No. 21-637

IN THE
SUPREME COURT OF THE UNITED STATES

William Lee, Superintendent of Eastern Correctional Facility,

Petitioner,

v.

James Garlick,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly applied 28 U.S.C. § 2254(d)(1) in holding that the New York Appellate Division's rejection of respondent's Confrontation Clause claim—which was based on the theory that the autopsy report the prosecution introduced at trial did not directly accuse respondent of a crime—was an unreasonable application of clearly established law.

2. Whether the Second Circuit correctly applied *Brecht v. Abrahamson*, 507 U.S. 619 (1993), in determining that the admission of the autopsy report had a "substantial and injurious" effect on the verdict.

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STATEMENT OF THE CASE

A. Factual Background

1. On November 1, 2011, the New York Police Department responded to a report of an assault at an apartment building in The Bronx. Trial Tr. 156-57, 169 ("Tr."). When the police arrived at the building, they found Gabriel Sherwood lying on the ground inside the building's lobby. An officer brought Sherwood to the hospital, where he was pronounced dead five minutes after arrival. Tr. 158-59.

That evening, the police began a homicide investigation. The investigation's lead detective, Detective DeGrazia, contacted the New York City Office of the Chief Medical Examiner ("OCME"), "request[ed]" an autopsy of the victim's body, and arranged for the body's transport. Pet. App. 22a; *see also id.* 3a. The police also reviewed the apartment building lobby's surveillance video. The video indicated a struggle in the lobby between the victim and two others, an unknown man and woman. The man and the victim fought in a corner of the lobby, after which the woman forcefully struck the victim's skull several times. The two suspects then left the building.

Around midnight, Detective DeGrazia concluded that Johanna Rivera was the woman who had repeatedly struck Sherwood in the head. Detective DeGrazia arrested Rivera in her home. Rivera informed him that James Garlick was the other man depicted in the video.

The next morning, the District Attorney's Office authorized the police to charge Johanna Rivera with intentional murder on the theory that her repeated blows to Sherwood's head caused his death. Tr. 250, 291; Suppression Hearing Tr.

29, 40. Detective DeGrazia then notified the Police Department that Mr. Garlick was the male suspect depicted on the video. Detective DeGrazia also issued a department-wide notification to arrest Mr. Garlick. Tr. 188-89; Suppression Hearing Tr. 45-47.

Later that morning, having received the victim's body from the police, OCME staff spoke with Detective DeGrazia and prepared a "Notice of Death" form, stating: "Circumstances of death: App. Manner: Homicide." OCME staff also created a "Supplemental Case Information Sheet" that documented the conversation with Detective DeGrazia and recorded information about where and how the body had been found. Tr. 289. Dr. Katherine Maloney of the OCME then performed the autopsy in the presence of two homicide detectives. Tr. 243.

Later that day, Dr. Maloney prepared a draft of an autopsy report in which she declared that the victim's death was caused by stabbing—not blows to the head. Autopsy Rpt. 1-5. She then notified the police of her findings. Tr. 277. After receiving this information, the NYPD declined to pursue murder charges against Rivera and instead turned their attention to Mr. Garlick as the likely perpetrator. Tr. 276-77.

2. About a week later, the police arrested Mr. Garlick. During an interrogation, Mr. Garlick stated that he had arrived at the scene because his girlfriend had called him and frantically explained that Sherwood was sexually harassing and threatening her and Rivera. Tr. 194-95; Trial Ex. 4 (written statement). When he arrived at the scene, he got into a fistfight with Sherwood outside the apartment building, which then spilled into the building's lobby. During

the fight, Sherwood brandished a knife and the two struggled for it. Tr. 194-95; Trial Ex. 4. As Mr. Garlick explained, "All I was trying to do was defend myself and my girlfriend. It was a tragedy. This wasn't supposed to happen and I'm sorry for my part in this. I wasn't trying to hurt anybody." Trial Ex. 4.

On November 28, 2011, the State indicted Mr. Garlick for intentional murder, voluntary manslaughter, and assault.

About a month after the indictment issued, Dr. Maloney completed and signed the final version of her autopsy report. At the beginning of the report, Dr. Maloney "certif[ied]" that she performed the victim's autopsy. Autopsy Rpt. 2. She then asserted that the "manner of death" was "homicide" and that the "cause of death" was a "stab wound of [the] torso with perforation of heart." *Id.* at 1. Dr. Maloney also claimed that the "depth of penetration" of the purportedly fatal wound to the left chest was "4-1/2 to 5-1/2" inches. *Id.* at 3. This fatal wound perforated the heart, collapsed the lung, and led to the loss of 1.5 liters of blood. *Id.* Dr. Maloney finally noted that the victim had "blunt impact injuries of [the] head," numerous "abrasions" of the head and face, and "contusions of [the] face." *Id.* at 1, 4. She asserted, however, that her "internal examination" of the head indicated no "scalp contusions" or skull "fracture[s]." *Id.* at 4.

OCME certified the autopsy report under New York's statutory business-record rule and "affixed the official seal of the Office of the Chief Medical Examiner of the City of New York" to it. OCME Records Cert. Form; *see also* N.Y. Civ. Practice Laws and Rules § 4518 (business records are admissible hearsay). As state and local law expressly mandate, OCME delivered the autopsy report to the District

Attorney's Office on the very day Dr. Maloney signed it. Autopsy Cover Page; N.Y. County Law § 677(4); *accord* N.Y. City Charter § 557(g).

B. Procedural Background

1. a. *State court proceedings.* At trial, the State introduced the surveillance video depicting the incident. But, as the trial court found during the charge conference, "[t]he video itself present[ed] a jury question whether a knife or sharp object [was] visible on the film." Tr. 415. Further, the video did not foreclose the possibility that Mr. Garlick inadvertently hurt Sherwood with the knife during a struggle for it. Trial Ex. 5. As a result, the State introduced and "relied heavily on the autopsy report throughout the trial." Pet. App. 6a.

Yet the State did not produce Dr. Maloney to submit to cross-examination about her report. Pet. App. 6a. The State did not claim that Dr. Maloney was unavailable. She had relocated to a private forensic practice in upstate New York, Tr. 47-48, and nothing in the record suggests she was unable to travel to New York City for the trial. Nevertheless, the State brought in Dr. Susan Ely, a medical examiner who neither attended the autopsy nor had any role in the creation of Dr. Maloney's report, to testify about the report. Pet. App. 31a.

Mr. Garlick objected that introducing the report and permitting Dr. Ely to testify about its contents would violate the Confrontation Clause. Pet. App. 54a. The Confrontation Clause prohibits the introduction of an out-of-court, "testimonial" statement unless its declarant is made available for cross-examination. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court held that forensic reports certifying seized

substances as illegal drugs fell within the "core class of testimonial statements." *Id.* at 310. And in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the Court confirmed more generally that "[a]n analyst's certification prepared in connection with a criminal investigation or prosecution . . . is 'testimonial.'" *Id.* at 658-59. Accordingly, Mr. Garlick argued that the autopsy report was testimonial because it was certified by a forensic examiner and had been prepared under circumstances that would lead an "objective witness" to reasonably believe it "would be available for use at a later trial," *Melendez-Diaz*, 557 U.S. at 310 (quoting *Crawford*, 541 U.S. at 52). Pet. App. 134a.

Relying in part on *People v. Freycinet*, 892 N.E.2d 843 (N.Y. 2008)—a case finding, before *Melendez-Diaz* or *Bullcoming*, a forensic autopsy non-testimonial—the trial court rejected Mr. Garlick's objection, holding that the report was admissible and that Dr. Ely could testify regarding its contents. Pet. App. 54a; *see also id.* 93a. While maintaining his Confrontation Clause objection, Mr. Garlick then argued that if Dr. Ely were permitted to convey the contents of the autopsy report to the jury, then the report itself should also be admitted to enable defense counsel to engage in coherent cross-examination. The State agreed and offered to introduce the report as a business record. Pet. 10.

Before the report was introduced into evidence as State's Exhibit 1, Mr. Garlick reiterated once more his objection to the report's introduction and to permitting Dr. Ely to testify as to the report. Pet. App. 54a. The trial court again overruled his objection, allowing the jury to consider the substance of the report as evidence against Mr. Garlick. *Id.*

Dr. Ely then testified about the report's numerous observations, blood-loss determinations, stab-depth measurements, and ultimate cause-of-death conclusions. Pet. App. 6a, Tr. 23-58.

Yet again at the end of Dr. Ely's testimony, defense counsel renewed his objection to "permitting Dr. Ely to testify as to the autopsy report and the introduction of the autopsy report" under *Bullcoming* and *Melendez-Diaz*. Pet. App. 55a; Tr. 59. The court responded, "I am sure you covered your record." Tr. 59.

In its closing argument, the State "heavily relied" on the autopsy report to establish that Mr. Garlick caused the death with the intent to cause serious harm. Pet. App. 26a; *see also* Tr. 452-53, 454, 460, 466. According to the State, the autopsy report showed that Mr. Garlick intentionally inflicted a "deadly" and "fatal [stab] wound" that "perforated" and "went through" Sherwood's heart. Tr. 452-53, 454, 460, 466. Again relying on the report, the State asserted that this wound caused "significant bleeding" and that "[o]ne-third of the blood in [Sherwood's] body was lost by that one fatal stab." *Id.* The State contended that the autopsy report ruled out Rivera's blows to the head as the cause of the death and instead pinned the blame on the stabbing. Tr. 454.

After asking the judge to "explain all three charges" again, Tr. 527, the jury acquitted Mr. Garlick of intentional murder but convicted him of voluntary manslaughter instead of the lesser charge of third-degree assault, *id.* 541. He was sentenced to two decades of incarceration. Pet. App. 7a.

b. Mr. Garlick appealed to the Appellate Division, First Department. Pet. App. 7a. As relevant here, he renewed his contention that the autopsy report was

testimonial and should not have been admitted without in-court testimony from its author. *Id.*

The Appellate Division affirmed Mr. Garlick's conviction. Pet. App. 127a. In a four-paragraph opinion, with just one paragraph discussing Mr. Garlick's Confrontation Clause claim, the court held in pertinent part:

> "Defendant's right of confrontation was not violated when an autopsy report prepared by a former medical examiner, who did not testify, was introduced through the testimony of another medical examiner" (*People v. Acevedo*, 976 N.Y.S.2d 82, 83 (App. Div. 2013)), since the report, which "d[id] not link the commission of the crime to a particular person," was not testimonial (*People v. John*, 52 N.E.3d 1114, 1128 (N.Y. 2016)). Defendant's contention that *People v. Freycinet*, 892 N.E.3d 843 (N.Y. 2008), has been undermined by subsequent decisions of the United States Supreme Court is unavailing[.]

Pet. App. 129a (parallel citations removed).

c. Mr. Garlick sought discretionary review of his Confrontation Clause claim before the New York Court of Appeals. The court denied his petition without comment. *People v. Garlick*, 76 N.E.3d 1082 (2017). Mr. Garlick then petitioned this Court for a writ of certiorari, which was also denied. *Garlick v. New York*, 138 S. Ct. 502 (2017).

2. a. *Federal court proceedings.* Mr. Garlick filed a petition for a writ of habeas corpus in the U.S. District Court for the Southern District of New York. Pet. App. 8a. A federal court may grant a writ of habeas corpus to a state prisoner whose petition satisfies three conditions. First, the court must find that the person seeking relief is in custody pursuant to a judgment procured "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Second, the court must determine that the state court's adjudication of the claim at issue was either

"contrary to" or "involved an unreasonable application of" clearly established federal law, as determined by this Court's precedents. 28 U.S.C. § 2254(d). Third, the state trial court's error must have had a "substantial and injurious effect" on the verdict. *Brecht v. Abramson*, 507 U.S. 619, 623 (1993).

The district court granted the writ. Pet. App 46a. It first held that Mr. Garlick's constitutional right to confrontation was violated at his trial because "the Autopsy Report was testimonial[.]" *Id.* 45a. Second, it concluded that the Appellate Division's decision to the contrary "unreasonably applied the Supreme Court's precedents." *Id.* 43a. Specifically, the district court explained that *Melendez-Diaz* "definitively did away with" the notion that a forensic report could be deemed non-testimonial on the ground that it is "non-accusatory," and *Bullcoming* subsequently confirmed that "a certified statement prepared during a criminal investigation which tends to prove some fact in the case is testimonial in nature." *Id.* Third, the district court held that the admission of the autopsy report "did not constitute harmless error." *Id.* 45a; *see also id.* 120a-125a (magistrate report and recommendation).

b. The Second Circuit affirmed. Pet. App. 2a. It first held that the introduction of the autopsy report violated Mr. Garlick's Sixth Amendment right to confrontation. *Id.* 24a. "Under the applicable Supreme Court precedents," the court explained, "the autopsy report is testimonial and was erroneously admitted without an opportunity for cross-examination." *Id.* 23a-24a.

Recognizing that "[its] inquiry d[id] not end with the conclusion that the admission of the report was erroneous," the Second Circuit next considered whether

the state court's application of federal law was not just incorrect, but unreasonable under Section 2254(d). Pet. App. 24a. Evaluating the opinion below through that lens, the court of appeals held that Section 2254(d) was satisfied because the Appellate Division rejected Mr. Garlick's Sixth Amendment claim on the theory that forensic reports are not testimonial if they do not "directly accuse" the defendant of a crime. *Id.* 26a. That reasoning, the court explained, "unreasonably applied [this Court's] clearly established law." *Id.* 24a. Specifically, this Court's precedent "squarely reject[s] the argument that forensic reports that 'do not directly accuse [the defendant] of wrongdoing' . . . are not testimonial." *Id.* 26a (quoting *Melendez-Diaz*, 557 U.S. at 313); *see also* 21a n. 5 (holding that § 2254(d)(1) was satisfied because even if it were not clearly established that the autopsy report here was testimonial, this Court has "plainly rejected the reasoning on which the First Department relied to hold the autopsy report admissible in Garlick's case").

Finally, the court of appeals agreed with the district court that the Appellate Division's error was not harmless. Pet. App. 26a-27a.

REASONS FOR DENYING THE WRIT

Petitioner does not ask this Court to resolve whether the admission of the autopsy report violated the Confrontation Clause. For good reason. This Court previously denied certiorari on that issue. *Garlick v. New York*, 138 S. Ct. 502 (2017). And this Court has recently and repeatedly declined to grant other petitions asking the Court to address whether autopsy reports were testimonial. *See, e.g.*, *People v. Taylor*, 2019 WL 6840329 (Ill. App. Ct. Aug. 13, 2019), *cert. denied*, 141 S. Ct. 1518 (2021); *State v. Maxwell*, 9 N.E.3d 930 (Ohio 2014), *cert. denied*, 574 U.S.

1160 (2015); *State v. Medina*, 306 P.3d 48 (Ariz. 2013), *cert. denied*, 571 U.S. 1200 (2014); *State v. Navarette*, 294 P.3d 435 (N.M. 2013), *cert. denied*, 571 U.S. 939 (2013). Indeed, because of this case's habeas posture, it would be a particularly unsuitable vehicle to take up any Confrontation Clause issue.

Perhaps for that reason, petitioner asks the Court to consider only whether the requirements for habeas relief were satisfied here. But petitioner's argument under 28 U.S.C. § 2254(d)(1) rests on a mischaracterization of the Second Circuit's decision as broadly declaring that "clearly established" Supreme Court precedent dictates that autopsy reports are categorically testimonial. In fact, the Second Circuit narrowly found § 2254(d)(1) satisfied for a different reason: the Appellate Division's invocation of the "non-accusatory" rationale unreasonably applied this Court's clearly-established precedent. *See* Pet. App. 21a n.5, 24a.-26a. Because that *particular* rationale constituted an unreasonable application of clearly-established law, Section 2254(d)(1) deference was overcome. Pet App. 21a n.5, 24a-26a. The court of appeals addressed no broader questions about whether this Court's precedents had "clearly established the testimonial nature of the autopsy report." *E.g.*, Pet. 19.

Properly understood, then, the Section 2254(d)(1) issue in this case is narrow, highly fact-bound, and does not arise with any frequency. Nor does the Second Circuit's holding conflict with the law in any other circuit.

Moreover, the Second Circuit's decision is correct: Properly focusing on the specific reasoning the state appellate court gave for rejecting Mr. Garlick's claim, *see Wilson v. Sellers*, 138 S. Ct. 1188, 1192-96 (2018), the court of appeals rightly

concluded that the Appellate Division's "non-accusatory" theory for deeming the autopsy report nontestimonial conflicts directly with this Court's clearly established law. And because the State "heavily relied" on the autopsy report, Pet. App. 26a, the constitutional violation here had a substantial and injurious effect on the verdict.

I. The Second Circuit's decision that Section 2254(d) was satisfied here does not warrant review.

A. The Second Circuit's decision has limited significance.

Petitioner maintains that the Second Circuit's decision threatens to "invalidate" convictions in states beyond the Second Circuit and to "overturn[]" numerous homicide convictions in New York. Pet. 29-30. Petitioner's contentions are wrong.

1. The reach of the decision below is necessarily limited. The Second Circuit's holding is not binding in any federal court outside the Second Circuit. Nor does it govern in any state court. *See Arizonans for Official English v. Arizona*, 520 U.S. 53, 58 n.11 (1997).

Even within the Second Circuit, the decision below will have minimal impact. Petitioner characterizes the Second Circuit's decision as holding that habeas relief is warranted whenever a state court holds that an autopsy report was nontestimonial. Pet. 16. But the Second Circuit did not rule nearly so broadly. Where, as here, a state court provides reasons for rejecting a federal claim, a federal court must "focus[ ] exclusively on the actual reasons" given by the state court. *Wilson*, 138 S. Ct. at 1192-96. If those reasons are "contrary to" or an "unreasonable

application" of clearly established law, a federal court can grant habeas relief on that specific basis. 28 U.S.C. § 2254(d); *Wilson*, 138 S. Ct at 1192-96.

As a result, the Second Circuit did not consider—and had no need to consider—whether the introduction of a forensic autopsy report under the circumstances here *always* warrants habeas relief. Rather, the court merely reviewed the "actual reasons," *Wilson*, 138 S. Ct. at 1195, that the Appellate Division gave in denying Mr. Garlick's Confrontation Clause Claim—namely, that the autopsy report did not "link the commission of the crime to a particular person," Pet. App. 129a. And the Second Circuit held that the Appellate Division's use of that "non-accusatory" theory was an unreasonable application of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). Pet. App. 26a. The Second Circuit went no further.

2. Even if the Second Circuit's analysis under Section 2254(d) went further than resting on the unreasonableness of the non-accusatory theory, it would still have modest import. Even when viewed as an entire class, cases in which state prisoners raise serious claims for federal habeas relief based on the introduction of autopsy reports are rare. As petitioner stresses, the decision below "is the *only* circuit case" in recent years to consider whether the introduction of an autopsy report warrants habeas relief. Pet. 17 (emphasis added). Petitioner cites just one other court of appeals decision since this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), that addressed a related question: the First Circuit's decision in *Hensley v. Roden*, 755 F.3d 724 (1st Cir. 2014). And petitioner

cites just six post-*Crawford* district court cases that consider whether the introduction of autopsies warrants habeas relief.

There is good reason for this paucity of case law. For a habeas petition challenging the admissibility of an autopsy report even to reach a federal court, the underlying case must involve several precise features. The case must arise in one of the few states whose courts have held that at least certain autopsies prepared in conjunction with criminal investigations are not testimonial, *see infra* at 25 & n.4; the prosecution must seek to introduce such an autopsy report without putting its author on the stand; the defense must articulate a clear constitutional objection (and preserve that claim throughout the state-court system); and the state courts must nonetheless authorize the admission of the report.

It is the exceedingly unusual case that checks all these boxes. In *Melendez-Diaz*, the Court noted that "[d]efense attorneys and their clients will often stipulate" to the introduction of forensic reports rather than "insist on live testimony." 557 U.S. at 328. That observation holds true for autopsy reports. The cause of death is often readily apparent in homicide prosecutions—for example, a single gunshot wound. And "defense attorneys [do not] want to antagonize the judge or jury by wasting time with the appearance of a witness . . . whose testimony defense counsel does not intend to rebut[.]" *Id.* Even if defense attorneys do insist on live testimony, prosecutors usually can easily erase any appellate issue by simply putting the medical examiner who authored the report on the stand.

What is more, even when an autopsy report is improperly introduced at trial, that constitutional error only gives rise to habeas relief if it had a "substantial and

injurious" effect on the verdict. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). That requirement is satisfied in this case because of its unusual facts: a third-party assaulted the victim with repeated blows to the head; the autopsy report ruled out those blows as the cause of death; and the autopsy report was critical evidence of state of mind, another hotly-contested issue at trial. *See* Pet. 26a-27a. But autopsy reports rarely have such a meaningful impact at trial. In the typical case with only one assailant, the prosecution often need not introduce the report. Even when such reports are admitted, any error involved is often harmless.[1]

B. The Second Circuit's decision creates no conflict.

Petitioner suggests that the Second Circuit's opinion "directly conflicts with the First Circuit and numerous district-level courts." Pet. 15 (typeface altered). But the First Circuit's decision in *Hensley*, 755 F.3d at 724, does not conflict with the decision below. Neither do the federal district court cases that petitioner cites.

1. In *Hensley*, the First Circuit considered whether the Supreme Judicial Court of Massachusetts's decision in *Commonwealth v. Hensley*, 913 N.E.2d 339 (Mass. 2009), was contrary to or an unreasonable application of clearly established federal law. At Hensley's trial, the Commonwealth produced a medical examiner who had not performed the autopsy on the victim to testify regarding the cause and manner of the victim's death. The autopsy report was not itself introduced into evidence, but Hensley argued that the examiner's testimony violated the

[1] *See, e.g.*, *Commonwealth v. Brown*, 185 A.3d 316, 318 (Pa. 2018); *Rosario v. State*, 175 So. 3d 843, 859 (Fla. Dist. Ct. App. 2015); *Lee v. State*, 418 S.W.3d 892, 901 (Tex. App. 2013).

Confrontation Clause because the examiner referred to the report while testifying. *Hensley*, 755 F.3d at 729. The Massachusetts court rejected this claim. *Id.* Declining to answer whether the testimony was proper, the court found that "any such error was harmless." *Id.*

Hensley pursued habeas relief, arguing that the medical examiner's testimony violated the Confrontation Clause and that the state court's decision met Section 2254's requirements. The First Circuit denied relief, reasoning that clearly-established law would not have required the state court to hold that the autopsy report the medical examiner referenced was testimonial. *Hensley*, 755 F.3d at 735.

There is no conflict between the *Hensley* decision and the Second Circuit's decision below. *Hensley* says nothing about whether the First Circuit would disagree with the Second Circuit that invoking the "non-accusatory" theory to classify an autopsy report as non-testimonial is an unreasonable application of clearly established law. Because the Massachusetts court rejected Hensley's confrontation claim solely on the ground that any error was harmless, the First Circuit did not consider the legitimacy of the "non-accusatory" theory for classifying a forensic report as nontestimonial. *Hensley*, 755 F.3d at 729.

In any event, the circumstances of *Hensley* were starkly different than those here. Here, the Appellate Division permitted the introduction of the autopsy report itself as substantive evidence of petitioner's guilt. But in *Hensley*, the state court was presented with a different claim—whether expert testimony, based on an autopsy report conducted by a different examiner, was improper where the autopsy report was *not even introduced* into evidence. Therefore, the only confrontation

question before the state court in *Hensley* was whether the expert could rely on another medical examiner's report—never introduced into evidence—as a basis for his own independent conclusions. Contrary to petitioner's suggestion (Pet. 27), that is a "different question" from the one in *Bullcoming*, 564 U.S. at 647, and here, where a testimonial autopsy report was introduced as direct evidence of guilt and presented to the jury for the "truth of the matter asserted." Pet. App. 24a n.6; *see also Bullcoming*, 564 U.S. at 673 (Sotomayor, J., concurring); Pet. App. 6a.

Lastly, the state court decision that the First Circuit addressed in *Hensley* predated *Bullcoming*. In *Melendez-Diaz*, 557 U.S. at 305, this Court held that a certified forensic report was testimonial. But it was arguably not until *Bullcoming* that the Court established as a general rule that "[a]n analyst's certification prepared in connection with a criminal investigation or prosecution . . . is testimonial." *Id.* at 658-59.

Because federal courts evaluate state-court decisions according to the clearly established law that existed when those decisions were issued, *Greene v. Fisher*, 565 U.S. 34 (2011), the First Circuit has not had occasion to consider *Bullcoming*'s additional guidance from this Court in the context of a case like this.[2]

Nor is the First Circuit likely to do so. The Massachusetts Supreme Judicial Court has now held for many years that "statements [made in an autopsy report]

[2] For similar reasons, petitioner is wrong that the Second Circuit's decision "conflicts with AEDPA Circuit Court cases interpreting pre-*Melendez-Diaz* state court opinions." Pet. 17. No habeas decisions excluding *Melendez-Diaz* and *Bullcoming* from its analysis could conflict with the Second Circuit's application of those cases here.

are testimonial" where they are made in the context of "investigating and prosecuting a crime." *Commonwealth v. Nardi*, 893 N.E.2d 1221, 1233 (Mass. 2008) (internal quotation marks and citation omitted). Thus, even if there were some tension between *Hensley* and this case, it would have no ongoing significance.

2. Petitioner also says that six federal district court cases "directly conflict[]" with the Second Circuit's holding here. Pet. 15 (typeface altered). But a true conflict can arise only among federal courts of appeals or state courts of last resort. At any rate, several of petitioner's cases are inapposite. In *Johnston v. Mahally*, 348 F. Supp. 3d 417 (E.D. Pa. 2018), for example, the court reviewed a state-court judgment that became final prior to *Melendez-Diaz* and *Bullcoming*. *Johnston*, 348 F. Supp. at 433-35. And two of the cases that petitioner cites are from district courts within the Second Circuit and thus are superseded by the decision here. *See Portes v. Capra*, 420 F. Supp. 3d 49 (E.D.N.Y. 2018); *Herb v. Smith*, 2017 WL 1497936 (E.D.N.Y. Apr. 25, 2017).

C. The Second Circuit correctly held that Section 2254(d) is satisfied.

Petitioner does not contest the Second Circuit's determination that this Court "has plainly rejected the [non-accusatory theory] on which the [state court] relied to hold the autopsy report admissible." Pet. App. 22a n.5, 26a. Nor could it. "The Supreme Court has squarely rejected the argument that forensic reports that 'do not directly accuse [the defendant] of wrongdoing' . . . are not testimonial." *Id.* 26a (quoting *Melendez-Diaz*, 557 U.S. at 313-14).

Instead, petitioner attacks the Second Circuit's decision using a different two-step argument. First, petitioner argues that Section 2254(d) required the Second

Circuit to assess whether *other* theories "could have" justified the autopsy report's introduction without the opportunity for confrontation. Pet. 26 (citation omitted). Second, petitioner argues that if the Second Circuit had considered these alternative legal theories, Section 2254(d)(1) would have barred habeas relief. Petitioner is wrong at each step.

1. The Second Circuit correctly restricted its analysis to the Appellate Division's "non-accusatory" theory.

Petitioner is wrong that the Second Circuit should have considered whether the state-court judgment here could be sustained for reasons other than the Appellate Division's "non-accusatory" theory.

a. Petitioner first contends that the Second Circuit misinterpreted the Appellate Division's opinion. Because the Appellate Division cited two state court decisions—*John*, 52 N.E.3d at 1114, and *Freycinet*, 892 N.E.2d at 843—in its discussion of Mr. Garlick's confrontation claim, petitioner maintains that the Appellate Division's decision "incorporated those holdings by reference." Pet. 25. As a result, petitioner argues, the Second Circuit had a responsibility to consider those holdings—and whether they might legitimize the Appellate Division's decision—before granting habeas relief to Mr. Garlick. *Id.* at 25-26.

A straightforward reading of the Appellate Division's decision shows that the court did not "incorporate" any reasoning, other than the non-accusatory theory, from either *John* or *Freycinet*. In rejecting Mr. Garlick's claim, the Appellate Division took care to specify its exact rationale: The autopsy could not be testimonial because it "did not link the commission of the crime to a particular

person." Pet. App. 129a (quoting *John*, 52 N.E.3d at 1128). The court included a citation to *John* merely as the precise source of this quotation; nothing more. The Appellate Division referenced *Freycinet* in the next sentence only to reject Mr. Garlick's contention that that case's reliance on the "non-accusatory" theory conflicted with *Melendez-Diaz* and *Bullcoming*. *Id.* The court made no further reference to *John* or *Freycinet* or their holdings.

Even if the Appellate Division had incorporated all of the reasoning in *John* and *Freycinet*, it would not matter. *John* rested its holding on a "non-accusatory" theory substantially identical to that of the Appellate Division, concluding that "statements which do not 'directly link' the defendant to the crime are not testimonial." Pet. App. 25a (quoting *Freycinet*, 892 N.E.2d at 846); *see also John*, 52 N.E.3d at 1128. And *Freycinet* predates *Melendez-Diaz* and *Bullcoming*. Thus, *Freycinet* cannot plausibly have grappled with or distinguished the rule of those cases—that certified forensic reports prepared in conjunction with criminal investigations are testimonial.

b. Petitioner adds that, irrespective of the content of the Appellate Division's opinion, Section 2254(d) required the Second Circuit to overlook the Appellate Division's stated reasoning and consider what other arguments "could have supported [its] determination." Pet. 26 (internal quotation marks and citation omitted). This suggestion is unavailing.

i. As a preliminary matter, petitioner did not make this statutory argument before the Second Circuit. That is, in its briefing before the Second Circuit, petitioner did not argue that Section 2254(d) required the court of appeals to look

beyond the Appellate Division's stated reasoning and consider what alternative theories could have supported its holding. To be sure, petitioner argued that the Appellate Division could have rejected Mr. Garlick's confrontation claim for reasons beyond the non-accusatory theory. Petr. C.A. Br. 38-39. But petitioner never contended that federal habeas law required the Second Circuit to ignore the Appellate Division's stated reasoning and consider petitioner's alternative theories, which the state court did not itself adopt.

Because petitioner did not preserve this argument below, this Court should not consider it in the first instance. *See Chaidez v. United States*, 568 U.S. 342, 358 n.16 (2013) (refusing to consider argument not raised below because "we are a court of review, not of first view") (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

ii. Petitioner's "could have supported" argument also lacks merit. This Court has repeatedly instructed that "a federal habeas court [must] train its attention on the *particular* reasons—both legal and factual—why state courts rejected a state prisoner's federal claims." *Wilson*, 138 S. Ct. at 1191-92 (internal quotation marks and citations omitted) (emphasis added). "[W]hen the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion . . . a federal habeas court simply reviews the specific reasons given by the state court." *Id.* at 1192. And when the particular theory the state court invoked "involves an unreasonable application of" or is "contrary to" clearly established federal law, Section 2254(d) is satisfied, leaving the habeas court to determine the remaining question of whether a federal constitutional violation occurred de novo. *See, e.g.*,

Panetti v. Quarterman, 551 U.S. 930, 953-54 (2007); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *Wiggins v. Smith*, 539 U.S. 510, 528-29 (2003); *Williams v. Taylor*, 529 U.S. 362, 397 (2000).

Ignoring this case law, petitioner insists that *Harrington v. Richter*, 562 U.S. 86 (2011), required the Second Circuit to consider and defer to all arguments or theories that *could have* supported the Appellate Division's determination. Pet. 26. But *Richter* is inapposite as it covers a distinct class of state-court decisions: those that denied relief "without an accompanying statement of reasons"—in that case, via a one-sentence summary order. 562 U.S. at 92, 96, 98. The *Richter* Court held that when no reasoning is provided, and no prior state court explanation exists, habeas courts must ask whether any theory that "could have supported" the state court's decision was reasonable. *Id.* at 98, 102.

Here, in contrast, the Appellate Division explained precisely why it denied relief. Pet. App. 129a. And in *Wilson*, the Court specifically rejected the argument that "*Richter*'s 'could have supported' framework [applies] even where there is a reasoned decision by a lower state court." 138 S. Ct. at 1195; *see also Richter*, 562 U.S. at 98-99 (presaging this distinction). Reaffirming the "look through" doctrine that applies here, *Wilson* held that when, as here, a state court offers a "reasoned decision" and the state high court denies review, a habeas court must "focus[] *exclusively* on the actual reasons given by the lower state court." *Wilson*, 138 S. Ct. at 1195-96 (emphasis added); *see also Cannedy v. Adams*, 706 F.3d 1148, 1158 (9th

Cir. 2013) (collecting federal appellate authority distinguishing *Richter* in this situation).[3]

2. In any event, petitioner's alternative arguments in defense of the Appellate Division's holding are meritless.

Petitioner advances a bevy of Sixth Amendment theories in defense of the Appellate Division's holding that the autopsy report here was not testimonial. As just explained, none of these arguments is relevant; because the Appellate Division's decision expressly relied on a "non-accusatory" theory that contradicted clearly established precedent, the Second Circuit properly granted habeas relief on that basis.

But in any event, petitioner's arguments are also wrong on their own terms. This Court's precedent clearly establishes that a certified forensic report prepared in connection with a criminal investigation and memorializing evidence of a crime is testimonial. And that rule applies with full force to the particular autopsy report in this case.

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[3] Because the Second Circuit held that the Appellate Division's "non-accusatory" theory was an unreasonable application of law clearly established in *Melendez-Diaz* and *Bullcoming*, the Second Circuit did not need to consider whether the Appellate Division's use of the "non-accusatory" theory was also "contrary to" clearly established federal law. *See* Garlick C.A. Br. 58-62. But the Second Circuit could have rested its grant of habeas relief on that alternative basis, too. "A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Williams v. Taylor*, 529 U.S. 362, 405 (2000); *see also id.* at 412-13 ("Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law[.]").

a. *Clearly established*. In *Melendez-Diaz*, the Court held that a forensic report certifying a substance as cocaine fell squarely "within the core class of testimonial statements." 557 U.S. at 310 (internal quotation marks and citations omitted). This Court in *Bullcoming* then established a general rule governing a broader set of forensic reports: "An analyst's certification prepared in connection with a criminal investigation or prosecution . . . is 'testimonial,' and therefore within the compass of the Confrontation Clause." 564 U.S. at 658-59 (quoting *Melendez-Diaz*, 557 U.S. at 321-24).

Petitioner nevertheless argues that *Williams v. Illinois*, 567 U.S. 50 (2012), precludes extracting any clear rule from *Melendez-Diaz* and *Bullcoming*. Pet. 20-21. In *Williams*, a fractured Court held that the introduction of a DNA profile without putting the author on the stand did not violate the Confrontation Clause. Petitioner makes much of how the rule of *Marks v. United States*, 430 U.S. 188 (1977), might apply to *Williams.* Pet. 20-21. But the only relevant question here is whether *Williams* changed the law regarding when a certified document memorializing a forensic analysis is testimonial. On that specific issue, Justice Thomas provided the pivotal fifth vote, reasoning that the DNA profile in that case "certifie[d] nothing" and thus "lacked the requisite formality and solemnity to be considered testimonial[.]" *See* 567 U.S. at 104, 112 (Thomas, J., concurring in the judgment) (internal quotation marks and citation omitted). Thus, the most *Williams* holds, as relevant to this case, is that an *informal* document providing forensic information is non-testimonial. That does not undermine the rule of *Melendez-Diaz* and *Bullcoming* that a *certified* forensic report prepared in conjunction with a criminal

investigation, like the report here, is testimonial. *See id.* at 112 (Thomas, J., concurring in the judgment) (reaffirming those decisions).

Petitioner also argues that the governing law here is not clearly established because some lower courts have held that autopsy reports under certain circumstances are nontestimonial. The text of the habeas statute, however, focuses the inquiry exclusively on "clearly established Federal law, *as determined by the Supreme Court of the United States*[.]" 28 U.S.C. § 2254(d)(1) (emphasis added). As the district court recognized, therefore, the "habeas statute is clear"—the only law that matters for purposes of the "clearly established" inquiry is "the word of the Supreme Court, and only the Supreme Court[.]" Pet. App. 42a. "[D]isagreements between lower state and federal courts" cannot preclude a finding of "clearly established law." *Id*.

To be sure, conflicting decisions among lower courts can "illustrate the *possibility* of fair-minded disagreement." *White v. Woodall*, 572 U.S. 415, 422 n.3 (2014) (emphasis added). But the Court has cautioned against "transform[ing] the [habeas] inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case." *Williams v. Taylor*, 529 U.S. 362, 409-10 (2000); *see also id.* at 409 (focusing on

existence of lower court authority can be "misleading"). For the purposes of the "clearly established" inquiry, it is the law of this Court that ultimately controls.[4]

b. *Unreasonable application*. Given the rule from *Melendez-Diaz* and *Bullcoming*, it would have been unreasonable for the Appellate Division to hold—for any reason—that the autopsy in this case was non-testimonial. "As in *Melendez-Diaz* and *Bullcoming*," the Second Circuit noted, the autopsy report here was requested and "performed in aid of an active police investigation." Pet. App. 22a. The report confirmed that the cause of death was "homicide," *id.* 30a, the OCME promptly informed law enforcement of the autopsy report's findings, *id.* 22a, and "the police consequently dropped charges against Rivera and pursued a murder charge against Garlick," *id.* And, "[j]ust as in *Melendez-Diaz* and *Bullcoming*," the report's evidentiary purpose was evident: The forensic examiner "prepared a certificate concerning the result of the examination that was formalized in a signed document" and, as mandated by New York Law, the "final, signed autopsy report was delivered to the Bronx District Attorney's Office[.]" *Id.* 22-23a (internal

[4] At any rate, whether an autopsy report is testimonial depends on a case's particular facts and circumstances, and some of the cases that petitioner cites did not involve autopsy reports like the one at issue here: a certified report rendered in aid of a police investigation. *See State v. Hutchinson*, 482 S.W.3d 893, 912 (Tenn. 2016) (autopsy report did not contain formalized certifications); *State v. Maxwell*, 9 N.E.3d 930, 951-52 (Ohio 2014), *cert. denied*, 574 U.S. 1160 (2015) (recognizing that "autopsy reports may play a testimonial role" in some criminal prosecutions but, where coroner performed ordinary duties "regardless of whether criminal activity [wa]s suspected or not," "[t]he record d[id] not show" the report was made for the specific "evidentiary purpose[]" of aiding in a police investigation).

quotation marks and citation omitted). Indeed, the autopsy report, as in *Melendez-Diaz*, was prima facie evidence under state law of the facts therein.[5]

Petitioner objects that the rule of *Melendez-Diaz* and *Bullcoming* is framed at too high a "level of generality" to satisfy Section 2254(d). Pet. 24. "This Court," petitioner asserts, "has never articulated the test for determining whether or under what circumstances *an autopsy report* is testimonial." Pet. 25 (emphasis added). But Section 2254(d) does not require an "identical factual pattern before a legal rule must be applied." *Panetti*, 551 U.S. at 953 (citation omitted). "[E]ven a general standard may be applied in an unreasonable manner." *Id.* Both of the cases on which petitioner relies (Pet. 24) recognize this reality; when "new factual permutations arise," the determinative question is whether "the necessity to apply the earlier rule is beyond doubt." *Woodall*, 572 U.S. at 427 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)) (internal quotations marks omitted).

Such is the case here. The Appellate Division did not need to extend *Melendez-Diaz* and *Bullcoming* to recognize that the autopsy report was testimonial. It merely needed to apply the rule of those cases—that certified forensic reports prepared to aid criminal prosecutions are testimonial—to the facts of this case.

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[5] *See* Pet. App. 98a; N.Y. Civ. Practice Laws and Rules § 4518(a),(c), 4520; N.Y. Pub. Health Law § 4103; N.Y. County Law § 673-77; N.Y. City Charter § 577 (g). Petitioner incorrectly suggests that the autopsy report was not, under state law, prima facie evidence of the cause of death. Pet. 27-28.

Petitioner offers three grounds on which the Appellate Division supposedly could have distinguished *Melendez-Diaz* and *Bullcoming*. But each of petitioner's arguments would be an unreasonable application of this Court's precedent.

First, petitioner argues that the Appellate Division could have found that the autopsy report was insufficiently formal because it was not "sworn" (apparently under oath or penalty of perjury). Pet. 26. This argument squarely contravenes *Bullcoming*, which rejected a "sworn" requirement because such a rule could easily be evaded by the State. 564 U.S. at 664 (citing *Crawford*, 541 U.S. at 52-53 n.3). Furthermore, the indicia of solemnity here are materially indistinguishable from those in *Melendez-Diaz* and in *Bullcoming*, where each forensic examiner "'prepared a certificate concerning the result' of the examination that was 'formalized' in a signed document." Pet. App. 23a (quoting *Bullcoming*, 564 U.S. at 664-65). The autopsy report had a formal title, an OCME seal, and a certification that Dr. Maloney performed the autopsy at the indicated date and time; it also contained initialed dates indicating when the draft report was prepared and finalized. Pet. App. 23a.

Second, petitioner argues that OCME's "independence" and neutrality rendered the autopsy report here non-testimonial. Pet. 27. But again, *Melendez-Diaz* and *Bullcoming* squarely foreclose this argument. In *Melendez-Diaz*, the Court held that the alleged "neutrality" of forensic examiners is irrelevant to whether their reports are testimonial. 557 U.S. at 318-19. And in *Bullcoming*, the State maintained that the statements in the forensic report were nontestimonial because "they were simply observations of an independent scientis[t] made according to a

non-adversarial public duty." 564 U.S. at 664 (internal quotation marks and citation omitted). The Court again squarely rejected that theory, holding that the purported independence of an office cannot alter the conclusion that a "document created for solely an 'evidentiary purpose' . . . made in aid of a police investigation, ranks as testimonial." *Id.* (quoting *Melendez-Diaz*, 557 U.S. at 311).

Third, petitioner vaguely argues that the Appellate Division could have reasonably held that, even if the report was testimonial, the Confrontation Clause was not violated. Pet 27. This is so, the theory seems to go, because, although the autopsy report was admitted into evidence and its contents were repeatedly conveyed to the jury by Dr. Ely, she "independently" assessed the ultimate cause of death based on the report's myriad findings, observations, and measurements. Pet. 27.

As a preliminary matter, petitioner forfeited this argument by failing to raise it in the district court (it never raised it in state court either). There, as in the state court, petitioner's sole response to Mr. Garlick's Confrontation Clause claim was that the report's contents were not testimonial. Petitioner never argued that even if the report was testimonial, the report was admissible because Mr. Garlick's ability to cross-examine Dr. Ely "satisfied the requirements of the Clause." Pet. 27. Petitioner raised that argument for the first time in the Second Circuit. Petr. C.A. Br. 32-36. Mr. Garlick pointed out that this argument was waived, Resp. C.A. Br. 53 (citing *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006)), and the court of appeals did not address it. This Court should not consider it in the first instance.

Even if this argument were not waived, it would be unavailing. In *Bullcoming*, the Court held that the introduction of a forensic report violated the Confrontation Clause even where the defendant was able to cross-examine an analyst with no connection to the report. 564 U.S. at 652. True, Justice Sotomayor noted that the Court would "face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were *not* themselves admitted as evidence." *Id.* at 673 (Sotomayor, J., concurring) (emphasis added). But that was not the issue in *Bullcoming*, and it is not the issue here. Petitioner introduced the autopsy report as a business record for its truth. Pet. App. 24a n.6.

II. The Second Circuit's harmless-error holding does not warrant review.

Every federal judge who has reviewed Mr. Garlick's claim has held that the introduction of the autopsy report here had a clear "substantial and injurious" effect on the verdict, *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). Pet. App. 26a, 45a, 125a. This conclusion does not warrant further review. The issue is completely fact-bound, and petitioner's efforts to attack the judgment below are fruitless.

1. Petitioner first argues that the constitutional violation here was harmless "[i]f the error was occasioned solely by the absence of a limiting instruction" telling the jury to consider the autopsy report solely for the purpose of evaluating Dr. Ely's testimony. Pet. 32. Petitioner did not make this argument before the district court, thus rendering it waived and not properly presented here.

At any rate, the error in this case did not derive from a lack of a limiting instruction. The Second Circuit held that the admission of the autopsy report

violated the Confrontation Clause because the report was introduced at trial for the truth of the matter asserted—to establish "the manner and cause of death"—and yet Mr. Garlick had no "opportunity for cross-examination" of the report's author. Pet. App. 23a-24a & 24a. n.6. Thus, the constitutional violation here was the admission of the autopsy report itself. The harmless-error inquiry hinges on whether that evidence had a substantial and injurious effect on the verdict. It did, as the Second Circuit correctly held.

2. Petitioner further contends that even if "any reference to the autopsy report was impermissible under the circumstances," the error here is still harmless because the surveillance footage, as well as Mr. Garlick's statements to police, "independently established that he disarmed Sherwood and subsequently stabbed him to death[.]" Pet. 32-33. Petitioner is incorrect. "The autopsy report was the strongest evidence in the State's case and was not cumulative of other inculpatory evidence connecting Garlick to the victim's death." Pet. App. 27a.

In particular, petitioner "introduced the autopsy report as its first exhibit and heavily relied on it[.]" Pet. App. 26a. It argued that the autopsy report "eliminate[d] Johanna Rivera as a potential cause of the victim's death," *id.* 23a, because, though Rivera had repeatedly and forcefully struck the victim's head, the autopsy report indicated no "scalp contusions" or "skull fractures," *supra*, 3, 6. In turn, petitioner used the autopsy report to argue that Mr. Garlick inflicted deep stab wounds that killed the victim. Pet. App. 26a-27a. "No other medical evidence was offered at trial to establish the cause and manner of the victim's death." *Id.*

Without the autopsy report, other aspects of petitioner's case against Mr. Garlick would have been "considerably weaker" too. Pet. App. 122a. As the trial court found, the surveillance video "present[ed] a jury question" as to whether a knife was involved in the altercation and whether Mr. Garlick intended to hurt Sherwood. *Id.* 122a; Tr. 415. Moreover, none of Mr. Garlick's statements to the police proved that he possessed a knife, much less that he stabbed Sherwood. Pet. App. 31a. Petitioner therefore used the autopsy report to rebut Mr. Garlick's contention that he did not possess a knife prior to the attack. Pet. App. 27a. Petitioner further used the autopsy report to establish Mr. Garlick's "intent to cause serious physical injury," *id.*, pointing to the depth of the wound that caused the victim's death, *id.* 123a.

That leaves petitioner's argument that Mr. Garlick's ability to cross-examine Dr. Ely regarding the autopsy report rendered its admission harmless. Pet. 33. But again, the inquiry is whether the *introduction* of the report harmed the defense. Mr. Garlick's ability to challenge the report through Dr. Ely is simply irrelevant. Petitioner's harmless-error argument here ignores that the remedy for *Crawford* violations is *preclusion* of the testimonial hearsay. *Crawford*, 541 U.S. at 53-54.

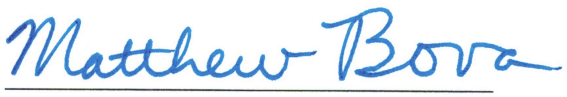
In any event, Petitioner's legal theory again fails on its own terms. As the Second Circuit noted, Dr. Ely "did not conduct or even participate in the autopsy." Pet App. 27a. For that reason, "[e]ven rigorous cross-examination of Dr. Ely could not have adequately revealed any defects in the autopsy's methods, conclusions, and reliability," *id.* 27a; *see id.* 124a (same). For purposes of the Confrontation Clause,

her availability for cross-examination was "insufficient" to support a finding of harmless error. *Id.* 124a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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