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**In the Supreme Court of the United States**

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**JOSEPH ANDREW PEREZ, JR.,**

Petitioner,

v.

**THE STATE OF CALIFORNIA,**

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
CALIFORNIA SUPREME COURT

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**BRIEF IN OPPOSITION**

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**CAPITAL CASE**

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CAPITAL CASE  
QUESTION PRESENTED

Whether the California Supreme Court erred in holding that, on the facts of this case, any Confrontation Clause error that might have occurred when a pathologist testified about an autopsy report prepared by a different pathologist was harmless beyond a reasonable doubt.

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**STATEMENT**

1. On March 24, 1998, a police officer found Janet Daher on the floor of her home. Pet. App. A1-2. She was not breathing, she had no pulse, and her hands and face were discolored. 9RT 2191; *see also* Exhs. 37, 38 (photos).<sup>1</sup> Her hands were bound tightly behind her back with the telephone cord, and the cord was also wrapped around her neck. 9RT 2191-2192; *see also* Exhs. 37, 38. Her sweatshirt was bloodstained and pierced with several slits apparently caused by stabbing. 13RT 2894-2895.

Petitioner Joseph Perez was indicted for the murder, along with Lee Snyder and Maury O'Brien. Pet. App. A1.<sup>2</sup> O'Brien was the lead prosecution witness at Perez's trial. *Id.* at A2-3. He testified that he entered the Daher residence along with Snyder and Perez for the purpose of robbing it. *Id.* at A2. When the men encountered Daher, Perez put his hand over her mouth and hit her on the head. *Id.* While the men were searching for valuables, O'Brien called out to Snyder by name, and Perez responded that O'Brien "would have to kill" Daher because he "spoke up and messed it all up." *Id.*

O'Brien further testified that Perez and Snyder led Daher upstairs to the master bedroom, where Snyder ripped the cord off the bedroom telephone. Pet. App. A3. Perez wrapped the cord around Daher's neck and pulled hard on the

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<sup>1</sup> "RT" refers to the reporter's transcript in the trial court.

<sup>2</sup> The three cases were severed, and Snyder was tried first. Snyder was convicted of all charges. *See People v. Snyder*, 112 Cal.App.4th 1200 (2003).

cord. *Id.* Perez then told O'Brien to get a knife from the kitchen. *Id.* O'Brien had a knife in his pocket, and he gave it to Perez. *Id.* Perez then repeatedly stabbed Daher as she lay motionless and face-down on the floor. *Id.*

Jason Hart, who had introduced O'Brien and Snyder to Perez, testified that Perez told him that the three men "robbed a lady" and strangled her to death with a phone cord. Pet. App. A-3. Hart also testified that the men showed him jewelry that they had stolen, and that he paid Perez \$200 for a diamond ring. *Id.* Two other witnesses testified that they had observed three men, including a man who looked like petitioner, in Daher's neighborhood at the approximate time of the killing. *Id.* at A2.

Daher's autopsy was performed by Dr. Susan Hogan, but Hogan did not testify at Perez's trial because she had moved out of the area. Pet. App. A17.<sup>3</sup> The prosecutor instead called criminalist Steven Ojena and Dr. Brian Peterson to describe the autopsy. *Id.* at A3. Defense counsel did not object to the testimony of either witness. See 13 RT 2916-2953, 3002-3026.

Ojena testified that he had attended and taken photographs during the autopsy, and he described what he had observed. Pet. App. A3. He saw a telephone cord tightly binding Daher's hands behind her back and stretched tightly around her neck. *Id.* He also saw "ligature marks" (*i.e.*, impression

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<sup>3</sup> Hogan did testify at Snyder's trial, two years before. See *People v. Snyder*, 112 Cal.App.4th 1200, 1210 (2003).

marks) on Daher's neck. *Id.* Ojena described his photographs of several apparent stab wounds in Daher's back, neck, and arms. *See* 13RT 2922, 2928-2930, 2954-2955; Exhs. 100-105. The wounds appeared to correspond to the slits in Daher's sweatshirt. 13RT 2928-2930.

Peterson worked at the same medical group that had employed Hogan at the time of the autopsy. Pet. App. A17. He testified that he had no personal knowledge about this case, so he based his testimony on the autopsy photos, the factual assertions in Hogan's autopsy report, and his own medical knowledge. *See id.* He did not testify about any of Hogan's opinions regarding the nature of Daher's wounds or the cause of her death, *see* 13RT 3002-3026, but he did expressly relay certain factual observations that Hogan had recorded during the autopsy, *see* Pet. App. A17.

Peterson discussed the condition of Daher's body during the autopsy. It appeared that the telephone cord had been wrapped so tightly around Daher's neck that it left a brown furrow in the skin. Pet. App. A17; 13RT 3007-3009. A photo of Daher's face showed it to be "very dusky," with internal bleeding in her face and eyes and the muscles of her neck. 13RT 3007-3009, 3015-3016. Peterson testified that such injuries were consistent with strangulation by a telephone cord. 13RT 3007-3009; Exh. 104. He also discussed the photos showing multiple stab and incise wounds in Daher's back, neck, and arms. 13RT 3009-3020. Based on the photos and Hogan's descriptions of the length, depth, and location of those wounds in the autopsy report, he opined that some



of the wounds could have been fatal and others nonfatal. 13RT 3012-3017. After the prosecutor showed Peterson a knife that had been recovered by the police with the assistance of O'Brien, Peterson testified that Daher's stab wounds were of a size and shape that could have been caused by the knife. Pet. App. A17. He concluded that Daher's death had been the result of both strangulation and stabbing. *Id.*

Neither the prosecution nor the defense focused its arguments to the jury on Peterson's testimony or on the exact cause or timing of Daher's death. The prosecutor said nothing about Peterson or the autopsy results in his opening statement or closing argument. The defense attorney argued that O'Brien and Snyder had killed Daher with the participation of an unknown third person, and that Perez had not been involved in the burglary, robbing, or killing in any way. *See* 15RT 3617-3619. The defense attorney told the jury that many of the factual issues in this case were undisputed, including the nature of Daher's injuries, and commented that the strangulation and stabbing of Daher "happened for sure." 9RT 2053-2057; 15RT 3616-3617.

The jury found Perez guilty on all four charged counts. Pet. App. A3. After a penalty phase trial, the jury returned a verdict of death. *Id.* at A4.

2. In Perez's direct appeal to the California Supreme Court, he argued that Peterson's testimony violated the Confrontation Clause in light of this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). Pet. App. A17-18. He challenged particular statements that he asserted "could only have

been obtained from Hogan’s autopsy report,” including “descriptions of the hemorrhaging of the victim’s eyes, the depth of knife wounds on the victim’s body, and internal injuries caused by the stabbings.” *Id.* at A18.

The California Supreme Court began its analysis by noting its prior decision in *People v. Duno*, 55 Cal.4th 608 (2012), “which addressed whether statements in autopsy reports are testimonial” under *Crawford*. Pet. App. A18. Among other things, *Duno* “held that ‘anatomical and physiological observations about the condition of the body’ are ‘not so formal and solemn as to be considered testimonial for purposes of the Sixth Amendment’s confrontation right.’” *Id.* at A19. In this case, the court concluded that it “need not address *Duno*’s continued viability . . . because any federal constitutional error arising from” Peterson’s testimony about the autopsy report “was harmless beyond a reasonable doubt.” *Id.*

In support of its harmless-error holding, the court compared the “hearsay statements” derived from the autopsy report with other evidence introduced at trial. Pet. App. A19. It noted that “evidence bearing no connection to the hearsay statements, such as photographs and police testimony, showed that someone had choked Mrs. Daher and stabbed her multiple times,” and that those “facts were not disputed.” *Id.* “The exact depth of the stab wounds, the fact that the victim’s eyes contained hemorrhages, and the details on her internal injuries, in light of the other evidence at trial, were such minor pieces of evidence that they had no effect on the jury’s ultimate determination of

Perez’s guilt.” *Id.* The court also reasoned that even if some of the factual findings in the autopsy report were testimonial hearsay, Peterson was nonetheless entitled under state law to rely on those findings in forming his opinions. *Id.* As a result, the jury would have “heard Peterson’s opinion about the cause of death even if the trial court had denied admission of the challenged” statements. *Id.*

## ARGUMENT

The application of the Confrontation Clause to autopsy reports is an important issue on which the lower courts have not followed a uniform approach. In this case, however, the California Supreme Court did not address that issue. It correctly held that, on the facts of this case, any constitutional error that might have occurred in admitting testimony about the autopsy report was harmless beyond a reasonable doubt. That fact-bound holding does not warrant further review.

1. Perez correctly observes (at 16-23) that lower courts have followed different approaches in applying this Court’s Confrontation Clause precedent to cases involving autopsy reports. For example, a number of courts have held that autopsy reports are not “testimonial,” within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004), where objective circumstances establish that the autopsy “serve[d] several purposes, only one of which was criminal investigation.” *People v. Dungo*, 55 Cal.4th 608, 621 (2012); *see, e.g., State v. Hutchison*, 482 S.W.3d 893, 914 (Tenn. 2016); *State v. Maxwell*, 139 Ohio St.

3d 12, 22-25 (2014); *People v. Leach*, 366 Ill. Dec. 477, 498-499 (2012); *cf. State v. Medina*, 232 Ariz. 391, 407 (2013). Other courts have treated autopsy reports as testimonial under circumstances where the medical examiner should have “know[n] that her statements m[ight] be used in future criminal litigation.” *State v. Navarette*, 294 P.3d 435, 440-441 (N.M. 2013); *see, e.g., United States v. Ignasiak*, 667 F.3d 1217, 1232 (11th Cir. 2012) (circumstances would lead objective witness to believe report would be available for use at later trial); *State v. Frazier*, 229 W. Va. 724, 728 (2012) (autopsy report testimonial if “prepared to establish or prove past events potentially relevant to later criminal prosecutions”).

That said, the petition overstates the extent of the conflict. Perez alleges that eight state courts of last resort “hold that [autopsy reports] are testimonial,” while seven courts “hold that they are non-testimonial.” Pet. 9. In fact, most courts have taken a more nuanced approach, declining to adopt a categorical rule on “the broader issue of whether autopsy reports, in general, are testimonial for purposes of the Confrontation Clause.” *State v. Bass*, 224 N.J. 285, 317 n.9 (2016). Lower courts have typically applied “a fact-specific analysis” that focuses on the particular circumstances of each case. *Id.*; *see, e.g., Hutchison*, 482 S.W.3d at 911 n.6 (“we look at the totality of the circumstances concerning the primary purpose of the autopsy report”). That approach generally considers the requirements of local laws governing autopsy procedures, which vary from state to state. *See, e.g., Ignasiak*, 667 F.3d at

1231-1232; *Maxwell*, 139 Ohio St. 3d at 24-25; *Navarette*, 294 P.3d at 440; *Leach*, 366 Ill. Dec. at 498; *Frazier*, 229 W. Va. at 728; *Dungo*, 55 Cal.4th at 620. And it takes account of factual matters that vary from case to case. *See, e.g., Bass*, 224 N.J. at 316-317 (“The autopsy was conducted in the presence of two law enforcement officers, one of whom was the lead investigator for the county prosecutor.”).<sup>4</sup>

This Court has previously denied certiorari in a number of cases involving application of the *Crawford* framework to autopsy reports. *See, e.g., People v. Garlick*, 42 N.Y.S.3d 28 (2016), *cert. denied*, 138 S. Ct. 502 (Dec. 4, 2017) (No. 17-5385); *Mattox v. Wisconsin*, 373 Wis. 2d 122 (2017), *cert. denied*, 138 S. Ct. 355 (Oct. 16, 2017) (No. 16-9167); *People v. Alger*, No. A126581, 2013 WL 5287305 (Cal. Ct. App. Sept. 19, 2013), *cert. denied*, 135 S. Ct. 49 (Oct. 6, 2014) (No. 13-1102); *People v. Edwards*, 57 Cal. 4th (2013), *cert. denied*, 134 S. Ct. 2662 (May 27, 2014) (No. 13-8618); *State v. Medina*, 306 P.3d 48 (Ariz. 2013), *cert. denied*, 134 S. Ct. 1309 (Feb. 24, 2014) (No. 13-735). In light of the importance of the subject and the lack of uniformity in the lower courts, it may be appropriate for the Court to grant review at some point in a suitable case

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<sup>4</sup> Many of the cases referenced by Perez consider whether it violated the Confrontation Clause to admit an autopsy report into evidence. *See Leach*, 980 N.E.2d at 580; *Medina*, 232 Ariz. at 405; *Maxwell*, 139 Ohio St. 3d at 17; *Frazier*, 229 W. Va. at 729; *Ignasiak*, 667 F.3d at 1229. In this case, Peterson testified about certain factual findings in the autopsy report, but the report itself was never admitted. *See* Pet. App. A17.

that squarely presents the issue. *Cf. Leach*, 366 Ill. Dec. at 500 (discussing “the confusion regarding application of the primary purpose test to reports of forensic testing”). But this is not that case.

2. The California Supreme Court never ruled on Perez’s Confrontation Clause claim. Indeed, it expressly reserved for another day the question of the “continued viability” of its 2012 *Dungo* decision, while resting its decision in this case entirely on the ground that any error was harmless. Pet. App. A19. Any further review of the constitutional question Perez seeks to present would therefore have to proceed without the benefit of any analysis by the state court. And even if this Court ultimately agreed with Perez’s understanding of the Confrontation Clause, it would then need to review the actual basis for the decision below—*i.e.*, the case-specific conclusion that any constitutional violation was harmless. Under the circumstances of this case, it is unlikely that Perez would obtain any relief following that record-intensive analysis.

As Justice Cuéllar explained in his opinion for the unanimous state court, Pet. App. A19, even assuming that parts of Peterson’s testimony violated Perez’s rights under the Confrontation Clause, that error was harmless beyond a reasonable doubt. Perez’s defense at trial was that he had no involvement in the burglary, robbery, or killing of Daher. *See* 15RT 3617-3619. But the jury heard extensive testimony from O’Brien describing Perez’s direct involvement. Pet. App. A2-3. O’Brien’s description of the crime was confirmed by independent evidence from several sources, including an eyewitness who

identified Perez as one of three men he saw near Daher's house on the afternoon of the murder, *id.* at A2, and others who testified about Perez and the other two men bragging about the crimes shortly after the murder, *id.* at A3. None of the three men lived anywhere near Daher's house, and there was no evidence that any of them had any other reason for being in that neighborhood at the time of the killing. *See id.* at A2.

Peterson's testimony, and the factual findings from the autopsy report that he discussed, did not address the identity of Daher's killers. *See* Pet. App. A17. Peterson confirmed that Daher had been strangled and stabbed to death. *See id.* But that was already established by the autopsy photos and the testimony of officials who discovered Daher's body and directly observed the autopsy. *See* 9RT 2191-2192; 13RT 2894-2895, 2922, 2928-2903, 2954, 2955. A lay juror would not have needed testimony from a pathologist to comprehend the lethality of the stab wounds to Daher's back and neck and the telephone cord wrapped tightly around her neck.

Perez argues that he was prejudiced by Peterson's testimony because 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." Pet. 32. He asserts that Peterson testified that stab wounds were the primary cause of death, while Hogan had testified (at Snyder's earlier trial) that the victim's "heart may not have been beating when these stab wounds occurred." Pet. 33 (emphasis omitted). Perez contends that Peterson's

testimony prejudiced him because “the main State’s witness, Maury O’Brien, attributed the stabbing solely to Perez.” *Id.* at 34.

But O’Brien also testified that Perez had strangled the victim. O’Brien “saw ‘Perez on top of the victim’ with the ‘telephone cord wrapped around [her].’” Pet. App. A3. He testified that “Perez ‘was pulling really hard on the telephone cord’ and Mrs. Daher’s ‘neck was twisted back.’” *Id.* So whatever the jurors believed to be the precise cause of death, the evidence before them established that Perez murdered Daher. Indeed, Perez’s defense at trial had nothing to do with whether Daher died because of the strangulation, the stab wounds, or both. His defense attorney argued that Perez was never even at Daher’s home. 15RT 3617-3619.

Moreover, Peterson’s testimony at Perez’s trial did not differ substantially from Hogan’s earlier testimony at Snyder’s trial. Hogan had described the “evidence of ligature strangulation cutting off the air and blood supply” and concluded that the strangulation was sufficient to be the cause of death. *People v. Snyder*, 112 Cal.App.4th at 1210. She also described the multiple wounds in Daher’s neck and back, observing that at least four of those wounds would have been fatal by themselves. *Id.* She noted that the evidence suggested that death by strangulation had probably, but not “definitively,” occurred before the stabbing. Pet. 33 (quoting reporter’s transcript in *Snyder*). At Perez’s trial, Peterson opined that the cause of Daher’s death was a “combination of” strangulation and stabbing, Pet. App. A17; 13RT 3021; that



the “major force” was “the strangulation,” 13RT3020; and that the lack of any defensive knife wounds on Daher’s hands suggested that Daher had been either dead or unconscious at the time of the stabbings, *id.*

On these facts, any exclusion of some (or all) of Peterson’s testimony on Confrontation Clause grounds would not have affected the jury’s guilty verdicts.<sup>5</sup> There is no reason for further review.

### CONCLUSION

The petition for a writ of certiorari should be denied.

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<sup>5</sup> Nor is there any substantial basis for Perez’s argument (at 37-38) that it would have made a difference in the jury’s penalty-phase deliberations if the jurors had believed “that strangulation, allegedly performed by both Snyder and Perez, was the main cause of death” instead of “that death was mainly due to the stab wounds, allegedly inflicted solely by Perez.”

Dated: September 26, 2018

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