

In the
Supreme Court of Ohio

STATE OF OHIO,

Plaintiff-Appellee,

v.

JEFFREY HARDIN,

Defendant-Appellant.

: Case No. 2011-0122
:
:
: On Appeal from the
: Pike County
: Court of Appeals,
: Fourth Appellate District
:
: Court of Appeals Case
: No. 10CA803
:
:

**MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL
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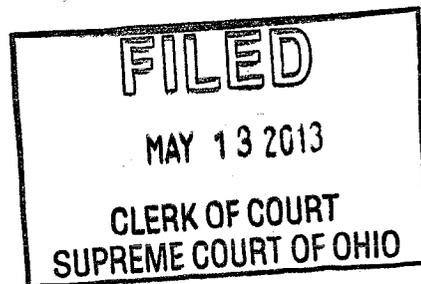


TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF AMICUS INTEREST	2
STATEMENT OF THE CASE AND FACTS	2
A. After a bench trial, Jeffrey Hardin was convicted of child endangerment and felony murder for the death of his five-month-old son.	2
B. At trial, Hardin objected to the admission of an autopsy report prepared by a non-testifying medical examiner on confrontation grounds; the trial court overruled his objection, and the appeals court affirmed.	3
ARGUMENT	4
<u>Amicus Curiae Ohio Attorney General’s Proposition of Law I:</u>	
<i>Autopsy reports are nontestimonial, and their admission at trial does not violate the Confrontation Clause</i>	4
A. The Confrontation Clause applies only to testimonial statements, made for the primary purpose of creating an out-of-court substitute for trial testimony.....	5
B. Autopsy reports are nontestimonial because their primary purpose is not to create an out-of-court substitute for trial testimony.....	7
1. Applying <i>Crawford</i> , this Court concluded in <i>Craig</i> that autopsy reports are nontestimonial business records.	7
2. <i>Craig</i> held that autopsy reports are nontestimonial because their primary purpose is to document the cause of death for public recordkeeping and public health purposes, not to provide a substitute for trial testimony.	8
3. The United States Supreme Court’s post- <i>Crawford</i> decisions do not undermine <i>Craig</i> ’s holding that autopsy reports are nontestimonial.	11
4. Hardin offers no sound reason for this Court to revisit its decision in <i>Craig</i>	14

Amicus Curiae Ohio Attorney General’s Proposition of Law II:

No confrontation violation occurs where a coroner relies on observational data recorded in an autopsy report as the basis for her independent expert opinion concerning the cause and manner of death.17

A. Observational data contained in an autopsy report are nontestimonial statements that may be admitted into evidence once any testimonial statements have been redacted.18

B. Dr. Gorniak’s trial testimony satisfied Hardin’s Sixth Amendment right to confront the witnesses against him.....20

1. An expert may rely on nontestimonial observational data contained in an autopsy report as the basis for her expert opinion.20

2. Dr. Gorniak testified at trial about her own opinions and was subject to cross-examination about those opinions and their bases.22

3. Dr. Gorniak’s testimony satisfied the requirements of the Confrontation Clause because she determined the manner of death for purposes of the coroner’s report and the coroner’s report bears her signature and seal.23

CONCLUSION.....25

CERTIFICATE OF SERVICEunnumbered

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Bullcoming v. New Mexico</i> , 131 S. Ct. 2705 (2011).....	<i>passim</i>
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	<i>passim</i>
<i>Davis v. Washington</i> , 547 U.S. 813 (2006).....	11, 18
<i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305 (2009).....	<i>passim</i>
<i>Michigan v. Bryant</i> , 131 S. Ct. 1143 (2011).....	6, 8, 15, 16
<i>Ohio v. Roberts</i> , 448 U.S. 56 (1980).....	5
<i>People v. Dungo</i> , 286 P.3d 442 (Cal. 2012).....	<i>passim</i>
<i>People v. Durio</i> , 7 Misc. 3d 729 (N.Y. Sup. Ct. 2005).....	8, 12
<i>People v. Freycinet</i> , 11 N.Y.3d 38 (2008).....	23
<i>People v. Leach</i> , 980 N.E. 2d 570 (Ill. 2012).....	<i>passim</i>
<i>People v. Westmoreland</i> , 213 Cal. App. 4th 602 (Cal. Ct. App. 2013).....	14
<i>Rollins v. State</i> , 866 A.2d 926 (Md. App. 2005).....	8
<i>State v. Adams</i> , No. 08 MA 246, 2012-Ohio-2719 (7th Dist.).....	13
<i>State v. Arnold</i> , 126 Ohio St. 3d 290, 2010-Ohio-2742.....	11, 17, 19
<i>State v. Banmah</i> , 87 So. 3d 101, 103 (Fla. Ct. App. 2012).....	14

<i>State v. Craig</i> , 110 Ohio St. 3d 306, 2006-Ohio-4571.....	<i>passim</i>
<i>State v. Joseph</i> , 283 P.3d 27 (Ariz. 2012).....	21
<i>State v. Kennedy</i> , 735 S.E. 2d 905 (W.Va 2012).....	21
<i>State v. Lopez</i> , 45 A.3d 1, 12-16 (R.I. 2012).....	21, 23
<i>State v. Monroe</i> , No. 94768, 2011-Ohio-3045 (8th Dist.).....	12, 13
<i>State v. Moon</i> , 512 F.3d 359 (7th Cir. 2008)	19
<i>State v. Muttart</i> , 116 Ohio St. 3d 5, 2007-Ohio-5267.....	11
<i>State v. Navarette</i> , 294 P.3d 435 (N.M. 2013)	21
<i>State v. Self</i> , 56 Ohio St. 3d 73 (1990).....	5
<i>State v. Williams</i> , 38 Ohio St. 3d 346, 528 N.E. 2d 910 (1988)	19
<i>State v. Zimmerman</i> , No. 96210, 2011-Ohio-6156 (11th Dist.).....	12, 13
<i>U.S. v. Johnson</i> , 587 F.3d 625 (4th Cir. 2009)	21
<i>United States v. Mallay</i> , 2013 U.S. App. LEXIS 6259 (2d Cir. 2013)	14
<i>United States v. Shanton</i> , 2013 U.S. App. LEXIS 4447 (4th.Cir. 2013)	21
<i>Vega v. Walsh</i> , 669 F.3d 123 (2d Cir. 2012).....	10
<i>Westfield Ins. Co. v. Galatis</i> , 100 Ohio St. 3d 216, 2003-Ohio-5849.....	14

<i>Williams v. Illinois</i> , 132 S. Ct. 2221 (2012).....	<i>passim</i>
--	---------------

<i>Young v. United States</i> , 2013 D.C. App. LEXIS 138 (D.C. 2013)	21
---	----

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

R.C. 109.02	2
R.C. 313.09	9, 18
R.C. 313.12	9
R.C. 313.17	15
R.C. 313.19	9, 24
R.C. 313.121	10
R.C. 313.131	9
R.C. 313.212	10
R.C. 2903.02(B).....	3
R.C. 3701.14(A).....	10
R.C. 3705.01(N) & (O).....	9
R.C. 3705.07(A).....	9, 10
R.C. Chapter 313.....	9, 15
U.S. Const. 6th Amend.	<i>passim</i>

OTHER AUTHORITIES

Carolyn Zabrycki, Comment, <i>Toward a Definition of “Testimonial”: How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement</i> , 96 Cal. L. Rev. 1093 (2008).....	8, 10
George M. Tsiatis, Note, <i>Putting Melendez-Diaz on Ice: How Autopsy Reports Can Survive the Supreme Court’s Confrontation Clause Jurisprudence?</i> , 85 St. John’s L. Rev. 355 (2011)	9

INTRODUCTION

Autopsy reports are nontestimonial business records, and their admission in a criminal trial does not implicate a defendant's confrontation rights. That is the answer this Court provided just six years ago to the very same question Hardin now presents on appeal. *State v. Craig*, 110 Ohio St. 3d 306, 2006-Ohio-4571. For three reasons the Court should reaffirm its holding in *Craig* and uphold the decision of the court below.

First, autopsy reports are public and business records, statutorily required for the primary purpose of documenting cause of death for public health reasons. Because they are created for that primary purpose, and not primarily to provide evidence in a future criminal proceeding, autopsy reports are nontestimonial. The fact that some autopsy reports have a secondary function of being helpful to law enforcement does not change the primary purpose for which the reports were prepared.

Second, the United States Supreme Court's recent confrontation jurisprudence does nothing to call into question the correctness of the *Craig* holding. None of the recent Confrontation Clause cases involved autopsy reports, see *Williams v. Illinois*, 132 S. Ct. 2221, 2251 (2012) (Breyer J., concurring). And autopsy reports are unlike the formal documents "made for the purpose of proving the guilt of a particular defendant at trial" that the Court found problematic in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). *Williams*, 132 S. Ct. at 2243 (plurality op. of Alito, J.).

Third, even if autopsy reports contain *some* testimonial statements, the proper course is to redact those statements—not to exclude a report all together. The bulk of an autopsy report consists of observational data and is nontestimonial. Those nontestimonial portions of a report may be introduced into evidence once the testimonial portions have been redacted. And here, even if limited portions of the autopsy report should have been redacted before being introduced

into evidence, failure to redact was, at most harmless error, since the homicide manner-of-death finding was merely cumulative of other trial testimony.

For these and the other reasons below, the Court should affirm the Fourth District's decision.

STATEMENT OF AMICUS INTEREST

As the State's chief law officer, R.C. 109.02, the Ohio Attorney General has an interest in the proper interpretation and enforcement of Ohio's criminal procedures, as well as the proper application and protection of defendants' constitutional rights. In the wake of *Crawford v. Washington*, 541 U.S. 36 (2004), courts have been faced with uncertainty about the proper application of the Sixth Amendment's Confrontation Clause. The Attorney General has an interest in ensuring that these questions are answered in a way that preserves the Sixth Amendment rights of defendants while also ensuring the thorough and effective enforcement of Ohio law.

STATEMENT OF THE CASE AND FACTS

A. After a bench trial, Jeffrey Hardin was convicted of child endangerment and felony murder for the death of his five-month-old son.

On May 11, 2009, paramedics responded to a 911 call that Jeffrey Hardin, Jr.—the defendant's five-month-old son—had stopped breathing. *State v. Hardin*, 193 Ohio App. 3d 666, 2010-Ohio-6304, ¶ 3 (4th Dist.) ("App. Op."). Paramedics took the child to the emergency room, and he was eventually transferred to Nationwide Children's Hospital in Columbus. *Id.* ¶ 4. Although they were able to reestablish the child's heartbeat, the doctors' efforts to restore the baby's respiratory functions proved unsuccessful, and they eventually discontinued life support. *Id.*

The police responded to the initial 911 call, along with emergency medical personnel. App. Op. ¶ 5. The responding officer described Hardin's emotional state at the scene as extremely distraught and said that Hardin told him that in an effort to get his son to sleep, he placed the infant on the sofa and pressed the cushions up and down, causing the baby to shake gently. *Id.* In a subsequent statement to the police, Hardin admitted that he "was having trouble with" his five-month-old son and "had shake[n] . . . him a couple of times. After that he started crying and fell asleep. He quit breathing." *Id.* ¶ 6. Hardin made a similar statement in speaking with an investigator from the Pike County Prosecutor's Office. *Id.*

Prosecutors charged Hardin with felony murder in violation of R.C. 2903.02(B) and endangering a child in violation of 2919.22(B)(1). App. Op. ¶ 9. Following a bench trial, he was found guilty on both counts and sentenced to concurrent terms of six years imprisonment on the child endangerment charge and fifteen years to life on the felony murder charge. *Id.*

B. At trial, Hardin objected to the admission of an autopsy report prepared by a non-testifying medical examiner on confrontation grounds; the trial court overruled his objection, and the appeals court affirmed.

At trial, the Franklin County Coroner, Dr. Jan Gorniak, testified to her opinion concerning the manner and cause of Hardin's son's death. Trial Tr. 89, 100-04, & 128. As the elected coroner at the time of the child's death, Dr. Gorniak was responsible for determining the cause and manner of death for purposes of the death certificate and final coroner's report. Trial Tr. 88-92 and 127-28. She testified at trial that, in her opinion, the child died as a result of "subdural hematoma due to non-accidental head trauma" caused by either "blunt trauma or a shaking mechanism." Trial Tr. 101 and 106. She also ruled the death a homicide. *Id.* at 104.

In reaching her conclusions about cause and manner of death, Dr. Gorniak relied, among other things, on photographs of the child's body and information contained in an autopsy report prepared by another pathologist from her office, Dr. Steven S. Sohn. *Id.* at 88-92, 94-95, 98-101,

& 125-128. The autopsy report included detailed observations describing the physical condition of the child's body and its organs. State Ex. 20 pp.3-5; Trial Tr. 92-95. The information Dr. Gorniak reviewed for purposes of trial was the same information she reviewed when preparing the child's death certificate and final coroner's report. Trial Tr. 88-89.

At the time of trial, Dr. Sohn was no longer with the coroner's office and did not testify. *Id.* at 113-14. Hardin objected to the admission of the autopsy report on confrontation grounds, but the trial court overruled his objection. *Id.* at 75-85, 94, 99-100, 101-103, 118, & 134-35.

On appeal, Hardin argued, among other things, that the admission of the autopsy report violated his confrontation rights because he was not given an opportunity to cross-examine Dr. Sohn. App. Op. ¶ 11. Applying *State v. Craig*, 110 Ohio St. 3d 306, 2006-Ohio-4571, the Fourth District Court of Appeals concluded that autopsy reports are nontestimonial business records and therefore that their admission does not implicate a defendant's confrontation rights. *Id.* ¶¶ 17-20.

Hardin sought discretionary review on the question of whether the admission the autopsy report violated the confrontation clause. This court accepted jurisdiction and held the case for a decision in *State v. Craig* ("*Craig II*"). *State v. Hardin*, 2011-0122 (Order, Apr. 20, 2011). After the death of the appellant in *Craig II*, the Court dismissed that case and ordered briefing in this matter. *State v. Hardin*, 2011-0122 (Order, Jan. 25, 2013).

ARGUMENT

Amicus Curiae Ohio Attorney General's Proposition of Law I:

Autopsy reports are nontestimonial, and their admission at trial does not violate the Confrontation Clause.

In 2006, this Court settled the very question Hardin now presents: the Court concluded that an autopsy report was a nontestimonial business record, and that its admission did not trigger

a defendant's confrontation rights. *Craig*, 2006-Ohio-4571 ¶¶ 81-88 (applying *Crawford v. Washington*, 541 U.S. 36 (2004)). That holding remains correct today, and nothing in the United States Supreme Court's recent confrontation jurisprudence—including *Melendez-Diaz*, *Bullcoming*, or *Williams*—mandates departure from that conclusion. At most, these cases require closer examination of the primary purpose of autopsy reports in Ohio. But that examination confirms this Court's prior holding. Autopsy reports are nontestimonial because they are not prepared for the primary purpose of serving as a substitute for trial testimony. And nothing *Hardin* says alters that conclusion. Accordingly, the Court should reject *Hardin*'s confrontation challenge and affirm the decision below.

A. The Confrontation Clause applies only to testimonial statements, made for the primary purpose of creating an out-of-court substitute for trial testimony.

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. 6th Amend.; see also *State v. Self*, 56 Ohio St. 3d 73, 79 (1990) (“Section 10, Article I [of the Ohio Constitution] provides no greater right of confrontation than the Sixth Amendment.”). But not every out-of-court statement triggers that right. Only *testimonial* statements demand confrontation. See *Crawford v. Washington*, 541 U.S. 36 (2004).

The “testimonial/nontestimonial” distinction is a recent development in confrontation jurisprudence. Before 2004, the United States Supreme Court took the view that the admission of an out-of-court statement did not pose a confrontation problem so long as it “fell within a firmly rooted exception to the hearsay rule.” *Williams v. Illinois*, 132 S. Ct. 2221, 2232 (plurality op. of Alito, J.) (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). But *Crawford* “adopted a fundamentally new interpretation of the confrontation right.” *Id.* Under this new regime, the Confrontation Clause bars the introduction of any “*testimonial* statements” of a non-

testifying witness unless that witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 53-54, 59 (emphasis added).

The *Crawford* Court declined “to spell out a comprehensive definition of ‘testimonial,’” *id.* at 68, explaining only that “[t]he text of the Confrontation Clause . . . applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’” *Id.* at 51. But subsequent decisions have amplified the meaning of testimonial.

It is now clear that testimonial statements are those made for the “primary purpose of creating an out-of-court substitute for trial testimony.” *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011); *see also Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 n.6 (2011) (“To rank as testimonial, a statement must have a primary purpose of establishing or proving past events potentially relevant to later criminal prosecution.”) (internal quotation marks and alteration omitted). If a statement’s primary purpose is anything else, it is nontestimonial. And its admissibility “is the concern of state and federal rules of evidence, not the Confrontation Clause.” *Bryant*, 131 S. Ct. at 1155. To discern the primary purpose, courts must assess that primary purpose “by objectively evaluating the statements and actions of the parties to the encounter” giving rise to the statements. *Id.* at 1162; *see also Williams*, 132 S. Ct. at 2243 (plurality op. of Alito, J.).

Four members of the Supreme Court have endorsed a more narrow primary-purpose test, and would find statements testimonial only when they are made “for the primary purpose of *accusing a targeted individual.*” *Williams*, 132 S. Ct. at 2243 (plurality op. of Alito, J.) (emphasis added); *but see id.* at 2262 (Thomas, J., concurring) (rejecting this formulation of the primary purpose test). This higher standard has been satisfied in “*every . . . post-Crawford case in which the Court has found a violation of the confrontation right.*” *Id.* at 2243. Under this

view, a record is testimonial only if someone prepares it “for the purpose of proving the guilt of a particular criminal defendant at trial.” *Id.* (emphasis added). If the primary purpose of a record is something else, it is not testimonial. *Id.*

Under either formulation of the “primary purpose” test, business and public records are generally nontestimonial “by their nature,” *Crawford*, 541 U.S. at 56. As explained in *Melendez-Diaz* “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.” 557 U.S. at 324. In other words, if the primary reason for creating a record is *not* to “establish[] or prov[e] some fact at trial,” the record is nontestimonial and admissible without confrontation. *Id.* But “if the regularly conducted business activity *is* the production of evidence for use at trial,” the record is testimonial and confrontation is required. *Id.* at 311, 321 (emphasis added).

B. Autopsy reports are nontestimonial because their primary purpose is not to create an out-of-court substitute for trial testimony.

The United States Supreme Court has not definitively resolved whether autopsy reports are nontestimonial. *See Williams*, 132 S. Ct. at 2251 (Breyer, J. concurring). But this Court has. In *Craig*, this Court concluded that autopsy reports are “admissible as nontestimonial business records,” *Craig*, 2006-Ohio-4571 ¶ 88, and Hardin offers no persuasive reason for this Court to abandon that holding now.

1. Applying *Crawford*, this Court concluded in *Craig* that autopsy reports are nontestimonial business records.

Craig answered the question of “whether [an] autopsy report is testimonial or nontestimonial.” *Craig*, 2006-Ohio-4571 ¶ 81. Following *Crawford*’s lead, the Court correctly concluded that such reports are nontestimonial business records and admissible at trial without confrontation. *Id.* ¶ 88.

The Court in *Craig* explained that “autopsy report[s], prepared by a medical examiner and documenting objective findings,” do not fall under the Confrontation Clause because they are the “quintessential business record[s].” *Id.* ¶ 82 (quoting *Rollins v. State*, 866 A.2d 926 (Md. App. 2005)). The Court found that they “are not testimonial in nature because they are prepared in the ordinary course of regularly conducted business and are ‘by their nature’ not prepared for litigation.” *Id.* (quoting *People v. Durio*, 7 Misc. 3d 729, 734 (N.Y. Sup. Ct. 2005)). Accordingly, the Court concluded that their admission without confrontation posed no constitutional problem. *Id.* ¶ 88.

The Court did not reach that conclusion lightly. Instead, it surveyed decisions from other jurisdictions assessing whether autopsy reports are testimonial and adopted the majority view. *See Craig*, 2006-Ohio-4571 ¶¶ 83-87 (collecting cases). At that time, at least one court had concluded that autopsy reports were testimonial, *id.* ¶ 86, some had treated them as hybrid documents containing both nontestimonial factual findings and testimonial conclusions, *id.* ¶ 84, but, as the Court explained, “[m]ost jurisdictions that [had] addressed the issue under *Crawford* [had] found that autopsy reports are admissible as nontestimonial business or public records.” *Id.* ¶ 83 (collecting cases).

2. ***Craig* held that autopsy reports are nontestimonial because their primary purpose is to document the cause of death for public recordkeeping and public health purposes, not to provide a substitute for trial testimony.**

An analysis of the “primary purpose” of autopsy reports bears out *Craig*’s conclusion that autopsy reports are nontestimonial. Autopsy reports are not intended to serve as an “out-of-court substitute for trial testimony.” *Bryant*, 131 S. Ct. at 1155. Instead, they are created “for the primary purpose of documenting cause of death for public records and public health.” Carolyn Zabrycki, Comment, *Toward a Definition of “Testimonial”*: *How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 Cal. L. Rev. 1093, 1130 (2008); *see also*

People v. Leach, 980 N.E. 2d 570, 591-92 (Ill. 2012) (A medical examiner is “charged with protecting the public health by determining the cause of a sudden death.”)

Ohio coroners (and medical examiners) conduct autopsies for the primary purpose of identifying a decedent’s cause of death. *See generally* R.C. Chapter 313. Coroners must “keep a complete record of and . . . fill in the cause of death on the death certificate, in all cases coming under [their] jurisdiction.” R.C. 313.09. The death certificate also must indicate the “manner and mode in which the death occurred.” R.C. 313.19. If the cause and manner of death are not immediately apparent—as when someone “dies as a result of criminal or other violent means, by casualty, by suicide, or in any suspicious or unusual manner” or “when any person . . . dies suddenly when in apparent good health,” R.C. 313.12—the coroner is notified so that an autopsy may be conducted. Indeed, an autopsy is a “compelling public necessity” if it is needed to “protect[] against an immediate and substantial threat to the public health” or to assist law enforcement conducting a murder investigation. R.C. 313.131 (explaining that the need for an autopsy is sufficient to overcome religious objections under these circumstances).

Once the coroner identifies the cause and manner of death and completes a death certificate, it must be filed with the local registrar of vital statistics. The local registrar, in turn, conveys all “original birth, fetal death, death, and military service certificates received . . . during the preceding month” to the Ohio Department of Health, Office of Vital Statistics. R.C. 3705.07(A); *see* R.C. 3705.01(N) & (O) (Ohio’s “[s]ystem of vital statistics” includes the collection and preservation of records of birth, death, fetal death, marriage, divorce, and other events).

Death certificates “stand as the final medical record for [an] individual” and “serve public health officials in prioritizing health risks.” George M. Tsiatis, Note, *Putting Melendez-Diaz on*

Ice: How Autopsy Reports Can Survive the Supreme Court's Confrontation Clause Jurisprudence?, 85 St. John's L. Rev. 355, 378 (2011). Ohio's director of health is statutorily required to study death certificates, "investigate . . . the cause of disease or illness, including contagious, infectious, epidemic, pandemic, or endemic conditions, and take prompt action to control and suppress it." R.C. 3701.14(A); *see also* Comment, 96 Cal. L. Rev. at 1124 (death certificates help public health officials "identify disease outbreaks, casualty dangers, and societal health risks" and also "help us design government programs and plan for retirement"). In addition, local registrars must "immediately notify the health commissioner with jurisdiction . . . of the receipt of a death certificate attesting that death resulted from a communicable disease." R.C. 3705.07(A). In certain contexts, coroners have more specific reporting requirements. They must notify the health department of any sudden infant deaths, R.C. 313.121, and may notify the state medical board of any deaths by overdose, R.C. 313.212. Among other things, notifying the health department of unexpected infant deaths triggers an obligation to provide the deceased child's parents with counseling and other supportive services. R.C. 313.121(E).

Although autopsy reports are sometimes relevant in criminal prosecutions, *Craig* was correct in concluding that such records are not created *primarily* for a prosecutorial purpose. Consistent with *Craig*, other courts have held post-*Williams* and/or post-*Bullcoming* that coroners are statutorily "empowered to investigate unnatural deaths and . . . authorized to perform autopsies in a number of situations, *only one of which* is when death is potentially the product of a homicidal act." *People v. Leach*, 939 N.E. 2d 537, 547 (Ill. App. Ct. 2010) (emphasis added), *aff'd Leach*, 980 N.E. 2d 570 (Ill. 2012). And in many cases, autopsies "determin[e] . . . cause of death when there is no anticipation of use of the autopsy in any kind of court proceeding." *Vega v. Walsh*, 669 F.3d 123, 128 (2d Cir. 2012). Thus, "[t]he usefulness of

autopsy reports . . . is not limited to criminal investigation and prosecution; such reports serve many other equally important purposes.” *People v. Dungo*, 286 P.3d 442, 450 (Cal. 2012).

Moreover, this Court has repeatedly rejected the proposition that a secondary, prosecutorial use renders otherwise nontestimonial evidence testimonial. *State v. Arnold*, 126 Ohio St. 3d 290, 2010-Ohio-2742, ¶ 43; *see also State v. Muttart*, 116 Ohio St. 3d 5, 2007-Ohio-5267, ¶ 62 (“The fact that the information gathered by . . . medical personnel . . . was subsequently used by the state does not change the fact that the statements were not made for the state’s use.”). For Sixth Amendment purposes, it is only the *primary* purpose of a document that determines whether it is testimonial or not.

3. The United States Supreme Court’s post-*Crawford* decisions do not undermine *Craig*’s holding that autopsy reports are nontestimonial.

Post-*Crawford* decisions do nothing to alter *Craig*’s holding. The above analysis shows that Ohio autopsy reports are unlike the scientific reports that led to confrontation violations in *Melendez-Diaz* and *Bullcoming*. The reports in both *Melendez-Diaz* and *Bullcoming* were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial. In *Melendez-Diaz*, the prosecution introduced “affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine.” 557 U.S. at 307. And in *Bullcoming*, the prosecution “introduce[d] a forensic laboratory report containing a testimonial certification” to show the defendant’s blood-alcohol concentration in a trial for driving while intoxicated. 131 S. Ct. at 2710. Both documents were testimonial because they were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” *Melendez-Diaz*, 557 U.S. at 310-11 (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)). They were “created solely for an ‘evidentiary purpose’ . . . made in aid of a police investigation.” *Bullcoming*, 131 S. Ct. at 2717.

In fact, they were “made for the purpose of proving the guilt of a particular criminal defendant at trial.” *Williams*, 132 S. Ct. at 2243 (plurality op. of Alito, J.) (discussing *Melendez-Diaz* and *Bullcoming*).

By contrast, autopsy reports are not affidavits or other substitutes for trial testimony. See *State v. Zimmerman*, No. 96210, 2011-Ohio-6156, ¶ 43 (11th Dist.) (distinguishing autopsy reports from the *Melendez-Diaz* reports because the latter were “prepared solely for use at trial”); see also *State v. Monroe*, No. 94768, 2011-Ohio-3045, ¶ 56 (8th Dist.). Though signed, autopsy reports do not bear any “indicia of solemnity.” *Williams*, 132 S. Ct. at 2259-60 (Thomas, J., concurring in the judgment). They “certify[y] nothing” and instead simply reflect the results of a physical examination. *Id.* at 2260. Put another way, autopsy reports are “simply an official explanation of an unusual death, and such official records are ordinarily not testimonial.” *Dungo*, 286 P.3d at 450 (citing *Melendez-Diaz*, 557 U.S. at 324). They seek to determine “*how* the victim died, not *who* was responsible.” *Leach*, 980 N.E. 2d at 592 (emphasis added). It is this explanatory recordkeeping function that the *Craig* Court relied on when holding that autopsy reports are nontestimonial. See 2006-Ohio-4571 ¶88.

Although *Melendez-Diaz*, *Bullcoming*, and *Williams* do not directly weigh in on whether autopsy reports are testimonial under the Confrontation Clause, two Justices have cited good reasons to conclude, as this Court did in *Craig*, that autopsy reports are not testimonial. See *Williams*, 132 S. Ct. at 2251 (Breyer, J., concurring); *Melendez-Diaz*, 557 U.S. at 335 (Kennedy, J., dissenting). Justice Breyer concluded that autopsies do not satisfy the primary-purpose test because they “are typically conducted soon after death,” often before a suspect is identified and before it is clear whether the facts found in the autopsy will be relevant in a criminal trial. *Williams*, 132 S. Ct. at 2251; see also *Durio*, 7 Misc. 3d at 736 (“[A]n autopsy is often conducted

before a suspect is identified or even before a homicide is suspected.”). And Justice Kennedy noted that every court to have considered the question to date had held that such reports are not testimonial, and that a contrary rule would have “staggering” consequences, including obstructing the resolution of cold cases. *Melendez-Diaz*, 557 U.S. at 335.

And both Justices noted that if defendants have a right to confront the medical examiner who performs an autopsy, then the “Confrontation Clause [will] effectively . . . function as a statute of limitations for murder.” *Williams*, 132 S. Ct. at 2251 (internal quotations omitted) (explaining that autopsies can often not be repeated and citing cases where medical examiners died before a criminal trial); *Melendez-Diaz*, 557 U.S. at 335 (Kennedy, J., dissenting) (same). “The potential for a lengthy delay between the crime and its prosecution could severely impede the cause of justice if routine autopsies were deemed testimonial merely because the cause of death is determined to be homicide.” *Leach*, 980 N.E.2d at 592.

Finally, Ohio courts, including the court below, have repeatedly recognized that nothing in the U.S. Supreme Court’s post-*Crawford* decisions conflicts with *Craig*’s holding that autopsy reports are nontestimonial. App. Op. ¶ 20 (“A close reading of *Melendez-Diaz* demonstrates that the basis of *Craig*’s ruling remains good law under current United States Supreme Court precedent, and we are bound to apply [it].”); see also *State v. Adams*, No. 08 MA 246, 2012-Ohio-2719, ¶¶ 20, 26 (7th Dist.) (stating that *Craig* still controls and explaining that this Court “specifically concluded that an autopsy report is nontestimonial evidence under *Crawford*, as it is not solely made at the behest of police in order to convict the particular defendant.”); *Zimmerman*, 2011-Ohio-6156 ¶¶ 42-46 (admission of autopsy report not in conflict with *Melendez-Diaz* or *Bullcoming*); *Monroe*, 2011-Ohio-3045 ¶ 56 (*Craig* not in conflict with *Melendez-Diaz*).

Nor are the Ohio courts alone in this view. Courts in other jurisdictions have concluded post-*Williams* and/or post-*Bullcoming* that autopsy reports prepared in the ordinary course pursuant to a coroner's statutory duty to investigate the circumstances of an unexplained death are nontestimonial. *Leach*, 980 N.E. 2d at 589-94 (“[U]nder the objective test set out by the plurality in *Williams*, under the test adopted in *Davis*, and under Justice Thomas’s ‘formality and solemnity’ rule, autopsy reports prepared by a medical examiner’s office in the normal course of its duties are nontestimonial.”); *see also United States v. Mally*, 2013 U.S. App. LEXIS 6259, *46 (2d Cir. 2013) (Autopsy report was “not testimonial because it was not prepared primarily to create a record for use at a criminal trial.”); *People v. Westmoreland*, 213 Cal. App. 4th 602, 616-24 (Cal. Ct. App. 2013) (Autopsy reports are nontestimonial because “[t]he primary purpose of an autopsy report, including its conclusion as to cause of death, is not criminal investigation.”); *State v. Banmah*, 87 So. 3d 101, 103 (Fla. Ct. App. 2012) (“[A]utopsy reports are non-testimonial because they are prepared pursuant to a statutory duty, and not solely for use in prosecution.”).

At bottom, there is nothing in the U.S. Supreme Court’s post-*Crawford* decisions that mandates this Court’s reversal of *Craig*. The Court should therefore hew to its prior holding that autopsy reports are not testimonial absent a clear directive to the contrary from the U.S. Supreme Court. *See Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, ¶ 42 (“This court . . . will abandon a previous holding only when it is incumbent upon us to do so.”).

4. Hardin offers no sound reason for this Court to revisit its decision in *Craig*.

In essence, Hardin asks this Court to embrace a simple, if flawed, proposition: “autopsy reports with a ‘homicide’ manner-of-death finding are testimonial.” Hardin Br. 14; *see also id.* at 1. Yet in urging that conclusion, Hardin puts the cart before the horse, asking the Court to evaluate the primary purpose of an autopsy report *after the fact*. The nontestimonial/testimonial

question, however, depends not on what the statement ultimately *concludes* but whether, *at the time of the record's creation*, it was made for the primary purpose "of creating an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155. Hardin offers no authority for the rule he would have this Court adopt, and his other efforts to cast doubt on *Craig's* holding that autopsy reports are nontestimonial are similarly unavailing.

First, Hardin points to R.C. Chapter 313, which outlines the duties and powers of a coroner to support his claim that autopsy reports are testimonial. Hardin Br. 14-16. But, as detailed above, this statutory scheme only confirms that the primary purpose of an autopsy report is to aid the coroner in fulfilling her recordkeeping and reporting obligations and in "protecting the public health by determining the cause of a sudden death." *Leach*, 980 N.E. 2d at 591-92. To be sure, coroners have a statutory duty to investigate the cause and manner of a person's death under certain circumstances, one of which includes when there is suspicion of criminal activity. Hardin Br. 15-16. And it is true that the investigatory tools that aid a coroner in completing this task include the power to subpoena and jail certain witnesses in narrow circumstances. R.C. 313.17. But the coroner's powers are limited to furthering the inquiry of "how the deceased came to his death," *id.* (emphasis added), not *who* is responsible. They are therefore not general law enforcement powers and do not transform coroners into an arm of law enforcement. And while the statutory scheme no doubt contemplates some degree of coordination between the coroner and law enforcement, *id.*, "the scope of" a coroner's "statutory duty to investigate is the same, regardless of whether the death resulted from criminal activity." *Dungo*, 286 P.3d at 450.

Next, Hardin observes that autopsy reports and the underlying science of forensic pathology are "inherently investigative" and often "steer prosecutorial decisions in violent

deaths.” Hardin Br. at 16-17. This is true, but irrelevant. First, the primary-purpose test asks whether a statement was intended to serve as an out-of-court substitute for testimony, not whether the statement arose in a context that is “inherently investigative.” *See Bryant*, 131 S. Ct. at 1155. Second, the fact that charging decisions may, in certain cases, be informed by work performed by a coroner does not lead inexorably to the conclusion that the primary purpose of an autopsy report is to provide evidence for later use at trial. Coroners conduct autopsies not because they are arms of law enforcement tasked with investigating criminal conduct, but because the cause and manner of death are not immediately apparent.

Finally, Hardin observes that both historically and today, coroners often work closely with law enforcement and that their ultimate findings may reflect information obtained from law enforcement or other sources outside the coroner’s office. Hardin Br. 18-19. These observations, too, change little. It is entirely unsurprising that coroners often work closely with law enforcement. As first responders, law enforcement officials, along with paramedics, firefighters, and other emergency personnel, possess information that will aid the coroner in investigating the circumstances of an unexplained death. And, as other courts have recognized, mere cooperation between a medical examiner and law enforcement will not render an autopsy report prepared as part of the medical examiner’s normal duties testimonial. *Leach*, 980 N.E. 2d at 593 (“[An] autopsy report prepared in the normal course of business of a medical examiner’s office is not rendered testimonial merely because the assistant medical examiner performing the autopsy is aware that police suspect homicide.”); *Dungo*, 286 P.3d 442, 450 (finding “[t]he presence of a detective at the autopsy and the statutory requirement that suspicious findings be reported to law enforcement” does not compel the conclusion that an autopsy report is testimonial).

In sum, as this Court has already determined, autopsy reports are nontestimonial business or public records admissible under the Confrontation Clause. Nothing said either by the U.S. Supreme Court or by Hardin requires the Court to revisit that determination. Unless or until the U.S. Supreme Court directs otherwise, the Court should adhere to its prior decision in *Craig*.

Amicus Curiae Ohio Attorney General's Proposition of Law II:

No confrontation violation occurs where a coroner relies on observational data recorded in an autopsy report as the basis for her independent expert opinion concerning the cause and manner of death.

If the Court were inclined to reverse its holding from *Craig* that autopsy reports are nontestimonial, it should nevertheless hold that autopsy reports are, at most, hybrid documents containing both testimonial *and* nontestimonial statements and that the Confrontation Clause permits a testifying expert witness to offer her own opinion based on the *nontestimonial* statements.

For several reasons, that alternative ruling is compelled if the Court renounces its prior ruling in *Craig*. First, the bulk of an autopsy report consists of nontestimonial statements merely reflecting observations made as part of a physical examination of a body. These reports also contain manner-of-death conclusions, and should the Court determine that *those* statements are testimonial (as Hardin contends, Br. 21-22, 24-25), that does nothing to affect the admissibility of the nontestimonial ones. As this Court held in *Arnold*, a report is still admissible so long as any testimonial statements are redacted. *Arnold*, 2010-Ohio-2742 ¶ 42 (“[W]hen evidence includes testimonial and nontestimonial statements, the testimonial statements must be redacted or excluded.”). Second, even if a “homicide” manner-of-death conclusion were testimonial, and inadmissible, but was nonetheless admitted into evidence, such an error would be subject to harmless review. And in this case at least, as explained further below, any error resulting from the admission of the unredacted report was harmless.

A. Observational data contained in an autopsy report are nontestimonial statements that may be admitted into evidence once any testimonial statements have been redacted.

A manner-of-death conclusion is just one part of an autopsy report. The bulk of these reports contain objective, recorded observations. For at least three reasons, such observational data bear none of the characteristics of testimonial statements, and therefore they are admissible at trial without posing any constitutional problem.

First, autopsy reports are not formal documents. That is, unlike a *coroner's* report, autopsy reports are not sworn. *Compare* State Ex. 20, pp. 1-2 *with* State Ex. 20, pp. 3-6; *see also* R.C. 313.09 (separately identifying a report of the coroner and autopsy findings). And autopsy reports themselves bear no “indicia of solemnity.” *See Davis*, 547 U.S. at 836-37 (Thomas, J., concurring in judgment in part and dissenting in part). They are not the equivalent of “depositions, affidavits, and prior testimony or statements resulting from ‘formalized dialogue.’” *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring in the judgment). In this case, although Dr. Sohn signed the autopsy report in question, nowhere is the information in the report certified or attested to. *See* State Ex. 20 pp. 3-5. Standing alone, a mere signature does not rise to the level of formality required to render a statement testimonial. *See Williams*, 132 S. Ct. at 2260 (a signed laboratory report was nontestimonial because the report did not attest to the accuracy of the testing done or of the results obtained).

Second, the primary purpose of observational data recorded in an autopsy report is to document the current physical state of a body. *See* Comment, 96 Calif. L. Rev. at 1126 (“Like a doctor, a medical examiner assesses different types of injuries to determine what caused them.”). The autopsy report in this case—located in the record at State Exhibit 20, pp.3-6—is par for the course. Like most autopsy reports, it is comprised almost entirely of observational data, broken down by anatomical category and bodily system. For example, under the heading of

“Cardiovascular System,” Jeffrey Hardin, Jr.’s autopsy report contains data regarding the weight of his heart (102 gm), valve measurements (mitral – 5cm, aortic – 3 cm, tricuspid – 6 cm, and pulmonic – 4 cm), and thickness of the ventricular free walls (0.8 cm left and 0.2 cm right). State Ex. 20 p. 4. The autopsy report’s other sections contain similar types of observed anatomical data—for instance, observations related to the pulmonary, endocrine, and digestive systems among others. These types of physical observations simply are not testimony by “witnesses against’ an accused.” See *Williams*, 132 S. Ct. at 2242 (plurality op. of Alito, J.).

Third, such raw observational data is meaningless on their own. Expertise is needed to give such data *meaning*. Cf. *State v. Moon*, 512 F.3d 359, 361-62 (7th Cir. 2008) (treating conclusions and test data separately for the purpose of the Confrontation Clause and finding that test results were not testimonial but that conclusions about *what the test results meant* were). It follows, then, that such recorded physical observations are not by themselves accusatory or adverse to a defendant (and not just a specific defendant—*any* defendant). For example, in this case, it was Dr. Gorniak’s manner-of-death *conclusions* and her opinion testimony that connected Hardin to the baby’s death—not the objective statement that the baby’s calvarium “shows bilateral subdural hemorrhages, 80 cc right, 60 cc left.” See State Ex. 20 p. 4.

Thus, even the if Court deemed a “homicide” manner-of-death finding testimonial, as long as that statement is redacted, the remaining portions of a report may be admitted and relied on by an expert without running afoul of the Confrontation Clause. *Arnold*, 2010-Ohio-2742 ¶¶ 41-42. Furthermore, the erroneous admission of an unredacted autopsy report is, at most, harmless error when it is cumulative of other properly-admitted testimony. See *State v. Williams*, 38 Ohio St. 3d 346, 350, 528 N.E. 2d 910 (1988) (finding the admission of evidence was harmless because it was duplicative of other testimony at trial).

B. Dr. Gorniak's trial testimony satisfied Hardin's Sixth Amendment right to confront the witnesses against him.

Here, the requirements of the Sixth Amendment were satisfied because Dr. Gorniak was more than just a surrogate witness serving as a conduit for the opinions of a non-testifying individual. She offered her own independent opinions, which were properly based on nontestimonial statements contained in the autopsy report. *Compare Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J. concurring). And, significantly, she was personally involved in making the final manner-of-death conclusions reflected in the autopsy report, and the formal coroner's report in this case bears her signature and seal. State Ex. 20 p. 2.

1. An expert may rely on nontestimonial observational data contained in an autopsy report as the basis for her expert opinion.

In *Craig*, the Court determined that an autopsy report provides a valid basis for an expert's opinion, holding that the expert's testimony there "was based in whole or major part on facts and data that she reviewed in the autopsy report" and that her "expert opinions as to the nature of Davenport's injuries, the time of her death, and the cause of death were based upon her knowledge and experience, as applied to the facts and data included in the autopsy report." 2006-Ohio-4571, ¶ 77 (internal citations omitted).

The same is true of Dr. Gorniak's testimony here, and none of the post-*Craig* cases interpreting the Confrontation Clause provides any reason to depart from that holding. While no single rationale garnered five votes in *Williams*, in the end, five justices permitted an expert to testify at trial about her own opinion, even though that opinion was based on information and data generated by others who did not testify. *See Williams*, 132 S. Ct. at 2233 (plurality op. of Alito, J.) ("[I]t has long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks first-hand knowledge of those facts."); *see also id.* at 2260-64 (Thomas, J. concurring) (finding no

confrontation violation where expert opinion was based on informal and therefore nontestimonial statements). In other words, if this case were to be reviewed by the U.S. Supreme Court, the same (albeit fractured) result would prevail—Dr. Gorniak’s testimony would be deemed admissible.

Indeed, following *Williams*, numerous courts have reached a similar conclusion, permitting experts to testify about opinions formed on the basis of data generated by others. See, e.g., *United States v. Shanton*, 2013 U.S. App. LEXIS 4447, *4 (4th Cir. 2013) (reaffirming difference between opinions and data); *State v. Lopez*, 45 A.3d 1, 12-16 (R.I. 2012) (expert rendering opinions testified to his own conclusions and was therefore the relevant witness against the defendant); but see *Young v. United States*, 2013 D.C. App. LEXIS 138 (D.C. 2013) (testimony of expert who relied on tests she did not perform was found to be testimonial).

This post-*Williams* interpretation of the Confrontation Clause has extended to autopsy reports. See *State v. Joseph*, 283 P.3d 27, ¶¶ 8-13 (Ariz. 2012) (no confrontation violation where expert testified to opinions based on an autopsy he did not perform); *Dungo*, 55 Cal. 4th at 619-21 (expert’s reliance on facts contained in an autopsy report did not give rise to a Confrontation Clause violation). And although some courts have found the admission of certain autopsy reports or testimony impermissible, those same courts have reaffirmed the ability of experts to testify to their own opinions more generally. See *State v. Kennedy*, 735 S.E. 2d 905, 922 (W.Va 2012) (excluding certain testimony but reaffirming that “[a]s long as [an expert] is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no [Confrontation Clause] problem. The expert’s opinion will be an original product that can be tested through cross-examination.” (quoting *U.S. v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009))); *State v. Navarette*, 294 P.3d 435, 443 (N.M. 2013) (holding

that after reviewing photographs “an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause” but concluding that the specific testimony at issue was inadmissible because there were no “objective markers that any third party can examine in order to express an independent opinion.”).

2. Dr. Gorniak testified at trial about her own opinions and was subject to cross-examination about those opinions and their bases.

Because Dr. Gorniak’s testimony in this case would pass muster with five Justices from *Williams*, her testimony did not run afoul of the Confrontation Clause.

First, Dr. Gorniak testified to her own opinions about both the cause and manner of Jeffrey Hardin, Jr.’s, death. *See* Trial Tr. 89, 100-04, & 125-28 (offering her own independent opinion, and separately agreeing with medical examiner’s conclusions). Testifying independently of any conclusions reached by Dr. Sohn, Dr. Gorniak stated the following at trial:

THE COURT: Okay. *Your* conclusion. . . Let’s ignore Dr. Sohn’s conclusion for a minute. Let’s just talk about *your* conclusion. Your conclusion is based upon what as to the cause of death?

DR. GORNIAK: Based on looking at photographs and the autopsy report.

Trial Tr. 125-26 (emphasis added). In other words, Dr. Gorniak made clear that she reached her own independent conclusions and that those conclusions were based on information she had observed, including autopsy photographs as well as the internal and external physical observations recorded as part of the autopsy, all of which were in evidence. *Id.* at 89-92, 94-95, 98-101, & 125-28; State Exs. 7-20.

Second, Dr. Gorniak was subject to extensive cross-examination about her opinions, how she reached them, and whether they were adequately supported by the records she reviewed. Trial Tr. at 106-15, 129-31. Also, while Hardin’s brief makes much of the controversy

surrounding diagnoses of child abuse, Hardin Brief pp. 26-28, his counsel cross-examined Dr. Gorniak on that very issue as well. Trial Tr. 108-10.

In short, because Hardin was able to confront Dr. Gorniak, he received exactly what the Confrontation Clause guarantees: the opportunity to confront the witness against him. The witness against him was not Dr. Sohn, whose limited role was to record the physical observations he made as part of the internal and external examination of the baby's body. Instead, the witness against him was Dr. Gorniak, who took the stand and testified under oath that it was *her personal opinion* that the baby's death was a homicide. *See Lopez*, 45 A.3d at 14-15 (testifying expert was the witness against the defendant); *see also People v. Freycinet*, 11 N.Y.3d 38, 42 (2008) (medical examiner who performed original autopsy "was not defendant's 'accuser' in any but the most attenuated sense.")

3. Dr. Gorniak's testimony satisfied the requirements of the Confrontation Clause because she determined the manner of death for purposes of the coroner's report and the coroner's report bears her signature and seal.

Independent of Dr. Gorniak's opinions, her testimony separately satisfied the Confrontation Clause because she was personally involved in making the final findings regarding the cause and manner of Jeffrey Hardin, Jr.'s death. *See* Trial Tr. 88-89 (Dr. Gorniak testifying that she presided over and participated in the meeting where the manner-of-death finding was made.). The U.S. Supreme Court has only ever found a violation of the Confrontation Clause when a testifying witness had no personal involvement in the subject matter of her testimony. *See Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J. concurring) (testimony violated Confrontation Clause in part because witness had "no involvement whatsoever in the relevant test and report."). There is simply no basis for finding a Confrontation Clause violation when an individual, like Dr. Gorniak, testifies about a decision that she was personally involved in making.

Additionally, it is only Dr. Gorniak's opinion, as contained in a coroner's report and death certificate, that has independent legal significance under Ohio law. *See* R.C. 313.19 (cause and manner of death "as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate . . . shall be the legally accepted manner and mode in which such death occurred."). As the elected coroner, Dr. Gorniak was the individual who signed and sealed Jeffrey Hardin, Jr.'s coroner's report. *State Ex. 20*, p. 2. Although Dr. Sohn may have played some role in identifying the cause and manner of the baby's death, *Trial Tr.* pp.88-89, Dr. Gorniak was the one responsible for making the final determination. *Id.* at 128 (testifying that "[l]egally [the manner of death finding] is my opinion, cause [sic] I signed the death certificate."); *see also id* at 90.

Thus even if Dr. Gorniak's independent opinion testimony based on the autopsy report's observational data was not enough to satisfy the requirements of the Confrontation Clause (though it was), her personal involvement in making the final manner-of-death determination were themselves enough to guarantee that Hardin's Sixth Amendment rights were satisfied.

CONCLUSION

For all the foregoing reasons, the decision of the appeals court, finding no Confrontation Clause violation, should be affirmed.

Respectfully submitted,

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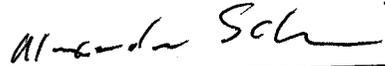
I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellee State of Ohio was served by U.S. mail this 13th day of May, 2013 upon the following counsel:

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