No. 06-_____

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD L. CRAIG,

Petitioner

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the
Ohio Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Is an autopsy report used in a murder prosecution a testimonial statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004)?

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Donald L. Craig respectfully petitions for a writ of certiorari to the Ohio Supreme Court in *State v. Criag,* No. 2004-1554.

OPINION BELOW

The opinion of the Ohio Supreme Court is reported at 110 Ohio St.3d 306 and at 853 N.E.2d 621, and is attached at A1-A27.

STATEMENT OF JURISDICTION

The Ohio Supreme Court issued its opinion on September 20, 2006 App. A1. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT OF THE CASE

This is a capital murder case. The state proved facts crucial for conviction by introducing a coroner's report of an autopsy performed on the victim, and by introducing testimony of another medical examiner as to what the reporting coroner had written. The reporting coroner did not testify at trial, even though he was available to do so – indeed, shortly before trial he consulted with the medical examiner who relayed his findingsto court -- and the accused never had an opportunity to cross-examine him. Accordingly, the trial court violated the accused's right under the Sixth Amendment to the Constitution "to be confronted with the witnesses against him." Nevertheless, the Ohio Supreme Court held that the autopsy report was not "testimonial" within the meaning of *Crawford*

v. Washington, 541 U.S. 36 (2004), because it fit within the "business records" exception to the state's rule against hearsay.

On February 28, 1996, Roseanna Davenport of Akron, Ohio, not quite 13 years old, Trial Transcript ("T.") 1603-04, was reported missing. She had not come home after visiting a friend at the house where Petitioner Donald Craig lived. Petitioner was in the house when Roseanna left it, and evidence indicated that he left the house shortly after she did. App. A6-7.

On March 5, Roseanna was found dead, apparently murdered, in a house that had been abandoned; the new owner of the house found her while cleaning it up. She was fully clothed. *Id.* A7. The police investigation focused on several suspects, chief among them Petitioner. *Id.*; T. 1926.

On March 6, 1996, Dr. Roberto Ruiz, Chief Deputy Coroner of the Summit County Coroner's Office, conducted an autopsy of Roseanna's body. Four police officers attended the autopsy, T. 1956; it was standard practice for Akron police officers to attend autopsies, *id.* 1890, 1956, and the Police Department and the Coroner's Office worked in close cooperation with each other. *Id.* 1920, 1926-27, 1937, 1949. Dr. Ruiz made extensive observations of the body and recorded them in an 11-page report with a three-page appendix. App. A30-33. He concluded that Roseanna had died of strangulation, and that she had been raped vaginally and anally. *Id.* A30.

Dr. Ruiz took swabs from several parts of Roseanna's body and from her underwear in an attempt to retrieve DNA that might help identify an assailant. The attempt proved unavailing at that time; according to Cellmark, a leading compoany in DNA analysis, there was not enough DNA to make an identification under the then-available

technology. *Id.* A7-8. Other efforts to identify a suspect through the collection of trace evidence – including searches of her body, of the house where she was found, and of the house where Petitioner lived – were also unsuccessful. T.2722-25. 2752-53. No arrest was made at that time.

By 2002, however, DNA technology had substantially improved, and an Akron officer submitted the DNA samples retrieved from Roseanna, together with DNA samples taken from Petitioner and other suspects, to a state laboratory. *Id.* A9. This time, the laboratory reported that Petitioner's DNA was found on the vaginal swab and on the swab taken from Roseanna's underwear. *Id.* A9. (At trial, the defense raised doubrts about the chain of custody of the DNA evidence. T. T. 2717-22.) No other DNA evidence was found in the swabs taken from Roseanna, T. 2523, 2559-60, and no other trace evidence linked Craig to the crimes. T. 2722-25.

Petitioner was charged with rape, kidnap, and murder and tried in the Court of Common Pleas for Summit County, Patricia A. Cosgrove, J., presiding. Dr. Ruiz had recently retired, T. 2200, and he did not testify at the trial. The State made no attempt to demonstrate that he was unavailable. App. A17. Indeed, it became apparent that he was available. Dr. Lisa J. Kohler, who was not present at the autopsy but who was the Chief Medical Examiner for the County at the time of trial, testified and told the jury at length (and over objection, T. 2201) what Dr. Ruiz had written in the report. For example, she said: "As Dr. Ruiz examined her, he identified multiple injuries involving the head and neck, the chest, the abodmen, genitalia, and extremities." T. 2204. Referring constantly to the report, she then described each injury at great length. T. 2204-09. Eventually, the report itself was admitted into evidence. T. 2480. During the course of her testimony,

Dr. Kohler stated that in preparation for trial she had consulted with Dr. Ruiz to clarify some matters. T. 2253. As explained further below, Dr. Ruiz's findings, relayed to the jury by Dr. Kohler, were crucial to the case.

The jury convicted Petitioner on all counts and recommended the death penalty, App. A6, which the court imposed. Petitioner then appealed as of right to the Ohio Supreme Court. He raised numerous grounds, including the violation of his confrontation right created by the presentation of Dr. Ruiz's conclusions without Dr. Ruiz himself ever testifying subject to confrontation *Id.* A17-19.

The Ohio Supreme Court issued its decision on September 20, 2006. It held that the trial court had not erred as a matter of state evidentiary law in allowing Dr. Kohler's testimony or in admitting the autopsy report itself. It further held that neither of these rulings violated the Confrontation Clause. With respect to Dr. Kohler's testimony, the court said:

> The jury was fully aware that Dr. Kohler had not personally conducted or been present during Davenport's autopsy. Moreover, the defense had the opportunity to question Dr. Kohler about the procedures that were performed, the test results, and her expert opinion about the time and cause of death.

Id. A17-18.

With respect to the report, the court said:

> An autopsy report, prepared by a medical examiner and documenting objective findings, is the "quintessential business record." *Rollins v. State* (2005), 161 Md.App. 34, 81, 866 A.2d 926. "The essence of the business record hearsay exception contemplated in *Crawford* is that such records or statements are not testimonial in nature because they are prepared in the ordinary course of regularly conducted business and are 'by their nature' not prepared for litigation." *People v. Durio* (2005), 7 Misc.3d 729, 734, 794 N.Y.S.2d 863.

Id. A18. Accordingly, under the view that *Crawford v. Wahington*, 541 U.S. 36 (2004), provides a categorical exemption from the Confrontation Clause for all business records,

the Court concluded that the report was not testimonial and that its admission did not violate the Confrontation Clause.

The state supreme court affirmed all of Petitioner's convictions and also the death sentence for the murder conviction. The Court decided that the trial court had improperly sentenced Petitioner on the rape and kidnapping charges on the basis of provisions that were not effective until after the date of the offenses.[1] This petition follows.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS ARE IRRECONCILABLY DIVIDED ON THE QUESTION OF WHETHER AUTOPSY RECORDS, AND OTHER REPORTS GENERATED BY GOVERNMENT AGENTS IN CONTEMPLATION OF PROSECUTION, ARE TESTIMONIAL.

In rejecting the conclusion that the trial court violated Petitioner's confrontation rights by admitting Dr. Ruiz's findings, the Ohio Supreme Court expressed agreement with what it called "the majority view under *Crawford*" and held squarely that "autopsy records are admissible as nontestimonial business records." 853 N.E.2d at 639; *see also id.* at 638 ("Most jurisdictions that have addressed the issue under *Crawford* have found that autopsy reports are admissible as nontestimonial business or public records."). At least one United States Court of Appeal and one state court of last resort have adopted

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[1] The fact that the state supreme court remanded for resentencing on the rape and kidnapping charges poses no impediment to the jurisdiction of this Court. Resolution of this sentencing issue has no bearing on the judgment of guilt on all counts, or on the imposition of the death sentence on the murder count. Accordingly, the judgment of the Ohio Supreme Court is final for purposes of the jurisdiction of this Court under 28 U.S.C. § 1257(a). *See, e.g.*, Cox Broadcating Corp. v. Cohn, 420 U.S. 469, 480 (1975) (holding that this Court has jurisdiction if "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings"); Brady v. Maryland, 373 U.S. 83, 85 & n.1 (1963) (holding that this Court had jurisdiction, notwithstanding fact that high court of state had remanded for determination of punishment, because question presented bore on whether defendant was entitled to new trial on guilt and would be unaffected by subsequent state proceedigns); ROBERT L. STERN, EUGENE GRESSMAN, et al., SUPREME COURT PRACTICE 153 (8th ed. 2002).

this unqualified position, *United States v. Feliz*, 467 F.3d 227 (2d Cir. 2006); *State v. Cutro*, 365 S.C. 366, 378, 618 S.E.2d 890 (S.C. 2005), as have numerous intermediate courts. *E.g., People v. McNeiece*, 2006 WL 2223797 (Cal App. 2006)*; Moreno Denoso v. State*, 156 S.W.3d 166, 181-82 (Tex.App.), *rev. denied* (Tex. Crim. 2005); *People v. Durio*, 7 Misc.3d 729, 734-36, 794 N.Y.S.2d 863 (N.Y. Sup. Ct. Kings Co. 2005).

By contrast, as the Ohio Supreme Court noted, "[s]ome jurisdictions have resolved the *Crawford* issue by distinguishing between objective factual findings, which are considered nontestimonial, and opinions and conclusions, which are considered testimonial." 853 N.E.2d at 638. At least two state courts of last resort have adopted this modified view. *Rollins v. State*, 392 Md. 455, 897 A.2d 821 (2006);[2] *State v. Lackey*, 280 Kan. 190, 120 P.3d 332 (2005), *cert. denied*, 126 S.Ct. 1653 (2006) (adopting similar test articulated by intermediate court in *Rollins*).

Petitioner contends that the correct.view is set forth in neither of these sets of cases, but rather is reflected in a decision of this Court from nearly a century ago. In *Diaz v. United States*, 223 U.S. 442, 450 (1912), this Court noted that an autopsy report and certain other pretrial statements – all of which together it characterized as "testimony" –

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[2] *Rollins* held:

> If the autopsy report contains only findings about the physical condition of the decedent that may be fairly characterized as routine, descriptive and not analytical, and those findings are generally reliable and are afforded an indicum of reliability, the report may be admitted into evidence without the testimony of its preparer, and without violating the Confrontation Clause. If the autopsy report contains statements which can be categorized as contested opinions or conclusions, or are central to the determination of the defendant's guilt, they are testimonial and trigger the protections of the Confrontation Clause . . . .

897 A.2d at 845-46.

"could not have been admitted without the consent of the accused, . . . because the accused was entitled to meet the witnesses face to face." *Id.* at 450.[3]

This principle was recognized in *Smith v. State*, 898 So.2d 907 (Ala. Crim. App.), *cert .denied* (Ala. 2004). The prosecution contended that the accused had asphyxiated the victim, while the accused contended that he had killed the victim by blows thrown in self-defense. The trial court admitted the autopsy report, which indicated asphyxiation as the cause of death, even though the forensic pathologist who performed the autopsy did not testify at trial; in a procedure resembling the one in the present case, two other forensic pathologists testified instead. The appellate court, while manifesting confusion about doctrinal categories,[4] held that this was a violation of the Confrontation Clause, albeit harmless in the circumstances:

> By introducing the records of the autopsy without providing [the accused] with the opportunity to cross-examine the one forensic pathologist who had observed the body and its wounds and who had conducted the tests on the body, the prosecution was permitted to prove an essential element of the crime without providing [the accused] with an opportunity to cross-examine the pathologist who originally reached the conclusion that [the victim] died of asphyxiation.

Id. at 917.[5]

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[3] The governing law was not the Confrontation Clause but § 5 of the Philippine Civil Government Act, 32 Stats. 692 (1902), which gave the accused the right "to meet the witnesses face to face." The Court, however, explicitly treated this protection as a "like right" to the one secured by the Constitution. *Id.* at 450-51.

[4] The court stated without explanation that the report was not testimonial under *Crawford* and that "[t]he admissibility of the autopsy report and materials associated with it is governed by hearsay law." 898 So.2d at 916. But then it went on to articulate reasons why admission of the report absent its author violated the Confrontation Clause.

[5] In reviewing cases from other jurisdictions, immediately after describing *Smith*, the Ohio Supreme Court described *State v. Delaney*, 171 N.C. App. 141, 144, 613 S.E.2d 699 (2005), which held that consistently with *Crawford* "an expert may base an opinion on tests performed by others in the field," so long as the accused is "given an opportunity to

Since *Crawford*, two courts of last resort have made holdings from which the conclusion that autopsy reports fall within the coverage of the Confrontation Clause follows *a fortiori*. In *City of Las Vegas v. Walsh,* 121 Nev. 899, 124 P.3d 203 (2005), the Nevada Supreme Court held that an affidavit by a registered nurse as to the manner in which she drew blood from the accused, in a prosecution for driving under the influence of alcohol, was testimonial. "Although [such documents] may document standard procedures," the Court said, "they are made for use at a later trial or legal proceeding. Thus, their admission, in lieu of live testimony, would violate the Confrontation Clause." *Id.* at 208.[6] Similarly, in *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006), the court held

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cross-examine [the expert] on the basis of his opinion." 853 N.E.2d at 639. The Ohio Supreme Court did not clearly endorse *Delaney*, and it does not appear to have relied on the theory of that case; rather, its holding expressed agreement with "the majority view under *Crawford* . . . that autopsy reports are admissible as nontestimonial records." App. A19. Indeed, the court could not plausibly have relied on the *Delaney* theory, because the trial court did not purport to limit admissibility of the autopsy report to use in support of Dr. Kohler's opinion. Furthermore, in this case, as in *People v. Goldstein*, 6 N.Y.3d 119, 810 N.Y.S.2d 100 (2005), the underlying statement could form a basis for the expert's opinion only if the "jury [took] the statement as true." And therefore, as *Goldstein* held:

> The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context. (See Kaye et al., The New Wigmore: Expert Evidence § 3.7, at 19 [Supp. 2005] ["(T)he 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."].)

810 N.Y.S.2d at 128.

[6] The Court nevertheless held that admissibility of the affidavit did not violate the accused's confrontation rights because the accused had not sufficiently raised a dispute of fact concerning the subject matter of the affidavit and therefore, under the applicable statute, had waived the right. *Id.* No doubt, an accused may be required, as a predicate for preserving a Confrontation Clause objection, to make a timely demand that the witness be produced. The question of what further burden, if any, may be imposed on the accused as a prerequisite to exercising the confrontation right is an important one, warranting this Court's prompt attention; that is the principal issue presented by the

that a state laboratory analyst's report, confirming that a tested substance was cocaine, was testimonial, and that admitting it violated the Confrontation Clause.[7] The report was "clearly prepared for litigation," and the court rejected the argument that the report should not be considered testimonial because "state crime lab analysts play a nonadversarial role and are removed from the prosecutorial process." *Id.* at 309. The affidavit in *Walsh* was a ministerial, boilerplate document; the report in *Caulfield* recorded the results of a simple, routine test. Nevertheless, according to those courts (and Petitioner agrees) these statements were testimonial. An autopsy report in a homicide case – in which a forensic pathologist sets forth detailed observations of the condition of the victim's body, drawing on the pathologist's extensive expertise and stating or leading to conclusions on such crucial matters as the cause and time of death – is even more clearly so.

Only intervention by this Court will resolve the conflict among the lower courts. Delay will not shed any further light on the matter. The Court should act now.

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pending petition for *certiorari*, filed October 20, 2006, in Pinks v. North Dakota, No. 06-564, seeking review of State v. Campbell, 719 N.W.2d 374 (2006), but it is not presented here.

[7] The decision in *Caulfield* is in accord with those of several other courts, *e.g.*, Shiver v. State, 900 So.2d 615, 618 (Fla.Dist.Ct.App.2005); People v. Lonsby, 268 Mich.App. 375, 707 N.W.2d 610, 618 (2005), rev. denied (Mich. Mar. 27, 2006); People v. Rogers, 8 A.D.3d 888, 780 N.Y.S.2d 393, 397 (N.Y.App.Div.2004); *see also* State v. Campbell, 719 N.W.2d 374 (2006), *certiorari petition filed* Oct. 20, 2006 sub nom. Pinks v. North Dakota, No. 06-564 (suggesting that laboratory report was testimonial but reserving decision, and collecting authorities), but against the majority of decisions, including those of state courts of last resort, considering laboratory reports. *E.g.*, Commonwealth v. Verde, 444 Mass. 279, 827 N.E.2d 701, 705 (2005); State v. Dedman, 136 N.M. 561, 102 P.3d 628, 634-36 (2004); State v. Cao, 626 S.E.2d 301, 305 (N.C.Ct.App.), *rev. denied* (N.C. 2006).

II. THE DECISION OF THE OHIO SUPREME COURT REFLECTS WIDE-SPREAD MISUNDERSTANDING OF *CRAWFORD* AND REACHES AN INTOLERABLE RESULT THAT WOULD SIGNIFICANTLY UNDERMINE THE CONFRONTATION RIGHT.

Even if the lower courts were not in conflict, this would be an appropriate case for the Court to review, because the decision of the Ohio Supreme Court reflects a widespread misunderstanding of *Crawford* and achieves a result that, if allowed to stand, would threaten to eviscerate the confrontation right.

The decision of the Ohio Supreme Court is based almost entirely on one sentence from the *Crawford* opinion, in which this Court said, "Most of the hearsay exceptions [as of 1791, when the Sixth Amndment was adopted] covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy." 541 U.S. at 56. Drawing on this sentence, the Ohio Supreme Court constructed a syllogistic argument: (1) Under *Crawford*, "business records are, 'by their nature,' not testimonial," App. A18, so that if a statement is a business record it is not testimonial. (2) Autopsy reports are a "quintissential" type of business record. (3) Therefore, autopsy reports are not testimonial. But both premises of this argument are false.

Plainly, the *Crawford* Court was making a descriptive comment about the state of the law in 1791: The statements covered at that time by the progenitor of the modern exception for business records were characteristically not testimonial in nature. The Court was *not* saying that the Sixth Amendment does not cover any statement that, more than two centuries later, a state might choose to bring within what it designates as a

hearsay exception for business records.[8] That interpretation would open a gaping hole in the Confrontation Clause, because states are free to develop their hearsay law however they wish. It would also run contrary to the fundamental structure eunciated by *Crawford*, which breaks the dependence of the Confrontation Clause on hearsay law. If a statement can be admitted against an accused without violating the Confrontation Clause *because* it fits within a hearsay exception, then we have returned to the discredited regime of *Ohio v. Roberts*, 448 U.S. 56 (1980).

The statement in *Crawford* refers to the fact that if a record is kept as part of a business routine it ordinarily cannot be testimonial, because it has been made for the conduct of mundane business and without anticipation of probable use in litigation. Thus, a shopbook recording ordinary business transactions – the classic kind of statement admitted by the eighteenth-century rule, *see* 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1518 (James H. Chadbourn rev., 1974) – is not testimonial. But this Court has drawn the basic distinction between documents created for ordinary business purposes and those created with litigation use in mind. *Palmer v. Hoffman*, 318 U.S. 109 (1943); *see State v. Miller*, 208 Or.App. 424, 144 P.3d 1052, 1058-60 (2006) (discussing *Palmer* in course of analyzing admissibility of a lab report under *Crawford*; concluding that report would not have been admitted under the traditional shop-book rule, or under the statute applicable in *Palmer*, and that it was "not the sort of 'business records' referred to in the *Crawford* dictum"). If a given type of document is routinely used in prosecution, therefore, it makes no sense to say that it is not testimonial because

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[8] *See* People v. Mitchell, 131 Cal.App.4th 1210, 32 Cal. Rptr.3d 613, 620 (2005) ("the Court could not have meant all documentary evidence which could broadly qualify in some context as a business record should automatically be considered non-testimonial").

it is routine. To say that a type of document may be admitted against an accused, without his having had a chance to cross-examine the author, because documents of that type are routinely prepared for use in prosecution is to say that the accused's confrontation rights may be violated routinely.

The principle that routinely kept records "by their nature" are not testimonial therefore cannot mean that the Confrontation Clause leaves a document untouched even if it is generated and kept as part of a routine that lends aid to prosecution of crime. And there is no doubt that an autopsy report is such a document. Indeed, in Ohio, this role is statutorily prescribed. A coroner is notified "whenever any person dies as a result of criminal or other violent means, by casualty, by suicide, or in any suspicious or unusual manner." Ohio Rev. Code § 313.12. With limited exceptions, the coroner has discretion to conduct an autopsy if in his opinion it is necessary. *Id.* § 313.131(B).[9] Once the coroner is done with his investigation, he must "promptly deliver, to the prosecuting attorney of the county in which such death occurred, copies of all necessary records [including the autopsy report] relating to every death in which, in the judgment of the coroner or prosecuting attorney, further investigation is advisable." *Id.* § 313.09.[10] And the

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[9] A "member of a law enforcement agency" is designated as an "interested person" whom the coroner may allow to attend the autopsy without receiving permission from the decedent's next of kin. Ohio Rev. Code § 313.23. In Akron it is standard practice for police officers to attend an autopsy, and four did so in this case. *See* p. 2 *supra*.

[10] Ohio Rev. Code § 313.15 also provides:

> All dead bodies in the custody of the coroner shall be held until such time as the coroner, after consultation with the prosecuting attorney, or with the police department of a municipal corporation, if the death occurred in a municipal corporation, or with the sheriff, has decided that it is no longer necessary to hold such body to enable him to decide on a diagnosis giving a reasonable and true cause of death, or to decide that such body is no longer necessary to assist any of

governing statute further provides that those records, or proper copies of them, "shall be received as evidence in any criminal or civil action or proceeding" in an Ohio court "as to the facts contained in those records." *Id.* § 313.10(A)(1).

This forensic role is of course typical of forensic pathologists nationwide. The National Association of Medical Examiners refers to medical examiners and coroners as "medicolegal officers," National Association of Medical Examiners, *Forensic Autopsy Performance Standards* (2006),[11] *passim*, and its crest features the scales of justice as well as the medical serpent and wings. *Id.* (cover); *see id.* at 1 ("Medicolegal death investigation officers . . . serv[e] both the criminal justice and public health systems."). The *Standards* state the circumstances in which a forensic pathologist must perform an autopsy; first among these is that "the death is known or suspected to have been caused by apparent criminal violence," and another is that "the forensic pathologist deems a forensic autopsy is necessary to . . . collect evidence." *Id.* at 3-4. The *Standards* give extensive advice on what the forensic pathologist should do to collect evidence and preserve it for use in court. *E.g., id.* at 7 (trace evidence), 9-10 (suspected sexual assault), 17 ("[c]ustodial maintenance and chain of custody," which "are legally required elements of documenting the handling of evidence").

There are, of course, situations in which coroners write autopsy reports without anticipation that they will likely be used in forensic proceedings, and for other purposes; the conclusion of the coroner might be, for example, that the decedent died from an

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such officials in his duties.

[11] The *Standards* are available at http://www.thename.org/index.php?option=com_docman&task=doc_download&gid=65&Itemid=26&mode=view (last checked Dec. 19, 2006).

infectious disease that poses a public health problem. But where, as here, the coroner concludes that the decedent was clearly a victim of homicide, there can be no genuine doubt that a reasonable person in the position of the coroner understands that there will be forensic proceedings and intends that the report will be used in them.

One argument sometimes made that autopsy reports are nevertheless not testimonial is based on the proposition that medical examiners are "independent" from police and prosecutors. *Feliz*, *supra*, 467 F.3d at 236-37. The point is, of course, irelevant. As *Crawford* noted, "The Framers would be astounded to learn that ex parte testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." 541 U.S. at 66. An ordinary lay witness is also independent of prosecutors and police, but that does not make the Confrontation Clause inapplicable to them. If independence were significant, the same principle would apply to police officers, who are institutionally independent of the prosecutorial arm of the state, 1 WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY KING, CRIMINAL PROCEDURE 404 (2d ed. 1999) ("With the police and prosecutor in separate, autonomous agencies, the natural conflicts between the two cannot be resolved through the directives of a higher ranking executive official."), and who, no less than medical examiners, are duty-bound to pursue the truth rather than a particular adversary. Or, if independence from the police were necessary and sufficient, a detective bureau could be spun off from a police department as an independent Public Safety Investigation Office with some public reporting duties, and then their officers' statements could be admitted without worrying about the Confrontation Clause.

In any event, the limited nature of the coroner's independence should be recognized. As the National Association of Medical Examiners puts it, "Medicolegal death

investigation officers . . . must investigate cooperatively with, but independent from, law enforcement and prosecutors." *Forensic Autopsy Performance Standards*, *supra,* at 1. In Petitioner's case, police officers testified not only that close cooperation between the police and the coroner was standard practice, but also that they followed the practice in this case. Police officers atended the autopsy; Dr. Ruiz gathered evidence and delivered it to them, T. 2092, 2093, 2119, 2265, and the Coroner's Office suggested leads that they should follow. T. 1962, 1965.

In light of all this, it might seem surprising that so many courts have taken the view that autopsy reports are not testimonial. But these courts have helped relieve the mystery. They have acknowledged three principal factors motivating their decisions – but all three are illegitimate.

First, what courts regard as the reliability of autopsy reports, at least with respect to descriptive statements, has played a significant role. *E.g., Rollins*, *supra,* 897 A.2d at 841;[12] *see also McNeiece, supra* (stating in paragraph including analysis of confrontation right: "The autopsy report was reliable and a proper basis for an expert opinion as to the cause of death"). The essence of *Crawford*, however, was to reject the principle of *Roberts* that reliability as assessed by the judiciary could take the place of an opportunity

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[12] *Rollins* was very explicit::

> We hold that the findings in an autopsy report of the physical condition of a decedent, which are routine, descriptive and not analytical, which are objectively ascertained and generally reliable and enjoy a generic indicium of reliability, may be received into evidence without the testimony of the examiner. Where, however, contested conclusions or opinions in an autopsy report are central to the determination of *corpus delecti* or criminal agency and are offered into evidence, they serve the same function as testimony and trigger the Sixth Amendment right of confrontation.

for cross-examination.[13] A statement that is testimonial by nature does not become non-testimonial because a court believes that it is reliable.

Second, courts have expressed concern that in some cases the forensic pathologist who performed the autopsy might become unavailable by the time of trial.[14] But of course this concern should not be addressed in a manipulative way, by using the blunderbuss of characterizing all autopsy reports as non-testimonial even though in most cases – including this one – the author of the report is available to testify at trial. Unavailability at trial is a potential problem with respect to all witnesses. The optimal response is for the State to provide an early opportunity for confrontation if it has reason to fear that an important witness will not be able to testify at trial. This, indeed, is the

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[13] The notorious record of Dr. Ralph Erdmann, who faked autsopsies and whose testimony aided in securing at least twenty capital convictions, should dispel any complacency about the reliability of autopsy reports. Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439, 449-53 (1997); Paul C. Giannelli, Ake v. Oklahoma*: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1318 n.74 (2004) (quoting remark by judicially apointed investigator: "If the prosecution theory was that death was caused by a Martian death ray, then that was what Dr. Erdmann reported.").

[14] Courts have not been shy about relying on this pragmatic concern. Thus, in *Durio, supra,* the court said:

> "[C]ourts cannot ignore the practical implications that would follow from treating autopsy reports as inadmissible testimonial hearsay in a homicide case. Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the autopsy report. . . . Certainly it would be against society's interests to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case."

794 N.Y.S.2d at 869 In *Rollins, supra*, the Maryland Court of Appeals endorsed this argument from *Durio* and said that to exclude the autopsy report because of the unavailabiity of its author would be "unacceptable in practical application." 897 A.2d at 845.

basis for the venerable practice of taking depositions for the preservation of testimony, *see, e.g.,* Fed. R. Crim. P. 15.[15]

Third, some courts have expressed the view that cross-examination of the author of an autopsy report is likely to be futile because forensic pathologists write so many reports they are unlikely to remember details. *Durio, supra,* 794 N.Y.S.2d at 869 ("[M]edical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report."). The argument is altogether remarkable, especially as applied to a capital case. Sometimes the author *does* remember the facts of the case, especially a particularly gruesome case like this one. Indeed, Dr. Ruiz remembered well enough that Dr. Kohler – not willing to "rely entirely on the autopsy report" – was able to consult with him to clarify some details. *See* page 3 *supra*. More fundamentally, the argument flies in the face of *Crawford*, which makes clear that there is only one way to assure that failure to give the accused an opportunity to confront a critical witness will not deprive him of the ability to impeach that witness's testimony: offer an opportunity for confrontation.

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[15] In this case, it would have been perfectly feasible for the State to offer Petitioner a deposition of Dr. Ruiz shortly after the autopsy, because Petitioner was the prime suspect from the outset of the investigation.

In a case in which, so long as a crucial witness is available, the eventual accused cannot yet be apprehended, it may still possible to preserve the witness's testimony by appointing counsel to represent the accused's interests and then holding a deposition for preservation of testimony. Perhaps a similar procedure would be possible in some cases even if the suspect had not yet been identified. Forfeiture doctrine might play a role in such cases. Resolution of whether and when such procedures are adequate under the Confrontation Clause can await a case in which the question is squarely presented. For now, it is enough to say that the imposition on the confrontation right created by such procedures is dwarfed by that created by a holding that the type of statement at issue is categorically beyond the reach of the Clause even if the author of the statement is readily available at the time of trial.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR ADDRESSING THE STATUS UNDER *CRAWFORD* OF AUTOPSY REPORTS, AND OF OTHER REPORTS PREPARED BY GOVERNMENT AGENTS IN CONTEMPLATION OF PROSECUTORIAL USE, AND FOR FURTHER REFINING THE MEANING OF THE CONFRONTATION CLAUSE.

For several reasons, this case is an excellent vehicle for (1) resolving the question of whether a prosecution can introduce an autopsy report or secondary evidence of its text without presenting the live testimony, subject to confrontation, of the author of the report, (2) beginning to address the broader question of what reports by government agents may be introduced against an accused without the author of the report testifying, and (3) further refining the meaning of the Confrontation Clause, as developed by *Crawford* and *Davis v. Washington*, 126 S.Ct. 2266 (2006).

First, there is no doubt as to the jurisdiction of this Court; this petition seeks review of the final decision of a state supreme court.[16] Moreover, the case comes here on direct appeal, simplifying the question presented.

Second, the Confrontation Clause issue is clearly preserved for review by this Court. Petitioner objected at trial to admission of Dr. Kohler's trial testimony reporting the text of Dr. Ruiz's report, and the state supreme court squarely addressed under the Confrontation Clause the admissibility of that testimony and of the report, App. A17-19, without any suggestion that the issue was not preserved.

Third, there can be no plausible contention that admission of secondary evidence of the contents of the report and of the report itself was harmless error. Dr. Ruiz's observations, which were extremely detailed and disturbing, were a critical part of the State's case. The State presented them at great length, *e.g.,* T. 2202-2215, and it relied

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[16] *See* note 1 *supra.*

heavily on Dr. Kohler's testimony of the contents of the report, both in responding to a motion for judgment of acquittal, T. 2613-14, and in arguing to the jury. T. 2683 ("She had so many injuries. The coroner testified for how long about her injuries."), T 2694 (Dr. Kohler "obviously did not actually perform the autopsy, byt . . . she was able to review all ofthat informaiton that was done in 1996, invluding the autopsy protocol . . . and notes written by Dr. Ruiz, and she took you through that"). Moreover, the State relied on Dr. Ruiz's observations for far more than their emotional value; those observations also formed a vital link in the prosecution's theory.

A key question at trial was the time of death. The prosecution's theory was that Petitioner had followed Roseanna from his house on the evening of February 28. But considerable evidence was presented that Roseanna had been seen alive on Saturday, March 2. *E.g.,* T. 2134-35, 2189, 2576, 2675. Thus, even if the jury were persuaded beyond a reasonable doubt that Petitioner had followed Roseanna on the evening of February 28 and had sexual contact with her then, accounting for the DNA evidence, the jury might decide that it could not conclude beyond a reasonable doubt that he had murdered her. Several factors lend additional force to this possibility. First, apart from the DNA evidence, there was no evidence whatsoever linking Petitioner and Roseanna after she left the house on February 28. Second, Roseanna's body was found fully clothed, App. A7, without any indication of her clothing having been ripped, T. 2260, thus suggesting a gap in time between any rape or other sexual incidents and the murder. Third, medical evidence also indicated a substantial time gap. T. 2261. Finally, Roseanna had repeatedly run away before, T. 1770, 1773-76. Indeed, she had run away the prior weekend, T. 1772, and she had not come home the night before her

disappearance, T. 1638, the fact that the autopsy revealed marijuana in her system, T. 2242, further suggested her familiarity with street life.

The jury might have concluded, therefore, that even if Petitioner had followed Roseanna on the evening of February 28 and raped her then, she had gotten dressed and survived until at least March 2. And if the jury broke the link between a rape on the evening of February 28 and the murder, then it might well have decided that there was reasonable doubt as to whether Petitioner had committed the murder. Relying on Dr. Ruiz's factual observations on such matters as the state of decomposition, however, Dr. Kohler testified to her opinion that Roseanna died within a time range that was broad enough to include February 28, and narrow enough to make it appear unlikely that Roseanna survived to March 2 and then was murdered. T. 2244. Dr. Ruiz, by contrast, had given no opinion as to the time of death; the accused never had an opportunity to explore with him why this was so. It would, of course, be utterly inappropriate to speculate that, had he testified at trial, cross-examination would have been completely unavailing in undermining the factual basis for an expert opinion supporting the prosecution's theory of time of death. Again, there is only one way to assure that the accused is not prejudiced by the lack of confrontation of a witness whose testimonial statement is offered to prove an essential fact: offer an opportunity for confrontation.

Fourth, Petitioner raises before this Court no other issues that might result in reversing the convictions or the sentence of death. The case revolves entirely on the Confrontation Clause issue.

Fifth, Dr. Ruiz was available to testify at trial. *Cf. United States v. Feliz*, 467 F.3d 227, 230 n.1 (2d Cir. 2006) (holding that defendant had waived right to contend that

pathologist who performed autopsy was available to testify at trial). This fact is not essential to Petitioner's contention; it suffices that Dr. Ruiz's report was testimonial and that Petitioner never had an opportunity to cross-examine him. But a case in which the witness is not available to testify at trial raises the practical question of how the prosecution may proceed if the previous testimonial statement may not be admitted. There are satisfactory answers to that question[17] – but the question need not be reached when the witness is available. The availability of Dr. Ruiz also highlights the casual attitude the State took towards the confrontation right in this case; there was no substantial impediment to providing Petitioner with an opportunity for confrontation before convicting him and sentencing him to death, but the State did not bother.

Sixth, probably more than any other type of writing by a government agent that is commonly introduced in a criminal prosecution, autopsy reports present in a stark light the reasons why many such writings must be considered testimonial. Unlike, say, a certificate that a given instrument is in working order, *Rackoff v. State*, 2006 WL 3345286 (Ga. Nov. 20, 2006), an autopsy report is directed to a single case. By definition, it reports on a death, and often, as here, there is no doubt when it is prepared that it is providing evidence for potential use in a homicide prosecution. A forensic pathologist performing an autopsy does not merely report a reading of a mechanical instrument, or the results of some simple, routinely performed test, or the existence or non-existence of a given type of document in a government file. Rather, the forensic pathlogist is a highly skilled and trained medical specialist, whose observations draw on his special expertise. Often the pathologist offers in the autopsy report opinions that are

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[17] *See supra* note 15 and accompanying text.

crucial to the case. Even if not, subtle differences in the factual conclusions and characterizations drawn by the pathologist can make critical differences in the inferences that other experts or the trier of fact might draw. No one could reasonably suppose that an accused in a homicide case who insists on invoking his right to cross-examine the pathologist who performed an autopsy on the victim was simply trying to impose costs or inconvenience on the prosecution.

Finally, deciding this case would allow the Court, if it wished, to continue the prudent, step-by-step approach toward developing the jurisprudence of the Confrontation Clause that it took in *Crawford* and *Davis*. Reversal here would require the Court only to say that the report of an autopsy performed on the victim of a homicide case is one of the categories of statement lying at the core of the Confrontation Clause. *See Crawford*, 541 U.S. at 52 ("statements [that] qualify under any definition" of "testimonial"). As in *Crawford* and *Davis*, the Court would not have to adopt a comprehensive definition of what the term "testimonial" means. Nor would the Court have to resolve the issue of "whether and when statements made to someone other than law enforcement personnel are 'testimonial,'" *Davis*, 126 S.Ct. at 2274 n.2; this statement was made *by* a government official cooperating with law enforcement authorities and delivered to those authorities.

The decision of the Ohio Supreme Court and others like it make clear that even more than two years after *Crawford*, even after this Court's decision in *Davis* reaffirmed and further developed the central principle of *Crawford*, many lower courts are still trying to do business as before. They have failed to come to terms with the fundamental transformation worked by *Crawford*, and they continue to believe that if they can bring a statement within certain exemptions to ordinary hearsay law then the Confrontation

Clause will not stand in their way. This Court must set them straight, as only it can do. All the criminal courts in the nation must understand that the Confrontaiton Clause is not a mere annoyance, to be avoided if it threatens to create substantial inconvenience. Rather, it is one of the central protections of our criminal justice system, and it is clearly violated when the State proves essential aspects of a homicide case by introducing an autopsy report made by a forensic pathologist who works for the State and who never confronts the accused face to face.

CONCLUSION

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

RESPECTFULLY SUBMITTED this 19th day of December, 2006

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