No. 23-5978

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN HEATH DAVIS –PETITIONER

vs.

RANDY GIBBS, et. al –RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PESENTED

Akin to Justice Sotomayor's *Bullcoming v. New Mexico*, 564 U.S. 647, 672-74 (2011) scenario; To what extent are Sixth Amendment guarantees of Confrontation and Effective Assistance violated when an expert conducts an autopsy, prepares an autopsy report, relies on the report to testify, but it is not admitted as evidence?

Does the reliance on found false information render the expert's inability to determine cause and manner of death inadmissible as a basis for establishing guilt beyond a reasonable doubt?

LIST OF PARTIES

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

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

Randy Gibbs

Kris Karberg

RELATED CASES

Davis v. Gibbs, et. al, No: 23-2416 United States Court of Appeals for the Eighth Circuit, Judgment entered Aug, 10, 2023

Davis v. Gibbs, et. al, Case 4:21-cv-00176-JEG United States District Court for the Southern District of Iowa Central Division, Judgment entered May, 22, 2023

Davis v. State, No: 18-2073, Iowa Court of Appeals,
Judgment entered Jan, 21, 2023

Davis v. State, PCCV025235 Fremont County Post-conviction
Judgment entered Oct, 5, 2018

State v. Davis, No: 15-0666, Iowa Court of Appeals,
Judgment entered Jan, 11, 2017

State v. Davis, FECR007365, Fremont County, Iowa District Court,
Judgment entered Feb, 16, 2015

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TABLE OF AUTHORITES

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

Federal

The opinion of the United States court of appeals appears at Appendix **A** to the petition and is unpublished. The opinion of the United States district court appears at Appendix **B** to the petition and is unpublished.

State

The opinion of the highest state court to review the merits appears at: Appendix **D** to the petition and is reported at: *Davis v. State*, 957 N.W. 2d 39 (Iowa Ct. App. 2021). The opinions of the Iowa Court of Appeals court appears at: Appendix **E** to the petition and is reported at: *State v. Davis*, 895 N.W. 2d 922 (Iowa Ct. App. 2017).

JURISDICTION

Federal

The date on which the United States Court of Appeals decided my case was: Aug. 10, 2023. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Sept. 18, 2023, and a copy of the order denying rehearing appears at Appendix **C**.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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. CONST., 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. §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 that he is in custody in violation of the Constitution or laws or treaties 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 waves 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 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 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 therin, 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 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 Substances Act, in all proceedings brought under this section, any subsequent proceedings on review, the 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

July 18, 2009, the decedent was found in petitioner's home by law enforcement. County coroner findings were suicide. The state medical examiner (M.E.) conducted an autopsy July 20, 2009. Her findings were inconclusive. The cause and manner of death were both undetermined. The M.E. was instructed not to release and file her report yet. There was involvement from the state attorney general office, where state actors relayed provably false information to the M.E. (contained in M.E. call log[1]) that the decedent was "very against suicide" [2] and the existence of "high velocity impact spatter" on the petitioner's clothing. The autopsy report was released and filed December 17, 2009. There was renewed investigation in 2014, where officials interviewed the petitioner on October 27, 2014 and insisted he confess because there existed "high velocity blood splatter," from his clothing proving petitioner was present while the gun discharged. Being scientifically and demonstrably untrue, this was artifice from the state. Petitioner denied his presence eleven times before out of frustration said, "I don't believe I was in the room." Eleven days later, Nov. 7, 2014, the state filed murder charges.

The M.E. was deposed and provided no additional information disclosed from the autopsy report. February 3-6, 2015 a bench trial was conducted. The M.E.'s autopsy report was not admitted into evidence. The M.E. testified that she could not

[1] M.E. Call Log was not discovered until postconviction 2017 and clearly documents the state AG office involvement.

[2] The record contains witness evidence where the decedent had threatened to "blow her head off" and "take a bunch of pills" plus suicidal ideation months prior and up to the day of death.

determine to a reasonable degree of medical certainty either the manner or cause of death. The M.E. changed and exaggerated her findings which were at odds with depositions and autopsy report that were before inconclusive discolorations into "partial bruising" of the decedent's neck area. Defense counsel elicited testimony from the M.E. that three other doctors agreed with her findings, however the other experts did not testify. The medical examiner concluded, the "lack of suicidal ideation" ... "raised the possibility of homicide," in her autopsy report. The M.E. remained reliant on those founded false informations relayed to her by the state. For the first time, the M.E. testified the gun wound as "highly unusual place for a self-inflicted shotgun wound." Counsel challenged this as beyond the minutes of testimony, without admitting the expert's autopsy report or a Daubert challenge. The bench found the petitioner guilty, a direct appeal was initiated. January 11, 2017, Iowa Court of Appeals affirmed the conviction, however finding the record in need of development. The Iowa Supreme Court denied further review.

The application for postconviction was filed August 3, 2017. This was where for the first time, the M.E.'s autopsy report was admitted into the record. On October 5, 2018, the Iowa district court denied petitioner's postconviction when it filed a verbatim adoption of the state's proposed order completely unaltered or edited in any manner[3].

[3] Judge James S. Heckerman adopted state attorney Brenna Bird's proposed order and conclusion of law. A review of both documents reveals that all pages begin and end with the exact same words, even same typographical errors.

PCR appeal *Davis v. State,* 18-2073 was filed November 26, 2018. On January 21, 2021, the Iowa Court of Appeals took the stance that the M.E.'s testimony doesn't prove she relied on anything false because the autopsy report wasn't in evidence while finding any alleged defect in regard to the autopsy report not preserved. A Pro se PCR further review was filed February 8, 2021, where petitioner carried forward two pro se claims, presenting questions:

I. DID APPELLATE COURT ERR IN FINDING NON-ADMISSION OF AUTOPSY REPORT INTO EVIDENCE ARGUMENT NOT PRESERVED FOR REVIEW? HOW DID THE ABSENT RECORD EFFECT COUNSEL'S ABILITY TO BE EFFECTIVE AND MEANINGFULLY TEST THE STATE'S CASE?

II. DID APPELLATE COURT ERR WHEN IT IGNORED PRO SE ARGUMENT REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL AND SELF-BOLSTERING OF EXPERT OPINION?

Counsel's PCR further review[4] was filed February 10, 2021 raising in regard to the ME:

I. THE DISTRICT COURT ERRED IN REFUSING TO RECOGNIZE TRIAL COUNSEL'S FAILURE TO COMPETENTLY CHALLENGE THE MEDICAL EXAMINER'S RELIANCE ON FALSE INFORMATION WHICH REPRESENTED A BREACH OF AN ESSENTIAL DUTY, TO THE PREJUDICE OF THE PETITIONER

Iowa Supreme Court denied further review April 29, 2021.

[4] PCR appellate counsel's questions presented for review February 10, 2021: 4. Whether The Court of Appeals' Mistaken Belief That the Deposition Of Medical Examiner Had Not Been A Part Of The Record In The PCR Means Further Review Should Be Granted To Remedy? 5. Did The Court Of Appeals Err In Ruling That The Pro Se Claim Regarding Reliability Of Autopsy Testimony And Failure To Admit Autopsy Report Not Preserved?

Petitioner filed a habeas petition on 6/10/21 Doc.1 case no. 4:21-cv-00176-JEG-HCA where seven issues were raised. Grounds: three, four, five, and seven are regarding the medical examiner:

> **Three**: Trial Counsel Failed To Competently Challenge Medical Examiner's Reliance On False Nonexistent Information Resulting In Violations of 6th, 5th, 14th Amndts. U.S. Const.
>
> **Four**: Trial Counsel's Failure To Challenge M.E. Allowing Self-Bolstering Of Own Opinion To Petitioner's Prejudice Violating 6th, 5th, 14th Amndts. U.S. Const.
>
> **Five**: Trial Counsel's Failure To Challenge/Test The Reliability of The Doctor's Undetermined Opinion, Non-Admission of Autopsy Report; U.S. Const. 6th, 5th, 14th
>
> **Seven**: The Medical Examiner's Opinion Of The Gunshot Wound Location Being "Highly Unusual" For A Self-Inflicted Wound Was Improperly Admitted As Beyond The Scope Of The Minutes Of Testimony And/Or Lacking Foundation And Prejudiced [Petitioner]

Counsel was appointed and filed a habeas merits brief. In the procedural history of the brief, counsel mistakenly removed the exhausted pro se claim of: I. "non-admission of autopsy report" from the petitioner's pro se PCR further review application 2/8/21, and substituted an ineffective assistance of appellate counsel issue the petitioner did not raise on pro se PCR further review application. This made counsel's version of procedural history appear the petitioner's pro se claims

were unexhausted. This was discovered in September 2023. Petitioner filed a timely 60(b) motion late October 2023 to reopen the record, and is likely pending litigation at the time of this certiorari petition.

The Eighth Circuit Southern District Court for Iowa denied relief, and COA in cause No. 4:21-cv-00176-JEG-HCA on May 22, 2023. However, the habeas district court references the autopsy report, distinctly "there were findings during the autopsy that could not be explained, suicidal ideation did not resolve those uncertainties." Then concluding the ME "was adequately confronted about the reliance on a [false] lack of suicidal ideation." The habeas court further defers to the Iowa court of appeals that there was no prejudice in counsel's decision not to confront the blood splatter issue. 5/22/23 Order

The habeas court gave deference to counsel's hypothetical "strategy" for not objecting to the "unusual location of gunshot" testimony because the expert "might have eighty-two papers on the subject" though clearly at odds with counsel's admission of surprise and the expert's curriculum vitae from 2015. The habeas court again deferred to the Iowa Court of Appeals in regard to the sufficiency of the evidence claim. 5/22/23 Order. Counsel appealed via notice, with no merits brief in support of the COA included. The United States Court of Appeals for the Eighth Circuit denied the COA in No. 23-2416 on August 10, 2023. Counsel then refused to file anything further in the case. Petitioner filed a timely pro se petition for rehearing en banc/rehearing by panel which was denied September 18, 2023, mandate issued September 26, 2023. Petitioner prays for this Courts intervention.

REASONS FOR GRANTING THE PETITION

Justice Sotomayor held a scenario similar to the instant case was left unaddressed in *Bullcoming v. New Mexico,* 564 U.S. 647, 672-74, 1315 S. Ct. 2705 180 L Ed. 2d 610 (2011) where in her concurrence in part, an expert gives opinion about testimonial reports not in evidence. Four years later, that scenario became reality at the petitioner's bench trial for murder, where the state medical examiner, (M.E.) conducted the autopsy, prepared an autopsy report, relied on it to testify, without the autopsy report being entered into evidence, even against mandatory state statutes.

Not only are there circuit splits about whether autopsy reports are testimonial in nature, but an egregious example is before this Court where lower courts have so far departed from the course of usual judicial proceedings that there exists the need for this Court's clarity and guidance.

The fundamental principles of the Sixth Amendment are central to this case, as well as the need for standardization of what role autopsy reports play in homicide cases and non-homicide cases. The recent Supreme Court case providing guidance in regard to what's testimonial is *Williams v. Illinois,* 567 U.S. 50, 66 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012); *see:* Douglas Malcom, *Protecting The Accused And Our Criminal Justice System's Integrity: Autopsy Reports Are Testimonial In Homicide Cases,* 2021 U. Ill. L. Rev. 1473 (2021).

When physical evidence is inconclusive, as here; the reliability of adversarial testing through cross-examination is most important. The Confrontation Clause of the Sixth Amendment requires reliability and veracity of the evidence used against a criminal defendant be tested by cross-examination, not determined by a trial court. Reliability of the underlying proceeding is inherently the focus of *Strickland v. Washington*, 466 U.S. 668 (1984).

How does defense cross-examine what is not properly corroborated and how does the prosecution "prove the foundational facts that are essential to the relevance of the expert's testimony" without an autopsy report on record? *Williams* at 81. The meaningful adversarial testing was left unengaged by counsel in petitioner's trial. At sentencing, and in regard of the expert's report, the bench remarked,

> "[T]he autopsy report and the deposition are not in front of me. They are not part of the record. I don't know that they would be admissible if they were offered..." *Sentencing Trans.* April 9, 2015, 5 at 11-14

National Importance and Circuit Splits

The national importance is connected to the diverse circuit splits as unsettled law in our country. In post-*Crawford v. Washington* (where Justice Scalia's testimonial hearsay was established) times, the question of what is and is not testimonial have inundated our courts. The Fourth and Eleventh and D.C Circuits have held autopsy reports are testimonial, in *United States v. Ignasiak,* 667 F. 3d 1217 (11th Cir. 2012) because they are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for

use at a later trial." at 1232. The First and Second Circuits held autopsy reports are nontestimonial and admissible under the business records exception. *United States, v. De La Cruz,* 514 F. 3d 121,133 (1st Cir. 2008) "business records are expressly excluded from the reach of *Crawford.*" Then revisited in *Nardi v. Pepe,* 662 F. 3d 107 (1st Cir. 2011) held, "it is uncertain how the Court would resolve the question." at 111. The Second Circuit has ultimately concluded autopsy reports are nontestimonial because it was not prepared for use as evidence at trial since the report was signed long before any criminal investigation into the death began. *United States v. James*, 712 F. 3d 79, 99 (2nd Cir. 2013). The Sixth and Ninth Circuits have avoided the determination, unwilling to make a decision the Supreme Court might soon reverse. *See, e.g., Euceda v. United States*, 66 A. 3d 994, 1012-13 (D.C. Cir. 2013) (observing that courts "continue to be split on this question").

Under the Eighth Circuit, Mr. Davis was convicted of murder in an Iowa state court without the autopsy report on record, admissible under *Objective Reasonable Belief, Primary Purpose* and *Targeted Individual* tests, whose counsel found it unnecessary to admit, and neither did the state, against state mandatory statute. That prevented meaningful adversarial testing and even made direct appeal unassailable. The harshest sentence Iowa offers, was handed down. The trial cannot be called fair or his counsel effective. Presented to the habeas court:

THE STATE COURT ERRED IN NOT FINDING TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR HIS FAILURE TO COMPETENTLY EXAMINE OR CHALLENGE THE MEDICAL EXAMINER'S TESTIMONY WITH REGARD TO VARIOUS MATTERS WHICH REPRESENTED A BREACH OF AN ESSENTIAL DUTY, TO THE PREJUDICE OF PETITIONER

At trial, the state called Deputy State Medical Examiner Jerri McLemore to testify with regard to the cause and manner of death. In forming her opinion as expressed in her autopsy report and later trial testimony were two pieces of information, which were proven to be certainly false. First, the M.E. was told by the state A.G. office that the decedent had "no known history of suicidal ideation" and was "very against suicide." Second, M.E. was led to believe that there was "high velocity blood splatter" on petitioner's clothing despite the fact that no blood spatter testing could be conducted. The M.E.'s deposition prior to trial could not determine cause and manner of death. However, at trial and for the first time, she added a significant finding that "the location of the wound was "highly unusual place for a self-inflicted shotgun wound." (Dkt. 11-12 at 29; Dkt. 11-3 at 99-100). Counsel objected as outside the minutes of testimony but did not challenge it on the basis of foundation or *Daubert* inquiry. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).

Cross-Examination Regarding Suicidal Ideation

The lower courts brevity has failed to appreciate the facts and circumstances of this scenario. The petitioner has demonstrated the M.E. admittedly relied on the report that wasn't in evidence. Instead of admitting the report, instead of using the two witnesses that testified to decedent's ideations of self-harm; counsel proposed a "what if"-type hypothetical scenario to the M.E. as follows:

> Q. If there was suicidal ideation either that day or over a period of time of up to 5 months before, would that have affected your opinion?
> A. Probably not.
> Q. Why?

A. Because again, it's not just that. It's also the findings on autopsy that I cannot explain, and I'm not sure how they fit in, which is why it came down to undetermined.
Q. Again. I'm reading your report, and it says the thing that bothered you was mainly lack of any suicidal ideation raised the possibility of homicide.
A. Yes.
Q. –doesn't that affect you at least somewhat?
A. Because I still have aspects of, especially my autopsy findings in that sentence. It's not just one piece of evidence that is concerning me·
Q. Okay.
A. –or has concerned me. Anyway, I couldn't form an opinion. That's why it's undetermined. (Dkt. 11·12 at 45·6; Dkt. 11·3 at 104)

The actual testimony of suicidal ideation was not presented to the M.E. by counsel or even by the state. Petitioner concludes this issue is an unreasonable determination of facts in light of the evidence and involved an unreasonable application of, clearly established Federal law pursuant to *Harrington v. Richter*, 562 U.S. 86, 100, (2011).

Cross·Examination of High Velocity Blood Splatter

PCR counsel argued trial counsel's ineffectiveness for the failure to confront the false information in the autopsy report, "there were, however, subtle discrepancies regarding high velocity blood splatter on the significant other's clothing..." Such a statement in an autopsy carries tremendous implications. It is the M.E.'s understanding that there is scientific evidence the petitioner was in the room, especially damning when she knew petitioner repeatedly denied his presence. Counsel's PCR application for further review asserted, "the COA fails to understand or adequately address this." (Dkt. 11·16 at 24). Habeas argument emphasizes, the point is not whether this false information was admitted at trial, but rather, that

the medical examiner relied on it in forming her opinion. A vigorous cross-examination on this issue would have demonstrated the infirmity of her opinion and could have altered her conclusion possibly affecting the judge's verdict of guilt. *Harrington v. Richter*, 562 U.S. 86, 100, (2011).

Cross-Examination of Unusual Wound Testimony

The medical examiner testified the location "highly unusual place for a self-inflicted shotgun wound." There was no substantial challenge to this ispse dixit comment. No foundational objection or to its scientific basis, which really is the ultimate question, was made. The problems with this are that the court rules it was strategic decision, when in fact the record demonstrates counsel was caught off guard and notably surprised by the undisclosed testimony. Counsel did not want to "bolster" the witness for the state, the habeas court quoting Iowa Court of Appeals,

> "[Expert's] testimony left clear reasonable doubt and the testimony...favorable to the defense...True expert witnesses will bolster their testimony whether they have any real basis to bolster it or not...so I felt any foundational questions about would only assist the State." Merits Brief Dkt. 18 at 17

On the potential risk of lodging foundational objections,

> "Well, you take a risk on that. Any time you're going to ask –if I ask to voir dire a witness, I'm going to say what's your experience in this area, and she then throws out that she's got [eighty-two] papers in it, I have helped the State." Merits Brief at 17

This was merely a hypothetical scenario that counsel proposed and not reflective of the record. This so-called strategy of counsel does not enjoy record support, because the expert's curriculum vitae (CV) at trial held no published work

or studies regarding nature and quality of gun wounds. Habeas counsel argued, "the fear of bolstering the testimony also makes no sense because the other option is that the evidence comes in unchallenged, which it did, and is relied on by the court, which it was[5]". For further proof, counsel said on the record at sentencing in 2015,

> "as defense counsel here we had no knowledge either by the minutes...by Dr. McLemore's deposition, or by her autopsy that she would be testifying to an opinion as to the location...being unusual for shotgun suicide...We believe as defense counsel and the defendant were...surprised something like that...was going to be testified to..." *Sentencing Tran.* April 9, 2015, 2 at 21-25, 3 at 1-10

The testimony carried great weight with the trial court as it was referenced twice in the verdict. *State v. Davis,* FECR007365, Fremont County, *Verdict Order* March 4, 2015, at 7-13. The petitioner asserts that the Eighth Circuit's deferral to the Iowa court's finding that missing a key and crucial objection as to foundation, under the circumstances of total surprise, was strategic is an unreasonable determination of the facts. In fact, the failure to make the objection and thus test the evidence was nothing other than an error by trial counsel which clearly prejudiced the petitioner. *Harrington v. Richter*, 562 U.S. 86, 100, (2011).

Self-Bolstering

At odds with the previous "strategy," counsel now wished to bolster the expert's testimony as it elicited from the M.E. that three other doctors agreed with her undetermined findings. Those other experts never testified. The Iowa court's

[5] In addition, his alleged strategic fear of bolstering the M.E.'s status with regard to his failure to object is wholly inconsistent with his alleged strategic desire to bolster her expertise when he posed questions to her regarding the peer review of her findings as to the cause and manner of death...

ignored this claim, just as they've pivoted from the non-admission of the autopsy report claim. *Harrington v. Richter*, 562 U.S. 86, 100, (2011).

Sufficiency of Evidence

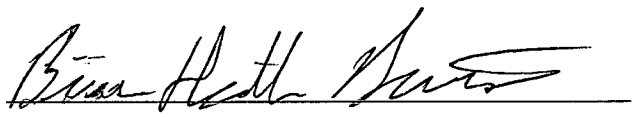
The lower courts have repeatedly denied this claim, while unreasonably relying on the medical examiner's opinion. The alleged neck bruising is rebuttable by clear and convincing evidence from the M.E.'s deposition. The trial testimony and deposition are at odds, Petitioner asserts the court's determinations are objectively unreasonable, emphasizing if there is no relevant evidence on record that establishes the underlying premise of an expert's opinion, other than only what an expert said, because the State didn't want to admit the autopsy report into evidence, and if that was the crux of the State's case, then there is insufficient evidence to convict the petitioner. It is objectively unreasonable for the bench trial judge to convict. *Cavazos v. Smith*, 565 U.S. 1, 132 S. Ct. 2, 181 L. Ed. 2d 311 (2011).

The Great Writ should be granted. All of the claims arise from the factual circumstance of the autopsy report being not of record, which prevented meaningful adversarial testing. Bench trials cannot do away with principle. Such a departure of basic principle in this case denies Sixth Amendment rights. Counsel's ineffectiveness cannot, nor can a bench trial judge's conduct deny a citizen an adversarial criminal trial. This conduct could recur nationwide if unaddressed. Many Americans are not afforded basic guarantees of our criminal justice system.

CONCLUSION

Petitioner prays this court would grant certiorari.

Genuinely submitted,



Date: Oct. 30, 2023