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DISSECTING THE CONSTITUTIONAL ADMISSIBILITY OF AUTOPSY REPORTS AFTER *CRAWFORD*

Matthew Yanovitch[+]

The Confrontation Clause of the Sixth Amendment of the United States Constitution guarantees a defendant in a criminal case "the right . . . to be confronted with the witnesses against him."[1] Hearsay evidence that would otherwise be admissible in a civil trial must pass this additional, constitutional barrier to admission in a criminal trial.[2] Those who stand accused of murder or manslaughter will likely face the admission of powerful hearsay evidence: the autopsy report.

When prosecutors call a coroner or medical examiner who performs an autopsy and writes a report as a witness at trial, Confrontation Clause issues are avoided. But a difficult issue arises when the medical examiner who performs an autopsy is deceased or otherwise unavailable. Admitting the autopsy report without calling the medical examiner to testify could violate the defendant's Sixth Amendment right to confront his accusers.[3] On the other hand, a blanket ban on the admission of autopsy reports when the preparing medical examiner is unavailable would make prosecuting "cold case" murders increasingly difficult, creating a serious public policy issue.[4]

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1. U.S. CONST. amend. VI.

2. *See* FED. R. EVID. 801. The Advisory Committee Notes to Article VIII of the Federal Rules of Evidence explain that, "[t]he pattern which emerges from the earlier cases invoking the clause is substantially that of the hearsay rule, applied to criminal cases: an accused is entitled to have the witnesses against him testify under oath, in the presence of himself and trier, subject to cross examination . . . ." *Id.* art. VIII advisory committee's notes.

3. *See* U.S. CONST. amend. VI.

4. *See, e.g.*, People v. Durio, 794 N.Y.S.2d 863, 869 (N.Y. Sup. Ct. 2005) ("Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the autopsy report. . . . Unlike other forensic tests, an autopsy cannot be replicated by another pathologist. Certainly it would be against society's interests to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case.").

Prior to the Supreme Court's 2004 decision in *Crawford v. Washington*,[5] prosecutors could submit autopsy reports without calling the declarant medical examiner.[6] Under the minimum constitutional requirements set forth by the Supreme Court in *Ohio v. Roberts*,[7] a prosecutor needed only to satisfy a two-pronged Confrontation Clause test by showing (1) that a good faith effort had been made to bring the unavailable medical examiner to testify at trial;[8] and (2) that the autopsy report demonstrated sufficient "indicia of reliability" to be admissible against the defendant.[9]

In *Crawford v. Washington*, the Supreme Court recently abandoned the *Roberts* test.[10] There, the Court rejected judicial determination of reliability as the test for the admissibility of "testimonial" hearsay.[11] Though the Court did not define "testimonial" hearsay, it held that ex parte examinations of witnesses, such as the police interrogation in question, were most certainly testimonial.[12] Indeed, such examinations were the primary concern of the Framers in drafting the Confrontation Clause.[13] By contrast, the Court noted in dictum that certain forms of hearsay, such as business records, are not testimonial by their nature.[14] Courts have since grappled with the application of the *Crawford* doctrine to autopsy reports, generally finding these reports to be "non-

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5. 541 U.S. 36 (2004).

6. *See* Ohio v. Roberts, 448 U.S. 56, 65-66 (1980); *see also* Paul Gianelli, *Admissibility of Lab Reports: The Right of Confrontation Post-Crawford*, 19 CRIM. JUST. 26, 28 (2004) (citing cases decided prior to *Crawford* allowing the admissibility of autopsy reports).

7. *Roberts*, 448 U.S. at 65-66; *see also* United States v. Rosa, 11 F.3d 315, 333 (2d Cir. 1993) (admitting an autopsy report under a *Roberts* analysis).

8. *Roberts*, 448 U.S. at 74-75. Exceptions to the requirement that the prosecution make a good faith effort to produce the declarant were subsequently announced by the Court in *United States v. Inadi*, 475 U.S. 387, 399-400 (1986) (excepting out-of-court statements by co-conspirators), and *White v. Illinois*, 502 U.S. 346, 348-49 (1992) (excepting out-of-court spontaneous declarations and statements made for purposes of medical diagnosis or treatment).

9. *See Roberts*, 448 U.S. at 65-66; *see also* PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE 548 (2d ed. 2006) (explaining the two-pronged *Roberts* test).

10. *Crawford*, 541 U.S. at 60-69.

11. *Id.* at 61 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection . . . to amorphous notions of 'reliability.'").

12. *Id.* at 50-53.

13. *Id.* at 50 ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.").

14. *Id.* at 56.

testimonial" business or public records, thereby avoiding the public policy problem in cold cases.[15]

This Comment examines the admissibility of autopsy reports in light of Sixth Amendment principles. This Comment first discusses the law governing the admissibility of autopsy reports under the now-abrogated *Roberts* test. This Comment next discusses *Crawford v. Washington,* which fundamentally changed Sixth Amendment jurisprudence. Then, this Comment digests several state court opinions that have attempted to apply *Crawford* to autopsy reports. This Comment subsequently analyzes the trend of state courts to classify reports as "non-testimonial" business or public records, and the state courts' policies and rationales for categorizing autopsy reports as non-testimonial. Finally, this Comment explains why the state courts' opinions may be in tension with the language of *Crawford* and suggests ways the Supreme Court could further refine *Crawford* if it agrees with the state courts' rationale.

I. THE ROAD TO CONFRONTATION

A. Admissibility of Autopsy Reports under Roberts

Prior to *Crawford*, courts applied *Ohio v. Roberts* when evaluating a Confrontation Clause objection to the admission of an autopsy report absent the medical examiner who prepared it.[16] Before *Roberts*, no consistent framework existed within which to analyze cases where the declarant did not testify.[17] The *Roberts* Court linked scattered prior precedent to establish a definitive two-pronged test to determine the constitutionality of admitting challenged hearsay evidence.[18] The prosecutor had to first satisfy the "declarant prong"[19] by either calling the

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15. *E.g.*, Rollins v. State, 897 A.2d 821, 831-35 (Md. 2006); People v. Durio, 794 N.Y.S.2d 863, 867-69 (N.Y. Sup. Ct. 2005).

16. *See supra* note 8. In *Roberts*, Herschel Roberts was arrested for forging a check. *Roberts*, 448 U.S. at 58. At a preliminary hearing, Roberts' lawyer called the victim's daughter as a defense witness in an attempt to solicit an admission that she gave Roberts permission to use the checks. *Id.* The witness denied having given the checks to Roberts, but despite five subpoenas for her appearance at trial, she did not appear. *Id.* at 58-59. The State moved to admit the transcripts of the testimony "relying on [an Ohio statute] which permits the use of preliminary examination testimony of a witness who 'cannot for any reason be produced at the trial.'" *Id.* at 59 (quoting OHIO REV. CODE ANN. § 2945.49(A)(2) (Lexis Nexis 2006)). Although Roberts objected to the admission of the transcript on the grounds that it violated his Confrontation Clause rights, the trial court admitted it into evidence. *Id.* at 59-60.

17. GIANNELLI, *supra* note 9, at 528.

18. *See Roberts*, 448 U.S. at 65-66; *see also* GIANNELLI, *supra* note 9, at 528 (describing the test as "two-pronged").

19. CLIFFORD S. FISHMAN, A STUDENT'S GUIDE TO HEARSAY 92 (3d ed. 2007) (using the term "declarant prong" to label the first *Roberts* requirement).

declarant as a witness or by demonstrating that the prosecutor had made a good-faith effort to secure the declarant's presence at the trial.[20] Second, the prosecutor had to satisfy the "reliability" prong by showing either that the statement fell within a "firmly rooted" hearsay exception, or that it had "particularized guarantees of trustworthiness."[21]

The Supreme Court modified the declarant prong of the *Roberts* test in *United States v. Inadi*.[22] There the Court held that a co-conspirator's statements could be admitted under the Confrontation Clause regardless of the availability of the declarant.[23] The Court concluded that these statements have "independent evidentiary significance"[24] because of the context in which they were made, and the declarant's in-court testimony would not be as important to the truth-finding process as the hearsay statement admitted in context.[25] Subsequently, in *White v. Illinois*, the Court included statements made for the purposes of medical diagnosis as well as excited utterances to the category of hearsay exceptions not requiring the unavailability of the declarant under the Sixth Amendment.[26] Thus, if a hearsay statement had independent evidentiary significance, the declarant prong would have been automatically satisfied without proof of a good-faith effort to produce the declarant.[27]

Manocchio v. Moran provides an example of an in-depth *Roberts* analysis of the admissibility of an autopsy report.[28] Nicholas Manocchio

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20. *Roberts*, 448 U.S. at 74-75. The *Roberts* court explained:

> The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), "good faith" demands nothing of the prosecution. But if there is the possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. "The lengths to which the prosecution must go . . . is a question of reasonableness."

Roberts, 448 U.S. at 74 (quoting California v. Green, 399 U.S. 148, 189 n.22 (1970)) (alteration in original).

21. *Roberts*, 448 U.S. at 66; *see also* FISHMAN, *supra* note 19, at 92 (using the term "'reliability' prong" to label the second *Roberts* requirement).

22. 475 U.S. 387, 391-96 (1986).

23. *Id.* at 399-400; *see also* FED. R. EVID. 801(d)(2)(E).

24. FISHMAN, *supra* note 19, at 92. Professor Fishman uses the term "independent evidentiary significance" to describe those hearsay exceptions under which "the prosecutor need not call the declarant." *Id.* The *Inadi* court described a statement admitted under the former testimony exception to the hearsay rule (under which the declarant must be produced) as "seldom ha[ving] *independent evidentiary significance* of its own." *Inadi*, 475 U.S. at 394 (emphasis added).

25. *Inadi*, 475 U.S. at 394-95.

26. White v. Illinois, 502 U.S. 346, 348-49 (1992).

27. *Id.* at 356-57. The *White* court uses the term "substantial probative value" instead of "independent evidentiary significance." *Id.*

28. Manocchio v. Moran, 919 F.2d 770, 773-76 (1st Cir. 1990).

was charged with the November 1980 murder of Richard Fournier.[29] According to an eyewitness, Fournier was severely beaten in a parking lot in North Providence, Rhode Island.[30] Fournier died at the hospital less than an hour after the beating.[31] Dr. Joel Zirkin, a forensic pathologist and Rhode Island's Associate Chief Medical Examiner, prepared an autopsy report pursuant to his statutory duties.[32] Dr. Zirkin's report described the victim's injuries, as well as facts reported to Dr. Zirkin by the police, and concluded that the cause of death was homicide.[33]

Prior to trial, Dr. Zirkin left the Medical Examiner's office and moved to Israel.[34] Dr. Zirkin was not brought back to testify, nor deposed prior to trial.[35] At the trial, the prosecutor introduced the autopsy report by calling a different Medical Examiner to testify.[36] Manocchio objected to the admission of the autopsy report, asserting that it violated his Sixth Amendment right to confront Dr. Zirkin.[37] The trial judge overruled the objection, and Manocchio was convicted of manslaughter.[38] He appealed the conviction to the Supreme Court of Rhode Island, which found no constitutional violation in the admission of the autopsy report.[39] Manocchio then sought habeas corpus relief from the United States District Court for the District of Rhode Island, which found a Sixth Amendment violation and "directed issuance of the writ . . . unless the State of Rhode Island afforded [him] a new trial . . . ."[40] The State appealed this decision to the United States Court of Appeals for the First Circuit.[41]

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29. *Id.* at 771-72.

30. *Id.* at 782.

31. *Id.* at 772.

32. *Id.* at 772, 776; *see also* R.I. GEN. LAWS § 23-4-3 (Lexis Nexis 2001) ("The office of state medical examiners shall be responsible for: (1) The investigation of deaths within the state that in its judgment might reasonably be expected to involve causes of death enumerated in this chapter [including homicide].").

33. *Manocchio*, 919 F.2d at 772.

34. *Id.* at 772.

35. *Id.*

36. *Id.* at 772-73. Dr. Burns, the Medical Examiner called to testify, was one of three signatories to the autopsy report performed by Dr. Zirking. *Id.* at 772.

37. *Id.* at 773.

38. *Id.* at 771-72.

39. State v. Manocchio, 497 A.2d 1, 8 (R.I. 1985) ("We conclude that the right of confrontation of defendant[] was not violated. This conclusion is based on the trial justice's finding that the circumstances surrounding the preparation of the autopsy report were trustworthy. We conclude that admission of the autopsy report was not error.").

40. *Manocchio*, 919 F.2d at 771.

41. *Id.*

The First Circuit began its *Roberts* analysis with the declarant prong.[42] The court determined that it was unnecessary to consider whether the state had made a good faith effort to produce Dr. Zirkin.[43] Rather, it held that *Inadi* controlled, and that the autopsy report satisfied the declarant prong regardless of Dr. Zirkin's availability.[44] Like co-conspirator statements, the court reasoned, autopsy reports have independent evidentiary significance because of the context in which they are prepared.[45]

Finding the declarant prong to be satisfied, the court moved on to the reliability prong.[46] After noting the two ways in which the reliability prong may be satisfied, the court concluded that autopsy reports do not fall within a firmly rooted hearsay exception.[47] Despite recognizing that other courts (including courts in Rhode Island) have held that autopsy reports qualify under the business records and public records exceptions to the hearsay rule,[48] the court expressed doubt that autopsy reports fall squarely within these "firmly rooted" exceptions due to the subjective nature of certain conclusions in autopsy reports.[49] Because it found that autopsy reports did not fall within a firmly rooted hearsay exception, the court required the prosecution to demonstrate that autopsy reports show "particularized guarantees of trustworthiness" in order to satisfy the Confrontation Clause.[50]

Receptive to the defendant's arguments that autopsy reports contain several different types of hearsay statements, the court divided the statements into four categories and evaluated each for "particularized guarantees of trustworthiness."[51] First, "descriptive observations of the condition of the corpse" were held to possess particularized guarantees of trustworthiness for all the reasons that attach to business records: "the routine and repetitive circumstances under which such reports are made [and the existence of] statutorily regularized procedures and established

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42. *Id.* at 773-74.

43. *See id.* at 774.

44. *See id.*

45. *Id.* at 774-75.

46. *See id.* at 776.

47. *See id.*

48. *See* FED. R. EVID. 803(6) (excepting business records from the hearsay rule); *id.* 803(8) (excepting certain public records from the hearsay rule).

49. *Manocchio*, 919 F.2d at 776-77 ("[T]hese cases fall short of establishing that autopsy reports, as such, are a firmly rooted hearsay exception. Because such reports may contain the examiner's views as to such matters as whether death was caused by homicide and may incorporate information from outside the medical examiner's office, problems are raised going beyond a simple application of the mentioned exceptions.").

50. *Id.* at 777.

51. *Id.* at 778.

medical standards" to which autopsies must adhere, and the specialized training that those who prepare the reports must have.[52] Second, the court found that "medical opinions as to the nature of any injuries" and the medical cause of the victim's death also demonstrate particularized guarantees of trustworthiness because they follow on the doctor's physical findings and reflect his expert judgment on a subject he is professionally and legally charged with determining and recording.[53]

On the other hand, the court found that "statements [in an autopsy report] as to circumstances surrounding the death taken from police reports or other sources" do not demonstrate particularized guarantees of trustworthiness.[54] Nonetheless, the court decided that inclusion of such statements here was not prejudicial to the defendant because other witnesses had independently established the information relayed in the report.[55] The court also held that the fourth category of statements, the doctor's conclusions as to whether the death was a homicide, do not demonstrate particularized guarantees of trustworthiness.[56] However, on the facts of the case, the court found the admission of these statements "at worst, harmless error beyond a reasonable doubt," because the doctor's finding of homicide "simply reflected the examiner's opinion that injuries received in an unquestioned beating—rather than some other medical cause—had caused death."[57] As a result, the court found that the admission of the autopsy report did not violate the Confrontation Clause under the *Roberts* test.[58]

B. Crawford *Changes Everything*

Crawford v. Washington fundamentally changed Sixth Amendment jurisprudence by announcing a new test of constitutionality under the Confrontation Clause.[59] Michael Crawford was charged with assault and attempted murder after he stabbed a man whom he believed had attempted to rape his wife.[60] The principal issue at trial was whether Crawford acted in self-defense.[61] Crawford testified at trial that he

52. *Id.* at 778-79.
53. *Id.* at 778, 779.
54. *See id.* at 779, 782-83.
55. *Id.*
56. *Id.* at 783.
57. *Id.* at 783-84.
58. *Id.* at 784-85.
59. Crawford v. Washington, 541 U.S. 36, 68 (2004).
60. *Id.* at 38, 40.
61. *Id.* at 40.

believed he saw the victim attempting to draw some type of weapon before Crawford stabbed him.[62]

The defendant's testimony contradicted his wife Sylvia's statement to the police following the incident.[63] The Washington State marital privilege, which prevents "a spouse from testifying without the other spouse's consent," precluded Crawford's wife from testifying at trial.[64]

The state introduced a tape recording of Sylvia's statements into evidence pursuant to the "statements against penal interest" exception to the hearsay rule.[65] The prosecutor was allowed to play the tape during the trial, and Crawford was convicted of assault.[66] On appeal, the Supreme Court of Washington applied a *Roberts* analysis and found no constitutional violation.[67] The court determined that the "declarant prong" was satisfied because Sylvia was unavailable due to the marital privilege.[68] It also found the "reliability prong" to be satisfied because, although statements against interest do not fall within a firmly rooted hearsay exception, Sylvia's statements demonstrated particularized guarantees of trustworthiness.[69]

After an in-depth examination of the historical context in which the Sixth Amendment was drafted,[70] Justice Scalia, writing for the majority, determined that "[t]his history supports two inferences about the meaning of the Sixth Amendment."[71] The Court wrote that first, "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[72] And second, "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."[73]

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62. *Id.* at 38-39.

63. *Id.* at 38-40.

64. *Id.* (citing WASH. REV. CODE § 5.60.060(1) (1994)).

65. *Id.* The State successfully argued that Sylvia's admission that she led Crawford to the victim's apartment constituted a statement against penal interest, because by facilitating the assault, Sylvia was culpable for the crime. *See id.*

66. *Id.* at 40-41.

67. State v. Crawford, 54 P.3d 656, 662-64 (Wash. 2002), *rev'd*, 541 U.S. 36 (2004).

68. *Id.* at 662.

69. *Crawford*, 541 U.S. at 40-41 ("Sylvia was not shifting blame but rather corroborating her husband's story that he acted in self-defense . . . ; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a 'neutral' law enforcement officer.").

70. *See id.* at 42-50.

71. *Id.* at 50.

72. *Id.*

73. *Id.* at 53-54.

The Court cited an English language dictionary published in 1828 for a revolutionary-era definition of testimony: "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[74] Though it declined to provide a comprehensive definition of "testimonial" for the purposes of the Sixth Amendment,[75] the Court

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74. *Id.* at 51 (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). For an argument that Justice Scalia has misread the historical record, see generally Thomas Y. Davies, *What Did The Framers Know and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105 (2005), stating that "[t]he historical claims regarding the original meaning of the Confrontation Clause in [*Crawford*] provide the latest installment of fictional originalism."

75. *Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"). The Court has handed down only one decision since *Crawford* that further fleshes out the meaning of "testimonial." The consolidated cases of *Davis v. Washington* and *Hammon v. Indiana* involved the admissibility of statements made to government officials in the context of domestic violence situations. Davis v. Washington, 126 S.Ct. 2266, 2270, 2272 (2006).

In *Davis*, Adrian Davis's former girlfriend, Michelle McCottry, called 911 during a domestic disturbance. *Id.* at 2270-71. She told the 911 operator that Davis was beating her again, and whenever McCottry began to talk, the operator cut her off with questions regarding Davis' appearance, age, and other descriptive information. *Id.* at 2271. Two police officers arrived several minutes later and found a shaken McCottry, but Davis had left the scene. *Id.* Davis was subsequently arrested and charged with "felony violation of a domestic no-contact order." *Id.*

McCottry did not testify at Davis's trial. *Id.* The two responding police officers were the prosecution's only witnesses, but neither could testify that Davis had injured McCottry. *Id.* The trial court allowed the prosecutor to play the 911 tape as evidence to establish Davis as the assailant, and Davis was convicted. *Id.*

The Court, with Justice Scalia writing for the majority (as he did in *Crawford*), held that McCottry's statements to the 911 operator were not testimonial. *Id.* at 2277. The Court's test focused on the purpose of the interrogation: "Statements are non-testimonial 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." *Id.* at 2273. By contrast, "[statements] are testimonial when the circumstances objectively indicate that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 2273-74. The Court distinguished McCottry's 911 call from the interrogation of Sylvia Crawford in *Crawford*: "McCottry was speaking about events *as they were actually happening*," whereas Sylvia's interrogation "took place hours after the events she described had occurred." *Id.* at 2276. Moreover, "McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat." *Id.*

According to the Court, determining the testimonial nature of statements made in response to police interrogation in the *Hammon* case was a "much easier task." *Id.* at 2278. There, the police responded to a report of a domestic disturbance at the home of Hershel and Amy Hammon, finding Amy alone on the porch. *Id.* at 2272. Amy allowed the police into the home, where the officers noticed broken glass on the floor near a furnace. *Id.* Hershel was in the kitchen at the time. *Id.*

provided three possible definitions, or "formulations," of "testimonial statements."[76] They include "*ex parte* in-court testimony or its functional equivalent;"[77] "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;"[78] and "statements that were made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial."[79] In dictum, the Court also stated that certain hearsay exceptions—"business records [and] statements in furtherance of a conspiracy"—are not testimonial by their nature.[80] However, the Court held that under even the narrowest of definitions, Sylvia Crawford's statements in response to structured police interrogation were certainly testimonial.[81]

The majority also condemned the *Roberts* test.[82] First, it found that *Roberts* unnecessarily afforded constitutional scrutiny to statements that were "far removed from the core concerns of the clause" (such as non-testimonial statements).[83] Second, on the facts of *Crawford*, use of the *Roberts* test would have resulted in admission of ex parte testimony

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One officer remained in the kitchen with Hershel while the other went into the living room with Amy to ask her what happened. *Id.* Amy told the officer about Hershel's violent behavior, and the officer had her fill out a battery affidavit. *Id.*

The Court found the statements within the affidavit to be "not much different from the statements we found to be testimonial in *Crawford.*" *Id.* at 2278. Notably, at the time the statements were given, there was no longer an ongoing argument between Amy and Hershel, Amy had told the officers that everything was fine, and the officer was seeking to determine what had already happened rather than what was going on at that moment. *Id.* The Court found that, "[o]bjectively viewed, the . . . sole[] purpose of the interrogation was to investigate a possible [past] crime." *Id.* As such, Amy's responses were considered testimonial. *Id.*

76. *Crawford*, 541 U.S. at 51-52.

77. *Id.* at 51-52 (quoting Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02-9410)) (explaining that such testimony includes, "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").

78. *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment), *quoted in Crawford*, 541 U.S. at 51-52.

79. Brief of the National Association of Criminal Defense Lawyers et al. as Amici Curiae in Support of Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02-9410), *available at* http://www.nacdl.org/public.nsf/newsissues/amicus_attachments/$FILE/crawford.pdf, *quoted in Crawford*, 541 U.S. at 51.

80. *Crawford*, 541 U.S. at 56.

81. *See id.* at 52 ("Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard."); *id.* at 61 ("Sylvia Crawford's statement is testimonial under any definition.").

82. *Id.* at 60-69.

83. *Id.* at 60-61.

based only upon a judicial finding of reliability.[84] The Court highlighted the unpredictable and subjective nature of the *Roberts* reliability test by reviewing numerous judicial decisions demonstrating contradictory outcomes under similar factual scenarios.[85] Concluding that a judicial determination of reliability was not the proper constitutional test, the Court stated: "[T]he Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[86]

II. COURTS STRUGGLE WITH *CRAWFORD*

This Comment will now examine how five state courts have applied, or attempted to avoid applying, *Crawford* to the decision to admit autopsy reports into evidence where the doctor who performed the autopsy did not testify at trial. The courts in each case came to the same ultimate result, upholding the defendants' convictions despite Confrontation Clause objections.[87] However, the quality and depth of the reasoning in these decisions varies considerably.

The Court of Appeals of Texas analyzed the post-*Crawford* admission of an autopsy report in the 2005 case of *Moreno Denoso v. State.*[88] Rogelio Moreno Denoso was convicted of murder in the shooting death of David Quintero.[89] According to the defendant, he was asked by four friends to pick up the victim, an acquaintance, and drive to a remote part of Hidalgo County, Texas.[90] There, Denoso alleged the other four men shot and killed the victim and ordered Denoso to help dispose of the body.[91] The victim's burnt and decomposed body was found by authorities, and an autopsy was performed in which gunshot wounds were determined to be the cause of death.[92] The medical examiner who prepared the autopsy report died before he could testify at trial.[93]

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84. *Id.* at 62, 65-66 (condemning the *Roberts* test for "allow[ing] a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability").

85. *Id.* at 63.

86. *Id.* at 61.

87. Smith v. State, 898 So.2d 907, 909 (Ala. Crim. App. 2004); State v. Lackey, 120 P.3d 332, 342 (Kan. 2005); Rollins v. State, 897 A.2d 821, 853 (Md. 2006); People v. Durio, 794 N.Y.S.2d 863, 864, 869 (N.Y.Sup. Ct. 2005); Moreno Denoso v. State, 156 S.W.3d 166, 172 (Tex. Ct. App. 2005).

88. 156 S.W.3d at 180-83.

89. *Id.* at 171-72.

90. *Id.* at 172.

91. *Id.*

92. *Id.* at 172, 182.

93. *Id.* at 181.

Denoso appealed his conviction on multiple counts, including that the admission of the autopsy report violated his Confrontation Clause rights.[94]

After holding that autopsy reports fell within the Texas hearsay exception for public records,[95] the court addressed the Confrontation Clause issue.[96] The court summarized *Crawford*, and reviewed how Texas courts had applied *Crawford* to a variety of situations.[97] The court then applied *Crawford* to the autopsy report.[98] It stated that an autopsy report "is not prior testimony at a preliminary hearing, before a grand jury, or at a former trial. It is not a statement given in response to police interrogations."[99] Accordingly, the court concluded that "the autopsy report in this case does not fall within the categories of testimonial evidence described in *Crawford* [because it] was non-testimonial in nature."[100] In dictum, the court noted that even if it was error to admit the autopsy report, it would have been harmless error beyond a reasonable doubt in light of the sufficiency of the other evidence against the defendant.[101]

A New York trial judge addressed this same issue in *People v. Durio*.[102] Durio was convicted of murder for shooting a man twice in the back.[103] The judge admitted the autopsy report as a business record, accompanied by in-court testimony from a medical examiner who neither participated in the victim's autopsy or the writing of the report.[104] The testifying medical examiner used the report as a reference and rendered her own opinion about the cause of death.[105] Durio moved to vacate his conviction on Sixth Amendment grounds, arguing that the autopsy report was testimonial in nature, and therefore inadmissible.[106]

The court began its analysis of the admissibility of the autopsy report, pursuant to *Crawford*, by finding that "business records are specifically exempted from challenge because they are outside the 'core testimonial

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94. *Id.* at 172, 181.

95. *Id.* at 180-81. Denoso unsuccessfully argued that the law enforcement exclusionary clause of the public records exception should apply to medical examiners. *Id.*

96. *Id.* at 181.

97. *Id.* at 181-82.

98. *Id.* at 182.

99. *Id.* (citation omitted)

100. *Id.* The court further noted that "the new rule articulated in *Crawford* is not applicable in this case." *Id.*

101. *Id.* at 182-83.

102. 794 N.Y.S.2d 863, 867-69 (N.Y.Sup. Ct. 2005).

103. *Id.* at 864.

104. *Id.* at 864-65.

105. *Id.* at 865.

106. *Id.* at 864.

statements that the Confrontation Clause plainly meant to exclude.'"[107] The court noted that the reason for *Crawford*'s classification of business records as non-testimonial is that they are prepared in the regular course of business, and therefore, by their nature, are not prepared for the purposes of litigation.[108] The court also held that under New York law the Office of the Chief Medical Examiner is a "business," and therefore autopsy reports are "business record[s]."[109]

Further, the court distinguished autopsy reports from blood tests,[110] which had been categorized as testimonial by an intermediate appellate court one year earlier in *People v. Rogers*.[111] The inadmissible blood test reports in *Rogers* were "initiated by the prosecution and generated by the desire to discover evidence against [the] defendant"[112] whereas "[t]he autopsy report in [*Durio*] was not manufactured for the benefit of the prosecution."[113] Furthermore, the court pointed out that autopsies are performed and reports are generated under statutory mandate, not at the request of prosecutors.[114] The mere possibility of future use of an autopsy report at trial, according to the court, "does not mean that it was composed for that accusatory purpose or that its use by a prosecutor is the inevitable consequence of its composition."[115]

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107. *Id.* at 867 (quoting Crawford v. Washington, 541 U.S. 36, 63 (2004)).

108. *Id.*

109. *Id.* at 868 ("A public agency such as the Office of the Chief Medical Examiner (OCME) constitutes a 'business' for the purposes of [the New York statute]."); *see also* N.Y. C.P.L.R. § 4518(a) (McKinney 2007) ("The term business includes a business, profession, occupation and calling of every kind."); *cf.* People v. Foster, 261 N.E.2d 389, 391 (N.Y. 1970) (concluding that certain functions of the police department are business functions), *quoted in Durio*, 794 N.Y.S.2d at 868.

110. *Durio*, 794 N.Y.S.2d at 868.

111. 780 N.Y.S.2d 393, 396-97 (N.Y. App. Div. 2004). There, the defendant was convicted of first degree rape and sodomy. *Id.* at 394. Laboratory analysis of the victim's blood was admitted by the trial judge without the testimony of the scientist who performed the test. *Id.* at 396-97. The victim's blood alcohol level "was especially significant here, as the victim's intoxication level [was] directly related to her capability to consent [to sex]." *Id.* at 397. The court concluded that the blood test was testimonial because it was conducted at the direction of the prosecution in anticipation of trial *Id.*

112. *Id.* at 397.

113. *Durio*, 794 N.Y.S.2d at 868-69.

114. *Id.* at 868; *see also* N.Y. CITY, CHARTER ch. 22, § 557(g) (2004) ("The chief medical examiner shall keep full and complete records in such form as may be provided by law. The chief medical examiner shall promptly deliver to the appropriate district attorney copies of all records relating to every death as to which there is, in the judgment of the medical examiner in charge, any indication of criminality. Such records shall not be open to public inspection.").

115. *Id.* at 869; *see also* People v. Foster, 261 N.E.2d 389, 391-92 (N.Y. 1970) ("While it is true that such records may later be used in litigation, such was not the sole purpose when they were made, and, therefore, they should not be excluded merely because this was a possible future use."), *quoted in Durio*, 794 N.Y.S.2d at 868.

Finally, the court addressed the public policy interest in favor of holding autopsy reports non-testimonial, stating that "courts cannot ignore the practical implications that would follow from treating autopsy reports as inadmissible."[116] The decision also noted the cold case dilemma: years may pass between the preparation of the autopsy report and the prosecution of the crime, and that this time lapse can lead to the unavailability of the medical examiner.[117] "[C]ertainly it would be against society's interests to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case."[118] The court concluded that the autopsy report was non-testimonial and that its admission did not violate the Confrontation Clause.[119]

The Alabama Court of Criminal Appeals similarly confronted this issue in *Smith v. State*.[120] Frankie David Smith was charged with murder after he killed a former business partner in a dispute over a debt.[121] Smith met the victim, Stumler, at a warehouse where they had previously operated a business together.[122] Smith claimed that after he told the victim he could not pay the debt, the victim sprayed him with a substance that burned his eyes.[123] Stumler then hit Smith twice with a bat.[124] Smith wrestled the bat away from Stumler and struck him in the head three times.[125] Smith then wrapped the victim's head in a plastic garbage bag; he later claimed he did so to keep blood from getting on the floor.[126] Finally, he bound the victim with duct tape, wrapped the body in plastic wrap, and drove to Florida where he disposed of the remains.[127]

At trial, Smith claimed self-defense, and contended that the victim died from the blows to the head with the bat, and not as a result of suffocation from the bag placed over his head.[128] The autopsy report, however, which was admitted over a Confrontation Clause objection,

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116. *Durio*, 794 N.Y.S.2d at 869.
117. *Id.*
118. *Id.*
119. *See id.*
120. 898 So.2d 907, 909 (Ala. Crim. App. 2004).
121. *Id.* at 908.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 908-09.
126. *Id.* at 909.
127. *Id.*
128. *Id.* ("The State's theory of the case was that Stumler was not killed by the blows to his head but was asphyxiated when Smith secured the plastic bag over his head. Smith admitted that he killed Stumler, but he claimed that he did so in self-defense.").

listed the cause of death as asphyxiation.[129] Dr. Marie Herrmann, the medical examiner who performed the autopsy, did not testify at trial despite being available.[130] Instead, a different medical examiner testified, and, based on Dr. Herrmann's report, reached the same conclusion about the cause of death.[131] A jury convicted Smith of manslaughter and sentenced him to twenty years in prison.[132]

Judge Cobb, writing for the majority, summarily concluded that *Crawford* "does not appear to be implicated here because the evidence at issue is not testimonial."[133] Therefore, "[t]he admissibility of the autopsy report and materials associated with it is governed by hearsay law [and] [t]his Court has held that an autopsy report is admissible as a business-records exception to the hearsay rule."[134] Notwithstanding the court's finding that the autopsy report was non-testimonial and that it fell within the business records hearsay exception, the court nevertheless found a Confrontation Clause violation.[135]

The court referred to the Supreme Court decision in *California v. Green* for the proposition that "the protections afforded by the Confrontation Clause have sometimes resulted in 'admissible' hearsay evidence being ruled inadmissible."[136] The court concluded that "[u]nder the facts of this case, the Confrontation Clause preclude[s] the prosecution from proving an essential element of its case by hearsay evidence alone."[137] This error was deemed harmless, however, in light of Smith's testimony and the jury's verdict of manslaughter.[138]

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129. *Id.* at 915.

130. *Id.* Dr. Herrmann had left her job with the County and had entered private practice. *Id.*

131. *Id.*

132. *Id.* at 908.

133. *Id.* at 916.

134. *Id.* (citing Adams v. State, 955 So.2d 1037, 1073 (Ala. Crim. App. 2003), *rev'd on other grounds* 955 So.2d 1106 (Ala. 2005)).

135. *Id.* at 916-17.

136. *Id.* at 916 (citing California v. Green, 399 U.S. 149, 155-56 (1970)).

137. *Id.* at 917.

138. *Id.* at 918 ("The jury in this case rejected the prosecution's assertion that Smith committed murder; it instead found him guilty of manslaughter. . . . [W]e find that the evidence presented was sufficient to support the jury's finding that Smith was guilty of manslaughter. . . . The facts overwhelmingly support the manslaughter conviction, even without consideration of the autopsy report.").

In concurrence, Judge Shaw agreed that admission of the autopsy report was harmless error, if it was error, but questioned the majority's confrontation clause analysis. *Id.* at 920-23 (Shaw, J., concurring). Judge Shaw noted that although *Crawford* suggested that business records are not testimonial, the Court "did not specifically address statements made by a medical examiner in an autopsy report prepared in anticipation of a criminal prosecution." *Id.* at 921. Additionally, Judge Shaw stated that *Crawford* had not expressly overturned *Illinois v. White*, and therefore cautioned that any finding of a

State v. Lackey provided the Kansas Supreme Court with its first opportunity to decide on the admissibility of autopsy reports under *Crawford*.[139] In December of 1982, the body of the victim was found stuffed in a closet in her Salina, Kansas mobile home.[140] Dr. David Clark, the county coroner, visited the scene and ordered an autopsy, which Dr. William Eckert performed.[141] The case laid dormant until 1996,[142] and Dr. Eckert had died by the time it went to trial.[143]

A major issue at trial was the time of death of the victim, which the autopsy report did not indicate.[144] Nonetheless, Dr. Eckert's autopsy report was admitted in its entirety, including his opinion as to the cause of death.[145] At trial, Dr. Clark testified, based upon his observations at

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statement as non-testimonial ought nevertheless also satisfy the *White* requirement of independent evidentiary significance. *Id.* at 923 ("[*White* holds] that a statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability."); *see also supra* notes 29-30 and accompanying text.

139. State v. Lackey, 120 P.3d 332, 348 (Kan. 2005).

140. *Id.* at 341. The facts of the case are grisly. Robert Henry Lackey, a drifter using the alias "Bob Moore," found a place to stay and worked as a cook at the Salina Gospel Mission. *Id.* at 340. His victim, "S.B.," was a 22-year-old college student volunteering at the mission. *Id.* The two became friends, but Lackey wanted more, and became angry when S.B. rejected his advances. *Id.*

On December 11, 1982, Lackey spent the afternoon drinking by himself at a local bar; at around 6 p.m., he took a cab from the bar to a convenience store within walking distance of S.B.'s mobile home. *Id.* at 340-41. Four to five hours later, he took a cab from the same convenience store back the mission. *Id.* at 341. At 7:30 a.m. the next morning, clergy at the mission discovered that Lackey was gone, along with all of his belongings and S.B. was never heard from again. *See id.*

S.B.'s boyfriend returned to Salina from out of town, and was unable to locate her. *See id.* at 341. He even stayed a few nights in her trailer during the week of December 12 through 17, 1982. *Id.* He concluded that she left town. He discovered S.B.'s body when he was moving his belongings out of the trailer. *Id.* She had bruises on her neck and "was wearing socks and underwear and her jeans were pulled down around her ankles." *Id.*

141. *Id.* at 341.

142. *See id.* at 342. The physical evidence from the initial investigation in 1982 was preserved; however, that investigation did not lead to an arrest. *See id.* In 1996, the Kansas Bureau of Investigation and the Salina Police received a tip from Canadian authorities that a "Robert Moore" had taken part in a homicide in Salina in 1982. *Id.* Through the Canadian tip, investigators learned that their suspect's name was Robert Lackey. *Id.* Witnesses from the 1982 investigation were re-interviewed and shown a 1979 picture of Lackey, whom they identified as Bob Moore. *Id.* DNA testing was performed on fluid residue from underwear found under Lackey's bed at the mission; these fluids matched those found in the victim's rape kit. *Id.* Lackey was tracked to Alabama where he was arrested. *Id.* In March 2002, he was extradited to Kansas to stand trial. *Id.*

143. *Id.* at 341.

144. *Id.* at 352. Although not specified in the opinion, the time of death appears critical to a possible alibi defense for Lackey, or to raise the possibility that S.B.'s boyfriend committed the crime. *See id.*

145. *Id.* at 346, 352.

the crime scene, that the cause of death was strangulation and that the body had been in the closet for six to eight days.[146] A second pathologist, Dr. Mitchell, testified for the state that based on his reading of the record, the victim had been strangled at least one or two days prior to the discovery of the body.[147] But Dr. Mitchell could not provide a maximum time that the victim had been dead before the body was discovered.[148]

On appeal, the defendant challenged the admission of the autopsy report on Confrontation Clause grounds.[149] After finding that the reports fell within the Kansas business records and public records exceptions to the hearsay rule,[150] the court addressed the Confrontation Clause issue.[151] The defendant argued that in order to determine whether the report was testimonial, a court should look to "the reasonable expectation of how the report[] will be used."[152] Because autopsies of homicide victims are performed with criminal litigation in mind, the defendant argued that they must therefore be testimonial.[153] The court responded to this argument by noting that "none of the cases which have addressed autopsy reports under *Crawford* have adopted this point of view."[154] It then summarized the case law from other jurisdictions and found

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146. *Id.* at 341.

147. *Id.*

148. *Id.*

149. *Id.* at 342.

150. *Id.* at 346-48. The court noted that, at the time of S.B.'s death, there was a statutory requirement that coroners file autopsy reports with the district court. *Id.* at 347-48. The court therefore concluded that "[s]ince a copy of the autopsy report was required to be filed with the clerk of the district court . . . it follows that the autopsy report would . . . qualify as a copy of an official record." *Id.* at 348.

151. *Id.* at 348.

152. *Id.* at 349.

153. *Id.* While the coroner may have been required to perform an autopsy pursuant to Kansas statute, the defendant argued, all those situations where an autopsy is required are for the purposes of litigation. *Id.* For example, the statute provides:

> When any person dies, or human body is found dead in the state, and the death is suspected to have been the result of violence, caused by unlawful means or by suicide, or by casualty, or suddenly when the decedent was in apparent health, or when decedent was not regularly attended by a licensed physician, or in any suspicious or unusual manner, or when in police custody, or when in a jail or correctional institution, . . . or when the determination of the cause of a death is held to be in the public interest, the coroner . . . shall be notified . . . .

KAN. STAT. ANN. §22a-231 (1995 & Supp. 2003), *quoted in Lackey*, 120 P.3d at 349. Therefore, to argue that the report was conducted in the regular course of business would not "analyze autopsy or coroner's reports by examining the reasonable expectation of how the reports will be used." *Lackey*, 120 P.3d at 349.

154. *Lackey*, 120 P.3d at 349.

persuasive the approach taken by Maryland's intermediate appellate court.[155]

For the purposes of categorizing statements within the report as testimonial or not, the court adopted the Maryland court's distinction between "factual, routine, descriptive, and nonanalytical findings" on the one hand, and "contested opinions, speculations, and conclusions" on the other.[156] Because "routine and descriptive observations of the physical body [occur] in an environment where the medical examiner would have little incentive to fabricate the results," the court held that such statements were non-testimonial.[157] But opinions and conclusions drawn from the objective findings were considered testimonial, and as such, the right to confrontation applies.[158] Thus, the court concluded that testimonial statements should be redacted from autopsy reports prior to admission if the declarant will not testify.[159] Applying this reasoning to the facts of *Lackey*, the court held that although admitting the autopsy report without redacting Dr. Eckert's testimonial conclusions as to the cause of death was error, it was nevertheless harmless.[160]

When Maryland's highest court reviewed the intermediate appellate decision in *Rollins v. State*—the decision the *Lackey* court found most persuasive—it cited the *Lackey* court's analysis with approval, although it applied a slightly different analysis.[161] Wesley Allen Rollins was charged with first-degree murder and other crimes in the death of seventy-one year old Irene Ebberts.[162] Family members found Ebberts dead on her bed amid evidence of a burglary.[163] In addition to the detailed descriptions of the body's physical and chemical condition, the autopsy report performed by medical examiner Dr. Pestaner included opinions that "the manner of death was 'homicide'" and "that the cause of death was 'smothering.'"[164] At trial, the judge admitted the report after redacting these conclusions.[165] Although Dr. Pestaner did not

155. *Id.* at 350-52 (citing Rollins v. State, 866 A.2d 926, 951-52 (Md. App. 2005), *aff'd* 897 A.2d 821 (Md. 2006)).

156. *Id.* at 351.

157. *Id.*

158. *Id.*

159. *Id.* at 351-52.

160. *See id.* at 352. The time of death, not the cause of death, was at issue, and Dr. Eckert did not speculate on the time of death in the report. *Id.* The cause of death was not contested by the defendant, and the evidence of the cause of death was cumulative in light of the testimony of Dr. Mitchell and Dr. Clark. *Id.*

161. *See* Rollins v. State, 897 A.2d 821, 833-34 (Md. 2006); *infra* Part III.C.

162. *Rollins*, 897 A.2d at 823-24.

163. *Id.* at 824-25.

164. *Id.* at 825.

165. *Id.* at 826-27.

testify, Dr. Mary Ripple, another medical examiner, testified as an expert at trial and reached the same conclusions.[166] Rollins argued that Dr. Ripple's testimony was based on hearsay statements provided by police detectives and unrelated to Dr. Pestaner's medical findings.[167]

In response to Rollins' claim that the admission of Dr. Ripple's testimony and the autopsy report violated his Confrontation Clause rights, the court first discussed *Crawford* and catalogued the post-*Crawford* autopsy report decisions from other states.[168] The court next determined that an autopsy report fell within Maryland's business and public records exceptions to hearsay.[169] Despite finding that the hearsay rule did not bar admission of the report, however, the court held that the trial judge must analyze each statement within the report to determine whether the individual statements are testimonial for Confrontation Clause purposes.[170]

The court distinguished between "findings . . . of the physical condition of a decedent" that are "not analytical" on the one hand, and "contested conclusions or opinions" on the other.[171] The court held that the former category of statements—findings of the physical condition of the decedent—were non-testimonial because they were objective and generally reliable.[172] However, contested conclusions and opinions "central to the determination of the *corpus dilecti*" are testimonial because "they serve the same function as testimony and trigger the Sixth Amendment right of confrontation."[173]

III. POST-*CRAWFORD* ADMISSIBILITY OF AUTOPSY REPORTS: NEW FRAMEWORK, SAME RESULTS

Some of the rationales employed by the various state courts in determining constitutional admissibility of autopsy reports are

166. *Id.* at 827-28, 848. Dr. Pestaner had left the state of Maryland to practice in California. *Id.* at 827 n.4. Interestingly, the trial judge "urged defense counsel to subpoena Dr. Pestaner" when the prosecution stated it might not do so. *Id.* at 827 n.4.

167. *Id.* at 827. Throughout the trial, Rollins admitted to the burglary but maintained that he did not kill Ebberts. *Id.* at 825. Instead, he argued that Ebberts died of natural causes. *Id.* at 825, 827-28. But the jury disagreed, and convicted him of Ebberts' murder. *Id.* at 823.

168. *Id.* at 828-35.

169. *Id.* at 835-38.

170. *See id.* at 845-46.

171. *Id.* at 841.

172. *See id.* at 845-46; *see also* Rollins v. State, 866 A.2d 926, 952 n.12 (Md. Ct. Spec. App. 2005), *aff'd* 897 A.2d 821 (Md. 2005) (explaining that the physical descriptions within the autopsy report were "objectively ascertained, generally reliable, and normally undisputed").

173. *Rollins*, 897 A.2d at 841.

questionable. As discussed below, the state courts in these cases appear to strain their constitutional analysis to reach an outcome that accords with the public policy of prosecuting alleged murderers even though the medical examiner is no longer available.[174]

A. Taking the "Back Door" and Re-introducing Reliability

The first questionable analytical pathway was used in the *Durio* case. There, the court reasoned that because *Crawford* mentioned in dicta that business records are non-testimonial, and because autopsy reports are admissible under New York's business record exception to the hearsay rule, autopsy reports must therefore be non-testimonial.[175] This could be called a "back door" approach to the *Crawford* analysis: the *Durio* court fits the statements into a category which it believes is *non-testimonial*, rather than analyzing whether the statements fall within any of the *Crawford* formulations of *testimonial*.[176] This approach appears to exempt from Confrontation Clause scrutiny anything that fits within the state's "business records" evidentiary classification.[177]

The problem with this reasoning is that a document's qualification as a business record under state evidence rules is based on its reliability.[178] Therefore, under the *Durio* approach, hearsay evidence is classified as non-testimonial based on a court's evidentiary determination of reliability. Since *Crawford* specifically rejected reliability as the test for Confrontation Clause admissibility, it is unlikely that the Supreme Court would approve of a method that re-incorporates reliability as the preliminary step in a Confrontation Clause analysis.[179] Furthermore, this method fails to adequately apply *Crawford* because it makes no attempt to analyze whether the autopsy report falls within any of the *Crawford* formulations of "testimonial."[180]

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174. *See infra* Part III.

175. *See* People v. Durio, 794 N.Y.S.2d 863, 866-69 (N.Y.Sup. Ct. 2005).

176. *See id.* at 866.

177. *See id.* at 867-69; *see also Rollins*, 897 A.2d at 831 ("*Crawford*'s reference to . . . business records as non-testimonial statements has led other jurisdictions to hold that finding evidence to be a business record automatically excepts that document from Confrontation Clause scrutiny.").

178. *See Durio*, 794 N.Y.S.2d at 867 ("The rationale for the business record exception is grounded in both necessity and enhanced reliability.").

179. *See supra* notes 92-94 and accompanying text.

180. *See* Crawford v. Washington, 541 U.S. 36, 51-52 (2004). The closest the *Durio* court came to analyzing whether the autopsy report statements fit within one of the *Crawford* formulations was in its conclusion that

> [t]he autopsy report in the case was not manufactured for the benefit of the prosecution. Indeed, an autopsy is often conducted before a suspect is identified or even before a homicide is suspected. That it may be presented as evidence in

B. Avoiding Crawford*'s Third Formulation by Adopting a Narrow View of "Testimonial"*

The *Denoso* court purported to analyze whether autopsy reports fall with any of the *Crawford* formulations of testimonial.[181] Problematically, the court did not consider the "categories of testimonial evidence described in *Crawford*"[182] to be the three possible definitions offered by the Court in *Crawford*,[183] but instead considered those categories to be "prior testimony at a preliminary hearing, before a grand jury, . . . at a former trial[, . . . or] a statement given in response to police interrogations."[184] These are the types of statements the Supreme Court said the term testimonial covers "at a minimum."[185] The *Denoso* court failed to apply any of the three possible formulations of the term testimonial offered by the Supreme Court, applying only the narrowest of definitions.[186]

Autopsy reports arguably fall within the third formulation noted by the Court in *Crawford*: "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."[187] It seems highly likely that a medical examiner, while performing an autopsy on a victim who has died a violent death, believes that the statements he makes in his report will be available for later use at trial.[188] In *Denoso*, this particular autopsy was in fact ordered by a Justice of the Peace under statutory

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> a homicide trial does not mean that it was composed for that accusatory purpose or that its use by a prosecutor is the inevitable consequence of its composition.

Durio, 794 N.Y.S.2d at 868-69.

181. Moreno Denoso v. State, 156 S.W.3d 166, 182 (Tex. Ct. App. 2005) ("Based on our review, the autopsy report in this case does not fall within the categories of testimonial evidence described in *Crawford*.").

182. *Id.*

183. *See Crawford*, 541 U.S. at 51-52

184. *Moreno Denoso*, 156 S.W.3d at 182.

185. *Crawford*, 541 U.S. at 68 ("Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.").

186. *See id.* at 51-52; *Moreno Denoso*, 156 S.W.3d at 182.

187. *Crawford*, 541 U.S. at 52 (quoting Brief of the National Association of Criminal Defense Lawyers et al. as Amici Curiae in Support of Petitioner, *supra* note 79, at 3).

188. *See, e.g.*, ALA. CODE § 15-4-1 (Lexis Nexis 1995) ("When a coroner has been informed that a person has been killed or suddenly died under such circumstances as to afford a reasonable ground for belief that such death has been occasioned by the act of another by unlawful means, he must forthwith make inquiry of the facts and circumstances of such death by taking the sworn statement in writing of the witnesses having personal knowledge thereof and submit the same to a judge of a court of record or a district attorney.").

directive.[189] Indeed, Professor Giannelli makes a plausible argument that scientific evidence such as autopsy reports may even fall within the first two possible definitions of testimonial because "[i]t is not too much of a step to argue that a laboratory report is simply the affidavit of an expert."[190]

C. Addressing the Third Formulation, but Dodging the Issue

The *Lackey* and *Rollins* courts addressed the question of whether autopsy reports fall within the third formulation of testimonial.[191] The court's answer in *Rollins* was that, while the autopsy report might eventually be used in a criminal trial, such use is not the express purpose of the report's statements.[192] Instead, the report is created under statutory duty.[193] But this resolution dodges the issue. The third *Crawford* formulation of testimonial does not inquire into the express purpose for which the declarant is making the statements, but rather, whether the declarant may reasonably believe that the statements will be used in future litigation.[194] A medical examiner making statements under a statutory duty would reasonably believe the statements will be used in later litigation.

The *Lackey* court provides an even less satisfactory answer. There, the defendant urged the court to assess the testimonial nature of the autopsy report by looking at the expectation of how the report would be used.[195] Lackey argued that "[w]here autopsy reports are prepared in cases of homicide, . . . the expectation of a criminal prosecution is clearly in mind and therefore the reports are testimonial."[196] The court's response was simply that "none of the cases which have addressed autopsy reports under *Crawford* have adopted this point of view."[197]

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189. *Moreno Denoso*, 156 S.W.3d at 180 & n.8 (citing TEX. CODE CRIM. PROC. ANN. Art. 49.25, §§ 6, 9, 11 (Vernon 2006)).

190. Giannelli, *supra* note 7, at 27.

191. State v. Lackey, 120 P.3d 332, 348-49 (Kan. 2005); Rollins v. State, 897 A.2d 821, 838 (Md. 2006).

192. *Rollins*, 897 A.2d at 838.

193. *See id.* at 838-39 ("It is clear that there is a statutory duty to prepare such a report when a death has occurred in 'any suspicious or unusual manner.'" (quoting MD. CODE ANN., HEALTH-GEN. § 5-309(b) (Lexis Nexis 2005))).

194. Crawford v. Washington, 541 U.S. 36, 52 (2004) (quoting Brief of the National Association of Criminal Defense Lawyers et al. as Amici Curiae in Support of Petitioner, *supra* note 79, at 3).

195. *Lackey*, 120 P.3d at 349.

196. *Id.*

197. *Id.*

D. A Second, Inappropriate Dose of Reliability

Another questionable line of reasoning in *Rollins* and *Lackey* is the distinction made between objective, non-analytical findings and contested conclusions and opinions.[198] The basis for the distinction classifying objective, non-analytical findings as non-testimonial is reliability.[199] In a manner analogous to *Durio*, the *Lackey* and *Rollins* courts inject reliability back into the Confrontation Clause analysis.[200] Although this distinction may have been appropriate under a *Roberts* analysis, *Crawford* has specifically rejected reliability as the test for Confrontation Clause admissibility.[201]

IV. CONCLUSION

Notwithstanding strong arguments by defendants that autopsy reports should be considered testimonial, public policy appears to be driving courts to find autopsy reports non-testimonial under *Crawford*.[202] If the United States Supreme Court agrees with the states, it could resolve the issue by narrowing the definition of testimonial. Specifically, the Court could eliminate the third Crawford formulation of testimonial: statements that the declarant reasonably believes will be available for use in future litigation. The Court could also explicitly disagree with the argument that autopsy reports act as the affidavit of a medical examiner but still maintain the first two *Crawford* formulations. However, for now, prosecutors seem to have won the day.

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198. *Lackey*, 120 P.3d at 351-52; *Rollins*, 897 A.2d at 839-41.

199. *See, e.g.*, Rollins v. State, 866 A.2d 926, 954 (Md. Ct. Spec. App. 2005), *aff'd* 897 A.2d 821 (Md. 2006) ("[F]indings in an autopsy report of the physical condition of a decedent, . . . which are objectively ascertained and *generally reliable* and enjoy a *generic indicium of reliability*, may be received into evidence without the testimony of the examiner." (emphasis added)).

200. *See supra* Part III.A.

201. *See supra* notes 92-94 and accompanying text.

202. *See Lackey*, 120 P.3d at 351 ("We believe the reason why these cases have not adopted the arguments and reasoning set forth by the defendant is that it would have the effect of requiring the pathologist [who performed the autopsy] to testify in every criminal proceeding. If, as in this case, the medical examiner who performed the autopsy is deceased or otherwise unavailable, the State would be precluded from using the autopsy report in presenting its case, which could preclude the prosecution of a homicide case.").