18-9555

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH THOMAS, Petitioner

-v-

TAMMY FERGUSON, ET AL., Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Submitted by,

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QUESTION PRESENTED FOR REVIEW

In **Commonwealth v. McCloud**, 457 Pa. 310, 322 A.2d 653 (Pa. 1974), the Pennsylvania Supreme Court addressed whether the defendant's right to confrontation and cross-examination was violated when portions of an autopsy report opining the victims' cause of death was read into evidence without making the authoring medical examination available to testify. Therein, it was held that the report's use to establish an **element of the crime** denied the defendant his fundamental constitutional right of confrontational and was error. (emphasis added).

Two decades later, this Honorable Court decided the case of **Crawford v. Washington**, 541 U.S. 36, 124 S. Ct. 1354 (2004) holding that the Confrontation Clause of the Sixth Amendment prohibits the use of testimonial hearsay unless the defendant has the opportunity to cross-examine the unavailable declarant. **Id**. at 54. Later, in **Melendez-Diaz v. Massachusetts**, 557 U.S. 305, 129 S. Ct. 2527 (2009), this Honorable Court addressed the "class of testimonial statements covered by the Confrontation Clause" delineated in **Crawford**. **Id**. at 2531. Such testimonial statements included "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits [...] that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for the use at trial." **Id**., quoting **Crawford**, supra at 52

In **Melendez-Diaz**, this Court determined that the certificates of an analysis describing the results of forensic testing which determined that the seized substance to be cocaine, was an affidavit as such was recognized as testimonial. Because the defendant had a right to confront his accuser and the prosecution offered no witness in support of the proffered certificates, the Confrontation Clause of the Sixth Amendment was violated when this admission occurred.

Finally, in **Bullcoming v. New Mexico**, 131 S. Ct. 2705 (2011), this Honorable Court applied its decision in **Melendez-Diaz** and held that a laboratory report prepared for the defendant's drunken driving trial was testimonial in nature pursuant to the Sixth Amendment, and the defendant's right to conformation demanded that he have the right to cross-examine the analyst who prepared the report. **Id**. at 2713.

Premised upon the above, most recently, the Pennsylvania Supreme Court in **Commonwealth v. Brown**, 185 A.3d 316 (Pa. 2018) has determined that an autopsy report is testimonial and its admission into evidence without the medical examiner's testimony and in the absence of any prior opportunity to cross-examine him, violates a defendant's right to confrontation under the Sixth Amendment of the United States Constitution.

The questions presented is:

WHETHER THIS COURT SHOULD CONSIDER IF THE INTRODUCTION OF AN AUTOPSY REPORT WHICH WAS PRESENTED AS SUBSTANTIVE EVIDENCE BUT NOT TESTIFIED TO BY ITS AUTHOR, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION?

WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT PETITIONER HAS FAILED TO SHOW THAT COUNSEL REPRESENTATION FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AS ARTICULATED IN STRICKLAND AND WAS THAT DECISION CONTRARY TO THIS COURT'S HOLDING?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States District Court for the Eastern District of Pennsylvania which was ultimately affirmed by the Third Circuit Court of Appeals.

OPINIONS BELOW

The Opinion of the United States Court for the Eastern District of Pennsylvania.

JURISDICTION

The judgment of the United States of the Eastern District of Pennsylvania was entered on February 7th, 2019. Jurisdiction is invoked pursuant to **28 U.S.C. § 1257(a)**.

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: " In all criminal prosecutions, the accused shall enjoy the right to … be confronted with the witness against him; … and to have the Assistance of Counsel for his defence." The Fourteenth Amendment to the United States Constitution provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY OF THE JUDGMENT IN ISSUE:

On December 13th, 2006, the Honorable Jeffrey P. Minehart of the Philadelphia Court of Common Pleas convicted Kenneth Thomas ("the Petitioner") of the following offenses: third-degree murder, carrying a firearm without a license, and possession of an instrument of crime. On March 28th, 2007, the Petitioner was sentenced to a term of twenty (20) to forty (40) years' imprisonment.

Following the conviction, on June 12, 2007, Petitioner filed a notice of appeal and on October 21st, 2008, the Pennsylvania Superior Court denied all of his claims as meritless. **Commonwealth v. Thomas**, 1591 EDA 2007 (Pa. Super. 2008).

On February 11th, 2009, under the State Post-Conviction Relief Act ("PCRA"), **42 Pa. C.S. § 9541 et seq.**, Petitioner filed a timely pro se PCRA Petition and on May 22nd, 2009, the State Court appointed Elayne Bryn, Esq. ("PCRA Counsel") to represent him. On February 20th, 2013, PCRA Counsel filed an Amended PCRA Petition. On May 2nd, 2014, the State court dismissed Petitioner's Amended PCRA Petition without an evidentiary hearing.

A timely notice of appeal was filed to the State Superior Court and on February 17th, 2015, that court denied collateral relief. **1579 EDA 2014** (Pa. Super. 2015). Subsequently, on September 28, 2015, the State Supreme Court denied review. **97 EAL 2017** (Pa. 2015).

On May 7th, 2016, pursuant to **28 U.S.C § 2254**, Petitioner filed a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. On July 20th, 2017, Magistrate Judge Marilyn Heffley issued a Report and Recommendation ("R & R") recommending that, Petitioner's habeas petition should be denied, dismissed, and a Certificate of Appealabilty ("COA") should not be issued. Thereafter, Petitioner filed objection to the R & R and on May

31st, 2018, District Court Judge Darnell Jones, II denied Petitioner's habeas corpus petition and no COA was issued.

On July 21st, 2018, the Petitioner sought a COA with the Third Circuit Court of Appeals of Pennsylvania which was ultimately denied and no opinion was issued by the circuit court. Thereafter, Petitioner sought en banc review and on February 7th, 2019, the Third Circuit Court of Appeals denied his request. This Petition for Writ of Certiorari now follows.

II. THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA RULING:

In his habeas corpus petition, Petitioner argued that collateral counsel was ineffective for failing to raise in the initial collateral review petition that his Trial Counsel was ineffective for failing to object and argue that the admission of the autopsy report as substantive evidence, without the author of such violated his Sixth Amendment right to Confrontation. It was also argued that the admission of this evidence violated his due process rights because without the report, the Commonwealth of Pennsylvania would not been able to prove each element of the crime beyond a reasonable doubt. These claims were presented to the Eastern District Court of Pennsylvania.

In its Memorandum, District Court Judge Jones adopted Magistrate Judge Heffley recommendations finding Petitioner's Petition for Writ of Habeas Corpus should be denied and dismissed without the issuance of a COA because trial counsel was not ineffective for failing to object to the admission of the medical examiner's report, and in not requiring the medical examiner to appear at trial and be subjected to cross-examination. See, **Memorandum at 5-6**.

District Court Judge Jones recognized this claim was procedurally defaulted, however, the court acknowledged that "such claim falls under a narrow exception of the Supreme Court precedent. ... **Martinez v. Ryan**, 566 U.S. 1, 14 (2012) (internal citations omitted)" indicating

that, "Petitioner's objection falls squarely under the second **Martinez** cause exception as Petitioner alleges that PCRA Counsel was ineffective in not bringing up Trial Counsel's ineffectiveness." **Appendix A, Memorandum at 9-10**.

Nevertheless, District Court Judge Jones found that the:

> "Petitioner has not put forth one credible benefit that would have come from Trial Counsel objecting to the medical examiner's report or Trial Counsel having the medical examiner testify. ...
>
> The purpose of the medical examiner's report was to determine the victim's cause of death, thus case of death is what Petitioner argues that Trial Counsel should have challenged. Given the facts of the case, it is not unreasonable for an attorney not to utilize precious judicial economy combating such autopsy report. Petitioner has given this Court no reason to think otherwise. The victim was found immediately after being shot. Shortly thereafter, the victim identified Petitioner to officers of the law. Subsequently, the victim died in a nearby hospital. This Court is not convinced that an objection to the medical examiner's report or an opportunity to cross-examine the medical examiner would have been beneficial to Petitioner.
>
> Petitioner has failed to show that 'counsel representation fell below an objective standard of reasonableness' as articulated in Strickland. Nor has Petitioner shown that he suffered any prejudice from the failure of Trial Counsel to neither object to the medical examiner's report nor call the medical examiner to the stand. In conclusion, PCRA Counsel was not ineffective. Petitioner's objections are overruled and the R & R is adopted and affirmed." **Appendix A, Memorandum at 10-11**.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY WHETHER AN AUTOPSY REPORT IS TESTIMONIAL AND WHETHER THE ADMISSION OF SUCH WITHOUT ITS AUTHOR, VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

The majority of the State Supreme Courts have found that an autopsy report is testimonial and the introduction of such, in absence of its author, violates the Confrontation Clause of the Sixth Amendment. However, several Federal Courts are split on this claim. Thus, review is appropriate for this Court to explain and clarify whether or not an autopsy report is testimonial and

what's the clearly established law on this claim.

Pursuant to **Rule 10(a)** review is appropriate when the "United States court of appeals" is "in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort."

Concerning the question of whether an autopsy report is testimonial for purposes of Confrontation under the Sixth Amendment; several state and federal courts have considered this issue and likewise held that an autopsy report is testimonial. See, e.g., **United States v. Ignasiak**, 667 F.3d 1217, 1232 (11th, Cir. 2012); **West Virginia v. Kennedy**, 229 W. Va. 756, 735 S.E.2d 905, 917-918 (W. Va. 2012); **United States v. Moore**, 651 F.3d 30, 69-74, 397 U.S. App. D.C. 148 (D.C. Cir. 2011)(per curiam), aff'd in part sub nom., **Smith v. United States**, 133 S. Ct. 714, 184 L.Ed. 2d 570 (2013); **Cuesta-Rodriguez v. Oklahoma**, 2010 OK Cr 23, 241 P.3d 214, 228 (Okla. Crim. App. 2010); **North Carolina v. Locklear**, 363 N.C. 438, 681 S.E. 2d 293, 305 (N.C. 2009); **Wood v. Texas**, 299 S.W. 3d 200, 209-210 (Tex. Crim. App. 2009); **Commonwealth v. Nardi**, 452 Mass. 379, 893 N.E. 2d 1221, 1233 (Mass. 2008).

Currently, however, there's a split in the Circuit Courts on the issue. For example, the Second Circuit in **United States v. James**, 712 F.3d 79, 99 (2d Cir. 2013) held that an autopsy report is not testimonial. And the same is said of in the First Circuit as the court in **Nardi v. Pepe**, 662 F.3d 107, 112 (1st Cir. 2011) explained that: "even now, [after **Melendez-Diaz** and **Bullcoming**,] it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial."

Nevertheless in **United States v. Ignasiak**, 667 F.3d 1217, 1232 (11th Cir. 2012) the Eleventh Circuit held that the admission of autopsy reports and testimony about them by a

293, 305 (N.C. 2009); **Wood v. Texas**, 299 S.W. 3d 200, 209-210 (Tex. Crim. App. 2009); **Commonwealth v. Nardi**, 452 Mass. 379, 893 N.E. 2d 1221, 1233 (Mass. 2008). But see, **United States v. James**, 712 F.3d 79, 99 (2d Cir. 2013); **Nardi v. Pepe**, 662 F.3d 107, 112 (1st Cir. 2011) (both are in conflict with other state courts of last resort).

Consequently, the "state court[s] of last resort has decided" this "important federal question in a way that conflicts with a decision" "of a United States Court of Appeals." Accordingly, a Writ of Certiorari is appropriate in this matter. See, **United States v. Castleman**, 572 U.S. 157, 134 S. Ct. 1405 (2014) (Certiorari was granted to resolve the split).

Finally, **Rule 10** subsection (c) indicates that, a Writ of Certiorari is appropriate when, a "state court or a United States court of appeals has decided an important question of federal law that has not been, *but should be*, settled by this court." (emphasis added)

As articulated above, several state courts have decided this "important question of federal law" and determined that an autopsy report is testimonial. See, **Commonwealth v. Brown**, 185 A.3d 316 (Pa. 2018); **West Virginia v. Kennedy**, 229 W. Va. 756, 735 S.E.2d 905, 917-918 (W. Va. 2012); **Cuesta-Rodriguez v. Oklahoma**, 2010 OK Cr 23, 241 P.3d 214, 228 (Okla. Crim. App. 2010); **North Carolina v. Locklear**, 363 N.C. 438, 681 S.E. 2d 293, 305 (N.C. 2009); **Wood v. Texas**, 299 S.W. 3d 200, 209-210 (Tex. Crim. App. 2009); **Commonwealth v. Nardi**, 452 Mass. 379, 893 N.E. 2d 1221, 1233 (Mass. 2008).

However, recent cases of this Court in applying **Crawford** confirmed that there is a wide latitude for reasonable differences of opinions on this very subject. Twice since 2009, this Honorable Court has addressed the issue of when an expert witness may testify about scientific issues in which he or she did not perform testing in the first instance. See, **Williams v. Illinois**, 567 U.S. 50, 132 S. Ct. 2221 (2012) and **Bullcoming v. New Mexico**, 564 U.S. 647, 131 S. Ct.

2705 (2011). In **Williams**, Justice Kagan's dissent commented on the difficulties confronted by courts and others who must apply these three decisions:

> "What comes out of four Justices' desires to limit **Melendez** and **Bullcoming** in whatever was possible, combined with one Justice's one-justice view of those holdings, is-to be frank-who knows what. Those decisions apparently no longer mean all that they say. Yet no one can tell in what way or to what extent they are altered because no proposed limitation commands the support of a majority." **Williams**, 567 U.S. at 56.

Justice Kagan's words have turned out to be true as this issue is the subject of a federal circuit split. Compare, **Hensley v. Roden**, 755 F.3d 724, 734 (1st Cir. 2014) (analyzing state and federal cases after Williams, and concluding that the cases make it clear that "the testimonial nature of autopsy reports was [not] clearly established" under **Crawford** and **Melendez-Diaz**); **United States v. James**, 712 F.3d 79, 87-88 (2d Cir. 2013) and **Smith v. Ryan**, 2014 U.S. Dist. Lexis 38511 (D. Ariz. 2014), aff'd 823 F.3d 1270 (9th Cir. 2016) (noting a lack of "clearly established federal law" on the issue of whether an autopsy report is testimonial) with **United States v. Moore**, 651 F.3d 30, 73 (D.C. Cir. 2011); **United States v. Ignasiak**, 667 F.3d 1217, 1231-32 (11th Cir. 2012); see also,

Accordingly, this Court's deep division on how to apply **Crawford** and **Melendez-Diaz** to the testimony of a "substitute" as well as the sharp division on the subject in state and federal courts, makes clear that this Honorable Court should consider this claim and this issue should be "settled by this court."

II. THIS COURT SHOULD GRANT REVIEW BECAUSE THE DISTRICT COURT'S DECISION WAS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW AS HELD BY THE COURT.

At the outset, it should be noted that the claim of whether Trial Counsel was ineffective for failing to object to the introduction of an autopsy report without its author was not raised by PCRA

Counsel during the initial collateral review proceedings. Nevertheless, this claim fell under the narrow exception as set forth by this Honorable Court in **Martinez v. Ryan**, 566 U.S. 1 (2012) which holds:

> "[W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review proceeding, where the claim should have been raised, was ineffective under the standards of **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)." **Martinez**, at 14.

The Third Circuit Court of Appeals has subsequently examined Pennsylvania procedural law and found that **Martinez** applies in Pennsylvania. See, **Cox v. Horn**, 757 F.3d 113, 124 n. 8 (3d Cir. 2014).

In **Strickland**, this Honorable Court set forth the standard governing claims of ineffective assistance of counsel. First, the Petitioner must show that counsel's performance was deficient. This requirement involves demonstrating that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. **Id**. at 687. Second, the Petitioner must show that he was prejudiced by the deficient performance. This requires showing that counsel's errors deprived the Petitioner of a fair trial. **Id**.

The District Court examined Petitioner's claim under the aforementioned standard and despite acknowledging that Petitioner argued that Trial Counsel should have challenged the cause of death, that court determined that the "Petitioner has not put forth one credible benefit that would have come from Trial Counsel objecting to the medical examiner's". Accordingly, the District Court was "not convinced that an objection to the medical examiner's report or an opportunity to cross-examine the medical examiner would have been beneficial to Petitioner." As a result, the "Petitioner has failed to show that 'counsel representation fell below an objective standard of

reasonableness' as articulated in **Strickland**. Nor has Petitioner shown that he suffered any prejudice from the failure of Trial Counsel to neither object to the medical examiner's report nor call the medical examiner to the stand." See, **Appendix A, Memorandum at 10-11**.

Thus, the question before this Honorable court is whether the District Court determinations that Petitioner's Trial Counsel was ineffective within the realms of **Strickland**, was "contrary to, or involved an unreasonable application of, clearly established Federal law." **28 U.S.C. § 2254(d)(1)**.

Prior to conviction, the accused is shielded by the presumption of innocence, the "bedrock[,] axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." **Reed v. Ross**, 468 U.S. 1, 4, 104 S. Ct. 2901 (1984). Accordingly, the Sixth Amendment provides those "accused" of a "crime" have the right to have effective assistance of counsel. This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved beyond a reasonable doubt. **United States v. Gaudin**, 515 U.S. 506, 510, 115 S. Ct. 2310 (1995); **In re Winship**, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970) (requiring "proof beyond a reasonable doubt of every fact necessary to constitute the crime").

It is undisputed that in the State of Pennsylvania causation constitutes an essential element of the offense of murder which the Commonwealth must prove beyond a reasonable doubt. **Commonwealth v. Webb**, 296 A.2d 734 (1972); see also, **Patterson v. New York**, 432 U.S. 197, 211, n 12, 97 S. Ct. 2319 (1977) (The applicability of the reasonable-doubt standard, however, has always been dependent on how a state defines the offense that is charged in any given case)

In this matter, the Petitioner was charged with murder in which the State was required to prove each and every element beyond a reasonable doubt. Thus, it was unreasonable for the District

CONCLUSION

For the foregoing reasons, Petitioner requests that this Honorable Court grant a writ of certiorari to the Third Circuit Court of Appeals.

Respectfully submitted,

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