

AUTOPSY REPORTS, “TESTIMONIAL” OR “NON-TESTIMONIAL”?

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## I.

### HISTORICAL EVOLUTION OF THE CONFRONTATION CLAUSE

The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]”<sup>1</sup> The Supreme Court explained that, “Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination.”<sup>2</sup> In the context of cases involving out-of-court statements, there are situations in which the declarant is unavailable to provide live in-court testimony or be cross-examined. If within an exception to the hearsay rule, an out-of-court statement may be admitted in lieu of a declarant’s in-court testimony; however, under the Confrontation Clause, the accused has a right to cross-examine any witness against him. Thus, an out-of-court statement may be admissible according to the Federal Rules of Evidence standing alone, but its admission, without allowing the accused the opportunity to cross-examine the declarant, would arguably violate the Confrontation Clause. In such circumstances, an inherent conflict arises between the admission of hearsay under the exceptions to the hearsay rule of the Federal Rules of Evidence, and the Sixth Amendment’s Confrontation Clause.

#### A. THE CONFRONTATION CLAUSE PRE-*CRAWFORD*

In *Ohio v. Roberts*, the Supreme Court used a balancing test to approach such a situation, stating that “competing interests, if ‘closely examined,’ . . . may warrant dispensing with

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<sup>1</sup> U.S. CONST. amend. VI.

<sup>2</sup> *Delaware v. Fensterer*, 474 U.S. 15, 18 (1985).

confrontation at trial.”<sup>3</sup> The Court identified “a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings.” The Court held that evidence falling within a firmly rooted hearsay exception was admissible and did not violate the Confrontation Clause.<sup>4</sup> The *Roberts* court went on to say that evidence that doesn’t fit into a “firmly rooted” exception, but that has “particularized guarantees of trustworthiness,” as is required by Rule 807’s residual exception, would also be admissible and would not violate the Sixth Amendment’s Confrontation Clause.<sup>5</sup> Thus, *Roberts* in effect held that any evidence that complies with the requirements of any hearsay exception, whether it is “firmly rooted” or has “particularized guarantees of trustworthiness” within Rule 807’s residual exception, is admissible and its admission without an opportunity for cross-examination does not violate the Confrontation Clause.<sup>6</sup>

#### B. *CRAWFORD* AND THE “TESTIMONIAL” VS. “NON-TESTIMONIAL” DISTINCTION

In 2004, the Supreme Court decided *Crawford v. Washington*.<sup>7</sup> In *Crawford*, the petitioner argued, and the Court ultimately agreed, that the test from *Roberts*, which required only that the evidence fit within a firmly rooted hearsay exception or bear particularized guarantees of trustworthiness, “stray[ed] from the original meaning of the Confrontation

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<sup>3</sup> *Ohio v. Roberts*, 448 U.S. 56, 64 (1980).

<sup>4</sup> *Id.* at 66.

<sup>5</sup> *Id.* at 66.

<sup>6</sup> 30B Fed. Prac. & Proc. Evid. § 7032 (1st ed.) (“If it was good enough for the Federal Rules of Evidence, it was good enough for the confrontation clause.”)

<sup>7</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

Clause.”<sup>8</sup> Engaging in a historical analysis of the Confrontation Clause, the Court concluded that the history supports two inferences. The first of these inferences was that, “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”<sup>9</sup> Secondly, “that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”<sup>10</sup>

“First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”<sup>11</sup> Based upon this first inference, the Court rejected the idea that the Confrontation Clause’s application to out-of-court statements hinges on modern rules of evidence, stating that, “[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.”<sup>12</sup> The Court explained that the Sixth Amendment was primarily aimed at “testimonial” hearsay,<sup>13</sup> and that the Confrontation Clause “applies to ‘witnesses’ against the accused – in other words, those who ‘bear testimony.’”<sup>14</sup> The Court clarified, without specifically defining the term, that

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<sup>8</sup> *Id.* at 42.

<sup>9</sup> *Id.* at 50.

<sup>10</sup> *Id.* at 55-56.

<sup>11</sup> *Id.* at 50.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 53 (“In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object.”)

<sup>14</sup> *Id.* at 51.

“testimonial” evidence may include, (1) “*ex parte* in-court testimony or its functional equivalent,” included in this category are “material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,” (2) “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” or, finally, (3) “statements 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.”<sup>15</sup> Thus, the Confrontation Clause is aimed at statements within this “core class”<sup>16</sup> of testimonial statements.

The second proposition supported by this historical analysis was “that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”<sup>17</sup> Justice Scalia, writing for the majority, points out that:

The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the “right . . . to be confronted with the witnesses against him,” is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.<sup>18</sup>

Following this line of reasoning, Scalia concluded that because, under the common law in 1791, in order for testimony to be admissible without cross-examination the witness had to be

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<sup>15</sup> *Id.* at 51-52.

<sup>16</sup> *Id.* at 51.

<sup>17</sup> *Id.* at 55-56.

<sup>18</sup> *Id.* at 54 (internal citations omitted)

unavailable and the defendant had to have a prior opportunity to cross-examine the witness, these requirements are incorporated into the Sixth Amendment.<sup>19</sup>

Thus, after *Crawford*, evidence is testimonial when it fits into one of the “core classes” of testimonial statements delineated in *Crawford*, and in order for testimonial evidence to comply with the Confrontation Clause, the declarant must be unavailable and there must have been a prior opportunity for the accused to cross-examine the declarant.

### C. *DAVIS* AND POST-*CRAWFORD* INTERPRETATIONS OF “TESTIMONIAL”

Following the Supreme Court’s Decision in *Crawford*, courts have been left with little more than a non-exclusive list of examples of “testimonial” evidence. Thus, the Supreme Court has been challenged with deciding several more cases involving issues which turn on the definition of “testimonial” evidence.

In 2006, the Supreme Court faced such an issue in *Davis v. Washington*.<sup>20</sup> This decision involved two consolidated cases of domestic abuse. In one case, petitioner Davis was charged with felony violation of a no-contact order.<sup>21</sup> The trial court admitted a recording of the victim’s 911 phone call and Davis was convicted.<sup>22</sup> On appeal, the Court of Appeals and the Washington Supreme Court affirmed, holding that the tape was not testimonial, and that if any portions of the tape were testimonial, admitting those portions was harmless error.<sup>23</sup> In the second case, the

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<sup>19</sup> *Id.*

<sup>20</sup> *Davis v. Washington*, 547 U.S. 813 (2006).

<sup>21</sup> *Id.* at 818.

<sup>22</sup> *Id.* at 819.

<sup>23</sup> *Id.*

police responded to a domestic disturbance call at the Hammon home.<sup>24</sup> Amy Hammon was sitting on the front porch and appeared to be somewhat frightened, but nonetheless insisted that nothing was wrong.<sup>25</sup> Hershel Hammon told police that there was an argument, but that everything was fine.<sup>26</sup> Amy filled out and signed an affidavit, which was admitted at Hershel's trial, where he was convicted of domestic violence and violation of probation.<sup>27</sup> The Indiana Supreme Court found that the affidavit was testimonial in nature, but that its admission was harmless error, largely because this was a bench trial.<sup>28</sup>

The Supreme Court in *Davis* affirmed the lower courts, and again exercised judicial restraint, refusing to define the term testimonial in any exhaustive manner.<sup>29</sup> The Court explained that, “[t]he questioning that generated the deponent's statement in *Crawford* – which was made and recorded while she was in police custody, after having been given *Miranda* warnings as a possible suspect herself – qualifies under any conceivable definition of an interrogation.”<sup>30</sup> Because the statement in *Crawford* was so clearly testimonial nature the Court refused to define the term “testimonial” in that case.<sup>31</sup> However, in *Davis* the Court was forced to go farther in defining “testimonial,” noting that “[t]he character of the statements in the present cases is not as clear, and these cases require us to determine more precisely which police

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 820-21.

<sup>28</sup> *Id.* at 821.

<sup>29</sup> *See id.* at 822.

<sup>30</sup> *Id.* at 822.

<sup>31</sup> *Id.*

interrogations produce testimony.”<sup>32</sup> Without defining testimonial any more precisely than necessary for the disposition of that case, the Court held that:

Statements 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. They are *testimonial* when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>33</sup>

Thus, though this is a relatively narrow holding, and its focus is specifically on police interrogations, the Court found it particularly significant to determine whether the potential piece of evidence was prepared to prove past events with an expectation of future criminal prosecution. The Court’s holding centered mainly around the facts from the first of the consolidated cases, involving petitioner Davis, as it found that the statements of Hershel Hammon, “were not much different from the statements we found to be testimonial in *Crawford*.”<sup>34</sup> In *Davis*, the 911 call was made, not for the purpose of proving “past events potentially relevant to a later criminal prosecution,” but for the purpose of responding to an ongoing emergency.<sup>35</sup> The Court explained that in *Davis*, the victim “was speaking about events *as they were actually happening*, rather than ‘describ[ing] past events[.]’”<sup>36</sup> Additionally, the victim was facing an ongoing emergency, and when objectively viewed, it is clear that this call was made for the purpose of responding to and resolving that emergency.<sup>37</sup> Finally, the Court noted the “striking” difference in formality

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 829.

<sup>35</sup> *Id.* at 827

<sup>36</sup> *Id.* at 827 (quoting *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion)).

<sup>37</sup> *Id.* at 827



between the statements in *Crawford* and *Davis*, stating that “Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even . . . safe.”<sup>38</sup>

The crux of the *Davis* holding centered on the purpose for the making of the statements. A 911 call, made during an ongoing emergency, which described events as they were occurring, rather than describing past events, was not testimonial. However, a statement made to police that described past events potentially relevant to a future prosecution was held to be testimonial.

#### D. MELENDEZ-DIAZ: APPLYING THE CONFRONTATION CLAUSE TO LAB REPORTS

In 2009, in *Melendez-Diaz v. United States*, the Supreme Court was faced with yet another Confrontation Clause issue.<sup>39</sup> The issue in *Melendez-Diaz* was whether a lab report concluding that a substance was cocaine was “testimonial” for Confrontation Clause purposes. Melendez-Diaz was convicted of distribution and trafficking of cocaine.<sup>40</sup> Several bags containing a white substance, which were found in the back of the police cruiser that Melendez-Diaz was driven to the station in, were sent to the crime lab for forensic analysis.<sup>41</sup> At trial, the bags containing the white substance were entered into evidence, along with three “certificates of analysis” which stated that the forensic analysis concluded that substance contained in the bags was cocaine.<sup>42</sup> On appeal, Melendez-Diaz argued that the admission of the certificates of

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<sup>38</sup> *Id.*

<sup>39</sup> *Melendez-Diaz v. United States*, 129 S.Ct. 2527 (2009).

<sup>40</sup> *Id.* at 2531.

<sup>41</sup> *Id.* at 2530

<sup>42</sup> *Id.* at 2530-31

analysis, without an opportunity to cross-examine the analyst who prepared them, was a violation of the Confrontation Clause.<sup>43</sup> The Massachusetts Court of Appeals affirmed the conviction, relying on the decision in *Commonwealth v. Verde*,<sup>44</sup> “which held that the authors of certificates of forensic analysis are not subject to confrontation under the Sixth Amendment.”<sup>45</sup> After the Massachusetts Supreme Judicial Court denied review, the U.S. Supreme Court granted certiorari.<sup>46</sup>

The Court likened the certificates of analysis to affidavits, which *Crawford* plainly stated are within the “core class of testimonial statements,” explaining that, “[t]he documents at issue here, while denominated by Massachusetts law ‘certificates,’ are quite plainly affidavits.”<sup>47</sup> In further demonstrating the testimonial nature of the certificates, the Court stated that “[t]he fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine – the precise testimony the analysts would be expected to provide if called at trial.”<sup>48</sup> Also pertinent to the Court’s holding was the fact that the certificates “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.”<sup>49</sup> The sole purpose of the certificates, as stated by the Massachusetts law under which they are prepared, “was to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed

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<sup>43</sup> *Id.* at 2531

<sup>44</sup> *Commonwealth v. Verde*, 827 N.E.2d 701, 705-706 (Mass. 2005)

<sup>45</sup> *Melendez-Diaz*, 129 S.Ct. at 2531 (citing *Verde*, 827 N.E.2d at 705-706).

<sup>46</sup> *Id.* at 2531.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (quoting *Crawford*, 541 U.S. at 52).

substance.”<sup>50</sup> Thus, the statute gave rise to a reasonable belief that the statement would be available for use as evidence at a later criminal trial.<sup>51</sup> The Supreme Court stated that “this case involves little more than the application of our holding in *Crawford*,”<sup>52</sup> and concluded that, “[t]here is little doubt that the documents at issue in this case fall within the ‘core class of testimonial statements’ . . . described [in *Crawford*].”<sup>53</sup>

Justice Scalia, writing for the majority in *Melendez-Diaz*, rejected several arguments presented by the respondent. First, he rejected the contention that the analysts who prepare the lab reports are not “accusatory witnesses,” and thus, are not subject to the Confrontation Clause.<sup>54</sup> Scalia explained that, “[w]hile the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses ‘against him,’ the Compulsory Process Clause guarantees a defendant the right to call witnesses ‘in his favor.’”<sup>55</sup> Thus, there are “two classes of witnesses – those against the defendant and those in his favor.”<sup>56</sup> Scalia concluded that no third category of “accusatory” witnesses exists, and that the lab report analysts in this case were clearly witnesses against the defendant, which the defendant has the right to cross-examine.<sup>57</sup>

Second, the Court rejected the argument that the defendant had no right to confront the analysts because they were not “conventional witnesses” at which the Confrontation Clause was

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<sup>50</sup> *Id.* (quoting Mass Gen Laws ch. 111, § 13).

<sup>51</sup> *Crawford*, 541 U.S. at 52.

<sup>52</sup> *Id.* at 2542.

<sup>53</sup> *Id.* at 2532.

<sup>54</sup> *Melendez-Diaz*, 129 S.Ct. at 2533-34.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

historically aimed.<sup>58</sup> The majority rejects this argument on three grounds. The Court refused to hold that the Confrontation Clause did not apply to the analysts based on any argument that “conventional witness recalls events observed in the past, while an analyst’s report contains near-contemporaneous observations of the test[;]” that the analysts are not conventional witnesses because they did observe any crime or human action related to it; or that “their statements were not provided in response to interrogation.”<sup>59</sup>

Third, the respondent argued, and the dissent agreed, that the scientific nature of the testimony makes it distinct from testimony which recalls past events.<sup>60</sup> This argument is based on the idea that recalling past events is “prone to distortion or manipulation,” while lab analysts simply record scientific findings and would be unlikely to testify in court to anything different to the information recorded in the lab report.<sup>61</sup> In response, the *Melendez-Diaz* Court stated that “[t]his argument is little more than an invitation to return to our overruled decision in [*Roberts*.]” The Court said that this amounted to an argument that the testimony is clearly reliable, and thus, reliability need not be tested through cross-examination.<sup>62</sup> Referring to *Crawford*, the Court explained the flawed logic of this argument, stating that the Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>63</sup>

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<sup>58</sup> *Id.* at 2534.

<sup>59</sup> *Id.* at 2535.

<sup>60</sup> *Id.* at 2536.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (quoting *Crawford*, 541 U.S. at 61-62).

In sum, the *Melendez-Diaz* Court found the certificates of analysis to be testimonial because of they were “quite plainly affidavits.” The Court referred the list of the “core class of testimonial statements” created in *Crawford* to determine that, as affidavits, the certificates were testimonial.<sup>64</sup> However, the Court also placed significant emphasis on the fact that the certificates were created with a reasonable belief that they could be used at a criminal trial in the future.<sup>65</sup> Because neither *Crawford* nor *Melendez-Diaz* created an exhaustive definition of “testimonial” evidence, the key inquiry remains vague: whether the statements fit within one of the “core classes” of testimonial statements.

## II.

### “TESTIMONIAL” HAS BEEN INTERPRETED BY SEVERAL STATES TO MEAN PREPARED UNDER BELIEF THAT THE STATEMENT MAY BE USED AT TRIAL

Several states to decide cases involving scientific evidence under the Confrontation Clause have turned on whether the statement was made with the reasonable belief that it may be used in a future criminal trial. The Minnesota Supreme Court, in *State v. Caufield*, though decided in 2006, before the Supreme Court’s ruling in *Melendez-Diaz*, was faced with a very similar factual scenario to that in *Melendez-Diaz*.<sup>66</sup> Caufield was an employee at a local pub in Rochester, Minnesota, who was arrested for possession of a controlled substance.<sup>67</sup> Field tests conducted on the substance concluded that it was cocaine.<sup>68</sup> Subsequently, the substance was

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<sup>64</sup> *Id.* at 2531.

<sup>65</sup> *Id.*

<sup>66</sup> *State v. Caufield*, 722 N.W.2d 306 (Minn. 2006).

<sup>67</sup> *Id.* at 306.

<sup>68</sup> *Id.*

sent to a lab for testing, which confirmed that the substance was cocaine.<sup>69</sup> The trial court admitted the lab report, despite the fact that the analyst that prepared the report was not available for cross-examination, and Caufield was convicted. The court in *Caufield* said that “the critical determinative factor in assessing whether a statement is testimonial is whether it was prepared for litigation.”<sup>70</sup>

In *State v. Kent*, the Superior Court of New Jersey, Appellate Division, found that results from a blood test conducted on a defendant at the hospital after a drunk driving accident were testimonial because there “was no ‘ongoing emergency’” and it could not “reasonably be argued that the ‘primary purpose’ of the lab certificate was anything other than to prove past events, specifically defendant’s blood alcohol concentration, relevant to his DWI prosecution.”<sup>71</sup> Thus, New Jersey has held that statements that are not made during an ongoing emergency, and that were intended to prove past events potentially relevant to a future criminal prosecution, are testimonial.

In *Cuadros-Fernandez v. State*, the Texas Court of Appeals found that the results of DNA analysis performed on a cabinet door that struck the victim’s head were testimonial in nature, even though the results were not offered in the form of an affidavit.<sup>72</sup> The *Cuadros-Fernandez* court did not focus on *Melendez-Diaz*’s classification of the certificates in that case as affidavits, explaining that:

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 309.

<sup>71</sup> *State v. Kent*, 918 A.2d 626, 637 (N.J. 2007).

<sup>72</sup> *Cuadros-Fernandez v. State*, \_\_ S.W.3d \_\_, 2009 WL 2647890 at 9 (Tex. App. Dallas 2009).

The Supreme Court did not end its analysis with its observation that the certificates were affidavits; it also looked to the substance of the certificates to determine if they 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*” and to the use of the affidavits to determine if they were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’”<sup>73</sup>

Thus, once again the focus of the analysis is on the circumstances surrounding the statement and whether those circumstances would create a reasonable belief that the statement could be used at a later trial. The mere fact that the statements were not affidavits or other sworn statements did not render them non-testimonial.

### III.

#### AUTOPSY REPORTS UNDER CRAWFORD AND MELENDEZ-DIAZ

Before Melendez-Diaz, the consensus among courts faced with determining the admissibility of autopsy reports since *Crawford*, is that autopsy reports are not testimonial, and thus are admissible.<sup>74</sup> Courts have used several different modes of reasoning in concluding that autopsy reports are not testimonial, however, none seem to be truly in line with the Supreme Court’s holdings in *Crawford* and *Melendez-Diaz*. Courts have found autopsy reports non-testimonial based primarily on the substantive reliability of the statements, an approach specifically rejected by the Supreme Court in *Crawford*. Some courts have claimed an exception to the Confrontation Clause for statements that qualify as business records, and others have focused on the nature of the statements as factual or analytical.

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<sup>73</sup> *Id.* (quoting, *Crawford*, 541 U.S. at 52; *Davis*, 547 U.S. at 830) (emphasis added).

<sup>74</sup> Carolyn Zabrycki, *Toward a Definition of “Testimonial”*: How autopsy reports do not embody the qualities of a testimonial statement, 96 CAL. L. REV. 1093, 1100 (2008).

#### A. IMPROPER EXCEPTION FOR BUSINESS RECORDS

Federal Rule of Evidence 803(6) provides for an exception to the hearsay rule for business records. Under Rule 803(6), in order for a piece of evidence to qualify as a business record and consequently be excepted from the scope of the hearsay rule, (1) it must have been prepared in the normal course of business – i.e. made in the regular course of a regularly conducted business activity and it was the regular practice of that business to make such a memorandum, (2) it must have been created at or near the time of the events recorded, and (3) it must be based on information that is the personal knowledge of the declarant, or information that is the personal knowledge of an informant who was under a business duty to relay the information to the declarant.<sup>75</sup>

In *United States v. Feliz*, 467 F.3d 227 (2d Cir. 2006), the Second Circuit found that autopsy reports were not testimonial because they fit into both the business records and the public records exceptions to the Federal Rules of Evidence.<sup>76</sup> Thus, *Feliz* illustrates the view that statements that fall within these hearsay exceptions are not testimonial, as they are not created for trial. Importantly, it is not because the autopsy report fit within a “firmly rooted” hearsay exception, but because it was found not to be testimonial, that the Confrontation Clause was not invoked. This decision came three years before the Supreme Court’s decision in *Melendez-Diaz*, where Justice Scalia stated:

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<sup>75</sup> See, 5 Weinstein’s Federal Evidence §803.08[1].

<sup>76</sup> *United States v. Feliz*, 467 F.3d 227, 237 (2d Cir. 2006).



Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but 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. Whether or not they qualify as business or official records, the analysts' statements here – prepared specifically for use at petitioner's trial – were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

If an autopsy report was prepared for litigation, it will likely be inadmissible under Rule 803(6)'s business records exception anyway.<sup>77</sup> However, this analysis begs the question, what if the certificates were not prepared specifically and solely for use at trial? If an autopsy report was conducted in the routine course of business, and later investigation uncovered criminal activity surrounding the death, would the report be admissible as a business record? In order for the Supreme Court's departure from *Roberts* to have any significance, the answer must depend on the circumstances surrounding the statement, and whether there was an objectively reasonable belief that the statement would be available for use at trial. To admit statements based on their classification within hearsay exceptions alone, without acknowledging that a reasonable belief that they may be used at a later trial would make them testimonial, would be nothing more than a return to the overruled *Roberts* test.

#### A. IMPROPER FACT/OPINION DISTINCTION

In a post-*Crawford*, but pre-*Davis* and *Melendez-Diaz* decision, the Maryland Court of Appeals, in *Rollins v. State*, found an autopsy report to be non-testimonial.<sup>78</sup> The *Rollins* court held that the statements in the autopsy report were routine and descriptive, and “were non-

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<sup>77</sup> See, 5 Weinstein's Federal Evidence §803.08[6][d] (“Material prepared for litigation poses special problems under the rule and is typically inadmissible, either as having not been prepared in the regular course of business or as having indications of lack of trustworthiness.”).

<sup>78</sup> *Rollins v. State*, 897 A.2d 821(Md. 2006).

analytical findings that we do not view to be part of the core class of testimonial statements that the Confrontation Clause is intended to prevent.”<sup>79</sup> One reason for the court’s holding was that the autopsy report in that case had been redacted to exclude all testimonial statements, according to the Maryland court’s understanding of that term, by excluding all opinions and references to cause or manner of death.<sup>80</sup> The *Rollins* court went on to say that: “Where, however, contested conclusions or opinions in an autopsy report are central to the determination of *corpus delecti* or criminal agency and are offered into evidence, they serve the same function as testimony and trigger the Sixth Amendment right of confrontation.”<sup>81</sup>

The court purported to determine whether autopsy reports may be testimonial by determining, under *Crawford*, whether they fell into the category of “statements 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.”<sup>82</sup> However, the court quickly turned its focus to whether or not the reports were conducted for the “sole purpose” of being used at trial, and concluded that because such reports are not always used at trial, the proper inquiry is whether the individual statements within the report are testimonial in nature.<sup>83</sup> In determining whether the statements within the report were testimonial, the court focused on whether the statements were opinions or observations, ignoring the *Crawford* analysis that the court acknowledged as the proper analysis in this case – whether the statements “were made under

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<sup>79</sup> *Id.* at 839-40.

<sup>80</sup> *Id.* 824.

<sup>81</sup> *Id.* at 841.

<sup>82</sup> *Crawford*, 451 U.S. at 52.

<sup>83</sup> *Rollins*, 897 A.2d at 840-41 (Md. 2006).

circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”

The origin of this observation versus opinion analysis is unknown, and in reviewing this decision, scholars have noted that there is no basis in any of the Supreme Court’s earlier decisions for the distinction expressed in *Rollins* which differentiates objective and opinion statements.<sup>84</sup> Additionally, such a distinction would be quite difficult to apply in practice. In *Rollins*, statements that the eyes were “cloudy” and statements which used other descriptive terms such as “acute” and “chronic” were classified as factual findings, thus non-testimonial and admissible. However, these sorts of observational statements are certainly capable of being classified as opinions, and thus testimonial statements, making the application of this standard highly impractical.<sup>85</sup>

Additionally, and perhaps most importantly, an analysis based on the nature of the statement as factual or analytical is patently inconsistent with the purpose-driven analysis of *Crawford*. In *Crawford*, Sylvia Crawford’s statement made to police that she did not see a weapon in Michael Crawford’s hand was found to be testimonial, as it was made under circumstances that would lead Sylvia to believe that it would be used at trial; however, this statement was a factual statement, that under the analysis proposed by the *Rollins* court and other courts that make a factual/analytical distinction, would be non-testimonial.<sup>86</sup> Thus, this

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<sup>84</sup> See Steven N. Yermish, *Melendez-Diaz and the Application of Crawford in the Lab*, 33 *Champion* 28, 31 (2009) (“There is little basis for the distinction expressed in *Rollins* and similar cases.”); Cyrus P.W. Rieck, *How to Deal With Laboratory Reports Under Crawford v. Washington: A Question With No Good Answer*, 62 *U. MIAMI L. REV.* 839, 863 (2008) (“there is no basis in *Crawford* or *Davis* for differentiating between “objective” and “opinion” statements.”).

<sup>85</sup> See Zabrycki, 96 *CAL. L. REV.* at 1110.

<sup>86</sup> *Id.* at 1110.

fact/opinion distinction is simply irreconcilable with the seminal Supreme Court decision which established “testimonial” evidence as the standard for Confrontation Clause analysis.

B. POST *MELLENDEZ-DIAZ* TREATMENT OF AUTOPSY REPORTS.

Since *Melendez-Diaz*, many courts have found autopsy reports, under the circumstances of those particular cases, to be testimonial. These courts have undoubtedly applied the testimonial/non-testimonial distinction in a manner far more reconcilable with the decisions in *Crawford* and *Melendez-Diaz*.

In the 2009 case, *People v. Dungo*, the California Court of Appeals found that an autopsy report, under the circumstances of that case, was testimonial.<sup>87</sup> The court highlighted that the report was made amidst a homicide investigation, that the findings were statutorily required to be reduced to writing or preserved, and that the coroner was statutorily required to report to the appropriate law enforcement agency in the event that criminal activity was suspected.<sup>88</sup> This statutory obligation, along with the circumstances surrounding the reports preparation, certainly appears to give rise to a reasonable belief that the report would be available for use at a later trial. While an appeal is pending in this case, the crux of the appeal appears to involve whether the testimony of another expert, based on the findings of an autopsy report performed by an unavailable medical examiner, violates the Confrontation Clause, and not whether the autopsy report itself is testimonial.<sup>89</sup>

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<sup>87</sup> *People v. Dungo*, 98 Cal.Rptr.3d 702 (Cal. Ct. App. 2009), *review granted*, 220 P.3d 240 (Cal. 2009).

<sup>88</sup> *Id.* at 710.

<sup>89</sup> “The parties will brief and argue the following issues: (1) Was defendant denied his right of confrontation under the Sixth Amendment when one forensic pathologist testified to the manner and cause of death in a murder case based upon an autopsy report prepared by another pathologist? (2) How does the decision of the United States Supreme Court in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ----, 129 S.Ct. 2527, 174 L.Ed.2d 314, affect

In *State v. Locklear*, the Supreme Court of North Carolina held that “when the State seeks to introduce forensic analyses, ‘[a]bsent a showing that the analysts [are] unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them’ such evidence is inadmissible under *Crawford*.”<sup>90</sup> While, the *Locklear* court found that the admission of the autopsy report was harmless error, the court stated that “the admission of such evidence violated defendant's constitutional right to confront the witnesses against him, and the trial court therefore erred in overruling defendant's objections.”<sup>91</sup>

In *Wood v. State*, while holding that the autopsy report was testimonial, the Texas Court of Appeals qualified it’s holding, stating that:

*We do not hold that all autopsy reports are categorically testimonial.* In this case, however, the circumstances surrounding Wessberg's death warranted the police in the suspicion that his death was a homicide, and there is evidence that this is exactly what the police did suspect. The homicide detective who was the lead investigator in this case and a police evidence specialist attended the autopsy of Wessberg's body. *Under these circumstances*, it is reasonable to assume that Colemeyer understood that the report containing her findings and opinions would be used prosecutorially.<sup>92</sup>

Thus, the court applied *Crawford* and *Melendez-Diaz* and inquired whether the examiner that performed the autopsy did so “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,”<sup>93</sup> and found

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this court's decision in *People v. Geier* (2007) 41 Cal.4th 555, 61 Cal.Rptr.3d 580, 161 P.3d 104?” Order Granting Petition for Review, 102 Cal.Rptr.3d 282 (Cal. 2009).

<sup>90</sup> *People v. Locklear*, 681 S.E.2d 283, 305 (N.C. 2009).

<sup>91</sup> *Id.*

<sup>92</sup> *Wood v. State*, 299 S.W.3d 200, 209-10 (Tex. Ct. App. 2009) (emphasis added).

<sup>93</sup> *Melendez-Diaz*, 129 S. Ct. at 2529 (quoting *Crawford*, 541 U.S. at 52).

that, “[u]nder these circumstances, it is reasonable to assume that [the medical examiner] understood that the report containing her findings and opinions would be used prosecutorially.”<sup>94</sup>

### III.

#### HOW SHOULD *CRAWFORD* BE APPLIED TO AUTOPSY REPORTS?

The open-ended definitions of “testimonial” offered by the Supreme Court in *Crawford*, *Davis*, and *Melendez-Diaz*, coupled with the inconsistent application of this rule by the states, makes it seemingly unavoidable that this definition will be revisited in future cases. Autopsy reports are often the most critical pieces of evidence in criminal trials involving the death of an individual. The question of whether findings and conclusions in autopsy reports should be considered testimonial for Confrontation Clause purposes is one that has not yet been addressed by the Supreme Court. The following outlines how the Confrontation Clause jurisprudence should evolve in the context of autopsy reports.

#### A. A STRICT APPLICATION OF *CRAWFORD*’S “CORE CLASS” ANALYSIS WILL RESULT IN A CONCLUSION THAT MOST AUTOPSY REPORTS ARE TESTIMONIAL

In *Crawford*, the Court provided a list of “core classes” of testimonial statements, all of which seemed to be formal documents prepared to function in much the same way as live in-court testimony, or statements made under circumstances that would give rise to an objectively reasonable belief that the statement may be used in a future trial.<sup>95</sup> In *Melendez-Diaz*, the Court relied on both the formal nature of the certificates of analysis, and the fact that they were prepared under an objectively reasonable belief that they could be used at a later criminal trial.<sup>96</sup>

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<sup>94</sup> *Wood*, 299 S.W.3d at 210.

<sup>95</sup> *See Crawford*, 541 U.S. at 42.

<sup>96</sup> *Melendez-Diaz*, 129 S.Ct. at 2531.

Thus, the important criteria, although significantly intertwined, appear to be whether the statements are formalized in nature, whether they are prepared under a reasonable belief that they could be used at a later criminal trial, and whether they would operate as the functional equivalent of live in-court testimony.

*Crawford* stated, and *Melendez-Diaz* reiterated, that testimonial statements include “statements ... contained in formalized testimonial materials.”<sup>97</sup> In describing what it meant by formalized testimonial materials, the Court listed several examples: “affidavits, depositions, prior testimony, or confessions”<sup>98</sup> In finding the certificates of analysis in *Melendez-Diaz* testimonial, the Court gave credence to the fact that the certificates were signed and notarized, and that “[t]he ‘certificates’ are functionally identical to live, in-court testimony, doing “precisely what a witness does on direct examination.”<sup>99</sup> The Court concluded that the certificates were “quite plainly affidavits: ‘declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.’”<sup>100</sup>

Just like the certificates in *Melendez-Diaz*, autopsy reports may fairly be characterized as “solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact.”<sup>101</sup> While autopsy reports may not be required to be notarized as the certificates in *Melendez-Diaz* were, they are generally required to bear the signature of the medical examiner that performed the autopsy. Autopsy reports are conducted by medical examiners for the

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<sup>97</sup> *Id.* (quoting *Crawford*, 541 U.S. at 51-52).

<sup>98</sup> *Id.*

<sup>99</sup> *Melendez-Diaz*, 129 S.Ct. at 2532 (citing *Davis*, 547 U.S. at 830).

<sup>100</sup> *Id.* at 2532 (quoting Black's Law Dictionary 62 (8th ed.2004)).

<sup>101</sup> *Id.* at 2531 (quoting *Crawford*, 541 at 51).

specific purpose of determining the cause of death, and thus, contain the precise testimony that would be given at trial on direct examination, and appear to be testimonial in nature.<sup>102</sup>

The *Melendez-Diaz* Court relied on the list of testimonial statements provided by *Crawford*, which referred to affidavits twice, concluding that because the “certificates” were affidavits, they were within the “core class of testimonial statements.” However, the fact that autopsy reports may not be “sworn to by the declarant before an officer authorized to administer oaths,”<sup>103</sup> does not render them non-testimonial as a matter of law. In *Davis*, the statements made to police were found to be testimonial despite the fact that they were not sworn statements. Thus, the sworn nature of the statements in *Melendez-Diaz* was a factor weighing in favor of their classification as testimonial, rather than an all or nothing requirement.

One common thread among *Crawford*, *Davis*, and *Melendez-Diaz*, is that each decision acknowledged that statements are testimonial when made with a reasonable belief that the statements could be used as evidence in a future criminal trial.<sup>104</sup> The *Melendez-Diaz* Court found it particularly important that the certificates of analysis in that case were prepared under a reasonable belief that they could be used in a future criminal trial.<sup>105</sup> While the relevant statute in that case specifically stated that “the *sole purpose* of the affidavits was to provide ‘prima facie

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<sup>102</sup> *See id.* at 2532.

<sup>103</sup> *Id.* (quoting Black's Law Dictionary 62 (8th ed.2004)).

<sup>104</sup> *Melendez-Diaz*, 129 S.Ct. at 2532 (“not only were the affidavits ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, but under Massachusetts law the *sole purpose* of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance.” (internal citations omitted)); *Davis*, 547 U.S. at 822 (“[statements] are testimonial when . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”); *Crawford*, 541 U.S. at 52 (explaining that testimonial statements include, “statements 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.”).

<sup>105</sup> *Melendez-Diaz*, 129 S.Ct. at 2532.



evidence of the composition, quality, and the net weight’ of the analyzed substance,”<sup>106</sup> this did not create a requirement that the “sole purpose” of the statement must be the provision of evidence for trial. That a statement is created for the sole purpose of trial is a sufficient, but not a necessary condition for admissibility. The standard from *Crawford, Davis, and Melendez-Diaz*, remains that there must have been a reasonable belief that the statement would be available for use at a later trial.

The nature of a medical examiner’s work should give rise to an objectively reasonable belief that autopsy reports may be available for use at a later trial. Medical examiners perform autopsy reports for one reason, to establish or prove past events – i.e. to determine the cause of death. Because autopsy reports have consistently been used in criminal prosecutions involving homicide, a reasonable medical examiner would know that his or her autopsy report may be used in a later criminal prosecution. In fact, many state statutes call for reporting to the appropriate law enforcement agency when it becomes apparent to the medical examiner that criminal activity may have been involved in an individual’s death. For instance in Alaska, the statute states in pertinent part: “If the findings and conclusions indicate that the death may have been caused by criminal means, the state medical examiner or the deputy medical examiner shall submit a copy of the report to the district attorney responsible for prosecutions in the location where the death occurred.”<sup>107</sup> Certainly under these circumstances, it should be even clearer to a medical examiner that his or her report may be available for use in a later trial.

Even in instances when a medical examiner finds no possibility of criminal activity, he or she may be required to turn the autopsy report over to law enforcement. Under certain statutes, a

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<sup>106</sup> *Id.* (quoting Mass Gen Laws ch. 111, § 13).

<sup>107</sup> ALASKA STAT. § 12.65.020 (2010).

medical examiner's conclusion that the cause of death was natural would not extinguish the objectively reasonable belief that the autopsy report may be used at some later trial. Regardless of a medical examiner's conclusions regarding cause of death, state laws often impose on medical examiners a duty to furnish an autopsy report to the appropriate government authority upon request.<sup>108</sup> For example, subsection F. of the Arizona statute states that, "[a] county attorney may request and upon request shall receive from the county medical examiner or alternate medical examiner a copy of the report on any autopsy performed." Thus, under such a statutory scheme it can be argued that a medical examiner is on constant notice that his or her report may be used in a later criminal trial.

Additionally, an autopsy report is the functional equivalent of the live in court testimony that the examiner would provide. In homicide cases, evidence regarding the cause of death is imperative. In cases where a medical examiner is unavailable, the autopsy report would be admitted for the purpose of establishing exactly what the medical examiner would attempt to establish on direct examination, the cause of death. Thus, autopsy reports, like the certificates of analysis in *Melendez-Diaz*, are "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'"<sup>109</sup> Thus it appears that an autopsy report, under the analysis set forth in *Crawford*, would generally qualify as testimonial statements.

**B. MAY ANOTHER EXPERT TESTIFY BASED ON AN AUTOPSY REPORT PREPARED BY AN UNAVAILABLE MEDICAL EXAMINER WITHOUT VIOLATING THE CONFRONTATION CLAUSE?**

A conclusion that autopsy reports are testimonial could prove to be a giant hurdle in the prosecution of "cold case" murders, and other prosecutions in which the medical examiner who

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<sup>108</sup> See; ARIZ. REV. STAT. § 11-597 (2010); CAL GOV'T CODE § 27491.1 (West 2010);

<sup>109</sup> *Melendez-Diaz*, 129 S.Ct. at 2532.

prepared the autopsy report is not available for cross-examination. Prosecutors could be left unable to use the most critical piece of evidence in many cases. In this situation, prosecutors may choose to call another expert to testify based on the autopsy report, without admitting the report itself as evidence, or calling the medical examiner who prepared the report to testify. This approach to using autopsy reports raises another pivotal issue: If the autopsy report is testimonial, and thus inadmissible without the opportunity to cross-examine the preparing medical examiner, should another expert be allowed to testify using his own opinion based on factual findings in the report?

1. *People v. Dungo*

This very issue is awaiting review at the California Supreme Court at this time. In *People v. Dungo*, the defendant was convicted of second degree murder for strangling his wife to death.<sup>110</sup> The defendant admitted that he choked his wife, but only after he was provoked to the point of losing all control, and thus, he should be guilty of voluntary manslaughter at the most.<sup>111</sup> A very critical fact in contention was the duration of the choking, which tended to show whether defendant was guilty of murder or manslaughter.<sup>112</sup> The autopsy report was not admitted to evidence, and another expert, Dr. Lawrence, who was the supervisor of Dr. Bolduc, the examiner that prepared the report, testified regarding cause of death and the duration of choking.<sup>113</sup> This case is relatively unique because, rather than dealing with an unavailable medical examiner, this case dealt with a prosecutor's choice to use the testimony of Dr. Lawrence, rather than that of Dr.

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<sup>110</sup> *Dungo*, 98 Cal.Rptr.3d at 704.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

Bolduc, because of Dr. Bolduc's less than perfect professional history. "Dr. Bolduc had been fired from Kern County and had been allowed to resign 'under a cloud' from Orange County and that both Stanislaus and San Joaquin Counties refused to use him to testify in homicide cases."<sup>114</sup>

At trial, the court found that because the report itself wasn't introduced, the *Crawford* analysis wasn't invoked, and that allowing Dr. Lawrence to testify based on Dr. Bolduc's report did not present a Sixth Amendment issue because "experts can rely on hearsay to help form their opinions and it doesn't call into effect the *Crawford* issue because that's not being used for the truth of the matter, that's just what he based his opinion on."

The appellate court held that the autopsy report was testimonial, as it was prepared amidst a homicide investigation, and that Dr. Bolduc was a "witness" for purposes of the Sixth Amendment.<sup>115</sup> The court went on to conclude that allowing Dr. Lawrence to testify based on Dr. Bolduc's autopsy report violated the defendant's right of confrontation because there was no showing that Dr. Bolduc, who prepared the autopsy report, was unavailable, or that there was a prior opportunity for defendant to cross-examine him.<sup>116</sup> The Court of Appeals recognized that "this case illustrates the inadequacies of substitute cross-examination[.]" explaining that "[w]hile Dr. Lawrence generally was aware of Dr. Bolduc's work history, Dr. Lawrence was unable to respond to specific questions concerning Dr. Bolduc's alleged incompetence in prior cases."<sup>117</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 705.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 714.

On appeal, the petitioner will rely on the 2007 case, *People v. Beeler*.<sup>118</sup> In this case, Dr. Fukumoto testified “regarding the autopsy procedures of the office and further testified that standard operating procedures were followed in the Stevenson autopsy and in the documentation of the autopsy.”<sup>119</sup> Although the examiner that prepared the report, Dr. Bolduc (the same Dr. Bolduc), was not made available for cross-examination, the report in *Beeler* was admitted based on its classification as a business record.<sup>120</sup> The petitioner also contends that based on *People v. Greier*, an expert may testify based upon a report that he or she did not prepare.<sup>121</sup>

The respondent will argue that “[t]o the extent that the appellate court's holding is inconsistent with this Court's precedent, that result was dictated by the holding and reasoning of the United States Supreme Court's decision in *Melendez-Diaz*.”<sup>122</sup> The respondent contends that *Melendez-Diaz* made it extremely clear that a statement's qualification as a business record does not affect the Confrontation Clause analysis, and that it is the objectively reasonable belief that the statement may be used at trial that is dispositive.<sup>123</sup> Attacking the petitioner's reliance on *Grier*, the respondent points out that “the ruling in *Geier* rested on this Court's conclusion that the laboratory report at issue was not testimonial hearsay, a conclusion that cannot be sustained in light of the decision in *Melendez-Diaz*.”<sup>124</sup>

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<sup>118</sup> Petition for Review at 5, *People v. Dungo*, 220 P.3d 240 (October 2, 2009).

<sup>119</sup> *People v. Beeler*, 891 P.2d 153, 168 (Cal. 1995).

<sup>120</sup> *Id.* at 167.

<sup>121</sup> Petition for Review at 6.

<sup>122</sup> Answer to Petition for Review at 1-2, *People v. Dungo*, 220 P.3d 240 (October 23, 2009).

<sup>123</sup> *Id.* at 4.

<sup>124</sup> *Id.* at 5 (internal citations omitted).

## 2. *Wood v. State*

In *Wood v. State*, the defendant was convicted of the murder of George Wessberg.<sup>125</sup> The medical examiner that prepared the autopsy report was not called to testify at trial, [i]nstead, the State called the chief medical examiner, Dr. David Dolinak, who had not been present at the autopsy, to testify regarding the examination of the body and to give his opinions regarding Wessberg's injuries and the cause of his death.”<sup>126</sup> Over the defense counsel’s objections, Dr. Dolinak was permitted to testify to his own opinions, based on his review of the autopsy report, and the defendant was convicted.

On appeal, the appellant argued that this violated the defendant’s right to cross examination under the Confrontation Clause.<sup>127</sup> Unconvinced by the appellee’s reliance on pre-*Melendez-Diaz* cases, the court held that the autopsy report in this case was testimonial.<sup>128</sup> However, the court noted that, “this does not resolve the issue because the autopsy report was not introduced in evidence.”<sup>129</sup> Thus, the court determined whether Dr. Dolinak’s opinions based on the testimonial autopsy report violated the defendant’s Sixth Amendment rights, concluding that Dolinak’s opinion testimony did not violate the Confrontation Clause:

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<sup>125</sup> *Wood*, 299 S.W.3d at 202.

<sup>126</sup> *Id.* at 207.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 208.

<sup>129</sup> *Id.* at 210.

When an expert bases an opinion on testimonial hearsay but does not disclose the testimonial hearsay on which that opinion is based, the jury hears only the expert's direct, in-court testimony. We hold that the Confrontation Clause was not offended when Dolinak testified to his own opinions regarding the nature and causes of Wessberg's injuries and death, even though those opinions were based in part on Dolinak's review of Colemeyer's autopsy report.<sup>130</sup>

However, Dolinak did not simply testify to his own opinions based on testimonial material, he also disclosed to the jury those testimonial statements on which his opinions were based.<sup>131</sup> The court explained that Rule 705(d) of the Federal Rules of Evidence allows an expert to disclose to the jury facts and data underlying their opinion, but only when their value for explaining and supporting the expert's position is not outweighed by the danger that they will be used for another purpose, for which they would be inadmissible.<sup>132</sup> The court explained that “[o]ne of the greatest dangers in allowing otherwise inadmissible evidence under Rule 705 is that *the jury will consider the facts and data as substantive evidence* rather than as merely constituting the underlying basis for the expert's opinion.”<sup>133</sup> Because the court found that the jury could not consider the testimonial statements in the autopsy report as supporting or explaining Dolinak's opinions, without assuming that the statements were true[,]” this constituted a violation of the Confrontation Clause.<sup>134</sup>

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<sup>130</sup> *Id.* at 213.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* (quoting *Valle v. State*, 109 S.W.3d 500, 505-06 (Tex. Crim. App. 2003)) (emphasis added).

<sup>134</sup> *Id.* at 214.

3. Why an expert should not be permitted to testify based on findings within a testimonial autopsy report.

The California Court of Appeals correctly explained in *Dungo*, that allowing “substitute cross-examination” is simply inadequate.<sup>135</sup> For example, as was the case in *Dungo*, the expert may not be capable of giving any meaningful answers to questions regarding the personal and professional to the medical examiner. As the Court cautioned in *Melendez-Diaz*, “Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well.”<sup>136</sup> To allow this “substitute cross-examination” would undercut the defendant’s ability to use his right to confront for the very purpose for which it was designed.

Finding an autopsy report testimonial, and subsequently allowing testimony from another expert based on the autopsy report would simply be an unconstitutional undermining of the Confrontation Clause. If the autopsy report is testimonial, the medical examiner who prepared it and made the statements within it is a witness against the defendant for purposes of the Sixth Amendment. The Supreme Court made it quite clear in *Melendez-Diaz* that the Confrontation Clause will not give way to prosecutorial convenience.<sup>137</sup> To allow another expert to testify based upon the contents of a testimonial autopsy report would be to find that the cross-examination of the medical examiner that prepared the report is a fundamental constitutional right of the defendant, provided by the Sixth Amendment, but that allowing the defendant to cross-examine someone else is good enough, in light of inconveniences to the prosecution.

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<sup>135</sup> *Dungo*, 98 Cal.Rptr.3d at 705.

<sup>136</sup> *Melendez-Diaz*, 129 S. Ct. at 2537

<sup>137</sup> *Id.* at 2540 (“The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause-like those other constitutional provisions-is binding, and we may not disregard it at our convenience.”)



### C. ARE NOTICE AND DEMAND STATUTES AN ACCEPTABLE SOLUTION TO THE CONFRONTATION CLAUSE PROBLEM?

Many states use procedural devices called “notice and demand” statutes in order to alleviate some of the burden placed on prosecutors by the defendant’s right to confront in the context of admitting forensic reports. These statutes fall into four basic categories, (1) basic notice and demand, (2) notice and demand plus, (3) anticipatory demand, and (4) defense subpoena.<sup>138</sup> Basic notice and demand statutes require that the prosecution notify the defendant of its intention to use a lab report (or in this context an autopsy report), and the defendant then must follow a simple procedure to avail himself of the right to cross examine the analyst (or medical examiner).<sup>139</sup> Under notice and demand plus statutes, the defendant must give substantive reasons justifying his demand.<sup>140</sup> Anticipatory demand (“AD”) statutes do not require the prosecution to notify the defendant of any intention to use a particular report at trial; however, the burden remains on the defendant to demand cross-examination.<sup>141</sup> Certain AD statutes also require the defendant to provide substantive reasons for the demand.<sup>142</sup> Finally, under defense subpoena statutes, there is no notice requirement, and the burden is on the defendant, not merely to demand the presence of the individual that prepared the report, but to subpoena that individual to appear.<sup>143</sup> Some such statutes contain provisions which allow the defendant to subpoena the individual that prepared the report to testify for the prosecution, but

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<sup>138</sup> Jenifer B. Sokoler, *Between Substance and Procedure: A role for states’ interests in the scope of the Confrontation Clause*, 110 COLUM. L. REV. 161, 182-83 (2010).

<sup>139</sup> *Id.* at 183-84.

<sup>140</sup> *Id.* at 185.

<sup>141</sup> *Id.* at 186.

<sup>142</sup> *Id.* at 186-87.

<sup>143</sup> *Id.* at 186.

absent such a provision, the defendant must subpoena that individual to testify during the defendant's own case.<sup>144</sup> Additionally, defense subpoena statutes typically require the defendant to provide substantive reasons for cross-examination.<sup>145</sup>

These statutes are criticized as unconstitutional because, under certain circumstances, it is argued that they impose too great of a burden on the defendant's right to confront, and do not provide adequate information to secure a knowing and voluntary waiver of this constitutional right.<sup>146</sup> Naturally, this concern is greater with statutes, such as AD statutes and defense subpoena statutes, which do not require the prosecution to give notice to the defendant, and thus, place a greater burden on defendants wishing to exercise their right to confront.

However, this does not necessarily mean that all notice and demand statutes should be unconstitutional violations of the Confrontation Clause. The Supreme Court in *Melendez-Diaz*, albeit in dicta, hinted to the fact that certain notice and demand statutes may be constitutional:

In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. Contrary to the dissent's perception, these statutes shift no burden whatever. The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections. It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. There is no conceivable reason why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial.<sup>147</sup>

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See *State v. Cunningham*, 930 So.2d 1110, 1126 (La. 2005) (Calogero, C.J., dissenting); *State v. Caulfield*, 722 N.W.2d 304, 313 (Minn. 2006).

<sup>147</sup> *Melendez-Diaz*, 129 S. Ct. at 2541 (internal citations omitted).

Thus, the Court indicates that simple notice and demand statutes may be constitutionally permissible. In her article entitled: *Between Substance and Procedure: A role for states' interests in the scope of the Confrontation Clause*, Jenifer B. Sokoler agrees, arguing that the use of proper notice and demand statutes would be “consistent with the Supreme Court precedent in other areas of constitutional criminal procedure where the Court has upheld state-imposed rules governing the implementation of a constitutional right.”<sup>148</sup> Specifically, Sokoler compares notice and demand statutes to a trial court’s preclusion of a defense witness as a sanction for failure to comply with state discovery procedures, which has been upheld despite the right to call witnesses under the Compulsory Process Clause.<sup>149</sup> Additionally, the Supreme Court upheld a criminal procedure rule in Florida, challenged under the Fifth and Fourteenth Amendments, which required the defendant to notify the prosecution of his intent to use an alibi defense at trial.<sup>150</sup> These cases illustrate the Court’s willingness to take into account the burdens placed on the prosecution, and allow for states to create procedural mechanisms for defendants to follow in order to exercise constitutional certain rights.

However, the question remains, what sort of notice and demand statutes are permissible? Shortly after its decision in *Melendez-Diaz*, the Supreme Court granted certiorari in *Briscoe v. Virginia*, where the issue was:

“If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth

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<sup>148</sup> Sokoler, 110 COLUM. L. REV. at 193.

<sup>149</sup> See *Taylor v. Illinois*, 484 U.S. 400 (1988).

<sup>150</sup> See *Williams v. Florida*, 399 U.S. 78 (1970).

Amendment by providing that the accused has a right to call the analyst as his own witness?”<sup>151</sup>

The petitioner argued that this issue had been directly addressed in *Melendez-Diaz*: “had the Court accepted the contention by Massachusetts that the ability to subpoena the analysts was a full substitute for the right to be confronted with them, presumably the Court would have affirmed rather than reversed the decision of the Appeals Court of Massachusetts affirming the conviction.”<sup>152</sup> After the issues were fully briefed and oral argument was held, the Supreme Court vacated the lower court’s decision and remanded the case for consideration under the recent decision in *Melendez-Diaz*.<sup>153</sup> The Virginia statute was a defense subpoena statute, which placed the burden of calling the witness on the defendant. Such a statute is likely to be found unconstitutional as it converts the defendant’s right to “be confronted” into a right to affirmatively call the witness.

In her article, Sokoler sets forth a “constitutional ceiling,” consisting of three conditions that must be met for a notice and demand statute to be constitutional:

(1) the defendant *must be provided with notice* of the *contents* of the report, the *conditions* under which it was prepared, the *consequences* of failure to demand his right to confrontation, and the procedure through which he can make this demand; (2) the *defendant cannot be obligated to request a subpoena* in order to exercise his right to confrontation, he cannot be required to provide a substantive basis for his demand, and he must be afforded reasonable time to make this demand; and (3) failure to demand *cannot result in forfeiture* of the right to confrontation if the defendant can demonstrate, by a preponderance of the evidence, that *he did not understand the procedure* to exercise his right or that after the time for his demand had expired, *he came across new information* that caused him to exercise his right.<sup>154</sup>

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<sup>151</sup> Petition for Certiorari, *Briscoe v. Virginia*, No. 07-11191 (2008).

<sup>152</sup> Brief for Petitioner, *Briscoe v. Virginia*, No. 07-11191 (2009).

<sup>153</sup> *Briscoe v. Virginia*, 559 U.S. \_\_; No. 07-11191 (2010).

<sup>154</sup> Sokoler, 110 COLUM. L. REV. at 201-02 (emphasis added).

Sokoler explains that each of the three requirements is significant to ensure the constitutionality of the statutes.

The notice requirement assures that defendant's are aware that the "default rule" that the witness will appear in person is "turned off," provides the defendant with adequate information to determine whether the right to confrontation should be exercised or waived, and assures that the defendant understands how to exercise his right to cross-examination.

The demand requirement assures that the statute does not shift the burden to the defendant to actually subpoena the witness.<sup>155</sup> Unlike simple notice and demand statutes, defense subpoena statutes actually shift the burden to defendants to secure the presence of the witness. Basic notice and demand statutes simply require the defendant to invoke his confrontation right at an earlier time, as Justice Scalia stated in *Melendez-Diaz*, "[t]he defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so."<sup>156</sup> Additionally, under this requirement, a defendant cannot be forced to show substantive reasons for invoking the confrontation right.<sup>157</sup> This protects against a retreat to the overruled *Roberts* analysis, because if a defendant were required to show substantive reasons for cross-examination, this would arguably be another form of admissibility based on the reliability of the testimony.

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<sup>155</sup> *Id.* at 205.

<sup>156</sup> *Melendez-Diaz*, 129 S. Ct. at 2541.

<sup>157</sup> Sokoler, 110 COLUM. L. REV. at 201.

Finally, the third requirement provides a residual exception for specific circumstances in which a particular defendant is simply unable to comply with the requirements of the statute.<sup>158</sup> The purpose of this requirement is to alleviate the concern that permitting any notice and demand statutes whatsoever would result in inadequate protection of defendants in situations where they are unaware or unable to meet the statute's requirements.<sup>159</sup>

This framework set forth by Sokoler would be appropriate for use in the context of autopsy reports, as it would adequately protect the interests of criminal defendants, while taking into account the state's practical concerns in making medical examiners testify in every case. Importantly, these requirements would not impose a large burden on defendants who wish to cross-examine medical examiners, but strike a proper balance between the practical difficulties inherent in making medical examiners available at every trial in which their reports are used, and the defendant's right to confront those individuals at trial if he so desires.

#### D. SHOULD THE COURT RE-DEFINE TESTIMONIAL?

Scholars have argued that the current standard for determining whether or not a statement is testimonial is simply too vague and would apply to statements, such as autopsy reports, that the Confrontation Clause was not originally intended to apply to. In her article, entitled *Toward a Definition of "Testimonial": How autopsy reports do not embody the qualities of a testimonial statement*, Carolyn Zabrycki proposes a new definition for testimonial, which she claims will properly reflect the original purpose for the Confrontation Clause: "out-of-court statements are testimonial and thus require confrontation if they are produced by, or with the involvement of,

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<sup>158</sup> *Id.* at 205.

<sup>159</sup> Sokoler, 110 COLUM. L. REV. at 205.

adversarial government officials responsible for investigating and prosecuting crime.”<sup>160</sup> Zabrycki argues that such a definition would sufficiently combat the historical evils at which the Confrontation Clause was aimed, as all of the historical cases discussed in *Crawford* were concerned primarily with the prosecutorial and investigative role of the individuals conducting the interrogation.<sup>161</sup>

This definition could be interpreted to make all autopsy reports non-testimonial, as was clearly intended by Zabrycki. Medical examiners are government officials, but Zabrycki argues that because they are not primarily concerned with investigation, they are not “adversary government officials.”<sup>162</sup> Additionally, because the report is only submitted to the police in certain circumstances, and not created with the involvement of police, it is argued that autopsy reports are not created with the involvement of, adversarial government officials.

This article was published the year before the Supreme Court decided *Melendez-Diaz*, and the decision in *Melendez-Diaz* appears to be reconcilable with this “adversary government officials” line of reasoning, at least to some extent. The certificates of analysis in that case were created at the request of law enforcement and under Massachusetts law, their sole purpose was for use as evidence at trial.<sup>163</sup> Thus, it appears clearly that the statements in that case were made with the involvement of adversarial government officials responsible for investigating and prosecuting crime, as required by Zarbycki’s proposed definition.

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<sup>160</sup> Zabrycki, 96 CAL. L. REV. at 1118.

<sup>161</sup> *Id.* at 1122-23.

<sup>162</sup> *Id.* at 1124-25.

<sup>163</sup> *Melendez-Diaz*, 129 S. Ct. 2532.

In applying her definition to autopsy reports, Zabrycki argues that medical examiners are not “adversary” government officials, and thus, their autopsy reports are not testimonial.<sup>164</sup> However, by the language of the definition Zabrycki would have the Court adopt, it appears that autopsy reports could potentially be classified as testimonial statements. There is no doubt that police officers are adversary government officials responsible for investigating and prosecuting crime under this analysis, and the definition makes any statements testimonial that are made “with the involvement of” such officials. Thus, this definition would not require that the medical examiners themselves be adversary government officials, but that they prepare the report with the involvement of adversary government officials. When the medical examiner concludes that the death was the result of homicide and submits the report to the police for investigation, the statement is arguably made with the involvement of adversary government officials, and thus, is testimonial.

While this definition may still render some autopsy reports testimonial, autopsy reports that indicate natural death and are only used in a later “cold case” criminal prosecution would likely be non-testimonial and admissible under this definition. This would at least alleviate concerns that cold cases would be near impossible to prosecute because examiners who prepared reports many years ago are likely to be unavailable and their reports inadmissible.

Ultimately, though this definition is intended to make autopsy reports non-testimonial and admissible, it would still depend on the courts’ interpretations of “involvement of adversary government officials,” which could be interpreted in a way that would still classify many autopsy reports as testimonial. This definition would certainly narrow the scope of testimonial statements to exclude statements that would have been testimonial under *Crawford’s* definition

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<sup>164</sup> Zabrycki, 96 CAL. L. REV. at 1123.



of “statements 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.”<sup>165</sup> If the definition of testimonial is to be changed, it should be changed with an eye toward uniform application and predictability. The definition proposed by Zabrycki, though arguably more concrete and predictable than the current standard, is still open to significant interpretation and manipulation.

#### CONCLUSION

While re-defining “testimonial” may aid the prosecution in admitting certain forensic reports without cross-examination of the preparing analyst, the Supreme Court is not likely to contradict the seminal decisions it has rendered in the past six years based merely on concerns regarding prosecutorial efficiency. How the Supreme Court will apply the *Crawford/Melendez-Diaz* line of cases to autopsy reports is likely to be a factual question, which will depend on whether a given report falls within one of the “core classes” of testimonial statements. If autopsy reports cannot be classified as sworn statements or statements akin to affidavits, such as the lab reports in *Melendez-Diaz*, the issue will likely turn on whether there is or should be an objectively reasonable belief in the preparing medical examiner that the autopsy report will be available for use in a future criminal trial. Autopsy reports created as part of a criminal investigation should clearly be included as “statements 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.”<sup>166</sup> In cases where the autopsy reports are not prepared amidst a criminal investigation, statutory provisions which require reporting to governmental authorities

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<sup>165</sup> *Crawford*, 541 U.S. at 51-52.

<sup>166</sup> *Id.*

and factual circumstances surrounding the preparation of the autopsy report will play a major role in the Court's determination of whether an autopsy report should be considered testimonial and invoke the Confrontation Clause.

The approach of allowing another expert to testify based upon the findings in an autopsy report hardly solves the Confrontation Clause problem. Rather than using non-testimonial evidence, or making the individual who created the report available for cross examination, this approach simply takes a testimonial statement, and places in the mouth of another witness, who is available to be cross-examined. It is the individual that prepared the autopsy report who "bears testimony" against the defendant, and thus, is a witness for Confrontation Clause purposes. Under *Crawford*, unless that witness can show that he or she is unavailable and the defendant had a prior opportunity to cross examine the witness, the statement is inadmissible.

Procedural devices such as notice and demand statutes are conceivably constitutional, and would likely strike an appropriate balance between the practical difficulties inherent in making every individual that prepares an autopsy report testify at trial, and the defendant's right to have that individual testify and be subjected to cross examination if he so chooses. It is necessary, however, to ensure that these statutes do not amount to defense subpoena statutes, or statutes which would otherwise impose too great a burden on defendant's wishing to exercise their Sixth Amendment rights. The three requirements expounded upon in Sokoler's article, and discussed *supra*, would provide an adequate safeguard for the defendant, while remaining receptive to the practical concerns of prosecutors and medical examiners.