

23-6559 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

FILED

JAN 05 2024

OFFICE OF THE CLERK
SUPREME COURT, U.S.

MARCUS JOHNSON,
Petitioner,

V.

SUPERINTENDENT FOREST SCI;
THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA;
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Pro Se Petitioner

Marcus Johnson (#MP1756)
SCI: Forest
P.O. Box 945
289 Woodland Drive
Marienville, P.A 16239

QUESTIONS PRESENTED

Mr. Johnson alleged that his right to Confrontation was violated when the trial court permitted a surrogate analyst to parrot the testimonial statements of a non-testifying expert witness. This testimony was the only evidence relied upon by the state that contradicted Mr. Johnson's self-defense account of the incident. Even so, per this same testimony offered by the state's expert witness, these testimonial statements also supported Mr. Johnson's self-defense claim.

In finding no prejudice, the District Court, in large part, relied on the testimony of an expert witness offered by Mr. Johnson, which is not in accord with applicable decisions of this Court. However in doing so, departed significantly from the accepted and usual course of judicial proceedings, and decided an unanswered important federal question in a way that conflicts with relevant decisions of this Court. The case thus presents the following questions.

1. Did the Third Circuit err in deferring to the District Court's finding that Mr. Johnson suffered no prejudice from the Confrontation violation that occurred at his trial, when the District Court's decision is in conflict with the decision of another United States Court of Appeals on the same important matter?

2. Did the Third Circuit err in deferring to the District Court's decision to answer an important question of federal law that should be settled by this Court, that is when the District Court found that there is no prejudice suffered as a result of a Confrontation violation where the defense presents testimony from its' own expert witness?

3. Where the testimonial statements contained in an autopsy report prepared by a non-testifying expert witness consists of lapses and infirmities, can a resultant Confrontation violation be cured by additional surrogate

testimony offered by the state's expert witness, when the witness had neither performed nor been present during the autopsy in question, and played no role in generating the data contained in the autopsy report upon which the expert witness based their opinion?

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PARTIES

Petitioner, pro se:

Marcus Johnson, #MP1756, P.O. Box 945, 289 Woodland Drive, Marienville, P.A 16239.

For Respondent D.F. Oberlander:

Pennsylvania Attorney General Ronald Eisenberg, Esq., 1600 Arch St., Suite 300, Philadelphia, P.A 19103; Philadelphia District Attorney Katherine E. Ernst, Esq., 3 S. Penn Square, Philadelphia, P.A 19107.

PRIOR OPINIONS AND ORDERS

June 27, 2016: Conviction, First-Degree Murder, Possession of an Instrument of Crime ("PIC"); Philadelphia, P.A; CP-51-CR-0014428-2014.

July 17, 2017: Direct Appeal, affirmed; **Commonwealth v. Johnson**, 175 A.3d 375 (Pa. Super. 2017)(table)(2432 EDA 2016).

Nov 28, 2017: Allocatur denied; **Commonwealth v. Johnson**, 175 A.3d 215 (Pa. 2017) (table)(337 EAL 2017).

Sep 20, 2019: Post-Conviction denied; Philadelphia, P.A; CP-51-CR-0014428-2014.

Oct 6, 2020: Post-Conviction appeal affirmed the denial; **Commonwealth v. Johnson**, 2964 EDA 2019, 2020 WL 5908145, (Pa. Super. October 6, 2020).

Apr 13, 2021: Post-Conviction appeal, allocatur denied; **Commonwealth v. Johnson**, 252 A.3d 596 (Pa. Apr. 13, 2021)(table)(441 EAL 2020).

Aug 29, 2022: Report and Recommendation issued; **Johnson v. Oberlander, et al.**, E.D. Pa. No. 2-21-CV-02235 (ECF No. 24).

Apr 18, 2023: Petition for Writ of Habeas Corpus denied; **Johnson v. Oberlander, et al.**, E.D. Pa. No. 2-21-CV-02235 (ECF No. 27).

Aug 30, 2023: Application for Certificate of Appealability denied; United States Court of Appeals for the Third Circuit; **Marcus Johnson v. Superintendent Forest**

SCI, et al., No. 23-1947.

Oct 11, 2023: Petition for Rehearing and/or Rehearing En Banc denied; United States Court of Appeals for the Third Circuit; **Marcus Johnson v. Superintendent Forest SCI, et al.**, No. 23-1947.

JURISDICTION

Seeking U.S. Supreme Court review of the denial of Mr. Johnson's petition for Writ of Habeas Corpus relief under 28 U.S.C. § 2254; denial was by the U.S. District Court for the Eastern District of Pennsylvania on 4/18/2023.

Petition for Certificate of Appealability was denied by the United States Court of Appeals for the Third Circuit on 8/30/23.

Rehearing was denied by the United States Court of Appeals for the Third Circuit on 10/11/2023.

Jurisdiction is conferred on this Court by U.S. Sup. Ct. Rules 10 (a), (c) and 13 (1). The denial conflicts with the Confrontation Clause of the 6th Amendment of the U.S. Constitution as read in Crawford v. Washington, 541 U.S. 36 (2004); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); and Bullcoming v. New Mexico, 564 U.S. 647 (2011).

CONSTITUTIONAL PROVISIONS AND STATUTES

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 protections of the laws.

18 Pa.C.S. § 505(a), (b)(2)(i)-(ii)

§ 505(a): Use of force justifiable for protection of the person. -- The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

§ 505(b): Limitations on justifying necessity for use of force. --

(2) The use of deadly force is not justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:

(i) the actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or

(ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating, except the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor

knows it to be.

STATEMENT OF THE CASE

Mr. Johnson was convicted of murder for the killing of decedent, (herein referred to by name, "Eugene"). Mr. Johnson gave a statement to the police, and testified at trial, that prior to the incident, he was shown "a picture on [Eugene's] phone" of him "holding a newborn baby" that did not belong to Eugene. Johnson then claimed to have taken the "phone out of [Eugene's] hand" and "turn[ed] away to delete the picture" while walking away from Eugene towards the kitchen area. Johnson further stated that when he turned around, Eugene had the gun pointed at his "face," and after putting his "hands up" and telling Eugene "to chill," Johnson took "a few steps towards" Eugene, thereafter a "mild struggle" ensued during which the fatal shots that killed Eugene were fired. Mr. Johnson also testified that the incident occurred very quickly, and that he never meant to hurt Eugene, but rather reacted out of fear of being shot in the face.

There were no eyewitnesses to the shooting, as the incident took place in Mr. Johnson's home. During the course of trial, the prosecution presented the expert testimony of Albert Chu, M.D., an Assistant Medical Examiner with the city of Philadelphia. However, the autopsy of Eugene was performed by Dr. Marlon Osbourne, another assistant medical examiner employed by the city. Dr. Chu never examined the body, he played no role in the autopsy, nor did he certify the Medical Examiner's Report. Also, he did not interview Dr. Osbourne. Yet, the prosecution sought to present Dr. Chu's testimony in order to establish the cause and manner of death; that Johnson possessed the specific intent to kill; and most of all, to rebut Mr. Johnson's self-defense account of the incident, as the state presented no other evidence to achieve the latter.

On the first day of trial, prior to the jury selection process, Mr. Johnson's trial counsel filed a motion to exclude the testimony of Dr. Chu. Relying on federal law and a recent ruling in a Pennsylvania case that found autopsy reports to be testimonial; counsel argued that allowing Dr. Chu to parrot the testimonial statements of the absent witness would violate Mr. Johnson's 6th Amendment right to confront and cross-examine the author of said statements: Dr. Osbourne. Mr. Johnson's motion was denied on the basis that the court believed that Dr. Chu could offer his own independent opinion.

A day later, moments before Dr. Chu's testimony, Mr. Johnson's counsel renewed its' motion, again arguing that Johnson's Conforntation rights would be violated if Chu was permitted to testify. The court again denied the motion.

Dr. Chu testified that the cause of death was gunshot wounds and the manner of death was homicide. Dr. Chu offered additional testimony based on Dr. Osbourne's findings in his report, that the information contained in the report supported the prosecution's theories of the incident. According to the prosecution's theories, Eugene was either shot while running towards the front door; kneeling down; or lying face flat on the floor. This portion of Dr. Chu's testimony had a dual purpose: 1) to rebut Mr. Johnson's self-defense version of the incident; and 2) to prove that Johnson committed a deliberate killing with malice and the specific intent to kill.

Dr. Chu also testified that the information in the report was "not inconsistent with the version of events that [Johnson] gave to the police the morning after...the incident." Nevertheless, Dr. Chu's testimony was the only evidence offered by the prosecution to refute Mr. Johnson's self-defense claim.

Mr. Johnson's counsel presented testimony from Dr. Jonathan Arden, who opined that the information in the autopsy report supported Johnson's self-defense account. Dr. Arden further testified that portions of Dr. Chu's testimony lacked support from the information in Dr. Osbourne's report, because Osbourne

failed to take recovery point photographs, and likewise failed to record crucial measurements of the "location of the point of recovery to make a comparison with the entry point" in order to determine any direction of angulation.

The jury found Mr. Johnson guilty of first degree murder, and he was sentenced to life imprisonment without the possibility of parole. **Commonwealth v. Johnson**, CP-51-CR-0014428-2014. His conviction was affirmed on direct appeal. **Commonwealth v. Johnson**, 175 A.3d 375 (Pa. Super. 2017). State post-conviction proceedings were filed; relief was denied in the P.C.R.A court and on appeal. **Commonwealth v. Johnson**, 2020 WL 5908145, (Pa. Super. October 6, 2020), App.

1-29b. Mr. Johnson then filed a habeas corpus action under 28 U.S.C. §2254.. Relief was denied by the district court (App. 17-25a), and Mr. Johnson was denied a Certificate of Appealability on the issue presented in this petition. App. 26-27a. Mr. Johnson's request for Rehearing and/or Rehearing En Banc was denied on the issue presented in this petition.

The P.C.R.A court denied relief on this claim on the sole ground that the "Confrontation Clause is not violated when an expert expresses his or her independent conclusions based on review of inadmissible evidence." App. 12b. The court relied on **Williams v. Illinois**, 567 U.S. 50, 66 (2012), and **Commonwealth v. Brown**, 185 A.3d 316 (Pa. 2018) in reaching its' conclusion. The P.A Superior Court refused to review this claim on its merits based on a finding that Mr. Johnson had not complied with a waiver rule requirement. App. 25-26b. Mr. Johnson petitioned the P.A Supreme Court for review of the Superior Court's waiver finding, claiming that the ruling was in error, but was denied allocatur.

The district court reviewed this claim based on the exception announced in **Martinez v. Ryan**, 566 U.S. 1, (2012). The district court denied relief on this claim on two grounds. First, the court stated that had Dr. Chu been questioned on cross-examination about the lapses in the autopsy report, "he

most likely would have" been able to offer an "additional explanation for his conclusion...." (App. 15a). The court went on to conclude that Mr. Johnson could not show prejudice because Dr. Arden, the defense's own expert witness, testified to the lapses being in the report, thus the jury was apprised of this information. (App. 15a, 24a). The Third Circuit Court of Appeals deferred to the district court's finding in denying Mr. Johnson's certificate of appealability (App. 26a), and likewise denied Johnson's request for rehearing. App. 28-29a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE THIRD CIRCUIT TO DEFER TO THE DISTRICT COURT'S FINDING FOR DENYING MR. JOHNSON RELIEF IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

In the closely analogous case of *Garlick v. Lee*, 1 F.4th 122, 2021 U.S. App. LEXIS 17433 (2d Cir. June 11, 2021) the court confronted a situation where the state, over objection, was permitted to elicit testimonial statements contained in an autopsy report through the surrogate testimony of another expert witness who had not performed the autopsy, and did not play any role in formulating the information in the report.

The state in the "Garlick" case offered the surrogate testimony to show evidence of Garlick's intent to cause serious physical injury and the intent to kill. The state did the same in Mr. Johnson's case. The state in the "Garlick" case also offered the surrogate testimony in order to show that Garlick had or used a knife during the killing. No witness testified that Garlick had or used a knife during the attack, and Garlick denied that he had a knife. The state in Mr. Johnson's case also offered the surrogate testimony in order to rebut Johnson's self-defense claim. No witness testified that Johnson did not act in self-defense, and Johnson testified that he feared for his life when Eugene had the gun pointed at his face. In addition to this, the surrogate testimony

corroborated Johnson's self-defense account. This factor in Mr. Johnson's case is of the utmost significance, as under P.A law, once a claim of self-defense has been substantiated, the prosecution accrues and additional evidentiary burden of disproving the claim beyond a reasonable doubt. see 18 Pa.C.S. § 505(a),(b) (2)(i)-(ii); also Commonwealth v. Mouzon, 617 Pa. 527, 53 A.3d 738, 751 (Pa. 2012). Nonetheless, under Crawford v. Washington, 541 U.S. 36, (2004) and its' progenies, Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) and Bullcoming v. New Mexico, 564 U.S. 647, (2011), the federal appeals court in "Garlick" found that the admission of the autopsy report at Garlick's trial through a surrogate witness was an unreasonable application of clearly established Supreme Court precedent. The conviction was reversed.

See also United States v. Ignasiak, 667 F.3d 1217, 1235-37 (11th Cir. 2012), where the court found that since the surrogate M.E had neither performed nor been present during the autopsies, the surrogate witness was not in a position to testify on cross-examination as to the facts surrounding how the autopsies were actually conducted or whether any errors, omissions, or mistakes were made. The court further found that the conclusions and supporting findings reflected in autopsy reports are the product of an examiner's skill and judgment, and not an infallible machine that requires no human intervention. And since human judgment and skill are involved, the court concluded that it could not assume that the non-testifying M.E's findings were reliable. Thus, the court found that Ignasiak suffered prejudice because of the significant role that the non-testifying experts played in conducting the autopsies and generating the data contained in the autopsy reports upon which the surrogate witness based their opinion.

These cases illustrate the fact that the Third Circuit Court of Appeals is out of step with this Court and with other circuits by deferring to the district court's finding that Mr. Johnson suffered no prejudice.

Certiorari should be granted to correct this error.

II. THE DECISION OF THE THIRD CIRCUIT TO DEFER TO THE DISTRICT COURT'S LEGAL FINDING OF WHY MR. JOHNSON FAILED TO SHOW PREJUDICE RESULTANT FROM A CONFRONTATION VIOLATION; WHERE THE DISTRICT COURT'S FINDING IMPERMISSIBLY ANSWERED AN IMPORTANT QUESTION OF FEDERAL LAW THAT COULD ONLY BE ANSWERED BY THIS COURT; WARRANTS THIS COURTS IMMEDIATE ATTENTION.

By deferring to the district court's finding on why Mr. Johnson could not show prejudice stemming from the Confrontation violation, the Third Circuit completely overlooked the district court overreaching its' authority to answer a question of Constitutional import that could only be answered by this Court. As a provision of the U.S. Constitution, under Article III, Section 1-2, the authority to interpret and determine the level of force to which the Confrontation Clause is to be applied at a criminal trial rests solely with this Court. Accordingly, the authority to determine if, or when, an exception to the Confrontation Clause could, or should apply, is vested to this Court.

Relevant to the issue before this Court, the district court concluded that since Dr. Arden, -(the defense's expert witness),- "testified to every issue" that Johnson claimed should have been raised during the cross-examination of Dr. Chu: Mr. Johnson could not show no prejudice "because the medical testimony he claims was favorable to his theory and should have been used to question Dr. Chu was presented to the jurors." (App. 24a). The court reached this conclusion despite acknowledging that Mr. Johnson's trial strategy was to "prove that the wounds the decedent suffered were consistent with [his] version of events rather than the Commonwealth's versions." *Td.*, (emphasis added).

To date, this Court has not announced a rule that suggests that the right to confront an adverse witness is nullified when a defendant produces a witness whose testimony is akin to the testimonial statements made by an unavailable prosecution's witness. This rationale departs so far from this

Court's Confrontation precedent, that this Court's input is warranted to determine if a strict reading of the 6th Amendment provision would permit such a legal application.

Concerning testimonial statements, this Court's precedent contemplates two types of witnesses: the author of the statements, and the non-author of the statements, to which this Court has referred to as a surrogate witness when dealing with expert testimony. *Crawford v. Washington*, 541 U.S. 36, (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647, (2011). Pursuant thereto, a defense's witness who did not author the testimonial statements would be in the same position as the prosecution's substitute expert: a surrogate witness.

For example, the district court acknowledged that Mr. Johnson sought to rely on the information contained in the autopsy report to prove that he acted in self-defense, and likewise to shed doubt on the state's theories. Conversely, the state sought a dual purpose aswell. But how could the underlying evidence be deemed reliable without testing in the crucible of "cross-examination?" Also, Even though Dr. Arden brought to light the defects in the autopsy report; how could questioning him about Dr. Osbourne's testimonial statements be sufficient testing to determine Osbourne's honesty, proficiency, and the methodology he employed when performing the autopsy and dictated the information into the report?

The district court held that Mr. Johnson failed to show that this issue impacted his trial, simply because Johnson produced his own expert testimony. (App. 24a). However, it's hard to see how the only evidence the state presented to satisfy its' burden to disprove Mr. Johnson's self-defense claim beyond a reasonable doubt, played no role in the jury's decision to disbelieve Johnson's self-defense account. All the while, this same evidence contained lapses and

and material defects, and completely circumvented the only form of testing Constitutionally afforded Mr. Johnson to determine its' reliability: "cross-examination."

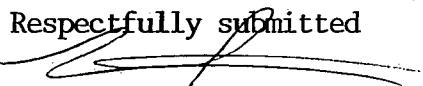
Since the Third Circuit Court of Appeals deferred to the aforementioned finding by the district court, -where that finding appears to have altered the force by which the Confrontation Clause applies in factual circumstances described herein,- this legal issue requires the wisdom and attention of this Court. Accordingly, since this is a question of Constitutional import, which can only be answered by this Court, this Court should grant certiorari.

Similarly, certiorari should be granted to answer the question of whether further testimony by a expert surrogate witness offered by the state can be found sufficiently reliable for explaining defects in a report authored by a non-testifying analyst.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Third Circuit's decision to defer to the district court's judgment and opinion in this matter.

Respectfully submitted


Marcus R. Johnson (Pro se)
SCI: Forest
P.O. Box 945
289 Woodland Drive
Marienville, P.A 16239

Date: January, 5 /2024