

No. 18-5399

**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 Writ of Certiorari to the  
California Supreme Court*

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**REPLY BRIEF OF PETITIONER**

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**CAPITAL CASE**

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This case presents the question of whether an autopsy report created as part of a homicide investigation is “testimonial” under the Confrontation Clause framework established in *Crawford v. Washington*, 541 U.S. 36 (2004). Respondent (the State)’s Brief In Opposition (“BIO”) does not contest Mr. Perez’s argument that “the application of the Confrontation Clause to autopsy reports is an important issue on which the lower courts have not followed a uniform approach.” (BIO at 6.) Neither does the State contest Perez’s showing that “lower courts have followed different approaches in applying this Court’s Confrontation Clause precedent to cases involving autopsy reports” (*Id.*), confirming the existence of a circuit split on this question. The State also confirms that

the issue “involving application of the *Crawford* framework to autopsy reports” has been the subject of prior petitions for certiorari in this Court and “[i]n 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 that squarely presents the issue.” (BIO at 6-7). Thus, the importance of the issue is not in question, only whether this case is the appropriate vehicle for further review and whether the error was harmless.

### **I. This Is An Appropriate Vehicle for the Court To Address The Issue.**

In this case,<sup>1</sup> Dr. Brian Peterson testified to, and relied upon, statements and opinions contained in an autopsy report (Pet. App. C) authored by a non-testifying doctor who actually performed the autopsy (Dr. Susan Hogan) to support his own opinions. Dr. Peterson’s testimony violated state hearsay law because it recited and relied upon inadmissible case-specific hearsay evidence to support his opinions, thus implicating appellant’s state and federal due process rights. Dr. Peterson’s testimony also violated Perez’s Sixth Amendment right to confrontation, because the hearsay was testimonial, under the holdings of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

The California Supreme 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 *People v. Sanchez*, 63 Cal.4th 665,

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<sup>1</sup> *People v. Perez*, 4 Cal. 5th 421, 411 P.3d 490, 229 Cal. Rptr. 3d 303 (2018) (Pet. App. A).

204 Cal.Rptr.3d 102, 374 P.3d 320 (2016) (Pet. App. A) and was improperly admitted. (*Perez, supra*, 4 Cal. 5th at 456 (Pet. App. A at 18.)) 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, Pet. App. A at 19.)

The State frames the question presented entirely in terms of harmless error: “[w]hether 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.” (BIO at i.) Similarly, the State’s main argument is that this case is not worthy of a grant of *certiorari* because the California Supreme Court “rest[ed] its decision in this case entirely on the ground that any error was harmless.” (*Id.* at 9.) The State argues that if *certiorari* is granted, this Court “would then need to review the actual basis for the decision below—*i.e.*, the case-specific conclusion that any constitutional violation was harmless.” (*Id.*)

Yet the “harmless error” holding is hardly the *certiorari*-disqualifying factor that the State makes it out to be. They argue that the California Supreme Court’s “fact-bound holding does not warrant further review.” (BIO at 6.) But as the State admits, “[l]ower courts [that have considered this question] have typically applied a ‘fact-specific analysis’

that focuses on the particular circumstances of each case.” (BIO at 7, citing *State v. Hutchison*, 482 S.W.3d 893, 911 n.6 (Tenn. 2016.)) These courts also regularly “take[] account of factual matters that vary from case to case.” (BIO at 8.)

Any case regarding the testimonial nature of autopsy reports will always involve a close examination of the relevant facts, whether in the context of determining whether the reports are or are not testimonial and/or in considering whether any error may have been prejudicial and thus not harmless. In reviewing this question, this Court will inevitably confront fact-based lower court decisions regarding the purpose and trial presentation of the autopsy report, whether it was prepared in anticipation of its use at trial, the extent to which it was relied upon to obtain a conviction, the availability of the original author of the report, and the inevitable harm analysis. Any conceivable context in which this issue will arise in the future will necessarily be “fact-bound,” as it was with the many lower court cases cited by the State. (BIO at 7-8.) This is true whether the holding was that the reports are categorically testimonial or non-testimonial, or whether they “have taken a more nuanced approach.” (BIO at 7.) It makes little sense to deem this case an inappropriate vehicle for further review simply because the California Supreme Court’s opinion was a “fact-bound holding” of harmless error. (BIO at 6.)

The State also argues that “[a]ny 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.” (BIO at 9.) Yet the State agrees with Perez that the courts below are split almost equally on this issue and have adopted divergent views and approaches, both

categorical and non-categorical holdings on the testimonial nature of the reports. (BIO at 7-8.) In this context, where virtually all possible views and divergent opinions on the question have already been expressed in the courts below, this Court would hardly benefit from any further “analysis by the state court,” as the State argues. (BIO at 9.) The lack of one more such opinion to the already lengthy list that will be confronting the Court is hardly a significant deterrent to *certiorari* review. Even so, such an opinion is not lacking here. While ducking the ultimate question, the California Supreme Court’s holding squarely presents this Court with the issue, as the State admits.

## **II. The Error Was Not Harmless.**

Nor did the State meet its burden to show harmless error, contrary to the holding of the court below. Evidentiary errors implicating a defendant's Fifth, Sixth and Fourteenth Amendment rights are evaluated for prejudice under a “harmless beyond a reasonable doubt” standard. (*Chapman v. California*, 386 U.S. 18, 24 (1967); *Neder v. United States*, 527 U.S. 1, 18 (1999).) “Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.” (*Chapman* at 24.) The *Chapman* test “require[s] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” (*Id.*; accord, *Neder v. United States*, 527 U.S. 1, 15 (1999) [under *Chapman*, the test is “whether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained’



”].) Viewing the error here in light of the record as a whole, the holding of the California Supreme Court does not hold up.

The State asserts that the California Supreme Court supported its harmless error holding in noting 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.” (BIO at 5, citing Pet. App. A 19.) Yet those findings had no relevance to the question of harmless error, as this was more a case of “who did it” and relative culpability.<sup>2</sup>

The California Supreme Court found that this error was harmless because “[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, Pet. App. A at 19, quoting *Sanchez, supra*, 63 Cal. 4th at 685.)

The holding that this was harmless error was erroneous, as Peterson’s testimony involved much more than merely the cause of death. 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 at

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<sup>2</sup> “At trial, 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. These facts were not disputed.” (*Perez* at 457, Pet. App. A at 19.)

Perez's trial frequently relied on Dr. Hogan's autopsy report for information that could not be shown or verified merely from the autopsy photos:

- Dr. Peterson testified: “[a]dditional findings included bleeding in the whites of the eyes. Those are call piticheal hemorrhages and swelling of the tissue around the eyes.” (13 RT 3007.) Dr. Peterson's description of the damage to the eyes appears to have been based solely on the autopsy report and not on any photographic evidence. Counsel has not been able to identify any autopsy photographs or trial exhibits showing the whites of the victim's eyes.

- Dr. Peterson testified about the depth of a wound marked as “E” in Exhibit 103. The depth of the cut cannot be determined from the photo, and Dr. Peterson expressly relates hearsay from Dr. Hogan to describe the depth of the cut:

wound E, down there, went into the left lower lung lobe, so it's substantially a deeper injury.... Wound E went into the left lower lobe of lung. Dr. Hogan estimated the depth of that wound being two-and-a-half inches.... So, with that injury, there was blood inside the chest cavity on the left.  
(13 RT 3014.)

In discussing wound E, Dr. Peterson admitted that he could not independently characterize the nature of a stab mark without physically manipulating the wound:

These wounds are all similar in terms of their physical characteristics. They all had two sharp edges. It's a little bit harder to see here, but normally what we will do is put a piece of tape across them and pull the edges together -- just use our fingers to do that -- and that way we can tell what the edges look like.  
(13 RT 3013-14.)

- Several times Dr. Peterson described internal injuries that were not photographed but were only reported in the autopsy report:

And injuries F, G, H and I are right here near the top of the chest.... These wounds are interesting ... F was actually the deepest. G and H were superficial. They only went into the skin and soft tissue. And then I is into the right upper lung lobe. They do have a couple of interesting characteristics, though. And if we begin with wound F over here on the corner, you will notice that's been delivered towards the back, and yet the blade passed through substantial soft tissue all way forward through the neck to -- actually caught the jugular vein, the carotid artery and the thyroid gland. The thyroid glands sit right in the front. That was a deep wound. Dr. Hogan estimated three-quarter inches. It also cut the trachea, the windpipe right in the mid line. That came all the way through the back into the front like that. The other interesting fact is -- and it's hard to see in this picture. It may be in this smaller picture.

(RT 3016-17.) (Wounds F, G, H and I shown in Exhibit 105.)

- A short time later, Dr. Peterson returned to wounds G and H, testifying that they were both superficial. (13 RT 3017.) Again, depth cannot be determined from the photographs, and if anything wound H appears quite similar to wound I in the same exhibit 105, which the witness described:

And then wound I, this big one down here, was deeper. There was no abrasion, so the knife wasn't pushed all the way into the bolster. And yet, it did enter the upper lobe of the right lung about an inch into the lung itself. And just as was the case on the other side of the body, there was blood in the right side of the chest.

(13 RT 3017.)

- Again, Dr. Peterson testified to internal injuries which could not be independently verified:

And as a group, beginning with wound J, those tend to be deeper. In fact, J, K and L -- J, K and L here, all went into the left lower lung lobe. And then M, N and O, over on the right side -- remember, looking at her back -- M, N

and O, all into the right lower lung lobe. So, all six of those injuries were deep. All six of them entered the lung either on the right or on the left. (13 RT 3018.) (Wounds J, K, L, M, N, O depicted in Exhibit 104.)

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.

Petitioner has shown in his petition (at 32-38) that there were three areas of prejudice which preclude a finding of harmless error.

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

When Dr. Hogan's testimony in co-defendant 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. 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. (11 RT 2488-89.) At Snyder's trial, co-defendant 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 2484-2485.) 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 Perez 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 in finding harmless error. (*Perez*, 4 Cal. 5th at 457, Pet. App A at 19) (“the exact depth of the stab wounds...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.”)

**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.

**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,

*s/s A. Richard Ellis*

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