No. 13-735

IN THE
SUPREME COURT OF THE UNITED STATES

EFREN MEDINA,

Petitioner,

VS.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION

THOMAS C. HORNE
Attorney General

ROBERT L. ELLMAN
Solicitor General

JEFFREY A. ZICK
Section Chief Counsel

JOHN PRESSLEY TODD
Assistant Attorney General
(Counsel of Record)
Capital Litigation Section
1275 W. Washington
Phoenix, Arizona 85007–2997
john.todd@azag.gov
cadocket@azag.gov
Telephone: (602) 542–4686

QUESTION PRESENTED

CAPITAL CASE

Given the different purposes of autopsy reports and the varying circumstances in which they are prepared, should this Court nevertheless grant certiorari and decide that autopsy reports are categorically testimonial or non-testimonial under the Confrontation Clause?

If so, given petitioner's failure to raise a Confrontation objection at trial, and the harmlessness of the alleged error, is this an appropriate case for certiorari review?

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The Arizona Supreme Court's opinion is published at *State v. Medina*, 306 P.3d 48 (Ariz. 2013) and included in the Appendix to Petitioner Efren Medina's petition for a writ of certiorari (Pet. App. A, 1a-40a).

STATEMENT OF JURISDICTION

This Court has jurisdiction under Article III, Section 2 of the United States Constitution and 28 U.S.C. § 1257(a). The Arizona Supreme Court entered its judgment on August 22, 2013. (Pet. App. A, 1a.) Justice Kennedy extended the time for filing Medina's petition for a writ of certiorari to December 20, 2013, after which Medina timely filed his petition on December 17, 2013.

CONSTITUTIONAL PROVISIONS

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Petitioner Efren Medina asks this Court to correct a claimed Confrontation Clause error, raised for the first time on appeal, arising from the admission of the victim's autopsy report into evidence in his capital sentencing proceeding. He contends the report was critical in establishing an aggravating circumstance. The record demonstrates that the report was neither testimonial for purposes of the Confrontation Clause,

nor critical in establishing an aggravating circumstance.

At the aggravation phase of his capital resentencing proceeding, Medina unsuccessfully objected on hearsay grounds to admission of the 19-page autopsy report (Trial Exhibit 105; reproduced at Pet. App. B 41a-60a.) describing the condition of the victim's body and concluding the death was a homicide cause by blunt force trauma. Medina's objection rested on the fact that the witness was not the same medical examiner who authored the report.[1] (Trial Tr. 9/15/2008, at 8.) On appeal, Medina assigned error on a different ground, claiming the admission of the report at this phase of the trial violated the Sixth Amendment Confrontation Clause. (Pet. App. 19a, ¶ 51.) The Arizona Supreme Court nevertheless addressed Medina's Confrontation Clause claim on the merits and rejected it, finding that the autopsy report was not testimonial. (*Id.* 19a, ¶ 53.)

Medina assigns prejudicial error to that finding because the victim's autopsy report supported the

[1] Medina does not dispute that the objection was limited to hearsay. (Pet. 6-7) ("on the basis that the report itself was 'hearsay' and 'was completed by a different person than the one that [was] going to testify"). Furthermore, Medina did not preserve a Sixth Amendment objection, as he implies, by at least claiming he was being deprived of his right to cross-examine the author of the autopsy report. While Medina's failure to preserve the issue he now presents weighs against a grant of certiorari, it does not deprive this Court of jurisdiction to hear this case, because the Arizona Supreme Court did not rest its judgment on this independent and adequate state-law procedural failure, this Court is not deprived of its *jurisdiction* to hear the case. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

"gratuitous violence" portion of Arizona's especially heinous or depraved aggravating circumstance. *See* A.R.S. § 13-751(F)(6) (describing this aggravating factor). Specifically, Medina complains that harm arose from the autopsy report's statements that the victim's liver was 'severely lacerated,' [Pet. App. 57a], and that the victim had suffered multiple rib fractures, [Pet. App. 58a-59a.]" (Pet. 4.) Under Arizona's capital sentencing scheme, jurors must find at least one aggravating circumstance to make a convicted murderer eligible for the death penalty. *See Ring v. Arizona*, 536 U.S. 584 (2002). In Medina's case, jurors found four aggravating circumstances. (Pet. App. 31a, ¶ 84.) Moreover, in upholding the jury's finding of the especially heinous or depraved aggravating circumstance under its independent review to assure the propriety of the death penalty, the Arizona Supreme Court did *not* rely on the autopsy report. (Pet. App. 34a-35a.)

Medina correctly represents that since 2004 when this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), lower courts have reached varying conclusions in cases addressing whether autopsy reports in homicide cases are testimonial. As this brief explains, that variance reflects significant differences in the purposes for which autopsy reports are prepared and the circumstances in which they are used as evidence, rather than an unresolved Sixth Amendment issue of nationwide importance. Since this Court decided *Williams v. Illinois*, 567 U.S. ___, 132 S. Ct. 2221 (2012), seven reported decisions (including the decision below) have addressed the testimonial implications of autopsy reports. Each decision rests

upon its own facts and circumstances. Accordingly, the considerations governing review on certiorari weigh against review here. *See* Rule 10(b, c), Rules of the Supreme Court of the United States.

1993: Medina Murders Carle Otis Hodge

The decision below describes the key facts surrounding the murder. (Pet. App. 2a-4a.) On a late September night 20 years ago, Medina and two accomplices decided to steal a car. Medina dragged the victim, 71-year-old Carle Hodge, from his car and beat him into submission. Unable to start the victim's car, Medina dragged the victim into the street and, then got into his car with his companions, sped away only to come racing back. Medina – who jokingly likened Mr. Hodge to a "speed bump" – then drove his car over Hodge's body three times with both the front and back wheels, "going forward over him, then reversing over him and going forward again." (Pet. App. 4a, ¶ 7.)

1999 to 2003: The Arizona Supreme Court Affirms the Death Sentence, But the Trial Court Grants Resentencing in Medina's Post-Conviction Relief Proceedings.

The Arizona Supreme Court affirmed Medina's 1995 convictions for first degree murder, third degree burglary, and aggravated robbery, and his death sentence for the murder of Carle Hodge. *State v. Medina*, 975 P.2d 94 (Ariz. 1999). Medina then filed a state post-conviction relief petition alleging his trial counsel was constitutionally ineffective at sentencing

for failing to examine Medina's juvenile court file. (Trial Tr. 6/27/2003, at 28.) The trial court found trial counsel's decision not to obtain the juvenile records unreasonable under *Strickland v. Washington*, 466 U.S. 648 (1984), and granted a new sentencing proceeding. (Minute Entry 205, filed 11/18/2003.)

2008: The First Resentencing Ends in a Mistrial.

Over a hearsay objection, the autopsy report (Trial Exhibit 105) was admitted at the first resentencing proceeding. (Trial Tr. 9/15/2008, 8, 16.) Dr. Philip R. Keen, the Medical Examiner, who had testified at the first trial in 1995, testified in the first resentencing proceeding that the photographs of Carle Hodge's injuries assisted him in forming his opinions concerning how Hodge was killed. (Trial Tr. 9/15/2008, at 21.) In his opinion, the photographs were consistent with Hodge having been run over by an automobile and inconsistent with Hodge having been standing at the time. (*Id.* at 23.) Based on the photographs and the autopsy report, Dr. Keen testified that the body had been run over more than one time. (*Id.* at 29.)

At the conclusion of the aggravation phase, jurors were instructed on four aggravating circumstances, any one of which would make Medina eligible for the death penalty. The jurors found: (1) Medina had previously been convicted of a serious offense (aggravated assault), (2) Medina had previously been convicted of another serious offense (robbery), (3) the murder was committed in an especially heinous or depraved manner, (4) Carle Hodge was at least 70 years old at the time of the murder, and (5) Medina

was on release from custody at the time of the murder. (Minute Entry 369, filed 9/22/2008.) Medina concedes all these aggravators were "relatively straightforward" except the "especially heinous or depraved" one. (Pet. 6.) However, the sentencing court declared a mistrial when the jurors could not reach a unanimous verdict on which punishment to impose after weighing the aggravating circumstances against the mitigation evidence.

2009: The Second Resentencing Proceeding Results in a Death Sentence.

The trial court conducted a second resentencing, to determine whether Medina would receive a death sentence based on the previously found aggravating circumstances. Dr. Keen again testified concerning his opinions. (Trial Tr. 12/4/2009, at 43-94.) He explained that in 1993 he supervised two full-time staff pathologists, one being Dr. Ann Bucholtz.[2] (*Id.* at 45.)

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[2] Medina erroneously asserts that Dr. Bucholtz was available to testify, and implies Dr. Keen testified instead for some nefarious reason. (Pet. 6, 12.) He asserts that Dr. Bucholtz lived in the Phoenix area and "continues to practice forensic pathology," citing a link to an internet website that is neither part of the record, nor is available for judicial notice. (*Id.* at 19). In the 1995 trial, Dr. Keen testified that Dr. Bucholtz no longer worked for his office, but was a medical examiner in Nashville, Tennessee. (Trial Tr. 3/13/1995, at 6.) At the 2009 resentencing proceeding, Dr. Keen testified that Dr. Bucholtz had returned periodically to work for the Maricopa Medical Examiner, but she was then currently working as a pathologist in California. (Trial Tr. 12/4/2009, at 45.) The Arizona website for the Arizona Medical Board indicates that Dr. Bucholtz is currently with the Ventura County Medical Examiner although her Arizona license remains active. (Continued)

Dr. Keen testified that when Dr. Bucholtz conducted autopsies, it was her practice to tape record specific traumatic findings as she observed them and then have the tape transcribed. (*Id.* at 48-49.) Dr. Keen explained that he and Dr. Bucholtz were both performing autopsies at the time of Hodge's autopsy and while not assisting in the Hodge's autopsy, he was able to observe portions of it. (*Id.* at 47.) When the State offered the autopsy report (Trial Exhibit 105) into evidence in this proceeding, Medina's counsel expressly stated he had no objection to its admission. (*Id.* at 52.) At the conclusion of this phase, jurors returned a verdict sentencing Medina to death. (Trial Tr. 1/12/2010, at 4-5.)

2013: The Arizona Supreme Court Again Affirms Medina's Death Sentence

In the direct appeal, Medina argued for the first time that admission of the autopsy report violated the Sixth Amendment Confrontation Clause. The Arizona Supreme Court applied *Williams* in rejecting Medina's Confrontation Clause claim. (Pet. App. 19a-24a.) The Court recognized that the Confrontation Clause prohibited the admission of out-of-court testimonial evidence absent the defendant's opportunity to cross-examine the declarant. (*Id.* 19a, ¶ 54.) The Court also

(Continued).

http://www.azmd.gov/glsuiteweb/clients/azbom/Public/Profile.aspx?entID=1622977&licID=256077&licType=1 (last visited Dec. 29, 2013). Medina fails to cite anything in the trial court record suggesting that Dr. Bucholtz was employed by the Maricopa County Medical Examiner in 2008 or 2009, or readily available to testify at the 2008 or 2009 resentencing proceedings.

acknowledged that public or business records generally are not testimonial because such records are not created for the purpose of proving some fact at trial, but rather for the administration of the entity's affairs, citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009) and *Crawford*. (*Id.* 20a, ¶ 55.)

The Arizona Supreme Court also acknowledged that this Court had not issued any opinion addressing whether an autopsy report is testimonial for purposes of the Confrontation Clause. (*Id.* ¶ 56.) In applying the reasoning of *Williams*, the Arizona Supreme Court first examined the plurality opinion authored by Justice Alito finding that the "primary purpose" of the challenged laboratory report was not to gather evidence against Williams. (*Id.* 21a, ¶ 57.) The Arizona Supreme Court then examined the concurrence by Justice Thomas, who found that the laboratory report "lack[ed] the solemnity of an affidavit" and "was not the product of any sort of formalized dialogue resembling custodial interrogations." (*Id.* 21a-22a, ¶ 59.)

Finding no categorical rule that treats an autopsy report as testimonial, the Arizona Supreme Court analyzed Bucholtz's autopsy report under both tests, finding it admissible under both. (*Id.* 22a-23a, ¶¶ 60-63.) Noting that Medina was not a suspect at the time the autopsy was conducted, the Arizona Supreme Court concluded "[u]nder the plurality test, the autopsy report *here* is not testimonial because *its* purpose was not primarily to accuse a specified individual." (*Id.* 22a, ¶ 61.) (emphases supplied). The Court also concluded, using the solemnity test, that the report

was nontestimonial because the autopsy report does not "certify[] the truth of the analyst's representations." (*Id.* 23a, ¶ 63.) "The signed report details the conditions of the body, states the examiner's conclusions regarding the cause and manner of death, and certifies that the report reflects her opinion as to the cause and manner of death and that she took charge of the body. The autopsy report does not certify that the report was correct or that she followed the correct procedures." (*Id.*)

Having concluded that the statements contained in the autopsy report were non-testimonial under either formulation in *Williams*, the Arizona Supreme Court held that Dr. Keen's testimony regarding the report "did not violate the Confrontation Clause." (*Id.* ¶ 64.)

Medina also argued that the evidence presented in his 2008 trial did not support a finding of gratuitous violence—that "he continued to inflict violence after he knew or should have known that a fatal action had occurred"—a predicate to a finding of the especially heinous and depraved aggravating circumstance. (*Id.* 32a, ¶ 88; 34a, ¶ 93.) Under Arizona law, the jurors were instructed that two factors could independently support a finding of heinousness and depravity: relishing the murder or inflicting gratuitous violence. (*Id.* 32a, ¶ 88.)

The Arizona Supreme Court concluded that Medina relished the murder because he had joked and laughed about it within hours. (Pet. App. 33a, ¶ 92.) Medina does not challenge that finding in his petition for a writ of certiorari. Rather, he theorizes that the autopsy

report was significant evidence of gratuitous violence, the other independent factor that would support a finding that Hodge's murder was heinous and depraved. (Pet. 6.) Although Medina did not testify at his trial or resentencings, he disputed the number of times he drove over Hodge.

Critically, in concluding that the evidence supported a finding of gratuitous violence, the Arizona Supreme Court did not rely on the autopsy report. Rather, it noted that "the medical examiner testified that 'the distribution of injuries' suggested that the victim was run over more than once." (Pet. App. 34a, ¶ 94.) The Court also focused on testimony by a witness Medina had spoken to shortly after the murder:

> Calderon testified that Medina told her that he ran over the victim "about three times," "once going forward, once going backwards and then once again coming forward." She also stated that Medina said "that every time he ran over [the victim,] the head would move into a different direction."

(*Id.* ¶ 95.) Finally, the Court considered statements by an eyewitness who had testified at the first trial:

> He testified that the victim became "red-headed" after the tires went over him. Giles could not see if the tires actually ran over the victim's head, but said the victim seemed to be either unconscious or dead after the first pass of the car.

(*Id.* ¶ 96.) The Arizona Supreme Court concluded:

> We find that Medina knew or should have known that he had inflicted a fatal wound and yet continued to inflict injury upon the victim. The seventy-one year old victim had been beaten up, stomped on, and dragged into the street, then run over by a car containing three men. According to the medical examiner, the victim died less than a minute, perhaps even seconds, after the first pass of the car. After the first pass, the victim was so bloodied that it was visible to a witness across the street. Yet Medina ran over the victim twice more.

(*Id.* 35a, ¶ 97.)

REASONS FOR DENYING THE WRIT

This case presents no compelling reason to grant a writ of certiorari. *See* Sup. Ct. R. 10.

The question posed in the petition is largely illusory: there is no categorical answer to whether an autopsy report is testimonial for purposes of the Confrontation Clause. The answer would depend on the purposes and circumstances of its creation and the use for which it was offered at trial. Even if this Court could appropriately treat autopsy reports as categorically testimonial (such as statements made by witnesses to investigating police officers), additional

considerations weigh against review: Medina failed to object on Confrontation Clause grounds in the trial court. Consequently, the trial court and the prosecutor had no opportunity to address this issue and develop a record regarding the facts and circumstances that would inform whether the autopsy report was testimonial. Additionally, even if the Arizona Supreme Court erred in applying this Court's precedent, the error was harmless beyond a reasonable doubt given the other proven aggravating circumstances and the additional compelling evidence of Medina's heinousness and depravity. This aggravating factor was independently supported by the jury's finding that Medina relished the murder, a finding upon which the autopsy report had no bearing. Moreover, the Arizona Supreme Court reasonably applied *Williams* in deciding whether the admission of the autopsy report in this case was testimonial.

1. *Any purported conflict in the lower court decisions is largely illusory given the nature of autopsy reports.*

Medina argues that "the sooner this Court clarifies autopsy reports prepared for homicide investigations are testimonial," the sooner it will resolve any litigation over the question. (Pet. 17.) Countless categories of documents and statements, however, draw *Crawford* objections. Some types of documents or statements (such as police investigative reports, police witness interviews) are categorically testimonial and others are categorically non-testimonial (such as 9-1-1 calls). But most types of documents and statements –

including autopsy reports – are not categorically testimonial or non-testimonial because the answer depends on the circumstances in which the document was created, particularly the purposes for which it was intended, in order to determine whether it is testimonial and subject to exclusion under the Confrontation Clause.

One need look no further than Medina's petition to recognize that autopsy reports are not amendable to the kind of categorical constitutional rule he seeks. For example, on the issue of certification the four examples of state statutes Medina cites provide for different types of certification. (Pet. 19.) Virginia provides that a certified autopsy report made under the proper authority "shall be received as evidence in any court[.]" Va. Code Ann. § 8.01-390.2. The Ohio statute referenced by Medina provides that the coroner or medical examiner or person serving in an equivalent capacity "shall certify the cause of death, unless . . . ." Ohio Rev. Code § 3705.16(C). It does not refer to an autopsy report, the manner of death, or the nature of the particular document. The Oregon statute cited by Medina simply provides that the State Medical Examiner "may" "[c]ertify cause and manner of a death requiring an investigation." Or. Rev. Stat. § 146.045(3)(c). The statute does not address certification of autopsy reports or their admissibility. Arizona's statute requires the county medical examiner to "[c]ertify the cause and manner of death following

completion of the death investigation." A.R.S. § 11-594(A). It does not require certification of an autopsy report.

Accordingly, even if lower courts from different jurisdictions reach different results in addressing an autopsy report's admissibility under the Confrontation Clause, it does not reflect a split in the interpretation or application of Supreme Court case law. Some of the cases dealing with autopsy reports, including this one, recognize that they are not "categorically" testimonial. *See United States v. Ignasiak*, 667 F.3d 1217, 1229-36 (11th Cir. 2012) (concluding, given the circumstances of preparation, that the autopsy report was testimonial). The statutes or ordinances or court rules that apply to autopsies, which control fundamental matters such as the circumstances in which they are prepared, and the purposes they serve, vary from state to state, county to county, and court to court. To be certain, splits of authority have developed since *Crawford* concerning statements that are genuinely categorical, such as 9-1-1 calls made by a person seeking protection from immediate danger which also report a crime. *See Davis v. Washington*, 547 U.S. 813 (2006). But autopsy reports are not so easily amenable to this kind of categorical analysis.

This becomes apparent in examining the reported cases since *Williams* that discuss the Confrontation Clause implications of using autopsy reports as

evidence (or as foundation for an expert's opinion) under the *Crawford* line of cases. The relevant facts controlling the outcome of the analysis differ in many outcome-determinative respects. *See United States v. James*, 712 F.3d 79, 96-102 (2d Cir. 2013) (autopsy report admitted with toxicology report, routine autopsy, completed before any criminal investigation, not testimonial not primarily prepared for criminal trial); *Miller v. State*, 313 .3d 934, 970-72 (Okla. 2013) (autopsy report not admitted, testimony consisted almost entirely presenting absent doctor's findings, testimonial); *People v. Edwards*, 306 P.3d 1049, 1087-90 (Cal. 2013) (autopsy report not admitted, not sworn or certified, testifying doctor agreed with findings in report); *State v. Navarette*, 294 P.3d 435, 436-443 (N.M. 2013) (autopsy report not admitted, specific findings admitted, an out-of-court statement disclosed to trier-of-fact testimonial, police attended autopsy, must report findings); *People v. Dungo*, 286 P.3d 442, 446-50 (Cal. 2012) (autopsy report not admitted, police present at autopsy, statutorily mandated, primary purpose not criminal investigation, testifying doctor gave own opinion); *State v. Kennedy*, 735 S.E.2d 905, 914-21 (W. Va. 2012) (autopsy report admitted, testimonial, statutorily required for judicial proceeding, defendant in custody at time of report, but to the extent testifying doctor was not transmitting author's opinion, testimony not in violation of Confrontation Clause); *People v. Leach*, 980 N.E.2d 570, 579-92 (Il. 2012) (autopsy report admitted, report

not certified or sworn, did not matter if author suspected it would be used in a criminal trial, primary purpose not for providing evidence, not testimonial).

Even if autopsy reports were amenable to a categorical ruling (i.e., either all of them are testimonial or all of them are non-testimonial), certiorari is inappropriate here because it is unnecessary and extremely impractical for this Court to grant certiorari every time lower courts apply *Crawford* and *Williams* to another category of document or statement and reach different conclusions. The court does not need to rule anew every time lower courts apply the Confrontation Clause to a new type of document or statement. This Court's decision in *Williams* is less than two years old and Medina has not presented any compelling showing that the lower courts are unreasonably applying *Williams*.

This case presents a very limited and narrow issue which depends entirely on its particular facts. As the opinion below correctly determined, the result is the same—and the issue is equally narrow—regardless whether a court applies the "primary purpose" or the requisite "formality and solemnity" test.

2. *There is no compelling reason why this Confrontation Question needs to be resolved now.*

Contrary to Medina's claim that autopsy reports "play a central evidentiary role in a large number of

high-stakes criminal trials (Pet. 14), in nearly half the cases cited by Medina, the autopsy report itself was not admitted. *See Miller*, 313 P.3d at 970, ¶ 100; *Edwards*, 306 P.3d at 1087; *Navarette*, 294 P.2d at 437; *Dungo*, 286 P.3d at 446; *Commonwealth v. Nardi*, 893 N.E.2d 1221, 1228 n.8 (Mass. 2008).[3] In many other similar cases, any Confrontation error was found not plain, not fundamental or harmless. *See, e.g, Miller*, 313 P.2d at 972, ¶ 108; *State v. Blevins*, 744 S.E.2d 245, 268 (W. Va. 2013); *United States v. Moore*, 651 F.3d 30, 74 (D.C. Cir. 2011); *People v. Cortez*, 931 N.E.2d 751, 757 (Il. 2010); *State v. Locklear*, 681 S.E.2d 293, 304 (N.C. 2009); *State v. Martin*, 291 S.W.3d 269, 287 (Mo. App. Ct. 2009); *Smith v. State*, 898 So. 2d 907, 915 (Crim. App. Ala. 2004).

The fact that many courts, under the circumstances of the particular case, have found a Confrontation Clause error arising from a Medical Examiner's report harmless demonstrates that autopsy reports in homicide investigations do not always require adversarial testing as Medina contends. (Pet. 14.) Moreover, while this Court has stated that "forensic analysts" conducting tests on critical evidence are sometimes "incompetent" or even "fraudulent," in Arizona autopsies are performed by licensed physician who have completed a pathology residency and forensic fellowship and who are merely recording their observations. A.R.S. §§ 11-591(5),(8), - 592(A). Given the varying circumstances in which this issue arises in

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[3] Additionally, in *Commonwealth v. Carr*, 986 N.E.2d 380, 399 (Mass. 2013) the issue concerned the admission of a death certificate, not an autopsy report.

homicide cases lower courts appear to be capably discerning when a true confrontation problem exists. Nowhere does Medina assert that Dr. Bucholtz's autopsy work was questionable. Rather to support his claim that there is a significant problem with autopsy reports, Medina relies essentially on a newspaper article and on a Court of Appeals' opinion in a California case. (Pet. 15-16.)

The California Supreme Court, however, reversed the Court of Appeals case. *Dungo*, 286 P.3d at 450. The Supreme Court noted that there existed a factual dispute about the competency of the author of the autopsy report, Dr. George Bolduc. *Id.* at 445-46. At trial, Dr. Robert Lawrence testified about the cause of death based on Dr. Bolduc's report and photographs, and offered his own independent opinion that the victim died from asphyxia caused by strangulation. *Id.* at 446. The defendant testified in his own defense, admitted he strangled the victim, but claimed it was in a sudden quarrel or heat of passion. *Id.* This case does not demonstrate any significant problem requiring this Court's intervention to prevent prosecutors from supposedly shielding "potentially questionable forensic work from cross-examination." (Pet. 16.) In fact, there is no indication that Dungo even sought a petition of certiorari in his case.

3. *This case offers a poor foundation upon which to build a new or refined Sixth Amendment doctrine*

Medina did not object to the report's admission on Confrontation Clause grounds at trial. In reaching the

merits of the constitutional claim below, the Arizona Supreme Court indulged the assumption that Medina properly raised a Confrontation Clause objection to the autopsy report. It would be fundamentally unfair to further delay this 20-year-old capital case to address a claim that Medina failed to raise in the trial court, depriving the State and the trial court of an opportunity to address and correct any purported error. *See State v. Hernandez*, 828 P.2d 1309, 1314-15 (Ariz. App. 1991) (a "hearsay" objection does not preserve a Confrontation Clause violation claim on appeal.) For purposes of the hearsay rule, Arizona autopsy reports are public records. *Schoenewies v. Hamner*, 221 P.3d 48 (Ariz. App. 2009); *Star Pub. Co. v. Parks*, 875 P.2d 837, 838 (Ariz. App. 1993). Accordingly, when Medina objected in 2008 on hearsay grounds to admission of the autopsy report, the trial court correctly overruled that objection and the case proceeded with no further discussion to the report's admissibility. Because Dr. Bucholtz was still licensed in Arizona, if Medina had made a Confrontation Clause objection, the State may well have overcome the objection and avoided the constitutional issue altogether by finding her and calling her to testify.

Additional considerations weigh against review given the narrowness of the issue that the Arizona Supreme Court actually resolved. In about half the cases Medina cites, the trial court did not admit the autopsy report into evidence. Here it did, and the basis of the Arizona Supreme Court's decision was that the report itself was not testimonial. Given that finding, the Court reasoned that the admission of the Medical Examiner's testimony, although not the author of the

report, was not a violation of the Confrontation Clause. Most of the decisions agree that where the medical expert simply offers an opinion based on a review of the autopsy materials and is subject to cross-examination, no Confrontation Clause violation occurs, even though the testifying expert did not author the report. *See, e.g.*, Fed. R. Evid. 705; *Edwards*, 306 P.3d at 1087-90; *Kennedy*, 735 S.E.2d at 922; *Cuesta-Rodriguez v. State*, 241 P.3d 214, 228-29 (Okla. 2010); *Wood v. State*, 299 S.W.2d 200, 210-12 (Tex. 2009); *Nardi*, 893 N.E.2d at 1229; *State v. Craig*, 853 N.E.2d 621, 639 (Ohio 2006). There is no widespread or oft-recurring dispute compelling this Court's intervention.

This Court's intervention is also misplaced because the alleged error here was harmless. *See* Eugene Gressman, et. al, Supreme Court Practice Ch. 4.4(f) (9th ed. 2007) (even when there is a clear conflict, this Court in its discretion may not accept certiorari where the conflict is irrelevant to the ultimate outcome of the case). The uncontested finding that Medina relished the murder independently establishes the heinous and depraved aggravating factor. *See State v. Anderson*, 111 P.3d 369, 394 n.19 (Ariz. 2005). Because a finding of gratuitous violence was not necessary to establish the aggravating circumstance at issue, the autopsy report's admission did not affect the sentencing's outcome.

Moreover, the evidence—aside from the autopsy report—overwhelmingly showed that Medina inflicted gratuitous violence. The fact that the autopsy report stated the victim's liver was "severely lacerated," and the victim had suffered multiple rib fractures was

hardly significant given Medina's statements to his girlfriend that he had run the victim over three times with his car (Pet. App. 34a, ¶ 95.) and Dr. Keen's opinion testimony to similar effect. (*Id.* at ¶ 94.) This case is unlike this Court's other forensic Confrontation Clause cases in which challenged forensic evidence went to the very heart of the case: *Melendez-Diaz*, 557 U.S. at 307-08 (defendant charged with distributing and trafficking in cocaine and the testimonial affidavits established the substance was cocaine and its weight); *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S. Ct. 2705, 2710-11 (2011) (defendant charged with DWI and the key forensic evidence presented through a surrogate analyst was the Report of Blood Alcohol Analysis); *Williams*, 132 S. Ct. at 2227 (defendant charged with rape, issue was identity, forensic evidence was a DNA profile produced from semen found on the victim).

4. The Arizona Supreme Court Correctly Decided the Case

As demonstrated by Medina's Appendix B to his Petition, autopsy reports prepared by the Maricopa County, Arizona Medical Examiner's Office are unlike the forensic tests performed in *Melendez-Diaz*, *Bullcoming*, and *Williams*. The report contains two opinions—"cause of death" and "manner of death." (Pet. App. 43a, 45a.) In Medina's case, it also included two diagrams. (*Id.* at 61a, 61b.) In the remaining 15 pages, Dr. Bucholtz recorded her observations as she examined the body externally, internally, and microscopically.

Arizona defines an "autopsy" as "a surgical procedure in which internal organs are exposed, removed or examined for the identification of trauma or natural disease." A.R.S. § 11-591(2). Homicides are not the only types of deaths that a Medical Examiner must investigate and detail in a written report. *See* A.R.S. §§ 11-593, -594(A)(2),-597(E). A private person or public official may request an autopsy. A.R.S. § 11-597(C). In Arizona, Medical Examiners, as more fully explained below, are required to certify two *opinions*; the cause and manner of death. A.R.S. § 11-594(A)(2).

Among their other duties, Medical Examiners must "[n]otify the county attorney or other law enforcement authority when death is found to be from other than natural causes." A.R.S. § 11-594(A)(6). A county attorney "may request" a copy of an autopsy report. A.R.S. § 11-597(F). Thus, as a matter of Arizona law, Medical Examiners are not required by law to assist law enforcement or prepare a report for court.

The certification on the autopsy report admitted in the aggravation phase of Medina's resentencing stated:

> Pursuant to section 11-594 Arizona Revised Statutes *I hereby certify* that I took charge of the body described herein and that after making inquiries into the cause and manner of death and examination of the body *it is my opinion that death occurred due to the cause(s) and in the manner stated.*

(Pet. App. 43a) (emphasis added). This certification is limited to the fact author took charge of the body,

made an independent investigation, and offered an opinion on the cause and manner of death. In contrast, the certification by its very text does not certify the autopsy report as a whole or the Medical Examiner's observations. Moreover, Dr. Bucholtz's opinion concerning the cause and manner of death also appeared on the death certificate, which was admitted in this case without objection, Trial Exhibit 101. (Trial Tr. 9/15/2008, at 15-16.)

At the aggravation resentencing phase, Dr. Keen identified a series of photographs, (Trial Exhibits 109-114), and testified that these photographs documenting the injuries to Hodge assisted him in forming his opinions concerning what happened to Hodge and how he may have been killed. (*Id.* at 21-22.) Using the photographs, the autopsy report, and the injuries to the victim, Dr. Keen explained to the jurors his opinion concerning the position of the victim when he was run over and how many times the victim was run over. (*Id.* at 28-29.)

Dr. Keen acknowledged that in determining that the manner of death was homicide, Dr. Bucholtz would have considered information police may have given her. (*Id.* at 41-42.). In such cases, it is normal to have police officers present when the autopsy is performed. (*Id.* at 42.)

As Dr. Keen testified, Arizona law requires a public inquiry in cases of unattended and unnatural death to determine the cause and manner of death. (*Id.* at 12.) Medina seeks to limit the Confrontation issue involving autopsy reports to a presumptively small

subset of reports, homicide cases. In most such cases, the determination that a death was a homicide will be made at the time of the autopsy—even though a suspect may not be known then or for years, and if known may not be apprehended for years. If the death is a homicide, it is reasonable to expect that at some point the case may result in a trial. And because of the lapse in time between the autopsy and any possible arrest or trial, the body will rarely be available for further examination, although photographs and preserved tissue often will be.

Despite these facts, Arizona law requires autopsy reports be made, and the manner and cause of death certified, whether or not there is a homicide, and whether or not there is a trial; the reports are not prepared "against" any person, but rather as a public statutory obligation. Unlike DNA tests from a victim, these reports are observations of the victim's condition. These required-by-law reports are not solemn accusatory documents, but rather the type of record routinely required to be kept by a public agency. The Arizona Supreme Court correctly held that these reports are nontestimonial.

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. . . .

CONCLUSION

For these reasons, the State respectfully requests that this Court exercise its broad discretion and deny certiorari in this case.

Respectfully submitted

THOMAS C. HORNE
Attorney General

ROBERT L. ELLMAN
Solicitor General

JEFFREY A. ZICK
Section Chief Counsel

JOHN PRESSLEY TODD
Assistant Attorney General
(Counsel of Record)
Capital Litigation Section

3656805