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

STEVEN LAZAR, Petitioner,	:	
	:	Civil Action
v.	:	No. 14-06907-GAM
GEORGE LITTLE et al., Respondents.	:	

RESPONSE TO PETITIONER'S AMENDED PETITION FOR HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

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INTRODUCTION

In 2010, petitioner Steven Lazar was convicted of second-degree murder, robbery, conspiracy to commit robbery, and a weapons offense. He is currently serving a life sentence without possibility of parole. In 2021, at Lazar's request, the Conviction Integrity Unit (CIU) in the Philadelphia District Attorney's Office agreed to review his case. Pursuant to a Discovery and Cooperation Agreement, the CIU provided Lazar with open-file discovery of the prosecution file and the Philadelphia Police Department's homicide file.

Lazar's review of the prosecution and homicide files revealed that the Commonwealth withheld and misrepresented evidence during trial and throughout post-conviction proceedings, leading Lazar to file a motion to reopen his habeas proceedings pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. On August 24, 2022, this Court granted Lazar's motion. *Lazar v. Little*, CV-14-6907, 2022 WL 3647816 (E.D. Pa. Aug. 24, 2022). Lazar has now filed an Amended Petition for Writ of Habeas Corpus in which he raises nine claims. Based on its review of the pleadings, the trial record, and the factual record, including the homicide and prosecution files, the Commonwealth acknowledges that Lazar is entitled to relief on his first, second, and fourth claims. First, the Commonwealth's repeated misrepresentations about alternative suspects Victor Berrios and William Rosa tainted the record upon which this Court reviewed the state court's decision denying Lazar's ineffective-assistance-of-counsel claim. Based on the untainted record—i.e., the record stripped of the Commonwealth's misrepresentations—this Court should find that the Pennsylvania courts erred in holding that under

Strickland, Lazar was not prejudiced by his counsel's deficient performance at trial. Second, the Commonwealth violated *Brady* by failing to disclose and misrepresenting evidence about Berrios and Rosa. Finally, the Commonwealth violated *Brady* by failing to disclose Detective David Baker's history of misconduct, including incidents in which he fabricated witness statements and perjured himself at trial.[1]

FACTS AND PROCEDURAL HISTORY

A. Lazar's Arrest and Interrogation

On January 9, 2007, an elderly man named Dario Gutierrez was found hacked to death in his Philadelphia home. *Lazar v. Coleman*, CV No. 14-6907, 2017 WL 783666, at *1 (E.D. Pa. Mar. 1, 2017). Gutierrez's wallet and keys were missing and his drawers had been ransacked. *Id.* A few months later, Gutierrez's daughter found a suitcase on her father's back porch containing several items identifying Lazar, including a letter from a methadone clinic, a yearbook with Lazar's photograph, and Lazar's social security card. *Id*. More than a month later, Detective David Baker, the lead detective on the case, picked Lazar up from a methadone clinic and brought him in for questioning. *Id.*; Trial Tr. 5/6/10, at 116. Lazar told Detective Baker that his friend had taken his suitcase and given it to someone else. *Lazar*, 2017 WL 783666, at *1. Detective Baker released Lazar and

[1] In the interest of judicial economy, the Commonwealth only addresses Lazar's first claim, part of his second claim, and his fourth claim. If the Court grants relief on one or more of those claims, Lazar's remaining claims will be rendered moot. Should the Court wish to hear from the Commonwealth on Lazar's other claims, the Commonwealth would respectfully request the opportunity to supplement this response.

returned the suitcase to him. *Id.*; Trial Tr. 5/6/10, at 129.

Over the next few months, Lazar purportedly made inculpatory statements to five of his friends and neighbors, all of whom testified at trial. *Lazar*, 2017 WL 783666, at *1. For example, he told two of his neighbors that he would be going to jail because he had "killed someone with an axe." *Id.* He told another friend that "If you are going to kill someone, the best weapon to use … [is] a hatchet." *Id.* As this Court has acknowledged, however, all five witnesses had credibility problems: "one, Lazar's friend, had a theft conviction and had contacted the police about Lazar's statements only after getting into a dispute with Lazar; two others had pending robbery or theft cases against them at the time of trial; and the last two changed their stories on the stand." *Id.* at *4.[2]

In November 2007, homicide detectives with the Philadelphia Police Department detained Lazar for a second time and interrogated him over a thirty-hour period. *Id.* at *1. On the first evening of his interrogation, Lazar told detectives that on the night of the murder, he and his friend "John" had been doing drugs in an abandoned house near Gutierrez's home. *Id.* at *2. John had a hatchet and talked about robbing Gutierrez. *Id.* Lazar and John briefly separated, and when Lazar went to Gutierrez's home, he found Gutierrez dead and John covered in blood and ransacking the drawers. *Id.*

In a second statement, taken the following afternoon by Detective Kenneth

[2] One of the witnesses, Mark Kedra, testified that Lazar told him troubling information about his interview with Detective Baker. According to Kedra, Lazar claimed that Baker fed him information about the crime and showed him photographs of the victim and the crime scene. Trial Tr. 5/6/11, at 55–56.

Rossiter, Lazar admitted that he had been present when Gutierrez was killed. *Id.* Lazar told detectives that he and John had gone to Gutierrez's home to perform oral sex on him. *Id*. After Gutierrez tried to reciprocate, Lazar hit him with his hand, and John struck him with the hatchet. *Id.* John then took Gutierrez's wallet and ransacked his drawers. *Id*.

At some point during his detention, Lazar began showing signs of methadone withdrawal. *Id*. at *2 & *2 n.2. Shortly after giving the second of his two statements, Lazar complained of painful urination and was taken to the hospital. *Id*. at *2. There he reported additional symptoms, including leg pain, shaking, dizziness, nausea, and diarrhea. *Id*. His blood tests were positive for multiple anti-withdrawal drugs, benzodiazepines, cocaine, and marijuana. *Id*. Despite his symptoms, hospital records described his appearance as "neat and appropriate" in appearance, his demeanor as "irritable but cooperative," and his speech as normal. *Id*. (citation omitted). Before being discharged that night, he was treated with anti-withdrawal drugs. *Id*.

B. Evidence of Alternative Suspects

Lazar was not the only suspect in Gutierrez's murder. Early in the investigation, detectives learned that Gutierrez had repeatedly clashed with drug dealers in his neighborhood. One of Gutierrez's neighbors, Ray Santos, told detectives that Gutierrez was known to chase drug dealers off his steps, even pouring motor oil on the steps to keep the drug dealers away. Pet'r App. in Support of Am. Pet., ECF No. 48-1, at 477 (Sept. 8, 2022) ("Pet'r App."). Another neighbor, Philadelphia Police Officer Javier Cortes, confirmed Santos's account, adding that

the drug dealers would smoke on Gutierrez's steps and trash the front of his house. *Id*. at 3; Trial Tr. 5/5/10, at 83–87. Police also heard from a couple who lived down the block that "word on [the] street was that [Gutierrez] was a snitch against the drug dealers on the corner." Pet'r App. at 322.

Even police officials seemed to believe that Gutierrez's murder was related to his anti-drug activities. In an *Inquirer* article published two days after Gutierrez's body was found, Chief Inspector Joseph Fox was quoted as saying, "We do have some indication it may have something to do with the drug activity in this neighborhood." Pet'r App. at 96–97 (Andrew Maykuth, *Dealers suspected in death of man, 79*, Phila. Inquirer (Jan. 11, 2007)). He added that Gutierrez was "very active" in getting Town Watch to confront the crack cocaine and heroin dealers who hung out at the corner of North Mascher and Somerset Streets. *Id*.

On January 11, 2007, a confidential informant contacted police with a tip about Gutierrez's murder. The informant told police that he saw two drug dealers, later identified as William Rosa and Victor Berrios, entering Gutierrez's house. Pet'r App. at 283.[3] According to police activity sheets, which were disclosed to defense counsel, the informant reported that the males gained entry to Gutierrez's house by having a female knock on the door. Once inside, she left the front door open for Rosa and Berrios. The informant also reported that when Rosa and Berrios did "their jobs," they drove a black Honda Accord. *Id*. On January 18, 2007, law-

[3] The informant also reported seeing a Black man with Berrios and Rosa. *Id*. There is no evidence in the homicide file to suggest that police ever identified the third man. Lazar, who is white, could not have been the third man.

enforcement officials executed a search warrant at Berrios's home and seized several items, including a machete, a crowbar, two pairs of boots, and a black Honda Accord. *Id.* at 284. That same day, Berrios was arrested on a federal indictment unrelated to Gutierrez's murder. *Id*.

Detectives also received tips about other potential suspects. *See* Am. Pet. at 43–47. For example, on January 10, 2007, an informant told police that Leon Ryans, aka "Muhammad," had admitted to taking the victim's money. Ex. A; Pet'r App. at 356. The informant also stated that Ryans "has been hanging around Mascher + Cambria for the past two weeks working the midnight shift (drugs)." Ex. A. Detectives pulled Ryan's criminal records and discovered that he had been charged in connection with two violent crimes, including one brutal assault in which he struck a man repeatedly in the head with a florescent light and a crowbar. Pet'r App. at 416–27. Although police attempted to locate Ryans, *id.* at 399, there is no evidence in the homicide file that they ever interviewed him.

On February 20, 2007, Holly McBride reported to police that a drug dealer in the neighborhood named Money Mike (aka Michael Bozyk) told her that he believed Gutierrez was murdered because he was causing problems for drug dealers, adding "the old guy [was] on Mascher St. for snitching on the boys selling on Mutter St." *Id*. at 438–39. McBride also gave the police the names of two neighborhood drug dealers, Flaco (aka Victor Flores) and Black (aka Pablo Costoso). *Id.* In his review of the homicide file, Lazar discovered Black and Flaco's mugshots, which included handwritten notes that stated, "sells drugs in the 25th around the corner from decedent's home." *Id*. at 473, 495; Am. Pet. at 44.

Police received tips about several other suspects who were known drug dealers, including one man with recent arrests who lived two doors away from Gutierrez. Pet'r App. at 441–67, 486, 491–94. Other than the information about Berrios and Rosa and a document showing that McBride was transported to homicide for an interview, none of this information about alternative suspects appears to have been provided to defense counsel.

C. Trial Proceedings

At both the suppression hearing and trial, defense counsel incorrectly stipulated that Lazar had last taken a daily dose of methadone on October 24, 2007, almost a month before he was interrogated. *Lazar*, 2022 WL 3647816, at *2. In fact, Lazar had taken a high dose of methadone on November 18, 2007, just one day before he was detained for interrogation. *Id.*; PCRA Hr'g Tr. 5/30/13, at 20–23. As a result, the jury heard evidence relating to Lazar's hospital visit, but without the context of Lazar being in acute methadone withdrawal, which is considered by many experts to be more traumatic than heroin withdrawal. *Lazar*, 2022 WL 3647816, at *2 n.1, n.2.[4]

At trial, the Commonwealth portrayed Lazar as the lone suspect in a case that had gone cold. In opening arguments, the prosecutor told the jury: "[B]asically the case goes cold, and it goes cold pretty fast." Trial Tr. 5/4/10, at 25. The Commonwealth also elicited testimony from Detective Baker to support this

[4] Consistent with state law, the court instructed the jury to determine whether Lazar's confession was voluntary before considering it as evidence. Trial Tr. 5/11/10, at 117–22.

narrative:

> Q: When you said you couldn't find anything, how long were you working on this after January 9th, '07 following these leads? Tell us what you do.
>
> A: Actually until shortly after July it was still an open case, but there was no information coming in at all.
>
> Q: When you say information, you had no interviews from people, anyone telling you about the case?
>
> A: No.

Trial Tr. 5/6/10, at 107; *see also id.* at 108 (Baker testifying that "there were no leads coming" between January 9th and April 24th, 2007). In closing arguments, the prosecutor returned to the lone-suspect theme: "What did [I] tell you at the beginning? This is the case that probably would have gone unsolved had the Defendant never opened up his mouth. Because there wasn't a lot of evidence, wasn't there?" Trial Tr. 5/11/10, at 59.

Defense counsel tried to argue that the victim was murdered in retaliation for his anti-drug activities, but the prosecution stymied his arguments. For example, when defense counsel sought to introduce evidence about Berrios and Rosa, the Commonwealth stated, "It's all hearsay, it was thrown out, it's irrelevant." Trial Tr. 5/6/10, at 168. In addition, because the Commonwealth withheld the other tips it received about alternative suspects, including drug dealers who operated near Gutierrez's home, *see* Am. Pet. at 21–23, 43–47, the jury never learned that the police had received leads about other individuals who might have played a role in Gutierrez's murder. This information would have bolstered defense counsel's argument that Gutierrez was killed by drug dealers in the neighborhood. Instead,

the jury left with the impression that Lazar was the only viable suspect.

The sole piece of physical evidence tying Lazar to the crime was his suitcase, which was found in the victim's backyard fourteen weeks after the murder.[5] Officer Terrance Lewis of the Crime Scene Unit, who processed the crime scene on the same day the victim's body was found, testified that he never went into or photographed the victim's backyard. Trial Tr. 5/5/10, at 123 ("the door was intact, there was a ladder against it, so I didn't go into the yard to photograph."); *id*. at 152 (the "back door was secured so I didn't have any reason to believe that somebody may have exited the property through the rear of the kitchen area, so no, I didn't go into the yard, no."). Detective Baker also testified on direct examination that he did not go into the backyard:

> The back door of the property had a ladder on with a dust pan on top of it so it appeared nobody used that to go anywhere because you can't put the ladder on the door when it's open. And the outside of the yard had a large gate locked.

Trial Tr. 5/6/10, at 101. But, on cross-examination, Baker conceded that he had gone into the victim's backyard about two weeks after the murder. *Id*. at 159. Defense counsel questioned Baker at length, implying that he would have noticed the suitcase if it had been there, and expressing incredulity that he would have overlooked it. *Id.* at 159–66, 181. Baker responded that he must have missed the

[5] According to the prosecution's theory of the case, Lazar's suitcase sat unnoticed in the victim's backyard, under an awning that left it exposed on three sides, between the months of January and April. As part of its investigation, the CIU examined the suitcase and its contents and found no obvious signs of weatherization. For example, the yearbook inside the suitcase was not warped; the binding was intact; and none of the pages were stained, curled, or stuck together.

suitcase because he "wasn't looking for it." *Id*. at 161; *see also id*. at 162 ("it's a large yard with vehicles in it, I'm not looking for a brief case, I'm looking for a weapon.").

On May 11, 2010, Lazar was convicted of second-degree murder, robbery, conspiracy to commit robbery, and a weapons offense. He was sentenced to life in prison without possibility of parole.

D. Post-Conviction Proceedings

After Lazar's conviction was upheld on direct appeal, he sought relief under Pennsylvania's Post-Conviction Relief Act (PCRA). In his petition, Lazar claimed, among other things, that trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for stipulating that Lazar had last taken methadone one month before his interrogation and for failing to obtain the proper records and expert testimony to confirm that Lazar would have been in severe methadone withdrawal during his interrogation. Pet'r App. at 84–123.

On January 11, 2013, Lazar's post-conviction counsel requested discovery from the Commonwealth about Berrios and Rosa. *Id*. at 14–15. On March 4, 2013, defense counsel filed a motion seeking the same information. *Id.* at 44–45. In response, the Commonwealth told the court that "*the police already investigated these two people and ruled them out*." *Id*. at 51 (emphasis in original).

On May 30, 2013, the PCRA court held an evidentiary hearing limited to the issue of whether counsel was ineffective for failing to obtain records showing that Lazar was administered methadone the day before his arrest. Ultimately, the court concluded that counsel was deficient but that Lazar had not been prejudiced.

Lazar, 2022 WL 3647816, at *2–3; *Commonwealth v. Lazar*, No. CP-51-CR-0002056-2008 (Pa. Ct. Common Pleas July 15, 2013). Lazar appealed to the Superior Court, which affirmed the trial court's decision. *Commonwealth v. Lazar*, 2019 EDA 2013 (Pa. Super. July 13, 2014). The Pennsylvania Supreme Court denied allowance of appeal. *Commonwealth v. Lazar*, 391 EAL 2014 (Pa. Dec. 2, 2014) (per curiam).

In 2014, Lazar filed a habeas petition in this Court. In a supporting memorandum, Lazar argued that the state courts' decisions were unreasonable because the courts failed to consider the entire record, including the unreliability of his confession and the evidence of alternative suspects Berrios and Rosa. *See* Ans. and Memo. of Law, *Lazar v. Coleman*, 14-cv-6907, ECF No. 9, at 16–17, 22–24 (Mar. 12, 2015). In a sur-reply, the Commonwealth characterized Lazar's arguments about Berrios and Rosa as "factual misrepresentations" and attacked defense counsel for "using the classic strategy of trying to pin the crime on another person by mentioning initial police investigative leads that were dead-ends." Pet'r App. at 72.

On September 29, 2016, Magistrate Judge Faith Angell issued a Report and Recommendation in which she concluded that the habeas petition should be denied and no certificate of appealability be issued. *Lazar*, 2022 WL 3647816, at *1. In his objections to the Report and Recommendation, Lazar argued that the state courts had misapplied the prejudice prong of the *Strickland* analysis by, among other things, failing to consider evidence of an alternative suspect. *See* Pet'r Objections, ECF No. 20, at *7 (Oct. 5, 2016). In response, the Commonwealth again stated that

Berrios had been excluded as a suspect: "Victor Barrios [*sic*], a local drug dealer on whom petitioner now wishes to pin the murder, was one of the initial non-fruitful leads police investigated. The victim had been known to chase drug dealers from his front steps, but the evidence showed that Barrios [*sic*] was not involved." Pet'r App. at 126.[6]

This Court adopted the Report and Recommendation in part, explaining that it based its decision "solely on the exceedingly deferential framework imposed me by 28 U.S.C. § 2254(d)." *Lazar*, 2022 WL 3647816, at *1. The Court wrote separately, however, "to stress my serious concern about the state courts' prejudice analysis." *Id*. In this Court's view, the Commonwealth's heavy reliance on Lazar's confession, coupled with the impeachment of the five civilian witnesses, "strongly suggest that the deficient performance of trial counsel was prejudicial." *Id*.

Lazar appealed to the Third Circuit and again argued that the lower courts had failed to consider Berrios as part of its prejudice analysis. Mot. for Rule 60(b) Relief, Pet'r App. at 111, ECF No. 33-2 ("A subsidiary error in the Magistrate's analysis is that the Superior Court … *omitted* the other significant evidence and

[6] In response to Lazar's objections, the Commonwealth also asserted that "[i]t is the state court's *result* that is owed deference, not the reasoning employed to reach that result." Pet'r App. at 127 n.2 (emphasis in original). However, in an opinion announced two months before the Commonwealth submitted its brief, the Third Circuit squarely rejected this position. *See Dennis v. Sec'y, Pa. Dep't of Corr*., 834 F.3d 263, 283 (3d Cir. 2016) (en banc) ("When a state court ruling is based on a reasoned, but erroneous analysis, federal habeas courts are empowered to engage in an alternate ground analysis—relying on any ground properly presented—but, in such a case, the federal court owes no deference to the state court.") The Commonwealth did not cite *Dennis* in its brief but instead relied on case law from two other circuits. Pet'r App. at 127 n.2.

factors favoring the defense, first being the evidence of an alternative suspect.") (emphasis in original). In its response, the Commonwealth reiterated that Berrios had been excluded as a suspect: "A nearby drug dealer, Victor Barrios [*sic*], had a rusty machete that could not have been murder weapon. He was quickly eliminated as a suspect and never arrested." *Id*. at 140–41. The Commonwealth also went further this time, noting that "Lazar calls Barrios [*sic*] 'an alternative suspect.' This is false and was resolved against him at trial." *Id*. at 141 n.6.

The Third Circuit affirmed this Court's decision denying Lazar's habeas petition. *Lazar v. Superintendent Fayette SCI*, 731 Fed. Appx. 119 (3d Cir. Apr. 24, 2018). In a footnote, the court dismissed Lazar's argument about an alternative suspect, noting that "Lazar also argues that police recovered a machete from another person. This matters little, as this weapon was rusty and the police eliminated the owner as a suspect." *Id*. at 123 n.5.

Lazar filed a pro se petition for writ of certiorari in the United States Supreme Court. On February 19, 2019, the Court denied Lazar's petition. *Lazar v. Capozza*, 139 S. Ct. 1167 (2019).

E. Newly Discovered Evidence and *Brady* Disclosures

In 2021, defense counsel obtained previously undisclosed evidence showing that Berrios and Rosa did not appear to have been excluded as suspects in Gutierrez's murder. *See* Am. Pet. at 19–20, 54–57. Perhaps most notably, a memorandum in the homicide file revealed that on February 5, 2007, just two weeks after seizing Rosa's car, the police department determined that it was "no longer needed for the investigation." Pet'r App. at 324. There is no evidence in the

homicide file to suggest that the car was ever subjected to any type of forensic examination, even though the informant who called in the anonymous tip reported that Berrios and Rosa typically traveled from their jobs in a black Honda Accord.[7]

In addition, in 2022, the CIU made *Brady* disclosures to defense counsel about several of the detectives involved in Lazar's case, including the lead detective, David Baker. Pet'r App. at 183–282. These disclosures, which were not previously provided to counsel, revealed that Detective Baker had a history of misconduct predating Lazar's trial:

- In an undated memorandum, the Internal Affairs Bureau sustained a finding that in 1998, Baker had denied a suspect an attorney after the suspect requested one. Detective Baker admitted that his intention was "[t]o see if he could convince [the suspect] to become a Commonwealth witness by having him admit his part in these murders." *Id*. at 185.

- In stipulations submitted in support of Chester Hollman's exoneration, the Commonwealth described Detective Baker's coercive investigative techniques, including his attempt to coerce a witness into signing a fabricated statement. *Id*. at 199–200, 214, 219.[8]

- In a 2021 filing submitted in Lavar Brown's case, the Commonwealth conceded that Baker fed information to witnesses and perjured himself at Brown's 2004 trial. Among other things, Baker testified that a cooperating witness's second statement was the first and only account she provided to the prosecution, when in fact the witness had given an earlier, contradictory statement to Baker. *Id*. at 231–32. The Commonwealth conceded that not only did it fail to disclose the

[7] Given how bloody the crime scene was, it is surprising that police officials would dispose of the car without conducting any forensic testing on it. Officer Lewis, who processed the crime scene, testified that there was "blood splattered everywhere" and that there was no evidence that anyone had washed blood off their hands before leaving the scene. *See* Trial Tr. 5/5/2010, at 149, 157.

[8] Hollman was exonerated in 2019 after spending 28 years in prison for a murder he did not commit. *See* Chester Hollman III, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5593 (last visited Oct. 21, 2022).

> witness's first statement, but it allowed Baker to testify falsely about the witness's history of cooperation. *Id*. at 233–38, 244–45, 271.

The Commonwealth also made *Brady* disclosures about other detectives involved in Lazar's case, including Detective Rossiter, who took Lazar's final, inculpatory statement. *Id*. at 329–39.

On April 27, 2022, Lazar filed a PCRA petition in state court based on the previously undisclosed evidence and the Commonwealth's *Brady* disclosures. On the same day, Lazar moved to reopen his habeas proceedings pursuant to Federal Rule of Civil Procedure 60(b). In its response, the Commonwealth conceded that it had repeatedly misrepresented the evidence about Berrios and Rosa. *See* Commonwealth Resp., ECF No. 38, at 7–12 (June 12, 2022). For example, the Commonwealth acknowledged that there was "little in the homicide or prosecution file to support the conclusion that Berrios or Rosa were excluded as suspects or were 'dead ends.'" *Id.* at 9. The Commonwealth also submitted a 2012 assignment memorandum from the head of the PCRA unit. Addressing Lazar's claim that the Commonwealth had suppressed evidence from a neighborhood activist about an alternative suspect, the PCRA chief noted, "there is no evidence police even investigated other suspects." *Id*. at 8; Pet'r App. at 513.

On August 24, 2022, this Court granted Lazar's Rule 60(b) motion. *Lazar v. Little*, CV-14-6907, 2022 WL 3647816 (E.D. Pa. Aug. 24, 2022). The Court found that Lazar was entitled to relief under Rule 60(b)(3) because the Commonwealth had failed to disclose and affirmatively misrepresented evidence about alternative suspects, thereby preventing Lazar from fully and fairly presenting his case. *Id.* at *4. The Court also found that Lazar was entitled to relief

under Rule 60(b)(6) because the Commonwealth's affirmative misrepresentations "to deceive the opposing party and the court" were "extraordinary." *Id*. As the Commonwealth acknowledged in its response to Lazar's 60(b) motion, those misrepresentations "'distorted the factual record before the federal courts, causing extreme hardship to Lazar.'" *Id*. (citing Commonwealth Resp. at 11).

Lazar has now filed an Amended Petition for habeas relief based in part on the Commonwealth's misrepresentations and withholding of evidence about Berrios and Rosa.

DISCUSSION

A. Procedural posture of Lazar's Amended Petition

Habeas petitioners normally must exhaust their claims in state court before a federal court will entertain their habeas petitions. 28 U.S.C. § 2254(b), (c); *see also Picard v. Connor*, 404 U.S. 270, 278 (1971) (to be exhausted, a federal claim must be "the substantial equivalent of that presented to the state courts."). This requirement gives the State "the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citation omitted). The requirement is not jurisdictional, "but arises rather from interests of comity between the state and federal systems." *Landano v. Rafferty*, 897 F.2d 661, 668 (3d Cir. 1990). Courts demand strict adherence to the exhaustion requirement because "it expresses 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." *Id*.

The Commonwealth agrees that Lazar exhausted Claim One of his Amended Petition. In Claim One, Lazar asks the Court to reconsider its analysis of the state court's decision denying his ineffective-assistance-of-counsel claim. Lazar does not ask the Court to consider new evidence or a new factual predicate, but instead asks that it consider his ineffective-assistance claim in light of the untainted record—i.e., the record stripped of the Commonwealth's misrepresentations about Berrios and Rosa. Because Lazar's ineffective-assistance claim was adjudicated in the state courts, and because he does not ask the Court to consider new evidence in analyzing the claim, the Commonwealth agrees that it has been exhausted.

Unlike Claim One, Lazar did not exhaust Claims Two or Four. A lack of exhaustion, however, is an affirmative defense that can be waived. 28 U.S.C. § 2254(b)(3); *Sharrieff v. Cathel*, 574 F.3d 225, 229–30 (3d Cir. 2009). In cases like this one, where serious constitutional violations occurred, a prosecutor is "obligat[ed] to see that the defendant is accorded procedural justice." Pa. R. Prof. Conduct 3.8, Comment 1 (Special Responsibilities of a Prosecutor); *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.")

The Commonwealth agrees that Lazar's rights have been violated and that he is entitled to procedural justice. In addition, Lazar's failure to exhaust his claims

was not because of a lack of diligence on his part, but because the Commonwealth failed to disclose evidence and made misleading statements to the courts. *See Lazar*, 2022 WL 3647816, at *5. Accordingly, to facilitate review and correction of the constitutional errors in this case, the Commonwealth will not assert and will affirmatively waive any procedural bars that would otherwise prevent this Court from considering the merits of Claims Two and Four.

B. Lazar is entitled to relief on Claim One because the state court unreasonably determined that he was not prejudiced by his counsel's deficient performance.

Under AEDPA, once a claim has been adjudicated on the merits by a state court, habeas relief may be granted if the state court decision (1) was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C § 2254(d)(1); or (2) was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id*. § 2254(d)(2). A state court decision is an unreasonable application of law "if the court identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular case." *Travillion v. Superintendent Rockview SCI*, 982 F.3d 896, 901 (3d Cir. 2020) (citation omitted). A state court decision is based on an unreasonable determination of facts when "the petitioner has demonstrated by clear and convincing evidence" that the state court's decision was unreasonable in light of the record. *Rountree v. Balicki*, 640 F.3d. 530, 538 (3d Cir. 2011).

In state court, Lazar argued that he received ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), because trial counsel

incorrectly stipulated that he had last taken methadone one month before his interrogation. *Lazar*, 2017 WL 783666, at *1, *2. As a result of counsel's failure, the jury never heard evidence that Lazar was suffering from acute methadone withdrawal during his lengthy interrogation. *Id.* at *2 n.2. To establish ineffective assistance of counsel under *Strickland*, Lazar was required to show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687. The state court concluded that Lazar met his burden of showing that counsel's performance was deficient but that he failed to show prejudice. *Lazar*, 2017 WL 783666, at *2. As to Lazar's confession, the court stated: "At best, [the jury] would have heard from competing experts that the defendant was experiencing an unknown quantum of withdrawal symptoms during the taking of his statements." *Id.* at *3 (citation omitted). The court also reasoned that even without Lazar's confession, there was "overwhelming evidence of guilt" in the form of "the implicating statements he made to the five individuals who testified at trial." *Id.*

In finding that Lazar was not prejudiced, the state court failed to consider the entire record, resulting in an unreasonable application of law under § 2254(d)(1). A court "must evaluate the totality of the available … evidence" in considering prejudice. *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000) (because the state court failed to consider the totality of the mitigation evidence, it unreasonably applied *Strickland* when it found that the defendant was not prejudiced by counsel's deficient performance); *see also Strickland*, 466 U.S. at 695 (in determining prejudice, "a court must consider the totality of the evidence

before the judge and jury"). The state court did not address whether Lazar's confession was unreliable (separate from whether it was voluntary); it ignored the civilian witnesses' credibility problems; and it made no mention of alternative suspects Berrios and Rosa. Accordingly, the court's decision constituted an unreasonable application of federal law pursuant to § 2254(d)(1).

For largely the same reasons, the state court made an unreasonable determination of facts under § 2254(d)(2). Indeed, the court appeared to focus solely on the evidence that favored the prosecution and supported the verdict. For example, the court characterized the civilian witness testimony as "overwhelming evidence of Lazar's guilt," *Lazar*, 2017 WL 783666, at *3, but failed to note that all five witnesses were impeached. The court also ignored the fact that the prosecutor devoted most of her closing argument to Lazar's confession. *See* Trial Tr. 5/11/10, 54–89 (closing argument), 67–72, 86–87 (discussion of witness testimony); c*f. Kyles v. Whitley*, 514 U.S. 419, 444 (1995) ("the likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and Williams were the State's two best witnesses."). Finally, the court made no mention of Berrios and Rosa, even though police had executed a search warrant at Berrios's home and seized several items, including a machete.

Because the state court's analysis of *Strickland's* prejudice prong involved an unreasonable application of law and facts, Claim One is subject to de novo review. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of

federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA requires."); *Branch v. Sweeney*, 758 F.3d 226, 233 (3d Cir. 2014) ("if the state courts unreasonably applied federal law in rejecting Branch's petition, the District Court should have reviewed Branch's ineffective assistance of counsel claim de novo.").

In reviewing the state courts' decisions, this Court previously concluded that it was constrained by AEDPA's deferential standards to deny habeas relief. *Lazar*, 2017 WL 783666, at *1. Nevertheless, the Court indicated that it was troubled by the result. The Court explained that unlike the state court, it would have found prejudice under *Strickland* because "the tainted evidence was a confession." *Id*. at *3. A confession, the Court observed, must be tested for both voluntariness and reliability. *Id.* The Court recognized that Lazar's confession was probably "withdrawal-tainted," making the reliability backstop even more important. *Id*. at *4. "It is not a new idea that someone whose mental and emotional faculties are impaired could freely give a false confession." *Id*.

In examining the entire record, the Court also recognized several other factors suggesting that Lazar was prejudiced by counsel's deficient performance. First, the Court observed that "juries place significant, often dispositive, emphasis on confessions. *Id*. "As a result, where the evidence tainted by deficient counsel's performance is a confession, courts should hesitate—or, to borrow a phrase, 'think hard, and then think again'—before finding there was no prejudice." *Id*. at *4 (citing *Camreta v. Greene*, 563 U.S. 692, 707 (2011)). Second, the Court noted that this general principle had "specific application" in Lazar's case, "where the five

civilian witnesses all had various credibility problems." *Id*. Finally, the Court noted that "the Commonwealth's heavy reliance on the confession, throughout trial and specifically in closing argument, speaks volumes about the confession's importance to the case." *Lazar*, 2017 WL 783666, at *4.

The Court could not have known, however, that its decision rested on a tainted record. That is because the Commonwealth repeatedly misrepresented that it had ruled out Berrios and Rosa. As a result, the Court did not address the fact that the state court omitted Berrios and Rosa from its analysis or that Berrios and Rosa appeared to be more viable suspects than Lazar. *See Lazar*, 2022 WL 3647816, at *4 ("I note particularly that the two alternative suspects were not included in this court's prejudice discussion and that the alternative suspects were specifically disregarded by the Third Circuit in its analysis.") In light of its prior misrepresentations, the Commonwealth agrees with Lazar that the untainted record should lead this Court to a different result, namely, that the state courts unreasonably erred in finding that Lazar was not prejudiced by his counsel's deficiencies. [9]

C. Lazar is entitled to relief on Claims Two and Four because the Commonwealth withheld exculpatory, material evidence in violation of *Brady*.

The Commonwealth violated Lazar's due process rights by (1) failing to

[9] The Commonwealth also agrees with Lazar that the state courts failed to consider the impact of an unreliable confession on the five witness statements. *See* Am. Pet. at 28. As Lazar explains, "The confession is what bolstered the unreliable and incentivized statements. Knowing that the confession came from an individual who was compromised by the acute effects of withdrawal fatally undermines the evidentiary value of the witness statements." *Id*. at 38.

disclose and misrepresenting evidence about Berrios and Rosa, and (2) failing to disclose evidence about Detective Baker's history of misconduct. The prosecution has an obligation to disclose information that is favorable to the guilt or punishment of the defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This obligation extends to information that is exculpatory as well as impeaching, *Dennis*, 834 F.3d at 284, and to evidence that could be used to "attack … the thoroughness and even the good faith of the investigation," *Kyles*, 514 U.S. at 445. The *Brady* rule also encompasses evidence known only to the police. "To comply with Brady, prosecutors must 'learn of any favorable evidence known to the others acting on the government's behalf…, including the police.'" *Dennis*, 834 F.3d at 284 (quoting *Strickler v. Greene*, 527 U.S. 263, 281 (1999)).

A new trial is required where the suppressed evidence is material, i.e., when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Cone v. Bell*, 556 U.S. 449, 469–70 (2009). A reasonable probability does not mean the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial. *Kyles*, 514 U.S. at 434. The materiality of suppressed evidence must be "considered collectively, not item by item." *Id*. at 436; *Dennis*, 834 F.3d at 312.

(1) The Commonwealth withheld and misrepresented evidence about alternative suspects Berrios and Rosa.

The Commonwealth suppressed evidence about its investigation into Berrios and Rosa—evidence that contradicted the Commonwealth's claims that Berrios and Rosa were ruled out as suspects. Perhaps most notably, the

Commonwealth did not disclose internal memoranda showing that the police department inexplicably decided to dispose of Rosa's Honda Accord just two weeks after it was seized. Pet'r App. at 324. Nothing in the file suggests that the car was subjected to any type of examination or forensic testing before being sent to auction. Indeed, the Commonwealth acknowledged in a 2012 memorandum that "there is no evidence police even investigated other suspects." *See* p. 15 *supra*; Pet'r App. at 513. But in 2013, when PCRA counsel sought discovery about Berrios and Rosa, the Commonwealth objected and told the state court that "*the police already investigated these two people and ruled them out*." Pet'r App. at 51 (emphasis in original). And in 2015, in a sur-reply submitted to this Court, the Commonwealth accused defense counsel of "using the classic strategy of trying to pin the crime on another person by mentioning initial police investigate leads that were dead-ends." Pet'r App. at 72. The Commonwealth never disclosed to defense counsel that the documents in the files contradicted this assertion, which would have significantly undercut this argument. *See Dennis*, 834 F.3d at 307 (finding a lead was "not fruitless, it was simply not rigorously pursued").

The suppressed evidence was both favorable to Lazar and material to the outcome of the case. Detectives apparently found the tip about Berrios and Rosa credible enough that they prepared an affidavit of probable cause and executed a search warrant at Berrios's home, seizing several items that could have been linked to the murder. *See* Ex. B. But as the suppressed evidence reveals, detectives botched the investigation into Berrios and Rosa—they never examined Rosa's car, even though he was reported to have used it after leaving an extremely bloody crime

scene; they failed to interview Berrios and Rosa; they never compared Berrios and Rosa's DNA to samples from the crime scene; and they never conducted tests for Gutierrez's DNA or matching fibers. Armed with this evidence, defense counsel could have discredited the caliber of the investigation and challenged the Commonwealth's decision to charge Lazar. *See Kyles*, 514 U.S. at 446 (holding that the thoroughness and good faith of a police investigation is a factor to be considered in determining whether withheld information is exculpatory); *Dennis*, 834 F.2d at 302 (finding that defense counsel could have used the suppressed information to "highlight the investigatory failures for the jury, which could have supported Dennis's acquittal"); *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (awarding new trial because the *Brady* evidence "carried within it the potential … [for] the discrediting, in some degree, of the police methods employed in assembling the case against" the defendant).

The suppressed information also would have allowed defense counsel to mount an "alternative suspect" defense. For example, defense counsel could have argued that Berrios and Rosa—two known drug dealers who operated in the victim's neighborhood—were more viable suspects than Lazar, given the victim's repeated clashes with drug dealers. *See Clemons v. Deb*, 124 F.3d 944, 950–52 (8th Cir. 1997) (finding *Brady* violation where the State failed to disclose that a correctional officer heard a rumor about an alternative suspect). Relatedly, the suppressed information would have impeached Detective Baker's testimony that "there was no information coming in at all [about the case]" and rebutted the Commonwealth's "lone suspect" narrative. Trial Tr. 5/6/2010, at 107; *see generally*

Wilson v. Beard, 589 F.3d 651, 665 (3d Cir. 2009) (suppressed evidence was material because it could have been used to impeach the credibility of a key witness); *Dennis*, 834 F.3d at 296 (suppressed evidence was material where it "would have empowered defense counsel to impeach one of the Commonwealth's strongest witnesses").

Finally, it bears noting that the Commonwealth rejected Lazar's requests for discovery about Berrios and Rosa. *See, e.g.*, Pet'r App. at 14–15, 44–45, 51–52. Although the prosecutor's duties under *Brady* do not depend upon a request from the accused, the prosecutor's *failure* to respond to a specific and relevant request is "seldom, if ever, excusable." *United States v. Agurs*, 427 U.S. 97, 106–07 (1976).

Thus, because the evidence about the investigation into Berrios and Rosa was not disclosed to the defense, and was material, the Commonwealth agrees that Lazar's due process rights were violated under *Brady* and that he is entitled to relief.

(2) The Commonwealth failed to disclose Detective Baker's history of misconduct.

The Commonwealth violated *Brady* by failing to disclose Detective Baker's history of misconduct, including evidence that he fabricated and coerced witness statements and perjured himself in a homicide trial. Detective Baker's credibility was critical to the outcome of the trial. As the lead detective on the case, Baker oversaw the processing of the crime scene and testified about the police department's failure to observe Lazar's suitcase in the victim's backyard. Baker also was the first detective to detain Lazar and question him about the suitcase. The prosecution argued that Lazar's knowledge of certain details about the crime—as reflected in his subsequent confession—proved that he was guilty, whereas Lazar

argued that Baker fed him information and showed him photos of the crime scene. Trial Tr. 5/11/10, at 88.

The undisclosed evidence was favorable and material because it could have been used to impeach Baker on each of these points. At trial, the prosecutor repeatedly vouched for Baker. *See, e.g., id.* at 73 (Baker "tells Lazar he's investigating a beating death. He doesn't tell him any other details about the crime. His job is to get information, not give information"); Trial Tr. 5/4/10, at 27–28 ("because it's a cold case, because it's an important case, because they want to solve it, they don't tell him too many details about the house and about what they found and how Mr. Gutierrez was killed."); Trial Tr. 5/11/10, at 68 ("This is not someone who is trying to jam anything or frame anyone."). But armed with information about Baker's history of feeding information to witnesses and fabricating witness statements, defense counsel could have impeached Baker's testimony that he did not feed Lazar information about the crime. *See Dennis*, 834 F.3d at 298, 308 (suppressed evidence is material where it could have been used to impeach the credibility of a key witness "in a manner not duplicated" by other evidence). The suppressed evidence also would have corroborated Mark Kedra's account that Baker fed Lazar with information about the crime. *See id.* at 287 (suppressed evidence can be favorable under *Brady* if it corroborates favorable testimony that otherwise received "little objective reinforcement.").

Similarly, defense counsel could have used Baker's misconduct to impeach his testimony about not seeing Lazar's suitcase in the backyard. On cross-examination and in closing arguments, defense counsel repeatedly challenged

Baker's account, but again, the prosecution vouched for Baker, telling the jury that he simply "missed" the suitcase. Had defense counsel been able to confront Baker with the evidence of his misconduct and especially his perjury, the prosecution's arguments likely would have rung hollow. As the Third Circuit has observed, "prior perjurious statements [are] an 'infirmity … that is almost unique in its detrimental effect on a witness's credibility.'" *Simmons v. Beard*, 590 F.3d 223, 235–36 (3d Cir. 2009) (citation omitted).

Detective Baker's testimony affected virtually every aspect of the prosecution's case against Lazar, including Lazar's knowledge of certain details about the crime and law enforcement's failure to observe the suitcase—the lone piece of physical evidence tying Lazar to the crime—in the victim's backyard. Discrediting Baker's testimony would have been devastating to the prosecution's case at trial. Given Baker's centrality to the case and the nature of his misconduct, there is a reasonable probability that, had the suppressed evidence been disclosed, the result of the trial would have been different. Accordingly, the Commonwealth agrees that Lazar's due process rights under *Brady* were violated and that he is entitled to relief.

CONCLUSION

Respondent respectfully requests that the Court grant a conditional writ of habeas corpus and order that Lazar be released from custody and retried within a reasonable time.

Respectfully submitted,

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Dated: October 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2022, I caused to be electronically filed the foregoing Response to Petitioner's Amended Petition for Habeas Corpus with the Clerk of Court via CM/ECF. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing systems. Parties may access the filing through the Court's CM/ECF System.

s/Jessica Attie Gurvich

JESSICA ATTIE GURVICH