No. 12-1256

IN THE
SUPREME COURT OF THE UNITED STATES

State of New Mexico,

Petitioner,

v.

Arnoldo Navarette,

Respondent.

On Petition for a Writ of Certiorari
to the New Mexico Supreme Court

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent Arnoldo Navarette respectfully requests that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

1. In 1993, Reynaldo Ornelas and his brother Daniel were shot. Reynaldo was killed and Daniel was wounded but survived. Witnesses at the scene stated that Reynaldo was shot while standing next to a parked car driven by Dolores "Lolo" Ortega and in which respondent was a passenger. An eyewitness, Miguel Montoya, testified that Ortega was the shooter. Pet. App. 3. Two other eyewitnesses offered contrary reports about the shooter's identity. *Id.*

Police officers referred Reynaldo's death to the New Mexico Office of the Medical Investigator (OMI) as a homicide. Pet. 7. As "part of [the] homicide investigation," Dr. Mary Dudley, a medical examiner for OMI, conducted an autopsy on Reynaldo's body. Pet. App. 4. Prior to conducting the autopsy, the investigating police officers told Dr. Dudley their theory of the homicide – that "the victim '[r]eportedly' had been shot by 'an occupant of the vehicle' that he approached in the street.'" Pet. 9 n.2. And two of the three investigating officers on the case were present in the examining room when the autopsy was conducted. Pet. 7.

In addition to reciting the officers' theory of the murder, Dr. Dudley concluded in the autopsy report that the manner of death was homicide from a gunshot wound to the chest. Dr. Dudley further concluded that Reynaldo was a victim of a distant range shooting because she did not see any evidence of a close range shooting. In particular, she found no evidence of soot, stippling, or gunpowder on the decedent's clothing or body. Pet. App. 5.

Section 24-11-7 of the New Mexico Statutes (which had long been in effect at the time of the autopsy) provides that when, as here, it appears that a death was caused by a criminal act,

"[t]he pathologist shall sign the report under oath and deliver it to the state, district or deputy medical investigator within a reasonable time."[1] While nothing in the record indicates whether the report incorporated this oath requirement, Dr. Dudley duly signed the report. The report was then delivered to the district attorney to enable further investigation. Pet. App. 15-16.

2. Some years later, the State charged respondent with murder and aggravated battery with a deadly weapon.[2] At respondent's trial, the crucial dispute was over "who shot Reynaldo – the driver [Ortega], who was closest to Reynaldo, or Navarette, who was several feet away from Reynaldo." Pet. App. 5.

In order to "assist the jury in assessing who shot the victims," Pet. App. 3, the State sought to introduce testimony concerning the autopsy report. Although Dr. Dudley was still working as a forensic pathologist in a different state, and thus was presumably available to testify, the prosecution never called Dr. Dudley to the stand. Instead, the prosecution elected to call only Dr. Ross Zumwalt, the Chief Medical Investigator for the State of New Mexico, as an expert witness to discuss the report. Dr. Zumwalt "neither participated nor observed Dr. Dudley perform the autopsy." Pet. App. 4.

Respondent objected to Dr. Zumwalt's reliance on the autopsy report, asserting that it would violate the Sixth Amendment's Confrontation Clause for Dr. Zumwalt to disclose the contents of Dr. Dudley's report without putting her on the stand as well. Pet. App. 4. The trial judge heard preliminary testimony from Dr. Zumwalt, and then asked the prosecution whether his testimony was necessary to its case. Pet. App. 4. The prosecution answered in the affirmative, and the court overruled the respondent's objection. Dr. Zumwalt thus "was

[1] The full text of this section and other relevant sections of the New Mexico Statutes is attached as Appendix A.

[2] The State also separately prosecuted Ortega for his alleged role in the shootings. He was acquitted of the charges against him.

permitted to testify before the jury and to rely on the contents of the autopsy report." Pet. App. 4.

Though the autopsy report itself was not offered into evidence, the "State referred Dr. Zumwalt to the contents of the autopsy report throughout his direct examination." Pet. App. 4. For example, Dr. Zumwalt testified as to "the cause and manner of Reynaldo's death" and offered his opinion, "based on the observations recorded in the autopsy report, as to whether the gun was fired from within two feet of the victim." Pet. App. 3. To support his opinion, Dr. Zumwalt testified that, to classify the range of the shooting, pathologists routinely look for soot, stippling, or gunpowder when examining a gunshot wound, and that Dr. Dudley noted that she had not seen any such evidence. Pet. 5-6. In its closing argument to the jury, the prosecution "emphasized Dr. Zumwalt's testimony" in explaining its theory that the shooter could not have been the driver of the car. Pet. App. 5-6.

The jury found respondent guilty of first-degree murder and aggravated battery with a deadly weapon. He was sentenced to life in prison on the murder charge and to three years on the battery charge. Pet. App. 27-28.

3. On direct appeal, the New Mexico Supreme Court unanimously reversed respondent's convictions on Confrontation Clause grounds and remanded for a new trial. Applying *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny, the New Mexico Supreme Court first held that the autopsy report that Dr. Zumwalt referenced and repeated at trial was "testimonial" evidence. Pet. App. 13. In particular, the New Mexico Supreme Court held that since state law concerning autopsies "conducted in the context of a death caused by this type of injury will automatically trigger a duty by medical examiners to report their findings to the district attorney," Pet. App. 17, "[i]t is axiomatic that Dr. Dudley made the statements in the

autopsy report . . . with the understanding that they may be used in a criminal prosecution." Pet. App. 14-15. Lest there be any doubt, the New Mexico Supreme Court noted that Dr. Zumwalt himself conceded that it was "immediately clear" that the autopsy report was "part of a homicide investigation." Pet. App. 16. And, in fact, the autopsy was conducted with two of the three investigating officers in the room. Pet. App. 14.

The New Mexico Supreme Court cautioned that it was not necessarily holding "that all material contained within an autopsy file is testimonial." Pet. App. 22. For instance, it "note[d] that an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause." *Id.* But in this case, Dr. Zumwalt's testimony concerning the absence of soot, stippling, and gunpowder was "not based on any scientific technique that produces raw data, but depend[ed] entirely on the subjective interpretation of the observer, who in this case was Dr. Dudley." Pet. App. 21.

Having found that Dr. Zumwalt disclosed testimonial statements from the autopsy report, the court turned to the State's primary argument – namely, that even if the report was testimonial, Dr. Zumwalt was still entitled to repeat its contents to the jury because he was an expert witness and the report itself was never introduced into evidence. The New Mexico Supreme Court rejected this argument, noting that five of this Court's Justices concluded in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), that "an out-of-court statement that is disclosed to the fact-finder as the basis for an expert's opinion is offered for the truth of the matter asserted" and is inadmissible absent putting the declarant of the statement on the stand. Pet. App. 12.

REASONS FOR DENYING THE WRIT

The State seeks certiorari primarily to challenge the New Mexico Supreme Court's holding that the pathologist's statements in the autopsy report in this case were "testimonial." The New Mexico Supreme Court's holding, however, is correct and does not warrant further review. It rests heavily on particulars of New Mexico law and the homicide investigation the report was created to aid. In addition, the holding does not conflict with the holding of any other court.

The State also asks this Court to overrule fundamental aspects of its confrontation jurisprudence and to grant review in order to engage in a harmless error analysis that it never asked the New Mexico Supreme Court to perform. But this Court seldom grants certiorari to reconsider prior holdings or to undertake harmless error review (even when the issue was pressed below). The State has not provided any good reason for taking either extraordinary step here.

I. The New Mexico Supreme Court's Holding That The Autopsy Report In This Case Was Testimonial Does Not Warrant Further Review.

The State does not dispute that if the autopsy report in this case is testimonial, then respondent's Sixth Amendment right of confrontation, as explicated in *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny was violated. Rather, the State challenges only the New Mexico Supreme Court's holding that the autopsy report here is testimonial. That holding is correct and does not warrant further review.

A. The New Mexico Supreme Court's Holding In This Case Was Correct.

This Court's precedent dictates that an autopsy report is testimonial, when, as here, it was created in concert with police officers as part of a homicide investigation concerning a shooting and transmitted directly to the district attorney.

1. In *Crawford*, this Court determined that the Confrontation Clause forbids "admission of *testimonial* statements of a witness who did not appear at trial unless he was unavailable to

testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 53-54 (emphasis added). In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), this Court held that formalized forensic reports fall within the "core class of testimonial statements" described in *Crawford*. *Melendez-Diaz*, 557 U.S. at 310. Specifically, such reports are created "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 311 (quoting *Crawford*, 541 U.S. at 52). Furthermore, the reports in *Melendez-Diaz* – sworn laboratory reports asserting that bags that the police seized from the defendant contained cocaine – were transmitted directly to the police and offered "the precise testimony the analysts would be expected to provide if called at trial." *Id.* at 310. This Court "safely assume[d] that the analysts were aware of the [reports'] evidentiary purpose," and thus held them to be testimonial. *Id.* at 311.

The parties and the Justices treated *Melendez-Diaz* as covering autopsy reports created to further homicide investigations. The Commonwealth specifically cited cases involving autopsies and suggested that they were no different from the drug reports at issue. *See* Resp. Br. 51-54, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (No. 07-591). And in his dissent, Justice Kennedy likewise noted that the Court's holding would extend to autopsy reports. *See Melendez-Diaz*, 557 U.S. at 335 (Kennedy, J., dissenting) (citing Comment, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 Calif. L. Rev. 1093, 1094, 1115 (2008)). The majority never disputed these suggestions. To the contrary, the Court's opinion twice referenced autopsy and coroner's reports as among the types of reports that its holding implicated. *See Melendez-Diaz*, 557 U.S. at 318 n.5 (referencing "autopsies"); *id.* at 322 (discussing "coroner's reports").

2. Even if *Melendez-Diaz* does not compel that *all* autopsy reports conducted during homicide investigations are testimonial, it surely dictates that the report *in this case* is testimonial because it was created in concert with the police and transmitted directly (pursuant to state law) to the district attorney.

Under New Mexico law, an autopsy must be conducted when a state medical investigator "suspects a death was caused by a criminal act or omission." N.M. Stat. Ann. § 24-11-7 (2012). As noted by the New Mexico Supreme Court, "this case involved a violent death by shooting in New Mexico, which would ordinarily raise a suspicion that the death was caused by a criminal act." Pet. App. 15. Furthermore, two of the three investigating police officers attended the autopsy, *id.* 14, and before the autopsy was conducted, the officers told the pathologist their theory of how the killing had transpired, Pet. 9 n.2. After the pathologist concluded that the cause of death was homicide, the report was transmitted, pursuant to New Mexico law, "to the district attorney," N.M. Stat. Ann. § 24-11-8, to further the criminal investigation. Pet. App. 14-15.

Given these circumstances and the statutory framework, there can be no doubt that the New Mexico Supreme Court correctly determined that "[t]he observations, findings, and opinions within the report are statements that were made when the pathologist understood that the statements might be used in a criminal prosecution." Pet. App. 17.

3. Contrary to the State's argument, this Court's recent decision in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), does not undermine the force of *Melendez-Diaz* as applied to the autopsy report in this case. The report at issue in *Williams* was a privately produced DNA report prepared to enable further forensic testing. The nature of such a report raises the question of whether the author of every preliminary report in a long chain of analysis is subject to the

Confrontation Clause. *See Williams*, 132 S. Ct. at 2246-48 (Breyer, J., concurring). By contrast, the autopsy report here constituted Dr. Dudley's final forensic work product and was submitted directly to the district attorney. It thus resembles the drug reports in *Melendez-Diaz* and the BAC report in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), not the report in *Williams*.

Furthermore, while Justice Thomas's separate opinion in *Williams* emphasized that forensic reports must contain "indicia of solemnity" in order to be testimonial, *id.* at 2259 (Thomas, J., concurring in the judgment) (internal quotation marks and citation omitted), the report here satisfies that test. As Justice Thomas has explained, his formality test is primarily intended to identify the kinds of statements that the common-law right of confrontation prohibited from being introduced without the declarants being put on the stand. *See id.* at 2260*; Davis v. Washington*, 547 U.S. 813, 837-38 (2006) (Thomas, J., dissenting). Autopsy and coroner's reports have historically been inadmissible in American courts absent the opportunity to cross-examine their authors. *See, e.g.*, *Diaz v. United States*, 223 U.S. 442, 450 (1912) (noting that autopsy report could not be admitted without the consent of the accused "because the accused was entitled to meet the witnesses face to face"); Note, *Evidence—Official Records—Coroner's Inquest*, 65 U. Pa. L. Rev. 290-91 (1917), *cited in Melendez-Diaz*, 557 U.S. at 322.

Even if history were not dispositive, the autopsy report in this case meets Justice Thomas's test because of the formality required under New Mexico state law. Justice Thomas's test is satisfied whenever a statement is made under oath. *Williams*, 132 S. Ct. at 2260-61 (Thomas, J., concurring in the judgment); *accord Melendez-Diaz*, 557 U.S. at 329-30 (Thomas, J., concurring). New Mexico law in fact requires that the pathologist conducting the autopsy "sign

the report under oath." N.M. Stat. Ann. § 24-11-7. Thus, while the New Mexico Supreme Court never mentioned the state-law oath requirement – probably because the State never sought judicial notice of the report in that court or argued there that the report was insufficiently formal to be testimonial – the state-law requirement dictates that the autopsy report was constructively signed under oath and thus must be considered "sworn." At the very least, the statutory oath requirement imputes formality that renders the report an "*unsworn ex parte* affidavit" of the sort that this Court in *Crawford* (in an opinion joined in full by Justice Thomas) explained constitutes a testimonial statement. 541 U.S. at 52 n.3.

B. The State Cannot Show That Any Other Court Would Have Held The Autopsy Report In This Case To Be Nontestimonial.

1. As the State concedes, since this Court's decision in *Melendez-Diaz,* numerous federal courts of appeals and state courts of last resort have held that autopsy reports created under circumstances similar to those here are testimonial. *See, e.g.*, *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012); *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011), *aff'd on other grounds*, *Smith v. United States*, 133 S. Ct. 714 (2013); *Commonwealth v. Avila*, 912 N.E.2d 1014 (Mass. 2009); *State v. Locklear*, 681 S.E.2d 293 (N.C. 2009); *Cuesta-Rodriguez v. State*, 241 P.3d 214 (Okla. Crim. App. 2010), *cert. denied*, 132 S. Ct. 259 (2011); *State v. Kennedy*, 735 S.E.2d 905 (W. Va. 2012).

2. On the other hand, the State summarily asserts that seven courts of appeals and state courts of last resort have held "autopsy reports to be nontestimonial." Pet. 19. It does not appear, however, that any of these courts would have held the autopsy report *in this case* to be nontestimonial.

As an initial matter, most of the cases the State cites are incapable of conflicting with the decision below because they were decided before *Melendez-Diaz*. *See United States v. De La Cruz*, 514 F.3d 121 (1st Cir. 2008); *People v. Freycinet*, 892 N.E.2d 843 (N.Y. 2008); *State v. Craig*, 853 N.E.2d 621 (Ohio 2006), *cert. denied*, 549 U.S. 1255 (2007); *State v. Cutro*, 618 S.E.2d 890 (S.C. 2005). These decisions generally held that autopsy reports could not be testimonial because they could be characterized as "business records" under modern evidence law. But this Court rejected this reasoning in *Melendez-Diaz*, holding that forensic reports are testimonial "[w]hether or not they qualify as business or official records . . . prepared specifically for use at [a criminal] trial." 557 U.S. at 324.

The State points to only three cases decided after *Melendez-Diaz* holding that autopsy reports were nontestimonial.[3] But none of these courts actually adopted a categorical rule to this effect. Instead, each of these courts issued holdings based on the particular circumstances of the individual case before them. And none of these fact-bound holdings conflict with the New Mexico Supreme Court's holding in this case.

In *United States v. James*, 712 F.3d 79 (2d Cir. 2013), in stark contrast to this case, the autopsy was completed "substantially before any criminal investigation into [the] death had begun," and "the autopsy report itself refer[red] to the cause of death as 'undetermined.'" *Id.* at 99. Indeed, at the time of the autopsy, there was no evidence that law enforcement had been "notified that [the] death was suspicious, or that any medical examiner expected a criminal investigation to result from [the autopsy]." *Id*. Under these circumstances, the Second Circuit

[3] The State cites two additional cases that postdate *Melendez-Diaz*, but it acknowledges these cases were resolved "without deciding whether the report itself was testimonial." Pet. 20 (citing *State v. Joseph*, 283 P.3d 27 (Ariz. 2012) (en banc), *cert. denied*, 133 S. Ct. 936 (2013); *State v. Mitchell*, 4 A.3d 478 (Me. 2010), *cert. denied*, 133 S. Ct. 55 (2012)).

determined that the autopsy report "was not prepared primarily to create a record for use at a criminal trial." *Id.* But the Second Circuit expressly refused to rule beyond those specific facts, emphasizing that autopsy reports call for a "case-by-case" determination, and that "[n]o court can say whether a particular kind of statement is testimonial until it has considered that kind of statement in an actual case." *Id.* at 97 (quoting *United States v. Burden*, 600 F.3d 204, 224 (2d Cir. 2010)) (internal quotation marks omitted).

Similarly, in *People v. Leach*, 980 N.E.2d 570 (Ill. 2012), the Illinois Supreme Court based its decision on specific circumstances in that case that differ from those present here. In *Leach*, the Illinois Supreme Court held that an autopsy report following a strangulation – but neither "done at the specific request of the police" nor formalized under state law – was nontestimonial. *Id.* at 591. Like the Second Circuit, the Illinois Supreme Court declined to adopt a categorical rule, explaining that it was "not prepared to say that the report of an autopsy conducted by the medical examiner's office can never be testimonial in nature." *Id.* at 593. To the contrary, the court conceded that such reports "should be deemed testimonial" when "the police play a direct role . . . and the purpose of the autopsy is clearly to provide evidence for use in a prosecution." *Id*. at 592.

The Illinois Supreme Court has not yet had occasion to elaborate on the specifics of its "direct role" comment, but the circumstances surrounding the autopsy in this case satisfy the plain meaning of that phrase. Not only did the investigating police officers attend the autopsy and relate their theory of the crime to the pathologist, Pet. 9 n.2, but the autopsy was conducted after "[p]olice officers referred Rey Ornelas's death as a homicide," Pet. 7.

Furthermore, even if the police in this case had not played a direct role in the autopsy, the formality of the report here distinguishes it from the one in *Leach.* The report in *Leach* "was

not certified or sworn in anticipation of its being used as evidence; it was merely signed by the doctor who performed the autopsy" without the backdrop of any state-law oath requirement. *Leach*, 980 N.E.2d at 592. Here, New Mexico law required the autopsy report to be signed under oath. *See* N.M. Stat. Ann. § 24-11-7.

Finally, in *People v. Dungo*, 286 P.3d 442 (Cal. 2012), the California Supreme Court held that a pathologist's statements in an autopsy report that "merely record[ed] objective facts" concerning a homicide victim were nontestimonial. *Id.* at 449. The court specifically noted, however, that because the prosecution did not introduce any "conclusions in [the] autopsy report as to the cause of [the decedent's] death," the court "need not determine whether such testimony, if it had been given, would have violated defendant's right to confront [the pathologist]." *Id.*; *see also id.* ("[W]e need not decide whether that entire report is testimonial in nature."). In addition, several Justices pointed out that no California law "mandated" that the autopsy report at issue "bear[] a formal certification." *Id.* at 452 (Werdegar, J., concurring).

Though the State tries to paint this case as involving only "objective facts" from the autopsy report, Pet. i., the testimony here, "in material respects," went beyond mere "objective markers" from the report. Pet. App. 21. Unlike the testimony relayed by the expert in *Dungo*, Dr. Zumwalt's testimony disclosed "subjective conclusion[s]" from the report to the jury. Pet. App. 22. For instance, Dr. Zumwalt "repeated Dr. Dudley's assertion in the report that this was a distant range shooting, because Dr. Dudley did not see any evidence of a close range shooting." Pet. App. 5. His assertion "depended entirely on the subjective interpretation of the observer, who in this case was Dr. Dudley." Pet. App. 21. Finally, in contrast to the autopsy report in *Dungo*, New Mexico state law mandated that the autopsy report in this case be signed under

oath. Accordingly, there is no way to know how the California Supreme Court would have decided this case.

C. This Case Is A Poor Vehicle For Addressing Whether Autopsy Reports In General Are Testimonial.

For three reasons, this case is a poor vehicle for addressing whether autopsy reports in general are testimonial.

1. The autopsy report is not part of the record in this case, nor did the State ask the New Mexico Supreme Court to take judicial notice of it. Pet. 8 n.1. Based on "practical considerations," this Court rarely grants certiorari to consider legal arguments in the first instance. *Adams v. Robertson*, 520 U.S. 83, 90 (1997). Thus, when a petitioner seeks review of a case without "an adequate factual and legal record," this Court should be wary of stepping into the dispute. *Id.* at 90-91. Such is the case here. Not only is the report absent from the record and the New Mexico Supreme Court opinion, but the State did not even argue in that court that the autopsy report was nontestimonial. *See* State's N.M. S. Ct. Br. 5-6.

The State tries to remedy this problem by noting that this Court allowed the State of Illinois to lodge the DNA report at issue in *Williams* and then went on to determine whether the report was testimonial. Pet. 8 n.1. This Court, however, did not grant certiorari in that case to consider the testimonial status of that report. Rather, this Court granted certiorari to "determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted into evidence." *Williams*, 132 S. Ct. at 2233 (internal quotation marks and citation omitted). The issue of whether the report was actually testimonial arose only because the State of Illinois, after this Court granted certiorari, exercised its "right, as the prevailing party" below to "defend its judgment on any ground

properly raised below whether or not that ground was relied upon, rejected, or even considered" by that court. *Yeager v. United States*, 557 U.S. 110, 126 (2009) (internal quotation marks omitted). As petitioner, the State does not have that right in this case.

2. Even if this Court were to ignore these broader prudential concerns, this case is a bad vehicle for resolving whether autopsy reports are testimonial because New Mexico appears to be an outlier in requiring autopsy reports to be signed under oath. Accordingly, if this Court were to hold that the report is testimonial, that holding might not give clear guidance with respect to reports from other states that lack such a statutory requirement.

To be sure, the State asserts in its petition that the report here "is neither certified nor sworn." Pet. 8. But the plain language of the New Mexico statute (which has been effect since the 1970s) could hardly be clearer: "The pathologist shall sign the report under oath . . . ." N.M. Stat. Ann. § 24-11-7. Therefore, at best, the State might argue that the pathologist here failed to follow this statutory requirement, somehow creating – in direct contravention of state law – an "informal" report. Such an argument, however, would embroil this Court in a dispute concerning the operation and effect of a state statute. This Court has a longstanding policy of avoiding such disputes; "when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question." *Harris Cnty. Comm'rs Court v. Moore*, 420 U.S. 77, 83 (1975).[4]

[4] New Mexico law contains a second formality requirement that may also be implicated by the autopsy report here. New Mexico's magistrate courts, which may hold "preliminary examinations in any criminal action," N.M. Stat. Ann. § 35-3-4, prohibit autopsy reports from being introduced unless they are "attached to a certification form approved by the Supreme Court," N.M. R. Crim. P. 6-608. Thus, the OMI typically attaches a "Case Disposition and Report Certification" to autopsy reports it creates, which includes an attestation by the medical investigator

3. Even if this Court held that the autopsy report here were nontestimonial, state law would still entitle respondent to a new trial at which the autopsy report would be inadmissible absent the author taking the stand. Under New Mexico Rule of Evidence 11-703, an expert is allowed to base his or her opinions on "facts" or "data" that are not admitted into evidence. N.M. R. Evid. 11-703. However, New Mexico law categorically bars experts from repeating any of the "opinions," as opposed to facts or data, articulated in another person's report when the report is not admitted into evidence. *See State v. Aragon*, 225 P.3d 1280, 1288-89 (N.M. 2010), *overruled on other grounds by State v. Tollarado*, 275 P.3d 110 (N.M. 2012); *O'Kelly v. State*, 607 P.2d 612, 614-15 (N.M. 1980). Yet here, Dr. Zumwalt disclosed Dr. Dudley's "subjective conclusion[s]" regarding the cause and manner of death. Pet. App. 22; *see also* Trial CD 9/29/10 at 11:30:29 ("[Dr. Dudley] said it was a distant range gunshot wound because she did not see any evidence of close-range firing.").[5] Accordingly, even if this Court reversed the New Mexico Supreme Court's constitutional holding, that court on remand would reach exactly the same conclusion on state law grounds.

D. The Testimonial Status of the Autopsy Report In This Case Does Not Present An Important Question Requiring This Court's Intervention.

For two reasons, the consequences of the New Mexico Supreme Court's holding are not significant enough to warrant this Court's intervention.

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certifying the authenticity and truth of the report under seal. *See* N.M. R. Crim. P. Form 9-506. (A recent example of such a completed certification can be found on the website of the New Mexico District Attorney's Association. Office of the Medical Investigator, Case Disposition and Report Certification (Mar. 18, 2013), *available at* http://2nd.nmdas.com/linked/mcdonald%20exhibit%2011.pdf.) Because the autopsy report is not part of the record, it is unclear if such a certification was attached or was required in this case by state court rules.

[5] Citations to the record in this brief and the State's are time-stamped because there is no written transcript. In certain judicial districts in New Mexico, parties are given only audio recordings, not written transcripts, for purposes of appellate review. *See* N.M. R. App. P. 12-221; N.M. R. Crim. P. 5-111.

1. As is typically the case, there is nothing in the record that would indicate that the pathologist who wrote the autopsy report at issue here is unavailable to testify in a new trial. Dr. Mary Dudley is currently serving as the Chief Medical Examiner of Jackson County, Missouri.[6] To be sure, she now works outside of New Mexico. But lay witnesses often move out of state, and no one has ever suggested that the mere necessity of airline travel excuses compliance with the Confrontation Clause. Indeed, the Office of the Medical Investigator set up a reimbursement system years ago that covers travel costs in these types of situations. *See* N.M. Code R. § 7.3.2.15(A)(2)(a) (2013).

2. This Court's immediate intervention is also unnecessary because – even in the infrequent case when a pathologist is unavailable to testify – autopsy reports are rarely necessary to enable the prosecution to prove its case. *See* Jeffrey F. Ghent, Annotation, *Necessity and Effect, in Homicide Prosecution, of Expert Medical Testimony as to Cause of Death*, 65 A.L.R.3d 283 (1975) ("In homicide cases, expert medical testimony as to the cause of death has usually, but not always, been held not necessary, the courts sometimes stating the general view that such testimony is not normally necessary." (footnotes omitted)). This is because the cause and manner of death in homicide cases is rarely contested (and, even when contested, can often easily be demonstrated by nontestimonial photographs). *See id.* In this sense, these reports differ markedly from the drug and BAC analyses held to be testimonial in *Melendez-Diaz* and *Bullcoming*, the contents of which are nearly always critical to the prosecution's case.

II. This Court Should Not Revisit The Primary Purpose Test In This Case.

The State does not challenge *Crawford*'s bedrock principle that the Confrontation Clause applies to statements from "witnesses" – in other words, "those who bear testimony" against the

[6] *See About Dr. Dudley*, Forensic Med. Investigation Inst., http://www.forensicmi.com/DrDudley.htm (last visited May 28, 2013).

accused. *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (internal quotation marks omitted). The State argues, however, in its second question presented that the "primary purpose" test used to identify who is a "witness" should be overruled or modified. There is no good reason for this Court to revisit its holding that a statement is testimonial if its primary purpose is to "establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

1. Contrary to the State's arguments, the "primary purpose" test is well grounded in history and produces logical results.

The history of the Confrontation Clause has already been thoroughly litigated in *Crawford* and subsequent cases. *See, e.g.*, *Crawford*, 541 U.S. at 50-57; *Davis*, 547 U.S. at 824-28. In *Crawford*, in particular, this Court considered that history at length and concluded that the Confrontation Clause applies to all statements produced for "an essentially investigative and prosecutorial function." 541 U.S. at 53. This Court subsequently crystallized the "primary purpose" test in *Davis* and applied it there and again in *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011). And this Court has applied the test in the context of forensic evidence. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009) (holding that forensic reports analyzing seized contraband fell within the "core class of testimonial statements" because of the reports' "evidentiary purpose").

The State gives no good reason for reconsidering the historical pedigree of the "primary purpose" test. The "primary purpose" test was adopted in *Davis* by eight Justices – not at the request of the defense bar, but rather at the request of the U.S. Solicitor General. As in *Crawford*, this Court grounded its holding in history. As this Court explained, "examining police officers" and others who "perform investigative and testimonial functions once performed

by examining Marian magistrates" produce the modern equivalent of the kinds of statements the Framers sought to subject to confrontation. *Davis*, 547 U.S. at 831 n.5. Contrary to the State's argument, there is no evidence that the Framers intended to limit the reach of the Confrontation Clause to "testimonial statements of the most formal sort." *Id.* at 826.

The State also asserts that there are "flaws inherent" in the primary purpose test, insofar as it "seem[s] to permit the very information it seeks to exclude." Pet. 22, 25. For example, the State notes that police reports are testimonial, even though "no reasonable police officer today would prepare a report expecting it to substitute for the officer's testimony at trial." *Id.* at 24-25. The State, however, misunderstands the primary purpose test.

The primary purpose test is not limited to an inquiry as to whether the purpose of the statement is to establish a fact for use *at trial*. Rather, as this Court explained in *Crawford*, statements made during police interrogations are testimonial because police perform "an essentially *investigative* and prosecutorial function." *See Crawford*, 541 U.S. at 53 (emphasis added). And in *Davis*, this Court held that a statement is testimonial when its primary purpose is to enable the police "to investigate a possible crime." 547 U.S. at 830; *see also* Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 Brook. L. Rev. 241, 251 (2005) (explaining why the primary purpose test includes statements made to assist pretrial investigations). Thus, police reports and similar statements are testimonial because they are made to further a law enforcement investigation of a potential crime.

2. Revisiting the primary purpose test here would be especially unwise because the State offers no coherent alternative to the test. The most one can glean from the State's petition is that it wishes to limit the testimonial concept to the precise abuses recognized by the Framers. *See* Pet. 27-28. But this Court (again, speaking in *Davis* through eight Justices) has already

correctly recognized that "[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction." 547 U.S. at 831 n.5; *see also Crawford*, 541 U.S. at 52 n.3 ("We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK."). The State gives no reason to doubt the wisdom of that observation.

To the contrary, the State's merits argument illustrates this point. State law required the autopsy report here to be signed under oath – an act that the State concedes would render it testimonial. *See* Pet. 15-16, 27 (accepting that "sworn affidavits" are testimonial). Yet the State apparently contends that this report was actually "not certified or sworn," and thus is not testimonial. Pet. i; *see also id.* 8, 15. It makes no sense for a constitutional right to hinge on such a distinction.

III. The State's Harmless Error Argument Does Not Warrant Review.

Having represented at trial that Dr. Zumwalt's testimony concerning the contents of the autopsy report was "of necessity" to its case, Trial CD 9/29/10 at 10:58:13, the State now asks this Court to grant certiorari to hold that the Confrontation Clause error was harmless. This Court should refuse to do so because the issue is waived, fact-bound, and meritless.

1. The State's harmless error argument, for two independent reasons, is not properly presented. First, the State has waived any harmless error argument as a matter of state law because it did not argue in the New Mexico Supreme Court that the admission of Dr. Zumwalt's testimony concerning the autopsy report constituted harmless error. Instead, the State contended solely that the disclosure of the autopsy report "did not violate the Confrontation Clause." State's N.M. S. Ct. Br. 5-21. "[B]y failing to brief it on appeal," the State has

"abandoned" this issue as a matter of New Mexico law. *See City of Santa Fe v. Komis*, 845 P.2d 753, 759 (N.M. 1992).[7]

Second, even if the harmless error question were not waived as a matter of state law, it would be inappropriate as a matter of this Court's discretionary-review jurisprudence to consider it here on certiorari review. It is "the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); *see also, e.g.*, *United States v. Williams*, 504 U.S. 36, 40-45 (1992) (citing a long line of cases for this proposition). Here, the State asserts that the New Mexico Supreme Court "implicitly rejected the State's harmless error argument." Pet. 32. But in fact the State never made any such argument, and the New Mexico Supreme Court never considered one.

2. The State's harmless error argument is utterly fact-bound. At the very most, the State asks this Court to apply the standard enunciated in *Chapman v. California*, 386 U.S. 18 (1967), to the facts of this case. Yet as this Court has noted, "[a]lthough we plainly have the authority to decide whether, on the facts of a particular case, a constitutional error was harmless under the *Chapman* standard, we do so sparingly." *Rose v. Clark*, 478 U.S. 570, 584 (1986) (internal quotation marks omitted); *see also Pope v. Illinois*, 481 U.S 497, 504 (1987). The State offers no good reason for taking such an exceptional step here.

[7] In fact, just last year, the State itself argued in a different case that the defense had "abandoned" any rebuttal to *its* harmless error analysis by failing to "conduct and argue any harmless error analysis in the amended brief-in-chief." State's Supp. Br. 16, *State v. Lovett*, 286 P.3d 265 (N.M. 2012) (No. 30,470). The New Mexico Supreme Court did not dispute the premise of the State's waiver argument but disagreed that the defense had failed to engage in any harmless error analysis. *Lovett*, 286 P.3d at 276.

3. In any event, the disclosure of the contents of the autopsy report was not "harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. The prosecution introduced Dr. Zumwalt's testimony concerning the autopsy during its case-in-chief and used the autopsy's conclusions regarding the manner of death to discredit the defense's key witness, arguing in its closing that "[Dr. Zumwalt's] testimony absolutely disputes Mr. Montoya's testimony. . . . He told you it was a distant shot." Trial CD 9/30/10 at 11:28:15; *see also supra* at 2-3. Given that the State relied on the testimony disclosing the autopsy report so heavily, "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 24 (citation omitted); *see also United States v. Alvarado-Valdez*, 521 F.3d 337, 342-43 (5th Cir. 2008) ("We cannot see how the government can conclusively show that the tainted evidence did not contribute to the conviction, because the government's closing argument relied on that very evidence.").

It makes no difference that the defense also relied to some degree on the assertions in the autopsy report. Respondent objected to Dr. Zumwalt's testimony during the prosecution's case-in-chief. Pet. App. 4. Once the trial judge overruled that objection and admitted the testimony disclosing the contents of the autopsy report – based in part on the prosecution's "representation that [it] was necessary," Pet. App. 4 – respondent could not avoid integrating the contents of the autopsy report into the defense's theory of the case.

CONCLUSION

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

Respectfully submitted,

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June 2013

APPENDIX A

NEW MEXICO STATUTES ANNOTATED
CHAPTER 24 – HEALTH AND SAFETY
ARTICLE 11 – MEDICAL INVESTIGATIONS

§ 24-11-5. Reports of violent death

When any person comes to a sudden, violent or untimely death or is found dead and the cause of death is unknown, anyone who becomes aware of the death shall report it immediately to law enforcement authorities or the office of the state or district medical investigator. The public official so notified, shall in turn notify either, or both, the appropriate law enforcement authorities or the office of the state or district medical investigator. The state or district medical investigator, or a deputy medical investigator under his direction, shall, without delay, view and take legal custody of the body.

* * * *

§ 24-11-7. Examination; autopsy; inquest

If the deceased is unidentified, the state, district or deputy medical investigator may order the body fingerprinted and photographed. When the state, district or deputy medical investigator suspects a death was caused by a criminal act or omission or the cause of death is obscure, he shall order an autopsy performed by a qualified pathologist certified by the state board of medical examiners who shall record every fact found in the examination tending to show the identity and condition of the body and the time, manner and cause of death. The pathologist shall sign the report under oath and deliver it to the state, district or deputy medical investigator within a reasonable time. The state, district or deputy medical investigator may take the testimony of the pathologist and any other persons and this testimony, combined with the written report of the pathologist, constitutes an inquest.

* * * *

§ 24-11-8. Reports to district attorney

The state or district medical investigator shall promptly report his findings, or the findings of a deputy medical investigator that has performed an investigation under his direction, to the district attorney in each death investigated. Upon request of the district attorney, the state or district medical investigator shall send a complete record of the medical investigation in any case, including a transcript of the testimony of witnesses examined at any inquest.