

- **Introduction:**

On June 21, 2024, the United States Supreme Court issued its decision in *Smith v. Arizona*, which can be found on the internet through search at *SCOTUS Docket 22-899*. The case was expected to lay down definitive rules around forensic analysts' appearance in court relative to the Sixth Amendment's right to confront witnesses in criminal cases. Instead, the Supreme Court issued guidance, but ultimately returned the case to the Arizona trial court for further findings, thereby leaving the opinion subject to myriad interpretations. Many commentators are claiming the opinion holds: 1) surrogate witness testimony is disallowed; and 2) all persons participating in the chain of custody must appear. A careful reading of the opinion, however, reveals that neither of those propositions are unequivocally stated; rather, the opinion can be read to return attorneys, courts, and cases to a case-by-case analysis of admissibility under the "primary purpose" doctrine. Since the primary purpose for autopsy is medical diagnosis, which enables accurate conveyance of critical medical information to decedents' family and public health systems, the *Smith v. Arizona* opinion leaves room for advocacy of forensic pathology surrogate or substitute witness testimony as nontestimonial admissible evidence.

- **Synopsis:**

A substitute or surrogate forensic pathologist cannot testify to the autopsy report prepared by the forensic pathologist who performed the autopsy if the report's "statements" constitute **testimonial hearsay—two parts: "testimonial" and "hearsay"**. An autopsy report constitutes **hearsay** if the testifying forensic pathologist's opinion is formulated based on the truthfulness and accuracy of the initial forensic pathology's findings or statements, and the autopsy report. In other words, *Smith* advises that if statements in the autopsy report written by the performing forensic pathologist must be true and accurate for the second forensic pathologist to have valid information on which to base his or her testimony, the autopsy report is **hearsay**.

To determine whether a statement is "**testimonial**", per the *Smith* decision, trial courts should engage in a two-step process. First, each trial court must define the exact statement(s) to be relied upon by the testifying expert and potentially admitted into evidence. "Exact statements" to be identified for the primary purpose determination will include the autopsy report, but will also include correlating documents, reports, and memorializations, such as the autopsy diagram. Second, each trial court must then determine the "**primary purpose**" for each of the statement(s). Trial courts will be called upon to particularly determine whether the out-of-court statement(s) primarily relate to future criminal proceedings. Stated another way, courts must determine, given all the relevant circumstances, the principal reason or purpose for which the statement or statements were made.

The Court's specific return to the "primary purpose" test provides an invaluable opportunity to forcefully bring to the forefront of public dialogue the importance of forensic pathology in medical diagnosis and practice. Courts, attorney, lawmakers, policy makers, and the public, need to embrace that the forensic pathologist is a medical doctor, and the autopsy is a surgical procedure to diagnose and reach medical determinations. In the final portion of this paper, **Application Notes** are included that set forth

various authorities and arguments on which one may to rely in educating attorneys, judges, and the public as to the “primary purpose” for forensic pathology and the autopsy as the practice of medicine. As practicing forensic pathologists, you will be the best advocate of your contributions to the medical diagnosis and findings relating to your patient’s diagnosis through the medical practice of the autopsy. Every supporting argument for the autopsy as a medical diagnostic tool and for each individual step taken during the autopsy should be formulated, memorialized, and shared as trial courts take up the “primary purpose” test in earnest. The NAME Executive Committee will spearhead the sharing of all arguments, positions, and situations.

Unfortunately, the Supreme Court’s decision in *Smith v. Arizona* provided no bright line rules other than disallowing surrogate witness testimony that is based solely on another professional’s “statements,” (e.g., reports and notes) if those statements are deemed testimonial, i.e., prepared for or with a purpose related to future court proceedings where the Sixth Amendment right of confrontation attaches. While the “primary purpose” for the autopsy is truly the practice of medicine in the subspecialty of Forensic Pathology, that messaging will need to be convincingly conveyed to attorneys and the judges in each criminal case so courts have a sufficient basis to find the autopsy report nontestimonial. The laws of each state, the prior decisions, the experience of the attorneys with whom you are dealing, the judge’s views on the Confrontation Clause of the Sixth Amendment, existing state law precedent, and the unique qualities of your particular system will all influence outcomes. The “primary purpose” test as applied to forensic pathology and the autopsy is not a surety to an outcome where surrogate witnesses can testify, but it is the strongest argument that remains amongst the forensic disciplines in the opinion of the NAME Executive Committee.

• **Crawford v. Washington and the genesis of “testimonial statements”:**

Confrontation Clause jurisprudence since *Crawford v. Washington*, 541 U.S. 36 (2004), is complex and multifaceted. The reader must, however, understand the legal precepts in SCOTUS precedent, as well as the holding and discussion of the *Smith v. Arizona* decision from June 21, 2024, to engage in discussion, distinction, and differentiation of the records and testimony that were found to be inadmissible in the *Smith* drug chemistry case from the practice of forensic pathology and the medical nature of the autopsy report.

In 2004, the U.S. Supreme Court handed down the case of *Crawford v. Washington*, 541 U.S. 36 (2004). The *Crawford* holding, which was extended to scientific evidence and testimony in *Melendez-Diaz v. Massachusetts*, *Bullcoming v. New Mexico*, and *Williams v. Illinois*, held: Testimonial statements of witnesses absent from a trial can only be admitted if the prosecution demonstrates: 1) The declarant of the statement is unavailable, and 2) the accused has had a prior opportunity for cross-examination. The definition of testimonial statements was “left for another day,” in the *Crawford* decision, although examples of such statements were given to include *ex parte* in-court testimony or its functional equivalent, that is material such as:

- affidavits,
- prior testimony that the defendant was unable to cross-examine, or
- custodial examinations,

- **“similar pretrial statements that declarants would reasonably expect to be used prosecutorially.”**

Since the *Crawford* decision, trial courts have been called upon on a case-by-case basis to make a **two-tiered inquiry** to determine whether out-of-court statements with an unavailable declarant are inadmissible hearsay. Courts must first determine whether those out-of-court statements (e.g., reports, notes, case summaries, diagrams) made by an unavailable witness are inadmissible hearsay or are admissible as “hearsay exceptions,” such as the business records, public records, or medical records exceptions. In the second step of the process, courts must determine whether statements (e.g., reports, notes, case summaries, diagrams) are “testimonial.” Again, the Supreme Court declined to precisely define “testimonial”, deferring this definition to each jurisdiction, but in the context of the autopsy report, trial courts under *Crawford v. Washington* (2004) have focused on various factors such as the degree of reliance on the prior forensic pathologist’s opinion, the review of other records, the nature of the autopsy report as a business record or a medical record, the formality of the opinion, and the primary purpose for performance of the autopsy.

As a result of the lack of uniformity in reasoning and analysis, state and federal courts have historically been split and divided as to whether an autopsy report is “testimonial.” As a result, surrogate or substitute testimony by a forensic pathologist who formulates in independent review based on all available information and data has been allowed in some states and districts, but not in others. In *Smith*, the Supreme Court ratified and boiled down the *Crawford* holding, stating: “The [Confrontation] Clause applies solely to “testimonial hearsay.” That means the Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”

- **Understanding *Smith v. Arizona*, substitute forensic pathology witnesses, and hearsay:**

Smith v. Arizona involved a search warrant, seizure, and “full scientific analysis” testing of controlled substances by chemists employed in a crime lab run by the Arizona Department of Public Safety. Analyst Elizabeth Rast performed the original testing, memorializing her testing procedures and results “in a prepared set of typed notes and a signed report; both on DPS letterhead.” (*Opinion Page 8*). The typed notes included Rast’s statements on description, weight, testing methods, and conclusions for each substance. At trial, Analyst Rast did not testify. Analyst Gregory Longoni testified in place of Rast, offering an “independent opinion” after review of Rast’s “notes and reports.” *Smith* specifically states, “And he [Longoni] did come to the same conclusion, in reliance on Rast’s records. Because he had not participated in the *Smith* case, Longoni prepared for trial by reviewing Rast’s report and notes.”

The Court held that Longoni’s testimony was essentially a reading of Rast’s “statements”¹ (i.e., report and notes) into evidence without having Rast present to testify, thereby violating the Confrontation Clause due to the improper admission of hearsay evidence. The Court held that when an expert conveys an absent analyst’s statement in support of his or her opinion, and the absent analyst’s statements are “basis testimony” that provide foundational support for the second substitute analyst’s testimony only if true, then the statements come in for the truth of the matter asserted and are hearsay. The Court stated:

¹ The *Smith v. Arizona* docket includes all “statements” reviewed by Analyst Longoni, which include laboratory reports, instrumentation outputs, and standard laboratory processing reports in addition to the final report. The docket record is available by internet search http://www.supremecourt.gov/Docket_22-899.

Or said a bit differently, the truth of the basis testimony is what makes it useful to the prosecutor; that is what supplies the predicate for—and thus gives value to—the state expert’s opinion. So, “[t]here is no meaningful distinction between disclosing an out-of-court statement” to “explain the basis of an expert’s opinion” and disclosing that statement for its truth.” A state may use only the formal label, but in all respects the two purposes merge. (*Opinion, page 14*).

Forensic Pathologists who have a long history of courtroom testimony will recall instances where courts admitted autopsy reports under the following exceptions to the hearsay rule: Business Records (Federal Rule of Evidence (FRE) 803(6), Public Records (FRE 803(8); and under the most medically appropriate exception, Statements Made for Medical Treatment and Diagnosis (FRE 803(4)). The Court in *Smith* has refocused the trial court’s inquiry away from the Rules of Evidence and to discernment of the real reason for admission of the first analyst’s statements, indicating, “Evidentiary rules, however, do not control the inquiry into whether a statement is admitted for the truth. Instead, courts must conduct an independent analysis of that question.” The Court continued:

Rast’s statements came in for their truth, and no less because they were admitted to show the basis of Longoni’s expert testimony. All of Longoni’s opinions were predicated on the truth of Rast’s factual statements....So the State’s basis evidence—more precisely, the truth of the statements on which its expert relied—propped up the whole case; yet the maker of the statements was not in the courtroom, and Smith could not ask her questions (*Opinion, page 16-17*).

Smith Conclusion Number 1: *Autopsy reports and the original pathologist’s notes will be deemed hearsay if a substitute or surrogate forensic pathologist testifies to matters in the reports that predicate the truth of his or her opinion.*

• **Understanding *Smith v. Arizona*, substitute forensic pathology witnesses, and “testimonial” hearsay:**

After dispatching the “truth of the matter asserted” inquiry, the *Smith* Court was left with the question of whether the out-of-court statements Longoni conveyed were testimonial. The Court stated, “As earlier explained, that question is independent of everything said above: To implicate the Confrontation Clause, a statement must be hearsay (“for the truth”) and it must be testimonial—and those two are separate from each other” (*Opinion Page 19*). The Supreme Court declined to rule on whether Longoni’s statements were testimonial due to Smith’s failure to reserve the claim in the record at the lower court level. That question was “remanded” or returned to the Arizona trial court for further proceedings and findings.

Nevertheless, the Court’s guidance regarding testimonial evidence is extremely helpful in formulating the argument that the forensic pathologist’s autopsy statement is not testimonial by cementing the inquiry to “the primary purpose test.” The Court stated that in determining whether a statement is testimonial, the focus shall be on the “primary purpose” of the statement, and in particular on how it relates to future criminal prosecutions. A court must therefore identify the out-of-court statement or statements to be relied upon and potentially introduced, and must determine, given all the “relevant circumstances,” the principal reason each statement was made.

Step One in a trial court's discernment of the primary purpose of the out-of-court statement, per the Supreme Court, is to determine exactly which of the out-of-court statements are at issue for admissibility. The Court noted that the record in the *Smith* case did not definitively indicate whether the "statement" admitted through Longoni consisted of Rast's notes, or her report, or whether the notes and reports were "a unit." The Supreme Court urges parsing, identification, and articulation of the specific and exact statement or statements to be admitted. This step will be most important, as exact and precise identification of "statements" formulated during the autopsy will allow linkage explanation to the medical primary purpose for the process and the statement.

The *Smith* Court stated that Step Two entails determining the "primary purpose" for admitting each of the statements. The Court stated:

In then addressing the statements' primary purpose [in this case] --why Rast created the report or notes—the court should consider the range of recordkeeping activities that lab analysts engage in. After all, some records of lab analysts will not have an evidentiary purpose....for example, lab records may come into being primarily to comply with laboratory accreditation requirements or to facilitate internal review and quality control. Or some analysts' notes may be written simply as reminders to self. In those cases, the record would not count as testimonial. **To do so, the document's primary purpose must have a "focus on court."** *(Internal citations omitted, emphasis added, Opinion Page 21).*

While the opinion and its outcome continue to leave the exact definition and parameters of what constitutes testimonial evidence unanswered, the Supreme Court's *Smith* decision returns trial court inquiry to "the primary purpose" for admission of a hearsay statement (such as an autopsy record relied upon by a surrogate witness). As will be discussed below, now is the time to educate the attorneys, judges, the public, and the media that forensic pathologists are doctors with a specialization and advanced medical training, just as oncologists and neurologists are doctors with additional specialization and training. The surgical procedure used by forensic pathologists is the autopsy. The fact that a forensic autopsy may be used in litigation or may be mandated by law in no way lessens the medical and surgical nature of the autopsy. Now is the time to unequivocally and strongly argue that the primary purpose of the forensic pathology autopsy, like the clinical autopsy, is medical diagnosis and attendant advisement of medical diagnosis, including cause and manner of death, to decedent's family, medical providers, and public health systems.

Smith Conclusion Number 2: *The Court stated that in determining whether a statement is testimonial, the focus shall be on specific identification of statements to be utilized, the "primary purpose" of those statements, and in particular on how it relates to future criminal prosecutions.*

• **Application Notes: The "Primary Purpose" for the medical practice of forensic pathologists and the surgical procedure of the autopsy is to provide medical diagnosis and answers to decedent's family about cause and manner of death which, in turn, informs clinical practice and public health systems such as the CDC about emerging trends data, and diagnostic education.**

The following steps are suggested for proving up for attorneys that the "primary purpose" of the autopsy and its related testing and analysis is medical diagnosis, and it not focused on the court or future court proceedings.

1) Make certain the listener understands the level of your medical education.

The Cleveland Clinic website sets forth the educational requirements and professional expertise of forensic pathologists, demonstrating you are medical doctors first and always.

A forensic pathologist is a licensed medical doctor who, following medical school, has completed additional post-graduate residency training in pathology (Anatomic Pathology or Anatomic or Clinical Pathology) and a post-graduate fellowship training in Forensic Pathology. The entire period of education and training for a Forensic Pathologist following high school is a minimum of 13 years (four-year college degree, four-year medical degree, four-year residency, one-year fellowship). After completion of residency and fellowship training, a pathologist is eligible to sit for examinations offered by the American Board of Pathology, which enables the pathologist to obtain board certification as a forensic pathologist.

2) Make sure the listener fully understands that Forensic Pathology is universally recognized as the practice of medicine.

The Accreditation Council for Graduate Medical Education (ACGME) recognizes Forensic Pathology as medical discipline. *See ACGME Program Requirements for Graduate Medical Education in Forensic Pathology; revised 2.4.2024 and effective in revision on 7.1.2024.* The American Medical Association (AMA) recognizes Forensic Pathology as a medical discipline. In fact, the AMA passed Resolution 708 in June 2024 calling for protection against legislative or governmental encroachments on the forensic pathologist’s practice of medicine. The AMA Resolution states, “Whereas forensic pathology is the practice of medicine; and Whereas the practice of forensic pathology in medicolegal death investigations is critical for many aspects of public health, practice and research, including death certification, surveillance, epidemiology, and injury prevention in areas such as unexpected child deaths, suicide, violence and substance abuse....” The College of American Pathologist’s website speaks of the importance of Forensic Pathology as a subspecialty in the medical discipline of Pathology.

The reader may want to analogize to other branches of medicine: Pediatric Oncology is a subset of Oncology; Addiction Psychiatry or Forensic Psychiatry are specialized practices within Psychiatry. Forensic Pathology requires an entire year of specialized training beyond your specialization in Pathology.

Do not assume what is obvious to you—make certain your listener knows what “Pathology” is, as nonmedical people may not know. The John Hopkins Department of Pathology eloquently and concisely states, “The mission of the Department of Pathology is to discover, disseminate, and apply knowledge in the study of disease to advance the field of human health, and to provide the highest quality of patient care.” It continues, “Pathology is the integrative discipline that looks simultaneously at the whole organism and its component cells, tissues, and molecules to study the mechanism of disease with the goal of improving disease management in the clinical setting.”

3. Make clear to the listener that the autopsy is a surgical procedure and as such, is essential to the practice of medicine.

The Yale School of Medicine Pathology Department lists the following information regarding the autopsy: “An autopsy, also known as a post-mortem examination, is a specialized surgical procedure used

to determine the cause and manner of death. The cause of death is the medical reason explaining why a patient passed. The manner of death is the circumstances surrounding the death.”

The autopsy is a medical procedure, whether conducted in a hospital by a pathologist, or conducted by a forensic pathologist. The CDC’s National Vital Statistics Report, which collates information on autopsy data, does not distinguish between the two types of autopsy in vital statistics data. “While two autopsy types are performed in the United States: a) hospital or clinical autopsies, which family or doctors request to clarify cause of death or assess care, and b) medicolegal autopsies, which legal authorities order to further investigate the circumstances surrounding death, the autopsy type is not distinguishable in vital statistics data.” See *Autopsies in the United States 2020*, Donna Hoyert, Ph.D., National Vital Statistics Report, Volume 72, Number 5, May 24, 2023.

To be sure, forensic autopsies and clinical autopsies differ in scope, type and focus. The variations in practice and focus are well documented in a publication entitled *Basic Competencies in Forensic Pathology – A Forensic Pathology Primer*, prepared jointly by the College of American Pathologists and the National Association of Medical Examiners in 2006. The differences between the two types of autopsy, however, do not change the common essence or core “primary purpose” of the autopsy, which is to provide the “final diagnosis” of the patient by establishing cause and manner of death and relating the cause of death to association pathologies and conditions.” See *Clinical v. Postmortem? The Importance of the Autopsy; a Retrospective Study*, Costache M, Lazaroiu AM, Contolenco A, et.al., *Journal of Clinical Medicine* 2014, 9(3) 261-265. Indeed, a review of the Basic Competencies publication cited above clearly demonstrates that the autopsy is the practice of medicine whether it is called for in the clinical setting or the medicolegal death investigation setting.

4. Forensic autopsies—many of which are never destined for courtrooms or litigation—remain medical diagnostic procedures, regardless of the source of authority ordering the autopsy.

Medicolegal death investigation systems vary widely from state to state. In many states, statutes dictate the enumerated officials, investigative categories, and circumstances that mandate autopsy. Some states authorize the coroner, medical examiner, sheriff, or other law enforcement of the respective counties to call the autopsy. Such statutes and reporting structures lead to fallacious assertions that the forensic pathologist conducts the autopsy for the purpose of providing evidence for law enforcement and judicial tribunals. The forensic pathologist performs the “forensic” part of his or her job by performing a specialized exam that differs from hospital autopsies. Nevertheless, the forensic pathologist is a physician first, and the primary purpose for conducting the autopsy is to ascertain medical diagnoses for decedents and public health systems.

Per the CDC’s publication entitled, *Table 2: Selected Characteristics of Deaths Requiring Autopsy by State*, L. Caucci and M. Warner, January 31, 2013, forensic/medicolegal autopsies may be ordered not only to determine if death was caused by unlawful means but may also be ordered if necessary to determine the nature of a public health threat or if authorities determine is in the public interest. Autopsies can be ordered in cases of suicide, environmental contamination, work or farm-related incidents, fire, explosion, drowning, death of a person who was apparently in good health, in-custody deaths that appear to be natural deaths, and myriad other circumstances that are not “focused on the court.”. Even in circumstances where a decedent presents with gunshot wounds or stab wounds, the forensic pathologist performs the autopsy to determine cause and manner of death and to report any contributory information and data relating to toxicology, underlying medical conditions, and other

findings necessary to discerning cause and manner of death. The forensic pathologist performs the same examination through autopsy regardless of whether the assailant is living and headed to court or dead. The primary purpose of the autopsy is clearly medical diagnosis focused on the patient, not process-focused on the court.

A key piece of information with which the reader may want to arm themselves is to document the number of autopsies performed per year, the reason for the autopsy, and the number of cases that proceed to litigation. Assumably, the number of autopsies performed for public health and noncriminal investigations will be significantly higher than the number of autopsies that proceed to criminal litigation, thereby demonstrating that a forensic autopsy is a tool for general medical diagnosis.

- Conclusion:

Smith v. Arizona, SCOTUS Docket No. 22-899, leaves Forensic Pathologists with the most cogent argument regarding the medical “primary purpose” of the autopsy, which renders the autopsy report’s “statements” nontestimonial. If the autopsy report is found to be nontestimonial, surrogate witness testimony would be admissible under *Smith*.

The reader will recall that each judge must make his or her own findings; therefore, the forensic pathologist will need to convince each attorney of the merits of this argument. The community will benefit from sharing any experiences related to the admissibility or suppression of autopsy testimony, records, and the *Smith* decision to EVP@TheNAME.org and with Dee McNally at NAME@theNAME.org, as acceptance by one court is likely to have precedential value with other courts and judges.