

No. USCA 3# 17-2142

IN THE SUPREME COURT OF THE UNITED STATES

NEAL L. PATTON, *Petitioner*

VS.

CYNTHIA LINK, et al., *Respondents*

* On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

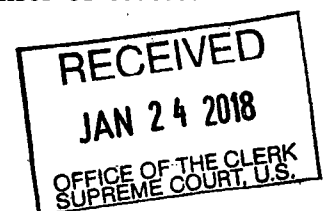
** NEAL L. PATTON
#GF 1147
SCI Graterford
P.O. Box 244
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Office of the District Attorney of Allegheny County
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* This is a state-conviction that has exhausted the federal appellate courts through habeas corpus.

** Petitioner is an imprisoned *pro se* party.

*** Throughout previous proceedings, the Respondents have shared this counsel of record.



QUESTIONS (AND SUBSIDIARY QUESTIONS) PRESENTED FOR REVIEW

[Page 1 of 2]

- I. Can the Petitioner be denied his constitutional right to confront a witness against him, which is protected under the Confrontation Clauses at U.S. Constitution, Amendment VI and Pennsylvania Constitution, Article I, Section 9 ?
 - a.) Can the Petitioner be denied his right to cross-examine the forensic pathologist who performed the forensic autopsy report that was used at Petitioner's trial, despite the precedent ruling issued by this Court in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009) ?
- II. Did the Petitioner's trial counsel provide ineffective assistance of counsel when trial counsel failed to object to the denial of Petitioner's constitutional right to confrontation, which is protected under the Confrontation Clauses at U.S. Constitution, Amendment VI and Pennsylvania Constitution, Article I, Section 9 ?
 - a.) Was the performance of Petitioner's trial counsel deficient pursuant to the two-prong test within this Court's precedent ruling under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) ?
- III. Can the trial judge remove the charge of voluntary manslaughter from jury consideration, after the Petitioner's trial defense had rested and the Petitioner's jury trial had ended, despite the Due Process Clauses at U.S. Constitution, Amendments V and XIV, and Pennsylvania Constitution, Article I, Section 9 as well as the Petitioner's right to be notified of the accusation(s) against him which is protected under U.S. Constitution, Amendment VI ?
 - a.) Can the trial judge inform the Petitioner and the jury (at the start of trial) that the Petitioner is facing a charge of voluntary manslaughter, then wait until Petitioner's trial has ended to amend the charges, despite the Petitioner's constitutional right to be notified (before trial) of all the charges he must defend himself against pursuant to U.S. Constitution, Amendment VI ?

QUESTIONS (AND SUBSIDIARY QUESTIONS) PRESENTED FOR REVIEW

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- IV. Can the Petitioner be convicted and sentenced in violation of governing state laws, despite the Petitioner's constitutional right to Procedural Due Process which is protected under U.S. Constitution, Amendments V and XIV, and Pennsylvania Constitution, Article I, Section 9?
- a.) Can the Petitioner be convicted of a capital offense and sentenced pursuant to prescribed capital punishment procedures at the conclusion of a non-capital criminal case?
- V. Can the Petitioner's trial judge preside over the Petitioner's criminal trial after failing to be lawfully retained through a retention election, which is in violation of governing state law as well as the Due Process Clauses at U.S. Constitution, Amendments V and XIV and Pennsylvania Constitution, Article I, Section 9?
- a.) Once Petitioner's trial judge failed to be lawfully retained through a retention election, were all of his subsequent judicial acts (including those at Petitioner's trial) considered to be void under law?

LIST OF PARTIES

PETITIONER, Neal L. Patton, is an imprisoned *pro se* party to this proceeding whom is seeking a Writ Of Certiorari to be granted by this Honorable Court to address the unlawful conviction and sentence imposed on the Petitioner. Petitioner is currently imprisoned against his will at:

SCI Graterford / P.O. Box 244 / Collegeville, PA 19426 / under state inmate number GF-1147.

RESPONDENT, Cynthia Link, is currently acting as the Superintendent of SCI Graterford, and is therefore in charge of the imprisonment of Petitioner's liberty. During previous proceedings to this matter, this Respondent has been represented by the following legal counsel of record:

Ronald M. Wabby, Jr. / Office of the District Attorney of Allegheny County / 436 Grant Street, 401 Courthouse / Pittsburgh, PA 15219 / (412) 350-3108.

RESPONDENT, Stephen A. Zappala, Jr., is the head prosecutor of the District Attorney's Office of Allegheny County, Pennsylvania – the prosecuting authority involved with Petitioner's criminal trial. During previous proceedings to this matter, this Respondent has been represented by the following legal counsel of record: *Ronald M. Wabby, Jr. / Office of the District Attorney of Allegheny County / 436 Grant Street, 401 Courthouse / Pittsburgh, PA 15219 / (412) 350-3108.*

RESPONDENT, Attorney General of Pennsylvania, is the head attorney of the Commonwealth of Pennsylvania and is included as a party to this proceeding as a matter of law (*although the Petitioner is not formally challenging the constitutionality of any state statute*). During previous proceedings to this matter, this Respondent has been represented by the following legal counsel of record: *Ronald M. Wabby, Jr. / Office of the District Attorney of Allegheny County / 436 Grant Street, 401 Courthouse / Pittsburgh, PA 15219 / (412) 350-3108.*

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

Petitioner's state-court conviction has been reviewed throughout the state appellate courts, before moving to the federal appellate courts via habeas corpus. Therefore, the pertinent federal court and state-court Opinions are as follows:

1. The Opinion of the United States Court of Appeals For The Third Circuit appears at "Petitioner's Appendix A", and is unpublished at this time.
2. The Opinion of the United States District Court For The Western District Of Pennsylvania appears at "Petitioner's Appendix B", and is published at Patton v. Link, 2017 U.S. Dist. LEXIS 62692.
3. The Opinion of the Superior Court of Pennsylvania (*during collateral appeal review*) appears at "Petitioner's Appendix E", and is unpublished.
4. The Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania (*during collateral appeal review*) appears at "Petitioner's Appendix F", and is unpublished.
5. The Opinion of the Supreme Court of Pennsylvania (*during direct appeal review*) appears at "Petitioner's Appendix J", and is published at Commonwealth v. Patton, 985 A.2d 1283, 604 Pa. 307 (2009).

6. The Opinion of the Superior Court of Pennsylvania (*during direct appeal review*) appears at “Petitioner’s Appendix H”, and is published at Commonwealth v. Patton, 936 A.2d 1170, 2007 PA Super 342 (2007).
7. The Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania (*during direct appeal review*) appears at “Petitioner’s Appendix I”, and is unpublished.

JURISDICTION

8. (This proceeding concerns a state conviction which was timely appealed to the federal appellate courts through a habeas corpus filing.) On October 25, 2017, the United States Court Of Appeals For The Third Circuit denied Petitioner’s PETITION FOR A REHEARING *EN BANC*, and that judgment was issued through an order. [See “Petitioner’s Appendix A”.] Pursuant to Supreme Court Rule 13.3, Petitioner has 90 days (*until January 23, 2018*) to file this PETITION FOR WRIT OF CERTIORARI with the Supreme Court of the United States – which the Petitioner has done. As a result, this Honorable Court does possess lawful jurisdiction to entertain this petition and grant the requested writ.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

9. The constitutional provisions involved in this case are as follows:

(In Alphabetical Order)

<u>Pennsylvania Constitution, Article I, Section 9</u>	PETITIONER'S APPENDIX BL
<u>U.S. Constitution, Amendment V</u>	PETITIONER'S APPENDIX BM
<u>U.S. Constitution, Amendment VI</u>	PETITIONER'S APPENDIX BN
<u>U.S. Constitution, Amendment XIV</u>	PETITIONER'S APPENDIX BO

10. The court rule provisions and statutory provisions involved in this case are as follows:

(In Alphabetical Order)

<u>1 Pa.C.S. §1921</u>	PETITIONER'S APPENDIX BP
<u>18 Pa.C.S. §2501</u>	PETITIONER'S APPENDIX P
<u>42 Pa.C.S. §3131</u>	PETITIONER'S APPENDIX BI
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<u>Rules of the Supreme Court of the United States, Rule 13.3</u>	PETITIONER'S APPENDIX BR

STATEMENT OF THE CASE

11. Petitioner was charged by Criminal Information filed in the Criminal Division of the Court of Common Pleas of Allegheny County, Pennsylvania. At CP-02-CR-0004832-2004 ¹, Petitioner was charged with one (1) count of Criminal Homicide ² arising from a killing that took place on August 25, 2003.

12. Petitioner's non-capital jury trial took place between February 23, 2005 and February 25, 2005, and concluded with the return of a guilty verdict for murder in the first degree. ³ Subsequently, on May 24, 2005, the Petitioner was sentenced to serve a term of life imprisonment without parole. ⁴

13. After Petitioner's post-sentence motion pleadings were exhausted, and the Petitioner's trial counsel (Donald N. Turner, Esquire) was granted leave to withdraw from Petitioner's representation, Petitioner filed a timely Notice of Appeal to the Superior Court of Pennsylvania to initiate Petitioner's direct appeal review. [The Notice of Appeal was filed on the Petitioner's behalf by his newly-appointed counsel, Kirk J. Henderson, Esquire, of the Office of the Public Defender of Allegheny County, Pennsylvania. A copy of that Notice of Appeal is incorporated herein and marked as "Petitioner's Appendix Q".]

14. On April 24, 2006, Petitioner's trial judge issued his Opinion. ["Petitioner's Appendix I".]

¹ A copy of this docket is incorporated herein and marked as "Petitioner's Appendix N".

² 18 Pa.C.S. §2501. Criminal homicide. A verbatim copy of the text of this statute is incorporated herein and marked as "Petitioner's Appendix P".

³ This particular action occurred at the end of Petitioner's jury trial, which is within Volume II of Petitioner's Trial Transcripts, incorporated herein and marked as "Petitioner's Appendix L".

⁴ Petitioner's Sentencing Hearing Transcripts are incorporated herein and marked as "Petitioner's Appendix M".

15. On September 21, 2006, Petitioner, through Attorney Henderson, filed a BRIEF FOR APPELLANT ⁵ in the Superior Court of Pennsylvania, which was docketed at No. 2130 WDA 2005 ⁶. On appeal, Petitioner raised the following claims:

I. May a prosecutor implore the jury to "send a message" to the community with its verdict despite clear and forceful language from the Supreme Court that a prosecutor may not do this and that this type of argument causes *per se* prejudice ?

II. When the cumulative impact of a series of events has caused a person to act under sudden and intense passion resulting from a serious provocation, can a trial court nonetheless refuse to instruct the jury that this could lead to a voluntary manslaughter conviction ?

[Claim II, above, is currently presented in this petition as Question III (on page i).
Claim I, above, *is not* presented in this instant petition as a Question.]

16. On October 17, 2006, the Commonwealth of Pennsylvania, through Assistant District Attorney Sandra Preuhs, filed a BRIEF FOR APPELLEE. ["Petitioner's Appendix T".] Shortly thereafter, on October 31, 2006, Petitioner, through Attorney Henderson, filed a REPLY BRIEF FOR APPELLANT. ["Petitioner's Appendix U".] However, on November 19, 2007, the Superior Court of Pennsylvania affirmed the judgment of the trial court. Commonwealth v. Patton, 936 A.2d 1170 (Pa.Super. 2007). ["Petitioner's Appendix H".]

17. On December 18, 2007, Petitioner, through Attorney Henderson, filed a PETITION FOR ALLOWANCE OF APPEAL ⁷ in the Supreme Court of Pennsylvania, which was docketed at No. 599 WAL 2007 ⁸. In the petition, Petitioner presented the following claims:

⁵ A copy of this filing is incorporated herein and marked as "Petitioner's Appendix R".

⁶ A copy of this docket is incorporated herein and marked as "Petitioner's Appendix S".

⁷ A copy of this filing is incorporated herein and marked as "Petitioner's Appendix V".

⁸ A copy of this docket is incorporated herein and marked as "Petitioner's Appendix W".

I(A). Do send-a-message arguments cause per se prejudice “at any stage of a criminal proceeding” as this Court has held or do they cause *per se* prejudice only in death penalty cases as Superior Court held in this published opinion?

I(B). If send-a-message arguments (contrary to this Court’s opinions) are subject to prejudice analysis, was prejudice caused when the Commonwealth urged the jurors to send a message to the community that a verdict other than first degree murder would send a message that talking to the police is a worthless endeavor?

II. Was Superior Court correct that a court can refuse to give a voluntary manslaughter instruction when a person is acting under a sudden and intense passion resulting from serious provocation?

18. On December 20, 2007, the Commonwealth of Pennsylvania, through Assistant District Attorney Preuhs, filed a “no answer” letter. [“Petitioner’s Appendix X”.] On June 27, 2008, at Commonwealth v. Patton, 952 A.2d 1166, 598 Pa. 8 (2008), the Supreme Court of Pennsylvania entered the following order:

AND NOW, this 27th day of June, 2008, the Petition For Allowance Of Appeal is GRANTED, LIMITED TO the issue set forth below. Allocatur is DENIED as to all remaining issues. The issue, rephrased for clarity, is:

Whether the *per se* rule of *DeJesus* applies in non-capital cases; if not, was the within request improper and prejudicial?

19. However, on December 30, 2009, the Supreme Court of Pennsylvania ultimately decided to affirm the judgment of the state trial court. Commonwealth v. Patton, 985 A.2d 1283, 604 Pa. 307 (2009). [“Petitioner’s Appendix J”.]

20. On December 28, 2010, Petitioner filed a timely *pro se* MOTION FOR POST CONVICTION RELIEF and an accompanying MEMORANDUM OF LAW to initiate Petitioner’s collateral appeal. [“Petitioner’s Appendix Y” and “Petitioner’s Appendix Z”.] However, on

September 12, 2011, Petitioner's trial judge passed away before adjudicating the Petitioner's post-conviction pleading.

21. With Petitioner's post-conviction pleading still pending, Petitioner filed a *pro se* APPLICATION TO REQUEST FOR REASSIGNMENT AND AMENDMENT OF PCRA PETITION ⁹ with the state trial court on August 9, 2013. Petitioner's pending post-conviction appeal was subsequently reassigned to Judge Kathleen A. Durkin.

22. On October 8, 2013, Judge Durkin appointed Charles Pass III, Esquire, to represent the Petitioner. However, on October 23, 2013, Petitioner filed a *pro se* MOTION TO REQUEST WAIVER OF COUNSEL ¹⁰. On November 25, 2013, Petitioner appeared before Judge Durkin for a waiver of counsel hearing ¹¹. Following a colloquy, Attorney Pass was granted leave to withdraw representation, Petitioner was granted the right to proceed *pro se*, and Petitioner was granted leave amend the pending post-conviction petition on or before February 28, 2014. [A copy of this Order is incorporated herein and marked as "Petitioner's Appendix AD".]

23. On February 28, 2014, Petitioner filed a timely *pro se* AMENDED PETITION FOR POST CONVICTION COLLATERAL RELIEF ¹². In the petition, Petitioner raised the following claims:

¶48. May the Petitioner be convicted of a Capital Offense during a Non-Capital trial, in violation of the Due Process Clauses of the United States Constitution and the Pennsylvania Constitution ?

⁹ A copy of this filing is incorporated herein and marked as "Petitioner's Appendix AA".

¹⁰ A copy of this filing is incorporated herein and marked as "Petitioner's Appendix AB".

¹¹ A copy of the transcripts to this proceeding are incorporated herein and marked as "Petitioner's Appendix AC".

¹² A copy of this filing is incorporated herein and marked as "Petitioner's Appendix AE".

¶49. May the Petitioner be convicted of a Capital Offense during a Non-Capital trial, in violation of the Pennsylvania Rules of Criminal Procedure as well as the well-established holdings of the Pennsylvania Supreme Court ?

¶50. May the Petitioner be sentenced pursuant to a statute that is not applicable to him, and without the trial court conducting the mandatory sentencing procedures prescribed within the statute, in violation of the Due Process Clauses of the United States Constitution, and the laws of the Commonwealth of Pennsylvania ?

¶51. May the Petitioner's trial, conviction, and sentences have any legal effect if the trial judge was not properly assigned to the matter pursuant to Pennsylvania Law and Pennsylvania Rules of Judicial Administration ?

¶52. May the Petitioner's sentence have any legal effect if such a sentence was imposed by a judicial officer that did not have lawful jurisdiction to exercise judicial authority ?

¶53. May the Petitioner's trial counsel be deemed effective after failing to object to an erroneous jury instruction before the jury retires to deliberate, which is required by the Pennsylvania Rules of Criminal Procedure ?

¶54. May the Petitioner's trial counsel be deemed effective after requesting a jury instruction that clearly conflicts with trial evidence as well as the Petitioner's testimony ?

¶55. May the Petitioner be held to answer for an alleged crime without a Grand Jury indictment or presentment, in violation of the United States Constitution's Supremacy Clause (at Article VI, Clause 2) ?

[Claims 48, 49, 50, 51, 52, and 53, above, have been consolidated and are currently presented in this petition as Questions III, IV, and V (*on pages i and ii*). Claims 54 and 55, above, *have not been* presented in this instant petition as a Question.]

24. On March 24, 2014, Judge Durkin issued a NOTICE OF INTENT TO DISMISS.

["Petitioner's Appendix AF".] In response, on April 4, 2014, Petitioner filed a *pro se* MOTION TO REQUEST CONTINUANCE OF PCRA PROCEEDINGS. Subsequently, on April 15, 2014, Judge Durkin granted the Petitioner a continuance with directions to amend the pending petition.

["Petitioner's Appendix AG".]

25. On July 14, 2014, Petitioner filed a timely *pro se* AMENDED PETITION FOR POST-CONVICTION COLLATERAL RELIEF. [“Petitioner’s Appendix AH”] In this amended petition, the Petitioner raised the following claims:

¶60. Petitioner was denied his constitutional right to confront witnesses against him, causing a violation to the Confrontation Clauses at U.S. Constitution, Amendment VI, and the Pennsylvania Constitution, Article I, §9.

¶61. Petitioner’s trial counsel was ineffective for failing to object to improper witness testimony, causing a violation to the Petitioner’s constitutional right to effective assistance of counsel as guaranteed by U.S. Constitution, Amendment VI.

¶62. Petitioner’s trial judge, John K. Reilly, Jr., improperly removed the charge of Voluntary Manslaughter from jury consideration, resulting in a conviction that violated the Due Process Clauses of U.S. Constitution, Amendments V and XIV, Pennsylvania Constitution, Article I, §9, the Petitioner’s right to be notified of the accusation against him at U.S. Constitution, Amendment VI, and so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

¶63. Petitioner’s trial judge gave improper definitions of criminal offenses to the jury, resulting in a conviction that violated the Due Process Clauses of U.S. Constitution, Amendments V and XIV, Pennsylvania Constitution, Article I, §9, the Petitioner’s right to a fair trial by impartial jury at U.S. Constitution, Amendment VI, and so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

¶64. Petitioner’s conviction and sentence resulted from violations of the U.S. Constitution, Amendments V and XIV, Pennsylvania Constitution, Article I, §9, and Pennsylvania Rules of Criminal Procedure 802, all of which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

¶65. Petitioner’s trial judge, Judge John K. Reilly, Jr., presided over the Petitioner’s jury trial without being properly assigned to Allegheny County, Pennsylvania’s jurisdiction, causing a violation to the Due Process Clauses of U.S. Constitution, Amendments V and XIV, Pennsylvania Constitution, Article I, §9, and the Pennsylvania Rules of Judicial Administration, all of which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

[Claims 60, 61, 62, 64, and 65, above, have been consolidated and are currently presented in this petition as Questions I, II, III, IV, and V (*on pages i and ii*). Claim 63, above, *has not been* presented in this instant petition as a Question.]

26. On July 18, 2014, Judge Durkin again issued a Notice Of Intent To Dismiss. ["Petitioner's Appendix AI".] On August 4, 2014, Commonwealth of Pennsylvania, through Attorney Ronald M. Wabby, Jr., filed a COMMONWEALTH'S ANSWER TO POST CONVICTION RELIEF ACT PETITION. ["Petitioner's Appendix AJ".] On February 27, 2015, Judge Durkin dismissed the Petitioner's pending petition. ["Petitioner's Appendix AK".]

27. On March 27, 2015, Petitioner filed a timely *pro se* Notice Of Appeal ¹³, and on June 26, 2015, Judge Durkin filed her Opinion ¹⁴.

28. On September 22, 2015, Petitioner filed a timely *pro se* BRIEF FOR APPELLANT ¹⁵ in the Supreme Court of Pennsylvania, which was docketed at No. 532 WDA 2015 ¹⁶. On appeal, Petitioner raised the following claims:

I. May the Appellant be denied his right to confront the affiant of the forensic autopsy report that was used against him, in light of the precedent(s) established by the U.S. Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), and Bullcoming v. New Mexico, 564 U.S. ____, 131 S.Ct. 2705 (2011) ?

¹³ A copy of this filing is incorporated herein and marked as "Petitioner's Appendix AL".

¹⁴ A copy of this filing is incorporated herein and marked as "Petitioner's Appendix F".

¹⁵ A copy of this filing is incorporated herein and marked as "Petitioner's Appendix AM".

¹⁶ A copy of this docket is incorporated herein and marked as "Petitioner's Appendix AN".

II. May the Appellant be denied his right to confront the affiant of the forensic autopsy report that was used against him, in violation of the Confrontation Clauses at U.S. Constitution Amendment VI and Pennsylvania Constitution, Article I, Section 9 ?

III. Can the Appellant's trial counsel be considered effective after failing to object to Appellant's right to Confrontation, which is in violation of the Appellant's right to have effective assistance of counsel as guaranteed under Amendment VI of the United States Constitution ?

IV. May the trial judge inform the Appellant during the trial that he is facing Voluntary Manslaughter, then wait until the Appellant's defense rests to remove Voluntary Manslaughter from jury consideration, in clear violation of Due Process of Law and the Appellant's constitutional right to be informed of the specific charge(s) against him as guaranteed at U.S. Constitution, Amendments V and XIV, as well as Pennsylvania Constitution, Article I, Section 9 ?

V. May the Appellant be convicted of a capital offense during a non-capital trial, in violation of the Due Process Clauses at U.S. Constitution, Amendments V and XIV, as well as Pennsylvania Constitution, Article I, Section 9 ?

VI. Can the Appellant's trial judge preside over Appellant's trial and exercise judicial authority without being lawfully assigned to the jurisdiction of Allegheny County, Pennsylvania, in light of the mandatory provisions of the Pennsylvania Rules of Judicial Administration ?

VII. Can the Appellant's trial, conviction, and sentence have any legal effect if the trial judge was not lawfully assigned to preside over the matter pursuant to Pennsylvania law and the Pennsylvania Rules of Judicial Administration ?

VIII. Can the PCRA Court dismiss Appellant's PCRA petition without providing the Appellant with a 20-day notice of such intention to dismiss, in clear violation of governing court rule Pa.R.Crim.P. 907(1) ?

[Claims I, II, III, IV, V, VI, and VII, above, have been consolidated and are currently presented in this petition as Questions I, II, III, IV, and V (*on pages i and ii*). Claim VIII, above, *has not been* presented in this instant petition as a Question.]

29. On October 30, 2015, the Commonwealth of Pennsylvania, through Assistant District Attorney Preuhs, filed a BRIEF FOR APPELLEE ¹⁷. On February 9, 2016, the Superior Court affirmed the judgment of the state trial court. [“Petitioner’s Appendix E”.] On March 10, 2016, Petitioner filed a timely pro se PETITION FOR ALLOWANCE OF APPEAL ¹⁸ in the Supreme Court of Pennsylvania, which was docketed at No. 128 WAL 2016 ¹⁹. In the petition, Petitioner raised the following claims:

I. May the Petitioner be denied his right to confront the affiant of the forensic autopsy report that was used against him, in light of the precedent(s) established by the U.S. Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), and Bullcoming v. New Mexico, 564 U.S. ___, 131 S.Ct. 2705 (2011) ?

II. Can the Petitioner’s trial counsel be considered effective after failing to object to the denial of a Petitioner’s constitutional right to Confrontation ?

III. May the Petitioner’s trial court inform the Petitioner that he is facing Voluntary Manslaughter before and during trial, then wait until the Petitioner’s defense rests to remove Voluntary Manslaughter from jury consideration, in clear violation of the Petitioner’s constitutional right to be informed of the specific charge(s) against him as guaranteed at U.S. Constitution, Amendment VI as well as Pennsylvania Constitution, Article I, Section 9 ?

IV. May the Petitioner be convicted of a capital crime during a non-capital trial, in violation of the mandatory statutory provisions at 42 Pa.C.S. §9711(a)(1), mandatory court rule provisions at Pa.R.Crim.P. 802 and the Due Process Clauses at U.S. Constitution, Amendments V and XIV and Pennsylvania Constitution, Article I, Section 9 ?

¹⁷ A copy of this filing is incorporated herein and marked as “Petitioner’s Appendix AO”.

¹⁸ A copy of this filing is incorporated herein and marked as “Petitioner’s Appendix AP”.

¹⁹ A copy of this docket is incorporated herein and marked as “Petitioner’s Appendix AQ”.

V. Can the Petitioner's trial judge preside over the Petitioner's trial and exercise judicial authority despite not being lawfully retained through a previous municipal election, in clear violation of statutory law and the Pennsylvania Rules of Judicial Administration ?

[Claims I, II, III, IV, and V, above, have each been presented in this petition as Questions I, II, III, IV, and V (*on pages i and ii*).]

30. On March 30, 2016, the Commonwealth of Pennsylvania, through Assistant District Attorney Preuhs, filed a "no answer" letter in response to the Petitioner's filing. ["Petitioner's Appendix AR".] On August 10, 2016, the Supreme Court of Pennsylvania denied the petition. ["Petitioner's Appendix G".]

31. On August 30, 2016, Petitioner filed a timely *pro se* PETITION FOR WRIT OF HABEAS CORPUS ²⁰ in the United States District Court for the Western District of Pennsylvania, which was docketed at Civil Action No. 16-1413 ²¹. In the petition, Petitioner raised the following:

GROUND ONE: Petitioner was denied his constitutional right to confront a witness against him, causing a violation to the confrontation clause at U.S. Constitution, Amendment VI and Pennsylvania Constitution, Article I, Section 9.

GROUND TWO: Petitioner's trial counsel was ineffective for failing to object to the violation of Petitioner's right to confrontation, causing a violation to the Petitioner's right to have effective assistance of counsel as protected by U.S. Constitution, Amendment VI and Pennsylvania Constitution, Article I, Section 9.

²⁰ A copy of this filing is incorporated herein and marked as "Petitioner's Appendix AS". [For purposes of clarity, it should be noted that once this petition was filed in the United States District Court through habeas corpus, the caption of the case changed from "Commonwealth of Pennsylvania v. Neal L. Patton" to "Neal L. Patton v. Cynthia Link, et al."]

²¹ A copy of this docket is incorporated herein and marked as "Petitioner's Appendix AT".

GROUND THREE: Petitioner's trial judge improperly removed the charge of voluntary manslaughter from jury consideration, resulting in a conviction that violated the due process clauses at U.S. Constitution, Amendments V and XIV, and Pennsylvania Constitution, Article I, Section 9, as well as the Petitioner's right to be notified of the accusation against him as protected at U.S. Constitution, Amendment VI.

GROUND FOUR: Petitioner's conviction and sentence resulted from violations to U.S. Constitution, Amendments V and XIV, Pennsylvania Constitution, Article I, Section 9, and Pennsylvania Rules of Criminal Procedure 802, all of which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

GROUND FIVE: Petitioner's trial judge presided over the Petitioner's jury trial despite failing to be lawfully retained through a previous municipal election, causing a violation to the due process clauses of U.S. Constitution, Amendments V and XIV, Pennsylvania Constitution, Article I, Section 9, and the Pennsylvania Rules of Judicial Administration, all of which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

[Grounds One, Two, Three, Four, and Five, above, have each been presented in this petition as Questions I, II, III, IV, and V (on pages i and ii).]

32. On October 21, 2016, Respondents, through Deputy District Attorney Ronald M. Wabby, Jr., filed a COMMONWEALTH'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS with the United States District Court for the Western District of Pennsylvania. [A copy of this filing is incorporated herein and marked as "Petitioner's Appendix AU".] On March 8, 2017, Magistrate Judge Robert C. Mitchell issued a REPORT AND RECOMMENDATION²², recommending that Petitioner's habeas corpus petition and requested Certificate Of Appealability be denied.

²² A copy of this filing is published at *Patton v. Link*, 2017 U.S. Dist. LEXIS 34137, and is incorporated herein and marked as "Petitioner's Appendix D".

33. In response to Magistrate Judge Mitchell's report, Petitioner filed a timely *pro se* OBJECTIONS TO REPORT AND RECOMMENDATION ²³ on March 23, 2017. However, on April 25, 2017, Petitioner's habeas corpus petition and request for Certificate Of Appealability was denied United States District Court for the Western District of Pennsylvania. Patton v. Link, 2017 U.S. Dist. LEXIS 62692. [A copy of this judgment and Opinion is incorporated herein and marked as "Petitioner's Appendix B".]

34. On May 15, 2017, Petitioner filed a timely *pro se* NOTICE OF APPEAL ²⁴ which was followed on May 31, 2017 by a timely *pro se* APPLICATION FOR A CERTIFICATE OF APPEALABILITY BY A CIRCUIT JUDGE ²⁵ with the United States Court Of Appeals For The Third Circuit, each of which were docketed at No. 17-2142 ²⁶. On September 28, 2017, the United States Court Of Appeals For The Third Circuit denied Petitioner's request for a Certificate of Appealability ²⁷. On October 10, 2017, Petitioner filed a timely *pro se* PETITION FOR REHEARING EN BANC ²⁸ with the United States Court Of Appeals For The Third Circuit. However, on October 25, 2017, Petitioner's petition for rehearing was denied ²⁹.

35. Today, Petitioner files this timely *pro se* PETITION FOR A WRIT OF CERTIORARI with the Supreme Court of the United States seeking appellate review of Petitioner's unlawful conviction and sentence.

²³ A copy of this filing is incorporated herein and marked as "Petitioner's Appendix AV".

²⁴ A copy of this filing is incorporated herein and marked as "Petitioner's Appendix AW".

²⁵ A copy of this filing is incorporated herein and marked as "Petitioner's Appendix AX".

²⁶ A copy of this docket is incorporated herein and marked as "Petitioner's Appendix AY".

²⁷ A copy of this judgment is incorporated herein and marked as "Petitioner's Appendix A".

²⁸ A copy of this filing is incorporated herein and marked as "Petitioner's Appendix AZ".

²⁹ A copy of this judgment is incorporated herein and marked as "Petitioner's Appendix C".

REASONS FOR GRANTING THE PETITION

REASON #1: Petitioner was denied his constitutional right to confront a witness against him, causing a violation to the confrontation clause at U.S. Constitution, Amendment VI and Pennsylvania Constitution, Article I, Section 9.

Compelling Reasons For Granting The Petition:

36. During Petitioner's jury trial, the prosecution introduced a forensic autopsy report that was conducted on the homicide victim's body by **Dr. Leon Rozin** of the Allegheny County Coroner's Office. However, at Petitioner's trial the prosecution denied the Petitioner his Sixth Amendment right to confront Dr. Leon Rozin through means of cross-examination. Instead, the prosecution provided **Dr. Shaun Ladham** (surrogate witness) at trial for the Petitioner to cross-examine.

37. This Confrontation Clause issue is governed by this Court's precedent ruling in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), which holds that: *Out-of-court certificates of analysis which are sworn to by the analyst(s) are not removed from coverage of the Confrontation Clause because they are prepared specifically to be used at a defendant's trial, the certificates of analysis are considered as "testimony" against the petitioner, the analyst(s) themselves are considered "witnesses" whom are subject to Confrontation under the Sixth Amendment* [Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. at 2539-2540] ; *and the prosecution must produce the analyst(s) at trial to be cross-examined under the Sixth Amendment's Compulsory Process Clause.* [Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. at 2534].

38. Despite the clear language in Melendez-Diaz, this confrontation issue has been decided by the state courts (as well as the United States Court of Appeals) in a way that is contrary to this Court's precedent decision. There has also been a *state court rule* created that infringes upon

the same constitutional safeguards that were clearly established in the Melendez-Diaz ruling.³⁰

As a result, Petitioner believes that compelling reasons *do exist* for this petition to be granted in accordance with Rule 10 of the Supreme Court of the United States and Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2009).

State Exhaustion And Procedural Default Of Issue:

39. Respondents have conceded that this particular issue *has been* duly exhausted with the state courts³¹. Respondents contend, however, that this particular issue is procedurally defaulted because the Petitioner did not raise this issue at trial.

40. Petitioner avers, however, that it was chronologically impossible to raise this issue (*under Melendez-Diaz*) at trial because Petitioner's trial took place from February 23, 2005 – February 25, 2005, while the decision in Melendez-Diaz was not issued by this Court until *52 months later*, on June 25, 2009. Consequently, the first opportunity to raise this confrontation clause issue under Melendez-Diaz was not available to the Petitioner until the collateral review stage of Petitioner's appeal, which is exactly when the Petitioner raised this issue for the first time. [*The Superior Court of Pennsylvania held that Petitioner's state post-conviction filing concerning this issue was timely, to wit, this issue was properly preserved for appellate litigation.*]³²

³⁰ Pennsylvania Rules of Criminal Procedure 574 was approved by the Pennsylvania Supreme Court and adopted in 2014. This state-court rule infringes upon the Sixth Amendment safeguards that were established by the United States Supreme Court in the Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009). A copy of this rule is incorporated herein and marked as "Petitioner's Appendix BA"

³¹ Respondents conceded to this fact on page 25 of their COMMONWEALTH'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS; A copy of this filing is incorporated herein and marked as "Petitioner's Appendix AU".

³² The Superior Court of Pennsylvania made this assertion within the Footnote on page 4 of their Opinion entered at Docket No. 532 WDA 2015; A copy of this Opinion is incorporated herein and marked as "Petitioner's Appendix E".

41. Moreover, due to the chronological hurdle associated with raising this issue at trial, the "procedural default" bar does not apply to this issue. [*Procedural default may be excused if: (1) Petitioner can demonstrate cause for the default as something external to the Petitioner that cannot fairly be attributed to him... For example, 'a showing that the factual or legal basis for a claim was not reasonably available ...'; and (2) Prisoner can demonstrate actual prejudice as a result of the alleged violation of federal law. See: Coleman v. Thompson, 501 U.S. 722, 751, 111 S.Ct. 2546, 2565-2566 (1991).*]

42. And lastly, Petitioner is aware that this Honorable Court issued a prior *confrontation clause* ruling under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), which was the predecessor to Melendez-Diaz. Petitioner is also aware that the Crawford ruling was issued on March 8, 2004, which was before the Petitioner's jury trial took place. However, the specific set of circumstances surrounding the Petitioner's confrontation clause issue were not directly addressed by this Honorable Court until the Melendez-Diaz ruling.³³

³³ Although the Crawford v. Washington ruling was issued by this Court before the start of Petitioner's trial, that ruling merely held the following examples to be "testimonial statements": *ex parte* in-court testimony or its functional equivalent such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, similar pretrial statements that declarants would reasonably expect to be used prosecutorially, and statements taken by police officers in the course of interrogations.

The Melendez-Diaz ruling, however, went a few steps further by holding that the certificates of analysis that were sworn to by the analyst(s) *were not* removed from coverage of Confrontation Clause because they were prepared specifically for use at petitioner's trial, the certificates were *testimony* against the petitioner, the analyst(s) themselves were subject to Confrontation under the Sixth Amendment [Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 2539-2540], and the prosecution must produce the analyst(s) under the Sixth Amendment's Compulsory Process Clause. Id. at 2534.

Merit Of The Issue:

43. The prosecution's reasoning for presenting *Dr. Shaun Ladham* instead of *Dr. Leon Rozin* at trial was because *Dr. Shaun Ladham* held an expertise in the field of forensic pathology, and thus, he was sufficient to qualify as an "expert witness" ³⁴. Petitioner, however, never questioned *Dr. Shaun Ladham's* "expertise" and/or "accomplishments" in the field of forensic pathology. Instead, Petitioner has continually maintained that *Dr. Shaun Ladham's surrogate testimony* was incapable of satisfying the Petitioner's right to confrontation through cross-examination; a fact that has been well-settled by the United States Supreme Court:

"Most witnesses after all, testify to their observations of factual conditions or events, e.g. 'the light was green' 'the hour was noon.' ... Could an officer other than the one who saw the number on the house or gun present the information in court – so long as that officer deployed was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? **As our precedent makes plain, the answer is emphatically 'No'.**" (*emphasis added*) Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. at 2546; Bullcoming v. New Mexico, 564 U.S. 647, 131 S.Ct. 2705, 2715 (2011).

"To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. ... Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. at 2536.

44. In defending *Dr. Shaun Ladham's* presence at Petitioner's trial, the state appellate courts

³⁴ The prosecution conducted a line of questioning designed to outline *Dr. Shaun Ladham's* expertise and accomplishments in the field of forensic pathology. This line of questioning can be seen on pages 132-137 of Petitioner's Trial Transcripts, Volume I; A copy of which is incorporated herein and marked as "Petitioner's Appendix K".

erroneously relied on a Pennsylvania Superior Court decision issued under Commonwealth v. Yohe, 39 A.3d 381 (Pa.Super. 2012), which held that a forensic pathologist whom did not perform a defendant's blood alcohol test could testify in court as an appropriate witness if such forensic pathologist certified the accuracy of the results through personal testing and signed the report themselves in anticipation for use at defendant's trial. Yohe at 389. Petitioner's case, however, is distinctively different, to wit, the Yohe decision was not applicable – even at the state-court level.

45. In Petitioner's case, a forensic autopsy report was performed on the homicide victim by *Dr. Leon Rozin*. Blood was drawn from the victim by *Jacob Pietrzak*. Specimens of the victim were submitted by *Teri E. Hancock*, while those specimens were received by *Christa L. Miklancie*. And lastly, the forensic autopsy report was only signed by three (3) analysts, namely: *Leon Rozin* (Chief Forensic Pathologist), *Cyril Wecht* (Coroner), and *Jennifer K. Jenssen* (Assistant Chief Toxicologist). Despite the several aforesaid analysts that performed or otherwise contributed to the completion of the autopsy report, ***none of these analysts were brought forth by the prosecution to testify at Petitioner's trial to satisfy Confrontation through cross-examination.***³⁵

As a result, Petitioner respectfully submits that his Sixth Amendment right to Confrontation was violated in direct conflict with the precedent holdings of this Court.

46. If this Honorable Court has determined that this issue (Reason #1) is procedurally defaulted because the Crawford v. Washington ruling of this Court applies and was issued on March 8, 2004 (before the start of Petitioner's trial), the Petitioner has respectfully presented Reason #2 (*starting on page 21 of this petition*) for this Honorable Court's consideration.

³⁵ Petitioner discovered the names and signatures of each forensic analyst who directly contributed to the completion of the forensic autopsy by examining the *forensic autopsy report*, a copy of which is incorporated herein and marked as "Petitioner's Appendix BB". It should be duly noted that multiple pages were missing from the autopsy report that was provided to the Petitioner through discovery.

REASONS FOR GRANTING THE PETITION

REASON #2: Petitioner's trial counsel was ineffective for failing to object to the violation of Petitioner's right to confrontation, causing a violation to the Petitioner's right to have effective assistance of counsel as protected by U.S. Constitution, Amendment VI and Pennsylvania Constitution, Article I, Section 9.

Compelling And Extraordinary Reasons For Granting The Petition:

47. This appellate issue is a combination of the Confrontation Clause violation explained in Reason #1 (*on pages 16-20 of this petition*), as well as how that violation was never objected to by Petitioner's trial counsel due to counsel's ineffective assistance. As a result, this particular '*reason for granting the petition*' is governed by this Honorable Court's two (2) precedent rulings under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

48. This particular '*reason for granting the petition*' is primarily being presented for review in case this Honorable Court has determined Reason #1 (*on pages 16-20 of this petition*) to be procedurally defaulted.

49. This appellate issue has already been decided by the state courts (*and the United States Court of Appeals*) in a way that is contrary to this Court's precedent decisions. Moreover, there has yet to be a decision published by this Honorable Court that firmly establishes how a criminal defendant's right to effective assistance of counsel should be assessed when a defendant's trial counsel fails to object to this type of Confrontation Clause violation. As a result, compelling reasons *do exist* for the granting of this petition in accordance with Rule 10(c) of the Supreme Court of the United States and under Williams v Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000).

State Exhaustion Of Issue:

50. Respondents have conceded that this particular issue has been duly exhausted and adequately raised with the state courts. [Respondents conceded to this fact on page 25 of their COMMONWEALTH'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS; a copy of this filing is incorporated herein and marked as "Petitioner's Appendix AU".]

Merit Of The Issue:

51. Under this Court's precedent ruling at Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), it was held that the following two prongs must be met for an ineffective assistance of counsel claim to have merit: (1) *Petitioner must show that trial counsel's performance was so deficient and/or erroneous that counsel was not functioning as 'counsel';* and (2) *Trial counsel's deficient performance prejudiced the defense enough to deprive Petitioner of a fair trial.*

Id at 687. As a result, Petitioner now moves to satisfy each prong.

1st Prong: The Performance of Petitioner's Trial Counsel Was Deficient

52. Under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), it was held that a criminal defendant shall not be prosecuted with the aid of out-court testimonial evidence unless the defendant was given an opportunity to confront the author of such evidence through the manner of cross-examination. Crawford v. Washington, 541 U.S. at 54, 124 S.Ct. at 1369. It was also held that the term "witness" refers to those who "bear testimony", while the term "testimony" refers to "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."

Crawford v. Washington, 541 U.S. at 51, 124 S.Ct. at 1364.

53. In light of this Court's Crawford holdings, Petitioner's trial counsel should have known that Dr. Leon Rozin was considered a "witness" under the Sixth Amendment's Confrontation

Clause while his forensic autopsy report was considered to be “*testimony*”. Under that reasoning, Petitioner’s trial counsel should have objected when it was disclosed by the prosecution that *Dr. Leon Rozin* would not be present at trial to testify regarding the forensic autopsy report.

54. At the outset of Petitioner’s trial, the trial judge informed the jury that the Petitioner would be facing three (3) classifications of criminal homicide, namely: *murder in the first degree, murder in the third degree, and voluntary manslaughter*. [See: pages 4-6 of Trial Transcripts, Volume I; which is incorporated herein and marked as “Petitioner’s Appendix K”.] Consequently, throughout Petitioner’s trial, the prosecution attempted to present evidence in support of a *first degree murder* conviction while the Petitioner attempted to provide evidence that the offense of first degree murder was never committed.³⁶

55. As a result, to be effective at trial, it became imperative for Petitioner’s trial counsel to present an adversarial testing process against the prosecution for the jury to consider.

“Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065 (1984).

56. During Petitioner’s trial, the prosecution’s witness Loenell Howze, alleged that: (1) *The Petitioner stood over the deceased who was lying on the ground, and (2) The Petitioner pressed a firearm to the side of the deceased’s head before delivering a gunshot wound*. [Trial Transcripts, Volume I, pages 61-63; incorporated as “Petitioner’s Appendix K”.] In contrast, the Petitioner contended that: (1) *The deceased was in a **standing/reaching** position when he received a gunshot to the side of his head because he aggressively lunged for the firearm before the Petitioner side-stepped the deceased’s attempt, and (2) The firearm was **never** pressed against the deceased’s*

³⁶ Petitioner never once alleged that he was innocent of committing a homicide. Instead, the Petitioner has steadfastly declared – *with his pre-trial statement, trial testimony, and appellate filings* – that he never committed the offense of first degree murder. Petitioner’s pre-trial statement is incorporated herein and marked as “Petitioner’s Appendix BE”.

head. [Trial Transcripts, Volume II, pages 41-44; incorporated as "Petitioner's Appendix L".]

57. To disprove the prosecution's allegations of malice and intent against the Petitioner, *(which would have weakened a first degree murder charge)*, Petitioner's trial counsel knew that specific elements of the case *(such as the trajectory of the bullet to the deceased's head as well as the closeness/proximity of the firearm to the deceased's head)* had to be proven through cross-examination testimony regarding the findings of the forensic autopsy report.

58. However, when the prosecution presented *Dr. Shaun Ladham* at Petitioner's trial, and the Petitioner's trial counsel *chose not to object* to this Confrontation Clause violation, it became nearly impossible for the Petitioner to disprove the prosecution's aforesaid allegations because *Dr. Shaun Ladham's surrogate testimony* was filled with contradictory guesstimates and assumptions, establishing the fact that he was incapable of answering any of the Petitioner's pertinent questions within a required medical degree of certainty:

[On Prosecution's Direct Examination...]

Prosecutor: Dr. Ladham, with respect to the gunshot wound to the head, what is the likelihood that gunshot wound could have been made while the victim... was lying down with his head on the left side on the ground?

Dr. Ladham: If he was lying down there was no way to say it couldn't happen that way. That's entirely likely, if someone's lying, to shoot downwards and get the angles that I see.

Prosecutor: What about it coming from somebody who is facing somebody head-on?

Dr. Ladham: If you're standing head-on, that would be impossible, because the wound is to the side of the head and going downwards. It would be impossible to get that...

[Then on Cross-Examination...]

Petitioner's Trial Counsel: ...Based on the scenario you were given in terms of would it be consistent with someone lying on the ground, would it be basically also true to state that you can't tell, you know where the head was located, because like you could get that same scenario with somebody falling or standing in some movement when a gunshot was delivered to the head? Would that be correct?

Dr. Ladham: *It depends on exactly what you say, but it isn't locked in that it has to be lying down.*

Petitioner's Trial Counsel: That's just one scenario; is that correct?

Dr. Ladham: That's correct...

Petitioner's Trial Counsel: Would it be fair to state that you can't conclude from what been presented or can't conclude exactly where the head was located?

Dr. Ladham: *(noticeably irritated)* ***I'm not trying to make any conclusions as to where it is.*** Our job is to say where the bullet went through the head. We don't try and say it had to be in this position.

**(emphasis added)*

[Trial Transcripts, Volume I, pages 150, 158, and 161; incorporated herein and marked as "Petitioner's Appendix K".]

59. As evidenced by the above-provided excerpts from the Petitioner's trial, it is clear that *Dr. Shaun Ladham* was incapable of explaining the trajectory of the gunshot wound the deceased suffered to the head. Moreover, during the Petitioner's trial, it became clear that *if* a firearm was placed against the deceased's head at the time of the gunshot wound, the deceased's head wound would have possessed a substantial amount of "soot" at the surface, which would have represented the wound's direct contact or close proximity to gunpowder. However, during cross-examination of *Dr. Shaun Ladham*, it was quickly discovered that no "soot" was ever found at or near the surface of the deceased's head wound. *[Trial Transcripts, Volume I, pages 155-156; incorporated herein and marked as "Petitioner's Appendix K".]*

60. *Dr. Shaun Ladham* also testified that the absence of "soot" at the deceased's head wound could have been attributed to the fact that the hair near the wound had been shaved off. *[Trial Transcripts, Volume I, page 151; incorporated herein and marked as "Petitioner's Appendix K".]* However, what *was not* mentioned was that the hair had been shaved off *to be tested*, and the laboratory test findings concluded that **no gunpowder particles were present**. Furthermore, additional laboratory test findings concluded that **the deceased's left hand possessed "antimony"**

and “barium” at levels consistent with gunshot residue (all of which meant that the Petitioner’s testimony was factual in regards to the deceased reaching for the firearm from a standing position; while the testimony given by the prosecution’s witness, Loenell Howze, was not credible in regards to a firearm being “pressed against the side of the victim’s head”) ³⁷.

61. Dr. Shaun Ladham could not conclusively answer any of the Petitioner’s pertinent questions because he himself *did not* personally handle the deceased’s body once it arrived at the Allegheny County Coroner’s Office. Because of this fact, the Petitioner was denied a crucial opportunity to disprove the inflammatory and false accusations presented by the prosecution and their witness, Loenell Howze, to wit, the Petitioner was denied his opportunity to present an adequate adversarial testing process concerning the prosecution’s alleged malice and/or intent.

62. Consequently, Petitioner’s trial counsel was deficient for failing to insist that the prosecution provide **Dr. Leon Rozin** for cross-examination – which would have helped the Petitioner cast reasonable doubt, at the least, upon the prosecution’s allegations. The performance, or lack thereof, of Petitioner’s trial counsel has thus damaged the credibility of the Petitioner’s trial result:

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”
Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984).

³⁷ A “CONFIDENTIAL REPORT OF LABORATORY FINDINGS - Pt. 1” and “CONFIDENTIAL REPORT OF LABORATORY FINDINGS - Pt. 2” were conducted in conjunction with the forensic autopsy report of the deceased. [Incorporated herein and marked as “Petitioner’s Appendix BC” and “Petitioner’s Appendix BD”.] The second confidential report was conducted to test the *hat* which the deceased wore at the time of the incident. The results of the second confidential report concluded that no gunpowder particles were found on the fabric of the hat. (*It should be noted that the hat *had not been “rinsed”*, or otherwise ever handled by hospital staff – as was assumed by surrogate witness Dr. Shaun Ladham.)

2nd Prong: Trial Counsel's deficient performance prejudiced the Petitioner

63. During Petitioner's trial, Dr. Shaun Ladham also *assumed* that the absence of "soot" at the deceased's head wound resulted from "rinsing" that the hospital must have performed before the deceased's body was sent to the Coroner's Office for an autopsy. [Trial Transcripts, Volume I, page 153; incorporated herein and marked as "Petitioner's Appendix K".] However, such an assumption was made by *Dr. Shaun Ladham* because he had absolutely nothing to do with the performance or completion of the forensic autopsy report. He merely viewed Dr. Leon Rozin's autopsy report and "*put together his own impression*" of what those findings actually meant:

Prosecution: I will draw your attention to the autopsy that was conducted at the Allegheny County Coroner's Office on August 26 of 2003. Was an autopsy conducted on the body of Anthony Patton ?

Dr. Ladham: Yes, it was.

Prosecution: Who conducted that autopsy ?

Dr. Ladham: Dr. Leon Rozin, our chief forensic pathologist...

Prosecution: Okay. With respect to the -- did you have an opportunity to review Dr. Rozin's reports, notes and anything else that he had documented during the autopsy of Anthony Patton ?

Dr. Ladham: I went through his typed autopsy report and the various photographs that were taken during that *to put together my impression of the case, yes.*

**(emphasis added) [Trial Transcripts, Volume I, pages 137-138; incorporated herein and marked as "Petitioner's Appendix K".]*

64. Providing a "*surrogate witness*" at the Petitioner's trial *did not* satisfy the Petitioner's right to test the findings of the autopsy report, especially since the Petitioner never had a prior opportunity to cross-examine *Dr. Leon Rozin*. [Crawford v. Washington, 541 U.S. 36, 59, 124 S.Ct. 1354, 1369 (2004).] Therefore, when Petitioner's trial counsel failed to object to the violation of Petitioner's confrontation rights, that failure to object *did prejudice* the Petitioner

because the Petitioner was forced to allow the prosecution's *interpretation* of the autopsy data stand *unchallenged*, thus supporting Loenell Howze's version of the case. If Petitioner had been provided an opportunity to cross-examine **Dr. Leon Rozin**, Dr. Rozin could have produced a much clearer and resolute picture for the jury concerning whose version of the case was truly supported by the forensic data (*the prosecution's or the Petitioner's*). However, the Petitioner was deprived of this constitutional right when his trial counsel *chose not to object* to the prosecution's use of a surrogate witness, *Dr. Shaun Ladham*, at Petitioner's trial.

"To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. ...Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." Crawford v. Washington, 541 U.S. 36, 61-62, 124 S.Ct. 1354, 1370-1371 (2004).

"Respondent and the dissent may be right that there are other ways – and in some cases better ways – to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have a license to suspend the Confrontation Clause when a preferable trial strategy is available." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 2536 (2009).

65. *Dr. Leon Rozin's* testimony would also have differed from the *surrogate testimony* of *Dr. Shaun Ladham* because *Dr. Leon Rozin* would have been better equipped to answer questions regarding the absence of "soot" at the deceased's head wound, as well as any communication(s) *Dr. Leon Rozin* may have had with hospital staff concerning the possibility of "rinsing" of the wound before the deceased's body was received at the Coroner's Office. [*"...defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."* Strickland v. Washington, 466 U.S. 668, 694 (1984).]

66. Asking these questions *would not* have been unusual for *Dr. Leon Rozin* to answer because he personally handled the deceased's body during the autopsy process. Therefore, in light of the foregoing facts, the failure of Petitioner's trial counsel to object such a Confrontation Clause violation *did prejudice* the Petitioner. Consequently, Petitioner has met the second prong under the two-prong test established by this Court's Strickland v. Washington ruling.

REASONS FOR GRANTING THE PETITION

REASON #3: Petitioner's trial judge improperly removed the charge of voluntary manslaughter from jury consideration, resulting in a conviction that violated the due process clauses at U.S. Constitution, Amendments V and XIV, and Pennsylvania Constitution, Article I, Section 9.

Compelling And Extraordinary Reasons For Granting The Petition:

67. Before the Petitioner's trial, the prosecution charged the Petitioner with a general and vague criminal charge of "Criminal Homicide"³⁸. As a result, at the start of Petitioner's trial it was necessary for the trial judge to specify exactly which charge(s) the Petitioner would be defending himself against throughout trial, and the trial judge specified the charges of: *murder in the first degree, murder in the third degree, and voluntary manslaughter*³⁹.

68. However, at the conclusion of Petitioner's trial (*after the Petitioner's defense had rested*), the trial judge removed the charge of voluntary manslaughter from jury consideration⁴⁰. As a result, this Reason for granting the petition involves a Sixth Amendment violation to the Petitioner's right to be notified of the charge(s) against him – *before* the start of his criminal trial – as well as the trial judge's obligation to provide the jury with a voluntary manslaughter instruction during a murder trial upon request from the Petitioner. [See: United States ex rel Matthews v. Johnson, 503 F.2d 339 (3d Cir 1974).]

69. This matter has already been decided by the state courts (and the United States Court of Appeals For The Third Circuit) in a way that is contrary to a previous precedent ruling by the United States Court Of Appeals For The Third Circuit. In light of these two reasons, Petitioner respectfully avers that compelling reasons *do exist* for the granting of this petition in accordance with Rule 10(a) of the Supreme Court of the United States.

State Exhaustion Of Issue:

70. Respondents have conceded that this particular issue has been duly exhausted and adequately raised with the state courts. [Respondents conceded to this fact on page 25 of their COMMONWEALTH'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS; A copy of this filing is incorporated herein and marked as "Petitioner's Appendix AU".]

Merit Of The Issue:

71. In the Petitioner's case, he was facing the charge(s) of *murder in the first degree, murder in the third degree, and voluntary manslaughter* during the course of trial. [See: Trial Transcripts,

³⁸ Before trial, the Petitioner was charged with 18 Pa.C.S. 2501. § Criminal homicide, which is an open and vague statute that instantaneously includes the offenses of: *murder in the first degree, murder in the second degree, murder in the third degree, voluntary manslaughter, and involuntary manslaughter*. A copy of this statute is incorporated herein and marked as "Petitioner's Appendix P".

³⁹ At the start of Petitioner's trial, in open court, the trial judge specified that the Petitioner would be facing the specific criminal charges of: *murder in the first degree, murder in the third degree, and voluntary manslaughter*. [See: Trial Transcripts, Volume I, pages 4-6; A copy of which is incorporated herein and marked as "Petitioner's Appendix K".]

⁴⁰ At the conclusion of Petitioner's trial, and after the Petitioner's defense had rested, the trial judge took it upon himself to *change* the charges that the Petitioner was facing by removing the charge of voluntary manslaughter from jury consideration. [See: Trial Transcripts, Volume II, page 123; A copy of which is incorporated herein and marked as "Petitioner's Appendix L".]

Volume I, pages 5-6; A copy of which is incorporated herein and marked as "Petitioner's Appendix K".] However, during the jury charge phase of Petitioner's murder trial, the trial judge chose to *remove* the charge of voluntary manslaughter from jury consideration. *[See: Trial Transcripts, Volume II, page 123; A copy of which is incorporated herein and marked as "Petitioner's Appendix L".]* Even though the Petitioner had previously preserved his right to have a jury instruction on voluntary manslaughter given to the jury. *[See: Trial Transcripts, Volume II, page 79; A copy of which is incorporated herein and marked as "Petitioner's Appendix L".]*

72. The United States Court Of Appeals For The Third Circuit has previously issued a decision that weighs heavily in the Petitioner's favor concerning this appellate issue. Such a situation (*similar to the Petitioner's*) presented itself in the matter of *United States ex rel Matthews v. Johnson*, 503 F.2d 339 (3d Cir. 1974). That case involved a failure of the trial court to grant a Pennsylvania defendant's requested jury instruction on voluntary manslaughter. In that case, the prosecution argued that the trial court's failure to grant the jury instruction on voluntary manslaughter was a "harmless error" because the jury had returned a guilty verdict for first degree murder. However, the United States Court Of Appeals disagreed, stating the following:

"This contention overlooks the possibility that if a jury had three options instead of two, the jury could have compromised on the middle ground of second degree. Although of course no one can say with precision that given three alternatives, the jury has a greater probability of compromise, we do recognize that with three alternatives, at least 'there is a reasonable possibility' of compromise. **Therefore, we cannot say that a failure to give the charge 'was harmless beyond a reasonable doubt.'**" (*emphasis added*) Id. at 346.

73. In Petitioner's case, the Petitioner was similarly prejudiced by the trial judge's refusal to allow the jury to consider a voluntary manslaughter verdict. Such a prejudice has led to a violation of the Petitioner's Due Process rights under established law:

“We believe that the safeguards of due process will be satisfied only when all defendants in Pennsylvania murder trials are given the same opportunity, upon request duly made, to have a jury return a verdict of voluntary manslaughter as well as first and second degree murder. To hold otherwise is to expose a defendant to the idiosyncrasies of the trial judge to whom the case has been assigned, or the ‘whim or caprice’ of a given judge on a given day.” (*emphasis added*) Id. at 346.

74. Furthermore, the state appellate courts have contended that the trial judge’s refusal to give a voluntary manslaughter jury instruction was not a violation because the evidence within Petitioner’s murder trial did not support a voluntary manslaughter verdict. However, Petitioner avers that this determination *was not* for the state appellate courts, nor the trial judge, to make as such a determination deprived the jury of their ability to act as fact-finder and return a different verdict:

“While it is considered felonious, voluntary manslaughter is the least culpable form of homicide included within a murder indictment. Thus, when considering the degree of culpability of an individual being tried under such an indictment, a jury may return a voluntary manslaughter verdict if it finds that the killing, although intentional, was committed without malice; that is, the accused may be shown to have been acting under the influence of sudden passion which was caused by legally adequate provocation that placed him beyond the control of reason... **These elements need not always be present, however, to support a voluntary manslaughter verdict.** Pennsylvania courts have long accepted the common law rule that **the jury has the power to find a defendant guilty of voluntary manslaughter even in the absence of passion or provocation, where the evidence is sufficient to support a first or second degree murder verdict...** Although superficially such a rule may seem incongruous, it does have a rational basis. In essence, the rationale of the rule is founded on two considerations: (1) the legal concept that voluntary manslaughter is by definition a lesser offense than murder but one included within a murder indictment, [and] (2) a realistic appreciation of the fact that factors such as sympathy or extenuating circumstances may lead a jury to find a defendant guilty of the lesser included offense of voluntary manslaughter even though the evidence is enough to establish guilt of murder in the second or first degree.” (*emphasis added*) Id. at 342.

75. Secondly, Petitioner’s conviction represents a violation of his Sixth Amendment right to be notified of all the charge(s) **before his trial starts.** “*In all criminal prosecutions, the alleged shall enjoy the right to... be informed of the nature and cause of the accusation...*” U.S. Constitution,

Amendment VI.

76. At the start of Petitioner's trial, the trial judge informed the jury and the Petitioner that the Petitioner would be facing the "*generic charge of criminal homicide*", and that the Petitioner would be specifically defending himself against the charges of: "*murder of the first degree, murder of the third degree, and voluntary manslaughter...*" [Trial Transcripts, Volume I, pages 4-6; A copy of which is incorporated herein as "Petitioner Appendix K".] When the trial judge informed the Petitioner and the jury (on the record) of the specific charges Petitioner was facing, the judge was providing the Petitioner with formal notice of the specific charge(s) against him to satisfy the Sixth Amendment, because Petitioner's charging document did not provide such notice ⁴¹.

77. However, after Petitioner's defense rested, the trial judge improperly changed the charges when he instructed the jury that they could only deliberate on the offenses of: "*murder in the first degree and murder in the third degree...*" [Trial Transcripts, Volume II, page 123; A copy of which is incorporated herein as "Petitioner's Appendix L".] Misleading the Petitioner into believing that he would be defending himself against a possible voluntary manslaughter verdict – only to later *change that fact* after the Petitioner's defense had rested – represents a blatant and direct violation to the Petitioner's Sixth Amendment rights:

"...it is necessary that the Commonwealth confront the defendant with a formal and specific accusation of the crimes charged. This accusation enables the defendant to prepare any defense available to him, and to

⁴¹ Pursuant to Petitioner's charging document (*the "Criminal Information"*), the Petitioner was charged with the vague offense of "criminal homicide", which has several underlying criminal offenses including within the statute, namely: *murder in the first degree, murder in the second degree, murder in the third degree, voluntary manslaughter, and involuntary manslaughter* – none of which were specified on the Petitioner's Criminal Information. [A copy of the Petitioner's charging document is incorporated herein and marked as "Petitioner's Appendix O". A copy of the vague statutory text of 18 Pa.C.S. §2501. Criminal homicide is incorporated herein and marked as "Petitioner's Appendix P".]

protect himself against further prosecution for the same cause; it also enables the trial court to pass on the sufficiency of the facts alleged in the indictment or information to support a conviction. ***The right to a formal notice of the charges, guaranteed by the Sixth Amendment of the federal constitution and by Article I, Section 9 of the Pennsylvania Constitution, is so basic to the fairness of the subsequent proceeding that it cannot be waived even if the defendant voluntarily submits to the jurisdiction of the court.*** (emphasis added) Commonwealth v. Little, 314 A.2d 270, 272-273, 455 Pa. 163, 168 (1974).

78. Although the aforementioned decision in Little primarily refers to a case addressing the subject matter jurisdiction of a Pennsylvania state trial court, the common principle of "*due notice of the accusation(s) alleged*" still applies. **It is procedurally impossible for a criminal defendant to adequately defend himself at trial if he has no idea of exactly what charge(s) the jury will be able to consider once trial is over. Moreover, what purpose does a Criminal Information (the charging document) serve if a trial court may simply amend the charge(s) of that document after the defendant has retired his defense at trial ?**

"...the Sixth Amendment of the U.S. Constitution and Article I, §9 of the Pennsylvania Constitution, each of which affords an accused person the right to be notified of the charges against him. Due Process requires that the notice '*set forth the alleged misconduct with particularity.*' " (emphasis added) In re Gault, 387 U.S. 1, 33, 87 S.Ct. 1428.

79. Petitioner respectfully avers that neither his charging document ⁴², nor the trial judge's opening remarks at Petitioner's trial ⁴³, provided the Petitioner with adequate *due notice* of the charge(s) against him, thus causing a blatant Sixth Amendment violation. Therefore, Petitioner respectfully requests that this Honorable Court grant this petition to address this constitutional violation.

⁴² A copy of this document is incorporated herein and marked as "Petitioner's Appendix O".

⁴³ Trial Transcripts, Volume I, pages 4-6; incorporated herein as "Petitioner's Appendix K".

REASONS FOR GRANTING THE PETITION

REASON #4: Petitioner's conviction and sentence resulted from violations to U.S. Constitution, Amendments V and XIV, Pennsylvania Constitution, Article I, Section 9, and Pennsylvania Rules of Criminal Procedure 802, all of which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

Compelling And Extraordinary Reasons For Granting The Petition:

80. This particular Reason for granting the petition is an appellate issue of first impression for the Court. It concerns an unlawful "customary practice" throughout Pennsylvania's state trial courts wherein criminal defendants in homicide cases have been routinely convicted and sentenced of committing a "*capital*" crime during a "*non-capital*" prosecution.

81. Petitioner seeks appellate review from this Honorable Court in hopes that a published decision would set a much-needed precedent and standard that would hopefully discourage the continuance of this blatant Due Process violation. For these reasons, Petitioner respectfully avers that this particular appellate issue *does possess* compelling reasons for the granting of this petition in accordance with Rule 10 of the Supreme Court of the United States.

State Exhaustion Of Issue:

82. Respondents have conceded that this particular issue has been duly exhausted and adequately raised with the state courts. [Respondents conceded to this fact on page 25 of their COMMONWEALTH'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS; A copy of this filing is incorporated herein and marked as "Petitioner's Appendix AU".]

Merit Of The Issue:

83. Under Pennsylvania state law, the prosecution must file a "*Notice Of Aggravating*

Circumstances" ⁴⁴, before the start of a homicide trial for the case to be a "*capital case*". See: Commonwealth v. Buck, 709 A.2d 892, 551 Pa. 184 (1998). The filing of this "*Notice Of Aggravating Circumstances*" also preserves the trial court's ability to conduct the statutorily-required sentencing procedures that *must follow* a first degree murder conviction after the verdict has been reached ⁴⁵.

84. 42 Pa.C.S. §9711 clearly reveals that the sentencing procedures for a first degree murder conviction in Pennsylvania *only pertain to capital cases*. No other sentencing procedures have been prescribed in Pennsylvania for first degree murder convictions. Consequently, it must be acknowledged that first degree murder under Pennsylvania law can only be considered as a "capital" offense which can only be reached during a "capital" murder case.

85. Petitioner's case, however, *was not* capital in nature because the prosecution chose not to file any "*Notice of Aggravating Circumstances*" before the start of trial. As a result, the prosecution forfeited their right to pursue a first degree murder conviction because the mandatory sentencing procedures at 42 Pa.C.S. §9711(c)(1)(i) and (ii) had no way of being procedurally implemented by the trial court during sentencing.

86. Although the trial judge knew there was no way to implement the mandatory sentencing procedures at 42 Pa.C.S. §9711(c)(1)(i) and (ii) (*wherein he had to instruct the jury on the aggravating and mitigating circumstances*), the trial judge still unlawfully: (1) instructed the jury

⁴⁴ A "*Notice Of Aggravating Circumstances*" filing before the start of a homicide trial, pursuant to Pa.R.Crim.P. 802, establishes and preserves the "*aggravating circumstances*" that can be weighed against mitigating circumstances after trial *if* a first degree murder conviction is reached. A verbatim copy of the text at Pa.R.Crim.P. 802 is incorporated herein and marked as "Petitioner's Appendix BF".

⁴⁵ Under Pennsylvania law, after a criminal defendant has been found guilty of "*murder in the first degree*", the trial court must conduct the mandatory sentencing procedures as prescribed under 42 Pa.C.S. §9711. Sentencing procedure for murder of the first degree. A verbatim copy of the text at 42 Pa.C.S. §9711 is incorporated herein as "Petitioner's Appendix BG".

to deliberate on a first degree murder charge, and (2) discharged the jury immediately after the first degree murder conviction was recorded, without conducting the statutorily-required "*penalty phase*" that was mandated at 42 Pa.C.S. §9711(a)(1) and 42 Pa.C.S. §9711(c)(1)(i) and (ii).

87. The trial judge did this despite the fact that the sentencing procedures at 42 Pa.C.S. §9711 ***mandated*** that trial judges only have the authority to discharge a jury early if it is determined that *further consideration of the aggravating and mitigating circumstances* will not result in a unanimous agreement between life imprisonment and the death penalty. 42 Pa.C.S. §9711(c)(1)(v).

88. Fully aware that provisions under 42 Pa.C.S. §9711 had been violated, the trial judge attempted to conceal the violations during Petitioner's sentencing hearing when he stated: "...*the jury having imposed the penalty of life imprisonment...*" [Sentencing Hearing Transcripts, page 6; A copy of which is incorporated herein and marked as "Petitioner's Appendix M".] However, it was procedurally impossible for the jury to have imposed the penalty of life imprisonment upon the Petitioner because the jury was immediately discharged by the trial judge *before* ever having the opportunity to deliberate Petitioner's sentence via a "*penalty phase*". [Trial Transcripts, Volume II, pages 125-128; A copy of which is incorporated herein and marked as "Petitioner's Appendix L".]

89. Petitioner has been convicted of a "*capital*" offense, even though his case was "*non-capital*" in nature. This is verified when you consider that the Petitioner has been convicted of a crime in which the mandatory sentencing procedures could not even be applied to him. An enacted state law cannot *lawfully* be disregarded and undermined by a trial judge the way it has been in Petitioner's case. Pennsylvania has long held that "*legislative intent*" controls:

"When the words of a statute are clear and free from ambiguity, the letter of it ***is not to be disregarded*** under the pretext of pursuing its spirit." (*emphasis added*) 1 Pa.C.S. §1921(b).

"... when interpreting a state statute, ***the role of the federal courts is to enforce that statute where possible according to it's plain terms***. When the language of a statute is unambiguous and conveys a clear and definite meaning, there is no need to restore to extrinsic tool to

determine a state's legislative intent. 1 Pa.C.S. 1921(b)(c)." (*emphasis added*) Buffalo Molded Plastics, Inc. v. Plastic Mold Tech, Inc., 354 B.R. 731 (3d Cir 2006).

90. Although the Petitioner has been sentenced to the "*lesser*" first degree murder penalty of life imprisonment – which the Respondents will aver was mandatory for the conviction – the fact still remains that the Petitioner should never have been convicted of a crime in which it was procedurally impossible for the mandatory sentencing procedures to be applied. To do so represented a blatant disregard for the Petitioner's Due Process rights at trial *and* sentencing:

"It has been held that since a person's liberty is at stake in a sentencing procedure, it obviously involves deprivation of due process if the sentencing procedure is improper." Commonwealth v. Walker, 428 A.2d 661, 662 (*Pa.Super.* 1981).

"It is now clear that the sentencing process, as well as the trial itself must satisfy the requirements of the Due Process Clause." Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205 (1977); Commonwealth v. Wright, 494 A.2d 354, 359, 508 Pa. 25, 36 (1985).

REASONS FOR GRANTING THE PETITION

REASON #5: Petitioner's trial judge presided over the Petitioner's jury trial despite failing to be lawfully retained through a previous municipal election, causing a violation to the due process clauses of U.S. Constitution, Amendments V and XIV, Pennsylvania Constitution, Article I, Section 9, and the Pennsylvania Rules of Judicial Administration, all of which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

91. This particular "*reason for granting the petition*" may be an appellate issue of first impression for this Honorable Court. It involves an illegal conviction and illegal sentence claim due to the trial judge's failure to be a duly-retained "judicial officer" under the scope of governing Pennsylvania state law. As a result, Petitioner avers that extraordinary reasons *do exist* for the

granting of this petition in accordance with Rule 10 of the Supreme Court of the United States.

92. Respondents have conceded that this particular issue has been duly exhausted and adequately raised with the state courts. [Respondents conceded to this fact on page of their COMMONWEALTH'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS; A copy of this filing is incorporated herein and marked as "Petitioner's Appendix AU".] Respondents contend, however, that this particular issue is procedurally defaulted.

93. This appellate issue consists of an unlawful trial proceeding and illegal sentence, the latter of which can never be waived (i.e.: procedurally defaulted) under established Pennsylvania law. [*"If the legality of sentence is implicated, whether it was properly preserved below is of no moment, as a challenge to the legality of sentence cannot be waived."* Commonwealth v. Taylor, 104 A.3d 479, 489, 628 Pa. 547, 563 (2014); Commonwealth v. Dickson, 918 A.2d 95, 99, 591 Pa. 364, 370 (2007).] Thus, Petitioner escapes the "procedural default" restriction for this particular issue.

94. Petitioner's trial judge, John K. Reilly, Jr., was initially elected as a judge in the Court of Common Pleas of Clearfield County, Pennsylvania, on November 6, 1973, at a municipal election. Then, on November 8, 1983, Judge Reilly was lawfully retained as a Common Pleas Judge through a retention election in the same county. [These facts were confirmed by the Petitioner through certified documents obtained from the Pennsylvania Department of State – Bureau of Elections Office.] However, on November 2, 1993, Judge Reilly failed to *lawfully* participate in that year's municipal retention election, which is required under state law at 42 Pa.C.S. §3153, nor did Judge Reilly participate in any other type of municipal election for judicial office that year, which is required under state law at 42 Pa.C.S. §3131(c). [A verbatim copy of the text at these two statutes is and marked as "Petitioner's Appendix BH" and "Petitioner's Appendix BI".]

95. Consequently, Judge Reilly's "tenure" as a judge beyond the date of January 1994 (*the date in which his last duly-elected judicial term ended*) was fraudulent and void of any legal authority.

To be *lawfully* considered for retention election, a judge must file a "*Declaration of Candidacy For Retention Election*" with the Secretary of the Commonwealth of Pennsylvania on or before the first Monday preceding the year in which that judge's term of office expires. 42 Pa.C.S. 3131(b).

96. However, pursuant to the Affidavit of Jessica Mathis, *Chief of the Elections and Voter Registration Division for the Pennsylvania Department of State*, there is no record on file for Judge John K. Reilly, Jr., to confirm that he properly filed the required "*Declaration of Candidacy For Retention Election*" to lawfully participate in the retention election of November 2, 1993. [A copy of this Affidavit is incorporated herein and marked as "Petitioner's Appendix BJ".]

97. Respondents have tried to discredit the Petitioner's appellate issue with a document that alleges Judge Reilly was retained through 1993's retention election. ["Petitioner's Appendix BK".] Close examination of "Petitioner's Appendix BK", reveals that all retention election questions and the retention election results (concerning judges who *lawfully* participated in that year's election) are uniformly *typed* into their respective columns and slots. However, the alleged retention election question and results, for Judge Reilly are *mysteriously handwritten* into empty columns and slots by an unknown party. ["Petitioner's Appendix BK".] Petitioner contends that the document provided by the Respondents is obviously fraudulent, inauthentic, and ultimately void.

CONCLUSION

98. WHEREFORE, in light of the foregoing facts and reasons, Petitioner respectfully avers that this *Petition For A Writ Of Certiorari* should be granted in the interest of justice.

January 18, 2018
Date

Respectfully submitted,

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