No. 20-5344

In the Supreme Court of the United States

CHRISTOPHER TAYLOR, PETITIONER,

v.

ILLINOIS, RESPONDENT.

On Petition for a Writ of Certiorari to the Illinois Appellate Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the medical examiner's autopsy report was not testimonial for purposes of the Confrontation Clause because its primary purpose was to memorialize conclusions generated as part of the normal operations of the medical examiner's office and not to aid in a criminal prosecution.

II. Whether any error in admitting the autopsy report was harmless because the cause of death was undisputed and a second forensic pathologist testified that the victim died due to multiple gunshot wounds.

RELATED CASES

- *People of the State of Illinois v. Christopher Taylor*, No. 07 CR 15069, Circuit Court of Cook County. Conviction and sentence entered on January 30, 2015.

- *People of the State of Illinois v. Christopher Taylor*, No. 1-15-0628, Illinois Appellate Court, First District. Opinion affirming conviction and sentence filed on December 13, 2019; order denying rehearing filed on January 10, 2020.

- *People of the State of Illinois v. Christopher Taylor*, No. 125746, Illinois Supreme Court. Order denying petition for leave to appeal entered on May 27, 2020.

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BRIEF IN OPPOSITION

Petitioner asks this Court to review the fact-bound question of whether an autopsy report should have been deemed testimonial given the unique circumstances of this case, based on how the prosecutor used the report and the nature of petitioner's defense. The question presented lacks a broad application, and this Court should deny the petition for that reason alone.

If the Court were inclined to rewrite the question presented to encompass a broader legal question than the one described in the petition, this case would not warrant certiorari for at least three additional reasons. First, petitioner has not met the criteria for certiorari. He has failed to demonstrate that the Illinois Appellate Court's holding conflicts with this Court's precedents, and he has failed to identify a split in authority that warrants this Court's review, given that the differing outcomes as to whether autopsy reports are testimonial can largely be reconciled as applications of this Court's established "primary purpose" test to different facts. Second, even if there is uncertainty over the application of the Confrontation Clause to forensic test results that this Court is inclined to address, an autopsy case is not the right vehicle for doing so because autopsy reports do not implicate the same concerns as other types of forensic evidence. And third, any Confrontation Clause error in this case was plainly harmless, and answering the

question presented in petitioner's favor would not result in reversal of his conviction.

STATEMENT

1. Derico Fitch was shot in a parking lot in the early morning hours of June 20, 2007, while he was in the company of Duane Smith, Devon Patton, and petitioner. Pet. App. A, ¶¶ 18-19, 27. Smith called for emergency assistance. *Id.* ¶ 20.

Responding police officers identified Smith, Patton, and petitioner as eyewitnesses to the shooting. *Id.* ¶ 49. Initially, petitioner claimed that an unidentified assailant "dressed in blue jeans and a white T-shirt" shot Fitch. *Id.* ¶ 50. But Smith identified petitioner as the shooter, *id.* ¶ 20, and petitioner ultimately admitted that he had shot Fitch, *id.* ¶ 52.

2. Fitch was transported to a hospital, pronounced dead, and taken to the Office of the Cook County Medical Examiner. OOOO23-26; Supp. C at 9. Under Illinois law, the medical examiner must investigate any "sudden or violent death, whether apparently suicidal, homicidal or accidental," 55 Ill. Comp. Stat. 5/3-3013(a), and, if the death is "suspicious," must conduct an autopsy, *id.* 5/3-3015.[1]

[1] The statute sets forth the duties of an elected coroner, which may be transferred to an appointed medical examiner, see 55 Ill. Comp. Stat. 5/3-3001(d), as Cook County has done, see Cook County Government website, Medical Examiner, https://www.cookcountyil.gov/agency/medical-examiner (last visited Jan. 6, 2021) (explaining creation of Office of Medical Examiner).

An autopsy report must then be filed with Illinois Department of Public Health. *Id.* 5/3-3014. Valerie Arangelovich, then employed by the medical examiner, completed Fitch's autopsy and prepared a report concluding that his death was a homicide. See Supp. C (autopsy report).

In the autopsy report, Arangelovich noted that Fitch was a healthy 21-year-old who showed no signs of illness. See *id.* at 1, 3-5. She identified, photographed, and described two gunshot wounds. One "gunshot wound of entrance" was located "[o]n the posterior left arm, 11.2 inches beneath the top of the head." *Id.* at 2. This wound "coursed from back to front, left to right, and upward," going through subcutaneous tissue and muscle before it "exit[ed] the body on the anteromedial left arm, 10.5 inches beneath the top of the head." *Ibid.*

A second entrance wound was located "[o]n the anterior right chest, 19.5 inches beneath the top of the head, below the right nipple," and was "0.3 inches in diameter." *Ibid.* The "wound course" went "from front to back, right to left, and downward," penetrating the liver, lungs, aorta, and spleen. *Ibid.* The wound "exit[ed] the body on the left back, 20.5 inches beneath the top of the head, 4.5 inches to the left of the posterior midline." *Ibid.* Arangelovich measured, in each half of the chest cavity, "1000 cc of bloody fluid." *Id.* at 3.

Arangelovich concluded that Fitch "died of multiple gunshot wounds" and characterized the death as a homicide. *Id.* at 6. Her report did not specify how

many bullets caused the wounds, and it did not identify who killed Fitch. An attachment to the report noted that, at the time of the autopsy, police believed that "[t]he alleged offender fled the scene and [was] not in custody." *Id.* at 9.

3. Petitioner was charged with murder on a theory that he shot Fitch with a firearm, knowing that his actions "created a strong probability of death or great bodily harm." C23 (citing 720 Ill. Comp. Stat. 5/9-1(a)(2)).

By statute, Arangelovich's autopsy report was admissible at trial even if she did not testify, but petitioner was entitled to subpoena her. 725 Ill. Comp. Stat. 5/115-5.1. Before trial, the prosecutors informed petitioner that they intended to call Dr. Eimad Zakariya to testify about the cause of death, because Arangelovich was no longer working in the medical examiner's office. See Pet. App. A, ¶ 11; LLLL5. Petitioner moved to bar Zakariya from testifying because he had not conducted the autopsy, contending that results of the autopsy constituted testimonial evidence and that he "[would] not be able to confront this witness and evidence if the state is permitted to present it through a substitute witness." C130-132. The circuit court denied the motion, noting, among other things, that the report was not testimonial for purposes of the Confrontation Clause. Pet. App. A, ¶ 11; PPPP77. Petitioner did not exercise his right to subpoena Arangelovich to testify at trial.

4. At the jury trial, both Smith and Patton testified that petitioner shot Fitch during an altercation. The men had been gathered at a house in Harvey, Illinois, when Fitch and petitioner began arguing loudly. Pet. App. A, ¶¶ 18, 26. The four of them went across the street to a parking lot, and Fitch and petitioner continued to argue. *Id.* ¶¶ 18, 26-27. Smith and Patton attempted to keep Fitch and petitioner apart. *Id.* ¶¶ 19, 27. Both men heard a gunshot and saw petitioner holding a gun, then saw Fitch on the ground. *Id.* ¶¶ 19, 27-28. Fitch was unarmed. *Id.* ¶ 28.

Petitioner's recorded statements admitting that he shot Fitch were played for the jury. *Id.* ¶¶ 52-53, 59. An officer testified that petitioner had initially lied and attempted to blame an unknown assailant. *Id.* ¶ 50.

Zakariya was qualified as an expert in forensic pathology and testified that he had reviewed the information from Fitch's autopsy, including Arangelovich's notes, measurements, and photographs. *Id.* ¶¶ 33, 35, 41; see also PPPP116-117. Using the photographs taken at the autopsy and referring to the measurements from Arangelovich's report, Zakariya detailed the gunshot wounds to Fitch's chest and arm. PPPP120-126, 133-37. He opined that Fitch's death was the result of multiple gunshot wounds. Pet. App. A, ¶ 38.

Zakariya further explained that Fitch's wounds could not have been caused by a single bullet, *id.* ¶ 37—a topic that Arangelovich's report did not address, see

Supp. C. For one thing, the locations of the wounds made this impossible. Pet. App. A, ¶ 37; PPPP126-127. Zakariya further explained that a bullet changes its flight path when it courses through body tissue, and Fitch's wounds were not consistent with what might occur if a single bullet had traveled once through Fitch's body and then reentered and exited a second time. Pet. App. A, ¶ 37; PPPP127-128.

On cross-examination, Zakariya acknowledged that he was relying on Arangelovich's measurements, which he could not independently verify. Pet. App. A, ¶ 41; PPPP171. Furthermore, he was limited to reviewing only those photographs that Arangelovich had chosen to take, and his review was less comprehensive than it would have been had he completed the autopsy. Pet. App. A, ¶ 41; PPPP175-176.

Over petitioner's objection, Arangelovich's autopsy report was admitted into evidence. See Pet. App. A, ¶ 45 n.1.

In closing arguments, the prosecutor argued that circumstantial evidence demonstrated petitioner's intent to commit first degree murder, given that he carried a gun, pulled out the gun during an argument, and fired at least once at Fitch. QQQQ10-13. Although petitioner denied pulling the trigger twice, Fitch's wounds required two separate bullets, and the firing of a second gunshot further demonstrated that petitioner knew his actions created a strong probability of death or great bodily harm. QQQQ14-15. In closing, petitioner did not deny that he shot

Fitch, but argued that the gun went off accidentally while he and Fitch struggled. QQQQ24-27.

The jury convicted petitioner of murder, and he was sentenced to 50 years in prison. Pet. App. A, ¶¶ 72, 76.

5. Petitioner appealed to the Illinois Appellate Court. He claimed that the admission of Arangelovich's autopsy report violated the Confrontation Clause because the report was "testimonial" and Arangelovich did not testify. *Id.* ¶¶ 123, 129. The State in its briefing responded that the autopsy report was not testimonial and that, in any event, any Confrontation Clause error was harmless. See State Br., *People v. Taylor*, No. 1-15-0628, at 39-40.

The Illinois Appellate Court rejected petitioner's claim in a non-precedential order. See Pet. App. A (designating order as filed under Illinois Supreme Court Rule 23); see also Ill. S. Ct. R. 23 (allowing non-precedential dispositions). The court applied Illinois Supreme Court precedent, *People v. Leach*, 2012 IL 111534, to determine that the autopsy report was not testimonial. Pet. App. A, ¶¶ 129-136.

The appellate court reasoned that "where an autopsy report was not prepared for the primary purpose of accusing a targeted individual or for the primary purpose of providing evidence in a criminal case, the report [is] not testimonial." *Id.* ¶ 130. Here, Fitch's autopsy "was not performed at the direction of the police," but instead "was conducted in accordance with Illinois law" requiring that the medical examiner

investigate any "sudden and violent death." *Id.* ¶ 132. And "[w]hile the State was able to use the autopsy report to support its two-shot theory as to [petitioner's] intent to kill, there is no evidence the autopsy report was created for any other purpose than to report the results of the examination of [Fitch's] body in compliance with state law." *Id.* ¶ 133. The appellate court acknowledged that in *Leach*, the Illinois Supreme Court had held that an autopsy report could be deemed testimonial if prepared at the direction of law enforcement, but it found that Arangelovich's report did not fall within that exception. *Id.* ¶¶ 131-133.

Finding no error, the appellate court did not address whether the purported error was harmless. *Id.* ¶ 136.

6. Petitioner filed a petition for leave to appeal to the Illinois Supreme Court, reiterating his claim that admission of the autopsy report violated the Confrontation Clause, but the court denied his petition. Pet. App. C.

REASONS FOR DENYING THE PETITION

I. This Court Should Deny Certiorari Because Petitioner's Fact-Bound Question Does Not Present An Issue Of Sufficiently Broad Application.

This Court should deny a writ of certiorari because the petition presents a fact-bound and contingent question that provides a poor vehicle for deciding a legal question of potentially broad importance. "[I]t is the petitioner himself who controls the scope of the question presented," and he may "generally frame the question as

broadly or as narrowly as he sees fit." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

Rather than seek review of a question with broad implications, petitioner asks this Court to resolve whether the particular manner in which the autopsy report was used in his trial violated the Confrontation Clause. Specifically, he requests a determination that admitting Arangelovich's autopsy report in this case was error given that "the State . . . relie[d] on [it], not just to show cause of death, but as the sole evidence supporting its argument that [he] fired two shots," and because "[he] consistently denie[d] firing two shots, . . . his denial [was] supported by each eyewitness and the physical evidence, and . . . the State's two-shot theory [was] crucial to its argument that [he] committed knowing murder." Pet. i. By urging that certiorari be granted on a question that is filled with conditions and contingencies, petitioner has ensured that any ruling in his favor on his question presented would be limited to the factual scenario in this case.

Equally as important, petitioner's question presented incorporates issues that are irrelevant to whether evidence is testimonial. The question suggests that the degree to which a prosecutor "relies on" the challenged evidence and the nature of the other evidence in the case bear on whether an autopsy report is testimonial. But petitioner cites no case in which this Court (or any other) has considered such

factors in determining whether evidence was admitted in violation of the Confrontation Clause.

This Court has "on occasion rephrased the question presented by a petitioner." *Yee*, 503 U.S. at 535. It has no compelling reason to do so here. To the contrary, this Court has repeatedly denied certiorari in cases presenting the question whether autopsy reports are testimonial. See, *e.g.*, *Mattox v. State*, 890 N.W.2d 256 (Wis. 2017) (holding toxicology results obtained as part of autopsy not testimonial), *cert. denied*, 138 S. Ct. 355 (2017) (No. 16-9167); *People v. Garlick*, 42 N.Y.S.3d 28 (N.Y. App. Div. 2016) (holding autopsy report not testimonial), *cert. denied*, 138 S. Ct. 502 (2017) (No. 17-5385); *Ackerman v. State*, 51 N.E.3d 171 (Ind. 2016) (same), *cert. denied*, 137 S. Ct. 475 (2016) (No. 16-5551); *State v. Maxwell*, 9 N.E.3d 930 (Ohio 2014) (same), *cert. denied*, 135 S. Ct. 1400 (2015) (No. 14-6882); *State v. Medina*, 306 P.3d 48 (Ariz. 2013) (same), *cert. denied*, 571 U.S. 1200 (2014) (No. 13-735); *State v. Navarette*, 294 P.3d 435 (N.M. 2013) (holding autopsy report testimonial), *cert. denied*, 571 U.S. 939 (2013) (No. 12-1256); *United States v. James*, 712 F.3d 79 (2d Cir. 2013) (holding autopsy report not testimonial), *cert. denied*, 572 U.S. 1134 (2014) (No. 13-632).

If those cases did not warrant certiorari, then this case—which presents a narrow, fact-bound question on the same general issue—does not either.

II. Even If The Question Presented Were Rewritten, The Petition Fails To Satisfy This Court's Criteria For Certiorari.

Even if this Court were inclined to rewrite the question presented, the case still would not warrant certiorari review because petitioner satisfies none of the criteria set forth in Rule 10. He has not shown that the Illinois Appellate Court's decision "conflicts with relevant decisions of this Court." See S. Ct. R. 10(c). To the contrary, its holding that the autopsy report was not testimonial resulted from a straightforward application of the Court's "primary purpose" test. Nor has petitioner identified a conflict in authority that warrants this Court's review. See S. Ct. R. 10(b).

A. The Illinois Appellate Court's holding does not conflict with this Court's precedents.

The Confrontation Clause, which "provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him,'" *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (quoting, with alteration, U.S. Const. amend. VI), bars the admission of testimonial hearsay unless the defendant had a prior opportunity to cross-examine the declarant, *id.* at 68. Whether an out-of-court statement qualifies as "testimonial" is governed by this Court's "'primary purpose' test." *Ohio v. Clark*, 576 U.S. 237, 244 (2015) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). "[T]he question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the

conversation was to 'creat[e] an out-of-court substitute for trial testimony'" in a criminal prosecution. *Id.* at 245 (quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011)). If a statement lacks this primary purpose, its "admissibility . . . is the concern of state and federal rules of evidence, not the Confrontation Clause." *Bryant*, 562 U.S. at 359.

The extent of involvement of law enforcement in procuring an out-of-court statement informs whether its primary purpose was to create a substitute for trial testimony in a criminal prosecution. A statement made at a police station when there is no ongoing emergency is more likely to be testimonial, while "statements to individuals who are not law enforcement officers . . . are much less likely to be testimonial." *Clark*, 576 U.S. at 246.[2] Thus, in *Clark*, this Court held that a child's statements to his schoolteacher relating abuse by the defendant were non-testimonial, even though the teacher was required to report suspected abuse to law enforcement, because the primary purpose of the conversation was to ensure the child's safety, not "to gather evidence for [defendant's] prosecution." *Id.* at 247.

Applying the primary purpose test, this Court has held that forensic test results are testimonial if law enforcement is centrally involved in their creation.

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[2] A statement made to a police officer is not necessarily testimonial, however; for example, such a statement will be non-testimonial if made for the primary purpose of ending an immediate threat. See *Bryant*, 562 U.S. at 361-362; *Davis*, 547 U.S. at 822.

See *Bullcoming v. New Mexico*, 564 U.S. 647, 665 (2011) (certification of blood-alcohol level was testimonial, where "a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations"); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009) (test result showing presence of cocaine was testimonial where law enforcement requested test, as "forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution").

The Illinois Supreme Court, in the case relied upon by the court below, correctly applied this Court's primary purpose test to conclude that autopsy reports in Illinois are usually non-testimonial because their primary purpose is not to create a substitute for trial testimony at a criminal prosecution. *People v. Leach*, 2012 IL 111534, ¶¶ 125-137. The court recognized that an autopsy report could be testimonial "in the unusual case in which the police play a direct role," such as "by arranging for the exhumation of a body to reopen a 'cold case.'" *Id.* ¶ 133.[3] The

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[3] At the time of its decision, the Illinois Supreme Court did not have the benefit of *Clark*, and instead applied *Williams v. Illinois*, 567 U.S. 50 (2012), a divided decision in which members of this Court endorsed three formulations of the primary purpose test. See *Williams*, 567 U.S. at 84-86 (Alito, J., plurality op.) (evaluating whether forensic report accused defendant); *id.* at 103 (Thomas, J., concurring in judgment) (considering whether report satisfied "solemnity" test); *id.* at 135 (Kagan, J., dissenting) (analyzing whether "statement was made for the primary purpose of establishing past events potentially relevant to later criminal prosecution") (internal quotations omitted). The Illinois Supreme Court concluded correctly that

Illinois Appellate Court, applying *Leach*, found that this case did not fit within that exception. Pet. App. A, ¶¶ 131-133.

Illinois's rule that an autopsy report is usually not testimonial rests on the neutral public-health role of a medical examiner under Illinois law. A medical examiner must, in every case involving a "'sudden or violent death, whether apparently suicidal, homicidal, or accidental,'" investigate the cause of death. *Leach*, 2012 IL 111534, ¶ 126 (quoting 55 Ill. Comp. Stat. 5/3-3013(a)). This public health duty exists independent of law enforcement. And "even when the police suspect foul play and the medical examiner's office is aware of this suspicion, an autopsy might reveal that the deceased died of natural causes and, thus, exonerate a suspect." *Ibid.* In other words, in Illinois the autopsy is required by law regardless of whether the death appears or is deemed to be homicidal or accidental, with the medical examiner "not acting as an agent of law enforcement, but as one charged with protecting the public health." *Id.* ¶ 129.

Thus, as the Illinois Supreme Court reasoned, an autopsy report will usually be non-testimonial because the "primary purpose" behind the report in most cases is

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the autopsy report at issue did not qualify as testimonial under any of the three *Williams* tests. See *Leach*, 2012 IL 111534, ¶¶ 120-122, 131-132. But petitioner's argument that the court misapplied *Williams*, Pet. 14-17, is ultimately beside the point. This Court's opinion in *Clark* reinforces that the Illinois Supreme Court correctly focused its analysis on the extent to which law enforcement was involved in the autopsy process in discerning whether the primary purpose test was satisfied.

to memorialize conclusions generated as part of "the normal course of operation of a medical examiner's office." *Id.* ¶ 130. To be sure, such a report could ultimately "be used in litigation of some sort, either civil or criminal" depending on its conclusion: a finding of "accidental death" could be used in litigating "claims of product liability, medical malpractice, or other tort"; a finding of "suicidal death" could be relevant "in a lawsuit over proceeds of a life insurance policy"; and "a finding of homicide may be used in a subsequent prosecution of the accused killer." *Ibid.* But the report's "primary purpose" was neither to accuse a particular suspect nor provide evidence at a criminal trial. *Ibid.*[4]

The majority of courts to have considered autopsy reports under this Court's primary purpose test have similarly concluded that they are usually non-testimonial. See *James*, 712 F.3d at 97-99 (routine autopsy conducted pursuant to New York law to determine unknown cause of death not testimonial); *Ackerman*, 51 N.E.3d at 185-186 (same under Indiana law); *Maxwell*, 9 N.E.3d at 950-952 (same under Ohio law); *People v. Dungo*, 286 P.3d 442, 450 (Cal. 2012) (same under California law); see also *State v. Hutchison*, 482 S.W.3d 893, 911-912 (Tenn. 2016) (holding autopsy report, prepared in that case under typical circumstances, was not

[4] Statistics confirm that in Illinois the medical examiner serves a neutral public health function. In 2017, the year of Fitch's death, the Cook County Medical Examiner completed 3,335 autopsies, and categorized only 840 deaths as homicides. See Office of Cook County Medical Examiner, 2017 Annual Report, https://tinyurl.com/ycqhretr (last visited Jan. 6, 2021).

testimonial); *Medina*, 306 P.3d at 62 (same). Like the Illinois Supreme Court, the high courts of Indiana, Ohio, and California emphasized the neutral role of medical examiners under each State's statutory scheme in holding that autopsy reports are generally non-testimonial. See *Ackerman*, 51 N.E.3d at 185-186 (autopsy reports generally not testimonial due to coroner's neutral public health role under Indiana law); *Maxwell*, 9 N.E.3d at 950-952 (autopsy reports generally not testimonial given primary public-health function served by autopsies under Ohio law); *Dungo*, 286 P.3d at 450 (autopsy reports not testimonial given that autopsies are required in any case of accident, suicide, or homicide for public health purposes). And the high courts of both Indiana and Ohio expressly agreed with *Leach* that a report could be testimonial if law enforcement played a more central role in its creation. See *Ackerman*, 51 N.E.3d at 187; *Maxwell*, 9 N.E.3d at 951-52.

As these cases confirm, the Illinois Appellate Court's decision below was consistent with this Court's precedents because the primary purpose of the autopsy report was not to create a substitute for trial testimony at a criminal prosecution. Accordingly, petitioner has failed to demonstrate that the case warrants certiorari. See S. Ct. R. 10(c).

B. Petitioner fails to identify a conflict in authority that warrants this Court's review.

Nor has petitioner set forth a persuasive case that there is a conflict among state high courts and federal courts of appeal warranting this Court's review.

Petitioner correctly notes that some jurisdictions have held, unlike the decision below, that an autopsy report was testimonial. Pet. 18-19. But the differing outcomes derive largely from application of the same primary purpose test to different factual scenarios.

For starters, though, petitioner mischaracterizes the purported split in two ways. First, it is not the case that courts "are sharply divided over the question of whether an autopsy report introduced at a murder trial *may* constitute testimonial hearsay." Pet. 11 (emphasis added). All courts agree that an autopsy report may be testimonial in the right circumstances—including the Illinois Supreme Court in *Leach* and the Illinois Appellate Court in the decision below. Second, it is inaccurate to say that courts are intractably divided over "what . . . circumstances" render an autopsy report testimonial. *Ibid.* Most courts agree that the outcome turns on the extent of law enforcement involvement—either under the pertinent statutory scheme or the facts of the case.

As a result, courts that have held that an autopsy report was testimonial have relied on features of state law or factual scenarios giving law enforcement a greater role in the autopsy process. For example, the Pennsylvania Supreme Court relied on features of Pennsylvania law linking autopsies to law enforcement to deem an autopsy report testimonial, *Commonwealth v. Brown*, 185 A.3d 316, 321-322, 329 (Pa. 2018) (emphasizing extent to which medical examiner must cooperate with

prosecutorial authority), and the Eleventh Circuit relied on similar features of Florida law in reaching the same result, *United States v. Ignasiak*, 667 F.3d 1217, 1231-1232 (11th Cir. 2012) (emphasizing that Medical Examiners Commission includes prosecutors and law enforcement officers in key oversight roles). The New Mexico Supreme Court, in adopting a rule that "autopsy reports regarding individuals who suffered a violent death are testimonial," stressed that the autopsy in that case "was performed as part of a homicide investigation," that "two police officers attended the autopsy," and that New Mexico law required a medical examiner to "report her findings to the district attorney." *Navarette*, 294 P.3d at 440-441. And the New Jersey Supreme Court similarly stressed the presence of law enforcement officers at an autopsy in deeming an autopsy report testimonial. *State v. Bass*, 132 A.3d 1207, 1225 (N.J. 2016). The results of those cases do not conflict with the holding here, because Illinois law does not similarly link the medical examiner to prosecutorial authorities, and law enforcement neither directed nor attended Fitch's autopsy.

In only one case has a state high court concluded that an autopsy report was testimonial without also relying on the involvement of law enforcement: *State v. Kennedy*, 735 S.E.2d 905 (W. Va. 2012).[5] However, the State in that case conceded

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[5] Petitioner also cites similar precedent from Texas's intermediate appellate court. See Pet. 19 (citing *Henriquez v. State*, 580 S.W.3d 421 (Tex. App. Ct. 2019)). Because that case could be overruled or refined when Texas's court of last resort

that the report was testimonial, *id.* at 912, and the West Virginia court did not have the benefit of this Court's opinion in *Clark*, which makes clear that law enforcement involvement is the appropriate focus.

In sum, the differing outcomes as to whether an autopsy report is testimonial are for the most part reconcilable based on application of this Court's *Clark* analysis, focusing on the role of law enforcement either under state law governing autopsies generally, or the role of law enforcement in the circumstances of the case. Accordingly, petitioner has failed to demonstrate a conflict in authority that warrants this Court's review, and the Court should deny certiorari to resolve the issue, as it has done before. See, *e.g.*, *Ackerman v. Indiana*, No. 16-5551 (declining to review whether autopsy report was testimonial based on same alleged conflict in authority, excepting *Commonwealth v. Brown*); see also *supra* p. 10.

III. This Court Should Decline To Resolve Any Broader Confrontation Clause Issues Posed By Forensic Test Results In The Context Of A Case Involving An Autopsy Report.

As discussed, there is no split in authority as to the application of the Confrontation Clause to autopsy reports that warrants this Court's review. To the extent that there may be disagreement about the application of the Confrontation Clause to forensic testing results generally, see *Stuart v. Alabama*, 139 S. Ct. 36

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addresses the issue, it does not support the grant of certiorari. See S. Ct. R. 10 (criteria favoring certiorari include conflicts among state courts "of last resort").

(2018) (Gorsuch, J., dissenting from denial of certiorari in case involving blood-alcohol-level testing), this Court should decline to resolve those issues in a case involving an autopsy report.

To begin, autopsy reports do not implicate the same concerns as forensic evidence prepared at the request of law enforcement for use in criminal prosecution. Previously, this Court has reviewed Confrontation Clause claims where the protections afforded by the clause were clearly implicated by the presentation of evidence prepared for purposes of prosecution to establish an element of the offense or the identity of the offender. See *Williams*, 567 U.S. 50 (reviewing whether report generated by DNA analysis was testimonial, where analysis was performed by state crime laboratory to establish identity of perpetrator of sexual assault); *Bullcoming*, 564 U.S. 647 (reviewing whether certification of blood-alcohol level was testimonial, where police requested analysis to establish element of offense of driving while intoxicated); *Melendez-Diaz*, 557 U.S. 305 (reviewing whether certificate of analysis showing presence of cocaine was testimonial, where law enforcement requested test in prosecution for cocaine trafficking).

But autopsy reports are generally not comparable to laboratory analyses ordered by law enforcement to further criminal investigations, and, accordingly, do not fit cleanly within this line of cases. As this Court noted in *Melendez-Diaz*, laboratories devoted to analyzing forensic evidence, such as testing of controlled

substances, are often "administered by law enforcement agencies" and may feel pressure to generate results favorable to the prosecution. 557 U.S. at 318. Autopsy reports do not carry a similar risk of abuse. In the typical case and under the laws of many States, as explained, see *supra* pp. 14-16, a medical examiner operates independently of law enforcement. This is certainly true in Illinois, where a state statute requires that an autopsy be performed in all cases involving "sudden or violent death," and the vast majority result in reports stating that a homicide did *not* occur, see *supra* pp. 14-15 & n.4. As discussed, then, *Clark*, where this Court concluded that the lack of law enforcement involvement rendered out-of-court statements concerning child abuse non-testimonial, is a more analogous case. See *Mattox*, 890 N.W.2d at 266-68 (finding toxicology report completed at request of medical examiner to be non-testimonial under *Clark*).

While petitioner argues that "medical examiners are no more immune than other forensic analysts to . . . human error," Pet. 22, unique characteristics of autopsies make it easier to identify possible mistakes and scrutinize the conclusions of the examining doctor. As this case illustrates, a medical examiner creates a photographic record and keeps extensive contemporaneous notes of her objective observations, such as wound measurements, quantities of observed bodily fluids (such as the bloody fluid here in the chest cavity indicative of internal bleeding), and the weight and characteristics of internal organs. Only after recording this

data at each step of the autopsy does she complete a report that explains her conclusions through reference to those recorded facts. As a result, another forensic pathologist can review an autopsy record and form an independent conclusion about the cause and manner of death, as Zakariya did here. Indeed, pathologists can reach different conclusions based on their interpretation of the same data. See, *e.g.*, *People v. King*, 2020 IL 123926, ¶¶ 14, 18 (one pathologist attributed death to manual strangulation and another to "cardiac event"); *People v. Radford*, 2020 IL 123975, ¶¶ 14-15 (one pathologist attributed death to accidental fall and another to blunt force trauma from abuse).

Finally, petitioner's concern that "an unscrupulous prosecutor" might "replace an analyst of questionable credibility with another, less problematic expert," Pet. 22, is unfounded. For one thing, at least under Illinois law, a defendant has the right to subpoena the autopsy report's author to expose defects in the underlying opinion. 725 Ill. Comp. Stat. 5/115-5.1. He may also retain his own expert to reexamine the autopsy notes, photographs, and report and provide an independent opinion. Because of these backstops, an autopsy report is readily subject to scrutiny and does not pose the same problems as other types of forensic analysis. And any concerns about the Confrontation Clause concerns posed by such forensic reports should await a more appropriate vehicle for their resolution.

IV. This Court Should Deny Review Because Any Error In Admitting The Autopsy Report Was Plainly Harmless And Would Not Warrant Reversal Of Petitioner's Conviction.

This case also provides a poor vehicle to resolve whether autopsy reports are testimonial because any error here was plainly harmless and would not invalidate petitioner's conviction. See *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (harmless violation of Confrontation Clause does not warrant relief).

The State argued below that the error was harmless. See *supra* p. 7. The Illinois Appellate Court, finding that no error occurred, did not address whether an error would be harmless. Pet. App. A, ¶ 136. But petitioner has incorporated harmlessness into his question presented by emphasizing the importance of the autopsy report to the State's theory of the case. Pet. i. Moreover, even if this Court were to decline to address harmlessness and hold that the autopsy report was testimonial, reversing the state appellate court's judgment as to that issue, the harmlessness of the error would bar relief on remand.

And the error was plainly harmless. The autopsy report simply described two gunshot wounds and concluded that Fitch died as a result of them. There is no dispute as to these conclusions. See Pet. App. A, ¶ 5. In any event, evidence apart from the autopsy report that is unchallenged here, including Zakariya's expert opinion, established both propositions. In such circumstances, where an independent expert has testified to cause of death, courts have deemed admission of

autopsy reports to be at most harmless error. See, *e.g.*, *Henriquez*, 580 S.W.3d at 429-430 (error in admitting autopsy report harmless in light of second doctor's independent conclusion about cause of death); *Brown*, 185 A.3d at 330-333 (error harmless because testifying expert formulated independent opinion based on photographs taken at autopsy as well as details in autopsy report); *Leach*, 2012 IL 111534, ¶¶ 146-150 (any error in admitting autopsy report, if one occurred, harmless in light of independent expert testimony).

The conclusion that petitioner complains was prejudicial—that Fitch's gunshot wounds resulted from two separate bullets—was not even contained in the autopsy report. This issue was addressed solely by Zakariya at trial, who testified, subject to thorough cross-examination, that the trajectories of the gunshot wounds were inconsistent with a single-bullet theory. But petitioner does not challenge the admission of Zakariya's testimony here—nor could he, as an expert may properly testify to conclusions based on evidence that is inadmissible hearsay and may even explain how that evidence supports his opinion. *E.g.*, *People v. Nieves*, 739 N.E.2d 1277, 1284 (Ill. 2000); see also *Williams*, 567 U.S. at 58 (Alito, J., plurality op.) ("Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.").

Instead, petitioner complains that the trial court admitted portions of a videotaped interview in which the prosecutor, in posing questions to petitioner, referred to the possibility of two gunshots based on information obtained at the autopsy. See Pet. 12, 17. But the state appellate court explained that the questions were presented for a non-hearsay purpose, and jurors were instructed that the statements "were not evidence." Pet. App. A, ¶¶ 104, 106. Petitioner does not challenge that ruling now, and the Confrontation Clause is not implicated if evidence is admitted for a non-hearsay purpose. *Crawford*, 541 U.S. at 59 n.9; see also *Tennessee v. Street*, 471 U.S. 409, 414 (1985). Thus, the only substantive evidence in this record that supported the two-gunshot theory was Zakariya's testimony, and nothing in the autopsy report itself could be deemed prejudicial on the theory petitioner advances.

Because the error that petitioner alleges was harmless, and indeed, petitioner does not even argue that any information contained in the autopsy report (as opposed to Zakariya's unchallenged and properly admitted testimony) was prejudicial, this Court should deny review to render an advisory opinion on whether the autopsy report was testimonial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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