No. 17-5385

IN THE

Supreme Court of the United States

JAMES GARLICK,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari
to the Appellate Division, Supreme Court of
New York, First Judicial Department.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The question presented is "[w]hether a certified autopsy report—created as part of a homicide investigation and asserting that the cause of death was homicide—is 'testimonial.'" Pet. i. The State does not dispute that this question is extremely important. And it cannot seriously deny that there is a deep and intractable conflict over the issue. Consequently, the only real question is whether this is the right vehicle—and the right time—to resolve the issue.

It is. None of the State's quibbles with the procedural history or record diminish the suitability of this case as a vehicle for resolving the questioned presented. As the State's "kitchen-sink" approach to the merits of this important and recurring constitutional question confirms that this Court's intervention is essential. This Court should grant certiorari to set the record straight on the Confrontation Clause's application to autopsy reports created as part of homicide investigations and asserting that the cause of death was homicide.

I. The Conflict is Deep and Intractable.

The State correctly observes that the testimonial status of an autopsy report hinges on the circumstances of the report's creation. Brief in Opp. (BIO) 10. But the State is wrong that so many factors influence the calculus that it is impossible to identify a "genuine conflict" over whether a certain class of reports is testimonial. BIO 10, 14. As the Petition demonstrates, a deep conflict exists over whether reports "created as part of a homicide investigation and asserting that the cause of death was homicide" are testimonial. Pet. i; *see also id.* at 11-16. That is a significant class of

autopsy reports, and the Confrontation Clause's treatment of them presents a chronic issue whose resolution is essential to the criminal justice system.

Perhaps the best evidence of the conflict over the testimonial status of this class of reports can be found in recent filings from state and federal governments in cases involving autopsy-related reports. Earlier this Term, the State of Wisconsin explained that several courts have held that autopsy reports are testimonial where "law enforcement either participated in the autopsy or was otherwise closely involved," or "it was clear before the autopsy began that the death involved criminal activity." Br. in Opp. 11-12, *Mattox v. Wisconsin,* 138 S. Ct. ___ (Oct. 16, 2017) (No. 16-9167). The Solicitor General has likewise acknowledged that many courts deem autopsy reports testimonial when "the autopsy was conducted as part of a criminal investigation" or "when criminal proceedings were anticipated." Br. in Opp. 26, *James v. United States*, 134 S. Ct. 2660 (2014) (No. 13-632). As support for these assertions, those two filings cited no fewer than *ten* cases from federal courts of appeals or state courts of last resort (the seven cited in the Petition at 12-13, plus three others).[1]

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[1] *See United States v. Ignasiak*, 667 F.3d 1217, 1229-35 (11th Cir. 2012); *United States v. Moore*, 651 F.3d 30, 69-73 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 918 (2012); *State v. Bass*, 132 A.3d 1207, 1225 (N.J. 2016); *State v. Liu*, 315 P.3d 493, 510-12 (Wash. 2014), *cert. denied*, 134 S. Ct. 2842 (2014); *State v. Navarette*, 294 P.3d 435, 440-42 (N.M. 2013), *cert. denied*, 134 S. Ct. 64 (2013); *Commonwealth v. Carr*, 986 N.E.2d 380, 398-400 (Mass. 2013); *State v. Kennedy*, 735 S.E.2d 905, 917 (W. Va. 2012); *People v. Childs*, 810 N.W.2d 563, 563 (Mich. 2012); *Cuesta-Rodriguez v. State*, 241 P.3d 214, 228-29 (Ok. 2010), *cert. denied*, 565 U.S. 885 (2011); *State v. Locklear*, 681 S.E. 2d 293 (N.C. 2009).

The reports in *Mattox* and *James* were *not* created in connection with homicide investigations. But there can be no serious debate that the report here was. The victim died in a violent altercation. And as the State acknowledges, the medical examiner was told before conducting the autopsy that the "App[arent] Manner" of death was "Homicide." BIO 5; Resp. Supp. Appx. 18; Pet. 4. The investigating detectives were also "present during the autopsy." BIO 6. The examiner declared in her report that the cause of death was indeed homicide and documented the allegedly fatal injuries. *Id*. The medical examiner then promptly delivered the report describing the serious felony to the District Attorney's Office. Pet. 6.

In short, there can be no doubt that the holding below (as well as the decisions from five other jurisdictions cited at Pet. 13) squarely conflict with the ten decisions mentioned above. The time has come to resolve that ever-widening split. The admissibility of autopsy reports created in connection with homicide investigations should not depend on whether the case is being tried in New York or, say, New Jersey. Whatever percolation this Court has been waiting for is no longer serving any useful purpose.

II. This Case is an Excellent Vehicle to Resolve the Conflict.

The State argues that there are various imperfections with this case that render it unsuitable for resolving whether autopsy reports created in connection with homicide investigations are testimonial. None of the State's arguments is persuasive. The Appellate Division and trial court expressly rejected petitioner's confrontation

argument exclusively on the ground that the autopsy report "was not testimonial." Pet. App. 3a, 18a-24a, 27a. This Court can and should decide whether that holding is correct.

1. The State contends that the case is not "procedurally clean" because petitioner did not to ask the State to redact portions of the autopsy report, to "introduce the report solely as a basis for the expert witness's opinion about cause of death," or to have the expert witness testify based on the report without putting it into evidence. BIO 18. This is all misdirection. The State does not, and cannot, dispute that petitioner argued in the trial court that the autopsy report was inadmissible because it was testimonial. *See* Pet. App. 7a-16a, 23a, 27a. The trial court rejected that argument. *Id.* 18a-20a, 27a. The State then elected to introduce the entire report for the truth of the matter asserted. *Id.* 19a, 25a. Having made that choice—and having persuaded the Appellate Division to condone it on the ground that the report was not testimonial, *see id.* 3a—the State has put the issue into play here.

It does not matter whether petitioner also asked for the State to introduce the report. BIO 18. Petitioner made this request only *after* the trial court held that the report was not testimonial and, therefore, that the State could have a surrogate witness testify based on its content. Pet. App. 18a-19a. Having had those objections overruled, the defense had to do the best it could under the circumstances. And here, as counsel stated on the record, counsel determined that the best way to protect his client was to use the autopsy report to cross-examine Dr. Ely. *See id.* 19a.

Lest there be any doubt that the question presented was properly preserved below, Petitioner "renewed" his objection to the report's admissibility on the brink of the prosecution's introducing it and then again after Dr. Ely's surrogate testimony concluded. Pet. App. 23a-24a, 27a. The trial court responded: "I am sure you covered your record." *Id.* 27a.

2. The State next maintains that the autopsy report here is not testimonial because various aspects of state and local law render medical examiners in New York City "independent of and not subject to the control of either the police of the office of the prosecutor." BIO 19 (citation omitted). This, however, is not really a vehicle argument. That is, the State does not argue that medical examiners in the ten jurisdictions referenced above—or medical examiners generally—operate under meaningfully different legal regimes. That being so, there is nothing about state and local law governing New York medical examiners that renders this case out of the ordinary.

As for the merits of this "independence" argument, petitioner addresses that below. *See infra* at 10.

3. The autopsy report here contains a certification that the medical examiner "performed Gabriel Sherwood's autopsy." Pet. App. 31a. And the overall report is obviously highly formalized. The State nonetheless argues that the report is not sufficiently formal to meet Justice Thomas's test for the testimonial status of forensic reports. This is so, according to the State, because the examiner did not specifically

certify "that the statements, findings, or conclusions contained in the autopsy report were true or accurate." BIO 25.

The State's parsing of the medical examiner's certification strains credulity. The examiner's certification, *see* Pet. App. 31a, is clearly intended to cover the entire document. Indeed, the examiner's signature—the action that makes the certification official and effective—does not appear until the end of the report, after all of the findings and conclusions have been laid out. *Id.* 35a.

Even if the examiner's certification did not cover the entire document, it would not matter. The State does not dispute that the examiner's assertion that she "performed Gabriel Sherwood's autopsy" was sufficiently formal to satisfy Justice Thomas's test. BIO 25. Absent that formalized assertion, none of the findings or conclusions that follow in the report would have had any value; they would have all lacked any basis in evidence. Accordingly, the testimonial status of the examiner's assertion that she conducted the autopsy here is alone sufficient to require resolution of the question presented.

4. The State's harmless-error theory is similarly unavailing. The State never advanced this argument in the New York courts, and no state court has considered this issue. So (insofar as the argument is properly preserved) it should be left for remand. *See, e.g.*, *Bullcoming v. New Mexico*, 564 U.S. 647, 668 n.11 (2011); *Melendez-Diaz*, 557 U.S. 305, 329 n.14 (2009).

In any event, the State's argument is baseless. Petitioner maintained at trial that the prosecution failed to prove that he—as opposed to co-defendant Rivera—caused the victim's death. *See* Tr. 435, 439-41. The State, through its surrogate medical examiner, Dr. Ely, used the autopsy report's findings and conclusions to dispute that contention. Ely 23-58; Pet. 7-8. The prosecutor even asked Dr. Ely to "use the designation[s] in the autopsy report to go through each of the injuries sustained by Mr. Sherwood to tell us exactly what was observed." Ely 37. Dr. Ely did just that. *Id.* at 37-44. Then in summation, the prosecutor showed the report to the jury and relied heavily upon it to establish "the cause of death." Tr. 448-453, 466 (Oct. 2, 2013); *see also* Pet. 9 (quoting summation).

Beyond cause of death, the autopsy report's conclusions regarding the number and nature of the stab wounds proved an intent to cause "serious physical injury," thus bolstering the prosecution's first-degree manslaughter theory. Pet. 8, 21; *see* N.Y. Penal Law § 125.20(1). Had the court precluded the autopsy report, the prosecution could not have disproven the real possibility that petitioner inadvertently hurt Mr. Sherwood with the knife during a struggle for it. Pet. 8, 21.

III. The Appellate Division's Holding is Incorrect.

The State's argument on the merits confirms the need for this Court's intervention. In *Melendez-Diaz*, and *Bullcoming*, this Court established a simple rule: "An analyst's certification prepared in connection with a criminal investigation or prosecution . . . is 'testimonial.'" *Bullcoming*, 564 U.S. at 658-59 (citing *Melendez-*

Diaz, 557 U.S. at 318-25). This rule is rooted in an historical principle that is equally straightforward: The Confrontation Clause forbids prosecutorial proof "via *ex parte* out-of-court affidavits." *Melendez-Diaz*, 557 U.S. at 324-25, 329; *accord id.* at 329-30 (Thomas, J., concurring). Try as the State might, it cannot escape that rule here.

1. Quoting *Ohio v. Clark*, 135 S. Ct. 2173, 2183 (2015), the State first argues that certified autopsy reports created in connection with criminal investigations are not testimonial because their primary purpose is not to "create an out-of-court *substitute* for trial testimony." BIO 25-26 (emphasis added) (internal quotations omitted). There is an immediate problem, however, with this argument: *Clark* is not a forensic evidence case. Indeed, *Clark* did not even mention *Melendez-Diaz* or *Bullcoming* at all. Instead, *Clark* involved a three-year-old child's statement to a teacher, and this Court's analysis applied only to statements describing events in informal "conversations" with teachers or police officers. 135 S. Ct. at 2180. Because the *Clark* opinion does not address, much less overrule, *Melendez-Diaz* or *Bullcoming*, those cases continue to govern here.

Furthermore, applying a "substitute for trial testimony" rule in the context of formal documentary evidence such as forensic reports would subvert history and gut the Confrontation Clause. This Court has observed that "[i]t is doubtful that the original purpose" of the certified statements taken under the 16th century Marian bail and committal statutes "was to produce evidence admissible at trial." *Crawford v. Washington*, 541 U.S. 36, 43-44 (2004). Yet the Confrontation Clause was adopted

to prevent the introduction of precisely these sorts of statements without an opportunity for cross-examination. *Id.* at 50. Thus, whatever the rule may be with respect to statements made in informal conversation, "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact" has always been considered testimonial—even if made simply to serve an "investigative function" as opposed to create evidence for a trial. *Id.* at 51-53 (citation omitted); *see also Bullcoming*, 564 U.S. at 664-65 (report must be made in connection with criminal "investigation *or* prosecution") (emphasis added); *Melendez-Diaz*, 557 U.S. at 310.

Any other rule would lead to absurd results. Suppose a medical examiner declares in a report: "In order to aid the police investigation into this death, I hereby find that John Smith killed the victim by poisoning, and I look forward to testifying against this evil man at trial." Under the State's theory, that autopsy report would be *nontestimonial* since the medical examiner would be merely assisting the investigation, not aiming to create a substitute for trial testimony. So too with pretrial depositions and police interrogations of eyewitnesses, performed and transcribed for purposes such as discovery and pinning down investigative facts. These formalized statements are all "core" testimonial statements. *Crawford*, 541 U.S. at 51-52. Yet applying the "substitute-for-trial-testimony" rule to such statements would exclude them all from the Clause's reach.

That the holding below can be defended only by proposing such a dramatic change in constitutional law makes this Court's intervention all the more necessary.

2. As a fallback, the State offers a dizzying grab bag of "factors" that it says show that the autopsy report here is nontestimonial. But this Court has already rejected the relevance of many of these factors, and the remaining proposals are similarly nonsensical.

a. The State repeatedly asserts that, in light of state and local law, medical examiners in New York are neutral, "independent" "public health official[s]," as opposed to agents of the police department. BIO 11, 12, 13, 19, 21, 24, 26. But *Melendez-Diaz*, which involved analysts employed by the "[d]epartment of [p]ublic [h]ealth," squarely held such "independence" irrelevant. 557 U.S. at 308, 317, 319 n.6. *Bullcoming* likewise rejected the theory that a forensic report is nontestimonial when created by an "'independent scientis[t]'" under "'a non-adversarial public duty.'" 564 U.S. at 664 (alteration in original).

b. The State asserts that the assertions in the autopsy report "were made contemporaneously with the medical examiner's observations." BIO 29. But this Court has twice rejected the relevance of contemporaneity. *Melendez-Diaz*, 557 U.S. at 315-16; *Bullcoming*, 564 U.S. at 660.

c. The State asserts that the autopsy report was not "directly accusatory," insofar as it did not directly identify a perpetrator. BIO 26 (citation omitted). Again, this Court has repeatedly rejected the relevance of this factor. *See* Pet. 26 (citing case law).

d. The State asserts that this case "could have been resolved in any number of ways without using the autopsy report in court," such as through "a plea bargain."

BIO 23. True enough. But the same could be said of every formalized pretrial statement that implicates the Confrontation Clause. *Cf. Missouri v. Frye*, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

e. The State asserts that medical examiners are required to conduct autopsies and write reports regardless of whether evidence of criminality is found. BIO 20. But the same was true of the analysts in *Melendez-Diaz*. 557 U.S. at 308. And this case concerns only reports that actually allege criminality. Such allegations confirm that the reports will "aid [ ] a police investigation" and, if necessary, be "available for use at a later trial." *Bullcoming*, 564 U.S. at 664.

f. Finally, the State asserts that the information in the autopsy report might have "*exonerated* the accused," if, for example, it concluded that the victim suffered "accidental death" or "suicide." BIO 23 (emphasis added by the State). But if the report had reached such a conclusion, then it would have fallen outside the question presented. We are concerned here solely with reports that (1) are conducted in conjunction with criminal investigations *and* (2) assert the cause of death is homicide. *See* Pet. i. Where a medical examiner makes such a declaration, she plainly offers a "solemn declaration or affirmation made for the purpose of establishing some fact" potentially relevant to a later criminal prosecution. *Melendez-Diaz*, 557 U.S. at 310 (citations omitted).

CONCLUSION

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

Respectfully submitted,

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