

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2011-0122
Plaintiff-Appellee,	:	
	:	On Appeal from the Pike
v.	:	County Court of Appeals
	:	Fourth Appellate District
JEFFREY HARDIN,	:	Case No. 10CA803
	:	
Defendant-Appellant.	:	

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APPELLANT JEFFREY HARDIN'S REPLY BRIEF

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OFFICE OF THE OHIO PUBLIC DEFENDER

ROBERT JUNK #0056250  
Pike County Prosecutor  
(COUNSEL OF RECORD)

Pike County Prosecutor's Office  
Pike County Courthouse  
100 East 2<sup>nd</sup> Street, 1<sup>st</sup> Floor  
Waverly, Ohio 45690  
(740) 947-4323  
(740) 947-7617 - Fax

COUNSEL FOR STATE OF OHIO

PETER GALYARDT #0085439  
Assistant State Public Defender  
(COUNSEL OF RECORD)

250 East Broad Street - Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 - Fax  
peter.galyardt@opd.ohio.gov

COUNSEL FOR JEFFREY HARDIN

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## INTRODUCTION

The State's and Attorney General's briefs demonstrate a fundamental misunderstanding of the current Confrontation-Clause framework. First, business records can be testimonial. Autopsy reports that include a "homicide" manner-of-death finding are testimonial business records. The State and Attorney General wrongly assert that all business records are automatically nontestimonial, and that all autopsy reports qualify as such. In doing so, they rely upon the flawed premise that all autopsy reports serve the same purpose. But their view ignores the objective circumstances framing autopsy reports with a "homicide" manner-of-death finding.

Second, observational data included in an autopsy report with a "homicide" manner-of-death finding is offered for its truth and cannot be admitted as the basis for an expert's opinion. The opposite view is that of the *Williams* plurality, which garnered only four votes. As such, it is not governing law. Rather, the governing law comes from Justice Thomas and the *Williams* dissent, made up of Justices Kagan, Scalia, Ginsburg, and Sotomayor. Under that governing law, observational data in a forensic report—such as an autopsy report that includes a "homicide" manner-of-death finding—is offered for its truth. Absent confrontation of the person who performed the work and authored the report, such data cannot be admitted as the basis for an expert's opinion in any way.

Accordingly, this Court should reverse the decision below and remand this case for a new trial, at which Mr. Hardin must be afforded his constitutional right to confrontation. The State could satisfy the Confrontation Clause in one of two ways. It could put Dr. Sohn on the stand and subject him to cross-examination. Or it could present the facts in Dr. Sohn's report to Dr. Gorniak as a true hypothetical. Dr. Gorniak's opinion based upon those hypothetical facts would

then be genuinely independent, and her cross-examination would satisfy the Confrontation Clause.

### STATEMENT OF THE CASE AND FACTS

Mr. Hardin relies upon the statement of the case and facts presented in his merit brief with one clarification: Ohio law required the autopsy on Jr. because 1) he died suddenly when he was less than two years of age and in apparent good health, *and* 2) because his death was suspected to be a homicide. R.C. 313.121; R.C. 313.131(F).

### ARGUMENT

#### PROPOSITION OF LAW

**The Confrontation Clause prohibits the State from introducing testimonial statements of a nontestifying coroner through the in-court testimony of a third party who did not perform or observe the autopsy on which the statements are based. Sixth and Fourteenth Amendments, United States Constitution; Section 10, Article I, Ohio Constitution.**

The State's and Attorney General's arguments are fatally flawed. Dr. Sohn's autopsy report is testimonial. And Dr. Gorniak's surrogate testimony violated the Confrontation Clause. Accordingly, this Court should reverse the decision below and remand this case for a new trial.

**I. Business records can be testimonial, and an autopsy report with a "homicide" manner-of-death finding—such as Dr. Sohn's—is a testimonial business record that must be tested in the crucible of cross-examination.**

A business record can be testimonial. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (explaining that even if the affidavits in that case qualified as business records, confrontation would still be required); *see also Williams v. Illinois*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2221, 2256, 183 L.Ed.2d 89 (2012) (Thomas, J., concurring in judgment) ("But we have recognized that concepts central to the application of the Confrontation Clause are ultimately matters of federal constitutional law that are not dictated by state or federal

evidentiary rules.”); *see also id.* at 2262-2263 (explaining that the evidentiary purpose must prevail when balancing mixed purposes of statements under circumstances that objectively indicate that the statements are material to prove a crime).

Significantly, four years after the decision in *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, this Court recognized that business records can be testimonial. *See State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, at paragraph one of the syllabus (“Statements made to interviewers at child-advocacy centers that serve primarily a forensic or investigative purpose are testimonial and are inadmissible pursuant to the Confrontation Clause when the declarant is unavailable for cross-examination.”). The business of child-advocacy centers, which are part of hospitals, is to interview children who may have endured some form of abuse and document those interviews in a written report. *Arnold* at ¶ 5-7, 29-32. The reports from those centers are incontrovertibly business records. *See* Evid.R. 803(6); *see also Guarino-Wong v. Hosler*, 1<sup>st</sup> Dist. No. C-120453, 2013-Ohio-1625, ¶ 13 (explaining that hospital records are indisputably admissible as business records under Evid.R. 803(6)). Thus, the State’s and Attorney General’s contention that all business records are automatically nontestimonial is misplaced.

**A. An autopsy report with a “homicide” manner-of-death finding is a statement resulting from a regularly conducted business activity that is the production of evidence for use at a later trial.**

Police reports are quintessential business records, but they are undoubtedly testimonial. *See Melendez-Diaz* at 322. And statements that result from a regularly conducted business activity that is the production of evidence for use at a later trial are testimonial. *Id.* at 321-322, citing *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). Here, the practice of medical examiners and coroners demonstrates that the regularly conducted business activity of

writing an autopsy report with a “homicide” manner-of-death finding *is* to create evidence for use at a later trial.

Forensic pathologists practice under the two-part premise that their “‘testimony’ begins in the autopsy room where the anatomic studies are conducted,” and that their report must be tailored to the needs of law enforcement and the courts. *See David Dolinak et al., Forensic Pathology: Principles and Practice* 669 (2005) (“[E]very [autopsy report with a “homicide” manner-of-death finding] should be approached as if the case will go to trial.”); *see also id.* (“The ‘testimony’ begins in the autopsy room where the anatomic studies are conducted....”); *id.* at 2 (“An ideal autopsy report is goal oriented and based on awareness of the needs of investigators who must depend on the report.”).

Autopsy reports with a “homicide” manner-of-death finding are written to “establish[ ] or prov[e] some fact at trial.” *See Melendez-Diaz* at 324. Thus, by their nature they are prepared for trial. *Id.* And there is no doubt that such reports are “‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’” *Id.* at 311, quoting *Crawford v. Washington*, 541 U.S. 36, 52, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In fact, an autopsy report with a “homicide” manner-of-death finding tells the story of the victim’s body and how the life within that body terminated, which is exactly “what a witness does on direct examination.” *See Davis v. Washington*, 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

As such, when assessing the primary purpose of autopsy reports with a “homicide” manner-of-death finding, the Attorney General missteps when it lumps all autopsy reports together. Again, the practice is to conduct an autopsy with future testimony in mind, and the report is written with an eye toward making it optimally functional for law enforcement and the

courts. Dolinak et al. at 669, 2. Further, the report is the accumulation of the statements that are ultimately admitted at trial and is written *after* the “homicide” manner-of-death conclusion has been reached. Tr. at 88.

Given this timeline and planning, it strains credulity to assert that the primary purpose of an autopsy report with a “homicide” manner-of-death finding is primarily public-health oriented. Patently, the primary purpose of the smaller sample size of autopsy reports with a “homicide” manner-of-death finding is to create a substitute for in-court testimony. Accordingly, those reports are testimonial. *State v. Navarette*, 294 P.3d 435, 436 (N.M.2013); *State v. Kennedy*, 735 S.E.2d 905, 916-917 (W.Va.2012); *see also United States v. Ignasiak*, 667 F.3d 1217, 1229-1235 (11th Cir.2012) (finding autopsy reports with an “accident” manner-of-death finding to be testimonial under the facts of that case); *United States v. Moore*, 651 F.3d 30, 73 (D.C.Cir.2011); *Conners v. State*, 92 So.3d 676, 684 (Miss.2012) (noting a pre-*Crawford* decision that held admission of an autopsy report required confrontation); *People v. Lewis*, 806 N.W.2d 295 (Mich.2011) (vacating lower court’s holding that an autopsy report was nontestimonial but holding the error harmless beyond a reasonable doubt); *State v. Locklear*, 681 S.E.2d 293, 305 (N.C.2009) (holding the autopsy report testimonial but finding the error harmless beyond a reasonable doubt); *Commonwealth v. Nardi*, 893 N.E.2d 1221, 1233 (Mass.2008) (holding the autopsy report testimonial but finding that the error was not a miscarriage of justice).

This analysis is analogous to this Court’s view of child-advocacy-center reports in *Arnold*. Although child-advocacy centers are part of hospitals and create medical records in general, the circumstances surrounding a child-advocacy-center report demonstrate that some of the report is solely forensic. Therefore, the regularly conducted business activity of creating the forensic portion of the report is the production of evidence for use at a later trial. *See Arnold* at

paragraph one of the syllabus. Here, the regularly conducted business activity of writing autopsy reports without a “homicide” manner-of-death finding, absent unique circumstances to suggest otherwise, is public-health related. But the regularly conducted business activity of writing autopsy reports with a “homicide” manner-of-death finding is the production of evidence for use at a later trial. *See Melendez-Diaz* at 321-322.

**B. The United States Supreme Court cases decided after this Court’s decision in *Craig* indicate that autopsy reports with a “homicide” manner-of-death finding are testimonial.**

The State and Attorney General argue that the post-*Craig* precedent from the Supreme Court of the United States “does nothing to call into question the correctness of the *Craig* holding.” Merit Brief of Amicus Curiae Ohio Attorney General at 1; *see also* Merit Brief of Appellee at 10. Both missed the Court’s directive that “whatever the status of coroner’s reports at common law in England, they were not accorded any special status in American practice.” (Citations omitted.) *Melendez-Diaz* at 322. Further, the Court explained that business records can be testimonial. *Id.* at 321, 329-330. And the Court signaled that autopsy reports may be testimonial when it identified them as a form of forensic analysis that cannot be repeated. *Id.* at 317, fn. 5. Consequently, an autopsy report with a “homicide” manner-of-death finding is not automatically admissible as a business record. *See id.* at 321-322, 329-330.

Since this Court’s decision in *Craig*, the Court has also meaningfully addressed different types of forensic analyses, provided additional means to scrutinize reports from those analyses, and defined how substitute witnesses impact the Confrontation-Clause framework. *See generally Bullcoming v. New Mexico*, 564 U.S. \_\_\_, 131 S.Ct. 2705, 2710, 2715-2717, 180 L.Ed.2d 610 (2011); *Williams* at 2257-2263 (Thomas, J., concurring in judgment); *id.* at 2268-2270, 2273-2274 (Kagan, J., dissenting).

Moreover, many other state supreme and federal courts have held that autopsy reports are testimonial since this Court decided *Craig*, which provides a drastically different landscape than this Court faced nearly seven years ago. See *Navarette* at 436; *Kennedy* at 916-917; *Ignasiak* at 1229-1235; *Moore* at 73; *Lewis* at 295; *Locklear* at 305; *Nardi* at 1233.

The Attorney General's own characterization that this Court "did not reach its decision in *Craig* lightly" requires this Court to scrutinize the impact of *Melendez-Diaz*, *Bullcoming*, *Williams*, and post-*Craig* decisions from other state high courts and federal courts of appeals. See Merit Brief of Amicus Curiae Ohio Attorney General at 8. Indeed, it is no longer true that "[m]ost jurisdictions that have addressed the issue . . . have found that autopsy reports are admissible as nontestimonial business or public records." *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶ 83; see *Navarette* at 436; *Kennedy* at 916-917; *Ignasiak* at 1229-1235; *Moore* at 73; *Lewis* at 295; *Locklear* at 305; *Nardi* at 1233.

Further, the State's and Attorney General's blanket assertion that this Court's decision in *Craig* is dispositive denies this Court's actions in *State v. Craig*, Case No. 2006-1806 ("*Craig II*"). In that case, which this case had been held for, this Court ordered supplemental briefing based upon *Melendez-Diaz*, then twice held that briefing schedule for the decisions in *Bullcoming* and *Williams*, respectively. (September 27, 2010 Entry, *Craig II*); (October 21, 2010 Entry, *Craig II*); (August 10, 2011 Entry, *Craig II*). Certainly those actions do not impact this Court's ultimate decision in this case, but they demonstrate that this Court has recognized that the background has significantly changed since September 2006 when *Craig* was decided.

Finally, the State and Attorney General fail to recognize that this Court has already held that business records can be testimonial. *Arnold* at paragraph one of the syllabus. Accordingly, this Court must analyze autopsy reports with a "homicide" manner-of-death finding, distinct

from autopsy reports as a whole, to determine their primary purpose. As previously described, when viewed against the backdrop of forensic pathology practice and the dual purpose of coroners and medical examiners, it is clear that the primary purpose of an autopsy report with a “homicide” manner-of-death finding is for its use at trial. *See Dolinak et al. at 669, 2; Natl. Research Council Commt. on Identifying the Needs of the Forensic Sciences Community, Strengthening Forensic Science in the United States: A Path Forward 244 (2009).* Any public-health considerations are secondary. *Id.*

In this case, the facts further demonstrate that the primary purpose of Dr. Sohn’s autopsy report was for use in a later trial. The pertinent coroner-enabling statutes and Dr. Gorniak’s testimony illustrated that the report was central to law enforcement efforts, law enforcement information was integral to the autopsy report conclusions, and the report applied Dr. Sohn’s medical knowledge to the field of law. *See R.C. 313.09; R.C. 313.121; R.C. 313.19; see also Tr. at 104, 116-117, 119-122, 124, 126-127.* And the report did exactly what Dr. Sohn would have done on direct examination—it provided a step-by-step recounting of the actions he performed and the conclusions that he reached. *State’s Exhibit 20; see Davis at 830.* Any public-health considerations surrounding Dr. Sohn’s autopsy report were secondary to its primary purpose as a substitute for his in-court testimony. *Id.*

## **II. Crucial factors that this Court cannot overlook.**

### **A. Ohio’s coroner-enabling statutes must be read in the proper context.**

Naturally, Ohio’s coroner-enabling statutes reflect the dual purpose of coroners and medical examiners. *Strengthening Forensic Science in the United States at 244.* Read through that lens, it is clear that certain sections of R.C. Chapter 313 emphasize the purpose to “serve the criminal justice system as medical detectives by identifying and documenting pathologic

findings in suspicious or violent deaths and testifying in courts as expert medical witnesses,” while other sections underscore the objective to “surveil for index cases of infection or toxicity that may herald biological or chemical terrorism, identify diseases with epidemic potential, and document injury trends.” *Id.*

Accordingly, an autopsy report with a “homicide” manner-of-death finding has a primary purpose to serve as a substitute for in-court testimony and there are many sections in R.C. Chapter 313 that support that conclusion. Conversely, an autopsy report that does not contain a “homicide” manner-of-death finding, absent specific circumstances to suggest otherwise, has a public health primary purpose and there are many sections in R.C. Chapter 313 that help illustrate that fact.

**B. Autopsy reports with a “homicide” manner-of-death finding are *always* relevant in criminal prosecutions.**

The Attorney General’s focus on autopsy reports in general is detached from the primary-purpose test it champions. Under that test, this Court must “objectively evaluat[e] the statements and actions of the parties to the encounter, in light of the circumstances in which” the statements were made. *Michigan v. Bryant*, 562 U.S. \_\_\_, 131 S.Ct. 1143, 1162, 179 L.Ed.2d 93 (2011).

The Attorney General asserts that autopsy reports are “sometimes relevant in criminal prosecutions.” *See* Merit Brief of Amicus Curiae Ohio Attorney General at 10. On the whole that is true, but irrelevant, because it ignores the objective realities surrounding autopsy reports that identify deaths as the result of criminal conduct. Autopsy reports with a “homicide” manner-of-death finding are *always* relevant in criminal prosecutions.

Accordingly, autopsy reports that do not contain a “homicide” manner-of-death finding are inconsequential to the objective circumstances surrounding the statements in an autopsy report that *does* have a “homicide” manner-of-death finding. In this case, Dr. Sohn’s autopsy

report, containing the cause-of-death and “homicide” manner-of-death conclusions, was the sole evidence proving the required proximate-result element of felony murder for which Mr. Hardin was convicted. *See* R.C. 2903.02(B).

For that reason, the Attorney General is misguided in its approach. This Court should not accept it. To do so would be to ignore that Dr. Sohn’s autopsy report functioned exactly like the reports in *Melendez-Diaz* and *Bullcoming*. *See Melendez-Diaz* at 307; *Bullcoming* at 2710. It proved Mr. Hardin’s guilt at trial, thus operating identically to live, in-court testimony, doing “precisely what a witness does on direct examination.” *Davis* at 830.

**C. The primary purpose of a statement admitted at trial must be objectively evaluated based upon all of the circumstances evident at the time that the statement was made.**

Another fatal flaw of the Attorney General’s approach is that it attempts to ascertain the primary purpose of a statement, later admitted at trial, without including the contemporaneous objective circumstances that are evident when the statement was made. But that is not the law. Accordingly, the Attorney General’s charge that Mr. Hardin endorses gauging the primary purpose “after the fact” is inaccurate. *See* Merit Brief of Amicus Curiae Ohio Attorney General at 14. In fact, the Attorney General’s view of the primary purpose of an autopsy report with a “homicide” manner-of-death finding occurs before a statement has ever been made. *Id.* at 7-8. But logic ensures it is not possible to objectively evaluate the circumstances under which a statement is made before that statement is made.

The primary-purpose test mandates that a statement be “objectively evaluat[ed] . . . in light of the circumstances in which the statement” was made. *Bryant* at 1162. Here, the statement is the autopsy report with a “homicide” manner-of-death finding. Consequently, the circumstances to be objectively evaluated are those when the pathologist sits down to write the

report. *Id.* By that time the autopsy has been conducted, law enforcement input has been consulted, the manner-of-death finding has been reached, and it is clear that the report will be used in a later prosecution. Dr. Gorniak described that process in her testimony. *See* Tr. at 104, 116-117, 119-122, 124, 126-127. Given this sequence, it is clear that an autopsy report with a “homicide” manner-of-death finding is primarily written as a substitute for in-court testimony, and all public-health purposes are secondary. Any contrary conclusion, by its nature, is the consequence of a refusal to accept the contemporaneous objective factors. But such a refusal is proscribed by the Supreme Court of the United States. *Bryant* at 1162.

Further, the Attorney General’s suggestion that the reformulated targeted-suspect-primary-purpose test from the *Williams* plurality has relevance to this Court is unsound. That test was plainly rejected by Justice Thomas and the four dissenters in *Williams*. It is not the law. And it has no foundation in the text of the Confrontation Clause, precedent from the Supreme Court of the United States, history, or logic. *Williams* at 2262-2263 (Thomas, J., concurring in judgment); *Id.* at 2273-2274 (Kagan, J., dissenting). Regardless, Mr. Hardin was the targeted suspect when Dr. Sohn performed Jr.’s autopsy and wrote his report. Tr. at 270-272.

**D. The post-*Williams* decisions from other jurisdictions are factually distinguishable and failed to consider the contemporaneous objective factors surrounding an autopsy report with a “homicide” manner-of-death finding.**

The only post-*Williams* decision cited by the Attorney General that found an autopsy report with a “homicide” manner-of-death finding to be nontestimonial, when that report was admitted into evidence, did not address an offense that included a proximate-result element. *People v. Leach*, 980 N.E.2d 570, 572, 578 (Ill.2012) (the defendant was convicted of *knowing* murder); *see* R.C. 2903.02(B). That distinction is monumental because nothing in that autopsy report was any, let alone the *sole*, evidence of an element of the offense.

The *Leach* court concluded that “the autopsy report sought to determine how the victim died, not who was responsible, and, thus, [the report’s author] was not [the] defendant’s accuser.” *Id.* at 592. The Attorney General offers the same argument here. See Merit Brief of Amicus Curiae Ohio Attorney General at 15. But that approach is fundamentally flawed. In this case, the State was required to prove that Jr. died as a proximate result of child endangering. See R.C. 2903.02(B). Thus, *how* Jr. died was a statutory element that the State had to prove at trial. *Id.* And Dr. Sohn’s autopsy report was the only evidence establishing that element of the offense. Consequently, the *Leach* court did not address a comparable set of facts and its analysis and holding are of no value to this Court.

Similarly, two other post-*Williams* decisions from other jurisdictions cited by the Attorney General that found an autopsy report with a “homicide” manner-of-death finding to be nontestimonial did not involve the admission of those reports into evidence. *State v. Joseph*, 283 P.3d 27, 29 (Ariz.2012); *People v. Dungo*, 286 P.3d 442, 446 (Cal.2012). But Dr. Sohn’s report was admitted into evidence. Tr. at 414. As such, *Joseph* and *Dungo* are inapplicable to this case. See *State v. Pearson*, 297 P.3d 793, 848 (Cal.2013) (explaining that the admission of the report presents a fundamentally different question, but refusing to answer that question because any error was harmless).

Further, the only other post-*Williams* decision cited by the Attorney General that held autopsy reports to be nontestimonial did not involve reports with a “homicide” manner-of-death finding. *United States v. Mally*, 712 F.3d 79, 99, 102 (2d Cir.2013). Accordingly, *Mally* offers this Court no guidance.

Regardless, none of those decisions adequately addressed the contemporaneous objective factors surrounding an autopsy report with a “homicide” manner-of-death finding. The closest

case to this one is *Leach*, and that court failed to analyze the significance of the dual purpose of coroners and medical examiners. *See Strengthening Forensic Science in the United States* at 244; *see also Navarette* at 440-441; *Mallay* at 108-111 (Eaton, J., concurring). It also failed to evaluate the primary purpose based upon the objective circumstances that existed at the time that the statement was made, which is when the report was written. *Leach* at 591-592; *see Tr.* at 88. Notably, the court neglected the documented practice of forensic pathologists to conduct an autopsy with future testimony in mind, and to write their report with an eye toward making it optimally functional for law enforcement and the courts. *See Dolinak et al.* at 669, 2. As such, the people who perform forensic autopsies and write autopsy reports with a “homicide” manner-of-death finding would be surprised to learn that their report is not prepared primarily for use at a later trial as was held by the *Leach* court. *See id.*; *see also Leach* at 594.

**E. Dr. Sohn’s autopsy report is sufficiently formal and solemn under Justice Thomas’s approach.**

The Attorney General wrongly asserts that Justice Thomas would hold Dr. Sohn’s autopsy report to be nontestimonial. *See Merit Brief of Amicus Curiae Ohio Attorney General* at 22. Dr. Sohn’s autopsy report cannot be viewed in a vacuum. The report is incorporated fully into the coroner’s report. State Exhibit’s 20. On the coroner’s report, the “Cause and Manner of Death” section identifies “Steven S. Sohn, M.D., 35 038291” as the “Name, Title and License Number of Person Who Completed Cause of Death.” And that identifier is directly next to the “Manner-of-Death” finding on the coroner’s report. Dr. Gorniak is never mentioned in the coroner’s report other than by title at the top of the page and through her signature on the seal. None of the information provided in the report is identified as coming from her. In essence, Dr. Gorniak is the notary of Dr. Sohn’s conclusions within the coroner’s report. As a notarized document, the coroner’s report—which fully adopts the conclusions in Dr. Sohn’s autopsy

report—certainly qualifies under Justice Thomas’s approach. *See Melendez-Diaz* at 329-330 (Thomas, J., concurring); *Williams* at 2260-2261 (Thomas, J., concurring in judgment), citing *Davis* at 835-836 (Thomas, J., concurring in the judgment in part); *see also* Appellant Jeffrey Hardin’s Merit Brief at 23 (describing how Revised Code Sections 313.09, 313.19, and 313.121 and Ohio Evid.R. 902(4) further demonstrate the formal, solemn nature of the coroner’s report and accompanying autopsy report).

Dr. Gorniak’s testimony supports this conclusion. That testimony makes clear that although Dr. Gorniak is independently responsible for the manner-of-death finding as the elected coroner, she did not independently make the finding. Tr. at 88. Rather, she adopted it after the fact through her review of the relevant materials, including Dr. Sohn’s autopsy report, and accepting Dr. Sohn’s cause-of-death finding. *Id.*

Moreover, the autopsy report itself is incontrovertibly “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford* at 51, quoting 2 N. Webster, *An American Dictionary of the English Language* (1828). And it is a requisite piece of a statutorily-mandated process. *See* Appellant Jeffrey Hardin’s Merit Brief at 23. Thus, it is more like “a formal statement to government officers” rather than “a casual remark [made] to an acquaintance,” and is therefore, “similar in solemnity to the Marian examination practices that the Confrontation Clause was designed to prevent.” *Bryant* at 1153, quoting *Crawford* at 51; *Davis* at 822, quoting *Crawford* at 51; *Williams* at 2260-2261 (Thomas, J., concurring in judgment), citing *Davis* at 835-836 (Thomas, J., concurring in the judgment in part); *Melendez-Diaz* at 329-330 (Thomas, J., concurring).

Accordingly, contrary to the Attorney General's contention, Justice Thomas's fifth vote would declare Dr. Sohn's autopsy report testimonial. *See* Merit Brief of Amicus Curiae Ohio Attorney General at 22.

**F. The decisions that have found autopsy reports to be testimonial.**

Various state supreme and federal courts have held autopsy reports to be testimonial. *Navarette* at 436; *Kennedy* at 916-917; *Ignasiak* at 1229-1235; *Moore* at 73; *Lewis* at 295; *Locklear* at 305; *Nardi* at 1233. But the State and Attorney General offer no criticism of those decisions. The decisions are well reasoned. This Court should follow their lead.

**III. Observational data included in an autopsy report with a "homicide" manner-of-death finding is offered for its truth and cannot be admitted as the basis for an expert's opinion.**

**A. *Williams* has conclusively decided this question.**

Five justices on the Supreme Court of the United States agree that factual statements in forensic reports have no purpose, and no relevance to a criminal proceeding, separate from their truth. *See Williams* at 2257-2259 (Thomas, J., concurring in judgment); *Id.* at 2268-2270 (Kagan, J., dissenting). Consequently, such statements are offered for their truth and cannot be admitted as the basis for an expert's opinion. *Id.* Accordingly, the Attorney General's assertion that observational data can be offered as basis testimony is inapt. *See* Merit Brief of Amicus Curiae Ohio Attorney General at 17-24. All of the arguments to that effect are those of the *Williams* plurality opinion, which gained four votes, and is not the law. *See Williams* at 2257-2259 (Thomas, J., concurring in judgment); *Id.* at 2268-2270 (Kagan, J., dissenting).

**B. Observational data and facts within an autopsy report with a "homicide" manner-of-death finding are testimonial.**

Observational data and facts within an autopsy report with a "homicide" manner-of-death finding are incontrovertibly "a solemn declaration or affirmation made for the purpose of

establishing or proving some fact.” *Crawford* at 51, quoting 2 N. Webster, An American Dictionary of the English Language (1828). Moreover, they have no purpose, and no relevance to a criminal proceeding, separate from their truth. *See Williams* at 2257-2259 (Thomas, J., concurring in judgment); *Id.* at 2268-2270 (Kagan, J., dissenting). The Attorney General argues that they are meaningless on their own, but that cannot be true. *See Merit Brief of Amicus Curiae Ohio Attorney General* at 19. If they were meaningless, they would be irrelevant to a prosecution and inadmissible. *See Evid.R. 402*. Of course, they are vital to the cause-of-death finding. And the cause-of-death finding is integral to the manner-of-death finding. *Tr.* at 89. Neither of the findings are possible without the underlying data and facts. *Id.* They are testimonial. *See Williams* at 2257-2259 (Thomas, J., concurring in judgment); *Id.* at 2268-2270 (Kagan, J., dissenting).

**C. Alternative approach under *Arnold*.**

If this Court determines that the facts within an autopsy report with a “homicide” manner-of-death finding are not testimonial, Dr. Sohn’s report still violated Mr. Hardin’s right to confrontation. Identifying a death as a homicide typically has no public-health implications. And any value such a finding brings to the public’s necessity for thorough and accurate records pales in comparison to its value to the public’s demand for justice. Thus, as the child victim statements made to child advocates describing past events of abuse were solely intended for use at a later criminal prosecution, so too are “homicide” manner-of-death findings. *See Arnold* at ¶ 35; *see also* State’s Exhibit 20; R.C. 313.09; R.C. 313.121; R.C. 313.19; Evid.R. 902(4). As such, Dr. Sohn’s “homicide” manner-of-death finding is testimonial. *Id.* And the admission of that testimonial statement was not harmless beyond a reasonable doubt. *See Section V*, below.

#### **IV. Dr. Gorniak's opinion was not independent.**

Dr. Gorniak's testimony and coroner's report demonstrate that her "homicide" manner-of-death finding was not independent, but rather an adoption of Dr. Sohn's finding. Dr. Gorniak had nothing to do with Jr.'s autopsy. Tr. at 75. She did not make a cause-of-death determination. *Id.* at 89. Indeed, she could not do so because she did not perform the autopsy. *Id.*; *see also id.* at 75. And Dr. Gorniak could not even attempt to make a manner-of-death determination without Dr. Sohn's autopsy report and cause-of-death finding. *Id.* at 89, 125.

Dr. Sohn presented his facts and findings to Dr. Gorniak in a meeting. *Id.* at 88. That presentation included Dr. Sohn's cause-of-death and manner-of-death findings. *Id.*; *see also* State's Exhibit 20. Dr. Gorniak agreed with Dr. Sohn. Tr. at 125. She adopted his findings after she reviewed his autopsy report, and as the elected coroner, put Dr. Sohn's findings into her official coroner's report, which only she could complete. *Id.* at 87; *see also* Section II, Part E, above. But that does not change that the determination was actually Dr. Sohn's, as is evidenced in the report itself. State's Exhibit 20; *see also* Section II, Part E, above. Accordingly, Dr. Sohn was the witness against Mr. Hardin during his trial, and it was he who had to be tested "in the crucible of cross-examination." *Crawford* at 61.

#### **V. The error was not harmless beyond a reasonable doubt.**

The Attorney General asserts that any error would be harmless. *See* Merit Brief of Amicus Curiae Ohio Attorney General at 17, 19. It does so without identifying the proper standard—harmless beyond a reasonable doubt—and without offering any analysis to support that conclusion. *Id.*; *see Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963). Given that the standard requires a demonstration that the error did not contribute to the

conviction, the Attorney General's conclusory assertion has no merit. *See Chapman* at 23-24, quoting *Fahy* at 86-87.

Under the proper analysis, it is clear that any error here is not harmless beyond a reasonable doubt. The Confrontation-Clause violation was the sole evidence to establish an element of Mr. Hardin's felony-murder conviction. It was in no way cumulative of anything. Dr. Gorniak's surrogate testimony was the *only* proof establishing that Jr.'s death was "a proximate result" of Mr. Hardin's commission of second-degree-felony child endangering. "Causing the death as a proximate result" of the child-endangering offense is an element of felony murder. R.C. 2903.02(B).

Mr. Hardin's limited admissions, both to law enforcement and to Jr.'s mother, only prove elements of his child-endangering conviction. They do not establish that Jr. died as a proximate result of Mr. Hardin's actions. Similarly, the other medical expert's testimony—Nationwide Children's Hospital Dr. Scribano, who never treated Jr. but reviewed numerous documents including the autopsy report—only established the extent and cause of Jr.'s injuries, not the cause and manner of death. Tr. at 373; *State v. Hardin*, 193 Ohio App.3d 666, 2010-Ohio-6304, 953 N.E.2d 847, ¶ 32 (4th Dist.). Notably, Dr. Scribano described the autopsy report as the "gold standard" for determining cause and manner of death. Tr. at 359. And he partially based his conclusion on the autopsy report. *Hardin* at ¶ 32. To the extent that Dr. Scribano's testimony relied on the autopsy report, it too violated the Confrontation Clause. *See* Appellant Jeffrey Hardin's Merit Brief at 14-25. Accordingly, Mr. Hardin could not have been convicted of felony murder without Dr. Gorniak's surrogate testimony. *Chapman* at 23-24, quoting *Fahy* at 86-87.

**VI. The Confrontation-Clause compliant way to admit genuinely independent expert opinion testimony on cause-of-death and manner-of-death findings.**

The Attorney General refuses to accept two principal tenets of confrontation identified by the Supreme Court of the United States in its current Confrontation-Clause analysis. First, the confrontation right is a *procedural* guarantee requiring that a testimonial statement's credibility be "assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford* at 61. As such, it—at times—requires forethought by prosecutors. Second, the testimonial statement's declarant must be the witness placed in the crucible of cross-examination. *Bullcoming* at 2709, 2715; *see also Williams* at 2265 (Kagan, J., dissenting). Thus, to admit the autopsy report in any manner, Dr. Sohn would have to testify. *Id.* But there is another way to constitutionally present the content of Dr. Sohn's autopsy report, excluding his cause-of-death and manner-of-death findings. Dr. Gorniak could then give her own, genuinely independent cause-of-death and manner-of-death findings.

**A. Dr. Gorniak can offer her own, genuinely independent expert opinion after being presented the observational data and facts of Dr. Sohn's autopsy report as a hypothetical.**

There is no constitutional prohibition against presenting known facts—such as those in Dr. Sohn's autopsy report—as a hypothetical to an expert witness. *See* Transcript of Oral Argument at 7-8, *Williams v. Illinois*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012) (No. 10-8505), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-8505.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-8505.pdf) (accessed May 27, 2013); *see also* Evid.R. 705. In addition to the hypothetical information provided on direct examination, Dr. Gorniak could explain that she thoroughly reviewed the autopsy photographs before testifying. Dr. Gorniak could then offer her own expert cause-of-death and manner-of-death opinions based upon the hypothetical information provided to her during direct examination and her review of the photographs. Under this practice, only Dr.

Gorniak's credibility is at issue because her entire testimony is her own statements. Thus, her cross-examination would satisfy the constitutional mandate. *Bullcoming* at 2709-2710, 2715.

Notably, this practice would also allow the State to constitutionally present expert opinions in cold cases that are brought to trial decades after the autopsy was performed. Accordingly, the Attorney General's reliance on concerns detailed by Justices Kennedy and Breyer, who are part of the *Williams* plurality and with whom five justices disagree in this area, is mistaken. See Merit Brief of Amicus Curiae Ohio Attorney General at 12-13; see also *Williams* at 2251 (Breyer, J., concurring); *Melendez-Diaz* at 335 (Kennedy, J., dissenting).

### CONCLUSION

The contemporaneous objective circumstances indicate that Dr. Sohn's autopsy report was prepared primarily for Mr. Hardin's trial. The report is adequately formal and solemn. It is testimonial. And, at bottom, the State and Attorney General urge this Court to sneak through the back door what the Constitution prohibits them from admitting through the front door. This Court should reject that invitation, and reverse the decision below.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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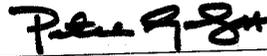
PETER GALYARDT #0085439  
Assistant State Public Defender  
(COUNSEL OF RECORD)

250 East Broad Street - Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 (Fax)  
peter.galyardt@opd.ohio.gov

COUNSEL FOR JEFFREY HARDIN

**CERTIFICATE OF SERVICE**

A copy of the foregoing **Appellant Jeffrey Hardin's Reply Brief** was sent via regular U.S. mail, postage prepaid to Robert Junk, Pike County Prosecuting Attorney, 100 East Second Street, 1<sup>st</sup> Floor, Waverly, Ohio 45690, and to Alexandra Schimmer, Solicitor General, Ohio Attorney General's Office, 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215 on this 30th day of May, 2013.



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PETER GALYARDT #0085439  
Assistant State Public Defender

COUNSEL FOR JEFFREY HARDIN