

NO. 06-8490

IN THE SUPREME COURT OF THE UNITED STATES

DONALD L. CRAIG  
Petitioner

-vs-

STATE OF OHIO  
Respondent

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On Petition For Writ Of Certiorari  
To The Supreme Court of Ohio

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BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

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Capital Case

QUESTION PRESENTED

IS AN AUTOPSY REPORT USED IN A MURDER PROSECUTION A TESTIMONIAL STATEMENT WITHIN THE MEANING OF *CRAWFORD V. WASHINGTON*, 541 U.S. 36 (2004)?

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OPINION BELOW

The opinion of the Supreme Court of Ohio (Pet. App. 1-27) is reported at 110 Ohio St. 3d 306, 853 N.E.2d 621, 2006-Ohio-4571.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right \*\*\* to be confronted with the witnesses against him."

## STATEMENT

On February 28, 1996 twelve-year old Rosie Davenport was visiting her friend Esther Stone, who lived with her mother, Michelle Lindsay, at 111 South Maple Street in Akron, Ohio. Rosie Davenport left the house around 6:00 PM and Petitioner left soon after. T., 9, pp. 1639, 1662, 1669, 1671, 1717. When Rosie's mother came to that house near 7:00 PM on the 28<sup>th</sup>, Petitioner was still not there. T., 9, pp. 1639, 1672.

Petitioner also lived with Michelle Lindsay. T., 9, pp. 1661-1662. Petitioner had told a person that Rosie Davenport was fast and loose. T., 14, 2602. Another person had seen Petitioner touch Rosie Davenport's leg. T., 14, p. 2580.

Rosie Davenport was not seen alive by friends or family after she left 111 South Maple Street on February 28, 1996. Rosie's body was discovered March 5, 1996 in the debris strewn, cold and wet basement at 156 South Maple Street. The house was not inhabited by anybody and was full of debris. T., 10, pp. 1740-1742; T., 10, 1818-1821.

The body was under stairs leading into the basement. T., 10, 1825. There were a shirt, jacket and blue jeans on the body. T., 10, p. 1827; T., 12, p. 2216. Notwithstanding that the body was found clothed, forensic examination showed that the vagina and anal area were bruised and torn. T., 12, pp. 2235-2239. There were bruises on the wrists and ankles as if the girl had been tied. T., 12, pp. 2207-2208, 2232-2234. The body had a large bruise under the chin going across the neck. T., 12, pp. 2227-2228. The girl had died of strangulation. T., 12, p. 2251. She had been raped before she died. T., 12, pp. 2261-2262.

DNA analysis was attempted in 1996 but there was not enough of a sample to do the analysis with the technology available at that time. T., 13, pp. 2351-2354, 2358. The evidence was preserved and in 2002 the evidence was sent to BCI. There it was tested

using technology not available in 1996. T., 14, p. 2528. BCI determined that Petitioner's DNA was on a vaginal swab from Rosie Davenport's body and also on her underpants. T., 14, pp. 2524-2526. The expected frequency of occurrence of the DNA profile on the swab for African-Americans was one in two hundred and twenty-two trillion, two hundred billion persons. T., 14, p. 2525.

Dr. Lisa J. Kohler is the Chief Medical Examiner for Summit County. T., 12, p. 2192. Under the Summit County Charter, the Medical Examiner has the powers and duties imposed by general law on coroners. The Medical Examiner must be a licensed physician preferably with specialized knowledge in forensic medicine and pathology. Summit County Charter, Art. IV, Sections 4.03-4.04. App. 1, 2.

Dr. Kohler is board certified in anatomic and clinical pathology and forensic medicine. T., 12, p. 2193. She said that Dr. Roberto Ruiz performed the autopsy on the body of Rosie Davenport on March 6, 1996. When Dr. Ruiz performed the autopsy he worked for the elected coroner. Id., p. 2200.

Dr. Ruiz retired from the Medical Examiner's Office in the past year (Petitioner's trial commenced June 22, 2004). Id., p. 2200. Dr. Kohler said she had reviewed all of the autopsy materials. Id. She said that she had talked to Dr. Ruiz briefly about the case and had asked him to clarify some issues. Id., p. 2253.

Petitioner objected that Dr. Kohler did not have first hand knowledge of the test, autopsy or protocol she proposed to testify to. T., 12, p. 2201. Petitioner conceded in his Merit Brief in the Supreme Court of Ohio that the records of the Medical Examiner's Office were admissible in evidence at trial. Pet. Merit Brief, pp. 34-35. The Supreme Court of Ohio construed Petitioner's trial objection as implicating the Confrontation Clause of the Sixth Amendment. Pet. A-17, ¶73.

Petitioner objected at trial to certain autopsy photographs, State Exhibits 59, 65, 66, 68, 69, 75, 76, 82, 83, 84, 85, 86, 87, 88, 89 and 90. His sole objection was that the photographs were gruesome, repetitive, and more prejudicial than probative. This was the same objection Petitioner raised in a pretrial motion in limine filed June 17, 2004.

Petitioner did not mention these photographs in his argument based on Dr. Kohler's trial testimony. Pet. A-18-19. Petitioner's objection raised a state law claim. The autopsy photographs were dealt with in a separate argument. Pet. A-19-20.

Dr. Kohler testified concerning these autopsy photographs. She said that Exhibit 59 showed the right side of the face and neck. There were abrasions on the nostrils and nose and the lip was inverted. There was a large abrasion across the neck. T., 12, pp. 2227-2228. Earlier Dr. Kohler described these injuries. Id., pp. 2205, 2212. The large abrasion was consistent with strangulation by means of a rope or the like. Id., pp. 2212, 2270. Dr. Kohler said that Exhibit 65 showed a close-up of a small abrasion coming down the left side of the neck. Id., p. 2227. Dr. Kohler had described this injury. Id., p. 2205.

Dr. Kohler said Exhibit 66 showed the unclothed body with abrasions and scrapes on the abdomen and chest. Id., p. 2220. Earlier Dr. Kohler described these injuries. Id., pp. 2206-2207. Dr. Kohler said that the bruises on the body's chest were consistent with a rough surface being rubbed up against the skin. Id., p. 2271.

Dr. Kohler said Exhibit 68 was a side view of the body showing an abrasion on the face, underneath the neck, on the rib cage, on the left hip and a carpet burn abrasion on the left lower leg. T., 12, pp. 2222-2223. Earlier Dr. Kohler said that there were abrasions on these parts of the body. T., 12, pp. 2204-2207. Dr. Kohler said that Exhibit 69 showed a closer view of the mid-portion of the body and better showed an

abrasion on the back of the left hand. *Id.*, p. 2223. Earlier she had described this abrasion. *Id.*, p. 2207.

Dr. Kohler said that Exhibits 75 and 76 showed the back of the right forearm with an abrasion. *Id.*, pp. 2233-2234. Earlier she had described this abrasion. *Id.*, p. 2207.

Dr. Kohler said that Exhibits 82 and 83 showed the right and left occipital scalp with the skin pulled back showing bruises. *Id.*, pp. 2235-2236. Earlier Dr. Kohler said these injuries were not visible on external examination. *Id.*, p. 2209.

Dr. Kohler said Exhibits 84, 85 and 86 showed the genital area. Exhibit 84 showed a bruise and a tear near the rectum and vagina. *Id.*, pp. 2235-2236. Exhibit 85 showed more of the internal anatomy and bruising on the back of the labia majora. There was also a tear. *Id.*, p. 2236. Exhibit 86 was a closer view showing multiple tears including smaller ones just coming into view. All the injuries were consistent with penetrating trauma. *Id.*, p. 2237. Earlier Dr. Kohler had described these injuries. *Id.*, pp. 2213-2214.

Dr. Kohler said that Exhibit 87 showed more of the trauma to the anus; bruises and multiple tears around the anal opening. *Id.*, p. 2238. Exhibit 88 was a closer view showing small tears at the top of the anal opening and large tears at the top. *Id.* Exhibit 89 showed bruises on both sides of the anal opening. *Id.*, p. 2239. Exhibit 90 was a close up view of the anal area showing more detail of the injuries. *T.*, 12, p. 2239. Earlier Dr. Kohler had described the anal injuries. *Id.*, p. 2214. These injuries were consistent with penetration. *Id.*

Dr. Kohler testified concerning additional photographs. Exhibit 57 showed red horizontal marks across the body's neck. *T.*, 12, p. 2218. Exhibits 60, 62 and 64 showed more of the abrasion on the neck. *Id.*, p. 2225-2226, 2229. Exhibit 78 showed a linear

abrasion on the left ankle. *Id.*, p. 2231. Exhibit 74 showed a linear abrasion on the left inner wrist. *Id.*, p. 2232. Exhibit 91 showed damage to the anus reflecting penetrating trauma. *Id.*, p. 2240.

Dr. Kohler stated that the victim had been dead for between three days and a week when the body was discovered on March 5th. *Id.*, p. 2244. The autopsy report contained no statement concerning the time of death. *Id.*, p. 2262.

## ARGUMENT

### A. Under Ohio Law the Autopsy Report Was Admissible As a Business Record and a Public Record.

In 1980 the people of Summit County utilized Section 3, Article X of the Ohio Constitution to establish a charter form of government. This charter form of government is subject to the authority of the State General Assembly to prescribe general laws governing counties. But the County of Summit as a charter county may regulate the form, exercise and performance of those laws. *State v. Davis* (2000), 139 Ohio App.3d 701, \*704 - \*705; *County of Summit v. Morgan*, (Nov. 25, 1981), Summit (Ohio) App. No. 10270, 1981 WL 4253, \*1.

The position of Medical Examiner was created as an appointive position to replace the elected coroner. Summit County Charter, Art. IV, Section 4.03. The elective office of coroner was abolished effective January 5, 1997. *Id.* Under the Summit County charter the Medical Examiner has the powers and duties imposed by general law on coroners. Summit County Charter, Art. IV, Sections 4.03-4.04. App. 1, 2.

Under Ohio law certified records of a coroner including autopsy reports are business records and public records. The autopsy report is admissible in any civil or

criminal action as to facts contained in the report. Ohio Revised Code Section 313.10, App. 3; Pet. A-18, ¶180.

The Supreme Court of Ohio held as a matter of state law that the autopsy report admitted at Petitioner's trial was admissible under the statute. Pet. A-18, ¶180. Petitioner conceded in his Merit Brief in the Supreme Court of Ohio that the report was admissible. Pet. Merit Brief, pp. 34-35.

Petitioner cannot argue that the autopsy report was neither a business record nor a public record. That determination of state law must be accepted by this Court. See *Phillips Petroleum Company v. Shutts* (1985), 472 U.S. 797, \*834 (Stevens, J. concurring in part and dissenting in part); *Garner v. Louisiana* (1961), 368 U.S. 157, \*174 (Frankfurter, J. concurring).

Autopsy reports admissible as business records are not testimonial under *Crawford*. *United States v. Feliz* (2<sup>nd</sup> Cir. 2006), 467 F.3d 227, \*233 - \*236; *People v. Durio* (2005), 794 N.Y.S.2d 863, \*868; *Denso v. State* (Tex. App. 2005), 156 S.W.3d 166, \*180, \*182; *State v. Cutro* (S.C. 2005), 618 S.E.2d 890, \*\*896.

In *Smith v. State* (Ala. 2004), 898 So.2d 907, the court held that the autopsy report did not implicate *Crawford* and that the admissibility of the report and associated materials was governed by hearsay law. Id. \*916. Then the court went on to find that the Confrontation Clause precluded the state from proving an essential element of its case by hearsay evidence. Id. \*917. Then the court found that use of the autopsy report was harmless error. Id. \*918. The State does not believe that *Smith* is good authority supporting the view that autopsy reports are testimonial.

Where a document is prepared in anticipation of litigation it does not have the guarantee of circumstantial trustworthiness afforded proper business records and is not

admissible as a business record. *Sikora v. Gibbs* (1999), 132 Ohio App.3d 770, \*\*776; *State v. Evans* (Aug. 18, 1993), Hamilton (Ohio) App. Nos. C-910443/910515, 1993 WL 311681, \*5. To be admissible as a public record the recorder of the information must be under a duty to reports facts objectively and accurately. *Sikora*, supra \*775. It cannot be maintained that the Supreme Court of Ohio would have held the autopsy report admissible as a business and public record had the court entertained any doubt as to the trustworthiness of the document or whether the report was prepared in anticipation of litigation. Having conceded the admissibility of the report under Ohio law and the holding of the Supreme Court of Ohio Petitioner's argument in this Court must be premised on the autopsy report being a proper business and public record.

B. *Crawford* Excludes Business Records From Testimonial Statements.

Referring to the common law in 1791 this Court observed that there were several exceptions to the general rule of exclusion of hearsay and that most of those exceptions "covered statements that by their nature were not testimonial- for example, business records \*\*\*." *Crawford*, 541 U.S. at \*55 - \*56. Concurring in the judgment the Chief Justice credited the majority with excluding business and official records from its definition of testimony. *Id.* \*76.

C. There Is No Federal Circuit Conflict.

Seven federal circuits hold that business records and or public records are not testimonial under *Crawford*. A nontestimonial business record is a document that was not prepared for purposes of litigation or by government agents for use at the defendant's trial. See *Palmer v. Hoffman* (1943), 318 U.S. 109, \*113 - \*114; *Thomas v. United States* (D.C. 2006), No. 03-CF-1125, 15-18.

In *United States v. DiPace* (2<sup>nd</sup> Cir. 2006), 2006 WL 3147474 (slip copy) the business records were minutes of an employee welfare benefit plan. In *United States v. King* (4<sup>th</sup> Cir. 2006), 161 Fed.Appx. 296, 2006 WL 41175 the business records are not named in the opinion. Relying on *Crawford* the court found that admission of the records was not plain error. Id. \*297. In *United States v. Thornton* (4<sup>th</sup> Cir. 2006), 2006 WL 3591902 (slip copy) the business/public records were fingerprint cards. Id. \*2.

In *United States v. Gutierrez-Gonzales* (5<sup>th</sup> Cir. 2004), 111 Fed.Appx. 732, 2004 WL 2294569 the public record was the defendant's immigration file. Id. \*734. In *United States v. Baker* (6<sup>th</sup> Cir. 2006), 458 F.3d 513, 2006 Fed.App. 0296P, the business records were postal records. Id. \*519. In *United States v. McIntosh* (7<sup>th</sup> Cir. 2006), 2006 WL 1158897 (slip copy) the business records were incident reports, punch cards and head count logs from a community correctional center. The court considered the claim in the context of an *Anders v. California* (1967), 386 U.S. 738 proceeding.

In *United States v. Hagege* (9<sup>th</sup> Cir. 2006), 437 F.3d 943, 69 Fed. R. Evid. Serv. 602 foreign business records admitted under 18 U.S.C. Section 3505 were found nontestimonial. Id. \*958. In *United States v. Shepard* (11 Cir. 2005), 154 Fed.Appx. 849, 2005 WL 3076499 unidentified business and financial statements were found nontestimonial. Id. \*851.

One circuit court squarely holds that an autopsy report admissible as a business record is nontestimonial. *United States v. Feliz* (2<sup>nd</sup> Cir. 2006), 467 F.3d 227, \*233 - \*236. The court reached the same result viewing an autopsy report as a public record. Id. \*237. The *Feliz* court reached these conclusions under both *Crawford* and *Davis v. Washington* (2006), 126 S.Ct. 2266.

D. *Diaz v. United States* (1912), 223 U.S. 442 is No Help to Petitioner.

Petitioner's reliance on *Diaz*, Pet. 6, is misplaced because the issue in this case was not remotely before the court in *Diaz*. There the defendant was charged with assault and battery and later homicide in the Philippines. At the homicide trial the defendant introduced prior proceedings before the justice of the peace who heard the assault charge and a preliminary investigation. Among those records was an autopsy report that was favorable to the defendant, testimony and a statement made by the defendant.

Despite his introduction of the records in the homicide trial the defendant claimed that he was denied his right of confrontation under Philippine law by introduction of the testimony produced before the justice of the peace and at the preliminary investigation.

This Court quickly rejected that notion since the defendant had introduced the records and thus waived any objection on confrontation grounds. See *Brooks v. Commonwealth* (Va. App. Dec. 19, 2006), 638 S.E.2d 131, \*162 - \*163 (defendant may waive the right to confrontation.) In the course of discussing the defendant's claim this Court's pertinent comment in full was, "the testimony could not have been admitted without the consent of the accused, first, because it was within the rule against hearsay, and, second because the accused was entitled to meet the witnesses face to face." *Diaz*, supra \*449 - \*450.

If Petitioner means that this Court's comment in *Diaz* is precedent that the autopsy report admitted in his trial is testimonial under *Crawford*, then Petitioner must agree that the autopsy report was barred by the rule against hearsay as well as by the right of confrontation. Since Petitioner makes no such argument he cannot argue that

*Diaz* is any precedent on the *Crawford* issue. Moreover, Petitioner cannot raise any hearsay issue in this Court on the autopsy report since as stated above the report is as a matter of Ohio law a business record and a public record. Pet. A-18, ¶180.

Since the records in *Diaz* included a statement made by the defendant it is not credible that this Court meant to include all of the records in the phrase "the testimony". The defendant objected to the use against him of the testimony before the justice of the peace and at the preliminary investigation. *Diaz*, supra \*449. It would be more than strange if the defendant objected on confrontation grounds to the use of his own statement and a favorable autopsy report. The comment in *Diaz* cannot reasonably be taken to mean that all of the records including the autopsy report constituted testimony.

E. There Are No Cases From Which the Conclusion That Autopsy Reports Are Testimonial Follows *a fortiori*.

Petitioner claims the obverse is true based on two cases, *City of Las Vegas v. Walsh* (Nev. Dec. 15, 2005), 124 P.3d 203 and *State v. Caulfield* (Minn. Oct. 5, 2006), 722 N.W. 304.

In *City of Las Vegas* the document was an affidavit prepared by a nurse who had drawn blood from the defendant in order to establish the blood alcohol content. 124 P.3d, \*204 - \*205. The court found that the affidavit was testimonial because it was prepared for use at a later trial and since *Crawford* mentioned as testimonial affidavits where the declarant reasonably expected the document to be used prosecutorially. Id. \*207 - \*208. Likewise in *Caulfield* the document was a State lab report prepared after a police request for use in the defendant's trial. 722 N.W.2d, \*306 - \*307, \*309. Another State lab report case is *State v. Miller* (Oregon Oct. 4, 2006), 144 P.3d 1052.

There as in *Caulfield* the lab report was prepared specifically for use against the defendant. 144 P.3d, \*\*1053, \*\*1058 - \*\*1059.

This sort of testimonial business record was addressed in *Thomas v. United States* (D.C. 2006), No. 03-CF-1125. There the document was a DEA chemist's written report prepared following the defendant's arrest and analyzing substances given by the defendant to an undercover officer. Id. 3-4. The document was prepared for use against the defendant at trial. Id. 15. As such it was testimonial albeit arguably a business record. Id. 17-18.

The autopsy report admitted in Petitioner's trial was not prepared for use against Petitioner. The report was prepared in 1996 and Petitioner was not identified as the killer until 2002. Pet. A-9, ¶20. This type of circumstance was noted in *People v. Durio* (2005), N.Y.S. 2d 863, \*869 where the court stated that, "an autopsy is often conducted before a suspect is identified \*\*\*. That it may be presented as evidence in a homicide trial does not mean that it was composed for that accusatory purpose or that its use by a prosecutor is the inevitable consequence of its composition."

The report by definition was not prepared in anticipation of litigation since it is a business record and a public record under Ohio law. Pet. A-18, ¶80; *Sikora v. Gibbs* (1999), 132 Ohio App.3d 770, supra; *State v. Evans* (Aug. 18, 1993), Hamilton (Ohio) App. Nos. C-910443/910515, 1993 WL 311681, supra.

#### F. Any Error Was Harmless Beyond A Reasonable Doubt.

Error under *Crawford* is subject to a harmless error analysis. *Crawford*, 541 U.S., \*76 (Rehnquist, C.J., concurring.); *United States v. Vieyra-Vazquez* (10th. Cir. 2006), 2006 WL 3262408 (slip copy), \*4 FN3; *Davis v. State* (Tex. Crim. App. 2006),

203 S.W.3d 845, \*849 - \*851. Constitutional error must be harmless beyond a reasonable doubt. *Chapman v. California* (1967), 386 U.S. 18, \*24.

In reviewing the erroneous admission of evidence in violation of the Confrontation Clause non-exclusive factors are, (1) the importance of the hearsay to the State's case; (2) whether the hearsay was cumulative of other evidence; (3) the presence or absence of evidence corroborating or contradicting the hearsay on material points and (4) the overall strength of the State's case. *Davis v. State*, supra \*852.

Petitioner does not mention the autopsy photographs identified and testified to by Dr. Kohler. In *United States v. Beach* (4<sup>th</sup> Cir. 2006), 196 Fed.Appx. 205 the court rejected an argument that photographs of missing seized evidence were testimonial under *Crawford*. Id. \*\*3. Autopsy photographs are not testimonial since they are but depictions of the deceased's body and under no stretch of the imagination can it be said that the deceased's body is a witness. Nor do such photographs bear testimony. *Crawford*, 541 U.S. at \*51, \*68; See *United States v. Oaxaca* (9<sup>th</sup> Cir. 1978), 569 F.2d 518, \*525 where the court stated that the availability of an inference from photographs did not make photographs assertions.

The relevance of the autopsy photographs admitted against Petitioner depended on expert evaluation of the photographs and testimony indicating what the photographs showed and how that was pertinent to the charges. That testimony was supplied not by Dr. Ruiz but by Dr. Kohler, who Petitioner had full opportunity to cross-examine. Pet. A-17, ¶79. The only word in the autopsy report, Pet. A-28-43, concerning photographs is "yes" indicating there were photographs. Pet. A-28.

The photographs were highly relevant to prove particularly savage rapes. T., 12, pp. 2235-2239. The photographs were also highly relevant to prove that the victim had

been strangled and tied at wrist and ankle. T., 12, pp. 2218, 2222-2228, 2232-2234. The photographs quite apart from the report proved that the victim had been strangled, raped and kidnapped. Pet. A-20, ¶¶93 -¶¶96; 22, ¶¶117.

The DNA evidence showed conclusively that Petitioner raped the victim. Pet. A-9, ¶¶20.

There was similar act evidence admitted to show identity and motive. That evidence was that Petitioner had in 1991 raped a seventeen year old girl in an abandoned house after tying her up. The girl later accused Petitioner of the rape. Pet. A-11-13.

Petitioner of course had full opportunity to cross-examine Dr. Kohler about any aspect of the autopsy report. Dr. Kohler consulted with Dr. Ruiz before she testified and clarified issues she had with the report. T., 12, p. 2253.

Petitioner posits that Dr. Ruiz could have been cross-examined about the time of death. Pet. 19. The autopsy report was silent on that subject. T., 12, p. 2262. Petitioner had the opportunity to cross-examine Dr. Kohler about her conclusions on the time of death. It is utter speculation that Dr. Ruiz would have testified differently.

Petitioner also posits that maybe he raped the victim on February 28<sup>th</sup>, and the girl then dressed and survived until at least March 2<sup>nd</sup>. Pet. 20. Then she was strangled to death by someone other than Petitioner and left in the same basement that Petitioner took her to. It is unclear how Dr. Ruiz could have corroborated that scenario. The jury believed that Petitioner took the girl to the basement on February 28<sup>th</sup>, tied her up, raped her at his leisure, allowed her to dress and then killed her to prevent her identifying him. Pet. A-9, ¶¶21-¶¶22; A-13, ¶¶45; A- 22, ¶¶118.

The State submits that due to the autopsy photographs, the DNA evidence, the similar act evidence and Petitioner's opportunity to cross-examine Dr. Kohler that admission of the autopsy report if error was harmless.

#### CONCLUSION

For the above stated reasons the State of Ohio respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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County of Summit, Ohio

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