NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY BEARD, et. al.,
Petitioners,

v.

JAMES LAMBERT,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE: QUESTION PRESENTED

James Lambert was convicted in 1984 of killing two men during the robbery of a Philadelphia bar. Years later, his lawyers unlawfully obtained the internal police file; in that file was a short, unattributed note that two eyewitnesses had been shown a photo of someone named "Lawrence Woodlock" after one of the robbers, a man with a long history of robbery convictions, had described him as a "co-defendant" – the note does not say in *what robbery* Woodlock was supposedly involved. The witnesses did not recognize Woodlock's picture, and his name appears nowhere else in the record.

The state courts rejected Lambert's claim that this note should have been disclosed under Brady v. Maryland, 373 U.S. 83 (1963), holding that the note was ambiguous and would have made no difference anyway. The Third Circuit held that decision to be "unreasonable" and ordered a new trial.

Did the Third Circuit fail to properly apply the habeas deference standard to the state court's rejection of Lambert's Brady claim, by failing to consider the state court's conclusion that the disputed evidence was ambiguous, and by engaging in an aggressively one-sided re-weighing of the facts?

LIST OF PARTIES

Petitioners:

Jeffrey Beard, Commissioner, Pennsylvania Department of Corrections

William Strickman III, Superintendent of the State Correctional Institution at Greene, Pennsylvania

The District Attorney of the County of Philadelphia, Pennsylvania

The Attorney General of the Commonwealth of Pennsylvania

Respondent:

James Lambert

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The judgment and opinion of the United States Court of Appeals for the Third Circuit dated February 7, 2011, reversing the order of the district court, is reported at 633 F.3d 126, and is reprinted at App. 6-27. Relevant portions of the district court's opinion and order dated July 24, 2007, denying the petition for writ of habeas corpus, are reprinted at App. 32-36. The decision of the Pennsylvania Supreme Court, dated October 18, 2005, rejecting (*inter alia*) the claim on which the Third Circuit granted relief, is reported at 884 A.2d 848, and relevant portions are reprinted at App.40-48.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a state capital defendant. Petitioners seek review of the order of the United States Court of Appeals of the Third Circuit granting Lambert a new trial based his claim under Brady v. Maryland. Rehearing was timely sought of this order, which was denied on March 7, 2011. App. 30-31. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d), which provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; ...

STATEMENT OF THE CASE

On the evening of September 23, 1982, James Lambert and his co-defendant, Bruce Reese, entered Prince's Lounge, a bar in Philadelphia. Both men were armed; their intention was to rob the bar at gunpoint, while a third co-conspirator, Bernard Jackson, waited outside in a car. Reese stood just inside the door, atop two stairs, while Lambert entered, walked inside, and pointed his gun in the face of a barmaid named Janet Ryan.

Ms. Ryan screamed, dropped to the ground, and crawled to the bathroom. Reese ordered the other barmaid on duty, Sarah Clark, to "get the money." As she began to empty the cash register, two customers – James Graves and James Huntley – attempted to stop the robbery. Lambert shot and killed both men, and the gunmen fled into the waiting car. See generally Commonwealth v. Lambert, 603 A.2d 568, 571 (Pa. 1992) ("Lambert I").

The murders went unsolved for several weeks, until Bernard Jackson was arrested for an unrelated robbery. On October 14, 1982, Jackson told detectives that he had been the driver of the getaway car in the robbery of Prince's Lounge, and that Lambert (Jackson referred to him in this first statement as "the dude") and Jackson's brother-in-law Reese had been the men inside the bar. Eight days later, on October 22, 1982, Jackson for the first time identified "the dude" as "Monk," which is Lambert's nickname. App. 47-48 & n.4. During that same statement, Jackson explained to detectives that the .38 caliber gun used in the fatal robbery at Prince's Lounge had been obtained in a prior robbery by Jackson, Reese, and a different man, known to Jackson only as "Weasel." In fact, during that statement of October 22, 1982, Jackson confessed to having participated in about a dozen other bar robberies, not only with "Weasel" and

Reese, but with other men nicknamed "Antman," and "Underdog."[1]

Three days after this statement – where Jackson identified Lambert by his nickname as a gunman in *this* robbery, and confessed to a host of *other* robberies that did not involve Lambert – there appears an unattributed entry in the "police activity sheet," a brief written record of developments in the investigation. This note indicates that Jackson named "Lawrence Woodlock" as a "co-defendant;" the note also states that a photo of "Woodlock" was shown to two witnesses, who did not recognize him as a participant in the this robbery. App. 16, 47; *Third Circuit Appendix* at 3334. That is the only time the name of "Lawrence Woodlock" appears in the entire police file or anywhere else in the record. The note does not explain what case "Woodlock" was a "co-defendant" in; the most obvious explanation is that Jackson identified him as a participant in one of the *other* dozen or so robberies to which he had just confessed. Perhaps

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[1] As the Pennsylvania Supreme Court explained on direct appeal, Jackson told police about a "string of robberies ... [s]ome were committed by Reese alone; some by Jackson alone; some by Jackson and Reese with third parties, and indeed, some by Jackson and Reese alone." Lambert I, 603 A.2d at 574.

"Lawrence Woodlock" was the real name of "Weasel" or "Antman" or "Underdog." That would explain why the witnesses to *this* shooting did not recognize him, and why the police did not ask Jackson more questions about "Woodlock" or pursue the matter further.

Lambert and Reese were tried together for the murders. Bernard Jackson testified that Reese and Lambert had committed the fatal robbery, and that while he did not see who did the shooting, the co-defendants later told him that Lambert fired the fatal shots. Jackson was vigorously cross-examined by both defense counsel, who challenged inconsistencies in his statements to police, as well as his motives, his lengthy prior record, and his hope to curry favor with the prosecution by testifying. This was difficult and intense testimony, but ultimately the jury found it to be credible.

Meanwhile, none of the witnesses inside the bar were able to identify Lambert until Janet Ryan took the stand. Ms. Ryan – who had earlier been shown photo arrays without success – became upset during her relatively brief testimony during the Commonwealth's case-in-chief. Afterwards, she told the prosecutor that she had recognized one of the co-defendants as the man who had pointed a gun at her. The trial court turned down the Commonwealth's request to recall Ms. Ryan, but

later, counsel for co-defendant Reese called her back to the stand. This time, Ms. Ryan testified that Lambert was the man who pointed a gun in her face; other eyewitness testimony established that the man who threatened Ms. Ryan was the same man who killed both bystanders. Lambert I, 603 A.2d at 571.

On April 25, 1984, the jury convicted Lambert on two counts of first-degree murder, and related charges. The penalty hearing followed; Lambert did not testify, and he instructed his lawyer not to offer evidence or argument on his behalf. The jury returned the death penalty for both murders.

There followed many years of appeals and collateral litigation in state court. After the trial court denied post-sentence motions, the Pennsylvania Supreme Court affirmed on direct appeal in 1992. Lambert I. Next, Lambert filed a petition for state collateral relief pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), which the state trial court denied on January 29, 1998. The Pennsylvania Supreme Court affirmed the denial of PCRA relief. Commonwealth v. Lambert, 797 A.2d 232 (Pa. 2001).

A few months later, the police investigatory file – along with the internal police files in approximately 25 other Philadelphia capital cases

– was unlawfully seized by the Federal Capital Habeas Corpus Unit of the Federal Defender Association of Philadelphia. Between June and October 2001, the Federal Defender subpoenaed these files directly from the City Archivist "apparently in an effort to circumvent [state] discovery requirements." App. 41. When the Commonwealth complained, the Supervising Judge of the Philadelphia Court of Common Pleas, Criminal Division, ordered that all of these files be sealed; later, the court "concluded that the Federal Defenders' actions constituted an abuse of the subpoena power ... [and] referred the matter to the Pennsylvania Disciplinary Board for appropriate action." Id.

Lambert's then-current attorney, who had been assisted by the Federal Defenders in connection with Lambert's first PCRA, soon filed a second state collateral petition. He alleged that he had learned from the Defenders that Lambert's police file "contained unspecified Brady material." App. 42. Lambert said he did not know what this "Brady material" might be, because the police file had been sealed by court order. This did not prove to be much of an obstacle: Lambert's lawyer later approached the PCRA judge, *ex parte*, and presented him with a proposed order directing the Federal Defenders to give him the file, evidently without bothering to remind the judge that the court's supervising judge specifically ordered the

file sealed. The PCRA judge signed the order. App. 42-43.

Having successfully violated state discovery rules and the order of the Supervising Judge, Lambert's lawyers scoured the police file, and declared that several of documents should have been turned over to the defense before trial but were not. One of these disputed documents was the "police activity sheet" described above, from October 25, 1982. The PCRA court denied this claim (along with several others) without a hearing by order dated December 11, 2003, concluding that there was no reasonable likelihood the disclosure of this document would have changed the verdict. App. 47. The Pennsylvania Supreme Court affirmed, explaining that (1) the meaning of the note "is purely speculative at best;" (2) the rest of the record suggests that police did *not* have any reason to suspect that someone named "Lawrence Woodlock" was involved in the Prince's Lounge shootings, because this name is nowhere else mentioned, by Bernard Jackson, the police, or anyone else; and (3) given the extensive cross-examination by both defense counsel, "any additional impeachment of Jackson arising from a police notation would have been cumulative." App. 47-48. (The Court rejected five other Brady claims as meritless, and one as untimely.)

Lambert filed a *Petition for Writ of Habeas Corpus* in federal court containing *twenty four* claims of error, including the Brady/police activity sheet claim. The district court (Baylson, J.) denied all relief on July 24, 2007. With respect to the claim at issue here,[2] the court first noted that the AEDPA deference standard applied because state courts had rejected this claim on the merits. The court went on to agree with the state supreme court that the activity sheet was "entirely ambiguous, and would have required the state courts to speculate to conclude they were favorable for Lambert and material to his guilt or punishment." App. 36. The district court also noted that Lambert's Brady claims "clearly were part of the preliminary stages of the police investigation," and there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." Id. (quoting Moore v. Illinois, 408 U.S. 786, 795 (1972)).[3]

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[2] The district court's thorough opinion is more than 100 pages long, and considers all of Lambert's two dozen claims. Included in this appendix is that portion of the opinion relevant to the Brady claim on which the Third Circuit ultimately granted relief.

[3] The district court denied a certificate of appealability on this claim (the court granted a certificate for two other, non-Brady claims). The Third Circuit, however, granted a

(continued ...)

Things changed, drastically, in the Court of Appeals. At the start of the Commonwealth's oral argument (after hundreds of pages of briefing), the panel suggested that the government should not have sought a first degree murder conviction based on the testimony of Bernard Jackson. When the Commonwealth's attorney began to address the Brady claim (one of eight claims raised by Lambert on appeal), the panel impatiently told him to move on without much discussion. A few weeks later, the panel issued its extraordinary first decision in the case, a two-page order stating (without explanation) its intention to grant Lambert a new sentencing hearing on an entirely *different* claim, under Mills v. Maryland, 486 U.S. 367 (1988). App. 1-3. The panel did not say *why* that claim had merit, or attempt to distinguish this Court's recent opinion in Smith v. Spisak, 130 S. Ct. 676 (2010), which involved a very similar Mills claim. The panel stated that such detail would come later, but first Lambert must be released from death row as soon as possible. The panel also suggested that a later opinion might become unnecessary if "there is a prior disposition of the case." App. 2. This two-page order was classified as a *precedential opinion.*

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certificate of appealability on six additional issues, including this one. App. 11.

The Commonwealth sought rehearing. In the meantime, at the direction of the panel, the Third Circuit mediator contacted the parties for purposes of determining whether the Commonwealth had either complied with the panel's "immediate release" order, or considered the panel's suggestion that the case be resolved out-of-court.

The Commonwealth declined the mediator's invitation to negotiate this double murder conviction downward. Habeas matters are explicitly exempted from local federal appellate mediation (3d Cir. LAR 33.2), because state court convictions are presumed valid, federal courts can only order relief upon finding a federal constitutional violation, and because any "settlement" would necessarily include an admission by the government that the Constitution had been violated, despite the contrary conclusions of the state courts. These presumptively valid judgments are not generally amenable to horse-trading.[4]

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[4] As for the panel's immediate release order: it is the policy of the Pennsylvania Department of Corrections to keep prisoners on death row who are facing possible re-sentencing. Lambert did not challenge that policy, and the Commonwealth informed the mediator that the Department of Corrections was not prepared to abandon a policy that had not even been challenged, let alone held unconstitutional.

About two months later, the panel vacated its earlier two-page decision, but issued a new opinion, this time granting Lambert a new trial. The panel reached only one issue: the Brady/police activity sheet claim. In analyzing this claim, the panel did not mention that the police files had been improperly seized; nor did the panel even acknowledge the *possibility* that the activity sheet notation was ambiguous. Rather, the Court of Appeals simply asserted that the activity sheet "should have been disclosed," and further asserted – incorrectly – that the Commonwealth conceded this point at oral argument. That is not true; the Commonwealth "conceded" only that the *present office policy* is to disclose all police activity sheets. *Third Circuit Oral Argument Audio File*, Part I, at 41:00-41:25. That is not because such disclosure is always legally required, but in an abundance of caution and to prevent speculative post-trial Brady claims like this one.

Having assumed that the Commonwealth had violated its obligation to disclose the police activity sheet, the panel turned to the question of materiality. The state supreme court had stated (among other things) that the police activity sheet was "cumulative" of other evidence; the panel interpreted this phrase as literally as possible, concluding that the state court had improperly held that once a witness is impeached "in one

manner," the absence of additional cross-examination can never be prejudicial.[5] But the Pennsylvania Supreme Court had neither announced nor recognized such a patently foolish rule. Rather, the Court had simply explained that Lambert was not prejudiced by the absence of "cumulative" evidence, meaning evidence that would likely not have added enough to change the outcome. Meanwhile, the Third Circuit said nothing about the state court's *other* holding – that the meaning of the note was "speculative" and the full record suggested that no one named "Lawrence Woodlock" had ever been named as a co-conspirator in *this* case.

The most remarkable thing about the panel's opinion, however, is its palpable disdain for the conviction, and its aggressive and misleading recharacterization of the facts. Indeed, the panel made several obvious factual errors that are critical to the materiality analysis. First, in its attempt to portray Bernard Jackson as a hopeless liar, the panel actually referred to an earlier inconsistent statement by Jackson to police *that*

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[5] The panel's exact language was, "it is patently unreasonable to presume – without explanation – that whenever a witness is impeached in one manner, any other impeachment becomes immaterial." App. 22. That is not a fair reading of the state supreme court's opinion.

does not exist. The panel insisted that Jackson told police "that Reese had admitted to shooting two people," App. 15, but that is not true. Jackson *never* told police that Reese was the shooter, and the panel's citation for this proposition does not reveal any such statement. Indeed, despite the acid rhetoric of the panel, Jackson's statements to police were remarkably consistent on the core issues, once he admitted that it was Reese, not Lambert, who did the talking once the men re-entered the car.[6]

The panel also omitted some basic, important facts – crucial to any honest accounting

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[6] Jackson at first told police that *Lambert* had done the talking once the men returned to the car; this was apparently a rather weak, short-lived attempt to protect Reese, Jackson's brother-in-law. In all subsequent statements, Jackson admitted that *Reese* had been the one to reveal that two people had been killed, and that *Reese* later disclosed that Lambert had done the shooting.

The panel's citation for Jackson's non-existent earlier statement is actually a citation to his trial testimony, in which defense counsel pounced on a perceived ambiguity in Jackson's use of pronouns at trial – did his use of "he" or "we" refer to *Reese* or *Lambert* firing the fatal shots? *Third Circuit Appendix* at 2002. Jackson denied any ambiguity, and that if he (Jackson) had implied by his use of pronouns that Reese had admitted the shooting, it was a simple slip of the tongue.

of this case. The panel did not mention, for example, that Lambert had *admitted* to being with Reese and Jackson that night; Lambert weakly told police that he had been dropped off nearby just before the fatal robbery, and that Reese and Jackson picked him up again afterwards. The prosecution did not use this statement, but surely would have, if the defense had attempted to pin this crime on someone named "Lawrence Woodlock." *Third Circuit Appendix* at 2956-57. As for the eyewitness who *identified Lambert as the shooter*, Ms. Ryan, the panel simply dismisses her testimony as "bizarre" and unworthy of further consideration. App. 26-27. But that is not a federal habeas court's call to make; the jury obviously found her credible, and the judges of the Court of Appeals were not in the courtroom when Ms. Ryan dramatically identified Lambert more than a quarter-century ago.

Other disturbing mistakes revealed the depth of the Third Circuit's failure to appreciate the facts or the proper role of federal courts in reviewing state convictions. For example, the panel did not reveal that the two eyewitnesses who were shown a picture of "Lawrence Woodlock" did not recognize him – suggesting yet again that "Woodlock" had nothing to do with this case. On the other hand, the panel *did* gratuitously note that Lambert obtained a statement from Jackson after trial, in which Jackson insisted that the

witness Janet Ryan was biased because she was a friend of Reese's family "and would never testify against Reese." App. 27. The panel mused that Jackson made this accusation "perhaps ... [because] Jackson saw the havoc his testimony had wrought." Id. Or, perhaps Jackson made this up at Lambert's request; at trial, Janet Ryan denied knowing Reese, another fact that the panel does not mention. See *Third Circuit Appendix* at 2823 ("Q: Do you know [Reese's wife and mother]? A (Ms. Ryan): No.")[7] In any event, the panel does not explain why it is inclined to accept the truth of Jackson's unsworn, contradicted, belated post-trial statement, while simultaneously rejecting his actual trial testimony out-of-hand.

The point is, the panel's recharacterization of the facts does not inspire confidence, and does

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[7] Not only does Jackson's post-trial statement rehash an allegation that Ms. Ryan refuted at trial, it was unsworn, another fact that the panel omitted. Rather, the Third Circuit described Jackson's post-trial statement as an "affidavit" that the state courts rejected because it was "untimely and not in proper form." App. 27. This is a misleading piece of advocacy, calculated to create the impression that the state court's rejection of this statement was hyper-technical. In fact, the state courts have no obligation – legally or morally – to accept unsworn post-trial statements by co-conspirators that are contradicted by trial evidence and presented contrary to state rules.

not remotely resemble the kind of deferential review required by the habeas statute. The panel's admonition that "[o]ne wonders how the Commonwealth could have based this case of first-degree murder on a Bernard Jackson," App. 15, given its own selective re-writing of the record, is simply outrageous.

Finally, the panel announced that the Commonwealth must retry Lambert "within 120 days of this opinion." App. 8. A few days ago, the panel granted only a short additional extension; the deadline now falls 30 days after this *Petition for Writ of Certiorari* is decided. In the meantime, the Commonwealth has been forced to pursue this case simultaneously in both state and federal court, preparing for retrial while also pursuing its right to review.

REASONS FOR GRANTING THE WRIT

This case is about the proper application of the habeas deference standard to claims of withheld evidence under Brady v. Maryland. Such claims are common in federal habeas review; courts must tread carefully, given the ease with which such accusations are made years after trial, the amount of speculation involved, and the potential harm these claims pose to the finality of old convictions and the reputation of the local

prosecutor. While this Court has repeatedly applied the deference standard to other types of claims – especially ineffectiveness issues – the Court has not yet applied deference review to a habeas Brady claim.

The particulars of this case demonstrate the need for this Court's guidance. Twenty-seven years after James Lambert was convicted of two first-degree murders in a Pennsylvania state court, the Third Circuit granted him a new trial on a Brady claim. Although the state courts had rejected this claim as speculative and immaterial, the Court of Appeals did not defer: indeed, the panel *assumed* that the disputed document should have been disclosed, and aggressively re-evaluated the facts to find that the omission was material. Along the way, the panel mischaracterized the evidence, made its own credibility determinations, ignored arguments relied upon by the state supreme court, and even scolded the Commonwealth for prosecuting Lambert in the first place. Although the panel paid lip service to the AEDPA deference standard, there is no actual deference in this opinion.

The Court of Appeals' failure to properly apply the deference standard is, unfortunately, not a surprise. Over the past decade, the Third Circuit has routinely granted relief in Pennsylvania death penalty cases – the only three prisoners to be

executed post-Furman have been volunteers, and even that has not happened since 1999. In the process, the Third Circuit has overlooked almost every procedural bar, second-guessed counsel, and engaged in wide-ranging *de novo* review.[8] Indeed,

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[8] Just in the *last three years* the Third Circuit has set aside state judgments in the following Pennsylvania death penalty cases: Kindler v. Horn, ---F.3d ---, 2011 WL 1602083 (3d Cir., April 29, 2011) (granting new penalty phase); Abu-Jamal v. Sec'y, Pennsylvania Dep't of Corrections, --- F.3d ---, 2011 WL 1549231 (3d Cir., April 26, 2011) (new penalty phase); Breakiron v. Horn, --- F.3d ---, 2011 WL 1458795 (3d Cir., April 18, 2011) (new trial on remaining conviction); Rollins v. Horn, 386 Fed. Appx. 267 (3d Cir. 2010) (new penalty phase), cert. denied, 131 S. Ct. 2143 (2011); Wilson v. Beard, 589 F.3d 651 (3d Cir. 2009) (new trial); Simmons v. Beard, 590 F.3d 223 (3d Cir. 2009) (new trial), cert. dismissed, 130 S. Ct. 1574 (2010); Thomas v. Horn, 570 F.3d 105 (3d Cir. 2009), cert. denied, 130 S. Ct. 1879 (2010) (new penalty phase); Hardcastle v. Horn, 332 Fed. Appx. 764 (3d Cir. 2009) (new trial); Bond v. Beard, 539 F.3d 256 (3d Cir. 2008) (new penalty phase), cert. denied, 130 S. Ct. 58 (2009); Holland v. Horn, 519 F.3d 107 (3d Cir.) (new penalty phase), cert. denied, 129 S. Ct. 571 (2008). In several other cases, the Third Circuit did not grant the writ outright, but remanded for further proceedings. Lark v. Sec'y, Dep't of Corrections, --- F.3d ---, 2011 WL 2409297 (3d Cir. June 16, 2011) (remanded for further proceedings on jury discrimination claim); Morris v. Beard, 633 F.3d 185 (3d Cir., Jan.26, 2011) (remanded for further proceedings on "conflict of interest" claim); Saranchak v. Beard, 616 F.3d 292 (3d Cir. 2010) (remanded for consideration of "remaining issues"), petition for cert. filed, No. 10-10114 (April 15, 2011, U.S.); Lewis v. Horn, 2009 WL 2914433 (3d Cir. 2009) (remanded for

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a few weeks ago the Third Circuit renewed two orders of habeas relief in Philadelphia capital cases, even after its earlier grants of relief were *reversed* by this Court and returned for further consideration. See Abu-Jamal v. Sec'y, Pennsylvania Dep't of Corrections, --- F.3d ---, 2011 WL 1549231 (3d Cir., April 26, 2011); Kindler v. Horn, ---F.3d ---, 2011 WL 1602083 (3d Cir., April 29, 2011).[9] The Third Circuit's determination to grant relief in Pennsylvania capital cases has not escaped the notice of the state supreme court. See, e.g., Commonwealth v. Bracey, 986 A.2d 128, 137 (Pa. 2009) ("it has been decades since the federal courts have upheld a sentence of death with respect to any Philadelphia prisoner who did not

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ineffectiveness hearing); Fahy v. Horn, 516 F.3d 169 (3d Cir. 2008) (remanded on "remaining sentencing phase issues").

In only two cases since the Pennsylvania death penalty statute was enacted 30 years ago has the Third Circuit denied all relief in a contested Pennsylvania capital case. The petitioner in Hackett v. Price, 381 F.3d 281 (3d Cir. 2004), cert. denied, 125 S. Ct. 2514 (2005), is currently litigating another state post-conviction petition; and in Williams v. Beard, 637 F.3d 195 (3d Cir., Mar. 9, 2011), the *Petition for Rehearing* has yet to be filed after several extensions of time.

[9] The Commonwealth is seeking *certiorari* in both Abu-Jamal and Kindler; the petitions will be filed within the next few days.

consent to be executed"). See also Commonwealth v. Spotz, 18 A.3d 244, 349 (Pa., April 29, 2011) (Castille, C.J., with McCaffery, J., concurring) ("[w]hen the families of murder victims, and other concerned citizens, ask why there is no effective death penalty in Pennsylvania, the dirty secret answer is: ask the federal court").

Several of these recent grants of relief were based on perceived violations of Brady; indeed, this is the *fourth* recent Third Circuit decision in the past two years to grant habeas relief to Pennsylvania death-sentenced prisoners on Brady grounds.[10] Such results have become common in other Circuits as well.[11] This case, however, is particularly disturbing, because the result here is so disrespectful to the state in its one-sided re-evaluation of the facts – a re-evaluation that is largely garbled, mistaken, and incomplete, and certainly calculated to put the prosecution in the worst possible light. The Third Circuit's

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[10] See Breakiron, 2011 WL 1458795; Wilson, 589 F.3d 651; Simmons, 590 F.3d 223.

[11] See, e.g., Robinson v. Mills, 592 F.3d 730, 734-38 (6th Cir. 2010); Maxwell v. Roe, 628 F.3d 486, 508-13 (9th Cir. 2010), petition for cert filed, No. 10-1548 (U.S., June 21, 1011); Valdorinos v. McGrath, 598 F.3d 568 (9th Cir. 2010), rev'd for further consideration in light of Harrington, 131 S. Ct. 1042 (2011).

infringement on state criminal judgments has reached a new level here, and this Court's review is warranted.

A. AEDPA requires that federal courts defer to reasonable state court decisions, and because Brady is a general rule applied to many different factual situations, the scope of deference is broad.

In Brady, this Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment." 527 U.S. at 280. The Court has further defined this right in succeeding cases, to make clear (among other things) that the prosecution's obligation extends to favorable evidence that is not specifically requested by the defense. See United States v. Agurs, 427 U.S. 97, 103-104 (1976).

But this Court has also explained that the existence of a Brady violation depends on two related, highly factual inquiries: whether the evidence was actually favorable to the defense, and especially, whether it was reasonably likely to have changed the outcome of the trial. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). This materiality standard is the same as the familiar prejudice standard governing ineffectiveness

claims. United States v. Bagley, 473 U.S. 667, 681-82 (1985), cited in Kyles v. Whitley, 514 U.S. 419, 434 (1995). The Court has repeatedly explained that the proper application of this standard requires the reviewing court to reduce the distorting effects of hindsight as much as possible. To do that, the reviewing court must consider *all* the circumstances, even those possibilities that are not immediately apparent in the record. For example: is there a reasonable contrary argument that the disputed evidence was *not* favorable? Or, what would have happened if this evidence had been disclosed and introduced? Would the prosecution have had possible rebuttal evidence? In answering these questions, just as in the ineffectiveness context, the burden for establishing materiality ultimately rests on the claimant. Strickler 527 U.S. at 282. If there are gaps in the record, or if some factual issues call for speculation, any doubts must be resolved in favor of the judgment. Otherwise, the finality of old convictions would be subject to endless attack by unprovable, speculative allegations.

Brady materiality, like Strickland prejudice, is thus a significant standard that must be applied with care. The standard is doubly difficult where, as here, the deferential AEDPA standard applies. Under the current habeas statute, relief may not be granted unless the state court's adjudication of the claim was "contrary to" federal law as clearly

established by the holdings of this Court, or the state decision "involved an unreasonable application of" such law. 28 U.S.C. sec. 2254(d)(1); Harrington v. Richter, 131 S. Ct. 770, 783-84 (2011). Even "a strong case for relief" is not enough; the state prisoner must demonstrate that the state decision was so utterly lacking in justification, "there was error ... beyond any possibility for fair-minded disagreement." Id., 131 S. Ct. at 786-87.

That is a difficult showing for any kind of claim, but especially for general rules like the Brady materiality standard and its twin, the Strickland prejudice standard. These rules give courts considerable leeway in application case-by-case. That means there are a greater number of reasonable outcomes, and it is correspondingly more difficult to establish that the state court's decision fell outside the wide range of acceptable conclusions. Yarborough v. Alvarado, 541 U.S. 652, 664 (2004), quoted in Harrington, 131 S. Ct. at 786.

Before relief may properly be granted under the deference standard in such a case, the federal court must observe certain basic steps. The court must at least *consider* arguments relied on by the state courts, and must consider other reasonable arguments as well. Harrington, 131 S. Ct. at 786 ("a habeas court must [first] determine what

arguments or theories ... could have supporte[d] the state court's decision"). The court must consider *all* of the relevant evidence and circumstances, including evidence that could have been admitted to rebut the claimant's new arguments. Bagley, 473 U.S. at 683 (court reviewing Brady claim must consider "totality of the circumstances"); Wong v. Belmontes, 130 S. Ct. 383, 386 (2009) (per curiam) (proper application of prejudice standard includes anticipation of *other* evidence that might have been introduced in rebuttal). And the federal court must avoid, to the extent possible, making credibility determinations and other matter-of-opinion assessments, with which a different factfinder might disagree. Marshall v. Lonberger, 459 U.S. 422, 434 (1983) (habeas statute "gives federal habeas courts no license to redetermine credibility"). This is true not only because the federal habeas court lacks first-hand exposure to the witnesses at trial, but also because the state court judgment under review rests on factual findings *already made* by the state factfinder. The presumption must be that the state factual findings – whether made by a state court judge, or jury; and whether explicit or implicit – were sound.

This Court has not yet applied these standards in the Brady context, perhaps because such claims are often intensely case-specific and factual. Review of this case, however, does not

require over-involvement with the record – because the basic questions are sharply posed and apparent from any reasonable review of the opinion below.

B. The Court of Appeals failed to defer to the state court's rejection of Lambert's Brady claim.

1. The Third Circuit did not consider contrary arguments relied upon by the state supreme court.

Perhaps most obviously, the Third Circuit failed to *consider* the possibility that the disputed evidence was ambiguous, and not even helpful to Lambert's case. The Commonwealth witness Bernard Jackson confessed to about one dozen armed robberies *other* than this one; the police "activity sheet," improperly seized from internal police files, contains only a brief, unexplained notation that Jackson identified someone named "Lawrence Woodlock" as a "co-defendant." Jackson may well have meant that "Woodlock" was a cohort in one of his *other* robberies, which would explain why the witnesses in this case did not recognize "Woodlock's" photo, why Jackson did not name "Woodlock" in any of his actual statements to police about *this* case, and why "Woodlock's" name never came up again.

The Pennsylvania Supreme Court held that the meaning of the "Woodlock" reference was

"purely speculative at best," and the notion that police had reason to suspect "Woodlock" is at odds with the rest of the record. App. 47. That is a reasonable interpretation of the matter; at the very least, the Third Circuit should have *considered* this argument. But the panel did not even mention the point, and even engaged in some misleading editing to pretend the state supreme court never made these observations.[12]

Instead, the panel focused on the Pennsylvania Supreme Court's other holding, that the police activity sheet was not material because it was "cumulative" of other evidence. The panel narrowly interpreted this as an inflexible rule that "whenever a witness is impeached in one manner, any other impeachment becomes immaterial." App. 22. The state court did not announce any such rule. As the state supreme court saw it, Bernard Jackson was so thoroughly impeached that "any additional impeachment ... from a police notation would have been cumulative." App. 48. The Pennsylvania Supreme Court here used the

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[12] The panel quotes only the *second half* of the critical paragraph from the state court opinion, leaving out the Pennsylvania Supreme Court's observations concerning the "speculative" nature of Lambert's argument. Compare App. 17-18 (Third Circuit opinion) with App. 47-48 (state supreme court opinion).

term "cumulative" to mean, simply, that additional cross-examination on this ambiguous point would not have changed anything. That is again a reasonable holding. This Court has made it clear that in habeas matters, state court opinions must be read to avoid any unnecessary state/federal conflict, and to give state courts the "benefit of the doubt." Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (per curiam). The Third Circuit did the opposite here, interpreting the state court's innocuous language to create a phantom, irrational error. This, too, is an important and harmful mistake.

2. The Court of Appeals omitted important facts, and invented others.

In addition to mischaracterizing the opinion of the Pennsylvania Supreme Court, the Court of Appeals aggressively re-engaged the factual record, making a number of plain mistakes in the process. First, in its haste to portray Bernard Jackson's trial testimony as unbelievable, the panel actually invented an inconsistent pre-trial statement that Jackson never made. According to the panel, Jackson first told police that Reese, not Lambert, did the shooting. Jackson said no such thing. He never identified Reese as the shooter; the only inconsistency was *who did the talking* when Reese and Lambert re-entered the car.

The Court of Appeals also did not mention that Lambert *confessed* to police that he was with Reese and Jackson on the night of the murders. (He said Reese and Jackson dropped him off before the crime, and picked him up afterwards; this is not an especially believable story, and the trial court called it "very incriminating" because it placed Lambert in the presence of his co-conspirators. *Third Circuit Appendix* at 2956-57.) The prosecution did not introduce Lambert's statement at trial, but if Lambert had tried to blame this crime on someone named "Lawrence Woodlock," the prosecution could surely have used his statement as rebuttal. This is an important part of the materiality analysis, which the Court of Appeals entirely skipped. See Wood v. Bartholomew, 516 U.S. 1 (1995) (government's failure to disclose polygraph not material where, among other things, prosecution could have introduced in rebuttal that defendant had confessed to a cellmate). Nor did the panel acknowledge that the two witnesses who were shown "Woodlock's" photo did not recognize it, which again is critical to any fair assessment of the importance of this evidence.

The panel's remarkable tone – its suggestion that Lambert may well be innocent, that the government may have been wrong to prosecute these charges at all – might also have been

tempered with a mention of Lambert's partial confession.[13]

3. The Court of Appeals improperly made credibility determinations, substituting its own reading of the record for the findings of the jury and the conclusions of the state courts.

While federal courts reviewing state convictions must steer clear of credibility disputes to the extent possible, the Third Circuit here did the opposite, eagerly characterizing evidence it never heard, as part of its materiality analysis.

The panel quickly dismissed the dramatic testimony of Janet Ryan – the barmaid who actually identified Lambert – as "bizarre," and gave it no weight at all. App. 26-27. If by "bizarre" the panel meant "unusual" – Ms. Ryan had been unable to identify Lambert before trial, but was able to do so when finally faced with him, after becoming visibly upset on the stand and confiding to the prosecutor that she recognized the man who

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[13] The Third Circuit could also have noted that when the police finally located Lambert (after many weeks of visiting various addresses and family members, without success, and without Lambert volunteering himself), he gave them a false i.d. and a false name. *Third Circuit Appendix* at 465. This is classic consciousness-of-guilt evidence, but again the court below overlooked it.

pointed a gun in her face – that was an overstatement. First-time courtroom identifications do happen, and witnesses to violent crimes often react emotionally. The reliability of Ms. Ryan's testimony was for the jury to decide.

The Third Circuit even purported to describe the *tone* of Bernard Jackson's testimony, which took place in a Philadelphia courtroom almost 30 years ago. The panel described the end of this testimony as "breathtaking" because Jackson "somewhat proudly" asserted that his story had been mostly consistent. App. 16. In fact, Jackson's "proud" boasts consisted of *one word answers* to the prosecutor's questions; there is no way to tell, now, whether these answers were particularly "proud" or "humble" or anything else.[14]

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[14] The supposedly "breathtaking" and "proud" climactic testimony of Bernard Jackson is as follows:

> Q: Did you ever say that there were two other people involved in this job with you ... other than [Reese and Lambert]?
>
> A: No.
>
> Q: Did you ever say that there was anything other than a .32 and a .38 caliber gun involved?
>
> A. No.

(continued ...)

Having characterized the evidence against Lambert as "bizarre" and "breathtaking," the panel turned around and proclaimed that the evidence is "quite strong" that Bruce Reese, not Lambert, was the shooter. App. 26. This is puzzling. While there is *direct eyewitness testimony* and the statements of a co-conspirator proving that *Lambert* was the shooter, the only possible evidence that *Reese* was the shooter is (1) the testimony of Bernard Jackson that Reese carried the murder weapon and gave Lambert a different gun before they entered the bar, and (2) the barmaids' estimation of the shooter's height. As for Jackson's testimony, the panel does not explain why it is willing to accept *this* portion of Jackson's account, while rejecting *all the rest of it*; nor does the panel say why it is so hard to believe that the men switched guns at some point (or perhaps Jackson was simply mistaken about who carried

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* * *

> Q: ... Did you ever not say that you were the getaway driver in this particular case and that those two went in the bar?
>
> A: No.

(*Third Circuit Appendix* at 2275-76.)

which gun). Further, the eyewitnesses gave widely varying accounts of the gunmen's height, which add up to "strong" evidence of nothing. Compare, e.g., Testimony of Janet Ryan (shooter was about 5'6", other gunman was 5'4"), with Testimony of Richard DeLoatch (shooter was about 5'10", other gunman was 5'9" or 5'10).[15]

But the panel never faced the most obvious problem for Lambert: the jury heard the testimony of Bernard Jackson, subject to grueling cross-examination, *and believed him*; the jury also heard the testimony of Janet Ryan, the barmaid who identified Lambert as the shooter, *and believed her*. Even without deference to the state court decisions, surely the jury's assessment of credibility deserves more respect.

Finally, the panel's lopsided review of the record was matched by its own heavy-handed treatment of the case. The Court of Appeals first granted penalty phase relief on an entirely different claim, without a reasoned opinion, and with an order to immediately change Lambert's conditions of confinement. When the Commonwealth protested that the relevant policy of the Department of Corrections had not even

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[15] *Third Circuit Appendix* at 1929-30 and 1957-58, respectively.

been *challenged* – and when the Commonwealth did not accept the panel's invitation to negotiate the case away – the Court of Appeals vacated its opinion and issued a new one, this time granting *more* relief (a new trial). The panel suggested that the government should not have undertaken this prosecution in the first place ("One wonders how the Commonwealth could have based this case of first-degree murder on a Bernard Jackson"), did not even mention that the disputed evidence had been improperly seized from police files, let alone that Lambert had given police a largely inculpatory statement, and set an abbreviated conditional deadline of 120 days "from the date of this Opinion," App. 8. The panel declined the Commonwealth's request to stay the deadline pending this *Petition*, instead re-setting the date at 30 days from this Court's resolution of the case. As a result, the Commonwealth must simultaneously prepare this 28-year-old case for retrial while filing this *Petition*; the state courts are grappling to move the case forward while the official state record is still in federal court.

With respect, the Third Circuit's handling of this case does not reflect the required deference owed to state court judgments or to state criminal justice processes. Federal review of decades-old state court convictions, violent crimes with real victims, real witnesses, and real court proceedings that are now reduced to a cold record, must be

undertaken with sensitivity and humility. The proper standards must be applied.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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App. 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-9005

JAMES LAMBERT,
Appellant

v.

JEFFREY BEARD, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; WILLIAM STRICKMAN, III, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 02-cv-09034)
District Judge: Honorable Michael M. Baylson

ORDER
