IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DANIEL GWYNN, **Petitioner,**	:	**CIVIL ACTION**
v.	:	**NO. 08-5061 (KSM)**
COMMISIONER JEFFREY BEARD, et al., **Respondents.**	:	

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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I. INTRODUCTION

In November 1994 someone set fire to 4504 Chestnut Street, an abandoned apartment building in West Philadelphia. A squatter living in the building, Marsha Smith, died in the fire. No eyewitnesses saw who did it. But two other squatters who had been living in the building, John Antrom and Donald Minnick, later testified that Gwynn, who they called "Rick," had assaulted and threatened them the day before the fire. Based on their testimony and a dubious confession, Gwynn was convicted of first-degree murder and sentenced to death.

Critically for the outcome of Gwynn's claim here, the witnesses allegedly told detectives that they identified Gwinn as "Rick" from photo arrays that were part of a separate murder investigation. But those photo arrays were never produced to Gwynn prior to trial—a prosecutor told the court in a pre-trial hearing that the arrays had been prepared for a "completely unrelated homicide," and that they no longer existed.

For nearly 30 years after Gwynn's conviction, the Commonwealth maintained that the other homicide was unrelated to Smith's murder and that the photo arrays did not exist.

But, in the course of these federal habeas proceedings Gwynn's court-appointed counsel discovered—and the Commonwealth was forced to disclose—the existence of black-and-white photo arrays in the police files, as well as critical information about the other homicide. This previously suppressed evidence points to a plausible alternative suspect for Marsha Smith's murder, not known to Gwynn or his counsel at the time of trial: Gary Lupton. As explained in Gwynn's habeas petition, the previously suppressed evidence reveals, among other things, that:

- The photo arrays in the police files did not include Gwynn's picture;
- The other homicide was a murder committed in the same building and before the same witnesses;
- The witnesses who testified against Gwynn had testified against the perpetrator in the other homicide, Lupton, three days before the fatal fire in this case;
- Lupton had threatened to have his associates kill the witnesses if they cooperated against him; and
- The witnesses had testified in Lupton's trial that Lupton, not Gwynn, was known as "Rick" in the neighborhood.

Based on this suppressed evidence, Gwynn now claims (among other things) in this habeas petition that the prosecution violated his constitutional rights by not disclosing the photo arrays or the alternative suspect evidence prior to his trial. *See Brady v. Maryland*, 373 U.S. 83 (1963).

After a careful review of the record and the relevant federal precedent, the Commonwealth is constrained to concede that its suppression of the photo arrays and the alternative suspect evidence violated *Brady* and that Gwynn is entitled to a new trial. The crux of Gwynn's claim is whether the suppressed evidence undermines confidence in the verdict—in *Brady* terms, whether it was material. The Commonwealth now believes, for reasons explained in this response, that it is just as likely that Lupton's associates set the deadly fire as it is that Gwynn did. If the jury had been told that the witnesses did not, in fact, identify Gwynn from a photo array, that they had testified against a different person who they knew as "Rick," and that that person had threatened to kill them if they cooperated with the police three days before the fire was set, there is a reasonable probability that one juror would have harbored a reasonable doubt as to Gwynn's guilt. The suppression of the photo arrays and the alternative suspect evidence violated Gwynn's due process rights and entitles him to habeas relief. That Gwynn signed a confession does not alter the analysis here. That confession, as explained below, is so at-odds with the available physical evidence in this case that Respondents believe it is unworthy of belief and does not defeat the materiality of the suppressed evidence.

Respondents do not arrive at this conclusion lightly. But Respondents are mindful that "[p]rosecutors have a special duty to seek justice." *Connick v. Thompson*, 563 U.S. 51, 65–66 (2011). A prosecutor's "interest 'in a criminal prosecution is not that he shall win a case, but that justice shall be done.'" *Dennis v. Secretary, Pa. Dept. of Corrs.*, 834 F.3d 263, 290 (3d Cir. 2016) (en banc) (internal alteration omitted) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); *see also* Explanatory Comment 1, Pa. R. Prof. Conduct 3.8 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). The Commonwealth's position here is the product of a thorough review of the record, coupled with "careful consideration" in light of its "primary authority for defining and enforcing the criminal law." *Kennedy v. Superintendent Dallas SCI*, 50 F.4th 377, 382 (3d Cir. 2022) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)).

This response first reviews, in some detail, what happened during the investigation and Gwynn's trial, as well as the relevant appellate and post-conviction proceedings in state court. Next, this response explains that Gwynn's claims are properly before the Court despite their procedural default. Although the state courts concluded in *dicta* that some of the alternative suspect evidence was not material under *Brady*, that conclusion was contrary to and an unreasonable application of clearly established federal

law, and 28 U.S.C. § 2254(d) does not bar relief. Finally, this response analyzes *de novo* why, if the alternative suspect evidence had been disclosed to Gwynn prior to trial, there is a reasonable probability that the outcome of the trial would have been different.

Gwynn has demonstrated that his right to due process was violated, and he is due habeas corpus relief. This Court should grant a conditional writ of habeas corpus on Gwynn's Ground One and order that he be retried within 180 days or released from custody.[1]

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The crime

In the early morning hours of November 20, 1994, an abandoned apartment building located at 4504 Chestnut Street in West Philadelphia (the "Building") was set ablaze. The Building was home to several squatters, one of whom, Marsha Smith, died of soot and smoke inhalation. Five others sustained injuries. Two of the squatters, John Antrom and Donald Minnick, told the police that Gwynn had threatened them the day before the fire.

[1] In the interests of judicial economy, Respondents only address Gwynn's *Brady* claim. Gwynn is entitled to complete relief on that claim, and the disposition of that claim will moot the remainder of Gwynn's petition. Should the Court wish to hear from Respondents regarding Gwynn's remaining claims, Respondents respectfully request the opportunity to supplement this response.

Gwynn was arrested ten days later on outstanding bench warrants related to thefts, and he had a number of matches and lighters in his knapsack. He was ultimately charged with setting the fire that killed Marsha Smith.

B. The investigation

1. The witness statements

Investigators took statements from five witnesses from the Building on the day of the fire: John Antrom, Donald Minnick, Larry Hawkins, Terry McCullough, and Rosalee Jones.

John Antrom told the police that he lived on the third floor of the Building with his brother, Terry McCullough, and that Donald Minnick and the decedent lived across the hall. On the morning of the fire, his other brother, Larry Hawkins, who lived on the fourth floor with Rosalee Jones, was yelling about a fire. According to Antrom, a man he called "Rick" came to the apartment building the day before the fire and demanded sex from the decedent. Antrom and Donald Minnick fought with Rick, and he left the building unsatisfied. As Rick was leaving, he reportedly threatened the squatters who expelled him. Antrom reported that he did not know Rick's last name or where he lived, but he knew that Rick had been on probation and that he had a friend who worked at the carwash on 46th and Chestnut.

He described Rick as around 5'9, 170 1bs with short hair and a dark complexion. About three hours later, he allegedly identified Gwynn as Rick from a photo array.

Donald Minnick, who also testified, told the police a similar story: he and his girlfriend, the decedent, were awoken by Larry Hawkins at around 6am on the day of the fire. Minnick had a couch blocking his front door, so he escaped through his window and jumped down to safety. He purportedly had the couch there to keep Rick from coming in. Minnick told the police that Rick used to live there and still came by every now and then to get high. Minnick told largely the same story that Antrom did, *i.e.*, that Rick came by early in the morning the previous day to demand sex from the decedent and got into a fistfight with Minnick and Antrom, after which Rick left the building and threatened the squatters. Minnick reported that Rick knew Glenn Taylor, a man who was murdered the year before in the Building. Minnick described Rick as 5'6 with a medium complexion, somewhat heavy with short hair and a light mustache. He also allegedly identified Gwynn as Rick from the photo arrays.

Terry McCullough, Antrom's brother and roommate who lived on the third floor of the Building, said a man called Rick was at the building the previous day and got into a fight with Antrom and Minnick. In

McCullough's telling, the fight lasted "about an hour," before Rick got weak and ran from the building while saying threatening things. McCullough didn't know anything about Rick but called him a "thief" and thought he was on probation. Three hours after his interview, he was presented with a photo array and allegedly selected Gwynn as Rick. He did not testify at trial.

Larry Hawkins and Rosalee Jones, who lived together on the fourth floor of the Building, told police that they were awoken by an alarm on the morning of the fire and saw smoke. After seeing flames on the third floor, they escaped through their window and climbed down to safety. They did not see the fight between Rick and the others the day before the fire and were not shown a photo array. Jones reported that she knew "Rick" as "the bully of the building" and that he had a friend at the car wash at 46th and Chestnut. They did not testify at Gwynn's trial.

Gwynn's cousin, Michelle Dotson, told police that Gwynn's name is "so bad around the neighborhood" that if anything happens he gets blamed for it. She did not testify at Gwynn's trial.

"Rick" is not listed as an alias on Gwynn's rap sheet. His criminal history contains only thefts and no record of arson. And none of the squatters said they saw Rick the morning of the fire.

2. The photo arrays

As noted above, Donald Minnick, Terry McCullough, and John Antrom allegedly told detectives that the man who threatened them was in a photo array that other officers had previously shown them during an earlier investigation into a different homicide. They each reportedly chose Gwynn from that prior array. However, at a pre-trial hearing, both the prosecutor and defense counsel told the court that they had not seen the photo spread themselves. N.T., 10/25/1995 at 116–17. The prosecutor also told the court that the spread was viewed as part of a separate, "completely unrelated homicide," that the squatters told the police the man who threatened them was part of the prior photo spread, and that the spread was no longer in existence. *Id*. at 117. According to the prosecutor, Gwynn's photo was allegedly a "filler" photo in the spread containing the "prime suspect" in the other murder, Gary Lupton. *See* N.T., 10/25/1995 at 113.

3. Gwynn's statement

On the day of his arrest, Gwynn made a statement to the lead detectives investigating the arson, Detectives Dougherty and Mangoni. In his statement, Gwynn admitted to having an argument with the squatters the day before the fire but could not remember what the argument was about or anything else about it. He then told the police that he found some plastic

containers in other peoples' trunks and some gasoline and took them. He said he went back to the Building and tried to apologize to the squatters, but they refused to speak with him and started calling him names. At that point, according to Gwynn's statement, he dropped the gas can on the floor in the hallway of the third floor and then accidentally dropped the match he was using to light his crack pipe and the gas ignited quickly. He then ran down the stairs and out the front door. He said he left the container of gas that he dropped at the scene. When pressed for more details, Gwynn said he just "shook out" the gas and watched it go down the steps from the third floor to the second floor and then he lit another match on the first floor and ignited some trash.

4. The arson evidence

The Philadelphia Fire Marshal's report indicates that the fire originated in the hallway areas of the third floor and spread to the stairs and landing up to the fourth floor, ultimately causing the roof of the Building to collapse. The most extensive fire damage was in front of the two third floor apartments. The Fire Marshal determined that the fire was started by a liquid accelerant used over a large area, particularly in front of both third-floor apartments, and that its ignition was not accidental. There was no evidence of fire down the stairs to the second floor or on the first floor.

C. The suppression hearing

Before trial, Gwynn moved to suppress the statement he made to detectives, arguing that he did not receive *Miranda* warnings and that the statement was generally involuntary.

At the suppression hearing, Detective Dominic Mangoni, who took Gwynn's statement, testified that he properly Mirandized Gwynn, that Gwynn did not request an attorney, and that Gwynn was not coerced into giving his statement in any way. N.T., 10/25/1995 at 50–59.[2]

Gwynn, a self-described crack addict, also testified at the suppression hearing. He told the court that he was under the influence of crack-cocaine at the time of his interview and that he was tired, confused, and paranoid. *Id*. at 79. He also told the court that, though Detective Mangoni did not strike him, he was scared for his life and issued an involuntary statement as a result. *Id*.

[2] Detective Mangoni is currently a defendant in a civil case accusing him of knowingly relying on a false/fabricated statement to arrest and prosecute the wrong man in a homicide trial. *See Crosland v. City of Philadelphia*, No. 22-cv-2416, ECF No. 33 ¶¶ 49–68. The plaintiff in that suit, Curtis Crosland, was recently released from prison after winning federal habeas relief in part due to Detective Mangoni's alleged misconduct. *See Crosland v. Commonwealth*, No. 21-cv-476, ECF No. 21 at 9–10, ECF No. 23. After his exoneration, Mr. Crosland was hired by the Philadelphia District Attorney's Office as a Community Engagement Liaison. He has taken no part in reviewing this case.

The trial court credited Detective Mangoni's testimony over that of Gwynn and denied the suppression motion.

D. Gwynn's trial

The court appointed Lee Mandell to represent Gwynn. The trial prosecutor was Paul Riley, and the case was tried in front of a jury before the Honorable David N. Savitt.

At trial, the prosecution's theory was that Gwynn was the "Rick" who fought with the squatters the day before the fire, threatened them, and then made good on those threats by setting the fire that killed Marsha Smith. The defense theory was that, if Gwynn started the fire, it was accidental and he was guilty of only third-degree murder.

To prove its case, the prosecution called a number of uniformed officers and detectives, experts in arson, and two witnesses from the apartment building: John Antrom and Donald Minnick. The defense did not put on any evidence. The prosecution's main evidence is summarized as follows:

1. Donald Minnick

Minnick testified that he had known Gwynn, who he referred to as "Rick," for over a year. N.T., 10/31/1995 at 54. The day before the fire, Rick had allegedly come to the Building looking for sex with the Marsha Smith, the decedent. At that point Minnick and another squatter, John Antrom, got

into a physical fight with Rick. Minnick reported that the fight lasted at least 30 minutes and ended when he and Antrom beat up Rick with a stick and threw him out of the apartment. According to Minnick's testimony, Rick left without issuing any threats. *Id*. at 75, 79–80, 98–99.

Minnick woke up the next morning to another squatter shouting "fire," after which he escaped out his window to try and find help. *Id*. at 60. He did not see anyone set the fire. At the time of his testimony, Minnick had an open case for drug possession and testified that he was not promised any help in exchange for his testimony. *Id*. at 69–70.

2. John Antrom

John Antrom testified that there was no electricity in the Building at the time of the fire. N.T., 10/31/1995 at 116. He also testified that he did not see anyone the morning of the fire, but Gwynn (who he also called "Rick") had threatened the squatters the day before the fire was set. *Id*. at 123–24. Antrom also testified that Gwynn came to the building the day before the fire looking for sex with Marsha Smith. Gwynn then fought with Antrom and Minnick. According to Antrom, the fight lasted nearly 70 minutes and involved beating Gwynn with a golf club until he fell to his knees bleeding. *Id*. at 138–40. Consistent with his police statement, Antrom told the court that Gwynn threatened the squatters as he left the Building.

3. Detective Dominic Mangoni

Detective Mangoni testified about how he elicited Gwynn's written statement—consistently with his testimony at Gwynn's suppression hearing—and he read the statement into the record. N.T., 11/1/1995 at 18–27.

4. The Fire Marshal

Lieutenant Thomas Lawson from the Philadelphia Fire Marshal's Office testified as an expert in fire origin and detection. He told the court that he inspected the Building and determined that the fire did not originate in just one area but possibly in four places: in front of two apartments on the third floor, in the third-floor landing area, and in the stairwell leading up to the fourth floor. N.T., 11/1/1995 at 62–63. He also determined that the fire was likely not accidental, used a liquid accelerant like gasoline, and likely involved at least three separate pours of accelerant. *Id*. at 65–70, 94, 126–27.

5. Lieutenant Arthur Czakowski (Gentry)

Lieutenant Arthur Czakowski from the Philadelphia Fire Marshal's Office also testified. He told the court that he examined the Building with his dog, Gentry, a black Labrador retriever who was trained to detect accelerants like gasoline. N.T., 11/2/1995 at 14–15. Gentry alerts that he believes an accelerant is present through his "mannerisms" and "general demeanor." *Id*. According to Lieutenant Czakowksi, Gentry alerted to the presence of

gasoline in four spots on the Building's third floor and on the staircase leading up to the fourth floor. Gentry also alerted to an empty cannister that smelled of gasoline and was submitted for fingerprints. Lieutenant Czakowski determined, based on Gentry's alerts, that the fire was set deliberately using gasoline as an accelerant. No discernible prints were taken from the cannister. *Id*. at 46, 64.

E. Conviction, Post-Conviction Proceedings, and Disclosures

The jury deliberated briefly before finding Gwynn guilty of all charges: one count of first-degree murder, one count of arson, and five counts of aggravated assault. After a penalty hearing, the jury sentenced Gwynn to death. In 1998, the Pennsylvania Supreme Court affirmed Gwynn's conviction and death sentence over the dissent of two justices who would have found that the trial court erred in failing to suppress Gwynn's statement due to issues with Gwynn's initial arrest. *Commonwealth v. Gwynn*, 723 A.2d 143, 154–56 (Pa. 1998) (*Gwynn-1*).

Gwynn then filed a timely *pro se* petition pursuant to Pennsylvania's Post-Conviction Relief Act, 42 Pa. C.S. § 9541–46. Gwynn's execution was stayed, attorney Scott F. Griffith was appointed to represent Gwynn, and an amended PCRA petition was filed. The PCRA court dismissed Gwynn's

amended petition as without merit and the Pennsylvania Supreme Court affirmed. *Commonwealth v. Gwynn*, 943 A.2d 940 (Pa. 2008) (*Gwynn-2*).[3]

With Gwynn's PCRA litigation completed, he filed a timely petition for federal habeas relief with this Court. ECF No. 5. This Court appointed the Federal Community Defender Organization (FCDO) to represent Gwynn, which began investigating the case. FCDO's investigators then, through interviewing witnesses and digging through documents, discovered the following evidence that had not been disclosed to the defense in advance of trial:

1. Glenn Taylor's murder and subsequent trial

In order to place Gwynn's current claim in context, the earlier murder of Glenn Taylor by someone called "Rick" and the subsequent investigation of that murder must be set forth in some detail.

In August 1993, two men beat a homeless man named Glenn Taylor to death with a pipe at the Building. John Antrom and Donald Minnick, two

[3] Justice Baer filed a concurrence admonishing the prosecutor for giving an improper closing argument, *Gwynn-2*, 943 A.2d at 417, and Justice Saylor dissented in part, writing that he would have remanded the matter for evidentiary development of Gwynn's sentencing-phase claims, *id*. at 418–19.

witnesses who testified against Gwynn, were also eyewitnesses to the Taylor murder, as were Terry McCullough and Larry Hawkins. Minnick was beaten during the same incident and was hospitalized as a result.

Antrom, McCullough, and Hawkins all identified two men as Taylor's killers: "Reese" and "Rick." They identified "Reese" as Maurice Johnson. They did not, however, identify "Rick" as Gwynn (as they did at Gwynn's trial) but as a different man: Gary Lupton. Lupton was on probation at the time of the killing for possessing a sawed-off shotgun, and he reportedly threatened to have his associates kill the witnesses if they cooperated with the police. *See* ECF No. 30, Ex. 42 at 2 (Antrom told police that Rick threatened him by saying that if Reese got picked up, Rick would carry out the rest of the orders and get someone to "spray" the building); Ex. 44 at 2 (McCullough told police that Rick told him that if he cooperated with the police he "had back-up that would take care of" the witnesses if they cooperated); Ex. 38 at 2 (Minnick told police that if he told the cops what happened then Rick would come back and "finish it up").

Antrom and Minnick, who both testified against Gwynn, also testified against Lupton in his own murder trial **three days before** the Building was set on fire. *See* ECF No. 30, Ex. 29. Antrom testified at Lupton's trial that he knew Lupton as "Rick" and reiterated that Lupton had threatened to have

him killed if they talked to the police. *See id*. (N.T., 11/17/1994 at 111, 119). Minnick also confirmed the contents of his police statement, and a third witness also testified that she knew Lupton as "Rick." *Id*. at 242. Lupton was ultimately convicted of murdering Taylor on November 30, 1994—ten days after the fire in this case—and was sentenced to life in prison.

2. Lorraine Irby

Another squatter called Lorraine Irby[4] testified against Gary Lupton at Lupton's trial for the murder of Glenn Taylor. She told the court that she had been threatened with death if she cooperated against Lupton. Specifically, she claimed that the stepfather of Lupton's co-defendant had stalked and threatened to kill her. ECF No. 30, Exs. 36, 47.

In March 1995, four months after Lupton's trial, someone set fire to the apartment building where Irby was living only four blocks from the Building in this case. One woman was killed, and others were injured. The fire was set in the early morning hours and gasoline was used as an accelerant. The gasoline was poured on the stairways and landings in the hallway outside of Irby's apartment, matching the way the gasoline was poured in this case. Gwynn was in custody at the time of that fire, and no arrests were made.

[4] Irby was not involved in Gwynn's prosecution.

3. Other fires

In addition to the above, the investigators discovered that between the time that Gary Lupton allegedly threatened the squatters in September 1993[5] and the fatal fire in November 1994, three other arson fires were set at the Building in May, July, and September 1994. ECF No. 30, Ex. 48. No arrests were made in connection with those arson fires.

* * *

Gwynn filed a successor PCRA petition in state court raising a *Brady* claim based on the above-described material, a motion to stay the federal habeas proceedings, and a motion for discovery. ECF Nos. 16, 25. This Court stayed the federal habeas matter to allow Gwynn to exhaust his *Brady* claim in state court.

The PCRA court denied Gwynn's successor petition, finding that Gwynn's *Brady* claim was untimely and otherwise without merit. The court, however, only analyzed the potential materiality of the evidence that the squatters referred to Gary Lupton as "Rick," ignoring the rest of the undisclosed evidence that Gwynn presented. The Pennsylvania Supreme Court

[5] Though the timeline of Lupton's custodial status is unclear, he was in custody at the time the fire in this case was set despite appearing at his jury trial in street clothes, possibly confusing the witnesses. Importantly, his threats specifically mentioned having his associates carry out his orders.

affirmed the dismissal in a summary order. *See Commonwealth v. Gwynn*, 69 A.3d 217 (Pa. June 17, 2013) (Table).

Thereafter, the stay was lifted in federal court and this Court granted Gwynn's discovery motion over the Commonwealth's objections. ECF No. 28. After court-ordered discovery, Gwynn became aware of the following additional, previously undisclosed evidence:

- A fellow inmate of Gary Lupton's, John Witherspoon, told the police during their investigation into Glenn Taylor's murder that Lupton had tried to hire him to kill witness Lorraine Irby and gave him the address of the Building as a place she might be staying. ECF No 87-1 at 9–14.

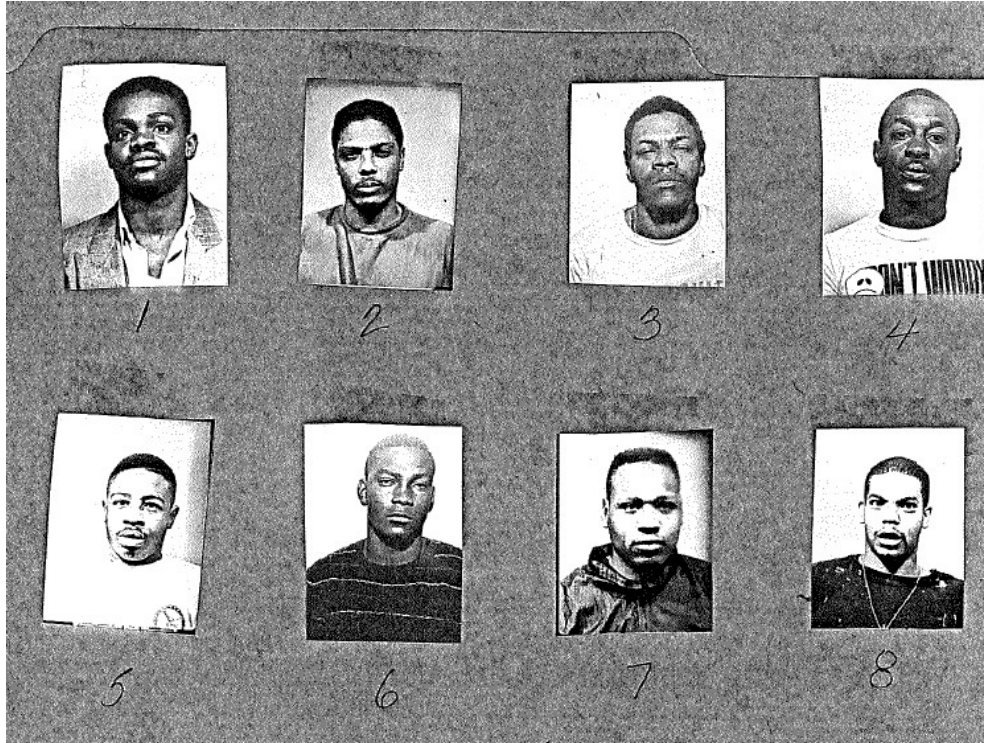
- In addition to being known as "Rick," Lupton matched other descriptors used by the squatters to describe the man that threatened them the day before the fire. For instance, the squatters told the police that "Rick" had been on probation, had a friend that worked at a neighboring car wash, and was a man with a heavy build. *See* ECF No. 30, Ex. 2 at 4; Ex. 13 at 5. The new evidence revealed that Lupton was on probation, was friends with Anthony Daniels, called "T," at the neighboring car wash, and had a heavy build. ECF No. 87-1 at 14, 24–26. Lupton, as seen on the date of his arrest, is below:

- Gwynn, by contrast, had no prior convictions, had no reported neighborhood friendships, and was gaunt at the time of his arrest. ECF No. 30, Ex. 21 at 3; ECF No. 87-1 at 54. Gwynn's arrest photo is

seen below:

- These photographs and other Lupton materials were maintained in Gwynn's prosecution and police file.

- The photo array from Lupton's case that was allegedly used by the squatters to identify Gwynn is seen below. Lupton, the "prime suspect," is number two. The array does not include a photo of Gwynn.



Gwynn filed an amended habeas petition incorporating this this evidence as exhibits. *See generally* ECF No. 87-1.

In December 2020, the parties filed joint stipulations agreeing that Gwynn was entitled to sentencing relief. ECF No. 106. This Court accepted the parties' stipulations and granted Gwynn habeas relief as to his penalty-phase claims. ECF No. 109.

The parties then engaged in voluntary discovery until January 2022, when Gwynn filed the operative memorandum of law raising the following three grounds for relief:

1. The prosecution violated *Brady v. Maryland* by failing to disclose the above-described evidence;

2. Gwynn's counsel rendered ineffective assistance when he failed to adequately challenge Gwynn's underlying confession; and

3. Gwynn's counsel rendered ineffective assistance when he failed to challenge the prosecution's use of peremptory challenges as discriminatory.

ECF No. 123 at 4.

Respondents now respond.

III. DISCUSSION

A. The merits of Gwynn's claim one are properly before this Court and should be reviewed *de novo*.

1. Gwynn's *Brady* claim is procedurally defaulted.

Habeas petitioners are required to "fairly present" claims to state courts in order to give the states a meaningful opportunity to pass upon and correct violations of federal constitutional rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *see O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) ("state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition"). This requirement both "expresses mutual respect for our dual judicial system and concern for harmonious relations between the two adjudicatory institutions" and "properly acknowledges that state courts, no less than federal courts, are bound to safeguard the constitutional rights of state criminal defendants." *Landano v. Rafferty*, 897 F.2d 661, 668 (3d Cir. 1990).

Where a petitioner has not properly presented claims to the state courts, and no state remedy remains available for her to present the claims, the claims are deemed exhausted even though the state courts have not had an opportunity to pass upon their merits. In that event, the claim is considered procedurally defaulted, and federal review of the merits is barred. *O'Sullivan*, 526 U.S. at 847–48 (unexhausted claims not presented in petition for discretionary review in state court are defaulted where time for filing petition in state supreme court has long passed). A claim is also considered defaulted, and therefore unreviewable on the merits in federal habeas, if it was dismissed by the state courts based on an independent and adequate state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

As conceded by Gwynn, ECF No. 123 at 35, Gwynn's *Brady* claim is procedurally defaulted for one of two reasons: Either because (1) Gwynn's original *Brady* claim was "fundamentally alter[ed]" by the new evidence discovered in federal court, *see Vazquez v. Hillery*, 474 U.S. 254, 260 (1986); *Landano,* 897 F.2d at 669 ("a general claim that the prosecutor has suppressed exculpatory information cannot satisfy the exhaustion requirement as to all subsequent *Brady* claims that a habeas petitioner may bring"), so his newly-constituted *Brady* claim has not been fairly presented to the state

courts and the time to do so has passed; or because (2) the state-court holding that Gwynn's original *Brady* claim was untimely[6] rested on an independent and adequate state procedural ground.

2. Respondents affirmatively waive their procedural defenses to the *Brady* claim addressed below.

Procedural default, however, does not deprive a federal court of jurisdiction over a claim; rather, it is an affirmative defense for the government to raise, and consequently, one that it can waive. *Trest v. Cain*, 522 U.S. 87, 89 (1997) (procedural default defense subject to waiver).[7] In light of the government's ability to waive this defense, it is incumbent upon prosecutors to

[6] In the course of finding the claim untimely, the state court also noted it found the claim without merit. *Commonwealth v. Gwynn*, CP-51-CR-1207051-1994 at 7–8 (Pa. Com. Pl. Mar, 27, 2012). Respondents "do not credit the court's conclusory statement as a true merits ruling." *Johnson v. Folino*, 705 F.3d 117, 127 n.4 (3d Cir. 2013). The state court here, as in *Folino*, was "merely concluding that it would not recognize an exception to the timeliness bar." *Id*. In the event the Court disagrees and finds the state court's conclusion an alternative merits determination that implicates 28 U.S.C. § 2254(d), *Rolan v. Coleman*, 680 F.3d 311, 321 (3d Cir. 2012), Respondents agree that it does not foreclose habeas relief. The state courts' materiality conclusion only addressed one piece of evidence that was presented to them—that the squatters knew Lupton as "Rick"—and ignored the rest. Federal courts need not defer to state courts on the question of cumulative materiality when the state courts "did not reach the issue of the collective effect of multiple violations." *Simmons v. Beard*, 590 F.3d 223, 233 (3d Cir. 2009). In such cases, as here, the Court's review of cumulative materiality is *de novo*. *Id*.

[7] "A court is not at liberty . . . to bypass, override, or excuse a State's deliberate waiver" of affirmative defenses. *Wood v. Milyard*, 566 U.S. 463, 466

seriously consider whether and to what extent the reliance on this procedural bar advances justice. Certainly, the principles of federalism, comity, and finality that animate procedural default are important considerations in that analysis. But they are not the only considerations. *See* Explanatory Comment 1, Pa. R. Prof. Conduct 3.8 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). Where, as here, a review of a challenged judgment discloses serious constitutional violations, the prosecutors are "obligat[ed] to see that [Petitioner] is accorded procedural justice[.]" *Id.*; *see also* AMERICAN BAR ASSOCIATION, *Criminal Justice Standards for the Prosecution Function*, Standard 3-8.5 (4th Ed. 2017) ("The prosecutor need not . . . invoke every possible defense to a collateral attack, and should consider potential negotiated dispositions or other remedies if the prosecutor and the prosecutor's office reasonably conclude that the interests of justice are thereby served.").

After thorough review, Respondents conclude that Gwynn's rights have been violated and lack confidence in his conviction. Accordingly, in order to facilitate review and correction of the constitutional errors in this case,

(2012) (reversing rejection of a claim as untimely where the state knowingly and intentionally waived the defense).

Respondents do not assert and affirmatively waive any procedural bars that would otherwise bar consideration of the merits of Gwynn's Ground One.[8]

B. Gwynn is due relief on his claim that the prosecution violated *Brady v. Maryland* by failing to turn over a host of evidence implicating an alternative suspect in the crime (Ground One).

The prosecution has an obligation to disclose to the defense information that is favorable to the guilt or punishment of the defendant, and the failure to do so may deprive a defendant of due process. *Brady*, 373 U.S. at 87. To prove a *Brady* violation, the evidence must have been (1) favorable to the accused, either exculpatory or impeaching, (2) suppressed by the state, either willfully or inadvertently, and (3) material enough that prejudice

[8] Additionally, the state courts' holding that Gwynn's original *Brady* claim was untimely rested on a finding that the evidence presented was available to find by Gwynn through other means if he had exercised due diligence. This is contrary to clearly established federal law. It is now well-settled that defendants do not have to go hunting for exculpatory or impeaching evidence and are entitled to rely on the government's duty to disclose. *Dennis*, 834 F.3d at 293 (holding there is no due diligence requirement in finding favorable evidence known to the government); *see also Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 294 (3d Cir. 2021) (dismissing Brady claim as untimely for lack of due diligence is unreasonable); *cf. Commonwealth v. Small*, 238 A.2d 1267, 1283–84 (Pa. 2020) (whether newly discovered evidence is in public record is irrelevant to determining whether PCRA petition is timely). Because the state courts' finding of untimeliness is both "interwoven with the federal law," *Coleman*, 501 U.S. at 735, and a misapplication of same, *Dennis*, 834 F.3d at 293, it was not an independent and adequate state procedural ruling that would bar merits review of this claim. To the extent the Commonwealth presented arguments in state court aligning with their reasoning, Respondents hereby disavow and withdraw them.

resulted from its suppression, meaning that there is a reasonable probability of a different result. *Dennis*, 834 F.3d at 284–85. Materiality of suppressed evidence must be "considered collectively, not item by item." *Id*. at 312.

Below, Respondents first assess whether the evidence Gwynn presents was (1) suppressed by the prosecution and (2) favorable to Gwynn. Respondents then evaluate whether the suppressed evidence is material when considered together, undermining confidence in the outcome of Gwynn's trial. Respondents conclude that Gwynn has satisfied all three *Brady* elements and is entitled to habeas relief.

1. The alternative-suspect and photo array evidence is favorable and was suppressed.

Gwynn now presents the following evidence in support of his *Brady* claim: [9]

- John Antrom and Donald Minnick, two witnesses who identified Gwynn as "Rick" and testified against him here, had previously

[9] Gwynn did not fail to develop the factual basis of his *Brady* claim in state court—he raised it and sought discovery to develop it, but the state courts denied his motion. Because Gwynn was diligent in pursuing the factual basis for his claim, 28 U.S.C. § 2254(e)(2) does not bar this Court from considering the new evidence. *See Williams v. Taylor*, 529 U.S. 420, 435 (2000) (making requests of the state court that are denied is sufficient to show diligence and satisfy § (e)(2)).

identified another man, Gary Lupton, as "Rick" and testified against him three days before the Building was set on fire. *See* ECF No. 30, Ex. 29 (N.T., 11/17/1994 at 111, 119, 242).

- Gary Lupton reportedly threatened to have his associates kill the squatters killed if they cooperated with the police against him. *See* ECF No. 30 at Exs. 36, 38, 42, 44, 47.

- Another squatter who testified against Lupton, Lorraine Irby, was possibly targeted with an arson fire four months after the fire in this case at a building four blocks away. The fire was set in the early morning hours using gasoline as an accelerant in front of various apartment doors, just like the fire in this case.

- Lupton's former cellmate, John Witherspoon, told police that Lupton offered to pay him to get rid of Irby and gave him five addresses where he could possibly find her, including the address to the Building. *See* ECF No. 87-1 at 9–11.

- Between the time of Gary Lupton's arrest and the fire in this case, three other arson fires were set at the Building in May, July, and September 1994. ECF No. 30, Ex. 48. No arrests were made in connection with those fires.

- Consistent with the description of "Rick" contained in the squatters' statements, Gary Lupton was on probation previously, had a friend called "T" at a neighboring carwash, and was a heavier guy with a dark complexion and a light moustache. *See* ECF No. 30 at Ex. 54 (Lupton's criminal docket sheet showing probation); ECF No. 87-1 at 29 (Anthony Daniels, a/k/a T, telling police that he knows Lupton and washed cars at 46th and Chestnut); ECF No. 87-1 at 14 (Lupton's mugshot). All of this information was maintained in the investigative files for Marcia Smith's death.

- The photo arrays that the squatters used to allegedly identify Gwynn were maintained in the police department's homicide files, contrary to what the trial prosecutor told the court, and the arrays did not include a photo of Gwynn. ECF No. 87-1 at 2–3.

a. Suppression

The first prong of a *Brady* analysis is whether a piece of undisclosed evidence was suppressed by the government. It is well-settled that, to comply with *Brady*, "prosecutors must 'learn of any favorable evidence known to the others acting on the government's behalf, including the police,'" and pass that to the defense. *Dennis*, 834 F.3d at 284 (quoting *Kyles*,

514 U.S. at 437). Defendants are entitled to rely on the prosecution's affirmative duty to disclose, so there is no due diligence requirement under *Brady*. *Dennis*, 834 F.3d at 290–91; *see also Brady*, 373 U.S. at 87 (holding that suppression of favorable evidence violates due process "irrespective of the good faith or bad faith of the prosecutor").

Here, none of the above-described evidence was disclosed to Gwynn or his counsel or mentioned at or before Gwynn's trial outside of the pre-trial suppression hearing. There, the trial prosecutor told the court that the photo arrays now before this Court did not exist and characterized Lupton's murder trial—stemming from an incident that occurred in the same building, in front of the same witnesses, and by a man also called Rick—as a "completely unrelated homicide."

The evidence in question was all maintained in either the prosecution's files and/or the police department's homicide files and was co-mingled between Lupton's file and Gwynn's file. Indeed, the same police sergeant, Sergeant Burke, supervised both investigations, and a number of the same police personnel conducted interviews in both cases.[10] Thus, because the

[10] For instance, Detective Perks interviewed Terry McCullough in relation to both crimes and heard him identify the perpetrator as "Rick" each time. ECF No. 30, Exs. 13, 30.

evidence was known to the prosecution in advance of Gwynn's trial and was not disclosed, Respondents agree that it was suppressed for the purposes of a *Brady* analysis. *See Dennis*, 834 F.3d at 288–89 (noting that any evidence possessed by police is imputed to the prosecutor regardless of whether the prosecutor in issue had actual knowledge of the evidence).

b. Favorability

The second prong of the three-pronged *Brady* analysis is favorability, *i.e.*, suppressed evidence must be favorable to the guilt or punishment of the defendant. Evidence can be favorable either as exculpatory or impeachment evidence. *Dennis*, 834 F.3d at 286–87. "[E]xculpatory evidence need not show a defendant's innocence conclusively" to be favorable under *Brady*. *Id.* at 287. Indeed, suppressed evidence that "does not wholly undermine the prosecution's theory of guilt does not sap it of its exculpatory value." *Id.* In addition, evidence that could have been used to impeach the testimony and credibility of witnesses and/or call into question the good faith of the larger investigation is sufficient to establish favorability under *Brady*. *Id*. at 286 (noting that impeachment evidence is favorable under *Brady* "even if the jury might not afford it significant weight" and even if the witness had been impeached on other grounds) (citing *Kyles*, 514 U.S. at 450–51).

Respondents agree that the suppressed evidence is favorable under *Brady* both for its exculpatory and impeachment value. The evidence paints a compelling picture of an alternative suspect who had the means, motive, and opportunity to have an associate set the fire at issue, which tends to exculpate Gwynn. In addition, evidence that key witnesses identified the alternative suspect – not Gwynn – as "Rick," and the evidence that a number of identifiers the squatters used to describe "Rick" fit Lupton and not Gwynn, could also have been used to impeach their testimony. This information calls into question not just the squatters' credibility and motivations, but their entire story about being attacked and threatened the day before the fire since as Lupton was in custody at the time.

The recently-discovered photo arrays are also favorable to Gwynn. The prosecutor told the court pre-trial that the squatters used an old photo spread from Lupton's case to identify Gwynn. The prosecutor said that Gwynn's photo was a "filler" photo in the spread containing the "prime suspect," Lupton. He also said that this array no longer existed. But not only does the array exist in Lupton's police file, **it does not include a photo of Gwynn**. This evidence further undermines the credibility of the squatters and calls the good faith of the larger investigation into question. *Kyles*, 514

U.S. at 445 (*Brady* extends to information that could "attack . . . the thoroughness and even the good faith of the investigation.").

2. Assessed cumulatively, the suppressed items were material.

Suppressed evidence is material if there is a reasonable probability that, had the evidence been disclosed, the result of the trial would have been different. *Dennis*, 834 F.3d at 309. However, "a defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434–35. To show a reasonable probability, a defendant need only show that the suppression undermines confidence in the outcome of the trial. *Id.*; *see also Strickler v. Green*, 527 U.S. 263, 298 (1999) (noting concern that use of the word "probability" may mislead lower courts, causing them to believe that the standard is "akin to the more demanding standard, 'more likely than not,'" when the materiality standard is a lower standard of proof closer to a "significant possibility") (Souter, J., concurring in part). For example, suppressed evidence that would have bolstered a defendant's defense at trial may put the case in such a different light that *Brady* materiality is satisfied. *Dennis*, 834 F.3d at 295. Similarly, suppressed evidence that could have been used to impeach the credibility of a key witness "in a manner not duplicated" by other evidence,

or to attack the reliability of the investigation, is sufficient to establish *Brady* materiality. *Id*. at 298, 308. Materiality is to be considered collectively, not item by item. *Kyles*, 514 U.S. at 436. The "importance of cumulative prejudice cannot be overstated" in a materiality analysis as it "stems from the inherent power held by the prosecution, which motivated *Brady*." *Dennis*, 834 F.3d at 312.

Here, after careful review and consideration of the trial record, the suppressed evidence, and relevant precedent, Respondents concede that all of the evidence suppressed here, considered collectively, satisfies *Brady's* materiality test and that a new trial is warranted. Indeed, while individual pieces of the suppressed evidence would warrant *Brady* relief on their own, here "the cumulative effect of their suppression commands it." *Dennis*, 834 F.3d at 311.

***a.* The suppressed evidence fatally undermines the prosecution's case.**

The suppressed evidence calls into doubt substantial parts of the prosecution's theory of the case that the jury heard at trial.

To start, the suppressed evidence undermines the credibility of two key prosecution witnesses: Minnick and Antrom. Both men testified that they knew Gwynn as "Rick," and that "Rick" threatened them the day before the fire. However, the suppressed evidence reveals that both men had testified

in a previous trial that they knew another man, Lupton, as "Rick." And additional suppressed evidence shows that the descriptors they used to describe Rick fit Lupton, not Gwynn. Finally, Antrom and Minnick allegedly identified Gwynn from a photo array that was part of a separate homicide investigation, but Gwynn is not in that array.

Evidence that these key witnesses, in addition to others who did not testify at Gwynn's trial, knew Gary Lupton as "Rick" and so testified at a prior trial, would have offered the defense valuable impeachment evidence regarding their credibility. That evidence is only strengthened by additional suppressed material showing that the descriptors the squatters initially used to describe Rick, *i.e.*, that he had been on probation, had a friend at a neighboring carwash, and was a heavier guy, fit Lupton and not Gwynn. *See* ECF No. 30, Ex. 2 at 4, Ex. 13 at 5, Ex. 21 at 3; ECF No. 87-1 at 29. Also, and perhaps most alarmingly, the photo arrays that the squatters allegedly used to initially identify Gwynn as "Rick," and that the trial prosecutor alleged did not exist, do exist and do not feature any photos of Gwynn. *See* § II.E, *supra* .

Indeed, as explained above, the trial court accepted the prosecutor's pre-trial statements that the witnesses identified Gwynn in the arrays and that they were no longer available. So the witnesses were never challenged

on their alleged identifications or how the defective arrays impacted their eventual trial testimony. Their testimony that Rick (Gwynn) was the person who threatened them the day before the fire played a significant role in the prosecution's case. It's difficult to overstate just how significant, since the only other evidence of Gwynn's involvement at all is the statement he gave to Detective Mangoni after his arrest, addressed below.

All of this would have allowed defense counsel to question the reliability of the witnesses' in-court identifications of Gwynn as Rick, as well as their motivations for doing so, thereby giving the jury the chance to assess a full picture of their credibility. Such impeachment evidence, evidence that calls into question key witnesses' credibility and motives in a way not duplicated by other evidence, is quintessential material evidence under *Brady*. *See*, *e.g.*, *Dennis*, 834 F.3d at 298–99; *Wearry v. Cain*, 577 U.S. 385, 393–94 (2016) (per curiam) (suppressed evidence that damaged key witness's credibility and called his motives into question required summary reversal of conviction); *Banks v. Dretke*, 540 U.S. 668, 702 (2004) (suppressed impeachment evidence required reversal of conviction where evidence was not duplicative of other impeachment evidence).[11]

[11] Knowing that the witnesses initially described someone consistent with Lupton as their attacker, given that Lupton was in custody at the time, undermines the story that someone had come and threatened them the day

Evidence that Lupton had previously threatened to have his associates kill the squatters if they cooperated against him in his own murder trial is also significant in assessing these witnesses' credibility, *i.e.*, they may have lied to avoid further reprisals from the real Rick. *See* ECF No. 30, Ex. 42 at 2 (Antrom telling police that Rick threatened him by saying that if Reese got picked up Rick would carry out the rest of the orders and get someone to "spray" the building); Ex. 44 at 2 (McCullough telling police that Rick told him that if he cooperated with the police he "had back-up that would take care of" them); Ex. 38 at 2 (Minnick telling police that if he told the cops what happened then Rick would come back and "finish it up"). This is further bolstered by evidence that Lupton attempted to hire his cellmate, John Witherspoon, to kill one of the squatters, Lorraine Irby, while he was incarcerated, *see* ECF No. 87-1 at 9–12, and that the fatal fire was set three days after the squatters testified against Lupton, ECF No. 30, Ex. 29.

before the fire at all. Taking this into account, the fact that Gwynn had no visible signs of injury ten days after a physical altercation that reportedly lasted 70 minutes and included two men beating him with a golf club and left him bleeding, and that only one of the witnesses testified that any threats were made, become more suspect. The jury should have had the opportunity to weigh this evidence. *See Dennis*, 834 F.3d at 301 (the critical question is "how the jury would have weighed the information").

Disclosure of all this evidence would have alerted defense counsel to the existence and importance of Lupton, Witherspoon and Irby and allowed him to argue to the jury that Lupton, who had motive and opportunity, was responsible for the fatal fire. And defense counsel could have credibly argued that the witnesses who testified at trial pointed the finger at Gwynn, who did not match their original descriptions of "Rick," because they were afraid of further retaliation from the real Rick, Lupton. Indeed, evidence that Lorraine Irby was almost killed in an arson fire a few months later in a building a few blocks away using the same method would further support an argument that the squatters had reason to fear Lupton, which may have motivated their testimony against Gwynn. Suppressed evidence suggesting that an alternate suspect had motive and/or opportunity to commit the crime falls within *Brady*'s ambit. *Kyles*, 514 U.S. at 447; *see also*, *e.g.*, *Haskins v. Superintendent Greene SCI*, 755 F. App'x 184, 189 (3d Cir. 2018) (non-precedential) (holding that suppressed evidence pointing to an alternative suspect that would have given the jury a competing version of events is material under *Brady*); *cf. Barton v. Warden, Southern Ohio Correctional Facility*, 786 F.3d 450 (6th Cir. 2015) (same); *U.S. v. Jernigan*, 492 F.3d 1050 (9th Cir. 2007) (same).

The disclosure of this evidence would have also allowed trial counsel to challenge the thoroughness and trustworthiness of the overall police investigation. Indeed, the fact that the photo arrays used do not include Gwynn; that the squatters' initial descriptions of their attacker seem to describe Lupton and not Gwynn; and that three days before the fatal fire here, two of the squatters living at the Building testified against Lupton, a man who had threatened to have his associates kill them if they did just that, among other things, evince a "remarkably uncritical attitude" in accepting Gwynn as the arsonist here. *Kyles*, 514 U.S. at 420. Evidence that the defense could have used at trial to "attack the reliability of the investigation" is material under *Brady*. *Dennis*, 834 F.3d at 308 (quoting *Kyles*, 514 U.S. at 446).

b. Gwynn's dubious confession further undermines confidence in the verdict.

With the undisclosed *Brady* material significantly undermining the squatters' testimony, the strongest remaining piece of evidence against Gwynn is his confession. But Gwynn's confession lacks markers of reliability: it is internally inconsistent, contains no information that the police did not already have, and, perhaps most damningly, contradicts the physical evidence and describes a series of events that could not have happened. As explained below, Respondents agree with Gwynn that it is

unlikely that this confession could support a first-degree murder verdict by itself, which reinforces the conclusion that the suppressed evidence was material to the outcome of Gwynn's trial.

Confessions, "even those that have been found to be voluntary, are not conclusive of guilt." *Crane v. Kentucky*, 476 U.S. 683, 689 (1986). As with any other evidence, "a confession may be shown to be insufficiently corroborated or otherwise unworthy of belief." *Id*. (internal citation omitted); *see also U.S. v. Raddatz*, 447 U.S. 667, 678 (1980) ("the reliability of a confession has nothing to do with its voluntariness").

A confession that contains markers of unreliability, such as facts that are inconsistent with the evidence, are a "warning sign" that the confession may be false. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 33–35 (2011) (noting that 75% of exonerations studied contained confessions that included facts inconsistent with the evidence). When such a confession is the only evidence presented, it may be insufficient to support a guilty verdict. *See United States v. Bryce,* 208 F.3d 346, 354 (2d Cir. 1999) ("A defendant's statement that does not demonstrate guilt with sufficient reliability is insufficient to support a guilty verdict."); *United States v. Stephens*, 482 F.3d 669, 673 (4th Cir. 2007) (same).

Here, Gwynn presents a report authored by Dr. Richard Leo, Ph.D., a law professor and expert on police interrogation. According to Dr. Leo's report, Gwynn's confession contains multiple indicators of unreliability. *See* ECF No. 44-1 at 14–18.[12] Respondents agree.

For instance, Gwynn's confession says that he escaped the Building through the front door even though it was boarded shut at the time; that he shook out a cannister of gasoline in one area and watched the gas spread down the stairs to the second floor; that he lit trash on the first floor on fire before exiting; and that he spoke with the squatters the morning of the fire and apologized for past behavior. The assistant fire marshal, by contrast, testified that there were likely four points of origin and three separate pours of gasoline, not one, and the gasoline spread on the third floor and up to the fourth, not down to the second, and that there was no indication of fire on the first floor at all. N.T., 11/1/1995 at 62–63, 65–70, 94, 126–27. In addition, none of the witnesses reported seeing Rick the morning of the fire, and Antrom testified that there was no electricity in the building, meaning it was unlikely that Gwynn could have been able to watch gasoline spread in the pitch-black. N.T., 10/31/1995 at 116.

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[12] Respondents do not address the merits Gwynn's ineffective assistance of counsel claim grounded in his confession, only the confession's impact on a *Brady* materiality analysis.

Though a materiality analysis under *Brady* is not a sufficiency-of-the-evidence test, *see Dennis*, 834 F.3d at 295, Respondents note that Gwynn's confession is so thoroughly contradicted by the available physical evidence that it is unlikely that it would have been sufficient to support a guilty verdict by itself. *See Adamson v. Cathel*, 633 F.3d 248, 261 (3d Cir. 2011) (reversing conviction where, after finding constitutional error, the only remaining evidence was the petitioner's own dubious confession); *Smith v. Bookhart*, 996 F.3d 402, 414–15 (7th Cir. 2021) (finding confession "riddled with holes" insufficient to support guilty verdict for first-degree murder). Such underwhelming evidence makes the suppression of the above-described alternative suspect evidence, assessed cumulatively, more likely to be material. *Cf. Strickland v. Washington*, 466 U.S. 668, 696 (1984) ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

* * *

Taken together, in light of the record as a whole, the suppressed evidence satisfies *Brady's* materiality standard. The prosecution's case at trial already suffered from weaknesses from conflicting or shifting witness testimony and a questionable confession, and suppressed evidence of a

plausible alternative suspect undermines confidence in the jury's guilty verdict. If the evidence had been disclosed, instead of hearing only from two squatters who offered inconsistent accounts, only one of whom testified that he heard Gwynn threaten them the day before the fire, the jury would also have heard from witnesses who knew of Gary Lupton, his trial, his threats to the witnesses, and the lack of a photo identification in this case. Neither the defense nor the jury knew that Lupton, a man convicted of murdering another squatter in the Building, had threated to have his associates kill the same witnesses or that the photo arrays the witnesses allegedly used to initially identify Gwynn did not contain Gwynn's photograph. This evidence, together with the other suppressed evidence and Gwynn's unreliable confession, is enough to cast the case in a different light and establish a reasonable probability of a different outcome.

As the jury already had reason to doubt the witnesses' testimony and the reliability of Gwynn's statement, it is reasonably probable that disclosure of the suppressed evidence would have built upon and reinforced those doubts in a way that changed the trial's outcome. Considering all of the suppressed evidence together and the trial record as a whole, Respondents agree that Gwynn has established *Brady* materiality and is entitled to habeas relief. *E.g.*, *Dennis*, 834 F.3d at 312.

IV. CONCLUSION

Daniel Gwynn's first-degree murder conviction was based on less than overwhelming evidence, hinging on two witnesses who offered shifting narratives and a dubious confession. We now know that the prosecution suppressed a staggering amount of material that would have been favorable to Gwynn's defense, undercutting the prosecution's case and calling into question the good faith of the investigation.

That the suppressed evidence does not conclusively exonerate Gwynn is of no moment. A jury that heard all the evidence still could have believed that Gwynn threatened the squatters the day before the trial and returned to make good on this threat, and also believed that his confession was reliable. But the existence of sufficient evidence does not defeat materiality. Indeed, even the actual-innocence gateway standard, which is much more demanding than *Brady's* materiality standard, was met in a case that was "not a case of conclusive exoneration." *House v. Bell*, 547 U.S. 518, 553–54 (2006). So, while the Commonwealth does not concede that Gwynn has proven his innocence, he has shown enough to satisfy *Brady* and is entitled to a new trial.

This Court should grant a conditional writ of habeas corpus and order that Gwynn be retried within 180 days or released from custody.

Respectfully submitted,

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