No. 06-8490

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD L. CRAIG,

Petitioner

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the
Ohio Supreme Court

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Most of the State's Brief in Opposition addresses issues that have no bearing on matters raised by the Petition or relevant to the question of whether the Court should grant a writ of *certiorari*. The State's Brief leaves undiminished the compelling reasons supporting grant of the writ.

I. THE DECISION OF THE OHIO SUPREME COURT REACHES AN INTOLERABLE RESULT THAT IS IN IRRECONCILABLE CONFLICT WITH DECISIONS FROM OTHER JURISDICTIONS.

Petitioner, of course, raises no issue in this Court under Ohio law.[1] Ohio may create and construe its hearsay law so that it poses no obstacle to admission of the contents of an autopsy report – that is, either admission of the report itself or of secondary evidence relaying what the report said – without the live testimony of the author of the report. Indeed, one can easily imagine circumstances in civil litigation in which such admissibility might be perfectly appropriate.

Construction of Ohio's hearsay law, however, has no bearing on the confrontation right. The essence of *Crawford v. Washington*, 541 U.S. 36 (2004), was to detach the confrontation right from the law of hearsay. And the fact that Ohio, like some other jurisdictions, freely admits

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[1] The State seems to acknowledge, Brief in Opposition [hereinafter BIO], at 3, that the Question Presented by the Petition has been preserved for review by this Court. In any event, there can be no doubt about the matter, for the Ohio Supreme Court explicitly and extensively considered the question of whether the Confrontation Clause precluded admission of Dr. Kohler's testimony about the contents of the autopsy report and of the report itself. 851 N.E.2d at 637-39, Appendix to Petition for Certiorari, at A17-A19; *see, e.g.,* ROBERT L. STERN, EUGENE GRESSMAN, et al., SUPREME COURT PRACTICE 185 (8th ed. 2002) ("Where the highest state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state courts disappears.").

autopsy reports demonstrates the necessity of avoiding reliance on state hearsay law as a proxy for, or a means of enforcing, the confrontation right.[2]

Nevertheless, the fact that the Ohio Supreme Court held that Ohio law does not require exclusion of the report is the essential foundation for virtually all the State's arguments both that the decision of that court does not violate the Confrontation Clause and that the decision is not in irreconcilable conflict with decisions from other jurisdictions. The State argues directly and indirectly from this fact. The direct argument, in accordance with the decision of the state supreme court, is that because the autopsy report is a business record under Ohio law it cannot be deemed testimonial under *Crawford*. The argument has no merit – and it highlights a basic conflict between this decision and decisions of high courts in other jurisdictions.

Petitioner has already addressed at considerable length, Petition at 10-12, the passage in *Crawford* characterizing most of the hearsay exceptions that existed as of 1791 as "cover[ing] statements that by their nature were not testimonial – for example, business records . . . ." 541 U.S. at 56. The State relies heavily on this passage – but beyond quoting it, BIO at 8, offers no response whatever to Petitioner's demonstration that the passage cannot mean "that the Sixth

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[2] The State attempts to dispel the significance of *Diaz v. United States*, 223 U.S. 442 (1912), with a mystifying argument. As the Petition points out, at 6-7, *Diaz* declared explicitly that an autopsy report could not be admitted against an accused without his consent because to do so would violate his right, guaranteed by a statute that conformed to the Confrontation Clause, "to meet the witnesses face to face." The State notes that *Diaz* also held that admission of the autopsy report would violate the rule against hearsay, and then argues that because Petitioner does not contend that the rule against hearsay requires exclusion of the report he cannot endorse *Diaz*'s assertion that the Constitution does require exclusion. The illogic of the State's argument is sufficiently obvious not to call for lengthy response. It is worth mentioning, however, that, as *Diaz* indicates, traditional hearsay law *does* require exclusion of an autopsy report offered against an accused without the author testifying; only in recent years have there been numerous decisions treating the business records and public records exceptions to the hearsay rule with sufficient laxness to allow admission.

Amendment does not cover any statement that, more than two centuries later, a state might choose to bring within what it designates as a hearsay exception for business records." Petition at 10-11.[3]

Moreover, the *per se* holding of the Ohio Supreme Court, endorsed by the State, that a report deemed to be a business record falls outside the protection of the Confrontation Clause, while in accordance with the holdings of some other jurisdictions,[4] is in sharp conflict with holdings by

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[3] The State also argues that the autopsy report escapes the Confrontation Clause because it is a public or official record. This argument adds nothing to the one based on the business records exception, and it has additional defects as well. The Ohio Supreme Court did not hold that the autopsy report fell within a hearsay exception generally applicable to official records, much less one that was extant in 1791. Rather, it relied on a statute, Ohio Rev. Code § 313.10, expressly devoted to autopsy reports – making it clear that if the state could legislate this report around the Confrontation Clause it could do so for any government-generated document. Furthermore, the "by their nature" passage on which the business records argument is based does not cite a hearsay exception for official records. Finally, the state's emphasis of the official nature of the autopsy report is particularly ironic in light of *Crawford*'s declaration that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar." 541 U.S. at 56 n.7.

[4] *E.g.*, United States v. Feliz, 467 F.3d 227 (2d Cir. 2006). In Commonwealth v. Verde, 827 N.E.2d 701 (Mass. 2005), the Massachusetts Supreme Judicial Court held that a certificate prepared by a technician from a laboratory of a state medical school as to the contents of drugs seized as part of a criminal investigation are not testimonial for purposes of the Confrontation Clause. The certificate was admitted under General Laws c. 111, § 13, which specifically provides that an analyst from the medical school should prepare such a certificate and that it is "prima facie evidence of the composition, quality, and net weight" of the drug. According to the court, the purpose of the statute is "to reduce court delays and the inconvenience of having the analyst called as a witness in each case." 827 N.E.2d at 703 n.1. Of course, delay and inconvenience could be reduced further by providing that *any* witness can testify by certificate; *Verde* must reflect a judgment that the drug certificate is sufficiently reliable to warrant admissibility not- withstanding the Confrontation Clause – but that of course is precisely the type of reasoning that *Crawford* precludes.

other courts of last resort.[5] *See State v. Caulfield*, 722 N.W.2d 304, 309-310 (Minn. 2006) (squarely rejecting the line of cases treating statements falling within the business records exception as necessarily non-testimonial); *Thomas v. United States*, 2006 WL 3794331 (D.C. 2006) ("where a document is created primarily for the government to use it as a substitute for live testimony in a criminal prosecution, the fact that the document might happen to fall within the jurisdiction's business records exception to the hearsay rule does not render the document non-testimonial"; accordingly, chemist's reports at issue deemed to be "testimonial, whether or not they happen to meet this jurisdiction's definition of a business record"); *see also City of Las Vegas v. Walsh*, 124 P.3d 203, 207-08 (Nev. 2006) (statutorily authorized affidavits of blood testing held testimonial "[a]lthough they may document standard procedures")

The State's indirect argument fares no better. This argument is that the state supreme court could have treated the report as it did under Ohio law only if it concluded that the report was not prepared in anticipation of litigation, and therefore the report cannot be testimonial. This argument suffers several basic flaws.[6]

First, the initial premise of the argument is at best dubious; Ohio's business records exception, Evid. R. 803(6), contains no "anticipation of litigation" exclusion, and the State cites

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[5] The State argues that there is no conflict among federal circuits. BIO at 8-9. But given the clear conflict among courts of last resort, this is irrelevant.

[6] The discussion below assumes *arguendo* that, as the State implicitly contends, the question of whether the report was prepared in anticipation of litigation is the touchstone of whether it is testimonial. Petitioner and the State may be in broad agreement on this matter, but this Court has not yet adopted such a rule.

no decision of the state supreme court in support of such a requirement.[7]

Second, the state supreme court did not purport to conclude that the autopsy record in this case was made for any purpose other than to assist in investigation and prosecution of a homicide, and the state offers no suggestion of any such alternative purpose for which the report might have been made. *Cf. Davis v. Washington*, 126 S.Ct. 2266, 2273 (2006) (holding that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency"). Indeed, in a homicide case, providing such assistance is obviously the primary, if not the sole, object of the autopsy and of the report that records the observations of the forensic pathologist who conducts it. That conclusion is all the more obvious in the circumstances of this case – involving an undisputed homicide, with four policeman present at the autopsy, and a statute, Ohio Rev. Code § 313.10, cited by the state supreme court, 853 N.E.2d at 638, that purports to render the report admissible.

Third, even if the state supreme court had concluded that autopsy reports in homicide prosecutions are not prepared in anticipation of litigation, or that this report was not so prepared,

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[7] In this case, the court did quote the statement by a court of another jurisdiction that business records "are 'by their nature' not prepared for litigation," 853 N.E.2d at 638, *quoting* People v. Durio, 7 Misc.3d 729, 734, 794 N.Y.S.2d 863, 867 (Sup. Ct. Kings Co. 2005), but it did not indicate that this translated to a rule that a record that would otherwise qualify for the business records exception is necessarily excluded from the exception if in fact it was made in anticipation of litigation. Significantly, in one of the two lower-court cases cited by the State in support of such a rule, the court applied the rule *against* the person accused of wrongdoing, Sikora v. Gibbs, 726 N.E.2d 540, 544 (Ohio App. 10th Dist. 1999) (business records exception not applied "[g]iven that the source of the information is the accused in the present [civil] case"), and in the other the error in admitting the statement against the accused was deemed harmless. State v. Evans, 1993 WL 311681, *5-6 (Ohio App. 1st Dist. 1993). Thus, the State cites no case in which the supposed rule was successfully invoked by an accused.

such a conclusion would not be binding on this Court. *See* ROBERT L. STERN, EUGENE GRESSMAN, et al., SUPREME COURT PRACTICE 216 (8th ed. 2002) ("the Court frequently makes independent examinations of facts that are intermingled with legal conclusions when necessary to decide whether a person has been deprived by a state court of a right secured by the Constitution"). Indeed, this Court should not even give deference to a state court finding that autopsy reports in homicide cases are not prepared in anticipation of litigation. Assuming that the question of whether such reports are deemed testimonial depends on whether they are so prepared, then deference to state courts could mean that in some states (ones concluding that hey are prepared in anticipation of litigation) such reports are testimonial, and in other states (ones concluding that they are not so prepared) such reports are not testimonial.[8]

Finally, the State attempts to salvage its case, and to minimize the appearance of conflict, by asserting that the autopsy report "was not prepared for use against Petitioner" because it was prepared before Petitioner was "identified as the killer." BIO at 12. The assertion is factually inaccurate and legally immaterial.

As the Petition has already pointed out, at 2, 17, Petitioner was the prime suspect, among a small group, from the very outset of the investigation. *See also* Trial Transcript ("T.") 2687

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[8] In terminology originated by Prof. Kenneth Davis, if the legal question of whether autopsy reports in homicide cases are testimonial for purposes of the Confrontation Clause depends on the question of whether such reports are prepared in anticipation of litigation, then the latter question is one of "legislative fact." That is, it is a question that has "relevance to legal reasoning and the lawmaking process," including "the formulation of a legal principle or ruling by a judge or court," Advisory Committee's Note to Proposed Federal Rule of Evidence 201(a), 51 F.R.D. 330, 330 (1971). Legislative facts stand in contrast to "adjudicative facts," which as described by Prof. Davis "are the facts that normally go to the jury in a jury case." *Id.* at 333, *quoting* 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 353 (1958). A court determining a question of law is necessarily unconstrained in resolving underlying questions of legislative fact. Advisory Committee's Note, *supra*, at 331.

(prosecutor's argument at trial: "Dondi Craig was the top of the list, but they still had other suspects."). It is true that there was insufficient evidence to prosecute Petitioner until a DNA test indicated (assuming a proper chain of custody, which Petitioner disputed) the presence of Petitioner's semen on the victim's body and in her clothing. But that cannot matter; if it did, all evidence gathered until there is sufficient evidence to support a conviction would automatically be nontestimonial.

Indeed, it cannot be that identification of the ultimate defendant as a suspect at all is a prerequisite for a statement to be deemed testimonial. Consider the bizarre results that would follow from such a rule. A woman comes to a police station, contending that she has been raped. She says that she cannot identify the rapist (or perhaps the police encourage her not to make an identification yet). Like Sylvia Crawford, she makes an electronically recorded statement in the station-house. Subsequently, a DNA test is performed on semen found on her body, and a search of a database of DNA profiles produces a match. The man thus identified, who presumably had some form of sexual contact with the complainant, is charged with rape. The complainant never takes an oath or submits to cross-examination, but her recorded statement – which is deemed nontestimonial under the State's not-yet-identified test – is admitted at trial, and together with the DNA evidence that is enough to support a conviction of rape charges. This result is plainly intolerable.

In short, the State's arguments leave it clear that the decision of the Ohio Supreme Court both violates the Confrontation Clause and conflicts sharply with decisions of other courts of last resort.

II. IMPROPER ADMISSION OF THE CONTENTS OF THE AUTOPSY REPORT WAS SERIOUSLY PREJUDICIAL TO PETITIONER.

The Petition has already demonstrated, at 18-20, that the error in admitting the contents of the autopsy reports was seriously prejudicial, but because the State contends to the contrary Petitioner will address the matter again.

At the outset, note that the Ohio Supreme Court made no suggestion that, if admission of the contents of the autopsy report was error, the error was harmless (though it did characterize as non-prejudicial two other errors made by the trial court, 853 N.E.2d at 631, 634, Pet. App. A11, 14). If this Court believes that the error could be deemed harmless beyond a reasonable doubt, the appropriate course would be to remand the case to the Ohio Supreme Court for a determination of harmlessness in the first instance. *E.g., Lilly v. Virginia*, 527 U.S. 116, 139-40 (1999) ("general custom"); *Neder v. United States*, 527 U.S. 1, 25 (1999) ("normal practice where the court below has not yet passed on the harmlessness of any error").

Petitioner submits, however, that it is clear that the error was in fact seriously prejudicial. As the Petition shows, the State placed great weight on the autopsy report at trial – presenting its contents in great and gruesome detail, and relying on it both in responding to a motion for judgment of acquittal and in arguing to the jury. Even without more, this is enough to prevent this Court from concluding that the error was harmless beyond a reasonable doubt.

But the autopsy report had more than emotive value. As explained in the Petition, at 19-20, establishing the time of death was an important part of the prosecution's case: If the jury believed, as some evidence suggested, that Roseanna had survived and was at large until March 2, then it would be far less likely to conclude – and at least arguably could not conclude beyond a

reasonable doubt – that Petitioner was the murderer, even if it did believe that he had followed her and raped her on the evening of February 28.[9] And the autopsy report was a critical component in supporting a time of death compatible with the prosecution's theory.

The State places great weight on the photographs. For purposes of this Petition, Petitioner does not challenge the admissibility of the photographs – but Dr. Kohler's estimate of the time of death was based in large part on the autopsy report and not exclusively, or even primarily, on the photographs. Indeed, though she apparently placed some reliance on the photographs, clearly the autopsy report placed at least as significant a role; in asking her for an opinion as to time of death, it was the report and not the photographs to which the prosecution referred.[10] In the initial

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[9] The only evidence that could have supported the conclusion that Petitioner raped Roseanna was that (assuming a proper chain of custody) his DNA was found on her and on her clothing. *There was no additional evidence that Petitioner murdered Roseanna* – nothing linking him either to her or to the place where she was found. Obviously the "similar act" evidence to which the State points, BIO at 14 – testimony by a woman that when she was 17, five years before Roseanna's murder, Petitioner had tied her up and raped her in an empty house – could not provide any significant support for a conclusion of *murder*, especially given that the grand jury in that case returned a no bill, and Craig was never prosecuted on charges arising from that accusation. 853 N.E.2d at 632, Pet. App. A12.

The State begs the question when it says that, according to Petitioner, Roseanna "was strangled to death by someone other than Petitioner and left in the same basement that Petitioner took her to." BIO at 14. If Petitioner did not murder Roseanna, then there is no basis whatever for concluding that he took her to the basement.

As an indication of how a conclusion of a late time of death could introduce doubt into the prosecution's case, note that in its initial closing argument the prosecutor asserted that on Friday, March 1, or at the latest Saturday, March 2, Michael Johnson, the new owner of the house where Roseanna was found, had locked it up, so that it was secured and no one could get into it, and that when he was in the basement at that time Roseanna was already buried there under clothing. T. 2698, 2699. But in rebuttal, trying to discount the importance of time of death, the prosecutor made the incompatible contention that perhaps Petitioner had bound Roseanna in the house on February 28, raped her repeatedly, and killed her on March 3. T. 2751.

[10] This exchange occurred as part of Dr. Kohler's direct examination:

Q. Doctor, with the understanding that from the protocol that you reviewed, from the

closing argument, the prosecutor said that Dr. Kohler's opinion was "based upon all the information that she reviewed." T. 2697. And on rebuttal, the prosecutor made explicit the fact that the estimated time of death was based in significant part on the reported observations of the pathologist who was never called to the witness stand; the prosecutor referred to "Dr. Kohler, who has looked at this body – has not looked at the body herself, but she has looked at photographs, she has looked at the report of the individual who examined the body . . . ." T. 2751-52.

Had Dr. Ruiz testified, based upon *his own* observations and subject to cross-examination, perhaps he would have given an estimated time of death less supportive of the prosecution's theory of the case; perhaps also he would have acknowledged that he failed to give an estimate in his report (and thus left it open for Dr. Kohler to provide an estimate without contradicting him) for fear of undermining the theory on which the police were already working. One cannot be sure, of course. Ironically, the State, in asserting that "[i]t is utter speculation that Dr. Ruiz would

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> notes that you reviewed, that her body was found on March 5th, with the autopsy being done the next day, are you able to determine an approximate time of death?
>
> A. I can give a range of possible times of death. . . . .

T. 2244. On cross-examination, this exchange occurred:

> Q. So you are making your estimate eight years later; is that correct, Doctor?
>
> A. Yes.
>
> Q. Based upon Dr. Ruiz' report and Dr. Ruiz' findings?
>
> A. His report and observations made by looking at photographs, yes.

T. 2262-63.

have testified differently" from Dr. Kohler, BIO at 14, makes Petitioner's point: It is inappropriate to speculate what Dr. Ruiz's testimony at trial subject to cross-examination would have been, and the only way to avoid such speculation was to bring him to trial.

In short, a state agent, working in close cooperation and in the presence of police officers, made observations critical to a homicide case and then prepared a report the only apparent purpose of which was to assist in the investigation and prosecution of the crime; the report failed to give an opinion on a central aspect of the case but recited factual observations that allowed another state agent to give an opinion compatible with the State's theory; the State could have presented the agent who made the observations as a witness at trial but it did not;[11] instead, the agent who testified at trial and relayed his observations to the jury consulted with him privately in preparation of her testimony. The prejudice, like the constitutional violation, is very clear.

The State's theory is that the type of report involved here can be introduced in lieu of the in-court testimony of its author because it is of a type commonly prepared in connection with investigation and prosecution of crimes. That theory, adopted by the state supreme court here and by other courts, displays such a blatant misunderstanding or disregard of the Confrontation Clause and of this Court's recent cases construing it that review by this Court would be warranted even if those courts were not in conflict with others. But in fact other courts, including courts of last resort, have forthrightly recognized that no matter how routine a report prepared by a government agent may be, if it is prepared in anticipation of assisting in investigating or prosecuting a crime, the prosecution may not introduce it at trial without the author confronting

[11] The retirement of Dr. Ruiz was no obstacle to calling him to testify at trial, of course. The prosecution did call a retired police officer to testify. T. 2089.

the accused and submitting to cross-examination under oath. The conflict is deep, significant, and irreconcilable. Inevitably, this Court will have to intervene, and because delay will only deepen the conflict without shedding additional light on it, the Court should do so now.

CONCLUSION

For the reasons stated above and in the Petition, the Court should grant a writ of certiorari.

RESPECTFULLY SUBMITTED this 5th day of February, 2007.

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