No. 13-1315

IN THE

Supreme Court of the United States

TIMOTHY ALAN DUNLAP,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court of Idaho

REPLY FOR PETITIONER

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I. THE STATE DOES NOT DISPUTE THAT THE QUESTION PRESENTED WARRANTS THIS COURT'S REVIEW.

The State's Brief in Opposition (BIO) effectively concedes that the question presented is worthy of this Court's attention. It at no point disputes that the state and federal courts are sharply divided on the question whether the Confrontation Clause applies to evidence admitted to prove death-penalty eligibility. The State also does not dispute that this question is one of great importance, implicating as it does defendants' right of confrontation in the determination whether they may lose their life, and bearing directly on capital-sentencing procedures in all ninety-four federal district courts and the courts of those thirty-two states that allow the death penalty.

The State also declines to defend the decision below on the merits. It acknowledges that the Idaho Supreme Court "did not distinguish the eligibility phase from the selection phase" in concluding that the Confrontation Clause does not "appl[y] to sentencing proceedings generally," and thus "fail[ed] to recognize the import of" this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). BIO at 7, 11-12. In doing so, the court below relied on its pre-*Ring*, pre-*Crawford* decisions and adopted the State's sweeping position that "the Confrontation Clause does not apply at sentencing proceedings." *See* Pet.App. 55a; *see also* Resp. Br. at 48, No. 37270 (Idaho S. Ct. Sept. 20, 2011) (2011 WL 4563817 *48) (arguing that the Confrontation Clause does not

apply at *any* "sentencing hearings, including those involving the death penalty").

Indeed, the State's only arguments for denying review involve assertions that this case is a poor vehicle through which to address the issue. For the reasons that follow, those assertions are incorrect.

II. THIS CASE IS A GOOD VEHICLE FOR DECIDING THE IMPORTANT QUESTION PRESENTED.

A. Petitioner Explicitly Addressed—And The Idaho Supreme Court Specifically Rejected—The Arguments That Make The Confrontation Clause Particularly Applicable To Evidence Offered To Prove Death Eligibility.

The State contends that Petitioner failed to advance the arguments made in the petition that particularly address the Confrontation Clause's application to death penalty eligibility, as distinct from the broader arguments for its application to all phases of death penalty sentencing. BIO at 14-15. Nothing could be further from the truth. Not only did petitioner address the particular arguments making the Confrontation Clause applicable to the eligibility phase, but it is also clear from the decision below that the court specifically rejected those arguments.

Petitioner did in fact raise the precise question presented before the Idaho Supreme Court. Initially, in his opening brief, Petitioner argued at substantial length that, under *Ring*, "[a]ggravators are akin to the elements of an enhanced offense," so that "[t]he bifurcation of capital trials between a guilt and penalty phase does not render the finding of aggravators any less important than the finding of

guilt." Dunlap Br. at 38-39, No. 37270 (Idaho S. Ct. Mar. 22, 2011) (2011 WL 1253697 **38-39). Petitioner further argued that, "[a] capital defendant should not be afforded less protection simply because the legislature has required the finding of an aggravator occur at sentencing." *Id.* (2011 WL 1253697 **38-39). Petitioner applied this reasoning first to support the proposition that the trial court erred in refusing to apply the Rules of Evidence to proof of death penalty eligibility:

> By refusing to subject the State's evidence in aggravation to the Rules of Evidence . . . the Court allowed the jury to consider unreliable and misleading evidence, such as Mr. Doten's . . . report[], in determining the existence of aggravators and in deciding Mr. Dunlap's sentence, in violation of his rights to due process and a fair trial. *See* Direct Appeal Claim XIV, *infra*.

Id. at 40 (2011 WL 1253697 *40).

The reference to "Direct Appeal Claim XIV" linked these contentions to petitioner's argument, which followed just four pages later, that admission of the Doten Report also violated the Confrontation Clause. *Id.* at 44 (2011 WL 1253697 *44). In advancing that latter argument, petitioner began by noting the aspects of the Doten Report that were most directly probative of the aggravating factors at issue in the case—lack of remorse, intent to kill, and future dangerousness:

> Doten characterized [petitioner] as "affectless," "exhibiting no signs of . . . remorse of any kind[,]" exhibiting "a sense of pride in talking about his criminal

> activities[,]" and reporting his criminal activity "with no emotion, guilt, or remorse exhibited. The most significant aspect however was that he would smile while talking of each killing."

Id. at 44 (2011 WL 1253697 *44) (quoting Doten's Report (State's Ex. 43)).

After briefly discussing the testimonial character of these statements, petitioner reaffirmed the applicability of the Confrontation Clause by invoking post-*Ring* scholarship which, he stated, explained "why the Confrontation Clause and *Crawford* apply to capital eligibility determinations." *Id.* at 45-46 (2011 WL 1253697 **45-46) (citing Michael D. Pepson & John N. Sharifi, *Two Wrongs Don't Make a Right: Federal Death Eligibility Determinations and Judicial Trifurcations*, 43 Akron L. Rev. 1, 30-40 (2010)). Petitioner's brief went on to distinguish the State's outdated authorities on the ground that they were "decided prior to *Ring* [*v. Arizona*]," and supported his *Ring*-based argument with cases involving confrontation and aggravating factors. *Id.* (2011 WL 1253697 **45-46) (citing *State v. Bell*, 603 S.E.2d 93, 115-16 (N.C. 2004); *Coble v. Dretke*, 444 F.3d 345, 353-54 (5th Cir. 2006)).

The State's brief before the court below demonstrates that it likewise understood petitioner's Confrontation Clause argument to be eligibility-focused. There, the State characterized petitioner as arguing that the earlier state-court decisions "[we]re inapposite because they were decided prior to *Ring v. Arizona*, 536 U.S. 584 (2002)," which allegedly altered the application of the Confrontation Clause to capital sentencing. Resp. Br. at 48 (2011 WL

4563817 *48). But, said the State, this *Ring*-based argument failed because, while other courts had specifically applied the Confrontation Clause to eligibility evidence, *see Coble*, 496 F.3d at 439; *Bell*, 603 S.E.2d at 116, no court had said it was doing so "because of *Ring*," Resp. Br. at 48-49 (2011 WL 4563817 *48-49). The State, therefore, clearly understood the nature of petitioner's argument and its emphasis on the eligibility phase.

Petitioner's reply brief starkly reiterated the same point. "At a minimum, the Confrontation Clause must apply to evidence relating to aggravating circumstances because the finding of an aggravator is necessary for the imposition of a death sentence." Pet. Reply Br. at 43, No. 37270 (Idaho S. Ct. Dec. 13, 2011) (2011 WL 6939609 *43). And here, petitioner argued, because Doten's report was "relied upon to support the aggravating circumstances alleged," its "admission violated the Confrontation Clause." *Id.* (2011 WL 6939609 *43).

The Idaho Supreme Court also clearly understood petitioner's challenge as pertaining to proof of aggravating circumstances to establish death eligibility. While the court below announced a categorical rule against application of the Confrontation Clause to any phase of death penalty sentencing, that broad rule flowed directly from the court's own explicit misreading of *Ring*. Specifically, just before deciding the Confrontation Clause issue, the court ruled that the Rules of Evidence do not apply at the sentencing proceeding, because, it said, *Ring* did not "elevate . . . statutory aggravating circumstances into elements of a crime." Pet.App. 48a (internal quotation marks omitted).

In so holding, the court below flatly contradicted *Ring*'s express statement that "aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" *Ring*, 536 U.S. at 597 n.3, 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)). The Idaho Supreme Court, thus, drew no distinction between eligibility and selection because it expressly rejected petitioner's argument that *Ring* required such a distinction.

This explicit misreading of *Ring* also explains the court's reliance on *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007). In *Fields*, the Fifth Circuit rejected a Confrontation Clause challenge to evidence presented at the selection phase of capital sentencing based on "the logic of *Williams* [*v. New York*, 337 U.S. 241 (1949)]." *Id.* at 327. In the Fifth Circuit's view, *Williams* drew a sharp "distinction between guilt and sentencing proceedings," finding no bar to the use of evidence at sentencing, because "witnesses providing information to the court after guilt is established are not accusers within the meaning of the confrontation clause." *Id.* at 327–28 (internal quotation marks omitted). The Fifth Circuit thus applied the broad "principles underlying *Williams*," which categorically allowed "the use of out-of-court statements at capital sentencing," *id.* at 330, 332, to resolve the case before it, which involved only evidence bearing on penalty selection.

For the court below, given its express refusal to recognize *Ring*'s clear distinction between aggravating and mitigating circumstances, *Field*'s analysis thus supported the categorical conclusion that the Confrontation Clause has no application to *any* part of "the sentencing phase in a capital case."

Pet.App. 56a. It reached this conclusion because of its erroneous reading of *Ring*, not because it was denied a chance to consider the argument.

B. Because The Doten Report Was "Crucial" To The State's "Evidence Of Aggravation," This Case Clearly Presents The Question Whether The Confrontation Clause Applies To Proof Of Eligibility For The Death Penalty.

The question presented is squarely raised here because the Doten report was entered into evidence and submitted to the jury, and its testimonial content bore directly on petitioner's eligibility for the death penalty. As the record shows, the State and its witnesses utilized the Doten report to establish both of the aggravating factors, including the two that survived the appeal: (1) that the defendant exhibited utter disregard for human life (the utter-disregard aggravator); and (2) that the defendant exhibited a propensity to commit murder such that he constituted a continuing threat to society (the propensity aggravator).

The State, however, contends that the Doten report was used only to rebut mitigation evidence. BIO at 15. More specifically, the State argues that its "references to Doten's report" while questioning its "rebuttal" witness, Dr. Matthews, in no way "helped establish" the "statutory aggravating factors" that rendered petitioner eligible for the death penalty. *Id.* These assertions are baseless and contradicted by the State's own representations.

Dr. Matthews was not simply a "rebuttal" witness, and his testimony pertained to far more than petitioner's mitigation evidence. The State disclosed its intention to call Dr. Matthews as its

expert witness several months before trial. *See* Supreme Court of Idaho Case No. 32773, State's Witness List 332 (Sept. 28, 2005) (listing Dr. Matthews). The trial judge also identified Dr. Matthews as "the State's expert witness," and simply took his testimony "out of order" for unspecified reasons. *See* Tr. Vol. 11, p.141-42. Moreover, the State admitted before the Idaho Supreme Court that "Dr. Matthews' testimony" constituted "particularly" "overwhelming evidence of *aggravation*." Resp. Br. at 52, 77 (2011 WL 4563817 *52, *77) (emphasis added).

And Dr. Matthews's testimonial "evidence of aggravation," *id.*, was, as he acknowledged, based in "crucial" part on Doten's report, *see* Tr. Vol. 11, p.166. Because Doten's interview occurred "as close to the time of the offense as possible," *id.*, Dr. Matthews relied heavily on Doten's report in studying what, in his view, was the critical factor: petitioner's "mental state . . . at the time he committed the offense[]," *id.* p.147. So "significan[t]" was Doten's report to his assessment that Dr. Matthews readily conceded that it played a much more important role in forming his testimony than did even "his interview" with petitioner—"which t[ook] place many, many years later," and which was therefore far "less interesting." *Id.* p.166. In light of these facts, it strains credulity for the State now to assert that Dr. Matthews's Doten-based testimony merely rebutted mitigation evidence without ever "bear[ing] on the aggravating factors." BIO at 16.

To the contrary, the record shows that the State and Dr. Matthews used information from Doten's report to impute to petitioner the behavioral and

cognitive traits identified as aggravating factors under Idaho law. As to the utter-disregard aggravator, the State employed Doten's report to establish that petitioner fit the jury instructions' definition of a "cold-blooded, pitiless slayer"—*i.e.*, one who kills in a "matter of fact" and "emotionless" manner "without feeling or sympathy." Jury Instr. 10; *see also* Tr. Vol. 12, p.37. Drawing on the report's description of petitioner as "totally affectless," Dr. Matthews testified that petitioner was "absolute[ly]" unable to feel "remorse and empathy for other people," and that he "really doesn't care very much who he hurts" or "how he hurts them." *Id.* Vol. 11, p.151. Similarly, the prosecutor described petitioner in terms identical to those used in Doten's report, arguing that petitioner felt "no sorrow" or "remorse for what he had done" and that he viewed murder in a "[m]atter of fact" and "emotionless" way. *Id.* Vol. 12, p.38-39.

So, too, with the propensity aggravator. Doten's report discusses a prior murder and describes petitioner as "smil[ing]" and "exhibit[ing] a sense of pride in talking about his criminal activities." State's Ex. 43 at 1, 3. Drawing directly on those statements, the prosecution argued that petitioner would be a continuing threat to society because not only had he killed without provocation, but he also "seem[ed] proud of what he" had done. Tr. Vol. 12, p.39, 45, 47, 50. Dr. Matthews also relied on Doten's report in portraying petitioner as embodying the jury instructions' definition of having "a propensity to commit murder"—*i.e.*, "a willing, predisposed killer" with "an affinity toward committing the act of murder." Jury Instr. 11. Viewing Doten's report as "crucial," Dr. Matthews testified that petitioner's

proclivities toward violence were caused by "life long" problems that "start when you are very young" and simply "continue[] on and on and on and on"—thus suggesting that petitioner would be "relentlessly" and "unremittingly" violent were he allowed to live. Tr. Vol. 11, p.147, 164, 166.

Accordingly, because Doten's report was submitted to the jury as independent evidence without limitation, and because the report's contemporaneous impressions of petitioner figured prominently in Dr. Matthews's testimonial "evidence of aggravation," *see* Resp. Br. at 52 (2011 WL 4563817 *52), this case squarely presents the question whether the Confrontation Clause applies to evidence used to establish aggravating factors at the eligibility phase of capital sentencing.

C. Petitioner's Ability To Show "Fundamental Error" Is A Question Of Idaho State Law That Does Not Bear On His Federal Constitutional Claims.

No issue of state law precludes this Court from granting the petition in this case and deciding this important federal constitutional question. In arguing to the contrary, the State asks this Court to interpret and apply principles of Idaho *state law* in reviewing petitioner's petition. BIO at 18. According to the State, the Court should deny the petition because petitioner cannot show "fundamental error"—a state law burden of proving the harmfulness of the Confrontation Clause violation alleged here. *See id.* The Court should decline this invitation to interpret and apply principles of Idaho law.

As the State concedes, assertions of harmless error by parties seeking to avoid this Court's review

are ordinarily not "sufficient reason for certiorari to be denied." *Id.* at 17. This is particularly true when state law provides the standard for harmlessness and the state high court never reached the issue.

Indeed, the Idaho Supreme Court did not address, let alone decide, whether admission of Doten's report constituted "fundamental error," which under Idaho law requires proof of a constitutional violation that is both plain and prejudicial. *See State v. Perry*, 245 P.3d 961, 980 (Idaho 2010). It did not do so because that court erroneously found no constitutional violation at the threshold. *See* Pet.App. 55a-57a. The propriety of this Court's review, then, does not depend on those as-yet unaddressed questions of state law. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329 n.14 (2009).[1]

D. Although The Doten Report Was Clearly Testimonial Evidence In The Context Of Petitioner's Sentencing Hearing, The Court Need Not Reach That Issue.

Although the State clearly submitted the Doten report to the jury as testimonial evidence, this Court need not decide that issue. The Idaho Supreme Court did not decide whether Doten's report is testimonial, but proceeded on the unstated premise that it was in

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[1] Nor is the propriety of this Court's review altered by defense counsel's speculation that the jury would "find one or all of" the alleged "aggravating factors." BIO at 17-18. These statements were made in light of the trial judge's erroneous jury instructions, which "improperly reduced the State's burden of proof for the specific intent aggravator," Pet.App. 21a, 23a, and of the admission of the Doten report for all purposes, which together made a finding of one aggravator seem inevitable.

holding that the Confrontation Clause categorically did not apply to capital-sentencing proceedings. *See* Pet.App. 55a-57a. Thus, there is no need for this Court to address that issue.

In any event, Doten's report is clearly testimonial when its contents are viewed in the context of what was at issue in petitioner's sentencing hearing. The report memorialized a jail official's formal, out-of-court interrogation of petitioner, which occurred *after* petitioner was identified as the prime suspect, and which recorded observations of petitioner's conduct and mood during the interrogation that bore directly on the aggravating factors at issue in petitioner's sentencing proceeding. *See, e.g.*, *Williams v. Illinois*, 132 S. Ct. 2221, 2227-28 (2012) (plurality op.). The Doten report, therefore, falls squarely within the "core class" of out-of-court "'testimonial' statements" that this Court has held must be excluded under the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

CONCLUSION

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

Respectfully submitted,

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