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What Happens if Autopsy Reports are Found Testimonial?: The Next Steps to Ensure the Admissibility of These Critical Documents in Criminal Trials

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COMMENT

WHAT HAPPENS IF AUTOPSY REPORTS ARE FOUND TESTIMONIAL?: THE NEXT STEPS TO ENSURE THE ADMISSIBILITY OF THESE CRITICAL DOCUMENTS IN CRIMINAL TRIALS

Dana Amato*

The Sixth Amendment guarantees a criminal defendant the right to confront the witnesses against her. This right to confrontation, known as the Confrontation Clause, applies to hearsay testimony. Therefore, even if a hearsay statement is admissible pursuant to the Federal Rules of Evidence, the Sixth Amendment may prohibit its admission. Whether hearsay runs afoul of the Confrontation Clause depends on whether that hearsay is “testimonial” in nature. However, the Supreme Court has refused to define “testimonial.” Furthermore, what little guidance the Court has released about the correct interpretation of “testimonial” is fractured, conflicting, and confusing. This is especially troubling with respect to forensic hearsay documents because of their importance in criminal trials as well as their ubiquity and variety. Chief among these problematic documents is the autopsy report—an integral and controversial incarnation of forensic hearsay. Due to splits at the state and federal levels regarding the correct interpretation of this rule with respect to autopsy reports, as well as the high-stakes nature of its answer, this Comment argues that it is likely the Court will eventually consider the issue. Furthermore, it predicts that the outcome will be pose problems for prosecutors of murder cases. Therefore,

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this Comment proposes a solution that might ensure the admissibility of these critical documents in criminal cases even if the Court's ultimate ruling is problematic.

TABLE OF CONTENTS

INTRODUCTION.....	294
I. BACKGROUND.....	296
A. What the Supreme Court Said	296
B. What the Federal Circuit Courts Heard	304
C. What the States Heard	307
II. PREDICTIONS & SOLUTIONS	309
A. The Supreme Court May Find Autopsy Reports Testimonial..	309
1. Why The Supreme Court Will Likely Hear the Issue	310
2. Autopsy Reports May Be Found Testimonial.....	310
i. Justices Ginsberg, Kagan, and Sotomayor.....	310
ii. Justice Thomas.....	314
iii. Justices Kennedy, Breyer, and Alito.....	315
iv. Chief Justice Roberts	317
v. The Empty Chair.....	318
B. An Interdisciplinary Solution	319
CONCLUSION.....	322

INTRODUCTION

The Sixth Amendment of the Constitution provides that a criminal defendant has the right to be “confronted with the witnesses against him.”¹ This provision is commonly referred to as the “Confrontation Clause.” The U.S. Supreme Court radically changed its view of the Confrontation Clause in 2004 with *Crawford v. Washington*,² a case which imposed a new fulcrum for Confrontation Clause cases: testimonial status.³ Under the old precedent, hearsay statements were admissible when the declarant was unavailable for trial but the statements contained sufficient “indicia of reliability” or “particularized guarantees of trustworthiness.”⁴ However, *Crawford* changed the inquiry: if a hearsay statement is offered against the

¹ U.S. CONST. amend. VI.

² 541 U.S. 36 (2004).

³ *Id.* at 53 (“In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object . . .”).

⁴ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004).

defendant in a criminal trial and its declarant does not testify, the statement is inadmissible for its truth if the statement is “testimonial” in nature, without any question about the statement’s independent reliability.⁵ Although the word “testimonial” is found nowhere in the text of the Confrontation Clause, the word testimonial became the central point upon which all post-*Crawford* cases turned.⁶ The Supreme Court has openly refused to define the word and has not produced coherent guidance to the lower courts on how to implement this precedent.⁷

One of the more severe consequences of *Crawford* and its progeny is the lack of clarity surrounding a certain type of hearsay integral to many murder trials across the country: autopsy reports. Although the Court has heard some cases regarding the admissibility of other types of forensic hearsay in the event of declarant unavailability, it has flatly refused to take up a case concerning the testimonial status of autopsy reports, despite a recent opportunity to do so.⁸

This Comment will make three main arguments about this issue. First, confusion in lower courts, the significant circuit and state splits on the issue, and the sheer importance of autopsy reports to the criminal justice system all make it more likely that the Supreme Court will grant certiorari on this issue. Moreover, whether autopsy reports are admissible in “declarant-unavailable” situations⁹ is a clear question that warrants a clear

⁵ *Id.* at 53–54 (majority opinion).

⁶ *See infra* Part II.

⁷ *See infra* Part II.

⁸ *See infra* Part II for a discussion on Petition for Writ of Certiorari, *Medina v. Arizona*, 134 S. Ct. 1309, 1309 (2014) (raising the sole issue on appeal as to “[w]hether an autopsy report created as part of a homicide investigation, and asserting that the death was indeed caused by homicide, is ‘testimonial’ under the Confrontation Clause framework established in [*Crawford*]”).

⁹ The Federal Rules of Evidence govern the admissibility of evidence when the declarant is unavailable:

(a) A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant’s statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so; (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement’s proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant’s attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

answer. Second, it is likely, based on existing precedent and the opinions authored by multiple justices on this topic, that the Court could find autopsy reports testimonial for the purpose of the Confrontation Clause. Lastly, this Comment explains the problem that results from this finding—namely, barring the admission of an autopsy report where its creator is unavailable for trial—and proposes an interdisciplinary solution to that problem. This Comment proposes that the medical community should enact a national standard for conducting autopsy reports. This standard should mandate preservation of the autopsy procedure with the explicit intent that future experts will be able to look at the report to draw independent conclusions without having to rely on the testimonial opinions of the original medical examiner.

I. BACKGROUND

In order to fully appreciate the complexity of this evidentiary issue, some background on the evolution of the law is necessary. The Supreme Court's jurisprudence on what counts as "testimonial" under the Confrontation Clause is at best unclear and at worst irreconcilable.¹⁰ The Court has a tendency to push off the difficult task of providing a concrete definition for "testimonial" evidence in favor of embracing a fact-specific analysis of the evidence in each case.¹¹ As a result, the current law has been interpreted in varying (often contradictory) ways by federal circuit and state courts alike.¹²

A. WHAT THE SUPREME COURT SAID

Justice Scalia, writing for the Court in *Crawford*, abrogated previous Confrontation Clause precedent from the 1980s.¹³ *Crawford* is now considered the landmark decision of current Confrontation Clause

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

FED. R. EVID. 804.

¹⁰ See, e.g., *Melendez-Díaz v. Massachusetts*, 557 U.S. 305, 331 (2009) (Kennedy, J., dissenting) ("Now, without guidance from any established body of law, the States can only guess what future rules this Court will distill from the sparse constitutional text.").

¹¹ See, e.g., *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

¹² See *infra*, pp. 18–26 (discussing the splits among the circuit and state courts).

¹³ 541 U.S. at 67. See generally *Ohio v. Roberts*, 448 U.S. 56 (1980) *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004) (codifying a two-part test for the admissibility of testimonial evidence in declarant-unavailable situations: (1) the state must make a good-faith effort to locate the unavailable witness and (2) the state must prove that the evidence carries sufficient indicia of trustworthiness).

jurisprudence.¹⁴ The defendant in *Crawford* was tried for assault and attempted murder.¹⁵ The state offered into evidence an incriminating, previously recorded statement made to the police by the defendant's wife, who did not testify at his trial.¹⁶ The defendant argued that admission of this evidence violated his Sixth Amendment right to be "confronted with witnesses against him."¹⁷ The Washington trial court had originally admitted the statement under the *Ohio v. Roberts*¹⁸ standard, namely because the statement had sufficient indicia of reliability.¹⁹ Still, under the *Roberts* standard, the appellate court of Washington reversed the trial court's decision on the ground that parts of the statement were sufficiently reliable, but others were not.²⁰ Finally, the Supreme Court of Washington reversed the appellate court decision, finding the statements sufficiently reliable and therefore admissible because the statement "sufficiently interlocked" with the defendant's own statements, thereby meeting the *Roberts* standard.²¹

The Supreme Court, however, agreed with the defendant's arguments.²² In doing so, the Supreme Court established a new rule: any evidence that is "testimonial"—even if such evidence does not come from a live witness—triggers the defendant's rights under the Confrontation Clause.²³ In declaring this new rule, Justice Scalia reasoned, "the [Confrontation] 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."²⁴ The Court refused to further explain its new understanding of the Confrontation Clause. Sidestepping the issue of exactly what "testimonial evidence" looks like, the Court declared "[w]e leave for another day any effort to spell out a

¹⁴ Daniel J. Capra & Joseph Tartakovsky, *Autopsy Reports and the Confrontation Clause: A Presumption of Admissibility*, 2 VA. J. CRIM. L. 62, 66 (2014).

¹⁵ 541 U.S. at 40.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 448 U.S. 56 (1980), *abrogated by* *Crawford v. Washington*, 541 U.S. 36 (2004).

¹⁹ *Crawford*, 541 U.S. at 36.

²⁰ *State v. Crawford*, 107 Wash. App. 1025, 1025 (2001), *rev'd*, 147 Wash. 2d 424 (2002), *rev'd and remanded*, 541 U.S. 36 (2004).

²¹ *State v. Crawford*, 147 Wash. 2d 424, 427 (2002), *rev'd and remanded*, 541 U.S. 36 (2004).

²² *Crawford*, 541 U.S. at 68–69.

²³ *Id.* at 40.

²⁴ *Id.* at 61.

comprehensive definition of ‘testimonial.’”²⁵ It did provide a list of examples, however, including but not limited to “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations.”²⁶ The Supreme Court’s justification for classifying the aforementioned evidence as categorically testimonial lies with the documents’ “clos[e] kinship to the abuses at which the Confrontation Clause was [originally] directed.”²⁷

Chief Justice Rehnquist presciently asserted that by unnecessarily overturning *Roberts*, the decision in *Crawford* “casts a mantle of uncertainty over future criminal trials in both federal and state courts”²⁸ This concurrence shows that the trouble *Crawford* would cause was recognized at the inception of the doctrine.²⁹

The next key case regarding the testimonial nature of certain hearsay evidence was *Davis v. Washington*,³⁰ a 9–0 decision in favor of the respondent, the State of Indiana.³¹ In that case, the Supreme Court clarified that:

Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: 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. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.³²

In other words, if the primary purpose of the hearsay statement was to aid police during an emergency—for example, “The man who shot her turned left down the street!”—the hearsay statement is *nontestimonial*. This is because the statement, when said, was not intended to accuse anyone of

²⁵ *Id.* at 68.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring).

²⁹ Note that Chief Justice Rehnquist’s concurrence was mainly concerned with (what he considered to be) the arbitrary and spontaneous distinction that appeared between testimonial and non-testimonial statements in the majority opinion. *Id.* at 71. His immediate reservation regarding the lack of clarity *Crawford* provides to lower courts, coupled with the confusion that actually ensued, supports this Comment’s argument that the Court should hear another Confrontation Clause case.

³⁰ 547 U.S. 813 (2006).

³¹ *Id.* at 834.

³² *Id.* at 822 (emphasis added).

wrongdoing (as the purpose of the statement would be in a courtroom), but rather it was said to assist police during an emergency. A statement made at the time of an emergency to the police is exempt from some of the general dangers of hearsay statements, such as the fear that the declarant is lying or misremembering what occurred; therefore, the ability to cross-examine the declarant is far less important.³³ On the other hand, the same statement “The man who shot her turned left down the street,” could be testimonial if the emergency were no longer occurring; for example, if it were said to the police in an interview the following day. Without the contemporaneousness and urgency of the ongoing emergency, the statement in this context is no different than any other hearsay statement, and thus poses the same dangers (e.g., honesty or reliability).³⁴ A statement made without the pressure of emergency is *testimonial* because it is intended to provide some kind of evidence (or *testimony*) against an individual; therefore, the right of the defendant to cross-examine the declarant should be strictly protected.

The first Supreme Court case dealing with the testimonial status of forensic documents came three years after *Davis*, in *Melendez-Diaz v. Massachusetts*,³⁵ where the Court ruled that forensic reports *could be* testimonial.³⁶ The reports in question in that case were “certificates” provided by state laboratory analysts, which stated that the substance seized by the police in connection with the defendant’s trial was cocaine.³⁷ Justice Scalia again wrote for the Court, describing the certificates as “declaration [s] [sic] of facts written down and sworn to by the declarant before an officer authorized to administer oaths,” making them “quite plainly affidavits,” which are categorically testimonial pursuant to *Crawford*.³⁸ It is important to note that the certificates were determined to be testimonial even though the documents themselves did not accuse the defendant of wrongdoing.³⁹ Justice Scalia noted that it was sufficient for the documents to “provid[e] testimony *against* petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine.”⁴⁰ In other words, the documents were substituted for the testimony that the analysts would have given if called as witnesses at trial.

³³ Ronald J. Allen, et al., *The Hearsay Rule*, in EVIDENCE: TEXT, PROBLEMS, AND CASES 414–20 (2002).

³⁴ *Id.*

³⁵ 557 U.S. 305 (2009).

³⁶ *Id.* at 310–11.

³⁷ *Id.* at 307.

³⁸ *Id.* at 310 (quoting BLACK’S LAW DICTIONARY 62 (8th ed. 2004)).

³⁹ *Id.* at 313.

⁴⁰ *Id.*

Thus, *Crawford*'s prohibition against testimonial hearsay barred their admission regardless of whether the defendant was personally mentioned in the documents themselves.⁴¹ This same argument would later apply to the debate about the testimonial nature of autopsy reports.

Melendez-Diaz was a 5–4 opinion, in which many of the justices submitted their own individual concurrences, distancing themselves from certain specific points made by the majority. Justice Thomas concurred alone, defending his pre-*Crawford* stance that the Confrontation Clause is only implicated in “formalized testimonial materials, such as affidavits,” and limiting his agreement with the majority to the finding that the certificates were affidavits and therefore testimonial.⁴² Justice Kennedy vehemently dissented, joined by Justices Breyer, Alito, and Chief Justice Roberts.⁴³ The dissent was incredulous toward the majority’s choice to “confidently disregard[] a century of jurisprudence” and to “swee[p] away an accepted rule governing the admission of scientific evidence.”⁴⁴ Moreover, the dissent accuses the majority of now forcing upon the States “an even more onerous burden than they did before *Crawford*. . . . Now, without guidance from any established body of law, the States can only guess what future rules this Court will distill from the sparse constitutional text.”⁴⁵ Recall that the sparse text of the U.S. Constitution does not contain the word “testimonial,” let alone a definition for it.⁴⁶ The *Melendez-Diaz* dissent too warned of the dangers of such a precedent, specifically the inability of lower courts to predict future applications of the holding due to “the breadth of the Court’s ruling . . . and its undefined scope.”⁴⁷ In particular, Justice Kennedy identifies the danger it could pose to “the range of other scientific tests that may be affected,” including autopsies.⁴⁸ He reasons that in the event of a medical examiner’s unavailability at trial, the categorical exclusion of surrogate testimony for such tests could potentially create a statute of limitations for murder.⁴⁹ This particular reservation of

⁴¹ *Id.* at 313.

⁴² *Id.* at 329 (Thomas, J., concurring) (citing *White v. Illinois*, 502 U.S. 346, 365 (1992)).

⁴³ *Id.* at 330 (Kennedy, J., dissenting).

⁴⁴ *Id.*

⁴⁵ *Id.* at 331.

⁴⁶ See U.S. CONST. amend. VI.

⁴⁷ *Melendez-Diaz*, 557 U.S. at 337 (Kennedy, J., dissenting).

⁴⁸ *Id.* at 335.

⁴⁹ *Id.* The fear is that this situation would exist in any murder case tried after the original autopsy performer has died. Once the original author of the document becomes unavailable, the autopsy becomes inadmissible. Therefore, cases that rely on the admission of autopsy reports to succeed have an expiration date—namely the life of the author. This would

Justice Kennedy's would become a refrain for those advocating against a testimonial label for autopsy reports.⁵⁰

Just two years later, the Court ruled in *Bullcoming v. New Mexico*⁵¹ that the analyst who performs the test and creates the forensic report must testify.⁵² In *Bullcoming*, the document in question was a blood-alcohol report in a drunk driving trial.⁵³ Justice Ginsberg wrote for the Court this time, establishing that “[i]n all material respects, the [blood-alcohol] report . . . resembles those in *Melendez-Diaz*.”⁵⁴ Even though the prosecution had produced a witness who knew the general laboratory procedures but did not perform or observe the test in question himself,⁵⁵ the report was deemed inadmissible testimonial hearsay.⁵⁶ Justices Kagan and Sotomayor joined the opinion in part, with Justice Sotomayor filing a short separate opinion;⁵⁷ Justice Thomas joined in all but the parts from which Justices Kagan and Sotomayor distanced themselves, with an additional removal;⁵⁸ and Justice Kennedy authored a dissent, in which Chief Justice Roberts and Justices Breyer and Alito joined.⁵⁹

The Court's *Bullcoming* opinion was a 5–4 split, but it is clear that the individual justices were even *more* conflicted on the appropriate analysis of this issue than such a split might suggest. Justices Kagan⁶⁰ and Sotomayor⁶¹ joined the opinion in all but the part that discusses the burdens imposed in requiring the “analyst” of a report to testify at trial. Justice Sotomayor went

function as a de facto statute of limitations on murder.

⁵⁰ See, e.g., Reid R. Allison, *Confronting the Dead: The Supreme Court's Confrontation Clause Jurisprudence and its Implications for Autopsy Reports*, 1 CRIM. L. PRAC. 23, 32 (2013) (noting that Justice Kennedy's remark “had led commentators to caution that barring introduction of autopsy reports could in effect create a statute of limitations for murder, a patently unacceptable result as indicated by the fact that states normally do not have a statute of limitations for murder”).

⁵¹ 564 U.S. 647 (2011).

⁵² *Id.* at 657–58.

⁵³ *Id.* at 655.

⁵⁴ *Id.* at 664.

⁵⁵ Witnesses who take “the place of another as a successor or substitute,” such as a witness with no personal knowledge of the analysis in question but who is familiar with the way analyses of that type are conducted, or a witness who is familiar with the results of the analysis in a specific case, are commonly referred to as “surrogates” or “surrogate witnesses.” BRYAN A. GARNER, *GARNER'S DICTIONARY OF LEGAL USAGE* 871 (3d ed. 2011).

⁵⁶ *Bullcoming v. New Mexico*, 564 U.S. 647, 647–50 (2011).

⁵⁷ *Id.* at 651 n.†, 668.

⁵⁸ *Id.* at 651 n.†.

⁵⁹ *Id.* at 674.

⁶⁰ *Id.* at 651 n.†.

⁶¹ *Id.* at 668.

even further by authoring her own concurrence which insisted that the proper analysis turned on the test articulated *Davis*,⁶² and “emphasiz[ing] the limited reach of the Court’s opinion.”⁶³ Justice Thomas followed suit, but took the additional step of distancing himself from statements made in a particular footnote in the majority opinion as well.⁶⁴ Justice Kennedy’s dissent (which is, ironically, the only portion of the opinion where more than two justices fully agree on the reasoning put forth), emphasizes the “serious misstep” of the Court to extend its *Melendez–Diaz* holding to a circumstance in which a knowledgeable laboratory employee was present to testify, but could not do so admissibly because he was not the analyst who transcribed the computerized blood-alcohol test onto the document itself.⁶⁵

In 2012, the Court heard *Williams v. Illinois*,⁶⁶ in which the state had offered a DNA profile against the defendant by means of a forensic specialist from the Illinois State Police Laboratory.⁶⁷ The forensic specialist testified that she matched a DNA profile produced by an outside laboratory to the profile produced by the state lab from a sample of the defendant’s blood.⁶⁸ The Court found that the specialist’s testimony regarding the outside laboratory’s results was admissible, even though she was technically testifying to the testimonial statements of others.⁶⁹ Justice Alito, writing for the plurality, reaffirmed that the Court’s recent jurisprudence, “while departing from prior Confrontation Clause precedent in other respects,” does not extend to testimony regarding the data underlying an expert’s conclusion (which would not be hearsay at all because the

⁶² *Id.*; see also *Davis v. Washington*, 547 U.S. 813, 814 (2006) (holding that statements are testimonial when their “primary purpose” is to establish or prove past events potentially relevant to later criminal prosecution). Justice Sotomayor insisted that the proper test to apply was whether the blood alcohol reports were made to stop an ongoing emergency or to preserve evidence, perhaps for use at a future trial. *Bullcoming*, 564 U.S. at 668 (Sotomayor, J., concurring).

⁶³ *Bullcoming*, 564 U.S. at 668 (Sotomayor, J., concurring).

⁶⁴ *Id.* at 659 n.6.

To rank as “testimonial,” a statement must have a “primary purpose” of “establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.” Elaborating on the purpose for which a “testimonial report” is created, we observed in *Melendez–Diaz* that business and public records “are generally admissible absent confrontation . . . 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.”

Id. (internal citations omitted).

⁶⁵ *Id.* at 674 (Kennedy, J., dissenting).

⁶⁶ 132 S. Ct. 2221 (2012) (plurality opinion).

⁶⁷ *Id.* at 2227.

⁶⁸ *Id.* at 2229–31.

⁶⁹ *Id.* at 2243–44.

statements would not be admitted for their truth).⁷⁰ Furthermore, Justice Alito reaffirmed that the outside lab report did not identify a “targeted individual” since the lab was not aware of the defendant’s identity; therefore, the report was not testimonial because the “primary purpose” of the statements contained therein was not to accuse the defendant of engaging in criminal conduct.⁷¹

Although the case produced another 5–4 split, Justice Alito’s opinion in *Williams* speaks for only a plurality of the justices, including Chief Justice Roberts and Justice Kennedy. Justice Breyer filed a separate concurrence,⁷² Justice Thomas concurred only in the judgment,⁷³ and the remaining justices cleanly dissented.⁷⁴

Justice Breyer’s concurrence focuses mainly on a problem he believed was not addressed by the plurality nor the dissent: “How does the Confrontation Clause apply to the . . . underlying technical statements written by (or otherwise made by) laboratory technicians” in crime lab reports?⁷⁵ He stated plainly that the “question [is] difficult, important, and not squarely addressed either today or in our earlier opinions” but it is answerable with further argument and briefing.⁷⁶ Because there was no re-argument, Justice Breyer combined the reasoning in the dissenting opinions in *Melendez–Diaz* and *Bullcoming*, together with the reasoning of the plurality in *Williams*.⁷⁷ Justice Breyer eventually questioned what this precedent would mean for a case in which the autopsy performer dies before a murder trial, reviving Justice Kennedy’s question from the *Melendez–Diaz* dissent: “Is the Confrontation Clause ‘effectively’ to function ‘as a statute of limitations for murder?’”⁷⁸ Under this precedent, Justice Breyer worried it very well might.⁷⁹

⁷⁰ *Id.* at 2235.

⁷¹ *Id.* at 2243–44.

⁷² 132 S. Ct. at 2244–55 (Breyer, J., concurring).

⁷³ *Id.* at 2255–64 (Thomas, J., concurring). Justice Thomas concurred only in the judgment, using his previously-defended (but never embraced by any other justice) analysis concentrating on the lack of “formality and solemnity” in the outside laboratory’s statements. Agreeing with the dissent’s view of the flaws in the plurality’s analysis, Justice Thomas asserted that the statements were in fact hearsay used for their truth, but their lack of strict formality (such as would be present with affidavits) meant they were not testimonial. *Id.* at 2255–60.

⁷⁴ *Id.* at 2264–77 (Kagan, J., dissenting).

⁷⁵ *Id.* at 2244 (Breyer, J., concurring).

⁷⁶ *Id.* at 2245.

⁷⁷ *Id.*

⁷⁸ *Id.* at 2251 (internal citations omitted).

⁷⁹ *Id.* (“Such a precedent could bar the admission of other reliable case-specific

Justice Kagan authored the dissent, joined by Justices Scalia, Ginsberg, and Sotomayor.⁸⁰ She focused on the desperate need for cross-examination of those who perform laboratory tests as a check on human error.⁸¹ This dissent viewed *Williams* as “open-and-shut” pursuant to “our Confrontation Clause precedents” because the prosecution introduced the results of a laboratory test through a witness with no personal knowledge of how it was generated.⁸² Significantly, Justice Kagan referred to Justice Alito’s opinion as “‘the plurality’ because that is the conventional term for it. But in all except its disposition, his opinion is a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its explication.”⁸³

It seems from the discussion above that the justices each had their own personal opinions on the way the issue should be decided, and those opinions did not often overlap. Furthermore, two justices predicted the confusion lower courts would experience when trying to apply what little guidance was provided to them by the Court.⁸⁴ It is no surprise, then, that states and federal circuits alike have had difficulty addressing the issue of forensic reports in their own courtrooms.

B. WHAT THE FEDERAL CIRCUIT COURTS HEARD

The federal circuit courts have interpreted *Crawford* and its progeny in various ways. The following is by no means an exhaustive list of problems within the circuits regarding testimonial hearsay; the next few cases are examples of the different ways circuits have applied the Supreme Court’s unclear and fractured precedent.

In 2008, the First Circuit held in *United States v. De La Cruz*⁸⁵ that autopsy reports are “in the nature of a business record, and business records are expressly excluded from the reach of *Crawford*.”⁸⁶ The court in *De La*

technical information such as, say, autopsy reports. . . . What is to happen if the medical examiner dies before trial?”).

⁸⁰ *Id.* at 2264 (Kagan, J., dissenting).

⁸¹ *Id.* (providing an example of a California case in which a lab technician testified that the DNA sample she analyzed matched the defendant, only to re-take the stand later and admit that she had accidentally switched the samples; the sample labeled with the defendant’s name had actually come from the victim, and vice versa. This error was only uncovered after confrontation on cross-examination.).

⁸² *Id.* at 2265.

⁸³ *Id.*

⁸⁴ *Melendez-Diaz*, 557 U.S. 305, 335 (2009) (Kennedy, J., dissenting); *Williams*, 132 S. Ct. at 2245 (Breyer, J., concurring).

⁸⁵ 514 F.3d 121 (1st Cir. 2008).

⁸⁶ *Id.* at 133.

Cruz rejected defendant's argument on the merits because

[a]n autopsy report is 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. An autopsy report thus involves, in principal part, a careful and contemporaneous reporting⁸⁷ of a series of steps taken and facts found by a medical examiner during an autopsy.

With that simple recognition of a well-known hearsay exception, the court disposed of the issue.

However, when the First Circuit revisited the issue four years later in *Nardi v. Pepe*,⁸⁸ instead of citing to its own precedent and dismissing the case, the court emphasized its confusion over the state of the law.⁸⁹ *Nardi* concerned a murder trial in which the state offered into evidence the victim's autopsy report.⁹⁰ The only problem was that the original medical examiner had retired to Florida and was unavailable to travel to the trial in Massachusetts due to a medical condition.⁹¹ The state entered this evidence through a classic surrogate—a highly experienced medical examiner with no personal knowledge of the autopsy itself, but who had familiarized himself with the autopsy report, as well as photographs of the body, and drew his own independent conclusion from the materials.⁹² He arrived at the same conclusion as the original medical examiner.⁹³ However, he also testified to the original medical examiner's *conclusion* contained within the autopsy report, as well as the veracity of several facts also contained therein (of which he had no personal knowledge),⁹⁴ which muddles the issue. The First Circuit found this testimony perfectly admissible—but did so based upon the “present uncertainty of the law,” the fact that it was “even more unsettled at the time of *Crawford*,” just how far *Crawford*'s ruling would extend, and that it was “certainly . . . not clearly established law at the time” the case was tried.⁹⁵ Unlike the confidence the court exuded in *De La Cruz* in 2008, by 2011, the First Circuit was begging for greater guidance on this issue.

The Second Circuit, however, had no trouble concluding that autopsy

⁸⁷ *Id.*

⁸⁸ 662 F.3d 107 (1st Cir. 2011).

⁸⁹ *Id.* at 112. Note that, unlike *De La Cruz*, *Nardi* was heard after the *Davis* opinion was handed down in 2006.

⁹⁰ *Id.* at 109.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Nardi*, 662 F.3d 107 at 109.

⁹⁵ *Id.* at 112.

reports are categorically not testimonial, in *United States v. Feliz*.⁹⁶ The *Feliz* opinion clearly states that hearsay properly admitted under the business record or public record exception to the hearsay rule cannot be testimonial, even in light of *Crawford*.⁹⁷ One basis for that conclusion lies with the *Crawford* concurrence, in which Chief Justice Rehnquist “praised what he considered to be *Crawford*’s per se exclusion of business records from the definition of testimonial.”⁹⁸ Interestingly, the court found that autopsy reports can still be nontestimonial as long as they are properly entered through the business or public records hearsay exception, *even when* the report maker is aware that her report may be used at a future trial.⁹⁹ Recall that statements made for the purpose of being used at future trial runs afoul of *Davis*.¹⁰⁰ In addition, traditionally speaking, business and public records must be kept in the regular course of business (as opposed to being prepared with an eye toward trial) in order to meet those exceptions.¹⁰¹

In contrast, the Eleventh and D.C. Circuits have found autopsy reports testimonial pursuant to each precedent set forth in *Crawford*, *Melendez–Diaz*, and *Bullcoming*.¹⁰² Although other circuits have encountered the issue, none have confronted it as deeply as the aforementioned.¹⁰³

⁹⁶ 467 F.3d 227, 233–34 (2d Cir. 2006).

⁹⁷ *Id.* (holding that hearsay admitted pursuant to the business records exception is not testimonial); *Id.* at 237 (holding that hearsay admitted pursuant to the public record exception is not testimonial).

⁹⁸ *Feliz*, 467 F.3d at 236; *Crawford v. Washington*, 541 U.S. 36, 76 (2004) (Rehnquist, C.J., concurring). Note that this is particularly puzzling because *Davis* made clear that statements made with an eye toward trial are by definition testimonial. *Davis v. Washington*, 547 U.S. 813, 826 (2006).

⁹⁹ *Id.*; *see also* *Vega v. Walsh*, 669 F.3d 123, 127 (2d Cir. 2012) (holding that a surrogate could testify to an autopsy report created by another, without admitting the autopsy report itself into evidence); *United States v. James*, 712 F.3d 79, 99 (2d Cir. 2013) *cert. denied*, 134 S. Ct. 2660 (2014) (finding no error in admitting an autopsy report into evidence even though the report author did not testify at trial, and even though a surrogate testified in trial to its contents, because the autopsy was completed far in advance to the start of the criminal investigation of the defendant).

¹⁰⁰ *Davis*, 547 U.S. at 822.

¹⁰¹ *See, e.g.*, *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943).

¹⁰² *See, e.g.*, *United States v. Ignasiak*, 667 F.3d 1217, 1231 (11th Cir. 2012) (“Applying the reasoning of *Crawford*, *Melendez–Diaz*, and *Bullcoming*, we conclude that the five autopsy reports admitted into evidence . . . violated the Confrontation Clause”); *United States v. Moore*, 651 F.3d 30, 73 (D.C. Cir. 2011) *aff’d in part sub nom* (finding autopsy reports testimonial because the Court determined the circumstances were sufficiently analogous *Bullcoming*, even though there were some differences).

¹⁰³ The Sixth Circuit held that autopsy reports may fall under the nontestimonial, business records exception. *Mitchell v. Kelly*, 520 F. App’x 329, 331 (6th Cir. 2013) (per

C. WHAT THE STATES HEARD

The following is not meant to be an exhaustive list, but merely a representative sampling of notable cases in which certain state courts have struggled with the testimonial nature of forensic documents at trial.¹⁰⁴

Massachusetts,¹⁰⁵ Michigan,¹⁰⁶ Missouri,¹⁰⁷ New Mexico,¹⁰⁸ Oklahoma,¹⁰⁹ North Carolina,¹¹⁰ New Jersey,¹¹¹ and West Virginia¹¹² have all held autopsy reports to be testimonial. Interestingly, the lower courts in Michigan first ruled that the autopsy report in *People v. Lewis*¹¹³ was nontestimonial because it was not prepared in anticipation of a trial.¹¹⁴ However, when the decision was affirmed a year later by the Michigan

curiam). The Ninth Circuit has also allowed portions of autopsy reports into evidence without finding a violation of either *Crawford* or *Davis*, even when the autopsy was attended by law enforcement. *McNiece v. Lattimore*, 501 F. App'x 634, 636 (9th Cir. 2012).

¹⁰⁴ For a much more in-depth examination of the following cases, see Marc D. Ginsberg, *The Confrontation Clause and Forensic Autopsy Reports—A “Testimonial”* 74 LA. L. REV. 117, 148–63 (2013–2014).

¹⁰⁵ *Commonwealth v. Avila*, 912 N.E.2d 1014, 1029 (Mass. 2009) (finding a surrogate's testimony inadmissible where he based his expert opinion on the autopsy report, the report was not admitted into evidence, but a diagram from the report was); *Commonwealth v. Reavis*, 992 N.E.2d 304, 312 (Mass. 2013) (“Substitute medical examiner may not, however, testify to facts in the underlying autopsy report where that report has not been admitted.”).

¹⁰⁶ *People v. Lewis*, 788 N.W.2d 461, 466–67 (Mich. Ct. App. 2010), *aff'd in judgment, vacated in part by* *People v. Lewis*, 806 N.W.2d 295, 295 (Mich. 2011) (holding initially that the autopsy report was nontestimonial, but vacating that portion of the opinion one year later).

¹⁰⁷ *State v. Davidson*, 242 S.W.3d 409, 417 (Mo. Ct. App. 2007) (holding the surrogate's testimony inadmissible when the autopsy report was prepared at the request of law enforcement and admitted into evidence at trial).

¹⁰⁸ *See, e.g., State v. Jaramillo*, 272 P.3d 682, 686 (N.M. Ct. App. 2011) (finding the autopsy report testimonial when it was prepared in anticipation of litigation and conducted in a manner requiring judgment and analysis); *State v. Navarette*, 294 P.3d 435, 438 (N.M. 2013), *cert. denied*, 134 S. Ct. 64 (2013) (holding that “there is no meaningful distinction between factual observations and conclusions requiring skill and judgment,” as stated in *Jaramillo*).

¹⁰⁹ *Cuesta-Rodriguez v. State*, 241 P.3d 214, 229 (Okla. Crim. App. 2010) (finding an autopsy report testimonial when applying the *Melendez-Diaz* precedent).

¹¹⁰ *State v. Locklear*, 681 S.E.2d 293, 304–05 (N.C. 2009) (finding an autopsy report testimonial when applying the *Melendez-Diaz* precedent).

¹¹¹ *State v. Bass*, No. 07-12-2903, 2013 WL 1798956, at *20 (N.J. Super. Ct. App. Div. Apr. 30, 2013) (per curiam) (*State v. Bass*, 224 N.J. 285, 316, 132 A.3d 1207, 1225 (2016)) (holding the autopsy report in question testimonial, using the “primary purpose” test).

¹¹² *State v. Kennedy*, 735 S.E.2d 905, 917 (W. Va. 2012) (“[F]or purposes of use in criminal prosecutions, autopsy reports are under all circumstances testimonial.”).

¹¹³ 788 N.W.2d 461 (Mich. Ct. App. 2010), *aff'd in judgment, vacated in part by* *People v. Lewis*, 806 N.W.2d 295 (Mich. 2011).

¹¹⁴ *Lewis*, 788 N.W.2d at 466–67.

Supreme Court, it issued an order vacating that particular part of the opinion.¹¹⁵ Together, the *Lewis* cases are one example of the internal confusion caused by the U.S. Supreme Court's precedent, let alone the confusion present between states.

In contrast to the states listed above, Arizona,¹¹⁶ California,¹¹⁷ Florida,¹¹⁸ Illinois,¹¹⁹ Louisiana,¹²⁰ Ohio,¹²¹ and South Carolina¹²² have held that autopsy reports are not testimonial. Most significant among these cases is *State v. Medina*,¹²³ a case recently denied certiorari by the U.S. Supreme

¹¹⁵ *Lewis*, 806 N.W.2d at 295.

¹¹⁶ *State v. Medina*, 306 P.3d 48, 62–64 (Ariz. 2013) (holding that an autopsy report did not violate the Confrontation Clause, considering *Melendez-Diaz* and *Williams*).

¹¹⁷ *People v. Dungo*, 286 P.3d 442, 450 (Cal. 2012) (holding that an autopsy report was nontestimonial for the purpose of the Confrontation Clause in part because of this particular report's lack of formality).

¹¹⁸ *Banmah v. State*, 87 So. 3d 101, 103 (Fla. Dist. Ct. App. 2012) (holding that "autopsy reports are non-testimonial because they are prepared pursuant to a statutory duty, and not solely for use in prosecution.").

¹¹⁹ *People v. Leach*, 980 N.E.2d 570, 590 (Ill. 2012) (holding that "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"); *People v. Brewer*, 987 N.E.2d 938, 951 (Ill. App. Ct. 2013) (holding the autopsy report in question nontestimonial because its primary purpose was to determine cause of death but not who was responsible for causing the death, nothing in the document linked the defendant to the crime, and, because the autopsy report was properly admitted into evidence, "the expert witness's testimony cannot have violated the confrontation clause even if it had the effect of offering the report for the truth of the matters asserted therein."); *People v. Cortez*, 931 N.E.2d 751, 756 (Ill. App. Ct. 2010) (holding that the autopsy report in question was nontestimonial because it was admitted through the business records hearsay exception and, pursuant to *Crawford*, documents admitted under that exception are nontestimonial).

¹²⁰ *State v. Russell*, 966 So. 2d 154, 166 (La. Ct. App. 2007) (finding that a coroner's report was properly admitted, even when the testifying witness had not personally prepared the report, because "[a] medical expert's opinion is almost always based on some degree of hearsay, given the fact that numerous other medical personnel and records may be involved in the treatment of a patient" and therefore "[t]he issue is not one concerning admissibility, but rather the weight a fact finder gives to this expert testimony, dependent upon the professional's qualifications and experience, and the facts upon which his opinion is based.").

¹²¹ *State v. Craig*, 853 N.E.2d 621, 638 (Ohio 2006) (holding that the admission of the autopsy report did not violate the Confrontation Clause because the document had been admitted under the public records hearsay exception, and it could have been admitted under the business records exception).

¹²² *State v. Cutro*, 618 S.E.2d 890, 896 (S.C. 2005) (holding that an autopsy report admitted under the business records hearsay exception does not violate the Confrontation Clause).

¹²³ *State v. Medina*, 306 P.3d 48 (Ariz. 2013) (case on direct appeal from a resentencing trial).

Court, where the issue on appeal was whether autopsy reports are testimonial for the purpose of the Confrontation Clause.¹²⁴

Maryland and New York have what has been called a “hybrid” policy on this issue.¹²⁵ Essentially, this means that those two states do not fall neatly into either category jurisprudentially, but have opted for a middle-ground approach, in an effort to form a coherent policy.¹²⁶ This middle-ground approach is characterized by regarding portions of an autopsy report as testimonial while others are not; for example, redacting “testimonial” conclusions from an autopsy report while admitting “nontestimonial” factual accounts of the procedure.¹²⁷ Despite the existence of hybrid policies at the state level, federal courts remain split between the two traditional camps.

II. PREDICTIONS & SOLUTIONS

A. THE SUPREME COURT MAY FIND AUTOPSY REPORTS TESTIMONIAL

As discussed above, the U.S. Supreme Court has not provided clear guidance on how its recent Confrontation Clause jurisprudence can and should apply to future cases. Furthermore, at least two of the justices have specifically identified autopsy reports as future problems for *Crawford* and its progeny.¹²⁸ This Comment argues that the Supreme Court may find autopsy reports testimonial when it eventually hears a case on the issue. First, due to the immense confusion and ongoing turmoil in the lower courts surrounding the testimonial status of forensic hearsay, the Court should take up the issue at some point. Second, when it does, it is possible that the Court will rule that autopsy reports are testimonial. It will then become necessary to deal with the problem of categorically testimonial autopsy reports, which can be done with help from the medical community.

¹²⁴ *Id.* at 62–65 (holding that the victim’s autopsy report was not testimonial for the purposes of the Confrontation Clause), *cert. denied*, *Medina v. Arizona*, 134 S. Ct. 1309 (2014).

¹²⁵ *See, e.g.*, *Rollins v. State*, 161 Md. App. 34, 82 (2006); *People v. Hall*, 923 N.Y.S.2d 428, 432 (N.Y. App. Div. 2011) (citing *People v. Freycinet*, 892 N.E.2d 38, 41 (N.Y. 2008)). For a more in-depth discussion of the hybrid approach, see Ginsberg, *supra* note 104, at 163–65.

¹²⁶ *Id.*

¹²⁷ *See, e.g.*, *Rollins*, 161 Md. App. at 82; *Hall*, 923 N.Y.S.2d at 432 (citing *Freycinet*, 892 N.E.2d at 42).

¹²⁸ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 337 (2009) (Kennedy, J., dissenting); *Williams v. Illinois*, 132 S. Ct. 2221, 2251 (2012) (Breyer, J., concurring).

1. *Why The Supreme Court Will Likely Hear the Issue*

First, as examined above, the sheer amount of confusion and split opinions between circuit and state courts suggests that it would be inappropriate for the Court to ignore the testimonial status of autopsies indefinitely. Even though the Court recently declined to hear *Medina v. Arizona*,¹²⁹ which presented an opportunity to resolve this exact question, perpetually burying its head in the sand will only cause continued uncertainty and disparate outcomes among lower courts.¹³⁰ It is important to note that these contradictions are avoidable—it is not as if they are disagreeing on an area of the law for which states could exercise their individual discretion. The issue is whether the admission of a certain type of document violates a criminal defendant’s constitutional rights if testified to by someone other than its declarant. Unlike many areas of the law, this is a question that can have a settled, definitive answer—one that should apply to every criminal defendant throughout the country. Furthermore, given the paramount importance of a defendant’s rights in the criminal justice system, this question deserves a straight answer.

2. *Autopsy Reports May Be Found Testimonial*

If the U.S. Supreme Court hears the issue, it may determine autopsy reports are testimonial. This prediction is supported by looking at each justice’s concerns in prior seminal cases. With the exception of Chief Justice Roberts, every single justice currently on the Court has written an opinion expressing their view on the testimonial status of forensic hearsay. The following examination of these overarching case concerns and individual opinions sheds more light on the question of whether the Court will find that autopsy reports are “testimonial.”

i. Justices Ginsberg, Kagan, and Sotomayor

It is highly likely that Justices Ginsberg, Kagan, and Sotomayor would find autopsies testimonial for the purposes of the Confrontation Clause. Justice Ginsberg agreed with the majority opinion in *Melendez-Diaz*, which held that the laboratory certificates in question were testimonial because they were essentially identical to affidavits, which are categorically testimonial.¹³¹ The certificates functioned to “provid[e] testimony *against* petitioner, proving one fact necessary for his conviction—that the substance

¹²⁹ 134 S. Ct. 1309, 1309 (2014) *cert. denied*.

¹³⁰ See *supra* notes 85–127 and accompanying text.

¹³¹ 557 U.S. at 310.

he possessed was cocaine.”¹³² Autopsy reports function in much the same way, providing the conclusions of the declarant in a testimonial manner. For example, autopsies are typically performed to determine an individual’s cause of death.¹³³ An autopsy concluding that an individual’s cause of death was homicide (as opposed to an accident) could “prov[e] one fact necessary for his conviction.”¹³⁴ Justice Ginsberg authored the majority opinion in *Bullcoming*, which held that an analyst who performs a forensic test must be brought into court personally to testify.¹³⁵ In that opinion, Justice Ginsberg explained that the Confrontation Clause does not permit the prosecution “to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification.”¹³⁶ Finally, Justice Ginsberg joined the dissent in *Williams*, which argued the paramount importance of a defendant’s ability to cross-examine the individual making testimonial statements about him.¹³⁷ The dissent argues that without this check on human error, unreliable forensic reports would be admitted into the record and presumed as true.¹³⁸ This concern can arguably also apply to autopsy reports.

Justice Kagan substantially joined Justice Ginsberg’s majority opinion in *Bullcoming* and authored the dissent in *Williams*. This indicated that Justice Kagan may share Justice Ginsberg’s concerns about what role forensic documents serve in a criminal conviction. She also voiced her own concerns about admitting a document of that nature into evidence without giving a defendant the opportunity to cross-examine its creator.¹³⁹ Justice Kagan’s dissent in *Williams* concentrated on this need for cross-examination.¹⁴⁰ Because of the ubiquity of television shows like *CSI* and *Law & Order*, which make frequent on-screen use of crime scene technicians and autopsies, the average person likely has some idea of what an autopsy entails.¹⁴¹ However, these shows can have the adverse effect of

¹³² *Id.* at 313.

¹³³ HANDBOOK OF AUTOPSY PRACTICE 113 (Brenda L. Waters ed. 2009).

¹³⁴ *Melendez-Diaz*, 557 U.S. at 313.

¹³⁵ 564 U.S. 647, 661 (2011).

¹³⁶ *Id.* at 652.

¹³⁷ 132 S. Ct. 2221, 2264 (2012) (Kagan, J., dissenting).

¹³⁸ *Id.*

¹³⁹ *Id.* at 2264–65.

¹⁴⁰ *Id.*

¹⁴¹ See N.J. Schweitzer & Michael J. Saks, *The CSI Effect: Popular Fiction About Forensic Science Affects the Public’s Expectations About Real Forensic Science*, 47

biasing lay jurors in criminal cases toward automatically placing forensic evidence on a pedestal, believing scientific tests reliable by default without considering the potential for human error.¹⁴² What the average juror might not know is that more than one in five physicians working in the country's busiest morgues is not board certified in forensic pathology, although experts say such certification is necessary to ensure that doctors who perform autopsies have at least basic skills.¹⁴³ That is, of course, when a medical doctor actually performs the autopsy—currently, eleven states operate under a coroner system, which means that an elected or appointed official with no required medical training is often in charge of overseeing autopsies.¹⁴⁴ In 2007, an eighteen-year-old became Indiana's youngest deputy coroner.¹⁴⁵

For states that still use the coroner system, or a hybrid of the coroner and medical examiner systems,¹⁴⁶ coroners can choose to refer autopsies to

JURIMETRICS 357–64 (2007). See generally Hon. Donald E. Shelton et al., *An Indirect-Effects Model of Mediated Adjudication: The CSI Myth, the Tech Effect, and Metropolitan Jurors' Expectations for Scientific Evidence*, 12 VAND. J. ENT. & TECH. L. 1 (2009).

¹⁴² Schweitzer & Saks, *supra* note 141. See generally Shelton, et al., *supra* note 141.

¹⁴³ *Post Mortem: The Story So Far*, PROPUBLICA (Aug. 16, 2011, 12:24 PM), <https://www.propublica.org/article/post-mortem-the-story-so-far>.

¹⁴⁴ The position of coroner differs slightly from jurisdiction to jurisdiction from how they are chosen to what their qualifications are.

Coroners are constitutional officers, with 82 percent being elected and 18 percent appointed. Coroners as elected officials fulfill requirements for residency, minimum age, and any other qualifications required by statute. They may or may not be physicians, may or may not have medical training, and may or may not perform autopsies. . . . Some serve as administrators of death investigation systems, while others are responsible solely for decisions regarding the cause and manner of death. Typical qualifications for election as a coroner include being a registered voter, attaining a minimum age requirement ranging from 18 to 25 years, being free of felony convictions, and completing a training program, which can be of varying length. The selection pool is local and small (because work is inconvenient and pay is relatively low), and medical training is not always a requirement. Coroners are independent of law enforcement and other agencies, but as elected officials they must be responsive to the public, and this may lead to difficulty in making unpopular determinations of the cause and manner of death.

NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 247 (2009).

¹⁴⁵ *Id.*; see also Associated Press, *Teen Becomes Indiana's Youngest Coroner*, NEWS OKAY (May 12, 2007 12:00 AM), <http://newsok.com/article/3053301>.

¹⁴⁶ See NAT'L RESEARCH COUNCIL, *supra* note 144, at 248–49.

In contrast [to coroners], medical examiners are almost always physicians, are appointed, and are often pathologists or forensic pathologists. . . . In statewide systems, cities and counties have local medical examiners that are physicians trained to receive the reports of death, decide jurisdiction, examine the body, and make a determination of the cause and manner of death. They certify locally many obvious natural and accidental deaths. In statewide and regionalized statewide systems, local medical examiners do not need to be forensic pathologists and do not perform autopsies, but they do refer, according to protocols, deaths from violence—particularly

forensic pathologists, but there is no oversight of this process.¹⁴⁷ There is also no system to assure that the coroner's certification of an individual's legal cause and manner of death is consistent with that forensic pathologist's conclusions.¹⁴⁸ Furthermore, the facilities for conducting autopsies vary greatly in quality between jurisdictions.¹⁴⁹ Compounding the problem, there is no national standard for certifying or educating autopsy performers.¹⁵⁰ Aside from facility quality and administrative oversight of the process, experts agree that the individual competence of the death investigator—be it a coroner, medical examiner, forensic pathologist, etc.—is the key factor to maintaining the integrity of expert testimony in criminal and civil cases.¹⁵¹

Justice Kagan is likely aware of at least some of the procedural and competency issues surrounding forensic investigators, as evidenced by her reference to a crucial laboratory mistake that was only discovered upon cross-examination of the forensic specialist who performed the test.¹⁵² It is for these reasons, as well as the unreliability surrounding autopsy reports, that Justice Kagan will most likely find autopsy reports testimonial.

Justice Sotomayor is also likely to find autopsy reports testimonial. In addition to joining Justice Kagan's dissent in *Williams*, Justice Sotomayor authored a concurrence in *Bullcoming* that sheds light on her particular views.¹⁵³ In her concurrence, Justice Sotomayor affirms the majority's decision to bar the admission of the forensic reports, but does so based on

suicides, homicides, and deaths occurring under suspicious circumstances—to a central or regional autopsy facility for autopsy and further follow-up by a forensic pathologist. In hybrid or mixed state systems, coroners may refer cases for autopsy to forensic pathologists, but there is no supervision or quality assurance to ensure that the coroner's certification of the cause of death and manner of death is concordant with the pathologist's conclusions.

Id.

¹⁴⁷ See *id.* at 249.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 250.

Only one-third of offices have in-house facilities to perform the histology needed to make microscopic diagnoses on tissues sampled at autopsy. Only one-third have in-house toxicology capabilities to identify drugs present in the deceased that either contributed to or were the primary cause of death. One-third do not have radiology services in-house that would allow the identification of missiles, disease, bony injury or identification features in decedents. Some coroner systems do not have any physical facility at all.

Id.

¹⁵⁰ *Id.* at 250–51.

¹⁵¹ *Id.* at 250.

¹⁵² *Williams v. Illinois*, 132 S. Ct. 2221, 2264 (2012) (Kagan, J., dissenting).

¹⁵³ *Bullcoming v. New Mexico*, 564 U.S. 647, 668 (2011) (Sotomayor, J., concurring).

reasoning from *Davis*.¹⁵⁴ She emphasizes that the *primary purpose* of the reports at issue was to create “an out-of-court substitute for trial testimony . . . which renders it testimonial.”¹⁵⁵ Although the report in *Bullcoming* was made in the course of a police investigation for drunk driving, Justice Sotomayor categorizes the documents as testimonial.¹⁵⁶ This is significant in the context of autopsy reports because they are certainly not made with the “primary purpose” of aiding an ongoing emergency; they are far more like statements made for an “evidentiary purpose” like the reports that troubled Justice Sotomayor.¹⁵⁷

ii. Justice Thomas

Justice Thomas has remained consistent throughout his Confrontation Clause jurisprudence, routinely coming back to his position that the key to testimonial status is sufficient solemnity.¹⁵⁸ As far back as *Melendez–Diaz*, Justice Thomas has insisted that the Confrontation Clause is only implicated in “formalized testimonial materials, such as affidavits.”¹⁵⁹ For Justice Thomas, such materials have included the laboratory certificates in *Melendez–Diaz*¹⁶⁰ and the blood alcohol tests in *Bullcoming*,¹⁶¹ but not the DNA profile in *Williams*.¹⁶² To Justice Thomas, the DNA profile in *Williams* did not violate the Confrontation Clause because “it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained.”¹⁶³ Justice Thomas noted that the reports in *Melendez–Diaz* were notarized and that the reports in *Bullcoming* included a “Certificate of Analyst,” while the report in *Williams* had neither, nor anything comparable.¹⁶⁴

Although it may be possible to predict Justice Thomas’s likely analysis

¹⁵⁴ *Id.* (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006) which established the “primary purpose” test for evaluating such statements).

¹⁵⁵ *Id.* at 671–72 (internal quotation marks and citations omitted).

¹⁵⁶ *Id.* at 672.

¹⁵⁷ *Id.*

¹⁵⁸ *See, e.g., Williams v. Illinois*, 132 S. Ct. 2221, 2255–60 (2012) (Thomas, J., concurring).

¹⁵⁹ *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 329 (2009) (Thomas, J., concurring) (citing *White v. Illinois*, 502 U.S. 346, 365 (1992)).

¹⁶⁰ *Id.*

¹⁶¹ *Bullcoming v. New Mexico*, 564 U.S. 647, 665 (2011).

¹⁶² *Williams*, 132 S. Ct. at 2255–60 (Thomas, J., concurring).

¹⁶³ *Id.* at 2260.

¹⁶⁴ *Id.*

of whether autopsy reports are testimonial, it is difficult to predict his ultimate decision. This is because his final decision is likely to depend on the autopsy report in the given case. As previously addressed, the quality and “formality” of autopsy reports vary widely by jurisdiction.¹⁶⁵ If a case dealt with a sufficiently formalized autopsy report, Justice Thomas would be likely to find it testimonial. However, if the autopsy report was not certified or attested in a formal manner, Justice Thomas would probably come to the opposite conclusion. In this respect, Justice Thomas is somewhat of a wild card. However, assuming that recommended procedures are followed, autopsy reports are more likely than not sufficiently formalized for Justice Thomas.¹⁶⁶

iii. Justices Kennedy, Breyer, and Alito

Justices Kennedy, Breyer, and Alito tend to vote together regarding testimonial questions. All three justices were part of the majority in *Davis*¹⁶⁷ as well as the dissents in *Melendez–Diaz*¹⁶⁸ and *Bullcoming*.¹⁶⁹ They only diverged in one instance: when Justices Kennedy and Alito joined the plurality in *Williams* while Justice Breyer chose to author his own concurrence.

Justice Kennedy’s dissent in *Melendez–Diaz* was primarily concerned with the unclear precedent set by the majority, as well as the future concern for how the rule excluding a forensic document as testimonial might apply to other kinds of forensic hearsay, such as autopsy reports.¹⁷⁰ Justice Breyer revived Justice Kennedy’s concern in the *Williams* concurrence, when he cited to Justice Kennedy’s *Melendez–Diaz* dissent: “Is the Confrontation Clause effectively to function as a statute of limitations for murder?”¹⁷¹

¹⁶⁵ See *supra* notes 143–151 and accompanying text.

¹⁶⁶ See HANDBOOK OF AUTOPSY PRACTICE, *supra* note 133, at 6 (encouraging colleagues to look over the report before final signatures are made in an attempt to catch any errors before the document is completed). Justice Thomas has stated that a document’s testimonial nature turns on whether that document is sufficiently “formalized”; that is to say, the document has been signed under penalty of perjury, notarized, or was written with sufficient “solemnity” showing that the author or signatory was careful and serious with the document’s preparation. See, e.g., *Williams*, 132 S. Ct. at 2255–60 (Thomas, J., concurring). Therefore, for Justice Thomas, the more formal a document is, the more likely is it to be testimonial.

¹⁶⁷ *Davis v. Washington*, 547 U.S. 813, 815 (2006).

¹⁶⁸ *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 330 (2009) (Kennedy, J., dissenting).

¹⁶⁹ *Bullcoming v. New Mexico*, 564 U.S. 647, 674 (2011) (Kennedy, J., concurring).

¹⁷⁰ 557 U.S. at 335 (Kennedy, J., dissenting).

¹⁷¹ *Williams v. Illinois*, 132 S. Ct. 2221, 2251 (2012) (plurality opinion).

Both justices substantially agree on the testimonial status of forensic hearsay, and even share the same fear regarding the potential result of this precedent's application to autopsy reports. Although Justice Alito has not authored an opinion raising this question himself, he joined Justice Kennedy's dissent where the inquiry into whether deeming autopsy reports testimonial could function as a statute of limitations on murder originated. However, as significant as that reservation may be, cases die all the time with their key witnesses.¹⁷² It is not uncommon for the death or unavailability of an important witness to handicap the prosecution, even in the case of serious crimes like murder.¹⁷³ Although this policy concern has been brought up by multiple judges at different stages of Confrontation Clause jurisprudence, it is unlikely that will be the deciding factor that makes autopsy reports nontestimonial, especially in light of the policy concerns expressed by Justices Ginsberg, Kagan, and Sotomayor.¹⁷⁴

The plurality in *Williams*, authored by Justice Alito and joined by Chief Justice Roberts and Justice Kennedy, is significant in a few respects. First, *Williams* emphasized that the testimonial question only applies to statements being admitted for their truth.¹⁷⁵ The Federal Rules of Evidence permit expert witnesses to testify to the facts underlying their conclusions, even if those underlying facts are inadmissible (such as hearsay), for a narrow purpose: giving the jury context for the overall testimony, so that they can assign appropriate weight to the expert's opinion.¹⁷⁶ In other

¹⁷² See, e.g., Veronica Rocha, *U.S. Prosecutors Drop Case in Massive Yosemite Fire After Witnesses Die*, L.A. TIMES (May 1, 2015, 11:46 AM), <http://www.latimes.com/local/la-me-ln-dismiss-indictment-rim-fire-20150501-story.html>; *Unavailable Witness Leads to Dropping Charges Against Brothers*, CHICAGO TRIBUNE (Mar. 13, 2015, 3:17 PM), <http://www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-case-dismissed-st-0316-20150313-story.html>; *Prosecutor: "I Don't Have a Choice,"* WANE.COM (May 4, 2015, 10:49 AM), <http://wane.com/2015/05/04/charges-to-be-dropped-for-man-accused-of-murder/>.

¹⁷³ *Id.*

¹⁷⁴ For example, the concern that all evidence against a defendant should be tested by the crucible of cross-examination. See, e.g., *Williams*, 132 S. Ct. at 2264 (Kagan, J., dissenting) (emphasizing the importance of a defendant's ability to cross-examine statements made against him); *Id.* at 2264 (emphasizing the importance of cross-examination in uncovering potential procedural errors in forensic tests).

¹⁷⁵ *Williams*, 132 S. Ct. at 2228 (plurality opinion).

¹⁷⁶ FED. R. EVID. 703.

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

words, in certain situations the jury needs to hear the basis for the expert's opinion, even if that basis consists of inadmissible hearsay, in order to judge the fairness or reliability of the conclusion the expert has drawn. However, the jury is not permitted to accept those underlying facts as true based solely upon the expert's testimony—the purpose of hearing those facts is limited to assigning weight alone.¹⁷⁷ In *Williams*, Justice Alito emphasized that there is no testimonial concern with experts testifying as such because those inadmissible facts are only getting to the jury for that limited purpose.¹⁷⁸ Although the argument could be made that a surrogate who testifies about the outcome of an autopsy is necessarily testifying to the accuracy of what was conducted and what resulted (without having personal knowledge of either), the *Williams* opinion seems to suggest that so long as the proponent of the evidence is using the allowances carved out for expert opinions, the testimony of the surrogate may be admitted. However, it should be noted that autopsies are unlike the forensic hearsay that was the subject of *Williams* in that autopsies contain an opinion component whereas the hearsay in *Williams* was a DNA report with no opinion component.¹⁷⁹ It is possible that this distinction, which formed the basis of the *Williams* plurality, may further lead Justices Alito, Breyer, and Kennedy to find autopsy reports testimonial—after all, if one subscribes to this view, that the underlying data from the autopsy report can be admitted for this limited purpose and a surrogate can be cross-examined on the conclusions she draws from those facts, what is the actual danger in declaring autopsy reports testimonial? Furthermore, even if these justices were to find autopsy reports nontestimonial, the three together would not be enough to form a majority.¹⁸⁰

iv. Chief Justice Roberts

Unlike the other justices, Chief Justice Roberts has not authored his own opinion on this issue. However, it is worth noting that as chief justice, if he is in the majority or plurality, Chief Justice Roberts assigns who is to author the majority or plurality opinion.¹⁸¹ Without an authored opinion, the only clue as to where Chief Justice Roberts might come down on the issue

Id.

¹⁷⁷ *Id.*

¹⁷⁸ *Williams*, 132 S. Ct. at 2228 (plurality opinion).

¹⁷⁹ *Id.* at 2244. The “opinion” of the expert in that case was whether the facts contained in the DNA report matched the facts contained in another report. *Id.*

¹⁸⁰ See *infra* Part IV.

¹⁸¹ Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1729–30 (2006).

is his selection of Justice Alito to author the plurality opinion in *Williams*. This might provide insight as to what reasoning and outcome Chief Justice Roberts finds persuasive, namely Justice Alito's particular point of view. However, Chief Justice Roberts has not said or done anything to confirm that interpretation; he may just have preferred Justice Alito's reasoning and outcome on the particular facts of *Williams*. Alternatively, he may have selected Justice Alito as the author to preserve a fragile coalition of justices who would author a less problematic opinion or outcome. Unfortunately, without an opinion directly authored by Chief Justice Roberts, there is nothing concrete on which to base a predication of his likely opinion on the issue.

v. The Empty Chair, Now Filled

Of course, the elephant in the room is the recent Supreme Court vacancy. This opening injected greater uncertainty into this issue because of Justice Scalia's active participation in the Court's foundational opinions—he authored the majority in *Crawford*, *Davis*, and *Melendez-Diaz*. Furthermore, as the most senior justice in the majority for *Bullcoming*, he was responsible for choosing Justice Ginsberg to author the majority opinion.¹⁸² Without Justice Scalia's voice in this debate, for better or worse, the Court is missing much of its previous guidance on the issue.

The confirmation of Justice Neil Gorsuch does not provide much insight into this issue. In his tenure as a circuit court judge, Justice Gorsuch only issued four, unreported opinions dealing with the Confrontation Clause,¹⁸³ only one of which concerned the testimonial nature of certain hearsay statements, and even then, it was a tangential issue in the case.¹⁸⁴ Thus, making any prediction about his approach to the issue as a justice is, for the moment, difficult.

There is reason to believe that the Court may find autopsy reports

¹⁸² See *supra* note 181. Note that, when the chief justice is not part of the majority or plurality, the most senior justice in the majority or plurality is responsible for assigning the author of the main opinion. *Id.* at 1731.

¹⁸³ *United States v. Leyva*, 442 F. App'x 376 (10th Cir. 2011); *United States v. Pursley*, 550 F. App'x 575 (10th Cir. 2013); *Winbush v. Faulk*, 510 F. App'x 746 (10th Cir. 2013); *Sanders v. Miller*, 555 F. App'x 750 (10th Cir. 2014).

¹⁸⁴ *Leyva*, 442 F. App'x at 382 n. 2 (“To mount a successful Confrontation Clause challenge, [the defendant] would have to show (among other things) both that any out of court statements relied upon by Officer Coleman were testimonial, and that he merely ‘parrot[ed]’ that testimonial hearsay instead of using such statements to inform his own independent opinion. On this record, neither of those conclusions would be at all plain. In any event, and for the reasons we’ve already given, we believe that any such error would be harmless beyond a reasonable doubt.”) (internal citations omitted).

testimonial, as evident by examining of each justice's rationales in past analogous cases. Although it is not possible to predict for every variable that might arise, based on the known concerns of each justice, it is a likely outcome. This presents a problem, though, for those prosecutors that rely on autopsy reports to make their case. What would happen to criminal trials if autopsy reports were barred from evidence unless the report preparer was able to testify to its contents?

B. AN INTERDISCIPLINARY SOLUTION

Finding autopsy reports testimonial would pose a huge problem for prosecutors—namely barring the admission of an autopsy report where its creator is unavailable for trial. Although several possible solutions exist, an interdisciplinary solution might be most effective. Considering the problems posed by these documents in the legal community, the medical community should embrace the testimonial status of these documents and use common sense understanding to everyone's advantage.

One of the determining factors to whether something is testimonial lies in the statement's "primary purpose," namely whether it was made for the purpose of producing evidence against a defendant in a criminal trial, or whether it had some non-litigation purpose.¹⁸⁵ Autopsy conductors, if not all forensic medical examiners,¹⁸⁶ understand that their reports may be used in a future criminal trial¹⁸⁷; at the very least, a forensic pathologist who performs an autopsy and determines the cause of death to be homicide should well know that her conclusion may become evidence against the perpetrator. It is also common for death investigators to perform autopsies at the request of law enforcement, or to have their own suspicions at the mere sight of a body (e.g., one riddled with bullet holes).¹⁸⁸ Instead of closing their eyes to the possibility that one's work could be used at trial (as one would have to do in order to argue that the report is nontestimonial),

¹⁸⁵ *Davis v. Washington*, 547 U.S. 813, 822 (2006).

¹⁸⁶ For a discussion of the key differences between *clinical* autopsies and *forensic* autopsies, see Andrew Higely, *Tales of the Dead: Why Autopsy Reports Should Be Classified as Testimonial Statements Under the Confrontation Clause*, 48 NEW ENG. L. REV. 171, 175 (2013–2014).

¹⁸⁷ HANDBOOK OF AUTOPSY PRACTICE, *supra* note 133, at 125.

In the broadest sense, a medicolegal autopsy is any autopsy that generates an evidentiary document that forms a basis for opinions rendered in a criminal trial, deposition, wrongful death civil suit, medical malpractice civil suit, administrative hearing, or workmen's compensation hearing. *Because any autopsy report can become such a document*, all autopsies should be considered medicolegal.

Id. (emphasis added).

¹⁸⁸ HANDBOOK OF AUTOPSY PRACTICE, *supra* note 133, at 137.

death investigators should prepare for that outcome to occur.

As discussed above, there is an awareness within the medical community and within the government that there needs to be greater regulation of death investigators.¹⁸⁹ This movement began around 2009.¹⁹⁰ In conjunction with this movement, the legal community and the medical community should collaborate on a re-drafting of the now-outdated Model Post-Mortem Examinations Act of 1954 (Model Act).¹⁹¹ The National Conference of Commissioners on Uniform State Laws issued the Model Act in 1954 as a model law.¹⁹² Like the Model Penal Code, states could choose to adopt or incorporate the Model Act's provisions as law, which a number of states did.¹⁹³ The Model Act's stated purpose "is to provide a means whereby greater competence can be assured in determining causes of death where criminal liability may be involved."¹⁹⁴ The Model Act includes a provision for "honorary commissions of disinterested persons" that would govern an oversight body called the Post-Mortem Examination Office to ensure that forensic death investigators were equipped with the appropriate facilities and possessed the appropriate training to carry out their tasks.¹⁹⁵ However, this Model Act is outdated—it was written in 1954 and has never been updated to reflect scientific advances since that time.¹⁹⁶ In fact, the Science, Technology, and Law Policy and Global Affairs Committee jointly with the Committee on Applied and Theoretical Statistics appealed to Congress in 2009 to redraft the Model Act on those grounds.¹⁹⁷ Furthermore, the National Institute of Standards and Technology, part of the United States Department of Commerce, has more recently appealed for

¹⁸⁹ See *supra* notes 144–151 and accompanying text.

¹⁹⁰ NAT'L RESEARCH COUNCIL, *supra* note 144, at 247.

¹⁹¹ Robert A. Leflar, *Drafting the Model Post-Mortem Examinations Act*, 41 A.B.A. J. 266, 266–68 (1955). See generally MODEL POST-MORTEM EXAMINATIONS ACT (PREFATORY NOTE) (1954).

¹⁹² NAT'L RESEARCH COUNCIL, *supra* note 144, at 242.

¹⁹³ *Id.* at 243; Leflar, *supra* note 191; see, e.g., Ark. Code Ann. § 14-15-301-309 (West); La. Civ. Code Ann. r.P. T. III, Refs & Annos; Mass. Gen. Laws Ann. ch. 38, § 2 (West).

¹⁹⁴ Leflar, *supra* note 191, at 266.

¹⁹⁵ MODEL POST-MORTEM EXAMINATIONS ACT, *supra* note 191.

¹⁹⁶ NAT'L RESEARCH COUNCIL, *supra* note 144, at 266; NAT'L INSTITUTE OF STANDARDS AND TECH., RECOMMENDATION TO THE ATTORNEY GENERAL: MODEL LEGISLATION FOR MEDICOLEGAL DEATH INVESTIGATION SYSTEMS 1 (2016) ("The 1954 act is so obsolete that it provides little guidance for either modern medical examiner or coroner legislation and needs to be updated.").

¹⁹⁷ NAT'L INSTITUTE OF STANDARDS AND TECH., RECOMMENDATION TO THE ATTORNEY GENERAL: MODEL LEGISLATION FOR MEDICOLEGAL DEATH INVESTIGATION SYSTEMS, *supra* note 196.

funding to redraft the model legislation.¹⁹⁸ Such a redrafting should include a provision suggesting or requiring that autopsies be undertaken with the intent to perfectly preserve the process (with video, photographs, etc.) such that another professional may review and obtain facts and data to support an original, independent conclusion.

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. Relying on images and video is far preferable to a cold paper record. Not only will the surrogate have the opportunity to view the underlying “facts” (e.g., condition of the body), but she will be able to observe the manner in which the examination was performed, taking her own understanding of the standards in the field into consideration when opining on the quality of the autopsy, if necessary.¹⁹⁹

This will not be an overly burdensome requirement. Most death investigators already take pictures in accordance with autopsies, although their purpose in doing so is not often principally to preserve the look of the body for future review.²⁰⁰ Today, even the most basic cameras have high image resolution, making it easier than ever to take high-quality pictures at a low cost. Other imaging techniques have becoming increasingly common in autopsies in recent years as well, including MRIs, CTs, and ultrasonography.²⁰¹

Undoubtedly, there is the question of the quality of the video or photographs produced, just as there would be with videos or photographs admitted into evidence (if they must actually be admitted) for any other purpose in a criminal trial: Are they authentic? Do they fairly and accurately depict what they purport to? However, these concerns can be adequately addressed in the redrafting of a new model standard for post-

¹⁹⁸ NAT'L INSTITUTE OF STANDARDS AND TECH., *supra* note 196, at 1–4.

¹⁹⁹ There are other benefits to adopting this solution, such as giving juries the ability to see more than just conclusory statements edited through the mouth of an individual who cannot and will not be subject to cross-examination. This method was essentially accepted by the First Circuit in *Nardi v. Pepe*, 662 F.3d 107, 112 (1st Cir. 2011).

²⁰⁰ Medical professionals are already accustomed to the standard of taking pictures at an autopsy in anticipation that they will be viewed by others, such as for teaching purposes. HANDBOOK OF AUTOPSY PRACTICE, *supra* note 133, at 6–7; *see also* NAT'L RESEARCH COUNCIL, *supra* note 144, at 264.

²⁰¹ HANDBOOK OF AUTOPSY PRACTICE, *supra* note 133, at 102–03; *see also* Ian S.D. Roberts, et. al., *Post-Mortem Imaging as an Alternative to Autopsy in the Diagnosis of Adult Deaths: A Validation Study*, 379 THE LANCET 136, 136 (2012).

mortem examinations, as well as in the case law of the jurisdiction that likely already exists. Furthermore, as seen in *Williams*, the Supreme Court is open to the possibility of surrogate testimony as long as only the opinions of the expert, not the underlying facts, are being admitted for their truth.²⁰²

Although it is true that video footage and pictures of the autopsy may improve the ability of independent reviewers who did not perform the initial autopsy to review the actions taken and draw similar or different conclusions independent of the initial examiner, the later independent reviews inherently cannot physically “redo” the autopsy. In other words, if the first examiner conducts a procedure or test incorrectly or fails to test for something, the results of the entire autopsy may be called into question. Furthermore, it is true that those errors may not appear on, or be obvious in, the video footage. However, the perfect should not be the enemy of the good in this situation. Embracing the potential testimonial nature of autopsy reports by preparing them as if future independent review is inevitable goes a long way toward solving the current problem.²⁰³

CONCLUSION

The current state of the law regarding the testimonial status of forensic hearsay is extremely vague and problematic, particularly with reference to autopsy reports. Since 2004, the Supreme Court has produced fractured and complicated opinions that have left lower courts to develop their own varying doctrines with regard to the testimonial nature of autopsy reports. It is therefore important that the Supreme Court grant certiorari on the issue. Given the continuous state of confusion in this area, the Court should eventually resolve the issue with new precedent. In light of the Court’s previous jurisprudence, and the vocal stances of almost every justice individually, it is likely that the Court may find autopsy reports testimonial for the purposes of the Confrontation Clause. This, however, presents an enormous problem for older murder prosecutions. This Comment’s proposed solution to this problem is simple, but it takes cooperation from the medical community. Ultimately, the courts should embrace the testimonial nature of autopsy reports and capitalize on foreknowledge so that they may be used at trial. In order to capitalize on this, the 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. Instead of pretending autopsies are

²⁰² *Williams v. Illinois*, 132 S. Ct. 2221, 2235–36 (2012) (plurality opinion).

²⁰³ See *supra* notes 200–201 and accompanying text.

independent, nontestimonial documents, as some scholars have tried to suggest,²⁰⁴ the justice system should be doing the opposite. Embracing their testimonial nature may ensure the admission of autopsies rather than their exclusion.

²⁰⁴ See generally, e.g., *supra* note 14.

