than either the reasonable probability or undermines confidence standards required under *Brady* and *Kyles*. The Pennsylvania Supreme Court failed to consider the impact of the suppression on the trial as a whole.

Consider first the prosecutor’s own words at trial. As discussed above, the prosecutor told the jury that Lewis was a critical witness because he says that “Marcel confessed a murder to him.” TT-5/27/15, 42-43. In closing, he relied on Lewis’s testimony and urged the jury to believe him. *Johnson*, 353 A.3d at 647, n.85. He repeatedly urged the jury to find Lewis credible. Even after trial, the prosecutor

described Lewis as the “linchpin” to the case because he was the only witness to provide direct evidence, PCRA Ex-243, and admitted at the evidentiary hearing that Lewis was “critical” to the case. NT-6/28/23, 113.

The Pennsylvania Supreme Court acknowledged the prosecutor’s understanding of the key role that Lewis played at trial. The majority opinion noted the prosecutor’s statement to the jury that Lewis was “one of the most important people in this case” due to Johnson’s confession. *Johnson*, 353 A.3d at 637. The opinion gave credence to the prosecutor’s post-trial assessment that he was the only witness “who gave direct testimony relating to [Johnson’s] commission of the murders. *Id.* Yet in the end, contrary to this Court’s directive in *Kyles*, the Court gave little weight to the prosecutor’s assessment of the important role Lewis played in the trial.

Wearry demonstrates the state court’s error. This Court recognized that evidence qualifies as material when there is “any reasonable likelihood it could have affected the judgment of the jury.” 577 U.S. at 391 (citations omitted). A petitioner can prevail on a *Brady* claim even where “the undisclosed evidence may not have affected the jury’s verdict. *Id.* at n.6. The suppressed evidence in *Wearry* would have created a very different trial that still could have resulted in *Wearry*’s conviction. But that did not render the suppressed evidence not material. “Even if the jury—armed with all of this new evidence—*could* have voted to convict *Wearry*, we have ‘no confidence that it *would* have done so.’” *Id.* at 394 (citation omitted).

Here, the Pennsylvania Supreme Court made the same type of errors as the state court did in *Wearry*. It imagined a trial without Lewis's testimony² and speculated that Mr. Johnson would likely be convicted because of the strong circumstantial evidence. Such an analysis is inconsistent with this Court's repeated discussions of *Brady* obligations and materiality. Rather than look at the impact of the suppressed evidence on the trial itself, the Court engaged in an imaginary and speculative view of a trial that never happened.

In *Kyles* 514 U.S. at 437, the Supreme Court held that the prosecution had suppressed evidence that could have been used to challenge the reliability of two of the four eyewitnesses. Even though two identification witnesses remained unscathed, the Court reasoned that the suppressed evidence was material because the two *Brady* witnesses were the more important witnesses. *Id.* at 444. *Kyles* is not unique but is part of a continuing line of authority that holds *Brady*'s materiality standard is satisfied when the withheld information bears on a key witness's credibility. See *Bagley*, 473 U.S. 667 at,690; *Banks*, 540 U.S. at 675.

Here, the defense was denied the information it could have used to impeach the prosecution's most important witness with his past lies, allowing the prosecution to effectively argue that the jury should believe his testimony. Like *Wearry*, this case

² The Court also discounted Marquis Johnson's testimony, a prosecution witness who provided the only evidence of motive, because the prosecution suppressed evidence damaging to his credibility as well.

deserves this Court's review, particularly in light of the need to resolve the circuit split as to reasonable diligence.

But even if the state court applied the proper standards – and it did not – its analysis of the evidence was deeply flawed. The Court explained that, without the testimony of Lewis (and Marquis Johnson) the circumstantial evidence showed that: Mr. Johnson was in the drug selling business with Ms. Talley and wanted to better himself; he was alone in the apartment with Ms. Talley for some period of time prior to the fire and the discovery of the bodies; he was seen leaving the parking lot in a hurry while driving Ms. Talley's car; he behaved suspiciously after the fire, made multiple calls to try to find out what was going on, and refused requests to return to the crime scene with the car; there were plastic bags in the car with a stamp similar to those found in Ms. Talley's apartment; he was described as extremely nervous during his police interview and allegedly lied repeatedly to the detectives; and his phone and other possessions were found in Ms. Talley's apartment or on other places around the apartment complex. *Johnson*, 353 A.3d at 629-30.

These circumstances may raise suspicions about Mr. Johnson's knowledge of or involvement in Ms. Talley's murder, but they fall far short of proving his guilt beyond a reasonable doubt. Many of the circumstances are consistent with the fact that Mr. Johnson was a frequent visitor and occasionally stayed over at Ms. Talley's apartment. And finding plastic bags in Ms. Talley's car that were similar to those in the apartment is neither surprising nor incriminating. Mr. Johnson's supposedly suspicious behavior

and nervousness after the murder is likewise not surprising given his presence at the scene shortly before the murder and his involvement in drug activity.

Noticeably absent from the circumstantial evidence is any forensic evidence tying Mr. Johnson to the murder. No murder weapon was ever tied to Mr. Johnson, nor was there any blood stains or fingerprints.³ Whatever suspicions may arise from the circumstantial evidence, they are hardly so compelling as to negate the impact of Lewis's testimony that Mr. Johnson confessed his guilt. Lewis's testimony that Johnson confessed to him was not only direct evidence of guilt, it was the most powerful evidence of guilt. A "confession is like no other evidence." *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991). *Accord Commonwealth v. Burno*, 154 A.3d 764, 796 (Pa. 2017) (Saylor, C.J., concurring).

Nevertheless, the Pennsylvania Supreme Court concluded that "the circumstantial case against Johnson was sufficiently compelling that it is difficult to perceive a reasonable probability that the trial outcome would have differed had the jury simply been denied Lewis' and Marquis' testimony and the relatively modest, equivocal DNA evidence entirely." *Johnson*, 353 A.3d at 631. This analysis smacks of a sufficiency of evidence test that is improper under *Bagley* and *Kyles*. The proper test of materiality is not whether the untainted evidence is "sufficiently compelling," it is whether the impact of the suppression on the presentation of the defense and the

³ There was some DNA testimony presented at trial that the Pennsylvania Supreme Court discounted because it was unquestioned that Johnson spent frequent time in the apartment which could explain the presence of Ms. Talley's DNA under his fingernails. *Johnson*, 353 A.3d at 624-25, 631.

trial as a whole undermines confidence in the verdict. The Pennsylvania Supreme Court applied the wrong test and reached the wrong result.

Moreover, contrary to the Pennsylvania Supreme Court's suggestion, *id.* at 630, there was evidence that other individuals had the motive and opportunity to commit these murders. Ms. Talley was a drug dealer who had told her customers that she had a large quantity of drugs available for sale. Any one of those customers may have had a motive to kill her in order to rob her for drugs and money, or to settle a drug dispute. And any one of her customers may have come to the apartment in the half hour or less between the time Mr. Johnson left the apartment and the discovery of the fire and the bodies. As the Pennsylvania Supreme Court recognized elsewhere in its opinion:

In sum, cell phone records at least implied that a drug customer may have been on the way to visit Talley at the same time that Johnson allegedly killed her, that Talley had informed numerous people the morning of her killing that she had a large volume of heroin to sell, and that Johnson had no apparent motive to kill a business associate.

Id. at 647. In addition, the Court recognized that the police failed to investigate other suspects:

Among people the police failed to identify from phone records[,] and that both counsel and police failed to investigate[,] were John Clinton, who stipulated for purposes of the PCRA hearing that Johnson was not in competition with Talley for drug business and that both obtained drugs from the same supplier. Clinton also would have testified that Kerkula contacted him the day of the murder; Kerkula was the next to last person Talley communicated with that day. At a minimum, counsel could have challenged investigators' failure to investigate Kerkula. Another person who appeared on Talley's phone log from the day of the killing was Mark Wilson. Wilson had a criminal record for setting fire to his parent's house while his mother was home—and taking her cell phone. This information is suggestive, at the very least.

Id. at 646-47.

The existence of other suspects who had motive and opportunity to commit the murders yet were not investigated by the police once again diminishes the supposedly compelling circumstantial evidence. Given the importance of Lewis's testimony, the evidentiary weight of a confession, and the existence of other suspects, the Pennsylvania Supreme Court's conclusion that Mr. Johnson did not meet his burden to show that the suppressed evidence was material because of the "sufficiently compelling" circumstantial evidence is unsustainable.

Finally, the suppressed evidence of Lewis's past lies was material to sentencing, as well as to guilt/innocence. Impeaching Lewis would likely have had a significant effect on the jury's deliberations because it would have negated the prosecution's argument in support of the aggravating circumstance that "[t]he victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses." 42 Pa. C.S. § 9711 (d)(5). Pennsylvania law requires that this aggravator be proven by direct evidence, and the prosecutor relied on Lewis's testimony as the only such direct evidence. See *Commonwealth v. Appel*, 529 A.2d 780, 784 n.2 (Pa. 1988). To meet this burden, the prosecutor told the jury that "probably one of the heaviest" aggravating circumstances they had to consider was that RR was murdered because she was a witness. NT-6/28/23, 124-25. The prosecutor explained, ". . . in the words of George Lewis—and that is direct evidence . . . not circumstantial evidence . . . the baby was smart, the baby knew me, and could identify me. That's what makes this an aggravating

circumstance.” *Id.* at 125-26. In his instructions to the jury, the trial court likewise highlighted that Lewis provided the only direct evidence to support this aggravating circumstance. NT 5/28/15 at 198-99.

The two dissenting justices below agreed that the *Brady* material that could have been used to impeach Lewis was material as to sentencing. Justice Donohue, joined by Justice McCaffrey, found that “the deficiency in the impeachment of Lewis infected the jury’s deliberation of Section 9711(d)(5) and contributed to Johnson’s death sentence.” 353 A.3d at 674. Emphasizing that, with the jail records and other suppressed impeachment evidence, “trial counsel could have attempted to show that Lewis was willing to do anything—including lying about another inmate’s confession or his granddaughter’s funeral—to get out of jail.” *Id.* at 677-78. As the dissent explained:

Had the jury been presented with this powerful impeachment evidence suggesting that Lewis was an informant for hire and a liar, there is a reasonable possibility that one or more of the jurors would have found that Lewis’s testimony was not credible and therefore, that the Commonwealth did not establish the aggravating circumstance beyond a reasonable doubt, and further that the two remaining aggravating circumstances did not outweigh the three mitigating circumstances.

Id. at 688-89.

Despite the dissent’s cogent analysis, the majority did not address the materiality of the *Brady* evidence regarding the penalty phase of the trial. In the context of an ineffective assistance claim, however, the majority held that the failure to investigate and impeach Lewis was not prejudicial at sentencing. *Id.* at 661. Again, the majority relied on a sufficiency analysis that was contrary to *Kyles* and *Banks*.

Instead of looking at the impact of the error on the jury's deliberations, and the prosecutor's arguments about the importance of Lewis's testimony, the majority held that the remaining two aggravators were sufficiently strong that no juror would have voted for life. For these reasons as well, this Court should grant certiorari.

CONCLUSION

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

Respectfully submitted,

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