

OCTOBER TERM, 2026

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

— CAPITAL CASE —

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REPLY TO BRIEF IN OPPOSITION

I. THIS CASE IS AN APPROPRIATE VEHICLE TO RESOLVE THE CIRCUIT SPLIT.

Petitioner has asked this Court to resolve a split among the Courts of Appeals as well as state courts such as Pennsylvania, regarding 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). In its Brief In Opposition ("BIO"), Respondent Commonwealth of Pennsylvania ("the Commonwealth") questions the need to resolve the "purported" split, but mainly argues that this case is not an appropriate vehicle to resolve the split. The Commonwealth bases this argument on the claim that the prosecution did not possess the impeachment evidence relating to its key jailhouse informant contained in the files of the prison investigators at the local county prison. In the Commonwealth's view, the prosecution does not have a duty to disclose evidence it does not possess and, therefore, the circuit split Petitioner has identified is not relevant to Petitioner's case. BIO at 21-25. The Commonwealth's view is mistaken and is contrary to this Court's precedent.

In *Kyles v. Whitley*, this Court held that prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." 514 U.S. 419, 437 (1995). Here, testimony at the post-conviction hearing demonstrated that the Bucks County prison investigators are the first line of investigation for law enforcement when a prisoner comes forward claiming to have information helpful to the prosecution or police.

In this case, prison investigators acted on behalf of the police and prosecutors when informant Lewis made his allegations against Mr. Johnson. Police Detective Timothy Fuhrman testified that he received a phone call from prison investigator Davis informing him that Lewis had information he wanted to provide concerning Mr. Johnson. NT, 8/9/23 at 90. Fuhrmann asked investigator Davis to interview Lewis first, which Davis did. *Id.* at 91. It was not uncommon for Fuhrmann to work with the prison investigators when there were incidents at the prison or when, as in this case, they called with information. *Id.* Police Detective Slattery testified that he would email prison investigators to obtain documents from the prison when needed. NT, 8/9/23 at 25. As part of his investigation in this case, Slattery also obtained other forms and a prison video from Investigator Davis. *Id.* at 27-28.

Lead prosecutor Matthew Weintraub further testified that Bucks County prosecutors “have a working relationship with” the investigators at the local Bucks County prison. NT 6/28/23, at 55-56. Another prosecutor, Thomas Gannon, testified that he would on occasion direct the prison investigators to do certain tasks and that the investigators would report back to him. NT 6/30/23, at 87-88.

Prison investigators took Lewis’ initial statement and passed the information along to Bucks County prosecutors. Investigator Frank Davis testified for the Commonwealth about Lewis’s statement at a pre-trial hearing. Prison investigators thus functioned like the police in this case—as part of the prosecution team. Therefore, the prosecutors were responsible for knowing the contents of Lewis’s prison records and disclosing any favorable evidence contained in those records.

In short, the prison investigators, police detectives, and the prosecution all worked together as a team to develop a case against Mr. Johnson. The lead detectives directed the prison investigator to investigate and provide files to them. The prosecutors testified that they work closely with the prison investigators and have the ability to request information and records from the prison. Given that relationship, the information contained in the prison files was readily available to the prosecution. As the Fifth Circuit has said, “[i]f disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States Government.” *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980). *See also*, *United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991); *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992); *United States v. Webster*, 392 F.3d 787, 798 n.20 (5th Cir. 2004).

In *Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997), the court recognized that a prosecutor who presents testimony of a jailhouse informant has the obligation to review and appropriately disclose exculpatory or impeachment evidence contained in those records. The court explained:

The prosecutor’s actual awareness (or lack thereof) of exculpatory evidence in the government’s hands, however, is not determinative of the prosecution’s disclosure obligations. Rather, the prosecution has a duty to learn of any exculpatory evidence known to others acting on the government’s behalf. Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned.

Id. at 479-80 (citations omitted).

When the state decides to rely on the testimony of jailhouse informants with a substantial prior record, the prosecution has an obligation to review and disclose exculpatory information contained in prison files. “This must include the witness’s criminal record, including prison records, and any information therein which bears on credibility.” *Id.* at 480.

Other courts have reached similar conclusions about agencies working with prosecutors. In *United States v. Wilson*, the Seventh Circuit imputed information in the hands of the U.S. Marshal’s Service to the prosecutors. 237 F.3d 827, 832 (7th Cir. 2001). In that case, a key witness testified that he had not tested positive for drugs while in the witness protection program. In reality, he had repeatedly tested positive for drugs, a fact not known to the prosecutors but known to the U.S. Marshal’s Service. The court stated, “it is impossible to say in good conscience that the U.S. Marshal’s Service was not ‘part of the team’ that was participating in the prosecution, even if the role of the Marshal’s Service was to keep the defendants in custody rather than to go out on the streets and collect evidence.” *Id.* The case for the Buck County prison being “part of the [prosecution] team” is even stronger here since the prison both kept the witness (and defendant) in custody *and* had an active role in the investigation.

In *McCormick v. Parker*, a hospital nurse was found to be part of the prosecution team; the fact that she was not certified (a fact known only to her, not the prosecutors) was imputed to the prosecution based on her role in the case. 821 F.3d 1240, 1247-48 (10th Cir. 2016). The failure to disclose this information violated *Brady*. The court found that the nurse, like the prison investigators here, became an arm of the

prosecution because she “acted at the request of law enforcement in the pre-arrest investigation of a crime.” *Id.* at 1248. *See also United States v. Thornton*, 1 F.3d 149, 158 (3d Cir. 1993) (“prosecutors have an obligation to make a thorough inquiry of all enforcement agencies that had a potential connection with the witnesses”).

In this case, the records showing Lewis’s past efforts to lie to authorities to benefit himself were in control of the county prison and its investigators who worked in cooperation with the prosecution. “This duty to disclose favorable evidence, we have explained, extends beyond evidence in the prosecution’s immediate possession to evidence in the possession of other actors assisting the government in its investigation. That includes any state and municipal agencies that are part of the ‘prosecutorial team’ broadly understood.” *United States v. Mitrovich*, 95 F.4th 1064, 1071 (7th Cir. 2024) (internal citations omitted). “Because prosecutors are in a ‘unique position to obtain information known to other agents of the government,’ they have an obligation to ‘disclos[e] what [they] do[] not know but could have learned.’” *United States v. Cano*, 934 F.3d 1002, 1023 (9th Cir. 2019) (internal citations omitted) (quoting *Carriger*, 132 F.3d at 480. *See also Auten*, 632 F.2d at 481 (noting there is “no suggestion in *Brady* that different arms of the government are such separate entities as to be insulated from one another”).

In this case, the prison investigators who dealt with Lewis were a part of the prosecution team. The Commonwealth cannot avoid its duty to disclose exculpatory or impeaching evidence in the prison files just because those records were not in their

actual possession. The Commonwealth's refusal to acknowledge that obligation should not deter this Court from granting review and resolving the circuit split.

II. THE PENNSYLVANIA SUPREME COURT MISAPPLIED THE MATERIALITY STANDARD.

The Commonwealth correctly points out that the Pennsylvania Supreme Court, at times, correctly set forth the appropriate test for determining materiality under *Brady*. BIO at 26. But the Commonwealth ignores the fact that, when it came time to actually apply the materiality test, the state court applied standards that deviated from the reasonable probability test and thus from this Court's precedent.

For example, this Court has consistently held that *Brady*'s materiality standard is satisfied when the withheld information bears on a key witness's credibility. *See United States v. Bagley*, 473 U.S. 667, 690 (1985); *Banks v. Dretke*, 540 U.S. 668, 675 (2004). Here, there is no doubt that George Lewis was a key witness, as the trial prosecutor told the jury. But rather than follow *Bagley* and *Banks*, the Pennsylvania Supreme Court relied on state court caselaw and applied a different test. The court held that "[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." *Commonwealth v. Johnson*, 353 A.3d 609, 632 (Pa. 2026) (quoting *Commonwealth v. Marinelli*, 810 A.2d 1257, 1273-74 (2002)). Requiring a defendant to prove that impeaching a witness with evidence suppressed by the state "may well be determinative" of guilt or innocence sets a significantly higher burden than the reasonable probability test of *Brady*. The test actually employed by the state court is not the test required by *Bagley* and *Banks*.

In another instance, the Pennsylvania Supreme Court merged the reasonable probability standard with its own “sufficiently compelling evidence” test:

In short, 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. Adding a “sufficiently compelling other evidence” standard to counter the reasonable probability test is inconsistent with this Court’s longstanding *Brady* precedent.

The state court analysis is flawed for another reason as well. Rather than examine the effect of the suppressed evidence on the case as it was tried, the Pennsylvania Supreme Court imagined a trial conducted without the Commonwealth’s most important evidence (because such evidence was impacted by *Brady* and ineffective assistance errors). That evidence consisted of: George Lewis, who testified to Johnson’s purported confession and supplied the only direct evidence of guilt, Marquis Johnson, who supplied the only evidence of motive, and DNA evidence which provided the marginal, but only, forensic evidence connecting Johnson to the crime. The court then speculated that the remaining circumstantial evidence was sufficiently compelling to support a guilty verdict.

This is not the proper application of the reasonable probability test. The question the court should have asked is whether George Lewis played an important role in the trial that was had. And there is no doubt that he did. Not only did Lewis provide the only direct evidence of guilt, through his claim that Johnson confessed to

him, but the trial prosecutor relied on Lewis's testimony in both his opening and closing arguments to the jury. Petition for Writ of Certiorari ("Petition") at 14-16. *Brady* does not allow a reviewing court to ignore the impact of a witness's testimony at trial by speculating about what a jury might have done had that witness never testified. The focus must be on the impact at the trial that actually occurred, not some fictional trial conjured by the court. Here, Lewis's testimony was important not only for its substantive value, but because it made it easier for the jury to draw inculpatory inferences from the otherwise disputable circumstantial evidence.

In short, given the prominent role Lewis played, the suppressed impeachment evidence that would have undermined Lewis's credibility was unquestionably material. Yet, by employing its own standards of materiality on top of those set out by *Brady* and its progeny, the Pennsylvania Supreme Court wrongly minimized the impact of his testimony.

Tellingly, the BIO makes no effort to rebut Petitioner's reliance on *Wearry v. Cain*, 577 U.S. 385 (2016). Petitioner argued that *Wearry* "demonstrates the state court's error" because "the Pennsylvania Supreme Court made the same type of errors as the state court did in *Wearry*." Petition at 16-17. Yet the BIO makes no effort to explain how the Pennsylvania Supreme Court's ruling was not contrary to *Wearry*. Indeed, the BIO makes no mention of *Wearry* at all and fails to acknowledge the test that the Pennsylvania Supreme Court actually applied. This Court's review is appropriate and necessary.

CONCLUSION

For the reasons set forth above, in addition to those set forth in the Petition, this Court should grant the writ of certiorari.

Respectfully submitted,

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