NO. 11-38
IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections, et al.,

Petitioners,

v.

JAMES LAMBERT,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED
CAPITAL CASE

Petitioners set forth a factual background for the Question Presented that omits several key facts and thus skews the question presented to this Court. For example Petitioners omit that the evidence found, a police report from the homicide case at issue, filled out by homicide detectives in this case, indicated that Bernard Jackson, the *Commonwealth's only inculpatory witness*, had named someone other than Lambert as his accomplice. Nor do Petitioners explain that the trial prosecutor took advantage of the suppression of that evidence to argue repeatedly to the jury that Jackson had consistently named Lambert as his accomplice, even though the suppressed evidence showed that to be false. Properly framed, with all facts in mind, the Question Presented is a fact based question that presents no important federal questions requiring this Court's review and can be stated as follows:

> *Where the Commonwealth suppressed evidence that its only inculpatory witness, an alleged accomplice testifying in return for a very favorable deal, had, at one time, told police that someone other than Mr. Lambert was his accomplice, and where the prosecutor elicited testimony and argued to the jury that its accomplice witness, despite other inconsistencies, should be believed because he consistently identified only Mr. Lambert as his accomplice, did the Third Circuit correctly apply habeas deference when it found that Mr. Lambert's due process rights under Brady v. Maryland had been violated and that the state court was objectively unreasonable in concluding that the suppressed evidence was not material?*

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COUNTERSTATEMENT OF THE CASE[1]

The Petition for Certiorari filed in this case presents a fact bound question that sets forth no important jurisprudential question deserving of this Court's review and identifies no conflict in the lower courts needing this Court's resolution. Instead, the *Petition* seeks review only for the purposes of correcting what the Commonwealth wrongly believes to be an erroneous decision. Certiorari should be denied.

At trial (and for more than a quarter century since), James Lambert's defense was that he had no involvement in this crime. His defense has always been that the robbery was committed solely by co-defendants Bernard Jackson and Bruce Reese who, as brothers-in-law and partners in numerous prior gunpoint bar robberies, needed a scapegoat to pin the murders on after this robbery turned deadly.

But Mr. Lambert was nonetheless convicted and sentenced to death in this case based solely upon the testimony of two witnesses who provided what courts have long recognized to be among the most unreliable evidence possible: (1) the self-serving testimony of Jackson, a Commonwealth witness who received a sweetheart – and largely undisclosed – plea deal in exchange for his testimony minimizing his role and his brother-in-law Reese's role in the crime, and (2) the highly suspect identification testimony of Janet Ryan, a witness called *by codefendant Reese*, who made her first and only identification of Mr. Lambert in a suggestive courtroom confrontation during her *second* appearance at trial, eighteen months after the crime, after having repeatedly insisted that she

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[1]Respondent here, James Lambert, was the Appellant in the Court below, and is referred to herein by name or as Respondent. Petitioners here, representatives of the Commonwealth of Pennsylvania, are referred to herein as "the Commonwealth." The Commonwealth's Petition for Certiorari is cited herein as "*Petition.*" References to the record are to the Appendix filed in the Court of Appeals and are cited as A followed by the page number. All emphasis is supplied unless otherwise noted.

had not even gotten a look at the gunman and could not make an identification. That was it. No physical evidence, no scientific evidence, and no statements linked Mr. Lambert to this crime.

A. The Evidence at Trial

In September of 1982, Bernard Jackson and Bruce Reese were close friends, brothers in law, and partners in crime. A1979-82; A2026-27; A2126-27. They were in the midst of an extensive crime spree of at least a dozen armed robberies in Philadelphia. Their crime of choice was to walk into a bar, rob the bar at gunpoint, and make off with the cash. See A587-94; A603; A633-34; A637; A643-663; A720-25; A734-40; A765; A1763-67.

On September 23, 1982, at approximately 8:45 p.m., two men entered Prince's Lounge at 4600 Walnut Street in West Philadelphia. One stood watch at the doorway, while the other went to the bar and pointed a gun in the face of bartender Janet Ryan. As soon as she saw the gun, Ms. Ryan dropped to the floor, screamed hysterically, and crawled into a restroom where she shut the door and remained hidden until the robbery was over. A second bartender, Sarah Clark, was ordered to get the money. As she began to retrieve the money, two customers, James Graves and James Huntley, tried to overpower the gunman. The gunman fatally shot both men with a .38 caliber weapon, and both robbers fled. A1821-37; A1881-95.

During the ensuing investigation, police showed photo lineups to the bartenders and customers, but only one positive identification resulted – bartender Sarah Clark identified Bernard Jackson as the robber who stood watch by the door. A1899-1903, A2174.[2]

Jackson told a different story. After his arrest, Jackson gave at least four statements to the police. He claimed that he sat in the car outside while Reese and a third man went inside to rob the

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[2]As the Court below noted, another bartender, Marie Green, was 80-90% sure that the man at the top of the stairs was Jackson. Lambert v. Beard, 633 F.3d 126, 130 (3d Cir. 2011).

bar. His statements variously identified the third accomplice as "the other dude," as "Lawrence Woodlock," as "Monk," and as Mr. Lambert.

Mr. Lambert and Reese were jointly tried for the murders and robbery, and Jackson was the Commonwealth's key witness. Jackson provided the only evidence presented by the Commonwealth that implicated Mr. Lambert in the crime. But the jury never learned about Jackson's police statement implicating "Lawrence Woodlock," because the Commonwealth suppressed it. The jury also never learned the full extent of the benefits Jackson would receive as a result of his testimony. And the jury never learned about the string of bar robberies that Jackson and Reese committed together (all *without* Mr. Lambert), because the trial court excluded the evidence.[3]

In its effort to defend Bernard Jackson's credibility, the Commonwealth repeatedly focused the jury's attention on the "fact" that, although Jackson made some inconsistent statements about the events at Prince's Lounge, he consistently named Mr. Lambert as a partner in this crime. See, e.g., A2266-67, A2275 (re-direct examination of Jackson); A3115, A3125 (prosecutor's closing argument). The police report that directly contradicted this claim of consistency was suppressed by the Commonwealth.

At trial, the Commonwealth also asserted that, in exchange for his testimony, Jackson had

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[3]Mr. Lambert could have undermined Jackson's trial testimony by presenting evidence of, and cross examining Jackson about, the long series of armed robberies of other bars that Jackson and Reese had committed together, without Lambert. That evidence would have provided direct and compelling support for the defense theory that it was Jackson and Reese who committed this bar robbery together (after all, Jackson was identified by bartender Sarah Clark as the robber who stood at the door during the crime), but then needed a scapegoat when their robbery ended in murder. The jury never heard this evidence, however, because the trial court refused to sever the trial despite the antagonistic nature of the co-defendants' defenses. The court also excluded the prior similar crimes evidence, in violation of Mr. Lambert's rights to due process, to present a defense, to compel witnesses, and to confrontation. Mr. Lambert's challenges to those rulings were rejected by the state courts and the District Court. The Court of Appeals granted Mr. Lambert a Certificate of Appealability on these and other claims, but did not reach the claim in light of its grant of relief on the Brady claim.

been permitted to plead guilty to third degree murder, robbery, and conspiracy arising out of the present incident. The Commonwealth insisted, however, that there were no promises, understandings, or inducements relating to the other robbery charges. A2021-24; A2430-33.[4] After Mr. Lambert's trial, Jackson pled guilty to five of the robbery counts and received sentences that were *concurrent* with his (12½ - 25 year) sentence for the murders and robbery at Prince's Lounge. Then, just two months after Mr. Lambert's trial, the prosecutor in the instant case, Robert Myers, appeared before Judge Marvin Halbert as Jackson pled guilty to eight additional counts of robbery. Mr. Myers asked Judge Halbert, a judge well known for his severe sentencing practices, to reduce these gunpoint robberies, which were felonies of the first degree, to second degree felonies, and further asked the court to make any sentence imposed on these robberies *concurrent* with the sentence Jackson received on his murder/robbery plea. See Commonwealth v. Bernard Jackson, CP 82-12-714-740, at A3307-08; A3310; A3317-18; A3324-26; A3328. Mr. Myers emphasized that he did not make his recommendation lightly and that he "would strenuously request" that the court adopt the Commonwealth's recommendation. A3325-26. Judge Halbert, recognizing that Mr. Myers' recommendation was unusual, went along with the recommendation. A3328-29. Thus, as a result of the Commonwealth's strenuous efforts, Jackson received *no additional prison time* for his guilty pleas to thirteen armed robberies.

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[4] For example, Arnold Gordon, Esq., chief of the Philadelphia District Attorney's Homicide Unit, testified that Mr. Jackson faced a potential sentence of 120 to 240 years imprisonment on the open robbery cases and that there had not been any negotiations between the District Attorney's Office and Mr. Jackson regarding those cases. A2433. Mr. Gordon told the jury that it was unlikely that Jackson would not receive an additional penalty for the robbery cases. A2439-40. In closing argument, the prosecutor told the jury that it had heard the entire deal, that Mr. Gordon had told the jurors what the deal was, that Mr. Jackson faced all those open cases, and that there was nothing hidden about the deal. A3117-18. The prosecutor never acknowledged, however, that he would ask another judge to reduce the severity of those open charges and ensure that Mr. Jackson would not serve a single additional day in jail for those robberies.

The jury also never learned about the string of armed robberies of bars that Jackson and Reese had committed together. The court precluded Mr. Lambert from presenting any evidence and from cross examining Jackson about his statements admitting that he and Reese had committed at least twelve other similar gun point robberies of bars in Philadelphia. A587-94; A603; A633-34; A637; A643-63; A720-25; A734-40; A765; A1763-66. The court ruled that the other crimes evidence of Reese and Jackson would not be admitted because it would be too prejudicial to Reese and "it's not relevant to this case." A1766; A2044-54. Counsel was only allowed to question Jackson about the existence of other charges against him, without any mention of Reese's role in those other similar crimes.

Other than Jackson's highly suspect testimony, the *only* evidence connecting Mr. Lambert to this crime was the surprise identification testimony from Janet Ryan, when, over defense objection, she was called *by co-defendant Reese,* after she had not made any identification when called by the Commonwealth.[5] Prior to her second appearance to testify at trial, Ryan never made any identification of the perpetrators. She initially told police that "I didn't even get a look at the man." A3530. She testified at trial that she had not gotten a good look at either perpetrator, explaining that she only "glanced" at the men as they entered the bar ("I saw them and I didn't see them") and that, as soon as she saw a gun, she dropped to the floor, crawled away, and hid in a bathroom where she could not see what happened. A1931-33. At most, she viewed the man for only a few seconds. A2831-32. By her own admission, she did not pay a great deal of attention to the perpetrator. She later provided only a vague and general description, A1929, one that matched co-defendant Reese but not Mr. Lambert, A2825-26.

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[5]In the words of the trial court, "the adversary system had switched from Commonwealth v. Defense into a Reese v. Lambert contest." A185.

Throughout all pre-trial proceedings, the Commonwealth consistently represented that Janet Ryan, like all of the other employees and customers at the bar that night, could not make an identification and was not an identification witness. A2860. Only after Ms. Ryan was called and dismissed as a non-identification Commonwealth witness, and had seen Mr. Lambert seated at defense counsel table, did she claim for the first time that Mr. Lambert looked like the man who had pointed the gun at her. A1940-43. The trial court precluded her identification testimony when the Commonwealth asked to recall her to the stand, but then allowed Ryan's identification to come before the jury when it was presented by co-defendant Reese.[6]

Thus, James Lambert was convicted of first degree murder based solely upon the fundamentally unreliable evidence given by Bernard Jackson and Janet Ryan.

B. The Suppressed Evidence and Its Impact at Trial

In the Police Activity Sheet of October 25, 1982, prepared by the Philadelphia police detectives assigned to this case and bearing the police case numbers and the victims' names in this case, Bernard Jackson named "Lawrence Woodlock" as the third defendant. Specifically, the police report stated that "Mr. Woodlock is named as co-defendant by Bernard Jackson." A3334.[7] Homicide detectives followed up on this information by showing Woodlock's photograph to the witnesses of this robbery, although no identification was made. Id.[8]

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[6]Trial counsel sought to suppress and preclude Ryan's in-court identification, but his objections were overruled. Mr. Lambert's challenges to those rulings were rejected by the state courts and the District Court. The Court of Appeals granted Mr. Lambert a Certificate of Appealability on this and other claims, but did not reach the claim in light of its grant of relief on the Brady claim.

[7]A copy of this police report is attached to this Brief as an Exhibit

[8]Throughout the course of this litigation, and in this Court, the Commonwealth has never cited to any evidence indicating that the police ever considered Woodlock to be a suspect in any other robbery committed by Jackson, or that his photo was shown to witnesses in any of those other

Jackson made this statement when police were investigating whether there were three perpetrators of this robbery and, if so, who the third perpetrator was.[9] This document was never turned over to the defense.[10]

At trial, Jackson was impeached by inconsistent statements he made to the police about the details of this robbery. In its effort to nonetheless defend Jackson's credibility to the jury, the Commonwealth repeatedly focused the jury's attention on the "fact" that, no matter what else he said, Jackson consistently named Mr. Lambert as an accomplice in this crime. On re-direct examination, the trial prosecutor questioned Jackson about his consistency in naming Mr. Lambert and Reese as the co-defendants, as follows:

> (Q): (by prosecutor) Now, when you were out on the street before being arrested on October 14, 1982, for the murder and prior to being arrested for that robbery a few days earlier than that, were there other people out on the street that you had problems with or people that you disliked intensely or had ongoing feuds with?
>
> (A): Yeah.
>
> (Q): And when you got arrested for this murder, you could have given them up on this murder, is that correct?
>
> (A): Yeah.

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robberies. The Commonwealth nonetheless contends in its *Petition* that this report may have referred to an investigation of some other crime. See infra at p.16.

[9]All of the witnesses in the bar told the police and testified at trial that there were only two perpetrators. Only Jackson claimed otherwise.

[10]Jackson gave at least four statements to the police. In the first statement of October 14, 1982, he identified a third accomplice as "the dude" or "the other dude" and never offered up any names. In the second statement of October 22, 1982, he identified the third defendant as "Monk," who he later said referred to Mr. Lambert. In the third statement – that which appears for the first time in this October 25, 1982 Police Activity Sheet that the Commonwealth withheld – Jackson identified "Lawrence Woodlock" as a third accomplice. Finally, in the fourth statement of January 14, 1983 and in his testimony at trial, Jackson identified Mr. Lambert as a third accomplice.

(Q): *But the only 2 people that you supplied to the police was Bruce Reese and Monk, who you later found out was James Lambert, is that correct?*

(A): *Correct.*

A2266-67. The prosecutor later returned to this issue:

(Q): And do you recall whether you, in all the statements you gave, the 4 or 5 statements, however many there are...*did you ever say that there were 2 other people involved in this job with you, that is, the Prince's Lounge other than Touche [Reese] and Monk?*

(A): *No.*

A2275.

In closing argument, the Commonwealth emphasized this point, arguing:

And in every statement he [Jackson] always says Touche [Reese] tells him that Lambert's the shooter. *And in every statement* he says that Touche lays it out that Touche went up to the bar to talk to the barmaid and the other person, Lambert, did the shooting.

A3115. The prosecutor returned to this point again later in his closing:

The next significant date is October 14, 1982, when Jackson was interviewed for the first time. Now on that day, Mister Jackson didn't choose to finger Antman or Underdog, or Weasel and he could have said that to the police, yeah these 2 guys did it, I don't know who their names are. And that might have been the end of the case. *He could have put the case on anybody.*

A3125.

Both the prosecutor and Jackson misled the jury. Jackson had, in fact, named another as his collaborator. But that statement was never disclosed to the defense, and was never revealed to the jury.

C. The Third Circuit's Opinion

The Third Circuit concluded that the Commonwealth's failure to disclose the police report revealing Jackson's identification of Leonard Woodlock as his co-defendant violated Lambert's due process rights under Brady v. Maryland, 373 U.S. 83, 87 (1963), and its progeny. The court also

concluded that the state court's holding that this evidence was not "material" was objectively unreasonable, particularly in light of the Commonwealth's insistence at trial that Jackson had always consistently maintained that *only* Reese and Lambert were involved with him in this crime. Lambert v. Beard, 633 F.3d 126 (3d Cir. 2011).

The court approached this case with deep respect for the implications of the matter before them, the age of the case, and the standard of review to be applied:

> We have approached this case with the utmost seriousness. We are humbled by the fact that over a twenty-eight-year period of time, the case has progressed through courts of the Commonwealth of Pennsylvania and the U.S. District Court without James Lambert having been granted relief. We, nonetheless, must decide this case consistent with what we believe our obligation to be, while according the utmost respect to the standard of review that we are required to apply.

Id. at 128. The court carefully explained the limited review required by the habeas statute:

> AEDPA created a new, highly deferential standard for evaluating state-court rulings. . . . That statute bars a federal court from granting habeas relief unless the state court's adjudication on the merits 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 . . . [T]he most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. . . . Under § 2254(d)(1)'s unreasonable application clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 132-33 (citations and quotations omitted) (emphasis in original).

Properly recognizing that the statute requires more than a conclusion that the state court's decision was erroneous or incorrect, and quoting this Court's recent decision in Harrington v. Richter, 131 S. Ct. 770, 786 (2011), the court acknowledged that habeas relief must be denied so long as "'fairminded jurists could disagree on the correctness of the state court's decision.'" Id. at 133.

Addressing the Brady claim, the court noted the importance of Jackson's testimony to the Commonwealth's case, and that his four statements "were devastatingly inconsistent with each other and with his testimony at trial." Id. at 131. Nevertheless, Jackson claimed that he "*always*" said that Mr. Lambert and Reese were with him. Id. (emphasis by the court).

The court gave appropriate deference to the Pennsylvania Supreme Court's conclusion that the police report naming Woodlock as Jackson's accomplice was not material because Jackson had been so thoroughly impeached in other areas. Id. at 133. Nevertheless, the court concluded that:

> [I]t is patently unreasonable to presume — without explanation — that whenever a witness is impeached in one manner, any other impeachment becomes immaterial. In a similar context, the Supreme Court has rejected such an argument. In *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), a prosecutor knowingly elicited false testimony that a cooperating government witness had not, in fact, been promised consideration in exchange for his testimony. Rejecting the government's argument that the defense had numerous other ways in which to impeach the witness, the Court held that it "[did] not believe that the fact that the jury was apprised of other grounds for believing that the witness ... may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one." *Id.* at 270, 79 S.Ct. 1173.
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> The logic of *Napue* has been extended to the *Brady* context, both by the Supreme Court of the United States and by various federal courts of appeals. In *Banks v. Dretke,* 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004), the Supreme Court rejected the state's argument that no *Brady* violation had occurred because the witness "was heavily impeached at trial" and thus that his status as a paid informant would have been "merely cumulative." *Id.* at 702, 124 S.Ct. 1256 (alterations omitted). Finding that no other impeachment evidence was "directly relevant" to the witness's status as an informant, the Court ruled that "one could not plausibly deny the existence of the requisite 'reasonable probability of a different result' had the suppressed information been disclosed to the defense." *Id.* at 702–03, 124 S.Ct. 1256. *See also Bagley,* 473 U.S. at 689, 105 S.Ct. 3375 ("If the testimony that might have been impeached is weak and also cumulative, corroborative, or tangential, the failure to disclose the impeachment evidence could conceivably be held harmless. But when the testimony is the start and finish of the prosecution's case, and is weak nonetheless, quite a different conclusion must necessarily be drawn.").

Id. at 134.

But even more importantly, the court recognized the impact of the suppressed evidence on

the prosecution's theory and argument at trial. The Commonwealth's strong reliance on the supposed consistency of Jackson's identification of Mr. Lambert would have been undermined by the evidence that the Commonwealth hid from the defense. The court explained:

> What is critical here is that the undisclosed statement by Jackson that there was another participant—a "co-defendant," to use his word—was not just one more piece of impeachment material to be placed in a "so what" category because Jackson had already been so thoroughly impeached. Rather, the undisclosed Police Activity Sheet would have opened an entirely new line of impeachment, and would have done far more than simply allow the defense to point out—as it did—that Jackson was inconsistent and often changed his story. The way we know that the undisclosed statement would have opened a new line of impeachment is that by not disclosing it, the prosecution was able to rely on Jackson's consistency in naming Reese and Lambert as the perpetrators, the *only* point on which he was consistent at trial. The Supreme Court has instructed that we may take the Commonwealth at its word that this was important. *See Kyles,* 514 U.S. at 444, 115 S.Ct. 1555 ("The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and Williams were the State's two best witnesses."). *Here, the prosecution's closing argument emphasized Jackson's consistency in naming Lambert and Reese as the perpetrators. (A3115.) No more, in our view, need be said to make clear that finding that Lambert had not met the requirements of Brady was an unreasonable application of clearly established Supreme Court precedent.*

Id. at 135.[11]

In short, the Third Circuit applied this Court's precedent concerning Brady, as well as this Court's explanations of habeas review, and reached the unremarkable conclusion that the evidence that was suppressed was exculpatory and material, particularly in light of the weakness of the Commonwealth's evidence against Lambert, and that the state court's conclusion to the contrary was objectively unreasonable.

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[11]In contrast, the Pennsylvania Supreme Court made no mention of the prosecutor's closing argument, or his emphasis on Jackson's supposed consistency in naming Lambert. And remarkably, though the prosecutor's argument played an important role in the court's decision, the Commonwealth's *Petition* in this Court makes no mention of it, and does not discuss this "critical" aspect of the Third Circuit's decision.

REASONS FOR DENYING CERTIORARI REVIEW

A writ of certiorari is "granted only for compelling reasons." Supreme Court Rule 10. This Court's certiorari jurisdiction is "exercised sparingly, and only in cases of peculiar gravity and general importance." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). This Court does not grant the writ simply to correct purported error by a lower court. See Watt v. Alaska, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring) ("certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases"); R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE 190-91 (6th ed. 1985) (same).

In this case, the Commonwealth's request that this Court grant certiorari is based on nothing more than its dissatisfaction with the Court of Appeals opinion and its hope that this Court will correct what the Commonwealth perceives to be error. The Commonwealth identifies no split in the Circuits and no principle of law in need of this Court's adjudication. This is decidedly not a case of first impression. The Commonwealth simply asks for error correction, and this, by itself, is reason enough to deny certiorari.

Certiorari review is not appropriate where, as here, the question presented is so factually-bound that resolution of the question "would be of no importance save to the litigants themselves." Rudolph v. United States, 370 U.S. 269, 270 (1962). "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79 (1955) (citing Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923), and dismissing writ of certiorari as improvidently granted).

Throughout its Petition, the Commonwealth seeks to avoid the inescapable fact that lies at the heart of the Third Circuit opinion – *the Commonwealth cheated in obtaining a capital murder conviction and death sentence against Mr. Lambert.*[12] Indeed, the Commonwealth seeks to divert this Court with a number of other complaints of its alleged mistreatment in this case. The Commonwealth complains about: an interim order issued by the Third Circuit vacating Mr. Lambert's death sentence due to instructions that violated Mills v. Maryland, 486 U.S. 367 (1988) (an order that was subsequently vacated due to the grant of a new trial and thus resulted in no harm to the Commonwealth), *Petition* at 10; the court's referral to a mediator to check on the implementation of the interim order and to explore the possibility of an amicable resolution of the appeal (again an action that caused no harm to the Commonwealth), *Petition* at 11; the court's setting of a 120-day time frame for re-trial as part of a conditional writ (and allowing the Commonwealth to seek reasonable extensions of that time frame if needed), *Petition* at 17; and the manner in which Mr. Lambert's lawyers discovered that the Commonwealth had suppressed material evidence in this case.[13] The Commonwealth seeks to paint the entire Third Circuit – not just the panel in this case

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[12]In another recent death penalty case in which the Third Circuit found that Pennsylvania prosecutors had violated Brady, the court aptly noted:

> The Commonwealth has not otherwise attempted to explain why this material was not disclosed or to defend the prosecutor's failure to disclose it. Like the District Court, we are troubled by that failure. We are at a loss to understand why prosecutors, so long after *Brady* became law, still play games with justice and commit constitutional violations by secreting and/or withholding exculpatory evidence from the defense.

Breakiron v. Horn, 642 F.3d 126, 133n.8 (3d Cir. 2011).

[13]The Commonwealth asserts in its Question Presented that Mr. Lambert's lawyers obtained the suppressed evidence "unlawfully," and later accuses counsel of violating several court orders. *Petition* at 6-8. Apparently, in the Commonwealth's view, the focus of a Brady claim should not be on the prosecution's suppression of exculpatory evidence, but on the manner in which the defense uncovers the Commonwealth's misconduct. This is wrong. See Banks v. Dretke, 540 U.S. 668, 696

– as a biased tribunal because of its supposed "infringement" in Pennsylvania capital cases. *Petition* at 18-22. In addition, the Commonwealth imagines numerous other slights in the Third Circuit's recitation of the facts and history of the case.

As discussed in more detail below, the Commonwealth's complaints are misguided, and not supported by the record. But more importantly, most of the Commonwealth's complaints are irrelevant to the narrow issue upon which it seeks review – whether the Third Circuit erred in determining that Mr. Lambert was entitled to habeas relief because the Commonwealth suppressed exculpatory, material evidence. This Court should not be distracted by the Commonwealth's efforts to paint itself as the victim of a biased tribunal. Instead, it must be remembered that the Commonwealth hid material evidence from the defense, and that this misconduct lies at the heart of the Third Circuit's decision. Certiorari should be denied.

A. The Third Circuit Was Correct That Brady v. Maryland Was Violated

This Court's case law is well established. The Due Process Clause requires the prosecution to disclose evidence to the accused that is favorable to the defense and that is material. Banks v. Dretke, 540 U.S. 668 (2004); Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 153-56 (1972); United States v. Bagley, 473 U.S. 667, 676 (1985); Kyles v. Whitley, 514 U.S. 419, 437 (1995). Favorable evidence includes impeachment evidence as well as evidence that exculpates the accused. Bagley, 473 U.S. at 676. The duty to enforce Brady "with painstaking

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(2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.... Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation").

The Commonwealth's complaints about counsel have not informed the decision of any of the state or federal courts below in regard to the Brady claim, and are not relevant to its request for this Court's review. In any event, no disciplinary action was taken against Lambert's counsel in connection with the discovery of the exculpatory evidence.

care is never more exacting than it is in a capital case." Kyles, 514 U.S. at 422.

A prosecutor's failure to disclose Brady material requires a new trial when the exculpatory evidence would have been material to the trial. Kyles, 514 U.S. at 432, quoting Brady, 373 U.S. at 87; see also Banks, 540 U.S. at 675-76. Evidence is "material" where there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The "touchstone of materiality is . . . not whether the defendant would more likely or not have received a different verdict with the [suppressed] evidence, but whether in its absence he received a fair trial. . . ." Kyles, 514 U.S. at 434. Thus, to show materiality, Mr. Lambert need not demonstrate that the non-suppressed evidence would have been inadequate to convict – "sufficiency of [the remaining] evidence [is not] the touchstone" of materiality. Id. at 435 n.8.[14]

In its effort to defend Bernard Jackson's credibility to the jury, the Commonwealth repeatedly focused the jury's attention on the "fact" that, no matter what else he said, Jackson consistently named Mr. Lambert as an accomplice in this crime. As described above, in both his re-direct examination of Jackson and in closing argument, both the prosecutor and Jackson misled the jury; Jackson had, in fact, named another as his accomplice. See *supra* at p.7-8. But that statement was never disclosed to the defense, and was kept from the jury. Had the evidence been disclosed, the credibility of the Commonwealth's only witness against Mr. Lambert would have been crippled.

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[14] More stringent due process standards are enforced where the State either deliberately solicits false evidence or allows false evidence to go uncorrected. Napue v. Illinois, 360 U.S. 264, 269 (1959). Even where such evidence goes only to the credibility of a witness, the state may not knowingly rely on false evidence because "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors . . . that a defendant's life or liberty may depend." Id.; see also Banks, 540 U.S. at 694. In this case, at a minimum, the prosecutor had a duty to know what was in the police files, and thus had constructive knowledge of the police activity report in question. Jackson's false testimony, and the prosecutor's false argument, about the consistency of Jackson's identification of Lambert should not be allowed to stand.

The Commonwealth calls the exculpatory nature of this suppressed evidence "speculative" and posits that Jackson's reference to Woodlock may have related to some other robbery he had committed. *Petition* at 26-28. But it is the Commonwealth that speculates, as there is not a shred of evidence supporting its view. An examination of the document itself (which is attached to this Brief) shows that it was written by the detectives investigating *these murders*, that it specifically references the police case numbers *for these murders*, that *the murder victims' names* appear at the top of the report, and that the witnesses who were shown Woodlock's photo were witnesses *to these murders*. The Commonwealth has never cited to or produced any evidence that Woodlock was ever investigated for any other robbery, or that his photo was ever shown to any other witness in any other robbery. Any conclusion that the police report was not exculpatory because it did not relate *to this murder* has no evidentiary support whatsoever, is contradicted by the report itself, and would be objectively unreasonable.[15]

Jackson's identification of Lawrence Woodlock was material for a number of reasons. Mr. Lambert's defense at trial was that Jackson and Reese did this robbery by themselves and that Jackson invented a third defendant as a convenient way to distance himself from the actual in-the-bar crime and to create the false impression that Reese, his brother-in-law and longtime partner in crime, did not do the actual shooting. In short, Jackson invented the third defendant, made this third defendant the shooter, conveniently moved himself from the doorway of the bar to the getaway car, and conjured the idea that he went into the bar first just to "check it out" in order to explain away

[15]In any event, the meaning of Jackson's identification of Woodlock should have been a question for the jury, as it would have been if the evidence was disclosed by the Commonwealth. The Commonwealth ought not be allowed to escape the consequences of its suppression of this evidence by baldly denying its obvious exculpatory value.

why a barmaid would identify him as one of the robbers.[16] The undisclosed evidence would have strongly supported – indeed proven – Mr. Lambert's defense that Jackson was making this up as he went along.

More particularly, disclosure of Jackson's statement naming Woodlock would have undermined the Commonwealth's efforts to bolster Jackson's credibility by allowing him to testify that he had been consistent in his identification of Lambert. A2266-67; A2275. The undisclosed October 25 statement proves that Jackson's testimony in this regard was false. "Reese" and "Lambert" were not the only names Jackson came up with; he did tell police that someone other than Mr. Lambert was the supposed third accomplice. In addition, assuming that Jackson was not lying when he said that there were three participants in the robbery, the statement provided substantive evidence that Woodlock, not Mr. Lambert, was the third accomplice. The Commonwealth had possession of this statement and never disclosed it to the defense.[17] This was a clear Brady violation.

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[16]One witness did indeed identify Jackson as one of the two robbers. A1899-1903; A2174. Meanwhile, witnesses denied that anyone had come in and cased the bar in the minutes before the crime, as Jackson claimed. See A1865-67; A1972.

[17] The Commonwealth objects to the Third Circuit's statement that it conceded at oral argument that the police report should have been turned over to the defense. *Petition* at 12. The tape of the oral argument reveals that, while specifically addressing the *materiality* of the suppressed police report, counsel for the Commonwealth interrupted himself and told the Court that, if the case were tried today "there's no question that a document like this would be, you know, would be produced to the defense," and, in response to Judge Barry's question, reiterated that "of course we would [turn it over]." *Third Circuit Oral Argument File* at 41:04 - 41:20, available at http://www.ca3.uscourts.gov/oralargument/ListArgumentsAll.aspx: "07-9005LambertvBeardetalPartI.wma" (last checked Aug. 2, 2011).

The Commonwealth now asserts that its comments at oral argument were meant to concede "only that the *present office policy* is to disclose all police activity sheets." *Petition* at 12 (emphasis in original). The Commonwealth does not explain how the Third Circuit could have been expected to divine the narrowness of such an irrelevant concession. The Philadelphia District Attorney's office policies have never been at issue in this case, and they were never mentioned before the Third Circuit. The Commonwealth's quibble with the Court's opinion provides no basis for certiorari review as the Court of Appeals correctly found, with or without a "concession" from the

B. The Third Circuit Correctly Found the State Court's Decision Unreasonable

The suppressed police report, reflecting the statement in which Jackson identified "Leonard Woodlock" as his accomplice, was material in a number of ways:

- as substantive evidence implicating Woodlock, not Mr. Lambert, as a participant in the crime with Jackson and Reese;
- to impeach Jackson's testimony that he had consistently named Appellant as the alleged third accomplice;
- to support the defense theory that there was, in fact, no third accomplice, and that Jackson was attempting to minimize his own role by giving whatever name would stick; and
- to demonstrate that the prosecutor's closing argument, emphasizing the consistency of Jackson's identification of Mr. Lambert, was untrue.

Nonetheless, in post-conviction proceedings, the totality of the Pennsylvania Supreme Court's analysis of this claim was as follows:

> Appellant's claim that Jackson's reference to Woodlock automatically means that someone other than himself committed the shootings and robbery is purely speculative at best. The Commonwealth accurately notes that the police must not have had reason to consider Woodlock a potential co-defendant in this case as his name is not mentioned anywhere else in the police investigation files. Furthermore, appellant's argument that this document reveals that Jackson named Woodlock as a co-defendant prior to identifying appellant is inaccurate. In his second formal statement to police on October 22, 1982, three days prior to the document at issue, Jackson identified the third participant in the robbery as "Monk," appellant's nickname. Moreover, this document would not have materially furthered the impeachment of Jackson at trial as he was already extensively impeached by both appellant and Reese. Indeed, each co-defendant cross-examined Jackson on the following: every inconsistency in his four police statements; that he was testifying on behalf of the Commonwealth pursuant to a plea bargain; and that he had several open robbery charges still pending and his testimony was motivated by a desire to receive lenient sentences for those crimes. Any additional impeachment of Jackson arising from a police notation would have been cumulative. Accordingly, the Commonwealth did not violate *Brady* by not disclosing this police activity sheet as

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Commonwealth, that disclosure was required under Brady. See Breakiron, 642 F.3d at 131, n.8 (discussing the inadequacy of a similar concession with regard to a Brady claim).

appellant has failed to show its materiality.

Commonwealth v. Lambert, 884 A.2d 848, 855-56 (Pa. 2005); A132.

The Third Circuit correctly found that the state court's analysis was an unreasonable application of this Court's Brady cases. As discussed supra, at p.9, the Court followed this Court's most recent opinions and applied the correct standard of review under the habeas statute,

First, it must be noted what the state court did not discuss. The court did not address the exculpatory nature of the evidence, the fact of its non-disclosure, or the Commonwealth's false portrayal of Jackson's consistency in naming Mr. Lambert as his accomplice. And the court did not address the clear support the evidence offered to Mr. Lambert's defense that Jackson was trying to name any alleged third accomplice in order to support his story that he was only a getaway driver and not one of the two armed robbers in the bar. In ignoring these crucial points, which in and of themselves establish the materiality of the evidence, the state court's decision failed to adjudicate the core of Mr. Lambert's claim. As the Third Circuit correctly found, the omission of these considerations from the state court's materiality analysis rendered its decision an unreasonable application of Brady, Giglio, Napue, and Kyles.

Both the state court, and the Commonwealth here, have ignored the key facts that make this evidence so important, and so material – the prosecutor's emphasis on the supposed consistency of Jackson's identification of Lambert and the suppressed evidence's direct contradiction of the prosecutor's evidence and argument in that regard. The prosecutor's evidence and argument cannot be so ignored. Materiality must be examined within the context of the actual trial. Kyles, 514 U.S. at 444 ("The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and Williams were the State's two best witnesses"). Here, the prosecutor made Jackson's "consistency" the centerpiece of his case against Mr. Lambert, twice

eliciting testimony about that "consistency" from Jackson and twice arguing the import of that testimony to the jury. See supra at 7-8. The suggestion that Jackson's actual *inconsistency* in his identification was not material is simply belied by the prosecutor's trial presentation. As the Third Circuit concluded:

> Here, the prosecution's closing argument emphasized Jackson's consistency in naming Lambert and Reese as the perpetrators. (A3115.) No more, in our view, need be said to make clear that finding that Lambert had not met the requirements of *Brady* was an unreasonable application of clearly established Supreme Court precedent.

Lambert, 636 F.3d at 135.

The conclusion of the Pennsylvania Supreme Court that the suppressed evidence would have been cumulative to other areas of impeachment was also objectively unreasonable. The fact that Jackson was cross examined, and his credibility attacked, in *other* areas, does not negate the materiality of *this* evidence. See Banks, 540 U.S. at 702 (rejecting the state's argument that no Brady violation had occurred because the witness "was heavily impeached at trial" and that additional impeachment would have been "merely cumulative"); accord Bagley, 473 U.S. at 689. Indeed, the prosecutor emphasized Jackson's consistency – which we now know was illusory – precisely because he understood that it was material. The suppressed evidence would have impeached a part of Jackson's testimony that was otherwise unimpeached and upon which the prosecutor relied. The Third Circuit was correct in finding the state court's analysis unreasonable. The Commonwealth's suggestion that. the Court paid lip service to the standard of review, but actually applied some other standard, is without support and provides no basis for the grant of certiorari review.

C. The Commonwealth's Arguments Do Not Support a Grant of Certiorari

1. The Commonwealth's criticisms of the Third Circuit are inaccurate and misleading

The Commonwealth devotes much of its Petition to a broadside attack on the Third Circuit's capital jurisprudence, claiming that the Third Circuit is to blame for the Commonwealth's failure to institute an "effective death penalty in Pennsylvania." *Petition* at 18-22 (internal quotation omitted). The Commonwealth misstates and misapprehends the Third Circuit's case law. In a number of the cases cited in support of the Commonwealth's assertion, the Third Circuit actually *reversed* grants of relief by the District Court. For example, the Commonwealth cites Thomas v. Horn, 570 F.3d 105 (3d Cir. 2009), for the proposition that "the Third Circuit has set aside state judgments" and awarded a "new penalty phase." *Petition* at 19 n.8. In fact, in Thomas, the Third Circuit *vacated* a grant of penalty phase relief. 570 F.3d at 130 ("we disagree with the District Court that Thomas' sentence should be vacated"). The Third Circuit has frequently done the same in other cases. Lewis v. Horn, 581 F.3d 92 (3d Cir. 2009) (affirming denial of guilt phase relief, vacating grant of new penalty phase, and remanding for further proceedings); Fahy v. Horn, 516 F.3d 169 (3d Cir. 2008) (same); Lark v. Secretary Pennsylvania Department of Corrections, --- F.3d ----, 2011 WL 2409297 (3d Cir. 2011) (vacating grant of new trial and remanding for further proceedings); Morris v. Beard, 633 F.3d 185 (3d Cir. 2011) (same); Saranchak v. Beard, 616 F.3d 292 (3d Cir. 2010) (same); see also Williams v. Beard, 637 F.3d 195 (3d Cir. 2011) (affirming denial of all relief in a capital case); Taylor v. Horn, 504 F.3d 416 (3d Cir. 2007 (same). Thus, an accurate account of the Third Circuit's recent case law belies the Commonwealth's complaint that the Third Circuit somehow impedes capital punishment in Pennsylvania.

Further, although the Third Circuit has found Brady violations and ineffective assistance of

defense counsel in other Pennsylvania capital cases, that Court has routinely denied relief in capital cases from Delaware. E.g., Jackson v. Carroll, 161 Fed. Appx. 190 (3d Cir. 2005) (affirming District Court's denial of all relief and vacating certificate of appealability); Shelton v. Carroll, 464 F.3d 423 (3d Cir. 2006) (denying all relief); Gattis v. Snyder, 278 F.3d 222 (3d Cir. 2002) (same); Hameen v. Delaware, 212 F.3d 226 (3d Cir. 2000) (same); Weeks v. Snyder, 219 F.3d 245 (3d Cir. 2000) (same); Dawson v. Snyder, 234 F.3d 1264 (3d Cir. 2000) (same) (Table); see also Steckel v. Carroll, 02-436-JJF, 2004 WL 825302 (D. Del. 2004) (denying all relief and denying certificate of appealability). In short, there is neither an anti-death penalty nor an anti-Pennsylvania bias from the Court.

Finally, the Commonwealth's argument rings hollow given that, as here, *its own misconduct* lies at the heart of many of the cases that have been granted relief in the Third Circuit. E.g., Wilson v. Beard, 589 F.3d 651, 664 (3d Cir. 2009) ("the Commonwealth does not and, in fact, cannot, seriously dispute that the prosecution 'suppressed' the information" where an investigator for the Philadelphia District Attorney's Office escorted a witness to a psychiatric hospital on the day the witness testified and had a financial relationship with another witness; a third witness' criminal history was in the prosecutor's file but was not disclosed); Hardcastle v. Horn, 332 Fed.Appx. 764, 766 (3d Cir. 2009) (upholding the District Court's factual finding that the Philadelphia District Attorney's Office engaged in intentional racial discrimination); Breakiron v. Horn, 642 F.3d 126, 129 (3d Cir. 2011) (explaining that the Commonwealth was not appealing grant of new murder trial in light of Brady violation); Simmons v. Beard, 590 F.3d 223, 234 (3d Cir. 2009) (Commonwealth conceded that it suppressed four pieces of evidence at trial). It is thus odd for the Commonwealth to complain that "this is the *fourth* recent Third Circuit decision in the past two years," *Petition* at 21 (emphasis in original), granting habeas relief on Brady grounds, where it was the

Commonwealth's own misconduct that led to the grant of relief. If anything, the successful Brady claims in Pennsylvania suggest a need for the federal courts to provide even closer scrutiny of prosecutorial behavior.

2. The Third Circuit did not invent or omit important facts

The Commonwealth next claims that the Third Circuit "omitted important facts, and invented others." *Petition* at 28. To support this claim, the Commonwealth makes two accusations. It first asserts that, "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 . . . [to wit, that] Jackson first told police that Reese, not Lambert, did the shooting." Id. Without citation to the record, the Commonwealth erroneously denies that Jackson made such a statement. The record reveals that the Third Circuit was correct.

The Third Circuit actually cited the relevant portion of the record. See Lambert, 633 F.3d at 131 (citing A2002). There, Jackson's trial testimony went as follows:

Prosecutor:	Who did the talking when they got in the car?
Jackson:	Bruce.
Prosecutor:	And what did he say?
Jackson:	He just shot two people.
Reese's counsel:	Could I hear that read back? I'm sorry.
Court Reporter:	He just shot two people.
Lambert's counsel:	We?
Court Reporter:	He.
Prosecutor:	Is that correct, Mister Jackson?
Jackson:	Correct.

A2002. This testimony was consistent with that of Detective Kelhower, who testified at a pre-trial hearing that after his arrest Jackson initially implicated only Bruce Reese. The detective testified:

Prosecutor:	Now, as a result of interviewing Mr. Jackson, what if anything did you do?
Detective:	After the arrest of Mr. Jackson, he implicated one of the defendants in his statement.
Prosecutor:	And, which one was that?
Detective:	It was Mr. Bruce Reese.
Prosecutor:	And--
Detective:	On the first statement, on the original statement.

A310-11. The Third Circuit thus accurately described the record, and the Commonwealth's unsupported contention that Jackson never identified Reese as the shooter is plainly incorrect.

Next, the Commonwealth claims that the Third Circuit "did not mention that Lambert *confessed* to police that he was with Reese and Jackson on the night of the murders." *Petition* at 29 (emphasis in original). The Commonwealth goes on to argue that this supposed "confession" is important to the materiality analysis, because the Commonwealth could have introduced the "confession" in rebuttal – assuming it had not, instead, suppressed the evidence of Jackson's inconsistent statement. See id.

The Commonwealth's argument is breathtaking: (a) in fact, there was no "confession," because Lambert's statement, denying any participation in the crime, was exculpatory; (b) *the Commonwealth* strenuously – and successfully – argued at trial that Lambert could not introduce the statement in his own defense because it was exculpatory; and (c) the Third Circuit, in any event, could not have credited the Commonwealth's creative argument, because the Commonwealth raised it for the first time in oral argument.

(a) Mr. Lambert never "confessed" to anything. He acknowledged that he met Jackson and Reese (for the first time) at a party on the night of the crime, and that he spent part of the evening with them. This evidence was not contested at trial. See A1983-84. But Mr. Lambert denied in his statement – as he always has denied – that he was with Jackson and Reese when they robbed the bar. At trial, the Commonwealth thus accurately characterized Lambert's statement as "exculpatory," "self-serving" "hearsay," because "the fact that they got together at somebody's house before or afterwards isn't itself a crime." A2946-47, A2954; see also A2956-57 (prosecutor arguing that "it's an exculpatory statement. He doesn't implicate himself. . . . He says he wasn't there in the robbery.") .

(b) At trial, Lambert sought to introduce his "confession" to be considered by the jury, *but the Commonwealth objected* because of the *exculpatory* nature of that "confession." The trial court sustained the Commonwealth's objection and refused to permit Lambert's counsel to introduce the exculpatory statement. A2972; A2975-77. It is incomprehensible for the Commonwealth to now argue that the "confession" it successfully excluded should now be used to defeat the materiality of the evidence it failed to disclose.

(c) Prior to oral argument in the Third Circuit, the Commonwealth never raised in these proceedings its current argument that Lambert "confessed" to the crime and that the Commonwealth's Brady violation should therefore be found immaterial. In *response* to oral argument by Lambert's counsel, the Commonwealth made this argument for the first time. The Third Circuit does not generally consider arguments raised for the first time on appeal. Delaware Nation v. Pennsylvania, 446 F.3d 410, 416 n.9 (3d Cir.2006). This is all the more true where an argument is raised for the first time *at oral argument* on appeal. Pichler v. UNITE, 542 F.3d 380, 396 n.19 (3d Cir. 2008); see also Tomasko v. Ira H. Weinstock, P.C., 357 Fed.Appx. 472 (3d Cir.

2009) ("It would be unfair to permit Weinstock to prevail on arguments raised for the first time at oral argument, a method of proceeding that can deprive one's opponent of any meaningful opportunity to respond.").

In short, the Commonwealth's argument is baseless and, in any event, waived.

3. The Third Circuit did not make "credibility determinations"

The Commonwealth takes further issue with the Third Circuit's materiality analysis, criticizing the panel for purportedly making a credibility determination when it characterized Janet Ryan's eyewitness identification as "bizarre." *Petition* at 30-31. Here are the circumstances that led to the Third Circuit's characterization:

- Ms. Ryan, in her statement to the police after the shooting, said:

> I was facing away from the man with the gun. He was behind me, to my left, I don't even recall seeing him come in. I just turned and saw him pointing the gun in my face and I ran. *I didn't even get a look at the man.*

A3530; A2833-34.

- When called to testify at trial, eighteen months later, Ms. Ryan confirmed much of her statement to the police. She testified:

> A young man walked over to where I was working -- I was just standing at that time. ...he pointed the gun at me.... I didn't pay any attention when they came in the door. I saw them and I didn't see them.... I just glanced at them and looked away.

A1927-28, A1931, A1933.

- She went on to testify that, immediately after the gun was pointed at her, she "hit the floor and scrambled my way back to the ladies room and locked the door." A1928. While hiding in the bathroom, Ms. Ryan did not see anything further, but heard the two gunshots.

- Before trial and during her testimony for the Commonwealth, Ms. Ryan could not identify either co-defendant – or anyone else – as an alleged perpetrator, although the Commonwealth showed her photographs of at least one of the defendants. A1947.

- After she left the witness stand, Ms. Ryan met with the prosecutor outside the courtroom.

The prosecutor subsequently reported to the court that Ms. Ryan now thought that Mr. Lambert looked like the man who had pointed the gun at her. A1940-43. The prosecutor sought to recall Ms. Ryan to the stand to make an identification, but the court sustained both co-defendants' objections to her testimony. A1949-50.

- However, co-defendant Reese later called Ms. Ryan as his witness, and the court overruled Mr. Lambert's objection. A2779-80. Ms. Ryan was allowed to identify Mr. Lambert, sitting at the defense table, as the man who pointed the gun at her. She admitted that the shooter was about the same height as Reese (approximately five foot seven inches tall) and shorter than the victims, each of whom was around six foot tall. A2826, A2844. Mr. Lambert, who was at least as tall as the victims, did not match that description. A2844.

Under these circumstances, the Third Circuit did not err in rejecting the Commonwealth's argument that Ryan's identification testimony rendered its Brady violation immaterial, and the panel did not make an improper credibility determination. The panel's description of Ryan's testimony as "bizarre" was, if anything, charitable to the Commonwealth.

The Commonwealth closes with several additional complaints, most of which do not merit further discussion. Nonetheless, as to the Commonwealth's protest that there was not evidence that Reese was the shooter, *Petition* at 32-33, it should be noted that Jackson, the Commonwealth's star witness, testified that "Reese carried the murder weapon" see A 2276-77, when they entered the bar. Further, as the Third Circuit recognized, several witnesses testified that the shooter was (like Reese) shorter than the victims, while Lambert was at least as tall. Lambert, 633 F.3d at 135. To this, we can add that Reese and Jackson had a history of committing armed robberies of bars together and that, contrary to his own testimony, Jackson was identified as the robber inside the bar who stood at the top of the stairs.

CONCLUSION

The Petition for Certiorari filed in this case presents a fact bound question that sets forth no important jurisprudential question deserving of this Court's review and identifies no conflict in the lower courts needing this Court's resolution. Instead, the *Petition* seeks review only for the purposes of correcting what the Commonwealth wrongly believes to be an erroneous decision.

Although the Commonwealth disagrees with the outcome of the Third Circuit's thorough analysis, it is clear that the Commonwealth's complaints are based on an inaccurate and incomplete understanding of the record, and that there is no basis for certiorari review. In truth, twenty-seven years after Mr. Lambert was wrongfully convicted and sentenced to death, and twenty-seven years after the Commonwealth suppressed the crucial evidence that facilitated this injustice, the Third Circuit finally held the Commonwealth to account for its misconduct – and finally vindicated Mr. Lambert's long-forsaken right to due process of law. The Third Circuit's decision should not be disturbed.

WHEREFORE, for the reasons set forth herein, this Court should deny the Commonwealth's petition for writ of certiorari.

Respectfully submitted,

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Dated: August 4, 2011

EXHIBIT

1

ACTIVITY SHEET # 2 Platoon Monday, 10/25/82 8A 4P Tour Sgt. Strohm/Lt. Hansen

H-82-268
H-82-269

Deceased: James HUNTLEY
James GRaves

Assigned/Kelhower

A Photo display was shown to the below listed person, Photo display contained a Lawrence WOODLOCK 27 M/M res. 5333 Walnut St. PPN # 477095 Mr. WOODLOCK is named as co-defendant by Bernard JACKSON. No identifition was made.

Sarah CLARK 5511 Saybrook Ave. Marie GREEN 5227 Pine St.

A Survey was made of the area 55RD. & Walnut St. to found Lawrence WOODLOCK Neg. results.