No. 13-735

In The Supreme Court of the United States

EFREN MEDINA,
Petitioner,
v.

ARIZONA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arizona

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the individual rights and protections guaranteed in our Constitution, including those articulated in the Sixth Amendment, apply as robustly as the Constitution's text and history require.

SUMMARY OF ARGUMENT

In presenting its case for sentencing Petitioner Efren Medina to death for first-degree murder, the State of Arizona relied on an autopsy report, prepared by Dr. Ann Bucholtz, a county medical examiner, to support its theory that Medina had inflicted "gratuitous violence" on his victim by running his car over the elderly man more than once as he lay dying in the street. Petitioner vigorously disputed this contention, and it ran contrary to the lone eyewitness's recollection.

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to

Pet. at 6. Instead of having Dr. Bucholtz testify regarding her autopsy report—despite her seeming availability to do so—the State called to the stand Chief Medical Examiner Philip Keen, who had far more experience testifying in court but who was not involved in preparing the autopsy report. The Supreme Court of Arizona erroneously held that because the autopsy report was not "testimonial," Petitioner's rights under the Sixth Amendment's Confrontation Clause were not violated when he was denied the opportunity to cross-examine the author of the report. This Court should grant review to resolve the split among state high courts on the question of whether autopsy reports created as part of homicide investigations are testimonial, *see* Pet. at 11-14, and to ensure that the confrontation right, in "the heartland of constitutional criminal procedure," Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 641 (1996), is respected.

The text of the Constitution clearly guarantees criminal defendants the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. According to the plain text, the Confrontation Clause applies to those who bear "witness" or testimony. *Crawford v. Washington*, 541 U.S. 36, 51 (2004). Interpreting this text and its history, the Court has ruled that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69. In accordance with the original meaning of the Confrontation Clause, the State thus may not

introduce testimonial statements at trial unless the defendant has the opportunity to cross-examine the witness who made the statements, or unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Id*. at 53-54.

The Court has held that forensic reports constitute testimonial statements. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The Court has further held that when testimonial statements such as forensic reports are offered into evidence, the Constitution requires that the defendant have the opportunity to cross-examine the analyst who was actually involved in preparing the report. *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). "Surrogate testimony" from a colleague of the analyst who did not himself participate in preparing the forensic report does not pass constitutional muster. *Id*. at 2710, 2712-13.

This Court has not yet ruled that autopsy reports created as part of a homicide investigation are testimonial for the purposes of the Sixth Amendment, triggering a criminal defendant's right to confront the author of the autopsy report in court. *Amicus* urges the Court to grant the Petition for a Writ of Certiorari and do so now. The text and history of the Confrontation Clause and this Court's precedents compel such a result.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT THE PROTECTIONS OF THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE APPLY TO AUTOPSY REPORTS CREATED AS PART OF A HOMICIDE INVESTIGATION

A. The Original Meaning Of The Confrontation Clause Requires That Criminal Defendants Have The Opportunity To Cross-Examine Witnesses Bearing Testimony Against Them.

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. This right applies in both state and federal prosecutions. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

As this Court has recognized, the right to confront one's accusers dates back to Roman times. *Crawford*, 541 U.S. at 43; *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988). The Founders' concept of this right was rooted in the English common law, a tradition in which live court testimony is subjected to adversarial testing. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373-374 (1768). The most infamous denial of the confrontation right under English law, which in

turn prompted common law reform, was in the 1603 trial of Sir Walter Raleigh for treason. *E.g.*, *Crawford*, 541 U.S. at 52 (calling the case "a paradigmatic confrontation violation"); *State v. Campbell*, 30 S.C.L. 124, 130 (App. L. 1844) ("Who would look to Sir W. Raleigh's . . . case for a fair trial or just judgment?"). Raleigh's alleged accomplice, Lord Cobham, implicated him in a letter and before the Privy Council, and despite Raleigh's pleas to the court to allow him to confront his accuser, the judges refused, and Raleigh was condemned to death. Raleigh's case became the touchstone for confrontation law—as, of course, a cautionary tale of abuse.

English law subsequently developed rules to protect the confrontation right, for example, admitting out-of-court examinations and statements into evidence only if the witness were clearly unable to testify in person. *E.g.*, *Lord Morley's Case*, 6 How. St. Tr. 769, 770-771 (H.L. 1666). Even when the witness was demonstrably unable to testify, in the instance of death, for example, the King's Bench ruled that pretrial statements or examinations would not be admitted if the defendant had not previously been given the opportunity for cross-examination. *See King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (1696). As this Court has explained, by 1791, the year the Sixth Amendment was ratified, English common law courts generally were applying the rule that out-of-court statements could be admitted only if there had been a prior opportunity for cross-examination. *Crawford*, 541 U.S at 46; *see, e.g.*, *King v. Dingler*, 2 Leach 561, 562-63, 168 Eng. Rep. 383, 383-84

(1791); *King v. Woodcock*, 1 Leach 500, 502-04, 168 Eng. Rep. 352, 353 (1789).

Many of the colonial precursors to the Bill of Rights contained a guaranteed right of confrontation. Delaware Declaration of Rights § 14 (1776); Maryland Declaration of Rights § XIX (1776); North Carolina Declaration of Rights § VII (1776); Pennsylvania Declaration of Rights § IX (1776); Virginia Declaration of Rights § 8 (1776); Vermont Declaration of Rights Ch. I, § X (1777); Massachusetts Declaration of Rights § XII (1780); New Hampshire Bill of Rights § XV (1783). In the Massachusetts ratifying convention, objections were raised to the proposed Constitution's failure to include protection of the right to confront one's accusers, pointedly warning that the new nation's tribunals could end up being "little less inauspicious than a certain tribunal in Spain . . . the *Inquisition*." 2 DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (J. Elliott ed., 2d ed. 1863) (statement of Abraham Holmes). *See generally Crawford*, 541 U.S. at 48-49 (discussing Founding-era history).

Responding to these concerns, the Sixth Amendment's procedural protections, including the confrontation right, were designed by the Framers to be "great engines by which an innocent man can make the truth of his innocence visible to the jury and the public." Amar, 84 GEO. L.J. at 643. The core meaning of the Confrontation Clause is clear: "when a witness in court takes the stand, the

defendant must have a chance to look him in the eye and confront him with questions." *Id*. at 693.

Beyond merely the right to confront in-court witnesses, the original meaning of the Confrontation Clause reflects the English common law's concern with out-of-court testimonial evidence being used against a defendant without an opportunity for cross-examination. Recalling the accusatory letter being read to condemn Sir Walter Raleigh, the paradigmatic example of abuse, Founding-era courts understood the Clause to apply to out-of-court statements as well as in-court statements. *Crawford*, 541 U.S. at 50-51. For example, early state decisions held that, in accordance with the common law, depositions could be read against a criminal defendant only if they were taken in the accused's presence. *E.g.*, *State v. Webb*, 2 N.C. 103, 104 (Super. L. & Eq. 1794) (declaring that "[i]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine").

The common law in 1791, incorporated into the Sixth Amendment, allowed admitting testimonial statements into evidence without confrontation only if a witness were unavailable for in-court questioning and there had been a prior opportunity for the accused to question the witness. *Crawford*, 541 U.S. at 54; *see also id*. at 68 ("Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.") The original meaning of the

Confrontation Clause clearly establishes that a criminal defendant has the right to confront through cross-examination testimonial evidence against him, subject only to the limitations of unavailability and prior opportunity to cross-examine.

B. The Arizona Supreme Court's Determination That The Confrontation Clause Does Not Apply To The Autopsy Report Used By The State Against Petitioner Is Incorrect.

1. The Autopsy Report Is Testimonial.

The autopsy report at issue in Petitioner's case falls squarely within the Confrontation Clause's textual framework and its original meaning. As discussed above, the text of the Confrontation Clause applies to "witnesses," or those who bear testimony. *Crawford*, 541 U.S. at 51. As this Court has explained, "'testimony' can typically be described as '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). Testimonial statements are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz*, 557 U.S. at 311 (quoting *Crawford*, 541 U.S. at 52). The Court catalogued the "core class" of testimonial statements in *Crawford*:

> *Ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

541 U.S. at 51-52. *See also Davis v. Washington*, 547 U.S. 813, 822 (2006) (explaining that statements are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"); *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment) ("[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.").

In *Melendez-Diaz*, this Court held that formalized forensic reports—in that case, a laboratory analysis of seized substances ultimately determined to be cocaine—fall within the "core

class of testimonial statements" covered by the Confrontation Clause. 557 U.S. at 310. And then in *Bullcoming*, the Court held that a forensic laboratory report certifying the accused's blood alcohol content was testimonial. 131 S. Ct. at 2717. Under the inescapable logic of these rulings, based on the common law and original meaning of the Confrontation Clause, the autopsy report used as evidence against Petitioner is testimonial and should be subject to the Confrontation Clause.

Like the forensic reports the Court has previously found to be testimonial, autopsy reports prepared as part of a homicide investigation are "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact . . . . functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Melendez-Diaz*, 557 U.S. at 310 (citations and quotation marks omitted). *See, e.g.*, *Diaz v. United States*, 223 U.S. 442, 450 (1912) (observing that the autopsy report in that case could not be admitted into evidence in the face of an objection "because the accused was entitled to meet the witnesses face to face"). Such autopsy reports are used to establish time and cause of death, particular injuries, and many other facts surrounding a person's state at the time of death, as well as the manner in which the autopsy inquiry was undertaken.

The autopsy report used against Petitioner was unquestionably a "solemn declaration or affirmation made for the purpose of establishing or proving some fact": Dr. Bucholtz signed her name

to the statement that "[p]ursuant to section 11-594 Arizona Revised Statutes I hereby certify that I took charge of the body described herein and that after making inquiries into the cause and manner of death and examination of the body it is my opinion that death occurred due to the cause and in the manner stated." Pet. App. 43a.

As this certification demonstrates, the autopsy report in this case bore substantial "indicia of formality." *Davis*, 547 U.S. at 840 (Thomas, J., concurring in the judgment in part and dissenting in part). *See also Williams v. Illinois*, 132 S. Ct. 2221, 2260 (2012) (Thomas, J., concurring in the judgment) (stating that "solemnity marked the practices that the Confrontation Clause was designed to eliminate, namely, the *ex parte* examination of witnesses under the English bail and committal statutes passed during the reign of Queen Mary"). It is quite plainly a "certified declaration of fact," *id.*, as to Dr. Bucholtz's conclusions and certain procedures, Pet. App. 43a, similar "to the Marian practice in which magistrates examined witnesses, typically on oath, and 'certif[ied] the results to the court.'" *Williams*, 132 S. Ct. at 2260 (quoting *Crawford*, 541 U.S. at 44).

The autopsy report was also part of an investigation, likely to be "use[d] at a later trial." *Melendez-Diaz*, 557 U.S. at 311; *Crawford*, 541 U.S. at 52. As the Petition explains, Arizona law requires the police to "promptly notify the county examiner" about any "suspicious, unusual or unnatural" death, Ariz. Rev. Stat. §§ 11-593(A)(6)

& (B), which was obviously something at issue with respect to Petitioner's alleged victim, who had been beaten and run over. Pet. at 3. By law, the police were required to "report the results" of their "investigation" up to that point to the medical examiner, which obviously would have alerted Dr. Bucholtz to the fact that the police were in the midst of a homicide investigation. After certifying "the cause and manner of death following completion of the death investigation," Ariz. Rev. Stat. §§ 11-594(A) - (B), Dr. Bucholtz was required by law to "[n]otify the county attorney or other law enforcement authority when death is found to be from other than natural causes," *id*. *See generally* Pet. at 3-4.

Dr. Bucholtz concluded that that Petitioner's alleged victim died as a result of "homicide." Pet. App. 45a. Her report detailed findings regarding the condition of the body. *Id.* at 45a-62a; *see* Pet. at 4. These findings are precisely why the State introduced Dr. Bucholtz's autopsy report into evidence to support its case for sentencing Petitioner to death. As the Petition explains, the prosecution used the autopsy report to support its theory that Petitioner acted in a heinous and depraved manner by running over his alleged victim "at least twice." Pet. at 7. Under this Court's Confrontation Clause jurisprudence, the autopsy report used against Petitioner is clearly "testimonial."

2. Petitioner Had The Right To Cross-Examine The Author Of The Autopsy Report, Not A Surrogate, Unless The Author Was Unavailable To Testify.

As this Court explained in *Crawford*, "the Framers would not have allowed 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. Here, Petitioner had no opportunity to cross-examine the medical examiner who actually prepared the autopsy report used against him by the State to justify imposition of the death sentence. Nor was there any suggestion that Dr. Bucholtz was unavailable to testify herself in court. It is likely that the State simply preferred to have Dr. Keen testify, as he was more experienced at testifying in court and would thus be a more effective witness.

The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61. As Blackstone observed, the "open examination of witnesses . . . is much more conducive to the clearing up of truth." 3 BLACKSTONE, COMMENTARIES, at 373. Cross-examination of witnesses who present scientific evidence helps to achieve this reliability and truth-seeking interest by "weed[ing] out not only the fraudulent analyst, but the incompetent one as well." *Melendez-Diaz*, 557 U.S. at 319. Moreover, the "prospect of

confrontation will deter fraudulent analysis in the first place." *Id.*

"Surrogate testimony" by a colleague of the analyst who prepared the report will not suffice. "The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Bullcoming*, 131 S. Ct. at 2710. Surrogate testimony will not "expose any lapses or lies on the certifying analyst's part." *Id.* at 2715. With the actual preparer of the report on the stand, counsel for the defense "could have asked questions designed to reveal whether incompetence, evasiveness, or dishonesty," *id.*, were involved, and "to raise before a jury questions concerning [the analyst's] proficiency, the care he took in performing his work, and his veracity," *id.* at 2716 n.7—an opportunity denied Petitioner at his sentencing hearing.

In addition, the circumstances under which Dr. Bucholtz prepared the autopsy report reflect the importance of affording Petitioner his Sixth Amendment right and preventing prosecutorial abuse. Law enforcement officers were present during the autopsy performed by Dr. Bucholtz, and it was unquestionably part of an investigation into unlawful conduct. Pet. at 3. "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers

were keenly familiar." *Crawford*, 541 U.S. at 56 n.7.[2]

In sum, Petitioner's opportunity to cross-examine Dr. Keen about the written autopsy report prepared by Dr. Bucholtz cannot satisfy the Sixth Amendment. As the Court observed in *Crawford*, Sir Walter "Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court." 541 U.S. at 51. But "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination" before allowing statements to be admitted without providing the accused the opportunity to confront the witness who made them. *Crawford*, 541 U.S. at 68. Just as in *Bullcoming*, 131 S. Ct. at 2713, in which the Court reversed the New Mexico Supreme Court's decision permitting the testimonial statement of one witness to enter into evidence through the in-court testimony of a second person, so, too, should the Court here grant review and reverse the Arizona Supreme Court's ruling allowing Dr. Keen to testify to and allow into evidence the autopsy report created by Dr. Bucholtz.

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[2] It is important to note, however, that the confrontation right does not rest on the suggestion of impropriety or incompetence: as Justice Scalia noted in *Melendez-Diaz*, "we would reach the same conclusion if all analysts always possessed the scientific acumen of Mme. Curie and the veracity of Mother Theresa." 557 U.S. at 319 n.6.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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