No. 20-5344

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER TAYLOR, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case presents the general question of when statements in an autopsy report concluding that the cause of death was homicide constitute "testimonial" hearsay, triggering the protections of the Confrontation Clause. Courts across the nation are deeply divided over this question, and have been for over a decade. Contrary to the State's Brief in Opposition (BIO), the conflict is not fact-bound. Rather, it is plain that Christopher Taylor would have been granted a new trial in several jurisdictions on precisely the same Confrontation Clause claim the Illinois courts rejected. This case presents an ideal vehicle for answering this question because the claim is fully preserved, the "testimonial" status of the hearsay at issue is dispositive of the constitutional question, and there was no finding of harmlessness below – nor could there be on remand because the autopsy report played a crucial role at this trial. This Court should grant certiorari.

I. This case presents a general question regarding the testimonial nature of autopsy reports.

The State asserts that the Petition for Certiorari betrays the fact-bound nature of this case, rendering it unworthy of review. (BIO 8-10) Nothing in the BIO, however, changes the fact that the question at the heart of this case is whether an autopsy report concluding the death resulted from homicide is testimonial. (Pet. 11) The State acknowledges that Chris's petition presents the "same general issue" as prior petitions asking this Court to determine whether an autopsy report was testimonial. (BIO 10) That question continues to divide courts across the land in the absence of this Court's guidance. *See, e.g., People v. Leach*, 2012 IL 111534, ¶¶ 134-36 (urging this Court to address "the confusion regarding application of the primary

purpose test" to autopsy reports after *Williams v. Illinois*, 567 U.S. 50 (2012)).

There is no need to rephrase the question presented to resolve the general question this case presents. The question in the Petition merely recognizes that this Court has ultimately answered questions regarding whether certain classes of statements are testimonial by looking at the particular facts of the cases before it. *See, e.g., Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009); *Michigan v. Bryant*, 562 U.S. 344, 371-78 (2011).

II. Lower courts are sharply divided on this question.

The State claims there is no conflict in authority over whether an autopsy report is testimonial sufficient to warrant this Court's review. (BIO 11-19) On the contrary, it would be hard to imagine a question where the conflict and confusion among the lower courts was more clear.

The State, like the court below, acknowledges that some jurisdictions outside Illinois have found autopsy reports to be testimonial. (BIO 17; Pet. App. A ¶ 135) But, according to the State, this is not a real conflict because any difference between holdings across state borders is the result of applying the "same primary purpose test to different factual scenarios." (BIO 17) If that were true – that is, if the outcome of this case depended entirely upon the facts – then there would no jurisdiction where Chris's claim would prevail. A brief survey of the cases shows this is not true. *See, e.g., Commonwealth v. Brown*, 185 A.3d 316, 318, 329 (Pa. 2018) (even where law enforcement had no direct role in autopsy, autopsy report testimonial because autopsy mandated by statute in all suspicious deaths and primary purpose of report was "to establish or prove past events potentially

relevant to a later criminal prosecution" and "any person creating the report would reasonably believe it would be available for use at a later criminal trial").

In the leading case from New Mexico, for example, the medical examiner, pursuant to statute, received the body of a person who had been shot and killed. *State v. Navarette*, 294 P.3d 435, 440-41 (N.M. 2013). The medical examiner did not know the target of the police investigation. She only knew the victim had died from a gunshot wound, then wrote down her observations and found the death was a homicide. Under those circumstances, the New Mexico Supreme Court found it to be unquestionable that the medical examiner "made the statements in the autopsy report primarily intending to establish some facts or opinions with the understanding that they *may* be used in a criminal prosecution," and thus that her autopsy report was testimonial. *Id*. (emphasis added). The court noted, in passing, that two police officers attended the autopsy. *Id*. at 440. But, in contrast to Illinois, the role law enforcement played in an autopsy is not dispositive in New Mexico, as demonstrated by *Navarette*'s approval of an appellate court opinion finding an autopsy report to be testimonial where law enforcement was not present at the autopsy. *Id*. at 440-42 (citing *State v. Jaramillo*, 272 P.3d 682, 685-86 (N.M. App. 2011)); *compare People v. Leach*, 2012 IL 111534, ¶¶ 133, 137 (autopsy report "should be deemed testimonial only 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," while "an autopsy report prepared in the normal course of business of a medical examiner's office is not rendered testimonial merely because the assistant medical examiner performing the autopsy is aware that police suspect

homicide and that a specific individual might be responsible").

If anything, it is even more clear that Chris's claim would have prevailed in Texas. *Henriquez v. State*, 580 S.W.3d 421, 428-29 (Tex. App. Houston 2019). The court of last resort in Texas defines "testimonial" statements as those "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." *Paredes v. State*, 462 S.W.3d 510, 514 (Tex. Crim. App. 2016) (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)). Applying that standard, the intermediate Texas court has routinely found autopsy reports to be testimonial because "an objective medical examiner would reasonably believe that the report would be used in a later prosecution." *Henriquez*, 580 S.W.3d at 427-29 (collecting cases). Thus, for example, even when no police officers were present during the autopsy, the autopsy report in *Henriquez* was testimonial because the victim had been shot and killed and the medical examiner found it to be a homicide. *Id.* at 428.

And there can be little doubt the autopsy report in this case would have been found to be testimonial in West Virginia, given that the high court in that state has held that "for purposes of use in criminal prosecutions, autopsy reports are under all circumstances testimonial." *State v. Kennedy*, 735 S.E.2d 905, 917 (W.Va. 2012). This is true in West Virginia, as the State's BIO acknowledges, even where law enforcement plays no role in the autopsy and even where, as in Illinois, a medical examiner in West Virginia is considered a public-health official, not a law-enforcement official. (BIO 14, 18) The fact that the West Virginia prosecuting authority conceded this should be the rule does not make it any less the law. (BIO

18) Instead, it is clear that the Confrontation Clause means something different in Illinois than it does in West Virginia.

The State dismisses *Kennedy* because that decision pre-dated this Court's decision in *Clark*. (BIO 19) The State asserts that *Clark* clarified much of the confusion regarding the "primary purpose" test for "testimonial" statements when it held that "the question is whether ... the primary purpose *of the conversation* was to create an out-of-court substitute for trial testimony." (BIO 11-12) (quoting *Ohio v. Clark*, 576 U.S. 237, 245 (2015) (internal quotation and modification omitted, emphasis added)). Given that *Clark* concerned oral statements by a three-year-old child "to preschool teachers, not the police," *id*. at 246, not forensic reports written by experts, it cannot do the work the State wants it to do. The State cites only one case that applied *Clark* to a forensic report – a toxicology report attached to an autopsy report – and found it non-testimonial. (BIO 21) (citing *State v. Mattox*, 890 N.W.2d 256, 259 (Wis. 2017)). But members of this Court have stated, even after *Clark*, that *Williams* continues to sow "confusion in courts across the country" over whether forensic reports are testimonial. *Stuart v. Alabama*, 139 S. Ct. 36 (2018) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).[1]

[1] California is another state where confusion over *Williams* is evident. The State's BIO cites California as a state where autopsy reports are considered non-testimonial. (BIO 15-16) (citing *People v. Dungo*, 286 P.3d 442, 450 (Cal. 2012)). But the California Supreme Court has acknowledged that "*Dungo*'s continued viability" is in question after its 2016 *Sanchez* decision. *See People v. Perez*, 411 P.3d 490, 517-18 (Cal. 2018) (citing *People v. Sanchez*, 374 P.3d 320, 328-35 (Cal. 2016) (appearing to disagree with *Dungo* in holding that testifying expert may not relay "case-specific out-of-court statements" in report written by non-testifying expert, citing a hypothetical autopsy report as an example)).

This Court's guidance on this question is urgently needed.

III. This case is an ideal vehicle for resolving this question.

The facts of this case demonstrate why it is such a good vehicle for this Court to answer the general question at issue. The State does not dispute that Chris's claim is fully preserved, that Chris was tried by jury, and that there was no finding of harmlessness below. Nor does the State dispute that if this Court finds the autopsy report to be testimonial, then the Confrontation Clause was violated. This case thus presents none of the complicating issues present in, for example, *Williams* and several of the autopsy-report cases where this Court denied certiorari. *See Williams v. Illinois*, 567 U.S. 50, 72-74 (2012) ("The dissent's argument [that a Confrontation Clause violation occurred] would have force if petitioner had elected to have a jury trial."); *see also, e.g., State v. Maxwell*, 9 N.E.3d 930, 952 (Ohio 2014) (any error in introducing autopsy report was harmless), *cert. denied*, 135 S. Ct. 1400 (2015) (No. 14-6882); *State v. Medina*, 306 P.3d 48, 62 (Ariz. 2013) (State disputed whether Confrontation Clause was violated even if the autopsy report was testimonial), *cert. denied*, 571 U.S. 1200 (2014) (No. 13-735).

On the contrary, this case cleanly presents the question of whether a typical autopsy report was testimonial in what should have been a typical murder prosecution. Derico Fitch was shot and killed on June 20, 2007. Pursuant to Illinois statute, his body was transported to the Medical Examiner's office, where Dr. Arangelovich performed the autopsy later the same day. Dr. Arangelovich was aware the police were looking for an "offender" at the time of the autopsy. She then made written observations as to Fitch's gunshot wounds and found his death was a

homicide. (BIO 3-4) There can be no question that Dr. Arangelovich was aware that her certified autopsy report might be used in a later homicide prosecution. In *Williams*, a majority of this Court rejected the notion that an autopsy report need do more – that is, "target" a specific individual – to qualify as testimonial. *See Williams*, 567 U.S. at 114-15 (Thomas, J., concurring in the judgment) ("There is no textual justification ... for limiting the confrontation right to statements made after the accused's identity became known."); *id.* at 135 (Kagan, J., dissenting) (precedent establishes that question is whether primary purpose of statement was to record facts potentially relevant to a criminal prosecution, while no precedent supports notion that "in addition, the statement must be meant to accuse a previously identified individual").

The State also argues this case is unworthy of review because any error below was harmless. (BIO 23-25) Chris's response is twofold. First, the State's assertion of harmlessness is irrelevant. The State agrees that no lower court has addressed whether any error was harmless. (BIO 23) Where this Court finds reversible error in these circumstances, it routinely remands for further proceedings, during which a lower court may address the State's harmless-error argument in the first instance. *See, e.g., Bullcoming v. New Mexico*, 564 U.S. 647, 668 n.11 (2011) (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329, and n.14 (2009)); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (all declining to reach harmless-error question and remanding for further proceedings, including possible harmless-error analysis).

And in any event, the State does not, and cannot, demonstrate that a

Confrontation Clause violation in this case was harmless beyond a reasonable doubt. *See Van Arsdall*, 475 U.S. at 684 (whether confrontation error is harmless beyond a reasonable doubt depends upon factors including the importance of the disputed evidence to the prosecution's case, the existence of evidence corroborating or contradicting the disputed evidence, "the extent of cross-examination otherwise permitted, and ... the overall strength of the prosecution's case").

The primary question before the jury concerned Chris's mental state – whether he committed knowing murder or reckless manslaughter. According to the State at trial, key to this question was whether Chris fired one shot or two. Chris admitted having a gun, but told law enforcement that he pointed it at the ground and it only fired once when Rico struggled with him over the gun. Chris denied pulling the trigger twice. Both State eyewitnesses, Duane and Devon, testified that they only heard one shot. And the police only found one casing in the parking lot. By contrast, the State's two-shot theory rested entirely upon Dr. Arangelovich's autopsy report and the opinions based on that report – her own opinion that two shots were fired, as relayed by the prosecutor who interviewed Chris on video, and the opinion testimony of Dr. Zukariya. Dr. Zukariya's testimony, moreover, was not unequivocal, given that he expressed uncertainty on cross-examination as to whether Rico's body could have been aligned in such a way that a single bullet could have caused both gunshot wounds.[2] (Pet. App. A ¶¶ 19, 27, 35-45, 65)

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[2] The Illinois Appellate Court omitted this testimony from its order. When defense counsel asked if Rico could have "jerked away" his arm in a way that created an unusual body alignment, Dr. Zukariya said, "It could be. I can't say." (R. PPPP 169).

If the introduction of the autopsy report violated the Confrontation Clause, the State cannot show beyond a reasonable doubt that this error was harmless. The State's evidence on the mental-state element was not overwhelming. The disputed evidence – Dr. Arangelovich's autopsy report – was crucial to the State's case, particularly on the question of Chris's mental state. Dr. Zukariya's opinion that two shots were fired, which rested entirely upon Dr. Arangelovich's autopsy report, was both uncorroborated by any other evidence and contradicted by the eyewitnesses and the physical evidence. And, of course, Chris had no opportunity to cross-examine Dr. Arangelovich at all. That was particularly prejudicial in this case because the jury actually heard *Dr. Arangelovich's* purported opinion that two shots were fired, as relayed by the prosecutor who interviewed Chris on video. (Pet. App. A ¶ 98) This highly prejudicial evidence could not have been cured by any limiting instruction. *See Williams*, 567 U.S. at 105 (Thomas, J., concurring in the judgment) ("limiting instructions may be insufficient in some circumstances to protect against violations of the Confrontation Clause") (citing *Bruton v. United States*, 391 U.S. 123 (1968)). Under *Van Arsdall*, there is a reasonable probability that Chris will prevail on any harmless-error review on remand, such that this question should play no role in this Court. 475 U.S. at 684.

IV. The autopsy report in this case was testimonial.

For the reasons set forth in the Petition, this Court should reverse the Illinois Appellate Court's finding that the autopsy report here was non-testimonial. (Pet. 12-17, 21-23) Aside from citing supporting authority on the other side of the conflict, the State makes two central points on the merits.

First, the State asserts that Illinois courts are correct to focus on "the extent to which law enforcement was involved in the autopsy process in discerning whether the primary purpose test was satisfied." (BIO 13-14 n.3) And the State asserts Illinois courts are correct that, absent "direct" involvement by law enforcement, autopsy reports are not testimonial because a medical examiner is categorized by Illinois statute as a "public-health" official "independent of law enforcement." (BIO 13-14) (citing *People v. Leach*, 2012 IL 111534, ¶¶ 126-33; 55 Ill. Comp. Stat. 5/3-3013(a)).

Medical examiners and coroners in Illinois, however, do not significantly differ in their relationship with law enforcement from their counterparts in other states. In Illinois, like many states, a medical examiner has a statutory duty to perform an autopsy in any violent or suspicious death. 55 Ill. Comp. Stat. 5/3-3013. While all autopsy reports are filed with the Department of Public Health (from whom, no doubt, law enforcement routinely obtains copies), in *homicide* cases the examiner has the additional duty of collecting "blood and buccal specimens" and providing them within 30 days to "the police agency responsible for investigating the death." 55 Ill. Comp. Stat. 5/3-3013, 3-3014. It is plain, therefore, that a medical examiner who writes an autopsy report finding the death to be a homicide does so with the understanding that the report will be used in a homicide investigation, rendering that report testimonial. *See Williams*, 567 U.S. at 138 (Kagan, J., dissenting) (forensic report regarding DNA evidence was testimonial "because the report is, in every conceivable respect, a statement meant to serve as evidence in a potential criminal trial").

It should not matter whether a police officer directly asked the medical examiner to perform an autopsy or attended the autopsy, or, on the other hand, the examiner's duty to perform the autopsy was triggered by statute. And it should not matter how a state categorizes its officials. Surely a state cannot, by mere statute, evade the requirements of the Confrontation Clause, by, say, obviating the need for the police to directly request an autopsy or by defining medical examiners as "public-health officials" rather than "law-enforcement officials."

The State similarly argues that this Court need not review a Confrontation Clause case concerning an autopsy report because autopsy reports are inherently more reliable than other forensic reports. (BIO 20-22) Even accepting this dubious proposition, *see* (Pet. 22) (citing cases where prosecution chose to call different expert where original medical examiner had been indicted or fired for official actions), this does not change the fact that the author of an autopsy report in a homicide case bears testimony against the defendant, like an analyst whose report indicates a substance is cocaine. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009); *see also Crawford v. Washington*, 541 U.S. 36, 62 (2004) ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."); *Bullcoming v. New Mexico*, 564 U.S. 647, 661 (2011) ("the analysts who write [testimonial] reports that the prosecution introduces must be made available for confrontation even if they posses the scientific acumen of Mme. Curie and the veracity of Mother Teresa") (quotation omitted).

This should be true where the autopsy report is merely introduced to prove

cause of death, which is often undisputed. But it should be even more true where, as here, the autopsy report was the sole source of the case-specific facts supporting the State's two-shot theory of heightened culpability. *See State v. Navarette*, 294 P.3d 435, 440-41 (N.M. 2013) (confrontation required where prosecution used autopsy report findings regarding stippling to refute defendant's claim that another person who was farther away was the shooter). And it should be more true where, as here, the jury even heard a prosecutor relay the purported *opinion* of the non-testifying medical examiner that two shots were fired – an opinion the State made sure to note in its closing argument. (Pet. 9, 12, 17; BIO 25); *see State v. Laird*, 447 P.3d 416, 67-68 (Mont. 2019) (where State not only offered the non-testifying examiner's factual observations, but also his "*opinion*" as to the nature of decedent's injuries, the latter was testimonial hearsay) (emphasis in original).

Finally, this Court should ignore the State's reliance upon the fact that most defendants have the authority to subpoena the original medical examiner. (BIO 22) This Court has made it plain that a defendant's subpoena power plays no role in a Confrontation Clause analysis. *See Melendez-Diaz*, 557 U.S. at 324 (power to subpoena "is no substitute for the right of confrontation," and "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court").

This Court should grant certiorari to address the profound confusion across the country regarding whether autopsy reports used in homicide prosecutions are testimonial, and, in doing so, reverse the Illinois Appellate Court's finding that the autopsy report in this case was not testimonial.

CONCLUSION

For the foregoing reasons, petitioner, Christopher Taylor, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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NOTICE AND PROOF OF SERVICE

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The undersigned, a member of the Bar of this Court, in compliance with Rules 29 and 33.2, on January 21, 2021, mailed the original and ten copies of the Reply Brief for Petitioner to the Clerk of the above Court and submitted an electronic copy using the Court's electronic filing system. On that same date, the undersigned personally served the same document on opposing counsel by delivering one copy of the Reply to an employee authorized to accept service at each office, and mailed one copy to the petitioner by depositing it in the United States mail, postage prepaid and addressed as above. An electronic version was also served by email to opposing counsel. All parties required to be served have been served.

//S// Michael C. Bennett
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