

2013

Confronting the Dead: The Supreme Court's Confrontation Clause Jurisprudence and its Implications for Autopsy Reports

Reid R. Allison

Supreme Court of Guam, Law Clerk

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/clp>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Allison, Reid R. (2013) "Confronting the Dead: The Supreme Court's Confrontation Clause Jurisprudence and its Implications for Autopsy Reports," *Criminal Law Practitioner*. Vol. 1 : Iss. 1 , Article 3.

Available at: <https://digitalcommons.wcl.american.edu/clp/vol1/iss1/3>

This Article is brought to you for free and open access by Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Criminal Law Practitioner by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.



CONFRONTING THE DEAD: THE SUPREME COURT'S CONFRONTATION CLAUSE JURISPRUDENCE AND ITS IMPLICATIONS FOR AUTOPSY REPORTS

by Reid R. Allison¹

In the past decade, the United States Supreme Court has attempted to overhaul Confrontation Clause jurisprudence. Since the Court's 2004 decision in *Crawford v. Washington*,² it has decided six substantive Confrontation Clause cases. As with all drastic precedential overhauls, the Court has injected an overwhelming amount of uncertainty into questions of Confrontation Clause legality.³ This article will examine the development of the *Crawford* era of Confrontation Clause case law, with a particular focus on one of the most difficult but pressing contexts: the admissibility of forensic reports. In examining these reports, particular attention will be paid to the looming question of the admissibility of autopsy reports. Given the development of the law—including a recent decision by the United States Court of Appeals for the Eleventh Circuit⁴—the autopsy

question is very likely to come before the Supreme Court within the next five years. After setting out the current landscape on the question in Part I, this article will discuss the significant problems with current precedent in Part II, establish autopsy reports as a worthwhile case study in Part III, and, in Part IV, make predictions and argue for ways in which the Court could and should address the autopsy report question and clarify its Confrontation Clause precedent in the field of forensic reports.

I. Confrontation Clause Precedent A. The *Crawford* Watershed

In 2004, the Supreme Court was presented with a relatively run-of-the-mill factual scenario. A husband and wife gave similar tape-recorded statements to the police after the husband was arrested for stabbing another man.⁵ At the husband's trial for assault and attempted murder, he argued that the stabbing occurred in self-defense.⁶ His wife could not testify under the state's marital privilege law without his consent, "so the State sought to introduce [her] tape-recorded statement to police" that had been recorded the night of the incident.⁷ The husband argued that such admission violated his constitutional right to confront witnesses against him: he would not have the opportunity to cross-examine his wife because the state's marital privilege barred her from testifying. The trial court admitted the

1 Thank you to Professor Paul Rothstein, Jessica Carter, Francis Gieringer, Paul Halliday, Michael Heckler, and Gabriel Kurcab for their invaluable feedback on drafts of this article. Thank you to the staff of the *Criminal Law Practitioner* for their tremendous work toward making this article what you read today. Thank you to Bill Larson for believing in me. Thank you also to Professor Steven Goldblatt for his mentorship throughout law school and Dr. John Rubadeau for teaching me to write and insisting that his students "scratch their itch." Finally, I must thank my parents, Cary Rouse and Chuck Allison, for—literally—everything and my brother, Kyle Allison, for being a perfect older brother and inspiring me with his writing.

2 541 U.S. 36 (2004).

3 See *Williams v. Illinois*, 132 S. Ct. 2221 (2012), for the latest decision to fail in providing sufficient, meaningful guidance.

4 *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012).

5 *Crawford v. Washington*, 541 U.S. 36, 38-39 (2004).

6 *Id.* at 40.

7 *Id.*



recording and the husband was convicted of assault. After the intermediate appellate court reversed, the Washington Supreme Court reinstated the trial court's verdict.⁸

Under United States Supreme Court precedent at the time, *Crawford* was a relatively easy case. *Ohio v. Roberts*⁹ required that the disputed evidence for which the producing witness's testimony was unavailable have adequate "indicia of reliability," as established either by "the evidence fall[ing] within a firmly rooted hearsay exception," or "a showing of particularized guarantees of trustworthiness."¹⁰ In *Crawford*, the Washington high court found that the wife's statement included guarantees of trustworthiness in that it was identical on the central and material points to the separate statement the husband had given police regarding the stabbing despite varying in certain other respects.¹¹ Her statement was potentially incriminating because she stated she saw nothing in the victim's hand after the victim was stabbed, which contrasted with the defendant's alleged belief that the victim had reached for a weapon.¹²

The Court, however, granted certiorari on the question of whether *Roberts* should be reconsidered. After briefing and argument in favor of abandoning the *Roberts* standard from the defendant, Mr. Crawford,¹³ and the United States as amicus curiae,¹⁴ the Court did just that. Mr. Crawford argued for a per se bar on the admission of testimonial statements made by a witness whom the defendant did not have an opportunity to cross-examine.¹⁵ On the other

hand, the United States asserted that Confrontation Clause is implicated only where a statement is testimonial, and argued against a per se bar on admission in favor of admissibility when the statement is inherently reliable.¹⁶ In a quintessentially Justice Scalia opinion,¹⁷ the Court began its analysis by referencing Roman times and sixteenth century England;¹⁸ this must have been disconcerting for defenders of *Roberts* because of Justice Scalia's previous statements on the issue.¹⁹ After thorough examination of preframing and framing era history, the Court held that the Confrontation Clause only applies to "testimonial" statements.²⁰ The Court, however, did not clearly define the parameters of "testimonial," opting instead to "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"²¹ It did stress 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," and contrasted these examinations with "an off-hand, overheard remark" which "bears little resemblance to the civil-law abuses the Confrontation Clause targeted."²² Put generally, the Court outlined testimonial as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact,"²³

prosecution — that have not been (or cannot be) subjected to cross-examination").

16 Brief for the United States as Amicus Curiae, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 22228005, at *5, 23.

17 Justice Scalia has told at least one interviewer that *Crawford* is his "legacy case." See Gaëtan Gerville-Réache, *Justice Scalia at the AJEI Summit in New Orleans*, ABA APPELLATE ISSUES (Feb. 2013), available at http://www.americanbar.org/content/dam/aba/publications/appellate_issues/2013win_ai.authcheckdam.pdf.

18 See *Crawford*, 541 U.S. at 43-44.

19 As early as 1992, Justice Scalia indicated that he believed the *Roberts* standard was incorrect based on the history of the Confrontation Clause. See *White v. Illinois*, 502 U.S. 346, 358 (1992) (Thomas, J., concurring, joined by Scalia, J.) (proposing that "our Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself").

20 *Crawford*, 541 U.S. at 50-54.

21 *Id.* at 68.

22 *Id.* at 50-51.

23 *Id.* at 51 (quoting 2 N. Webster, *An American Dic-*

8 *Id.* at 40-42.

9 448 U.S. 56 (1980).

10 *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

11 *State v. Crawford*, 147 Wash. 2d 424, 437-39 (2002).

12 *Id.*; 541 U.S. at 38-40.

13 Brief for the Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21939940.

14 Brief for United States as Amicus Curiae, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 22228005.

15 See generally Brief for the Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21939940, at *9 (arguing that "the government may not convict a defendant through any testimonial statements—that is, statements given in connection with its investigation or



and gave, as examples of testimonial evidence “affidavits, custodial examinations . . . depositions, prior testimony, or confessions.”²⁴

After determining that a statement’s testimonial status was the touchstone of the inquiry, the Court held that, “[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”²⁵ This means that, unless the defendant had a prior opportunity to cross-examine the witness who created the testimonial evidence, that evidence cannot be introduced without the testimony of that witness. If the witness is unavailable, then the evidence is inadmissible. The Court was easily convinced that the statement at issue was testimonial because it was the result of police interrogation.²⁶ Concurring, Chief Justice Rehnquist and Justice O’Connor chastised the Court for “cast[ing] a mantle of uncertainty over future criminal trials in both federal and state courts” by needlessly overruling *Roberts* while refusing to effectively define what evidence is “testimonial.”²⁷ This fear has been amply borne out by the decade of subsequent Confrontation Clause tumult on questions of whether a piece of evidence is testimonial and how such evidence may still be admitted without the testimony of the original record-creator. The concurrence also exemplified how an argument based on “history” can be turned into support for conflicting positions by noting that the history points with equal force to no formal distinction between testimonial and non-testimonial, testimonial being limited to sworn statements, and such statements are not necessarily categorically excluded.²⁸

However, Chief Justice Rehnquist and Justice O’Connor concurred in the judgment because they believed that the Supreme Court of Washington could and should be reversed

under the *Roberts* standard.²⁹ The state court had given decisive weight to the interlocking nature of the statements and had deemed such interlocking sufficient indicia of reliability, but Chief Justice Rehnquist argued that such an argument was foreclosed by *Idaho v. Wright*,³⁰ which had held that an out-of-court statement was not admissible at trial simply because other evidence corroborated its truthfulness.³¹

B. Recent Forensic Report Cases

Five years after *Crawford*, and after having decided two other Confrontation Clause cases in the interim,³² the Court was presented for the first time with a Confrontation Clause issue pertaining to the admissibility of a type of forensic report. The case, *Melendez-Diaz v. Massachusetts*,³³ involved a laboratory’s chemical analysis of seized contraband. The analyst who conducted the chemical test did not testify at trial; instead, the results were admitted by way of “certificates of analysis” which the analyst had sworn to before a notary public.³⁴ The United States, supporting the respondent Commonwealth, asserted chemical tests should not be deemed testimonial and therefore should be admissible without the testimony of the laboratory technician who conducted the test.³⁵ In support of this proposition, the United States argued such test results could not properly be deemed statements because a machine created the results, which were merely recorded and authenticated by humans; thus,

²⁹ *Id.* at 76.

³⁰ 497 U.S. 805 (1990) (rejecting the theory that when co-defendants’ respective confessions “interlock” it is determinative of the confessions’ trustworthiness).

³¹ *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring).

³² *Giles v. California*, 554 U.S. 353, 361 (2008) (holding that unfronted testimony is inadmissible absent a showing the defendant intended to prevent a witness from testifying); *see also* *Davis v. Washington*, 547 U.S. 813, 822 (2006) (holding that statements are non-testimonial when their primary purpose is to assist police in meeting an ongoing emergency).

³³ 557 U.S. 305 (2009).

³⁴ *Id.* at 308.

³⁵ *See* Brief for United States as Amicus Curiae Supporting Respondent, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), 2008 WL 4195142, at *5-7.

tionary of the English Language (1828)).

²⁴ *Id.* at 51.

²⁵ *Id.* at 68.

²⁶ *Crawford v. Washington*, 541 U.S. 36, 65-68 (2004) at 65, 68.

²⁷ *Id.* at 69 (Rehnquist, C.J., concurring)

²⁸ *Id.* at 69-74.



testing machines are not witnesses in the constitutional sense.³⁶ Furthermore, requiring the technician's testimony would significantly hamper criminal prosecutions.

The Court was not persuaded. Again, Justice Scalia wrote for the majority and purported to ground his decision on the bright-line rule established in *Crawford*.³⁷ Justice Scalia once more asserted that his position was dictated by history and applied with equal force to a case whose dispute resolved a scientific analysis centuries removed from the Founding era.³⁸ Importantly, Justice Clarence Thomas provided the deciding fifth vote, but the scope of his agreement was very limited and came in a paragraph-long opinion. Justice Thomas stated, "I join the Court's opinion in this case because the documents at issue in this case are quite plainly affidavits."³⁹ For Justice Thomas, only formalized testimonial materials (e.g., affidavits, depositions, prior testimony, or confessions) implicate the Confrontation Clause, but the swearing procedure for the forensic report in this case rendered it sufficiently formal.⁴⁰ His represented the narrowest view of 'testimonial' set out in *Crawford*,⁴¹ and thus rejected the broader proposition that evidence other than affidavits or formalized materials may still be testimonial.⁴²

In dissent, Justice Kennedy joined by Chief Justice Roberts, Justice Alito, and Justice Breyer criticized the fact that the formalism of the forensic report cases is founded on a "history" that could not even fathom the types

of forensic reports at issue.⁴³ As the dissent stressed, "laboratory analysts are not 'witnesses against' the defendant as those words would have been understood at the framing."⁴⁴ Instead, "witnesses against" contemplated conventional, in-person, eyeball witnesses to crimes.⁴⁵ The dissent reasoned that beyond being unforeseeable to the Framers lab analysts could not be considered conventional witnesses because one, analysts record their contemporaneous observations and do not rely on memory as do conventional witnesses; two, the analyst is ignorant regarding who is accused or what his or her quantum of guilt may be where conventional witnesses see a person's identity and wrongful acts; and three, the scientific protocol involved in lab tests and reports adds layers of reliability that do not attach to conventional witnesses.⁴⁶ Each of these differences convinced the dissent that the lab analysts of today were starkly different from conventional witnesses contemplated by the Framers, both in terms of their reliability and adversarial nature.

Two years later, the Court was confronted with a similar Confrontation Clause question. In *Bullcoming v. New Mexico*, the Court considered a blood-alcohol concentration lab report the state tried to admit through the testimony of another scientist worked at the same lab but did not perform or observe the test and did not sign the certification.⁴⁷ Defense counsel dubbed this "surrogate testimony."⁴⁸ The Court found this report and method of introduction was similar enough to be governed by

36 See *id.*

37 *Melendez-Diaz*, 557 U.S. at 329 (stating "[t]his case involves little more than the application of our holding in *Crawford v. Washington*").

38 See *id.*

39 *Id.* at 329 (Thomas, J., concurring) (asserting that extrajudicial statements implicate the Confrontation Clause only when contained in formalized testimonials).

40 *Id.* at 329.

41 *Crawford*, 541 U.S. at 51-2 (describing the "core" class of testimonial statements as including affidavits and other formalized materials).

42 See, e.g., *Davis v. Washington*, 547 U.S. 813, 835-42 (2006) (Thomas, J., concurring in judgment in part and dissenting) (decrying the Court's extension of "testimonial" status to statements made during a 911 call).

43 See *Melendez-Diaz*, 557 U.S. at 331 (Kennedy, J., dissenting) (averring that "[t]he Court's opinion suggests this will be a body of formalistic and wooden rules, divorced from precedent, common sense, and the underlying purpose of the [Confrontation] Clause").

44 *Id.* at 343 (observing the concerns of treating analysts as conventional witnesses; for example, the analyst must be in court for his or her findings to be considered by the jury).

45 *Id.* at 343-44 (arguing that the Confrontation Clause applies only to witnesses who have personal knowledge of the defendant's guilt, not to evidence analysts).

46 *Id.* at 345-46.

47 *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011) (noting that the New Mexico Supreme Court determined live testimony of another analyst satisfied the Confrontation Clause).

48 Petitioner's Brief, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), 2010 WL 4913553, *10.



Melendez-Diaz, and then held that the type of surrogate testimony attempted here by a “scientist who had neither observed nor reviewed” the testing technician’s work was insufficient to satisfy the Confrontation Clause.⁴⁹ *Bullcoming* did not, however, foreclose the possibility of acceptable ‘surrogate’ testimony. Indeed, Justice Sotomayor’s concurrence, representing the necessary fifth vote, seemed to deliberately pave the way for such testimony to be deemed sufficient in future cases; she stressed that it “would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results.”⁵⁰ She also noted, presaging *Williams v. Illinois*, that this was not a case in which an expert gave an independent opinion on a testimonial report that was not itself admitted into evidence.⁵¹

In dissent, Justice Kennedy again joined by Chief Justice Roberts, Justice Breyer, and Justice Alito noted that his arguments from *Melendez-Diaz* applied with equal force to this case and that other reasons particular to *Bullcoming* also weighed against the majority’s decision.⁵² The dissent lamented that extending *Melendez-Diaz* would cause more problems for state prosecutions and exhaust state resources.⁵³ For example, the dissent noted a 71% increase in subpoenas for analyst testimony in DUI cases after *Melendez-Diaz*, which caused analysts to have to travel great distances to testify in court on most working days and hindered laboratory efficiency and productivity.⁵⁴

The dissent also believed it was unnecessary to apply *Melendez-Diaz* to this case because of the continued availability of certain safeguards. One such safeguard was the defendant’s ability to obtain free re-testing of the physical evi-

dence as well as to subpoena the test-conducting lab technician to testify.⁵⁵ Additionally, the defendant benefitted from “testing by an independent agency; routine process performed en masse, which reduce . . . targeted bias; and labs operating pursuant to scientific and professional norms and oversight.”⁵⁶ Furthermore, the dissent decried that “the *Crawford* line of cases has treated the reliability of evidence as a reason to exclude it,” by concentrating on formality while formality tends to support reliability, *Crawford* and its progeny have determined that formality of a statement leads to testimonial status, which in turn leads to exclusion.⁵⁷

Finally, last year, the Court decided its most recent forensic report case. In *Williams v. Illinois*, the Court considered the admissibility of expert testimony that was based on a DNA matching test that had been performed by a lab technician who did not testify.⁵⁸ The testifying lab technician created a DNA profile of the defendant; the non-testifying technician had tested physical evidence from the rape evidence to derive DNA material and create a different profile, to which the testifying technician matched her profile.⁵⁹ Crucially, the report “was neither admitted into evidence nor shown to the factfinder. [The testifying lab technician] did not quote or read from the [other technician’s] report; nor did she identify it as the source of any of the opinions she expressed.”⁶⁰

In an intensely fractured set of opinions, the plurality was comprised of Chief Justice Roberts along with Justices Kennedy, Alito, and Breyer the dissenting bloc from both *Melendez-Diaz* and *Bullcoming*. The plurality, authored by Justice Alito, had two foundations for its opinion. First, Justice Alito determined the testimony was not introduced for the truth of the matter—that is, the veracity of the DNA test conducted by the non-testifying technician—and thus the Confrontation Clause was

49 *Bullcoming*, 131 S. Ct. at 2713 (holding that out-of-court testimonials may not be introduced against the accused at trial unless the witness is unavailable and the accused had the opportunity to confront him or her in the past).

50 *Id.* at 2722 (Sotomayor, J., concurring).

51 *Id.* (Sotomayor, J., concurring).

52 *See id.* at 2723 (Kennedy, J., dissenting).

53 *Id.* at 2726-28 (Kennedy, J., dissenting) (detailing evidence of the heavy burdens imposed on prosecutors as a result of the Court’s Confrontation Clause holdings).

54 *Id.* at 2727-28.

55 *Id.* at 2726-27.

56 *Id.* at 2727.

57 *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2725 (2011) at 2725.

58 *Williams v. Illinois*, 132 S. Ct. 2221, 2223 (2012).

59 *See id.* at 2229-30.

60 *Id.* at 2230.



not implicated.⁶¹ The plurality highlighted the facts that the testifying technician only testified to relying on the other lab's DNA profile, made it clear that she had not conducted the test herself and could not speak from personal knowledge to its veracity, and merely properly assumed the prosecutor's premise regarding the other lab's DNA profile.⁶²

The plurality also stressed that the report in question was "neither admitted into evidence nor shown to the factfinder,"⁶³ while in both *Melendez-Diaz* and *Bullcoming*, "[c]ritically, the report was introduced at trial for the substantive purpose of proving the truth of the matter asserted."⁶⁴ Furthermore, the fact that this case was presented before a judge rather than a jury saved it from potential jury instruction impossibilities.⁶⁵ There was no need to rely on a jury's understanding and application of the fact that the DNA expert's testimony was not to be understood as going to the reliability of the other technician's DNA profile or its origin in the physical evidence.⁶⁶

Second, Justice Alito argued that the Court had only applied the Confrontation Clause in cases where the statement/report had "the primary purpose of accusing [a]targeted individual of engaging in criminal conduct."⁶⁷ Here, the DNA test of the vaginal swab was not

61 *See id.* at 2240 (averring that there is simply no way around the fact that under *Crawford*, the Confrontation Clause applies only to out-of-court statements used to establish the truth of the matter asserted).

62 *See id.* at 2235-37 (asserting that the lab technician's presumption was taken as substantive evidence to establish where DNA profiles came from).

63 *Id.* at 2230.

64 *See Williams*, 132 S. Ct. at 2223.

65 *See id.* at 2236 (proposing that "there would have been a danger of the jury's taking [the] testimony as proof that the [other lab's DNA] profile was derived from the sample obtained from the victim's vaginal swabs. Absent . . . careful jury instructions, the testimony could not have gone to the jury").

66 *See id.* at 2236-37 (stating that "this case involves . . . a bench trial, and we must assume that the trial judge understood that the portion of . . . testimony to which the dissent objects was not admissible to prove the truth of the matter asserted").

67 *Id.* at 2242 (finding that the Confrontation Clause applies to formalized testimony by witnesses against an accused that directly links him to the crime alleged).

conducted with a specific suspect in mind the defendant was not in custody or even under suspicion for the rape⁶⁸ nor did the conducting lab have any idea whether the results of the test would inculcate or exculpate anyone.⁶⁹ In light of these realities, "there was no 'prospect of fabrication' and no incentive to produce anything other than a scientifically sound and reliable profile."⁷⁰

Justice Breyer concurred to express his desire that the case be reargued on general questions of the limit of *Crawford*.⁷¹ Justice Breyer was (and likely remains) very concerned with the Court's unwillingness to grapple with defining what evidence is and is not testimonial and what factors are involved in this determination.⁷² He insisted that answering this question was of utmost importance in order to give courts real guidance regarding a massive swath of their dockets: criminal cases, including those that involve lab reports.⁷³ In the absence of reargument, Justice Breyer would have held that the DNA report was not testimonial, because it was conducted by technicians of an accredited lab who were behind a veil of ignorance as to the origin of the sample and the purposes for which the result may be used⁷⁴ a rationale somewhat akin to Justice Alito's targeted criminal suspect requirement.

Justice Thomas concurred in the judgment (and was the necessary vote for the result) but did not join the plurality's opinion. As ever, Justice Thomas's conception of the Confrontation Clause remained the narrowest of the nine justices as he held that the DNA report in question, though admitted here for the truth of the

68 *Id.* at 2242-44.

69 *Id.* at 2243-44.

70 *Williams*, 132 S. Ct. at 2224 (avowing that the Confrontation Clause did not apply because there was no risk of malice or fabrication in the collection of the scientific evidence).

71 *Id.* at 2247 (Breyer, J., concurring) (discussing the various approaches to applying the Confrontation Clause which would be more compatible with *Crawford*).

72 *See id.* at 2244-45 (contemplating "what, if any, are the outer limits of the 'testimonial statements' rule set forth in *Crawford*").

73 *Id.* at 2248.

74 *Id.* at 2249-52.



matter asserted, was not testimonial because it was unsworn and not otherwise formalized enough to be testimonial.⁷⁵ Justice Thomas explicitly disagreed with the plurality's "accusing a targeted individual" requirement for testimonial status after finding no grounds for it in the text and history of the Confrontation Clause.⁷⁶

Justice Kagan, writing in dissent along with Justices Scalia, Ginsburg, and Sotomayor, viewed this case as a straightforward application of *Melendez-Diaz* and *Bullcoming*,⁷⁷ going so far as to ask, "Have we not already decided this case?"⁷⁸ To the plurality's first argument, the dissent responded that what the plurality had signed off on was the functional equivalent of the surrogacy rejected in *Bullcoming*—namely, the Court allowed an expert to testify regarding an inadmissible, Confrontation Clause-deficient fact of which she had no personal knowledge. To the plurality's second argument, the dissent stated that the "primary purpose" test had never required particularized suspicion regarding a targeted individual,⁷⁹ there was no reason to add such requirement,⁸⁰ and the Court had faced and rejected similar arguments of the reliability of forensic reports in *Melendez-Diaz* and *Bullcoming*.⁸¹ Summing up the opinions, Justice Kagan stated, "What comes out of four Justices' desire to limit *Melendez Diaz* and *Bullcoming* in whatever way possible, combined with one Justice's one-justice view of those holdings, is to be frank—who knows what."⁸²

II. Analysis and Critiques of Case Law

As Justice Kagan rightly noted, it is anyone's guess what will become of Confrontation Clause jurisprudence in the area of forensic reports; however, this problem existed long before the Court's decision in *Williams*. In terms of guidance, a major shortcoming of the *Crawford* opinion was that it did almost nothing to define

the parameters of the newly-crowned operative term, "testimonial." *Crawford* conceded that there could be many, widely varying formulations of testimonial.⁸³ However, as discussed above, the case did not begin to answer many important questions. For example, *Crawford* did not address whether less formal conversations with police or statements made before there is any criminal suspect or even suspicion of a crime could possibly be deemed testimonial. Indeed, the Court seemed to leave open that, beyond the largely undefined "core" of testimonial statements (e.g., affidavits, depositions, prior testimony, etc.), there may be other forms of statements, which could be deemed testimonial for Confrontation Clause purposes.⁸⁴ While the Court certainly could not have conclusively defined the field regarding the new standard in the genesis case, its reliance on history as a crutch has made the forensic report cases where history has only the vaguest and most attenuated relevance—all the more confused.

In the forensic report context, the confusion began with the very first case. *Melendez-Diaz* asked whether a report needed formal swearing to be deemed testimonial.⁸⁵ *Crawford* seemingly resolved this question by noting that historically, "the absence of oath was not dispositive" and the statement made against Sir Walter Raleigh, (the "paradigmatic confrontation violation") was unsworn.⁸⁶ However, Justice Thomas was the fifth vote in *Melendez-Diaz* and rested entirely on his determination that the reports at issue were sworn affidavits.⁸⁷

Thus, after *Melendez-Diaz*, this question had significant potential ramifications, because if Justice Thomas's very formal view triumphed (a dubious proposition considering the contrary views of at least seven other justices), the definition of "testimonial" would have been quite limited. Perversely, testimonial status could be avoided by not having certain reports sworn, and would be very easily dispatched by simply

75 *Id.* at 2258-61 (Thomas, J., concurring).

76 *Williams*, 132 S. Ct. at 2262-64 (Thomas, J., concurring).

77 *Id.* at 2266 (Kagan, J., dissenting).

78 *Id.* at 2267.

79 *See id.* at 2273.

80 *See id.* at 2274.

81 *See id.* at 2274-75 (Kagan, J., dissenting).

82 *Williams*, 132 S. Ct. at 2277.

83 *Crawford*, 541 U.S. at 51.

84 *See id.*

85 *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009) (Thomas, J., concurring).

86 *Crawford*, 541 U.S. at 52.

87 *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring).



examining the face of the report in question. Under this regime, much of the subsequent case law would not have reached the merits stage in the Supreme Court. However, *Bullcoming* dispatched this possibility by holding that whether a forensic report is sworn or unsworn is not determinative in the testimonial analysis.⁸⁸

The Court, though, proceeded to leave open a potentially larger avenue for admission. Though it struck down the variety of “surrogate testimony” present in *Bullcoming*, the majority’s opinion⁸⁹ as well as Justice Sotomayor’s fifth-vote concurrence, made clear that the surrogate theory was not dead. Justice Sotomayor’s opinion leaves the potential parameters of such testimony completely open to question by stating, “we need not address what degree of involvement [by a testifying surrogate in the forensic report at issue] is sufficient.”⁹⁰ Justice Sotomayor’s concurrence and the majority’s carefully drafted language arguably left open potentially acceptable surrogate testimony, including: the testimony of a supervisor who has internal oversight authority for the unavailable technician who conducted the test; testimony of a peer or subordinate technician who observed the particular test; and designation of a lone technician or group of technicians who would observe the forensic tests and become experts at testifying as to the reports.

Justice Sotomayor’s opinion in *Bullcoming* also left open two other potential avenues to avoid Confrontation Clause inadmissibility. First, she hinted at the possibility that “an expert witness [being] asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence,” may still be permissible under Federal Rule of Evidence 703,⁹¹ which regards bases of expert opinion testimony. This rationale was

subsequently utilized by the plurality in *Williams*, though Justice Sotomayor joined the dissent in that case.

Second, she noted that the Court may have decided the case differently if the state had “suggested . . . an alternate primary purpose,” such as the blood-alcohol report being “necessary to provide . . . medical treatment.”⁹² This strain of argument remains uncertain after *Williams*, as the Court has yet to grapple with a case in which it finds multiple primary purposes (e.g., one for use in a criminal proceeding and one for non-criminal reasons). However, the concept of an “alternate primary purpose” is arguably internally contradictory as the word “primary” is defined as “of first rank, importance, or value,”⁹³ which indicates that there can be only one truly primary purpose for testimonial evidence. *Williams* perhaps raises the most questions of any of the three cases, all while leaving the surrogacy issue as open as Justice Sotomayor left it. The jumble of opinions in this case is incredibly difficult to comprehend, and it remains somewhat unclear how they will be read to include or form a coherent precedent that can be cohesively followed. Regarding Justice Alito’s plurality opinion, it is unclear to what extent the nuanced and complicated “not for the truth of the matter asserted” rationale would apply in a jury trial setting.⁹⁴ Justice Alito made clear that he was relying on the fact that this was a bench trial to convince himself that the nuanced admission of the evidence was fully understood by the finder of fact.⁹⁵ The legal acumen required in even this relatively straightforward evidentiary issue makes it appear unlikely that a jury instruction could

92 *Id.*

93 *Primary Definition*, MERRIAM-WEBSTER.COM, <http://www.meriam-webster.com/dictionary/primary> (last visited Dec. 12, 2013).

94 *Williams*, 132 S. Ct. at 2236 (proposing that “[t]he dissent’s argument would have force if petitioner had elected to have a jury trial. In that event, there would have been a danger of the jury’s taking [the lab technician’s] testimony as proof that the [other lab’s] profile was derived from the sample obtained from the victim’s vaginal swabs”).

95 *Id.* at 2236-37 (asserting that “this case . . . involves a bench trial, and we must assume that the trial judge understood” for which purposes the evidence was admissible and for which it was inadmissible) (emphasis in original).



properly cure potential Confrontation Clause risks, such as the DNA expert's testimony being used for the veracity or reliability of the swab test. Indeed, Justice Alito conceded that such an argument would have force in the jury trial context,⁹⁶ because a jury may not be able to understand and follow such nuanced (and arguably "factually implausible")⁹⁷ legal arguments even with the most careful of instructions. Additionally, even before the *Williams* opinions were handed down, commentators who rightly predicted the outcome stressed that the Court would need to provide clear guidance on "the nature and quantum of independent judgment and independent basis which is required to permit testimony of an expert predicated in part upon the forensic report compiled by another analyst."⁹⁸ Unfortunately, the plurality did no such thing, and these questions remain as unclear as before.

Of even more potential import is Justice Alito's second theory—namely that the Confrontation Clause is only triggered by statements/tests that are elicited or conducted when law enforcement has a particular target in a criminal investigation.⁹⁹ If this rationale were to find a fifth vote at some point, it could be of incredible significance not just for DNA test cases, but also in many autopsy report cases where the autopsy was conducted before there was any criminal suspicion at all.

Of course, the woefully unhelpful nature of these opinions is largely the result of a Court irreconcilably divided against itself: between dogged adherence to "history" on the one hand (exemplified best by Justices Scalia and

Thomas) and a more realistic and pragmatic approach (exemplified by the dissenting bloc of Chief Justice Roberts, and Justices Alito, Breyer, and Kennedy). However, at this point the Court must be fully aware of this divide, and it ought to no longer act so cavalierly in this area.

The Court should be especially careful in granting certiorari in its next Confrontation Clause case—granting certiorari without a willingness to resolve important questions of law serves neither criminal defendants nor the state's prosecutions. Rather, it heightens the degree of unpredictability in each new, slightly different factual situation. For example, after *Williams*, prosecutors may believe they are constitutionally safe where the statement occurred before there was any criminal suspicion; they thus may attempt to craft some form of permissible surrogate testimony through a supervisor or other informed party, or they may argue that the report in question had an alternate primary purpose other than preparation for a criminal trial. Any of these efforts may be perfectly well intentioned and optimally protective of all interests involved, and yet it is far from clear which, if any, would be acceptable.

Part IV of this paper will present the most likely methods for the state to introduce autopsy reports without the testimony of the medical examiner who conducted the autopsy, discuss the pros and cons of each way forward, and analyze the relative likelihood of success of each method in the Supreme Court. But first, Part III will detail the development of Confrontation Clause as related to autopsy reports and discuss how this field may provide an opportunity for the Court to clarify its Confrontation Clause jurisprudence as applied to forensic reports.

III. Autopsy as Case Study

Autopsy reports are a useful subset of forensic reports for Confrontation Clause purposes because they are very important to a prosecution's case, are typically involved in cases resulting in death, meaning the public has the greatest interest in effective prosecution, and the Supreme Court will likely be dealing with the question within the next few terms.

96 *Id.* at 2236 (noting that "absent an evaluation of the risk of juror confusion and careful jury instructions, the case could not have gone to the jury").

97 *Id.* at 2269 (Kagan, J., dissenting) (asserting that "the principal modern treatise on evidence variously calls the idea that such 'basis evidence' comes in not for its truth, but only to help the factfinder evaluate an expert's opinion 'very weak,' 'factually implausible,' 'nonsense,' and 'sheer fiction'") (quoting D. KAYE ET AL., *THE NEW WIGMORE: EXPERT EVIDENCE* § 4.10.1, at 196-97 (2d ed. 2011)).

98 Ronald Coleman & Paul Rothstein, *Grabbing the Bullcoming by the Horns*, 90 NEB. L. REV. 502, 542 (2011) [hereinafter *Grabbing the Bullcoming*].

99 *See Williams*, 132 S. Ct. at 2242-44.



An autopsy report differs materially from almost any other forensic report, and certainly from any the Court has considered. Importantly, in cases like *Melendez-Diaz* and *Bullcoming*, the police have the identity of the criminal suspect, and he or she is the source of the physical evidence is tested. On the other hand, autopsy reports in murder situations are not always tied to a suspect; instead, autopsies are performed to establish the cause of death or to add detail to a police recreation of the incident that led to the murder. Like the vaginal swab in *Williams*, the source of the physical evidence tested is the victim rather than the perpetrator.

A. The Particular Importance and Unique Challenges of the Autopsy

The fact that the source of the physical evidence tested is the victim rather than the perpetrator is important for both legal and policy reasons. First, and foremost, it means that autopsy reports are nowhere near as automatically attached to a swift prosecution and trial as the types of report present in *Melendez-Diaz*, *Bullcoming*, and *Williams*. In the first two cases, once the report was completed, prosecutors essentially had everything necessary to bring a case against the suspect, and there was little to no danger of significant delay between the test and the date of testimony. In contrast, murder investigations can lay dormant for long periods of time before a suspect is pinpointed and captured. In most cases, the existence of the autopsy will not further significantly the effort to discover the wrongdoer; it typically reveals only the cause of death, not necessarily the identity of any person who may have contributed to the death. Second, the above problem is compounded by the fact that autopsy reports are not repeatable in the same way that most other forensic reports are. In the other forensic report cases, the tested evidence is often preserved and may be retested at a later date.

This availability mitigates some of the concern that the death of a particular scientist may render vital evidence inadmissible; indeed, this has been noted in *Melendez-Diaz*¹⁰⁰

and *Bullcoming*.¹⁰¹ Each opinion recognized that the harsh consequences for prosecutions attendant to barring introduction of these reports are significantly diminished where the physical evidence remains available and viable to be retested and admitted into evidence with the testimony of the second tester. For example in drug test cases, a sample of the drugs are typically kept through trial so there is physical evidence to present, and that evidence will not degrade and may be retested to solve potential Confrontation Clause problems.

However, the Court correctly observed that such alternatives are simply not available when dealing with autopsy reports.¹⁰² This had led commentators to caution that barring introduction of autopsy reports could in effect create a statute of limitations for murder¹⁰³ a patently unacceptable result as indicated by the fact that states normally do not have a statute of limitations for murder.¹⁰⁴

Finally, of all forensic reports, autopsy reports may provide the starkest illustration of how uncertainty in Confrontation Clause doctrine can have significantly negative effects on our system of criminal prosecution. Whereas, the three cases decided thus far respectively arose out of serious drug crimes and a heinous rape, cases in which the prosecution seeks to introduce an autopsy, as evidence will involve a criminal act or omission that resulted in death. These are precisely the kind of crimes for which the public reserves the utmost condemnation and prosecutors have the greatest desire and incentive to prosecute. Because of the importance of effective prosecution of these crimes, it is vitally important to establish ways to admit autopsy reports even when the opportunity to cross-examine is not available. Such an argu-

101 See *Bullcoming*, 131 S. Ct. at 2718.

102 See *Melendez-Diaz*, 129 S. Ct. at 2536 (stating that “[s]ome forensic analyses, such as autopsy reports . . . cannot be repeated, and the specimens used for other analyses have often been lost or degraded”).

103 *Grabbing the Bullcoming*, *supra* note 98, at 546 (quoting Carolyn Zabrycki, *Toward A Definition of “Testimonial:” How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 CALIF. L. REV. 1093, 1115 (2008)).

104 See, e.g., *United States v. Burke*, 425 F.3d 400, 409 (7th Cir. 2005).

100 See *Melendez-Diaz*, 129 S. Ct. at 2536.



ment does not inexorably require diminution or sacrifice of defendant's rights at the altar of prosecution; rather, it argues in favor of other, equally-protective procedures beyond cross-examination that would still allow for introduction of a properly conducted and recorded autopsy report.

On the other hand, autopsy reports may necessitate detailed testimony more often than the tests conducted in *Melendez-Diaz*, *Bullcoming*, and *Williams*. In each of those cases, the test at issue was conducted by use of sophisticated machines according to a rote and straightforward procedure. These machines, with minimal input from the humans operating them, produced a straightforward answer to a relatively simple question.¹⁰⁵ In *Melendez-Diaz*, the machine revealed whether the substance was an illegal drug; in *Bullcoming*, the machine showed whether the defendant's blood alcohol concentration above the legal limit; in *Williams*, it revealed whether there was a DNA match. Less simple and straightforward, autopsies rely heavily on the expertise and experiential inferences of the conducting medical examiner. Furthermore, autopsies do not necessarily produce a definitive or simple answer to the question of cause of death. This counterargument counsels in favor of having the conducting examiners testify whenever it is reasonably feasible. However, the complexity of autopsies should not be subject to the draconian bar the Court has erected to admission, when, for example, the conducting examiner has died in the interim or his or her whereabouts are actually unknown to the prosecution. Murder prosecutions and the centrality of autopsy reports to them are simply too important to be left to the happenstance of when a suspect is found and prosecuted, let alone the significant risk of a material change in the circumstances of the

105 *But see* Paul F. Rothstein & Ronald J. Cohen, *Williams v. Illinois and the Confrontation Clause: Does Testimony by a Surrogate Witness Violate the Confrontation Clause*, at n.1, (Dec. 6, 2011), available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1740&context=facpub> (noting, in a piece featuring a debate between the authors, the myriad complications that can arise even with mechanical forensic testing, and arguing that forensic testers have their own self-interest, namely, to prove that their job requires significant expertise and machines do not do the lion's share of the work).

medical examiner who conducted the autopsy. Examples abound of the unavailability of medical examiners from retirement, significant moves,¹⁰⁶ medical conditions,¹⁰⁷ or death and the fact that many murder prosecutions take place years after the autopsy is conducted only heightens these risks.

In analyzing this issue, the current legal backdrop (including the ebbs and flows following each Supreme Court decision) of the autopsy issue will be examined.

Finally, this article will suggest possible methods for introducing such evidence without the testimony of the medical examiner that conducted the autopsy.

B. Post-Crawford Autopsy Case Law

Two years after *Crawford* overhauled the Confrontation Clause analysis, the Second Circuit confronted the newly important question of whether autopsy reports are testimonial such that they must be barred in the absence of cross-examination of the conducting medical examiner.¹⁰⁸ In *United States v. Feliz*, the Second Circuit panel confronted a case in which nine autopsy reports had been admitted in a homicide prosecution without the testimony of the conducting medical examiner. The defendant had run a violent drug distribution organization, but the autopsies were conducted without targeting a specific individual for suspicion. On appeal of his conviction, the defendant did not challenge the District Court's decision that the autopsy reports were admissible as business records.¹⁰⁹ Instead he argued that *Crawford* rendered the autopsy reports inadmissible as testimonial evidence submitted without the opportunity to cross-examine the medical examiner that had conducted the autopsies and

106 *See, e.g.,* *United States v. Williams*, 740 F. Supp. 2d 4, 6 (D.D.C. 2010) (noting autopsy-conducting medical examiner had moved overseas).

107 *See, e.g.,* *Nardi v. Pepe*, 662 F.3d 107, 109 (1st Cir. 2011) (explaining that the autopsy-conducting medical examiner had retired to Florida and could not testify at trial due to a medical condition).

108 *United States v. Feliz*, 467 F.3d 227, 229 (2d Cir. 2006).

109 *Id.* at 230.



drafted the reports. The panel first found that “the sole relevant inquiry under the Confrontation Clause is whether the autopsy reports are testimonial,”¹¹⁰ and that labeling the reports as a business record without inquiry into testimonial status would not be sufficient.¹¹¹

The Second Circuit then held that a properly admitted business record “cannot be testimonial because a business record is fundamentally inconsistent with what the Supreme Court has suggested comprise the defining characteristics of testimonial evidence.”¹¹² In reaching this conclusion, the panel reasoned that business records “cannot be made in anticipation of litigation” and thus “bear[] little resemblance to the civil-law abuses the Confrontation Clause targeted.”¹¹³ In holding that the autopsy reports were not testimonial, the panel noted that the reports were “reports kept in the course of a regularly conducted business activity; the Office of the Chief Medical Examiner of New York conducts thousands of routine autopsies every year, without regard to the likelihood of their use at trial.”¹¹⁴

Interestingly (particularly after *Williams*), the court admitted, “Certainly, practical norms may lead a medical examiner reasonably to expect autopsy reports may be available for use at trial, but this practical expectation alone cannot be dispositive on the issue of whether those reports are testimonial.”¹¹⁵ The panel justified this apparent logical conflict by stating, “Given that the Supreme Court did not opt for an expansive definition that depended on a declarant’s expectations, we are hesitant to do so here.”¹¹⁶ In light of subsequent Confrontation Clause precedent particularly the development of the “primary purpose” inquiry¹¹⁷ the

Second Circuit’s admission that parties would reasonably expect autopsy reports to be used at trial could be fatal to this rule’s continued vitality, as this statement tends to indicate that the primary purpose of autopsies in homicide cases is for use in a subsequent criminal proceeding.

The First Circuit also addressed the question after *Crawford* but before *Melendez-Diaz* and *Bullcoming*.¹¹⁸ In *De La Cruz*, the panel was confronted with a challenge to the admissibility of an autopsy in a case in which drug distribution allegedly resulted in the death of one of the drug buyers.¹¹⁹ The testifying medical examiner had not conducted the autopsy in question, but rather based his testimony on the autopsy report, crime scene photographs, and a general review of the whole investigative record.¹²⁰ The court agreed with the Second Circuit reasoning, “[A]n autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy,” the report thus was admissible as a non-testimonial business record.¹²¹

The business record exception noted in and relied on (to varying degrees) by *Feliz* and *De La Cruz* no longer ends the analysis, as the *Melendez-Diaz* Court made clear. There, the Court asserted, “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.”¹²² The *Feliz* reasoning may retain some life because it relied on the Supreme Court’s general interpretations of “testimonial” rather than the blanket business re-

treatment purposes” from testimonial status); *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2722 (2011) (Sotomayor, J., concurring) (hinting that a primary purpose argument could have rendered the blood alcohol report non-testimonial).

118 *United States v. De La Cruz*, 514 F.3d 121 (1st Cir. 2008).

119 *Id.* at 125-27.

120 *Id.* at 132.

121 *Id.* at 133 (asserting that “business records are expressly excluded from the reach of *Crawford*”).

122 *Melendez-Diaz*, 557 U.S. at 324.

110 *Id.*

111 *Id.* at 233-34, n.4.

112 *Id.* at 233-34.

113 *Id.* at 234 (quoting *Crawford v. Washington*, 541 U.S. 36, 50 (2004)).

114 *United States v. Feliz*, 467 F.3d 227, 236 (2d Cir. 2006) (internal citation omitted) (internal quotation marks omitted).

115 *Id.* at 235.

116 *Id.* at 236.

117 *See, e.g., Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.12 (2009) (excluding “medical reports created for



cord exception used by the First Circuit, which the *Melendez-Diaz* passage specifically sought to clarify. The *Feliz* court noted that merely labeling evidence as a business record was not sufficient to exclude it from testimonial status, and it instead embarked on a searching discussion of what the Supreme Court meant by “testimonial” and how it applied to autopsies. For this definitional argument to retain any strength, a reviewing court would have to distinguish autopsy reports from the chemical test conducted in *Melendez-Diaz* and the blood alcohol concentration test from *Bullcoming*, because each of those varieties of forensic reports have clearly been deemed testimonial. However strong *Feliz* may be in a broad legal sense, it may be undermined on its facts, because the autopsies were conducted following homicides and, as noted above, were likely carried out for the primary purpose of providing evidence at a future trial. Autopsy reports in this context are likely testimonial.

Early last year, the Eleventh Circuit addressed the autopsy question with the added benefit of the Supreme Court’s decisions in *Melendez-Diaz* and *Bullcoming*.¹²³ *Ignasiak* involved a doctor convicted of illegally dispensing controlled substances. Autopsy reports had been admitted—some with and some without the testimony of the conducting medical examiner—to show that the doctor was providing controlled substances in unnecessary or excessive quantities without a legitimate medical purpose and that such dispensation had resulted in the deaths of some of his patients.¹²⁴

The autopsy reports were performed pursuant to Florida state statute and were carried out before the investigation into the doctor’s practice began.¹²⁵ The court relied heavily on *Melendez-Diaz* and *Bullcoming* to issue blanket statements such as “forensic reports constitute testimonial evidence,” and “the scientific nature of forensic reports does not jus-

tify subjecting them to lesser scrutiny.”¹²⁶ The court then looked to the state’s autopsy statute to bolster the proposition that autopsy reports in Florida are testimonial. Most notably, the court considered certain reporting requirements between law enforcement and medical examiners¹²⁷ that may not exist in the same way in every jurisdiction.

Finally, cutting back in the non-testimonial direction, the Supreme Court of Illinois recently decided that an autopsy was non-testimonial and admissible without the testimony of the conducting medical examiner.¹²⁸ The court examined a case in which an autopsy report was introduced, without the testimony of the medical examiner, to help prove intentional homicide after the defendant had admitted to killing his wife but claimed it was an accident.¹²⁹ When the autopsy was conducted, the state had criminal suspicion and a particular, targeted suspect. The court detailed the significant rift in authority between the states on this question, but determined that the autopsy in this case was not testimonial. First, the court noted that autopsy reports are “not usually prepared for the sole purpose of litigation,”¹³⁰ and the “primary purpose of preparing an autopsy report is not to accuse a targeted individual of engaging in criminal conduct.”¹³¹ Next, the court contrasted the autopsy with a DNA match in stating that “the autopsy report did not directly accuse [the] defendant.” Other evidence was required to tie the defendant to the particular body; all the autopsy proved was that the death was in fact a homicide.¹³² Even in cases where “the police suspect foul play and the medical examiner’s office is aware of this suspicion, an autopsy might reveal that the deceased died of natural causes and, thus, exon-

126 *Ignasiak*, 667 F.3d at 1230.

127 *Id.* at 1231-32 (citing Fla. St. § 406.13, which requires the medical examiner to “notify the appropriate law enforcement agency” upon receipt of a dead body to be autopsied).

128 *People v. Leach*, 980 N.E.2d 570 (Ill. 2012).

129 *Id.* at 572-73.

130 *Id.* at 592.

131 *Id.* (quoting *Williams v. Illinois*, 132 S. Ct. at 2242 (2012) (citation omitted) (internal quotation marks omitted)).

132 *Leach*, 980 N.E.2d at 592.

123 *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012).

124 *Id.* 667 F.3d at 1219.

125 *See generally* Brief of Plaintiff-Appellee United States, *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012), 2009 WL 5635077.



erate a suspect.¹³³ Finally, the court advanced an imminently reasonable, though almost entirely pragmatic, rationale: “the potential for a lengthy delay between the crime and its prosecution could severely impede the cause of justice if routine autopsy reports were deemed testimonial merely because the cause of death is determined to be homicide.”¹³⁴ The Illinois Supreme Court’s holding in *People v. Leach* is not terribly convincing. It leans heavily on the *Williams*’ plurality “targeting” rationale even though that rationale did not win five votes in the United States Supreme Court. Furthermore, in *Leach*, there was a targeted individual—the husband—when the autopsy was conducted. What *Leach* will likely do, though, is speed up the development of Confrontation Clause questions regarding autopsies in the lower courts, and may ultimately encourage the Supreme Court to clarify the issue.

As of the time this article was written, Missouri,¹³⁵ Texas,¹³⁶ and the Eleventh¹³⁷ and D.C.¹³⁸ Circuits have held that autopsy reports (conducted under the circumstances set out in the corresponding footnotes) are deemed testimonial for Confrontation Clause purposes. On the other hand, as discussed above, Illinois and the First and Second Circuits appear to hold that autopsy reports are not testimonial, relying on a business record rationale that may be on shaky footing after *Melendez-Diaz* and *Bullcoming*. Depending on how the Supreme Court approaches the issue, these decisions could be reconcilable; however, if the Court seeks a categorical, bright-line rule, rather than a case-by-case determination, it will have to choose between the two alternatives put forth by the lower courts.

133 *Id.* at 591.

134 *Id.* at 592.

135 *State v. Davidson*, 242 S.W.3d 409, 417 (Mo. Ct. App. 2007) (holding that autopsy performed at request of law enforcement is testimonial).

136 *Martinez v. State*, 311 S.W.3d 104, 111 (Tex. Ct. App. 2010) (holding that autopsy at which law enforcement took pictures and which was conducted pursuant to statute because death was suspected to be caused by unlawful means was testimonial).

137 *Ignasiak*, 667 F.3d at 1229-30.

138 *United States v. Moore*, 651 F.3d 30, 73 (D.C. Cir. 2011) (holding autopsy requested by law enforcement and attended by law enforcement to be testimonial).

IV. Analysis and Possible Ways Forward

This article proposes that the Confrontation Clause holdings are trending in the wrong direction. *Melendez-Diaz* and *Bullcoming* appear to have convinced some courts that all varieties of forensic reports are testimonial, regardless of the actual circumstances or the comparable import of the reports. Indeed, even in Second Circuit trial courts, where *Feliz* remains good law, there is uncertainty about its continued vitality after *Melendez-Diaz* and *Bullcoming*.¹³⁹ *Leach*, the recent Illinois decision, will likely spur further development of the issue in state and federal courts, eventually leading to a well-defined split of authority involving many jurisdictions, making it ripe for Supreme Court review.

There are a few ways forward when the Court is eventually confronted with the issue. First, it is important to separate the potential situations in which autopsy reports may be introduced. This is necessary, because the legal grounds for admitting autopsy reports may diverge significantly between the three broadly framed groups of cases. These three situations are: one, cases in which the autopsy is conducted without particularized criminal suspicion, but is conducted instead under a non-criminal provision of a state’s autopsy statute (e.g., *Ignasiak*); two, cases in which law enforcement have criminal suspicion but no suspect (e.g., *Feliz*); and three, cases in which law enforcement have criminal suspicion and a suspect prior to or contemporaneous with the autopsy (e.g., *Leach* and *De La Cruz*).

The Eleventh Circuit in *Ignasiak* sufficiently illustrated the first set of cases. In a non-homicide context, this case provides a perfect example of how harmful a strict and unreflective application of the Confrontation Clause to bar the introduction of autopsy reports can be. There is a strong argument that such an autopsy report is not testimonial. Autopsy reports conducted in cases before there is suspicion of any criminal wrongdoing are typically conducted pursuant to state law requiring au-

139 *See, e.g., Vega v. Walsh*, 2010 WL 2265043, *4 (E.D.N.Y. May 28, 2010).



topsy reports in certain situations even before any sort of criminal component exists. State statutes provide many reasons to conduct autopsies that extend well beyond obvious circumstances of criminal wrongdoing.¹⁴⁰ In each of the state statutes listed below that provide for autopsy in the public interest or at the discretion of the medical examiner, there are alternative grounds for explicit criminal suspicion-related autopsies, including autopsies conducted at the request of the prosecutor's office. Clearly, then, there is significant room in state statutes for autopsies to be conducted in cases without criminal suspicion. If the autopsy reports were conducted years before the underlying criminal investigation even began, it strains credulity to claim that the autopsy reports were somehow conducted with a primary purpose for use in litigation. To adopt this broad of an interpretation would mean that every single case would involve a testimonial statement; in an *ex post* view, if the prosecution attempts to

introduce the evidence, the evidence must be intended for litigation, rendering it testimonial and therefore barred, absent the testimony of the party who created the evidence.

The second set of cases, where there is criminal suspicion but no targeted individual, is left somewhat indeterminate after *Williams*. This confusion comes from the distinction between Justice Alito's view that the lack of a particularized suspect renders a report non-testimonial¹⁴¹ and the dissent's view that only a primary purpose for use in litigation, rather than in litigation against a particular suspect, is required to render a report testimonial.¹⁴² Going forward, the latter argument seems more likely to prevail. Indeed, arguably, it did prevail in *Williams* itself because Justice Thomas seems to have joined the dissent on this point.¹⁴³ Accordingly, this variety of autopsy reports is most safely dealt with in the same way as the third and final variety.

The third set of cases, exemplified by *Leach* and *De La Cruz*, are those in which there is both criminal suspicion and an actual suspect, and these are probably the most straightforward. Any argument that such an autopsy was not testimonial i.e., was not conducted with the primary purpose of use in criminal prosecution is unpersuasive. Under current Supreme Court precedent, neither the second nor third variety of autopsies would be admissible without the testimony of the conducting medical examiner. Even so, as discussed above, there are compelling reasons why the Court should be receptive to different ways of introducing the evidence found in an autopsy report so long as the means of admission protects defendants' interests as well as (or better than) cross-examination. Here, I suggest three potential methods of introducing autopsy

140 See, e.g., ALASKA STAT. § 12.65.020(a) (providing for autopsy where the medical examiner determines that the death occurred under circumstances that warrant investigation); ARIZ. REV. STAT. § 11-597 (providing for autopsy when medical examiner determines it is in public interest); ARK. CODE § 12-12-315(a)(1)(A) (providing myriad reasons for autopsies beyond criminal suspicion); CAL. GOV. CODE § 27491 (providing myriad reasons for autopsies beyond criminal suspicion); CONN. GEN. STAT. § 19a-406 (same); DEL. CODE § 4707(b) (providing for autopsy in the public interest); D.C. CODE § 5-1409(b) (same); HAW. REV. STAT. § 841-14 (same); IDAHO CODE § 19-4301B (same); IND. CODE § 36-2-14-6 (providing for autopsy in non-criminal situations where the medical examiner deems an autopsy necessary); IOWA CODE § 331.802 (providing for autopsy in the public interest, including many enumerated non-criminal circumstances); KAN. STAT. § 22a-233 (providing for autopsy where coroner deems one necessary); MAINE REV. STAT. § 3028(8) (providing for autopsy in the public interest); MASS. GEN. LAWS 38 §§ 3(1)-(19), 4 (providing for notification and autopsy in myriad non-criminal contexts); MINN. STAT. § 390.11 (providing for autopsy in the public interest, including many enumerated non-criminal circumstances); MISS. CODE §§ 41-61-65(1), 41-61-59 (same); N.H. REV. STAT. 611-B:17 (providing for autopsy where medical examiner deems one necessary); N.J. STAT. 52:17B-88 (same); N.C. GEN. STAT. § 130A-389(a) (providing for autopsy in the public interest); 63 OKLA. STAT. § 944 (same); TENN. CODE §§ 38-7-108, 38-7-109 (providing for notification and autopsy in myriad non-criminal contexts); UTAH CODE § 26-4-6 (providing for autopsy where medical examiner deems on necessary); VA. CODE § 32.1-285 (providing for autopsy in the public interest); W.V. CODE § 61-12-10 (same).

141 *Williams v. Illinois*, 132 S. Ct. 2221, 2242 (2012).

142 *Id.* at 2273-74 (Kagan, J., dissenting).

143 See *id.* at 2262 (Thomas, J., concurring in judgment) (arguing that the plurality's targeted primary purpose test "lacks any grounding in constitutional text, in history, or in logic"); see also *id.* at 2273 (Kagan, J., dissenting) ("Justice Thomas rejects the plurality's views for similar reasons as I do, thus bringing to five the number of Justices who repudiate the plurality's understanding of what statements count as testimonial.").



reports of the second and third variety, which could each apply equally to the first variety if the non-testimonial argument fails.

First, the possibility of surrogate testimony remains alive, though perhaps not “well.”¹⁴⁴ After *Bullcoming* particularly in light of Justice Sotomayor’s concurrence it seems any allowable surrogate testimony would have to be closely tied to the examiner who conducted the autopsy. If the testifying witness had in fact observed or supervised the autopsy in question, it is likely that the Court would be satisfied with his or her testimony. One possibility for jurisdictions with available resources would be to videotape the examination room. It appears that at least Florida,¹⁴⁵ Indiana,¹⁴⁶ North Carolina,¹⁴⁷ North Dakota,¹⁴⁸ and South Carolina¹⁴⁹ already contemplate photography and videography to some degree during autopsies. In so doing, the jurisdiction would provide a means of admission where testimony is needed but the conducting examiner is not available for whatever reason. Another member of the same lab would be able to view the autopsy after the fact in much the same way as if he or she had been present during the autopsy, and this viewing would then qualify the examiner to testify as a proper surrogate. This route has the virtue of simplicity and efficiency, as it preserves resources and medical examiners’ time. In the vast majority of autopsy reports, no future testimony will be required, so it would be an incredible burden to require contemporaneous

observation by another examiner during each autopsy just in case examiner testimony were later needed at trial. Video also allows the lab to avoid having to guess which exams may result in evidence that will be necessary for later prosecutions.

This solution would also likely provide for even better cross-examination fodder than would the testimony of the conducting examiner were he or she to proceed without the benefit of the videotape. Medical examiners conduct hundreds of autopsies per year and it is incredibly unlikely that an individual medical examiner will remember anything about a single autopsy conducted months (or longer) before. Instead, any examiner who testifies without the aid of video would likely testify as to what the report says and would claim to have followed typical lab protocol neither of which provides much fruit for cross-examination. Indeed, cross-examination in many circumstances is unlikely to effectively protect a defendant’s rights.¹⁵⁰ With or without the ability to cross-examine, the best possible forensic evidence will only come through rigorous laboratory accreditation standards, vigilant internal oversight, and inquisitive public organizations. To the extent that the Court can incentivize or bolster these three things, it should, but they are best addressed through legislation, funding, and public scrutiny.

Second, and perhaps more likely to succeed in the Court, the prosecution could attempt the *Williams* form of introduction. In short, the prosecution could have an expert testify regarding the cause of death after reviewing the autopsy report without attempting to introduce the report itself. Such testimony would be the expert’s own opinion, and it should not be allowed to be used as an end-run around the Confrontation Clause.¹⁵¹ That is to say, a

144 See, e.g., *Grabbing the Bullcoming*, *supra* note 98, at 545-46.

145 See FLA. STAT. § 406.135 (providing for disclosure of autopsy video and/or audio recordings to certain parties).

146 See IND. CODE 16-39-7.1-3 (providing for disclosure of autopsy video and/or audio recordings to certain parties).

147 See N.C. GEN. STAT. § 130A-389.1 (entitled “Photographs and video or audio recordings made pursuant to autopsy”).

148 See N.D. CENT. CODE § 44-04-18.18 (providing for disclosure and use of autopsy photographs or videos to certain parties for particular reasons).

149 See S.C. CODE § 17-5-535 (providing for disclosure and use of autopsy photographs or videos to certain parties for particular reasons, including for use by the prosecutor’s office in pressing charges).

150 See, e.g., *Williams*, 132 S. Ct. at 2250 (Breyer, J., concurring) (noting the ineffectiveness of cross-examination to root out faulty evidence, and citing studies, concluding that, “[i]n the wrongful-conviction cases to which this Court has previously referred, the forensic experts all testified in court and were available for cross-examination”).

151 See *id.* at 2272 (Kagan, J., dissenting) (cautioning that this approach would “allow prosecutors to do through subterfuge and indirection what we previously have held the



court must be satisfied that the testimony was introduced as a permissible expert opinion relying on foundational, though inadmissible, evidence, rather than for the truth of the matter asserted.

Similar to the surrogacy option, the permissible scope of such a procedure is unclear. All that is known is that the report itself could not be admitted, and that the expert's testimony as it directly pertains to the report could not be introduced for the truth of the matter asserted. Defense counsel will undoubtedly argue that an autopsy report is more nuanced than the simple "does this 'match' in your expert opinion" presented in *Williams* regarding DNA matching. This added complexity may confuse the jury and perhaps render a saving jury instruction impossible. The complexity also may undermine the expert's ultimate opinion since he or she is only operating from the written notes of the conducting medical examiner. These types of arguments could force the Court to confront more directly the parameters of expert opinion admissibility under the Confrontation Clause, where it is based on forensic reports.

Another significant and, perhaps, fatal concern with the admission of such testimony is that it is not clear that it sufficiently protects defendants' rights. Unlike the video option presented above, the defendant is not afforded an opportunity to confront the specially-informed examiner (i.e., one who has reviewed the tape of the report in question) and instead is stuck with the worst possible scenario: an expert who relies entirely on the report itself, without any requirement of personal knowledge as to the lab in question, the conducting examiner, or how the particular autopsy report was created. Furthermore, though the report itself is ostensibly not admitted, as the discussion above (as well as the discussion in *Williams*) makes clear, it is nearly impossible to disentangle assumptions about the veracity and reliability of the substance of the report from jury's minds once it has been discussed, even tangentially, by the

expert. Accordingly, the video option is far superior, and the Court should be very reluctant to expand the first theory of *Williams* to other contexts.

Finally, there is the least realistic (from a current "five-votes" perspective) but potentially appealing proposition raised very briefly by Justice Breyer in *Williams*. He argued that there might be room for state regulation where the evidence at issue is not particular testimonial statements that occupy a "constitutional heartland" described by *Crawford*.¹⁵² In particular, he argued "the states could create an exception that presumptively would allow introduction of DNA reports from accredited crime laboratories." However, this presumption would vanish where "there [is] significant reason to question a laboratory's technical competence or its neutrality."¹⁵³ Though it is unclear to what extent his argument was conditioned on a determination that DNA profiles were not testimonial, his brief argument arguably distinguished between "core" testimonial and other testimonial evidence, and states could regulate the latter. It is also unclear whether Justice Breyer would expand this practice beyond DNA laboratories. Despite the uncertainties, there is much to support Justice Breyer's idea.

If done properly, both prosecutors and defendants could benefit from this approach. First, prosecutors would appreciate clarity and ease of introduction of often-vital forensic evidence, as compared to the current uncertain approach. There would be no danger of the court flatly barring important evidence; rather, it would be introduced when the testing lab lived up to the accreditation standards. If the lab did not, the prosecution would still have an opportunity to present testimony sufficient to introduce the evidence. Additionally, lab accreditation and monitoring would not unduly burden the state from a resource perspective, because if a state chooses to operate its own labs there can be no argument of unfairly draining resources. The labs would simply be required to meet the standards of good practice established by stat-

Confrontation Clause prohibits").

¹⁵² See *Williams*, 132 S. Ct. at 2248 (Breyer, J., concurring in judgment).

¹⁵³ *Id.*



ute and upheld by courts.

Defendants, on the other hand, would have a better way to attack the reliability of technicians and tests than cross-examination. In making the argument for cross-examination, defendants have pointed out the many examples of labs around the country that have significant internal problems regarding storage, labeling, and testing of physical evidence.¹⁵⁴ In *Melendez-Diaz*, amici argued that cross-examination is necessary because “forensic laboratories are not even required to maintain accreditation with a standard-bearing organization.”¹⁵⁵ If accreditation were required, stringent, and closely monitored, defendants and defense counsel should be pleased.

Though this approach is certainly unrealistic with the current composition of the Court, developments in the next few presidential terms may change the outlook. The Court’s current quagmire on Confrontation Clause questions in forensic report cases is largely traceable to Justice Scalia: by authoring the majority in *Crawford* he took the Court away from reliability concerns, and by authoring the opinion in *Melendez-Diaz* (the first of the forensic report cases) he arguably enlarged the Confrontation Clause beyond its bounds,¹⁵⁶ firmly entrenching forensic reports in the uncomfortable, unclear, and unwieldy position of having “testimonial” status. Sometime within the next decade, Justice Scalia will likely leave the Court. As he does, he will leave behind at least Justices Kagan and Sotomayor, who voted with him in *Bullcoming*. But neither of these Justices seems likely to take up the banner for the formal, “historical” approach that Scalia championed. If Justice Thomas has also left the bench (or if

he is unable to marshal four votes on divisive issues), the Court may make a significant shift in its forensic report Confrontation Clause jurisprudence. Justice Breyer’s suggestion, if fleshed out and properly implemented, could satisfy both prosecutor-friendly pragmatists (particularly Chief Justice Roberts and Justice Alito) and defendant-friendly Justices (Justices Kagan and Sotomayor). Combined with the fact that any new Justices are very unlikely to be as chained to “history” as Justice Scalia, Justice Breyer’s suggestion could presage what a differently-comprised Court will do long term.

V. Conclusion

The Supreme Court should temper its approach to granting Confrontation Clause cases as long as it retains an unwillingness (or inability) to answer important questions of law and give sufficient guidance to the criminal justice system. The current state of the law, after *Williams* a case with no apparent majority opinion¹⁵⁷ is untenably vague, confusing, and uninformative for prosecutors, defendants, and trial judges. But this should not persuade the Court to continue making it worse before it makes it better.

Within the next few terms, the Court may be confronted with an opportunity to clarify or put an outer bound on Confrontation Clause questions when it addresses what to do with the admissibility of autopsy reports. In addition to the rationale of maintaining stability in the legal process, there is ample reason for the Court to hold that autopsy reports are not testimonial or that they may be admitted without the conducting examiner’s testimony. The most significant hurdle to this holding is the ‘historical’ wing of the Court, and its complete lack of interest in pragmatic considerations. At least one commentator has cautioned against the strict historical approach to autopsy questions regarding autopsy reports.¹⁵⁸ The historical ap-

154 See generally, Brief for National Innocence Network as Amicus Curiae Supporting Petitioner, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), 2008 WL 2550614.

155 Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), 2008 WL 2550612 at *8.

156 See, e.g., *Melendez-Diaz*, 557 U.S. at 346-47 (Kennedy, J., dissenting) (arguing that the majority, without any reasoning or supporting authority, stretched the Confrontation Clause beyond the “conventional witnesses” to which it was meant to apply).

157 See *Williams*, 132 S. Ct. at 2265 (Kagan, J., dissenting) (stating “[i]n the pages that follow, I call Justice Alito’s opinion ‘the plurality,’ because that is the conventional term for it. But in all except its disposition, his opinion is a dissent”).

158 See Stephanos Bibas, *Two Cheers, Not Three, For*



proach does not fit as comfortably in the autopsy case because there is little historical evidence that seems to require confrontation, the nature of murder prosecution often entails significant delays that seriously risk the unavailability of the examiner; autopsy reports cannot be re-conducted when a prosecution arises, and cross-examination of examiners is largely unhelpful—they will almost certainly not have memory of a particular autopsy—and is likely unnecessary to avoid injustices the Confrontation Clause is designed to prevent.¹⁵⁹

The Court should retreat from the blind “historical” track it has taken and provide much-needed clarity to the Confrontation Clause analysis in cases involving forensic reports—this author hopes that the eventual autopsy case will present an appropriate and adequate vehicle to do just that.

About the AUTHOR



REID R. ALLISON is currently a Senior Law Clerk for the Supreme Court of Guam. He was born and raised in Flint, Michigan, and graduated from the University of Michigan. He earned his Juris Doctor from Georgetown University Law Center.

Sixth Amendment Originalism, 34 HARV. J. L. & PUB. POL’Y 45, 50-52 (2011).

¹⁵⁹ See *id.* (citing David A. Sklansky, *Hearsay’s Last Hurrah*, 2009 SUP. CT. REV. 1, 40).