THE CONFRONTATION CLAUSE AND AUTOPSY REPORTS IN MURDER PROSECUTIONS

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This memorandum examines cases and other materials bearing on the question of whether an autopsy report used in a murder prosecution is a testimonial statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004).

A. Differing Approaches

In answering this question, courts have developed and applied several different approaches. Indeed, disparity of treatment has reigned. It is important to note, however, that all of the methods *should* be—at their core—examining whether the autopsy report was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[1] *Crawford*, 541 U.S. at 52. As the Supreme Court has stated, later cases such as *Melendez-Diaz* "involve[] little more than the application of" *Crawford*. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329 (2009).[2] Yet the approach taken by courts still varies.

The starting point for courts is the primary purpose test, as articulated by a plurality of the Supreme Court in *Williams v. Illinois*, 132 S. Ct. 2221 (2012). This test examines the reasons

[1] The language from *Crawford* could not be clearer—"*available* for use at *a later trial*." *Id.* at 52 (emphasis added). As set forth *infra*, several courts have adopted a narrow view of the primary purpose test that requires that the autopsy be performed for the primary purpose of accusing "a *targeted* individual." *See Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012). This test seems at odds with the standard enunciated in *Crawford*, as recognized by Justice Kagan in *Williams*. 132 S. Ct. at 2273 (Kagan, J., dissenting).

[2] In *Melendez-Diaz*, Justice Thomas noted in his concurrence that the court's decision would affect a "range of other scientific tests," and cited autopsy reports as an example. 557 U.S. at 335 (citing Comment, Carolyn Zabrycki, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody Qualities of a Testimonial Statement*, 96 CAL. L. REV. 1093, 1084, 1115 (2008) (noting that every court post-*Crawford* has held that autopsy reports are not testimonial, and warning that a contrary rule would "effectively function[] as a statute of limitations for murder")).

for and purpose of the autopsy report in question. *See Michigan v. Bryant*, 562 U.S. 344, 358 (2011) (holding that a statement is testimonial when its primary purpose is to create an out-of-court substitute for trial testimony). In *Williams*, the plurality held that expert testimony premised on a report generated by a different laboratory did not violate the Confrontation Clause because: (1) the report was not offered for its truth, but for the limited purpose of explaining the basis of the expert's conclusion; and (2) even if the report had been offered for its truth, it would not have been a testimonial statement because it was not produced for the primary purpose of accusing a targeted individual. 132 S. Ct. at 2236, 2243.

When considering an autopsy report in a murder prosecution, courts are split on the question of whether the primary purpose test should be construed narrowly (targeted-individual test)—as articulated by the plurality in *Williams*—or broadly (to provide evidence in a criminal trial)—as articulated by the separate opinions of Justice Thomas[3] and Justice Kagan[4] in *Williams*. And although the approach taken by courts differs, the following framework generally guides courts' analyses:

> (1) Is the primary purpose of the autopsy report to prove past events potentially relevant to a criminal prosecution?
> (2) If so, was the primary purpose of the autopsy report to accuse a targeted individual?

This split between the broad and narrow view is of serious consequence—when the primary purpose test is not met, the admissibility of the autopsy report is not the concern of the Confrontation Clause. *See Bryant*, 562 U.S. at 359. Under the broad view, if the answer to

[3] Justice Thomas argued that, in addition to being solemn and formalized, a testimonial statement must be "primarily intend[ed] to establish some fact with the understanding that [the] statement may be used in a criminal prosecution." *Williams*, 132 S. Ct. at 2261 (Thomas, J., concurring).

[4] Justice Kagan argued that a testimonial statement must have "the primary purpose of establishing 'past events potentially relevant to later criminal prosecution'—in other words, for the purpose of providing evidence." *Williams*, 132 S. Ct. at 2273 (Kagan, J., dissenting) (quoting *Davis*, 547 U.S. at 822).

prong one above is "yes," the court's inquiry is over—the report is testimonial. *See Davis v. Washington*, 547 U.S. 813, 822 (2006); *see also United States v. James*, 712 F.3d 79, 99 (2d Cir. 2013) (holding autopsy report not testimonial "because it was not prepared primarily to create a record for use at a criminal trial"). However, under the narrow view, even if a court answers "yes" to prong one, if the answer to the second prong is "no"—usually for the reason that an autopsy report is simply created to document the cause of death for public records and public health—the statement is not testimonial. *See Williams*, 132 S. Ct. at 2243; *People v. Leach*, 366 Ill. Dec. 477 (Ill. 2012); *State v. Hutchison*, 482 S.W.3d 893 (Tenn. 2016). In applying both views, courts "look for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances." *Williams*, 132 S. Ct. at 2243.

B. Factors

No matter whether the court construes the primary purpose test narrowly or broadly, courts consider a number of factors when determining the primary purpose of an autopsy report. The two main factors that courts consider are whether (1) the state's statutory scheme requires a medical examiner to conduct an autopsy, prepare a report, or give that report to law enforcement; and (2) the police had identified the defendant as a suspect or had the defendant in custody at the time the autopsy report was prepared.

The discussion below organizes the cases around these two factors, which seem to drive (to varying degrees) the decision of the court in each case. But the court's approach is not always clear, and while one factor may drive the analysis, courts often take a "kitchen sink" approach and consider a number of factors. For example, although not dispositive, most courts will also consider the nature of the injuries suffered by the deceased. As such, although the

author has included each case under the factor that he thinks was the driver of the court's decision, there is a fair argument that a few cases could rest comfortably (and accurately) beneath either of the factors below.

One last point before we get to the cases: The divide that separates these cases seems to be a disagreement about whether the autopsy report is completed to **establish past events for trial** or **to document the cause of death for public records and public health**. This divide turns, of course, on the factors. And the factors appear to really be geared towards answering a single, fundamental question: What did the medical examiner ***know***—or should have known—at the time he or she completed the autopsy? To flesh this out, let us turn to the cases.

1. Whether the state's statutory scheme requires a medical examiner to conduct an autopsy, prepare a report, or give that report to law enforcement.

In *Cuesta-Rodriguez v. State*, 241 P.3d 214 (Okla. Crim. App. 2010), the court held that an autopsy report was testimonial because the state statute required the medical examiner to investigate suspicious deaths and promptly turn over all records relating to the deaths to the district attorney. *Id.* at 227–28. The State argued that because autopsy reports are created in the ordinary course of business, they are a business record and therefore nontestimonial by nature. *Id.* This position was rooted in the statutory structure in Oklahoma, which required the medical examiner to prepare autopsy reports "under a number of statutorily enumerated circumstances, not just circumstances in which the report might be used in a criminal prosecution." *Id.* The court, however, viewed the statutory structure differently. *Id.* at 228. Given the statutory structure, the court found it "obvious that a medical examiner's words recorded in an autopsy report involving a violent or suspicious death could constitute statements that the medical examiner should reasonably expect to be used in a criminal prosecution." *Id.*

In *United States v. James*, 712 F.3d 79 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2660, the court held that a routine autopsy report was not testimonial because it "was not prepared primarily to create a record for use at a criminal trial," even though the autopsy report concluded that the defendant died due to ammonia poisoning. *Id.* at 86, 99. The court reasoned that the "key" to making this determination was identifying the "particular relationship between the OCME [New York City Office of Chief Medical Examiner] and law enforcement both generally and in this particular case." *Id.* at 97. The court found that the OCME was an independent agency and not subject to the control of the prosecutor's office, relying primarily on the fact that "the police are only required to notify [the OCME] when someone has died 'from criminal violence, by accident, by suicide, [or] suddenly when in apparent health.'" *Id.* at 98 (internal citation omitted). The court concluded that there was no suggestion here that anyone involved in the autopsy process suspected murder or that the report would be used at a criminal trial. *Id.* at 98–99.

In *Com. v. Brown*, 139 A.3d 208 (Pa. Super. Ct. 2016), *appeal granted*, (Dec. 14, 2016), however, the Superior Court of Pennsylvania disagreed with *James*. The court held that an autopsy report was testimonial, and that its admission without the testimony of a doctor who performed the autopsy therefore violated the defendant's right to confrontation. *Brown*, 139 A.3d at 212–213. Here, the doctor examined the body to determine whether the victim died from the four gunshot wounds he sustained. *Id.* at 212. The autopsy report addressed this issue and listed the victim's cause of death as being from the gunshot wounds, making the case a homicide. *Id.* The court reasoned that the autopsy report was testimonial because it "established past events

that were potentially relevant to later criminal proceedings."[5] *Id.* The court relied on the statutory scheme governing medical examiners in making this determination, which "contemplates that the autopsy report will be used in a criminal trial when the circumstances suggest that the death was sudden, violent, suspicious or . . . not the result of natural causes." *Id.* at 212–13. The court also noted that although the medical examiner is independent, the statutory framework in Pennsylvania requires he or she, "so far as may be practicable, consult and advise with the district attorney." *Id.* at 212 (citing 16 P.S. § 1242).

In *U.S. v. Moore*, 651 F.3d 30 (D.C. Cir. 2011), the court held an autopsy report entered into evidence at trial was testimonial because of the state's statutory structure and the manner of death. *Id.* at 73. Then-Chief D.C. Medical Examiner, Dr. Jonathan Arden, testified for the government "as to the contents of approximately 30 autopsy reports authored by medical examiners in his office . . . , [but] he neither performed nor observed the autopsies and his signature does not appear on any of the reports." *Id.* at 71. The Court noted that *Bullcoming* foreclosed the argument by the government that the report was nontestimonial, as the circumstances here were analogous to those in *Bullcoming*. *Id.* at 72 (noting that the laboratory report in *Bullcoming* was testimonial, in part, because "a law-enforcement officer provided [the] evidence to a state laboratory *required by law* to assist in police investigations) (emphasis added).

Here, the Office of the Medical Examiners was *required* to investigate deaths for the police department or at the request of a United States Attorney.[6] *Id.* at 73. Even though the

[5] The court noted that "an objective witness who prepared an autopsy report on an individual who sustained four gunshot wounds to the chest should reasonably believe that the report would be made available for use at a later trial." *Brown*, 139 A.3d at 212.

[6] The government argued that the D.C. Code that imposed these duties on the Office of the Medical Examiner meant that the autopsy reports were "business records not made for the

reports at issue did not indicate whether they were completed at the request of law enforcement, "MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies." *Id.* Further, notations on the reports showed that law enforcement officers were not only present to observe the autopsies, but participated in the creation of the reports. *Id.* (noting that one report commented: "Should have indictment re John Raynor for this murder"). The court held that all of these factors, "combined with the fact that each autopsy found the manner of death to be a homicide by gunshot wounds," are "circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* (quoting *Melendez Diaz*, 129 S. Ct. at 2532).

The court in *U.S. v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012), also found autopsy reports to be testimonial because the statutory framework *required* the medical examiner to perform an autopsy if requested by the state attorney. *Ignasiak*, 667 F.3d at 1231. But the court did not stop there. It continued its analysis and noted an additional reason to view autopsy reports as testimonial: "Medical examiners are not mere scriveners reporting machine generated raw-data." *Id.* at 1232 (citing *Bullcoming v. New Mexico*, 564 U.S. 647, 659–60 (2011)). Rather, the reports contain "observational data and conclusions . . . [that] are the product of the skill, methodology, and judgment of the highly trained examiners who actually performed the autopsy." *Id.* The reports at issue were "replete with the extensive presence and intervention of human hands and exercise of judgment that 'presents a risk of error that might be explored on cross-examination.'" *Id.* at 1233 (quoting *Melendez-Diaz*, 557 U.S. at 320). The court found that, in this way, autopsy

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purposes of litigation." *Id.* at n.16. The Court declined to answer whether, as a categorical matter, autopsy reports are testimonial, and stated that it was "doubtful that such an approach would comport with Supreme Court precedent." *Id.* (citing *Melendez-Diaz*, 129 S. Ct. at 2532, and *Bryant*, 131 S. Ct. at 1155–56).

reports are much like other types of forensic evidence used in prosecutions—they may be "invalid or unreliable because of the examiner's errors, omissions, mistakes, or bias." *Id.*

In *State v. Navarette*, 294 P.3d 435 (N.M. 2013), the Court held an autopsy report was testimonial where the testifying doctor (who did not conduct the autopsy) admitted that the autopsy was performed as part of a homicide investigation and that two police officers attended the autopsy. *Id.* at 440. The Court found that, based on these objective circumstances, it was "axiomatic that [the autopsy doctor] made the statements in the autopsy report primarily intending to establish some facts or opinions with the understanding that they may be used in a criminal prosecution." *Id.*; *see State v. Jaramillo*, 272 P.3d 682, 686 (N.M. Ct. App. 2011) ("By the time the medical examiner had determined the cause of death to be closed head injuries and the manner of death to be homicide, there was no doubt this would be used against someone in a criminal prosecution."). The Court noted that where, as here, the statutory scheme requires the medical examiner to report her findings to the district attorney, she "should know that her statement may be used in future criminal litigation." *Id.* at 440–41. The Court ultimately stated the categorical holding that "autopsy reports regarding individuals who suffered a violent death are testimonial." *Id.* at 441.[7]

Finally, in *Rosario v. State*, 175 So. 3d 843 (Fla. Dist. Ct. App. 2015), the court held that an autopsy report was testimonial because of the statutory structure of Florida law. The court

[7] This seems to be, to the author, a reasonable rule to be adopted by courts nationwide. Indeed, a fairly common view among courts is that if the autopsy finds the manner of death to be homicide (particularly by gunshot wound), the autopsy report *is* testimonial. *See Moore*, 651 F.3d at 73; *Cuesta-Rodriguez*, 241 P.3d at 228; *Jaramillo*, 272 P.3d at 686. This is, however, not a hard-and-fast rule. *See Hutchison*, 482, S.W.3d at 191. And some courts have gone even farther. *See State v. Kennedy*, 229 W.Va. 756, 768 (W. Va. 2012) (finding that the state statutory framework "compel[led] the conclusion that, for purposes of use in criminal prosecutions, autopsy reports are under all circumstances testimonial"); *see also Rosario*, 175 So. 3d at 856 (holding that whenever an autopsy report is "introduced 'against' the defendant at trial, he must be given an opportunity to cross-examine the medical examiner who prepared the report").

reasoned that the question of whether the report is actually used at trial is immaterial. *Id.* at 858. The court first examined historical texts and determined that "the framers of the Constitution categorically viewed autopsy reports as testimonial." *Id.* at 854–55. It then examined the Florida statute that governed the relationship between medical examiners and law enforcement. *Id.* at 855–56. The statute, among other things, required the medical examiner to "make [the autopsy report] available to the state attorney." *Id.* at 856. The court concluded that "[d]ue to this statutory relationship with law enforcement and the 'suspicious' circumstances that give rise to, and in fact require, the creation of an autopsy report in Florida," the autopsy report at issue was testimonial. *Id.*

In examining the primary purpose of the autopsy report, the court also noted that "[i]t is reasonably foreseeable that an autopsy report may be used prosecutorially, especially when the medical examiner concludes that the cause of death was a homicide, as in this case." *Id.* And the court added that the Confrontation Clause "has never mandated that a statement's *sole* use must be for prosecution in order for it to be testimonial," and that the mere fact that an autopsy report is not always accusatory or "inherently inculpatory" does not make it nontestimonial in all circumstances. *Id.* The court concluded by holding that whenever an autopsy report created pursuant to the Florida statute is "introduced 'against' the defendant at trial, he must be given an opportunity to cross-examine the medical examiner who prepared the report." *Id.*[8]

2. Whether the police had identified the defendant as a suspect or had the defendant in custody at the time the autopsy report was prepared.

[8] *Compare Banmah v. State*, 87 So. 3d 101, 103 (Fla. Dist. Ct. App. 2012) (concluding that autopsy reports are not testimonial because they are made pursuant to a statutory duty and not, in all instances, used in prosecutions) *with Rosario*, 175 So. 3d at 858 (finding autopsy report was testimonial and noting that "[w]ith respect to the broad statement in *Banmah* that 'autopsy reports are non-testimonial because they are prepared pursuant to a statutory duty, and not solely for use in prosecution,' we respectfully disagree").

In *People v. Leach*, 366 Ill. Dec. 477 (Ill. 2012), a case frequently cited by courts faced with this issue today, the court held that, "whichever definition of primary purpose applied," the autopsy report was not testimonial because the medical examiner was "not acting as an agent of law enforcement, but as one charged with protecting the public health by determining the cause of a sudden death that might have been 'suicidal, homicidal or accidental.'" *Id.* at 498–99 (internal citation omitted). Further, the court noted that the report "did not bear testimony against the defendant"—"[n]othing in the report directly linked [the] defendant to the crime."[9] *Id.* at 499. "In short, the autopsy sought to determine how the victim died, not who was responsible, and, thus, [the medical examiner] was not defendant's accuser."[10] *Id.*

The court reached this conclusion despite the fact that, at the time of the autopsy, the medical examiner was aware that the victim's husband was in custody, that he had admitted to "choking her," and that his examination would "incriminate[] or exonerate[] [the husband], depending on what the body revealed about the cause of death." *Id.* at 498. The statute at issue, too, required the medical examiner to prepare a report and submit it to the police. *Id.*

The court also noted that "while it is true that an autopsy report might eventually be used in litigation of some sort, either civil or criminal, these reports are not usually prepared for the sole purpose of litigation." *Id.* at 499. "An autopsy report is prepared in the normal course of operation of the medical examiner's office, to determine the cause and manner of death, which, if determined to be homicide, could result in charges being brought." *Id.* Lastly, unlike the

[9] The court went on to note that "[u]nlike a DNA test which might identify a defendant as the perpetrator of a particular crime, the autopsy finding of homicide did not directly accuse defendant." *Id.* at 499.

[10] *See State v. Medina*, 306 P.3d 48, 63 (Ariz. 2013) (finding an autopsy report nontestimonial where it was conducted the day after the murder, before the defendant had become a suspect, and reasoning that evidence from the autopsy was "gathered to determine the manner and cause of death in order to help 'catch dangerous [murderer] who was still at large,' not to gather evidence to accuse [the defendant]") (internal citation omitted).

forensic report at issue in *Melendez-Diaz*, the court found that the autopsy report here "was not certified or sworn in anticipation of its being used as evidence; it was merely signed by the doctor who performed the autopsy." *Id.* Thus, under Justice Thomas's "solemnity" view, the autopsy report was not testimonial. *Id.*[11]

Similarly, in *State v. Maxwell*, 139 Ohio St. 3d 12 (Oh. 2014), *cert. denied*, 135 S. Ct. 1400 (2015), the court held the admission of a nontestifying medical examiner's autopsy report did not violate the defendant's right to confrontation because the autopsy report was not: (1) prepared for the primary purpose of accusing a targeted individual; or (2) prepared for the primary purpose of providing evidence in a criminal trial. *Id.* at 24. The court found that "[a]utopsy reports are not intended to serve as an 'out-of-court substitute for trial testimony.'" *Id.* (quoting *Bryant*, 562 U.S. at 358). Instead, the court found, they are created "for the purpose of documenting cause of death for public records and public health."[12] *Id.* (citing *Leach*, 366 Ill. Dec. at 499). In so holding, the court followed its decision in *Craig*, which held that an autopsy report is a nontestimonial business record that is not created primarily for a prosecutorial purpose. *Id.* at 25 (citing *State v. Craig*, 110 Ohio St. 3d 306 (Oh. 2006)). The court distinguished *Melendez-Diaz* and *Bullcoming* on the grounds that, in both cases, the forensic

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[11] The court in *Leach* went even further by making the categorical statement that:

> [A]s a practical matter, because a prosecution for murder may be brought years or even decades after the autopsy was performed and the report prepared, these reports should be deemed testimonial only in the unusual case in which the police play a direct role (perhaps by arranging for the exhumation of a body to reopen a 'cold case') and the purpose of the autopsy is clearly to provide evidence for use in a prosecution.

Id. at 499. This author has found no other court that has taken such a restrictive view of the Confrontation Clause's application to autopsy reports.

[12] Put differently, "[f]or the purpose of ascertaining the cause, seat, and nature of a disease or for the purpose of inquiring into the cause of death." *Ackerman v. State*, 51 N.E.3d 171, 186 (Ind. 2016).

reports were made at the request of police for specific "evidentiary purposes" in order to aid in a police investigation. *Id.* at 26.

In *People v. Merritt*, 2014 WL 4748090, *1 (Colo. App. 2014), *cert. denied*, 2015 WL 5213336 (Colo. 2015), the court found an autopsy report testimonial even though the defendant had not yet been identified as a suspect. The crux of the state's argument was this: The report was not testimonial because, at the time of the autopsy, the police had not yet identified the defendant as a suspect. *Id.* at *6. "Because the investigation did not focus on defendant until months after the autopsy report was prepared," the State argued that the "primary purpose was not to accuse defendant or to create evidence for use against defendant at trial, but rather to catch a dangerous murderer who was still at large." *Id.* at *6. In essence, the State's argument was that the report's primary purpose was not to build a case against the defendant, but rather "to determine the cause and manner of the victim's death." *Id.* at *6.

Defendant, meanwhile, argued that the report was testimonial because "an objective witness would reasonably believe that the information provided in the report would be available for use at a later trial." *Id.* at *6. Defendant explained that autopsies are inherently investigative and conducted in coordination with the police, and pointed out that, in Colorado, "the police department requests the coroner's assistance when confronting a suspected homicide or suicide and that a crime scene investigator from the police department is present during the autopsy." *Id.* at *6. Essentially, defendant's argument was that because the coroner's office was legally *required* to investigate suspicious deaths, "it must expect that its findings will be used to prosecute if the findings conclude that a death may have been the result of foul play." *Id.* at *6.

The court turned to an analysis of the circumstances of the case to determine the primary purpose for the autopsy. After noting that autopsies may be conducted for a myriad of reasons,

the court found that "[g]iven the state of the body, the nature of the crime scene, and the statutorily mandated cooperation between the coroner's office and the district attorney's office, under the circumstances of this case, it was reasonable for [the medical examiner] to assume that the report containing her findings and conclusions would be used prosecutorially."[13] *Id.* at *6–7. The court held that the autopsy report and information within it was testimonial evidence.[14] *Id.* at *9.

But in *Chaidez v. McDowell*, 2016 WL 2771129, *1 (N.D. Cal. May 13, 2016), the court found that even if a particular suspect has been identified at the time of an autopsy, the autopsy report is not testimonial. The doctor that performed the autopsy on the murder victim was unable to testify at trial, so another doctor testified regarding "the autopsy report and the findings it contained." *Id.* at *16. When asked about the cause of death, the testifying doctor stated "Dr. Happy phrased it as gunshot wounds of the head and torso." *Id.* Chaidez argued that his Confrontation Clause rights were violated because he could not cross-examine Dr. Happy about this statement. *Id.* In denying habeas relief, the court found that "an autopsy report is generally not testimonial hearsay, and was not in the context of this case" because the statement was not made in court and was not likely to be used at a criminal proceeding. *Id.* at *19. Rather, "Autopsy reports, such as the one at issue here, are made to announce the cause of death 'whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial.'" *Id.* (quoting *Williams*, 132 S. Ct. at 2248) (Breyer, J., concurring).

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[13] *But see People v. Dungo*, 55 Cal. 4th 608 (Cal. 2012) (finding that even though California's statutory scheme required the reporting of suspicious autopsy findings to law enforcement, an autopsy serves several purposes and the "autopsy report itself was simply an official explanation of an unusual death, and such official records are not testimonial").

[14] The court also noted the importance of the fact that "a crime scene investigator from the police department [was] present during the autopsy"). *Merritt*, 2014 WL 4748090, at *6.

In *State v. Hutchison*, 482 S.W.3d 893 (Tenn. 2016), the court held an autopsy report was not testimonial even though it was meant to serve as evidence in a potential criminal trial and the defendant was in custody at the time the autopsy report was conducted. The court's analysis was guided by the following framework of questions: (1) whether the primary purpose of the autopsy was to prove past events potentially relevant to a criminal prosecution; (2) if so, whether (a) the autopsy report has "indicia of solemnity"[15] *or* (b) the primary purpose of the autopsy report was to accuse a targeted individual.[16] *Id.* at 910 (citing *Williams*, 132 S. Ct. at 2243, 2259–60). Under this framework, if the answer to the first question was "yes" and either of the latter two questions were answered affirmatively, the court would deem the statement testimonial. *Id.* at 910–11.[17]

In this case, it was obvious that the victim's death was caused by foul play. *Id.* at 911. Further, Knoxville Police Department personnel were "present at the autopsy, photographed the body during the autopsy, and brought to the autopsy items possibly used to kill the victim." *Id.* The court reasoned that these facts "would have indicated to the medical examiner that the autopsy would likely be used in a criminal prosecution."[18] *Id.* Here, the court found that the circumstances surrounding the creation of the autopsy report objectively indicated that the report

[15] As set forth in Justice Thomas's separate concurrence in *Williams*, 132 S. Ct. at 2243.
[16] In accordance with Justice Alito's plurality in *Williams,* 132 S. Ct. at 2259–60.
[17] Note that an affirmative "yes" on prong one would clearly satisfy the test as enunciated in *Crawford*. 541 U.S. at 62 (holding a statement is testimonial if it is "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial").
[18] *See Moore,* 651 F.3d at 73 (deeming autopsies testimonial in part based on the fact that law enforcement officers observed the autopsies and participated in creation of the creation of the autopsy reports); *Lee v. State*, 418 S.W.3d 892, 896 (Tex. App. 2013) (finding that "an objective medical examiner would reasonably believe that her report would be used in a later prosecution" when a law enforcement officer was present at autopsy); *Martinez v. State*, 311 S.W.3d 104, 111 (Tex. App. 2010) (finding it would have been reasonable for medical examiner "to have assumed that his autopsy report would be used prosecutorially" where police officer attended autopsy and photographed the body).

was "meant to serve as evidence in a potential criminal trial." *Id.* at 911. Thus, prong one of the test was satisfied.

On the question of whether there were adequate "indicia of solemnity," the court looked for indicia such as a "sworn or certified declaration of fact as would be contained in an affidavit or deposition." *Id.* Here, although the report was "authorized by" the medical examiner that conducted the autopsy and contained her electronic signature, she did not "swear to nor certify the facts or findings contained in the report." *Id.* The court therefore concluded that the autopsy report "lack[ed] the formality and solemnity of an affidavit, deposition, or prior testimony." *Id.*

The court then turned to whether the primary purpose of the autopsy report was to accuse a targeted individual. Here, the defendant was in custody at the time of the autopsy. *Id.* at 912. Below, the Criminal Court of Appeals had held that, nevertheless, the primary purpose of the autopsy was "to identify the injuries sustained by the victim and determine his cause of death," not to accuse the defendant. *Id.* The majority found that "the autopsy report would have remained the same whether or not the police had [the defendant] or any other suspect in custody." *Id.* The dissenting opinion stated that it would reach the opposite conclusion because of the fact that the victim's death was a homicide and that the defendant was identified as the suspect before the autopsy commenced. *Id.*

Here, the court ultimately concluded that because the primary purpose was not to accuse a targeted individual, the statement was not testimonial. *Id.* at 914. In making this determination, it adopted the reasoning of the Illinois Supreme Court in *Leach*, which stated:

> [T]he primary purpose of preparing an autopsy report is not to accuse 'a targeted individual of engaging in criminal conduct' or to provide evidence in a criminal trial. An autopsy report is prepared in the normal course of operation of the medical examiner's office, to determine the cause and manner of death, which, if determined to be homicide, could result in charges being brought.

Leach, 366 Ill. Dec. at 499 (internal citation omitted). The court further agreed with the *Leach* court that "an autopsy report created in the normal course of business of a medical examiner's office is not rendered testimonial merely because the . . . medical examiner performing the autopsy is aware that police suspect homicide and that a specific individual might be responsible." *Hutchinson*, 482 S.W.3d at 914 (quoting *Leach*, 366 Ill. Dec. at 500). Thus, having failed the second prong of the two-part test, the court held that the autopsy report was not testimonial. *Id.*

Finally, a recent case from the Indiana Supreme Court engages deeply with all of the issues discussed throughout this memorandum. In *Ackerman v. State*, 51 N.E.3d 171 (Ind. 2016), the court found the autopsy report at issue was not testimonial. *Id.* at 185. The report contained "conclusions about the cause and manner of death, along with documentation of the injuries . . . suffered." *Id.* In determining the primary purpose of the report, the court first considered the relevant Indiana statutes. *Id.* The court gave particular weight to one statute that defined "autopsy" as "the dissection of a dead body *for the purpose of ascertaining the cause, seat, and nature of a disease or for the purpose of inquiring into the cause of death*." *Id.* at 186 (quoting Ind. Code. § 16–36–2–1) (emphasis added). The court concluded that although an autopsy *could* aid in the investigation or prosecution of a criminal case, the relevant statutes did not suggest that the primary purpose of an autopsy was to assist in a criminal case. *Id.*

The court next turned to the distinction between criminal investigations into death (to find the perpetrator) and a Coroner's investigation (to help determine identity, cause of death, time of death, and circumstances), and then to the facts at hand. *Id.* at 186. Here, at the time of the autopsy, law enforcement did believe that the case was a "possible homicide" and had spoken with the defendant, who stated that he had tried to revive the child. *Id.* While law enforcement

had no other evidence implicating the defendant at the time, "two police officers[19] were present during the autopsy."[20] *Id.* at 186–87.

The court went on to note that "nothing suggests that investigating officers communicated with [the autopsy doctor] that a potential homicide investigation was underway." *Id.* at 187. Thus, at the time of the autopsy, the doctor was, at most, "aware that [the child had] died under suspicious circumstances." *Id.* The court reasoned that the lack of charges against the defendant, despite the doctor's finding that the manner of death was homicide, demonstrated that the report was not prepared solely for an evidentiary purpose to aid a police investigation.[21] *Id.* Having found that the broadly construed primary purpose test was not met, the court declined to consider the more specific primary purpose test. *Id.* at 188.

Finally, the court considered whether the autopsy report "demonstrated enough formality as to render it '[a] solemn declaration or affirmation' or whether the statements bears 'indicia of solemnity.'" *Id.* (internal citations omitted). It held that it did not because the autopsy report "only contained a certification that [the autopsy doctor] was a legally qualified physician," and that he performed the autopsy in question. *Id.* The doctor did not certify the report's accuracy or that a certain procedure was followed." *Id.* Lastly, the court took into account that the report was not labeled as a "report," but rather as an "Anatomical Diagnosis." *Id.* The Court concluded

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[19] *But see State v. Jaramillo*, 272 P.3d at 685–86 (finding an autopsy report testimonial where (1) it was prepared with the purpose of preserving evidence for criminal litigation; (2) performed as part of a homicide investigation *with two police officers* attending the autopsy; and (3) the state statutory framework required the medical examiner to report his or her findings to the district attorney if he or she "should know that her statements may be used in future criminal litigation") (emphasis added).

[20] The Court reasoned that "the presence of police officers during the autopsy should not be determinative of the primary purpose, as it would be just as possible that police may be present when the cause of death is accidental." *Id.*

[21] The Court also appeared to give significant weight to the fact that criminal charges were not brought until an eyewitness came forward over thirty years after the offense. *Id.* at 187.

that this label "best capture[s] what an autopsy report truly is, a medical diagnosis, not a formal attestation of fact 'bearing indicia of solemnity.'" *Id.* (internal citations omitted). In sum, the "objective circumstances surrounding the autopsy" and its lack of formality compelled the finding that the autopsy report was nontestimonial. *Id.* at 188–89.

C. Analysis

Given the Supreme Court's failure to articulate a coherent approach for evaluating whether a forensic report is testimonial, lower courts have varied widely in determining whether an autopsy report used in a murder trial is a testimonial statement under *Crawford*. And as shown above, although they do not accord them the same weight, courts commonly consider the same objective factors in reaching their ultimate decision. While the courts are asking the correct questions, they often reach divergent answers. This seems to be driven in large part by the fact that the question of whether one's right to confrontation was violated has become unnecessary complicated. Remember: This tangled web of case law has its genesis in a relatively simple pronouncement in *Crawford*—a statement is testimonial if it is "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52.

As most courts have done, the inquiry into the state's statutory structure seems a proper place to start. The two main questions a court will look to answer here are (1) whether the medical examiner was ***required*** to conduct an autopsy and prepare a report; and (2) whether the report is ***required*** to be given to law enforcement (such as when the report finds the cause of death to be homicide). *See Ignasiak* 667 F.3d at 1232; *Moore*, 651 F.3d at 73; *Cuesta-Rodriguez*, 241 P.3d at 228. When the state statute requires the medical examiner to provide the autopsy report to law enforcement, it seems difficult to believe that a reasonable person would

think the police simply want it for archival or public health purposes. An objective witness privy to the handing over of an autopsy report to law enforcement would surely think that, at the least, the report would "*be available* for use at a later trial." *Crawford*, 541 U.S. at 52 (emphasis added).

Another broader inquiry is made into whether the Office of the Medical Examiner is formally and functionally independent from law enforcement. *See Ignasiak*, 667 F.3d at 1231. And as we saw above, in making this independence determination, courts will often consider whether law enforcement officers were present to observe the autopsies or participated in the creation of the report. *Moore*, 651 F.3d at 73; *Navarette*, 294 P.3d at 440. Here, too, courts go astray. This is no more clear than in *Ackerman*.

As discussed above, there the court found the autopsy report nontestimonial despite the fact that "two police officers were present during the autopsy." *Ackerman*, 51 N.E.3d at 186–87. The court attempted to explain this away, stating that "the presence of police officers during the autopsy should not be determinative of the primary purpose, as it would be just as possible that police may be present when the cause of death is accidental." *Id.* First, the author highly doubts this statement is true; it seems odd to think that police officers would attend autopsies for non-suspicious crimes at the rate they would for suspicious crimes. But for the sake of argument, let us assume that the mere fact that a police officer (or two) was in the room would not, by itself, make a reasonable witness think that the autopsy report would be available for use at a later trial. Surely, though, this fact—coupled with the fact that the doctor was aware that the child died under "suspicious circumstances" and actually found that the manner of death was homicide—

would lead a reasonable person to believe that the autopsy report would be available to be used at a later trial. *Id.* at 187.[22]

On this point, a factor that deserves more serious weight from courts is the **state of the body** at the autopsy. For example, if the victim has suffered a gunshot wound or contusion to the back of the head that caused *internal* bleeding (indicative of a forceful blow)—and the medical examiner knew this at the time he or she conducted the autopsy or detailed those findings in statements in an autopsy report—it would seem that an objective witness would reasonably believe that the report would not just be available, but actually be used at a later trial. A few courts have even adopted the categorical rule that where an autopsy report finds that the individual suffered a violent death, the report is testimonial. *See Navarette*, 294 P.3d at 441; *Kennedy*, 229 W.Va. at 768; *Rosario*, 175 So. 3d at 843. In the author's opinion, this would be a sensible rule for the Supreme Court to adopt if presented with the proper vehicle.

Another bright line rule the Court could potentially draw is that when the autopsy report accuses a particular person or directly links a person to the murder, the report is testimonial. This, it seems, would be an easy call, as words in an autopsy report directly implicating a defendant seem like the exact danger that animated *Crawford*, *Davis*, and *Williams*—the words accuse an "individual of engaging in criminal conduct." *Williams*, 132 S. Ct. 2243. In other words, to answer the question begged by the title of this piece, if the medical examiner who conducts the autopsy knows he or she is doing so as part of a murder investigation, the state of the body indicates the cause of death was homicide, or the autopsy report states that the cause of death is homicide, courts should deem the autopsy report testimonial.

[22] For an articulation of this view on similar facts, see *Jaramillo*, *supra* note 19.

But more difficult cases—ones where the defendant is not directly named in the autopsy report—help elucidate the fundamental disagreement that seems to lie at the heart of these conflicting decisions: whether an autopsy report is created for the primary purpose of "documenting cause of death for public records and public heath," *Maxwell*, 193 Ohio St. 3d at 24, or to create a record that one would "reasonably expect to be used prosecutorially." *Crawford*, 541 U.S. at 51. Viewed in this light, it is not any one factor or combination of factors that leads to a particular conclusion regarding the testimonial nature of an autopsy report, but rather a fundamental difference of opinion as to the *function* of a medical examiner's office and the duties it performs.

D. An Interesting Wrinkle—Calloway v. State

Assume an autopsy report is deemed testimonial and is not entered into evidence, and that a substitute medical examiner who did not complete the autopsy takes the stand at trial and offers his or her opinion about the autopsy report without ultimately testifying to the underlying truth of that report. Do the statements of the substitute medical examiner violate the Confrontation Clause? As noted above, in *Bullcoming*, the Court held that the blood-alcohol reports admitted during surrogate testimony (by someone other than the person who created the reports) were testimonial. But when a similar question arose recently in *Calloway v. State*, 210 So. 3d 1160 (Fla. 2017)—a question Justice Sotomayor mentioned in her concurrence in *Bullcoming*[23]—the court held that statements made in the autopsy report were not testimonial. *Calloway*, 210 So 3d. at 1159.

[23] "[T]his is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence . . . . We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." *Bullcoming*, 564 U.S. at 673 (Sotomayor, J., concurring).

At trial in *Calloway*, the court allowed a substitute forensic technician—a medical examiner, Dr. Hyma—to take the stand and testify regarding the "causes of death and injuries to the victims." *Id.* at 1192.[24] The reports announced the results of the autopsies of five men who had "been shot once in the head, execution style" and had been "bound [at the ankles, hands, and wrists] with duct tape, which had also covered their eyes and mouths. *Id.* at 1167. The medical examiner found that their "wounds were consistent with a .45 caliber firearm, which resulted in an immediate loss of consciousness and death," and that one of the victim's head wounds featured stippling, which indicated that he was shot at close range." *Id.* at 1167. "None of the men exhibited defensive wounds." *Id.*

The court reasoned that the autopsy reports completed by Dr. Siebert were not testimonial because they "were not admitted through the testimony of Dr. Hyma." *Id.* at 1195 (citing *Williams*, 132 S. Ct. at 2238–40). Instead, Dr. Hyma "clearly explained to the jury that his *independent opinion* was derived from the photographs taken by investigators at the scene *and from Dr. Siebert's autopsy reports*." *Id.* (emphasis added). Therefore, "[i]t was his independent opinion that was available during trial and subject to cross-examination." *Id.* The court reasoned that because Dr. Hyma testified that he "drew [his] own independent conclusions," the defendant was "afforded the in-court opportunity to cross-examine the State's expert about the causes of death." *Id.*

The distinction elucidated in *Calloway* and by other courts seems to be that a substitute examiner may testify as to ***his or her own, independent*** expert opinions and conclusions regarding the autopsy and the victim's death. *See Commonwealth v. Avila*, 454 Mass. 744, 762 (Mass. 2009) ("[T]he expert witness's testimony must be confined to his or her own opinions

[24] At trial, Dr. Hyma admitted, "a homicide officer likely attended the autopsies conducted by Dr. Siebert." *Id.* at *23.

and, as to these, the expert is available for cross-examination); *see also Commonwealth v. Phim*, 462 Mass. 470, 479 (Mass. 2012) (finding that a substitute medical examiner may not testify on direct examination as to facts and conclusions stated in an autopsy report without personal knowledge or having independently reached the same conclusion); *State v. Joseph*, 230 Ariz. 296, 298 (Ariz. 2012) (holding that, as long as the substitute expert reaches his or her own conclusions, the Confrontation Clause is satisfied). This can be done, for example, by viewing various materials that were viewed by the examiner when he or she actually created the report in question (*e.g.*, crime scene photos, autopsy photos), or by viewing the actual autopsy report created by the medical examiner who conducted the autopsy.

But where should courts draw the line in a case like *Calloway*? Should another medical examiner who was not present at the autopsy be permitted to provide surrogate testimony? It certainly seems reasonable to argue that if the testifying medical examiner derives his opinion by looking at the autopsy report prepared by another medical examiner and was not present for the autopsy—as occurred in *Calloway*—the testimony should not be permitted. Reaching that conclusion seems to require two steps: (1) that the statements in the autopsy report created by the non-testifying doctor are testimonial statements; and (2) that those statements are based on the independent, subjective, and qualitative analyses of the medical examiner who prepared the report.

Perhaps the best argument on the second prong is that the statements made in the report are a result of the medical examiner applying his or her unique skill set, expertise, and judgment—characteristics that fundamentally differ from one medical examiner to the next. Reaching a decision as to the cause of death requires a medical examiner to identify, weigh, and dismiss a wealth of factors that bring to bear all of his or her training and experience. These

decisions are not only colored by experience and education, but by the medical examiner's own biases and predispositions. The autopsy report generated is therefore a uniquely individual assessment of factors and considerations that only the medical examiner who conducted the autopsy can explain.

This argument does seem to imply that the medical examiner who conducted the autopsy would *have* to testify—no surrogate testimony will do. And this, some have argued, would create a sort of statute of limitations for murder prosecutions.[25] But the death of a medical examiner should not allow for the abrogation of the constitutional right of another. To solve this problem, a court does not have to require the medical examiner who conducted the autopsy to testify, but could instead require another medical examiner to be present during and observe the autopsy. The medical examiner conducting the autopsy would then be able to explain his or her thought process and findings in real time.

This rule would thus preclude a medical examiner who did not conduct and was not present during the autopsy from giving her own independent opinion about the cause of death based on the factual findings contained in the autopsy report. This would not, however, prevent the medical examiner from viewing the crime scene photos, autopsy photos, and other evidence obtained in order to form an independent opinion for purposes of trial; it would simply prevent the medical examiner from reading the autopsy report created by the conducting medical examiner and using those words—the result of the medical examiner's own subjective and qualitative analyses—to form the basis of an "independent" opinion.

E. Conclusion

[25] *See* Zabrycki, *supra* note 2, at 1115.

Until the Supreme Court provides more concrete guidance on how autopsy reports used in murder prosecutions should be treated under the Confrontation Clause, lower courts will continue to be adrift in a sea of contradictory opinions that reach divergent conclusions from substantially similar facts. As it stands today, though, the primary goal of a party arguing that an autopsy report used in a murder prosecution is a testimonial statement should be to utilize the factors outlined above to convince the court that—even assuming an autopsy is generally a routine examination done for the purpose of determining the cause and manner of death for public record—the moment an objective witness present at an autopsy becomes aware that a death is violent or suspicious (or believes so because of police presence at the autopsy), the autopsy report is reasonably expected to be used prosecutorially, and is therefore conducted for the primary purpose of establishing a record that might later be used in a criminal prosecution.