Action No. 20-5818 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

TYRONE JOHNSTON,

PETITIONER,

vs.

KEVIN RANSOM,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

PRO SE PETITIONER:

/s/ Tyrone Johnston

Tyrone Johnston
Inst. Id. No. HY-2797
c/o S.C.I. at DALLAS
1000 Follies Road
Dallas, PA. 18612

QUESTION(S) PRESENTED

DID THE THIRD CIRCUIT ERR IN DENYING A CERTIFICATE OF APPEAL ("COA") BASED UPON A FAILURE TO SHOW ENTITLEMENT TO RELIEF, DESPITE SATISFYING THE REQUIREMENTS FOR OBTAINING A COA — I.E., THAT NOT ONLY COULD JURISTS OF REASON DISAGREE WITH THE DISTRICT COURT'S DETERMINATION, BUT THAT, THERE IS CLEAR AND CONVINCING INDICIA THAT A DISAGREEMENT AMONGST JURISTS OF REASON CURRENTLY EXISTS REGARDING THE NATURE OF AUTOPSIES AND ONE'S RIGHT TO CONFRONTATION, AND THUS, AT MINIMUM WOULD ENCOURAGE FURTHER PROCEEDINGS ?

LIST OF PARTIES

[☑] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

N/A

RELATED CASES

COM. v. JOHNSTON, NO. CP-51-CR-1300475-2006.

COM. v. JOHNSTON, NO. CP-51-CR-0004489-2007.

COM. v. JOHNSTON, NO. 2105 EDA 2009 (PA.SUPER.CT. SEP. 22, 2010).

COM. v. JOHNSTON, NO. 2116 EDA 2009 (PA.SUPER.CT. MAR. 20, 2011).

COM. v. JOHNSTON, NO. 3271 EDA 2013 (PA.SUPER.CT. MAR. 10, 2015).

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix E to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was April 27, 2020.

[✓] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE FOLLOWING STATUTORY AND CONSTITUTIONAL PROVISIONS ARE INVOLVED IN THIS CASE.

U.S. CONST., AMEND. VI

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENCE.

U.S. CONT., AMEND. XIV

SECTION 1. ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

28 U.S.C. §2253

(a) IN A HABEAS CORPUS PROCEEDING OR A PROCEEDING UNDER SECTION 2255 [28 USCS § 2255] BEFORE A DISTRICT JUDGE, THE FINAL ORDER SHALL BE SUBJECT TO REVIEW, ON APPEAL, BY THE COURT OF APPEALS FOR THE CIRCUIT IN WHICH THE PROCEEDING IS HELD.

(b) THERE SHALL BE NO RIGHT OF APPEAL FROM A FINAL ORDER IN A PROCEEDING TO TEST THE VALIDITY OF A WARRANT TO REMOVE TO ANOTHER DISTRICT OR PLACE FOR COMMITMENT OR TRIAL A PERSON CHARGED WITH A CRIMINAL OFFENSE AGAINST THE UNITED STATES, OR TO TEST THE VALIDITY OF SUCH PERSON'S DETENTION PENDING REMOVAL PROCEEDINGS.

(c)(1) UNLESS A CIRCUIT JUSTICE OR JUDGE ISSUES A CERTIFICATE OF APPEALABILITY, AN APPEAL MAY NOT BE TAKEN TO THE COURT OF APPEALS FROM --

(A) THE FINAL ORDER IN A HABEAS CORPUS PROCEEDING IN WHICH THE DETENTION COMPLAINED OF ARISES OUT OF PROCESS ISSUED BY A STATE COURT; OR

(B) THE FINAL ORDER IN A PROCEEDING UNDER SECTION 2255 [28 USCS § 2255].

(2) A CERTIFICATE OF APPEALABILITY MAY ISSUE UNDER PARAGRAPH (1) ONLY IF THE APPLICANT HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

(3) THE CERTIFICATE OF APPEALABILITY UNDER PARAGRAPH (1) SHALL INDICATE WHICH SPECIFIC ISSUE OR ISSUES SATISFY THE SHOWING REQUIRED BY PARAGRAPH (2).

28 U.S.C. §2254

(a) THE SUPREME COURT, A JUSTICE THEREOF, A CIRCUIT JUDGE, OR A DISTRICT COURT SHALL ENTERTAIN AN APPLICATION FOR A WRIT OF HABEAS CORPUS IN BEHALF OF A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT ONLY ON THE GROUND THAT HE IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OR LAWS OF THE UNITED STATES.

(b)(1) AN APPLICATION FOR A WRIT OF HABEAS CORPUS ON BEHALF OF A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT SHALL NOT BE GRANTED UNLESS IT APPEARS THAT-

(A) THE APPLICANT HAS EXHAUSTED THE REMEDIES AVAILABLE IN THE COURTS OF THE STATE; OR

(B)(i) THERE IS AN ABSENCE OF AVAILABLE STATE CORRECTIVE PROCESS; OR

(ii) CIRCUMSTANCES EXIST THAT RENDER SUCH PROCESS INEFFECTIVE TO PROTECT THE RIGHTS OF THE APPLICANT.

(2) AN APPLICATION FOR A WRIT OF HABEAS CORPUS MAY BE DENIED ON THE MERITS, NOTWITHSTANDING THE FAILURE OF THE APPLICANT TO EXHAUST THE REMEDIES AVAILABLE IN THE COURTS OF THE STATE.

(3) A STATE SHALL NOT BE DEEMED TO HAVE WAIVED THE EXHAUSTION REQUIREMENT OR BE ESTOPPED FROM RELIANCE UPON THE REQUIREMENT UNLESS THE STATE, THROUGH COUNSEL, EXPRESSLY WAIVES THE REQUIREMENT.

(c) AN APPLICANT SHALL NOT BE DEEMED TO HAVE EXHAUSTED THE REMEDIES AVAILABLE IN THE COURTS OF THE STATE, WITHIN THE MEANING OF THIS SECTION, IF HE HAS THE RIGHT UNDER THE LAW OF THE STATE TO RAISE, BY ANY AVAILABLE PROCEDURE, THE QUESTION PRESENTED.

(d) AN APPLICATION FOR A WRIT OF HABEAS CORPUS ON BEHALF OF A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT SHALL NOT BE GRANTED WITH RESPECT TO ANY CLAIM THAT WAS ADJUDICATED ON THE MERITS IN STATE COURT PROCEEDINGS UNLESS THE ADJUDICATION OF THE CLAIM--

(1) RESULTED IN A DECISION THAT WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES; OR

(2) RESULTED IN A DECISION THAT WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDING.

(e)(1) IN A PROCEEDING INSTITUTED BY AN APPLICATION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT A DETERMINATION OF A FACTUAL ISSUE MADE BY A STATE COURT SHALL BE PRESUMED TO BE CORRECT. THE APPLICANT SHALL HAVE THE BURDEN OF REBUTTING THE PRESUMPTION OF CORRECTNESS BY CLEAR AND CONVINCING EVIDENCE.

(2) IF THE APPLICANT HAS FAILED TO DEVELOP THE FACTUAL BASIS OF A CLAIM IN STATE COURT PROCEEDINGS, THE COURT SHALL NOT HOLD AN EVIDENTIARY HEARING ON THE CLAIM UNLESS THE APPLICANT

SHOWS THAT--

(A) THE CLAIM RELIES ON--

(i) A NEW RULE OF CONSTITUTIONAL LAW, MADE RETROACTIVE TO CASES ON COLLATERAL REVIEW BY THE SUPREME COURT, THAT WAS PREVIOUSLY UNAVAILABLE; OR

(ii) A FACTUAL PREDICATE THAT COULD NOT HAVE BEEN PREVIOUSLY DISCOVERED THROUGH THE EXERCISE OF DUE DILIGENCE; AND

(B) THE FACTS UNDERLYING THE CLAIM WOULD BE SUFFICIENT TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT BUT FOR CONSTITUTIONAL ERROR, NO REASONABLE FACTFINDER WOULD HAVE FOUND THE APPLICANT GUILTY OF THE UNDERLYING OFFENSE.

(f) IF THE APPLICANT CHALLENGES THE SUFFICIENCY OF THE EVIDENCE ADDUCED IN SUCH STATE COURT PROCEEDING TO SUPPORT THE STATE COURT'S DETERMINATION OF A FACTUAL ISSUE MADE THEREIN, THE APPLICANT, IF ABLE, SHALL PRODUCE THAT PART OF THE RECORD PERTINENT TO A DETERMINATION OF THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT SUCH DETERMINATION. IF THE APPLICANT, BECAUSE OF INDIGENCY OR OTHER REASON IS UNABLE TO PRODUCE SUCH PART OF THE RECORD, THEN THE STATE SHALL PRODUCE SUCH PART OF THE RECORD AND THE FEDERAL COURT SHALL DIRECT THE STATE TO DO SO BY ORDER DIRECTED TO AN APPROPRIATE STATE OFFICIAL. IF THE STATE CANNOT PROVIDE SUCH PERTINENT PART OF THE RECORD, THEN THE COURT SHALL DETERMINE UNDER THE EXISTING FACTS AND CIRCUMSTANCES WHAT WEIGHT SHALL BE GIVEN TO THE STATE COURT'S FACTUAL DETERMINATION.

(g) A COPY OF THE OFFICIAL RECORDS OF THE STATE COURT, DULY CERTIFIED BY THE CLERK OF SUCH COURT TO BE A TRUE AND CORRECT COPY OF A FINDING, JUDICIAL OPINION, OR OTHER RELIABLE WRITTEN INDICIA SHOWING SUCH A FACTUAL DETERMINATION BY THE STATE COURT SHALL BE ADMISSIBLE IN THE FEDERAL COURT PROCEEDING.

(h) EXCEPT AS PROVIDED IN SECTION 408 OF THE CONTROLLED SUBSTANCE ACT, IN ALL PROCEEDINGS BROUGHT UNDER THIS SECTION, AND ANY SUBSEQUENT PROCEEDING ON REVIEW, THE COURT MAY APPOINT COUNSEL FOR AN APPLICANT WHO IS OR BECOMES FINANCIALLY UNABLE TO AFFORD COUNSEL, EXCEPT AS PROVIDED BY A RULE PROMULGATED BY THE SUPREME COURT PURSUANT TO STATUTORY AUTHORITY. APPOINTMENT OF COUNSEL UNDER THIS SECTION SHALL BE GOVERNED BY SECTION 3006A OF TITLE 18.

(i) THE INEFFECTIVENESS OR INCOMPETENCE OF COUNSEL DURING FEDERAL OR STATE COLLATERAL POST-CONVICTION PROCEEDINGS SHALL NOT BE A GROUND FOR RELIEF IN A PROCEEDING ARISING UNDER SECTION 2254.

STATEMENT OF THE CASE

TYRONE JOHNSTON WAS CONVICTED OF MURDER OF THE FIRST DEGREE (18 PA.C.S. § 2502(a) [H-1]) AND POSSESSING INSTRUMENT OF CRIME (PIC) (18 PA.C.S. § 907(A) [M-1]) IN CONNECTION WITH THE KILLING OF STEPHANIE LABANCE, ON FEBRUARY 26, 2009, FOLLOWING A BENCH TRIAL WHICH COMMENCED ON FEBRUARY 17, 2009. (CP-51-CR-1300475-2006) (LABANCE CASE). AT THIS TRIAL, MR. JOHNSTON WAS CONVICTED OF MURDER OF THE FIRST DEGREE, CRIMINAL CONSPIRACY (18 PA.C.S. § 903 [F-1]), AND PIC IN CONNECTION WITH THE KILLING OF JAMEL CONNER. (CP-51-CR-0004489-2007) (CONNER CASE). SENTENCING IN BOTH CASES, WAS DEFERRED UNTIL MARCH 4, 2009.

AT SENTENCING, IN CONNECTION WITH THE CONNOR CASE, MR. JOHNSTON WAS SENTENCED TO THE MANDATORY TERM OF LIFE IMPRISONMENT (18 PA.C.S. § 1102(a)(1)) FOR THE COUNT OF MURDER, WITH A CONSECUTIVE TERM OF NOT LESS THAN TWENTY NOR MORE THAN FORTY YEARS' IMPRISONMENT FOR THE COUNT OF CRIMINAL CONSPIRACY, AND A CONSECUTIVE TERM OF NOT LESS THAN TWO-AND-A-HALF NOR MORE THAN FIVE YEARS' IMPRISONMENT FOR THE COUNT OF PIC. IN CONNECTION WITH THE LABANCE CASE, MR. JOHNSTON WAS SENTENCED TO A CONSECUTIVE MANDATORY TERM OF LIFE IMPRISONMENT FOR THE COUNT OF MURDER, AND A TERM OF NOT LESS THAN TWO-AND-A-HALF NOR MORE THAN FIVE YEARS' IMPRISONMENT FOR THE COUNT OF PIC.

POST-SENTENCE MOTIONS WERE FILED ON MARCH 12, 2009 AND DENIED ON JULY 8, 2009. MR. JOHNSTON'S CONVICTION IN THE LABANCE CASE WAS AFFIRMED ON DIRECT APPEAL. COMMONWEALTH v. JOHNSTON, NO. 2116 EDA 2009 (PA.SUPER.CT. MAR. 20, 2011) (UNPUBLISHED) (APPENDIX E). ON SEPTEMBER 11, 2011, OUR SUPREME COURT DENIED

ALLOWANCE OF APPEAL FILED ON APRIL 11, 2011. IN THE CONNER CASE, THE SUPERIOR COURT DISMISSED THE APPEAL FOR COUNSEL'S SECOND FAILURE TO FILE A BRIEF THERETO. COMMONWEALTH v. JOHNSTON, NO. 2105 EDA 2009 (PA.SUPER.CT. SEP. 22, 2010). STATE POST-CONVICTION PROCEEDINGS WERE FILED ON NOVEMBER 22, 2010; RELIEF, FOLLOWING AN EVIDENTIARY HEARING, WAS DENIED ON NOVEMBER 25, 2013. THE SUPERIOR COURT AFFIRMED THE DENIAL OF POST-CONVICTION RELIEF IN THE LABANCE CASE. COMMONWEALTH v. JOHNSTON, 3271 EDA 2013 (PA.SUPER.CT. MAR. 10, 2015) (NON-PRECEDENTIAL DECISION) (APPENDIX D).

MR. JOHNSTON THEN FILED A HABEAS CORPUS ACTION UNDER 28 U.S.C. § 2254. RELIEF WAS DENIED BY THE DISTRICT COURT (APPENDIX B), AS WAS, A CERTIFICATE OF APPEALABILITY (COA) (APPENDIX C). MR. JOHNSTON THEN SOUGHT A COA FROM THE THIRD CIRCUIT COURT OF APPEALS, WHICH WAS SUBSEQUENTLY DENIED (APPENDIX A).

AT MR. JOHNSTON'S TRIAL, THE COURT PERMITTED A DR. GARY COLLINS -- WHOM ONLY RECEIVED REPORTS THE NIGHT BEFORE -- TO TESTIFY AS TO THE CAUSE AND MANNER OF BOTH CONNER'S DEATH, AS WELL, AS THAT OF LABANCE, ALTHOUGH A DIFFERENT MEDICAL EXAMINER HAD PERFORMED THE AUTOPSIES; THAT IS, DR. GREGORY MCDONALD IN THE CONNER CASE, AND DR. IAN HOOD IN THE LABANCE CASE. AT THE BEGINNING OF DR. COLLIN'S TESTIMONY, THE COMMONWEALTH CONDUCTED VOIR DIRE AS TO HIS QUALIFICATIONS AND EXPERIRENCE, TO WHICH, DEFENSE COUNSEL OPTED NOT TO CONDUCT SAME OF DR. COLLIN'S.

AFTER DR. COLLIN'S HAD TESTIFIED ABOUT WHO HAD CONDUCTED THE AUTOPSIES AND WRITTEN THE REPORTS IN THE CASE, HE WAS ASKED WHETHER HE WAS "ABLE TO DRAW A CONCLUSION" THEREFROM. DEFENSE

COUNSEL OBJECTED ON THE BASIS THAT DR. COLLIN'S "DIDN'T VIEW THE BODY, AND [WAS] NOT COMPETENT TO TESTIFY AS TO THE AUTOPSY RESULTS MERELY FROM READING SOMEONE ELSE'S REPORT." AFTER A FEW MORE QUESTIONS, DEFENSE COUNSEL AGAIN OBJECTED, AND A LENGTHY SIDEBAR DISCUSSION ENSUED. HOWSOEVER, DEFENSE DID NOT CLEARLY RAISE A HEARSAY OBJECTION, AND THE COURT ALLOWED DR. COLLINS TO CONTINUE HIS TESTIMONY.

THE COURT, DURING STATE POST-CONVICTION PROCEEDINGS, DENINED MR. JOHNSTON'S CLAIM REGARDING THE RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT REASONING THE AUTOPSY REPORTS INTRODUCED AT TRIAL WAS "NON-TESTIMONIAL". THE DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (DISTRICT COURT) DENIED HABEAS CORPUS RELIEF BECAUSE THERE IS NO "CLEARLY ESTABLISHED FEDERAL LAW" OR "SQUARELY ESTABLISHED" RULES CONCERNING AUTOPSY REPORTS, AND THUS, UNWILLING TO ADDRESS THE MERITS OF MR. JOHNSTON'S ARGUMENT THAT AUTOPSY REPORTS SHOULD BE DEEMED TESTIMONIAL, AS WITHOUT THEM, A PROSECUTOR CANNOT PROVE THE CAUSE OF DEATH, FOR EXAMPLE, WAS MURDER AND NOT SUICIDE, GOING TO THE HEART UPON WHICH ANY MURDER IS BUILT.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT COURT OF APPEALS ERRED IN DENYING A COA BASED UPON A FAILURE TO SHOW ENTITLEMENT TO RELIEF IF A COA WAS ISSUED.

IN THIS CASE, THE DISTRICT COURT, AFTER REVIEWING THE EVIDENCE BEFORE THE STATE TRIAL COURT, DETERMINED THAT MR. JOHNSTON FAILED TO ESTABLISH A CONSTITUTIONAL VIOLATION WARRANTING HABEAS RELIEF. THE COURT OF APPEALS FOR THE THIRD CIRCUIT ("COURT OF APPEALS"), IN DENYING A COA FROM THE DISTRICT COURT DETERMINATION, CONCLUDED THAT MR. JOHNSTON HAD NOT MADE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT, BECAUSE HE FAILED TO SHOW HE WOULD BE ENTITLED TO RELIEF. THE COA DENIAL IS THE SUBJECT OF THIS APPEAL, WHICH, IN MR. JOHNSTON'S CASE, SHOULD HAVE ISSUED.

A. STANDARDS FOR ISSUANCE OF COA.

AT ISSUE HERE ARE THE STANDARDS THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT ("AEDPA") IMPOSES BEFORE A COURT OF APPEALS MAY ISSUE A COA TO REVIEW A DENIAL OF HABEAS RELIEF IN THE DISTRICT COURT. TO OBTAIN A COA, MR. JOHNSTON NEED ONLY DEMONSTRATE "A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT". 28 USC § 2253(c)(2).

THIS STANDARD IS SATISFIED BY DEMONSTRATING THAT JURISTS OF REASON COULD DISAGREE WITH THE DISTRICT COURT'S RESOLUTION OF HIS CONSTITUTIONAL CLAIMS OR THAT JURISTS COULD CONCLUDE THE ISSUES PRESENTED ARE ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER. SEE SLACK v. MCDANIEL, 529 US 473, 474 (2000).

MR. JOHNSTON IS NOT REQUIRED TO PROVE, BEFORE THE ISSUANCE OF A COA, THAT SOME JURISTS WOULD GRANT THE PETITION FOR

HABEAS CORPUS. INSTEAD, FOR COA PURPOSES, THE SHOWING REQUIRED TO SATISFY 28 USC § 2253(c) IS STRAIGHTFORWARD, THAT IS, THAT MR. JOHNSTON MUST DEMONSTRATE THAT REASONABLE JURISTS WOULD FIND THE DISTRICT COURT'S ASSESSMENT OF THE CONSTITUTIONAL RIGHT DEBATABLE OR WRONG. SEE MILLER-EL v. COCKRELL, 537 US 322, 337-38 (2003).

B. MERITS FOR ISSUANCE OF COA.

MR. JOHNSTON FILED A PETITION FOR WRIT OF HABEAS CORPUS IN THE DISTRICT COURT PURSUANT TO 28 USC § 2254, RAISING NINE ISSUES. THE MAGISTRATE JUDGE WHOM CONSIDERED THE MERITS, RECOMMENDED THAT RELIEF BE DENIED. MR. JOHNSTON CONCEDED TO THE REPORT AND RECOMMENDATION ("R&R") ON ALL BUT TWO GROUNDS, OBJECTING TO THE RECOMMENDATION TO DENY RELIEF FOR HIS CLAIMS THAT HE SUFFERED FROM:

> (1) A VIOLATION OF THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE IN RELATION TO THE ADMISSION OF AUTOPSY REPORTS AND TESTIMONY OF A MEDICAL EXAMINER WHO DID NOT CONDUCT THE AUTOPSIES. (GROUND TWO); AND,
>
> (2) INEFFECTIVE ASSISTANCE OF COUNSEL IN RELATION TO TRIALS COUNSEL'S FAILURE TO SEEK RELIEF FOR LACK OF A SPEEDY TRIAL. (GROUND FOUR).

THE DISTRICT COURT APPROVED THE R&R AS TO GROUNDS 1, 3, AND 5-9, DENYING THE PETITION ON THOSE GROUNDS. FOLLOWING DE NOVO REVIEW OF GROUNDS 2 AND 4, THE COURT DENIED THE ISSUANCE OF A WRIT OF HABEAS CORPUS AND THE ISSUANCE OF A COA. MR. JOHNSTON, PURSUANT TO 28 USC § 2253, SOUGHT A COA FROM THE COURT OF APPEALS. THE APPLICATION WAS DENIED.

THE COURT OF APEEALS, AS TO THE FIRST ISSUE — A VIOLATION OF THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE — NOTED THAT: "MR JOHNSTON HAS NOT MADE A SUBSTANTIAL SHOWING OF THE

DENIAL OF A CONSTITUTIONAL RIGHT. IN PARTICULAR, JURISTS OF REASON WOULD NOT DEBATE WHETHER MR. JOHNSTON CAN PREVAIL ON HIS CONFRONTATION CLAUSE CLAIM, BECAUSE EVEN ASSUMING HE COULD DEMONSTRATE SUCH A CONSTITUTIONAL VIOLATION, HE CANNOT DEMONSTRATE THAT IT HAD A SUBSTANTIAL AND INJURIOUS EFFECT OF INFLUENCE IN DETERMINING THE JURY'S VERDICT." (SEE EXHIBIT A)M(INTERNAL CITATIONS OMITTED).

THE COURT OF APPEALS DENIAL OF THE ISSUANCE OF A COA ON THIS ISSUE IS, RESPECTFULLY, IN ERROR. FOR A COA DOES NOT REQUIRE A SHOWING THAT AN APPEAL WILL SUCCEED. A COURT OF APPEALS SHOULD NOT DECLINE THE APPLICATION FOR A COA MERELY BECAUSE IT BELIEVES MR. JOHNSTON WILL NOT DEMONSTRATE AN ENTITLEMENT TO RELIEF. IT IS CONSISTENT WITH § 2253 THAT A COA WILL ISSUE IN SOME INSTANCES WHERE THERE IS NO CERTAINTY OF ULTIMATE RELIEF. SEE MILLER-EL, 537 US AT 337.

MR. JOHNSTON IS ONLY REQUIRED TO SHOW THAT "REASONABLE JURISTS 'COULD DEBATE' WHETHER (OR, FOR THAT MATTER, AGREE THAT) THE PETITION SHOULD HAVE BEEN RESOLVED IN A DIFFERENT MANNER OR THAT THE ISSUES PRESENTED WERE 'ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER.'" SLACK, 529 US AT 484 (QUOTING BAREFOOT v. ESTELLE, 463 US 880, 893 n. 4 (1983)).

IN APPLYING THIS REQUIREMENT TO MR. JOHNSTON'S SIXTH AMENDMENT CONFRONTATION CLAUSE CLAIM IN RELATION TO THE ADMISSION OF AUTOPSY REPORTS AND TESTIMONY OF A MEDICAL EXAMINER WHOM DID NOT CONDUCT THE AUTOPSIES HINGES ON WHETHER AUTOPSY REPORTS ARE TESTIMONIAL OR NON-TESTIMONIAL. ON THIS VERY QUESTION OF LAW HAVING CONSTITUTIONAL IMPLICATIONS, AND THE LACK OF "CLEARLY

ESTABLISHED" FEDERAL LAW OR "SQUARELY ESTABLISHED" RULE CONCERNING AUTOPSY REPORTS, THERE IS A CLEAR DEBATE AMONGST REASONABLE JURISTS AS TO THE NATURE OF AUTOPSY REPORTS AND THEIR APPLICATION CONCERNING THE CONSTITUTIONAL RIGHT TO CONFRONTATION. SEE, E.G., HENSLEY v. RODEN, 755 F.3d 724, 733-34 (CA 1 2014) (TESTIMONIAL QUESTION UNSETTLED).

AND, BECAUSE OF THIS UNSETTLED DEBATE AMONGST JURISTS OF REASON, IT IS EVIDENT THAT THEY COULD AGREE (AND/OR DISAGREE) AS TO WHETHER MR. JOHNSTON'S PETITION SHOULD HAVE BEEN RESOLVED IN A DIFFERENT MANNER DEPENDING UPON WHICH SIDE OF THE DEBATE THEY SIT. SEE, E.G., U.S. v. JAMES, 712 F.3d 79, 97-100 (CA 2 2013) (AUTOPSY REPORTS NON-TESTIMONIAL); U.S. v. IGNASIAK, 667 F.3d 1217, 1231 (CA 11 2012) (AUTOPSY REPORTS TESTIMONIAL).

AND, SINCE THERE IS CLEARLY A DEBATE AMONGST JURISTS OF REASON ON WHETHER AUTOPSY REPORTS ARE TESTIMONIAL OR NON-TESTIMONIAL, THEN, MR. JOHNSTON HAS SATISFIED THE REQUIREMENTS FOR THE ISSUANCE OF A COA. ADDITIONALLY, AS THIS DEBATE HAS SUBSTANTIAL CONSTITUTIONAL IMPLICATIONS, EFFECTING A FAIR TRIAL IN ACCORDANCE WITH DUE PROCESS PRINCIPLES, IT IS ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER, IN ORDER, TO SETTLE THIS DEBATE AMONGST JURISTS OF REASON AND/OR TO ESTABLISH FEDERAL LAW OR RULE THERETO. THUS, MR. JOHNSTON SHOULD HAVE BEEN ISSUED A COA.

AS TOT THE COURT OF APPEALS NOTION, THAT MR. JOHNSTON CANNOT DEMONSTRATE A "SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE" ON THE OUTCOME, WHILE IMMATERIAL AS TO WHETHER A COA SHOULD ISSUE, OR NOT, IT IS THIS UNSETTLED DEBATE ON THE

CLASSIFICATION OF AUTOPSY REPORTS THAT CLOUDS THE CONSTITUTIONAL RIGHT TO CONFRONTATION, UNDER THE 6TH/14TH AMENDMENTS, WHICH IS ESSENTIAL TO A FAIR TRIAL IN ACCORDANCE WITH DUE PROCESS PRINCIPLES. SEE CHAMBERS v. MISSISSIPPI, 410 US 284, 93 S.CT. 1038, 1045 (1973) (THE RIGHT OF AN ACCUSED IN A CRIMINAL TRIAL TO DUE PROCESS IS, IN ESSENCE, THE RIGHT TO A FAIR OPPORTUNITY TO DEFEND AGAINST THE STATE'S ACCUSATIONS. THE RIGHTS TO CONFRONT AND CROSS-EXAMINE WITNESSES AND TO CALL WITNESSES ON ONE'S OWN BEHALF HAVE LONG BEEN RECOGNIZED AS ESSENTIAL TO DUE PROCESS.).

A FAIR TRIAL, IS A TRIAL BY AN IMPARTIAL AND DISINTERESTED TRIBUNAL IN ACCORDANCE WITH REGULAR PROCEDURES; ESP., A CRIMINAL TRIAL IN WHICH THE DEFENDANT'S CONSTITUTIONAL AND LEGAL RIGHTS ARE RESPECTED. IT IS ONE THAT WOULD MEET THE PROCEDURAL REQUIREMENTS OF DUE, INCLUDING REASONABLE NOTICE OF THE CHARGES, THE RIGHT TO A HEARING, AND AN OPPORTUNITY TO EXAMINE THE EVIDENCE, TO CROSS-EXAMINE WITNESSES SUPPORTING THE CHARGES, TO OFFER TESTIMONY ON ONE'S OWN BEHALF, AND TO BE REPRESENTED BY COUNSEL. SEE SLOCHOWER v. BD. OF HIGHER EDU., 350 US 551, 100 L.ED. 692, 695-96 (1956); PETERS v. HOBBY, 349 US 331, 351 (1955) ("CONFRONTATION AND CROSS-EXAMINATION UNDER OATH ARE ESSENTIAL, IF THE AMERICAN IDEAL OF DUE PROCESS IS TO REMAIN A VITAL FORCE IN OUR PUBLIC LIFE.").

"[A] TRIAL AND CONVICTION IN UNCONSTITUTIONAL WAY IS AS VIOLATIVE OF CONSTITUTIONAL RIGHTS AS A TRIAL AND CONVICTION UNDER AN UNCONSTITUTIONAL LAW": ADAMS v. NEW YORK, 192 US 585, 48 L.ED. 575, 576 (1904), AND THUS, INJURIOUS ON THE OUTCOME, MANDATING A NEW TRIAL BE CONDUCTED IN A FAIR MANNER IN ACCORDANCE

WITH DUE PROCESS PRINCIPLES, AS NO PERSON SHALL BE "DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW." U.S. CONST., 6TH/14TH AMDTS..

AND FINALLY, AS TO WHETHER AUTOPSY RECORDS ARE TESTIMONIAL, OR NOT, AND THUS, HAVING CONSTITUTIONAL IMPLICATIONS AFFECTING RIGHTS AND THE FAIRNESS OF A TRIAL, IS QUITE SIMPLE TO DEDUCE. TESTIMONIAL EVIDENCE IS ANY EVIDENCE WHICH IS USED TO PROVE A FACT: SEE CRAWFORD v. WASHINGTON, 514 US 36, 51 (2004); WIGMORE'S, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE 120 (1935), AND WHERE SUCH EVIDENCE IS PRIMARILY PREPARED "SPECIFICALLY FOR USE AT [THE DEFENDANT'S] TRIAL" IN AN EFFORT TO PROVIDE EVIDENCE AGAINST THE DEFENDANT, THE DEFENDANT IS ENTITLED TO "BE CONFRONTED WITH THE ANALYSTS AT TRIAL." MELENDEZ-DIAZ v. MASSACHUSETTS, 557 US 305, 311, 323-24 (2009).

IN TERMS OF AN AUTOPSY REPORT, USED IN A MURDER TRIAL, THERE IS NO GREATER OR MORE IMPORTANT EVIDENCE TO PROVE THE FACT — I.E., CAUSE OR MANNER OF DEATH — THEN THIS CERTIFICATION. AS WITHOUT IT, THE PROSECUTION WOULD BE UNABLE TO PROVE THE PRIMARY ELEMENT OF THE OFFENSE OF MURDER, LEAVING THE TRIER OF ACT TO WONDER IF INDEED IT WAS MURDER, OR MAYBE SUICIDE, OR ACCIDENTAL, HAVING A SUBSTANTIAL IMPACT ON THE OUTCOME. AND THUS, BEING A "SOLEMN DECLARATION OR AFFIRMATION MADE FOR THE PURPOSE OF ESTABLISHING OR PROVING SOME FACT": CRAWFORD, 514 US AT 51, AS A KEY ELEMENT OF THE ACCUSATION, IT SHOULD, IN ACCORDANCE WITH THE FUNDAMENTAL FAIRNESS DOCTRINE, ENTITLE THE ACCUSED, IN THIS MR. JOHNSTON, TO BE CONFRONT WITH THE ANALYSTS WHOM PERFORMED THE AUTOPSY.

THE 6TH AMENDMENT'S CONFRONTATION CLAUSE DOES NOT PERMIT THE PROSECUTION TO PROVE ITS CASE VIA EX PARTE OUT-OF-COURT AFFIDAVITS, NOR, TO INTRODUCE A FORENSIC LABORATORY REPORT CONTAINING A TESTIMONIAL CERTIFICATION, MADE IN ORDER TO PROVE A FACT AT A CRIMINAL TRIAL, THROUGH THE IN-COURT TESTIMONY OF AN ANALYST WHO DID NOT SIGN THE CERTIFICATION OR PERSONALLY PERFORM OR OBSERVE THE PERFORMANCE OF THE TEST REPORTED IN THE CERTIFICATION. SEE BULLCOMING v. NEW MEXICO, 564 US 647 (2011).

RATHER, THE CONFRONTATION CLAUSE OF THE 6TH AMENDMENT STRIVES TO ENSURE THAT A CRIMINAL DEFENDANT MAY HAVE A JURY ASSESS THE PROSECUTION'S WITNESSES "FACE TO FACE". MATTOX v. UNITED STATES, 156 US 237, 242-43 (1895). THUS, THE PROSECUTION MAY NOT SUBSTITUTE FORMER TESTIMONY FOR LIVE TESTIMONY UNLESS THE GOVERNMENT FIRST DEMONSTRATES THAT THE WITNESS REMAINS UNAVAILABLE FOR TRIAL PROCEEDINGS. OHIO v. ROBERTS, 448 US 56, 65 (1980), OVERRULED ON OTHER GROUNDS, CRAWFORD v. WASHINGTON, 514 US 36 (2004). THE UNAVAILABILITY EXCEPTION CONTAINS TWO REQUIREMENTS: THE WITNESS'S TESTIMONY WAS GIVEN AT PREVIOUS JUDICIAL PROCEEDINGS AGAINST THE SAME DEFENDANT WHICH WAS SUBJECT TO CROSS-EXAMINATION BY THE DEFENDANT. CRAWFORD, 514 US AT 54.

IN MR. JOHNSTON'S CASE, THE PROSECUTION DID NOT SATISFY ITS 6TH AMENDMENT DUTY TO MAKE REASONABLY GOOD FAITH EFFORTS TO OBTAIN DR. IAN HOOD'S, NOR, DR. GREGORY MCDONALD'S PRESENCE AT TRIAL, ALLOWING A DR. GARY COLLINS TO TESTIFY WHOM NEITHER SIGNED THE CERTIFICATION, NOR, PERSONALLY PERFORMED OR OBSERVED THE PERFORMANCE OF THE AUTOPSY.

WHEREFORE, FOR THESE FOREGOING REASONS, AND IN

ACCORDANCE WITH PRIOR DECISIONS OF THE SCOTUS, CONCERNING DUE PROCESS AND EXPERT TESTIMONY, MR. JOHNSTON SHOULD HAVE BEEN ISSUED A COA TO PROCEED FURTHER ON THE REVIEW OF HIS CONFRONTATION CLAIM.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 9-17-2020