No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH ELLIOTT,

Petitioner,

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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March 9, 2022

QUESTIONS PRESENTED

Prior to trying Petitioner's capital case, trial counsel met with Petitioner to discuss the case only once, for less than fifteen minutes, on the first day of jury selection. Petitioner claimed that his trial counsel was ineffective where, as a result of failing to meet with him, trial counsel failed to recognize or rebut critical issues concerning the victim's time of death. Petitioner also claimed that his right to confront the witnesses against him was violated where the testifying medical examiner relied upon out-of-court statements – made after authorities had already identified Petitioner as their primary suspect, by medical-examiner personnel who were not subjected to cross examination – in order to establish the victim's time of death. The Third Circuit declined to issue a certificate of appealability on these claims, finding that both were so insubstantial they were not deserving of appellate review.

The Questions Presented are:

1. Whether, in accordance with *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003), Petitioner made a showing that reasonable jurists would debate whether trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), where trial counsel met with Petitioner to discuss his capital case for the first time for less than fifteen minutes on the first day of jury selection?

2. Whether, in accordance with *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003), Petitioner made a showing that reasonable jurists would debate – in a "somewhat unsettled" area of law where the District Court remarked that Petitioner had raised "compelling arguments" – whether Petitioner established a Confrontation Clause violation under *Williams v. Illinois*, 567 U.S. 50 (2012), where the trial court admitted out-of-court statements made by medical-examiner personnel after authorities had already identified Petitioner as their primary suspect, and the error was not harmless because Petitioner's conviction was otherwise based on "purely circumstantial evidence"?

PARTIES TO THE PROCEEDINGS

The Petitioner herein, who was the appellant below, is Joseph Elliott. The Respondents herein, who were the appellees below, are the Secretary for the Pennsylvania Department of Corrections, the Attorney General of Pennsylvania, and the District Attorney of Philadelphia.

LIST OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States Court of Appeals for the Third Circuit, the United States District Court for the Eastern District of Pennsylvania, the Supreme Court of Pennsylvania, and the Court of Common Pleas for Philadelphia:

- *Elliott v. Secretary Pennsylvania Department of Corrections*, No. 21-1753 (3d Cir. Aug. 24, 2021)
- *Elliott v. Wetzel*, No. 16-cv-2076, 2021 WL 1061189 (E.D. Pa. May 19, 2021)
- *Commonwealth v. Elliott*, 80 A.3d 415 (Pa. 2013), *cert. denied*, 135 S. Ct. 50 (2014)
- *Commonwealth v. Elliott*, No. CP-51-CR-0410911-1994 (Phila. Cty. Ct. Com. Pl. Oct. 13, 2010)
- *Commonwealth v. Elliott*, 700 A.2d 1243 (Pa. 1997), *cert denied*, 524 U.S. 955 (1998)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joseph Elliott respectfully requests that a writ of certiorari issue to review the United States Court of Appeals for the Third Circuit's denial of his application for a certificate of appealability ("COA") pursuant to 28 U.S.C. § 2253(c)(2).

OPINIONS BELOW

The orders of the Third Circuit denying the COA (App.[1] A) and denying Mr. Elliott's petition for rehearing en banc (App. G) are unreported. The Report and Recommendation (R. & R.) of the magistrate judge (App. C) and the order of the district court (App. B), adopting the R. & R. and declining to issue a COA, are both unreported and are available at 2020 WL 8919201 and 2021 WL 1061189, respectively. The state court determination (App. D), reversing the PCRA court's unreported grant of a new trial on Mr. Elliott's ineffective-assistance-of-counsel claim (App. E), is reported at *Commonwealth v. Elliott*, 80 A.3d 415 (Pa. 2013), *cert. denied*, 135 S. Ct. 50 (2014).

JURISDICTION

The Third Circuit issued its orders denying Mr. Elliott's application for a COA and Mr. Elliott's petition for panel rehearing and/or rehearing en banc on August 24, 2021 and October 25, 2021, respectively. On January 12, 2022, Justice Alito granted Mr. Elliott's application to extend the time to file a petition for a writ

[1] "App." refers to Petitioner's Appendix that is filed concurrently herewith.

of certiorari to March 9, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253(c) provides:

> (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
>
> ****
>
> (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.

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement 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.

STATEMENT OF THE CASE

A. Introduction

No defendant faced with murder charges can possibly receive effective assistance of counsel – especially in a capital case – when his attorney meets with him to discuss his case for the first time for less than 15 minutes on the first day of jury selection.

Petitioner's position should be uncontroversial. Even the trial court remarked at Petitioner's trial that it was "not satisfied with the way this case was prepared." App. 152, NT 10/25/94 at 31; *see also* App. 150, *id.* at 29 ("In the event of a conviction here, the defendant might have a good argument about the preparation of this case."); App. 095, *Commonwealth v. Elliott*, No. CP-51-CR-0410911-1994, slip op. at 8 (Phila. Cty. Ct. Com. Pl. Oct. 13, 2010) (*Elliott-3*) (post-conviction court finding that "[t]he record of the instant case is rife with evidence of trial counsel's unpreparedness"). Indeed, trial counsel had not even informed Petitioner that he was coming to court on murder charges. As a result of his failure to meet with his client, trial counsel was not alerted to the importance of the victim's time of death – the most critical issue in Petitioner's case – and was left unprepared to rebut the testimony of the Commonwealth's medical examiner, who presented an

incriminating time-of-death window that completely overlapped with Petitioner's presence at the murder site.

The state post-conviction court granted a new trial (App. E), but the state appellate court disagreed (App. D). Notwithstanding trial counsel's cursory preparation, the Third Circuit went on to unfairly apply the law of this Court in a manner inconsistent with *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) and *Strickland v. Washington*, 466 U.S. 668 (1984) to support a finding of effective legal representation. Indeed, without even questioning trial counsel's patently deficient performance, and despite the fact that the state post-conviction judge had found the issue worthy of a new trial, the Third Circuit found that reasonable jurists would not even debate counsel's effectiveness. Surely jurists of reason would debate whether constitutionally adequate representation in a capital case demands more than a single 14-minute meeting. This Court should grant a writ of certiorari not only to preserve the floor for effective assistance of counsel in capital cases, but also to remind the lower courts that formulaic, nine-sentence orders comprised of conclusory findings will not overcome 28 USC § 2253(c)(2)'s low bar.

In addition, this case presents a Confrontation Clause issue arising from the medical examiner's reliance on out-of-court statements and notes made by an investigator, who did not testify, to reach incriminating conclusions about the victim's time of death. This Court should also grant a writ of certiorari to build upon its holding in *Williams v. Illinois*, 567 U.S. 50 (2012), and provide guidance to the lower courts on the Confrontation Clause's reach – particularly to out-of-court

forensic statements made after the police have already identified their primary suspect. At the very least, this Court should remind the lower courts that jurists of reason can necessarily debate an issue where, as here, the District Court observed that the "defense and prosecution alike have compelling arguments," and the underlying law is "somewhat unsettled."

B. The Case Brought Against Petitioner

In the early morning hours of May 7, 1992, Petitioner, Kimberly Griffith, and a third individual, Frank Nardone, were socializing at a bar in Philadelphia. App. 064, *Commonwealth v. Elliott*, 80 A.3d 415, 421 (Pa. 2013) (*Elliott-4*), *cert. denied*, 135 S. Ct. 50 (2014). At approximately 4:00 a.m., the trio left the bar together and proceeded to Mr. Nardone's apartment. *Id.* Police were first contacted later that afternoon, when Mr. Nardone called and claimed that he had awoken to find Ms. Griffith's dead body on his couch. *Id.*

Homicide detectives questioned Petitioner within twelve hours of the discovery of Ms. Griffith's body. *Id.* Petitioner acknowledged being in the company of Ms. Griffith and Mr. Nardone the prior night and further acknowledged that he and Ms. Griffith had engaged in consensual sex. *Id.* Petitioner, however, denied raping or murdering Ms. Griffith, and informed police that when he left Mr. Nardone's apartment on the morning of May 7, she was still alive. *Id.* During the interview, police noticed some scratches and a bruise on Petitioner's body, which Petitioner permitted them to photograph. *Id.*

Faced with a thin evidentiary record, police did not arrest Petitioner for over a year and a half. App. 064, *id.* at 422. During that time period, police obtained

essentially no new evidence tying Petitioner to the rape and murder of Ms. Griffith. Indeed, the case-in-chief consisted primarily of the above-described circumstantial evidence, namely: Mr. Nardone's preliminary hearing testimony,[2] Petitioner's police statement, and the marks on Petitioner's body. *Id.* The only "new evidence" the Commonwealth was able to present alleged that Petitioner, a black man, had a racial motive in attacking Ms. Griffith, a white woman, as shown by his purported involvement in three separate, unrelated assaults of other white women – even though two of the incidents never resulted in a conviction. This evidence was admitted despite Pennsylvania's general prohibition on propensity evidence of unrelated criminal conduct. *See* App. 119, *Commonwealth v. Elliott*, 700 A.2d 1243, 1249 (Pa. 1997) (*Elliott-2*), *cert denied*, 524 U.S. 955 (1998).

The most significant piece of Commonwealth evidence was adduced during the prosecution's case in rebuttal. Petitioner testified on his own behalf, denied assaulting Ms. Griffith, and insisted that she was alive and unhurt at the time he left Nardone's house. Petitioner guessed that he left Mr. Nardone's house at approximately 10:00 a.m. on the day Ms. Griffith's body was discovered. NT 10/26/94 at 140. In rebuttal, the prosecution re-called the medical examiner to testify that Ms. Griffith died at some point between 5:00 a.m. and 10:00 a.m. on

[2] Mr. Nardone, a white man and the only other likely suspect, did not actually testify at Petitioner's trial; he was killed in his apartment by another woman prior to trial. His preliminary hearing testimony, in which he stated that he awoke to find Ms. Griffith's dead body, was instead read into the record. App. 080, *Elliott-4* at 446.

May 7, 1992.[3] NT 10/27/94 at 143. The medical examiner based her testimony on a report from an investigator, who did not testify at trial, that the victim's lividity was "not fixed" at the time the body was discovered. *Id*. at 131. The medical examiner's testimony regarding time of death was not based upon the autopsy report. App. 096, *Elliott-3* at 9. Rather, the autopsy report indicated that the time of death was 4:50 p.m. (the time the body was viewed by the medical examiner investigator) and listed the time of injury as unknown. *Id*.

C. Trial Counsel's Failure to Meet with Petitioner and Adequately Prepare to Try Petitioner's Capital Case

In preparation for trial, defense counsel Benjamin Paul discussed this capital case with Petitioner, for the first time, for approximately fourteen minutes, in a holding cell at the courthouse on the first day of jury selection. App. 143, NT 10/24/94 at 7. From the very beginning, Petitioner made a record of Mr. Paul's lack of communication and preparation. Petitioner noted early on, for example, that *he did not even know his trial date or that he was coming to court on murder charges*:

> Petitioner: Your Honor, since Mr. Paul has had this case . . . I have had a problem communicating with him. I have had no present knowledge of ever being scheduled for court today or knowing anything. I was informed that I was coming down with another case. I get down here and it's a homicide case. I have not discussed with him any of the matters in this case, at any length at all, and there has been a problem with communicating with him . . . I can't see how he is going to be representing me properly. We have not even discussed this case.
>
> The Court: You have never discussed this case with him?

[3] The medical examiner initially gave the time of death window as being between 5:00 a.m. and 9:00 a.m., but she acknowledged on cross-examination that she had made an arithmetic error.

> Petitioner: Briefly. Only in the holding cell. I have never talked to him up at Graterford or Smithville. I don't see how I can be represented properly.

App. 131-132, NT 10/18/94 at 34-35.

Mr. Paul admitted on the record that he had, in fact, only met with Petitioner in the holding cell on the first day of jury selection. Despite this, Mr. Paul asserted that after a single, brief conversation in a holding cell, he had nothing else to discuss with his client in a capital murder case. App. 134-135, *id*. at 37-38 ("I mean, just to go to the prison to hold his hand and discuss the case may not be proper.").

Petitioner repeated his complaints about Mr. Paul's lack of communication and failure to meet with him throughout the trial. *See, e.g.*, App. 141, NT 10/24/94 at 3 ("I have, you know verbalized, not wanting him to represent me because of the lack of communication. I only get the opportunity to talk to him . . . when I get to the court, around the D.A., around the jury and around other witnesses that the D.A. may have, which is not right."); App. 142, *id*. at 5 ("Mr. Paul clearly told me in the courtroom, I will be up Sunday to see you. That man never came to see me to talk about anything.").

Mr. Paul's failure to meet or communicate with his client necessarily resulted in a failure to discuss important strategic matters. *See, e.g.*, App. 135-136, NT 10/18/94 at 38-39 (failing to discuss the possible presentation of character witnesses on Petitioner's behalf and failing to inform Petitioner of his court date).

Mr. Paul also repeatedly stated that he was not prepared for trial, as he never investigated the unrelated sexual assault cases that were introduced in the

capital case. *See, e.g.*, App. 138-139, NT 10/19/94 at 34-35; App. 147, NT 10/25/94 at 5 ("I have no investigation."). Indeed, with respect to one witness to an unrelated assault, counsel admitted that the reason for his failure to prepare was his misplaced hope that the court would rule the testimony inadmissible – a laissez-faire approach that prompted the court to admonish counsel for leaving things up to chance. App. 148-149, NT 10/25/94 at 16-17 (chiding counsel that a lawyer can't just hope for "a windfall," but has "to prepare [his] case on the ground I am going to let [the testimony] in").

In addition to counsel's failure to conduct even a rudimentary investigation, the record demonstrates counsel did not read much of the discovery that was turned over to him. NT 10/24/94 at 95-105; *id*. at 128. Mr. Paul was, for example, unaware whether he was in possession of the statement of one of the alleged victims of the separate assaults, which the judge characterized as "deadly" information. App. 153-155, NT 10/25/94 at 40-42. Counsel's stated reason for failing to read the discovery and discuss it with his client was that he was too busy. App. 153, *id*. at 40 ("The Court: I am not too sure [the case] was fully prepared. . . . Mr. Paul: I have so many other things to do, I didn't have an opportunity to do that.").

Regarding the forensic medical testimony, counsel did virtually nothing to prepare. To begin, counsel did not know what his client's testimony would be regarding when he left the apartment, given that Mr. Paul never discussed the case

with Petitioner.[4] Counsel also did not consult with or present his own forensic pathologist at trial. Had counsel done so, the jury would have been presented with a time-of-death window that extended beyond Petitioner's time at the murder site. Indeed, during PCRA proceedings, Petitioner proffered a report from Dr. Jonathan Arden, a well-qualified forensic pathologist, who discredited the basis upon which the medical examiner opined as to time of death and estimated that the victim's time of death "would include the period up to approximately 12:00 noon on 5/7/1992" – two hours beyond the time Petitioner initially guessed he left Nardone's home. App. 158, Arden Report at 3.

Instead, counsel did not levy any challenge to the basis upon which the medical examiner testified as to time of death. Counsel also did not think to object to the lack of notice of the medical examiner's expert opinion, despite the fact that the autopsy report listed the time of injury as being unknown. Counsel's cross-examination of the medical examiner's rebuttal testimony was disorganized, as he repeatedly could not keep her testimony straight, and he effectively left her testimony about time of death completely intact. *See* NT 10/27/94 at 132-44. The trial prosecutor emphasized the importance of the unrebutted time-of-death testimony in his closing argument:

> [Petitioner] put himself in the death scene from 5:00 o'clock in the morning until 9:00 o'clock in the morning. . . . This science tells you that this woman was dead between 5:00 a.m. and 10:00 in the morning. . . . Her body became a clock. It became, in a sense, a time bomb against this man here. . . .

[4] Petitioner's statement, which counsel claims to have read, says "[i]t was the morning and it was light out" when Petitioner left. Elliott 5/8/1992 Statement at 4. It did not give a specific time.

NT 10/28/94 at 7. Petitioner was convicted and sentenced to death.

D. State Post-Conviction Proceedings

During state post-conviction proceedings, Petitioner raised various claims that attacked his conviction and penalty, including the two guilt-phase claims that formed the basis of his COA application: 1) Petitioner received ineffective assistance of counsel when trial counsel failed to meet with him to discuss his capital case, and as a result, was unprepared to adequately challenge the relevant forensic medical issues; and 2) Petitioner's rights under the Confrontation Clause were violated by the medical examiner's testimony, which made a victim-lividity determination based on out-of-court statements from another investigator after authorities had already identified Petitioner as a prime suspect.

On February 26, 2010, with the Commonwealth's agreement, the post-conviction court granted penalty-phase relief and Petitioner was resentenced to life imprisonment. Three months later, the PCRA court granted Petitioner a new trial due to ineffective assistance of counsel for failing to meet with Petitioner prior to trial, and failing to challenge testimony from the medical examiner. App. 094-095, *Elliott-3* at 7-8 (finding that trial counsel was ineffective for failing to meet with Petitioner because he had "not [discussed] the future capital homicide case" with Petitioner and "it [was] impossible that [ ] trial counsel could have developed [a] 'fundamental base of communication' [with Petitioner] after a brief meeting in the holding cell on the day that the trial began"); *see also id.* (observing that the "record

of the instant case is rife with evidence of trial counsel's unpreparedness"). The PCRA court denied all of Petitioner's remaining guilt-phase claims.

On November 21, 2013, the Pennsylvania Supreme Court reversed the PCRA court's grant of a new trial and affirmed the PCRA court's denial of the remaining claims. The Pennsylvania Supreme Court held that Petitioner's failure to meet claim had been waived and that, in any event, there was no merit to the claim because "neither Elliott nor the PCRA court have identified any beneficial information or issue that trial counsel would have discovered had he engaged in a more thorough pretrial consultation with Elliott, which would have changed the outcome of his trial." App. 069-071, *Elliott-4* at 260-64. With respect to Petitioner's claims surrounding the medical examiner, the Pennsylvania Supreme Court held, inter alia, that "it was proper for the medical examiner to estimate the victim's time of death based on the results of her investigator's lividity test, as it was standard procedure for her to rely on tests performed by members of her office" and therefore there was no arguable merit to a claim of trial counsel ineffectiveness. App. 073-074, i*d*. at 270-71. The court went on to conclude that even if trial counsel should have hired an expert to rebut the medical examiner's time-of-death testimony, "Elliott has not demonstrated that Dr. Arden or any similar expert was available at the time of trial." App. 074, *id.* at 271.

Petitioner was resentenced to life imprisonment on May 1, 2015.

E. The District Court Decision

Petitioner's federal habeas petition, which included the two claims enumerated above, followed. After briefing from the parties, the Magistrate Judge

issued a R. & R. that Petitioner's habeas petition be dismissed with prejudice and without the issuance of a COA. App. C.

The Magistrate Judge concluded that "the record does not support Elliott's claim that counsel failed to meet with him or prepare the case," because even though "counsel did not meet with Elliott in prison, counsel had an established relationship with Elliott" from four prior case representations. App. 022-024, R. & R. at 11-13. In addition, the Magistrate Judge explained that Petitioner was not prejudiced by trial counsel's failure to meet with him because Petitioner "does not allege, and the record does not show, that counsel was absent, or prevented from assisting Elliott during a critical stage of the case." App. 026-027, *id*. at 15-16. The Magistrate Judge also conceded that "the Pennsylvania Supreme Court cited standards from Pennsylvania state cases that may have been more rigid than those required by *Strickland*," but did not see "how [the Pennsylvania Supreme Court]'s decision was dependent on those standards." App. 023-024, *id*. at 12-13.[5] With respect to the medical examiner's testimony, the Magistrate Judge held that "the time of the victim's death was not so obvious an issue that trial counsel should be

[5] But, a state court decision is contrary to, or an unreasonable application of, *Strickland* where the state court articulates standards that impose a higher burden on a petitioner than that required by *Strickland*. *See, e.g.*, *Sears v. Upton*, 561 U.S. 945, 954-55 (2010) (holding that the lower court failed to apply the appropriate prejudice inquiry under *Strickland*, granting the petition for certiorari, and vacating the judgment below); *Hummel v. Rossmeyer,* 564 F.3d 290, 304-305 (3d Cir. 2009) (no deference to the state court's findings because the state court's articulation of an outcome determinative standard of prejudice was contrary to *Strickland's* reasonable probability standard); *Breakiron v. Horn,* 642 F.3d 126, 139 (3d Cir. 2011) (state court sufficiency standard of prejudice was an unreasonable application of *Strickland*); *Saranchak v. Sec'y, Pa. Dep't of Corr.*, 802 F.3d 579, 589 (3d Cir. 2015) ("We accord no deference to a state court's resolution of a claim if that resolution was contrary to or reflected an unreasonable application of clearly established Supreme Court precedent"). Neither this Court's precedent, nor the Third Circuit's, looks at whether the state court decision was "dependent upon" the erroneous standards set forth in the state court opinion.

deemed incompetent for failing to have foreseen it," and that Petitioner was not prejudiced by trial counsel's failure to retain an expert, like Dr. Arden, who could rebut the medical examiner. App. 027-030, *id*. at 16-19. The Magistrate Judge explained that because Dr. Arden did not state that he would have been able to provide his opinion at the time of Petitioner's trial, trial counsel could not be deemed ineffective for failing to consult with or retain him. App. 029, *id*. at 18. And, even if counsel had performed deficiently in failing to properly challenge the medical examiner's time-of-death testimony, Petitioner was not prejudiced because other circumstantial evidence linked Petitioner to the victim's death. App. 030-031, *id*. at 19-20.

The Magistrate Judge also rejected Petitioner's Confrontation Clause claim. The Magistrate Judge opined that "because the investigator did not perform the lividity assessment for the primary purpose of targeting Elliott, who was not arrested until over one year after the assessment, it was not testimonial based on the reasoning of the plurality" in *Williams*. App. 039-040, *id*. at 28-29.

Petitioner objected to the proposed resolution of his claims. The District Court overruled Petitioner's objections, adopted the R. & R., and denied Petitioner's request for a COA. App. B. In adopting the R. & R., the District Court wrote separately to address the Confrontation Clause claim, acknowledging that the "defense and prosecution alike have compelling arguments," the underlying law is "somewhat unsettled," and the Supreme Court will likely make a "quick return" to the questions raised in *Williams*. App. 005, 008, Dist. Ct. Order at 1, 4 n1. The

District Court explained that Petitioner had met *William*'s first prong (whether the investigator's report was introduced for the purpose of proving the truth of the matter asserted therein), but failed to meet *William*'s second prong (whether the primary purpose of the investigator's report was to obtain evidence for use against Petitioner) because "the Medical Examiner investigates every suspicious death pursuant to statute, not just cases where law enforcement has concluded a crime occurred and is considering suspects." App. 007-008, *id*. at 3-4. The District Court thus concluded that the investigator's report could not be considered testimonial and that the medical examiner's testimony did not violate the Confrontation Clause. App. 008-009, *id*. at 4-5.

F. The Court of Appeals Decision

In a nine-sentence order, a panel for the Third Circuit unanimously agreed that jurists of reason would not debate the District Court's conclusion that Petitioner's trial counsel was not ineffective. App. A. The Third Circuit held that reasonable jurists would not debate whether ineffectiveness should be presumed where trial counsel only meets with his client for less than 15 minutes on the first day of trial. App. 001-002, Third Cir. Order at 1-2. Similarly, the Third Circuit also held that jurists of reason would not debate whether trial counsel was "ineffective for failing to retain a medical expert, or to further combat the medical examiner's testimony as to the victim's time of death," particularly given that Petitioner "failed to show that the scientific evidence in his proposed expert witness's report was available at [the] time of [Petitioner]'s trial." App. 002, *id*. at 2. With respect to Petitioner's *Williams*-based Confrontation Clause claim, the Third Circuit did not

address the merits, but ruled that even assuming Petitioner's rights were violated, "jurists of reason would not debate that the error was harmless, given the strength of the evidence against [Petitioner] aside from establishing the time of the victim's death." App. 002, *id*. at 2.

Petitioner filed a petition for panel rehearing and rehearing en banc, which the Third Circuit denied. App. G.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO PRESERVE THE LOW BAR TO THE ISSUANCE OF A COA, SAFEGUARD *STRICKLAND'S* REACH, AND REMIND THE LOWER COURTS THAT JURISTS OF REASON COULD SURELY DEBATE THE INEFFECTIVENESS OF A LAWYER WHO FIRST MET WITH HIS CLIENT TO DISCUSS A CAPITAL CASE FOR LESS THAN FIFTEEN MINUTES BEFORE THE START OF JURY SELECTION.

As set forth below, Petitioner satisfied the requirements for the issuance of a COA. This Court should clarify the low bar to the issuance of a COA and remind the lower courts to apply that low bar in a manner consistent with *Miller-El*.

A. This Court Has Held that the COA Requirement Should Not Place Too Heavy a Burden on the Prisoner.

To obtain a COA, a habeas litigant must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard 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." *Miller-El*, 537 U.S. at 327 (internal citation omitted); *id.* at 338 ("[A] claim can be debatable even though every jurist of reason might agree, after the COA has been

granted and the case has received full consideration, that petitioner will not prevail.").

A petitioner meets the substantial showing standard when he presents a claim that "is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez v. Ryan*, 566 U.S. 1, 14 (2012). A claim is only insubstantial if "it does not have any merit or . . . it is wholly without factual support." *Id.* at 16. The COA requirement exists "to prevent frivolous appeals." *Barefoot v. Estelle*, 463 U.S. 880, 892 (1983). However, the COA inquiry is "not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). The requirement contemplates only a threshold inquiry that should not "place[] too heavy a burden on the prisoner at the COA stage." *Id.* at 774.

B. Notwithstanding Petitioner's Lighter Burden at the COA Stage, the Third Circuit Ruled that Jurists of Reason Would Not Debate Whether A Single, Fourteen-Minute Meeting Amounts to Effective Assistance of Counsel in a Capital Case.

The Third Circuit ruled that "jurists of reason would not debate the District Court's conclusion that [Petitioner]'s trial counsel was not ineffective" because the surrounding circumstances did not "justify a presumption of ineffectiveness." App. 001-002, Third Cir. Order at 1-2 (citing *United States v. Cronic*, 466 U.S. 648, 662 (1984)) (internal quotations omitted). But the Third Circuit missed the thrust of Petitioner's claim. Petitioner did not simply argue that a lawyer should be presumed ineffective where he only has a single, brief meeting with his client prior

to jury selection in a capital case.[6] Rather, Petitioner argued that he was prejudiced by trial counsel's failure to meet with him because, had trial counsel met with Petitioner, trial counsel would have been alerted to the significance of time of death in Petitioner's case and retained a forensic-pathology expert who would have extended the time-of-death window. 7/12/2021 COA Application at 20.

Indeed, given Petitioner's statement to the police that the deceased was alive when he left Nardone's apartment, any reasonably competent lawyer would understand that establishing overlap between the victim's time of death and Petitioner's presence at the crime scene would be critical to the Commonwealth's assertion that Petitioner was responsible for the victim's death. And, even if trial counsel did not anticipate that the Commonwealth would use time of death to prove its case, reasonable trial counsel would still have retained an expert in forensic pathology to investigate time of death to use as a sword in support of his client's innocence claim – i.e., to determine whether the Commonwealth's case could be undermined by establishing that the victim died after Petitioner had left Nardone's home. *See, e.g.*, *Andrus v. Texas*, 140 S. Ct. 1875, 1884 (2020) (holding that counsel's performance was deficient where counsel failed to independently investigate the state's case, and "thus could not, and did not, rebut critical [ ]

[6] Petitioner did assert that "prejudice should be presumed" here because "it is objectively impossible to *meaningfully* meet with a client – in order to thoroughly investigate claims and defenses, adequately prepare for trial, and make a fully informed defense strategy – in under fifteen minutes directly prior to trying a capital case." 7/12/2021 COA Application at 15. While Petitioner maintains that position, it was a two-sentence sub-argument, presented as an alternative to Petitioner's primary argument – that trial counsel's failure to retain a forensic-pathology expert, who would have extended the time-of-death window beyond Petitioner's presence at the murder site, was the prejudice that arose from trial counsel's deficient performance in failing to meet with Petitioner.

evidence"). Trial counsel took none of these steps because he never met with Petitioner to discuss the case, and as a result, failed to identify its core issue. App. 134-135, NT 10/18/94 at 37-38 (trial counsel attempting to excuse his deficient performance by callously arguing, "I mean, just to go to the prison to hold his hand and discuss the case may not be proper"); *but see Andrus*, 140 S. Ct. at 1881 (quoting *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)) ("Counsel in a death-penalty case has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.") (internal quotations omitted); *see also Porter v. McCollum*, 558 U.S. 30, 40 (2009) (counsel's performance fell below prevailing professional norms where he "ignored pertinent avenues for investigation of which he should have been aware"); *Strickland*, 466 U.S. at 688 (describing the duty "to consult with the defendant on important decisions" as "basic").

Thus, Petitioner's claim is not simply that trial counsel was ineffective for failure to retain an expert in forensic pathology, as characterized by the Third Circuit. App. 001, Third Cir. Order at 1. Rather, Petitioner argues that trial counsel was ineffective because his failure to meet with his client fell below prevailing professional norms. Such deficient performance prejudiced Petitioner because, but for trial counsel's failure to consult with him about the case, there is a reasonable probability that the outcome of the proceedings would have been different, where reasonable counsel would have: (1) met with Petitioner, (2) recognized that Petitioner's case would center around the victim's time of death, and then (3) consulted with or retained a forensic-pathology expert, like Dr. Arden,

who would have rebutted the Commonwealth's medical examiner and testified that the victim's time-of-death window extended beyond the time Petitioner was at the murder site. *See, e.g.*, *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (holding that counsel was deficient when he failed to retain a qualified expert and explaining that "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence").

In fact, as Dr. Arden's 2010 report makes plain, the medical examiner's testimony at trial was speculative and without an adequate scientific basis. "Estimating the postmortem interval by the assessment of lividity is not a reliable method" and "is not a common or accepted practice within forensic pathology . . ., especially not when it is the sole factor for the basis of such an opinion." App. 157, Arden Report at 2. The medical examiner also failed to measure body temperature, which is the most reliable method for estimating time of death. App. 158, *id.* at 3. Dr. Arden estimated that the victim's time of death could have been as late as 12:00 p.m., *id.* – an estimate which extends the medical examiner's time-of-death estimate two hours beyond the time Petitioner initially guessed he left Nardone's home and provides support for Petitioner's testimony that Ms. Griffith was alive when he left around 10:00 a.m. NT 10/26/94 at 140. At a minimum, such testimony supports reasonable doubt as to Petitioner's guilt, and that is all that is needed to show prejudice. *Hinton*, 134 S. Ct. at 1089-90 (prejudice shown where, but for counsel's error, jury could have a reasonable doubt about defendant's guilt).

Here, it is at least debatable that counsel's failure to meet with Petitioner and discuss his capital case with him until just before the start of jury selection fell below prevailing professional norms for reasonable counsel. Indeed, it is hard to imagine any jurist approving of counsel's conduct, particularly where, as here, the record fully supports the allegation. The Third Circuit's determination that counsel's assistance was so professionally reasonable that it was not even debatable is contrary to *Strickland*, *Wiggins*, *Porter, Hinton*, and *Andrus,* and does not align with this Court's caselaw concerning the COA standard.

The Third Circuit also discounted the value of Dr. Arden's critical findings – and by extension the prejudice caused by trial counsel's deficient performance – because Petitioner "failed to show that the scientific evidence in his proposed expert witness's report was available at [the] time of [Petitioner]'s trial." App. 002, Third Cir. Order at 2. However, Dr. Arden's findings were available at the time of Petitioner's 1994 trial. The 1995 treatise *The Estimation of the Time Since Death in the Early Postmortem Period* by Henssge, et al., to which Dr. Arden referred in his Report, notes that "*standard* forensic medicine textbooks offer a wide range of time of onset" and refers to published studies from 1964, 1978, 1984, 1987, and 1991. Henssge et al., *The Estimation of the Time Since Death in the Early Postmortem Period* (1st ed. 1995) at 219, 220 n.1-5 (emphasis added). Furthermore, Petitioner requested that the state court hold a hearing on his claims – at which time Dr. Arden would have readily confirmed that he or someone similar would have been available at the time of Petitioner's 1994 trial – but the state court never conducted

a hearing, choosing to rule on the papers alone. Petitioner should not be penalized for the state court's decision not to hear his claim.

Moreover, Petitioner's case is not one where the evidence of guilt was overwhelming. To the contrary, as the PCRA court noted in granting relief on this claim, "[t]his was a case of purely circumstantial evidence" and "[t]here were no eye-witnesses to the actual crime." App. 097, *Elliott-3* at 10 (recognizing that Petitioner's admission to consensual sex with the victim "is not enough to convict him of her murder"). And, this is not a case where Petitioner was the only viable suspect. Frank Nardone spent much of the night socializing with the victim too (something he initially lied about to authorities) and was indisputably present in his home at the time of the victim's death. Jurists of reason could disagree as to whether Petitioner was prejudiced by trial counsel's failure to meet with him where, as a result of the failure to meet, trial counsel did not recognize that the victim's time-of-death would become a central issue to the case and consequently did not retain a forensic-pathology expert. And, jurists of reason could also disagree as to whether Dr. Arden, or a similar forensic-pathology expert, would have been able to present testimony consistent with the findings in Dr. Arden's report at the time of Petitioner's trial. If the trial court, after witnessing trial counsel's performance first hand, was "not satisfied with the way this case was prepared" and thought that "[i]n the event of a conviction [ ], the defendant might have a good argument about the preparation of this case," it is hard to see how reasonable jurists would not at least

debate Petitioner's ineffective-assistance-of-counsel claim. App. 150, 152, NT 10/25/94 at 29, 31.

Effective representation of the indigent, particularly those facing a death sentence, must demand more than a single, 14-minute meeting prior to a murder trial. App. 144-145, NT 10/24/94 at 12-13 (Petitioner complaining that if trial counsel "had given me in the ten months that he had been representing me, at least an hour of his time, maybe I could have made some sense of [the charges against me] . . . . He has to read the things with me, so I can show [my version of the facts] to him."); Pa. R. Prof'l Cond. 1.4(a)(3) ("[a] lawyer shall keep the client reasonably informed about the status of the matter"); *id*. at R. 1.4(a)(4) ("[a] lawyer shall promptly comply with reasonable requests for information"); *id*. at R. 1.4(a)(2) ("[a] lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished"); *id*. at R. 1.4(b) ("[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"). That cannot be debatable. The Third Circuit, however, circumvented this Court's instruction – providing a hollow recitation of *Miller-El*'s standard in its order and issuing a decision contrary to that standard.

Requiring defense attorneys to discuss capital murder charges with their clients in advance of trial is an absolute minimum standard in any fair justice system. This Court has an opportunity to stem the erosion not only of the COA standard, but also of the Sixth Amendment's guarantee to effective assistance of

counsel, particularly in cases involving the highest penalty our justice system can impose. The petition should be granted.

II. THE DENIAL OF COA ON PETITIONER'S CONFRONTATION CLAUSE CLAIM WAS CONTRARY TO THIS COURT'S PRECEDENTS WHERE THE DISTRICT COURT FOUND THAT THE "DEFENSE AND PROSECUTION ALIKE HAVE COMPELLING ARGUMENTS"

In response to Petitioner's testimony that he left Nardone's house at approximately 10:00 a.m. on the day Ms. Griffith's body was discovered, NT 10/26/94 at 140, the prosecution re-called its medical examiner, Dr. Perlman, to testify that Ms. Griffith died at some point between 5:00 a.m. and 10:00 a.m. on May 7, 1992. NT 10/27/94 at 143. The medical examiner based her testimony on notes and statements from an investigator, who did not testify at trial, that the victim's lividity was "not fixed" by the time the body was examined. *Id*. at 131.

Jurists of reason could debate the District Court's ultimate determination that Dr. Perlman's testimony did not violate the Confrontation Clause under *Williams v. Illinois*, 567 U.S. 50 (2012). Indeed, the District Court itself acknowledged that the "defense and prosecution alike have compelling arguments," the underlying law is "somewhat unsettled," and the United States Supreme Court will likely make a "quick return" to the Confrontation Clause questions raised in *Williams*. App. 005, 008, Dist. Ct. Order at 1, 4 n1. And, jurists of reason could debate the Third Circuit's holding that "even assuming [ ] [Petitioner]'s rights under the Confrontation Clause were violated, jurists of reason would not debate that the error was harmless, given the strength of the evidence against [Petitioner]." App. 002, Third Cir. Order at 2. Frank Nardone was another viable suspect who lied to

authorities about his involvement with the deceased on the night of her death, and, as noted by the PCRA court, "[t]his was a case of purely circumstantial evidence" where "[t]here were no eye-witnesses to the actual crime." App. 097, *Elliott-3* at 10.

In *Williams*, this Court had to determine whether a state lab forensic specialist's testimony regarding the contents of an out-of-court-DNA-profile report created by a third party violated the Confrontation Clause. In determining that there was no Confrontation Clause violation, a plurality for this Court rested its decision on two foundations: 1) the state "expert witness referred to the report not to prove the truth of the matter asserted in the report, i.e., that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the [third-party] report contained a DNA profile that matched the [state's] DNA profile deduced from petitioner's blood," 567 U.S. at 79; and 2) the primary purpose of producing the report was "to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time." 567 U.S. at 84-85.

Here, the District Court correctly determined that "[t]he first ground on which the *Williams* court based its decision rings hollow here, when one considers that the purpose of the expert's testimony in utilizing the lividity analysis was to establish a time of death, thus tying the defendant to the crime." App. 008, Dist. Ct. Order at 4. Thus, unlike the facts underlying *Williams*, the out-of-court investigator's notes were not used for the "distinctive and limited purpose" of seeing whether they matched Dr. Perlman's autopsy report. 567 U.S. at 79. Rather, Dr.

Perlman relied upon the investigator's lividity analysis in the out-of-court notes and the investigator's out-of-court statements to prove the truth of the matter asserted therein, and opine that the victim died before Petitioner left Nardone's apartment. *See* NT 10/27/94 at 131.

The District Court's determination that Petitioner did not meet the second *Williams* factor is debatable. Unlike the facts underlying *Williams* – where the petitioner "was neither in custody nor under suspicion at [the] time" of the report's creation, 567 U.S. at 84 – here, Petitioner was immediately under suspicion when the murder was reported by Frank Nardone and Petitioner was interrogated by authorities within twelve hours of the discovery of the victim's body, prior to the victim's autopsy. The District Court, however, concluded that the lividity analysis was not generated for use as evidence against Petitioner because "the Medical Examiner investigates every suspicious death pursuant to statute, not just cases where law enforcement has concluded a crime has occurred and is considering suspects." App. 008, Dist. Ct. Order at 4. But such reasoning makes no sense where, as here, the condition of the body makes it obvious that the medical examiner would be performing an autopsy on a homicide victim. From the outset, the investigator knew that he was investigating a homicide and that his findings would likely be used in any future prosecution, most likely of the prime suspect the police immediately had in their sights – a black man who had intercourse with the victim shortly before she died.

Jurists of reason could further debate the Third Circuit's conclusion that any error was harmless. App. 002, Third Cir. Order at 2. As the PCRA court acknowledged, the bulk of the evidence against Petitioner was circumstantial. App. 097, *Elliott-3* at 10. As discussed above, time of death was a critical issue in light of Petitioner's statement to police that the deceased was alive and well when he left the house. *See also* App. 098, *id.* at 11 (post-conviction court acknowledging that "the medical examiner's testimony [regarding time of death] could have been a crucial element in the jury's decision-making"). Without any witnesses to the killing, the only evidence the prosecution had to refute Petitioner's testimony was the medical examiner's testimony about time of death – testimony that was based on an investigator's out-of-court statements. Petitioner's defense rose and fell with the medical examiner's time-of-death determination, which the prosecution characterized as an incontrovertible, scientific "time bomb" against Petitioner. NT 10/28/94 at 7. Thus, the use of the out-of-court lividity analysis that formed the basis of the medical examiner's time-of-death testimony had a considerable impact on the determination of Petitioner's guilt.

Here, both the existence of a constitutional error and its harm are reasonably debatable, and a COA should have issued.

CONCLUSION

For the foregoing reasons, Petitioner Joseph Elliott respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit. In the alternative, he requests that the Court grant certiorari, vacate the Third Circuit's judgment, and remand with instructions for the Third Circuit to grant a Certificate of Appealability on either or both of the claims identified here.

Respectfully submitted,

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Dated: March 9, 2022