No. 13-1315

In The Supreme Court of the United States

TIMOTHY ALAN DUNLAP,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Whether the Confrontation Clause applies to evidence offered by the prosecution to prove statutory aggravating circumstances that establish a defendant's eligibility for the death penalty.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

1. On October 16, 1991, petitioner Timothy Alan Dunlap entered the Security State Bank in Soda Springs, Idaho, walked up to "bank teller Tonya Crane, and ordered her to give him all her money." *Dunlap v. State (Dunlap III)*, 106 P.3d 376, 381 (Idaho 2005). After she complied with his request, "Dunlap immediately and calmly pulled the trigger of his sawed-off shotgun, which was less than two feet from Tonya Crane's chest, literally blowing her out of her shoes." *Id*. She was pronounced dead shortly thereafter. *Id.*

Dunlap fled, but later surrendered to the police. After police gave him his *Miranda* warnings, Dunlap confessed to murdering Crane and to a murder in Ohio ten days earlier. *Id*. He confessed again the next day, "and explained how he planned and completed both murders." *Id*.

On the day of Dunlap's arrest, David R. Doten, Chief of Mental Health Services at the Bonneville County Sheriff's Office, commenced a three-hour mental status evaluation on Dunlap.[1] State's Ex. 43.[2]

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[1] Although the Idaho Supreme Court subsequently referred to Doten as "Dr. Doten," Pet. App. 55a, his report did not support that statement, State's Ex. 43, p.3, and Dunlap's objection at his resentencing to Doten being referred to as a doctor was sustained. Tr., Vol.11, p.108.

[2] Unless otherwise noted, all subsequent citations to exhibits or the trial transcript are to the record in Idaho Supreme Court No. 32773.

Less than a week later, Doten submitted a report that was less than three pages to Soda Springs Police Chief, Blynn Wilcox. *Id.* The report included a very general description of Dunlap's accounts of various crimes he had allegedly committed, including Crane's murder, Doten's observations of him during the evaluation, and Doten's "tentative" mental health diagnosis; there was no discussion of any statutory aggravating factors. *Id*.

2. Dunlap was charged with first-degree murder, robbery, and use of a firearm during commission of the robbery and murder. *State v. Dunlap (Dunlap I)*, 873 P.2d 784, 785 (Idaho 1993). Pursuant to a plea agreement, Dunlap pled guilty to first-degree murder and use of a firearm in the commission of the murder; the remaining charges were dismissed. *Id.* After a sentencing hearing, the trial court sentenced Dunlap to death. *Id*. at 786. Dunlap's conviction and death sentence were affirmed by the Idaho Supreme Court, but during post-conviction proceedings the state conceded error during Dunlap's sentence, prompting a new sentencing hearing. *Dunlap III*, 106 P.3d at 382.

During the resentencing, the state did not mention Doten's report during its case-in-chief. The defense called Dr. Craig Beaver to testify regarding mitigation issues, particularly Dunlap's mental health history. Tr., Vol.11, pp.7-140. During Dunlap's direct examination, Dr. Beaver discussed multiple records he had reviewed, his diagnosis of Dunlap, why there were so many different diagnoses from the various mental health providers Dunlap had seen,

treatment options, and future dangerousness. *Id*. pp.2-53. During the state's cross-examination, the prosecutor briefly questioned Dr. Beaver regarding those various mental health records, including Doten's report. *Id*. pp.83-84, 109-10. Specifically, the prosecutor twice asked Dr. Beaver whether Doten made the same diagnosis of Dunlap's mental health as Dr. Beaver, who conceded Doten did not make the same diagnosis. *Id*. pp.84, 109. Defense counsel did not object to this reference to Doten's report.

During its rebuttal, the state called a mental health expert, Dr. Darrell Matthews, to refute Dunlap's mental health mitigation. The prosecutor asked Dr. Matthews whether he considered various mental health assessments, including Doten's. *Id*. pp.165-66. Matthews said he had considered Doten's report, given how soon after the crime it was produced. *Id*. p.166. Without objection, the prosecutor introduced the report into evidence shortly thereafter. *Id*. p.168.

The prosecutor's closing argument was divided into two parts, with defense counsel's closing argument between. The prosecutor discussed the statutory aggravators alleged by the state in his first closing argument, during which he did not mention Doten's report. Tr., Vol.12, pp.37-49. During his closing argument, Dunlap's counsel conceded, "[t]he aggravating factors that the State has appropriately argued, you are going to find one or all of them. And if this were an argument over aggravating factors, we would be arguing for less than a life sentence. But we are convinced that there is one or all of those aggravating

factors." *Id*. p.57. Presumably for that reason, the prosecutor did not return to the issue of aggravation during his final closing argument. Rather, he focused exclusively on the mitigation evidence, *id*. pp.72-84, briefly noting that Doten found "no signs of psychosis" or hallucinations, and that Dunlap therefore was not "suffering from a major mental illness." *Id*. pp.78-79. Defense counsel, once again, did not object to this reference to Doten's report.

The jury found that the state had proven three statutory aggravating factors. Pet. App. 5a-6a. The two that survived appeal are:

> (1) by the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life (Idaho Code § 19-2515(9)(f)) (the utter disregard aggravator); . . . and (3) the defendant, by prior conduct or conduct in the commission of the murder at hand, has established a propensity to commit murder which will probably constitute a continuing threat to society (Idaho Code § 19-2515(9)(h)) (the propensity aggravator).

Pet. App. 5a-6a, 21a-22a. The jury also concluded the collective mitigation evidence, weighed against each statutory aggravating factor individually, was not sufficiently compelling to make imposition of the death penalty unjust. *Id.* Based upon the jury's verdict, the trial court sentenced Dunlap to death. *Id.* 6a.

3. Dunlap filed a timely post-conviction petition, which was summarily dismissed by the trial court.

Pursuant to Idaho law, the Idaho Supreme Court consolidated Dunlap's appeal of the denial of his post-conviction petition with his direct appeal. Pet. App. 2a. With respect to the direct appeal, the court affirmed the death sentence. *Id.* Among the many claims the court rejected was Dunlap's assertion that introduction of Doten's report violated his rights under the Confrontation Clause. *Id.* 55a-57a. Dunlap's opening appellate brief argued generically that the Confrontation Clause applies at sentencing; he did not cite *Ring v. Arizona*, 536 U.S. 584 (2002), or in any other way suggest Doten's report was improperly used with respect to the eligibility phase. Dunlap Idaho Sup. Ct. Br. 44-46.

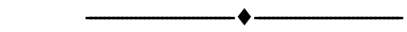
The Idaho Supreme Court found that Dunlap raised this issue for the first time on appeal and therefore addressed it under Idaho's capital fundamental error doctrine. Pet. App. 13a-19a, 55a-57a. The court noted it had held in *Sivak v. State*, 731 P.2d 192, 215 (Idaho 1986), that the Confrontation Clause "does not require that a capital defendant be afforded the opportunity to confront and cross-examine live witnesses in his sentencing proceedings." Pet. App. 55a-56a. *Sivak* relied on *Williams v. New York*, 338 U.S. 241, 246-50 (1949), which recognized the historical practice of permitting a sentencing judge to exercise wide discretion in considering information for sentencing and concluded that modern penological interests mandating individualized sentencing would be thwarted if information was "restricted to that

given in open court by witnesses subject to cross-examination."

The Idaho Supreme Court then addressed this Court's more recent Confrontation Clause cases, explaining that *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006), held that "the Confrontation Clause applies to 'prosecutions' and statements made for prosecutorial use." Pet. App. 56a. But the court stated, that "begs the question whether the sentencing phase in a capital case is a 'prosecution.'" *Id*. The court concluded the Fifth Circuit's analysis in *United States v. Fields*, 483 F.3d 313, 324-37 (5th Cir. 2007), was most persuasive. Pet. App. 56a-57a. In that case, the Fifth Circuit held that "'the Confrontation Clause is inapplicable to the presentation of testimony relevant only to the sentencing authority's selection decision.'" Pet. App. 57a (quoting *Fields*, 483 F.3d at 337). The Idaho Supreme Court stated that it "agree[s] and hold[s] that the admission of the reports did not violate Dunlap's Sixth Amendment rights." Pet. App. 57a.

The Idaho Supreme Court also concluded, however, that the trial court erred by summarily dismissing two post-conviction claims – ineffective assistance of counsel regarding the investigation and presentation of mitigation evidence and rebuttal of the state's evidence in aggravation, and alleged violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1962) – and remanded both claims for an evidentiary hearing. Pet. App. 80a-85a. That hearing is scheduled to commence in August

2014. The court affirmed the summary dismissal of Dunlap's remaining post-conviction claims. Pet. App. 90a.



REASONS FOR DENYING THE PETITION

Dunlap's petition does not ask the Court to rule that the Confrontation Clause applies throughout a capital sentencing proceeding. Rather, he argues only that the Clause applies to evidence introduced to establish statutory aggravating factors that make a murderer eligible for the death penalty. Pet. i, 2, 18. As support for this narrower contention, Dunlap relies on *Ring v. Arizona*, which held that "aggravating circumstances necessary to render a defendant eligible for the death penalty 'operate as the functional equivalent of an element of a greater offense.'" Pet. 2 (quoting *Ring*, 536 U.S. at 609 (internal quotation marks omitted)).

For multiple reasons, this is an exceedingly poor vehicle through which to resolve that question. First, Dunlap did not make that argument to the Idaho Supreme Court; he argued for the sweeping rule that would apply the Confrontation Clause to mitigation and weighing phases of a capital sentencing proceeding. *That* is the claim the Idaho Supreme Court rejected. The court can hardly be faulted for failing to recognize the import of *Ring* when Dunlap did not even cite *Ring* (or *Apprendi v. New Jersey*, 530 U.S. 466 (2000)) to the court.

Second, given the state-law standard of review and the prosecution's use of the evidence, Dunlap could not possibly obtain relief even if there were a Confrontation Clause violation – meaning this Court's review of the case would be an academic exercise. Dunlap never alleged to the Idaho Supreme Court that the prosecution used the Doten report to prove his *eligibility* for the death penalty. Nor could he, for his counsel conceded the existence of the statutory aggravating factors, and the few fleeting references to Doten's report during questioning and closing argument went to the mitigation issue of Dunlap's mental health. As a consequence, Dunlap could not possibly satisfy the burden he has under Idaho's fundamental error doctrine of establishing that any error was not harmless.

Third, Dunlap has failed to establish the predicate to his Confrontation Clause claim: that Doten's report was hearsay subject to the Confrontation Clause. In *Crawford* and *Williams v. Illinois*, 132 S. Ct. 2221 (2012), this Court reaffirmed *Tennessee v. Street*, 471 U.S. 409, 414 (1985), which held the Clause applies only to hearsay introduced for the truth of the matter asserted. A strong argument can be made that the prosecution's use of the Doten report was non-testimonial under that standard, which would make resolution of the question presented – once again – purely academic.

Dunlap contends that the question presented is a recurring issue of national importance. Pet. App. 23-24. If that is so, the Court will have ample

opportunity to resolve it in a case where the lower court was actually presented with the question and where its resolution would actually make a difference to the outcome of the case. The petition should be denied.

A. Dunlap Failed To Properly Raise The Question Presented To The Idaho Supreme Court

1. In his Opening Brief before the Idaho Supreme Court Dunlap made a general challenge to the admission of Doten's report by contending, "The Sixth Amendment confrontation right applies to the sentencing phase of a capital case." Dunlap Idaho Sup. Ct. Br. 45. His argument did not discuss the specific question now presented to this Court, namely, whether the Confrontation Clause applies to evidence offered by the state to prove a statutory aggravating factor or "death eligibility." *Id*. pp.44-46. He did not cite *Ring* and did not claim aggravating factors are elements of the offense, which allegedly are entitled to the same procedural guarantees as other elements. From all appearances, Dunlap was arguing his Confrontation Clause rights were violated because the Clause applies to evidence that goes to mitigation and weighing.

Neither of the two cases cited by Dunlap in his Opening Brief discussed whether the Confrontation Clause applies to death eligibility. Rather, in *Coble v. Dretke*, 444 F.3d 345, 353-54 (5th Cir. 2006), *superseded by Coble v. Quarterman*, 496 F.3d 430 (5th Cir.

2007), the court merely assumed that the right generally exists, but concluded that the reports admitted were not testimonial. Similarly, the court in *State v. Bell*, 603 S.E.2d 93, 115-16 (N.C. 2004), assumed that the right generally exists, but concluded that any error was not prejudicial. Neither case discussed the distinction between death eligibility and death selection.

Nor did Dunlap's Opening Brief discuss how any of the information in Doten's report was even applicable to any of the three statutory aggravating factors alleged by the state. Even in his Final Amended Petition for Post-Conviction Relief, where he contended that trial counsel was ineffective for failing to object to the admission of Doten's report, Dunlap failed to distinguish between death eligibility and death selection, failed to cite or discuss *Ring*, and failed to explain what portions of Doten's report were relevant to any of the three statutory aggravating factors alleged by the state. PCR, pp.1079-82. Rather, Dunlap argued the claim was based upon death selection, contending, "But for trial counsels' failure to prevent the use of [Doten's report] there is a reasonable probability that the jury would have shown *mercy* toward Mr. Dunlap in the form of a life sentence." *Id.* p.1082 (emphasis added).

That Dunlap's claim before the Idaho Supreme Court was not the specific question presented to this Court is bolstered by his Reply Brief to the Idaho court, where he modified his claim by contending, "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 the death penalty." Reply Brief, p.43. However, in Idaho, the appellate courts will not consider issues raised for the first time in a reply brief. The Idaho Supreme Court applied that rule in *State v. Raudebaugh*, 864 P.2d 596, 601 (Idaho 1993), where the defendant challenged the constitutionality of jury instructions in his Opening Brief, but waited until his Reply Brief to challenge the instructions under Idaho's constitution. Relying upon Idaho Appellate Rule 35(a)(4), which requires an appellant to list the issues on appeal in the Opening Brief, the Idaho court held that "[r]aising the issue at this late stage of the briefing does not allow for full consideration of the issue, and we will not address it." *Id*. at 601. This fundamental appellate rule continues to be applied by Idaho's appellate courts. *See, e.g., Telford v. Smith County, Texas*, 314 P.3d 179, 184 (Idaho 2013); *Suits v. Nix*, 117 P.3d 120, 122 (Idaho 2005); *Hernandez v. State*, 905 P.2d 86, 88 (Idaho 1995). Moreover, even in his Reply Brief, Dunlap failed to discuss *Ring* or explain what portions of Doten's report were relevant to any of the three statutory aggravating factors alleged by the state.

2. The Idaho Supreme Court's decision confirms that Dunlap's claim was not about death *eligibility*, but was based upon death *selection*. Following Dunlap's lead, the court did not cite *Ring* and did not distinguish the eligibility phase from the selection phase. It instead assessed whether the Confrontation

Clause applies to sentencing proceedings generally. *See, e.g.*, Pet. App. 55a-56a (citing *Sivak* as having held that the Clause does not apply "in his sentencing proceeding"); *id*. 56a (asking whether "the sentencing phase in a capital case is a 'prosecution' "); *id*. (noting that *Pepper v. United States*, 131 S. Ct. 1229, 1240 (2011), "reaffirmed the principle that all the information available to a sentencer should be considered").

The clearest evidence that the Idaho Supreme Court was not addressing whether, under *Ring*, the Confrontation Clause applies to death eligibility is the court's reliance on the Fifth Circuit's decision in *United States v. Fields*. Pet. App. 56a-57a ("In our view, the most persuasive analysis of the applicability of the Confrontation Clause in capital sentencing proceedings is to be found in *United States v. Fields*[.]"). The Fifth Circuit in *Fields* explained that "[n]one of the challenged statements was presented as part of the government's effort to establish the statutory aggravating factors that trigger death-eligibility under the Federal Death Penalty Act[.]" 483 F.3d at 325. The court therefore addressed whether the Confrontation Clause applies to statements "relevant only to the jury's selection of the appropriate punishment within an authorized range and not to the establishment of his eligibility for the death penalty." *Id.* at 325-26. The court concluded it does not. *Id*. The court speculated that "there is a stronger argument to be made for the attachment of the confrontation right where the government is attempting to establish eligibility-triggering factors," but expressly declined

to address the question because it was not "squarely presented by [that] case." *Id*. at 331 n.18.

Given the Fifth Circuit's explicit refusal to answer the question presented by Dunlap here, the Idaho Supreme Court – by relying so heavily on the Fifth Circuit's "persuasive analysis" and "lengthy and scholarly consideration of precedent from the U.S. Supreme Court" – was not purporting to answer that question either. The Idaho Supreme Court would not have adopted the Fifth Circuit's reasoning if it intended to consider Dunlap's claim as a death eligibility issue. Rather, like the Fifth Circuit, the Idaho court recognized the issue of death eligibility was not "squarely presented" and declined to address it.[3]

3. This Court has repeatedly held that federal constitutional issues must first be raised in state court before being raised before this Court. *Illinois v. Gates*, 462 U.S. 213, 217-24 (1983). Several purposes underlie that policy. One is that "due regard for the appropriate relationship of this Court to state courts demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials, and equally important, propose changes in existing remedies for unconstitutional actions." *Id*. at

[3] Dunlap's amicus asks the Court to reach the broader question whether the Confrontation Clause applies to "all contested evidence offered during capital sentencing proceedings." NACDL Br. 2. This Court generally does not, however, reach issues presented only by amici. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 267 n.4 (2010).

221 (internal citation and quotation marks omitted). In addition, "we permit a state court, even if it agrees with the State as a matter of federal law, to rest its decision on an adequate and independent state ground." *Id.* at 222.

Those considerations fully apply here, even if Dunlap's Opening Brief to the Idaho Supreme Court is generously read to encompass the narrower question he now presents to this Court. The Idaho Supreme Court did not view itself as having been asked to address whether *Apprendi* and *Ring* require a different rule with respect to evidence presented to establish death eligibility. It therefore did not have the "opportunity to consider the constitutionality of the actions of state officials" or the opportunity to assess whether "an adequate and independent state ground" resolved it.

Making matters worse, Dunlap did not object at the resentencing to admission of the Doten report. That deprived the state of the opportunity to explain why admission of the report was proper and ask for a limiting jury instruction, if necessary. *See* Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 Yale L.J. 992, 958 (2006) (stating that a contemporaneous objection "may prevent an error from happening in the first place, either because the judge sustains the defendant's objection or the prosecutor backs off, fearing that a trial-level victory might sow the seeds for a later appellate reversal"). Dunlap thus sandbagged the state at trial by not objecting, and then sandbagged the Idaho Supreme Court by

not plainly raising the specific claim he now asserts. Certiorari is not warranted in such a case.

B. The Question Dunlap Presents Does Not Arise In His Case Because Doten's Report Was Not Used To Support Dunlap's Eligibility For The Death Penalty

Dunlap did not merely fail to specifically argue his present question presented to the Idaho Supreme Court, he failed to assert the factual predicate of that question: that the Doten report helped establish statutory aggravating factors found by the jury. Most notably, his Opening Brief to the Idaho Supreme Court did not make that assertion. *See* Dunlap Idaho Sup. Ct. Br. 44-46. And for good reason, there is no basis to believe the Doten report was used for any purpose other than responding to the defense's mitigation case.

The prosecutor discussed the evidence supporting the utter disregard aggravator during the first part of his closing argument, which included the manner in which Crane was murdered and Dunlap's statements to law enforcement after his arrest. Tr., Vol.12, pp.37-40. The prosecutor made no mention of Doten's report. When he discussed the propensity aggravator, the prosecutor focused upon the murder of Belinda Bolanos, Dunlap's girlfriend whom he murdered in Ohio by shooting her with a crossbow in the neck prior to coming to Idaho. *Id*. pp.45-47. While the prosecutor discussed evidence Dunlap presented

regarding future dangerousness, he again made no mention of Doten's report. *Id*. pp.48-49. The *only* discussion of Doten's report during the prosecutor's closing argument was after Dunlap's attorney conceded he could not contest the existence of aggravating factors, *id*. p.57, and the prosecutor's reference was merely to rebut the mental health mitigation. *Id*. pp.78-79 ("So clearly at the time of the crime, Tim Dunlap wasn't suffering from a major mental illness.").

Nor did the brief references to Doten's report during the cross-examination of Dr. Beaver and the rebuttal questioning of Dr. Matthews bear on the aggravating factors. Dr. Beaver merely agreed Doten did not make the same mental health diagnosis he had made. Tr., Vol.11, pp.83-84, 109-10. And Dr. Matthews merely agreed he considered Doten's report, given how soon after the crime it was produced. *Id*. pp.165-66. Given all that, one can hardly fault Dunlap's counsel for not contending that the prosecution used Doten's report to establish Dunlap's death eligibility.

In his petition, Dunlap meekly observes that "[t]he Supreme Court of Idaho itself noted that 'each of the three aggravators was supported by the entirety of the evidence.'" Pet. 24 (quoting Pet. App. 23a-24a). Surely that does not mean that *every* piece of evidence admitted at trial was relevant to death eligibility or that Dunlap should be treated as having asserted such an absurd proposition.

C. Dunlap Cannot Obtain Relief Because He Cannot Possibly Meet His Burden Under Idaho's Fundamental Error Doctrine Of Showing That Any Confrontation Clause Violation Was Not Harmless

In the ordinary case, a respondent's claim that an asserted error was harmless might not be sufficient reason for certiorari to be denied. This is no ordinary case, however. First, as explained in Section B, *supra*, Dunlap never specifically claimed the evidence whose admission purportedly violated the Confrontation Clause was used to establish his death eligibility because there would have been no basis for such a claim. Even if the evidence is broadly construed as having somehow touched upon the eligibility issue, it did so only in the slightest way.

Second, Dunlap's counsel conceded the state proved the existence of the statutory aggravating factors. During his closing argument, Dunlap's attorney stated, "The aggravating factors that the State has appropriately argued, you are going to find one or all of them. And if this were an argument over aggravating factors, we would be arguing for less than a life sentence. But we are convinced that there is one or all of those aggravating factors." Tr., Vol.12, p.57. Given the small role the Doten report played in this case, it is more than implausible to believe that its admission was in any way responsible for that concession.

There are therefore ample grounds to conclude that any purported Confrontation Clause violation was harmless under *Chapman v. California*, 386 U.S. 18, 24 (1987), which requires the state to establish that any error "was harmless beyond a reasonable doubt." But the state does not have that burden here because Dunlap raised his Confrontation Clause claim for the first on appeal requiring that it be addressed under Idaho's fundamental error doctrine. Pet. App. 18a-19a, 55a-57a. Under that doctrine, if an unobjected-to error is raised for the first time on appeal, "the defendant bears the burden of proving the existence of an error that was not harmless." Pet. App. 18a. Dunlap cannot possibly meet that burden.

Unlike the ordinary case, the harmless error inquiry here does not involve reviewing all of the evidence introduced on the relevant issue (death eligibility) and assessing whether the jury would have reached the same conclusion had it not received the allegedly improper evidence. Dunlap never claimed the allegedly improper evidence related to death eligibility and his counsel conceded the state proved death eligibility. These distinguishing features make this case a particularly poor one through which to resolve the predicate constitutional question.

D. Because The Testimony Regarding Doten's Report, And The Report Itself, Were Not Offered For The Truth Of The Matter Asserted, The Confrontation Clause Is Inapplicable

Dunlap's effort to obtain review of the question presented suffers from still another flaw: It is doubtful that the statement in the question – the Doten report – was even hearsay subject to the Confrontation Clause. In *Tennessee v. Street*, 471 U.S. 409, 414 (1985), this Court held that the Confrontation Clause does not apply to non-hearsay, that is, to evidence not introduced to prove the truth of the matter asserted. *Crawford* reaffirmed that principle. 541 U.S. at 59 n.9 ("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee v. Street*[.]"). More recently, in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), all nine members of the Court, while disagreeing on its application, agreed with *Street*'s continuing vitality. *Id*. at 2234-35 (plurality); *id*. at 2256-57 (Thomas, J., concurring in judgment); *id*. at 2268 (Kagan, J., dissenting).

The prosecution did not use the Doten report to prove any element in the state's case. The prosecution's first use of that report was during cross-examination of Dr. Beaver, Dunlap's mental health mitigation expert. Dr. Beaver was asked what information he was using to support his diagnosis, and responded that his diagnosis "really comes about by looking at the history and record of multiple people

having interacted and observed Tim Dunlap, and how he has been observed and treated while institutionalized at the maximum security facility." Tr., Vol.11, p.83. When asked if that included "people who did diagnoses of Tim Dunlap somewhere near the time of the crime itself," Dr. Beaver responded, "Yes, you consider that information also." *Id*. pp.83-84. He admitted that Doten was "[o]ne of those people" who made a diagnosis and that his diagnosis was different than Dr. Beaver's. *Id*. p.84.

In this context, Doten's report was not discussed for the truth of the conclusions it reached, but instead to impeach Dr. Beaver by showing that, although he purported to be basing his conclusions on prior records of people who "interacted and observed Tim Dunlap," some of those people reached different conclusions than he. The state's brief reference to the Doten report during the rebuttal questioning of Dr. Matthews likewise was not made for the purpose of proving the truth of the matter asserted. As noted, the prosecutor asked Dr. Matthews if he looked at that report and to explain why Doten's report was significant in developing Dr. Matthews' opinions. *Id*. pp.165-66. Matthews did not recite any of the findings in Doten's report or even "repeat[ ] an out-of-court statement" made in the report "as the basis for a conclusion." *Williams*, 132 S. Ct. at 2268 (Kagan, J., dissenting).

That leaves the prosecutor's final closing argument, one paragraph of which referenced the Doten report. To be sure, the prosecutor stated that Doten

found "no signs of psychosis" or "hallucinations," and that his demeanor suggested that he "wasn't suffering from a major mental illness." Tr., Vol.12, pp.78-79. A prosecutor's argument, however, is not evidence and cannot change the nature of evidence admitted at trial, particularly when the jury is so instructed. *Cf. Darden v. Wainwright*, 477 U.S. 168, 182 (1986) (improper statements by a prosecutor did not deprive the defendant of a fair trial in part because the trial court instructed the jury to base its decision on the evidence and that arguments by counsel were not evidence); *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974) (same). Dunlap's jury was so instructed. Jury Instr. 2. Irrespective, the most that can be said of the prosecutor's statement is that it pertained to mitigation and weighing issues, not Dunlap's eligibility for the death sentence.

Because the discussion regarding Doten's report and admission of the report itself was not offered for the truth of the matter asserted, there was no Confrontation Clause violation, particularly since the evidence regarding Doten's report was not offered to prove any of the statutory aggravating factors, but pertained to Dunlap's mental health mitigation presented in *his* case-in-chief.

* * *

Dunlap correctly asserts that his case is not "encumbered by the complexities that typically accompany capital cases on federal habeas review." Pet. 24. Of course, that is true of all cases on direct

appeal, but that does not make all cases on direct appeal suitable vehicles through which to resolve thorny constitutional questions. For the reasons set out above, this case is manifestly *not* a suitable vehicle through which to resolve the Confrontation Clause issue presented by Dunlap. And on top of those reasons, the Idaho Supreme Court has remanded the case to the trial court to assess an ineffective assistance of counsel claim and alleged violations of *Brady* and *Napue*. Although the case is final – the remand concerned claims made in Dunlap's post-conviction petition – the pendency of state-court proceedings further militates against this Court's review.

In the end, if the question "[w]hether the Confrontation Clause applies to evidence offered by the prosecution to prove statutory aggravating circumstances that establish a defendant's eligibility for the death penalty" is as important as Dunlap alleges, it can be addressed in another direct review case: One that is not encumbered by a failure to present the claim before the state's highest court, by a failure to assert that the evidence in question pertained to the statutory aggravating circumstances, by a failure to make a contemporaneous objection, by the patent harmlessness of any error, and by a serious question whether the evidence was even hearsay subject to the Confrontation Clause.

We do not know how the Idaho Supreme Court would rule on the question presented if it were given an actual opportunity to address it. While Dunlap

contends there is a conflict among the courts, the only state that currently has a death penalty and has definitively rejected Dunlap's position on the question presented is Nevada. *See* Pet. 14-15 & n.18 (discussing Nevada Supreme Court rulings). It makes no sense to grant certiorari in an Idaho case that did not squarely face the issue to resolve a conflict created by the Nevada courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED this 30th day of July, 2014.

Respectfully submitted,

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