

No. A-_____

In the Supreme Court of the United States

BRYAN R. JOHNSTON,

Applicants,

v.

LISA A. MITCHELL

SUPERINTENDENT, OLD COLONY CORRECTIONAL CENTER,

Respondent.

**Application for Extension of Time to File
Petition for Writ of Certiorari
to the United States Court of Appeals for the First Circuit**

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Bryan Johnson respectfully request a 60-day extension of time, to and including Monday, February 5, 2018, within which to file a petition for a writ of certiorari.

The decision of the United States Court of Appeals entered on its docket on September 8, 2017. *Johnston v. Mitchell*, 871 F.3d 52 (1st Cir. 2017). The opinion is attached.

Unless extended, Petitioners' time to file a petition for a writ of certiorari will expire on December 7, 2017. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

Issue to be Presented in Certiorari Petition

The petitioners' forthcoming certiorari petition presents the following two questions:

1. In a first degree murder case, trial counsel introduced psychiatric records from pre-trial detention facilities containing numerous damaging statements made after Johnston invoked his Fifth Amendment right to counsel. *Edwards v. Arizona*, 451 U.S. 477 (1981) held that statements made in response to questioning after an invocation of the right to counsel must be suppressed. *Estelle v. Smith*, 451 U.S. 454 (1981) holds that, for Fifth Amendment purposes, there is no difference between police interrogation and doctors conducting a court-ordered evaluation. In those circumstances, should a reasonable attorney have pursued a motion to suppress Johnston's post-invocation statements?
2. Trial counsel introduced evidence that Johnston invoked his *Miranda* rights at least fifteen times. The invocations undercut the sole defense of mental illness by making Johnston appear calculating and rational. The state court held that counsel's performance was ineffective but the error was harmless. Where courts have only held such errors harmless if the references to *Miranda* invocations were few and isolated, was this prejudice determination unreasonable?

Basis of Jurisdiction and Judgment Sought to be Reviewed

This Court has jurisdiction under § 1254(1) because the judgment was rendered by the Court of Appeals for the First Circuit. The First Circuit rejected Johnston's arguments on the merits, not on the basis of procedural default. *Johnston*, 871 F.3d at 61, 64.

Good Cause for Extension

Undersigned counsel is not able to properly prepare the contemplated petition prior to December 7, 2017 for the reasons listed below. A first draft of the first issue has been completed.

Undersigned counsel is responsible for the following cases which have required his attention or will require his attention during the period for seeking certiorari:

1. *McGrath, et al v. Massachusetts*, No. 17-6483 (U.S. 2017) (first degree murder). A petition for certiorari was filed on October 23, 2017.
2. *Commonwealth v. Dowds*, No. SJC-10340 (first degree murder). After filing the defendant's principal brief, the Commonwealth revealed exculpatory evidence in April, 2017. The matter has been remanded for a new evidentiary hearing scheduled for December 7, 2017.
3. *Commonwealth v. Rogers*, No. SUCR2004-10439 (Suffolk Sup. Ct.) (first degree murder). Substantial investigation and drafting in anticipation of a motion for new trial has occurred. The filing of that motion is imminent.
4. *Commonwealth v. Bateman*, No. SJC-10079 (Mass.) (first degree murder, two counts). A motion for new trial to be filed concurrently with the defendant's direct appeal is actively being

drafted and investigated. Further, in the past 3 months, counsel has conducted intensive drafting and investigation.

5. *Commonwealth v. Olszewski*, No. 82-472 (Hampden Sup. Ct.) (first degree murder). A motion for discovery and DNA testing pursuant to M.G.L. c. 278A were recently allowed in this 35 year old case. With all counsel present, materials were submitted to a forensic laboratory for testing on October 17, 2017.
6. *Commonwealth v. Carter*, No. SJC-11517 (first degree murder). Counsel has undertaken substantial and significant investigation, which is ongoing.

Conclusion

For all the foregoing reasons, the Court should grant Petitioner an extension of time to and including February 5, 2017, within which to file a petition for a writ of certiorari.

Respectfully submitted,

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