No._____

In the
Supreme Court of the United States

JOSEPH ANDREW PEREZ JR.,
Petitioner,
-v-
THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the
California Supreme Court

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

Whether an autopsy report created as part of a homicide investigation, and asserting that the death was caused by homicide, is "testimonial" under the Confrontation Clause framework established in *Crawford v. Washington*, 541 U.S. 36 (2004).

LIST OF PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a direct appeal in which petitioner, Joseph Andrew Perez, Jr., was the appellant before the California Supreme Court. The Respondent was the State of California represented by the Office of the Attorney General of the State of California.

Mr. Perez asks that the Court issue a Writ of Certiorari to the Supreme Court of California.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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Joseph Andrew Perez Jr. respectfully petitions for a writ of certiorari to review the judgment and decision of the California Supreme Court affirming his conviction and death sentence.

OPINION BELOW

On March 1, 2018, and modified on denial of rehearing on May 16, 2018, the California Supreme Court issued an opinion denying Mr. Perez's appeal. This opinion, reported as *People v. Perez*, 4 Cal. 5th 421, 411 P.3d 490, 229 Cal. Rptr. 3d 303 (2018) is attached as Appendix A. The order of that Court modifying the opinion and denying the petition for rehearing, dated May 16, 2018, is attached as Appendix B.

STATEMENT OF JURISDICTION

Because the California Supreme Court issued its modified opinion on May 16, 2018, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The question presented implicates the Confrontation Clause of the Sixth Amendment, which provides: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

CAL. GOV'T CODE § 27491.1., entitled "Report of death to police officials," the coroner was required

> [i]n all cases in which a person has died under circumstances that afford a reasonable ground to suspect that the person's death has been occasioned by the act of another by criminal means, the coroner, upon determining that those reasonable grounds exist, shall immediately notify the law enforcement agency having jurisdiction over the criminal investigation. Notification shall be made by the most direct communication available. The report shall state the name of the deceased person, if known, the location of the remains, and other information received by the coroner relating to the death, including any medical information of the decedent that is directly related to the death. The report shall not include any information contained in the decedent's medical records regarding any other person unless that information is relevant and directly related to the decedent's death. (Added by Stats.1959, c. 1537, p. 3864, § 1. Amended by Stats.1985, c. 304, § 3; Stats.2000, c. 1068 (A.B.1836), § 2.)

Under CAL. GOV'T CODE § 27521, additional duties arise when the victim is unidentified:

> …(d)...If the results of an autopsy performed using electronic imaging provides the basis to suspect that the death was caused by or related to the criminal act of another*, and it is necessary to collect evidence for presentation in a court of law,* then a dissection autopsy shall be performed in order to determine the cause and manner of death.
>
> (e) The coroner, medical examiner, or other agency performing a postmortem examination or autopsy *shall prepare a final report of investigation in a format established by the Department of Justice*. ...
> (Added by Stats.2000, c. 284 (S.B.1736), § 1. Amended by Stats.2014, c. 437 (S.B.1066), § 6, eff. Jan. 1, 2015; Stats.2016, c. 136 (A.B.2457), § 1, eff. Jan. 1, 2017.) (Emphasis added).

The legislature has recognized that the autopsy is part of the investigation process and has added additional safeguards for the autopsy to under Government Code section 27522:

> (f)(1) *Only individuals who are directly involved in the investigation of the death of the decedent shall be allowed into the autopsy suite.*
> (2) If an individual dies due to the involvement of law enforcement activity, law enforcement personnel *directly involved in the death of that individual shall not be involved with any portion of the postmortem examination, nor allowed inside the autopsy suite during the performance of the autopsy*.
> (g) *Any police reports, crime scene or other information, videos, or laboratory tests that are in the possession of law enforcement and are related to a death that is incident to law enforcement activity shall be made available to the physician and surgeon who conducts the autopsy prior to the completion of the investigation of the death*.
> (Emphasis added).
> (Added by Stats. 2016, Ch. 787, Sec. 7. Effective January 1, 2017.)

In the case of violent death, CAL. GOV'T CODE § 27504.1 requires the following:

> If the findings are that the deceased met his or her death at the hands of another, the coroner shall, in addition to filing the report in his or her office or with the county clerk, as determined by the board of supervisors pursuant to Section 27503, *transmit his or her written findings to the district attorney, the police agency wherein the dead body was recovered, and any other police agency requesting copies of the findings*….

(Amended by Stats. 2002, Ch. 221, Sec. 36. Effective January 1, 2003) (emphasis added).

STATEMENT OF THE CASE

Absent narrow exceptions inapplicable here, the Confrontation Clause forbids the prosecution in a criminal case from introducing out-of-court "testimonial" statements unless the declarants are unavailable and the defendants had a prior opportunity to cross-examine them. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), this Court held that formalized forensic analysis reports created for use in criminal prosecutions fall within the "core class of testimonial statements" described in *Crawford. Melendez-Diaz* at 310 (internal quotation marks and citation omitted). This case presents a fundamental and recurring question over which the state courts of last resort are intractably divided: whether the holding of *Melendez-Diaz* applies to autopsy reports created as part of a homicide investigation and asserting that the cause of death was homicide. The California Supreme Court currently holds that it does not.

A. Factual Background.

This case arises from a homicide that occurred on March 24, 1998 in Lafayette, California, in which the victim Janet Daher was killed in the course of an alleged residential burglary. *People v. Perez*, 4 Cal. 5th 421, 428 (2018) (Appendix A). Charges against petitioner and co-defendants Lee Snyder and Maury O'Brien were commenced on

March 23, 1999. (1 RT 100.)[1] There were four charges in the initial draft indictment: murder; residential robbery; residential burglary; and the theft of the victim's vehicle. *Perez*, 4 Cal. 5th at 428. The special circumstances allegations, pursuant to CAL. PENAL CODE § 190.2(A)(17), were that the murder was committed while they were engaged in the commission of robbery and a burglary. *Id.*

On October 16, 2001, petitioner was found guilty on all counts: Count 1, murder, in violation of CAL. PENAL CODE § 187; Count 2, the murder was committed while engaged in a robbery, a violation of CAL. PENAL CODE § 211; Count 3, first degree burglary, a violation of CAL. PENAL CODE § 459 and 460; and Count 4, taking of a vehicle in violation of CAL. VEH. CODE § 10851. (*Perez*, 4 Cal. 5th at 428; 15 RT 3688-3689.) Petitioner was formally sentenced to death on January 25, 2002. (24 RT 5618.)

On August 16, 2017, the California Supreme Court ordered the parties to "serve and file supplemental briefs addressing the effect of recent precedent on the hearsay and confrontation clause issues related to Brian Peterson's testimony that were raised in this appeal," citing *People v. Sanchez*, 63 Cal. 4th 665 (2016), and suggesting that it be compared with certain decisions reached by high courts in various other States (Oklahoma, New Mexico, Indiana, Tennessee, Ohio, Arizona, West Virginia and Illinois.)

The Court's order referred to Issue XVII of the direct appeal, "trial court error in allowing inadmissible hearsay testimony from the pathologist who was not present at the

[1] "RT" designates the Reporter's Transcript in these proceedings, "CT" designates the Clerk's Transcript.

autopsy." *See Perez*, 4 Cal. 5th at 454-457. Petitioner argued on both Confrontation Clause and hearsay/due process grounds. This is the issue presented herein.

B. How the issue was decided in the courts below.

The California Supreme Court summarized the trial testimony as follows:

> Mrs. Daher's autopsy was performed by a pathologist named Susan Hogan, who worked for a private company that had a contract with Contra Costa County to perform autopsies.[2] Hogan testified at Snyder's trial but had moved out of the area by the time of Perez's trial, so the prosecution presented testimony about the autopsy from another pathologist from the same company named Brian Peterson. The prosecution never proffered evidence showing that Hogan was unavailable to testify. (See Evid. Code, § 240, subd. (a).) Peterson had zero involvement with Mrs. Daher's autopsy, and his entire knowledge of the autopsy came from Hogan's report, which was never admitted into evidence.
>
> Peterson's testimony included a description of the signs that Daher was strangled, including marks around her neck, bleeding in the whites of her eyes, bleeding in the muscles of her neck, and a furrow around her neck. He testified that these "changes in the face [ ] implied that that force had indeed contributed to this lady's death." Peterson also characterized the severity and cause of various stab wounds. Peterson asserted, for example, that for six different stab wounds "it's safe to say that ... the knife was pushed in far enough so that the entire blade was inside the body." The prosecutor then showed Peterson the knife that was in evidence, and Peterson testified that "this knife is certainly consistent with every injury that we saw here that was delivered by sharp force." At times, Peterson expressly relayed observations that Hogan had recorded at the autopsy, saying things like "Dr. Hogan estimated," "she noted," and "[her] findings included." Peterson also shared various reasons why he believed "that the strangulation happened first" and that "the major force in this case was ... the strangulation." Though Peterson believed "that relatively lethal to sub lethal force had already been delivered before those stab wounds," he testified that he could "say unequivocally, based on the blood inside the chest, that her heart was still beating at the time those stab wounds were

[2] Dr. Hogan's autopsy report is included herein as Appendix C.

> delivered." Asked if "in your opinion would the cause of death be a combination of ligature strangulation and stabbing," Peterson answered yes. *Perez*, 4 Cal. 5th at 454.

The autopsy report was written by Dr. Hogan. (CT 608, 615; 1 RT 309; 13 RT 2919, 3022.) Prior to petitioner's trial, Dr. Hogan testified at co-defendant Lee Snyder's trial, that she could not rule out the possibility that the decedent had already died when stabbing wounds were inflicted. (Snyder RT 943-44.)[3] She would have expected substantially more blood in the lungs if the victim was still alive when she was stabbed. (*Id.*) This testimony contradicts Dr. Brian Peterson's testimony in Perez's trial and the cause of death listed in the autopsy report, which includes both ligature strangling and stabbing as having caused death. (13 RT 3020-21.)

The autopsy report was not admitted into evidence at petitioner's trial except through the testimony of an expert, Dr. Peterson, who did not attend the autopsy, but who relied on the autopsy report to draw conclusions as to the cause of death. Dr. Peterson's only connection to the case was that he worked for a company, Forensic Medical Group of Fairfield, California, that was the former employer of the physician who actually performed the autopsy, Dr. Susan Hogan. (13 RT 3001.) Contrary to Dr. Hogan's testimony, Dr. Peterson testified that he was certain, based upon the autopsy report, that the decedent was alive at the time she was stabbed. (13 RT 3020.) As argued herein, the inconsistency between Dr. Hogan's report and her testimony, and the circumstances

[3] The Snyder Reporter's Transcript was incorporated into the Record on Appeal in this case.

surrounding the autopsy should have removed her report, and Dr. Peterson's testimony, from the protections of any state evidentiary laws. The inconsistencies between Dr. Hogan's testimony in co-defendant Snyder's trial and Dr. Peterson's testimony in petitioner's trial show that the error was not harmless and that petitioner was prejudiced.

In denying this claim, the California Supreme Court declined to revisit *People v. Dungo*, 55 Cal. 4th 608 (2012), holding that autopsy reports were not testimonial, because it found the error harmless beyond a reasonable doubt. (*Perez* at 456.) The *Perez* court applied *People v. Sanchez*, 63 Cal. 4th 665 (2013) to the problem of the testifying pathologist who did not make the original observations. The *Perez* court concluded that the substitute pathologist's description of the victim's wounds and postmortem condition, taken directly from the original pathologist's report, constituted hearsay under *Sanchez* and were improperly admitted. (*Perez*, *supra*, 4 Cal. 5th at 456, 229 Cal.Rptr.3d 303, 411 P.3d 490.) However, the Court also concluded:

> "While [the testifying pathologist] relied on hearsay in forming his opinion, he is permitted to do so under *Sanchez* and Evidence Code section 802. (See *Sanchez*, *supra*, 63 Cal.4th at p. 685, 204 Cal.Rptr.3d 102, 374 P.3d 320 ['Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so.'].) The jury would have thus heard [his] opinion about the cause of death even if the trial court had denied admission of the challenged hearsay statements. So we conclude that any error was harmless beyond a reasonable doubt."
> (*Perez*, at 457, 229 Cal.Rptr.3d 303, 411 P.3d 490.)

REASONS FOR GRANTING CERTIORARI

This Court held in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and reaffirmed in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), that formalized forensic reports created for evidentiary use are testimonial. Subsequently, in *Williams v. Illinois*, 567 U.S. 50 (2012), five Justices, in two opinions, held that a DNA report was not testimonial. *See id.* at 2227 (plurality opinion); *id.* at 2255 (Thomas, J., concurring in the judgment). But because the DNA report was not formalized, nothing in that holding undermined the rule of *Melendez-Diaz* that formalized forensic reports created for evidentiary use in criminal investigations are testimonial.

Nevertheless, in the past few years, state high courts have splintered over whether autopsy reports, created as part of a homicide investigation, and asserting that the cause of death was homicide, are testimonial. Eight states hold that they are testimonial: Massachusetts, Michigan, Missouri, New Mexico, Oklahoma, North Carolina, New Jersey and West Virginia. And seven states hold that they are non-testimonial: Arizona, California, Florida, Illinois, Louisiana, Ohio, and South Carolina. Other courts hold that some statements are testimonial while other statements are not.

The importance of this issue to the administration of criminal justice is manifest. This case presents an ideal vehicle for resolving the issue because, in every relevant aspect, the circumstances under which the forensic examiner conducted the autopsy are typical; and we have the oft-recurring situation of a substitute coroner who testified at trial instead of the coroner who actually performed the autopsy.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER AUTOPSY REPORTS CREATED AS PART OF HOMICIDE INVESTIGATIONS ARE TESTIMONIAL.

I. Introduction.

In this case, Dr. Brian Peterson testified to, and relied upon, statements and opinions contained in an autopsy report authored by a non-testifying doctor who actually performed the autopsy (Dr. Susan Hogan) to support his own opinions. The California Supreme Court held that Dr. Peterson's testimony violated state hearsay law, as clarified by this Court in *Sanchez*, because it recited and relied upon inadmissible case-specific hearsay evidence to support his opinions, thus implicating petitioner's state and federal due process rights. The holding that this was harmless error was erroneous, as Dr. Hogan testified significantly differently from Dr. Peterson in Perez's co-defendant Snyder's trial and her testimony at that trial was more favorable to Perez than Dr. Peterson's.

Dr. Peterson's testimony violated petitioner's Sixth Amendment right to confrontation, because the hearsay was testimonial, under the holdings of *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527 (2009) and *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705 (2011).

Here, there was no showing of the unavailability of Dr. Hogan (*Perez*, 4 Cal. 5th at 454) and petitioner was denied his right to confront the evidence against him when the prosecution's expert impermissibly testified to unverifiable hearsay contained in the autopsy report. Case-specific hearsay in the autopsy report was used which could not be

independently verified by the expert, and had in fact been rejected by the author of the autopsy report.

II. United States Supreme Court Holdings On This Issue.

Under the Sixth Amendment of the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." This protection has been incorporated into the Fourteenth Amendment and thus is applicable in state court prosecutions. (*Pointer v. Texas*, 380 U.S. 400, 406-07 (1965).) This Court held that this prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington*, 541 U.S. 36, 53–54 (2004).) While this Court left "testimonial" undefined, it did identify the "core class of 'testimonial statements' " with which the Confrontation Clause is primarily concerned: (1) "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" (2) "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Id.* at 51–52.)

Since *Crawford,* this Court has expanded upon the definition of "testimonial." In *Davis v. Washington*, 547 U.S. 813, 822 (2006), this Court explained that statements are testimonial when the "circumstances objectively indicate" that they are being made for the "primary purpose" of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." "An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose' " of the statement. (*Michigan v. Bryant*, 562 U.S. 344, 360 (2011).) Thus, for those statements that do not clearly fall within the core class of testimonial statements as set out in *Crawford,* the "primary purpose test" has been the predominant analysis in determining whether a statement is in fact testimonial.

This Court has not addressed whether an autopsy report is testimonial in nature, but two cases have discussed the testimonial nature of a close analogy, forensic lab reports: *Melendez–Diaz* and *Bullcoming, supra*. Other State jurisdictions and high courts have looked to both of these cases as guidance in assessing whether autopsy reports should similarly be treated as testimonial statements.

In *Melendez–Diaz,* this Court addressed a confrontation clause challenge to the admission of "certificates of analysis," which showed the results of a forensic test. (557 U.S. at 308.) The certificates were sworn before a notary public by the analysts who conducted the forensic testing, but the analysts did not testify at trial. (*Id.* at 308–09.) This Court determined that the certificates fell clearly within the category of testimonial statements, as they were "quite plainly affidavits: 'declaration[s] of facts written down

and sworn to by the declarant before an officer authorized to administer oaths.'" (*Id.* at 310, quoting Black's Law Dictionary 62 (8th ed.2004).) Next, this Court concluded that the purpose of the certificates under state law was specifically to provide evidence of a substance's composition, quality, and net weight, allowing the court to "safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves." (*Id.* at 311.) Thus, this Court considered that the certificates were akin to formal affidavits that fall within a traditional type of testimonial statement, and the circumstances when the testing was performed also supported the conclusion that the analyst should have been aware that the primary purpose of the forensic test would be to aid in a future criminal investigation or prosecution.

In *Bullcoming v. New Mexico,* a forensic lab report certifying the petitioner's blood-alcohol concentration was admitted, showing that his concentration level was high enough to establish an aggravated driving offense. (564 U.S. at 651.) As in Mr. Perez's case, the forensic analyst did not testify at trial and was never shown to be unavailable. (*Id.* at 651, 659.) This Court addressed whether the report could be admitted through the testimony of another analyst who did not sign the report certification, conduct the test, or observe the testing. (*Id.* at 652.) The analyst who performed the testing had certified that the sample was opened in the laboratory, that the report was accurate, and that certain procedures set out on the report had been followed. (*Id.*) In accordance with *Melendez–Diaz,* this Court concluded that "[a]n analyst's certification prepared in

connection with a criminal investigation or prosecution ... is 'testimonial,' and therefore within the compass of the Confrontation Clause." (*Id.* at 658-659.) This Court asserted that a confrontation violation could still arise, even if the analyst who performed the test merely transcribed results provided by a machine. (*Id.* at 659-660.) The surrogate analyst could not be cross-examined on the test used, the process followed, any misinformation in the report, or explain why the analyst who had performed the test was now on unpaid leave, *Id.* at 662, just as here, the prosecution never explained why Dr. Hogan was "unavailable." This Court also reiterated that the forensic report itself was testimonial. (*Id.* at 662-668.) Even though the report was unsworn, in all other respects the *Bullcoming* report resembled those from *Melendez–Diaz:* law-enforcement provided the sample to be tested at a laboratory required by law to assist in police investigations, the analyst conducted the test and certified the results of the analysis, the forensic report was "formalized" in a signed document, and the legend in the report referenced local court rules that allowed for the admission of these reports in court. (*Id.* at 664-665.) Again, the formality of the document was considered, along with the primary purpose of the document in light of the circumstances.

Thus, while this Court has held twice that certificates of analysis showing the results of forensic testing and created in aid of police investigations were testimonial, this Court has yet to clearly determine whether an autopsy report, that explains the manner and cause of death, is also testimonial.

More recently, this Court handed down *Williams v. Illinois*, 567 U.S. 50 (2012), which addressed the testimonial nature of yet another type of laboratory report, a DNA profile of a suspect in a rape case. A plurality of the court found that the lab report was not testimonial. (*Id.* at 86.) Justice Alito's opinion held that no confrontation violation arose because the report was not admitted for the truth of the matter asserted and therefore was not hearsay. (*Id.* at 57-58.) However, even if hearsay, the report would not be testimonial because the primary purpose of the report was not to serve as evidence against a specified individual. (*Id.*) Alternatively, Justice Thomas' concurrence relied solely upon the solemnity test, concluding that the report lacked the "solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact." (*Id.* at 111.)

Typically, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds...." (*Nichols v. U.S.*, 511 U.S. 738, 745 (1994), quoting *Marks v. U.S.*, 430 U.S. 188, 193 (1977).) However, in some cases "there is no lowest common denominator or 'narrowest grounds' that represents the Court's holding," and thus it is not useful to engage in this inquiry. (*Nichols,* 511 U.S. at 745.) Because *Williams* presents such a situation where there is no "narrowest ground" between Justice Alito's and Justice Thomas' opinions, *Williams* is not controlling.

III. State High Courts Are Intractably Divided Over Whether Autopsy Reports Created As Part Of Homicide Investigations Are Testimonial.

State high courts are now hopelessly splintered over whether the Confrontation Clause applies to autopsy reports prepared to further homicide investigations and asserting that deaths were caused by homicide.

A. States that have found the autopsy reports to be testimonial.

The New Mexico Supreme Court has addressed whether an autopsy report is testimonial, and also whether a surrogate pathologist or medical examiner could testify about the facts and conclusions of a report that the testifying pathologist was not present for nor created. (*State v. Navarette*, 294 P.3d 435, 438 (N.M. 2013).) "Since *Crawford,* a majority of the United States Supreme Court has mainly focused on the primary purpose for which the statement was made," in assessing whether a statement is testimonial. (*Id.*)[4] The autopsy was performed as "part of a homicide investigation" with two police officers attending the autopsy. (*Navarette,* 294 P.3d at 440.) In addition, because state statute required medical examiners to report his or her findings to the district attorney, he or she "should know that her statements may be used in future criminal litigation." (*Id.* at 440–41.)

The *Navarette* court then took the analysis from *Jaramillo* one step further to conclude that even though the autopsy report itself was not admitted into evidence, a

[4] In applying this standard, the court in *State v. Jaramillo*, 272 P.3d 682 (N.M.App. 2011), had earlier found an autopsy report to be testimonial, because the autopsy report was critical to the prosecution and was "prepared with the purpose of preserving evidence for criminal litigation." (*Id.* at 682.)

pathologist who did not perform or observe the autopsy could not testify about the findings and conclusions of that report without also violating the defendant's confrontation right. (*Id.* at 443.) However, the court clarified that it is "not to say that all material contained within an autopsy file is testimonial....[w]ithout attempting to catalogue all material in a file that could be admissible, we note that an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause." (*Id.*)

In applying the primary purpose test, the Supreme Court of West Virginia has also concluded that autopsy reports can be testimonial in nature. (*State v. Frazier*, 229 W.Va. 724, 735 S.E.2d 727, 731 (2012).) An autopsy was conducted on a woman who had been shot, and the medical examiner who performed the autopsy discussed the circumstances of the victim's death with police. (*Id.* at 729.) The medical examiner noted in the autopsy report what he had learned from police about the shooting, including that the suspected perpetrator had been arrested and had confessed to the shooting. (*Id.*) The court also considered state statutes, which required autopsy reports to be kept and indexed, allowed prosecuting attorneys or law-enforcement to secure copies of the records "for the performance of his or her official duties," required that reports be furnished to "any court of law, or to the parties therein to whom the cause of death is a material issue," and also required that autopsy reports be admitted into evidence. (*Id.* at 731.) The court concluded that "[i]t is clear that ... an autopsy report prepared in a homicide case has the primary purpose of establishing or proving past events (facts) potentially relevant to a later

criminal prosecution, and is therefore a testimonial statement." (*Id.* at 732.) Moreover, because the medical examiner, who had not performed nor observed the autopsy, failed to testify about his own opinions, but rather repeated the key findings from the autopsy report, the court concluded that the error was not harmless. (*Id.* at 733–34.) (*See also Com. v. Avila*, 454 Mass. 744, 912 N.E.2d 1014, 1029 (2009) (holding expert testimony by a medical examiner who did not conduct the autopsy and who recited the findings within the autopsy report was inadmissible hearsay and also violated the confrontation clause); *Cuesta–Rodriguez v. State,* 241 P.3d 214, 228 (Okla.Crim.App.2010) (autopsy report is testimonial, holding that the circumstances surrounding the death "warranted the suspicion" that the death was a homicide, and because of that it was "reasonable to assume" that the medical examiner performing the autopsy was aware that his findings and opinions would be used in a criminal prosecution).)

Other state courts and a federal court of appeals have held that autopsy reports are testimonial:

- *State v. Bass,* 132 A.3d 1207, 1222-1227 (N.J. 2016) (report was testimonial and although not admitted into evidence, it was "parroted" by the testifying expert, where circumstances of the autopsy showed it was part of on-going investigation already targeting the defendant who was in custody, with the prosecutor's investigator and a police officer in attendance; reversed on other grounds);
- *Miller v. State*, 313 P.3d 934, 967-71 (Okla. Crim. App. 2013) (plain error to allow expert to relate findings from an autopsy report where he had no personal

knowledge of the findings presented in the report, but harmless where defendant was able to cross examine the doctor who performed autopsy at earlier trial and no factual issues were raised at that time);

● *Commonwealth v. Carr*, 986 N.E.2d 380, 398-400 (Mass. 2013) (Court states a two part test: (1) determine whether the statement was "*testimonial per se*," that is, whether it was made in a formal or solemnized form (such as a deposition, affidavit, confession, or prior testimony) or in response to law enforcement interrogation. If not, then (2) consider if it was *testimonial in fact*, that is whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting a crime; part (2) found where medical examiner was aware that the decedent suffered a violent death; error was harmless where cause of victim's death by gunshot wound to the head was not a disputed issue at trial, and four eye-witnesses identified him as the shooter);

●*West Virginia v. Kennedy*, 735 S.E.2d 905, 912-17 & fn. 10 (W.Va. 2012) (court finds that "*Williams* cannot be fairly read to supplant the 'primary purpose' test previously endorsed by the Supreme Court and established in *Melendez-Diaz* and *Bullcoming;*" because of the interplay between the prosecution and the medical examiner at the time of the autopsy and because by statute the autopsy and the autopsy report must be completed for use in judicial proceedings, there is no question that the report is testimonial);

- *United States v. Ignasiak,* 667 F.3d 1217, 1229-35 (11th Cir. 2012) (Autopsy reports of five former patients who over-dosed in prosecution for illegally dispensing controlled substances, were testimonial; medical examiners who conduct autopsies required to notify appropriate law enforcement agency when beginning their examinations and required to report causes of death to state attorney; their conclusions were product of individual skill, methodology, and judgment, and were subject to risk of human error and error was not harmless given questions of *mens rea*);
- *Wood v. Texas* 299 S.W.3d 200, 208-10 (Tex. Crim. App. 2009);
- *Massachusetts v. Nardi*, 452 Mass. 379, 893 N.E.2d 1221, 1233 (Mass. 2008) ;
- *Rosario v. State,* 175 So.3d 843, 854-58 (Fla. App. 2015);
- *North Carolina v. Locklear,* 363 N.C. 438, 681 S.E.2d 293, 305 (2009).

B. States that have found the autopsy reports to be non-testimonial.

Alternatively, several jurisdictions, including California, *People v. Dungo*, 55 Cal.4th 608, 147 Cal.Rptr.3d 527 (2012), have held that such reports are not testimonial. Several states have agreed with this holding.

The Illinois Supreme Court engaged in a four-part analysis to determine whether the admission of an autopsy report in a homicide case violated the confrontation clause. (*People v. Leach,* 366 Ill. Dec. 477, 980 N.E.2d 570, 581 (Ill. 2012).) The court considered: (1) whether the statement was offered for the truth of the matter asserted (hearsay); (2) If hearsay, was there an applicable hearsay exception; (3) If admissible

hearsay, was the statement testimonial; and (4) If testimonial, was the admission of the statement harmless error? *Id.* The court determined that the autopsy report was admitted for the truth of the matter asserted, but the business records hearsay exception and the public records exception both applied. (*Id.,* 366 Ill. Dec. 477, 980 N.E.2d at 581–82.) The court then assessed the testimonial nature of the autopsy report. (*Id.,* 366 Ill. Dec. 477, 980 N.E.2d at 582.) Although *Crawford* provided that business records would rarely implicate the confrontation clause, the *Leach* court acknowledged that even business records could be testimonial. (*Id.,* 366 Ill. Dec. 477, 980 N.E.2d at 583.)

After examining relevant precedent of this Court, the *Leach* court concluded that "whichever definition of primary purpose is applied, the autopsy report in the present case was not testimonial because it was (1) not prepared for the primary purpose of accusing a targeted individual[5] or (2) for the primary purpose of providing evidence in a criminal case." (*Id.*, 366 Ill. Dec. 477, 980 N.E.2d at 590.) "[A]lthough the police discovered the body and arranged for transport" the police did not request the autopsy, but rather "[t]he medical examiner's officer performed the autopsy pursuant to state law, just as it would have if the police had arranged to transport the body of an accident victim" (*Id.,* 366 Ill. Dec. 477, 980 N.E.2d at 591.) Therefore, the medical examiner "was not acting as an agent of law enforcement, but as one charged with protecting the public health by

[5] The *Williams* plurality provides that this is the proper standard for assessing the primary purpose of a statement. (*Williams,* 567 U. S. at 82-83.) The court explained that cases giving rise to confrontation violations have two common characteristics: "(a) they involved out-of-court statements having the primary purpose of *accusing a targeted individual of engaging in criminal conduct* and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions." (*Id.*) (emphasis added).

determining the cause of a sudden death that might have been 'suicidal, homicidal or accidental.' (*Id.,* 366 Ill. Dec. 477, 980 N.E.2d at 591–92 (citing 55 ILCS 5/3–3013 (West 2010).) Even though autopsy reports can be used in civil or criminal cases, "these reports are not usually prepared for the sole purpose of litigation." (*Id.,* 366 Ill. Dec. 477, 980 N.E.2d at 592.) Additionally, the court distinguished the autopsy report from the certificates of analysis in *Melendez–Diaz* by explaining that the autopsy report was not "certified or sworn" but "was merely signed by the doctor who performed the autopsy." (*Id.*) However, as in prior cases, the *Leach* court did not intend to make a blanket rule for all autopsy reports. Instead, the court provided that autopsy reports may be testimonial "in the unusual case in which the police play a direct role ... and the purpose of the autopsy is clearly to provide evidence for use in a prosecution." (*Id.*)

The Arizona Supreme Court has also found autopsy reports to be non-testimonial. (*State v. Medina,* 232 Ariz. 391, 306 P.3d 48 (2013).) The court looked to *Williams* and concluded that "[n]either the plurality's 'primary purpose' test nor Justice Thomas's solemnity standard can be deemed a subset of the other; therefore, there is no binding rule for determining when reports are testimonial." (*Medina,* 306 P.3d at 63.) As such, the court applied both standards and held that the autopsy report was neither created for the primary purpose of accusing a specified individual, nor did the report satisfy the solemnity test because it did not certify the truth of the analyst's representations or arise from "a formal dialogue akin to custodial interrogation." (*Id.* at 63–64.) Accordingly, the court also held that the surrogate medical examiner could testify about the contents of the

autopsy report without violating the defendant's confrontation rights. (*Id.* at 64.) (*See also United States v. James,* 712 F.3d 79, 97–99 (2nd Cir.2013) [objective circumstances and examination of state statutes led to conclusion that autopsy report "was not prepared primarily to create a record for use at a criminal trial")] and in *State v. Maxwell* 139 Ohio St. 3d 12, 9 N.E.3d 930, 944–52 (Ohio 2014) [autopsy reports are not to serve as substitutes for trial testimony, but rather serve the purpose of documenting cause of death for public records and public health].)

Other courts that have held that autopsy reports created as part of criminal investigations are non-testimonial include:

- *State v. Hutchison,* 482 S.W.3d 893, 905-14 (Tenn. 2015) (autopsy report admitted into evidence; court finds that autopsy was part of criminal investigation, but not sufficiently solemn and no one targeted at time of autopsy);
- *State v. Maxwell*, 9 N.E.3d 930, 945-52 (Ohio 2014), *cert. denied* (2015) 135 S. Ct. 1400 (expert testifies without admission of autopsy report, relies on reasoning in *Dungo*).

C. The testimonial cases are more persuasive.

In addition to being out-numbered by the testimonial cases, none of the non-testimonial cases are persuasive as shown by the circumstances of this case discussed *infra.* As Justice Corrigan said in her dissent in *Dungo:* "the autopsy report was sufficiently formal and primarily made for an evidentiary purpose, as the United States Supreme Court has explicated those terms to date. … High court authority compels the

conclusion that admitting this testimony violated defendant's confrontation rights." (at 633).

Unlike the cases above, in *Dungo*, *supra*, 55 Cal. 4th at 618-620, the California Supreme Court read the plurality in *Williams* as a binding revision of *Melendez-Diaz* and *Bullcoming.* That Court found that the criminal investigation was not the primary purpose for the autopsy report's description of a body in this case, and that the pathologist's anatomical and physiological observations about the condition of the body recorded in the autopsy report were not so formal and solemn as to be considered testimonial for purposes of the Sixth Amendment's confrontation clause. (*Dungo* at 621.) Justice Corrigan dissented. (55 Cal. 4th at 633.)

These cases show that each state considers the circumstances of that particular case in applying its understanding of the primary purpose test. In each instance, the circumstances under which the autopsy is performed and relevant state statutes strongly influence the analysis. The New Mexico Supreme Court, which has found autopsy reports to be testimonial, still acknowledged that it is "not to say that all material contained within an autopsy file is testimonial...." (*Navarette,* 294 P.3d at 443), and the Illinois Supreme Court, which has found autopsy reports to be non-testimonial, conceded that autopsy reports may be testimonial "in the unusual case in which the police play a direct role ... and the purpose of the autopsy is clearly to provide evidence for use in a prosecution." (*Leach,* 366 Ill. Dec. 477, 980 N.E.2d at 592.)

For example, the circumstances presented in *Frazier,* decided by the West Virginia Supreme Court, may have caused the Illinois Supreme Court to agree that the autopsy report under the facts of *Frazier* was testimonial. In *Frazier,* the medical examiner spoke to police about the circumstances surrounding the victim's death. In a summary within the autopsy report, the medical examiner noted what he had discussed with police, providing that the victim had been fighting with her boyfriend, walked into the bedroom and grabbed a gun, and the boyfriend then grabbed the gun from her and shot her. (*Frazier,* 735 S.E.2d at 729.) Even more significant, the medical examiner was aware that the boyfriend had been arrested and confessed to the shooting. (*Id.*) Thus, these circumstances would possibly support the Illinois Supreme Court in concluding that the police were directly involved, and the medical examiner was aware that the autopsy report would be aiding in a criminal investigation and prosecution. Thus, the differing conclusions reached by the states are informative.

Similarly, this Court's analyses in *Melendez–Diaz* and *Bullcoming* also emphasize that the *circumstances* under which the certificates of analysis were developed supported the conclusion that the reports had been created for the purpose of aiding a police investigation. Here the circumstances point to a holding that the autopsy report was testimonial.

D. The California Supreme Court erred in finding the admission of Dr. Peterson's testimony as harmless error.

Dr. Peterson's use of the autopsy report findings, which he could not himself verify, resulted in a fundamentally unfair trial. The error was prejudicial under any standard. The California Supreme Court in *Perez* found that this error was harmless in that

> [a]ny expert may still rely on hearsay in forming an opinion and may tell the jury in general terms that he did so....The jury would then have thus heard Peterson's opinion about the cause of death even if the trial court had denied admission of the challenged hearsay statements.
> *Perez*, 4 Cal. 5th at 457, quoting *Sanchez, supra*, 63 Cal. 4th at 685.

However, it was not merely Dr. Peterson's opinion of the cause of death that is at issue here, it was the manner and circumstances of death. The depth of the stab wounds, the severity of the hemorrhaging of the eyes, and the amount of blood in the chest cavity could not be independently verified through any of the photographic exhibits used during his testimony, and hence the record supplies no non-hearsay source for his testimony. Thus, in this case, Dr. Peterson did exactly what the Confrontation Clause and *Sanchez* prohibits.

IV. Dr. Peterson's Testimony Violated Petitioner's Right To Confrontation Under The Sixth Amendment Because The Autopsy Report Was Testimonial.

Because, as shown *supra*, Dr. Hogan's autopsy report was testimonial, Dr. Peterson's recitation of and reliance on its hearsay also violated petitioner's right to confrontation under the Sixth Amendment.

Even if the report were admissible under CAL. EVID. CODE § 802, as the California Supreme Court held, *Perez* at 457, the Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." "Witnesses" are those who give testimony. Petitioner's Sixth Amendment right to confrontation trumps any state evidentiary statute. (*Chambers v. Mississippi,* 410 U.S. 284 (1973).) The following factors show that the report was testimonial:

A. The coroner was required to transmit the autopsy report to the district attorney and was aware that the report would be used for purposes of litigation.

This Court should consider the coroner's statutory duties under other sections of the California Government Code which are triggered when a decedent has died from the criminal acts of another. Special requirements are imposed on the contents of the autopsy report which apply only when it is done as part of a criminal investigation. Under CAL. GOV'T CODE § 27491.1., entitled " Report of death to police officials", the coroner was required

> [i]n all cases in which a person has died under circumstances that afford a reasonable ground to suspect that the person's death has been occasioned by the act of another by criminal means, the coroner, upon determining that those reasonable grounds exist, *shall immediately notify the law enforcement agency having jurisdiction over the criminal investigation. Notification shall be made by the most direct communication available. The report shall state the name of the deceased person, if known, the location of the remains, and other information received by the coroner relating to the death, including any medical information of the decedent that is directly related to the death. The report shall not include any information contained in the decedent's medical records regarding any other person unless that*

> *information is relevant and directly related to the decedent's death.* (Added by Stats.1959, c. 1537, p. 3864, § 1. Amended by Stats.1985, c. 304, § 3; Stats.2000, c. 1068 (A.B.1836), § 2.)

Under CAL. GOV'T CODE § 27521, additional duties arise when the victim is unidentified:

> …(d) (3) A coroner, medical examiner, or other agency tasked with performing an autopsy pursuant to Section 27491 shall not use an electronic imaging system to conduct an autopsy in any investigation where the circumstances surrounding the death afford a reasonable basis to suspect that the death was caused by or related to the criminal act of another and it is necessary to collect evidence for presentation in a court of law. If the results of an autopsy performed using electronic imaging provides the basis to suspect that the death was caused by or related to the criminal act of another*, and it is necessary to collect evidence for presentation in a court of law,* then a dissection autopsy shall be performed in order to determine the cause and manner of death.
>
> (e) The coroner, medical examiner, or other agency performing a postmortem examination or autopsy *shall prepare a final report of investigation in a format established by the Department of Justice*. ...
> (Added by Stats.2000, c. 284 (S.B.1736), § 1. Amended by Stats.2014, c. 437 (S.B.1066), § 6, eff. Jan. 1, 2015; Stats.2016, c. 136 (A.B.2457), § 1, eff. Jan. 1, 2017.) (Emphasis added).

More recently, the legislature has recognized that the autopsy is part of the investigation process and has added additional safeguards for the autopsy to under CAL. GOV'T CODE § 27522:

> (f)(1) *Only individuals who are directly involved in the investigation of the death of the decedent shall be allowed into the autopsy suite.*
> (2) If an individual dies due to the involvement of law enforcement activity, law enforcement personnel *directly involved in the death of that individual shall not be involved with any portion of the postmortem examination, nor allowed inside the autopsy suite during the performance of the autopsy*.

> (g) *Any police reports, crime scene or other information, videos, or laboratory tests that are in the possession of law enforcement and are related to a death that is incident to law enforcement activity shall be made available to the physician and surgeon who conducts the autopsy prior to the completion of the investigation of the death*.
> (Emphasis added).
> (Added by Stats. 2016, Ch. 787, Sec. 7. Effective January 1, 2017.)

In the case of violent death, CAL. GOV'T CODE § 27504.1 requires the following:

> If the findings are that the deceased met his or her death at the hands of another, the coroner shall, in addition to filing the report in his or her office or with the county clerk, as determined by the board of supervisors pursuant to Section 27503, *transmit his or her written findings to the district attorney, the police agency wherein the dead body was recovered, and any other police agency requesting copies of the findings*….
> (Amended by Stats. 2002, Ch. 221, Sec. 36. Effective January 1, 2003) (emphasis added).

The courts of New Mexico, West Virginia and the 11th Circuit Court of Appeals have said such statutory directives are sufficient to establish that a statement is testimonial.

In *Dungo* (55 Cal. 4th at 619), the California Supreme Court held that autopsy reports asserting that the cause of death was homicide are non-testimonial because an autopsy does not invariably support a criminal prosecution. (*See also Leach*, 980 N.E.2d at 591-92). For instance, an autopsy may be performed to rule out suicide or accident, or it might unexpectedly produce exculpatory evidence. (*Id*.) Also in *Dungo* (55 Cal. 4th at 621), that Court held that autopsy reports are non-testimonial because medical examiners are authorized to perform autopsies in a number of situations, only one of which is when a death is potentially a homicide. (*See also Maxwell*, 9 N.E.3d at 951.) Thus, this

reasoning goes, the primary purpose of an autopsy report is never to create evidence for a criminal trial. (*Id.*)

It is true that medical examiners do not invariably initiate an autopsy with a criminal investigation in mind. But when they do -- the only circumstances that matter under the question presented --an autopsy report's primary purpose is to codify evidence for a criminal prosecution. (*See*, *e.g., Bullcoming*, 564 U.S. at 663-64; *Melendez-Diaz*,557 U.S. at 310 (quoting *Crawford*, 541 U.S. at 51; *see also Michigan v. Bryant*, 564 U.S. 344, 365 (2011) [the testimonial inquiry hinges on the "context" of the declaration].)

When examiners write, sign, and certify a report declaring that the cause of death was caused by criminal acts, and then forward that report directly to the district attorney or the department of justice, the report's primary purpose is to support a criminal case.

B. The findings in an autopsy report are subjective and the autopsy was conducted in circumstances which increased the risk of subjectivity.

Melendez-Diaz forecloses any holding that "objective" anatomical and physiological observations in autopsy reports prepared in conjunction with homicide investigations are non-testimonial. Witnesses' statements regarding "objective" facts in the physical world -- license plate numbers, the color of getaway cars, the time a clock displayed when shots rang out, etc. -- are no less testimonial than other statements which are made to provide evidence for a criminal trial. (*See Bullcoming*, 564 U.S. at 660.)

History reinforces this testimonial analysis. As this Court has recently recognized, "coroner's reports" were inadmissible under American common law without the

opportunity for prior confrontation. (*Melendez-Diaz*, 557 U.S. at 322, citing *Crawford*, 541 U.S. at 47 n. 2, *Giles v. California*, 554 U.S. 353, 398-401 (2008) (Breyer, J., dissenting), and *Evidence-Official Records-Coroner's Inquest*, 65 U. Pa. L. Rev. 290 (1917)). And long before *Crawford*, this Court explained that an autopsy report could not be admitted without the consent of the accused "because the accused was entitled to meet the witnesses face to face." (*Diaz v. United States*, 223 U.S. 442, 450 (1912).)

Although the four-Justice plurality in *Williams* suggested that forensic reports should be deemed testimonial within the meaning of *Crawford* only when they "accus[e] a targeted individual," 567 U.S. at 82, a majority rejected this suggestion. As Justice Kagan explained: "Where that test comes from is anyone's guess. Justice Thomas rightly shows that it derives neither from the text nor from the history of the Confrontation Clause." (*Williams*, 567 U.S. at 135 (Kagan, J., dissenting) (*citing id.* at 114-115 (Thomas, J., concurring).)

In addition, even with regard to so-called "objective" findings, forensic pathology involves a significant amount of subjectivity and judgment -- far more than that involved in the drug or alcohol testing this Court analyzed in *Melendez-Diaz* and *Bullcoming*. (*See,* George M. Tsiatis, *Putting Melendez-Diaz on Ice: How Autopsy Reports Can, Survive the Supreme Court's Confrontation Clause Jurisprudence*, 85 St. John's L. Rev. 355, 383 (2011) ["Autopsies are also much more complex than the identification of a narcotic, and are more prone to shades of gray, as their outcome is a diagnosis, not a chemical compound match."]; *see also,* National Association of Medical Examiners, *Forensic*

Autopsy Performance Standards, Section B (2006), available at <http.//www.mtf.org/pdf/name_standards_2006.pdf> [describing processes for arriving at "interpretation and opinions," as well as exercising "the discretion to determine the need for additional dissection and laboratory tests"].)

V. The Confrontation Clause Violations Here Were Prejudicial.

Because the autopsy report was testimonial hearsay that violated petitioner's federal Constitutional rights under the Sixth, Eighth and Fourteenth amendments, *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824 (1967) applies. However, under any standard, the error was prejudicial and requires a new trial. Against this background, we cannot conclude the improperly admitted evidence was harmless beyond a reasonable doubt. (*Chapman, supra*.) As discussed infra, the California Supreme Court erred in finding that the hearsay statements were not prejudicial, as Dr. Peterson should not have been allowed to rely on the hearsay and the harm was not limited to the jury hearing "Peterson's opinion about the cause of death..." (*Perez,* 4 Cal. 5th at 457.)

A. Prejudice as to the jury's findings on causation.

When Dr. Hogan's testimony in the Snyder case is compared to that of Dr. Peterson's in Perez's, it can be seen that Dr. Peterson minimized the evidence of strangling as the sole cause of death and exaggerated the likelihood that the stabbing wounds were inflicted while the victim was alive. Had Dr. Hogan testified, her actual observations during the autopsy would have been explored. Her written conclusions were based on observations not fully set out in the autopsy report. As a result, defense counsel

was deprived of the opportunity to raise doubts as to who, among the three entrants into the Dahers' house, was responsible, or primarily responsible, for the death of Mrs. Daher.

At Perez's trial, Dr. Peterson testified that there was evidence of ligature strangulation accomplished by a phone cord. (13 RT 3007.) In his opinion, death was caused by a combination of ligature strangulation and stabbing. (13 RT 3021.) There was no way to tell whether Mrs. Daher was conscious or unconscious when she was stabbed (13 RT 3025) but "*unequivocally*, based on the blood inside her chest....*her heart was still beating at the time those stab wounds were delivered.*" (13 RT 3020.) (Emphasis added). Thus, the cause of death was primarily due to the stab wounds, not strangulation, according to Dr. Peterson.

As for the strangulation, Dr. Peterson testified that

> ligature strangulation was accomplished with a phone cord. Specifically, it was the coiled part of the phone cord that was wrapped around the neck with sufficient force to actually leave a furrow in the skin....So, there had been...there was a cord wrapped around the neck as the body was received. There was a ligature furrow associated with that cord.
> (13 RT 3007.)

Yet at co-defendant Snyder's trial, Dr. Hogan, who actually performed the autopsy, testified that

> For the extent of these injuries, I would expect more blood in the chest. So, I can't say definitively, but my opinion is that the strangulation occurred first and that *her heart may not have been beating when these stab wounds occurred*, based on the you know, I would expect about a thousand milliliters [of blood] with these kind of injuries.
> (Snyder RT 943-944.) (Emphasis added).

Describing the strangling at co-defendant Snyder's trial, she was emphatic:

> She didn't just have petechial, she had hemorrhages. The whites of her eyes were bright red from big edges, and she had a lot of hemorrhages from the periorbital soft tissue, so they had even broken larger vessels. So, there was a tremendous force applied ….
> (Snyder RT 933.)

Thus, Dr. Hogan attributed the primary cause of death to strangulation in Snyder's trial. This opinion would have been much more favorable to Perez than what his jury heard from Dr. Peterson, that the victim was still breathing after the strangulation and the primary cause of death was the stabbing. This is because the main State's witness, Maury O'Brien, attributed the stabbing solely to Perez at his trial:

> Q. When you handed the knife to Mr. Perez, what did you see him do?
>
> A. I saw him walk over to the victim and stab her many times.
>
> (11 RT 2488-89.)

Mr. O'Brien, as a co-defendant who testified against Mr. Perez in hopes of avoiding the death penalty, was the State's most important guilt phase witness. He was the lynchpin of the State's case for Perez's guilt as the only witness to directly tie Perez to the murder of Mrs. Daher. Because O'Brien testified inconsistently at Perez's trial and at co-defendant Lee Snyder's trial as to what he allegedly saw of the victim's murder, the guilt phase question of who-did-what was very much in issue.

At Snyder's trial, O'Brien testified that he saw *both* Snyder and Perez put their hands on the decedent while she was being strangled. (4 Snyder RT 717). But at Mr. Perez's later trial, O'Brien changed his story dramatically in order to make it appear that Mr. Perez was the sole or the main perpetrator of the murder. (11 RT 2484.)

Regarding the strangulation of the victim by means of the phone cord, O'Brien testified in the Snyder case as follows:

> Q. At that point did you see the phone cord?
> A. Yes.
> Q And where was the phone cord?
> A. Tied around her feet, kind of like hogtied, and her neck...
> Q. Were they using the phone cord to pull her back, if you remember?
> A. No. No.
> Q. So the phone cord was around her neck and she was tied on her stomach and they were both pulling her head back?
> A. Yeah that's what I remember.
> (Snyder RT 717-718.)

Yet at Perez's trial, O'Brien was asked by prosecutor Sequeira:

> Q. Could you see the cord wrapped around the victim's neck?
> A. I wasn't that close to see it. I remember seeing the cord around her back as well so that...I can't remember seeing it around her neck.
> (11 RT 2484-2485.)

There was testimony at Perez's trial that Snyder, not Perez, did the stabbing. O'Brien's girlfriend Layce Harpe was called as a defense witness. (14 RT 3340.) She testified that O'Brien had talked to her about a murder case before he was arrested. (14 RT 3344.) Harpe testified that O'Brien said that he and Lee Snyder and another guy had gone inside an open garage into a lady's house and killed her for her car and $20. (14 RT 3346.) Ms. Harpe was not sure who O'Brien said strangled the victim but O'Brien told her that Lee Snyder stabbed the woman many times. (14 RT 3348.) O'Brien kept changing his story. (*Id.*) Harpe was uncomfortable talking to the police and did not tell them that O'Brien had said Lee Snyder stabbed the lady. (14 RT 3350.)

At trial, Harpe also admitted that about nine months or a year after the crime, a defense investigator talked to her. (14 RT 3351.) Harpe told the investigator that O'Brien told her that Lee Snyder stabbed the lady. (14 RT 3353.) O'Brien also told the investigator that he was downstairs in the house and then went upstairs to give Lee Snyder the knife. (14 RT 3358.) Harpe claimed that the only difference between what Harpe told the police and what she told the investigator was that O'Brien said Snyder asked for a knife and that he watched Snyder stab the victim. (14 RT 3377.) O'Brien said that Snyder and the other person killed her. (14 RT 3379.)

The prosecutor had to attack Harpe as an unreliable witness as her testimony did not fit with that of O'Brien:

> Her big chance in this case was Lee Snyder did the stabbing as opposed to the defendant. She doesn't know who the third person was. Maury O'Brien never told her.. That's what her testimony was. But it seemed to be...the big difference was that Lee did the stabbing and not the defendant. She was hardly a reliable witness...So Lacy (sic) Harpe is hardly the type of witness that is going to raise a reasonable doubt in your mind and negate the testimony of [the State's witnesses] and 115 some odd People's exhibits.
> (15 RT 3588-89.)

O'Brien's attribution of the stabbing to Perez, along with Dr. Peterson's testimony exaggerating the stabbing as a cause of death and minimizing the strangling, resulted in the jury having a warped view of the evidence and prevented petitioner from being able to effectively confront the untrustworthy evidence for both guilt and penalty phase purposes.

B. Prejudice as to the jury's consideration of circumstantial evidence of *mens rea*.

The prosecutor admitted that the stab wounds were relevant to prove *mens rea.* "I'm highlighting every stab wound. *Every stab wound is further evidence of intent to kill, express malice."* (8 RT 1969.) (emphasis added) The prosecutor also wanted all the pictures in evidence and, to support that argument, stated that there will be an expert who will give an opinion based on the photos. (8 RT 1969.)

Mens rea was also stressed at the State's guilt phase final arguments. The prosecution told the jury that

> [t]he killing was done with malice aforethought or occurred during the commission of a robbery or burglary...What is malice aforethought? Intent to kill. Intent to kill or do a dangerous act knowing it's dangerous and with disregard for consequences...consequences of human life.
> ...the additional facts that elevate it from second degree to first degree murder, the killing was willfully, deliberate and premeditated.
> (15 RT 3543, 3545.)

However, a jury could have believed that the stab wounds were inflicted with the knowledge that the victim was already dead, and it would have caused the jury to more closely examine the evidence as to what role Mr. Perez played in the crime. This was not harmless, as the California Supreme Court held. (*Perez*, 4 Cal. 5th at 457.)

C. Prejudice as to the jury's consideration of evidence to establish aggravating circumstances of the crime during penalty phase deliberations.

Similarly, had Dr. Hogan testified that strangulation, allegedly performed by both Snyder and Perez, was the main cause of death, rather than Dr. Peterson's testimony that death was mainly due to the stab wounds, allegedly inflicted solely by Perez, this could

have been used at the punishment phase as a rationale for a punishment of less than death. However, Perez's jury was left with the testimony of O'Brien that Perez was primarily responsible for the victim's death. The ambiguity and uncertainty created by the differing versions of events renders petitioner's sentence of death unreliable under the Sixth, Eighth and Fourteenth Amendments.

CONCLUSION

For the forgoing reasons, the Court should grant the petition for writ of certiorari to consider the important question presented by this petition.

Respectfully Submitted,

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