

No. 26-5426

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

BRIEF IN OPPOSITION

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September 23, 2026

***** CAPITAL CASE *****

COUNTER QUESTIONS PRESENTED

- I. Does Petitioner's purported circuit split involve a question which has no bearing on the outcome of this case and does he effectively request this court issue an advisory opinion?
- II. Did the Pennsylvania Supreme Court identify and apply the correct standard for assessing materiality under *Brady*?

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COUNTER STATEMENT OF THE CASE

I. Relevant Procedural History

Petitioner's jury trial began on May 27, 2015, and on June 3, 2015, the jury returned a guilty verdict on the charges of first-degree murder as to victims Ebony Talley and R.R., three counts of third-degree murder, arson, and possessing an instrument of crime. The jury found Petitioner not guilty of three counts of second-degree murder, relating to all three victims, and not guilty of first-degree murder of Ebony Talley's unborn child.

The penalty phase of the trial began on June 4, 2015, and concluded on June 9, 2015, when the jury returned a verdict of death on the single first-degree murder count pertaining to R.R. The trial court imposed the sentence of death with a consecutive aggregate sentence of life without parole followed by not less than 32 years and 6 months to not more than 65 years of incarceration.

Petitioner filed a direct appeal from that judgment of sentence. The Pennsylvania Supreme Court affirmed on May 25, 2017, with this Court denying certiorari on December 4, 2017. *Commonwealth v. Johnson*, 160 A.3d 127 (Pa. 2017), *cert. denied*, 538 U.S. 1017 (2017). The instant PCRA proceedings were initiated by way of a *pro se* petition filed on January 9, 2018. The Federal Community Defenders Organization ("FCDO") ultimately entered their appearance and filed amendments and discovery requests. Petitioner, through counsel, also

sought a protective order seeking to preclude the Commonwealth from interviewing trial counsel prior to the PCRA hearing. This request was denied on October 5, 2020, and Petitioner took an interlocutory appeal from this Order. The Pennsylvania Supreme Court affirmed on June 4, 2021. *Commonwealth v. Johnson*, 261 A.3d 378 (Pa. 2021)(*Johnson II*).

Following remand, evidentiary hearings were held on June 28, 29, and 30, 2023, as well as August 9, and 10, 2023. The parties submitted lengthy briefs on the numerous issues presented and the PCRA court held oral argument on November 27, 2023. Ultimately, the PCRA court denied relief on December 29, 2023. Petitioner appealed this denial to the Pennsylvania Supreme Court and that Court affirmed on March 26, 2026. *Commonwealth v. Johnson*, 353 A.3d 609 (Pa. 2026)(*Johnson III*). Petitioner now asks this Court to grant a writ of certiorari.

II. Factual History

A. Guilt Phase Evidence

In November of 2013, Ebony Talley and her daughter, four-year-old R.R., lived in Apartment 604 of the Avalon Court Apartments, Bristol Township, Bucks County, Pennsylvania. N.T. 5/27/15, pp.56-57. Ms. Talley was pregnant at the time, and her pregnancy was publicly known. *Id.*, at 14-15. The apartment belonged to Gigi Ucci, who was out of the country and permitted Ms. Talley to live in her

apartment while she was away. *Id.*, at 57. In addition to staying at Ms. Ucci's apartment, Ms. Talley also used Ms. Ucci's maroon Cadillac. *Id.*, at 57-58.

Petitioner had lost his apartment, and, as a result, Ms. Talley allowed him to keep a box and a trash bag of his belongings in one of the apartment closets, and further allowed him to shower and "do his daily routine" at the apartment. N.T. 5/27/15, pp.94-95. As a result, Petitioner was frequently there. *Id.*, at 89.

On November 25, 2013, Ms. Talley's boyfriend, Eric Nawuoh, arrived at her apartment around 12:00 A.M. and, at her request, told Petitioner to leave. N.T. 5/27/15, pp.89, 99. Petitioner left, but returned to the apartment later that morning and was still there when Mr. Nawuoh left at 10:00 A.M. *Id.*, at 90, 99.

Later that same day, around lunchtime, Ms. Talley's sisters – Paulina Burke and Tatiana Talley – as well as their mother, Pearline Burke, were at the apartment. N.T. 5/27/15, pp.110-12; N.T. 5/28/15, pp.269-70. Pearline Burke briefly left with Ms. Talley so that Ms. Talley could purchase an \$80 money order. *Id.*, at 116. Petitioner remained at the apartment during this time; he wore dark clothing – a blue or black hoodie, dark pants, and dark shoes. *Id.*, at 112-13, 115. When Ms. Talley's sisters and mother later left, Petitioner was still in the apartment with Ms. Talley and R.R. N.T. 5/28/15, p.276.

At approximately 2:00 P.M., Joseph Casey, a maintenance worker for Avalon Court, saw R.R. playing outside with a dog. N.T. 5/27/15, pp.63-66. R.R. said that she was outside watching her grandmother leave. When Mr. Casey saw the car pull away, he told R.R. to go inside because she was outside alone. *Id.*, at 65-66. Mr. Casey also noticed a “burgundy” Cadillac parked in front of the 600 building. *Id.*, at 66.

At approximately 3:00 P.M., Mr. Casey saw that the 600 building was on fire. N.T. 5/27/15, pp.69-70. He pulled the fire alarm and began warning residents by banging on their doors; he also attempted to save R.R. from her apartment, where the fire originated. *Ibid.* He was unable to get into the apartment because of the black smoke, which had filled the whole hallway. *Id.*, at 70, 74. When he exited, Mr. Casey noticed the Cadillac was missing. *Id.*, at 71.

Approximately five to ten minutes before firefighters and police arrived, Nigerria Gary was reading in her car, when she saw a burgundy car “pull out of a parking spot really fast and hit another car.” N.T. 5/27/15, pp.76-77. Petitioner later admitted to police that he was driving this vehicle, Ms. Ucci’s Cadillac. N.T. 5/29/15, p.300.

A police officer and later two fire fighters attempted to enter Ms. Talley’s apartment, which was a basement unit, in order to save R.R., who was reported to

be in the apartment. N.T. 5/27/15, pp.70-71, 167-69, 125-29. All three were forced to retreat because of thick, black smoke and the heat. *Id.*,

Emergency responders did not enter the apartment until fire engines with emergency equipment arrived. N.T. 5/27/15, pp.129-44. When the fire was extinguished, R.R. was found underneath an overturned couch. *Id.*, at 153-54. R.R. was rushed to the hospital, where she was pronounced dead. *Id.*, at 155.

Emergency responders also found Ms. Talley face-down on the bedroom floor. N.T. 5/27/15, p.138. A blue plastic bag was wrapped around her head. N.T. 5/27/15, p.245; Trial Exhibit C-76. Unused heroin bags stamped with “#1 Way To Go” were found underneath her head and scattered around her body. N.T. 5/27/15, p.226; N.T. 6/1/15, p.119. Police found a broken frying pan – the handle of which was found in the hallway leading to the bedroom, while the pan itself was found in the bedroom. N.T. 5/27/15, p.227. The broken handle of the frying pan contained a partial male DNA profile consistent with that of Petitioner. N.T. 5/29/15, p.174. One of Ms. Talley’s teeth and a ripped-out earring were found in the area between the living room and kitchen. N.T. 5/27/15, p.235.

Police also recovered a wireless Xbox controller, but no Xbox console, and a personalized dog tag that read, “Tashia loves you forever.” N.T. 5/27/15, pp.235, 239. The dog tag was found in the living room, near the kitchen dividing line. *Id.*,

at 238; Trial Exhibit C-71. Ms. Talley's blood was located on one side of the dog tag. N.T. 5/29/15, p.174. Petitioner's girlfriend, Natashia Martinez, would later tell police that the dog tag belonged to Petitioner, who always wore it. N.T. 6/1/15, pp. 45-46. Petitioner's cell phone was plugged into the wall and was sitting on a dining room chair. N.T. 5/27/15, p.234.

Ms. Talley had been stabbed thirty-five times; the shallowness of the stab wounds indicated she had struggled. N.T. 5/28/15, p.205. The autopsy revealed stab wounds to her scalp and cheek, her neck (one of which nicked her common carotid artery and would have caused considerable bleeding), her chest, and her armpit (which indicated her arm was up). *Id.*, at 205-07. Two stab wounds perforated her chest cavity, causing both lungs to collapse. *Id.*, at 208. She also had four stab wounds on her abdomen, one of which pierced the amniotic sac. *Id.*, at 209. All of the stab wounds to her head, neck, trunk, arms, hands, and legs indicated she was moving during the attack, likely trying to ward off a weapon. *Id.*, at 210-11.

Two of Ms. Talley's teeth were broken but her lips were undamaged, indicating her mouth was open as something hard and unforgiving, such as a frying pan, hit her mouth. N.T. 5/28/15, p.212. This hit likely disoriented her or possibly knocked her out. *Id.*, A partially-melted plastic bag was secured over her head. *Id.*, at 213, 225-026. While most of the burns found on Ms. Talley's body were inflicted while she was dead or dying, there was some "vital reaction" indicating that Ms.

Talley was either still alive or in the process of dying during the fire. *Id.*, at 220-21, 234. The ultimate cause of Ms. Talley's death was either the combination of all her wounds, which would have taken some time, or asphyxiation due to the plastic bag, which would have taken no more than four minutes. *Id.*, at 232. Ms. Talley's otherwise healthy male fetus was at twenty weeks' gestation and, when the trauma sustained by Ms. Talley deprived him of circulation, he "died simply because his mother did." *Id.*, at 228-29.

R.R.'s autopsy revealed that she was a robust and healthy four-year-old child who died from a single stab wound below her right collar bone. N.T. 5/28/15, pp.195-94. The knife cut R.R.'s common carotid artery and internal jugular, which caused her to bleed profusely and die of blood loss. *Id.*, at 195. The toxicology screen revealed a small amount of sulfhemoglobin, which was caused by exposure to fire and burning as she was dying. *Id.*, at 194.

The fire was found to have been started in the bedroom next to Ms. Talley's body and in the living room next to R.R.'s body. N.T. 5/27/15, pp.185-87. The fires were intentionally set when an open flame was applied to fuel sources at both origin points. *Id.*, at 185, 187-89. The fuel source in the bedroom, where the more significant fire occurred, was clothing and a cushion seat. *Id.*, at 187. In addition, cooking oil – a combustible liquid – was located at various places throughout the apartment. N.T. 5/27/15, pp.190-91; N.T. 5/28/15, pp.35-37.

Around 4:00 P.M the day of the murders, Petitioner called Brittany Coles, Ms. Talley's cousin, by using a number she did not recognize, and asked her to go to Ms. Talley's apartment to see if he left his cell phone there. N.T. 5/28/15, pp.246-50, 53. Ms. Coles, minutes before, had received a call alerting her to the fire and informed Petitioner the apartment was on fire, with R.R. possibly inside, and asked if he had spoken to Ms. Talley. *Id.*, at 250-51. Petitioner replied "no," that he was out selling an Xbox for Ms. Talley and was at the Levittown Trace Apartments in her Cadillac. *Id.*, Levittown Trace is located less than a mile from Avalon Court. N.T. 5/29/15, pp.227-28.

When Petitioner called five to ten minutes later from a different unknown number, Ms. Coles said R.R. had been found in the apartment and rushed to the hospital and asked him to go over to the apartment to see what was going on. N.T. 5/28/15, pp.254-55. When Petitioner responded he would not go because he had warrants, Ms. Coles became angry and told him to stop calling her. *Id.*, at 257-59.

Seconds later, Petitioner called a third time to ask her for Ms. Talley's sister's number. Ms. Coles thought he sounded scared and made whining or sobbing noises that she did not believe were genuine. N.T. 5/28/15, pp.260-61. She again urged Petitioner to go to Ms. Talley's apartment complex to get more information, telling him that the police would not know who he was and the warrants did not matter. Nevertheless, Petitioner still refused to go to the apartment. *Id.*, at 264.

Ms. Talley's sisters, Paulina and Tatiana, were together when Paulina learned that Ms. Talley and R.R. were both dead. N.T. 5/28/15, pp.271-73. Paulina Burke received multiple phone calls from Petitioner from unknown numbers after that. *Id.*, at 271, 274-75. During the first call, Petitioner asked if Ms. Talley and the baby was okay. Ms. Burke responded "no," that they had been killed in the fire. *Id.*, at 276.

She received three to five additional phone calls from Petitioner thereafter. N.T. 5/28/15, p.277. Ms. Burke knew that he had Ebony Talley's car and asked him to come to the police station with it, but Petitioner refused, again citing the warrants. *Id.*, at 277-78. Ms. Burke thought his response was crazy, "like something [was] not right," as everyone was at the station trying to understand what had happened. *Id.*,

Petitioner was in Ms. Talley's Cadillac at the Levittown Trace apartment complex between 5:00 and 5:30 P.M. N.T. 5/28/15, pp.288-291, 293. Jill Connolly, who resides in apartment H-48 of Tower H in Levittown Trace, was outside her building when she saw the Cadillac bypass empty parking spaces, switch off the headlights, back up, and then go around a corner of the H Tower, which she thought was odd due to all the open parking spaces. *Id.*, at 290-91. Tower H is the last tower in the Levittown Trace complex and the parking lot around the side of the building is secluded. N.T. 5/29/15, p.10. When Petitioner approached Ms. Connolly a few minutes later, he seemed "super occupied." N.T. 5/28/15, pp.293-94.

Petitioner knocked at the door of Jina Padilla, who resided in Apartment F-70 of Levittown Trace, and asked to use her cell phone. N.T. 5/29/15, pp.31-32. Petitioner seemed “worried” and took her phone into her bedroom, where she could hear him make a sobbing noise and breathing heavily. *Id.*, at 33-34. Ms. Padilla noticed that he seemed “really panicky” and made several outgoing calls from her phone. *Id.*, at 36-37. When Petitioner finished making the calls, he came out of the bedroom and “looked very panicky, very worried.” *Id.*, at 37-38. Petitioner used the bathroom for about five to ten minutes. *Id.*, at 39-40. Petitioner then asked Ms. Padilla if he could leave a bag at her apartment, but she refused. *Id.*,

At approximately 5:40 P.M., Bristol Township Detective Alexander Asmann received information from Paulina Burke that Petitioner was at Levittown Trace Apartments. N.T. 5/29/15, pp.5-8. At 6:20 P.M., Detective Asmann and fellow Detective Michael Slaughter located the Cadillac, verified it was unoccupied, and set up surveillance on the vehicle. *Id.*, at 8-9, 19, 62-63.

At approximately 7:08 P.M., the car’s brake lights illuminated, although Detective Asmann had not seen Petitioner exit from the door of Tower H, the closest building to the vehicle. N.T. 5/29/15, p.9. The vehicle was subsequently stopped with Petitioner as the sole occupant. *Id.*, at 50-51. Inside the car, police found a digital scale, heroin bags bearing the stamp “#1 Way To Go,” yellow bags with a

black rubber band, a lighter, and bleach. N.T. 6/1/15, p.92. Petitioner was also taken into custody with fifty dollars in cash on his person. N.T. 5/29/15, pp.297-98.

Testimony from those who saw Petitioner that afternoon and evening established that he was no longer wearing the dark clothes he had been wearing when he was at Ms. Talley's apartment prior to the murders. Instead, he had on a maroon and plaid gray sweater, with a blue jacket, and black jeans. N.T. 5/29/15, p.47; N.T. 6/1/15, p.18.

Police performed a search of all the common areas in the Levittown Trace Apartments and, in Tower F, found a cardboard Burger King box in a clean, well-maintained laundry room that appeared to be regularly used by tenants. N.T. 5/29/15, pp.71-72, 67-68. The cardboard box contained a book with Petitioner's birth certificate and an Xbox with the audio/visual and power cords. *Id.*, at 71, 81-82. Police also located a duffle bag and plastic trash bag outside the entrance to Tower F. *Id.*, at 67, 71. The plastic trash bag was filled to capacity with clothing, including a Giant store employee's shirt with Petitioner's name tag. *Id.*, at 71, 77. The duffle bag contained Xbox games. *Id.*, at 74. Blue nitrile gloves were found in one of these containers. *Id.*, at 76-77.

At the time of arrest, Petitioner had two injuries to his hand – a small cut to his pinkie and a laceration to his palm. N.T. 5/29/15, p.233. These injuries were not

scabbed over and did not appear to be very old. *Ibid.* Petitioner reported that the injuries were from jumping out of a window at Levittown Trace. *Id.*, at 303.

When interviewed by police that same day, Petitioner claimed that he left Ms. Talley's apartment earlier and walked one to two miles to the Burger King parking lot in Bristol Borough where "Eric Stahl," a 21-year-old black male, picked him up in the Cadillac and drove to Levittown Trace. "Eric" gave Petitioner the keys and left to meet a girl. N.T. 5/29/15, pp.273-75, 277-28. Petitioner then drove over to H Tower to meet an acquaintance but found the door to the apartment locked. *Id.*, at 279. Petitioner said he drove around the lot and then was arrested. *Ibid.* He never mentioned visiting Jina Padilla. *Id.*, at 279-280. Moreover, Petitioner could give no additional identifying information about "Eric" to police, claiming that he borrowed a cell phone at Burger King, logged into his Google account to retrieve "Eric's" number, and then called him. *Id.*, at 277. No record of "Eric Stahl" was found in PennDOT or Bristol Township police databases. *Id.*, at 274, 277.

Petitioner admitted that he had contacted Brittany Coles earlier because he believed something was going on at Avalon Court, and that she had told him about the fire, that two dead bodies were inside, that R.R. had been burned, and that the apartment had been boarded up. N.T. 5/29/15, pp.285, 289-90. When he spoke, Petitioner expressed no emotion; when detectives remarked on his lack of emotion, however, Petitioner began to feign crying. *Id.*, at 285-86. Petitioner also provided

reasons why the fire was an accident. He explained that Ms. Talley left the stove on as a heat source and that she would leave pots and pans of grease or oil next to the open flame. *Id.*, at 287-88.

Petitioner also admitted he spoke with Paulina Burke, who urged him to bring the Cadillac to the police department. N.T. 5/29/15, pp.291-93. Petitioner claimed he did not do so because he had non-traffic warrants for sleeping inside a vehicle. *Id.*, at 294. Petitioner also claimed that Ebony Talley was like a sister to him yet stated that he did not return to the apartment because he did not want to get involved in whatever had happened and that it was “every man for himself.” *Id.*, at 294-96. Petitioner admitted that he knew Ms. Talley was pregnant. *Id.*, at 287.

Only after the detectives asked Petitioner about what they could expect to see on Burger King’s surveillance tapes, did Petitioner admit that he was the one who left Avalon Court in the Cadillac. N.T. 5/29/15, p.300. Petitioner admitted that he had removed an Xbox game and console from Ms. Talley’s apartment but stated that he gave these items to “Eric” to sell the items for Petitioner. *Id.*, at 301. “Eric,” however, never returned. *Ibid.*

As he spoke to police, Petitioner was shivering and shaking, but also sweating; he left condensation on the chair from his lower back and bottom. N.T. 5/29/15, p.305. When the interviewing detective told Petitioner that he had a knot in his

stomach from the moment he was called about the case, Petitioner began to laugh and asked the detective if he was hungry. *Id.*, at 306. When the detective replied that the knot was caused by the nature of the investigation, Petitioner initially showed no response but then put his head down and feigned crying without producing tears. *Id.*, at 306-07.

Following the interview, detectives executed a search warrant for a buccal swab from Petitioner and swabbing and scraping from his hands and fingernails. N.T. 5/29/15, p.232. DNA analysis of the scrapings from underneath Petitioner's right-hand fingernails was consistent with Ms. Talley's DNA. N.T. 5/29/15, pp.131-32.¹ At trial, the Commonwealth's expert opined that it would have taken more than casual contact to get somebody else's DNA under one's nails. *Id.*, at 179.

After being incarcerated, Petitioner called his brother, Marquis Johnson, from prison by using another inmate's account and then connecting to Marquis through a third party. N.T. 6/1/15, pp.67, 197-200; Trial Exhibits C-141, C-142. Petitioner directed Marquis to retrieve something that he hid inside a mechanical box in a laundry room at Levittown Trace, and told him to make sure the evidence "never [saw] the light of day." *Id.*, at 69-70; Trial Exhibits C-141, C-142. Marquis later

¹ Although DNA testing of the fingernail scrapings from Petitioner's left hand also indicated the presence of another's DNA, there was insufficient data to determine whose DNA it was. N.T. 5/29/15, p.132.

found a box containing an \$80 money order and drugs contained in yellow baggies inside a blue nitrile glove. *Id.*, at 70-71. Marquis cashed the money order and hid the drugs in the crawl space of his house. *Id.*, at 71, 111-12, 206. Police recovered the glove, which contained 167 bags of heroin stamped with the same “#1 Way To Go”; thirty bags were tested and found to contain 395.03 grams of heroin. N.T. 6/1/15, pp.112-13, 115, 116. The bags recovered from Marquis Johnson’s house were identical to the eleven baggies found on Petitioner when he was stopped by the police as well as the unused baggies found scattered around Ms. Talley’s head at the murder scene. *Id.*, at 117, 119-20.

Marquis Johnson also told police that a few days before the murder, he was with Petitioner. N.T. 6/1/15, pp.62-63. Petitioner was distressed and told Marquis that he wanted to do things with his life, to be an achiever, and that “I’m willing to do anything to make a come up.” *Id.*, at 63-64. Petitioner said if he had to shoot someone to make a “come up” or be involved in anything to make that “come up,” he would do it. *Id.*, at 64. This conversation ended when Ms. Talley arrived. *Id.*, at 65. Evidence at trial established that Petitioner was aware Ms. Talley sold heroin. *Id.*, at 173-75, 153-54.

After Petitioner was incarcerated, an inmate, George Lewis, was assigned to “babysit” Petitioner while he was housed on the restricted unit. N.T. 6/1/15, pp.224-25. “Babysitting” refers to watching someone who may try to hurt themselves or

others. *Id.*, at 225. Petitioner was sitting with his head down, and Mr. Lewis asked Petitioner what was wrong. *Id.*, at 230. Petitioner responded, “She made – she made me kill her.” *Ibid.* Mr. Lewis asked, “Who made you kill her?” Petitioner replied, “Ebony,” then stated, “And I also killed the baby.” *Ibid.* Petitioner continued, “Yeah. I had to stab her because she very – she 4 years old. She very smart and she can identify me.” *Ibid.* Petitioner said that he stabbed her once in the upper chest on the right side. *Id.*, at 239. Petitioner also said “they” were trying to get him for murder, but “they ain’t got no evidence.” *Id.*, at 236.

B. Relevant Penalty Phase Evidence

At the penalty phase, trial counsel presented the testimony of a mitigation specialist who, without objection from the Commonwealth, presented details regarding Petitioner’s upbringing based on witness interviews and records. Counsel also presented the testimony of two individuals who worked with Petitioner at one of his juvenile placements with whom Petitioner formed a special bond, and the testimony of Juvenile Probation Officer Steven Cantwell, who was familiar with Petitioner’s family. In addition, counsel presented the testimony of two expert witnesses who testified regarding Petitioner’s mental health history.

Based on the evidence of mitigation, the sentencing jury found as mitigators that Petitioner had no significant prior history of criminal convictions, his age at the time of the crime, and other evidence of mitigation concerning his character and

record and the circumstances of his offense (the so-called “catch-all” mitigator). N.T. 6/9/15, pp.21-22, 23.

As to the murder of Ebony Talley, the jury found as aggravators the following: that Petitioner had committed another murder before or at the time of the instant offense; that Petitioner and Ms. Talley were associates in drug dealing and the murder was motivated by that drug association; and that Petitioner was aware of Ms. Talley’s pregnancy.

As to the murder of R.R., the jury found the following aggravators: that R.R. was a prosecution witness to the murder of Ms. Talley and was killed for the purpose of preventing her testimony against Petitioner; that Petitioner had committed another murder before or at the time of the instant offense; and that R.R. was under twelve years of age.

C. Relevant PCRA Proceedings

During the PCRA proceedings, Petitioner alleged that he was entitled to relief pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and progeny. Petitioner alleged the prosecution withheld exculpatory evidence which would have been used to impeach George Lewis and Petitioner’s brother, Marquis Johnson. Specifically, he claimed the prosecution withheld: 1.) a letter from George Lewis offering to cooperate in a prior, unrelated case while he was incarcerated in lieu of bail; 2.) an

alleged agreement with New Jersey authority to grant sentencing consideration there in exchange for testimony; 3.) records from the Bucks County Correctional Facility regarding prior alleged misstatements to prison officials regarding a requested furlough and another inmate's confession; 4.) a threat of prosecution allegedly made to Marquis Johnson if he did not testify and a domestic violence dispute he was involved in while Marquis was on probation.

The Commonwealth conceded the letter from George Lewis previously offering to cooperate existed in his old criminal file and that it was inadvertently not turned over as the prosecution at the time of trial was unaware of it. N.T., 6/28/2023, p.74, 119; N.T., 6/30/2023 (a.m.), p.113-15. The PCRA Court found this evidence to be cumulative and thus, not material, and the Pennsylvania Supreme Court agreed. *Johnson III*, 353 A.3d at 639-41.

As for the alleged agreement between the prosecution and the New Jersey authorities, coupled with George Lewis' testimony as to what he expected to personally gain from his testimony, the testimony at the PCRA hearing established that the prosecution here did not request New Jersey extend any consideration on George Lewis' behalf, there was no agreement made, and no promises of leniency were ever extended to George Lewis. N.T., 6/28/2023, at 97-98; 114-15. The PCRA court found no promises of assistance were made, expressly or impliedly, and the

Pennsylvania Supreme Court determined this factual finding to be supported by the record. *Johnson III*, 353 A.3d at 643.

At the PCRA hearing, the testimony established that the records relating to George Lewis' prior actions in the Bucks County Correctional Facility were never in the possession of the prosecution and they were wholly unaware of the incidents reflected in the records at issue. N.T., 6/28/2023, pp.68-70; 78-82; N.T., 8/9/2023, pp.146-47; N.T., 6/30/2023, p.116. The prison officials were not an arm of the prosecution and were not working closely with the prosecution in this case. Indeed, the testimony bore out that the prison officials did not respond to many requests from the investigators and were generally dilatory in dealing with requests for information and documentation. N.T. 8/9/2023, p.25-28. The Pennsylvania Supreme Court confirmed "there is no evidence that BCCF officials were acting at the behest of the [prosecution] in this case. Nor was there any evidence that government control of the records in question was exclusive." *Johnson III*, 353 A.3d at 634.

As to the prospective charges and probation violations regarding Marquis Johnson which Petitioner alleges were withheld, the testimony established that no such evidence existed. The domestic incident occurred shortly before Marquis Johnson's trial testimony and his probation officer did not discuss the domestic incident and possibility of a violation with Marquis Johnson until after he testified. PCRA Ex.157, p.P4686. Thus, the PCRA court found, and the Pennsylvania

Supreme Court affirmed, no offer of assistance of leniency in the violation matter could have existed based on this timing. *Johnson III*, 353 A.3d at 640. The Court further found that while Marquis Johnson was informed he could potentially face charges for destroying or concealing evidence of the murder, “the mere prospect of criminal exposure is neither a promise of leniency nor can it be assumed to have extracted his materially corroborated testimony.” *Id.*, at 641. The Pennsylvania Supreme Court further found that Petitioner failed to show materiality and prejudice because Marquis Johnson’s testimony was corroborated by the unchallenged testimony of Natasha Martinez. *Ibid.*

REASONS FOR DENYING THE PETITION

III. PETITIONER’S PURPORTED CIRCUIT SPLIT INVOLVES A QUESTION WHICH HAS NO BEARING ON THE OUTCOME OF THIS CASE AND DOES HE EFFECTIVELY REQUESTS THIS COURT ISSUE AN ADVISORY OPINION.

In support of his claim that this Court should grant the requested writ of certiorari, Petitioner points to a purported circuit split in which a minority of Circuit Courts of Appeals have held that a criminal defendant’s due diligence in discovering equally available exculpatory evidence is irrelevant if the prosecution suppressed that exculpatory evidence. Petitioner cites *United States v. Tavera*, 719 F.3d 705, 712 (6th Cir. 2013), *Amado v. Gonzalez*, 758 F.3d 1119, 1137 (9th Cir. 2014), and *Fontenot v. Crow*, 4 F.4th 982, 1065 (10th Cir. 2021), *cert. denied*, ___ U.S. ___; 142 S.Ct 2777 (2022), for their holdings that where the prosecution is in possession of exculpatory evidence and does not disclose that evidence to the defendant, those courts will not place any burden of diligence on the defense team to uncover the exculpatory evidence which was in the possession of the prosecution.

However, the only exculpatory evidence that the Pennsylvania Supreme Court found Petitioner had equal access to with the exercise of due diligence were the prison records relating to George Lewis’s request for furlough and his statements regarding another inmate’s confession to him. This evidence was never in the possession of the prosecution but were maintained and held by a third-party agency – the Bucks County Correctional Facility. The evidence presented at the PCRA

hearing established that the prosecution team never had these reports in their possession and indeed had no knowledge of their existence. New Jersey authorities were alerted to the statements relating to Shaquel Rock and prison officials apparently told no one about the furlough issues. *Johnson III*, 353 A.3d at 633-34.

More importantly, the Bucks County Correctional Facility was not an arm of the prosecutor's office or the police department investigating this murder. Rather, the testimony at the PCRA hearings established that the prison officials the investigators sought records from often failed to respond. Moreover, as the Pennsylvania Supreme Court noted, there was no evidence that the prison was acting at the behest of the prosecution in this matter. *Id.*, at 634. *C.f.*, *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

On these facts, the resolution of the purported circuit split that Petitioner cites to is wholly immaterial to this matter. In no case that Petitioner cites was the prosecution faulted for not disclosing evidence it did not possess and of which it was unaware. In *Tavara*, the prosecution was in possession of a statement in which a co-defendant stated that Tavara was unaware of the presence of drugs. *Tavara*, 719 F.3d at 710. In *Amado*, the prosecution was in possession of a probation report containing evidence relative to a government witness. *Amado*, 758 F.3d 1127-28. In *Fontenot*, it was undisputed that over 860 pages of documents were in the possession of the prosecution. *Fontenot*, 4 F.4th at 1062. Indeed, this Court's decision in *Banks v.*

Dretke, 540 U.S. 668, 696 (2004), on which these cases rely was concerned with approving of a rule “delaying ‘prosecutor may hide, defendant must seek.’” *Ibid*.

Petitioner cites no case in which a violation of *Brady* and progeny has been found where the prosecutorial team was neither aware of nor in possession of the evidence at issue. To the contrary, the well-established rule of *Brady* is that “the government has the obligation to turn over evidence *in its possession* that is both favorable to the accused and material to guilt or punishment.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987)(emphasis added). There is no divergence in the Circuit Courts of Appeals on this issue. *See, e.g., United States v. Mitrovich*, 95 F.4th 1064, 1071 (7th Cir. 2024)(“As a general rule, prosecutors cannot suppress evidence they do not possess.”); *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007)(“But *Brady* clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess.” (quotation omitted)); *United States v. Hall*, 434 F.3d 42, 55 (1st Cir. 2006)(“While a prosecutor must disclose information maintained by government agents even if the prosecutor herself does not possess the information, this duty does not extend to information possessed by government agents not working with the prosecution.” (citation omitted)). Even the Courts which have recognized the absence of a diligence requirement in the context of a true claim of the prosecution suppressing possessed exculpatory evidence have maintained the requirement that a defendant exercise due

diligence themselves where there is no *Brady* violation. *Lewis v. Connecticut Commissioner of Correction*, 790 F.3d 109, 122 (2d Cir. 2015).

As the prison records relating to George Lewis’s prior efforts to avoid his incarceration through cooperation and furlough requests were not within the possession of the Commonwealth or “others acting on the government’s behalf in this case,” *Kyles*, 514 U.S. at 437, resolving the purported circuit split to which Petitioner points will have no bearing on the outcome of this matter. With the facts presented before and found by the PCRA court, Petitioner’s presented question is nothing more than an invitation for this Court to issue an advisory opinion. However, it is well-established that

the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues concrete legal issues, presented in actual cases, not abstractions are requisite.

United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 89 (1947)(footnotes and quotations omitted).

Additionally, it is of note that none of the circuit court opinions Petitioner cites as maintaining the diligence requirement in their *Brady* analysis appear to have been presented with an argument to reconsider that element following *Banks*. When presented with the question, the Third Circuit Court of Appeals has re-assessed its precedent and affirmatively jettisoned any diligence requirement when exculpatory evidence has actually been suppressed by the prosecution, *Dennis v. Secretary*,

Pennsylvania Department of Corrections, 834 F.3d 263, 291-92 (3d Cir. 2016), relying on *Tavera*, *supra*, and this Court’s strong language in *Banks*, *supra*. Presently, there does not appear to be any circuit split over the applicability of *Banks* to *Brady*’s diligence requirement – merely circuits which have not been asked to re-evaluate the requirement of diligence considering this Court’s *Banks* opinion. Respondents humbly suggest that even if this question were pertinent to the outcome of this case, prudence would suggest withholding intervention until a lower court has maintained its diligence requirement after reconsidering it in light *Banks*.

For these reasons, Petitioner’s request for certiorari should be denied.

IV. THE PENNSYLVANIA SUPREME COURT IDENTIFIED AND APPLIED THE CORRECT STANDARD FOR ASSESSING MATERIALITY UNDER *BRADY*.

In assessing materiality under *Brady*, this Court has set for a standard which is met when the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. In short, [Petitioner] must show a reasonable probability of a different result.

Banks, 540 U.S. at 698-99 (quotations and citations omitted). A reasonable probability does not require a showing that “the defendant would more likely than not have received a different verdict with the evidence,” *Kyles*, 541 U.S. at 434, but is “shown when the government’s evidentiary suppression undermines confidence in the outcome of the trial.” *Id.*, at 434 (quotations omitted). In making this assessment, this Court has commanded that reviewing courts must evaluate “the

cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item.” *Kyles*, 541 U.S. at 420.

In the matter at hand, the Pennsylvania Supreme Court identified this exact standard asking whether there was “a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Johnson III*, 353 A.3d at 609 (quotations and alterations omitted).² The Pennsylvania Supreme Court specifically noted that

[a] reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence; it means only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial.

Ibid. As it pertained to materiality, the Pennsylvania Supreme Court further confirmed that a *Brady* analysis required it “to view the effect of the non-disclosures cumulatively.” *Ibid.* Quite plainly, the Pennsylvania Supreme Court identified and articulated the correct standard for assessing materiality under *Brady* and its progeny.

The Pennsylvania Supreme Court also correctly applied this standard by viewing the undisclosed impeachment evidence against the entirety of the record. Petitioner’s arguments to the contrary are initially premised upon a wholesale

² The Pennsylvania Supreme Court referred to this standard as showing prejudice. However, in the paragraph immediately preceding this statement, the Court noted that *Brady*’s materiality, in its test, means that prejudice ensued. *Johnson*, 353 A.3d at 631 (quoting *Commonwealth v. Chambers*, 807 A.2d 872, 887 (Pa. 2002)).

disregard for the facts established during the PCRA proceedings and the impeachment evidence which had already been presented at trial.

Petitioner's analysis repeatedly references documentation of purported lies George Lewis had previously told prison officials. However, the foregoing section's analysis makes clear that this evidence was not suppressed by the prosecution as they never possessed this evidence and indeed never knew about it. The only impeachment evidence relating to George Lewis which was actually possessed by the prosecution but not turned over to the defense for use at trial was a letter and a notation in a prior case file indicating that George Lewis had offered to cooperate in exchange for leniency during that prior case. Evidence pertaining to Lewis' furlough and Shaquel Rock was not suppressed in violation of *Brady* as the prosecution was wholly unaware of it and there was never a promise of leniency with regard to Lewis' outstanding New Jersey offenses. *Johnson III*, 353 A.3d 634-37. Petitioner's insistence on including this in his materiality analysis is improper.

Assessing the offer to cooperate found in Lewis' prior case file, this evidence could have been used to argue that Lewis had a habit of trying to cooperate with the prosecution when he found himself in trouble. The PCRA court found that the jury was already well aware of this fact – noting the jury had already heard evidence of Lewis' prior efforts to cooperate with New Jersey authorities and testimony from the prison investigator that the defense team presented which reflected that Lewis only

came forward with Petitioner’s statements in conjunction with a request for assistance with prison misconducts he had incurred. *Id.*, at 639. The Pennsylvania Supreme Court found “no error in this result.” *Id.*, at 640. As for the alleged exculpatory evidence to impeach Marquis Johnson, the Pennsylvania Supreme Court reviewed the entire record and noted that Johnson’s testimony relating to Petitioner’s motive was corroborated by the unchallenged testimony of another witness. *Id.*, at p. 641. That Court further noted that merely informing Marquis Johnson of the prospect of criminal exposure was “neither [] a promise of leniency nor can it be assumed to have extracted his materially corroborated testimony.” *Ibid.*³

This analysis of the materiality of the undisclosed impeachment evidence was not contrary to this Court’s precedents. It was wholly aligned with this Court’s command to

evaluate the withheld evidence **in the context of the entire record** and determine in light of that examination whether there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.

Turner v. United States, 582 U.S. 313, 325 (2017) (quotations and citations omitted; emphasis added). Where impeachment evidence is largely cumulative of other impeachment evidence, which was available, this Court has commanded that the

³ The allegation of a prospect for leniency for Marquis Johnson’s own probation violations was found to be irrelevant based on the timing of the probation violation as Marquis was not aware of any possible violation until after trial. *Id.*, at 640.

materiality requirement is not met. *Id.*, at 327 (“The jury was also well aware of Jacobs’ vacillation, as she was impeached on the state with her shifting stores about what she witnessed.”).

Nor did the Pennsylvania Supreme Court fail to conduct a cumulative analysis its assessment of materiality of the exculpatory evidence. To the contrary, that Court expressly considered the value of the impeachment evidence against both Marquis Johnson and George Lewis, finding

[r]egardless of the vigor and rigor of the cross-examinations of Lewis and Marquis with the benefit of the allegedly undisclosed *Brady* evidence, our confidence in the jury verdict is not sufficiently undermined.

Johnson III, 353 A.3d at 641.

In doing, so the Pennsylvania Supreme Court cited its past precedent of *Commonwealth v. Abdul-Salaam*, 42 A.3d 983, 987 (Pa. 2012), for the test of whether “cumulative analysis of multiple items of *Brady* non-disclosure” created “a reasonable probability of a different outcome with the benefit of the *Brady* evidence in question.” *Johnson III*, 353 A.3d at 641 n.104. While the Pennsylvania Supreme Court expressed its conclusion on this question as stating the Court’s “confidence in the jury verdict is not sufficiently undermined,” *Johnson III*, 353 A.3d at 641, this shorthand language did not reflect a different standard applied than the reasonable probability standard which it simultaneously cited from its *Abdul-Salaam* precedent. Petitioner’s argument to the contrary is specious.

This also is not a case in which it could be said the Pennsylvania Supreme Court failed to “distinguish between the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to punishment.” *Cone v. Bell*, 556 U.S. 449, 472 (2009). Here, the Pennsylvania Supreme Court undertook a separate analysis in which it assumed that all of the impeachment evidence from the PCRA hearing against George Lewis⁴ had been effectively presented at the penalty phase with the “desired effect” of “reduc[ing] the aggravators found unanimously from three to two” by eliminating the murder of a witness aggravator. *Johnson III*, 353 A.3d at 661. After doing so, that Court found that it was not “reasonably probable, in light of the two other aggravators found by the jury, that one or more members of the jury would have retreated from imposing a death sentence under these circumstances.” *Ibid*.

This analysis, which viewed all of the impeachment evidence and assumed its effectiveness, was a proper application of the cumulative analysis. This analysis asked and answered the proper question of whether there was a reasonable probability that effective use of that impeachment evidence would have changed the outcome was the proper standard as outlined by this Court. *See, United States. v. Bagley*, 473 U.S. 667, 684 (1985)(remanding for the lower court to “determination

⁴ Marquis Johnson was a witness for Petitioner in the penalty phase and impeachment of his testimony would not be relevant in this discrete assessment.

whether there is a reasonable probability that, had the inducement offered by the Government to O'Connor and Mitchell been disclosed to the defense, the result of the trial would have been different.”); *Cone*, 556 U.S. at 452 (“remand[ing] the case to the District Court to determine in the first instance whether there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment of the appropriate penalty for Cone's crimes.”).

Because this brief is limited to the question of whether or not the request for certiorari should be granted, Respondents will refrain from reiterating the Pennsylvania Supreme Court's reasoning for finding the evidence presented at trial was overwhelming such that it precluded “a showing of materiality and prejudice.” *Johnson III*, 353 A.3d at 641. Nonetheless, Respondents wholeheartedly concur with that assessment. For the purposes of this limited response, Respondents note simply that to the extent that Petitioner asks this Court to review the Pennsylvania Supreme Court's application of the facts to the objectively correct standard of review articulated and employed by the that Court, this is not a question worthy of the grant of the great writ of certiorari. Sup. Ct. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”); *Florida v. Rodriguez*, 469 U.S. 1 (1984)(Justice Stevens dissenting)(“As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-

correcting function in federal litigation. We do not have comparable supervisory responsibility to correct mistakes that are bound to occur in the thousands of state tribunals throughout the land.”).

As the Pennsylvania Supreme Court identified and applied the correct materiality test under *Brady* and progeny, Petitioner’s request for certiorari should be denied.

CONCLUSION

Wherefore, as the established facts of this case make the question of any diligence requirement on behalf of a defendant in a *Brady* analysis irrelevant; and where the Pennsylvania Supreme Court correctly identified and applied this Court's materiality standard in assessing claimed violations of *Brady* and progeny, Respondent's request that this Honorable Court deny the request for certiorari in this matter.

Respectfully Submitted,

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