No. 23-6559

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS JOHNSON,

Petitioner,

V.

RANDY IRWIN, SUPERINTENDENT, SCI FOREST, ET AL.,

Respondents.

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

PETITION FOR REHEARING

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

Petitioner Pro Se

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

Rules

PETITION FOR REHEARING AND SUGGESTIONS IN SUPPORT

COMES NOW Petitioner, Marcus Johnson, Pro Se, and prays this Court to grant Rehearing pursuant to Rule 44, and thereafter, grant him a Writ of Certiorari to review the Third Circuit Court of Appeals decision to defer to the District court's finding which was in conflict with the decision of other Circuit Court of Appeals on the same legal question.

STATEMENT OF FACTS

At trial, Marcus Johnson was convicted by a jury of first degree murder and possession of an instrument of crim ("PIC") and sentenced to life without the possibility of parole. No further sentence was imposed for the ("PIC") charge.

According to the state's forensic expert witness, Dr. Albert Chu, the information contained in the autopsy report supported the state's theories of the shooting. The state proposed that the decedent had been shot while either running towards the front door; in a kneeling position, or while lying face flat on the floor. Because there were no eyewitnesses and no other evidence to support these theories, the state relied solely on Dr. Chu's testimony to disprove Johnson's self-defense account, and to prove first degree murder. In turn, for lack of other evidence, Dr. Chu's testimony was based solely on testimonial statements contained in the autopsy report, as well as additional information included therein.

However, it was Dr. Marlon Osborne, a different medical examiner employed by the state, who performed the decedent's autopsy and dictated the information in the report. Dr. Chu did not assist in the autopsy, nor did he interview Dr. Osborne. In sum, Dr. Chu did not have any first hand knowledge of how Dr. Osborne conducted the autopsy and recorded the information, and thus was not

in a position to certify the report.

In addition, Mr. Johnson did not have a prior opportunity to question Dr. Osborne. Moreover, the state made it clear that it did not intend on presenting testimony from Dr. Osborne at Johnson's trial. Given these circumstances, and the fact that in Pennsylvania autopsy reports are considered testimonial reports containing testimonial statements; Mr. Johnson's trial counsel argued via motion that Dr. Chu should not be permitted to parrot the testimonial statements contained in the report. That to allow him to do so would violate Johnson's 6th Amendment right to Confrontation, specifically where he would have no opportunity to cross-examine Dr. Osborne.

The trial court agreed with Johnson's counsel that admitting the autopsy report into evidence would indeed violate Johnson's Confrontation rights. Nevertheless, the court denied Johnson's motion, finding that while the report itself was inadmissible, allowing Dr. Chu to testify would not violate Johnson's 6th Amendment right. The following day, Johnson's counsel again sought to have Dr. Chu's testimony excluded. Arguing that even though Dr. Chu would claim his opinion to be independent, he would in fact simply be parroting what another medical examiner (Dr. Osborne) said he did when performing the autopsy, as Dr. Chu had failed to prepare a report in his own words. The Court overruled the objection, and allowed Dr. Chu to testify.

Although the State of Pennsylvania presented other circumstantial evidence regarding events preceding and after the incident, it presented just one piece of evidence to disprove Johnson's self-defense claim and to prove he acted with the specific intent to kill: the testimonial statements of Dr. Osborne through the in-court testimony of Dr. Chu, however Johnson had no opportunity to cross-examine Dr. Osborne.

Furthermore, in addition to Dr. Chu stating that the information contained in Dr. Osborne's report supported the states theories, he also concluded that

the autopsy report's contents were "not inconsistent with the version of events that [Johnson] gave to the police the morning after...the incident."

Additionally, even though it was Dr. Jonathen Arden (the defense's expert witness) whom brought to light that Dr. Osborne's report contained lapses and infirmities; -(i.e., that Osborne failed to take recovery point photographs, and failed to record 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),- Dr. Chu, while referring to Osborne's report, testified that he could not offer any additional explanation in regards to the above-mentioned information absent from the report.

Dr. Chu admitted that he could not imply with "any kind of accuracy as far as the exact location," because, as he further stated, he did not "think there's that precise of an estimate of where it was located in Dr. Osborne's report."

The State conceded that the decedent had the gun pointed at Mr. Johnson moments before the shooting, but vehemently argued that after the mild struggle for the gun between Johnson and the decedent, Johnson was no longer in any danger at the time of the shooting. Johnson however argued that the entire incident occurred in quick rapid succession, and that he acted absent any thought and out of fear of being shot in the face. In any case, the State relied solely on the information contained in Dr. Osborne's report to support the above-mentioned theories, which was presented to the jury through the surrogate testimony of Dr. Chu.

REASONS MERITING REHEARING

1. Mr. Johnson's case presents to this Court a crucial factual question intertwined with this Court's Confrontation Clause precedents, forewarned in **Bullcoming v. New Mexico**, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011),

and identical to the question this Court sought to answer in its' holding in **Williams v. Illinois**, 567 U.S. 50, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012). That is, Dr. Chu was asked to offer an independent opinion about Dr. Osborne's testimonial report which itself was not admitted into evidence. **see Bullcoming**, 564 U.S., at 673, 131 S. Ct. 2705, 180 L. Ed. 2d 610, 629 (Sotomayor, J., concurring in part):

> "We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence."

See also., Williams, 2012 U.S. LEXIS at 29-31:

> "In concurrence, Justice Sotomayor highlighted the importance of the fact that the forensic report had been admitted into evidence for the purpose of proving the truth of the matter it asserted. She emphasized that 'this [was] not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence.'" "We would face a different question, 'she observed,' if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence."
>
> **"We now confront that question."**

However, this Court in its' holding in "Williams" was unable to answer this question, as this Court was fractured in its' opinion. See **Williams**, 2012 U.S. LEXIS at 115-120 (Kagan, J., dissenting):

> "Under our Confrontation Clause precedents, this is an open-and--shut case....the State did not give Williams a chance to question the analyst who produced [the] evidence. Instead, the prosecution introduced the results of Cellmark's testing through an expert witness who had no idea how they were generated. That approach-no less (perhaps more) than the confrontation-free methods of presenting forensic evidence we have formely banned--deprived Williams of his Sixth Amendment right to 'confron[t]....the witnesses against him."
>
> "The Court today disagrees, though it cannot settle on a reason why. Justice Alito, joined by three other Justices, advances two theories--that the expert's summary of the Cellmark report was not offered for its truth, and that the report is not the kind of statement triggering the Confrontation Clause's protection...I call Justice Alito's opinion 'the plurality,' because that is the

> **e.g., State v. Dotson,** 450 S.W.3d 1, 68 (Tenn. 2014)("The Supreme Court's fractured decision in Williams provides little guidance and is of uncertain precedential value").
>
> **e.g., State v. Michaels,** 219 N.J. 1, 31, 95 A. 3d 648, 666 (N.J. 2014)("We find Williams's force, as precedent, at best unclear").

The above-cited cases illustrate but a modicum of the confusion and varying inconsistency with which the Confrontation Clause has been applied in courts across the country since this Court's holding in **Williams.**

However, the truly detrimental effect of the **Williams** ruling manifests in cases such as **Stuart v. Alabama,** 139 S. Ct. 36, 37, 202 L. Ed. 2d 414 (2018). In this case the defendant, Vanessa Stuart, was accused of driving under the influence. The State of Alabama sought to prove its' accusations by introducing as evidence the results of a blood-alcohol test. The State did not call to testify, the analyst who performed the test. In place of the testing analyst, the State called a different analyst who did not play a role in the testing. The blood-alcohol test results played a crucial role in Stuart's conviction.

Upon consideration for Writ of Certiorari by this Court, Justice Gorsuch stated that "the Constitution promises every person accused of a crime the right to confront his accusers," (**citing Amdt. 6.**), unfortunately for Vanessa Stuart, according to Justice Gorsuch, "[t]hat promise was broken." **Id**

Justice Gorsuch went on to explain that the confusion throughout courts across the country concerning expert testimony and the Confrontation Clause, was due to this Court's fractured holding in "Williams," and the Justice voiced the significance of this Court's duty and responsibility to give guidance to the lower courts across America. **see Stuart v. Alabama, supra.,** (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of cert):

> "To be fair, the problem appears to be largely of our creation. This Court's most recent foray in this field, **Williams v. Illinois...** yielded no majority and its various opinions have sown confusion in courts across the country....[t]his case supplies another example of that confusion."

> "Respectfully, I believe we owe lower courts struggling to abide our holdings more clarity than we have afforded them in this area. ... Williams imposes on courts with crowded dockets the job of trying to distill holdings on two separate and important issues from four competing opinions. The errors here may be manifest, but they are understandable and they affect courts across the country in cases that regularly recur. I would grant review." **Id**

Indeed, not only have the errors Justice Gorsuch alluded to become a recurring issue, but have grown into an outright summary rejection of Confrontation claims involving expert testimony. **see Collins v. Juarez**, 2021 U.S. Dist. LEXIS 143035, (C.D. Cal., May 27, 2021), **report and recommendation adopted by, Collins v. Juarez**, 2021 U.S. Dist. LEXIS 141055, 2021 WL 3190899 (C.D. Cal., July 28, 2021)("Notably, at least two justices of the Supreme Court have observed that Williams did not clarify the law regarding expert testimony and the Confrontation Clause, but, instead, served mainly to 'sow[] confusion in courts across the country'...**[g]iven this state of the law, the court of appeals's rejection of petitioner's Confrontation Clause claim could not have been an unreasonable application of, or contrary to, clearly established law as determined by the Supreme Court.**")(Internal citations omitted, emphasis added).

This Court has an ethical duty by the United States Constitution to establish the law of the land and to assure the Citizens of the United States of America that the lower courts apply that law. Moreover, where a fragmented opinion by this Court is the bedrock responsible for the lower courts inability to apply the law and protect Constitutional rights with uniformity; this Court is obligated to exercise its' infinite knowledge and wisdom in order to guide lower courts so that justice is administered fairly. This Court must hear this case, not simply to rule on the merits of Mr. Johnson's claim, but to complete what it set out to do in "**Williams,**" and give clarity to the lower courts so that thousands of American citizens may enjoy the 6th Amendment right to confront adverse witnesses as the Framers intended.

2. The Third Circuit decision to defer to the District Court's finding in

denying Mr. Johnson relief is clearly in direct conflict with **Garlick v. Lee**, 1 F.4th 122, 2021 U.S. App. LEXIS 17433 (2d Cir. June 11, 2021), which case is so strikingly similar, both legally and factually, that the same result reached in **Garlick** must also be reached in this case.

Mr. Johnson's Confrontation claim presents factual, and legal similarities to a decision from the United States Court of Appeals for the Second Circuit in **Garlick v. Lee supra.**, and as such raises an issue on which the panel's decision conflicts with that ruling. (Johnson has attached a copy of the "**Garlick**" case to this petition).

The panel concluded that Mr. Johnson's Confrontation claim failed based on the same reasons provided by the district court which was adopted from the Magistrate's report: which according to the Magistrate and district court, "Johnson [had] not shown prejudice, (ECF No. 24 at 28). This decision by the panel conflicts with the decision in "**Garlick.**"

Specifically, the State sought to introduce the autopsy report through the surrogate testimony of Dr. Chu. Johnson's attorney objected, arguing that allowing Dr. Chu to parrot the testimonial statements contained in the autopsy report would violate Johnson's right to Confrontation under the Sixth Amendment because Dr. Chu did not prepare the autopsy report and was not involved in the autopsy. Relying on **Commonwealth v. Brown supra.**, the trial court found that Dr. Osbourne's autopsy report was testimonial and thus inadmissible, but ruled that Dr. Chu was permitted to testify. The trial court allowed Dr. Chu to offer testimony about the contents of the report as an expert in the field of forensic pathology.

These facts are identical to those confronted by the Court of Appeals in **Garlick.** However, the panel overlooked these similarities.

Even more, the State relied heavily on Dr. Chu's testimony as evidence of Johnson's intent to cause serious physical injury and to show the specific

intent to kill. The State likewise, relied solely on Chu's testimony in order to contradict Johnson's self-defense claim. There were no eyewitnesses to the incident, and Dr. Chu's testimony was not cumulative of other inculpatory evidence used to contradict Johnson's self-defense claim.

The panel also ignored two additional facts that were presented in Johnson's case.

That Dr. Chu testified that based on Dr. Osborne's report, Johnson's self-defense account was "possible," and that the information in the report concerning "wound paths" were "not inconsistent with the version of events that [Johnson] gave to the police the morning after...the incident." (N.T. 6/21/2016 at 232, 239-240, 248-249).

The panel overlooked the significance of this undisputed facts coming from the state's own witness. By Dr. Chu's own admission, the autopsy report was insufficient for disproving Johnson's self-defense claim beyond a reasonable doubt. In this vein, Johnson's case bares facts similar to the Garlick case.

That is, the State used the autopsy report to eliminate one suspect and connect Garlick to the killing through the use of a knife. Garlick denied having a knife, and no witness testified that Garlick had or used a knife during the attack. Because of these factors the 2nd Circuit Court of Appeals found the autopsy report to be the strongest evidence presented by the State against Garlick. Here, the panel's decision conflicts with the decision in Garlick.

More importantly, during trial it was revealed that Dr. Osborne's autopsy report contained lapses and infirmities. Even Dr. Chu expressed a lack of confidence in his testimony due to Osborne's deficient report. (N.T. 6/23/2016 at 201)("I mean, I don't want to imply any kind of accuracy as far as the exact location because I don't think there's that precise of an estimate of where it was located in Dr. Osborne's report....")

Two conclusions can be made from the above-cited portion of Dr. Chu's

and the Confrontation Clause. Then, after this Court has unraveled this legal conundrum, turn its ears to Johnson's cry's for justice and fundamental fairness and grant him such relief which he seeks. This Great Nation towers above all others, not because of military strength or the abundance of resources, but because of the immutable principle of Justice and Equality. That no Man stands taller than another. And if this principle were to sustain any injury, the Supreme Halls of Justice shall give way to the emergence of this Honorable Court, and its' Words shall act as healing hands by way of infinite knowledge and Wisdom, and Justice shall be whole once more. Johnson prays this Court hears his Cry.

Respectfully submitted,

Date: May 7, 2024

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed First class, postage prepaid, this 7 day of May, 2024, to the following:

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Nancy Winkelman
3 S. Penn Square
Philadelphia, P.A 19107

Ronald Eisenberg, Esq., Pennsylvania Attorney General
1600 Arch St., Suite 300
Philadelphia, P.A 19103

/s/
Marcus Johnson (Pro Se)

No. 23-6559

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS JOHNSON,
Petitioner,

V.

RANDY IRWIN, SUPERINTENDENT, SCI FOREST, ET AL.,
Respondents.

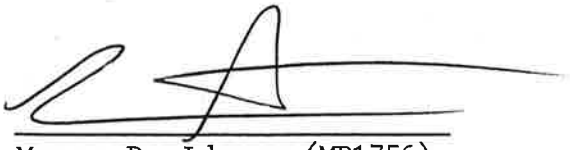
CERTIFICATE OF GOOD FAITH

COMES NOW, Petitioner, Marcus Johnson, and makes certification that his petition for rehearing is presented to this Court in good faith pursuant to Rule 44. The grounds set forth in Mr. Johnson's petition are limited to an intervening conflicting decision from a circuit court of appeals, and to other substantial grounds not previously presented. Mr. Johnson further states the following:

1. Mr. Johnson truly believes that his case presents this Court with a specific set of facts, and with adequate grounds to justify the granting of rehearing in this case, and said petition is brought in good faith and not for delay. Mr. Johnson truly believes that the Third Circuit Court's decision in his case is in direct conflict with the decision from the United States Court of Appeals for the Second Circuit in **Garlick v. Lee**, 1 F.4th 122, 2021 U.S. App. LEXIS 17433 (2d Cir. June 11, 2021). Likewise, Mr. Johnson believes that based upon certain areas of Confrontation precedent of this Court, viewed paralleled to the facts of this case; that if this Court grants Rehearing, this Court will ultimately have the opportunity to give clarity and guidance to courts accross the country whom have struggled to abide by this Court's Confrontation precedent since its' holding in **Williams v. Illinois**, 567, U.S. 50, 58, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012). This matter has yet to be presented to this Court, and this Court may reach a resolution on the matter absent a finding that Mr. Johnson may or may not be entitled to relief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7 day of May, 2024.



Marcus R. Johnson (MP1756)

Additional material from this filing is available in the Clerk's Office.