NO. 13-1102

IN THE

SUPREME COURT OF THE UNITED STATES

JARED THOMAS ALGER,
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

PETITIONER'S BRIEF IN REPLY

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QUESTIONS PRESENTED

Where state fails to call an available medical witness who had not previously been cross-examined to testify in a murder trial and instead calls a medical examiner as a percipient scientific witness who was not involved in the autopsy and enters the autopsy report into evidence where the main issue in the case is manner of death, was Petitioner's Confrontation Clause right violated?

When an autopsy report is entered into evidence and the person who drafted the report is available, but not called and was not previously cross-examined, is the autopsy testimonial and its admission into evidence therefore violates Petitioner's Confrontation Clause rights?

Did the trial court err in using the *Marsden* standard to decide whether Petitioner could replace his public defender with privately retained counsel?

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Petitioner's case presents unique questions of great Constitutional importance that this Court should address as it squarely presents the still open question of whether autopsies are testimonial and whether use of another witness in place of a percipient scientific witness violates the Petitioner's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Similarly, this Court should grant review on the appropriate standard by which private counsel can replace a public defender before trial. The California court incorrectly determined an issue of federal law related to Petitioner's Sixth Amendment right to counsel when it used a standard applied when replacing public defenders with public defenders instead of the more deferential standard of replacement with a privately retained attorney.

A. Split Exists on Definition of Testimonial

Respondent's brief in opposition only serves to highlight the need for this Court to provide guidance as to when an autopsy is testimonial. In an attempt to minimize the importance of the question presented, Respondent argues there is no split in authority and that all courts have determined that autopsies are not "testimonial".

Respondent's argue "'Decisional authority nationwide, in the wake of *Williams*, is in accord". Pet. Response 20 referencing *Williams v. Illinois*, 132 S.Ct. 2221 (2012). To back this proposition, they cite *United States v. James*, 712 F.3d 79 (2d Cir. 2013), *State v. Medina*, 306 P.3d 48 (Az. 2013) and *People v. Leach*, 980 N.E.2d 570 (Ill. 2012) and argue everyone must agree that autopsies are not testimonial. They have also agreed post-*Williams*, the law is confused and disjointed.

However, also in the wake of *Williams*, several courts have agreed that autopsies are testimonial showing there is a conflict of authority. In *New Mexico v. Navarette*, 294 P.3d 435 (N.M. 2013), the New Mexico Supreme Court held that statements in autopsy reports that formed the basis of the trial testimony of the chief medical investigator were testimonial hearsay under the Confrontation Clause.

In *West Virginia v. Kennedy*, 735 S.E.2d 905, 229 W.Va. 756 (2012), the Supreme Court of the state of West Virginia held that for purposes of use in criminal prosecutions, autopsies are, under all circumstances, "testimonial hearsay" under the Confrontation Clause of the U.S. Constitution.

In *Jenkins v. United States*, 75 A.3d. 174 (D.C. App. 2013), the court determined *Williams* failed to produce a common view held by five justices and thus created no new rule of law. *Jenkins*, 75 A.3d at 176. *Jenkins* held the DNA lab test results the expert in that case relayed to the jury, but had not performed, was testimonial and thus violated the

Confrontation Clause. *Jenkins v. United States*, 75 A.3d 174, 191 (D.C. App. 2013).

In *United States v. Duron-Caldera*, 737 F.3d 988 (5th Cir. 2013), the Fifth Circuit determined that use of a signed and sworn affidavit by the defendant's grandmother to prove lineage was a violation of the defendant's Confrontation Clause rights under *Williams v. Illinois*, 132 S. Ct. 2221 (2012). The government in *Duron-Caldera* argued the affidavit was not testimonial because its primary purpose was for use in immigration, not criminal proceedings. The Fifth Circuit dismissed this argument saying "[b]ased on our review of the record, we conclude that the government has failed to establish that the Serrato Affidavit was *not* created for the primary purpose of providing evidence for a later criminal trial." *U.S. v. Duron-Caldera*, 737 F.3d 988, 994 (5th Cir. 2013). The Fifth Circuit also specifically refused to adopt the primary purpose test saying there was no support for such a test in either the Confrontation Clause or in Supreme Court precedent. *Duron-Caldera*, 737 U.S. at 994.

Contrary to Petitioner's assertions, the law in the area is neither settled nor uniform and under the facts of this case, the Court could address the issues involving the definition of testimonial because the autopsy itself was admitted and someone other than the performing forensic pathologist testified and was unable to answer jury questions about the autopsy. The jury, through their questioning, showed that contrary to the Petitioner's assertion the matter was settled "inconsequential", the autopsy and its related

testimony was the determining factor in their decision. Res. Pet. 21.

B. State Holding Contrary to Federal Authority

Respondent asserts there was no violation of Petitioner's right to counsel because the court determined his public defender was competently representing him. However, that is not the standard and the court's use of such as test was in violation of the federal law related to the Constitutional right to counsel afforded under the Sixth Amendment.

As it stands, there is no coherent or consistent test as to the standard to use when replacing appointed counsel with retained counsel. While rare, the situation does arise and by allowing courts to rely on a competency standard, defendants' are held to an unconstitutionally high standard that is almost always out of reach. If the defendant has the means to retain counsel of his choice, has not abused that right with multiple substitutions and it is not the eve of trial meaning the night before or during trial, a defendant's right to counsel should be protected as it has in the past.

In *U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006), this Court stated:

> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." We have previously held that an element of this right is the right of

> a defendant who does not require appointed counsel to choose who will represent him. *Wheat v. United States,* 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Cf. *Powell v. Alabama,* 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932)

In *Gonzalez-Lopez*, this Court held that denial of the right to counsel is a "structural error" and therefore the defendant does not have to prove harm.

> We have little trouble concluding that erroneous deprivation of the right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S.Ct. 2078 (1993).

The denial of Petitioner's counsel of his choosing did not require him to demonstrate harm. Therefore the trial court erred in requiring him to show harm and by upholding the trial court's decision; the Court of Appeal has set a dangerous precedent in violation of the federal court's rulings on the matter and in violation of the Petitioner's Sixth Amendment rights.

CONCLUSION

WHEREFORE, for the foregoing reasons and the reasons stated in the Petition for Writ of Certiorari, Petitioner respectfully requests this Court grant certiorari on this Petition.

Respectfully submitted,

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