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No. 00-0000

IN THE SUPREME COURT OF THE UNITED STATES

LOUIS FOLINO, SUPERINTENDENT;
THE DISTRICT ATTORNEY OF THE COUNTY OF BERKS;
THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA
Petitioners

v.

RODERICK JOHNSON
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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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Third Circuit and other courts of appeals which have interpreted the materiality standard of *Brady v. Maryland*, 373 U.S. 83 (1963) to include evidence inadmissible at trial if such material could have led to the discovery of admissible evidence have expanded the scope of *Brady* in a manner contrary to *Wood v. Bartholomew*, 516 U.S. 1(1995), and, in so doing, have substituted mere admissibility for the requirement that to be "material" undisclosed evidence must present a "reasonable probability" that the result of the trial would have been different had the evidence been disclosed, and in a manner which, in the instant case, would have required the prosecution to search the entire universe of police reports to find those reports which referenced, but did not charge, a prosecution witness.

2. Whether the United States Court of Appeals for the Third Circuit, by directing the District Court to evaluate Johnson's claim "in light of" the Third Circuit opinion, has required the District Court to accept characterizations of the allegedly suppressed evidence which in some instances are contrary to this Court's teachings, such as the weight to be given affidavits solicited by habeas counsel long after the verdict was obtained, and which, in other instances, are factually inaccurate.

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding appear in the caption of the case.

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BASIS FOR JURISDICTION

By order and opinion of January 16, 2013, the United States Court of Appeals for the Third Circuit reversed the judgment of the District Court and remanded for further proceedings, chiefly the re-analysis of evidence alleged by the defense to have been suppressed in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.C.A. Const. Amend. XIV Sect. 1 (emphasis added).

PROCEDURAL HISTORY

Roderick Johnson, a state prisoner, filed a petition for writ of habeas corpus pursuant to 18 U.S.C. § 2254, challenging the life sentence imposed following his July 14, 1998 conviction of first degree murder and related offenses in the Court of Common Pleas of Berks County, Pennsylvania. The Pennsylvania Superior Court affirmed the judgment of sentence. App. M. The Pennsylvania Supreme Court denied allowance of appeal. App. L. Johnson timely filed a petition for post-conviction relief, (PCRA), pursuant to 42 Pa.C.S. §9541, et seq. (West 2007). The lower court denied relief and Superior Court affirmed. App. K. Johnson sought allowance of appeal. While his petition for allowance of appeal from the denial of state post conviction relief was pending, Johnson filed a second PCRA petition on September 12, 2003. The Pennsylvania Supreme Court denied the petition for appeal of the initial PCRA petition by order of March 22, 2004. App. J. Johnson re-filed the second PCRA petition on April 12, 2004. On June 25, 2004, counsel filed an amended federal petition for writ of habeas corpus, the original petition having been filed April 24, 2003.

The Court of Common Pleas of Berks County dismissed the second petition for state post conviction relief. Superior Court affirmed the denial, finding the second PCRA untimely and subject to none of the exceptions to the statutory, jurisdictional time-bar. App. I. The Pennsylvania Supreme Court denied allowance of appeal by order of March 16, 2006 at No. 870 MAL 2005.

On June 19, 2007, August 2, 2007, and November 16, 2007, respectively, Johnson filed third, fourth and fifth "protective" post conviction petitions in the Court of Common Pleas of Berks County. The lower court dismissed these petitions. App. G. The Pennsylvania Superior Court affirmed the denial of relief. App.F.

In federal proceedings, the District Court found the *Brady* claim (Claim 4 of the habeas petition) procedurally defaulted and additionally found Johnson had failed to establish cause for, and prejudice from, the default. App. D. The District Court denied the remaining claims by order and memorandum opinion of August 12, 2010, and declined to issue a certificate of appealability. App. C.

In response to a motion for partial reconsideration, the District Court granted a certificate of appealability only as to Petitioner's Claim 4, the *Brady* claim. App. B. After briefing and oral argument, the Third Circuit reversed the judgment of the District Court and remanded with the direction that the District Court "evaluate the materiality of each item of suppressed evidence individually, bearing in mind not only its content, but also where it might have led the defense in its efforts to undermine [Commonwealth witness] Robles." App. A, 27a.

TESTIMONY AT TRIAL

The following summation of the evidence at trial is from *Johnson v. Folino*, 735 F.Supp. 2d 225, 230-32 (E.D. Pa. 2010), App. C.

"At approximately 11:15 p.m., on November 1, 1996, Pearl Torres ("Torres) observed two men run across Schuylkill Avenue in Reading, Pennsylvania. (Trial Tr.119, July 9, 1998). One of the men, later found by the jury to be [Johnson], was carrying a black semi-automatic handgun which he used to shoot the other individual, Martinez. (Id.) After Martinez fell to the ground, [Johnson] fired three shots into Martinez' body, after which Torres saw [Johnson] leave the scene. (*Id.*, at 119, 121-22)

"Shannon Sanders ("Sanders") testified that at the same time on November 1, 1996, she was in the vicinity of the 300 block of Schuylkill Avenue in Reading. (Id. at 228). Sanders testified that at this time she heard three gunshots, and immediately after hearing the gunshots she observed an African-American male run by her. (*Id.* at 230). She testified that the individual was in possession of a semi-automatic handgun. (Id. at 231-32) Sanders testified that when the individual ran by her she heard him "yo, that motherfucker's dead. I just killed him. You know what I mean. I just killed him." (*Id.* at 230). Immediately after the exchange, the male fled the area. (Id. at 233). Sanders testified that she could not identify [Johnson] as the individual that she observed during this

exchange because she did not get an adequate look at the individual's face. (*Id.*)

"[George] Robles testified that [Johnson] showed up at his residence at 428 Buttonwood Street at approximately midnight on November 1, 1996, and was out of breath when he arrived. (*Id.* at 370.) Robles testified that [Johnson] told him "Yo, I just killed this dude. I just killed this dude. (*Id.* at 372.) Robles testified that [Johnson] showed Robles a semi-automatic handgun that [Johnson] stated he had just used to shoot someone. (*Id.* at 372-74.) [Johnson] told Robles that he and Richard Morales ("Morales had seen Martinez at a convenience store on Schuylkill Avenue, at which point [Johnson] questioned Martinez about a drug debt owed to [Johnson's] associate Shawn Bridge. (*Id.* at 375-79.) [Johnson] told Robles that Martinez fled on Schuylkill Avenue and that [Johnson] and Morales pursued Martinez in a van. (*Id.* at 376.) When Martinez crossed the intersection of West Elm Street, [Johnson] exited the van driven by Morales and chased Martinez on foot. (*Id.* at 376-77.) [Johnson] told Robles that he fired several shots into Martinez' body. (*Id.* at 376-78.) After recounting the event to Robles, [Johnson] left Robles residence.

"[Luz] Cintron testified that one to two days after the shooting incident she entered the residence that she shared with Robles, and Tyhir Biggs ("Biggs") at 428 Buttonwood Street in Reading and overheard a conversation between [Johnson] and Biggs. (*Id.* at 286.) Cintron testified that she overheard [Johnson] tell Biggs that he and Morales had confronted Martinez on Schuylkill

Avenue and that Martinez became scared and ran away, at which point [Johnson] ran after him and shot him. (*Id.*) Cintron further testified that she overheard [Johnson] tell Biggs that he shot Martinez in the back. (*Id.* at 326.)

"[Mylta] Velazquez testified that approximately one to two days after the incident she and [Johnson] were watching a news broadcast that showed a story about Martinez's murder. (*Id.* at 156, 162-68.) Velazquez testified that in response to the news story [Johnson] asked he if he could trust her, at which point he told her that he was the one who short Martinez. (*Id.*) [Johnson] went on to state to Velazquez that he was a "hitman" and "that's what he does." (*See id.* at 158-59, 162-68, 177).

REASONS TO GRANT THE WRIT

The Court should grant the writ of certiorari for two reasons.

A. The Third Circuit and various sister circuits have expanded the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), by interpreting its materiality standard to include evidence inadmissible at trial if such material could have led to the discovery of admissible evidence. Such an expansion of *Brady* is contrary to *Wood v. Bartholomew*, 516 U.S. 1 (1995), and requires the scrutiny of this Court.

It is well settled that the government has the obligation to turn over evidence in its possession "where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The obligation to disclose extends to impeachment evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985), and disclosure is mandatory even if the accused has not requested such evidence, *United States v. Agurs*, 427 U.S. 97, 109 (1976). Evidence is "material" under *Brady* only where there exists a "reasonable probability" that had the evidence been disclosed the result of the trial would have been different. *Kyles v. Whitley*, 514 U.S. 419, 433-434 (1995). The defendant need not prove that it is more likely than not that he would have received a different verdict had the evidence been included, but need only prove "whether in its absence he received a fair

trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S. at 434.

Various circuits have extended the definition of materiality under *Brady* to include inadmissible evidence if such evidence might lead to the discovery of admissible evidence. The Third Circuit, in the case for which certiorari is sought, has included itself in that category, citing *Ellsworth v. Warden*, 333 F. 3d 1, 5 (1st Cir. 2003)(en banc)(grant of writ of habeas corpus conditioned on outcome of inquiry into where a lead based on inadmissible evidence would have led); *United States v. Gil*, 297 F. 3d 93, 104 (2d Cir. 2002)(admissibility is consideration that bears on *Brady* materiality); *Bradley v. Nagle*, 212 F.3d 559,567(11th Cir. 2000)(inadmissible hearsay would not have led defense to admissible material exculpatory evidence); *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991) cert. denied, 504 U.S. 930 (1992)(information not material unless information consists of, or would lead directly to, evidence admissible at trial for either substantive or impeachment purposes). App. A. 27a. In contrast, the Fourth Circuit has, to date, adopted the contrary view: "We are at a loss to understand how [statements inadmissible at trial] could even possibly be considered 'material.'" *Hoke v. Netherland*, 92 F.3d 1350, 1355 (4th Cir.1996).

The expansive reading of the *Brady* materiality standard is contrary to *Wood v. Bartholomew*, 516 U.S. 1 (1995). In *Wood* the Court held that inadmissible evidence can never be considered material for *Brady* purposes, and went so far as to refuse to classify inadmissible

polygraph results as "evidence." *Wood* specifically rejected the attempt of the Ninth Circuit "to get around" the inadmissibility problem by reasoning that the polygraph results *might* have led counsel to some additional evidence that could have been utilized. *Wood*, 516 U.S. at 6. The Ninth Circuit's "work-around" has now become the accepted practice of various circuits, despite *Wood's* rejection of the attempts of the Ninth Circuit to boot-strap inadmissible evidence into *Brady* material.

In the instant case, the District Court followed controlling Supreme Court authority: "Under these circumstances [the presentation of tangential, speculative and confusing "evidence"] the Court believes the alleged *Brady* evidence would not have been admissible despite its potential probative value." App. B at 4b. In contrast, the Third Circuit has contravened controlling authority by classifying inadmissible evidence as *Brady* material if it could have led to the discovery of admissible evidence.

Further, those circuits which read *Brady* to require the production of inadmissible evidence if such evidence would lead to the discovery of admissible evidence have, in essence, swallowed up the materiality analysis which *Brady* requires. Materiality is more than mere admissibility. Evidence is "material" under *Brady* only where there exists a "reasonable probability" that had the evidence been disclosed the result of the trial would have been different. *Kyles v. Whitley*, 514 U.S. 419, 433-434(1995). The Third Circuit in a prior decision characterized the second and independent inquiry of *Brady* as "whether suppression of that

evidence undermines confidence in the outcome of a criminal trial." App.D at 16d, quoting *Smith v. Holtz*, 210 F.3d 186, 196 (3d Cir. 2000). This prong of *Brady* materiality analysis is subsumed when a *Brady* violation is premised on the failure to disclose inadmissible evidence for the sole reason that such material would lead to the discovery of admissible, but not necessarily reasonably determinative evidence.

In joining the circuits which have adopted the expanded scope of *Brady*, the Third Circuit, in essence, faults the Commonwealth because it did not search the entire universe of police reports to find, and turn over, documents which referenced, but did not charge, a witness for the prosecution, and which were of dubious admissibility. "[A] rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." *United States v. Bagley*, 473 U.S. 667, 675 n.5. In the case for which certiorari is sought, the Third Circuit has imposed the "impossible burden" by holding the prosecution accountable for the discovery of various police reports, none of which were made in the course of the murder investigation at issue and none of which charged Commonwealth witness George Robles with any crime.

No clearly established United States Supreme Court authority requires the prosecution to find, and disclose, every police report which references a prosecution witness when those

reports were made for a purpose other than investigation of the crime charged to the defendant, and when those reports did not culminate in the filing of criminal charges. *See Moore v. Illinois*, 408 U.S. 786, 795 (1972). ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.") Habeas relief should not be granted on the basis of a legal principle never established by this Court. *Bobby v. Dixon*, 132 S.Ct. 26, 32 (2011) (because no precedent of this Court required Ohio to do more, the Sixth Circuit was without authority to overturn the reasoned judgment of the State's highest court).

The Court should grant certiorari to address the expansion of *Brady* adopted by the Third Circuit and various sister circuits.

B. **The Third Circuit directed the District Court to "evaluate Johnson's claim anew in light of our opinion today." App.A at 34a. This directive is suspect because the Third Circuit opinion derives from various mischaracterizations of the allegedly suppressed "evidence" and because the District Court did, in fact, conduct a complete materiality analysis. This Court should grant certiorari to exercise its supervisory powers.**

The District Court acknowledged that if information existed which evidenced an agreement between Robles and the Commonwealth in regard to criminal charges, such information could affect

Robles' credibility and would be *Brady* material. However, the District Court found Johnson unable to point "to any express or implied agreement" between Robles and the Commonwealth. The District Court found the allegedly suppressed evidence "speculative, tangential to the issues considered in Petitioner's state trial, and [was] also likely to confuse the jury," and further offered that an equally plausible inference was that Robles was investigated with respect to several criminal matters, but insufficient evidence was found to support charges. App.B at 4b. The Third Circuit found the materiality analysis of the District Court incomplete and remanded with instruction that the District Court conduct a more detailed materiality analysis consistent with the standard enunciated in *Kyles v. Whitley*, 514 U.S. 419, 436, n.10 (1995). ("We evaluate the tendency and force of the undisclosed evidence item by item . . . we evaluate its cumulative effect for purposes of materiality separately.")

The District Court had, in fact, looked at the evidence "item by item," finding the materials "speculative," "tangential," and "likely to confuse the jury." App.B at 4b; *see also* App.D at 23d-34d. In the belief that the alleged *Brady* material would have been inadmissible and, in light of the fact that the District Court found other alleged *Brady* evidence "to have not been wrongfully suppressed at all," the District Court found "no need to conduct an *explicit* cumulative prejudice analysis in the Court's already lengthy memorandum opinion." App.B at 4b (emphasis supplied). By implication, the District Court found the failure to disclose speculative, tangential, and confusing "evidence"

did not give rise to a reasonable probability that the verdict would have been different with its admission. Looked at in its totality, the District Court did conduct a comprehensive analysis. *See* App.D at 23d-34d.

As for itself, the Third Circuit concluded "the Commonwealth possessed copious evidence linking Robles to various criminal investigations in addition to information bearing on the motives of [Commonwealth witnesses] Cintron and Velazquez that it never disclosed to Johnson." App.A at 8a-10a, cataloging alleged "evidence." This conclusion derives from a highly partisan evaluation of the allegedly suppressed "evidence," including a valuation of after-verdict affidavits at odds with the jurisprudence of this Court.

For example, the "information bearing on the motives of "Cintron and Velazquez" to which the Circuit gave credence derives from affidavits of investigators working for habeas counsel who interviewed Commonwealth witnesses long after their trial testimony. The Circuit read those affidavits as establishing "the *fact* that the two witnesses were coerced into testifying." App.A at 17a (emphasis supplied). These affidavits are comprised of hearsay. They were obtained years after the events they purport to recall. Their averments are untested by either cross-examination or credibility determinations. Even so, the Third Circuit accepts the affidavits as stating "facts." In contrast, this Court has taken a jaundiced view of the worth to be afforded to affidavits comprised of hearsay and obtained long after conviction. *Herrera v. Collins*, 506 U.S. 390,

417(1993)(in context of new trial, motions based solely upon affidavits are disfavored because affiants' statements are obtained without benefit of cross-examination and opportunity to make credibility determinations.)

The Third Circuit asserts that "at the time Robles testified, he was under investigation for his role in a shooting, an assault, and multiple shots fired incidents." App.A at 3. In point of fact, a police report notes that Robles was a by-stander when police arrived to investigate a report of "shots-fired" at, or in the vicinity of, Robles' house. The report neither states, nor implies, that Robles was under investigation for having fired those shoots. Johnson's exhibits for hearing of 4/20/11, Vol. 1, Attachment B, pp.239-241. In a report of shots fired in the 500 block of Cedar Street, Robles is listed as a complainant. Johnson's exhibits for hearing of 4/20/11, Vol. 1, Attachment B, p.221. The police investigation of Robles' suspected role in an assault, which included the discharge of a firearm, was closed because the alleged victims refused to cooperate. Johnson's exhibits for hearing of 4/20/11, Vol. 1, Attachment B, p. 312. ("This case is CLOSEC (sic) EXCEPTIONAL (sic) there is enough to make an arrest, but the victims refused to file charges.")

In view of the Circuit's partisan and inaccurate characterization of the allegedly suppressed "evidence," the District Court should be relieved of the obligation to "evaluate Johnson's claim anew in light of" the Third Circuit opinion.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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