No. 13-1102

In the Supreme Court of the United States

JARED THOMAS ALGER, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the admission into evidence of an autopsy report or testimony by a medical examiner who did not perform the autopsy violated the Confrontation Clause on the facts of this case.

2. Whether the denial of petitioner's request to substitute counsel violated the Sixth Amendment right to counsel of choice on the facts of this case.

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STATEMENT

In 2009, a jury convicted petitioner of voluntary manslaughter, false imprisonment, and assault. Pet. App. A 3-4. The jury also found that petitioner had personally used a firearm in committing the manslaughter. *Ibid.* Petitioner was sentenced to sixteen years and eight months in prison. *Id.* at 4. In January 2012, the California Court of Appeal reversed in an unreported opinion. Pet. App. B 67, 68. The California Supreme Court granted review (Pet. App. E), and remanded for reconsideration (Pet. App. D). On remand in September 2013, the Court of Appeal affirmed in an unreported opinion. Pet. App. A 1, 2. The California Supreme Court denied review. Pet. App. C.

1. On August 26, 2006, petitioner shot and killed Steve Goodmanson, who was romantically involved with Anna Cattour, petitioner's former girlfriend. Pet. App. A 4-6, 9, 12. That night, petitioner, Goodmanson, Cattour, and Louis Aguilar rode in Goodmanson's truck to a nearby pond to shoot frogs and rabbits. Pet. App. A 5, 6. After arriving, petitioner—armed with a rifle—walked away with Goodmanson, with whom he had been arguing. *Id.* at 6. Then multiple gunshots rang out, followed fifteen minutes later by a single shot. *Ibid.* About a minute later, petitioner returned with the rifle, "pacing around . . . agitated, surprised, and scared." *Id.* at 6-7. Petitioner told Aguilar that Goodmanson had gone "fishing"; then he ran back down the road. *Id.* at 7. Aguilar could not see petitioner, but soon heard "what sounded like something rolling off the levee into the water." *Ibid.*

Petitioner later drove Cattoor to the location where Goodmanson lay shot. *Id.* at 8-9. Petitioner said to her, "'[T]his is what you wanted.'" *Id.* at 12. Cattoor screamed. Petitioner forced her back into the truck at gunpoint, hit her with his rifle, and forcibly restrained her when she tried to escape. *Id.* at 9. Cattoor eventually jumped out and ran; petitioner chased her down and hit her on the head. *Ibid.* Cattoor awoke in a hospital with multiple injuries. *Ibid.*

Sheriff's deputies apprehended petitioner near Goodmanson's body, which lay in shallow water beneath a levee. Pet. App. A 11, 12. Petitioner's pocket contained ammunition for a .22-caliber rifle. *Id.* at 11. The deputies found an expended .22 cartridge and a pool of blood on the road above Goodmanson's body, as well as a .22 rifle in the water about 15 feet from the body. *Id.* at 12.

In a recorded post-arrest interview, petitioner admitted shooting Goodmanson. Pet. App. A 16-17. Petitioner said that he and Goodmanson had a heated argument, then a fistfight. *Id.* at 16. Suggesting that Goodmanson had wanted petitioner to kill him in an assisted suicide, petitioner described Goodmanson grabbing at the gun as the two rolled on the ground. *Ibid.* Petitioner pushed up on the gun "barrel or stock" as Goodmanson held the "butt or the handle," resulting in a blow—or possibly a gunshot—to Goodmanson's head. *Id.* Petitioner saw Goodmanson "sitting there, you know, farting and fucking. . . . And, I mean, at this point I found (unintelligible) I pretty much know he's fuckin, pretty fuckin dead, right?'" *Id.* at 16-17. Petitioner

then shot Goodmanson "'like a wounded animal'" to end his suffering, out of "respect." *Id*. at 17.

Dr. Brian Peterson performed an autopsy on Goodmanson and signed the autopsy report. Pet. App. A 12-13, 25. Dr. Peterson "concluded that the cause of Goodmanson's death was a [single] gunshot wound to the head," and that the bullet's trajectory from Goodmanson's cheek into the lower skull caused brainstem injury and immediate death. *Id*. at 13.

2. Petitioner was charged with murder, kidnapping, and assault with a deadly weapon. Pet. App. A 3. About two weeks before the scheduled trial date, petitioner asked to substitute retained counsel for his appointed counsel. *Id*. at 58, 61. Private counsel appeared and asked for a six-month continuance to prepare for trial. *Id*. at 58. Petitioner had contacted the attorney's law firm "a few days before" to arrange for representation. *Id*. at 59. The prosecution opposed the motions for substitution and a continuance, "pointing out that the murder occurred in August 2006, appellant was arraigned in the fall of 2007, and the case had been continued several times despite letters from the victim's family urging the court to move the case forward." *Id*. at 58. The trial court denied the motion for substitution of counsel. *Id*. at 58-59. The court had previously admonished the parties that "there would be no further continuances," and the victim's family had been urging an expeditious trial. *Id*. at 60.

Petitioner immediately reframed his request as a motion, pursuant to *People* v. *Marsden*, 2 Cal. 3d 118, 465 P.2d 44 (1970), to substitute counsel due to "a serious conflict with his public defender." Pet.

App. A 59. The trial court held a hearing at which petitioner explained his reasons for his discontent. *Ibid*. The trial court then denied his *Marsden* motion.

The next day, a different attorney appeared from the same law firm petitioner previously had solicited. That attorney said she could be ready to try the case in less than two months despite having reviewed no case materials. Pet. App. A 59. The trial court—and the prosecutor—expressed doubt about such a commitment when counsel knew nothing of the case. The court allowed the proposed new counsel to review case materials with petitioner's current counsel before reconsidering its ruling on the substitution motion. *Id*. at 59-60.

The following day, two attorneys from the law firm appeared and reiterated that they could be ready for trial in less than two months. Pet. App. A 60. The attorneys "conceded that they could not rule out the possibility of needing a continuance but promised not to employ delay as a tactic." Ibid. The trial court denied the request for the substitution of retained counsel. Id. at 61. The court balanced the "'[p]rejudice to the People, prejudice to the victim's family waiting this long and having further a delay, against the Sixth Amendment right to counsel of choice,' and expressed reluctance 'to allow a substitution at this late date when we have very competent counsel ready to say ready.'" Pet. App. A 60. The court indicated a willingness to permit substitution of counsel were it "'confident that would effect a continuance of only three or four weeks . . . .'" The court noted, however, that petitioner

> "was held to answer in September of '07. This case has been set for trial multiple times. We have had victims who have spoken to the Court and are obviously having tremendous difficulty with the multiple continuances in this case. We have counsel who has been found to have been competently representing [petitioner], so there's not an issue of competency here. And we have already—I'm hearing all kinds of second-guessing going on that gives me very little confidence this is going to be a brief continuance."

Id. at 60-61. The court continued,

> "I too take seriously the defendant's right to counsel of his choice. [¶] However, that right is not absolute, and . . . I think it's not appropriate in this case where we are just two weeks from trial in a case that's been pending for a couple of years . . . to, at this late date, suddenly be substituting counsel when I have absolutely no confidence that there will not be repeated delays at this time."

Id. at 61.

At trial, the prosecution did not call Dr. Peterson as a witness on the cause of the victim's death. Instead, it presented criminalist Terence Wong, who testified to his observations of the Goodmanson autopsy at which Wong had taken about 150 photographs. Pet. App. A 12-13. Wong recounted how Dr. Peterson determined the bullet's trajectory by inserting a rod into Goodmanson's

cheek and extending it into the brain to the point where the bullet had come to rest. *Id.* at 13. One photograph of the body authenticated by Wong showed the entrance wound on Goodmanson's right cheek, and another showed a laceration on the back of Goodmanson's head. *Id.* at 12.

In addition, Dr. Gregory Reiber testified for the prosecution "as an expert on the manner and cause of death and injury, based on his review of the autopsy report and documentation, including the approximately 150 photographs taken by Wong." Pet. App. A 13, 24. Dr. Rieber and Dr. Peterson had been colleagues in the same forensic medical practice and had reviewed each other's work previously. *Id.* at 24. An autopsy report, Dr. Reiber explained, is a standardized business record routinely prepared by his medical group. *Id.* at 25. Dr. Reiber described standard autopsy procedures, including the pathologist's contemporaneous dictation of observations and actions during the procedure, and the transcribing of a report that the pathologist signs. *Id.* at 24-25. In this case, Dr. Reiber stated that he had reviewed the autopsy photos and Dr. Peterson's autopsy report before testifying. The trial court admitted the autopsy report into evidence without objection. *Ibid.*

Dr. Reiber described Goodmanson's gunshot wound and its effects. Pet. App. A 14, 25. Dr. Reiber relied on Dr. Peterson's autopsy report and Wong's photographs of the autopsy. *Id.* at 25. Dr. Reiber opined that the photographs indicated a close-range shooting, and he recreated for the jury the bullet's trajectory using a foam mannequin head. *Id.* at 13, 26. Dr. Reiber's demonstration drew upon the

autopsy photographs showing Peterson's insertion of a metal probe along the bullet's pathway. *Id.* at 26. With the prosecutor, Dr. Reiber "role played scenarios for a struggle over the gun based on [petitioner's] description of the incident." *Id.* at 13. Based on the photos of the entrance wound, and the trajectory angle, Dr. Reiber testified about Goodmanson's physical position if he were shot by pulling the trigger of the rifle himself. *Id.* at 27. Dr. Reiber also discussed the laceration on the back of Goodmanson's head—as shown in a photograph—and explained that it could have been inflicted by a blow from a rifle butt or by Goodmanson falling backward to the ground. Pet. App. A 14, 27.

Petitioner testified that there was tension between him and Goodmanson over Cattoor's affections. Pet. App. A 18-19. On the levee, he recounted, the two men's conversation grew "'volatile,'" and Goodmanson became physically aggressive. *Id.* at 20. Petitioner testified that he believed his life was in danger when Goodmanson grasped the gun in a struggle. *Ibid.* Petitioner stated that he had pushed back on the gun, which discharged and killed Goodmanson. *Id.* at 21. Petitioner denied administering a *coup de grâce* gunshot. *Ibid.*

4. On appeal, petitioner argued that Dr. Reiber's trial testimony, given in the absence of Dr. Peterson, violated his right of confrontation. Pet. App. B 89. He also claimed that the trial court had erroneously denied the motion to substitute retained counsel for the public defender. *Id.* at 116.[1]

[1] Petitioner did not appeal the denial of his *Marsden* (continued…)

a. The California Court of Appeal reversed. Pet. App. B 67. It held that petitioner's "constitutional right of confrontation was violated because the pathologist who performed the victim's autopsy did not testify at trial . . . ." *Id*. at 68. The Court of Appeal did not reach the question of the trial court's denial of petitioner's request to replace appointed counsel. Pet. App. B 116.

The California Supreme Court granted review, but deferred action pending its resolution of other cases presenting questions under the Confrontation Clause. Pet. App. E. On May 22, 2013, the California Supreme Court retransferred the cause with directions that the Court of Appeal reconsider the case in light of *Williams* v. *Illinois*, 132 S. Ct. 2221 (2012), *People* v. *Lopez*, 55 Cal. 4th 569 (2012), *People* v. *Dungo*, 55 Cal. 4th 608 (2012), and *People* v. *Rutterschmidt*, 55 Cal. 4th 650 (2012).

b. In a second opinion filed September 19, 2013, the Court of Appeal affirmed the judgment. Pet. App. A 1-2. The Court of Appeal found it unnecessary to "determine whether the [autopsy] report itself, or Reiber's testimony about the conclusion it reached [that the cause of death was a gunshot wound to the head], were testimonial in nature." Pet. App. A 41. The cause of death was "of little consequence" at trial compared to the issue of how and why the shooting occurred. *Ibid*. Even if Dr. Peterson's conclusion in the autopsy report as to the cause of death was testimonial, the admission of the report or Dr. Reiber's description of the report's

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(…continued)
motion. Pet. App. A 58, 59.

conclusion was harmless beyond a reasonable doubt. *Ibid.*

Moreover, Dr. Reiber's testimony about "*how* Goodmanson came to be shot and whether the shooting could have occurred in the manner [petitioner] described" did not rely upon the autopsy report, which "contained no statements addressing this issue." Pet. App. A 40. Rather, "[i]t was Reiber's independent testimony and re-enactment of the struggle that informed the jury it would have been very unlikely the scenario [petitioner] described could have resulted in the bullet following the trajectory described in the autopsy report." *Ibid.* Thus, Dr. Reiber was the witness against petitioner and was subjected to confrontation and cross-examination. He did not act as a conduit for testimonial statements—e.g., formalized and accusatory opinions—recorded by Dr. Peterson.

The Court of Appeal also addressed the testimonial status of specific portions of the autopsy report, drawing on this Court's confrontation cases as interpreted by the California Supreme Court. To the extent Dr. Reiber relied upon Dr. Peterson's initial determination of the bullet trajectory with recorded observations and measurements, the state court found no constitutional error because that autopsy report content

> was part of the pathologist's examination of the decedent's external and internal injuries necessary to "'support diagnoses, opinions, and conclusions'" and "governed primarily by medical standards rather than by legal requirements of formality or solemnity." (*Dungo*, *supra*, 55 Cal.4th at p.

> 624, conc. opn. of Werdeger, J.) As with the other descriptive portions of the report, "there was no prospect of fabrication or incentive to produce anything other than a scientifically reliable report. The purpose of this part of the autopsy report is 'simply to perform [the pathologist's] task in accordance with accepted procedures.' [Citation.]" (*Dungo*, *supra*, 55 Cal.4th at pp. 627, 630, conc. opn. of Chin, J.) The autopsy report and Reiber's testimony about its contents simply provided the basis for Reiber's independent conclusions and demonstration to the jury, and appellant was free to cross-examine Reiber on these points.

Pet. App. A 40-41. Accordingly, the Court of Appeal rejected the confrontation claim.

b. Addressing petitioner's counsel-of-choice claim, the Court of Appeal found that the trial court had not abused its discretion in denying a continuance to allow retained counsel to replaced appointed counsel. Pet. App. A 64. The appellate court discussed the factors a trial court may consider in ruling on such a request, including a defendant's limited due process right to choose his or her counsel, the need for orderly and expeditious adjudication of cases, and the timing of the request to change lawyers. *Id*. at 62-63.

The appellate court observed that (1) petitioner brought the motion twenty days before trial after his attorney had represented him for over two years; (2) the trial date had been continued "multiple times";

(3) the victim's family had expressed "frustration with the slow pace of the proceedings"; (4) the trial judge had reasonably questioned the ability of potential new counsel to become familiar enough to try the case expeditiously "without significant delay," particularly when the retained attorneys "knew nothing about the case when [petitioner's] request was initially raised and had only briefly reviewed the file when they represented they could be ready for trial in short order"; and (5) the prospective new attorneys acknowledged the possibility of further delays. *Id.* at 63-64. The Court of Appeal concluded: "Confronted with an entirely uncertain scenario if the substitution motion was granted and, on the other hand, appointed counsel who had worked the case for more than two years and was ready for trial, we cannot find an abuse of discretion in the court's denial of the substitution motion." *Id.* at 64.

ARGUMENT

Petitioner argues that "an autopsy [report] is testimonial and allowing a surrogate to testify in place of a percipient scientific witness about the contents of that testimonial autopsy report is a violation of the Sixth Amendment." Pet. 13. But this case is a poor vehicle by which to address those assertions. The Court of Appeal did not need to decide, and did not decide, whether Dr. Peterson's autopsy report as a whole was testimonial. Nor did the Court of Appeal decide whether Dr. Reiber's expert testimony about the victim's cause of death as recorded in the autopsy report violated petitioner's right to confrontation. The issues presented for review are far broader than those decided by the lower court.

To the extent the California Court of Appeal addressed the merits of that confrontation claim, its decision was correct and warrants no further review. This Court's decisions in *Crawford*, *Melendez-Diaz*, *Bullcoming*, and *Williams* have established a set of Confrontation Clause principles applicable to forensic science evidence that, especially since *Williams*, have been consistently applied by lower courts.

Finally, the case is not a useful vehicle for clarifying the accused's confrontation rights regarding autopsy evidence. Far from being outcome-determinative, the cause of death was not in dispute. Dr. Peterson's expert opinion on that subject, to the extent it was introduced through the autopsy report, was inconsequential.

Nor is certiorari warranted on petitioner's second contention that the trial court's refusal of his request to substitute retained counsel for his public defender violated his Sixth Amendment right to counsel of choice, and that the error was structural. Pet. 18-19. He argues that the trial court confused the right to counsel of choice on the substitution motion with its earlier evaluation of the competency of his existing lawyer in the *Marsden* hearing. Pet. 18-19. Here too, no dispute over any constitutional principle is presented, and review is unnecessary. The trial court's actions, in light of the facts presented and as affirmed by the Court of Appeal, were consistent with established authority governing the right to counsel of one's choosing.

a. The Sixth Amendment of the United States Constitution provides in part that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to

be confronted with the witnesses against him . . . ." In *Crawford* v. *Washington*, 541 U.S. 36 (2004), this Court tethered the right to confront witnesses to whether their out-of-court statements were "testimonial." *Id*. at p. 68. Subsequently, the Court has addressed the application of *Crawford* to forensic evidence and expert testimony in *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305 (2009), *Bullcoming* v. *New Mexico*, 131 S. Ct. 2705 (2011), and *Williams* v. *Illinois*, 132 S. Ct. 2221 (2012). While the Court was closely divided in each case, certain identifiable principles of law run consistently through this chain of authority and have informed this Court's analysis in each instance. Lower courts have demonstrated a workable understanding of these general principles, as the present case illustrates.

Whether an out-of-court statement is testimonial depends generally upon both the primary purpose for which the statement was made and the degree of formality it embodies. In *Williams*, the most recent iteration in this series of cases, the "primary purpose test" was articulated in several ways. The four-justice plurality characterized testimonial statements as "having the primary purpose of accusing a targeted individual of engaging in criminal conduct . . . ." *Williams*, 132 S. Ct. at 2242 (plurality opinion). The dissent drew upon *Davis* v. *Washington*, 547 U.S. 813, 822 (2006), to state that testimonial statements are made "for the primary purpose of establishing 'past events potentially relevant to later criminal prosecution'—in other words, for the purpose of providing evidence." *Williams*, 132 S. Ct. at 2273 (Kagan, J., dissenting). In his *Williams* concurrence, Justice Thomas articulated an analogous test: whether the declarant

"primarily intend[ed] to establish some fact with the understanding that his statement may be used in a criminal prosecution." *Id.* at 2261 (Thomas, J., concurring). As the California Supreme Court has observed: "[A]ll nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be." *People* v. *Lopez*, 55 Cal. 4th at 582.

As for the requisite formality or solemnity of the statement, Justice Thomas in *Williams* wrote that "the Confrontation Clause reaches ""formalized testimonial materials,"" such as depositions, affidavits, and prior testimony, or statements resulting from ""formalized dialogue,"" such as custodial interrogation. 132 S. Ct. at 2260 (Thomas, J., concurring). The *Williams* plurality noted that the Confrontation Clause was adopted to curtail introduction of "formalized statements such as affidavits, depositions, prior testimony, or confessions" when the declarant cannot be confronted. *Id.* at 2242 (plurality opinion). The dissent took a broader view of formality that includes any official signed report as long as its "form, function, and purpose" was similar to a document actually certified or attested by oath. *Id.* at 2276 (Kagen, J., dissenting). In response, the California Supreme Court generalized that "to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity." *Lopez*, 55 Cal. 4th at 581.

The California Supreme Court's application of these principles to autopsy evidence reasonably

synthesized the various views expressed by this Court in *Williams* and its predecessor cases. In *People* v. *Dungo*, 55 Cal. 4th 608, a murder case, a forensic pathologist who had not performed the autopsy provided independent opinion testimony about the cause and manner of the victim's death. *Id*. at 612. The California Supreme Court found no violation of the Confrontation Clause because, as relevant here, the statements in the nontestifying pathologist's autopsy report relied upon by the testifying pathologist—the "objective facts about the condition of [the victim's] body"—were not testimonial. *Id*. at 621. In other words, the California Supreme Court did not adopt an "all or nothing" stance as to autopsy reports; instead, it appropriately parsed out and identified those statements in the report that were potentially testimonial (the pathologist's conclusions) versus those that were clearly not (objective measurements and observations).

The court in *Dungo* discussed both the formality and the primary purpose of statements in an autopsy report. Regarding formality, the statements in the autopsy report "describing the pathologist's anatomical and physiological observations about the condition of the body" were mere recordation of objective facts by a pathologist, analogous to medical records written by a treating physician. As such, they do not possess the formality of testimonial statements. *Dungo*, 55 Cal. 4th at 619-20; see also *id*. at 624 (Werdegar, J., concurring, joined by Cantil-Sakauye, C.J., Baxter, J., and Chin, J.) (an autopsy is structured as a systematic medical examination governed by medical standards, rather than an interrogation); *Rollins* v. *State*, 866 A.2d 926, 953

(Md. App. 2005) (an autopsy report is a "quintessential business record" and nontestimonial in nature). A pathologist's expert conclusions, on the other hand, may embody a greater degree of formality. *Dungo*, 55 Cal. 4th at 619. Significantly, the expert witness in *Dungo* "did not describe to the jury [the autopsy surgeon's] opinion about the cause of [the victim's] death; instead, he only gave his own independent opinion as a forensic pathologist." *Id*. at 614; see also *id*. at 618.

On the issue of the statement's purpose, "criminal investigation was not the *primary* purpose for the autopsy report's description of the condition of [the victim's] body; it was only one of several purposes." *Dungo*, 55 Cal. 4th at 621. Other reasons for generating an autopsy report include statutory mandates requiring inquiry into certain deaths (most of which are unrelated to criminal activity),[2] public health, public safety, use in wrongful death civil litigation, insurance coverage determinations, public awareness, and resolving questions for a deceased's family. *Id*.; see also *id*. at 625 (Werdegar, J., concurring) (describing nontestimonial primary purpose), 631 (Chin, J., concurring, joined by Cantil-Sakauye, C.J., Baxter, J., and Werdegar, J.) (primary purpose of autopsy report was to "describe the

[2] For example, in 2012 in Riverside County, California, out of 2,333 deaths processed by the Coroner's Office 86 (or .04 percent) were classified as homicides. Coroner's Statistics, Riverside County Coroner's Office, available at http://www.riversidesheriff.org/coroner/statistics.asp. The largest category of deaths investigated that year were attributed to natural causes (1,113), followed by miscellaneous accidental death (620), suicide (251), traffic-related (213), homicide (86), and "[u]ndetermined" (50). *Ibid*.

condition of the body" and not to accuse the defendant or other "targeted individual"). In short, "[t]he autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial." *Id.* at 625.

The Court of Appeal in this case was correct in ruling accordingly. Pet. App. A 40-41. It held that Dr. Reiber's courtroom opinions and reenactments of the possible circumstances under which the shot was fired relied primarily upon "the probe used during the autopsy," which was "part of the pathologist's examination of the decedent's external and internal injuries necessary to "'support diagnoses, opinions, and conclusions'" and 'governed primarily by *medical* standards rather than by legal requirements of formality or solemnity.'" Pet. App. at 40 (quoting *Dungo*, 55 Cal. 4th at 624 (Werdegar, J., concurring)). "As with the other descriptive portions of the report, 'there was no prospect of fabrication or incentive to produce anything other than a scientifically reliable report. The purpose of this part of the autopsy report is "simply to perform [the pathologist's] task in accordance with accepted procedures." [Citation.]'" Pet. App. A 40 (quoting *Dungo*, 55 Cal.4th at 627, 630 (Chin, J., concurring)).

This reasoning is sound. The fundamental reason an autopsy is generated is to medically "develop[] accurate and adequate information about the death of each and every human being, whenever possible." *People* v. *Roehler*, 167 Cal. App. 3d 353, 374, 213 Cal. Rptr. 353 (1985). The broad societal interest in conducting autopsies extends well beyond the narrower and collateral function of detecting evidence of a crime. Even the secondary reasons for

collecting data at autopsies do not relate exclusively to the criminal justice system but, rather, "range from beliefs about the fundamental dignity of man to such practical concerns as control of disease, the keeping of statistics, and of course, the detection of negligent or intentional wrongdoing. It can be said that the safety of all members of society depends upon orderly and open procedures relative to death." *Id*. As the Court of Appeals for the First Circuit has noted, "'a medical examiner, although often called a forensic expert, bears more similarity to a treating physician than he does to one who is merely rendering an opinion for use in the trial of a case.'" *Manocchio* v. *Moran*, 919 F.2d 770, 777 (1st Cir. 1990).

The California Court of Appeal properly concluded that scientific data—including medical observations and measurements—are not made with a primary purpose or degree of formality characteristic of testimonial statements. "Scientific data are the coin of the realm in science, and they are always treated with reverence." David Goodstein, *How Science Works*, *in Fed. Jud. Ctr., Reference Manual on Scientific Evidence* 43 (3d ed. 2011). By extension, science does not require that those who collect data be those who interpret it; indeed, "[t]rained experts commonly extrapolate from existing data." *General Electric* v. *Joiner*, 522 U.S. 136, 146 (1997). There is a plain distinction between raw data and conclusions that may be drawn therefrom; whatever accusatory implications the latter may have, the former lack any at all. In fact, the scientific method itself is premised on skepticism. A prominent theoretical physicist once wrote, "I cannot stress often enough that what science is all

about is not proving things to be true but proving them to be false. What fails the test of empirical reality, as determined by observation and experiment, gets thrown out like yesterday's newspaper." Lawrence M. Krauss, *War Is Peace: Can Science Fight Media Disinformation?*, Sci. Am., Dec. 2009, at 40. This core perspective is inimical to any suggestion that scientific data are generated with a particular accusatory purpose. Data simply exist, regardless of what meaning an expert may later accord them. This conclusion is particularly apt for data contained in autopsy reports, which are prepared for many reasons other than creation of evidence for later use at a criminal trial.

As the Court of Appeal observed in this case, the critical component of Dr. Reiber's testimony consisted of "independent conclusions and demonstration to the jury" about "*how* Goodmanson came to be shot and whether the shooting could have occurred in the manner [petitioner] described." Pet. App. A 40, 41. Dr. Reiber did not act as a conduit for transmitting Dr. Peterson's conclusions to the jury, because "the autopsy report contained no statements addressing this issue." Pet. App. A 40. To the extent Dr. Reiber's opinion overlapped a conclusion also reached by Dr. Peterson—such as to the cause of Goodmanson's death—that testimony was informed by Reiber's independent review of Wong's 150 photographs, as well as the medical documentation of the condition of Goodmanson's body. Cf. *United States* v. *Ignasiak*, 667 F.3d 1217, 1233 n.21 (11th Cir. 2012) (distinguishing case facts from those in *Williams* in light of trial expert essentially reading the contents of nontestifying pathologist's autopsy

reports into evidence, leaving no ground for viewing testimony as "truly independent expert opinion").

Decisional authority from appellate courts nationwide, in the wake of *Williams*, is in accord. See *United States* v. *James*, 712 F.3d 79, 99 (2d Cir. 2013) ("[T]he autopsy report was not testimonial because it was not prepared primarily to create a record for use at a criminal trial."); *State* v. *Medina*, 306 P.3d 48, 63-64 (Ariz. 2013) (holding that autopsy report was not testimonial); *People* v. *Leach*, 980 N.E.2d 570, 593 (Ill. 2012) ("[W]e conclude that under the objective test set out by the plurality in *Williams*, under the test adopted in *Davis*, and under Justice Thomas's 'formality and solemnity' rule, autopsy reports prepared by a medical examiner's office in the normal course of its duties are nontestimonial.").

Petitioner's related theory of error is that Dr. Reiber was an improper "replacement" for Dr. Peterson as a "percipient scientific witness, not an expert . . . ." Pet. 8. Petitioner claims a conflict exists as to whether the Court's Confrontation Clause jurisprudence applies to this situation. Pet. 8. But he cites no case law that supports this claim. And, as discussed, the percipient observations recorded by Dr. Peterson were not testimonial statements.

In addition, the Court of Appeal did not decide whether the autopsy report as a whole was testimonial (and, if so, which part(s)), or whether Dr. Reiber's testimony about the cause of death infringed upon petitioner's Sixth Amendment confrontation right; thus any review of these issues would have to proceed without the benefit of prior consideration by

the lower court. Pet. App. A 41 (relying on harmless error analysis).

In any event, as the Court of Appeal emphasized, the cause-of-death opinion expressed by Dr. Peterson in the autopsy report was inconsequential to the proof of petitioner's guilt. *Id.* at 40. A substantial body of other evidence demonstrated beyond a reasonable doubt that petitioner killed Goodmason with a rifle shot to the head. Petitioner himself admitted as much. *Id.* at 16-17, 20-21. Instead, the relevance of Dr. Reiber's testimony lay in his independent and original extrapolations from photographs and descriptions of the bullet's trajectory to demonstrate the possible relative positions of petitioner and Goodmanson when the shot was fired. *Id.* at 40. "The autopsy report contained no statements addressing this issue." *Ibid.* The testimony of criminalist Wong, who observed the autopsy and documented it with photographs, provided a sufficient foundation for empirical facts referenced by Dr. Reiber in his testimony. Nor does this case present a scenario in which a testifying expert's opinions overlap with a nontestifying expert's opinions, such that it could become important to determine the testimonial status of the latter.

2. Petitioner presents no cogent reason for reviewing the trial court's denial of his request for a substitution of retained counsel. The issue is factbound. Further, the law governing this issue is well-established, and was applied correctly by the lower courts here.

At the threshold, petitioner incorrectly characterizes as error the trial court's application of the state-law *Marsden* standard in its ruling on his substitution motion. Pet. 19. The trial court denied petitioner's substitution motion *before* petitioner made the *Marsden* motion. Pet. App. A at 59. It could not have transposed law governing the latter with law governing the former. After denying the substitution motion, the court heard and denied the *Marsden* motion. *Ibid.* Still later, the court reconsidered its ruling on the original substitution motion, and denied it again. *Id.* at 61. Each ruling was discrete. To the extent that the trial court considered the competency of appointed counsel in adjudicating petitioner's substitution motion, it did so in a manner fully consistent with Sixth Amendment principles.

The Sixth Amendment affords criminal defendants the right to assistance of counsel. For those defendants "who do[] not require appointed counsel," this includes the right to counsel of one's choosing. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). The right to retained counsel of one's choosing, while a standalone constitutional guarantee, may be limited under some circumstances because it is a means of ensuring the overarching goal of a fair trial. *Id.* at 145, 151-52. This interrelationship of rights drives a discretionary judicial analysis of Sixth Amendment right to counsel claims. *Wheat* v. *United States*, 486 U.S. 153, 159 (1988); *Strickland* v. *Washington*, 466 U.S. 668, 685-86 (1984). "[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an

effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat*, 486 U.S. at 159. Under some circumstances, therefore, a trial court may "require a defendant to proceed to trial with counsel not of defendant's choosing." *United States* v. *Schmidt*, 105 F.3d 82, 89 (2d Cir. 1997); see *Gonzalez-Lopez*, 548 U.S. at 147 n.3 ("[T]he right to counsel of choice may be limited by the need for fair trial . . . .").

There is no absolute and inviolable Sixth Amendment rule that the accused's discontent with an attorney means the defendant must be permitted to replace that lawyer. This Court has rejected the notion that the right to counsel includes the right to a "'meaningful attorney-client relationship.'" *Morris* v. *Slappy*, 461 U.S. 1, 14 n.6 (1983). And, "nothing in the Constitution" implies that effective advocacy includes litigating a case exactly the way the client wishes despite the attorney's reasonable professional judgments. *Jones* v. *Barnes*, 463 U.S. 745, 754 (1983).

A court possesses the discretion, therefore, to consider a request to substitute counsel in the larger context of the trial as a whole, with an eye toward fairness and efficiency. Proper considerations can include the interests of the victim's family in expediting trial, as well as the consumption of judicial resources entailed by further delays. See *Morris* v. *Slappy*, 461 U.S. at 14-15 (consideration of victims' concerns and judicial resources is appropriate in evaluating right to counsel claim). These matters are largely factbound.

> Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel.

Id., at 11-12. In *Gonzalez-Lopez*, this Court recognized "a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar," as well as a trial court's "power to . . . make scheduling and other decisions that effectively exclude a defendant's first choice of counsel." 548 U.S. at 152; see, *e.g.*, *United States* v. *Jones*, 733 F.3d 574 (5th Cir. 2013) ("[T]he district court was required to balance [defendant's] right to counsel of choice against the needs of fairness and the demands of its calendar."); *United States* v. *Ensign*, 491 F.3d 1109, 1115 (9th Cir. 2007) (holding that the "purposes inherent in the fair, efficient and orderly administration of justice" may dictate that a defendant be denied permission to hire counsel of his or her choice); *United States* v. *Weninger*, 624 F.2d 163, 166 (10th Cir. 1980) ("A defendant's right to obtain counsel of his choice must be balanced against the need for the efficient and effective administration of criminal justice.").

The timing of the substitution request and the quality of the existing representation are thus important factors for the trial court's consideration. "When a defendant attempts to substitute counsel at the eleventh hour or in mid-trial, he must show good cause such as a conflict of interest, a breakdown in communication or an irreconcilable dispute with his attorney." *United States* v. *Panzardi Alvarez*, 816 F.2d 813, 816 (1st Cir. 1987). Because there was no showing of constitutionally ineffective representation below, the trial court here acted well within its discretion in considering delay that would potentially—if not inevitably—result from substitution of defense counsel mere weeks before the murder trial was set to begin. See *United States* v. *Brumer*, 528 F.3d 157, 161 (2nd Cir. 2008) (trial court acted within its discretion, and consistent with the Sixth Amendment, in considering impact on scheduling and effectiveness of incumbent counsel in denying request to substitute counsel).

Likewise, the trial court's decision was properly informed by other facts. First, the request to substitute counsel came only twenty days before trial and after multiple continuances. Second petitioner "had been represented by the same public defender" for "well over two years." Third, the victim's family had manifested clear frustration with the pace of proceedings. See Pet. App. A at 63. Fourth, the trial court was justifiably concerned with the prospect of lengthy delay. That concern was well-founded. The initial request by proposed new counsel for a six-month continuance was rapidly succeeded by a request for a two-month continuance, although new counsel had examined no materials in the case. Once such an examination was evidently made, new

counsel could not represent further continuances would not, in fact, become necessary. Pet. App. A 60.

That the trial court was satisfied with the competency of petitioner's appointed counsel at the *Marsden* hearing did not bring its denial of the motion to substitute a retained attorney into conflict with the Counsel Clause. To the contrary, this Court's precedent confirms that a trial court's finding of effective advocacy by incumbent counsel, while not sufficient grounds in isolation for denying a substitution motion, see *Gonzalez-Lopez*, 548 U.S. at 147-148, can and should be considered by the trial court along with other factors bearing on the fair and efficient administration of justice, *id.* at 147 (the right to effective representation, like the right to retain counsel of one's choice, derives from the fundamental purpose of ensuring a fair trial). There was no error in this case, structural or otherwise.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted

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