

No. _____

In the Supreme Court of the United States

BRYAN JOHNSTON,

Petitioner,

v.

LISA A MITCHELL,
SUPERINTENDENT, OLD COLONY CORRECTIONAL CENTER

Respondent.

**Petition for Writ of Certiorari
to the United States Court of Appeals
For the First Circuit**

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Questions Presented

1. Trial counsel failed to move to suppress numerous statements elicited after Johnston repeatedly invoked his right to counsel. *Edwards v. Arizona*, 451 U.S. 477 (1981) held that such statements must be suppressed. And while Johnston made the statements during court-ordered pre-trial detention in a psychiatric jail facility, *Estelle v. Smith*, 451 U.S. 454 (1981) held that the *Miranda* doctrine applies equally to police and doctors conducting court-ordered evaluations. Should a reasonable attorney have pursued a motion to suppress Johnston's post-invocation statements?

2. The lower courts found more than a dozen violations of *Doyle v. Ohio*, 426 U.S. 610 (1976). By portraying Johnston to the jury as calculating and rational because he invoked his *Miranda* rights, these violations dovetailed with the prosecution's theory that Johnston was not delusional and went to the heart of Johnston's insanity defense. *Doyle* violations are particularly poisonous and no reviewing court anywhere has ever found so many *Doyle* violations harmless. Was the ruling of harmlessness unreasonable?

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II. The lower courts found more than a dozen violations of *Doyle v. Ohio*, 426 U.S. 610 (1976). By portraying Johnston to the jury as calculating and rational because he invoked his *Miranda* rights, these violations dovetailed with the prosecution’s theory that Johnston was not delusional and went to the heart of Johnston’s insanity defense. *Doyle* violations are particularly poisonous and no reviewing court anywhere has ever found so many *Doyle* violations harmless. 17

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Petition for a Writ of Certiorari

Petitioner Bryan R. Johnston respectfully prays for a writ of certiorari to review the judgment of the United State Court of Appeals for the First Circuit.

Citations to the Opinions Below

The opinion of the Massachusetts Supreme Judicial Court (“SJC”) affirming Johnston’s conviction is reported as *Commonwealth v. Johnston*, 467 Mass. 674 (2014) (“*Johnston I*”). The opinion of the United States District Court denying Johnston’s petition for a writ of habeas corpus is reported as *Johnston v. Mitchell*, 213 F.Supp.3d 282 (D. Mass. 2016) (“*Johnston II*”). The opinion of the United States Court of Appeals for the First Circuit affirming the denial of Johnston’s habeas corpus petition is reported as *Johnston v. Mitchell*, 871 F.3d 52 (1st Cir. 2017) (“*Johnston III*”). Copies of the opinions below appear in the appendix to this petition at App. 1a-35a.

Statement of Jurisdiction

The United States Court of Appeals for the First Circuit affirmed the denial of Johnston’s petition for a writ of habeas corpus on September 8, 2017. This Court has jurisdiction under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved In This Case

1. The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

2. The Sixth Amendment to the United States Constitution provides:

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.

Concise Statement of the Case

At trial for the murder of his friend, David Sullivan, and related offenses, Johnston asserted an insanity defense. *Johnston I*, 467 Mass. at 680. The evidence presented at trial focused on Johnston's mental health and behavior in the time leading up to and immediately after the killing. *Id.* at 677–685. Some facts are reserved for discussion in the body of this petition. *Infra* at 8, 13–14, 16–20.

In brief, Johnston entered Sullivan's house and shot him six times with a rifle, killing him. *Johnston I*, 467 Mass. at 677. The evidence showed that Johnston suffered from delusions that others, particularly Sullivan, were part of an organized crime conspiracy to harm him and his family. *Id.* at 681, 683. Johnston had a substance abuse problem, but he was observed to harbor these delusions while sober and while intoxicated. *Id.* at 682; JA.1988.

In the immediate aftermath of the shooting, Johnston made intense, irrational statements regarding the mafia and gangs, and threatened suicide.

Id. at 682. When he arrived home on December 7, his parents quickly initiated civil commitment proceedings against him, but Johnston resisted police executing the commitment order. *Id.* at 679. A toxicology screen at the psychiatric hospital was negative for cocaine and amphetamines. *Id.* at 682. The jury also heard that Johnston took some rational actions indicative of consciousness of guilt. *Id.* at 677–79.

Relevant to this petition, the jury also received evidence that, upon Johnston’s admission to jail on December 8, Johnston “refused examination ‘upon advice of my attorney.’” App.36a. On December 9, Johnston refused medical intake, “stating ‘My lawyer said not to say a word.’” App.37a. On December 10, he was committed to Bridgewater State Hospital¹ for an evaluation of whether “he was in danger of harming himself” due to mental illness, not whether he was criminally responsible.² *Johnston III*, 871 F.3d. at 55–56. From December 10–17, 2004, Johnston responded to numerous re-approaches by invoking his right to counsel multiple times. App.38a-40a, 43a-51a, 54a; JA.197, 206, 244.

The jury learned that Johnston eventually responded to some of the re-approaches by simply denying any concerns (instead of futilely asking for his attorney once again). In this way, he made multiple statements denying

¹ Pre-trial detainees at the Bridgewater State Hospital (“Bridgewater”) are “in custody ... awaiting trial” but also in need of psychiatric treatment; commitment to Bridgewater is “the functional equivalent of being incarcerated”. *Commonwealth v. Morasse*, 446 Mass. 113, 119–20 (2006) (citation omitted).

² M.G.L. c. 123, § 18(a).

mental illness, hallucinations, and suicidal behavior.³ He also denied homicidal or suicidal ideation.⁴

The records undercut the basis of defense expert testimony, e.g., that Johnston did report auditory hallucinations,⁵ that Johnston believed that Sullivan had arranged for Johnston to be raped,⁶ and that Johnston was suicidal (i.e., psychotic) around the time of the shooting.⁷

Indeed, three mental health experts testified as to criminal responsibility: Dr. Carol Feldman and Dr. Martin Kelly for the defense, and Dr. Michael Welner for the prosecution (the same overreaching prosecution expert at issue in *Kansas v. Cheever*, 134 S.Ct. 596, 601 (2013)).⁸

Dr. Feldman opined that Johnston suffered from paranoid schizophrenia that rendered him not criminally responsible for the killing of Sullivan. Johnston believed he was being persecuted by organized crime groups, believed himself to be Sullivan’s prisoner, and heard “voices of people intending to kill him”. *Johnston I*, 467 Mass. at 683.

Dr. Kelly testified that Johnston lacked criminal responsibility due to a paranoid delusional disorder. *Id.* Unlike paranoid schizophrenia, paranoid delusional disorder is not characterized by a decline in functioning, which explains Johnston’s capacity to work and attend college. *Id.* His delusions

³ JA.211, 213, 223, 241, 245Q, 247, 2837–2838, 4225.

⁴ JA.4229; JA.254, 255, 274, 328–29.

⁵ JA.2335–36, 2350, 2355.

⁶ JA.198, 351, 355, 2239–40, 2334–36, 2352, 2453, 2465–66, 2500–01, 2525–26, 2890.

⁷ JA.193–94, 4264–66.

⁸ A fourth expert, Dr. Leonard Peebles was called by the Commonwealth to recite his diagnosis of Johnston made in the context of his evaluation regarding Johnston’s ability to be held in normal pre-trial detention. JA.4210–38, 4255–79.

centered on organized crime groups intending to “kill him and his parents.”
Id.

Dr. Kelly ruled out cocaine and alcohol intoxication as the cause of Johnston’s delusions for multiple reasons. *Id.* at 683, 684. First, Johnston experienced delusions even when sober, including reporting them to his personal psychiatrist prior to the shooting. *Id.* at 684 & n.1. Indeed, the toxicology screen done just hours after the shooting was negative for cocaine and amphetamines. *Id.* at 683. Similarly, amphetamines do not cause systematized delusions like Johnston’s and amphetamine psychosis is very rare. *Id.* at 684. And even those symptoms do not persist for fifteen months, as Johnston’s did after the shooting. *Id.*

In opposition, Dr. Welner testified that Johnston

did not suffer from a major mental illness. He ruled out paranoid delusional disorder because the defendant had reported to Dr. Berlin that his symptoms were not worsening or intensifying.⁹ He also considered that the defendant did not report persecutory or delusional behavior on the job¹⁰ or at school, and that up to the night of the shooting the defendant continued to be sociable, even though his friends avoided him.

Dr. Welner opined that the defendant’s hallucinations originated from his drug use, and not from mental illness. He explained that psychiatric illness is primarily associated with auditory

⁹ In a footnote, the SJC added: “However, Dr. Berlin’s notes indicate that the defendant was “more sweaty [and] tense than self-report,” and that on October 1, 2004, the defendant’s anxiety level had risen.” *Johnston I*, 467 Mass. at 684 n. 1.

¹⁰ In a footnote, the SJC added: “On October 2, 2004, the defendant went out socially with some coworkers at Baystate Medical Center. The defendant became delusional about the Central Intelligence Agency and fired a shot into the air with his handgun. He then claimed the mafia was trying to get him for a rape he purportedly committed. The record shows that he did not commit rape. He later apologized and attributed his behavior to alcohol.” *Johnston I*, 467 Mass. at 684 n. 2.

hallucinations, not visual hallucinations. When a person has visual as well as auditory hallucinations, the indication is that they are drug induced.

Dr. Welner cited the defendant's ability to mislead Hadley police officers about where he had been and his concerns about their presence as evidence of his ability to appreciate the wrongfulness of his conduct.

Johnston I, 467 Mass. at 684–85.

In addition to expert testimony, multiple lay witnesses testified regarding Johnston's delusions preceding the crime. His delusions regarding organized crime, surveillance, and the FBI began while he was attending university in Hawaii. *Id.* at 680–81. He also abused drugs during this period. *Id.* at 680. In April 2002, these delusions became so powerful that Johnston abruptly left Hawaii with no belongings. *Id.* at 681.

From the very moment of his return through the time of the shooting two years later, Johnston repeatedly told friends, family and even police that organized crime wanted to kill him, that he was being followed, and that Sullivan was involved in organized crime.^{11, 12} In multiple incidents,¹³ whether sober or intoxicated, Johnston's "delusional fear of organized crime families and of gangs intensified during the six months preceding the victim's death." *Johnston I*, 467 Mass. at 682.

¹¹ See, e.g., J.A. 1813, 1822, 1875, 1982, 1984–85, 2021–22, 2250, 3112–16; *Johnston I*, 467 Mass. at 681.

¹² Johnston was able to work and attend college. *Johnston I*, 467 Mass. at 681–82.

¹³ JA.3027–28, 3304–05 (repeated statements regarding organized crime and being followed). JA.3126 (terrified of person on beach in St. Martin); JA.2026 (accosted friend Levernoch, believed red shirt signified Bloods membership); J.A.2030–31, 2056, 3034–38 (agitated, sweaty, pacing with gun at another friend's house, claiming to have orders from IRA to kill Levernoch).

Reasons for Granting the Petition

- I. Trial counsel failed to move to suppress numerous statements elicited after Johnston repeatedly invoked his right to counsel. *Edwards v. Arizona*, 451 U.S. 477 (1981) held that such statements must be suppressed. And while Johnston made the statements during court-ordered pre-trial detention in a psychiatric jail facility, *Estelle v. Smith*, 451 U.S. 454 (1981) held that the *Miranda* doctrine applies equally to police and doctors conducting court-ordered evaluations. Should a reasonable attorney have pursued a motion to suppress Johnston’s post-invocation statements?**

From the time Johnston arrived in jail on the evening of December 8 and then again from his arrival at Bridgewater on December 10, Johnston continuously refused to answer questions and asked for counsel. App.36a-41a, 43a-48a, 50a, 51a, 53a, 54a; *see also* JA.197, 206, 217, 224, 226, 244, 247, 254, 262, 324, 2649, 2828, 2832–35, 2840–42, 3004, 3537–38, , 4219–21, 4223, 4227–28, 4237–38). He was nevertheless re-approached and questioned numerous times.

Based upon these facts, Johnston had a meritorious *Edwards* motion to suppress these statements. *Edwards v. Arizona*, 451 U.S. 477 (1981). Specifically, counsel could have suppressed all the statements made by Johnston at Bridgewater except for the December 21 and 23 interviews with Dr. Peebles when counsel was present. JA:4220; *see n.8, supra; Minnick v. Mississippi*, 498 U.S. 146, 153-54 (1990) (reapproach after invocation prohibited unless counsel is actually present). But counsel never moved to suppress or exclude statements on this basis. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (failure to move to suppress due to counsel’s mistaken

legal view held to be deficient performance); *see also Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014) (mistake of state law constitutes ineffective assistance). That established deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687-691 (1984).

In *Morrison*, the defense counsel simply failed to appreciate that the State was not obligated to disclose inculpatory evidence pretrial. *Morrison*, 477 U.S. at 385. Thus, when he learned during trial of the seizure of inculpatory bedsheets and moved to suppress them, his motion came too late. *Morrison*, 477 U.S. at 386–87. This Court held that this constituted deficient performance, even though it was not clear from the record whether the motion would eventually succeed. *Id.* The Court remanded for a prejudice determination of whether the claim was viable. *Id.* at 373, 390–91.

The First Circuit ruled that Johnston’s ineffective assistance of counsel argument failed on the *Strickland* performance prong¹⁴ because “prior case

¹⁴ The First Circuit departed from the *Morrison* framework by evaluating the merit of the suppression motion in the performance prong rather than the prejudice prong. *Johnston III*, 871 F.3d 52, 60 (1st Cir. 2017) (citing *Lockhart v. Fretwell*, 506 U.S. 364, 374 (1993) (O’Connor, J., concurring)); *Johnston III*, 871 F.3d at 63 (resolving claim on performance, not prejudice grounds). In so doing, the First Circuit relied on the *sui generis* holding in *Fretwell* that, if the merit of the omitted action depended on since-overruled precedent, the defendant cannot claim prejudice. *Id.* This Court has repeatedly stated *Fretwell* is not to be applied outside its own unique factual context. *Glover v. United States*, 531 U.S. 198, 203 (2001) (“our holding in *Lockhart* does not supplant the *Strickland* analysis”); *Williams v. Taylor*, 529 U.S. 362, 391–93 (2000) (state court erred in applying *Fretwell* outside context of claims of ineffective assistance for failing to assert a right to benefit from overruled precedent or a right to testify falsely); *Lafler v. Cooper*, 566 U.S. 156, 166–67 (2012) (reiterating *sui generis* status of *Fretwell* and reaffirming *Strickland* applies where the issue is “counsel’s failure to meet a valid legal standard, not . . . counsel’s refusal to violate it”). This Court has never modified the *Morrison* analysis. Indeed, the Court’s most recent relevant statement reinforced and expanded the *Morrison* approach. In *Lafler v. Cooper*, the Court held that the deficient performance was pre-trial advice to go to trial and reject an offered plea deal (which is not a right in itself) and prejudice was demonstrated by only a reasonable probability that the sought-after relief (the plea deal) would have been granted. 566 U.S. 156, 169 (2012)

law had [not] offered strong support for the notion” that statements obtained in violation of *Edwards* were inadmissible against a defendant asserting an insanity defense.^{15, 16} *Johnston*, 871 F.3d at 62–63.

This analysis unreasonably circumscribed the Fifth Amendment protections announced in *Estelle v. Smith*, which extended the *Miranda* protections to “pretrial psychiatric examinations.” 451 U.S. 454, 465–67 (1981). If left standing, the First Circuit’s ruling completely eliminates the Fifth Amendment rights of defendants who raise mental health defenses. That is not the law; such defendants retain Fifth Amendment protections. *See Kansas v. Cheever*, 134 S.Ct. 596, 601 (2013); *Buchanan v. Kentucky*, 483 U.S. 402 (1987); *Smith*, 451 U.S. at 465, 467. “The fact that the [defendant’s] statements were uttered in the context of a psychiatric examination does not automatically remove them from the reach of the Fifth Amendment.” *Estelle v. Smith*, 451 U.S. 454, 465 (1981).

The only protection such defendants lose is, if they intend to introduce expert testimony based on a defense expert’s interview of the defendant, the government gets a reciprocal — not greater — right to interview the defendant. *Cheever*, 134 S. Ct. at 601; *Buchanan v. Kentucky*, 483 U.S. 402,

(citing *Morrison*). *Johnston*’s *Edwards*-based suppression claim clearly possessed merit. The First Circuit should have said so and proceeded to a standard *Strickland* prejudice analysis. That is, whether there is a reasonable probability that a motion to suppress would have been granted. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¹⁵ Because the First Circuit decided that counsel’s performance was not deficient it did not analyze whether *Johnston* was prejudiced by the jurors receiving evidence of his statements contained in his medical records. *Johnston*, 871 F.3d at 63.

¹⁶ The First Circuit assumed but did not decide that *de novo* review applied to *Johnston*’s claim of ineffective assistance of counsel based upon the failure to file a motion to suppress under the Fifth Amendment. *Johnston*, 871 F.3d at 60.

423–25 & n.21 (1987) (if defendant relies on parts of pre-trial mental health report, the prosecution may rebut with other parts of same report). This Court must act to ensure that constitutional protections described in these precedents are applied faithfully by the lower courts and not whittled away.

The First Circuit opined that Johnston forfeited his *Edwards* protections because *Cheever*

would not read as it does if the prior case law had offered strong support for the notion that the results of a psychiatric examination compelled without counsel present could not be offered by the government in a case in which a defendant mounted an insanity defense.

Johnston v. Mitchell, 871 F.3d 52, 62–63 (1st Cir. 2017). In essence, the First Circuit found that its dubious view of some strained, implicit holding in *Cheever* necessarily deprived mentally ill defendants of the protections provided by the clear, bright-line holdings of *Edwards* and *Minnick*.

The First Circuit’s interpretation cruelly disables the most vulnerable defendants. Posit a defendant who requests counsel but the government continues to question him. If he asserts a reasonable doubt defense, the resulting statements are inadmissible under *Edwards*. But if that same defendant is severely mentally ill and properly asserts an insanity defense, all of those otherwise improperly obtained statements go to the jury.

The First Circuit’s interpretation would give the government a perverse incentive: if a defendant (like Johnston) is obviously mentally ill at the time of arrest or while in pretrial detention, the government can

anticipate a mental health defense and completely ignore requests for counsel. Disturbingly, this would eliminate Fifth Amendment protections for those defendants who are least able to fend for themselves. That cannot be the law. *Wainwright v. Greenfield*, 474 U.S. 284, 292 (1986).

Beyond making bad policy, the First Circuit also impermissibly restricted *Edwards* and *Smith*, which is the sole province of this Court and beyond the power of the Circuit Courts. “If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). Indeed, even where this Court has explicitly overruled a decision in part, the balance of the decision remains binding precedent that lower courts may not ignore. *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016). Note that *Edwards* was announced on May 18, 1981, the same day *Smith* was announced. Obviously, this Court saw no conflict between the two rulings at the time. It was not for the First Circuit to invent one.¹⁷ They, along with the

¹⁷ Indeed, until Johnston’s case, no Court of Appeals has ever suggested statements taken in violation of *Edwards* could be used to rebut an insanity defense. The District of Columbia Circuit explicitly forbids the practice. *United States v. Hinckley*, 672 F.2d 115, 133–34 (D.C.Cir. 1982) (abrogated on other grounds by *Hudson v. Palmer*, 468 U.S. 517 (1984) (holding such statements inadmissible). The lower courts have only squabbled about the admissibility of “demeanor” evidence obtained after a request for counsel. *Jones v. Dugger*, 839 F.2d 1441 (11th Cir. 1988), cert. denied, 109 S. Ct. 91 (1988) (permitting it); *Gholson v. Estelle*, 675 F.2d 734, 742 (5th Cir. 1982) (forbidding it); Julie A. Hardy, The Admissibility of Mental State Observations Obtained During Unlawful Custodial Interrogation: Drawing the Line on the Real or Physical Evidence Distinction, 30 B.C. L. Rev. 1029 (1989) (reciting circuit split and concluding that such evidence should be inadmissible).

Massachusetts courts and Johnston’s trial counsel, were simply bound to apply the syllogism of *Edwards* and *Smith*, which leads to a viable suppression claim.

Buchanan does not change that analysis. *Smith* made clear that the Fifth Amendment applies to all court-ordered psychiatric examinations unless they are “a sanity examination occasioned by a defendant’s plea of not guilty by reason of insanity at the time of his offense.” *Smith*, 451 U.S. at 465. *Buchanan* expanded *Smith*’s holding to equate insanity defense examinations with other mental health examinations that were not explicitly directed to criminal responsibility but were nevertheless requested for the explicit purpose of producing evidence regarding a mental health defense to criminal charges. *Buchanan*, 483 U.S. at 423.

But that is simply not what happened here. Here, Johnston’s counsel was appropriately concerned that his client was suicidal and so did nothing to resist¹⁸ Johnston’s involuntary commitment to a psychiatric detention facility — so that his client could simply remain alive. But he was very careful to steer examinations away from any discussion of the criminal charges against Johnston, and Johnston himself was similarly guarded.¹⁹ JA.4223, 4226–27. And Johnston’s defense at trial relied on the forensic sanity examinations

¹⁸ Unlike *Buchanan*, Johnston did not ask for the evaluation that occasioned the questioning. Agents of the Commonwealth petitioned for it. *Johnston III*, 871 F.3d at 55-56.

¹⁹ Several evaluators specifically noted plans to encourage Johnston to speak despite his invocations. On December 14, 2004, one evaluator notes a plan to “[e]ncourage cooperation”. App.46a. On December 15, 2004, one doctor wrote “I encouraged him to comply.” App.50a. And on December 20, an evaluator explicitly states that they will “encourage p[atien]t to disclose more relevant aspects of his h[istory].” JA.226.

conducted by his own experts and civilian accounts of Johnston's bizarre behavior, not the Bridgewater records. That is a far cry from the defense actions in *Buchanan*: affirmatively requesting an evaluation which was calculated to produce evidence for use in his criminal case. *Buchanan*, 483 U.S. at 423.

Adopting the First Circuit's interpretation would literally endanger human life. Defense attorneys with valid insanity defenses for suicidal clients would be forced to choose between undercutting the trial defense by allowing such safety-directed examinations and endangering the client's life by not allowing them. That is obviously perverse. Thankfully, it is not and should not be the law. The Commonwealth was entitled only to the same evidence and opportunity to examine Johnston, but instead it got far more.

As noted, Johnston's trial defense relied on lay witnesses and two defense experts, not the Bridgewater examination or records. The Commonwealth had advance notice of the defense and the reciprocal opportunity to rebuttal that it was entitled to. It hired the volunteering, over-enthusiastic Dr. Welner to examine Johnston. In addition, court-ordered interviews conducted by Dr. Peebles (for a different purpose but with counsel present) were admissible. Thus, the Commonwealth had ample access to evidence with which to "controvert[] proof on an issue that [Johnston] injected into the case" without employing statements that should have been suppressed. *Smith*, 451 U.S. at 465.

Allowing the Commonwealth to introduce every jot and tittle uttered by Johnston outside these court-ordered forensic interviews at any time does not provide equal or reciprocal access to evidence for the prosecution. Instead, such a rule would provide an asymmetrical unfair advantage to the Commonwealth because (1) it could commit a defendant to a facility without his agreement for thirty days of completely admissible questioning by dozens of Commonwealth agents while (2) the defense gets a limited number of partially admissible interviews by defense experts, which he must first clear with the warden each time. This Court's precedent requires an *equal* opportunity to conduct "personal interviews" of the defendant. It does not permit a psychological free-for-all to be pitted against a few previously-scheduled interviews.

"The Fifth Amendment privilege is 'as broad as the mischief against which it seeks to guard.'" *Smith*, 451 U.S. at 467–68, quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). This Court should not allow *Smith* to be twisted into a case that permits the wholesale waiver of a defendant's Fifth Amendment rights because he raises a mental health defense.

Finally, there can be no question that there is a reasonable probability that the result of Johnston's trial was affected by the admission of the statements that should have been suppressed. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). As noted above, *supra* at 4, the records undercut the basis of defense expert

testimony. The records undercut the basis of Dr. Feldman's testimony: Johnston's statements to her that he did have auditory hallucinations. JA.2335–36, 2350, 2355. They contained Johnston's denial of mental illness, head trauma, suicidal behavior and multiple denials of hallucinations. JA.211, 213, 241, 245Q, 247, 2838, 4225.

The records also contain his denial of sexual trauma, JA.223, undercutting Johnston's bizarre statements to Drs. Kelly, Feldman, and Peebles that he believed that Sullivan had him raped in Hawaii. JA.198, 351, 355, 2334, 2453, 2465–66, 2890, 2981. Most significantly, it undercut Dr. Feldman's testimony that "It's my thinking that once Bryan Johnston thought he heard David say to him, 'We paid to have you raped,' that he then became the focus of his delusional system." JA.2352, 2500–01, 2525.

The evidence that should have been suppressed also undermined Johnston's statement to Dr. Sherry on December 10 that he was suicidal (and therefore psychotic). JA.193–194, 4267–69, 4463. To wit, the prosecution introduced post-invocation testimony and Bridgewater records that Johnston denied any homicidal or suicidal ideation. JA. 254, 255, 274, 4226, 4229. In sum, counsel's error undermined Johnston's sole defense on multiple fronts.

II. The lower courts found more than a dozen violations of *Doyle v. Ohio*, 426 U.S. 610 (1976). By portraying Johnston to the jury as calculating and rational because he invoked his *Miranda* rights, these violations dovetailed with the prosecution's theory that Johnston was not delusional and went to the heart of Johnston's insanity defense. *Doyle*

violations are particularly poisonous and no reviewing court anywhere has ever found so many *Doyle* violations harmless. Was the ruling of harmlessness unreasonable?

The First Circuit concluded that the SJC did not unreasonably apply *Doyle v. Ohio*, 426 U.S. 610 (1976) in determining that Johnson suffered no prejudice from the introduction of his more than a dozen invocations of his right to counsel. *Johnston III*, 871 F.3d at 66. To petitioner's knowledge, no court has ever found harmless error in a case with as many instances of the introduction of such poisonous evidence. *See, e.g., Wainwright v. Greenfield*, 474 U.S. 284, 285 (1986) (granting habeas), affirming *Greenfield v. Wainwright*, 741 F.2d 329, 336 (11th Cir. 1984) (no objection to three elicitations of invocations, objection to three references in closing)

Every court to review Johnston's case has found or assumed error in counsel's introduction of Johnston's invocations. Johnston's expert, Dr. Kelly, made the first reference to Johnston refusing to answer questions on the advice of counsel. JA.2649. But the prosecutor then elicited from Dr. Kelly that Johnston refused to answer questions at the jail and at Bridgewater *five more times*. JA.2828, 2832–35. *See also* JA. 3004 (prosecutor attempting to elicit this evidence from sister). The prosecutor also elicited from Dr. Peebles that upon admission to Bridgewater, Johnston was silent upon advice of counsel. JA.4226–27.

The damage from these improprieties multiplied because Johnston's requests for counsel were recorded in detail in the medical records that the

parties pointedly called to the jurors' attention. For example, when an evaluator approached Johnston, he "decline[d] to answer most questions unless his attorney is present." JA.217. And the resulting evaluation form includes "declines to answer" or "refuses to answer" at least 10 times. JA.217–26. There were several other instances. App.49a-50a, 52a-53a; JA.224, 225, 245Q, 249–50, 254, 262. Defense counsel encouraged the jurors to review these records showing Johnston invoking his rights "day after day after day ... over and over and over again", i.e. at least fifteen times. JA.4436–37. There was a single mid-trial curative instruction on the issue, and all of the offending evidence was actually submitted to the jury.

If jurors perceive that a defendant is not cooperating with authorities — withholding evidence — they respond negatively and often assume guilt. *United States v. Hale*, 422 U.S. 171, 180 (1975) (juries are likely to draw a "strong negative inference" from the fact that a defendant remained silent).²⁰

In cases where multiple invocations of the right to counsel are introduced to the jurors, courts consistently find *Doyle* violations prejudicial. See *Wainwright v. Greenfield*, 474 U.S. 284, 287, 295 (1986), affirming

²⁰ Researchers reach a similar conclusion. Justin Sevier, *Omission Suspicion: Juries, Hearsay, and Attorney's Strategic Choices*, 40 Fl. St. Univ. L. Rev. 1, 19–20 (2012); Clyde Hendrick & David R. Shaffer, *Effect of Pleading the Fifth Amendment on Perceptions of Guilt and Morality*, 6 BULL. PSYCHONOMIC SOC'Y 449, 449–52 (1975); David R. Shaffer, Cyril Sadowski & Clyde Hendrick, *Effects of Withheld Evidence on Juridic Decisions*, 42 PSYCHOL. REP. 1235, 1236–38 (1978); David R. Shaffer & Cyril Sadowski, *Effects of Withheld Evidence on Juridic Decisions II: Locus of Withholding Strategy*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 40, 41 (1979); Sharon R. Gromer, *Fifth Amendment – The Right to a No Adverse Inference Jury Instruction*, 72 J. CRIM. & CRIMINOLOGY 1307, 1308–1309, 1322 (1981); see also, e.g., *United States v. Zaccaria*, 240 F.3d 75, 79 (1st Cir. 2001) ("evidence of the invocation of the right to remain silent is inherently prejudicial").

Greenfield v. Wainwright, 741 F.2d 329, 336 (11th Cir. 1984) (no objection to three elicitations of invocations, objection to three references in closing);²¹ contrast *Brecht v. Abrahamson*, 507 U.S. 619, 625 & n.2 (1993) (three references harmless where jury heard many more instances of admissible pre-trial silence); cf. *Greer v. Miller*, 483 U.S. 756, 764 (1987) (no *Doyle* violation where single reference was stricken and jury instructed to disregard).

Further, the evidence admitted due to counsel’s failures struck at the heart of Johnston’s defense. Here, the SJC and the District Court found that the prosecutor used Johnston’s invocations to rebut the defense that Johnston was delusional at the time he committed the offense. *Johnston I*, 467 Mass. at 690; *Johnston II*, 213 F.Supp.3d at 294. There was a direct relationship between this evidence and Johnston’s trial defense. *Id.* If *Brecht* and *Strickland* are to mean anything, fifteen constitutional errors that undercut the central thrust of the defense must warrant relief from any reasonable judge.²²

²¹ See also *Hill v. Turpin*, 135 F.3d 1411, 1418–19 (11th Cir. 1998) (multiple elicitations of defendant’s invocations, multiple “valiant and well-intentioned” curative instructions); *United States v. Kallin*, 50 F.3d 689, 693–95 (9th Cir. 1995) (*Doyle* error prejudicial despite curative instruction, prosecutor’s references calculated rather than inadvertent); *United States v. Meneses-Davila*, 580 F.2d 888, 891–96 (5th Cir. 1978) (four intentional references not harmless where “[d]efendant’s story is not totally implausible and the indicia of guilt is not overwhelming”).

²² See *United States v. Gentry*, 555 F.3d 659, 664 (8th Cir. 2009) (*Doyle* error prejudicial where there were five improper references and defense was not “transparently frivolous”); *Gov’t of Virgin Islands v. Davis*, 561 F.3d 159, 166–67 (3d Cir. 2009) (repeated references to defendant’s invocation prejudicial where they went to heart of defense); *United States v. Harp*, 536 F.2d 601, 603 (5th Cir. 1976) (improperly admitted “comments struck at the jugular” of defense, thus prejudicial), cited with approval in *United States v. Wright*, 777 F.3d 769, 782 (5th Cir. 2015).

Conclusion

This Court should grant certiorari and hold that evidence, inadmissible against all other defendants due to *Miranda* violations, is not admissible against mentally ill defendants simply because they assert an insanity defense. The Court should further hold that more than a dozen such violations going to the central issue at trial constitutes prejudice.

Respectfully submitted,

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