

No. 14-1008
In the Supreme Court of the United States

JEFFREY HARDIN,

Petitioner,

v.

OHIO,

Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO*

BRIEF IN OPPOSITION

ROBERT JUNK
Pike County
Prosecutor
100 East Second St.
1st Floor
Waverly, Ohio 45690

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON
MATTHEW R. CUSHING
Deputy Solicitors
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

*Counsel for Respondent
State of Ohio*

QUESTION PRESENTED

Petitioner Jeffrey Hardin was convicted of killing his five-month-old son. The county coroner signed the final coroner's report, which included the autopsy report signed by the deputy coroner who performed the autopsy and the photographs taken of the baby's body. At Hardin's bench trial, the coroner (but not the deputy) testified that it was her conclusion that the child died as a result of "subdural hematoma" and that the baby's death was a "homicide." She reached these conclusions based on a review of the photographs, the autopsy report, medical records, and police records. During the coroner's testimony, the prosecution introduced the coroner's report and the autopsy report, both of which identified the same cause and manner of death as the coroner. In a two-sentence decision, the Ohio Supreme Court affirmed the rejection of Hardin's Confrontation Clause challenge. The question presented is:

Did the admission of the autopsy report that was attached to the coroner's report violate the Confrontation Clause even though the coroner herself testified at trial?

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INTRODUCTION

Hardin's petition is not worthy of this Court's review. His is at least the fifth petition since 2014 to allege a conflict in the state courts over when, if ever, autopsy reports are testimonial within the meaning of the Confrontation Clause. This Court has denied *all* previous petitions raising that general subject, including, most recently, the petition in *Maxwell v. Ohio*, 135 S. Ct. 1400 (2015), which arose from the same Ohio Supreme Court decision that is central to Hardin's petition in this case. Hardin's petition presents the same issue and claims the same split as these many other cases. And nothing has changed since *Maxwell* that would require the Court to reverse course and grant review over the issue now.

Indeed, this case would be a particularly poor vehicle for resolving any broad Confrontation Clause issues surrounding the use of autopsy reports at trial. Unlike in prior cases where the expert testifying about the autopsy report had no connection to it, the testifying party in this case was the coroner who signed the final *coroner's* report to which the *autopsy* report was attached. Further, before the coroner signed her report, she met with her deputy coroners (including the deputy who did the autopsy) to reach her own conclusions about the cause and manner of death. *Cf. Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2722 (2011) (Sotomayor, J., concurring in part) (noting that "this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue"). And the non-testifying deputy merely signed the autopsy report, a signature that lacked sufficient solemnity. *See Williams v. Illinois*, 132 S. Ct. 2221, 2260 (2012) (Thomas, J., concurring in judgment). No matter how this Court ultimately

treats autopsy reports, the specific facts of this case present little or no Confrontation Clause concerns.

COUNTERSTATEMENT

A. Hardin's Five-Month-Old Son Died A Day After Hardin Shook The Baby

In the spring of 2009, Hardin lived with his girlfriend, Sasha Starkey, her two-year-old son, Tanner, and their five-month-old baby, Jeffrey Hardin, Jr., in an apartment in Piketon, Ohio. Trial Tr. ("Tr.") 21-22. On May 11, 2009, Starkey had volunteered at a food pantry and left the children in Hardin's care early in the morning. Tr. 22-23. That afternoon, Hardin called Starkey telling her that she needed to come home immediately because something was wrong with their baby. Tr. 26. Starkey hurried home and found Hardin crying and the baby not breathing. Tr. 27. Starkey directed her friend to call 911 as she tried to revive her son. Tr. 27-28. When the emergency response team arrived, they could not restore the baby's respiratory functions. Pet. App. 3a. Neither could physicians at a local hospital or later at Nationwide Children's Hospital in Columbus, Ohio. *Id.* Eventually, Starkey and the attending physicians in Columbus determined that they should take the baby off of life support. *Id.* He died the next day at Nationwide Children's Hospital. *Id.*

Rick Jenkins, the police officer who responded to the 911 call along with the paramedics, found Hardin distraught when the first responders arrived at his apartment. *Id.* Hardin initially told Jenkins that he had placed his crying baby on the couch and, in an effort to induce sleep, had pushed up and down on the couch cushions to shake the baby gently. *Id.* Later, when giving his official statement to Jenkins,

Hardin said that he “was having trouble with [his] son of 5 months” and “had shake[n] . . . him a couple of times. After that he started crying and fell asleep. He quit breathing.” Pet. App. 3a-4a. Hardin later told a criminal investigator from the Pike County Prosecutor’s Office that he had shaken the child by moving his hands up and down on the couch cushion on which the child rested. Tr. 288-89. Finally, Hardin wrote a letter to Starkey from jail explaining the circumstances: “Jr. had been crying all day long and I was stressed out. My nerves were shot and I lost it. I only shook him a couple times and in the process my knuckles is what caused the . . . marks on his face. That’s what happened. I’m sorry. I love him with all my heart and would not do anything to hurt anyone on purpose.” Tr. 36.

B. The Franklin County Coroner Issued A Coroner’s Report Stating That Hardin’s Son Had Died From A Homicide

1. Ohio coroners, elected officials in each county, must be licensed physicians. Ohio Rev. Code §§ 313.01, 313.02(A). They are allowed a staff of deputy coroners (who also must be licensed physicians) to help them perform their duties. Ohio Rev. Code § 313.05(A)(1). As their principal duty, coroners must identify a *cause* of death and a *manner* of death for certain individuals who die within their counties. See Ohio Rev. Code § 313.19; Tr. 74. As for the cause (e.g., the disease or condition that resulted in the death, such as cardiac or respiratory arrest), coroners “shall keep a complete record of and shall fill in the cause of death on the death certificate, in all cases coming under [their] jurisdiction.” Ohio Rev. Code § 313.09; Tr. 92, 124-25. As for the manner (e.g., the circumstances of the death, such as

natural death, accident, homicide, or undetermined), the “coroner’s verdict” and “death certificate” must identify the coroner’s conclusion about the “mode in which the death occurred.” Ohio Rev. Code § 313.19; Tr. 87.

The coroner’s duties generally get triggered “[w]hen any person dies as a result of criminal or other violent means, by casualty, by suicide, or in any suspicious or unusual manner, when any person, including a child under two years of age, dies suddenly when in apparent good health, or when any mentally retarded person or developmentally disabled person dies regardless of the circumstances.” Ohio Rev. Code § 313.12; *see* Ohio Rev. Code § 3705.16(C); Tr. 74. In these circumstances, the coroner “shall perform an autopsy” if the coroner concludes that the autopsy is “necessary” to determine the cause and manner of death. Ohio Rev. Code § 313.131(B); *see also* Ohio Rev. Code § 313.121(B) (requiring autopsies on children under two who die suddenly when in apparent good health). Deputy coroners who are pathologists may perform the autopsy. Ohio Rev. Code § 313.05(A)(1). When an autopsy is performed, “a detailed description of the observations written during the progress of such autopsy, or as soon after such autopsy as reasonably possible, and the conclusions drawn from the observations shall be filed in the office of the coroner.” Ohio Rev. Code § 313.13(A).

If the autopsy would be contrary to the decedent’s religious beliefs, the coroner should not perform it. Ohio Rev. Code § 313.131(B). Even then, however, a coroner may undertake the autopsy after 48 hours if the coroner finds it to be a “compelling public necessity”—e.g., if the autopsy is needed to assist law en-

forcement with a criminal investigation or to “protect[] against an immediate and substantial threat to the public health.” Ohio Rev. Code § 313.131(C)(1) (noting that the decedent’s relatives may file suit to enjoin the autopsy within the 48 hours); *see also* Ohio Rev. Code § 313.131(F) (noting that these temporary-delay provisions are inapplicable for murder or manslaughter investigations).

Once a coroner identifies the cause and manner of death, the coroner lists those conclusions in the “coroner’s verdict” and the “death certificate.” Ohio Rev. Code § 313.19; *see* Tr. 88, 128, 132. The coroner must keep in the coroner’s office each individual decedent’s records, including *both* the “report of the coroner” *and* “the detailed findings of the autopsy.” Ohio Rev. Code § 313.09. If, after reaching conclusions on the cause and manner of death, the coroner determines that “further investigation is advisable,” copies of those coroner records should be delivered to the “prosecuting attorney.” *Id.* The coroner’s records, as “certified by the coroner,” are also admissible “as evidence in any criminal or civil action or proceeding . . . as to the facts contained in those records.” Ohio Rev. Code § 313.10(A)(1).

The coroner must file the death certificate with the local registrar of vital statistics. *See* Ohio Rev. Code § 3705.16(B). The local registrar, in turn, sends all “death . . . certificates received . . . during the preceding month” to the statewide Office of Vital Statistics within Ohio’s Department of Health. Ohio Rev. Code § 3705.07(A); Ohio Rev. Code § 3705.01(N) & (O) (Ohio’s “[s]ystem of vital statistics” includes the collection and preservation of records of birth, death, marriage, divorce, and other events). Unless challenged in court, the cause and manner of death listed

on the death certificate qualify as the legal manner and mode of death for purposes of state law. *Id.* § 313.19.

2. Because Hardin's son died in Columbus, the former Franklin County Coroner, Dr. Jan Gorniak, was responsible for determining the baby's cause and manner of death. Ohio Rev. Code §§ 313.01, 313.121(B). On May 13, 2009, Dr. Steven Sohn, one of Dr. Gorniak's deputy coroners, performed an autopsy on the child's body. Pet. App. 17a-22a; Tr. 123. After an external and internal examination, Sohn listed the cause of death as "subdural hemorrhage" and the manner of death as "homicide" on the autopsy report. Pet. App. 17a. Several pictures of the child's body and brain were taken during the autopsy. Tr. 89-90, 128; Exs. 7-19. Sohn put his signature at the end of the autopsy report. *See* Pet. App. 22a.

Because shaken baby syndrome (more recently referred to as abusive head trauma, Tr. 336) is often associated with retinal hemorrhaging, Sohn requested a consult from an ophthalmic pathologist to analyze the baby's eyes. Pet. App. 22a. Carl Boesel, a doctor at Nationwide Children's Hospital, performed this analysis and concluded that the child had "[e]xtensive recent retinal hemorrhages." Pet. App. 24a. A third doctor, John Wyman, the chief toxicologist in the coroner's office, found nothing abnormal with the child's blood. Pet. App. 23a.

Dr. Gorniak met biweekly with the four other pathologists in her office to discuss the cases they had completed so she could reach a conclusion as to the cause and manner of death in each case. Tr. 88. The pathologists discussed the death of Hardin's son during one of these meetings; they had at their dis-

posal the autopsy and toxicology reports, the pictures that had been taken during the autopsy, the baby's medical records, and the police records from the incident. Tr. 91-92, 103-04, 117, 126-27. After the meeting, Dr. Gorniak independently concluded that the cause and manner of death of Hardin's son had been subdural hemorrhaging and homicide. Tr. 88-89, 132; Pet. App. 14a-15a. She signed the coroner's verdict and the death certificate identifying those conclusions, something she would not have done had she disagreed with the cause and manner of death that she listed. Pet. App. 14a-16a; Tr. 127, 132; *see also* Ohio Rev. Code § 313.19.

C. A Trial Court Convicted Hardin Of Child Endangerment And Felony Murder, And The State Appellate Courts Affirmed

1. The Pike County prosecutor charged Hardin with felony murder and endangering a child for the death of his son. Hardin agreed to a bench trial.

At trial, the prosecution introduced evidence and testimony suggesting that Hardin had not shaken the baby "gently," but instead had done so with sufficient force to kill the baby. Pet. App. 4a. The witnesses included the baby's mother, Tr. 18, the paramedics who arrived at the apartment, Tr. 50, 196, a social worker in Nationwide Children's Hospital who encountered the baby on his arrival, Tr. 136, the police officer who arrived at Hardin's apartment and spoke with him about what had happened, Tr. 256, and a criminal investigator who later spoke with Hardin about the baby's injuries, Tr. 280.

In addition, the pediatric radiologist at Nationwide Children's Hospital who had examined the baby's CT scan while the baby was still alive testified

that he had found subdural hemorrhages of the type that can occur from shaking a child. Tr. 160, 174-80. The two treating physicians from the local Piketon hospital and from Nationwide Children's Hospital also testified about their suspicions of child abuse. Tr. 216, 228-32, 291, 296, 302.

The prosecution also called Dr. Gorniak. She testified both that the child had died as a result of "subdural hematoma due to non-accidental head trauma," and that the baby's death was a homicide. Tr. 101, 104, 106. During Gorniak's testimony, the prosecution introduced the coroner's records, including her coroner's report, the autopsy reports of Dr. Sohn, Dr. Boesel, and Dr. Wyman that were attached to her report, and the pictures of the child's body taken during the autopsy. Tr. 89-90, 128; Exs. 7-19; Pet. App. 14a-26a. Dr. Gorniak testified that she determined the cause and manner of the baby's death for purposes of the coroner's report by looking at, among other things, the photographs of the child's body, the various autopsy and toxicology reports, the medical records, and the police records. Tr. 88-92, 94-95, 98-104, 125-128. When the prosecution showed her the photographs of the baby's brain, she pinpointed the locations of the subdural hemorrhages and stated that those hemorrhages would have been "enough . . . for a child this size to be the cause of death." Tr. 95; *see* Tr. 98-99. Her conclusions as to the cause and manner of death were independent of Dr. Sohn's, but she had studied the information contained in his autopsy report in the process of coming to her own conclusions. Pet. App. 5a; *see also* Tr. 88-89.

Hardin cross-examined Dr. Gorniak extensively about her opinions and how she reached them. He attempted to impeach her testimony by questioning

whether her opinions were based on adequate information in the records that she had reviewed. *See, e.g.*, Tr. 106-15, 129-32. The trial court also questioned Dr. Gorniak to determine whether she was merely testifying about Dr. Sohn's conclusions or whether she had reached her own conclusions independently of him. Dr. Gorniak clarified that even if Sohn had not expressed an opinion in his report as to the cause of death, she could still identify that cause for purposes of signing the death certificate based on the physical results of the autopsy. Tr. 126-28.

The prosecution lastly called an expert witness, Dr. Phillip Scribano, the medical director of the Center for Child and Family Advocacy at Nationwide Children's Hospital. Pet. App. 3a-4a; Tr. 322-410. Dr. Scribano concluded that, "[w]ithin a reasonable degree of medical certainty, my diagnosis when I received the call and reviewed the x-rays and medical record [] was abusive head trauma. That was confirmed by additional review of the photographs by our staff in the hospital, as well as the photos from the Coroner's Office." Pet. App. 10a. He explained that the baby's injuries could not have been caused by manipulating couch cushions. Pet. App. 4a, 11a. When asked "what kind of force would be needed," he said "severe" force "that no reasonable caregiver would ever come close to exhibiting in normal care of an infant." Pet. App. 11a. He added that the kind of force necessary was the same as, or "worse than, severe motor vehicle crashes that require immediate life support." *Id.*

The other doctors in the coroner's office (Drs. Sohn and Wyman) and the doctor who examined the child's eyes (Dr. Boesel) did not testify. Tr. 80. At

the time of trial, Dr. Gorniak noted, Dr. Sohn was no longer employed by her office. Tr. 113-14.

The trial court convicted Hardin of both felony murder and endangerment of a child, and sentenced him to fifteen years to life in prison. Pet. App. 4a.

2. Hardin appealed his conviction, arguing to the intermediate appellate court that (1) the admission of the autopsy report violated his confrontation right because he was unable to cross-examine Sohn, and (2) the admission of Scribano's expert testimony violated state law. Pet. App. 5a, 10a. The intermediate court concluded that the autopsy report was a non-testimonial business record, and its admission into evidence did not implicate Hardin's confrontation rights. Pet. App. 6a-8a. It, however, agreed with Hardin that admitting Scribano's testimony was wrong under state law because the prosecution had accidentally failed to admit into evidence all of the underlying reports and records on which he had relied. Pet. App. 11a. The court recognized that all of the records likely were admissible, but the prosecution failed to do so. *Id.* Nevertheless, because Scribano's testimony was duplicative of Gorniak's, the court found the error harmless and affirmed Hardin's conviction. Pet. App. 12a.

Hardin sought discretionary review in the Ohio Supreme Court. While his appeal was pending, the Ohio Supreme Court, in a different case, held that an autopsy report was nontestimonial and that its admission into evidence did not violate the defendant's confrontation rights. *State v. Maxwell*, 9 N.E.3d 930, 945-52 (Ohio 2014), *cert. denied* 135 S. Ct. 1400 (2015). The Ohio Supreme Court later affirmed Hardin's conviction in a two-sentence decision that cited

Maxwell. Pet. App. 1a. That court then denied Hardin's motion for reconsideration. Pet. App. 13a.

REASONS TO DENY THE WRIT

Hardin provides no adequate grounds for this Court's review. *First*, the Court has repeatedly denied petitions presenting the same issue and the same alleged conflict. *Second*, the facts of this case do not even implicate Hardin's alleged split because all state courts agree that experts may testify about their own independent conclusions based on autopsy photographs and records—which is, at most, largely what occurred in this case. *Third*, this case presents a poor vehicle to address any broad Confrontation Clause issues because it comes from an unreasoned Ohio Supreme Court decision and presents unique facts. *Fourth*, the admission of the autopsy report did not violate the Confrontation Clause under the principles set forth by *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny.

I. HARDIN'S PETITION PRESENTS THE SAME ISSUE AND THE SAME ALLEGED CONFLICT THAT THIS COURT HAS REPEATEDLY DECLINED TO REVIEW

In the last few years, this Court has repeatedly denied petitions that raised the same issue and alleged the same conflict as Hardin's petition does in this case. Last Term, this Court denied many petitions (filed by criminal defendants and state prosecutors alike) asking when, if ever, a defendant's confrontation rights are implicated by admission of, or reliance on, an autopsy report during a criminal trial. *See United States v. James*, 712 F.3d 79 (2d Cir. 2013), *cert. denied* 134 S. Ct. 2660 (2014); *State v. Lui*, 315 P.3d 493 (Wash. 2014), *cert. denied* 134 S. Ct. 2842 (2014); *State v. Medina*, 306 P.3d 48

(Ariz. 2013), *cert. denied* 134 S. Ct. 1309 (2014); *State v. Navarette*, 294 P.3d 435 (N.M. 2013), *cert. denied* 134 S. Ct. 64 (2013). This Term, the Court has stayed the course, again denying a petition raising a similar issue. *State v. Maxwell*, 9 N.E.3d 930 (Ohio 2014), *cert. denied* 135 S. Ct. 1400 (2015). Hardin’s petition offers no grounds for the Court to depart from this prior practice in his case. That is made plain by a comparison of this petition to two of the more recent petitions on the subject that have been denied—those in *Medina* and *Maxwell*.

Medina. Hardin’s petition mirrors the one denied in *Medina* in nearly every respect. Pet. for Writ of Cert., *Medina v. Arizona*, No. 13-735, 2013 WL 6678617 (Dec. 17, 2013) (“*Medina* Pet.”). It presents the same question. Compare *Medina* Pet. i, with Pet. i. It alleges the same conflict, with the addition of only two state cases (both of which this Court declined to review). Compare *Medina* Pet. 11-14 (citing *People v. Leach*, 980 N.E.2d 570 (Ill. 2012); *People v. Dungo*, 286 P.3d 442 (Cal. 2012); *People v. Edwards*, 306 P.3d 1049 (Cal. 2013); *Miller v. State*, 313 P.3d 934 (Okla. Crim. App. 2013); *Navarette*, 294 P.3d 435; *State v. Kennedy*, 735 S.E.2d 905 (W. Va. 2012); *State v. Blevins*, 744 S.E.2d 264 (W. Va. 2013); *Commonwealth v. Nardi*, 893 N.E.2d 1221 (Mass. 2008); *Commonwealth v. Carr*, 986 N.E.2d 380 (Mass. 2013)), with Pet. 9-13 (citing same cases and adding only *Maxwell*, 9 N.E.3d 930, and *State v. Lui*, 315 P.3d 493 (Wash. 2014)). And it provides nearly identical reasons why the question “is important and should be resolved now.” Compare *Medina* Pet. 14-17, with Pet. 13-16. If that case was unworthy of review then, this case is unworthy of review now.

Hardin downplays this Court's denial of the *Medina* petition, see 134 S. Ct. 1309, noting that the brief in opposition in that case had argued that, even if error, the introduction of the autopsy report was harmless. Pet. 21. Yet *Medina* was a better vehicle than this case. There, the testifying doctor appeared to have no involvement with the autopsy report, see 306 P.3d at 62, and was *not* the doctor who "certifie[d] that the report reflects her opinion as to the cause and manner of death," *id.* at 64. Here, the testifying doctor (Dr. Gorniak) *was* the doctor who signed the coroner's report listing the cause and manner of death after meeting with her deputies to discuss the decedent. Pet. App. 16a; Tr. 88, 127. While she did not perform the autopsy, it cannot be said that she "had no involvement whatsoever in the relevant test *and report*." *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2722 (2011) (Sotomayor, J., concurring in part) (emphasis added). Also unlike in *Medina*, the non-testifying doctor who performed the autopsy (Dr. Sohn) merely signed the autopsy report and did not certify anything. Pet. App. 22a. His signature "lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact." *Williams v. Illinois*, 132 S. Ct. 2221, 2260 (2012) (Thomas, J., concurring in judgment). Finally, as discussed below, the admission of the autopsy report here was just as harmless as in *Medina*.

Maxwell. Hardin's petition even addresses the same state-court decision that was presented by the *Maxwell* petition. Hardin and the defendant in *Maxwell* each sought a writ of certiorari based on the assertion that the Ohio Supreme Court wrongly found autopsy reports non-testimonial. See Pet. for Writ of Cert., *Maxwell v. Ohio*, No. 14-6882, at ii

(Oct. 24, 2014) (“*Maxwell* Pet.”). Indeed, Hardin relies extensively on the Ohio Supreme Court’s decision in *Maxwell* as the basis for the Court’s review in this case. Pet. 6-8. But, as noted, this Court denied review in *Maxwell*. See 135 S. Ct. 1400.

Here, again, *Maxwell* was likely the better vehicle. Like in *Medina* and unlike in this case, the testifying doctor in *Maxwell* appeared to have *no* involvement in the report identifying the decedent’s cause and manner of death. 9 N.E.3d at 945. Further, unlike the reasoned decision in *Maxwell*, the Ohio Supreme Court in this case issued a short, two-sentence decision that provided no analysis regarding this case’s unique facts. Pet. App. 1a. This Court routinely denies petitions based on such unreasoned decisions. See, e.g., *Maremont Corp. v. St. John*, 558 U.S. 1148 (2010) (denying petition for writ of certiorari from one-sentence circuit decision); *Oklahoma Oncology & Hematology, P.C. v. United States District Court for S.D. Texas*, 552 U.S. 1098 (2008) (same); *Crown Paper Liquidating Trust v. Pricewaterhouse Coopers*, 549 U.S. 1253 (2007) (same); *California v. M&P Invs.*, 538 U.S. 944 (2003) (same). Finally, Hardin does not identify any cases that arose after this Court denied the *Maxwell* petition that would now make this issue cert-worthy. If *Maxwell* was not worthy of this Court’s attention, there is no reason why a decision comprised entirely of a two-sentence citation to *Maxwell* would be.

In sum, Hardin’s petition presents an issue and an alleged split over which this Court has repeatedly declined review. Yet the petition provides no rationales why that issue and that alleged split have *now* become worthy of the Court’s review. They have not.

Hardin's petition, like the petitions in these many other cases, should be denied.

II. THE FACTS OF THIS CASE DO NOT IMPLICATE HARDIN'S PURPORTED STATE-COURT CONFLICT

Hardin's petition asserts that a 4-3-2 state-court conflict has developed on the heels of this Court's fractured decision in *Williams*. The petition says: (1) that New Mexico (in *Navarette*), West Virginia (in *Kennedy* and *Blevins*), Massachusetts (in *Nardi* and *Carr*), and Oklahoma (in *Miller*) all hold that autopsy reports conducted during homicide investigations and listing the manner of death as a homicide are testimonial under the Confrontation Clause; (2) that Ohio (in *Maxwell*), Illinois (in *Leach*), and Arizona (in *Medina*), hold that those same reports are not testimonial; and (3) that Washington (in *Lui*) and California (in *Dungo* and *Edwards*) walk a middle ground on those facts. *See* Pet. 10-13. Even if Hardin's cited cases were in tension with each other, this case does not implicate that tension.

Here, there is no dispute that the key conclusions from the autopsy report were statements about the cause of death (subdural hemorrhage) and the manner of death (homicide). Pet. App. 17a; *see* Pet. 21. Yet those are the same conclusions that Dr. Gorniak (the testifying doctor) reached independently of Dr. Sohn (the non-testifying doctor). Tr. 127-28. Indeed, Gorniak testified that the manner of death is a "ruling" legally *required* to be "made by the coroner," not by the autopsy doctor. Tr. 87; *id.* at 88-89, 128. Further, during her testimony, she specifically pointed to the precise locations of the subdural hemorrhages in photographs of the child's brain that caused the child's death. Tr. 95, 98-99.

None of the cases on which Hardin relies for the alleged state-court conflict with the Ohio Supreme Court's *Maxwell* decision would reach a different result on those facts. Start with the cases that allegedly find autopsy reports always testimonial. Pet. 10-11. In *Navarette*, the New Mexico Supreme Court noted that not "all material contained within an autopsy file is testimonial and therefore inadmissible" and that "an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause." 294 P.3d at 443; *see also State v. Garcia*, No. 33,756, 2014 WL 2933211, *2-5 (N.M. June 26, 2014) (finding no Confrontation Clause violation where expert asserted conclusions based on review of "entire autopsy file, including autopsy photographs admitted into evidence"). Even setting aside the fact that it was Dr. Gorniak *herself* who issued the coroner's report, this is what she did in this case—assert her independent conclusions that subdural hemorrhaging was the cause of death and that homicide was the manner of death. Tr. 95, 98-99, 127-28.

The West Virginia Supreme Court took a similarly nuanced approach in *Kennedy*. Like the New Mexico Supreme Court, it upheld the use of certain items from an autopsy report, like "autopsy photographs," to "permit [a testifying witness] to make his own, individualized observations." 735 S.E.2d at 921. The court concluded that, for Confrontation Clause purposes, "[t]he question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay. As long as he is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no *Crawford* prob-

lem.” *Id.* at 922 (quoting *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009)).

The Massachusetts Supreme Court has adopted a substantially similar approach. It has said that “[a] substitute medical examiner who did not perform the autopsy may offer an opinion on the cause of death, based on his review of an autopsy report by the medical examiner who performed the autopsy and his review of the autopsy photographs.” *Commonwealth v. Reavis*, 992 N.E.2d 304, 311 (Mass. 2013). A substitute medical examiner may also “offer an expert opinion as to the time that would have elapsed between injury and death, the force required to inflict the injury, and the effect that certain types of injuries would have upon a victim,” and only cannot “testify to facts in the underlying autopsy report.” *Id.* at 312; *see also Commonwealth v. Tassone*, 11 N.E.3d 67, 73 (Mass. 2014); *Commonwealth v. Rivera*, 981 N.E.2d 171, 188-89 (Mass. 2013).

The final case on this side of the purported split, the Oklahoma Supreme Court’s decision in *Miller*, stands for the converse proposition—that testifying experts cannot merely transmit conclusions reached by non-testifying experts. The issue in *Miller* was whether a substitute medical examiner could inform the jury of a different, non-testifying medical examiner’s opinions. *See* 313 P.3d at 967. The defendant was convicted of murder based in part on expert testimony by Dr. Distefano, a medical examiner who had not performed the autopsy of the victim. *Id.* Dr. Distefano in *Miller* made clear that he was only “presenting [*the prior medical examiner*]’s findings and conclusions” to the jury, and not providing his own independent conclusions. *Id.* at 970; *see id.* (noting that Dr. Distefano admitted that he had prepared for

his testimony with the understanding that he was “to present to this jury what [the prior medical examiner’s] findings were regarding the autopsy . . .’ and ‘to also be able to relay what [the prior medical examiner]’s findings were regarding the cause of death”). Here, by contrast, Dr. Gorniak did *not* merely convey Dr. Sohn’s conclusions. The trial court clarified this point in its specific questioning of Gorniak, when asking her what her conclusions would have been had Dr. Sohn *not* stated any conclusions *at all* about the cause of death. Tr. 127-28.

Finally, the two state courts that take the alleged “middle course” have said essentially the same thing. Pet. 12; *see, e.g., Lui*, 315 P.3d at 510-11 (distinguishing between an expert’s testimony expressing independent conclusions “based on the autopsy photographs” and an expert’s testimony that “merely recited a conclusion prepared by nontestifying experts”); *Dungo*, 286 P.3d at 450 (noting that testifying expert’s “description to the jury of objective facts about the condition of victim Pina’s body, facts he derived from [the non-testifying expert’s] autopsy report and its accompanying photographs, did not give defendant a right to confront and cross-examine” the non-testifying expert).

In sum, whether or not tension exists in some of these cases, the facts of this case do not implicate that tension. All courts agree that a witness may use autopsy reports or photographs to reach independent conclusions about the manner and cause of death. Indeed, even Hardin concedes that autopsy doctors may “take photographs” to preserve the ability of a different witness to testify about the conclusions that witness reached from those photographs. Pet. 26. That is largely all that Dr. Gorniak did here.

III. THIS CASE PROVIDES A BAD VEHICLE FOR THE COURT TO ADDRESS BROAD CONFRONTATION CLAUSE ISSUES SURROUNDING THE USE OR ADMISSION OF AUTOPSY REPORTS AT TRIAL

Hardin claims that “[t]his case is an ideal vehicle for resolving the issue.” Pet. 16-21. He is mistaken. This case is not the appropriate one to resolve any broad Confrontation Clause issues regarding the use or admission of autopsy reports at trial. That is true both because of the case’s unique facts and because any alleged error would have been harmless even assuming any potential constitutional violation.

A. This Case’s Facts Make It A Bad Vehicle To Reach General Conclusions For The Mine Run Of Autopsy-Report Cases

This case’s facts only tangentially present the issue that Hardin’s petition seeks to have the Court review. For at least two reasons, no Confrontation Clause violation occurred in this case—even assuming that some combination of the death certificate, coroner’s report, or autopsy report would have been testimonial.

First, the coroner, Dr. Gorniak, supervised the overall autopsy process. As Justice Sotomayor recognized in her concurrence, *Bullcoming* did not address the situation presented here—namely, where “the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue.” 131 S. Ct. at 2722 (Sotomayor, J., concurring). Where a supervisor testifies after having involvement with the process, the risk of a confrontation violation is substantially diminished. Supervisors can be cross-examined both as to their opinions, and as to the underlying infor-

mation contained in the autopsy report on account of the supervisor's "personal . . . connection" to it. *Id.*

Second, it was Dr. Gorniak, not Dr. Sohn, who signed the final coroner's verdict and the death certificate. In Ohio, it is the coroner's verdict and death certificate, not the autopsy report, that announce the cause and manner of death for purposes of the state's records; the autopsy report has no legal effect and is merely a record within the coroner's office. *See* Ohio Rev. Code §§ 313.09, -.19. At most, the deputy's autopsy report provides helpful background information that assists the corner in reaching the conclusions for the coroner's verdict and death certificate.

Thus, Hardin can claim no confrontation violation from the introduction of the coroner's report, because Dr. Gorniak testified at trial and was subject to cross examination about her report's determinations about the cause and manner of death. She testified that it was her medical conclusion that the child died as a result of "subdural hematoma due to non-accidental head trauma" caused by either "blunt trauma or a shaking mechanism," and that the baby's death was a homicide. Tr. 101, 104, 106. She determined the cause and manner of the baby's death by looking at, among other things, photographs of the child's body and objective information contained in the autopsy report. Tr. 88-92, 94-95, 98-101, 125-128. And she made clear that her conclusion was independent of the cause-of-death conclusion listed in Dr. Sohn's autopsy report. Pet. App. 5a; Tr. 126-28.

Hardin conducted a thorough cross-examination of Dr. Gorniak, asking questions about her opinions, how she reached them, and whether they were based on adequate information in the records she had re-

viewed. *See* Tr. 106-15, 129-31. There is no doubt that this satisfies the requirements of the Confrontation Clause. Hardin’s petition therefore presents a question that his case addresses only tangentially. It would be far better for the Court to examine this subject in the context of a case (like *Medina* or *Maxwell*) where the testifying medical examiner is *not* the individual who issued the coroner’s report reaching conclusions about the cause and manner of death.

B. The Admission of Dr. Sohn’s Separate Conclusions In The Autopsy Report Was, At Most, Harmless Error

This case is also a bad vehicle in which to consider any broad legal issues surrounding the use of autopsy reports because, even assuming any error in the admission of the autopsy report, the error would have been “harmless beyond a reasonable doubt under the standard of *Chapman v. California*, 386 U.S. 18, 24 (1987).” *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988); *cf. Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (“The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.”). This harmless-error issue was addressed by the Ohio Attorney General in an *amicus* brief in the Ohio Supreme Court (at 19), and responded to by Hardin in his Reply Brief in that court (at 17-18). And it is not clear how the Ohio Supreme Court ruled on the issue; its bare citation to *Maxwell* did not clarify whether it was incorporating *solely Maxwell’s* Confrontation Clause analysis or *also Maxwell’s* harmless-error analysis. *See Maxwell*, 9 N.E.3d at 952 (concluding, even if there was any error in the admission of the autopsy report, it was harmless).

Hardin says that the “autopsy report played a pivotal role in this case.” Pet. 20. That is simply not the case. It was Dr. Gorniak’s *testimony* that played the role on the key questions concerning the cause and manner of death. As noted, she identified the subdural hemorrhages from pictures of the child’s brain. Tr. 95 (“So you see the subdural here, and you can also see subdural there.”); Tr. 98-99. And the trial court specifically asked her that “if [Dr. Sohn] had no opinion,” “[w]ould you be able to make an opinion based upon the physical results of the autopsy, the internal and external examination?” Tr. 127. She responded: “Yes, cause that’s why we have the meetings. Uh, because as you see, my signature’s on the bottom of this page, which has the cause and the manner of death. If I don’t agree with the cause and there were some debate about it, this paper will not be signed.” Tr. 127. In addition, the radiologists who interpreted the CT scan of the baby from Nationwide Children’s Hospital testified that he saw subdural hemorrhaging in the brain. Tr. 174-80.

Hardin’s two subsidiary points about the “centrality” of the autopsy report are equally mistaken. Pet. 21. For one thing, Hardin claims that “[t]he baby here – as in other ‘shaken baby’ prosecutions now believed to have resulted in wrongful convictions – displayed no visible physical injuries.” Pet. 21. Ironically, it is only the autopsy report—the very piece of evidence that Hardin now seeks to exclude—that allows him to make this statement. *See* Pet. App. 18a-19a. The many witnesses who saw the baby closer in time to the events in question, by contrast, all testified about external marks or bruises that they saw on the baby’s face. The paramedics noted that “when [they] got a little bit of circulation going, bruising

started to appear” on the side of the baby’s face. Tr. 55-56, 69, 203-06; Exs. 1-2. One even suggested that “the bruises on the side of the head looked like [the baby] would’ve been slapped.” Tr. 206. The social worker at Nationwide Children’s Hospital likewise stated that the child had “some bruising to his . . . chin and his forehead,” leaving her with the “impression [of] suspected physical abuse.” Tr. 152; *id.* at 153-54. At trial, she identified the bruising (which she described as “broken blood vessels that usually come after being struck”) in pictures she had taken of the baby at the hospital. Tr. 157-58; Exs. 21-26.

The treating physicians also both testified about this bruising. Tr. 223-24, 253, 294. The physician at the Piketon hospital noted that she suspected abuse because “[t]he bruising pattern did not appear to be typical for a child that age.” Tr. 229. She added that “[i]t would take a pretty significant amount of force on an individual for a child to get a bruise about the face,” Tr. 231, and that the bruising had “an appearance of what appeared to be like three (3) or four (4) fingers up on the side of the face,” Tr. 232. The physician at the children’s hospital testified that the “bruising on the side of the face was concerning for an inflicted injury,” Tr. 296, and suggested “potential abuse of behavior towards the child,” Tr. 310.

For another thing, Hardin claims that “there were no eyewitnesses (save petitioner) to the baby’s death.” Pet. 21. But Hardin’s *own* statements to Starkey, his girlfriend, provide compelling evidence about the circumstances of the child’s death. He wrote to Starkey from jail about how the baby died, stating that the baby “had been crying all day long and I was stressed out. My nerves were shot and I lost it. I only shook him a couple of times and in the

process my knuckles is what caused the . . . marks on his face.” Tr. 36. Thus, there is no dispute that Hardin at least shook his son (if not hit him). Knuckle marks on a face do not result from pushing couch cushions up and down gently. And there is no dispute that the child had subdural hemorrhages. In the face of all this evidence, the statements about the manner and cause of death in the autopsy report were, at most, entirely cumulative.

IV. THE ADMISSION OF THE AUTOPSY REPORT IN THIS CASE DID NOT VIOLATE THE CONFRONTATION CLAUSE

The admission of the autopsy report in this case did not violate the Confrontation Clause for at least four reasons. *First*, all agree that the Confrontation Clause is implicated only by statements made for the “primary purpose of creating an out-of-court substitute for trial testimony.” *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011). That is, testimonial statements must be made “for the purpose of establishing or proving some fact at trial.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). If a statement’s primary purpose, evaluated objectively, is anything else, the statement does not trigger the Confrontation Clause’s mandates and is left to regulation under state-law hearsay rules instead. *See Bryant*, 131 S. Ct. at 1155.

Under this test, business and public records generally do not implicate the Confrontation Clause, “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.” *Melendez-Diaz*, 557 U.S. at 324. Only “if the regularly conducted business activity is

the production of evidence for use at trial” will the record implicate the Confrontation Clause. *Id.* at 321 (emphasis added).

Autopsy reports, at least under Ohio law, do not satisfy this criterion. The regularly conducted business activity of county coroners is *not* to create trial evidence, and autopsy reports are *not* generated “specifically for use at [a particular defendant’s] trial.” *Id.* at 324. Instead, as detailed above, Ohio’s statutory scheme shows that autopsy reports have a primary purpose of allowing the coroner accurately to determine the manner and cause of death for purposes of the State’s public records. *Maxwell*, 9 N.E.3d at 950; *see* Ohio Rev. Code §§ 313.09 & .19; 3701.14(A); 3705.07(A). Those reports are created to allow a coroner to provide “an official explanation of an unusual death.” *Dungo*, 286 P.3d at 450. Medical examiners, by contrast, do “not conduct autopsies and prepare autopsy reports with the primary purpose of their being used as evidence in future criminal trials of targeted individuals.” *Leach*, 980 N.E.2d at 591. Accordingly, those types of “official records are ordinarily not testimonial.” *Dungo*, 286 P.3d at 450 (citing *Melendez-Diaz*, 557 U.S. at 324).

Contrast the purpose behind autopsy reports with the purpose of the scientific reports at issue in *Melendez-Diaz* and *Bullcoming*. The reports in those cases were the equivalent of affidavits made *specifically* for trial to prove the guilt of a particular criminal defendant, and thus triggered the defendant’s confrontation right. 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*, 547 U.S. at 830). They were “created solely for an ‘evidentiary purpose’ . . . made in aid of a police investigation.” *Bullcoming*, 131 S. Ct. at 2717.

Second, the *Williams* plurality also held that the statements must be made for an even narrower purpose—namely, to “accus[e] a targeted individual” of a crime. 132 S. Ct. at 2243 (plurality op.). But the autopsy in this case was not undertaken to accuse anyone, let alone Hardin. It does not even mention Hardin. Instead, the autopsy was conducted to assist the coroner in determining the manner and cause of death of Hardin’s five-month-old son. Just like those who conduct DNA testing, individuals who perform autopsies “generally have no way of knowing whether [the autopsy] will turn out to be incriminating or exonerating—or both.” *Id.* at 2244. And those individuals seek to determine “*how* the victim died, not *who* was responsible.” *Leach*, 980 N.E. 2d at 592 (emphases added).

Indeed, several Justices have already suggested that autopsy reports should not generally trigger any confrontation rights. *Williams*, 132 S. Ct. at 2251 (Breyer, J., concurring); *Melendez-Diaz*, 557 U.S. at 335 (Kennedy, J., dissenting). Justice Breyer’s *Williams* concurrence noted 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 at trial. 132 S. Ct. at 2251. And Justice Kennedy’s *Melendez-Diaz* dissent noted that a ruling that an autopsy report triggers the Confrontation Clause could have “staggering” consequences, including obstructing the resolution of cold cases. 557 U.S. at 335.

Both opinions noted that if defendants have a universal right to confront the medical examiner who performs an autopsy, the “Confrontation Clause [could] effectively . . . function as a statute of limitations for murder.” *Williams*, 132 S. Ct. at 2251 (Breyer, J., concurring) (internal quotation marks omitted); *Melendez-Diaz*, 557 U.S. at 335 (Kennedy, J., dissenting). “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. Cold-case homicides could rarely be prosecuted if autopsy reports were found to implicate the Confrontation Clause, because with the passage of substantial time comes the increased risk that the medical examiner who conducted the autopsy will have died or otherwise become unavailable. *See Williams*, 132 S. Ct. at 2251 (Breyer, J., concurring).

Third, whatever the autopsy report’s primary purpose, the Court has also noted that testimonial statements must be sufficiently solemn. *See Davis v. Washington*, 547 U.S. 813, 830 n.5 (2006) (noting that “formality is indeed essential to testimonial utterance”). The statements in the autopsy report in this case do not suffice. Like with the DNA report in *Williams*, Dr. Sohn merely signed the report at the end. Pet. App. 22a; *see Williams*, 132 S. Ct. at 2260

(Thomas, J., concurring in judgment); *see also Leach*, 980 N.E.2d at 592 (noting that the report “was merely signed by the doctor who performed the autopsy”). And unlike with the scientific reports in *Melendez-Diaz* and *Bullcoming*, nowhere did Dr. Sohn either swear to anything stated in the report or certify its statements as true. Pet. App. 17a-22a; *see Bullcoming*, 131 S. Ct. at 2710; *Melendez-Diaz*, 557 U.S. at 308. While Hardin notes that “[s]tate law demands that autopsy reports be ‘certified,’” Pet. 23, he cites a public-records provision noting that all of the coroner’s public records “certified *by the coroner*” are admissible at trial. Ohio Rev. Code § 313.10 (emphasis added). Whether or not the *coroner’s* signature and seal had sufficient solemnity is beside the point here because she testified at trial. And the statements in the report by the *deputy coroner* should be considered non-testimonial because his signature is analogous to the two signatures on the report in *Williams*.

Fourth, even if the Court considers the autopsy report “testimonial,” it should still hold that Dr. Gorniak’s testimony satisfied the confrontation right regarding the statements in that report. As noted above, Dr. Gorniak should not be viewed as merely a “substitute witness” like the witness found insufficient in *Bullcoming*. 131 S. Ct. at 2716. Instead, as the elected coroner, she supervised the office’s processes, met with her deputies to discuss the findings of each case, and reached her own conclusions on the manner and cause of death for purpose of signing her coroner’s report and the death certificate. Tr. 88-89, 127. In this respect, the autopsy report should merely be considered a preliminary step toward the final conclusions identified by the coroner in the coroner’s

report. *See Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring in part).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor

**Counsel of Record*
SAMUEL C. PETERSON
MATTHEW R. CUSHING
Deputy Solicitors
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

ROBERT JUNK
Pike County Prosecutor
100 East Second St.
1st Floor
Waverly, Ohio 45690

Counsel for Respondent
State of Ohio

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