

No.
IN THE
SUPREME COURT OF THE UNITED STATES

JAMES COTTON, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari
To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a defendant is denied his Sixth Amendment right to be confronted with the witnesses against him where a court admits into evidence a written, certified autopsy report, without requiring the State to present the testimony of the author, or even a substitute expert, and the State then relies on the report, not just to show cause and manner of death, but to argue to the jury that the unfronted descriptions of the injuries in the report disprove the defendant's claim of self-defense.

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The petitioner, James Cotton, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The unpublished decision of the Illinois Appellate Court is reported at *People v. Cotton*, 2016 IL App (1st) 132820-U, and is attached as Appendix A. A copy of the order denying rehearing is attached as Appendix B.

The order of the Illinois Supreme Court denying leave to appeal is reported at __ N.E.3d __, 2017 WL 5641296, and is attached as Appendix C.

JURISDICTION

The judgment of the Illinois Appellate Court, First District, was entered on August 26, 2016. A petition for rehearing was timely filed and denied on September 22, 2016. The Illinois Supreme Court denied a timely filed petition for leave to appeal on November 22, 2017. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend VI.

INTRODUCTION

This case presents the question of whether an autopsy report may be considered testimonial hearsay, thus triggering the protections of the Confrontation Clause. And if this Court agrees with courts that have found an autopsy report may constitute testimonial hearsay under some circumstances, this case also presents the question of what those circumstances might be.

James Cotton testified that he killed Romeo Burdine with blunt force, but told the jury he acted in self-defense and did not use a weapon. A medical examiner performed Burdine’s autopsy in the presence of two police officers investigating this incident. Months later, after Cotton had been charged with murder in Burdine’s death, the medical examiner signed the autopsy report, had it certified, and tendered it to the

prosecutors. Over Cotton’s objection, the State introduced the written autopsy report into evidence, without the testimony of the authoring medical examiner, or even a substitute medical examiner, and without a showing that the author was unavailable to testify. Then, in closing argument, the prosecutor read aloud for the jury the written descriptions of Burdine’s injuries, and argued to the jury that the medical examiner’s words both proved Cotton used a weapon and refuted his claim of self-defense.

Following the Illinois Supreme Court in *People v. Leach*, 2012 IL 111534, the appellate court found that the autopsy report could be “testimonial” under the Confrontation Clause only if the “primary purpose” in producing it was “to accuse a targeted individual or for providing evidence in a criminal case.” Both *Leach* and the appellate court held that there may be some circumstances under which an autopsy report is testimonial. But the appellate court then held that “[a]n autopsy report is not generated for the production of evidence at trial.” The court also found that “[n]othing in the autopsy report linked” Cotton to the death, and that the “presence of police officers at the autopsy did not establish that the police played a direct role.” The court thus found the autopsy report “nontestimonial” under *Leach*. (App. A 21-24).

Since *Crawford v. Washington*, 541 U.S. 36 (2004), this Court has held that a forensic analyst’s written report may be testimonial in some cases. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Williams v. Illinois*, 567 U.S. 50 (2012). But this Court has never addressed the specific questions of whether an autopsy report may be testimonial, and, if so, under what circumstances. There is a profound division among federal and state courts on these questions, particularly after this Court’s fractured decision in *Williams*. See, e.g.,

United States v. Ignasiak, 667 F.3d 1217, 1232 (11th Cir. 2012) (autopsy reports are testimonial because they are “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”); *United States v. James*, 712 F.3d 79, 99 n.11 (2d Cir. 2013) (autopsy report not testimonial because “it was not prepared primarily to create a record for use at a criminal trial,” distinguishing *Ignasiak* based on whether medical examiner’s office in given state is designated part of “law enforcement”); *State v. Navarette*, 294 P.3d 435, 440-43 (N.M. 2013) (autopsy report testimonial where police officers were present during autopsy and prosecution argued written findings refuted defense theory).

This case, involving a preserved claim where there was no finding of harmless error below, represents an appropriate vehicle for this Court to address the conflict over this important and frequently litigated question.

STATEMENT

Jury Trial

James Cotton was charged with first-degree murder after the beating death of 53-year-old Romeo Burdine on March 30, 2010.

Cotton testified that he was 35 years old at the time and had been addicted to cocaine and alcohol for about fifteen years. On the evening of March 29, 2010, Cotton was walking to his home in Lansing, Illinois, when Burdine approached and invited him over to smoke crack cocaine. Cotton accepted the invitation. When they entered the apartment, Burdine took Cotton to the bedroom, where they sat on separate chairs, drank alcohol, smoked cocaine, and watched pornography. While they were talking,

they exchanged cell-phone numbers. When Burdine told Cotton that he was gay and HIV-positive, Cotton said, "that is fine," but told Burdine that he was not gay and Burdine should not "come to [him] with any of that." As Cotton watched the movies, he became aroused, then stood up and started to masturbate. Burdine tried to put his mouth on Cotton's penis, but Cotton refused and moved away. Cotton told the police after his arrest that Burdine's mouth was on his penis for five to ten seconds and that he ejaculated. Cotton smoked more cocaine, then left Burdine's apartment at 4:21 a.m.

After Cotton left, Burdine called him asking if he knew anyone who would want to have oral sex. Cotton told Burdine he was not interested. As Cotton walked home, he realized he left his cell-phone charger in the apartment and called Burdine at 5:15 a.m. to ask if he could return to get the charger. After Burdine let him in, Cotton went to the bedroom, where he saw a fresh drink and a cigarette on the table. Cotton sat down to have the drink and smoke the cigarette.

After he finished, Cotton got his charger and started to leave. Burdine grabbed Cotton and said, "[Y]ou're not going nowhere until you give me what you owe me." Cotton testified that he was 5'10" and 210 pounds and Burdine was about 6'2" and 260 pounds. After Cotton said he did not owe Burdine anything, Burdine lunged at Cotton and scratched his face. Cotton hit Burdine, then Burdine grabbed Cotton and threw him on the bed. Burdine was initially on top of Cotton as they both threw punches, but Cotton was able to get on top of Burdine. Burdine bit Cotton's upper left arm. Cotton hit Burdine with "three elbows," then heard "snoring."

Cotton denied hitting Burdine with an object. On cross-examination, Cotton acknowledged that during his police interview he initially denied killing Burdine and

asked the police, “What did I kill him with?” The prosecutor then asked Cotton, “Is your elbow geometrically shaped?” Cotton did not respond.

While Burdine was unconscious, Cotton tried to clean up the blood by pouring bleach on Burdine and the area around him. Cotton then put three DVD players, some DVDs, and Burdine’s cell phone in bags. Cotton did this because he was angry at Burdine for trying to rape him. When Cotton left the apartment, he believed Burdine was still alive. Cotton sold the electronics for cocaine later that day.

Illinois State Police crime-scene investigator William Wujek testified that Cook County Assistant Medical Examiner Dr. J. Lawrence Cogan performed Burdine’s autopsy on March 31, 2010. Both Wujek and Lansing Police Detective O’Brien were present with Dr. Cogan during the autopsy.

The prosecution listed Dr. Cogan as a potential witness before trial, but elected not to call him. The State never showed Dr. Cogan was unavailable to testify, and the court never required it to do so. Neither did the State call a substitute medical examiner, and again the court did not require it to do so. Instead, the prosecution sought to introduce into evidence only Dr. Cogan’s written autopsy report. Cotton objected to introducing the report without having the opportunity to cross-examine Dr. Cogan. The court overruled that objection and allowed the written report into evidence.

Dr. Cogan signed the autopsy report on December 9, 2010, about seven months after Cotton was charged. His report was “certified” on March 30, 2011. Dr. Cogan found that Burdine’s death was a homicide caused by blunt-force injuries to the head. His report noted 26 separate injuries, and described some of the wounds as “rectangular,” “oval,” or “triangular,” and one laceration as “rectangularly shaped” with

“fairly sharp” edges.

During closing argument, the prosecutor read aloud to the jury Dr. Cogan’s written description of all 26 injuries. The prosecutor argued that these written descriptions showed that Burdine’s injuries “weren’t just from an elbow” and proved that Cotton “used a weapon.” In rebuttal, the prosecutor again referred to Dr. Cogan’s report: “Contusion, rectangularly shaped, oval shaped, rectangularly shaped laceration, edges are fairly sharp. What is geometrically shaped on the human body? He used a weapon. He used a weapon. He can’t admit it because that looks bad. ... But what is geometrically shaped? He used a weapon ...”

The court instructed the jury on self-defense and the lesser offense of second-degree murder – that is, where the defendant either acted under a sudden and intense passion resulting from serious provocation, or believed the use of deadly force was justified but that belief was unreasonable. After about three hours of deliberation, the jury sent the judge a note asking, “Can we have a descriptive explanation of second degree murder?” The court told the jury to continue deliberations. About 90 minutes later, the jury found Cotton guilty of first-degree murder.

In his motion for new trial, Cotton argued, among other things, that the court violated the Confrontation Clause when it admitted Dr. Cogan’s autopsy report without his testimony. The court denied the motion and sentenced Cotton to 37 years in prison.

Appeal

Cotton again raised the Confrontation Clause claim on appeal, among other issues. The appellate court noted that “the confrontation clause bars the admission of testimonial statements of a witness who does not testify unless the witness is

unavailable, and the defendant had a prior opportunity to cross-examine the witness.” In order to determine whether the autopsy report was “testimonial,” the appellate court applied the Illinois Supreme Court’s “primary purpose” test from *Leach*: if, in light of “all the relevant circumstances,” a “reasonable person” would find that “the primary purpose was not to accuse a targeted individual or for providing evidence in a criminal case, then [the autopsy report] was not testimonial.”

The appellate court wrote that “[l]ike the [Illinois Supreme Court in *Leach*], we cannot state that an autopsy report could never be testimonial.” Citing *Leach*, however, the appellate court held that Dr. Cogan’s autopsy report was not testimonial because “[a]n autopsy report is not generated for the production of evidence at trial.”

The court also found that the presence of two police officers during the autopsy “did not establish that the police played a direct role” in the autopsy. The court noted that *Leach* held autopsy reports “should be considered testimonial only in the unusual case in which the police played a direct role, such as where the police arrange for the exhumation of a body to reopen a cold case.” Under *Leach*, the appellate court found that an autopsy report is not testimonial even where the medical examiner “was aware that the police suspected homicide and that a specific individual might be responsible.”

The appellate court’s resolution of this claim rested entirely on its finding that the autopsy report was not testimonial. The court made no finding as to whether any violation of the Confrontation Clause was harmless. (App. A 21-24).

The appellate court affirmed Cotton’s conviction and sentence, then denied Cotton’s petition for rehearing. (App. B).

Cotton filed a petition for leave to appeal in the Illinois Supreme Court, raising

the Confrontation Clause claim and one other issue. The court denied Cotton’s petition for leave to appeal on November 22, 2017. (App. C).

REASONS FOR GRANTING CERTIORARI

Federal courts of appeals and state high courts are sharply divided over the question of whether an autopsy report introduced at a murder trial may constitute “testimonial” hearsay, triggering the protections of the Confrontation Clause. And even if, as most courts recognize, an autopsy report may be testimonial under some circumstances, courts are even more divided as to what those circumstances might be. *See, e.g.,* Marc D. Ginsberg, *The Confrontation Clause and Forensic Autopsy Reports*, 74 La. L. Rev. 117, 135-66 (2013) (detailing conflicting holdings from federal circuit courts and state high courts).

The holding of the Illinois appellate court in this case only perpetuates this conflict. Indeed, the divide is so great at this point that the Confrontation Clause simply means different things in different jurisdictions. *Compare State v. Navarette*, 294 P.3d 435, 437-43 (N.M. 2013) (autopsy report testimonial where two police officers were present during autopsy and prosecution argued written findings refuted defense theory); *with People v. Cotton*, 2016 IL App (1st) 132820-U, ¶¶ 78-82 (App. A 22-24) (autopsy report not testimonial where two police officers were present during autopsy and prosecution argued written findings refuted defendant’s claim of self-defense).

This case also represents an ideal vehicle for addressing this long-simmering issue. The autopsy report was introduced into evidence, with no opportunity for Cotton to confront its author or any other expert, and the State argued the written findings

refuted Cotton's claim of self-defense. Cotton's claim is also fully preserved, and the decision below rests solely upon the court's finding that the autopsy report was not testimonial, without reaching the question of whether any Confrontation Clause violation was harmless.

This Court should grant certiorari.

I. The introduction of the autopsy report in this case, without a showing of the author's unavailability and without Cotton having the opportunity to cross-examine the author, or even a substitute expert, violated the Confrontation Clause.

James Cotton told the jury he acted in self-defense and denied using a weapon. The prosecutor introduced Dr. Cogan's autopsy report into evidence, but did not call Dr. Cogan to the stand. The court allowed this over Cotton's objection. Then, in closing and rebuttal argument, the prosecutors read aloud for the jury Dr. Cogan's written description of each of Burdine's injuries. Noting that Dr. Cogan used geometric terms to describe some of those injuries, the prosecutors argued that Dr. Cogan's report disproved Cotton's claim that he did not use a weapon, and thus disproved Cotton's claim of self-defense. Cotton never had the opportunity to cross-examine Dr. Cogan, or anyone else, about the accuracy or meaning of those written findings, such as whether they indicated that Burdine was struck with a weapon and not merely an elbow or fist, and the degree of certainty in the expert's answers to that question.

The State thus used Dr. Cogan's written report not only to prove cause and manner of death, elements that were not in dispute, but also to prove the contested fact that Cotton acted without justification, likewise an element of first-degree murder in Illinois. 720 ILCS 5/9-1(a) (West 2010). In short, Dr. Cogan bore testimony against Cotton through his autopsy report, and Cotton never had the opportunity to cross-

examine him.

This is the prosecutorial practice this Court rejected in *Crawford v. Washington*, 541 U.S. 36 (2004). There, the trial court admitted the recorded statement of a witness without requiring the prosecution to present that witness for cross-examination. The prosecution played the recording for the jury, then argued in closing that it constituted evidence that refuted the defendant's claim of self-defense. 541 U.S. at 40-41. This Court found that the recording constituted testimonial evidence, triggering the Sixth Amendment's guarantee to the defendant either to be confronted with the declarant or to a showing of unavailability and a prior opportunity to cross-examine. *Id.* at 59, 68. This Court declined to define "testimonial" in specific terms, but generally defined such statements as those "that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52. This Court reversed because "cross-examination might well have undermined" the weight the jury accorded to the declarant's testimony, finding the error particularly serious where the prosecutor used the unfronted statements in argument to refute the defendant's claim of self-defense. *Id.* at 67.

This Court's application of *Crawford* to written reports by forensic analysts reinforces Cotton's claim. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), as here, the trial court allowed the prosecution to introduce written reports from an expert concluding that the substance at issue was cocaine, without presenting that expert or a substitute expert. 557 U.S. at 308. This Court found the notarized certificates at issue were "functionally identical" to the direct examination of the analyst, thus triggering the defendant's right to cross-examine that analyst. *Id.* at 310-

11. Likewise, *Melendez-Diaz* found that a reasonable analyst would have believed the certificates would be used at a criminal trial. *Id.* at 311. In doing so, this Court rejected the argument that the analyst's reports were not testimonial because they did not specifically target the defendant. Rather, the analyst was a witness against the defendant because the evidence in the reports constituted "one fact necessary for [the defendant's] conviction." *Id.* at 313. And again, the violation of the defendant's right to confrontation required reversal based on what cross-examination *may* have revealed. *Id.* at 320; *see also Bullcoming v. New Mexico*, 564 U.S. 647, 664-65 (2011) (non-testifying analyst's unsworn report was testimonial, and testimony of substitute expert did not cure Confrontation Clause violation).

This Court's fractured decision in *Williams v. Illinois*, 567 U.S. 50 (2012), does not affect the conclusion that the autopsy report in Cotton's case was testimonial. This is because a majority of this Court in *Williams* rejected the notion that an out-of-court statement cannot be testimonial unless the declarant specifically targeted the defendant at the time the statement was made. *Compare* 567 U.S. at 84 (plurality opinion's "primary purpose" test), *with id.* at 114-16 (Thomas, J., concurring in the judgment), *and id.* at 123 (Kagan, J., dissenting, joined by Scalia, Ginsburg, and Sotomayor, JJ.) (both rejecting plurality's test).

Likewise, while the *Williams* plurality found that the DNA analyst's report was not testimonial, that was due, in part, to the fact that the report was never introduced into evidence, which distinguished *Williams* from *Melendez-Diaz* and *Bullcoming*, and distinguishes *Williams* from Cotton's case. *Id.* at 79. The plurality also emphasized that *Williams* involved a bench trial rather than a jury trial, another fact that

distinguishes *Williams* from *Melendez-Diaz*, *Bullcoming*, and Cotton’s case. *Id.*

In its leading decision on autopsy reports and the Confrontation Clause, the Illinois Supreme Court asked whether the report was, under the *Williams* plurality, “prepared for the primary purpose of accusing a targeted individual,” or, under the test favored by five Justices in *Williams*, was prepared “for the primary purpose of providing evidence in a criminal case.” *People v. Leach*, 2012 IL 111534, ¶ 122. In practice, however, the Illinois Supreme Court only applied the test from the *Williams* plurality opinion, and required that the autopsy link the defendant to the crime or “directly accuse” the defendant to be considered testimonial. *Id.* at ¶ 132. The court purported to apply the majority test as well, but found that the autopsy report was not testimonial largely because the medical examiner “was not acting as an agent of law enforcement” and because “these reports are not *usually* prepared for the *sole* purpose of litigation.” *Id.* at ¶¶ 129-30 (emphases added); *but see Williams*, 567 U.S. at 135 (Kagan, J., dissenting) (proper test is “whether a statement was made for the *primary* purpose of establishing past events *potentially* relevant to later criminal prosecution—in other words, for the purpose of providing evidence. ... None of our cases has ever suggested that, in addition, the statement must be meant to accuse a previously identified individual ...”) (quotation and citations omitted, emphases added).

The Illinois Supreme Court was “not prepared to say” that autopsy reports are never testimonial. *Leach*, 2012 IL 111534, ¶ 136. Instead, an autopsy report “should be deemed testimonial only in the unusual case in which the police play a direct role (perhaps by arranging for the exhumation of a body to reopen a ‘cold case’) and the purpose of the autopsy is clearly to provide evidence for use in a prosecution.” *Id.* at ¶

133. The court did not explain how arranging for the exhumation of a body for delivery to the medical examiner is any more “direct” police role than in a more typical case where the police find a body and arrange for its delivery to the medical examiner. And the court’s exception for autopsies whose “purpose ... is clearly to provide evidence” in a criminal case is no exception at all, given that *Leach* also held, in essence, that autopsy reports are non-testimonial *per se*: “an autopsy report prepared in the normal course of business ... is not rendered testimonial merely because the assistant medical examiner ... is aware that police suspect homicide and that a specific individual might be responsible.” *Id.* at ¶ 136. It is difficult not to read *Leach* as requiring that the person who performs the autopsy also be a police officer who suspects the defendant of homicide before the autopsy report will be considered testimonial. At minimum, however, autopsy reports in Illinois are, practically speaking, never testimonial.

That conclusion is borne out by the appellate court’s application of *Leach* in this case. Here, Dr. Cogan performed Burdine’s autopsy in the presence of two police officers – specifically, a crime-scene investigator and a detective. The officers did not write the autopsy report, and there is no record of their conversation with Dr. Cogan, but this is a far more “direct” law-enforcement role in the autopsy than the Illinois Supreme Court’s own example of police officers arranging for the delivery of a body that had been exhumed as part of a cold-case investigation. The appellate court, however, found the presence of the officers during the autopsy not to be a “direct role” as compared to the Illinois Supreme Court’s hypothetical. (App. A 23).

Likewise, Dr. Cogan performed the autopsy before Cotton’s arrest, but he signed it, certified it, and tendered it to the prosecutors in this case months after Cotton was

charged with murder in Burdine's death. There can be little question that a reasonable declarant in Dr. Cogan's position would have known that the primary purpose of his report was to establish past events potentially relevant to a criminal prosecution. *Williams*, 567 U.S. at 135 (Kagan, J., dissenting); *Crawford*, 541 U.S. at 51-52; cf. *United States v. James*, 712 F.3d 79, 99 (2d Cir. 2013) (autopsy report non-testimonial, in part, because autopsy performed after death and signed six months later, well *before* any homicide investigation began in that case).

The autopsy report here was arguably testimonial on these facts alone, but any doubt about this should have been erased by the way the State used Dr. Cogan's autopsy report against Cotton. The prosecutors never showed Dr. Cogan was unavailable to testify, they simply chose not to call him. Then they read his findings to the jury and argued that those unfronted statements constituted proof that Cotton's claim of self-defense was false. *See Crawford*, 541 U.S. at 67 (State's use of unfronted statements in argument to refute defense theory may be considered in a Confrontation Clause analysis). Dr. Cogan, in short, bore testimony against Cotton, and Cotton had no opportunity to cross-examine him. That violated the Confrontation Clause.

II. The division among state high courts and federal appeals courts on the question of whether autopsy reports are testimonial has only deepened in recent years.

It is well-documented that federal and state courts have offered widely divergent answers to the question of whether autopsy reports are testimonial. *See, e.g.*, Marc D. Ginsberg, *The Confrontation Clause and Forensic Autopsy Reports*, 74 La. L. Rev. 117,

135-66 (2013) (discussing split between eight states and two federal appellate courts finding autopsy reports testimonial, and eight states and five federal appellate courts finding autopsy reports non-testimonial); *People v. Leach*, 2012 IL 111534, ¶¶ 134-36 (collecting cases from various jurisdictions on each side of the divide and urging this Court to address “the confusion regarding application of the primary purpose test to reports of forensic testing”). Such a split in authority might be expected where this Court has established that the question be answered on a case-by-case basis and offered some guidance as to the factors to be considered in a given case. In that situation, the divergent results could solely result from the unique facts of each case.

But the split in authority on this question has as much, or more, to do with the absence of guidance from this Court as it does to the factual differences between the cases. Two examples illustrate this.

First, comparing *Leach* and the appellate court’s decision here with the *Navarette* decision from the New Mexico Supreme Court shows that the Confrontation Clause means something different in each state. As in Illinois, the medical examiner in New Mexico was statutorily required to perform the autopsy at issue. *State v. Navarette*, 294 P.3d 435, 440 (N.M. 2013). And as in Cotton’s case, the medical examiner performed the autopsy in the presence of two police officers involved in the ongoing investigation. *See id.* (“[The medical examiner] acknowledged that the autopsy ... was performed as part of a homicide investigation. In fact, two police officers attended the autopsy.”). Also as in Cotton’s case, the prosecutors in *Navarette* relied upon the medical examiner’s findings for something more than cause and manner of death, but also to refute the defendant’s theory that someone else was the shooter. *Id.*

at 437, 442-43. Because these findings were emphasized by the State in argument as evidence of the defendant's culpability, *Navarette* held that the constitution required that the defendant have an opportunity to subject them to cross-examination. *Id.* This, despite the fact that the written autopsy report was never introduced into evidence and the State presented a substitute expert for cross-examination. *Id.* at 437. If it is "axiomatic" that the original autopsy report in *Navarette* was testimonial, then the same must be true here, where two police officers were in the room with the medical examiner, the State introduced the written report into evidence without calling *anyone* to the stand, and the State argued that the written findings refuted Cotton's claim of self-defense. *Id.* at 440.

Similarly, Illinois courts have found that a medical examiner is "not an agent of law enforcement," but is instead a "public health" official, and that this creates a presumption that an autopsy report is not testimonial. *Leach*, 2012 IL 111534, ¶ 129. This, too, is a factor that divides lower courts – a division that can be remedied by guidance from this Court. *See, e.g., United States v. Ignasiak*, 667 F.3d 1217, 1232 (11th Cir. 2012) (autopsy reports in Florida are testimonial because they are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"); *United States v. James*, 712 F.3d 79, 99 n.11 (2d Cir. 2013) (autopsy reports in New York City are not testimonial because they are "not prepared primarily to create a record for use at a criminal trial," distinguishing *Ignasiak* based on Florida statute placing medical examiner's office in the Department of Law Enforcement, while the New York City medical examiner is "wholly independent" of law enforcement). This Court should take this opportunity to

clarify that whether an autopsy report is testimonial depends upon the nature of the statements and the objective expectations of the author, not upon an arbitrary classification that varies from state to state.

III. This case constitutes an appropriate vehicle for this Court to address this important and divisive question.

Finally, this Court should hear this case because it provides a suitable vehicle for addressing these important questions. The signed and certified autopsy report was introduced as evidence and is contained in the record. Cotton's Confrontation Clause claim was preserved below and reaches this Court on direct appeal. And the decision below rests solely upon the court's finding that the autopsy report at issue was non-testimonial under precedent from this Court and the Illinois Supreme Court, without reaching the question of whether any Confrontation Clause violation was harmless.

Because this case presents an important, frequently litigated question that continues to divide federal and state courts, this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, petitioner, James Cotton, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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