No. 14-___

IN THE

Supreme Court of the United States

JEFFREY HARDIN

Petitioner,

v.

OHIO,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

Peter Galyardt
ASSISTANT OHIO PUBLIC DEFENDER
250 East Broad Street
Suite 1400
Columbus, OH 43215

Jeffrey L. Fisher
Counsel of Record
Brian Wolfman
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

QUESTION PRESENTED

Whether an autopsy report created as part of a homicide investigation, and asserting that the death was caused by homicide, is "testimonial" under the Confrontation Clause framework established in *Crawford v. Washington*, 541 U.S. 36 (2004).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeffrey Hardin respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio.

OPINIONS BELOW

The decision of the Ohio Supreme Court (Pet. App. 1a) is published at 140 Ohio St. 3d 1409, 15 N.E.3d 878. The opinion of the Court of Appeals of Ohio (Pet. App. 2a) is published at 953 N.E.2d 847. The relevant proceedings and order from the trial court are unpublished.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on September 3, 2014. Pet. App. 1a. A motion for reconsideration was denied on October 22, 2014. Pet. App. 13a. On January 12, 2015, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including February 19, 2015. *See* No. 14A735. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Ohio Revised Code Section 313.10 provides in relevant part: "**Records to be public – certified copies as evidence. (A)(1)** Except as otherwise provided in this section, the records of the coroner

who has jurisdiction over the case, including, but not limited to, the detailed descriptions of the observations written during the progress of an autopsy and the conclusions drawn from those observations filed in the office of the coroner under division (A) of section 313.13 of the Revised Code, made personally by the coroner or anyone acting under the coroner's direction or supervision, are public records. Those records, or transcripts or photostatic copies of them, certified by the coroner shall be received as evidence in any criminal or civil action or proceeding in a court in this state, as to the facts contained in those records."

STATEMENT OF THE CASE

Absent narrow exceptions inapplicable here, the Confrontation Clause forbids the prosecution in a criminal case from introducing out-of-court "testimonial" statements unless the declarants are unavailable and the defendants had a prior opportunity to cross-examine them. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), this Court held that formalized forensic analysis reports created for use in criminal prosecutions fall within the "core class of testimonial statements" described in *Crawford*. *Id.* at 310 (internal quotation marks and citation omitted). This case presents a fundamental and recurring question over which the state courts of last resort are intractably divided: whether the holding of *Melendez-Diaz* applies to autopsy reports created as part of a homicide investigation and asserting that the cause of death was homicide. The Ohio Supreme Court, deepening a conflict on the issue, held that it does not.

1. One evening in 2009, petitioner's girlfriend called 9-1-1. She reported that their five-month-old son, Jeffrey Hardin Jr. ("Junior"), had stopped breathing. Paramedics and Corporal Rick Jenkins of the Piketon, Ohio Police Department were dispatched to petitioner's home. Pet. App. 3a. When they arrived, petitioner was "extremely distraught." *Id.* Although Junior was a "well-developed, well-nourished" baby who showed no signs of physical abuse, he was pale, cool, and had no pulse. *Id.* 3a, 17a. Paramedics immediately began resuscitation and rushed the child to the hospital.

Meanwhile, Corporal Jenkins questioned petitioner about what had happened. Petitioner said he had tried to get the baby to sleep by "placing the child on a sofa and pressing up and down on the cushions, causing the baby to gently shake." Pet. App. 3a. Later, petitioner gave a written statement in which he stated that he had shaken the child "a couple of times. After that he started crying and fell asleep. He quit breathing." *Id.* 3a-4a.

Doctors at the hospital were able to reestablish Junior's pulse, but they were unable to reestablish respiration. As a result, the child passed away. Pet. App. 3a.

2. Ohio law requires that the county coroner be notified whenever a person dies "as a result of criminal or other violent means . . . or in any suspicious or unusual manner." Ohio Rev. Code § 313.12. The coroner must then conduct an autopsy. Indeed, as Ohio law puts it, "[a]n autopsy is a compelling public necessity if it is necessary to the conduct of an investigation by law enforcement officials of a homicide or suspected homicide." *Id.*

§ 313.131; *see also State v. Maxwell*, 9 N.E.3d 930, 950-51 (Ohio 2014).

Once the autopsy report is complete, the coroner must "certif[y]" the report, Ohio Rev. Code § 313.10, and "shall promptly deliver [it] to the prosecuting attorney of the county in which such death occurred" if, "in the judgment of the coroner or prosecuting attorney, further investigation is advisable," *id.* § 313.09. Finally, the autopsy report "shall be received as evidence in any criminal or civil action or proceeding in a court in this state, as to the facts contained in [it]." *Id.* § 313.10.

3. In light of petitioner's statements to Corporal Jenkins, the police had Junior's body taken to the Franklin County Coroner's office for an autopsy. Pet. App. 4a. The police told the office that they thought the "[v]ictim" – that is, the child – was a "shaken baby." *Id.* 16a, 24a.

The autopsy was performed by deputy coroner Dr. Stephen Sohn. Pet. App. 4a. Save an insignificant abrasion on the child's arm, Dr. Sohn observed "no external injuries" on the child. *Id.* 18a. Accordingly, he focused on an internal examination.

Following that examination, Dr. Sohn prepared an "Autopsy Report" documenting his findings and conclusions. Pet. App. 17a-22a (reproducing report). On the first page of this report, Dr. Sohn expressly attributed the death to "Homicide." *Id.* 17a. Specifically, Dr. Sohn wrote that the "cause of death" was an "Acute bilateral subdural hemorrhage." *Id.* In the remainder of the report, Dr. Sohn provided more detailed assertions concerning the condition of

the child's body and its internal condition. *Id.* 18a-22a.

Dr. Sohn submitted his autopsy report to the county coroner, Dr. Jan Gorniak. Dr. Gorniak reviewed the findings in that report and the relevant police reports, Tr. 104, and prepared a "Coroner's Report." Pet. App. 14a-16a. That report notes that Dr. Sohn concluded that the "Manner of Death" was "Homicide" and declares, in accordance with the autopsy report, that the "Immediate Cause" of death was a "Subdural hematoma" due to "Non-accidental head trauma." *Id.* 14a, 15a. The coroner's report also attaches the autopsy report and incorporates Dr. Sohn's pathology findings by reference. *Id.* 15a.

Dr. Gorniak certified the reports then sent them to the Piketon Police Department, which she identified as the "Investigating Agency" on the case. Pet. App. 15a.

4. The State charged petitioner with felony murder and endangering a child. Pet. App. 4a. At his bench trial, petitioner contended that when he told the investigating officer on the day of the incident that he had "shaken" Junior, he meant only that he had shaken the cushions. *Id.*; *see also* Tr. 289 (testimony of investigator who interviewed petitioner). The State did not call any eyewitnesses to contradict this account. Nor did the State call Dr. Sohn, who performed the autopsy, to the stand.

Instead, to prove its allegation that petitioner shook Junior himself, causing him to die, the State proposed to introduce Dr. Sohn's autopsy report in evidence and to call Dr. Gorniak to the stand to discuss the report's findings. Pet. App. 4a. Petitioner

objected that introducing Dr. Sohn's report without his live testimony would violate the Confrontation Clause. In particular, petitioner argued that the autopsy report – as well as the portions of the coroner's report repeating or incorporating it – are "testimonial" under *Crawford v. Washington*, 541 U.S. 36 (2004), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). Tr. 76-85, 412-14. The trial court overruled petitioner's objection without providing any explanation. Tr. 414.

After trial, the court found petitioner guilty of felony murder and child endangerment. Pet. App. 4a. It sentenced petitioner to fifteen years to life in prison. *Id.*

5. The Court of Appeals of Ohio affirmed. As is relevant here, the court of appeals noted that the Ohio Supreme Court had held in *State v. Craig*, 853 N.E.2d 621, 638-39 (Ohio 2006), that autopsy reports are not testimonial. Pet. App. 7a. *Craig* preceded this Court's holding in *Melendez-Diaz* that formal forensic reports created "for the purpose of establishing or proving some fact at trial" are testimonial. 557 U.S. at 324. But the court of appeals still deemed itself "bound to apply *Craig*." Pet. App. 8a. *Melendez-Diaz* applies only to forensic reports prepared to prove facts for criminal litigation, and, in *Craig*, the Ohio Supreme Court asserted that autopsy reports are "not prepared for the purposes of litigation." *Id.*

6. The Ohio Supreme Court granted discretionary review, *State v. Hardin*, 945 N.E.2d 522 (Ohio 2011), and heard petitioner's case in tandem with another presenting the same issue, *State v.*

Maxwell, 9 N.E.3d 930 (Ohio 2014), *petition for cert. filed* (No. 14-6882).

The Ohio Supreme Court decided *Maxwell* first, holding by a 4-3 vote that *Melendez-Diaz* did not undercut its prior holding in *Craig*. The majority acknowledged that medical examiners sometimes perform autopsies "when a death is potentially a homicide," *Maxwell*, 9 N.E.3d at 951 – and, as noted above, coroners in those instances must forward the results to the local prosecuting attorney for evidentiary use, *see* Ohio Rev. Code §§ 313.09-10. But the Ohio Supreme Court deemed it irrelevant that that was exactly what had happened in *Maxwell.* The majority asserted that forensic reports are testimonial only if, *as a general class*, they are "prepared for the primary purpose of providing evidence in a criminal trial." 9 N.E.3d at 951. Because autopsies are performed in "a number of situations" besides homicide investigations, the Ohio Supreme Court reasoned that even autopsy reports actually prepared to aid such investigations are not testimonial. *Id.*

The Ohio Supreme Court also suggested that "unique policy interests" reinforced excluding autopsy reports from the ambit of the Confrontation Clause. 9 N.E.3d at 951. As the majority put it: "A medical examiner who conducted an autopsy may be unavailable or deceased when a trial begins. And unlike other forensic tests, a second autopsy may not be possible due to cremation of the victim's body or other loss of evidence with passage of time." *Id.*

The Justices who disagreed with this holding declared that "whether a particular autopsy report is testimonial should be determined on a case-by-case

basis." 9 N.E.3d at 990-91 (Pfeifer, J., concurring in part and dissenting in part). And, they explained, if the report is prepared as part of "investigating a homicide," it is testimonial. *Id.* at 987 (French, J., concurring).

These three Justices believed – as did the majority – that any error in *Maxwell* was harmless. 9 N.E.3d at 986 (French, J., concurring); *id.* at 998 (Pfeifer, J., concurring in part and dissenting in part). But the three Justices who wrote separately urged this Court to "grant[] certiorari on the issue" in a proper case. *Id.* at 987 (Pfeifer, J., concurring in part and dissenting in part). "The nation, like this court, remains split on the question," they explained. *Id.*; *see also id.* at 996 (citing conflicting authority). And "it is a recurring issue that demands resolution." *Id.*

About six months later, the Ohio Supreme Court decided petitioner's case. Relying solely "on the authority" of *Maxwell*, the court affirmed petitioner's conviction in a decision without an opinion. Pet. App. 1a. Two Justices noted their dissent. *Id.*

REASONS FOR GRANTING THE WRIT

This Court held in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and reaffirmed in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), that formalized forensic reports created for evidentiary use are testimonial. Subsequently, in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), five Justices, in two opinions, held that a DNA report was not testimonial. *See id.* at 2227 (plurality opinion); *id.* at 2255 (Thomas, J., concurring in the judgment). But because that DNA report was not formalized,

nothing in that holding undermined the rule of *Melendez-Diaz* that formalized forensic reports created for evidentiary use in criminal investigations are testimonial.

Nevertheless, in the past few years, state high courts have splintered over whether autopsy reports created as part of a homicide investigation, and asserting that the cause of death was homicide, are testimonial. Four courts hold that they are testimonial; three courts, including the Ohio Supreme Court, hold that they are not; and two other courts hold that some statements in autopsy reports are testimonial while other statements are not.

The importance of this issue to the administration of criminal justice is manifest. And this case presents an ideal vehicle for resolving the issue. In every relevant respect, the circumstances under which the forensic examiner conducted the autopsy here are typical. And because the report itself was introduced in evidence and (as required by state law in Ohio and other states) is certified, a reaffirmation of this Court's previous holdings that formalized forensic reports are testimonial is all that is necessary to decide this case and to restore clarity to this area of law more generally.

I. State High Courts Are Intractably Divided Over Whether Autopsy Reports Created As Part Of Homicide Investigations Are Testimonial.

State high courts are now hopelessly splintered over whether the Confrontation Clause applies to autopsy reports prepared to further homicide

investigations and asserting that deaths were caused by homicide.

1. Four state high courts since *Williams v. Illinois*, 132 S. Ct. 2221 (2012), have held that autopsy reports created during homicide investigations and concluding that homicide was the cause of death are testimonial. Three of these courts have issued such holdings and found confrontation violations on facts indistinguishable from those here. *See, e.g.*, *Miller v. State*, 313 P.3d 934, 969 (Ok. Crim. 2013) ("[A] medical examiner's autopsy report in the case of a violent or suspicious death is indeed testimonial for Sixth Amendment confrontation purposes.") (internal quotation marks and citation omitted); *State v. Navarette*, 294 P.3d 435, 440-42 (N.M. 2013) (autopsy reports prepared during homicide investigations are testimonial because "[i]t is axiomatic" that medical examiners create such reports "with the understanding that they may be used in a criminal prosecution"), *cert. denied*, 134 S. Ct. 64 (2013); *State v. Kennedy*, 735 S.E.2d 905, 916-17 (W. Va. 2012) (autopsy reports conducted during "death investigations" are "under all circumstances testimonial"); *State v. Blevins*, 744 S.E.2d 245, 264-66 (W. Va. 2013) (same).

The Massachusetts Supreme Judicial Court likewise held before *Williams* that autopsy reports "undertaken as an *investigation and inquiry* into the *cause* of [a victim's] death" are testimonial "because a reasonable person in [the medical examiner's] position would anticipate his [findings and conclusions] being used against the accused in investigating and prosecuting a crime." *Commonwealth v. Nardi*, 893 N.E.2d 1221, 1233

(Mass. 2008) (third alteration in original) (internal quotation marks and citation omitted). Since *Williams*, that court has cited that holding with approval and further held, for the same reasons given in *Nardi*, that a death certificate prepared by a forensic pathologist who has conducted an autopsy and determined that "a victim has undoubtedly died an unnatural death" is testimonial. *Commonwealth v. Carr*, 986 N.E.2d 380, 398-99 (Mass. 2013). Thus, the Massachusetts Supreme Judicial Court would have held that the autopsy report here was testimonial.[1]

2. In direct contrast, the Supreme Court of Ohio has now become the third state high court since the *Williams* decision to hold that statements in autopsy reports created as part of homicide investigations are nontestimonial. Pet. App. 1a; *State v. Maxwell*, 9 N.E.3d 930, 951 (Ohio 2014), *petition for cert. filed* (No. 14-6882).

In *People v. Leach*, 980 N.E.2d 570 (Ill. 2012) – a case the Ohio Supreme Court cited and followed, *see*

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[1] One other state high court and two federal courts of appeals have similarly held that *Melendez-Diaz* dictates that autopsy reports created during homicide investigations and concluding that victims indeed died of homicide are testimonial. *See State v. Locklear*, 681 S.E.2d 293 (N.C. 2009); *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012); *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011), *aff'd on other grounds, Smith v. United States*, 133 S. Ct. 714 (2013). None of those courts has revisited the issue since *Williams.* Still other courts addressed the question presented before *Melendez-Diaz*, but those holdings have little precedential value in light of this Court's intervening decisions.

Maxwell, 9 N.E.3d at 951 – the Illinois Supreme Court held that autopsy reports such as the one in this case are nontestimonial. *Leach*, 980 N.E.2d at 593. Specifically, while recognizing the "split of opinion" on the issue, the Illinois Supreme Court concluded that an autopsy report created "in the midst of a criminal investigation into a violent death," and determining that the cause of death was homicide, was nontestimonial. *Id.* at 590-94. Similarly, the Arizona Supreme Court has held that autopsy reports conducted as part of murder investigations "to determine the manner and cause of death" are not testimonial. *State v. Medina*, 306 P.3d 48, 62-64 (Ariz. 2013), *cert. denied*, 134 S. Ct. 1309 (2014).

3. Two other state high courts have attempted to steer a middle course – although even these two courts disagree on what the proper rule should be. The Washington Supreme Court has held that statements in autopsy reports are testimonial insofar as they have an "inculpatory effect," while suggesting that such statements might not be testimonial if incriminating only in combination with other evidence. *State v. Lui*, 315 P.3d 493, 510-12 (Wash.), *cert. denied*, 134 S. Ct. 2842 (2014). The California Supreme Court has held that "anatomical and physiological observations" in autopsy reports created during homicide investigations are nontestimonial, while reserving the question whether "conclusions as to the cause of the victim's death" might be testimonial. *People v. Dungo*, 286 P.3d 442, 449-50 (Cal. 2012); *accord People v. Edwards*, 306 P.3d 1049, 1088-89 & n.12 (Cal. 2013).

4. The conflict over the status of autopsy reports created under the circumstances here is deeply entrenched. Numerous state high courts have weighed in, and new courts to confront the issue are no longer usefully contributing to any process of percolation. Only this Court can resolve the conflict over how the Confrontation Clause applies in this context.

II. The Question Presented Is Important And Should Be Resolved Now.

For three reasons, there is a pressing need for this Court to resolve the conflict over whether autopsy reports prepared as parts of homicide investigations are testimonial.

1. Autopsy reports play a central evidentiary role in a large number of high-stakes criminal trials. In particular, autopsy reports are present in virtually every homicide prosecution. And when, as here, the parties dispute whether the victim died as a result of malfeasance or natural causes, the reports often are a critical component of the prosecution's case.

2. Submitting the authors of autopsy reports to adversarial testing according to the dictates of the Confrontation Clause is essential to avoid wrongful convictions. This Court already has recognized, as a general matter, that forensic analysts are sometimes "incompetent" or even "fraudulent." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009). On a more subtle level, "[a] forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution." *Id.* at 318. It is vital that defendants have the

opportunity to cross-examine the authors of forensic reports to "expose any lapses or lies" on their part. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2715 (2011).

This all holds true – indeed, especially true – with respect to autopsy reports created during homicide investigations. Police officers typically converse with forensic examiners prior to, or during, such autopsies, and officers usually tell examiners how they think the death occurred. In addition, even more so than drug or alcohol testing of the type involved in *Melendez-Diaz* and *Bullcoming*, forensic pathology involves a significant amount of subjectivity and judgment. *See generally* National Association of Medical Examiners, *Forensic Autopsy Performance Standards* § B (2006), *available at* http://www.mtf.org/pdf/name_standards_2006.pdf (describing processes for arriving at "interpretation and opinions," as well as exercising "the discretion to determine the need for additional dissection and laboratory tests").

Yet sometimes medical examiners display anything but the skill and integrity necessary to the task. A recent investigation in Mississippi, for example, revealed several wrongful convictions due to autopsies performed by "a forensic analyst with inadequate training" and questionable ethics "who was given far too much deference in the courts." Campbell Robertson, *Questions Left for Mississippi Over Doctor's Autopsies*, N.Y. Times, Jan. 7, 2013. Other similar examples abound. *See, e.g.*, Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 Stan. L. & Pol'y Rev. 381, 401 (2004).

Worse yet, prosecutors sometimes work to shield potentially questionable forensic pathology from cross-examination. In one recent case, for instance, the medical examiner who had prepared the autopsy report had been blacklisted from testifying in several California counties, including the county where the trial took place. *People v. Dungo*, 98 Cal. Rptr. 3d 702, 707-08 (Cal. Ct. App. 2009). The examiner had also falsified his credentials, performed incompetent work in other California counties, and been fired and forced to resign "under a cloud." *Id.* at 714. Finally, the examiner had been known to base his conclusions on police reports instead of forensic methods. *See People v. Beeler*, 891 P.2d 153, 168 (Cal. 1995); Scott Smith, *S.J. Pathologist Under Fire Over Questionable Past*, The Record, Jan. 7, 2007, *available at* http://www.recordnet.com/apps/pbcs.dll/article?AID=/20070107/A_NEWS/701070311. In light of this track record, the prosecution decided to put the medical examiner's supervisor on the stand instead of him. The California Court of Appeal held that this surrogate testimony violated the Confrontation Clause, observing that the "prosecution's intent" in failing to call the actual medical examiner had been to "prevent[] the defense from exploring the possibility that [he] lacked proper training or had poor judgment or from testing [his] 'honesty, proficiency, and methodology.'" *Dungo*, 98 Cal. Rptr. 3d at 714 (quoting *Melendez-Diaz*, 557 U.S. at 321).

Without disagreeing with any of these factual findings, the California Supreme Court reversed on the ground that the medical examiner's findings in the autopsy report were nontestimonial. *People v. Dungo*, 286 P.3d 442, 450 (Cal. 2012). Only by

granting certiorari here can this Court foreclose similar prosecutorial maneuvering in the future.

3. The sooner this Court clarifies whether autopsy reports prepared for homicide investigations are testimonial, the sooner courts, institutions, and litigants can adapt to this Court's holding. For instance, if such autopsy reports are testimonial, States and localities could take steps to ensure that important assertions in autopsy reports are admissible even if a report's author becomes unavailable. Some states require two medical examiners to be present at every autopsy performed as part of a homicide investigation – ensuring that if one becomes unavailable, the other can still testify and explain the report. Medical examiners can also take extra photographs or videos, and preserve extra samples to allow retesting if the original examiner becomes unavailable. *Cf. Bullcoming*, 131 S. Ct. at 2718 (plurality opinion) (noting that retesting forensic evidence is often possible and takes care of confrontation concerns).

In short, enough time, energy, and ink has been expended battling over whether autopsy reports in cases such as this are testimonial. This Court should answer the question so that energy can be spent moving forward.

III. This Case Is An Ideal Vehicle For Resolving The Issue.

Last Term, this Court denied review in three cases presenting questions concerning the testimonial status of autopsy reports. *See United States v. James*, 712 F.3d 79 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2660 (2014) (No. 13-632); *State v.*

Medina, 306 P.3d 48, 62-64 (Ariz. 2013), *cert. denied*, 134 S. Ct. 1309 (2014) (No. 13-735); *State v. Lui*, 315 P.3d 493, 510-12 (Wash.), *cert. denied*, 134 S. Ct. 2842 (2014) (No. 13-9561). If this Court desired further percolation, the Ohio Supreme Court's decisions in *Maxwell* and this case have provided it – making clear now that courts are intractably divided over the question presented. In addition, four aspects of this case collectively render it a better vehicle than any of the prior three.

1. The autopsy report in this case was unquestionably written as part of a homicide investigation. The local police delivered the body to the coroner's office and said that they suspected that petitioner had killed the "[v]ictim." Pet. App. 15a. The report also concluded that the manner of death was "Homicide." *Id.* 17a. Contrast these facts with *James*, in which the autopsy was completed "substantially *before* any criminal investigation into [the] death had begun," and "the autopsy report itself refer[red] to the cause of death as 'undetermined.'" *James*, 712 F.3d at 99 (emphasis added). Indeed, in *James*, law enforcement had not even been "notified that [the] death was suspicious, or that any medical examiner expected a criminal investigation to result from [the autopsy]." *Id.*[2]

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[2] The Illinois Supreme Court similarly noted in *People v. Leach* that medical examiners conducting autopsies following suspicious deaths sometimes conclude "that the deceased died of natural causes and, thus, exonerate a suspect." 980 N.E.2d 570, 591 (Ill. 2012). It is unlikely that an indictment would ever result in these circumstances – much less that the report reaching this conclusion would later be introduced against the

2. The circumstances surrounding this autopsy and trial are typical of cases involving autopsy reports created during homicide investigations and concluding that the victim died of homicide.

From the moment the body was delivered to the coroner's office, police suspected that the death was a homicide. Pet. App. 4a. There can be no doubt, therefore, that when the medical examiner concurred that the death was a homicide, he knew that his forensic findings likely would be used in a criminal prosecution. *Id.*; *see also State v. Kennedy*, 735 S.E.2d 905, 917 (W. Va. 2012). Ohio state law, in fact, required the report to be sent directly to the local prosecuting attorney and provided that it "shall be received as evidence in any criminal or civil action or proceeding in a court in this state, as to the facts contained in [it]." Ohio Rev. Code §§ 313.09-10; *see also State v. Navarette*, 294 P.3d 435, 436 (N.M.), *cert. denied*, 134 S. Ct. 64 (2013); *Leach*, 980 N.E.2d at 591.

The coroner's office also certified the autopsy report pursuant to Ohio law, thereby creating a formalized report under typical state-law requirements. Pet. App. 16a; Ohio Rev. Code § 313.10; *see also, e.g.*, Ariz. Rev. Stat. § 11-594(A)(2) (medical examiner shall "[c]ertify to the cause and manner of death"); Or. Rev. Stat. § 146.045(3)(c) (requiring medical examiners to "[c]ertify the cause

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suspect at a trial. But if it were, the constitutional calculus would be different from here because the prosecution could plausibly argue that the medical examiner who wrote the report did not reasonably expect it to be used in a criminal prosecution.

and manner of a death requiring investigation"); Va. Code Ann. § 8.01-390.2 (autopsy reports must be "certified" and "duly attested by the Chief Medical Examiner").

Finally, there is no apparent reason why the prosecution would have been unable to put Dr. Sohn, the medical examiner who conducted the autopsy and later prepared the report, on the stand at trial. The State never contended that Dr. Sohn was unavailable. Nor does there appear to be any reason it could have. Dr. Sohn no longer worked at the coroner's office, but there was no indication he would have been unable to travel and testify as necessary.

3. This case also is an excellent vehicle for resolving the question presented because – in contrast to *Lui*, *see* 315 P.3d at 496 – the prosecution introduced in evidence the autopsy report itself. Several advantages flow from this fact. First, the report's presence in the record (*see* Pet. App. 17a-22a) ensures that this Court will be able to assess it directly, as opposed to attempting to deduce its contents through witness testimony or lodgings. Second, the prosecution's decision to submit the autopsy report as stand-alone evidence means that if the report was testimonial, the Confrontation Clause was unquestionably violated. As in *Bullcoming* (and in contrast to *Lui*), "this is not a case" in which this Court must consider whether "an expert witness [may be] asked for his independent opinion about underlying testimonial reports *that were not themselves admitted into evidence*." *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring in part) (emphasis added); *see* Br. in Opp. 7, 10, *Lui v. Washington*, 134 S. Ct. 2842 (2014) (No. 13-9561).

Finally, the presence of the entire autopsy report in evidence allows this Court to address the validity of the Washington and California Supreme Courts' suggestions that the Confrontation Clause might require courts to parse among different types of statements in such reports. *See supra* at 12.

4. Finally, and perhaps most importantly, the autopsy report played a pivotal role in this case. Unlike many homicide prosecutions, the central issue at trial here was *whether a homicide occurred at all.* The State prosecuted and convicted petitioner of the felony-murder of his five-month-old son, alleging the baby died of "shaken baby syndrome." Numerous recent medical and legal studies, however, have revealed that such allegations are highly dubious – or, at a minimum, highly contestable. Emily Bazelon, *Shaken-Baby Syndrome Faces New Questions in Court*, N.Y. Times Magazine, Feb. 2, 2011. In particular, "a significant and legitimate debate in the medical community has developed in the past ten years over whether infants can be fatally injured through shaking alone, . . . and whether other causes may mimic the symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome." *State v. Edmunds*, 746 N.W.2d 590, 596 (Wis. Ct. App. 2008); *see also* Cassandra Ann Jenecke, Comment, *Shaken Baby Syndrome, Wrongful Convictions, and the Dangers of Aversion to Changing Science in Criminal Law*, 48 U.S.F. L. Rev. 147 (2013); Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash. U. L. Rev. 1 (2009); Keith A. Findley et al., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right*, 12 Hous. J. Health L. & Pol'y 209 (2012).

The baby here – as in other "shaken baby" prosecutions now believed to have resulted in wrongful convictions – displayed no visible physical injuries, and there were no eyewitnesses (save petitioner) to the baby's death. Accordingly, the autopsy report alleging, in accordance with the suspicions the police transmitted to the medical examiner, that the cause of death was homicide was *the* critical piece of evidence. Yet petitioner was unable to cross-examine the person who conducted the autopsy and prepared the report introduced against him.

The centrality of the autopsy report here distinguishes this case from *Medina*, in which the victim had obviously been murdered and the State claimed that any details in the report concerning the precise manner of death were surely harmless. *See* Br. in Opp. 20-21, *Medina v. Arizona*, 134 S. Ct. 1309 (2014) (No. 13-735).[3] No harmless-error argument would be plausible here. Indeed, it is hard to imagine a case that puts the stakes involving the testimonial status of autopsy reports into sharper relief.

IV. The Ohio Supreme Court's Decision Contravenes This Court's Precedent.

The incompatibility of the Ohio Supreme Court's holding with this Court's Confrontation Clause

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[3] The defendant in *Medina* also failed to make a timely objection to the introduction of the autopsy report, something the State also argued rendered the case an unsuitable vehicle for certiorari. *See Medina*, 306 P.3d at 62; *Medina* Br. in Opp. 18-19.

jurisprudence further necessitates this Court's review.

1. Autopsy reports created as parts of homicide investigations and concluding that deaths were caused by homicide are the type of statements this Court has already held are testimonial. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), this Court held that formalized forensic reports fall within the "core class of testimonial statements" covered by the Confrontation Clause. *Id.* at 310. Such reports are created "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 311 (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)). Furthermore, the reports in *Melendez-Diaz* – sworn laboratory reports asserting that bags that the police seized from the defendant contained cocaine – were transmitted directly to the police and offered "the precise testimony the analysts would be expected to provide if called at trial." *Id.* at 310. This Court "safely assume[d] that the analysts were aware of the [reports'] evidentiary purpose" and thus held them to be testimonial. *Id.* at 311; *see also Davis v. Washington*, 547 U.S. 813, 822 (2006) (statements are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution").

In *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), this Court likewise held that a forensic laboratory report certifying the defendant's blood alcohol content was above the legal threshold was testimonial. As in *Melendez-Diaz*, this Court stressed that the laboratory was required by state

law to assist the police investigation; that the analyst "tested the evidence and prepared a certificate concerning the result of his analysis"; and that the certificate was "formalized" in a signed document. *Bullcoming*, 131 S. Ct. at 2717.

Melendez-Diaz and *Bullcoming* dictate that autopsy reports created, as here, as part of a homicide investigation and asserting that the death was caused by homicide are testimonial. As in those cases, forensic examiners conducting autopsies in this situation know – from the suspicious circumstances surrounding the victims' deaths; the delivery of the bodies by the police; and the examiners' statutory mandate to conduct autopsies to aid criminal investigations – that their reports likely will be used for prosecutorial purposes. Indeed, medical examiners under these circumstances are required by Ohio law to "promptly deliver [their reports] to the prosecuting attorney of the county in which such death occurred" if, "in the judgment of the coroner or prosecuting attorney, further investigation is advisable." Ohio Rev. Code § 313.09. Furthermore, just like the reports in *Melendez-Diaz* and *Bullcoming*, autopsy reports are formalized documents, specially designed and certified for evidentiary use. State law demands that autopsy reports be "certified" and provides that they "shall be received as evidence in any criminal or civil action or proceeding in a court in this state, as to the facts contained in [them]." *Id.* § 313.10.

Lest there be any doubt as to the testimonial status of autopsy reports, this Court's *Crawford* jurisprudence is designed to "comport[] with history" and to apply the Confrontation Clause to the kinds of

documents it traditionally barred without testimony from the author. *Williams v. Illinois*, 132 S. Ct. 2221, 2260 (2012) (Thomas, J., concurring in the judgment). Historical sources demonstrate that the right to confrontation covered coroner's reports finding deaths to be caused by homicide. *See, e.g.*, *Diaz v. United States*, 223 U.S. 442, 450 (1912) (noting that autopsy report could not be admitted without the consent of the accused "because the accused was entitled to meet the witnesses face to face"); Note, *Evidence – Official Records – Coroner's Inquest*, 65 U. Pa. L. Rev. 290-91 (1917), cited in *Melendez-Diaz*, 557 U.S. at 322.

2. As in the years leading up to *Melendez-Diaz*, *see* 557 U.S. at 312, state high courts have offered a "potpourri" of arguments to resist the straightforward conclusion that autopsy reports created for homicide investigations and concluding that deaths were caused by homicide are testimonial. None of these arguments withstands scrutiny.

a. The Ohio Supreme Court held that autopsy reports conducted as part of homicide investigations are not testimonial because medical examiners are "authorized to perform autopsies in a number of situations, only one of which is when a death is potentially a homicide." *State v. Maxwell*, 9 N.E.3d 930, 951 (Ohio 2014). That being so, the Ohio Supreme Court reasoned that the "primary purpose" of autopsy reports as a class is not to "provid[e] evidence in a criminal trial." *Id.*

As the dissenters in that case explained, *see Maxwell*, 9 N.E.3d at 988-91, this analysis misconceives the primary purpose test. That test does not ask whether statements *as an entire class*

have the primary purpose of aiding criminal investigations. Rather, the test is a "highly context-dependent inquiry" that recognizes that people make statements (and make reports) with "different motives" at different times. *Michigan v. Bryant*, 131 S. Ct. 1143, 1158, 1161 (2011). Thus, not even statements generated during police interrogations are categorically testimonial or nontestimonial. Such statements are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 1154 (quoting *Davis*, 547 U.S. at 822). Such statements are not testimonial when made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* (quoting *Davis*, 547 U.S. at 822).

So too with autopsy reports. Under a proper application of this Court's precedent, such reports are testimonial when prepared in order to establish or prove facts to aid a homicide investigation. They are not testimonial when prepared under other circumstances. And here, there is no dispute that the report was prepared to aid a homicide investigation.

b. The Ohio Supreme Court also suggested that "unique policy interests" support holding that autopsy reports prepared for criminal prosecutions are nontestimonial. *Maxwell*, 9 N.E.3d at 951. Specifically, the Ohio Supreme Court noted that "[a] medical examiner who conducted an autopsy may be unavailable or deceased when a trial begins" and "a second autopsy may not be possible." *Id.*

These considerations, however, are hardly unique. For centuries, courts have understood that

eyewitnesses and other declarants of testimonial statements sometimes become unavailable by the time of trial. *See Crawford v. Washington*, 541 U.S. 36, 53-56 (2004). Yet the Confrontation Clause has never deemed this reality to justify admitting testimonial statements without an opportunity for cross-examination. *Id.* There is no reason to depart from that time-honored rule here. To the contrary, the opportunities states have in the realm of forensic testing to preserve evidence (or take photographs) for further testing by other analysts would make it especially unwarranted here to create a special rule to protect against unavailability.

c. Relying on the plurality opinion in *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012), the Arizona and Illinois Supreme Courts have asserted that autopsy reports prepared to aid homicide investigations are not designed primarily to accuse a specified individual. *State v. Medina*, 306 P.3d 48, 63 (Ariz. 2013); *People v. Leach*, 980 N.E.2d 570, 592 (Ill. 2012). Yet where, as here, the police have a clear suspect – and only one suspect – from inception of their investigation, it would seem that an autopsy report declaring the cause of death to be homicide *does* accuse a specified individual.

At any rate, this Court has never held that a forensic report or any other declaration must directly accuse the defendant of a crime to be testimonial. To the contrary, *Melendez-Diaz* expressly rejected such a requirement, and a majority of the Justices in *Williams* reaffirmed that holding. *Williams*, 132 S. Ct. at 2262-63 (Thomas, J., concurring in the judgment); *id.* at 2273-74 (Kagan, J., dissenting). As Justice Thomas explained:

> A statement that is not facially inculpatory may turn out to be highly probative of a defendant's guilt when considered with other evidence. Recognizing this point, we previously rejected the view that a witness is not subject to confrontation if his testimony is "inculpatory only when taken together with other evidence." *Melendez-Diaz*, [557 U.S.] at 313. I see no justification for reviving that discredited approach, and the plurality offers none.

Williams, 132 S. Ct. at 2263 (Thomas, J., concurring in the judgment). When five Justices of this Court have twice rejected an argument, so should a state court.

d. This reasoning in *Melendez-Diaz* also disposes of the Washington Supreme Court's suggestion that autopsy reports might not be testimonial insofar as they have an "inculpatory effect" only in combination with other evidence. *State v. Lui*, 315 P.3d 493, 510-12 (Wash. 2014). To repeat: forensic reports prepared for evidentiary use that are "inculpatory only when taken together with other evidence" are still testimonial. *Melendez-Diaz*, 557 U.S. at 313.

e. The California Supreme Court's holding that anatomical and physiological observations in autopsy reports are nontestimonial – and potentially different in this respect than conclusions regarding cause and manner of death – fares no better. According to the California Supreme Court, anatomical and physiological observations are nontestimonial because they "are less formal than statements setting forth a pathologist's expert conclusions" as to the cause and manner of death. *People v. Dungo*, 286

P.3d 442, 449 (Cal. 2012). This is so, the California Supreme Court maintains, because the anatomical and physiological observations are more "comparable to observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment." *Id.* at 449.

This reasoning misses the mark. The reason ordinary physicians' notes are nontestimonial is not because they are inherently "objective," but rather because – in contrast to autopsy reports prepared for homicide investigations – they are not created with the primary purpose of creating evidence for a criminal investigation. When that purpose is present, *Bullcoming* holds that statements are testimonial no matter how "objective" (that is, purportedly reliable) they may be. 131 S. Ct. at 2714.

The California Supreme Court's "objectivity" reasoning, in other words, is nothing more than an attempt to revive an argument this Court already rejected – rebranding it as one about formality instead of reliability. But this repackaging will not wash. A single report is either formal or it is not. The certified report here is obviously formal. It also, of course, contains conclusions regarding the supposed cause and manner of death – exactly the kinds of statements even the California Supreme Court has suggested are testimonial.

CONCLUSION

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

Respectfully submitted,

Peter Galyardt
ASSISTANT OHIO PUBLIC DEFENDER
250 East Broad Street
Suite 1400
Columbus, OH 43215

Jeffrey L. Fisher
Counsel of Record
Brian Wolfman
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

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