PROTECTING THE ACCUSED AND OUR CRIMINAL JUSTICE SYSTEM'S INTEGRITY: AUTOPSY REPORTS ARE TESTIMONIAL IN HOMICIDE CASES

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The right to confront one's accuser at criminal trial is enshrined in the Bill of Rights and could find its origin in the Magna Carta. But this right is denied to many accused where an autopsy report is at question. This means that many thousands of Americans are not afforded one of the basic guarantees of our criminal justice system. The system must be changed to allow for such confrontation.

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* J.D., 2020, University of Illinois College of Law; B.A. in Theatre, Cedarville University; Research Attorney, Third District Appellate Court of Illinois. Special thanks to my wife and my first child who was born in the middle of the pandemic. I am desperately grateful that they kept me sane and stable during such a difficult time. I would also like to credit any legal success I encounter to Professor Andrew Leipold and Magistrate Judge Jonathan Hawley of the Central District of Illinois. Thank you for believing in me before I did. Finally, I must sincerely thank all the members of the University of Illinois Law Review for their edits, revisions, and suggestions on the successive versions of this Note. I could not have finished this without you.

I. INTRODUCTION

In 1985, Byron Halsey was a twenty-four-year-old man living with his girlfriend and her two children in Plainfield, New Jersey, working to provide for the family and raising the children as his own.[1] One night he returned home to find the children missing.[2] A repairman found their dead bodies in the basement the following morning.[3] Law enforcement interrogated Byron for thirty hours over the course of two days; he eventually confessed.[4]

Byron had a sixth-grade education and severe learning disabilities.[5] The interrogating detective later said that Byron appeared to be in a trance during questioning and described many of Byron's answers as "gibberish."[6] Undeterred, prosecutors argued that Byron's confession was valid.[7] They charged Byron with murdering and sexually assaulting both children and sought the death penalty.[8]

In 1988, a jury convicted Byron on two counts of felony murder and one count of aggravated sexual assault, sentencing him two life sentences plus twenty years.[9] When the jury announced that Byron would not receive the death penalty, "spectators in the courtroom jeered loudly."[10]

After a New Jersey law permitting post-conviction access to DNA testing took effect, the Innocence Project took on Byron's case and secured testing for

1. *Byron Halsey*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/byron-halsey/ (last visited May 27, 2021) [https://perma.cc/MX8N-LDXQ].
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

crime scene evidence.[11] The results proved Byron innocent.[12] By July of 2007, Byron was released, his conviction was vacated, and he was officially exonerated.[13] Byron served nineteen years—nearly half his life—in solitary confinement for crimes he did not commit.[14]

"The idea that a free citizen could be unjustly sentenced to prison or executed by the State is diametrically opposed to the concept of judicious treatment expected in the United States."[15] Wrongful convictions pose a dire threat to the public's faith in the legal system's ability to administer justice.[16] According to the National Registry of Exonerations, 2,720 people were convicted of crimes they did not commit and then exonerated between 1989 and November 2019.[17] Those innocent men and women collectively spent 24,609 years incarcerated, an average of 9.1 years per person.[18] This is not a new phenomenon; in 1923, Judge Learned Hand warned that the criminal justice system "has always been haunted by the ghost of the innocent man convicted."[19]

The criminal justice system rests on the foundational principle that no person is guilty until the prosecution meets its burden of proof.[20] The phrase "innocent until proven guilty" has permeated the American lexicon to near ubiquity.[21] In criminal cases, prosecutors must meet the highest burden of proof—"beyond a reasonable doubt"—to ensure our legal system does not wrongly convict and

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*. *See generally* NAT'L REGISTRY OF EXONERATIONS, *Byron Halsey*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3272 (Dec. 12, 2019) [https://perma.cc/6ALS-67XQ].

15. Joshua A. Jones, *Wrongful Conviction in the American Judicial Process: History, Scope, and Analysis*, 4 INQUIRES J. 1, 1 (2012).

16. THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW'S CONVICTION INTEGRITY PROJECT, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTORS' OFFICES 13 (2012), https://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf ("The issue of wrongful convictions is very much in the public's consciousness. As more individuals are exonerated for crimes that they did not commit, the public might perceive that wrongful convictions are a growing trend. This creates a risk that the public—which includes jurors, witnesses, and judges—will begin to lose confidence in prosecutors and view them as responsible. To combat this misperception, prosecutors have two choices. Prosecutors can allow defense-side groups or Innocence Projects to tout wrongful convictions and cast doubt on the legal system (even though they often represent a very small subset of cases brought), or prosecutors can take affirmative steps to safeguard and improve the integrity of their cases, thereby shaping the narrative on wrongful convictions.").

17. NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited May 27, 2021) [https://perma.cc/WA9J-QW7H].

18. *Id.*

19. Jones, *supra* note 15, at 1.

20. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE 562 n.1 (1898) ("'Law presumes that the prisoner is innocent until he is found guilty, but it were well to wager four to one that the jury will be satisfied of his guilt.'" (*quoting* Maitland, Justice, and Police. Macmillan & Co., 1885)); *Presumption of Innocence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/presumption_of_innocence (last visited May 27, 2021) [https://perma.cc/5BC5-BVNS] ("One of the most sacred principles in the American criminal justice system, holding that a defendant is innocent until proven guilty. In other words, the prosecution must prove, beyond a reasonable doubt, each essential element of the crime charged.").

21. Coffin v. United States, 156 U.S. 432, 456 (1895) (discussing the history of the presumption of innocence). *See generally* Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 JURIST 106 (2003).

punish innocent people.[22] William Blackstone, an eminent legal scholar of the 18th century, declared, "It is better that ten guilty persons escape than that one innocent suffer."[23]

The United States Constitution extends several protections to defendants: the Fourth Amendment protects against warrantless searches and seizures;[24] the Fifth Amendment secures defendants' due process rights, protects against double jeopardy, and prevents defendants from being compelled to testify against themselves;[25] and the Sixth Amendment guarantees defendants a "speedy and public" jury trial, an attorney's assistance during the judicial proceedings, and the right "to be confronted with the witnesses against him."[26] This final constitutional protection is commonly known as the Confrontation Clause.[27]

The Sixth Amendment's Confrontation Clause grants defendants the right to cross-examine those who testify against them.[28] It "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[29] This principle reflects the belief that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back,'"[30] and that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'"[31] The Confrontation Clause helps to ensure the criminal justice system affords defendants the opportunity to mount as robust a defense as possible.[32]

22. Charlene Sabini, *Burden of Proof: An Essay of Definition*, NALS: NALS DOCKET (Apr. 25, 2018), https://www.nals.org/blogpost/1359892/300369/Burden-of-Proof-An-Essay-of-Definition [https://perma.cc/K8DZ-XFQX] ("In a criminal case, the accused person is by law assumed innocent until the prosecution proves that he is guilty. The burden of proof in a criminal case rests on the prosecution, with no requirement that the defendant prove that he is innocent. The standard to which the prosecution must prove the defendant's guilt is much higher than in a civil case, as the defendant's freedom is often at risk. In a criminal matter, the prosecution must prove, *beyond a reasonable doubt*, that the defendant did the deed." (emphasis in original)).

23. 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

24. U.S. CONST. amend. IV.

25. *Id.* amend. V.

26. *Id.* amend. VI.

27. John G. Douglass, *The Heritage Guide to the Constitution: Confrontation Clause*, HERITAGE FOUND. (2020), https://www.heritage.org/constitution/#!/amendments/6/essays/156/confrontation-clause (last visited May 27, 2021) [https://perma.cc/AD76-PDH4].

28. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."); *see* Crawford v. Washington, 541 U.S. 36, 54 (2004) ("As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations.").

29. Coy v. Iowa, 487 U.S. 1012, 1016 (1988).

30. *Id.* at 1019.

31. *Id.* at 1017 (citation omitted).

32. Randolph N. Jonakait*, Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 585 (1988) ("The rights of notice, counsel, confrontation, and compulsory process constitutionalize the adversary system, and while we presume truth comes out of this system, the converging sixth amendment protections guarantee neither accurate determinations nor even the most reliable way to ascertain the facts. Instead, the accused is guaranteed an adversary criminal trial even if that is not the best truth-determining process for him. Just as the state cannot deny an accused a jury trial by establishing that a nonjury trial was the better way to determine the facts, the accused cannot be denied an adversary criminal trial even if an inquisitorial proceeding would have determined the truth better in the accused's case.").

In *Crawford v. Washington*,[33] Justice Scalia described the Confrontation Clause as targeted primarily toward "the principal evil . . . of *ex parte* examinations [used] as evidence against the accused[,]"[34] asserting that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[35] Scalia concluded that "the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine"[36] and that the Confrontation Clause "incorporates those limitations."[37] Thus, when a defendant does not receive the opportunity to cross-examine those who testify against him, or those who prepared documents to be used as evidence against him at trial, he is robbed of his constitutionally guaranteed rights under the Confrontation Clause.[38]

The Confrontation Clause applies to both out-of-court statements and in-court testimony[39] because the clause's text "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'"[40]

> An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.[41]

Based on Scalia's description of the Confrontation Clause in *Crawford*, if an expert prepared a document for a trial and the expert is unavailable to testify, that document is inadmissible because the defendant cannot cross-examine the document's preparer.[42] In a murder trial, perhaps the most high-stakes court proceeding, the autopsy report is frequently the central piece of evidence.[43] The

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

34. *Id.* at 50.

35. *Id.* at 53–54.

36. *Id.* at 54.

37. *Id.*

38. *See* U.S. CONST. amend. VI; *Confrontation*, JUSTIA: U.S. LAW, https://law.justia.com/constitution/us/amendment-06/10-confrontation.html#tc-222 (last visited May 27, 2021) [https://perma.cc/V9VR-WYR6] ("The right of confrontation is '[o]ne of the fundamental guarantees of life and liberty . . . long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union.'" (quoting Kirby v. United States, 174 U.S. 47, 55, 56 (1899))).

39. *Crawford*, 541 U.S. at 50–51 ("[W]e once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.'" (citation omitted)).

40. *Id.* at 51 (citation omitted).

41. *Id.*

42. *Id.* at 51–52.

43. Handar Subhandi Bakhtiar, Andi Muhammad Sofyan, Slamet Sampurno Soewondo, *The Essence of Autopsy in the Criminal Investigation Process*, 8 INT'L J. SCI. & TECH. RSCH. 9, 9 (2019).

Confrontation Clause is implicated when the medical examiner or coroner is unavailable to testify regarding the autopsy report.[44] The Confrontation Clause endows criminal defendants with the right to cross-examine the report's preparer.[45] If that individual is unavailable to testify, the admission of the autopsy report into evidence violates the defendant's Sixth Amendment Confrontation Clause right.[46]

After *Crawford*, testimonial hearsay violates the Confrontation Clause unless the defendant has the opportunity to cross-examine the report's preparer.[47] State and federal jurisdictions are split as to whether autopsy reports are testimonial, and those that conclude that they are testimonial disagree regarding whether surrogate testimony is sufficient to satisfy the Confrontation Clause.[48]

The United States Supreme Court should declare autopsy reports testimonial for Confrontation Clause purposes, thereby clarifying *Crawford* and its progeny, and resolving splits at the federal and state levels. This decision would reduce the likelihood that a homicide defendant would be convicted based on an autopsy report's admission where the defendant was not afforded the opportunity to cross-examine the report's preparer, thus decreasing the number of wrongful

44. *See* Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011).

45. *See id.* ("The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist."); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 ("In *Crawford* . . . . we held that it guarantees a defendant's right to confront those 'who bear testimony' against him. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.") (citing *Crawford*, 541 U.S. at 51, 54); *see also Crawford* 541 U.S. at 43, 50–51 ("The right to confront one's accusers is a concept that dates back to Roman times . . . [W]e once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.'") (citation omitted).

46. *See Melendez-Diaz*, 557 U.S. at 311 ("Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial.") (quoting *Crawford*, 541 U.S. at 54); *Bullcoming*, 564 U.S. at 657 ("As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.").

47. *See Bullcoming*, 564 U.S. at 657.

48. *See* Johnston v. Mahally, No. 15-cv-4800, 2017 U.S. Dist. LEXIS 50504, at *16 (D. Pa. Mar. 30, 2017) ("This Court finds there is 'fairminded disagreement' on the question whether autopsy reports are testimonial. For example, the eleventh Circuit has found autopsy reports to be testimonial, while the Second Circuit has found the opposite."); Daniel J. Capra & Joseph Tartakovsky, *Autopsy Reports and the Confrontation Clause: A Presumption of Admissibility*, 2 VA. J. CRIM. L. 62, 64–65 (2014).

convictions in this country.[49] This would help protect our criminal justice system's integrity,[50] begin to restore the public's faith in the criminal justice system,[51] and reinforce the constitutional rights afforded to defendants.[52]

Part II of this Note outlines the factual and legal background surrounding the current split over the testimonial, or non-testimonial, nature of autopsy reports. It describes how *Crawford* injected the testimonial hearsay concept into the Confrontation Clause analysis, and how the Supreme Court interpreted *Crawford* in subsequent cases. It also lays out the different ways that the Federal Circuit courts have interpreted how *Crawford* applies to autopsy reports, highlighting the divergence between the opposing approaches.

Part III analyzes the Supreme Court precedent regarding this issue, as well as the federal and state caselaw interpreting the Supreme Court's jurisprudence. It identifies the various justifications jurisdictions use to declare autopsy reports testimonial, as well as those used to reach the opposite conclusion. It also explores the interplay between these lines of reasoning and presents multiple perspectives on the issue. Additionally, it lays the groundwork for my recommendation that the Supreme Court should hold that autopsy reports are testimonial for Confrontation Clause purposes in homicide cases.

Part IV recommends that the Supreme Court declare autopsy reports testimonial for Confrontation Clause purposes, thereby clarifying *Crawford* and its progeny regarding testimonial evidence and resolving the current Federal and State court splits. This decision would protect the criminal justice system's integrity by solidifying defendants' rights, ensuring that murder convictions are not secured through reliance on autopsy reports presented in court where the medical examiner or coroner was not held accountable via cross-examination.[53]

Part V concludes that because the Confrontation Clause protects both the integrity of our criminal justice system and the constitutional rights of homicide defendants, the Supreme Court should reinforce the Confrontation Clause by determining that autopsy reports are testimonial in homicide cases and therefore

49. *See* Robert Dunham, *DPIC Analysis: Causes of Wrongful Convictions*, DEATH PENALTY INFO. CTR. (May 31, 2017), https://deathpenaltyinfo.org/stories/dpic-analysis-causes-of-wrongful-convictions [https://perma.cc/7QUE-WH5H] (identifying that 32.4% of death-row exonerations between 2007 and April 2017 involved false or misleading forensic evidence).

50. *See* Brian Saady, *Fighting Corruption in the U.S. Criminal Justice System*, AM. CONSERVATIVE: CRIM. JUST. (Dec. 13, 2018, 10:19 PM), https://www.theamericanconservative.com/articles/fighting-corruption-in-the-u-s-criminal-justice-system/ [https://perma.cc/Z4CN-KRWZ] ("[T]here is a clear crisis of credibility within the criminal justice system."); *Integrity in the Criminal Justice System*, U.N. OFF. ON DRUGS AND CRIME, https://www.unodc.org/unodc/en/corruption/criminal-justice-system.html (last visited May 27, 2021) [https://perma.cc/UK2B-SA6W] ("[T]he wider effects of corruption on the rule of law and sustainable development are not only harmful, but destructive, in particular when the justice sector, which should embody the principles of independence, impartiality, integrity and equality, is undermined.").

51. Ron Faucheux, *By the Numbers: Americans Lack Confidence in the Legal System*, ATLANTIC (July 6, 2012), https://www.theatlantic.com/national/archive/2012/07/by-the-numbers-americans-lack-confidence-in-the-legal-system/259458/ [https://perma.cc/4KLP-CJAF] ("[A] recent Gallup poll discovered merely 29 percent of Americans have a 'great deal' or 'quite a lot' of confidence in the criminal justice system.").

52. *See* U.S. CONST. amend. VI; *see also* Douglass, *supra* note 27.

53. *See* Andrew Higley, *Tales of the Dead: Why Autopsy Reports Should be Classified as Testimonial Statements Under the Confrontation Clause*, 48 NEW ENG. L. REV. 171, 191–92 (2013).

inadmissible unless the defendant receives the opportunity to cross-examine the report's preparer.

II. BACKGROUND

A. Factual Background

The Confrontation Clause gives defendants the right to confront those who testify against them in a criminal trial.[54] The Sixth Amendment specifically states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[55] Thus, the Confrontation Clause protects defendants from being convicted based on testimony that they could not cross-examine.[56] This includes documents prepared for trial, when the documents' preparer is unavailable to testify.[57]

Things get more complicated in homicide cases when the document is an autopsy report and its preparer is unavailable to testify. Autopsy reports are key components in many homicide cases because they include necessary information for the prosecution to meet their burden of proof, like the manner, mode, and time of death.[58] An autopsy report is often a vital information source for a prosecutor trying a homicide case.[59]

A defendant's Confrontation Clause rights clash with the autopsy report's importance to the prosecution's argument in a homicide case when the report's preparer is unavailable to testify. While this is not a problem in most homicide cases, a constitutional question presents itself when the medical examiner or coroner who prepared the autopsy report moves away,[60] dies before trial,[61] or is otherwise unavailable to testify. If the report's preparer cannot testify to the report's creation and accuracy, the defendant cannot cross-examine the preparer. If the defendant cannot cross-examine the preparer, entering the autopsy report into evidence would rob the defendant of their Sixth Amendment right to confront their accusers.[62]

54. *See* U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36, 54 (2004).

55. U.S. CONST. amend. VI.

56. *See id.*; *Crawford*, 541 U.S. at 53–54.

57. *Crawford*, 541 U.S. at 50–51.

58. *Autopsy Reports as Testimonial Evidence: How Important Are They?* CROOKS, LOW & CONNELL, S.C. (July 3, 2017), https://www.crooks-law.com/importance-of-autopsy-reports-as-testimonial-evidence/ [https://perma.cc/MC46-9ST2]; *Forensic Autopsy—A Body of Clues*, OFFICER.COM (Aug. 27, 2007), https://www.officer.com/investigations/article/10249533/forensic-autopsya-body-of-clues/ [https://perma.cc/AAQ2-CE9F].

59. *See Forensic Autopsy—A Body of Clues*, *supra* note 58 ("A murder victim's body is often a source of invaluable clues to what has happened at a crime scene. It is the job of the forensic pathologist performing a forensic autopsy to discover, collect and document these clues.").

60. As was the case in *People v. Leach*, where Dr. Eupil Choi conducted an autopsy and prepared an autopsy report in 2004, but then "retired and left the office" before trial in 2007. People v. Leach, 980 N.E.2d 570, 573 (Ill. 2012).

61. Like in *United States. v. MacKay*, where Dr. Maureen Frikke, who prepared the autopsy report in question, passed away before trial. United States v. MacKay, 715 F.3d 807, 826 (10th Cir. 2013).

62. *See Crawford*, 541 U.S. at 53–54.

In homicide cases, generally, the victim's family and community desperately want the court system to punish the defendant, often without regard for the defendant's constitutional rights. Their desire often puts enormous pressure on the prosecution, which already wants to secure a conviction to justify charging the defendant. Further, the court knows its actions must be just, and several scholarly articles contend there is no justice where an autopsy report's inadmissibility derails a homicide case.[63]

This conflict between a defendant's Confrontation Clause right and the justice system's desire to bring criminals to justice has split both federal and state courts.[64] Some courts declare autopsy reports testimonial and inadmissible when the report's preparer is unavailable to testify at trial,[65] while other courts have held that autopsy reports are nontestimonial and admissible under these circumstances.[66] The different legal reasonings courts use to reach these disparate conclusions will be addressed *infra* in Part III.

B. United States Supreme Court

1. Crawford v. Washington

In *Crawford v. Washington*, the United States Supreme Court held that testimonial hearsay is inadmissible where the defendant cannot cross-examine the individual who made the statement.[67] Writing for the court, Justice Scalia asserted that "[t]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[68] The Court further concluded the Sixth Amendment's language was unambiguous and provided no room for alternative interpretations:

> The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the 'right . . . to be confronted with the witnesses against him,' . . .

63. *See, e.g.*, Capra & Tartakovsky, *supra* note 48, at 93–94 ("[I]t is 'against society's interests to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case,' especially with such reliable, non-accusatory evidence." (quoting People v. Dungo, 286 P.3d 442, 457 (Cal. 2012)); Robert Molko, *The Law of Unintended Consequences Strikes Again: Does Murder Have a Statute of Limitations Now? The Sky Will Fall Unless the Supreme Court Changes Its Interpretation of the Right of Confrontation*, 63 DRAKE L. REV 527, 573 (2015) ("[T]o bar admission of the out-of-court records at issue here could undermine, not fortify, the accuracy of factfinding at a criminal trial. Such a precedent could bar the admission of other reliable case-specific technical information." (quoting Williams v. Illinois, 567 U.S. 50, 97 (2012) (Breyer, J., concurring)); Jesse J. Norris, *Who Can Testify About Lab Results After* Melendez-Diaz *and* Bullcoming*? Surrogate Testimony and the Confrontation Clause*, 38 AM. J. CRIM. L. 375, 423 n. 312 (2011) ("In homicide prosecutions, it is not uncommon for the prosecution to substitute as an expert at trial a medical examiner who was not the pathologist who actually performed the autopsy. In testifying to the manner and cause of death, these 'substitute medical examiners' routinely rely upon the autopsy report, photographs, and other data and information obtained or created in the course of the death investigation.").

64. *See* discussion *infra* Section II.B–C; Norris, *supra* note 63, at 381.

65. *See* discussion *infra* Section II.C.3; Crawford v. Washington, 541 U.S. 36, 54 (2004).

66. *See* discussion *infra* Section II.C.2; Michigan v. Bryant, 562 U.S. 344, 358–59 (2011).

67. *Crawford*, 541 U.S. at 59.

68. *Id.* at 53–54.

> is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.[69]

When describing what statements are "testimonial," the Court included "statements that 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."[70] The Court determined that testimonial statements also include "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,"[71] and "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[72]

Crawford clearly established that testimonial hearsay is inadmissible if the witness is unavailable to testify at trial, unless the defendant had the opportunity to cross-examine the witness prior to trial.[73] But the Court's defined testimonial hearsay categories did not provide sufficient clarity to avoid subsequent confusion.[74] Questions regarding what was and was not testimonial hearsay continued to reach the Court for another decade.[75]

2. Davis v. Washington

Two years after *Crawford*, the Supreme Court attempted to clarify what statements are testimonial—specifically, what statements are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"[76]—in *Davis v. Washington*.[77] In that case, which revolved around the issue of whether a victim's statements to a 911 emergency operator in which she sought protection from an ongoing domestic disturbance were testimonial, the Court introduced the "primary purpose" test: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[78] The Court explained that statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary

69. *Id.* at 54.
70. *Id.* at 52.
71. *Id.* at 51.
72. *Id.* at 51–52.
73. *Id.* at 53–54.
74. *See* discussion *infra* Section II.C.
75. *See* Bullcoming v. New Mexico, 564 U.S. 647 (2011); Michigan v. Bryant, 562 U.S. 344 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Davis v. Washington, 547 U.S. 813 (2006).
76. *Crawford*, 541 U.S. at 52.
77. *Davis*, 547 U.S. at 822.
78. *Id.* at 822.

purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[79]

Justice Thomas concurred with the *Davis* opinion, but called the primary purpose test "unpredictable" and presented his own test—the "solemnity test."[80] According to Justice Thomas, the challenged statements in *Davis* were admissible because they "carry sufficient indicia of solemnity to constitute formalized statements."[81] He insisted "the Confrontation Clause must include 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'"[82] Justice Thomas asserted that his solemnity test properly acknowledged the historical context and motivations that led our nation's founders to write the Confrontation Clause, and rejected the primary purpose test as "unworkable" and ineffective against "the abuses forbidden by the Clause."[83]

3. Melendez-Diaz v. Massachusetts

Three years later, the Court provided some clarity at the edges of the testimonial hearsay issue in *Melendez-Diaz v. Massachusetts*,[84] where it held that reports showing forensic analysis results are not admissible as business records when the "regularly conducted business activity is the production of evidence for use at trial."[85] The government had argued that affidavits written by witnesses who were unavailable to testify at trial were admissible under the business records exception to the hearsay exclusion rule.[86] The Court disagreed, holding that because the affidavits were "calculated for use essentially in the court, not in the business," they did not fall under the business records hearsay exception.[87]

Additionally, the Court corrected the respondent's misunderstanding regarding the relationship between the business records hearsay exception and the Confrontation Clause, explaining that evidence does not satisfy the Confrontation Clause simply because it falls under a hearsay exception:

79. *Id.*

80. *Id.* at 836–37 (Thomas, J., concurring) ("Admittedly, we did not set forth a detailed framework for addressing whether a statement is 'testimonial' and thus subject to the Confrontation Clause. But the plain terms of the 'testimony' definition we endorsed necessarily require some degree of solemnity before a statement can be deemed 'testimonial.' This requirement of solemnity supports my view that the statements regulated by the Confrontation Clause must include 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' Affidavits, depositions, and prior testimony are, by their very nature, taken through a formalized process. Likewise, confessions, when extracted by police in a formal manner, carry sufficient indicia of solemnity to constitute formalized statements and, accordingly, bear a 'striking resemblance,' to the examinations of the accused and accusers under the Marian statutes.") (citations omitted).

81. *Id.* at 837.

82. *Id.* at 836.

83. *Id.* at 842.

84. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307 (2009).

85. *Id.* at 321.

86. *Id.* ("Respondent argues that the analysts' affidavits are admissible without confrontation because they are 'akin to the types of official and business records admissible at common law.'").

87. *Id.* at 321–22.

> As we stated in *Crawford*: "Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy." Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.[88]

In his dissent, Justice Kennedy insisted the *Melendez-Diaz* affidavits were distinguishable from the challenged evidence in *Crawford* and *Davis* because the affidavits were not from "typical" eyewitnesses, but instead from scientific experts who did not have personal knowledge regarding the defendant's guilt:

> *Crawford* and *Davis* do not say—indeed, could not have said, because the facts were not before the Court—that anyone who makes a testimonial statement is a witness for purposes of the Confrontation Clause, even when that person has, in fact, witnessed nothing to give them personal knowledge of the defendant's guilt.[89]

Justice Kennedy dissented, warning that the *Melendez-Diaz* decision would throw many present and future prosecutions into question if a witness does not or cannot testify in court:

> For the sake of these negligible benefits, the Court threatens to disrupt forensic investigations across the country and to put prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician, now invested by the Court's new constitutional designation as the analyst, simply does not or cannot appear.[90]

Despite Justice Kennedy's full-throated dissent, which Chief Justice Roberts, Justice Breyer, and Justice Alito joined, the *Melendez-Diaz* opinion established the principle that forensic certificates created for use at trial do not fall under the business records exception to hearsay, and evidence can violate the Confrontation Clause even if it falls under a hearsay exception.[91] The opinion reinforced that a statement or report is testimonial hearsay if it was created for use as evidence at trial.[92]

88. *Id.* at 324.

89. *Id.* at 331 (Kennedy, J., dissenting).

90. *Id.* at 340–41 (Kennedy, J., dissenting).

91. *See id.* at 321–22.

92. *Id.* at 311 ("Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." (citation omitted)).

4. Michigan v. Bryant

In 2011, the Court published two opinions concerning the Confrontation Clause and testimonial hearsay.[93] In *Michigan v. Bryant*, the Court held that admitting a shooting victim's statements to the police did not violate the Confrontation Clause because the statements were made to aid the police in an ongoing emergency.[94] The statements were considered nontestimonial because their primary purpose was not for use as evidence in a trial.[95]

Writing for the court, Justice Alito asserted that the primary purpose determination is an objective one, which requires an analysis of both the declarant and the officer's words and actions:

> In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation . . . *Davis* requires a combined inquiry that accounts for both the declarant and the interrogator. In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers.[96]

The Supreme Court recognized that "there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony."[97] While hearsay rules cannot prevent testimonial hearsay from violating the Confrontation Clause, they are useful when making a primary purpose determination.[98] But when a statement is nontestimonial—its primary purpose is not for use as evidence at trial—hearsay rules determine the statement's admissibility.[99]

Justice Scalia dissented, insisting that the primary purpose determination must be made after an inquiry into only the declarant's perspective.[100] He contended a declarant-focused primary purpose inquiry[101] would be "the only inquiry that would work in every fact pattern implicating the Confrontation Clause,"[102] and an inquiry that took the officer's perspective into account would

93. *See* Michigan v. Bryant, 562 U.S. 344, 349 (2011); Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011).

94. *Bryant*, 562 U.S. at 375–78.

95. *Id.* at 361, n.8 ("The emergency is relevant to the 'primary purpose of the interrogation' because of the effect it has on the parties' purpose, not because of its actual existence.").

96. *Id.* at 367–68.

97. *Id.* at 358.

98. *Id.* at 358–59.

99. *Id.*

100. *Id.* at 380–81 (Scalia, J., dissenting).

101. As opposed to an inquiry conducted from the interrogator's perspective. In his dissent, Justice Scalia vehemently advocated that the Supreme Court conduct its analysis from the declarant's perspective, and not consider the interrogator's perspective, saying, "[B]ecause the Court picks a perspective so will I: The declarant's intent is what counts. In-court testimony is more than a narrative of past events; it is a solemn declaration made in the course of a criminal trial. For an out-of-court statement to qualify as testimonial, the declarant must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark; and he must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused." *Id.* (Scalia, J., dissenting).

102. *Id.* (Scalia, J., dissenting).

create a mixed-motive problem where the declarant and officer have conflicting or contradictory motives.[103]

5. Bullcoming v. New Mexico

In June 2011, the Court held that using surrogate testimony to introduce a blood-alcohol analysis report was insufficient to satisfy the Confrontation Clause in *Bullcoming v. New Mexico*.[104] Citing *Crawford*, the Court stressed that a report's reliability was unimportant in a Confrontation Clause analysis because the Confrontation Clause does not require "that evidence be reliable, but that reliability be assessed in a particular manner: by testing [the evidence] in the crucible of cross-examination."[105] A statement's reliability does not affect the Confrontation Clause analysis: "[T]he analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.'"[106]

In her partial concurrence, Justice Sotomayor observed that *Bullcoming* did not address several potentially challenging factual scenarios, such as where the prosecution argues that the evidence's primary purpose was not for use at trial, a surrogate witness was personally connected to the challenged evidence, an expert witness gave his opinion about testimonial reports not in evidence, or the prosecution seeks to enter only machine-generated results.[107]

Justice Kennedy again dissented, challenging the apparent inconsistencies between the *Bryant* and *Bullcoming* decisions.[108] Kennedy observed that the majority held the *Bullcoming* reports violated the Confrontation Clause, despite their apparent reliability, "because reliability does not animate the Confrontation Clause,"[109] but in *Bryant*, "reliability was an essential part of the constitutional inquiry."[110]

Justice Kennedy further decried the ambiguity created by the *Bullcoming* decision, observing that *Melendez-Diaz* determined that only testimony from a report's preparer at trial could satisfy the Confrontation Clause, while *Bullcoming* permitted that anyone "competent" to testify to a report's validity and veracity could testify at trial and satisfy the confrontation clause:

103. *Id.* at 383 (Scalia, J., dissenting) ("Sorting out the primary purpose of a declarant with mixed motives is sometimes difficult. But adding in the mixed motives of the police only compounds the problem. Now courts will have to sort through two sets of mixed motives to determine the primary purpose of an interrogation. And the Court's solution creates a mixed-motive problem where (under the proper theory) it does not exist—viz., where the police and the declarant each have one motive, but those motives conflict. The Court does not provide an answer to this glaringly obvious problem, probably because it does not have one.").

104. Bullcoming v. New Mexico, 564 U.S. 647, 658–61 (2011).

105. *Id.* at 661 (citing Crawford v. Washington, 541 U.S. 36, 61–62 (2004)).

106. *Id.* (quoting Melendez–Diaz v. Massachusetts, 557 U.S. 305, 319–20, n.6 (2009)).

107. *Id.* at 672–74 (Sotomayor, J., concurring).

108. *Id.* at 678 (Kennedy, J., dissenting).

109. *Id.* (Kennedy, J., dissenting).

110. *Id.* (Kennedy, J., dissenting).

> It is not even clear which witnesses' testimony could render a scientific report admissible under the Court's approach. *Melendez–Diaz* stated an inflexible rule: Where "analysts' affidavits" included "testimonial statements," defendants were "entitled to be confronted with the analysts" themselves. Now, the Court reveals, this rule is either less clear than it first appeared or too strict to be followed. A report is admissible, today's opinion states, if a "live witness competent to testify to the truth of the statements made in the report" appears. Such witnesses include not just the certifying analyst, but also any "scientist who . . . perform[ed] or observe[d] the test reported in the certification."[111]

Lastly, Justice Kennedy warned that the *Crawford* decision was already negatively impacting law enforcement offices,[112] deeming the caselaw's judicial impact "at odds with the sound administration of justice."[113] Justice Kennedy urged the Supreme Court to "return to solid ground," saying "[a] proper place to begin that return is to decline to extend *Melendez–Diaz* to bar the reliable, commonsense evidentiary framework" that the prosecution used.[114]

6. Williams v. Illinois

Finally, in *Williams v. Illinois*,[115] a plurality of the Supreme Court held that "the use at trial of a DNA report prepared by a modern, accredited laboratory bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate."[116] When a witness affirmatively answered a question that included information contained in a DNA report she did not prepare, the court held the testimony did not violate the Confrontation Clause because the evidence was not entered to confirm the truth of the matter: "[T]hat fact was a mere premise of the prosecutor's question," and the witness "simply assumed that premise to be true when she gave her answer indicating that there was a match between the two DNA profiles."[117] The court concluded "[t]here is no reason to think that the trier of fact took [the witness's] answer as substantive evidence to establish where the DNA profiles came from."[118]

The court distinguished the DNA report from the *Melendez-Diaz* and *Bullcoming* forensic reports, stating the forensic report preparers must have known their work would be used at trial against the respective defendants, who were already in custody when the reports were made, while the DNA report preparers did not know their report would be used against a specific defendant, but only

111. *Id.* at 678–79 (Kennedy, J., dissenting) (internal citations omitted).

112. *Id.* at 683. (Kennedy, J., dissenting) ("[T]he 10 toxicologists for the Los Angeles Police Department spent 782 hours at 261 court appearances during a 1–year period . . . each blood-alcohol analyst in California processes 3,220 cases per year on average . . . [f]rom 2008 to 2010, subpoenas requiring New Mexico analysts to testify in impaired-driving cases rose 71%, to 1,600—or 8 or 9 every workday.").

113. *Id.* at 684. (Kennedy, J., dissenting).

114. *Id.* (Kennedy, J., dissenting).

115. Williams v. Illinois, 567 U.S. 50 (2012).

116. *Id.* at 86 (internal citations omitted).

117. *Id.* at 72.

118. *Id.*

that their report would be used "to catch a dangerous rapist who was still at large."[119]

The court observed the *Melendez-Diaz* and *Bullcoming* forensic reports "were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial," neither case involved an ongoing emergency, the tests in question could be performed by a single analyst, and "the technicians who prepared the reports must have realized that their contents (which reported an elevated blood-alcohol level and the presence of an illegal drug) would be incriminating."[120]

The court asserted that the *Williams* DNA report, conversely, was not created "to accuse petitioner or to create evidence for use at trial" because "[w]hen lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be."[121] A plurality of the Court concluded that because lab technicians who create a DNA profile have no way of knowing whether their work will incriminate or exonerate someone, their work's primary purpose is not for use as evidence at trial.[122] The plurality also recognized that the practice in many DNA labs is to have multiple technicians working on each DNA profile, concluding that "[w]hen the work of a lab is divided up in such a way, it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures."[123]

Justice Kagan authored the dissent, which Justices Scalia, Ginsburg, and Sotomayor joined, arguing that the testimony in *Williams* was "functionally identical" to the *Bullcoming* surrogate testimony.[124] The *Williams* witness could not share what the report's actual preparer knew and observed regarding the test and the process used, nor could the witness's testimony "expose any lapses or lies on the testing analyst's part."[125] According to Justice Kagan, this was sufficient to resolve the case.[126]

Justice Kagan also challenged the court's truth-of-the-matter-asserted analysis.[127] She pointed out that this specific limitation was rooted in *Crawford*, which stated, "[t]he Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[128] But, in the context in which *Crawford* acknowledged the Confrontation Clause's not-for-the-truth carveout, the statement's truthfulness was immaterial,[129] while in *Williams*, "the statement's utility is then dependent on its truth. If the statement is true, then the conclusion based on it is probably true; if not, not."[130]

119. *Id.* at 84.
120. *Id.*
121. *Id.* at 85.
122. *Id.* at 84–85.
123. *Id.* at 85.
124. *Id.* at 124. (Kagan, J., dissenting).
125. *Id.* (Kagan, J., dissenting).
126. *Id.* at 125. (Kagan, J., dissenting).
127. *Id.*
128. *Id.*
129. *Id.* at 126 (Kagan, J., dissenting).
130. *Id.* (Kagan, J., dissenting).

In his concurrence, Justice Breyer voiced his dissatisfaction with both the plurality and the dissent.[131] He bemoaned the Court's failure to answer the question that he believed to be most pertinent: "How does the Confrontation Clause apply to crime laboratory reports and underlying technical statements made by laboratory technicians?"[132] Justice Breyer relied on the reasoning espoused in the *Melendez-Diaz* and *Bullcoming* dissents to argue the DNA report was not testimonial, and therefore did not violate the Confrontation Clause.[133]

Justice Breyer agreed that because the DNA report was not created for use against one specific defendant, it did not satisfy the primary purpose test to determine whether a statement was testimonial: "[H]ere the DNA report sought, not to accuse petitioner, but instead to generate objectively a profile of a then-unknown suspect's DNA from the semen he left in committing the crime."[134]

Justice Breyer concluded by expressing his concern that declaring similar forensic reports testimonial would compromise a criminal trial's outcome, stating "to bar admission of the out-of-court records at issue here could undermine, not fortify, the accuracy of factfinding at a criminal trial."[135] He predicted the very issue on which this Note focuses, warning that the dissent's reasoning would make it possible to prevent autopsy reports from being used as evidence in murder trials where the report's preparer does not testify at trial:

> Such a precedent could bar the admission of other reliable case-specific technical information such as, say, autopsy reports. 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]

C. Federal Circuit Split

Since the Court has failed to define clearly the "testimonial" definition's limits or maintain a consistent application of the primary purpose test, the federal courts are split regarding whether autopsy reports are testimonial.[137] The First and Second Circuits determined that autopsy reports are nontestimonial, while the Eleventh and D.C. Circuits reached the opposite conclusion.[138] The Fourth

131. *Id.* at 86 (Breyer, J., concurring).

132. *Id.* at 89. (Breyer, J., concurring).

133. *Id.* at 93. (Breyer, J., concurring).

134. *Id.* at 97. (Breyer, J., concurring).

135. *Id.* (Breyer, J., concurring).

136. *Id.* at 97–98 (Breyer, J., concurring) (internal citations and quotations omitted).

137. *See*, *e.g.*, Nardi v. Pepe, 662 F.3d 107, 111–12 (1st Cir. 2011) (holding autopsy reports are non-testimonial); United States v. James, 712 F.3d 79, 88 (2d Cir. 2013); United States v. Ignasiak, 667 F.3d 1217, 1220 (11th Cir. 2012) (holding autopsy reports are testimonial); United States v. Moore, 651 F.3d 30, 69–70 (D.C. Cir. 2011).

138. *See supra* note 137 (collecting cases).

and Ninth Circuits left their opinions on this issue unpublished,[139] choosing to avoid making a binding determination until the Supreme Court provides more concrete guidance.

1. First Circuit

The First Circuit dealt with this issue in *United States v. De La Cruz*,[140] holding that autopsy reports fall under the business records hearsay exception, "and business records are expressly excluded from the reach of *Crawford*."[141] The First Circuit held that autopsy reports qualify as business records because they are "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" and they involve "a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy."[142]

It is important to note that the *Crawford* passage cited by the First Circuit does not explicitly state business records are automatically nontestimonial; instead, the passage says "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy."[143] Part III discusses in greater detail whether autopsy reports are business records, and if they are, whether that is sufficient to avoid violating the Confrontation Clause. For now, it is enough to know that the First Circuit declared autopsy reports nontestimonial by classifying them as business records.[144]

The First Circuit revisited the issue in *Nardi v. Pepe*,[145] after the Supreme Court's *Melendez-Diaz* and *Bullcoming* decisions, once again holding that autopsy reports were nontestimonial.[146] The First Circuit refused to analyze either Supreme Court decisions or reach a firm conclusion, saying "it is uncertain how the Court would resolve the question."[147] The court ultimately relied on its *De La Cruz* holding, stating: "We treated such reports as not covered by the Confrontation Clause, but the law has continued to evolve and no one can be certain just what the Supreme Court would say about that issue today."[148]

139. Mitchell v. Kelly, 520 F. Appx 329, 331 (6th Cir. 2013) (per curiam); McNeiece v. Lattimore, 501 F. App'x 634, 636 (9th Cir. 2012).

140. United States v. De La Cruz, 514 F.3d 121 (1st Cir. 2008).

141. *Id.* at 133.

142. *Id.*

143. Crawford v. Washington, 541 U.S. 36, 56 (2004).

144. *De La Cruz*, 514 F.3d at 133.

145. Nardi v. Pepe, 662 F.3d 107 (1st Cir. 2011).

146. *Id.* at 110–12.

147. *Id.* at 111.

148. *Id.* (internal citations omitted).

2. Second Circuit

The Second Circuit initially applied the First Circuit's approach to this issue and reached the same conclusion.[149] In *United States v. Feliz*,[150] a post-*Crawford* and pre-*Melendez-Diaz* case, the Second Circuit held that autopsy reports qualify as business records because they are "kept in the course of a regularly conducted business activity" and because "the Office of the Chief Medical Examiner of New York conducts thousands of routine autopsies every year, without regard to the likelihood of their use at trial."[151] Thus, the Second Circuit declared autopsy reports nontestimonial.[152]

The Second Circuit affirmed this conclusion in *United States v. James*,[153] a post-*Williams* case, this time analyzing the context in which the report was created.[154] The Second Circuit acknowledged the *Melendez-Diaz* and *Bullcoming* decisions cast doubt over their *Feliz* reasoning, but struggled to determine what test to apply after *Williams*.[155] Ultimately, the Second Circuit relied on the Supreme Court's pre-*Williams* precedent because the *Williams* plurality failed to yield a test that a majority of the Supreme Court supported.[156] The Second Circuit concluded that the autopsy report was nontestimonial because it was not prepared for use as evidence at trial in that case—the report was completed and signed long before any criminal investigation into the victim's death began.[157]

3. Eleventh Circuit

Contrary to the First and Second Circuits, the Eleventh Circuit concluded that autopsy reports were testimonial in *United States v. Ignasiak*.[158] Applying the reasoning used in *Crawford*, *Melendez-Diaz*, and *Bullcoming*, the Eleventh Circuit held that the autopsy reports presented were prepared for use at trial.[159] The court addressed the argument that autopsy reports are nontestimonial because they are business records—the reasoning both the First and Second Circuits used to declare autopsy reports nontestimonial—by saying the "business record exception does not encompass documents generated by an entity that regularly 'produc[es] . . . evidence for use at trial,'" quoting *Melendez-Diaz*.[160]

The court observed that Florida's Medical Examiners Commission exists as part of the Department of Law Enforcement, and each time the medical examiner makes a cause of death determination he is statutorily required to report that

149. *See generally* United States v. Feliz, 467 F.3d 227 (2d Cir. 2006).
150. *Id.*
151. *Id.* at 236.
152. *Id.* at 237.
153. United States v. James, 712 F.3d 79, 87–88 (2d Cir. 2013).
154. *Id.* at 97–99.
155. *Id.* at 94.
156. *Id.* at 95–96.
157. *Id.* at 99.
158. United States v. Ignasiak, 667 F.3d 1217, 1231 (11th Cir. 2012).
159. *Id.*
160. *Id.*; Melendez-Diaz v. Massachusetts, 557 U.S. 305, 321 (2009).

determination to the state attorney.[161] Relying on this statutory framework, the court determined that autopsy reports are testimonial for Confrontation Clause purposes, "even though not all Florida autopsy reports will be used in criminal trials," because they are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[162]

Additionally, the court insisted their determination regarding autopsy reports' testimonial nature was correct because "medical examiners are not mere scriveners reporting machine generated raw-data."[163] Because the data and observations included in an autopsy report "are the product of the skill, methodology, and judgment of the highly trained examiners who actually performed the autopsy," the report's preparer should be subjected to cross-examination in order to satisfy the Confrontation Clause.[164] The court reiterated that autopsy reports are "replete with the extensive presence and intervention of human hands and exercise of judgment that 'presents a risk of error that might be explored on cross-examination,'"[165] and may be "invalid or unreliable because of the examiner's errors, omissions, mistakes, or bias."[166]

The Eleventh Circuit concluded by analogizing autopsy reports to other forensic evidence used at trial:

> In this way, these autopsy reports are like many other types of forensic evidence used in criminal prosecutions. They may be invalid or unreliable because of the examiner's errors, omissions, mistakes, or bias. To paraphrase the Supreme Court's reasoning in *Melendez-Diaz*, "there is little reason to believe that confrontation will be useless in testing medical examiners's [*sic*] honesty, proficiency, and methodology—the features that are commonly the focus in the cross-examination of experts."[167]

4. D.C. Circuit

The D.C. Circuit likewise held that autopsy reports are testimonial in *United States v. Moore*.[168] Quoting *Melendez-Diaz* and *Bullcoming*, the D.C. Circuit explained that testimonial statements are "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact are testimonial statements. Put another way, [a] document created solely for an evidentiary purpose . . . made in aid of a police investigation, ranks as testimonial."[169]

The court analogized autopsy reports to the *Bullcoming* lab reports and applied the Supreme Court's *Bullcoming* reasoning.[170] Because the Office of the

161. *Ignasiak*, 667 F.3d at 1232.
162. *Id.*
163. *Id.*
164. *Id.* at 1232–33.
165. *Id.* at 1233.
166. *Id.*
167. *Id.*
168. United States v. Moore, 651 F.3d 30, 73 (D.C. Cir. 2011) (per curiam).
169. *Id.* at 72 (citations omitted).
170. *Id.* at 73.

Medical Examiner is statutorily required to comply when a law enforcement agency requests an investigation into a person's death, officers are frequently present when autopsies are conducted, and "the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are 'circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"[171]

The D.C. Circuit acknowledged the argument that autopsy reports are business records in a footnote, saying that it was "unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent."[172]

5. Sixth and Ninth Circuits

While neither the Sixth Circuit nor the Ninth Circuit has published an opinion deciding whether autopsy reports are testimonial, both courts have discussed the issue in unpublished opinions.[173] In *Mitchell v. Kelly*,[174] the Sixth Circuit declined the opportunity to declare autopsy reports testimonial in light of the lack of clear Supreme Court precedent regarding the testimonial nature of autopsy reports:[175]

> While subsequent Supreme Court decisions addressed whether forensic laboratory reports are testimonial, at the time of Mitchell's direct appeal, no Supreme Court precedent clearly established that an autopsy report constitutes testimonial evidence . . . We agree with the district court that the decision of the Ohio Court of Appeals was not an unreasonable application of *Crawford* given the lack of Supreme Court precedent establishing that an autopsy report is testimonial.[176]

Likewise, in *McNeiece v. Lattimore*,[177] the Ninth Circuit held that a trial court did not unreasonably apply clearly established precedent by admitting portions of an autopsy report into evidence under the business record hearsay exception because the Supreme Court caselaw had not clearly established that autopsy reports are testimonial.[178] The Ninth Circuit avoided deciding whether *Melendez-Diaz* and *Bullcoming* established autopsy reports as testimonial because both Supreme Court cases were decided after the *McNeiece* defendant's conviction was finalized.[179]

While neither *Mitchell* nor *McNeiece* is precedential, these cases demonstrate the Fourth Circuit and Ninth Circuit's hesitancy to declare autopsy reports

171. *Id.* (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009)).

172. *Id*. at 73, n.16.

173. *See, e.g.*, Mitchell v. Kelly, 520 F. App'x 329, 331 (6th Cir. 2013) (per curiam); McNeiece v. Lattimore, 501 F. App'x 634, 636 (9th Cir. 2012).

174. *Mitchell*, 520 F. App'x at 329.

175. *Id.* at 331.

176. *Id.*

177. *McNeice*, 501 F. App'x at 634.

178. *Id.* at 636.

179. *Id.*

testimonial. In both instances, the courts let the lower court's decision stand because the Supreme Court had not explicitly commanded the opposite outcome.[180] Both courts pointed to the Supreme Court's obfuscation regarding autopsy reports' testimonial status as the primary factor in their decisions, indicating the Supreme Court should address this question directly.[181]

III. ANALYSIS

Autopsy reports are testimonial in homicide cases because they are prepared for use in legal proceedings and they provide information material to those proceedings, thereby satisfying the Supreme Court's objective reasonable belief test and the broad interpretation of the Supreme Court's primary purpose test for determining whether hearsay evidence is testimonial.[182] Autopsy reports may also satisfy Justice Thomas's solemnity test, as the reports are frequently conducted within a statutory framework and their findings are often certified by the preparer, indicating solemnity and formality.[183] Even if autopsy reports were not testimonial, they would be inadmissible in the homicide context because they are hearsay and do not fall under any exceptions.[184] Furthermore, surrogate testimony would not prevent the reports from running afoul of the Confrontation Clause.[185]

According to Professor Marc D. Ginsberg, "a forensic autopsy report, if offered in evidence at trial for its truth, is classic hearsay."[186] Therefore, to be admissible under federal and state evidence rules, an autopsy report must fall

180. *See Mitchell*, 520 F. App'x at 331; *McNeiece*, 501 F. App'x at 636.

181. *See Mitchell*, 520 F. App'x at 331; *McNeiece*, 501 F. App'x at 636.

182. *See* Crawford v. Washington, 541 U.S. 36, 51–52; Marc D. Ginsberg, *The Confrontation Clause and Forensic Autopsy Reports—A "Testimonial"*, 74 LA. L. REV. 117, 119 (2013) ("The forensic autopsy report is an important component of a criminal homicide prosecution. The report, which is used to memorialize the cause and manner of death under the auspices of a coroner's or medical examiner's office, constitutes a significant phase of a death investigation that is used to (hopefully) convict the guilty and exonerate the innocent." (quotation omitted)); Higley, *supra* note 53, at 194 ("First, there is no doubt that autopsies can provide a relevant fact for trial: In fact[,] . . . they can provide the most relevant fact for trial (cause or manner of death) . . . . Next, pathologists are fully aware that their reports may be used by law enforcement as part of an investigation, and thus they may reasonably believe that the reports may be used later at trial.").

183. *See, e.g.*, United States v. Ignasiak, 667 F.3d 1217, 1231–32 (11th Cir. 2012); Commonwealth v. Brown, 139 A.3d 208, 212–13 (Pa. Super. Ct. 2016); *see also* Davis v. Washington, 547 U.S. 813, 836–38 (2006) (Thomas, J., concurring).

184. *See* Matthew Yanovitch, *Dissecting the Constitutional Admissibility of Autopsy Reports After Crawford*, 57 CATH. U. L. REV. 269, 274 (2007).

185. *See infra* Sections III.B–D; *see also* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009) ("Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.").

186. Ginsberg, *supra* note 182, at 166.

under a widely recognized hearsay exception.[187] But autopsy reports do not fall under any such exception; per the Court's decision in *Melendez-Diaz*,[188] they neither qualify as business records, nor do they qualify as public records for hearsay exception purposes.[189]

Even if autopsy reports did fall under a hearsay exception, however, the Confrontation Clause issue would remain unaddressed.[190] The hearsay exception would only resolve the hearsay issue.[191] An exception to one evidence rule does not satisfy all other evidentiary requirements.[192] For example, evidence may satisfy Federal Rule of Evidence 403, which prohibits evidence that is substantially more prejudicial than it is probative to the issue at hand, but not the Fourth Amendment's protection against unreasonable searches and seizures.[193] Likewise, evidence may satisfy the rule against hearsay but not the Confrontation Clause.[194]

A. The Supreme Court's Tests for Determining Whether Hearsay Evidence Is Testimonial

1. Crawford*'s Objective Reasonable Belief Test*

Autopsy reports are testimonial in homicide cases because medical examiners and coroners prepare them for use in legal proceedings, and they provide information that is material to those proceedings.[195] *Crawford* described testimonial statements as "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"[196] and "material . . . that declarants would reasonably expect to be used prosecutorially."[197]

187. *Id.* at 120 ("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, which is inadmissible unless it fits within a recognized exception to the hearsay rule.").

188. *Melendez-Diaz,* 557 U.S. at 321.

189. *See id.* at 324 ("Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.").

190. *See* Crawford v. Washington, 541 U.S. 36, 68 (2004) ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

191. *See id.*; *see also* Ginsberg, *supra* note 182, at 167 ("[S]ince *Crawford*, a well-recognized exception to the hearsay rule will not trump the Sixth Amendment Confrontation Clause.").

192. *See, e.g.*, *Crawford*, 541 U.S. at 68 (saying the states' development of hearsay law is applicable to nontestimonial hearsay, but not to testimonial hearsay).

193. U.S. CONST. amend. IV; FED. R. EVID. 403. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 647 (1961).

194. *See Crawford*, 541 U.S. at 68–69; *see also* Higley, *supra* note 53, at 177 ("However, the Confrontation Clause differs from hearsay rules because even if a statement falls within one of the many possible hearsay exceptions it will still be barred from trial if that statement is 'testimonial' in nature.").

195. *See Crawford*, 541 U.S. at 51–52; Ginsberg, *supra* note 182, at 119; Higley, *supra* note 53, at 194.

196. *Crawford*, 541 U.S. at 52.

197. *Id.* at 51.

Autopsy reports are testimonial under either of these criteria. When a medical examiner or coroner prepares an autopsy report as law enforcement investigate the events surrounding the deceased's passing, an objective witness would reasonably believe the report would be made available for use at a later trial, should one occur.[198] Autopsy reports provide information vital to a prosecutor's case, including a formal description of the autopsy's findings, the cause of death, and the manner of death.[199] When a prosecutor enters an autopsy report into evidence in a homicide trial, they are significantly more likely to secure a conviction.[200] Similarly, when a prosecutor fails to enter an autopsy report into evidence in a homicide case, the likelihood of securing a conviction plummets.[201] Because autopsy reports play such an important role in homicide cases, an objective witness would reasonably believe that an autopsy report would be made available for a later trial, thus satisfying the first *Crawford* testimonial hearsay description.[202]

This holds true even in cases where a medical examiner or coroner prepares an autopsy report without knowing whether law enforcement is investigating the events surrounding the deceased's passing.[203] Many autopsy reports are created outside of a criminal investigation, and some courts rely on this fact to hold that autopsy reports are nontestimonial.[204] But this approach fails to address cases in which an autopsy report *is* prepared for use as evidence at trial. Courts cannot resolve this issue by looking at all autopsy reports, generally.[205] Instead, courts should ask whether the autopsy report a party seeks to enter into evidence *in this*

198. *See* Higley, *supra* note 53, at 194–95; Richard D. Friedman, *An Issue to Be Resolved: The Treatment of Autopsy Reports*, CONFRONTATION BLOG (May 30, 2017, 7:06 PM), https://confrontationright.blogspot.com/2017/05/an-issue-to-be-resolved-treatment-of.html [https://perma.cc/EEF5-GD98]
("[T]he primary purpose of a forensic autopsy report is to provide information for the criminal justice system leading to the conviction of the perpetrator of a homicide.").

199. *See* Ginsberg, *supra* note 182, at 119.

200. *See Forensic Autopsy—A Body of Clues*, *supra* note 58 ("[T]he information derived from the autopsy finding will find their way into the prosecution's case as evidence used to convict the perpetrator of the crime when that individual is caught.").

201. *See id.*

202. *See* Friedman, *supra* note 198 ("Let's bear in mind how this issue comes up. Almost always, it is the prosecution in a murder case that wants to use the report without producing as a live witness the medical examiner who made the report. And the report provides some information—often the cause of death, and sometimes the time as well—that is helpful to the prosecution. Almost always it is clear that, at least as of the time the examiner wrote the report, he or she believed that the death was probably a homicide. And that means that the examiner must have known that he or she was creating evidence for use in a criminal case. In such a case, I think it is clear that the report (and especially the statements of use to the prosecution) is testimonial in nature . . . [T]he primary purpose of a forensic autopsy report is to provide information for the criminal justice system leading to the conviction of the perpetrator of a homicide.").

203. *Id.*

204. *See, e.g.*, United States v. James, 712 F.3d 79, 99 (2d Cir. 2013).

205. Friedman, *supra* note 198 ("[Some courts] have regarded autopsy reports as non-testimonial, principally on the basis of the proposition that autopsies are frequently performed for public health purposes having nothing to do with prosecution. That proposition is true but immaterial. The question should not be resolved by taking a survey of such a large body of reports—the question in any given case is whether this report is testimonial.").

specific case was prepared for use at trial.[206] In the context of a homicide investigation, or where an autopsy report's cause of death determination could trigger a homicide investigation, an objective witness would reasonably believe the autopsy report would be used in future criminal proceedings.[207] Thus, in homicide cases, autopsy reports are testimonial according to *Crawford*'s objective reasonable belief test.[208]

Medical examiners and coroners know that when they prepare an autopsy report for law enforcement, that report might be used in any future prosecutions stemming from the circumstances surrounding the death in question.[209] Autopsy reports are testimonial under *Crawford*'s objective reasonable belief test because they are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"[210] and are "material . . . that declarants would reasonably expect to be used prosecutorially."[211]

2. The Primary Purpose Test

The Supreme Court introduced the primary purpose test in *Davis*, stating that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[212] The primary purpose test is an objective test where a court "look[s] for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances."[213]

Courts have construed the primary purpose test both narrowly, as exemplified by the *Williams* targeted individual requirement,[214] and broadly, as exemplified by Justice Kagan's *Williams* dissent.[215] The broad interpretation simply asks whether the autopsy report's primary purpose was to prove past events that are potentially relevant to a criminal prosecution.[216] If so, the report is testimonial and inadmissible at trial.[217] The narrow interpretation begins with the same question but tacks on the *Williams* targeted individual requirement.[218] Unless the

206. *Id.*

207. *See id.*

208. *Id.*

209. *Id.* ("Almost always it is clear that, at least as of the time the examiner wrote the report, he or she believed that the death was probably a homicide. And that means that the examiner must have known that he or she was creating evidence for use in a criminal case.").

210. Crawford v. Washington, 541 U.S. 36, 52 (2004).

211. *Id.* at 51.

212. Davis v. Washington, 547 U.S. 813, 813–14 (2006).

213. Williams v. Illinois, 567 U.S. 50, 84 (2012).

214. *See* Cody L. Reaves, The Confrontation Clause and Autopsy Reports in Murder Prosecutions 2–3 (2018) (unpublished memorandum) (on file with author), http://www-personal.umich.edu/~rdfrdman/Autopsy.Reports.in.Murder.Prosecutions.pdf [https://perma.cc/5TQA-YJUV].

215. *See id.*

216. *Id.*

217. *Id.*

218. *Id.*

autopsy report's primary purpose was to accuse a specific, "targeted" individual, the autopsy report is nontestimonial and admissible at trial under the narrow interpretation of the primary purpose test.[219]

The *Williams* plurality applied the narrow interpretation of the primary purpose test to DNA lab reports, concluding the reports' primary purpose "was not to accuse petitioner or to create evidence for use at trial"[220] because "[i]t plainly was not prepared for the primary purpose of accusing a targeted individual."[221] Based on this reasoning, most autopsy reports would not qualify as testimonial evidence. Law enforcement will often use autopsy reports to identify suspects.[222] Should the Supreme Court more fully adopt the *Williams* plurality's narrow interpretation of the primary purpose test and its targeted individual requirement,[223] law enforcement could render all autopsy reports non-testimonial by delaying the identification of suspects until the reports are completed. The targeted individual requirement focuses on when an autopsy report is submitted in the context of an investigation instead of addressing the central admissibility question—namely, whether autopsy reports are testimonial or nontestimonial hearsay. It also fails to provide lower courts with an easily applicable rule to utilize when this issue inevitably recurs.

Five justices rejected the plurality's targeted individual requirement, with the dissent opining, "Where that test comes from is anyone's guess."[224] Professor Richard D. Friedman, an evidence expert and author of several books and articles on *Crawford* and its progeny,[225] echoed the dissent's confusion, finding no historical basis for the targeted individual requirement.[226] Professor Friedman observed that the targeted individual requirement may have "stunning consequences—for example, rendering outside the scope of the confrontation right a police officer's formal description of a crime scene, made before a suspect was identified but in full anticipation of use at an eventual trial."[227]

Further, the *Williams* narrow interpretation of the primary purpose test clashes with the Supreme Court's *Crawford*, *Melendez-Diaz*, and *Bullcoming* decisions.[228] None of these opinions require evidence to target a specific individual to qualify as testimonial.[229] *Crawford* held that a statement is testimonial if it

219. *Id.*

220. Williams v. Illinois, 567 U.S. 50, 84 (2012).

221. *Id.*

222. *Id.* at 85.

223. *See id.* at 84.

224. *Id.* at 135 (Kagan, J., dissenting).

225. *See, e.g.*, Richard D. Friedman, *Who Said the* Crawford *Revolution Would Be Easy?*, 26 CRIM. JUST. 14, 15 (2012); Richard D. Friedman, Crawford*,* Davis*, and Way Beyond*, 15 J.L. & POL'Y 553, 554 (2007); Richard D. Friedman, Crawford *Surprises: Mostly Unpleasant*, 20 CRIM. JUST. 36, 36 (2005); Richard D. Friedman, *Adjusting to* Crawford*: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 5 (2004).

226. *See* Richard D. Friedman, *Source of the "Targeted Individual" Test?*, CONFRONTATION BLOG (June 21, 2012), https://confrontationright.blogspot.com/2012/06/source-of-targeted-individual-test.html [https://perma.cc/5W7F-YWPQ].

227. *Id.*

228. *See* Friedman, *Who Said the* Crawford *Revolution Would Be Easy?*, *supra* note 225, at 19.

229. *Id.*

was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" without any further narrowing qualifiers.[230] *Melendez-Diaz* held that a document's preparer must be subjected to confrontation in order for that document to be admissible at trial.[231] And *Bullcoming* held that evidence's apparent reliability does not satisfy the Confrontation Clause because the Sixth Amendment "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing [the evidence] in the crucible of cross-examination."[232] While *Williams* targeted individual requirement attempts to narrow the scope of the Confrontation Clause, *Crawford*, *Melendez-Diaz*, and *Bullcoming* demonstrate that the Confrontation Clause is a broad requirement not easily satisfied unless a defendant is afforded the opportunity to cross-examine the witnesses testifying against him.[233]

The Supreme Court should reject the narrow primary purpose test interpretation and the *Williams* targeted individual requirement. It failed to receive approval from a majority of the Supreme Court, it clashes with the approach espoused in *Crawford*, *Melendez-Diaz*, and *Bullcoming*, and it lacks historical or legal precedent.[234] The Supreme Court should instead explicitly adopt the broad primary purpose test interpretation, which asks whether an autopsy report's primary purpose is to demonstrate past events that may be relevant to a criminal prosecution.[235] This approach aligns with *Crawford* and its progeny, is rooted in legal and historical precedent, and affirms defendants' Confrontation Clause protections.[236]

In homicide cases, "the primary purpose of a forensic autopsy report is to provide information for the criminal justice system leading to the conviction of the perpetrator of a homicide."[237] Therefore, any autopsy report that a prosecutor seeks to enter into evidence in a homicide case is testimonial under the broad primary purpose test interpretation because its primary purpose is to prove past events that are potentially relevant to a criminal prosecution.[238]

3. Justice Thomas's Solemnity Test

In his *Davis* concurrence, Justice Thomas argued for the adoption of a solemnity test in place of the primary purpose test, which he described as "unpredictable."[239] Under Justice Thomas's solemnity test, statements that might be

230. Crawford v. Washington, 541 U.S. 36, 52 (2004).

231. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 321 (2009).

232. Bullcoming v. New Mexico, 564 U.S. 647, 661 (2011) (quoting Crawford v. Washington, 541 U.S. 36, 61 (2004)).

233. *See id.* at 652; *Crawford*, 541 U.S. at 59; *Melendez-Diaz*, 557 U.S. at 311; Williams v. Illinois, 567 U.S. 50, 57–58 (2012).

234. *See* Friedman, *Source of the "Targeted Individual" Test?*, *supra* note 226.

235. Reaves, *supra* note 214, at 2–3.

236. *See* Crawford v. Washington, 541 U.S. 36, 59 (2004).

237. *See* Friedman, *An Issue to be Resolved: The Treatment of Autopsy Reports, supra* note 198.

238. *See* Reaves, *supra* note 214, at 2–3.

239. Davis v. Washington, 547 U.S. 813, 834 (Thomas, J., concurring).

considered testimonial under other standards should be considered nontestimonial—and therefore admissible under the Confrontation Clause—if they do not "carry sufficient indicia of solemnity to constitute formalized statements."[240] According to Justice Thomas, such indicia may include, but are not limited to, the presence of *Miranda* warnings,[241] a certification of validity,[242] or a sworn oath to speak truthfully.[243]

In his *Davis* concurrence, Justice Thomas introduced his solemnity test by saying that "the plain terms of the 'testimony' definition we endorsed necessarily require some degree of solemnity before a statement can be deemed 'testimonial.'"[244] As an example, he said that "confessions, when extracted by police in a formal manner, carry sufficient indicia of solemnity to constitute formalized statements"[245] and *Miranda* warnings "import[] a solemnity to the process that is not present in a mere conversation between a witness or suspect and a police officer."[246] In his *Williams* concurrence, Justice Thomas argued the challenged DNA report was nontestimonial because it was "neither a sworn nor a certified declaration of fact"[247] and "it was not the product of any sort of formalized dialogue resembling custodial interrogation."[248] In his *Bryant* concurrence, Justice Thomas contended that "the police questioning was not 'a formalized dialogue,' did not result in 'formalized testimonial materials' such as a deposition or affidavit, and bore no 'indicia of solemnity.'"[249]

Though Justice Thomas failed to persuade his colleagues on the Supreme Court to adopt this new test, the Illinois Supreme Court considered the solemnity test in *People v. Leach*,[250] alongside others, for determining whether the evidence in question was or was not testimonial.[251] The Illinois Supreme Court determined that, either under the *Crawford* objective reasonable belief test, the *Davis* primary purpose test, or Justice Thomas's solemnity test, "autopsy reports prepared by a medical examiner's office in the normal course of its duties are nontestimonial."[252] The Illinois Supreme Court reasoned that an autopsy report that was "merely signed by the doctor who performed the autopsy . . . would not be

240. *Id.* at 837.
241. *See id.* at 837–38.
242. *See* Williams v. Illinois, 567 U.S. 50, 111 (2012) (Thomas, J., concurring).
243. *See id.*
244. *Davis*, 547 U.S. at 836 (Thomas, J., concurring).
245. *Id.* at 837.
246. *Id.* at 838.
247. *Williams*, 567 U.S. at 111 (Thomas, J., concurring).
248. *Id.*
249. Michigan v. Bryant, 562 U.S. 344, 379 (2011) (Thomas, J., concurring) (quoting *Davis*, 547 U.S. at 837 (Thomas, J., concurring)).
250. People v. Leach, 980 N.E.2d 570, 593 (Ill. 2012).
251. *Id.* ("[W]hile we are not prepared to say that the report of an autopsy conducted by the medical examiner's office can never be testimonial in nature, we conclude that under the objective test set out by the plurality in *Williams*, under the test adopted in *Davis*, and under Justice Thomas's 'formality and solemnity' rule, autopsy reports prepared by a medical examiner's office in the normal course of its duties are nontestimonial.").
252. *Id.*

deemed testimonial by Justice Thomas, because it lacks the formality and solemnity of an affidavit, deposition, or prior sworn testimony."[253]

Similarly, the Arizona Supreme Court contemplated the solemnity test in *State v. Medina*.[254] The court acknowledged that neither the primary purpose test nor the solemnity test is binding, ultimately concluding that the autopsy report in question was nontestimonial under either test.[255] The court analogized the autopsy report in question to the report in *Williams*, saying:

> Like the report in *Williams*, the autopsy report in this case does not "[certify] the truth of the analyst's representations." The signed report details the conditions of the body, states the examiner's conclusions regarding the cause and manner of death, and certifies that the report reflects her opinion as to the cause and manner of death and that she took charge of the body. The autopsy report does not certify that the report was correct or that she followed the correct procedures. Nor did the autopsy report arise from a formal dialogue akin to custodial interrogation.[256]

Despite these conclusions reached by the Supreme Court of Illinois and the Supreme Court of Arizona,[257] it remains unclear whether autopsy reports satisfy Justice Thomas's solemnity test. Some states have statutory frameworks requiring autopsies to be performed in specific contexts, which indicates solemnity and formality.[258] Autopsy results are memorialized and recorded in reports, not unlike a transcript of an interrogation.[259] Additionally, several states require medical examiners and coroners to certify each autopsy's findings.[260] But autopsy reports do not "[certify] the truth of the analyst's representations,"[261] nor do they "arise from a formal dialogue akin to custodial interrogation."[262] While both the Illinois Supreme Court and the Arizona Supreme Court concluded that autopsy reports are nontestimonial under the solemnity test, Justice Thomas—the sole proponent of the solemnity test on the United State Supreme Court—has yet to speak definitively on the issue. Several elements of an autopsy report serve as indicia of solemnity, as they memorialize and record autopsy results, some states have statutory frameworks determining when an autopsy must be performed, and some states require that autopsy findings be certified. Autopsy reports, however, lack certain aspects highlighted by Justice Thomas's solemnity test analyses, as

253. *Id.* at 592.

254. State v. Medina, 306 P.3d 48, 63 (Ariz. 2013).

255. *Id.* at 63–64 ("Neither the plurality's 'primary purpose' test nor Justice Thomas's solemnity standard can be deemed a subset of the other; therefore, there is no binding rule for determining when reports are testimonial. Under the plurality test, the autopsy report here is not testimonial because its purpose was not primarily to accuse a specified individual . . . The autopsy report in this case is also nontestimonial using the solemnity test from Justice Thomas's concurring opinion.") (citation omitted).

256. *Id.* (citations omitted).

257. *See id.*; *Leach*, 980 N.E.2d at 592.

258. *See, e.g.*, United States v. Ignasiak, 667 F.3d 1217, 1231–32 (11th Cir. 2012); Commonwealth v. Brown, 139 A.3d 208, 212–13 (Pa. Super. Ct. 2016).

259. *See* Davis v. Washington, 547 U.S. 813, 837–38 (2006) (Thomas, J., concurring).

260. *See, e.g.*, *Brown*, 139 A.3d at 216.

261. State v. Medina, 306 P.3d 48, 64 (Ariz. 2013) (citation omitted).

262. *Id.*

they do not certify the truth of the preparer's representations, nor are they created in a context comparable to custodial interrogation.

Ultimately, the solemnity test flies in the face of the Supreme Court's *Bullcoming* decision, which reiterated that the Confrontation Clause does not require "that evidence be reliable, but that reliability be assessed in a particular manner: by testing [the evidence] in the crucible of cross-examination."[263] When determining whether an autopsy report is admissible under the Confrontation Clause, the issue is not the report's reliability but whether the defendant was permitted to cross-examine the report's preparer.[264] The autopsy report's solemnity has little bearing on a Confrontation Clause analysis; what matters is whether the preparer is available to testify, and, if he or she is not, whether the report is testimonial.[265] The report's reliability, and its solemnity by extension, is not dispositive in a Confrontation Clause analysis.[266]

B. Autopsy Reports Are Not Business Records

While an autopsy report's reliability does not impact its admissibility under the Confrontation Clause, some courts have relied on the business records hearsay exception to declare autopsy reports nontestimonial, and therefore admissible, when the report's preparer was unavailable for cross-examination.[267] The key question when conducting a Confrontation Clause analysis is whether the challenged evidence is testimonial, not whether a hearsay exception applies.[268] But even if a hearsay exception could render an autopsy report nontestimonial, autopsy reports would be inadmissible because they do not qualify as business records.[269]

Both the First and Second Circuits used the business records hearsay exception to declare autopsy reports nontestimonial.[270] The Federal Rules of Evidence define business records as:

> [R]ecord[s] 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

263. Bullcoming v. New Mexico, 564 U.S. 647, 661 (2011) (quoting Crawford v. Washington, 541 U.S. 36, 61 (2004)).

264. *See id.*

265. *Id.* ("This Court settled in Crawford that the 'obviou[s] reliab[ility]' of a testimonial statement does not dispense with the Confrontation Clause. Accordingly, the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.'" (citations omitted)).

266. *See id.*

267. *See* United States v. De La Cruz, 514 F.3d 121, 133 (1st Cir. 2008); United States v. Feliz, 467 F.3d 227, 236 (2d Cir. 2006).

268. *See Bullcoming*, 564 U.S. at 661.

269. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 321 (2009) ("Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But that is not the case if the regularly conducted business activity is the production of evidence for use at trial." (citation omitted)).

270. *See De La Cruz*, 514 F.3d at 133; *Feliz*, 467 F.3d at 236.

> 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 . . .[.][271]

The First Circuit's reasoning in *De La Cruz* demonstrates the most common line of reasoning employed by courts using a hearsay exception to declare autopsy reports nontestimonial: "Such a report is . . . in the nature of a business record, and business records are expressly excluded from the reach of *Crawford*."[272] The First Circuit cited to the part of *Crawford* that says, "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy."[273] The Second Circuit applied the same logic in *Feliz* holding that autopsy reports are nontestimonial because they are "kept in the course of a regularly conducted business activity" and because "the Office of the Chief Medical Examiner of New York conducts thousands of routine autopsies every year, without regard to the likelihood of their use at trial."[274]

The Supreme Court directly renounced this reasoning in *Melendez-Diaz*, holding that forensic certificates are not business records when the "regularly conducted business activity is the production of evidence for use at trial."[275] The Supreme Court concluded that because the affidavits in question were "calculated for use essentially in the court, not in the business," the affidavits did not fall under the business records hearsay exception.[276]

Thus, the business records hearsay exception does not prevent testimonial evidence from violating the Confrontation Clause.[277] Instead, the central question is whether the statement is testimonial, which, as the *Melendez-Diaz* decision highlights, is determined by the statement's purpose—if the statement was made for use at trial, the statement is testimonial.[278] The business records hearsay exception only addresses the hearsay admissibility problem; it does not address the Confrontation Clause problem created when a defendant is denied the opportunity to cross-examine an autopsy report's preparer.

C. Autopsy Reports Are Not Public Records

While more courts have used the business records hearsay exception to hold that autopsy reports are nontestimonial for Confrontation Clause purposes, some courts have also utilized the public records hearsay exception, either in addition

271. FED. R. EVID. 803(6)(A)–(D).

272. *See De La Cruz*, 514 F.3d at 133.

273. *See* Crawford v. Washington, 541 U.S. 36, 56 (2004).

274. *See Feliz*, 467 F.3d at 236.

275. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 321 (2009).

276. *Id.* (quoting Palmer v. Hoffman, 318 U.S. 109, 114 (1943)).

277. *Id.* at 324 ("Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.").

278. *Id.* at 321 (saying evidence commonly classified as a business record will not fall under the business records hearsay exception "if it was 'calculated for use essentially in the court, not in the business.'" (citation omitted)).

to or instead of the business records exception.[279] The Federal Rules of Evidence define public records as "[r]ecords, reports, statements . . . in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . .[.]"[280]

In *Feliz*, the Second Circuit held that autopsy reports qualify as public records, using the same logic that supported its conclusion that autopsy reports also qualify as business records: "We hold that the autopsy reports are equally admissible as public records. For reasons substantially analogous to those outlined above, we find that public records are, indeed, nontestimonial under *Crawford*."[281] But the *Melendez-Diaz* decision directly addressed the public records hearsay exception argument alongside its rebuttal to the business records hearsay exception argument:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.[282]

Just as the business records hearsay exception does not render testimonial evidence admissible under the Confrontation Clause, the public records hearsay exception fails to prevent testimonial evidence from violating the Confrontation Clause.[283] Again, the essential inquiry in determining if evidence violates the Confrontation Clause is whether that evidence is testimonial, not whether the evidence falls under a hearsay exception.[284] Hearsay exceptions are insufficient to prevent autopsy reports from violating the Sixth Amendment.[285] The public records hearsay exception fails to satisfy the Confrontation Clause because it fails to address the constitutional issue created when a defendant is not offered the opportunity to cross-examine an autopsy report's preparer.[286] Although the

279. *See, e.g.*, *Feliz*, 467 F.3d at 237 ("We hold that the autopsy reports are equally admissible as public records. For reasons substantially analogous to those outlined above [which explains why we find that autopsy reports qualify as business records and are therefore nontestimonial under *Crawford*], we find that public records are, indeed, nontestimonial under *Crawford*."); State v. Cutro, 618 S.E.2d 890, 896 (S.C. 2005) ("Further, autopsy reports are not hearsay under Rule 803, SCRE. Subsection (8) of this rule excepts from hearsay public records and reports containing matters there is a duty to report. Autopsies are required in cases of SIDS if law enforcement deems it necessary.").

280. FED. R. EVID. 803(8)(A)–(B); *Feliz*, 467 F.3d at 237.

281. *Feliz*, 467 F.3d at 237.

282. *See Melendez-Diaz*, 557 U.S. at 324.

283. *Id.*

284. *Id.* at 321.

285. *Id.* at 324; *see also* Crawford v. Washington, 541 U.S. 36, 68 (2004) (saying the States' development of hearsay law is applicable to nontestimonial hearsay, but not to testimonial hearsay); Ginsberg, *supra* note 182, at 167 ("[S]ince *Crawford*, a well-recognized exception to the hearsay rule will not trump the Sixth Amendment Confrontation Clause."); Higley, *supra* note 53, at 177 ("However, the Confrontation Clause differs from hearsay rules because even if a statement falls within one of the many possible hearsay exceptions it will still be barred from trial if that statement is 'testimonial' in nature.").

286. Higley, *supra* note 53, at 194.

public records hearsay exception may resolve the hearsay issue, it does not resolve the Confrontation Clause issue.[287]

D. Surrogate Testimony Does Not Satisfy the Confrontation Clause

In an effort to ensure autopsy reports' admissibility in homicide cases, some suggest that surrogate witnesses should be permitted to testify to the autopsy report's contents, thereby providing the defendant the opportunity to cross-examine the surrogate witness.[288] Advocates of this approach tout surrogate witness testimony's ability to safeguard against a medical examiner's or coroner's potential unavailability for trial,[289] provide defendants with the opportunity to cross-examine a witness with knowledge of the report,[290] and undergird the report's reliability as evidence.[291]

Though these benefits of surrogate testimony may prove helpful in certain contexts, such as when the evidence's reliability is the primary issue, they are insufficient to fully satisfy the Confrontation Clause issue created when a defendant cannot cross-examine an autopsy report's preparer.[292] In such cases, the autopsy report's reliability is not the most significant evidentiary concern facing the courts—the primary concern is whether the defendant had the opportunity to cross-examine the report's preparer, either before or during trial.[293] Absent this opportunity, the Confrontation Clause remains unsatisfied.[294]

287. *Id.* at 176.

288. *See* Stephen Aiken, *Autopsy Reports, the Confrontation Clause, and a Virtual Solution*, 53 JURIMETRICS J. 213, 236 (2013) ("Because the data used by the virtopsy [virtual autopsy] approach does not involve testimonial statements, it provides an excellent opportunity to serve as the basis for surrogate testimony."); Dana Amato, *What Happens if Autopsy Reports Are Found Testimonial? The Next Steps to Ensure the Admissibility of These Critical Documents in Criminal Trials*, 107 J. CRIM. L. & CRIMINOLOGY 293, 321 (2017) ("Performing the autopsy with the expectation of peer review serves multiple purposes. First, it can act as a deterrent against producing a sloppy work product. Second, it helps to ensure that all stages of the autopsy are preserved so that a future surrogate may be able to come to his own independent conclusion about information on which he can be cross-examined."); Elizabeth Wright, *Autopsy Reports Are a Victim's Last Statement: The Residual Exception and Surrogate Testimony*, 37 T. JEFFERSON L. REV. 473, 507 (2015) ("The vast majority of autopsies are performed in cases of natural causes, accidental death, or suicide and do not lead to a criminal trial. As such, admitting the reports into evidence does not trigger the Confrontation Clause and surrogate testimony regarding the reports would be allowed when the performing pathologist is unavailable.").

289. *See* Wright, *supra* note 288, at 491 ("Surrogate testimony is important in cases involving autopsy reports because there are often many years between the autopsy and the trial and thus the performing pathologist may no longer be available for the defendant to confront.).

290. *See id.* ("Furthermore, surrogate testimony gives the defendant the opportunity to cross-examine an expert witness regarding the autopsy report. The jury is aware that the testifying witness did not perform the autopsy and can thus weigh the reliability of the testimony.").

291. *See* Amato, *supra* note 288, at 322 ("[T]he goal should be the creation of autopsy reports with the possibility of a future trial in mind, such that surrogate testimony will be reliable, independent from the original conclusions, and clear enough that a jury can see with their own eyes what the surrogate is talking about.").

292. *See* Bullcoming v. New Mexico, 564 U.S. 647, 661 (2011) (The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing [the evidence] in the crucible of cross-examination." (quoting Crawford v. Washington, 541 U.S. 36, 61 (2004))).

293. *See id.*

294. *See id.*

In *Bullcoming*, the Supreme Court held that using surrogate testimony to introduce a blood-alcohol analysis report was insufficient to satisfy the Confrontation Clause.[295] Citing *Crawford*, the Supreme Court stressed that a report's reliability did not factor into the Confrontation Clause analysis.[296] The Confrontation Clause does not require "that evidence be reliable, but that reliability be assessed in a particular manner: by testing [the evidence] in the crucible of cross-examination."[297]

The Sixth Amendment Confrontation Clause does not exist to afford criminal defendants the right to cross-examine anyone who can speak to the report; it endows criminal defendants with the right to cross-examine the specific individual who created the report.[298] If that individual is unavailable to testify, the admission of the autopsy report into evidence violates the defendant's Sixth Amendment Confrontation Clause right.[299]

IV. RECOMMENDATION

The United States Supreme Court should hold that autopsy reports are testimonial in homicide cases and therefore inadmissible when the defendant is not afforded the opportunity to cross-examine the report's preparer, either before or during trial. This decision would reduce the likelihood that a defendant in a homicide case would be convicted based on the admission of an autopsy report where the defendant was not afforded the opportunity to cross-examine the report's preparer, thus reducing the number of wrongful convictions in this country.[300] This would help protect our criminal justice system's integrity,[301] begin to restore the

295. *Id.* at 665 ("In sum, the formalities attending the 'report of blood alcohol analysis' are more than adequate to qualify Caylor's assertions as testimonial. The absence of notarization does not remove his certification from Confrontation Clause governance. The New Mexico Supreme Court, guided by *Melendez–Diaz*, correctly recognized that Caylor's report 'fell within the core class of testimonial statements' described in this Court's leading Confrontation Clause decisions.").

296. *Id.* at 661 (quoting Crawford v. Washington, 541 U.S. 36, 62 (2004)).

297. *Id.* (quoting *Crawford*, 541 U.S. at 62).

298. *See id.* at 652 ("The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist."); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009) ("In *Crawford* . . .we held that it guarantees a defendant's right to confront those 'who bear testimony' against him. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.") (citing *Crawford*, 541 U.S. at 51, 54); *see also Crawford* 541 U.S. at 43, 50–51 ("The right to confront one's accusers is a concept that dates back to Roman times . . . we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.'").

299. *See Melendez-Diaz*, 557 U.S. at 311 ("Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." (quoting *Crawford*, 541 U.S. at 54)); Bullcoming v. New Mexico, 564 U.S. 647, 657 (2011) ("As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.").

300. *See* Dunham, *supra* note 49.

301. Saady, *supra* note 50; UNITED NATIONS OFF. ON DRUGS & CRIME, *supra* note 50.

public's faith in the criminal justice system,[302] and reinforce the constitutional rights afforded to defendants.[303]

A. Autopsy Reports Satisfy the Crawford Objective Reasonable Belief Test and the Primary Purpose Test's Broad Interpretation

First, autopsy reports are testimonial because medical examiners and coroners prepare them with the knowledge that the reports will likely be used in any subsequent court proceedings.[304] Under the objective reasonable belief test, which asks whether the report was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," autopsy reports are testimonial because medical examiners and coroners know that when they prepare an autopsy report for law enforcement, it may be used in prosecutions stemming from the circumstances surrounding the death in question.[305]

Second, under the broad interpretation of the primary purpose test, which asks whether an autopsy report's primary purpose was to prove past events that are potentially relevant to a criminal prosecution,[306] autopsy reports are testimonial in homicide cases because prosecutors rely on the reports to prove relevant facts such as the cause and manner of death.[307] Per the narrow interpretation of the primary purpose test, which adds the targeted individual requirement to the inquiry made by the broad interpretation of the primary purpose test,[308] autopsy reports are almost certainly nontestimonial. Rarely do medical examiners and coroners prepare autopsy reports for the purpose of accusing a specific suspect; therefore, the vast majority of autopsy reports would be classified as nontestimonial according to the targeted individual requirement of the narrow interpretation of the primary purpose test.

Third, under Justice Thomas's solemnity test, which requires evidence to contain sufficient indicia of solemnity to be admissible,[309] autopsy reports may or may not be testimonial. Autopsy reports memorialize the autopsy's results, much like an interrogation transcript.[310] Several states have statutory frameworks that trigger when an autopsy must be conducted and require autopsy preparers to

302. *See* Faucheux, *supra* note 51.

303. *See* U.S. CONST. amend. VI; *see also* Douglass, *supra* note 27.

304. *See* Higley, *supra* note 53, at 194 ("[P]athologists are fully aware that their reports may be used by law enforcement as part of an investigation, and thus they may reasonably believe that the reports may be used later at trial.").

305. *See* Friedman, *An Issue to Be Resolved: The Treatment of Autopsy Reports*, *supra* note 198 ("Almost always it is clear that, at least as of the time the examiner wrote the report, he or she believed that the death was probably a homicide. And that means that the examiner must have known that he or she was creating evidence for use in a criminal case.").

306. *See* Reaves, *supra* note 214, at 2.

307. *Id.* at 15.

308. *Id.* at 2.

309. *Id.* at 14 n.15.

310. *See* Davis v. Washington, 547 U.S. 813, 837–38 (2006) (Thomas, J., concurring).

certify the results, which indicates solemnity and formality.[311] But autopsy reports do not "[certify] the truth of the analyst's representations,"[312] nor do they "arise from a formal dialogue akin to custodial interrogation."[313] In light of these inconsistent indications, it is unclear whether autopsy reports are testimonial under Justice Thomas's solemnity test. Because Justice Thomas is the only member of the Supreme Court to express fealty to the solemnity test,[314] it should not play a decisive role in the debate over whether autopsy reports are testimonial.

Finally, neither hearsay exceptions nor surrogate testimony can satisfy the Confrontation Clause.[315] Hearsay exceptions, including the business records exception and the public records exceptions, and surrogate testimony suffer from the same shortcomings when courts attempt to use them to sidestep an autopsy report's Confrontation Clause issues: they do not allow a defendant the opportunity to cross-examine the report's preparer. Hearsay exceptions and surrogate testimony help to ensure an autopsy report's reliability, but reliability is not the Confrontation Clause's primary concern. The Confrontation Clause does not require "that evidence be reliable, but that reliability be assessed in a particular manner: by testing [the evidence] in the crucible of cross-examination."[316] The Confrontation Clause bestows upon criminal defendants the right to cross-examine an autopsy report's preparer;[317] if the preparer is unavailable to testify, the report's admission into evidence violates the Confrontation Clause.[318]

The Supreme Court should take the earliest opportunity to grant *certiorari* in a case that will allow them to hold that autopsy reports are inadmissible in homicide cases if the person who prepared the report is unavailable to testify to the report's legitimacy and is not subjected to cross-examination by the defendant.

311. *See, e.g.*, United States v. Ignasiak, 667 F.3d 1217, 1231–32 (11th Cir. 2012); Commonwealth v. Brown, 139 A.3d 208, 212–13 (Pa. Super. Ct. 2016); *see also Davis*, 547 U.S. at 835 (Thomas, J., concurring).

312. State v. Medina, 306 P.3d 48, 64 (Ariz. 2013) (quoting Williams v. Illinois, 567 U.S. 50, 112 (2012) (Thomas, J., concurring)).

313. *Id.*

314. Williams v. Illinois, 567 U.S. 50, 103 (2012) (Thomas, J., concurring).

315. *See id.* at 94; *id.* at 124 (Kagan, J., dissenting).

316. Bullcoming v. New Mexico, 564 U.S. 647, 661 (2011) (quoting Crawford v. Washington, 541 U.S. 36, 64 (2004)).

317. *See id.* at 652 ("The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist."); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009) ("In *Crawford* . . .we held that it guarantees a defendant's right to confront those 'who bear testimony' against him. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." (citing *Crawford*, 541 U.S. at 51, 54)); *see also Crawford* 541 U.S. at 43, 50–51 ("The right to confront one's accusers is a concept that dates back to Roman times . . . we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.'").

318. *See Melendez-Diaz*, 557 U.S. at 311 ("Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial.") (quoting *Crawford*, 541 U.S. at 54); *Bullcoming*, 564 U.S. at 657 ("As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.").

By declaring autopsy reports testimonial in homicide cases for Confrontation Clause purposes, the Supreme Court would clarify *Crawford* and its progeny regarding autopsy reports,[319] just as *Melendez-Diaz* clarified that forensic certificates are not business records when the "regularly conducted business activity is the production of evidence for use at trial,"[320] *Bullcoming* clarified that forensic laboratory reports are testimonial,[321] and *Bryant* clarified that statements made to aide law enforcement in an ongoing emergency are nontestimonial.[322] This ruling would help solidify the criminal justice system's integrity by reinforcing defendants' rights, ensuring murder convictions are not secured through reliance on autopsy reports presented in court where the medical examiner or coroner was not held accountable through cross-examination,[323] while also resolving a divide among both state and federal courts over this issue.[324]

B. State and Federal Courts Are Divided on This Issue

As discussed in Section II.C, federal circuit courts are split over whether autopsy reports are testimonial hearsay.[325] The Fourth and Eleventh Circuits have held that autopsy reports are testimonial, comparing them to other forensic reports prepared for use in criminal prosecutions.[326] Conversely, the First and Second Circuits concluded that autopsy reports are nontestimonial, holding that autopsy reports fall under the business records exception to hearsay and are therefore admissible, even when the report's preparer is unavailable to testify at trial.[327] The Sixth and Ninth Circuits have avoided determining whether autopsy reports are testimonial, unwilling to make a decision the Supreme Court might soon reverse.[328]

319. *See* Capra & Tartakovsky, *supra* note 48, at 64 ("*Crawford* firmed up the right in favor of criminal defendants but, as with most major constitutional decisions, it raised as many questions as it answered."); Higley, *supra* note 53, at 201 ("The Court should firmly clarify *Williams* and hold that the State cannot make an end-run around the Constitution."); Molko, *supra* note 63, at 543–44 ("But, as the *Melendez-Diaz* dissent correctly argued, the plurality had not clarified how many analysts must testify, and, if only one is required, which analyst's testimony would be sufficient.").

320. *Melendez-Diaz*, 557 U.S. at 321.

321. *Bullcoming*, 564 U.S. 647, 665 (2011).

322. Michigan v. Bryant, 562 U.S. 344, 375–78 (2011).

323. *Cf* Dunham, *supra* note 49.

324. *See, e.g.*, Euceda v. United States, 66 A.3d 994, 1012–13 (D.C. Cir. 2013) (observing that courts "continue to be split on this question"); People v. Lewis, 806 N.W.2d 295, 295 (Mich. 2011) (Kelly, J., concurring) ("[W]hether admission of the contents of an autopsy report through testimony of a medical examiner who did not prepare the report constitutes inadmissible testimonial hearsay . . . is a jurisprudentially significant question that has divided courts across the country.").

325. *See supra* Section II.C. (detailing the federal circuit split over whether autopsy reports are testimonial).

326. *See* United States v. Ignasiak, 667 F.3d 1217, 1232 (11th Cir. 2012); United States v. Moore, 651 F.3d 30, 72 (D.C. Cir. 2011) (per curiam); Burr v. Lassiter, 513 F. App'x 327, 334, 337 (4th Cir. 2013) (per curiam).

327. *See* United States v. De La Cruz, 514 F.3d 121, 133–34 (1st Cir. 2008); Nardi v. Pepe, 662 F.3d 107, 111 (1st Cir. 2011).

328. *See*, *e.g.*, Mitchell v. Kelly, 520 F. App'x 329, 330–31 (6th Cir. 2013) (per curiam); McNeiece v. Lattimore, 501 F. App'x 634, 636 (9th Cir. 2012).

State Courts are similarly divided. Massachusetts,[329] Michigan,[330] Missouri,[331] New Mexico,[332] North Carolina,[333] Oklahoma,[334] and West Virginia[335] have all treated autopsy reports as testimonial, while Arizona,[336] California,[337] Florida,[338] Illinois,[339] Louisiana,[340] Ohio,[341] and South Carolina[342] have declared autopsy reports nontestimonial. Several courts acknowledge that the Supreme Court has not yet answered this question definitively, and at any point in

329. *See* Commonwealth v. Avila, 912 N.E.2d 1014, 1029 (Mass. 2009) ("In the present case, and in accordance with *Nardi*, we conclude that the judge correctly permitted Dr. Flomenbaum to offer his opinions concerning issues related to the autopsy, but erred in allowing Dr. Flomenbaum to testify on direct examination about the findings in Dr. Philip's autopsy report—both because these findings were inadmissible hearsay and because they violated the confrontation clause.").

330. *See* People v. Lewis, 806 N.W.2d 295, 295 (Mich. 2011) ("[W]e affirm the result reached by the Court of Appeals, but vacate that part of the Court of Appeals 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. In particular, we disagree with the Court of Appeals' reliance on MRE 803(8) and its determination that the autopsy report was not prepared in anticipation of litigation.").

331. *See* State v. Davidson, 242 S.W.3d 409, 417 (Mo. Ct. App. 2007) ("We conclude that the autopsy report in this case qualifies as a 'testimonial statement' under *Crawford*.").

332. *See* State v. Jaramillo, 272 P.3d 682, 686 (N.M. Ct. App. 2011) ("Because Dr. Natarajan's report was prepared to document a homicide and intended for use in prosecution of a criminal case, we conclude that the purpose of the autopsy report was to provide prosecutorial evidence. Thus, we hold that the statements contained in the report were testimonial.").

333. *See* State v. Locklear, 681 S.E.2d 293, 305 (N.C. 2009) ("Here, the State sought to introduce evidence of forensic analyses performed by a forensic pathologist and a forensic dentist who did not testify. The State failed to show that either witness was unavailable to testify or that defendant had been given a prior opportunity to cross-examine them. The admission of such evidence violated defendant's constitutional right to confront the witnesses against him, and the trial court therefore erred in overruling defendant's objections.").

334. *See* Cuesta-Rodriguez v. State, 241 P.3d 214, 228 (Okla. Crim. App. 2010) ("[I]t is obvious that a medical examiner's words recorded in an autopsy report involving a violent or suspicious death could constitute statements that the medical examiner should reasonably expect to be used in a criminal prosecution and therefore under the *Crawford* and *Melendez-Diaz* framework would be testimonial for Sixth Amendment confrontation purposes.").

335. *See* State v. Kennedy, 735 S.E.2d 905, 918 (W. Va. 2012) ("W. Va. Code § 61–12–3(d) compels the conclusion that, for purposes of use in criminal prosecutions, autopsy reports are under all circumstances testimonial.").

336. *See* State v. Medina, 306 P.3d 48, 63 (Ariz. 2013) ("Under the plurality test, the autopsy report here is not testimonial because its purpose was not primarily to accuse a specified individual.").

337. *See* People v. Dungo, 286 P.3d 442, 449 (Cal. 2012) ("These statements, which merely record objective facts, are less formal than statements setting forth a pathologist's expert conclusions. They are comparable 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. Such observations are not testimonial in nature.").

338. *See* Banmah v. State, 87 So.3d 101, 103 (Fla. Dist. Ct. App. 2012) ("[A]utopsy reports are non-testimonial because they are prepared pursuant to a statutory duty, and not solely for use in prosecution.").

339. *See* People v. Leach, 980 N.E.2d 570, 590 (Ill. 2012) ("We conclude that whichever definition of primary purpose is applied, the autopsy report in the present case was not testimonial because it was (1) not prepared for the primary purpose of accusing a targeted individual or (2) for the primary purpose of providing evidence in a criminal case.").

340. *See* State v. Russell, 966 So.2d 154, 165 (La. Ct. App. 2007) ("The record reveals that the information contained in the report was routine, descriptive, nonanalytical, and thus, nontestimonial in nature.").

341. *See* State v. Craig, 853 N.E.2d 621, 639 (Ohio 2006) ("We agree with the majority view under *Crawford* and conclude that autopsy records are admissible as nontestimonial business records. We conclude that Dr. Kohler's expert testimony about the autopsy findings, the test results, and her opinion about the cause of death did not violate Craig's confrontation rights.").

342. *See* State v. Cutro, 618 S.E.2d 890, 896 (S.C. 2005) ("A public record, very much like a business record, is not testimonial and its admission similarly does not violate the defendant's confrontation rights.").

time the Supreme Court could proclaim their holdings invalid.[343] But many courts have chosen to move forward, unwilling to wait for the Supreme Court provide further clarity.[344] The Supreme Court should provide the clarity state and federal courts so desperately need by holding that autopsy reports are testimonial in homicide cases, thereby resolving the split that has developed at the federal and state levels.[345]

C. Protecting Our Criminal Justice System's Integrity

The American public's faith in their criminal justice system is eroding.[346] Our criminal justice system's integrity relies on its ability to ensure that defendants who are ultimately convicted of crimes are actually guilty.[347] When people are convicted of crimes they did not commit, the justice system fails to live up to the quality inherent in its name—it fails to mete out justice.[348] To strengthen societal trust in the criminal justice system, courts must preserve the rights of people accused of crimes.[349]

The phrase "innocent until proven guilty" is embedded into the fabric of the criminal justice system.[350] Prosecutors must prove a criminal charge's ele-

343. *See, e.g.*, Nardi v. Pepe, 662 F.3d 107, 111 (1st Cir. 2011) ("Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *Melendez–Diaz* and *Bullcoming*, and it is uncertain how the Court would resolve the question."); *Leach*, 980 N.E.2d at 593 ("This split of opinion and the confusion regarding application of the primary purpose test to reports of forensic testing may eventually be resolved by the United States Supreme Court.").

344. *See supra* text accompanying 327–29.

345. *See*, *e.g.*, *supra* notes 327–29, 331–44 and accompanying text.

346. *See* Faucheux, *supra* note 51 ("Clearly, Americans sense something isn't working in our nation's courtrooms. That comes on top of well-documented public suspicion of political backrooms and corporate boardrooms. This massive lack of trust is not an esoteric issue to be discussed in law school seminars—it is, instead, a fundamental problem in a diverse, expansive country that relies upon public confidence in its institutions for national stability.").

347. *Beyond a Reasonable Doubt: Why It Matters in Criminal Law*, L. DICTIONARY, https://thelawdictionary.org/article/beyond-reasonable-doubt-matters-criminal-law/ (last visited May 27, 2021) [perma.cc/GU4A-SG8V] ("The presumption of innocence is one of the foundations of the administration of criminal law in the United States . . . The presumption of innocence is important in criminal law since being found guilty of a criminal offense could deprive a defendant of his or her liberty. Therefore, the only way the state has the ability to deprive somebody of his or her liberty is to prove beyond a reasonable doubt that that person has committed a criminal offense.").

348. JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 1 (2008) ("No person in our country can be convicted of a crime unless there is absolute certainty about his guilt. That is the theory, at least. If the accused does not willingly plead guilty, all the essential elements of guilty must be proven to a jury, and they must be proven 'beyond a reasonable doubt.'").

349. *See* Faucheux, *supra* note 51 ("Clearly, Americans sense something isn't working in our nation's courtrooms. That comes on top of well-documented public suspicion of political backrooms and corporate boardrooms. This massive lack of trust is not an esoteric issue to be discussed in law school seminars—it is, instead, a fundamental problem in a diverse, expansive country that relies upon public confidence in its institutions for national stability.").

350. *See* WHITMAN, *supra* note 349, at 1 ("The words 'reasonable doubt' may not appear in the Constitution; but it is inconceivable that we could abandon our American commitment to the 'reasonable doubt' standard of proof . . . .").

ments beyond a reasonable doubt—the highest burden of proof in our legal system.[351] The Constitution provides defendants numerous protections to ensure the prosecution does not convict innocent individuals, including the Sixth Amendment's Confrontation Clause.[352] To affirm the Confrontation Clause's protections and strengthen society's faith in the criminal justice system, the Supreme Court should take the earliest opportunity to hold that autopsy reports are testimonial in homicide cases, thereby rendering autopsy reports inadmissible when the report's preparer is unavailable to testify at trial and the defendant did not receive the chance to cross-examine the preparer.

V. CONCLUSION

Since *Crawford v. Washington*,[353] in which Justice Scalia introduced the concept of testimonial hearsay into the legal world, questions regarding what evidence is and is not testimonial hearsay have plagued our criminal justice system.[354] Both state and federal courts are split nearly down the middle regarding whether autopsy reports are testimonial.[355] In homicide cases, where defendants face the most severe punishments the American criminal justice system may administer, the justice system's integrity relies on our ability to protect defendants' constitutional rights.[356] The Confrontation Clause prevents defendants from being convicted based on testimony that they cannot cross-examine by ensuring that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[357]

351. *Beyond a Reasonable Doubt: Why It Matters in Criminal Law*, *supra* note 347 ("Beyond a reasonable doubt is the highest standard of evidence that exists in the judicial systems of common law countries.").

352. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

353. Crawford v. Washington, 541 U.S. 36, 53 (2004).

354. *See, e.g.*, People v. Leach, 980 N.E.2d 570, 593 (Ill. 2012) ("We acknowledge that defendant has cited several cases from other jurisdictions in which the courts of our sister states have held that an autopsy report is testimonial hearsay, either in a case in which the report was admitted or in which a medical examiner other than the one who performed the autopsy was permitted to testify to the contents of the report . . . However, these cases are countered by cases holding that an autopsy report may be admitted into evidence without the testimony of the pathologist who performed the autopsy without violating the defendant's rights under the confrontation clause." (citations omitted)); Ginsberg, *supra* note 182, at 170 ("Supreme Court jurisprudence including and since Crawford is ambiguous, confusing, and not particularly predictive on this point"); Higley, *supra* note 53, at 173 ("Over the last decade, the United States Supreme Court has dramatically re-crafted the Sixth Amendment's Confrontation Clause jurisprudence and has left a labyrinth of new case law in its wake . . . . Applying this rapidly evolving case law, lower federal and state courts are split on whether autopsy reports are subject to the Confrontation Clause, which would constitutionally require the pathologist who prepared the report to testify at trial about his or her findings.").

355. *See* Ginsberg, *supra* note 182, at 135–63 (exploring the state and federal circuit courts' split regarding whether autopsy reports are testimonial under *Crawford*).

356. *See, e.g.*, Kimberly M. Gardner, *Defending the Integrity of the Criminal Justice System*, ST. LOUIS POST-DISPATCH (Feb. 25, 2019), https://www.stltoday.com/opinion/columnists/defending-the-integrity-of-the-criminal-justice-system/article_abb8c1b9-d2c7-5b30-a531-8f571bafebc8.html [perma.cc/96F7-MCPN] ("Public trust is a vital component of the criminal justice system."); Saady, *supra* note 50, at 170; U.N. OFF. ON DRUGS & CRIME, *supra* note 50.

357. U.S. CONST. amend. VI.; *see* Crawford v. Washington, 541 U.S. 36, 53–54 (2004). ("[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.").

The United States Supreme Court should take the earliest available opportunity to hold autopsy reports are testimonial in homicide cases for Confrontation Clause purposes. This would clarify *Crawford*[358] and its progeny regarding testimonial evidence, resolve splits at the Federal and State levels, and defend our criminal justice system's integrity by protecting defendants' Sixth Amendment rights. The Supreme Court made similar clarifying decisions in *Melendez-Diaz*, *Bullcoming*, and *Bryant*.[359] The most recent Supreme Court case to provide parameters describing what is and is not testimonial hearsay, however, was published in 2012.[360]

Homicide cases entail some of the most high-stakes decisions in our criminal justice system. But, given the present system, an enormous question mark hovers over cases where the medical examiner or coroner who prepared the autopsy report is unavailable to testify at trial, and the defendant was not afforded the chance to cross-examine the report's preparer. The Court should erase this question mark by holding that autopsy reports are testimonial for Confrontation Clause purposes in homicide cases because autopsy reports are prepared for use in legal proceedings, they provide information material to those legal proceedings, and neither hearsay exceptions nor surrogate testimony would prevent them from running afoul of the Confrontation Clause. This decision would not only resolve the split among state and federal courts over this issue but would also help protect the integrity of our criminal justice system by reinforcing defendants' constitutional rights under the Confrontation Clause.

358. *Crawford*, 541 U.S. at 68–69.

359. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 329 (2009) (clarifying drug reports are testimonial hearsay); Bullcoming v. New Mexico, 564 U.S. 647, 661 (2011) (clarifying blood alcohol reports are testimonial hearsay); Michigan v. Bryant, 562 U.S. 344, 378 (2011) (clarifying victim's statements to police following shooting were nontestimonial).

360. Williams v. Illinois, 567 U.S. 50, 76 (2012) (clarifying DNA report produced from semen not testimonial).