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I. INTRODUCTION

> It bears mentioning that the blanket prohibition on the admission of autopsy reports urged by defendant could result in practical difficulties for murder prosecutions. If, for example, the medical examiner who performed the autopsy passes away before a perpetrator is apprehended and tried, barring the use in evidence of the autopsy report could, in some situations, effectively amount to a statute of limitations on murder, where none otherwise exists.[1]

The forensic autopsy report is an important component of a criminal homicide prosecution.[2] The report, which is used to memorialize the cause[3] and manner of death[4] under the auspices of a coroner's or medical examiner's office,[5] constitutes a significant phase of a death investigation that is used "to (hopefully) convict the guilty and exonerate the innocent."[6]

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1. People v. Hall, 923 N.Y.S.2d 428, 432 (N.Y. App. Div. 2011).

2. Medicolegal autopsies are conducted to determine the cause of death; assist with the determination of the manner of death as natural, suicide, homicide, or accident; collect medical evidence that may be useful for public health or the courts; and develop information that may be useful for reconstructing how the person received a fatal injury. NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 248 (2009).

> The autopsy is a post-mortem medical examination for studying the pathologic changes present and determining the cause of death. The autopsy includes three kinds of examinations: an inspection of the external body; an examination and dissection of the internal organs and vital structures; and a microscopic examination of selected tissues.

Cheryl M. Reichert & Virginia L. Kelly, *Prognosis for the Autopsy*, HEALTH AFF., May 1985, at 82, 82.

3. "The cause of death is the trauma, disease, or combination of conditions that terminated the person's life." ANDRE A. MOENSSENS, BETTY LAYNE DESPORTES & CARL N. EDWARDS, SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES § 14.09, at 666 (6th ed. 2013).

4. Manner of death may be characterized as "natural, accident, suicide, homicide, and undetermined." *Id.* § 14.10, at 666.

5. For an excellent description of the offices of the coroner and medical examiner, including their roles and history, see generally Randy Hanzlick & Debra Combs, *Medical Examiner and Coroner Systems*, 279 JAMA 870 (1998); Randy Hanzlick, *Medical Examiners, Coroners, and Public Health: A Review and Update*, 130 ARCHIVES PATHOLOGY & LABORATORY MED. 1274 (2006); Randy Hanzlick, *The Conversion of Coroner Systems to Medical Examiner Systems in the United States: A Lull in the Action*, 28 AM. J. FORENSIC MED. & PATHOLOGY 279 (2007).

6. MOENSSENS ET. AL., *supra* note 3, § 14.03, at 654. *See also* Reichart & Kelly, *supra* note 2, at 85 ("The correlation of autopsy findings with criminal investigations is an invaluable asset for a just society. Forensic autopsy findings frequently implicate the guilty and vindicate the innocent."). To demonstrate the

The trial testimony of the pathologist[7] and reference to the pathologist's forensic autopsy report implicate significant evidentiary issues. First, the forensic autopsy report is a document prepared subsequent to the autopsy, out of court, and is offered in court for the truth of the matter it asserts. The examining pathologist is the out-of-court declarant. Therefore, the forensic autopsy report is classic hearsay,[8] which is inadmissible unless it fits within a recognized exception to the hearsay rule.[9] Typically, finding an applicable exception is not a difficult obstacle to overcome, as forensic autopsy reports may constitute business records[10] (records of a regularly conducted activity), public/official records,[11] or may simply fall within a state statutory hearsay exception created for the purpose of the admission of forensic autopsy reports.[12]

The second evidentiary issue is far more complicated and requires attention to the Sixth Amendment of the United States Constitution.[13] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

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potential significance of the forensic autopsy report in death investigations, "[i]n 2011, an estimated 14,612 persons were murdered in the United States." FED. BUREAU OF INVESTIGATION, U.S. DEP'T JUSTICE, UNIFORM CRIME REPORT CRIME IN THE UNITED STATES, 2011 (2012), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/violent-crime/murdermain_final.pdf.

7. A "pathologist" is "[a] physician trained in the medical specialty of pathology and the medical subspecialty of forensic pathology (the examination of persons who die suddenly, unexpectedly, or violently)." MOENSSENS ET. AL., *supra* note 3, § 14.02, at 651.

> Forensic pathology is the study of the diseases and injuries of the community. Forensic pathologists have been described as detectives in white coats. No other field of medicine supplies the intellectual challenge of forensic pathology, as it requires a working knowledge of diagnosis and treatment in every specialty of medicine plus an understanding of such nonmedical fields as criminology, criminalistics, engineering, highway design, police science, and political science.

Ronald K. Wright & Larry G. Tate, *Forensic Pathology – Last Stronghold Of The Autopsy*, 1 AM. J. FORENSIC MED. & PATHOLOGY 57 (1980) (footnote omitted).

8. FED. R. EVID. 801(a)–(c).
9. FED. R. EVID. 803, 804.
10. FED. R. EVID. 803(6).
11. FED. R. EVID. 803(8).
12. *See* 725 ILL. COMP. STAT. ANN. 5/115-5.1 (West 2002).
13. U.S. CONST. amend. VI.

> to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[14]

It is the Confrontation Clause of the Sixth Amendment that is of particular relevance here.

The classic forensic pathology testimony at a criminal homicide trial comes in one of two basic forms: (1) the examining pathologist—the pathologist who performed the forensic autopsy on the victim and prepared the autopsy report—is the in-court witness who refers to the autopsy report, explains its findings and conclusions, and is subject to cross-examination by the defendant[15] or (2) the in-court witness is a "surrogate" pathologist, one who was not the examining pathologist, from the office of the coroner or medical examiner. The surrogate pathologist relies on the examining pathologist's autopsy report and offers a professional opinion at trial as an expert witness.[16] Here, the defendant is unable to confront and cross-examine the examining pathologist. Yet, the prosecution may seek to offer the autopsy report in evidence as the report, classic hearsay,[17] fits nicely within a recognized exception to the hearsay rule.[18]

The second scenario has created the constitutional controversy to which this Article is directed. Prior to the opinion of the Supreme Court in *Crawford v. Washington*,[19] the surrogate pathologist's reference to the autopsy report authored by the examining pathologist and the admissibility of the autopsy report were governed by the Supreme Court's opinion in *Ohio v. Roberts*.[20] The Court in *Roberts* pronounced that the Confrontation Clause did not prohibit the admission of an unavailable witness's statement against a criminal defendant if the statement bore "adequate indicia of reliability."[21] A hearsay statement made by an unavailable declarant met the *Roberts* standard if it fell within a firmly rooted hearsay

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14. *Id.*

15. *See, e.g.*, Burr v. Lassiter, 513 F. App'x 327, 334, 337 (4th Cir. 2013); People v. Avila, 208 P.3d 634, 647 (Cal. 2009); State v. Gales, 658 N.W.2d 604, 609 (Neb. 2003).

16. *See* People v. Leach, 980 N.E.2d 570, 575 (Ill. 2012).

17. FED. R. EVID. 801(a)–(c).

18. FED. R. EVID. 803(6), (8); or applicable state statute pertaining to the admissibility of forensic autopsy reports.

19. Crawford v. Washington, 541 U.S. 36 (2004).

20. Ohio v. Roberts, 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. 36.

21. *Id.* at 66.

exception.[22] The forensic autopsy report fit within a recognized hearsay exception, and the evidentiary and constitutional problems were avoided.[23]

Crawford v. Washington dramatically altered the Confrontation Clause–hearsay landscape.[24] In *Crawford*, the Supreme Court pronounced that a recognized hearsay exception applicable to an unavailable declarant does not trump the Sixth Amendment Confrontation Clause if the hearsay statement is "testimonial," a description suggesting that the statement has potential evidentiary significance.[25] This ruling has created a stir in the Supreme Court.

Despite the curious suggestion of one state supreme court,[26] the Supreme Court of the United States has not resolved the issue of whether a forensic autopsy report is testimonial. There is a split among the circuit courts of appeals and among state courts on this topic.

This Article examines the landscape of legal issues involved in determining whether the presence at trial of a surrogate pathologist, whose testimony refers to a forensic autopsy report prepared by the examining pathologist and provides the foundation for the admissibility of the forensic autopsy report, implicates the Confrontation Clause of the Sixth Amendment. This Article concludes that the practice of surrogate testimony and admission of the forensic autopsy report, well known and often required in criminal homicide prosecutions, implicates and violates the Confrontation Clause.

II. LEGAL ISSUES RELATING TO THE FORENSIC AUTOPSY REPORT

A. Hearsay

Federal Rule of Evidence 801 defines hearsay as follows:

> (a) *Statement*. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

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22. *Id. See also* Ralph Ruebner & Timothy Scahill, Crawford v. Washington*, the Confrontation Clause, and Hearsay: A New Paradigm for Illinois Evidence Law*, 36 LOY. U. CHI. L. J. 703, 705 (2005).

23. *See* 725 ILL. COMP. STAT. ANN. 5/115-5.1 (West 2002); FED. R. EVID. 803(6), (8).

24. *Crawford*, 541 U.S. 36 (2004).

25. *Id.* at 68.

26. State v. Locklear, 681 S.E.2d 293, 304–05 (N.C. 2009) (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009)).

> (b) *Declarant*. "Declarant" means the person who made the statement.
> (c) *Hearsay*. "Hearsay" means a statement that:
> (1) the declarant does not make while testifying at the current trial or hearing; and
> (2) a party offers in evidence to prove the truth of the matter asserted in the statement.[27]

When a party offers a forensic autopsy report into evidence at a criminal homicide trial, hearsay becomes an issue. The forensic autopsy report prepared by the examining forensic pathologist should include two basic components: (1) the forensic autopsy findings[28] and (2) "the interpretations of the forensic pathologist including cause and manner of death."[29] More specifically, the National Association of Medical Examiners[30] recommends that the forensic pathologist undertake the following tasks in reporting autopsy results:

- prepare a written narrative report for each postmortem examination;
- include the date, place, and time of examination;
- include the name of deceased, if known;
- include the case number;
- include observations of the external examination and, when performed, the internal examination;
- include a separate section on injuries;
- include a description of internal and external injuries;
- include descriptions of findings in sufficient detail to support diagnoses, opinions, and conclusions;
- include a list of the diagnoses and interpretations in forensic autopsy reports;
- include cause of death;
- include manner of death;
- include the name and title of each forensic pathologist; and
- sign and date each postmortem examination report.[31]

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27. FED. R. EVID. 801(a)–(c).
28. NAT'L ASS'N OF MED. EXAM'RS, FORENSIC AUTOPSY PERFORMANCE STANDARDS 26 (2012), *available at* https://netforum.avectra.com/temp/Client Images /NAME /eed6c85d-5871-4da1-aef3-abfc9bb80b92.pdf [hereinafter NAME STANDARDS].
29. *Id.*
30. "[T]he national professional organization of physician medical examiners." *About NAME,* NAT'L ASS'N OF MED. EXAMINERS, https://netforum .avectra.com/eweb/DynamicPage.aspx?Site=NAME&WebCode=AboutNAME (last visited July 2, 2013).
31. NAME STANDARDS, *supra* note 28, at 26.

Unquestionably, the forensic autopsy report contains a series of assertive statements, prepared by an out-of-court declarant (the forensic pathologist), and the report is then offered in evidence at trial to prove the truth of the matters asserted in the report. Therefore, the forensic autopsy report is hearsay.[32]

The next step in determining the admissibility of the forensic autopsy report is to determine if it, as hearsay, fits within a recognized exception to the hearsay rule. Federal Rules of Evidence 803[33] and 804,[34] state counterparts, and special state statutes provide the hearsay exceptions. Insofar as the Federal Rules of Evidence are concerned, Rule 803(6) provides as follows:

> (6) *Records of a Regularly Conducted Activity*. A record of an act, event, condition, opinion or diagnosis if:
> (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> (C) making the record was a regular practice of that activity;
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
> (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.[35]

Rule 803(8) provides:

> (8) *Public Records*. A record or statement of a public office if:
> (A) it sets out:
> (i) the office's activities;
> (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

32. FED. R. EVID. 801.
33. FED. R. EVID. 803.
34. FED. R. EVID. 804.
35. FED. R. EVID. 803(6).

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.[36]

Rule 803(6) encompasses the business records exception to the hearsay rule,[37] which federal circuit courts of appeals have applied to forensic autopsy reports.[38] Rule 803(8), the public records exception, may also apply,[39] and state courts have applied their own counterparts.[40]

Further, some state statutes create an exception to the hearsay rule for forensic autopsy reports, such as that in Illinois.[41] The Illinois statute is of particular interest insofar as it provides a hearsay exception for the forensic autopsy report and contemplates the testimony of a surrogate witness due to the death of the examining pathologist. The Illinois statute provides as follows:

> In any civil or criminal action the records of the coroner's medical or laboratory examiner summarizing and detailing the performance of his or her official duties in performing medical examinations upon deceased persons or autopsies, or both, and kept in the ordinary course of business of the coroner's office, duly certified by the county coroner or chief supervisory coroner's pathologist or medical examiner, shall be received as competent evidence in any court of this State, to the extent permitted by this Section. These reports, specifically including but not limited to the pathologist's protocol, autopsy reports and toxicological reports, shall be public documents and thereby may be admissible as prima facie evidence of the facts, findings, opinions, diagnoses and conditions stated therein.
>
> A duly certified coroner's protocol or autopsy report, or both, complying with the requirements of this Section may be duly admitted into evidence as an exception to the hearsay rule as prima facie proof of the cause of death of the person to whom it relates. The records referred to in this Section shall be limited to the records of the results of post-

36. FED. R. EVID. 803(8).
37. FED. R. EVID. 803(6).
38. *See, e.g.*, United States v. Feliz, 467 F.3d 227 (2d Cir. 2006).
39. FED. R. EVID. 803(8).
40. *Id. See* People v. Leach, 980 N.E.2d 570, 581 (Ill. 2012).
41. 725 ILL. COMP. STAT. ANN. 5/115-5.1 (West 2002).

> mortem examinations of the findings of autopsy and toxicological laboratory examinations.
>
> Persons who prepare reports or records offered in evidence hereunder may be subpoenaed as witnesses in civil or criminal cases upon the request of either party to the cause. However, if such person is dead, the county coroner or a duly authorized official of the coroner's office may testify to the fact that the examining pathologist, toxicologist or other medical or laboratory examiner is deceased and that the offered report or record was prepared by such deceased person. The witness must further attest that the medical report or record was prepared in the ordinary and usual course of the deceased person's duty or employment in conformity with the provisions of this Section.[42]

On the assumption that the forensic autopsy report neatly fits within a recognized hearsay exception, the first legal issue of hearsay has been resolved.[43] However, in a criminal homicide prosecution, the applicable hearsay exception does not end the quest for admissibility. The Confrontation Clause provides the key obstacle to admissibility and must be examined.[44]

B. The Confrontation Clause

1. Supreme Court Jurisprudence—Defining "Testimonial"

As previously mentioned, the admissibility of the forensic autopsy report through the trial testimony of a surrogate forensic pathologist was more than possible—it was likely—under the *Ohio v. Roberts* standards.[45] A hearsay statement made by an unavailable declarant that fit within a firmly rooted hearsay exception did not run afoul of the Confrontation Clause pursuant to *Roberts*.[46] Thereafter, the Supreme Court decided *Crawford v. Washington* and changed the Confrontation Clause–hearsay landscape.[47] *Crawford*

42. *Id.*
43. FED. R. EVID. 803(6), (8). *See also* state law counterparts and state statutes specifically providing for the admissibility of forensic autopsy reports.
44. U.S. CONST. amend. VI.
45. Ohio v. Roberts, 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).
46. *Id.* at 66.
47. *Crawford*, 541 U.S. 36.

was the first in a series of Supreme Court opinions[48] to address the concept of "testimonial" hearsay.[49]

a. Crawford v. Washington

In *Crawford*, the Supreme Court replaced *Roberts* as the standard against which to measure the admission of classic hearsay for a criminal prosecution when the out-of-court declarant was unavailable for trial and cross-examination by the defendant. It was in *Crawford* that the Supreme Court focused on the concept of testimonial hearsay and the Confrontation Clause.[50]

Police arrested Crawford in Washington State for stabbing Lee.[51] Crawford and his wife searched for Lee on the belief that Lee had previously attempted to rape his wife.[52] Crawford and his wife were taken into custody and separately interrogated.[53]

Crawford told the police of his belief that Lee was reaching for a weapon when Crawford and Lee were fighting prior to the stabbing.[54] However, Crawford's wife told a different story about the fight—She did not believe that the victim had a weapon.[55]

Crawford was charged with assault and attempted murder.[56] His wife, a non-defendant, asserted the Washington State marital privilege and did not testify at trial.[57] The police recorded her statement, and the prosecution offered it into evidence at Crawford's trial to refute his claim of self-defense.[58] Her out-of-court statement was obviously offered to prove its truth—that Crawford did not act in self-defense and that the victim had no weapon. Therefore, the statement of Crawford's wife was classic hearsay. Crawford's wife admitted having assisted Crawford in finding the victim;[59] therefore, her statement qualified as a statement against interest, a well-known exception to the hearsay rule applicable only when the out-of-court

48. *Id.* at 68–69; Davis v. Washington, 547 U.S. 813, 828–29 (2006); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009); Michigan v. Bryant, 131 S. Ct. 1143, 1167 (2011); Bullcoming v. New Mexico, 131 S. Ct. 2705, 2717 (2011); Williams v. Illinois, 132 S. Ct. 2221, 2243–44 (2012).
49. *Crawford*, 541 U.S. at 68.
50. *Id.*
51. *Id.* at 38.
52. *Id.*
53. *Id.* at 38–39.
54. *Id.*
55. *Id.* at 39–40.
56. *Id.* at 40.
57. *Id.*
58. *Id.*
59. *Id.*

declarant is unavailable to testify at trial.[60] Crawford's wife, by asserting the marital privilege, was "unavailable" under the Washington State (and Federal) Rules of Evidence.

Crawford was convicted, but the court of appeals reversed, holding that the out-of-court statement of Crawford's wife did not carry the required, particularized guarantees of trustworthiness.[61] The Washington Supreme Court reversed and reinstated Crawford's conviction.[62] It held that while the statement of Crawford's wife did not fall within a firmly rooted hearsay exception, it did have guarantees of trustworthiness because the statements of Crawford and his wife were overlapping and interlocking.[63]

The Supreme Court "granted certiorari to determine whether the State's use of [the wife's] statement violated the Confrontation Clause."[64] The *Crawford* Court emphasized that the Confrontation Clause applies to witnesses against the accused whose "statements . . . were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[65] As a result, even a hearsay statement by an unavailable declarant that fits within a recognized exception to the hearsay rule may be inadmissible under the Sixth Amendment if the defendant did not have a prior opportunity to confront and cross-examine the declarant.[66]

Therefore, under *Crawford*, it is essential to know the type or quality of hearsay involved—Is it testimonial or not? Testimonial hearsay will implicate the Sixth Amendment.[67]

Crawford provided insight to the identification of testimonial hearsay. Testimonial hearsay includes:

- prior testimony;[68]
- depositions;[69]
- confessions;[70]
- affidavits;[71]

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60. *See* FED. R. EVID. 804(b)(3).
61. *Crawford*, 541 U.S. at 41.
62. State v. Crawford, 54 P.3d 656, 664 (Wash. 2002).
63. *Id.*
64. *Crawford*, 541 U.S. at 42.
65. *Id.* at 52 (quoting Brief for National Association of Criminal Defense Lawyers et. al. as Amici Curiae Supporting Petitioner, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754961, at * 3).
66. *Id.* at 68.
67. *Id.*
68. *Id.* at 52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J. & Scalia, J., concurring in part and concurring in the judgment)).
69. *Id.*
70. *Id.*

- ex parte, in-court testimony;[72]
- custodial police interrogations;[73] and
- pre-trial statements by declarants expected to be used prosecutorially.[74]

Testimonial hearsay does not require actual testimony. There is, however, an "official" character of testimonial hearsay.

Crawford did allude to a form of non-testimonial hearsay that relates to the topic of this Article—business records, which by their nature are not testimonial.[75] Of course, *Crawford* did not consider whether the forensic autopsy report was a business record. Ultimately, this Article urges that a forensic autopsy report, even as a business record, is testimonial, implicating the Confrontation Clause.

b. Davis v. Washington

The Supreme Court's opinion in *Davis v. Washington* also did not address forensic autopsy reports.[76] However, the Court's opinion was instructive regarding the definition of "testimonial." The Court focused on the issue of whether a domestic violence victim's statements in response to the interrogation of a 911 operator were testimonial.[77] *Davis* contributed the "primary purpose" test to the analysis and characterization of testimonial statements.[78] If the primary purpose of the police interrogation aids an ongoing emergency, then the statements are considered non-testimonial.[79] However, if the purpose of the police interrogation is to establish evidence relevant to a later criminal prosecution and there is no ongoing emergency, then the statements are testimonial.[80] Although forensic autopsies and their reports may serve multiple purposes, it is clear that they constitute important evidence in criminal prosecutions.[81]

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71. *Id.*
72. *Id.* at 51 (quoting Brief for Petitioner at 23, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410)).
73. *Id.*
74. *Id. See also* Ruebner & Scahill, *supra* note 22, at 715–21.
75. *Crawford*, 541 U.S. at 56.
76. Davis v. Washington, 547 U.S. 813 (2006).
77. *Id.* at 817.
78. *Id.* at 822.
79. *Id.*
80. *Id.*
81. *See* Maurice Levin, *The Medicolegal Autopsy – Science Aids the Lawyer*, 1964 INS. L.J. 274, 275 (1964).

c. Melendez-Diaz v. Massachusetts

Melendez-Diaz v. Massachusetts, addressing the testimonial nature of forensic certificates, involved the police detention and search of a suspect yielding the seizure of white plastic bags containing a substance resembling cocaine.[82] Pursuant to Massachusetts law, the police submitted the evidence to a state laboratory for chemical analysis.[83] The defendant was charged with distributing and trafficking cocaine.[84] At trial, the prosecution offered and the court admitted into evidence certificates of forensic analysis of the seized substances.[85] The forensic analysis identified cocaine.[86] The certificates were notarized and sworn to at the state laboratory.[87] The actual analysts who performed the testing did not testify at trial.[88] The defendant was found guilty, and the conviction was affirmed on appeal.[89] The Supreme Judicial Court of Massachusetts denied further review, and the Supreme Court granted certiorari.[90]

The Supreme Court held that the certificates constituted testimonial statements.[91] They were affidavits that were solemn declarations created for the purpose of proving a fact.[92] Here, the purpose was to provide information regarding the analyzed substance, which would lead one to believe that the certificate would be available for use at a later trial.[93]

The analysts who performed the forensic testing (but did not testify) were witnesses against the defendant. The Supreme Court noted that "[c]onfrontation is one means of assuring accurate forensic analysis."[94] If the analysts lacked proper training or were deficient in their judgment, these failings could be disclosed on cross-examination.[95]

The Supreme Court referred to Federal Rule of Evidence 803(6), which provides a hearsay exception for records of a regularly conducted activity (the business records exception).[96] Here, the

82. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 308 (2009).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 309.
89. *Id.*
90. *Id.*
91. *Id.* at 310.
92. *Id.*
93. *Id.* at 311.
94. *Id.* at 318.
95. *Id.* at 320.
96. *See* FED. R. EVID. 803(6).

Supreme Court concluded that the forensic certificates did not constitute business records insofar as the "regularly conducted business activity is the production of evidence for use at trial."[97]

It is noteworthy that the Supreme Court alluded to the evidentiary status of "results of a coroner's inquest" and "coroner's reports," commenting that "whatever the status of coroner's reports at common law in England, they were not accorded any special status in American practice."[98] Contrary to the suggestion of one state court opinion,[99] the Supreme Court in *Melendez-Diaz* did not opine on the specifics of forensic autopsy reports. The Court did not characterize the reports as business records, nor did the Court determine if the reports constituted testimonial hearsay.

d. Michigan v. Bryant

Michigan v. Bryant is the next case in the series of Supreme Court jurisprudence sounding in on the definition of "testimonial" hearsay.[100] It involved the conviction of the defendant for second-degree murder, possession of a firearm by a felon, and possession of a firearm during the commission of a felony.[101] The evidentiary issue was the admissibility at trial of statements to the police by the victim of a shooting; the victim was the out-of-court declarant for hearsay purposes.[102]

In *Bryant*, the Supreme Court noted that *Crawford v. Washington*[103] left for another day any effort to spell out a comprehensive definition of "testimonial."[104] The primary contribution of *Bryant* was to explain the non-testimonial nature of the declarant's statement as it related to an ongoing emergency.[105]

e. Bullcoming v. New Mexico

In *Bullcoming v. New Mexico*, the Supreme Court considered the testimonial nature of a laboratory report after the defendant was convicted of driving while under the influence of alcohol.[106] A

97. *Melendez-Diaz*, 557 U.S. at 321.
98. *Id.* at 322.
99. State v. Locklear, 681 S.E.2d 293, 304–05 (N.C. 2009).
100. Michigan v. Bryant, 131 S. Ct. 1143, 1150 (2011).
101. *Id.*
102. FED. R. EVID. 801; *Bryant*, 131 S. Ct. at 1150.
103. Crawford v. Washington, 541 U.S. 36 (2004).
104. *Bryant*, 131 S. Ct. at 1153.
105. *Id.* at 1167. This hearsay analysis is not involved in the discussion of forensic autopsy reports and will not be pursued in this Article.
106. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2709 (2011).

laboratory analyst performed a blood alcohol analysis, prepared a report, and signed a certification.[107] However, at trial, this analyst did not testify.[108] A surrogate analyst, familiar with the forensic laboratory reporting process, testified at trial.[109] The laboratory report certified that the defendant's blood-alcohol concentration was well above the limit for aggravated DWI.[110]

The Supreme Court held that surrogate trial testimony by the analyst who did not participate in or observe the forensic testing violated the Sixth Amendment Confrontation Clause and that the forensic laboratory report was testimonial.[111] The Court stated that the absence of an oath did not determine if the statement was testimonial and that the laboratory report resembled those in *Melendez-Diaz*.[112]

With the Supreme Court opinions in *Melendez-Diaz*[113] and *Bullcoming*[114] focusing on the testimonial nature of forensic data analysis and forensic reports, one might reasonably predict that the authors of forensic reports must anticipate the attempted introduction of the reports in evidence and that the reports are testimonial. The use of surrogate witnesses precludes a criminal defendant from confronting and cross-examining the author of the report and, necessarily, implicates the Confrontation Clause. *Crawford v. Washington* made clear that a well-recognized hearsay exception will not trump the Sixth Amendment when testimonial hearsay is involved.[115] Potential evidence developed through forensic analysis has an "official" quality and, therefore, appears testimonial. Before the predictive process becomes comfortable, this Article must address *Williams v. Illinois*.[116]

f. Williams v. Illinois

In *Williams*, the defendant was convicted of aggravated criminal sexual assault, aggravated robbery, and aggravated kidnapping.[117] The victim was abducted and raped.[118] The police were called, the

107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 2717.
112. *Id.*; Melendez-Diaz v. Massachusetts, 557 U.S. 305, 308–09 (2009).
113. *Melendez-Diaz*, 557 U.S. at 308–09.
114. *Bullcoming*, 131 S. Ct. at 2709.
115. *See* Crawford v. Washington, 541 U.S. 36, 68 (2004).
116. Williams v. Illinois, 132 S. Ct. 2221 (2012).
117. *Id.* at 2231.
118. *Id.* at 2229.

victim was taken to a hospital, and a sexual assault kit was obtained.[119] The kit was placed in the custody of the Chicago Police and sent to the Illinois State Police Lab.[120] At the lab, a forensic scientist received the kit and analyzed the evidence, confirming the presence of semen on vaginal swabs.[121] The kit was resealed and placed in an evidence freezer.[122] The state lab then sent the vaginal swabs to another lab, Cellmark, for DNA testing and produced a male DNA profile.[123] By this time, the defendant was not yet under suspicion for rape.[124]

The state police lab undertook a computer search to determine if the DNA profile matched entries in the Illinois State DNA Database.[125] There was a match with defendant's blood obtained from an earlier sample.[126]

Thereafter, the police conducted a lineup, and the victim identified the defendant.[127] The defendant was indicted and tried in a bench trial.[128] The Cellmark DNA report was not admitted in evidence.[129] A prosecution expert witness in forensic biology and forensic DNA analysis (not the analyst who performed or observed the tests) relied on the Cellmark DNA profile for her testimony.[130]

Remarkably, a plurality of the Supreme Court held that even if the DNA report had been introduced in evidence, a Confrontation Clause violation would not have resulted.[131] It found that the Sixth Amendment Confrontation Clause refers to witnesses against an accused, focusing on accusing a targeted individual along with formalized statements such as affidavits, depositions, prior testimony, and confessions.[132] The Supreme Court held that the Cellmark report was not prepared for the primary purpose of accusing a targeted individual.[133] Nor was the purpose of the report to accuse or create evidence at trial.[134]

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119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 2230.
130. *Id.*
131. *Id.* at 2240.
132. *Id.* at 2242.
133. *Id.* at 2243.
134. *Id.*

It should be noted that Justice Breyer, in his concurrence, refers to the problem created by the inadmissibility of forensic autopsy reports due to Confrontation Clause violations.[135] He stated:

> Autopsies, like the DNA report in this case, are often conducted when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial. Autopsies are typically conducted soon after death. And when, say, a victim's body has decomposed, repetition of the autopsy may not be possible. What is to happen if the medical examiner dies before trial? Is the Confrontation Clause effectively to function as a statute of limitations for murder?[136]

Justice Breyer's comments do not refer to the skill, judgment, and subjectivity involved in the performance of the autopsy and preparation of the autopsy report. These factors should play a prominent role in the determination of the testimonial nature of forensic autopsy reports.

Williams is a curious opinion in multiple respects. The Supreme Court essentially dismissed the hearsay issue by focusing on expert testimony.[137] The expert testifying at trial was subject to cross-examination about the opinions offered at trial.[138] The DNA profile (the out-of-court statement), in the Supreme Court's view, was not offered in court for its truth but only to provide an explanation for the expert's opinions.[139] This seems a contorted view of hearsay. If the DNA report was untrue, why would an in-court expert rely on it?

That the defendant was not charged with a crime by the time the forensic testing was undertaken really begs the question of the testimonial nature of the DNA report. Any forensic scientist undertaking testing that may result in the identification of a criminal suspect must anticipate that the test results may constitute evidence in a criminal prosecution.

The Seventh Circuit Court of Appeals very recently made a comment on the unsettling nature of the *Williams* opinion in *United States v. Maxwell*.[140] The *Maxwell* court noted that "the [*Williams*'s] Court's 4-1-4 division left no clear guidance about how exactly an expert must phrase its testimony about the results of testing

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135. *Id.* at 2251 (Breyer, J., concurring).
136. *Id.* (citations omitted) (internal quotation marks omitted).
137. *Id.* at 2228.
138. *Id.* at 2230.
139. *Id.* at 2239–40.
140. United States v. Maxwell, 724 F.3d 724 (7th Cir. 2013).

performed by another analyst in order for the testimony to be admissible."[141]

State supreme court justices have not been shy in commenting on the uncertainty and ambiguity of Supreme Court opinions pertaining to forensic documents and the Confrontation Clause.[142] How much formality is required for testimonial hearsay? Must a primary evidentiary purpose completely overshadow other possible purposes of a statement? Why is it not fair to conclude that the authors of all forensic documentation in general, and autopsy reports in specific, must anticipate that they will be introduced in evidence in a criminal prosecution? A highly respected legal scholar predicted, "[T]he Supreme Court will hold [another] round . . . in the battle over the Confrontation Clause implications of forensic lab reports."[143]

What, then, is the fate of the forensic autopsy report prepared by the examining pathologist but testified about by a surrogate pathologist? Certainly, a forensic pathologist must anticipate that the forensic autopsy report will constitute evidence. A forensic autopsy report may be issued before a suspect is charged with homicide. Should that fact impact the determination of the report as testimonial or non-testimonial? In the absence of more cogent guidance by the Supreme Court, it is necessary to examine the opinions of the circuit courts of appeals and state courts that have addressed this issue.

III. POST-*CRAWFORD* JURISPRUDENCE FROM THE CIRCUIT COURTS OF APPEALS

This Section examines the jurisprudence of the circuit courts of appeals. The purpose of this exercise is to use these opinions to predict or forecast future action of the Supreme Court should it take up the admissibility of forensic autopsy reports through the testimony of surrogate forensic pathologists.

A. First Circuit

1. United States v. De La Cruz

The United States Court of Appeals for the First Circuit has addressed the precise issue that is the subject of this Article. In

141. *Id.* at 727.

142. *See* Martin v. State, 60 A.3d 1100, 1102 (Del. 2013); People v. Lopez, 286 P.3d 469, 483 (Cal. 2012) (Liu, J., concurring).

143. Richard D. Friedman, *Confrontation and Forensic Laboratory Reports, Round Four*, 45 TEX. TECH. L. REV. 51, 82 (2012).

United States v. De La Cruz, the defendant was convicted of drug-related charges, including the distribution of heroin causing the drug user's death.[144] At trial, an expert medical examiner testified for the prosecution.[145] He did not perform the autopsy on the victim.[146] His testimony relied on the autopsy report prepared by the examining pathologist.[147] Defendant objected to the testimony on Confrontation Clause grounds, urging that the autopsy report was testimonial.[148]

The court of appeals utilized a classic hearsay analysis and held that the forensic autopsy report was a business record insofar as it was "made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy."[149] The character of the forensic autopsy report, the First Circuit concluded, "involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy."[150] The court then relied on *Crawford v. Washington*[151] and opined that it excluded business records from its "reach."[152] Consequently, the opinion of the court in *De La Cruz* teaches that business records are not testimonial.[153]

Of course, *De La Cruz* does not address why certain business records cannot be testimonial. It does not address whether the examining forensic pathologist should anticipate that the autopsy report would constitute trial evidence.

The real basis of the *De La Cruz* opinion may be the court of appeals's references to the post-*Crawford* New York state court opinion in *People v. Durio*.[154] There, the court, in finding an autopsy report non-testimonial, focused on a practical problem encountered in criminal prosecutions involving autopsies—the passage of time contributing to the unavailability at trial of the examining pathologist who performed the autopsy and prepared the forensic autopsy report.[155] The *Durio* court stated: "Certainly it would be against society's interests to permit the unavailability of the medical

144. United States v. De La Cruz, 514 F.3d 121, 128 (1st Cir. 2008).
145. *Id.* at 131–32.
146. *Id.* at 132.
147. *Id.*
148. *Id.* at 132–33.
149. *Id.* at 133.
150. *Id.*
151. Crawford v. Washington, 541 U.S. 36 (2004).
152. *See Crawford*, 541 U.S. at 56; *De La Cruz*, 514 F.3d at 133.
153. *De La Cruz*, 514 F.3d at 133.
154. People v. Durio, 794 N.Y.S.2d 863 (N.Y. App. Div. 2005), *abrogated by* People v. Rawlins, 884 N.E.2d 1019 (N.Y. 2008).
155. *Id.* at 869.

examiner who prepared the report to preclude the prosecution of a homicide case."[156]

The *De La Cruz* opinion is, therefore, one based on expediency and practicality. The court was concerned about crippling criminal prosecutions through the use of surrogate or expert forensic pathology witnesses.[157]

To the extent that the vitality of *De La Cruz* is reliant on *Durio*, that vitality may now be subject to question. In 2008, the Court of Appeals of New York in *People v. Rawlins* rejected one of the foundations of *Durio*, that documents encompassed by the business record hearsay exception are not testimonial.[158] Although *Rawlins* did not concern forensic autopsy evidence, the court made clear that it did not approve of a bright-line, non-testimonial characterization of business records.[159]

2. Nardi v. Pepe

The First Circuit revisited the topic in 2011 in *Nardi v. Pepe*.[160] In *Nardi*, the defendant was convicted of murder in Massachusetts, and his conviction was affirmed in 2008,[161] prior to the U.S. Supreme Court opinions in *Melendez-Diaz*[162] and *Bullcoming*.[163] The U.S. district court denied his petition for a writ of habeas corpus, but it granted a certificate of appealability.[164] Nardi appealed to the First Circuit.[165]

Nardi was convicted of killing his mother.[166] An autopsy was performed, and the report "concluded that the cause of death was consistent with asphyxia by suffocation."[167] The examining pathologist had retired, suffered a medical condition, and could not attend the trial.[168] A surrogate pathologist, not involved in the victim's autopsy, testified at trial for the prosecution.[169] After the surrogate pathologist reviewed the autopsy report, he "testified to

156. *Id.*
157. *Id.*
158. *Rawlins*, 884 N.E.2d 1019, 1027–28 n.8.
159. *Id.* at 1028.
160. Nardi v. Pepe, 662 F.3d 107 (1st Cir. 2011).
161. *Id.* at 108.
162. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).
163. Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).
164. *Nardi*, 662 F.3d at 110.
165. *See generally id.*
166. *Id.* at 108.
167. *Id.* at 109.
168. *Id.*
169. *Id.*

several facts derived from the autopsy report" and to the conclusion of the examining pathologist that the victim was suffocated.[170]

On direct review of the conviction, the Supreme Judicial Court (SJC) of Massachusetts affirmed the conviction and rejected the Confrontation Clause claim.[171] The SJC held that the testifying pathologist appropriately offered his opinion, but insofar as he revealed portions of the examining pathologist's autopsy report, that portion of the surrogate pathologist's testimony did violate Nardi's Confrontation Clause rights.[172]

As to the petition for habeas corpus, the certificate of appealability issued by the U.S. district court focused on this issue: "whether it was clearly established law at the time of Nardi's trial that an autopsy report was inadmissible testimonial hearsay and, if so, whether a testifying expert's opinion may rely on inadmissible [testimonial] hearsay."[173]

The First Circuit held that *Crawford*[174] "did not 'clearly establish' that either the autopsy report or [the surrogate pathologist's] opinion in partial reliance upon it were inadmissible under the Confrontation Clause."[175] The First Circuit discussed the subsequent Supreme Court decisions in *Melendez-Diaz*[176] and *Bullcoming*,[177] noted that autopsy reports could fit within either analysis, and concluded that "it is uncertain how the [Supreme] Court would resolve the question."[178] This uncertainty exists even when using the "primary purpose test" emphasized in *Bullcoming*.[179] Therefore, the First Circuit, holding that it could not resolve the testimonial–non-testimonial dilemma through the application of *Crawford*, *Melendez-Diaz*, and *Bullcoming*, found that *Crawford* did not bar the admissibility of the surrogate pathologist's testimony and the forensic autopsy report, affirmed Nardi's conviction.[180]

170. *Id.*
171. *Id.* at 108; Commonwealth v. Nardi, 893 N.E.2d 1221 (Mass. 2008).
172. *Nardi*, 662 F.3d at 109–10.
173. *Id.* at 110 (internal quotation marks omitted).
174. Crawford v. Washington, 541 U.S. 36 (2004).
175. *Nardi*, 662 F.3d at 110–11.
176. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).
177. Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).
178. *Nardi*, 662 F.3d at 111.
179. *Bullcoming*, 131 S. Ct. at 2716–17.
180. *Nardi*, 662 F.3d at 112.

B. Second Circuit

1. United States v. Feliz

In *United States v. Feliz*, a post-*Crawford*, pre-*Melendez-Diaz* and *Bullcoming* case, the Second Circuit considered a conviction for, among other crimes, conspiring in the commission of murder in aid of racketeering.[181] "[T]o establish the manner and cause of death," the prosecution offered autopsy reports in evidence through a surrogate medical examiner.[182] The trial court admitted the autopsy reports as business records.[183]

The Second Circuit rather easily dispatched the Confrontation Clause issue, holding "that a statement properly admitted under Federal Rule of Evidence 803(6) cannot be testimonial because a business record is fundamentally inconsistent with what the Supreme Court has suggested comprise the defining characteristics of testimonial evidence."[184] The court went to great lengths in attempting to characterize a forensic medical examiner as a treating physician whose record of patient treatment would not be composed for use at trial.[185] Further, even though a forensic pathologist may be aware that his or her autopsy report "may be available for later use at trial," the Second Circuit concluded that forensic autopsy reports constitute business records and are, therefore, non-testimonial.[186] Additionally, the Second Circuit held that forensic autopsy reports constitute records within the public records exception to the hearsay rule[187] and are non-testimonial.[188]

2. United States v. Burden

United States v. Burden did not involve a murder conviction or a forensic autopsy.[189] The Second Circuit, did, however, address the definition of "testimonial statements."[190] In its opinion, the court

181. United States v. Feliz, 467 F.3d 227, 229 (2d Cir. 2006).
182. *Id.*
183. *Id.*
184. *Id.* at 233–34.
185. *Id.* at 234–35.
186. *Id.* at 236.
187. FED. R. EVID. 803(8).
188. *Feliz*, 467 F.3d at 237.
189. United States v. Burden, 600 F.3d 204 (2d Cir. 2010).
190. *Id.* at 223.

referred to its opinion in *Feliz*,[191] which held that forensic autopsy reports were not testimonial.[192]

3. Vega v. Walsh

Vega involved a request for federal habeas corpus relief from a New York State murder conviction in 2002.[193] By the time the conviction was affirmed on appeal in the New York State court system,[194] *Crawford*[195] had been decided by the U.S. Supreme Court, but *Melendez-Diaz*[196] and *Bullcoming*[197] had not.[198]

Although a forensic autopsy report was not admitted in evidence at trial, a surrogate medical examiner was allowed to testify about the results of the autopsy.[199] The testifying medical examiner did state that, "the prosecution's theory of [the victim's] death . . . was consistent with the autopsy results."[200] This testimony was the subject of an issue raised by the habeas petition—Did the admission of the surrogate medical examiner's testimony violate the defendant's confrontation rights?[201]

The Second Circuit paid homage to its opinion in *Feliz* holding "that autopsy reports are not testimonial and are admissible as public and business records."[202] It noted that *Crawford* was the controlling Supreme Court jurisprudence at the time the state court system affirmed the defendant's conviction and that the admission in evidence of the surrogate's testimony was permissible under *Crawford*.[203]

The Second Circuit also noted that *Crawford* did not exhaustively define or provide examples of testimonial statements.[204] The court was obliged to refer to non-prosecutorial uses of forensic autopsy reports, presumably to rebut the argument that the medical examiner can anticipate that an autopsy report will constitute courtroom evidence.[205]

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191. *Id.*; *Feliz*, 467 F.3d at 235–36.
192. *Burden*, 600 F.3d at 225.
193. Vega v. Walsh, 669 F.3d 123, 125 (2d Cir. 2012).
194. People v. Vega, 805 N.Y.S.2d 642 (N.Y. App. Div. 2005).
195. Crawford v. Washington, 541 U.S. 36 (2004).
196. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).
197. Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).
198. *Vega*, 669 F.3d at 126−27.
199. *Id.* at 125.
200. *Id.*
201. *Id.*
202. *Id.* at 126.
203. *Id.* at 127−28.
204. *Id.* at 128.
205. *Id.*

4. United States v. James

Most recently, in *United States v. James*, the Second Circuit directly addressed the issues on which this Article focuses. Here, the court considered the defendants's convictions of multiple crimes, including murder.[206] A surrogate medical examiner testified at trial regarding a forensic autopsy performed by another medical examiner, and autopsy reports were admitted in evidence.[207] The court reviewed the post-*Crawford*[208] Supreme Court jurisprudence—*Melendez-Diaz*,[209] *Bullcoming*,[210] and *Williams*[211]—and held that forensic autopsy reports are not testimonial "because they were not created 'for the purpose of establishing or proving some fact at trial.'"[212]

The court reexamined its opinion in *Feliz*[213] and its conclusions therein, that autopsy reports were business records (exceptions to the hearsay rule) pursuant to Federal Rule of Evidence 803(6) and public records (exceptions to the hearsay rule) pursuant to Federal Rule of Evidence 803(8).[214] It examined the post-*Crawford*[215] jurisprudence of the Supreme Court, in search of guidance in defining "testimonial." The court found no assistance in the *Williams*[216] plurality opinion regarding the "primary purpose" test.[217]

How, then, did the *James* court conclude that the forensic autopsy report was non-testimonial? The court examined "the particular relationship between the Office of the Chief Medical Examiner (OCME) and law enforcement both generally and in this particular case."[218] It noted that the victim's autopsy was completed, and the autopsy report was prepared "before any criminal investigation into [the victim's] death had begun."[219] In the court's opinion, the medical examiner did not expect a resulting criminal investigation. The autopsy report "was not prepared primarily to create a record for use at a criminal trial."[220]

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206. United States v. James, 712 F.3d 79 (2d Cir. 2013).
207. *Id.* at 87.
208. Crawford v. Washington, 541 U.S. 36 (2004).
209. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).
210. Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).
211. Williams v. Illinois, 132 S. Ct. 2221 (2011).
212. *James*, 712 F.3d at 88 (quoting *Melendez-Diaz*, 557 U.S. at 324).
213. United States v. Feliz, 467 F.3d 227 (2d Cir. 2006).
214. *James*, 712 F.3d at 89.
215. Crawford v. Washington, 541 U.S. 36 (2004).
216. *Williams*, 132 S. Ct. 2221.
217. *James*, 712 F.3d at 95−96.
218. *Id.* at 97.
219. *Id.* at 99.
220. *Id.*

A final point should be made about the *James* majority opinion. It referred to the victim's autopsy as "routine."[221] This characterization merits later comment as this Article urges that forensic autopsy reports are testimonial (and not routine).

The concurring opinion takes exception with the holding that the forensic autopsy report was non-testimonial.[222] The concurrence distills the Supreme Court jurisprudence and identifies "three key considerations for determining if a statement is testimonial" as follows:[223]

(1) "Testimony is a solemn declaration or affirmation made for the purpose of establishing or proving some fact."[224]
(2) "[T]he statement must have been made in a way that is sufficiently solemn so as to make it more like 'a formal statement to government officers' rather than 'a casual remark to an acquaintance.'"[225]
(3) "[T]he statement must reasonably be understood as being 'available for use at a later trial.'"[226]

The concurrence applied these considerations and easily found that they were satisfied.[227] The forensic autopsy report was "created to establish facts regarding the death of [the victim]," including components pertaining to forensic description, analysis, and cause of death.[228] Next, the forensic autopsy report was "sufficiently solemn" as it was created pursuant to applicable law.[229] Lastly, the findings of the autopsy report, including that the victim may have been poisoned, would lead "a reasonable medical examiner [to anticipate] that the autopsy report could be used prosecutorially."[230]

Two additional points raised by the concurrence merit comment. First, the forensic autopsy report, when admitted in evidence, functions as a witness at trial.[231] Next, referring to the Eleventh Circuit opinion in *Ignasiak*,[232] the concurrence emphasized that the forensic autopsy report is "the product of the skill, methodology, and judgment of the highly trained examiner[] who actually

221. *Id.*
222. *Id.* at 108 (Eaton, J., concurring).
223. *Id.*
224. *Id.* (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004)).
225. *Id.* at 109 (quoting Michigan v. Bryant, 131 S. Ct. 1143, 1153 (2011)).
226. *Id.* (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009)).
227. *Id.* at 109−10.
228. *Id.*
229. *Id.* at 110.
230. *Id.*
231. *Id.*
232. United States v. Ignasiak, 667 F.3d 1217 (11th Cir. 2012).

performed the autopsy."[233] This speaks against the concept of a routine autopsy and a report that merely communicates objective data. As this Article will later show, this attribute of the forensic autopsy report may be the most significant in implicating the Confrontation Clause.[234]

C. Sixth Circuit

In *Mitchell v. Kelly*, a recent per curiam, unpublished disposition, the Court of Appeals for the Sixth Circuit considered the admissibility of a forensic autopsy report and the testimony of a surrogate coroner's physician.[235] A jury convicted Mitchell of murder and other crimes in 2005 in the Ohio State court system.[236] His petition for a writ of habeas corpus was denied, and "[t]he district court granted Mitchell a certificate of appealability regarding his Confrontation Clause claim."[237]

The procedure at trial was a familiar one. A surrogate pathologist testified, and the forensic autopsy report was admitted in evidence as a business record.[238] In disposing of the habeas petition, "the district court determined that the state courts did not unreasonably refuse to extend *Crawford v. Washington*, to exclude the autopsy report admitted at Mitchell's trial."[239]

The *Mitchell* court made clear that under Ohio law, "autopsy reports are admissible as nontestimonial business records."[240] The Sixth Circuit correctly noted "the lack of Supreme Court precedent establishing that an autopsy report is testimonial."[241]

233. *James*, 712 F.3d at 111 (Eaton, J., concurring) (quoting *Ignasiak*, 667 F.3d at 1232).
234. *See infra* Part V.
235. Mitchell v. Kelly, 520 F. App'x 329, 330 (6th Cir. 2013) (per curiam).
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.* (citation omitted).
240. *Id.* at 331.
241. *Id.*

D. Ninth Circuit

In *McNeiece v. Lattimore*, an unpublished disposition of a habeas petition, the Ninth Circuit considered a Confrontation Clause claim stemming from a pre-*Melendez-Diaz*[242] and *Bullcoming*[243] conviction.[244] Here, "excerpts of an autopsy report showing a diagram of the victim's body with descriptions of the bullet wounds" were admitted in evidence pursuant to the business records exception to the hearsay rule.[245] The court permitted a surrogate pathologist to testify to his "own opinions" based on the autopsy report.[246] On appeal, the state appellate court held the autopsy report "non-testimonial" pursuant to *Crawford*.[247]

Essentially, the Ninth Circuit's review revealed that these evidentiary determinations were not contrary to *Crawford*[248] or *Davis*,[249] the Supreme Court jurisprudence available as of the time of the underlying conviction.[250] Further, the Ninth Circuit was not impressed with the fact that law enforcement personnel attended the victim's autopsy.[251] Of course, the attendance at forensic autopsies by law enforcement personnel contributes to the awareness of the examining pathologist that the autopsy report is likely to constitute evidence at a criminal prosecution.

E. Tenth Circuit

In *United States v. MacKay*, the United States Court of Appeals for the Tenth Circuit considered the appeal from the physician–defendant's conviction of unlawfully prescribing controlled substances.[252] One of the issues on appeal concerned the admissibility of an autopsy report resulting from the autopsy of one of the defendant's patients.[253]

The physician who performed the autopsy and prepared the autopsy report died before trial.[254] The prosecution introduced the

242. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).
243. Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).
244. McNeiece v. Lattimore, 501 F. App'x 634 (9th Cir. 2012).
245. *Id.* at 636.
246. *Id.*
247. *Id*.
248. Crawford v. Washington, 541 U.S. 36 (2004).
249. Davis v. Washington, 547 U.S. 813 (2006).
250. *McNeiece*, 501 F. App'x at 636.
251. *Id.*
252. United States v. MacKay, 715 F.3d 807, 812–13 (10th Cir. 2013).
253. *Id.* at 830.
254. *Id.* at 826.

report in evidence.[255] The Chief Medical Examiner, the surrogate, testified at trial as to the cause of death.[256] A toxicologist who had reviewed the autopsy report also testified as to the mechanism of death, as did a defense expert.[257] In referring to the autopsy report, the Tenth Circuit stated that "Dr. Frikke, the doctor who performed the autopsy, 'certified that the death was due to drug toxicity poisoning with hydrocodone and oxycodone.'"[258] On appeal, the defendant "argue[d] the autopsy report's admission into evidence present[ed] a Confrontation Clause issue."[259]

The Government argued that the defendant did not preserve the Confrontation Clause issue for review by his failure to object at trial.[260] The defendant urged that the law changed post-conviction due to *Bullcoming* and *Ignasiak*.[261] However, the Tenth Circuit noted that *Bullcoming* pre-dated defendant's conviction, and he could have objected to the admission of the autopsy report based on *Bullcoming*.[262] Additionally, the court noted that defendant was unable to prove that the trial court committed plain error in admitting the autopsy report.[263] Therefore, the Tenth Circuit simply did not reach the evidentiary and constitutional issues in *MacKay*.[264]

F. Eleventh Circuit

In 2012, the Eleventh Circuit decided *United States v. Ignasiak*, an appeal from the defendant's conviction of health care fraud and illegally prescribing controlled substances in violation of the Controlled Substances Act.[265] The defendant was a medical doctor who allegedly "prescribed unnecessary or excessive quantities of controlled substances without a legitimate medical purpose and 'outside the usual course of professional practice.'"[266] Patients of the defendant died allegedly as a result of the defendant's conduct.[267] Autopsies were performed and reports were prepared, but the

255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 829 (citation omitted).
259. *Id.* at 831.
260. *Id.*
261. *Id. See* Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011); United States v. Ignasiak, 667 F.3d 1217 (11th Cir. 2012).
262. *See Bullcoming*, 131 S. Ct. 2705.
263. *MacKay*, 715 F.3d at 832.
264. *Id.*
265. *Ignasiak*, 667 F.3d at 1217, 1219.
266. *Id.*
267. *Id.*

examining pathologists did not testify at trial.[268] The trial court admitted into evidence the autopsy reports and testimony about the reports.[269] There was no evidence to suggest that "the coroners who performed the autopsies were unavailable and the accused had a prior opportunity to cross-examine them."[270] Therefore, the court was faced with the classic case of the surrogate medical examiner witness at trial.[271]

The Eleventh Circuit noted that the autopsy reports were admitted in evidence as business records.[272] The court reviewed *Crawford*,[273] *Melendez-Diaz*,[274] and *Bullcoming*[275] and concluded that forensic autopsy reports are testimonial, implicating the Confrontation Clause.[276] It referred to state court opinions on both sides of this issue and the Second Circuit opinion in *Feliz*.[277] The *Ignasiak* court easily dispensed with *Feliz* as a pre-*Melendez-Diaz* opinion, stating that *Feliz* "has little persuasive value on this issue."[278] Further, it found that the forensic autopsy reports "were prepared 'for use at trial,'" referring to Florida law pertaining to the office and responsibilities of medical examiners in the state.[279] They were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[280] Therefore, these reports were testimonial.[281]

Significantly, the *Ignasiak* court referred to the "medical–legal" justification for the defendant's need to confront and cross-examine the pathologist who performs a forensic autopsy.[282] It is only through confrontation and cross-examination that the defendant may explore a forensic pathologist's skill and judgment.[283] In this regard, the forensic pathologist is similar to the physician who provides care to the living based on the physician's education, training,

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268. *Id.* at 1220.
269. *Id.* at 1229.
270. *Id.* at 1220.
271. *Id.* at 1229.
272. *Id.*
273. Crawford v. Washington, 541 U.S. 36 (2004).
274. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).
275. Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).
276. *Ignasiak*, 667 F.3d at 1231−32.
277. United States v. Feliz, 467 F.3d 227 (2d Cir. 2006). *See supra* Part III.B.1.
278. *Ignasiak*, 667 F.3d at 1231 n.15.
279. *Id.* at 1231.
280. *Id.* at 1232 (quoting United States v. Baker, 432 F.3d 1189, 1203 (11th Cir. 2005)).
281. *Id.*
282. *Id.* at 1232−33.
283. *Id.*

experience, skill, and judgment. The court in *Ignasiak* recognized that "autopsy reports are like many other types of forensic evidence used in criminal prosecutions."[284] The report "may be invalid or unreliable because of the examiner's errors, omissions, mistakes, or bias."[285] This insight critically addresses the thought that forensic autopsy reports simply collect objective data and that all pathologists would routinely replicate findings contained in the report. Surrogate pathology witnesses cannot be effectively cross-examined regarding the findings of the examining pathologists. Surely, this is a compelling Confrontation Clause position.

G. District of Columbia Circuit

In *United States v. Moore*,[286] the defendants were convicted of multiple crimes, including murder.[287] Admitted in evidence were "autopsy reports authored by the Office of the Chief Medical Examiner of the District of Columbia."[288] The author of the reports was unavailable to testify.[289] The surrogate witness was the chief of the medical examiner's office, who "neither performed nor observed the autopsies and his signature [did] not appear on any of the reports."[290]

The D.C. Circuit noted that the application of the Confrontation Clause to the admissibility of forensic autopsy reports through a surrogate witness "is a question left open in *Bullcoming*."[291] After addressing the Supreme Court jurisprudence on the topic, the court held that the forensic autopsy reports were testimonial.[292] The relevant factors were: the statutory obligation of the medical examiner to investigate deaths; the presence of law enforcement officers at the autopsies; the participation of law enforcement officers in the creation of reports related to the autopsies; and "each autopsy found the manner of death to be a homicide caused by gunshot wounds."[293] Consequently, the court found that these "circumstances . . . would lead an objective witness reasonably to

284. *Id.* at 1233.
285. *Id.*
286. United States v. Moore, 651 F.3d 30 (D.C. Cir. 2011) (per curiam).
287. *Id.* at 39.
288. *Id.* at 69.
289. *Id.* at 71.
290. *Id.*
291. *Id.* at 72.
292. *Id.* at 73.
293. *Id.*

believe that the [autopsy reports] would be available for use at a later trial."[294]

To date, the circuit courts of appeals are split on the testimonial nature of forensic autopsy reports offered in evidence through surrogate witnesses. The First, Second, Sixth, and Ninth Circuits have held these reports to be "non-testimonial" and admissible.[295] The Eleventh and D.C. Circuits have held these reports to be "testimonial," implicating the Confrontation Clause.[296] In an effort to explore a more complete jurisprudential landscape, a survey of state court opinions will be examined.

IV. POST-*CRAWFORD* JURISPRUDENCE FROM THE STATES

A. States Holding Forensic Autopsy Reports to be Testimonial

1. Massachusetts

In 2009, the SJC of Massachusetts addressed the admissibility of a surrogate medical examiner's in-court testimony in *Commonwealth v. Avila*.[297] The examining pathologist (who conducted the autopsy) was not employed by Massachusetts at the time of trial.[298] At trial, the surrogate medical examiner offered opinions on the cause and manner of death, how long it took the victim to die, and "whether the victim might have been conscious after each shot was fired."[299] The surrogate's in-court testimony was based upon the examining pathologist's autopsy report and diagram.[300] The diagram was admitted into evidence, but the autopsy report was not. Despite this fact, the *Avila* court stated that "the substitute medical examiner, as an expert witness, is not permitted on direct examination to recite or otherwise testify about the underlying factual findings of the unavailable medical examiner as contained in the autopsy report."[301] The testimony of the surrogate medical examiner, in this regard, violated the Confrontation Clause.[302]

In 2013, the SJC of Massachusetts reaffirmed this position in *Commonwealth v. Reavis*.[303] Here, the attending medical examiner

294. *Id.* (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009)).
295. See supra Parts III.A–E.
296. See supra Parts III.F, G.
297. Commonwealth v. Avila, 912 N.E.2d 1014, 1027 (Mass. 2009).
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.* at 1029.
302. *Id.*
303. Commonwealth v. Reavis, 992 N.E.2d 304 (Mass. 2013).

was unavailable for trial. A surrogate medical examiner testified and opined on the cause of death, based upon "his review of the autopsy report, the toxicology report, and the autopsy photographs."[304] The SJC approved this trial strategy while apparently maintaining its position in *Avila*.[305] In this regard, the court stated that, "[a] substitute medical examiner may not, however, testify to facts in the underlying autopsy report where that report has not been admitted."[306] It is possible that the phrase "where that report has not been admitted" may have been a judicial slip of the tongue, particularly if *Avila* intended to teach that forensic autopsy reports are testimonial.[307] It is also possible that the *Reavis* court was contemplating a situation in which the defendant did not object to the admission in evidence of the report.[308]

Avila and *Reavis*, therefore, at least suggest that the forensic autopsy report constitutes testimonial hearsay. Insofar as the court's opinions approved of the surrogate's in-court opinion testimony,[309] Massachusetts could adopt a variant of the hybrid approach to the admissibility of forensic autopsy reports, an approach to be discussed later in this Article.[310]

2. Michigan

As a result of recent involvement of the Supreme Court of Michigan, it may be reasonable to place Michigan in the "testimonial column." In 2010, the Court of Appeals of Michigan in *People v. Lewis* proclaimed that a forensic autopsy report was admissible as non-testimonial despite the admission of the report through a surrogate medical examiner.[311] The court held that the autopsy report was prepared pursuant to a statutory requirement, "was not prepared primarily for use in a later criminal prosecution," and the surrogate was subject to cross-examination regarding his opinions, which were based on the autopsy report.[312] This was the recipe for a non-testimonial autopsy report.

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304. *Id.* at 311.
305. *Avila*, 912 N.E.2d 1014.
306. *Reavis*, 992 N.E.2d at 312.
307. *See Avila*, 912 N.E.2d 1014.
308. *See Reavis*, 992 N.E.2d 304.
309. *Id.* at 312.
310. This approach, which will be discussed later, permits the admissibility of the "objective data" contained in the autopsy report—anatomical findings—and excludes the examining pathologist's opinions on cause and manner of death. *See infra* Part IV.C.
311. People v. Lewis, 788 N.W.2d 461, 466–67 (Mich. Ct. App. 2010), *aff'g judgment, vacating in part*, People v. Lewis, 806 N.W.2d 295 (Mich. 2011).
312. *Id.*

In 2011, the Supreme Court of Michigan issued an order in *Lewis* affirming the result but vacating "that part of the . . . opinion holding that the autopsy report was not testimonial and, therefore, that its admission did not violate the defendant's Sixth Amendment right to be confronted with the witnesses against him."[313] The supreme court disagreed with the court of appeals application of a Michigan rule of evidence "and its determination that the autopsy report was not prepared in anticipation of litigation."[314] The court of appeals opinion was affirmed as the supreme court agreed "that the admission of the [autopsy] report was not outcome determinative."[315]

Of special interest is the concurrence contained in the order, which urges that the supreme court's order did not decide "whether the autopsy report constituted testimonial hearsay evidence."[316] The concurring judge preferred that the supreme court directly address this issue.[317]

Notwithstanding the concurrence, the Supreme Court of Michigan's order in *Lewis* suggests that it was troubled by the characterization of the autopsy report as non-testimonial. Therefore, with caution, it seems fair to urge that Michigan has become another jurisdiction to recognize the testimonial nature of forensic autopsy reports.

3. Missouri

In 2007, a Missouri court of appeals addressed the precise issue in *State v. Davidson*.[318] Here, a surrogate medical examiner testified at trial. The examining physician did not testify at trial "because she was 'out of town on vacation or something.'"[319] The victim's autopsy report was admitted in evidence.[320] The *Davidson* court referred to the state's pre-*Crawford* practice of admitting forensic autopsy reports in evidence under the business records exception to the hearsay rule.[321] Post-*Crawford*, however, the court held that the forensic autopsy report issued in the prosecution was testimonial.[322] It was prepared "at the request of law enforcement in anticipation of

313. *Lewis*, 806 N.W.2d at 295.
314. *Id.* (citation omitted).
315. *Id.*
316. *Id.* (Kelly, J., concurring).
317. *Id.*
318. State v. Davidson, 242 S.W.3d 409 (Mo. Ct. App. 2007).
319. *Id.* at 412.
320. *Id.*
321. *Id.* at 416.
322. *Id.* at 417.

a murder prosecution, and the report was offered to prove the victim's cause of death."[323] The court then pronounced, "[w]hen an autopsy report is prepared for purposes of criminal prosecution, as this one was, the report is testimonial."[324]

4. New Mexico

The evidentiary character of forensic autopsy reports has been the subject of two recent cases: *State v. Jaramillo*[325] and *State v. Navarette*.[326]

a. State v. Jaramillo

In *Jaramillo*, which involved a prosecution for child abuse resulting in death, the medical examiner who performed the autopsy was no longer employed by the medical examiner's office at the time of trial.[327] He demanded a large fee to testify at trial that the State would not pay.[328] A surrogate medical examiner testified at trial "to establish the cause and manner of [the victim's] death."[329] He "read directly from the autopsy report" and "testified to . . . specific observations and notations made during the autopsy."[330] The autopsy report was admitted in evidence.[331]

Referring to New Mexico case law, the *Jaramillo* court noted the testimonial nature of a forensic report that was based on "an exercise of judgment and analysis" and attributed this quality to the autopsy report.[332] The court also found that "the autopsy report was prepared with the purpose of preserving evidence for criminal litigation" as it "was made with the intention of the medical examiner to establish the cause and manner of . . . death," additional characteristics of a testimonial statement.[333] Further, the *Jaramillo* court acknowledged the need for cross-examination of the examining pathologist, noting that "cross-examination is necessary to explore the boundaries of the expert's qualifications and correct

323. *Id.*
324. *Id.*
325. State v. Jaramillo, 272 P.3d 682 (N.M. Ct. App. 2011).
326. State v. Navarette, 294 P.3d 435 (N.M. 2013).
327. *Jaramillo*, 272 P.3d 682, 684.
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.* at 685.
333. *Id.* at 685–86.

application of scientific techniques and methods."[334] As previously mentioned, the pathologist who performed the forensic autopsy is no different than the physician who examined and treated a patient. Each relies on experience, training, skill, and judgment, the application of which can only be explored at trial through cross-examination.

b. State v. Navarette

In 2013, in *State v. Navarette*, the Supreme Court of New Mexico followed *Jaramillo* and held that forensic autopsy reports are testimonial.[335] Significantly, the *Navarette* court, in reliance on *Bullcoming*,[336] stated "that when determining whether an out-of-court statement is testimonial, there is no meaningful distinction between factual observations and conclusions requiring *skill and judgment*."[337] This pronouncement discounts the argument made by the proponents of admissibility, that forensic autopsy reports contain objective data, presumably of the type that would be reported in a similar fashion by any forensic pathologist. This position, rejected in New Mexico, would authorize a surrogate pathologist to testify because the surrogate would simply testify regarding objective autopsy findings and the surrogate's "opinions" would be subject to cross-examination.

5. North Carolina

In *State v. Locklear*, the Supreme Court of North Carolina, with guidance supplied by *Melendez-Diaz*,[338] held that forensic autopsy reports admitted in evidence through a surrogate medical examiner were testimonial.[339] Curiously, the *Locklear* court suggested that the testimonial nature of forensic autopsy reports was recognized by *Melendez-Diaz*.[340] To be sure, *Melendez-Diaz*, in a footnote, referred to the importance of confrontation, presumably to challenge "forensic analyses, such as autopsies."[341] It did not, however, conclude that forensic autopsy reports are testimonial, the admission into evidence of which violates the Confrontation Clause when the

334. *Id.* at 687.
335. State v. Navarette, 294 P.3d 435, 441 (N.M. 2013).
336. Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).
337. *Navarette*, 294 P.3d at 438 (emphasis added).
338. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).
339. State v. Locklear, 681 S.E.2d 293, 305 (N.C. 2009).
340. *Id.* at 304–05.
341. *Melendez-Diaz*, 557 U.S. at 318 n.5.

defendant had no prior opportunity to confront and cross-examine the examining pathologist.

6. Oklahoma

In 2010, the Oklahoma Court of Criminal Appeals in *Cuesta-Rodriguez v. State* held that a forensic autopsy report was testimonial.[342] Here, the medical examiner who performed the autopsy and prepared the autopsy report had retired by the time of trial.[343] A surrogate, the Chief Medical Examiner, testified at trial.[344] The surrogate "testified regarding the examination of the body conducted by [the medical examiner who performed the autopsy] and gave his own opinions on [the victim's] injuries and cause of death based on . . . observations as recorded in [the] autopsy report."[345] The prosecution urged the admission of the autopsy report as a business record, the preparation of which the statute required for multiple possible purposes.[346]

The *Cuesta-Rodriguez* court examined the statutory responsibilities of the medical examiner and held that a medical examiner must anticipate that a forensic "autopsy report involving a violent or suspicious death . . . should reasonably [be] expect[ed] to be used in a criminal prosecution."[347] The report would constitute testimonial evidence pursuant to *Crawford* and *Melendez-Diaz*.

Cuesta-Rodriguez also addressed the issue of whether a surrogate witness may use the contents of an otherwise testimonial forensic autopsy report as the basis of trial opinion testimony when the autopsy report is not introduced in evidence.[348] The answer is no. Applicable "evidence rules cannot trump the Sixth Amendments right of confrontation."[349] Therefore, a surrogate pathology witness, qualified as an expert, cannot base his or her trial opinions on evidence that would violate the Confrontation Clause due to its testimonial nature.[350]

342. Cuesta-Rodriguez v. State, 241 P.3d 214, 229 (Okla. Crim. App. 2010).
343. *Id.* at 226.
344. *Id.*
345. *Id.* at 226–27.
346. *Id.* at 227.
347. *Id.* at 228.
348. *Id.* at 229.
349. *Id.*
350. *Id.*

7. Texas

The appellate courts of Texas have twice recently pronounced the testimonial nature of forensic autopsy reports in cases involving the in-court testimony of surrogate medical examiners in which the reports were not offered into evidence.[351] The courts sent mixed messages, however, as to whether a surrogate witness may base in-court opinions on the review of testimonial autopsy reports.

a. Martinez v. State

In 2010, in *Martinez v. State*, a Texas court determined that the forensic autopsy report was testimonial.[352] Here, a police "officer attended the autopsy and took photographs of the body."[353] The medical examiner could reasonably assume "that his autopsy report would be used prosecutorially."[354] Additionally, the court adeptly noted that the content of the autopsy report would support the opinions of the surrogate medical examiner only if the content was true and that this "use of testimonial statements" would offend the Confrontation Clause.[355]

b. Wood v. State

In 2009, in *Wood v. State*, a surrogate medical examiner provided in-court testimony.[356] "The homicide detective who was the lead investigator in this case and a police evidence specialist attended the autopsy."[357] The court had no difficulty finding that the medical examiner who performed the autopsy "understood that the report containing her findings and opinions would be used prosecutorially."[358]

Curiously, the *Wood* court engaged in a tedious analysis as to whether the surrogate medical examiner could base his in-court opinions on a testimonial forensic autopsy report. First, the court held that "the Confrontation Clause was not offended when [the surrogate] testified to his own opinions regarding the nature and causes of [the victim's] injuries and death, even though those

351. Martinez v. State, 311 S.W.3d 104 (Tex. Ct. App. 2010); Wood v. State, 299 S.W.3d 200 (Tex. Ct. App. 2009).
352. *Martinez*, 311 S.W.3d at 111.
353. *Id.*
354. *Id.*
355. *Id.* at 112.
356. Wood v. State, 299 S.W.3d 200 (Tex. Ct. App. 2009).
357. *Id.* at 210.
358. *Id.*

opinions were based in part on [the surrogate's] review of [the] autopsy report."[359] Of course, this approach ignores the "house of cards" character of this form of opinion testimony. But then the *Wood* court noted that the surrogate "did more than merely offer his expert opinions. He also disclosed to the jury the testimonial statements in the autopsy report on which his opinions were based."[360] Because the contents of the forensic autopsy report only supported the surrogate's in-court opinions if the contents were true, the disclosure of the forensic autopsy report contents violated the Confrontation Clause.[361]

Frankly, it seems that the *Wood* court has recognized a distinction without a difference. The Confrontation Clause is no less involved when a surrogate medical examiner testifies to opinions based upon a testimonial forensic autopsy report than when the same witness discloses to the jury the specific findings contained in the report. In either case, the otherwise inadmissible report, testimonial in nature, informs the in-court opinion testimony solely due to its presumptive truth. Therefore, in either case, the forensic autopsy report as a testimonial statement is inadmissible as violative of the Confrontation Clause, and the surrogate's opinions based on the report should be inadmissible as well.

8. West Virginia

In 2012, in *State v. Kennedy*, the West Virginia Supreme Court of Appeals addressed the classic scenario: a murder prosecution, an autopsy, an autopsy report prepared by the examining pathologist, a surrogate pathologist providing in-court testimony, and the autopsy report admitted in evidence.[362] The surrogate pathologist also "offered testimony regarding the general methodology of performing autopsies."[363]

After reviewing relevant jurisprudence and noting the primary purpose of the autopsy report, the *Kennedy* court concluded "that, for purposes of use in criminal prosecutions, autopsy reports are under all circumstances testimonial."[364] Further, the court held that because a West Virginia statute[365]

359. *Id.* at 213.
360. *Id.*
361. *Id.*
362. State v. Kennedy, 735 S.E.2d 905 (W. Va. 2012).
363. *Id.* at 910.
364. *Id.* at 917.
365. W. VA. CODE ANN. § 61-12-13 (Westlaw 2013).

> compels the mandatory admission of an autopsy report or other testimonial document, in a criminal action, where the performing pathologist or analyst does not appear at trial and the State fails to establish that the pathologist or analyst is unavailable and that the accused has had a prior opportunity to cross-examine the witness, [the statute] is unconstitutional and unenforceable.[366]

B. States Holding Forensic Autopsy Reports to be Non-Testimonial

1. Arizona

Quite recently, in *State v. Medina*, the Supreme Court of Arizona considered an automatic appeal from a murder conviction and death sentence.[367] At issue on appeal was the admissibility of the forensic autopsy report, prepared by the examining pathologist, and the in-court testimony of a surrogate pathologist "who testified concerning the report's conclusions and used the report and photographs of the body to make various independent conclusions about the death."[368]

The Supreme Court of Arizona correctly noted that "[t]he United States Supreme Court ha[d] not determined whether an autopsy report is testimonial."[369] In referring to U.S. Supreme Court jurisprudence and its primary purpose and solemnity tests,[370] the court concluded that neither test was particularly helpful. The court pronounced, "[T]here is no binding rule for determining when reports are testimonial."[371]

Despite its recognition that neither the primary purpose nor solemnity tests were binding, the court applied both tests and concluded that the forensic autopsy report was not testimonial.[372] The purpose of the report "was not primarily to accuse a specified

366. *Kennedy*, 735 S.E.2d at 917.
367. State v. Medina, 306 P.3d 48, 55 (Ariz. 2013).
368. *Id.* at 62.
369. *Id.* at 63.
370. Williams v. Illinois, 132 S. Ct. 2221 (2012). The plurality opinion noted the abuses that trigger the right to confrontation include "out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct . . . ." *Id.* at 2242. In his concurrence, Justice Thomas argued the right to confrontation exists only when material is sufficiently solemn. *Id.* at 2259–60 (Thomas, J., concurring). The solemnity standard refers to the dignity of an affidavit. *Id.* at 2260.
371. *Medina*, 306 P.3d at 63.
372. *Id.* at 63–64.

individual" and was neither certified nor arose "from formal dialogue akin to custodial interrogation."[373]

Finally, the court had no problem with the in-court testimony of the surrogate pathologist. The in-court testimony revealed the surrogate's "independent conclusions" and did not violate the Confrontation Clause under Arizona law.[374]

2. California

In *People v. Dungo*, the Supreme Court of California considered the in-court testimony of a surrogate pathologist–expert who opined on the cause of the victim's death.[375] The forensic autopsy report was not introduced in evidence.[376] The surrogate pathology witness did not describe the victim's cause of death as specified in the forensic autopsy report.[377] The surrogate witness did describe the condition of the victim's body based the surrogate's review of the forensic autopsy report and autopsy photographs.[378] Therefore, the forensic autopsy report informed the in-court opinions of the surrogate.

Comparing the statements in the autopsy report, "describing the pathologist's anatomical and physiological observations about the condition of the body" to "observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment," the *Dungo* court, guided by *Melendez-Diaz*,[379] held those statements non-testimonial.[380]

The *Dungo* court determined that "criminal investigation was not the *primary* purpose for the autopsy report's description of the condition of [the victim's] body; it was only one of several purposes" based on California law.[381] The court adhered to this position even though a detective was present at the autopsy.[382]

Consequently, in *Dungo*, the court did not find the necessary formality or primary purpose of the forensic autopsy report to implicate the defendant's right of confrontation.[383]

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373. *Id.*
374. *Id.*
375. People v. Dungo, 286 P.3d 442 (Cal. 2012).
376. *Id.* at 444.
377. *Id.* at 444−46.
378. *Id.* at 444.
379. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).
380. *Dungo*, 286 P.3d at 449.
381. *Id.* at 450.
382. *Id.* at 449.
383. *Id.* at 450.

3. Florida

Banmah v. State[384] concerned a murder and armed robbery prosecution in which a surrogate medical examiner testified about the autopsy findings of the medical examiner who performed the autopsy, a practice permitted by Florida case law.[385] Without even a reference to U.S. Supreme Court jurisprudence, the *Banmah* court held that "autopsy reports are non-testimonial because they are prepared pursuant to a statutory duty, and not solely for use in prosecution."[386]

4. Illinois

a. People v. Leach

In 2012, in *People v. Leach*, the Supreme Court of Illinois addressed both aspects of the forensic autopsy evidentiary problem—the admission in evidence of the forensic autopsy report and the opinion testimony of a surrogate forensic pathologist.[387] *Leach* involved a murder conviction.[388] At trial, the defendant moved in limine to prevent trial testimony from a surrogate medical examiner, but the motion did not address the admission of the forensic autopsy report.[389] The prosecution's predictable position was that the court should permit the testifying medical examiner, as an expert witness, to give opinions at trial and rely on materials from the medical examiner who performed the autopsy.[390] The defendant's motion was denied.[391]

The surrogate medical examiner testified that "she had reviewed 'the autopsy protocol, the toxicology reports, [the] investigator's report, and photographs' that documented [the examining medical examiner's] external and internal examinations of the body."[392] The surrogate also gave opinions as to cause and manner of death.[393]

At trial, the court admitted the autopsy report into evidence without objection by the defendant.[394] The defendant's "posttrial

384. Banmah v. State, 87 So. 3d 101 (Fla. Dist. Ct. App. 2012).
385. *Id.* at 103.
386. *Id.*
387. People v. Leach, 980 N.E.2d 570 (Ill. 2012).
388. *Id.* at 572.
389. *Id.*
390. *Id.* at 573.
391. *Id.*
392. *Id.* at 575.
393. *Id.*
394. *Id.* at 577.

motion did not raise any issue in connection with the admission of the autopsy report itself."[395] However, the defendant did urge error in allowing the testimony of the surrogate medical examiner.[396]

The defendant's post-trial motion was denied.[397] On appeal, the appellate court noted that the defendant did not object to the introduction of the autopsy report in evidence and did not raise the issue in the post-trial motion.[398] The conviction was affirmed on appeal.[399]

As to *Crawford*,[400] the appellate court held that the autopsy report was a business record and that *Crawford* instructed that business records are not testimonial.[401] Further, the appellate court approved an expert's use of inadmissible evidence to explain the basis of an opinion as not violative of *Crawford*.[402]

The Supreme Court of Illinois determined that it would address the issue of the admissibility of the forensic autopsy report because it "implicates a fundamental constitutional right."[403] The court first determined that the forensic autopsy report was admissible under the Illinois evidence rules as a business record or a public record.[404] Additionally, the forensic autopsy report was admissible pursuant to a specific Illinois statute providing for admissibility.[405]

Next, the supreme court undertook an examination of *Crawford*,[406] *Melendez-Diaz*,[407] *Bryant*,[408] *Bullcoming*,[409] and *Williams*.[410] It concluded that the forensic autopsy report was not testimonial.[411] The report was "not prepared for the primary purpose of accusing a targeted individual," and it was not prepared "for the primary purpose of providing evidence in a criminal case."[412] Predictably, the court referred to the multiple purposes for which a forensic autopsy report may be used, concluding that the report is

395. *Id.* at 578.
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. Crawford v. Washington, 541 U.S. 36 (2004).
401. *Leach*, 980 N.E.2d at 578.
402. *Id.* at 579.
403. *Id.* at 581.
404. *Id.* at 582.
405. *Id.*
406. Crawford v. Washington, 541 U.S. 36 (2004).
407. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).
408. Michigan v. Bryant, 131 S. Ct. 1143 (2011).
409. Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).
410. Williams v. Illinois, 132 S. Ct. 2221 (2012).
411. People v. Leach, 980 N.E.2d 570, 582–90 (Ill. 2012).
412. *Id.* at 590.

"prepared in the normal course of operation of the medical examiner's office, to determine the cause and manner of death, which, if determined to be homicide, could result in charges being brought."[413] The court then offered a strained analysis suggesting that:

> [T]he autopsy finding of homicide did not directly accuse defendant. Only when the autopsy findings are viewed in light of defendant's own statement to the police is he linked to the crime. In short, the autopsy sought to determine how the victim died, not who was responsible, and, thus [the attending medical examiner] was not defendant's accuser.[414]

b. People v. Cortez

Leach followed the opinion of the Appellate Court of Illinois for the First District in *People v. Cortez*.[415] There, the appellate court held the forensic autopsy report was not testimonial; that it was a business record; and curiously, that it "was not admitted to establish or prove some fact at trial and did not lend itself to establishing defendant's guilt or innocence," urging that "[t]he cause and manner of the victim's death were not contested."[416] One might legitimately question the relevance of the forensic autopsy report if it was not admitted to prove a fact at trial.

c. People v. Brewer

It should be noted that the Appellate Court of Illinois for the First District recently followed *Leach* in *People v. Brewer*.[417] Here, the court emphasized that the autopsy report did not "link[ ] Brewer to the shooting and it is only when the autopsy findings are viewed in light of Brewer's own statement to the police and other evidence at trial is there a connection established between Brewer and the crime."[418] Further, the court approved the testimony of the surrogate medical examiner "'even if it had the effect of offering the report for the truth of the matters asserted therein.'"[419]

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413. *Id.* at 592.
414. *Id.*
415. People v Cortez, 931 N.E.2d 751 (Ill. App. Ct. 2010).
416. *Id.* at 756.
417. People v. Brewer, 987 N.E.2d 938 (Ill. App. Ct. 2013).
418. *Id.* at 951.
419. *Id.* (quoting *Leach*, 980 N.E.2d at 580).

5. Louisiana

The Court of Appeal of Louisiana for the Second Circuit considered the admissibility of the forensic autopsy report (coroner's report) and the surrogate pathology witness in *State v. Russell*.[420] Here, the examining coroner died prior to trial.[421] The coroner's report was admitted into evidence over the defendant's objection.[422] The surrogate pathologist based his trial opinions in part on the review of the autopsy report.[423] A Louisiana statute provided that "[a] coroner's report . . . shall be competent evidence of death and the cause thereof, but not of any other fact."[424] The court held that neither proof of death nor cause of death as stated in a coroner's report implicates an accused, and therefore, the report was non-testimonial.[425] The court characterized "the information contained in the report [as] routine, descriptive, nonanalytical, and thus, nontestimonial in nature."[426] Of course, this characterization suggests that an autopsy report contains objective data, not subject to the varying skill and judgment among forensic pathologists, a characterization that this Article disputes.[427] Even without a reference to *Russell*, another Louisiana appellate court has recently maintained this non-testimonial position.[428]

6. New Jersey

In 2013, a New Jersey appellate court concluded that the testimony of a surrogate medical examiner in a murder prosecution was constitutionally permissible.[429] The court affirmed the defendant's conviction in *State v. Bass*.[430] "An autopsy determined that the bullet that killed [the victim] had entered through her back and exited through her chest, passing through her lung and heart."[431]

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420. State v. Russell, 966 So. 2d 154 (La. Ct. App. 2007).
421. *Id.* at 159.
422. *Id.* at 159–60.
423. *Id.*
424. LA. CODE CRIM. PROC. ANN. art. 105 (2013); *Russell*, 966 So. 2d at 163.
425. *Russell*, 966 So. 2d at 164.
426. *Id.* at 165.
427. *See infra* Part V.
428. State v. Francis, No. 12-1221, 2013 WL 1459454 at *2 (La. Ct. App. 2013) (finding no error by lower court for admitting autopsy report over defendant's objection because autopsy report did not fall within scope of Confrontation Clause).
429. State v. Bass, No. 07-12-2903, 2013 WL 1798956, at *20 (N.J. Super. Ct. App. Div. Apr. 30, 2013) (per curiam).
430. *Id.* at *1.
431. *Id.* at *3.

The medical examiner who performed the autopsy and prepared the report died prior to trial.[432] The testifying medical examiner did not participate in the autopsy and, therefore, was a surrogate witness. He did review the autopsy photographs and report and, at trial, "concurred with [the attending medical examiner's] conclusions as to the cause and manner of . . . death."[433] The "autopsy report was not admitted into evidence, so . . . findings were only made known to the jury indirectly through the expert testimony of [the surrogate]."[434]

The court noted, having reviewed the relevant Supreme Court cases, that "[i]t is obvious that the United States Supreme Court's jurisprudence on these confrontation issues, in the aftermath of *Melendez-Diaz*, *Bullcoming*, and *Williams*, has been in a state of considerable flux."[435] Because the autopsy report was not admitted in evidence, the court did "not reach the controversial question of whether an autopsy report, by its very nature, is 'testimonial' for purposes of *Crawford* analysis."[436]

The court, however, noted that the surrogate witness "independently reviewed the evidence, including [the attending medical examiner's] findings, to reach his own conclusions."[437] This position is a bit disingenuous as the surrogate medical examiner "concurred with [the attending medical examiner's] conclusions as to the cause and manner of . . . death."[438] The court, despite having stated that it need not sound in on the testimonial or non-testimonial nature of the autopsy report, did just that, holding that the autopsy report was not "sufficiently 'formalized' to be considered 'testimonial' under the test expressed in Justice Thomas's concurring opinion in *Williams*."[439] In a footnote, the court also noted that the New Jersey Supreme Court would likely have the opportunity to resolve this issue.[440]

7. Ohio

In *State v. Craig*, the Supreme Court of Ohio addressed an aggravated murder conviction that involved an autopsy performed

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432. *Id.* at *16.
433. *Id.*
434. *Id.*
435. *Id.* at *19.
436. *Id.* at *19 n.4.
437. *Id.* at *20.
438. *Id.* at *16.
439. *Id.* at *20.
440. *Id.* at *20 n.5.

before the suspect was arrested.[441] The attending medical examiner retired prior to trial, and a surrogate medical examiner testified at trial.[442] The autopsy report was admitted in evidence.[443] Under Ohio law, the autopsy report was admissible as a public or business record, and the Supreme Court of Ohio, relying on *Crawford*,[444] held that business records are not testimonial, not having been prepared for litigation.[445]

8. South Carolina

In *State v. Cutro*, the Supreme Court of South Carolina noted that autopsy reports were excepted from the hearsay rule as public records.[446] It analogized autopsy reports to business records and, therefore, pursuant to the guidance of *Crawford*, held that the autopsy report was not testimonial.[447]

C. "Hybrid" Jurisdictions

A court's expression of the practical concern for the potential exclusion from evidence of the forensic autopsy report when the in-court witness is a surrogate is as follows:

> It bears mentioning that the blanket prohibition on the admission of autopsy reports . . . could result in practical difficulties for murder prosecutions. If, for example, the medical examiner who performed the autopsy passes away before a perpetrator is apprehended and tried, barring the use in evidence of the autopsy report could, in some situations, effectively amount to a statute of limitations on murder, where none otherwise exists.[448]

In order to combat the problem, an approach has been designed to permit the admission in evidence of "objective" findings contained in forensic autopsy reports. The basis of this approach is an assumption that autopsy findings are objective data as distinguished from the forensic pathologist's opinions as to cause of death and manner of death, both of which require the use of analysis and judgment. Essentially, the theory is that findings on external and

441. State v. Craig, 853 N.E.2d 621 (Ohio 2006).
442. *Id.* at 637.
443. *Id.*
444. Crawford v. Washington, 541 U.S. 36 (2004).
445. *Craig*, 853 N.E.2d at 638–39.
446. State v. Cutro, 618 S.E.2d 890, 896 (S.C. 2005).
447. *Id.*
448. People v. Hall, 923 N.Y.S.2d 428, 432 (N.Y. App. Div. 2011).

internal examination of the victim's body are not judgmental in nature, are not reliant on the skill of the examining pathologist, and would be duplicated if other pathologists had the opportunity to conduct the autopsy. Consequently, this approach concludes that the objective data—basic anatomical findings—are not testimonial, but the reporting of cause and manner of death is testimonial.

An example of the hybrid approach is shown in *People v. Hall*, a New York case concerning a first-degree murder conviction.[449] The victim's autopsy was performed (and report prepared) by a medical examiner who was out of state by the time of trial.[450] A surrogate medical examiner who had reviewed the autopsy report testified at trial.[451] The testifying medical examiner "made some references to facts contained in the autopsy report, [but] emphasized that all of the conclusions she reached were her own."[452] The autopsy report was admitted into evidence in its entirety as a business record.[453]

The *Hall* court relied on *People v. Freycinet*,[454] which stands for the proposition that "the factual part of the [forensic] autopsy report is nontestimonial and admissible."[455] The *Hall* court pronounced that "*Melendez-Diaz* did not explicitly hold that autopsy reports are testimonial."[456] This analysis is based on the fact that the medical examiner is obligated to determine cause of death in circumstances that may not implicate a crime (e.g., suicide or sudden deaths when in apparent good health) and that the "factual portions of the autopsy report consisting primarily of contemporaneous observations and measurements" record "only what happened to the victim, [and do] not directly link [a] defendant to the crime."[457] Because the defendant may cross-examine the surrogate witness as to the "objective" data in the autopsy report and the surrogate's "opinions" are his or her own as opposed to those of the attending pathologist, use of the surrogate witness does not implicate the Confrontation Clause.

Maryland has adopted this hybrid approach as well. In *Rollins v. State*, the Maryland Court of Special Appeals considered a conviction for murder and other crimes.[458] The defendant was charged with murder "after . . . [the] autopsy report concluded that

449. *Id.*
450. *Id.* at 429.
451. *Id.*
452. *Id.* at 429–30.
453. *Id.* at 429.
454. People v. Freycinet, 892 N.E.2d 843 (N.Y. 2008).
455. *Hall*, 923 N.Y.S.2d at 429 (citing *Freycinet*, 892 N.E.2d 843).
456. *Id*. at 430.
457. *Id.* at 432.
458. Rollins v. State, 866 A.2d 926 (Md. Ct. Spec. App. 2005).

the cause of death was smothering and the manner of death was homicide."[459] The forensic autopsy report indicated that the attending medical examiner was aware of a death investigation.[460] A surrogate medical examiner testified at trial, and her cause of death opinion was "based on the physical findings in [the attending medical examiner's] autopsy report and other information contained in the file."[461] The trial court redacted from the autopsy report the opinion of the attending medical examiner "that the manner of death was homicide by asphyxiation."[462] The remainder of the report was admitted in evidence, consisting of "routine and objectively ascertained findings . . . including the documentation of hemorrhaging to the mouth and other physical conditions of the victim"[463] In a footnote in its opinion, the court referred to three sections of the autopsy report it believed were "illustrative of the medical examiner's findings of the condition of the deceased which were objectively ascertained, generally reliable, and normally undisputed: Head[] (Central Nervous System) . . . Cardiovascular System . . . [and] Respiratory System."[464]

The hybrid approach, therefore, spares criminal prosecutions from potential failure by using a hearsay exception for the admission of the forensic autopsy report and dissecting from the report the opinions of the attending pathologist as to cause of death, as it is only those opinions that have "testimonial" dignity. The surrogate witness, despite having reviewed the autopsy reports, may then testify to his or her own opinions as to cause and manner of death and is subject to cross-examination as to those opinions, thus avoiding violation of the Confrontation Clause. The surrogate may testify to "objective data" (pathological findings) contained in the autopsy report without implicating the Confrontation Clause.

How, then, is this interesting evidentiary issue properly resolved? Are forensic autopsy reports testimonial, non-testimonial, or of a hybrid character? The federal courts of appeals and state courts are simply split. The United States Supreme Court has not directly addressed the issue. The next Section of this Article argues that medicine assists in the search for the answer.

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459. *Id.* at 931.
460. *Id.* at 931 n.1.
461. *Id.* at 937.
462. *Id.* at 952.
463. *Id.*
464. *Id.* at 952 n.12 (alteration to original).

V. THE VERDICT—FORENSIC AUTOPSY REPORTS ARE "TESTIMONIAL"

At this point, the parameters of the inquiry are well known and understood as follows:

- A death occurs, possibly due to criminal conduct.
- A crime scene investigation occurs, likely attended by police and persons employed by the medical examiner or coroner.
- The victim is taken to the office of the medical examiner or coroner.
- The medical examiner or coroner receives some investigatory information, and a pathologist performs a forensic autopsy.
- Law enforcement personnel are or are not in attendance at the autopsy.
- The attending forensic pathologist prepares a forensic autopsy report containing autopsy findings and opinions on cause and manner of death.
- The criminal defendant has or has not been arrested or charged by the time of the autopsy.
- The pathologist who performed the autopsy retires, dies, will not return for trial, or cannot be located and does not testify at the trial of the accused.
- The criminal prosecution ensues, and a surrogate pathologist testifies at trial for the prosecution. The surrogate pathologist has reviewed the forensic autopsy report, and it forms the basis of the testifying pathologist's opinions at trial.
- The forensic autopsy report (or some portion thereof) is admitted in evidence. At trial, the defendant cannot confront and cross-examine the pathologist who performed the autopsy and prepared the report.
- The defendant is convicted.

Also apparent is that courts are concerned with the administration of criminal justice and that the inadmissibility of forensic autopsy reports will hamper, if not derail, criminal prosecutions.[465]

As to the legal analysis, it is clear that a forensic autopsy report, if offered in evidence at trial for its truth, is classic hearsay. The report may very well fall within a recognized exception to the hearsay rule—the business record exception,[466] the public record

465. *See, e.g.*, People v. Hall, 923 N.Y.S.2d 428, 432 (N.Y. App. Div. 2011).
466. FED. R. EVID. 803(6).

exception,[467] or an exception created by a state-specific statute.[468] Further, since *Crawford*, a well-recognized exception to the hearsay rule will not trump the Sixth Amendment Confrontation Clause.[469] Therefore, the issue is whether forensic autopsy reports are testimonial.

Medical examiners and coroners perform their duties pursuant to legal authority and forensic autopsy reports are formal documents. Forensic autopsies are performed for a number of reasons, not the least of which is to investigate violent, and likely criminal, deaths. Forensic pathologists do not perform autopsies in a vacuum in the absence of some investigatory facts. It is true that the autopsy report will not typically, if ever, identify the criminal perpetrator. The forensic pathologist will, nevertheless, know that the details of a forensic autopsy may constitute evidence in a criminal prosecution.

Forensic autopsy reports do not look like transcripts of in-court or deposition testimony. They are, however, "official" documents. The office of the medical examiner or coroner clearly issues the reports. The attending pathologist then signs and dates the report. Therefore, they are issued pursuant to appropriate authority for official purposes, and their use as evidence in a criminal trial is foreseeable.

It is not necessary to look only to the law as the source of the formality attributable to forensic autopsy reports or to confirm that forensic pathologists must anticipate that their work will contribute to evidence used at a criminal trial. The National Association of Medical Examiners (NAME), the professional organization for those "who perform the official duties of the medicolegal investigation of deaths,"[470] has published "Forensic Autopsy Performance Standards."[471] These standards emphasize the following:

- "Medicolegal death investigation officers . . . are charged by statute to investigate deaths deemed to be in the public interest—serving . . . the criminal justice, civil justice and public health systems."[472]
- "Just as a surgeon does not operate without first preparing a history and physical examination, so must the forensic pathologist ascertain enough history and circumstances . . . to decide whether a forensic autopsy is

467. FED. R. EVID. 803(8).
468. *See* 725 ILL. COMP. STAT. ANN. 5/115-5.1 (West 2002).
469. Crawford v. Washington, 541 U.S. 36, 68 (2004).
470. *About NAME*, *supra* note 30.
471. NAME STANDARDS, *supra* note 28.
472. *Id.* at 7.

> indicated and to direct the forensic autopsy toward relevant case questions."[473]
> - "The forensic pathologist or representative shall: collect, package, label, and preserve all evidentiary items" and "document chain of custody of all evidentiary items."[474]
> - The need for a formal, written, signed and dated "postmortem examination report" that will include observations and descriptions of injuries, a detailed description of findings, "a list of the diagnoses and interpretations," and cause and manner of death.[475]

Thus, NAME clearly recognizes the formality of the forensic autopsy report as well as its evidentiary significance. So much for the argument against forensic autopsy report formality.

The crux of the confrontation issue—the need to confront and cross-examine the attending forensic pathologist—is that forensic pathologists are physicians. Physicians exercise judgment and make mistakes, whether they treat living, breathing patients or perform forensic autopsies. Courts that have adopted the view that forensic autopsy reports simply memorialize objective data are misinformed. Neither forensic pathologists nor forensic autopsy reports are fungible. Forensic pathologists would not necessarily report the same findings if each were, hypothetically, able to perform the same autopsy.

Prior to commenting on the specifics of the judgment of a forensic pathologist, a few comments on basic, clinical medical judgment are appropriate and provide some needed context regarding the role and responsibility of a physician. It has been urged that "[t]he quality of clinical judgment rendered by an individual physician who is faced by a patient seeking help is probably the most important determinant of the quality of the care he will provide."[476] Physician judgment constitutes one of the components of "assessment of clinical competence."[477] Clinical judgment has been defined as:

> the totality of the mental processes involved in all stages at which the clinician collects and interprets data; formulates a problem statement, confirms and refutes diagnostic hypotheses; considers, plans, and implements possible

473. *Id.* at 13.
474. *Id.* at 25.
475. *Id.* at 26.
476. John W. Williamson, *Assessing Clinical Judgment*, 40 J. MED. EDUC. 180, 180 (Feb. 1965).
477. *Id.*

> diagnostic and therapeutic options, tests, and interventions; and evaluates likelihoods and outcomes.[478]

Therefore, there is no underestimation of the significance of clinical medical judgment. Certainly, lapses in clinical medical judgment lead to medical errors.

Undoubtedly, clinical medical judgment, and lapses therefore, may be analogized to forensic pathology. That forensic pathologists make mistakes is well known to medical literature. In 1956, Moritz detailed these errors in his work, *Classical Mistakes in Forensic Pathology*.[479] Among these mistakes, he described the following:

- "Mistakes of Not Being Aware of the Objective of the Medicolegal Autopsy";[480]
- "Mistake of Performing an Incomplete Autopsy";[481]
- "Mistakes Resulting from Nonrecognition or Misinterpretation of Postmortem Changes";[482]
- "Mistake of Failing to Make an Adequate Examination and Description of External Abnormalities";[483]
- "Mistake of Confusing the Objective with the Subjective Sections of the Protocol";[484]
- "Mistake of Not Examining the Body at the Scene of the Crime";[485]
- "Mistake of Substituting Intuition for Scientifically Defensible Interpretation";[486]
- "Mistake of Not Making Adequate Photographs of the Evidence";[487]
- "Mistake of Not Exercising Good Judgment in the Taking or Handling of Specimens for Toxicologic Examination";[488] and
- "Errors . . . that result in the production of undesirable artifacts or in the destruction of valid evidence."[489]

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478. Gilbert M. Goldman, *The Tacit Dimension of Clinical Judgment*, 63 YALE J. BIOL. & MED. 47, 48 (1990).
479. Alan R. Moritz, *Classical Mistakes in Forensic Pathology*, 26 AM. J. CLINICAL PATHOLOGY 1383 (1956).
480. *Id.* at 1383.
481. *Id.* at 1384.
482. *Id.* at 1386.
483. *Id.* at 1387.
484. *Id.* at 1388.
485. *Id.* at 1389.
486. *Id.*
487. *Id.* at 1390.
488. *Id.* at 1391.
489. *Id.* at 1395.

That these mistakes occur in forensic pathology confirms the notion that "an autopsy cannot be any better than the understanding of the person who performs it."[490] "The tragic consequence of a poorly performed, partial, or superficial autopsy is an unjust or unrealistic verdict . . . ."[491] The forensic pathologist who fails in the forensic autopsy performance "may well be sowing the seeds of forensic disaster."[492]

The only vehicle by which a criminal defendant may explore the subjectivity involved in the performance of the forensic autopsy—to question the judgment of the examining forensic pathologist—is cross-examination. The in-court testimony of the surrogate forensic pathologist who examines the autopsy report prepared by the examining pathologist is an inadequate substitute. The surrogate witness is not the physician who was required to be familiar with the facts and the autopsy protocol, examine the victim's body, perform the autopsy procedure, make and report findings, and report the cause and manner of death. The cross-examination of the surrogate yields very little. The surrogate can rely on the autopsy findings with impunity. There is simply little to be gained by the defendant in the effort to cross-examine the surrogate. Cross-examination is the great truth-seeking test,[493] but it is an empty exercise when the surrogate testifies at trial.

VI. CONCLUSION

Although the United States Supreme Court has addressed the testimonial nature of certain forensic evidence, it has not addressed the forensic pathology report. Further, Supreme Court jurisprudence including and since *Crawford*[494] is ambiguous, confusing, and not particularly predictive on this point. "Testimonial" statements include testimony, but that is not a requirement. "Testimonial" statements suggest statements made with some degree of solemnity, formality, and authority, but those characteristics are moving targets. "Testimonial" statements should also have evidentiary consequences. There should be some understanding (if not

490. Milton Helpern, *The Immediate Screening of Deaths and the Responsibility of Official Pathologists*, 47 BULL. N.Y. ACAD. MED. 776, 778 (1971).

491. Lester Adelson, *The Anatomy of Justice*, 47 BULL. N.Y. ACAD. MED. 745, 746 (1971).

492. *Id.*

493. *See* KENNETH S. BROWN, MCCORMICK ON EVIDENCE §19, at 151−52 (7th ed. 2013); JOHN HENRY WIGMORE, WIGMORE'S CODE OF THE RULES OF EVIDENCE § 1315, at 259 (3d ed. 1942).

494. Crawford v. Washington, 541 U.S. 36 (2004).

anticipation) by the declarant that the statement will be used for evidence at a criminal trial.

The forensic autopsy report qualifies as a testimonial statement. Forensic pathologists are obligated to perform autopsies in cases of violent or otherwise criminally caused deaths. Forensic autopsy reports are formal, legal documents that are prepared pursuant to a formal protocol. They do not identify the culprit, but they do formally describe autopsy findings and report the cause and manner of death. Forensic pathologists are quite aware that their autopsy reports will be evidentiary and that the testimony of a forensic pathologist will be sought at trial. Because the examining pathologist is a physician who exercises judgment throughout the performance and reporting of the autopsy, the accused must be entitled to confront and cross-examine the examining forensic pathologist to test the validity of the autopsy and the pathologist's observations, conclusions, and opinions.

In the absence of Supreme Court guidance, what remains is a split of authority in the circuit courts of appeals and the state courts as to the testimonial nature of the forensic autopsy report. The non-testimonial characterization of the forensic autopsy report is convenient for the administration of criminal justice and results when courts do not appreciate the medicine that is at the core of the forensic autopsy. Medical decision-making and medical judgment cannot be cross-examined if the examining pathologist is not a witness at trial. When the examining pathologist is unable to testify at trial, the inadmissibility of the forensic autopsy report and the surrogate pathologist's testimony is the correct price to pay in order to preserve the protection of the Confrontation Clause.