No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT GENE REGA,

Petitioner,

v.

SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT PHOENIX,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Sonali Shahi
Counsel of Record
Assistant Federal Defender
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(215) 928-0520
Sonali_Shahi@fd.org
Counsel for Petitioner

QUESTION PRESENTED

This Court has summarily reversed when a federal court failed to afford "a presumption of correctness" to a state court's factual findings in a habeas case. *See Burden v. Zant*, 498 U.S. 433, 436–38 (1991) (per curiam). In this habeas case, a state court found that a prosecutor had assured four Commonwealth witnesses that he would "maintain[] the possibility for later negotiation based on the witnesses' cooperation." Pet. App. 150a (footnote omitted). All four witnesses had faced their own charges and played a central role at Petitioner's trial. A federal district court presumed the correctness of the state court's fact-finding but concluded that the state court did not violate 28 U.S.C. § 2254(d) by denying Petitioner's claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959). The Third Circuit affirmed on different grounds. It read the state court to have found that the prosecutor had maintained "the possibility for later negotiation" with only one witness "based on the witness['s] cooperation." *See* Pet. App. 10a–11a (quoting Pet. App. 150a) (alteration in Third Circuit's opinion).

The question presented is:

Does the decision below, which misstates and fails to afford any presumption of correctness to a state court's factual findings in a habeas case, warrant summary reversal?

PARTIES TO THE PROCEEDING

Petitioner is Robert Gene Rega. Respondents are the Secretary of the Pennsylvania Department of Corrections, the Superintendent of the State Correctional Institution at Greene, the Superintendent of the State Correctional Institution at Rockview, and, based on Petitioner's current place of confinement, the Superintendent of the State Correctional Institution at Phoenix. Petitioner is including the Superintendent of the State Correctional Institution at Phoenix in the caption because Petitioner was transferred to this facility during the pendency of these proceedings, making its Superintendent the appropriate Respondent in this case. *See* Sup. Ct. R. 35.3–35.4; Fed. R. App. P. 43(c)(2).

RELATED PROCEEDINGS

United States Supreme Court:

- *In re Robert Gene Rega*, No. 23-7658 (Oct. 7, 2024)

United States Court of Appeals for the Third Circuit:

- *Rega v. Sec'y, Pennsylvania Dep't of Corr.*, Nos. 18-9002, 18-9003 (Aug. 23, 2024)

United States District Court for the Western District of Pennsylvania:

- *Rega v. Wetzel*, No. 2:13-cv-01781-JFC (Feb. 15, 2018)

Supreme Court of Pennsylvania:

- *Pennsylvania v. Rega*, No. 642 CAP (June 17, 2013)
- *Pennsylvania v. Rega*, Nos. 506, 507 CAP (Oct. 17, 2007), *cert. denied*, *Rega v. Pennsylvania*, No. 07-9161 (2007).

Court of Common Pleas of Jefferson County, Pennsylvania:

- *Pennsylvania v. Rega*, No. CP-33-CR-0000026-2001 (June 24, 2002)
- *Pennsylvania v. Rega*, No. CP-33-CR-0000524-2001 (May 29, 2003)

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Federal Cases

Statutes

Other Authorities

Rules

Treatises

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Rega respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

INTRODUCTION

This Court has summarily reversed when a lower federal court failed to afford the requisite "presumption of correctness" to a state court's factual findings in a habeas case. *See Burden v. Zant*, 498 U.S. 433, 436–38 (1991) (per curiam). That presumption applies to any party which contests such findings. *See id.* at 437–38 (reversing and remanding to apply the presumption against the state). And this Court has summarily reversed on numerous other occasions to "ensure observance of Congress's abridgment of [lower courts'] habeas power" through the Antiterrorism and Effective Death Penalty Act. *See Cash v. Maxwell*, 132 S. Ct. 611, 616–17 (2012) (Scalia, J., dissenting from denial of certiorari). The Court should follow that course here, because the decision below failed to afford the presumption of correctness to a state court's clear factual findings. Twice. In fact, the Third Circuit rewrote a state court's factual findings to reach the decision below.

The state court held a hearing and found that a prosecutor had provided four witnesses who testified at Rega's first-degree-murder trial "no agreements or incentives, *other than* maintaining the possibility for later negotiation based on the witnesses' cooperation." *See* Pet. App. 150a (footnote omitted) (emphasis added); *see also* Pet. App. 183a–87a. Those witnesses (Susan Jones, Raymond Fishel, Shawn Bair, and Michael Sharp) faced their own charges at the time of their testimony, but the jury never heard about the prosecutor's assurances to each one. Three of those witnesses provided the only testimony that Rega had shot the victim, and a fourth provided testimony to support a case for Rega's consciousness of guilt. *See* Pet. App. 236a, 239a. Rega asserted that the Commonwealth violated *Brady v. Maryland*, 373 U.S. 83 (1963), based on the findings that the prosecutor had made such "agreements" with, or provided such "incentives" to, all four witnesses. *See* Pet. App. 150a. Rega asserted that the Commonwealth also violated *Napue v. Illinois*, 360 U.S. 264 (1959), because three of the witnesses testified that the prosecutor had made no "promises" to them in exchange for their testimony, *see* 3 Joint Appendix 421, 465, 550, *Rega v Sec'y, Pennsylvania Dep't of Corr.*, Nos. 18-9002, 18-9003 (3d Cir. filed Dec. 20, 2019).

After Rega exhausted his state-court remedies, a federal district court denied habeas relief on both claims, and the Third Circuit affirmed. But the Third Circuit reached that result only by making two fundamental errors.

First, rather than presume the correctness of the state court's findings that all four witnesses had received favorable commitments from the prosecutor, the Third Circuit rewrote those findings to have been limited to only one witness. According to the Third Circuit, the state court found that the prosecutor only had reached an undisclosed agreement or provided an undisclosed incentive to Bair. Pet. App. 9a–11a. But the state court did not distinguish among the four witnesses when it found the prosecutor "maintain[ed] the possibility for later negotiation based on the witnesses' cooperation." Pet. App. 150a (footnote omitted). Only the Third Circuit made that distinction—and only by taking the state court's clear finding that the prosecutor maintained the possibility of considering the *plural* "witnesses' cooperation," Pet. App. 150a, and rewriting it to have found that the prosecutor did so regarding only a *singular* "witness['s] cooperation," Pet. App. 11a (alteration in Third Circuit's opinion). Worse yet, the decision below never addressed

the fact that the state supreme court's determination was grounded in findings from a lower state court. *See* Pet. App. 183a–87a. No court distinguished among the witnesses as the Third Circuit did. As a result, the decision below was manifestly wrong as a matter of fact and misapplied AEDPA as a matter of law.

Second, the Third Circuit rewrote the state court's opinion yet again by wrongly attributing to it a novel finding that one witness (Bair) had not committed perjury when denying receipt of any promise from the prosecutor. According to the Third Circuit, the state court "determined that Bair did not perjure himself when he denied being made any promises because . . . Rega offered no evidence that the prosecutor made anything other than a vague statement to Bair that his cooperation might be considered in future plea negotiations." Pet. App. 17a–18a. Where does that finding appear in the state court's opinion? Nowhere. The state court never said a word about the truth or falsity of Bair's testimony. It would have been one thing for the Third Circuit to reach a determination about the breadth and meaning of Bair's, Susan Jones's, and Fishel's testimony about whether the prosecutor had made any "promises" to them and whether such a determination warranted AEDPA deference. *See* 3 Joint

Appendix 421, 465, 550. But it was another entirely for the Third Circuit to write a finding about Bair's perjury into the state court's reasoned opinion and then defer to it. That represents another failure to apply AEDPA's well-settled rules.

Only by rewriting the state court's opinion in these two ways did the Third Circuit deny relief. Its *Brady* denial turned on a materiality analysis erroneously limited to the suppressed evidence regarding one witness, rather than all four critical witnesses. And its *Napue* denial turned on improper deference to a finding the state court never made along with a materiality analysis mistakenly limited, again, to only one witness. On both claims, the Third Circuit disregarded a state court's decision-making and issued an opinion that "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." *See* Sup. Ct. R. 10(a). The Court should summarily reverse and remand to ensure the lower court conducts proper *Brady*, *Napue*, and AEDPA analyses based on the facts the state court actually found.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Third Circuit (Pet. App. 1a–24a) is reported at 115 F.4th 235.

JURISDICTION

The Third Circuit, exercising jurisdiction under 28 U.S.C. § 1291 and § 2253, entered judgment on August 23, 2024. Pet. App. 20a–21a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT FEDERAL PROVISIONS

Section one of the Fourteenth Amendment to the United States Constitution provides, in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Title 28 United States Code § 2254(e)(1) provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

1. Robert Rega has always maintained his innocence. The Commonwealth of Pennsylvania charged him with first-degree murder and other offenses for the killing of Christopher Lauth during a robbery

in December 2000. Pet. App. 149a. At Rega's trial, the Commonwealth presented testimony from three others whom it had charged for their roles in the crime: Susan Jones, Raymond Fishel, and Shawn Bair. Pet. App. 4a–5a.[1] Each of these witnesses testified that Rega had shot the victim. Pet. App. 4a–5a. The Commonwealth also called a fourth witness, Michael Sharp, who faced charges related to his alleged hindering of Rega's apprehension as well as an unrelated matter and who testified that Rega had asked for a false alibi. *See* Pet. App. 4a, 67a. Those four witnesses were central to the Commonwealth's case. The state supreme court explained on direct appeal that "all of [Rega]'s co-conspirators identified him as the shooter," 1 Joint Appendix 150, *Rega*, Nos. 18-9002, 18-9003 (3d Cir. filed Dec. 20, 2019), and, according to Sharp's testimony, Sharp initially "had lied at [Rega's] request" about having been "with [Rega] on the night of the" crime, 1 Joint Appendix 152. Apart from their

[1] As part of Rega's own defense, he called Stanford Jones to the stand, who had confessed to being the shooter in a pretrial letter to the Commonwealth. Pet. App. 30a–31a. Stanford Jones retracted that confession and testified that Rega had been the shooter, Pet. App. 30a–31a, after which both the defense and the Commonwealth questioned Stanford Jones's credibility, *see* Pet. App. 31a n. 7; 3 Joint Appendix 673–75, 680–81, 689.

testimony, the Commonwealth presented evidence regarding Rega's behavior before and after the crime. *See* 1 Joint Appendix 153.

Rega challenged the credibility of the three co-conspirators (Susan Jones, Fishel, and Bair). Rega's "[c]ounsel sought to show that their testimony was inconsistent with prior statements to the police and that their own criminal charges provided them a motive to testify." Pet. App. 5a. To bolster their credibility, the prosecutor elicited testimony that they had not received any "promises" in exchange for their testimony. *See* 3 Joint Appendix 421, 465, 550. Specifically, the prosecutor asked Susan Jones whether she had "been made any promises in exchange for [her] testimony[]" and whether the prosecutor had "told [her] anything about the way [she] w[ould] be treated[.]" 3 Joint Appendix 421. Susan Jones answered both questions: "No." 3 Joint Appendix 421. Bair similarly answered, "No," when asked whether "[any] promises [had] been made to [him] about [his] testimony[.]" 3 Joint Appendix 465. And Fishel agreed that he, too, had been "charged with serious crimes" before answering, "No," when asked whether "anybody made [him] any promises in exchange for [his] testimony[.]" 3 Joint Appendix 550.

Closing arguments accepted as true that the Commonwealth had not promised the witnesses anything. Rega argued that "each one want[ed] to please the Commonwealth with the testimony that they ha[d] offered" and were "obviously thinking I want the Commonwealth to give me a favorable plea agreement or treat me in an otherwise favorable way." Pet. App. 5a (quoting 3 Joint Appendix 658). And Rega relied on a "'polluted source' instruction that the trial court went on to give" regarding the fact that each witness "'may [have] testif[ied] falsely in the hope of obtaining favorable treatment.'" Pet. App. 6a (quoting 3 Joint Appendix 659–60). The prosecutor responded in his own closing that Bair, Fishel, and Stanford Jones "ha[d] admitted serious, serious crimes" but that "not a single one of them took the stand . . . with a promise from the Commonwealth." 3 Joint Appendix 688. And the prosecutor argued that Susan Jones "ha[d] nothing in this," had not been accused of murder by anyone, and had no "reason when she took th[e] stand to point the finger at the wrong person[.]" 3 Joint Appendix 715.

Rega's counsel had little to say in closing about Sharp's testimony. Counsel asserted that Sharp had established nothing more than the fact that Sharp went to Rega's "house three to four nights a week" and that

Rega's statement to Sharp "was in the form of weren't you at my house on such and such a night because you are there three or four nights every other week." 3 Joint Appendix 677. In response, the prosecutor reiterated Sharp's testimony about Rega asking for an alibi "if the police come looking." 3 Joint Appendix 701.

The jury found Rega guilty of first-degree murder and, after a sentencing phase, sentenced him to death. *See* Pet. App. 6a.

2. Rega unsuccessfully sought relief in the state courts. He first did so through a direct appeal, but the state supreme court affirmed the judgment. *See* Pet. App. 6a.

Rega then unsuccessfully sought relief through state post-conviction proceedings. He raised, in relevant part, a *Brady* claim based on evidence that the Commonwealth's four critical witnesses (Susan Jones, Fishel, Bair, and Sharp) had sought lenient treatment in their own criminal cases and that the prosecutor had responded to their hopes by telling them that he, at least, would consider their cooperation against Rega in future negotiations. *See* Pet. App. 6a, 149a–50a. A state trial-level post-conviction court denied relief after finding that the prosecutor did not "foster the notion that any of [the witnesses] would receive any

level of leniency, let alone a specific deal, in exchange for their cooperation." Pet. App. 187a (footnote omitted). That lower state court summed up its view of the *Brady* claim as follows: "The clear picture that emerged from the testimony of" attorneys for Bair, Stanford Jones, Susan Jones, and Sharp "was that [the prosecutor] did not deviate in this case from his established policy that plea deals would be neither offered nor negotiated for co-defendants wishing to cooperate in a fellow co-defendant's prosecution until after the latter's charges had been resolved." Pet. App. 183a. Apart from particular deals or degrees of leniency, the court found that the prosecutor "conveyed nothing more [to Susan Jones, Bair, and Fishel] than that he would 'probably' take any cooperation into account when later considering plea deals." Pet. App. 187a. The court made the same findings regarding Sharp and Stanford Jones: The prosecutor "said nothing more than that should Sharp and Stan Jones testify, [the prosecutor] would consider their cooperation when it came time to assemble a plea deal, and the attorneys conveyed that to their clients." Pet. App. 183a.

The state supreme court affirmed the lower court's denial of relief on Rega's *Brady* claim. It adopted the finding that the prosecutor

"enforced a policy that plea agreements would be neither offered nor negotiated with witnesses charged with crimes until their cooperation was fully realized." Pet. App. 150a. And it decided that the "the record plainly support[ed] the [trial] court's finding of no agreements or incentives, other than maintaining the possibility for later negotiation based on the witnesses' cooperation." Pet. App. 150a. In a footnote, the state court added that Rega's "attorneys were well aware of this incentive, as they questioned various of the Commonwealth's witness[es] about their desires for leniency in their own criminal cases." Pet. App. 150a n. 3. Based on those findings, the state court decided that Rega failed to prove his *Brady* claim.

Rega also raised a *Napue* claim based on the prosecutor's statements and three witnesses' testimony that the prosecutor had not made them any "promises." *See* 9 Joint Appendix 3502–05, *Rega*, Nos. 18-9002, 18-9003 (3d Cir. filed Dec. 20, 2019). The state trial-level post-conviction court decided that, "[h]aving not fostered any expectations of leniency, the Commonwealth also did not elicit false testimony or misrepresent the facts at trial." Pet. App. 187a. It added that, "[w]hen [the prosecutor] questioned Rega's co-defendants and gave his closing

argument, he was not privy to their private thoughts or their discussions with defense counsel" and "knew, though, that he had never promised or suggested any degree of clemency." Pet. App. 187a. On appeal from that ruling, the state supreme court cited *Napue* and described Rega's claim that "the Commonwealth failed to disclose alleged verbal understandings with prosecution witnesses." JA182–83. But the state supreme court ultimately affirmed the lower court's factual finding that the prosecutor only was "maintaining the possibility for later negotiation based on the witnesses' cooperation" and denied relief without providing reasoning on any of the elements of Rega's *Napue* claim. *See* Pet. App. 150a (footnote omitted).

3. On April 14, 2014, Rega timely filed a federal habeas corpus petition raising, in relevant part, the *Brady* and *Napue* claims. 11 Joint Appendix 4270–4344, *Rega*, Nos. 18-9002, 18-9003 (3d Cir. filed Dec. 20, 2019). The district court denied relief on the merits and declined to issue a certificate of appealability. Pet. App. 42a–86a, 145a.[2] The district court

[2] The district court granted penalty-phase relief in connection with a separate claim, a determination from which the Commonwealth did not appeal. *See* Pet. App. 6a–7a & n. 2.

applied a presumption of correctness to the state court's fact-finding and explained that, "[a]t most, as the [state supreme court] found and [the] Commonwealth acknowledge[d], the prosecution conveyed only that there was the 'possibility for later negotiation based on the witnesses' cooperation.'" Pet. App. 76a–77a (quoting Pet. App. 150a). And the district court rejected an argument that the state court had not adjudicated the merits of Rega's *Napue* claim—reasoning that the state supreme court had rejected that claim "for the same reason [the state supreme court] denied his suppressed-evidence claims: because [the state supreme court] found that the [lower state court's] factual determinations precluded relief." Pet. App. 75a (footnote omitted). The district court then decided that the state court's denial of Rega's *Brady* and *Napue* claims based on that fact-finding warranted deference under § 2254(d)(1), because the "understanding" between the witnesses and the Commonwealth "was obvious to Rega's defense," Pet. App. 77a, and Rega knew that "they all had a clear incentive to cooperate with the Commonwealth," which made cases like *United States v. Bagley*, 473 U.S. 667 (1985), distinct, Pet. App. 79a.

4. Rega appealed the district court's denial of relief, and the Third Circuit issued a certificate of appealability on both claims at issue here. *See* Pet. App. 6a–7a. But the Third Circuit ultimately affirmed on different grounds than the district court.

According to the Third Circuit, Bair, Fishel, and Susan Jones "each acknowledged that they faced their own criminal charges arising from the incident but maintained that the prosecutor had not made any 'promises' about how those charges would be resolved." Pet. App. 4a (citing 3 Joint Appendix 421, 465, 550). And the Third Circuit recognized that the prosecutor had "told Bair that his assistance 'probably . . . would be taken into account' in any future plea deal." Pet. App. 10a (quoting 5 Joint Appendix 1248, *Rega*, Nos. 18-9002, 18-9003 (3d Cir. filed Dec. 20, 2019)). The Third Circuit decided, though, that the "nature of [the state supreme] court's ruling did not require it to make any finding" regarding whether "the prosecutor made this statement to all four witnesses." Pet. App. 11a n. 4. And, according to the Third Circuit, the state supreme court "did not" make any such finding. Pet. App. 11a n. 4.

From there, the Third Circuit imposed a burden of proof on Rega to show that the prosecutor had made the statement to the other three

witnesses. The Third Circuit found that "Rega ha[d] shown only that the prosecutor made this statement to Bair." Pet. App. 10a. And the Third Circuit decided that the single statement to Bair "clearly was not material" under *Brady* by reasoning that "Bair was one of *four* participating witnesses who . . . unequivocally testified that [Rega] was the shooter," the prosecutor's statement to Bair was "noncommittal," and "other trial evidence tied Rega to the murder weapon." Pet. App. 11a–14a (footnote omitted) (emphasis in original).

The Third Circuit took a similar approach to reject Rega's *Napue* claim. The Third Circuit applied the same reasoning that "Rega ha[d] shown only that the prosecutor made [the pertinent] statement to Bair." Pet. App. 16a. And the Third Circuit read the state supreme court to have "determined that Bair did not perjure himself when he denied being made any promises because . . . Rega offered no evidence that the prosecutor made anything other than a vague statement to Bair that his cooperation might be considered in future plea negotiations." Pet. App. 17a–18a. And the Third Circuit deferred to that "determination" under § 2254(d)(1). Pet. App. 18a. Alternatively, the Third Circuit assumed

Bair's testimony "was 'false'" and denied relief on the basis that Bair's false testimony was not material by itself. *See* Pet. App. 18a–19a.

REASONS FOR GRANTING THE WRIT

The Third Circuit overstepped the bounds of a federal court's proper role when presented with a state court's factual findings in a habeas case. The presumption of correctness has long been established as a constraint on federal habeas courts. But the decision below disregarded it by rewriting the state court's findings—rendering what had been findings about a prosecutor's commitments to all four critical witnesses who testified against Rega to simply a finding about one. After that, the Third Circuit wrote a finding into the state court's opinion about whether that one witness had committed perjury by denying that the prosecutor had made any promises in exchange for the witness's testimony against Rega. These two rewrites led to the Third Circuit's denial of Rega's *Brady* and *Napue* claims. And they call out for this Court's intervention to ensure that the Third Circuit follows the well-established and deferential standard of review federal courts owe to state courts' fact-finding.

1. The decision below flouted longstanding precedent by misstating the state court's fact-finding and failing to afford any presumption of correctness to the facts the state court actually found—that the

prosecutor had reached "agreements" or provided "incentives" to multiple witnesses (plural). *See* Pet. App. 150a.

Contrary to the decision below, the Third Circuit needed to apply the presumption of correctness that governs federal-court review of state-court fact-finding, and the Commonwealth (not Rega) bore the burden of overcoming that presumption. When a state court makes "a determination of historical fact," that determination is "'presumed to be correct' for purposes of a federal habeas corpus proceeding." *Burden*, 498 U.S. at 436–37 (quoting 28 U.S.C. § 2254(d) (1966)) (footnote omitted). And that presumption applies a burden on whoever contests the state court's findings. *See id.* (applying the burden against the state); *see also* § 2254(e)(1) (stating that "a determination of a factual issue made by a State court shall be presumed to be correct" before stating that "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence"); Hertz & Liebman, 1 Federal Habeas Corpus Practice and Procedure § 20.2 n. 45 (collecting examples of the presumption being applied "equally to all state court factfindings, regardless of which party they support"). Rather than apply

this presumption and hold the Commonwealth to its burden to overcome it though, the Third Circuit disregarded it altogether.

The Third Circuit rewrote the state court's fact-finding from what had been a finding that the prosecutor reached an agreement or understanding with all four witnesses to a finding limited to only one witness. The Third Circuit limited its analysis to Bair only by changing the state court's use of the plural "witnesses' cooperation" to the singular—characterizing the state court as having decided "that the prosecutor's statement to Bair" "was nothing more than 'the possibility for later negotiation based on the witness['s] cooperation.'" Pet. App. 11a (quoting Pet. App. 150a) (alteration in Third Circuit's opinion). The Third Circuit explained its editing by reasoning that, "[a]lthough [Rega] contends that the [state supreme court] found that the prosecutor made this statement to all four witnesses, the nature of that court's ruling did not require it to make any finding on this point, and it did not." Pet. App. 11a n. 4. That reasoning blinks reality. The state supreme court absolutely made this finding: The state supreme court decided that "the record plainly support[ed]" a "finding of no agreements or incentives, *other than* maintaining the possibility for later negotiation based on the

witnesses' cooperation." Pet. App. 150a (emphases added) (footnote omitted). And whether the state supreme court needed to have reached this determination was neither here nor there: Once the state court made it, the Third Circuit had to defer to it. The presumption of correctness undoubtedly applied. And the decision below did not even hint that the state could come close to overcoming it.

Looking through to the lower state court's fact-finding confirms that the Third Circuit misstated what the state court had found and failed to presume its findings were correct. When making the critical findings which the state supreme court affirmed and on which Rega later relied, the lower state court referred to all four witnesses (not just one, let alone Bair). The lower court specifically found that the prosecutor "said nothing more than that should Sharp and Stan Jones testify, [the prosecutor] would consider their cooperation when it came time to assemble a plea deal, and the attorneys conveyed that to their clients." Pet. App. 183a. Then, regarding Susan Jones, Bair, and Fishel, the state court found that the prosecutor "conveyed nothing more than that he would 'probably' take any cooperation into account when later considering plea deals" (plural). Pet. App. 187a. The phrase "nothing

more than" means "only," i.e., the prosecutor conveyed only that he would probably take any cooperation into account when later considering plea deals. *See Nothing more than*, Cambridge Advanced Learner's Dictionary & Thesaurus, *available at* https://dictionary.cambridge.org/us/dictionary/english/nothing-more-than; *Nothing more than*, Collins COBUILD Advanced Learner's Dictionary, *available at* https://www.collinsdictionary.com/us/dictionary/english/nothing-more-than. On top of that, the lower court assessed credibility and cited testimony from Bair's, Stanford Jones's, Susan Jones's, and Sharp's attorneys about the prosecutor's "established policy" of declining to provide concrete "deals" until after "a fellow co-defendant's . . . charges had been resolved." *See* Pet. App. 183a–88a.

If that were not enough, another court read the state court to have made these findings with regard to all four witnesses too: the federal district court. The federal district court took as a given that the state court's findings applied to all four witnesses, not just one, and presumed those findings were correct. *See* Pet. App. 77a, 79a. Only the Third Circuit changed course. To put it differently, the Third Circuit "reached a conclusion which was in conflict with the conclusion reached by every

other state and federal judge after reviewing the exact same record." *See Sumner v. Mata*, 449 U.S. 539, 548–49 (1981).

Ultimately, the Third Circuit's rewrite calls for summary reversal. This Court should reverse and remand for a proper analysis of Rega's *Brady* claim based on the findings the state court actually made. *See Burden*, 498 U.S. at 438 (summarily reversing and remanding for a court of appeals to apply the presumption of correctness in the first instance); *see also Dye v. Hofbauer*, 546 U.S. 1, 3–4 (2005) (per curiam) (summarily reversing and remanding after a federal court erroneously concluded that, first, a habeas petitioner had not based his prosecutorial-misconduct claim, "at least in part, on a federal right" in earlier state-court proceedings and, second, the claim was "too vague and general" in his federal petition).

2. The Third Circuit repeated its mistake when denying Rega's second claim that, even if the Commonwealth did not violate *Brady* in connection with all four witnesses, it violated *Napue* by knowingly eliciting false testimony about the prosecutor's promises to three of them. When adjudicating this claim, the Third Circuit continued to disregard the state court's findings about the prosecutor's statements to two

witnesses in addition to Bair (Susan Jones and Fishel). Then, the Third Circuit rewrote the state court's opinion yet again: this time, to include a finding that the state court never made—"that Bair did not perjure himself when he denied being made any promises." *See* Pet. App. 17a–18a. The Third Circuit then deferred to that finding. *See* Pet. App. 17a–18a. This approach to Rega's *Napue* claim failed to afford the proper deference to the state court's fact-finding, too, and independently calls for summary reversal.

The state court reached no finding of fact or conclusion of law regarding whether Bair—and Bair alone—testified falsely. All the state court did with regard to Rega's *Napue* claim was cite *Napue* at one point and, later, deny relief based on the same factual findings underlying its rejection of Rega's *Brady* claim. *See* Pet. App. 150a.

Yet the Third Circuit described the state court's opinion in a way that cannot be squared with any fair reading of it. According to the decision below, because "Rega offered no evidence that the prosecutor made anything other than a vague statement to Bair that his cooperation might be considered in future plea negotiations," the state court reasonably decided "that Bair did not perjure himself when he denied

being made any promises." Pet. App. 17a–18a. But the state court never said a word about whether Bair (or Susan Jones or Fishel) had testified falsely at Rega's trial that the prosecutor had not made any promises to them. *See* 3 Joint Appendix 421, 465, 550. The state court rejected Rega's *Napue* claim based on the very same fact-finding that led to its denial of relief on Rega's *Brady* claim. *See* Pet. App. 150a. And that denial did not involve—let alone turn on—a state-court finding regarding the falsity of Bair's (and only Bair's) testimony. By failing to account for the state court's findings (about all the witnesses) and then purporting to defer to a finding that court never made, the decision below failed to apply the presumption of correctness to the court's findings and deferred to a finding the court simply had not made. *See Brumfield v. Cain*, 576 U.S. 305, 323 (2015) (explaining that, because a "state trial court never made any finding" on a particular point, there was "no determination on that point to which a federal court must defer" under AEDPA); *Wilson v. Sellers*, 584 U.S. 122, 125 (2018) (explaining that, under § 2254(d), "when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion," "a federal habeas court

simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable").

Apart from misstating the state court's actual fact-finding, the Third Circuit characterized the necessarily factual issue of whether Bair committed perjury as if it presented a legal question, but that view cannot be squared with the state court's reasoning either. The decision below purported to apply deference under § 2254(d)(1) to what it viewed as the state court's "reasonable determination" "that Bair did not perjure himself . . . because . . . Rega offered no evidence that the prosecutor made anything other than a vague statement to Bair that his cooperation might be considered in future plea negotiations." Pet. App. 17a–18a. Even if the state court had made that determination, § 2254(d)(1) would not have applied to it, because the provision does not apply to purely factual determinations. *See* § 2254(d)(1) (asking whether an "adjudication of [a] claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law"). And whether a witness "actually perjured himself and the government knew or should have known of his perjury" "are factual determinations" subject to § 2254(d)(2) and § 2254(e)(1), not legal ones that would trigger

§ 2254(d)(1). *See Lambert v. Blackwell*, 387 F.3d 210, 242, 249 (3d Cir. 2004); *see also Harding v. Walls*, 300 F.3d 824, 828 (7th Cir. 2002) (recognizing that a state court's "determination that [a witness] did not perjure himself" answered a factual question by asking whether it "was unreasonable in light of the record," i.e., under § 2254(d)(2), not (d)(1)).

Nor could the Third Circuit have identified any state-court legal determination about the meaning of the word "promise." Because the state court issued a "reasoned opinion," the Third Circuit needed to "simply review[] the specific reasons given by the state court and defer[] to those reasons if they [we]re reasonable." *See Wilson*, 584 U.S. at 125. The state court did not reach any legal conclusion about whether each witness's testimony denying that anyone had made any "promises" to them included the type of assurances the state court found the prosecutor had, in fact, made. *See* 3 Joint Appendix 421, 465, 550. For good reason. That testimony was false on any fair reading of the same record that led the state court to find that the prosecutor had "maintain[ed] the possibility for later negotiation based on the witnesses' cooperation" against Rega. *See* Pet. App. 150a (footnote omitted); *see also Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (per curiam) (identifying a due process

violation after a prosecutor knowingly elicited "testimony, taken as a whole, [that] gave the jury [a] false impression" which was material to the defense theory at trial). And the state court never defined "promise" as a matter of law in any way that could have triggered deference under § 2241(d)(1).

In sum, just as the Third Circuit did with Rega's *Brady* claim, the court rejected his *Napue* claim only by rewriting the state court's opinion and failing to presume the state court's actual findings were correct.

3. These errors call for this Court to exercise its power to summarily reverse. The Third Circuit twice misstated a state court's factual findings to reach the decision below and failed to afford those findings the presumption of correctness they deserved. This type of error has warranted summary reversal in the past. *See Burden*, 498 U.S. at 436–38. And it warrants it again here. After all, the Court "may grant review if [a] lower court conspicuously failed to apply a governing legal rule." *See Salazar-Limon v. City of Houston, Tex.*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in the denial of certiorari). And this case is not "simply a run-of-the-mine case in which an appellate court had reached an opposite conclusion from a trial court in a unitary judicial system."

See Mata, 449 U.S. at 543. "Instead, this case presents important questions regarding the role to be played by the federal courts in the exercise of the habeas corpus jurisdiction . . . ." *Id.*

4. The Third Circuit's errors in reviewing the state court's opinion drove the ultimate disposition to deny habeas relief, confirming the need for a remand for the Circuit to apply the correct standard of review to the state court's findings. Taking those findings as they were and applying the presumption of correctness to them demanded a pair of materiality analyses under *Brady* and *Napue* that the Third Circuit never conducted. Instead, the decision below denied habeas relief "because the evidence and testimony in question"—i.e., the evidence and testimony only regarding Bair—"were not material to Rega's murder conviction." *See* Pet. App. 3a. This Court should reverse to ensure the Third Circuit conducts complete *Brady* and *Napue* analyses while giving the state court's findings regarding all four witnesses the deference they are due.

By limiting its review of materiality for purposes of Rega's *Brady* claim to only one witness, the Third Circuit disregarded the fact that the only Commonwealth witnesses to tie Rega directly to the murder all had received undisclosed assurances from the prosecutor before trial. The

decision below properly applied de novo review to the materiality issue. *See* Pet. App. 11a n. 5. But it improperly limited that review to Bair, deciding that the suppressed evidence limited to him was not material because he "was one of *four* participating witnesses who knew Rega and who unequivocally testified that [Rega] was the shooter." Pet. App. 11a (emphasis in original). That is, by failing to afford the presumption of correctness to the fact that the prosecutor provided all four witnesses the same undisclosed assurances, the Third Circuit failed to recognize that the linchpin of the Commonwealth's case for murder—a set of four testifying witnesses—would have been knocked out of position but for the prosecutor's suppression.

To the extent the Third Circuit reasoned that the nature of the suppressed evidence "would not have significantly undermined even Bair's own testimony," because "the jury already knew that" "Bair had a general motive to testify in the hope of receiving leniency on his own charges," the Third Circuit missed the point. *See* Pet. App. 12a. It is one thing for a juror to hear that a witness hopes to obtain leniency from a prosecutor. It is another entirely to hear that a prosecutor with power over that witness's life and liberty responded to that hope by saying, in

effect: "[B]ased on" your "cooperation" against Rega, I will "maintain[] the possibility for later negotiation" in your pending criminal cases. *See* Pet. App. 150a (footnote omitted). The latter happened here. Four times. And it created an inducement or expectation in each critical witness for a later reward. Everyone knew that all four witnesses were looking for leniency. *Cf.* Pet. App. 150a n. 3 (state court's finding that Rega's "attorneys were well aware of this incentive, as they questioned various of the Commonwealth's witness[es] about their desires for leniency in their own criminal cases"). Yet no one other than the Commonwealth and the witnesses knew that the prosecutor had given them reason to think they would find what they were looking for after they testified against Rega. Rega is entitled to a proper *Brady* materiality analysis regarding all four witnesses. But the Third Circuit's glaring errors denied him one.

The same errors led to the same truncated materiality analysis on Rega's *Napue* claim. *Napue* brings an even lower bar for materiality than *Brady*. *See* Pet. App. 17a (asking whether "there exists 'any reasonable likelihood that the false testimony could have affected the verdict'" (quoting *Lambert*, 387 F.3d at 242). And the Third Circuit applied de novo

review to this issue. *See* Pet. App. 18a n. 8.[3] A proper analysis based on the state court's findings would have considered the effect on the jury of learning that, contrary to Susan Jones's, Bair's, and Fishel's sworn testimony about not receiving any promises, the prosecutor had assured all three of "the possibility for later negotiation based on the witnesses' cooperation." *See* Pet. App. 150a (footnote omitted). Yet, just as it had done when assessing *Brady* materiality, the Third Circuit limited its review to Bair and decided that "Bair's disavowal of any 'promises' was not material." Pet. App. 16a (footnote omitted). That decision turned on the threshold fact that "Bair was merely one of four witnesses who identified Rega as the shooter," just as the *Brady* decision had. *See* Pet. App. 18a. Yet the Third Circuit never addressed the materiality of exposing the truth not only once, but rather three different times from three critical witnesses.

---

[3] Although the Third Circuit separately decided to defer to the state court's "reasonable determination" "that Bair did not perjure himself when he denied being made any promises," Pet. App. 17a–18a, that alternative basis for denying relief on the *Napue* claim cannot withstand scrutiny for the reason discussed above: The state court reached no such determination to which the Third Circuit could defer.

Because the Third Circuit rewrote the state court's opinion to avoid presuming the correctness of a state court's fact-finding regarding a prosecutor's undisclosed assurances to four witnesses before Rega's trial, this case calls for summary reversal and a remand to apply the proper standard in the first instance. This Court has taken this course before when a federal court "erroneous[ly] fail[ed] to credit [a] state trial court's finding" in a habeas case. *See Burden*, 498 U.S. at 438. And it should do so again here.

CONCLUSION

This Court should summarily reverse the decision below.

Respectfully submitted,

/s/Sonali Shahi
Sonali Shahi
Counsel of Record
Assistant Federal Defender
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
Sonali_Shahi@fd.org
(215) 928-0520

Counsel for Petitioner

Dated: November 20, 2024