

**IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

**COMMONWEALTH OF PENNSYLVANIA,       :       SUPREME COURT**

**:**

**vs.**

**:**

**41 EAP 2016**

**DARNELL BROWN,**

**:**

**Appellant**

**:**

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**BRIEF FOR APPELLANT**

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This is an Appeal from the Order of Judgment of the Superior Court of Pennsylvania dated May 10, 2016, on docket 1165 EDA 2015, which was an appeal Appeal from the Judgment of Sentence Rendered By The Honorable Scott O’Keefe on March 26, 2015, on CP-51-CR-0003322-2013, Commonwealth Application for Reargument Denied July 13, 2016. **Case consolidated with 41 EAP 2106.**

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**STATEMENT OF JURISDICTION**

Having allowed the appeal in this matter, this Court has jurisdiction to review the determination of the Superior Court. 42 Pa.C.S. §§ 724, 5105.

### **TEXT OF THE ORDER IN QUESTION**

The Text of the Order is stated as follows:

Appellant, Darnell Brown, appeals from the judgment of sentence entered on March 26, 2015. In this case, we consider whether an autopsy report is testimonial for purposes of the Confrontation Clause. After careful consideration, we hold that the autopsy report in this case was testimonial and the trial court erred in admitting the autopsy report. The trial court also improperly admitted certain expert testimony relating to the opinions expressed in the autopsy report. We hold, however, that the trial court properly admitted expert testimony expressing independent conclusions based on the autopsy report. Accordingly, we conclude that the improper admission of evidence was harmless error and affirm the judgment of sentence.

#### **OFFICIAL REPORTS:**

The Trial Court, by the Honorable Scott O’Keefe, Philadelphia Court of Common Pleas, sentenced the Defendant and thereafter issued his Opinion in this matter; a copy of said Opinion is attached hereto and made a part hereof as Exhibit “A.”

The Superior Court of Pennsylvania affirmed the Lower Court and denied the appeal on May 10, 2016, and issued an Opinion on said date, and a copy of same is attached hereto and made a part hereof as Exhibit “B.” That decision is reported at Commonwealth v. Brown, 2016 Pa. Super. LEXIS 266, 2016 PA Super 98, 2016 WL 2732086 (Pa. Super. Ct. 2016). The Commonwealth application for reargument was denied on July 13, 2016.

## **STATEMENT OF SCOPE AND STANDARD OF REVIEW**

The issues before this Court involve claims of a denial of a Constitutional right.

“Whether the admission [and use] of the [autopsy] Report violated Appellant's rights under the Confrontation Clause is a question of law, for which [the] standard of review is de novo and [the] scope of review is plenary.” Commonwealth v. Yohe, 621 Pa. 527, 543-44, 79 A.3d 520, 530 (2013) .

## QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

- I. Because an autopsy report constitutes testimonial hearsay, does use of that report by another expert as the basis of his own opinion violate the Sixth Amendment guarantee of the right of Confrontation?
- II. Because Rule 703 allows an expert to use inadmissible evidence to form an opinion but does not allow that inadmissible evidence to be used for its truth, did not the Superior Court err in concluding that Rule 703 permitted the testimony in this case where the testifying expert's opinion has relevance and probative value *only* if the report he relied on is true?



## **STATEMENT OF THE CASE**

The Defendant, Appellant herein, was arrested and charged with Murder and related offenses, and was represented by counsel Jay Gottlieb for trial. The case was assigned to Judge Scott O'Keefe of the Philadelphia Court of Common Pleas. Appellant elected to be tried by jury and that trial commenced on November 3, 2014 and ended on November 7, 2014, when he was convicted of Third Degree Murder and related weapons offenses. On March 26, 2015, he was sentenced to a term of twenty (20) to forty (40) years incarceration for Third Degree Murder; to a consecutive term of four (4) to eight (8) years for violation of the Uniform Firearms Act (VUFA)--Carrying a Firearm without a License--and a consecutive term of one (1) to two (2) years for VUFA--Carrying a Firearm in Public, plus five (5) years of probation for possession of an instrument of crime (PIC).

Thereafter, Appellant filed a timely Notice of Appeal. On May 10, 2016, the Superior Court affirmed the Lower Court and denied the appeal finding that, while the Trial Court erred in admitting the autopsy report and certain expert testimony regarding opinions expressed in said autopsy report, the improper admission was harmless error by virtue of the right of an expert to rely on inadmissible evidence in forming an opinion. A Commonwealth application for reargument was denied on July 13, 2016. A timely Petition for Allowance of Appeal was filed by both Mr. Brown and the Commonwealth, and the appeal was allowed on Mr. Brown's Petition as to both questions raised therein and on the Commonwealth Petition as to the one question raised.

As in the Superior Court Brief for Appellant, the undersigned will adopt the factual history

as recited by Judge O’Keefe in his Opinion and as elaborated upon by the Superior Court, and supplement it as pertains to this appeal. The basic summary of the trial court is as follows:

On the evening of December 9, 2012 there was a tattoo party on the 2600 block of North Stanley Street in Philadelphia. People were drinking, smoking, going in and out of houses and mingling on the street. Darnell Brown and Marcus Stokes arrived together. Around 11:30 p.m. defendant Brown was ‘taking a leak’ in the street when his revolver fell to the ground. Apparently the defendant was looking for trouble. (N.T. 11-4-14, p. 109-110). About forty-five minutes later this defendant started an argument with Cory Morton over one of them throwing a tissue at the other. The verbal confrontation escalated when Brown punched Morton in the face. Brown then retrieved his revolver from the wheel well of a parked car. While Brown had his gun pointed at another individual, Morton quipped that the Brown ‘won’t do it, he ain’t crazy’. In response, Brown took a step back and shot Morton five times, resulting in Cory Morton’s untimely demise. (N.T. 11-4-14, pp. 109-122.) Brown and Stokes ran away. (N.T. 11-4-14, pp. 120-124).

Dr. Chu testified to the cause of death and the manner of death. (Notes of Trial Transcript, 11/05/14, Pages 122, et seq.). He conceded that he had not participated in the preparation of the Medical Examiner’s report. (N/T, 11/05/14, p. 131). He had been in Philadelphia for three months as of the date that he testified which was November 5, 2014, and the report had been completed by a Dr. Osbourne on January 2, 2013. (N/T, 11/05/14, p. 131).

As elaborated by the Superior Court,

At trial, Dr. Albert Chu, an assistant medical examiner, testified as an expert witness as to the cause and manner of Morton's death. Dr. Chu neither assisted nor was present at Morton's autopsy, which was performed by Dr. Marlon Osbourne. Instead, Dr. Chu testified based upon his review of the autopsy report prepared by Dr. Osbourne and the accompanying autopsy photographs.

Commonwealth v. Brown, 2016 Pa. Super. LEXIS 266, \*2-3, 2016 PA Super 98, 2016 WL 2732086 (Pa. Super. Ct. 2016).

As pertains to this appeal, trial counsel preserved an objection on Confrontation grounds to

medical examiner testimony at issue. N.T. 11/5, 100-101. In his testimony<sup>1</sup>, Dr. Chu acknowledged having no involvement in the autopsy in this matter, and in fact entered the employment of the Philadelphia Medical Examiner office after the date the autopsy occurred. N.T. 11/5, 122. His testimony derived from the autopsy report, which was admitted into the record, and autopsy photographs. N.T. 11/5, 122-124.

From this review, Dr. Chu testified to:

- the number of gunshot wounds (page 123);
- the location of each (page 124);
- the direction [wound path] of each shot (page 124);
- the absence of soot or stippling *according to the report* (pages 125-126);
- whether the shots were perforating or penetrating *according to the report* (pages 124-125; 127-128);
- an estimate regarding distance between the shooter and the deceased *according to the report averment regarding the absence of soot or stippling* (page 126); and
- which organs were struck by each bullet apparently *according to the report* (N.T. 127-128).

Perhaps most importantly, the testifying examiner was asked whether the findings *of the report* were consistent with the prosecution theory of the case.

Q: But based on your review of the report, are the wounds incurred by Cory Morton consistent with somebody shooting him from a distance of six to eight feet away while facing him and then Mr. Morton either turning or otherwise showing his back to the victim and being struck one time in the back?

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<sup>1</sup> The entirety of the Medical Examiner's testimony is contained in Exhibit "C," *infra*.

A: It would be consistent with that.

Q: Would it be consistent with Cory Morton walking for a few feet before he collapsed?

A: Yes.

N.T. 11/5, 129.

## SUMMARY OF ARGUMENT

Autopsy reports are testimonial hearsay. They are required by Pennsylvania law to “determine the cause of any such death and to determine whether or not there is sufficient reason for the coroner to believe that any such death may have resulted from criminal acts or criminal neglect of persons other than the deceased.” 16 P.S. §1237. As well, they detail the factual findings of a forensic investigation and in every regard mirror the testimony to be proffered in court, from specific observations to ultimate issue conclusions as to cause and manner of death. They result from an examination of evidence (the body) gathered by police, are written under circumstances in which an objective observer would anticipate their use in court, and are created for an evidentiary purpose.

Because the reports are testimonial hearsay, the right of Confrontation guaranteed by the Sixth Amendment prevents their admission unless there is an opportunity for cross-examination of the author or of another expert who supervised, participated in or at least observed the autopsy. Because the testifying witness in the case at hand met none of these criteria, its direct use at trial violated appellant’s Confrontation guarantee.

The Constitutional analysis is no different when a new expert reads the report and makes it the basis for her/his conclusion. Use of testimonial hearsay to support a conclusion deprives an accused of that same Confrontation guarantee. The factual description of the body’s condition and the results of the examination neither require nor permit any independent analysis or application of expertise; rather, they are simply being conveyed through the new, testifying expert.

Because the autopsy report itself was admitted as evidence against appellant, and because the testifying expert repeated factual findings from the report and then used those findings directly

to respond to the prosecutor's questions as to whether they were consistent with the prosecution theory of the case, appellant was deprived of the Sixth Amendment right of Confrontation.

The Superior Court's determination that there could have been no harm because an expert may rely upon inadmissible evidence when presenting an opinion is contrary to the Confrontation guarantee. Where that inadmissible information is *testimonial* hearsay, Pa. R. Evid. 703 must bow to the right of Confrontation because the only way the in-court testimony has relevance is if the information relied upon is true - and that reliance consequently 'back doors' testimonial hearsay, a violation of the Sixth Amendment.

As appellant shows in Argument 2, *infra*, that proposition has been accepted by a majority of the Justices of the United States Supreme Court in analyzing the interplay between Federal Rule of Evidence 703 and the Confrontation right. That analysis carries even more sway in Pennsylvania where, unlike in Federal trials, the jury must be informed of the inadmissible facts relied upon by the testifying expert. *See* Rule 705, Pa.R. Evid. Here, no instruction was given to the jury that the report was to be considered only to explain the basis for the expert's opinion, and not as substantive evidence.

The prosecution made direct use of the report and relied upon it for its:

Q: But based on your review of the report, are the wounds incurred by Cory Morton consistent with somebody shooting him from a distance of six to eight feet away while facing him and then Mr. Morton either turning or otherwise showing his back to the victim and being struck one time in the back?

A: It would be consistent with that.

Q: Would it be consistent with Cory Morton walking for a few feet before he collapsed?

A: Yes.

It was the report *taken as true* that gave meaning to the testimony presented to the jury. Because

the Right of Confrontation overrides evidentiary rules, the lower court's reliance on Rule 703 is erroneous and cannot be upheld.

## ARGUMENT

### 1. BECAUSE AN AUTOPSY REPORT CONSTITUTES TESTIMONIAL HEARSAY, USE OF THAT REPORT BY ANOTHER EXPERT AS THE BASIS OF HIS OWN OPINION VIOLATES THE SIXTH AMENDMENT GUARANTEE OF THE RIGHT OF CONFRONTATION.

Forensic reports are testimonial hearsay. Bullcoming v. New Mexico, 131 S.Ct. 2705, 180 L. Ed. 2d 610 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). That an autopsy report falls squarely within that category of reports and is therefore testimonial cannot be questioned<sup>2</sup>, particularly in light of the role accorded it under Pennsylvania's statutory framework. 35 P.S. §450.503; 16 P.S. §1237. Their admission, directly or via incorporation through a person who has read and relied on them to draw conclusions, constitutes the giving of testimony and entitles the accused to the right of Confrontation. Where the person

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<sup>2</sup> The Superior Court noted that

Several state and federal courts that have recently considered the issue have likewise held that autopsy reports are testimonial. E.g., United States v. Ignasiak, 667 F.3d 1217, 1232 (11th Cir. 2012); West Virginia v. Kennedy, 229 W. Va. 756, 735 S.E.2d 905, 917-918 (W.Va. 2012); United States v. Moore, 651 F.3d 30, 69-74, 397 U.S. App. D.C. 148 (D.C. Cir. 2011) (per curiam), aff'd in part sub nom., Smith v. United States, 133 S.Ct. 714, 184 L. Ed. 2d 570 (2013); Cuesta-Rodriguez v. Oklahoma, 2010 OK CR 23, 241 P.3d 214, 228 (Okla. Crim. App. 2010); North Carolina v. Locklear, 363 N.C. 438, 681 S.E.2d 293, 305 (N.C. 2009); Wood v. Texas, 299 S.W.3d 200, 209-210 (Tex. Crim. App. 2009); Commonwealth v. Nardi, 452 Mass. 379, 893 N.E.2d 1221, 1233 (Mass. 2008).

Commonwealth v. Brown, 2016 Pa. Super. LEXIS 266, \*9, 2016 PA Super 98, 2016 WL 2732086 (Pa. Super. Ct. 2016). Petitioner adds State v. Bass, 224 N.J. 285, 318-320, 132 A.3d 1207, 1226-1227 (N.J. 2016), discussed *infra*, to that list.



testifying neither authored the report nor participated in or supervised the examination and the author is not produced at trial for cross-examination, use of the autopsy report violates the Sixth Amendment.

Autopsy reports are required by Pennsylvania law in cases of a suspicious death to determine whether the cause was criminal activity. 35 P.S. §450.503; 16 P.S. §1237 (“The purpose of the investigation shall be to determine the cause of any such death and to determine whether or not there is sufficient reason for the coroner to believe that any such death may have resulted from criminal acts or criminal neglect of persons other than the deceased.”). Beyond the obligation to examine a body to determine if a crime has occurred, Pennsylvania law requires cooperation between the coroner and the prosecutor. 16 P.S. §1242 (“the coroner shall, so much as may be practicable, consult and advise with the District Attorney”).<sup>3</sup>

The contents of an autopsy report make indisputable the conclusion that they are testimonial. Detailing the physical findings of an examination and then drawing forensic conclusions therefrom, they mirror “the precise testimony the analysts would be expected to provide if called at trial. The [reports] are functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-11, 129 S. Ct. 2527, 2532 (citation omitted).

In Commonwealth v. Yohe, 79 A.3d 520, 537 (Pa. 2013), this Court identified the factors that make a forensic report such as that at issue here testimonial:

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<sup>3</sup> That a primary purpose of autopsy reports is to provide forensic testimony in criminal proceedings is further confirmed by the report *STRENGTHENING FORENSIC SCIENCE: A PATH FORWARD* (2009 National Academy of Sciences), which devotes an entire chapter to the medico-legal death investigation process. *Id.*, chapter 9.

- “a law enforcement officer provided evidence [here, the body of the deceased] to a laboratory for scientific testing[;]”
- the report had “the identical function of live, in-court testimony[;]”
- “the 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[;] and
- it “was plainly created for an ‘evidentiary purpose.’”

*Id.* (citations omitted).

That an autopsy report is testimonial finds further confirmation, if such is needed, in the autopsy “Standards” of the National Association of Medical Examiners.

<https://netforum.avectra.com/public/temp/ClientImages/NAME/684b2442-ae68-4e64-9ecc-015f8d0f849e.pdf> (last visited January 8, 2017). Of particular importance, “[t]hese officials must investigate cooperatively with, but independent from, law enforcement and prosecutors. The parallel investigation promotes neutral and objective medical assessment of the cause and manner of death.” *Id.*, 7. The Standards also detail the precise contours of what is required in a forensic report, including diagnoses, interpretations, and cause of death. *Id.*, 26.<sup>4</sup>

Appellant makes two final points<sup>5</sup> confirming that the autopsy report in the case at hand is testimonial hearsay. Even assuming, arguendo, that *some* autopsy reports might be non-

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<sup>4</sup> As is evinced by a comparison of the autopsy report here and the testimony provided at trial, the latter “mirror[ed]” the former. *See* Exhibits “C” and “D,” *infra*.

<sup>5</sup> Appellant does so in light of this Court having also accepted the Commonwealth’s Petition for Allowance of Appeal in the instant matter on the question of whether “the Superior Court err when it rejected binding Confrontation Clause authority and held as a matter of first impression that autopsy reports are testimonial[.]” 40 EAP 2016, ORDER of December 14, 2016 granting allowance of appeal.

testimonial, a point appellant does not concede, *this* report is. The autopsy was a core part of the evidence gathering in a “suspicious” death. *Cf.*, Rosario v. State, 175 So. 3d 843, 856 (Fla. Dist. Ct. App. 2015) (“Due 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, we conclude that an autopsy report prepared pursuant to chapter 406 is presumptively testimonial in nature.”).

Second, even if one were to assume that *a* primary purpose of an autopsy report is a public health one such as facilitating mortality health record keeping, because *another* primary purpose is forensic the report remains testimonial. By definition, something that is “primary” is a top-ranked categorization but not an exclusive one, such that a person may have “his [or her] primary goals in life.” <http://www.dictionary.com/browse/primary> (last visited January 8, 2017; emphasis added). Particularly in light of the mandate of 16 P.S. §1237 that *the* purpose of an autopsy is “to determine the cause of any such death and to determine whether or not there is sufficient reason for the coroner to believe that any such death may have resulted from criminal acts or criminal neglect...” that is a *primary* one that renders the report testimonial.<sup>6</sup>

As such, and as this Court’s precedent makes clear, the introduction of such a report at trial may occur only when the testifying witness is the person who prepared the report, observed the examination from which the report arose, or actively supervised its preparation and completion and is subject to cross-examination. Yohe, 79 A.3d at 539 (allowing testimony “where the person

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<sup>6</sup> As Professor Richard Friedman, who submitted an *amicus curiae* brief in Crawford and argued Hammond before the Supreme Court, emphasizes, “[l]abeling one purpose after the fact as primary seems to be a rather arbitrary exercise—and thus the test invites manipulation to enhance the chance that the evidence will be received.” Friedman, *Crawford, Davis and Way Beyond*, XV Journal of Law and Policy No. 2, 553, 560 (2007)(footnote omitted).

testifying is a supervisor, reviewer, or someone with a personal but limited connection with the scientific test at issue”).<sup>7</sup> Because the autopsy report in the case at hand was introduced by a witness who met none of the *Yohe* criteria, its direct use at trial violated appellant’s Confrontation guarantee.

The Constitutional analysis is no different when an expert reads the report and makes it the basis for her/his ‘new’ conclusion. Use of testimonial hearsay to establish a conclusion deprives an accused of that same Confrontation guarantee.

Illustrative of this is the instance where an expert on drug gangs testifies to how the gangs operates *based on custodial interrogations* [*i.e.*, testimonial hearsay] of captured gang members. As explained by the Second Circuit,

[w]hen faced with the intersection of the *Crawford* rule and officer experts, we have determined that an officer expert's testimony violates *Crawford* if [the expert] communicated out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of an expert opinion.

United States v. Mejia, 545 F.3d 179, 198-99 (2d Cir. 2008)(internal quotations and citation omitted). As the Mejia Court elaborated, this was not an independent analysis of evidence but a conveying of the substance of the testimonial statements as the expert’s opinion. “ We are at a loss in understanding how [the expert] might have ‘applied his expertise’ to these statements before conveying them to the jury, such that he could have avoided convey[ing] the substance of [those] statements to the jury.” *Id.* (internal quotations and citation omitted).

Mejia does not stand in isolation. In United States v. Blazier, 69 M.J. 218, 226 (C.A.A.F.

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<sup>7</sup> See also, Commonwealth v. Ali, 608 Pa. 71, 107-12, 10 A.3d 282, 304-07 (2010) (allowing an expert who witnessed the autopsy to testify to findings recorded by another medical examiner).

2010), a drug analysis expert testified from and relied in part on the “cover memoranda” that accompanied various machine-created data.

Dr. Papa's testimony contained a mix of inadmissible and admissible evidence. Specifically, the cover memoranda were inadmissible under the Confrontation Clause, and Dr. Papa's testimony conveying the statements contained in those cover memoranda -- including those concerning what tests were conducted, what substances were detected, and the nanogram levels of each substance detected -- were inadmissible under both the Confrontation Clause and M.R.E. 703, while the machine-generated printouts and data were not hearsay at all and could properly be admitted into evidence and serve as the basis for Dr. Papa's expert conclusions.

*Id.*

The same is true when a new expert relies upon a medical examiner's written<sup>8</sup> autopsy findings. The factual description of the body's condition and the results of the examination neither require nor permit any independent analysis or application of expertise; rather, it is simply being conveyed through the new, testifying expert.

This is the precise conclusion drawn by the New Jersey Supreme Court in Bass, *supra*. As that Court explained,

At defendant's trial, instead of limiting its examination of Dr. DiCarlo to his independent observations and analysis regarding Shabazz's condition and cause of death, the State prompted its expert to read the contents of various portions of Dr. Peacock's autopsy report, as if Dr. DiCarlo had been present at the autopsy and Dr. Peacock's findings were his own. Defense counsel objected, arguing that the witness should not be "parroting what was in Dr. Peacock's

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<sup>8</sup> Appellant acknowledges that photographs from an autopsy are not hearsay. Thus, reliance on visual images created by machine - as opposed to a sketch intended to convey a description - implicates no Confrontation issue. See State v. Smith, 367 P.3d 420, 432 (N.Mex. 2016)(collecting cases confirming that autopsy *photos* are not testimonial evidence). The same is likely true where an expert testifies in reliance on machine-created data, such as gas chromatograph charts, x-rays or blood content analysis.

report as if these were his findings." He asked the trial court to limit Dr. DiCarlo to "his own independent observations of the autopsy photographs and things of that nature."

...

Thus, Dr. DiCarlo was permitted to engage in precisely the type of "parroting" of the autopsy report that has been held to violate the Confrontation Clause.

State v. Bass, 224 N.J. 285, 318-320, 132 A.3d 1207, 1226-1227, 2016 N.J. LEXIS 223, \*52-57 (N.J. 2016). *See also*, State v. Smith, 367 P.3d 420, 432 (N.Mex. 2016) ("an expert could not testify based on the contents of someone else's autopsy report, though 'an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause.'"); *see generally*, Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011).

This is what transpired in the instant case. The original report was moved into evidence and its contents were testified to extensively, both directly in terms of wound path and organs struck, and as the basis for determining whether the body's condition could have resulted from specific factual scenarios.

In sum, whether the in-court expert repeats another expert's testimonial report or adopts it into his/her own verbiage by making it the basis of the conclusions relayed in the courtroom, the result is the same - a violation of the Sixth Amendment right of Confrontation.

## 2. RULE 703 DOES NOT PERMIT AN EXPERT TO OFFER AN OPINION BASED UPON TESTIMONIAL HEARSAY

Pennsylvania Evidence Rule 703, like its Federal counterpart, permits experts to rely upon otherwise inadmissible evidence if of the type reasonably used in forming opinions in that field. "If experts in the particular field would reasonably rely on those kinds of facts or data in forming

an opinion on the subject, they need not be admissible for the opinion to be admitted.” At the same time, “[t]he underlying information is not admissible for its truth or substance, but only to inform the jury of the foundation for the opinion.” 1-703 Ohlbaum on the Pennsylvania Rules of Evidence § 03.07 (2016). Where that inadmissible information is *testimonial* hearsay, however, 703 must bow to the right of Confrontation, because the only way the in-court testimony has relevance is if the information relied upon is true - and that reliance consequently ‘back doors’ testimonial hearsay, a violation of the Sixth Amendment.

Rule 703 was intended to permit experts to assist juries by filtering information, picking that which is “reliable” as determined by experience and knowledge, rejecting that which has no or limited value, and then offering an opinion. As explained in the Advisory Committee Notes to Federal Rule of Evidence 703,

the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.

As expressed in this Note, “[m]ost of them are admissible in evidence...” In that regard, 703 offers an evidentiary shortcut, *i.e.*, a practical convenience . The testifying expert gathers

information, information assessed for its reliability by a judge under Evidence Rule 104<sup>9</sup>, and from that presumptively reliable data forms the opinion. Yet historically, this does not permit the testifying witness to serve solely as an echo for another expert's determination. Mike's Train House, Inc. v. Lionel, L.L.C., 472 F.3d 398, 409 (6th Cir. 2006) ("circuits have squarely rejected any argument that Rule 703 extends so far as to allow an expert to testify about the conclusions of other experts"). That is especially true when that prior determination is testimonial hearsay, reliance on which violates not only Rule 703 but the Constitution.

This is because in almost all cases - and in the case at hand - the in-court testimony has relevance only if the information relied upon is reliable, *i.e.*, true - and a jury must assume that in order to credit the testifying expert. As noted in People v. Hill, 191 Cal. App. 4th 1104, 1130 n.16, 120 Cal. Rptr. 3d 251, 273 (2011), "[s]ubstantial academic commentary agrees."<sup>10</sup> See Mnookin

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<sup>9</sup> "Implicit in Rule 703 is the trial court's sound discretion under Pa.R.E. 104(a) to make a preliminary determination as to whether the particular underlying facts are of a kind reasonably relied upon by experts in the particular field." Commonwealth v. Towles, 630 Pa. 183, 208, 106 A.3d 591, 605 (2014).

<sup>10</sup> (See Kaye et al., New Wigmore Treatise on Evidence (2010 Cumulative Supp.) Expert Evidence, § 3.10.1, p. 59 (Kaye) ["To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true. If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; conversely, if the jury doubts the accuracy or validity of the basis evidence, that presumably increases skepticism about the expert's conclusions. The factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions but not for its truth ought not permit an end-run around a constitutional prohibition." (fn. omitted)]; Mnookin, Expert Evidence and the Confrontation Clause After Crawford v. Washington (2007) 15 J.L. & Pol'y 791, 816 (Mnookin) ["To say that [inadmissible] evidence offered for the purpose of helping the jury to assess the expert's basis is not being introduced for the truth of its contents rests on an inferential error."]; Oliver, Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington (2004) 55 Hastings L.J. 1539, 1555-1560.) Professor Mnookin sets out a lengthy list of pre-Crawford academic commentary on



and Kaye, CONFRONTING SCIENCE: EXPERT EVIDENCE AND THE CONFRONTATION CLAUSE, 2013 SUP.CT.REV. 99, 119-120 (2012).

Where the expert merely “parrots” the testimonial hearsay under Rule 703, a Constitutional violation has occurred. United States v. Rios, 830 F.3d 403, 417-18 (6th Cir. 2016)(rejecting expert testimony that is only a “conduit” for testimonial hearsay); United States v. Garcia, 793 F.3d 1194, 1213 (10th Cir. 2015) (same, and reviewing cases). This is true as well when the testifying expert draws conclusions from the testimonial hearsay. This issue was directly before the Court in Williams v. Illinois, 132 S. Ct. 2221, 2257, 183 L. Ed. 2d 89, 130, (U.S. 2012). At least five of the nine Justices agreed that 703 does not permit expert testimony based on testimonial hearsay where it has relevance only if true. Justice Thomas, writing for himself, explained that

[t]o use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true.” D. Kaye, D. Bernstein, & J. Mnookin, *The New Wigmore: A Treatise on Evidence: Expert Evidence* §4.10.1, p. 196 (2d ed. 2011) (hereinafter Kaye). “If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert's conclusions.”

*Id.* at 2257 (Thomas, J. concurring). The four dissenters - Justices Kagan, Scalia, Ginsberg and Sotomayor - were even more forceful in their rejection of 703 as a vehicle for testimonial hearsay.

The situation could not be more different when a witness, expert or otherwise, repeats an out-of-court statement as the basis for a conclusion, because the statement's utility is then dependent on its truth. If the statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness's

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this issue. (Mnookin, *supra*, at p. 803, fn. 24.)

conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies.

*Id.* at 2268-2269 (Kagan, J. dissenting).

Even the plurality in Williams would likely reject the Superior Court's 703 analysis in the case at hand. For the Williams plurality, while it disagreed as to whether the out-of-court report had relevance only if it was deemed truthful, the critical distinction was that reliance on a report occurred in the context of a *bench* trial and that in *jury* trials the jury would be precluded from learning the underlying [hearsay] information. Williams v. Illinois, 132 S. Ct. 2221, 2234-35 ("in jury trials, both Illinois and federal law generally bar an expert from disclosing such inadmissible evidence... When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose.").

This distinction has particular resonance here, because unlike in Illinois and under federal law Pennsylvania law *requires* that the jury learn the inadmissible information to assess how the expert reached a conclusion. As the Comment to Pennsylvania Rule of Evidence 703 explains,

[t]his rule is identical to the first two sentences of F.R.E. 703. It does not include the third sentence of the Federal Rule that provides that the facts and data that are the bases for the expert's opinion are not admissible unless their probative value substantially outweighs their prejudicial effect. This is inconsistent with Pennsylvania law which requires that facts and data that are the bases for the expert's opinion must be disclosed to the trier of fact. *See* Pa.R.E. 705.

Compounding the 703 problem in the case at hand, no instruction was given to the jury "to consider the facts and data only to explain the basis for the expert's opinion, and not as substantive evidence." Pennsylvania Rule of Evidence 703, Comment.

In the case at hand, the use of the testimonial hearsay was pronounced and was relevant

only if the jury were to conclude that the original medical examiner's report was true. This included the following points:

- the direction [wound path] of each shot (page 124);
- the absence of soot or stippling *according to the report* (pages 125-126);
- whether the shots were perforating or penetrating *according to the report* (pages 124-125; 127-128);
- an estimate regarding distance between the shooter and the deceased *according to the report averment regarding the absence of soot or stippling* (page 126); and
- which organs were struck by each bullet apparently *according to the report* (N.T. 127-128).

Perhaps most importantly, the testifying examiner was asked whether the findings of the report were consistent with the prosecution theory of the case.

Q: But based on your review of the report, are the wounds incurred by Cory Morton consistent with somebody shooting him from a distance of six to eight feet away while facing him and then Mr. Morton either turning or otherwise showing his back to the victim and being struck one time in the back?

A: It would be consistent with that.

Q: Would

A: Yes.

N.T. 11/5, 129.

Clearly, it was the report and its truthfulness that were at issue; and it was the report *taken as true* that gave meaning to the testimony presented to the jury. Because the right of confrontation overrides evidentiary rules, *compare* Holmes v. South Carolina, 547 U.S. 319 (2006)(holding that a state evidentiary rule may not override the constitutional rights of an accused), the lower court's

reliance on Rule 703 is erroneous and cannot be upheld.

**CONCLUSION**

WHEREFORE, for the reasons contained herein, appellant requests this Court to find that his Confrontation rights were violated, reverse the lower courts, and remand for a new trial.

Respectfully submitted,



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# **EXHIBIT “A”**

## **Court of Common Pleas Opinion**

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :

CRIMINAL TRIAL DIVISION

vs. :

1165 EDA 2015

DARNELL BROWN

**FILED**

JUL 15 2015

CP-51-CR-0003322-2013

Criminal Appeals Unit  
First Judicial District of PACP-51-CR-0003322-2013 Comm. v. Brown, Darnell  
OpinionOPINION

O'KEEFE, J.



7319724961

Defendant, Darnell Brown, appeals from his conviction of third degree murder and related offenses. Mr. Brown's sole complaint is that the Assistant Medical Examiner who testified at trial was not the doctor who performed the autopsy or authored the Medical Examiner's Report.

PROCEDURAL HISTORY:

Darnell Brown, was arrested on January 3, 2013, and charged with murder, conspiracy, violations of the Uniform Firearms Act and possessing an instrument of crime. The defendant was held for court on all charges after a preliminary hearing on March 12, 2013. Trial was held from November 3, 2014 through November 7, 2014, wherein the jury convicted Mr. Brown of third degree murder, carrying a firearm without a license, carrying a firearm in a public place,

and possessing the instrument of a crime, and not guilty of murder of the first degree and conspiracy. The charge of possession of firearm prohibited was not presented to the jury and subsequently *nolle prossed* by the prosecution. The co-defendant, Marcus Stokes, was acquitted of all charges. Mr. Brown was sentenced to twenty to forty years incarceration for the third degree murder, four to eight years consecutive incarceration for carrying a firearm without a license and a consecutive one to two years incarceration for carrying a firearm in public, to be followed by five years probation for possessing an instrument of a crime. (N.T. 3-26-15, p. 14). The defendant timely appealed.

#### **STANDARD OF REVIEW:**

The standard of review for a claim of inadmissibility of evidence is that the admission of evidence is within the sound discretion of the trial court and will not be reversed absent a showing that the trial court clearly abused its discretion. An abuse of discretion occurs when the law is overridden or misapplied, or the judgment exercised was manifestly unreasonable. *Commonwealth v. Handfield*, 34 A.3d 187, 207-08 (Pa.Super. 2011).

#### **FACTS:**

On the evening of December 9, 2012 there was a tattoo party on the 2600 block of North Stanley Street in Philadelphia. People were drinking, smoking, going in and out of houses and mingling on the street. Darnell Brown and Marcus Stokes arrived together. Around 11:30 p.m. defendant Brown was 'taking a leak' in the street when his revolver fell to the ground. Apparently the defendant was looking for trouble. (N.T. 11-4-14, p. 109-110). About forty-five



minutes later this defendant started an argument with Cory Morton over one of them throwing a tissue at the other. The verbal confrontation escalated when Brown punched Morton in the face. Brown then retrieved his revolver from the wheel well of a parked car. While Brown had his gun pointed at another individual, Morton quipped that the Brown 'won't do it, he ain't crazy'. In response, Brown took a step back and shot Morton five times, resulting in Cory Morton's untimely demise. (N.T. 11-4-14, pp. 109-122). Brown and Stokes ran away. (N.T. 11-4-14, pp. 120-124).

#### LEGAL DISCUSSION:

Defendant's sole claim of error is that this court committed reversible error in allowing Assistant Medical Examiner Albert Chu, M.D. to testify as to the cause and manner of death when he had not performed the autopsy, nor certified the Medical Examiner's Report. Appellant relies on *Bulcoming v. New Mexico*, 131 S.Ct. 2705, 180 L.Ed.2d, 610 (2011) for his claim. Such reliance is misplaced.

During the course of this trial, the prosecution presented the expert testimony of Albert Chu, M.D., an Assistant Medical Examiner with the city of Philadelphia. Dr. Chu testified that the autopsy of Cory Morton was performed by Dr. Marlon Osbourne another assistant medical examiner employed by the city. Dr. Chu testified that he reviewed the autopsy report, the autopsy photographs as well as the toxicology report and that he had formed his own opinion, to a reasonable degree of medical certainty, as to the cause and manner of death of the decedent. (N.T. 11-5-14, p. 122-123). Although that opinion was the same as that of Dr. Osbourne, the opinion expressed by Dr. Chu was Dr. Chu's opinion, and he held that opinion to a reasonable degree of medical certainty. (N.T. 11-5-14, p. 130). No objection was made to the witness's

expertise, testimony or opinion at any time during the trial. (N.T. 11-5-14, p. 118-132). The record reveals that both defense counsel stipulated to the expertise of Dr. Chu. (N.T. 11-5-14, p. 118).

It is well settled that failure to timely object to improper testimony constitutes a waiver of that claim of error. *Commonwealth v. Baumhammers*, 599 Pa. 1, 960 A.2d 59, 73 (2008), *Commonwealth v. Powell*, 598 Pa. 224, 956 A.2d 406, 423 (2008), *Commonwealth v. Adams*, 39 A.3d 310 (Pa.Super. 2012), *Commonwealth v. Molina*, 33 A.3d 51 (Pa.Super. 2011). In the case at bar, no objection was made to the testimony of Assistant Medical Examiner Chu, either prior to his testimony, during his testimony, nor at the conclusion of his testimony. As such, the defendant has waived this claim of error.

Assuming *arguendo* that the claim is not waived, the allegation fails on its merits as well.

In *Bullcoming v. New Mexico*, *supra*, the prosecution attempted to introduce a blood alcohol report prepared by Curtis Caylor, the forensic analyst assigned to test Bullcoming's blood sample, through the testimony of Gerasimos Razatos, a fellow analyst who had neither observed, nor reviewed Caylor's analysis. The state did not assert that Razatos had any independent opinion concerning the blood alcohol content. Mr. Razatos testified as to the standards used by the laboratory as well as the standard procedure mandated by the lab. The analyst expressed no opinion as to the results of the test in question and did no independent verification of the results, but instead, merely testified as to another analyst's findings. Further, Bullcoming's attorney objected to the testimony of Mr. Razatos in lieu of the performing analyst.

Such is not the case at hand. Although Dr. Chu did not perform the autopsy, he did review the autopsy, the autopsy photographs and toxicology reports, and more importantly, the opinions as to the cause and manner of death were his own opinions, expressed to a reasonable

degree of medical certainty. Dr. Chu testified as to the four gunshot wounds suffered by the decedent, including the bullet that entered the victim's right chest and went through the victim's heart, aorta, left lung and left rib. (N.T. 11-5-2014 p.127). Dr. Chu opined that as a result of his examination that the cause of death was multiple gunshot wounds and the manner of death homicide. Dr. Chu's actions and opinions were available for cross-examination. Dr. Chu was more than qualified to express his expert opinion that the four gunshot wounds suffered by the decedent were the cause of death and the manner homicide. It was Dr. Chu's opinion as to the cause and manner of death that were presented to the jury, and as such his unchallenged testimony was properly admitted before the jury.

Accordingly, the judgment of sentence of this court should be affirmed.

BY THE COURT:



J. SCOTT O'KEEFE, J.

DATE: July 15, 2015

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CRIMINAL TRIAL DIVISION

vs. : 1165 EDA 2015

DARNELL BROWN : CP-51-CR-0003322-2013

Proof of Service

I hereby certify that I am on this day serving the foregoing Court's Opinion upon the person(s), and in the manner indicated below, which service satisfies the requirements of Pa.R.Crim.P. 114:

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Date: July 15, 2015

  
Allison M. O'Keefe, Law Clerk

## **EXHIBIT “B”**

### **Superior Court Opinion**

## Commonwealth v. Brown

Superior Court of Pennsylvania  
May 10, 2016, Decided; May 10, 2016, Filed  
No. 1165 EDA 2015

### Reporter

139 A.3d 208 \*; 2016 Pa. Super. LEXIS 266 \*\*; 2016 PA Super 98; 2016 WL 2732086

COMMONWEALTH OF PENNSYLVANIA, Appellee v.  
**DARNELL BROWN**, Appellant

**Subsequent History:** Rehearing denied by  
*Commonwealth v. Brown*, 2016 Pa. Super. LEXIS 385  
(Pa. Super. Ct., July 13, 2016)

Appeal granted by *Commonwealth v. Brown*, 2016 Pa.  
LEXIS 2802 (Pa., Dec. 14, 2016)

Appeal granted by *Commonwealth v. Brown*, 2016 Pa.  
LEXIS 2803 (Pa., Dec. 14, 2016)

**Prior History:** [\*1] Appeal from the Judgment of  
Sentence of March 26, 2015. In the Court of Common  
Pleas of Philadelphia County. Criminal Division at No(s):  
CP-51-CR-0003322-2013. Before O'Keefe, J.

### Core Terms

autopsy report, testimonial, autopsy, medical examiner,  
cause of death, trial court, primary purpose, criminal  
prosecution, circumstances, admissible, homicide,  
independent conclusion, expert testimony, harmless,  
violent, natural causes, confrontation, suspicious,  
forensic, courts, sudden, statutory framework, manner  
of death, gun shot wound, cross-examination,  
nontestimonial, conclusions, Appeals, rights, internal  
quotation marks

### Case Summary

#### Overview

**HOLDINGS:** [1]-The trial court erred in admitting an  
autopsy report, as well as an independent expert's  
reference to the medical examiner's opinions therein, as  
the report was testimonial under the primary purpose  
test for purposes of the *confrontation clause of U.S.*  
*Const. amend. VI* and based on the statutory scheme

for medical examiners under *35 Pa. Stat. Ann. §*  
*450.503* and *16 Pa. Stat. Ann. § 1242*; [2]-The autopsy  
report was testimonial because it established past  
events that were potentially relevant to later criminal  
proceedings with respect to the cause of death, it was  
reasonable to believe that it would be made available for  
use at a later trial, and the death was sudden, violent, or  
suspicious in nature; [3]-However, as expert testimony  
expressing independent conclusions based on the  
autopsy report was properly admitted, the error was  
harmless.

#### Outcome

Judgment of sentence affirmed.

### LexisNexis® Headnotes

Governments > Local Governments > Employees &  
Officials

Healthcare Law > Medical Treatment > Human  
Remains > Duties of Coroners & Medical Examiners

**HN1** Philadelphia, Pennsylvania abolished the position  
of coroner and replaced it with a medical examiner.  
Philadelphia, Pa., Code § 2-102. The medical examiner  
in Philadelphia has the same powers and duties as do  
coroners in other counties of the Commonwealth.

Constitutional Law > ... > Fundamental Rights > Criminal  
Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's  
Rights > Right to Confrontation

Criminal Law & Procedure > ... > Standards of Review > De  
Novo Review > Conclusions of Law

**HN2** Whether a defendant's confrontation rights were  
violated is a pure question of law; therefore, an  
appellate court's standard of review is de novo and the  
scope of review is plenary.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

**HN3** See Pa. Const. art. I, § 9.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Witnesses

Evidence > Admissibility > Expert Witnesses

**HN4** Although the admission of expert testimony is subject to an abuse of discretion standard of review, an error of law constitutes an abuse of discretion.

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

**HN5** Pa. R. Evid. 103(b) provides that once the court rules definitively on the record - either before or at trial - a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

**HN6** See U.S. Const. amend. VI.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

**HN7** The protection under the confrontation clause of U.S. Const. amend. VI has been incorporated into the Fourteenth Amendment, U.S. Const. amend. XIV, and thus is applicable in state court prosecutions. The Confrontation Clause applies to witnesses against the accused-in other words, those who bear testimony. Testimony, in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

**HN8** In order to determine if a document or statement created out-of-court is testimonial in nature for purposes of the confrontation clause, the Supreme Court of Pennsylvania looks at the primary purpose of the document or statement. A document or statement is testimonial if its primary purpose is to establish or prove past events potentially relevant to later criminal prosecution. A document or statement has such a primary purpose if it is created or given under circumstances which would lead an objective witness reasonably to believe that the document or statement would be available for use at a later trial. If a document or statement is testimonial, then the witness who prepared it must testify at trial, unless he or she is unavailable and the defendant had a prior opportunity for cross-examination.

Evidence > ... > Scientific Evidence > Bodily Evidence > Autopsies

Governments > Local Governments > Employees & Officials

Healthcare Law > Medical Treatment > Human Remains > Duties of Coroners & Medical Examiners

**HN9** In Pennsylvania, the medical examiner must issue a certificate attesting to an individual's cause of death where the circumstances suggest that the death was sudden or violent or suspicious in nature or was the result of other than natural causes. 35 Pa. Stat. Ann. § 450.503. This is almost always accomplished through performing an autopsy. Although the medical examiner is independent, in the exercise of his duties as contained in this subdivision, the medical examiner shall, so far as may be practicable, consult and advise with the district attorney. 16 Pa. Stat. Ann. § 1242. Although not all autopsies in Pennsylvania are used in court proceedings, the statutory framework contemplates that the autopsy report will be used in a criminal trial when the circumstances suggest that the death was sudden, violent or suspicious or was the result of other than natural causes.

Evidence > ... > Scientific Evidence > Bodily Evidence > Autopsies

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

**HN10** Several state and federal courts that have recently held that autopsy reports are testimonial, such as for confrontation purposes.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Evidence > ... > Scientific Evidence > Bodily Evidence > Autopsies

Healthcare Law > Medical Treatment > Human Remains > Duties of Coroners & Medical Examiners

**HN11** Medical examiners are not mere scriveners reporting machine generated raw-data. The observational data and conclusions contained in the autopsy reports are the product of the skill, methodology, and judgment of the highly trained examiners who actually performed the autopsy. Most portions of an autopsy report involve judgments and decisions made by the medical examiner performing the autopsy. As such, there is little reason to believe that confrontation will be useless in testing medical examiners' honesty, proficiency, and methodology - the features that are commonly the focus in the cross-examination of experts.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Evidence > ... > Scientific Evidence > Bodily Evidence > Autopsies

Healthcare Law > Medical Treatment > Human Remains > Duties of Coroners & Medical Examiners

**HN12** The Pennsylvania Supreme Court held that whether a document or statement is testimonial, such as for the confrontation clause, depends upon its primary purpose. Under Pennsylvania law, where the circumstances suggest that the death was sudden or violent or suspicious in nature or was the result of other than natural causes, the medical examiner must typically perform an autopsy. 35 Pa. Stat. Ann. § 450.503.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Evidence > ... > Scientific Evidence > Bodily Evidence > Autopsies

**HN13** Many courts found it irrelevant that not all autopsy reports are used in criminal prosecutions and that a

certain (high) percentage of autopsies are done for other reasons. Instead, they found the fact that the statutory frameworks contemplate using autopsy reports in criminal prosecutions compelling. The statutory framework in Pennsylvania contemplates using autopsies in criminal proceedings. There is a sharp split in authority on whether autopsy reports are testimonial, such as for purposes of the confrontation clause.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Evidence > ... > Scientific Evidence > Bodily Evidence > Autopsies

Healthcare Law > Medical Treatment > Human Remains > Duties of Coroners & Medical Examiners

**HN14** The Confrontation Clause, U.S. Const. amend. VI, may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause - like those other constitutional provisions - is binding, and courts may not disregard it at their convenience. Thus, although forcing medical examiners to testify regarding the findings of an autopsy report may be costly, that does not exempt autopsy reports from the Confrontation Clause.

Evidence > ... > Scientific Evidence > Bodily Evidence > Autopsies

Healthcare Law > Medical Treatment > Human Remains > Duties of Coroners & Medical Examiners

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

**HN15** The primary purpose test under the confrontation clause asks whether a statement was made for the primary purpose of establishing past events potentially relevant to later criminal prosecution. The primary purpose of an autopsy is to establish a fact, i.e., the cause of death. This fact is certainly potentially relevant to later criminal prosecutions. It is immaterial that the autopsy was not created for the sole purpose of being used in court. Under Pennsylvania law the medical examiner is required to certify the findings of the autopsy report. 16 Pa. Stat. Ann. § 1244. This is sufficiently solemn to be considered testimonial.



Evidence > ... > Scientific Evidence > Bodily  
Evidence > Autopsies

Criminal Law & Procedure > Trials > Defendant's  
Rights > Right to Confrontation

Constitutional Law > ... > Fundamental Rights > Criminal  
Process > Right to Confrontation

**HN16** An autopsy report that is prepared because of a sudden, violent, or suspicious death or a death that is the result of other than natural causes, is testimonial. Such an autopsy report is prepared to prove a fact, i.e., the victim's cause and manner of death, that an objective observer would reasonably believe could later be used in a criminal prosecution. As such autopsy reports are testimonial and the author of the autopsy report is required to testify at trial in order to satisfy the Confrontation Clause.

Evidence > ... > Exceptions > Business  
Records > Admissibility in Criminal Trials

Evidence > ... > Scientific Evidence > Bodily  
Evidence > Autopsies

Criminal Law & Procedure > Trials > Examination of  
Witnesses > Cross-Examination

**HN17** The Pennsylvania Supreme Court's pre-Crawford jurisprudence held that in a homicide prosecution, evidentiary use, as a business records exception to the hearsay rule, of an autopsy report in proving legal causation is impermissible unless the accused is afforded the opportunity to confront and cross-examine the medical examiner who performed the autopsy.

Criminal Law & Procedure > ... > Murder > Third-Degree  
Murder > Elements

Evidence > ... > Testimony > Expert Witnesses > Criminal  
Proceedings

**HN18** Although non-expert testimony may be sufficient to establish cause of death by a preponderance of the evidence, it does not satisfy the more stringent standard of criminal trials. Thus, in order to prove all the elements of third-degree murder, inter alia, that the victim's death was caused by gunshot wounds, expert testimony is required. The expert testimony need not be offered by a medical doctor. Courts have found sufficient a lay coroner's expert testimony regarding the cause of death. On the other hand, a conclusion upon the question whether a death from external cause or violence was accidental, suicidal, or homicidal, may ordinarily be determined by a jury without the assistance of expert witnesses.

Criminal Law & Procedure > Trials > Examination of  
Witnesses > Cross-Examination

Criminal Law & Procedure > Trials > Defendant's  
Rights > Right to Confrontation

Constitutional Law > ... > Fundamental Rights > Criminal  
Process > Right to Confrontation

**HN19** The Confrontation Clause, U.S. Const. amend. VI, does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination. Courts 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.

Constitutional Law > ... > Fundamental Rights > Criminal  
Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's  
Rights > Right to Confrontation

Evidence > Admissibility > Procedural Matters > Rulings on  
Evidence

Evidence > ... > Testimony > Expert Witnesses > Criminal  
Proceedings

Evidence > Admissibility > Expert Witnesses

**HN20** The Confrontation Clause, U.S. Const. amend. VI, is not violated when an expert expresses his or her independent conclusions based upon his or her review of inadmissible evidence. However, the underlying inadmissible evidence does not become admissible based upon the expert's independent conclusions and his or her reliance on such inadmissible evidence.

Evidence > Admissibility > Expert Witnesses

**HN21** See Pa. R. Evid. 703.

Evidence > Admissibility > Expert Witnesses

**HN22** Courts in Pennsylvania have long held that independent conclusions by an expert under Pa. R. Evid. 703 based upon inadmissible evidence are admissible.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > Criminal  
Proceedings

**HN23** Where the information is that of an attending nurse or physician having personal observation and an

interest in learning and describing accurately, there seems to be every reason for admitting testimony based in part on this. In other words, the Pennsylvania Supreme Court held that a medical expert may express his opinion on the cause of death based upon the report of a non-testifying physician who examined the body.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights

**HN24** After determining there was a Confrontation Clause, *U.S. Const. amend. VI*, violation the second step is to determine if that violation was harmless. Before a federal constitutional error can be held harmless on direct appeal, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

Evidence > ... > Scientific Evidence > Bodily Evidence > Autopsies

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

**HN25** An autopsy report is testimonial, for purposes of the confrontation clause, when the death was sudden, violent, or suspicious in nature, or was the result of other than natural causes.

**Counsel:** For Appellant: Jay S. Gottlieb, Philadelphia.

For Commonwealth, Appellee: Hugh J. Burns, Jr., Assistant District Attorney; Michael C. Witsch, Assistant District Attorney; Anthony J. Carissimi, Assistant District Attorney, Philadelphia.

**Judges:** BEFORE: BENDER, P.J.E., OLSON AND PLATT,\* JJ. OPINION BY OLSON, J. President Judge Emeritus Bender joins this Opinion. Judge Platt concurs in the result.

**Opinion by:** OLSON

## Opinion

### [\*210] OPINION BY OLSON, J.:

Appellant, Darnell Brown, appeals from the judgment of sentence entered on March 26, 2015. In this case, we consider whether an autopsy report is testimonial for purposes of the Confrontation Clause. After careful consideration, we hold that the autopsy report in this case was testimonial and the trial court erred in admitting the autopsy report. The trial court also improperly admitted certain expert testimony relating to the opinions expressed in the autopsy report. We hold, however, that the trial court properly admitted expert testimony expressing independent conclusions based on the autopsy report. Accordingly, we conclude that the improper admission of evidence was harmless error and affirm the judgment of sentence.

The factual background and procedural history of this case are as follows. On the evening of December [\*\*2] 9, 2012, Appellant and his codefendant, Marcus Stokes ("Stokes"), arrived together at a tattoo party taking place on the 2600 block of North Stanley Street in Philadelphia. At approximately 11:30 p.m., Appellant's revolver fell to the ground after which the revolver was placed in the wheel well of a parked car. Approximately 45 minutes later, Appellant started an argument with Cory Morton ("Morton") over the throwing of a tissue. The verbal confrontation escalated to the point where Appellant punched Morton in the face. Appellant thereafter retrieved his revolver and pointed it at a third-party. Morton stated that Appellant would not shoot the third-party. Appellant then stepped back and shot Morton four times in the chest. Morton died as a result of the gunshot wounds.

On March 25, 2013, Appellant was charged via criminal information with murder,<sup>1</sup> possession of a firearm by a prohibited person,<sup>2</sup> carrying a firearm without a license,<sup>3</sup> carrying a firearm on the streets of Philadelphia,<sup>4</sup> possessing an instrument of crime,<sup>5</sup> and conspiracy to commit murder.<sup>6</sup> A jury trial commenced on November

<sup>1</sup> 18 Pa.C.S.A. § 2502.

<sup>2</sup> 18 Pa.C.S.A. § 6105(a)(1).

<sup>3</sup> 18 Pa.C.S.A. § 6106(a)(1).

<sup>4</sup> 18 Pa.C.S.A. § 6108.

<sup>5</sup> 18 Pa.C.S.A. § 907(a).

<sup>6</sup> 18 Pa.C.S.A. §§ 903(c); 2502.

\* Retired Senior Judge Assigned to the Superior Court

4, 2014 at which Appellant and co-defendant, Stokes, were tried together. At trial, Dr. Albert Chu, an [\*\*3] assistant medical examiner,<sup>7</sup> testified as an expert witness as to the cause and manner of Morton's death. Dr. Chu neither assisted nor was present at Morton's autopsy, which was performed by Dr. Marlon Osbourne. Instead, Dr. Chu testified based upon his [\*\*211] review of the autopsy report prepared by Dr. Osbourne and the accompanying autopsy photographs. The autopsy report was admitted into evidence at the conclusion of trial.<sup>8</sup>

On November 7, 2014, the jury found Appellant guilty of third-degree murder,<sup>9</sup> carrying a firearm without [\*\*4] a license, carrying a firearm on the streets of Philadelphia, and possessing an instrument of crime. On March 26, 2015, the trial court sentenced Appellant to an aggregate term of 25 to 50 years' imprisonment. This timely appeal followed.<sup>10</sup>

Appellant presents one issue for our review:

Did the [trial court] err when, over objection, it ruled that [Dr. Chu] could testify as to [the] cause and manner of [Morton's] death when [Dr. Chu] took no part in the original autopsy?

Appellant's Brief at 3.

In his lone issue on appeal, Appellant argues that the trial court erred by permitting Dr. Chu to testify as to Morton's cause and manner of death. Specifically,

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<sup>7</sup> HN1 Philadelphia abolished the position of coroner and replaced it with a medical examiner. Phila. Code § 2-102. The medical examiner in Philadelphia has the same powers and duties as do coroners in other counties of the Commonwealth. *Id.* Throughout this opinion, we refer to "medical examiner;" however, this term is meant to encompass coroners in those counties that retain that office.

<sup>8</sup> The autopsy report was never sent back with the jury. Instead, the parties and the trial court agreed not to initially send any exhibits back with the jury. The parties and trial court agreed to litigate the admissibility of any exhibits if the jury requested them. See N.T., 11/6/14, at 8.

<sup>9</sup> 18 Pa.C.S.A. § 2502(c).

<sup>10</sup> On April 23, 2015, the trial court ordered Appellant to file a concise statement of errors complained of on appeal ("concise statement"). See Pa.R.A.P. 1925(b). On June 29, 2015, Appellant filed his concise statement. On July 15, 2015, the trial court issued its Rule 1925(a) opinion. Appellant's lone issue on appeal was included in his concise statement.

Appellant argues that the admission of Dr. Chu's testimony violated the Confrontation Clause of the Sixth Amendment to the United States Constitution as incorporated by the Fourteenth Amendment.<sup>11</sup> HN2 Whether Appellant's confrontation rights were violated is a pure question of law; therefore, our standard of review is [\*\*5] *de novo* and our scope of review is plenary.<sup>12</sup> Commonwealth v. Yohe, 621 Pa. 527, 79 A.3d 520, 530 (Pa. 2013), cert denied, 134 S. Ct. 2662, 189 L. Ed. 2d 209 (2014).

As a preliminary matter, the trial court found this issue waived based upon Appellant's alleged failure to timely object to Dr. Chu's testimony. See Trial Court Opinion, 7/15/15, at 3-4. At trial, however, Stokes' counsel objected to Dr. Chu's testimony based on the fact that it violated the Confrontation Clause. See N.T., 11/5/14, at 100-101. Appellant's counsel joined in that objection. *Id.* at 101. Thus, Appellant properly preserved this issue by objecting to Dr. Chu's testimony before the doctor testified at trial.<sup>13</sup> See HN5 Pa.R.Evid. 103(b) ("Once the court rules definitively [\*\*212] on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error [\*\*6] for appeal.").

Turning to the merits of Appellant's lone issue, the Sixth Amendment of the United States Constitution provides that, HN6 "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. Amend. VI. HN7 This protection has been incorporated into the Fourteenth Amendment and thus is applicable in state court

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<sup>11</sup> Although Appellant has not premised his argument on Article I, Section 9 of the Pennsylvania Constitution, it similarly provides: HN3 "In all criminal prosecutions the accused hath a right . . . to be confronted with the witnesses against him. . . ." Commonwealth v. Yohe, 621 Pa. 527, 79 A.3d 520, 531 n.10 (Pa. 2013), cert denied, 134 S. Ct. 2662, 189 L. Ed. 2d 209 (2014) (ellipses in original).

<sup>12</sup> HN4 Although the admission of expert testimony is subject to an abuse of discretion standard of review, Commonwealth v. Watson, 2008 PA Super 17, 945 A.2d 174, 176 (Pa. Super. 2008) (citation omitted), an error of law constitutes an abuse of discretion. Nat'l Cas. Co. v. Kinney, 2014 PA Super 84, 90 A.3d 747, 753 (Pa. Super. 2014) (citation omitted). Thus, we ultimately employ a *de novo* standard of review.

<sup>13</sup> Although not binding on this Court, the trial court acknowledged at trial that the issue was "preserved for the record." N.T., 11/5/14, at 101.

prosecutions. Pointer v. Texas, 380 U.S. 400, 406-407, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). The Confrontation Clause, "applies to witnesses against the accused—in other words, those who bear testimony. Testimony, in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (internal alteration, quotation marks, and citations omitted).

**HN8** In order to determine if a document or statement created out-of-court is testimonial in nature, our Supreme Court looks at the primary purpose of the document or statement. Yohe, 79 A.3d at 531-532 (citations omitted). A document or statement is testimonial if its primary purpose is "to establish or prove past events potentially relevant to later criminal prosecution." Id. at 531. (citation omitted). A document or statement has such a primary purpose if it is created or given "under circumstances [\*7] which would lead an objective witness reasonably to believe that the [document or] statement would be available for use at a later trial[.]" Id. (citation omitted). If a document or statement is testimonial, then the witness who prepared it must testify at trial, unless he or she is unavailable and the defendant had a prior opportunity for cross-examination. Michigan v. Bryant, 562 U.S. 344, 354, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) ("[F]or testimonial evidence to be admissible, the Sixth Amendment demands what the common law required: unavailability [of a witness] and a prior opportunity for cross-examination." (internal quotation marks and citation omitted)).

In this case, the fact at issue was whether Morton died from the four gunshot wounds he sustained. The autopsy report admitted into evidence addressed this fact, *i.e.*, it listed Morton's cause of death as being multiple gunshot wounds and the manner of death as homicide. Thus, the autopsy report established past events that were potentially relevant to later criminal proceedings, and thus, was testimonial. Furthermore, 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. [\*8]

Our conclusion finds support in the statutory scheme governing medical examiners. **HN9** In Pennsylvania, the medical examiner must issue a certificate attesting to an individual's cause of death "where the circumstances suggest that the death was sudden or violent or suspicious in nature or was the result of other than

natural causes[.]" 35 P.S. § 450.503. This is almost always accomplished through performing an autopsy. Although the medical examiner is independent, "[i]n the exercise of his duties as contained in this subdivision, the [medical examiner] shall, so far as may be practicable, consult and advise with the district attorney." 16 P.S. § 1242. Although not all autopsies in Pennsylvania are used in court proceedings, the statutory framework contemplates that the autopsy report will be used in a criminal trial when the circumstances suggest that the death was sudden, violent or suspicious or [\*213] was the result of other than natural causes. In this case, the circumstances surrounding Morton's death suggest that his death was sudden, violent and suspicious and not the result of natural causes. A relatively young male died in the middle of the street after being shot multiple times. As such, based upon the statutory framework [\*9] in Pennsylvania and the circumstances surrounding Morton's death, it is evident that the autopsy report in this case was testimonial in nature.

**HN10** Several state and federal courts that have recently considered the issue have likewise held that autopsy reports are testimonial. *E.g.*, United States v. Ignasiak, 667 F.3d 1217, 1232 (11th Cir. 2012); West Virginia v. Kennedy, 229 W. Va. 756, 735 S.E.2d 905, 917-918 (W.Va. 2012); United States v. Moore, 651 F.3d 30, 69-74, 397 U.S. App. D.C. 148 (D.C. Cir. 2011) (*per curiam*), *aff'd in part sub nom.*, Smith v. United States, 133 S.Ct. 714, 184 L. Ed. 2d 570 (2013); Cuesta-Rodriguez v. Oklahoma, 2010 OK CR 23, 241 P.3d 214, 228 (Okla. Crim. App. 2010); North Carolina v. Locklear, 363 N.C. 438, 681 S.E.2d 293, 305 (N.C. 2009); Wood v. Texas, 299 S.W.3d 200, 209-210 (Tex. Crim. App. 2009); Commonwealth v. Nardi, 452 Mass. 379, 893 N.E.2d 1221, 1233 (Mass. 2008).

In addition to the reasons set forth above regarding the circumstances surrounding Morton's death and the statutory framework in Pennsylvania, we find persuasive one of the Eleventh Circuit's rationales for concluding that autopsy reports are testimonial in nature. As the Eleventh Circuit Court of Appeals stated, **HN11** "[m]edical examiners are not mere scriveners reporting machine generated raw-data. . . . [T]he observational data and conclusions contained in the autopsy reports are the product of the skill, methodology, and judgment of the highly trained examiners who actually performed the autopsy." Ignasiak, 667 F.3d at 1232 (internal quotation marks and citation omitted). The Supreme Judicial Court of Massachusetts relied upon a similar rationale in concluding that an autopsy report was



testimonial. The court emphasized how most portions of an autopsy report involve judgments [\*10] and decisions made by the medical examiner performing the autopsy. *Nardi*, 893 N.E.2d at 1232-1233. As such, "there is little reason to believe that confrontation will be useless in testing medical examiners'[] honesty, proficiency, and methodology—the features that are commonly the focus in the cross-examination of experts." *Ignasiak*, 667 F.3d at 1233 (internal alteration omitted).

The Commonwealth contends that the autopsy report in this case was nontestimonial because it was non-accusatorial. This contention appears to rely on Justice Alito's opinion announcing the judgment of the court in *Williams v. Illinois*, 132 S.Ct. 2221, 183 L. Ed. 2d 89 (2012). In *Williams*, a splintered United States Supreme Court held that a DNA report used to compare with a known subject's DNA profile was nontestimonial. In his opinion, Justice Alito stated that the forensic report at issue in *Williams* was nontestimonial because it did not target a specific individual, *i.e.*, the defendant in that case. *Id.* at 2243. Five justices, however, rejected Justice Alito's rationale and instead found that a forensic report need not accuse a particular individual in order to be testimonial in nature. *Id.* at 2262 (Thomas, J. concurring) (Justice Alito's "test lacks any grounding in constitutional text, in history, or in logic."); *id.* at 2273 (Kagan, J. dissenting) [\*11] (Justice Alito's test "has no basis in our precedents. We have previously asked whether a statement was made for the primary purpose of establishing past events potentially relevant to later criminal prosecution—in other words, for the purpose of providing evidence."). As a majority of the Court in *Williams* rejected [\*214] the argument being made by the Commonwealth in this case, the Commonwealth's argument based upon Justice Alito's test in *Williams* is without merit.

The Commonwealth next argues that autopsy reports are nontestimonial because the medical examiner is required to conduct autopsies in a variety of situations, most of which do not ultimately lead to criminal prosecutions. See Phila. Code § 2-102; 16 P.S. § 1237. The Commonwealth notes that, in Philadelphia County, approximately 14% of autopsies relate to homicides while the remaining 86% of autopsies are done for some other reason, *e.g.*, the individual will be buried at sea. See Commonwealth's Brief at 9, citing Medical Examiner's Office Pathology Unit (available at <http://www.phila.gov/health/medicalexaminer/Pathology.html>, last accessed Dec. 11, 2015).

We reject this argument for several reasons. First, in *Yohe HN12* our Supreme Court held that whether a document or statement is testimonial depends upon its [\*12] primary purpose. *Yohe*, 79 A.3d at 531-532 (citations omitted). Under Pennsylvania law, "where the circumstances suggest that the death was sudden or violent or suspicious in nature or was the result of other than natural causes" the medical examiner must typically perform an autopsy. See 35 P.S. § 450.503. That is what occurred in this case. Thus, under the particular circumstances of this case, it is evident that the primary purpose of the autopsy was not statistical. Instead, the primary purpose of the autopsy report in this case was to prove that Morton died of multiple gunshot wounds and that his death was the result of a homicide.

As we do today, most courts that considered arguments similar to those advanced by the Commonwealth examined the structure of state laws regarding medical examiners and autopsies to determine whether the primary purpose of an autopsy report is to prove a fact for use at trial. We find persuasive the reasoning used by the Supreme Court of West Virginia in *Kennedy* in rejecting the Commonwealth's contention. Like in Pennsylvania, medical examiners in West Virginia are independent. See *Kennedy*, 735 S.E.2d at 917. Nonetheless, in West Virginia the use of autopsies in judicial proceedings is contemplated. See *id.* The Supreme [\*13] Court of West Virginia relied upon the Eleventh Circuit's decision in *Ignasiak* in reaching its conclusion that autopsy reports are testimonial. In *Ignasiak*, the Eleventh Circuit held that "even though not all Florida autopsy reports will be used in criminal trials, the reports in this case are testimonial and subject to the *Confrontation Clause*." *Ignasiak*, 667 F.3d at 1232.

The United States Court of Appeals for the District of Columbia Circuit adopted similar rationale in finding autopsy reports testimonial. In explaining why the autopsy reports were testimonial, the court stated:

the autopsy reports were formalized in signed documents titled reports . . . [C]ombined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, circumstances [existed] which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

*Moore*, 651 F.3d at 73 (internal quotation marks and citation omitted).

The Court of Criminal Appeals of Oklahoma likewise concluded that an autopsy report is testimonial based upon a similar statutory framework and the nature of the death. That court concluded that "a medical examiner's words recorded in an autopsy report involving a violent or suspicious [\*14] death could constitute statements that the medical examiner should reasonably expect [\*215] to be used in a criminal prosecution and therefore under the Crawford and Melendez-Diaz [*iv. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)] framework would be testimonial for Sixth Amendment confrontation purposes." Cuesta-Rodriguez, 241 P.3d at 228.

The Court of Appeals of Texas also looked at the structure of state law and the circumstances surrounding the death when determining an autopsy report was testimonial. Specifically, the court concluded that "the circumstances surrounding [the victim's] death warranted the police in the suspicion that his death was a homicide . . . . Under these circumstances, it is reasonable to assume that [the medical examiner] understood that the report containing her findings and opinions would be used prosecutorially." Wood, 299 S.W.3d at 209-210.

HN13 All of these courts found it irrelevant that not all autopsy reports are used in criminal prosecutions and that a certain (high) percentage of autopsies are done for other reasons. Instead, they found the fact that the statutory frameworks contemplate using autopsy reports in criminal prosecutions compelling. As noted above, we hold today that the statutory framework in Pennsylvania contemplates using autopsies in criminal proceedings.

We acknowledge [\*15] that there is a sharp split in authority on whether autopsy reports are testimonial. Indeed, the Commonwealth directs our attention to several state and federal courts that have held that autopsy reports are nontestimonial. *E.g.*, State v. Hutchison, 482 S.W.3d 893, 2016 Tenn. LEXIS 83, 2016 WL 531266, \*16 (Tenn. Feb. 5, 2016); Ohio v. Maxwell, 139 Ohio St. 3d 12, 2014- Ohio 1019, 9 N.E.3d 930, 949-952 (Ohio 2014); Arizona v. Medina, 232 Ariz. 391, 306 P.3d 48, 63 (Ariz. 2013); United States v. James, 712 F.3d 79, 97-99 (2d Cir. 2013); People v. Leach, 2012 IL 111534, 980 N.E.2d 570, 592, 366 Ill. Dec. 477 (Ill. 2012); People v. Dongo, 55 Cal. 4th 608, 147 Cal. Rptr. 3d 527, 286 P.3d 442, 450 (Cal. 2012).

The Supreme Court of Ohio adopted the rationale advanced by the Commonwealth in this case, *i.e.*, that

because autopsy reports have multiple uses, they categorically cannot be considered testimonial in nature. The court specifically held that because autopsy reports are not usually created for use in criminal prosecutions, they do not have the primary purpose of being used as a substitute for out-of-court testimony. Maxwell, 9 N.E.3d at 950-952. The Supreme Court of Illinois employed a similar rationale in finding autopsy reports are nontestimonial. The court stated 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." Leach, 980 N.E.2d at 592.<sup>14</sup> The Second Circuit Court of Appeals also adopted a rationale similar to that advanced by the Commonwealth. *See James*, 712 F.3d at 97-99.<sup>15</sup>

[\*216] We respectfully disagree with the rationale endorsed by these courts [\*17] and advanced by the Commonwealth. Five members of the Supreme Court of the United States concluded that a similar rationale by Justice Alito in Williams was flawed. As Justice Kagan explained, HN15 the primary purpose test asks whether a statement "was made for the primary purpose of establishing past events potentially relevant to later criminal prosecution." Williams, 132 S.Ct. at 2273 (Kagan, J. dissenting) (emphasis added); *see also id.*

<sup>14</sup> The court in Leach also argued that it was impracticable to require medical examiners to testify regarding [\*16] autopsy reports. Leach, 980 N.E.2d at 592. This argument has been soundly rejected by the Supreme Court of the United States. Melendez-Diaz, 557 U.S. at 325 (HN14 "The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience."). Thus, although forcing medical examiners to testify regarding the findings of an autopsy report may be costly, that does not exempt autopsy reports from the Confrontation Clause.

<sup>15</sup> As we shall discuss *infra*, we reject the conclusions reached in this line of authority. In addition, James is distinguishable from the case *sub judice*. In James, the Second Circuit noted that the medical examiner did not originally believe a homicide occurred when conducting the autopsy. James, 712 F.3d at 99. This indicates that the Second Circuit may reach a different conclusion if presented with a case where the autopsy was done because the medical examiner suspected homicide. In the case at bar, it is evident that the autopsy was performed because the medical examiner believed that a homicide was committed.

at 2262 (Thomas, J. concurring). As the Supreme Court of Ohio recognized, the primary purpose of an autopsy is to establish a fact, *i.e.*, the cause of death. This fact is certainly potentially relevant to later criminal prosecutions. It is immaterial that the autopsy was not created for the sole purpose of being used in court.

We also decline to follow the reasoning adopted by several courts that have held that autopsy reports are not sufficiently solemn to meet the test set forth by Justice Thomas in *Williams*. See *Hutchison*, 2016 Tenn. LEXIS 83, 2016 WL 531266 at \*15; *Medina*, 306 P.3d at 64; *Dungo*, 286 P.3d at 449-450. In his concurring opinion in *Williams*, Justice Thomas concluded that the DNA report at issue did not violate the *Confrontation Clause* because it "lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the *Confrontation Clause*." *Williams*, 132 S.Ct. at 2255, quoting *Bryant*, 131 S.Ct. at 1167 (Thomas, J. concurring). We [\*18] find this rationale unpersuasive for two reasons. First, in *Yohe* our Supreme Court did not employ Justice Thomas' solemnity test. Instead, our Supreme Court focused on the primary purpose of the evidence, an approach closer to that of Justice Kagan than that of Justice Thomas. See *Yohe*, 79 A.3d at 537-538. Second, as noted above, under Pennsylvania law the medical examiner is required to certify the findings of the autopsy report. See 16 P.S. § 1244. This is sufficiently solemn to be considered testimonial even under Justice Thomas' test.

Thus, we hold that *HN16* an autopsy report that is prepared because of a sudden, violent, or suspicious death or a death that is the result of other than natural causes, is testimonial. Such an autopsy report is prepared to prove a fact, *i.e.*, the victim's cause and manner of death, that an objective observer would reasonably believe could later be used in a criminal prosecution. As such autopsy reports are testimonial and the author of the autopsy report is required to testify at trial in order to satisfy the *Confrontation Clause*.<sup>16</sup> In

this case, Dr. Osbourne did not testify and Appellant did not have a chance to cross-examine him prior to trial. Accordingly, Appellant's *Confrontation Clause* rights [\*217] were violated by the admission of [\*19] the autopsy report in this case.

Having determined that the autopsy report was testimonial, we turn to the Commonwealth's contention that Dr. *Chu*'s testimony was independently admissible. Approximately one week prior to trial, Dr. *Chu*, who testified as an expert with no challenge to his qualifications, reviewed Dr. Osbourne's autopsy report as well as photographs taken during the autopsy. N.T., 11/5/14, at 123, 131-132. Based upon this review of the autopsy report and autopsy photographs, the Commonwealth asked Dr. *Chu* about the cause and manner of Morton's death. The Commonwealth contends that this testimony was admissible as Dr. *Chu* proffered his own independent conclusions regarding the cause and manner of Morton's death. Appellant, [\*20] on the other hand, contends that Dr. *Chu* merely served as a surrogate for Dr. Osbourne and, therefore, his testimony violated Appellant's *Confrontation Clause* rights.

The reason that Dr. *Chu*'s expert testimony was critical to the Commonwealth's case is because this Court has held that, *HN18* although non-expert testimony "may be sufficient to establish cause of death by a preponderance of the evidence, it does not satisfy the more stringent standard of criminal trials." *Commonwealth v. Baker*, 299 Pa. Super. 241, 445 A.2d 544, 548 n.2 (Pa. Super. 1982). Thus, in order to prove all the elements of third-degree murder, *inter alia*, that Morton's death was caused by gunshot wounds, expert testimony was required.<sup>17</sup> As Dr. *Chu* was the only expert called regarding cause of death, we must examine whether he provided sufficient admissible evidence to prove Morton died as a result of gunshot wounds.<sup>18</sup>

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medical examiner who performed the autopsy." *McCloud*, 322 A.2d at 656-657.

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<sup>16</sup> Our holding today is consistent with *HN17* our Supreme Court's pre-*Crawford* jurisprudence. In *Commonwealth v. McCloud*, 457 Pa. 310, 322 A.2d 653 (Pa. 1974), *abrogated on other grounds*, *Commonwealth v. McGrogan*, 523 Pa. 614, 568 A.2d 924 (Pa. 1990), our Supreme Court held "that in a homicide prosecution, evidentiary use, as a business records exception to the hearsay rule, of an autopsy report in proving legal causation is impermissible unless the accused is afforded the opportunity to confront and cross-examine the

<sup>17</sup> The expert testimony need not be offered by a medical doctor. For example, this Court has found sufficient a lay coroner's expert testimony regarding the cause of death. *Commonwealth v. Smith*, 2002 PA Super 302, 808 A.2d 215, 230 (Pa. Super. 2002).

<sup>18</sup> On the other hand, "a conclusion upon the question whether a death from external cause or violence was accidental, suicidal, or homicidal, may ordinarily be determined by a jury without the assistance of expert witnesses." *Smith*, 808 A.2d

In order to understand the background of this issue, it is necessary to review Justice Sotomayor's concurring opinion in Bullcoming v. New Mexico, 564 U.S. 647, 131 S.Ct. 2705, 180 L. Ed. 2d 610 (2011).<sup>19</sup> In Bullcoming, the defendant was charged with aggravated driving while under the influence of alcohol. At trial, the prosecution entered into evidence a forensic laboratory report stating the defendant's blood alcohol concentration was sufficient for aggravated driving while intoxicated. Id. at 2709. "[T]he prosecution did not call as a witness the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample." Id.

The Supreme Court of the United States held that the prosecution violated Bullcoming's Confrontation Clause rights. The Court held that "surrogate testimony . . . could not convey what [the analyst] knew [\*218] or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." Id. Furthermore, the Court explained that HN19 the Confrontation "Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." Id. at 2716.

In her concurrence, Justice Sotomayor stated Bullcoming was

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. As the [majority] note[d], the State [did] not assert that [the surrogate] offered an independent, expert opinion about Bullcoming's blood alcohol concentration. Rather, the State

explain[ed that] aside from reading a report that was introduced as an exhibit, [the surrogate] offered no opinion about [Bullcoming's] [\*23] blood alcohol content. Here the State offered the BAC report, including [the analyst's] testimonial statements, 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, 131 S.Ct. at 2722 (Sotomayor, J. concurring) (internal alterations, ellipsis, quotation marks, and citations omitted).

The Supreme Court of the United States granted certiorari in Williams to decide the expert testimony issue left unresolved in Bullcoming. See Williams, 132 S.Ct. at 2233 (Alito, J. announcing the judgment of the Court). Unfortunately, the Supreme Court of the United States did not issue a binding rule on this issue in Williams. Medina, 306 P.3d at 63; see also Yohe, 79 A.3d at 536. Thus, we proceed to consider Dr. Chu's testimony by analyzing the various opinions in Williams and settled Pennsylvania law.

From the various opinions in Williams, we glean that HN20 the Confrontation Clause is not violated when an expert expresses his or her independent conclusions based upon his or her review of inadmissible evidence. Williams, 132 S.Ct. at 2233 (Alito, J. announcing the judgment of the Court). However, the underlying inadmissible evidence does not become admissible based upon [\*24] the expert's independent conclusions and his or her reliance on such inadmissible evidence. See id. at 2256-2257 (Thomas, J. concurring); id. at 2268-2269 (Kagan, J. dissenting). Thus, we turn to Pennsylvania law regarding what evidence an expert can rely upon in order to offer his or her own independent conclusions.

Under Pennsylvania Rule of Evidence 703:

HN21 An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Pa.R.Evid. 703.

at 229 (internal quotation [\*21] marks and citation omitted). Thus, no expert testimony was necessary to prove the manner of Morton's death.

<sup>19</sup> The Commonwealth states that "Bullcoming is a plurality decision[.]" Commonwealth's Brief at 11 n.3. It appears that the Commonwealth meant to state that Williams was a plurality opinion. Nonetheless, Justice Ginsburg's opinion in Bullcoming was joined by four other justices except as to part IV and footnote 6. See Bullcoming, 131 S.Ct. at 2709. As such, it was a majority decision as to all but those portions of Justice Ginsburg's opinion. [\*22]



**HN22** Courts in Pennsylvania have long held that such independent conclusions based upon inadmissible evidence are admissible. *E.g., In re D.Y.*, 2011 PA Super 267, 34 A.3d 177, 182-183 (Pa. Super. 2011), appeal denied, 616 Pa. 638, 47 A.3d 848 (2012); *Boucher v. Pa. Hosp.*, 2003 PA Super 282, 831 A.2d 623, 628 (Pa. Super. 2003), appeal denied, 577 Pa. 705, 847 A.2d 1276 (2004); *Primavera v. Celotex Corp.*, 415 Pa. Super. 41, 608 A.2d 515, 519-520 [219] (Pa. Super. 1992), appeal denied, 533 Pa. 641, 622 A.2d 1374 (1993); *Maravich v. Aetna Life & Casualty Co.*, 350 Pa. Super. 392, 504 A.2d 896, 900-901 (Pa. Super. 1986); *Commonwealth v. Thomas*, 444 Pa. 436, 282 A.2d 693, 698 (Pa. Super. 1971).

Our Supreme Court addressed a similar situation to the case at bar in *Commonwealth v. Daniels*, 480 Pa. 340, 390 A.2d 172 (Pa. 1978). In *Daniels*, the Commonwealth called as an expert witness a forensic pathologist, who had not originally investigated the victim's death. The forensic pathologist consulted the following sources prior to testifying:

interviews with former residents of the school (all of whom testified for the Commonwealth concerning [the victim's] symptoms); [\*\*25] certain hospital records . . . ; the death certificate . . . ; a letter from and a conversation with a person who had performed a dissection of a body believed to be that of the [victim]; the testimony the [forensic pathologist] heard during the trial; and certain police reports concerning [the victim's] death. [The forensic pathologist] was asked whether, as a result of this investigation, he had come to an opinion regarding the cause and manner of [the victim's] death. He answered in the affirmative and, over objection, was permitted to testify to that opinion.

*Daniels*, 390 A.2d at 175 (footnote omitted).

Our Supreme Court held that such testimony was admissible. As our Supreme Court stated, **HN23** "where the information is that of an attending nurse or physician having personal observation and an interest in learning and describing accurately, there seems to be every reason for admitting testimony based in part on this." *Id.* at 177 (internal quotation marks and citation omitted). In other words, our Supreme Court held that a medical expert may express his opinion on the cause of death based upon the report of a non-testifying physician who examined the body. See also *Commonwealth v. Ali*, 608 Pa. 71, 10 A.3d 282, 306 (Pa. 2010) ("[A] medical expert who did not perform the autopsy [\*\*26] may

testify as to cause of death as long as the testifying expert is qualified and sufficiently informed[.]"); *Commonwealth v. Smith*, 480 Pa. 524, 391 A.2d 1009, 1012-1013 (Pa. 1978) (permitting pathologist to testify regarding cause of death based upon findings of an autopsy performed by a non-physician).

Based upon this precedent, we hold that Dr. **Chu's** independent conclusions regarding the cause and manner of Morton's death were admissible. During trial, Dr. **Chu** testified that it was his own independent conclusion that the cause of death was multiple gunshot wounds and that the manner of death was homicide. N.T., 11/5/14, at 130. He emphasized that these conclusions were his own and not a mere parroting of Dr. Osbourne's conclusions as set forth in the autopsy report. See *id.* Thus, the Commonwealth provided sufficient admissible evidence at trial to prove that Morton's cause of death was multiple gunshot wounds.

Finally, having determined that Appellant's *Confrontation Clause* rights were violated,<sup>20</sup> we turn to

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<sup>20</sup> We see two ways in which the Commonwealth violated Appellant's *Sixth Amendment* rights; first, admission of the autopsy report without testimony from its author, Dr. Osbourne; and second, admission of Dr. Osbourne's opinions found in the report. The Commonwealth avers that "Dr. Osbourne's conclusions were never offered against [Appellant.]" Commonwealth's Brief at 13. Instead, the Commonwealth argues that only Dr. **Chu's** independent conclusions were offered against Appellant. Our review of the trial testimony, however, belies this assertion. At the conclusion of Dr. **Chu's** testimony, he testified that Dr. Osbourne concluded that the cause of death was multiple gunshot wounds and that the manner of death was homicide. Specifically, the Commonwealth asked Dr. **Chu**, "Is your opinion in this case, are you merely repeating Dr. Osbourne's opinion from the report or through your medical experience and training, do you also hold this opinion?" N.T., 11/5/14, at 130 (emphasis added). Dr. **Chu** responded, "I also hold this opinion." *Id.* (emphasis added). [\*\*28]

This type of basis evidence is the type that five justices in *Williams* rejected as violating the *Confrontation Clause*. It is similar in nature to the surrogate testimony that the Court rejected in *Bulcoming*. Dr. **Chu** was, in at least portions of his testimony, acting as a surrogate for Dr. Osbourne and outlining the conclusions Dr. Osbourne drew as a result of the autopsy conducted in this case. As such, we conclude that while the trial court correctly admitted the portions of Dr. **Chu's** testimony in which he gave his own independent conclusions regarding the cause and manner of Morton's death, the admission of Dr. **Chu's** testimony which relayed Dr. Osbourne's opinions regarding the cause and manner of

whether this error was harmless. See Commonwealth [\*\*220] v. Rosser, 2016 PA Super 51, 135 A.3d 1077, 2016 WL 769485, \*9 (2016) (HN24 after determining there was a Confrontation Clause violation the second step is to determine if that violation was harmless); see also Melendez-Diaz, 557 U.S. at 329 n.14 (expressing no view as to whether \ Confrontation Clause violation was harmless). "Before a federal constitutional error can be held [\*\*27] harmless [on direct appeal], th[is C]ourt must be able to declare a belief that it was harmless beyond a reasonable doubt." Davis v. Ayala, 135 S.Ct. 2187, 2197, 192 L. Ed. 2d 323 (2015) (internal alteration and citation omitted).

This is not a case where the cause of the victim's death was seriously at issue. For example, this is not a cyanide poisoning case in which the testimony of the medical examiner that performed the autopsy was critical to the Commonwealth's case. Cf. Commonwealth v. Ferrante, CP-02-CR-0013724-2013 (C.C.P. Allegheny). Instead, this is a case where a healthy individual in his twenties was shot several times in the chest. Although this Court's precedent requires that an expert opinion [\*\*29] be offered to prove the cause of death, extensive expert testimony was not necessary under the specific facts of this case. Instead, Dr. Chu's opinion was sufficient to prove Morton's cause of death beyond a reasonable doubt. Accordingly, we conclude that the admission of the autopsy report and the portions of Dr. Chu's testimony referencing Dr. Osbourne's opinions was harmless error.

In sum, we conclude that Appellant preserved his lone issue for appeal. We hold that HN25 an autopsy report is testimonial when the death was sudden, violent, or suspicious in nature, or was the result of other than natural causes. Because Morton's death was sudden, violent, and the result of other than natural causes, the autopsy report in this case was testimonial and the trial court erred by admitting the autopsy report and Dr. Chu's reference to the opinions expressed by Dr. Osbourne in the autopsy report. Nonetheless, Dr. Chu's independent expert testimony regarding the cause of Morton's death was admissible and sufficient to prove his cause of death beyond a reasonable doubt. Thus, the Confrontation Clause violation was harmless error. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

President [\*\*30] Judge Emeritus Bender joins this

Opinion.

Judge Platt concurs in the result.

Judgment Entered.

Date: 5/10/2016

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Morton's death violated the Confrontation Clause.

Jules Epstein

## **EXHIBIT “C”**

### **Testimony of Medical Examiner**

[1] Com. v Marcus Stokes and Darnell Brown  
[2] Q. So, the detectives that are there at 3:00 p.m.,  
[3] they are going to assume that you come in at  
[4] midnight and just have this person kind of detained  
[5] there until you arrive?  
[6] A. Yes.  
[7] Q. Let's say you called out sick, right, at  
[8] midnight. He stays until the next time you come in?  
[9] A. No. Don't forget, there is more than one  
[10] detective working the case. There is a group of us  
[11] that are working. So, if one person called out  
[12] sick, there is someone else there to carry the ball.  
[13] MR. MISCHAK: I have no further  
[14] questions.  
[15] MR. GOTTLIEB: If I may?  
[16] CROSS-EXAMINATION  
[17] BY MR. GOTTLIEB:  
[18] Q. Was Detective Pirrone working this case,  
[19] P-I-R-R-O-N-E?  
[20] A. Yes, he was.  
[21] MR. GOTTLIEB: Thank you, sir.  
[22] THE COURT: Mr. MacArthur, anything  
[23] further?  
[24] MR. MacARTHUR: No, Your Honor.  
[25] THE COURT: Thank you, Detective.

[1] Com. v Marcus Stokes and Darnell Brown  
[2] (Witness excused.)  
[3] THE COURT: Mr. MacArthur.  
[4] MR. MacARTHUR: The Commonwealth  
[5] calls Dr. Albert Chu.  
[6] THE COURT: Do you have a  
[7] stipulation?  
[8] MR. GOTTLIEB: I would stipulate to  
[9] his, not his reputation but his being an  
[10] expert.  
[11] MR. MacARTHUR: I can go through it  
[12] briefly.  
[13] MR. GOTTLIEB: Okay.  
[14] THE COURT CRIER: May I, Your Honor?  
[15] THE COURT: Yes.  
[16] THE COURT CRIER: Doctor, please  
[17] state your name and spell it for the record and  
[18] your title.  
[19] THE WITNESS: Albert Chu, that's  
[20] C-H-U, and title is Assistant Medical Examiner.  
[21] (Witness sworn.)  
[22] MR. MacARTHUR: May I proceed, Your  
[23] Honor?  
[24] THE COURT: Sure.  
[25] DIRECT EXAMINATION

[1] Com. v Marcus Stokes and Darnell Brown  
[2] BY MR. MacARTHUR:  
[3] Q. Dr. Chu, how long have you been a medical  
[4] examiner in Philadelphia?  
[5] A. Just over three months.  
[6] Q. Prior to that, what did you do?  
[7] A. I was assistant medical examiner in Houston,  
[8] Texas.  
[9] Q. How long were you a medical examiner in  
[10] Houston?  
[11] A. For nine years.  
[12] Q. What training and education did you have to  
[13] receive in order to become a medical examiner?  
[14] A. I went to college at Johns Hopkins University  
[15] in Baltimore, Maryland. I also received a master's  
[16] degree from that same university. I then went to  
[17] medical school at the state university in New York  
[18] at Buffalo, in Buffalo, New York. After graduating,  
[19] I did a residency program in anatomic and clinical  
[20] pathology at the Hospital of the University of  
[21] Pennsylvania here in Philadelphia. I then did a  
[22] one-year fellowship program in forensic pathology at  
[23] the office of the chief medical examiner for the  
[24] State of Maryland in Baltimore, Maryland.  
[25] Q. Can you briefly tell the jury what is meant by

[1] Com. v Marcus Stokes and Darnell Brown  
[2] pathology and forensic pathology?  
[3] A. Pathology is a specialty of medicine that deals  
[4] with basically the diagnosis of disease by means of  
[5] examination of tissues. Forensic pathology is a  
[6] subspecialty of pathology that deals with the  
[7] investigation of sudden, unexpected or violent  
[8] death.  
[9] Q. Can you tell the jury what an autopsy is?  
[10] A. An autopsy is examination of a dead person for  
[11] the purpose of determining the cause and manner of  
[12] death. Basically it consists of an external  
[13] examination, during which I will look on the outside  
[14] of the body for any evidence of injury or disease,  
[15] followed by an internal examination, during which I  
[16] will look on the inside of the body, again, looking  
[17] for any evidence of injury or disease.  
[18] Q. Have you performed autopsies?  
[19] A. Yes.  
[20] Q. Approximately how many?  
[21] A. Over 2,000.  
[22] Q. Have you testified in court before?  
[23] A. Yes.  
[24] Q. As an expert witness?  
[25] A. Yes.

[1] Com. v Marcus Stokes and Darnell Brown  
[2] **Q.** In which courts have you testified and  
[3] approximately how many times?  
[4] **A.** I have testified in Houston, Texas and some of  
[5] the surrounding counties around Houston. I have  
[6] also testified here in Philadelphia like two or  
[7] three times since I have been here. So overall,  
[8] nearly 100 times.

[9] **MR. MacARTHUR:** Your Honor, at this  
[10] time I would offer Dr. Chu for  
[11] cross-examination in his credential as a  
[12] forensic pathologist.

[13] **THE COURT:** Mr. Gottlieb.

[14] **MR. GOTTLIEB:** No questions.

[15] **THE COURT:** Mr. Mischak.

[16] **MR. MISCHAK:** No questions.

[17] **THE COURT:** I qualify him as an  
[18] expert.

[19] Ladies and gentlemen, there are two  
[20] types of witnesses; the ordinary witnesses, who  
[21] you have already seen, and we also have expert  
[22] witnesses. The difference is an expert has  
[23] specialized knowledge that ordinary witnesses  
[24] don't have and he is allowed to give you an  
[25] opinion where an ordinary witness can only

[1] Com. v Marcus Stokes and Darnell Brown  
[2] testify to the facts, what they see and what  
[3] they heard. This doctor is going to give you  
[4] his opinion.

[5] Go ahead.

[6] **MR. MacARTHUR:** Thank you, Your  
[7] Honor.

[8] **DIRECT EXAMINATION**

[9] **BY MR. MacARTHUR:**

[10] **Q.** Dr. Chu, you said you had been a medical  
[11] examiner here in Philadelphia for three months?

[12] **A.** Yes.

[13] **Q.** So, is it safe to assume that you were not the  
[14] medical examiner who was originally assigned to this  
[15] case who performed the autopsy on Cory Morton?

[16] **A.** Yes.

[17] **Q.** Is that correct?

[18] **A.** Yes.

[19] **Q.** Who was that doctor?

[20] **A.** Dr. Marlon Osbourne.

[21] **Q.** Did Dr. Osbourne prepare a report in this case?

[22] **A.** Yes.

[23] **MR. MacARTHUR:** Can you please show  
[24] Dr. Chu C-43.

[25] **THE COURT CRIER:** C-43.

[1] Com. v Marcus Stokes and Darnell Brown  
[2] **BY MR. MacARTHUR:**  
[3] **Q.** Doctor, do you recognize what has been marked  
[4] as C-43?

[5] **A.** Yes.

[6] **Q.** What is it?

[7] **A.** This is a copy of Cory Morton's autopsy report  
[8] with an attached toxicology report.

[9] **Q.** Did you have a chance to review it before  
[10] coming to court today?

[11] **A.** Yes.

[12] **Q.** Did you review anything else in the case file  
[13] before court today?

[14] **A.** I also reviewed the autopsy photographs.

[15] **Q.** Between reviewing the photographs and the  
[16] report, what were the injuries that Dr. Osbourne  
[17] observed on the body of Cory Morton?

[18] **A.** Mr. Morton had four gunshot wounds.

[19] **Q.** Where were they?

[20] **MR. MacARTHUR:** And, if we can have  
[21] this marked as C-52 to aid the doctor.

[22] (C-52 marked for identification.)

[23] **MR. GOTTLIEB:** We are okay.

[24] **BY MR. MacARTHUR:**

[25] **Q.** So, the wounds that were sustained by Cory

[1] Com. v Marcus Stokes and Darnell Brown  
[2] Morton.

[3] **A.** Okay. I am just going to mark off where the  
[4] bullets entered the body.

[5] So, there is an entrance on the left side  
[6] of the upper chest; an entrance on the right side of  
[7] the upper chest; an entrance on the right side of  
[8] the central chest; and an entrance on the central  
[9] upper back.

[10] **Q.** What is the direction of travel of those  
[11] wounds?

[12] **A.** The gunshot wound that entered on the left side  
[13] of the upper chest was right to left, front to back  
[14] and downward. The gunshot wound that entered on the  
[15] right side of the upper chest was basically front to  
[16] back and slightly downward. The gunshot wound that  
[17] entered on the right side of the central chest was  
[18] right to left, front to back and downward, and then  
[19] the gunshot wound that entered on the back was right  
[20] to left, back to front, and upward.

[21] **Q.** Okay. In the report, Doctor, the wounds are  
[22] described either as penetrating gunshot wounds or  
[23] perforating gunshot wounds.

[24] Can you, first of all, describe what the  
[25] difference between a penetrating gunshot wound is

[1] Com. v Marcus Stokes and Darnell Brown  
[2] and a perforating gunshot wound.  
[3] **A.** A penetrating gunshot wound refers to a gunshot  
[4] wound that does not exit the body, so that means if  
[5] the bullet was recovered from the body, whereas a  
[6] perforating wound is a bullet that enters and exits  
[7] the body, so there is typically not a bullet  
[8] recovered.

[9] **Q.** Can you explain to the jury what soot and  
[10] stippling is?

[11] **A.** So, when a gun is fired, it is not just the  
[12] bullet that exits the barrel of the gun, there is  
[13] also soot or smoke, as well as particles of either  
[14] unburned or partially burned gunpowder. And, so, if  
[15] the target or the person who is being shot is close  
[16] enough to the end of gun when it is fired, you might  
[17] see deposition of some of these other substances  
[18] other than just a bullet hole on the skin around the  
[19] bullet entrance wound.

[20] So, stippling refers to sort of dot-like  
[21] scrapes of the skin that are the result of either  
[22] unburned or partially burned particles of gunpowder  
[23] forcefully striking the skin. When I see stippling  
[24] or gunpowder stippling, there is a ballpark  
[25] figure -- and every combination of weapon and

[1] Com. v Marcus Stokes and Darnell Brown  
[2] ammunition are different, so I can't be precise, but  
[3] as a ballpark figure, it usually means a gun is  
[4] within about two feet of the target.

[5] If I see soot, which just refers to the  
[6] deposition of basically smoke onto the skin of or if  
[7] I see the deposition of soot on the skin around an  
[8] entrance wound, that suggests that the gun is even  
[9] closer; again, as a ballpark figure, within about  
[10] six inches, but, again, that will depend on  
[11] combination of the weapon and ammunition used.

[12] **Q.** Was there any soot or stippling noted in this  
[13] case?

[14] **A.** No.

[15] **Q.** So, what would that lead you to conclude about  
[16] the distance of the shooter from Cory Morton?

[17] **A.** If there is no soot or stippling, I can't make  
[18] any statement as to the range. Obviously, it can  
[19] mean that the gun is further away than two feet or a  
[20] greater distance, or it could be that there might be  
[21] an intermediary object; it could be clothing, it  
[22] could be a car door, a window, that would be  
[23] filtering out those substances even if the gun is  
[24] within two feet. So, the absence of soot or  
[25] stippling just means I can't make any statement at

[1] Com. v Marcus Stokes and Darnell Brown  
[2] all on the range of fire.  
[3] **Q.** Doctor, I want to go back to the wounds. Can  
[4] you go through each wound and state whether they  
[5] were penetrating or perforating and which, if any,  
[6] internal organs were hit?

[7] **A.** Yes. So, the gunshot wound on the left side of  
[8] the upper chest was a perforating wound, which,  
[9] again, means that it exited the body. That one  
[10] exited the left side of the upper back and hit the  
[11] left lung, left third rib -- and left third rib.

[12] The gunshot wound on the right side of the  
[13] upper chest, kind of right shoulder, that just went  
[14] through soft tissue only. It didn't hit any vital  
[15] structures and exited the back of the right  
[16] shoulder.

[17] The gunshot wound on the right side of the  
[18] central chest went through the heart, aorta, which  
[19] is the largest artery in the body, the left lung and  
[20] left rib eight, and that was a penetrating wound,  
[21] which means a bullet was recovered, in this case,  
[22] from the left side of the back.

[23] And then the gunshot wound to the back  
[24] went through the -- went through left rib three and  
[25] the left lung, and that was a penetrating wound and

[1] Com. v Marcus Stokes and Darnell Brown  
[2] a bullet was recovered from the left shoulder.  
[3] **Q.** So, both the lungs and the heart were struck by  
[4] bullets?

[5] **A.** Yes, the left lung and the heart.

[6] **Q.** Someone who incurred these wounds, how long  
[7] would they live without medical treatment?

[8] **A.** It would not be an instantaneous death, but it  
[9] would be rapid. It is hard to give an exact -- it  
[10] is impossible to give exact time. Probably death  
[11] would occur within minutes.

[12] **Q.** Would they be able to walk for a short distance  
[13] before succumbing to their wounds?

[14] **A.** Yes.

[15] **Q.** With the penetrating gunshot wounds, were the  
[16] bullets in this case recovered by Dr. Osbourne?

[17] **A.** Yes.

[18] **Q.** What is the medical examiner office's procedure  
[19] when a bullet is recovered?

[20] **A.** The bullet is obviously retrieved from the body  
[21] and then it is put inside a paper envelope that is  
[22] labeled with the person's name, as well as the  
[23] unique -- we assign every case that comes to our  
[24] office a unique number. So, the number, the name of  
[25] the person, the nature of the projectile; in this

[1] Com. v Marcus Stokes and Darnell Brown  
[2] case it is just a bullet, and the location from the  
[3] body, all those things are put on the envelope, and  
[4] then that envelope is sealed with evidence tape,  
[5] initialed, dated and then submitted into a locked  
[6] evidence box, from which it is later retrieved by,  
[7] you know, police, firearms people.  
[8] **Q.** The four wounds that you described, you have no  
[9] way of knowing in which order they were received;  
[10] correct?  
[11] **A.** Correct.  
[12] **Q.** But based on your review of the report, are the  
[13] wounds incurred by Cory Morton consistent with  
[14] somebody shooting him from a distance of six to  
[15] eight feet away while facing him and then Mr. Morton  
[16] either turning or otherwise showing his back to the  
[17] victim and being struck one time in the back?  
[18] **A.** It would be consistent with that.  
[19] **Q.** Would it be consistent with Cory Morton walking  
[20] for a few feet before he collapsed?  
[21] **A.** Yes.  
[22] **Q.** Can you explain to the jury what is meant by  
[23] cause of death and manner of death?  
[24] **A.** Cause of death is basically what it sounds  
[25] like; it is the reason why someone dies.

[1] Com. v Marcus Stokes and Darnell Brown  
[2] I have no further questions, Your  
[3] Honor.  
[4] **MR. GOTTLIEB:** May I inquire, sir?  
[5] **THE COURT:** Sure.  
[6] **MR. GOTTLIEB:** Thank you, sir.  
[7] **CROSS-EXAMINATION**  
[8] **BY MR. GOTTLIEB:**  
[9] **Q.** Doctor, you had no participation in the  
[10] preparation of this medical examiner's report, am I  
[11] correct, sir?  
[12] **A.** Yes.  
[13] **Q.** You have been in Philadelphia now three months,  
[14] and this was completed, reading the front of it, on  
[15] January 2, 2013, by Dr. Osbourne; is that correct?  
[16] **A.** Yes.  
[17] **Q.** Now you indicated you reviewed this. When did  
[18] you first review this medical examiner's report?  
[19] **A.** I reviewed this on October 29 of this year.  
[20] **Q.** Seven days ago?  
[21] **A.** Yes.  
[22] **Q.** And the pictures that you indicated that you  
[23] looked at, when did you first look at those pictures  
[24] of the body?  
[25] **A.** At that same time.

[1] Com. v Marcus Stokes and Darnell Brown  
[2] The manner of death refers to the way in  
[3] which the death occurs. So, there are five  
[4] different manners of death typically. So, homicide  
[5] is one, when someone kills another person. There is  
[6] also natural death, which is the majority of deaths;  
[7] suicide, accidents, as well as undetermined, which  
[8] just means we can't tell once our investigation is  
[9] complete.  
[10] So, cause of death is the reason why they  
[11] are dead. The manner of death is the way in which  
[12] the death occurs.  
[13] **Q.** In this case what is the cause of death?  
[14] **A.** The cause of death is multiple gunshot wounds.  
[15] **Q.** What is the manner of death?  
[16] **A.** Homicide.  
[17] **Q.** Are these opinions within a reasonable degree  
[18] of scientific and medical certainty?  
[19] **A.** Yes.  
[20] **Q.** Is your opinion in this case, are you merely  
[21] repeating Dr. Osbourne's opinion from the report or  
[22] through your medical experience and training, do you  
[23] also hold this opinion?  
[24] **A.** I also hold this opinion.  
[25] **MR. MacARTHUR:** Thank you.

[1] Com. v Marcus Stokes and Darnell Brown  
[2] **Q.** On October 29?  
[3] **A.** Yes.  
[4] **Q.** Seven days ago?  
[5] **A.** Yes.  
[6] **MR. GOTTLIEB:** I have nothing further  
[7] of Dr. Chu, Your Honor.  
[8] Thank you.  
[9] **MR. MISCHAK:** I have no questions.  
[10] Thank you.  
[11] **THE COURT:** Thank you, Dr. Chu.  
[12] You may step down.  
[13] (Witness excused.)  
[14] **MR. MacARTHUR:** Commonwealth calls  
[15] Detective James Pitts.  
[16] **THE COURT CRIER:** May I, Your Honor?  
[17] **THE COURT:** Yes.  
[18] **THE COURT CRIER:** Detective, please  
[19] state your name, spell it for the record,  
[20] badge, district and unit.  
[21] **THE WITNESS:** Detective James Pitts,  
[22] P-I-T-T-S, Badge Number 9040, presently  
[23] assigned to the Homicide Unit.  
[24] (Witness sworn.)  
[25] **MR. MacARTHUR:** May I, Your Honor?



[1] Com. v Marcus Stokes and Darnell Brown  
[2] **THE COURT:** Yes.  
[3] **DIRECT EXAMINATION**  
[4] **BY MR. MacARTHUR:**  
[5] **Q.** Detective Pitts, how long have you been a  
[6] Philadelphia Police Officer?  
[7] **A.** Since 1996.  
[8] **Q.** How long have you been a detective?  
[9] **A.** Since 1999.  
[10] **Q.** How long have you been in Homicide?  
[11] **A.** Since 2006.  
[12] **Q.** Were you the assigned investigator in this  
[13] case?  
[14] **A.** I do not believe I was.  
[15] **Q.** Did you assist Detective Pirrone in doing  
[16] anything in this case?  
[17] **A.** Yes, I did.  
[18] **Q.** In your experience as a detective and a  
[19] homicide detective, have you had the opportunity to  
[20] take statements from witnesses?  
[21] **A.** Yes, I have.  
[22] **Q.** When you take a statement from a witness, do  
[23] you record that statement?  
[24] **A.** If they allow me to write it down, I do.  
[25] **Q.** If they allow you to write it down, do you

[1] Com. v Marcus Stokes and Darnell Brown  
[2] statement was taken?  
[3] **A.** It was taken on December 9 of 2012 at  
[4] 11:30 a.m.  
[5] **Q.** When you took this statement, did you write  
[6] down word for word what your questions were and what  
[7] Ms. Shockley's answers were?  
[8] **A.** Yes.  
[9] **Q.** Did she at that time seem to understand what  
[10] was going on?  
[11] **A.** Yes.  
[12] **Q.** Did she have any questions for you?  
[13] **A.** I really couldn't tell you if she had any  
[14] questions prior to the interview, but that's why we  
[15] record what we ask a person. The interview itself  
[16] is a verbatim question and answer.  
[17] **Q.** At the time that you took this interview, how  
[18] much did you know about the shooting of Cory Morton  
[19] that happened on 2637 Stanley Street?  
[20] **A.** I couldn't tell you exactly where we were in  
[21] the investigation on this particular case when this  
[22] interview was conducted.  
[23] **Q.** Fair enough. Detective, at the time I would  
[24] like you to read the questions and answers that were  
[25] posed to Ms. Shockley.

[1] Com. v Marcus Stokes and Darnell Brown  
[2] summarize what was said or do you write it down word  
[3] for word?  
[4] **A.** No. If I write a statement down, it is a  
[5] verbatim statement. That means I ask a question, I  
[6] type down exactly what I am asking, and whatever  
[7] they answer, I type it down exactly, minus typos.  
[8] **Q.** After that written document is prepared, does a  
[9] witness get the opportunity to review it?  
[10] **A.** Yes, they do.  
[11] **MR. MacARTHUR:** Can we show the  
[12] detective C-16, please.  
[13] **THE COURT CRIER:** C-16 to the  
[14] witness.  
[15] **THE WITNESS:** Thank you.  
[16] **BY MR. MacARTHUR:**  
[17] **Q.** Detective, do you see C-16 in front of you?  
[18] **A.** Yes, I do.  
[19] **Q.** Do you recognize what that is?  
[20] **A.** Yes. It is a statement taken by myself and  
[21] Detective Jacobs from Ms. Shana Shockley.  
[22] **Q.** Shana what?  
[23] **A.** Shockley.  
[24] **Q.** Shana Shockley.  
[25] What was the date and the time that this

[1] Com. v Marcus Stokes and Darnell Brown  
[2] **A. Question:** Shana, we are investigating the  
[3] shooting defendant of Cory Morton. The incident  
[4] occurred on 12/9/12, at approximately 2:18 a.m. in  
[5] the area of 2637 North Stanley Street. We will be  
[6] asking you questions concerning this incident. Is  
[7] this okay?  
[8] **Answer:** Yes.  
[9] **Question:** Do you read, write and  
[10] understand the English language?  
[11] **Answer:** Yes.  
[12] **Question:** How far did you go in school?  
[13] **Answer:** I graduated 12th grade and I  
[14] finished trade school.  
[15] **Question:** Are you presently under the  
[16] influence of any -- I am sorry -- any prescription  
[17] medications, narcotics and/or alcohol that would  
[18] interfere with your participation in this interview?  
[19] **Answer:** No.  
[20] **Question:** Are you known by any other  
[21] names and/or nicknames?  
[22] **Answer:** Just Shana.  
[23] **Question:** Would you like anything to eat  
[24] or drink or an opportunity to use the restroom  
[25] before we begin?



# **EXHIBIT “D”**

## **Autopsy Report**



**City of Philadelphia  
Office of the Medical Examiner**

321 University Avenue  
Philadelphia, PA 19104

Case Number : 12-04960  
Date of Death : Dec 9 2012

**FINDINGS AND OPINIONS**

DECEDENT'S NAME <b>Cory R. Morton</b>	AGE <b>27 Years</b>	RACE <b>Black</b>	SEX <b>Male</b>	HEIGHT <b>5 ft 11 in</b>	WEIGHT <b>192 lb</b>
PRONOUNCED DEAD BY <b>Dr. Ropplode</b>	AT <b>Temple University Hospital Philadelphia PA</b>			DATE & TIME <b>Dec 9 2012 2:37AM</b>	
ID WITNESS NAME <b>Dawn Swain Ethel Kirkley</b>	ADDRESS <b>2033 W. Stella St. Philadelphia PA 529 N. Creighton St. Philadelphia PA</b>			RELATION <b>Mother Grandparent</b>	

**Findings:**

Penetrating gunshot wound to chest, range indeterminate  
Perforates the atria of the heart, the thoracic aorta and the lower lobe of the left lung  
Bullet recovered

Perforating gunshot wound to chest, range indeterminate  
Perforates the upper lobe of the left lung


Penetrating gunshot wound to back, range indeterminate  
Perforates the upper lobe of the left lung  
Bullet recovered

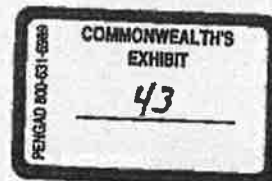
Perforating gunshot wound to right shoulder, range indeterminate

**Cause of Death:** Multiple Gunshot Wounds

**Other Significant Conditions:**

**Manner of Death:** Homicide

  
Marlon Osbourne, M.D.  
Associate Medical Examiner  
Date: 11/2/2013





**City of Philadelphia  
Office of the Medical Examiner**

321 University Avenue  
Philadelphia, PA 19104

Case Number : 12-04960  
Date of Death : Dec 9 2012

**REPORT OF EXAMINATION**

**DECEDENT'S NAME**

**Cory R. Morton**

An autopsy was performed on the body of the decedent at the Philadelphia Medical Examiner's Office on December 9, 2012. The external examination was started at approximately 8:40AM. The internal examination was started at approximately 9:50AM.

**Clothing:** The clothing that accompanies the decedent consists of beige long sleeve shirt, a black athletic tee shirt, underwear, dark jeans, and brown/tan shoes. The shirt has defects that correspond to the entrance wounds of the gunshot wounds to the chest, shoulder and back and exit wounds of the gunshot wound to the chest and shoulder. The athletic tee shirt has defects that correspond to the entrance wounds of the gunshot wounds to the chest, and back and exit wound of the gunshot wound to the chest. There is no visible evidence of soot or gunpowder around the defects on the shirt or the athletic tee shirt.

**EXTERNAL EXAMINATION:**

The body is that of a 5 foot 11 inch, 193 pound, black male who appears compatible with reported age of 27 years. There is no lividity. There is rigor mortis of the extremities. The atraumatic scalp is covered by black hair. The face has mustache and beard. The facial bones have no palpable fractures. The irides are brown. The sclerae are white. The conjunctivae have no petechiae. The external auditory meatuses have no discharge. The nares are patent. The nasal bones and nasal septum are intact. The lips are atraumatic. The oral cavity has no injuries. The teeth are natural and in good repair. The neck is symmetric and has no palpable masses or injuries. The chest is symmetric and has no palpable masses. The abdomen is flat. The body habitus is mesomorphic. The back is symmetric. The upper and lower extremities have no deformities or fractures. The external genitalia are those of a circumcised adult male. The testes are within the scrotum. The anus and perineum have no trauma or abnormalities. A hospital bracelet around the right wrist bears the decedent's name and medical record number (30887285).

**PERFORATING GUNSHOT WOUND TO THE CHEST:**

An entrance gunshot wound on the left side of the base of the neck is 28.5 centimeters below the top of the head and 3 centimeters to the left of midline. The round 0.5 x 0.5 centimeter skin defect has a circumferential abrasion collar. The edges of the wound cannot be reapproximated. The wound has no soot, stipple, or muzzle imprint. The bullet perforates the skin and soft tissue of the left supraclavicular area, passes through the left first intercostal space, enters the left pleural cavity, perforates the upper lobe of the left lung, and fractures the left third rib posteriorly. The bullet exits the skin through a 0.6 x 0.5 centimeter ovoid defect on the left side of the back that is 33 centimeters below top of the head and 10 centimeters to left of midline.

Associated with the wound path are skin, soft tissue, and intramuscular hemorrhages, fractures of the left third rib, and perforating defects to the left lung. The left pleural cavity contains 700 milliliters of liquid blood.

The path of the bullet with the body in the normal anatomic position is right to left, front to back, and downward.

**PENETRATING GUNSHOT WOUND TO THE CHEST:**

An entrance gunshot wound on the right side of the chest is 39 centimeters below the top of the head and 5 centimeters to the right of midline. The ovoid 0.5 x 0.4 centimeter skin defect has a circumferential abrasion collar. The edges of the wound cannot be reapproximated. The wound has no soot, stipple, or muzzle imprint. The bullet perforates the skin and soft tissue of the chest wall, passes through the right third intercostal space, enter the anterior mediastinum, perforates the heart at the base of the right auricle perforates the intraatrial septum, perforates the left atrium, perforates the thoracic aorta, perforates the lower lobe of the left lung, and perforates the left eighth rib posteriorly. A deformed medium caliber jacketed bullet is recovered from left side of the back

Associated with the wound path are skin, soft tissue, and intramuscular hemorrhages, fractures of the left third eighth rib, and perforating defects to the heart, aorta and left lung. The left pleural cavity contains 700 milliliters of liquid blood.

The path of the bullet with the body in the normal anatomic position is right to left, front to back, and downward.

**PENETRATING GUNSHOT WOUND TO THE BACK:**

An entrance gunshot wound on the left side of the back is 39 centimeters below the top of the head and 1.5 centimeters left of midline. The ovoid 0.6 x 0.4 centimeter skin defect has a circumferential abrasion collar. The edges of the wound cannot be reapproximated. The wound has no soot, stipple, or muzzle imprint. The bullet perforates the skin and soft tissue of the back, passes through the back muscles, fractures the left third rib posteriorly, enters the left pleural cavity, perforates the upper lobe of the left lung, fractures the left third rib posterolaterally, passes through the left axilla, and creating hemorrhagic wound track through the left deltoid muscle. A medium caliber jacketed bullet is recovered from left shoulder.

Associated with the wound path are skin, soft tissue, and intramuscular hemorrhages, fractures of the left third rib, and perforating defects to the left lung. The left pleural cavity contains 700 milliliters of liquid blood.

The path of the bullet with the body in the normal anatomic position is right to left, back to front, and upward.

**PERFORATING GUNSHOT WOUND TO THE RIGHT SHOULDER:**

An entrance gunshot wound on the anterior aspect of the right shoulder is 3 centimeters below the top of the right shoulder. The ovoid 0.8 x 0.9 centimeter skin defect has a 0.1 centimeter abrasion collar in the 4 o'clock to the 6 o'clock positions. The edges of the wound cannot be reapproximated. The wound has no soot, stipple, or muzzle imprint. The bullet perforates the skin and soft tissue of the right shoulder, and passes through the coracoclavicular and acromioclavicular ligaments of the shoulder joint. The bullet exits the skin through a 1 x 0.6 centimeter ovoid defect on the posterior aspect of the right shoulder that is 4 centimeters below top of the right shoulder.

Associated with the wound path are skin, soft tissues and aforementioned ligaments of the right shoulder.

The path of the bullet with the body in the normal anatomic position is front to back and slightly downward.

**MEDICAL INTERVENTION:**

The right side of the chest has a laterally placed chest tube in the fifth intercostal space. The left side of the chest has a sutured horizontally oriented thoracotomy incision.

**INTERNAL EXAMINATION:**

**Neck:**

The firm, brown, muscles of the anterior neck, have no injuries. The tongue has no bite marks or contusions. The hyoid bone and laryngeal cartilages are intact. The adjacent connective tissue and vessels of the anterior aspect of the cervical spine are unremarkable.

**Body Cavities:**

The soft tissues and muscles of the abdomen have no masses or injuries. The clavicles, sternum, and pelvic bones have no fractures. The peritoneal cavity has no adhesions and contains no fluid. The intrathoracic and intraabdominal organs are in their normal positions.

**Cardiovascular System:**

The injuries to the heart are as previously described. The smooth epicardium has a normal amount of subepicardial adipose tissue in a normal distribution. The heart is 340 grams. The right coronary artery supplies the posterior interventricular septum. The coronary arteries have no atherosclerosis. The chambers of the heart contain no mural thrombi. The atrioventricular and semilunar valves are normally formed and have no calcifications, nodularity, or vegetations. The coronary arteries arise normally from the sinuses of Valsalva. The firm, red-brown, homogenous myocardium has no areas of fibrosis or necrosis. The aorta arises

from its usual position, has a normal branching pattern and no atherosclerosis. Injuries to the aorta are as previously described. The pulmonary arteries have no thromboemboli.

**Respiratory System:**

The larynx and trachea have no foreign objects or mucous plugs. The right and left lungs are 190 grams and 220 grams, respectively. Injuries to the left lung are as previously described. The red-maroon, spongy airless lung parenchyma has no emphysema, pneumonia or masses. The tracheobronchial tree has no mucous plugs or foreign objects.

**Gastrointestinal System:**

The esophagus, stomach small and large intestines have tan, smooth serosa and no perforation, obstruction, or masses. The stomach contains 150 milliliters of partially digested food. The stomach and duodenum have no erosions or ulcers. The appendix is present. The rectum is filled with green stool.

**Hepatobiliary System and Pancreas:**

The 1430 gram liver has an intact capsule, and unremarkable red-brown congested parenchyma. The gallbladder contains 5 milliliters of brown bile and no calculi. The tan, lobulated pancreas has no masses or calcifications.

**Hemic and Lymphatic System:**

The 70 gram spleen has a lavender intact capsule, and unremarkable red-maroon parenchyma. The paraaortic, paratracheal, and mediastinal lymph nodes are not enlarged.

**Genitourinary System:**


The right and left kidneys are 120 grams and 130 grams, respectively. The cortical surfaces are smooth. The renal parenchyma has distinct corticomedullary junctions. The calyces and pelves are not dilated and have no masses or calculi. The ureters are unobstructed and normal in course and caliber to the urinary bladder. The urinary bladder contains 200 milliliters of yellow urine. The tan rubbery prostate gland has no nodules. The testes have a soft brown parenchyma and no masses.

**Endocrine System:**

The brown, bilobed thyroid gland has no masses, nodules or cysts. The parathyroid glands are inconspicuous. The adrenal glands have thin yellow cortices and brown medullae. The pituitary gland is normal in size and free of masses.

**Head and Nervous System:**

The reflected scalp has no subgaleal hemorrhages. The calvarium and skull base are intact. The epidural and subdural spaces have no liquid accumulations. The leptomeninges are thin and translucent. The brain is 1410 grams. The cerebral hemispheres are symmetric. The corpus callosum is intact. The basilar artery, its tributaries and branches have no atherosclerosis or aneurysms. The cingulate gyri, unci and cerebellar tonsils are not herniated. The cortical ribbon is uniform throughout and has no contusions. The white matter has no areas of softening, masses, or infarcts. The basal ganglia and thalami are normal size, color and configuration. The ventricles are not dilated or compressed. The cerebrospinal fluid is clear. The mamillary bodies are normal. The substantia nigra is adequately pigmented for age. The pons, medulla and midbrain are normal. The cerebellar hemispheres, dentate nuclei and vermis are normal.

  
**Marlon Osbourne, M.D.**  
**Associate Medical Examiner**

**(End of Report)**



# Toxicology Report

City of Philadelphia  
Office of the Medical Examiner

CASE NO. 12-04960

Name: CORY R. MORTON

Age: 27 Years Sex: Male Race: Black

Pathologist: Marlon Osbourne

## ELISA - Enzyme Immunoassay

BENZODIAZEPINES	Blood, Femoral (F)	Negative
FENTANYL	Blood, Femoral (F)	Negative
OPIATES	Blood, Femoral (F)	Negative
OPIATES	Urine	Negative

## Wet Chemical Tests - Colorimetry

VOLATILES	Blood, Femoral (F)	Presumptive Positive
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## Drug Screen - SPE, GC/MSD

GC/MS DRUG SCREEN	Urine	Negative
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## Headspace GC/FID

ETHANOL	Blood, Femoral (F)	Present	115 mg/dl
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## Analysis Notes

*Volatiles analysis is a colorimetric method that screens for low molecular weight organic volatile reducing agents such as ethanol, methanol, isopropanol, acetaldehyde, and formaldehyde.*

*Drug Screen by GC/MSD includes screening for the following drug(s) and class of drugs: anticonvulsants, antidepressants, antihistamines, anticholinergics, barbiturates, muscle relaxants and non-steroidal anti-inflammatory agents (excluding salicylates), non-benzodiazepine sedative-hypnotics, cocaine, phencyclidine (PCP), amphetamine-like stimulants. Detection of specific compounds of each class is concentration dependent and not all drugs of each class are detected. Certain compounds outside of these classes are also detected. Common incidental findings such as caffeine and metabolites or nicotine and metabolites are not reported.*

*Enzyme immunoassay testing results are preliminary. Any positive results must be confirmed by another technique.*

Toxicologist: Lisa A. Mundy

Date: 1/2/2013