No. 13-735

IN THE

Supreme Court of the United States

EFREN MEDINA,

Petitioner,

v.

ARIZONA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Arizona

REPLY BRIEF FOR PETITIONER

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The State's Brief in Opposition (BIO) does nothing to dispel the need for this Court to resolve the legal question whether an autopsy report created as part of a homicide investigation, and concluding that the death was caused by criminal conduct, is testimonial. Nor do any of the State's quibbles with the procedural history and record here diminish the suitability of this case as a vehicle for resolving that issue. The petition for certiorari should be granted.

1. The State does not seriously dispute that state courts of last resort are split over the question presented. Instead, the State offers two comments concerning the conflict, neither of which withstands scrutiny.

First, the State asserts that "there is no categorical answer to whether an autopsy report is testimonial" because the answer "depend[s] on the purpose and circumstances of its creation." BIO 11. Petitioner has no quarrel with this general assertion; petitioner does not claim that courts are divided over whether autopsy reports *as an entire class* are testimonial. Rather, petitioner contends that courts are divided over whether autopsy reports are testimonial when they share two critical, yet common, characteristics: (1) they are created as part of homicide investigations and (2) they declare that homicide was the cause of death. *See* Pet. i, 11-13. The State does not seriously contest that contention.[*]

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[*] The State also suggests without argument that the testimonial status of an autopsy report depends on "the use for

Second, the State professes uncertainty over whether the holdings from the high courts in Oklahoma, New Mexico, and West Virginia actually conflict with the Arizona Supreme Court's holding here. BIO 15. (The State makes no such claim with respect to the holdings from the Massachusetts Supreme Judicial Court. *See* Pet. 13.) But the State makes no real argument in this respect. Nor could it. Each of those courts – as the Petition and the courts' opinions themselves show beyond any doubt – held that autopsy reports identical in all relevant respects to the one here were testimonial.

Lest there be any doubt that this Court's intervention is needed, three decisions issued since the filing of the Petition for Certiorari illustrate the depth of the disagreement across the country on the question presented. In *Lee v. State*, ___ S.W.3d ___, 2013 WL 6689378 (Tex. Ct. App. Dec. 19, 2013), the Texas Court of Appeals held that an autopsy report prepared in coordination with a homicide investigation, and concluding that the death was caused by homicide, was testimonial. *Id.* at *2-3. In

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which it was offered at trial." BIO 11. This is mistaken. The testimonial inquiry turns solely on the circumstances surrounding a document's (or statement's) creation, not the use for which it was offered at trial. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309-11 (2009). To be sure, the Confrontation Clause does not bar the introduction of concededly testimonial statements for purposes other than the truth of the matter asserted. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004). But the State never contends (nor could it) that the autopsy report here was not introduced for its truth. Accordingly, this case – just like all of the others in the conflict – turns on whether the report was testimonial.

State v. Lui, 315 P.3d 493 (Wash. 2014), the Washington Supreme Court adopted a middle ground, holding that statements in an autopsy report issued during a homicide investigation were testimonial insofar as they had an "inculpatory effect," while suggesting elsewhere in its opinion that such statements in such a report would not be testimonial if they were incriminating only in combination with other evidence. *Id.* at 510-12. And in *People v. Crawford*, ___ N.E.2d ___, 2013 WL 6631792 (Ill. App. Ct. Dec. 16, 2013), the Appellate Court of Illinois followed the Illinois Supreme Court's decision in *People v. Leach*, 980 N.E.2d 570 (Ill. 2012), to hold that an autopsy report created during a homicide investigation and declaring that the victim was strangled to death was nontestimonial in its entirety. *Id.* at *35-36. The court reached this conclusion even though the medical examiner delayed making his cause-of-death determination for two months "while he gathered more information [from] police detectives" and concluded that strangulation was the cause of death "based upon information [he] received from police investigators". *Id.* at *10, *36.

In short, the question presented continues to arise with great frequency, and courts across the country are in disarray. Only this Court can bring order to the issue.

2. The State next contends that the testimonial status of autopsy reports like the one here is not a pressing issue because (a) the erroneous admission of autopsy reports is sometimes deemed harmless; and (b) "lower courts appear to be capably discerning" when "adversarial testing" of such reports is truly

necessary. BIO 16-18. Neither of these contentions is persuasive.

It is immaterial that the admission of autopsy reports is sometimes deemed harmless. It cannot be denied that such reports' assertions regarding the cause and manner of death, as well as descriptive assertions concerning the bodies of the deceased, often *do* play a central role in homicide trials. And even when the contents of such reports are less vital to the prosecution, the cases finding harmless error show that prosecutors still deem these reports important enough to put them into evidence. It takes little reflection to see why: even in cases in which the cause and manner of death are undisputed, autopsy reports can have a powerful effect on juries.

Furthermore, to the extent that the Petition does not amply establish that autopsy reports like the one at issue here are often vitally in need of adversarial testing, surely the amicus briefs from the Innocence Network and the National Association of Criminal Defense Lawyers drive the point home. *See also Lee*, ___ S.W.3d ___, 2013 WL 6689378, at *2, *4 (noting that the prosecution refrained from putting medical examiner who wrote autopsy report on the stand because it preferred to "avoid uncomfortable questioning" about the fact that he subsequently "had been indicted for allegedly making false statements under oath").

If anything, the State's suggestion that this Court should leave it to lower courts to require "adversarial testing" only when they believe that a medical examiner's work may be "questionable" actually reinforces the need for review. The core holding of *Crawford v. Washington*, 541 U.S. 36

(2004), is that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. That is not what the Sixth Amendment prescribes." *Id.* at 62; *see also Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2715 (2011) ("[Forensic] analysts who write [testimonial] reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.") (quoting *Melendez-Diaz*, 557 U.S. at 319 n.6)). The Confrontation Clause is unbending in this respect precisely because courts would otherwise regularly surmise that testimonial statements are reliable when they are not really so. *See Crawford*, 541 U.S. at 63-68. If that teaching is not yet clear to the States, this Court should make it so.

3. Contrary to the State's suggestions, this case is an excellent vehicle for resolving the conflict over the testimonial status of autopsy reports such as the one here.

The State first claims that petitioner failed to preserve his confrontation objection at trial. BIO 18-19. But as the State is forced to acknowledge (BIO 2 n.1), even if petitioner had failed to do so, it would not matter because the Arizona Supreme Court squarely passed on the constitutional issue, resolving the case only on the merits. *See* Pet. App. 19a-24a.

In any event, petitioner *did* adequately preserve his constitutional claim at trial. In the case the State cites, *State v. Hernandez*, 823 P.2d 1309, 1315 (Ariz. Ct. App. 1991), the defendant failed to preserve a federal confrontation claim because he objected to the evidence at issue only on hearsay grounds. By

contrast, petitioner objected to the autopsy report here not only on hearsay grounds but also on the ground that the report "was completed by a different person than the one that [was] going to testify." Pet. 6-7 (quoting RT 9/15/08 at 8). This separate complaint that he would be unable to cross-examine the actual author of the report – describing exactly what the Confrontation Clause is concerned about – is sufficient under Arizona law to preserve such a constitutional objection even if the defendant does not recite the constitutional provision itself. *See State v. King*, 132 P.3d 311, 314 (Ariz. Ct. App. 2006).

The State also argues that any error here was harmless. BIO 20-21. But yet again, this argument misses the mark on numerous levels. Most fundamentally, the Arizona Supreme Court did not consider this argument, and "this Court ordinarily leaves it to lower courts to pass on the harmlessness of error in the first instance." *Ring v. Arizona*, 536 U.S. 584, 609 n.7 (2002) (citing *Neder v. United States*, 527 U.S. 1, 25 (1999)). This Court, in fact, has uniformly followed this practice in recent confrontation cases. *See Bullcoming*, 131 S. Ct. at 2719 n.11; *Melendez-Diaz*, 557 U.S. at 329 n.14; *Lilly v. Virginia*, 527 U.S. 116, 139 (1999) (this Court should "allow[] state courts initially to assess the effect of erroneously admitted evidence in light of substantive state criminal law").

Anyhow, the State's harmless-error argument lacks merit. The State asserts that "[t]he uncontested finding that Medina relished the murder independently establishes the heinous and depraved aggravating factor," thus rendering the autopsy report's contribution to the gratuitous violence

finding irrelevant. BIO 20. But where, as here, the State offers alternative theories in support of a proposed aggravator, Arizona law requires that an aggravator to be vacated if the evidence supporting *either* theory turns out to be problematic. *See State v. Anderson*, 111 P.3d 369, 397-98 (Ariz. 2005). Accordingly, the Arizona Supreme Court in this case expressly refrained from holding that the relishing finding independently supported the heinous and depraved aggravator. Pet. App. 36a.

Moreover, even if the relishing finding could independently support the heinous and depraved factor (which it cannot), the State's introduction of the autopsy report still would have had a prejudicial effect on the jury's qualitative determination whether, in fact, to return a death sentence. In making such a qualitative determination, Arizona law requires the jury to evaluate all of "the facts of the case, the severity of the aggravating factors, and the quality of any mitigating evidence." *State v. Prince*, 250 P.3d 1145, 1155 (Ariz. 2011) (internal quotation marks and citation omitted). One need not look any farther than the State's own recitation of the "facts" of this case – which it reduces to a single paragraph but includes the graphic assertion that petitioner "drove his car over Hodge's body three times" – to appreciate that this hotly contested allegation (and the gratuitous violence argument it facilitated) packed a hefty emotional and persuasive punch. *See* BIO 4; *see also* Pet. App. 4a (same recitation in Arizona Supreme Court's opinion).

Lastly, the State maintains that evidence besides the autopsy report "overwhelmingly showed" that petitioner ran over the victim three times – once

forward, then backward, then forward again – because petitioner told his girlfriend this the night of the killing. BIO 20-21. Not so. Petitioner was extremely intoxicated the night of the murder, and so was hardly a reliable reporter of events. Pet. 2; Pet. App. 36a. By contrast, the neighbor who witnessed the killing that night was clear-eyed. He testified that he saw the car run over the victim only once. Pet. 6; Tr. Exh. 144 at 33-36, 47. And one of the Phoenix police officers who responded to the scene believed that "all indications were that the vehicle was going in a forward motion" only. RT 9/11/08 at 100-05, 115-16, 123. The State used the autopsy report (and the forensic testimony it elicited based on the report) to encourage the jury to credit petitioner's questionable statement over the latter testimony. This is hardly the stuff of harmless error.

4. In large part, the State's arguments on the merits simply repeat the Arizona Supreme Court's. Petitioner has already explained why those arguments are misguided (*see* Pet. 21-26) and will not repeat those explanations here.

The State also contends that the autopsy report here was nontestimonial because "[h]omicides are not the only types of death that a Medical Examiner must investigate and detail in a written report." BIO 22. Be that as it may, there is no dispute that the medical examiner *in this case* believed when she wrote her report and transmitted it to law enforcement that the death at issue was a homicide. That basic reality – along with the formality of the report – controls this case and requires reversal. *See* Pet. 22-23.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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