No.

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IN THE SUPREME COURT OF THE UNITED STATES

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CURTIS HILL,

Petitioner,

vs.

JOE LIZARRAGA, WARDEN,

Respondent

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ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# PETITION FOR A WRIT OF *CERTIORARI*

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## QUESTIONS PRESENTED

1. Under 28 U.S.C. § 2254(d)(2) did the California Court of Appeal unreasonably determine the facts critical to a proper Confrontation Clause analysis of whether the diagnosis of a non-testifying neuropathologist could be introduced on the key issue of cause of death?

2. Did the Ninth Circuit fail to give sufficient liberal construction to the filing by a pro se petitioner when he submitted two new medical expert reports which challenged the conclusion regarding cause of death but did not respond to the district court's queries regarding them other than to ask that an attorney be appointed to assist him in filing objections to the Report and Recommendation?

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## I. OPINION BELOW

On July 18, 2018, the Court of Appeals entered its decision affirming the denial of Petitioner's 2254 habeas petition. (Appendix A.) The decision in unpublished.

## II. JURISDICTION

On July 18, 2018, the Court of Appeals affirmed the denial of Petitioner's 2254 habeas petition. (Appendix A.) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment states, in relevant part: "No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2254(d) provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court

proceedings unless the adjudication of the claim -- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established law Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable application of the facts in light of the evidence presented in the State court proceedings."

## IV. STATEMENT OF THE CASE

### A. Introduction

Cecil Warren ("Warren"), a 77-year old man with multiple health issues, was assaulted and robbed by petitioner Curtis Hill ("Hill") and co-defendant John McKinney ("McKinney") on November 11, 2003. Warren was found and taken to the hospital, where he lapsed into a coma. Nearly four years later he died.

Hill, who had already pled guilty and was serving time for the robbery and assault charged as a result of the incident, was charged with Warren's murder. According to the prosecutor, "the crux of litigation"[1] was whether Warren's "death

[1] Effective January 1, 1997, California Penal Code § 194 was amended to provide: "To make the killing either murder or manslaughter, it is not requisite that the party die within three years and a day after the stroke received or the cause

occurred as a result of the commission of a robbery." The evidence produced on that issue included the testimony of the coroner, Dr. Aruna Singhania ("Singhania"), and her supervisor, Dr. Anthony Juguilon ("Juguilon"). But the key evidence regarding the alleged critical brain injury—Diffuse Axonal Injury ("DAI")— caused by the blunt force trauma of the assault was developed by Dr. Andrews ("Andrews"), a brain pathology specialist who was not called to testify. Over a *Crawford*[2] objection, the court allowed Juguilon to testify and rely on the contents of the Andrews' report as essential support for his opinion regarding the cause of death. Singhania was also allowed to incorporate the diagnosis into her testimony.

The California court failed to correctly apply this Court's *Crawford* line of cases when it classified Andrews' report and findings as observations rather than diagnoses and excused it from the protections of the Confrontation Clause. Indeed, Juguilon specifically testified that "diffuse axonal injury is a *specific diagnosis*

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of death administered. If death occurs beyond the time of three years and a day, there shall be a rebuttable presumption that the killing was not criminal. The prosecution shall bear the burden of overcoming this presumption." Cal. Penal Code § 194. This rebuttable presumption applied in this case given that Warren died nearly four years after the assault occurred.

[2] *Crawford v. Washington*, 541 U.S. 36 (2004).

rendered by a neuropathologist." (emphasis added.) And the *Crawford* error was not harmless. The prosecutor repeated the theme in closing arguments, arguing that Juguilon's finding that Warren's death was a direct result of the blunt force trauma inflicted by petitioner was "due to the fact that the brain, 3-1/2 years later, when examined [by Andrews] was still diagnosed with widespread DAI." "That's the only reason that Mr. Warrant was on life support. As a result of blunt force trauma, widespread DAI in the brain."

While the matter was pending in the district court, Hill filed a document entitled "Newly Discovered Evidence" which consisted of two expert reports, one by Dr. Marvin Pietruszka ("Pietruszka") and the other by Dr. John C. Hiserodt ("Hiserodt"). (ER 33.) These reports appear to have been prepared at the request of Robison Harley, appointed counsel for Hill's separately tried co-defendant, McKinney. Both reports take issue with the conclusions of the prosecution experts who testified at Hill's trial and conclude that Warren's death was due to causes other than the blunt force trauma of the assault. These reports were addressed by the magistrate judge in her report and recommendation, and dismissed because the evidence was not exhausted and would not have changed the outcome at trial. The

Ninth Circuit agreed that no action was necessary and that there was no error in failing to appoint counsel on request for Petitioner. The analysis of these new records was not based on the liberal interpretation that this Court requires for pro se pleadings.

## B. Procedural History

Hill was convicted in Los Angeles County Superior Court on November 1, 2011 of first-degree felony murder for causing the death of Cecil Warren during the course of a robbery under California Penal Code §§ 187(a), 189. (ER 2.) The jury also found the special circumstance of murder during the commission of a robbery to be true. Pen. Code §§ 211, 212.5, 190.2(a)(17)(A) and (G). The court sentenced Hill to life without the possibility of parole on December 16, 2011. (ER 5.)

Attorney Madeline Kopas was appointed to represent Hill. The California Court of Appeal ("CCA") affirmed his conviction on November 5, 2013. (Appendix C.) His petition for review to the California Supreme Court was summarily denied on February 26, 2014. (Appendix D.) He did not file a state habeas petition prior to filing his pro se federal 2254 petition on March 12, 2015. (ER 47.)

The magistrate judge ordered a response to the petition, which was filed by the Attorney General on June 29, 2015. (ER 87.) The record was lodged in paper format on that same date. (ER 121.) Hill filed his Traverse on July 15, 2015. (ER 124.) The magistrate judge issued her report and recommendation on November 6, 2015. (Appendix B) Hill filed objections on December 21, 2015, and included a request for appointment of counsel. (ER 556, 559.) The report and recommendation was adopted by the district court on January 4, 2016 without any action on the request for counsel and judgment was entered. (Appendix B.) The Ninth Circuit granted a certificate of appealability and appointed counsel. Following argument, the decision of the district court was affirmed in a Memorandum Opinion. (Appendix A.)

## C. Facts of the Case

At the time of the crime in this case Hill was 21 years old, employed full time, had two children and a serious drinking problem. (1 CT 275-77, 289, 292; 1 RT 215-16, 219-220.)

Warren was 77 years old, and worked maintaining the grounds at a Union Bank in Huntington Beach. (1 RT 185, 193; 2 RT 316.) He was at work in the early morning hours of November 11, 2003. He was found lying on the ground in the Union Bank

parking lot at about 5:00 a.m. by Henry Stoltenberg ("Stoltenberg"). (1 RT 186; 2 RT 316.) His face was swollen and bloody. (1 RT 187.) Warren told Stoltenberg he had been mugged, and Stoltenberg called 911. (1 RT 187-88.) The paramedics arrived shortly after the police, and spoke with Warren. Warren was fully oriented, seemed relaxed and did not complain of any pain. (1 RT 196, 200-01, 203.) Warren told one paramedic that he had a cardiac history and had a pacemaker. (1 RT 196-97, 202.) He was taken to the hospital. (1 RT 197-99.) After arriving at the hospital his condition worsened and he eventually slipped into a coma and was placed on life support. (ER 2-3.)

Hill and McKinney were identified as the perpetrators. Hill admitted his role in the robbery, including seeing the white van in the Union Bank parking lot, getting into the unlocked van and taking out a tool. (2 CT 572-74, 579-80.) He also told the police about his activities prior to the assault, which included copious drinking over a lengthy period of time, up to and including the time of the assault. (2 CT 523-55, 527-31, 534, 545, 547, 549-50, 552, 554-55, 560-63.)

Hill told the police that he and McKinney bought cigarettes at a Mobil gas station close to the Union Bank, and then cut through the parking lot on their way

back. They saw a white van in the parking lot, and Warren. They got into the van and took out an edging tool. (2 CT 572-74, 579-80.) Warren came up and asked them what was going on, and Hill and McKinney said "nothing." (2 CT 573, 580.) Hill hit Warren, and Warren fell to the ground. (2 CT 573-74, 576-77, 583.) Hill took Warren's wallet from his pocket and then kicked Warren and ran. (2 CT 576-79.) Hill's DNA was found on Warren's right rear pants pocket. (2 RT 339-41.)

When Hill and McKinney were back at McKinney's house Hill went through the wallet and gave McKinney $40 of the $90 cash. They burned the wallet and threw away the checks and ID. (2 CT 578, 585-89.)

Hill pled guilty to robbery and assault and was sentenced to 9 years. (1 RT 7-8, 48-51; 1 CT 191, 194, 284; ER 4.) The jury who heard the murder case was not advised of this fact. (*Id.*)

Then, on September 22, 2007, nearly four years after the assault, Warren passed away and the prosecution brought new charges, special circumstance first degree felony murder, against Hill and McKinney. (ER 4.) Hill and McKinney were tried separately, with Hill being tried first.

At Hill's trial the prosecution presented two expert witnesses as to cause of death, Singhania and Juguilon, the coroner who performed the autopsy and her supervisor, respectively. But the pathologist who examined Warren's brain, Andrews, was not called as a witness, although his diagnosis and evidence played the key role in the prosecution's theory as to cause of death.

During opening statements the prosecutor previewed that the evidence would show that "a conclusion was reached by *all*—Dr. Singhania, Dr. Andrews, Dr. Juguilon—that Lucky Warren died as a result of the injuries he suffered as a result of the robbery and assault by [appellant's] hands and his companion ...." (1 RT 178, italics added.) The prosecutor told the jury that "you would have all of the forensic evidence dealing with DNA and pathology to leave you no doubt about the cause of death of Mr. Warren and no doubt in your mind" that appellant was guilty of murder in the course of a burglary and a robbery. (1 RT 180.)

Singhania performed the autopsy. (ER 287.) She did see any abnormalities during an external examination of his brain. (ER 302.) She preserved the brain for examination by a neuropathologist, Andrews. (ER 302.) She reviewed a "brief investigative report" prior to conducting the autopsy. (ER 292.)

Independent of Andrews' diagnosis, with respect to cause of death, Singhania testified it was a "multisystem failure." (ER 303.) She noted extensive other medical issues, including being "diabetic," and having "very bad coronary arteries," "atherosclerotic disease," "failing [kidneys]," a "[fatty] liver . . . early . . . cirrhosis and also central venous congestion," and "pulmonary edema." (ER 299, 301-03.) Singhania saw "nothing abnormal in the brain itself on gross examination." (ER 302.) She sent Warren's brain to Andrews for examination. She testified that she relied on his findings to determine the cause of Warren's death, specifically, his finding that Warren had "chronic sequelae" indicative of blunt force trauma to the head and "that's why [Warren was] not able to breathe by himself [and] . . . was on life support. And that's how I put the cause of death." (ER 303, 333.)

Defense counsel objected to this opinion. (ER 304.) When the prosecutor tried to get her to agree that as to Warren's myriad other medical issues "ultimately all of those are contributing causes, meaning they're in place, but it is the bronchopneumonia as a result of being on life support that ultimately causes the death. . . ?," Singhania responded "[w]ell, again, as I said, this person is a complicated death." (ER 304.) The questioning also revealed that Singhania did not

have independent information that it was the blunt force trauma that caused Warren to be on life support:

> Q: Okay. Now when you say the due to, you again—that's something that you had, again, been briefed on about the fact that this particular patient had suffered blunt force trauma. Correct?
> A: That's correct.
> Q: That had landed him on life support?
> A: That's correct.

(ER 306.) On cross-examination Singhania agreed that the loss of lung functionality from his pre-existing COPD could have made it more difficult to fight off pneumonia. (ER 325.) She did not know if Warren had preexisting pulmonary edema, but agreed it "could make the pneumonia condition worse." (ER 326.)

Juguilon testified to the same opinion as to cause of death, also relying on Andrew's report. He testified that a neuropathologist such as Andrews "is a pathologist that specializes in examining the central nervous system, and that means the brain and the spinal cord. So this person would have additional training above and beyond the general pathology to handle these types of cases." (ER 337.) When he began to discuss Andrews' microscopic neuropathology report and its findings, defense counsel objected:

> Q. And in that [microscopic] examination [of the brain tissue], Dr. Andrews talks about something called diffuse axonal injury?
> A. Yes, he does.
> DEFENSE COUNSEL: I'm going to object, your Honor. Hearsay.
> THE COURT: Are you asking for a limiting instruction again, Mr. Goldman, or are you objecting in general?
> DEFENSE COUNSEL: Well, I'd like to ask to be heard briefly but I'm hesitant to do that.
> THE COURT: Just state your objection so I can rule on it.
> DEFENSE COUNSEL: Hearsay, lack of foundation, and the *Crawford* line of cases.
> THE COURT: All right. It's overruled on the *Crawford* basis inasmuch as I think really *Crawford* and the other cases an expert can still rely on what would otherwise be hearsay. I don't think that's a Sixth Amendment issue under the cases I'm familiar with."

(ER 339-40.)

Juguilon testified that "diffuse axonal injury" is a *specific diagnosis* rendered by the neuropathologist [Andrews]. And what it is, it's widespread brain cell injury that follows sever chronic head injuries . . ." (ER 341, emphasis added.) He testified that DAI is caused solely by severe blunt head trauma. (ER 344, 354.) Juguilon then went further and opined that the DAI diagnosed by Andrews could have been caused by someone being hit very hard with an object such as a pipe, and being hit and kicked in the head, (ER 345), and concluded that a death such as Warren's would be consistent with the original blunt force trauma. (ER 346.) According to Juguilon, the

initial injury and the DAI caused Warren to become ventilator-dependent for the remainder of his life, and he "ultimately died as a result of the [required] mechanical ventilation, the pneumonia and the sequelae. So there's a logical sequence between the blunt head injury [reported by Andrews] and the ultimate cause of death." (ER 346-47.) Andrews was not called to testify at trial.

The prosecutor relied significantly on Juguilon's testimony in argument to the jury, stating that "the crux of litigation in this case" was whether Warren's "death occurred as a result of the commission of a robbery." (ER 405-06.) The prosecutor argued that the law permits more than one cause of death, and appellant's act in inflicting the blunt force trauma was a substantial factor in causing Warren's death (ER 408.) According to the prosecutor, the government had overcome the presumption of the "three years and one day" rule by proving Warren died of the blunt force trauma. (ER 406.)

The prosecutor relied on the expert medical testimony to support this theory. (ER 409-10.) She referred to Juguilon, "the Chief Forensic Pathologist for the Orange County Coroner's Office" (ER 411), and the fact he found that Warren's "death was a direct result of the original blunt force trauma inflicted" by appellant

(ER 412.) While not specifically referencing Andrews' neuropathology report (ER 409-14), the prosecutor repeatedly referred to the blunt force brain trauma and resulting widespread DAI in linking appellant to Warren's death. (*See* ER 410-14.)

The prosecutor argued that Juguilon's finding that Warren's death was a direct result of the blunt force trauma inflicted by appellant was "due to the fact that the brain, 3-1/2 years later, when examined [by Andrews] was still diagnosed with widespread DAI." (ER 412.) "That's the only reason that Mr. Warren was on life support. As a result of blunt force trauma, widespread DAI in the brain." (2 RT 448.) The prosecutor further argued Warren "was suffering from DAI blunt force trauma that required him to be on the ventilator that ultimately caused his pneumonia[.]" (ER 414.)

Appellant's jury was instructed that "[t]he meaning and importance of any [expert] opinion are for you to decide. In evaluating the believability of an expert witness, ... consider ... the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate...." (1 CT

239.) During deliberations, the jury requested the rereading of Juguilon's testimony. (ER 448; 1 CT 41, 266.)

The expert reports submitted to the district court by Hill told a different story regarding cause of death. The reports were prepared in connection with the trial of Hill's co-defendant, McKinney. According to Pietruszka, the cause of death was congestive heart failure, not bronchopneumonia. (ER 39.) Pietruszka reviewed extensive documentation prior to rendering this opinion, including the Orange County Emergency Medical Services Pre-Hospital Care Report, the Fire Department Paramedic report, the Hoag Hospital Records, the autopsy report, the neuropathology report, additional medical records, and the records created at the time of admission to the hospital. (ER 36-37.) He listed Warren's numerous pre-existing health issues, including hypertension, chronic obstructive lung disease, coronary artery disease, congestive heart failure, a history of urinary tract infections, gastroesophageal reflux disease, and diabetes. (ER 36-37.) Although he accepted the diagnosis of DAI by Dr. Andrews, the conclusion he drew from the facts differed:

> Perhaps the most significant autopsy data is found in both the cardiovascular and respiratory system findings in which an adhesive pericarditis and markedly enlarged and hypertrophied heart consistent with hypertensive cardiovascular disease is described. The respiratory

> tract findings at autopsy are consistent with pulmonary edema. This diagnosis is further supported by the enlarged liver that demonstrated central venous congestion and the enlarged spleen. The respiratory section of the autopsy report, in addition, specifically states that there is no obvious gross pneumonia. This is supported by the description in the same paragraph in which pneumonic consolidation is not observed. The renal findings further support a diagnosis of longstanding hypertension.
>
> It is, therefore, my opinion that Mr. Warren died of congestive heart failure and not acute bilateral bronchopneumonia as there are absolutely no pathologic findings consistent with pneumonia. In fact, the "early bronchitis" mentioned at the time of autopsy is a diagnosis that could readily be confused with the findings of congestive heart failure.

(ER 39.)

Dr. Hiserodt's report was to similar effect. (ER 41.) He concluded that Warren:

> died as a result of terminal congestive heart failure secondary to severe hypertensive and atherosclerotic cardiovascular disease exacerbated by underlying diabetes. Also contributing to his death is underlying chronic obstructive pulmonary disease (COPD). Because these diseases were present long before Mr. Warren was assaulted and because injuries sustained during the assault did not accelerate these disease processes, necessarily makes this manner of death as natural.

(ER 41.)

On appeal Hill challenged various aspects of his conviction, including the Sixth Amendment Confrontation Clause violation which occurred when Juguilon and Singhania were allowed to rely on and present Andrews' findings without

requiring that Andrews testify for the prosecution. (ER 130.) The California Court of Appeal ("CCA") agreed that Andrews had not been shown to be unavailable and Hill did not have a prior opportunity to cross examine him. (ER 28.) But the CCA ruled that "[b]ecause the information contained in Dr. Andrews' report was not offered for its truth, but simply to establish the basis for Dr. Singhania's and Dr. Juguilon's expert opinions, its admission did not violate appellant's confrontation rights. (ER 28.) The CCA also found that "the information that Drs. Singhania and Juglion relied on and revealed to the jury was limited to Dr. Andrew's *objective findings* regarding the condition of Warren's brain." (ER 28, emphasis added.)

## V. ARGUMENT

### A. This Court should grant certiorari to review the Ninth Circuit's decision because it failed to find that the ruling of the California court was based on an unreasonable determination of the facts when the court incorrectly related the testimony during trial.

The law in this Court on Confrontation Clause violations is in some flux, and it was on that basis that the Ninth Circuit ruled against Petitioner on his § 2254(d)(1) argument. But the issue presented is different when the § 2254(d)(2) argument is

addressed because there is no requirement of *clearly* established Supreme Court law. And the applicable Supreme Court law supports relief.

### 1. Unreasonable factual findings under 28 U.S.C. § 2254(d)(2) are evaluated in light of the state court record.

The district court stated that it was relying on "facts, taken from the California Court of Appeal's unpublished written decision" on the basis that these "facts" had "not been rebutted with clear and convincing evidence," citing *Slovik v. Yates*, 556 F.3d 747, 749 (9th Cir. 2009). Those facts were not accurate and were therefore unreasonably determined. Further, the presumption of correctness found in § 2254(e)(1) does not apply when a court is analyzing factual determinations based on matters contained in the state court record. The so-called "intrinsic review" of the state court's decision is conducted under § 2254(d)(2).

The CCA based its rejection of the Confrontation Clause argument on a distinction drawn by the California Supreme Court (CSC) in *People v. Dungo*, 55 Cal. 4th 608 (2012). The CCA described the ruling rejecting a Confrontation Clause argument in *Dungo* as follows:

> In *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*), the California Supreme Court addressed a very similar situation. As in our case, a forensic pathologist was allowed to give his expert opinion on the cause of the victim's death based on "objective facts about the condition of the victim's body as recorded in the autopsy report" of a nontestifying pathologist. (*Id.* at p. 612.) Also like our case, the expert was allowed to refer to those objective facts in explaining the basis for his opinion, but the autopsy report itself was not admitted into evidence. (*Ibid.*) In determining whether the jury's exposure to the information in the autopsy report violated the defendant's Sixth Amendment rights, the *Dungo* court explained that an out-of-court statement must possess "two critical components" to be testimonial: "First, . . . the statement must be made with some degree of formality or solemnity. Second, . . . its primary purpose [must] pertain[] in some fashion to a criminal prosecution." (*Id.* at p. 619.)

The hearsay information at issue in *Dungo* possessed neither of those qualities. Contrasting objective *observations* about the condition of the victim's body with subjective *conclusions* about the cause of death, the Supreme Court ruled statements in the former category lack the requisite formality or solemnity to be testimonial. (*Dungo, supra*, 55 Cal.4th at pp. 619-620.) Moreover, because autopsies are conducted not only to facilitate criminal investigations, but also to provide information relevant to civil proceedings, insurance claims and other issues, it cannot be said that their *primary purpose* pertains to criminal prosecution. (*Id.* at pp. 620-621.) Therefore, *Dungo* concluded the expert's reliance on the objective facts

contained in the autopsy report did not violate the defendant's right to confront the pathologist who prepared the report. (*Id.* at p. 621.)

Therefore, the CCA's finding that Dr. Andrews' report consisted of "objective findings" rather than a "diagnosis" is not entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1) and is instead evaluated in the context of the state court record before the CCA. That review demonstrates that that findings were unreasonable. No AEDPA deference applies.

### 2. There was a Confrontation Clause violation in Petitioner's trial.

Most recently in *Williams v. Illinois*, 567 U.S. 50 (2012) this Court addressed the issue of Confrontation Clause violations, this time in the context of autopsies. This followed the other cases interpreting the Confrontation Clause post-*Ohio v. Roberts*, 448 U.S. 56 (1980), *Crawford v. Washington,* 541 U.S. 36 (2004), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009); and *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011).

This case differs from the run-of-the-mill case because Petitioner had already been convicted on the criminal act against Mr. Warren—the only question was cause

of death nearly four years later in an effort to bring murder charges and rebut the presumption under Cal. Penal Code § 194. This distinguishes it from the types of cases discussing whether autopsies as a general category should be considered testimonial statements under *Crawford*. *See, e.g., Melendez–Diaz,* 557 U.S. at 335 (Kennedy, J., dissenting) (quoting Comment, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 Cal. L. Rev. 1093, 1115 (2008)); *See Williams v. Illinois,* 567 U.S. at 98 (Breyer, J., concurring) (noting the problems that would be posed for factfinding at a criminal trial if autopsy reports were to be classified as testimonial, even where the medical examiner who performed the autopsy may not be available to testify, and the deceased's body has decomposed, precluding repetition of the autopsy).

Dr. Andrews' report was testimonial. "To the extent the analysts were witnesses (a question resolved above), they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine." *Melendez-Diaz*, 557 U.S. at 313. To the same effect, Andrews provided "one fact necessary for [Hill's] conviction"—a diagnosis of DAI. *Id*.

### 3. Andrews' diagnosis was accusatory.

The diagnosis of DAI was essential to the opinions and testimony of Singhania and Juguilon regarding cause of death in this case where the prosecution had to overcome a presumption that the assault was *not* the cause of death given the passage of time. Under the clear language of *Melendez-Diaz*, this makes Andrews' report accusatory. "To the extent the analysts were witnesses (a question resolved above), they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine." *Melendez-Diaz*, 557 U.S. at 313. To the same effect, Andrews provided "one fact necessary for [Hill's] conviction"—a diagnosis of DAI. *Id.*

### 4. The Confrontation Clause applies to "neutral, scientific testing."

This Court in *Melendez-Diaz* specifically rejected the proposition that scientific findings are exempt from the Confrontation Clause, and the related proposition that "neutral, scientific testing" was somehow different from other evidence.

Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, "[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency." National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 6–1 (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). And "[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." *Id.,* at S–17. A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution. *Melendez-Diaz*, 557 U.S. at 318. And indeed, the coroner in this case was under the auspices of the Orange County Sheriff's office. Testing Andrews' results by requiring confrontation "is one means of assuring accurate forensic analysis." *Id.*

### 5. The distinction between "observation" and "conclusion" was misapplied.

The California Supreme Court took a dramatic wrong turn in applying the teachings of *Crawford* and *Melendez-Diaz* when it developed it's "observation" versus "conclusion" paradigm, and likened an autopsy to a report prepared by a treating physician:

> We begin with the issue of formality. An autopsy report typically contains two types of statements: (1) statements describing the pathologist′s anatomical and physiological observations about the condition of the body, and (2) statements setting forth the pathologist's conclusions as to the cause of the victim's death. The out-of-court statements at issue here—Pathologist Bolduc's observations about the condition of victim Pina's body—all fall into the first of the two categories. These statements, which merely record objective facts, are less formal than statements setting forth a pathologist's expert conclusions. They are comparable to observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment. Such observations are not testimonial in nature.

*People v. Dungo*, 55 Cal. 4th at 619–20.

This analysis allowed the court to get the import of *Melendez-Diaz* exactly wrong. According to *Melendez-Diaz*, "[w]hether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at

petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment." *Melendez-Diaz v. Massachusetts*, 557 U.S. at 324. But the CSC cited to this very page, and stated as follows: "The autopsy continued to serve several purposes, only one of which was criminal investigation. The autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial. *People v. Dungo*, 55 Cal. 4th at 621. The hearsay information at issue in *Dungo* possessed neither of those qualities. Contrasting objective *observations* about the condition of the victim's body with subjective *conclusions* about the cause of death, the Supreme Court ruled statements in the former category lack the requisite formality or solemnity to be testimonial. (*Dungo, supra*, 55 Cal.4th at pp. 619-620.) Moreover, because autopsies are conducted not only to facilitate criminal investigations, but also to provide information relevant to civil proceedings, insurance claims and other issues, it cannot be said that their *primary purpose* pertains to criminal prosecution. (*Id*. at pp. 620-621.) Therefore, *Dungo* concluded the expert's reliance on the objective facts contained in the autopsy report did not violate the defendant's right to confront the pathologist who prepared the report. (*Id.* at p. 621.)

### 6. The factual recitations of the CCA, relied upon by the Ninth Circuit, were erroneous based on the record.

In light of this analysis of the Confrontation Clause case law, it is clear that the factual recitations by the CCA were wrong in several respects. First, the primary purpose of the autopsy and Andrews' examination absolutely had the "primary purpose" of a criminal prosecution. Hill had already pled guilty to the assault and served time. The briefing Singhania received included the information about the assault. (ER 306, 332-33.)

Second, what Andrew's did in Hill's case was not just record objective findings, but instead render a "neuropathologic diagnosis." (ER 339.) The CCA, however, referred to this diagnosis as findings. (ER 24 ('she relied on Dr. Andrew's finding"); ER 28 ("the information that Drs. Singhania and Juguilon relied on and revealed to the jury was limited to Dr. Andrew's objective findings regarding the condition of Warren's brain"); ER 28 (Dr. Andrew's personal observations that Warren's brain had signs of chronic sequelae and DAI").

The California Court of Appeal ("CCA") found that "the information that Drs. Singhania and Juglion relied on and revealed to the jury was limited to Dr. Andrews' *objective findings* regarding the condition of Warren's brain." (emphasis added.) To the extent the CCA make a finding that Dr. Andrews' report contained objective findings rather than a diagnosis, the CCA made an unreasonable factual determination based on the state court record before it. As such, no AEDPA deference applies.

The unreasonableness of the California Supreme Court's finding can be seen by looking at the trial court record. Dr. Juguilon specifically testified that "diffuse axonal injury is a *specific diagnosis* rendered by a neuropathologist." (ER 341, emphasis added.) The prosecutor repeated the theme in closing arguments, arguing that Juguilon's finding that Warren's death was a direct result of the blunt force trauma inflicted by petitioner was "due to the fact that the brain, 3-1/2 years later, when examined [by Andrews] was still diagnosed with widespread DAI." (ER 412.) "That's the only reason that Mr. Warrant was on life support. As a result of blunt force trauma, widespread DAI in the brain." (ER 412.)

Juguilon relied on Andrews' report. He testified that "diffuse axonal injury" is a *specific diagnosis* rendered by the neuropathologist [Andrews]. And what it is, it's widespread brain cell injury that follows sever chronic head injuries . . ." (ER 341, emphasis added.) He concluded that a death such as Warren's would be consistent with the original blunt force trauma. (ER 346.) According to Juguilon, the initial injury and the DAI caused Warren to become ventilator-dependent for the remainder of his life, and he "ultimately died as a result of the [required] mechanical ventilation, the pneumonia and the sequelae. So there's a logical sequence between the blunt head injury [reported by Andrews] and the ultimate cause of death." (ER 346-47.)

Application of *Crawford v. Washington,* 541 U.S. 36 (2004), turns on the key question of confrontation, which involves the question of whether Dr. Andrews merely recorded "objective observations" or rendered a "diagnosis." The CCA's conclusions that they were merely "objective observations" it at odds with the trial court record, and therefore does not survive the intrinsic review under § 2254(d)(2). Andrews rendered a "neuropathologic diagnosis." (ER 339.) The CCA, however, referred to this diagnosis as findings. (ER 24 "she relied on Dr. Andrew's finding");

ER 28 ("the information that Drs. Singhania and Juguilon relied on and revealed to the jury was limited to Dr. Andrews' objective findings regarding the condition of Warren's brain"); ER 28 (Dr. Andrews' personal observations that Warren's brain had signs of chronic sequelae and DAI").

But in the trial court record these "findings" were correctly labeled a "diagnosis." The CCA's conclusions that this was an objective finding rather than a diagnosis, which was an integral part of its Confrontation Clause analysis, was at odds with the state court record, and therefore unreasonable. Under the provisions of 28 U.S.C. § 2254(d)(2), therefore, AEDPA deference does not apply. The Ninth Circuit incorrectly lumped the (d)(2) analysis in with the (d)(1) analysis and therefore misapplied this Court's Confrontation Clause case law. Petitioner seeks a writ of certiorari to address this failure.

## B. The Ninth Circuit failed to apply the required "liberal construction" to Petitioner's pro se supplemental submission of two expert reports that contradicted the opinions regarding the cause of death testified to at trial.

The vast majority of Hill's submissions to the district court consisted of copies or parroting of appellate court filings by his state appellate attorney. Section 8 of the form petition, which asked for the "ground(s) on which you claim that you are being held in violation of the Constitution," contained only references to "Attachment C," the 89-page Petition for Review filed by appellate counsel Kopas with the CSC. (ER 79-81; CV 1, Attachment C.) Similarly, the Traverse merely parroted the headings in the Opening Brief filed by state appellate counsel (ER 124-26) and the points and authorities submitted with the Traverse merely parroted the Introduction in the Opening Brief and then attaches the brief in toto to the filing. (*Compare* ER 128-29 with 146-47.) Other than the federal constitutional analysis contained in the briefing done by state appellate counsel, there was no independent analysis contained in Hill's filings. These filings were the best this pro se petitioner was able to do without counsel.

Thus, when he submitted his "Newly Discovered Evidence," the burden was on the district court to broadly construe that submission by a pro se litigant. This Court has repeatedly held that prisoner *pro se* pleadings are given the benefit of liberal construction. *Tomkins v. State of Missouri*, 323 U.S. 485, 487 (1945) ("But we can hardly demand of a layman and pauper who draws his petition behind prison walls the skill of one trained in the law."); *Erickson v. Pardus,* 551 U.S. 89, 94 (2007) (per curiam) ("A document filed pro se is to be liberally construed"); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (same); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) ("allegations of the pro se complaint [are held] to less stringent standards"); *Holiday v. Johnston*, 313 U.S. 342, 350 (1941) ("A petition for habeas corpus ought not to be scrutinized with technical nicety.").

Had the lower courts correctly construed Petitioner's pro se submissions the court would have recognized claims regarding ineffective assistance of trial counsel for not obtaining similar opinions in advance of Hill's trial, support for his Confrontation Clause claim, and excuses from any procedural default in connection with those claims due to allegations of actual innocence under *Schlup v. Delo*, 513 U. S. 298 (1995) (actual innocence gateway to get around procedural bar) and

*McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013) (actual innocence gateway to get around expiration of AEDPA statute of limitations), or allegations of ineffective assistance under *Martinez v. Ryan*, 566 U.S. 1 (2012). Instead, the district court applied anything but a liberal standard to Hill's claims and the Ninth Circuit found no fault.

> Because the reports were filed without any explanation of how or when Petitioner acquired them or of which claims they were meant to support, the district court had no reason to believe that any claim based on these reports would be either timely or exhausted. Even after the magistrate judge expressly faulted Petitioner for failing to explain the circumstances surrounding the reports or why he did not submit them earlier, Petitioner made no mention of them in his objections to the magistrate judge's Report and Recommendations.

(Opn. at 2-3.) The question of timeliness of the submission could have been addressed with a liberal construction. As argued by counsel in the Opening Brief, the two supplemental expert reports were dated April 28 and April 30, 2012, respectively. (ER 36, 41.) Handwritten at the top of each report is the notation "Received copies 10-6-15." (ER 36, 41.) They were filed with the court on October 29, 2015. (ER 36, 41.) Other than the notation as to a "received" date, Hill did not provide the court with any additional information as to why he was not aware of these reports at an earlier time.

The Report and Recommendation rejecting consideration of that new evidence and noted that "the one-year statute of limitations under AEDPA begins to run on the date on which the factual predicate of the claims presented could have been discovered through the exercise of due diligence," citing 28 U.S.C. § 2244(d)(1)(D) and *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013). The court also noted a diligence standard from *Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012), and faulted petitioner's October 29 declaration because it "offer[ed] no explanation of when these expert opinions, dated nearly a year after his conviction, were 'discovered.'" (ER 67.)

In response, Hill filed objections and included a specific request that counsel be appointed.

> 1. I declare I am the petitioner.
> 2. I declare I have less than layman abilities at law. However my intensions by these objections are to object to the Magistrates findings and recommendations for the reasons as stated by my trial and appellant attorney's reasons and arguments on appeal.
> 3. In order to professionally object to the Magistrate Judges findings, I am in need of an attorney appointed for me in this case by the instant court.

(ER 559.) Other than this request for counsel, and the allusion to the briefing by this state court attorneys, his objections were totally lacking in any specificity, merely

reciting the § 2254(d)(1) and (d)(2) standards. Hill did not address or respond to the Magistrate Judge's comments on the inadequacies of his factual presented on when he discovered his "newly discovered evidence." It appears from the record available that he indeed had "less than layman abilities at law" and did not understand and was not able to respond with the facts the judge required in order to consider the new evidence. This inadequate briefing again illustrated the limitation inherent in pro se representation and the need for a rule of liberal construction.

## VI. CONCLUSION

For the foregoing reasons Petitioner Curtis Hill asks that this Court issue a writ of certiorari to review the decision of the Ninth Circuit in his case.

Respectfully submitted,

GAIL IVENS

DATED: November 9, 2018

*s/ Gail Ivens*

GAIL IVENS
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